Croatia's Accession in the Light of Gender Equality

Bodiroga-Vukobrat, Nada; Martinović, Adrijana

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Nada Bodiroga-Vukobrat and Adrijana Martinović [*]

1. Introduction

The conclusion and implementation of the Stability and Association Agreement[1] and the launch of the formal accession negotiations between the EU and the Republic of Croatia in 2005 required comprehensive modification of Croatian legislation covering the *acquis communautaire* described in 35 negotiation chapters. Chapter 19 'Social policy and employment' and Chapter 23 'Judiciary and fundamental rights' were crucial for the harmonisation of legislation in the field of equal opportunities, equal treatment and non-discrimination. It entailed the adoption of a series of new legislative acts (such as the Gender Equality Act (GEA), the Anti-Discrimination Act (ADA), the Act on Forms of Same-Sex Cohabitation, the Act on Professional Rehabilitation and Employment of Persons with Disabilities), as well as amendments to existing legislation (e.g. the Labour Act (LA), the Pension Insurance Act, and the Criminal Code)).[2] The judiciary system had to be adapted with a view to increasing its efficiency and accessibility. Each stage of the negotiation process was verified and closely monitored by the European Commission. The progress in acceptance, transposition, implementation and enforcement of the EU *acquis* was analysed and evaluated in periodic monitoring reports.[3] It seems that the more 'problematic' areas (mostly associated with the protection of fundamental rights and peaceful post-war reintegration, sanctioning of war crimes, reform of the judiciary etc.) were under tighter control than other areas, primarily regarding the capacity and efficiency of the institutions to properly enforce the accepted commitments.

This contribution will not attempt to critically analyse the entire harmonisation process in the field of gender equality law. Its purpose is simply to provide a solid basis for the answer to the question of whether the Croatian judicial system has (so far) caught up with the normative inflation of anti-discrimination legislation, especially gender equality law. The underlying question is whether the system can cope with the challenge of implementing

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[*] Nada Bodiroga-Vukobrat is currently Professor of European Law at the University of Rijeka, Croatia, and the Croatian expert for the European Network of Legal Experts in the field of Gender Equality. She presently holds the Chair at the Jean Monnet Chair for European Public Law.

[1] The Stabilisation and Association Agreement was signed on 21 October 2001 and entered into force on 1 February 2005.

[2] Article 3 of the Constitution of the Republic of Croatia guarantees equal rights and gender equality (along with freedom, national equality, peace-making, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law and a democratic multiparty system), as the highest values of the constitutional order and grounds for interpretation of the Constitution. Article 14 of the Constitution guarantees all persons in the Republic of Croatia enjoyment of rights and freedoms, with an open-ended enumeration of prohibited discriminatory grounds. Anti-discrimination legislation in Croatia includes special Acts, such as the Anti-Discrimination Act (ADA) and the Gender Equality Act (GEA), as well as anti-discriminatory provisions in other Acts, such as the Labour Act (LA), the Act on Forms of Same-Sex Cohabitation, the Criminal Code, the Constitutional Act on the Rights of National Minorities, etc. The first Gender Equality Act was adopted in 2003 (Official Gazette No. 116/03) and was in force until the adoption of a new Gender Equality Act in 2008 (Official Gazette No. 82/08), in an effort to further align legislation and fulfil one of the criteria for closing negotiations on Chapter 19: Social Policy and Employment.
On 1 January 2009, the Anti-discrimination Act (Official Gazette No. 85/08) entered into force, as a horizontal Act in the field of equal opportunities which includes an exhaustive list of discriminatory grounds (gender, race, ethnic origin, skin colour, language, political or other opinion, national or social origin, property, trade union membership, education, social status, marital or family status, age, health, disability, genetic heritage, gender identity and expression, or sexual orientation) and prescribes judicial protection in discrimination cases.

[3] The last and final Report was published on 26 March 2013: Communication from the Commission to the European Parliament and the Council Monitoring Report on Croatia's accession preparations, Brussels, 26.3.2013 COM(2013) 171 final.

international and European anti-discrimination standards, which imply reconsidering the traditional role of the judiciary in the interpretation and application of positive legal norms.

Before going into the subject matter any further, an initial remark should be made. In the last 10 years (i.e. since the adoption of the first Gender Equality Act in 2003), there has been no substantial increase in case law specifically relating to gender equality issues. Therefore, many conclusions in this paper are drawn in connection and by analogy with the judicial approach and reception of the wider notion of anti-discrimination law.

2. The jurisdiction of courts in anti-discrimination cases

The general and special jurisdiction of national courts is stipulated in the Judiciary Act and other special laws (e.g. the Civil Procedure Act (CPA) and Criminal Procedure Act). The judicial power in the Republic of Croatia is exercised by regular and special courts (Article 14(1) and (2) of the Judiciary Act). Regular courts include municipal courts and county courts. The highest judicial authority is the Supreme Court of the Republic of Croatia. The municipal courts are vested with a general and broad open-ended catalogue of competences. In civil proceedings, they adjudicate in the first instance in disputes relating to civil, family, labour, housing and other areas of law, which are not in the first instance the jurisdiction of other courts in accordance with special laws (Article 34(2) CPA). Pursuant to the ADA, municipal courts have subject-matter jurisdiction in litigation based on special legal action for protection against discrimination (Article 17(1) ADA and Article 18(1) ADA).[4] County courts adjudicate first-instance disputes prescribed by law and decide on appeals against decisions of the municipal courts. In the field of equality law, county courts have subject-matter jurisdiction for joint legal actions (representative actions) for protection against discrimination.[5] The Supreme Court is the highest judicial authority, whose task is to ensure the uniform application of laws and the equality of all before the law (Article 116 of the Constitution of the Republic of Croatia[6]). In civil proceedings, its authorities include deciding on appeals against first-instance decisions of county courts and revisions as extraordinary legal remedies against (final and binding) second-instance decisions, in cases prescribed by law.

The Constitutional Court of the Republic of Croatia decides on the compliance of laws with the Constitution, compliance of other regulations with the Constitution and with laws, and on constitutional claims against individual decisions taken by government agencies, bodies of local and regional self-government and legal persons vested with public authority where such decisions violate human rights and fundamental freedoms, as well as the right to local and regional self-government guaranteed by the Constitution of the Republic of Croatia (Article 125 of the Constitution of the Republic of Croatia).

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4 Apart from special legal action for the protection against discrimination, the ADA authorises any person who claims that his/her rights have been violated as a result of discrimination to seek protection in proceedings deciding upon that right as the main issue (Article 16(1) ADA). The GEA authorises any party who considers that her/his rights have been violated due to discrimination described in that Act to file a legal action before the regular court of general jurisdiction (Article 30(1) GEA), in other words, to initiate litigation before a municipal court.

5 Pursuant to Article 24(1) ADA, associations, bodies, institutions or other organisations set up in accordance with the law and having a justified interest in protecting collective interests of a certain group, or those which within their scope of activities deal with the protection of the right to equal treatment, may bring a legal action against a person that has violated the right to equal treatment. Representative action is a collective remedy available under the GEA as well, but the general conditions are prescribed in the ADA.

6 Official Gazette 56/90, 135/97, 113/00, 28/01 and 76/10. Consolidated version of the Constitution of the Republic of Croatia drafted by the Constitutional Court of the Republic of Croatia in accordance with its Report No. U-X-1435/2011 of 23 March 2011, available at http://www.usud.hr/uploads/Redakcijski%20prociscen%20tekst%20Ustava%20Republike%20Hrvatske,%20Ustavni%20sud%20Republike%20Hrvatske,%2023.%20ozujka%202011.pdf, accessed 25 March 2013.

3. The capacity of the judiciary to apply EU equality law

Courts are to administer justice according to the Constitution, law, international treaties and other valid sources of law.[7] Strictly speaking, case law is not formally a general source of law in the Republic of Croatia.[8] Nevertheless, in the interest of uniform application of laws, a legal interpretation adopted at the meeting of all judges or judicial departments of the Supreme Court or the county court, for example, binds all second-instance judicial panels or judges in that department or court (Article 40(2) of the Judiciary Act).[9] Legal opinions of the Constitutional Court adopted in its case law establish binding legal standards of protection of human rights, which all state, local and regional authorities are obliged to respect and follow when deciding in individual legal matters.[10]

Given the above, what implications arise out of the interpretative power of CJEU case law in the Croatian legal system? Understanding CJEU case law is indispensable for the correct application of EU equality law, and consequently, of the national equality law that transposes it. The capability of the Croatian judiciary to apply gender equality legislation must be evaluated with the following aspects in mind:

1. In the past decade, a significant normative expansion of anti-discrimination legislation has occurred, introducing new legal terminology and standards, which have more often than not been left undefined, open for interpretation, indeterminate and sometimes inconsistent with other laws. In the field of gender equality, for example, the Constitutional Court's Decision to annul the first Act on Gender Equality of 2003 on formal grounds[11] (due to violation of the procedure for the adoption of the Act) was reason for the adoption of the new Act on Gender Equality in 2008. The fact that the new Act also contained material amendments compared to the previous one, as well as that it required adoption of new subordinate implementing rules has resulted in potential misinterpretation and uncertainty in its application.
2. The impact of educational programmes and training for the application of anti-discrimination legislation in general is so far unclear. Systematic training programmes of judges are organised by the Judicial Academy, but the question remains how many judges are reached and participate in those programmes? It may be necessary to improve targeting and change the educational approach, e.g. educating the educators in specific aspects and fields of anti-discrimination law for them to be able to organise workshops at their respective courts. Corresponding education and training of lawyers, within their national or regional chambers, as well as targeted and repeated public campaigns to raise awareness among the general public are necessary to truly implement gender equality in practice.
3. The overall 'weakness' of the Croatian judicial system is poor accessibility and non-publication of case law in the field of anti-discrimination legislation, which constitutes the likely cause of inconsistent interpretation, inefficiency and low visibility of decisions

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7 Article 118 of the Constitution of the Republic of Croatia; Article 5 of the Judiciary Act, Official Gazette 28/2013.

8 A court decision is binding only upon the parties who participated in the proceedings and the legal positions expressed therein oblige neither that court nor any other court in future proceedings.

9 Department meetings are convened to discuss, inter alia, disputable questions of law and unification of case law, as well as differences in the application of certain laws between certain departments, panels or judges. A meeting is also convened if a certain panel or judge deviates from a previously accepted interpretation (Articles 38 and 40 of the Judiciary Act). These provisions of the new Judiciary Act 2013 basically consolidate and maintain the provisions of the previous Judiciary Act 2005 (Official Gazette 150/05, 16/07, 113/08, 153/09, 116/10, 27/11, 130/11). However, the new Act omits the previously existing authority of the president of the court or department if a certain judge or panel deviates from the interpretation taken by another judge or panel. In that case, the issuing of the transcription of the decision could have been suspended until the difference in interpretation was discussed at the meeting of judges or panels.

10 Decision of the Constitutional Court U-III-3695/2010 of 10 November 2011. Under Article 31(1) of the Constitutional Act on the Constitutional Court of the Republic of Croatia, decisions and rulings of the Constitutional Court are obligatory and every legal or natural person is required to follow them.

11 Decision of the Constitutional Court U-I-2696/2003 of 16 January 2008.

in this area. Specifically regarding gender equality, the public perception of inequality seems to exceed by far the actual case law on gender equality related issues.[12]

Ad 1 The Croatian courts base their rulings on laws and other regulations. Case law is not a formal source of law.[13] However, the courts, faced with predominantly new legislative instruments, seem to prefer the old ways and apply, where possible, other laws instead of applicable and binding anti-discrimination laws. There is a vague perception of what discrimination actually is, and how is it recognised and proved.[14] The main problem is that the Croatian anti-discrimination regulations were mostly adopted in haste, under the pressure of compulsory harmonisation with the *acquis*,[15] without taking sufficient time for in-depth reflection to understand the far-reaching consequences of a given legislative solution in the domestic legal arena. In addition, the understanding that those provisions, i.e. the relatively new and sometimes vague legal terms contained therein, will have to be interpreted in accordance with CJEU case law, is slow to set in. The level of knowledge of EU anti-discrimination case law is relatively low, and so is the perception that it is indispensable for interpreting those rules. The primary hurdle is that the purposive or teleological interpretation applied by the CJEU differs from the traditional rule-based approach to interpretation inherent to the Croatian legal system. In this connection, Article 4 GEA appears especially important for the future development and application of anti-discrimination legislation in Croatia. It explicitly stipulates that the provisions of that Act shall not be interpreted nor applied in a manner that would limit or reduce the content of guarantees of gender equality arising from the general rules of international law, the *acquis* Communautaire, the Convention on the Elimination of All Forms of Discrimination Against Women, the UN Conventions on civil and political, as well as economic, social and cultural rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms. This provision highlights the European and international conditionality of legal standards regarding the protection of the principle of equal treatment. According to Dika, it also places a heavy burden on those who will have to apply that Act.[16] To our knowledge, no national court decisions have referred to the said provision yet.[17]

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12 For example, gender discrimination is considered the third most common ground of discrimination in the labour market by employed and unemployed persons. See Franc et al. (eds.) *Raširenost i obilježja diskriminacije na hrvatskom tržištu rada*, Zagreb, Institut Ivo Pilar 2010. However, as shown below, case law specifically relating to gender discrimination is extremely scarce.

13 However, even in a country with a strong rule-oriented tradition in interpretation, there is room for a creative function of case law in the interpretation of legal rules, especially when legal provisions are incomplete or there are gaps and inconsistencies. The persuasiveness and the strength of arguments expressed in a given decision could create a consistent interpretation practice. See S. Triva & M. Dika *Građansko parnično procesno pravo* 7th Ed., Zagreb, Narodne novine 2004, 44.

14 Ž. Potočnjak & A. Grgić 'Važnost prakse Europskog suda za ljudska prava i Europskog suda pravde za razvoj hrvatskog antidiskriminacijskog prava' in: Crnić et al. (eds.) *Primjena antidiskriminacijskog prava u praksi* pp. 6-67 Zagreb, Centar za mirovne studije 2011, 7. For further explanations see Section 4.1. below on the burden of proof.

15 The ADA, for example, explicitly refers to and declares its compatibility with Directive 2000/78, Directive 2000/43, Directive 2004/113 and Directive 2006/54 (Article 1.a ADA).

16 M. Dika 'Sudska zaštita u diskriminacijskim stvarima' in: Crnić et al. (eds.) *Primjena antidiskriminacijskog prava u praksi* pp. 69-95 Zagreb, Centar za mirovne studije, 2011, 74.

17 It would be interesting to see how a Croatian court would decide in a hypothetical case of incitement (Cro. *poticanje*) to discriminate committed under the GEA. Pursuant to Article 6(5) GEA, incitement of another person to discriminate falls under the definition of discrimination, if committed with intent. The equivalent provision was contained in Article 4(1) ADA until intent was erased as constitutive element in the latest amendments to that Act (Official Gazette 112/12 of 11 October 2012). The justification for this amendment was found in the necessity of complete approximation with Directives 2000/78 and 2000/43, which do not mention intent either. In comparison, intent is not required for incitement to discriminate under the Act on Forms of Same-Sex Cohabitation either. 'Incitement' (the term used in Croatian legislation) is understood in theory to have a much broader meaning than 'instruction' (the term used in the EU anti-discrimination directives), and as not depending on the relations of influence or subordination, as in the event of instruction. See A. Horvat 'Novi standardi hrvatskoga i europskoga antidiskriminacijskog zakonodavstva', *Zbornik PFZ* 58(6) (2008), pp. 1453-1498, 1463. Coupled with the fact that the scope and meaning of the 'instruction to discriminate' are still not clear in CJEU case law (see the contribution of I. Asscher-Vonk in EGELR

Ad 2 In light of the above, the solution for uniform and correct application of EU law in the situation of unprecedented normative expansion is accompanying education of all participants in the legal system. Regular education of judges is organised by the Judicial Academy.[18] Corresponding education of other participants and stakeholders in the judicial and administrative system is lacking.[19] It would be wrong and unfair to point the finger only to the judiciary when it comes to applying European standards. Great responsibility lies on lawyers (attorneys at law) as well. It is precisely education of the latter which can contribute to the development and recognisability of protection against discrimination and compliance with the EU law and CJEU case law. Their education, however, primarily depends on individual ambition and assessment, although they are, in our opinion, capable of providing important incentive for the development of case law, by demanding the court to recognise international and European legal standards of protection in the course of representing their clients. Until this awareness is raised, the clients, even when represented by attorneys, often will only assert discrimination as a last resort in later stages of the proceedings, when submission of evidence and establishment of factual background is no longer possible (appellate proceedings, revision).[20] Lacking proper advice, victims of discrimination might even refrain from initiating proceedings.

Crucial for a proper understanding of EU anti-discrimination case law is a basic knowledge of the EU legal system. Croatian judges and other lawyers are still not quite familiar with the functioning of this system and consider it as an 'intruder' in the national legal order.[21] Of special importance are the occasional conferences[22] and workshops[23] on

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No. 1/2012), the different treatment of the incitement to discriminate in various Croatian laws could become an issue. Reference to Article 4 GEA seems plausible, but not likely, as it could entail deviation from an explicit legal norm. Existing case law where incitement to discriminate is asserted within the framework of the ADA refers to the period prior to amendments, where intent was necessary (see the decisions of the Supreme Court of the Republic of Croatia in cases Gž-38/11, Gž-12/11).

18 Since 1 January 2010, the Judicial Academy is a public institution established by law with the purpose of implementing programmes for public legal officials and continuous professional training of judges and state attorneys.

19 Administrative barriers may prove to be the hardest to overcome in an effort to fully accomplish the principle of equality in practice. Recently, a county office of state administration and the Ministry of Justice refused to change the data on gender and name in the main entry in the Registry of Birth, by interpreting the legally prescribed requirement of 'appropriate medical documentation' as a basis for such entry to mean only the documentation attesting to a gender change operation. The Ombudsperson for Gender Equality condemned such practice as direct discrimination and warned the mentioned bodies that they violated the prohibition of direct discrimination based on sex and the principle of effective legal protection against discrimination. See http://www.prs.hr/index.php/odluke-prs/prema-obliku-diskriminacije/izravna/446-upozorenje-i-preporuka-vezano-za-spolnu-diskriminaciju-u-postupku-izmjene-temeljnog-upisa-spola-u-matici-rodenih-3, accessed 29 March 2013.

20 E.g. the decisions of the Supreme Court of the Republic of Croatia VSRH Revr-829/07; VSRH Revr-850/07.

21 So far, the only available empirical research study analysed the attitudes of judges towards the application of EU law in the national legal arena. It was conducted in 2011 as part of the project 'Knowledge and Understanding of European and International Law in the Republic of Croatia'. See further B. Preložnjak 'Poznavanje, razumijevanje i stavovi hrvatskih sudaca o europskom i međunarodnom pravu' in: I. Šimonović (ed.) *Poznavanje i vrijednosno prihvaćanje europskog i međunarodnog prava u Republici Hrvatskoj* Zagreb, Sveučilište u Zagrebu, Pravni fakultet, 2012, 128. Even though the scope of this study is unfortunately very limited, it may be used as an indication of the current and future capacity of judges to accept and recognise the challenges placed before them once Croatia joins the EU. The results have shown that, despite the judges' critical self-assessment of their level of knowledge of international and European law as mediocre, they are in fact fairly well educated in these areas. They have shown very good knowledge of EU law, with the percentage of correct answers to specific questions regarding EU institutions and primary and secondary EU law reaching 85-87 %. However, these findings are limited to the judges who participated in the educational seminars on EU law and its implication for national legal systems, and the study was conducted immediately after completion of those seminars. Only 61 judges participated in the study. It would have been interesting to subject the judges who never attended such educational seminars, or those particular ones, to the same questions, and compare the results. It would also be useful to further explore who apply for education and training. Are all judges, not just in theory, but also in practice free to participate, or are they restricted by, for example, organisational decisions of the presidents of the courts? What effect could this have on the level and pace of Europeanisation of a national judge?

22 E.g. the international conference 'Anti-Discrimination Law and Practice', 27 April 2009, Zagreb. The press release following the conference warned that final and binding judgments were rare and showed that the

specific aspects of judicial anti-discrimination protection, organised in academic circles and by civil society organisations. Valuable publications on the application of anti-discrimination laws in practice are published from time to time.[24]

Ad 3 This leads us to what seems to be the crucial cause of incoherent and sporadic case law. Case law in anti-discrimination cases in general is not published or updated regularly and is very hard to come by. The examination of case law of lower courts often boils down to personal contacts and collegial assistance by judges. Published case law (judgments of the Supreme Court, judgments of the Constitutional Court, selected judgments of county courts) is classified in a non-transparent manner and case-law search engines are far from user-friendly. These problems may not appear so difficult for a seasoned researcher or other skilled person trained to investigate different areas of anti-discrimination protection, but for an average user and for those who should benefit from it the most – the victims of discrimination – they may be insurmountable. This also has a negative impact on the uniformity and efficiency of judicial protection in the entire Croatian territory, because until the Supreme Court takes a position on a certain issue (which may not necessarily happen), the courts are basically left without any possibility of knowing the positions and interpretations of other courts. Their only points of reference are internal interpretations of that particular court, provided that there are any. There is no obligation to publish either final and binding judgments, or judgments pending appeal. Even though courts at all levels have their own websites where, applying the rules on anonimisation,[25] case law may be published, in most cases this is not done at all.[26]

One of the last monitoring reports for Croatia prior to its accession has found that, apart from fully aligning its legislation in the area of anti-discrimination, '...measures aimed at developing a comprehensive system of monitoring cases of discrimination are on-going.'[27]

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national courts were having trouble recognising what discrimination is, and what is not, and that therefore the education of police officers, state attorneys, judges, attorneys, public officials and civil society stakeholders regarding international and national legislation and case law of international courts on the fight against discrimination seems to be decisive for the actual application of the new national anti-discrimination laws. Press release, http://www.ombudsman.hr/dodaci/Poruka_za_javnost.pdf, accessed 28 March 2013.

23 E.g. several workshop/training seminars were organised in 2012 as part of the project 'Strengthening of civil society organisations for effective implementation and monitoring of anti-discrimination policy in Croatia' financed by the EU through the IPA 2008 instrument. Occasional seminars and workshops on different aspects of gender equality are organised or supported by the Office for Gender Equality and local and regional gender equality committees, as well as CSOs. It is important to mention the seminar series on gender equality organised by the Academy of European Law (ERA) in Trier, which are open to legal practitioners, members of judiciary and academics. Unfortunately, the authors of this paper have no information on participants from Croatia.

24 Such as I. Crnić et al. (eds.) *Primjena antidiskriminacijskog prava u praksi* Zagreb, Centar za mirovne studije 2011; T. Šimonović Einwalter (ed.) *Vodič uz Zakon o suzbijanju diskriminacije* Zagreb, Ured za ljudska prava Vlade Republike Hrvatske 2009; S. Lalić et al. (eds.) *Report on Implementation of the Anti-Discrimination Act in 2011* Zagreb, Centre for Peace Studies 2012.

25 In the opinion of the Agency for the Protection of Personal Data, there are no obstacles for publishing case law on websites. The operation of courts is public, unless an Act or the Constitution excludes the participation of public. It is also 'well-known that court decisions and judgments are public'. However, the protection of privacy dictates differentiation of the public from the private sphere and entails protection of personal data of natural persons – parties in court proceedings in relation to judgments containing personal data, which are made publicly available; http://www.azop.hr/news.aspx?newsID=43&pageID=25, accessed 25 March 2013. The Supreme Court has adopted the Rules on anonimisation of court decisions, Su-748-IV/03-2 of 31 December 2003 and the Instruction on anonimisation of court decisions, Su-748-IV/03-3 of 31 December 2003 for decisions published on the website of the Supreme Court of the Republic of Croatia and recommended their application to all other courts, if they do not adopt their own rules modelled upon those rules.

26 As part of the PHARE 2006 project 'Approximation and publication of case law', the Supreme Court announced the new and improved information system called *SupraNova*. Introducing improved options to search court decisions, the *SupraNova* system should soon be published and become available to the wider public and take the role of the existing *SuPra* system. http://www.vsrh.hr/EasyWeb.asp?pcpid=937, accessed 3 April 2013.

27 Commission Staff Working Document, Comprehensive Monitoring Report on Croatia, Brussels, 10 October 2012, SWD(2012) 338, 30. The very last Monitoring Report published on 26 March 2013 only concludes that Croatia has completed legal alignment in the fields of anti-discrimination and equal opportunities.

Although it is true that the statistical framework for monitoring anti-discrimination case law has been established,[28] the available data hardly allows drawing any correct conclusions on the actual state of case law in this area. For example, according to the Report on the Implementation of the National Gender Equality Policy 2006 – 2010 for 2009 and 2010,[29] Measure 1.6 (to improve the accessibility of justice and legal protection for women in cases of violation of their rights and to develop the methodology of gathering data on the number and types of legal actions concerning discrimination and their results, including the raising of awareness of women regarding the mechanisms of legal protection) has been fully implemented. However, it is argued that statistics do not reflect the real status of anti-discrimination case law, especially in the field of gender equality. The methodology does not disaggregate cases based on different anti-discrimination laws and other legislation, even if the majority of discrimination cases might occur in specific branches of law (e.g. labour relations). Another problem is the low visibility of records, since the Ministry of Justice does not make them publicly available.

With this in mind, the following reservations apply to the case law analysed and referred to in this contribution. First, the majority of case law (even cases recently decided by the Supreme Court) is based on factual background which occurred before the entering into force of the existing special anti-discrimination legislation (ADA, GEA, the Act on Forms of Same-Sex Cohabitation). Although the fundamental principles of equality and non-discrimination were protected even then and guaranteed by the Constitution and other laws (primarily by the Labour Act in the field of employment and working conditions), this fact puts the conclusions on the degree of development of Croatian anti-discrimination case law into some perspective. The hope remains that 'good' existing case law will set the scene for legal standards and interpretation of the anti-discrimination rules in force.[30]

Second, and partly due to the first point, the majority of analysed case law refers to discrimination in the field of employment, work and working conditions and interprets the provisions on the prohibition of discrimination from the Labour Act which was previously in force.[31] The search of the case-law database of the Supreme Court *SuPra* does not yield any

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Communication from the Commission to the European Parliament and the Council Monitoring Report on Croatia's accession preparations, Brussels, 26.3.2013 COM(2013) 171 final, 10.

28 According to the Report on Implementation of the Anti-Discrimination Act in 2011, the Ministry of Justice has been collecting data since 2009, when the ADA came into force, but the statistical monitoring forms changed only in 2010, enabling access to the data on specific grounds of discrimination, which previously was not possible. There are 20 grounds of discrimination using which discrimination is monitored, with some artificial categories (such as expression, separate from gender identity), which makes the monitoring of the real number of cases, according to specific discrimination grounds, impossible. See Lalić et al. (eds.), 46. Monitoring is conducted separately according to the type of competent court (civil, criminal and misdemeanour cases). The ADA provides for civil and misdemeanour liability, whereas the Criminal Code provides for criminal liability. In the area of gender discrimination, for example, there was only 1 new reported civil case in 2011, with 3 cases pending from the previous period. No case categorised as gender discrimination was resolved in the same period, leaving a total of 4 cases unresolved at the end of the reporting period. In comparison, a total of 29 new discrimination cases on all discrimination grounds were registered before civil courts in the same year. In the same period, there were 16 new misdemeanour gender discrimination cases, 7 of which were resolved (out of which 4 convictions). The Report makes the important recommendation for the courts to record statistics of cases that are not filed under the ADA but are interpreted as such.

29 Office for Gender Equality of the Government of the Republic of Croatia, Report on the implementation of the national gender equality policy 2006-2010 for 2009 and 2010, Zagreb, 2011. The Office was established in 2004 as an administrative and professional service of the Croatian Government.

30 The courts should be very careful to avoid considering any difference in treatment as discrimination, regardless of the existence of discriminatory grounds. For such examples, see especially VS RH Revr-300/06 where the court asserted that dismissal was discriminatory because the claimant was 'placed in an unequal position', without any further mentioning or identification of discriminatory grounds, let alone explaining what the discrimination consisted of. In VS RH Revr-787/07 the Court rightly dismissed the claimant's vague and unsubstantiated allegation that he had suffered harm as a result of discrimination by his employer, without stating any discriminatory grounds or indeed providing any factual background to corroborate that assumption. In VS RH Revr-116/07 the claimant's argument that he had been 'discriminated against by having been fired' was rightly dismissed.

31 Until the entry into force of the new Labour Act in 2009, the previous Labour Act of 1995 (Official Gazette 38/95, 54/95, 65/95, 17/01, 82/01, 114/03, 142/03, 30/04 and 137/04 – consolidated version) prohibited the

results in the legislative directory for the search 'Gender Equality Act', whereas the search 'Anti-Discrimination Act' offers only two results. The subject-matter directory yields more results: approximately 20 results for the search 'prohibition of discrimination; discrimination; or discrimination – prohibition and fight against discrimination', most of which are labour disputes regarding the annulment of the termination of a labour contract or payment of salary.[32]

Finally, the observed case law refers to all discriminatory grounds, not just gender, because it includes interpretation of common legal terms. Another reason is that, were it just strictly gender equality case law presented, there would hardly be any material for analysis, given the scarcity of case law in this field.

4. Case law: examples of interpretation

4.1. The burden of proof

All EU anti-discrimination directives contain basically identical provisions on the burden of proof: Member States are to take the necessary measures, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment. Member States are free to introduce rules of evidence which are more favourable to plaintiffs. The wording of the two main anti-discrimination laws in Croatia, the ADA and the GEA, on the burden of proof slightly differs, which may lead to inconsistent interpretation.

Under Article 20 ADA, a party claiming discrimination does not have to prove it with any degree of certainty – it suffices to establish probability[33] that the discrimination occurred ('shall make it plausible that discrimination has taken place'), while the respondent has to prove the contrary with sufficient degree of certainty. Failing this, it is considered that the right to equal treatment was violated.[34] The concept of probability is not defined in Croatian civil proceedings legislation.[35] The claimant has to prove the probability of facts, on which the right to equal treatment and its violation depend. These facts need not be proven with the degree of certainty normally required from the party who bears the burden of proof.[36] According to Dika, probability in this context should be interpreted as *prima facie* evidence, a legal standard which is not applied in Croatian law and practice. It involves the creation of a

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discrimination of any person in employment relations based on race, colour of skin, gender, sexual orientation, marital status, family commitments, age, language, religion, political or other conviction, national or social background, economic situation, birth, social status, membership of a political party or trade union and physical or mental disabilities and described the field of application of those provisions, exceptions, burden of proof and the right to damages in Articles 2-6. The previous Act also contained definitions of direct and indirect discrimination, harassment and sexual harassment. The existing LA 2009 (Official Gazette 149/09 and 61/11) was horizontally adjusted with anti-discrimination legislation, so that the LA now only contains a general prohibition of direct and indirect discrimination in the field of work and working conditions, in accordance with special Acts (Article 5(4) LA). Equal pay for men and women is still explicitly prescribed in the LA (Article 83).

32 This contribution is based not only on the case law published in the mentioned database and the database of the Constitutional Court of the Republic of Croatia, but also on the judgments obtained from other sources (in cooperation with certain courts, attorneys and civil society organisations).

33 Cro. '...učiniti vjerojatnim...'.

34 In a recent judgment of the Supreme Court Gž-25/11 of 28 February 2012 the respondent's statement was deemed to have violated the dignity of persons of homosexual orientation within the meaning of Article 3(1) ADA (harassment). Whereas the first-instance court found no discrimination, the appellate court was of the opinion that it was enough for the claimant in a representative action to present the respondent's statement to the court and concluded that the 'purposive meaning of that statement was evident per se: humiliation and degradation of that category of persons'. The claimant showed with probability that discrimination of the target group occurred as a result of that statement, which was enough for the burden of proof to shift to the respondent.

35 M. Dika, 84.

36 M. Dika, 85.

preliminary standpoint on the existence of discrimination, based on typical developments, which, according to the rules of experience, refer to a causal connection with the discriminatory behaviour or liability for such behaviour. By lowering the required standard for presentation of evidence, the task of the party bearing the (initial) burden of proof is facilitated.[37] The following case law illustrates this approach in practice. The existence of harassment, which is defined as a form of discrimination in Article 3(1) ADA, depends on the court's margin of appreciation. Thus, the Supreme Court reached different conclusions in recent related cases involving discrimination based on sexual orientation. In cases Gž-25/11 and Gž-41/11 the rules on the burden of proof were interpreted so as to shift the burden of proof to prove that there had been no discrimination to the respondent, when the meaning of his statement was obvious in itself (degradation and humiliation).[38] In case Gž-12/11 the respondent's statement declaring support for the statement of the respondent in the previously mentioned cases was found to fall within the boundaries of the freedom of speech: the initial probability was not evident.

The burden of proof according to Article 30(4) GEA is somewhat differently construed: a party claiming that his/her right has been violated has to present facts which raise the suspicion that discriminatory behaviour has occurred;[39] the burden of proof then shifts to the opposing party who has to prove that there has been no discrimination. Dika argues that this wording can be interpreted to mean that it is sufficient for the alleged victim of discrimination to present facts, which, in themselves, if true, would raise the suspicion that discriminatory behaviour occurred, which is an even lighter burden than proving the probability.[40] In our opinion, this provision was probably influenced by the identical wording contained in the provision on the burden of proof from the old Labour Act 1995.[41] In a recent case VS RH Revr-1469/10 involving the said provisions of the old Labour Act 1995, the Supreme Court concluded that the burden of proof for mobbing and harassment is essentially the same and that the lower courts were wrong in treating them differently: the claimant has to present facts which raise the suspicion that the respondent acted in violation of his obligation of non-discrimination. It is then upon the respondent to prove that there has been no discrimination.

4.2. Discriminatory grounds

Unlike Article 1 ADA, which includes an exhaustive enumeration of discriminatory grounds, Article 14(1) of the Constitution of the Republic of Croatia is an open-ended clause. This means that the legislator, as well as courts when adjudicating cases based on the Constitution and laws may establish any other ground not mentioned in the Constitution, the ADA, the GEA or any other act, as discriminatory.[42] Basically, the court will have to find convincing arguments to rely on Article 14(1) of the Constitution and establish a certain feature as discriminatory in the relevant case.[43] Consequently, all cases where unequal treatment is alleged deserve special care as to the ground of discrimination claimed.[44]

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37 *Loc. cit.*

38 In both cases that share the same factual background, the first-instance courts concluded that the claimants did not make discrimination plausible, i.e. did not show probability that the respondent's statement had caused direct discrimination. See judgments of the County Court in Zagreb Pnz-8/10 and Pnz-7/10.

39 Cro. '...opravdavaju sumnju...'

40 M. Dika, 86.

41 Labour Act of 1995 (Official Gazette 38/95, 54/95, 65/95, 17/01, 82/01, 114/03, 142/03, 30/04 and 137/04 – consolidated version).

42 Ž. Potočnjak & A. Grgić, 19.

43 In Supreme Court case Revr-85/11, the Court confirmed that the enumeration of discriminatory grounds from the (old) Article 2 LA 1995 is not complete (even though that provision also contained an exhaustive enumeration) and that the Court may establish other discriminatory grounds within the meaning of Article 14 of the Constitution and the guaranteed right to equal treatment. In case Revr-1676/09, the fact that the (old) Article 2 LA 1995 does not mention education as one of the discriminatory grounds, does not mean that such discrimination would not be possible in labour relations, within the meaning of the Constitution. The Constitutional Court expands this case law even further, by finding that, for example, legislation which distinguishes between two categories of drivers (those who have a certain amount of alcohol in their blood and those who have the same amount of alcohol but also commit an offence) are treated unequally as to their

4.3. Direct and indirect discrimination: justifications or derogations?

In EU gender equality law, derogations from discrimination law must be explicitly prescribed, whereas justification (in accordance with the principle of proportionality) is included only in the definition of indirect discrimination.

It seems that the position of Croatian legislation and case law is that objective justification is possible for direct as well as for indirect discrimination. Potočnjak and Grgić cite the decision of the Constitutional Court of the Republic of Croatia USRH U-I-764/2004 (salaries of judges and public legal officials), where the Court reasoned that even though the legislator is free to regulate rights and obligations, any difference in treatment must be reasonably and objectively justified, i.e. must be proportional to the goal it pursues.[45] In U-I-1152/2000 (gender equality in the pension system), the Constitutional Court referred to the previously mentioned decision and reiterated that the Constitution does not prohibit the legislator from prescribing rights and obligations of same or similar groups in a different manner, if it serves to correct existing inequalities among those groups or if there are other justifiable reasons based on the Constitution. Different requirements for obtaining certain rights arising from the pension system (different age requirements for men and women, based exclusively on gender) are, nevertheless, found to be constitutionally unacceptable. There are no similar decisions relating to pregnancy discrimination. However, some provisions on the protection of pregnant workers are potentially contradictory to the constitutional guarantee of equal treatment. For example, under Article 49(1) LA employers are prohibited from ordering pregnant women to do night work, except if a pregnant woman explicitly requests such work and presents a medical certificate that such work is not harmful to her health or the health of the foetus, which could in reality present an obstacle to equal treatment. Under Article 39 of the Occupational Safety and Health Act, pregnant women and women who are breastfeeding are *a priori* prohibited from performing a number of explicitly listed jobs, without the assessment of the actual risk involved. These provisions have never been tested before the Constitutional Court.

Therefore, even in direct discrimination cases the test of legitimate goal and proportionality applies, which is similar to the case law of the European Court of Human Rights.[46]

4.4. Comparable situation

A constitutive element of direct discrimination is the existence of a comparable situation (except in the event of pregnancy discrimination). It seems that the Croatian judiciary takes a predominantly formalistic approach and overemphasises the importance of a comparator.[47]

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liability for the offence (the first category not punishable at all, the second category punishable both for the presence of alcohol and for the other offence committed), which represents a violation of the right to equal treatment, unless objectively justified by a legitimate aim and proportional. See U-I-3084/2008 (Act on Road Safety). For a strict interpretation of discriminatory grounds as exhaustive, see VS RH Revr-787/07.

44 See the Decision of the Constitutional Court in cases U-I-764/2004 and U-I-3084/2008.

45 Ž. Potočnjak & A. Grgić, 29-30.

46 *Loc. cit.* Typically very strong, constitutionally acceptable reasons are required if the Constitutional Court is to declare that the regulation which prescribes the difference in treatment based exclusively on one of the grounds enumerated in Article 14(1) of the Constitution is compatible with the Constitution. However, if general measures of economic and social policy are at stake, the legislator's margin of appreciation is considerably wider, in which case the Constitutional Court will, as a rule, respect the choice of the legislator. See the Decision of the Constitutional Court, USRH-I-764/2004, Paragraph 12, U-I-2578/2004, U-I-2670/2004, U-I-3006/2004, U-I-1452/2005; as well as U-I-1152/00, U-I-1814/2001, U-I-1478/2004, U-I-3137/2002 and U-3760/2005.

47 The analysis of case law in the field of anti-discrimination protection, conducted by the Ombudsperson for gender equality in 2010 shows that the courts are reluctant to link anti-discrimination protection with the proportionality test, that they tend to 'over-formalise' protection, confuse equal treatment with completely identical treatment and overemphasise the importance of a comparator. See http://www.prs.hr/index.php/

For example, the claimant will be required to prove that the respondent should have treated him/her equally to another person in a comparable situation, whereby any difference in formal requirements overturns comparability (e.g. where a job classification system exists, any formal difference might exclude comparability). For example, it seems that the performance of actual tasks will be relevant only where there is no legally prescribed salary classification system. If the classification system exists, the employer will be found in breach of a specific obligation arising out of binding legislation or subordinate regulations if he abides by the equal pay principle.[48] In a recent series of judgments the Supreme Court did not allow a cross-employer comparison even in cases where employers were a parent company and a fully-owned affiliate. It consequently rejected the claimant's argument of comparability with an employee performing identical tasks, but formally working for another employer (a parent company), even though the claimant worked in the business premises and used the assets of the parent company.[49] This position is dubious from the point of view of CJEU case law.[50]

5. Conclusion

The aim of the present contribution was to evaluate the capacity of the national judiciary in the application of gender equality law, which largely originates from the EU *acquis*. The approximation at normative and institutional levels, i.e. the formal transposition of the equal treatment directives and the creation of new institutional mechanisms, such as the Ombudsperson for gender equality, seems to be at a satisfactory level. However, it takes more time and effort to accept and implement the interpretative openness of EU equality law, as applied by the CJEU, in practice. In our opinion, education and accessibility of national case law play a crucial role in preparing the judiciary for the challenging shift of approach in adjudication.

Gender continuously ranks among the top three discriminatory grounds, according to various studies. The reported rise in the number of gender discrimination cases brought before the Ombudsperson for gender equality in recent years does not necessarily mean that these forms of discrimination occur more often, but that people are increasingly becoming aware of their rights to be protected from discrimination and exercise these rights. For example, about one fifth of all new cases before the Ombudsperson for gender equality in 2012 concerned the area of work, working conditions and self-employment. Gender discrimination was claimed in 99.1 % of those cases.[51] Yet, there is a striking mismatch between the number of reported cases and the number of court proceedings regarding the protection against gender

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analize-i-istrazivanja/obrazovanje-4/181-istrazivanje-sudske-prakse-u-podrucju-antidiskriminacijske-zastite-2010, accessed 23 March 2013. There are no similar studies concentrating on gender equality case law.

48 Case law on comparability is numerous and exceeds the limits of this contribution. However, some examples have to be highlighted. In case VS RH Revr-1676/09 the claimant asserted having been paid less for work of equal value, when she actually performed tasks of a higher skilled worker. The Court concluded that since the determination of salary in public services is prescribed by law (categories and coefficients), the respondent may only pay the claimant in accordance with her qualifications, because they would otherwise contravene the explicit and legally binding rule. In VS RH Revr-246/10 the formal job classification was deemed crucial for denying comparability. In VS RH Revr-1545/11, the Supreme Court concluded that the claimant failed to prove comparability, because the respondent 'did not threat or physically assaulted the claimant [*sic*]' so it could not be claimed that their situation was comparable. For a contradictory approach, see the ruling in equal pay case VS RH Revr-135/09, where it was concluded that the title of the job or its classification do not automatically give the right to be paid equally to another worker with the same job title, but that the pay depends on actual work and tasks performed by a particular worker.

49 See VS RH Revr-1429/10.

50 I.e. Case C-320/00 *A. G. Lawrence and Others v Regent Office Care Ltd, Commercial Catering Group and Mitie Secure Services Ltd*. [2002] ECR I-07325, Case C-256/01 *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment* [2004] ECR I-00873: A cross-employer comparison may be allowed where there is a single source and a single body responsible for inequality which could restore equal treatment. See C. Barnard *EU Employment Law*, 4th ed., Oxford, Oxford University Press 2013, 307-311.

51 Ombudsperson for gender equality, Annual Report 2012, http://www.prs.hr/attachments/article/633/IZVJESCE%20PRS%20SABORU%20RH%20ZA%202012%20GODINU.pdf, accessed 6 May 2013.

discrimination. This leads us to conclude that court protection in gender discrimination cases, as in discrimination cases in general, is still perceived as too slow and inefficient.

Effectively combating discrimination and protecting rights and freedoms, in the words of Supreme Court Judge Mr R. Marijan, require an independent and professional judiciary and the existence of clear and fair legislation, including strict procedural rules.[52] It is only the combination of these two fundamental preconditions that can yield the required results.

Let us conclude with a quote, which summarises the foregoing:

> 'Judges feel the burden of their judgments every day, live under the constant pressure of responsibility for their decisions and carrying the heavy weight inherent to their profession, which is not properly valued in this country. Many of them endure these conditions with honesty and bravery, but some, unfortunately, do not.'[53]

[52] R. Marijan 'Uloga sudstva u suzbijanju diskriminacije' in: Crnić et al. (eds.) *Primjena antidiskriminacijskog prava u praksi*, pp. 155-161, Zagreb, Centar za mirovne studije 2011.

[53] R. Marijan 'Uloga sudstva u suzbijanju diskriminacije' in: Crnić et al. (eds.) *Primjena antidiskriminacijskog prava u praksi*, pp. 155-161, Zagreb, Centar za mirovne studije 2011.