
**NEW
DEVELOPMENTS
IN EU LABOUR,
EQUALITY AND
HUMAN RIGHTS
LAW**

EDITED BY MARIO VINKOVIĆ

NEW DEVELOPMENTS IN EU LABOUR,
EQUALITY AND HUMAN RIGHTS LAW

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NEW DEVELOPMENTS IN EU LABOUR, EQUALITY AND HUMAN RIGHTS LAW

**Proceedings from the International Jean Monnet Conference
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Dear readers,

the proceedings entitled “New Developments in EU Labour, Equality and Human Rights Law” introduces most papers presented at the conference with the same name organised by the Jean Monnet Chair in EU Labour, Equality and Human Rights Law (542486-LLP-1-2013-1-HR-AJM-CH) in the period between 2013 and 2016 and financially supported by the European Union Lifelong Learning Programme, that was held at the Faculty of Law, Josip Juraj Strossmayer University of Osijek on 21 and 22 May 2015. The conference brought together thirty researchers from Austria, Belgium, Bosnia and Herzegovina, Croatia, Lithuania, Hungary, the Netherlands, Slovenia and Serbia, who presented the results of their own research on various aspects of EU labour law, equality rights and human rights observed in a European, international and national context. A special value of the conference lies in the fact that several representatives of the Office of the Ombudsman of the Republic of Croatia took part in the conference, i.e., Mr. Goran Selanec, Deputy Ombudsman for Gender Equality, who gave a very remarkable presentation entitled “Balance Representation - Just an Instrument or the Final Goal”, Ms. Branka Meić Salie, Advisor of the Croatian Ombudsman for Persons with Disabilities, who gave a memorable presentation on behalf of herself and the Ombudsman that was entitled “Reasonable Accommodation - Precondition for Equality of Persons with Disabilities on the Labour Market, and representatives of the Office of the Ombudsman for Children.

PhD students, representatives of the Croatian Employers’ Association, individual unions, as well as other interested scholars, legal practitioners and experts contributed significantly to discussions at the conference and its quality.

Unfortunately, some of the papers presented at the conference are not published in this publication due to numerous obligations of authors and limited preparation time of the conference proceedings, as well as the desire expressed by some authors who would like to present their research in their native languages that would make them more accessible to a specific local audience.

Special thanks go to Josip Juraj Strossmayer University of Osijek and its Rector, Željko Turkalj, full professor, for support to all activities of the Jean Monnet Chair in EU Labour Equality and Human Rights Law, Boris Bakota, associate professor, Dean of the Faculty of Law in Osijek, and vice deans, assistant professors Igor Vuletić, Tunjica Petrašević and Nikol Žiha for their support in relation to conference organisation, as well as for their active two-day participation in the conference. Finally, and most importantly, our thanks go to the European Union, which has recognised our efforts through the Lifelong Learning Programme and decided to fund the activities of the Jean Monnet Chair in EU Labour, Equality and Human Rights Law which are *inter alia* focused on the implementation of

European values of intercultural dialogue, inter-ethnic and gender equality in the field of access to employment, as well as legal protection of underrepresented groups in the labour market and in the workplace. At the same time, the Jean Monnet Chair would like to strengthen knowledge of European labour law, European equality law and European human rights law, which will contribute not only to the professional development of involved parties, but also to civic and citizenship education of European citizens in the function of active participation in the arena of political and human rights.

Assoc. Professor Mario Vinković, PhD
Jean Monnet Chair holder



NEW
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LABOUR LAW

ERIKA KOVÁCS, PH. D.*

THE LEGAL NATURE OF ART. 30 CFREU – A HUMAN RIGHT, A FUNDAMENTAL RIGHT, A RIGHT?

Abstract:

The article provides for an analysis of the legal nature of Article 30 of the Charter of Fundamental Rights of the European Union, which declares “the right to protection against unjustified dismissal”. In the focus of attention is the question, whether this right constitutes a human or a fundamental right or it is a right without the status of being fundamental or alternatively only a basic principle.

The considerations are based on the legal theory of human rights and particularly social rights, as well as on the understanding of this right in the various international treaties and the constitutional traditions of the Member States. Furthermore, the article addresses the question of implementation of Article 30 in the national laws, scrutinizes the interpretation of Art. 51 Abs 1 of the Charter and highlights the deficiencies and possibilities. Also the image of this right mirrored in the European Union’s law and the case law of the Court of Justice of the European Union is examined.

Keywords: *human rights; fundamental rights; dismissal law; the Charter of Fundamental Rights of the European Union*

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I. INTRODUCTION

The right to protection against unfair dismissal lies in the middle of collision of various interests and rights, economic and legal theories. From an economic point of view, the uncertain role of dismissal protection in the various flexibility and security models, ranging from strong job security to the priority of the labour market coupled with loose dismissal protection makes it difficult to find the ideal level of protection to avoid the segmentation of labour market and minimize the overall costs for the society in the context of dismissal. From a fundamental rights perspective the right to protection against unfair dismissal is closely connected to the right to work and job security, whereas it conflicts with the freedom of business and the managerial prerogatives of the employer. As *Collins* highlights, this right is inherently related to and indeed rooted in human dignity and autonomy of each individual, as work is a crucial part of the personal development.¹

The article makes an attempt to inquire the legal nature of the right to protection against unfair dismissal in general and more specifically the character of Art. 30 of the Charter of Fundamental Rights of the European Union (in the following: CFREU), which declares “the right to protection against unjustified dismissal”. In the focus of attention is the question, whether it is a human or a fundamental right or it is a right without the status of being fundamental or alternatively only a principle. The issue, whether and how Art. 30 is legally binding and for which personal scope, will be addressed.

To analyse the right to protection against unfair dismissal the following considerations are based on the legal theory of human rights and particularly social rights, the understanding of this right in the international treaties and the constitutional traditions in the Member States. Furthermore, the position of Art. 30 in Chapter IV on ‘Solidarity’ in the CFREU and the interpretation of the expression of Art. 51 Abs 1 “only when they are implementing Union law” will be scrutinized. The question here is how Art. 30 can be implemented into the national laws. Also the image of this right in the European Union’s law and the case law of the Court of Justice of the European Union (in the following: CJEU) will be examined.

¹ H. Collins, *Justice in Dismissal. The Law of Termination of Employment*, Oxford, Clarendon press Oxford, 1992, pp.16-21.

II. CLASSIFICATION OF LABOUR RIGHTS AS HUMAN RIGHTS – THEORETICAL BACKGROUND

2.1. Introduction

Labour rights are usually not in the mainstream of human rights theory and mechanism.² Human rights' activists rarely concentrate on the defence of workers' rights.³ However, considering labour rights as human rights brings about the advantage (and disadvantage) that we adopt and apply the language, theory and typology of human rights to labour law.⁴ The spread of human rights norms goes hand in hand with the globalization and is often seen as a counterweight and at the same time a moral consequence of it. However, this trend is significantly weakened by the lack of universal acceptance of human rights. One sarcastic remark on the claim of human rights to universalism even labels human rights as "the gift of the West to the Rest".⁵

The adoption of the CFREU as a legally binding document increased the role of the Union as a human rights actor. As *De Búrca* puts it, by the Charter of Fundamental Rights, "Europe has come to occupy a privileged place as the poster child for global human rights progress"⁶. However, she also argues that the attitude of the EU to human rights and its development is not a unidirectional progress, but can be rather characterised as a dialectical tension between national and EU actors; whereas EU bodies wish to strengthen human rights protection, governments seek to deter the same.⁷ Nevertheless, the proclamation of the Charter signifies the "constitutional maturation of human rights within the EU legal and constitutional framework."⁸

Regarding labour rights the CFREU does not contain a consistent system, and in the literature the opinions are diverse on the nature of the articles proclaiming workers' rights. As *Bercusson* stated not all labour rights are fundamental and not all labour rights are de-

² T. Novitz and C. Fenwick, *The Application of Human Rights Discourse to Labour Relations: Translation of Theory into Practice*, in C. Fenwick and T. Novitz (eds.), *Human Rights at Work. Perspectives on Law and Regulation*, Oregon, Oxford and Portland, 2010, p. 27.

³ V. A. Leary, 'The Paradox of Workers' Rights as Human Rights', cited in L. A. Compa and S. F. Diamond (eds.), *Human rights, labor rights, and international trade*, Philadelphia, 1996, p. 22.

⁴ P. Alston, 'Labour Rights as Human Rights: The Not so Happy State of the Art', in P. Alston (ed.), *Labour Rights as Human Rights*, Oxford, 2005, p. 1.

⁵ B. Upendra, *The Future of Human Rights*, 2nd ed. Oxford, 2006, p. 33.

⁶ G. de Búrca, 'The Road Not Taken: The EU as a Global Human Rights Actor' *American Journal of International Law*, no 105, 2011, pp. 649, 651.

⁷ *Ibid*, p. 651.

⁸ *Ibid*, p. 671.

clared in the CFREU.⁹ Despite the legally binding CFREU, at European level a substantive system of European fundamental rights protection does not exist and the theory of fundamental rights in Union law is relatively sparsely sophisticated.¹⁰ The reason for this lies inter alia in the case law of the Court of Justice of the European Union (in the following: CJEU), which has elaborated the substantive content of the rights differently extensively depending on the significance of the question for the future development of the Union law. In most cases the CJEU delivered a simplified proportionality test without elaborating the substantive subject of the right.¹¹ Until now the CJEU applied the fundamental labour rights only as additional argument next to secondary regulation, but not as a sole ground of inquiry, i.e. a real test of fundamental rights protection is still missing.¹²

2.2. Natural Rights – The Roots

There are different ways and methods to assess, whether certain rights can be qualified as human rights. The origin of the classification of workers' rights as human rights has its roots in the idea of *natural rights*. The idea of natural law dates back to Plato and Aristotle, amplified by the work of St. Thomas Aquinas.¹³

It is important to note that most philosophers of the 17th and 18th-centuries, who have dealt with natural rights and social contracts affecting partly also workers' rights do not address the problem of fair termination of employment.

The teaching of the Roman Catholic Church, starting particularly with Pope Leo XIII's encyclical *Rerum Novarum* of 1891, beyond mentioning human dignity has also acknowledged a range of workers' rights.¹⁴ The recognized rights were for example just wage and safe working environment.¹⁵ The protection against unfair dismissal directly did not appear in this text, although in the next decades measures were required to protect security of employment.¹⁶

⁹ B. Bercusson, 'Social and Labour Rights under the EU Constitution', in G. de Búrca, B. de Witte and L. Ogertschnig (eds.), *Social Rights in Europe New York*, Oxford, 2005, pp. 169-197.

¹⁰ K. F. Gärditz, '§ 4 Schutzbereich und Grundrechtseingriff', in C. Grabenwarter (ed.), *Europäischer Grundrechtsschutz*, Baden-Baden, 1st edn, 2014, pp. 161-192.

¹¹ *Ibid*, mn. 6.

¹² R. Rebhahn, '§ 16 Rechte des Arbeitslebens (Art. 27 bis 33 GRC)', in C. Grabenwarter (ed.), *Europäischer Grundrechtsschutz*, Baden-Baden, 1st edn, 2014, pp. 635-682.

¹³ Novitz and Fenwick, p.5.

¹⁴ Pope Leo XIII, *Rerum Novarum*, http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum.html, (accessed on 15 September 2015).

¹⁵ Novitz and Fenwick, p. 6.

¹⁶ *Ibid*, p.6.

2.3. Connection to Human Dignity

Classification of a particular right as a human right has the precondition that the right has an inherent connection to and originates in dignity. The close link between certain labour rights and human dignity is obvious in case of prohibition of forced labour or of discrimination. Consequently, one can certainly argue that human dignity requires the application of human rights' theory to – at least – certain labour rights.

The connection between labour and human rights has been strengthened by the ILO's Decent Work Agenda.¹⁷ As *Alston* puts it, decent working conditions can be only guaranteed, when labour rights are secured as human rights.¹⁸ Only the acceptance of labour rights as human rights can counteract the otherwise inevitable 'race to the bottom' arising from the highly competitive global trade, which brings about not only the competition of national markets, but also that of national social standards. This idea is a main driving power for states to motivate their trading partner countries to adopt at least minimum labour standards.

In the British literature on dismissal law traditionally two theories have been represented as basis for the protection against unfair dismissal. First, the protection shall provide the worker 'job property' or 'ownership of jobs'¹⁹ and second it shall guarantee his dignity. As the theories on the 'ownership of jobs' faded into the background, new ideas have been looked after to legitimize the limitation of the managerial power of the employers regarding the termination of employment. At this stage the idea came to the fore that the employment should bring a certain 'job satisfaction', i.e. the personality should be developed by the job.²⁰ Art. 30 in this context requires that the worker has to be treated with dignity during the termination of his employment relationship.

However, *Collins* states that the dismissal of the incompetent worker does not affect dignity.²¹ Following this argument, also *Deakin/Morris* argues that dignity cannot create the legal basis for the protection against dismissal, as many dismissals simply do not touch human dignity, particularly those, which are based on the incapacity of the worker or the fact that the employer no longer requires his services (redundancy).²²

¹⁷ Available at: <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--en/index.htm>

¹⁸ *Alston*, p. 1.

¹⁹ One of the first authors dealing in detail with this topic was Meyers, see: *F. Meyers, Ownership of Jobs: A Comparative Study*, Los Angeles, University of California Press, 1964.; See also *W. Njoya, Property in Work*, 2007, p. 61.

²⁰ *Collins*, pp. 12-18.

²¹ *Ibid*, p.17.

²² S. Deakin and G. S. Morris, *Labour Law*, Oregon, Oxford and Portland, 6th edn, 2012, p. 419.

In my opinion it is evident that work significantly contributes to the improvement of the personality and self-satisfaction and so work performance constitutes an important segment of human dignity. However, regarding the termination of employment relationship, dignity only requires the protection against dismissals, which are based on unfair motives or are exercised in an unfair manner. Consequently, not every dismissal touches upon human dignity, but only the 'unfair' ones and so protection should be aimed at preventing these kinds of termination. The interesting final question is, whether dignity is affected by a dismissal, which occurs substantively and procedurally fairly, but results in an unfair situation for the worker, which affects negatively his dignity. It is controversial, whether dismissal law can/should make employer responsible for the situation of the worker after such dismissal, ie. whether it is justified to take social circumstances outside the employment relationship into consideration when making a decision on dismissal.

2.4. Typology of Fundamental Rights of Workers

Labour rights cannot be classified in the framework of the traditional typology of fundamental rights, that sticks to the categorization of rights into generations or at least categories, like civil, political and social.²³

Labour rights belong to different categories, which can be best illustrated by the variety of rights in the CFREU. The prohibition of forced labour (Art. 5) in Chapter I (Dignity) has the feature of civil right which shows also that it is coupled with the prohibition of slavery. The right to association in Art. 12 is part of the classical civil and political right to assembly. Also in Chapter II (Freedom) to be found the freedom to choose an occupation and the right to engage in work (Art. 15). Chapter III on Equality contains significant rights of the workers, i.e. the general principle on prohibition of discrimination, the equal treatment principle between men and women in work and special rights for the most vulnerable groups of children and disabled. The Chapter IV on solidarity includes rights that are more closely related to labour, but certain rights of this Chapter go even further and address policies outside of the range of social rights in a narrow sense. Environmental protection (Art. 37) and consumer protection (Art. 38) belong to the third generation of human rights.

As the classification of the Charter clearly proves, certain labour rights can be classified as social rights, while others should be seen rather as civil rights.²⁴ However, while classical civil rights are individual, certain labour rights have a collective character.

Regarding the substantive content of labour rights *Judy Fudge* points out that these can be classified neither in the traditional typology of negative and positive obligations, nor

²³ J. Fudge, 'The new discourse of labor rights: From social to fundamental rights?', *Comparative Labor Law and Policy Journal*, vol. 29, 2007., pp. 46-47.

²⁴ *Ibid.*

in the trichotomy of obligations to respect, protect and fulfil, since different labour rights require completely different attitude from the state.²⁵

III. THE IMPACT OF INTERNATIONAL DOCUMENTS ON ART. 30 CFREU

3.1. The Positivist Approach - Integration into Human Rights Documents

In a positivist sense the incorporation of certain rights into international and European human rights treaties is a major sign for the legal nature of a human right.²⁶ *Alston's* first argument for accepting certain labour rights as human rights is that they were declared in the Universal Declaration of Human Rights (UDHR) of 1948 and have been adopted in several universal and regional treaties.²⁷

The classic universal and regional international treaties dealing with human rights – the Universal Declaration of Human Rights, the two International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights, the European Convention on Human Rights (in the following: ECHR) as well as the European Social Charter – do not mention the right to protection against unfair dismissal. Also the Community Charter of the Fundamental Social Rights of Workers of 1989 did not contain this right.

The ILO has as early as in 1963 adopted its Recommendation No. 119 on the termination of employment, which was replaced by the Termination of Employment Convention (No. 158) and the Recommendation No. 166.

The revised European Social Charter (rev. ESC) integrated 'the right to protection in cases of termination of employment' into its Art. 24.

This right to protection against 'unjustified' dismissal appears at EU level rather late, only in the CFREU. Whereas most of the rights of the CFREU have been already included in the Community Charter of the Fundamental Social Rights of Workers in 1989, this was not the case regarding Art. 30 CFREU.

3.2. The Relationship between Art. 30 CFREU and the International Treaties

The relationship between the rights in the CFREU and in international documents is anything, but clearly clarified. The specification of this relationship is generally hampered

²⁵ *Ibid*, p. 50.

²⁶ Novitz and Fenwick, p. 3.

²⁷ Alston, p. 2.

by original terminological difficulties, like the legal qualification of the EU which ranges from a federal state through an international organization to a *sui generis* concept.²⁸

The use of international documents to find the material, substantive content of a particular right ideally should have a legal basis and theoretical clarity, otherwise it can become boundless. *Krebbber* criticises that the CJEU regularly detaches from the normative basis and refers to rights in various documents in a very broad way. The references to these rights often happen without any determination of the substantive content of the right. As *Krebbber* puts it sharply, the CJEU tends to whisk social rights of different sources to a shallow mishmash with blurred contours.²⁹

From a normative perspective it is very difficult to specify the relationship between international and Union law and the effect of international law to the law of the EU.³⁰ There is a clear tension between the EU's stressed commitment to international law on the one hand and the increasing emphasis of the autonomy of the EU resulting in the lack of a clear stance on the relationship of international law to EU law on the other hand.³¹ The search for a more coherent approach to international law implies the question, whether the EU law or the international legal order has primacy over the other one.³² In the *Kadi* judgment³³ the CJEU stated that "fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has special significance (...)"³⁴ However, the most important message of his judgment was the statement that the EU constitutional order has autonomy and primacy over international law.³⁵

²⁸ B. de Witte, 'The European Union as an international legal experiment', in G. de Búrca and Weiler, H.H. Joseph, (eds.), *The Worlds of European Constitutionalism*, Cambridge, 2012, pp. 19-56.

²⁹ "... der EuGH so weit geht, die sozialen Rechte der in Art. 6 Abs. 2 EU und Art. 136 EG genannten sowie weiterer Quellen zu einem seichten Einheitsbrei mit unscharfen Konturen zu verquirlen". S. Krebber, 'Soziale Rechte in der Gemeinschaftsrechtsordnung', *Recht der Arbeit*, 2009, pp. 224-236., 230.

³⁰ G. de Búrca and Weiler, H.H. Joseph, (eds.), *The Worlds of European Constitutionalism*, Cambridge, 2012, p. 108.

³¹ *Ibid*, p. 108.

³² *Ibid*, p.109. Gráinne de Búrca suggests an alternative, 'soft-constitutionalist approach'.

³³ Joined Cases C-402/05 PKadi [2008] and C415/05 P *Yusuf and Al Barakaat Foundation* [2008], para. 282.. See the analysis of this case *ibid.*, pp. 110-123.

³⁴ *Ibid.*, par. 283.

³⁵ See: G. de Búrca in J.H.H. Weiler, 'Dialogical epilogue', in G. de Búrca and J.H.H. Weiler (eds.), *The Worlds of European Constitutionalism*, Cambridge, 2012, pp.262-309. 279.

When thinking about the question, whether and if yes, to what extent the interpretation of the corresponding rights of the revised ESC, the ILO Convention No 158 and the ECHR effects the understanding of Art. 30 of the CFREU, the answers are numerous. Expressed clarification of the relationship is provided only by Art. 52 par. 3 CFREU, which is limited to those rights of the CFREU, which are also protected by the ECHR. The CJEU referred to the ECHR even before the adoption of the CFREU to substantiate fundamental rights.³⁶

On the contrary, there is no general obligation of a consistent interpretation of the rights of the CFREU with those of the revised ESC or the ILO Constitution. Consequently, the protection provided by the CFREU can be theoretically lower than the protection by the mentioned documents.

Since the *Vandeweghe* judgment³⁷ the CJEU's settled case law is that the Court has no jurisdiction under Art. 267 TFEU to rule on the interpretation of provisions of international law which bind Member States outside the framework of EU law. The references to the ECHR and the Social Charters of the Council of Europe in the Preamble of the CFREU have not significantly changed this situation.

3.3. The European Convention on Human Rights

The European Convention on Human Rights does not contain the discussed right. However, Art. 6 of ECHR, which protects the right to a fair trial, can be invoked in this context as this right constitutes part of the right to protection against unjustified dismissal. Due to the reference of the CFREU to the ECHR in its Preamble and Art. 52. par. 3 the rights in the European Convention on Human Rights constitute central standards for fundamental rights protection and play a special role in the interpretation of the rights of the CFREU.

In the case *K.M.C. v Hungary*³⁸ the European Court of Human Rights (ECtHR) pointed out that a dismissal of a civil servant without giving reasons violated Art. 6 § 1 ECHR, because without knowing the reasons of dismissal "it is inconceivable for the applicant to have brought a meaningful action, for want of any known position of the respondent employer."³⁹ Recently the ECtHR delivered a judgment stating that the excessive length – more than six years – of litigation in a labour dispute violates Article 6 § 1 and Article 13 ECHR.⁴⁰ The ECtHR delivered some other judgments affecting the protection from

³⁶ Case C-260/89 ERT [1991] ECR I-2926, para.41-42.

³⁷ Case-130/73 *Vanderweghe* [1973] ECR I-1973, para.2. See also recently Case C-117/14 *Poclava* [2015]

³⁸ Application no. 19554/11 *K.M.C. v. HUNGARY* [2012]

³⁹ *Ibid*, para. 34.

⁴⁰ Application no. 48322/12 *Gazsó v Hungary* [2015]

dismissal, where the dismissal violated another fundamental right, like the freedom of religion or the freedom of expression.⁴¹

The linkage of the Union law to the ECHR is significantly stronger than to other fundamental rights documents due to the normative incorporation of the ECHR into the CFREU by Art. 52 par 3 CFREU and the institutional accession of the EU to the Convention by Art. 6 par 2 of the Treaty on European Union. The CJEU has even cited in its judgments the decisions of the ECHR.⁴² In this context *De Búrca* criticises that the CJEU relies only on the ECHR, but notoriously refuses to cite or consider other international or regional human rights treaties.⁴³

The lack of regulation of protection against unfair dismissal in the ECHR has an indirect, but significant negative effect on the appreciation of Art. 30 CFREU as a fundamental – or even human – right in the EU. This lies in the fact that the interpretation of human rights by the CJEU is closely related to and partly based on the case law of the European Court of Human Rights, but at most marginally considers the European Social Charter and the ILO Conventions and Recommendations.⁴⁴

3.4. The ILO Convention No. 158

The states have been reluctant to ratify the ILO Convention No 158; until now only 36 countries, – 10 of which are EU Member States (Cyprus, Finland, France, Latvia, Luxembourg, Portugal, Slovakia, Slovenia, Spain and Sweden) – did so. Prima facie this is a small number, however, the Convention is rather in the middle field of ratifications.⁴⁵ The great aversion to this document is easy to understand, as it contains very extensive and detailed standards, which do not allow any separate national way in dismissal protection. The requirement of a broad range of detailed rules without the possibility to have some margin to adopt the rules to the organically developed national regulation naturally resulted in the high proportion of absences. The opponents of the Convention can bring up several arguments, starting from the excessive protection of workers, which is economically unacceptable and hinders new employments to the statement that the Convention does not regulate a model which is acceptable for all – or at least most of the – states and it should have rath-

⁴¹ See the cases: J. Kenner, 'Article 30 - Protection in the Event of Unjustified Dismissal', in *The EU Charter of Fundamental Rights. A Commentary*, Oxford, Portland, Oregon, 2014, pp. 805, 814-815.

⁴² Case C-438/05 *Viking* [2007] ECR I-10806, para.86.

⁴³ She highlights that "the EU and the ECJ draw sporadically and inconsistently on such international human rights sources and insist that the ECJ is the final and authoritative arbiter of their meaning and impact within the EU", p. 680.

⁴⁴ T. Novitz and P. Syrpis, 'Giving with the One Hand and Taking with the Other: Protection of Workers' Human Rights in the European Union', in C. Fenwick and T. Novitz (eds.), *Human Rights at Work. Perspectives on Law and Regulation*, Oregon, Oxford and Portland, 2010, pp. 463, 467.

⁴⁵ www.ilo.org/dyn/normlex/en, (accessed on 15 September 2015)

er been limited to a minimum level of protection.⁴⁶ The majority of the states are not willing to undertake any – even minor – modifications of their existing regulation on dismissal, as it is a highly sensitive issue, deeply embedded in the social and economic environment.⁴⁷

However, the Convention has a considerable indirect impact, e.g. their provisions have inspired Art. 24 of the revised ESC,⁴⁸ which again was the model for Art. 30 CFREU. By this indirect connection the ILO Convention influences the interpretation of Art. 30 CFREU.

It is worth considering the assessment of the nature of the right to protection against unfair dismissal in the framework of the ILO. Ever since the adoption of the ILO Declaration on Fundamental Principles and Rights at Work in 1998 the ILO differentiates between core labour standards, called fundamental rights of workers and other rights do not belonging to the core. This distinction shows the ILO's priority, however, the highlighting of the four fundamental rights does not automatically mean that all rights left beyond the group of the most favoured are not fundamental.⁴⁹

The protection against unfair dismissal does not belong to the most prioritized area of the ILO, but under its Decent Work Agenda the ILO set four strategic objectives affecting dismissal protection, inter alia promoting jobs and extending social protection.

The CJEU in some cases refers to certain ILO Conventions following the reasoning of some parties in the cases, but the mentioned Conventions did not create a basis of decision.⁵⁰

However, in the Viking and Laval judgments the CJEU argued that the right to take collective action, including the right to strike must be recognised as a fundamental right based on the argument that various international and EU instruments (ESC 1961, ILO Convention No 87, the Community Charter of the Fundamental Social Rights of Workers of 1989 and the CFREU) have recognised this right.⁵¹ The acceptance of the right to strike as a fundamental right was basically underpinned by the argument that the majority of the relevant international and EU documents acknowledged this right.

⁴⁶ See on this in detail: K. Lörcher, 'Internationale Arbeitsnormen unter ungerechtfertigtem Druck: - das Beispiel des Kündigungsschutzübereinkommens Nr. 158 der Internationalen Arbeitsorganisation (ILO)', *ZESAR*, 2012, pp. 263, 268-271.

⁴⁷ See the attitude of Germany to the Convention in *ibid.*, p. 266.

⁴⁸ *Explanatory Report - European Social Charter*, 1996, p. 86., available at: <http://conventions.coe.int/Treaty/EN/Reports/HTML/163.htm> (accessed 25 June 2015)

⁴⁹ 'Declaration on Fundamental Principles and Rights at Work and its Follow-up', available at: <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang-en/index.htm>, (accessed 25 June 2015)

⁵⁰ See for example the reference of the Commission to the ILO Convention No. 171 of 1990 on night work in CJEU, Case C- 158/91 *Criminal proceedings against Jean-Claude Levy*, [1993] ECR I-4287, para. 18. and sometimes mentioned Convention No 111 prohibiting discrimination in the field of employment and occupation, e.g. CJEU judgment in Case C-555/07 *Kücükdeveci* [2010] para. 3. and CJEU judgment in Case C-144/04 *Mangold* [2005] para. 7

⁵¹ Case C-438/05 *Viking* [2007] para.43. and C-341/05 *Laval* [2007] para. 90.

The Court of Justice has not mentioned the ILO Convention No. 158 until now. However, the two other courts, namely the Civil Service Tribunal and the General Court (Appeal Chamber of the first) delivered judgments⁵² with some analysis of Art. 30 CFREU mentioning also the ILO Convention, but these statements are not standards of review beyond the civil service of the EU.

3.5. The Revised European Social Charter

Also the revised European Social Charter has integrated the right to protection in cases of termination of employment into its Art. 24. This article plays an extraordinary role in the interpretation of Art. 30 of the CFREU, as its explanation expressly refers to the revised ESC, as the basis on which Art. 30 CFREU was drawn. Therefore some authors argue that Art. 24 rev ESC and Art. 30 CFREU should be interpreted consistently in order to avoid double standards.⁵³ *Hepple* desires that “interpretations by the European Committee of Social Rights under the ESC should be of persuasive value.”⁵⁴ *Jääskinen* even argues that in cases, when certain rights are protected under the (revised) ESC and the CFREU, and the explanation expressly refers to the ESC, “the authors of the Charter have created a (rebuttable) presumption of homogeneity between the two instruments.”⁵⁵

When comparing the wording of the right in the two documents the difference is striking. Whereas the CFREU only states the right of workers to protection, the revised ESC is more detailed and states the effective exercise of this right as a goal and specifies the requirements which a state has to fulfil in order to guarantee this right. Basically Art. 24 of the revised ESC requires three elements to ensure the effective exercise of this right: (1) the existence of a valid reason for the termination of the employment, (2) adequate compensation or other appropriate relief in case of termination without a valid reason and finally (3) the right to appeal to an impartial body. Compared to these specific requirements Art. 30 CFREU seems to be only an ‘empty cover’ as *Krebber* properly puts it, since apart from the sole declaration of the right it does not deliver any specification of its content.⁵⁶

⁵² Judgment of the European Union Civil Service Tribunal, F 1/05 *Landgren* [2006] para. 69; Judgment of the General Court (Appeal Chamber) Case T-107/11 P *Schuerings* [2013], par. 101.; Judgment of the European Union Civil Service Tribunal Case F 109/13 DG [2004] para. 51-59.

⁵³ B. Hepple, ‘The EU Charter of Fundamental Rights’, *Industrial Law Journal*, vol. 30, 2001, pp. 225-231. 226. and Kenner *op. cit.* n 41 *supra*, p. 825.

⁵⁴ Hepple *op. cit.* n 53 *supra*, p. 226.

⁵⁵ N. Jääskinen, ‘Fundamental Social Rights in the Charter - Are They Rights? Are They Fundamental?’, in *The EU Charter of Fundamental Rights. A Commentary*, Oxford, Portland and Oregon, 2014, pp. 1703, 1707.

⁵⁶ S. Krebber, ‘Art. 30 GRCh’, in C. Calliess and M. Ruffert (eds.), *EUV/AEUV. Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta*. Kommentar, München, 4th edn, 2011, p. 2905.

The real impact of Art. 24 revised ESC on the Member States at international level has been very limited, as not all of them have adopted this article. Until March 2015, 26 states accepted Art. 24, which are the majority of the 43 Member States of the ESC. There are seven countries⁵⁷ who ratified the revised ESC, but refused the acceptance of Art. 24 and another ten states, who only ratified the 1961 ESC. Among the last states there are several Western European states with broad acceptance of social rights and high level of dismissal protection regulation, like Germany.⁵⁸

The reluctance of acceptance proves that states are cautious to recognise any supranational right on dismissal law. This is particularly due to the fact that the European Committee on Social Rights interpreted Art. 24 in a very broad sense and elaborated very specific obligations for the parties. So for example it explained that a six months long probationary period⁵⁹ or the limitation of the compensation for an unlawful dismissal to a maximum of six months' wages were not in conformity with the Charter.⁶⁰

It is important to note in this context that the opinions of the European Committee on Social Rights are not legally binding for the Member States and their courts, as it is a group of experts, but not a court, so it does not have the legitimation to deliver interpretation, which binds the national courts.⁶¹

It is crucial to note that not only those states are bound to Art. 24 rev. ESC, that expressly adopted this article, as the Union documents constituted a link between the law of the Union and the ESC. Art. 151 of the Treaty on the Functioning of the European Union (TFEU) refers to the fundamental social rights of the European Social Charter 1961 as a model, when it sets the objectives of social policy in the EU. As it is only a programmatic declaration, the Preamble of the CFREU is more important, since it mentions both Social Charters of the Council of Europe. Regardless of this reference, the CJEU has been very reluctant to invoke the ESC.⁶²

⁵⁷ The seven countries are: Andorra, Austria, Belgium, Bosnia and Herzegovina, Georgia, Hungary and Sweden.

⁵⁸ The mentioned ten states are: Croatia, Czech Republic, Denmark, Germany, Greece, Iceland, Luxembourg, Poland, Spain and Greece. See the list on the acceptance of the rights: http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/ProvisionTableRevMarch2015_en.pdf, (accessed on 20 September 2015)

⁵⁹ So for example in case of Italy; see the Conclusions in 2008 and 2012 on Article 24. Available: <http://hudoc.esc.coe.int/eng>, (accessed on 20 September 2015)

⁶⁰ See e.g. the cases of Bulgaria and Estonia in the Conclusions 2007 and 2012 on Article 24. Available: <http://hudoc.esc.coe.int/eng>, (accessed on 20 September 2015)

⁶¹ Rebhahn, *op. cit.* n 12 *supra* mn. 42.

⁶² In some judgments the CJEU made a broad reference to the ESC 1961, so for example in Case C-438/05 *Viking* [2007] para.43.

IV. THE EU AND SOCIAL RIGHTS

4.1. Subordination of the Social Rights to Economic Goals

The initially exclusively economic objective of the European Communities, namely the integration of the national markets of the Member States, has resulted in the priority of economic goals and freedoms over social rights. This tendency could be noticed in numerous directives and regulations in social law and also the CJEU has confirmed in some cornerstone cases – the most striking of them were the *Viking* and *Laval* judgments⁶³ – the privilege of economic freedoms or assumed economic interests over social rights. Heated debate took place regarding the mentioned decisions, which mainly focused on the question whether and if yes, how far the economic freedom of the EU can restrict the workers' rights to bargain collectively and to strike. The CJEU's position was clear as far as it gave prevalence to the economic considerations over workers' rights, even if at the same time it also clearly recognized the right to strike as a fundamental right of workers.⁶⁴

The question is, how far we can adopt the arguments and the outcome of these judgments to Art. 30. Obviously, the statements in these cases cannot be directly applied to the interpretation of Art. 30, as in the contested cases the controversial rights were collective rights of the workers, which are expressly excluded from the competences of the EU. This is not the case regarding the right against unfair dismissal. However, the attitude of the Union on how to solve conflicts between economic and social goals is clear and gives some consideration regarding Art. 30 as well.

The opponents of the acceptance of social rights as human rights usually bring up the argument of the neo liberal economists, which is currently very influential in Europe. Representatives of this economic theory argue that labour standards act as a deterrent to the actors of the market and social rights create burdens directly on employers and indirectly on economic growth. They impair flexibility and competition and thus damage economic growth. Proponents of this theory have the opinion that overall economic growth can be best achieved by deregulation of labour law and this should contribute to the realization of the adequate standard of living of workers.⁶⁵ The background of this position at European level is the commitment of certain influential Member States to neo-liberalism instead of the other prominent political ideology, namely social democracy.⁶⁶ The earlier

⁶³ S. Fredman, 'Transformation or Dilution: Fundamental Rights in the EU Social Space', *European Law Journal*, vol.12, 2006, p. 41.; S. Novitz, *op. cit.* n 44 *supra*, p. 465. D. Schiek, 'Re-embedding economic and social constitutionalism: Normative perspectives for the EU', in D. Schiek, U. Liebert and H. Schneider (eds.), *European economic and social constitutionalism after the Treaty of Lisbon*, New York, Cambridge, 2011, p. 17.

⁶⁴ *Viking*, para. 42-44. and *Laval* para. 89-91.

⁶⁵ Alston *op. cit.* n 4 *supra*, p. 5.

⁶⁶ Fredman *op. cit.* n 63 *supra*, p. 43.

positive image of labour/social rights as significant pillar of a welfare democracy has been clearly denigrated and they were made the scapegoat for the laziness of the economy. In my opinion economic considerations have restricted influence on the question, whether certain labour rights are regarded as human or fundamental right, because this classification is outside of the range of financial feasibility. One can argue against the declaration of certain rights in a particular state as a human or fundamental right with financial reasons, but cannot doubt the theoretical classification of these rights as human right.

Having this in mind any social right in the EU has to stand the examination of harmlessness for creating the European common market. Having said that *Novitz'* and *Syrpis'* statement: "in the EU context, human rights act as a 'shield', rather than as a 'sword',..."⁶⁷ seems to be true. This statement is still true, even if since the integration of the Social Chapter into the Treaty of Amsterdam the EU has several times acknowledged its commitment to the social rights, and the adoption of the CFREU has opened up a new chapter regarding social rights at EU level.

4.2. The Socio-Economic Rights in the CFREU

The list of articles with socio-economic content in the CFREU is a mixture of disparate fundamental rights models, combining classical liberal rights with social principles.⁶⁸

Based on the wordings of the socio-economic rights of the Charter two broad groups can be created.⁶⁹ As all classification regarding fundamental rights, this can only serve as a guidance, as the borders between the categories are floating. Differences can be noticed in the intensity of the protection (prohibition, individual right, "shall have the right", recognition and respect of a right) and in the addressee of the rights (worker, state, Union).

The strongest protection is provided by the articles, which formulate an expressed prohibition (e.g. Art. 5 – Prohibition of slavery and forced labour; Art. 21 – Non-discrimination; Art. 32 – Prohibition of child labour). Certain articles – and also Art. 30 belongs to this group – are formulated as positive rights providing a right to the individual ("Every worker has the right to..."; e.g. Art. 28 - Right of collective bargaining and action; Art. 31 – Fair and just working conditions). To the next group of rights belong those, which are 'softer' formulated, for example they state that the Union recognizes and respects rights (e.g. Art. 25 – The rights of the elderly; Art. 26 - Integration of persons with disabilities, etc). Finally in some cases the Charter only requires that someone, for example the family shall enjoy protection (Art. 33) or the Union shall respect diversity (Art. 22).

Leaving aside the socio-economic rights which do not refer directly to the employment relationship the classification of labour rights in a narrow sense in the Charter is

⁶⁷ *Novitz and Syrpis op. cit.* n 44 *supra*, p. 467.

⁶⁸ *Gärditz op. cit.* n 10 *supra* mn. 1.

⁶⁹ See also *Fredman op. cit.* n 63 *supra*, p. 56.

more homogeneous and more often creates the impression of positive, enforceable rights. This is certainly true for the important articles which are formulated in a negative form as prohibition of certain activities. Other rights regarding employment relationship and industrial relations are formulated as positive rights of the individuals (and their representatives) or in some cases the right or protection 'must' be ensured or guaranteed (e.g. Art. 23 – Equality between men and women; Art. 27 – Workers' right to information and consultation within the undertaking). These articles provide the image of being more hard law, than other socio-economic rights.

This classification does not reflect the traditional concern that only civil and political rights are formulated as 'rights,' whereas in the field of social law rather only 'principles' exist. Regarding labour rights we do not need to address the traditional division between civil and political rights on the one hand and socio-economic rights on the other hand, as labour rights are predominantly formulated as positive rights. Important is to note in this context that the Charter does not subordinate social rights to civil and political rights and the structure of the Charter does not suggest the priority of certain kind of rights above the others.⁷⁰

The willingness of the state to accept labour rights as positive rights lies on the fact that it is not the addressee and so the costs linked to these rights are rather indirect through the employer as direct, which is not the case regarding rights on health care or housing.⁷¹ The readiness to acknowledge positive rights significantly depends on the costs of each right.

Art. 30 is formulated as a positive, individual right, not only a declaration of a principle and directly the workers are addressed by this right. Art. 30 is negatively formulated as its aim is to protect workers against unfair dismissal and not to guarantee a fair dismissal. However, the negative wording requires positive actions. Protection implies an active policy and intervention from the state in order to guarantee the protection as opposed to the employer.

In case we accept the division of fundamental labour rights into 'procedural rights' or 'process rights' on the one hand and 'substantive rights' on the other hand,⁷² Art. 30 shall be considered as a material right with certain procedural element, i.e. the right to a fair trial in case of unfair dismissal is part of this right.

4.3. The Constitutional Traditions of Member States

Even before the adoption of the CFREU as legally binding document the CJEU deduced the fundamental rights from the national constitutional traditions of the Member

⁷⁰ Fudge *op. cit.* n 23 *supra*, p. 41.

⁷¹ Novitz and Fenwick *op. cit.* n 2 *supra*, pp. 16-17.

⁷² S. Deakin and F. Wilkinson, 'Rights vs efficiency?: The economic case for transnational labour standards,' *Industrial Law Journal*, vol. 23, no.289, 1994, p. 290.

States.⁷³ Since the CFREU there is also a normative basis for the consideration of the constitutions in the legal reasoning. Article 52 par 4. of the CFREU expressly states: “In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.”

The Constitutional traditions of Member States can serve as a source of norms regarding human rights of workers, but taking into account of the diversity of the systems, it is often difficult to draw general consequences from it.⁷⁴

Remarkably, when the CJEU cited the constitutional traditions of the Member States,⁷⁵ it was not a condition of the citation, that the invoked right is recognised in the majority of the Member States.⁷⁶ Such references to the common constitutional tradition usually failed a plausible demonstration.⁷⁷ Loose references clearly contradict the formulation of the treaties⁷⁸ and the Preamble of the CFREU, which requires the consideration of constitutional traditions common to the Member States.

The overwhelming majority of the constitutions of the Member States has not incorporated the right to protection against unfair dismissal. Exceptions can be found in the Portuguese and Slovakian constitutions. Article 53 of the Portuguese Constitution states that “Workers are guaranteed job security, and dismissal without fair cause or for political or ideological reasons is prohibited.”⁷⁹ Furthermore, Article 36 lit b) of the Slovakian Constitution states that the law guarantees protection against arbitrary dismissal.⁸⁰

⁷³ See in the early case law: CJEU Case C-11/70 *Internationale Handelsgesellschaft mbH*, [1970] para. 4. and CJEU, Case C-4/73 *Nold* [1974] para 13-14.

⁷⁴ Novitz and Syrpis *op. cit.* n 44 *supra*, p. 468.

⁷⁵ See in the early case law: See in the early case law: CJEU Case C-11/70 *Internationale Handelsgesellschaft mbH* [1970] para. 4. and CJEU Case C-4/73 *Nold* [1974] para 13-14.

⁷⁶ M. Breuer, ‘§ 7 Fundamentalgarantien’, in C. Grabenwarter (ed.), *Europäischer Grundrechtsschutz* (Baden-Baden, 1st edn, 2014), 303-346. mn. 1.

⁷⁷ Rebhahn *op. cit.* n 12 *supra* mn. 11.

⁷⁸ Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, A.1. first sentence.

⁷⁹ Artigo 53. Segurança no emprego: É garantida aos trabalhadores a segurança no emprego, sendo proibidos os despedimentos sem justa causa ou por motivos políticos ou ideológicos. In English: Article 53 (Job security). See the homepage of the Portuguese Parliament: <http://www.parlamento.pt/Legislacao/Paginas/ConstituicaoRepublicaPortuguesa.aspx> (accessed on 12 May 2015).

⁸⁰ Art. 36 „Zamestnanci majú právo na spravodlivé a uspokojujúce pracovné podmienky. Zákon im zabezpečuje najmä (...) b) ochranu proti svojvoľnému prepúšťaniu zo zamestnania (...)”. <http://www.narodnostnemensiny.gov.sk/druha-hlava/> In English: Art. 36 “Employees have the right to equitable and adequate working conditions. The law guarantees, above all (...) b) protection against arbitrary dismissal (...)”. See: <http://www.slovak-republic.org/constitution/> (accessed on 25 July 2015).

Consequently, due to the small number of states with constitutional recognition this right cannot be considered as a right guaranteed by the common constitutional tradition of the Member States.⁸¹

4.4. The Constitutionalisation of Labour Law

The term 'constitution' was usually stuck to and reserved for the state, a national order. However, the legal developments of the European Communities in the 1960s and 1970s brought about the internationalisation of the constitutionalisation. The transformation of the CFREU into a legally binding document was one major step in the constitutionalisation of the Union law.⁸² Also regarding the right to protection against unfair dismissal the CFREU was certainly the turning point.

The constitutionalisation of labour and socio-economic rights is regarded completely differently by scholars. The borderline usually, but not necessarily lies between the scholars, socialised in common law and civil (Roman) law. Whereas the first often take this process for granted or even welcome it, civil lawyers are more cautious and express concerns mainly due to the normative and democratic shortcomings of constitutionalisation.

The proponents of the constitutionalisation of labour law at European level see in this process a positive development that strengthens the protection of workers. *Schiek* argues that the reconciliation of social and economic dimensions of European integration is only possible by the re-embedding of EU-constitutionalism.⁸³ She understands EU constitutionalism as a dynamic process beyond positive law. *Liebert* also speaks about post-and transnational economic, social and democratic constitutionalism.⁸⁴ Social constitutionalism seems to be the answer to counterbalance economic challenges in the EU, even if some argues that it can undermine the economic integration.⁸⁵

Weiler criticises the exaggerated and ubiquitous use of various constitutionalism theories, emphasising that particular terms like 'global constitutionalism' and 'constitutional pluralism' are recently fancy and politically correct without exact understanding of these expressions, but rather with a multiplicity of meanings.⁸⁶ He also expresses his doubt from

⁸¹ *Knecht* in *Schwarze/Becker/Hatje/Schoo* (ed.), *EU-Kommentar*, 3. Ed., p. 2688.

⁸² *Gärditz op. cit.* n 10 *supra* mn 19.

⁸³ *Schiek op. cit.* n 63 *supra*, p. 18.

⁸⁴ U. Liebert, 'Reconciling market with Social Europe? The EU under the Lisbon Treaty', in D. Schiek, U. Liebert and H. Schneider (eds.), *European economic and social constitutionalism after the Treaty of Lisbon*, Cambridge, New York, 2011, pp. 47, 49-50.

⁸⁵ *Ibid*, 49.

⁸⁶ J.H.H. Weiler, 'Prologue: global and pluralist constitutionalism - some doubts', in G. de Búrca and J.H.H. Weiler, (eds.), *The Worlds of European Constitutionalism*, Cambridge, 2012, pp. 8-18.

a normative view and emphasises that the constitutional vocabulary should be restricted to the EU, as constitutionalism without some kind of democratic legitimacy is ‘highly problematic.’⁸⁷ *De Búrca* also states that the term constitutionalism has been eroded through overuse and overextension.⁸⁸ However, the two prominent scholars restrict their criticism to the constitutional development outside the EU.

To the contrary, *Rebhahn* strongly criticises the constitutionalisation of the European and national labour law.⁸⁹ He argues that the shift of the decision making power from the Parliaments to the courts (to the CJEU or national courts respectively) with the following loss of power of Parliament and policy as well as gain in power of the courts have serious adverse effects both on the democracy and the quality of legal doctrine. Constitutionalisation of labour law deprives the legitimate legislator the chance to regulate particular issues and leads to the supremacy of the courts and particularly the CJEU. This occurs by the interpretation of social and economic interests and their collisions as legal question, by shifting the debates from policy to law. This tendency entails the risk that conflicts of interests seem to have the glamour of objective questions, solved by experts, although they are about pure political debates and the distribution of resources. This is a serious risk for democracy and legal doctrine, as well.⁹⁰

4.5. Right or Principle?

Article 51 par. 1 CFREU requires to respect the rights and observe the principles, which suggests the differentiation between rights and principles. General Advocate *Cruz Villalon* in his opinion to the case *AMS* treated Art. 27 as a ‘principle’, but the judgment fails to qualify Art. 27 as a right or a principle. This reluctance of the CJEU indicates that the discussion on the nature of the articles of CFREU as rights or principles is even within the CJEU not finally settled.⁹¹

For the classification of Art. 30 it is crucial its wording, i.e. whether it provides precise rules regarding the content and addressees of this right. Art. 30 is ambiguous in this sense, since the first part of the sentence gives the impression of a real right, whereas the reference to the Union law and national laws weakens the unambiguity and increases the margin of elaboration for the Member States. As stated above Art. 30 is formulated as a

⁸⁷ *Ibid*, 12.

⁸⁸ *Búrca and Weiler, op. cit. n 30 supra*, p. 132.

⁸⁹ *Rebhahn op. cit. n 12 supra*, mn. 94-97. and R. Rebhahn, ‘Der Einfluss der Europäischen Grundrechtecharta auf das österreichische Arbeitsrecht’, in R. Rebhahn (ed.), *Grundrechte statt Arbeitsrecht?*, Wien, 2012, pp. 9, 30-31.

⁹⁰ *Rebhahn op. cit. n 12 supra*, mn. 54-57.

⁹¹ M. Holoubek, ‘Keine mittelbare Drittwirkung für „Grundsätze“ der GRC’, *Das Recht der Arbeit* 21, 2015, p. 24.

positive, individual right, not only a declaration of a principle and directly the workers are addressed by this right. It aims at granting the workers appropriate protection, whereas the state has a margin for designing the specific rules.

When considering the question, whether Art. 30 can be regarded as a right, it is useful to realise that several fundamental rights do not fulfil the narrow definition of a 'right' – meaning an unconditional, self-standing claim of an individual, justiciable in front of a competent judicial organ.⁹² Human and fundamental rights naturally need legislative elaboration to become enforceable entitlements and the legislator usually has a (great) margin of appreciation in the elaboration of the right.⁹³

The very broad and general reference significantly lowers the possibility to control the compliance of the national regulation with this right, but – in my opinion – does not negatively influence the legal qualification of this article as a right. The reference to the Union law and the national laws in Art. 30 grants openness and dynamics to this right and expresses that it roots in the legal traditions of the Member States and indeed depends from the respective status of development of a society, its orientation to values and also financial situation.⁹⁴ I agree with the approach of *Rebhahn*, who argues that the reference gives a very wide scope to the Member States and the EU to regulate this right, which naturally restricts the possibility of the CJEU to control the compliance with Art. 30. However, the reference itself does not eliminate the legal nature of Art. 30 as a fundamental right.⁹⁵

V. IMPLEMENTATION OF ART. 30 IN NATIONAL LAWS – DEFICIENCIES AND POSSIBILITIES

5.1. Deficiencies

Fundamental social and labour rights are traditionally weak in terms of their justiciability, implementation and enforcement.⁹⁶ This statement is also true regarding the labour rights of the CFREU. Although the CFREU is extremely ambitious in the enumeration of social rights, it is very much cautious regarding the implementation of these rights. The inclusion of several rights in the solidarity chapter of the CFREU, which are expressly excluded from the competences of the EU, like the right to freedom of association, col-

⁹² Jääskinen *op. cit.* n 55 *supra*, p. 1707.

⁹³ *Ibid*, p. 1707.

⁹⁴ M. Fister, 'Neuerungen bei den Grundrechten des Arbeitslebens,' in C. Grabenwarter, W. Pöcherstorfer and C. Rosenmayr-Klemenz (eds.), *Die Grundrechte des Wirtschaftslebens nach dem Vertrag von Lissabon*, 2012, pp. 45, 54.

⁹⁵ *Rebhahn op. cit.* n 12 *supra*, mn. 46.

⁹⁶ Bercusson *op. cit.* n 9 *supra*, pp. 180-181.

lective bargaining and strike brought about a general doubt on the implementation of the declared labour rights.

Ever since the *Åkerberg Fransson* judgment the opinion of the CJEU on the applicability of the fundamental rights of the CFREU is clear. It takes seriously the restriction of Art. 51, which lays down that the provisions of the Charter are addressed to the Member States “only when they are implementing Union law.” It states that “it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law.”⁹⁷ The Member States are consequently only bound to respect the fundamental rights defined in the context of the Union when they act in the scope of Union law.

The fundamental social rights of the CFREU have a significant interpretative and programmatic effect on the institutions and bodies of the Union, so in the interpretation of Union law and in the elaboration of new law, the fundamental social rights should be considered and promoted.⁹⁸ As Art. 30 legally binds also the organs of the EU it is an extremely interesting question, whether the activity of the European Commission is bound to the fundamental rights of the CFREU. When taking Art. 51 par 1. seriously, this question has to be answered on the affirmative.⁹⁹ The Commission pursues the policy of flexibility by combining active and passive labour market policy measures with weak dismissal protection. Until now there is no sign that the open method of coordination of the European Commission would have been measured on Art. 30.

In the following the article focuses only on the possible implementation in the national laws. There are several conceivable ways, how Art. 30 can be implemented in national laws. The two most important possibilities are the following: a) through the implementation of the Union law and b) by the impairment of fundamental freedoms by a national rule. Also the national, particularly the Constitutional courts play an important role in the interpretation and implementation of Union law. In the following I will consider these options shortly.

5.2. Implementation through Union Law

The first possibility to apply Art. 30 CFREU is by the implementation of secondary Union law, dominantly directives. Art. 30 has to be applied in any case, if the Member States interpret, implement or enforce a directive or regulation of the European Union. The existing specific rules on dismissal in various directives open the door to implementation. Further, it is conceivable to apply Art. 30 in the context of directives which effect dismissal

⁹⁷ Case C-617/10 *Åkerberg Fransson* [2013] para. 19.

⁹⁸ Jääskinen *op. cit.* n 55 *supra*, p. 1711.

⁹⁹ Rebhahn *op. cit.* n 12 *supra*, mn. 27.

law only indirectly by a broad interpretation of the scope of the directive. However, until now the Court of Justice refused to make use of both possibilities.

There is a strong opinion that Art. 51 par. 1 has to be interpreted in a narrow way, meaning that the rights of the CFREU bind the states only, if there is already a secondary legislation on a particular issue; ie. the national implementation requires the existence of (a precise) secondary legislation.¹⁰⁰ However, it is highly controversial, in which case a particular directive or regulation falls in the scope of a right. The protection against dismissal has been partly regulated in several directives, like in the Directive on the Transfer of Undertaking (2001/23/EC), on Maternity Leave (92/85/EC) and it was affected by the directives on equal treatment. The Directive on Collective Redundancies contains procedural rules of dismissal (98/59/EC) and the Directive on Fixed-Term Contracts (1999/70/EC) has an indirect effect on the dismissal law. The crucial question is, how far these fragmented rules on dismissal protection can be regarded as the 'implementation' of the generally formulated protection declared in Art. 30 CFREU.¹⁰¹

In a few cases national courts tried to argue in front of the CJEU that a certain issue falls within the scope of Art. 30 through a specific directive. The CJEU confirmed in every case that it takes the wording of Art. 51 CFREU seriously and the fundamental rights of the Charter are only applicable in situations governed by EU law.

For example in the case *Rodríguez Mayor*¹⁰² the national court asked, whether the Spanish legislation on collective redundancies infringes Art. 30. The claimants criticized the rule which stated that in cases of death, retirement or incapacity of the employer, workers shall be entitled to payment of a sum equivalent to one month's remuneration. The Court declined to give a substantive answer based on the fact that the situation fell outside the scope of Directive 98/59/EC and, accordingly, outside that of Community law.¹⁰³ Remarkably, the same fact has not bothered the Court to rule on the central question of the case.

In the case *Poclava*¹⁰⁴ the question was, whether a one-year probationary period in Spain contradicts the directive on fixed-term contracts. The CJUE emphasised the difference between probationary period and fixed-term contract in order to state that the probationary period is not regulated by Directive 1999/70/EC and so the national rule falls outside the scope of EU law and the CJEU does not have jurisdiction to examine it on Art. 30 of the CFREU. Even if the Directive on fixed-term contract stresses that the contract

¹⁰⁰ *Ibid*, mn. 20.

¹⁰¹ See on this *ibid*, mn. 30.

¹⁰² Case C-323/08 *Rodríguez Mayor* [2009]

¹⁰³ *Ibid*, 59.

¹⁰⁴ Case C-117/14 *Poclava* [2015]

for indefinite period is the usual form of contracts, it was not enough to give a basis for the examination of probationary period in the light of Art. 30.

In the judgment *Nagy*¹⁰⁵ the CJEU ruled that it did not have jurisdiction, where a Hungarian court referred a case on the same legal basis, on which the ECtHR delivered its *KMC versus Hungary* judgment. The CJEU ruled that the case did not concern the implementation of EU law.

The CJEU ruled in the judgment *AMS* that Art. 27 CFREU cannot be invoked “in order to conclude that the national provision which is not in conformity with Directive 2002/14 should not be applied.”¹⁰⁶ The CJEU resulted in this case that Art. 27 CFREU does not have horizontal direct effect, so it cannot overrule a national law, even if there is the Directive 2002/14 which makes the content of the right more precise and the national regulation was adopted to implement this directive. The CJEU highlighted that Art. 27 CFREU differs from the principle of non-discrimination on grounds of age laid down in Art. 21 (1) CFREU and judged in the *Küçükdeveci* judgment,¹⁰⁷ because Art. 27 CFREU needs the specification and is not sufficient in itself to confer on individuals an individual right.

Even if the CJEU did not state, its *AMS* judgment was based on the perception of Art. 27 as a principle instead of being a right. In order for a right of the CFREU to be fully effective it must be given more specific expression in European Union or national law.¹⁰⁸ This judgment indicates that the CJEU differentiates between principles and rights in their impact. Whereas ‘rights’ can have horizontal direct effect, ‘principles’ – as e.g. Art. 27 – do not have the same effect. Therefore – in my opinion – the findings of the CJEU in this judgment cannot be applied to Art. 30. When comparing the wording of Art. 27, Art. 21 (1) and Art. 30, the outcome is that the latter is more similar to the formulation of Art. 21 (1) regarding accuracy and cannot be classified as a ‘principle’.

The conclusion of the case-law of the CJEU is that for the implementation of the Charter it is necessary, that a secondary regulation is applicable to the situation, which does not only affect the same question in an abstract way, but more specifically. The CJEU has so far rejected to regard certain articles of the directives as implementation rules of Art. 30, which leaves open the question, which rules can be considered to implement the substantive content of Art. 30 and which are only indirectly – broadly – related to dismissal law. The border between abstract and direct influence of a certain field (here individual protection against unfair dismissal) is far from being clear.

¹⁰⁵ Cases C-488/12 to 491/12 and 526/12 *Nagy and Others* [2013]

¹⁰⁶ CJEU judgment, Case C-176/12 *AMS* [2014] para. 48.

¹⁰⁷ CJEU judgment, Case C-555/07 *Küçükdeveci* [2010]

¹⁰⁸ CJEU judgment, Case C-176/12 *AMS* [2014] para. 45.

5.3. Violation of Fundamental Freedoms

The second major possibility to implement Art. 30 in national laws would be to find situations, in which the national rules on dismissal law directly affect the scope of Union law. The scope of Art. 30 CFREU is opened, if national regulation infringes a fundamental freedom of the EU. The question is, whether one can find situations, in which the national rules on dismissal law affect a fundamental freedom of the EU and thus fall into the scope of Union law. One could argue that the different levels of dismissal protection in the Member States could lead to situations, in which the free movement of workers or the freedom of establishment is constrained. *Rebhahn* mentions the example that the strong dismissal protection in Italy would be suitable to make this country less attractive for companies as location and in this way it impairs the freedom of establishment, even if it does not violate this principle. Furthermore, the weaker Austrian dismissal protection could attract Italian employees to take up employment in Austria instead of Italy and this also could maybe adversely affect the free movement of workers.¹⁰⁹ Impairment of a freedom of such a low intensity could theoretically provoke the application of the fundamental freedom and require a justification. The CJEU usually interprets the scope of freedoms very broadly and it fulfils the requirement of getting into the scope of the right, if a national measure makes the use of a freedom less attractive, i.e. the marginal impairment of the right is sufficient.¹¹⁰ However, adopting such a broad perspective would lead to the situation that nearly all national regulations would implement Union law and would be bound on the CFREU.¹¹¹

5.4. The Interpretation of National (Constitutional) Courts

The third way how Art. 30 CFREU can make a significant impact on national law is, if the Constitutional Courts or even national labour courts invoke Art. 30. For the possible role of the Constitutional Courts in the interpretation of Art. 30 Austria provides a good example. The Austrian Constitution is not only one piece of law, but a great number of statutes or particular articles of statutes have constitutional status. Also the European Convention on Human Rights is part of the Austrian Constitution. This fragmentation of the Constitution made it possible that 2012 the Austrian Constitutional Court elevated the CFREU to constitutional status. The legal basis for that was the principle of equivalence adopted by the CJEU.¹¹²

¹⁰⁹ *Rebhahn op. cit.* n 12 *supra*, mn. 34.

¹¹⁰ *Ibid*, mn. 33.

¹¹¹ *Ibid*, mn. 35.

¹¹² The CJEU stated in its established case-law that “in the absence of Community rules governing the matter it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, however, that such rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and do not render virtually

The *Austrian Constitutional Court* in general has been the view that European Union law in general is not a standard for its scrutiny of Austrian law, however, this principle cannot be transferred to the Charter.¹¹³ Further it follows from the principle of equivalence that also the rights of the CFREU can be invoked in front of the Constitutional Court as constitutionally guaranteed rights and they constitute a control standard ('Prüfungsmaßstab') in the process of the general compliance control of Austrian legislation. It added that the rights guaranteed in the Charter can be asserted as constitutionally guaranteed rights.¹¹⁴

The Court itself restricted this statement by saying that this rule applies only, if the right concerned in the CFREU is similar to the rights of the Constitution in terms of formulation and specification, meaning that certain precision in the wording is needed. The Court argued that the articles are different regarding their normativity, some of them are only guidelines or principles. It expressly mentioned Art. 22 (cultural, religious and linguistic diversity) and Art. 37 (environmental protection).¹¹⁵ Therefore it is on a case-by-case basis to decide, which articles of the CFREU create a standard for the process in front of the Constitutional Court. Bearing in mind this restriction, it is not clear, whether Art. 30 fulfils the requirements of accuracy to be applied as a control standard.

The applicability of the CFREU on acts of the organs of the EU requires that these act in the implementation of the right of the EU, i.e. the contested case has to fall under the scope of the EU law. This has to be broadly understood and covers not only the implementation of Union law by courts and authorities, but also the enforcement of national implementation measures.¹¹⁶

Similar to the CJEU the *German Constitutional Court* interpreted Art. 51 par. 2 CFREU strictly reluctant.¹¹⁷ It emphasised that national law which has the potential to influence the functioning of legal relationships regulated by Union law only indirectly, does not satisfy the requirement for the control of compliance with the standards of the Union's fundamental rights. It further highlighted that the required connection of a national regulation to Union law is not constituted by mere subject-matter reference of a rule to the abstract scope of Union law, by pure factual effects on the Union law or by indirect influence on legal relationships regulated by Union law.¹¹⁸

impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness) (...)" CJEU Levez, 1 December 1998, C-326/96, par. 18.

¹¹³ Austrian Constitutional Court, U466/11 ua, 14.03.2012. points 4.2. and 5.

¹¹⁴ *Ibid*, points 5.5. and 5.8.

¹¹⁵ *Ibid*, point 5.5.

¹¹⁶ *Ibid*, point 6.

¹¹⁷ BVerfG 24.4.2013 – 1 BvR 1215/07, mn 90-91. Available at: http://www.bundesverfassungsgericht.de/SiteGlobals/Forms/Suche/Entscheidungensuche_Formular.html?language_=de, (accessed on 23 June 2015)

¹¹⁸ *Ibid*, mn. 91. and BAG 11.9.2013, 7 AZR 843/11, mn. 41.

The *German Federal Labour Court* also confirmed the interpretation of the CJEU. The plaintiff complained of the rule that during the six months waiting period the general dismissal protection does not apply, but the termination of contract can only be contested alleging the violation of good moral or breach of good faith. The German Court did not find any link to a particular directive and to the Union law, so the national law could not be scrutinised on the compliance with Art. 30.¹¹⁹ However, it also stated that Art. 30 can be used to the substantial enrichment of certain indeterminate terms of the labour law by the national courts. As an example it mentioned the dismissal protection gained from the principle of performance in good faith pursuant to § 242 BGB (German Civil Code) for those not covered by general dismissal protection.¹²⁰

VI. CONCLUSION

“Social rights are like paper tigers, fierce in appearance but missing in tooth and claw.”¹²¹ My analysis in this article came to the result, that *Hepple’s* apt general statement exactly describes the nature of Art. 30 of the CFREU.

The right to protection against unjustified dismissal does not seem to possess the same status as a human right like several other labour rights do, for example the prohibition of forced and child labour or the freedom of association. The missing or rare international and constitutional declarations of this right counteracts the acceptance of this right as a human right. This is also the result of a broad interpretation of this right, which does not only include protection against humiliating reasons and method of dismissal, but several other aspects. The broad understanding of this right brought about that only a fragment of the right against unfair dismissal is inherently connected to dignity and this raises serious doubts on the recognition of this right as a human right.

The answer to the question, whether the right to protection against unjustified dismissal in Art. 30 is a fundamental right is affirmative, which can be confirmed *inter alia* by the integration of Art. 30 into the CFREU.

The weakness of Art. 30 certainly lies in its implementation deficiencies. It provides a weak actual protection due to the implementation barrier of Art. 51 par. 1 CFREU and the restrained case law of the CJEU. However, the highlighted shortcomings regarding the implementation of Art. 30 do not change the legal nature of this article as an individual right of the worker.

¹¹⁹ German Federal Labour Court, BAG 8.12.2011, 6 AZN 1371/11, mn. 10, 12. Available at: <http://www.bag-urteil.com/08-12-2011-bag-6-azn-137111/> (accessed on 23 June 2015)

¹²⁰ *Ibid*, mn. 11.

¹²¹ B. Hepple, ‘Enforcement: the law and politics of cooperation and compliance’, in B. Hepple (ed.), *Social and labour rights in a global context. International and comparative perspectives* (Cambridge, 2002), p. 238.

ATTILA KUN, PH. D.*

REDIRECTING THE REGULATORY FOCUS OF LABOUR LAW – FROM THE CONTRACT TO THE ORGANIZATION? THE EXAMPLE OF NON-FINANCIAL REPORTING IN THE EU**

Abstract:

In a wide sense, the paper deals with the shifting regulatory character of labour law (more particularly, labour-related regulation in a wider context). The paper strives to highlight how the effectiveness of labour law is increasingly related to the activation of market-based incentives for compliance and what kind of innovative regulatory mechanisms might support such aspirations.

More concretely, a particular, EU-linked innovative ‘regulatory case study’ is conceptualized in a complex theoretical framework: the link between labour law and non-financial (‘social’) reporting. In this context, the paper analyses Directive 2014/95/EU on disclosure of non-financial and diversity information by certain large undertakings and groups amending the Accounting Directive 2013/34/EU both from the perspective of regulatory theories and labour law doctrine. The theoretical pillars of our analysis are rooted, among others, in the new governance, decentred regulation, reflexive law, regulated self-regulation and light-touch regulation literature. The paper also draws insights from the ‘law and economics’ study of labour law and attempts to relate all these regulatory theories to non-financial reporting in the context of labour law.

The main goal of the contribution is to identify how these relatively new legal ‘channels’ might be able to bring new forces of compliance into labour law, and how the role of law is changing. The essence of associated EU-level (and national-level) legal developments is analysed in a theoretical context, with a broad view on the possible future of labour regulation. Even though these regulatory methods are still rather on the periphery of labour law (in strong intersections with other branches of law, such as company law), they have the potential to become more integral building

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blocks of a modern labour law architecture. These new regulatory methods can contribute to improved compliance with labour laws and can foster responsible, decent employment practices.

Keywords: EU law, labour law, Accounting Directive, law and economics

I. INTRODUCTION

In a broad sense, the paper intends to deal with the changing character of labour law (more particularly, labour-related regulation in a wider meaning). To underline our broad theoretical arguments about the shifting character of labour law, one - especially European and EU-linked - novel 'regulatory case study' is conceptualized in a comprehensive theoretical framework.

The underlying, exemplary regulatory 'case study' is the relationship between labour law and non-financial (social) reporting. In our context, non-financial¹ corporate disclosure and reporting refers to the practice of giving public information about environmental, social and governance performance. This corporate activity is mostly voluntary, as part of the CSR (Corporate Social Responsibility)-strategy², but, to some extent, in some jurisdictions (e.g. France, UK, Denmark) it is also obligatory. The disclosure may take many forms, such as sustainability / CSR / ESG³ / 'triple bottom line' / social reports. Information about working conditions and employment practices are usually vital elements of the 'social' part of the report. The main idea of social reporting is to structurally inform the market and the public about working and employment conditions with a view to boost comparison and a positive, image-based competition among companies. The fundamental idea of non-financial reporting can also be described by a well-known quote⁴: "sunlight is the best disinfectant." This refers to the benefits of openness and transparency⁵, what is also very crucial in terms of labour law.

¹ Non-financial indicators are measures that are not directly linked to financial performance but still impact a company or organisation's overall performance – and in many cases even the financial performance.

² According to the most recent definition of the European Commission, CSR is "the responsibility of enterprises for their impacts on society" (EU Commission, 2011).

³ Environmental, social and governance reporting (ESG). The term describes environmental, social and governance issues that investors are considering in the context of corporate behaviour. In order to maximize the sustainable value of a business, the company should be able to understand and consider the Environmental, Social and Governance (ESG) factors that determine its extra financial performance. They must also be able to measure them and to provide evidence on how they impact on financial drivers, so that these factors can be recognized and evaluated by the market.

⁴ From U.S. Supreme Court Justice Louis Brandeis.

⁵ Transparency: the disclosure of all material information and the capability to measure its results in a quantitative way through key indicators.

The public transparency of labour practices and the increased accountability for them might facilitate compliance and create a positive, upward spiral (as a so-called ‘pulling force’). Employers might be involved in a positive, image- and market-based, self-regulatory competition based on the quality of their employment standards and CSR-practices (see the idea of the “race to the top”).⁶ Such information strategies might also have a wide educational role as they can encourage the adoption of decent employment practices by demonstrating best practices. Furthermore, not less importantly, non-financial information is increasingly essential for the persuasion of investors and for the engagement of other stakeholders (such as regulators, public authorities, the general public, consumers, NGOs, trade unions, business partners, local communities, potential and current employees). On a more abstract level, social reporting can help to increase public trust in enterprises.

The aim of the paper is to identify how this relatively innovative legal ‘channel’ might be able to indirectly bring new forces of compliance into labour law, and how the role of law is changing. The new EU-Directive on non-financial reporting⁷ is analysed in a theoretical context, with a broad view on the possible future directions of labour regulation in general. Even though information disclosure as regulatory strategy is still immature and situates rather on the side-lines of labour law (in strong intersection with other branches of law, such as company law), it can have the potential to become more integral building block of a modern labour law architecture. At the end of the day, information disclosure as regulatory strategy might contribute to enhanced compliance with labour laws and can also foster responsible, decent employment practices.

The main purpose of the paper is to point out that such ‘fresh,’ non-legal, market-based forces, energies of labour law compliance as public transparency are emerging, and these energies might be effectively triggered and catalysed by innovative, well-targeted regulatory mechanisms. The paper highlights that even if these regulatory ideas are grounded in soft law and CSR (Corporate Social Responsibility), they are on a so-called “hardening” way of progression and can be conceptualised as promising fields of legal development. The nature of statutory law is presumed to alter in the context of these regulatory terrains: the law should play a triggering, activating role in relation to corporate self-regulation, instead of a “policing” approach. Legal interventions should rather be well-directed, forceful ‘semaphores’ instead of purely hard-hitting ‘truncheons.’ The ultimate goal of information disclosure as regulatory strategy is in fact to effectuate a behavioural change on the side of employers, in order to uphold decent working conditions.

⁶ B. Hepple, *Labour laws and global trade*, Oregon, Hart Publishing, Oxford and Portland, 2005, p. 85.; Murray and Jill, „Corporate Social Responsibility Discussion Paper”, *Global Social Policy* Vol. 4 (2), 2004, p. 174; Simon Zadek, „Responsible competitiveness: reshaping global markets through responsible business practices.” *Corporate Governance*, vol. 6. no. 4, 2006, p. 334.

⁷ Directive 2014/95/EU on disclosure of non-financial and diversity information by certain large undertakings and groups amending the Accounting Directive 2013/34/EU.

The paper starts with a general, introductory description of the idea and the development of non-financial reporting (Chapter 1). As we presume that this innovative regulatory technique echos some overall contemporary trends in modern regulatory theory, Chapter 2 points out the main theoretical streams of thoughts that - in our view - might back up these regulatory trends (including the idea of non-financial reporting). Chapter 3 briefly describes Directive 2014/95/EU from a basically labour law perspective. Directive 2014/95/EU is about disclosure of non-financial and diversity information by certain large undertakings and groups amending the Accounting Directive 2013/34/EU. Furthermore, this Chapter aims to show how the general regulatory concepts and ideas (described briefly in Chapter 2) are reflected in the Directive's approach. Chapter 4 reflects on the main features of this regulatory concept and its possible effects on and interplays with the generally changing character of labour regulation.

II. NON-FINANCIAL REPORTING: THE IDEA AND ITS DEVELOPMENT IN BRIEF

The paper intends to describe and put into context one illustrative example for innovative regulatory ideas on the periphery of labour law.⁸ The paper strives to highlight some relationships between labour law and this related - but distinct - regulatory method in order to conceptualise innovative enforcement strategies for labour law. Non-financial reporting as a regulatory technique is clearly outside the conventional, 'mainstream' scope of labour law, but it can have direct impact on the behaviour of employers and as a consequence, on working conditions and labour standards. Even if non-financial reporting, as a regulatory technique is not 'labour law' in a strict sense, it might also serve various labour law-related ends. This Chapter aims to describe the way of evolution of the idea of non-financial reporting as a regulatory technique: the cranky, but still obvious road from voluntarism, soft law (and self-regulation) towards hard law (with a particular focus on EU-law).

There seems to be an emerging legal development - especially on the EU level -, in which non-financial reporting, as a regulatory technique is increasingly manifested on the regulatory agenda. This part illustrates how the soft law (and CSR)-based innovative regulatory idea of non-financial reporting might progressively seep into hard law.⁹ At first,

⁸ Other innovative regulatory ideas (not discussed in this paper) could be: socially responsible public procurement, subcontracting liability etc. See for more details: A. Kun, *A munkajogi megfelelés ösztönzésének újszerű jogi eszközei*, Budapest, L'Harmattan Kiadó-KRE, 2014.

⁹ The core debate in CSR concerns the 'voluntarism versus regulation' track. See for more details: Kun, Attila & Hajdú, József, 'Conceptualization of Corporate Social Responsibility in the context of Labour Law' in: R. Blanpain and W. Kluwer, *Rethinking Corporate Governance, From Shareholder Value to Stakeholder Value*, 2011. pp. 175-194; A.C. Neal, 'Corporate Social Responsibility: Governance Gain or Laissez-Faire Figleaf?' *Comparative Labor Law & Policy Journal*, vol. 29, no. 4, 2008.

we give some hints about the private, self-regulatory, soft law roots of the regulatory idea, then we demonstrate the perceived process of ‘juridification’.

Corporate non-financial / sustainability reporting has a long history going back to environmental reporting.¹⁰ Social reporting is a rather recent trend. Many companies voluntarily produce annual reports (for e.g. as part of their CSR-strategy) and there are a wide array of private auditing, screening, rating and reporting standards around. Some organisations do not have stand-alone social reports, but prefer to report their non-financial performance through other existing reporting mechanisms. The key drivers and patterns for the quality of sustainability reports are the guidelines of the Global Reporting Initiative (GRI)¹¹, various award schemes or rankings. The simple dissemination of voluntary codes of conducts is also an alternative – rather immature – form of disclosure. During the 2000s non-financial (including social) reporting has become increasingly widespread and kind of an expected part of business.

Social reporting is about providing useful, transparent information for companies, investors and society at large. According to experiences, companies that already publish information on their financial and non-financial performances typically take a longer term perspective in their decision-making.¹² Social reporting helps organizational transparency, internal self-reflection (and self-regulation), improves compliance (and responsibility beyond compliance) and boosts stakeholder engagement. As one metaphoric saying describes the essence of reporting, “people who are forced to undress in public will presumably pay some attention to their figures.”¹³ According to Estlund, the benefits of information disclosure can be described along three dimensions: “improving the efficiency of employment contracts and labour markets, improving compliance with existing substantive mandates, and inducing employers to reach ‘beyond compliance’ toward evolving norms of good employment practices and standards of social responsibility.”¹⁴ As one report about reporting observes: “The obedience of private enterprises to the law

¹⁰ The first environmental reports were published in the late 1980s by companies in the chemical industry which had serious image problems.

¹¹ The GRI enable all organizations worldwide to assess their sustainability performance and disclose the results in a similar way to financial reporting. GRI is a non-profit organization that pioneered sustainability reporting; released in 2003, G4 is the fourth generation of its renowned sustainability reporting framework. In 2014, more than 5,000 organizations across more than 90 countries have used the GRI Guidelines for their sustainability reporting, and 25 countries or regions have referred, mentioned, or recommended the Guidelines in their policies, regulations, or other instruments. <https://www.globalreporting.org/Pages/default.aspx> (accessed on 11 February 2015)

¹² For further details: D. Hess, *The Three Pillars of Corporate Social Reporting as New Governance Regulation: Disclosure, Dialogue and Development*, Ross School of Business Working Paper No. 1112, July 2008.

¹³ L. Loss, cited by: D.J. Doorey, „Who made that?: Influencing foreign labour practices through reflexive domestic disclosure regulation”, *Osgoode Hall Law Journal* Vol. 43, No. 4, 2005, p. 372.

¹⁴ C. Estlund, „Just the facts: the case for workplace transparency”, *Stanford Law Review*, Vol. 63 January 2011, p. 357.

rests on institutional preconditions: systematic guarantees of compliance with standards require organisational structure within each company that integrates respect for labour law regulations and translates it into personnel policy instruments.¹⁵ The transparency of non-financial (in our case: social) information might indirectly improve the quality of such institutional preconditions for compliance.

The main general, possible benefits and risks of transparency (non-financial reporting) are summarized in the table below (both for companies and for the public / society).

The main benefits and risks of transparency (non-financial reporting) for companies and for the public (society)		
	Companies	Public (society)
Benefits	<ul style="list-style-type: none"> - improved public image, social legitimacy and acceptance - promotion, marketing, PR - risk-management - better, more responsive self-regulation, internal self-reflection - improved institutional preconditions for compliance 	<ul style="list-style-type: none"> - comparable, transparent, easily available public information about companies - open communication and fair competition - “race to the top” - improved (legal) compliance - mobilisation of stakeholders - improved accountability of companies
Risks	<ul style="list-style-type: none"> - increased public scrutiny, pressure and demand for accountability - reporting is a kind of administrative and financial burden - the danger of non-well-targeted reporting - possible loss of social acceptance 	<ul style="list-style-type: none"> - reporting might remain a box-ticking exercise, or simple PR-activity - non-well-targeted, unstructured, non-comparable, confusing, inaccurate etc. reporting - misleading reporting

Table 1 The Author’s own summary.

Besides the voluntary, CSR-based developments, social reporting is increasingly appearing on the legislative agenda. The European Commission has announced in 2011 that the EU is preparing a legislative proposal on the transparency of the social and environ-

¹⁵ Kocher, Klose, Kühn, Wenckebach, ‘No Accountability without Transparency - Legal Instruments for Corporate Duties to Disclose Working and Employment Conditions’, *FES*, June 2012, p. 5.

mental information provided by companies in all sectors.¹⁶ Some Member States (like France¹⁷, Denmark¹⁸, UK¹⁹, Sweden²⁰) have already introduced progressive non-financial disclosure requirements that in some cases even go beyond existing EU legislation. However, as the Commission observes, legislative requirements on non-financial reporting are not widespread through Member States but this is more common in countries with an established tradition of CSR or state-owned enterprises. Other countries are starting the process by conducting pilot activities or using the international guidelines.²¹

The antecedent of the new Directive (Directive 2014/95/EU about disclosure of non-financial and diversity information) is the so-called Modernisation Directive 2003/51/EC which requires enterprises to disclose in their annual reports environmental and employee-related information ‘to the extent necessary’ for an understanding of the company’s development, performance or position. The requirements of this piece of EU-legislation have proved to be unclear and ineffective and applied in different ways in different Member States.²² Nevertheless, there is a general trend towards more government-driven, regulatory initiatives related to reporting.²³ In the EU, most Member States have implemented some kind of measures for disclosure or provided companies with guidance or incentives to start reporting.²⁴ In this context, the new Directive is a logical next step.

¹⁶ A renewed EU strategy 2011-14 for Corporate Social Responsibility, Brussels, 25.10.2011; COM(2011) 681 final, p. 12.

¹⁷ France was the first country to make public company reporting mandatory. The Act of 15 May 2001 on new economic regulations (the “NER” Act) requires public companies to include information on a series of topics in their annual report: status of employees, mobility of staff, work hours, social relations, health and safety, training, health policy, profits distribution and the amount of outsourcing. They must also describe the ways in which their sub-contractors respect ILO standards. M. Doucin, *France’s policy for reporting corporate social responsibility undertakings*, French Ministry of Foreign and European Affairs, 2009.

¹⁸ In Denmark, the 1,100 biggest companies, as well as state-owned companies, institutional investors, mutual funds and listed financial businesses must provide information about their CSR policies on a “comply or explain” basis in their annual financial reports. *CSR – National Public Policies in the European Union*, European Commission, 2010, p. 26. For further details: K. Buhmann, *Company law as an agent for migration of CSR-related international law into companies self-regulation? The case of the Danish CSR reporting requirement*, University of Oslo, Faculty of Law, Legal Studies Research Paper Series No. 2011-05, Oslo, 2011.

¹⁹ ‘Business Review’, Companies Act 2006.

²⁰ Starting in 2007, state-owned companies in Sweden were legally required to publish sustainability reports according to the Global Reporting Initiative (GRI) framework.

²¹ *CSR – National Public Policies in the European Union*, Compendium, European Commission, 2014, p. 38.

²² J. Cremers, *Non-financial reporting beyond the strict minimum: is the workforce a well-informed stakeholder?*, ETUI Working Paper 2013., Brussels, 2013.

²³ See also: Proposals for “*Establishing Mandatory Environmental and Social Reporting*”, European Coalition For Corporate Justice (ECCJ) Legal Proposals to Improve Corporate Accountability for Human Rights Abuses (2008).

²⁴ *CSR – National Public Policies in the European Union*, European Commission, 2010, p. 26.

Richard Howitt, *European Parliament Rapporteur on Corporate Social Responsibility*, first proposed stricter rules on reporting in a European Parliament report as long ago as 1999. After long discussions²⁵, the European Commission adopted on 16 April 2013 a proposal for a new directive enhancing the transparency of certain large companies on social and environmental matters.²⁶ The adopted Directive 2014/95/EU on disclosure of non-financial and diversity information by certain large undertakings and groups amends the Accounting Directive 2013/34/EU. The Directive entered into force on 6 December 2014. EU Member States have two years to transpose it into national legislation. The concrete nature of the required disclosures will become clearer once national implementation has been drafted in 2016. Reporting must start with business year 2017. In this context, the European Commission is organising informal transposition workshops to assist national authorities. The Directive has a ‘built-in’ review clause (Art. 3), according to which the Commission shall submit a report to the European Parliament and to the Council on the implementation of the Directive, including, among other aspects, its scope, particularly as regards large non-listed undertakings, its effectiveness and the level of guidance and methods provided. The report shall be published by 6 December 2018 and shall be accompanied, if appropriate, by legislative proposals. This provision ensures that the idea will remain on the agenda.

Before analysing the Directive from a regulatory and a labour law perspective, the paper briefly highlights the most important recent streams of regulatory concepts which might be relevant both in terms of the Directive’s unique regulatory approach and of the future of labour-related regulation in general.

III. UNDERLYING THEORETICAL CONCERNS²⁷

From the perspective of regulatory theories, the following regulatory features and strands can be highly relevant to analyze the new Directive’s regulatory approach and to draw some wider conclusions concerning the trends of labour-related regulation in general. For the sake of simplicity, these regulatory concerns are addressed in ten points.

²⁵ For instance, the European Coalition for Corporate Justice (ECCJ) – a broad coalition representing NGOs, consumer groups, trade unions and academics – has been heavily urging the legislative reform.

²⁶ Proposal for a Directive of the European Parliament And the Council amending Council Directives 78/660/EEC and 83/349/EEC as regards disclosure of non-financial and diversity information by certain large companies and groups, COM/2013/0207 final.

²⁷ This Chapter heavily draws on the author’s paper: Attila Kun, *The Semaphore Versus the Truncheon - New “Energies” in Labour Regulation?*, In: Proceedings of the Twelfth International Conference in Commemoration of Prof Marco Biagi, *“Labour And Social Rights. An Evolving Scenario”*, T. Addabbo, W. Bromwich, T.M. Fabbri, I. Senatori, (eds.), Marco Biagi Book Series, n. 6, Giappichelli, Torino, 2015.

- a) The idea of CSR (Corporate Social Responsibility) as an ideological root.
- b) Enhanced compliance with labour laws as a decisive goal of regulation.
- c) The broad, expanding understanding of labour law / labour regulation as a link to labour law.
- d) Indirect way of regulation: furthering the aims of labour law via non-labour law mechanisms.
- e) New governance and the concept of de-centred regulation as a doctrinaire foundation of regulation.
- f) Reflexive law and responsive regulation as the dynamics of regulation (see also: regulated self-regulation).
- g) From soft law to hard law, as a way of development.
- h) Employers' organizational culture (governance structure) as the ultimate object of regulation.
- i) Non- or extra- legal forces as regulatory incentives.
- k) Enhanced market-conformity of regulation (as an expectation of "law & economics").

Below, the paper briefly reflects on these general theoretical baselines.

3.1. The idea of CSR (Corporate Social Responsibility) as an ideological root.

Information disclosure as a regulatory strategy finds its roots in soft law, mostly in the concept and practice of Corporate Social Responsibility (CSR).²⁸ It is possible to view CSR as an innovative, inspirational background-ideology, catalyst or guiding principle for such regulatory ideas. As an illustration, we can observe that the most recent, authoritative international standards and policies of CSR - on one way or another - are all referring to such innovative regulatory concepts as reporting. For instance, reporting as a concept is clearly manifested in the European Commission's Communication "A renewed strategy 2011–2014 for Corporate Social Responsibility" issued in October 2011 and in the UN "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" proposed by UN Special Representative John Ruggie.²⁹

²⁸ D. McBarnet, A.Voiculescu, T.Cambell, (eds.): *The new Corporate Accountability – CSR and the law*, Cambridge University Press, 2007.

²⁹ http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (accessed on 11 February 2015)

Information disclosure as a regulatory strategy represents a sound combination of hard and soft law approaches. It tends to mix state regulation (e.g.: mandatory reporting) and private self-regulation (e.g.: reporting schemes). In this regard, the concepts of co-regulation and meta-regulation³⁰ might also be called upon. These regulatory strategies might step into the enforcement gap left open by traditional, 'hard' labour laws.

3.2. Enhanced compliance with labour laws as a decisive goal of regulation.

Compliance (in general) has increasingly become a prevalent concern of both corporate management and academics.³¹ On the one hand, compliance is a status of being in accordance with established guidelines or legislation. As such, it is a complex combination of the fulfilment of legal (hard and soft) and non-legal expectations. On the other hand, compliance is also a process of becoming 'compliant'. As such, it is dynamic and process-oriented. From a pure legal point of view, compliance usually refers to behaviour in accordance with legislation. As such, the ultimate goal of compliance is a behavioural transformation. Ideally, it is not a 'box-ticking' exercise. Compliance is both about internal corporate attitude and 'responsive' reflection to external expectations, such as market-based influences.

The increasing need for compliance stems from the widely recognized fact that there is a so-called crisis in labour law³² and the obvious limitations of traditional labour law mechanisms. Moreover, some scholars also bring into question the very survival of labour law³³, others simply state that the implementation of labour law suffers from a structural

³⁰ M.M. Rahim, 'Meta-regulation Approach of Law: A Potential Legal Strategy to Develop Socially Responsible Business Selfregulation in Least Developed Common Law Countries', 40 *Comm. L. World Rev.*, 2011, pp. 174-206.

³¹ About compliance in labour law, see: R. Pires, 2008: Promoting sustainable compliance: Styles of labour inspection and compliance outcomes in Brazil, *International Labour Review*, Vol. 147, No. 2-3, 2008; *Compliance with labour legislation: its efficacy and efficiency = respect de la législation du travail : efficacité et impact* / edited by G. Casale, A. Perulli; International Labour Office, Labour Administration and Inspection Programme (LAB/ADMIN), Geneva: ILO, 2010, Working document; No.6; F. Maschmann, *Corporate Compliance und Arbeitsrecht*, Mannheimer Arbeitsrechtstag 2009; A. Mengel, *Compliance und Arbeitsrecht*, Implementierung, Durchsetzung, Organisation, Verlag C.H.BECK, München, 2009; J.T.Lelley, *Compliance im Arbeitsrecht*, Leitfaden für die Praxis, 1. Auflage, Luchterhand, 2010; P. Macklem, M.Trebilcock, *New Labour Standards Compliance Strategies: Corporate Codes of Conduct and Social Labeling Programs*, Faculty of Law, University of Toronto, A Research Report prepared for the Federal Labour Standards Review, 2006.

³² Cf.: G. Davidov, 'The Enforcement Crisis in Labour Law and the Fallacy of Voluntarist Solutions', *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 26, 2010, pp. 61-82; R.Zahn, 'Crisis in Labour Law', University of Kingston, 11th May 2012: (with N. Busby) 'European Labour Law in Crisis: the Demise of Social Rights?' etc.

³³ Cf.: M. Rigaux, J.Buelens, A.Latinne, *From Labour Law to Social Competition Law?* Intersentia, Cambridge - Antwerp - Portland, 2014. pp. 9-11.

deficiency in effectiveness.³⁴ In general, labour law is widely considered to be in crisis: the ineffectiveness of traditional labour law is often recognized both by labour law scholars³⁵ and practitioners. In other words: all over the world, a constantly growing, large number of employers fail to comply with labour laws. It is also clear that there is a growing divergence between the law and the reality of the employment relationship.³⁶ As Davidov and Langille give their justification, “one of the most salient aspects of the crisis in labour law is its inability in an increasing number of cases to deliver the necessary rights and entitlements to workers.”³⁷

Many new normative, regulatory approaches – also in accordance with contemporary regulatory theories – prefer procedural rules over substantive rights.³⁸ To put it differently: they do not provide for new protective rights, they just focus on the innovative ways of stirring up compliance with existing standards. Furthermore, instead of guaranteeing new rights, they tend to facilitate internal corporate reflection and self-regulation. Information disclosure as a regulatory strategy totally fits into these tendencies.

3.3 The broad, expanding understanding of labour law / labour regulation as a link to labour law.

As a starting point, the broadening and expanding view of labour law and the growing plurality and the hybridization of labour law’s regulatory mechanisms are to be mentioned.³⁹ Nowadays, more and more labour law scholars are arguing in favour of a broader, extended view of labour law. It is not at all easy to clearly define the ideas of labour law in a changing world.⁴⁰ Even if we treat labour law as an ideologically stable, independent and coherent branch of law, there is a continuous and vital need to explore innovative ways of regulation and enforcement. Thus, the plurality and the hybridization of labour law’s regulatory mechanisms are recognized by many. Harry Arthurs, for example, states that “labour law itself is likely to evolve into a broader, more inclusive and perhaps more efficacious regime of social ordering, field of intellectual inquiry and domain of professional

³⁴ Kocher, Klose, Kühn, Wenckebach, 2012, p. 5.

³⁵ G. Davidov and B.Langille (eds.), 2011, Introduction.

³⁶ *The Employment Relationship*, International Labour Conference, ILO, 95th Session, 2006, Report V(1), p. 15.

³⁷ G. Davidov and B.Langille, *Understanding Labour Law: A Timeless Idea, a Timed-Out Idea, or an Idea Whose Time has Now Come*, In G. Davidov and B.Langille (eds.), *The Idea of Labour Law*, Oxford, Oxford University Press, 2011, pp. 1-13.

³⁸ Cf.: A. Goldin, *Global Conceptualizations and Local Constructions*, in Davidov, Guy & Langille, p. 74.

³⁹ Cf.: U. Mückenberger, *Hybrid Global Labour Law*, cited in R.Blainpain, F.Hendrickx (eds.), *Labour Law Between Change and Tradition, Liber Amicorum Antoine Jacobs*, Alphen aan de Rijn: Kluwer, 2011, pp. 99-116.

⁴⁰ See in details about the various contemporary ideas of labour law: G. Davidov and B.Langille (eds.)

practice". He also acknowledges that "labour law scholarship will have to extend its reach to all policy domains that influence work relations or labour market outcomes".⁴¹ Similarly, Vosko argues for "broadening labour law's focus from employment relations to work or labour market relations" in general.⁴² Karl Klare also envisages a colourful and vibrant regulatory terrain for labour law when he states that the law regulating work cannot be fitted into a single overarching paradigm and labour law must pursue many different approaches.⁴³ Langille also believes in the expansion of labour law's justificatory horizons.⁴⁴ While Manfred Weiss does not see a vital need for a change of paradigm in labour law, he also recognizes some need for adaptation and the necessity for labour law to respond to the new realities in the area of employment in its broadest sense.⁴⁵ As we have seen before, regulators are under pressure to explore innovative ways to create facilitators for businesses for more general and systematic compliance with labour laws. In line with the pluralist concept of labour regulation, Howe states that a "broader view of what constitutes labour law is crucial to the future health and vitality of labour law scholarship."⁴⁶

The broadening scope of labour law can also be conceptualised in the mirror of regulatory theory.⁴⁷ According to this thinking, labour law can be seen as a broad 'regulatory space' instead of a narrowly defined branch of law. A 'regulatory space' is defined by the wide array of issues belonging to a given area of regulation. This 'space' may be filled by a range of various regulatory methods and approaches, among which hard and soft law measures, traditional and innovative regulatory concepts are combined. In this context, information disclosure as a regulatory strategy might be a part of an extended concept of labour law, even if it doesn't rely on the traditional mechanisms of labour law, but follows an alternative concept. Information disclosure as a regulatory strategy is one example of these alternative concepts.

3.4. Indirect ways of regulation: furthering the aims of labour law via non-labour law mechanisms.

New methods of enforcement strategies are needed, and these strategies often can be found beyond the conventional borders of labour law, sometimes in other fields of law.

⁴¹ H. Arthurs, *Labour Law after Labour*, in G. Davidov and B. Langille (eds.), pp. 27, 29.

⁴² V. F. Leah, *Out of the shadow?*, in G. Davidov and B. Langille (eds.), p. 368.

⁴³ K. Karl, *The Horizons of Transformative Labour Law and Employment Law*, in J. Conaghan, M. Fischl, and K. Karl (eds.), *Labour Law in the Era of Globalization*, Oxford University Press, 2002, pp. 3-29.

⁴⁴ B. Langille, *Labour Law's Theory of Justice*, in G. Davidov and B. Langille (eds.), p. 102.

⁴⁵ M. Weiss, *Re-Inventing Labour Law*, in G. Davidov and B. Langille (eds.), pp. 43-57.

⁴⁶ Cf.: J. Howe, *The Broad Idea of Labour Law*, in G. Davidov and B. Langille (eds.), pp. 299-300.

⁴⁷ C. Fenwick and T. Novitz, *Conclusion: Regulating to Protect Workers' Human Rights*, *Human Rights at Work*, Oregon, Hart Publishing, 2010, pp. 585-617.

Thus, one of the several possible ways of broadening the scope of labour law is the building up of more strategic and organic, more coherent links with other, related branches and fields of law. This idea is also in line with Mitchell and Arup's theory: they argue for the reformulation of labour law as the 'law of labour market regulation', dismantling disciplinary boundaries among work-related distinctive areas of law (such as company law, for instance).⁴⁸ Indeed, the Labour Code in a country (if any as such) is far from comprising all labour-related regulation. Without doubt, the regulatory terrain and the complexity of labour law are expanding. This argument is also in line with the concept of the so-called legal homogeneity. As Rigaux formulates it, in a comprehensive legal perspective, "law is considered to form a homogenous entity within which legal rules of a different nature and of a different origin interact."⁴⁹

Information disclosure as a regulatory strategy is clearly outside the conventional, 'mainstream' scope of labour law, but it can have direct impact on the level of working conditions. Mandated transparency of company-related social information might have the potential to contribute to the enhanced compliance with labour laws. Innovative regulatory strategies as social reporting might also serve various labour-related ends, even if they are not 'labour laws' in a strict sense (such as socially responsible public procurement law, company law dealing with non-financial reporting etc.). The original, to a large extent still valid - but heavily discussed - basic purposes and values of labour law (i.e. 'protection', redistribution of powers etc.) can be followed through different regulatory mechanisms. Among these mechanisms, other branches of law (such as public procurement law, company law, consumer protection law etc.) can also play a fruitful role.

3.5. New governance and the concept of de-centred regulation as a doctrinaire foundation of regulation.

The regulatory theory, in its conventional understanding, responds to the above mentioned enforcement crisis existing in contemporary law, in our closer perspective, especially in labour law. As Fenwick and Novitz formulate it, "regulation theory is to explore the weakness in practice of such a 'command and control' (hereinafter: CAC) approach to regulation, and of how regulators might respond to those limits in innovative ways."⁵⁰ This broader approach to regulation captures a wider range of regulatory ideas and techniques. In terms of labour law, the scope and regulatory strategies of labour law should be deployed in different ways than might conventionally be understood. A clear experimentalist tendency is detectable as the idea and the style of regulation moves away from purely con-

⁴⁸ Cited by: J.Fudge, Labour as a 'Fictive Commodity': Radically Reconceptualizing Labour Law, G. Davidov and B. Langille (eds.), p. 125.

⁴⁹ Rigaux, Buelens, Latinne (eds.), *op. cit.*, p. 2.

⁵⁰ C. Fenwick and T. Novitz, p. 605.

tract-oriented, command and control employment regulation to more innovative methods of regulation. Some authors use the notion of 'new governance'⁵¹ and/or the concept of de-centred regulation⁵² as umbrella terms for such modern regulatory ideas.⁵³ These regulatory approaches are trying to reflect changes in society and growing complexities of the regulated subjects. In brief, new governance regulation is collaborative, participatory, innovative, complex (i.e. public and private mix), experimental, process-oriented, flexible, expansive and decentralized.⁵⁴ As Estlund formulates it, new governance is "one umbrella term for a range of post-command-and-control strategies for social control of economic organizations and activity."⁵⁵

3.6. Reflexive law and responsive regulation as the dynamics of regulation (see also: regulated self-regulation).

The new regulatory approaches described above are in line with Teubnerian logic of reflexive law⁵⁶, because they are trying to influence the internal decision-making processes of employers. Furthermore, in the framework of such innovative regulatory ideas, top-down state regulation is combined with market-based measures and initiatives. For example, disclosure / reporting measures may induce internal reflection of enterprises about their own employment practices and social policies. In this sense, such a legal strategy is also responsive to the needs of economic actors.⁵⁷

To put it differently: such regulatory approaches can be considered to be one tool for reflexively and responsively implementing the values and ends of labour law. In these reg-

⁵¹ O. Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, Legal Studies Research Paper Series, Research Paper No. 07-27, University of San Diego, December 2005.

⁵² J. Black, Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory World", *Cur. Leg. Problems*, vol. 53, no. 103, 2001

⁵³ B.P. Haar, *Open method of coordination. An analysis of its meaning for the development of a social Europe*, Amsterdam, Leiden University, 2012, pp. 24-28.

⁵⁴ Cf.: D. Doorey, A Model of Responsive Workplace Law, *Osgoode Hall L. J.*, vol. 50, 2012, p. 47.

⁵⁵ C. Estlund, Just the facts: the case for workplace transparency, *Stanford Law Review*, Vol. 63, January 2011, p. 354;

⁵⁶ About reflexive law, see: G. Teubner, 'Substantive and reflexive elements in modern law', *Law & Society Review*, Vol. 17. No. 2, 1983; G. Teubner, 'Corporate Responsibility as a Problem of Company Constitution', 1983 EUI Working Paper No. 51, Badia Fiesolana, San Domenico (FI); R. Rogowski, T. Wiltshagen (eds.), 'Reflexive Labour Law' Kluwer Law and Taxation Publishers; C. Barnard, S. Deakin, R. Hobbs, 'Reflexive law, Corporate Social Responsibility and the Evolution of Labour Standards: The Case of Working Time' (2004) ESRC Centre for Business Research, University of Cambridge Working Paper No. 294, CBR research Programme on Corporate Governance.

⁵⁷ About responsive regulation: I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, New York, Oxford University Press, 1992.

ulatory ideas the conventionally reactive (sanctioning) nature of labour laws is replaced by a rather proactive attitude. As Hess points out, “the ultimate goal of a reflexive law - and New Governance - approach is to ensure that corporations are meaningfully thinking ‘critically, creatively, and continually’ about their social performance and how to improve it.”⁵⁸ This is also one of the main goals of mandatory social reporting.

3.7. From soft law to hard law, as a way of development.

Many innovative regulatory methods find their roots in soft law⁵⁹ and in the concept and practice of Corporate Social Responsibility (CSR). For example, responsible procurement, social reporting, or supply chain controlling practices are all well grounded and proliferated in - especially transnational - private, non-governmental soft regulation. Normally, these practices are applied under public social pressure rather than as a result of state regulation. However, one of the classical functions of soft law is the so-called ‘pre-law’ function: soft law measures may have the capacity for ‘hardening’, since they can be a first step in the process of legislation.⁶⁰ Soft law measures can also be a so-called ‘testing field’ of innovative regulatory concepts and source of inspiration or pattern for regulators. As such, ideas in soft law may pave the path for the adoption of hard laws in the future. This phenomenon can also be labelled as the ‘spill over’ function of soft law⁶¹ and can represent the dynamic of a given field of law (in our case, the dynamic of labour law as a widely interpreted ‘space’ of regulation). However, it must be mentioned that hard law is generally lagging behind changes in self-regulatory practices and regulatory ideas. Furthermore, in these specific regulatory terrains (e.g. procurement, reporting, supply chain responsibility) extensive legal regulation could significantly undermine respective competitive market dynamics (thus, hard regulation is not always and not in all aspects necessarily needed). Social reporting is obviously a good example for this ‘hardening’ process. It seems to be a tendency that voluntary best practices are gradually becoming ‘the regulatory norm’.

⁵⁸ D. Hess, Social Reporting and New Governance Regulation: The Prospects of Achieving Corporate Accountability through Transparency, *Business Ethics Quarterly*, Volume 17, Issue 3., 2007, p. 470.

⁵⁹ See for the general description of the role of soft law in labour law: I. Duplessis, Soft international labour law: The preferred method of regulation in a decentralized society, In: *Governance, International Law & Corporate Social Responsibility*, International Institute for Labour Studies, Research Series 116., ILO, 2008; R. Blanpain, and M. Colucci, *The Globalization of Labour Standards, The Soft Law Track*, Kluwer Law International.

⁶⁰ Cf.: Senden, *Soft Law in European Community Law*, Oxford, Hart Publishing, 2004.

⁶¹ Cf.: M.A. Alhambra, B. Ter Haar and A. Kun, ‘Soft on the Inside, Hard on the Outside: An Analysis of the Legal Nature of New Forms of International Labour Law’. *The International Journal of Comparative Labour Law and Industrial Relations*, vol. 27, no. 4, 2011, pp. 337–363.

3.8. Employers' organizational culture and corporate attitude as the ultimate object of regulation.

The nature of state intervention is presumed to alter in the context of these innovative regulatory concepts: the law should play a triggering, activating role in relation to corporate self-regulation, instead of a "policing" approach. Legal interventions should rather be well-directed, forceful 'semaphores' instead of purely hard-hitting 'truncheons'. In other words, the state (the regulator) should rather be a 'chorus-master' than a 'policeman'. The ultimate goal of these innovative regulatory practices is in fact to effectuate a behavioural change on the side of employers, in order to progressively uphold decent working conditions. On the one hand, compliance with applicable (labour) laws is the absolute minimum. On the other hand, truly socially responsible - CSR-conscious - attitude is the desired other end of this attitudinal transformation. The behavioural change leading to compliance and to social responsibility might be motivated by way of various regulatory mechanisms. In such cases the state tries to steer and guide internal corporate governance mechanisms to capture certain public policy goals (such as enhanced compliance with labour laws).

3.9. Non- or extra- legal forces as regulatory incentives.

The main purpose of the paper is to point out that 'fresh', non-legal, market-based forces, energies of labour law compliance are emerging, and these energies might be effectively triggered and catalysed by innovative regulatory mechanisms. Even if these regulatory mechanisms (such as non-financial disclosure) are grounded in soft law and CSR, they are on a so-called "hardening" way of progression and can be conceptualised as promising fields of legal development.

The perceived new energies and powers furthering labour law compliance are, among others, the following: market-based, financial, relational, risk-based and reputational incentives. All of these drivers can be found behind the idea of information disclosure as a regulatory strategy. Accompanying legal interventions (such as the obligation to report, as in the new EU-Directive analysed below) should have the goal to reflexively embed these market-based incentives into corporate self-regulatory practices, and to guide, intensify and guarantee related corporate policies.

3.10. Enhanced market-conformity of regulation (as an expectation of "law & economics").

These new regulatory ideas typically aim to create positive incentives as an attempt to solve the deep compliance problems. Such innovative enforcement strategies are typically not intruding into the market as harshly as conventional labour laws, they rather have a

market-friendly regulatory approach and a ‘market constituting’ / ‘market-creating’ role.⁶² In other words: these regulatory methods often create a ‘business case’ for compliance, what is apparently an important added-value and facilitator for employers. The ‘business case’ can be manifested, for instance, in image (brand)-based incentives (such as in the case of non-financial disclosure and reporting). The ‘business case’ behind these regulatory techniques might have the potential to appease the classical economic critiques of the field of labour law.⁶³ Such regulatory approaches are trying to find a better, more responsive balance between regulatory (social) goals and the logic of routine business practices (such as information disclosure). In other words: regulation - indirectly and smoothly - tries to implant some social dimension into customary business practices (such as reporting). These regulatory methods can also be interpreted as more business-friendly, softer advancements of labour law’s original values. They permit employers to experiment and comply proactively and creatively.

Harry Arthurs acknowledges that “market dynamics are often a more powerful determinant of decent labour standards than regulatory legislation.”⁶⁴ It means that in some cases private, market-based, self-regulatory (soft law) mechanisms can also be a source of innovation in terms of compliance. Furthermore, regulatory methods can utilize and catalyze such market dynamics. Owing to their market-friendly nature, such regulatory approaches are also often labelled as ‘light-touch’ regulation.⁶⁵

IV. DIRECTIVE 2014/95/EU - CONTENT, CONTEXT AND CONCEPTUALISATION FROM A LABOUR LAW PERSPECTIVE

This Chapter describes the main features of Directive 2014/95/EU on disclosure of non-financial and diversity information by certain large undertakings and groups amending the Accounting Directive 2013/34/EU from a labour law perspective. Furthermore, this Chapter aims to show how the general regulatory concepts and ideas (described briefly in Chapter 2) are reflected in the Directive’s approach.

⁶² Cf.: S. Deakin, *The Contribution of Labour Law to Economic and Human Development*, in: G. Davidov and B.Langille (eds.), pp. 156-179.

⁶³ Cf.: R. Del Punta, *The Economic Challenge to Labour Law*, in: *Compliance with labour legislation: its efficacy and efficiency*, ILO LAB/ADMIN, Working Document No. 6., Jan. 2010. About Law & Economics: Bouckaert, Boudewijn & De Geest, Gerrit (eds.), *Encyclopedia of Law and Economics, Volume I. The History and Methodology of Law and Economics*, Cheltenham, Edward Elgar, 2000.

⁶⁴ H. Arthurs, p. 18.

⁶⁵ J. Howe, *The Regulatory Impact of Using Public Procurement to Promote Better Labour in Corporate Supply Chains*, Legal Studies Research Papers No. 528, Melbourne Law School, 2010, p. 4.

The Directive is not a labour law Directive. Nevertheless, mandatory reporting might indirectly influence labour law-related issues, as described above (see: Chapter 2, d.). The Directive is closely linked to regulations concerning financial disclosure. In fact, it amends an earlier directive that regulates corporate annual financial statements, consolidated financial statements, and related reports.⁶⁶

The objective of the new Directive is to enhance the relevance, consistency and comparability of non-financial information disclosed throughout the Union in order to increase EU companies' transparency and performance on environmental and social matters, and, therefore, to contribute effectively to long-term economic growth and employment. In the EU Directive the management report is specified as the default part of corporate reporting where the non-financial statement should be included. However, it also allows companies to issue the non-financial statement as a separate report if it covers the same financial year as the management report. The directive also requires that the statutory auditor or audit firm verify whether the non-financial statement has been provided.⁶⁷

The new Directive requires companies concerned to disclose in their management report, information on policies, risks and outcomes as regards environmental matters, social and employee aspects, respect for human rights, anti-corruption and bribery issues, and diversity in their board of directors. The non-financial statement should also include information on the due diligence processes implemented by the undertaking, also regarding, where relevant and proportionate, its supply and subcontracting chains, in order to identify, prevent and mitigate existing and potential adverse impacts. As such, materiality assessment is extended to include the supply chain. In sum, the Directive requests the same points of disclosure for each sustainability matter:

- a description of the policy pursued by the undertaking in relation to those matters, including due diligence processes implemented;
- the outcome of those policies;
- the principal risks related to those matters linked to the undertaking's operations including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts in those areas, and how the undertaking manages those risks;
- non-financial key performance indicators relevant to the particular business.

It should be possible for Member States to exempt undertakings which are subject to this Directive from the obligation to prepare a non-financial statement when a separate report corresponding to the same financial year and covering the same content is provid-

⁶⁶ B. Kasemir, Impact of the EU Directive on Non-Financial Reporting, <http://www.environmentalleader.com/2015/08/06/impact-of-the-eu-directive-on-non-financial-reporting/> (accessed on 12 December 2015)

⁶⁷ http://ec.europa.eu/internal_market/accounting/non-financial_reporting/ (accessed on 15 May 2015)

ed. The core idea of the Directive is that such reporting should provide investors and other stakeholders with a more comprehensive picture of a company's performance. This is a legislative initiative with relevance for the European Economic Area (EEA).

The new rules will only apply to some large companies with more than 500 employees. This includes listed companies as well as other public-interest entities (PIE), such as banks, insurance companies, and other companies that are so designated by Member States because of their significant public relevance, activities, size or number of employees. According to estimations, the scope includes approx. 6 000 large companies and groups across the EU. As such, this regulatory strategy is rather experimentalist in this stage (as most 'new governance'-type regulatory strategies), but it might have the potential to further expand in the future.

There are some exceptional rules in the Directive, which further increase its flexibility. For instance, it contains a rather broadly formulated, optional 'Safe Harbour Clause': Member States may allow information relating to impending developments or matters in the course of negotiation to be omitted in exceptional cases where, in the duly justified opinion of the members of the administrative, management and supervisory bodies, acting within the competences assigned to them by national law and having collective responsibility for that opinion, the disclosure of such information would be seriously prejudicial to the commercial position of the undertaking, provided that such omission does not prevent a fair and balanced understanding of the undertaking's development, performance, position and impact of its activity. (Art. 1, par. 1).

Furthermore, a subsidiary undertaking may be exempted from the reporting obligation if its parent entity includes the non-financial statement in the consolidated management report (Art. 1, par. 3). Accordingly, companies that are not headquartered in the EU will also be impacted by mandatory reporting requirements: the non-EU headquartered corporations that do business in EU Member States via local subsidiaries that fall under the Directive's requirements. The Directive specifies that subsidiary undertakings shall be exempt from mandatory reporting if they are covered in a consolidated non-financial statement of their parent group that meets the Directive's requirements. According to some opinions, many corporate group and holding companies will likely elect to publish a non-financial report that meets the EU requirements, probably at the strictest Directive implementation level from within those member states where they do business, rather than invest in having each of their subsidiaries do their own reporting.⁶⁸

As the Recital specifies it, as regards social and employee-related matters, the information provided in the statement may concern the actions taken to ensure gender equality, implementation of fundamental conventions of the International Labour Organisation, working conditions, social dialogue, respect for the right of workers to be informed and

⁶⁸ B. Kasemir, 2015

consulted, respect for trade union rights, health and safety at work and the dialogue with local communities, and/or the actions taken to ensure the protection and the development of those communities (Recital, Para. 7). One general problem with social reporting is that it can mainly focus on empirically, objectively observable circumstances and thus can never give a full picture of companies' social performance. Furthermore, the objectivity, validity and practicability of social indicators can always be doubted.⁶⁹

The Directive - in line with reflexive regulatory approaches, new governance considerations and Law & Economics concerns - strives to ensure that administrative burdens are kept to a minimum. Reporting is mandatory, but wide margin of flexibility is given to companies. The Directive has been designed with a non-prescriptive mind-set, and leaves significant flexibility for companies to disclose relevant information in the way that they consider most useful (one might also call it as 'light touch' regulatory approach, as described above). In this context, this Directive is a good example of reflexivity and responsiveness in regulation (as it is also an important feature of reflexive law that law must realise its systemic limits with respect to regulation of other social systems, such as the economy⁷⁰). The Recital plainly emphasizes the need to respect the "freedom to conduct a business" (Para. 22), while, at the same time, the whole idea of the Directive is about softly regulating the routine business practice of reporting with a 'social' view. As such, the Directive is a good example of balancing between the interventionist and 'laissez fair' approaches towards the market. The Directive - in any case - intends to send a strong signal to the market. However, the intention of the Directive might be watered down to various degrees in different Member States, as the Directive regulatory approach is extremely flexible.

The Directive's regulatory concept is substantially process-oriented inasmuch as it strives to boost the change-managing potential of affected companies (*cf.* Recital, Para. 3). Accordingly, the Directive's regulatory concept is also reflexive, inasmuch as it tries to influence the internal decision-making processes of companies (in our context: employers). The encouragement of 'due diligence processes' (Art. 1, par. 1, b.) also reflects the procedural nature of the regulatory concept applied. The reporting process is supposed to be embedded in the heart of the organization's business strategy and it shouldn't be a simple tick box exercise. Similarly, the responsiveness of the Directive's regulatory concept is reflected in the goal to help the measuring, monitoring and managing of undertakings' performance and their impact on society by information disclosure (*cf.* Recital, Para. 3). This concern also reveals that reporting is not only valuable for stakeholders (to make more informed decisions and hold companies accountable), but - as a management tool - it has advantages for companies too (e.g. to identify risks). In other words, there is

⁶⁹ Kocher, Klose, Kühn, Wenckeback, p. 10.

⁷⁰ R. Rogowski, *Reflexive Labour Law in the World Society*, Edward Elgar, Cheltenham, UK, 2013, p. 39.

a business case in reporting (which is important from a “law and economics” perspective, see Chapter 2. j).

The Directive’s regulatory concept is ‘risk-based’ as it assumes that information disclosure might help identifying sustainability risks and increasing investor and consumer trust (Recital, Para. 3). Furthermore, as regards the content of the reports, companies should provide “adequate information in relation to matters that stand out as being most likely to bring about the materialisation of principal risks of severe impacts, along with those that have already materialised” (Recital, Para. 8). This approach is the concept of materiality. As such, reporting should be based on a risk-oriented approach.

The Directive applies a public and private mix of regulatory mechanisms and it strives to find a delicate balance between the stability of regulation and the flexibility of mandated self-regulation.⁷¹ As the Recital formulate this: the Directive allows “for high flexibility of action, in order to take account of the multidimensional nature of corporate social responsibility (CSR) and the diversity of the CSR policies implemented by businesses matched by a sufficient level of comparability to meet the needs of investors and other stakeholders as well as the need to provide consumers with easy access to information on the impact of businesses on society.” (Recital, Para. 3) Thus, the Directive sets the ‘floor’ for reporting and creates a level playing field, while leaves companies wide margin to innovate towards higher self-regulatory standards. After all, the Directive intends to steer self-regulation: by complying with the requirements, companies will have a better understanding of the risks they face, and will be pressured internally and externally to act (and to self-regulate) to reduce these risks.⁷²

The Directive offers many instances for innovatively combining hard and soft regulatory approaches. For instance, when reporting, companies may use recognised international or national guidelines which they consider appropriate (for instance, the UN Global Compact, ISO 26000, the Guiding Principles on Business and Human Rights implementing the UN ‘Protect, Respect and Remedy’ Framework, the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, the International Organisation for Standardisation’s ISO 26000, the International Labour Organisation’s Tripartite Declaration of principles concerning multinational enterprises and social policy, the Global Reporting Initiative⁷³, or other recognised international frame-

⁷¹ Cf.: “smart mix” between regulation and voluntarism in the Ruggie-framework.

⁷² Assessment of the EU Directive on the disclosure of non-financial information by certain large companies, ECCJ briefing, May 2014, p. 3.

⁷³ The GRI have also played an important role during the development of the Directive by providing expertise. Furthermore, GRI G4 is fully aligned with the requirements of the Directive, so it can be a fundamental tool for companies during the implementation. The GRI might enhance the spill-over effect of the Directive, also beyond the EU. See for further details: Making Headway in Europe: Linking G4 and the European Directive on non-financial and diversity disclosure, GRI https://www.globalreporting.org/resourcelibrary/GRI_G4_EU%20Directive_Linkage.pdf (accessed on 1 June 2015)

works, see Recital, Para. 9). As such, the Directive explicitly builds on the CSR-related roots and practices. Furthermore, according to Article 2, “the Commission shall prepare non-binding guidelines on methodology for reporting non-financial information, including non-financial key performance indicators, general and sectoral, with a view to facilitating relevant, useful and comparable disclosure of non-financial information by undertakings.” In doing so, the Commission shall consult relevant stakeholders. The Commission shall publish the guidelines by 6 December 2016. This kind of ‘soft’, supplementary guidance on reporting also reflects a mixed, hybrid (hard and soft) regulatory approach.

The Directive clearly applies techniques developed in the realm of CSR. For instance, the so-called ‘comply or explain’ principle is clearly manifested in the Directive: “Where the undertaking does not pursue policies in relation to one or more of those matters, the non-financial statement shall provide a clear and reasoned explanation for not doing so.” (Art. 1, par. 1). Furthermore, the Directive motivates private auditing when it recalls in its Recital (Para. 16.) that statutory auditors and audit firms should only check that the non-financial statement or the separate report has been provided. In addition, it should be possible for Member States to require that the information included in the non-financial statement or in the separate report be verified by an independent assurance services provider (Art. 1, par. 6).

The Directive’s regulatory concept is also expansive and innovative in a sense that the required non-financial statement should also include information on the due diligence processes implemented by the undertaking, also regarding, where relevant and proportionate, its supply and subcontracting chains, in order to identify, prevent and mitigate existing and potential adverse impacts. The references to due diligence and to the supply chain are important, but rather symbolic achievements. On the one hand, there is no clear guidance on what due diligence should really mean. On the other hand, reporting on supply chain is only required ‘where relevant and proportionate’, which formulation might lead to diverging interpretation.

The Directive’s regulatory concept is also participative inasmuch as it relies on and empowers stakeholders (NGOs, communities, workers, consumers etc.) to pressure companies to produce more robust reports and to hold companies accountable for negative impacts.

As we have already mentioned, the Directive is rather experimentalist in its current form (similarly to most ‘new governance’-type regulatory strategies), as its scope is quite limited (approx. 6 000 large companies). However, it might have the potential to further expand its scope in the future (see the above-mentioned ‘built-in’ review clause). According to some experts, the number of companies ultimately affected may be much higher than initially expected (because of various approaches of national implementation). Furthermore, if those companies required to report start asking their suppliers to provide them non-financial (social etc.) information for their reports, all companies doing busi-

ness with them will feel the pressure of increasing CR disclosure expectations as well.⁷⁴ These are possible spill-over effects of the Directive.

It could be a next step to ensure that misleading information provided by companies in non-financial reports can be effectively challenged and sanctioned. Certain consumer protection law, unfair competition law mechanisms are in principle applicable in this sense, but further clarification is needed in this respect. Other prospects for development for the future can be to supplement the duty to disclosure with mandatory auditing and assurance, to systematically test the correctness and validity of the disclosed data, to extend the personal scope of the reporting obligation, to institutionalize the rights of associations (NGOs, trade unions) for class action and to organize structural public support for reporting (e.g. governmental guides, promotional activities, guidelines, incentives etc.). One might suspect that regulating the duty to report as such is not necessarily sufficient in itself. As one study about social reporting in general concludes, “without influential procedures for enforcing the duties of disclosure, a new regulation is in danger of remaining ineffective.”⁷⁵ This might also be true for the new EU-Directive, even if it represents a promising idea, as described above.

V. CONCLUSIONS - THE CHANGING CHARACTER OF LABOUR REGULATION?

On the one hand, the Directive might be far from being perfect and far from being a ‘miracle.’ There are many regulatory options about this Directive owing to its tremendously flexible regulatory approach. Its ultimate added-value will largely depend on the methods of implementation on the level of Member States and, at the end of the day, on affected firms’ willingness to meaningfully comply. On the other hand, the Directive’s main, strong message - mandatory reporting - might mark an important initial step in the ‘juridification’ (or positivization) of CSR-related soft laws. Furthermore, it might mirror some important, on-going paradigm-shifts in labour law (or in labour-related regulation in a wider sense) in general and might open the door for similarly innovative legislative developments.

Such innovative regulatory methods as mandatory non-financial reporting are clear examples of the fact that the legal sources of labour law in a wide sense and the legal strategies aimed at the advancement of labour law-compliance can be increasingly multifaceted, dispersed and decentred and can also be found beyond the conventional ‘brackets’ of labour law. Taken into account the well-known recent low willingness and ability

⁷⁴ B. Kasemir

⁷⁵ Kocher, Klose, Kühn, Wenckebach, p. 27.

of the EU to pass 'direct' social policy, labour law legislation⁷⁶, such 'indirect', innovative ways of regulating 'social' matters - as it is the case with mandatory non-financial reporting - should be appreciated. If there seems to be a 'moratorium' on any EU legislation in the fields of 'classical' labour law⁷⁷, such indirect ways of regulation should be especially valued as promising supplementary regulatory mechanisms. The strategy to creatively implant and 'smuggle' some 'social' dimension into routine business practices as reporting seems to replace 'direct' social regulatory expectations.

As we have seen, information disclosure as a basically company law-related regulatory strategy has some evident links to labour law, especially from a compliance-oriented perspective. However, at the same time, such innovative regulatory methods alter and challenge some classical pillars of regulating labour law matters. Among others, the focus (object) of regulation, the method of regulation, as well as the force of regulation are re-conceptualized and innovated.

Firstly, if we analyze the main *focus (object) of regulation*, it is fair to generalize that traditional labour law takes the contract (i.e. the employment contract) as the basic pillar and the main point of reference for regulation. This concept is often labelled as the 'Vertragsprinzip', symbolizing the civil law origins of labour law.⁷⁸ It is apparently one of the most topical focal points of contemporary discussions of labour law scholarship, how the nature, the scope and the function of the employment contract are changing in modern times.⁷⁹ As for information disclosure as a regulatory strategy, it takes the employer - and its market position, organizational culture and self-regulatory potential - as the most important target of regulation. It tries to boost and build on the 'social responsibility' of employers⁸⁰ instead of focusing on the contract. In other words, such methods

⁷⁶ As Schlachter formulates it in general: "The probability of convincing the European Council into social policy legislation has become more difficult the more members are present, and due to a striking economic crisis, social policy in many Member States tends to be among the first items to be reduced." M. Schlachter, *Transnational collective bargaining and the institutionalized "social dialogue" at EU level*, Conference Paper, MTA-PTE Research Group of Comparative and European Employment Policy and Labour Law, Recent Developments in Labour Law, Pécs, Hungary, 2012, pp.25-26, <http://mta-pte.ajk.pte.hu/index.php?lang=hu&link=konferencia> (accessed on 1 May 2015)

⁷⁷ Cf.: T.Müller, H.Platzer, Wolfgang, Rüb, *Transnational company agreements and the role of European Works Councils in negotiations, A quantitative analysis in the metalworking sector*, ETUI, Report 127, Brussels. p. 14.

⁷⁸ Cf.: R. Richardi, *Der Arbeitsvertrag im Zivilrechtssystem*, *Zeitschrift für Arbeitsrecht* 1988/7, p.231.

⁷⁹ Cf.:M. Freedland and N. Kountouris, *The Legal Characterization of Personal Work Relations and the Idea of Labour Law*, In: G. Davidov and B. Langille (eds.), pp. 190-209; M. Freedland and N. Kountouris, *The Legal Construction of Personal Work Relations*, *Oxford Monographs in Labour Law*, 2012; A. Perulli, *Economically dependent / quasi-subordinate (parasubordinate) employment: legal, social and economic aspects*, Committee on Employment and Social Affairs of the European Parliament and DG Employment and Employment and Social Affairs, Brussels, 2003; Gyulavári Tamás, *A foglalkoztatásjogviszonyokújdimenziója*, *Esély*, 22. évf. 1. sz., 2011, pp. 3-23.

⁸⁰ See the links to the above-described concept of CSR (Chapter 1.).

of regulation become relatively independent of the contract and try to concentrate on employers' responsibility. With this approach, it is possible to relieve labour regulation of analyzing the nature of the contract, while putting targeted regulatory pressure directly on employers' attitude (for instance, how employers manage their 'branding' and its credibility via social reporting). In this context, regulation strives to give some risk-based 'legal signals'⁸¹ for employers with the ambition of motivating compliance, self-regulation and social responsibility.

Secondly, *the method of regulation* is also under fundamental reconstruction in the ambit of innovative regulatory ideas. As we have already seen, a general tendency is detectable as 'hard-hitting' command and control (CAC) regulation is increasingly rolled back in many fields of labour regulation while reflexive, responsive, softer and light-touch styles of regulation are gradually coming to the forefront. The emerging regulatory terrain of mandatory social reporting is among the best examples for such a paradigm-shift in regulation. It endeavours to bring together hard and soft law approaches, or regulation and self-regulation. It doesn't intend to regulate with full force and in full details, but it leaves a large (but, to some extent, regulated) margin for self-regulation.⁸² In other words, regulation tries to express some targeted signals for responsible self-regulation. In this context, regulation is more of a shepherding rather than of a directing nature. Social reporting regulation aims to steer responsible self-regulation by mandating a comparable, transparent public image. Smart, indirect techniques of influencing corporate behaviour step into the place of traditional enforcement.

Thirdly, *the force of regulation (power, 'energy' of compliance)* is also unusual under the innovative regulatory ideas. As a rough generalization, normative state regulation and the various tools of collective voice are the two basic traditional regulatory powers of labour law. These two classical powers are to be used for protecting employees and influencing employers' behaviour. These classical regulatory powers are harshly intruding into the market-logic or at least correcting the market.⁸³ On the other hand, information disclosure as a regulatory strategy (and other innovative regulatory ideas, such as responsible public procurement, subcontracting liability etc.) is increasingly building on market-based incentives of compliance. In other words, these regulatory concepts try to utilize the market-based fact that employers can be motivated to comply with labour standards and be 'responsible' not only under administrative, regulatory control and collective pressure, but also under some forms of market-based pressure. The market-based pressures and incentives are widespread, fluctuating and dynamic. Such regulatory methods basically build on market-based incentives, reputational incentives (such as better 'branding' and

⁸¹ D. Doorey, (2012): A Model of Responsive Workplace Law, *Osgoode Hall L. J.*, vol. 50, no. 47, 2012

⁸² See the concept of 'regulated self-regulation.' C. Estlund, Rebuilding the Law of the Workplace in an Era of Self-Regulation; *Columbia Law Review* Vol 105. No. 2., March 2005.

⁸³ As for the discussion of the relationship between labour law and the market, see especially: S. Deakin

more transparent corporate image) and relational incentives (such as better, more transparent relationship with stakeholders). All of these incentives are generated - normally and originally - by the market, but can be activated, steered and catalyzed by regulation as well. All in all, the function of regulation is to enhance these market-based incentives by boosting self-regulation (or sanctioning the lack of proper self-regulation).

As an overall conclusion, the paper argues that such innovative regulatory methods as mandatory non-financial disclosure can add to a multi-coloured and vibrant regulatory arena for labour law, symbolizing that the law regulating labour cannot be fitted into a single concept. These regulatory mechanisms - as complementary tools - might contribute to overcome the current limitations of traditional labour law mechanisms, however, they can never fully replace the traditional regulatory mechanisms of labour law.⁸⁴ Such regulatory strategies might help to fill the gap where traditional labour laws have remained largely ineffective. In general, these regulatory ideas may contribute to the re-vitalization and opening up of the horizon of labour regulation.

⁸⁴ One of the main critiques to be raised against such regulatory innovations is that the state intends to shift certain parts of law-enforcement to private actors.

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THE CHALLENGES OF PART-TIME WORK IN THE CONTEXT OF FLEXICURITY¹

Abstract:

Part-time work has become an important instrument of the national legislators to create new jobs and to respond to employers' demands for increased flexibility. For workers it can be a „bridge“ between employment and inactivity and vice versa, as well as an instrument to achieve a better balance between working life and family responsibilities. The law regulating atypical employment relationship has a complex role to play today: to promote the creation of the desired voluntary part-time work arrangements and to put those workers on equal footing with „standard“ workers. In Croatia only a small percentage of workers work part-time. Unlike workers in other EU member states, especially those with a lower unemployment rate, Croatian workers choose to work part-time mostly involuntarily in the absence of full-time employment opportunities. The authors analyse the advantages and disadvantages of part-time work, regulation of part-time work at the international and regional level with special attention to problem issues regarding definition and access to part-time work. In this context the case law of the European Court of Justice has been consulted. Measures encouraging part-time work, as well as good practice in some European countries have been presented. Also, they analyse problem related to low rate of part-time work in Croatia and propose solutions de lege ferenda.

Keywords: *part-time work, ILO Part-Time Work Convention (No. 175), Part-Time Work Directive, Croatian law, CJEU case law.*

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I. INTRODUCTION

The EU employment policy is most visibly articulated through the European Employment Strategy² (EES)³ as an open method of coordination process in existence since the late 1990s⁴, which as a rule favours a combination of flexibility⁵ and security (flexicurity)⁶. Flexicurity involves a combination of flexible and reliable contractual arrangements⁷,

² M. Biagi, 'The Impact of European Employment Strategy on the Role of Labour Law and Industrial Relations' in M. Tiraboschi (ed.), *Marco Biagi Selected Writings*, The Hague, Kluwer Law International, 2003, pp. 13-28.

³ The aim of the EES is threefold. First, the increase of the legitimacy of Community-level action by respecting to a greater degree the diversity of national industrial relations and labour market systems. Second, to improve the efficiency of Social Europe by achieving more and better results. The competition introduced with Maastricht Treaty between two basic rule-making methods (legislative and contractual) was supposed to enhance the efficiency of social regulation. Third, the EES was also intended to serve as a catalyst for the efficiency of national employment policies. J. Goetschy, 'The European Employment Strategy: Genesis and Development', *European Journal of Industrial Relations*, vol. 5, no. 2, 1999, pp. 130-133.

⁴ N. Bodiroga-Vukobrat, G. Sander and S. Barić (eds.), *Die Offene Methode der Koordinierung in der Europäischen Union / Open Method of Coordination in the European Union*, Hamburg, Verlag Dr. Kovač, 2010.

⁵ A decade ago the issue of labour market flexibility has become instrumental in the debate over labour market policy in Europe. The lack of dynamism in the flexibility of labour markets within EU countries, which was often characterised by a high share of long-term unemployment and strict employment protection legislation, has frequently been blamed for poor employment performance of the 1980s and 1990s. Atypical employment such as part-time work, self-employment and temporary employment could help to utilise untapped employment potential. H. Buddelmeyer, G. Mourre, and M. Ward-Warmedinger, 'Part-time work in EU countries (labour market mobility, entry and exit)', European Central Bank, *Working Paper Series*, No. 460, 2005, <https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp460.pdf>, (accessed 25 September 2015). A number of studies dealing with the labour market flexibility in the context of Monetary Union argue that flexibility has beneficial effect on employment, output and prices, improving prospects for jobs creation. J. M. Abowd and F. Kramarz, 'The cost of hiring and separations', *National bureau of economic research working paper*, no. 6110, 1997; T. M. Andersen, N. Haldrup and J. R. Sørensen, 2000; 'Labour Market Implications of EU Product Market Integration', *Economic Policy*, vol. 30, pp. 107-133.; J. Haskel, B. Kersley and C. Martin, 'Labour market flexibility and employment adjustment: micro evidence from UK establishments', *Oxford Economic Papers, New Series*, vol. 49, no. 3, 1997, pp. 362-379; G. Saint-Paul and S. Bentolia, 'Will EMU increase Eurosclerosis?', *CERP Discussion paper*, no. 2423, 2000.

⁶ There has been a shift from a debate around the needs of market integration to one that focuses on the most appropriate forms of market regulation, that is finding the best mix between worker protection and economic freedom with a view to enhancing the European Union's competitiveness. A. Bilić, 'Transformacija radnopravnog odnosa', *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, vol. 32, no. 2, 2011, p. 755-794. This balance between economic and social considerations is now reflected in the Treaty's commitment to pursue a highly competitive social market economy. Article 3(3) of the Treaty on European Union.

⁷ A. Bilić, 'Fleksibilni oblici rada i radno pravo', *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, vol. 30, no. 2, 2009, pp. 920-942; A. Bilić, 'Ugovor o radu na određeno vrijeme – usklađivanje radnog zakonodavstva Republike Hrvatske sa propisima Europske unije', *Zbornik radova Pravnog fakulteta u Splitu*, vol. 41, 2004, pp. 167-18; I. Rozić, S. Jašarević and A. Bilić, 'Harmonizacija nacionalnog radnog prava s komunitarnim radnim pravom uz poseban osvrt na fleksibilne oblike zapošljavanja (Republika Hrvatska, Bosna i Hercegovina i Srbija)', *Zbornik radova Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse*, no. 10, 2012, pp. 330-361.

comprehensive lifelong learning strategies, effective labour market policies and modern, adequate and sustainable social protection systems.⁸ The EES, thus put the spotlight on the growth of non-standard forms of work, in light of the risk that two-tier labour market was emerging divided between „insiders“ (standard work associated with full protection) and „outsiders“ (non standard work confronting greater precariousness).⁹

Among non-standard forms of work over the past 20 years there has been an increase¹⁰ in part-time employment, as opposed to full-time employment.¹¹

In most countries, part-time work is defined in relation to full-time working hours. Considering that full-time working hours can be calculated on a daily, weekly, monthly or even yearly basis as the average period of employment, there are many differences in national statistics in regard to what is considered full-time working hours. In consequence, a part-time worker in one country might be considered a full-time worker in another country.¹²

⁸ European Commission, Modernizing labour law to meet the challenges of the 21st Century, COM (2006)708, p. 4. More on lifelong learning strategies, effective labour market policies and sustainable social protection systems, in A. Bilić, 'Fleksibilnost i deregulacija u radnim odnosima', PhD Thesis, Sveučilište u Splitu, 2012, pp. 199-234.

⁹ In his study Tam finds that the boundary between the two markets divides the part-time working population. The shorter the hours worked, the worse off the part-time will be. Especially in the case of women, part-time work appears to be a factor that aggravates initial handicaps, such as low skill levels, and thereby weakens the worker's position on the labour market. Part-time work constitutes a trap which lowers woman's lifetime employment prospects and earnings. M. Tam, *Part-time employment: A bridge or trap?*, Avebury, Aldershot, 1997, pp. 240-243.

¹⁰ Factors affecting part-time rate are: access to childcare; differences in working hours cultures; quality of available part-time jobs and differences in legislation. E. Sandor, 'Part-time work in Europe', *European company survey*, European foundation for the improvement of living and working conditions, 2009, p.13.

¹¹ In 2012 the part-time work in EU amounted to 19.8%. Part-time employment was stable from 2013 to 2014 (20.6 %). In 2014, the share of employees working part-time was highest in the Netherlands (52.4 % of employees), followed by Germany (28.3 %), Austria (27.7 %), Denmark (26.3%) and the United Kingdom and Sweden (both 26.2 %). The lowest shares were recorded in Romania (0.7 %), Bulgaria (2.1 %), Croatia (3.0 %), Slovakia (5.7 %) and Latvia (5.9 %). Two EFTA countries, Switzerland (37.4 %) and Norway (26.5 %), also had a relatively large share of part-time employees. http://ec.europa.eu/eurostat/statistics-explained/index.php/Labour_market_and_Labour_force_survey_%28LFS%29_statistics, (accessed 25 September 2015).

¹² In countries where part-time work is common, the number of jobs of more than 30 usual hours per week that are classified as part-time are significant. These countries tend to use a definition based on a 35 usual hours threshold. In countries where part-time work is relatively less common, the incidence of jobs of less than 35 usual hours per week that are classified as full-time is high. Part-time jobs are generally identified on the basis of self-assessment in these countries. There is less variability among countries in the incidence of part-time work when the latter is defined by a threshold (30 or 35 usual hours) than when the national definitions are used. Application of a uniform threshold across countries does not substantially change the relative position of countries regarding the frequency of part-time work. A. Bastelaer van, G. Lemaitre and P. Marianna, 'The definition of part-time work for the purpose of international comparisons', *OECD Labour market and social policy occasional papers*, no. 22, 1997, p. 12, <https://is.muni.cz/repo/1301291/5lgs-jhv7t7c.pdf> (accessed 28 September 2015).

In Croatia only a small percentage of workers work part-time.¹³ In general, workers in Croatia are not very interested in shortening their working hours and earnings because the low level of wages means that any wage reduction has an impact on the household budget.

Employers also prefer full-time employment claiming that part-time contracts do not usually bring sufficient cost reduction to counterbalance the negative effect of the unavailability of part-time employees to their colleagues and clients during regular working hours, while job sharing in fact poses additional costs. Unlike workers in other EU member states, especially those with a lower unemployment rate, Croatian workers choose to work part-time mostly involuntarily in the absence of full-time employment opportunities.

The share of involuntary part-time work has been higher than 40%. Indeed, faced with financial problems many enterprises turn to shorter working hours of all or certain categories of workers to bridge this difficult period. Croatia has experienced a certain increase in the share of part-time employment within total employment. Despite the high unemployment rate (17,2%) in Croatia, only about 8.7% of total employed persons work less than full time, from which it can be concluded that this institute is still rarely used. Of the total employed persons working part-time, 11.1 % are woman and 6.8% are men.

A vast majority of part-time workers are employed by small and medium-sized enterprises, predominately in the sector of education (both elementary and secondary), then in agriculture, followed by the administrative, services sector, financial and insurance sector, and at least in industrial activities. Instead of concluding a part-time contract, employers very often use service contract (contract for work), mostly illegal, since it is concluded for the work with characteristics of employment.¹⁴

In Croatia woman workers are overrepresented among part-time workers. A more frequent incidence of part-time work among woman is connected with their primary responsibility for childcare and care for the elderly that is still rarely done by men, whereas this arrangement enables them to combine employment with family responsibilities. Moreover, a combination of part-time employment and maternity/parental leave without losing entitlement to allowances is utilised quite often.¹⁵

In this article the authors analyse pertinent issues concerning part-time work: the advantages and disadvantages of part-time work, its regulation at the international and EU

¹³ According to statistical data provided by the Croatian Pension Insurance Fund for 2012, 73.000 of the obligatory insured persons were part-time workers. Among them 45.400 were employed by two or more employers, therefore in fact should be considered full-time employees. <http://rasprava.mrms.hr/bill/nacrt-prijedloga-iskaz-zakon-o-radu/1/1/1>, (accessed 16 October 2014)

¹⁴ M. Zuber, 'Rad u nepunom radnom vremenu', *Računovodstvo i financije*, vol. 50, no. 5, 2004, p. 44.

¹⁵ A. Bilić, 'Ravnopravnost spolova u kontekstu fleksibilnih oblika rada', in Ž. Potočnjak, (ed.), *Perspektive antidiskriminacijskog prava*, Zagreb, Pravni fakultet Zagreb, 2014, p. 129.

level, Croatian legislation and prospects regarding part-time work, part-time work in relation to „very atypical work“, relevant case-law of the CJEU and measures encouraging part-time work. In conclusion, the authors make proposals *de lege ferenda*.

II. PART-TIME WORK AS A NON-STANDARD FORM OF WORK

The following factors can be singled out as the determinants of part-time work: household composition regarding the probability of working part-time for both males and females; country specific arrangements that may strongly influence individual decisions to work part time; the effect of past labour market history, which has a significant impact on the current labour market state for both men and women and the firms' behaviour^{16, 17} In this respect it is crucial that the family as an institution be considered central to the understanding of labour market reforms. If social policy is leading to „de-familialisation“ or detachment from the family, than more weight is put on the state for the provision of services otherwise assigned to families. Accordingly, family support may very well channel the choice of unemployed people towards non-standard forms of work.¹⁸

Indeed, there has been much public praise of its supposed merits in reducing unemployment and of its benefits for workers and employers alike.¹⁹

2.1. Advantages of part-time work

Part-time work offers workers a better balance between working life and family responsibilities, training, leisure or civic activities.²⁰ The most striking feature of part-time work is its gendered nature, as women prevail among those working part-time. Pursuant

¹⁶ Buddelmeyer et al., Part-time work, pp. 5, 6.

¹⁷ The differences in the diffusion of part-time employment at the national level could be explained by differences among European countries as regards labour market regulations, extension of market activities relying on the use of part-time employment, tax and social security systems, economic situation, availability and organization of childcare provision, and cultures. J. O'Reilly and C. Fagan (eds.), *Part-time prospects: An international comparison of part-time work in Europe, North America and the Pacific*, Routledge, 1998.

¹⁸ S. Schiarra, 'New discourses in labour law: part-time work and the paradigm of flexibility', in S. Schiarra, P. Davies and M. Freedland (eds.), *Employment Policy and the Regulation of Part-time Work in the European Union (A Comparative Analysis)*, New York, Cambridge University Press, 2011, p. 10.

¹⁹ H. Buddelmeyer, G. Mourre and M. Ward, 'Recent developments in part-time work in EU-15 countries: trends and policy', *Discussion Paper Series*, Forschungsinstitut zur Zukunft der Arbeit, no. 1415, 2004, p. 5; H. Buddelmeyer, G. Mourre and M. Ward, 'Why do Europeans work part-time? A cross-country panel analysis', European central bank, *Working paper series*, no. 872, 2008, p. 5.

²⁰ Sandor, pp. 6-8.

to a 2014 statistics, 20.6 % workers worked part-time in the European Union, whereas three out of four employees working part-time in the EU were women (77.3 %).²¹ This trend can be witnessed across geographically and culturally diverse countries. This is not surprising in light of the fact that women remain the main care providers - whether in terms of raising children or looking after older relatives and part-time work is a means of allowing women to combine caring responsibilities with paid employment.

Furthermore, part-time work can also make it easier for workers to enter the labour market or retire from employment.²² One of the supposed virtues of part-time work is namely, that it facilitates a gradual entry of young persons into the labour market and enables older workers to gradually withdraw from employment. As regards the proportion of part-time work in older age groups of workers, various early retirement schemes²³ have been developed often in response to high unemployment or to avoid redundancies during restructuring accompanied with financial help from the state or unemployment insurance funds. At the enterprise level, however, such arrangements can cause a sudden loss of skills and experience.²⁴ For this reason, a number of countries such as Belgium, France, Portugal and Spain were promoting gradual retirement by offering older workers part-time work, while encouraging employers to hire young persons also on a part-time basis, thus enabling experienced workers to pass on their skills to beginners.²⁵ Part-time

²¹ http://ec.europa.eu/eurostat/statistics-explained/index.php/Labour_market_and_Labour_force_survey_%28LFS%29_statistics (accessed 25 September 2015)

²² L. Delsen, 'Part-time early retirement in Europe', *The Geneva papers on risk and insurance*, vol. 15, no. 55, April, 1990, pp. 139-157.

²³ These schemes may be applied to the national, sectoral or enterprise level. Part-time early retirement schemes give to older workers the freedom of choice and flexibility with regard to when and how they prefer to retire. This gradual transition to complete retirement contributes to the humanisation of work. These schemes may also improve the employment situation by sharing available jobs between a large number of people as a means of reducing unemployment. Delsen, p. 140.

²⁴ Early retirement schemes were initiated by employers. The main aim was to reduce the total early retirement costs and to retain knowledge and experience of older workers. Offering part-time work is a way of gaining access to a wider labour market or relevantly skilled workers, thus avoiding recruitment and training-related difficulties. Every economic growth contributes to the success of part-time early retirement. Delsen, p. 152. Due to the changed economic and demographic circumstances (ageing population, retirement of the baby-boom population, economic and financial crisis, slow economic growth, budget deficit and low employment) the EC White Paper (An Agenda for Adequate, Safe and Sustainable Pensions) 2012, emphasises the need to develop and put in place comprehensive strategies to adapt current EU Member States pension systems. „Pension reforms aimed at keeping people longer on the labour market also need to focus on removing unwarranted early retirement options which may apply to all employees or to specific professions... Whenever early retirement options are eliminated, it is important to ensure that the individuals concerned are enabled to work longer or, if this is not possible, can enjoy adequate income security.“ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0055:FIN:EN:PDE>, (accessed at 5 September 2015), p. 11. For Croatian legislation, see S. Baloković, 'Starosna mirovina u hrvatskom mirovinskom osiguranju', *Radno pravo*, no. 7-8, 2014, p. 40-45.

²⁵ Contrary to full-time retirement schemes, none of the national schemes gives employees the right to part-time early retirement. Partial early retirement has to be a result of agreement between employer and

work makes it easier to reconcile family responsibilities with employment, with the added advantage of maintaining a link with working life and thus avoiding a total break as in the case of parental leave, which can create problems as regards subsequent skills upgrading.²⁶ In fact, it is within these three worker categories: youth, older workers and those with family responsibilities that part-time work prevails. Therefore, from the worker's point of view, part-time employment fulfils two main functions: that of a "bridge" between employment and inactivity and *vice versa*²⁷, and that of reconciling paid work and family responsibilities. The paradigm of women combining work with care responsibilities remains the dominant one, while an approach based exclusively on gender equality law marginalizes other types of part-time workers.²⁸ However, it is necessary to add that part-time work gives a chance to another vulnerable group of workers, i.e. workers with disabilities or certain illnesses, to join the world of work.

On the other side, by using part-time work the employers not only respond to market requirements with greater flexibility (e.g. by increasing capacity utilization or extending opening hours), but also increase productivity gains. That said, in the circumstances of economic change or crisis and consequently the need for greater flexibility, part-time work is a means for the employer to cope with extra workloads not requiring full-time workers, as well as to adjust working and opening hours in the retail trade, for example.²⁹ Some studies found that the hourly productivity of part-time workers is often higher.³⁰ The plausible explanations for this are that part-time employees work more intense; are as a rule less absent from work and less worn-out, and that "part-time workers, especially when they formerly worked full time, may be expected to carry out a set of activities that normally would be carried out by a full-time worker"³¹

employee. The Swedish partial pension scheme is financed by a pay-roll tax and in Germany by the employer. In Germany full retirement schemes was replaced by the part-time early retirement scheme and in all others European countries exists parallel to a full early retirement system. Delsen, p. 140-141.

²⁶ D. G. Tremblay and É. Genin, 'Parental leave: An important employee right, but an organizational challenge', *Employ respons rights*, no. 23, 2011, p. 258.

²⁷ J. O'Reilly and S. Bothfeld, 'What happens after working part-time? Integration, maintenance or exclusionary transitions in Britain and Western Germany', *Cambridge Journal of Economics*, vol. 26, no. 4, pp. 409ff.

²⁸ M. Bell, 'Achieving the objectives of the part-time work Directive? Revisiting the part-time workers regulations', *Industrial Law Journal*, vol. 40, no. 3, 2011, p. 279.

²⁹ Buddelmeyer et al., Recent developments, p. 28.

³⁰ A. Cataldi, S. Kampelman and F. Rycx, 'Part-time Work, Wages and Productivity: Evidence from Matched Panel Data', <http://www.sole-jole.org/12382.pdf> (accessed 2 October 2015); L. Golden, 'The effects of working time on productivity and firm performance: a research synthesis paper', International Labour Office, Geneva, Conditions of work and employment series, no. 33, 2011, pp. 6-7.

³¹ International Labour Office, *Part-time work*. Report V (1), International Labour Conference, 80th Session, Geneva, 1993, p. 40.

The growth of part-time work is of vital importance for policy-makers confronted with high unemployment, like those in Croatia. Resorting to part-time work may reduce the number of jobseekers³² and in turn lower politically-sensitive unemployment rates without requiring an increase in the total number of working hours.³³ It is worth mentioning here that when active employment policies are required to increase the employment rates, it has to be specified at the national level that new jobs should not be created under deregulatory regimes nor violate fundamental rights.³⁴

As Bell stressed, part-time work falls under the umbrella of precarious work, though it is not always evident why. Compared to fixed-term work, part-time work is not necessarily insecure regarding its duration. Moreover, contrary to agency work,³⁵ part-time workers often have a clear contractual relationship with the provider of employment.³⁶ Nonetheless, part-time work has its drawbacks.

2.2. Disadvantages of part-time work

Working part-time carries certain disadvantages for workers in comparison with their colleagues who perform equivalent work full time.³⁷ According to an ILO study,³⁸ their

³² New institutional economists argue that there are benefits for employers in the provision of part-time jobs. The reasons are partly macroeconomic, i.e. to use the country's labour resources to the full. At the micro-economic level, firms get access to a wider pool of talent from which they could recruit their employees. But the part-time jobs have to be sufficiently attractive. A.C.L. Davies, *Perspectives on Labour Law*, New York, Cambridge University Press, 2004, p. 6.

³³ F. Bönker and H. Wollmann, 'Stumbling towards reform: the German welfare state in the 1990s', in: P. Taylor-Gooby (ed.), *Welfare states under pressure*, London, Sage Publications, 1990, pp. 75-99; C. Fagan, *Working-time preferences and work-life balance in the EU: Some policy considerations for enhancing the quality of life*, Dublin, European Foundation for the Improvement of Living and Working Conditions, 2003, p. 14.

³⁴ S. Schiarra, *New Discourses*, p. 11.

³⁵ For Croatian legislation, see in S. Laleta and A. Križanović, 'Rad putem agencija za privremeno zapošljavanje u hrvatskom, europskom i usporednom pravu', *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, vol. 36, no. 1, 2015, pp. 305-340.

³⁶ M. Bell, 'Strengthening the protection of precarious workers: part-time workers', International Training Centre, International Labour Office, p. 2.; http://www.google.hr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKewiH0KLOIK7JAhXMNxxQKHAYjDLsQFggZMAA&url=http%3A%2F%2Fctrav-courses.itcilo.org%2Ffen%2Fa4-54332%2Fa4-54332-resources%2Ffitc-ilo-precarious-work%2Fstrengthening-the-protection-of-precarious-workers-part-time-workers%2Fat_download%2Ffile&usg=AFQjCNEBj_3Nd1MzYCBAOkJd2Ku7eIw6JA&sig2=SIHkaPc_xoQcVYGKA1Ninw (accessed 15 October 2015)

³⁷ The European working conditions survey (EWCS), a tool originally set up to help the improvement of quality of work in Europe, defines key dimensions of quality of work and employment as: career and employment security; health and well-being; skills development; reconciling work-life balance.

³⁸ P. Bollé, 'Part-time work: Solution or trap?' *International Labour Review*, vol. 136, no. 4, 1997, <http://www.ilo.org/public/english/revue/articles/97-4.htm>, (accessed at 5 May 2015).

hourly wages are typically lower³⁹ and their career prospects more limited⁴⁰. Likewise, their access to training and skill development opportunities are less favourable.⁴¹

Moreover, part-time workers are ineligible for certain social benefits. Working part-time often means less contribution to pensions based on workers' contributions, which consequently results in lower pensions and causes the gender pension gap.⁴²

Difficulties for part-time workers in relation to social security requirements were also identified in a research done by the ILO. In its survey of maternity rights (1999) it found that female part-time workers 'may have difficulty meeting the eligibility requirements for benefits in the form of time-in-service requirements or minimum periods of contribution which may take the part-time worker much longer to fulfil than a full-time worker. In this way, a large number of women workers may fall outside of maternity protection.'⁴³

³⁹ Most of the full-time/part-time wage in hourly wages is driven by sex segregation. E. Matteazzi, A. Pailhé and A. Solaz, 'Part-time wage penalties in Europe: a matter of selection or segregation?' *ECINEQ, working paper series*, no. 250, 2012, p. 26, <http://www.ecineq.org/milano/WP/ECINEQ2012-250.pdf> (accessed 12 September 2015); M. Jepsen et al., 'The wage penalty induced by part-time work: the case of Belgium', *Brussels Economic Review*, vol. 48, no. 1-2, pp. 73-94; D. Fernández-Kranz and N. Rodríguez-Planas, 'The part-time pay penalty in a segmented labour market', *IZA DP*, no. 4342, 2009, <http://ftp.iza.org/dp4342.pdf>, (accessed 23 October 2015); A. Manning and B. Petrongolo, B., 'The part-time penalty for woman in Britain', *The Economic Journal*, vol. 118, no. 526, 2008, pp. 28-51; E. Bardasi and J. Gornick 'Working for less? Women's part-time wage penalties across countries', *Feminist Economics*, vol. 14, no. 1, 2009, pp. 37-72.

⁴⁰ On average, part-time workers are less likely to feel that their job offers good prospects for career advancement. Analysis by the number of hours worked per week shows that employees working between 41 and 50 hours are optimistic about their career prospects (34%), followed by those working 31 to 40 hours (32%). Those working less are significantly less likely to say they have good opportunities for promotion, and this proportion decreases in line with the number of hours worked. Sandor, p. 5.

⁴¹ C. Lyonette, B. Baldauf and H. Behle, *Quality part-time work: A review of the evidence*, London, Government Equalities Office, Institute for Employment Research, University of Warwick, Coventry, 2010, p. 56-59.

⁴² S. Burri and H. Aune, *Sex Discrimination in Relation to Part-Time and Fixed-Term Work, The application of EU and national law in practice in 33 European countries*, European Union, 2013, p. 23. "Unless mechanisms are in place to ensure social security coverage for non-standard workers through an extension of contributory or non-contributory social security mechanisms, these workers are more likely to be inadequately covered or not covered at all and are, as a result, more exposed to social risks than other workers, including with respect to income security and effective access to health care." International Labour Office, *Non-standard forms of employment*, Report for discussion at the Meeting of Experts on Non-Standard Forms of Employment, Geneva, 16–19 February 2015, p. 27, http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/meetingdocument/wcms_336934.pdf, (accessed 3 September 2015); International Labour Office, *World Social Protection Report 2014/15: Building economic recovery, inclusive development and social justice*, Geneva, http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_245201.pdf, (accessed 3 September 2015). Also: S. Houseman and M. Osawa, 'What is the nature of the part-time work in the United States and Japan?' in J. O'Reilly and C. Fagan (eds.), *Part-time prospects: An international comparison of part-time work in Europe, North America and the Pacific*, London, Routledge, 1998, pp. 232-251.

⁴³ International Labour Office, 'Maternity protection at work. Report V(1); International Labour Conference, 87th session, 1999, chapter 2.

Besides, unless working part time is voluntary, it may leave them only marginally better off than if they were unemployed.⁴⁴ Part-time workers are also at a disadvantage because of their hours of work. In the case of overtime work, part-time worker often receives premium payments for overtime only after he/she has worked the normal full-time hours. Here the overtime is used as a means of achieving flexibility by employing part-time workers on relatively short basic hours and requesting them to work substantial overtime during peak periods. Some laws or collective agreements prescribe that overtime rates apply once the normal working hours of part-time worker have been exceeded. Nevertheless, their provisions do specify a maximum of overtime hours with the view of avoiding discrepancies between part-time and full-time labour costs.

As previously said part-time workers are on average paid lower hourly rates than full-time workers.⁴⁵ This is the case even with respect to equivalent work performed within the same establishment. However, the difference is even more apparent when considering groups of workers. A number of factors are relevant in this context: part-time workers “tend to work in sectors and indeed in branches of sectors where the hourly rates of pay are low in comparison with the national average. They also tend to be employed in low-graded jobs and to be excluded from supervisory posts.”⁴⁶ Workers who work part-time are more likely to be excluded from supplementary payments (bonuses, holiday and sickness pay, training allowances, seniority payments, etc.). In addition, one of very important questions is that of the minimum number of hours of work required to qualify for certain entitlements, as in the case of redundancy pay or other benefits.⁴⁷

The precariousness of part-time work results in a weaker level of part-timers’ collective organisation.⁴⁸ According to the ILO 2004 global report there were lower rates of unionisation amongst part-time workers,⁴⁹ which has been partially attributed to the

⁴⁴ P. Bollé, p. 1.

⁴⁵ C. Fagan and J. O’Reilly, ‘Conceptualising part-time work: the value of an integrated comparative perspective’, in: J. O’Reilly and C. Fagan, (eds.), *Part-time prospects*, pp. 1-31; J. C. Gornick and J. A. Jacobs, ‘A cross national analysis of the wages of part-time workers: evidence from the United States, the United Kingdom, Canada and Australia’, *Work, Employment and Society*, vol. 10, no. 1, 1996, pp. 1-27; F. McGinnity and P. McManus, ‘Paying the price for reconciling work and family life: comparing the wage penalty for women’s part-time work in Britain, Germany and the United States’, *Journal of comparative policy analysis: research and practice*, vol. 9, no. 2, 2007, pp. 115-234.

⁴⁶ International Labour Office, *Part-time work*, 1993, p. 34.

⁴⁷ P. Bollé, cit.

⁴⁸ Bell, *Strengthening the protection*, p. 5.

⁴⁹ International Labour Office, *Organising for social justice. Global report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, International Labour Conference 92nd session, report I(B), 2004, p. 53. In the UK, only 22% of part-timers are trade union members (in the private sector only 10%) comparing to 30% of full-time employees. J. Achur, *Trade union membership 2009*, London, Department for Business, Innovation and Skills, 2010, p. 15. One of the arguments is the specific trade unions’ approach to part-time workers, i.e. in the past, recruitment of these workers has been perceived as

prevalent number of part-time workers in occupations with lower levels of trade-union membership in general.⁵⁰

Bell reiterates that the gendered nature of part-time work is a central reason for its devaluation within the labour market.⁵¹ The ILO's 2007 global report concluded that: 'in most countries part-time work remains women's work and is synonymous with low status, low training and limited career opportunities, despite its being often presented as available to both working mothers and fathers. Moreover, part-time may often be involuntary, in the sense that it is a second-best option to a full-time job.'⁵²

Part-timers who work "on call", on the "zero hours" system (without any guaranteed minimum weekly or monthly number of hours) are in a particularly vulnerable situation. They cannot rely on a minimum income, and are often excluded from certain rights and benefits, or entitlement which is subject to a minimum number of hours worked.⁵³

From the employers' point of view, part-time work has for a long time presented more disadvantages than advantages. For one thing, it increases costs (e.g. for fixed recruitment and training costs per employee and social security contributions) and, on the other hand, complicates work organization (e.g. co-ordination among part-time employees).

Likewise, involuntary part-time work (i.e. work done by people who would prefer a full time job) amounts to underemployment in macroeconomic and macrosocial terms.

There are two main categories of involuntary part-time work: individuals who work part-time due to a lack of work or unfavorable business conditions and individuals who could only find part-time work.⁵⁴ Involuntary part-time work can weaken demand, and consequently have negative effects on growth and in turn employment.

EU statistics confirm the view that part-time work is sometimes involuntary because of a lack of adequate childcare facilities. In 2008, around 30% of women were economically inactive or working part-time as a result of the lack of care services for children and other dependents. Because of women's caring responsibilities, they are often unable to

less important. S. Walters, 'Female part-time workers' attitudes to trade unions in Britain', *British Journal of Industrial Relations*, vol. 40, 2002, pp. 49, 50, both cited in Bell, Strengthening the protection, p. 5.

⁵⁰ Walters, p. 5.

⁵¹ Bell, Strengthening the protection, p. 4.

⁵² International Labour Office, *Equality at work: tackling the challenges. Global report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, International Labour Conference 96th session, report I(B), 2007, p. 78. http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---webdev/documents/publication/wcms_082607.pdf (accessed 10 September 2015)

⁵³ International Labour Office, *Part-time work*, 1993, p. 16.

⁵⁴ T. Cajner et al., 'Why is involuntary part-time work elevated?' <http://www.federalreserve.gov/econresdata/notes/feds-notes/2014/why-is-involuntary-part-time-work-elevated-20140414.html>, (accessed 15 September 2015)

work full-time (especially if it means long and antisocial working hours). Part-time work tends to be frequent in the low status parts of the labour market, which can result in women working below the level of their qualifications and/or professional experience.⁵⁵ As a result of a disproportionate share of women with family responsibilities and difficulties in reconciling work with private life, many work part-time or under atypical contracts.⁵⁶

III. REGULATION OF PART-TIME WORK AT THE INTERNATIONAL AND REGIONAL LEVEL

Irrespective of the above mentioned disadvantages, part-time work has been increasingly considered a positive instrument for promoting employment and facilitating the reconciliation of work and family life. In encouraging its growth and improving its quality, the labour market regulation is faced with the difficulty of achieving a balance. „Measures to encourage employers to use part-time work might lead in the direction of deregulation, whereas steps to combat the disadvantages experienced by part-time workers tend to require legal intervention. In this respect, part-time work is a good example of the crossroads between flexible labour markets and protecting social rights.“⁵⁷

The increase in part-time employment and the difficulties associated with it attracted much attention and in turn led to the adoption of two important regulatory instruments. At the international level in 1994 the ILO has adopted the Part-Time Work Convention (No. 175) and Recommendation (No. 182). At the European level the social partners of the

⁵⁵ Bell, *Strengthening the protection*, p. 4; European Commission, *Report on equality between women and men – 2010*, Luxembourg, Publications Office of the European Union, 2010, p. 40. http://www.google.hr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwjx8OrkK7JAhXlUhQKHe45COAQFggZMAA&url=http%3A%2F%2Fec.europa.eu%2Fsocial%2FBlobServlet%3FdocId%3D4613%26langId%3Den&usg=AFQjCNGnQct1C61Dv_wDNHIR4yyuDbUnKg&sig2=uqAmTINXe256CRjBU5rZRQ, (accessed 22 September 2015); European Commission, *Gender segregation in the labour market – root causes, implications and policy responses in the EU*, Luxembourg, Publications Office of the European Union, 2009, p. 43.

⁵⁶ This permits them to remain in the labour market while managing family responsibilities, but consequently can have a negative impact on their pay, career development, promotion prospects and pensions. European Commission, *Strategy for equality between women and men 2010-2015*, http://ec.europa.eu/justice/gender-equality/files/strategy_equality_women_men_en.pdf, (accessed 25 October 2015). The European Union released its new framework *Gender equality and women's empowerment: transforming the lives of girls and women through EU external relations 2016-2020* – the new EU Gender Action Plan (GAP) for 2016-2020, on 21 of September 2016. It was the answer to 2010-2015 GAP's weak institutional leadership, accountability and capacity. See more H. O'Connell, 'The European Union's new Gender Action Plan 2016-2020 (Gender equality and women's empowerment in external relations)', <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/9926.pdf>, (accessed 24 November 2015)

⁵⁷ Bell, *Strengthening the protection*, p. 5.

European Union signed in 1997 the Framework Agreement on part-time work,⁵⁸ which was later upgraded into a Directive.⁵⁹

The objectives of the Convention and Part-Time Workers' Directive are: removal of discrimination against part-time workers; improvement of quality of part-time work; development of part-time work on a voluntary basis; contribution to the flexible organisation of working time in a manner which takes into account the needs of employers and workers.

The Part-Time Work Convention of 1994 (No. 175) aims at promoting access to productive and freely chosen part-time work that meets the needs of both employers and workers, and ensuring protection for part-time workers with respect to access to employment, working conditions and social security.

The Convention applies to all part-time workers – defined as employed persons whose normal hours of work are fewer than those of comparable full-time workers. The Convention seeks to ensure equal treatment of part-time workers and comparable full-time workers in a variety of ways. First, part-time workers are to be granted the same protection as comparable full-time workers in relation to the right to organize, the right to bargain collectively and the right to worker representatives; occupational safety and health; and discrimination in employment and occupation. Second, measures must be taken to ensure that part-time workers do not, solely because they work part-time, receive a basic wage which, calculated proportionately, is lower than that of comparable full-time workers. Third, statutory social security schemes based on occupational activity should be adapted so that part-time workers enjoy conditions equivalent to those of comparable full-time workers, and these conditions may be determined in proportion to hours of work, contributions or earnings. Fourth, part-time workers must also enjoy equivalent conditions with respect to maternity protection, termination of employment, paid annual leave and paid public holidays, and sick leave. The Convention also calls for the adoption of measures to facilitate access to productive and freely chosen part-time work which meets the needs of both employers and workers, provided that the required protection, as mentioned above, is ensured. It also provides that measures must be taken, where appropriate, to ensure that transfer from full-time to part-time work or *vice versa* is voluntary, in accordance with national law and practice.⁶⁰

⁵⁸ Its parties are the European Trade Union Confederation (ETUC), the Union of Industrial and Employers' Confederations of Europe (UNICE) and the European Centre of Enterprises with Public Participation (CEEP).

⁵⁹ Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, OJ L 014, 20/01/1998, P. 0009 – 0014.

⁶⁰ N. Valticos and G. von Potobsky, *International labour law*, Boston, Kluwer Law and Taxation Publishers, 1995, pp. 166-167.

As regards the EU level, the Part-Time Directive reflects a trade-off between flexibility of working time and standards on the treatment of part-time workers. This is most evident in the form of obligation imposed on the Member States and social partners to „identify and review“ obstacles to part-time working. So, the purpose of Directive is to: a) provide for the removal of discrimination against part-time workers and to improve the quality of part-time work; b) facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organisation of working time in a manner which takes into account the needs of employers and workers.⁶¹

Consequently, when regulating part-time work, Member States have to pursue: worker's protection, employment promotion and flexibilisation of work relations, support of part-time work. This can be realised by both soft and hard law instruments.

In view of the application of the principle of non-discrimination of part-time workers in practice, we must examine the definition of a part-time worker and access to part-time work.

3.1. Problems related to the definition of a part-time worker

Both the Convention and the Directive provide a similar definition of the term 'part-time worker'. According to the Art. 1a) Convention No. 175 "the term 'part-time worker' means an employed person whose normal hours of work are less than those of comparable full-time workers". The reason why the concept of a "comparable" worker is mentioned is that "the number of hours per week or per month that are regarded as being normal for full-time employees vary considerably according to the profession or activity concerned". Concerning hours of work, Convention No. 175 states that these may be calculated weekly or on average over a given period of employment. Similarly, the Directive offers the following definition: "The term 'part-time worker' refers to an employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker" (Clause 3/1).

The Framework Agreement intends to contribute to the EES on employment and to combat discrimination against part-time workers. The notion of comparable full-time worker is introduced as a means to define the part-timer. The main implication of the principle of non-discrimination is the ban on less favourable treatment of part-timers as compared to full-timers within the same establishment, or where such worker does not exist, with reference to collective agreement or other national sources. Exemption could

⁶¹ Clause 1.

be made if justified on objective grounds, and recourse, whenever possible, to the principle of *pro rata temporis*.⁶²

Using comparators is a common method for identifying discrimination. However, the requirement for a comparator presents numerous difficulties for the practical implementation of both the Convention and the Framework Agreement. The biggest problem is that most EU anti-discrimination legislation leaves the courts considerable flexibility⁶³ identifying the appropriate comparator which allows the courts, for example, to have recourse to a hypothetical comparator where no actual comparator can be identified.

Also, for claimants it will be difficult to prove that they enjoy the same 'type' of employment relationship and perform 'the same or a similar type of work'. Compared to full-time workers, part-time workers are present in the workplace for a smaller number of hours per week and consequently full-time workers have a wider range of tasks and responsibilities. The employers may object that the type of work performed is sufficiently different in order to render the workers not comparable.⁶⁴

Another observation to be made here is that the requirement for comparability is likely to lower the possibility for casual workers⁶⁵ to rely on the Convention.⁶⁶ Art. 3(1) of the

⁶² S. Schiarra, 'New Discourses in Labour Law (Part-time Work and the Paradigm of Flexibility)', *EUI Working Paper LAW*, No. 2003/14, Florence, European University Institute, 2003, p. 20-22, <http://cadmus.eui.eu/bitstream/handle/1814/1868/law03-14.pdf?sequence=1> (accessed 30 September 2015). For example, the annual leave entitlement of a worker who works 3 days per week would be 60% of that of a full-time worker who works 5 days per week. The definition of 'comparable full-time worker' is very similar to that found in Convention 175.

⁶³ M. Bell has identified some initial trends. The Court of Justice has rejected the idea that the principle of equal treatment should be interpreted in a highly flexible manner (Case C144/04 Mangold [2005] ECR I-9981, para. 42, 43. Further, it has supported a broad interpretation of material scope of the prohibition of discrimination (Case C-396/08 INPS v Bruno and Pettini, *INPS v Lotti and Matteucci*[2010]). There is a Courts' tendency to minimise the flexibility within the principle of equal treatment relates to the scope for objective justification for difference in treatment. That concept requires the unequal treatment at issue to be justified by the existence of precise and concrete factors on the basis of objective and transparent criteria in order to ensure that that unequal treatment in fact responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose. Case C-307/05 *Del Cerro Alonso* [2007] ECR I-7109 para. 57 – 58.

⁶⁴ Bell, *Strengthening the protection*, p. 11. The author finds the illustration of this argument in the case of *Matthews and others v Kent and Medway Towns Fire Authority*. The case concerned part-time fire fighters (so called 'retained' fire fighters) and their exclusion from an occupational pension scheme that was open to full-time fire fighters. The employer argued that the part-time fire fighters mainly provided emergency work (i.e. responding to fires), whereas full-time fire fighters also undertook educational and safety inspection work. The relevant English legislation required part-time workers to demonstrate that they had the same type of employment contract and performed similar work to the full-time comparator.

⁶⁵ See *infra* chapter 5.

⁶⁶ L. Vosko, 'Gender, precarious work, and the International Labour Code: the ghost in the ILO closet' in J. Fudge and R. Owens (eds.), *Precarious work, women, and the new economy – the challenge to legal norms*, Oxford, Hart Publishing, 2006, pp. 53, 61 in Bell, *Strengthening the protection*, p. 11.

Convention enables Member States to exclude this type of worker from its scope. But even if they are covered by the Convention, „the requirement to show that they have the ‘same type of employment relationship’ is likely to limit the Convention’s utility“.⁶⁷

Another hurdle for part-time worker could emerge in situations in which there is no full-time worker to be compared to the part-timer. As previously mentioned, part-time work tends to be concentrated in low status sectors of the economy and lower grade occupations within an enterprise. According to Article 1(c)(iii) it is possible to find a comparator outside the enterprise, ‘in the same branch of activity’. Bell suggests a more flexible approach by allowing hypothetical comparators as in the English case of *Royal Mail Group plc v Lynch*.⁶⁸

Also, there is abundant evidence demonstrating that the Part-Time Work Directive (and also other directives on atypical work) is primarily based on the flexicurity approach. On the other hand, the Court of Justice has in its initial case law adopted a relatively rigorous interpretation of the principle of equal treatment that places little emphasis on flexicurity and the reason is the use of the comparator test. According to the latter, only those non-standard workers whose employment relationship is relatively proximate to the standard worker are able to access the benefits of the principle of equal treatment.⁶⁹ This

⁶⁷ Bell, Strengthening the protection, p. 12 As Bell points out in Case C-313/02 *Wippel* [2004] ECR I-9483, the Court of Justice concluded that even if the claimant fell within the scope of the EU Framework Agreement on Part-Time Work, she could not be treated as comparable to a full-time worker because she had no fixed working hours and she had the possibility to refuse work if she did not wish to do it. For more on this case see infra note 70.

⁶⁸ In this case the claimant was a part-time worker. She was successful in applying for a full-time position within the same enterprise. The employer had a policy that an internal job applicant could only be appointed to a full-time, permanent contract if the worker had previously held a full-time position. Consequently, she was appointed to the full-time post but on a temporary contract. Although the less favourable treatment is easy to identify, there was no comparable full-time worker with which she could compare herself because no fulltime worker had applied for the position. According to Bell this illustrates the “benefits of the law permitting recourse to hypothetical comparators. In this case, it could be demonstrated that if a fulltime worker from within the enterprise had applied for the same position, the full-timer would have been appointed to a permanent contract.” Bell, Strengthening the protection, p. 12.

⁶⁹ M. Bell, ‘Between flexicurity and fundamental social rights: the EU Directives on atypical work’, *European Law Review*, vol. 37, no. 1, 2012, pp. 8, 9. In Case *Wippel*, Mrs Wippel, who was a shop worker, challenged an Austrian collective agreement. According to this collective agreement, a normal working week for full-time workers was set at 40 hours. It did not specify what constituted a normal working week for part-time workers. Mrs Wippel challenged this as less favourable treatment of part-time workers and indirect sex discrimination, given that 90% of part-time workers were women. The claimant was employed under an ‘on demand’ contract where no regular working hours were guaranteed and the volume of work fluctuated. She claimed that this constituted less-favourable treatment in comparison with full-time workers who, according to national law, had to have an agreed set of working hours. A preliminary issue that arose at the Court of Justice was whether her employment relationship qualified her as a ‘worker’ for the purposes of gender equality legislation and the Framework Agreement. The Court held that the claimant did fall within the scope of EU gender equality legislation, but that whether she was covered by the Framework Agreement was a matter for the national law.

situation creates the risk of a new dichotomy between those who are by Countouris called „typified-atypical“⁷⁰ and those who are according to Eurofound’s definition „very atypical“ workers^{71, 72}

However, locating an actual comparator is not enough in establishing less favourable treatment, while the claimant will have to demonstrate that the less favourable treatment is based on the ground that the worker is a part-time worker. This is the so-called “solely” test. If the employer can prove that there were other reasons which satisfy less favourable treatment, this test cannot be applied. It is worth mentioning that in the case of Part-Time Directive the latter test is very difficult to reconcile with indirect discrimination that, by its nature, concerns rules and practices applied in an abstract manner, and resulting in a particular disadvantage for a particular group.

There is another obstacle to proving less favourable treatment of part-time worker. The employer can show that this kind of treatment is „justified on objective grounds“, i.e. that the measure was an appropriate and necessary means of achieving a legitimate objective.

3.2. Access to part-time work

The Preamble of the ILO Convention underlines the economic importance of part-time work, as well as the need for employment policies to take into account its role in facilitating new employment opportunities. The increasing of employment by expanding part-time work could be achieved through different measures of deregulation as recommended in Article 9, if the existing labour laws and regulations prevent or discourage part-time work.⁷³ The Court of Justice has dealt with restrictions on those forms of work that deviate from the standard (full-time) employment contract, as initially imposed in some European legal systems.⁷⁴ In the case of *Michaeler*, which concerned an Italian law requirement that copies of all part-time employment contracts had to be sent to the La-

The Court decided that there were no comparable full-time workers in the enterprise, and that the full-time workers are obliged to perform work required under their contract, whereas casual workers had the possibility to decline work. The absence of comparable full-time worker meant there was no reason to proceed beyond the examination of her treatment, which effectively deprives casual workers of any opportunity to benefit from the principle of equal treatment. Case C-313/02 *Wippel* [2004] ECR I-9483.

⁷⁰ N. Countouris, *The changing law of the employment relationship – comparative analyses in the European context*, Aldershot, Ashgate, 2007, p. 89.

⁷¹ Eurofound, *Very Atypical Work: Exploratory Analysis of fourth European Working Conditions Survey*, cited in M. Bell, *Between flexicurity*, p. 31-48.

⁷² Bell, *Between flexicurity*, p. 41.

⁷³ Bell, *Strengthening the protection*, p. 12.

⁷⁴ Countouris, p. 88.

bour and Social Security Inspectorate, the opinion of the Court of Justice was that this was an unjustified restriction on part-time work that breached the Framework Agreement.⁷⁵

One of the objectives of the Directive is promoting flexible organization of working time. Therefore, the Directive is not simply an instrument that altruistically deals with the disadvantages of part-time workers, but is expressly designed as an instrument of employment policy aiming to increase part-time work in order to raise the employment rate, and stimulate a reform of the labour market.⁷⁶

A more complex problem in the labour market concerns the issue of access to (good quality) part-time work. The concentration of part-time work in low-paid, low-status occupations implies a structural inequality that cannot be addressed by the legal rules that guarantee to part-time workers the equal treatment as to full-time workers. According to Bell employers often restrict part-time work to positions at the lower grades in the enterprise and advertise managerial jobs on a full-time basis only. The latter practice does not seem to contravene the Convention's requirements. The possibility of adapting the employment contract to switch between full-time and part-time working or *vice versa* may be at the initiative of the worker or the employer. The employer could request the switch (to part-time work) with the aim of reducing salary costs for the enterprise, or a reorganisation of the business that requires full-time work.⁷⁷

According to Article 10 of the Convention the transfer from full-time to part-time work or *vice versa* should be voluntary, in accordance with national law and practice. The Recommendation encourages employers to take practical measures to facilitate such transfers (Art. 18). Also, in Art. 19 and 20 it recommends two worker's rights. Worker's refusal to transfer from one form of working to another (unless there are other operational requirements) should not be a valid reason for termination of employment contract. Workers with caring responsibilities should be able to transfer from full-time to part-time work (and back again). Due to different interests of the worker and employer, it is obvious that the balance between flexibility and security is difficult to strike.⁷⁸

Clause 5 of the Directive contemplates situations that concern access to part-time work. First, it requires from Member States and social partners to review and eliminate obstacles to part-time work („where appropriate"). Second, the employers have a duty to

⁷⁵ Cases C-55/07 and C-56/07 Michaeler, Subito GmbH, and Volgger v Amt für sozialen Arbeitsschutz, Autonome Provinz Bozen [2008] ECR I-3135.

⁷⁶ Bell, *Achieving the objectives*, p. 255, 265.

⁷⁷ Bell, *Strengthening the protection*, p. 12, 13.

⁷⁸ The worker would like to enjoy the flexibility to transfer from full-time and part-time employment, accompanied by security that the change of working time will not occur against his/her wishes. Employers would prefer flexibility in ordering those working time arrangements that best fit the requirements of the business, and the security that the worker can be returned to full-time status when necessary for the enterprise. Bell, *Strengthening the protection*, p. 13.

consider the request of the worker to transfer from full-time to part-time work (and *vice versa*). Thirdly, employers should also facilitate access to part-time work at all levels of the enterprise, including vocational training for part-time workers.

The progressive elimination of discriminatory requirements for access to particular conditions of employment and of other obstacles limiting opportunities for part-time work put an obligation on Member States to act for the removal of discriminatory laws and practices, both on their own initiative, in order to comply with European law and following individual complaints. Thereof, the Member States and the social partners, in their respective sphere of competence, have to identify and review obstacles which are likely to limit opportunities for part-timers. 'The non-binding nature of this clause creates uncertainties as regards a clear definition of a right to access to employment free of discrimination.'⁷⁹

According to Clause 5(3)(a) employers should, as far as possible, give consideration to workers' requests to transfer from full-time to part-time work 'that becomes available in the establishment'. Bell assesses the wording of this obligation as 'ambiguous'. If interpreted narrowly 'it would only cover situations where a part-time vacancy has arisen and fortuitously a full-time worker seeks to avail of that opportunity'. As the objective of the Framework Agreement is bolder, i.e. the flexible organisation of working time, the obligation should be given a broad interpretation, that 'full-time worker should be entitled to make such a request if the *possibility* of working part-time exists within the establishment.'⁸⁰

In the European Union there are a range of different approaches to regulating transfers between full-time and part-time work.⁸¹ The provisions of German *Law on part-time*

⁷⁹ Schiarra, *New Discourses*, 2011, p. 25, 26.

⁸⁰ Bell, *Achieving the objectives*, p. 273.

⁸¹ In United Kingdom, section 80F of the Employment Rights Act (ERA) 1996 provides a right to request a change in the terms and conditions of employment, including in relation to the hours and times of work. This includes a request to change from full-time to part-time working. The right to request is extended to a qualifying employee if 'his purpose in applying for the change is to enable him to care for someone' (s. 80F(1)(b) ERA 1996.). This right covers parents with children under the age of 17 (or 18 if the child is disabled), and carers of persons over the age of 18 where the employee is married to, in a civil partnership with, or is a relative of the person receiving care (Regs 3A-3B, *The Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002*, SI 2002/3236.) According to academic literature this right seems to be more procedural than substantive. D. McCann, *Regulating flexible work*, Oxford, Oxford University Press, 2008, p. 91; G. James, *The legal regulation of pregnancy and parenting in the labour market*, London, Routledge Cavendish, 2009, p. 48, in Bell, *Achieving the objectives*, p. 274. The employer must comply with certain rules prescribing the handling of the request (e.g. a possibility to appeal against the initial decision). If the request is refused, the employer's reason must fall into one of a list of specified reasons (s.80G(1)(b) ERA 1996.). The role of the Employment Tribunal is limited to whether a request was handled according to the statutory requirements and not based on incorrect facts (s.80H(1) ERA 1996.). The Tribunal may not evaluate the merits of the employer's decision, provided it falls within the list of permitted reasons for refusing the request. There are different opinions on the utility of this right in literature. For more see H. Collins,

work and fixed-term employment contract are a good example of a law that guarantees the worker effective way to achieve a transfer from full-time to part-time work. The right to request working part-time was introduced in 2001 for employees with more than six months' continuous service and where the employer regularly employs more than 15 employees (regardless of the number of trainees, employed by the same employer). The employer has a duty to discuss the request with the employee in order 'to reach an agreement' ('Vereinbarung'). The employer has a possibility to refuse the reduction in working time for 'operational reasons' (i.e. when the reduction of working time can cause a serious damage to the work organisation, the course of work or the security in the enterprise, or the unproportionate costs).⁸²

Compared to the German legislation, the Croatian legislation is lagging far behind, as shall be seen in the following part.

IV. PART-TIME WORK IN CROATIA

What is the state of play in Croatia concerning the obligations prescribed by the Directive? Analysing the rights of part-time workers in Croatian law, it is evident that in line with (the prohibition of discrimination prescribed by) the Directive Croatian Labour Act⁸³ guarantees: right to equal pay and other material rights of part-time workers (according to *pro rata temporis* principle); equivalent conditions for vocational training and education; right to rest and right to paid annual leave; and in general, the same working conditions as for comparable full-time workers. Legal scholars find that the level of statutory protection of part-time workers is much higher than the level guaranteed by the Directive and that this is the reason why part-time work in Croatia is only of marginal importance.⁸⁴ However, in respect of the Directive's objective to promote part-time work,

'The right to flexibility' in J. Conaghan and K. Rittich (eds.), *Labour law, work, and family*, Oxford, Oxford University Press, 2005, p. 99, 119-120. The employees' requests are often accepted in practice, and more frequently in respect of female employees. Therefore, the right to request flexible working covers only a limited group of employees. Bell, *Achieving the objectives*, p. 274. Other states have introduced stronger legal provisions concerning the right of the employee to move to part-time work.

⁸² § 8 Teilzeit- und befristungsgesetz vom 21. Dezember 2000 (BGBl. I S. 1966), das zuletzt durch Artikel 23 des Gesetzes vom 20. Dezember 2011 (BGBl. I S. 2854) geändert worden ist (Law on Part-time Employment Contract and Fixed-term Employment Contracts). For more see M. Schmidt, 'The right to part-time work under German law: progress in or a boomerang for equal employment opportunities', *Industrial Law Journal*, vol. 30, 2001, pp. 335, 340; M. Fuchs, 'Germany: part-time work – a bone of contention' in S. Sciarra et al. (eds.), *Employment policy and the regulation of part-time work in the European Union*, New York, Cambridge University Press, 2004, p. 121.

⁸³ Zakon o radu, *eng.* Labour Act (Official Gazette 149/14)

⁸⁴ Ž. Potočnjak, 'Flexsigurnost radnih odnosa u Hrvatskoj i pravna stečevina Europske unije', *Zbornik Susreta pravnika Opatija '13*, J. Barbić and M. Giunio (eds.), Zagreb, Hrvatski savez udruga pravnika u gosp-

we can paraphrase Bell and say that the Croatian legislator took the half-hearted approach to flexible working.⁸⁵

4.1. Definition of part-time work

According to the Labour Act, full working time in Croatia amounts to 40 hours a week. The Labour Act defines part-time ('nepuno radno vrijeme') in relation to full time as "every working time that is shorter than full working time" (Art. 62/1). It can, therefore, amount to only one hour per week.

Specific duration of full-time work in an enterprise can be regulated by special law(s), collective agreements or in an agreement between the workers' council and the employer or in an employment contract (Art. 61/2). Therefore, not only do the employer and worker have to stipulate working hours in the employment contract, but also specify whether these should be considered full or part working time.

In addition, the contractual parties have to specify weekly and daily working hours.⁸⁶ Part-time workers perform their work according to the schedule of working hours ("raspored radnog vremena")⁸⁷ that depends on the stipulated number of working hours and the distribution of work on one or more days, or 6 days a week etc.

The fact that the Croatian legislator considers part-time work as an exception not in favor of the worker, could be seen from the perspective of the provisions of the Act (Art. 62) regulating the criteria for the accumulation of two or more part-time employment contracts of one worker. First, if part-time worker is employed by two or more employers her/his working time is limited and should not exceed 40 hours per week. However, even the worker whose total part time amounts to 40 hours per week by two or more employers, could sign another employment contract with another employer for the maximum of 8 working hours per week, or 180 working hours per year, provided she/he has a consent from the other employers.

In any case, a part-time worker who wants to conclude an employment contract with a second (or third) employer, has to inform this employer about the existing employment contract(s). Even though not prescribed by the Act, it seems logical and necessary that workers have a duty to inform their first employer too. Because of the particularities of

odarstvu, 2013, p. 309.

⁸⁵ M. Bell, *Achieving the objective*, p. 278.

⁸⁶ V. Jelčić, 'Radno vrijeme', in Ž. Potočnjak (ed.), *Radni odnosi u Republici Hrvatskoj*, Zagreb, Pravni fakultet u Zagrebu i Organizator, 2007, p. 171.

⁸⁷ The working time schedule could be agreed by employment contract, but also by collective agreement, or prescribed in regulation, employer's rules or by unilateral employer's decision (art. 66 LA). M. Zuber, 'Radna i socijalna prava zaposlenih u nepunom radnom vremenu u Hrvatskoj', *Revija za socijalnu politiku*, vol. 13, no. 1, 2006, p. 178-179.

this type of labour relations, the rights and duties of both part-time worker and their employers should be clear and precise in order to enable the fulfilment of rights and organization of work. Therefore, the authors propose *de lege ferenda* clarification to the provision in question.

The above mentioned statistics on the number of part-time workers employed by two or more employers in order to achieve full-time employment confirm that part-time work in Croatia is prevalently involuntary.

The new LA has resolved some doubts concerning the question whether work performed by the part-time worker above the contractually stipulated working hours represents overtime work or not. According to the LA, overtime work is every work a worker has to perform in case of force majeure or extraordinary increase of work load and in similar cases of necessity, based on a written request of employer, or when employee works longer than his full time or part time working hours. (Art. 65).

4.2. Right to equal pay and other material rights

The introduction of the *pro rata temporis* principle as regards the right to equal pay and other material rights of part-time workers is a novelty of the Labour Act of 2014. It took off the financial burden from the employer who is no more obligated to pay off to the part-time worker the same, i.e. full amount as to the full-time worker in case of different material rights.⁸⁸ Nevertheless, the Labour Act allows for derogations from the *pro rata temporis* principle, provided this is stipulated by collective agreements, employer's rules or by an individual employment contract.

Pursuant to the Labour Act, "other material rights" include the seniority award, compensation for annual leave, Christmas bonus and other rights. These rights are often regulated by collective agreements and employer's rules. Compensation for annual leave prescribed by collective agreements as a special annual reward paid by the employer was usually paid in an absolute amount to all workers irrespective of the individual worker's wage.

The right to paid travel expenses as an important material right is usually provided by collective agreements in full amount for part-timers as for workers working full time. Given the different purpose of this material right as compared to the compensation for annual leave or Christmas bonus, and considering its relatively high total amount, the right to a full amount of travel expenses seems to be one of the decisive issues for a worker who is willing to work part-time to accept this type of work.

Concerning possible derogations of the *pro rata temporis* principle, in collective agreements, employer's rules or individual employment contract those derogations should be

⁸⁸ Certainly, it doesn't include the right to a monthly wage, as well as the right to a minimum wage, and a wage compensation in case of absence because of illness, all counted based on the *pro rata temporis* principle.

explicitly prescribed.⁸⁹ It must be noted that the employer's and worker's duty to obligatory social insurance contributions and taxes are calculated in relation to the amount of gross wage. The contributions and taxes for part-time worker are proportionally lower to those for the full-time worker, wherefore they do not represent an additional burden for the Croatian employer.

4.3. Presumption of full-time work

If any right arising from employment relationship is based on a period of previous employment with the same employer, there is an irrefutable statutory presumption that the period of part-time work is a period of full-time work employment (Art. 62/5 LA). The most important examples of such rights are right to a statutory (minimum) period of notice and to redundancy payment in case of dismissal. In both cases, the amount of the wage (or wage compensation) and amount of redundancy payment are counted according to *pro rata temporis* principle.

4.4. A guarantee of the same working conditions

In addition to the already mentioned rights, the Labour Act prescribes a general duty of the employer to guarantee a part-time worker the same working conditions as to a comparable worker (Art. 63). In this case a criterion of an actual comparator is used.

The comparator is a worker who has an employment contract for a full-time work with the same employer, or another linked employer, and who has equal or similar professional knowledge and capabilities and who performs equal or similar work (Art. 63/1 LA). If no actual comparator exists, the duty of the employer is to guarantee a part-time worker the working conditions as prescribed in collective agreement or other regulation that the employer is obligated to apply and that are applicable to a full-time worker who performs similar work and has similar professional knowledge and capabilities. If such rules do not exist, the employer is obliged to guarantee adequate working conditions as to his full-time worker performing similar work and possessing similar professional knowledge and capabilities.

The duty of the employer is to guarantee part-time workers the same conditions for professional training and education as to full-time workers.

⁸⁹ Adapting the employer's rules will be easier than the provisions of the collective agreements. D. Čavrak, et. al. (eds), *Detaljni komentar novoga Zakona o radu*, Zagreb, Radno pravo, 2014, p. 223.

4.5. Access to part-time work

Clause 5 of the Directive requires the elimination of obstacles to part-time work. Croatian law does not entail any provisions regulating (at least generally) the duty to an active role of the state, social partners or individual employers in removing the obstacles to part-time work. Also, at the moment, we are not aware of the existence of these obstacles within Croatian law.

Furthermore, under Art. 62/7 of LA the employer is obligated to consider the request of the worker for change in the duration of working hours agreed by the employment contract: from part-time to full-time and *vice versa*.

However, the employer has this obligation only if a possibility for that type of work in his enterprise actually exists. It is important to note that the wording of the provision is not precise, and consequently the employer's obligation remains unclear and vague. Therefore, we are sceptical in regard to the effectiveness of this provision.⁹⁰

In light of these considerations it seems that much more has to be done in the Croatian legislation, and in policy to reach the objective envisaged by clause 5(3) of the Directive, namely promotion of part-time work by facilitating part-time work within the labour market, including flexibility for workers to move between part-time and full-time work.⁹¹ It should also be mentioned that the job-sharing scheme, as a special case of part-time work, has been offered through different packages of state aid for employment.⁹²

When analysing the constraints in the use of part-time working arrangements it should be borne in mind that as far as flexicurity is concerned the economic, social and labour market reform processes in Croatia during the last decade have not been driven by the guiding principles of flexicurity. One of the critical issues in this respect is an underdeveloped social partnership (social dialog) that has to overcome many barriers, most notably mutual distrust⁹³.

On the other hand, the access to paid work for women could be achieved through:

⁹⁰ In academic literature depicted as a „good but only instructive provision that doesn't impose any obligation to the employer“. Čavrak et al., p. 224.

⁹¹ Cf. M. Bell, *Achieving the objective*, p. 254.

⁹² S. Laleta and V. Smokvina, 'Državne potpore za zapošljavanje u svjetlu Opće uredbe o skupnim izuzećima i iskustava država članica EU', *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, vol. 32, no. 1, 2011., pp. 407-442.

⁹³ As Wilthagen and Tros put it: 'Trust is a major factor here. If levels of trust are low or absent, either among social partners or towards the government, flexicurity strategies can be expected to meet with strong opposition and mistrust ...countries, sectors and companies that lack a tradition and platform for coordination and negotiation seem to be at a disadvantage when it comes to producing flexibilitysecurity trade-offs'. T. Wilthagen and F. Tros, 'The concept of "Flexicurity": A new approach to regulating employment and labour markets', *Flexicurity paper 2003-4*, Tilburg University, 2004., <http://www.nvf.cz/assets/docs/80401adfb0953f74d581d0c0a71ff37/359-0/youth-flexicurity.pdf>, (accessed 5 October 2015).

1. childcare and elderly care (increase of funding for childcare and care for other dependants; providing incentives to companies for building and maintaining childcare facilities; providing support to employers who offer their employees career breaks; child care and other family support services; more liberal conditions for private child care services⁹;
2. flexibility - despite the debate of long-term consequences of part time work for gender equality, there is a need for promotion of flexible working arrangements that allow for a better reconciliation of work and family life in the form of flexible working hours, flexible workplace and flexible work contracts.

V. „VERY ATYPICAL WORK“, CASUAL WORK

Another important issue has surfaced, namely whether casual work should be treated as falling within the scope of part-time work.⁹⁴

Different studies carried out by the *Eurofound*⁹⁵ analyse the legal status of workers engaged in different ‘non-standard forms of work’, that have emerged in the European labour market. Within this broader category, the ‘very atypical’ forms of work have been developed involving ‘precarious situations’: workers with very short (six months or less) fixed-term contracts, zero hours or on-call working, non-written contracts, part-time work of fewer than 10 hours a week (‘mini-jobs’).⁹⁶

Not all of these ‘very atypical’ forms of work are necessarily equivalent to part-time work, but it seems likely that these categories of workers will often be working less than full-time hours.⁹⁷ According to the Eurofound research agriculture, food industry, personal care and cleaning industries, domestic services sectors, real estate sectors, education, health and social work sectors, and construction are the most common areas for ‘very atypical’ work, although overall only 2% of employees said that they worked less than 10 hours per week.⁹⁸

⁹⁴ The Court of Justice has adopted a fairly expansive definition of ‘worker’ that brings casual forms of work within the scope of various aspects of EU law, such as the right to work in another Member State or equal pay for women and men. *Countouris*, pp. 172-181.

⁹⁵ European Foundation for the Improvement of Living and Working Conditions, *Very atypical work*, cit.; European Foundation for the Improvement of Living and Working Conditions, *Flexible forms of work: ‘very atypical’ contractual arrangements*, Dublin, 2010.

⁹⁶ Eurofound, *Flexible forms of work*, pp. 3ff.

⁹⁷ Bell, *Strengthening the protection*, p. 8.

⁹⁸ Eurofound, *Very atypical work*, p. 9; Eurofound, *Flexible forms of work*, p. 10.

As previously mentioned, the Member States can exclude this category of workers from the scope of the ILO Convention 175. But even if this is not the case, the requirement of comparability makes the protection of their rights difficult. In addition, the EU Framework Agreement permits Member States after consulting social partners to ‘exclude wholly or partly from the terms of this Agreement part-time workers who work on a casual basis.’⁹⁹ Again, even in cases where casual workers were not excluded from the scope of the Framework Agreement, “its provisions may be of limited assistance”,¹⁰⁰ as in the above cited case *Wippel*.

In relation to the Part-time Work Directive, the Member States have become more intensively involved in the special regulation of part-time work, pursuing the following objectives: worker protection, employment promotion and flexibilisation of work relations; encouragement of part-time work and moderation of its relation to full-time work; regulation by soft and hard law.¹⁰¹

VI. PART-TIME WORK IN THE CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION (CJEU)

As Ellis pointed out, the case law settled before the Court of Justice of the European Union illustrates a tendency in labour law and social security regimes to exclude the workers whose working hours are low.¹⁰² The prerequisite for this is the existence of “thresholds, in terms of working hours or salary, in order to come within the scope of employment protection legislation (e.g. protection from dismissal) or for entitlement to social security benefits (e.g. unemployment allowance, sick pay).”¹⁰³ There are different national practices in this context.¹⁰⁴

⁹⁹ Clause 2(2).

¹⁰⁰ Bell, *Strengthening the protection*, pp. 8, 9.

¹⁰¹ P. Davies and M. Freedland, ‘The Role of EU Employment Law and Policy’ in S. Schiarra, P. Davies and M. Freedland (eds.), *Employment Policy and the Regulation of Part-time Work in the European Union (A Comparative Analysis)*, New York, Cambridge University Press, 2011, p. 71.

¹⁰² E. Ellis, *EU Anti-Discrimination Law*, Oxford, Oxford University Press, 2005, pp. 91-96.

¹⁰³ Bell, *Strengthening the protection*, p. 4.

¹⁰⁴ The German legislation limited an early retirement scheme to workers who had worked fulltime for three of the previous five years (Case C-77/02 *Steinicke v Bundesanstalt für Arbeit* [2003] ECR I-9027); part-time workers were excluded from membership of occupational pension schemes in Germany (Case 170/84 *Bilka-Kaufhaus GmbH v Weber Von Hartz* [1986] ECR 1607; and in United Kingdom (Case C-78/98 *Preston and others v Wolverhampton Healthcare NHS Trust and others* [2000] ECR I-3201); German legislation required employers to pay workers for a period of up to six weeks when the worker is on sick leave, but this did not apply to workers who worked less than 10 hours per week or 45 hours per month (Case 171/88 *Rinner-Kuhn v FWW Spezial-Gebaudereinigung GmbH & Co KG* [1989] ECR

There is only a limited body of case law under the Part-time (as well as fixed-term) Directive. For the purpose of this study hereinafter are analysed three cases.

In the Case *Mascellani*,¹⁰⁵ the Italian court (Tribunale di Trento) issued a preliminary question concerning the interpretation of Clause 5.2 of the Agreement implemented by the Part-time Work Directive 97/81/EC. This Clause reads as follows: "A worker's refusal to transfer from full-time to part-time work or vice-versa should not in itself constitute a valid reason for termination of employment, without prejudice to termination in accordance with national law, collective agreements and practice, for other reasons such as may arise from the operational requirements of the establishment concerned."

The request for a preliminary ruling has been made in proceedings between Ms Mascellani and the Ministero della Giustizia (Ministry of Justice) concerning a decision ordering the conversion of her part-time employment relationship into a full-time employment relationship. The applicant, Teresa Mascellani, was an employee of the Italian Ministry of Justice, working at the Court in Trento on a part-time basis, spread over 3 days a week. She worked part-time since 28 October 2000. Under Article 16 of Italian Law No 183, the public administration may, within 180 days of the entry into force of Law No 183/2010 and subject to the principles of fairness and good faith, re-evaluate decisions permitting the conversion of full-time employment relationships into part-time employment relationships where such decisions were adopted prior to the entry into force of the Decree-Law No 112 of 2008. The Ministry of Justice re-examined part-time arrangements granted to the applicant and, in accordance with the mentioned Article 16 of Law No 183, unilaterally terminated that arrangement by imposing a full-time working arrangement spread over six days (decision effective as of 1 April 2011). On 16 March 2011 Ms Mascellani informed the Ministry of Justice that she opposed the conversion of the part-time arrangement into a full-time employment. By a new decision (of 21 March 2011) the District Court in Trento ordered the applicant to comply with the new working arrangements. The applicant brought an action before the Ordinary Court in Trento seeking an annulment of the above mentioned decisions of the Ministry of Justice and the District Court in Trento. She argued that part-time working enables her to use her free time to care for her family and undertake vocational training.

2743); a provision of German law that part-time work would only be counted as two-thirds of normal working hours when calculating the length of service of workers (length of service was relevant to the possibility for promotion) (Case C-1/95 Gerster v Freistaat Bayern [1997] ECR I-5253); a provision of a German collective agreement for public sector employees that an annual bonus of one month's extra salary was not payable to those working less than 15 hours per week (Case C-281/97 Krüger v Kreiskrankenhaus Ebersberg [1999] ECR I-5127); a provision of a German Federal civil service collective agreement restricting severance payments to those who worked at least 38 hours per week (Case C-33/89 Kowalska v Freie und Hansestadt Hamburg [1990] ECR I-2591).

¹⁰⁵ Case C-221/13 Teresa Mascellani v Ministero della Giustizia [2013].

The ECJ ruled that the Framework Agreement on part-time work, in particular Clause 5.2 thereof, must be interpreted as meaning that, in circumstances such as those in the main proceedings, it does not preclude national legislation pursuant to which the employer may order conversion of a part-time employment relationship into a full-time employment relationship without the consent of the worker concerned.

In a recent case *Österreichischer Gewerkschaftsbund v Verband Österreichischer Banken*¹⁰⁶ the Austrian trade union in the banking sector initiated proceedings before the Austrian Supreme Court against the employers' representatives in the banking sector. The issue at hand was that part-time workers falling within the scope of the applicable collective agreement in the banking sector ("bank staff and bankers") were entitled to only an amount of 'dependent child allowance' which was calculated *pro rata* on the number of hours worked. The 'dependent child allowance' is a social benefit paid by the employer to meet part of the employee's expenses for the maintenance of his/her child. The trade union held that the use of the principle of *pro rata temporis* as is laid down in the Directive on Part-time Work (Clause 4.2.) was not appropriate with regard to this allowance.

The Austrian Supreme Court referred questions to the ECJ for preliminary ruling, asking whether the principle of *pro rata temporis* should be applied to this allowance based on the (appropriate) nature of that benefit. If this is the case, could the disadvantage suffered by part-time workers that results from making a reduction in their entitlement to the dependent child allowance in proportion to their shorter working hours be objectively justified under Clause 4.1 of the Framework Agreement? The third question referred to the ECJ was that if the *pro rata temporis* should not be applied and no objective justification could be given for its use, does Article 28 of the Charter of Fundamental Rights of the European Union render invalid all the provisions of the collective agreement relating to that area (in this case, child allowance) if the national practice is to render invalid certain parts of the collective agreement when only a point of detail in the collective agreement breaches an EU law rule?

The ECJ observed that the dependent child allowance is not a benefit provided for by law and paid by the State, but is paid by the employer pursuant to a collective agreement. Therefore, it cannot be treated as a 'social security benefit' within the meaning of EC Regulation 883/2004 on the coordination of social security systems, even though its objectives are similar to those of certain benefits provided for by this Regulation. Nevertheless, the child allowance does constitute (a part of) 'pay' to the worker, and as such it is determined by the terms of the employment relationship agreed between the worker and the employer. Consequently, for part-time workers the calculation of the dependent child allowance in accordance with the principle *pro rata temporis* is objectively justified, within the meaning of Clause 4.1 of the Framework agreement on part-time work, as the ECJ

¹⁰⁶ Case C-476/12 *Österreichischer Gewerkschaftsbund v Verband Österreichischer Banken* [2012].

has already decided in other cases.¹⁰⁷ It was also deemed appropriate within the meaning of Clause 4.2, since the dependent child allowance as an advantage paid in cash to workers is therefore a divisible benefit.¹⁰⁸

The ECJ ruled that the Clause 4.2 of Directive 97/81/EC must be interpreted as meaning that principle *pro rata temporis* applies to the calculation of the amount of a dependent child allowance paid by an employer to a part-time worker pursuant to a collective agreement such as that applicable to the employees of Austrian banks and bankers. Therefore, there was no need to answer preliminary questions 1 and 2.

Finally, in the Case *Cachaldora Fernández v Instituto Nacional de la Seguridad Social (INSS), Tesorería General de la Seguridad Social (TGSS)*¹⁰⁹ the Spanish national social security institutions¹¹⁰ calculated the permanent invalidity pension of Ms Cachaldora Fernández taking into account the periods during which she did not pay contributions to the social security scheme relying on reduced contribution bases, as she had worked on a part-time basis during the period immediately preceding that contribution gap. The High Court of Justice in Galicia asked the ECJ whether such a procedure is contrary to Article 4 of Directive 79/7/EEC¹¹¹ and Clause 5(1)(a) of Directive 97/81/EC. The Court ruled that Directive 97/81/EC did not apply in this case. The Court has based its decision on the following arguments. The preamble of the Framework Agreement relates to the ‘employment conditions of part-time workers, recognising that matters concerning statutory social security are for decision by the Member States’. According to the ECJ case law the term ‘employment conditions’, within the meaning of the Framework Agreement, covers pensions which depend on an employment relationship between worker and the employer, and consequently, statutory social security pensions (determined less by that relationship than by considerations of social policy) are excluded.¹¹² In the present case the pension at issue was proved to be statutory social security pension and consequently could not be regarded as an ‘employment condition’. Therefore, it does not fall within the scope of the Framework Agreement. According to the Court “an interpretation of ‘obstacles of a legal ... nature’, as referred to in Clause 5(1)(a) of the Framework Agreement,

¹⁰⁷ Case C-229/11 and C-230/11 *Heimann and Toltschin* [2012], para. 34.

¹⁰⁸ See by analogy, Cases C-395/08 and C-396/08 *Bruno and Others* [2010], para. 34, Case C-268/06 *Impact* [2008], para. 116.

¹⁰⁹ Case C-527/13 *Cachaldora Fernández v INSS, TGSS* [2014] OJ C 9

¹¹⁰ National Institute of Social Security and Social Security General Fund.

¹¹¹ Article 4(1) of Directive 79/7/EEC must be interpreted as not precluding a rule of national law which provides that the contribution gaps existing within the reference period for calculating a contributory invalidity pension, after a period of part-time employment, are taken into account by using the minimum contribution basis applicable at any time, reduced as a result of the reduction coefficient of that employment, whereas, if those gaps follow full-time employment, there is no provision for such a reduction.

¹¹² Case C-385/11 *Elbal Moreno* [2012], para. 21.

under which Member States would be forced to adopt, outside the area of employment conditions, measures relating to a pension such as that at issue in the main proceedings” (before the Spanish High Court of Justice in Galicia), “would amount to imposing general social policy obligations on those Member States concerning measures that fall outside the scope of the Framework Agreement.”¹¹³

VII. MEASURES ENCOURAGING PART-TIME WORK

The labour market regulation tended to encourage the growth of part-time work and introduce measures to improve its quality. Many governments have introduced various measures to facilitate or encourage part-time work, especially in countries with a high unemployment rate. Some of these promotional measures target discrimination of part-time workers in comparison to full-time workers and reduce the fixed costs associated with part-time employment. They consist in attenuating administrative barriers and targeting income tax issues, social security systems, unemployment benefits, job-sharing, career prospects and vocational training,¹¹⁴ as well as specific categories of workers, e.g. those with family responsibilities or older workers,¹¹⁵ or those with disability or certain illnesses, as a way of a reasonable accommodation.

A group of measures directly addresses the cost of part-time work, either generally or as a means of providing access to a labour market to new entrants. They consist in subsidies for part-time employment through tax relief or reduced social security contributions. In addition to their positive effects, they can give rise to an increase of proportion of involuntary part-time workers, i.e. underemployment.

The regulatory and institutional framework varies considerably across countries of the EU. Some regulations have a direct effect on the rate of part-time work. They are legally binding and limit the use of part-time work, i.e. the employer has the right to deny an employee’s request to work part-time.¹¹⁶ The second set of regulations has an indirect

¹¹³ Judgment of the Court, 14 April 2015, par. 39. Moreover the provision of Spanish law does not affect all part-time workers, but a group of them who had a gap in their contributions immediately after a period of part-time work. Therefore, the Court thinks that this provision, due to the random nature of the impact of that provision on part-time workers, cannot be regarded as a legal obstacle likely to limit the opportunities for part-time work. (par. 40).

¹¹⁴ Measures such as extension of social security coverage to part-timers or measures that depend on annual rather than weekly working hours affect employers. These measures are aimed at bringing the entitlements to social benefits for part-time workers in line with those of full-time workers. Bastelaer et al., p. 5.

¹¹⁵ Bollé, cit.

¹¹⁶ Certain types of regulation Also, V. Genre et al., ‘A widening scope for non wage components in collective bargaining in the EU?’ in: G. Fagan, J. Morgan and F. P. Mongelli (eds.), *Institutions and wage formation in the New Europe*, Cheltenham, Edward Elgar, 2003, pp.134-173.

effect on part-time employment through different financial incentives for firms to offer part-time work as well as for employees to accept it.¹¹⁷ A third set of regulations and institutions influence employment in general, but may have an indirect impact on part-time employment too.¹¹⁸ Those provisions belong to the child benefit/care system and unemployment benefit systems. Both may create an ‘unemployment trap’.¹¹⁹

Taking into account the previously said, it is obvious how difficult it is to influence the quantitative development of atypical part-time work. At a qualitative level that includes social rights, labour law, wage issues, there is more potential for political influence in terms of “context governance”.¹²⁰ In order to disconnect part-time work from precarious working and living conditions, the following policy measures could be proposed as the most essential:

- more employee-orientated flexibility;
- the right to change from full-time to part-time and *vice versa*;
- full inclusion in the social system and integration under labour law regulations;
- breaking down traditional role models; expansion of childcare institutions;
- reduction of overtime, working time and non-permanent working contracts; reducing the risks of future precarious conditions.¹²¹

The question thus arises as to whether the term “normal” should refer to any relations to traditional working patterns? A possible answer is that “normal” should be used for

¹¹⁷ Labour laws may facilitate the conversion of full-time jobs into voluntary part-time employment with the aim of reconciling personal and professional lives. J. Ginn and S. Arber, ‘How does part-time work lead to low pension income’, in O’Reilly and Fagan (eds.), *Part-time prospects*, pp. 156–174.

¹¹⁸ G. Laroque and B. Salanié, “Participation, Fertility and Financial Incentives in France”, Paper presented at ECB/CEPR workshop “What Explains the Pattern of Labour Supply in Europe”, Frankfurt, June 2003, cited in H. Buddelmeyer, G. Mourre and M. Ward, *The Determinants of Part-Time Work in EU Countries: Empirical Investigations with Macro-Panel Data*, IZA DP, no. 1361, 2004, p. 10, <http://repec.iza.org/dp1361.pdf>, (accessed 3 October 2015).

¹¹⁹ For mothers with young children it has been argued that the probability of (re-)entering the labour market, either in the form of full-time or part-time employment, is strongly linked with the system of child benefit/care arrangements in place. In general, the provision of child benefits can create an “unemployment trap” if benefits are means tested. Moreover, some child benefit systems grant additional income to parents who renounce work in order to take care of their young children. On the other hand, the lack of affordable (subsidized) childcare may represent a major disincentive to taking up employment. Similarly, unemployment benefit systems (together with other benefits) may create an ‘unemployment trap’ through high net replacement rates and long benefit duration.

¹²⁰ M. Fink, ‘Atypische Beschäftigungsverhältnisse und deren politische Steuerung im internationalen Vergleich’, *Österreichische Zeitschrift für Politikwissenschaft*, no. 39, 2004, pp. 401–415, cited in T. Hinterseer, ‘Part-time work: Atypical? Precarious? Normal?’, *European Journal of Futures Research*, 2013, <http://link.springer.com/article/10.1007%2F940309-013-0018-1/fulltext.html#CR37>, (accessed 5 September 2015).

¹²¹ Hinterseer, cit.

all working arrangements which guarantee a high amount of social security and individual freedom for employees. Flexible working time models need to adopt a more employee-friendly orientation with more time-autonomy and self-determination. To achieve this goal, flexibility must be managed and controlled politically.¹²² According to Rodgers, it is precisely this combination of institutions and policies which constitutes a social model, whereas an important lesson to be learned from successful experiences in Europe and elsewhere is that the broad participation and social dialogue in the process are of vital importance.¹²³

VIII. CONCLUSION

Part-time work has become an important instrument of the national legislators to create new jobs and to respond to employers' demands for increased flexibility. For workers it can be a „bridge“ between employment and inactivity and *vice versa*, as well as an instrument to achieve a better balance between working life and family responsibilities.

Since atypical employment, such as part-time work, is probably not going to be the first choice for the companies or for people looking for work, the interests of the parties involved are likely to differ, which can result in precariousness of this type of work. Consequently, the law regulating atypical employment relationship has a complex role to play today: the institutional framework should help to promote, or at least not hinder the creation of the desired voluntary part-time work arrangements and to put those workers on equal footing with „standard“ workers. Hence, the underlying principle should be their integration, not exclusion.

Recognising the advantages of part-time work for workers and employers, both the Convention and Directive have laid down the principle of non-discrimination of part-time workers and access to part-time work. The principle of non-discrimination as defined by the Directive includes the ban on less favourable treatment (in relation to a 'comparable full-time worker'), unless justified on objective grounds, and the recourse, where appropriate, to the principle of *pro rata temporis*. This principle has been shaped as a justiciable right.

Clause 5 on progressive elimination of discriminatory requirements for access to particular conditions of employment and other obstacles which may limit the opportunities for part-time work imposes the obligation to Member States to act in order to remove discriminatory laws and practice together with social partners, in their sphere of compe-

¹²² Hinterseer, cit.

¹²³ G. Rodgers, 'Labour Market Flexibility and Decent Work', *DESA Working Paper*, No. 47, 2007, http://www.un.org/esa/desa/papers/2007/wp47_2007.pdf, (accessed at 3 September 2015)

tence and through procedures prescribed in collective agreements. Contrary to the principle of non-discrimination, the Member States consider these provisions as non-binding. Consequently, in the absence of a clear definition in national legislations doubt is cast on the guarantee of individual rights of part-time workers. As Schiarra points out, it is an interesting but unclear combination of regulatory techniques and hard law principles in a soft law environment.

The Croatian legislator follows the same path. Although the Labour Act prescribes the right of the worker to request flexible working in line with the Directive, it neither requires from the state and social partners to remove the obstacles to part-time work, nor gives an enforceable guarantee to the worker to move from part-time to full-time work or *vice versa*, wherefore, new mechanisms *de lege ferenda* are needed. The obligation of the employer to consider the request of the worker to change from part-time to full-time should be defined more precisely. Considering the other side of the coin, policy-makers should do more in the implementation of different measures in order to facilitate part-time work within the labour market.

As is the case in other European countries, women work mostly as part-time workers in Croatia. The first problem is the misuse of certain flexible forms of work and at the same time underuse of other non-standard employment arrangements. The second problem is related to the lack of awareness that women are overrepresented in this kind of employment, not as a consequence of their will, but due to reduced workload or misuse of some forms of work, which means that they hold temporary, insecure or even informal jobs. In other words, women hold weaker positions in the labour market, which makes them more vulnerable to poverty and external shocks, such as the recent economic crisis.

The Croatian society must first and foremost strengthen institutional protection of women's rights, encourage the work of women's think-tank associations, develop atypical forms of employment contracts and undertake a transition from fixed to flexible working hours. Such an approach, coupled with changes to the educational policy, education of judges and labour inspectors in the domain of gender equality, as well as more intensive and more responsible role of the media, strengthening of labour courts and speeding up their activity can lead to a breaking down of stereotypes and achieving equal distribution of responsibilities in family and working environment, affirming the principles and values of equality as an inseparable part of individual's integrity in general.

As previously mentioned, part-time work has been observed as a phenomenon that belongs to the family-friendly labour environment, mostly reserved for women with family responsibilities, or as a means to enter or exit gradually from the labour market. However, it is vital to emphasize that it can also be a useful device for another vulnerable category of workers, namely those with disabilities or illnesses.

The ILO definition of five key dimensions for a proper working time include healthy, family friendly and productive working time, gender equality by working time and choice and influence regarding working time. For most of Europe's part-time workers, these goals are still far from achieved. Needless to say, in respect of part-time workers in Croatia much remains to be done as well.

EDIT KAJTÁR, PH. D.*

THINK IT OVER! PRE-EMPLOYMENT SEARCH ON SOCIAL NETWORKING SITES¹

Abstract:

The rapid spreading of social networking sites such as Facebook, Twitter or WhatsApp has a profound impact on the workplace. Pre-employment search on these sites is common practice, yet it remains in the grey zone of law. This paper provides thoughts on the nature of these relatively new, digital channels of communication and examines the potential dangers of pre-employment screening from the angle of privacy protection and anti-discrimination. It examines how the right to privacy is balanced against the employers' lawful rights and interests such as to avoid vicarious liability and to recruit the best possible employees. Viewpoints from different backgrounds are discussed, highlighting the key patterns, legal lacunas and possible solutions.

Keywords: *social networking sites; privacy; employment*

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I. PLENTY OF INFORMATION ONLY A FEW CLICKS AWAY

It comes without surprise that a Google search is part of the recruitment process in many workplaces. It is a fast, easy, cost effective and overall, a very convenient way to find information about the job applicants. With a few clicks of the mouse the employer may not only check the candidates' background and verify some of the facts stated in the CV (professional experience, skills, qualifications etc.) but also acquires his first impressions of the future employee.² Given the wide spread use of social networking sites (SNSs), the Google search will probably lead to a profile such as Facebook or Twitter. Very often it is this stage where the important decision whether a candidate will evolve to employee is made. Profiles are tale-telling. Posts full of spelling mistakes speak volumes about the lack of written communication skills and most certainly ruin the effect of even the most impressive motivation letter. No matter how nice the recommendations attached to the application are, pictures suggesting drug abuse or extensive use of alcohol, or offensive comments about former company and colleagues will get the application shipwrecked. The employers most certainly look for red flags when they type the applicants name in the Google browser. However, the information they encounter (most cases without the authorisation or even previous knowledge of the owner of the profile) is more than warning signs. The posts, comments, pictures, even the music shared reveal a multitude of information on the lifestyle, political and spiritual views, family status or sexual orientation of the candidate. As we can see these data are not work related, on the contrary, they concern the candidate's personal life, often the most private aspects of it.

II. SOCIAL NETWORKING SITES³

Users of SNSs step outside their immediate family circle and enter the realm of virtual social interactions; they introduce themselves by sharing information; connect and communicate with other each other. SNSs are products of what the Spanish sociologist and cybernetic culture theoretician Manuel Castells calls "global network society", a society where the guiding principle is "being online".⁴ SNSs differ from physical places in many respects: they are mediated, and potentially global, searchable, and the interactions may

² S. D.Sanders, 'Privacy is Dead: The Birth of Social Media Background Checks', *S.U. L. REV.*, Vol. 39, Issue 1, 2012, p. 243.; V. R.,Brown, E. D.Vaughn, 'The Writing on the (Facebook) Wall: The Use of Social Networking Sites in Hiring Decisions', *Journal of Business and Psychology*, Vol. 26, Issue 2, 2011. p. 219.

³ Social networking sites are typical examples of the so-called Web 2.0 sites that enable users to interact with each other in a virtual community. The idea behind these sites is to connect people like friends; alumni etc. with one another on an informal basis and make communication more effective.

⁴ M. Castells, *The Rise of the Network Society: The Information Age: Economy, Society and Culture*, Vol. 1, Chichester, 2nd ed. Blackwell, 2010. p. 406.

be recorded or copied and also these sites may have invisible audiences or audiences not present at the time of the conversation.⁵ The popularity of these sites lies in their social functions. By giving users a forum in which they can create social identities, build relationships and accumulate social capital, Facebook and other SNSs fulfil basic human needs.⁶ This explains why in many cases employees and job candidates themselves contribute to the invasion of their privacy by oversharing.

Their placement on a “from private to public” spectrum proves to be difficult. In my opinion, because of their distinctive features, the objectives they serve and the environment they operate in SNSs have public, semi-public and private aspects at the same time. Images in academic literature attempting to capture posts with relevance to the employment relationship include “new water cooler” and “notice board of the staff canteen”. In the UK even if SNS profiles are set to private, there can generally be no expectation of privacy, the posts will be deemed to be public. In other countries the size of the intended audience plays a relevant role. However, even if SNSs posts are intended to be accessible to a limited audience, case law on “Facebook firings” from in and outside the European Union shows that privacy is of relative value. The semi-public aspect is also supported by the fact that these sites operate in a virtual space, thus whatever is put on the platform is relatively easy to search, reach, share and trace. The more limited the audience, the closer the information shared is to being considered private. One-to-one functions such as mail or chat should be treated as private and enjoy legal protection accordingly.

III. PRIVACY CONCERNS

Due to their inherent characteristics, SNSs pose a challenge to traditional privacy regulations, which are usually concerned with protection of citizens against unfair or non-proportional processing of personal data by the public administration, and businesses, and offer only very few rules governing the publication of personal data at the initiative of private individuals.⁷

Within the European context, the legal assessment of a pre-employment Google search is shaped by the principles of data protection enshrined in documents such as: Directive 95/46/EC⁸; the OECD Guidelines on the Protection of Privacy (hereinafter: OECD Guide-

⁵ D. Boyd and N. Ellison, ‘Social Network Sites: Definition, History, and Scholarship’, *Journal of Computer-Mediated Communication*, Vol. 13, Issue 1, 2008., p. 210.

⁶ J. Grimmelman, ‘Saving Facebook’, *Iowa Law Review*, Vol. 94., p. 1206.

⁷ International Working Group on Data Protection in Telecommunications. p. 1.

⁸ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data OJ L 281 of 23.11.1995.

lines); the UN Guidelines⁹; the Council of Europe's Convention No. 108 (hereinafter: CoE Convention) as well as the national employment and data protection provisions. When it comes to the level of collective agreement, pre-employment data protection issues are seldom tackled.¹⁰ Below application of the following most important principles are examined: fair and lawful processing (as an overarching principle); data reduction and data economy; permission; purpose; direct collection; access; accuracy and limitation.

The overarching twin principle of fairness and lawfulness is the number one principle of the UN Guidelines, it is also enshrined in Art. 5(a) of the CoE Convention; in Art 6(1) (a) of Directive 95/46/EC. It is a crucial requirement, one that is embodied in numerous specific sub-requirements. It covers but it is not limited to existence of a fair and legal grounds. Art. 7 of Directive 95/46/EC lists six potential options; where personal data can be processed:

- a) based on the data subject's unambiguous consent or processing is necessary for:
- b) performance of a contract with the data subject;
- c) compliance with a legal obligation imposed on the controller;
- d) protection of the vital interests of the data subject;
- e) performance of a task carried out in the public interest; or
- l) legitimate interests pursued by the controller, subject to an additional balancing test against the data subject's rights and interests.

Naturally, irrespective of the existence of a legal ground, data processing must always comply with the principle of necessity, proportionality, purpose limitation and all the other general requirements discussed later in this paper. Out of the six grounds, those listed in (a), (b) and (f) appear to be reasonable candidates for justifying a pre-employment search on SNSs. Relying on Art. 7(a) is very shaky ground as the genuine nature of consent is always questionable due to the power imbalances of the parties. Though in itself it is – in my opinion – an insufficient justification, attaining consent complies with other data protection principles such as transparency. Art. 7(b) provides a legal ground in situations where “processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract”. This article covers pre-contractual relations, provided that steps are taken at the request of the data subject, rather than at the initiative of the controller or any third party. However, detailed online background checks are unlikely be considered as necessary steps made at the request of the data subject.

⁹ Guidelines for the Regulation of Computerized Personal Data Files, as adopted by General Assembly resolution 45/95 of 14 December 1990.

¹⁰ G. L. Szóke (ed.), *Privacy in the Workplace: Data Protection Law and Self-regulation in Germany and Hungary*, HVG-ORAC, Budapest, 2012; I.Böröcz, 'A munkahelyi érdek-összeütközés rendhagyó formája: munkavállalók megfigyelése pró és kontra', *Infokommunikáció és Jog*, Vol. 10, Issue 55, 2013, pp. 99-101.

The employer may also try to rely on Art. 7(f). To select the best possible candidate is a legitimate interest. Careful selection is also important because the employer is liable for the damage caused by actions of employees committed within the scope or course of employment. To avoid vicarious liability and “negligent hiring” claims the future employer has to take reasonable action to examine the candidate’s background, to gain relevant information, verify documentations etc. However it has to be balanced against the candidate’s rights and interests (to express him- or herself freely, right to private life, etc.). It is also noteworthy that less intrusive measures are available to check the validity of the statements of the candidate. The employer may (with the consent of the candidate) ask for a reference about the former employee or search public databases (classified directory for example).

According to the principle of data reduction and data economy (also called as principle of necessity, non-excessiveness or proportionality by the various data protection instruments) data processing systems must be designed and selected to collect, process and use as little personal data as possible (see e.g. Art. 6(1)(c) and Art. 7 of Directive 95/46/EC, Art. 5(c) of the CoE Convention). This principle is infringed as Facebook reveals a multitude of mostly non-work related information.

The collection, processing and use of personal data are only admissible if either it is expressly permitted by legal provision or the data subject has expressly consented in advance. Generally no legal provision exists (except in relation to certain specific categories of workers) and the permission is also missing. In line with the principle of purpose, the purposes for which data is to be processed or used must be defined at the time of collection and personal data can only be processed and used in accordance with this purpose (See para 9 of the OECD Guidelines; Principle 3 of the UN Guidelines; Art. 5(b) of the CoE Convention and Art 6(1)(b) of Directive 95/46/EC). In our case the purpose is most likely the selection of the best possible candidate and verification of facts stated in the CV.

According to the principle of direct collection, personal data must be collected from the data subject, unless an exemption applies by law, or the collection from the data subject would require disproportionate effort and the justified interests of the data subject are not affected. Personal data in our case is not collected from the candidate, and as the collection from the data subject would not require disproportionate effort, the exception rule does not apply either, consequently this principle is violated.

Candidates have the right to know what information is collected about them, for what reason and how it will be used. The principle of access and openness is violated, because the data subject may not access the information that is stored concerning him or her after the Google search. The principle of accuracy (data quality and correctness) is enshrined in para 8 of the OECD Guidelines; Art. 5(d) of the CoE Convention and Art 6(1)(d) of Directive 95/46/EC. Assessing someone’s potential employability based on an online profile may produce false results. Profiles do not necessarily provide an accurate and up to

date picture of the individual. As it was demonstrated in the French test case cited above, pre-employment screens are often superficial and thus are very likely to lead to speculative conclusions. The principle of accuracy would require correction of incorrect personal data, however, as the candidate is unaware of the search let alone its result, he or she clearly cannot demand the employer to correct inappropriate data. Finally, the principle of limitation would require the employer to erase the personal data collected from the Internet once it is no longer necessary for the purpose for which it has been collected (i.e. the job is filled). This is generally unlikely to happen in practice.¹¹

IV. PRE-EMPLOYMENT GOOGLE SEARCH AS POTENTIAL DISCRIMINATION CASE

Google search does not only raise privacy concerns, it may also lead to discriminatory practice. According to EU regulations as well as national employment and data protection laws employers are only permitted to ask for personal information about the applicant's if the information is relevant to the specific job.¹² The main problem with Google search is that the employer also collects information that he or she would not have the right to obtain during a job interview. In addition this happens without the candidate's knowledge. Googling may very well lead to discrimination and unethical practices, applicants can be eliminated because the content they post online is considered to be inappropriate or it simply does not fit with the image of the company. A huge body of academic literature is dedicated to protection against discrimination including prohibition of discriminatory hiring (job advertisements and interviews infringing the principle of equal treatment etc.), the potential danger in a Google search from the perspective of discrimination is worthy of our attention as well.

To highlight the relevance of the issue I would like to speak of a recent field study conducted by academics of Université Paris Sud. During one year from March 2012 to March 2013 the researchers handed in more than 800 applications for real accountant job offers

¹¹ See for instance L. Pók, 'A közösség hálójában – Közösségi oldalak munkajogi vonatkozásai', *Infokommunikáció és Jog*, Vol. 48, Issue 1, 2012, pp. 10–17.; L.Horváth and A.Gelányi, 'Lájkolni vagy nem lájkolni? A közösségi oldalak használatának munkajogi kérdései', *Infokommunikáció és Jog*, Vol.8, Issue 43, 2011, pp. 60-66; J.Németh, 'Az internet nem felejt – közösségi média-használatra alapított munkáltatói és munkavállalói felmondások', *Infokommunikáció és Jog*, Vol. 10, Issue 55, 2013, pp. 96–98. 96.; For an overview on Hungarian data protection law at the workplace see e.g. M.Arany Tóth, *A munkavállalók személyes adatainak védelme a magyar munkajogban*. Bába K. Szeged, 2008; J.Hajdú, *A munkavállalók személyiségi jogainak védelme. Az adatvédelem alapkérdései*. Szeged, Pólay Elemér Alapítvány, 2005; Jóri A. (ed.), *Adatvédelem és információszabadság a gyakorlatban*, Budapest, CompLex, 2010.

¹² J. J.Abrantes, *Algumas notas sobre o direito do trabalhador à reserva da vida privada*, in Amaral, F. et al (ed.), *Estudos Comemorativos dos 10 anos da Faculdade de Direito da Universidade Nova de Lisboa*, Vol. II, 2008., pp. 241-248.

in the greater Paris area. They adjusted the content of Facebook accounts of the candidates to manipulate the perceived origins of applicants (home town and language spoken). The twist of the experiment was that they only manipulated the Facebook profiles, not the application material, this way they could see the impact of pre-employment screening on the number of call-backs received from employers. The test applicant received a third fewer call-backs compared to the control applicant. During the course of the experiment they modified the profiles so that the language spoken by the applicants could only be reached by clicking on a tab. The results were surprising. In subsequent months, the gap between the two applicant types shrank and virtually disappeared suggesting that the future employers based their hiring decision on a search that only concerned the very surface of the profiles.¹³

The push toward the emergence of legal parameters to control the privacy aspects of SNSs in the employment context is a visible trend in the US. Lawyers warn of increasing numbers of “failure to hire” lawsuits if it can be proved that employers are using SNSs to gather information on the candidate’s protected characteristics (such as marital status, religion, race, sexual identity, political opinion or national origin) as a basis for hiring decisions.¹⁴ To give an example: In 2007 the University of Kentucky was looking for a founding director for the university’s astronomical observatory. C. Martin Gaskell applied for the position and being the best candidate by far, he stood a high chance of getting hired. Yet, at a certain point along the selection procedure the hiring committee found his blog, which discussed astronomy and the Bible from a creationist viewpoint. The same committee that had previously noted that Gaskell was “clearly the most experienced” candidate and had “already done everything [the hiring committee] could possibly want the observatory director to do,” recommended another candidate for the position. Gaskell sued for religious discrimination.¹⁵

V. POSSIBLE RESPONSES

The assessment of a pre-employment google search depends on the privacy awareness of the given country. In Finland the Data Protection Ombudsman explicitly stated

¹³ M. Manant, S. Pajak, N. Soulié, ‘Online Social Networks and Hiring: A Field Experiment on the French Labor Market’, *Social Science Research Network*, 2014., <http://dx.doi.org/10.2139/ssrn.2458468>, (accessed: 12 December 2014.)

¹⁴ R. L. Waring and F. R. Buchanan, ‘Social Networking Web Sites: the Legal and Ethical Aspects of Pre-Employment Screening and Employee Surveillance’, *Journal of Human Resources Education*, Vol. 4, Issue 2, 2010. p. 19.

¹⁵ Gaskell v. Univ. of Kentucky, No. CIV.A. 09 -244-KSE, 2010 WL 4867630 (E.D. Ky. Nov. 23, 2010). in K. Carlson, ‘Social Media and the Workplace: How I Learned to Stop Worrying and Love Privacy Settings and the NLRB’, *Florida Law Review*, Vol. 66, Issue 1, 2014, p. 484. The case was later settled.

that employers cannot use Internet search engines such as Google to collect background information on job candidates.¹⁶ He said: “According to the Privacy in Working Life Act, employers can only view personal data provided by their employees, and this includes data about job applicants”. The response was a lot milder for instance in the UK. The Employment Practices Code published by the UK Information Commissioner’s Office simply advised employers to “[e]nsure there is a clear statement on the application form or surrounding documents, explaining what information will be sought and from whom” and “explain the nature of and sources from which information might be obtained about the applicant in addition to the information supplied directly by the applicant”¹⁷.

The above mentioned reactions came from expert bodies; however, we can also find hard law responses. A draft bill on “Arbeitnehmerdatenschutz” was produced on 25 August 2010 in Germany. The draft prohibited employers from using personal SNSs to screen applicants, but allowed the use of business-focused networks when conducting background checks.¹⁸ The Explanations by the Home Office on Internet searches of the employer highlighted that the employer may, in principle, gather information on an applicant from all publicly available sources (e.g. newspapers or Internet). Regarding online social networks, as far as they serve private use (e.g. Facebook, schülerVZ, StudiVZ or StayFriends), the employer may not use them to get information. Despite this, the employer may benefit from searching those SNSs that are intended to represent its members professionally (e.g. Xing, Linked In).¹⁹ Due to lack of consensus the draft was rejected in 2013.

VI. LESSONS TO BE LEARNED?

The arrival of social networking sites is perhaps one of the biggest changes in the workplace over the last decade. The spreading of these new channels of communication has both beneficial and adverse effects. They can combat inequality and accelerate human

¹⁶ W. McGeeveran, ‘Finnish Employers Cannot Google Applicants’, <http://blogs.law.harvard.edu/info/2006/11/15/finnish-employers-cannot-google-applicants/#more-187> (Accessed: 12 November 2015)

¹⁷ Information Commissioner’s Office, *Data Protection. The Employment Practices Code*, 2011, https://ico.org.uk/media/for-organisations/documents/1064/the_employment_practices_code.pdf, (accessed: 14 December 2015)

¹⁸ See § 32 Absatz 6 BDSG Access from, <http://www.arbeitnehmerdatenschutz.de/Gesetz/32-BDSG-Datenerhebung-vor-Beschäftigungsverhältnis.html>, (accessed: 14. December 2015)

¹⁹ <http://www.arbeitnehmerdatenschutz.de/Gesetz/32-BDSG-Datenerhebung-vor-Beschäftigungsverhältnis.html>, (Accessed: 14 June 2015); See also: P.Gola, ‘Von Personalakten- und Beschäftigtendaten’, *Recht der Datenverarbeitung*, Vol. 27, Issue 2, 2011; J. T. Lelley and F. Müller, ‘Ist § 32 Abs. 6 Satz 3 BDSG-E verfassungsmäßig?’, *Recht der Datenverarbeitung*, Vol. 27, Issue 2, 2011.

progress; the freedom of assembly and association, the right to strike²⁰ can be exercised not only traditionally but also on a virtual level on SNSs or other virtual platforms. It is undeniable that social networking sites provide a new forum for people (and workers) to communicate about different issues; they shape identity and create new cultures. However, because they make information relatively easy to access SNSs provide employers additional opportunities to monitor and inspect the job candidates conduct, on occasions even the most personal and sensitive aspects of it. The employers' need for information has to be balanced with the applicants' right to respect for their private life, freedom of expression as well as their right not to be discriminated. 'Workers don't leave behind their rights as persons (and certainly not their right to privacy and data protection)...'²¹ A clear-cut solution would be to avoid pre-employment Google search in general (see the Finnish example above). On a theoretical level, such a system can be backed up by referring to the very nature of SNSs: these sites operate without pre-edition, or any kind of previous control, therefore enable expression of very diverse and unfiltered opinions. The possibility of background checks have a destructive impact on the quality of online human interaction, in the long run they may force users to create duplicate profiles, and censor their online activities for fear of being judged by their future employer. Obviously, the acceptance of the current practice may have a chilling effect and render a widespread communication medium dangerous for people to use.²²

Yet, I think imposing a complete ban on pre-employment screens is not feasible mostly because the invisibility of the search and the benefits it offers (fast, cheap, and easy). The solution the UK Information Commissioner's Office advocates, that is to notify the candidates about the background checks and document which data is collected, is more realistic. A written policy that specifies what information or sites will be consulted before the decision is made, who will conduct the review, and what records will be maintained helps to prevent possible lawsuits. Before hitting "search" it is also advisable that the employer ask him- or herself if the search fulfils the general requirements of processing data or not. Is it reasonable? Are there other, less intrusive measures available?

To select the best possible candidate for the job is a legitimate interest of the employer; however Google search is not without its dangers. Although the current practice clearly goes against the most basic principles of lawful data processing it is unlikely to change also because of the users of the SNSs. While users do not intend their future employers to see their posts and pictures on Facebook or Twitter, it is them who make it possible for the public (including employers) to access information on their profile. The desire of

²⁰ The first virtual industrial action was organised by Italian employees of IBM on Second Life. See E. Kajtár, 'Bridge(s) over Troubled Water', *Pécsi Munkajogi Közlemények*, Vol. 4, Issue 1, 2011, pp. 117-131.

²¹ T. C. Moreira, The Digital To Be or Not To Be: Privacy of Employees and the Use of Online Social Networks in the Recruitment Process. *Journal of Law and Social Sciences (JLSS)*, 2, 2013, pp. 76-79.

²² L. A. Clark and S. J. Roberts, 'Employer's Use of Social Networking Sites: A Socially Irresponsible Practice', *Journal of Business Ethics*, Vol. 95, Issue 4, 2010, pp. 507-525.

self-expression, information sharing, networking, etc. is dominant when the profiles are shaped, the opposite desire, the one for clear separation of work and private life, the wish for solitude kicks in or is realised later (or too late). This is one of the reasons why pre-employment search on social networking sites remains in the grey zone of law.

For the time being candidates may protect themselves mainly by being cautious about what information they share online and by choosing their privacy settings wisely. This of course presupposes a certain awareness of one's digital footprint. As to the adverse effects, the biggest concern is the issue of how to provide evidence. Even though in discrimination cases the burden of proof is reversed, employment discrimination can often be difficult to prove. Though candidates are seldom in the position to present a *prima facie* case for discrimination, successful cases such as the one concerning the job at University of Kentucky cited above give rise for optimism.

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RIGHT TO PROTECTION AGAINST UNFAIR DISMISSAL AND OBSTACLES FOR ITS EFFECTIVE EXERCISE IN TIMES OF CRISIS

Abstract:

The right to protection against unfair dismissal is one of the fundamental rights of employees. It means that an employer cannot dismiss an employee unless there is a valid reason related to the capacity or conduct of that employee or to the employer's requirements. At the very core of this rule lies an inclination to create a balance between the need to protect employees, as the weaker (economically dependent and legally subordinate) party to the employment relationship, and the need to preserve employers autonomy in matters that affect their business activities.

In times of crisis, broad guarantees of employment security are criticized as an obstacle to overcoming the difficulties employers face in the market. On the other hand, the legal systems that give employers absolute freedom to dismiss employees are also criticized, because employees feel a bigger need for protection when they're facing the risk of (long-term) unemployment. These were the ongoing debates after the flare-up of economic crisis in the autumn of 2008, and certain European countries decided to loosen up the protection against dismissal (simplifying the dismissal procedures, shortening the notice period, decreasing protection against unlawful dismissal). However, there is fear that such solutions may not be able to induce increase in employment rates and that they may lead to a deeper social inequality and marginalization of the most vulnerable categories of workers. Therefore, this paper starts with the examination of the right to protection against unfair dismissal and its place in the corpus of labour rights, as well as the development and contemporary interpretations of the concept of valid reasons for dismissal. After that, the key aspects of the reformed rules on dismissal in European countries are identified, as well as the fundamental challenges and obstacles for effective exercise of the right to protection against unfair dismissal in Serbian legislation and practice. And in the end, we draw a conclusion that economic crisis can be a legitimate reason for amending the rules on dismissal, but that these amendments should not result in excessive insecurity of employees and violation of their fundamental social rights.

Keywords: *labour rights; reasons for dismissal; economic crisis; labour law reform; Republic of Serbia.*

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I. INTRODUCTION

For the vast majority of employees, working for an employer represents, for them and their families, a sole or a main means of subsistence. Termination of employment, therefore, represents an especially difficult event, not only in their professional lives (due to the loss of employee status and all the associated rights), but in their personal lives as well, since they are facing a decline in the standard of living as well as the disruption of their social status. Bearing all this in mind, as well as the inequality between the contracting parties (i.e. economic dependency and legal subordination of employees), one of the fundamental rules of contemporary labour law states that an employer may not dismiss an employee unless there are valid reasons for dismissal, such as employee's competence or conduct or employer's requirements.

Consequences of dismissal are particularly hard in times of economic and financial crisis. These changes often force governments to face cost cutting and mass unemployment issues, and employers to face the challenges of preserving business continuity, restructuring as well as collective redundancies.¹ This is why some experts criticize broad guarantees of employment security and see them as an obstacle to overcoming the difficulties employers face in the market. And that's why, at the beginning of the millennium, flexible regulation of dismissal was introduced, which was based on the view that the high costs of *open-ended employment contracts*, and termination of such contracts (severance pay, termination notice, dismissal procedure etc.) not only discourage employers from establishing a *standard employment relationship*, but encourage them to resort to *bogus self-employment*, as well as *undeclared work*.²

Flexible regulation of dismissal was promoted shortly after the start of economic crisis in 2008, especially in Greece, Italy, Portugal and Spain, as well as Estonia, France, Great Britain, Romania, Slovenia and Holland.³ The same goes for the Republic of Serbia, considering that flexibilisation has become one of the fundamental goals of the Serbian labour legislation, in accordance with the belief that it could decidedly increase foreign investment as well as the number of jobs. However, implementation of such labour reforms is associated with a significant risk of violation of fundamental labour rights, including the right to protection against unfair dismissal. Dismissal, in fact, represents one of the institutes of labour law where (non)existence of adequate protection of employees and employer arbitrariness is very noticeable, because employers often, by trying hard to cut

¹ European Network of Legal Experts, *Protection, Involvement and Adaptation. European Labour Law in Time of Crisis, Restructuring and Transition*, 2010, p. 1, <http://www.labourlawnetwork.eu>, (accessed 14 July 2015).

² I. Schömann, *Labour Law Reforms in Europe: Adjusting Employment Protection Legislation for the Worse?*, Brussels, European Trade Union Institute, 2014, p. 7.

³ Schömann, p. 5.

labour costs, end up having more power over employees than what they are entitled to under law. That's why the following words of Simone Weil sound just as plausible today as the day they were written in 1934: „Work is no longer done with the proud consciousness that one is being useful, but with the humiliating and agonizing feeling of enjoying a privilege bestowed by a temporary stroke of fortune, a privilege from which one excludes several human beings by the mere fact that one enjoys, in short, a job”⁴

Still, we should critically re-examine the views that claim there is a strong relationship between strict rules on protection against dismissal and increasing (direct and indirect) costs, since some research shows that rules on protection against unfair dismissal don't necessarily burden employers with unreasonable costs. Besides, one shouldn't lose sight of the fact that flexible solutions, in many countries, resulted in impoverishment and marginalization of vulnerable categories of workers instead of creating new jobs. Therefore, we can legitimately ask if, and to which extent, can economic crisis represent a legitimate reason to lower the protection against unfair dismissal?

II. RIGHT TO PROTECTION AGAINST UNFAIR DISMISSAL AND ITS PLACE IN THE CORPUS OF LABOUR RIGHTS

The history of human rights law is inseparable from the realm of employment and employment relationships. Mostly because one of the major objectives of the „second generation“ human rights was the recognition of the fundamental rights and freedoms of employees as such in constitutions and international instruments for protection of human rights, including the right to work and the right to protection against unfair dismissal. Many authors, without hesitation, qualify labour rights as human rights, while some authors refrain from such qualifications or express doubts regarding its justification, believing that it is not enough that the labour rights are recognized as human rights in many international instruments for protection of human rights.⁵ These differing opinions, in fact, reflect the “old” dispute about the legal nature of economic and social rights and the idea of the necessity of drawing sharp lines of demarcation between this group of rights, on the one hand, and civil and political rights, on the other hand. However, drawing sharp boundaries between the two types of rights is considered unacceptable today, especially since the right to work means that everyone is entitled to earn a living from a freely chosen or accepted employment, and that everyone has the opportunity to develop their own

⁴ S. Weil, 'Reflections Concerning the Causes of Liberty and Social Oppression', in: *Oppression and Liberty*, trans. A. Wills and J. Petrie, London/New York, Routledge, 2004, pp. 36-37.

⁵ V. Mantouvalou, 'Are Labour Rights Human Rights?', *UCL Labour Rights Institute On-Line Working Papers*, vol. X, 2012, p. 1.

personality.⁶ Effective exercise of this right does not only contribute to the „survival of the individual and to that of his/her family, but insofar as work is freely chosen or accepted, to his/her development and recognition within the community“.⁷ The right to work, therefore, represents an „inseparable and inherent part of human dignity“, as well as the prerequisite to effective exercise of several other human rights, such as the right to life, health, housing and education.

Guaranteeing the right to work is not, however, an absolute and unconditional right of everyone to gain employment. Instead, it is centred on free choice or free acceptance of a job, as well as protection against unfair dismissal.⁸ It should be noted that in some states, legal guarantees of the right to work are primarily centred on employment security and protection of workers against unfair dismissal, while employment measures come in second. However, most contemporary authors, and the same goes for bodies responsible for monitoring the implementation of international instruments for protection of human rights, give priority to measures for ensuring equal opportunity for employment and free employment services – in comparison to measures aimed at protecting employment.⁹

In most European countries, employment security includes three elements: the first one being the rule that *no one can be dismissed without a justified reason*.¹⁰ Besides that, employment security also includes *appropriate financial compensation for dismissed employee*, as well as *procedural guarantees and appropriate sanctions for unlawful dismissal*, i.e. employees have the right to appeal against dismissal to an impartial body that will, in case of unlawful dismissal, award damages or reinstatement.¹¹ We should also bear in mind that protection against unfair dismissal has another important purpose, in addition to providing the employees with an opportunity to keep their employment on the basis of which they make a living. It represents a *specific guarantee for realization of other employees rights*, because there is a risk that employees, who fear for their jobs, may be reluctant to ask their employers to create the conditions for effective exercise of certain employment rights, such as the right to have *limited working hours*, safe and healthy working environment and fair wages. In this sense, we can conclude that the rules that guarantee

⁶ A. Cieslar, A. Nayer and B. Smeesters, *Le droit à l'épanouissement de l'être humain au travail: Métamorphoses du droit social*, Bruxelles, Bruylant, 2007, p. 126.

⁷ Committee on Economic, Social and Cultural Rights, *The right to work: General comment No. 18*, adopted on 24 November 2005, UN Doc E/C.12/GC/18, paragraph 1.

⁸ Committee on Economic, Social and Cultural Rights, paragraph 4.

⁹ L. Samuel, *Droits sociaux fondamentaux - Jurisprudence de la Charte sociale européenne*, 2^e édition, Strasbourg, Editions du Conseil de l'Europe, 2002, p. 13.

¹⁰ C. Kollonay-Lehoczky, 'Une „troisième voie“ en droit du travail? Un panorama du nouveau Code du travail hongrois: Entre un libéralisme extrême et des réminiscences de l'économie planifiée centralisée', *Revue de droit comparé du travail et de la sécurité sociale*, no. 2, 2012, pp. 86-87.

¹¹ Kollonay-Lehoczky, pp. 86-87.

a certain level of employment security, such as the rules on justified reasons for dismissal, may be essential for the effective exercise of labour rights.¹² This is the reason why stability of employment cannot be reduced to the protection of income of employees. Especially because contemporary labour policies have the tendency to lower the protection provided under the unemployment insurance system and to redirect the problem of unemployment towards the integration measures of the unemployed into the labour market. This turning point was inspired by the idea of the greater individual responsibility for protection against social risks as well as the belief that the generous system of unemployment insurance, rather than to stimulate the unemployed to seek out work, develops a culture of dependency to social benefits. This is why many legislators established the obligation of the unemployed to actively seek out and accept employment offered to them by the employment agency, or otherwise lose their right to unemployment benefits. Such draconian solutions, however, require special attention, especially when consequences, if the unemployed refuse unsuitable employment offered to them by the employment agency, are the same. This solution, as the European Committee of Social Rights concludes, can be qualified as „work which is exacted under the menace of any penalty“, in terms of the generally accepted definitions of forced labour.¹³ One of the objectives of unemployment insurance is to, at least in the initial unemployment period, protect the unemployed from the obligation to accept any employment and to enable them to find a job suited to their competence and skills. That was also the reasoning of the ILO Committee of Experts on the Application of Conventions and Recommendations, who pointed out that unemployment insurance rights are exercised only when the unemployed fulfil certain conditions regarding the minimum insurance period (prior payments of insurance contributions over a certain period of time), i.e. if the period of exercise of a certain right is determined based on the length of insurance period or period of employment, which is why imposing a new, additional requirement, that would involve having an (unsuitable) job, in order to exercise that right - represents mandatory labour under the threat of loss of the acquired social insurance right.¹⁴

¹² V. de Stefano, 'A Tale of Oversimplification and Deregulation: The Mainstream Approach to Labour Market Segmentation and Recent Responses to the Crisis in European Countries', *Industrial Law Journal*, vol. 43, no. 3, 2014, p. 281.

¹³ L. Samuel, *Droits sociaux fondamentaux*, p. 20.

¹⁴ Committee of Experts on the Application of Conventions and Recommendations, *General survey concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105)*, paragraph 129. This view is important for the Serbian labour legislation, since the provisions of the *Law on employment and unemployment insurance* (Official Gazette RS, no. 71/03 and 84/04) stated that the unemployed shall be deleted from the records of the National Employment Agency in case they do not accept suitable employment that is offered to them, and that after nine months of unemployment – any job offered shall be considered suitable employment. The procedure was initiated to assess the constitutionality of this Law, since declining any job offer would lead to deletion from the Agency records, i.e. suspension of payment of unemployment benefits and the loss of health insurance, which can rightfully be qualified as punishment in relation to the provisions of the ILO Convention No. 29 concerning Forced or

III DEVELOPMENT OF THE CONCEPT OF JUSTIFIED REASONS FOR DISMISSAL

Open ended employment relationship can be terminated at the initiative of either party. For employees, there are requirements regarding timely notice and prohibition of resignation at inopportune times, while limitations for the employers' right to dismissal do not only refer to the notice period and the dismissal procedure, but also to the reasons for dismissal. This is because employees earn their exclusive or predominant means of subsistence by working for an employer, and by entering into an employment contract, they take on the obligation of working in the name of, on behalf of and under the (managerial, normative and disciplinary) prerogatives of the employer. This further means that, besides the actual power manifested in economic dominance, the employer also has prerogatives to organize, direct and control the work of employees, lay down the rights, duties and responsibilities, as well as punish them for breach of work obligations. Without these prerogatives, effective organization of employer's activities would not be possible, which is why the employer's right to unilaterally terminate employment relationship is an important complement to the aforementioned prerogatives.

The first legal interventions concerning termination of employment relationship entailed the confirmation of freedom of employer and employee to unilaterally terminate open ended employment contract for any reason at all, with restrictions related to the notice period and severance pay rules. Legal rules however couldn't ensure the full protection of the weaker party to the employment relationship, because an employer could, at any time (and without any consequences), relegate the business risk to his employees. That's why, at the later stages of labour law development, employers were, in certain cases, forbidden from firing their employees or restricted in doing so.

Each legal system defines the circumstances under which an employer may terminate employment relationship. Although comparative law recognizes exceptions that are based on the ideas of the employment at will doctrine, which includes the right of the employer to fire an employee no matter what the reason, the contemporary labour law has mostly abandoned or modified the general rules of the obligation law regarding termination of contract.¹⁵ That included the development of several institutes of labour law, starting with the principle that an employer cannot terminate a contract *ad nutum*, but rather only for

Compulsory Labour. Luckily, the new *Law on employment and unemployment insurance* (Official Gazette RS, no. 36/09 and 88/10) abandoned this solution and defined the suitable employment, in the first 12 months since the registration, as employment within the acquired level and type of education, and after this period as „employment at lower levels within the same or similar type of acquired education, in accordance with the individual employment plan, taking into account the experience and the current state of the labour market“ (art. 32-33).

¹⁵ B. Lubarda, *Radno pravo – Rasprava o dostojanstvu na radu i socijalnom dijalogu*, Belgrade, Pravni fakultet Univerziteta u Beogradu, 2012, pp. 718-719.

legitimate reasons. First limitations to the employers' right to dismiss were set in the Mexican Constitution in 1917,¹⁶ and later on in the provisions of the German Works Council Law from 1920, The Labour Law of the Russian Soviet Federative Socialist Republic from 1922, The Norwegian Working Environment Law from 1936, as well as the Cuban labour legislation between 1934 and 1938.¹⁷ In 1920, The Weimar Republic was the first European country to introduce, although shyly, protection of employees against unfair dismissal, and 31 years later the Law on Protection against Dismissal was adopted, confirming that the social justification of a dismissal is the fundamental criterion of its legality. Solutions from the aforementioned Law also served as an inspiration and a template for many legislators. In fact, German legislation, especially the Law from 1951, heavily influenced the adoption of the standards of the International Labour Organization (ILO) concerning termination of employment at the initiative of the employer.¹⁸

From the historical perspective and the perspective of comparative law, protection against unfair dismissal included two approaches: the first approach included a general guarantee that employees will not be unfairly dismissed, i.e. that they will not be dismissed in a manner or under circumstances that are not „socially justifiable“ or can lead to abuse of employer's powers. The second approach included establishing the list of reasons when dismissal would be considered (i)llegal. The two approaches were „reconciled“ after the development of the concept of valid reasons for dismissal, under the auspices of the ILO. The foundation of this concept was set in the ILO Recommendation No. 119 concerning Termination of Employment at the Initiative of the Employer, which was based on two essential ideas of employment protection: a) the idea of protecting workers from arbitrary and unjustified termination of employment; and b) the idea of protecting workers against the economic and social difficulties inherent in the loss of employment.¹⁹ Standards that deal with the reasons for termination of employment, the notice period and the right to an appeal as well as standards that deal with the protection of income and protection against downsizing were instrumental in bringing these ideas to fruition. This is because the ILO Recommendation, other than protecting the workers and their income, sought to protect the employer's prerogative to make decisions on matters that may affect the operation of the undertaking, and to protect the state interest of preserving the social peace. The main standard of the ILO Recommendation No. 119 was the rule specifying that an employee has the right to stay employed unless there is a valid reason for termination at the initia-

¹⁶ Constitución Política de los Estados Unidos Mexicanos (1917), article 123, A, XXI.

¹⁷ V. Vannes and L. Dear, *La rupture abusive du contrat de travail – Théorie et applications*, Bruxelles, Bruylant, 2010, p. 81.

¹⁸ S. Laleta, 'Prestanak ugovora o radu', PhD Thesis, University of Zagreb, 2011, p. 171.

¹⁹ International Labour Conference, 82nd Session 1995, *Protection against unjustified dismissal. General Survey on the Termination of Employment Convention (No. 158) and Recommendation (No. 166), 1982 - Report of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Office, Geneva, 1995, paragraph 3.

tive of the employer. Although the provisions of the Recommendation confirm that valid reasons for dismissal may refer to the „capacity or conduct of the worker or operational requirements of the undertaking, establishment or service“, ILO failed to specify these three general categories of reasons. Instead, it was left up to member states to make a catalogue of valid reasons, in accordance with the national circumstances.²⁰

In spite of its legally non binding nature, or maybe because of it, the standards from Recommendation No. 119 had a significant role in improving employment security and legal protection from dismissal in ILO member states.²¹ Despite being well accepted, there was still a need to make the standards more clear and contemporary. That's why Convention No. 158 and Recommendation No. 166 were adopted in 1982, and today are considered a reliable base for defining the terms justified and unjustified dismissal. Provisions of Convention No. 158 reaffirm the rule that „the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service“. ²² On the other hand, the catalogue of invalid reasons for termination of employment largely fits the list given in Recommendation No. 119, although authors of the Convention took the opportunity to amend it and make it more precise.²³

The presented solutions show that the International Labour Conference sought, through its norms, to point out the differences between unlawful and unfair termination of employment relationship. At the same time, ILO member states regulate justified and unjustified reasons for dismissal *via* labour laws, while some states prohibit every unfair or abusive dismissal by law and give judges and arbiters the prerogative to specify in each case the content and the limitations of the prohibition.²⁴ In many states, introduction of

²⁰ Making of the catalogues was facilitated by the Recommendation No. 119 which contained indicative list of reasons that were not to be considered as valid reasons for termination of employment such as: union membership or participation in union activities; acting or having acted in the capacity of a workers' representative; the filing of a complaint or the participation in a proceeding against an employer involving alleged violation of laws or regulations; race, colour, sex, marital status, religion, political opinion, national extraction or social origin.

²¹ Although assessments of the impact of Recommendation No. 119 on the reform of rules regarding termination of employment in ILO member states aren't unanimous, authors agree that not all aspects of these reforms can be „attributed to“ Recommendation No. 119, but that its adoption was a strong incentive to make changes regarding termination of employment. B. Napier, 'Dismissals – The New I. L. O. Standards', *Industrial Law Journal*, vol. 12, no. 1, 1983, p. 17.

²² ILO Convention no. 158, article 4.

²³ Also, based on Recommendation No. 166 the catalogue of invalid reasons for dismissal was expanded to include leave of absence due to national service (military or civil) and old age. The latter should contribute to the elimination of age discrimination in the narrow sense (discrimination towards old people), because it should be considered within the boundaries of the national legislation and the practice of taking the old-age pension.

²⁴ R. Pešić, 'Prestanak radnog odnosa – Uporedno proučavanje zakonodavstva i prakse u vezi sa regulisanjem ove institucije u pojedinim zemljama sveta', *Zbornik Pravnog fakulteta u Novom Sadu*, vol. 3, no. 3, 1969, p. 189.

strict legal rules regarding termination of employment is „crowned“ with constitutional guarantees of the principle of legality of dismissal.

IV PROTECTION AGAINST UNFAIR DISMISSAL IN TIMES OF ECONOMIC CRISIS

The effectiveness and comprehensiveness of the protection of employees against unfair dismissal, to a large extent, depends on the social and economic changes. These changes require constant consideration, especially in times of economic and financial crisis, considering that some authors are of the opinion that the application of rules on protection against dismissal may cause negative macroeconomic effects, and more precisely, create obstacles for employment, because the high (direct and indirect) cost of dismissals discourage employers from hiring new employees.²⁵ This persuaded some legislators, after the start of economic crisis in 2008, to change the rules on termination of employment, starting with the simplified dismissal procedure, a shortened notice period and decreasing protection of workers in cases of unlawful dismissal. Also, some countries, such as Germany, made this reform before the first signs of crisis.

Although the reform of labour legislation, in some countries, included certain improvements in protection against dismissal, particularly when it comes to the special protection of vulnerable categories of employees, in most countries, the rule changes included a reduced protection against dismissal. In many countries, instead of the expected increase in employment, implementation of the amended rules led to a deeper social inequality and significant disturbance in employment stability. Therefore, we can conclude that economic crisis can be a legitimate reason to amend labour legislation, but that the amendments shouldn't lead to excessive insecurity for workers and shouldn't violate their fundamental rights. Especially since labour rights has been significantly jeopardized in some countries (Italy, Hungary), due to the possibility to derogate *in peius* provisions of the general collective agreement (with certain limitations, of course) *via* the provisions of the collective agreement with the employer, thus making the collective bargaining into a means for protection of employers' interests.²⁶

²⁵ H. Räsänen, 'Recent Labour Market Developments – An Overview', in: *Reconciling Labour Flexibility with Social Cohesion – Ideas for Political Action*, Strasbourg, Council of Europe Publishing, 2006, p. 61; European Commission, *Towards Common Principles of Flexicurity: More and Better Jobs through Flexibility and Security. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 27 June 2007*, COM(2007) 359 final, p. 12.

²⁶ G. Loy, 'La réforme italienne: Entre le malentendu de la flexicurity et la tentation du contrat unique', *Revue de droit comparé de travail et de la sécurité sociale*, no. 2, 2012, p. 39; T. Gyulavári and N. Hós, 'The Road to Flexibility? Lessons From the New Hungarian Labour Code', *European Labour Law Journal*, vol. 3, no. 4, 2012, p. 257; Kollonay-Lehoczky, *Une „troisième voie“ en droit du travail*, p. 76.

4.1. Catalogue of justified reasons for dismissal

The latest reforms of labour legislation in many European countries didn't include any intervention in the catalogue of valid reasons for dismissal. Estonia is an exception, because in 2009, the rules on reasons for dismissal were amended to include an increased prerogative of employers to terminate employment.²⁷ Besides, changes were adopted in relation to the reasons for dismissal that stem from employers' requirements, since they are very sensitive to economic crisis. Although the main objective of the aforementioned rules is to eliminate or alleviate, as much as possible, the negative effects that company restructuring can have on employees, the latest reforms in several European countries speak to the contrary. They primarily redefined the criteria for collective redundancy in order to enable employers to easily adjust to market changes (e.g. Czech Republic, Great Britain, Portugal, Slovakia and Spain).²⁸

The Greek Law attracted the most attention within the research sample, since Greek legislator opted for extreme changes allowing almost absolute flexibility of rules on dismissal. Although the legality of dismissal in this legal system wasn't dependant on existence of valid reasons, in practice, the prerogative of most employers, and especially the ones with many employees, to dismiss was limited by sources of autonomous law, which regulated the dismissal procedure and reaffirmed the requirement for justified reasons for dismissal.²⁹ It was precisely those limitations of the employer's prerogatives that have been rescinded by the Law no. 4046/2012³⁰ as have been the rights of employees to a notice period and unemployment benefits (assuming employment was terminated in the first year of the standard employment contract). The reform of the Greek labour law included the changes of the strict rules regarding collective redundancies, which used to require the approval of the trade union or a state representative. The aforementioned rule is rarely used in practice and yet Law no. 3863/2010 changed the number of workers whose dismissal can be qualified as „collective redundancy“ because of the abuse of successive dismissal of smaller numbers of workers than the number qualified as redundancy.³¹ The Greek example has shown the dramatic impact of economic crisis on labour legislation, with „deconstruction of labour laws“ and abandonment of its fundamental values.³² These consequences are serious, especially because the social benefits aren't generous in Greece,

²⁷ R. Rebhahn, 'Significant Changes/Trends in Dismissal Law Since 2006', in: European Labour Law Network, *Protection Against Dismissal in Europe. Basic Features and Current Trends*, 2011, p. 53.

²⁸ S. Clauwaert and I. Schömann, *The Crisis and National Labour Law Reforms: A Mapping Exercise*, Brussels, European Trade Union Institute, ETUI aisbl, 2012, p. 12.

²⁹ C. Papadimitriou, 'Le droit du travail Grec face à la crise: Un passage dangereux vers une nouvelle physiologie juridique', *Revue de droit comparé de travail et de la sécurité sociale*, no. 2, 2012, p. 12.

³⁰ Papadimitriou, p. 12.

³¹ Papadimitriou, p. 12.

³² Papadimitriou, p. 16.

and the culture of social dialogue is underdeveloped, as well as active labour market policies and the practice of lifelong learning, without which there is no support for the development of the concept of flexicurity.

There is an example from the French Law, that we should pay special attention to, which was the subject of discussion by the ILO tripartite committee. The case in question was related to the rules on the new recruitment contracts (*contrat 'nouvelle embauche'*), regarding which the French confederation of trade unions *Force ouvrière* addressed the Committee. This new type of contract, which was introduced in the French legal system in 2005, can be entered into by the employers employing less than 20 people, who have the right to, contrary to the rules of the Labour Code, dismiss an employee *for any reason* during the initial two year period (the so called employment consolidation period /*consolidation de l'emploi*).³³ The ILO Committee report that was unanimously adopted by the Administrative Council, concluded that these rules represented a violation of the provisions of ILO Convention No. 158. This was because the Convention allowed for the derogation of the rules on protection against dismissal during the probationary or qualifying period, which had to be a reasonable period of time; which is not how one could qualify the initial two year period of the new recruitment contract, despite taking into account all relevant factors (the time required to gain the skills and experience necessary to perform the entrusted work; the general interest to encourage small employers to employ young workers; catalogue of rights available to employees upon termination of the contract of new recruitment, particularly in connection with finding alternative employment; and the possibility of judicial protection because an employer abused his power /discriminatory dismissal/).³⁴ The Committee, therefore, concluded that the period of so-called consolidation of employment does not constitute a qualifying period of reasonable duration, which is why in 2008, the French legislator abolished the contract of new recruitment, as an institute of the labour law.³⁵

The view taken by the European Court of Human Rights, regarding the British Employment Rights Act (1996), which allows employers to dismiss employees without explanation within the first 12 months of recruitment, however, differs from the view of the

³³ *Ordonnance n° 2005-893 du 2 août 2005 relative au contrat de travail „nouvelles embauches“*; JORF, n° 179, du 3 août 2005, p. 12689.

³⁴ Report of the Committee Set Up to Examine the Representation Alleging Non-Observance by France of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) and the Termination of Employment Convention, 1982 (No. 158), made under article 24 of the ILO Constitution by the Confédération générale du travail – Force ouvrière, Geneva, November 2007, GB.300/20/6, paragraph 89.

³⁵ Contracts that have been entered into by that time and under that name have been automatically altered into open ended employment contracts to which all the provisions of the Labour Code shall be applied. *Loi n° 2008-596 du 25 juin 2008 portant modernisation du marché du travail*, JORF, n° 148, du 26 juin 2008, p. 10224, article 9.

ILO Committee. The Court concluded that a one year qualifying period was introduced because the „Government considered that the risks of unjustified involvement with tribunals in unfair dismissal cases and the cost of such involvement could deter employers from giving more people jobs. Thus, the purpose of the one-year qualifying period was to benefit the domestic economy by increasing labour demand“.³⁶ The Court also commented on the length of the qualifying period, concluding that a one-year period is long enough to enable the employer to determine if the employee is suitable or not for the job.³⁷ This conclusion was sufficient to determine that „it was in principle both reasonable and appropriate for the respondent State to bolster the domestic labour market by preventing new employees from bringing unfair dismissal claims“.³⁸

4.2. Notice period

The notice period allows the employer to find a new employee to supplant the one whose employment will be terminated or to reassign his duties, and also allows the employee to find new employment during this period. ILO standards have established that „a worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct“.³⁹ A long notice period may represent a significant burden and cost for the employer, especially if the employee was dismissed due to lack of competence or failure to achieve results, or due to redundancy.⁴⁰ This is the main reason why some legislators recently resorted to shortening of the notice period (e.g. Bulgaria, Greece, Estonia, Lithuania, Portugal, Slovakia, Slovenia and Spain). On the other side, Greek Law number 3899/2010 abolished the right to a notice period (and severance pay) for employees whose open ended employment is terminated in the first year on the job, which is considered to be the *probationary period*.⁴¹ The aforementioned solution was rightly seen as the violation of the provisions of the European Social Charter, which guarantees „the right of all workers to a reasonable period of notice for termination of employment“, as an important element of the right to a fair

³⁶ European Court of Human Rights, Judgement in Case *Redfearn v. The United Kingdom*, of 6 November 2012 (Application no. 47335/06), paragraph 53.

³⁷ European Court of Human Rights, paragraph 53.

³⁸ European Court of Human Rights, paragraph 53. Especially because the rule of exclusion of employees, who have been working less than 12 months, from the circle of protected persons is derogated in case of a dismissal due to race, gender, religion and other characteristics of the employee which could constitute the basis for discrimination.

³⁹ ILO Convention No. 158, article 11.

⁴⁰ E. Korpić Horvat, 'Ali pravna ureditev varstva za primer brezposlenosti sledi ciljem prožne varnosti', *Delavci in delodajalci*, vol. 10, no. 2-3, 2010, p. 332.

⁴¹ *Law number 3899/2010 on urgent measures for the implementation of the assistance program of the Greek Economy*, 17 December 2010 (Νόμος 3899/2010, ΦΕΚ 212/τ. Α/17-12-2010).

remuneration.⁴² European Committee for Social Rights confirmed that the right to a reasonable period of notice belongs to *every* category of employees, including the ones with atypical employment, as well as the ones on probationary employment.⁴³ Therefore, The Committee found the explanation by the Greek Government that the problematic provisions were introduced into the legal system due to the „financial vortex threatening the survival of its country’s economy“ unacceptable, in spite of it being a temporary measure that was to be abolished as soon as the economic situation would allow; and because of the political and economic difficulties Greece was facing, it was impossible to determine the actual timeframe for that.⁴⁴

4.3. The dismissal procedure and legal consequences of unlawful termination

Apart from the changes to the notice period, many European countries made changes (i.e. simplifications) to the dismissal procedure. This particularly included alleviation of the employer’s obligation to inform and consult the employees regarding dismissal (e.g. in Greece, Hungary and Spain), elimination of the requirement to get approval on dismissal from the relevant state authority (e.g. in Latvia), as well as limiting the opportunities to initiate labour disputes regarding dismissal (in Great Britain).⁴⁵ In some countries, the consequences for violation of the dismissal procedure were changed, and the most important innovation was that such violation no longer represented the reason for annulment of the dismissal, as well as that the employer was (only) obliged to compensate the employee (e.g. in Portugal and Spain).⁴⁶ It should also be noted that the changes of dismissal rules in most European countries included the consequences for unlawful dismissal, especially regarding the rights of employees to ask for reinstatement. New solutions were based on the idea that the reinstatement impacts in a negative way the employers’ ability to adjust the number and structure of employees to the needs of the market. On the other hand, there are authors who believe that reinstatement is just a symbolic measure without actual

⁴² *European Social Charter* (European Treaty Series, No. 35), article 4, paragraph 4.

⁴³ „While it is legitimate for such concepts (concepts of probationary or trial periods – Lj. K.) to apply to enable employers to check that employees’ qualifications and, more generally, their conduct meet the requirements of the post they occupy, the concept should not be so broadly interpreted and the period it lasts should not be so long that guarantees concerning notice and severance pay are rendered ineffective“. European Committee of Social Rights, Decision on the merit, *General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants’ Trade Unions (ADEDY) v. Greece* (Complaint No. 65/2011), 23 May 2012, paragraph 26.

⁴⁴ Resolution CM/ResChS(2013)2 adopted by the Committee of Ministers on 5 February 2013 at the 1161st meeting of the Ministers’ Deputies (General Federation of employees of the National Electric Power Corporation /GENOP-DEI/ and Confederation of Greek Civil Servants’ Trade Unions /ADEDY/ against Greece, Complaint No. 65/2011), paragraph 12.

⁴⁵ Clauwaert and Schömann, *The Crisis and National Labour Law Reforms*, p. 12.

⁴⁶ Rebhahn, *Significant Changes/Trends in Dismissal Law Since 2006*, p. 52.

capacity to deter employers from dismissal and that it only „encourages“ them to abuse and circumvent the existing rules.⁴⁷ That’s why there has recently been a growing number of countries where compensation is the only instrument of protection against wrongful termination, save for some exceptional cases such as discriminatory dismissal (e.g. in Hungary, Italy and Spain).⁴⁸

V. CHALLENGES AND OBSTACLES FOR EFFECTIVE PROTECTION AGAINST UNFAIR DISMISSAL IN SERBIAN LEGISLATION AND LEGAL PRACTICE

In Serbian law, like most other legal systems, the process of limiting the employer’s right to terminate employment was gradual and long. The first state intervention in this field was undertaken in the first decades of the XX century, announcing a wave of interventionism that was powerful enough to engage all the important aspects of the protection of employees, with „dissolution“ of the rules of the obligation law, that were based on the principle of party autonomy and the principle of equality of the parties.⁴⁹ After World War II, a new context for further development of protection against dismissal consisted of the Yugoslav socialist self-management law, in which a completely new concept of employment was endorsed, because managerial and other prerogatives that traditionally belonged to the employer, now belonged to the workers. The highest standards of protection against dismissal were set by the Law on Mutual Relations of Employees in Associated Labour⁵⁰ and the Law on Associated Labour,⁵¹ which ruled out the possibility of dismissing an employee against his will or without establishing his guilt. These laws included a historically unique rule that employment cannot be terminated due to technological or

⁴⁷ M. Tiraboschi, ‘Italian Labour Law After the So-Called Monti-Fornero Reform (Law No. 92/2012); *E-Journal of International and Comparative Labour Studies*, vol. 1, no. 3-4, 2012, p. 84.

⁴⁸ Schömann, *Labour Law Reforms in Europe*, p. 32-34.

⁴⁹ The initial step towards the establishment of elementary social justice in the field of termination of employment has been made with the *Workshops Act* (Serbian Gazette, of 29 June 1910), which, in principle, gave both parties to the employment contract an equal freedom to terminate the contract, if they respected the notice period. *The Law on protection of workers* (Official Gazette of the Kingdom of Serbs, Croats and Slovenians no. 128/XXI, 75/XIV, 72/XXII and 135/LXII) and the new *Workshops Act* (Official Gazette of the Kingdom of Yugoslavia, number 262/LXXXI) announced a new approach in regulating the termination of employment, which included a requirement that every dismissal be explained and motivated by valid reasons, distinguishing between legal and illegal, justified and unjustified reasons for dismissal. Provisions of these laws guaranteed a special protection from dismissal in favour of pregnant women, women who recently gave birth and workers’ representatives, as well as employees who participated in military exercises.

⁵⁰ Official Gazette SFRY, no. 22/73.

⁵¹ Official Gazette SFRY, no. 53/76, 57/83, 85/87, 6/88 and 38/88.

other advancements, which, in practice, often resulted in irrational employment policies and retention of employees even after the real need for them ended.

After decades of development within the framework of the self-management concept of employment relationship, labour legislation started to return, at the end of the 1980s, to the classic contractual concept of employment relationship.⁵² With each new law, effort was made to continue with consistent implementation of the contractual concept of employment relationship and to round out the concept of justified reasons for dismissal, whose norms were honed in the labour laws of 2001 and 2005.⁵³

In that sense, one of the fundamental rules of the current labour law of the Republic of Serbia reads: an employer may not dismiss an employee without a justified reason relating to employee's competence or conduct or employer's requirements. This rule was confirmed in the latest Amendment to the Labour Law⁵⁴, which was adopted with the aim to cut labour costs, increase foreign investment and stimulate employment, through flexible rules. This included new rules on dismissal, some of which improve and some of which limit the protection of employees⁵⁵. This was done despite the fact that, according to the World Bank and International Labour Organization, Serbian Labour Law, in terms of strictness of legal protection of employment, ranks „somewhere around the European and world average“.⁵⁶ Right up until 2014, the notice period in Serbia was between one and three months, but just like so many European countries, that period was shortened, in the last Amendment to the Labour Law, to 8 to 30 days. Also, legal consequences of unlawful dismissal have been changed, meaning that the court will reject an employee's request for reinstatement, if it finds that there were grounds for termination of employment, even though the employer acted contrary to the rules of the dismissal procedure.

⁵² More on the development of Serbian labour law in: Lj. Kovačević, 'Évolution du concept de la relation de travail dans le droit serbe: d'un concept autogestionnaire authentique à une (ré)affirmation tardive du concept contractuel', *Revue de droit comparé du travail et de la sécurité sociale*, no. 1, 2015, pp. 28-37.

⁵³ See: *Labour Law* (Official Gazette RS, no. 70/01 and 73/01); *Labour Law* (Official Gazette RS, no. 24/05, 61/05, 54/09, 32/13 and 75/14).

⁵⁴ *Amendment to the Labour Law* (Official Gazette RS, no. 75/14).

⁵⁵ Certain novelties that were introduced regarding termination of employment deserved praise, since they filled the gaps and eliminated the shortcomings that created serious problems in practice. This refers to specifying the reason for dismissal that consists of the breach of work obligation and labour discipline. Special protection during pregnancy, maternity leave and child care leave has been improved as well, considering that the contract of employment cannot be terminated in these situations, and that the limited term employment is extended until the leave expires. In addition, in the event of a dismissal that an employee feels is related to his work as the workers representative, his trade union membership or his participation in trade union activities, the burden of proof has been transferred to the employer to prove that the dismissal or placing an employee at a disadvantage was not the consequence of that status or those activities.

⁵⁶ M. Arandarenko, *Tržište rada u Srbiji. Trendovi, institucije, politike*, Belgrade, Centar za izdavačku delatnost Ekonomskog fakulteta u Beogradu, 2011, p. 178.

In this case, the employee is only protected by the right to a guaranteed compensation of up to six salaries.⁵⁷

There are instances of dismissal in Serbian law that haven't been sufficiently regulated, which can deprive certain legal guarantees of their legal content, and also separate them from the purpose for which they were established. In addition, it should be recognized that a considerable number of persons who fall within the scope of application of labour legislation are effectively denied the opportunity to enjoy protection against unfair dismissal, among other things, because employers, by trying to cut labour costs no matter what, often find ways to avoid implementation of rules on protection against dismissal. This is evidenced by numerous court cases on unlawful dismissal, which, together with the large number of laid-off employees, vividly shows that existence of solid legal rules on dismissal cannot ensure effective protection of employees against unfair dismissal.

5.1. Dismissal due to the lack of results or lack of competence

In accordance with the standards of ILO as well as the Serbian courts jurisprudence, in the last Amendment to the Serbian Labour Law, for an employer to dismiss an employee due to the lack of results or lack of competence, he will first have to notify an employee about the shortcomings in his performance, provide guidance and an appropriate deadline for him to improve performance, making the dismissal legal only if the employee doesn't improve his performance in the set deadline.⁵⁸ The legislator, however, failed to establish the principles of evaluation of competence and performance, which represents a serious risk to employment security. The aforementioned issues are rarely regulated through collective agreements, unilateral acts of the employer or employment contracts, which is why employers often arbitrarily select the methods and criteria for appraisal of performance and competence. This may result in the abuse of reasons for dismissal, which is why the Labour Law should have limited the employer's prerogatives regarding performance evaluation, by, at least requesting that the appraisal criteria used, match the purpose of appraisal and ensure an objective verification of performance. In addition to these material requirements, certain procedural guarantees should be determined, ranging from the employer's obligation to inform employees regarding the criteria and procedures for evaluation, to establishing the rules on prerogatives for evaluation. In addition, the Law should establish clear rules regarding consequences of evaluation, monitoring of evaluators and other guarantees in connection with the evaluation. Employers should refrain from using the evaluation methods that may endanger the mental health of em-

⁵⁷ *Labour Law* (Official Gazette RS, no. 24/05, 61/05, 54/09, 32/13 and 75/14), art. 191, para 7.

⁵⁸ *Labour Law* (Official Gazette RS, no. 24/05, 61/05, 54/09, 32/13 and 75/14), art. 180a. Cf.: ILO Recommendation No. 166 concerning Termination of Employment at the Initiative of the Employer, point 8; Judgement of the Serbian Supreme Court Rev. II 17/06, 29 March 2006, *Bilten sudske prakse*, no 3, 2006, pp. 77–78.

ployees, which is most obvious in methods that are focused exclusively on increasing the productivity of employees, consequently creating a virtually unlimited competition between them (e.g. ranking).⁵⁹

5.2. Dismissal due to employee conduct

Misconduct of employees can have significant consequences for their legal and employment status; it can create justified reasons for dismissal due to breach of work obligation, discipline or due to being found guilty in the court of law for a crime at work. The status of employees can be affected by their actions at the workplace and during the working hours, as well as their actions otherwise associated with the tasks performed for the employer. Employee's actions that are not related to work in the name, on the behalf of and under the prerogatives of the employer, cannot constitute a reason for termination of employment.⁶⁰ However, there are exceptional cases where „disciplinary immunity“ of facts from the private life of an employee may be revoked or restricted.⁶¹ To be more precise, these are the cases where a close connection between the facts from the private life of an employee and successful operation of the company exists, when the conduct of an employee is causing real disturbance in the company (financial loss, loss of clients, damage to the reputation, disruption of the relationship between colleagues that prevents or hinders the work of employees etc.), even if that is happening outside of working hours and the workplace.⁶² Serbian legislator did not regulate this issue, nor has the court practice developed. However, we can conclude that the cases in question are the ones where *the nature of work performed by an employee for the employer is closely connected with the facts he's been charged with*. In practice, however, it is quite delicate to qualify this as a justified reason for dismissal, due to legal uncertainty and the risk of qualifying as justified the conduct that is only indirectly and loosely, or even artificially, connected with the entrusted work.⁶³ This finally means that the absence of *unambiguous specific link between*

⁵⁹ A. Chirez, 'Notation et évaluation des salariés', *Droit ouvrier*, Août, 2003, p. 310.

⁶⁰ A. Cœuret and É. Fortis, *Droit pénal du travail*, 4^e édition, Paris, LexisNexis/Litec, 2008, p. 78.

⁶¹ J. Savatier, 'Porté de l'immunité disciplinaire du salarié pour les actes de sa vie personnelle: Cass. soc., 25 et 26 février 2003', *Droit social*, no. 6, 2003, p. 629.

⁶² This has been confirmed in the French case law in the form of a rule stating that the conduct of the employee that is causing real disturbance in the company (*trouble caractérisé au sein de l'entreprise*) may represent a cause for sanctions against the employee, even if it happened outside of working hours and the workplace (J.-E. Ray, 'Vies professionnelles et vies personnelles', *Droit social*, no. 1, 2004, p. 8). In line with this view is the decision number 4501/79 of the Serbian Court of Associated Labour which confirms that „the breach of work obligation can be caused outside of the workplace if the worker is damaging the reputation of the organization and thereby disturbing the company operations“. Acc. to D. Simonović, *Radnopravna čitanka. Druga knjiga*, Belgrade, Službeni glasnik, 2009, p. 33.

⁶³ C. Jacquélet, *La vie privée du salarié à l'épreuve des relations de travail*, Aix-en-Provence, Presses Universitaires d'Aix-Marseille, 2008, p. 253.

conduct and professional activities of an employee must be regarded as sufficient reason for the preservation of “disciplinary immunity” of the facts from the private life. Any other solution would mean that the employer is given excessive powers and that the rules on dismissal have turned against the weaker party to the employment relationship. In these cases, the requirements for implementation of rules regarding legal determination of breach of work obligation haven’t been met and prohibited actions from private lives of employees are determined arbitrarily as well as *ad hoc*. Related to this is the question of how to establish the rules employees have to adhere to, even in certain aspects of their private lives, for their conduct to be considered appropriate. Serbian theory and practice have yet to answer these questions, considering that right now they’re dealt with only as factual questions for each case individually and without a clear „template“.

On the other hand, the last thirteen years, Serbian legislator didn’t directly or completely regulate issues of disciplinary liability and did it only through the institute of dismissal. This unique nomotechnical and conceptual solution was interpreted differently. One group of authors held the position that the labour laws from 2001 and 2005 do not recognize disciplinary liability as a special kind of liability of employees, while another interpretation was based on the belief that social partners are allowed to use sources of autonomous law to set disciplinary procedure and sanctions. The Amendments to the Labour law from 2014 have „resolved“ this dilemma in favour of the position of disciplinary liability as a kind of legal liability of employees, by introducing fines and warnings before dismissal as new disciplinary measures. The latter is important in creating conditions for effective implementation of principle of *progressive sanctions*, as well as in providing employers the opportunity to impose different measures that may contribute to ensuring a good functioning of the company.⁶⁴

5.3. Dismissal due to employer’s requirements

In times of economic and financial crisis, vulnerability of the right to protection against unfair dismissal is most intensely manifested in the risk of circumventing the rules on collective dismissals. This risk includes the so called „intelligent fragmentation of workforce“, considering that certain employers are trying to circumvent their obligations that

⁶⁴ Although by regulating the disciplinary liability within the institute of dismissal, certain procedural guarantees are ensured for employees who are found liable for major disciplinary offences, we must not lose sight of the necessity to protect the fundamental rights of employees. Without it, it’s impossible to achieve even a formal equality between parties, considering that neither the breaches of work obligation, nor employee culpability can be presumed. Especially because the principles of just and fair procedure must be implemented when establishing disciplinary liability. This involves reaffirming employers’ obligation to inform employees about the rules of procedure, to create conditions for effective exercise of their rights to a defence as well as an appeal, and to establish short deadlines to initiate and conduct a disciplinary procedure and impose disciplinary measures. In addition, there is a need to determine, through sources of the autonomous law, the purpose for the money generated by fines, which should be primarily connected to improvement of working conditions.

stem from relevant rules by dismissing the workforce little by little i.e. by dismissing the number of employees that is smaller than the number qualified as redundancy, that can gradually lead to the shutting down of the company. In addition, the practice in Serbia shows that the rules on collective dismissals can be circumvented by reducing the number of employees by offering them to enter into a mutual agreement on termination of employment, with the so called stimulating severance pay.

Dismissal due to rejection of an employer's offer to change the essential elements of the employment contract because of operational or organizational requirements also carries the risk of abuse. We should also keep in mind that the right to reject an employer's offer to change the employment contract is the absolute right of an employee, which he can exercise even if the proposed changes are minimal or more favourable to him. Therefore, an employer who, in spite of an employee's refusal to accept the offer to conclude the annex, *via facti* imposes the modification of the employment contract, will be in breach of the contract. If the conditions of the contract are unilaterally altered, the employee is not obliged to perform the new tasks, work at a new workplace or under any new conditions.

Termination of employment due to rejection of an employer's offer to conclude an annex to the employment contract will be null and void if it was done with discriminatory motives. In Serbia, this risk is particularly pronounced in relation to employees who use pregnancy and maternity leave, since there is a risk of transfer to a lower level job upon their return from leave, as well as a risk that exercising these rights may lead to the loss or limitation of rights and benefits related to the working conditions, particularly wage.⁶⁵ Such transfers can cause discrimination, and can be misused in a number of ways, e.g. a calculated transfer to a job that is about to be eliminated or a proposed transfer in order to harass an employee or place him in less favourable working conditions. The risk of abusing the transfer becomes that much more serious if we keep in mind that employees are faced with economic pressure to accept the employer's offer to amend their employment contracts, because the alternative is the loss of a job and the risk of long-term unemployment.⁶⁶

5.4. The circle of protected persons

A particular problem in the application of legal rules for dismissal in the Republic of Serbia is the fact that a considerable number of persons who fall within the scope of la-

⁶⁵ Despite the fact that Serbia ratified the UN and ILO conventions that guarantee special protection of workers during pregnancy and maternity: Convention on the Elimination of All Forms of Discrimination against Women (art. 11, para. 2, point b); ILO Convention No. 156 concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities (art. 7); ILO Convention No. 183 concerning the revision of the Maternity Protection Convention (Revised), art. 8, para. 2.

⁶⁶ J. Rivero and J. Savatier, *Droit du travail*, Paris, PUF, 1956, p. 330. As well as A. Martinon, *Essai sur la stabilité du contrat de travail à durée indéterminée*, Paris, Dalloz, 2005, pp. 132-133.

bour legislation are *in effect* denied from enjoying the protection against unfair dismissal. This is because employers, by trying to cut labour costs no matter what, often have a much higher true impact on employees than what they are entitled to under laws. At the same time, we should bear in mind that in practice, legal protection against unfair dismissal is gradually shrinking thanks to the *increase of limited term employment contracts*, as well as misuse of this type of contract, most notably by successively entering into the same type of contract by the same people for the same jobs, i.e. entering into such a contract even when it is not justified by the specific and temporary requirements of the employer or the employee. We can also add *production fragmentation* to the list, since the so called small employers are excluded from the scope of application of the rules on collective redundancies, while the position of employees in other dismissal cases becomes worse due to *the weakening of the role of the trade unions*, primarily because of the declining rates of unionization and union lack of agility in respect of ensuring the effective application of the labour legislation. This problem of non compliance and abuse of employers' powers cannot be solved only by changing the laws, but also by fortifying the inspections and other monitoring and protection mechanisms.

5.5. The impact of European integrations on protection against unfair dismissal

Efforts to harmonize Serbian legislation with EU law do not play a part in the strengthening of mechanisms for prevention of abuse of an employer's right to terminate employment. Mainly because *acquis communautaire* does not regulate termination of employment, even though the Treaty of Functioning of the European Union explicitly gives the power to EU institutions to regulate matters related to protection of employees in case of dismissal⁶⁷. However, European Parliament and European Council, to date, have not adopted the directive which would regulate key aspects of this delicate legal issue, especially valid reasons for termination, the (maximum and minimum) length of the notice period and the consequences of unlawful termination. The sensitivity of these issues, as well as the significant national differences in their regulation, are the reasons why we cannot expect this situation to change anytime soon. This is separate from the fact that the Charter of Fundamental Rights of the European Union reaffirms the right of employees to protection against unfair dismissal⁶⁸ which reaffirms employment security as one of the values of the European Union legislation. This was confirmed in several directives that indirectly regulate termination of employment, as is the case with the directives governing non-discrimination in employment or limited term employment. At the same time, we should bear in mind that the directives on protection of rights of employees in cases of collective redundancies, transfer of undertakings and employer insolvency were adopted under the auspices of the European Economic Community. The first two of the three di-

⁶⁷ Article 153, paragraph 1, item d).

⁶⁸ Article 30.

rectives are significant for the application of the principle of employment security, even though their adoption, both in terms of the original text, but also in terms of their amendments, was not governed only by social, but also economic goals.

Because of all the obstacles that stand in the way of the minimal harmonization of rules on dismissal, the mere thought of harmonization of these rules is considered to be utopia. This, however, does not negate the possibility of applying certain *soft law* sources in this area, especially in the context of implementation of the „flexicurity“ concept, since it implies mitigation of strict rules on termination of employment and gives priority to the professional mobility of workers and their employment security in comparison to the job security. This is closely associated with the need to ensure employability of workers, i.e. to open up the possibility of being employed, even if it doesn't mean staying on the same job. Hence, there is room for the conclusion that the flexibility concept „opened the doors“ to deregulation of dismissal rules, which, based on the highly successful Danish model of flexicurity, should be accompanied by advanced measures of active employment policies and generous unemployment benefits.⁶⁹ Therefore, „Member States should assess and, where necessary, alter the level of flexibility provided in standard contracts in areas such as periods of notice, costs and procedures for individual or collective dismissal, or the definition of unfair dismissal“.⁷⁰ However, these views require critical re-examination because experience from several European countries shows that deregulation is not a satisfactory response to high unemployment.⁷¹

VI. CONCLUSION

In recent years, labour law, as never before, has been facing the pressure to gradually but inexorably alter its protective nature, in order to turn this branch of law into „an instrument for stimulation of enterprise competitiveness“.⁷² Especially because in public, flexible regulation and organization of work, as well as reduction of legal protection in order to cut labour costs and stimulate employment – are touted as instruments for overcoming economic and financial crisis. And yet, even the most consistent implementation

⁶⁹ F. Hendrickx, 'Flexicurity and the EU Approach to the Law on Dismissal', *Tilburg Law Review*, vol. 14, 2007-2008, pp. 103-104.

⁷⁰ *Jobs, Jobs, Jobs: Creating More Employment in Europe. Report of the Employment Taskforce*, November 2003, p. 28. Furthermore, it was concluded in the *Green Paper: Modernising labour law to meet the challenges of the 21st century* (COM/2006/0708 final), with regards to the view that providing certain aspects of protection of economically dependent workers was (un)justified, that „other rights, particularly those relating to notice and dismissal, tend to be restricted to regular employees having completed a prescribed period of continuous employment“.

⁷¹ Schömann, *Labour Law Reforms in Europe*, p. 13.

⁷² Loy, *La réforme italienne*, p. 48.

of these proposals in most European countries hasn't led to the creation of a significant number of good new jobs, but rather to the impoverishment of the population.⁷³ Labour law reforms undertaken for the purpose of deregulation of already flexible labour rules had an extremely negative impact on the fundamental social rights, deepened the inequalities among the population and strengthened their economic insecurities.⁷⁴ This trend has rightly caused a concern for many authors, especially if we take into account that „the assumption that the labour law reforms represent a way out of the crisis - is questionable”, just as „it is difficult to distinguish whether labour law reforms are a response to the economic crisis or merely accompany the crisis, with no certainty about any causal link between them“.⁷⁵

This conclusion is also true for the changes to the rules on termination of employment, although the reform of labour legislation, in several countries, included certain improvements in protection against dismissal, especially in the field of special protection of certain categories of workers. Still, in most countries, changes to the labour law included reductions in protection against dismissal and, especially, protection against unlawful termination (reducing the notice period, lowering the level of severance pay, changes to the rules relating to consequences of unlawful dismissal, particularly in relation to the right of an employee to request reinstatement). In most cases, implementation of the new solutions showed that they were *conceptually incorrect*, since some studies have already shown that the rules regarding justified dismissal don't necessarily burden employers with unreasonable costs,⁷⁶ and that the high employment rates can not be ensured only by reducing protection against dismissal. These findings are especially important for the countries that do not provide, through their social security system, sufficient protection for the unemployed. Besides, the countries whose employment agencies don't have the capacity to ensure the appropriate quality and scope of service to all interested persons, have shown restraint in decreasing protection from dismissal.

On the other hand, the mere existence of solid legal solutions isn't enough to ensure effective protection of employees from unfair dismissal, and it's very important that the labour laws are complied with. Without effective implementation, solid legislation does not have a value greater than „a dead letter“, which is often the case with rules regarding the dismissal procedure or rules on collective redundancy that are violated every step of

⁷³ Loy, p. 48.

⁷⁴ Clauwaert and Schömann, *The Crisis and National Labour Law Reforms*, p. 16.

⁷⁵ Clauwaert and Schömann, pp. 16-17.

⁷⁶ This was confirmed in the research that Ewing and Hendy conducted regarding the British law and practice, where they proved that the rules on justified dismissal do not burden the employers with excessive costs. Instead „it offers minimal protection for workers: too many are excluded from the legislation; it is too easy for an employer to justify a dismissal as not being 'unreasonable', and the remedies for those who are dismissed remain wholly inadequate“. K. D. Ewing and J. Hendy, 'Unfair Dismissal Law Changes - Unfair?', *Industrial Law Journal*, vol. 41, no. 1/2012, p. 121.

the way. Such state of affairs in practice does not mean, however, that these legal institutions lost their value or that they have become outdated. Instead there is a need to make them clearer and more certain and adaptable to the needs of society. Labour legislation, therefore, must be sensitive to changes occurring in the field of labour, must predict or at least identify and regulate them. This, however, cannot result in the betrayal of the idea of social justice and other ideas and values that express the spirit and the being of the labour law, including the requirement to respect the fundamental social rights. In that sense, European Committee of Social Rights has warned that the means by which social rights are unduly limited shouldn't be used for elimination of consequences of economic crisis.⁷⁷ This finally means that the economic crisis may constitute a legitimate reason for amending the existing laws and practices in order to limit public spending or mitigate the burden faced by the employers. However, the aforementioned amendments may not be achieved *via* excessive insecurity and destabilization of the status of subjects of fundamental social rights: „doing away with such guarantees would not only force employees to shoulder an excessively large share of the consequences of the crisis but also accept pro-cyclical effects liable to make the crisis worse and to increase the burden on welfare systems, particularly social assistance”.⁷⁸

⁷⁷ J.-P. Marguénaud and J. Mouly, 'La Comité européen des droits sociaux face au principe de non-régression en temps de crise économique,' *Droit social*, no. 4, 2013, p. 344.

⁷⁸ European Committee of Social Rights, paragraph 18.

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THE RIGHT TO OCCUPATIONAL HEALTH, SAFETY AND DIGNITY – EU WORKERS’ FUNDAMENTAL RIGHT VIEWED FROM CROATIAN PERSPECTIVE

Abstract:

This paper has two objectives. Firstly, to warn that the workers’ right to occupational health, safety and dignity is the fundamental right defined in the Charter of Fundamental Rights of the European Union, because this fact is together with its legal implications disregarded in Croatia. The right is exercised based on the applicable EU Directives and the European Social Charter (revised). Obligation and responsibility of Croatia as a member state is to fully and properly transpose all requirements defined in European sources into the national legal framework, and as a result the second objective of the paper is to assess the legislative achievements of Croatia.

The paper brings the analysis and comparison of selected normative solutions from the sources of European and national legislation relevant for this topic, and legal interpretations of the Supreme Court of the Republic of Croatia. The results show that there are obstacles to the efficient exercise of the fundamental workers’ right to occupational health, safety and dignity in Croatia. They include deficient regulations that do not entirely reflect the intentions of EU legislators and the judicial practice when it departs from the regulations in which the normative content of rights and duties of subjects in labour relations is entirely appropriately defined in relation to EU legislation.

Key words: *occupational safety and health, dignity at work, harassment, special working conditions, termination of the employment contract*

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I. INTRODUCTION

From the perspective of workers and unions in Croatia, the right to pay and other benefits belongs to the most important labour-related rights. The actors of collective labour relations devote much more attention to them than to the rights of workers and obligations of employers connected with occupational health, safety and dignity. This conclusion arises from the insight into selected collective agreements.¹ However, whether the worker will be in the situation to work and earn his or her pay and thus enjoy other material rights depends solely on his or her working ability (health status and psychological fitness). Working ability is directly under the influence of the way in which an employer treats the obligations concerning the implementation of the protection of safety, health and dignity at work. It is therefore both justified and important to put under notice that the right to this kind of protection is the fundamental right of workers in the EU and that this fact must guide the design of the normative content and the realization of that right in Croatia.

Given that Croatia is a member state of the EU, the paper outlines the sources of EU legislation, which are superordinate to Croatian legal order and define the right to occupational health, safety and dignity as the fundamental workers' right. EU legal sources set minimum normative content to be transposed to the legal orders of the member states. After that, the paper summarizes the normative content of that legislation as it is established in the Croatian legal order. Finally, prior to the conclusion, there are three examples taken from the regulations and court practice in Croatia that lead to the conclusion that legal order and court practice in Croatia still deviate from EU normative content and legal interpretations, unfortunately to the detriment of workers.

II. NORMATIVE CONTENT OF THE WORKERS' RIGHT TO OCCUPATIONAL HEALTH, SAFETY AND DIGNITY

2.1. EU legal framework

The right to occupational safety, health and dignity is unquestionably the fundamental workers' right in the EU, because it follows from the provisions of Article 31 (Fair and just

¹ Kolektivni ugovor zadjelatnost humanitarnog razminiravanja, *eng.* Collective agreement for the humanitarian mine clearing (Official Gazette 66/14); Kolektivni ugovor za djelatnost privatnog zdravstva Hrvatske, *eng.* Collective agreement for the private health care sector in Croatia (Official Gazette 150/14); Kolektivni ugovor za HEP grupu, *eng.* Collective agreement for the HEP company (Official Gazette 132/14); Kolektivni ugovor za Hrvatsku lutriju d.o.o., *eng.* Collective agreement for the Croatian Lottery Ltd. (Official Gazette 133/14); Kolektivni ugovor za zaposlenike u srednjoškolskim ustanovama, *eng.* Collective agreement for the secondary schools' employees (Official Gazette 72/14) and Kolektivni ugovor ugostiteljstva, *eng.* Collective agreement for the catering industry (Official Gazette 16/15).

working conditions) of the Charter of Fundamental Rights of the European Union². Every worker in the EU has the right to working conditions which respect his or her health, safety and dignity and every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave. The Charter has the same legal force as the establishing treaties.³ With respect to the normative content of the said right, it is important to point out two circumstances. First, issues relating to the organization of working hours present special measures of safety at work. They do not pertain to the rights and obligations primarily or exclusively aimed at regulating the labour market supply and demand. Second, the Charter treats the protection of workers' dignity as directly connected to the protection of health and safety at work and they both are important integral parts of working conditions.

Other provisions of the Charter also contribute to the normative content of the right to occupational safety, health and dignity of every worker in the EU. "Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education."⁴ "EU recognizes and respects the entitlement to social security benefits and social services providing protection in cases such as maternity or industrial accidents, in accordance with the rules laid down by EU law and national laws and practices."⁵

In accordance with the Preamble of the Charter⁶ the Explanations Relating to the Charter should be taken into consideration as well⁷. They point to the conclusion that the

² Charter of Fundamental Rights of the European Union (OJ C 83)

³ Article 6 of the Treaty on European Union (consolidated version 2012) (OJ C 326)

⁴ Ibid. Article 32 (Prohibition of child labour and protection of young people at work)

⁵ Ibid. Article 34 (Social security and social assistance)

⁶ '... the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention.'

⁷ Explanations Relating to the Charter of Fundamental Rights (OJ C 303, 14. 12. 2007.)

Explanation on Article 31 (Fair and just working conditions):

'1. Paragraph 1 of this Article is based on Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work. It also draws on Article 3 of the Social Charter and point 19 of the Community Charter on the rights of workers, and, as regards dignity at work, on Article 26 of the revised Social Charter. The expression 'working conditions' is to be understood in the sense of Article 156 of the Treaty on the Functioning of the European Union.

2. Paragraph 2 is based on Directive 93/104/EC concerning certain aspects of the organisation of working time, Article 2 of the European Social Charter and point 8 of the Community Charter on the rights of workers.'

Explanation on Article 32 (Prohibition of child labour and protection of young people at work):

'This Article is based on Directive 94/33/EC on the protection of young people at work, Article 7 of the European Social Charter and points 20 to 23 of the Community Charter of the Fundamental Social Rights of Workers.'

normative content of the fundamental right to occupational safety, health and dignity at work is also defined in the secondary EU legislation, including both framework Directive 89/391/EEC⁸ and individual directives⁹, and in the European Social Charter¹⁰ and the revised Social Charter¹¹. The combination of these sources suggests the application, among others, of the “consensual method”¹² of legal interpretation.

The connection between the directives and the fundamental rights established by the Charter is important. Namely, the provisions of the Charter are addressed to the member states only when they are implementing EU law.¹³ It is therefore legally relevant to consider the relationship of the Charter and the regulations passed in Croatia for the purpose of transposing into national legislation the requirements of directives on the protection of health, safety and dignity at work, because it concerns the implementation of EU legislation in a member state.

In order to understand the right of workers to the protection of dignity at work, it is important to implement Article 26 of the European Social Charter (revised), which reads: “With a view to ensuring the effective exercise of the right of all workers to protection of their dignity at work, the Parties undertake, in consultation with employers’ and workers’ organisations: to promote awareness, information and prevention of sexual harassment in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct; to promote awareness, information and prevention of recur-

Explanation on Article 34(1) (Social security and social assistance):

‘The principle set out in Article 34(1) is based on Articles 153 and 156 of the Treaty on the Functioning of the European Union, Article 12 of the European Social Charter and point 10 of the Community Charter on the rights of workers. The Union must respect it when exercising the powers conferred on it by Articles 153 and 156 of the Treaty on the Functioning of the European Union. The reference to social services relates to cases in which such services have been introduced to provide certain advantages but does not imply that such services must be created where they do not exist. ‘Maternity’ must be understood in the same sense as in the preceding Article.’

⁸ Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ L 183)

⁹ Updated overview of directives in force can be found in the EUR-Lex base in the registry area 05.20.20.10 Health and Safety, http://eur-lex.europa.eu/search.html?CC_1_CODED=05&CC_4_CODED=05202010&name=browse-by:legislation-in-force&CC_2_CODED=0520&displayProfile=allRelAll-ConsDocProfile&qid=1427211746387&CC_3_CODED=052020&type=named, (accessed 27 June 2015).

¹⁰ European Social Charter, CETS No. 35, <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=035&CM=8&DF=05/06/2015&CL=ENG>, (accessed 27 June 2015).

¹¹ European Social Charter (revised), CETS No. 163, <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=163&CM=8&DF=05/06/2015&CL=ENG>, (accessed 27 June 2015).

¹² C. Pitea, ‘Interpreting the ECHR in the Light of ‘Other Instruments’: Systemic Integration or Fragmentation of Rules on Treaty Interpretation?’, in N. Boschiero, T. Scovazzi, C. Pitea and C. Ragni (eds.), *International Courts and the Development of International Law, Essays in Honor of Prof. Tullio*, The Hague, Asser Press, 2013, p. 555.

¹³ Article 51 paragraph 1.

rent reprehensible or distinctly negative and offensive actions directed against individual workers in the workplace or in relation to work and to take all appropriate measures to protect workers from such conduct.”

With regard to connecting health, safety and dignity at work into a single right, which is a component part of the European concept of working conditions, it is of use to indicate that this concerns the rights of personality. According to Radolović, the right of personality is in the subjective sense “the right of a certain legal subject to seek from all other subjects and to enforce the respect and development of one’s own personality in accordance with one’s stage of psycho-social development. The stipulation is made towards the third parties, including the state, because the state is very frequently not only the infringer of someone’s subjective right of personality but also the promotor of the situations that create an unfavourable social environment regarding the development and enforcement of the right of personality. The state, however, is the only one that can present the other decisive factor for the proper development of this right.”¹⁴ Resulting from Radolović’s consideration of the role of the state, attention is drawn to the fact that the right to the protection of health and safety at work was recognized on the international level already in 1976 by way of entry into force of the Covenant on Economic, Social and Cultural Rights.¹⁵ Croatia is a party to the Covenant based on the notification of succession. The implementation of the Covenant is directed by the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights¹⁶, which give instructions on the meaning of these rights, possibilities of violating them by conduct or omission, liability for violations and the right of individuals to effective state-guaranteed remedies for the protection of violated rights. According to the Guidelines, there are three different obligations imposed on states: to respect, to protect and to fulfil the rights. Failure to perform any one of these three obligations constitutes a violation of such rights. The obligation to respect requires states to refrain from interfering with the enjoyment of economic, social and cultural rights. The obligation to protect requires states to prevent violations of such rights by third parties. The obligation to fulfil requires states to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights.

Consequent to the said facts, it should not be disputable that the right of workers in Croatia to occupational health, safety and dignity is a fundamental right in connection to which the state is obliged to ensure effective realization and protection. However, the effectiveness of realization and protection of the right depends on the precision by which

¹⁴ Author’s translation of the quote according to the following reference: A. Radolović, ‘Pravo osobnosti u novom Zakonu o obveznim odnosima’, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, Vol. 27, No. 1, 2006, p. 133.

¹⁵ International Covenant on Economic, Social and Cultural Rights, United Nations: Human Rights, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>, (accessed 27 June 2015).

¹⁶ The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, <http://www.unhcr.ch/tbs/doc.nsf/0/6b748989d76d2bb8c125699700500e17?Opendocument>, (accessed 27 June 2015).

the normative content of the right was regulated. With respect to the rights of workers following from the EU legal order, the realization and protection of the right may depend, in addition to the already mentioned factors, on the possibility for workers in Croatia to directly refer to that right before the courts or e.g. work inspectors during inspections. Of course, this is important in cases when Croatia partly or completely failed to transpose a certain labour-relations right into the national legal order.

Considering Article 51 of the Charter, Leczykiewicz thinks it is possible to refer to the Charter directly “where there exists an EU Directive which protects the relevant right but it has not been correctly implemented by the Member State. Absence of correct implementation can consist of situations where incompatible domestic provisions are preserved, the provisions adopted to implement the Directive do not adequately achieve the Directive’s objective, or national law is simply silent on the matter. Here the Charter could be used to make the right effective despite absence of correct implementation of the Directive.”¹⁷

2.2. Croatian legal framework

The Constitution of the Republic of Croatia¹⁸ defines the right of specific groups of employees (mothers, young people and disabled persons) to special protection at work. *Argumentum a contrario* – all other employees have the constitutional right to regular safety at work. Also, each employee shall under the Constitution be entitled to annual holidays with pay, and shall never waive these rights.

The Labour Act¹⁹ and the Occupational Health and Safety Act²⁰, as well as subordinate legislation, define the general normative content of the right to occupational safety and health. Special acts and other regulations additionally regulate that right specifically for workers in certain fields of activity (all types of traffic, humanitarian mine clearing, forestry, mining etc.). Directive 89/391/EEC is transposed by way of the Occupational Health and Safety Act, and individual directives by way of subordinate regulations. Directives on working time organization and special safety at work for minor workers are transposed by way of the Labour Act.

The Civil Obligations Act defines the rights of personality, which include the right to life, to physical and mental health, reputation, honour and dignity. Every person has the

¹⁷ D. Leczykiewicz, ‘Horizontal Application of the Charter of Fundamental Rights’, *European Law Review*, no. 38, available at <http://ssrn.com/abstract=2328175> (accessed 27 June 2015).

¹⁸ Ustav Republike Hrvatske, *eng.* Constitution of the Republic of Croatia (Official Gazette 56/90, 135/97, 113/00, 28/01, 76/10 and 5/14)

¹⁹ Zakon o radu, *eng.* Labour Act (Official Gazette 93/14)

²⁰ Zakon o zaštiti na radu, *eng.* Occupational Health and Safety Act (Official Gazette 71/14, 118/14, 154/14)

right to the protection of personality rights under the legally defined conditions.²¹ Naturally, the term “every person” applies also to every worker in Croatia.

The Anti-Discrimination Act²² regulates protection from harassment pursuant to the EU Directives that are by way of this Act transposed into the national legal order.²³

Croatia has signed but not yet ratified the revised Social Charter. Still, pursuant to the Explanations Relating to the Charter of Fundamental Rights, Croatia must apply the definition and normative content of the workers’ right to the protection of dignity as defined in Article 26 of the revised Social Charter (to promote awareness, information and prevention and to protect workers). There is obvious similarity of approaches found in The Explanations Relating to the Charter and the Maastricht Guidelines (to respect, to protect and to fulfil).

III. SELECTED EXAMPLES FROM REGULATIONS AND COURT PRACTICE IN CROATIA

3.1. Jobs performed under special working conditions

Jobs performed under special working conditions may be performed exclusively by employees fulfilling special prescribed conditions when performing these jobs. The purpose of this is to prevent harmful influences of work on the life and health of workers (injuries, professional diseases, other work-related diseases). Prescribed special conditions that workers must fulfil concern age, sex, professional abilities, health, physical and psychological condition (health status) and psychophysiological and psychological abilities (psychological fitness) of the candidates for employment or the workers performing certain jobs. Within the framework of special conditions of health status and psychological fitness, contraindication is prescribed. The employer must check whether the employee fulfils special conditions prior to employment, and during employment the employer must ensure in the given periods of time that periodic controls of complying with the special conditions for the performance of jobs are carried out. On the occasion of repeated check-up of health status and psychological fitness, it is determined whether the

²¹ Article 19 of the Zakon o obveznim odnosima, *eng.* Civil Obligations Act (Official Gazette 35/05, 41/08 and 125/11)

²² Zakon o suzbijanju diskriminacije, *eng.* Anti-Discrimination Act (Official Gazette 85/08 and 112/12)

²³ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ L 303, 02. 12. 2000.); Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180, 19. 7. 2000.); Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ C 373, 21. 12. 2004.); Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (OJ L 204, 26. 07. 2006.)

worker has experienced any health damage or changes of psychological status which are prescribed as contraindications for job performance, or whether there has been deviation concerning prescribed conditions. Health status and psychological fitness needed for the continuation of work are evaluated depending on the level of the possible damage of health or changes in the psychological condition of the worker. The evaluation is provided by the specialist in occupational medicine who the employer engages to provide this service to the workers. If there are any changes diagnosed, the employer must urgently apply additional measures for the protection of workers' health and safety. The employer must not hire a new employee unless all prescribed conditions regarding the health status and psychological fitness are met. Likewise, the employer must not allow the worker to continue performing jobs under special working conditions if it is determined during a periodic check-up that he or she no longer meets all prescribed conditions. The worker may demand an *ad hoc* check-up even prior to the regular periodic check-up time.

There are in total 56 jobs recognized as the jobs performed under special working conditions, including for example those of firefighter and diver, then the jobs including the exposure of the worker to vibrations, chemical or biological agents, the jobs demanding heavy physical strain, the jobs performed at heights or in unfavourable microclimate, the jobs of protecting persons and property that include firearms and many other.²⁴ The list is open-ended, allowing the employer to determine that in his or her case there are other jobs that are performed under special working conditions in addition to the ones listed under 56 prescribed jobs. Preventive measures, dynamics of health status and psychological fitness check-ups and employer's obligations are drawn up based on the assumption that a worker performs a job under special working conditions full time (40 hours per week). If the worker works within the framework of full time hours and if the employer implements all prescribed obligations i.e. preventive measures, the health status and psychological fitness of workers performing jobs under special working conditions should not change to the detriment of workers.

However, in 2014 the Labour Act defined a new right of workers. Now the Labour Act allows an employee with a full-time employment to conclude a labour contract with another employer, with the maximum duration of eight hours a week, or 180 hours a year. An employee must for this purpose obtain the consent of the primary employer in writing.²⁵ By introducing this provision into the Labour Act, the legislator had in mind primarily its effects on the labour market demand and supply, completely disregarding the connection with the regulations on occupational safety and health. When the provisions of the Labour Act are looked at from the perspective of the Occupational Health and Safety Act, it is clear that there is lacking normative content and a wide field of insecurity regarding the fundamental

²⁴ Pravilnik o poslovima s posebnim uvjetima rada, *eng.* The Ordinance on Jobs Performed under Special Working Conditions (Official Gazette 5/84)

²⁵ Article 61 paragraph 3

right to occupational health and safety of workers performing jobs under special working conditions. The normative content of both workers' rights and employers' obligations and responsibilities has remained deficient in the said type of a cumulative employment status.

The subject of the provision of Article 61 paragraph 3 of the Labour Act is "a full-time worker". The provision refers to working time only, and not to working conditions such as e.g. special working conditions pursuant to the Ordinance on Jobs Performed under Special Working Conditions. The regulations pertaining to labour law in Croatia provide no answer to the question whether an employer may allow an employee performing 40-hours-week job under special working conditions for him to perform higher-risk jobs for another employer. The second employer's risk assessment will not establish that the job performed for him entails higher risks, because the employee performs it only eight hours a week or not more than 180 hours a year. What if the employee in addition to 40 hours working for the primary employer performs for the same employer the job overtime and has regarding this provided his or her written consent to perform higher-risk jobs for another employer? Does the obligation and responsibility of the employer to undertake safety and health measures refer also to the employment of that worker with another employer? Is the employer for the reasons of occupational safety and health protection free to deny written consent to the worker and that way prevent him or her from concluding the other labour contract? Should the employer prior to giving consent be notified of the assessment of risk of performing the job for another employer? Or, should the other employer take into account the risks a worker is already exposed to while working full time? Should care be taken of possible effects on health status and psychological fitness that can be caused by the exposure of the worker to the combination of risks from both employments? Does the second employer have to arrange occupational medicine services for the worker he or she employs 180 hours a year and does he or she have to check the health status and psychological fitness of that worker? Does it suffice that only the first employer checks this? What if the opinions of occupational medicine specialists employed by both employers respectively differ? Does this give the right to the worker to seek an independent opinion of a third specialist and does this opinion then oblige both employers? Are only complicated expert evaluations of the health status and psychological fitness of the worker and of working conditions at both employers able to suggest the final conclusion as to which employment reduces the working ability of the worker, should there appear such reduction? A barrage of questions we need to face here is obvious, because the questions are not merely hypothetical but have direct consequences for both the realization of the fundamental right to occupational safety and health in every work-related way and the damages sought in case of any harm to health or reduction or loss of the working ability.

All the mentioned difficulties are fully relevant for every cumulative employment, including the cases in which the worker performing jobs under special working conditions works part-time cumulatively for two or more employers in order to reach full-time working hours.

There are too many unresolved questions and there is too much consequential legal uncertainty to allow the interpretation based on the appeal to the freedom to regulate obligations²⁶.

3.2. Dignity at work

Failure to care for the protection of the dignity of the worker directly implies the failure to care for the protection of health, because many forms of harassment and violence directly harm the health of the worker.²⁷

The Anti-Discrimination Act, which *inter alia* applies to the area of work and employment, provides protection in case of harassment, but exclusively in relation to the prohibited grounds of discrimination that apply in anti-discrimination legislation (race or ethnic affiliation or colour, gender, language, religion, political or other belief, national or social origin, property, trade union membership, education, social status, marital or family status, age, health condition, disability, genetic heritage, native identity, expression or sexual orientation).²⁸ The Act imposes no preventive measures that would oblige the employer. It only regulates the court protection of the victim of harassment, which is in case of workers carried out in a labour dispute.

The Labour Act regulates the employer's obligation to undertake measures against harassment, but only posterior to the event of harassment and upon the inspection of the worker's complaint, on the basis of which adequate measures are undertaken to prevent the continuation of harassment in an individual case.²⁹ These measures are not preventive, but present merely a reaction to already suffered harassment and they are not designed for the purposes of preventive protection of all workers, but for a specific reported case of harassment.

Hence, there is no obligatory preventive measure to be undertaken by the employer to protect the employee that follows from the two discussed pieces of legislation. Unfortunately, it does not follow from the third act as well. Namely, in the process of passing

²⁶ Article 8 paragraph 4 of the Labour Act and article 2 of the Civil Obligations Act.

²⁷ The conclusion is justified by the research results e.g. S. Einarsen and M. Birkeland Nielsen, 'Workplace bullying as an antecedent of mental health problems: a five-year prospective and representative study', *International Archives of Occupational and Environmental Health*, Vol. 88, No. 2, 2015, pp. 131 – 142.; C.C. Rodríguez et al., 'Workplace Harassment and Workers' Health: Review of the 'Mobbing and Health' Working Groups', *Social Medicine*, Vol. 6, No. 4, 2012, pp. 266 – 267, <http://www.socialmedicine.info/index.php/socialmedicine/article/view/640/1245>, (accessed 27. 06. 2015.); Jagdish Khubchandani and James H. Price, 'Workplace Harassment and Morbidity Among US Adults: Results from the National Health Interview Survey', *Journal of Community Health*, No. 40, 2015, <http://link.springer.com/article/10.1007/s10900-014-9971-2#page-1>, (accessed 27 June 2015.)

²⁸ Article 1 paragraph 1 and article 3 paragraph 3

²⁹ Article 134

the new Occupational Health and Safety Act, all the provisions designed to contribute in a general preventive sense to the prevention, recognition and resolving of the problem of harassment at work or related to work have been removed from the text of the bill. With the participation of social partners, an unacceptable inconsistency has been made legal. As a result, regarding alcohol intoxication at work, the employer explicitly prescribes preventive measures to be taken by the employer that are considered adequate. Pursuant to the same legislation, however, in case of harassment at work or related to work, the legislator mentions no preventive measure or the obligation of the employer to implement it.

Contrary to this, Directive 89/391/EEC stipulates the employer's obligations to assess all work-related risks and to protect the worker from them in a preventive rather than reactive manner.³⁰ Hence, two obligations are prescribed: to assess risks in all work-related ways and protect the worker from the determined risks. Necessary quality or effectiveness of protection is also prescribed ("... the preventive measures and the working and production methods implemented by the employer must assure an improvement in the level of protection afforded to workers with regard to safety and health and be integrated into all the activities of the undertaking and/or establishment and at all hierarchical levels; ..."). The protection is provided based on the general principles of prevention. In this case there are three important principles (avoiding risks, evaluating the risks which cannot be avoided, combating the risks at source).³¹ The accent is clearly put on the primary prevention, thus suggesting the conclusion that Croatian regulations that only determine the right of the victim of harassment to court protection are far from meeting EU legal requirements concerning preventive action aimed at preventing harmful consequences of harassment at work or related to work. Specifically, according to the current regulations in Croatia, the employer cannot be held responsible for failing to take a particular preventive measure or be commanded to take it, and the worker cannot be confident about the content of the right to protection that should be provided to him by the employer or seek from the employer particular preventive actions. The worker can refer to his or her legal rights and undertake protection only posterior to becoming the victim of harassment, because it is only then that the worker falls within the scope of the provisions of the Labour Act.

It is a belief wrongly held in Croatia that harassment at work appears exclusively in relation to the forbidden bases of discrimination prescribed in corresponding EU Directives and that the legislator has completely regulated all issues related to harassment of workers at work or in relation to work once the requirements pronounced in these directives have been transposed to the national legal order by way of the Anti-Discrimination Act. Quite

³⁰ Article 5 paragraph 1: '1. The employer shall have a duty to ensure the safety and health of workers in every aspect related to the work.'

Article 6 paragraph 3 (a): '3. Without prejudice to the other provisions of this Directive, the employer shall, taking into account the nature of the activities of the enterprise and / or establishment: (a) evaluate the risks to the safety and health of workers...'

³¹ Article 6 paragraph 2 (a), (b), (c)

the contrary, there are many cases of harassment at work not in any way connected with discrimination. An example can be the harassment related to the hierarchical position of the person who harasses (so called *bossing*). Another example is the harassment of teachers by students. It does not have to be connected with any of the forbidden bases of discrimination, but is simply an inappropriate, humiliating and unacceptable reaction of students to the decisions made by teachers when they apply the criteria for student achievement evaluation.

European social partners have recognized harassment and violence as work-related risks that may affect every workplace and every worker, regardless of the company size, field of activity or the form of the work contract or labour relations. More importantly, they have become aware that certain groups and branches of activity are under greater safety risks, and pursuant to these conclusions they have entered into the European framework agreement on harassment and violence at work³², which mentions direct connection with Directive 89/391/EEC. It has also been recognized by the European Commission.³³ Hence, it is not disputed in the least that EU regulations pertaining to occupational safety and health refer to and should be applied to the harassment as a risk at work or related to work, particularly framework Directive 89/391/EEC, in all cases when harassment is not related to the forbidden bases of discrimination. Regulations in Croatia should reflect this, taking care to oblige the institutions that bring forward, pass and implement regulations.

Social partners in Croatia obviously cannot support the role of European social partners and take responsibility for enforcing the Framework Agreement. This was proven during their participation in the public discussion on the draft of the Occupational Health and Safety Act. It is therefore not realistic to expect that a collective agreement might be a legal source for compensating the discussed failures of the legislator in Croatia related to the regulation of the protection of dignity of workers at work or related to work. The state should completely fulfil its duty, because the obligations follow from EU Directives, and the directives are legal instruments addressed by the EU to its member states.

3.3. Work under the influence of alcohol

The presented two examples indicate that the failures of the legislator to precisely determine the normative content of a particular right contribute to legal security, realistic expectations of addressees and legal effectiveness. Legal security and effectiveness are

³² European framework agreement on harassment and violence at work, Brussels, <http://www.etuc.org/framework-agreement-harassment-and-violence-work>, (accessed 27 June 2015).

³³ Commission of the European Communities. 'Communication from the Commission to the Council and the European Parliament transmitting the European framework agreement on harassment and violence at work', COM(2007) 686 final, Brussels, p. 4, http://www.europarl.europa.eu/hearings/20071121/femm/framework_agreement_en.pdf, (accessed 27 June 2015.)

constitutional categories in the framework of the rule of law. Realistic expectations of addressees, in this case the workers in Croatia, result from the EU legal order, which guarantees the fundamental right of workers to the protection of health, safety and dignity at work and related to work.

The purpose of the following example is to draw attention to the fact that it is sometimes in Croatia the case that even completely correct normative content of a particular right cannot help workers protect their fundamental right to the protection of health, safety and dignity at work. This refers to the situations in which the way institutions enforce the law contributes to legal insecurity or even illegal decision-making. The problems are in this manner generated in a new, unexpected and completely unjustified way, reversing thereby all the benefits of appropriate legislation.

The Occupational Health and Safety Act prohibits work under the influence of alcohol, whereby the procedure to check whether the worker is under the influence of alcohol is specified. Under the established procedure, the use of alcotest, breath test or other suitable device or means is foreseen.³⁴ The courts in Croatia have in the last twenty years consistently passed rulings that the termination of the labour contract on account of alcohol intoxication of the worker is unauthorised if it is not determined by alcotest but only based on depositions of other workers as witnesses. Legal opinion of the courts in such a case is that alcohol intoxication has not been proven.³⁵

³⁴ Article 59 paragraph 1.

³⁵ The following rulings and legal interpretations contained in them serve as examples (author's translation):

'Alcohol intoxication of workers cannot be determined by way of witnesses' depositions.' ,Vrhovni sud Republike Hrvatske, *eng.* Supreme Court of the Republic of Croatia, Rev 2873/99.

'Alcohol intoxication of workers should be determined by means of an alcotest or other suitable instrument or tool, and only exceptionally, when no suitable instruments are at the employer's disposal, can alcohol intoxication be determined in some other way if the fact of intoxication during the very event was not in question. For example, such case would be when the worker admitted it him/herself or when it results from the worker's conduct that he/she admits the consumption of alcohol and being influenced by it.' , Vrhovni sud Republike Hrvatske, *eng.* Supreme Court of the Republic of Croatia, Revr 2077/00.

'In determining alcohol intoxication of the plaintiff, the defendant failed to use alcotest or some other device... The plaintiff agreed to the test of alcohol intoxication. If alcohol intoxication of the plaintiff were determined in a way other than the one defined in Article 65 of the Occupational Health and Safety Act, according to the proper assessment of the courts, the defendant failed to prove in any of the ways the claim about the plaintiff's alcohol intoxication. The circumstance that the plaintiff was treated for alcoholism does not per se influence the conclusion that the plaintiff in the disputed case was under the influence of alcohol. Given the fact that there is no evidence of the plaintiff in the disputed case being under the influence of alcohol, the courts commanded the defendant to reemploy the plaintiff as salesman-shift manager at a petrol station.' , Vrhovni sud Republike Hrvatske, *eng.* Supreme Court of the Republic of Croatia, Revr 267/07-2.

'In terms of the provision of Article 65 of the Occupational Health and Safety Act, the employer is obliged to temporarily remove from the workplace the worker under the influence of alcohol, and alcohol intoxication i.e. the presence of alcohol in the organism can be determined by alcotest or other suitable device or procedure, and if the worker refuses the testing, he is considered to be under the influence of alcohol. The defendant in the given case failed to act in accordance with this legal provision, because he failed to determine the plaintiff's alcohol intoxication in the prescribed way. The defendant wrongly thinks that in

However, the Supreme Court of the Republic of Croatia revises the ruling³⁶ to allow the termination of the work contract and deems it possible to establish alcohol intoxication based on “the experiential estimation of witnesses” (supports the ruling of the court of first instance). The court of second instance established in this case that pursuant to the Occupational Health and Safety Act³⁷ alcohol intoxication of the worker remained unproven, because it is allowed to determine intoxication exclusively by means of alcotest, which was not the case. Evident departure from legal provisions was defended by the Supreme Court on the grounds that the failure of the employer to administer the alcotest was the reason of organizational nature (working hours of persons in charge of administering the alcotest were over), and that this must not be the reason for leaving the worker unsanctioned for alcohol intoxication. The Supreme Court contradicts with the presented interpretation not only legal provisions concerning the way to check alcohol intoxication of the worker but also legal regulations concerning obligations and responsibilities of the employer to organize the implementation of preventive and organizational measures for the protection of health and safety of the worker, the organization of occupational safety service included. The employer must not organize the work of occupational safety service in such a way that after the working hours of the service, and during working hours of other employees, there is no one with access to alcotest or without the presence of at least one worker qualified for the proper use of alcotest. The employer who failed to meet legal requirements is according to this ruling enabled to terminate the labour contract of the worker whose intoxication has not been proven, and by reason of the employer’s own organizational oversight.

The ruling also lays foundation for the wrong interpretation of the right of the employer to prohibit the worker from working, and in relation to the termination of the employment contract. Namely, according to the Occupational Health and Safety Act the

the given case he could not perform the testing for alcohol intoxication of the plaintiff. The circumstance that some passengers thought the plaintiff was under the influence of alcohol on that occasion is no proof of the plaintiff’s alcoholisation.’, Vrhovni sud Republike Hrvatske, *eng.* Supreme Court of the Republic of Croatia, Revr 626/08-2.

‘Not every case of alcohol intoxication is the reason for irregular termination of the employment contract, but only the case that would present a particularly severe violation of the obligations defined in the employment contract and that would render the continuation of the worker’s employment by the same employer impossible. The courts ruled that the plaintiff is a good worker, that there were no alcohol-related problems at work in this case, that he is ill and that he has 33 years of employment. The courts rightly held that legal presumptions for the irregular termination of the employment contract were not fulfilled.’, Vrhovni sud Republike Hrvatske, *eng.* Supreme Court of the Republic of Croatia, Revr 312/12-2

³⁶ Vrhovni sud Republike Hrvatske, *eng.* Supreme Court of the Republic of Croatia, Revr 1074/09-2.

³⁷ The ruling is based on the 1996 version of the Occupational Health and Safety Act, which is no longer in force. All the facts specified in this example are completely relevant for the enforcement of the current Occupational Health and Safety Act (passed in 2014), as well as of the 1996 Act. Namely, the provisions of the new act on obligations of employers related to the work of workers under the influence of alcohol and to the organization of the implementation of occupational safety measures are identical to the 1996 provisions.

employer must prohibit the worker under the influence of alcohol from working, but it is not obligatory in that case to terminate the employment contract. The connection between prohibition to work and termination of the employment contract is established in the Labour Act, but the Occupational Health and Safety Act has a priority in application, because it presents specialized legislation. Pursuant to the Occupational Health and Safety Act, prohibition to work is a preventive organizational measure for the protection of health and safety of workers. When there is indication that the worker is under the influence of alcohol, the employer should as a measure of precaution prohibit him from working and may do it based on the indication. However, the termination of the employment contract cannot be based upon indication but exclusively on evidence, which is alcohol intoxication determined in a legally prescribed way.

A ruling that would repeat the said debatable legal interpretations should not be issued before Croatian courts ever again, just as the discussed one should not have ever been issued. Namely, the legal provision relating to the way of determining alcohol intoxication of workers while working is clear to the extent to which it does not require court explanations, especially not elaborate to the extent that they negate the legal right of the worker to have alcohol intoxication tested exclusively by means of prescribed technical devices and procedures. Also, Directive 89/391/EEC, as well as the Occupational Health and Safety Act (both 2014 and 1996) indisputably define the employer as responsible for the organization of and resources for occupational safety. In addition to this, it is important that the Occupational Health and Safety Act defines misdemeanour liability of the employer in cases of failing to implement by way of appropriate measures the prohibition of misusing alcoholic beverages at workplace.³⁸ The legal list of appropriate measures contains, among others, the obligation of the employer to define in writing and effectively implement the procedure of testing whether a worker is under the influence of alcohol. The procedure includes the worker's consent, the method of testing, the type of test or devices, recording methods and methods for verification of results, the procedure in the event that an employee refuses to be subjected to testing. Hence, the depositions of witnesses are in no way legally relevant or encompassed by prescribed measures. Finally, but not less importantly, there is a legal obligation of the employer i.e. the authorized occupational safety officer to prohibit the workers under the influence of alcohol from working and to instruct them to leave the workplace, whereby the employer is obliged to ensure the entrusted person the conditions for the realization of that authority.³⁹ This includes ensuring the availability of instruments for testing alcohol intoxication and the services of a person trained to perform that procedure, or otherwise the authorized person must be trained to perform the testing in a regular way in order to be able to test alcohol intoxication of workers in a legal way. All specified obligations and responsibilities of the employer were defined un-

³⁸ Articles 95 and 58

³⁹ Article 24

der the 1996 Occupational Health and Safety Act. Still, the illustrated questionable ruling shows that they were completely disregarded by the Supreme Court. Provisions with clear normative content were unnecessarily interpreted, to the detriment of workers and so extensively that they eventually departed from the legal provisions stipulating important obligations of employers.

IV. CONCLUSION

Many more examples like the ones described above could be listed. They would all lead to the same conclusion. It is either the regulations or the institutions in charge of their implementation that fail. The consequences are suffered by the workers, because they are left with long-lasting and uncertain legal proceeding concerning the protection of their work-related rights.

Unquestionable oversights in general labour law result from the uncoordinated and thus improper division of jurisdiction between the Labour Act and the Occupational Health and Safety Act. The consequence is that important questions concerning the protection of safety and health and dignity of workers are generally not regulated, and the solutions from special legislation provide no assistance as well. Whenever and however the main actors of these processes decide to change the provisions concerning working hours and rest, they only have the effects on the labour market in mind, completely thereby disregarding the fact that they interfere with special provisions the fundamental purpose of which is to protect the health, safety and dignity of workers. The rules regarding the organization of working hours and rests belong to special rules of occupational safety and health in the EU legislation, and this is what they must be in the national juridical system as well. The right to the protection of health, occupational safety and dignity is the fundamental right of workers in the EU, and thereby of workers in Croatia as well.

Also, it is necessary to finally start consistently applying regulations concerning the regulatory impact assessment, for the purpose of realizing the objectives they are designed for (*SMART regulations* – standardised, measurable, actionable, reliable, transparent). The decision to, for example, skip important parts of the procedure in the preparation of the draft of the act significantly shortens the periods of public discussion with experts, engages too much politics, leads to insufficient or no expert consultation, and produces inconsistent legislation that cannot efficiently protect the subjective rights of workers.

Transferring the burden from legislator to courts is of no help. Namely, if the parties in a labour dispute appeal to the EU law, this form of protection is significantly slowed down, because there is an obligation of national courts to pose prior questions to the Court of Justice of the European Union concerning interpretations of the EU legislation. That preliminary procedure is almost impossible to avoid, because the major part of the labour

law in Croatia has originated from EU law i.e. from the requirement to align national legislation with that of the EU.

Lastly, in addition to workers, damage is suffered also by tax payers, because they have to finance the administration which is excessive precisely due to the inefficiency of the juridical system. SMART regulation would decrease the need for intervention of work inspectors, courts, arbitration and other institutions.

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THE PRINCIPLE OF SUBSIDIARITY IN THE CONTEXT OF CRIMINAL LAW PROTECTION OF WORKERS – A CROATIAN PERSPECTIVE

Abstract:

The paper deals with criminal labour law as a field that has been unduly neglected in the Republic of Croatia, not only at legislative, but also at practical and theoretical level. The authors analyse the provisions of the title referring to criminal offenses against labour relations and social security, which was introduced into Croatian legislation in 2013. The introduction of a new title of criminal law legislation is a sign of enhanced criminal law protection of rights arising from labour relations and social security. However, there have been some complaints about the provisions in question, coming not only from among employers, but also from trade unions. Taking into account the objections raised by social partners, the authors try to give a critical review of this matter through the prism of one of the pivotal principles of criminal law - the principle of subsidiarity. In this context, the three most controversial criminal offenses from the title in question are analysed, i.e., a violation of the right to work, failure to pay wages and harassment at work, and it is assessed whether these criminal offenses are designed in accordance with the principle of subsidiarity. In conclusion, the authors give some suggestions in favorem improvements of Croatian criminal labour law de lege ferenda.

Keywords: *subsidiarity, fragmentation, material element of a criminal offense, employment, dismissal, harassment, wage, discrimination, corruption*

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I. INTRODUCTION

Labour legislation in the Republic of Croatia is often criticised as “inflexible” and “strict”. It is stated *inter alia* that “rigidity” of the existing system enables a worker to be overprotected against dismissal, that temporary employment is difficult, that the legal regulation of working time is insufficiently adaptable to the needs of modern work processes, and that a rigid system of employment protection legislation and lack of market flexibility are the biggest obstacles to attracting foreign investments and increasing employment. Therefore, the legislator is required to adopt more liberal regulations.¹ At this point, we will not deal with dissonance between social partners on whether criticism of one or the other side is related to the advocacy of a higher degree of flexibility in labour law, representing the achievements of neoliberal legislation or a power struggle in which trade unions insist on rigid legislation as the last powerful means they really have at their disposal.

The relevant discussions have so far been focused mainly on the labour law perspective. However, with the entry into force of the new Criminal Code on 1 January 2013 and the introduction of a new title of the ‘Criminal offenses against labour relations and social security’ (Title XII), the labour law controversy was extended to the field of criminal law. Namely, the new Criminal Code has significantly expanded the scope of legal protection of workers’ rights. As expected, such turn was met with harsh criticism of the Croatian Employers’ Association (hereinafter referred to as: the ‘CEA’), which, during public discussion, proposed deletion of several provisions. It was emphasised that all workers’ rights that are protected under the Criminal Code are already sufficiently protected by other areas of law. Consequently, the proposed regime will contribute further, as they mentioned, to rigidity of a too rigid normative framework that regulates the rights of workers², and deepen the problems at the implementation level.

On the other hand, union representatives also expressed their dissatisfaction, holding that the changes did not reach a satisfactory level of legal protection of labour and social rights. In their opinion, the national trade union centres proposed a series of changes that would further deepen criminal law repression in this area.³

One of the basic principles of criminal law is the principle of subsidiarity, which states that we may reach for criminal law protection only if sufficient protection cannot be

¹ For more details about the need to harmonise criminal law protection of workers with economic trends, see: V. Grozdanić, M. Škorić and I. Martinović, ‘Kaznenopravna zaštita radnika prema odredbama novog kaznenog zakona’, *Hrvatski ljetopis za kazneno pravo i praksu*, vol. 19, no. 2, 2012, pp. 474-477.

² Cf. Opinion of the Committee for legislation, collective bargaining and the protection of rights of the Economic and Social Council, dissenting opinion of the Croatian Employers’ Association, pp. 1-4; available at: <http://www.socijalno-partnerstvo.hr/UserDocsImages/Mi%C5%A1ljenje%20PovjerenstvaKona%C4%8D-ni%20prijedlog%20Kaznenog%20zakona.pdf> (accessed on 22 November 2015).

³ Cf. *ibid.*, pp. 4-7.

achieved by some other (milder) branches of law.⁴ The aim of this paper is to test the following hypothesis: does the new Criminal Code violate the principle of subsidiarity and does this contribute to even greater rigidity of labour legislation in the Republic of Croatia? In the elaboration of this issue, we will analyse the provisions of the new Criminal Code and, where appropriate, other relevant provisions of Croatian legislation. We will evaluate those provisions from two perspectives: nomotechnical refinement and practical feasibility. Based on results of the analysis, we will provide an array of our own answers to the given question. The paper is structured as follows: firstly, we clarify the principle of subsidiarity as a managerial principle that the legislator has to bear in mind in the approach to the standardisation of a particular criminal law related matter. Attention is drawn to the limitations set by this principle, and then the three most controversial criminal offenses against labour relations and social security are analysed, i.e., a violation of the right to work, failure to pay wages and harassment at work. An assessment of compliance with the principle of subsidiarity is provided for each of the specified criminal offenses. We will also look at the problems that could, in our opinion, arise in practical applications of the analysed provisions. In conclusion, we will assess whether the existing legal solution is in accordance with the principle of subsidiarity and give a few suggestions for possible improvement of Croatian criminal and labour legislation *de lege ferenda*.

II. THE PRINCIPLE OF SUBSIDIARITY AS A MANAGERIAL LEGISLATIVE PRINCIPLE IN CRIMINAL LAW

When dealing with criminal law regulation in some area, the legislator must take into account the principle of subsidiarity. This principle states that we may reach for criminal law protection only if sufficient protection cannot be achieved by some other, less repressive branch of law. In this context, we talk about criminal law as a last resort or *ultimae rationis* of social protection.⁵ Fragmentation builds on the principle of subsidiarity as a fundamental characteristic of criminal law, which implies that criminal law protects only the highest social goods and only against the most difficult forms of assault, while the rest is left to other branches of law. This means that, whenever possible, criminal law lets regulation of unlawful conduct primarily to misdemeanour law, and then also to other branches with less repression against norm violators. The importance of the principle of subsidiarity can be seen in the fact that it is proclaimed in Article 1 of the Criminal Code as the basis and the limitation of legal force and it is proposed as a managerial principle of correct interpretation of certain provisions of the Criminal Code as well as for the delineation between misdemeanours and criminal offenses.⁶

⁴ P. Novoselec and I. Bojanić, *Opći dio kaznenog prava*, Fourth edition, Pravni fakultet u Zagrebu, 2013, p. 8.

⁵ Novoselec and Bojanić, p. 8.

⁶ Cf. K. Turković (ed.) et al., *Komentar Kaznenog zakona*, Narodne novine, Zagreb, 2013, p. 28.

It is clear from the aforementioned that the difference between a criminal offense and other forms of prohibited conduct is of qualitative nature and it is reflected in a higher level of social danger. In the literature in German, this danger is also expressed as the worthiness of punishment (or *Strafwürdigkeit*) so that the criminal offense itself is understood as a “quasi-right worthy of punishment”.⁷ In this case, criminal sanctions appear to be the only adequate means of restoring legal order. This raises the question of criteria used for such legislative assessment. For the purpose of this paper, we will accept the criterion proposed by Jescheck and Weigend, according to which the worthiness of punishment depends on the following three elements: the value of the protected legal good, the danger of an assault and a degree of the intent of the perpetrator to commit a crime.⁸ In what follows, we assess these criteria in relation to the relevant criminal offenses in Title XII of the Criminal Code.

III. CRIMINAL LAW PROTECTION OF WORKERS IN THE REPUBLIC OF CROATIA AND THE PRINCIPLE OF SUBSIDIARITY

Labour rights and social rights were protected by Croatian legislation in the past, primarily through the provisions of labour and misdemeanour law, but also, to a very limited extent, by the provisions of criminal law. By adopting the Criminal Code in 2013, the legislator significantly expanded the criminal dimension. Such tightening is not a curiosity of Croatian criminal law, but it can be observed in some other European legal systems as well.⁹ Below we describe a new regulatory framework and apply the defined criteria of subsidiarity to legal provisions. We will also mention a few problems that we believe could constitute an obstacle to a successful practical application.

3.1. Normative framework

Fragments of criminal law protection of the rights of workers existed in the 1997 Criminal Code as well, within the framework of criminal offenses against the freedom and rights of man and of the citizen. We refer here to “fragments” because there were only two criminal offenses, i.e., *a violation of the right to work and other rights arising from employment*

⁷ Cf. H-H. Jescheck and T. Weigend, *Lehrbuch des Strafrechts, Allgemeiner Teil, 5. vollständig neubearbeitete und erweiterte Auflage*, Berlin, Duncker & Humblot, 1996, § 7/I, pp. 49-50.

⁸ Jescheck and Weigend, p. 51.

⁹ For example, German criminal law has been characterised lately by a tendency towards tightening and criminal and labour law is getting more important. For more information on this issue, see: B. Gercke, O. Kraft and M. Richter, *Arbeitsstrafrecht, Strafrechtliche Risiken und Risikomanagement*, Heidelberg, München, Landsberg, Frechen, Hamburg, C. F. Müller, 2012, 1. Kapitel, pp. 22-24.

and a violation of health and disability rights. The new code applied a more systematical approach to this matter and, as we have pointed out in the introduction, provided for a special title with five criminal offenses. Some of them are completely new, whereas some modify the old solutions. It should be noted that separation of labour related criminal offenses is not a complete novelty in Croatian criminal legislation. Such a solution existed in the old Criminal Code of the Republic of Croatia. In this regard, we believe this separation into a special title is positive because it generated a double benefit. On the one hand, it provided transparency and a clear definition of the protected legal goods. On the other hand, the new (old) solution is a kind of return to the Croatian criminal law tradition.

The new title contains five criminal offenses. These are as follows: a violation of the right to work (Article 131), failure to pay wages (Article 132), harassment at work (Article 133), a violation of the right to social security (Article 134) and illegal employment (Article 135). At this point, we will not engage in a detailed analysis of all these criminal offenses, but rather concentrate on the three criminal offenses that have caused the greatest controversies and prompted the introductory problem question. These are a violation of the right to work, failure to pay wages, and harassment at work.¹⁰

a) **Violation of the right to work**

This criminal offense existed in Article 114 of the 1997 Criminal Code. The scope of criminal law protection has been significantly expanded in two directions by the new Criminal Code. Firstly, it provides for an imprisonment of up to three years for an employer who terminates an employee's contract of employment because "*in good faith and on reasonable suspicion of corruption, he/she addressed or reported thereon*" to the competent authorities. The *ratio legis* of this provision was to achieve enhanced protection for the so-called whistleblowers.¹¹ Secondly, it introduced culpability of an employer who dismisses a worker participating in a lawful strike. This provision is adjusted to Article 215 of the existing Labour Act (hereinafter referred to as: the 'LA').¹²

During public discussion, the CEA criticised the provision on enhanced protection for whistleblowers. They pointed out that it is sufficient to regulate this protection through the sanctions stipulated by the LA. However, this view was not explained in detail. It was only briefly mentioned that sufficient protection is achieved by regulating such behaviour as one of the gravest types of violations by employers.¹³

¹⁰ It should be mentioned that these criminal offenses have already provoked scientific analyses of high quality in the Croatian literature. See Grozdanić, Škorić and Martinović, pp. 473-499.

¹¹ Grozdanić, Škorić and Martinović, p. 496.

¹² Zakon o radu, *Eng.* Labour Act, Official Gazette, no. 93/14.

¹³ Opinion of the Committee for legislation, collective bargaining and the protection of rights of the Economic and Social Council, dissenting opinion of the Croatian Employers' Association, pp. 1-4.

At this point, we would like to draw attention to two important circumstances. First of all, although the new provision emphasises whistleblower protection, it should be said that such protection was also provided pursuant to the 1997 Criminal Code. In fact, Article 114 of the 1997 Criminal Code contained a very vague formulation under which different types of behaviour could be classified, including dismissal on the grounds of whistleblowing. However, to the best of our knowledge, no such criminal proceeding has been initiated in practice. In addition, we believe that the new provision narrowed the scope of legal protection of whistleblowers because a criminal offense is limited to dismissal for the reporting of *corruption*. Corruption is not defined in the Criminal Code. On the other hand, the Act on the Office for the Suppression of Corruption and Organised Crime limits corruption to only a few criminal offenses. This means that in the case of reporting other criminal offenses (such as forgery, sexual offenses, harassment at work, and the like), the employer may dismiss a worker without any sanction in criminal law! A different interpretation would imply a form of prohibited analogy to the detriment of the perpetrator of a criminal offense. This raises the problem of insufficient specificity of the legal text, which is not in accordance with the principle of *nullum crimen sine lege certa* as one of the postulates of the principle of legality. It should be added that pursuant to Article 117(3) of the Labour Act adopted one year after the Criminal Code, *the worker's approach to the competent persons or state authorities on the grounds of reasonable suspicion of corruption or his/her report in good faith on the said suspicion shall not constitute a just cause for dismissal*, which is a result of horizontal harmonisation of national regulations. In fact, the absence of horizontal harmonisation of national legislation, use of different terminology, incompatible definitions of certain legal institutes in different regulations, particularly those transposed from EU legislation, are the most common reasons why it is difficult to obtain legal protection and why in the implementation of such regulations it is necessary to have highly developed competencies of judges and lawyers in relation to legal interpretation.

Stipulation of the present Criminal Code provision clearly suggests that those workers who did not act in good faith, i.e., those who abused the criminal law framework aware of the fact that the employer did not act and operate corruptly, will not be able to exercise criminal law protection. This refers to cases where there are no reasonable grounds for these statements by workers. In this sense, judicial practice will *inter alia* have to answer the question as to what is considered under acting in "good faith" and based on "reasonable grounds" because filing a feigned motion violates the relationship of trust between an employer and an employee, causes serious damage to a company's reputation and should result in termination of the employment contract without negative consequences for the employer in the context of both criminal law solutions and provisions of relevant labour legislation. However, in dubious circumstances and without interpretations of acting in good faith and with a reasonable doubt, which are founded on case law, the question arises as to whether the court will succumb to the principle *in dubio pro reo* in favour of workers. Hence there is an additional debate on whether the right to work is a right that

can be used by an employee against his/her employer, as researched in the eighties of the last century by Bob Hepple, and reviewed today by Joanna Howe.¹⁴ In this context, we find interesting an Australian court case of *Thomson v Broadley*¹⁵, in which a former employee, who was fired because, as a whistleblower, he reported his employer for alleged illegal activities and illegal practice in the conduct of business, claims that, due to stigmatisation, he is not able to find another job and thus demands material compensation. However, the claim failed due to lack of evidence of corrupt and dishonest business practices of the former employer, as well as lack of evidence of any relation between “limited abuse of the employer” and the inability to find a new job.¹⁶

When thinking of workers acting in good faith and with a reasonable suspicion of corruption in the conduct of business of their employers, a question naturally arises as to whether such a claim should be supported, endorsed or strengthened by a trade union or a workers’ council if they are constituted and operate in the company, i.e., a large group of workers¹⁷, which might have an impact in the public and governmental service systems, but it is questionable whether this would be possible in privately owned companies and in small businesses.

Keeping in mind the aforementioned, we can conclude that the new Criminal Code indeed pointed out the problem of whistleblower protection as an especially vulnerable category of workers, but at the same time, it narrowed the scope of application with respect to Article 114 of the 1997 Criminal Code. If we put this into context with our working hypothesis and set criteria, we conclude that in this segment the legislator has not violated the principle of subsidiarity because criminal law protection is narrowed only to situations related to the reporting of corruption as one of the most dangerous forms of crime in the public and private sectors. Therefore, in our opinion, this change has not made domestic criminal law more rigid, but it was left to labour legislation and judicial practice to penalise other reasons for unfair dismissal. One can therefore say that the disputed provision has made criminal labour legislation more selective in the approach. It would be appropriate *de lege ferenda* to precisely define corruption, or compile an exhaustive list of criminal offenses that would be categorised under this term which is insufficiently defined in criminal labour and criminal law regulation.

¹⁴ B. Hepple, ‘A Right to Work’, *Industrial Law Journal*, vol. 10, no. 1, pp. 65-83; J. Howe ‘Why Do So Few Employees Return to their Jobs? In Pursuit of a Right to Work Following Unfair Dismissal’, in V. Mantouvalou (ed.) *The Right to Work. Legal and Philosophical Perspectives*, Oxford and Portland, Hart Publishing, 2015, pp. 255-274, 255.

¹⁵ *Thomson v. Broadley* [2002] QSC 255.

¹⁶ P. Weeks, ‘Employment Law – A Test of Coherence Between Statute and Common Law’, in S. Corcoran and S. Bottomley (eds.), *Interpreting Statutes*, Sydney, The Federation Press, 2001, p. 191.

¹⁷ Howe, pp. 266-269.

b) Failure to pay wages

Failure to pay wages was covered by Article 114 of the 1997 Criminal Code. The new Criminal Code has just placed it into a specific provision (Article 132) and specified the content of this criminal offense. However, since the new provision is relatively extensive, we will not engage in a detailed analysis, but focus on the most controversial part. In particular, these are paragraphs 1 and 2, which criminalise non-payment of wages in cases where the employer is solvent or is intentionally brought to a state of insolvency in order to avoid payment of wages. They also provide for the employer who subsequently pays all arrears of wages to be exempted from paying the fines (this is so-called effective regret).

This criminal offense was met with harsh criticism of both the CEA and the national trade union centres. The CEA strived to delete the entire article from the Criminal Code. If this were not accepted, they also suggested that criminal liability should be confined to cases of non-payment of wages for the purpose of securing unfair or unlawful gain to themselves or other persons, on the grounds that in the event of non-payment of wages a worker has a number of other legal options available (to cancel the contract of employment, to initiate enforcement proceedings on the basis of a pay slip, to go on strike, to initiate bankruptcy proceedings and to file a complaint against the employer with the Labour Inspectorate).¹⁸ On the other hand, the trade unions believed that failure to pay wages should be a criminal offense, regardless of the reasons that led to non-payment (as it threatens the existence of workers) and that the provision on effective regret should be deleted (as it allows the unpunished repetition of the criminal offense in question).¹⁹ The legislator did not take criticism and recommendations and legalised the original proposal.

We will look at this issue from the perspective of the principle of subsidiarity. First of all, it should be mentioned that failure to pay wages was covered by the general provision of Article 114 of the 1997 Criminal Code, which means that the legislator did not introduce but only modified the existing form of criminal law protection. The new provision specifies the characteristics of a criminal offense and stresses the importance of this form of protection. The legislator was clearly led by statistical data referring to a large number of employers who do not pay wages²⁰ and by thinking that a repressive provision can

¹⁸ Opinion of the Committee for legislation, collective bargaining and the protection of rights of the Economic and Social Council, pp. 1-4.

¹⁹ Opinion of the Committee for legislation, collective bargaining and the protection of rights of the Economic and Social Council, pp. 4-7.

²⁰ The list of taxpayers/employers that, according to available data, fail to pay wages is given separately for legal and natural persons at: <http://www.porezna-uprava.hr/bi/Stranice/Neisplatiteljiplaca.aspx> (accessed on 20 November 2015). The list contains 7,584 employers - legal persons and 1,921 employers - natural persons in the period from January to December 2014, which, according to official data of the Ministry of Finance, failed to pay wages to their workers. The list does not include employers who did not submit the JOPPD form, those who failed to pay wages in three consecutive months or in three months within

have a psychological effect on reducing and combating undeclared work, demonstrating that relevant provisions of labour legislation are not sufficient for that.²¹ One should not underestimate the fact that, from the point of view of labour law, payment of wages is counter-prestation for the work done,²² i.e. recoverability/onerosity is one of the essential elements of labour relations that can differentiate it from other forms of work in which there is no recoverability as a result of the existence of other forms of (non-free) work - forced or slave labour, which are sanctioned through other provisions of criminal law, or international sources.²³

Furthermore, three important circumstances should also be noted. Firstly, a criminal offense exists only in the case of non-payment of wages as the *gravest* type of assault on the protected legal good. Other types of assault, such as denial of the right to work time and rest breaks at work as regulated by law, illegal orders related to overtime, not keeping records of workers and their working hours, lack of written contracts of employment, refusing to hire a pregnant woman or changes to a contract of employment under unfavourable conditions referring to a pregnant woman, a woman who has given birth or a breastfeeding woman, etc., are contained in misdemeanour provisions of the Labour Act. In this context, the fragmentary nature of criminal law is especially emphasised here.

Secondly, only those employers who are either solvent or have intentionally brought about insolvency are punished. This actually means only employers are punished who act with *direct intention* as the most serious form of guilt. This solution gives rise to the following dilemma: does this mean that only those operating successfully in the market shall be punished, while those that are insolvent can freely generate further losses without any consequences? If so, then the existing legislation is untenable because it puts solvent employers in an unfavourable position, which is discriminatory and contrary not only to the principle of subsidiarity as a basic principle of criminal law, but also to the constitutional

the period of the last six months, as well as those who failed to pay wages for the period before 1 January 2014, because before the introduction of the JOPPD form, the Tax Administration did not have analytical data/tools on the payment of wages. In other words, the figures are much higher. In the period between January and April 2014, there were 29,398 workers who did not receive their salaries (The labour market in Croatia, the Ministry of Labour and Pension System, available at: <http://www.mrms.hr/wp-content/uploads/2014/06/sibenik.pdf>) (accessed on 20 November 2015).

²¹ Wages are primarily governed by the provisions of Articles 90-97 of the Labour Act, while pursuant to Article 229(1)(34) of the same Act, the situations in which an employer fails to deliver to the worker a pay slip for an unpaid wage, benefit or severance pay, or if such accounting has no predetermined content, are qualified as the gravest types of violations of the employer.

²² I. Grgurev 'Ugovor o radu', in Ž. Potočnjak (ed.) et al. *Radni odnosi u Republici Hrvatskoj*, Zagreb, Organizator and Pravni fakultet u Zagrebu, 2007, pp. 12-18.

²³ A. Ravnić *Osnove radnog prava – domaćeg, usporednog i međunarodnog*, Zagreb, Pravni fakultet u Zagrebu, 2004, pp. 76-92. See also J. Penner 'Aristotle, Arendt and the Gentleman: How the Conception of Remuneration Figures in our Understanding of a Right to Work and Be Paid', in V. Mantouvalou (ed.) *The Right to Work. Legal and Philosophical Perspectives*, Oxford and Portland, Hart Publishing, 2015, pp. 87-97.

principle of equality of all before the law. Therefore, this provision should *de lege ferenda* be changed so as to cover all employers, regardless of their solvency.

Thirdly, there is a possibility of effective regret, which means that until the last moment the perpetrator can avoid punishment. Effective regret is an institute which provides for certain privileges to the perpetrators who give up a criminal offense following its formal completion and prior to its substantial completion.²⁴ These privileges are within the sphere of punishment and they most frequently include a more lenient punishment or exemption from punishment. In this case, the legislator provides for the possibility of acquittal, but that possibility also implies the possibility of unlimited mitigation in sentencing, which means that the repressive measure in this area is partially offset.

Taking all this into consideration, there is a legitimate question whether the purpose and the objective to be achieved by punishment are proportional to the means used. In other words, the question is whether the legislator has taken into account the proportionality test and impact assessment of that legal norm. Is effective regret a way to avoid sanctioning in almost all cases? If so, then what is the meaning of the provision? Not to mention the psychological effect of the provision, or a nomotechnical construct, subsumed in this way, which can be pretty demotivating for solvent and commercially successful employers. Is this alternatively “sanctioning” of capital under the aegis of “the sin of capital” that is perceived through the recent discourse of domination of economic freedoms over social rights? Or, a social context of Europe has not been reflected here in an interdisciplinary and functional sense at all. If part of the answers to these questions is yes, then despite all criticisms that are partially justified, there is a reasonable premise of a daily political function of “flattering” one or the other social partner through the nomotechnical and semantic mechanism. Moreover, by neglecting the proportionality test, the given norm is categorised as an explicit threat of the criminal justice system to the world of capital, which was created *ab ovo* through an impotent mechanism that will most likely not affect the improvement in the situation faced by the workers in these cases. Bearing this in mind, it should be considered *de lege ferenda* whether this criminal offense should be kept in this form or whether it would be more purposeful, guided by the principle of subsidiarity, to leave this area to milder branches of law.

c) Harassment at work

This is a new criminal offense. It incriminates harassment in the workplace, known as mobbing.²⁵ Long-term research on and monitoring of mobbing in foreign and Croatian

²⁴ Novoselec and Bojanić, pp. 315-316.

²⁵ The word *mobbing* is derived from the Latin phrase *mobile vulgus* ('the fickle crowd'). For more information on the word, see: D. Rittossa, M. Trbojević Palalić, 'Kaznenopravni pristup problematici mobbinga', *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, vol. 28, no. 2, 2007, pp. 1326-1327.

literature, numerous studies, as well as relevant case law, have not resulted in a unique and universally accepted definition of mobbing yet. In the available literature it is possible to identify a number of terms used almost interchangeably, although experts in this field distinguish between them more precisely. Terms like *emotional violence*, *harassment*, *sexual harassment*, *emotional abuse*, *mobbing*, *bullying*, *psychoterror in the workplace*, *psychological abuse in the workplace*, are mentioned frequently, for which most readers *prima facie* notice that these are similar but not always identical behaviours. Germany and the Nordic countries have adopted the term “mobbing”, while in Australia, Ireland and the UK the term “bullying” is used as a synonym more frequently.²⁶ Bullying often refers to individual cases of harassment and mobbing includes collective forms.²⁷ Leymann, who can be called the father of research on psychological abuse in the workplace, is more precise in determining the concepts. By analysing behaviour at school, he points out that strong elements of physically aggressive behaviour are expressed in *bullying*, while sophisticated and repetitive behaviour with adverse treatment or adverse pressure on an individual employee is typical of mobbing.²⁸ Since the beginning of the eighties of the last century, Leymann’s research on mobbing has resulted in revolutionary analyses of the problem in the medical and psychological literature, as well as multidisciplinary scientific analyses and studies, and a few decades later, in its identification as a predominantly separate legal institute in a number of national legislations. Thanks to the aforementioned scientist, an operational definition of *mobbing* was created, whose elements are used by experts in the field and recent case law. According to this operational definition, “*psychological terror or mobbing in the workplace involves hostile and unethical communication, which is directed in a systematical way, by one or a few individuals mainly towards one individual who is, due to mobbing, pushed into a helpless and defenceless position, being held there by means of continuing mobbing activities.*”²⁹ Hence *mobbing* represents a form of behaviour in the workplace in which an individual or a group of persons systematically, over longer periods of time, psychologically abuse another person with a view to violating human dignity, integrity, reputation and honour.³⁰ Given a huge range of behaviours that fall within the

²⁶ V. Di Martino, ‘A cross-national comparison of workplace violence and response strategies’, in V. Bowie, B. S., Fisher and C. L. Cooper (eds.), *Workplace violence - issues, trends, strategies*, Devon, Willan Publishing, 2005, p. 21.

²⁷ Di Martino, pp. 21-22.

²⁸ H. Leymann, ‘Mobbing and Psychological Terror at Workplaces’, *Violence and Victims*, vol. 5, no. 2, 1990, pp. 119-126.

²⁹ H. Leymann, ‘The Content and Development of Mobbing at Work’, in D. Zapf and H. Leymann, (eds.) *Mobbing and Victimization at Work*, *European Journal of Work and Organizational Psychology*, vol. 5, no. 2, 1996, pp. 165-184.

³⁰ Leymann *Mobbing and psychological terror at workplaces*, pp.119-126.

scope of the definition, it may be best to use the term the *mobbing syndrome*,³¹ a characteristic of which is the specific developmental dynamics. In the beginning, there is unresolved conflict, which gradually turns into aggressive tendency towards others aimed at attacking and punishing, victims become clearly marked, isolated and objects of ridicule in their workplaces. By various forms of psychological, and sometimes also physical, abuse, a victim of mobbing becomes “marked” and is presented as a problem in the working environment.³²

The *ratio legis* of the provision is to protect workers from long-term harassment in the workplace that can lead to multiple and lasting consequences, not only for workers themselves but also for their families. The results of the Sixth European Working Conditions Survey show that in the EU in 2015, 17% of women and 15% of men were exposed to negative social behaviour, and 7% of all workers experienced some form of discrimination (an increase from 5% in 2005 and 6% in 2010).³³ These statistical indicators definitely include mobbing behaviours, because research clearly shows psychosocial risk factors relating to organisation, management, high demands, labour intensity, emotional demands, a lack of autonomy and poor social relationships and bad leadership. In addition, when it comes to data interpretation, we should not underestimate changes in the structure of employment due to a marked increase in the number of workers in the service industry and, consequently, a decrease in the number of workers involved in the manufacturing sector.³⁴

During public discussion, the CEA requested deletion of this provision on the grounds that such behaviour is more precisely defined and sanctioned by the penalty provisions of the Anti-discrimination Act, so that its standardisation in the Criminal Code also leads to different regulation of the same issue and contributes to legal uncertainty.³⁵ It should be borne in mind that Croatian legislation does not define mobbing at the level of either labour or criminal law, or even anti-discrimination law, and attempts at passing a separate Act on the Prevention of Harassment at Workplace, initiated a decade ago, did not bear fruit

³¹ N. Davenport, R. D. Schwartz and G. P. Elliot, *Mobbing: Emotional Abuse in the American Workplace*, Ames: Civil Society Publishing, 2002; Vinković, M., Vinković, M., ‘Mobbing - Legal and Medical Aspects in the Transitional Society (Case Croatia)’, *Contemporary Legal and Economic Issues*, 2007, pp. 136-149; A. Simonić, V. Šendula-Jengiđ, G. Bošković, ‘*Mobbing u suvremenom društvu*’, in N. Bodiroga-Vukobrat, T. Frančišković and M. Pernar (eds.), *Mobbing*, Društvo psihologa primorsko-goranske županije, Rijeka, 2006, pp. 14-15.

³² Simonić, Šendula-Jengiđ and Bošković, p. 15.

³³ *First findings: Sixth European Working Conditions Survey*, Eurofound, 23.11.2015, p. 7. Available at: http://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1568hr.pdf (accessed on 25 November 2015)

³⁴ Sixth European Working Conditions Survey, p. 6.

³⁵ Opinion of the Committee for legislation, collective bargaining and the protection of rights of the Economic and Social Council, pp.1-4.

either³⁶. Legal protection can therefore be achieved only through the provisions related to harassment and the prohibition of discrimination in the Anti-discrimination Act, which are generally harmonised with the *acquis communautaire*, and the provision of the Civil Obligations Act on the protection of personality rights and compensation. However, the implementation of the provisions relating to harassment and discrimination means that harassment is associated with some of the specified legal bases for prohibiting discrimination, which is most commonly not the case with mobbing. Since 2014, the Protection at Work Act³⁷ has dealt with stress at work as *health and psychological changes which are the result of the accumulating impact of stressors at work over a longer period of time, manifested as physiological, emotional and cognitive reactions and as behavioural changes of the worker*³⁸ and obligations the employer and the workers or their representatives have in this regard.³⁹

Below we evaluate new incrimination in the context of our working hypothesis. The Criminal Code provided for insults, humiliation, abuse and harassment, as modalities of action. Although at first glance they may seem insufficiently specified, these modalities are also contained in many other criminal offenses. This means that case law should have already developed clear interpretations on what actions are covered. Furthermore, the modalities described will be treated as a criminal offense if they are repeated for a long time and if they demonstrate a cause-effect relationship with adverse health effects on workers. It is also highlighted that deterioration of health is not an objective condition of punishability/criminal liability but an integral part of this criminal offense, which means that it must be encompassed by intent on the part of the perpetrator.⁴⁰ In this context, this criminal offense should be seen as *lex specialis* with respect to the criminal offense of bodily injury under Article 117 of the Criminal Code, which might also consist in health impairment. This means that there is no possibility of acquisition between these criminal offenses. Analogously to the criminal offense of bodily injury, health impairment must be interpreted restrictively as a cause of a disease or an exacerbation of the medical condition.⁴¹ By introducing the described consequence into the essence of this criminal offense, the domain of criminal liability is relatively narrow, so we can conclude that the legislator

³⁶ The 2007 Draft Act on the Prevention from Harassment at Workplace is available on the website of the Croatian Parliament: www.sabor.hr/fgs.axd?id=7137 (accessed on 20 September 2015)

³⁷ Zakon o zaštiti na radu, *eng.* Protection at Work Act, Official Gazette, no. 71/14, 118/14, 154/14.

³⁸ Protection at Work Act, Article 3, Para. 1(34).

³⁹ Protection at Work Act, Article 51 and Article 52.

⁴⁰ Turković (ed.) et al., p. 185.

⁴¹ For more information on the concept of health impairment as a characteristic of bodily injury, see: D. Derenčinović, in D. Derenčinović (ed.) et al., *Posebni dio kaznenog prava*, Pravni fakultet u Zagrebu, 2013, pp. 97-98. Also, P. Novoselec, in: P. Novoselec (ed.) et al., *Posebni dio kaznenog prava*, Pravni fakultet u Zagrebu, 2011, p. 35.

wanted to criminalise only the most severe forms of mobbing, which means that the legislator was guided by the principle of subsidiarity.

As we have already emphasised, the aforementioned misdemeanour provisions of anti-discrimination legislation referred to by the CEA, or more precisely, the provisions of the Anti-discrimination Act, reduce mobbing exclusively to discriminatory grounds. Other situations (e.g., abuse of power, jealousy, competitiveness, etc.), which are in practice often not covered by the provisions of that act but by the provisions of the Civil Obligations Act, in particular in the context of infringement of personality rights. However, in Croatia, there are only a few final judgments for mobbing, which are the result of the completed labour disputes. In mobbing as a multi-layered phenomenon, it is necessary to understand the necessity of observing it through the focus of different scientific areas. Some of its definitions are based on the conclusions drawn by psychologists and psychiatrists, others are the result of judicial activity of foreign courts, and some express the views of jurisprudence. It should be noted that different perceptions of mobbing need not substantially fully coincide, but for the legal protection it is necessary to identify the form it can be provided in. In fact, mobbing, which *inter alia* includes physical assault, surpasses the boundaries of a labour dispute and enters the domain of criminal law. The same is also applicable to the situations in which a person was not only mentally abused, but was a victim of sexual assault as well, because the latter will also be in charge of the State Attorney's Office in criminal proceedings in respect of other (potential) criminal offenses. The question of compensation for pecuniary and non-pecuniary damage suffered by the victim is very important in establishing the claim, and, in addition to confirming the existence of mobbing, it is important to order termination of mobbing activities or establish infringement of personality rights. Therefore, we should bear in mind that in cases of mobbing, legal protection can be achieved through the provisions of labour, civil and criminal law.

If we take all this into consideration, we can conclude that the Criminal Code has filled the current void by incriminating possible forms of horizontal and vertical mobbing based on reasons other than those related to the legal basis of non-discrimination. It clearly delineates punishment from misdemeanour responsibility by stipulating that the behaviour must be repeated and that it must cause health impairment. In this way, lighter cases of mobbing are left to be handled by misdemeanour law, while criminal law provides for (the most) more serious forms. It is clear from this that the new provision does not violate the principle of subsidiarity of criminal law. Moreover, the above provision bridges the gap because the Croatian legal system is not familiar with a legal definition of mobbing, so that, as we have already pointed out, it needs to be proved by means of provisions relating to the prohibition of harassment and discrimination contained in the Anti-discrimination Act and/or the provisions relating to infringements of personality rights and compensation for non-pecuniary damage contained in the Civil Obligations Act. By the aforementioned decision the legislator followed the practice of Belgian and French criminal law in

terms of moral harassment in the workplace,⁴² but let prosecution of this criminal offense upon motion of the victim of abuse.

3.2. Potential problems of the practical feasibility

At this point, we would like to emphasise a few more problems that were not discussed in the Croatian literature earlier and that we believe may arise in practice, and impede or prevent the application of legal provisions. The Croatian case law has traditionally been sceptical about the changes brought by modern development of criminal law. When we talk about criminal labour law, we can point out the following problems that we hold relevant: the amount of prescribed penalties, possible difficulties in proving and prosecution of workplace harassment upon motion.

In terms of the amount of prescribed penalties, we can see that the penalties for criminal offenses under this title are relatively low. The maximum upper limit for a criminal offense related to undocumented/illegal employment under Article 135 of the Criminal Code is five years' imprisonment, while for other criminal offenses the penalties are up to two or three years. This issue is at the same characterised by lack of logic. For example, this illegal employment obstructed a more severe penalty than for workplace harassment, even though in addition to labour rights, the latter also infringes health as one of the highest personal goods. Such low penalties make imposed penalties to be low as well, which will in practice lead to a higher share of suspended sentences for these criminal offenses. If we add the aforementioned effective regret in relation to non-payment of wages under Article 132(4), it is obvious that the legislator placed emphasis on special prevention. Unlike this, German law, for example, has recently recorded a noticeable trend of imposing more severe punishments for labour related criminal offenses, with special emphasis placed on general prevention.⁴³ Although the principle of subsidiarity was obviously taken into account, we can question the purposefulness of such solution due to which one gets the impression that this title of the Criminal Code has been marginalised.

Furthermore, we believe that it will be difficult, if not impossible in practice, to prove some of the criminal offenses from this title. This objection primarily relates to the criminal offense of harassment at work in which it will be necessary to prove two key conditions: the causal link between harassment and health impairment as well as the fact that such impairment was caused by intent on the part of the perpetrator, which means that the perpetrator was aware of such consequence or at least agreed to it.

⁴² R. Pražetina Kaleb, 'Oblici mobinga i sudska zaštita žrtava mobinga', *Policija i sigurnost*, vol. 21, no. 4, 2012, pp. 828-830.

⁴³ For more information, see: B. Gercke, O. Kraft and M. Richter, *Arbeitsstrafrecht, Strafrechtliche Risiken und Risikomanagement*, Heidelberg, München, Landsberg, Frechen, Hamburg, C. F. Müller, 2012, 1. Kapitel, pp. 27-28.

The third issue that we believe has to be emphasised is the fact that harassment at work proceedings are to be taken upon motion of the injured party (Article 133(2) of the Criminal Code). Such a proposal implies a much greater involvement of injured parties than the mere filing of criminal charges because criminal charges can also be filed anonymously, whereas filing a motion implies disclosure of the identity of the applicant and thus presents a greater risk to the injured party who may still be employed by the same employer and may be subject to different kinds of pressure. Therefore, we believe that such solution will result in a small number of procedures so that we should *de lege ferenda* consider that the proceedings are initiated *ex officio*.

IV. CONCLUSION

In conclusion, we can state that the Croatian legislator certainly made an important step towards the modernisation of criminal labour law. The domain of criminal liability has been considerably extended by introducing a new title into the Criminal Code and incriminating new criminal offenses. However, there is still plenty of room for improvement.

In the context of the questions analysed in this paper - whether new solutions are in accordance with the principle of subsidiarity - we came to the conclusion that the legislator mainly took into account this principle and reserved criminal law protection only for the most serious cases. Moreover, we can see that in certain cases there was no room for a further extension of the scope of that protection. This mainly refers to a violation of the right to work, which is unduly limited only to cases of reporting corruption, and to harassment at work, for which, in our opinion, the prescribed penalty is too low and it is conceived in such a way that it would be very difficult to prove the requisite intent.

On the other hand, in our view, the principle of subsidiarity is not sufficiently appreciated in the case of failure to pay wages. This is so primarily because only those employers are punished who do business regularly and are solvent. This solution is also discriminatory and therefore unsustainable and must be changed in the future. Moreover, it raises the question whether it meets the proportionality test and whether the desired *ratio* has been achieved by this regulation.

Bearing all the above in mind, we can conclude that strengthening the emphasis on criminal law protection of labour and social rights is certainly to be welcomed. However, we should bear in mind that the principle of subsidiarity in labour related criminal offenses has not been achieved to the full extent. Thus this should certainly be taken into account in future revisions of the Criminal Code.

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DEMANDS OF THE LABOUR MARKET IN THE NETHERLANDS AND THE EU BLUE CARD: LIMITATIONS AND OPPORTUNITIES

Abstract:

An ageing society, rapid technological developments combined with an increasing demand for (highly) skilled workers places the EU for great challenges. To implement and bring the EU Blue Card into practice was a means to partly alleviate the demand at least for the highly skilled labour and a first step to increase the attractiveness of the EU labour market. However, current researches show that the impact of the Blue Card is limited. There is a variety of conditions set by the Member States (MS) which diminishes a user friendly procedure for highly skilled migrant workers. Furthermore, MS were allowed to develop their own national regulations for attracting (highly) skilled workers. This, in particularly the Netherlands led more to priorities in national regulations than to emphasising the Blue Card.

The intentions of the EU to give the Blue Card a boost in the upcoming term will give way for new initiatives. The success of the new Blue Card version though, will also depend on the attention paid to factors that are decisive for migrant workers such as their preference for the nationality of a MS and social aspects in their life that can either decrease or increase the incentive for mobility within the EU. Furthermore, the role of the (HR) division of the employer can be a key factor to make the future migrants aware of the choice between national residence permits and the Blue card. A sole focus on a new or amended set of regulations is however a too narrow starting point. Another aspect is the demand driven mechanism of the Blue Card which leads to individual initiatives of employers whether or not to hire an employee from a third country. This stands in the way of an (additional) macro-economic approach with a supply driven point based system in which sectors with high demands for (highly) skilled workers form the core business. The extent to which this risk avoiding character will be held onto in the near future will affect the way in which the Blue Card will be developed. In conclusion, the success of the future Blue Card will very well depend on the boldness in the EU decision making process and that of the MS to open the economic markets for third country (highly) skilled workers in such a way that labour demands in the next decades can be answered as the quest for a more efficient use of EU labour potential has still not been fulfilled.

Keywords: EU law, labour law, Blue Card, migrant workers, highly skilled workers

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I. INTRODUCTION

The European labour market is confronted with many great challenges¹, such as rapid technological changes and an ageing society. An increasing demand for a highly skilled labour force whereas the existence of an uncertainty about the future growth brings another complication to these challenges. The increasing demand can lead to an assumption that the Member States (MS) install policy instruments to solve (future) shortages on their labour market. However, labour migration from third countries is not structurally used as an instrument to decrease labour shortages in the MS.² With regards to the aspect of mobility it can be stated that theoretically the EU Blue Card has an advantage in comparison with the several national policies in that sense that the possession of the Blue Card enables the migrant to move within the EU labour market under certain preconditions. This leads to the key question to which extent the EU Blue Card can contribute to a decrease in the shortages of (highly) skilled migrants to live and work in the EU and especially in the Netherlands.

It must be noted that although the Blue Card nowadays focuses on highly skilled labour, it should not be ruled out that its emphasis can include skilled workers in the future. With that in mind, information on this particular target group is also incorporated.

The following topics will be discussed. Firstly, the Blue Card and its objective is briefly explained. Secondly, the sectors in the Netherlands with great demands are highlighted after which the present Dutch answers to these demands are explained. Thirdly, the obstacles of the Blue Card are mentioned including the current issues that needs to be taken into account that can offer new insights with regard to the obstacles mentioned. The possible opportunities are the final subject after which the conclusions are presented.

II. EU BLUE CARD

Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, also known as the EU Blue Card, enables the residence of highly qualified employment of third country nationals in the EU. The main conditions are the possession of a valid work contract or binding job offer of at least one year, an agreed salary that has to be at least the threshold set by the individual

¹ K. Attström et.al., *Mapping and Analysing Bottleneck Vacancies in EU Labour Markets*, Rotterdam, Ramboll and SEOR Erasmus School of Economics commissioned by the European Commission, 2014.

² European Migration Network, *Labour market shortages and migration*, Rijswijk, European Commission, 2015

MS³ and the successful completion a post-secondary higher education program⁴ of at least three years. The residence permit is granted for the same duration as your employment contract with a maximum of 5 years.

The Blue Card can be used to enhance mobility within the MS of the European Union. One of the preconditions to attain this mobility is the 18 months of legal residence in the first MS as an EU Blue Card holder before moving to the second one. The latter MS examines the application with its own set of requirements. The card holder and family members are allowed to move to another MS for the purpose of highly qualified employment if the requirements for the Blue Card are met in the latter MS.

After five years of legal and continuous stay in the Netherlands every migrant - also the EU Blue Card holder - may qualify for a permanent EC long term residence permit under Directive 2003/109/EC. The EU Blue Card holder however is allowed to accumulate periods of residence in different MS in order to fulfil the requirements of 5 years of legal and continuous stay.⁵

Absence of the territory of the EU by the EU Blue Card holder is not considered an interruption of the 5 years of legal and continuous stay. This period of absence is shorter than 12 consecutive months and does not exceed in total 18 months.⁶

After this illustration of the set-up of the Blue Card, the next step is to look into the shortages of workers in the EU and particularly in the Netherlands after which a comparison is made to identify to which extent the Blue Card is compatible with the level of skills of the needed labour migrants.

III. SHORTAGES OF (HIGHLY) SKILLED WORKERS IN THE EU AND PARTICULARLY IN THE NETHERLANDS

The table below illustrates the top 20 bottleneck vacancies. The International Standard Classification of Occupations (ISCO)⁷ is used as a common identifier of job classifications in

³ The threshold in the Netherlands is a gross monthly salary of EUR 4,908 (exclusive of 8% holiday allowance) amounting to an annual gross salary of EUR 63,607.68 (including 8% holiday allowance).

⁴ In order to prove this a diploma or certificate has to be submitted. Foreign diplomas must be evaluated by the Dutch organisation IDW (Internationale diplomawaardering).

⁵ Provided, that the applicant has legal and continuous residence for two years immediately prior to the submission within the territory of the MS, where the application for the EC-long term residence permit is lodged.

⁶ These periods of absence are restricted to cases where the EU Blue Card holder has returned to his country of origin to work as an employee, self-employed person, to perform voluntary service, or to study. Once the EC-long term resident status is acquired by the former EU Blue Card holder, they are allowed to be absent of the territory of the European Union for 24 months.

⁷ ISCO is one of the main international classifications for which ILO is responsible.

the EU and shows that not only highly skilled labour, but that also skilled labour are amongst the bottlenecks as well. Examples of high demands in highly skilled labour are science and engineering professionals as well as information and communications technology professionals, and health professionals. Bottlenecks in skilled labour are found in demands for metal, machinery and related trades workers which is ranked on the first place on the list of bottleneck vacancies. In the top 5 are also building and related trades workers, excluding electricians with a higher ranking than science and engineering associate professionals.

Table 1 Top 20 bottleneck vacancies at ISCO 2-digit level European level⁸

Rank at ISCO 2-digit level	ISCO code and description	Rank value ⁹	Number of countries reporting
1	72 Metal, machinery and related trades workers	677	23
2	21 Science and engineering professionals	576	22
3	25 Information and communications technology professionals	530	20
4	22 Health professionals	521	21
5	71 Building and related trades workers, excluding electricians	485	18
6	51 Personal service workers	438	22
7	31 Science and engineering associate professionals	310	14
8	52 Sales workers	257	13
9	83 Drivers and mobile plant operators	252	16
10	75 Food processing, wood working, garment and other craft and related trades workers	237	12
11	23 Teaching professionals	215	12
12	33 Business and administration associate professionals	204	13
13	24 Business and administration professionals	176	11
14	74 Electrical and electronic trades workers	172	12
15	81 Stationary plant and machine operators	155	9
16	91 Cleaners and helpers	145	8
17	96 Refuse workers and other elementary workers	140	5
18	53 Personal care workers	139	6
19	12 Administrative and commercial managers	119	6
20	92 Agricultural, forestry and fishery labourers	112	3

⁸ K. Attström et.al.

⁹ The bottleneck occupations in 18 countries out of 29 countries were identified. The ranking was done by a ranking of a supply-demand ratio, an employer's survey and other possible rankings. The ranking in the Netherlands differed to much from this system and was therefore not compatible with the ranking of other MS and not included in the table above.

In the Netherlands, shortages are concentrated on the sectors of technology, IT and specific niches of chartered accountants for example and district nurses. These shortages are not only seen on the higher and academic level, but on a secondary level as well. This regards inter alia technical occupations (technicians, computer numerical control operators, welders), the technical field (structural engineers, calculators, technical sales people) and occupations in the medically technical field (optician, hearing care professional).¹⁰

The demands on the higher and academic level involve amongst others IT occupations, and occupations in education and teaching. In specifically the care sector indications of shortages are in both very specific occupations and occupations on a higher and academic level as well (nurse practitioners for general practitioners or specialists in geriatric medicine).

IV. THE DUTCH ANSWER TO LABOUR SHORTAGES

The labour migration policy has an almost exclusively demand-driven character in the Netherlands which means that the supply of the labour market within the Netherlands and the EU/EEA come in first to fill the vacancies. An employer can only attract a labour migrant from a third country national when the vacancy cannot be fulfilled by the Dutch or EU/EEA supply. The initiative to attract an employee from a third country lies solely on the employer who also has to take care of a work permit.¹¹ The work permit is subject to a labour market test first to verify the shortages in the Dutch or EU/EEA supply. The bottleneck is that these tests are based on the individual and the present vacancy, so there is no overall focus on the professional sector in these tests. This kind of policy is not set up towards solving labour shortages on a macro-level such as in the USA. Their Green Card system with a supply driven character allows a number of specialized jobs for example to attain a residence permit based on a past or current job (e.g. Afghan/Iraqi translators, broadcasters, and religious workers) independent of the initiative of employers on the US labour market.

The policy for the top levels of the labour market does not have a restrictive character. For the category of knowledge worker the main criteria is an income threshold. Moreover, there is no obliged test to verify the Dutch and EU/EEA labour supply. In the execution of this policy it is also possible for employers to receive a decision on the residence permit application for a knowledge worker within two weeks. These regulations explain the number of applications, namely 10,900 received applications in the knowledge and talent category in 2014 in contrast to the labour migrants category with around 1,700 applica-

¹⁰ European Migration Network

¹¹ The Dutch system has a separate work permit (tewerkstellingsvergunning) and a combined version of the residence and the work permit (GVVA).

tions in the same year. However, although the Dutch policy is more inviting for the top levels, its basis is still demand driven. This demand driven character is further elaborated in the next section.

V. ACKNOWLEDGING THE COMPLEXITY OF THE BLUE CARD

Let us keep in mind that the arrival of the Blue Card marks a remarkable start to combine forces to achieve the desired level of highly skilled workers in the EU. But to become the next attractive continent to work and live in, the Expert Group on Economic Migration already took steps in discussing the complexities of the Blue Card.

One of the complex aspects is the national schemes for highly qualified migrants that exist next to the Blue Card scheme.¹² MS are allowed to run national schemes targeted at highly qualified migrants. These residence permits issued under such national schemes do not confer the same rights of residence in the other MS as provided for in the Blue Card Directive which results in a large number of labour migration schemes across the EU and which affect the level of mobility of the migrant.

Although many issues are highlighted with the preliminary evaluations of the Blue Card (family reunification, attracting graduates/young professionals and so on) one main issue seems to be left out of the discussions, namely the demand driven approach of the Blue Card. The demand driven character indicates that there is no evident macro-level approach to combat the labour shortages in the EU. Due to this system, the potential power of such a regulation is lost, because the initiative is put in the hands of employers to first offer a contract to the highly skilled worker. Therefore, the Blue Card serves the relative small group of migrants who need to cooperate with their employers in order to attain the Blue Card. It may seem that the EU and MS keep control of the labour demand issue, but the flip side of the story shows that EU and the MS have put themselves offside.

VI. ADDITIONAL ISSUES TO TAKE INTO ACCOUNT

The EU discussions about the Blue Card mechanism holds an assumption that the job is the only leading factor for the working migrant, but we need to keep other factors in mind that can be decisive in one's choices and one's life.

One of the factors that need to be discussed is the possible preference to obtain the nationality of a MS rather than the Blue Card. In the case of the Netherlands, a work-

¹² Article 3(4) of the Directive allows this construction.

ing migrant can have the option to become a Dutch citizenship after to have lived for a consecutive period of at least five years in the Netherlands on the basis of a permanent residence permit. A permit on the basis of (highly) qualified work can lead to such a permit with a permanent character. By becoming a Dutch citizen, the migrant automatically achieves mobility within the EU through the right of free movement of persons within the EU territory. Moreover, the rights as a Dutch citizen gives security in terms of e.g. social services, the right to be elected, or the option to become a civil servant. The preference for the Blue Card instead of the Dutch nationality can of course occur if the migrant wants to keep the nationality of the country of origin.¹³

Another factor is the language issue. Obviously, living in a country such as the USA, Canada or Australia comes with less linguistic challenges than living in the majority of MS. Their labour market does not have linguistic restrictions, whereas a migrant who is not fluent in Dutch may not have the same opportunities in the Netherlands as he would have had in the countries with English as the dominant key of communication. Let alone move on a regular base to a country with yet another foreign language to overcome. For the time being, the Blue Card benefits those who are not depending on a certain language proficiency level in their job mobility across the EU, such as positions offered by employers with an international setting such as SAP, MSG, Shell, Philips, Unilever, Lego, Proctor & Gamble, Heineken and so on and those who easily acquire a foreign language.

Social contexts in adult lives can strongly affect the choice to settle in a specific country. Although the Blue Card enables a greater mobility for a migrant worker, one may not prefer this mobility e.g. when raising small children which may to the desire of living in one place or in the same country which diminishes the incentive to opt for a Blue Card. Of course, this does not diminish the contribution of the migrant to enhance the knowledge climate of the country of residence.

Furthermore, the phenomenon of contemporary labour contracts which becomes more and more common on the Dutch labour market has to be taken into account. Although the threshold regarding the term of the contract is set at a minimum of a year, chances should not be ruled out that an amount of these contemporary contracts of less than a year could stand in the way of obtaining the Blue Card.

Finally, key actors to apply for residence permits are often enough (HR) divisions of (international) companies. They are the one who decide for which type of residence permit they will (help to) apply: the Blue Card, a national scheme, or a EC-long term residence permit. It is only logical that a preference for the national scheme continues to exist when thresholds of the national scheme are lower than those of the Blue Card. In the Netherlands, the salary threshold of a so called knowledge migrant is a monthly salary

¹³ In general, a migrant loses the nationality of the country of origin when becoming a Dutch citizen. Moroccan and Turkish migrants are exempted from this rule.

between approximately €3,100 and 4,200 excluding holiday pay¹⁴, whereas the minimum salary for the Blue Card is set at around €4,900 and results in a difference of between approximately €700 and €1,800. Another criteria that reduces a possible preference of the Blue Card is the completion a post-secondary higher education program which is not (yet) a criteria in the knowledge migrant scheme. With the lower thresholds in national regulations, chances very well exist that migrants obtain a residence permit without being (fully) informed or made aware of every existing option. A worthy research subject to look into more closely.

VII. CONCLUSIONS: BUILDING ON AN ATTRACTIVE EUROPE

Commission President Jean Claude Juncker set the goal to make Europe at least as attractive as the favourite migration destinations such as Australia, Canada and the USA. A review of the Blue Card Directive is mostly needed.¹⁵ The question still remains whether changing the criteria of the Blue Card in a more American, Canadian or Australian style and a points based system will lead to more attractiveness. There are arrears to be tackled. The somewhat natural EU tendency toward avoiding risks can increase this backlog as America, Canada and Australia are not waiting for the EU to catch up. Two scenarios are in place.

The first is a careful one with incremental steps. The next step would then be to find more alignment between the different policies of the MS with efficient application processes. Maybe graduate students will be part of the target group. Possible changes in the conditions for the application regard the income threshold combined with relevant work experience. But these kind of amendments will only mean a continuation of the present frame work.

The second scenario is quite bold. In this intervention application for the Blue Card is not only open for the higher segments, but also for the skilled labours. It acknowledges that the bottlenecks of vacancies lie in the shortages of not only highly skilled labour, but in skilled labour as well. It also acknowledges the prognosis that the existing and future labour force is not quantitatively and qualitatively sufficient enough to properly fulfil the vacancies. The boldness can even be extended a step further to implement an additional demand driven system to the supply driven one in order to increase the control on the labour market with a measure on a macro-level.

¹⁴ The salary threshold of knowledge migrants of 30 years and older is set at around €4,200 and that of knowledge migrants younger than 30 years around € 3,200 excluding holiday pay. These standard amounts is adjusted every year.

¹⁵ Expert Group on Economic Migration, *Reviewing the Blue Card Directive*, Brussels, European Commission, 2015.

So what does the future hold? With the economic recess more or less behind us the next decade may as well be to change course in the way we look at migrant labours. Rather than leaving the incentive in the hands of employers, an awareness in the EU decision making process must be achieved in which skilled and highly skilled workers are not only willing to live in the EU due to its attractiveness on the labour market, but in which also is understood that without sufficient employees the EU labour market does not stand a chance in the battle for brains against the USA, Canada and Australia.

NEW
DEVELOPMENTS
IN EU EQUALITY
AND HUMAN
RIGHTS LAW AND
NATIONAL LEGAL
SYSTEMS

SNJEŽANA VASILJEVIĆ, PHD*

EQUALITY, NON-DISCRIMINATION & FUNDAMENTAL RIGHTS: OLD HABITS DIE HARD!

Summary:

The non-discrimination principle is the core principle of the internal market of the European Union (EU). It is defined through primary and secondary EU law. The problem of its interpretation lies in the interpretation of direct effect in both vertical and horizontal situations. This paper discusses the key issue of the understanding of fundamental rights protection and the implementation of anti-discrimination legislation.

Key words: *fundamental rights, Court of Justice of the European Union and the European Court of Human Rights, European Convention on Human Rights, EU competences, equality principle*

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I. INTRODUCTION

The aim of this paper is to reveal how the European legal system protects human rights and to observe the obstacles for the consistent implementation of European equality standards. Further, the paper will discuss how two separate European legal orders operate through the active role of the two European courts. The first section will explore the role of European equality legislation and possible interpretations. The second section will reveal possible challenges faced by fundamental rights protection in times of economic crisis by focusing on the issue of multiple discrimination. The third section will reveal the limits of fundamental rights protection. The final section will focus on a possible way out of the equality law crisis by discussing the direct effect of EU law and a possible way towards the efficient suppression of discrimination.

II. EUROPEAN EQUALITY LAW

European fundamental rights protection is subject to certain limitations. The first anti-discrimination standards were adopted in the 70s, although to date they have not produced revolutionary results. When I say “revolutionary”, I refer to the lack of final judgments before the national courts and clear legal reasoning in balancing between two or more protected fundamental rights. There are several reasons for this. Firstly, the concept of fundamental rights protection was not the core element of the internal market at the beginning of European integration. European primary law was lacking the basic element of fundamental rights protection until first the Maastricht Treaty (1993) and then the Amsterdam Treaty (1999) entered into force. The Amsterdam Treaty revealed the existence of different forms of discrimination which the founding fathers decided to prohibit in its Article 13. Article 13 was the legal basis for the development of the European secondary anti-discrimination legislation. Secondly, anti-discrimination directives have not been transposed fully or correctly into national legal orders. Sometimes, anti-discrimination directives cannot be considered a sufficient tool in the fight against discrimination. Thirdly, the fact that, in general, EU directives do not have a direct effect on private parties reflects negatively on national anti-discrimination frameworks. Fourthly, another possible negative reflection is that human rights protection lies outside the scope of EU law. Nevertheless, there is another safeguard system operated by the Council of Europe. In some European countries (mostly Eastern European countries) reform of the justice system and access to justice are very slow and there is a huge backlog of pending cases.

In the meantime, the European legislature has already developed a system of legal norms and judicial practice which simplify implementation. One possible way out is for the principle of non-discrimination enshrined in the Charter of Fundamental Rights in

Article 21 to open up space for the further development of the application of EU law, as well as for the possible broadening of EU competences. Further, a more active approach by the ECtHR would help strengthen the protection of fundamental rights in Europe.

To begin, it is necessary to outline the background of the principle of equality. Development of EU equality law has undergone turbulent decades of recognition in the EU legal order as well as in national legal orders. The primary goal of the creation of anti-discrimination law was to enable fair competition in the European market.¹ However, the secondary goal was the suppression of sex discrimination and the implementation of social measures. Since 1975, the EU has created a comprehensive anti-discrimination legal and policy framework. This framework has been criticised over the years.² One can notice that the European anti-discrimination concept has lost its primary purpose, since the anti-discrimination model is dominated by a purely individualistic approach that does not solve the problem in the form of structural social discrimination of marginalised groups in society, such as racial and sex discrimination,³ and therefore excludes the implementation of specific (positive) measures that are primarily needed to correct certain social inequality.⁴ The equality and non-discrimination principle is the core principle of the internal market of the European Union. Moreover, it is considered the highest value in all human rights international agreements. The principle of equality and non-discrimination has been of particular importance in European Community law and has now been raised to the level of a general principle. With the entering into force of the Treaty of Maastricht (1993), the modern European Union emerged. Primary and secondary European law on equal opportunities between women and men has developed over the past thirty years in order to eradicate the gender pay gap and gender discrimination in working conditions and social security. Over the years, the practice of the CJEU has helped in the interpretation and implementation of the legal framework for gender discrimination. Today, equality between women and men is recognised as one of the key objectives of the EU in its inclusion of the gender dimension in all activities of the Union.

Building on the experience of the EU in the fight against discrimination on grounds of sex, consensus was reached in the mid-1990s for regulating other forms of discrimination in the European Union, including in European primary and secondary legislation. The result of this process is the inclusion of a new Article 13 in the Treaty of Maastricht. Finally, the EU decided to adopt a general prohibition of discrimination, but for a limited list of

¹ CJEU, Case C-43/75 *Defrenne* [1976]

² M. Bell, "Advancing EU Anti-Discrimination Law: The European Commission's 2008 Proposal for a New Directive," *The Equal Rights Review*, Vol.3, 2009, <http://www.equalrightstrust.org/ertdocumentbank/mark%20bell.pdf>, (accessed 21 November 2015).

³ M. Bell, *Racism and Equality in the European Union*, Oxford, Oxford University Press, 2008.

⁴ A. D. Freeman, "Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine," *Minnesota Law Review*, vol. 62, 1978, pp. 1049-1119.

protected characteristics. However, the Amsterdam Treaty strengthens the existing provisions on the protection of human rights in the Treaty on European Union (Articles 6 and 7) by introducing a set of principles on which the Union is founded (“freedom, democracy, respect for human rights and fundamental freedoms and the rule of law”), giving the CJEU powers to guarantee respect of these principles by the European institutions, and in anticipation of sanctions in the case of violation of the fundamental principles of the Member States.⁵ Article 13 of the Amsterdam Treaty broadened the scope of the prohibition of discrimination by adding more protected characteristics to the existing list: sex, race, ethnicity, disability, age and sexual orientation. This list is exhaustive, which means that it does not allow other protected characteristics to be added. However, those Treaty norms were the kick off for the further development of secondary anti-discrimination legislation. On the other hand, this was also reflected in efforts to create a “European Bill of Rights”. In 1999 the European Council proposed that a “body composed of representatives of the Heads of State and Government and of the President of the Commission as well as of members of the European Parliament and national parliaments” should be formed to draft a Charter of Fundamental Rights (“Charter”). The draft Charter was adopted on 2 October 2000 and it was solemnly proclaimed by the European Parliament, the Council of Ministers and the European Commission on 7 December 2000.⁶

Unfortunately, at the beginning of its existence, the Charter was not legally binding. Its legal status was uncertain until the entry into force of the Treaty of Lisbon on 1 December 2009. Following the entry into force of the Lisbon Treaty, the Charter has had the same legal value as the European Union treaties. Thus, the Charter has become a powerful weapon in the fight against discrimination. The principle of non-discrimination enshrined in the Charter builds on Article 13 of the Treaty on EU and represents the basis for the further development of EU antidiscrimination legislation.

The adoption of Article 13 is a reflection of the growing recognition of the need to develop a coherent and integrated approach to combat discrimination. The European Commission decided to give effect to the powers set forth in Article 13 and in 1999 adopted a package of proposals. This led to the unanimous adoption of the key directives in 2000 aim-

⁵ Art. 13 of the TEU: “1. Without prejudice to other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

2. By way of derogation from paragraph 1, when the Council adopts Community incentive measures, excluding any harmonisation of the laws and regulations of the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1, it shall act in accordance with the procedure referred to in Article 251. Treaty establishing the European Community” (consolidated version 1997), *Official Journal* C 340 of 10 November 1997 <http://eur-lex.europa.edu/en/treaties/index.htm#founding>, (accessed 22 October 2015).

⁶ European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, *Official Journal of the European Communities*, 18 December 2000 (OJ C 364/01) <http://www.refworld.org/docid/3ae6b3b70.html> (accessed 30 July 2013).

ing at providing effective legal protection against discrimination.⁷ The Racial Equality Directive prohibits direct and indirect discrimination, including incitement to discrimination based on ethnic or racial origin. It covers the area of employment, training, education, social security, health care, housing and access to goods and services. It also prohibits multiple discrimination. However, the CJEU and national case law consider discrimination solely on the basis of the single axis approach.⁸ The single axis approach analyses discrimination on the basis of each of the grounds for discrimination separately. For example, imagine that in the same case we are a victim of discrimination based on gender and also a member of some vulnerable or marginalised group. The courts would probably not have taken into account the fact that discrimination occurred on two or more different bases.⁹ Much of the existing literature exploring multiple discrimination has criticised the single axis approach from a legal perspective (Moon, 2002; Vasiljevic, 2009; Schiek and Lawson, 2011).

In some countries this represented a completely new approach to anti-discrimination legislation and policies based on individual rights. Member States must complement their own legislation on gender equality in the light of the general Equal Treatment Directive,¹⁰ the Directive on Equal Treatment in Employment and Occupation, and the Racial Equality Directive. The Racial Equality Directive is broader in its scope because it covers other areas outside the labour market, such as education, social security, and access to goods and services. This has led to the adoption of national laws covering discrimination on grounds of sex amongst other grounds of discrimination. Moreover, the new Directive introduced the principle of equality between men and women in the access to goods and services and their provision.¹¹ Finally, a political decision was made to bring a new comprehensive directive based on the principle of equal opportunities and equal treatment for men and women in employment.¹² The Directive for the first time in many Member States

⁷ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000 and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000.

⁸ S. Vasiljević, *Similar or Different: Discrimination in the European Union and the Republic of Croatia*, Zagreb, Tim Press, 2011.

⁹ D. Schiek & A. Lawson (eds.), *EU Non-Discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination*, Ashgate, 2011.

¹⁰ Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 269/15, 5.12.2002.

¹¹ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373, 21.12.2004.

¹² Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006.

presented protection against discrimination on the basis of certain grounds. Directives require the introduction of new definitions and legal concepts. In this area, they have also led to the establishment of new specialised equality bodies and to the exercise of the powers of certain existing bodies. Deadlines for the transposition of the Racial Equality Directive and the Employment Equality Directive into national law have already passed; however, the correct implementation of both directives into national law does not exhaust the possibility for natural and legal persons in national courts to refer directly to the individual rights guaranteed by the equality directives. In general, this is possible when the directives are properly implemented in national law, but the application of national law does not achieve the result prescribed by the directives.¹³

All Member States have adopted a unique and comprehensive anti-discrimination framework. There is also a visible and positive trend of single equality bodies dealing with all grounds of discrimination set out in the directives. Such bodies are not the “invention” of the European Commission, because they were established in some countries much earlier (for example in the UK, Netherlands, Sweden). Through the establishment of such bodies, citizens are offered a cheaper and faster alternative to resolve discrimination complaints. Such bodies also strengthen collective awareness of the dangers of discrimination and the need to develop a culture of equal opportunity and non-discrimination. Unfortunately, this kind of institutional protection of human rights is still underutilised.

III. CHALLENGES OF FUNDAMENTAL RIGHTS PROTECTION IN TIMES OF ECONOMIC CRISIS

Sometimes anti-discrimination laws can recognise problems arising for certain individuals belonging to vulnerable groups. For example, it can be seen if one experiences discrimination on different grounds in separate cases: if a woman with disabilities does not get promotion solely because she is a woman and if it is also preferred for such a position to go to a male candidate, or in any other situation where her participation in business meetings was prevented because the meetings were held in rooms that do not have access for people with disabilities. In such situations, courts deal separately with certain grounds of discrimination. Such cases of discrimination arise from a situation where, for example, there are different requirements in a job description advertised for candidates where the absence of one of the conditions would reduce the chances of securing the job, and, in the case of the lack of more specific characteristics, the chance of winning a particular work position further decreases. The United Kingdom is one of the few Member States

¹³ The deadline for the transposition of Directive 2000/43/EZ expired on 19 July 2003. The deadline for the transposition of Directive 2000/78/EZ expired on 2 December 2003. Some Member States have used the possibility to request an additional period up to three years to adopt provisions relating to discrimination based on age and disability, Case C-62/00 *Marks & Spencer* [2002] ECR I-6325.

which has a wide variety of special legislation to combat discrimination (the Sex Discrimination Act 1975, the Equal Pay Act, 1976, the Protection against Harassment Act 1997, the Equality Act, 2006, etc.). In the UK, in the case of *Perera v. Civil Service Commission* (No. 2),¹⁴ Mr Perera, who was born in Sri Lanka, claimed that he had been rejected on a number of occasions for jobs in the Civil Service on the grounds of his colour or national origin. After having been granted discovery of limited documents by the Employment Appeal Tribunal [1980] IRLR 233, his case was heard on its merits by an Industrial Tribunal. The case of Ms. Perera was the case of multiple discrimination but in his case multiple discrimination was not recognised by courts.

African-American women first spoke out about the ways in which single-ground approaches to anti-discrimination law failed to capture the lived realities of inequalities linked to gender, race and ethnicity.¹⁵ Discrimination becomes more visible in times of economic crisis and women are mostly affected by its consequences. During economic crises, “it is more likely that the members of disadvantaged groups are made redundant first”¹⁶ Multiple discrimination continues to be deeply affected by international relations and political developments after September 11th.¹⁷ As Sheppard claims (2011: 2), “ongoing tensions around national security, religious diversity, race and gender have led to growing controversies around racial profiling (predominantly affecting racialised Muslim men) and religious dress codes in the workplace (affecting predominantly racialised Muslim women).”¹⁸ In these contexts, it is impossible to separate the overlapping strands of exclusion linked to national and ethnic origin, race, religion, and gender.¹⁹ Research has shown that inequality at work is often experienced on more than one ground at the same

¹⁴ *Perera v. Civil Service Commission* (no 2) [1983] ICR428.

¹⁵ K. Crenshaw, “Demarginalizing the Intersection Between Race and Sex: A Black Feminist Critique of Anti-discrimination Doctrine, Feminist Theory and Anti-Racist Politics”, in *University of Chicago Legal Forum*, 1989, pp. 139-167; see also, J. Conaghan, “Intersectionality and the Feminist Project in Law”, in E. Grabham et al, *Intersectionality and Beyond – Law, Power and the Politics of Location*, New York, Routledge-Cavendish, 2009, pp. 21-48 at pp. 22-24 and pp. 35-38.

¹⁶ European Union Agency for Fundamental Rights, *The Impact of the Racial Equality Directive - Views of Trade Unions and Employers in the European Union: Strengthening the Fundamental Rights Architecture in the EU IV*, Luxembourg, 2010, p. 45.; C. Sheppard, “Multiple Discrimination in the World of Work,” Working Paper No. 66, International Labour Organisation, 2011.

¹⁷ C. M. Gandara, “Post-9/11 Backlash Discrimination in the Workplace: Employers Beware of Potential Double Recovery”, in *Houston Business and Tax Journal*, Vol. 7, 2006, pp. 169-200. See also, S. Estreicher and M. Bodie (eds.), “Workplace Discrimination Privacy and Security in an Age of Terrorism”, *Proceedings of the New York University 55th Annual Conference on Labor Workplace Discrimination in an Age of Terrorism*, Aspen Publishers, 2007.

¹⁸ C. Sheppard, *Multiple Discrimination in the World of Work*, Working Paper No. 66, International Labour Organisation, 2011.

¹⁹ D. Schiek and V. Chege, *European Union Non-discrimination Law: Comparative Perspectives on Multidimensional Equality Law*, London, New York, Routledge-Cavendish, 2009.

time.²⁰ The result of growing inequalities at the workplace is a violation of human dignity and a risk of further limitations of human rights. “To prevent this risk, new concepts and approaches are needed to address the realities of multiple and overlapping inequalities and vulnerability at work.”²¹ Multiple discrimination in particular cases is not recognised. A part of the problem lies in the fact that the formal prerequisite for proving discrimination depends of the existence of a comparator. Direct discrimination is the unfavourable treatment of a person because of certain characteristics. There are two methods of proof: the procedural and analytical approach and the comparative approach. In addition, it is my opinion that direct discrimination wrongly restricts the comparative method of proof with regard to establishing less favourable treatment concerning a person who is in the same conditions as other “innocent” people. In contrast, indirect discrimination is a situation where an apparently neutral standard has a less favourable impact on members of a group (the *Bilka* case).²² The problem of indirect discrimination includes the practice, policy or rule applied to a certain group of people in the same way regardless of who they are. For example, there is a rule that all employees must enter the company’s building from the front door. This is a neutral rule, which affects everyone who works for the particular employer. This group is called the pool for comparison. Within this group, some people with a particular protected characteristic may be indirectly discriminated by the neutral rule. For example, if you are a person with disabilities, you cannot enter the company’s building from the front door if the entrance is not accessible. It does not matter if there are no other people with disabilities. There can still be indirect discrimination if something would normally disadvantage people sharing your characteristic. In cases of direct and indirect discrimination, courts recognise discrimination only on a legitimate ground (e.g. either sex or race). Looking at the problem at the horizontal and vertical levels, we can see that the law allows comparison only at the purely horizontal (women and black women and white women) or exclusively at the vertical level (a black woman and a black man). Comparing the bias level is not permitted (black women and white men).

This is a real problem, which can be displayed graphically based on these cases:

1. The comparison of a black woman doing military service with a male black man does not have to show the discrimination she experienced as it will be proven even through a comparison with a white woman. Black men do not need to have problems with military service and neither do white women. However, in this particular case, black women can face discriminatory behaviour. In order to prove this, it is

²⁰ P. Uccellari, “Multiple Discrimination: How Law Can Reflect Reality,” in *The Equal Rights Review*, 2008, Vol. 1, pp. 24-49 at p. 29.

²¹ C. Sheppard, “Multiple Discrimination in the World of Work,” Working Paper No. 66, International Labour Organisation, 2011.

²² CJEU, Case C-170/84 *Bilka Kaufhaus GmbH v Weber von Hartz* [1986]

necessary to allow a comparison with multiple effects in relation to ethnicity and gender/sex.

2. Also, a comparison of the experiences of a woman of Islamic faith with those of a man of Islamic faith does not have to show the level of discrimination. However, comparison with a woman of the Christian faith may show possible discrimination. In order to observe the true dimension of discrimination, it is necessary to include in this case religion and gender.
3. The case of boy members of the Afro-Caribbean race that were expelled from school compared to a similar case of girls of the Afro-Caribbean race may reveal only gendered aspect of discrimination, but not the racial experience of discrimination. So, again, it is necessary to include gender and race.
4. Similarly, we can for example take a male homosexual who is HIV positive and who is fired from his place of work on account of this. Perhaps the employer would not have acted if it was an HIV-positive heterosexual person. The real reason may be proven only when we take into account the full experience of discrimination, taking into account gender, sexual orientation and state of health.

In Britain, in the *Bahl v Law Society* case,²³ the mentioned problems could be observed. Ms Bahl, a woman of Asian descent, claimed to be a victim of discrimination based on gender and race. In the first stage of the case, the Employment Tribunal decided that her situation could be compared to a white man so as to take into account both the characteristics of race and gender. However, the labour court and the appeal court decided that this was not possible and that it was an incorrect interpretation of the law. On appeal, Judge Lord Peter Gibson said: "In our judgment, it was necessary for the EAT to find the primary facts in relation to each type of discrimination against each alleged discriminator and then to explain why it was making the inference, which it did in favour of Dr Bahl on whom lay the burden of proving her case. It failed to do so, and thereby, as the EAT correctly found, erred in law". As can be seen from this point of view and from the judgment of the Court of Appeal, it is considered necessary to separately consider each form of discrimination if the plaintiff claims that all the grounds for discrimination intermingle. In cases of direct discrimination such as *Bahl*, it is necessary to determine whether there was less favourable treatment in relation to the treatment of any other person with similar characteristics as the plaintiff. The comparison may be a real person, if one exists, and, if not, the comparator may be a hypothetical person.²⁴ In court practice it is first necessary to determine whether there is unfavourable treatment in relation to the comparator (the "less favourable treatment" issue) and whether the unfavourable treatment is the only relevant reason (the "reason why" issue). In summary, the above case leads to the conclusion that European

²³ *Bahl v. Law Society* [2004] IRLR 799.

²⁴ This is explained in *Shamoon v. Chief Constable of the Royal Ulster Constabulary*.

legislation is not sufficiently effective to protect against discrimination because it does not provide comprehensive legal protection based on a combination of multiple experiences of discrimination that is indivisible and therefore deserves special treatment not only because it is an issue of equal opportunities but also a multi-dimensional experience that deserves special attention within the scope of the protection of fundamental human rights.

There is no case in front of the CJEU or the ECtHR on the issue of multiple discrimination. When it comes to discrimination, the CJEU has a long practice of deciding in cases related to the labour market because of its limited competences, as well as the limited scope of the equality directives. The exception from the labour market is Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services which enshrines in EU law the principle of equal treatment between men and women in the access to and supply of goods and services. All EU countries were required to implement the directive by the end of 2007. A specific exception was also foreseen for insurance and related financial services where gender was used as a determining factor in the assessment of risk based on relevant and accurate actuarial and statistical data. However, the Court of Justice of the European Union annulled Article 5(2) of the Directive in its *Test Achats* ruling. The ruling obliged Member States to make unisex premiums and benefits mandatory by 21 December 2012. Since this date, the unisex rule has applied without derogation in relation to the calculation of individuals' premiums and benefits in new contracts.²⁵ On the other hand, the ECtHR protects fundamental rights in all spheres of life but as a "European constitutional court", after all legal remedies have been exhausted before national courts.

IV. LIMITS OF EUROPEAN FUNDAMENTAL RIGHTS PROTECTION

European human rights legislation provides different levels of protection. Human rights protection in Europe has two separate supranational legal foundations. The first is the European Convention of Human Rights (ECHR), operating under the auspices of the Council of Europe (CoE), and with the European Court of Human Rights (ECtHR) as the final judicial body to hear and settle alleged violations of the Convention by the CoE's 47 Member States. The second is the Treaty on the Functioning of the European Union

²⁵ CJEU, Case C-236/09 *Test Achats* [2011], the Grand Chamber ruled that a provision which enabled States to maintain sex-specific insurance premiums, notwithstanding the rule on unisex insurance and benefits laid down in Directive 2004/113, was incompatible with the principle of sex equality, enshrined in Articles 21 and 23 of the Charter. The Court took the unusual step of delaying the entry into force of the judgment until the expiry of an "appropriate transitional period", allowing insurance companies time to adjust to the ruling. See more at: <http://europeanlawblog.eu/?p=1384#sthash.cVMmclxh.dpuf>, (accessed 15 November 2015).

(TFEU) and the EU Charter of Fundamental Rights (EU Charter) that was promulgated by the 2009 Lisbon Treaty. However, the legal order of the EU, interpreted by the Court of Justice of the European Union (CJEU), creates a new arena for the further development of fundamental rights protection.

Given that all EU Member States are also members of the Council of Europe, it would appear that there is no need for two sources of European human rights law being enforced by two separate legal institutions. Moreover, this might cause confusion in determining the level of fundamental rights protection. One might conclude that two separate legal jurisdictions over human rights might create double standards or, even worse, legal uncertainty. The CJEU and the ECtHR have jurisdiction over different human rights instruments even though their territorial jurisdiction overlaps. The concern is that this engenders two different bodies of law, thereby subjecting European states to dual, and possibly contradictory, treaty obligations, which may not be uniformly interpreted because of the divergences in the respective functions and mandates of the CJEU and the ECtHR. The ECtHR delivers judgments against Member States of the Council of Europe on alleged violations of the European human rights treaties. Complaints may be lodged by individuals or by other Member States. This mechanism works very well and individuals are quite active in their efforts to achieve justice.²⁶ The CJEU has limited competences and its focus is on the interpretation of its primary and secondary law.

First of all, it is very important to emphasise the supreme character of EU law.²⁷ This means that you cannot depart from EU law by a subsequent national law. From the very beginning, constitutional courts of the Member States were not ready to accept the supreme character of EU law. In the *Handelsgesellschaft* case,²⁸ the Court decided that the respect for fundamental rights was part of the general principles that have to be obeyed. In this case, the so-called 'Solange' problem arose. The German court finally agreed that EU law prevailed as long as its protection was better. In cases where German national protection was better, German law would still be applicable. Next to this supreme character, EU law can be directly applicable. To explain in which circumstances it can be directly applicable, I have to make a distinction between primary law and secondary law. Primary law encompasses the treaties (TEU and TFEU), general principles (which includes fundamental rights) and constitutional rights (Art 2 TEU). Secondary law includes international agreements, directives, recommendations, regulations and opinions. Secondary law can only have direct effect when it meets three requirements, namely, the text has to be sufficiently clear, unconditional and not requiring other legal actions. The direct effect of EU law enables an

²⁶ E. Voeten, Politics, Judicial Behavior and Institutional Design, in Jonas Christoffersen, Mikael Rask Madsen (eds), *The European Court of Human Rights Between Law and Politics*, OUP, 2011, pp. 62.

²⁷ CJEU, Case C-6/64 *Costa v ENEL* [1964]; Case C-29/69 *Stauder* [1969].

²⁸ CJEU, Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970]

individual of a Member State to rely on, for example, the treaties before national tribunals and national courts. Now, we have arrived at the difference between vertical and horizontal effect. Horizontal effect is about the presence of EU law between one natural person or legal entity and another natural person or legal entity. Normally, horizontal effect is not really a common thing because it can cause damage to individuals. In its early practice, the CJEU confirmed that norms of the founding treaties could have a direct effect in horizontal situations. This was confirmed in the case of *Defrenne vs. Sabena*.²⁹ This case was about a difference in wages between a man and a woman in the company Sabena. The principle of equality means that a man and woman should be paid in an equal way for the same job. Because of the direct effect of Article 119 of the EEC Treaty, individuals can rely on it before national courts, even though the Member State has not transposed the provisions into national law. The CJEU has confirmed the importance of the prohibition on gender discrimination in many cases; however, it has always linked it to the general principle of equal treatment (the principle was already established in the Treaty of Rome of 1957 (Art 119 of the 1957 EEC Treaty) and now this principle is prescribed in Art 157 TFEU), which is recognised as a fundamental norm of EU law. For four decades, EU actions in this field of discrimination were limited to sex discrimination in the workplace. With the entry into force of the Amsterdam Treaty, the EU obtained a clear legal basis for combating discrimination, which is currently enshrined in Art 19 TFEU on a number of grounds other than sex. In 2000, two directives were adopted: the Employment Equality Directive,³⁰ prohibiting discrimination on the basis of sexual orientation, religious beliefs, age and disability in the area of employment; and the Racial Equality Directive. This was a great expansion of the scope of non-discrimination law under the EU. Later, when the Treaty of Lisbon entered into force in 2009, the Charter of Fundamental Rights became a legally binding document. As a result, EU institutions are bound to it and Member States are also bound when implementing EU law. Specifically, Art 21³¹ of the Charter contains prohibition on various grounds. This means that individuals can complain about EU legislation or national legislation that implements EU law if they feel the Charter has not been respected.

Since then, the CJEU went even further when examining direct effect of directives in horizontal situations. The CJEU stated that a direct provision of a directive could only

²⁹ CJEU, Case C-43/75 *Defrenne* [1976]

³⁰ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML>, (accessed 30 November 2015).

³¹ Charter of Fundamental Rights of the European Union, 2000, Article 21 - Non-discrimination: "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited" http://www.europarl.europa.eu/charter/pdf/text_en.pdf, (accessed 30 November 2015).

have horizontal effect if no positive obligation for the individual arises.³² But there are some exceptions when it comes to fundamental rights. There are several examples in EU law concerning the horizontal effect of a directive in cases of discrimination based on the principle of equality of the Charter. The *Kukukdeveci* case³³ considered a German national who was discriminated against based on her age. A notice period was based on the amount of years of service, but the years before the age of 25 were not taken into account. Discrimination can only be justified if there is an objective, reasonable and legitimate aim. The principle of equal treatment could not be justified and was violated in this case because people who started working before the age of 25 are discriminated against compared to people who started working later than the age of 25. As long as the content, in this case, of a directive, consolidates a fundamental principle, the horizontal effect can cause the non-application of the national law which was not in accordance with EU law. Regarding horizontal direct effect, it has to be emphasised that directives, unlike regulations or decisions, will always require further implementation on the part of Member States, for which Member States have considerable discretion. However, even if the provision of a directive cannot directly replace the normally applicable national law/provision in determining the outcomes of a dispute in horizontal situations (between individuals), a directive may still produce indirect effects. The CJEU has confirmed this in its recent cases (*Mangold* and *Kukudeveci*). The fact that a directive, which is a secondary source of EU law, provides that direct age discrimination could be justified in connection with other grounds, Art 6(1) of the Charter leaves some questions for this ground of discrimination to be regarded as a fundamental human right. But knowing that this ground is recognised under Art 21 of the Charter, the CJEU jurisprudence confirms it.

In *Mangold*, *Bartsch*³⁴ and *Kukudeveci*, the CJEU extended the scope of the equal treatment principle and included all the non-discrimination grounds set out in the 2000 directives. These three judgments reaffirmed and clarified the relationship that exists between the 2000 directives, the general principle of equal treatment and the provisions of the Charter.³⁵ Later, the CJEU made it clear that the directives should not only be read as simply setting minimum standards, but also that they provide real protection against discrimination. This was developed in *Firma Feryn*,³⁶ *Coleman*,³⁷ and *Meister*³⁸ which con-

³² CJEU, Case C-201/02 *Wells* [2004]

³³ Case C-555/07 *Kücükdeveci* [2010] ECR I-365

³⁴ CJEU, Case C-427/06 *Bartsch* [2008] ECR I-7245.

³⁵ C. O'Conneide, European Network of Legal Experts in the non-discrimination field, "The Evolution and Impact of the Case-Law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC", 2012, p. 17.

³⁶ CJEU, Case C-54/07 *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding* [2008] ECR I-5187.

³⁷ CJEU, Case C-303/06 *Coleman* [2008] ECR I-5603, para. 47-48.

³⁸ CCJEU, Case C-415/10 *Meister* [2012]

cerned direct discrimination. These cases clarified the scope of prohibition of direct discrimination and indicated that the directives should not be read in a narrow or excessively formal manner. In sum, all these developments increasingly clarify the non-discrimination principle in EU law.

After referring to the CJEU's judgments (*Mangold* and *Küküdeveci*), it is clear that the Charter made it possible for private parties to rely on it and that it was applicable in horizontal situations, which would give the same possibility in our case. To confirm this, the CJEU went on in the *AMS* case to distinguish *AMS* from *Küküdeveci*, ruling that "the principle of non-discrimination on grounds of age at issue in that case, laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals an individual right which they may invoke as such".³⁹ Of course, the CJEU remains reluctant to agree that all rights are directly horizontally applicable and have a test for this, which is used to determine whether this is so. The provision has to be intended to confer rights on individuals and has to be sufficiently clear and precise.

As Sever (2014) claims, "the Court of Justice has developed its case law on the horizontal effect of the Charter by interpreting the directives particularly in the area of employment law or by adjudicating on their validity with the Charter. Despite the wording of Article 51(1) of the Charter which governs the Charter's scope of application, and according to which individuals may invoke fundamental rights vis-à-vis the institutions, bodies, offices and agencies of the Union and the Member States only when they are implementing Union law, the Court of Justice has interpreted it broadly and has held in a number of cases that certain provisions of the Charter directly apply in relationships between individuals".⁴⁰

Further, in the future, one may expect an increase of cases where the Court of Justice is confronted with situations which raise the question of the right to rely, in proceedings between private persons, on directives which contribute to ensuring observance of fundamental rights, since among the fundamental rights contained in the Charter are a number which are already part of the existing body of EU law in the form of directives.⁴¹ As Seifert (2012) claims, horizontal effect is intended to provide a minimum of social justice in the private relations of individuals in order to guarantee basic fairness to the 'weaker' party.⁴²

One can argue that the horizontal effect of the Charter provisions as expressions of a general principle of law and which have been made concrete with directives is compensation for the lack of horizontal effect of directives. In this sense, Advocate General Bot opines

³⁹ CJEU, Case C-176/12 *Association de médiation sociale* [2014], para. 47.

⁴⁰ S. Sever, "Horizontal Effect and the Charter", *Croatian Yearbook of European Law and Policy*, 2014.

⁴¹ A. Seifert, 'L'effet horizontal des droits fondamentaux', *Revue Trimestrielle de Droit Européen*, vol. 48, no. 4, p. 801, 2012.

⁴² A. Seifert, 'L'effet horizontal des droits fondamentaux', *Revue Trimestrielle de Droit Européen*, vol. 48, no. 4, p. 801, 2012.

in *Kücükdeveci*⁴³ that when it is apparent that the national legislation in question implementing a directive is contrary to EU law, it is not contested that the national court, within the limits of its jurisdiction, has to ensure the full effectiveness of EU law when it determines the dispute before it.⁴⁴ Traditionally, the principle of equality binds the Union institutions and also the Member States, where they implement, or act within the scope of, EU law. In certain circumstances, it may bind natural and legal persons. This occurs in particular in the areas of prohibition of discrimination on grounds of nationality and sex discrimination.⁴⁵

Indeed, the horizontal effect of fundamental rights of the EU concerning the application of the general principle of equality – the principle of equal pay and prohibition of discrimination on grounds of nationality – existed in the primary law of the EU and was, therefore, legally binding before the adoption of the Charter. So, the horizontal effect of these provisions was, when the Charter was adopted, a well-established rule rather than an exception. Moreover, since corresponding provisions also exist in the Charter, the horizontal effect is also recognised for the latter provisions. In any case, it would be paradoxical if the introduction of the Charter reduced the protection of fundamental rights in primary law.⁴⁶

CJEU case law, as shown above, already stated that general principles such as equal treatment are derived from the constitutional traditions of European Member States. Fundamental rights are also enshrined in the Charter, and they have to be basically protected because they result from the constitutional traditions common to the Member States, because they are not new, but founded on the basis of 'established laws', such as Community Treaties, the constitutional principles common to the Member States, the European Convention on Human Rights and the Social Charters of the EU and the Council of Europe.

V. EQUALITY PRINCIPLE - STUCK BETWEEN TWO EUROPEAN COURTS?

In the EU, there is a tendency towards universal interpretation of the principle of equality, but after decades of introducing the principle of equal pay for equal work, the rhetorical question arises of where are we now? As a result of these changes, inequality has increased both within and between nation-states; a feminisation of labour has escalated; and an extreme xenophobic right wing has become established in many European countries. In addition, the EU equality directives provide protection for a limited list of reasons for discrimination. Despite the fact that Member States can enhance their nation-

⁴³ Case C-555/07 *Kücükdeveci* [2010] ECR I-365, Opinion of AG Bot, paras. 57-70.

⁴⁴ *Ibid.*, para 48.

⁴⁵ T. Tridimas, *The General Principles of EU Law*, 2nd edn, Oxford, Oxford University Press, 2007, pp. 74-75.

⁴⁶ CJEU, Case C-176/12 *Association de médiation sociale* [2014], Opinion of AG Cruz Villalón, paras. 34-35.

al legislation and add more specific anti-discrimination provisions, in a number of countries the national legislation has not even been fully aligned with European Union law. The possible way out of today's political and nationalistic turbulence is the application of both legislative and non-legislative measures (e.g. comprehensive anti-discrimination policies, social inclusion, tolerance towards migrants and asylum seekers, etc.).

The window through which the protection of fundamental rights entered into the anti-discrimination legal framework was the development of general legal principles of the European Community. The constitutional traditions of the Member States has also entered the legal system of Community law,⁴⁷ and the CJEU has attributed special importance to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) but not in terms of actual incorporation, because the CJEU implies only legal acts of the Union. The CJEU monitors the legality of the actions of the EU and in an indirect way examines violations of fundamental rights. When it comes to discrimination, both courts seek to coordinate jurisprudence, and the CJEU in its practice often refers to the judgments of the ECtHR. The CJEU has also been clear that EU law takes precedence over all other claims of international law and the decisions of other international tribunals.⁴⁸ Although the European Union has not yet acceded to the ECHR, the Convention is often a source of inspiration for the CJEU when designing the fundamental principles of EU law.⁴⁹ The CJEU has held that the substantive fundamental rights provisions of the ECHR themselves express and reflect existing general principles of EU law. And this line of CJEU case law is now reflected in the terms of Article 6(3) of the Treaty on European Union (TEU) which states that “fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law”. As general principles, the claims of fundamental rights are binding on the EU institutions, and on the Member States when acting within the sphere of EU law.⁵⁰ The CJEU holds itself to be the European Supreme Court, finally and authoritatively interpreting – at least for the EU Member States – the provisions of the ECHR when its provisions arise within a field also covered by EU law. However, as Weiler notes, “Accepting supremacy of Community law without some guarantee that this supreme law would not violate rights fundamental to

⁴⁷ The CJEU's landmark case *Nold v Commission* of 1974 (Case 4/73 *Nold v Commission* [1974] ECR 491, § 13) where the Court held that the rights set out in the European Convention on Human Rights were protected by the Community legal order.

⁴⁸ CJEU joined Cases C-402/05 P *Kadi* [2008] and C415/05 P *Yusuf and Al Barakaat Foundation* [2008]. Compare, however, T-85/09 *Kadi v Commission* [2010], paras. 115-21.

⁴⁹ Case C-555/07 *Küçükdeveci* [2010] ECR I-365

⁵⁰ ECtHR, *Chaplin v. the United Kingdom*, Application No. 59842/10, 4 September 2012; ECtHR, *Eweida v. the United Kingdom*, Application No. 48420/10, 4 September 2012; ECtHR, *Ladele v. the United Kingdom*, Application No. 51671/10, 4 September 2012; ECtHR, *McFarlane v. the United Kingdom*, Application No. 36516/10, 4 September 2012.

the legal patrimony of an individual Member State would be virtually impossible” (1991: 2418). In relation to fundamental rights issues falling within EU law, the Member States of the EU are to regard themselves as simultaneously bound by two different masters: the CJEU (under and in terms of the EU Treaties) and the ECtHR (under and in terms of the ECHR). But these two European courts do not always stand in the same position. They used to have a different interpretation of the following issues: the existence and extent of the privilege against self-incrimination under ECHR, Art 6(1); whether business premises are covered by the ECHR; the right to respect for private life (Art 8); whether the protections of the ECHR could be prayed in aid in relation to the dissemination of information relating to the availability of abortion in other States (Art 10); and whether sexual orientation was a prohibited ground of discrimination under reference to ECHR (Art 14).⁵¹ This burning issue creates confusion in national legal orders and places the courts of the Member States in a difficult position.

Whereas the primary role of the CJEU has been to foster European economic integration, the role of the ECtHR has been to serve as a human rights guardian. Compared to the CJEU’s integrative function, the ECtHR’s role is distinctly different. Although meant to reinforce a common set of rights (specifically drawing inspiration from the Universal Declaration of Human Rights),⁵² the ECHR that was ratified on 4 November 1950 by the Council of Europe was not meant to serve as an exclusively integrative tool. Rather, it was meant to serve as a minimum standard of human rights protections beyond which diversity in Member State practices would be tolerated (O’Donnell 1982). In interpreting the ECHR, Joseph Weiler argues that “When there is a diverse constitutional practice among the Convention States [...] the Court needs to listen, not only preach”, because the “European landscape [...] is a unique and uniquely promising model of tolerance and pluralism” (2010: 1-2). The ECtHR’s purpose, then, is not integrative; in interpreting the Convention, its role is to seek a careful balance between observing a minimal standard of human rights protections and preserving the diverse practices that add texture to the European social landscape. Put differently, if the function of the CJEU is to help build unity through standardisation and harmonisation, the function of the ECtHR is to help build community by forging interdependence where commonalities exist and protecting pluralism where consensus is lacking. However, the ECtHR can only adjudicate in individual cases and impose fines on the violating state. This means that, unlike the CJEU, the

⁵¹ ECtHR, *Schalk and Kopf v. Austria*, Application no. 30141/04. The Court explicitly noted that if and when the ECtHR does recognise the fundamental right of same-sex couples to marry, it would be because a majority of European states already observe marriage equality.

⁵² The preamble of the ECHR notes: “Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10 December 1948 [...] Being resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law to take the first steps for the collective enforcement of certain of the Rights stated in the Universal declaration...” Full text available at: <http://www.hri.org/docs/ECHR50.html>, (accessed 15 November 2015).

ECtHR cannot strike down Member State laws. Further, the ECtHR has developed the “margin of appreciation,” which endows state parties to the ECHR with some discretion in incorporating the Convention’s requirements within their domestic legal orders.⁵³ The existence of two distinct means of reference to fundamental rights, either under direct reference to the ECHR or under reference to the general principles of EU law, including the Charter of Fundamental Rights, creates the possibility of conflict for national courts between competing fundamental rights considerations and interpretations.

⁵³ To this end, it cited its 1998 *Petrovic v. Austria* judgment, which held that “the scope of the margin of appreciation will vary according to the circumstances [...] in this respect, one of the relevant factors may be the existence or non existence of common ground between the laws of the Contracting States”.

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THE RIGHTS OF OLDER PERSONS WITH DISABILITIES IN THE REPUBLIC OF CROATIA

Abstract:

One of the consequences of the omnipresent demographic trend of the population ageing is the increasing number of persons with disabilities on a global scale. The disability rates among older age groups are higher than the ones among younger age groups, and older persons are disproportionately represented within the category of persons with disabilities. This trend is especially pronounced in Europe, therefore in Croatia, too. The basic assumption of this paper is that identifying the specific problems of older persons with disabilities is important for creating adequate policies and measures with the goal of improving the position of this population. So this paper tries to answer the question of whether there is a difference between the position and needs of older persons with disabilities and the position and needs of other age groups with disabilities, i.e. the position and needs of older persons without disabilities. The paper also gives an overview of the existing legal framework for the protection of rights of older persons with disabilities on the international, regional and national level and analyses the position of this population in the Republic of Croatia.

Keywords: *older persons with disabilities, demographic ageing, international law, the European Union, the Republic of Croatia*

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I. INTRODUCTION

The population ageing combined with a high prevalence of chronic, noncommunicable diseases (diabetes, cardiovascular diseases, mental disorders) lead to an increasing number of persons with disabilities on a global level. The disability rate among older population is higher than the one among younger population and rises with chronological age. Therefore, older persons are disproportionately represented within the category of persons with disabilities. Regarded as separate groups, older persons and persons with disabilities share some common characteristics (they are often perceived as a burden on society and a social problem, are often exposed to a higher risk of poverty and social exclusion, are often victims of violence). However, there is a question of the position of those belonging to both groups at the same time.

Therefore, this paper analyzes the available statistical data and current studies on older persons with disabilities and gives an overview of the existing legal framework for the protection of this vulnerable population. The position of older persons with disabilities in the Republic of Croatia is viewed within the context of social inclusion/exclusion, use of social services and rights within the social welfare system and occurrence of violence against these persons. The identification of normative and implementational shortcomings as well as specific needs of older persons with disabilities are a precondition of creating adequate policies and measures for improvement of the position of this population.

II. OLDER PERSONS WITH DISABILITIES - INTRODUCTION

2.1 The term of older person with disabilities

In order to better understand the specific problems older persons with disabilities encounter, it is necessary to differentiate terminologically between ageing, old age, an older person and an older person with disabilities. However, the attempts to define the aforementioned terms have encountered many difficulties. While ageing is a natural, physiological and individual process, depending upon many factors, old age is the last developmental stage in the life of a human.¹ Therefore, ageing is a progressive, constant and gradual process of decreasing of the structure and function of organs and organ systems which lasts from conception until death², and old age is a socially constructed phenomenon, whose beginning is mostly connected to a specific chronological age (regardless of the psychophysical condition of an individual). In most European countries, so as in the

¹ For more details, see: I. Rešetar Čulo, 'Zaštita prava starijih osoba u Europi – trenutno stanje, nedostaci i izazovi', *Pravni vjesnik*, 14/2, 2014, p. 118.

² I. Stipešević Rakamarić, 'Zavod za javno zdravstvo Varaždinske županije', <http://www.zzzzv.hr/?gid=2&a-id=165>, (accessed 8 September 2015).

Republic of Croatia, too, the older age limit is set to the chronological age of 65 years. Persons aged 65 and above are considered to be older persons.³

Ageing results in various changes, which according to their nature, can be differentiated into the following categories: biological changes (gradual slowdown and decrease of body functions), psychological changes (changes in psychological body functions over time) but also social changes (changes related to an individual who is getting older and the society the individual lives in).⁴ The process of primary, physiological ageing is contributed by so-called secondary ageing, i.e. pathological changes and decrease with years as a consequence of external factors, including disease, environmental influences and behaviour.⁵ Although older persons are exposed to a higher risk of specific diseases and injuries, the stereotypes, according to which all older persons are sick or disabled, are based upon the misunderstanding of the natural process of “normal ageing”.⁶ Regardless of person’s age, “normal ageing” imposes very few limitations to the everyday activities and it can be slowed down by modifying the risk factors for chronic noncommunicable diseases like high blood pressure, smoking and sedentary way of life.⁷ A sudden relapse and decay of any organ system is always a consequence of a disease and not “normal ageing”.⁸ Disease and poor health condition in general and disability are not synonyms.

It is a big challenge to define the terms “disability” and “a person with disability” without negative connotations which reflect and intensify negative stereotypes and prejudices. A shift from moral through medical and rehabilitation one, towards social and even the subjective model of disability leads to changes in defining these terms.⁹ At least formally, disability is nowadays not considered a person’s deficiency but rather an interrelationship between an individual and his surroundings, which does not adjust itself to the individual’s differences and limits and hinders his participation in society.¹⁰ Weller opines that exactly through the acceptance of the social model of disability in the Convention on the Rights of Persons With Disabilities (2006)¹¹, the Convention shifted towards the conceptual fusion of social, economic and cultural rights with civil and po-

³ *Zakon o socijalnoj skrbi, eng. The Social Welfare Act*, (Official Gazette 157/13, 152/14).

⁴ I. Stipešević Rakamarić, ‘Zavod za javno zdravstvo Varaždinske županije’

⁵ *Ibidem*.

⁶ *Ibidem*.

⁷ I. Stipešević Rakamarić, ‘Zavod za javno zdravstvo Varaždinske županije’.

⁸ *Ibidem*.

⁹ E. Kajtár, ‘Changing Perspective on Social Inclusion of People with Disabilities: A European – Hungarian Outlook’, *Studia Iuridica Auctoritate Universitatis Pecs*, No. 167, 2008, pp. 168 – 169.

¹⁰ A. Slonšjak and J. Papa, *Praćenje Konvencije o pravima osoba s invaliditetom, Vodič za organizacije koje prate ljudska prava*, Zagreb, Program Ujedinjenih naroda za razvoj, 2012, pp. 9 – 10.

¹¹ *Zakon o potvrđivanju Konvencije o pravima osoba s invaliditetom i Fakultativnog protokola uz Konvenciju o pravima osoba s invaliditetom*, (Official Gazette – International Agreements 6/2007, 3/2008, 5/2008).

litical rights.¹² It all resulted in defining the term of persons with disabilities in a way that such term includes persons who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others. Therefore, a long term impairment per se (physical, mental, intellectual or sensory) is not a disability. Disability is a result of an inadequate response of society to some of the above-listed impairments. In the end this inadequate response of society, whether it be architectural obstacles or stereotypes and prejudices towards persons with disabilities, results in social exclusion.

Following the above-listed definition of basic terms, for the purpose of this paper older persons with disabilities include all persons over 65 years of age with long term physical, mental, intellectual or sensory impairments, which in interaction with different barriers can hinder their complete and efficient participation in society on the equal basis with others. Of course, older persons with disabilities are a heterogeneous group which differs in various characteristics (sex, education, type of impairment, ethnicity affiliation etc.). It is also necessary to distinguish between older persons who have become physically, mentally, intellectually or sensory impaired in old age and older persons who have become impaired in earlier life stages.

2.2 Population ageing and prevalence of disabilities in world and the European Union

For the last decades, there has been a pronounced worldwide trend of demographic ageing, i.e. the increase of share of older age groups in the total population. The share of persons over 60 in the total number of inhabitants on the world level has increased from 9% in 1994 to 12% in 2014 and is expected to rise up to 21% until the year 2050.¹³ There were approximately 524 millions of persons over 65 years of age in the world in 2010 and this population made up 8% of the entire world population.¹⁴ It is predicted that this number will triple until 2050 and by then there will have been 1,5 billion of persons over 65, which will make up about 16% of the world population.¹⁵ Older persons are the fastest rising age group. The growth rate of this age group in the year 2014 was almost three times higher than the growth rate of the total population.¹⁶ Due to such growth rate, the number of persons over 60 almost

In the Republic of Croatia, the Convention on the Rights of Persons with Disabilities entered into force on May 3, 2008.

¹² P. Weller, 'The Convention on the Rights of Persons with Disabilities and the social model of health: new perspectives', *Journal of Mental Health Law*, No. 74, 2011, p. 75.

¹³ *Concise Report on the World Population Situation in 2014*, United Nations, Department of Economic and Social Affairs, Population Division, 2014, p. 24.

¹⁴ *Global Health and Ageing*, World Health Organization, NIH Publication no. 11-7737, 2011, p. 4.

¹⁵ *Ibidem*.

¹⁶ *Concise Report on the World Population Situation in 2014*, p. 25

tripled in the period between 1994 and 2014, and surpasses the number of children under 5.¹⁷ But the older population per se is getting older. The share of persons over 80 (the “oldest old”) in the total number of older persons was 14% in 2014, and is predicted to reach 19% until the year 2050.¹⁸ Should these predictions come true, there could be 392 millions of persons over 80 by the year 2050, i.e. triple numbers of today’s population over 80.¹⁹

Europe is a continent with the oldest population in the world. The share of persons over 65 in the total population number of the EU-27 member states amounted to 17,8% in 2012.²⁰ According to some forecasts, the share of persons aged 0 to 14 in the total population in the EU-28 states will remain constant until 2060 (about 15%), the share of persons in the age group from 15 to 64 will decrease from 66% to 57%, whereas the share of persons over 65 will increase from 18% to 28%.²¹ It is also predicted that the share of persons over 80 in the total population number will increase from 5% to 12% and almost equalize to the share of persons in the youngest age group (0-14 years).²²

The globally present phenomenon of demographic ageing affects all aspects of life and, along with a high prevalence of chronic diseases connected to disability (diabetes, cardiovascular diseases and mental disorders), is considered one of the main causes of the increasing number of persons with disabilities in the world.²³ According to the estimates of the World Health Organization there is more than one billion of persons with disabilities (about 15% of world population).²⁴ Between 2,2% and 3,9% are persons with extreme forms of disability.²⁵ Every sixth person in the European Union is a person with disability, which means that there are approximately 80 millions of persons with disabilities.²⁶ The connection between population ageing and increase of number of persons with disability is simple: older persons are exposed to a higher risk of disability, and world population is increasingly getting older.²⁷ This results in higher disability rates among older persons

¹⁷ *Ibidem.*

¹⁸ *Ibidem.*

¹⁹ *Ibidem.*

²⁰ S.A.Robustillo et al., *EU Employment and Social Situation, Quarterly Review*, European Union, 2013, p. 7.

²¹ *The 2015 Ageing Report, Underlying Assumptions and Projection Methodologies*, European Commission, Economic and Financial Affairs, 2014, p. 18

²² *Ibidem.*

²³ *Summary World Report on Disability*, World Health Organization, 2011, p. 8

²⁴ *World Report on Disability*, World Health Organization, 2011, p. 29.

²⁵ *Ibidem.*

²⁶ *European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe*, European Commission, Brussels, 2010, p. 3

²⁷ *World Report on Disability*, pp. 34 – 35.

compared to the disability rates among younger age groups and disproportional representation of older persons within the category of persons with disability.²⁸ For example, in Germany, out of the total number of persons with disability in 2007, 54,3% of them were over 65 years of age.²⁹ This is in accordance with the data that the prevalence of disabilities among older persons in the European Union is much higher than among younger age groups.³⁰ Namely, 54% of persons over 65 are persons with disabilities, compared to 18% of persons in the age group from 16 to 64.³¹ More than a third of older persons over 75 in the European Union has some sort of disability, and more than 20% of them have a more severe form of disability.³²

2.3 Population ageing and disability in older age in the Republic of Croatia

The trend of demographic ageing has been also pronounced in the Republic of Croatia. According to the 2011 census, the share of persons over 65 in the total population of the Republic of Croatia comprised 17,7% (758633 persons).³³ In accordance with global demographic trends, in our country there is also an increase in very old population. Therefore, the share of population over 80 in 1953 was 0,8%, whereas in 2011 it amounted to 3,9%.³⁴

Considering that the population of the Republic of Croatia is among the older ones in Europe, the increase of number of persons with disability is also expected. According to the data from the Report on Persons with Disability in the Republic of Croatia, on the day of March 12, 2015 there were 508350 persons with disabilities, 306614 (60%) of which were men, and 201736 (40%) were women.³⁵ Therefore, persons with disabilities comprised about 12% of the total population of the Republic of Croatia. The largest number of persons with disabilities, 259887 (51,1%) of them, is in the work-active age (19-64 years).³⁶ In the age group from 0 to 19 years, 42836 persons with disabilities (8,4%) were

²⁸ *Ibidem*, p. 35.

²⁹ *Ibidem*, p. 35

³⁰ *Initial Report of States parties due in 2012 – European Union, CRPD/C/EU/1, 2014*, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/232/64/PDF/G1423264.pdf?OpenElement>, (accessed 15 September 2015) para. 17.

³¹ *Ibidem*.

³² *European Disability Strategy 2010-2020*, p. 3.

³³ Lj. Ostroški, 'Popis stanovništva, kućanstava i stanova 2011., Stanovništvo prema spolu i starosti', Zagreb, Hrvatski zavod za statistiku, 2013, p. 10.

³⁴ *Ibidem*.

³⁵ T. Benjak, *Izvješće o osobama s invaliditetom u Republici Hrvatskoj (2015)*, (hereinafter referred to as: *Izvješće o osobama s invaliditetom u Republici Hrvatskoj (2015)*), Hrvatski zavod za javno zdravstvo, 2015, p. 5.

³⁶ *Ibidem*.

recorded.³⁷ The share of persons over 65 in the total number of persons with disabilities comprises 40,5% (205639 persons).³⁸ The highest prevalence of disability in older age was recorded in the Krapina-Zagorje County, and the lowest in Istria County.³⁹ If we consider the data on the share of older persons in the total population of the Republic of Croatia (17,7%), and the share in the population of persons with disability in the Republic of Croatia (40,5%), it can be concluded that almost every third person over 65 is a person with disabilities, and that older persons with disabilities are disproportionately represented in the total number of persons with disabilities. There is a noticeable increase of older persons with disabilities among the total population of persons with disabilities on the annual level. Namely, in the beginning of 2013 this share was 38,9%⁴⁰, in the beginning of 2014 39,1%⁴¹, and in the beginning of 2015 it amounted to 40,5%⁴².

In the Osijek-Baranja County on the day of March 12, 2015 there were 31731 persons with disabilities, 20252 (64%) of which were men, and 11479 (36%) women.⁴³ Therefore, persons with disabilities comprise 10,4% of the total population of the County.⁴⁴ The share of older persons with disabilities in the total number of persons with disabilities comprises 34%, the share of children with disabilities is 9%, whereas the share of persons with disabilities in the age group from 19 to 64 amounts to 57%.⁴⁵

Older age is commonly divided into early old age, which includes a period from 65 to 74 years, middle old age, which includes a period from 75 to 84 years, and deep old age, which refers to a period over 85.⁴⁶ This division is important because within the category of older persons itself there are differences in the number of persons with disabilities, number of persons with difficulties in performing everyday activities and the number of permanently disabled persons, depending on the fact whether an older person belongs to a younger age group (early old age), middle age group (middle old age) or older age group (the oldest old). According to some estimates, on a global scale, 20% of all persons over 70,

³⁷ *Ibidem*.

³⁸ *Ibidem*.

³⁹ Izvješće o osobama s invaliditetom u Republici Hrvatskoj (2015), p. 6

⁴⁰ T. Benjak, *Izvješće o osobama s invaliditetom u Republici Hrvatskoj(2013)*, Hrvatski zavod za javno zdravstvo, 2013, p. 5.

⁴¹ T. Benjak, *Izvješće o osobama s invaliditetom u Republici Hrvatskoj(2014)*, Hrvatski zavod za javno zdravstvo, 2014, p. 5.

⁴² T. Benjak, *Izvješće o osobama s invaliditetom u Republici Hrvatskoj (2015)*, p. 5.

⁴³ *Ibidem*, p. 29.

⁴⁴ *Ibidem*.

⁴⁵ *Ibidem*.

⁴⁶ S. Roksandić et al., 'Zdravstvena prava za starije osobe u Republici Hrvatskoj', *Medicus*, Vol. 14, No. 2, 2005, p. 314.

i.e. 50% of all persons over 85 has some sort of disability.⁴⁷ Regarding the Republic of Croatia, the share of persons with difficulties in performing everyday activities also increases with chronological age. Therefore, the share of persons with difficulties in performing everyday activities in the younger age group comprises 38,44%, middle age group 53,85% and old age group 67,93%.⁴⁸ When it comes to physical mobility among older persons who reported having difficulties in performing everyday activities, the situation is the following: there are 1,74% permanently disabled persons in the younger age group, 4,11% in the middle one and 10,74% in the old one.⁴⁹ The situation is the opposite when it comes to completely mobile persons among those who report having difficulties performing everyday activities. In the younger age group there are 58,75% completely mobile persons, in the middle one 39,71% and in the old one 22,77%.⁵⁰

Regarding the cause of disability, it is important to point out that disability in older age group appears mostly as a consequence of chronic diseases connected to the disability (diabetes, cardiovascular diseases and mental disorders).⁵¹ Even the sudden appearance of heavier impairments in older age caused by stroke or falls is connected to the person's health condition.⁵² According to the data from the primary health care the most common groups of the determined diseases and conditions among older persons are: diseases of circulatory system (with the share of 20,8%), diseases of musculo-articular system and connective tissue (12,4%), diseases of respiratory system (7,9%) and hormonal dysfunctions, nutritional diseases and metabolic diseases (7,7%).⁵³ The most common causes of disability in older age in the Republic of Croatia are lesions of the locomotor system (cca. 30% of all causes of disability), lesions of other organs and organ systems, lesions of the central nervous system and mental disorders.⁵⁴

⁴⁷ N. L. Chappel and A. H. Cook, 'Age Related Disabilities – Ageing and Quality of Life' in J. H. Stone and M. Blouin (eds.): *International Encyclopedia of Rehabilitation*, <http://cirrie.buffalo.edu/encyclopedia/en/article/189/> (accessed 27 October 2015)

⁴⁸ *Strategija socijalne skrbi za starije osobe u Republici Hrvatskoj za razdoblje od 2014. – 2016.*, Zagreb, Ministarstvo socijalne politike i mladih, 2014, p. 9.

⁴⁹ *Strategija socijalne skrbi za starije osobe u Republici Hrvatskoj za razdoblje od 2014. – 2016.*, p.9.

⁵⁰ *Ibid.*

⁵¹ J.A Kelley-Moore, *et al.*: 'When Do Older Adults Become „Disabled“; Social and Health Antecedents of Perceived Disability in a Panel Study of the Oldest Old', *Journal of Health and Social Behavior*, Vol. 47, 2006, p. 129.

⁵² *Ibid.*

⁵³ T. Poljičanin and T. Benjak, *Hrvatski zdravstveno-statistički ljetopis za 2014. godinu*, Zagreb, Hrvatski institut za javno zdravstvo, 2015, p. 309.

⁵⁴ Z. Leutar *et al.*, 'Socijalna uključenost u zajednicu starijih osoba s invaliditetom', *Hrvatska revija za rehabilitacijska istraživanja*, Vol. 50, No. 2, 2014, p. 119.

III. RIGHTS OF OLDER PERSONS WITH DISABILITIES

3.1 The protection of rights of older persons with disabilities on the international and regional level

The Convention on the Rights of Persons with Disabilities from 2006 is one of few international documents⁵⁵, which refer specifically to older persons, i.e. age. Thus by the provision of Art. 25(b) of the cited Convention, States Parties are obliged to, among other things, provide health services intended to minimize and prevent further disabilities, including disabilities in children and older persons. Older persons are also explicitly mentioned in the Art. 28(2b) of the Convention on the Rights of Persons with Disabilities, pursuant to which States Parties are obliged to ensure people with disabilities, and especially women, girls and older persons with disabilities, access to social protection and poverty reduction programs. Age is explicitly stated in the Art. 13(1) of the Convention on the Rights of Persons with Disabilities which calls for introduction of procedural and age-appropriate accommodations for access to justice, and Art. 16 which calls for introduction of measures of protection and support for victims of exploitation, violence and abuse, adjusted to victim's age. Age is also referred to in the item (p) of the preamble of the cited Convention as one of the grounds of discrimination faced by persons with disabilities, and in Art. 8(1b) of the Convention within the context of raising awareness and fighting against stereotypes.

The Convention on the Rights of Persons with Disabilities is the first international document on the protection of human rights which European Union, as a regional organization, is participant to. Therefore in 2014, the European Union submitted a first report to the Committee on the Rights of Persons with Disabilities on the measures taken for meeting the obligations given by the Convention. In that report it is stressed that over 50% of persons over 65 years of age in the European Union are persons with disabilities.⁵⁶ The *European Disability Strategy 2010-2020* from 2010 has a goal to empower persons with disabilities in order for them to be able to enjoy their rights, participate in society and economy of the European Union.⁵⁷ The Strategy is based on the elimination of barriers to the inclusion of persons with disabilities in society, and the European Commission has identified eight main areas where action is required: Accessibility, Participation, Equality, Employment, Education and training, Social protection, Health, and External Action. In addition to these documents, it should be noted that by the Charter of Fundamental Rights of the European

⁵⁵ For example, age is explicitly mentioned in Art. 7 of the *International Convention on the Protection of All Migrant Worker and Members of Their Families*. According to that article, discrimination based on age is prohibited in the exercise of the rights guaranteed by that Convention. *International Convention on the Protection of All Migrant Worker and Members of Their Families*, United Nations, *Treaty Series*, sv. 2220, p. 3.; Doc.A/RES/45/158.

⁵⁶ *Initial Report of States parties due in 2012 – European Union, CRPD/C/EU/1*, para 17.

⁵⁷ *European Disability Strategy 2010 – 2020*, para 2.

Union (2000)⁵⁸ the European Union „recognizes and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life“ (Art. 25 of the Charter). By the Art. 26 of the Charter, the European Union also recognizes and respects the rights of persons with disabilities to measures designed to ensure their independence, social and professional inclusion, and their participation in community life. In the Art. 10 of the Treaty on the Functioning of the European Union⁵⁹ it is stated that during determination and implementation of its policies and activities, the European Union is focused on fighting discrimination on the basis of age and disability, among other things.

As for the protection of rights of older persons with disabilities, on the level of the Council of Europe, the most significant documents are the European Social Charter (1963)⁶⁰ and the Convention for the Protection of Human Rights and Fundamental Freedoms (1950)⁶¹. Thus, the Convention for the Protection of Human Rights and Fundamental Freedoms guarantees by its protocols civil and political rights to all persons, including the older persons with disabilities. Protocol 12 of the Convention is especially important for the protection of the rights of older persons with disabilities, since it contains a provision on the general prohibition of discrimination in the enjoyment of all rights stated by the law. The European Social Charter stipulates by the Art. 15 that every person with disability has a right to professional education, as well as social and professional rehabilitation, regardless of the origin and nature of their disability, while simultaneously committing States Parties to take appropriate measures in order to accomplish these rights. Art. 4 of the Additional Protocol to the European Social Charter (1988)⁶², whose text became Art. 23 of the Revised European Social Charter (1996)⁶³ governs the rights of older persons with disabilities to social protection. A key document on the protection of rights of persons with disabilities, which directed activities of the European states in the field of the protection of rights of persons with disabilities for nearly ten years is the Action Plan of the Council of Europe to promote the rights and full participation in society for people

⁵⁸ *Charter of Fundamental Rights of the European Union*, (Official Journal of the European Communities, C 364/14, 2000).

⁵⁹ *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union*, (Official Journal of the European Union, C 83/01, 2010).

⁶⁰ *Zakonu o prihvaćanju Europske socijalne povelje, Dodatnog protokola Europskoj socijalnoj povelji, Protokola o izmjenama Europske socijalne povelje i Dodatnog protokola Europskoj socijalnoj povelji kojim se uspostavlja sustav kolektivnih žalbi* (Official Gazette – International Agreements 15/02 and 8/03).

⁶¹ *Konvencija za zaštitu ljudskih prava i temeljnih sloboda*, (Official Gazette – International Agreements 18/97, 6/99, 14/02, 13/03, 9/05, 1/06, 2/10).

⁶² Full text of the *Additional Protocol to the European Social Charter* see in: *Zakon o prihvaćanju Europske socijalne povelje, Dodatnog protokola Europskoj socijalnoj povelji, Protokola o izmjenama Europske socijalne povelje i Dodatnog protokola Europskoj socijalnoj povelji kojim se uspostavlja sustav kolektivnih žalbi* (see note 60)

⁶³ *European Social Charter (revised)*, official websites of the Council of Europe, <http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm> (accessed 18 September 2015)

with disabilities: Improving the quality of life of people with disabilities in Europe 2006-2015 (2006)⁶⁴ (hereinafter referred to as: Action Plan of the Council of Europe). It emphasizes how ageing of persons with disabilities, especially the ones in the need of intensive care due to the nature of their disability, represents a new challenge to societies across Europe.⁶⁵ What is also emphasized in the Action Plan is that concerted action with the aim of enabling older persons with disabilities to remain in community as long as possible, which requires assessment of individual needs, planning ahead as well as the availability of necessary services.⁶⁶ While designing policies for older persons it is necessary to take into consideration the issue of disability, and in planning actions based on the guidelines it is necessary to consider all issues and factors which affect participation of older persons with disabilities in everyday life and activities.⁶⁷

Within the context of the protection of older persons with disabilities, it is essential to stress the importance of the Recommendation CM/REC(2014)2 of the Committee of Ministers to Member States on the promotion of the human rights of older persons (2014)⁶⁸ as only comprehensive (although legally non-binding) document on the rights of older persons on the European level. This document represents concretization of goals outlined in the European Social Charter and contains 54 principles for the protection of older persons, divided into seven categories: sphere of activity and general principles, non-discrimination, independence and participation, protection against violence and abuse, social protection and employment, welfare and administration of justice. The Recommendation outlines an implementation of a series of measures to ensure dignity of older persons, protection against violence and participation of older persons in all aspects of life, health improvement and well-being of older persons, as well as providing home help and care services for older persons, but also in the institutions, and palliative care for the older persons. From the aspect of the protection of the rights of older persons with disabilities, the importance of the Recommendation lies in the fact that it contains a number of principles created by taking into consideration all the particulars of old age, including the increased risk of disability.

⁶⁴ *Recommendation Rec(2006)5 of the Committee of Ministers to member states on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015*, official websites of the Council of Europe, http://www.coe.int/t/e/social_cohesion/soc-sp/Rec_2006_5%20Disability%20Action%20Plan.pdf (accessed 5 October 2015)

⁶⁵ *Ibidem*, item 4.5.

⁶⁶ *Ibidem*.

⁶⁷ *Ibidem*.

⁶⁸ *Recommendation CM/Rec(2014)2 of the Committee of Ministers to member States on the promotion of the human rights of older person*, official websites of the Council of Europe, http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/cddh-age/Document_CDDH_AGE/CMRec%282014%292_en.pdf (accessed 5 October 2015)

3.2 The protection of the rights of older persons with disabilities in the Republic of Croatia

The Croatian Constitution⁶⁹ (hereinafter referred to as: the Constitution) is the basis for the regulation of relations in all areas concerning human rights, and discrimination elimination. Art. 3 of the Constitution proclaims the principle of equality as one of the highest values of the constitutional order and the foundation for interpreting the Constitution, while Art. 14 guarantees rights and freedoms regardless of any form of discrimination. Pursuant to the provisions of Art. 58(2) of the Constitution, the state provides special care for the protection of persons with disabilities and their inclusion in social life. The state ensures the right to assistance to those who are unable to meet their basic needs, for all the weak, helpless and the other neglected persons, either because of the unemployment or incapacity for work (Art. 58(1) of the Constitution).

Provisions of numerous laws are imperative for the protection of the rights of older persons with disabilities in the Republic of Croatia: The Anti-Discrimination Act (2008)⁷⁰, the Social Welfare Act (2013), the Foster Care Act (2011)⁷¹, the Act on the Protection of Persons with Mental Disorders (2014)⁷², the Law on Unique Body of Expertise (2014)⁷³, the Pension Insurance Act (2013)⁷⁴, the Family Law Act (2015)⁷⁵, Free Legal Aid Act (2013)⁷⁶, the Domestic Violence Protection Act (2009)⁷⁷, the Croatian Criminal Code (2011)⁷⁸, the Compulsory Health Insurance Act (2013)⁷⁹ and others. Because of the Act on Croatian Register of Persons with Disabilities (2001)⁸⁰, which determines the way of collecting, pro-

⁶⁹ *Ustav Republike Hrvatske, eng. Constitution of Republic of Croatia*, (Official Gazette - International Agreements 56/90, 135/97, 8/98., 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10 – consolidated text and 5/14).

⁷⁰ *Zakon o suzbijanju diskriminacije, eng. Anti-Discrimination Act*, (Official Gazette 85/08 and 112/12).

⁷¹ *Zakon o udomiteljstvu, eng. Foster Care Act*, (Official Gazette 90/11 and 78/12).

⁷² *Zakon o zaštiti osoba s duševnim smetnjama, eng. The Law on the Protection of Persons with Mental Disorders*, (Official Gazette 76/14).

⁷³ *Zakon o jedinstvenom tijelu vještačenja, eng. Law on single expertise body*, (Official Gazette 85/14).

⁷⁴ *Zakon o mirovinskom osiguranju, eng. Pension Insurance Act*, (Official Gazette 157/13, 151/14, 33/15 and 93/15).

⁷⁵ *Obiteljski zakon, eng. Family Law*, (Official Gazette 103/15).

⁷⁶ *Zakon o besplatnoj pravnoj pomoći, eng. Free Legal Aid Act*, (Official Gazette 143/13).

⁷⁷ *Zakon o zaštiti od nasilja u obitelji, eng. Law on Protection Against Domestic Violence*, (Official Gazette 137/09, 14/10 and 60/10).

⁷⁸ *Kazneni zakon Republike Hrvatske, eng. Croatian Criminal code*, (Official Gazette 125/11).

⁷⁹ *Zakon o obveznom zdravstvenom osiguranju, eng. Compulsory Health Insurance Act*, (Official Gazette 80/13 and 137/13).

⁸⁰ *Zakon o Hrvatskom registru o osobama s invaliditetom, eng. The Law on Croatian Register of Persons with Disabilities*, (Official Gazette 64/01).

cessing and protecting data privacy of persons with disabilities, and whose management was entrusted to the Croatian Institute for Public Health, statistical data on persons with disabilities is systematically collected in our state. In order to ensure better coverage and continuous improvement of quality of epidemiological data with the aim of facilitating access to relevant data and based policy and decision-making regarding this vulnerable section of population, a new Act on Croatian Register of Persons with Disabilities is in the process of being legislated.⁸¹

The policies regarding the protection of the rights of older persons with disabilities are based on the National Strategy for Equal Opportunities for Persons With Disabilities from 2007 – 2015⁸² (hereinafter referred to as: National Strategy for Equal Opportunities) and the *Strategy of Social Welfare for the Elderly in the Republic of Croatia for the period of 2014 – 2016*, from 2014 (hereinafter referred to as: Strategy of Social Welfare for the Elderly). With the National Strategy for Equal Opportunities for Persons with Disabilities, which is based on a Convention on the Rights of Persons with Disabilities of the United Nations and the Council of Europe Action Plan, new solutions are sought to ensure a comprehensive approach in all areas of interest for persons with disabilities, such as: family, life in the community, education, health care, social welfare and pension insurance, housing, mobility and accessibility, professional rehabilitation, employment and work, legal protection and protection from violence and abuse, informing, communication and awareness raising, participation in cultural life, participation in political and public life, research and development, recreation, entertainment and sport, associations of persons with disabilities in civil society, and international cooperation (Paragraph 1.3. of the National Strategy for Equal Opportunities). The aim of this Strategy is to make the Croatian society as sensible and adaptable as possible for the necessary changes in favor of equalization of opportunities for persons with disabilities, that is, to create conditions for their active involvement and equal participation in society, respect for the inherent dignity and special interests, to avoid any discrimination, and also strengthen all forms of social solidarity (Paragraph 1.3. of the National Strategy for Equal Opportunities). The goals of Strategy of Social Welfare for the Elderly are related to the improvement of the normative framework and the system of providing assistance and services, provision of timely information on the rights and services from the system of social welfare for the older persons, and the development of different forms of social services which contribute to the inclusion of older people in community life.⁸³

⁸¹ *Nacrt Zakona o Hrvatskom registru osoba s invaliditetom*, eng. *Draft Law on the Croatian Register of Persons with Disabilities*, http://www.zdravlje.hr/zakonodavstvo/savjetovanje_sa_zainteresiranom_javnoscucuarhiva/zakon_o_hrvatskom_registru_osoba_s_invaliditetom2, (accessed 17 September 2015).

⁸² *Nacionalna strategija izjednačavanja mogućnosti za osobe s invaliditetom od 2007. do 2015. godine iz 2007. godine*, eng. *The National Strategy for Equalization of Opportunities for Persons with Disabilities from 2007 to 2015*, (Official Gazette 63/07).

⁸³ *Strategija socijalne skrbi za starije osobe*, p. 4.

IV. STATUS OF OLDER PERSONS WITH DISABILITIES IN THE REPUBLIC OF CROATIA

When observed as separate groups, older persons and persons with disabilities share some common characteristics. Specifically, older persons, just like persons with disabilities, are unfortunately viewed as a burden to society as well as social issue, which, combined with heterogeneity of these groups, specific needs and vulnerability of older population and population of persons with disabilities, leads to those groups being exposed to numerous violations of human rights. However, there's an issue with the situation of those persons belonging to both groups. Does the status of older persons with disabilities differ from the status of other age groups of persons with disabilities? Does the status of older persons with disabilities differ from the status of older persons without disabilities? Identifying specific problems of older persons with disabilities is important for creating adequate policy responses, with the aim of improving the situation of this vulnerable social group. It's those special measures of social policy that can influence persons with disabilities in a different, specific way.⁸⁴ In order to ensure the equality of all persons, it is necessary to have a systematic response of the society to the needs of those who seek equality.⁸⁵ In the previous chapter we gave a brief outline of the legal framework for the protection of older persons with disabilities. Further on in the text we will review the status of these persons in the Republic of Croatia from the aspect of their inclusion in society, the availability of social services and rights, and incidence of violence against these persons.

4.1 Poverty and social exclusion of older persons with disabilities

In literature it is widely regarded that there is a negative correlation between the disability level, high chronological age and level of life quality of older persons with disabilities.⁸⁶ Higher level of disability and higher chronological age result in a perception of less control over one's activities.⁸⁷ According to the data of a study done in 2010 in the Republic of Croatia on a sample of 114 older persons with disabilities, one third of older persons with disabilities are unsatisfied and highly unsatisfied with their life quality, and only 4,46% are extremely satisfied.⁸⁸

⁸⁴ Z. Leutar et al., 'Socijalna politika i kvaliteta života starijih osoba s tjelesnim invaliditetom', *Revija za socijalnu politiku*, Vol. 14, No. 3-4, 2007, p. 343.

⁸⁵ N. Hansen and L. Turnbull, 'Disability and Care: Still Not „Getting It“', *Canadian Journal of Women and the Law*, Vol. 25, No. 111, 2013, p. 112.

⁸⁶ A. Štambuk et al., 'Neke dimenzije kvalitete života starijih osoba s invaliditetom', *Hrvatska revija za rehabilitacijska istraživanja*, Vol. 48, No. 1, 2012, p. 85.

⁸⁷ *Ibidem*.

⁸⁸ *Ibidem*, p. 93.

The economic situation, but also the subjective assessment of material conditions, greatly affects the evaluation of life quality of older persons with disabilities.⁸⁹ According to the same survey, 44,9% of older persons with disabilities rated their financial situation as poor and very poor, 44,7% respondents rated their financial situation as mediocre, and only 7,4% respondents rated their situation as very good or excellent.⁹⁰ However, persons with lower disability levels and higher life satisfaction evaluate their material conditions as more optimal.⁹¹ In 47,6% cases, pension is the main income source for the older persons with disabilities.⁹² Personal disability compensation is received by 19% of older persons with disabilities, and 9,5% respondents receive social welfare.⁹³ Other sources of income include right to assistance and care allowance (20,2% older persons with disabilities).⁹⁴ Great differences in payment amounts are also mentioned, depending on the basis of the rights respondents got them from.⁹⁵

Older age by itself is one of the predictors of poverty. According to the statistics of the Ministry of Social Policy and Youth, 1781 person aged 65 and over has received personal disability compensation in 2012, accounting for 0,08% of all the recipients of personal disability compensation.⁹⁶ In the same period, 41805 persons aged 65 and over received right to assistance and care allowance, accounting for 53,39% of all the recipients of assistance and care allowance.⁹⁷ At-risk-of-poverty rate for persons over 65 was 23,4% in 2013, while at-risk-of-poverty rate for the entire population was 19,5%.⁹⁸ Persons with disabilities are also at high risk of poverty. According to the study conducted in 2006, 55,8% persons with disabilities in the Republic of Croatia are of poor financial means, and a staggering 85% of persons with severe disabilities stated that they are barely able to make ends meet.⁹⁹ There is no systematically collected data on poverty of older persons with disabilities, but since data shows that older persons and older persons with disabilities are at increased risk of poverty, one can assume that the poverty risk multiplies if a person is both older and with disabilities.

⁸⁹ *Ibidem*, p. 92.

⁹⁰ *Ibidem*, p. 87.

⁹¹ *Ibidem*, p. 87.

⁹² Leutar et al., p. 333.

⁹³ *Ibidem*.

⁹⁴ *Ibidem*.

⁹⁵ *Ibidem*.

⁹⁶ *Strategija socijalne skrbi za starije osobe*, p. 11.

⁹⁷ *Ibidem*, p. 12.

⁹⁸ *Pokazatelji siromaštva u 2013. godini – konačni rezultati*, Hrvatski zavod za statistiku, Zagreb, 2014.

⁹⁹ Z. Leutar, 'Osobe s invaliditetom i siromaštvo', *Revija za socijalnu politiku*, Vol. 13, No. 3-4, Zagreb, 2006, p. 301.

There is a similar correlation between the social exclusion, age and disability. A high percentage of older persons with disabilities in the Republic of Croatia (52,3%) do not consider themselves active community members, 24,3% consider themselves partially active, and only 8,4% fully active.¹⁰⁰ The same study showed that older persons with disabilities almost never go to theater, forums or lectures in their place of living, and 24,3% do not know whether there are associations for people with disabilities in their local communities.¹⁰¹ When it comes to formal and informal sources of support, older persons with disabilities receive the biggest support from their spouses and children, extended family, friends and neighbors, while support received from health workers, experts in social welfare centers and church is also similar.¹⁰² The support received from associations and message boards is viewed as insignificant by older persons.¹⁰³

4.2 Use of social services and rights in social welfare system of the Republic of Croatia

The data on self-care points to the need of establishment and implementation of social services aimed at older persons with disabilities, on a family and local community level.¹⁰⁴ To be specific, older persons with disabilities regard their options in using public transport, buying groceries and getting around the area as very poor.¹⁰⁵ Social services should be available and take into account real needs of their users. Older persons with disabilities exercise their social system welfare rights less than younger persons with disabilities because they are less informed.¹⁰⁶ In a study conducted in 2007 on the life quality of older persons with disabilities, not knowing whom to turn to for help was the main reason for not receiving social benefits, according to the respondents (42,6%).¹⁰⁷ As we stated in the previous chapter, out of all the available rights and social benefits, older persons with disabilities mostly use personal disability compensation and assistance and care allowance. According to the statistics of the Ministry of Social Policy and Youth, on December 31, 2012, 15686 persons aged 65 and over were placed in homes and other legal entities for the elderly and disabled, of which 4165 persons aged 65 and over, under the decision of

¹⁰⁰ Z.Leutar et al, 'Socijalna uključenost u zajednicu starijih osoba s invaliditetom', p. 127.

¹⁰¹ *Ibidem*, p. 130.

¹⁰² Štambuk, p. 89.

¹⁰³ *Ibidem*.

¹⁰⁴ *Ibidem*, p. 92.

¹⁰⁵ *Ibidem*, p. 88.

¹⁰⁶ Leutar, 'Socijalna politika i kvaliteta života starijih osoba s tjelesnim invaliditetom', p. 343.

¹⁰⁷ *Ibidem*, p. 338.

the Social Welfare Center.¹⁰⁸ In the statistics of the Ministry of Social Policy and Youth, there is no age group data for the users of assistance and care services, but only the total number of users under the decision of Social Welfare Center which amounts to 1195, from which the majority are older persons.¹⁰⁹ Services from programs “Home help for seniors” and “Day care and home assistance for seniors” cover (according to the 2012 data) 15550 persons, that is, 2,1 % of the total number of older persons.¹¹⁰

Older persons with disabilities are more in need of various social services. According to certain estimates, about 20% of older persons in developed countries are in need of home assistance and care services.¹¹¹ However, the network of social services for older persons in the Republic of Croatia is not adapted to the real needs of older persons with disabilities. It is characterized by the uneven distribution of social service providers throughout the Republic of Croatia, the lack of beds in institutions for persons who wish to reside there, which results in long waiting lists; the lack of support and help for older persons and their family members in the local communities; the lack of transparent criteria for the approval of the use of social services and insufficient awareness of rights and services for older persons with disabilities.¹¹²

4.3 Violence against older persons with disabilities

Generally, the victims of violence usually belong to vulnerable social groups, such as: women, children, older persons, persons with disabilities etc. However, there is a question of whether older persons with disabilities are more exposed to the risk of violence than older persons without disabilities. Although there is no systematically collected data on violence against older persons as well as violence against older persons with disabilities, studies have shown that older persons with disabilities, older persons of poor health and older persons, who generally depend on other people’s help are more exposed to violence than older, healthy persons.¹¹³ As an example, one can use the fact that the rate of exposure to violence against the older persons with dementia is higher than that of older persons without cognitive difficulties. To be more specific, the probability that a person will become a murder victim by a family member is three times higher if they suffer from

¹⁰⁸ *Strategija socijalne skrbi za starije osobe*, p. 13.

¹⁰⁹ *Ibidem*, p. 14.

¹¹⁰ *Ibidem*, p. 15.

¹¹¹ J.W. Rowe and L.P. Fried, ‘Meeting the Health Care Needs of Ageing Societies’, *Brown Journal of World Affairs*, Vol. 20, Issue 1, 2013, p. 65.

¹¹² *Izvjješće pučke pravobraniteljice za 2014. godinu*, Ured Pučkog pravobranitelja, 2015, p. 69– 71.

¹¹³ *European report on preventing elder maltreatment*, World Health Organization, Regional Office for Europe, Copenhagen, 2011, p. 31.

Alzheimer's disease or some other form of dementia.¹¹⁴ As stated by Milić Babić, the increased risk of violence against persons with disabilities is enabled by society through discrimination and stereotypes about these people.¹¹⁵ One could find a similar correlation in cases of violence against older persons.

In the Republic of Croatia only several studies have been conducted about the occurrence of violence against older persons and persons with disabilities. However, there is no data on the prevalence of violence against older persons with disabilities. The results of a study conducted in 2007 in Zagreb, on a sample of 1000 respondents aged over 65, show that the most common form of violence against older persons in their families is psychological abuse.¹¹⁶ About 11,4% of respondents have experienced such violence.¹¹⁷ About 1% of respondents have endured physical abuse, 1,8% material abuse, and 0,1% sexual abuse.¹¹⁸ The first study on violence against persons with disabilities in the Republic of Croatia was conducted on a modest sample of 59 persons with intellectual difficulties.¹¹⁹ In that study, 50,8% of those surveyed confirmed they had been hurt by the other party, while 49,2% stated they had never been hurt.¹²⁰ Among those who have endured abuse, 40,7% experienced verbal abuse, while 33,9% experienced physical abuse.¹²¹ In order to provide efficient protection against violence for older persons with disabilities, it is necessary to not just educate and sensitize society about this issue, but also form a database on victims of violence, their personal and socio-economic characteristics, forms of violence and perpetrators of violence.

V. CONCLUSION

Demographic ageing presents a tremendous challenge for public health system on a global level and is one of the factors which greatly affects the worldwide increase in the number of persons with disabilities. In this context, the issue of adequate measures for the protection of human rights of older population with disabilities becomes incredibly im-

¹¹⁴ *European report on preventing elder maltreatment*, p.31..

¹¹⁵ M. Milić Babić, 'Nasilje i osobe s invaliditetom', *Ljetopis socijalnog rada*, Vol. 16, No. 3, 2009, p. 603.

¹¹⁶ S. Rusac, 'Nasilje nad starijim osobama na području Grada Zagreba', *Ljetopis socijalnog rada*, Vol. 16., No. 3, 2009, p. 580.

¹¹⁷ *Ibidem*.

¹¹⁸ *Ibidem*.

¹¹⁹ A.M. Josipović et al., 'Nasilje nad osobama s intelektualnim teškoćama', *Nova prisutnost*, Vol. VI, No. 3, 2008, p. 364.

¹²⁰ *Ibidem*.

¹²¹ *Ibidem*, pp. 365-366.

portant. Specific issues of older persons with disabilities in relation to the general population, including older persons as well as persons with disabilities require the introduction of policies and measures adapted exactly to these very issues.

In the Republic of Croatia, the issue of protection of rights of older persons with disabilities is (at least formally) recognized, but not adequately answered. A number of legal texts and strategies contain provisions applicable to the protection of these persons. However, based on the analysis of the status of older persons with disabilities, there are several challenges and systematic issues in our state faced by this especially vulnerable population. One that needs to be highlighted is the uneven distribution of social service providers, which results in the lack of availability of those services in certain areas of the Republic of Croatia. Also notable are the insufficient capacities in institutions for those who wish to reside there, as well as non-transparent criteria for the accommodation approval. The lack of information on rights and services available to older persons with disabilities, and the underdevelopment of the support network for older people and members of their families in local community also present a big issue. All of the above, combined with widespread negative stereotypes about the older persons with disabilities, leads to poverty and social exclusion of this population.

The challenge of demographic ageing and related number increase of persons with disabilities should be approached systematically, by taking into consideration all the specificities of disability in old age. It is also necessary to ensure the availability of information on certain services, in a way that would be user-friendly for the older persons. But, facing the challenge of an increasing number of persons with disabilities due to demographic ageing presumes continuous preventive action and promotion of the concept of active ageing. When creating policies and measures designed for older population with disabilities, the starting point should be systematically collected data on this population, as well as attitudes and opinions of persons affected by those policies and measures.

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REASONABLE ACCOMMODATION - A PRECONDITION FOR EQUALITY OF PERSONS WITH DISABILITIES ON THE LABOUR MARKET

Abstract:

The UN Convention on the Rights of Persons with Disabilities (CRPD) makes reasonable accommodation central to realising equal opportunities for persons with disabilities in all areas of life, work and employment in particular. This principle has been incorporated into Croatian legislation via the EU Directive 2000/78 on equal treatment in employment and occupation.

While protecting, monitoring and promoting the rights of persons with disabilities the Disability Ombudsman's Office finds that there is a lack of application of the principle in practice in particular in combating discrimination on the grounds of disability through litigation.

To facilitate development of the practice in this area the article presents a case from the practice of the Court of Justice of the European Union (CJEU) (Cases C-335/11 and C-337/11 Ring and Skouboe Werge). In this judgment from 2013 the CJEU defines disability in line with the CRPD, explains the position of the CRPD in the EU legal system and interprets reasonable accommodation.

Key words: *reasonable accommodation, disability ombudsman, disability based discrimination at work, part time work, disproportionate burden*

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To begin with I must say that my educational background is not in law. However, I believe the insights I gained during seven years of working at the Disability Ombudsman’s office as the advisor for international cooperation through following the theory and practice of discrimination on the ground of disability in EU member states and elsewhere, as well as analysing policy and complaints handled by the Disability Ombudsman might be useful for those who can contribute to making anti-discrimination legislation an effective tool in combating widespread inequality and unfavourable treatment of persons with disabilities in practice.

I will start by briefly presenting the Disability Ombudsman’s Office and its three fold mandate. I will share some of my observations regarding the state of play on the implementation of anti-discrimination legislation in Croatia drawing on examples from the practice of the Office. Since the United Nations adopted its youngest human rights treaty in 2006, the Convention on the Rights of Persons with Disabilities (CRPD), nothing pertaining to persons with disabilities can be discussed without taking into consideration its provisions. Therefore I will try to explain why this international legal document makes reasonable accommodation central to realising equal opportunities for persons with disabilities in all areas of life, work and employment in particular and how it defines disability.

As one of my conclusions regarding the implementation of anti-discrimination legislation on the grounds of disability is the need for developing a body of court practice and strategic litigation, I will discuss a case from the practice of the Court of Justice of the European Union (CJEU) which defines disability in line with the CRPD, explains the position of the CRPD in the EU legal system and interprets reasonable accommodation to help toward developing the practice.

The Disability Ombudsman’s Office of the Republic of Croatia was established on 1 July 2008 as an independent state institution reporting to Parliament. In May that year the UN CRPD ratified by Croatia entered into force and establishing a specialised body for protection, promotion and monitoring of the rights of persons with disabilities was one of the measures in the National Plan for Equalisation of Opportunities for Persons with Disabilities from 2007-2015 in the area of strengthening their legal protection. The office has a broad mandate which involves the functions of an **ombudsman’s** office handling complaints in the area of maladministration, a **human rights institution** that promotes disability rights as human rights and monitors legislation and its implementation as well as an **equality body** mandated with implementing the Anti-discrimination Act in the area of disability.

The mandate of the Disability Ombudsman’s Office entails:

- dealing with complaints of persons with disabilities and children with developmental difficulties on all matters and in all areas towards both government agencies and private entities

- monitoring compliance of legislation with legally binding international documents in the field of protection of rights of persons with disabilities primarily the UN CRPD. In that respect the Office to the best of its abilities fulfils the role of an independent body for the protection, promotion and monitoring of the CRPD according to the Article 33 (2) of the CRPD
- proposing amendments to legislation pertaining to the rights of persons with disabilities

The number of complaints to the disability ombudsman alleging discrimination has been steadily increasing from 25 in 2011 to 97 in 2015. There are very few cases appearing in court involving discrimination on the grounds of disability in Croatia and the general level of awareness of discrimination, in particular in the form of denial of reasonable accommodation, is very low. Monitoring of the court practice is made further difficult if not impossible due to the very poor practice of courts to make their judgments available.

The Disability Ombudswoman employs so called soft law measures in fighting discrimination: issuing recommendations and warnings and requesting reports on the measures undertaken to remove discriminatory practices. This can provide efficient and timely relief through a kind of informal mediation which the Office frequently carries out in particular in the area of access to education. Since some of the reasons why persons with disabilities despite being faced with widespread discrimination in all areas of life do not resort to the courts are the cost and duration of court proceedings this is for them often a preferable way of seeking redress. The Disability Ombudsman cannot represent complainants in a court of law but can intervene in the proceedings on behalf of the complainant. The Office could also initiate class actions but its budget does not contain allocations for potential court cases.

The Anti-discrimination Act in Croatia entered into force on 1 January 2009. It prohibited discrimination on 18 grounds including disability. It specifically listed denial of reasonable accommodation to persons with disabilities as a form of discrimination. Denial of reasonable accommodation is deemed to be failure to enable persons with disabilities to use publicly available resources, take part in public and social life, access work place and adequate working conditions through adjustments of infrastructure and space, use of equipment and in other ways which are not a disproportionate burden for anyone who is obliged to provide these conditions.¹

The Anti-discrimination act in its provisions prohibits discrimination in almost all areas of life: work and working conditions, employment, access to vocational training and further education, education at all levels, science, sports, social security (including areas of social care, pension and health insurance and insurance in cases of unemployment), health care, justice and administration, housing, public information and media, access to

¹ Zakon o suzbijanju diskriminacije, *eng.* Anti-discrimination Act, (Official Gazette 85/08, 112/12), art. 8

and provision of goods and services, membership and conducting affairs in trade unions, non-governmental organizations, political parties or other organizations, taking part in cultural and artistic activities.²

At the moment there are four ombudsman offices in Croatia: People's, Children's Ombudsman, Gender Equality Ombudsman and Disability Ombudsman.

In December 2014 a number of stakeholders gathered to mark the 15th anniversary of the entering into force of the Anti-discrimination Act in Croatia. The summary of the discussion could be that the grieved parties on all grounds rarely resort to the Anti-discrimination Act as a tool to address their grievances, lawyers seem to be uncertain in the implementation of the provisions which have a number of features alien to the continental law system and one of the present judges admitted to discrimination cases being a hot potato for judges. The general feeling expressed by the members of the academia, civil society, judiciary and lawyers was that of disappointment and frustration that the Act had not really come to life and, as is customary, there was a lot of blame passing. But the fact is that the prohibition of discrimination in employment entered into legislation in the United States back in 1965. The concept of reasonable accommodation was first introduced in the Americans with Disabilities Act, a federal civil rights law that was passed in 1990 and went into effect beginning in 1992. It required employers to provide reasonable accommodation for employees with disabilities. Compared to such a long history of combating discrimination in general and discrimination on the ground of disability in particular it is hardly surprising that we are still experiencing teething difficulties.

That standard was adopted by the European Union through the Council Directive 2000/78/EC on Equal treatment in employment and occupation. During the pre-accession negotiations the Directive was transposed into Croatian legislation by adoption of the Anti-discrimination act (OG, 85/08, 112/12).

In 2008 Croatia ratified the UN Convention on the rights of persons with disabilities (UN CRPD). The UN CRPD is the first international treaty signed by a union of states and also the first international treaty that the EU has become a party to in 2009.

Who are persons with disabilities and why is the concept of reasonable accommodation important for exercising their right to work?

Under Article 1 of the UN Convention *persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.*³ (underlined by the author).

² Zakon o suzbijanju diskriminacije, *eng.* Anti-discrimination Act, (Official Gazette, 85/08, 112/12), art. 4 (2)

³ *UN Convention on the Rights of Persons with Disabilities*, Art. 1, <http://www.un.org/disabilities/convention/conventionfull.shtml>, (accessed 18 April 2016).

Impairment including	physical	Interaction with BARRIERS	= DISABILITY (hindrance to participation)
	sensory		
	intellectual		
	mental (psychosocial)		

What is important to note about this non-definition of disability is that it does not provide an exhaustive list of impairments that might lead to disability. Also, it does not equate impairment with disability. The definition of disability when fighting discrimination will in particular be wider than it is defined in for instance social policy or in other areas through which various entitlements are provided. This is due to the fact that the purpose of anti-discrimination provisions is to promote inclusion and therefore everyone who encounters problems in participating in the labour market due to impairment or a health condition is considered to be a person with disability although they do not have to be considered a person with disability by other systems or in the general sense of that word as we are used to it. All these considerations will prove relevant in the joint cases C-335/11 and C-337/11 Ring and Skouboe Werge before the Court of Justice of the European Union which we will look into later.

The second important feature of this non-definition makes a clear shift from the so called medical model of disability in which disability was equated with a person's impairment and this impairment was seen as a natural limitation of a person's rights. The UN CRPD defines disability as an interaction between an impairment and barriers in the society. In that way it is the society that turns an impairment a person has into an inability to participate in different areas of life. This at the same time means that the society can and has an obligation to remove obstacles to participation. In a very simple illustration of that concept, stairs at the entrance into a building will hinder participation of a wheelchair user in any activities taking place in that building. If stairs are replaced by a universally designed entrance or supplemented with a ramp, the mobility impairment will not hinder participation of a wheelchair user. The focus of any disability assessment should thus be moved from limitations that impairments pose and instead look at the remaining capabilities and potentials of the person while proposing support interventions that would mitigate those limitations.

Barriers to participation of persons with disabilities can be prevented by designing products and services in line with the principles of universal design which takes into account the needs of as broad as possible a spectrum of potential users and not just an average user. In case of the existing buildings or services barriers are removed by means of reasonable accommodation.

Under the fourth indent of Article 2 of the Convention, "*Reasonable accommodation*" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with

*disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.*⁴

Recitals 16 and 17 in the preamble to the EU directive on Equal Opportunities in employment 2000/78 explain the importance of reasonable accommodation for persons with disabilities and its limits.

(16) The provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on grounds of disability.

*(17) This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.*⁵

In practice determining whether a certain work task or practice which needs to be adjusted falls under the scope of essential function of the post will be a most frequent consideration. A person without the use of his or her hands at a managerial position may need assistance in the way of a typist who would put their interventions in writing. The essential function for that post will not be that of typing unlike for the post of typist who should actually be able to type. This does not mean that blind or deaf persons cannot be typists if the way in which they carry out the activity of typing is adjusted by enabling them to use a voice operated personal computer or a sign language translator. Such an approach enables a much wider number of persons with disabilities who were previously excluded from the labour market to exercise their right to work. It does not stop at saying: *we have nothing against employing persons with disabilities. On the contrary, we are more than willing to employ them but they cannot work.* The new model does not allow that impairment be seen as a natural limitation of their right to work but requires an employers to look into ways in which some characteristics of their environment or work processes can actually exclude differently abled workers. It also poses an obligation on employers to modify such practices to the extent which will not cause them an undue burden.

To sum up, we could say that denial of reasonable accommodation will lead to less favourable treatment of persons with disabilities, which is discrimination. On the other hand, providing reasonable accommodation will in a way neutralise impairment and enable a person with disability to participate in the labour market in line with their remaining capacities. Nowadays direct discrimination of persons with disabilities in work, employment and all other areas is very infrequent. Employers do not say that they have turned

⁴ UN *Convention on the Rights of Persons with Disabilities*, Art. 1, <http://www.un.org/disabilities/convention/conventionfull.shtml>, (accessed 18 April 2016).

⁵ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303 , 02/12/2000 P. 0016 - 0022

down a prospective candidate due to their disability. However, they might be tempted to include seemingly neutral provisions that would place persons with disabilities in an unfavourable position. A more frequent scenario is finding persons with disabilities unfit to work because they cannot perform all the functions of the job in a manner expected from an average employee. In other words, it is not taken into consideration whether a person with a disability is capable of performing essential functions of a job and whether adjustments that would not cause undue burden could be made to the manner in which tasks are carried out. In that way persons with disabilities are discriminated against by denial of reasonable accommodation and their impairment is seen as a natural limitation of their right to work in line with the old model of disability.

Impairment – reasonable accommodation = treated less favourably (discrimination)

Impairment + reasonable accommodation = participation in line with remaining capacities

The situation with applying the principle of reasonable accommodation in employment in Croatia can be illustrated by a complaint handled by the Disability Ombudsman's Office. A person with visual impairment applied for the post of a courtroom note taker. Fearing that his application would be rejected if the prospective employer found out about his disability, the client tried his best to hide it. However the disability was too severe not to be noticed. A part of the recruitment process consisted in testing the typing ability. The client was told that a person with such a severe visual impairment cannot be a courtroom note taker and that there was no point in him taking the test.

The ombudswoman issued a warning that such treatment is discriminatory and that the employer is obliged to ensure reasonable accommodation for testing. The client was then invited to take part in the test which required that a text is copied into a computer. The text was prepared in the augmented form but the client could not see the keys on the keyboard or the computer and could not save the text. It turned out he was using a screen reader during his education.

The prospective employer in this example failed to consider the adequacy of the adjustment. From the initial attitude which represented direct discrimination it became clear that the actual equalising of opportunities during the testing can be ensured only if reasonable accommodation is provided by way of using aids which the person is accustomed to using and which he would use to carry out working tasks in case he was given the job. The employer demonstrated a willingness to create equal opportunities but also lack of awareness of what adequate adjustment would be.

We at the Disability Ombudsman's Office see the abstract and succinct language of the Anti-discrimination Act and failure to incorporate discrimination provisions in more detail for instance in the Labour Act, by at least making a mention of reasonable accommoda-

tion as yet another factor that contributes to its poor implementation. This was noticed by the UN Committee on the rights of persons with disabilities during reviewing of the initial report on the implementation of the CRPD in Croatia. In its concluding observations the Committee noted that *there seems to be a lack of understanding of the meaning of reasonable accommodation and universal design in areas such as education, health, employment, built environment*⁶. Accordingly, it recommended to the Croatian government that *the concepts of reasonable accommodation and universal design are regulated beyond the context of the anti-discrimination act in areas such as education, health, transportation and building*.⁷

By way of comparison, the Disability Discrimination Act was enacted in Great Britain back in 1995 to be replaced by the Equality Act in 2010. It suffices to say that the Act has 251 pages. Among other things, it prescribes in detail measures required for combating discrimination and clearly identifies duty bearers.

Based on such long legislative tradition in combating disability based discrimination, a good practice has been developed in which employers actively seek input from applicants on whether they need any form of reasonable accommodation and what that accommodation should entail. The application form contains a following statement: *Please inform us if you need any form of reasonable accommodation due to disability so that we could ensure that you attend the interview or what you would like us to take into account when considering your application. Reasonable accommodation pertains to, among other things, sign language translators, modifying the time of the interview or securing an accessible room. If you have additional questions regarding your needs arising from disability, contact the human resources manager. That will not be discriminatory*.⁸ That kind of practice is only to be developed in Croatia and the example of a person with visual impairment demonstrates the urgency for its establishment.

One of the most striking facts in this case was a lack of communication on the part of person with disability who not only failed to communicate the need for accommodation but even tried to conceal his disability from the employer for fear that mentioning it would immediately disqualify him. Unfortunately, this fear was confirmed by the employer's subsequent conduct. Persons with disabilities who submit a complaint to the Disability Ombudsman's office are informed about the possibility to take their cases to court if the measures that the ombudswoman has at her disposal failed to stop discrimination. However, clients choose not to invest their limited financial, physical and emotional resources in legal battles with uncertain and potentially long and costly outcome. In a coun-

⁶ Concluding observations on the initial report of Croatia, (5), Committee on the Rights of Persons with Disabilities, Thirteenth session, 25 March-17 April 2015

⁷ Concluding observations on the initial report of Croatia, (6)

⁸ L. Waddington, 'Primjer razumne prilagodbe i pozitivne akcije u Velikoj Britaniji, eng. An Example of reasonable accommodation and positive action in Great Britain' in *Priručnik za savjetnike na tržištu rada o metodama sveobuhvatnog promicanja zapošljavanja osoba s invaliditetom*, Zagreb, 2011, p. 316.

try which has no tradition of fighting discrimination people are not aware of their right to equal treatment especially when securing it seems like making (unreasonable) demands from the prospective employer. On the other hand, employers and other agents who have the obligation to provide reasonable accommodation are not aware of their obligation and see it as a matter of their goodwill or simply dismiss it. In that light any attempt at seeking reasonable accommodation is seen as seeking preferential treatment.

That is why litigation and court cases could be a particularly efficient awareness raising tool. Due to the lack of court practice in Croatia we find it very important to disseminate cases from the Court of Justice of the European Union which set precedents in dealing with disability discrimination.

CASES C-335/11 AND C-337/11 RING AND SKOUBOE WERGE

In the joint cases C335/11 and C337/11 Ring and Skouboe Werge v Dansk Arbejdsgiverforening from 2013 the national Danish court stayed the proceedings and asked the Court of Justice of the European Union to give interpretation of the EU law and to clarify the concept of disability.

In these two cases which were joined two women were dismissed following a period of sick leave. One woman suffered from constant lumbar pain which could not be treated and no prognosis could be made as regards the prospect of returning to full-time employment. The second woman sustained whiplash injuries as a consequence of a road traffic accident and was found unfit for work as an office assistant/management secretary. Similar to the first case, the doctor could not give an opinion on the duration of the unfitness for work. Under the Danish law if the employee had received salary during periods of illness for a total period of 120 days during any period of 12 consecutive months the employee will be dismissed immediately on the expiry of the 120 days of illness and while the employee is still ill.

The trade union HK, acting on behalf of the two applicants in the main proceedings, brought proceedings against their employers seeking compensation on the basis of the Anti-Discrimination Law. HK submitted that *both employees were suffering from a disability and that their employers were required to offer them reduced working hours, by virtue of the obligation to provide accommodation pursuant to Article 5 of Directive 2000/78*. HK also argued that *the Danish national law couldn't not be applied to those two employees, because their absences because of illness were the result of their disability*.⁹

The employers disputed that the applicants' state of health is covered by the concept of disability since the only incapacity that affected them was that they are not able to work

⁹ Joined Cases C-335/11 and 337/11 *Ring and Skuboe Werge* [2013] para. 23.

full-time. They also disputed that reduced working hours would constitute reasonable accommodation under the Directive.

Questions which were referred to the CJEU were as follows:

Is any person who, because of physical, mental or psychological impairments, cannot or can only to a limited extent carry out his work in a period that satisfies the requirement as to duration specified in Paragraph 45 of the judgment [in *Chacón Navas*] covered by the concept of disability within the meaning of [Directive 2000/78]?

This question in essence asked the court to (re)define disability. In 2006 the then European court of Justice made a judgement in a similar case of a woman who was certified as unfit for work on grounds of sickness and was not in a position to return to work in the short term. She was, according to the referring court, dismissed solely on account of the fact that she was absent from work because of sickness. (Case C13/05, *Chacon Navas v Eures Colectividades SA*).

In the judgment in this case which was adopted prior to the EU ascending to the UN CRPD the Court said: *Directive 2000/78 aims to combat certain types of discrimination as regards employment and occupation. In that context, the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.*¹⁰ In this definition disability resides solely in the individual and for an impairment to reach the level of disability it has to hinder the participation, in this case, in professional life. There is no mention of the barriers in the environment. Following this definition the ECJ in 2006 reached a decision that *a person who has been dismissed by his employer solely on account of sickness does not fall within the general framework laid down for combating discrimination on grounds of disability by Directive 2000/78.*¹¹

UN CRPD AND EU LAW

Since this definition of disability the European Union acceded to the UN Convention on the Rights of Persons with Disabilities. The Convention was ratified by the decision of 26 November 2009. When (re)defining the concept of disability in the joint cases **Ring and Skouboe Werge** the CJEU explicitly defined the position of the UN CRPD as an international legal instrument in the EU law by stating that by approving the UN Convention the provisions of the Convention became an integral part of the European Union legal order. This means that EU legislation (Directive 2000/78) must be interpreted in a

¹⁰ Case C-13/15 *Cachon Navas* [2006] para. 43.

¹¹ *Chacon Navas* (52)

manner that is consistent with the CRPD. Furthermore, *by virtue of Article 216(2) Treaty on the Functioning of the EU, where international agreements are concluded by the European Union they are binding on its institutions, prevail over acts of the EU.*¹²

That is why the CJEU in its judgement in the joint cases C335/11 and C337/11 Ring and Skouboe Werge v Dansk Arbejdsgiverforening from 2013 redefined disability to bring it in line with the UN CRPD and reached a different judgement to the one in a similar case from 2006. In Ring and Skouboe Werge case the court ruled that a long term inability to participate in professional life is disability irrespective of the cause of such inability (sickness or an accident). *It must therefore be concluded that if a curable or incurable illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one, such an illness can be covered by the concept of 'disability' within the meaning of Directive 2000/78.*

On the other hand, an illness not entailing such a limitation is not covered by the concept of 'discrimination' within the meaning of Directive 2000/78.¹³

*A disability does not necessarily imply complete exclusion from work or professional life.*¹⁴

The person does not have to be considered a person with disability in a general sense or have substantial limitation in other activities of daily living outside professional life. The fact that an impairment in interaction with the environment caused limited or hindered participation of these two women in professional life makes them persons with disabilities in the context of work. The fact that inability to participate might have been mitigated by an action of employers created an obligation for them to take such an action. In these two cases such an action would be enabling workers to work part time in line with their remaining capacity. Such measure was not considered nor offered to the workers. In response to the question of whether the absence of workers was due to the fact that the employer has not implemented the measures appropriate in the specific situation to enable a person with a disability to perform his work the court ruled that such an action constituted denial of reasonable accommodation and thus discrimination on the ground of disability. *The circumstance that an employer has failed to take those measures may have the consequence, having regard to the obligation under Article 5 of Directive 2000/78, that the absences of a worker with a disability are attributable to the employer's failure to act, not to the worker's disability.*¹⁵

¹² Ring and Skouboe Werge (28)

¹³ Ring and Skouboe Werge (41)

¹⁴ Ring and Skouboe Werge (43)

¹⁵ Ring and Skouboe Werge (66)

This statement marks the shift the court made from the medical model of disability in the case *Chacon Navas* to the social model which sees the absence of workers, that is limitation in their participation not as one inherent in their impairment but rather a barrier in the environment (the employer's failure to act). In other words, the employer failed to provide reasonable accommodation.

The Court explained that disability is a hindrance to the exercise of a professional activity and not just the complete impossibility of exercising it. The Court also noted a difference between sickness and disability which cannot be equated. Sickness becomes disability only when and if it limits a person's participation (in professional life).

The court explicitly said that a condition caused by a medically diagnosed incurable illness provided that it is long-term and leads to a permanent reduction in functional capacity constitutes disability. It noted that disability does not mean that a person will necessarily have a need for special aids or the like but means solely or essentially that the person concerned is not able to work full-time. This means that persons with such conditions are protected by Directive 2000/78.

The Court did, however, emphasise that the condition or the impairment has to be long term. The UN CRPD seems to have adopted the concept of reasonable accommodation from Americans with Disabilities Act of 1990. Although the practice in the US foresees the so called temporary disability and even applies provisions pertaining to persons with disabilities to pregnant women who are also entitled to reasonable accommodation during pregnancy, the EU law and even the CRPD insist that disability can only result from a long term condition. It is natural that during negotiations of the Convention the governments were eager to limit the number of people who would be a protected category after identifying themselves with the definition of disability. However, there are arguments that support recognising even short term limitations of participation as disability. Seeing even temporary states that limit a person's participation as a disability will not necessarily unduly inflate the numbers of claimants of disability benefits if we accept that there is no universal classification of disability and that a person can be classified as a person with disability in some environments and not in others. Accepting temporary limitation of participation as disability could also contribute to seeing disability as something that can be transient in nature respecting the fact that situations change and people recover and/or find new ways of performing activities or new activities which suit the way in which their abilities have changed. Or, even more importantly, that the environments change especially in the light of new technological advances which remove barriers.

A person does not have to be substantially limited in performing major life activities (to echo Americans with Disabilities Act) in order to be deemed a person with disability in work. That is, people can be limited in performing activities at work while their ability to perform other major life activities outside work can remain relatively intact. Furthermore,

the Americans with Disabilities Act lists working as one of the major life activities.¹⁶ Disability as a result of an interaction between an impairment and the environment depends on requirements posed by a particular environment so it is logical to assume that working environment may pose requirements in which an impairment will lead to disability, i.e. limitation in participation. It is interesting to note that the inability to work full time is a limitation and not a complete absence of working ability.

Legislators in the State of New Jersey quoted figures which support the need for introducing temporary disability benefits: *disabling sickness or accident occurs throughout the working population at one time or another and approximately 15 % of the number of people at work may be expected to suffer disabling illness of more than one week per year.*¹⁷ Bearing in mind that sick leave in American states is very limited compared to European countries, the legislators found that recognising temporary disability *benefits employers by reducing employee turnover and increasing worker productivity*¹⁸.

PART TIME WORK AS REASONABLE ACCOMMODATION

When it comes to what actually constitutes reasonable accommodation, in the joint cases **Ring and Skouboe Werge** the CJEU, the referring court asked the CJEU whether a reduction in working hours is among the measures covered by Article 5 of the Directive. The Court looked into provisions of Directive 2000/78 which in Recital 20 states the following:

*Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, **patterns of working time**, the distribution of tasks or the provision of training or integration resources.*¹⁹

Further to that, the Court concluded that reduction in working hours is an organisational measure (pattern of working time) that makes it possible for the worker to continue employment in accordance with the objective of the Directive.²⁰

The Court also noted that the definition of appropriate measures is not exhaustive but rather exemplary since it is impossible to prescribe all the circumstances arising in life.

¹⁶ Americans with Disabilities Act, Sec. 12102, available at <http://www.ada.gov/pubs/adastatute08.htm#12102>, (accessed 18 April 2016).

¹⁷ Temporary Disability Benefits Law, 41:21-26, available a http://lwd.dol.state.nj.us/labor/forms_pdfs/tdi/Law.pdf, (accessed 18 April 2016).

¹⁸ Temporary Disability Benefits Law

¹⁹ Council Directive 2000/78/EC, (20)

²⁰ *Ring and Skouboe Werge*, (56)

DISPROPORTIONATE BURDEN

The Directive details some other considerations that should be taken into account when determining whether a particular measure exceeds the reasonableness requirement:

*(21) To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance.*²¹

The Court ruled that it is for the national court to assess whether a reduction in working hours, as an accommodation measure, represents a disproportionate burden on the employers.

It is to be expected that such measures will cause additional costs and require additional resources. That is why the state will step in with subsidies and other incentives so that the obligation of employers to provide reasonable accommodation does not interfere with the legitimate goal of any business enterprise to make profit. In securing such funds the state will acknowledge that for any individual the right to work is empowering in more ways than just financial. Due to its contribution to human dignity the right to work has been listed as one of the basic human rights.²² Although there is a general perception that being spared of the obligation to work to provide for oneself and rely on social welfare is somehow having an easy way out, exercising their right to work is of particular importance for the sense of dignity and self-worth of persons with disabilities. In the same way as everybody else, it gives them a power to be a more active holders of other rights and active agents of their own lives. At the same time, the level of the expectation of society and all its systems that should support inclusion is very low frequently leading to low self-expectations. Recognising this value of work for persons with disabilities forces governments to direct funds not only into providing social welfare benefits but also to providing support for persons with disabilities on the open labour market as well as funding other necessary adjustments so that this does not pose an undue burden for the employer. Apart from enforcing human rights of persons with disabilities such approach to disability policy would make use now discarded potential of persons with disabilities and would in the be more cost effective.

Although part time work can have negative impact on workers, for some categories of workers it can make a difference between being gainfully employed and socially included in line with their capacities and being excluded from the open labour market with all financial and human consequences such social exclusion entails.

²¹ Council Directive 2000/78/EC, (21)

²² Universal Declaration of Human Rights, article 23. "Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment." <http://www.un.org/en/universal-declaration-human-rights/index.html>, (accessed 18 April 2016).

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PROFILING OF THE WORKING-AGE POPULATION IN THE REPUBLIC OF CROATIA TOWARD ATTITUDES ABOUT WORK AND CAREER

Abstract:

There are many definitions of market segmentation - strategy of dividing a broad target of population into subsets who have, or are perceived to have, common needs, interests, and priorities, and then designing and implementing strategies to target them. Traditional segmentation variables are demographic variables, such as gender, age, income, education. They can be used to explain the characteristics of the segments, however, they cannot identify the complete characteristics of the segments because it is proven that population in the same socio-demographic group can have very different psychographic profile. Due to the criterion variable, different segmentation can be used for creating profiles, such as geographic, behavioural, psychographic, occasional, segmentation by benefits, cultural segmentation. Still, demographic segmentation is dominant in most fields and disciplines where there is need for understanding different sub-groups within population. Profiling of population based on segmentation model can be used much wider than in business and marketing. Understanding population and their perception is crucial in law, primarily when decisions, which will "regulate" the lives of certain population, have to be made. This paper examines profiles of the working-age population in The Republic of Croatia toward attitudes about work and career, which means that this study discusses demographic variables as output (profile description), not input (criteria variable). Aim of this paper was not only to provide a theoretical framework for understanding the key concepts related to the non-demographic segmentation, but to help in creating a clearer picture of Croatia's population on attitudes on work and career. Analysis of Croatia's population was done using backdate of 4 research waves through 2 years, two waves per year for years: 2010 and 2014. Year 2014 was in the focus of analysis and 2010 was used for comparison and time change detection.

Keywords: *segmentation, profile, working age population, research*

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I. TRADITIONAL SEGMENTING AND PROFILING OF POPULATION

Strategy of dividing the market in homogenous group is known as segmentation. The purpose of segmentation is the concentration of communication energy within the segment, primarily in business communication. There are many definitions of market segmentation. The segmentation concept was first developed by Smith¹, an American professor of marketing, in 1957, and is concerned with grouping consumers in terms of their needs. The aim of segmentation is to identify a group of people who have a need or needs that can be met by a single product, in order to concentrate the marketing firm's efforts most effectively and economically. Basic definition says that "market segmentation is to divide a market into smaller groups of buyers with distinct needs, characteristics, or behaviours who might require separate products or marketing mixes."² According to Peter D, Bennett, "market segmentation is the process of subdividing a market into distinct subsets of customers that behave in the same way or have similar needs. Each subset may conceivably be chosen as a market target to be reached with a distinctive marketing strategy. The process begins with a basis of segmentation - a product specific factor that reflects differences in customers' requirements or responsiveness to marketing variables (possibilities are purchase behaviour, usage, benefits sought, intentions, preference or loyalty)"³It can be summarised that segmentation is a strategy which involves dividing a broad target of population into subsets who have, or are perceived to have, common needs, interests, and priorities, and then designing and implementing strategies to target them.

Traditional segmentation variables are demographic variables, such as gender, age, income, education. They can be used to explain the characteristics of the segments. Traditional demographic variables, however, cannot identify the complete characteristics of the segments because it is proven that population in the same socio-demographic group can have very different psychographic profile.⁴ Consumer behaviour can be modelled from a number of perspectives. As furthermore pointed out by Kotler and Armstrong⁵ consumer behaviour and purchases are influenced by forces such as:

¹ W.R. Smith, „Product differentiation and market segmentation as alternative marketing strategies“, *Journal of Marketing*, 1957, p.3.

² C. W. Lamb, J. F. Fair and C. McDaniel, *Marketing*, Beijing, Peking University Press, 2003, p. 214.

³ 'Market segmentation', in P. D. Bennett (ed.), *Dictionary of Marketing Terms*, 2nd edn., Chicago, AMA NTC Publishing Group, 1995.

⁴ P. Kotler and G. Armstrong, *Principles of marketing*, Englewood Cliffs, Prentice Hall International, 2012, p.160

⁵ Kotler and Armstrong, p.161

- Cultural: the set of basic values, perceptions, wants and behaviours learned by an individual from being a member of society
- Social: the influences of social factors such as the consumer's relation to small groups, family and social roles
- Individual: the characteristics of the individual such as the consumer's age, economic situation and occupation
- Psychological: the motivation, perception and beliefs and attitudes¹ of the consumer.

Due to the criterion variable, different segmentation can be used for creating profiles, such as geographic, behavioural, psychographic, occasional, segmentation by benefits, cultural segmentation, multi-variable account segmentation... Still, demographic segmentation is dominant in most fields and disciplines where there is need for understanding different subgroups within population.

II. PROFILING OF POPULATION TOWARD ATTITUDES

Profiling of population based on segmentation model can be used much wider than in business and marketing. Understanding population and their perception is crucial in law, primarily when decisions, which will "regulate" the lives of certain population, have to be made. Segmentation variables must be considered in light of their measurability, availability, reliability and ability to uncover the characteristics and a profile of certain segment. Psychographic segmentation variables include interests, activities, opinions, values and attitudes.⁶

This paper examines profiles of the working-age population in The Republic of Croatia toward attitudes about work and career, which means that this study discusses demographic variables such as gender as output (profile description), not input (criteria variable).

III. CROATIAN CITIZEN'S ATTITUDES ON WORK AND CAREER

Since the aim of this paper was not only to provide a theoretical framework for understanding the key concepts related to the non-demographic segmentation, but to help in creating a clearer picture of Croatia's population on attitudes on work and career, analysis of Croatia's population direct responses related to work and career was conducted.

⁶ S. Goya, „The basis of market segmentation: a critical review of literature“, *European Journal of Business and Management*, Vol 3, No.9, 2011, p 48.

3.1. Methodology Overview

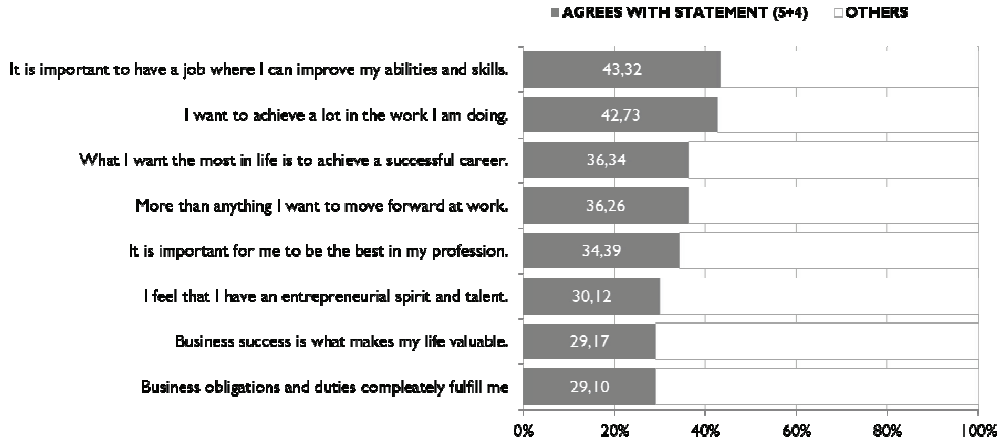
Analysis was done using backdate⁷ of 4 research waves through 2 years, two waves per year (April and October) for years: 2010 (n=4029) and 2014 (n=4000). Year 2014 was in the focus of analysis and 2010 was used for comparison and time change detection. Data collection was done using self-completion method, and data set related to attitudes toward work and career was a part of wider research project. Sample was representative for Croatian population aged from 15 to 65 years, meaning that sample represents around 2.970.000 Croatian inhabitants. Controlled variables were gender, age, and region and settlement type. Selected segment of measurement instrument was consisted of attitudes statements plus questions related to socio-demography. Statements were evaluated using predefined answers of ordinal Likert scale (1 to 5, while analysing recoded to 1 to 3 point scale: agree, nor/neither, disagree).

3.2. Research Results

First observed 8 statements, all presented in Graph 1, were evaluating attitudes toward work and career. In year 2014, with statement: *"It is important to have a job where I can improve my abilities and skills."* agrees 43% of adult Croatian population, while 19% of them disagree with that statement. Around 38% does not have firm attitude about this statement. This statement is followed by: *"I want to achieve a lot in the work I am doing"* is describing also around 43% of working age population. It is interesting that almost ¼ of working age population does not agree with this statement. *Achieving successful career, moving forward at work and being best in profession* is important for around 34% to 36% of working age population in Croatia. There are almost the same proportion of population who disagrees with these statements. *Entrepreneurial spirit and talent, business success oriented lifestyle* are describing around 30% of Croatian adult population.

⁷ BRANDpuls is a research project of IPSOS, market research agency, created in Croatia in 2006 in response to advertiser and agency dissatisfaction with other offerings in the market. By early 2011, BRANDpuls was running in seven countries: Croatia, Serbia and Bosnia/Herzegovina in Europe and Egypt, the Lebanon, Saudi Arabia and the United Arab Emirates in the Middle East. BRANDpuls blends four key aspects of consumer markets in order to build a comprehensive picture of consumers: attitudes, brand analysis, demographics, and media. BRANDpuls collects data by means of self-completion surveys placed by interviewers, who train respondents how to complete the surveys. IPSOS agency gave us permission to use work and career set of data for purpose of this study.

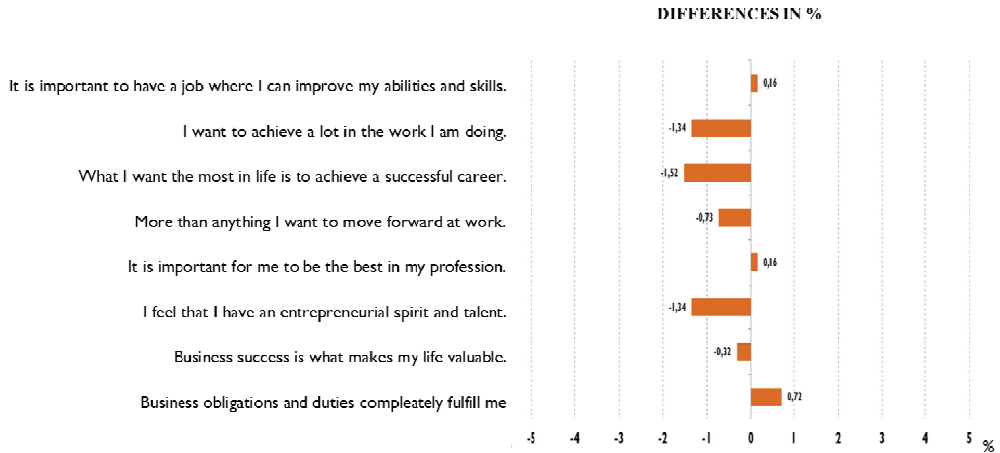
Graph1. Agreement with statements about work and career



Source: Made by authors based on data from BRANDpuls project, 2014.

Stated did not changed through time: it is almost on the same level from 2010 to 2013. Differences are in range from 0% up to 2% per item (Graph2).

Graph 2. Differences in relation to 2010.

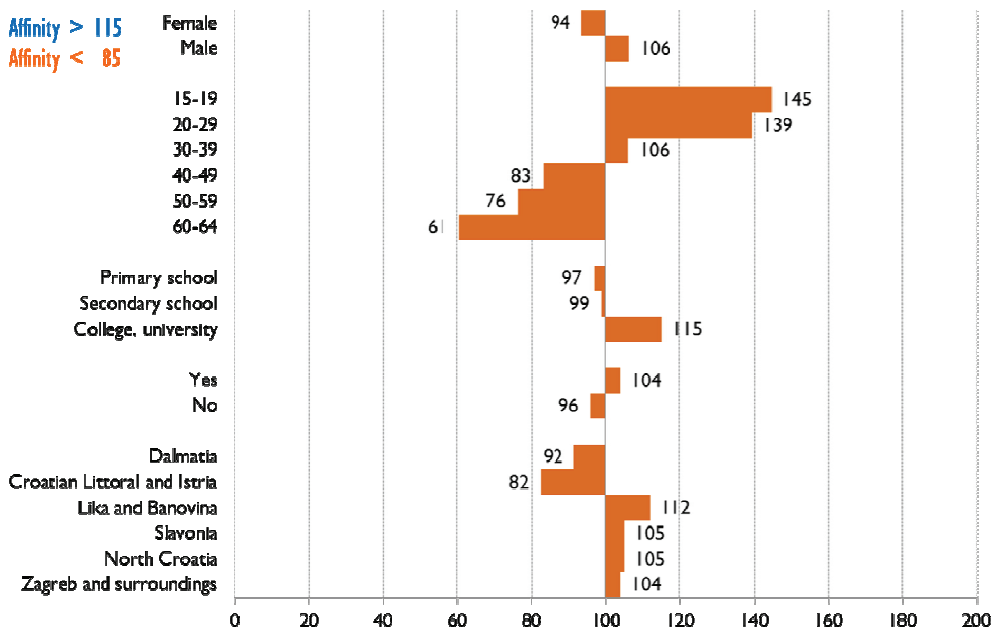


Source: Made by authors based on data from BRANDpuls project, 2014.

When analysing overlapping of statements agreement, there is around **30%** of working population who are **fully business/work oriented**, and it goes **up to 36% of career oriented population**, furthermore to **43% business achievement oriented population**.

This 30% of working population being fully business/work oriented is homogeneous segment of population which can be profiled by socio-demographic variables. Profile is shown in Graph3. Comparison is done by using affinity index, which means target's affinity toward particular answer. Differences between demography groups were measured through affinity index = target's affinity toward particular answer (null point = 100, affinity reference - total sample). Interpretation criteria says that if affinity is above 115, meaning 15% more that reference target, in this case population average, it is significant for positive interpretation. If affinity index is lower than 85, meaning 15% less that reference target, in this case population average it is significant for negative interpretation.

Graph 3. Profile of “Fully work oriented” segment



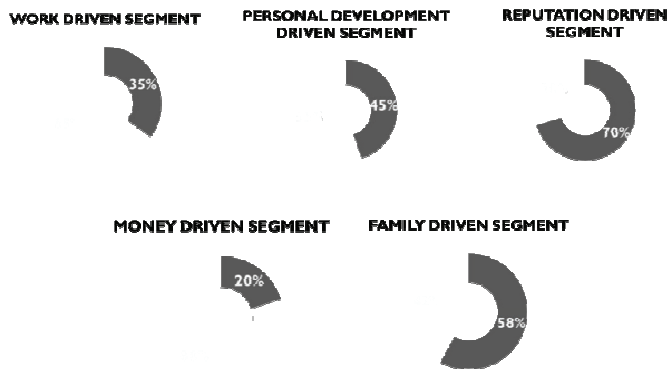
Source: Made by authors based on data from BRANDpuls project, 2014.

Regarding gender differences, men are somewhat more fully work oriented, but it is not significant difference. Regarding age differences, youngest target groups, up to 30 years are, as expected, more work oriented than older one. It significantly drops in 40ties. When observing education level, although there are some differences, they are not significant for interpretation, although higher education correlates with higher work orienta-

tion. People already working are somewhat more work oriented people comparing to ones not working at the moment. Still, this criterion is also not the one that drives differences. Regarding regions in Croatia, there are some differences, interestingly; “sea regions” are less work oriented than average population, where Lika and Banovina are significantly more work oriented than average or other regions.

In order to contextualize size of described “work oriented” segment, several more segments were extracted from survey data (Graph 4).

Graph 4. Size comparison to other segments



Croatian adult population is mostly “reputation driven” nation, meaning that there is 70% of working age population who finds reputation very important and reputation is criteria for making daily decisions. Secondly it is “family oriented” nation, meaning that for 58% of adult population, family comes first, followed by “personal development” driven population, where for 45% of population, personal development is very important. Finally, “work driven” population is bigger only than “money driven segment”, where socially acceptable responses must be taken into consideration.

IV. CONCLUSION

Segmentation and profiling of homogenous segment is important tool not only in business and marketing, but in other social studies as well, where understanding working age population not only by demographic differences but their attitudes toward work and career, can help when generating working policies, procedures and laws, since attitudes are basis for people behaviour.

Regarding Croatia’s population profile on attitudes about work and career, there is around 30% of working population who are fully business/work oriented, and it goes up

to 36% of career oriented population, furthermore to 43% business achievement oriented population.

There are no changes within last four years; there are around 20% to 30% of people without attitudes, meaning that they are open / available for changes (more than negatively oriented segment). Regarding socio-demographic differences men are somewhat more fully work oriented, but it is not significant difference. Regarding age differences, youngest target groups, up to 30 years are, as expected, more work oriented than older one. It significantly drops in 40ties. When observing education level, although there are some differences, they are not significant for interpretation, although higher education correlates with higher work orientation. People already working are somewhat more work oriented people comparing to ones not working at the moment. Still, this criterion is also not the one that drives differences. Regarding regions in Croatia, there are some differences; “sea regions” are less work oriented than average population, where Lika and Banovina are significantly more work oriented than average or other regions. Although work is important for rather wide proportion of population, Croatian adult population is mostly “reputation driven” and “family oriented” nation.

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DISCRIMINATION IN A CROSS-NATIONAL PERSPECTIVE: LABOUR AND SOCIAL DISCRIMINATION OF MIGRANT WORKERS IN THE REPUBLIC OF CROATIA

Abstract:

The Republic of Croatia was traditionally a country of labour emigration and only in the last decade has it become a country of labour destination, mainly for migrants from the region. The overall migration rate remains low if compared to traditional migration countries. Still, laws, regulations and administrative provisions have to ensure equality in access to labour and social rights and must prevent, as far as possible, discrimination of migrants. Despite EU membership, national laws are not fully aligned with the legal obligations arising from international human rights treaties, the EU migration acquis and the Stabilisation and Association Agreements with the EU candidate countries. This paper focuses on legal research to determine whether discriminatory provisions in national labour and social law, particularly relating to third-country nationals and seasonal workers, are preventing higher labour market participation and limiting migrants' labour mobility within the national market. In addition, the research attempts to answer the question whether the current legal provisions impede migrant workers' access to social rights and full local integration in the Republic of Croatia. The main research method is qualitative research of existing laws, regulations and administrative provisions. The findings can be summarised in three categories: 1. Croatian legislation has several areas of unequal treatment of migrants and their family members that can result in discrimination; 2. national social legislation precludes certain categories of migrants from full access to social rights, thus obstructing their local integration; 3. currently, several categories of migrant workers do not enjoy internal labour mobility.

Keywords: *migrant workers, discrimination of migrants, access to labour and social rights.*

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I. INTRODUCTION

The recent publication of the first report on the Migrant Integration Policy Index (MIPEX) for the Republic of Croatia has revealed unfavourable integration policies in the areas of migrants' access to health services, political participation, education and access to nationality.¹ The report also exposes numerous discriminatory provisions of applicable laws, regulations and policies in the areas of anti-discrimination, labour market mobility, the right to family unity and access to permanent residence for migrants.² The Republic of Croatia ranked 30th out of 38 countries included in the MIPEX research, clearly pointing out that the labour and social discrimination of migrants is the main obstacle to the successful integration of foreigners.

Croatian migration legislation is generally harmonised with the EU *acquis*, which had been one of the conditions for Croatia's accession to the EU in July 2013, but certain labour rights of migrant workers are still under-regulated or unregulated. The paper will try to analyse national laws, regulations and policies in labour and social law that are of crucial importance for the equal treatment of migrant workers. We will examine if any of the provisions of national legislation might prevent higher labour market participation and might limit migrants' mobility within the national labour market. In addition, the research will try to answer the question of whether the current legal provisions impede migrant workers' access to social rights and full local integration in the Republic of Croatia.

II. ACCESS TO THE NATIONAL LABOUR MARKET FOR EU NATIONALS

The principal law governing the entry, stay, residence and certain other rights of foreigners (including specific labour and social rights) in the Republic of Croatia is the Aliens Act adopted on 1 January 2012 and amended in 2013.

Formally, EU nationals have free access to the Croatian labour market, with the exception of nationals of 13 EU Member States that introduced transitional measures for Croatian nationals following the accession of the Republic of Croatia to the EU. These re-

¹ Research for the paper was conducted within the framework of Jean Monnet Chair in EU Labour, Equality and Human Rights Law. The paper was presented at the IMISCOE Conference: Rights, Democracy and Migration – Challenges and Opportunities at the University of Geneva in June 2015.

The author of this paper has been involved in MIPEX research in the capacity of expert for the labour mobility and as a peer-review expert in the area of access to health.

² T. Huddleston et al., Migrant Integration Policy Index 2014, Brussels, 2015., available at: <http://www.mipex.eu/what-is-mipex>, (accessed on 01 May 2015).

strictions are in line with Art. 153 of the Aliens Act and the Regulation on the temporary application of restrictions for EU nationals conditioning employment on the obligation to obtain a work permit.

EU nationals wishing to work in Croatia have to undertake a rather complicated procedure of registering either a short-term stay (within a very short deadline of 48 hours upon arrival in the Republic of Croatia) or a temporary stay within another tight deadline of three days from entry into the Republic of Croatia. Following the registration procedure and in accordance with the provisions of the Treaty on the Functioning of the European Union, EU nationals should be able to enjoy the same access to employment as Croatian nationals, with the exception of employment in the public service. In practice, access to national employment is restricted for several reasons.

Jobs in the Croatian labour market are generally divided into three sectors: the private sector, public service (state administration including ministries under which are hospitals, universities, schools, social services, etc.) and public companies (electricity, gas and water providers, public financial companies, state agencies, the national airline company, public insurance companies, state television, public transportation companies, etc.). The major obstacle to employment in public companies in the Republic of Croatia is the common formal requirement of the submission of a certificate of citizenship. This is applicable to all job seekers, regardless of whether the applicant is a graduate of a Croatian university. Subsequently, due to the requirement of a certificate of citizenship for the public sector, EU nationals enjoy free access only to private employment or self-employment in the Republic of Croatia. Discrimination based on the nationality of workers of the Member States as regards employment can be legally justified only on grounds of public policy, public security or public health, but employment in public companies commonly does not entail any of the above-mentioned grounds, so we find very little justification for the formal requirement of citizenship for employment in public companies.

Furthermore, the Republic of Croatia has a very elaborate list of 250 regulated professions for which a particular expert qualification is required and which are regulated by specific laws. Professional chambers or state bodies authorised to approve employment in a specific profession have the main role in recognising foreign qualifications for regulated professions. Even two years after the accession of the Republic of Croatia to the EU, chambers have still not introduced automatic recognition of EU-acquired qualifications, nor have they afforded preferential access to the national labour market to EU nationals. The annual report of the Ombudsman for 2014 emphasised citizens' complaints against the work of the Croatian Chamber of Dental Medicine, the Croatian Nurses Chamber and the Croatian Medical Chamber in dealing with requests for the recognition of foreign qualifications.³ Existing procedures of recognition of qualifications are conducted under the au-

³ Izvješće pučke pravobraniteljice za 2014. godinu, Zagreb, <http://www.ombudsman.hr/attachments/article/517/Izvje%C5%A1%C4%87e%20pu%C4%8Dke%20pravobraniteljice%20za%202014.%20godinu.pdf>,

thority of professional chambers and they are slow, expensive and inefficient. In practice, certain EU study programmes are incompatible with Croatian programmes, which has led to additional requirements, such as extensive study periods and supplementary exams.⁴ As this paper was being drafted, the Croatian Parliament accepted the Draft Act on the Recognition of Qualifications in order to facilitate the full alignment of the Croatian legal framework with Directive 2005/36/EEZ on the recognition of professional qualifications. According to the Draft Act, all professional qualifications of medical doctors, specialised doctors, general care nurses, dental practitioners, specialised dental practitioners, veterinary surgeons, midwives, pharmacists and architects acquired in the EEA Member States should be automatically recognised in the Republic of Croatia.

The final point related to access to the national labour market is related to sports athletes. Two years into full EU membership of the Republic of Croatia, EEA sports athletes are not afforded the same treatment as Croatian nationals in regards to access to professional clubs and have the same access as all other foreigners, i.e. third-country nationals. According to the Aliens Act, professional athletes are eligible for a single permit outside the annual quota (Art. 76). The Sports Act stipulates that national sports associations regulate the right of foreign athletes to play for Croatian clubs, as well as the conditions of participation in sports games (Art 47, para 6). The Act explicitly excludes EU nationals from the notion of “foreigners”, i.e. EEA nationals have the same rights as Croatian nationals (Art. 62.2 of the Sports Act). At the same time, the regulations of sports associations, such as the basketball and volleyball associations, do not reflect the EU membership of the Republic of Croatia. Thus, they still do not differentiate between EU and EEA nationals, the nationals of countries that have entered into the SAA with the EU, and third-country nationals. Thus, EU nationals can play in Croatian sports clubs in limited numbers and do not enjoy equal access to professional sports in the Republic of Croatia based on their nationality. This is not in accordance with the jurisprudence of the Court of Justice of the EU.⁵

Furthermore, the regulations of sports associations do not grant preferential treatment to the nationals of EU candidate countries (Albania, Serbia, Montenegro, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia and Turkey) based on their association agreements with the EU. These agreements stipulate “treatment of legally employed workers free of any discrimination based on nationality”. Consequently, the num-

2014., (accessed on 25 April 2015).

⁴ Deliberations of the Croatian Parliamentary Councils, <http://www.sabor.hr/prijedlog-zakona-o-reguliranim-profesijama-i-prizn> (accessed on 25 April 2015).

⁵ Particularly related to decisions of the Court of the EU in cases C-13/76, *Gaetano Dona v. Maria Mantero*, 14 July 1976; C-415/93, *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman*, 15 December 1995. and Z. Pivač, Economic Freedoms of the EU Analysed from the Point of Sports Organizations in Republic of Croatia, *Pravni vjesnik* 14/2, pp. 233-251.

ber of athletes from SEE countries who can play in certain sports events in the Republic of Croatia is limited and such athletes are equal to any third-country national. This is not in accordance with the decision of the Court of Justice of the European Union related to the rights of nationals of non-Member States that have concluded partnership or association agreements with the EU (IOM, 2014).

III. ACCESS TO THE NATIONAL LABOUR MARKET FOR THIRD-COUNTRY NATIONALS

Access to employment for third-country nationals (TCNs) is related to the work status of a foreigner and Croatian residence status. TCNs can be admitted on the basis of a quota system, work outside the quota, a work permit or one of the EU common migration policy statuses such as that of a Blue Card holder.

According to the Regulation on the status and work of foreigners in the Republic of Croatia, the employer is required to enclose an explanatory justification of the employment of the foreigner, including information on his or her professional competences, qualification and working experience and justification on why the position cannot be filled from the Croatian national labour market. The police may then check with the Croatian Public Employment Service if the position indeed cannot be filled from the Croatian national labour market.

The possibility to change residence status after entry is available only to Blue Card holders and temporary residents who qualify for long-term residence status.

IV. ACCESS TO THE LABOUR MARKET FOR NATIONALS OF EU CANDIDATE COUNTRIES

Albania, Iceland, Montenegro, Serbia, the Former Yugoslav Republic of Macedonia and Turkey currently have the status of EU candidate countries, while Bosnia and Herzegovina and Kosovo are EU potential candidate countries. All the above-mentioned countries have concluded Stabilisation and Association Agreements with the EU except Iceland and Kosovo. All agreements regulate the movement of workers between candidate countries and the EU Member States. In this regard, all six agreements clearly stipulate reciprocal treatment of legally resident workers and their family members who should be free of any discrimination based on nationality, regarding working conditions, remuneration or dismissal, compared to the nationals of Member States. Stabilisation and Association Agreements provide for free access to the labour market of Member States for family members of a worker and open the possibility for granting additional access to professional training

after three years of the conclusion of the agreement, taking into account the situation in the labour market in the Member States and in the Community.

Despite the legal nature of the Stabilisation and Association Agreements which are international agreements, i.e. legally binding instruments for all parties, in this case we have a very specific situation. In reality, nationals and family members of candidate countries legally residing in the Republic of Croatia are granted the same treatment with regard to working conditions and access to the labour market as other third-country nationals. There is no specific provision in any of the applicable national migration laws and regulations to afford preferential treatment to candidate countries' nationals or their family members based on the Stabilisation and Association Agreements. The only exception is related to the coordination of social security benefits due to the fact that the Republic of Croatia has concluded bilateral agreements on the recognition of social security benefits with five of the six candidate countries (Bosnia and Herzegovina, FYRoM, Montenegro, Serbia and Turkey). These bilateral agreements were concluded prior to the entry into force of the Stabilisation and Association Agreements and are currently the legal basis for the recognition and export of social security benefits.

Another important question is the enforceability of the provisions related to the movement of workers and the equality of treatment of nationals of candidate countries and of EU Member States. It is not clear whether the nationals of Albania, Bosnia and Herzegovina, FYRoM, Montenegro, Serbia and Turkey could complain to the Stabilisation and Association Council or whether the EU has another complaint mechanism for the violations of provisions of the Stabilisation and Association Agreement. Having in mind that the Stabilisation and Association Agreements are linked to the fulfilment of the Copenhagen criteria for accession to the EU, it is unlikely to expect that the Stabilisation and Association Agreements have the same legal effects as other international agreements.

V. INTERNAL LABOUR MARKET MOBILITY OF MIGRANT WORKERS

Given the already mentioned limitations imposed on the nationals of 13 Member States that need to obtain a work permit as a condition for legal employment in the Republic of Croatia for two years following accession (until the end of June 2015), leading to their inability to change their employer because of a link between their residence permit and work permit, we can conclude that at this moment EEA nationals have limited internal labour market mobility.

In addition, the previously mentioned requirement for a certificate of citizenship and the difficulties in recognising foreign qualifications also seriously impede the internal labour market mobility of EEA nationals.

Certain categories of third-country nationals do enjoy unrestricted labour mobility in the Republic of Croatia. Among them are permanent residents, persons under international protection (including subsidiary and temporary protection), family members of a Croatian national, foreigners having permanent residence, refugees, persons on humanitarian stay, persons on autonomous stay, full-time pupils or students when they perform work through authorised agents, without contracting employment, and researchers who enjoy the unrestricted right to employment and self-employment without a residence or work permit and, therefore, enjoy full labour market mobility (as per Art. 73 of the Aliens Act).

Long-term residents and residents on family reunion permits enjoy the right to change employment (jobs and sectors) in the same way as nationals. Residents on temporary work permits are tied to the specific job and employer for which the work permit was issued (as per Art. 73, paras 5 and 6), and have no possibility of changing jobs, unless new employers submit new requests for work permits.

VI. SPECIFIC LABOUR RIGHTS

The labour rights of legally residing migrant workers are regulated by the Aliens Act and Labour Act and by a number of specific bylaws in various sectors and professions.

Only permanent residents and EU nationals enjoy labour rights comparable to Croatian nationals, except unlimited access to regulated professions. Temporary residents, posted workers, Blue Card holders and long-term residents enjoy the right to regulated maximum working hours, a minimum period of rest, paid annual leave, minimum remuneration including payment for overtime, protection of health and safety at work, protective measures for pregnant workers and workers who have recently delivered, who are breastfeeding or minor workers, protection against discrimination, the right to vocational training, education and study grants, social care, rights to pension insurance and healthcare, the right to child allowance (subject to the requirement of three years' residence), pregnancy and parenthood support allowance, tax benefits, access to goods and services markets, the freedom of association and unionisation, membership in organisations which represent workers or employers, or organisations whose members perform a particular profession, including the right to a fee for such work. All categories also enjoy the right to recognition of diplomas and professional qualifications and job search counselling services (as per Arts. 85a, 86(5), (6), 98(1) subparas 2-7, (2) of the Aliens Act. All third-country nationals should conclude a labour contract with the employer, but work without a labour contract has the same legal effects, as prescribed in the provisions of the national Labour Act (Arts. 12 and 13).

Due to the incomplete transposition of the EU Employer Sanctions Directive into Croatian legislation, undocumented migrant workers do not enjoy basic labour rights. Instead of the complete transposition of Art. 6 of the Directive which guarantees the right to outstanding remuneration, including costs arising from sending back payments to the country to which the third-country national has returned or has been returned, the Aliens Act has transposed only one out of three substantive provisions.⁶ The transposed provision relates to the employer's obligation to pay public contributions, i.e. taxes and social contributions, the penalty rate and fees (Art. 212 of the Aliens Act). Since the Aliens Act has not legalised the right to remuneration subsequently, a violation of that right has not been included in the part of the Act which stipulates criminal liability, i.e. penalties and fines. Therefore, employers could claim that undocumented migrant workers in Croatia are not entitled to paid employment merely on account of their undocumented residence status, and the courts would have difficulties in establishing applicable statutory penalties even if they derive the undocumented migrant workers' right to paid employment from the applicable regional or international human rights instruments.⁷

The Aliens Act also transposed the provision of Art. 6, para 2b of the Directive stipulating that "before the execution of an expulsion order, the alien who resided and worked illegally will be informed about the available options for remuneration compensation, with any statutory contributions in accordance with a *lex specialis*, and will be informed about the possibility to lodge a complaint or to take legal action against the employer" (Art. 107, para 5). In the Directive, this provision is part of the overall statutory right to remuneration for past work, while in the Croatian Act the incorporation of this provision is confusing since the Act does not specify any entitlement to remuneration, or applicable legislation from which an alien could derive his or her right to remuneration. Stipulating mere information of entitlement to a right which cannot be derived either from the Labour Act or from the Aliens Act seems redundant.

Furthermore, reference to a *lex specialis* in this case could be a reference to the Labour Act (which in fact is a *lex generalis*) or to another law applicable to special categories of employees (it is difficult to imagine the applicability of a *lex specialis* in labour law as it mainly regulates employment in public services, which is *de facto* and *de iure* irrelevant to undocumented migrants). Notwithstanding the legislator's intention, none of the Croatian laws could be considered a *lex specialis* applicable to derive the right to remuneration due to the fact that an employment contract, or a verbal agreement on employment concluded between the employer and an undocumented migrant, violates directly the *ius cogens* on the authorisation of entry, residence and employment, entails criminal liability,

⁶ H. Špadina, 'Undocumented Migrant Workers' Right to Remuneration: Consequences of Incomplete Transposition of the Employer Sanctions Directive into the Croatian Law', *Contemporary Legal and Economic Issues IV*, (eds. I. Barković, M. Lulić), 2013, pp. 189 – 206.

⁷ Ibid.

and any formal agreement of that kind would be null and void.⁸ Employers could easily abuse legally unrecognised employment to avoid the payment of outstanding remuneration to the worker, particularly bearing in mind that undocumented migrants usually face swift deportation from the country of employment, which deprives them of the possibility of submitting a substantiated claim before a competent authority or court. This was precisely one of the reasons why the provisions on sending back payments to the country of origin or residence were incorporated in the Employer Sanctions Directive. Apart from this, the Aliens Act, in Art. 219, para 2, uses the term “*compensation*” instead of remuneration, stipulating that “the amount of compensation to the illegally residing alien and the amount of paid public contribution based on that compensation shall not be considered tax expenditure of the employer”. This provision clearly intended to penalise employers, but, as a side effect, the employers could be encouraged to engage in labour exploitation since the cost of work (due to the worker’s residence status) is legally unrecognised.

Besides, the Aliens Act omits to stipulate the internationally recognised right to a minimum wage or to a wage that would be in accordance with the mandatory national provisions on wages, collective agreements or in accordance with the established practice in the relevant occupational branches (as stipulated in Art. 6, para. 1a of the Directive) which creates an opportunity for possible abuse since the Croatian Minimum Wage Act is derogated by the force of *ius cogens* of the migration legislation. Undocumented migrant workers are consequently legally unprotected from the employers’ discretionary power to determine their salaries below the threshold of the statutory minimum wage.

Croatian legislation will have to be further harmonised in order to fully comply with the provisions of the Employer Sanctions Directive and international and regional human rights instruments. All of these instruments stipulate the right to remuneration of all workers, and even explicitly stipulate the right of undocumented migrants to paid employment and protection against labour exploitation (CoE Resolution No. 1509).

VII. SOCIAL RIGHTS OF MIGRANT WORKERS

Human rights and the social rights of migrants, including the prohibition of discrimination and the right to equal treatment, are protected in the Croatian Constitution and in the Anti-Discrimination Act. Labour and social rights of legally residing migrant workers are regulated in the Labour Act, the Health Care Act, the Child Allowance Act, the Social Welfare Act, the Pension Insurance Act and other *leges speciales*.

⁸ H. Momčinović, ‘Nevaljanost ugovora – ništetni i pobojni ugovori prema Zakonu o obveznim odnosima’, *Pravo u gospodarstvu*, Vol. 45, No. 6, 2006, pp. 129-132. and I.Vukorepa, *Zapošljavanje stranaca*, Radni odnosi u Republici Hrvatskoj, (ed. Ž. Potočnjak), *Organizator*, 2007, pp. 893-922.

The scope of the social rights of migrants in Croatia depends on their residence status and employment. EEA nationals and permanent residents enjoy certain social rights comparable to Croatian nationals, but other categories of migrant workers are mainly excluded from the statutory entitlement to social rights, apart from compulsory health and pension insurance applicable to all categories of legally employed migrant workers, regardless of their nationality.

The equality of treatment of EEA nationals is also restricted in some areas of social rights, such as the right to unemployment benefits and child allowance. According to the provisions of the Aliens Act, EEA nationals can retain the status of employee or self-employed person if they become temporarily unable to work due to illness or accident, if they lose the job held for at least one year when this is not their fault, if they are registered with the competent Public Employment Office as a job-seeker or if they join an occupational training programme. All EEA nationals whose employment contract for a definite period of time shorter than one year has been terminated and who are registered as unemployed with the Public Employment Office, or, if in the first 12 months of work further to an employment contract for an indefinite period of time in the Republic of Croatia they have lost their job through no fault of their own and are registered as a job-seeker, retain the status of employee or self-employed person for a period of six months after the termination of employment. It is not clear from the provisions of the Aliens Act if EEA nationals are entitled to unemployment benefits and what the intention of the legislation was when the prolongation of employment status was regulated. Presumably, this provision is linked to the legal entitlement to residence status which could not be regulated for unemployed persons, but the Aliens Act still omits to regulate whether EEA nationals would qualify for unemployment benefits following the termination of employment status, or whether they could not claim such benefits. On the other hand, the Act on Employment Mediation and Unemployment Rights previously regulated the equality of treatment for EEA nationals including nationals of the Swiss Confederation. Subsequently, Croatian nationals and EEA nationals are entitled to unemployment allowance if they have at least 9 months of working experience in the last 24 months. The Act also stipulates the right to pension insurance (including for permanent seasonal employment), compensation of education, specialisation, traineeship and relocation costs and various lump sum allowances. Other categories of migrant workers have limited access to unemployment benefits. Asylum seekers, foreigners under subsidiary and temporary protection enjoy unemployment benefits for the duration of their protected status (Art. 14). Temporary residents enjoy unemployment allowances only if they have lost their job through no fault of their own or with consent. Upon the termination of their unemployment allowance or the expiration of residence, temporary residents lose their unemployment status and their entitlement to all other benefits (as per Art. 15 of the Act).

Regarding social entitlements to parental and child support, the Maternity and Parental Benefits Act and the Child Allowance Act provide social entitlements only for certain

categories of migrants such as permanent residents, refugees and persons under subsidiary protection (along with family members). The Maternity and Parental Benefits Act limited the use of such benefits to aliens who have the recognised status of insured person within compulsory health insurance. This act did not make a condition for the use of benefits a certain duration of residence in Croatia (Art. 8), while the Child Allowance Act excluded from entitlement all migrants who were without permanent residence for at least three years prior to the submission of the application for the allowance (Art. 7.2.). Putting as a condition for child allowance uninterrupted permanent residence in Croatia excludes seasonal migrant workers from claiming child allowance for the periods of contributions to the Croatian social security system. This is not in line with the ECJ decision in C-611/10 *Hudzinski* in which the Court considered that EU applicable law must be interpreted in a manner favourable to migrant workers in the sense that EU law must not have the effect of depriving a Member State, even if it is not the competent State, of the right to grant workers social benefits provided for under its national legislation. Therefore, it is considered that this ECJ case will have a significant impact on the future jurisprudence of Croatia. In addition, the Child Allowance Act does not yet include treatment of EEA nationals equal to that of Croatian nationals.⁹

Access to health services for migrants is an area of particular concern as several categories of migrants have restricted access to healthcare services or are denied such access. For the past several years, the Council of Europe's European Committee on Social Rights has been warning Croatia that the situation with regard to access to healthcare for migrants has not conformed with Article 13§4 of the European Social Charter. The Committee has noted that it has not been established that all legally and unlawfully present foreigners in need are entitled to emergency medical and social assistance. The CoE-ES-CR added that foreign nationals in Croatia are subject to an excessive length of residence requirement to be eligible for social assistance.¹⁰

In general, all compulsorily insured migrant workers have access to healthcare, except temporary residents whose health insurance contributions have not been paid for 30 days or longer. In that case, they are eligible to use only emergency healthcare (Art. 8. paras 1 and 2 of the Compulsory Health Insurance Act). In 1998, the Constitutional Court decided that limitations to emergency healthcare for insured nationals who have not paid healthcare contributions are unconstitutional and in violation of fundamental rights.¹¹

⁹ Joined Cases C-611/10 and C-612/10 *Hudzinski and Wawrzyniak* [2012] Available at: <http://curia.europa.eu/juris/liste.jsf?num=C-611/10> (accessed on 25 April 2015).

¹⁰ Human Rights Council, Working Group on the Universal Periodic Review. Geneva, 1–12 November 2010, Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) of the Annex to Human Rights Council Resolution 5/1, Summary of 11 stakeholders' submissions¹ to the Universal Periodic Review. A/HRC/WG.6/9/HRV/3, page 8, point 52.

¹¹ Ustavni sud Republike Hrvatske, *eng. Constitutional Court of Republic of Croatia*, U-I-222/1995, O.G. 150/98.

This decision is in line with international human rights standards and should be equally applicable to all categories of insured persons, regardless of nationality.

The Compulsory Health Insurance Act and the Act on the Health Protection of Foreigners in the Republic of Croatia stipulate that all migrants on short and temporary stay, as well as undocumented migrants who are not accommodated in a pre-deportation centre, should cover all healthcare costs, including emergency healthcare services. The European Committee of Social Rights has emphasised that all categories of non-residents in Croatia should be entitled to emergency healthcare and that this should not be linked to the pre-deportation or residence status of a foreigner.¹²

Further, pregnant migrant women cannot derive their healthcare rights from any applicable laws, unless they are obligatorily insured in Croatia. The Act on Compulsory Health Care Insurance does not regulate the healthcare of female migrants, including ante- and postnatal care, nor does it regulate healthcare rights of newborn migrant children. Ante- and postnatal care is not clearly classified, so it is difficult to assess whether delivery would be considered an emergency health service and whether it should be paid for. According to the Regulation on the conditions, organisation and working arrangements of out-of-hospital emergency healthcare, emergency delivery outside the hospital conducted by the competent emergency staff is considered an emergency health service.

Another issue is that the scope of health rights for migrant children is not specifically regulated, so it is not clear whether or not they enjoy the same scope of health protection as Croatian nationals. Without proper legislation, it is difficult to assess whether access to health services for migrant children is in accordance with international human rights instruments. Thus, children of undocumented migrants outside a pre-deportation centre might be denied access to healthcare.

In addition, the Elementary and Secondary Education Act excludes children of undocumented migrants outside a pre-deportation centre from the basic human right to elementary education:

“Aliens who are illegally residing in Croatia will be allowed to attend elementary education only:

1. if they are accommodated in the Reception Centre for Aliens;
2. if their forced removal has been temporary suspended;
3. during the period for which removal has been postponed.”

Thus, we can conclude that the basic internationally recognised human right to education is severely conditioned and absolutely restricted to a small group of undocumented

¹² European Committee of Social Rights, Conclusions XIX-2 (2009), (CROATIA), January 2010, Articles 11, 13 and 14 of the Charter. European Committee of Social Rights, Conclusions XX-2 (2013), (CROATIA), Articles 11, 13 and 14 of the 1961 Charter.

migrants who have been apprehended by the state authorities and who are waiting to be forcibly deported. This is not in accordance with the universal right to primary compulsory education enshrined in Art. 28 of the Convention on the Rights of the Child and all other universal human rights instruments.¹³ The Act also stipulates that EU nationals enjoy the rights to elementary and secondary education equal to Croatians, and certain additional rights, such as the right to education in their mother tongue and concerning the culture of the country of origin (Art. 44 of the Act) and the right to extra-curricular catch-up lessons in the Croatian language (Art. 43). The Act provides the right to elementary and secondary education and the right to catch-up lessons in Croatian to children of asylum seekers, refugees, and persons under subsidiary protection and temporary protection (Art. 46, para 1). The Act omits to regulate the scope of education rights of third-country nationals, so we need to assume that children of third-country nationals who have legal residence in Croatia would also be entitled to elementary and secondary education and catch-up lessons in Croatian. However, in the absence of a clear legal provision, this would be subject to the interpretation of courts or administrative bodies.

VIII. CONCLUSION

Through qualitative research of the legal framework applicable to migrant workers in the Republic of Croatia, we have attempted to provide a comprehensive and substantiated analysis of the current scope of labour and social rights for various categories of migrant workers. In conclusion, we can confirm that existing laws and regulations could lead to discriminatory treatment of certain categories of migrant workers and their family members.

In this regard, it is particularly concerning to note that two years after the official accession of the Republic of Croatia to the EU, EEA nationals still do not enjoy the same treatment as Croatian nationals in all spheres of access to employment and social rights. They are restricted in access to employment by the formal requirement to submit a certificate of citizenship as part of all job applications to public companies. They are also restricted by the continuing legal gap in the recognition of EU acquired qualifications for regulated professions. Finally, EEA athletes still do not enjoy the same treatment as Croatian nationals. In addition to restricted access to the labour market, EEA nationals also face restricted internal labour market mobility. In summary, we can conclude that basic, organic laws such as the Aliens Act and the Labour Act do not contain legal obstacles, but implementing legislation, regulations and specific sectorial laws contain provisions that

¹³ UDHR, Article 26(1), ICERD, Article 5(e-v), ICESCR, Article 13(1, 2), 14, CRC, Article 28(1), 29(1), ICRMW, Article 30, UNESCO Convention against discrimination in education, Article 3, ECHR, Protocol I, Article 2.

are discriminatory and hinder the full equality of treatment regarding access to employment for EEA nationals.

Access to social rights for EEA nationals in the Republic of Croatia is also not fully comparable with that of Croatian nationals. The right to child allowance and unemployment benefits still has to be additionally amended and clarified.

Other categories of migrant workers have rather limited access to the national labour market, which is heavily protected by a quota system. In addition, numerous categories of third-country nationals are entitled to work outside the quota system, and a further complication is the very complex migration legislation. Internal labour market mobility is reserved for permanent residents and persons under various forms of international protection. Specific labour rights are an issue for undocumented migrant workers who do not enjoy the universal right to paid work.

Several categories of migrants are excluded from the provision of free emergency healthcare, while healthcare for temporary residents might be restricted for migrants whose employers fail to pay contributions. Specifically vulnerable categories of migrants, such as pregnant migrant females or children of migrant workers, do not enjoy explicit legal protection as stipulated in international human rights instruments and their needs are not addressed in any of the migration strategic documents.

The current legal gaps in labour and social legislation of the Republic of Croatia lead to the discriminatory treatment of migrant workers, including internal EU migrants, i.e. nationals of the EEA. Despite a very low number of migrant workers residing in the Republic of Croatia, the legal framework should be free of any discrimination and should be conducive to migrations that would contribute to the economic development of the country. Having in mind the very high rate of labour emigration from the Republic of Croatia over the last year that has resulted in shortages of medical and health staff, and the demographic projections of a low birth rate and the rapid aging of the population, it is of utmost importance to promulgate migration legislation that would ensure full respect of all internationally recognised standards of the labour and social rights of migrant workers and their family members.

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OPINION 2/13 ON THE EU ACCESSION TO THE ECHR

Abstract:

On 18 December 2014 the Court of Justice of the European Union delivered Opinion 2/13 on the European Union's accession to the European Convention on Human rights (ECHR). The Court ruled that the Draft Agreement on the Accession of the EU to the ECHR was incompatible with EU legal order. Opinion 2/13 is complex decision which finds the conflict with the Treaties on several main grounds: violation of the integrity and autonomy of the EU legal order; institutional innovations that were included in the Accession Agreement and are not compatible with EU legal order and the specific characteristics of EU law as regards judicial review in Common foreign and security policy (CFSP) matters was not respected.

This paper is focused on two reasons for the incompatibility: Protocol No 16 to the ECHR and Common foreign and security policy issues and it will try to answer further question : if the EU would access the ECHR, will the human rights protection be potentially better. Finally, the paper will reach the conclusion about two analysed reasons of incompatibility and propose possible solutions if there are some.

Key words: *European Convention on Human Rights, EU accession to ECHR, Opinion 2/13, Court of Justice, Protocol No 16, CFSP*

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I. INTRODUCTION

On 18 December 2014 the Court of Justice of the European Union (hereinafter: CJEU or the Court) delivered *Opinion 2/13* on the European Union's accession to the European Convention on Human rights (ECHR). The Court has always been a promoter of the autonomy of EU law. The Art 218 (11) TFEU which proscribes the advisory opinion of the Court is legal basis of its power to guard the EU autonomy. This is the second Court's opinion about the EU accession to the ECHR, back in 1996; in *Opinion 2/94* the CJEU ruled that European Community could not accede the ECHR. In the first part of this paper, the authors will give the analysis of the advisory opinion under Art 218(11) TFEU and the historical background of the accession procedure to the ECHR. It is essential for the understanding of the Court's ruling in the *Opinion 2/13*.

The Court ruled that the Draft Agreement on the Accession of the EU to the ECHR (the Accession Agreement) was incompatible with the EU treaties. *Opinion 2/13* is very complex decision which consists of 258 paragraphs and finds the conflict of draft agreement with the Treaties on several main grounds. Those grounds can be divided into three groups : violation of the integrity and autonomy of the EU legal order; institutional innovations that were included in the Accession Agreement and are not compatible with EU legal order and the specific characteristics of EU law as regards judicial review in Common Foreign and security Policy (CFSP) matters. It should be noted that only in just few days after the judgment was published, and it is a process that continues up to today, the judgments was a target of criticism among EU law bloggers¹ and in has been analysed in many different views among academics.²

While there are several reasons for the incompatibility, this paper will turn focus on two of them: Protocol No 16 to the ECHR and Common foreign and security policy. The authors will compare the Advisory opinion proscribed in the Protocol No 16 with the

¹ S. Peers, 'The CJEU and the EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection', *EU L. ANALYSIS BLOG*, <http://eulawanalysis.blogspot.com.es/2014/12/the-cjeu-and-eus-accession-to-echr.html> (accessed 15 June 2015); S. Douglas-Scott, 'Opinion 2/13 on EU Accession to the ECHR: A Christmas Bombshell From the European Court of Justice', *U.K. CONST. L. BLOG*, <http://uk-constitutionallaw.org>, (accessed 15 June 2015); G. Gotev, Court of Justice rejects draft agreement of EU accession to ECHR, <http://www.euractiv.com/sections/eu-priorities-2020/court-justice-rejects-draft-agreement-eu-accession-echr-310983>, (accessed 17 June 2015); Aidan O'Neill, Opinion 2/13 on EU Accession to the ECHR: the CJEU as Humpty Dumpty, *EUTOPIALAW* <http://eutopialaw.com/2014/12/18/opinion-213-on-eu-accession-to-the-echr-the-cjeu-as-humpty-dumpty/>, (accessed 15 June 2015); W. Michl, Thou Shalt Have No Other Courts Before Me <http://www.verfassungsblog.de/en/thou-shalt-no-courts>, (accessed 17 June 2015); T. Lock, Oops! We did it again – the CJEU's Opinion on EU Accession to the ECHR, <http://www.verfassungsblog.de/en/oops-das-gutachten-des-eugh-zum-emrk-beitritt-der-eu/>, (accessed 18 June 2015).

² For an academic appraisal see, inter alia, A. Łazowski and R.A. Wessel, S. Peers, D. Halberstam, S. O. Johansen, and C. Krenn in Special Section: *Opinion 2/13*, *German Law Journal*, Vol. 16. Issue. 1, 2015.

preliminary ruling procedure (Art 267 TFEU) and conclude if in fact it could potentially touch upon the autonomy of the EU. Further, the authors will touch the issue of the Common Foreign and Security Policy, which is the most troublesome. It is the fact that TEU specifically excludes the jurisdiction of the CJEU in field of the CFSP and Member States (MS) have no intention of so ever to give the CJEU the jurisdictions over the CFSP matter. On the other hand excluding the jurisdiction of the European Court of Human Rights (ECtHR) in the field of CFSP would significantly reduce the ability of ECtHR to conduct the review of the human rights in the field where the EU is capable of violating human rights. Being that there are two exceptions to the CJEU non jurisdiction in the field of CFSP. The first exception is to monitor Art 40 TEU (the relationship between CFSP and other areas of external action). The second exception is set out in Art 263 (4) TFEU (reviewing the legality of restrictive measures against natural or legal persons). This paper will analyse the proceedings brought under the Article 263 (4) TFEU and try to answer the question: if the EU will access the ECHR, will the human rights protection be potentially better. Finally, the paper will reach the conclusion about two analysed reasons of incompatibility and propose possible solutions if there are some.

II. IDEA OF ACCESSION OF THE EU TO THE ECHR AND THE ADVISORY OPINION UNDER ARTICLE 218(11) TFEU

The EEC Treaty (1957) had no specific provisions on the protection of fundamental rights. There are two reasons. Firstly, the EEC was primary economic integration and secondly the protection of the human rights was the point of the interest of another international organization – The Council of Europe. In a series of early cases, the CJEU even refused to recognize fundamental rights (e.g. *Stork, Geitling and Sgarlata*).³ The consequence was that some national courts reserved the right to declare Community law inapplicable if they found it incompatible with national constitutional provisions concerning protection of human rights. The most famous case is *Solange I*, the case before the German Bundeversammlung (hereinafter BvG).⁴

Due to the fear that autonomy and supremacy of EU law could be jeopardized, the CJEU started to emphasize the obligation to observe human rights in its own rulings. So, in 1963, in case *Stauder v. Ulm* clarified: “*fundamental human rights are enshrined in the general principles of Community law and protected by the Court.*”⁵

³ C-1/58 *Stork - High Authority* [1959] ECR 17; C-36, 37, 38 and 40/59 *Geitling - High Authority*, [1960] ECR 423 and C-40/64 *Sgarlata - Commission*, [1965] ECR 215.

⁴ *Solange I* BVerfGE 37, 271, 2, BvL 52/71

⁵ C-29/69, *Stauder - City of Ulm*, [1969] ECR 419

Since the European Communities did not have their own catalogue of human rights, the CJEU sought for inspiration elsewhere. In determining the scope of the fundamental rights, it looked to: “the constitutional traditions common to the Member States” and to “international treaties for the protection of human rights, on which the Member States have collaborated or of which they are signatories”.⁶ The CJEU developed a series of “human rights cases”⁷ and this case law was later enshrined in EU law, in the Maastricht Treaty (TEU). Article F (later article 6 of the TEU) states that “the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms”.⁸

In some member states, in particular in Germany, there was a persistent sense of unease that an organization as powerful as the European Union did not have its own binding catalogue of human rights.⁹ Therefore, during the German Presidency of the Council, the idea of its own Human Rights charter was thrown up. On the 7 December 2000, at the European Council in Nice, the Charter of Fundamental Rights (Charter) was proclaimed. The Lisbon Treaty gave the Charter legally binding status, meaning that from 1 December 2009, the Charter acquired the same legal status as the Treaties.

The sole idea of accession of the EU to the Convention is not the new one. The Commission was the first one who proposed the accession in 1979 and repeated in 1990. On 30 November 1994, the Council decided to seek the advice of the Court of Justice. The result was Opinion 2/94, in which the CJEU advised against accession. The Court observed that accession was impossible in the light of Community law since there was no firm legal basis for it.¹⁰

Ever since, things have significantly changed. Firstly, the new Treaty basis was introduced by the Lisbon. Article 6(2) TEU states: “*The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties.*”¹¹ Furthermore, there is the Protocol 8, regulating aspects of the accession, as well as a Declaration requiring that accession to the ECHR must comply with the ‘specific characteristics’ of EU law. Apart from EU legal regulation in the Council of Europe legal order a new Protocol 14 in the Article 59(2) introduced that: “*The European Union may accede to this Convention.*”

⁶ M. Kuijer, “The accession of the EU to the ECHR: a gift for the ECHR’s 60th anniversary or an unwelcome intruder at the party?” *Amsterdam Law Forum*, 2011, pp. 4, 17-32

⁷ C-36/75, *Rutili*, [1975] ECR 1219; C-149/77 *Defrenne - Sabena*, [1978] ECR 1365; C-44/79, *Hauer - Land Rheinland-Pfalz*, [1979] ECR 3727

⁸ See art F TEU (Maastricht).

⁹ Kuijer (n 6), p. 19

¹⁰ Kuijer (n 6) 20

¹¹ Article 6(2) TEU

Furthermore, Article 47 TEU explicitly recognizes the legal personality of the EU and as an integral part *ius contrahendi*. Finally, Art 218 TFEU (Lisbon) regulates the international agreements and in the Article 218(11) TFEU gives the possibility for Member State, the European Parliament, the Council or the Commission to obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.¹²

After the entering into force of the Lisbon Treaty, upon the recommendation of the Commission, the Council adopted a decision on 4 June 2010 authorising the opening of negotiations for an accession agreement. Draft Accession Agreement of the EU to the ECHR was adopted at 5 April 2013.¹³ Based on the legitimacy under Article 218(11) to obtain the Opinion of the CJEU, the Commission requested an Opinion of the compatibility of the Accession Agreement with the Treaties. Finally, the CJEU published its negative Opinion on 18 December 2014.

III. BRIEF OVERVIEW OF THE REASONS FOR INCOMPATIBILITY

The Opinion 2/13 consist of 258 paragraph, it is a rather long judgment, but as far as the substance is concerned, only last 114 paragraph present the position of the CJEU whereas first 144 paragraphs involve long introduction and legal basis for the Court's decision. Actually, the largest part of the judgment is limited to the overview of the Accession Agreement, ECHR and presentation of the position of MS and European Commission that were submitted during the Court's proceedings.¹⁴ In this section of the paper focus will be on those 114 paragraphs that represent the substance of the Court's position.

Primarily, the CJEU ruled that the case was admissible¹⁵ and makes some preliminary points¹⁶. Interestingly, the Court in this introductory section repeats already well recognised principle that the EU has a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly so-

¹² Article 218(11) TFEU

¹³ Council of Europe, cooperation with other international organisations http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/default_en.asp, (accessed 15 August 2015).

¹⁴ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454. , par. 3 – 143.

¹⁵ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454. , par. 144- 152.

¹⁶ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454. , par. 153 – 177

phisticated institutional structure and a full set of legal rules to ensure its operation.¹⁷ It underlines what was found in the landmark judgments *van Gend & Loos*¹⁸ and *Costa*¹⁹ and it is accepted in the EU legal order for almost 50 years: EU is a *sui generis* autonomous legal order. Solely reason for the emphasis of a well-established principle can be found in the context of the whole judgment, whereas the violation of the integrity and autonomy of the EU legal order presents not one but it can found in all the reasons for incompatibility of the Accession Agreement with the EU treaties.

The Court holds that the Accession Agreement is incompatible with the Treaties for five basic grounds, some with multiple subparts, thus in total seven grounds for incompatibility. Those grounds can be divided into three groups: violation of the integrity and autonomy of the EU legal order (Article 53 of the ECHR; Principle of ‘mutual trust’ between EU Member States; Protocol No 16 to the ECHR; Article 344 TFEU)²⁰; institutional innovations those were included in the Accession Agreement and are not compatible with EU legal order (The co-respondent mechanism and the procedure for the prior involvement of the Court of Justice)²¹ and the specific characteristics of EU law as regards judicial review in CFSP matters.²²

3.1. Violation the integrity and autonomy of the EU legal order

First set of concerns that the Court has are about the violation of the integrity and autonomy of the EU legal order by the Accession Agreement. The Court finds that the Accession Agreement disregards the specific characterises of the EU law in several ways. Firstly, the Court refers to the Article 53 of the ECHR which sets out that Contracting Parties can lay down higher standards of protection of fundamental rights then those guaranteed by the Convention, whether in their national laws or n the international agree-

¹⁷ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454, par. 158

¹⁸ Case 26/62, *Van Gend en Loos* [1963] ECR 1; more recent analysis of Van gend en Loss can be found in European Journal of International Law and International Journal of Constitutional Law published a Joint Symposium on Revisiting Van Gend en Loos with half of the symposium published in EJIL and half in ICON: http://www.oxfordjournals.org/our_journals/ejilaw/ejil_icon_symposium.html, (accessed 15 July 2016)

¹⁹ Case 6/64, *Flaminio Costa v ENEL* [1964] ECR 585

²⁰ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454, par.178 – 214

²¹ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454, par. 215 – 248

²² Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454, par. 249 – 258

ments.²³ The EU has similar (if not the same provision) in the Article 53 Charter of fundamental rights²⁴ on which the CJEU has already ruled in the *Melloni* judgment. The Court in *Melloni* determined that national authorities and courts remain free to apply higher national standards of protection of fundamental rights if they do not compromise the level of protection provided by the Charter or the primacy, unity and effectiveness of EU law.²⁵ The Court predicts that if the Accession Agreement would come into force MS could use higher protection of fundamental rights and not act in accordance with *Melloni* whereby they will not take into account primacy, unity and effectiveness of EU which could in the Court's opinion affect the autonomy of EU law. Although, the Court referred to a need of "coordination" between Article 53 ECHR²⁶ and Article 53 of the Charter, this can be understood as a request for an opt-out.²⁷

Further, the second Court's concern relates to the principle of mutual trust between EU Member States. The principle of mutual trust requires Member state to consider another MS as being in compliance with EU law and particularly with the fundamental rights recognised by the EU law. This principle is especially important in the area of freedom, security and justice and can be related with the principle of mutual recognition which is a subject of previously mentioned *Melloni* judgment in which the Court endeavoured to balance fundamental rights and the principle of mutual recognition in criminal matter.²⁸ One must bear in mind that the principle of mutual trust is essentially for the area of freedom, security and justice. On the contrary, there is a long lasting discrepancy between the CJEU and ECtHR jurisprudence regarding for example the Dublin system on the interstate transfer of asylum seekers to the Member State of first entry. For example in the *N. S. and Others* case *N.S.*, for instance, the Court explained that an individual only has a legal claim to resist transfer to the Member State of first entry if the sending state has evidence of "systemic deficiencies" in the receiving state meaning that they have "amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment" in the receiving state.²⁹ On contrary, *in M.S.S.*

²³ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 53.

²⁴ Charter of Fundamental Rights of the European Union [2010] OJ C 83/02, art. 53 ; also see : B de Witte, 'Article 53', in S. Peers, T. Hervey, J. Kenner, A. Ward (eds), *The EU Charter of Fundamental Rights. A Commentary*, Oregon, CH Beck-Hart-Nomos, Oxford and Portland, 2014, pp. 1523-1537

²⁵ Case 399/11 *Melloni* [2013] ECR 107, par. 60 – 63

²⁶ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454, , par 189

²⁷ A. Lazowski, R. A. Wessel, 'When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR', *German Law Journal* vol.16, 2015, pp. 179 – 212 ; 191

²⁸ Joined cases C 411/10 and C 493/10 *N. S. and Others* [2011] ECR I-13905 par. 78 – 80 and Case 399/11 *Melloni* [2013] ECR 107, par. 37 – 63

²⁹ Joined cases C 411/10 and C 493/10 *N. S. and Others* [2011] ECR I-13905 par. 94

v. Belgium and Greece, the ECtHR found Belgium liable under the Convention for having transferred an asylum seeker back to Greece (which the ECtHR had separately found to have violated Article 3 ECHR's prohibition on inhuman or degrading treatment).³⁰ All in all, the clash between CJEU and ECtHR is evident regarding the questions of mutual trust in the area of freedom, security and justice. Having above mention in mind, it is clear why it is the Courts opinion that the Accession Agreement did not take into account the specific characteristics of EU law cause with the entering into force of the Accession Agreement MS of the Union will be by the ECHR obliged to check one another in their observation of fundamental rights. According to the Court this situation is liable to upset the underlining balance of the EU and undermine the autonomy of EU law.³¹

The third objective made by the Court is related to the Protocol 16 of the ECHR (Protocol is open for signature in 2013 and has not yet entered into force) and according to Court it would also violate the specific characteristics of EU law. The protocol introduces the possibility for national courts of ECHR high contracting parties to send a request for advisory opinion to the ECtHR. The CJEU predicted that this protocol (of whom the EU would not become a party)³² is a potential threat to the autonomy of EU law. Reason for that is it's similarity to the preliminary ruling procedure in EU law whereby a national courts of MS of the Union may request a ruling from the CJEU on a question of EU law. The very fact that the Accession Agreement fails to make any provision in respect of the relationship between the mechanism established by Protocol No 16 and the preliminary ruling procedure provided for in Article 267 TFEU, the Agreement envisaged is liable adversely to affect the autonomy and effectiveness of the latter procedure.³³ The comparison of the procedures will be done in the further chapter of this paper.

Finally, in this category of Court's objections we can find the Court's concern that the Accession Agreement is violating Article 344 TFEU which prescribes that Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.³⁴ This provision provides an exclusive jurisdiction to the CJEU regarding interstate disputes between MS concerning the Union law. This Article can also be understood as a specific expression

³⁰ ECHR App. No. 30696/09 (Jan. 21, 2011), par. 264 , further examples of difference in judgments between CJEU and ECtHR can be found in Daniel Halberstam, 'It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward', *German Law Journal* vol.16, 2015, pp. 105 – 146, 126 – 130

³¹ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454., par 194

³² Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454., par 197

³³ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454., par 197

³⁴ Consolidated Version of the Treaty Establishing the European Union [2010] OJ C 83/47

of the MS duty of loyal cooperation under Article 4(3) TEU.³⁵ The tension is obvious: Article 344 TFEU proscribes for Member States to only bring disputes concerning EU law before the CJEU, whereas Article 55 ECHR demands a settlement of disputes relating to the ECHR before the ECtHR by means of the inter-State cases procedure (Article 33 ECHR). The Court finds that proceedings under Article 33 ECHR by one MS against another, or between EU and MS, would violate the Article 344 and by that the autonomy of EU law.³⁶

Discussion about the Article 344 TEU (ex Article 292 TEC) can be found in the Court's jurisprudence previously only in the case *European Commission v Ireland (MOX Plant)*³⁷ *MOX Plant* concerned a dispute between Ireland and the United Kingdom regarding the commissioning of a mixed oxide (MOX) plant at Sellafield, on the British coast of the Irish Sea. The plant was designed to convert spent nuclear fuel into MOX, which can be used as fuel in light water nuclear reactors. In 2001, when the plant was about to become operational, Ireland initiated proceedings against the United Kingdom under both the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) and the United Nations Convention on the Law of the Sea (UNCLOS).³⁸ Legal disputes between Member States of the European Union occur rarely. More common, within the EC legal order, were cases brought by the Commission against Member States for alleged failures to respect Treaty obligations. In this case, the Commission brought the case against Ireland whether the case should have been heard at the EC level, rather than in the arbitral tribunal and was relying for the first time on Articles 292 EC and 192 EAEC. The CJEU said that to respect the court's exclusive jurisdiction "must be understood as a specific expression of the Member States' more general duty of loyalty".³⁹ Main difference in *MOX plant* and Opinion 2/13 reasoning can be found in the fact that the CJEU in Opinion 2/13 constructs a stricter approach by choosing not to follow an interpretation that would allow for agreements with dispute resolution provisions as long as they make it possible for the member states to comply with TFEU Article 344, as laid down in *MOX Plant*. According to the Opinion 2/13 the Member States cannot even be given a theoret-

³⁵ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454., par 202

³⁶ See on this issue also P. Eeckhout, 'The European Convention on Human Rights and Fundamental Freedoms as an Integral Part of EU Law – Some Reflections', in I. Govaere, E. Lannon, P. Van Elsuwege, S. Adam (eds.), *The European Union in the World: Essays in Honour of Marc Maresceau*, Leiden/Boston, Martinus Nijhoff Publishers, 2013, pp. 87-99.

³⁷ *Case C-459/03, European Commission v Ireland*[2011] ECR I-04635

³⁸ N. Schrijver, *The MOX Plant Case – A Litigation Saga Without a Pronouncement on the Merits*, in THE MOX PLANT CASE (IRELAND V. UNITED KINGDOM): RECORD OF THE PROCEEDINGS 2001-2008 1–18, 2 (Permanent Court of Arbitration ed., 2010).

³⁹ P. J. Cardwell and D. French, 'Who Decides? The ECJ's Judgment on Jurisdiction in the MOX Plant Dispute', *Environmental Law*, vol.19(1), 2010, pp. 121-129

ical possibility of breaching Article 344 TFEU. This not only departure from the earlier CJEU practice but also it is in contrast with the views of Advocate General Kokott.⁴⁰

MOX Plant and *Opinion 2/13* are both cases that concern mixed agreements with provisions on inter-party disputes. There are many mixed agreements that Union has already conducted and if they are viewed in the lights of *Opinion 2/13* reassigning they must be considered incompatible with Article 344 TFEU. For example a suit by one MS against another or against the EU within in the WTO can in the light of this reasoning be found incompatible with Article 344 TFEU. This is a situation that will not invalidate those agreements as a matter of public international law but the Union and the MS would be under the obligation to terminate those agreements, or to opt out of the conflicting dispute mechanism.⁴¹ To solve this there is a possibility to exclude the jurisdiction of the ECtHR in the disputes between EU and MS or MS against MS. It is a possibility, if it would be actable by other contracting parties of the Convention whereby they would be in the situation to relay on the practice of the CJEU on which they have no access. The question is why any of them would accept this solution, knowing they are not bound by the EU treaties, it is a pat position for the negotiators.

3.2. Institutional innovations those were included in the Accession Agreement

All the above disused objectives are related to the possibility that EU accession to the ECHR can possibly violate the autonomy and integrity of EU legal order and that the Accession Agreement did not significantly taken into account the specific characteristics of the EU law. This may give the impression that previously there was no discussion of the fact that EU is not a state (as the Court itself declares in this *Opinion 2/13*) that the EU cannot accede to the ECHR by merely depositing its ratification instruments, that EU does not fit into standard Convention system (due to the fact the EU will not accede to the Council of Europe, from whose budget the Convention system is financed, but only to the ECHR, the EU's financial contribution has to be negotiated) etc.⁴² But in fact, all the above mentioned specific characteristics of the EU's accession were previously broadly discussed in the accession negotiations and in literature.⁴³ This led to the introduction

⁴⁰ Opinion of Advocate General Kokott, Opinion Procedure 2/13, CJEU Case C-2/13, par. 107–200

⁴¹ S. Ø. Johansen, 'The Reinterpretation of TFEU Article 344 in Opinion 2/13 and Its Potential Consequences,' *German Law Journal* vol.16, 2015, pp. 169 – 178, 176 – 177

⁴² C. Krenn, 'Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13,' *German Law Journal*, vol. 16, 2015., pp. 147 – 168.; 150.

⁴³ T. Lock, 'The ECJ and the ECHR: The Future Relationship Between the Two European Courts,' *Law and Practice of International Courts and Tribunals* vol.8., 2009, pp. 375-398; T. Lock 'EU Accession to the ECHR: Implications for the Judicial Review in Strasbourg,' *European Law Review* vol.35., 2010, pp. 777-798 ; J. P. Jacqué, 'The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms,' *Common Market Law Review* vol 48. No. 4, 2011, pp. 995-1023.; T. Lock, 'Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Or-

of special institutional mechanisms, on which in the Opinion 2/13 the Court objects. The first one is the “co- respondent mechanism” which has the aim to ensure that, in accordance with the requirements of Article 1(b) of Protocol No 8 EU, proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the EU as appropriate.⁴⁴ It is the Courts opinion that this mechanism is not in accordance with the specific characteristics of EU law merely by the fact that this procedure would still require the ECtHR to assess rules of EU when deciding on the co-respondent.

Also, the Court objects to another institutional innovation: the prior involvement mechanism. This is the procedure would allow the CJEU to assess the compatibility of the EU law with ECHR before the case is heard in the ECtHR. On this procedure there was a discussion of the presidents of the two courts before it was included into the Accession Agreement ⁴⁵ Nevertheless, the CJEU found that the design of this mechanism would violate EU law. According to this procedure, the ECtHR would be called upon to decide whether the CJEU has already previously ruled on the same question. It is the Court’s opinion that merely by granting the ECtHR the power to access this question, the ECtHR would be called upon to interpret the EU law. ⁴⁶

Finally, the Court of Justice declares the that the Accession Agreement is incompatible with the specific characterises of EU law regarding the ECtHR competence in the field of Common Foreign and Security Policy of which there will be further elaboration in the next chapter.

IV. PROTOCOL NO 16 TO THE ECHR

As it is already stated, in the event of the accession, the ECHR would become an integral part of EU law. The CJEU found Protocol 16 to the ECHR very contentious. Namely, Protocol 16 permits the highest courts and tribunals of the Member States to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms guaranteed by the ECHR or the protocols thereto.⁴⁷

der’, 48Common Market Law Review 4, 2011, pp. 1034–37; T. Lock, ‘End of an epic? The draft agreement on the EU’s accession to the ECHR’, *Yearbook of European Law*, vol.31, no. 1, 2012, pp. 162-97

⁴⁴ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454., par 216

⁴⁵ *Joint Communication from Presidents Costa and Skouris*, CCBE (Jan. 24, 2011) http://www.ccbe.eu/file-admin/user_upload/document/Roundtable_2011_Luxembourg/Joint_communication_from_Presidents_Costa_and_Skouris_EN.pdf (accessed 15 June 2015)

⁴⁶ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454., par 229-234.

⁴⁷ See art. 1 of the Protocol 16. Notion: protocol 16 is not yet in force.

The AG Kokkot named this mechanism as a “voluntary preliminary ruling procedure in the ECHR system”⁴⁸

The CJEU found that the mechanism established by that protocol could affect the autonomy and effectiveness of the preliminary ruling procedure provided for by the Article 267 TFEU. It would become a problem in cases where rights guaranteed by the Charter correspond to rights secured by the ECHR. There is a risk that the preliminary ruling procedure might be circumvented. The CJEU considers that the draft agreement fails to make any provision in respect of the relationship between those two mechanisms.⁴⁹

We would like to highlight a few controversial conclusions by the CJEU. Firstly, the Protocol No 16 is not among the legal instruments to which the EU is to accede in accordance with the draft agreement. It is not even entered into force to date. According to the Opinion of the AG Kokkot, this protocol should not have been the subject of review by the CJEU.⁵⁰ The CJEU did so-called “*ex ante* attack.”⁵¹ As it is noticed by the Lazowski, the Court did not offer any solution that would be satisfying.⁵²

Secondly, the CJEU prevented the accession to the ECHR but problem still remains. Even without accession, Member States who ratified the protocol can ask advisory opinions from the ECtHR instead of referring to the CJEU.⁵³ We are sharing the opinion that this problem is already solved by the EU treaties. The Article 267(3) TFEU takes precedence over national law and thus also over any international agreement that may have been ratified by individual Member States of the EU, such as Protocol No 16 to the ECHR.⁵⁴ Namely, according to Article 267(3) TFEU the courts of last instance are in obligation to refer the questions to the CJEU. If they infringe its obligation, there is possibility to engage called infringement proceeding against the member state. Our conclusion is that the threat of Protocol No 16 to the preliminary reference procedure exists with or without EU accession to the ECHR.

⁴⁸ Opinion of Advocate General Kokott, Opinion Procedure 2/13, CJEU Case C-2/13 par. 137.

⁴⁹ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454, par. 197-198

⁵⁰ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454, par. 138. Same view is shared by other authors. See e.g.: Adam Lazowski, Ramses A. Wessel, ‘When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR’ (2015) German Law Journal 16, 179 – 21,

⁵¹ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454, par. 192.

⁵² Lazowski, Wessel (n 27).

⁵³ See more at: <http://europeanlawblog.eu/?p=2731#sthash.goNn6mZJ.dpuf>, (accessed 20 August 2015)

⁵⁴ Opinion of Advocate General Kokott, Opinion Procedure 2/13, CJEU Case C-2/13, par 14.

V. COMMON FOREIGN AND SECURITY POLICY

It should be noted at the begging of the elaboration that the Common Foreign and Security Policy is *de facto* specific and clearly separate from other EU policies. It is only policy regulated by the TEU⁵⁵ it has specific instruments⁵⁶, *sui generis* competence and indeed represents a separate pillar. It should also be noted that it is prescribed in the Article 24(1) TEU that the CJEU shall not have jurisdiction with respect to the CFSP, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union.⁵⁷ Article 275 prescribes that the first exception of Court non jurisdiction in the CFSP is to monitor Art 40 TEU (the relationship between CFSP and other areas of external action). The second exception is set out in Art 263 (4) TFEU (reviewing the legality of restrictive measures against natural or legal persons). The problem is clear, the Accession Agreement does not exclude the jurisdiction of the ECtHR regarding the CFSP matters. To use the language of the Court in the Opinion 2/13 “ the ECtHR would be able to rule on the compatibility with the ECHR of certain acts, actions or omission preformed in the context of the CFSP”⁵⁸ meaning that ECtHR will have jurisdiction in the part of the EU law where the CJEU jurisdiction is explicitly excluded.

The Court’s jurisdiction in the field of CFSP has been analysed broadly in the literature,⁵⁹but still there is no answer what is the scope of the Court’s jurisdiction. Moreover, the Court itself states in the Opinion 2/3 that the Court has not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters as a result of those provisions.⁶⁰ Jurisdiction over CFSP that has not been delegated to the CJEU

⁵⁵ Article 21 – 46 TEU regulate the external actions and CFSP all the other Eu’s external policies (and other policies are regulated in TFEU

⁵⁶ Article 25 TEU

⁵⁷ Article 24 (1) TEU

⁵⁸ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454. , par 254

⁵⁹ L. Saltinyté, ‘Jurisdiction of the European Court of Justice over issues relations to the Common Foreign and Security Policy under the Lisbon Treaty’, *119 Jurisprudence*, 2010, p.261 ; S. Griller, ‘The Court of Justice and the Common Foreign and Security Policy’, in A. Rosas, E. Levits and Y. Bot (eds), *Court of Justice of the European Union - Cour de Justice de l’Union Européene, T.M.C. Asser Press*, 2013, pp. 675-692; Bart van Vooren and Ramses A.Wessel, *EU External Relations Law – Text, Cases and Materials*, Cambridge, Cambridge University Press , 2014; C Hillion, ‘A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy’, in M. Cremona and A. Thies (eds), *The ECJ and External Relations: Constitutional Challenges*, Oxford, Hart Publishing, 2014; R.A. Wessel, ‘Resisting Legal Facts: Are CFSP Norms as Soft as They Seem?’, *2 European Foreign Affairs Review*, 2015, pp. 123-145.

⁶⁰ Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] ECLI:EU:C:2014:2454., par 251

stays in the jurisdiction of national courts of MS.⁶¹ Basically; until the CJEU clarifies its jurisdiction under Article 275 TFEU Member States high courts will have final say in the interpretation of the Charter rights in some CFSP matters. The Treaty in its article 19(1) TEU suggest that MS courts are courts of the Union, meaning that when MS interprets the EU law in CFSP matter they have an obligation to take into account the EU law, but there is no control of the behaviour in this matter. It is the fact, that goes from the ECtHR UN- related case law⁶² that ECtHR can adjudicate CFSP- related actions only indirectly (only insofar as the actions is at least partly attributed to a Member State). If MS is partly responsible, the ECtHR will charge the MS with liability under ECHR for the MS own EU related CFSP activity.⁶³ Of course, if the action is exclusive under the EU actions, the ECtHR has no jurisdiction in protection of human rights.

At this point, we will do the jurisdiction analysis to answer the question: if the EU would join the ECHR, will the human rights protection in the CFSP matter be better? The analysis will look at CJEU judgments in the field of CFSP and see how many there are and what rights under ECtHR could be protected if the EU would access the ECHR.

When we search Eurlex Domain: EU law and related documents, Subdomain: EU case law, Results containing: "Common foreign and security policy" In title and text, we get 411 results, of which there is 170 CFSP subject related judgments, of which there is 72 successful actions for annulment of the restrictive measure; 52 unfound actions of annulment and 30 inadmissible actions of annulment.⁶⁴

We will look at the unfound actions of annulment of restrictive measures imposed on certain persons. The reason is that the ECHR proscribes the reasons for admissibility. Not to elaborate all the reasons, we will focus on two-admissibility criteria as a filter the selection of judgments on which the article will refer.⁶⁵ First criteria, the Court may receive applications from any person, non-governmental organisation or group of individuals⁶⁶ As it is broadly described in "The Practical Guide on Admissibility Criteria for the ECtHR" there are strict condition for "non-governmental" organisation, to avoid going into analysis if the legal persons who are applicants in CJEU proceeding are satisfying the

⁶¹ Article 274 TFEU

⁶² *Al Jedda v. United Kingdom*, ECHR App. No. 27021/08 (July 7, 2011). Cf. Marko Milanovic, Al-Skeini and Al-Jedda in Strasbourg, 23 EUR. J. INT'L L. 121 (2012).

⁶³ Halberstam (n 30), p. 139

⁶⁴ The search was done 06 July 2015 : http://eur-lex.europa.eu/search.html?textScope=ti-te&qid=1436172994060&CASE_LAW_SUMMARY=false&DTS_DOM=EU_LAW&type=advanced&lang=en&andText0=%22common%20foreign%20and%20security%20policy%22&SUBDOM_INIT=EU_CASE_LAW&DTS_SUBDOM=EU_CASE_LAW&CT_CODED=PESC

⁶⁵ The Practical Guide on Admissibility Criteria http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf (accessed 6 July 2015)

⁶⁶ Article 34 ECHR

ECtHR criteria, for the purpose of this analysis we will use the CJEU judgments relating only to individuals. Second criteria used, the Court may only deal with the matter after all domestic remedies have been exhausted.⁶⁷ So, here we can look at the possible application from individuals that have exhausted domestic (meaning here EU proceedings having in mind the fact that they have started the annulment procedure of the restrictive measure against them which was by the CJEU decided to be unfound. It is important to notice that the authors will not go into subject matter analysis of any of the judgments or legality of the restrictive measures (it is the Courts jurisdiction to do so) but purely analyse the reasons for the action for annulment as a possible ground for ECtHR proceeding.

Of in total 52 CJEU unfound annulment procedures against restrictive measures imposed on certain persons and entities, in 25 of them the applicants are individuals and in the 27 of them applicants are legal persons. In each of the analysed judgments we can find that applicants state the “fundamental rights protection” as a reason for action for annulment. It is noticeable that after Charter of fundamental rights become binding the application for annulment are specifying the fundamental rights from Charter : right to property, right to respect for private life, rights of the defence, right to effective judicial protection etc. Needless to say, all this rights are also guaranteed by the ECHR. Thus, if the EU will access the ECHR in this situations the applicants will be able (if they fulfil all other admissibility criteria) to ask for protection of their fundamental right in front of the Strasburg court.

VI. CONCLUSION

On 18 December 2014 the CJEU gave the negative Opinion 2/13 on the EU accession to the ECHR. The Opinion 2/13 consists of 258 paragraphs, it is a rather long judgment, but as far as the substance is concerned, only last 114 paragraphs present the position of the CJEU. The Court in this introductory section repeats already well recognised principle that the EU is a *sui generis* autonomous legal order. Solely reason for the emphasis of a well-established principle can be found in the context of the whole judgment, whereas the violation of the integrity and autonomy of the EU legal order presents not one but it can found in all the reasons for incompatibility of the Accession Agreement with the EU treaties. If we know that all the countries that have signed the ECHR and members of the Council of Europe also have autonomous legal order, to the general public it can seem strange that this in fact can be solely reason for incompatibility. But if we look the Opinion from the angle of the Court to Court relations it is clear that the accession will violate integrity and autonomy of the CJEU which has to be understood as a basic reason for the CJEU decision.

⁶⁷ Article 35 (1) ECHR

Of all the mention reasons for incompatibility (Article 53 of the ECHR; Principle of 'mutual trust' between EU Member States; Protocol No 16 to the ECHR; Article 344 TFEU) ; institutional innovations (The co-respondent mechanism and the procedure for the prior involvement of the Court of Justice) and the specific characteristics of EU law as regards judicial review in CFSP matters, this article has put an emphasis on two : Protocol No 16 to the ECHR and specific characteristics of EU law as regards judicial review in CFSP matters and has produces further conclusions :

Regarding the Protocol No 16 it is firstly important to stress that the Protocol is not among the legal instruments to which the EU is to accede in accordance with the draft agreement. It is not even entered into force to date. Secondly, the CJEU prevented the accession to the ECHR but problem remains. Even without accession, Member States who ratified the Protocol can ask advisory opinions from the ECtHR instead of referring to the CJEU. We are sharing the opinion that this problem is already solved by the EU treaties. Namely, according to Article 267(3) TFEU the courts of last instance are in obligation to refer the questions to the CJEU. If they infringe its obligation, there is possibility to engage so-called infringement proceeding against the member state. Our conclusion, regarding the matter of Protocol No 16 is that the threat of Protocol 16 to the preliminary reference procedure exists with or without EU accession to the ECHR

On the question relating to the incompatibility of the Accession Agreement with the specific characterises of the EU law regarding the judicial review of the CFSP it is evident that CJEU rejects to define the extent to which its jurisdiction is limited in CFSP matters and that there is a number of legal situation where the CJEU has no jurisdiction. Within the analysis of the jurisprudence of the CJEU related to the Article 263(4) TFEU that exists so far, even though the extent of CJEU jurisdiction is not defined, we have concluded that there are may request for the procreation of fundamental rights that could be addressed in front of the ECtHR if the EU would accede the ECHR. In all the analysed judgments, the applicants stated the "fundamental rights protection" as a reason for action for annulment. Thus, if the EU will access the ECHR in this situations the applicants will be able (if they fulfil all other admissibility criteria) to ask for protection of their fundamental right in front ECtHR Consequently, it would possibly lead to the higher protection of fundamental rights.

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WELFARE RIGHTS IN THE CROATIAN CONSTITUTION

Abstract:

The idea that human rights involve the right not to be hungry, the right to healthcare, the right to an adequate income or the right to primary education acquired omnipresent characteristics after World War II when these rights became part of international conventions on human rights protection as well as part of national constitutions. The scope of human rights has thus been greatly expanded, which has faced some resistance. This paper is aimed at clarification of the nature of welfare or socio-economic rights and reasons behind their inclusion in fundamental human rights and their incorporation in constitutional texts. This first part of the paper elaborates specific philosophical criticism addressed to this group of rights: the criticism that challenges their universality and inalienability. The primary goal of the second part of the paper is to investigate the referring provisions of the Croatian Constitution and depict the ways in which the Constitutional Court of the Republic of Croatia interprets and thus tailors welfare rights.

Key words: *welfare rights, universality, inalienability, dignity*

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I. INTRODUCTION

Welfare rights belong to the so-called second-generation rights and are as such not incorporated in the 1776 U.S. Declaration of Independence or the 1789 French Declaration of the Rights of Man and of the Citizen.¹ These 18th-century declarations on "the rights of man"² contain only what is called today classic first-generation rights³ which primarily protect an individual from abuse of discretionary powers.⁴ These are, before all, the rights to the protection of personal liberty and to the protection of political freedom.⁵ They encompass the rights to the judicial protection of these liberties: "the right to the rule of law", "habeas corpus", and the right to "accountable public administration".⁶ These rights are often denoted as liberty rights.⁷

The idea that human rights involve the right not to be hungry, the right to healthcare⁸, the right to an adequate income or the right to primary education was brought to daylight much later. After World War II, these rights became part of international conventions on human rights protection as well as part of national constitutions.⁹ The scope of human rights has thus been greatly expanded, which has faced some resistance. What emerged was ideological and philosophical resistance to the newly generated rights. The ideological battle was fought between the advocates of liberal capitalism who thought that the term of rights should be restricted to civil and political rights only and those who claimed that first-generation rights mean nothing without enjoyment of economic and social benefits by an individual and that both sets of rights are equally important, some even high-

¹ A. Sen, "Elements of a Theory of Human Rights", *Philosophy & Public Affairs*, vol. 32, no. 4, 2004, p 346.

² Sen, pp. 316-317.

³ Sen, p. 346.

⁴ G. Zagrebelsky, "Ronald Dworkin's Principle Based Constitutionalism: An Italian Point of View", *Int J Constitutional Law*, vol. 1, no. 4, 2003, p 642.

⁵ Sen, *Philosophy & Public Affairs*, p. 317.

⁶ O. O'Neil, "The Dark Side of Human Rights", *International Affairs*, vol. 81, no. 2, 2005, p 428.

⁷ O'Neil, p. 428.

⁸ Sen, *Philosophy & Public Affairs*, 345.

⁹ Sen, pp. 316-317.

The terms welfare rights or socio-economic rights are used as synonyms in this paper. This is due to their broad application in the respective literature for denotation of this group of rights. Although some authors, like O'Neil, raise the doubt about the appropriateness of the term of welfare for depiction of this group of rights. O'Neil warns that this term blurs the true nature of these rights which substantially appear as the rights to goods and services and as such contribute to the welfare of their recipients (O'Neil, *International Affairs*, pp. 427-428). She would strongly disagree with De Burca's definition of this group of rights. De Burca sees them as "a category of rights which concern economic and social wellbeing" (G. De Burca, "The Future of Social Rights Protection in Europe" in G. De Burca and B. De Witte (eds.), *Social Rights in Europe*, Oxford University Press, 1 edition, 2005, p. 3).

lighted the greater relevance of economic and welfare rights for human flourishing.¹⁰ The United States belong to the group of states which in the period after World War II or more precisely, at the time of the preparation of an International Bill of Human Rights, did not completely embrace the concept of economic, social and cultural rights and were not willing to accept the obligations of their fulfilment.¹¹ Moreover, the United States is still today featured by the prevalent standpoint that economic, social and cultural rights should be subordinated to civil and political rights.¹²

Unlike the United States, contemporary Europe has mainly acknowledged welfare rights. They have been incorporated in most constitutions and are protected within the framework of the Council of Europe and the European Union. For that reason, the second chapter of the paper first offers a short appraisal of their current status in Europe and then focuses on the philosophical legal discussions on the nature of welfare rights and on preferable mechanisms for their protection. Today a great number of authors deal with this issue, trying to determine the features of welfare rights and their relation towards the civil and political rights laid down in the first declarations of human rights. There is no consent about the criteria that differentiate them, so those who assert that the difference between these two sets of rights is “ambiguous” and disputable seem to be right.¹³

The primary goal of the third chapter of this paper is to investigate the referring provisions of the Croatian Constitution and depict the ways in which the Croatian Constitutional Court interprets and thus tailors welfare rights.

II. PHILOSOPHICAL REFLECTIONS ON WELFARE RIGHTS

This chapter is divided into three sections. The first section presents the current status of welfare rights in Europe. The second one centres on the philosophical critiques of

¹⁰ C. Fabre, “Social Rights in European Constitutions” in G. De Burca and B. De Witte (eds.), *Social Rights in Europe*, Oxford University Press, 1 edition, 2005, p. 2.

¹¹ The 1948 Universal Declaration of Human Rights comprises both sets of rights. The subsequent division of human rights into two main categories resulted from the controversial decision of the UN General Assembly made in 1951. More precisely, while drafting an International Bill of Human Rights, the General Assembly decided that two separate covenants on human rights should be enacted. The reason for such a decision was primarily of ideological nature, i.e. particular states were unwilling to accept the duty of fulfilment of economic, social and cultural rights. Those states were thus given a possibility to adopt only those provisions of the International Covenant on Civil and Political Rights, which they found indisputable (A. Eide, “Economic, Social and Cultural Rights as Human Rights” in A. Eide, C. Krause and A. Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook*, Martinus Nijhoff, 2nd Revised edition, 2012, pp. 9-12).

¹² Fabre, *Social Rights in Europe*, p. 20.

¹³ J. Vande Lanotte and T. De Pelsmaeker, “Economic, Social and Cultural Rights in the Belgian Constitution” in P. Van der Auweraert, T. De Pelsmaeker, J. Sarkin and J. Vande Lanotte, (eds.), *Social, Economic and Cultural Rights: An Appraisal of Current European and International Developments*, Antwerpen-Apeldoorn, Maklu, 2002, p. 264.

welfare rights. Due to limited space, this section is largely confined to the criticism that denies the universality and inalienability of welfare rights. After offering a critical analysis of this set of rights, the third section promotes the conclusion that the philosophical foundations of both sets of rights are the same and that the integral approach is the most complete approach to rights.

2.1. Welfare Rights in Europe

As stated in the introduction, the United States is dominated by the liberal legal tradition and human rights are regarded there as a tool for protection from abuse of the discretionary powers of the government.¹⁴ Welfare rights requiring creation and adoption of public policies which promote the wellbeing and the rights of socially disadvantaged people do not fit well into this idea. Those tasks, from the liberal viewpoint, should be performed by the legislative and not by the judicial branch of government. The concept of welfare rights implies complex "re-distribution" which should not belong to the competences of the judiciary.¹⁵ Unlike civil and political rights, these rights do not shed light on personal liberty but on "economic justice".¹⁶

Europe has promoted a different concept of constitution and constitutional rights. European constitutions contain principles requiring that the rights of individuals are adapted to general interests.¹⁷ For instance, Article 41 of the Italian Constitution reads as follows:

"Private economic enterprise is free. It may not be carried out against the *common good* or in such a manner that could damage safety, liberty and human dignity. The law shall provide for appropriate programmes and controls so that public and private-sector economic activity may be oriented and co-ordinated for *social purposes*"(emphasis added).¹⁸

Based on examination of 29 constitutions of the EU Member States and states striving to join the EU, Cecil Fabre has concluded that there is a common "European culture of social justice".¹⁹ A welfare state is the central concept of the European model.²⁰ Even though there are differences between states in this view, what they all have in common is the fact

¹⁴ Zagrebelsky, *Int J Constitutional Law*, p. 642.

¹⁵ Fabre, *Social Rights in Europe*, p. 15.

¹⁶ De Burca, *Social Rights in Europe*, p. 3.

¹⁷ Zagrebelsky, *Int J Constitutional Law*, p. 642.

¹⁸ Constitution of the Italian Republic (1948), with Amending Acts, https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf, (accessed 10 September 2015).

¹⁹ De Burca, *Social Rights in Europe*, p. 5

²⁰ Although it is today facing great challenges. See Fabre, *Social Rights in Europe*, p. 16.

that with respect to constitutional provisions, they explicitly or implicitly refer to human dignity and equality and in most cases enumerate a number of welfare rights such as the right to education, healthcare and social assistance.²¹

When it comes to constitutional provisions on human dignity, Belgium and Italy explicitly mention dignity in their constitutions.²² Article 23 of the Belgian Constitution reads as follows: "Everyone has the right to lead a life in keeping with human dignity". Since it says "everyone", it means that both Belgians and foreigners are holders of this right. This right is intrinsic to human nature and all the human beings are its holders.²³

Article 3 of the Italian Constitutions stipulates as follows: "All citizens have *equal social dignity* and are *equal* before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions" (emphasis added).

Equality and social justice are some of the highest values of the constitutional order of the Republic of Croatia and represent a foundation for constitutional interpretation.²⁴

The modern age is often designated as "the era of dignity".²⁵ Dignity is omnipresent and is regularly regarded as the foundation of the concept of human rights.²⁶ However, although European constitutions propagate human dignity, they do not define it clearly themselves.²⁷ This is a usual characteristic of constitutional provisions. Constitutional provisions as superior norms in a particular state are more indeterminate than the norms

²¹ Fabre, p. 16

²² The Constitutions of the Czech Republic, Finland, Italy and Portugal explicitly call upon dignity too. Fabre, p. 23.

²³ The Belgian Constitution (constitutional revisions of 6 January 2014, Belgian Official Gazette of 31 January 2014), http://www.const-court.be/en/basic_text/belgian_constitution.pdf, (accessed 10 September 2015). See Vande Lanotte and De Pelsmaeker, *Social, Economic and Cultural Rights*, p. 266.

²⁴ Art. 3 of the Croatian Constitution. The Constitution of the Republic of Croatia, translation by B. Smerdel and A. Horvat Vuković, Zagreb, Novi informator LLC, 2010.

²⁵ S. Hennette-Vauchez, When Ambivalent Principles Prevail. Leads for Explaining Western Legal Orders' Infatuation with the Human Dignity Principle, EUJ Working Papers, LAW 2007 /37, p. 3.

²⁶ Hennette-Vauchez, p. 4.

Both, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in their preambles contain provision that human rights "derive from the inherent dignity of the human person". See: International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <https://treaties.un.org/Home.aspx?lang=en>, (accessed 1 May 2015), and International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 and vol. 1057, p. 407, available at: <https://treaties.un.org/Home.aspx?lang=en>, (accessed 1 May 2015).

²⁷ C. Fabre, *Social Rights under the Constitution – Government and the Decent Life*, Oxford, Oxford University Press, 2000, p. 94.

placed lower in the hierarchy – statutory provisions and administrative regulations and therefore, they are more prone to judicial interpretation.²⁸

In her research of welfare rights and their meaning, Fabre leans on the philosophical, religious and political discussions which constitute the foundation of the European legal culture: "human beings have a special moral status, in that they have attributes such as the capacity for moral and rational agency which no other being has. Moreover, they have that capacity to the same degree. Accordingly, in so far as they have equal moral worth, they should be treated with equal concern and respect."²⁹

Fabre clearly differentiates between the phrase "treating with concern" and the phrase "treating with respect". If someone is treated with concern, it means that his/her interests to lead a "minimally decent life" are credited and that his/her right to life and to be provided with assistance in obtaining means for leading such a life is respected. On the other hand, if someone is treated with respect, it implies that this is a rational person capable of moral action. It is this formulation that sets grounds for some welfare rights such as the right to an adequate income. Constitutions which grant the right to the minimum wage acknowledge that individuals are capable of obtaining, through their work, necessary means for leading a decent life.³⁰

Accordingly, Article 56 (1) of the Croatian Constitution prescribes as follows: "Each employee shall be entitled to remuneration enabling him/her to ensure a free and suitable life for himself/herself and his/her family."

However, the meaning of the phrase minimum income is not, nor it is desirable, strictly defined. In the modern world, minimum income cannot only be regarded as the thing that satisfies the "subsistence need", i.e. the need for food, water, clothing and shelter, but also as the thing that satisfies social needs, i.e. the need for public transportation, internet, phone etc. If in contemporary societies these needs are not satisfied, individuals cannot be autonomous and they cannot lead a "minimally decent life".³¹ Adequate income resulting from inclusion of both types of needs depends on the social and economic development of a certain country.³²

²⁸ M. Kumm, "Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice. A Review Essay on A Theory of Constitutional Rights", *Int J Constitutional Law*, vol. 2, no. 3, 2004, p. 574.

²⁹ Fabre, *Social Rights in Europe*, p. 24.

³⁰ In Fabre's opinion, European constitutions would show much less respect to those in need if they were provided with food or clothes instead of pecuniary aid (Fabre, p. 24).

³¹ Fabre, p. 17.

³² Fabre, p. 17.

2.2. Reflections on Some Issues Concerning Welfare Rights

This section of the paper elaborates specific criticism addressed to this group of rights. We investigate the critiques of the appropriateness of the use of word right in the context of welfare rights and the disagreements on their nature. The purpose of this section of the paper is to shed light on the distinctive features of these rights and to provide an answer to the question whether welfare rights can be qualified as universal and inalienable human rights.

2.2.1. “Rights against everyone” and “rights against someone”³³

Universal rights refer to all at all times.³⁴ The liberty rights laid down in the first declarations are deemed universal as well as are their correlative obligations. These are rights that can be violated by everyone and hence they are directed towards all the other individuals and institutions.³⁵ When it comes to the determination of one of the fundamental human rights – the right to life, it is not known whom this right is addressed to.³⁶ Yet, since the type of a duty imposed by this right is negative, the addressee is required not to interfere with the right to life and this duty can be violated by everyone or in other words, the right to life is a right against all.³⁷

Indeed, the right of person A to life is “a conjunctive right” against everyone.³⁸ It is “a bundle of rights” possessed by an individual against person C, person D and person E...³⁹ Such negative rights with the correlative duties of non-interference do not come into mutual conflicts. They are all realisable since they do not require that individuals are provided with particular scarce resources.⁴⁰ In this regard, the following sentences of Charles Fried can be instructive: “Indeed, we can fail to assault an infinity of people every hour of the day. Indeed, we can fail to lie to them, fail to steal their property, and fail to sully their good names – all at the same time”.⁴¹ Fried therewith suggests that it is logically possible

³³ The title has been borrowed from: M. Stepanians, “Perfecting Imperfect Duties via Institutionalization” in J.-C. Merle (ed.), *Spheres of Global Justice: Volume 2 Fair Distribution- Global Economic, Social and Intergenerational Justice*, Springer Netherlands, 2013, p. 591.

³⁴ Fabre, *Social Rights under the Constitution*, p. 26.

³⁵ O’Neil, *International Affairs*, p. 428.

³⁶ Stepanians, *Spheres of Global Justice*, p. 591.

³⁷ Everyone can perform negative action required by its correlative duty. Stepanians, p. 591.

³⁸ Stepanians, p. 591.

³⁹ Stepanians, p. 591.

⁴⁰ Fabre, *Social Rights under the Constitution*, p. 28.

⁴¹ C. Fried, *Right and Wrong*, Cambridge, Mass., Harvard University Press, 1987, 16-17, quoted according to Fabre, p. 28.

to simultaneously respect an indefinite number of negative rights, which cannot be said, at least to the same extent, for welfare rights.⁴²

After this short overview of the features of liberty rights, one has to raise the question if welfare rights are universal. Welfare rights include, unlike liberty rights, the positive rights to food, shelter, healthcare and subsistence.⁴³ Many wonder if the language of rights is convenient in this context at all.⁴⁴

In order to qualify rights as rights in the full sense of that word, they should be defined by their providers.⁴⁵ What is needed here is coincidence between a genuine right and "its precisely formulated correlative duty".⁴⁶ O'Neil stresses that such coincidence exists only when a certain right is institutionalized. Therefore, this set of critiques of welfare rights is called "institutionalization critique".⁴⁷ Pursuant to O'Neil, welfare rights (can and) must be institutionalized in order to be regarded as rights.⁴⁸

O'Neil's "institutionalization thesis" is based on her classical "relational" comprehension of rights.⁴⁹ The full statement of the classical relation between rights and duties comprises three elements: "the holder of the right", "the content of the right" and "the bearer of the correlative duty".⁵⁰

Like liberty rights, welfare rights are also claim-rights which are directed towards those who are bound by correlative obligations.⁵¹ Rights are seen as one side of the nor-

⁴² Fabre, p. 40. See section 2.2.3 "The conflict objection".

⁴³ K. Eddy, "Welfare Rights and Conflicts of Rights", *Res Publica*, vol. 12, 2006, p. 337.

⁴⁴ Fabre, *Social Rights in Europe*, p. 15.

⁴⁵ O'Neil, *International Affairs*, pp. 427-428.

⁴⁶ Sen, *Philosophy & Public Affairs*, p. 346.

⁴⁷ Sen, p. 346.

⁴⁸ Sen, p. 346.

⁴⁹ Stepanians, *Spheres of Global Justice*, p. 587.

Influential proponents of the interest theory of rights interpret the relation between rights and duties in a different way. Namely, MacCormick and Raz equalize rights with relevant interests. Rights are interests strong enough to support the correlative duties of others. Existence of rights does not always entail existence of the duties of others (Stepanians, p. 588, n. 1).

⁵⁰ Stepanians, p. 588.

⁵¹ O'Neil, *International Affairs*, p. 430.

O'Neil calls them the rights to goods and services and designates them as claim-rights or entitlements (O'Neil, p. 430). On the other hand, Alexy confines the term of entitlements to the rights to positive action by the state (R. Alexy, *A Theory of Constitutional Rights* (Introduction and Translation Julian Rivers), Oxford, Oxford University Press, 2004, p. 294).

When mentioning rights, O'Neil means the Hohfeldian claim-rights. She even classifies liberty rights as rights which main constituent is the claim-right against others to abstain from interference. Consequent-

mative relation between a right holder and a duty holder. They are viewed normatively or prescriptively but not aspirationally.

“For to say that someone, P, has a right to something, A, is not merely to say that it would be good or desirable for P to get A. It amounts to the much stronger claim that P *must* get A, and that third parties, upon whom it is incumbent to respect the right, do not have a choice in the matter (unless P releases them from their obligation).“⁵²

Human rights would make no sense if there were no corresponding duty of action or abstaining from action. If someone possesses rights, there must be “identifiable others” and these can be all or “specified others” with the correlative duties.⁵³ Unlike rights which have to be accompanied with corresponding (correlative) duties, the latter may exist even if there are no correlative rights. These are the so-called imperfect duties which are usually perceived as moral obligations and not as, as believed by O’Neil, “an obligation of justice with counterpart rights.”⁵⁴ “From the viewpoint of the agent”, the duty to help or provide assistance is “imperfect” unless it has been made complete (perfect) by establishment of corresponding institutions.⁵⁵

If international documents or constitutional texts do not include an unambiguous definition of the bearer of the correlative duty, such rights cannot be exercised.⁵⁶ Their content thus becomes incomprehensible.⁵⁷ The International Covenant on Economic, Social and Cultural Rights “allocates” the duty to respect these rights to the signatory states.⁵⁸ These duties are special (institutional) and not universal. Even when it comes to welfare rights set out in constitutions, the duty of their implementation is mostly reserved to states.

For example, the constitutional right to adequate housing is not a right against all. This is a disjunctive right against someone. This someone can be person A, person B or per-

ly, welfare rights occur to be “paradigmatic cases of claim rights” (Stepanians, *Spheres of Global Justice*, p. 588, n. 2).

⁵² Fabre, *Social Rights in Europe*, p. 18.

⁵³ O’Neil, *International Affairs*, p. 431.

⁵⁴ O’Neil, p. 430.

⁵⁵ Stepanians, *Spheres of Global Justice*, p. 587.

Kant was first to mention the difference between perfect and imperfect obligations (Sen, *Philosophy & Public Affairs*, pp. 321–322. See I. Kant, *Critique of Practical Reason* (1788), trans. L. W. Beck, New York, Bobbs-Merrill, 1956).

⁵⁶ O’Neil, *International Affairs*, p. 428.

⁵⁷ O’Neill, *Towards Justice and Virtue*, pp. 131–32, and *Bounds of Justice*, Cambridge, Cambridge University Press, 2000, cited according to Sen, *Philosophy & Public Affairs*, p. 346.

⁵⁸ O’Neil, *International Affairs*, p. 431.

son C.⁵⁹ In that manner, the Slovenian Constitution prescribes that the state is obliged to “create opportunities for citizens to obtain proper housing”.⁶⁰ The right to positive action implies respective obligations which cannot be fulfilled by everyone.⁶¹

O’Neil thinks that the difference between positive and negative rights is not simple that one can assume that liberty rights are rights against all and welfare rights rights against certain persons.⁶² Institutions for implementation of liberties require allocation of obligations “to specified others” and not to all. O’Neil asserts that the first order obligations to respect liberty rights have to be universal. Still, second order obligations or the obligations to ensure respect for universal liberty rights must be allocated. In the eyes of O’Neil, there can be no “effective accountability of public administration” without institutions that allocate tasks to particular “office holders” and keep them responsible for the task performance. However, holds the author, the difference between these sets of rights keeps on being evident. In fact, in case of liberty rights with universal effect, it is clear who can violate them whereas in the event of welfare rights, this is not known before allocating the obligation of their implementation.

Amartya Sen rejects the institutional critique of welfare rights and the assumption that all the rights have to be supplemented with correlative obligations. According to Sen, the ethical importance of economic, social and cultural rights provides firm foundation for their exercise “through institutional expansion and reform”. One of the ways to achieve this is involvement of social organizations in “demanding and agitating for appropriate legislation” and “social monitoring”.⁶³ In case of violation of fundamental human rights, individuals and social groups have the imperfect obligations to put pressure on the authorities for the purpose of initiating institutional changes.

2.2.2. *Structure of welfare rights*

There is a feature of positive rights, explaining the more limited role of courts in their enforcement.⁶⁴ Positive and negative rights are structurally different.⁶⁵ In terms of welfare rights, political branches have a greater degree of discretion in the specification of action

⁵⁹ Stepanians, *Spheres of Global Justice*, p. 47.

⁶⁰ Constitution of the Republic of Slovenia, Official Gazette of the Republic of Slovenia No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13, <http://www.us-rs.si/media/constitution.pdf> (accessed 10 September 2015).

⁶¹ Stepanians, *Spheres of Global Justice*, p. 47.

⁶² O’Neil, *International Affairs*, p. 428.

⁶³ Sen, *Philosophy & Public Affairs*, p. 346

⁶⁴ Kumm, *Int J Constitutional Law*, p. 586.

⁶⁵ Kumm, p. 586.

which needs to be performed.⁶⁶ Regarding this structural difference, Robert Alexy emphasizes that negative (defensive) rights are "prohibitions on destroying, adversely affecting, and so on, directed to the addressee".⁶⁷ On the other hand, positive rights, which he calls entitlements, are "commands to protect" and "support". When it comes to negative rights, every act leading to destruction or harmful consequences is prohibited. Consequently, believes Alexy, prohibition of killing entails prohibition of every "act of killing".

In the event of positive action, every act of protection or support is not required. Indeed, a rescue command does not include every act of rescuing. As an example, Alexy mentions a drowning man and to rescue him, it is necessary to perform only one of the possible acts of rescuing, e.g. to throw him a lifebelt. It is not inevitable to swim towards him or send him a lifeboat. It means that it is sufficient to try one of the alternatives, either the first, second or third one.⁶⁸ Unlike negative obligations which have a conjunctive structure, positive obligations have a disjunctive structure.⁶⁹ It suggests that the addressee of the rescue command is provided with discretion with respect to which possible act of rescuing he/she is going to perform.⁷⁰

Pursuant to Alexy, the reason for the difference is hidden in the fact that "refraining from each individual destructive or adverse act is a necessary condition, and only refraining from all destructive and adverse acts is a sufficient condition for satisfying the prohibition". On the other hand, Alexy underlines that fulfilment of a positive right requires adoption of only one "suitable protective or supporting act".⁷¹

Alexy finds this difference between defensive rights and entitlements in the case-law of the Federal Constitutional Court of Germany. This Court holds that the state should have "the protective duty", but also accentuates that the way how to fulfil this duty "in the first instance" is a matter of the legislator. In the judgement in the *Schleyer* case, the Court, regarding Article 2 (2) (1) in conjunction with Article 1 (1) (2) of the Basic Law (*Grundgesetz*) which makes the state liable to protect life, established "how the state organs are to fulfil their duty effectively to protect life is in principle to be decided by them on their own responsibility".⁷²

⁶⁶ Kumm, p. 586.

⁶⁷ Alexy, *A Theory of Constitutional Rights*, p. 308.

⁶⁸ Alexy, p. 308.

⁶⁹ Klatt, *Heidelberg Journal of International Law*, p. 695.

⁷⁰ Alexy, *A Theory of Constitutional Rights*, p. 308.

⁷¹ Alexy, p. 309.

⁷² BVerfGE 46, 160 (164), quoted according to Alexy, p. 309.

2.2.3. “The conflict objection”⁷³

One of the important objections to the universality of welfare rights refers to the scarcity of resources and the incapacity to satisfy the needs of all people.⁷⁴ Welfare rights are entitlements over potentially scarce goods.⁷⁵ There is a significant difference between negative and positive rights. Fabre calls it “scarcity division”.⁷⁶ Positive rights impose the duty to provide assistance and obtain particular resources and that is why they come into mutual conflict.⁷⁷ Scarcity thus further undermines the universality of welfare rights.⁷⁸

It can be noticed that scarcity distinction was taken into consideration when drafting the two covenants on human rights and hence there is a significant difference between them with respect to the enforcement of the rights regulated therein.⁷⁹ The provisions of the International Covenant on Civil and Political Rights are unconditional and unlimited while the provisions of the International Covenant on Economic, Social and Cultural Rights bind the signatory states to use all of their available resources to enforce the rights regulated therein.⁸⁰ Welfare rights do not require from the state to provide, “no matter what”, every individual with social goods such as healthcare. Their realization depends on available state resources.⁸¹

Rights imply important interests.⁸² The interest in proper healthcare is one of the most important interests. The appertaining right is protected by international conventions and national constitutions. For instance, Article 12 (1) of the International Covenant on Eco-

⁷³ Eddy, *Res Publica*, 337.

⁷⁴ Fabre, *Social Rights under the Constitution*, p. 28.

⁷⁵ The title has been borrowed from: Eddy, *Res Publica*, p. 337.

⁷⁶ Fabre, *Social Rights under the Constitution*, p. 41.

⁷⁷ Fabre, p. 41. Pursuant to Jeremy Waldron’s theory, if we embrace the interest theory of rights, we shall also accept the fact that conflicts between rights are natural and inevitable (Fabre, p. 29, Eddy, *Res Publica*, p. 339).

⁷⁸ Fabre, *Social Rights under the Constitution*, p. 31.

⁷⁹ For more details see J. Andrassy, B. Bakotić, and B. Vukas, *Međunarodno pravo*, Školska knjiga, Zagreb, 1995, p. 300.

⁸⁰ Andrassy et al, p. 300.

See Article 2 (1) of the International Covenant on Economic, Social and Cultural Rights:

“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, *to the maximum of its available resources*, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures” (emphasis added).

⁸¹ Fabre, *Social Rights under the Constitution*, p. 31, A. Kavanagh, “Social Rights under the Constitution – Government and the Decent Life by Cecile Fabre (Oxford, Oxford University Press, 2000) Book Review” *Journal of Law and Society*, vol. 29, no. 2, 2002, p. 356.

⁸² Eddy, *Res Publica*, p. 337.

conomic, Social and Cultural Rights grants all people the right to enjoy “the highest attainable standard of physical and mental health”.

It comes to a problem when due to limited resources, and healthcare is deemed a scarce resource, the interests of different individuals are mutually unsatisfiable.⁸³ What if an individual needs an expensive medical treatment? Has the state the duty to provide it? One can easily imagine a situation in which the rights of several persons are confronted due to the scarcity of the same good. In the well-known case of *Soobramoney v Minister of Health (Kwazulu-Natal)*, the South African Constitutional Court decided that the state is not obliged to provide a patient with kidney dialysis. In this concrete case, Mr Soobramoney, a diabetic also suffering from ischaemic heart disease and cerebrovascular disease, applied for an access to a dialysis programme in a state hospital. The access was denied because the hospital, due to limited resources and an insufficient number of dialysis machines and trained nursing staff, adopted the policy that the programme can be attended only by patients who can be cured within a short period of time and by those with “chronic renal failure” who are eligible for kidney transplantation, which was not the case with Mr Soobramoney.

Mr Soobramoney’s right to be provided with proper medical care was contrary to the rights of other patients since the hospital, in spite of only 20 available dialysis devices and room for 60 patients, had already accepted 85 patients for treatment. Mr Soobramoney shared the fate of 70 % of patients who were not admitted to the dialysis programme.

The South African Constitutional Court considered that political bodies and healthcare authorities are responsible for the adoption of the healthcare budget and making decisions on respective priorities,” the Court would be slow to interfere with such decisions if they were rational and taken in good faith.”⁸⁴

The Constitutional Court upheld the idea that when exercising welfare rights, the availability of resources and the equality of the requests of other individuals for welfare rights shall be taken account of.⁸⁵ Fabre finds the assessment of the South African Constitutional Court well-founded since welfare rights do not place such strict requests with the state in the sense that the state is obliged to enable realization of all welfare rights.⁸⁶

⁸³ Eddy, *Res Publica*, p. 346.

⁸⁴ *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997), <http://www.saflii.org/za/cases/ZACC/1997/17.html>, (accessed 10 September 2015).

⁸⁵ Eddy, p. 342.

See the “reasonableness” clauses in the South African Constitution regarding housing in sections 26 (2), and healthcare, food, water and social security in sections 27 (2):

“The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right” (Constitution of the Republic of South Africa, Act 108 of 1996).

⁸⁶ Fabre, *Social Rights under the Constitution*, p. 31.

Can is preferred over *ought*. The provisions on welfare rights need to be implemented in accordance with the level of the social and economic development of a particular state, considering other people's prospects of having a decent life and considering all the other costs such as the costs of police forces, motorway construction etc.⁸⁷

2.2.4. *Are welfare rights inalienable?*

Some authors claim that unlike liberty rights, welfare rights are alienable or in other words, individuals can waive them. If individuals are treated with respect, it means that their capability to act morally and rationally or to dispose of their rights is recognized. Fabre stresses that unlike the Universal Declaration of Human Rights, European constitutions qualify neither human rights in general nor welfare rights specifically as inalienable. If a person decides not to take advantage of material benefits granted by the Constitution, his/her choice shall be respected.⁸⁸

But, is it really so? Modern constitutions grant a number of welfare rights which, based on an explicit formulation, cannot be waived by their holders. In this light, Article 56 (2) and (3) of the Croatian Constitution stipulates as follows:

“Maximum working hours shall be regulated by law.

Each employee shall be entitled to a weekly rest and annual holidays with pay, and shall never waive these rights.“

The reason why these rights have been made inalienable can be found in the issue of “collective harm.”⁸⁹ Hardin clearly depicted it using the example of workers who have, based on a collective bargaining agreement, given their consent to the maximum number of working hours per week and hence they have generated a right which cannot be waived. One can perceive a situation in which a person wishes to work overtime, meaning more than it is envisaged by the agreement, but this would result in deterioration of the working conditions and a decrease in the salary on the part of all the members of the working class.⁹⁰ According to Russell Hardin, this example indubitably shows what happens in cases in which members of a particular class are in a potential conflict. In order to prevent emergence of collective harm, it is necessary to prevent individual members from becoming free riders who attain certain benefits because other members of the class are restraining themselves.

⁸⁷ Fabre, p. 31.

⁸⁸ Fabre, *Social Rights in Europe*, p. 25.

⁸⁹ H. Klepper, “Mandatory Rights and Compulsory Education”, *Law and Philosophy*, vol. 15, no 2, 1996, p. 155.

⁹⁰ R. Hardin, “The Utilitarian Logic of Liberalism”, *Ethics*, vol. 97, no. 1, 1986, p 55. See also Klepper, p. 155.

Inalienable rights can be contested for being contradictory since they restrain the liberty of their holder to do something and due to their inalienability, they are more similar to duties than to rights. However, according to Hardin, this can only be applied if inalienable rights are seen as the rights of individuals (exclusively from the viewpoint of an individual) while their real meaning will become evident if they are perceived at the level of a class. The benefit from these rights for an individual, highlighted Hardin, arises indirectly, through their impact on the whole class. The aforementioned suggests that although "welfare assistance" is funded by taxes and provided by the state, constitutional welfare rights can be violated by actors other than the state, e.g. by employers.⁹¹ European constitutions protect a large number of rights which are provided at the workplace and shall be respected by the employer. For instance, Article 56 (4) of the Croatian Constitution governs as follows: "Employees may, in conformity with law, participate in decision-making in their places of employment."⁹²

The freedom of an individual does not depend only on government decisions and constitutions do not regulate only the relation between the state and its citizens but also relations between citizens themselves, which is demonstrated in the above example of a relation between an employee and his/her employer.⁹³ It means that private actors may, just like the state, have the duty to provide individuals with minimum resources necessary for a decent life.⁹⁴ Employees possess the right to require from the state to enforce certain welfare rights against such private actors.⁹⁵ Fabre identifies three kinds of duties which may be borne by the state with respect to welfare rights:

- "(1) A duty to provide the resources warranted by social rights;
- (2) A duty not to deprive people of these resources if they already have them; and
- (3) A duty to ensure that other people such as employers fulfil all or part of its duties specified in (1) and (2)"

⁹¹ Fabre, *Social Rights in Europe*, p. 17.

⁹² See also Article 57 of the Slovenian Constitution on "participation in management".

⁹³ Fabre, *Social Rights in Europe*, p. 18.

It means, as believed by Fabre, that we can have welfare rights against people with whom we are in a special relation, in this case it is our employer, but it can also be our landlord and similar. Such relations are based on contracts and exclude arbitrariness regarding who has the duty to provide needy ones with assistance (Fabre, *Social Rights under the Constitution*, p. 57).

⁹⁴ Fabre, pp. 65-66.

⁹⁵ Fabre, *Social Rights under the Constitution*, p. 57.

2.2.5. “Deserved” and “Undeserved Needy”

Constitutions, though not always explicitly, make a difference between those who are “needy” without their guilt and those who are to be blamed for their situation themselves.⁹⁶ Individuals who cannot live in compliance with the principle of dignity for reasons beyond their power are entitled to compensation for their ill-fortune.⁹⁷ “The principle of redress” is placed in the centre of the concept of solidarity and represents the main reason for the existence of a social security and health insurance system.⁹⁸

It is particularly evident in regard to the right to the adequate income where the exercise of this right is related to phrases such as “those who cannot work” and “those who cannot secure the means for their own subsistence”.⁹⁹ It is revealed in section 19 (1) of the Finnish Constitution which reads as follows: “Those who cannot obtain the means necessary for a life of dignity have the right to receive indispensable subsistence and care.”¹⁰⁰ A similar provision can also be found in article 58 (1) of the Croatian Constitution “The state shall ensure the right to assistance for weak, infirm or other persons unable to meet their basic subsistence needs as a result of their unemployment or incapacity for work.”

Some theoreticians and policy makers have opposing views on this issue. For instance, it can be heard that instead of detecting the individual responsibility and reasons why individuals have found themselves in a difficult situation, all the needy ones have to be provided with “unconditional basic income”.¹⁰¹ Yet, it is important to point out that in practice it is almost impossible to establish the difference between the undeserved and deserved needy due to the necessity of taking into consideration not only their current moves but also their upbringing, education and similar.¹⁰² Even in rare situations in which the guilt of an individual can be ascertained, e.g. a person who refused to get vaccinated against an infectious disease and later got infected thereby, European societies do not approve if such a person is denied a medical treatment and left to go down with the illness.¹⁰³

⁹⁶ Fabre, p. 20.

⁹⁷ K. Raes, “The Philosophical Basis of Social, Economic and Cultural Rights”, in P. Van der Auweraert, T. De Pelsmaeker, J. Sarkin and J. Vande Lanotte, (eds.), *Social, Economic and Cultural Rights: An Appraisal of Current European and International Developments*, Antwerpen-Apeldoorn, Maklu, 2002, p. 50.

⁹⁸ Raes, p. 50.

⁹⁹ Fabre, *Social Rights in Europe*, p. 20.

¹⁰⁰ The Constitution of Finland 11 June 1999 (731/1999, amendments up to 1112 / 2011 included). <http://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf>, (accessed 10 May 2015).

¹⁰¹ Fabre, p. 20.

¹⁰² Fabre, p. 21.

¹⁰³ Fabre, p. 21.

2.3. Integral Approach to Rights

At the end of this chapter where the arguments about the difference between these sets of rights are critically examined, one cannot avoid the conclusion that the integral approach is the most complete approach to rights. What gives moral strength to welfare rights? It is difficult to contradict the opinion that the philosophical basis of both sets of rights is identical: an ethical idea that human beings have to be treated with respect as free beings. This attitude of respect towards human beings has to be analogously present with respect to what others are not permitted to do to them and what others owe them.¹⁰⁴

These rights are based on human dignity which is deemed inalienable. An individual can neither be deprived of human dignity nor can he/she waive it since dignity is what he/she is entitled to as a member of the human species.¹⁰⁵ This assertion has been affirmed by various European constitutional courts in their judgements, e.g. the Federal Constitutional Court of Germany and the French Council of State.¹⁰⁶

As seen by Koen Raes, in line with this integral approach to rights, both sets of rights are based on the concept that human beings are "the sources of intentions and purposes, decisions and choices". Human beings are capable of making choices and taking responsibility for their choices. The thesis that there is no intrinsic difference between these two sets of rights is not relevant only from the theoretical point of view. According to Raes, both sets of rights are part of the comprehensive view to what human beings are, what they strive for and which institutions are necessary to secure human advancement. Can one draw the line between the right not to be killed and the right not to be left to die of starvation or of a disease when both of these things can be prevented?¹⁰⁷ These two sets of rights are both intended to provide an individual with entitlements against abuse of the state power and to keep him/her from becoming a toy in the hands of those in power.¹⁰⁸

The UN Vienna Declaration and Program of Action adopted at the Second World Conference on Human Rights in 1993 supports the thesis that there is no formal hierar-

¹⁰⁴ Raes, *Social, Economic and Cultural Rights*, p. 53.

¹⁰⁵ Hennette-Vauchez, *When Ambivalent Principles Prevail*, pp. 21-22.

¹⁰⁶ Hennette-Vauchez, pp. 21-22. The Federal Constitutional Court of Germany has confirmed it with regard to the inalienability of the dignity of women who voluntarily appear in peep shows (BVerwGE, 15 déc. 1981, quoted according to Hennette-Vauchez, pp. 21-22). The same reasoning was offered by the French Council of State when it supported municipal orders prohibiting dwarf-throwing shows, regardless of the voluntariness of their performers. Concerning these and similar examples in contemporary legal systems, Hennette-Vauchez holds that the principle of dignity hides "politically conservative", "theoretically naturalist viewpoints" covering up paternalism and moralism which restrain legal freedom of decision-making and prevent changes (Hennette-Vauchez, p. 1).

¹⁰⁷ Fabre, *Social Rights in Europe*, p. 20.

¹⁰⁸ Raes, *Social, Economic and Cultural Rights*, pp. 45, 50.

chy between these two sets of rights. Human rights are "indivisible", "interdependent" and "interrelated".¹⁰⁹

III. WELFARE RIGHTS IN THE CONSTITUTION OF THE REPUBLIC OF CROATIA

Thanks to the dominant view in Europe (and in contrast to the constitutional tradition of the United States) - that welfare rights properly *belong* in constitutions, the Central and Eastern Europe constitution-makers were (no different from the drafters of the Western European constitutions) included these types of rights alongside civil and political ones.¹¹⁰ By overall, when elaborating the welfare rights through the prism of Central and Eastern European states constitutions, we may see that nearly all of the constitutions of the region contain very broad catalogues of socio-economic rights and that nearly all¹¹¹ constitutions of the region ignore distinction in status between civil and political rights on the one hand, and socio-economic rights, on the other. The Constitution of the Republic of Croatia is not the exception.¹¹²

The Constitution of the Republic of Croatia is the one of the 14 constitutions¹¹³ of the region which do not draw any meaningful distinction between socio-economic and other rights. Almost half of its provisions relate to human rights and Heading III of the Constitution entitled "Protection of human rights and fundamental freedoms" is divided into three sections: 1. General provisions, 2. Personal and Political freedoms and rights, and 3. Economic, social and cultural rights. The catalogue of socio-economic rights is quite broad and it includes numerous social (right to work and freedom of work,¹¹⁴ right to fair remuneration and equal working conditions,¹¹⁵ right to social security and social

¹⁰⁹ See paragraph 5. See also G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford University Press, Second edition, 2009, p. 23.

¹¹⁰ W. Sadurski, *Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, Second Edition, Springer, 2014, p. 257.

¹¹¹ With the exception of the constitutions of the Czech Republic and Slovakia.

¹¹² The Constitution of the Republic of Croatia, translation by B. Smerdel and A. Horvat Vuković, Zagreb, Novi informator LLC, 2010.

¹¹³ Belarus, Bulgaria, Croatia, Estonia, Georgia, Hungary, Latvia, Lithuania, Macedonia, Romania, Russia, Ukraine, Montenegro, and Serbia.

¹¹⁴ Article 55 of the Constitution stipulates that everyone shall have the right to work and enjoy freedom of work. Everyone shall have free to choose their vacation and occupation, and all jobs and duties shall be accessible to everyone under the same conditions.

¹¹⁵ According to the Article 56 of the Constitution, employees shall have the right to fair remuneration, such as to ensure free and decent standard of living for them and their families. Maximum working hours shall

insurance,¹¹⁶ right to health care,¹¹⁷ right to form trade unions,¹¹⁸ right to strike,¹¹⁹ protection of family¹²⁰) and economic rights (right of ownership,¹²¹ entrepreneurial and market freedom¹²²).

In addition to broad catalogue of welfare rights, Article 1 of the Constitution defines the Republic of Croatia as a social state¹²³ and Article 3 of the Constitution stipulates *inter alia* that equality, peace-making, social justice, respect for human rights and the rule

be regulated by law and every employee shall be entitled to paid weekly rest and annual holidays and these rights may not be renounced. In conformity with law, employees may participate in the decision-making process in their enterprise.

¹¹⁶ Article 57 sec. 1 of the Constitution states that the right of employees and members of their families to social security and social insurance shall be regulated by law and collective agreement.

¹¹⁷ Article 59 of the Constitution determines that everyone the right to health care in conformity with law.

¹¹⁸ In order to protect their economic and social interests, all employees shall have, according to the Article 60 of the Constitution, the right to form trade unions and shall be free to join them or leave them. In addition, trade unions may form their federations and join international trade unions organizations. The formation of trade unions in the Armed Forces and the police may be restricted by law. Furthermore, employers shall have the right to form associations and shall be free to join them or leave them.

¹¹⁹ Article 61 of the Constitution stipulates that the right to strike shall be guaranteed. The right to strike may be restricted in the Armed Forces, the police, public administration and public services as specified by law.

¹²⁰ Articles 62-65 of the Constitution provide the constitutional grounds for the statutory regulation of legal relations in a family. The family shall enjoy the special protection of the State, the Republic of Croatia shall protect maternity, children, and young people, parents shall have the duty to bring up, support, and educate their children, and children shall be bound to take care of their old and helpless parents. The Republic of Croatia shall take special care of parentless minors or parentally neglected children, and everyone shall have the duty to protect children and helpless persons.

¹²¹ Section 1 of Article 48 of the Constitution provides that "The right of ownership shall be guaranteed." In sec. 2 of Article 48, the Constitution provides that ownership implies obligations. Ownership implies obligations, and property owners and beneficiaries shall contribute to the general welfare. Furthermore, an alien may acquire property under conditions spelled out by law. The right of inheritance shall be guaranteed.

¹²² Article 49 of the Constitution states: "Entrepreneurial and market freedom shall be the basis of the economic system of the Republic of Croatia. The State shall ensure all entrepreneurs an equal legal status on the market. The abuse of the monopoly position as defined by law shall be forbidden. The State shall stimulate economic progress and social welfare and shall care for the economic development of all its regions. The rights acquired through the investment of capital shall not be diminished by law, or by any other legal act. Foreign investors shall be guaranteed free transfer and repatriation of profits and capital invested." However, entrepreneurial freedom is not absolutely unlimited: "The exercise of entrepreneurial freedom and property rights may exceptionally be restricted by law for the purposes of protecting the interests and security of the Republic of Croatia, nature, the environment and public health." (Article 50 sec. 2 of the Constitution).

¹²³ According to the Article 1 sec. 1 of the Constitution of the Republic of Croatia, the Republic of Croatia is a unitary and indivisible democratic and social state.

of law are the highest values of the constitutional order of the Republic of Croatia and grounds for interpreting the Constitution.¹²⁴

The general picture is that, on the one hand, we may see the explicit constitutionalisation of the terms social state, social justice and social rights, while, on the other hand, the concretisation of these principles is left to the legislative branch. Here we come to the role of the Constitutional Court of the Republic of Croatia, which, of course, cannot legislate subjective welfare rights but it is authorised to review the compatibility of laws with the constitutional principles of a welfare state and with other fundamental values of the Croatian constitutional order.

When discussing the role of Croatian Constitutional Court in the area of welfare rights, we must start with a short parallel with other constitutional courts in the region which, as we stated before, have been quite active in reviewing statutes under the standards of welfare rights and which, in situation where they have had a choice between striking down a law under a general constitutional clause (such as "social justice" or "equality") or under a specific welfare right, usually have opted for the former.¹²⁵

In its jurisprudence so far, the Croatian Constitutional Court has also been quite active in reviewing statutes under the standards of welfare rights. In this context, the Court deliberated, *inter alia*, on: the adjustment of pensions to trends in wages and salaries of the working population (1998);¹²⁶ the "acquired" rights to pension and changes in the pension

¹²⁴ According to the Article 3 of the Constitution of the Republic of Croatia, freedom, equal rights, national equality and equality of genders, love of peace, social justice, respect for human rights, inviolability of ownership, conversation of nature and the environment, the rule of law and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia and the grounds for interpretation of the Constitution.

¹²⁵ Sadurski, W., *Constitutional Socio-Economic Rights: Lessons from Central Europe*, The Foundation for Law, Justice and Society, 2009, p. 5-6.

¹²⁶ See Decision No. U-I-283/1997 of 12 May 1998 (CRO-1998-3-011) – abstract control of constitutionality of the Act on Adjustment of Pensions and Other Allowances from the Pension and Disability Fund and Administration of Funds of the Pensions and Disability Fund, Official Gazette, No. 20/97. In reviewing the constitutionality of the disputed Act, the Court found that it is not disputable that the legislator has the competence to determine such system of pension and disability insurance as he deems reasonable, in a manner proscribed by Constitution and laws. However, in view of disputed Act, he interferes with the rights of pensioners who had retired according to another system of computation of pensions. That system was a unity with rights and obligations of pensioners and was in force during the entire time of effectiveness of the decrees and decisions restricted the amount of pensions. Furthermore, the Court found indisputable the right of the legislator to regulate the level of economic and social rights entitled in the Constitution (which are not, however, absolute) in accordance with economic strength of the State. However, the use of this right may not bring into question the fundamental constitutional rights and principles (equality, social justice, rule of law). Hence, "the Court deems that the claim of the proponents concerning the existence of reasonable doubt that by enacting the disputed Adjustment Law, the legislator turned the temporary state created earlier by the contested decrees of the Government of the Republic of Croatia and decisions of the Pensions Fund into a permanent state with negative impact on the amount of pensions if funded". In rendering the decision on the constitutionality of the disputed provisions, the Court found that "the legal solutions in the disputed Act changed the social status of pensioners to such

insurance system (2010),¹²⁷ the realization of the right to a children allowance (2008),¹²⁸ and so on.

For the purposes of this paper we will make a short overview of three recent Constitutional Court decisions. The first one is from 2009 and it is famous decision on so called “Special Tax” (or the “Crisis Tax”), and we chose it because it was pretty criticized by the experts, trade unions and the public in general, and it because it actually opened the door for some other, future reductions of welfare rights in Croatia which have been done by several legal regulations. The other two cases are very fresh – from the end of March of this year (2015), and they were also criticized, especially by the trade unions; here the

an extent that this fact leads to social discrimination of citizens”. Hence, the Court determined that the provisions of the disputed Act contravene the principles ensued in Articles 1, 3, 5 and 14, sec. 2 of the Constitution of the Republic of Croatia (The Republic of Croatia is a social state; social justice is one of the highest values of the constitutional order of the Republic of Croatia; in the Republic of Croatia laws shall conform with the Constitution; all are equal before the law).

¹²⁷ See Decision and Ruling No. U-I-988/1998 *et al.* of 17 March 2010 (CRO-2010-1-002) – abstract control of constitutionality of the Pension Insurance Act (Official Gazette Nos. 102/98, 127/00, 59/01, 109/01, 147/02, 117/03, 30/04, 177/04, 43/07 – decision of the Constitutional Court, 79/07 and 35/08). In this particular case, the Constitutional Court, *inter alia*, raised the question connected to the legal nature of the right to a pension in the pension insurance sub-scheme based on generation solidarity: is the legislator empowered, under constitutional law, to revoke particular rights from this sub-system? The Court deemed that there is no doubt the legislator is constitutionally empowered to change the laws regulating the pension insurance sub-scheme based on generation solidarity so as to adapt it to changed economic and social conditions in the country or to stabilise it, i.e. to create preconditions for a long-term viable pension scheme. The Court specially emphasised that “the possible loss of a certain amount of the earlier pension or of another benefit from the pension insurance, which may result from the new statutory measures redefining the pension rights acquired earlier, does not a priori mean that the essence of the “right to pension” has been damaged, as long as this loss of part of the earlier benefit from pension insurance resulted from the general redefinition of insured rights in the pension insurance scheme based on generation solidarity, and is proportional in its effects. This is a general, broadly defining principle. Everything else depends on the circumstances of a particular case.”

¹²⁸ See Decision No. U-I-3851/2004 of 12 March 2008 (CRO-2008-1-005) – abstract control of constitutionality of the Children’s Allowance Act (Official Gazette, Nos. 94/01, 138/06 and 107/07). In this case the Constitutional Court found that Article 8/2 of Children’s Allowance Act does not comply with the Constitution. Starting from the fact that children’s allowance is state aid to the person who is actually caring for, supporting, looking after and raising children, the legislator has, in Article 6/1 of the disputed Act, laid down who has the beneficiary of this allowance, while Article 8/1 prescribes which children this allowance is paid for (natural children, step children, grandchildren, and parentless children). After regulations of this kind, the Court found that there is no reason acceptable in constitutional law nor any need for the additional regulation in the disputed Article 8/2 of the Children’s Allowance Act of the cases in which the fosterer has the right to the children’s allowance for grandchildren and other children who have a parent. In the view of the Court, “withholding the right to a children’s allowance from the people who are really bringing up and supporting children that their parents cannot or will not support is directly contrary to the interests and welfare of the child. The disputed legal provision also contravenes the constitutional obligation of the state to take “special” care of parentally neglected children (Article 63/5 of the Constitution). Implementing this principle of constitutional law requires creating optimum conditions for protecting the rights of the child, which means bringing the child up and ensuing his or her support, if this not provided by the parents, and the reason why parental care is missing cannot be decisive in any event, nor whether the parents have lost their parental rights because of child neglect.”

Court uphold two so called “Acts on Denials” – the Act on Denial of the Payment of Certain Material Rights to Public Service Employees¹²⁹ and the Act on Denial of the Right for Enlarging Salaries Based on Seniority and Job Complexity for Public Services.¹³⁰ These decisions have once again proved, as professor Arsen Bačić concluded few years earlier, when analysing the Special Tax Decision (and we will see that this conclusion is still very actual), that “there is an opinion present that the control of such regulations” (which represents examples of a severe reduction of social rights) “can detect the inclination of the higher judiciary to rather defend the interests of the government than the interests of the people.”¹³¹

Hence we may say that starting with the Special Tax on Salaries, Pensions and Other Receipts Act (hereinafter: Special Tax Act),¹³² the legislative answer to the circumstances of the economic (and not just economic) crisis was reflected in several legal regulations and, unfortunately, a severe reduction of welfare rights in Croatia.

In the case of abstract control of constitutionality of the Special Tax Act,¹³³ the Constitutional Court had the duty to review and examine one particular legal measure: the introduction in the tax system of the Republic of Croatia, for a limited time, under conditions of economic crisis, of an extraordinary tax which in addition to the usual regular tax burden will for a maximum period of 17 months tax the receipts (salaries, pensions and other receipts as provided for in Article 4 of the Special Tax Act) of certain categories of taxpayers.

In proceedings of constitutional review the Constitutional Court had the obligation to examine, first and foremost, whether the Special Tax Act complies - in the light of the constitutional concept of the Republic of Croatia as a social state (Article 1 of the Constitution) – with the basic principles and highest values of the constitutional order, the most important of which for this case were the following: equality, social justice and the rule of law as the highest values of the constitutional order (Article 3 of the Constitution); the principle of prohibiting discrimination (Article 14 sec. 1 of the Constitution); the general principle of the equality of all before the law (Article 14 sec. 2 of the Constitution); the special principle of tax equality and equity (Article 51 sec. 2 of the Constitution); the general principle of proportionality (Article 16 sec. 1 of the Constitution) and the special

¹²⁹ Act on Denial of the Payment of Certain Material Rights to Public Service Employees, Official Gazette, No. 143/12.

¹³⁰ Act on Denial of the Right for Enlarging Salaries Based on Seniority and Job Complexity for Public Services, Official Gazette, No. 41/14.

¹³¹ A. Bačić, “O konstitucionalizaciji socijalnih prava i njihovu slabljenju prema sadržaju”, HAZU, 50=516(2013), p. 207.

¹³² Special Tax on Salaries, Pensions and Other Receipts Act, Official Gazette, No. 94/09.

¹³³ Decision and ruling No. U-IP-3820/2009 *et al.* of 17 November 2009 (CRO-2009-3-011) – abstract control of constitutionality of the Special Tax on Salaries, Pensions and Other Receipts Act, Official Gazette, No. 143/09.

principle of proportionality in the defrayment of public expenses (Article 51 sec. 1 of the Constitution).

When elaborating the social state¹³⁴ and the principle of social justice¹³⁵ (Articles 1 and 3 of the Constitution), the Court has outlined that the principles of the social state and social justice are expressed in a special way in the control of legislative activities by constitutional courts. This hinges on the following fundamental problem: how to determine the borderline on which the constitutionalisation of social rights clashes with democracy? This is a problem located on the very crossroads of two basic questions of political philosophy that are also important for contemporary constitutional policy: at the crossroads of the question of democracy and of the question of distributive justice.¹³⁶

In the work of constitutional courts this problem is particularly present in the control of the constitutionality of laws that deal with public policies, especially social policy. The borderline mentioned above is also the line up to which constitutional courts may control the work of the legislature from the aspect of the social state (Article 1 of the Constitution) and social justice (Article 3 of the Constitution).

In addition, the Court has stressed that the standards for determining this borderline in constitutional-court case law, formulated by the Federal Constitutional Court of the Federal Republic of Germany, are today considered the ruling guidelines for the work of European constitutional courts:

¹³⁴ The Court has outlined that a social state is one of the cornerstones of European constitutional identity and that, in principle, the concept of a social state fills three functions: (1) it enables various forms of positive measures by the government and public authorities in the economic field; (2) it requires the government and public authorities to influence and to interfere with the market so as to ensure basic social rights, social security and equalise or decrease extreme social differences, and (3) it prohibits the erosion of the fundamental structures of the welfare state or the radical restriction of recognised social rights. Furthermore, the Court has stressed that the constitutional character of social rights points towards two basic requirements of social state: (1) the government and public authorities are bound to follow the policy of an equitable and equal redistribution of national resources so as to equalise extreme inequality, and (2) the legislative and executive powers are legally bound to achieve a balance between the limited assets of the government budget and the social goals laid down in the Constitution. Point 13.1. of the respective Decision.

¹³⁵ According to the Article 3 of the Constitution, social justice is a highest value of the constitutional order of the Republic of Croatia and a ground for interpreting the Constitution. In its case-law the Constitutional Court has confirmed that Article 3 of the Constitution has an additional function: besides serving as the ground for interpreting the Constitution, this Article is also a guideline for the legislator in the elaboration of particular human rights and fundamental freedoms enshrined in the Constitution. The Court has outlined that social justice is a component of the social state, because "this kind of a state demands the establishment and preservation of social justice. Therefore, the concept of the social state is violated when the help provided for those who need it does not comply with the requirements of social justice, either because the distribution of some social benefits has been wrongly restricted, or because a social group has not been provided with social protection." Point 13.2. of the respective Decision.

¹³⁶ Point 13.3. of the respective Decision.

“The principle of the social state may surface in the interpretation of fundamental rights and in the interpretation and assessment by constitutional courts – according to the criteria of the kinds of restrictions permitted by law – of laws that restrict fundamental rights. However, this principle is not suitable for directly restricting fundamental rights without closer specification by the legislator. It lays down the state’s obligation to ensure an equitable social order (...); in the fulfilment of this obligation the legislator has a wide margin of free decision-making (...). The principle of the social state, therefore, places an obligation before the state but does not give the details as to how this obligation should be fulfilled – were it otherwise, the principle of the social state would contradict the principle of democracy: the democratic order of the Basic Law, as an order of a free political process, would be fundamentally restricted and deprived if a prior constitutional obligation of a particular and no other solution was imposed on the formation of political will. Because of this openness the principle of the social state cannot directly impose boundaries on fundamental rights (...).”¹³⁷

In short, therefore, the Court outlined that the substance of the concepts of the social state, the principle of social justice, even constitutionally recognised social justice are abstract in nature, although of different levels of abstraction. This can be seen from the fact that the writer of the Constitution left it to the legislator to regulate and elaborate all the constitutionally defined social rights, and this authority is usually explicit because the Constitution explicitly requires the enactment of a law for the application of some “social” norm. Therefore the constitutional provisions about the social state and social justice, even about constitutionally recognised social rights, cannot be applied directly. For them to be applied, they must first be elaborated in a law and very often they must be further specified in subordinate legislation for the operation of the relevant law.¹³⁸

And the findings of the Constitutional Court were, *inter alia*, that the special importance that the Special Tax Act has for the stability of public expenditures of the Republic of Croatia at specific moment had priority over the requirements for achieving absolute equality and equity in levying the special tax. The Court held that the temporary levying of the special tax was based on a qualified public interest, so some differences that the Special Tax Act created among its addressees, although subject to criticism, did not reach the degree because of which this act could at that moment be proclaimed in breach of the Constitution.

However, we believe that there were reasons for serious considerations of some objections of the proponents, especially having in mind the fact that no state of economic emergency is a reason for non-compliance with fundamental constitutional values and human rights. Hence we agree with professor Arsen Bačić who perfectly explained why

¹³⁷ Point 13.3. of the Decision.

¹³⁸ Point 13.3. of the Decision.

the Constitutional Court could decide differently in this case : because the Special Tax Act **did not** “promoted economic and cultural progress and social welfare” (quoted from the Historical Foundations of the Constitution), because with this Act the legislator has reduced the already questionable *Existenzminimum* of the majority of citizens; because this Act *was contrary* to the principle of social state (since it threatened the existence of the poorest citizens), the principle of equality (since the special tax did not include all the categories of taxpayers), the principle of social justice (since it contradicted to the principle of equality and justice) and the principle of respect of human rights as the highest value of the constitutional order (since it reduced the possibility of constitutionally guaranteed social security and dignity in personal and family life of citizens).¹³⁹

Unfortunately, in the second and third “Act on Denials” cases,¹⁴⁰ the Constitutional Court again decided to defend the interest of the government and its measures to deny the payment of certain material rights to public service employees for a specific period of time (for 2012 and 2013, and then also for 2014) and to deny the right for enlarging salaries based on seniority and job complexity. The background is as follows: under the Act on Denial of the Right for Enlarging Salaries Based on Seniority and Job Complexity for Public Services, civil and public service employees were denied the right to salary increases based on seniority in the period from 1 April to 31 December 2014. However, the Government’s negotiations with trade unions were not finalised for all branch collective agreements by end 2014. Hence, in order to continue the measures already underway, the Government has adopted a Decree on amendments to the respective Act. By virtue of this Decree, the application of the Act reducing employees’ rights has been extended until 31 March 2015. Under the Act on Denial of the Payment of Certain Material Rights to Public Service Employees, the Government has abolished the paid annual leave and Christmas bonuses for the period from 2012 to 2014 and for 2015.

The Court held that these “Acts on Denials” were in line with the Constitution. In both cases the Court held that “denial of certain benefits for a limited period in order to consolidate the economic situation of the country may be a measure in the area of economic policy because of the circumstances that existed at the time when the Croatian Parliament was not in session”.¹⁴¹ However, the Court outlined that any eventually further extending

¹³⁹ A. Bačić, “O konstitucionalizaciji socijalnih prava i njihovu slabljenju prema sadržaju”, p. 201-203.

¹⁴⁰ Decision No. U-I-4405/2013, U-II-3222/2014 of 31 March 2015 – abstract control of constitutionality of the Act on Denial of the Payment of Certain Material Rights to Public Service Employees and of Decree on amendments to the Act on Denial of the Payment of Certain Material Rights to Public Service Employees, and Decision No. U-I-1625/2014 *et al* of 30 March 2015 – abstract control of constitutionality of the Act on Denial of the Right for Enlarging Salaries Based on Seniority and Job Complexity for Public Services.

¹⁴¹ Decision on constitutionality of the Act on Denial of the Payment of Certain Material Rights to Public Service Employees and of Decree on amendments to the Act on Denial of the Payment of Certain Material Rights to Public Service Employees, Point 44, and Decision on of constitutionality of the Act on Denial of the Right for Enlarging Salaries Based on Seniority and Job Complexity for Public Services, Point 28.

of the respective measures could lead to the fact that the problem of denial of payment of certain material rights turns into the problem of achieving the rule of law, the principle of legal security, legal certainty and legal predictability.

Furthermore, in this two cases the Court held that there were some procedural mistakes ("derogation from full respect of the rules of democratic procedure of collective bargaining"), but only to a lesser extent, and the emphasis was placed on economic circumstances in which these acts were adopted. We may see that constitutional judges have made decisions on economic policymaking for which they have, as Sadurski concluded when analysing constitutional development in Central and East Europe, "questionable competence, knowledge, or legitimacy."¹⁴²

To sum up: in Croatia, we have broad catalogue of welfare rights in the Constitution, we have numerous legal regulations which are constantly being amended and which in the circumstances of the economic crises represents severe reduction of welfare rights, and we have Constitutional Court praxis which is, unfortunately, well-disposed to this reductions of welfare rights.

IV. CONCLUSION

Welfare rights in most European countries are constitutionalized. Courts appearing in the role "of the final arbiter of constitutional claims" often face "politically controversial issues" and thus become a major political actor.¹⁴³ What is crucial here is the issue of the limits of court power to repeal laws on the ground of their unconstitutionality.¹⁴⁴

The second chapter of the paper attempts to underpin the integral approach to rights, implying denial of the existence of a fundamental difference in the philosophical foundations of first- and second-generation rights.¹⁴⁵ These two groups are interconnected and mutually dependant. The democratic legitimacy of the government relates to the capacity to honour both sets of rights.¹⁴⁶

In the third chapter of the paper, when discussing the role of Constitutional Court of the Republic of Croatia in the area of welfare rights, we have drawn a parallel with other constitutional courts in the region which have been quite active in reviewing statutes under the standards of welfare rights and which, in situation where they have had a choice

¹⁴² Sadurski, *Constitutional Socio-Economic Rights: Lessons from Central Europe*, p. 6.

¹⁴³ Kumm, *Int J Constitutional Law*, 574.

¹⁴⁴ Kumm, p. 574.

¹⁴⁵ Raes, *Social, Economic and Cultural Rights*, p. 44.

¹⁴⁶ Raes, p. 52.

between striking down a law under a general constitutional clause (such as “social justice” or “equality”) or under a specific welfare right, usually have opted for the former. As we have shown, in its jurisprudence so far, the Croatian Constitutional Court has also been quite active in reviewing statutes under the standards of welfare rights. Unfortunately, the Constitutional Court praxis, especially the recent one, has shown that this Court is well-disposed to reductions of welfare rights.

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HATE SPEECH AS A VIOLATION OF HUMAN RIGHTS: THE MEANING, IMPLICATIONS AND REGULATION IN CRIMINAL LAW

The freedom of expression...constitutes one of the essentials foundations of such a society, one of the basic conditions for its progress and for the development of every man.

Handyside v. United Kingdom, 1976.

Abstract:

Freedom of expression is one of the guaranteed human freedoms and the conditio sine qua non of contemporary society. However, its scope is not unlimited. Certain restrictions are necessary in order to prevent the violations of rights and freedoms of others in the broadest sense. Hate speech represents the unprotected expression, but legal approaches to its sanctioning are not unique. This paper deals with basic features regarding hate speech and its criminal law regulation in selected legal systems. Having in mind modern European tendencies, we give the overview of specific case law from European Court of Human Rights, important for establishing legal standards in this area. At the end, provisions of Croatian criminal law are presented, including numerous changes that were adopted within the scope of this incrimination.

Keywords: *hate speech, freedom of expression, violation of human rights*

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I. INTRODUCTORY REMARKS ON THE MEANING OF HATE SPEECH IN MODERN LEGAL SYSTEMS

The position of freedom of expression can be described as constitutive element of the society, a basic prerequisite of its progress and for development of every man. This was stated almost forty years ago on behalf of European Court of Human Rights (ECtHR).¹ In its judgments this Court also stressed the necessity to fight against racial discrimination in all its forms² as well as the role of tolerance and respect for the dignity of all people in democratic and pluralist society.³ Having this in mind, freedom of expression is not an absolute right. It assumes certain duties and responsibilities.⁴ Limitations are also provided in European Convention on Human Rights and Fundamental Freedoms (ECHR). They are possible in exceptional cases under cumulative assumptions: ordered exclusively by law with purpose to protect explicitly specified individual and social values to the extent necessary in a democratic society and proportionate to the need.⁵ Although democracy without freedom of expression is unthinkable, it can be conflicted with other guaranteed human rights as democratic society foundations.^{6,7} It is believed that freedom of expression has three elements: freedom of thoughts, freedom of dissemination of ideas

¹ «The freedom of expression...constitutes one of the essentials foundations of such a society, one of the basic conditions for its progress and for the development of every man» *Handyside v. United Kingdom* App no. 5493/72, (ECtHR 7 December 1976), Series A No. 24, para 49. The case is relevant since the *margin of appreciation* was determined for the first time. It is one of the main interpretive principles, meaning that ECHR may be interpreted in different ways in signatory countries, taking into account the diversity of legal systems.

² *Jersild v. Denmark* App no 15890/89 (ECtHR September 1994), Series A No. 298, para 30.

³ *Günduz v. Turkey* App no 35071/97 (ECtHR 4 December 2003), para 40 and *Erbakan v. Turkey* App no 59405/00 (ECtHR 6 July 2006) para 56.

⁴ For analysis of freedom of expression within Hohfeld's and Dvorkin's understanding of human rights, see I. Tucak, 'Analysis of Freedom of Speech', *Jura A Peci Tudományegyetem Allam-es, Karanak tudomanyos lapja* 2011, 1. szám, pp. 132-141.

⁵ Of all the rights that the ECHR provides, only prohibition of torture, freedom from slavery, prohibition of retroactive application of criminal law and the prohibition of expulsion of its own nationals cannot be restricted (they are absolute), while all other rights are subjected to different restrictions modalities depending on the circumstances. I. Radačić ed., 'Interpretativna načela Europskog suda za ljudska prava', *Usklađenost hrvatskog zakonodavstva i prakse sa standardima Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda*, Centar za mirovne studije, 2011, p. 34.

⁶ A. Weber, *Manual on Hate speech*, Strassbourg, Council of Europe Publishing, 2009., p. 2.

⁷ When it comes to conflict of Human Rights with the same legal status, the fundamental problem is to set up a fair balance. When it comes to relation between particular human right and legitimately restrictions, fundamental problem is to establish proportionality of restrictions if the legitimate purpose to be achieved. The first problem is the case of the relation of two equal principles and the second problem is the relation between the primary principle and secondary exceptions. V. Alaburić, *Sloboda izražavanja u praksi Europskog suda za ljudska prava*, Zagreb, Narodne novine, 2002, pp. 56-57.

and information and the freedom to receive ideas and information.⁸ A particularly sensitive problem occurs when this freedom is used to manifest various forms of incitement to hatred and intolerance that leads to the so-called “hate speech”.

Even though our life experience teaches us that this speech is a common social phenomenon, relatively easily recognized, to this day there is no generally accepted definition.⁹ This fact is often subjected to criticism.¹⁰ The notion is common in ECtHR judicature, but this Court has not yet engaged in its strict definition. The result is a sort of substantial departure from the notion that national courts use.¹¹ Croatian literature contains a review of particular hate speech content as well as basic common features: expression of certain hate content oriented to certain social groups that have common characteristics.¹² In Recommendation of Committee of Ministers of the Council of Europe No. R (97) 20 it is stipulated that hate speech includes all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerance through aggressive nationalism and ethnocentrism, discrimination and hostility towards minorities, migrants and immigrant origin persons.¹³

Weber classifies manifests of hate speech into three groups: incitement of racial hatred (hatred directed against persons or groups based on race), incitement to hatred on religious grounds (as well as hatred on the basis of the relationship between believers and

⁸ For every elements content see: Z. Đurđević, ‘Sloboda izražavanja: čl. 10 Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda’ cited in I. Radačić (ed.), pp.154-159.

⁹ R.M. Simpson, ‘Dignity, harm and hate speech’, *Law and Philosophy*, vol.32, 2013, pp. 701-728. The author states that hate speech includes, for example, violence and abuse based on assumptions of identity, use of certain epithets, extreme political and religious attitudes and use of certain symbols of hatred. These are activities that promote the idea of belonging to a common social determinism implies susceptibility to contempt. See also, Weber, p. 3.

¹⁰ For example, Kiska stated that hate speech can actually mean whatever people choose, because it lacks an objective element of judgment. In this context, no one knows what hate speech is or how to determine it. R. Kiska, ‘Hate Speech: A Comparison between the European Court of Human Rights and the United States Supreme Court Jurisprudence’, *Regent University Law Review*, vol. 25, issue 1, 2012-2013, p.110.

¹¹ On judgments in which this was the case as well as the autonomous concept theory used by the ECtHR, see Weber, op.cit. (n 6) 3. The autonomous interpretation of certain terms is not uncommon. In doing so, the national law determinations are sometimes just a “starting position” which does not bound the Court. General principles of law as well as other international instruments on human rights and freedoms are taking into account. See, Radačić, pp. 38-39.

¹² See, V. Alaburić, ‘Ograničavanje «govora mržnje» u demokratskome društvu-teorijski, zakonodavni i praktični aspekti’, *Hrvatska pravna revija*, 2003, pp. 63-65.

¹³ «For the purposes of the application of these principles, the term “hate speech” shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin.» Recommendation No.R (97)20 of 30 October 1997, the Committee of Ministers to Member states on «Hate speech» available at http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh-lgbt_docs/CM_Rec%2897%2920_en.pdf, (accessed on 4 May 2015).

nonbelievers) and incitement to other forms of hatred based on intolerance on the basis of aggressive nationalism and ethnocentrism.¹⁴

The problem of appropriate social response to verbalization of discrimination, intolerance and violence is not easy to solve. There are no simple guidelines on how we should treat hate speech in the general communication process. The problem includes the relation of legal system towards the weak and different ones. Hate speech control is described as “certainly the most complex border problem in the freedom of expression field.”¹⁵ This control is aggravated through collision with freedom of expression, a fundamental human right enshrined in all major international documents on human rights and freedoms.

Generally speaking, there are two opposing models, known as the American and European model. The first one treats hate speech mostly as an integral part of freedom of expression. In second, this is abuse of freedom that needs to be sanctioned. Still, this division is to be taken *cum grano salis*, since the case law is showing the lack of strict dichotomy. More precisely it can be said that inappropriate expression of this kind is not absolutely prohibited in American jurisprudence, nor absolutely forbidden in European one. Appropriately designed indicators are used to show the breach of provided safeguard provisions. This will be discussed later.

According to ECHR, the freedom of expression can be restricted due to three-fold legitimate objectives: protection of public interest (national security, territorial integrity, public safety, prevention of disorder or crime, health or moral protection), maintaining the authority and impartiality of the judiciary and the protection of others rights and interests (preventing the confidential information disclosure and the protection of the reputation and rights of others). It is the last objective that is *raison d'être* for hate speech sanctioning. Alaburić stipulates that the “rights of others” is a complex notion, a sort of common denominator for different individual and group rights and legitimate interests. It covers the right to protection from discrimination and from hatred and violence (based on race, colour, national origin, religion, gender, sexual orientation or on some other feature), the right to privacy protection, the right to a fair trial, to protection of professional, market-commercial and business interests, the right to an effective and unbiased democratic institutions etc.¹⁶

¹⁴ Weber, p. 4. More informations on minorities rights in the context of International Conveant on Civil and political Right regarding of hate speech protection, see, N. Ghanea, ‘Minorities and Hatred: Protections and Implications’, *17 International Journal on Minority and Group Rights*, 2010., pp. 423-446.

¹⁵ Alaburić, op.cit. (n 12), p. 62.

¹⁶ See Alaburić, op.cit. (n 7), p.52.

Fundamental rights and freedoms are proclaimed as general legal standards that need to be interpreted and applied *in concreto*.¹⁷ They receive their full significance through interpretation of case law.

What does freedom of expression actually include? ECtHR interprets it extensively so that it covers freedom of opinion and freedom to receive and impart information and ideas, whereby the information itself is interpreted extensively. It is not just about facts, data and topics of public interest published through media, but also photographs, television and radio programs. The right of artistic expression is included which enables intercession with cultural, social and political information and ideas of all kinds, as well as freedom of information of commercial value. Furthermore, it is not only about the information content of but also transmission mode, taking into account the role of the media in a democratic society.¹⁸ This broad and complex concept encompasses a variety of forms and methods of spreading and receiving information and ideas through any media and regardless of frontiers. It is about the various ways verbal and nonverbal expression, closely connected with other ECHR rights and freedoms.¹⁹

We can conclude that hate speech may include verbal or nonverbal manifest of hate, which is generally practiced in order to develop the culture of hatred against certain groups in society. Harm effects of this speech towards the individual and society have repeatedly been the subject of various scientific analyses.²⁰

II. SHORT OVERVIEW OF RELEVANT INTERNATIONAL DOCUMENTS, COMPARATIVE REGULATION IN SELECTED SYSTEMS AND EUROPEAN COURT OF HUMAN RIGHTS PRACTICE

Legal approaches to hate speech sanctioning are not unique. Specific acts sanctioning this speech are the product of second half of twentieth century, significantly influenced by

¹⁷ Freedom of expression is the primary principle and its possible limitations are only exceptions. These exceptions are to be precisely formulated and narrowly interpreted in practice. Hate speech belongs among these exceptions. Alaburić, op.cit. (n 12), p. 62

¹⁸ Weber, op.cit. (n 6), pp. 20-22.

¹⁹ For example, a fair trial, the right to privacy, the right to freedom of thought, conscience and religion, freedom of assembly and association, the prohibition of discrimination on any ground in the enjoyment of ECHR rights. Alaburić, op.cit. (n 7), p. 21-22.

²⁰ Previous analysis of (hate speech) harmful effects Alaburić classifies into six basic categories: causing emotional distress, humiliation and loss of dignity, denial and restrictions of human rights and freedoms; discriminatory messages, maintenance of social subordination and inequality; victim silencing through intimidation and encouraging individual and mass violence. Alaburić, op.cit. (n 12), pp. 66-68.

specific historical and national circumstances. The consequences of Nazi-regime in Germany led to hate speech restrictions are an obvious example. Certain scholars (mostly from USA), support the view that state should not sanction hate speech since freedom of expression is so valuable that it excludes the interference of repressive state mechanism. Therefore, it is stipulated that hate speech enjoys the protection of the First Amendment, allowing strong freedoms in the area of speech and expression in general.²¹ This approach had inspired many authors to analyse it to the point of statement that the amount of American academic literature on this issue exceeds everything written in all other countries. Simpson stipulates that legal status of hate speech is an “absorbing issue” considering that it creates pressure in practicing liberal democratic freedoms of others. He emphasizes the fact that many American authors support the case law which favours the First Amendment, protecting wide freedom of speech.²² In this regard it expresses significantly greater tolerance towards verbal and nonverbal manifests of hate speech contrary to European countries where legal restrictions are well established and basically unchallenged. Accordingly, hate speech is considered as a form of speech (despite that it may hurt others)²³ and generally is not subjected to sanctions in the United States. This applies even when it comes to, for example, racial violence proclamations, burning flags or protesting on homosexual equality held at the funeral of one soldier.²⁴ Despite of this liberal attitude, there are certain categories of speech that are not allowed: the obscene (licentious) speech (obscenity), slander (defamation) and speech that represents a “clear and present danger”²⁵ creating substantial damage.²⁶

²¹ In American literature, themes related to the constitutionality of restrictions on freedom of speech and hate speech prohibitions are relatively frequent. One of examples are Campus speech codes: lists of rules that education institutions use to suppress hate speech. The sanction is usually a suspension or expulsion. See, N. Strossen, ‘Regulating Hate Speech on Campus: A Modest Proposal?’ (1990), *Duke Law Journal*, June 1990, pp. 484-573. See also, Kiska, op.cit. (n 10), pp. 138-140.

²² Simpson, op.cit. (n 9), p. 702.

²³ W. Brugger, ‘Ban On or Protection of Hate Speech? Some observations Based on German and American Law’ vol.17., no.1, *Tulane European & Civil Law Forum*, 2002, p. 2.

²⁴ See, R. Cohen, ‘Regulating Hate Speech: Nothing Customary about It’ (2014), *Chicago Journal of International Law*, vol. 15, no. 1, p. 231. Following decisions are important: *Brandenburg v. Ohio* (1969) 395 US 444, paras 448-449; *Texas v. Johnson* (1989) 491 US 397, para 420; *Snyder v. Phelps* (2011) 131 S. Ct. 1207, para 1220. The author points out that the protection covers even the most vulgar forms of hate speech since offensiveness alone does not provide a constitutional basis for combating hate speech.

²⁵ Clear and present danger doctrine is a result of *Schenck v. United States* (1919) 249 US 47, 52. The founder is Supreme Court Judge *Oliver Wendell Holmes*, who expressed the view that hate speech should be protected only when it does not impose a clear and present danger for people. It is to observe the circumstances which indicate a clear and present danger and will it cause certain harms that Congress has a right to sanction, since freedom of speech does not mean freedom to terrorize or to arouse hatred. See, <http://definitions.uslegal.com/c/clear-and-present-danger/>, last accessed on 10 May 2015. Also see N. Živanovski, ‘Različit tretman govora mržnje u procesima komunikacije u Evropi i SAD’, *Communication and Media Journal*, vol.32, 2014, pp. 63-64.

²⁶ Kiska, op.cit. (n 10), p. 139. One interesting category of punishable speech is called “fighting words”. Those are words which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

From this perspective, there are two reasons why the majority of European countries restrict freedom of expression. The first is the so-called “values-based” approach to speech, balancing between the principles of dignity and equality of the individual and freedom of expression. In this collision, principles take precedence over expression. Second reason is the fact that the governments of European countries are considered to be responsible for these values and principles realization (the state has an obligation to respect them as well as to protect them from encroachment of others). This justifies the regulated limits.²⁷

A detailed review of relevant European documents, agreements and recommendations applicable to hate speech is beyond the scope of this paper.²⁸ It is sufficient to mention that some of them are the Charter of the United Nations from 1945 (Art. 55c); Universal Declaration of Human Rights from 1948 (Art. 19); International Convention on the Elimination of All Forms of Racial Discrimination from 1966 (Art. 2 (1) d and Art. 4, whereby Art. 1 broadly defines racial discrimination)²⁹, International Covenant on Civil and Political Rights from 1966, entered into force in 1976 (Art. 20 and 26); Recommendation of Committee of Ministers of the Council of Europe on Hate Speech, No.R (97) 20. Furthermore, Framework Decision on Combating Racism and Xenophobia as well as the provisions of the international courts statutes that criminalize incitement to genocide. Important is also the Convention on Cybercrime, concerning the criminalization of acts of racist and xenophobic nature committed through computer systems and the Additional Protocol to the Convention which extends its scope and deals with hate speech.

The ECHR was adopted in 1950 within Council of Europe and entered into force in 1953.³⁰ In addition to the proclaimed provisions, of significant importance is the supervisory mechanism which monitors the potential violations of the Member States: the ECtHR in Strassbourg. Every state has positive and negative duties: a negative obligation

²⁷ See, Cohen, *op.cit.* (n 24), pp. 238-239. The difference in the European and American courts approach to hate speech is evident. However, in one case, the US Supreme Court dealt with the balance between human dignity and freedom of speech. The preference was undoubtedly given to freedom of speech. It was said that importance of freedom of expression in a democratic society goes beyond any theoretical and unproven benefits of censorship: “The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship” *Reno v. ACLU* (1997) 521 US 844, 885.

²⁸ For overview, see Weber *op.cit.* (n 6), pp. 7-17.

²⁹ This act proposes various measures to combat racial discrimination and hate speech. In Art. 4 it requires to signatory parties to establish specific criminal offense: all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, any act of violence or incitement to violence against any race or group of persons of another skin colour or ethnic origin as well as any assistance to racist activities, including financing. The same goes for propaganda, promotion and encouragement of participation in such activities.

³⁰ For Croatia, it is binding from 05. 11. 1997, when the Act on Ratification of the ECHR came into force (Official Gazette-International Treaties 18/97). The basic proclamations of ECHR entered Croatian legal system earlier, we can say from the end of 1991, when Constitutional Act on Human Rights and Freedoms and Rights of Ethnic Minorities in the Republic of Croatia came into force since Art. 1 of this Act states the obligation to respect the ECHR and its protocols.

assumes “restraint” i.e. not to affect the guaranteed rights and freedoms more than necessary. Positive duty implies the obligation to ensure conditions for unhindered use of guaranteed rights and their protection.³¹

ECHR guarantees freedom of expression, but at the same time provides possible restrictions in Art. 10 (2). Some authors stipulate that ECHR is the first human rights instrument which provides restrictions on freedom of expression.³² As mentioned earlier, they can be classified into three different categories. The existence of these restrictions is important when imposing repressive measures in national legislation, since Member states use reference to the legitimate convention limits.

When deciding *in concreto* on freedom of expression, two ECHR provisions are important. Already mentioned limitations are stated in the Art. 10 (2). Prohibition of abuse of rights, is regulated under Art. 17. “Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention” This is the basis renunciation of protection to specific content of the speech directed to promoting hatred and violence.³³ The basic difference in application between the Art. 10 (2) and Art.17, is the type of expression (we can call it the strength of injury to others). In cases when expression or speech is aiming at ECHR rights/freedoms denial, the Art. 17 will be applied. Decision is made when deciding on application admissibility, without deciding on the merits.³⁴ If the concerned expression does not have such a “heavy” content, but it represents specific term that can be considered as hate speech, the court will examine the restrictions provided in Art. 10 (2).

When deciding on violation, ECtHR applies three-part test. This test consists of fulfilment of following conditions regarding imposed restriction: prescribed by law, designed

³¹ In this regard, the State is treated in two ways in ECHR: as a possible violator of human rights and freedoms and as a guarantor of their compliance. Modalities for the violation of ECHR are acts or omissions. Alaburić, op.cit. (n 7), p. 12; Đurđević, op.cit. (n 8), p. 162.

³² R. Clayton and H. Tomlinson, *The Law of Human Rights*, Oxford, Oxford University Press, 2008., p. 1058, cited in Đurđević, *ibid*, p.160.

³³ Specific relation between this Article and others is explained in *Lawless v. Ireland*, App no 332/57 (ECtHR 1 July 1961), Series A3, para 7. According to Weber, this Article was first applied in 1957. in *Communist Party (KPD) v. Federal Republic of Germany*, 20 July 1957 Weber, op.cit. (n 6), pp. 22-26

³⁴ Examples of such judgments: promoting national socialist values- *Schimanek v. Austria* App no 32307/96 (ECtHR 1 February 2000); denial of the Holocaust- *Garaudy v. France* App no 65831/01 (ECtHR 24 June 2003); expression of religious and racial hatred - *Glimmerveen and Hagenbeek v. Netherlands* App no 8348/78 and 8406/78 (ECtHR 11 October 1979); also *Rujak v Croatia* App no 57942/10 (ECtHR 2 October 2012).

to protect a legitimate aim (Art. 10 (2) ECHR), and necessity in a democratic society.³⁵ If all three conditions are satisfied, there is no violation.³⁶ Hate speech does not enjoy the ECHR protection, as confirmed by the ECtHR practice which will be presented in next chapter. However, political discourse enjoys a high degree of protection due to significant value for democratic society. When it comes to speech restrictions permissibility, ECtHR uses following criteria: the purpose of speech (intention to spread racist ideas, or to inform the public on matters of public interest), the content of the speech (can it cause feelings of hostility, rejection and hatred of the target population) and context (status and role of offender in society, the dominant social climate, manner, place and media of expression as well as targeted audience).³⁷

Protocol 12 to the Convention³⁸ proclaims exercising all rights set forth by law, without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Generally speaking, European countries prohibit discrimination already through constitutional provisions and their criminal law provisions are sanctioning not only discriminatory behaviour, but also hate speech.

An influential example of specific hate speech regulation we can find in Germany. Its criminalization and amendments are often perceived as a complex answer to the “darkest” period of German history, under the Nazi regime. This answer consists in the collective recognition of historic circumstances and developments as well as in providing safety guidelines for the future. Therefore it is often cited as an example of European model regarding the hate speech regulation (new model of democracy).³⁹ German Constitution guarantees freedom of speech, but also proclaims human dignity as an inviolable.⁴⁰ The apparent supremacy of human dignity compared to other values can be seen in Art. 21 of

³⁵ The first two conditions are relatively easy to verify, while the third is subjected to more detailed examination. Weber, op.cit. (n 6), pp. 30-32; Kiska, op.cit. (n 10), pp. 122-129; Đurđević, op.cit. (n 8), pp. 160-162.

³⁶ In restrictions of speech assessment, American court apply three-part test also: is the speech protected by the First Amendment, what kind of place is the one in which the subject practiced speech (“the nature of the forum”) which greatly dictates the restriction standards, and is the restriction justifying necessary standards (requisite standards). See, Kiska, op.cit. (n 10), p. 139.

³⁷ M.M. Vajda, ‘Zakonska podloga za sankcioniranje govora mržnje-devedestih i danas’ in Maja Dubljević (ed): *Procesuiranje ratnih zločina-jamstvo procesa suočavanja s prošlošću u Hrvatskoj*, Zagreb, Documenta, 2014, p. 368.

³⁸ Official Gazette – International Agreements 14-160/2002

³⁹ See, F. Kübler, ‘How Much Freedom for Racist Speech? Transnational Aspects of a Conflict of Human Rights’, Hofstra Law Review, vol. 27, no.2, 1998, pp. 336-338.

⁴⁰ Grundgesetz für die Bundesrepublik Deutschland, Art. 5, available at <https://www.bundestag.de/grundgesetz>, (last accessed on 15 June 2015). German *Bundesverfassungsgericht* acknowledged human dignity as a central point of all decisions. See, C. Enders, ‘The Right to have Rights: The concept of human dignity in German Basic Law’ (2010) 2(1) *Revista de Estudos Constitucionais, Hermeneutica e Teoria do Direito* (RECHTD)

German Constitution. Some authors point out that this is a result of increased sensitivity to human dignity in general. With this in mind, German Criminal Code (*Strafgesetzbuch*) contains extensive provisions against hate speech in Art. 84, 85 and 130.⁴¹

Although without written constitution, United Kingdom has a legal tradition that respects and protects individual rights and freedoms. Being signatory of many international treaties, UK guarantees their protection. Some authors stipulate that hate speech restrictions actually existed for centuries.⁴² In this context, four acts are of significant importance. Race Relations Act from 1965, incriminates public speech and publications that are threatening, abusive or insulting and directed on promotion of hatred based on race, colour and origin.⁴³ Public Order Act from 1986 prohibits actions intended to encourage racial hatred. Protection from Harassment Act from 1997 prohibits behaviour (including speech) that increases the hatred towards “the other” and Racial and Religious Hatred Act from 2006, criminalizes speech that may encourage racial or religious hatred.⁴⁴

France has the reputation of being a country with the strictest prohibitions on hate speech in Europe.⁴⁵ Some authors even claim that in relation to the other fundamental

⁴¹ The criminalization of Holocaust denial is colloquially referred to as *Auschwitz Lüge* or *Auschwitz Lie*. It was the reason for the changes in limiting freedom of speech that was initially based on insult, libel and similar forms of verbal aggression. Given that former general provisions could not be applied to the protection of human dignity when it comes to this particular situation, in 1960 a new provision was written. German *Bundesgerichtshof* distinguished simple and qualified *Auschwitz lie*, until 1994, when the provision was changed again and the entire § 130 (3) was adapted to Holocaust denial criminalization. Kübler, op.cit. (n 39), pp. 340-345. Denying the Holocaust or the complaint of victim exaggerating is considered to be a simple lie. It becomes qualified if associated additional conclusions or calls into action. Brugger, op.cit. (n 23), p.15. Today, the Article is as follows: §130 *Volksverhetzung*, (3) *Mit Freiheitsstrafe bis zu fünf Jahren oder mit Geldstrafe wird bestraft, wer eine unter der Herrschaft des Nationalsozialismus begangene Handlung der in §6 Abs. 1 des Völkerstrafgesetzbuches bezeichneten Art in einer Weise die geeignet ist, der öffentlichen Frieden zu stören, öffentlich oder in einer Versammlung billigt, leugnet oder verharmlost.* (4) *Mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe wird bestraft, wer öffentlich oder in einer Versammlung den öffentlichen Frieden in einer Würde der Opfer verletzenden Weise dadurch stört, dass er die nationalsozialistische Gewalt- und Willkürherrschaft billigt, verherrlicht oder rechtfertigt.* See, Detlev Sternberg-Lieben in Adolf Schönke and Horst Schröder (eds), *Strafgesetzbuch, Kommentar*, (29. Auflage, C. H. Beck, 2014), pp. 1521-1522.

⁴² Cohen, op.cit. (n 24), p. 241.

⁴³ See, P.N. Sooben, ‘The Origins of the Race Relations Act’, Research Paper in Ethnic Relations No.12, Warwick, Centre for Research in Ethnic Relations, University of Warwick, 1990, available at https://web.warwick.ac.uk/fac/soc/CRER_RC/publications/pdfs/Research%20Papers%20in%20Ethnic%20Relations/RP%20No.12.pdf, (accessed 15 May 2015).

⁴⁴ All mentioned Acts are available at <http://www.legislation.gov.uk>, accessed 15 May 2015. In addition, the Crown prosecution service (Crown Prosecution Service-CPS) has issued guidelines for violent extremism prosecution. Some authors evaluated them as simple and extensive standards that are easy to fill and make it easier to prosecute. Cohen, op.cit. (n 24), p. 242.

⁴⁵ It is described it as a country that has ruthless culture of free speech repression, preventing that certain topics become public. See, S. Schulman, ‘The Great Free Speech Experiment. What good have Holocaust-denial bans done?’, *The Weekly Standard*, vol.20, no.19, 2015, p.1.

rights, freedom of expression has a “back seat” in the French constitutional hierarchy and is known for its freedom of speech inferiority recognition, compared to other rights. Nevertheless, the problem of speech and hatred motivated violence is progressive.⁴⁶ Within the relevant French legislation, we can mention the Pleven anti racism Law from 1972 and Gaysot Act from 1990. Pleven Law provides protection from racial discrimination in public and private sphere by banning speech that provokes discrimination, hatred or violence towards persons or groups based on ethnicity, nationality, race or religion. Gaysot Act was adopted as a response to growing violence and is described as the most controversial regulation of hate speech in Europe. It incriminates questioning of one or more crimes described in the Statute of International Military Tribunal (Art.6). Similar to German regulation, it prohibits Holocaust denial. This controversial act is criticized on behalf of large part of the French professionals and association for human rights and media freedom and described as a potentially unconstitutional.⁴⁷

2.1. European Court of Human Rights

As mentioned, expressions protected with Art. 10 are not only limited to (written or spoken) words, but also includes pictures, visual presentations and the actions aimed at idea expression or information presentation. It is not only the content, but also the form in which they are expressed (means for the production and communication, transmission or distribution of information and ideas are also “covered”). Freedom of expression also includes the negative freedom, i.e., the freedom not to express. Likewise, one of the characteristics of Article 10 is that it protects expression that carries the risk of damage or actually harms the interests of others. In general, opinions held by the majority or large groups are not at risk to come to the intervention of the state. That is why protection provided by Article 10 includes information and opinions expressed by small groups or even an individual when such an expression shocks the majority. In this regard, the ECtHR determined that Article 10 protects not only information or ideas that are favourably received or regarded as inoffensive or something that does not cause reactions, but also those that offend, shock or disturb. Such are demands of pluralism, tolerance and broad-mindedness without which there is no democratic society.^{48, 49}

⁴⁶ See, Cohen, op.cit. (n 24), pp. 243-244.

⁴⁷ Also, The “Lellouche” Law from 2003 establishes that racist or anti-Semitic grounds for an offence are considered as aggravated circumstances. See, Responding to Racism in France, European network against racism, ENAR-France, available at http://cms.horus.be/files/99935/MediaArchive/pdf/france_en.pdf, (accessed 15 May 2015).

⁴⁸ M. Macovei, ‘Sloboda izražavanja - Vodič za primjenu Člana 10 Evropske Konvencije o ljudskim pravima’, *Priručnik iz oblasti ljudskih prava br. 2*, 2004, pp. 5-14.; J.A. Frowein, ‘Freedom of expression under the European Convention on Human Rights’, *3 Monitor/Inf*, Council of Europe, 1997.

⁴⁹ *Handyside v. United Kingdom*, op.cit. (n 1), *Jersild v. Denmark*, op.cit. (n 2).

The opinions expressed by sharp and exaggerated language are also protected, and the scope of protection depends on the context and purpose of criticism. In matters of public controversy or public interest, during a political debate, in election campaigns or when critics refer to the Government, politicians or state authorities, sharp words and harsh criticism can be expected and the ECtHR tolerates them to a greater extent. In the case *Erbakan v. Turkey*⁵⁰ the ECtHR stated that by using religious expressions in his speech, Mr. Erbakan indeed reduced diversity – a factor inherent in any society – to a simple division between “believers” and “non-believers” and called for a political line to be formed on the basis of religious affiliation. The Court also pointed out that combating all forms of intolerance was an integral part of human-rights protection and that it was crucially important that in their speeches politicians avoid making comments likely to foster such intolerance. However, in view of the fundamental nature of freedom of political debate in a democratic society, a severe penalty in relation to political speech can be justified only for compelling reasons. The ECtHR concluded in that regard that it is particularly difficult to hold the applicant responsible for all the comments cited in the indictment. Furthermore, it had not been established that the speech had given rise to or had been likely to give rise to a “present risk” and an “imminent danger”. Taking into account the seriousness of one year imprisonment, it was found that the interference with freedom of expression of the applicant was not necessary in a democratic society. Therefore, ECtHR accordingly held that there had been a violation of Article 10.⁵¹ Likewise, in the *Jersild*⁵² case the significant fact was that an interview containing racist statements was presented in a serious news program which was intended to inform the public about serious events in the community or abroad.

Article 10 does not provide protection in cases of direct expressions which promote violence or a real possibility for the violence exist. In the case of *Le Pen v. France*, the applicant was the chairman of the French party The National Front, who was in 2005 sentenced to a fine of 10000 Euros for “incitement to discrimination, hatred and violence towards group of people for their origin or belonging to particular ethnic group, nation, race or religion.” He was convicted because of the interview he gave to a weekly newspaper *Le Monde*, in which he asserted, among other things, that the day there are no longer 5 million Muslims in France, as it was then, but 25 million they will be in charge. What he actually meant was that the French should be afraid of that moment. After that he was sentenced to another fine of the same amount, after having commented on the initial fine in the weekly *Rivarol* in the following words: “When I tell people that when we have 25 million Muslims in France we French will have to watch our step, they often reply: ‘But Mr. Le Pen, that is already the case now!’ – and they are right.” The French Court of Appeal

⁵⁰ *Erbakan v. Turkey*, op.cit. (n 3).

⁵¹ *ibid*

⁵² *Jersild v. Denmark*, op.cit. (n 2).

considered that Le Pen's freedom of expression was not a justification for incitement to discrimination, hatred or violence. In a decision of 20 April 2010 the ECtHR has declared the application of Le Pen manifestly ill-founded and hence inadmissible since Le Pen's comments had certainly presented the Muslim community in a disturbing light, likely to give rise to feelings of rejection and hostility. Furthermore, in its comments it can be read that for him a rapid growth in the number of Muslims is a latent threat to the dignity and security of the French people. The ECtHR found that the interference with Le Pen's enjoyment of his right to freedom of expression was "necessary in a democratic society" and that his conviction in France represents allowed limit of freedom of (political) expression.⁵³ This decision shows there is no excuse for the speech of hatred⁵⁴ and that politicians must avoid comments that might promote intolerance.⁵⁵

The speech that promotes Nazi ideology, denies the holocaust and incites hatred and racial discrimination represents a special problem. In the *Kühnen* case, the applicant was the head of an organization which tried to restore a National Socialist party, which was banned in Germany. He wrote and distributed publications in which he encouraged the fight for independent greater Germany. Kühnen lodged an appeal against the conviction, which was imposed upon him by the German Court, on the basis of Article 10. The application was declared inadmissible, relying on Article 17 of the ECHR which prohibits the execution of any action aimed at the destruction of any of guaranteed rights and freedoms. It was determined that the applicant advocated national socialism with the aim of compromising the basic order of freedom and democracy, and that his speech is in opposition to one of the fundamental values mentioned in the ECHR preamble. Basic freedoms set forth in the Convention are "best protected by effective political democracy". In addition, it was found that the applicant's policy clearly contains elements of racial and religious discrimination.⁵⁶

In connection with the ban of speech that promotes Nazi ideology, we should mention the decision of the ECtHR in the case of *Schimanek v. Austria*. The applicant was convicted in Austria for promoting Nazi ideology and sentenced to eight years imprisonment. The applicant, as the leader of neo-Nazi organization, recruited new members and organized special events where they glorified Nazi Germany (Third Reich), organized army and special forces, whilst at the same time denied systematic murders and the use of poison gas in the concentration camps that had happened in Nazi Germany. Furthermore, it was found that he transmitted a Nazi ideology to the members and organized distribution of pamphlets with similar content, organized paramilitary training camps in order to seize power in Austria and incorporate it into the great Germany (*Grossdeutschland*). The ap-

⁵³ *Jean-Marie Le Pen v. France* App no 18788/09 (ECtHR 20 April 2010).

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Kühnen v Federal Republic of Germany*, App. No. 12194/86 (ECtHR 12 May 1988).

plicant considered that the conviction constituted interference with his right to freedom of expression, which is prescribed by the law. In his complaint he stated that there was a violation of Articles 3, 7, 9 and 10 of the Convention. The ECtHR found in this case that the right to freedom of expression may not be invoked as a justification for actions aimed at denying the rights of others. The applicant was found guilty for holding a leading position in the Nazi organization, advocating a totalitarian doctrine incompatible with democracy and human rights. Applying Art. 17, ECHR declared that it does not constitute a violation of the right to freedom of expression, thus the application was inadmissible.⁵⁷

The public debate statements that deny Holocaust are not protected by Art. 10. In the case of *Garaudy v. France*, Roger Garaudy, a French citizen, wrote and published a book titled "The Founding Myths of Modern Israel" In this book he questioned the nature and conditions of the Holocaust, using as an example the so called „myth of the six million". It was considered that the content of the book denies the Holocaust. The French courts convicted Garaudy for "Holocaust denial", a criminal offense under French law, for libeling against Jews and incitement to racial hatred. After that, he lodged a complaint to the ECtHR in which he alleged that his right to freedom of expression under Art. 10 was violated. However, the ECtHR concluded that the author's conviction did not violate his right to freedom of expression. In its decision it was stated that "denial of crimes against humanity is one of the most serious forms of offending Jews on racial grounds and incitement to hatred against them." Also, denial of the existence of clearly established historical events such as the Holocaust, is not a scientific or historical research, but the clear objective is rehabilitation of Nazi regime and blaming the victims for falsifying history. Therefore, as incompatible with the fundamental values of ECHR it is not protected by the right to freedom of expression.⁵⁸

Case X v. Germany is one of the earliest cases concerning denial of the Holocaust. The applicant exhibited and distributed pamphlets containing statements which described the Holocaust as "unacceptable lie" and "Zionist fraud". These pamphlets were seen on his estate. His neighbor, a Jew, whose grandfather was killed in the German concentration camp Auschwitz, lodged a civil complaint against him. The Federal Court emphasized that denial of the Holocaust is not protected by the freedom of expression prescribed in the German Constitution. After that, Mr. X applied to ECtHR claiming that Art. 10 was violated, together with Art. 6 (the right to fair trial). Regarding Art. 10, it was found that "... in describing the historical fact of the murder of millions of Jews, the fact that the applicant himself recognized as lies and Zionist fraud, not only do these pamphlets give a distorted picture of the relevant historical facts, but also contain an attack to the reputation of all of those who were described as liars and swindlers... In addition, having found the complaint inadmissible, it was stipulated that the Holocaust is "well known historical fact", proved

⁵⁷ *Schimanek v. Austria* App no 32307/96 (ECtHR 01 February 2000).

⁵⁸ *Garaudy v. France* App no 65831/01 (ECtHR 24 June 2003)

beyond any doubt by numerous evidence of every kind, and therefore the ban was justified by the protection of the reputation and rights of others.⁵⁹

In *Witzsch v. Germany* the applicant complained of the violation of Art. 9 and 10, when German courts did not take into account that his views were expressed in private letters. Among other things in these letters Mr. Witzsch denied the existence of gas chambers and mass killing by calling them “the so called gas chambers” and “historical lies”.⁶⁰ German Federal Constitutional Court stated that although the applicant did not deny the Holocausts itself, he disparaged the dignity of the dead by denying the Hitler and Nazi party responsibility. Accordingly, the ECtHR declared that the views expressed by the applicant were contrary to the content and the spirit of the ECHR and that his statements, according to Article 17 of the Convention, cannot be protected by Article 10. The fact that his views are expressed in a private letter and not expressed publicly is of significant importance. Punishment of the applicant was necessary and proportionate in a democratic society in order to prevent disorder and crime for defamatory statements about the Holocaust, as well as the need to protect the interests of the victims.⁶¹

Prohibition of discrimination is established by Art. 14. “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” In the case of *Glimmerveen and Hagenbeek v. Netherlands*, the applicants were Glimmerveen, the chairman of the political party *vöiks Nederlandse Unie*, supporting the need for “pure ethnic society”, while Hagenbeek was the member of the party. They distributed pamphlets addressed to “white Dutch people” in which they insulted immigrant workers on racial grounds. The applicants were convicted for the possession and planned distribution of these pamphlets.⁶² They lodged a complaint to ECHR, relying on Art. 10 and Art. 3 of the Protocol (right to free elections). The complaint was declared inadmissible, explaining that “the applicants attempted to exploit the European Convention on Human Rights in order to engage in activities which are contrary to the Convention”, i.e. “in order to spread ideas of racial discrimination.”⁶³

The ECtHR did not find any violation of Art. 10 in convicting the applicant, the chairman of the *Front National* party, for public incitement to discrimination or hatred, upon receiving complaints about the flyers that his party had been distributing during the electoral campaign. Namely, he was convicted in Belgium for distributing election flyers with

⁵⁹ *X v. Federal Republic of Germany* App no 92351/81, (ECtHR 16 July 1982) para 29.

⁶⁰ Alaburić, op.cit. (n 12), p. 14.

⁶¹ *Witzsch v. Germany* App no 00041448/98, (ECtHR 13 December 2005)

⁶² Alaburić, op.cit. (n 12), p. 14.

⁶³ *Glimmerveen and Hagenbeek v. Netherlands* App no 8348/78 and 8406118 (ECtHR 11 October 1979)

the slogans “stand up against islamification of Belgium“, “Stop to fake integration politics“, “Send back home non-Europeans seeking jobs“, and the flyer “Mind your own business!“ was in particular the subject of numerous criminal complaints submitted by citizens to the police.⁶⁴

In addition to racial discrimination, ECHR also prohibits any form of discrimination based on sexual orientation. In case of *Vejdeland v. Sweden*, the applicant, with three other people, went to a higher secondary school and distributed about hundred leaflets, leaving them in student’s lockers. The incident ended when the principle of the school intervened and forced them to leave the premises. The author of the leaflets was an organization called National Youth, and the leaflets alleged that homosexuality is “deviant sexual proclivity“, which had “morally destructive effect on the very substance of the society“, and which is responsible for the existence of HIV and AIDS. For these reasons the applicants were charged for agitation against national or ethnical group. The ECtHR concluded that the conviction of the applicant did not breach their right to freedom of expression. Furthermore, the Court considered that the allegations in the leaflets were serious and full of prejudices, hence they emphasized that discrimination based on sexual orientation is as offensive as discrimination based on race, origin or skin color.⁶⁵ Although these allegations did not represent direct call for hatred or other criminal offenses, the verdict could reasonably be considered “necessary“in a democratic society with an aim to protect reputation and rights of others.⁶⁶ Namely, attacks on persons or specific groups of population, exercised through insults, defamation and disparagement can be enough of a reason for the government to decide to combat racist speech when faced with irresponsible exercise of rights to freedom of expression.⁶⁷

Article 10 also applies to all relations between employers and employees, i.e. other individual rights are protected as well. This is evident in the case of *Fuentes Bobo v. Spain*. ECtHR concluded that the Art. 10 of the Convention was breached when a producer of broadcasting TV company was dismissed after making insulting remarks in two interviews about the manager of a Spanish TV company. The Court reminded that Article 10 is applicable to all relations between employers and employees even to those which fall under the domain of private law, and that the state, in certain cases, has positive obligations to protect the right of freedom of expression. In addition, the ECtHR pointed out the following: “...Article 10 of the Convention does not guarantee freedom of expression without restrictions, even when it comes to newspaper reports on serious issues of general interest.“ In this case, the use of expression such as “leeches“ on account of certain executives could have, with no doubt, harm his reputation and it therefore justified the punishment.

⁶⁴ *Feret v. Belgium* App no 15615/07 (ECtHR 16 July 2009)

⁶⁵ See, *Smith and Grady v. United Kingdom* App no 33985/96 and 33986/96 (ECtHR, 25 July 2000), para 97.

⁶⁶ *Vejdeland v. Sweden* App no 1813/07 (ECtHR 9 February 2012).

⁶⁷ See also, *Féret v. Belgium*, op.cit. (n 64).

However, the impugned statements were an integral part of public and acrimonious debates on alleged irregularities in the management of the state TV. These statements were previously made by “radio speakers” and the applicant only confirmed them (...) during quick and spontaneous exchange of words“. In addition, the managers did not initiate any proceedings for defamation and insults. According to the Court the applicant’s dismissal with no rights to compensation represented “very sever character of disciplinary sanction, although less severe and more appropriate disciplinary sanctions could have been taken into consideration.”⁶⁸

III. HATE SPEECH REGULATION IN REPUBLIC OF CROATIA

Hate speech does not only include the abuse of freedom of expression, but also violation of equality⁶⁹ as one of the highest constitutional values. It is the right of every person not to be discriminated and their dignity and equality should be respected. Freedom of expression is protected in the Republic of Croatia at the constitutional level. In this context, the following Constitution provisions are relevant:⁷⁰ The freedom of thoughts and their expression (Art. 38) which may be restricted by law with purpose to protect freedoms and rights of others, public order, public moral and health (Art. 16). Restrictions are subjected to the proportionality principle and must not lead to discrimination on certain grounds (the scope of restrictions should be adequate to the endangerment nature and may not result in citizen’s inequality based on race, color, sex, language, religion, national or social origin, Art.17). Furthermore, respect and legal protection of personal and family life, dignity, reputation and honor is guaranteed (Art. 35). Invitation or incitement to war or use of violence, national, racial or religious hatred or any form of intolerance is forbidden and punishable (Art. 39). In this regard, hate speech is not protected freedom of expression. It is interesting to mention that (freedom of expression) restrictions regulated in Art. 16 are shorter than legitimate aims for a restriction in the ECHR in Art. 10 (2): Constitution provides four and ECHR a total of eight of them. Certain forms of manifested hate speech owe their frequency to historical circumstances in specific multi-ethnic area. There is no official definition of hate speech in Croatia, but it does not mean it is not punishable. Sanctions are provided in criminal law since severe forms of hate speech

⁶⁸ *Fuentes Bobo v. Spain* App no 39293/98 (ECtHR 29 February 2000)

⁶⁹ The defendant, with his statements indulged in hate speech and justification of physical confrontation and attacks on the homosexual group. He directly incited to violence and hatred towards LGBT people. This represents discrimination prohibited by Anti-discrimination Act, Art. 4 (1) and Art. 1 (1), (2), based on sexual orientation. See, Vrhovni sud Republike Hrvatske, *eng.* Supreme Court of Republic of Croatia, decision VSRH Gž 38/2011-2, 7 March 2012.

⁷⁰ *Ustav Republike Hrvatske, eng. Constitution of Republic of Croatia*, (Official Gazette 56/90, 135/97, 113/00, 28/01, 76/10, 5/14).

are regulated as criminal offense in Criminal Code. In the context of criminal law regulation, it should be emphasized that freedom of expression is protected but limited. These limitations represent important legal interests that deserve criminal law protection as well: honor and reputation of individuals⁷¹, prohibition of discrimination, confidentiality obligation...etc. Also, different forms of speech that are not considered hate speech can be characterized as unacceptable and discriminatory speech. Insofar, provisions of other acts are being violated. This enables misdemeanor law sanctioning or civil actions. There are Misdemeanors against Public Order and Peace Act⁷², Anti-discrimination Act⁷³ Media Act⁷⁴, Electronic Media Act⁷⁵, Croatian Radio and Television Act⁷⁶, Gender Equality Act⁷⁷ and the Civil Partnership of the same sex Act⁷⁸ when regulating freedom of information and discrimination prohibition.⁷⁹ Further on we will concentrate only on criminal law provisions.

The Criminal Code/⁷⁷⁸⁰ contained a criminal offense called Incitement to national, racial and religious hatred, division or intolerance. It was placed among the chapter of Criminal Offenses against Republic of Croatia, regulated in Art. 236k:

⁷¹ The protection of honor and reputation is considered a significant limitation to freedom of expression (some Croatian authors find it to be the most significant one, see Đurđević, op.cit. (n 8), p. 173). More on this group of criminal offenses see L.Cvitanović, `Kaznena djela protiv časti i ugleda` in Davor Derenčinović (ed) *Posebni dio kaznenog prava, Zagreb, Sveučilište u Zagrebu, 2013, pp.133-156*; I. Bojanić, `Die Rolle der Ehre im Strafrecht in Kroatien` in Silvia Tellenbach, (ed): *Die Rolle der Ehre im Strafrecht*, Berlin, Duncker&Humblot, 2007, pp. 405-457; T. Lenckner and J. Eisele, *Vierzehnter Abschnitt. Beleidigung in Schönke, Schröder, op.cit. (n 41), pp. 1741-1768.*

⁷² *Zakon o prekršajima protiv javnog reda i mira*, (Official Gazette 41/1977, 47/89, 55/89, 83/89, 47/90, 55/91, 29/94).

⁷³ *Zakon o suzbijanju diskriminacije*, (Official Gazette 85/2008, 112/2012), Art. 25 (1). Whoever, with intent to intimidate another person or to create a hostile, degrading or offensive environment on the basis of race, ethnicity, skin colour, sex, language, religion, political or other opinion, national or social origin, property, trade union membership, social status, marital or family status, age, health, disability, genetic heritage, gender identity or expression, and sexual orientation violates the dignity, shall be imposed a fine of 5,000.00 to 30,000.00 HRK.

⁷⁴ *Zakon o medijima*, (Official Gazette Nos. 59/04, 84/11, 81/13).

⁷⁵ *Zakon o elektroničkim medijima*, (Official Gazette Nos. 153/09, 84/11, 94/13, 136/13).

⁷⁶ *Zakon o hrvatskoj radioteleviziji*, (Official Gazette Nos. 137/20, 76/20).

⁷⁷ *Zakon o ravnopravnosti spolova*, (Official Gazette Nos. 82/08, 125/11, 20/12, 138/12).

⁷⁸ *Zakon o životnom partnerstvu osoba istog spola*, (Official Gazette Nos. 92/14).

⁷⁹ A detail overview of provisions regarding freedom of speech as a part of anti-discrimination legislation see, Đurđević, op.cit. (n 8), pp. 163-172.

⁸⁰ *Kazneni zakon*, (Official Gazette Nos. 25/77, 50/78, 25/84, 52/87, 43/89, 8/1990, 54/90, 9/91, 67/91, 71/91, 25/92, 33/92, 39/92, 77/92, 91/92, 37/94, 28/96, 30/96, 110/97).

- (1) *Whoever incites or stirs national, racial or religious hatred, discord or animosity among nations and minorities living in the Republic of Croatia shall be punished with imprisonment from six months to five years.*
- (2) *If the offense referred to in paragraph 1 of this Article was committed by coercion, maltreatment, compromising security, national, ethnic or religious symbols mockery, property damaging, monuments, memorials or graves desecration, the perpetrator shall be punished with imprisonment up to eight years.*
- (3) *If the offense referred to in paragraphs 1 and 2 of this Article is committed by abusing position or authority, or if result is a riot, violence or other grave consequences to life of peoples and minorities living in the Republic of Croatia, the perpetrator shall be punished for the offense referred to in paragraph 1 of this Article by imprisonment up to eight years, and for the offense from paragraph 2 by imprisonment up to ten years.*

Regardless of this criminalization, absence of judicial decision was the reality.⁸¹ This situation should not be interpreted with the lack of social behaviour described with incrimination.⁸²

It would be more appropriate to point out the lack of victim's awareness and education on their rights and protection, but also the lack of competent authorities' awareness in this matter.

In the Criminal Code/97⁸³ hate speech was incriminated within the chapter of Criminal offenses against the international law values- Racial and other discrimination, in Art. 174 :

- (1) *Whoever, on the basis of race, gender, colour, nationality or ethnic origin, violates basic human rights and freedoms recognized by the international community, shall be punished by imprisonment for six months to five years.*
- (2) *The punishment referred to in paragraph 1 of this Article shall be imposed on whoever persecutes organizations or individuals for promoting equality between people.*

⁸¹ M. Vajda, op. cit. (n 37), pp. 360-361 and V. Alaburić, 'Ograničavanje «govora mržnje» u demokratskome društvu-teorijski, zakonodavni i praktični aspekti' *Hrvatska pravna revija*, vol.2, no.2, 2003, p. 85.

⁸² Thus, in certain periodic reports on human rights numerous examples were stipulated where hate speech was used by public authorities, public figures as well as citizens. See, *Izveštaj Centra za ljudska prava, Rasna netrpeljivost i «govor mržnje»-međunarodni i hrvatski standardi i praksa*, http://www.ombudsman.hr/dodaci/036_izvjestajgovormrznje.pdf, (accessed 30 April 2015). A warning on hate speech was made by G. Vilović, *Govor mržnje u hrvatskim medijima, Odsustvo novinarskog senzibiliteta za osjetljiva pitanja*, available at <http://www.mediaonline.ba/ba/pdf.asp?ID=407&n=ODSUSTVO%20NOVINARSKOG%20SENZIBILITETA%20ZA%20OSJETLJIVA%20PITANJA>, (accessed 30 April 2015)

⁸³ Kazneni zakon, (Official Gazette 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 84/05, 71/06, 110/07, 152/08, 57/11, 77/11, 125/11, 143/12).

- (3) *Whoever publicly states or propagates ideas of one race superiority over another, spreads racial hatred or incites racial discrimination, shall be punished by imprisonment for three months to three years.*

The emphasis was on race, but without providing protection to religion, gender... Criminalization of inciting national and religious hatred was abandoned.⁸⁴ On the other hand, racial discrimination in international law had its broad meaning.⁸⁵

Amendments to the Criminal Code/ 97 were made in 2000⁸⁶:

- (1) *Whoever violates basic human rights and freedoms recognized by the international community, on the basis of race, religion, language, political or other opinion, property, birth, education, social status or other characteristics, gender, skin colour, nationality or ethnic origin, shall be punished by imprisonment of six months to five years.*
- (2) *The punishment referred to in paragraph 1 of this Article shall be imposed on perpetrator who persecutes organizations or individuals promoting equality between people.*
- (3) *Whoever, with the purpose of spreading racial, religious, gender, national, ethnic hatred or hatred based on skin colour, or with the purpose of underestimation, publicly states or disseminates ideas of superiority or inferiority of one race, ethnic or religious community, gender, nation or ideas of superiority or inferiority based on skin colour, shall be punished by imprisonment of three months to three years.*

These amendments brought change by limiting incrimination actions on public statement and dissemination of superiority/ inferiority ideas. In addition, conducts in order to spread hatred or underestimation were inserted, which significantly narrowed the possibility of criminal proceedings.⁸⁷ The fundamental lack of legal description was the absence of incrimination of incitement to violence and ethnic, religious hatred or other forms of intolerance *per se*.⁸⁸

⁸⁴ See M. Vajda, op.cit. (37), pp. 360-361; Đurđević, op.cit. (n 8), p.178.

⁸⁵ International Convention on Elimination of All forms of Racial Discrimination, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>, (accessed on 05 May 2015)

⁸⁶ *Kazneni zakon*, (Official Gazette no. 129/00).

⁸⁷ A numerous examples of hate speech in Croatian political and public life, see, T. Erceg, 'Sloboda govora najveći izazov sankcioniranju govora mržnje', *Regionalni glasnik za promociju kulture manjinskih prava i međuetničke tolerancije*, vol. 2, 2004, pp. 17-18.

⁸⁸ In this context Đurđević stipulated that incitement to violence against a certain group of people or category or public disclosure of hate speech on national, religious or sexual orientation, but without presenting

Amendments to the Criminal Code / 97 from 2004⁸⁹

- (1) *Whoever, on the basis of race, religion, language, political or other opinion, property, birth, education, social status or other characteristics, gender, skin colour, nationality or ethnic origin, violates basic human rights and freedoms recognized by the international community, shall be punished by imprisonment for six months to five years.*
- (2) *The punishment referred to in paragraph 1 of this Article shall be imposed on whoever persecutes organizations or individuals for promoting equality between people.*
- (3) *Whoever, with the purpose of spreading racial, religious, gender, national, ethnic hatred or hatred based on skin colour or sexual orientation or other characteristics or with the purpose of putting down, publicly states or disseminates ideas on the superiority or inferiority of one race, ethnic or religious community, gender, nation or ideas on superiority or inferiority based on skin colour, or sexual orientation, or other characteristics shall be punished by imprisonment for three months to three years.*
- (4) *Whoever, in the purpose of paragraph 3 of this Article, by means of a computer system distributes or otherwise makes available to public materials which deny, significantly reduce, approve or justify the crime of genocide or crime against humanity, shall be punished by a fine or penalty imprisonment for three months to three years.*

This amendment brought introduction of sexual orientation and other characteristics as a basis of discrimination, followed by distribution on Internet or making available to the public in other way of materials which deny, significantly reduce or justify the crime of genocide or crimes against humanity, with the intention of spreading hatred.

The last amendment⁹⁰ only changed sentencing range from the last paragraph to *imprisonment for six months up to three years*. Presented legal descriptions show that incrimination scope constantly grew, but regardless of that, there was almost no prosecu-

the idea of superiority or inferiority, was not punishable through former provision. So, for example, the one who incited to violence against the Roma, asylum seekers and homosexuals without presenting idea on their subordination, did not meet the elements of the offense. Đurđević, op.cit. (n 8), p. 179.

⁸⁹ *Kazneni zakon*, (Official Gazette no. 105/04).

⁹⁰ *Kazneni zakon*, (Official Gazette 71/2006).

tion of this offense. In this context, authors again stipulated the inadequate criminalization of hate speech.⁹¹

New Croatian Criminal Code/11⁹² provided, *inter alia*, news in the field of limiting freedom of expression. Incrimination of public incitement to hatred was followed with European standardization trends and compliance with Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law of November 28, 2008⁹³.

Pursuant to Art. 89 (21) of CC, hate crime is criminal offense committed because of race affiliation, skin colour, religion, national or ethnic origin, disability, gender, sexual orientation or gender identity of another person and such action is taken as an aggravating circumstance unless harder punishment is expressly provided.⁹⁴

New offense is called Public incitement to violence and hatred, and placed among crimes against public order and peace in Art. 325:

- (1) *Whoever, through press, radio, television, computer system or network, on public meeting or otherwise publicly incites or makes available pamphlets, pictures or other material that would incite to violence or hatred directed against a group or group member for their racial, religious, national or ethnic affiliation, origin, skin colour, sex, sexual orientation, gender identity, disability or any other characteristic, shall be punished by imprisonment of up to three years.*
- (2) *The punishment referred to in paragraph 1 of this Article shall be imposed to anyone who publicly approves, denies or significantly reduces genocide, crime of aggression, crime against humanity or war crime directed to a group or a group member based on their racial, religion, national or ethnic affiliation, origin or skin colour, in a manner appropriate to encourage violence or hatred against such a group or a group member.*

⁹¹ For example, Munivrana Vajda pointed out that prosecution obviously depends on two factors: the awareness of competent authorities and the prevailing "social climate" as well as the fact that hate speech, even after all of these changes, was not adequately incriminated. Munivrana Vajda, *op.cit.* (n 37), 364.

⁹² *Kazneni zakon*, (Official Gazette, 125/11, 144/12, 56/15, 61/15).

⁹³ Official Journal of the European Union, L 328/55 from 06 12 2008., available at <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32008F0913>

⁹⁴ It is stated that definition of hate crimes is in line with the requirements of the Framework Decision no. 2008/913 /JHA of 28.11. 2008 on combating certain forms and expressions of racism and xenophobia criminal means. In some offences qualifying circumstance is provided and in others that should be taken as an aggravating circumstance. The reason for the severe punishment is discriminatory motive, which manifests in violence against members of the group. This Framework Decision provides certain possibilities for narrowing the responsibility of hate speech that are not used in CC. More, Turković, et al., *Komentar Kaznenog zakona*, Zagreb, Narodne novine, 2013, p. 400.

- (3) *The attempt of the criminal offenses referred to in paragraphs 1 and 2 of this Article shall be punished.*

Shortly after its adoption, criminal offense was changed. Two new paragraphs were added regarding group or association in committing this offense.⁹⁵

- (1) *Whoever, through press, radio, television, computer system or network, on public meeting or otherwise publicly incites or makes available pamphlets, pictures or other material that would incite to violence or hatred directed against a group or group member for their racial, religious, national or ethnic affiliation, origin, skin colour, sex, sexual orientation, gender identity, disability or any other characteristic, shall be punished by imprisonment of up to three years.*
- (2) *Whoever organizes or leads a group of three or more persons to commit the offenses referred to in paragraph 1 of this Article, shall be punished by imprisonment for six months to five years.*
- (3) *A person who participates in the association referred to in paragraph 2 of this Article shall be punished by imprisonment of up to one year.*
- (4) *The punishment referred to in paragraph 1 of this Article shall be imposed to anyone who publicly approves, denies or significantly reduces genocide, crime of aggression, crime against humanity or war crime directed to a group or a group member based on their racial, religion, national or ethnic affiliation, origin or skin colour, in a manner appropriate to encourage violence or hatred against such a group or a group member.*
- (5) *The attempt of the criminal offense under paragraphs 1 and 4 of this Article shall be punished.*

Data from Central Bureau of Statistics⁹⁶ concerning reports and convictions for hate speech (criminal offenses: Racial and other discrimination and Public incitement to violence or hatred) are presenting an interesting fact. The percentage of reports and convictions in relation to the overall yearly crime is almost negligible. For example, in 2010, there were 25 reports and only 3 convictions, in 2011, 27 reports and 6 convictions, in 2012, 15 reports and 3 convictions, in 2013, 14 reports and 2 convictions.

⁹⁵ This was due to recommendations of ECRI (European Commission against Racism and Intolerance) to anticipate sanctioning for organiser or leader of a group inciting to violence and hatred. Ibid.

⁹⁶ Yearly Publication `Punoljetni počinitelji kaznenih djela-prijave, optužbe i osude, statistička izvješća` for 2010, 2011, 2012, 2013, by Državni zavod za statistiku.

Also, a restrictive incrimination interpretation is advocated, in order of “clearer” demarcation from misdemeanours under the Anti-discrimination Act and misdemeanours against public order and peace.⁹⁷

According to the Ombudsman Report for 2012⁹⁸, unacceptable, discriminatory expression and hate speech were present in the Croatian public during 2012, especially on the Internet, football games, and in public speeches, particularly those coming from politicians.⁹⁹ It was most often related to national minorities or minority ethnic groups. In comparison with 2011, the amount of such public expression related to the Pride Parade was decreased, specific speech referring to people and groups defined on the basis of their religious affiliation or lack thereof was increased. In 2013, discriminatory expressions and hate speech were mostly focused on national minorities, in particular the Serbian and Roma, which was connected with putting the Cyrillic inscription and the perpetuation of stereotypes about Roma as thieves.¹⁰⁰

IV. CONCLUDING REMARKS

Hatred is the greatest chameleon in human emotions.

I. Mandić

Having in mind all previously mentioned, it is needed to make some concluding remarks regarding hate speech. Hate speech content includes various statements. A case in which a certain speech meets the necessary “hate qualifications” is not always easy to assess. New Croatian criminal offense called Public incitement to violence and hatred is harmonized with mentioned Council Framework Decision 2008/913/JHA and last recommendations made by European Commission against Racism and Intolerance.¹⁰¹ It remains to be seen if new criminal law provisions will lead to different situation regarding

⁹⁷ For example, the opinion that new incrimination will not lead to a significant increase in hate speech persecution, since criminal law is *ultima ratio societatis*. Attention should be focused to misdemeanours. M. Vajda, op.cit. (n 37), 368. Also see, M.M. Vajda, `Novi Kazneni zakon u svjetlu pristupanja Europskoj uniji: inkriminiranje govora mržnje i nekih drugih oblika rasizma i ksenofobije`, *Godišnjak Akademije pravnih znanosti Hrvatske*, vol.4 (1), 2013, pp. 131-144.

⁹⁸ See, Ombudsman Report, *Sažetak izvješća o pojavama diskriminacije za 2012*, <http://www.ombudsman.hr/index.php/hr/izvjesca/izvjesca/finish/21-2012/3-sazetak-izvjesca-o-pojavama-diskriminacije-za-2012-godinu>, (accessed 16 May 2015)

⁹⁹ Certain examples are presented in I. Dojčinović et.al., `An introductory report on legal matters regarding online hate speech in Croatia and Europe`, *Pravnik*, vol.47 (1), 2014., p. 147.

¹⁰⁰ *Izvješće pučke pravobraniteljice*, eng. Ombudsman Report, <http://www.ombudsman.hr/index.php/hr/izvjesca/2014/finish/41-2014/562-izvjesce-pucke-pravobraniteljice-za-2014-godinu>, 2014, (accessed 16 May 2015)

¹⁰¹ Available at <http://hudoc.fcnm.coe.int/ecri/query.asp?action=query#results>, (accessed 19 May 2015)

hate speech prosecuting. In this regard, restrictive interpretation of incrimination was proposed, for a clearer demarcation from misdemeanours since hate speech is mostly being sanctioned through these misdemeanours proceedings. Due to adequate descriptions as well as the possibility of faster completion of misdemeanor proceedings in relation to the criminal, this is legal treatment appears to be particularly suitable. If conducted properly, it would also disable the breach of *non bis in idem* principle. Also, a private anti-discrimination lawsuit is always a possibility.

It is reasonable to point out the lack of awareness of hate speech victims on the rights they are entitled to as well as possible protection envisaged within the legal system. It seems that when it comes to limiting freedom of expression, the forefront offenses are ones against honour and reputation: insult, libel and embarrassment/defamation. Unlike Public incitement to violence and hatred prosecuted *ex officio*, these offenses are prosecuted through private lawsuit. So, one part of what is actually hate speech certainly “goes through” these offenses. But, due to this criminal proceedings initiation, greater financial resources are needed, which contributes to weaker victim initiative. The collision with other criminal offenses is not excluded: criminal offenses against human rights and fundamental freedoms (Chapter XI of Criminal Code) or Criminal offenses against Republic of Croatia (Chapter XXXII of Criminal Code).¹⁰²

Complaints directed to broad hate speech prohibitions (made mostly by American scholars) can be reduced to the following three: the lack of a standard definition of hate speech, selective criminal proceedings and symbolic prohibition function. Regarding the first complaint, the same can be said for notions like corruption and terrorism. Standard consensus is not easy to achieve, but the current situation has its advantages. Specific definition would assume restriction on certain forms of hate speech. This “disadvantage” can only be a challenge to existing provisions improvement. Regarding the selective criminal proceedings complaint, we can say that political influence is often used in this

¹⁰² This is the example of the latter. It is a ECtHR decision in case of *Rujak v. Croatia*. App no 57942/10, (ECtHR 2 October 2012). Applicant is a Croatian citizen of Serbian ethnic origin, V. Rujak. In 2004, he participated in a fight with two other recruits. He stated a series of curses, insults and outbursts of hatred against members of the Christian religion and Croatian ethnic origin. When asked by superior if he intended to insult someone's religion or ethnic origin, he replied affirmative, continuing with his statements. Other soldiers soldiers witnessed this. Rujak was charged with a criminal offense: Reputation violation of the Republic of Croatia. (former Art. 151 of the CC), acknowledged culpability, expressed regret and sentenced to 6 months. Prison. County Court in the reasons pointed out that the defendant “... publicly ridiculed the contempt and severe disdain the Croatian people and the Republic of Croatia ... more humiliation, spite ... which objects are insulting lost dignity.” The Supreme Court, acting on an appeal of the convicted confirmed the verdict and reversed the sentence, a suspended sentence: six months. Sentence replaced with a probation period of two years. Beyond that filed a constitutional complaint by the Constitutional Court declared it inadmissible, and subsequently a complaint to the European Court of Human Rights, complaining that he had violated the freedom of expression. The court rejected the applicant's complaint (as incompatible *ratione materiae* with the provisions of the Convention), pointing out that indecent and obscene speech has no significant role in the expression of ideas, and that is evident from the context that the only intention was to insult what is not included in Art. 10 ECHR.

context. But this would require a separate analysis since there are opinions where “left” political affiliation is stipulated. However, criminal proceedings initiation does not have to have political context, depending on legal system possibilities for hate speech sanctioning. As presented, Croatian system includes misdemeanour sanctioning which is primarily used option.

The last is “symbolic function of prohibition” complaint. European academic authors unquestionably support hate speech sanctioning. This approach should be confirmed. Hate speech is based on discrimination whose suppression and sanctioning is a part of the constitutional provisions of most European countries as well as international treaties. This speech causes a significant amount of discomfort and fear to targeted group members. When repeated, it can lead to an escalation. Public stigmatization of certain society members based on their individual characteristics or features may cause the so-called “Silencing effect” or their marginalization and disintegration which leads to the society that cannot respect the fundamental values of modern civilization: multiculturalism, mutual respect, pluralism and tolerance.

RIGHT OF
CHILD AND THE
EUROPEAN FAMILY
LAW

IRENA MAJSTORVIĆ, PHD*

FAMILY LAW AND THE EU - AT THE CROSSROADS? **

Abstract:

Family law is a particular branch of law, under considerable influence of tradition, culture, customs and religion. As a consequence, it has long been excluded from the processes of European integration. However, during the last decades the shift in legal paradigm occurred - from complete neglect to the mainstreaming the issues of family law and human rights into the European Union policies. The Union clearly shows great interest in the family law and the expectation that it shall continue to do so even more vigorously leads us to the doubts, as considered in this paper.

The three main issues include: the significance and the value of the Charter of fundamental rights of the European Union from the family law aspect; the relationship between multilevel protection systems and finally, the direction and scope of future development. Namely, it seems at this point that the development of EU interest in the issues of family law has reached a turning point. The most realistic scenarios for the future in the view of the author are refocusing on economic issues; further and concrete committing to human rights issues and finally, maintaining the status quo, which is found to be the most likely scenario.

Keywords: *Family law, human rights, European Union, Charter of fundamental rights of the European Union, Council of Europe, harmonisation and unification, multilevel protection systems*

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I. INTRODUCTORY NOTES

Family law is a very particular branch of law, considerably influenced by tradition, culture, customs and religion. As such, it has long been excluded from the processes of European integration. However, it is now time to confirm that such „isolation“ is neither possible, nor meaningful. Moreover, as Perišin correctly states, an activity within the EU which would be completely outside the scope of the European law is almost incomprehensible.¹ It is also beyond any doubt that the subject matter of regulation of the European law today includes the issues which were long considered to be the „centre of national sovereignty“, such as the national and international human rights guarantees.²

This trend has been evident in the development of the EU interest in the family law issues. Namely, during the last decades the shift in legal paradigm occurred - from complete neglect to the mainstreaming the issues of family law and human rights into the EU policies. The fact that the EU clearly shows great interest in the family law and the expectation that it shall continue to do so even more vigorously, leads us to the main doubts, as considered in this paper.

Firstly, which is the significance and the value of the Charter of fundamental rights of the European Union; is it just the first step to a much more elaborated system of protection of human rights? Secondly, which is the relationship between multilevel protection systems; and could it be envisaged that the EU shall take over the precedence of the Council of Europe being the most important organisation in Europe for the protection of human rights? And thirdly, which could be the direction and scope of future development? The aim of the paper is to present some views on the mentioned relevant issues of the protection of human rights from the family law perspective, and hopefully to serve as incentive for future considerations.

II. DEVELOPMENT OF EU INTEREST IN THE ISSUES OF FAMILY LAW

The rise of interest of the European Union (earlier the European (Economic) Community) in the family law, and particularly as regards substantive family law, could be divided into three phases.³ The first, from the establishment of the Communities and the Treaty of

¹ T. Perišin, 'Ima li Europska unija ovlast regulirati privatno (posebice ugovorno) pravo? (Does the European Union have the competence to regulate private (especially contract) Law?)', *Zbornik Pravnog fakulteta u Zagrebu*, 62, 5-6, 2012, p. 1799.

² Perišin, pp. 1799-1800.

³ On the development from the standpoint of international private law, see: M. Župan and V. Puljko, 'Shaping European international family law', *Slovenian law review*, 23, 7, 2010, pp. 30-39.

Rome⁴ in 1957 until the entry into force of the Treaty of Amsterdam⁵ in 1999. The second, from 1999 until the last revision of the founding treaties, that is the entry into force of the Treaty of Lisbon⁶ in 2009. And the third phase is the present time, marked by lots of initiatives of the European institutions.

From the establishment, the European community was dedicated to the economic issues and as Defeis puts it “little attention was paid to the protection of human rights ... (which) were being addressed in other forums”⁷, such as the United nations. To be more precise, the Treaty establishing the European Economic Community did not even mention fundamental rights at all.⁸ Some commentators find it to be a “stunning omission”, but even they consider that it can be explained by the “drafter’s vision of the nature of the institution being created; that is, one of limited competence, primarily concerned with economic matters, that would not unduly encroach on the rights of the Member States”⁹.

However, the Court of justice of the European Communities (as it then was, further: ECJ) took another path, passing numerous judgements in which it established the principle of supremacy of Community law over the domestic law of the Member states. Hence, it established “a new legal order for member states”. For example, in the case *Van Gend en Loos v Netherlands* in 1963¹⁰ the ECJ draw a conclusion that “the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, *albeit within limited fields* (emphasis I.M.)¹¹, and the subjects of which comprise not only Member States but also their nationals. Independently of the legisla-

⁴ Treaty establishing the European Economic Community (1957), not published in the Official Journal. It is available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:xy0023>, (accessed 1st September 2015).

⁵ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and related acts, Official Journal C 340, 10.11.1997, pp. 1-144.

⁶ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, Official Journal C 306, 17.12.2007, p. 1–271. See also: Consolidated version of the Treaty on European Union, Official Journal C 326, 26.10.2012, p. 13–390 and Consolidated version of the Treaty on the Functioning of the European Union, Official Journal C 326, 26.10.2012, pp. 47–390.

⁷ E. F. Defeis, ‘Human Rights and the European Court of Justice: An Appraisal’, *Fordham International Law Journal*, 31, 5, 2007, p. 1105.

⁸ It should be said that the phrase fundamental rights is not synonymous to human rights, since *e.g.* the companies may claim them too. *Cf.* Douglas-Scott, S.: The European Union and human rights after the Treaty of Lisbon, *Human rights law review*, 11, 4, 2011, p. 651., note 26. In this text the phrases are used interchangeably.

⁹ Defeis, *Fordham International Law Journal*, p. 1106.

¹⁰ *Case C-26/62, Van Gend and Loos* [1963] ECR English special edition p. 12.

¹¹ It should be noticed that even now, half a century later, it still remains an open questions which are those limited fields. The same: Perišin, p. 1806.

tion of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.”¹²

A year later, in case *Costa v. ENEL*¹³ it stated that “... the EEC Treaty has created its own legal system which ... became an integral part of the legal systems of the Member States and which their courts are bound to apply.”¹⁴ It continued that “[t]he executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardising the attainment of the objectives of the Treaty.”¹⁵

In 1969, in case *Stauder v. Ulm*,¹⁶ the ECJ found that fundamental rights form part of the Community law, in that way “reaffirmed its role as a guardian of human rights within the framework of Community law.”¹⁷ This idea was further elaborated in *Internationale Handelsgesellschaft* case, when the Court stated that the Community law is “inspired by the constitutional tradition of member states.”¹⁸ As Defeis correctly notices, “the substance of these decisions had now been incorporated into the subsequent treaties of the EU.”¹⁹

However, as regards the family law in particular, the first real milestone was the Treaty of Amsterdam, which entered into force in 1999. It brought significant changes in the Union’s structure, and what is of interest for the topic of this paper, the judicial co-operation was for the first time to be regulated by secondary legislation, instead of inter-country conventions, as was the case in the past. In that very year, the ECJ confirmed that the family law issues fall exclusively within the competence of the member states. In the case *Johannes v. Johannes*, it elaborated: “... Those rights are governed by the rules of private law and family law applying in the Member states, which fall within the competence of those Member states.”²⁰

¹² *Case C-26/62, Van Gend and Loos* [1963] ECR English special edition p. 12.

¹³ *Case C-6/64 Costa v ENEL* [1964] ECR English special edition p.585.

¹⁴ *Ibid.*, p. 593.

¹⁵ *Ibid.*, p. 594.

¹⁶ *Case C-29/69 Stauder* [1969] ECR 419

¹⁷ H. Stalford, ‘Concepts of family under EU law – lessons from the ECHR’, *International law of law, policy and the family*, vol. 16, 2002, p. 425.

¹⁸ *Case C-11/70 Internationale Handelsgesellschaft mbH* [1970] ECR 1134

¹⁹ Defeis, *Fordham International Law Journal*, p. 1110. Article 6 Para 3 of the Consolidated Treaty on European Union defines as follows: Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.

²⁰ *Case C-430/97 Jutta Johannes v. Harmut Johannes*, [1999] ECR I-3475, para. 18.

Slowly and still gradually, the issues of family law were being tackled more and more, at first in the “marginal areas”, particularly by linkage to the questions of free movement of family members and family reunification, but still without any concrete developments. Furthermore, the only explicit mention of family law in the founding treaties was until the Lisbon Treaty an excluding formulation. Namely, in accordance with Article 67 Para 5 Subpara 2 of the Treaty on the European Union, “the Council shall adopt ... measures provided for in Article 65 (that is measures in the field of judicial cooperation in civil matters having cross-border implications) with the exception of aspects relating to family law” (insertion and emphasis I.M.).²¹ Nevertheless, it was the time of EU’s “adopting a much more proactive role in the development and application of European family law and policy”.²²

The second milestone in the development of the EU interest in the family law was the Treaty of Lisbon which entered into force in 2009 and allowed for a political and legal paradigm shift. Two articles of the Treaty on the functioning of the European Union are to be particularly emphasised. First is Article 67 which confirms that Union shall constitute an Area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States. The establishment of the Area had significant implications on family law and it has proven that „the EU has gone beyond being a Common Market, encompassing a much greater range of activities“.²³ It is in particular the issues of family law that deserve much attention in regards to the Area of freedom, security and justice, which is often overshadowed by more pressing problems, like the ones of the asylum procedures.

Second and by far the most important provision for the topic of this paper is Article 81, which defines that the Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases and that such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

Unlike other areas of law, upon which it is decided in ordinary procedure, it is defined in Paragraph 3 of the same article that „... *measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament.*“ Furthermore: „*The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament.*“

²¹ Consolidated versions of the Treaty on European Union and of the Treaty establishing the European Community, Official Journal C 321, 29.12.2006.

²² Stalford, *International law of law, policy and the family*, p. 410.

²³ Douglas-Scott, *Human rights law review*, p. 648.

The proposal referred to in the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision.“

It is yet to be seen whether national parliaments shall be able and willing, in cases of need, to protect national interests. Such a commitment requires knowledge and diplomatic and political skills. It is therefore very important that the significance of family law issues is always acknowledged and respected.

With the entry into force of the Treaty of Lisbon, another change happened. Namely, the change in the legal importance of the Charter of fundamental rights - it finally became of binding nature.²⁴ The impact of this document on the family law is further elaborated in the next chapter.

III. CHARTER OF FUNDAMENTAL RIGHTS

The Charter of fundamental rights of the European Union²⁵ is a catalogue of rights, very similar to the European convention for the protection of human rights and fundamental freedoms and/or other international documents, the impact of which on family law has undoubtedly been significant.²⁶ The wording is not identical nor the rights are identical, but similarity is comprehensible and also expected.

There are two main issues I shall address in this part. Firstly, what was the reasoning behind adopting such a document and secondly, how important is it for the family law? It should be emphasised that even before the Charter became legally binding, the ECJ defined that the “principal aim of the Charter, as is apparent from its preamble, is to reaffirm ‘rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court ... and of the European Court of Human

²⁴ Article 6 Para 1 of the Treaty on European Union: The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

²⁵ Charter of Fundamental Rights of the European Union, Official Journal C 326, 26.10.2012, p. 391–407.

²⁶ S. Choudry and J. Herring, *‘European human rights and family law’*, Oregon, Hart publishing, Oxford and Portland, 2010, p. 1.

Rights.²⁷ As Stalford puts it, even the adoption of the Charter „further endorses the status of human rights at EU level“.²⁸

3.1 Family law provisions in the Charter

As regards the family law, there are several provisions worth mentioning.²⁹ First is Article 33 Para 1 which stipulates that the family shall enjoy legal, economic and social protection. This is a very important provision, which McGlynn finds to be recognition of the fact that Union law does impact on families and expresses an aim to seek to “protect” them.³⁰

It is also a reflection of several constitutional provisions of the member states which guarantee in their highest legal sources the protection of the state to marriage and the family.³¹ It should be accentuated that constitutional protection of family is a common notion in Europe, since 1919 when the German Weimar Constitution in its Article 119 emphasised it.³² As Jakovac-Lozić states, even in European constitutions which do not mention family explicitly, it is beyond any doubt protected by their civil and family-law codes as an institution upon which the real social values rest.³³

²⁷ Case C-540/03 *European Parliament v Council of the European Union* [2006] ECR I-05769, para. 38. Arguments to the contrary, that is the concept that „the Charter expands the interpretative scope of Union and law and policy and perhaps even its competence“ is offered by C. McGlynn, ‘Families and the European Union Charter of Fundamental Rights: progressive change or entrenching the status quo?’, *European Law Review*, vol. 26, no. 6, 2001, p. 586, 587.

²⁸ Stalford, *International law of law, policy and the family*, p. 412.

²⁹ For thorough analysis, see: A. Korać Graovac, ‘Povelja o temeljnim pravima Europske unije i obiteljsko pravo (Charter of fundamental rights of the European Union and family law)’, in: A. Korać Graovac and I. Majstorović (eds.), ‘*Europsko obiteljsko pravo (European family law)*’, Narodne novine, Zagreb, 2013, pp. 25-51.

³⁰ McGlynn, *European Law Review*, p. 587.

³¹ Examples could be found for instance in German and in Croatian Constitution. Reference is to be made also to the so-called Solange Saga, namely, Germany accepts the supremacy of EU law only „as long as“ (German: solange) the EU law guarantees the fundamental rights as defined in German Basic Law (Grundgesetz), cf. Re Wuensche Handelsgesellschaft, BVerfG decision of 22 October 1986 [1987] 3 CMLR 225,265). More on the position of family in constitutions, D. Jakovac-Lozić, ‘Obitelj - mjesto i zaštita u europskim ustavima (Family - Its Position and Protection in European Constitutions)’, *Hrvatska pravna revija*, 2, 11, 2002, pp. 39-53.

³² Jakovac-Lozić, p. 46. Article 119 of the *Die Verfassung des Deutschen Reichs* (The Constitution of the German Empire), in English reads: Marriage, as the foundation of the family and the preservation and expansion of the nation, enjoys the special protection of the Constitution. It is based on the equality of both genders. It is the task of both the State and the communities to strengthen and socially promote the family. Large families may claim social welfare. Motherhood is placed under state protection and welfare.

³³ Jakovac-Lozić, p. 51.

Article 7 guarantees respect for private and family life,³⁴ article 9 right to marry and to found a family³⁵ and article 24 the rights of the child³⁶. Linked to family law issues are also the protection of the rights of the elderly (Article 25)³⁷ and the integration of persons with disabilities (Article 26).³⁸

It is quite obvious that the Charter was not intended to establish new rights. However, as Douglas-Scott argues “... the Charter is innovative in containing, in the same instrument, both economic and social rights along with more traditional civil and political rights“ and in that way it „represents the sharpest relief the *indivisibility* of human rights“.³⁹ The same author correctly emphasises the symbolic significance of the Charter.⁴⁰ Still, has it brought anything new or better in substantive meaning in the family law area? The answer is undoubtedly negative. Let us just *exempli gratia* briefly compare two provisions of the Charter to the two already existing legal instruments, to which all member states of the EU are also parties.⁴¹

As regards the right to marry and to found a family, one could compare Article 9 of the Charter to Article 12 of the European convention for the protection of human rights and fundamental freedoms. Article 12 of the ECHR defines as follows:

³⁴ Everyone has the right to respect for his or her private and family life, home and communications.

³⁵ The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

³⁶ 1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

³⁷ The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

³⁸ The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

³⁹ Douglas-Scott, *Human rights law review*, p. 651. It should be also mentioned that the Charter guarantees protection of various aspects of family and family life in an indirect manner. Cf. *amplius*: D. Hrabar, 'Prava djece u Europskoj uniji – pravni okvir (Children's rights in the European Union – legal framework)', in: A. Korać Graovac and I. Majstorović (eds.), *Europsko obiteljsko pravo (European family law)*, Narodne novine, Zagreb, 2013, pp. 58, 59.

⁴⁰ Douglas-Scott, *Human rights law review*, p. 656.

⁴¹ See also: I. Majstorović, 'Europski pravni kontekst i značenje za hrvatsko materijalno obiteljsko pravo (European legal context and its significance for Croatian substantive family law)', *Godišnjak Akademije pravnih znanosti Hrvatske*, 4, 1, 2013, particularly pp. 86, 87.

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 9 of the Charter reads:

The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

The Charter itself defines that in the „mirroring-rights“, their meaning and scope shall remain the same as in the European Convention, but this does not prevent Union law providing more extensive protection⁴². As McGlynn pointed out soon after the adoption of the Charter „such a provision leaves considerable ambiguity in interpretation and thus enlarges judicial discretion in the interpretation and development of rights, either progressively or regressively, with little control or direction from the Charter“⁴³.

At this point, it is safe to say that the significance of such a legal solution remains unclear even today. It has been stated that the significant change brought by the Charter is separating the right to marry from the right to found a family,⁴⁴ but it seems at the same time that it has already happened in the jurisprudence of the European court for human rights. It omits the so-called heterosexuality-clause, but it should be emphasised that it does not impose on member states the obligation to allow for same-sex marriages.

As regards the rights of the child, the comparison is to be made between Article 24 of the Charter and several relevant provisions of the Convention on the rights of the child, the most important document for the protection of children's rights.

Relevant provisions of the Convention on the rights of the child are:

States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. (Art 3 Para 2)

States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. (Art 12 Para 1)

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. (Art 3 Para 1)

⁴² Article 53, Para 3 of the Charter.

⁴³ McGlynn, *European Law Review*, p. 584.

⁴⁴ McGlynn, p. 593.

States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests. (Art 9 Para 3)

Similarly, Article 24 of the Charter of fundamental rights defines:

Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

There are of course some changes and new wordings, but the significance of such a legal provision has, above all, symbolic meaning. There are authors like McGlynn who claim that „the very existence of a specific provision is highly symbolic and represents a significant new phase in the Union's relation with children“⁴⁵ and that „the children's provisions ... are the success story of the family provisions of the Charter“.⁴⁶ It might be said that they were additional motivation for the adoption of further strategies for protection of the rights of the child at the level of the European Union, such as the EU Guidelines for the promotion and protection of the rights of the child,⁴⁷ EU Strategy on the rights of child,⁴⁸ or the most important one, the EU Agenda on the rights of the child.⁴⁹ Nevertheless, the state of protection of children's rights, as well as human rights in general requires coherent changes and concrete developments.⁵⁰

3.2 Charter as an instrument of „bringing Union closer to its citizens“?

As already mentioned, the intention of the Charter was not to establish new rights, but to „bring Union closer to its citizens“, as is one of the goals defined already in the Treaty of Amsterdam in 1997. However, it is clear that this goal is not (yet) achieved. Namely, as

⁴⁵ McGlynn, p. 594.

⁴⁶ McGlynn, p. 597.

⁴⁷ The guidelines are not published in the Official Journal, but are available at: http://eeas.europa.eu/human_rights/guidelines/child/index_en.htm (accessed 1 September 2015).

⁴⁸ Commission communication of 4 July 2006, Towards an EU strategy on the rights of the child, COM (2006) 367 final, 4.7.2006.

⁴⁹ Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the Committee of the regions: An EU Agenda for the rights of the child, COM (2011) 60 final, 15.2.2011.

⁵⁰ See more: Hrabar, *Evropsko obiteljsko pravo (European family law)*, pp. 53-71.

regards the public perception of the Charter, the general awareness is rather high, but the actual knowledge remains low. Namely, while 65 % of the respondents in the latest Eurobarometer survey say that they are familiar with the Charter, only 14 % of them know what Charter really is. Moreover, 35% of the respondents have never heard about it.⁵¹

Furthermore, most of the citizens do not know or understand the significance or the legal scope of the Charter. Unlike many other international legal instruments, such as the European convention on human rights, the Charter of fundamental rights is not „a freestanding bill of rights“;⁵² but it only applies within the field of EU law.⁵³ Majority of respondents say that it applies to all actions of EU member states, including the matters of national competence, which is not true, since it applies to all actions of EU institutions and bodies, as well as the EU member states only when they implement EU law.⁵⁴

Therefore, one can wonder what is the aim of the Charter, apart from bringing numerous human rights provisions in one document? One of the advantages of the system it establishes could be the fact that, as Douglas-Scott states „unlike under the ECHR, where the applicant must exhaust all domestic remedies in order to get a hearing in Strasbourg, applicants may get a ruling from Luxembourg by way of preliminary reference from a domestic court.“⁵⁵ In that way, each national court would indeed be a European court, but at this point, it seems like a long way to achieve it.

On the contrary, such development sometimes seems highly unlikely. Therefore, the questions arise: what significant changes are introduced by the Charter? What was the purpose of such an endeavour? And finally, how does it improve the legal position of European citizens? Providing unanimous answers to these questions is impossible, but one conclusion

⁵¹ European commission: Flash Eurobarometer 416, The Charter of fundamental rights of the European Union, Report, Fieldwork: February 2015, Publication: May 2015, available at: http://ec.europa.eu/public_opinion/flash/fl_416_en.pdf, pp. 4-6.

⁵² Douglas-Scott, *Human rights law review*, p. 652.

⁵³ Article 51 (Field of application) reads: 1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties. 2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

⁵⁴ European commission: Flash Eurobarometer 416, The Charter of fundamental rights of the European Union, Report, Fieldwork: February 2015, Publication: May 2015, available at: http://ec.europa.eu/public_opinion/flash/fl_416_en.pdf, p. 4.

⁵⁵ Douglas-Scott, *Human rights law review*, p. 657.

to my mind cannot be successfully challenged. Namely, the legal framework is too complicated. It is more a labyrinth, than a coherent system of protection of human rights of citizens.⁵⁶

As Douglas-Scott puts it „... the most appropriate conclusion to draw on the Lisbon Treaty human rights provisions, and recent Court of Justice case law, might be that it is complexity (emphasis I.M.), rather than human rights protection itself, which has increased most“.⁵⁷ The same concern was raised fifteen years ago by Lowe, who claimed that international law relating to families is becoming „hopelessly complex“ (emphasis I.M.) with a rhetorical question in continuance “surely the very antithesis of the idea of international Conventions?”⁵⁸ The fact is that at this point, there are several protection systems, which stem from different organisations and cause different levels of protection, which is further elaborated in the following chapter.

IV. MULTILEVEL PROTECTION SYSTEMS

Issues of human rights protection in Europe are today resolved within three parallel systems, which De Búrca has long called „three interconnected systems of law: the (as it then was, addition I.M.) European Community, The European Convention on Human Rights, and national law.“⁵⁹

The endeavours for the protection of human rights, and in particular as regards the family law, have long been undertaken within national legal systems, as well as through the activities of the Council of Europe. Its Convention on human rights has rightly been named „European charter of liberty“.⁶⁰ On the other hand, the activities of the European Union (or earlier Community(ies)) were focused on entirely different field, that is the economic suc-

⁵⁶ Similarly, see: V. Bouček, ‘Smjernica kao izvor europskoga međunarodnoga privatnoga prava (Directive as a source of European private international private law)’, *Zbornik Pravnog fakulteta u Zagrebu*, 58, 6, 2008, p. 1382, or the same author: *Europsko međunarodno privatno pravo u eurointegracijskom procesu i harmonizacija hrvatskog međunarodnog privatnog prava (European private international law in Eurointegrational process and harmonisation of Croatian international private law)*, author’s own edition, Zagreb, 1 *et sq.* On the contrary, there are authors who state that only uninformed claim that EU system looks like a labyrinth, and that it constitutes a coherent, synoptic and unified system of legal norms (*cf.* M. Župan, ‘Međunarodna nadležnost u obiteljskopравnim stvarima – presjek pravne stečevine Europske unije (International jurisdiction in family matters – an overview of EU *acquis*)’, in: J. Garašić, J. (ed.), *Europsko građansko procesno pravo (European civil procedural law)*, Narodne novine, Zagreb, 2013, pp. 170.). However, they still have not presented valid arguments to support such a conclusion.

⁵⁷ Douglas-Scott, *Human rights law review*, p. 682.

⁵⁸ N. Lowe, ‘New international conventions affecting the law relating to children - a cause for concern?’, *International Family Law*, 2001, p. 179.

⁵⁹ G. De Búrca, ‘Fundamental human rights and the reach of EC law’, *Oxford journal of legal studies*, vol.13, no. 3, 1993, p. 284.

⁶⁰ *Cf.*: P. Modinos, ‘Effects and repercussions of the European convention on human rights’, *The international and comparative law quarterly*, 11, 2, 1962, available at <http://www.jstor.org/stable/755988>, p. 1108.

cess. As Douglas-Scott reminds us, the EU's „centre of gravity appears to lie elsewhere.“⁶¹ It is of course beyond any doubt for decades now that Community's legislative and executive institutions are bound to comply with recognised fundamental rights and principles, „even though these were not expressly referred to in the Treaties nor in EC legislation.“⁶² The ECJ has also in its early judgements referred to „constitutional traditions“.⁶³

However, in spite all the EU initiatives and efforts, I cannot but agree with the conclusion, that „protection of fundamental rights in the EU has evolved in an *ad hoc*, confusing, incremental way and that there exists no clear, conceptual underpinning to the rights protected under EU law.“⁶⁴ Therefore, at this point there exists „not a lack, but possibly a surfeit of human rights protection within the European legal space“.⁶⁵

According to Article 6 of the Consolidated treaty on European Union, the Union recognises the rights, freedoms and principles set out in the Charter of fundamental rights, but its provision do not extend in any way the competences of the Union as defined in the Treaties.⁶⁶ The core question as a consequence of multilevel protection systems is the one of their feasibility and justification. In general, the issue is whether those parallel systems are equivalent and equally important? At this point, the answer seems to be negative. Moreover, the EU is investing ever more endeavours in order to further its activities in the human rights field, which are of particular relevance for the family law, as shown *infra*.

⁶¹ Douglas-Scott, *Human rights law review*, p. 646.

⁶² De Búrca, *Oxford journal of legal studies*, p. 296.

⁶³ Cf. e.g. the wording in the Case C-4/73 *Nold* [1974] ECR 491, para 13: As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of those States. Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.

⁶⁴ Douglas-Scott, *Human rights law review*, p. 649.

⁶⁵ Douglas-Scott, p. 647.

⁶⁶ It is defined in the same Article, para 2. that „the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties“. This path has been expected. E.g. De Búrca has long advocated for a formal relationship between the Court of justice and the Court of human rights, arguing that „if principles expressed in the European Convention are taken seriously, it could improve the level of protection given by Member States to the values which each of them has guaranteed under the Convention to respect“. See: De Búrca, *Oxford journal of legal studies*, p. 319. However, at this point, having in mind the Opinion 2/2013 of the Court of justice of the EU on EU accession to the European convention on human rights, this goal is yet to be achieved. The opinion is available at: <http://curia.europa.eu/juris/document/document.jsf?docid=160882&doclang=EN>, (accessed 1st September 2015).

4.1. Union's activities in the family law area

As already mentioned, family law has long resisted the harmonisation and unification activities, as encouraged or envisaged by institutions and bodies of the European Union. However, as Borrás pointed out as early as in 1998, „[t]he issue of family law ... has to be faced as part of the phenomenon of European integration“.⁶⁷

Significant distinction is to be made between substantive and procedural family law. Namely, substantive family law is (still) not under the direct influence of the EU institutions. However, procedural and private international law rules in family matters are growing in number and significance.

The two regulations on private international law issues related to family law in force⁶⁸ are the one on matrimonial matters and the matters of parental responsibility: Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (so-called Brussels II *bis* regulation)⁶⁹ and the other regulating maintenance obligations: Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.⁷⁰

The third important regulation is in force only for a limited number of member states who have chosen to be bound by it. This is the Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (so-called Rome III regulation).⁷¹ The mechanism of enhanced cooperation, allowing for a multi-speed Europe, was in fact started for the first time in EU history exactly in this matter.⁷²

⁶⁷ A. Borrás, 'Explanatory report to the Convention drawn up on the basis of Article K. 3 of the Treaty on European Union on jurisdiction, recognition and enforcement of judgements in matrimonial matters', Official Journal C 221, 16.7.1998., para 1.

⁶⁸ It should be emphasised how poorly known these regulations are to the wider public, and sometimes even to lawyers. McGlynn justifiably states that it is "tremendously disturbing". C. McGlynn, *Families and the European Union – Law, politics and pluralism*, Cambridge university press, 2006, p. 152.

⁶⁹ Official Journal L 338, 23.12.2003, pp. 1–29. It should be mentioned that this regulation widened the material and personal scope of application, in comparison to the document it has repealed. Namely, the Regulation 1347/2000 excluded parental responsibility towards stepchildren or children adopted by only one spouse in a previous union. Such a development clearly shows the changes in the legal and social understanding of family. Further: Stalford, *International law of law, policy and the family*, pp. 410-434.

⁷⁰ Official Journal L 7, 10.1.2009, pp. 1–79.

⁷¹ Official Journal L 343, 29.12.2010, pp. 10-16.

⁷² Cf. I. Majstorović, 'Obiteljsko pravo kao različitost u jedinstvu: EU i Hrvatska (Family law as diversity in unity: EU and Croatia)', in: A. Korać Graovac and I. Majstorović (eds.) *'Europsko obiteljsko pravo (European family law)'*, Narodne novine, Zagreb, 2013, pp. 19, 20.

As it is confirmed in Article 2 of the Consolidated treaty on European Union, „the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.” This provision can definitely be called the “majestic claim.”⁷³ The question which arises is whether these concepts have a common meaning in the EU? Is there a “European consensus” on these matters? I would guess that political, legal and social changes point us to the negative answer.⁷⁴ From the legal point of view, the most intriguing question regarding future development is the question of competence, as elaborated further.

4.2. The issues of competence as an obstacle for further regulation of family matters

One of the crucial issues regarding the EU regulation of private law is the one of competence. Although of utmost importance, this question is often avoided.⁷⁵ Even if the issue seems resolved in other private law areas, this is definitely not the case in the family law field. Namely, there are three basic principles of the EU law which are at the same time three basic obstacles to the widening of the competence of EU in the family law area: principles of conferral, subsidiarity and proportionality, all defined in Article 5 of the Consolidated version of the Treaty on the European Union.⁷⁶

In accordance with the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States. In the area of family law, the member states have not (yet) relinquished a part of their sovereignty to the EU.

Principle of subsidiarity means that in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. Although it is often mentioned as a purely theoretical

⁷³ Douglas-Scott, *Human rights law review*, p. 647.

⁷⁴ The level of uniformity in certain areas remains to be low, as it was the case also forty years ago. *Cf.* Judgment of the European court of human rights in the Case Handyside vs. the United Kingdom (application no. 5493/72) of 7 December 1976, para 48, ... „In particular, it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject.“

⁷⁵ See: Perišin, p. 1801.

⁷⁶ „The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.“

question, the answer to the issue of how is it even possible to fulfil this precondition in the family law field remains open.

Finally, the principle of proportionality requires that the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. Furthermore, this is a cornerstone of the approach defined already in Amsterdam in 1997, with the Protocol on the application of the principles of subsidiarity and proportionality.

The Lisbon Treaty also states that all the „competences not conferred upon the Union in the Treaties remain with the Member States,“⁷⁷ however the category of the non-conferred competences is not further elaborated.⁷⁸ Therefore, having in mind the aim of this paper, it remains to be defined which are the possible paths EU could follow as regards the family law in the future. Namely, I agree that it would be naive „to think or even hope that there would be no future for the European Union’s family law.“⁷⁹

V. EUROPEAN UNION AT THE CROSSROADS?

It seems at this point that the development of EU interest in the issues of family law has reached a turning point. There are of course several possible scenarios of future activities, but I will focus on three I find to be most realistic: refocusing on economic issues, further and concrete committing to human rights issues and finally, maintaining the *status quo*.

The first option is (re)focusing on economic issues. It might be said that it would be coming back to „the roots“. Having in mind the economic crisis and new challenges put before the EU institutions, such a decision would be self-explanatory. In wider social terms, it would also be needed for the reasons of ageing population, changes in family structures and migration issues.

The second path that EU could follow is making headway in issues of family law, hence promoting its (new) role as the promotor of human rights in Europe. In that manner, the EU would in a certain sense take the regional precedence over the Council of Europe. Such a development would have been unimaginable at the time of their establishment after the Second World War. Since the late sixties of the last century, the Council of Eu-

⁷⁷ Cf. Article 4 of the Consolidated version of the Treaty on European Union.

⁷⁸ The same: Perišin who correctly states that while the Union’s competences are defined as exclusive, shared, complementary, which division does not include the competences withheld to the states. She explains it by the possibilities it leaves open for the European institution to interpret certain competences in a manner which complies to the social and political circumstances and to adjust the Union’s activities to the needs of a certain time, which is usually called „creeping competences“. Perišin, *Zbornik Pravnog fakulteta u Zagrebu*, pp. 1806, 1807.

⁷⁹ McGlynn, *Families and the EU*, p. 199.

rope has undertaken lots of harmonisation activities, and it has continued to be the most important European organisation devoted to the protection of human rights.⁸⁰

The key question therefore is whether the EU is competent to overtake such a role, being the European human rights patron. At this point, I claim that the answer is negative. The basic principles of subsidiarity, proportionality and conferral of powers still preclude the success of this scenario and represent an obstacle to further development in this direction.

Furthermore, it is not only an issue at the European, but also at the global level. Namely, the actions of EU institutions influence the impact of the conventions adopted within the Hague conference on private international law. As McGlynn states, „Community action actually creates a number of anomalies and disadvantages. The benefits of the Hague convention are that they provide potentially global solutions, rather than ones limited to the member states of the Union...“⁸¹

The other significant question is whether the EU itself has the capacity to fulfil this role. There are authors who claim that the EU not only has the capacity, but „it should in fact become a new kind of post-national human rights institution *lato sensu*.“⁸² It might be concluded that the EU has made efforts to this direction. For instance, the Agency for fundamental rights of the European Union has done remarkable research into human rights and in particular family law issues. Nevertheless, this option would require development of new legal instruments in the field of family law. This scenario asks for introduction of new EU bodies responsible for the protection of human rights. In the area of family law, notwithstanding the relevant scenarios, I would most certainly advocate for the proposal made by Hrabar on the establishment of the European court for the rights of the child.⁸³

The reason can in general be found in the fact that „[t]hroughout its fifty year history, the ECJ has decided many cases which deal with fundamental rights such as non-discrimination, freedom of religion, association and expression. Undoubtedly, in the next fifty years, with both the widening and the deepening of the Union, the Court will be faced with new controversies involving human rights.“⁸⁴ Moreover, it is also true that „... the EU (and CJEU) has no clearly developed, substantive sense of human rights (or indeed of jus-

⁸⁰ I. Majstorović, 'Harmonizacija i unifikacija europskog obiteljskog prava (*Harmonisation and unification of European family law*)', Pravni fakultet Sveučilišta u Zagrebu, Zavod za građanskopravne znanosti i obiteljskopravnu znanost, Poslijediplomski doktorski studij iz građanskopravnih i obiteljskopravne znanosti, Zagreb, 2009, pp. 35-94, 150-184.

⁸¹ McGlynn, *Families and the EU*, p. 162.

⁸² S. Besson, 'The European Union and human rights: towards a post-national human rights institution?', *Human rights law review*, 6, 2, 2006, p. 326.

⁸³ D. Hrabar, 'The Establishment of a European Court for the Rights of the Child as a New Contribution to the Area of Freedom, Security and Justice', *Zbornik Pravnog fakulteta u Zagrebu*, 64, 2, 2014, pp. 181-198.

⁸⁴ Defeis, *Fordham International Law Journal*, p. 1106.

tics),⁸⁵ and furthermore, that „it is likely that the CJEU will continue to determine issues of fundamental rights on a case by case basis, with a particular focus on the proportionality of any infringement of rights, rather than with an eye to the development of a coherent substantive fundamental rights law“.⁸⁶

In the family law area, such a fragmentary system is not adequate and it would definitely pose significant challenges to the protection of human rights. Therefore, a new court would allow for development of a more coherent system, which would enhance the protection of children's rights, as well as human rights in general. It should also be mentioned that children's rights represent one of the family law areas more "prone" to harmonisation, and the situation is similar for instance as regards maintenance issues or guardianship. However, there are also family law issues so linked to national traditions, such as marital law, that the harmonisation, let alone unification, would require not only national consensus, but also a pan-European one. It is unlikely at this point that such an approach would be taken by all EU member states. The example for such a heterogeneous approach is the enhanced co-operation procedure, established by so-called Rome III regulation, as mentioned earlier.⁸⁷

The third, the middle option that I find to be most likely is maintaining the *status quo*. The doubt arising in this case is the relevance of the EU human rights policy and the feasibility of further development of European family law. As Alston and Weiler advocated for more than fifteen years ago, „the Union can only achieve the leadership role to which it aspires through the example it sets to its partners and other States. Leading by example should become the *leitmotif* of a new EU human rights policy“.⁸⁸ One can only wonder whether the recent decision of the CJEU on accession of the European Union to the European convention on human rights is a sign to the other direction.

In all scenarios, here mentioned or not, in regards to the family law issues, an important *caveat* still remains of utmost importance. Namely, as confirmed also by the Preamble of the Treaty on the European Union, its desire is „to deepen the solidarity between their peoples while respecting their history, their culture and their traditions.“ Achieving this goal would demand well-thought actions, as well as balancing the national and "pan-European" interests. Whether the Union has the capacity and interest to fulfil this goal also within the family law area remains yet to be seen.

⁸⁵ Douglas-Scott, *Human rights law review*, p. 678.

⁸⁶ Douglas-Scott, p. 680.

⁸⁷ Cf. *supra* 4.1.

⁸⁸ P. Alston and J. H.H. Weiler, 'An „ever closer union“ in need of a human rights policy: The European Union and human rights', *European journal of international law*, 9, 1998, p. 663.

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CONCENTRATION OF JURISDICTION IN CROSS-BORDER FAMILY MATTERS – CHILD ABDUCTION AT FOCUS

Abstract:

Court of Justice of European Union (hereinafter CJEU) recently rendered a decision dealing with organizational issues of judiciary, where such internal organization of a distinctive Member States had an impact on functioning and application of European Union (hereinafter EU) rules. Particularity of this decision in the framework of judicial cooperation in civil matters is that unlike usual conflict of jurisdiction among courts situated in several different Member States, here the problem is with the conflict of jurisdiction of the courts situated within one and the same Member State.

This paper elaborates on the function and nature of rules of international and internal jurisdiction; concentration of jurisdiction in family matters – both at universal and European level, with particular interest in child abduction matters; CJEU ruling in case C-498/14 of 9 January 2015. In the end authors question whether the Member States are still free to enact internal rules that influence rules on jurisdiction enacted with EU regulation, if such rules are impeding the functioning on internal EU legal order.

Keywords: *child abduction, interest of child, EU legal order, cross-border family matters, conflict of jurisdiction*

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I. INTRODUCTION

Court of Justice of European Union (hereinafter CJEU) recently rendered a decision dealing with organizational issues of judiciary, where such internal organization of a Member States has an impact on functioning and application of European Union (hereinafter EU) rules. Particularity of this decision in the framework of judicial cooperation in civil matters is that unlike usual conflict of jurisdiction among courts situated in several different Member States, here the problem is with the conflict of jurisdiction of the courts situated within one and the same Member State.

This ruling has opened doctrinal and practical issues, some of them are to be dealt here. First of all, question on the function and nature of rules of international and internal jurisdiction occurs. Interplay of these factors is in forefront of Chapter 2 of this paper. Principle of functionality is in adjudicating cross-border family matters best reflected through rules on concentration of jurisdiction. As they are advocated both on universal (Hague conference of private international law) and European level, paper would present the current state of fact as well as costs and benefits of such centralization of jurisdiction in settling child abduction cases (Chapter 3). Paper would further present the CJEU ruling in case C-498/14 of 9 January 2015 (Chapter 4). Chapter 5 contains remarks on several questions: are Member States still free to enact internal rules that influence rules on jurisdiction enacted with EU regulation, are such rules impeding the functioning on internal EU legal order?

II. REGULATORY SCHEME FOR RULES ON INTERNAL / INTERNATIONAL JURISDICTION

In comparison to internal, in international dispute settlement jurisdictional issues have different function and relevance. Determining international jurisdiction is the first step that assures that dispute is settled within one national juridical system.¹ For this utmost importance, regulation of international jurisdiction was in the past perceived as purely autonomous national issue. International jurisdiction rules were settled within national law, pertaining to internal legal sources.² At international level such standing was long preserved within multilateral as well as bilateral international conventions. If one inspects the Hague conference on private international law (hereinafter HCCH) system, until the end of 20th century conventions contained only „indirect“ international jurisdiction – i.e., among the rules on recognition and enforcement legislator prescribed the desirable juris-

¹ Đ. Vuković, E. Kunštek, *Međunarodno građansko postupovno pravo*, Zagreb, Zgombić & partneri, 2005

² S. Triva, V. Belajec, M. Dika, *Građansko parnično procesno pravo*, Zagreb, Narodne Novine, 2004, p. 259.

dictions as a precondition for a judgement to be recognized in other contracting states! Contracting states are thus not directly obliged to alter their national rules on direct jurisdiction to align them with conventional (indirect) rules, but such development is desirable and self-evident.³

Although it has long been argued that true unification results would be achieved only with *convention double*, reaching such compromise on a global scale faced hardship. States with no political and economic relations and diverse standing on most appropriate criteria for determining jurisdiction clashed in the course of attempts to adopt the Hague judgments convention of 1999, which in the end failed adoption.⁴ With exception of 1996 Hague Child Protection Measures Convention,⁵ the indirect system is retained in HCCH conventions system, also in the most recent 2007 Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.⁶

Due to harmonizing activity of European Community Member States reached the agreement that free circulation of judgements could only be achieved if unified rules on the international jurisdiction exist. It was first confirmed with early adopted 1968 Brussels convention which is *convention double*.⁷ EU has in the subsequent era significantly altered national systems of direct international jurisdiction. It has over the years enacted regulations dealing with wide range of subject matters, preserving the room for international jurisdictional rules deriving from national sources only to small array. If the inspection of the area of “civil and commercial matters” is narrowed to family matters, one realizes that variety of layers are however introduced. There is still a possibility to apply national jurisdictional criteria in divorce and parental responsibility matters if according to rules of jurisdiction prescribed by the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000⁸ (hereinafter Regulation 2201/2003, Brussels II *bis* regulation) no oth-

³ M. Verwilghen, *Explanatory Report on the 1973 Hague Maintenance Conventions*, HCCH Publications, 1975, note 47.

⁴ R. Brand, „Jurisdictional common ground: in search of a global convention“, in J. A.R. Nafziger, S. Symeonides (eds.), *Law and justice in a multi-state world: essays in honor of Arthur T. von Mehren*, Ardsley, 2002, p. 11 et.seq.

⁵ As the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70>, (accessed on 30 December 2015).

⁶ Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, <https://www.hcch.net/en/instruments/conventions/specialised-sections/child-support>, (accessed on 30 December 2015).

⁷ Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated version) OJ L 299, 31.12.1972, p. 0032 – 0042.

⁸ OJ L 338, 23.12.2003, p. 0001 – 0029.

er Member State has jurisdiction (Article 6-7, Article 14). On the other hand, in matters on maintenance obligations rules of international jurisdiction deriving from national sources have been abolished with enactment of Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations⁹ (hereinafter Maintenance Regulation). CJEU has given many decisions in preliminary ruling procedure where it clearly stated that no national interpretation of unified jurisdictional rules is acceptable: uniform interpretation which is in accordance to *ratio* of EU regulation is advocated. All of these figures clearly point to the fact that Member States have lost the grounds to enact / interpret rules in area on international jurisdiction falling under *rationae materiae* EU competence. Despite to it, the first preliminary ruling procedure regarding Maintenance Regulation poses new questions on interplay of rules on internal and international jurisdiction, which would be dealt with further in this paper.

III. CONCENTRATION OF JURISDICTION IN ADJUDICATING CROSS-BORDER FAMILY MATTERS

Concentration of jurisdiction by definition means that within certain national jurisdiction a particular court or a limited number of courts can deal with distinctive issue.¹⁰ Although concentration of jurisdiction has its roots in child abduction matters, it is getting ground in wider area of family matters. In some jurisdictions it has long term tradition to diverse cross-border family matters,¹¹ whereas in some states concentration of jurisdiction has been employed as a court organizational scheme for implementing international treaties.¹² Some EU Member States have introduced the system of concen-

⁹ OJ L 7/1, 10.1.2009.

¹⁰ There are various models of performing concentration of jurisdiction. Basics models are:

- a) jurisdiction of a court of higher level (appellate court)
- b) jurisdictions of specialized family courts
- c) jurisdiction of one/several first instance courts.

¹¹ See G. A. Serghides, „Cyprus” p. 11, B. Greenberger, „Israel”, p. 19, D. P. Cedeno, „Panama”, p. 21, M. E. Giménez d Allen, „Paraguay”, p. 22, in „Concentration of jurisdiction under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction”, special edition of *The Judges' Newsletter on International Child Protection*, Vol. XX / Summer-Autumn 2013.

¹² Luxembourg Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (Belgium, Bulgaria, Finland, Germany, Hungary), Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (Bulgaria, Canada (through the Canadian networks of Judges), China (Hong Kong SAR) and Finland); Hague Convention of 19 October 1996 on jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children (Canada, Finland and Germany); Hague Convention of 13 January 2000 on the International Protection of Adults (Germany); Hague Convention of 23 November 2007 on the International Recovery

tration as well as for EU instruments in child related matters. Belgium, Bulgaria, Cyprus, Finland, France, Germany, Hungary, Netherlands, Sweden and the United Kingdom have employed it regarding the Regulation 2201/2003,¹³ whereas Germany did it in respect of Maintenance Regulation. Exactly the first preliminary ruling procedure regarding Maintenance Regulation posed new questions on interplay of rules on internal and international jurisdiction.

In joined cases C-400/13 and C-408/13¹⁴ requests for preliminary ruling were made from the Amtsgericht Düsseldorf and the Amtsgericht Karlsruhe (Germany) whether according to the interpretation of the Article 3(a) and (b) of Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations Paragraph 28(1) of the AUG is contrary to Article 3(a) and (b) of Regulation No 4/2009. In order to understand the cases at hand as well as the decision of the CJEU it is necessary to state the facts of the cases.

These cases have arisen in two disputes relating to claims for maintenance payments, first, between Miss Sanders, a minor represented by her mother, Ms Sanders, and Mr Verhaegen, Miss Sanders' father and, second, between Mrs Huber and her husband, Mr Huber, from whom Mrs Huber is separated. Those claims were brought, respectively, before the Amtsgericht (local court of first instance) of the German towns in which the maintenance creditors concerned habitually reside. Amtsgericht Düsseldorf and the Amtsgericht Karlsruhe, according to a provision implementing in German law the cases to which Article 3(a) and (b) of Regulation No 4/2009 refers, declined jurisdiction in favour of the Amtsgericht in the town of the seat of the Oberlandesgericht (Higher Regional Court) in whose area of jurisdiction those applicants reside.

In its decision the CJEU took the view that Article 3(b) of Regulation No 4/2009 must be interpreted as precluding national legislation such as that at issue in the main proceedings which establishes a centralization of judicial jurisdiction in matters relating to cross-border maintenance obligations in favor of a first instance court which has jurisdiction for the seat of the appeal court, "except where that rule helps to achieve the objective of a proper administration of justice and protects the interests of maintenance creditors while promoting the effective recovery of such claims, which is, however, a matter for the referring courts to verify". [48]

of Child Support and Other Forms of Family Maintenance (Canada). Lortie, *Introduction. Concentration of jurisdiction*, p. 3.

¹³ Belgium, Bulgaria, Cyprus, Finland, France, Germany, Hungary, Netherlands, Sweden and the United Kingdom (England & Wales and Northern Ireland), Lortie, *Introduction. Concentration of jurisdiction*, p. 3.

¹⁴ Joined Cases C-400/13 and C-408/13 Sanders and Huber [2014]

CJEU placed a heavy test before each specialized court: in every case they have to question whether centralized jurisdiction is in balance with other justified principle, particularly the proper administration of justice and access to justice.

IV. CHILD ABDUCTION AS PROTOTYPE FOR CONCENTRATION OF JURISDICTION

4.1. Legal background

In settling cross border disputes in family matters concentration of jurisdictions is best established in child abduction area. Its great impact on child abduction regime can best be justified if we acknowledge the nature and function of the Convention on the Civil Aspects of International Child Abduction concluded at the Hague on 25 October 1980 (hereinafter: 1980 Hague Child Abduction Convention). It is not a typical private international law treaty that is enacted to deal with merits in child related cases. I recall to an interesting comparison: it is more like an ambulance car that comes into play in emergency situation, if one of the parents retains or removes the child against the will of the other parent.¹⁵ The return of a child to jurisdiction of his habitual residence prior to wrongful retention or removal is to be ordered by a court of refuge within 6 weeks of the initiation of the return procedure. In exceptional cases court of refuge can decide to refuse a return of a child, but defences to mandatory return must be dealt with extreme caution.¹⁶ To be able to adjudicate child abduction proceedings in terms of rendering a quality decision and in terms of rendering a decision within timeframe of 6 weeks, a judge must have certain knowledge and expertise. If no particular rule exists, such a demanding case file can end up with a first instance judge not even specialized to family matters, a judge that deals with various civil claims or even insolvency at the same time. Such authority cannot perform to serve the child friendly justice. The more judicial or administrative authorities that have jurisdiction, the more scattered the experience will be among the judges concerned and there will be less consistency of legal practice.¹⁷

¹⁵ N. Lowe, M. Nicholls, M. Everall, *International Movement of Children: Law Practice and Procedure*, Bristol, Jordan Publishing, 2006, p. 196 et.seq.

¹⁶ R. Schuz, *The Hague Child Abduction Convention*, Oxford, Hart Publishing, p. 223-369; Lowe, *International movement of children*, p. 291-370.

¹⁷ The issues, conclusions and and recommendations of LEPCA (Lawyers in Europe on Parental Child Abduction). Centrum Internationale Kinderontvoeringreport 2014, p. 6, <http://www.lepca.eu/uploads/Report%20LEPCA%202014.pdf>, (accessed on 22 October 2015).

In order to present the full picture of child abduction regime in EU, one must explain the function and nature of several rules inserted into Brussels II *bis* regulation.¹⁸ Namely, detailed rules adopted by Regulation are designed to enhance, as regards relations between the Member States, the effectiveness of the arrangements established by the 1980 Hague Convention. These rules remain applicable within the European Union. Article 11(1) of the Brussels II *bis* Regulation sets a rule that if a child is wrongfully removed or retained in another Member State holders of the rights of custody can apply for the child's return to the competent authorities in that State. Such request is based on the 1980 Hague Convention. Room to refuse the return of a child is for the courts of the Member State to which the child has been removed narrowed by the Brussels II *bis* Regulation. Article 11(3) to (5) of the Brussels II *bis* Regulation clearly marks that general rule is the return of the child without delay, and refusal is merely an exception. Court can oppose his or her return in specific, duly justified cases, in particular, if 'there is a grave risk that his or her return would expose the child to physical or psychological harm', as prescribed by Article 13b of the 1980 Child Abduction Convention.¹⁹ Unlike the Convention system, in system of the Brussels II *bis* Regulation where the court concerned opposes return, that does not automatically bring the dispute concerning the return to an end. Namely, „such a decision could be replaced by a subsequent decision by the court of the Member State of habitual residence of the child prior to the wrongful removal or retention“. As argued by some commentators, judgment refusing the return of a child is to a certain degree only a provisional decision. In the system of Regulation the jurisdiction is retained with the courts of the merits established under Article 8 which would in general have the final word on the parental responsibility issue. In the context of this paper rules that also depart from 1980 Child Abduction Convention system, which are embodied in Article 11 (7)-(8) present a cornerstone of recent CJEU ruling. These rules would be tightly explained later in the paper.

4.2. Prevalence of concentrated jurisdiction in child abduction matters

Turning to concentration issues in national legislation, even before child abduction convention was enacted several states employed such organization of judiciary. In some contracting states it came along with the implementation of the 1980 Child Abduction Convention,²⁰ and is one of the aspects of English/Welsh system most applauded by the HCCH community. Considerable number of states enacted the system following the rat-

¹⁸ Explanatory memorandum of the proposal of the Brussels II *bis* Regulation, presented on 3 May 2002 by the Commission [COM(2002) 222 final, OJ 2002 C 203 E, p. 161].

¹⁹ Recital 17 of the Regulation

²⁰ China (Hong Kong SAR), Finland, South Africa and the United Kingdom (England & Wales and Northern Ireland), in Ph. Lortie, „Introduction. Concentration of jurisdiction under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction“, *The Judges' Newsletter on International Child Protection*, Vol. XX / Summer-Autumn 2013, p. 2-3.

ification of 1980 Child Abduction Convention.²¹ However, around 50 states still haven't concentrated jurisdiction to these matters. Currently, out of 93 contracting states less than half have concentrated jurisdictions. Most states have enacted it rather recently, influenced by its positive effects on procedures in child abduction cases.

If we narrow the focus down to European Union, we may see that in majority of European countries, jurisdiction was more or less concentrated in international parental child abduction cases.²² Most recent example of introduction of concentrated jurisdiction is the Spain²³ whereas Croatia is still among the countries where jurisdiction to child abduction is not concentrated.

Concentration of jurisdiction for child abduction cases is advocated widely: academics and policy are attracting attention on importance and desirability that a concentration of jurisdiction is brought into force in worldwide,²⁴ but also particularly within EU. European Commission Practice guide on application of 2201/2003 regulation states:

“Although the organisation of courts falls outside the scope of the Regulation, the experiences of Member States which have concentrated jurisdiction to hear cases under the 1980 Hague Convention in a limited number of courts or judges are positive and show an increase in quality and efficiency.”²⁵

Concentration of jurisdiction in child abduction matters has been emphasized as particularly desirable regional initiative in Asia-Pacific²⁶ as well Western Balkans region.²⁷ The positive experience of several countries that have concentrated jurisdiction over Hague return cases to a limited number of courts and judges has been widely recognised by judges. Concentration of jurisdiction is however scarcely elaborated by doctrine. Lead-

²¹ Belgium, Bulgaria, Dominican Republic, France, Germany, Netherlands, Sweden and Switzerland. Lortie, *Introduction. Concentration of jurisdiction*, p. 2-3.

²² „Cross-border parental child abduction in the European Union, European Parliament - Study for the LIBE Committee“, 2015, [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510012/IPOL_STU\(2015\)510012_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510012/IPOL_STU(2015)510012_EN.pdf), (accessed on 30 December 2015), pp. 74-75.

²³ Law 15/2015 de Jurisdicción Voluntaria, 2.7.2015. http://www.jordanpublishing.co.uk/practice-areas/international-family-law/news_and_comment/child-abduction-specific-legislation-in-spain#.VooxkPn-hDIU, (accessed on 30 December 2015).

²⁴ Lortie, *Introduction. Concentration of jurisdiction*, p. 2.

²⁵ Practice Guide for the application of the Brussels IIa Regulation, p. 50 http://ec.europa.eu/justice/civil/files/brussels_ii_practice_guide_en.pdf, (accessed on 22 October 2015).

²⁶ Towards the Well-Being of the Child Through the Hague Child Abduction and Protection of Children Conventions: An Asia Pacific Symposium Macao, China. Thursday 25 to Friday 26 June 2015. HCCH, note 8. www.hcchconventions-macaosymposium.org/, (accessed on 22 October 2015).

²⁷ M. Župan, (ed./ur.), *Private International Law in the Jurisprudence of European Courts – Family at Focus / Međunarodno privatno pravo u praksi europskih sudova – obitelj u fokusu*, Osijek, Faculty of Law J. J. Strossmayer University of Osijek, 2015. at: <http://www.pravos.unios.hr/katedra-medunarodnog-privatnog-prava/recent-updates>, (accessed on 15 December 2015).

ing readings on Child abduction cases advocate concentration of jurisdiction, but do not provide for a broader discussion.²⁸

4.3. Judicial specialization in child abduction matters

Concentration can lead to new level of specialization.²⁹ Such specialization would entail that within court designated to adjudicate child abduction matters another concentration is proceeded and only one or more specialised judges are responsible for child abduction cases.³⁰

In order to further explore the matter of concentration of jurisdiction in child abduction, especially the cost and benefits of such approach, it is necessary to first explain its interrelation to judicial specialization which is regularly implied in the idea of concentration of jurisdiction. Thereby, there are two aspects of judicial specialization which need to be taken into account. Firstly, in Member States there is no coherent approach to judicial specialization, and while in some Member States there is a low level of judicial specialization (Czech Republic, Denmark, Estonia, the Netherlands) in other there is a large number of specialized courts which are different in nature (Belgium, Finland, Germany).³¹ This illustrates the difference in attitudes of national legislators towards judicial specialization. Secondly, although there is a customary perception of specialization as division of work between courts into several branches of jurisdiction that have separate appellate instances and form a separate pyramid of hierarchical institutions (jurisdictional specialization; judicial specialization in narrow sense), there are several other categories of specialization that need to be considered. A possibility for the parties to have their disputes decided by specialized judges may be provided within a 'specialized' court but also within a separate division or unit within a 'generalist' court. Since parties are unaware of the internal division because they are only required to approach the territorially competent court, and the distribution of cases will be done internally, this category of specialization could be considered to be *internal* specialization. When different skills, approaches and competences of judges are taken into account when assigning disputes to judges, it is a case of *personal* specialization. *Procedural* specialization occurs if special methods or ways of solving disputes which are regulated or prescribed by law are used in order to resolve a case by different specialized courts or judges.³²

²⁸ Schuz, The Hague Child Abduction Convention, p. 39.

²⁹ Bulgaria, Germany, Israel, South Africa and the United Kingdom (England & Wales and Northern Ireland)).

³⁰ E. Silvestri, „Judicial Specialization: In Search of the ‘Right’ Judge for Each Case?“ *Russian Law Journal* Volume II, Issue 4, 2014., p. 167.

³¹ See Uzelac, Alan, Mixed Blessing, of Judicial Specialisation: The Devil is in the Detail, *Russian Law Journal*, Volume II, Issue 4, 2014., p. 146-164, at p. 151.

³² See Uzelac, p. 148-149.

Different approaches towards specialization in national legal systems lead to different expectations in terms of the fashion in which justice will be administrated. Also, depending on whether specialization implies only internal, procedural or personal specialization or even a combination of several categories it will bring different results in achieving ability of the courts to deal with complex and delicate cases (such as cross-border family matters) in efficient and expeditious manner.

In this sense, it should be noted that in relation to concentration of jurisdiction judicial specialization obviously cannot be understood unambiguously as entrusting specialist judges with adjudicating disputes within a particular court or a limited number of courts. Having that in mind, along with other costs and benefits of concentration of jurisdiction, divergences caused by differences in approach towards judicial specialization in national legal systems of the Member States should be expected. Thereby, the main obstacles to a more coherent approach towards judicial specialization in Member States are caused by the inability to detect a common set of criteria which must be followed in the choice of judges and their respective virtues and values as well as matters to which specialization should be applied.³³

4.4. Cost and benefit of concentrated jurisdictions

Principal advantages of concentration of jurisdiction in child abduction can be divided to several categories:³⁴

- advantages for court system
 - clear system of jurisdiction is established
 - efficient case management is introduced
 - reviews of performance are facilitated
- advantages for policy principles of Hague Child Abduction Conventions
 - expeditors return procedure has positive effects to main operational principles of the Convention

³³ See Silvestri, p. 167.

³⁴ P. Beaumont, P. McEleavy, *The Hague Convention on International Child Abduction*, Oxford, Oxford University Press, 1999, p. 260; Guide to good practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Part II – IMPLEMENTING MEASURES, Hague Conference on Private International Law 2003; J. Yokoyama, „A Japanese Implementation Bill for the 1980 Child Abduction Convention“, in *A Commitment to Private International Law. Essays in honour of Hans van Loon / Un engagement au service du droit international privé. Mélanges en l'honneur de Hans van Loon*, Permanent Bureau of the HCCH, Intersentia, 2013, p. 664; Schuz, *The Hague Child Abduction Convention* op.cit. p. 39.

- advantages to adjudication process
 - elimination of any confusion as to the competent court and the law applicable
 - improvement in relation to the quality of the decisions;
 - accumulation of experience among the judges concerned;
 - creation of a high level of interdisciplinary understanding of Convention objectives (particularly distinction from custody proceedings)
 - child-friendly justice
 - improvement in relation to duration of the proceedings;
 - mitigation against delay;
 - consistency of practice by judges and lawyers
 - consistency and coherency in the case law
 - enhanced legal certainty
 - development of mutual confidence
 - people have greater confidence in trusting justice and its institutions
 - between judges and authorities in different legal systems
 - facilitates judicial liaison.

Main disadvantages are:

- not always practical for geographical reasons (particularly large countries);
- encounters problems with enforcement,³⁵ that can be various:
 - if there is a specialised enforcement court the possible benefits of a concentration of jurisdiction at the enforcement stage should be balanced against the advantages of proximity of the enforcement court to the place of enforcement (enforcement court has to be close to the scene of enforcement-location of a child, thus selection of appropriate measure of enforcement is facilitated and cooperation and surveillance of local enforcement officers is assured).
 - if a concentration of jurisdiction at the level of the courts is not supplemented by a concentration of competence at the level of the

³⁵ Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part IV – Enforcement, <https://www.hcch.net/en/news-archive/details/?varevent=201>, (accessed on 30 December 2015), p. 11-13.

- a) enforcement officers, problems may encounter as working routines which have developed between a court and the competent local enforcement officers may differ from one district to another;
 - b) other professionals involved in enforcement (e.g., child protection authorities), problems may encounter. Therefore it is advisable that even concentration of child protection authority is introduced.
- in both above mentioned situations co-operation between new partners is established only for one particular case; communication should be clearly and explicitly prescribed or agreed; benefit can be that there are no personal contacts that could deprive professionalism of handling the case – particularly having in mind the sensitives of return procedure.

4.5. Challenging concentration of jurisdiction in child abduction matter – CJEU in *Bradbrook v. Aleksandrowicz*³⁶

CJEU was asked by Cour d'appel de Bruxelles (Belgium) to give a preliminary ruling to clarify the interpretation of Article 11(7) and (8) in relation to assigning jurisdiction to a specialist court to consider a child abduction case, even though another court of the same Member State is already seized in parental responsibility proceedings to the merits. In order to understand the cases at hand as well as the decision of the CJEU it is necessary to state the facts of the cases.

The father is an English national who lives in Belgium. The mother is a Polish national who lives in Poland, where she gave birth to their child. Subsequently mother and a child moved to Belgium, but only the mother has a parental responsibility, she lived with a child while the father had regular contacts with the child. Mother and a child went to Poland for holidays, and remained there, whereas father applied to a juvenile court seeking custody over the child, as well as for prohibition of leaving Belgium. First instance court retained the custody with the mother, and contacts with the father. Father appealed the decision, but also initiated return of a child through Hague Child Abduction procedure, along the Regulation 2201/2003. Polish court reached the conclusion that the child had its habitual residence in Belgium, but the Polish judge issued a decision of non-return in accordance to Article 13 of the Hague Convention. This Polish decision was transmitted to the Belgian authorities in accordance to 11(6) of the Regulation 2201/2003. In accordance to Belgian law the case file was allocated to a family Court of First Instance, and after the entry into force of the new law (*Loi de 30 juillet portant la creation d'un tribunal de la famille et de la jeunesse*) the case was reallocated to the pertinent specialized Court.

³⁶ Case C-498/14 PPU *Bradbrooke* [2015]

At that moment parallel proceedings occurred, as the second instance court procedure was pending in the first custody case to which father has appealed. Belgian court of appeal which was seized by a father in the child return application asked the CJEU to clarify whether Article 11(7) and (8) shall be interpreted as precluding the possibility that a Member State favours the specialization of courts in cases of parental abduction to the procedure set forth in the same provisions, even when a court or a tribunal has already been seized of substantive proceedings relating to parental responsibility.

Details of the legal background of the case follow. Relevant Articles 11(6) – (8) of Brussels II *bis* Regulation serve in situations of child abduction within EU. These rules upgrade the system introduced by Hague Child Abduction Convention, and aim to foster the child abduction return mechanism among Member States. Provision sets that if a judge of a Member State delivers a non-return decision pursuant to Article 13 of Hague Child Abduction Convention, a copy of that decision must be sent to the authority competent to decide upon the case or to the central authority where the child was habitually resident immediately before being wrongfully removed or retained. Receiving court or central authority must notify the parties of such decision and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification. Upon such submission that court can still review the case and hinder a final ruling on custody of the child. Pursuant to Article 11(8) such judgement on merits overrules the non-return order of a refugee court, moreover, such judgement is automatically enforceable according to Article 42.

At present case, the internal rule on specialization with concentrated jurisdiction led to uncertainty in application of the Regulation. Therefore, the first question for the CJEU is whether a Member State is permitted to opt for a specialisation of courts which are to have jurisdiction in that regard, even where proceedings of which the subject-matter is parental responsibility with respect to the child who has been wrongfully removed are already pending before another court of that State. The other question was whether the national law that is removing, from the court seized of proceedings on the substance of parental responsibility jurisdiction to give judgment on the custody of the child, despite the fact that this court has jurisdiction under the Regulation, is compatible with the Regulation.

The mere referring court is keen to accept the interpretation that national rules present an obstacle to smooth application of the Regulation, whereas both the Belgian Government, Commission and the Advocate General (hereinafter AG) Jääskinen supported the contrary argument.

As previously stated by CJEU in the context of Brussels Convention,³⁷ and later in the context of child abduction under Regulation Brussels II *bis*: “Even if the object of the

³⁷ Case C-365/88 Hagan [1990] ECR I-1845, paragraphs 19 and 20; Case C-68/93 Shevill and Others [1995] ECR I-415, paragraph 36 and Case C-159/02 Turner [2004] ECR I-3565, paragraph 29.

Regulation is not to unify the rules of substantive law and of procedure of the different Member States, it is nevertheless important that the application of those national rules does not prejudice its useful effect”.³⁸ In order to put these two sides into balance, and to answer the questions put before the CJEU, AG Jääskinen takes a closer look to provision of the Regulation and conducts it’s a teleological interpretation. Article 11(6) states there is an obligation to inform ‘the court with jurisdiction or the central authority in the Member State where the child was habitually resident’ and to send immediately a copy of that order and copies of all relevant documents, all ‘as determined by national law’. AG Jääskinen states:

“Given the wording of Article 11(6), which does not have as one of its objectives the identification of which court, among those situated within the territory to the Member State where the child was habitually resident, ought to receive the information referred to in that provision, I consider that there can be scarcely any doubt that each Member State has the option of designating, by adopting a domestic rule concerning jurisdiction, the national court which is to be the recipient.”³⁹

Concern raised by the referring court is whether the national rules that allow different courts to rule on these matters is justified by the Regulation, as they advocate that according to the first clause of Article 11(7) the notification procedure is required ‘[u]nless the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seized by one of the parties’, which they find reaffirmed in the recital 18 of the preamble to the Regulation: ‘unless the court in [the Member State where the child was habitually resident immediately before the wrongful removal or retention] has been seized, this court, or the central authority, should notify the parties’. Referring court argues that the EU legislature wanted to maintain the jurisdiction of a court in that Member State which was in the position of being already seized of a dispute that relates to parental responsibility of a wrongfully retained child, in accordance with the general rule of *perpetuatio fori*. Several relevant academic sources⁴⁰ as well as European Commission Practice Guide⁴¹ supports such interpretation. AG remains with rather vague ground in its explanation on the wording of Article 11(7)

³⁸ Case C-195/08 PPU *Rinau* [2008] and case C-211/10 PPU *Povse* [2010]

³⁹ AG Jääskinen opinion [44].

⁴⁰ P. McElevy, „The New Child Abduction Regime in the European Union: Symbiotic Relationship or Forced Partnership?“, *Journal of Private International Law*, No 1, 2005, p. 30; U. Magnus, P. Mankowski (eds.) *Brussels II bis Regulation*, Munich, Sellier European Law Publishers, 2012, p. 142 et seq.

⁴¹ ‘If a court in the Member State of origin has previously issued a judgment concerning the child in question, the documents shall in principle be transmitted to that court. In the absence of a judgment, the information shall be sent to the court which is competent according to the law of that Member State’. Practice guide, p. 58.

and prior seizing of a court. Even though AG was previously in favour of a more general wording of Article 11(7), here he argues that „the qualification in recital 18 relates to the prior seizing not of any court whatsoever of the Member State where the child was habitually resident, without any distinction, but of a specific court, namely that court which has jurisdiction in that Member State to receive the file relating to the non-return order“.⁴²

However, the position taken he defences arguing that these provisions are a qualification that is to be read differently, not merely by grammatical interpretation of the law, but rather in conjunction to other CJEU rulings.⁴³ CJEU judicature to this field is founded on protection of fundamental rights of the child, its best interest principle deriving from UN CRC convention and what is reaffirmed with Article 24(2) and (3) of the Charter of Fundamental Rights of the European Union (hereinafter Charter). Best interest of a child is further envisaged by the Regulation rules aiming to enhance prompt and efficient procedures in child related matters. Several rules are in the context of child abduction serving that principle. Firstly, rule of Article 11(3) set a six weeks after the application is lodged for the court seized of an application for return to issue a decision. Secondly, rule of Article 11(6) requires the notification on the non-return decision done within one month of the date of the non-return order. Thirdly, Article 11(7) sets a new timeframe for the parties to make submissions within three months of the date of receiving the information on non-return order.

However, these rules are indefinite while making a reference to the provisions of „national law“: they do not speak of the construction of national judicial system. Concretely, Article 11(6) as regards the communication of information on the non-return order to the *competent authorities* in the Member State where the child was habitually resident, as well as Article 11(7) as regards the requirements pertaining to the notification of that information to the parties and the invitation to the parties to make submissions *to the court having jurisdiction*. These rules are indefinite in comparison to the wording of Maintenance Regulation which refers to „*the court for the place where the creditor is habitually resident*“. These facts are by AG opinion sufficient to justify that the Brussels II *bis* regulation leaves it up to the Member State to allocate the action to competent authority of its preference.⁴⁴

If one acknowledges that Member States are free to enact national rules on specialization, it remains to question if in this particular case such national rules are impairing the effectiveness of the Regulation. As far as Belgian rules to adjudicate the child abduction cases are concerned, their aim may not be considered inconsistent with the Regulation

⁴² AG Jääskinen opinion [61].

⁴³ AG Jääskinen opinion [52].

⁴⁴ AG Jääskinen opinion [58].

aims.⁴⁵ Ever since its enactment in 1998 when an emergency procedure as in summary proceedings is introduced, and its revision in 2007 when specialisation of judges and a concentration of jurisdiction is introduced, such rules aim to reinforce the 1980 Child Abduction regime.

Further concern relating to national law relates to compatibility of the legislation of the Member States on concurrent proceedings to particular requirements of expedition and effectiveness imposed by the Regulation. As in the present case, court of the merits which was first seized had to stay its proceedings and wait until the specialized court ruled on the child abduction matters. It derives that for the purpose of effectiveness and best interest of a child it would be reasonable to allow the court first seized to proceed also in the child abduction matters, as that court has already reached evidences and has relevant information on the relationship of the child with both parents, parental abilities, habits of the parents, material circumstances of the case in general.

CJEU rendered a decision on the conformity of specialized courts with the Regulation 2201/2003 on 9th January 2015. CJEU states that provision of Article 11(7) does not aim to determine the exact national competent authority. Court considers it to be a technical provision that determines the modalities of notification of the non-return decision.⁴⁶ CJEU held that Regulation 2201/2003 is not intended either to modify or to harmonize Member States' substantial and procedural rules, but they remain regulated by national legal sources. Still, CJEU emphasized that national provisions cannot undermine the regulation's *effet utile*, which is particularly directed towards conformity with the fundamental rights of the child, as prescribed in particular with Article 24 of the Charter of Fundamental Rights of the European Union. Effects of Article 24 are particularly directed towards the right of a child to maintain personal relationships and direct contact with each parent and obligation to ensure the case is dealt with expeditiously. In the end, as long as promptness of procedure in adjudicating child abduction cases is not jeopardized, such specialization of a court cannot be contrary to *effet utile* of the Regulation.

“In the light of the foregoing, the answer to the question referred is that Article 11(7) and (8) of the Regulation must be interpreted as not precluding, as a general rule, a Member State from allocating to a specialised court the jurisdiction to examine questions of return or custody with respect to a child in the context of the procedure set out in those provisions, even where proceedings on the substance of parental responsibility with respect to the child have already, separately, been brought before a court or tribunal.”⁴⁷

⁴⁵ M. De Hemptinne, „Belgium“, in Concentration of jurisdiction under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction“, special edition of *The Judges' Newsletter on International Child Protection*, Vol. XX / Summer-Autumn 2013, p. 5-6.

⁴⁶ *Bradbrooke v Aleksandrowicz* [46].

⁴⁷ *Ibid*, [54].

V. CONCLUDING REMARKS

Although internal organization of judiciary is not in domain of EU competence nor its regulatory activity, national rules on jurisdiction can be decisive for implementation of EU *acquis*. When child abduction cases are at stake, it has been advocated by academics and international organizations that concentration of jurisdiction is preferable. By definition, concentration of jurisdiction means that within certain national jurisdiction a particular court or a limited number of courts can deal with child abduction matters. Such structure of adjudication can lead to new level of specialization, which would entail that within court designated to adjudicate child abduction matters another concentration is proceeded and only one or more specialised judges are responsible for handling such cases. As advocated by doctrine, the quality of decisions and the efficiency in the disposition of cases are the two virtues of a specialized judiciary. Cost-benefit analyses of concentrated jurisdiction can be done on its most employed prototype - child abduction cases. As presented in the paper, detailed list of *pro* is far beyond the list of *contra*. List of the benefits of concentration and specialization, as well as positive experience of concentrated jurisdictions that manage to deal child abduction cases within defined timeframe of 6 weeks are in support this CJEU ruling. However, this case file, along with AG opinion, reflects the difficulties of handling cases in EU civil justice area. Closer inspection reveals that despite the fact that European Commission advocates concentration of jurisdiction, guidance prescribed by the same Commission may not always be consistent to national rules. The case at hand reaffirms that synergy of such national rules with EU rules is needed. This case file emphasizes that CJEU employs the fundamental human rights, particularly the children's rights prescribed by the Charter, to support the idea it finds worthy justification.

This CJEU ruling reaffirms the standing that it is a matter of the national procedural law of a Member State to assign a specialist court jurisdiction to consider parental child abduction issues. Moreover, in context of the provisions of Article 11(7)-(8), as long as any rules established in relation to the allocation of jurisdiction to the specialist court were consistent with the operation and effectiveness of Brussels II *bis*. Despite rather simple standing instruction, CJEU prescribes an "operation and effectiveness test" before any national system with concentrated jurisdiction.

NATAŠA LUCIĆ, PHD

ADOPTION OF A CHILD WITHOUT CONSENT OF ITS PARENT WITH A INTELLECTUAL DISABILITY – CASE OF A.K. AND L. *v.* CROATIA

Abstract:

This paper discusses the matter of parents prior right to provide his/her child with care in situations in which a child's parent is a person with intellectual disabilities. The author analyzes the case of A.K. and L. v. Croatia in which European Court of Human Rights concluded that it come to violation of the right to family life of A.K, a mother with an intellectual disability and her son L., who was adopted without the mother's consent.

The paper presents a critical review of Croatian family law in a matter of a parent's consent for an adoption when the parent is a person with intellectual disabilities. By connecting contemporary standpoints of the European Court of Human Rights and the latest scientific knowledge about the ability of persons with intellectual disabilities to take care of their child, the author discusses a possible conflict between the principle of child's best interest and the priority right of a parent to take care of his/her child. Also, the author warns about the danger of a parent with intellectual disabilities being deprived of his/her parental rights and completely excluded from the process of adoption even in situations when the parent could, with adequate professional help and support, maintain a family relationship with the child. From that perspective the author also discusses the latest reforms of the family law concerning protection of parental rights of persons deprived of their capacity for work.

Keywords: *parental responsibility, intellectual disability, adoption, consent*

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I. INTRODUCTION

In the case of *A.K. and L. v. Croatia*¹ (hereinafter: *A.K. and L. v. C.*), the first applicant was a person with a mild mental disability² who applied to the European Court of Human Rights (hereinafter: ECtHR) due to violation of the right to family life between her and her son L. Since A.K. was, following a decision of the competent court, divested of her parental rights in respect of L. and since according to the Croatian family law legislation, no parent's consent for child adoption is required if the parent has been divested of his/her parental rights, L. was adopted without consent of A.K. What is disputable in this case is the reasoning of the competent national court implying that due to her mild mental disability and scoliosis, A.K. should have been provided assistance in the protection her rights and interests because she was not able to protect them herself and she should have been provided professional help and support in the exercise of her parental rights, instead of having been divested thereof. Nonetheless, A.K. had been, based on a decision of the competent court which adjudicated following a request of the Welfare Centre, divested of her parental rights, after which L. was adopted without her consent. Although A.K. had never directly hurt the interests of her child and even though she, within the limits set by her (mild) mental disability, had shown concern for her child and expressed a wish to proceed with maintaining family life with her child, the system did not protect her parental rights and thus, referring to the best interests of the child, irreversibly broke the family bond between A.K. and her son L.

¹ *A. K. and L. v. Croatia*, ECtHR, Application no. 37956/11 [2013]

² T. Not explains it in a way that people with mental disabilities should be classified as disabled persons. This author stresses that people with mental disabilities are also known as persons with developmental disabilities or persons with special needs, but the term of persons with intellectual disabilities has lately prevailed in this context. She also warns that the differences in the terminology and definitions, which exist both in professional books and relevant regulations, may affect the consistence of law enforcement and bring to denial of certain privileges and rights. See T. Not, "Mentalna retardacija: definicija, klasifikacija i suvremena podrška osobama s intelektualnim teškoćama, *eng. Mental Disability: Definition, Classification and Contemporary Support to Persons with Intellectual Disabilities*", *Nova prisutnost*, vol. 6, no. 3, 2008, p. 341. A. Došen also observes that the term of mental retardation (disability) has been substituted with the term of intellectual disability which is defined as "a deficiency in psychosocial development (particularly its cognitive segment) with respect to an average person of the same chronological age." She then suggests that "pursuant to international systems of classification of mental disorders (DSM IV and ICD 10), intellectual disabilities are classified according to the following criteria:

- reduced cognitive ability (IQ score in psychometric tests below 70)
- difficulties in adaptive behaviour
- diagnosis before the age of 18 years."

This author emphasizes that intellectual difficulties are not mental but developmental disorders and hence they cannot be treated or cured like some other illnesses but one should focus on stimulation of possible development. See A. Došen, "Poremećaji ponašanja i psihički poremećaji osoba s intelektualnim teškoćama, *eng. Behavioural Disorders and Mental Disorders of Persons with Intellectual Disabilities*", *Socijalna psihijatrija*, vol. 38, no. 2, 2010, p. 109-110.

This paper begins with analysis of the circumstances of the case of *A.K. and L. v. C.*, basic objections of the applicant and conclusions of the ECtHR. All the controversial case-related issues of child adoption without consent of the parent with intellectual and physical disabilities are also taken into consideration. The paper attempts to answer if there is a conflict between the principle of the best interest of the child and the fundamental parental right to provide childcare even in case of a parent's intellectual disability. Since the judgment in the case of *A.K. and L. v. C.* was passed when the Family Act was in force³ [(hereinafter: FA (2003))], the relevant legal issues are viewed through the prism of this Act. Taking account of the standpoints of the ECtHR in the case of *A.K. and L. v. C.*, the new Family Act⁴ [hereinafter: FA (2015)] has brought some novelties relating to the protection of the parental rights of those who are not capable of protecting their own rights and interests, which is also discussed in this paper.

Although the judgment uses the term of 'mental disability', the respective literature has recently replaced it with the notion of 'intellectual disability'⁵, so wherever in the paper reference is not made exclusively to the judgment in the case of *A.K. and L. v. C.*, the term of 'intellectual disability' will be preferred.⁶

II. CASE OF A.K. AND L. V. C.⁷

2. 1. The Circumstances of the Case

The first applicant A.K. was born in 1987. The second applicant L., the biological son of the first applicant was born on 10 December 2008. By a decision of the K. Welfare Centre of 19 December 2008, L. was placed in a foster family in another town, on the ground that the first applicant was unemployed and had no income, was supported by her mother, attended a special needs programme in school and lived with her mother and mentally ill brother in an old and dilapidated house without heating.

The Welfare Centre drew the conclusion that A.K. is mildly mentally retarded and lodged a request with the court proposing that A.K. be divested of parental rights since she lived in poor housing conditions, in untidy and unmaintained premises, since she had

³ Obiteljski zakon, *eng.* Family Act (Official Gazette 116/03, 17/04, 136/04, 107/07, 57/11, 61/11)

⁴ Obiteljski zakon, *eng.* Family Act (Official Gazette no. 103/15)

⁵ See footnote no. 2.

⁶ Zakon o socijalnoj skrbi, *eng.* Social Welfare Act (Official Gazette no. 157/13, 152/14, 99/15) in its Article 4 item 9 defines a disabled person as "a person with long-term physical, mental, intellectual or sensory impairment which may, in interaction with various drawbacks, prevent such a person from full and efficient participation in the society on an equal footing to a person without disabilities".

⁷ Quoted from the judgment in the case of *A. K. and L. v. Croatia*

visited her son only twice in a one-year time and was not interested in him, so she, according to the Centre's opinion, had abandoned her child and had not created appropriate conditions for joint life with her child within a year after the child had been separated from its family. The first applicant contested the request and asked the court to restore her parental rights and give her a chance to care for the child again. For the sake of determining the facts in the case, the competent Municipal Court ordered the first applicant to undergo psychiatric expertise. The expertise resulted in the diagnosis that A.K. was affected by a mild intellectual disability accompanied with severe scoliosis and that due to her mental and physical condition, she was not capable of providing her son with good care.

On 10 May 2010, the K. Municipal Court divested the first applicant of her parental rights in respect of her son L., stating that "this court accepts the opinion of the expert ... and considers that the mother ... is not able to care for L. Owing to her health – advanced scoliosis – she is not able to pick the child up, hold him in her arms, run after him, or prevent him from hurting himself, because the scoliosis prevents her from moving quickly. In addition, at the hearings held before this court, [hereinafter: the Court] established that the mother spoke with difficulty and had a limited vocabulary, which indicated a risk that, if entrusted to his mother's care, the child would not learn to speak or would learn to do so with a delay. It is questionable whether he would be able to start his schooling on time, because he would surely be behind in his development in comparison with other children of the same age; so this Court cannot allow that to happen, because the child has the right to a life of good quality in orderly surroundings with all the necessary care, and, above all, in sanitary conditions, none of which he would have with his mother.

In her reply the respondent stated that she wished to try to care for her son L., but this Court, in order to protect the wellbeing of the child, cannot allow such an experiment."

On 28 October 2010, the first applicant's legal aid lawyer lodged a request with the K. Municipal Court, asking it to restore her parental rights in respect of L. The first applicant alleged that her living conditions had significantly changed after the decision divesting her of her parental rights had been adopted. Thus, her mentally ill brother no longer lived in the same household but had been placed in an institution; the house had been partly renovated and a heating system had been installed. She also argued that a mild intellectual disability should not be a reason for depriving her of her parental rights and that the allegations that she did not know how to prepare meals or care for a child had not been true. Furthermore, no expert opinion had established that she had a speech problem and had limited vocabulary or a limited ability to reason which would create a risk that the child, if entrusted to her care, would not learn how to speak.

On 10 December 2010, the first applicant informed the Welfare Centre that in a telephone conversation with L's guardian, which took place on 7 December 2010, she had learned that L. had been put up for adoption. She asked the Welfare Centre to provide her with all the relevant information concerning the adoption of her son L. On 14 De-

ember 2010, the Welfare Centre replied that L. had been adopted by the final decision of 15 October 2010 and that no consent for adoption was needed from the parent who had been divested of parental rights, and that such a parent could not be a party to adoption proceedings.⁸ No further information could be given to her since the data concerning the adoption were confidential.

2.2. The Applicant's Objections

The first applicant complained that hers and her son's right to respect for family life protected by the European Convention on Human Rights⁹ (hereinafter: ECHR) under Article 8 thereof¹⁰ had been infringed in that she could not effectively participate in the proceedings concerning her parental rights, and that her son was put up for adoption without her knowledge, consent or participation in the adoption proceedings.

The first applicant also complained, under Article 6 of the ECHR, that she had not been a party to the adoption proceedings, that she had not given her consent to the adoption and that she had never been informed that such proceedings had been instituted. In this connection, the first applicant complained that her child's guardian had been an employee of the Welfare Centre that had carried out the adoption proceedings, and claimed that the guardian had influenced the initiation of the adoption proceedings instead of protecting the first applicant's rights.

The first applicant also complained that her child had been taken from her owing to her intellectual disability and physical impairment and that therefore she had been discriminated against on that basis. She relied on Article 14¹¹ of the ECHR.

2.3. Basic Conclusions of the ECtHR

While judging in this case, the ECtHR noted as follows:

⁸ Pursuant to Article 138 paragraph 3 of the FA (2003), parents whose consent for child adoption is not required shall not be deemed a party in adoption proceedings.

⁹ The ECHR was adopted by the Council of Europe in 1950, it came into force in 1953 and Croatia ratified it together with its Protocols in 1997.

¹⁰ Article 8 of the ECHR, reads as follows:

*"1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

¹¹ Relevant part of Article 14 of the ECHR reads as follows:

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

“The Court considers that the national authorities should have ensured that, in view of the importance of the proceedings at issue for her right to respect for her family life, the first applicant’s interests were adequately protected in the proceedings at issue. That the first applicant could not properly understand the full legal effect of such proceedings and adequately argue her case and thus protect her rights and interests as the biological mother of L., is evidenced by her above-described personal circumstances. ... The Court finds it difficult to accept that a person whose speech impediment and limited vocabulary were taken as grounds to fear that she would not be able to teach her child to speak properly, would be able to argue her case in proceedings before the national courts concerning her parental rights. ... Owing to the decision of 10 May 2010, divesting the first applicant of her parental rights in respect of L., the first applicant was subsequently excluded from the adoption of L. Therefore, in the proceedings preceding a decision of such paramount consequences, the applicants’ rights and interests should have been adequately protected by the first applicant being provided with proper assistance by a lawyer in the interests of affording her the requisite consideration of her views and protection of her interests as well as those of her biological son L. from the standpoint of preserving ties with his biological mother. While those proceedings were pending, the first applicant learned on 7 December 2010 that L. had already been adopted. The proceedings for restoring the first applicant’s parental rights were therefore terminated on 28 January 2011. No further remedy would have served any purpose, since no proceedings concerning the first applicant’s parental rights could be continued owing to the fact that L. had already been adopted. The Court further notes that the first applicant was not informed of the adoption proceedings and was not heard at any time in that connection. Since she was not a party to the adoption proceedings she had no right to use any remedy in the context of those proceedings. While the Court can accept that her consent, owing to the fact that she had been divested of her parental rights, was not necessary in the adoption proceedings, it nevertheless considers that where, as in Croatia, a national system allows for parental rights to be restored, it is indispensable that a parent be given an opportunity to exercise that right before the child is put up for adoption, should such a possibility have any meaning. In the present case, by not informing the first applicant about the adoption proceedings the national authorities deprived her of the opportunity to seek restoration of her parental rights before the ties between the biological parent and child were finally severed by the child’s adoption. She was thus prevented from enjoying her right guaranteed by the Family Act.”

Against this background the ECtHR concluded that it came to violation of Article 8 of the Convention. Having found violation of this provision, the ECtHR concluded that no separate issue arises under Article 6 § 1 of the Convention. The ECtHR also concluded that it is not necessary to examine any further complaint under Article 14 of the Convention.

III. WHAT IS DISPUTABLE IN THE CASE OF A. K. AND L. V. C IN REGARD TO CHILD ADOPTION WITHOUT CONSENT OF A MOTHER WITH INTELLECTUAL AND PHYSICAL DISABILITIES?

As shown in the circumstances of the case of *A. K. and L. v. C*, the Welfare Centre did not require consent of A. K. for adoption of her son L. Furthermore, despite the resistance to divest her of parental rights and her struggle for the child's return, the child was adopted without her knowledge and consent. The circumstances in this case entail that one should take into consideration the legal frameworks regulating consent of parents with intellectual and physical disabilities.

First of all, it is important to accentuate that parents' intellectual and physical disabilities themselves shall, neither pursuant to the FA (2003) nor in line to the FA (2015)¹², constitute a ground on which a child could be adopted without consent of its parents.¹³ In the judgment *A. K. and L. v. C*, disability is not stated as the reason why the Welfare Centre did not require consent of A.K. for adoption of L., but only deprivation of her parental rights. In fact, in compliance with the FA (2003), a child may be adopted without

¹² See Chapter V.

¹³ *Obiteljski zakon, eng. The Family Act* (Official Gazette 162/98) encompassed a provision, according to which adoption could be carried out against the will or without consent of the non-resident parent if such has grossly neglected their care for the child for over three months (Article 129 paragraph 2). It is hard to assume which circumstances may lead to a failure of the non-resident parent to care for their child for over three months. It is certain that the circumstances due to which a parent might grossly neglect the care for their child do not necessarily have to arise solely from the action of the parent, so this provision hid the danger of adopting the child against the will of the non-resident parent and in case the parent could not provide the child with proper care for objective reasons for over three months. Among other things, a parent's intellect disabilities might be the cause that he/she does not properly care for her/his child, which does not necessarily mean that the parent has no emotional bonds with the child or that he/she does not want to provide proper care for the child, but more likely that the former is not (currently) capable thereof due to his/her intellectual disabilities. It is this issue that appeared in the case of *A.K. and L. v. C*. If this provision had been in force at the time when the Welfare Centre decided on child adoption in the referring case, it would have represented a legal ground for adoption against the will of A.K. even if there had been no judicial decision on the divestment of parental rights. Having observed the dangers emerging from the legal possibility that the Welfare Centre makes a discretionary assessment if it would come to adoption against the will of a parent with parental rights, the legislator, by adopting the FA (2003), withdrew such a legal possibility. It is worth mentioning that the research conducted by D. Hrabar and A. Korać-Graovac has demonstrated that all the possibilities foreseen by the FA (1998) relating to adoption without a parent's consent, in respective cases, the welfare centres applied only the prerequisite that a parent had already been divested of his/her parental rights and they did not exercise their power to determine the circumstances of the case and make an adoption decision against the will of the parent pursuant to Article 129 paragraph 2 of the Family Act (1998). See D. Hrabar and A. Korać-Graovac, *Primjena obiteljskopравnih mjera za zaštitu dobrobiti djece te zasnivanje posvojenja bez pristanka roditelja, eng. Implementation of Family Law Measures for the Protection of the Well-Being of Children and Adoption without Consent of the Parents*, Zagreb, Pravni fakultet Sveučilišta u Zagrebu, 2003, p. 119.

consent of a parent deprived of their parental rights, a parent fully incapacitated for work and a minor parent who cannot comprehend the meaning of adoption.¹⁴ To sum up, since A.K. was divested of her parental rights, she was not invited to provide consent for the adoption of her son.

The European Convention on the Adoption of Children (Revised)¹⁵ stipulates that adoption shall not be granted without consent of the parents, but if the father or mother is not a holder of parental responsibility in respect of the child, or at least of the right to consent to an adoption, the law may provide that it shall not be necessary to obtain his or her consent.¹⁶

Europe's White Paper on principles concerning the establishment and legal consequences of parentage¹⁷ also sets forth that adoption shall not be granted without consent of the mother and father, but consent of the mother or the father or both of them shall not be required if they are not holders of parental rights.¹⁸

Indeed, from the aspect of both international and national law, there is nothing controversial in the fact that in the case of *A.K. and L. v. C, L.* was adopted without consent of his mother A.K. who had been previously divested of her parental rights. However, what requires speculations is the ground for divestment of the first applicant's parental rights and their close link with her intellectual disabilities and severe scoliosis. After psychiatric examination, A.K. was diagnosed with a mild mental disability accompanied with severe scoliosis, which makes her incapable of caring for her son. The Welfare Centre had previously ascertained that the mother does not maintain personal hygiene nor cleans her housing premises. It is to be assumed that such conduct has resulted from her intellectual disability, due to which the applicant was not able to understand the dangers of such a way

¹⁴ Article 130 of the FA (2003)

¹⁵ The European Convention on the Adoption of Children was adopted in Strasbourg in 1967. In 2008, the Council of Europe opened the revised European Convention on the Adoption of Children for signing. The revised Convention entered into force on 1 September 2011. Croatia has neither signed the European Convention on the Adoption of Children (1967) nor the revised European Convention on the Adoption of Children (2008). See a comparative view to these Conventions in A. Korać Graovac, "Europska konvencija o posvojenju djece, *eng.* European Convention on the Adoption of Children", *Dijete i društvo*, vol. 11, no. 1/2, 2009, pp. 279-292. See also D. Hrabar, "Posvojenje na razmeđu interesa posvojitelja i posvojenika, *eng.* Adoption at the Crossroads between Adopters and Adopted Children", *Zbornik radova Pravnog fakulteta u Zagrebu*, vol. 58, no. 5, 2008, pp. 1107-1139, D. Jakovac-Lozić, "Ususret novoj Europskoj konvenciji o posvojenju djece, *eng.* Meeting the New European Convention on the Adoption of Children", *Zbornik radova Pravnog fakulteta Sveučilišta u Mostaru*, 2007, pages 91-121.

¹⁶ See Article 5, paragraph 1 item a and paragraph 4 of the European Convention on the Adoption of Children.

¹⁷ Council of Europe's Committee of Experts on Family Law on 15 January 2002 adopted a "White Paper on principles concerning the establishment and legal consequences of parentage". "White Paper" contains 29 principles which are contained in the following 3 parts: principles relating to the establishment of legal parentage; principles relating to legal consequences of parentage; and possible legal consequences where parentage has not been established.

¹⁸ See Principle 15.

of life for her and the child. Therefore, one can conclude that the intellectual disabilities did not set grounds for not requiring the A. K. consent for the adoption. Yet, the intellectual and physical disabilities had resulted in the mother's incapability to provide the child with proper care, which motivated the competent Court to divest her of parental rights. So, it can be implied that in this concrete case, it was the mother's intellectual and physical impairment that brought to adoption of the child without her consent.

In this respect, one can raise the question whether a parent's intellectual and physical disability can constitute a firm ground for divestment of his/her parental rights. Pursuant to the FA (2003), which was in force at the time when the decision on the divestment of the first applicant's parental rights was made, the reasons for divestment of parental rights include abuse and severe infringement of parental responsibilities, duties and rights.¹⁹ In the light of Article 114 paragraph 2 of the FA (2003), a parent shall be considered abusing or severely violating parental responsibilities, duties and rights if he/she:

1. inflicts physical or emotional violence on the child, including exposure to violence among adult family members,
2. abuses the child sexually,
3. exploits the child, forcing it to excessive labour or labour which is not appropriate for its age,
4. permits the child to consume alcoholic beverages, drugs or other narcotics,
5. guides the child to socially unacceptable behaviour,
7. does not provide the child with proper care as its non-resident parent,
8. does not create, without having justified grounds for not doing so, conditions for joint life with the child within a period of three years after becoming its non-resident parent,
9. does not provide for the basic needs of the child as its resident parent or does not adhere to the measures previously passed by a competent body for the sake of protection of the rights and wellbeing of the child,
10. in any other way severely abuses the rights of the child.

As presented above, the FA (2003) does not regard parents' intellectual and physical disabilities as a reason for divestment of his/her parental rights. Only if a parent with intellectual and physical disabilities has abused or severely violated his/her parental responsibilities, duties and rights in one of the ways laid down in Article 114 paragraph 2 of the FA (2003), he/she could be deprived of parental rights like any other parent.

It is rather unusual that the psychophysical condition of A. K. lead to deprivation of her parental rights but not to deprivation of her capacity for work, even though the FA

¹⁹ Article 114 paragraph 1 of the FA (2003)

(2003) foresaw the possibility of full or partial deprivation of capacity for work. If she had been deprived of capacity for work, a guardian would have been appointed to her in order to protect her fundamental human rights which could not obviously be protected by herself, such as the right to family life with her child.²⁰ Actually, the purpose of guardianship as an institute from the field of family law is protection of the rights and interest of persons who, due to their condition, might get into an underprivileged position with respect to other persons or groups.²¹

The same authority is competent of conducting adoption proceedings and of care for people who are incapable of defending their rights and interests, so what is even more surprising is the fact that in the case of *A.K. and L. v. C*, the Welfare Centre made an adoption decision referring to the protection of the interests of the child and at the same time completely neglected the rights and interests of the mother with intellectual disabilities. Particularly worrying is the fact that the Welfare Centre did only fail to provide the mother with necessary aid after the divestment of her parental rights but also excluded her from making any decisions relating to her child. Moreover, it did not take so long at all for the Welfare Centre to make a decision on child adoption whereat it fully neglected the mother's appeal to get her son back, try to care for him and create conditions for living with him. One can conclude that the competent bodies made a huge mistake in this case and thus violated the fundament human rights of both the mother and her son.

IV. BEST INTERESTS OF THE CHILD AND THE PARENTAL RIGHTS OF PARENTS WITH INTELLECTUAL DISABILITIES

It is quite certain, as pointed out by B. Rešetar, that the institute of parental care will remain immortal in its core and exist as long as the human race. On the other hand, one cannot ignore the fact that the world unstopably goes on and brings what used to be unimaginable.²² Once it was believed that persons with intellectual disabilities

²⁰ On the family law regulation of the status of persons deprived of capacity for work see in I. Milas, "Obiteljskopравни status osoba lišenih poslovne sposobnosti, eng. *The Status of Persons Deprived of Capacity for Work in Family Law*", Zagreb, Pravni fakultet Sveučilišta u Zagrebu, 2005. More on the role of a guardian in the protection of persons who are incapable of protecting their rights and liabilities see in I. Milas Klarić, "Pravni status skrbnika kao jamstvo zaštite ljudskih prava odraslih osoba, eng. *The Legal Status of a Guardian as a Guarantee of Protection of Human Rights of Adults*", Zagreb, Pravni fakultet Sveučilišta u Zagrebu, 2010.

²¹ Similarly J. Džankić and I. Milas Klarić, "Uloga skrbnika u zaštiti osobnosti osobe lišene poslovne sposobnosti, eng. *The Role of a Guardian in the Protection of the Personality of Persons Deprived of Capacity for Work*", *Pravnik*, vol. 44, no. 88, 2010, p. 89.

²² B. Rešetar, "Pravna zaštita prava na (zajedničku) roditeljsku skrb – kamo vodi ovaj put kojim smo krenuli, eng. *Legal protection of the Right to (Joint) Parental Care – the Path We Have Taken?*", *Pravna zaštita prava na (zajedničku) roditeljsku skrb*, Osijek, Pravni fakultet Sveučilišta J.J. Strossmayera u Osijeku, 2012, p. 244.

were incapable of providing adequate care for their children and could not benefit from teaching programmes²³. Consequently, the parental rights of persons with intellectual disabilities used to be fully marginalized. Today the possibility of exercising their parental rights is in the focus of interests of numerous experts.²⁴ There is much more acknowledgement than before that while many such parents face specific and challenging problems, they remain parents, with the same hopes and fears as others.²⁵

Taking into consideration all presented in relation to the case *A. K. and L. v. C.* so far, one faces the question if the principle of the best interests of the child contradicts the prior right and duty of parents to provide their children with care in situations in which a child's parent is a person with intellectual disabilities. In order to answer the question if there is a conflict between the principle of the best interest of the child and the prior right and duty of parents to provide their child with care in situations in which a child's parent is a person with intellectual disabilities, one should first define what the best interest of the child in such situations really is.

The Convention on the Rights of the Child²⁶ prescribes that "*in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*".²⁷ The preamble of the Convention on the Rights of the Child states that "*child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding*". This Convention prescribes that the child shall have the right to parental

²³ See E. Emerson *et al.*, "Clinical Psychology and People with Intellectual Disabilities", Malden/Oxford/West Sussex, John Wiley & Sons, 2012, p. 296.

²⁴ See, for instance, C. Andritschke, *Was lässt Eltern mit geistiger Behinderung zu schwierigen Fällen werden?: Befunde, Konflikte, Herausforderungen*, Hamburg, Diplom.de, 2010; H. Cleaver *et al.*, *Children's Needs – Parenting Capacity: Child abuse, Parental mental illness, learning disability, substance misuse, and domestic violence*, London, The Stationery Office, 2011; G. Llewellyn *et al.* (ed.), *Parents with Intellectual Disabilities: Past, Present and Futures*, West Sussex/Oxford/ Malden, John Wiley & Sons, 2010; R. Mildon *et al.*, *Best Practice in Parenting Education: Understanding and Supporting Parents with Learning Difficulties*, Carlton, Victorian Parenting Centre, 2011; K. MacLean and M. Aunos, 'Addressing the Needs of Parents with Intellectual Disabilities: Exploring a Parenting Pilot Project', *Journal on Developmental Disabilities*, vol. 16, no. 1, pp. 18-33.; K. Schiborr, *Zur Lebenssituation von Eltern mit geistiger Behinderung und ihren Kindern*, GRIN Verlag, 2003 etc.

²⁵ S. McGaw, 'What Works for Parents with Learning Disabilities? – Summary', 2000, available at <http://www.barnardos.org.uk/wwparwld.pdf>, (accessed 2 December 2015.)

²⁶ The Convention on the Rights of the Child was adopted at the 44th session of the General Assembly of the United Nations held on 20 November 1989 (Resolution no. 44/25) and it came into force on 2 September 1990. Pursuant to the Decision on Publishing Multilateral Treaties to which Croatia has been a contracting party based on succession recognitions (Official Gazette – International Treaties no. 12/93), Croatia has been a contracting party to the Convention on the Rights of the Child since 8 October 1991.

²⁷ Article 7 paragraph 1 of the Convention on the Rights of the Child

care²⁸ and that it shall not be separated from its parents against their will²⁹. If separation is necessary due to protection of the interests of the child, all the persons whose interests are being decided upon shall have the right to participate and be heard in proceedings dealing with their rights and interests.

The Convention on the Rights of Persons with Disabilities³⁰ prescribes that *"States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents."*³¹

The foreword of the Guidelines for Practice on National and Intercountry Adoption and Foster Family Care³² governs that *"as a matter of principle, all efforts should be directed to ensuring that children be raised by their own families"* and the basic principles of these Guidelines set forth that *"priority for a child is to be cared for by his/her biologi-*

²⁸ Article 7 of the Convention on the Rights of the Child:

'(1) The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. (2) States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.'

²⁹ Article 9 paragraphs 1, 2 and 3 of the Convention on the Rights of the Child:

'(1) States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence. (2) In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known. (3) States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.'

³⁰ Convention on the Rights of Persons with Disabilities and its Optional Protocol was adopted on 13 December 2006 at the United Nations Headquarters in New York, entered into force on 3 May 2008. Croatia signed the Convention on the Rights of Persons with Disabilities in 2007.

³¹ Art. 23. par. 4. Convention on the Rights of Persons with Disabilities

³² 'The Child's Right To Grow Up in a Family: Guidelines for Practice on National and Intercountry Adoption and Foster Family Care' (1997). This document provides guidelines for practice on national and intercountry adoption and foster family care, developed under the aegis of the International Council on Social Welfare and incorporating the work of over 200 practitioners, experts, and government officials representing nearly 30 countries. Available at <http://eric.ed.gov/?id=ED423025>, (accessed 1 December 2015.)

cal parent/s”³³ and that “governments and societies shall commit themselves to providing families the possibility and encouragement to care for their own children.”³⁴

From the legal point of view it is impossible to give a single answer to the question in which situations it is in the best interest of the child that its parent with intellectual disabilities does not provide it with care without an interdisciplinary approach to this vital and legally very delicate issue. Assessment of the type and intensity of the risk for the child when its parent does not provide it with proper care, no matter if the inadequate care results from the parent’s intellectual disabilities or any other reason, is mostly an exceptionally complex task.³⁵ The answer to the question if support of the family or detachment of the child is the key that resolves this issue in the event of inadequate parental care depends on the circumstances of every single case.³⁶

However, it should be noted that the respective literature often highlights that an intellectual disability *per se* is a poor indicator of parental capacity and that there are many other factors that will influence a parent with an intellectual disability’s capacity to provide adequate care to their children, such as poverty, unemployment, social isolation, stress, domestic violence etc.³⁷ A. Lamont and L. Bromfield stress that the experience

³³ Principle 3.3.

³⁴ Principle 3.4.

³⁵ See M. Ajduković (ed.) and T. Radočaj (ed.), ‘Pravo djeteta na život u obitelji: stručna pomoć obiteljima s djecom i nadzor nad izvršavanjem roditeljske skrbi kao proces podrške za uspješno roditeljstvo, eng. The Right of the Child to Live in a Family: Professional Help Provided to Families with Children and Supervision over Providing Childcare as a Process of Support for Successful Parenthood’, UNICEF Office for Croatia, 2008.

³⁶ Not speaking about the context of the risks exclusively caused by parents’ intellectual disabilities but generally about the risk factors for the child in a family, M. Ajduković claims that most countries have integrated the “family support” model, which concentrates on strengthening of the family in order to enable it to perform its function of bringing up children, with the “saving children” model or with their separation from a risky environment. This author also shares the opinion that both models have their good and bad sides. Hence, putting a primary focus on ‘saving children’ leads to situations in which many children are separated from families who had, with appropriate expert support, a potential to provide these children with good care. On the other hand, preference of the ‘family support’ model brings to short-term and multiple separation and return of children to their families, which additionally jeopardizes their sanity. Therefore it is necessary, from the viewpoint of M. Ajduković, to find the right balance between these two approaches, taking account of the best interest of the child in every single case. M. Ajduković, ‘Rane intervencije i ostale intervencije u zajednici kao podrška roditeljima pod rizicima, eng. Early and Other Interventions within a Community as Support to Parents at Risk’, *Prava djeteta na život u obitelji*, UNICEF Office for Croatia, 2008, p. 74.

³⁷ See, for example, H. Cleaver *et al.*, ‘Children’s Needs - Parenting Capacity: The Impact of Parental Mental Illness, Problem Alcohol and Drug Use, and Domestic Violence on Children’s Development’, The Stationery Office, London, 1999, A. Lamont i L. Bromfield, ‘Parental intellectual disability and child protection: Key issues’, National Child Protection Clearinghouse, Australian Institute of Family Studies, Melbourne, 2009, available at <https://aifs.gov.au/cfca/publications/parental-intellectual-disability-and-child-protection-key-i>, (accessed 21 December 2015).

of these factors does not mean that parents are at high risk of abusing their children - the problem might increase the risk, but could be counter-balanced by other protective factors. Even where the risk is high, it does not mean that parents definitely will abuse or neglect their children. However, identification of risk factors is valuable as it may help to determine the support needs of parents with intellectual disabilities, or situations where the risk of children's safety and wellbeing is unacceptable high.³⁸ They also assert that many parents with intellectual disabilities will be able to provide sufficient and supportive care to their children, however others will need additional support and training. The capacity for the service system to accommodate the support needs of such parents is a critical step in trying to reduce the over-representation of parents with intellectual disabilities in the child protection system.³⁹ "Parents with an intellectual disability are not a homogenous group. Cognitive limitations vary from individual to individual and IQ testing fails to reflect the way in which individuals adapt to their environments or their social functioning. It is important for each case featuring a parent with an intellectual disability be assessed individually with consideration given to the risk and the protective factors. When concerns regarding parental capacity are raised, practitioners making assessments, need to focus on how the parent's intellectual disability or learning difficulty is affecting their parenting and whether they are experiencing other stressors that may increase the risk of children experiencing abuse or neglect."⁴⁰

M. A. Field and V. A. Sanchez also suggest that the ability of a parent to provide adequate childcare cannot be predicted on the basis of intelligence alone and that as with parents without disabilities, the ability to parent successfully depends on a wide range of factors.⁴¹ Some parents with intellectual disabilities may neglect their child, but it is not clear whether children of parents with intellectual disabilities are at greater risk than other children - particularly given the variation in the degree of intellectual disabilities and the impact it may have on children's safety and wellbeing.⁴²

A similar standpoint is promoted by A. Tymchuk and M. Feldman who also hold that parents with intellectual disabilities, like any other group, are diverse with regard to their parenting skills so that parent intelligence is a poor predictor of parenting capacity.⁴³

³⁸ A. Lamont and L. Bromfield (2009)

³⁹ A. Lamont and L. Bromfield (2009)

⁴⁰ A. Lamont and L. Bromfield (2009)

⁴¹ M. A. Field and V. A. Sanchez, *Equal Treatment for People with Mental Retardation: Having and Raising Children*, Cambridge, Harvard University Press, 1999.

⁴² A. Lamont and L. Bromfield, 'Parental intellectual disability and child protection: Key issues', available at <https://aifs.gov.au/cfca/publications/parental-intellectual-disability-and-child-protection-key-i>, (accessed 21 December 2015).

⁴³ A. Tymchuk and M. Feldman, 'Parents with mental retardation and their children: Review of research relevant to professional practice', *Canadian Psychology*, vol. 32, 1991, pp. 486-496.

If the conclusions on the parental rights of persons with disabilities, which can be found in contemporary works belonging to other scientific disciplines, are adjusted to the legal frameworks for the parental rights of persons with disabilities, one has to conclude that parents with disabilities should not experience discrimination based on stereotypes and presumptions about their parenting capacity. Such a stance is held by the ECtHR too. The case of *A. K. and L. v. C.* is not the only case in which the ECtHR has been invited to adjudicate on violation of the right to the private and family life of the child and its disabled parent as a consequence of separation of the child from the family only on the ground of the parent's disability. The case-law of the ECtHR constantly warns us that separation of a child from its family due to a parent's disability may lead to infringement of the right to respect for private and family life under Article 8 of the ECHR.⁴⁴

It is beyond any doubt that welfare centres should be the ones to undertake a measure for the protection of the personal interests of the child or to, if need be, propose pronouncement of one of the repressive measures by the court if they assess that a parent (due to his/her intellectual disabilities) does not provide proper childcare. Although

⁴⁴ P. Bartlett points out that ECtHR case 46544/99 *Kutzner v. Germany* [2002] 'is the first family law case to be brought by parents with intellectual disabilities'; P. Bartlett, *Mental Disability and the European Convention on Human Rights*, Leiden/Boston, BRILL, 2006, page 195.

In the *Kutzner v. Germany* case, the applicants were parents with mild intellectual disabilities who lived with their two daughters, who were late developers, and who were receiving educational assistance and support. A court withdrew the applicants' parental rights and ordered their placement with foster parents on the grounds that applicants did not have the intellectual capacity required to bring up their children. The girls were placed in separate, unidentified foster homes. The applicants' visiting rights were sharply restricted. The applicants alleged a breach of Article 8, arguing that the withdrawal of their parental rights over their daughters and their placement with foster parents had infringed the applicants' right to respect for family life under Article 8. Although the authorities may have had legitimate concerns about the late development of the children, the ECtHR considered that both the care order itself and the manner in which it was implemented were unsatisfactory. Bearing in mind the children's age, severing contact and limiting visiting rights could lead only to the children's increased 'alienation' from their parents and from each other. The interference was therefore not proportionate to the legitimate aims pursued. Quoted from J. Fiala et al. (ed.), 'Summaries of Mental Disability Cases Decided by the European Court of Human Rights', Mental Disability Advocacy Center, 2007.

ECtHR case 39948/06 *Saviny v. Ukraine* [2008] concerned the placement of children in public care on the ground that their parents, who have both been blind since childhood, had failed to provide them with adequate care and housing. The domestic authorities based their decision on a finding that the applicants' lack of financial means and personal qualities endangered their children's life, health and moral upbringing. The Court held that there had been violation of Article 8 (right to respect of private and family life) of the Convention, doubting the adequacy of the evidence on which the authorities had based their finding that the children's living conditions had in fact been dangerous to their life and health. It was observed in particular that the judicial authorities had only examined those difficulties which could have been overcome by targeted financial and social assistance and effective counselling and had not apparently analysed in any depth the extent to which the applicants' irremediable incapacity to provide requisite care had been responsible for the inadequacies of their children's upbringing. Downloaded from the ECtHR webpage, available at http://www.echr.coe.int/Documents/FS_Parental_ENG.pdf, (accessed 1 December 2015). See also ECtHR case 35731/97 *Venema v. The Netherlands* [2002].

the possible conflict between the best interests of the child and the prior right of a parent with intellectual disabilities may be viewed through all the repressive measures for the protection of the personal interests of the child foreseen by family law legislation⁴⁵, the child can be adopted without consent of its parent only if he/she has been divested of his/her parental rights. Accordingly, against the will of the parent, none of the other repressive measures can result in irreversible termination of the parent-child bond as a result of child adoption.⁴⁶

The moment of the assessment if the child's right to family life needs to be protected by withholding it from adoption is indicative and decisive indeed.⁴⁷ It seems that this issue as well as responses thereto are even more complex when a decision on the adoption of a child of parents with intellectual disabilities is to be made. In such situations it is impossible to provide a single answer to the question where to draw a line between the best interest of the child and the prior right of its parents to provide childcare without interdisciplinary analysis of the circumstances of every single case.⁴⁸ Still, the importance of providing persons with intellectual disabilities with assistance and support and of protecting the family bond between the child and its parent with intellectual disabilities instead of breaking it, is nowadays growing.⁴⁹ As C. Watkins stated, if we are truly concerned about the welfare of children, we should invest more

⁴⁵ On repressive measures for the protection of personal rights and wellbeing of the child from the interdisciplinary, comparative and international aspect, see B. Rešetar and S. Aras, *Represivne mjere za zaštitu osobnih prava i dobrobiti djeteta*, eng. *Repressive Measures for the Protection of the Personal Rights and Wellbeing of the Child*, Osijek, Pravni fakultet Sveučilišta J.J.Strossmayera u Osijeku, 2014.

⁴⁶ The FA (2015) foresees exceptional cases in which a parent's' consent for child adoption may be substituted by a court decision in non-contentious proceedings. See Chapter V.

⁴⁷ Similarly in D. Hrabar, 'Pravo djeteta na obiteljski život', eng. 'The Child's Right to Family Life', *Dijete i društvo*, vol. 7, no. 2, 2005, page 391.

⁴⁸ The psychological-sociological aspects of adoption represent an inseparable part of the legal dimension of this institute. D. Jakovac-Lozić, *Posvojenje*, eng. *Adoption*, Split, Pravni fakultet Sveučilišta u Splitu, 2000, p. 169.

⁴⁹ There are a large number of projects indicating it. E.g., the European Commission within the Lifelong Learning Programme co-funded project '*PID - Parents with Intellectual Disabilities - EUROPEAN FAMILY SET*'. The overall objective of the project is based on the 2006 Convention on the Rights of Persons with Disabilities, Article 23. The project will meet this convention by supporting people with disabilities in matters of marriage, family, parenthood, and relationship, prevent separation of families, learning from good practice examples from all over the world, developing family competences by intergeneration/family learning, etc. See <http://www.docfoc.com/european-family-set-parents-with-intellectual-disabilities>, (accessed, 1 December 2015).

United Kingdom's Department of Health fund the project '*Inclusive support for parents with a learning disability*'. See report that describes this project available at <https://www.mencap.org.uk/sites/default/files/documents/2011-03/making%20the%20difference.pdf>, (1 December 2015).

The Australian government has funded a capacity-building model known as '*Healthy Start: A national strategy for children of parents with intellectual disabilities*'. See more in D. McConnell et al., 'Healthy Start.' A National Strategy for Parents With Intellectual Disabilities and Their Children', *Journal of Policy and Practice in Intellectual Disabilities*, vol. 5, no.3, 2008, pp. 194-202.

money and energy in preventive services for families rather than in parental rights termination.⁵⁰ The success of the family law protection of the family depends primarily on the willingness to ensure, at institutional level, sufficient funds, services and aid for parents providing proper childcare.⁵¹ A society has to demonstrate willingness to embrace people with any mental disability and to apply modern models for providing support to these people.⁵²

Concerning all the aforementioned, one can draw the conclusion that divesting parents with intellectual disabilities of parental rights may be justified only in situations in which regardless of all the necessary assistance provided by the system, the parent is in no way capable to provide proper childcare, so the best interest of the child should be protected by entrusting it to another person. Since such a parent is not in position to exercise his/her parental rights, it makes no sense to elaborate the conflict between his/her parental rights and best interest of the child. In case a parent with intellectual disabilities is capable of providing childcare within acceptable level, he/she should not be deprived of his/her parental rights.⁵³ Divestment of parental rights in regard to a parent who is, though with assistance of the system, capable of providing proper childcare does not facilitate but suppress the child's interests. Therefore, it is to ascertain that there should be no conflict between the best interest of the child and the prior right and duty of parents to provide childcare if a child's parent is a person with intellectual disabilities.

The United States National Council on Disability (independent federal agency making recommendations to the President, Congress and other federal agencies regarding policies, programs, practices, and procedures that affect people with disabilities, to enhance the quality of life for all Americans with disabilities and their families) 2012 made a report '*Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children*', available at https://www.ncd.gov/rawmedia_repository/89591c1f_384e_4003_a7ee_0a14ed3e11aa.pdf, (accessed 1 December 2015.). The goal of *Rocking the Cradle* is to advance understanding and promote the rights of parents with disabilities and their children. The report provides a comprehensive review of the obstacles people with diverse disabilities, experience when exercising their fundamental right to create and maintain families, as well as persistent, systemic, and pervasive discrimination against parents with disabilities.

⁵⁰ C. Watkins, 'Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded', *California Law Review*, vol. 83, no. 6, 1995, pp. 1475.

⁵¹ A. Korać Graovac, "Obiteljskoppravna zaštita osobnih interesa djece prije izdvajanja iz obitelji: prava djece – odgovornosti i prava roditelja, *eng.* The Family Law Protection of the Personal Interests of Children Prior to the Separation from Their Families: the Children's Rights – the Parents' Liabilities and Rights)", *Prava djeteta na život u obitelji*, UNICEF Office for Croatia, 2008, pp. 53-54.

⁵² T. Not (2008), p. 339.

⁵³ Certainly, if there is no any other reason for divestment of parental rights.

V. RESPONSE OF THE NEW FAMILY LAW LEGISLATION TO THE CASE OF *A.K. AND L. V. C.*

Speaking within the sphere of the protection of parental and other rights of persons with intellectual disabilities granted by the new family law legislation⁵⁴, it should be noted that the FA (2015) has abandoned the institute of full deprivation of capacity for work. As highlighted by S. Aras, beside abandoning the institute of full deprivation of capacity for work and enhancing the procedural law position of people subject to proceedings for deprivation of capacity for work, the FA (2015) has raised the quality of the provisions on the guardianship of adults with disabilities, taking into account the autonomy of their will.⁵⁵

Taking into consideration the viewpoints of the ECtHR expressed in the judgment both in the case of *A.K. and L. v. C.* and in the case of *X v. C.*⁵⁶, the FA (2015) has paid great attention to the case-law protection of the interests of parents who are not capable of protecting their rights and interests.⁵⁷ Unlike the FA (2003), the FA (2015) does not regard deprivation of capacity for work as the reason why parent's consent for child adoption is not required. Pursuant to Article 188 of the FA (2015), a parent's consent is not required only if the parent has:

1. died, disappeared or is not known or
2. been divested of parental rights.

If consent for child adoption is to be given by a parent deprived of capacity for work, irrespective of his/her partial or full incapacity, the parent shall be able to understand the meaning of consent for the adoption and the competent welfare centre is obliged to inform him/her about the appertaining consequences. If a parent incapacitated for work is not capable of comprehending the meaning of consent for the adoption, his/her consent

⁵⁴ Which other significant novelties have been introduced into the family law legislation by the Family Act (Official Gazette no. 75/14), that have been incorporated in the FA (2015) see in S. Ledić, 'Glavne značajke reforme obiteljskog prava i postupka', *eng.* Main Features of the Family Law and Procedure Reform', *Aktualnosti hrvatskog zakonodavstva i pravne prakse*, vol. 21, 2014, pp. 197-233.

⁵⁵ See S. Aras, 'Što donosi novi Obiteljski zakon', *eng.* What Brings the New Family Act?', *Pravo i porezi*, Vol. 24, No. 11, 2015, page 25.

⁵⁶ XECtHR case 11223/04 *X v. Croatia* [2008]. In this case, the ECtHR found violation of Article 8 of the ECHR since the state had, by not preventing the exclusion of the applicant as a person incapacitated for work from the proceedings having resulted in the adoption of her daughter, failed to secure respect for her private and family life. More on this and other judgments of the ECtHR relating to the Croatia and the area of the protection of people with mental disorders see in I. Milas Klarić, 'Reforma skrbničkog zakonodavstva i europski pravni okvir (Reform of the Guardianship Legislation and European Legal Framework)', *Godišnjak akademije pravnih znanosti Hrvatske*, vol. 5, no. 1, 2014, pp. 103-110.

⁵⁷ Although *A.K.* was not deprived of capacity for work, she was mildly mentally retarded, because of which she was capable of protecting her rights and interest in an adequate way.

can be substituted by a court decision⁵⁸, but in compliance with Article 190 paragraph 1 item 3 of the FA (2015), it shall be only possible if the parent is incapable of providing childcare to such an extent that he/she is not capable of providing any segment of childcare on a permanent basis and there is no chance that the child will be raised by the child's close relatives and the child is expected to benefit from the adoption.⁵⁹

As far as the case of *A.K. and L. v. C.* is concerned, the provisions of the FA (2015) regulating adoption proceedings, particularly the protection of the rights and interests of a person incapacitated for work, could not though protect the rights and interests of A.K. since she was not deprived of capacity for work but of parental rights. Yet, the previous lines suggest that according to the circumstances of this concrete case, it should not have come to divestment of parental rights in the first place. If the first applicant had not been divested of her parental rights, it would not have been possible, pursuant to the FA (2015), to substitute her consent for the adoption with a court decision because she was not incapable of providing childcare to such an extent that she could not provide any segment of childcare on a permanent basis. Besides, neither of the other two requirements under Article 190 of the FA (2015) for substitution of parent's consent with a court decision was met. The requirements are as follows:

1. parent has been abusing or severely violating his/her parental responsibilities, duties and right or has been showing a lack of interest in the child for a longer period of time and adoption would be beneficial for the child,⁶⁰

2. parent has been abusing or severely violating his/her parental responsibilities, duties and right for a shorter period of time but to such an extent that he/she will never be eligible for conferring the childcare on him/her on a permanent basis.

The FA (2015) foresees the possibility of divesting a parent with intellectual disabilities of his/her parental rights in the event his/her mental ability is so limited that he/she is not capable of providing any segment of childcare on a permanent basis whereat the wellbeing of the child is put in jeopardy.⁶¹ Otherwise, divestment of parental rights of a parent with intellectual disabilities may be initiated only if such a parent, like any other non-disabled parent:

⁵⁸ A court decision in non-contentious proceedings which is made following a proposal of a welfare centre.

⁵⁹ Which other forms of the protection of adults with disabilities is foreseen by the Family Act (2015) see in S. Aras, pp. 28-30.

⁶⁰ The court shall reject any proposal for making a decision substituting a parent's consent for child adoption if the welfare centre did not previously notice the parent thereabout or inform him/her about the possibility of being pronounced the measure of intensive professional help or if it has been less than three months since the day of the notice or if it has been less than three months since the first attempt to determine the parent's place of living in case it was not possible to give notice to the parent due to his/her unknown address. See Articles 189 and 190 of the FA (2015).

⁶¹ Article 171 paragraph 1 item 6 of the FA (2015)

1. abuses or severely violates his/her parental responsibilities, duties and rights,⁶²
2. has abandoned the child,
3. if the child is exposed to violence among adult family members,
4. if a report of the competent welfare centre implies that the parent does not honour the measures, decisions and instructions previously issued by a welfare centre or court for the purpose of protection of the rights and wellbeing of the child,
5. if a report or assessment of the competent welfare centre suggests that return of the child to its family after an implemented measure for protection of the rights and wellbeing of the child would represent a serious threat to the child's life, health and development, and
6. based on a valid verdict against the parent in cases involving some of the crimes explicitly laid down in the FA (2015), which have been committed against his/her child.⁶³

Like the FA (2003), the FA (2015) also requires no consent for child adoption in case a parent has been deprived of his/her parental rights. Nevertheless, the FA (2015) stipulates that the competent welfare centre shall provide a parent divested of parental rights with the possibility to express his/her opinion on possible child adoption. The parent's opinion is not binding, but the welfare centre experts are obliged to take such an opinion into consideration when making assessment if adoption in a concrete case is the most convenient form of permanent child placement.⁶⁴

If a person is deprived of capacity for work in the part referring to the exercise of his/her parental rights, these rights shall, according to the FA (2015), be suspended. During the suspension, daily childcare may be provided individually by the person in question or collectively with the other parent or the child's guardian. Suspension of parental rights due to legal obstacles shall be terminated if the reasons for the suspension cease to exist.⁶⁵

What is particularly important in this context is that the FA (2015) foresees the possibility of providing professional help and support in the exercise of parental rights. The competent welfare centre shall supply parents with professional help and support if it finds that they are not capable of autonomously providing full or partial childcare due to circumstances affecting them or the child whereat the child's development is put in jeopardy but not its life or health.⁶⁶ Such a measure shall be pronounced if a child grows

⁶² Article 170 of the FA (2015)

⁶³ Article 171 paragraph 1 items 1-5 of the FA (2015)

⁶⁴ See Article 210 of the FA (2015)

⁶⁵ See Article 114 of the FA (2015)

⁶⁶ This measure is regulated in Articles 140-144 of the FA (2015)

up in a risky environment and the parents (or other persons who provide childcare on a daily basis) are not capable of providing autonomous and proper childcare due to special circumstances, including parents' intellectual disabilities.

The presented overview and analysis of the relevant provisions of the FA (2015) reveal major improvements in the protection of the parental rights of persons with intellectual disabilities. Still, it should not be forgotten that "no reform can succeed if the perception is not changed, so it is necessary to provide people with intellectual disability with social support at all levels in order to help them preserve and reinforce what they have all in common – their own dignity."⁶⁷

VI. CONCLUSION

While once it was common to think that parents with intellectual disabilities are not capable of providing proper childcare, today there is a growing number of those who realize that parental intellectual disability affects parenting capacity to the extent that parents with intellectual disability are unable to provide adequate care for their children and that the diagnosis of intellectual disability *per se* is a poor indicator of risk for child abuse and neglect. Here the emphasis is put on assuring aid and support to people with intellectual disabilities in providing childcare in order to protect, where possible, the child-parent bond instead of breaking it.

The case of *A. K. and L. v. C.* makes us consider if Croatian institutions keep track with contemporary world trends when it comes to providing parents with intellectual disabilities with assistance and support in the exercise of their parental rights and protection of the bond between the child and its parent with intellectual disabilities. Judging by the conclusions of the national court in the reasoning of the decision based on which mother A. K. was divested of her parental rights, after which the child was soon adopted without her consent, one can conclude that there is not enough awareness that the right of a parent with intellectual disabilities to family life with his/her children does not differentiate from the same right of any other parent. What is particularly upsetting in this case is that A.K. has never done direct harm to the child and showed, despite her intellectual disabilities, a wish to provide childcare. Apart from contesting the divestment of her parental rights, she did everything to remedy what the Welfare Centre assessed risky for the child. She claimed that she had rehabilitated the housing premises and installed a heating system as well as that she did not live with her mentally brother any more since he had been placed

⁶⁷ A. Korać Graovac i A. Čulo, 'Konvencija o pravima osoba s invaliditetom – novi pristup shvaćanju prava osoba s duševnim smetnjama, *eng.* Convention on the Rights of Persons with Disabilities – a New Approach to Persons with Mental Disorders), *Zbornik radova Pravnog fakulteta u Zagrebu*, vol. 61, no. 1, 2011, p. 106.

in an institution. When doing all those things aimed at demonstrating that she can be a good parent and that she can live with her child, she was not provided, at least that is what the judgment in the case of *A. K. and L. v. C.* discloses, with any assistance by the system. There is a hope that the case of mother A. K. will remain an exception to the rule that Croatia institutions act in accordance with the protection of the parental rights of persons with intellectual disabilities.

Encouraged by the conclusions of the ECtHR in the case of *A. K. and L. v. C.*, the Croatian legislator has made significant improvements in the FA (2015) regarding the protection of the parental rights of those who have no capacity to protect their own rights and interests. Among other things, it is essential to mention that deprivation of capacity for work is no longer a reason why a parent's consent for child adoption is not required. If consent for child adoption is given by a parent deprived of capacity for work, he/she shall be able to understand its meaning and the competent welfare centre is obliged to inform him/her about the legal and factual consequences of the adoption in an appropriate way. If a parent deprived of capacity for work is not able to comprehend the meaning of consent for child adoption, his/her consent can be substituted with a court decision, but only if the parent is incapable of providing childcare to such an extent that he/she is not capable of providing any segment of childcare on a permanent basis and there is no chance that the child will be raised by the child's close relatives and the child is expected to benefit from the adoption. The FA (2015) foresees the possibility of divesting a parent with intellectual disabilities of his/her parental rights in the event his/her mental ability is so limited that he/she is not capable of providing any segment of childcare on a permanent basis whereat the wellbeing of the child is put in jeopardy. Besides, the FA (2015) has introduced the institute of suspension of parental rights, according to which the parental rights of a person incapacitated for work are suspended as long as the circumstances having led to the suspension are present. It is vastly important to highlight the professional help and support in providing childcare, which is foreseen by the FA (2015) and intended for parents who are not capable of providing their children with autonomous and proper care due to special circumstance, including parents' intellectual disabilities.

The case of *A. K. and L. v. C.* has encouraged us to realize that when deciding on the parental rights of persons with intellectual disabilities, one should never forget that "persons with intellectual disabilities are different in abilities but not in the rights"⁶⁸ and that parents' intellectual disabilities should not be an incentive to disrespect the instruction in the Guidelines for Practice on National and Intercountry Adoption and Foster Family Care propagating that "primary purpose of adoption is to provide a child with a family and a home to call his/her own and not to provide a child for a family".

⁶⁸ T. Not (2008), page 339.

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