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Review article

CHALLENGES IN PRE-ACCESSION HARMONIZATION OF ANTI-DISCRIMINATION LAWS IN BOSNIA AND HERZEGOVINA

Ljubinko Mitrović, PhD, Full Professor
Human Rights Ombudsman of Bosnia and Herzegovina
Jovana Surutke 13, Banja Luka
bl.ombudsmen@ombudsmen.gov.ba

Predrag Raosavljević, PhD, Associate Professor
Assistant Human Rights Ombudsman of Bosnia and Herzegovina
Jovana Surutke 13, Banja Luka
praosavljevic@ombudsmen.gov.ba

ABSTRACT

The goal of this article is to assess the level of harmonization of the laws of Bosnia and Herzegovina with the acquis communautaire in the field of protection from discrimination, to underline the significance of the implementation of European standards even before formal membership in the Union, to identify challenges in interpretation of individual norms of the European law in the context of domestic legal culture and to exemplify or illustrate potential discord between national and European legislation. Having in mind that the enlargement is one of the most important policies of the European Union, scientific analysis can assist candidate countries to successfully harmonize their legislative framework in the field of protection from discrimination with acquis communautaire. Additionally, elaboration and exemplification of the foreign legal concepts can help formulate adequate anti-discrimination policies, containing measures aimed at promotion of principle of genuine equality between groups that enjoy special protection. In assessing the level and success of harmonization of Bosnian legislation with the anti-discrimination laws of the European Union, authors resorted to normative, comparative and analytical method related to the content and scope of application of the anti-discrimination clauses of founding treaties and anti-discrimination directives while using case studies of the Court of Justice of the European Union. It is demonstrated that the divided jurisdiction between different levels of government, plurality of legal systems and complex administrative structure established by the Dayton Peace Agreement represent some of the key procedural challenges in the process of European integration of Bosnia and Herzegovina. It can

equally be observed that no other country, candidate for membership in European Union, had to face such internal challenges, amplified by the fact that deep divisions persist after the armed conflict and still found their way into the current political constellation. Concrete substantive challenges Bosnia and Herzegovina is facing when transposing European law are identified in the field of the general exemptions from the principle of equal treatment, the definition of indirect discrimination, wording of the threshold for the burden of proof, exemptions from prohibition of unequal treatment for protection of family relations and awarding damages.

***Keywords**: harmonization of laws, acquis communautaire, discrimination, transposing legislation*

1. INTRODUCTION

On 16 June 2008, Bosnia and Herzegovina signed Association and Stabilization Agreement, which became effective on 1 June, 2015, which entails duty to harmonize domestic legislation with European Union *acquis communautaire*. Process of harmonization of laws is very complex, gradual, divided in chapters and it involves participation and contribution of large number of experts with comprehensive knowledge of domestic legislation, laws of the European Union and demonstrated lawmaking skills. In order to reach this objective, Council of Ministers of Bosnia and Herzegovina adopted Decision on process of harmonization of laws of Bosnia and Herzegovina with European Union *acquis communautaire*[1] on 28. July 2016. Mentioned decision clearly defines the duties of different institutions and administrative bodies to thoroughly follow the process of harmonization, from legislative drafting to the adoption the final text or amendments in legislative bodies. Copenhagen criteria defined at the meeting of the European Council in Copenhagen in 1993, represent conditions for the membership in the European Union. Those criteria are divided in political, which translate into stability of institutions tasked with ensuring democracy, rule of law, protection of human rights and minorities' rights, economic criteria entailing existence of functional market economy capable of sustaining competitive pressures and markets forces coming from the Union and legal criteria demanding capacity to assume the responsibilities of the membership, including dedication to the objectives of political, economic and monetary union. In addition to original principles, states have subsequently agreed upon Madrid Criteria which is also called administrative criteria because it requires strengthening administrative capacities and creating effective government services mandated with implementation of the *acquis communautaire* and other obligations stemming from the membership in the European Union, as well as convergence criteria which approximates preparedness of the member states for the participation in the third phase of economic and monetary union.

[1] "Official Gazzette of Bosnia and Herzegovina" number 75/16

Within the framework of political criteria, candidate countries are asked to harmonize their legislation with the anti-discrimination laws of the European Union, contained in the anti-discrimination clauses of founding treaties, anti-discrimination directives and relevant decisions of the Court of Justice of the European Union. When countries join European Union, implementation of EU laws is not conferred on EU institutions specifically founded for that purpose, but rather on national bodies of Member states.[2]

The goal of this article is to assess the level of harmonization of the laws of Bosnia and Herzegovina with the *acquis communautaire* in the field of protection from discrimination, to underline the significance of the implementation of European standards even before formal membership in the Union, to identify challenges in interpretation of individual norms of the European law in the context of domestic legal culture and to exemplify or illustrate potential discord between national and European legislation.

Divided jurisdiction between different levels of government, plurality of legal systems and complex administrative structure established by the Dayton Peace Agreement can be as quoted as some of the key challenges in the process of European integration of Bosnia and Herzegovina.

2. SIGNIFICANCE OF HARMONIZATION OF BH LEGISLATIVE FRAMEWORK WITH THE LAWS OF EU

Successful harmonization of legislation and implementation of amended regulations are the most important conditions any country has to fulfill in the process of accession to the European Union. By signing Stabilization and Association Agreement on June 16, 2008, Bosnia and Herzegovina committed to gradually harmonize the state legislation with the *acquis communautaire*, which is demanding task, requiring involvement of diverse group of experts with the knowledge of national legal framework, experience in legislative process and the laws of European Union. For example, when Slovenia was joining European Union, it had to adopt around 700 laws and around 3000 by-laws.[3] Prior to accession, the Czech Republic had to adopt and implement into national legislation more than 80,000 pages of EU rules and regulations.[4] In Bosnia and Herzegovina, three different institutions are mandated with the process of harmonization and cooperation with European

[2] Duić, D.; Petrašević, T., *Five Years of Application of EU Law: An Analysis of Cases Involving Breaches of EU Law Against the Republic of Croatia and References for Preliminary Ruling by Croatian Courts*, Godišnjak Akademije pravnih znanosti Hrvatske, *vol.* 10, no. 1, 2019, p. 66

[3] Furhstofer A.; Hein M. *Constitutional Politics in Eastern and Central Europe,* Springer VS, 2016, p. 210

[4] Marek D.; Baun M. *The Czech Republic and the European Union,* Routlegde, 2010, p. 75

Union: Direction for European Integrations, Ministry for economic relations and regional cooperation of Republika Srpska and Federal Legislative Bureau, while the only relevant assessment of the progress made in legislative harmonization can be found in the annual reports of the European Commission on the progress of Bosnia and Herzegovina and in the communiqués from the joint bodies mandates with following the Agreement's implementation. According to the relevant regulatory framework, institutions who are proponents of legal acts incorporating EU acquis communautaire are obligated to seek opinion on compatibility of such acts with the acquis. Opinions on the compatibility for the acts proposed by the ministries and other administrative bodies at the state level are formulated by the Direction for European Integrations. In the Government of Republika Srpska, such opinions are delivered by the Ministry for Economic Relations and Regional Cooperation, while the same duty is performed by the Government Bureau for Legislative Affairs and Harmonization of Law with the European Union, for the level of Federation of Bosnia and Herzegovina. Harmonization of laws with the acquis is the most demanding and most complex part of EU integrations which entails numerous challenges related to the number of EU acts in specific areas, financial implications required by implementation of transposed documents in different fields (such as environmental protection) or continuous evolution of the acquis. Harmonization of laws entails not only transposition of the parts of the acquis into national legal system, but also implementation of such norms in order to provide legal certainty to the citizens. In Bosnia and Herzegovina, one legal act from EU level can potentially be transposed by one or more different levels of Government. Namely, most of the EU legislation regulates matters that are under jurisdiction of Entities (according to some statistics around 70%) which places additional time and human sources constraints on Entity governments.[5] Institutions designated as responsible for harmonization process at the level of Federation of Bosnia and Herzegovina are competent ministries, within their regular jurisdiction. Those ministries are obliged to deliver correspondence tables along with each piece of legislation that is being harmonized to the Legislative Bureau, which in turn evaluates whether the text is in harmony with laws of the European Union and to what extent. On the other hand, there is no official database with precise number of laws transposing EU legislation in national legal system. According to the Constitution of Federation of Bosnia and Herzegovina, there are areas in which Federation has exclusive jurisdiction, while in others such jurisdiction is divided between federal and cantonal governments, or falls under exclusive competence of the cantons with coordinating role of the federal government. Equally, according to the Constitution of Federation of Bosnia and Herzegovina, cantons

[5] European Commission, *Bosnia and Herzegovina Analytical Report,* COM (2019), 261, p. 19, 28

have jurisdiction over matters not specifically assigned to the federal government.[6] Such constitutional arrangements add to the complexity of harmonization process at the level of Federation of Bosnia and Herzegovina.

Process of harmonization of laws of Republika Srpska with the *acquis communautaire* started in 2007 under the lead of the Ministry of economic relations and regional cooperation of Republika Srpska. At the same time, each ministry of Republika Srpska Government designated an official to act as a liaison with the coordinating Ministry. It is estimated that over 1500 laws and other regulations have undergone process of harmonization up to date.[7] The whole process is regulated in detail by the Decision of the Government on the process of harmonization of legislation of Republika Srpska with the *acquis communautaire* of the European Union and with regulations of the Council of Europe.[8] One of the integral parts of the Decision is the Methodology of harmonization, which can assist the officials responsible for proposing or transposing EU legislation to the national legal system and can serve as guidance for resolving any disputes arising from the harmonization process. Ministry for economic relations and regional cooperation monitors implementation of the Decision and reports to the Government and National Assembly of Republika Srpska presenting the most important advancements achieved in the process of transposition of EU legislation and Council of Europe acts and on all problems, challenges or issues identified in the process of harmonization. In order to be able to systematically track fulfillment of set benchmarks, Ministry for economic relations and regional cooperation develops while Government adopts Action plan for harmonization of legislation of Republika Srpska with European laws and acts of Council of Europe for each calendar year. Action plan is developed in cooperation with competent ministries, taking into consideration their legislative proposals plans as well as their realistic capacities for transposition of relevant *acquis* in the timeframe covered by the Plan. Furthermore, Ministry for economic relations and regional cooperation conducts activities of coordination of trainings in this field. In order to effectively carry out this task, Ministry relies on cooperation and support from international partners such as Regional School for Public Administration (ReSPA), Organization for International Development of Federal Republic of Germany (GIZ) and European

6 Constitution of Federation of Bosnia and Herzegovina, Art III. 4

7 Delić A.; Golijan D. *Harmonization of legal acts of Bosnia and Herzegovina with the European law,* International University Travnik, 2018, p. 50

8 "Official Gazzette of Republika Srpska" number 119/18

Commission Division for Technical Assistance - TAIEX (Technical Assistance and Information Exchange Instrument).[9]

3. PROHIBITION OF DISCRIMINATION IN EUROPEAN LAW

At the level of international law, virtually every human rights instrument includes a non-discrimination clause.[10] Primary sources of the European Law are founding agreements such as Treaty of Lisbon, Treaty on European Union and Treaty on the functioning of the European Union. From the perspective of prohibition of discrimination, primary sources also include EU Charter of Fundamental Rights as well as general principles of the EU Law. In principle, legal norms from the founding treaties have supremacy over national legislation. In case of disagreement between domestic legal norms and guarantees enshrined in EU treaties, national courts of the member states always have obligation to exempt domestic legal norm from application and apply relevant provision of the founding treaty if the former cannot be harmonized by the "friendly" interpretation.[11] It should be added, however, that Community law allows Member States to make exemptions from their obligations arising from the founding treaties. They can take unilateral measures when it comes to the vital interests of its security or in the event of a conflict of interest, in the face of the maintenance of the internal order and peace, in the event of a serious international crisis threatening or in order to fulfill the commitments taken to preserve peace and international security.[12] Article 2 of the Treaty on European Union stipulates that the Union is founded on founded on the values of respect for human dignity, equality and respect for human rights, including the rights of persons belonging to minorities. Countries that violate those values are risking being sanctioned according to the Article 7 of the Treaty on European Union, which includes possibility of suspension of membership. It

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9 Government of Republika Srpska, *Information on obligations which Bosnia and Herzegovina and Republika Srpska acquired in the process of joining European Union with outline of the measures and activities realized during 2017, with achieved results in harmonization of laws of Republika Srpska with laws of the European Union*, p. 32, available at: [https://e-vijecenarodars.net/wp-content/uploads/2018/04/Informacija-o-obavezama-iz-procesa-EU-integracija-za-2017.pdf], accessed on 08 April 2020

10 Petričušić, A. *et al.*, *Course on Legal Protection against Discrimination in South East Europe, Joint Reader - Targeting Academic Teaching on Equality and Protection against Discrimination*, Ludwig Boltzmann Institute for Human Rights and South East European Law Schools Network, 2018, p. 24

11 Ioannis D. *Conflicts between EU law and National Constitutional Law in the Field of Fundamental Rights*, available at: [http://www.ejtn.eu/PageFiles/17318/DIMITRAKOPOULOS%20Conflicts%20between%20EU%20law%20and%20National%20Constitutional%20Law.pdf] accessed on 04 April 2020, p 1

12 Čaušević, M.; Gavrić, T., *Legal and economic aspects of integration of Bosnia and Herzegovina in the European union;* in: Petrašević, T.; Duić, D. (eds.), EU and Member states; Legal and Economic Issues, Osijek, University of Osijek, Faculty of Law Osijek, 2019, p. 9

is equally clear that candidate countries will not successfully complete negotiation process if they fail to fully harmonize their legal and constitutional system with the fundamental EU values. According to the Article 3 of the Treaty on EU, the Union shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.[13] Although these norms are not directly applicable by national courts, they can be used as guiding principles in interpretation of the directly applicable EU norms or national legislation by the Court of justice of the European Union in the field of equality in general, minorities' rights, discrimination and gender equality. Article 9 of the Treaty on the functioning of the European Union defines that in defining and implementing its policies and activities, the Union shall take into account requirements linked to the fight against social exclusion.[14] Proactive role of the European Union in combating discrimination follows from the reading of Article 3(3) of the Treaty on European Union in conjunction with Article 10 of the Treaty on the functioning of the European Union, according to which the Union has an objective to combat discrimination based on gender, racial or ethnic origin, religion or belief, disability or sexual orientation, in defining and implementing its policies and activities. Article 19 of the Treaty on the functioning of the European Union served as a basis for adoption of the key EU Directives: Race Equality Directive (2000/43/EC) and Directive (2000/78/EC) establishing a general framework for equal treatment in employment and occupation.

European Union Charter of Fundamental Rights contains several provisions directly related to promotion of equality between protected groups. Article 21 includes general prohibition of discrimination on several bases and this list is not conclusive. Article 23 contains particular norm guaranteeing equality between men and women specifically permitting possibility of affirmative action. Article 22 foresees that the Union shall respect cultural, religious and linguistic diversity, which would not be possible without differential treatment of various groups, while Article 24 guarantees the rights of child, Article 25 protects the rights of the elderly and Article 26 call for integration of persons with disabilities.[15]

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13 Treaty on European Union, available at: [https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF], accessed on 04 April 2020, p 5

14 Treaty on the functioning of the European Union, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN], accessed on 04 April 2020, p 7

15 EU Charter on Fundamental Rights, available at: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT] accessed on 04 April 2020

Directive 2000/43/EC and Directive 2000/78/EC prohibit direct and indirect discrimination, incitement to discrimination and harassment. Application of both directives encompasses all physical and legal entities, in public and private sector. Both directives permit exemptions from principle of equal treatment and they do not call for affirmative action. Both directives require that the state provides protection through judicial or administrative proceedings, protection from victimization, possibility of third party interventions as a representative or support to the victim of discrimination, reversal of burden of proof and that the sanctions are effective, proportional and dissuasive. Differences between two mentioned directives are related to their scope of application especially since Directive 2000/43/EC only refers to racial or ethnic origin while the other one applies to access to employment, access to professional trainings and education, work and work-related conditions, and membership in workers associations or employers' associations. Racial Equality Directive applies to the field of social protection, including social security and health services, social benefits, education and access to goods and services. According to the provisions contained in Directive 2000/43, member states have a duty to establish bodies mandated with prohibition and elimination of racial/ethnic discrimination, while this is not the case with the Equality Framework Directive.[16]

Sometimes, anti-discrimination directives cannot be considered a sufficient tool in the fight against discrimination.[17] Consequently, case law of the Court of Justice of the European Union in Luxembourg is equally significant source of European law. While the EU Court is not hierarchically superior to the national courts, its main objective is ensuring adequate application and interpretation of EU law. In the case of *Attila Vajnai*,[18] the Court declared itself not competent to resolve the matter as the norm of domestic legislation was outside of the scope of the Directive 2000/43/EC, illustrating the fact that European law is not relevant in all cases that are brought under the Law on prohibition of discrimination. In the case *Centrum voor gelijkheid van kansen en voor racismebestrijding/Firma Feryn NV*[19] the Court had an opportunity to interpret the Directive 2000/43/EC and thereby has ruled that in order to establish the direct discrimination, there does not have to be a concrete victim. Court has reasoned that the mere fact that the employer

16 Simonovic Einwalter T.; Selanec G., *Alignment of the Law on Prohibition of Discrimination with the EU acquis,* Sarajevo, 2015, p. 17

17 Vasiljević, S., *Equality and non-discrimination principle in the context of the Croatian membership in the EU*, in: Barić, S. *et al.* (eds.), New Perspecttives of South East European Public, Skopje, SEELS, 2014, p. 52

18 Case C-328/04 *Attila Vajnai* [2005] ECR I-8577

19 Case C-54/07 Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV (2008) ECR 733

publicly stated that individuals of certain racial or ethnic background would not be employed is something that would most certainly dissuade certain candidates from even applying for such positions, which was limiting their access to the labor market, thereby constituting direct discrimination in the field of employment, in the sense of the Directive 2000/78/EC. Practical application of the reversal of burden of proof principle was considered in the cases *Enderby*,[20] *Brunnhofer*,[21] *Danfoss*,[22] *Feryn*[23] and *Steaua.*[24] In those cases the Court affirmed its previously established standing that the burden of proof generally lies with the plaintiff, but it emphasized that the discrimination is hard to prove taking into consideration numerous challenges faced by the victims related to the access to information and materials crucial for favorable outcome in evidentiary part of the proceedings. In that regard, the Court emphasized that plaintiffs cannot be penalized for not having meaningful access to the required evidentiary materials. Therefore, any indication of lack of transparency in the process of decision making or actions that could represent discrimination in principle, are sufficient to completely shift the burden of proof to the defendant. Arguments that have to be proved by the defendant depend on the facts of the case in question, predominantly on what the plaintiff could have proved or have proved in the first phase of the process. However, judging from the case law of the Court of Justice of the European Union, it is clear that plaintiff cannot be asked to prove discrimination with specific level of certainty if he is not in position to do so for objective reasons. Deciding on the question of the scope and content of the prohibition of discrimination based on sexual orientation, Court issued several verdicts, most notably in cases *K.B.*,[25] *Grant*,[26] *Maruko*,[27] *Hay*[28] and *Romer.*[29]

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20 Case C-127/92 Enderby (1993) ECR 5535

21 Case C-381/99 Susanna Brunnhofer v Bank der osterreichischen Postsparkasse AG. 2001 ECR I-04961

22 Case C-109/88 Danfoss (1989) ECR 3199

23 Supra at 14

24 Case C-431/12 Agenția Națională de Administrare Fiscală v SC Rafinăria *Steaua* Română SA (2013) ECR 686

25 Case C-117/01 K.B. v National Health Service Pensions Agency and Secretary of State for Health (2004) ECR I-00541

26 Case C-249/96 Lisa Jacqueline Grant v South-West Trains Ltd. (1998) ECR I-00621

27 Case C-267/06 Maruko v Versorgungsanstalt der Deutschen Buhnen (2008) 2 C.M.L.R. 32

28 Case C-267/12 Frederic Hay v Credit agricole mutuel de Charente-Maritime et des Deux-Sevres (2013) ECR 0000

29 Case C-147/08 Jurgen Romer v Freie und Hansestadt Hamburg (2011) ECR I-03591

4. PROHIBITION OF DISCRIMINATION IN BOSNIA AND HERZEGOVINA

By virtue of Article II/4 of the Constitution of Bosnia and Herzegovina, the enjoyment of rights and freedoms is guaranteed to everyone without discrimination, including the rights enumerated in international agreements from Annex I, such as those in Article 7 of the International Covenant on Civil and Political Rights and optional protocols. Constitution of Bosnia and Herzegovina as well as Constitutions of Republika Srpska and Federation of Bosnia and Herzegovina contain provisions that introduce fundamental freedoms protected by international documents in domestic legal system thereby acquiring the status of constitutional norms. At the same time, preferential constitutional protection is afforded to those basic rights in case of different regulation at the state or entity level.

Law on prohibition of discrimination[30] as a single code applicable throughout the country was adopted in August 2009 and it was further amended in September of 2016. According to the adopted text, prohibited practices include discrimination on the grounds of national origin, segregation in education and discrimination by association. Procedural improvements include prioritization of discrimination cases in courts, differentiated suits, security measures, shifting the burden of proof, third party interventions and class actions. Both Law on prohibition of discrimination and Law on gender equality foresee exemptions from the principle of equal treatment and define circumstances in which affirmative action is warranted. Some of the vulnerable groups that are permitted to benefit from the exemptions of the principle of equal treatment are persons with disabilities, members of national minorities, women, pregnant women, children, youth, elderly, refugees and asylum seekers. Equally, law allows exemptions in employment of clerical staff based on their religious affiliation, setting mandatory retirement age or prescribing citizenship as a mandatory requirement set by law, given that such exemptions are re-assessed on regular basis.

In addition to civil suit, breaches of anti-discrimination law can result in misdemeanor charges against physical or legal entities for the following infractions: ignoring Ombudsmen recommendation or request to deliver documents or for the act of victimization. Final court decision in such cases is published in media, while for the some forms of discrimination that entail criminal responsibility such as domestic violence or inciting religious or national hatred or intolerance criminal sanctions such as imprisonment, monetary fine or probation, can be ordered. Central institution mandated with implementation of the anti-discrimination

[30] "Official Gazzette of Bosnia and Herzegovina" no. 59/09 and 66/16

closes is Human Rights Ombudsmen of Bosnia and Herzegovina. Among other duties, Ombudsmen Institution is entitled to receive individual and group complaints, to inform public on occurrences of discrimination, to promote the Law on prohibition of discrimination, to raise awareness and conduct anti-discrimination campaigns. During the course of investigation, Ombudsmen must be allowed access to any governmental body in order to determine the facts of the case, conduct interviews or collect administrative acts or other documents related to the activities of the responsible party under investigation. No public institution may refuse access to documents or databases when such access is request by the Human Rights Ombudsmen. In addition to Ombudsmen Institution, Ministry of Human Rights and Refugees, Agency for Gender Equality of Bosnia and Herzegovina, Gender Centers of Republika Srpska and Federation of Bosnia and Herzegovina, as well as Council of National Minorities also deal with issues related to gender equality.

In the field of employment, education, health, social protection, housing and access to goods and services, victims of discrimination can directly address the courts of the both Entities and Brcko District of Bosnia and Herzegovina. In addition to general rules of determining court jurisdiction, in discrimination cases jurisdiction is established based on the residence of the plaintiff, in order to facilitate his/her position.

Finally, Law on prohibition of discrimination also covers indirect discrimination, harassment, sexual harassment and incitement to discrimination.

5. CONCLUSION

Some of the key challenges Bosnia and Herzegovina is facing are adoption of acts and regulations in due time, planning and adaptation of process to all actors affected by the legislation that is being transposed. At the same time, it is necessary to take into consideration the recommendations by the European Commission contained within the Progress Report for each year. This process is marked by specific political and administrative structure of Bosnia and Herzegovina, designed by the Dayton Peace Agreement. No other country, candidate for membership in European Union, had to face such internal challenges, amplified by the fact that deep divisions persist after the armed conflict and still found their way into the current political constellation. One of the best examples is the understanding at the level of Entities that establishment of any new institution at the level of central government represent transfer of authority contradictory to the Peace Agreement. This can understandably affect not only institution building or strengthening but also legislative or normative activities that require coordination at the state level.

Insisting on one-sided or simplified solutions to such challenges from European partners can only complicate the already delicate balance of power and cause further mistrust toward the process of integration itself. It is precisely for this reason that the responsibility of competent bodies and designated officials is even greater as they have to take into account not only requirements and standards set by the competent European authorities, but have to design the road map to implement novel policies in fractured, disharmonized and often antagonized internal political landscape.

Having in mind that the enlargement is one of the most important policies of the European Union, Article 10 of the Treaty on the functioning of the European Union carries important message to candidate countries that they have to fully harmonize their legislative framework in the field of protection from discrimination with *acquis communautaire.* Additionally, anti-discrimination legislation needs to be supported by relevant anti-discrimination policies, that contain measures aimed at promotion of principle of genuine equality between groups that enjoy special protection from the European Union (based on gender, sexual orientation, racial or ethnic origin, disability, religion or belief) and that are clearly benchmarked for the period of several years. Those policies could become part of government strategy promoting equal opportunities for historically marginalized groups allowing equal access to education, employment, private life and other areas of life; ensuring correction of legal norms inhibiting mentioned opportunities; implementing norms on prohibition of incitement to discrimination, harassment and victimization and formulating recommendations for change in legislation.[31] In order to reach those objectives, European Union countries largely established new institutions or widened the scope of authority of the existing ones.[32]

When it comes to the scope of protection from unequal treatment, Law on prohibition of discrimination will have to take into account the case law of the Court of Justice of the European Union, according to which the general exemptions from the principle of equal treatment contained in Article 5. Paragraph 1. of the Law are too broad and will have to be narrowed in line with the Directive 2006/54 and Directive 2000/43. Equally, affirmative actions aimed at improving position of certain protected groups such as persons with disabilities should not be considered (and treated) as exemptions from the principle of equal treatment, but should nonetheless enjoy the same status as the prohibition of discrimination itself.

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31 Vasiljević, S., S*imilar and different: Discrimination in the European Union and the Republic of Croatia*, Zagreb, Tim Press, 2011, p. 202

32 Horvat, A., *New standards of Croatian and European anti-discrimination legislation*, Zbornik Pravnog fakulteta u Zagrebu, *vol*. 58, no. 6, 2008, p. 1475

In terms of transposition of Directive 2000/43 and Directive 2000/78, it is important to note that both directives set minimum requirements when it comes to measures aimed at combating discrimination, while at the same time allowing the member states to introduce or keep more favorable normative solutions. According to the Articles 6 and 8 of the mentioned Directives, respectively, member states may introduce or maintain provisions which are more favorable to the protection of the principle of equal treatment than those laid down in this Directive. At the same time the implementation of the Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive.

Judging from the relevant provisions of the founding treaties, anti-discrimination directives and the case law of the European Court, it seems that the definition of indirect discrimination contained in Article 3 of the Law on prohibition of discrimination should be amended, so that the disparate treatment of seemingly neutral provision can be justified as necessary or proportional to the significance of the legitimate aim that neutral provision seeks to achieve. Furthermore, the definition of the harassment from Article 4 paragraph 1 of the Law on prohibition of discrimination should be amended so that the behavior must be defined „undesirable" by the perpetrator.

Wording of the Article 15 of the Law on prohibition of discrimination which deals with the burden of proof is not completely harmonized with the view of the European Court of Justice as it does not set any threshold for presumption of *prima facie* discrimination, based on which the burden of proof should transfer to the defendant. Instead, it states that after the plaintiff states the facts argumenting the allegations that the prohibition of discrimination has been breached, defendant has to prove the opposite. Such broad wording allows for generally wide discretion of the courts to set the threshold of proof themselves for the plaintiffs, which could eventually be set higher than the mere facts based on which it is possible to suppose that discrimination might have occurred, or even lower, if for example, the burden of proof shifts to the defendant even if plaintiff did not invest any reasonable effort to prove *prima facie* discrimination.

Currently, Member states of the European Union are debating whetheher national legistaltion should introduce legal norms allowing same sex marriages, and it is precisely same sex marriage which is considered as ultimate goal of same sex couples.[33]

[33] Petrašević, T.; Duić, D.; Buljan, E., *The rights of same-sex couples in the European Union with special emphasis on the Republic of Croatia,* Strani pravni život, *vol.* 3, no. 3, 2017, p. 145

When it comes to application of anti-discrimination laws to the same sex marriages, it is important to take notice of two Curt rulings in cases *Maruko* and *Hay*. According to those rulings, exemption from Article 5 point (g) of the Law on prohibition of discrimination set in order to protect family relations cannot result in differential treatment of same sex marriages in access to rights, benefits and privileges, guaranteed by EU law in comparison to heterosexual couples, despite the fact that member states have exclusive authority over regulation of family matters.

In case C-144/04 *Werner Mangold/Rüdiger Helm,* Court has ruled that age based discrimination should be considered community law, which is not literaly reflected in the Law on elimination of all forms of discrimination.

Furthermore, there are no legal provisions related to the damages that can be awarded by the courts in cases of gender based discrimination. Court decides on the amount of compensation according to the general rules of civil law, where the crucial criterion is the amount of suffered damage, which includes material and moral damages as well as forgone benefits.

Finally, at the time of writing this article, decisive efforts are being made at the European Union level aimed at adoption of separate directives prohibiting discrimination based on religion or belief, age, sexual orientation and disability, which means that the courts will have to take into consideration new directives when applying provisions of the Law on prohibition of discrimination.

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