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“RULE OF LAW, HUMAN RIGHTS AND EUROPEAN UNION”
25th and 26th June 2012
- BOOK OF PROCEEDINGS -
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- Bečići, Montenegro -

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FOREWORD

“As long as I have any choice, I will stay only in a country where political liberty, toleration, and equality of all citizens before the law are the rule.” - Albert Einstein, 1879-1955

Dear Reader,

The European Union is founded on the values of respect for human dignity, freedom, democracy, equality, the Rule of Law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. Any European State which respects these values and is committed to promoting them may apply to become a member of the Union.

All of the countries from South East Europe (SEE) have been given the prospect of EU membership and they work closely with the EU to further consolidate peace and to promote stability, democracy, the Rule of Law, and respect for human and minority rights in the region. Compliance with the Copenhagen political criteria, including the respect for human rights and the protection of minorities, feature prominently in the Accession and European Partnerships of SEE countries. These principles are as well central to the EU’s pre-accession strategies in the region, the Stabilisation and Association Process, for both the candidate countries (Croatia, Macedonia, Montenegro, Serbia), and the potential candidates (Albania, Bosnia and Herzegovina, Kosovo*).

The SEE countries are expected to fully comply with the Human Rights acquis of the Council of Europe, especially the European Convention on Human Rights (ECHR), the Framework Convention for the Protection of National Minorities (FCNM), the European Charter for Regional and Minority Languages (ECRML), as well as the relevant recommendations made by other relevant Council of Europe bodies, such as the Commissioner for Human Rights or the Parliamentary Assembly.

1 Article 2 of the Treaty of European Union.
2 Article 49 of the Treaty of European Union.
* This designation is without prejudice to positions on status, and is in line with UNSCR 1244/99 and the ICJ Opinion on the Kosovo declaration of independence.
With the main purpose to gather regional and international experts to share their knowledge and experiences for better understanding of regional problems in implementation of the Rule of Law and protection of human rights, as well as discussing EU values and standards in their promotion and protection, the first Summer Academy “Rule of Law, Human Rights and EU” organised by the South East European Law School Network (SEELS) and supported by Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Open Regional Fund for South East Europe-Legal Reform took place on June 25th and 26th in Bečiči (Montenegro). It assembled seven regional, two international experts and seventeen Master and PhD students from six SEE countries.

The collection of academic papers within this book present valuable contribution by a distinguished pool of law professors from SEE countries and Germany who delivered lectures at the Summer Academy. The Summer Academy offered an opportunity for an academic debate and dialogue and exchange and sharing of knowledge, creating common platform for future work of the SEELS members, as well as tightening the joint efforts towards the common goal of integration in the EU through respect of Rule of Law principle, democracy and protection of human rights.

Knowledge and experiences shared at the Summer Academy would strengthen the connection and networking between the academic staff and young researchers within SEELS Network and would serve as a good platform for future cooperation in relevant educational and research projects in the respective fields of the Rule of Law and human rights protection.

We do anticipate this book to serve as a regional manual for students, wider academic and social community and to be a useful resource to further explore and research in the field. We strongly encourage you to share this book with anyone you consider might be interested in reading it.

*Skopje, September, 2012.*

**Prof. Dr. Goran Koevski**  
Manager  
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**Dr. Veronika Efremova**  
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PRINCIPLE “RULE OF LAW” OR “RECHTSSTAATLICHKEIT”
AS BASIS FOR HUMAN RIGHTS PROTECTION IN
EUROPEAN UNION LAW

Introduction

The Rule of Law and human rights\(^1\) are guaranteed by a multilevel approach (see Article 6 TEU\(^2\)), in terms of International Law together by national constitutions, human right acts and international conventions such as the European Convention on Human Rights and Fundamental Freedoms.\(^3\) With the EU a supranational player takes an additional role. The EU and its understanding of EU Law as autonomous source and supremacy towards member states law a higher complexity of rules and decision making occurs. The question is if this complexity makes decisions more difficult or is this question irrelevant as far as basic rights are strengthened? In any case these questions are relevant for the member and candidate states in South East Europe because primary law including the European Chapter of Fundamental Rights\(^4\) is part of the acquis

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\(^1\) In this article synonyms for human rights are the terms “basic rights“ or “fundamental rights“.


\(^3\) In the following ECHR in BGBl. (Bürgerliches Gesetzesblatt/Textbook of Federal German Law) 1952 II 686; BGBl. 2002 II 1055.

communautaire, according to Article 20 IV TEU condition for accession to the EU. To understand the structure and impact of basic rights in the EU the following Article is structured in 3 chapters. Chapter 1 serves as basis to explain the codification of the Rule of Law and basic rights in primary law and to show that these rights are genuinely and normatively linked to each other in EU Law. Both are expressively mentioned in Title I of the Treaties of Lisbon and the ECFR which demonstrates their importance and moreover an implementation in the principal structure of EU Law. For understanding the principal structure of EU Law and to cope with the Rule of Law as well as basic rights appropriately a basic knowledge of legal dogmatic with its methods of interpretation is required. Due to the specific structure of EU Law Chapter 2 explains the principle of supremacy by analysing the “Solange” idea as created by the German Constitutional Court. “Solange” is more and more a principal for understanding and executing competencies. At the latest this has to be considered for the protection of Human Rights as well since the European Court for Protection of Human rights in its decisions refers to the “Solange” idea. An analysis of Article 53 ECFR shows that the EU legislator also takes the “Solange” idea into account. Thus, in Chapter 3 different questions will be raised provoked by this multilevel approach of national constitutions, international conventions and supranational rights to find out if the different jurisdictions of the states, the EU and the ECHR have to be aligned or at least competencies clarified.

Chapter 1 – The Material Dimension of the Principle of Rule of Law or “Rechtsstaatlichkeit“

I. Genesis and Legal Nature

The Rule of Law was developed already in the ancient world as Platon thought about legality and Aristotle about a constitutional separation of powers. It lasted until the time of Enlightenment when the Rule of Law was con-

5 C. Stumpf, Art. 2 EUV no. 16, Art. 3 EUV no. 7 and A. Hatje, Art. 43 EUV no. 19 in EU-Kommentar (Ed: J. Schwarze) 2009.
cretized by several sub-principles. This work intensively took place in France and Germany. In the Anglo-Saxon regions the Rule of Law was guaranteed in a more formal sense while in continental Europe, predominantly in Germany, the principle of Rule of Law was enlarged by a material dimension. The German term used to express this material understanding of the Rule of Law is “Rechtsstaatsprinzip” or “Rechtsstaatlichkeit”. Essential formal principles are the legal requirements, legal certainty, fairness, separation of powers, non-retroactivity, effective judicial protection, justifiability of acts of authorities and state liability. The material dimension of the Rule of Law mainly is determined by the basic rights and the social constitutional state idea. Although principles are in general deemed as objective rights valid for all people and authorities, the Rule of Law gives an approach for establishing subjective rights. The formal

7 I. Kant, Die Metaphysik der Sitten, Erster Teil, Metaphysische Anfangsgründe der Rechtslehre, AA Band VI, 203 ff.; I. Kant, Grundlegung zur Metaphysik der Sitten, AA Band IV, 358 ff.
9 R. Bäumlin/H. Ridder Art. 20, 4 ff. in Kommentar des Grundgesetzes für die Bundesrepublik Deutschland, Band 1 (Ed: R. Wassermann) 1989.
and material understanding more and more converge. This is crucially caused by the growing importance, codification and enforcement of human rights in the 20th century. The ECHR and the ECFR are prominent laws on the protection of human rights showing that parliaments do not accept an exclusively formal status of authorities in modern “Rechtsstaat“. Even Great Britain implemented by the Human Rights Act in 1999 a written catalogue.14

II. Guarantee of Rule of Law and Basic Rights in Primary Law

1. Rule of Law as Basis of Basic Rights

While the Rule of Law in English wording is not necessarily linked to the legal system of a state, the German “Rechtsstaatsprinzip“ is focused on a state, and the EU is not a state, but a supranational organization or sui generis.15 Nevertheless, all member states of the EU accept the application of the “Rechtsstaatsprinzip” in the EU which is deemed as a “Rechtsgemeinschaft”16 (“Legal Community”)17. It is a secondary question if the “Rechtsstaatsprinzip” can be applied directly or analogue. In any case the member states of the EU accept whether the Rule of Law, the principle of “Rechtsstaatlichkeit” or the “Rechtsstaatsprinzip”.18 Additionally, according to Article 3, Statute of the Eu-
ropean Council every member of the Council of Europe must accept the principles of Rule of Law and enjoyment within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively.\textsuperscript{19} Within the EU, the Rule of Law was already established by the legal practice of the court before it was explicitly normed in primary law.\textsuperscript{20} By the Copenhagen Criteria from 1993 the EU has made principles such as the Rule of Law and the protection of human rights a requirement for applicant members.\textsuperscript{21} Officially, the Rule of Law was implemented in 1993 by the Treaty of Maastricht in the preamble section 3 and Article 11 section 1. In 1999 the importance of the Rule of Law was emphasized by combining this principle with other general principals such as democracy, freedom and equality in Article 6 TEU Treaty of Amsterdam. With the Treaty of Lisbon the Rule of Law has been strengthened. It is expressively stipulated in the preamble of the TEU, Article 2, 6 and 21 TEU, in the preamble of the TFEU in Article 4 II, 6 III or 340 II, III TFEU.

The Rule of Law is deemed as leading or fundamental principal in modern constitutions. According to Article 2 TEU the EU is founded on the values of respect for human dignity, freedom, democracy, equality, the Rule of Law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the member states in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. The importance of Article 2 is underlined by the potential sanctions in Article 7 TEU. On a reasoned proposal by one third of the member states, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a member state of the values referred to in Article 2 TEU. The importance of the values in Article 2 such as the Rule of Law and basic rights is confirmed in the preamble of the ECFR. The EU conscious of

its spiritual and moral heritage, is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the Rule of Law. It places the individual at the heart of its activities, by establishing the citizenship of the EU and by creating an area of freedom, security and justice. The Rule of Law is intended to bind and limit the authorities and to ensure minority rights as well as basic rights, particularly in a democracy where a democratic legitimacy empowers majorities. An absolute primacy of politics over the Rule of Law is not stipulated in the primary law of the EU and not in the constitutions of the member states. The Rule of Law contains sub-principles such as separation of powers, checks and balances and judicial independence of courts to ensure a balance between the principles.

2. Article 6 TEU as multiple approach to Basic Rights – From a General Principle to a Catalogue of Rights

The EU has adopted several declarations to guarantee basic rights since 1977, but all not legally binding, even not the ECFR when implemented in 2000. The ECJ and the courts of the member states supported this development. Basic rights understanding was formed as general legal principle as established in the member states. Only single regulations such as Article 21-24

or 157 I TFEU or the four freedoms served as basic rights\textsuperscript{26}. Since the Treaty of Lisbon, the protection of basic rights can be based on three sources, the ECFR, Article 6 I TEU, the accession of the EU to the ECHR,\textsuperscript{27} Article 6 II TEU\textsuperscript{28} and the constitutional traditions of the member states as general principles, Article 6 III TEU. The Court of the EU rather heterogeneously uses all three sources in its legal practice. Fundamentally, Article 6 III TEU states that basic rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the member states, shall constitute general principles of EU Law\textsuperscript{29}. All member states of the EU are members of the ECHR. Furthermore, by the Treaty of Lisbon the EU has agreed to access to the ECHR, Article 6 II TEU. Before the Treaty of Lisbon an access to the ECHR was barred by the regulations of the ECHR and the EU principle of conferral as stated in the opinion 02/1994 by the ECJ\textsuperscript{30}. Article 308 European Community Treaty was not a sufficient legal basis, because such a step would have represented an essential treaty amendment\textsuperscript{31}. Besides international organisations were not allowed to access to the ECHR. Within the traditional understanding of national states and sovereignty this privilege was reserved for states (former Article 59 I 1 ECHR). With the ratification of protocol No. 14 to the ECHR\textsuperscript{32} by Russia 2010 an accession of the EU became possible\textsuperscript{33}. In the past the ECJ already followed the legal

\textsuperscript{26} C. Nowak, Europarecht nach Lissabon, 2011, 201 ff., in particular 221 ff.
\textsuperscript{27} S. Stock, Der Beitritt der Europäischen Union zur Europäischen Menschenrechtskommission als Gemischtes Abkommen?, 2010; C.-D. Munding, Das Grundrecht auf effektiven Rechtsschutz im Rechtssystem der Europäischen Union, 2010, 364 ff.
\textsuperscript{28} C.-D. Munding, Das Grundrecht auf effektiven Rechtsschutz im Rechtssystem der Europäischen Union, 2010, 150 ff.
\textsuperscript{32} Art. 59 II ECHR; European Council, OJ EU 2010 C 115, 8; Art. 216-219 TFEU.
\textsuperscript{33} H.C. Krüger/J. Polakiewicz, “Proposals for a Coherent Human Rights Protection System in
practice of the ECtHR\textsuperscript{34}. In 1999 the European Council named a Convention to elaborate the ECFR, but the declaration of the ECFR in 2000 was not legally binding. Nevertheless, the ECJ and the courts of the member states considered the Charter when interpreting basic rights.\textsuperscript{35} According to Article 6 I TEU the ECFR shall have the same legal values as the treaties\textsuperscript{36}.

The ECFR contains general provisions governing the interpretation and application of the Charter in its title VII, Article 51 ff. ECFR. Remarkable is the Article 53 ECFR, which represents an expression of the “Solange” idea\textsuperscript{37}. Nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by EU Law and International Law and by international agreements to which the EU or all the member states are party, including the ECHR, and by the member states’ constitutions. In this way a comparable, but not congruent level of protection is assured, considering characteristics of legal cultures and constitutional pluralism. Hence, basic rights can be interpreted according to the circumstances. There is no absolute understanding. The ECJ has confirmed this in its “Omega” decision in 2004 where it allowed a specific


interpretation of the complex right of human dignity\textsuperscript{38}. The court respects specific national values as part of constitutional pluralism. By taking additionally Article 6 III TEU into consideration, the ECJ can recognize interpretation of basic rights in single member states as general principles in the EU\textsuperscript{39}.

The multiple approach within the EU is complex and can lead to overlapping or even contradictory understandings. By the implementation of the ECFR single basic rights such as data protection (compare Article 8 I ECFR and Article 16 I TFEU) or citizenship rights are protected twice (Article 39 ff. ECFR and Article 20 ff. TFEU). However, these overlapping are irrespective of the strengthened level of protection by the increased legal practice and laws for protection of basic rights. The complexity of basic rights regulation is a workload to be coped with, maybe to be clarified or consolidated in future. But first the level of protection by the legislator and the ECJ has to be assured.

III. Principle Approach and Methods of Interpretation

1. Principle approach

The principle approach is complex in the EU with its 27 member states, specific horizontal institutional and vertical structures towards member states\textsuperscript{40}. Primary law of the EU is characterized by its wide principal approach, objectives and general clauses, in particular in the preamble and Title 1 “Common Provisions” of the TEU. Principles such as integration and effect utile are not enumerative defined and have to be determined by interpretation of the treaties considering other principles and objectives. Conflicts arise with the principles

\textsuperscript{38} ECJ, “Omega” ECR 2004 C 36/02.


of legal certainty and protection of confidence. Further transfer of competencies to the EU requires a political will of the member states. Detailed regulations in the sense of a “Gesetzespositivismus” (“legal positivism”) could lead to a lower level of consensus, decrease the process of integration and weaken the developments of basic rights. The ECFR is a recent achievement which has to be strengthened by legal practice and to become an integral part of the awareness of EU authorities, member state governments and citizens. The advantage of the principle approach is its flexibility to cover several situations and to establish a balance with other principles. Hence, the Rule of Law on the basis of a reciprocal effect determines a framework and at the same time dependents on the interpretation of other principles.

2. Principles and Methods of Interpretation

a) Principle of Proportionality and Essential Content, Article 52, 53 ECFR

For a systematic protection of basic rights the EU has implemented the principle of proportionality\(^4\) and essential content\(^2\) in Article 52 ECFR. The principle of proportionality is explicitly stipulated in Article 52 I 2 ECFR\(^3\). Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others. Remarkably, rights and freedoms of others can serve as justifications. The ECJ does not review the principle of proportionality as intensive as the BVerfG (so named “Kontrolldichte” or „power of judicial review“)\(^4\). The BVerfG more dogmati-

cally reviews the principle of proportionality in three steps, “geeignet” (“necessary”), “erforderlich” (“proportional”) and “angemessen” (“appropriate”).

The essential content of rights and freedom enjoys a specific protection. There is no room for interpretation if once an untouchable, absolute essence is defined. As example, in German constitutional system limitation of basic rights can be justified usually, however human dignity is untouchable. Hence, the crucial point is the definition of the essential content. In German literature the essential content of a basic right can be judged from an abstract-general or concrete-individual point of view. The abstract-general view is strict and has to define an absolute essence of protection. This is rather difficult because all cases have to be anticipated and treated in the same way, flexibility and individual circumstances cannot be considered.

b) Article 19 TEU

The principle approach is intensively linked to the methods of interpretation needed to reach a balance of primary law principles. According to Article 19 TEU the ECJ shall ensure that in the interpretation and application of the treaties the law is observed. Article 19 TEU covers the whole primary law including basic rights. Classical methods of interpretation as implemented by C. F. Savigny, the canon of interpretation with its historical, grammatical, systematically and teleological methods serve as basis. The ECJ basically follows the

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48 J. Schwarze, Art. 220 EGV, 1 ff. in EU-Kommentar (Ed: J. Schwarze) 2009;
method of interpretation as applied in the member states, but due to the different legal cultures and the balance of at least interests of 27 member states the ECJ applies the methods of interpretation in an autonomous European way. The ECJ emphasizes the method of “wertende Rechtsvergleichend” (“evaluative method of comparative law”) to obtain the best possible consensus out of all legal understandings among member states. At whole, the ECJ uses the methods of constitutional interpretation to ensure the unity of law. In case of conflicting principles the classical rules of interpretation are not always sufficient. To find an appropriate balance in the sense of the principle of proportionality and justice in German legal literature the term “praktische Konkordanz” (“practical concordance”) was invented. According to this all principals have to be interpreted in a way to reach the most possible impact of each principle.

The preamble, Article 3 and 6 TEU together with the preamble, rights and freedoms of the ECFR show that basic rights are fundamental and intrinsically tied to the Rule of Law. The Rule of Law itself as general principle is granted in the ECFR, hence there is a reciprocal effect to be considered in each interpretation. Altogether the level of protection of basic rights depends


53 P. Häberle, Europäische Verfassungslehre, 2009, 481.


on the level of integration, the will of the authorities and the development of legal practice\textsuperscript{57}. The process of integration is determined on the one hand by the national view of the member states, the principle of sovereignty and conferral and on the other hand by the European view, in particular by the principles of integration, supremacy, effect utile and loyalty\textsuperscript{58}. The abstractness of the EU principles offers big chances, but their indefinite scope causes concerns\textsuperscript{59}. The ECJ has accelerated the process of integration by interpreting the Rule of Law in the spirit of the objectives and principles of the treaties. While the preamble of the European Community Treaty was very much concentrated on the economic dimension of the EU, the preamble of the TEU is more aligned to the Rule of Law and basic rights. It is more and more emphasized that the EU is a “Rechtsgemeinschaft” (“legal community”)\textsuperscript{60} and has to ensure a legal fundament in compliance with the treaties. The court do not allow an unilateral preference of national interests and emphasizes the principal approach on the basis of the objectives of the treaties which compulsory leads to the application of methods of interpretation, an autonomous way of European interpretation considering intensively the evaluitive method of comparative law\textsuperscript{61}.

The principle approach in primary law offers a good basis to bring the Rule of Law and basic rights to full force and effect. While the member states have avoided solving some fundamental questions of the Rule of Law, the ECJ took this responsibility to clarify general aspects\textsuperscript{62}. Usually the Com-

\textsuperscript{57} F. Hanschmann, Der Begriff der Homogenität in der Verfassungslehre und Europarechtswis-
senschaft, 2008, 149 ff.


\textsuperscript{60} J. Schwarze, Art. 220 EGV no. 3 in EU-Kommentar (Ed: J. Schwarze) 2009; R. Ullerich, Rechtsstaat und Rechtsgemeinschaft im Europarecht, 2011.


\textsuperscript{62} M. Pechstein, Entscheidungen des EuGH, 2011.
mission with its initial legislation rights is known as “motor of integration”. By its innovative legal practice the court itself besides the Commission meanwhile is named as “motor of integration”\(^{63}\). Some of the landmark decisions of the court are van Gend en Loos, Costa/ENEL, Simmenthal or Francovich\(^{64}\). These decisions have remarkably changed the understanding of vertical relationships towards member states and citizens\(^{65}\). By its decision the court has concretized the legal understanding of principles such as democracy\(^{66}\), institutional balance\(^{67}\), loyalty\(^{68}\), justice\(^{69}\), legal certainty\(^{70}\), retroactivity\(^{71}\), proportionality\(^{72}\), subsidiarity\(^{73}\), equality before law\(^{74}\), right to a court hearing\(^{75}\) or indemnity\(^{76}\). For some of these decisions the court is heavily criticized by several governments and constitutional courts to exceed the limits of jurisprudence, not to respect the judicial self-restraint and the principal of separation of powers\(^{77}\).

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\(^{63}\) F. Hanschmann, Der Begriff der Homogenität in der Verfassungslehre und Europarechtswissenschaft, 2008, 149 ff.
\(^{64}\) J. Schwarze, Art. 220 EGV no. 4 f. in EU-Kommentar (Ed: J. Schwarze) 2009.
\(^{65}\) H. Lecheler, Europarecht 2011, 11 ff.
\(^{67}\) ECJ, “Meroni./Hohe Behoerde“ 1958.
The “richterliche Rechtsfortbildung” (“judicial development of law“)\(^{78}\) is limited by different constitutional principles and rules of interpretation\(^{79}\). First of all, the court has to respect the principle of institutional balance and democracy. The EU parliament, the governments and parliaments of the member states are (in-) directly legitimated by the people. The court is not entitled to compensate this democratic legitimacy. Methods of interpretation are used as rules to ensure essential competencies of the legislator. The courts have to respect the wording of laws and the will of the parliaments. Law is a partner of democracy, partially frame and basis, but not a substitute. The question is if the court will withdraw to its origin role as a “richterliche Kontrollinstanz” (“judicial review institution“). Very much depends on the self-understanding of the court and its “judicial-self-restraint”\(^{80}\). Due to the independence the development of a constitutional system is determined by the quality and reputation of judiciary. In so far many weaknesses of political systems cannot be used as justification for a weak legal practice.

**Chapter 2 – The EU Process of Integration between Supremacy of Law and “Solange” Principle**

The principle of supremacy of EU Law was created by the ECJ in the decision “Costa/E.N.E.L.”\(^{81}\). The court has confirmed its decision in 1978 by “Simmenthal II”\(^{82}\) and once again in 1987 by “Foto-Frost”\(^{83}\). From the perspective of the ECJ EU Law always takes precedence over the law of the member


\(^{83}\) ECJ, “Foto-Frost“, ECR 1987, 4199.
states irrespective of the level of EU and National Law. The EU court does not
differentiate between constitutional law and elementary laws. Furthermore
the court of the EU does not distinguish the kind of European Law which means
that secondary as well as primary law has priority over constitutional member
state law. Supremacy is not equal with voidness which means that national laws
remain valid and have full force and effect within the member states. This
absolute understanding is an innovative interpretation of the ECJ. Primary law
does not contain any regulation that constitutes such a principle. Only in the
Declaration No. 17 to the Treaty of Lisbon it is stated that all regulations based
on the treaties take precedence over member state law in line with the legal
practice of the court. The ECJ has developed the principle of supremacy by
teleological interpretation with the justification that member states have aban-
donned their sovereign rights in the frame of the treaties. The court determined
the extent of supremacy in its decision “Internationale Handelsgesellschaft”. Due to the supranational, autonomous nature of EU Law and its principles such
as effect utile and loyalty to act together on this level national Constitutional
Law or understandings cannot prevent the effectiveness of EU Law under con-
sideration of the principle of conferral.

This understanding of supremacy has evoked strong reactions of differ-
ent constitutional courts in the member states, in particular of the BVerfG en-
joying a wide acceptance. The BVerfG has made several decisions within the
last few decades all determining the relationship of European and German Law.
The absolute supremacy as declared by the ECJ was deemed as dogmatically
not justified, not precise and distinguishing enough. The court searched for a le-
gitimation to justify a hierarchy in line both with European a national Constitu-
tional Law. It agrees that EU Law has priority as far as Germany has transferred
its competencies to the EU. For this transfer of competencies the court used the

86 ECR EU 2007 C 306/02.
terminology “Rechtsanwendungsbefehl” (“permission to application of law”).
All other areas remain in the national jurisdiction or at least the court of the
member state remains its “ultra vires control” or the necessary control to ensure
a minimum level of fundamental principles and rights as defined by Article 79
III German constitution. In the period as of 1973 to 2009 the BVerfG has made
several decisions to determine the hierarchy of European towards German Law.
(1993) and “Lisbon” (2009). All the decisions touch fundamental principle and
rights such as basic rights, democratic legitimacy (in particular competencies)
and constitutional identity (fundamental constitutional principles). For these
three areas the BVerfG has reserved rights of judicial review towards the ECJ
as long as the EU does not reach another level of democratic legitimacy and
constitutional assurance.

In its decision “Solange I” (1974)\textsuperscript{89} the BVerfG doubted that the EU
ensures a sufficient level of assurance of basic rights comparable to the Ger-
man constitutional level. Therefore the BVerfG deemed itself further on as re-
ponsible to review if European acts are in accordance with level of protection
granted by the German constitution “Solange” (the simple translation is “as
long as”) the EU has not implemented a sufficient level of assurance. Explicitly,
the BVerfG required from the EU to implement a catalogue of basic rights what
happened nearly 0 years later. The description of the time aspect “as long as”
became a generally acknowledged term described as “as long as – principle”
or in a more material sense it is described as “equivalent protection principle”.

In 1992 the German legislator implemented a new constitutional Ar-
ticle 23 to legitimate the transfer of competences to the EU compliant with
fundamental legal principles such as democracy and federalism, in particular to
consider the rights of the “Bundesländer“, the 16 German federal states. For-
merly, Article 23 of the German Constitution served as basis to transfer rights
to international organizations, but it was never intended to transfer rights to an
international organization in an extent such as to the EU. The Treaty of Maas-

\textsuperscript{89} BverfGE 37, 271ff. “Solange I”.
tricht established a monetary union, the EU citizenship, new competences in the areas of foreign policy and security. The claimants in the Maastricht court procedure claimed that fundamental principles referred to in Article 79 III (fundamental structures of the constitution), Article 38 (democracy and electoral rights) and Article 20 (fundamental state principles such as the Rule of Law) of the German Constitution were violated. The BverfG denied that fundamental structures and principles of the German constitution were violated, but it emphasized to reserve the right of ultra vires control to review if the competences of the EU are in compliance with democratic legitimacy and transfer of competences.

Similar to the Maastricht decision the BVerfG confirmed in its Lisbon decision that basically the process of integration of the EU is in compliance with German Constitutional Law. As in its Maastricht decision the court did not accept an absolute supremacy of EU Law. It remains its ultra vires control with respect to Articles 79, 38 and 20 of the German Constitution to preserve the constitutional identity.

Chapter 3 – Basic Rights in EU Primary Law between Judicial Competencies and Cooperation

I. Legal Practice of the ECJ

Contrary to its self-conscious, innovative decisions, the ECJ has in the 1950s and 1960s avoided to review human rights comprehensively. This was changed by the landmark decision “Stauder” in 1969 and since then, the court

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90 BverfG 123, 267ff.
strengthened basic rights. The increased importance of basic rights in the EU became apparent by the declaration of the ECFR and yet again by Article 6 TEU Treaty of Lisbon. In the first decades of the EC the two main goals were the guarantee of peace and development of markets. In the course of the development of the markets the four freedoms took an important role within legal practice and due to the material overlapping the freedoms contributed to the extension of basic rights.

Basic rights are traditionally protection rights against authorities as far as they offer a subjective content to claim an individual right. Individual rights can be distinguished from pure objectives with a general effect for all people. Subjective and objective rights converge, hence it is not always possible or needed to establish an antagonism. Objectives, principles and general clauses are often indefinite and an interpretation is needed to extract an individual position. This shows that methods of interpretation are fundamental for the understanding of basic rights. Meanwhile, the ECJ interprets directives more and more in the spirit of the ECFR. Besides the individual dimension, basic rights, objectives and principles such as the Rule of Law constitute an objective effect for all people. The ECJ has in some areas developed basic rights from their classical protective function to obligations, e.g. in the area of media the
court requires the assurance of pluralism\textsuperscript{100}. Objective rights can be interpreted to prevent dangers or offer services and benefits, not only to give protection to prevent limitations or violations. The social constitutional state is a wide, indefinite principle which touches all areas of society and life. In an extreme sense it can be interpreted as an obligation for a social welfare state. These are classical constitutional questions to be answered in all constitutional systems, not only the EU, but especially in the EU with the implementation of the ECFR.

The ECFR raises several questions to be clarified in future\textsuperscript{101}. The first question is if the ECFR is legally binding and which legal status has the ECFR. Irrespective of different dogmatical approaches, Article 6 II TEU states that the ECFR shall have the same legal values as the treaties. Hence, the ECFR is equal to primary law but that causes the question if primary law can be measured by the ECFR.

Furthermore, the simple wording in Article 6 II TEU “accesses to the ECHR” is questioned. The pure wording could indicate that the EU is only obliged to the Convention itself, but not to the (additional) protocols. This interpretation of the wording can be disargued by a teleological and historical interpretation. The ECFR contains the rights stipulated in the protocols or at least refers to these. The will of the EU legislator is directed to the protocols. Historically the ECJ has already used the ECHR for interpretation of basic rights, including the protocols. An effective protection in the spirit of the treaties can better be achieved by considering the whole convention with its amendments.

Articles 51 and 52 ECFR enable different understandings. Both refer to “laws” as legal basis, Article 51 for protection and Article 52 for limitation of basic rights. The term “laws” can be understood in a formal or a material sense. A formal law requires an adoption or at least a participation of the parliament. In EU terms that would mean only laws adopted by the co-decision proce-

\textsuperscript{100} J. Kühling, “Grundrechtskontrolle durch den EuGH”, 296 ff. in EuGRZ 1997.

dure or ordinary legislation can serve as legal basis. In the sense of Articles 51 and 52 ECFR material laws are as well accepted as the legal basis. Therefore directives or general administrative regulations can serve as legal basis. This requires an implicate review of legal basis within the review of basic rights, in particular if material laws are adopted by the authorities.

II. Basic Rights between Judicial Competencies and Cooperation

According to Article 19 TEU the court shall ensure that in the interpretation and application of the treaties, the law is observed. This clause establishes a “Rechtsprechungsmonopol” (“judicial monopoly”). Towards the ECtHR the ECJ was rather careful. He kept a distance similar to the constitutional courts of the member states towards the ECJ. With the accession of the EU to the ECHR among the courts on the international, supranational and national level a triangle relationship will be officially established. For a long time the ECtHR did the same and denied to review acts of the EU due to the fact that the EU was not a member of the ECHR. Indirectly however, the ECtHR reviewed acts of the EU by reviewing acts of its member states which are all members of the ECHR. It was stated that the member states of the EU shall not be able to avoid obligations by transferring competences to the EU. The ECtHR set a remarkable sign with its “Matthews” decision in 1999. Thus, the ECtHR can

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review primary law and its enforcement because these are acts directly by the member states.

Similar to the BVerfG the ECtHR distinguishes primary from secondary law. In case of secondary law the court takes more rights to review acts of the EU\textsuperscript{106}. However, the court does not manifest itself clearly. In case of “DSR Senator Lines”\textsuperscript{107} the court of the EU has rejected a claim, whereupon the claimant appealed to the ECtHR. The court also rejected the claim, hence, the competency of the court for reviewing secondary law of the EU was not resolved. Instead the ECtHR uses the idea of the “Solange” decision of the BVerfG to explain its competencies for reviewing EU Law\textsuperscript{108}. For secondary law the ECtHR has not behaved clearly. In its landmark decision “Bhosporus” in 2005 it adopted the “Solange” idea. If the member states do not act with discretion, it is assumed that basic rights are assured by the EU on a comparable level to the ECHR. The ECtHR expresses its confidence in and the will to promote international organizations such as the EU. This position can be criticized due to its tautology. The goal itself is not a proper justification. It is not self-explanatory that a union of several states assure a better protection of basic rights than single states with its constitutions and legal cultures. The ECtHR allows disproving the general assumption to enable proper individual protection when the level of protection apparently is not guaranted. Similar to the “Solange” decision it is difficult to interpret indefinite terms such as “apparent”. Because of the individual right of disproof the “Solange” idea here is represented in a simplified form. The BverfG does not accept single actions as long as the level of protection of basic rights in the EU is systematically and essentially assured. The ECtHR generally deems single action as admissible according to Article 35 I ECHR, but limitations are assumed as justified as long as not disproved.

The accession to the ECHR raises different questions in its relationship towards the ECHR and inside the EU regarding in particular hierarchy of

\textsuperscript{106} C. Lenz, “Notes to the decision of the ECtHR Nr. 24833/94 (vom 18.02.1999)“, 311 ff. in EuZW 1999.
\textsuperscript{107} ECtHR, “Senator Lines“, 279 ff. in EuGRZ 2004.
\textsuperscript{108} ECtHR, “Bosphorus Airways“, 197 ff. in NJW 2006.
norms, autonomy of EU Law, competencies and procedures\textsuperscript{109}. Article 52 III ECFR clarifies that the relationship towards the ECHR is not absolutely accessory\textsuperscript{110}. As far as the ECHR stipulates higher standards the EU has to adjust, but this is not valid vice versa. The EU is not forbidden to extend protection, however the question is to what extent the ECJ is allowed to develop laws\textsuperscript{111}. Article 52 III ECFR serves as a kind of minimum guarantee\textsuperscript{112}. Example, human dignity is explicitly guaranteed by the ECFR or the right of free acting is not regulated in the ECFR, but established by the legal practice since 1985\textsuperscript{113}. The enforcement of EU Law will lead to the question of responsibility. The EU has to clarify internally whether the EU is responsible, the member state or both. This could be a question of the co-respondent mechanism as foreseen in the negotiations of the ECHR and the EU for its accession to the ECHR. In future Article 36 ECHR will have a new section 4 with a co-respondent mechanism allowing the EU to act together with its member states. Nevertheless, a legal no determination is caused by the wording “may”. The parties may act together, but they are not obliged and a clarification procedure is not foreseen. Article 344 TFEU establishes an exclusive right of the ECJ in its vertical relation to the member states\textsuperscript{114}. If rights arise out of the ECHR this monopoly could be questioned\textsuperscript{115}. EU Law remains its supremacy towards member states;


\textsuperscript{114} T. Lock, Das Verhältnis zwischen dem EuGH und internationalen Gerichten, 2010, 155 ff.

\textsuperscript{115} W. Weiß, “Grundrechtsquellen im Verfassungsvertrag“, 348 in ZEuS 2005.
thus, the obligations of primary law cannot be abandoned. The ECJ continues to emphasize the autonomy and characteristics of EU Law\textsuperscript{116}. Similar questions arise with Articles 35 I ECHR according to which domestic remedies have to be exhausted. It has to be clarified if the obligation of preliminary ruling pursuant to Article 267 TFEU is mandatory.

The questions regarding the overlapping principles, conventions, chapters and laws as well as the different jurisdictions show the need for closer cooperation and finally the requirement to clarify competencies\textsuperscript{117}. Maybe the pressure on the EU will lead to a further landmark decision such as a “Solange III”. In German literature increasingly a further step to a common “European constitutional court” is raised\textsuperscript{118}. Discussions about a reform or more efficient structure of the ECJ are continuously in process\textsuperscript{119}.

\textsuperscript{117} T. Lock, Das Verhältnis zwischen dem EuGH und internationalen Gerichten, 2010.
\textsuperscript{119} C.-D. Munding, Das Grundrecht auf effektiven Rechtsschutz im Rechtssystem der Europäischen Union, 2010, 385 ff.
1. **Introduction**

All states in the Western Balkans are multiethnic/cultural/national since the ancient times. Even before modern history of the international community, this region was crossed over and conquered by different peoples. Famous writer, a Nobel Price winner for literature, Ivo Andric stated that the Balkans is the east for West and the west for East.

Being a crossroads of cultures, the region has become a real multicultural center of South-eastern Europe. However, that did not mean that it was calm spot at all. On the contrary, Balkan Wars, World Wars as well as many civil wars, clashes and turbulences like many forms of the unintentional armed conflicts happened or were initiated here. Most of them had the motive in inter-ethnic and intercultural, mainly interreligious bigotry.

Contemporary multiculturalism in the Western Balkans is its feature, which determines human rights protection as well as building democracy and the Rule of Law in the respected states. Respect of diversity is an indicator of democracy. Protection of minority rights is a precondition for human security in ethnically, nationally and culturally diverse states.

Having in mind its history of intolerance as well as periods of har-
mony\(^1\), the situation in the region could be defined as *sui generis*. Here multiculturalism could not be defined neither as ‘melting pot’ nor ‘bowl of mixed salad’, but a specific mixture of ethnicities, religions, nationalities, languages with appearance of ‘new’ minorities\(^2\) after the dissolution of Former Yugoslavia. That mixture provides preservation of national, ethnic, cultural, religious and linguistic identities, without melting into new one.

The appearance of so-called new minorities in all new states, successors of the Former Yugoslavia, after dissolution of the former great federation imposed the issue of legal status of those people. Not all of the present states of the Western Balkans recognize minority status to nationals of the Former Yugoslav Republics, nowadays independent states. Such example is Slovenia, which recognizes minority status and minority rights protection only to old minorities (Italians and Hungarians) as autochthon minorities. All others, such as Montenegrins, Serbs, Croats, Macedonians, and Bosnians are not recognized as minorities due to Slovenian approach of non recognition of so-called allochthonous minorities. In other states, Former Yugoslav Republics, minority status of the ‘new’ minorities have been, more or less, protected by laws, but the implementation has been differently realized. All in all, those who belong to any minority could no feel equal and secure, especially during the first years of dissolution of former federation, when the armed conflicts took significant Rule of Law in everyone’s’ lives.

Having in mind previous experiences, as well as good example of some of the states\(^3\), it is to state that full minority rights protection is the best way for long-term peace and stability everywhere, and especially in the region of turbulent inter/multiculturalism.

\(^1\) Such as living together in the frame of peaceful coexistence of different constitutive Yugoslav peoples and nationalities in Former SFRY.

\(^2\) In order to differentiate minorities that existed in former Yugoslavia and that were nationals of neighboring states, such as Hungarians, Italians, Albanians, from minorities that became so due to Yugoslavia dissolution the concept of ‘new’ minorities is used for the people belonging to constitutive nations of the former Yugoslav republics, such as Croats, Macedonians, Slovenians, Montenegrins, Bosnians, Serbians.

\(^3\) Montenegro is a good example of peaceful coexistence of diversity, as only state in the Western Balkans which did not have any armed conflict after the Second World War, also resisting to external challenges during last century.
Multiculturalism defines human rights protection and mechanism of ensuring the Rule of Law in two directions: respect for diversity and minority rights protection. As a precondition for realization of the concept of Rule of Law in multicultural societies, it is crucially important to provide for the participation of minorities in decision making process, at all levels of governance.

The concept of Rule of Law is the commitment of all Balkan states, as one of the main principles of Council of Europe and European Union. It is a part of all preambles of constitutions (materiae constitutionis) of the states concerned. In some states it is confirmed by stipulation in separate article of the constitution.

2. Principle of the Rule of Law in Multicultural Balkans

The implementation of the Rule of Law is inseparable from the respect for human rights. Actually, that is a prerequisite of their full realization. As primarily a political principle, but also a general social value, the Rule of Law in the European Union has a status of supreme value and principle that all others are subordinated to. Also, as a key principle of the international legal order of this supranational organization, all the aspects of EU political activities are subordinated to the Rule of Law.

However, in some respects, the idea of Rule of Law may arise as a problem in the European Union, especially when we consider its impact on different levels and relationships, the relationship of the individual and the state, through interstates relationship, and relationship of the latter and the European Union, where the particular topical issue is the respect for international law, including human rights.

As the principle which means supremacy of law over powers, force, interests, entities, as well as (powerful) individuals, and which guarantees that

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4 Article 1, par. 2 of 2007 Constitution (Official Gazette of Montenegro, No 01/07): “Montenegro is a civil, democratic, ecological and the state of social justice, based on the Rule of Law”. Available at: http://www.unher.org/refworld/type,LEGISLATION,,MNE,47e11b0c2,0.html.
all persons, institutions and entities are accountable to laws, the Rule of Law is especially challenged in the states of high level of corruption.

The measures to ensure adherence to the principles of supremacy of the laws and equality before the law and in human rights were given in the UN Approach to Rule of Law assistance, from 14.04.2008.

The Rule of Law is also a basic constitutional value of all modern democracies, on which are based functioning of the legislative, executive and judicial power in the modern states of the European Union and those aspiring to become its members. It encompasses many principles of modern democracy, such as the principle of legality, the principle of proportionality, the principle method based on the law, the principle of subsidiarity.

Furthermore, respect for the Rule of Law in the European Union implies devotion to objectives and principles of the United Nations, as well as direct application of international agreements where appropriate. According to Etinski, “request of the Union for the Rule of Law includes, also, the demand for respect of international customary law within the Community law”, which confirms the practice of the Court of Justice of the European Union.

Rule of Law is a standard of EU, but also a precondition for its membership. In that regard, the Rule of Law is a value that requires an uncompromising submission to the constitution and law, and international law. In the spirit of the requirements of the European Union, it means finding ways for the constitutional states’ traditions of the Western Balkans to adjust to this concept. Also, the implementation of the Rule of Law into practice requires the engagement of legal mechanisms to ensure the respect through sanctioning.

European Union does not define the Rule of Law, nor in treaties, nor in jurisprudence of the Court of Justice of the European Union. However,

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6 UN Secretary-General (UNSG), Guidance Note of the Secretary-General: United Nations Approach to Rule of Law Assistance, 14 April 2008. Accessible at: http://www.unhcr.org/refworld/docid/4a54bbf64.html [29.05. 2012.].
8 Ibid, p. 684.
the Court confirms the rule of European Law, providing the uniform application in all member states through its ruling.

Also, even within the United Nations there is no universally accepted definition of the binding principles. However, UN Secretary-General Ban Ki Moon, has brought above mentioned Guidance on the UN Approach to the Rule of Law, bearing in mind that the United Nations in the past decade has been particularly involved in providing support for strengthening the Rule of Law. According to him, the Rule of Law is the principle of the rules in which all individuals, institutions and entities, public or private, including the state itself, accountable to laws that are publicly promulgated, equally applied and which are independently judged, and that are consistent with norms and standards of international human rights law. This principle requires measures to ensure adherence to the principle of supremacy of law, equality before the law, liability for breach of law, fairness in application of law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and substantive legal transparency.

Bearing in mind that the standards and norms of the UN are applied within the EU and the Council of Europe, the definition of the Rule of Law can be considered valid and legal space of Europe.

Applying the Rule of Law, as a key principle of EU legal order, but also as a political principle of the good governance, carries many challenges. They can be viewed through three different groups of EU policies, within its law and institutions, as well as in the enlargement policy and foreign policy.

In connection with EU enlargement policy, previously mentioned elements of the Rule of Law from the Guidelines of Ban Ki Moon were specially emphasized. The European Council Conclusions of 29 April 1997,

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10 UN Secretary-General (UNSG), Op. cit.
11 Ibid.
established the requirements of Rule of Law for the Western Balkans, as a part of official policy of the EU towards the region with the aim of establishing and implementing the principle in practice. This document, in fact, has the meaning which the conclusions of Copenhagen in 1993 have for the Central and Eastern European states. Conclusions of the European Council emphasized some additional requirements that the Union has set for Western Balkan countries, such as separation of powers, supremacy of law, especially the subordination of government and state institutions to the constitution and laws, review of administrative decisions, free access to courts and fair trial, equality before the law and equal protection by the law, freedom from inhuman and degrading treatment and arbitrary arrest.

In regard to these criteria the EU assesses whether and to what extent the conditions for membership have been fulfilled. Opinion of the European Commission on the accession of Montenegro into the EU\(^{15}\) contains, as one of the seven key priorities that Montenegro needs to realize in order to open accession negotiations, states a request that it should “strengthen the Rule of Law, particularly the de-politicized and merit-based appointment of members High Judicial and Prosecutorial Council and State Prosecutors, as well as through the implementation of independence, autonomy, efficiency and accountability of judges and prosecutors”.

The implementation of the Rule of Law in all areas of life refers different measures. For example, having in mind the fact that “corruption and organized crime threaten the Rule of Law” and represent “a serious threat to the basic principles and values of the Council of Europe”, the Committee of Ministers adopted a Resolution on the Twenty Guiding Principles for the Fight against Corruption\(^{16}\). This emphasizes the limitations of immunity from investigation, prosecution and conviction for corruption offenses to the “extent necessary in a democratic society”\(^{17}\).


\(^{16}\) Council of Europe, Committee of Ministers, REZ (97) 24.

\(^{17}\) Ibid.
In order to strengthen the Rule of Law, special emphasis is given to the process of transitional justice and its implementation\(^{18}\). Also, this is a particularly important part in the process of reconciliation in areas where the armed conflicts happened and crimes were committed.

Additional criteria for the implementation of the Rule of Law in the Western Balkan countries are also related to the provision of participation of persons belonging to minorities and minorities as a collective in the process of making the social decisions, at all levels of decision making process and concerning both types of decisions - those important for the whole community of the state, and those concerning the right of minority communities. Minorities’ participation in that process is crucial not only concerning the area of their special interests, such as national identity, but also in areas of general issues which are important for the society and state as a whole.

Respect of minority rights is reflection of modern democratic societies, particularly multicultural one, as all the countries of the region. In this regard, these additional requirements are set as preconditions for states accession to the EU.

Bearing in mind the recent developments in the European system of protection of human rights, particularly in the period after the entry into force of the Treaty of Lisbon, one can rightly say that Europe is integrating the protection of human rights. This conclusion survives, despite numerous challenges and differences between countries that often appear as obstacles in reaching a consensus, as reflected in the negotiating process of the EU accession to the European Convention on Human Rights, in which some states set aside their opinions on essential issues. Approaching between the European Union and the Council of Europe, particularly through the process of EU accession to the Convention and strengthening the Rule of Law of the European Court of Human Rights, supports the previous statement\(^{19}\).

\(^{18}\) UN Secretary-General (UNSG): Op. cit.

\(^{19}\) Jelić I.: Novine u politici zaštite ljudskih prava u Evropi: pristupanje Evropske unije Evropskoj konvenciji o ljudskim pravima, Montenegrin Journal of Political Science CIVIS, vol 1, no. 1,
Finally, speaking of Rule of Law and human rights in the Western Balkans, the importance of the Charter on Fundamental Rights of the European Union\textsuperscript{20} cannot be skipped. The Rule of Law is mentioned in Preamble as well as a need for the respect for diversity. In addition, its Article 22 stipulates that the Union shall respect cultural, religious and linguistic diversity. The importance of the provision is greater after Lisbon Treaty, as the Charter became imperative legal act of the European Union, and consequently the part of acquis that candidate states have to fulfill.

3. **Human and Minority Rights Protection in the Western Balkans**

Human rights are often politically determined issue, which is controversial to their nature of inherent and natural rights. In the states in transition, some rights such as right to information, or prohibition of discrimination are often infringed. More the state is closer to modern real democratic order, the violation of human rights are less frequent and more directed to individual than to the collective.

In multicultural states, especially those which suffered from interethnic tenses, human rights protection is mainly focused to minority protection.

Social determinants in the frame of birth of new states during late 90s of the twentieth century in the Balkans, causing appearance of new minorities in the area of former socialist federation, have shown that new legal framework was indispensably needed for the region of South East Europe.

All states of the Western Balkans have ratified or acceded, due to succession rules, the most important international instruments of human and minority rights protection. All below analyzed instruments actually are binding for all of them.

Concerning minority rights protection, several legal dilemmas are imposed in the ear of the United Nations. First of all, due to the controversial

\textsuperscript{20} Official Journal of the European Union, no. C 83/389, dd. 30.03.2010.
nature of legal protection, it has been doubtful should minorities be protected through individual approach (as members of the minority group, i.e. persons belonging to minorities) or through collective approach (protection of the group). All legal instruments stipulate minority protection in regard to individual rights of persons belonging to minorities. Some soft law documents, especially of OSCE, which were adopted after or during the armed conflicts in the Balkans introduce protection of collective rights, such a participation in public affairs and decision making process. The combination of two approaches is the best model for full protection of minorities in the region.

Dilemma concerning sufficient universally accepted legal framework for minority rights protection has been solved in the manner of negative answer. Namely, it is very modest due to the fact that there is only one legal binding provision dealing with international protection of minorities, and which is very general - Article 27 ICCPR\(^21\). In addition, General Assembly of the United Nations adopted a Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities in form of resolution in 1992. But, the problem with its implementation is that this instrument is legally non-binding.

Another legal dilemma is connected to the definition of a minority. Still there is no universally accepted legal definition, but the most useful and widely accepted is the one that Professor Francesco Capotorti proposed in the Rule of Law of the Special Rapporteur for the UN Sub-Commission for Antidiscrimination and Minority Rights\(^22\).

Concerning European system of Minority Rights Protection, it is well known that it is best organized legal system at international level, although it is

\(^{21}\) The article reads: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”

\(^{22}\) Professor Capotorti, has proposed the following definition of minority for the purposes of Article 27: ‘A group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members - being nationals of the state - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language’.
still to be developed and improved. Anyhow, Europe as a crib of national states and protection of national minorities developed a notion of nation, minority and its legal protection in the frame of Framework Convention for the Protection of National Minorities, adopted by the Council of Europe in 1995\textsuperscript{23}. It is a legal instrument, one of obligatory character, which gives comprehensive protection, but allows great level of regulation to the states. Another legal instrument is the European Charter for Regional or Minority Languages, adopted by the Council of Europe in 1992\textsuperscript{24}. The European concept has been accepted as international one as it is only one of its kind.

Speaking about minority rights protection, the main weakness in today’s international system is the omission of a collective approach – the protection of the rights of groups. Namely, some of the collective or group rights of minority peoples – mainly cultural (religion, the use of language, and some aspects of education), but also political rights regarding representation (in parliament, government, self-government, and policy making) – should be recognized to minorities in order to fully protect their specific rights.

OSCE’s activities in strengthening the Rule of Law, democracy and human rights protection are mainly concentrated to security and cooperation issues, in accordance with its mandate. In the field of minority rights protection and promotion and management in diversity respect very important Rule of Law belongs to the High Commissioner for National Minority. The Commissioner’s recommendations concerning particular rights (education, usage of language, etc) are focused in fact to improving the status of minorities, preserving their identity, integration and participation. OSCE work concerned is stressed on conferences emphasizing the ‘human dimension’, as well as the work of its High Commissioner on National Minorities who is empowered to conduct on-site missions and engage in preventive diplomacy at the earliest stage of tension, as operating independently of all parties involved. The most

\textsuperscript{23} The Convention got into force 1998. Out of 47 members of Council of Europe, 39 states have ratified it till nowadays (15\textsuperscript{th} June 2012).

\textsuperscript{24} The Charter got into force 1998. Only 25 states, out of 47 members of Council of Europe, have ratified it till nowadays (15\textsuperscript{th} June 2012).
important recommendations of the Commissioner’s office were inspired by the Western Balkans situation. They are the following: Hague Recommendations – Recommendations on the education rights of national minorities (adopted 1 October 1996), Oslo Recommendations – Recommendations regarding the linguistic rights of national minorities (1 February 1998), Lund Recommendations – Recommendations on effective participation of national minorities in public life (1 September 1999).

Although the nature of these recommendations is rather ‘soft law’ than pure legal, for the Western Balkans they have a Rule of Law of binding acts. In fact, their substance is still on the accession to the EU agenda of many Balkan states.

EU has not brought the legal frame of specific minority rights protection, but it pursues measures of political, functional/financial and foreign policy character. South East Europe or now Western Balkans states are conditioned that they can join EU, if they respect human rights and especially minority rights, as this issue has special importance for the regional stability and security.

Cooperation within the region of the Balkans is the way towards wider integrations. Juncture of the Balkan and European determinants is the very point in which we should search for the possibility of creating sub-regional system, which would gratify states of the region and enable them to dedicate themselves to their huge internal problems.

Stability in the region is conditio sine qua non for European/international peace and stability. Apart of above mentioned international legal protection, regional minority rights protection in South East Europe is enhanced by so called soft law, which encompasses mainly OSCE and EU activities and documents. Ensuring of respect for minority rights is indispensable element for long-lasting peace and stability in the region.

In last several years, and in order to improve human rights protection in Europe, several legal and political steps have been taken during the last two

years. They followed Lisbon Treaty’s entry into force, which paved trail for linking the human rights protection within the Council of Europe and the EU. The most important legal novelty is Protocol No. 14 entering into force, which implies change of the procedure before the European Court for Human Rights. The novelty in the human rights protection was marked by the EU accession to the Convention\textsuperscript{26}, which is a step towards the concentration of human rights protection at the Court in Strasbourg.

For the states of Western Balkans above mentioned novelties at the European level are important from the members of the Council of Europe point of view\textsuperscript{27}.

Respect and protection of cultural identity deserves a regional approach in the Western Balkans. As stipulated in the Article 6 of the Framework Convention on National Minorities, it is important to build a “spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons’ ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media”. Consequently, the states are obliged to encourage this approach.

In multicultural Montenegro, which as well as other Balkan states has passed the transition from real socialism towards modern democracy, human rights protection in the first period was mainly concentrated on the anti-discriminatory and minority rights approach, in the first phase more in the domestic legislation and multicultural policy direction, than at the courts’ practice. Montenegro accepted all relevant international legal instruments concerning human rights protection. According to the Article 9 of Montenegrin Constitu-

\textsuperscript{26} Despite the fact that it is about real progress in international human rights protection, still the fate of the Accession Agreement of EU remains uncertain having in mind present distribution of political powers and non-EU states’ fear from imposing supremacy of the EU over other High Contracting Parties.

\textsuperscript{27} All the states are members of the Council of Europe. Croatia has become a new member-state of the EU decided by the European Council in 2011. Montenegro has opened negotiations with the EU on 29\textsuperscript{th} June 2012 by the decision of the European Council.
tion, they are a part of its legal order and in case of collision with domestic laws, international standards have priority28.

The legal guarantees for full protection of minorities, according to international law as well as domestic legal orders of the concerned states, are the following: prohibition of discrimination, prohibition of (forced) assimilation, providing the affirmative action measures i.e. positive discrimination as previously common name for preferential status given to those groups that were historically discriminated, as well as the integration into society.

Full protection of minority rights would contribute to the human security, especially of those persons belonging to minorities who have felt insecure for years due to their status.

Human security is universal value, which is also an objective by itself. In order to provide each human being to be safe and free it is not enough, in certain situations, and under certain circumstances, to guarantee or proscribe by laws the human rights that are recognized as natural rights belonging to each human being, those rights immanent to human specific nature and dignity. Human security, however, is to be reached by full respect of related international legal instruments, as well as domestic law which is to be harmonized with international legal order concerning human rights, because they are above state or national framework, and they became internationalized category. But more than that, there should be better enforcement of domestic laws. Here, there is the root for the most of problems concerning the Balkans. All states of this region have good laws, mostly harmonized with EU standards and all of them have accepted universal and regional legal instruments concerned. But, implementation of such obligations that states had undertaken is still weak point of Western Balkans. It is best visible concerning corruption, organized criminal and minority rights protection.

28 Art. 9 of the Constitution of Montenegro reads: “The ratified and published international agreements and generally accepted rules of international law shall make an integral part of the internal legal order, shall have the supremacy over the national legislation and shall be directly applicable when they regulate the relations differently from the internal legislation.”
In addition, there is also a kind of unequal security problem concerning the position and enjoyment of rights of those who are different from majority, no matter if it is about national, religious, linguistic or ethnic minority groups, sexual or homosexual or vulnerable ones. The main goal of stable state should be to have safe and free citizens, no matter of their nationality or any other background. The Balkans as historically proven unstable area indispensably needs to build a framework of full protection of all human beings, especially those who were historically discriminated or neglected from the standpoint of enjoyment of their civil and political rights, I the first line.

4. Conclusion

Human rights protection, democracy and Rule of Law are common values of the Council of Europe, European Union and OSCE, as well as common goals of all multicultural states of Western Balkans on their European path.

Gap between legislation and implementation of legal guarantees in practice is still present in the Western Balkans, though at lower level than it was before. Legal infrastructure, both on national and international level, is just the first step and a precondition for reaching full human rights protection and human security in multicultural contemporary world. Respect of legal provisions with good interpretation of laws, according to international standards should be strengthened in the region. Full enforcement of domestic laws is highly needed.

Leading concept in minority rights protection, which influences most of aspects of the Rule of Law in multicultural states, is the concept of integration without (forced) assimilation.

As we have seen on previous pages, the new requirements for realization of the Rule of Law principle in practice are designed for the purpose of states which still need assistance from the international community to build democracy and long-lasting stability. Human rights protection is one of the goals, but also one of mechanisms to provide Rule of Law and democracy, as being interconnected. Consequently, human security of all human beings, without differentiation based on their origin, nationality, religion or so, would be reached.
RULE OF LAW AND PROTECTION OF MINORITIES – A CONTRADICTION?

According to Chesterman the Rule of Law is characterized by three elements. The first one is the prohibition of the arbitrarily exercise of the power by the state. However, this does not require that state power be exercised for any particular purpose. The laws must be prospective, accessible, and clear. Secondly, the law applies to the sovereign and instruments of the state, with an independent institution such as a judiciary. Thirdly, the law must apply to all persons equally, offering equal protection without prejudicial discrimination.1 Concerning minority protection there is the requirement of utmost importance, that people in positions of authority should exercise their power within a constraining framework of public norms.2 This presumes the authority in power knows which norms are applicable concerning minorities.

1. European instruments of minority protection

After the end of the cold war Europe got some instruments of minority protection. The Conference on security and Cooperation in Europe (CSCE) acted as a kind of icebreaker with its Copenhagen Document of 1990 and the Charter of Paris. After these initiatives of the CSCE the Council of Europe

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(CoE) was also ready to deal with the issue of minorities. This Article deals in the first line with the CoE’s Framework Convention on the Protection of National Minorities (FCNM) of 2005.

If one applies that description by Chesterman on the issue of minority rights it becomes obvious that the law is prospective, accessible and clear. Article 3 (1) of the Framework Convention determines that every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights which are connected to that choice. During the codification of that most experts recognised that certain objective elements could be identified when determining whether a person belongs to a national minority. At the same time, it was felt that no attempt should be made to define those objective elements. However, there was no consent on the definition of the term minority as well as the question whether they were talking about individual or collective rights.

2. **Question: the holder of the right**

The first drafts of a European Convention on the Protection of Minorities, the predecessor of the FCNM, considered minority rights as collective rights. The switch from a collective formulation to an individual one already took place later during the elaboration in the Steering Committee for Human Rights (CDDH). An individualistic formulation was later adopted by the Parliamentarian Assembly in its Recommendation 1201 (Bonoit-Rohmer, 1996, p. 36). Support for such an approach can be found in the CSCE’s Copenhagen

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4 http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=157&CM=1&DF=13/06/2012&CL=ENG.

Declaration which declares that to belong to a national minority is a matter of individual choice and no disadvantage may arise from the exercise of such choice.

Other international instruments contain similar provisions. For example, the CSCE Copenhagen Document determines that “belonging to a national minority” is a matter of a person’s individual choice and no disadvantage may arise from the exercise of such choice. It further adds that no disadvantage may arise for a person belonging to a national minority on account of the exercise or non-exercise of such rights. Concerning the different ways in which individuals are identified as being members of a particular racial or ethnic group the Committee on the Elimination of Racial Discrimination (CERD) comments that such identification shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned. The Convention on the Elimination of Racial Discrimination is one of the most relevant Treaties for minority protection because the approach is a very broad definition of the beneficiaries of the prohibition of racial discrimination and places groups as well as individual under its protection. The UN-Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities demands that no disadvantage shall result for any person belonging to a minority as a consequence of the exercise or non-exercise of the rights set forth in the present Declaration. The interpretation of this obligation by the Working Group on Minorities of the Sub-Commission on the Promotion and Protection of Human Rights finds that this provision is directed both towards the state and the bodies representing the minority group. State cannot impose a particular ethnic identity on a given person by the use of negative sanctions against those who do not wish to be part of that group; nor can persons belonging to minorities

be subject to any disadvantage. Persons who on objective criteria, may be held to form part of their group but who, subjectively, do not want to belong to it. While, under Conventional Law, responsibility for human rights compliance normally rests with the state, the Declaration in this respect implies duties - at least morally - for persons representing minorities. Furthermore, the states are obliged to prohibit minorities from taking measures imposing their particular rules on persons who do not wish to be part of the minority concerned and, therefore, do not wish to exercise their rights.

The individualist approach is the universal recognized dealing with minority rights. This is surprising against the background of the aim of minority rights which is the protection of the minority groups as such, the preservation of their cultural existence and their identity. The idea is to stand against the pressure from the dominant society to assimilate. Group rights, however, are a conceptual challenge because they empower a group. Group’s empowerment may lead to human rights violations because the groups can put pressure on the members. Therefore argue some scholars that group protective and individual human rights seem to be irreconcilable. Consequently the international community decided after World War II to codify minority rights as individual rights of the members of minority groups. In contrast to minority protection the right to self-determination of peoples is a group rights, which lacks also clarity as Saul underlines: “the doctrinal debates, on the meaning of ‘peoples’ and the contents of the right that ‘peoples’ enjoy, have no end in sight”. A special status have the instruments relating to the protection of Indigenous Peoples which not only require persons to identify themselves as indigenous or tribal, but also demand that those persons meet other criteria like their descent from the population which inhabited the country or a part of it, at the time of the conquest, colonization or establishment of present state boundaries and who, irrespective

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of their legal status, retain some or all of their own social, economic, cultural and political institutions.\footnote{Marquardt, Stephan, "International Law and Indigenous Peoples”, in: International Journal on Group Rights 3 (1995), p. 66.}

In conclusion one can argue that the holder of minority rights is the person belonging to the minority. It’s not the minority group as such. Therefore the regulation meets the requirements of the Rule of Law: it is prospective, accessible and clear.

3. \textbf{Question of the definition of the minority}

The instruments on the universal or on the regional European level do not provide any definition of minorities. Hofmann assesses that this is accepted by all concerned, in particular by the states and minorities themselves.\footnote{Hofmann, Rainer, “Minorities, European Protection”, in: Max Planck Encyclopedia of Public International Law, accessed June 9, 2012, http://www.mpepil.com.} This raises the question what is the point of international documents, the subject of which is not defined? Klebes is right to regret that no agreement on definition could be reached yet. He argues, however, that the shortcoming is less serious than it may appear at first sight and goes on, that the object and purpose of the documents contain constitutive elements of a definition.\footnote{Klebes, Heinrich, “The Council of Europe’s Framework Convention for the Protection of National Minorities”, Human Rights Law Journal 16 (1995), p. 93.} Furthermore the control mechanisms on the basis of state reports can contribute to circumscribing the concept of a minority. Against this background one can believe that the practice of international treaty bodies demonstrates the irrelevance of detailed definitions. As things stand, the practice is not that convincing because there is always a moment of arbitrariness involved. Concerning the implementation of Article 27 ICCPR the Human Rights Committee has held in the case law that it applies not only to persons belonging to ethnic, religious or linguistic minorities but also to indigenous peoples in Canada, Scandinavia and New Zealand. Persons belonging to indigenous peoples may be understood as belonging to an
ethnic, religious or linguistic minority for the purposes of enjoying the rights mentioned in Article 27.

The Advisory Committee of the FCNM has followed the same approach as the Human Rights Committee. It has underlined that in the absence of a definition in the FCNM itself, the parties must determine the personal scope of application. This means in the opinion of the Advisory Committee on the one hand, that parties are granted a certain margin of appreciation taking into account the specific circumstances prevailing in their country. On the other hand this must be exercised in accordance with the general principles of International Law and fundamental principles as set out in Article 3. In particular, the Advisory Committee stresses that the implementation of the FCNM should not be a source of arbitrary or unjustified distinctions. This understanding of the State parties’ obligations follows the line of some demands of scholars: “States should … not be able, by way of unilateral declarations or reservations which seem to go against the very object and purpose of the exercise, to withhold protection by denying the existence of a minority…”\textsuperscript{14}

For this reason, the Advisory Committee considers as part of its duty to examine whether the personal scope adopted by the state parties regarding the implementation of the FCNM does not lead to arbitrary or unjustified distinctions. Furthermore, it considers that it must verify the proper application of the fundamental principles set out in Article 3.

Austria, Belgium, Denmark, Estonia, Germany, Luxembourg, Poland, Slovenia, Switzerland and Macedonia explicitly declared in their instruments of ratification that the FCNM contains no definition of the notion of national minorities. As a consequence they argue that it is up to the individual contracting parties to determine the groups to which it shall apply after ratification. This means it is up to national legislation to define who belongs to a national minority and who is protected by the FCNM, thereby leaving the authority to define

the terms in the hands of the individual states. This provides obvious opportunities for the state parties to include groups which do not fall in the “traditional” understanding of the term “national minorities”. In Switzerland, e.g., it appears from this definition that the FCNM can be applied not only to national linguistic minorities, but also to other minority groups of the Swiss population, such as members of the Jewish community and travellers. This demonstrates the irrelevance of labels for the protection of persons belonging to minority groups in need of protection. One can consider this as enlargement of the scope which is strongly welcomed.

Thus, the Advisory Committee welcomed “the inclusive approach” of the United Kingdom in its interpretation of the term “national minority”. The scope of the FCNM in the UK is based on the broad “conventional” definition of “racial group” as set out in the Race Relations Act (1976). Under this Act “racial group” is defined as “a group of persons defined by colour, race, nationality (including citizenship) or ethnic or national origin”. This includes the ethnic and found it to include the Scots, Irish and Welsh by virtue of their national origin. On case by case basis the courts have also included Roma / Gypsies as well as Irish Travellers [also defined as a racial group for the purposes of the Race Relations (Northern Ireland) Order (1997)], Sikhs and Jews. However, such an inclusive approach of the UK may raise issues of inequalities between groups, because Jews and Sikhs are included, while Muslims and other religious groups are not. It seems that even in the UK the lack of definition opens room for (arbitrarily) exclusion of certain minorities from the scope of application of the FCNM.

Therefore, the issue of the validity of such declarations needs to be raised in the light of international treaty law. Without a doubt, general state practice is rather confusing, for reactions and objections against reservations (or declarations) are submitted in uncoordinated ways and are further lacking any consistent follow-up.15 Indeterminacy also persists up to the authority al-

lowing determining the validity of a reservation. Faced with this uncertainty, scholars argued that regarding human rights treaties, it is the rule that the respective treaty bodies have the power to decide on the validity of reservations, which means that, in this case it is the Advisory Committee that rules on the validity of such reservations.16

Practice shows that the Advisory Committee did not automatically rubber-stamp the declarations/reservations made by the state parties. The Committee examined the declarations/reservations “inter alia in order to ensure that they are in line with the general principles of International Law and that they are not discriminatory”.17 In case the Advisory Committee has found that another approach which does not rush into declaring that a particular community should be considered as a national minority. Instead it has urged the state parties to discuss this question with the concerned groups. According to Frowein/Blank ten state parties to the FCNM had added declarations concerning the scope of the convention to their instruments of ratification. These declarations may be divided into three groups.18

The first type defines a national minority by using abstract criteria found in national law. E.g. Austria interprets the term according to national legislation. Estonia, Luxembourg, Latvia and Switzerland use specific abstract criteria to identify national minorities, among other criteria these are: (i) numerical inferiority to the rest of the population (Switzerland); (ii) members must be resident of the country (Estonia, Luxembourg, Austria, Poland, Latvia); (iii) members must have longstanding, firm and lasting ties with the state (Estonia, Luxembourg, Austria); (iv) citizenship (Estonia, Luxembourg, Poland, Latvia); (v) distinct ethnic, cultural, religious or linguistic identity (Estonia, Luxem-

bourg, Austria, Latvia); and (vi) motivation to maintain the common culture (Estonia, Latvia).

The second type clearly identifies those national minorities which fall into the scope of the FCNM. States having adopted this approach are Denmark, Germany, Macedonia, Slovenia, Sweden and the Netherlands. Some state parties offer detailed criteria for the identification of those minorities which are protected, e.g. Sweden:

- Self-identification. The individual and also the group should have a desire and ambition to retain their identity. Groups with a pronounced affinity who, as regards numbers in relation to the remainder of the population, have a non-dominating position in society. The determination of the group cannot only be made according to the numeric number of persons within the group but importance must be attached here to the structure and unity of the group;

- Religious, linguistic, traditional and/or cultural belonging. Only one of the listed characteristic features needs to exist, but those characteristic features that the group demonstrates must in some essential respect distinguish it from the majority;

- Historical or long bonds with Sweden. The Government does not consider that it is possible to draw an absolute limit measured in years. Minority groups whose minority culture existed in Sweden prior to the 20th century may be said to satisfy the requirement for an historic or long bond.

Some of the declarations of state parties belonging to this type include also certain groups which, in their opinion, do not constitute national minorities, i.e. Germany declares the application with regard to Frisians as well as to Sinti and Roma, and Slovenia with regard to Roma. Sweden applies the convention to Sami, Swedish Finns, Tornedalers, Roma and Jews. Finland made no declaration upon ratification at all, but, informed the Advisory Committee in its report that in the Government Bill for the acceptance of the provisions of
the FCNM minorities were considered as follows: “[...] at least the Sami, the Roma, the Jews, the Tatars and the so-called Old Russians and de facto also the Swedish-speaking Finns.” According to the Finnish report there are, in addition, other minority groups, like the various immigrant groups, of which the largest ones are the Russians, Estonians and Somalis, which do not fall in the scope of the FCNM.

The third type of declaration simply state, that there are no national minorities in the territory of a state party (Liechtenstein, Malta and San Marino). Interesting is the explanation of Liechtenstein for its membership in the FCNM. Liechtenstein considers its ratification of the FCNM as an act of solidarity correspondent with the intentions of the objectives of the Convention. The Advisory Committee, however, expects some information on other groups that the Government does not consider, at this stage, to be covered by the Convention. Malta and San Marino submitted no comprehensive information at all. In the absence of such information and given the limited information obtained from other sources, the Advisory Committee is not in a position to assess the statement of the Maltese and San Marinon authorities. Other state parties, e.g. Ireland, argued that there is due to the relatively homogenous population no need for any minority legislation. However, there are many cases in which the Advisory Committee is of the opinion that it would be possible to consider the inclusion of persons belonging to groups which are not recognized as minorities, as such, e.g. non-citizens as appropriate, in the application of the FCNM on an article-by-article basis and recommends that the authorities should consider this issue in consultation with those concerned at some appropriate time in the future.

This approach of defining the scope of beneficiaries by formal declarations was accepted by all state parties baring one exception. The Russian Federation explicitly rejected the right of state parties to define national minorities: “the Russian Federation considers that none is entitled to include unilaterally in reservations or declarations, made while signing or ratifying the Framework Convention for the Protection of National Minorities, a definition of the term “national minority”, which is not contained in the Framework Convention. In
the opinion of the Russian Federation, attempts to exclude from the scope of the Framework Convention the persons who permanently reside in the territory Convention and previously had a citizenship but have been arbitrarily deprived of it, contradict the purpose of the Framework Convention for the Protection of National Minorities”.

The Advisory Committee did not react to that statement, but it is obvious, without expressly saying, that the Russian declaration was aimed at the situation of the Russian minority in Estonia. However, one may say that there was an indirect reaction by the Advisory Committee. In its general remarks on Estonia the Committee argued that further efforts are needed in order to make naturalisation more accessible, bearing in mind the high number of stateless persons and the fact that the lack of citizenship had often a detrimental impact on the enjoyment of full and effective equality.

Confronted with the Russian declaration and the subsequent practice of the Advisory Committee, the legal status of the abovementioned declarations remains questionable. It seems clear that, according to general international treaty law, the state parties are allowed to interpret their obligations under the FCNM. This right cannot be generally excluded. Therefore the Russian declaration, which unilaterally rejects the right of state parties to define the term national minority, cannot be imposed on other state parties. Still, the exclusion of certain minority groups from the scope of application of the FCNM by declarations has to be considered as a reservation contrary to the purpose of the convention.

4. **Case Study: Denmark**

State practice has confirmed that the definition of the FCNM’s scope by each member state provides obvious opportunities for arbitrarily restrictions. An example is the case of Denmark. This state declared that the FCNM shall apply only to the German minority in South Jutland. This may be seen as a

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19 CoE Doc. ACFC/SR (99) 15
limitation of the application and a reservation. However, the legal qualification of a restrictive interpretation of the term national minority pertains to a legal grey area. Therefore the reaction of the Advisory Committee deserves some interest. The Committee has argued that “the personal scope of application of the Framework Convention in Denmark, limited to the German minority in Southern Jutland has not been satisfactorily addressed.” It noted, in particular, that persons belonging to other groups with long historic ties to Denmark such as Faroese and Greenlanders seem to have been excluded a priori from protection under the Framework Convention. The same applies to Roma, despite their historic presence in Denmark. The Committee considered this approach to be incompatible with the FCNM and argued that a limited territorial application, leading to the a priori exclusion of certain groups, is not in conformity with the Framework Convention.

In the light of these considerations the Advisory Committee recommended that Denmark should, in consultation with those concerned, examine the scope of application of the Framework Convention. This comment of the Advisory Committee was rejected by the Danish Government, arguing that Denmark’s ratification of the Convention was based on the view that neither the FCNM nor any other international instruments in the field of minorities contain a definition of the notion of national minority, thus leaving it to the participating states to determine the content of the notion through actual practice. Denmark further contends, that in order to define the term “national minority” one needs to apply general rules of treaty interpretation. Both the history and the aim of the FCNM needed to be taken into account. According to the preamble of the Convention, the Convention is essential because the upheavals of European history have shown that the protection of national minorities is crucial to maintain stability in Europe. Moreover, several parts of the Convention assert that the implementation of the principles of the Convention implies to cross-border cooperation between local and regional authorities, which means that the Convention contain certain territorial limitations. In the final section of its comments, the Committee of Ministers draws the conclusion that the personal scope of application of the FCNM merits further consideration by the
Government of Denmark with those concerned. Legal scholars often argue that such a geographical limitation plainly violates the object and purpose of the FCNM since the goal of the protection of the identity of a person belonging to a national minority cannot solely be limited to those persons living in the traditional area.

Another conceptual question is whether indigenous peoples fall into the scope of the FCNM. The Advisory Committee dealt with this issue in connection with the Norwegian report. Norway offers to the Sami protection without using the term national minority, arguing that this approach reflects the applicability of the FCNM to indigenous peoples. Norway also takes into account the views expressed by the Sami Parliament with respect to the applicability of the Norwegian policy for national minorities to the persons belonging to this indigenous people. From the viewpoint of legal theory one has nevertheless to argue that indigenous peoples can at times constitute minorities and therefore fall within the scope of the FCNM. However, they are still a distinct category due to their relative economic and social underdevelopment and their right, to follow their own customs and traditions at least to some extent. There is furthermore an obligation to respect their sustained historical continuity with the land that pre-dates the arrival of the dominant population of the state party to the FCNM.

Undoubtedly the rights of indigenous peoples are not properly addressed in the FCNM. The main instrument at the global level relating to indigenous peoples is the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries. It should, therefore, be welcome that the Norwegian report speaks about “national minorities and indigenous populations”. This approach is reflects the will of the indigenous peoples who consider themselves as more than minorities. Norway chose not to make a declaration of the personal scope of the FCNM, partly because such a declaration could be regarded as a limitation of the scope of the convention, another reason was that it might give rise to unintended reactions among persons belonging to the groups in question. During the preparations for the ratification, the Norwegian Sami Parliament clearly stated that the Sami did not wish to be included in such
a declaration, since they prefer to maintain their status as an indigenous people and protect the strengthened legal status that has been achieved for indigenous peoples through the ILO Convention No. 169. However, the Advisory Committee argues that the protection of the FCNM remains available to the Sami should persons belonging to this indigenous people wish to rely on the protection provided therein, in order to ensure that the treaties designed for indigenous peoples are not construed as mutually exclusive regimes. Similar problems arose concerning the Crimean Tatars in the Ukraine, whose representatives prefer the term “indigenous people”. The Advisory Committee shares the view, held by the Government and a number of representatives of the Crimean Tatars that the recognition of a group as indigenous people does not exclude these persons belonging to that group that benefits from protection offered by the FCNM.

This practice of the ICCPR proves that the issue of indigenous peoples pushed forward the boundaries of minority rights. Most of the cases, under the optional protocol to the ICCPR on Article 27, like in Lovelace v. Canada, concern indigenous peoples. The viewpoint of Denmark, however, differs. Denmark holds the view that the citizens of Greenland and the Faroe Islands are covered by Article 1 of the Covenant and therefore cannot simultaneously be characterised as minorities under Article 27 of this Covenant. That means that the recognition of a group of persons as constituting an indigenous people or a people excludes the possibility of benefiting at the same time from protection as a “national minority”. The Advisory Committee does not share this view. The fact that a group of persons may be entitled to a different form of protection cannot, by itself, justify their exclusion from other forms of protection.

5. Conclusion

The dispute between Denmark and the Advisory Committee reflects that the lack of a definition of a minority creates serious problems concerning the application of minority protection instruments. The lack of a definition can also be considered as a violation of the Rule of Law because the regulations do not meet the requirement of being prospective, accessible and clear.
Instead there is a moment of an arbitrarily exercise of the power of the state involved. Many double standards are a consequence and this is in contradiction to the Rule of Law. The Advisory Committee has taken the view that the assessment of what constitutes a minority under this instrument cannot be left entirely to the discretion of the states. However, the question is still open who decides which groups form minorities in the FCNM member states. The example of Denmark is not an encouraging experience. After two monitoring cycles the Advisory Committee has argued again in 2011 that the FCNM Convention could apply outside South Jutland and the German minority and called on the authorities to bear this possibility in mind. Therefore the Committee encouraged the authorities to consult the Greenlanders and Faroese to determine whether they would like to benefit from the protection afforded by the Framework Convention and, if necessary, to review their position concerning the instrument’s personal scope of application in relation to the members of these groups. Moreover, the Committee repeated that persons belonging to the Roma community could not a priori be excluded from the scope of the Framework Convention. The lack of a definition leads on the one hand to the consequence that one cannot register any improvement of the legal situation of the Roma or Greenlanders in Denmark at least concerning the application of minority protection instruments. The Danish Government, on the other hand, repeated, that the FCNM only relate to the German minority in South Jutland and do not apply to any wider extent. Against this background minority protection by the FCNM and the Rule of Law are contradictions.

21 Report accessible http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/Table_en.asp.
22 CoE Doc. ACFC/OP/III(2011)002
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1. Introduction - on the Rule of Law and its Importance for New Democracies

Being itself an ancient idea, dating from Greek philosophers Plato and Aristotle as so far as western philosophy is concerned, the Rule of Law is surely one of the most complex, most debated, and at the same time one of the most widely accepted concepts in modern legal thought. Moreover, towards the end of the twentieth century it has almost become a rule that nation-states of East and West, as well as international and supranational organizations, express their support for the Rule of Law\(^1\). Political leaders at all levels champion the Rule of Law\(^2\), be it they do so on all sorts of occasions and to such an extent that in the end the expression may become meaningless\(^3\). Finally, people themselves around the globe declare their adherence to the Rule of Law and desire to live in a society that is governed by and under this principle. Thus one can rightfully

\(^1\) L. Pech suggests that such support has become usual since the end of the Cold War, even though it’s on occasions only rhetorical. See Pech, Laurent. “The Rule of Law as a Constitutional Principle of the European Union”, Jean Monnet Working Paper no. 04/09 (2009): p. 3.


\(^3\) J. Shklar therefore argues that due to ideological abuse of the expression “it may well have become just another of those self-congratulatory rhetorical devices” why in the end “no intellectual effort need to be wasted on this bit of ruling-class chatter”. Shklar, Judith. “Political Theory and the Rule of Law”, in The Rule of Law: Ideal or Ideology, edited by Hutchinson A.C. & Monahan P., Toronto: Carswell, 1987, p. 1.
conclude that there is indeed a global support for the Rule of Law and that it is generally regarded as a positive thing, something that is good to have on your side⁴.

The international community has embraced the ideal of the Rule of Law as a foundation of international order, together with International Law⁵. The principle of the Rule of Law is embedded in the Preamble of the Charter of the United Nations (1945) and explicitly mentioned in the Preamble of the 1948 Universal Declaration of Human Rights (‘’Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the Rule of Law’’). Both documents are often considered to be essential parts of the constitution of the international community⁶.

The picture is similar at regional levels too, especially regarding Europe. Following the aforementioned UN documents, the COE’s European Convention on Human Rights (1950) in its Preamble recognises the Rule of Law (together with political traditions, ideals and freedom) as a common heritage of European countries.

The Rule of Law is also recognized as a constitutional principle at the supranational level i.e. in the constitutional documents of the European Union, starting from the Maastricht Treaty (1992) in which multiple references to the Rule of Law with ‘’largely symbolic’’ meaning can be found (Preamble, Article 11, Article 177), followed by the Amsterdam Treaty (1997) which puts Rule of Law together with liberty, democracy and human rights among primary principles on which the EU is founded (Article 6), and finally to the Lisbon Treaty (2009) which amended the wording of TEU replacing the term ‘’principle’’

with the term ‘‘value’’: ‘‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the Rule of Law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the member states in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail’’ (Article 2).7

The principle of the Rule of Law is entrenched in many modern constitutions, though not all of them explicitly mention the term. But it undoubtedly forms part of the ‘‘ethical concept’’ upon which modern constitutions are based,8 and as such has a pivotal role among basic principles upon which nation-states rest. Although it surely goes for well established democracies throughout the world as well, it is our intention to highlight the particular importance that constitualization of the Rule of Law principle has for newly formed states. That was very evident in the case of the so-called new democracies of Europe. Namely, in the process of transition to democracy which ex-socialist countries of Europe have been going through at the end of the 1980s and the beginning of 1990s, new constitution-makers faced a highly demanding challenge of complete change of till then existing political and social system. The citizens of socialist countries have largely required disintegration of the old authoritarian-bureaucratic political system and its transformation to pluralist democracy. Demands for change have been built around three prevailing ideas: Rule of Law, constitutionalism, human rights.9

Even a limited insight into the constitutions of Central and Eastern European states already clearly illustrates that the new concept of a state based on the Rule of Law, among other, was overwhelmingly accepted.10 In fact, a large

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majority of these constitutions explicitly refer to the Rule of Law or to the principle of a state governed by law\textsuperscript{11}.

Thus, the 1995 Constitution of Bosnia and Herzegovina in Article 2 defines state as a “democratic state, which shall operate under the Rule of Law and with free and democratic elections”\textsuperscript{12}.

The 1991 Constitution of the Republic of Bulgaria explicitly mentions the principle of the Rule of Law in its Preamble (“...resolve to create a democratic and social state, governed by the Rule of Law, by establishing this Constitution”), as well as in Article 4 par. 1: “The Republic of Bulgaria shall be a state governed by the Rule of Law. It shall be governed by the Constitution and the laws of the country”\textsuperscript{13}.

The Constitution of the Republic of Estonia explicitly refers to the principle of the Rule of Law in Article 10: “The rights, freedoms and duties set out in this Chapter shall not preclude other rights, freedoms and duties which arise from the spirit of the Constitution or are in accordance therewith, and conform to the principles of human dignity and of a state based on social justice, democracy, and the Rule of Law”\textsuperscript{14}.

The 2012 Fundamental Law of Hungary explicitly mentions the principle of the Rule of Law in its Article B (1): “Hungary shall be an independent, democratic State under the Rule of Law”\textsuperscript{15}.

The 1992 Lithuanian Constitution explicitly refers to the principle of

the Rule of Law in its Preamble (‘’...striving for an open, just and harmonious civil society and State under the Rule of Law’’)\textsuperscript{16}.

The 1991 Constitution of the Republic of Macedonia explicitly mentions the principle of the Rule of Law in its Preamble (‘’...intention of establishing and consolidating the Rule of Law’’), as well as in Article 8(1) among other fundamental values of the constitutional order of the Republic of Macedonia\textsuperscript{17}.

The 2007 Constitution of Montenegro explicitly refers to the principle of the Rule of Law in its Preamble (‘’...state in which the basic values are freedom, peace, tolerance, respect for human rights and liberties, multiculturalism, democracy, and the Rule of Law...’’) and in Article 1 par. 2: ‘’Montenegro is a civil, democratic, ecological and the state of social justice, based on the Rule of Law’’\textsuperscript{18}.

The 1997 Constitution in Article 2 defines the Republic of Poland as ‘’democratic state ruled by law and implementing the principles of social justice’’\textsuperscript{19}.

The 1991 Constitution in its Article 1(3) defines Romania as a ‘’democratic and social state governed by the Rule of Law in which human dignity, the citizens’ rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the Romanian people’s democratic traditions and the ideals embodied by the December 1989 Revolution, and shall be guaranteed’’\textsuperscript{20}.

\textsuperscript{20} The Constitution of Romania, http://www.ccr.ro/default.aspx?page=laws/constitution. The principle is also explicitly mentioned in Article 40 (as regards unconstitutionality of political parties or organizations).
The 2006 Constitution defines the Republic of Serbia as a state based on the Rule of Law: “Article 1 - Republic of Serbia: the Republic of Serbia is a state of Serbian people and all citizens who live in it, based on the Rule of Law and social justice, principles of civil democracy, human and minority rights and freedoms, and commitment to European principles and values”; Article 3 further elaborates the principle: “Article 3 - Rule of Law: Rule of Law is a fundamental prerequisite for the Constitution which is based on inalienable human rights. The Rule of Law shall be exercised through free and direct elections, constitutional guarantees of human and minority rights, separation of power, independent judiciary and observance of Constitution and Law by the authorities”

The 1992 Constitution of the Slovak Republic explicitly refers to the principle of the Rule of Law in Article 1 which defines the state: “The Slovak Republic is a sovereign, democratic state governed by the Rule of Law. It is not bound to any ideology or religion”

The 1991 Constitution of the Republic of Slovenia in its Article 2 explicitly states the following: “Slovenia is a state governed by the Rule of Law and a social state”

The Rule of Law is thus today firmly embedded into the foundations of democratic legal systems. Nevertheless, despite its universally acceptance and inclusion in constitutional documents, it might prove to be a difficult task to define the precise content of the Rule of Law concept. In the words of Ronald A.

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22 The Constitution of the Slovak Republic, http://www.concourt.sk/info.do?id_submenu=b&urlpage=material&lang=a. The Rule of Law is also mentioned in Article 134 (the text of constitutional judges’ oath) and in Article 151.a (concerning public defender of rights).

23 The Constitution of the Republic of Slovenia, http://www.us-rs.si/en/about-the-court/legal-basis/constitution/. The Rule of Law is also mentioned in Article 3a par. 1 regarding transfer of sovereign rights to international organizations which are based, among other principles, on the Rule of Law.
Cass, the meaning of the Rule of Law “has been subject of innumerable scholarly discussions by great thinkers... but ‘the Rule of Law’ still means very different things to different people”\(^{24}\). We could also recall Simon Chestermann’s conclusion that “such a high degree of consensus on the virtues of the Rule of Law is possible only because of dissensus of its meaning”\(^{25}\). Is it possible, as some argue that this omnipresent concept is popular and successful because it’s vague and far from clear?\(^{26}\) What does the Rule of Law actually mean?

2. **On the Meaning of the Rule of Law and Role of (Constitutional) Courts**

Many would agree that the famous phrase “government of laws and not of men” - which is possible to trace from James Harrington’s The Commonwealth of Oceana (1656) and David Hume’s Essays (1742), accepted by John Adams who inserted it into the 1780 Bill of Rights of the Constitution of Massachusets and was later used by Chief Justice Marshall in the landmark 1803 Marbury v. Madison decision - though itself broad and as such inevitably open to further elaboration, captures the very essence of the idea of the Rule of Law. In other words, any exercise of the power should be subject to law\(^{27}\).

\(^{24}\) Cass, Ronald A., op. cit., p. 1. B. Tamanaha, for example, describes the Rule of Law, despite its “ascendance as a global ideal”, as “an exceedingly elusive notion” regarding which there is a “rampant divergence of understandings”. Tamanaha, Brian, op. cit., p. 3


\(^{27}\) Cass considers this phrase to be “the core conception of the Rule of Law”. Cass, Ronald A., op. cit., p. 2. Pech states that “the Rule of Law... is regularly equated with the idea of “government of laws, not of men””; Pech, Laurent, op. cit., p. 3. While, in so doing, Pech argues that “the phrase in fact first appeared in the 1780 Bill of Rights of the Constitution of Massachusets”; Fleiner T. and Basta Fleiner L.R. on the other hand credit James Harrington to be the first author who coined the phrase: “That men should not be ruled by men but by law was first expressed as the principle of the ‘Rule of Law’ in 17th Century England, by republican James Harrington in his famous work The Commonwealth of Oceana (1656)”; Fleiner, Thomas and Basta Fleiner, Lidiya R. Constitutional Democracy in a Multicultural and Globalised World, Berlin – Heidel-
words of John Locke: ‘‘Wher-ever law ends, tyranny begins’’\textsuperscript{28}.

Since famous English jurist Albert Ven Dicey in his classical work Introduction to the Study of the Law of the Constitution (1885) formulated the concept of the Rule of Law that outlined its three main elements (basically - predominance of regular law as opposed to arbitrary power, equality before the law, importance of judge-made law as the best source of protection of individual rights),\textsuperscript{29} many attempts by numerous scholars have been made in order to elaborate the concept. Today it is widely accepted that there are at least two main views regarding the Rule of Law – formal (procedural) and substantive (material) one\textsuperscript{30}, while at the same time many authors suggest their own conceptions which combine elements of those approaches\textsuperscript{31}. Though we have no intention of entering further into the examination and evaluation of the aforementioned categorisation, we find that later conceptions, which in fact represent a mixture of formal and substantive elements, address the real notion of the Rule of Law in a more appropriate way\textsuperscript{32}.

One among many modern conceptions of the Rule of Law is that of Lord Bingham who, relying on John Locke’s and Thomas Paine’s ideas, first

\textsuperscript{28} Locke John, Two Treatises of Government, 1689, Chap. XVIII (Of Tyranny), s. 202; ed. Thomas Hollis (London, A. Millar et al., 1764), accessed from: http://oll.libertyfund.org/


\textsuperscript{30} This is the categorisation suggested by Paul Craig who describes formal conceptions as those concerned with how the law is made and its essential attributes (clear, prospective), while substantive conceptions are concerned with the formal percepts but also with some basic content of law (justice, morality). Brian Tamanaha accepts this categorisation and classifies them further from ‘‘thinner’’ to ‘‘thicker’’ versions. On this see Beaulac, Stephane., op. cit., p. 5-6. See also Pech, Laurent, op. cit., p. 23-27; Kochenov, Dimitry, op. cit., p. 8-10.

\textsuperscript{31} Before emphasizing ‘‘aspects of the procedural side of the Rule of Law that are in tension with the ideal of formal predictability’’, Waldron argues: ‘‘For the most part, these two currents of thought sit comfortably together. They complement each other...’’. See also Waldron, Jeremy, op. cit., p. 5-9.

of all suggests that the core of the principle is “that all persons and authorities within the state, whether public or private, should be bound and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts”33. Bingham further identifies eight rules i.e. implications of the principle of Rule of Law: 1) the law must be accessible and so far as possible intelligible, clear and predictable; 2) questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion; 3) the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation; 4) law must afford adequate protection of fundamental human rights; 5) means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve; 6) ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers; 7) adjudicative procedures provided by the state should be fair; 8) existing principle of the Rule of Law requires compliance by the state with its obligations in international law, the law which whether deriving from treaty or international custom and practice governs the conduct of nations34.

Lord Bingham’s considerations on the Rule of Law were given after the adoption of the UK Constitutional Reform Act (2005) which provides that the Act ‘’does not adversely affect the constitutional principle of the Rule of Law or the Lord Chancellor’s existing constitutional role in relation to that principle”, though at the same time it does not define either the constitutional principle of the Rule of Law, nor the Lord Chancellor’s existing constitutional role in relation to it35. Thus Bingham concludes that the authors of the 2005 Act ‘’preferred to leave the task of definition to the courts if and when occasion arose”, the consequence of which is that “the judges, in their role as journey-

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34 Ibid, p. 6-29.
men judgment-makers, are not free to dismiss the Rule of Law as meaningless
verbiage’’36.

The judges indeed should play an essential part in upholding the Rule of Law, by checking excesses of executive power and precluding that those measures which originated from unlawful actions of the executive take effect, as well as providing effective protection of guaranteed rights and freedoms. The importance of such role of the courts was particularly evident in post-socialist states of Central and Eastern Europe that, by the end of the 1980s and the beginning of the 1990s, have undergone complete economic and political transformation. That process also emphasized the specific role of constitutional courts. Performing their competences, primarily through abstract and concrete judicial review and protection of constitutionally guaranteed rights deciding on constitutional complaints, constitutional courts can contribute considerably to the consolidation and realization of a democratic government. Moreover, some of those courts have managed to contribute in “making a new regime not merely a democracy, but a Rechtsstaat, a state governed by law and respectful of its citizens”37.

Being a part of the transition from a single-party system to a constitutional democracy in 1990 and later, the Republic of Croatia confronted certain challenges and experienced some difficulties similar to those in other new democracies. All of these countries were supposed to build a new civil society, new political and economic system that would replace the socialist order, to establish and consolidate democracy, constitutionalism and protection of human rights, to guarantee the right to private property and freedom of contract. It was necessary to make a decisive step towards the establishing of democratic institutions founded on the Rule of Law38. On the other hand, one should not

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36 Ibid, p. 4.
38 The post-socialist new democracies’ complete economic and political transformation that had begun in 1989 was primarily seen in radical constitutional changes. This new outbreak of constitution-making was particularly well analyzed by Jon Elster, who asked a significant and actually
forget that although in most of the Central and East European countries major political changes were occurring peaceably, not all of the ex-socialist states had the good fortune to experience the so-called velvet revolutions, that is, peaceful transitions to constitutional democracies\textsuperscript{39}. The most difficult road, as later events would demonstrate, lay ahead of the countries that had seceded from the Social Federative Republic of Yugoslavia\textsuperscript{40}. It is therefore necessary to take into account those different circumstances when analysing how transition to democracy took place in Croatia. In the following sections of this article we shall try to shed light on the period of democratic transition, to stress the importance of the Rule of Law for Croatia and to analyse the role of its Constitutional Court in the process of building the Rule of Law at national level.

3. Republic of Croatia in Transition to Democracy and the Position of Judiciary

As one of six Yugoslav republics, Croatia was a part of the Yugoslav Federation and its socialist constitutionality until 25 June 1991. On that day, the Croatian Parliament adopted the Constitutional Decision on the Sovereignty and Independence of the Republic of Croatia, and the Declaration on the Establishment of the Sovereign and Independent Republic of Croatia. On October 8 of the same year, the Constitutional Decision entered into force and the Republic of Croatia cut all legal and political ties with Yugoslavia\textsuperscript{41}.


\textsuperscript{40} There is, of course, a big difference between Slovenian case (the conflict between the Slovene armed forces and the Yugoslav People’s Army was brief – it lasted from June 27 to July 6, dubbed the 10-day war) and the events that started occurring throughout the rest of Yugoslavia, beginning with the aggression against the Republic of Croatia in 1991.

\textsuperscript{41} The Decision was published in Official Gazette ‘Narodne novine’ No. 31/91; the Declaration was published in Official Gazette ‘Narodne novine’ No. 53/91.
The Constitution of the Republic of Croatia was adopted on 21 December 1990 (the so-called Christmas Constitution)\(^\text{42}\). New Constitution of the Republic of Croatia was founded on a set of fundamental principles that differed completely from principles exercised in the old regime. Following the example of other countries, Croatian constitution-makers believed that the aim of the constitution-making process was not just a constitution as a mere document, but the desire to democratically constitute the people as the source of government. Croatian constitution-makers’ new approach was reflected in the interpretation of the Constitution as the fundamental state norm, whose supremacy is indicated by the constitutional values expressed in Article 3: “Freedom, equal rights, national equality, love of peace, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the Rule of Law and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia”.

According to the 1990 Constitution, the Rule of Law in Croatia was in fact determined by the extent of the guarantee of fundamental rights to its citizens. Constitution makers focused their attention on the separation of the judicial branch from the executive and legislative branches, independence of courts and their placement under the authority of the Constitution and law. The new and democratic Constitution of the Republic of Croatia placed a special emphasis on the Constitutional Court as a constitutional and legal institution that would ensure the Rule of Law and create new relations between the state and individuals by exercising its constitutional authority.

The events that followed the adoption of the Constitution significantly determined the first few years of post-socialist constitutionalism in Croatia. The resolving of the issue on an appropriate role of government bodies in the state of emergency was significantly influenced by the war in Croatia that lasted from 1991 till 1995\(^\text{43}\). Consequently, the result of aggression against Croatia

\(^{42}\) Official Gazette ‘Narodne novine’ No. 56/1990

\(^{43}\) See, for example, Bjelajac, Mile & Žunec, Ozren. The War in Croatia 1991-1995. The war in Croatia – Full Text Report SI Team Seven, at: http://www.ffzg.hr/polemos/prvi/03.html
was the consolidation of the head of state’s constitutional position as the head of the executive branch. We believe that this solution was justified by the aforementioned circumstances. Nevertheless, we can infer that the legal capacity of the Croatian semi-presidential system and the real capacity of the then President of the Republic had been stripped of all pretence after 1991, under war circumstances. The head of the executive branch and his actions during the state of emergency had been very detrimental to the development of democracy and implementation of the legislative and particularly judicial powers in the Republic of Croatia.

It is certain that the new constitutional and political framework was expected to instigate some sort of a renaissance of the judicial branch. Nevertheless, during the war in Croatia, executive bodies exerted a lot of political pressure on the regular judiciary. A number of decrees with the statutory force that were issued by the President in 1991, stand out prominently in this context. Some of these regulations referred directly to the judiciary (for example, Decree on Organization, Work and Jurisdiction of the Judiciary in the State of Emergency or Imminent Threat to Independence and Unity of the Republic of Croatia, Decree on Application of the Law on Criminal Procedure in the State of Emergency or Imminent Threat to Independence and Unity of the Republic of Croatia, etc.). Judges’ already diminished capacity of interpreting and practicing law according to the principle of legality and constitutionality under severe circumstances was seriously limited when combined with an extreme positivist approach as a certain inheritance from socialist period, which then continued in times of peace. By the year 2000, the growing dissatisfaction of

44 During the first stage of the constitutional development (1990-2000), Croatia’s entire institutional system was de facto dominated by one person and one party – the President Franjo Tuđman and Croatian Democratic Union (HDZ). President Tuđman had a profound influence. In fact, he obstructed the work of constitutional institutions in relation to constitutional provisions on the separation of powers.

45 Official Gazette ‘Narodne novine’ No. 67/1991

46 Official Gazette ‘Narodne novine’ No. 73/1991

the public was increased by the regular judiciary’s lack of contribution to the establishment of the Rule of Law and its slow reform.

As a result of those circumstances, a strong and truly independent judiciary was not established, which substantiated some general estimates of transitional judiciaries. Comparative analyses of the judiciary’s place in post-communist countries show that the judiciary’s weaknesses sprang from the lack of independence. In addition, these analyses show that courts are greatly distrusted by the public and the state is unable to resolve this issue satisfactorily. Most of these observations can be applied to the Republic of Croatia. Prof. Ivo Josipović, among many others, harshly criticised the Croatian judiciary pointing out that it has almost completely lost citizen’s trust and that objective indicators such as numerous unresolved cases, unreasonable duration of proceedings, etc. clearly explain such state of affairs, indicating in the same time that the quality of judges has seriously deteriorated.

During the war and post war period numerous and complex “transition-al justice” issues arose. These issues had brought about a feeling of lack of legal and existential security. The breakdown of existing controls of the political and economic sectors had created equally critical problems. A question of constitutionality and human rights permeated these examples and it also pointed out to the judiciary’s liability. Therefore, a phenomenon that can be described as “guided judicial activity” had occurred in the context of Croatia’s transition.

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49 Both domestic and foreign researchers agree in their conclusions. For example, foreign observers have thoroughly and continuously criticized the state the Croatian judiciary is in. Such a research, ABA/CELLI (1995-2000, 2000-2002) can be found at: http://www.abanet.org/rol/publications/croatia-jri-2002-cr.pdf; see also suggestions in Croatian Judiciary: Lessons and Perspectives, Croatian Helsinki Committee for Human Rights & Netherlands Helsinki Committee, Zagreb, 2002.

There was a tinge of “reactionary” and “conservative” comparative activism in this activity, but basic characteristics were a chronic lack of independence, irresponsibility, and a complete absence of the notion of the judiciary’s corrective function. The corrective function would imply the concept of the Rule of Law that elevates the principle of equality before the law and demands respect for that principle from the government and, above all, from the courts. Richard A. Posner, a prominent American judge, commented on this subject: “The protection of rights irrespective of the popularity of the rights holders is the essence of the “Rule of Law,” a doctrine that was passed down to us from Aristotle, who in the Nicomachean Ethics set forth the theory of law that he called “corrective justice”51.

One may therefore conclude that the Croatian judiciary in general has been slow to promote the transition to democracy, respect for human rights, and the establishment of the Rule of Law in general. In such circumstances, as a constitutional institution *sui generis*, the Constitutional Court of the Republic of Croatia has been given a particular responsibility in establishing constitutionality and the Rule of Law.

## 4. Constitutional Court of the Republic of Croatia

Croatia had its Constitutional Court when it still formed a part of the former Socialist Federative Republic of Yugoslavia. Constitutional courts were established both at a federal level and at the level of federal units. The Croatian Constitutional Court was established by the 1963 Constitution, and it was retained by the later 1974 Constitution. It was primarily competent for abstract norm control, and it also examined the constitutionality and legality of self-governing general acts. Due to the socialist ideology on the supremacy of elected assembly, in the case it found a law to be contrary to the Constitution, the

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Court could not repeal the law. It would only declare its inconformity and the Assembly would have 6 months to enact new legislation. It was not competent for deciding on the constitutionality and legality of individual acts\(^{52}\). Although being a curiosity in the world of socialist constitutionality, the adopted model of constitutional adjudication did not in fact disturb the adopted doctrine on unity of state power. In reality, the Constitutional Court never managed to achieve a more significant role in political system.

The Constitutional Court of the Republic of Croatia (hereinafter: the Constitutional Court) was constituted on December 5, 1991, and after the judges took their oath before the President of the Republic it started to function on December 7, 1991. The constitutional position of the Constitutional Court follows the Kelsenian, continental European tradition, since it is designed as an intermediate branch which controls all three branches of government (legislative, executive and judicial). It is neither placed above them in hierarchy, nor is it a part of them in either organizational or functional way\(^{53}\).

Besides the Constitution, another essential part of the normative framework for the functioning and internal organisation of the Constitutional Court is the Constitutional Act on the Constitutional Court (hereafter: CACC). CACC of September 24th, 1999\(^{54}\) added substantial number of procedural provision in order to cure shortcomings and vagueness of the previous 1991 Act\(^{55}\). After constitutional revisions of 2000\(^{56}\) and 2001\(^{57}\), revision of the CACC took place on March 15th, 2002\(^{58}\). Finally, the Consolidated Version of the CACC was

\(^{53}\) Ibid.
\(^{54}\) Official Gazette „Narodne novine“, no. 99/1999. Suffices to say that the former Constitutional Act had 47 articles, while the 1999 one consisted of 96.
\(^{56}\) Official Gazette „Narodne novine“, no. 113/2000 (primarily for the purpose of reduction of presidential powers).
\(^{57}\) Official Gazette „Narodne novine“, no. 28/2001 (abolishment of the Upper Chamber of the Parliament).
\(^{58}\) Official Gazette „Narodne novine“, no. 29/2002.
then published on March 18th, 2002\textsuperscript{59}. Apart from linguistic harmonization with the Constitution, the 2002 revision incorporated important alterations regarding, i.e., active legitimating for abstract review, protection of human rights and fundamental freedoms, introduction of new competences for the Constitutional Court, etc. It also expressly regulated important safeguards of the Court’s independence (CACC, Article 2): “The Constitutional Court shall be independent of all state bodies, and shall independently distribute the assets approved in the state budget for the functioning of the activities of the Constitutional Court, in accordance with its annual budget and the law.“ The internal organization of the Constitutional Court is regulated by the Rules of Procedure of the Constitutional Court of the Republic of Croatia\textsuperscript{60}. The President of the Constitutional Court is in charge of application of the Rules, while the Rules are interpreted by the Court itself\textsuperscript{61}.

Originally, the Constitutional Court consisted of eleven judges appointed by the House of Representatives (Lower Chamber of the Parliament) by absolute majority of votes on the recommendation of the House of Counties (Upper Chamber of the Parliament) for a period of 8 years. After the constitutional revision of 2001 and abolishment of the Upper Chamber, the Court consisted of thirteen judges appointed by the Croatian Parliament (as a unicameral parliament) by absolute majority vote. Finally, following the latest constitutional revision of 2010 judges are elected by a two-thirds majority of Parliament members. Judges of the Constitutional Court must be selected among notable jurists, especially judges, public prosecutors, lawyers and university professors of law.

The Constitutional Court guarantees compliance with, and application of, the Constitution of the Republic of Croatia and bases its work solely on provisions of the Constitution and the Constitutional Act. Thus, the Constitutional Court has following competences:

\textsuperscript{59}Official Gazette „Narodne novine“, no. 49/2002.
\textsuperscript{60}Official Gazette „Narodne novine“, no. 41/2001
\textsuperscript{61}See Barić, Sanja and Bačić, Petar, op. cit., p. 2
- decides on the conformity of laws with the Constitution;
- decides on the conformity of other regulations with the Constitution and the laws;
- decides, if necessary, on the constitutionality of laws and the constitutionality and legality of other rules and regulations which have lost their legal force, provided that not more than one year has passed from the moment of their loss of legal force until the submission of a request or a proposal to institute proceedings (added by Constitutional revision in 2000);
- decides on constitutional complaints against individual decisions of governmental bodies, bodies of local and regional self-government and legal entities with public authority, when these 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;
- observes the realization of constitutionality and legality and notifies the Croatian Parliament of the instances of unconstitutionality and illegality which come to light thereby (added by Constitutional revision in 2000);
- decides on jurisdictional disputes between the legislative, the executive and the judicial branches of government;
- decides, in conformity with the Constitution, on the impeachment of the President of the Republic;
- supervises the constitutionality of the programs and activities of political parties and may, in conformity with the Constitution, ban their work;
- supervises the constitutionality and legality of elections and national referenda, and decides on electoral disputes outside the courts’ jurisdiction;
performs other duties specified by the Constitution (e.g., the President of the Republic takes a solemn oath before the President of the Constitutional Court).

The first three competences are in reality abstract and concrete judicial review, while the fourth is concretized in the right to direct constitutional complaint by private individuals to the Constitutional Court. The right to application includes a right to initiate constitutional legal proceedings and a right to obtain a decision on the disputed act\textsuperscript{62}. The Constitutional Court repeals a law if it finds it to be unconstitutional, and repeals or annuls any other regulation if it finds it to be unconstitutional or illegal.

5. **Constitutional Court of the Republic of Croatia on the Rule of Law - Selected Cases**

We have already emphasized the situation concerning numerous decrees with statutory force enacted by the President of the Republic starting from 1991, out of which more than twenty regulated highly sensitive matters such as organization and work of judicial power, police activities, criminal acts, public gatherings, social security, etc. Although the constitutionality of those decrees was more than questionable for several obvious reasons, the Constitutional Court did not react according to the expectations of many citizens, organizations and legal observers. On the contrary, in its Decision of 24 June 1992 the Constitutional Court found presidential decrees to be in conformity with the Constitution. According to one commentator, it was “too big bite for the Constitutional Court that had no courage to declare, in the middle of war events, the decrees of the all-powerful president for unconstitutional”\textsuperscript{63}.

However, in spite of this inglorious beginning, in following years the Constitutional Court has managed to strengthen its position within the political system and to gradually establish itself as the guardian of the Constitution.

\textsuperscript{62} Barić, Sanja and Bačić, Petar, op. cit., p. 4

\textsuperscript{63} Uzelac, Alan, op. cit.
and the Rule of Law principle. We shall try to illustrate this evolution through selected constitutional case-law, starting from the first composition of the Court under presidency of Jadranko Crnić (1991-1999).


In 1998 the Constitutional Court had adopted a decision that objectively reflected one of its most significant attempts at creating policies by way of strengthening the Rule of Law and protection of human rights. Provisions of Articles 1, 2, 3, 4, and 6 of the Pension Adjustment Act\(^{64}\) were repealed by this decision.

The Decision pertained to the Government and Parliament’s actions which had been found unconstitutional by the Court even before the Decision became effective. In 1993, the Government of the Republic of Croatia ceased to adjust pensions according to the increase in inflation rate and cost of living, even though it continued to do so with wages and salaries of the working population. According to the facts determined during the proceedings, the result of these actions was that wages increased twice as much as pensions in the period from July 1993 to December 1997, that is, in 1997, the average pension was half of the average wage, which means that the standard of living for retired persons (pensioners) was half the standard of the working population with average incomes. Therefore, the Constitutional Court ruled that “this legal arrangement… changed the social status of pensioners to such an extent that it created social inequality of citizens”, and that is exactly why the contested provisions “contravene basic constitutional provisions of Article 3 of the Constitution of the Republic of Croatia, which guarantee equality, social justice, and the Rule of Law; and with Article 5 of the Constitution, which states that laws are to be in conformity with the Constitution.” Therefore all the aforementioned Pension Adjustment Act provisions were repealed. Furthermore, pensioners were to receive the unpaid pensions for the period from 1993 to 1997.

\(^{64}\) Law on Adjustment of Pensions and Other Allowances From the Pension and Disability Fund and Administration of Funds of the Pension and Disability Fund, Official Gazette „Narodne novine“, no. 20/1997

The Constitutional Court in its case-law also repeatedly confirmed that the principle of the Rule of Law requires compliance by the state with its obligations in international law. Resolving the matter of conformity with the Constitution of the Public Assembly Act, the Constitutional Court found the disputed provision regarding the right of public assembly to constitute, among others, a breach of Article 11 of the COE’s Convention for the Protection of Human Rights and Fundamental Freedoms and concluded that such non-compliance with the provisions of International Law “violates the principle of the Rule of Law in Article 3 of the Constitution, as a fundamental value of the constitutional order of the Republic of Croatia”.


Reviewing the constitutionality of the Criminal Law, the Constitutional Court got the opportunity to elaborate its approach on one of the essential elements of the Rule of Law principle i.e. equality of all before the law. This was, in fact, Constitutional Court’s second chance to examine provisions of the Criminal Law according to which if criminal acts against honour and reputation are committed against certain state officials (the President of the Republic, the Prime Minister, etc.), in connection with their work and position, criminal proceedings shall be instituted *ex officio* by the State Attorney. Namely, the same provisions were already reviewed by the Court in 1996, but the proposal to annul the provisions was not accepted\(^6\). This time the Constitutional Court changed its position. Starting with the constitutional values in Article 3 of the Constitution such as equal rights, respect for human rights and the Rule of Law, and taking into account, among other constitutional provisions, Article 14 that prohibits any discrimination of human beings on any grounds and guarantees equality of all before the law, the Constitutional Court concluded that although “inequality in connection with a person’s position and office is not always un-

\(^6\) In accordance with Article 52 of the CACC (Official Gazette „Narodne novine“, no. 99/99), the Constitutional Court may review the constitutionality of a law, or the constitutionality and legality of other regulations, even in the case when the same law or regulation has already been reviewed by the Constitutional Court.
constitutional... the inequality i.e. differences arising from the disputed provisions that refer to bringing criminal action for certain criminal acts, is not justified by the position or office of the person“ (par. 16 and 17). All citizens should exercise their right to respect for and protection of their reputation and honour under equal conditions and procedures66.


Among several important decisions, the decision to repeal a number of provisions of the Law on the State Judicial Council probably was the most important one67. This important institution, having among other competences also the right to appoint and to dismiss judges, had long been mere extension of the ruling party, openly ignoring the Constitutional Court’s decisions. Furthermore, its actions had damaged the remaining bits of the judiciary’s reputation68. In the stated Decision (U-I-659/1994),69 the Constitutional Court further elaborated its attitude on the Rule of Law, which is the highest value of Croatia’s constitutional order and as such “contains, inter alia, the issue on the general characteristics which the laws should have in order to be in congruity with the Rule of Law”, deciding in the process that “this is the most important issue for review of the constitutionality of the disputed Law” (par. 10). Furthermore, the Constitutional Court believes that the Rule of Law is “more than a mere requirement for acting in keeping with the law. It embraces the requirements that concern the contents of the laws (…) the Rule of Law is not just the Rule of Law, but also the rule by rights which - in addition to the requirements regarding the constitutionality and legality, as the most important principles of every regulated legal order – also contains additional requirements, which are relative

to the very laws and their contents” (par. 11). In addition, Court indicates the broad contents of the principle of legal security (certainty) and the principle of protecting the legitimate expectations of parties in proceedings,\(^7^0\) pointing out that “within the legal order founded on the Rule of Law, laws must be general (universal) and equal for all, and legal consequences must be unambiguous (certain) for all those to whom the law is applied... legal consequences must be adequate to the legitimate expectations by the parties involved in every specific case where the law is directly applied to them (par. 11.1).” The aforementioned citations together with paragraph 12 of the Decision represent “a strong message to the legislators and other constitutional authorities”\(^7^1\) concerning the position and role of the Rule of Law in Croatia’s constitutional and democratic order: “The principle of the separation of powers... is one of the rules of the organisation of state government which are useful to the extent that they serve to the Rule of Law and defend it... the principle of the separation of powers in one of the elements of the Rule of Law, as it prevents the concentration of political power competencies in (only) one body”(par. 12).

By the aforementioned Decision, the judges in the Constitutional Court have significantly expanded constitution-makers’ definition of the Rule of Law as a fundamental value. To that effect, the Decision also testifies to an increase in “liberal interpretation of the constitution” and an activist approach that encourage the consolidation of the Rule of Law and democracy in the Republic of Croatia\(^7^2\).

\(^7^0\) See also, for example, subsequent cases U-III/43/2005 (par. 9), U-III-1297/2006 (par. 6), etc.

\(^7^1\) See Bačić, Arsen. «Vladavina prava i institucije kontrole ustavnosti zakona». In Ustavni sud u zaštiti ljudskih prava, edited by Crnić, Jadranko & Filipović, Nikola, Zagreb: Organizator, 2000., p. 53.

\(^7^2\) According to Prof. Smiljko Sokol, former President of the Constitutional Court (1999-2003). Sokol S., Ustavna interpretacija Ustavnog suda u kontroli ustavnosti zakona, in Crnić, Jadranko & Filipović, Nikola (ed), op. cit., p. 24 Nevertheless, that “more liberal and broader use of the constitutional interpretation” acting as a source of “increased activism” has been gradually reduced with “a certain level of judicial self-restraint”, which definitely had something to do with an increased number of constitutional complaints submitted by many Croatian citizens who obviously felt that their rights previously were not adequately protected by the regular judiciary. Quotes from former President of the Constitutional Court (2003-2007) Petar Klarić’s speech marking the Constitutional Court’s 15th anniversary. See Klarić, Petar. Govor za 15. godišnjicu Ustavnog suda, p. 7; available at: http://www.usud.hr/.

Since adopting the Decision on State Judicial Council, the Constitutional Court continued to elaborate characteristics which an act should have to be in accordance with the Rule of Law in many of its decisions. One such decision is U-I-906/2000 (review of conformity with the Constitution of the Criminal Procedure Act), which stipulates that “the Rule of Law has a wider significance than just the requirement that governmental bodies should act lawfully. Although it presumes complete constitutionality and legality... it also includes requirements concerning the content of law”. Therefore, the Rule of Law “is not only the rule of acts, it is ruling in accordance with the law, which embodies... additional requirements concerning the acts themselves and their substance”. Those additional requirements imply the following: “Acts must be general and equal for all, their legal effects must be foreseeable for those to whom they are to be applied and appropriate to the legitimate expectations of the parties in each specific case in which the act in question is applied to them” (par. 10).


The requirement for a definite and precise legal norm as one of the basic elements of the principle of the Rule of Law was further elaborated in two recent cases on Free Legal Aid Act and on Act on the Execution of Prison Sentences. In both aforementioned cases, with reference to the judgment of European Court of Human Rights in the case of Beian v. Romania, the Constitutional Court deemed that “addressees of a legal norm cannot truly and distinctively know their rights and obligations and foresee the consequences of their behaviour if the legal norm is not sufficiently definite and precise”. Since the requirement for the definiteness and precision is “crucial for the development

74 Beian v. Romania, App. no. 30658/05, 6 December 2007.
and preservation of the legitimacy of a legal order”, it is therefore “more than a semantic requirement” and constitutes a “composite part of the Rule of Law in all the branches of law” (U-I-3843/2007, par. 19). Finally, after elaborating both positive and negative meaning of the requirement for the definiteness and precision of the legal norm, the Constitutional Court concludes that any such norm must be “accessible, clear, definite and uncontradictory in content”, or else it simply does not satisfy the Rule of Law (U-I-722/2009, par. 8.2)75.


Deciding once again on the conformity of an act regulating pensions of Croatian citizens (Pension Insurance Act - PIA) with the Constitution,76 the Constitutional Court once again referred to the Pension Adjustment Act Decision of 15 March 2000 (U-I-659/1994) and the then laid down standards that are inherent in the principle of the Rule of Law. In the 2007 Decision on PIA the Constitutional Court decided to repeal, among others, Article 21 of PIA which empowered a legal person with public powers (Croatian Pension Insurance Bureau - HZMO) to pass a general enactment in which it may determine some basic conditions regarding pensions without at the same time placing limits on the HZMO’s powers to regulate relations in question. Such legislator’s permission given to an administrative body in order to regulate “independently, directly and without restrictions... the preconditions in substantive law”, which is in fact a legislative activity, and not providing in so doing “any, even the most general standards that should guide” this body in regulating relations in question, makes the disputed provision nothing more than a “carte blanche for the administration to define a rule of behaviour”. Therefore, the Constitutional Court found that such a provision “is not in accordance with the principle of the Rule of Law... and particularly with the principles of legal security and the certainty of legal relations, which are inherent in it” (par. 3.2)77. Finally, we find


it important to emphasize, regarding our next example, that PIA was passed in 1998 and until its adoption to 2005 it was revised and amended several times, more precisely on nine occasions.


Examining the matter of compiling the consolidated wordings of normative acts, the Constitutional Court in 2006 Report pointed out that, though consolidated wordings are necessary because acts, especially those of a more extensive nature, are frequently amended and such attempts are therefore very helpful allowing addressees to apply the acts more easily, they must at the same time be compiled “in conformity with the rules of legal practice and the demands...” of the principle of the Rule of Law “concerning the other characteristics that an act must satisfy - clarity of content and unchanged numerical designations of the articles” (par. 3, 2006 Report). However, the Constitutional Court noticed and notified the Croatian Parliament on certain instances of unconstitutionality in its practice of compiling the consolidated wordings of acts (which is a special competence of the Legislation Committee of the Croatian Parliament). Moreover, the Constitutional Court warned Parliament that such practice led to “increased degree of legal uncertainty of the objective legal order” as well as to the “legal uncertainty in the realizations of the rights and obligations of the citizens of the Republic of Croatia” (par. 4, 2006 Report).

In 2011 the Constitutional Court again seized an opportunity to warn Parliament on the constitutionally unacceptable effects of the consolidated wordings. Immediate cause for rendering the 2011 Report was the adoption of the consolidated wording of the Constitution of the Republic of Croatia (compiled by the Parliament’s Committee for the Constitution after proclamation of the Amendment of the Constitution in June 2010). In the first part of its 2011 Report the Constitutional Court noticed that the rules contained in 2006 Report “were not complied with for several years after its publication”78. The

78 However, the Constitutional Court also noticed that in November 2010 Parliament’s Commit-
consequence of such “increased internal inconsistency of the Croatian legislative order” was serious undermining of the principle of the Rule of Law as a “highest value of the constitutional order of the Republic”79. Therefore, the Constitutional Court concluded that “all the bodies competent for compiling the consolidated wordings of constitutional acts, statutes, other regulations and general acts... shall pro futuro, from the first day after the publication of this notification... comply with the standards” given in 2006 and 2011 Notifications. However, in order to ensure stability of the legal order in the transition period the Constitutional Court decided to refer to the consolidated wordings of normative acts as they were published before its 2011 Notification.

Nevertheless, an important exception from the aforementioned rule was adopted. Namely, regarding consolidated wording (CW) of the Constitution, the Constitutional Court noticed that neither one of three consolidated wordings of the Constitution (CW 2000, CW 2001, CW 2010) was compiled in accordance with the rules given in the 2006 Report, which has “seriously undermined the integrity of the constitutional text”. Therefore, taking into account “the fundamental importance of the Constitution for the constitutional order of the Republic”, the Constitutional Court ordered the Parliament’s Committee for the Constitution to “publish, without delay, the new consolidated wording of the Constitution”. Moreover, “to reduce the possibility of errors in the procedure of compiling” the new CW of the Constitution, the Constitutional Court itself published the CW “compiled in accordance with the requirements of the principle of the Rule of Law”. Aforementioned request of the Constitutional Court provoked resolute reaction of the ruling party’s members of the Parliament’s Committee for the Constitution, as well as of Committee’s external members, who agreed that reports of the Constitutional Court are not obligatory and that Parliament has no obligation to obey to such Constitutional Court’s request80.

80 In words of prof. Branko Smerdel: “Reports of the Constitutional Court are not obligatory and
6. Conclusion

The constitutional development of the Republic of Croatia and a gradual stabilization of state institutions from 1990 till the present day are, in a special way, reflected in the theory and practice of constitutional adjudication. We are of opinion that the development of constitutional jurisprudence in Croatia has shown the gradual adjustment of judges to new values, such as the Rule of Law and the separation of powers. However, occasional manoeuvring in relation to the interests of main political actors, which was evident for example when the Constitutional Court did not accept the proposals, backed by almost 100,000 citizen’s signatures, for the review of the constitutionality of the Special Tax on Salaries and Pensions (better known as the Crisis Tax), testifies to judge’s avoidance of resolving important political questions and their inclination to the formalist interpretation of the Constitution and relevant laws. Their repeated adherence to the political question doctrine and self-restraint or, in other words, their hesitation in making more decisive step towards taking more activist approach, clearly illustrates that they are still partially inclined to the projection of a judge as a mere “mouth that pronounces the words of law” (Montesquieu). Nevertheless, by expanding constitution-makers’ definition of the Rule of Law as a fundamental value of the constitutional order and the ground for interpretation of the Constitution, the Constitutional Court has not only significantly contributed to clarifying the content of such a complex principle, but it had also proved its capability to contribute to overall consolidation of the new democratic constitutional structures, even indicating from time to time its capacity for making genuine constitutional transformation by

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“influencing mode of operation of a society’s political and legal institutions”⁸³. However, it is our wish that such brave episodes become more frequent in years to come.

THE RULE OF LAW AND PROTECTION OF HUMAN RIGHTS IN MACEDONIA

1. Democratization and “Europeanization” in South East Europe

Twentieth century brought with itself the “third wave of democracy”. No global trend has been more successful and powerful than the expansion of democracy over the world. Democratic reforms in South Eastern Europe have come “surfing on the wave”, get strong push by the Copenhagen criteria, and now their “ideological” underpinning and spiritus movens are ideas and aspiration for European integration.

It has been already written that Europe is not geographical entity but an “imagined space”, created out of our mental maps. That supports the idea that Europe is entity with fluid borders, which “are matter of ideology and politics rather than cartography”. EU ideology emphasizes individual rights, the Rule of Law, constitutional democracy, freedom, market economy and economic integration. Today European integration is most influential contemporary recipe for democracy and peace in the region and EU serves as a reference model for European states in establishing law-governed, market-oriented, liberal democratic political and economic systems.

But, “democracy is more than a regime; it is an interacting system,” wrote Juan J. Linz and Alfred Stepan, pointing that “if a functioning state exists, five other interconnected and mutually reinforcing conditions must also exist or be crafted for a democracy to be consolidated. First, the conditions

must exist for the development of a free and lively civil society. Second, there must be a relatively autonomous and valued political society. Third, there must be a Rule of Law to ensure legal guarantees for citizens’ freedoms and independent associational life. Fourth, there must be a state bureaucracy that is usable by the new democratic government. Fifth, there must be an institutionalized economic society… No single arena in such a system can function properly without some support form one, or after all, of the other arenas.”

That is why democratic transition is complex and difficult process. The work of establishing democracy and human rights protective regimes is much more difficult than to maintain repression. That aim demands institutionalizing new laws, practices and attitudes inspired by an appreciation for the profound limits on government posed by individual rights. So, transition to democracy and its consolidation embraces more processes. It is multi-dimensional phenomenon, which cannot take place in isolation from the dynamic societal forces. Ralf Dahrendorf has referred to this as “dilemma of the three clocks”, where “in ‘the hour of the lawyer’ the constitutional and political framework is established during the course of several months; in ‘the hour of the economist’ the rudiments of a market economy are built in a process that may take five or six years; and finally, in ‘the hour of the citizen’ the social impulses of civil society are regenerated in the course of a process that will inevitably take decades.”

From the current perspective of some countries of South Europe, Dahrendorf was too much optimistic.

In post-socialist countries in South East Europe the quest for democracy has assumed the form of constitutionalism. The constitutions were viewed as instruments for establishing the base of domestic stability, peace and protection of human rights. There is no doubt that constitutions have their limit, that they are not substitutes for political action. Constitutionalism is not merely a

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legal prescription or prudence elevated to the rank of prescription\textsuperscript{4}. Adoption of the constitution does not mean establishment of constitutionalism, but it is good starting point. The constitutionalism depends on lot of factors: political, social and economic stability and a political culture that is committed to constitutionalism (right consciousness, culture of rights). The constitution can create moral imperatives, declaring people’s aspirations and setting benchmarks for a good society.\textsuperscript{5} But, whether those moral imperatives declared in the constitution would be just a heap of words or not, depends on the state and society.\textsuperscript{6} A society, which is serious about its constitution and constitutionalism, may turn a constitutional text of “law quality” into high-quality constitutionalism. Conversely, a wonderful constitutional text means nothing if the social actors circumvent it.\textsuperscript{7}

So, for consolidation of democracy realization of such constitution is needed. For obtaining this aim, the newly created institutions and all actors within political and civil society must follow, respect and uphold the Rule of Law. And Rule of Law embodied in a spirit of constitutionalism is an indispensable condition for consolidation of democracy.

But the consolidation of democracy is by no means a stable phenomenon, let alone a universal trend. Democratic institutions have to be not only created but also developed and supported by conditions necessary for bloom of democracy. Some contextual factors that influence stabilization of the democratic institutions as are presence of the Rule of Law, political society, socio-

\textsuperscript{4}“Law cannot be a substitute for a morality, tradition, or everyday common sense. As great thinkers from Montesquieu to Tocqueville emphasized, constitutionalism has operational elements besides law. ‘Like the navigator, he may direct the vessel which bears him, but he can neither change its structure, nor rise the winds, nor lull the waters that swell beneath him…’” (Tocqueville: 171).


economic conditions, and support of civil society, are not developed, or even missing in some of the countries in South East Europe, including Macedonia.

2. Constitutional Frame of Human Rights in Macedonia

The development in post-communist Europe has shown that it is not easy to abandon the totalitarian heritage, not in the drafting of the constitutional texts, and even less in their implementation. New Constitution of the Republic of Macedonia was adopted in 1991 as a result of the effort to make a clear break with the past and to make a new fresh Article.

This new constitution was very important first step on the way of constitutionalism. Efforts to create meaningful protection of human rights and not to settle for merely high-sounding declarations were at “the heart” of the new constitution. Constitution of the Republic of Macedonia from 1991 was made in the “laboratory”, not in the state institutions.

But, if the constitution-drafters could chose between different constitutional models of the organization of state power, the room for manoeuvre in the drafting the human rights provisions in the constitution was considerably limited by the international human rights law. International human rights law served not only as “yard-sticks for proposed legislation, but also as models of the constitutional regulation.”

During the adoption of the Constitution of the Republic of Macedonia there was a political consensus about the need of constitutional guarantees of human rights and about the need of catalogues of human rights contained in the constitutions; or in short about the constitutional concept of human rights. Despite of that, the consensus was not present for regulating status of ethnic groups.


Human rights in the Constitution of the Republic of Macedonia are treated in two manners: as fundamental values of the constitutional order of the country, on the one hand; and on the other hand, some of them as justifiable legal rights and other as programmatic principles that state should create conditions to achieve\textsuperscript{10}.

Other benchmark on the constitutional conception of the human rights in the Republic of Macedonia is the existence of too many constitutional provisions (25 provisions), which allow guaranteed right to be regulated by laws (statutory reservations). That is characteristic, which is common to most constitutions in post-communist Europe.

Two kind of statutory reservations on human rights are prescribed in the Macedonian Constitution. First is the possibility to regulate the details, the manner of exercise of human rights whenever it is necessary by reason of the particular nature of those rights;\textsuperscript{11} and the second is the possibility to limit these rights.

The statutory regulation of some human right brings the danger of its restriction. That happened with the right to assembly. The Article 21 of the Constitution proclaims that “citizens have the right to assemble peacefully and to express public protest without prior announcement or a special license. The exercise of this right may be restricted only during a state of emergency or war.”

\textsuperscript{10} In the Constitution of RM as programmatic principles are proclaimed: the right to work (Article32), right to healthy living environment and the obligation of the Republic to create conditions for enjoyment of the rights of the citizens of healthy living environment (Article43); obligation of the state to stimulate, assist and protects the development of scholarship, the arts and culture, as well as to stimulate ad assist scientific and technological development, technical education and sport (Article47).

\textsuperscript{11} The examples of first kind of explicit statutory reservations on the human rights are present in the articles which guarantee: the rights of the foreigners in general (Article 29 of the Constitution of RM), the right to social security (Article 34 of the Constitution of RM), the right to marriage and family (Article 40 of the Constitution of RM), property right of foreigners (Article 31 of the Constitution of RM), the right to defend the country (Article 28 of the Constitution of RM), the rights of the workers (Article 32 of the Constitution of RM). Looking at this list we can notice that in the Constitution of RM there is no explicit statutory reservation to some rights, which because of their nature must be regulated by law. For example, that kind of human right is the right to health care.
The Constitution is very clear about the exercise of this right and it contains no provision for its statutory regulation. But Law for Public Assemblies\(^{12}\) was adopted which regulated and in the same time limited the exercise of this right. The statutory provisions burden the organizers with so many duties during the assembly and put them in the role of the police, which practically means statutory limitation of this right, which is not in the conformity with the Constitution.

Second kind of statutory reservation is the possibility some right to be limited by the law. The constitution proclaims that human rights shall be limited in cases as are determined by the Constitution\(^{13}\).

The possibilities of limitations of human rights in the Constitution of Republic of Macedonia are given in two manners. For some rights Constitution regulates the conditions for their limitation\(^{14}\), or it leaves to the statutes to determine the conditions under which right may be limited\(^{15}\). But even when the Constitution determines the conditions for limitation of the human rights, those conditions are very broad and imprecise, which also gives an opportunity for their own interpretation of human rights by the Parliament and by the Constitutional court when the question of constitutionality is raised.

Besides the possibility of limitation of human rights, the constitution contains provisions allowing temporary revocation or restriction of rights during the state of war or emergency. There is limited number of “hard-core” rights, which are protected from restriction in these situations. The constitution

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\(^{12}\) Official Gazette of the Republic of Macedonia, 55/95, 19/2006, and Decision of Constitutional court 31/2006-0-1

\(^{13}\) In the Constitution of RM there are possibility of limitations of the: right of personal liberty (Article 12 of the Constitution of RM), freedom of movement and housing (Article 27 of the Constitution of RM), inviolability of dwellings (Article 26 of the Constitution of RM), right of privacy of the post (Article 17 of the Constitution of RM), right to association (Article 20 of the Constitution of RM), right to strike (Article 38 of the Constitution of RM), right to property (compulsory acquisition) (Article 30 of the Constitution of RM), right to establish trade unions (Article 37 of the Constitution of RM).

\(^{14}\) For example the Article 17, 20, 27 in the Constitution of RM.

\(^{15}\) For example, Article 12, 37, 38 in the Constitution of RM.
contains prohibition of discriminatory revocation or restriction of rights. One of the weak points of the Constitution of the Republic of Macedonia is that it does not contain the principle of proportionality of the restriction of human rights, i.e. the principle that restriction of rights must be reasonably justified as necessary and proportionate to the gravity of the treat. But, because Republic of Macedonia has ratified the European Convention of Human Rights, the principle of proportionality from Article 15 of the Convention should be applied in this country whenever the state of war is proclaimed.

3. **Instruments for Human Rights Protection in the Republic of Macedonia**

The evaluation of the existence of the Rule of Law in one country means not only evaluation of the constitutional concepts of human rights, but also of their successful protection. As, it is already written, “this success is often the result of an almost endless process of measuring reality against the promise of the constitution.”

That is necessary if the purpose is to avoid what Sckolewicz terms as “constitutional nominalism” or the confusion of terminology with actual conditions.

The establishment of Rule of Law is both an idealistic and a practical undertaking. The need for adequate domestic remedies for human rights infringements is an indisputable element of a system of constitutional protection of human rights and for establishment of Rule of Law.

The degree of success of national human rights institutions depends on a number of legal, political, financial and social factors affecting the in-

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stitutions. These factors which are interrelated are following: the democratic governance structure of the state; the degree of independence of the institution from government; the extent of the institution’s jurisdiction; the adequacy of the powers given to the institution; the accessibility of the institution to members of the public; the level of cooperation of the institution with other bodies; the operational efficiency of the institution; the accountability of the institution; the personal character of the person(s) appointed to head the institution; the behaviour of government in not politicizing the institution and in having a receptive attitude toward its activities; and the credibility of the office in the eyes of the populace.^{18}

Generally, the protection of rights can be divided into two categories: protection against a specific violation of rights (individual act or failure to act of the executive power) and protection against general rules adopted by the legislative power or issued by the executive branch (constitutional review).

These kinds of protection of human rights are performed by Constitutional court, ordinary and administrative Courts, Ombudsman and Parliamentary Commission on human rights.

3.1. **The role of Constitutional court in protection of human rights**

The wave of democratization and ideas about human rights protection in countries of the post-communist Europe actualized the need for human rights protection by the Constitutional Court, i.e. the idea of constitutional complaint. Constitutional complaint is one of the most important, but in the same time controversial means for the human rights protection. The Constitution of Macedonia determines that Constitutional Court protects the freedoms and rights of the individual and citizen relating to the freedom of conviction, conscience, thought and public expression of thought, political association and activity as

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well as to the prohibition of discrimination among citizens on the ground of sex, race, religion or national, social or political affiliation (Article 110, para.1, subpara.3). It is not clear the criteria on which the “framing fathers” selected only these rights to be protected by the Constitutional Court.

The subject matter of a demand for protection of some of the enumerated rights before the Constitutional Court of Macedonia is individual act or activity. Procedural conditions stated in Article 51 of the Rules of the Procedure of the Constitutional Court of Macedonia are: that the demand for protection of the right should be submitted in the period of two months from the day of the final legally valid individual act, or of the day when the citizen found out about the activity, but not later than five years. From this provision which establishes subjective and objective terms is derived the conclusion that “the Constitutional Court can carry out direct protection of the mentioned freedoms and rights only if they are violated by a final individual act of an ordinary court.”

The Constitutional Court in a Resolution U no.168/97 stated that it “decides for protection of freedoms and rights violated by final and legally valid act, and the act of the Public Prosecutor is not an act which is final or legally valid individual act which decides on freedoms and rights, i.e. which revokes or limits some freedoms and rights.”

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The biggest weakness of the competence of the Constitutional Court of Macedonia is its very limited scope of rights, which are protected. That can lead us to the conclusion that in Macedonia there is no constitutional complaint.


20 The Constitutional Courts also rejected the demand for human rights protection with the Resolution No. 111/99 with explanation that the Agreement between the Faculty of Law and the student for paying scholarship and the Announcements for enrollment of students in First year of the Faculties of the “Ss.Kiril and Metodij” University for 1997/98, as well as the Resolution of the Ministry of Education of 14 June 1996 are not individual or final acts which violate right of the citizens. Another demand which was rejected because the Constitutional Courts is not competent to decide for violation of rights by some acts was the demand lodged for protection of women from discrimination during concluding religious marriage. The Constitutional Courts decided that it lacks competence to decide on violation of rights by religious books (U. no. 32/96).
Such restricted competence of the Constitutional Court of Macedonia resulted in very small number of demands received and only one case in which the court found violation of human right. The “irony” is that the only case, in which the Constitutional court found violation of human rights, was a case concerning violation of right to election, which is not in the competence of the court. In this case, Constitutional case used its competence to decide on the right to political association and activity. After this decision, another problematic issue was raised – impossibility of the applicant to obtain remedy for violation of his human right.

Also, the competence of the Constitutional court to decide on constitutionality and legality is very important for protection of human rights. Article 110 of the Constitution of the Republic of Macedonia provides that the Constitutional Court decides on: the conformity of the laws with the Constitution and the conformity of collective agreements and other regulations with the Constitution and the laws.

As it could be seen, instead of enumeration of the acts which are subject of the judicial review, the Constitution uses the term other regulations which is very broad and entails: by-laws (decrees, decisions of the Government, directions, rules and other acts of the administrative bodies) enacted by the executive power; local-government acts (municipality statute, decisions and conclusions of the municipal council etc.); the acts of the institutions and organizations with public powers; the statutes and rules of the educational, health and other institutions and organizations; the regulations of the Assembly of the Republic of Macedonia which do not have status of law (decisions, conclusions, declarations, resolutions and recommendations) etc. These acts are subject to the judicial review if they are general acts i.e. if they are valid for an uncertain number of entities in Macedonia. But the evaluation whether some act is general or not is in power of the Constitutional Court. The Constitutional Court (mis)used this power to declare it incompetent for deciding in constitutionality of some acts, which were considered as acts, which are not general, by the members of the Constitutional Court. One very obvious example was the decision of the Constitutional Court that it is not competent to decide on the constitutionality of the
Conclusion of the Assembly that there is no constitutional base for Parliament to issue a notice for referendum for pre-term elections\textsuperscript{21}. The Constitutional Court decided that it was not competent to decide on the constitutionality of the Conclusion of the Assembly with explanation that it (Conclusion) did not regulate relations, which make this act general, but it was an act of the work of the Assembly with which it decided concrete question\textsuperscript{22}. This is very problematic explanation, because it raises many questions, as are the question of the definition of general acts; if the general acts are acts which erga omnes tanguit, whether this Conclusion of the Assembly does not produces consequences erga omnes etc.

This decision showed that the Constitutional Court was not prepared at that time to be check on the ruling power and guardian of the Constitution; as well as that shaping of the competencies of the Constitutional Court with such general expressions in the Constitution can leave space for different interpretations and for manoeuvre for the Constitutional Court itself.

In the Article 110 of the Constitution of the Republic of Macedonia there is not explicit competence for the Constitutional Court a posteriori to decide on constitutionality of ratified international agreements. There was a case in front of the Constitutional Court to decide on constitutionality of the Law for Ratification of the agreement between the states-parties in North-Atlantic Agreement and other state parties in the Partnership for peace (No. 178/2000). The Constitutional Court rejected this initiative because its content was evaluation of the “content of international agreement”. The Court ruled that it did

\textsuperscript{21} According to the Constitution of RM the Assembly decides on issuing notice of referendum concerning specific matters within its sphere of competence. The Assembly is obliged to issue notice of referendum if one is proposed by at least 150 000 voters. In 1996, 150 000 voters demanded by the Assembly to issue a notice of referendum on the question: “Are you for pre-term elections for representatives in the Assembly of RM, which would be held at the end of 1996?” The Assembly did not accept this initiative with the explanation that it can issue a notice of referendum concerning specific matters within its sphere of competence, and not for pre-term elections. There was initiative sent to the Constitutional Courts for deciding on constitutionality of this Conclusion of the Assembly.

\textsuperscript{22} Resolution of the Constitutional Court, No. 1290, Official Gazette of the Republic of Macedonia, No. 70/96.
not have such competence. In 2002 the Constitutional court in same composition decided that the Constitution gives it the opportunity to decide on formal and material aspects of the Law for Ratification of some bilateral agreement because international agreements, with an act of ratification become part of the legal system of the Republic of Macedonia and they should be in conformity with the Constitution (U. No.140/2001).

The Constitution of the Republic of Macedonia is silent on the question of who can initiate procedure in front of the Constitutional Court (issue of “standing”). Most of the questions about the work and status of the Constitutional Court are regulated by the Rules of the Procedure of the Constitutional Court. The constitutional provisions, which are too basic and too modest, and non-existence of the law, which will regulate the questions connected with the Constitutional Court, gave a lot of space to the Constitutional Court to regulate its status by itself. The Rules of Procedure of the Constitutional Court determine that anyone can give an initiative for starting a procedure in front of the Constitutional Court. That opens a possibility for concrete judicial review. So, this kind of judicial review can be founded on the Article 12 of the Rules of the Procedure of the Constitutional Court.

In Macedonia anyone can submit the initiative to begin the procedure. The Constitutional Court also can start a procedure without initiative of anyone (Article 12 and 14 of the Rules of Procedure of the Constitutional Court). The Constitutional Court used this competence several times, as for example in Decision U.no.206/94 (The Law on Protection and Usage of Farming Land); Decision U. no. 81/95 (The Law on Operating and Managing of the Amenity Enterprises with Special Public Interest) etc. The Court has also used the right to broaden evaluation of the constitutionality or legality to some other provisions and questions, which were not asked in the initiative, but which, come out during the work of the court.

The Constitutional Court can issue decision with which it will abrogate (ex tunc) or vitiate (ex nunc) the law, ordinance, enactment, collective agreement, or shortly said every general legal rule if they are not in compliance with the Constitution or the law.
Having in mind these characteristics of the Constitutional Court in the Republic of Macedonia, especially the “standing rules” and legal effects of the decisions of the Constitutional Court, it could be said that it is one of the most powerful and perhaps even most active specimen at its kind in the world. But, in the practice it is not like that. The Constitutional Court has not become “key player” in the constitutional and political system.

Performing its competencies in evaluation of constitutionality and legality of general legal rules, Constitutional Court most of the times (not always) held opinions which were quite defensible, but not always argued in a sufficiently explicit way to persuade the public. The Constitutional Court has not always avoided political influence when it decided on some cases. But, even when the Constitutional Court managed to act as protector of the Constitution, the government made pressures to “discipline” the members of the Court.\(^{23}\)

The Constitutional Court had difficult job in the previous period, because the legal system was changing radically, but old laws were still in force. But it managed to deal with that situation by adopting decisions, which were mostly approved by the public.

For the Constitutional Court to be honoured in their function to protect human rights by their normative violations they should try to represent the “idealism” of the constitutional regulations, in contrast to the “pragmatism” of the other state bodies.

\[3.2. \textbf{The role of courts in protection of human rights}\]

The courts should be principal guardians of human rights in all countries in the world. Almost all constitutions provide that the judiciary is the guardian of the human rights of the individual. For judges to be able to perform this function, some institutional requirements should be fulfilled. One of them is guaranteeing judicial independence.

\(^{23}\) These pressures were expressed even in public through financial restrictions from the Ministry of Finance in February 2001. Also from 2008 till now, the Constitutional court faced strong and open pressure from the Government.
“Judges shall be independent and subject only to the law” is proclaimed in the constitutions, but this is only a guiding principle with aim to prevent interference and domination by legislative and executive power over the judiciary. But, in practice, the separation and independence of judiciary from other branches is never fully established.

The office of a judge in Macedonia is permanent and the conditions of election of judges are determined in the Laws on Courts. Till 2005 the judges were elected by the legislative body on the proposal of Republican Judicial Council. The election of the Republican Judicial Council was only in competence of the Assembly. The Council was consisted of seven members elected by the Assembly “from the ranks of outstanding members of the legal profession”. Two of them were proposed by the President of the Republic and others are proposed by the Assembly. The qualification, which was demanded for electing a member of the Republican Judicial Council (outstanding member of the legal profession), was very subjective. There was no provision in the Constitution that the Council should be consisted at least of certain number of judges.

With these provisions for election of the members of the Judicial Council, they were dependent of the ruling political parties in the Parliament, and the judicial branch had no influence on the election of its members, despite of the fact that it was a body that should have been closest connected with it. The degree of partisation of the Republican Judicial Council influenced the partisation of the process of electing judges.

In 2005 constitutional amendments on judiciary were adopted. Those amendments changed the system of election of judges. Now, judges are elected by the Judicial Council which is consisted of 15 members. Eight of them are elected among and by the judges themselves, five are elected by the Parliament. Minister of justice and President of the Supreme Court are also members of the Judicial Council. But, these reforms have not changed anything in partisation of judiciary. The situation is even worse, with direct participation of the Minister of Justice in the body that elects judges.

The public opinion in Macedonia about the independence of judges is predominantly negative. The similar are the remarks from assessment reports
of Rule of Law in Macedonia. The judges themselves did not make much to gain real power. The executive and legislative power did not do much to give courts a chance for that. A “collective memory of the communist regime” and the role of the courts in that time is still present in both countries. The consequences of the period when law was essentially subordinate to politics are still apparent today, especially within the legal administration and judiciary, whose role within the legal order and society is still underestimated.\(^{24}\)

That results in the widespread public mistrust of the legal system. The mistrust in courts is not only because of the doubts in their independence, but also because of their inefficiency in protection of the rights. Most of the claims against Macedonia before the European Court of Human Rights are based on the Article 6 of European Convention of Human Rights (ECHR), which guarantees the “right to fair trial within reasonable time”. Among all judgments from 1991-2011 in which the Court determined the violation of ECHR by Macedonia, in 81% the Court determined violation of Article 6. If we add to that 4% of cases in which the Court determined violation of Article 13 (right to efficient legal remedy), it could be seen that “behaviour” of Macedonian judges was qualified as behaviour that directly violates human rights in 85% of all judgments in which Macedonia is proclaimed “guilty”.

<table>
<thead>
<tr>
<th>Determined violations of ECHR by Macedonia from 1991 - 2011</th>
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<tr>
<td>■ Art 6 - Right to fair trial</td>
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<td>■ Art 6 - Right to trial within reasonable rime</td>
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<td>■ Art 6 - Right to efficient legal remedy</td>
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<tr>
<td>■ Other articles</td>
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If we add to these numbers, friendly settlements and unilateral declaration, the total number of cases for trial in reasonable time is 75%, or in numbers 211\(^{25}\).


\(^{25}\) Annual Report for the work of the State Agent and Analysis of the cases and procedures before
3.3. The role of Ombudsman in protection of human rights

The awareness that judiciary and procedure before the Constitutional Court are not enough for human rights protection led toward introduction of informal institutions for human rights protection in democratic countries.\(^{26}\) Most spread informal institution for human rights protection is Ombudsman, who is a kind of mediator “between the state and the civil society.”\(^{27}\)

The competence of the Ombudsman to protect the violation of the rights by the state bodies and other organizations is very important because these bodies, especially administrative are major violators of human rights. The role of the Ombudsman in performing control over these bodies is especially important in the process of transition when the transformation of the administration is the hot topic. The Ombudsman has preventive role, because the mere fact that someone is watching over them urges them to act properly. As Ivan Bizjak, Slovenian Ombudsman wrote, in countries in transition, the principle of state as all-powerful remains strongly rooted in the minds of administrative officials. The Ombudsman can help establish the principle that the state exists to serve the citizens, not the other way around. The Ombudsman can also play an important role in the prevention of the corruption within state bodies.\(^{28}\)

The role of the Ombudsman in human rights protection in one country depends on few factors: constitutional and legal frames of the competence of the Ombudsman; the attitude of the holder of the function Ombudsman toward its competencies and duties; the attitude of the state bodies and other organizations toward the Ombudsman; and the relationship between the public and the Ombudsman.

The Ombudsman in Macedonia is elected by the Parliament, for a term

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European Court of Human Rights for 2011.


of eight years with the right for one re-election. The Constitution did not provide special majority for election of the Ombudsman, as it is the case with the Government (Article 90) and the Constitutional Court (Article 109), so the Ombudsman was elected with majority smaller than absolute!!! This provision has been changed with the Amendment XI, according to which the ombudsman is elected with the majority of the total number of the representatives and the majority of the total number of the representatives belonging to the minority communities in Macedonia.

The Ombudsman in Macedonia is competent only for protection of the constitutional and legal rights of citizens violated by bodies of state administration and by other bodies and organizations with public mandates.

If the Ombudsman decides to launch a full investigation he communicates his decision to the petitioner and to the body against which the petition has been lodged and requires all necessary explanations and additional information. The bodies are obliged to furnish the Ombudsman all the information and data, within their competencies, irrespective of the level of secrecy, and shall enable them to carry out the investigation. All officials and other employees of the body must respond to the Ombudsmen’s call to co-operate in an investigation and provide explanations. The Ombudsmen may summon any witness or expert to an interview about the case they are dealing with.

The process of establishing the institution of the Ombudsman in the practice of the Macedonia was very slow. The Constitution established this institution in 1991, but the law that regulates this institution was adopted later in 1997, after which in the same year the first holder of this post was elected. The institutionalization of the Ombudsman was accepted by the people who sent many complaints to them. Many hopes and demands were directed toward the Ombudsmen.

But it must be pointed out that Ombudsman was criticized for marginalization of his position. For successful performing of its function i.e. to enforce and promote human rights, the ombudsman should be independent which
means that should have legal and political autonomy; have clear, legitimate mandate with clear sphere of jurisdiction; be efficient and be accessible for the individuals.

These preconditions are necessary not only for ombudsman, but for all institutions, which are competent to protect human rights: judicial and non-judicial, but it must be admitted that not all of them are fulfilled in Macedonia.

4. Conclusions: Macedonia in practice - “Rule of Law” or “Rule of man”?! 

Finally, we are in front of the question: Is there Rule of Law in the Macedonia? The answer of this question could be searched through testing the existence of the benchmarks of the Rule of Law in this country.

1. Limited government - the governments are limited by human rights (external principle) and separation of power (internal principle). The Constitution of the Republic of Macedonia declares the separation of powers as basic value of the system, but the practice is not always compatible to the norms.

The problems with the independence of the judges in the country were already pointed out. The Constitutional court also has been subject to open pressure and disqualifications by the Government. The Government and the Parliament openly has not respected the decisions of the Constitutional court. In many cases state bodies has been operating unlawfully, without respect of legal norms, including the Constitution. For example, the Parliament in several cases adopted the same or similar legal rules, as were already declared as unconstitutional by the Constitutional court29. Also, there was a case in 2008, when the Parliament violated the procedure for adoption of over 100 laws. Af-

29 That was the case with the so called Law on lustration which was amended in 2011, without respect of the reasoning given in the Decision of the Constitutional court from 2010.
After the elections in 2008, at the end of July and beginning of August, ruling majority adopted 172 laws without any discussion, following emergency or short procedure. The Rules of Procedure determines the cases in which the law can be passed following emergency procedure: when it is necessary for prevention and removal of major distortion in the economy; or when the interests of security and defence of the Republic or similar major disaster, epidemics or other emergencies and urgent needs demand it. No one of these reasons was present to justify the use of emergency procedure.

The laws were adopted in the “fast fingers” style: from reading of the name of the law till its adoption, only 35 to 40 seconds passed. That left consequences on the quality of the laws, so several of them were brought to the Constitutional court for evaluation of their constitutionality. During this “fast fingers” session, there was nebulous case in which the Parliament introduced changes in one Article of Law on Financing Political Parties, which did not exist in the legal system because it was abolished by the Constitutional Court two years ago (in 2006).

During this procedure for adoption of these laws, there was attempt from the Speaker to violate the President’s right to veto. When the President announced that he will put veto on several laws, the Speaker put these laws on second vote in the Parliament without waiting the elaboration of the veto of the President. After that strange situation occurred, that ended with three times voting of the same law in the Parliament. That is contrary to the legal norms prescribing law-making procedure. At the end of such “humiliating behaviour” of the Parliament in 2008, the Speaker apologized publicly, but did not take political or legal responsibility for violation of the legal norms regulating the procedure for law-making.

Behaviour of the state bodies as “unlimited” also leads to disrespect of the principle of “predictability of state actions” as basic rule of the constitutionalism and Rule of Law. The disrespect of the proclaimed principles depends in a large measure on the level of political culture in one country. According to the typology of Gabriel A. Almond and Sidney Verba, in Macedonia there is
still “subjective” political culture. Public opinion is weak and convenient for manipulation, which is done through massive propaganda by the Government and pro-governmental media.

2. Protection of human rights – for a long time the main attention in the reports on human rights protection in the Republic of Macedonia, is focused on the “more obvious” violations of human rights, as are occasional use of the excessive force by the police against criminal suspects following their arrest; or violation of presumption of innocence, degrading conditions in prisons etc.

Faced with these “painful” violations of human rights in the Republic of Macedonia, it has been almost forgotten that another rights are also abused: health care, social security and other social rights are on very low level etc.

The latest human rights reports point to violations to some political rights, as are: freedom of speech (for 2011 - there were reports that the government attempted to impede criticism) and freedom of press, freedom of assembly etc.

But the purpose of this paper is not to report mere facts, because it carries with itself danger of writing a paper, which will be outdated very soon. The situation in the Republic of Macedonia is still similar to the situation described by one Russian artist: you produce a film about the absence of sausages, but next day the cheese is gone.

So, it is more or less clear that, in Macedonia, “the consensus about the basic institutions of the Rule of Law is still predominantly based on the abstract level and not in the sphere of the interpretation and implementation of


these institutions.”32 Actually, establishment of the Rule of Law is one of the most sensitive and difficult tasks in the process of building constitutionalism in post-communist countries.

The governments have done a little for establishment of Rule of Law in the Republic of Macedonia, as vital part of constitutionalism. Even, Rule of Law in its most formal context (equal to legal state) does not exist in the Republic of Macedonia. The higher values and legal rules have not been respected by the governments. The principles of legal security and responsibility of the state officials have no meaning in Macedonian political and legal life. “Rule of man” and not of law is as permanent tradition in the country. The organized crime and corruption are in the scene. The judiciary is not independent neither efficient. During the whole period of the transition the Republic of Macedonia has grappled with some problems in building up judiciary as a guardian of human rights. It is clear that a weak state of uncertain legitimacy and the reality of socio-economic turmoil were severely hampering the strengthening of the courts.

The US Department of State points in its County Report on Human Rights in Macedonia for 2011 “the most important human rights problem was the government’s failure to fully respect the Rule of Law, which was reflected in its interference in the judiciary and the media, selective prosecution of political opponents of the country’s leaders, and significant levels of government corruption and police impunity”33.

Because of that, Republic of Macedonia has to start with building conscience about human rights and strong public opinion supportive to the rights values and the Rule of Law. Building a participative political culture and human rights culture is very important, if not most important for accepting Rule of Law and human rights as its part, as a pillar of the society in the Republic of Macedonia.

Bibliography


THE CONCEPT OF FUNDAMENTAL RIGHTS: DEVELOPMENT, PRINCIPLES AND PERSPECTIVES

I. On fundamental rights in general

The initial understanding of the notion of human rights and freedoms should take into account at least two of their basic dimensions. The first one is related to their natural law and positive qualifications while the second one relates strictly to their positive conceptions. A few clarifications thereof should be made.

A key to the distinction between natural law and positive law conceptions of human rights and freedoms must be located within their “positivisation” or incorporation into the constitutional and legal order. According to G. P. Barba Martinez, one of the leading contemporary Spanish constitutionalists and a co-writer of the Spanish 1978 Constitution, the term “natural rights” (droits naturels) relates to those rights “that precede government and positive law…that are by their cause within human nature…those that direct and limit sovereign power”. Such a dialectics between natural and positive rights moreover provokes a discussion on the division between that which is (positive law) and that which ought to be (natural law) and human rights therefore appear as concepts that require an analysis from the point of view of legal philosophy.

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2 Besides this „ontological“ level of relationships between that which is and that which ought to be, another discussion on the relationship between law and morals can also be added here. On
which by itself goes beyond our purposes here. However, such a reductionism enables us to make some additional specifications in terms of both terminology and concepts. Namely, the natural law theory “stream” presents human rights through notions of “natural” and “moral” rights”, while its positive counterpart usually, on one hand, uses terms such as “subjective public rights” (subjektiven öffentlichen Rechte, droits publics subjectifs) and „public liberties“ (libertés publiques), or, on the other hand, operates with notions of „basic/fundamental liberties“ (libertés fondamentales) and „basic/fundamental rights“ (fundamentale rights, droits fondamentaux, die Grundrechte). The very notion of human rights (human rights, droits de l’homme) appears in both mentioned dimensions and represents a general, higher category. A distinct quality of being “basic” or “fundamental” in this sense represents a key element of definition which requires that rights and liberties, in order to be truly “fundamental”, fulfill several basic conditions.

The first one is that relevant fundamental rights and liberties are directed to the protection of specific, particularly important interests, those that are at the same time different from the interests protected by “ordinary” rights. Considering such a possible and necessary gradation of rights and liberties, an additional concept of “hierarchical” relationships between them, and towards other constitutional values, becomes obvious. Directly linked to it is a second condition of a fundamental rights idea, namely a request of a constitutional level of their protection3. Accordingly, two other important features of such rights must also be observed. The first one is a kind of “emancipation” from the parliamentary majority-rule or, in other words, a request that fundamental

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rights can be regulated only on a highest level of a political and social consensus (through constitutional documents or specific sources of law, such as organic laws). The second feature is a request for an efficient legal protection and this is worked out through the judicial (constitutional) review, but not in its ordinary form: in this case, more strict criteria of evaluation of constitutionality of restrictions of fundamental rights must be applied. In that sense, one could talk about the “qualified” judicial review. At the same time, appropriate and efficient judicial review here serves as a precondition for the emancipation from the majority rule.4

II. Historical developments

In its full capacity, from that point of view, fundamental rights and liberties do not appear at the very moment of their incorporation into the relevant legal documents: quite the contrary, a comparative perspective reveals that fundamental rights have been marked by a long and normatively progressive historical process of development5. That process includes several phases. At first, human rights and liberties were primarily envisaged as philosophical, moral and social aspirations which, at one point of history, were also politi-


cally proclaimed\textsuperscript{6}. This phase is clearly expressed through documents such as American 1776 Declaration of Independence and French 1789 Declaration\textsuperscript{7}. The second phase represents a “positivisation” of rights and liberties, i.e. their actual inclusion into legal systems by which they cease to represent only certain political and social aspirations and appear as real subjective rights which through their concrete legal effects start to require obedience by the state/public bodies. Historically, a process of “positivisation” of rights and liberties is reflected in two temporally and normatively distinct stages: the first being the legislative regulation (classical liberalism period) and the second qualified by the constitutional level of human rights and liberties protection (in most cases, the second part of the 20th century). This genesis is also reflected in particular terminology applied\textsuperscript{8}.

In France, the peak of development of fundamental rights has not been achieved until 1971, and even then the very process only started\textsuperscript{9}. For previous

\textsuperscript{6} On the doctrinal and political evolution of the notion of human rights through the works of a number of relevant, classical authors (e.g. J. Locke, Ch. L. Montesquieu, J. J. Rousseau, Voltaire, J. R. d’Alembert, M. de Condorcet, Th. Paine etc.), see: Favoreu, L. et al. Droit des libertés fondamentales. op. cit., pp. 19-23. Also in: Colliard, Claude-Albert and Letteron, Roseline. Libertés publiques., op. cit., pp. 19-46.


\textsuperscript{8} Thus, notions such as „public liberties“ are related to the legislative phase, while „fundamental rights“ contain an element of the highest, i.e. constitutional level of protection.

\textsuperscript{9} Contrary to the practice developed during the 60’s, the Constitutional Council gradually emancipated itself from its initial role of an arbiter between the legislative and executive branches and became a protector of rights and freedoms which themselves in that period acquire a level of a constitutional category. This process is marked by a progressive inclusion of various sources of rights and freedoms in what is nowadays known as the “constitutionality bloc” (Bloc de constitutionnalité). A process of formation of constitutional sources of rights and freedoms in the real meaning in France commences in 1971 with the decision of the Constitutional Council, by which the so-called “basic principles recognized by the laws of the Republic” (Principes fondamentaux reconnus par les lois de la République - PFRLR) were given a constitutional level. See: Décision
periods of French history, L. Favoreu made a clear observation: “...up until the revolution of the V Republic, the dominant legicentrism for a long time excluded the very idea of fundamental constitutional rights: law-maker could not do wrong; liberties were protected by him”.10

In the German case, a decisive turn in direction of fundamental rights development occurred after the Second World War, following the enactment of the 1949 Basic Law. On the other hand, the period of the Weimar Republic represents only a “legislative” historical phase. This is confirmed by the Basic Law itself which introduces the institution of the Constitutional Court (Bundes-verfassungsgericht) while its Article 1 paragraph 3 prescribes that “(3) The following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law.” It is of interest to note here that, for instance, D. P. Kommers claims that the basic difference between the 1949 constitutional text and its Weimar predecessor lies in the fact that the Weimar version, although having recognized basic rights as objectives, did not provide for their judicial enforcement. Moreover, the same author stresses the conclusion that the 1949 Basic Law is the first constitutional text in Germany which acknowledged the existence of pre-constitutional rights and from that point of view stands in the strict opposition to the legal positivism, so much characteristic for the period between the two great wars11.

This is in accordance with the propositions suggested by C. Starck who confirms the conclusion that the history of fundamental rights in most Western countries until the 20th century was marked by their conception as “programmatic principles”, rather than higher-value (legal/constitutional) norms.


Accordingly, the same author asserts that human rights in Germany, for the duration of the Weimar period, were acquiring their legal validity exclusively through the relevant legislation, which is in contrast to the situation that started in 1949 (in that respect, C. Starck claims that the higher level value of fundamental rights protected by the 1949 Basic Law emerges from various elements: from the natural-law sources derived from its Article 1 paragraph 2; from the fact that those rights bind not only the executive and judicial branches, but also the legislature itself; from the fact that the Basic Law in its Article 19 paragraph 2 prohibits the limitations upon the essence of the basic rights; and finally from the prohibition of the human dignity clause12.

However, what is of even more significant interest here are some additional conclusions related to the issue of the application of the Rule of Law principle and the existence of constitutional (judicial) review. Thus, Kommers directly stresses that the period of the first part of the 20th century, including the Weimar Republic, was marked by the formalistic conception of the legal state principle (Rechstaat), as well as by the general positivism within which the law formulated in (parliamentary enacted) laws was a supreme law, because it reflected the popular will. At the same time, courts were under obligation to support such a concept of (democratically formulated) law and to ensure that all the activities of the state are undertaken in accordance to the supreme legislative will. Consequently, there was no room for the judicial (constitutional) review13. Contrary to that, according to Kommers, the new constitutional text of 1949

represented a shift towards a new and completely different material conception of the legal state principle, the one in which the legislature was bound by the “constitutional order”. Moreover, such a constitutional order is here protected exactly by the judicial (constitutional) review mechanism. In the English case, human rights and liberties have started to acquire full characteristics of fundamental rights concepts only in the most recent period, namely after the enactment of the 1998 Human Rights Act which partially led towards the “abolishment” of the traditional supremacy of the British parliament and towards binding of the Parliament (as well as other public bodies) by the criteria established within the jurisprudence of the European Court of Human Rights (based upon the European Convention for the Protection of Human Rights and Fundamental Freedoms). The American example is rather specific because the original version of the US Constitution contains only a few guarantees of individual rights and freedoms, a fact primarily connected to the classical Anglo-American concept of constitutional law.

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14 Kommers, D. P. The Constitutional Jurisprudence of the Federal Republic of Germany, op. cit., pp. 36-37. In this segment, D. P. Kommers is quoting one of the leading German constitutional theoreticians and a judge of the Federal Constitutional Court, E. W. Böckenförde, along with his understanding of the substantive (material) conception of the legal state principle, according to which the freedom is not any more unconditionally guaranteed through a formal legal demarcation, but an additional justification related to the fundamental system of values (Wertgrundlage) contained in the Constitution in that respect is also sought.


16 On individual, particular guarantees of rights and freedoms enumerated in the original text of
of the so-called “procedural” constitutional theories, concerned mainly with the separation of powers issues, rather than with the protection of individual rights. The first significant turning point here was the enactment of the Bill of Rights in 1791, which was followed shortly after by the introduction of the judicial review mechanism, affirmed in the case of Marbury v. Madison.\(^{17}\) Notwithstanding the fact that these two elements were thus fulfilled historically very early, a real step forward occurred only later, but still earlier than in the rest of the world. M. Konvitz points out that the first practical steps in the evolution of fundamental rights concepts could be observed already with J. Madison\(^{18}\) and in the opinion of the judge B. Washington, formulated in the case of Corfield v. Coryell in 1823\(^{19}\). However, in the American paradigm, the decisive historical point of the fundamental rights development was the period after the Civil War and the enactment of the XIV Amendment to the US Constitution.\(^{20}\) The essential relationship between the XIV Amendment and fundamental rights in the American constitutional system lies in a particular interpretation of the so-called Due Process Clause, according to which no state shall “deprive any person of life, liberty, or property, without due process of law”. This at the same time brought to surface the issue of how to interpret the notion of “liberty”, mentioned in the clause, and, accordingly, the issue of whether such a “liberty” pertains also to individual rights enumerated in the first ten amendments (Bill of the Constitution of the United States of America (prohibitions on bill of attainder, ex post facto laws, laws impairing the obligation of contracts, suspension of habeas corpus), see: Nowak, J. E., Rotunda, R. D., Young, J. N. Constitutional Law. St. Paul., Minn.: West Publishing Co., 3\(^{rd}\) edition, 1986, pp. 314-315.


of Rights), which bound the Federation, but not the states. In such a way, a long
lasting process of the so-called “incorporation” of the first ten amendments
commenced: following the logic that through the Due Process Clause particular
rights and freedoms contained in the Bill of Rights could be applied directly to
the states, i.e. that they are in such a way “incorporated”, it was accepted that
this could related only to those rights that are in a certain way “fundamental”,
or in their meaning and significance so much “basic” that their general appli-
cation could not be avoided. The explanation of the notion of “fundamental”
was first offered in the case of Gitlow v. New York in 1925\(^{21}\), while the general
formula of „incorporation” was articulated in the case of Palko v. Connecticut
in 1937\(^{22}\), where the justice B. Cardozo postulated that basic or fundamen-
tal rights could be only those rights which are of the very essence of a scheme of
ordered liberty…principles of justice so rooted in the traditions and conscience
of our people as to be ranked as fundamental”\(^{23}\).

III. Judicial review and applicable tests

Historically alongside the process of incorporation, the US Supreme
Court started to develop specific methods for evaluating the constitutionality of
restrictions of rights and freedoms, within which a key position belongs to two
separate tests: the so called “rationality review” test (or “rational-basis review”) and the “strict scrutiny” review. The latter category, as a form of a stronger ju-
dicial review test, at the same time represents the basic parameter in qualifying
the “American” fundamental rights, even though its application is not merely
bound to them, but relates also to assessments of measures by which particular

\(^{23}\) Palko v. Connecticut, 302 U.S. 319, 325 (1937). In the American constitutional system, a theo-
ry of the so-called “selective incorporation” was adopted, according to which it was accepted that
a majority of rights and freedoms from the Bill of Rights belong to the category of fundamental
rights, while the exceptions are few. On these exceptions, among other sources, see: Killian, J.
“suspect classifications” of subjects are introduced\textsuperscript{24}. From the practical point of view, the strict scrutiny test is thus linked to both the Due Process Clause and the Equal Protection of the Laws Clause of the US Constitution\textsuperscript{25}. In both cases, the methodology applied by the courts is basically directed towards the assessment of whether a particular act which places restrictions upon fundamental rights and freedoms, or which introduces “suspect” classifications or classifications pertaining to the enjoyment of fundamental rights and freedoms, is necessary for the furtherance of a particular overriding/compelling state interest. At the same time, the government bears the burden of proof to justify the measure, i.e. to defend the constitutionality of a law.

Contrary to that, where there is a legislative or other act which does not regulate the domain of fundamental rights and freedoms (or does not introduce “suspect” classifications), the courts apply a less rigid test, the rationality review. In substance, the rationality review consists of assessment whether there is a rational basis for concluding that, through enactment of such acts which restrict rights and freedoms, the government wanted to pursue a particular legitimate aim. Accordingly, the burden of proof here is on the side of the one claiming the unconstitutionality of a law, while the law itself is presumed constitutional. This test is usually applied for the evaluation of constitutionality of those laws that are regulating “economic and social welfare”\textsuperscript{26}. In the historical perspective, gradual articulation of the strict scrutiny and rational basis tests is intrinsically linked to the abandonment of the old doctrine of “Lochnerism”

\textsuperscript{24} In the sense of a direct relationship between the notion of fundamental rights and the strict scrutiny test, Milton Konvitz explicitly stresses that it is exactly the strict scrutiny that serves as a distinctive feature of fundamental rights, the element that distinguishes them from other, non-fundamental rights.


\textsuperscript{25} The strict scrutiny and rationality review tests have widely been discussed and analyzed in the theory of American constitutional law. Their general description in this place is based on the following sources: Nowak, J. E., Rotunda, R. D., Young, J. N. Constitutional Law. op. cit.; Stone, G.R., Seidman, L.M., Sunstein, C.R., Tushnet, M.V. Constitutional Law. op. cit.; Sullivan, K. M. and Gunther, G. Constitutional Law. op. cit.

\textsuperscript{26} Nowak, J. E., Rotunda, R. D., Young, J. N. Constitutional Law, op. cit., pp. 323 and 330.
classical liberal doctrine formally formulated in the early 20th century) and the acceptance of less rigid levels of review for the economic and social legislation from the New Deal era onwards, as well as more rigid levels of review for, as already mentioned, fundamental rights. Accordingly, it seems that the American doctrine reached a consensus on the conclusion that the decisive turning point in establishing the strict scrutiny review was introduced in the famous footnote four by the justice H. F. Stone, added to the opinion in the case of United States v. Carolene Products Co. in 1938.

The equivalent to the American concepts of the strict scrutiny and rational basis reviews in the German constitutional system is represented by the proportionality test which, according to D. P. Kommers, requires the constitutional analysis in three steps: first, through evaluation whether the means applied in restricting fundamental rights were also appropriate for the achievement of the legitimate aim; second, whether the means applied at the same time have the least restrictive effect on a constitutional value; and third, whether the means are proportionate to the aim.

In France, the proportionality test is derived from the so-called “manifest error” standard (l’erreur manifeste), according to which the Constitutional Council verifies the legislature’s assessment of circumstances upon which its action is based, and in a case of a manifest error, a law can be held unconstitutional. Additionally, the proportionality in the strict sense is also applied, and in this situation the Constitutional Council verifies if the legislature’s measures towards a constitutional right are so burdensome that they can deform its meaning, and at the same time the manifest error standard is used so as to balance

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the general interest pursued by a law on one side and the threats to a particular constitutional principle on the other.\textsuperscript{30}

In the Republic of Croatia, the Constitutional Court applies the proportionality principle of the more or less the same version as it exists in the Federal Republic of Germany\textsuperscript{31}. So far, the constitutional case-law has not developed standards in terms of valid restrictions for all the rights and freedoms, although a majority of them have been addressed and worked out. For instance, the basic right to life has not so far been examined in such a way so as to provide relevant guidelines for future developments. On the other hand, a constitutional prohibition of ill-treatment resulted in a kind of a “stricter scrutiny” which emphasized several important analytical conclusions: that this particular right implies an absolute prohibition, while the prisoners still retain all the rights and freedoms conferred to them by the European Convention for the Protection of Human Rights and Fundamental Freedoms; that there are certain positive obligations of the state to provide such conditions that respect essential guarantees of human dignity; that it is the state, and not the prisoner, which must prove that the medical status of the prisoner is compatible with his longer incarceration, taking into account his health condition before and during the staying in prison, capacities for providing an appropriate medical care in prison, as well as the suitability of longer incarceration. Similarly, the constitutional guarantee of the right to liberty (as it is contained within a category of the so-called personal

\textsuperscript{30} Rousseau, Dominique. „The Constitutional Judge: Master or Slave of the Constitution“. In Constitutionalism, Identity, Difference and Legitimacy, edited by Michel Rosenfeld, pp. 265 and

rights enumerated in the Croatian Constitution) also leads to a form of a stricter scrutiny. Relevant criteria in that respect (taking also a paradigm of detainment) include, for instance, the following: that detainment represents particularly sensitive measure of restriction of personal freedom; that presumption of innocence in such cases is still fully applicable; that detainment is not and cannot become a prison sentence; that it can be applied only in so far there is an extremely high level of probability, or “serious doubt”, that a person indeed committed a crime; that there is a duty of a court to, periodically (every two months), examine whether the legal conditions for detainment are still present (with a possibility to terminate the measure or to extend it); that a prolongation of detainment depends on circumstances of each actual case, and that the public interest in prolongation heavily overweighs the principle of individual liberty; that a competent court is under obligation to present a thorough and detailed reasoning (explanation) for the prolongation of detainment. As far as the freedom of expression is concerned, the Croatian constitutional case-law has, it seems, developed a certain form of a rational-basis, rather that strict scrutiny, review. This, of course, is of utmost importance for an overall assessment of the position of fundamental rights and freedoms in the Croatian constitutional system, considering a general importance which freedom of expression is given worldwide. On the other hand, rights of assembly and peaceful protest provided a kind of a stricter scrutiny. This in no way, however, cannot be said for the protection of the, for example, freedom of religion.

In any case, it could be said that an overall assessment of the quality of protection of constitutional rights and freedoms in the Republic of Croatia reveals that the true level of “fundamentality” has not yet been fully achieved: not only that those rights that definitely should be protected by the highest standards of the judicial scrutiny are excluded from such guarantees (at least so far), but the very case-law itself has not yet produced relevant standards in all the fields.

Apart from that, it should also be emphasized that in the Croatian constitutional system, rights and freedoms are additionally protected by the so-called “organic laws”, special laws that require to be enacted by a qualified
majority of the votes in the Parliament. The Croatian Constitutional Court has, however, specified that the organic laws do not and should not address all the categories of basic human rights and freedoms, as they are enumerated in the Constitution, but only those that pertain to the so-called civil (personal) and political rights (thus, excluding from such a protection all those rights and freedoms that are qualified as economic, social and cultural).

IV. Contemporary perspectives of fundamental rights and European Union standards

Finally, several mutually connected observations related to the notion of fundamental rights can be made at this place. On a rather basic level, it could be said that they represent an expression of the aim to achieve general principles of liberty and equality. In that respect, their basic “constitutional philosophy” is intrinsically linked to the relationship between the notions of constitutionalism and democracy, which is clearly seen from the fundamental rights tendency to be emancipated from the parliamentary majority rule. Accordingly, the same goes for the actuality of the well-known constitutional “process-based” (e.g. J. H. Ely) and “rights-based” theories (e.g. R. Dworkin), as well as for the doctrinal division of the principle of Rule of Law into its


33 Ely, John H. „Democracy and Distrust (A Theory of Judicial Review)“. Cambridge, Massachusetts and London, England: Harvard University Press, 1980; Dworkin, Ronald. „Taking Rights Seriously“. Cambridge, Massachusetts: Harvard University Press, 1977, 1978; see also: Garvey, J. H. and Aleinikoff, T. A. “Modern Constitutional Theory: A Reader“. St. Paul, Minnesota: West Publishing Co., 1994, pp. 3-40. These mentioned theories basically posit the problem of who is authorized to decide upon the fundamental rights and freedoms, parliaments or courts. Consequently, this addresses the basic issue of whether a constitution as a separate document is primarily aimed at preserving the balance and separation of power of various governmental branches, or it should also contain some substantive guarantees, expressed, articulated and formulated under the term of rights and freedoms. In that respect, it seems that rather similar theoretical problems can also be located (at least) in the Republic of Croatia, in those cases that were dealing with the constitutional judge election procedures and with the referendum issue (see the decisions of the Croatian Constitutional Court U-III-443/2009, April 30th 2009; U-VIIR-4696/2010, October 20th 2010).
formal and material versions. Moreover, certain other theoretical elements of the fundamental rights theory can be added here. Thus, it could be claimed that they stand in a mutually “relative” position, depending on a particular value they embody, and also depending on an “objective order of values” that is possibly incorporated in a Constitution. Also, fundamental rights are normatively a historical phenomenon, meaning that one has to take a position on whether they go through a “progressive development” or not.

As for the developments on a level of the European Union, several important observations can be made. First, it seems that the entry into force of the Charter of Fundamental Rights represents the most important element of the process towards the adoption of the fundamental rights concept, since this is the document that explicitly provides very firm substantive human rights guarantees. In other words, the process that within Europe already started with the European Court for Human Rights in Strasbourg is now to be continued on an additional EU level. Secondly, it is of utmost importance that a new protection is also qualified by a possibility of applying a judicial review, an element which, as it has been shown here, makes an inevitable component of the very notion of fundamental rights. Finally, it should be noted that various human rights guarantees on the European level, draw their authority, apart from the EU documents, principally from two sources: from international human rights treaties (among which a special place belongs to the European Convention for the Protection of Human Rights and Fundamental Freedoms) and, even more importantly, from “constitutional traditions common to the Member States”. The latter category normatively resembles some previous standards developed

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35 For the “objective order of values” in the Croatian constitutional system, see the decision of the Croatian Constitutional Court U-I-3597/2010 (July 29th 2011). See also: Kommers, Donald P. The Constitutional Jurisprudence of the Federal Republic of Germany. op. cit., pp. 47-48.

in the Strasbourg case-law (e.g. the so-called “margin of appreciation”) and could possibly be understood as a necessary element of recognition of different constitutional, political and social cultures. But on the highest level, this element should not excessively burden the concept of universality of fundamental rights, or, in other words, their ideal general and non-discriminatory application.
1. The Evolution of Human Rights Protection within the European Union: Is there a need of a Charter?

The founding Treaties of the European Communities did not have any special provision on the protection of human rights at the community level save to the provisions on non discrimination on basis of nationality\(^1\) and the principle of equal payment for men and women in work\(^2\). This is due to the fact that the first community Treaties aimed at the creation of a regional organization of economic character rather than of a political nature. The Paris Treaty and the Rome Treaties established a pragmatic model for uniting the post-war Europe, based on the economic spillover integration, instead of the “United States of Europe”. Due to the lack of legal provisions on human rights in the fundamental Treaties, the European Court of Justice, in a series of cases such as Stork\(^3\), Geitling\(^4\), and Sgarlata\(^5\), resisted taking into consideration the protection of fundamental rights in deciding on the disputes brought before it\(^6\). However,

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\(^{1}\) Article 10 of the Treaty of European Community.

\(^{2}\) Article 119 of the Treaty of European Community.

\(^{3}\) Case 1/58, Stork v. Authority [1959], ECR 17, para 4.

\(^{4}\) Cases 36, 37,38, 40&59, Geitling v. High Authority, [1960], ECR 423, para 438.

\(^{5}\) Case 40/64, Sgarlata and others v. Commission [1965], ECR 215.

a wind of change was noticed in the ECJ jurisprudence during seventies. First in Stauder and then in International Handelsgesellschaft, Nold, Hauer, Rutili et.al. The Court recognized that the human rights guaranteed in the national constitutions of member states, as well as in other international Treaties, stay in the foundations of the Community Law. Some authors link this change of the ECJ jurisprudence with the doctrine of direct effect and supremacy of EU Law\(^7\), a rather attribute this consequence to the transformation of the European communities\(^8\). However the Court constructed a human rights doctrine in a series of relevant cases, but from a pragmatic perspective, without defining an overall human rights policy\(^9\).

Based on the ECJ jurisprudence, the member states started to elaborate the principle of protection of human rights at the Treaty level. Thus, the Preamble of the Single European Act of 1986, recital 6, reflected the will of “the member states to work together to promote democracy on the basis of fundamental rights recognized in the Constitution and laws of the member states”. Moreover, the Maastricht Treaty envisaged for the first time within an EU Treaty a special provision on Human Rights. Article F.1 of this Treaty reads: “The Union shall respect fundamental rights as guaranteed by the European Convention on the Human Rights and as they result from the constitutional traditions common to the member states as general principles of Community Law”. Through the Maastricht Treaty the EC moved gradually from the merely economic organization to also a political one, implying a deeper concern for human rights, visible not only in the mentioned articles, but also in the provisions on the EU citizenship and the section of Cooperation in Justice and Home affairs. This political aspect was also exported in its enlargement and external


\(^9\) Dutheil de la Rochere Jacqueline, op.cit.1777.
policy. One of the criteria set at the Copenhagen European Council, for the accession of other EU member states, was the political criteria, defined as respect for the Rule of Law and human rights protection. These developments triggered the Council to ask the ECJ on the possibility of accession in the European Convention of Human Rights. The Court gave a negative answer in its Opinion 2/94, of 28 March 1996, reasoning that the European Communities lack the necessary competences to conclude an international agreement in the field of human rights10.

The Amsterdam Treaty (ToA) is another stepping stone bringing the protection of human rights at the European Union level. Article 6.1. of ToA provided that “the Union is founded on the principles of liberty, democracy, respect of human rights and the fundamental freedoms and the Rule of Law”. Moreover in its Article 7 a sanction procedure was envisaged against a member state which is suspected to be engaged in a serious and persistent breach of principles of human rights. Thirdly, it required the ECJ to ensure compliance with Article 6.2 TEU in the field of police and judicial cooperation in criminal matters11. Furthermore, Article 49 provided that the respect for fundamental rights, as foreseen in the ECHR, is the basis to accede the EU. The Treaty of Nice provided an early warning system, by enabling the Council to ascertain, and thus deter the Commission of such violation before they arose12. Although the recognition of human right protection as an EU principle, both in the ECJ practice and the EU Treaties mentioned above, there was not any EU policy on human rights.

The protection of the human rights at the European Union level could have gone along this way, but as stressed in the Cologne European Council 1999, “at the present stage of development of the European Union, the funda-

11 Article 46 of TEU.
mental rights applicable at Union level should be consolidated in a Charter.”

With the extension of EC competences with the Maastricht, and Amsterdam Treaty, and in the perspective of accession of other countries, it was necessary the drafting of a Charter to give visibility and clearness the protection of fundamental rights in EU level. A convention of representatives from the European Parliament, the national parliament, member of Governments of member states, the European Commission and observers from the ECJ, started the work in December 1999 to draft the Charter of EU for fundamental rights. The draft of the Charter was approved by the Biarritz European Council, October 2000, and signed in the European Council of Nice on 7 December by the Presidents of the European Parliament, the Council and the Commission on behalf of their institutions. In the European Council of Nice, the EU Charter of fundamental rights was recognized as a political instrument, but nothing was foreseen whether this document would be legally binding. Eventually, in the Treaty of Nice, the Charter was recognised as a “politically binding” instrument, but not as a legally binding part of the constitutional framework of the EU.

A lot of debates have taken place on the legal status of the Charter, as well its relevance in a pluralistic system of the human right protection. Despite the long criticism that accompanied the Charter, opposing its relevance in the protection of human rights, we believe that the adoption of the EU Charter on fundamental rights was necessary for the below mentioned reasons:

First, the Charter is a modern international act that corresponds to the recent social needs and changes. The Charter is structured as a document of 54

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14 Point 2 of the Presidency conclusion: The European Council welcomes the joint proclamation, by the Council, the European Parliament and the Commission, of the Charter of Fundamental Rights, combining in a single text the civil, political, economic, social and societal rights hitherto laid down in a variety of international, European or national sources. The European Council would like to see the Charter disseminated as widely as possible amongst the Union’s citizens. In accordance with the Cologne conclusions, the question of the Charter’s force will be considered later (my Italics). http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00400-r1.%20ann.en0.htm.

Articles, organized on six headings of Dignity, Freedom, Equality, Solidarity, Citizen’s Rights and General provisions. The Charter includes classical rights foreseen also in other international acts on human rights as ECHR, the Social Charter of the European Council, the Charter of European Communities on Fundamental Social rights of workers, and other international conventions where the EU or members states are the signatories’ party, as well as the constitutional tradition of member states of EU.

However, the Charter is more than just a collection of human rights sanctioned in international agreements and national constitutions. Apart of the rights guaranteed in other international documents, such as the right of life, personal security etc, the Charter has provisions which aim to respond directly to social contemporary needs and challenges. This is also announced in the preamble of the Charter, recital 4: “... it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter”. In this regard, the Charter has provisions such as for the protection of personal data (Article 8), freedom of academic research (Article 13), prohibition of human cloning (Article 24), the right of collective bargaining (Article 28), protection of environment (Article 37), the right for good administration (Article 41).

The Charter guarantees also the protection of rights foreseen in the European Convention of Human Rights. In order to avoid different interpretation, Article 52(3) of the Charter sanctioned that: “Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention”. However the second sentence of this provision continues emphasizes that this shall not prevent Union law providing more extensive protection of the rights guaranteed in both documents. In fact, although principle of discrimination is guaranteed both in the ECHR (Article 14) and the Charter (Article 21/1), the last document extended the prohibition of discrimination also on grounds of sexual orientation and genetic features; the prohibition of forced labor and
slavery guaranteed in Article 4 of the ECHR, is enhanced by the prohibition of human trafficking (Article 5 of the Charter); Article 10 of the Charter apart of freedom of thought and religion and conscious foreseen in Article 9 of the ECHR, guarantees the right to conscious objections; Article 12 and 13 for private and family right, guarantee also the right of “good reputation”, which is not foreseen in Article 8 and 12 of the ECHR.

Secondly, the Charter serves to the principle of democratic legitimacy and Rule of Law in the EU\textsuperscript{16}. Before the entering into force of the Charter, the protection of the fundamental rights was made by the Court of Justice evoking to the “general principles of EU”. There was not any legal basis in the EU Treaties where the Court may refer in solving the specific cases concerning human rights; thus it referred to the general provision for the protection of human rights in Article 6(1) TEU and than searched in the international instruments for the protection of human rights and to the national constitution of member states, in order to find the special right challenged and its scope. With the Charter the Court of Justice, but also the Institutions when drafting legislation have a clear legal basis where to found their acts.

Thirdly, the Charter ensures the legal certainty principle in the EU decision-making and activities. The founding treaties of the European Community contained no reference to fundamental rights. However, as integration deepened and as the Community came to have more far-reaching effects on the daily lives of citizens the need for explicit mention of fundamental rights was recognized\textsuperscript{17}. Since the EU is not a signatory part of the ECHR, the principle of legal certainty is only secured in a limited sense at the Community level. It is the Court which case by case “discovers” and specify which are the fundamental rights of the EU that the Institutions are bound to apply. This makes it difficult for the citizen to understand the rights they are entitled to against EU institutions or member states when they apply EU Law.


The lack of legal certainty applies not only internally, but also externally. The EU scrutinizes the candidate states that apply for membership whether they respect the political criterion, a main component of which is the protection of human rights. When basic institutions are lacking in the EU with regard to human rights, it is difficult to lead by example. The ensuing document is intended to do something about this deficiency. The Charter substantiates the rights mentioned in Article 6(2) of the Treaty on European Union (TEU) by spelling out the specific obligations of the institutions\textsuperscript{18}. 

2. The Legal Status of the Charter

The legal status of the Charter could be divided into two periods of time, from December 2000 till the entering into force of the Lisbon Treaty - where the Charter was formally non-binding and from the entering into force of the Lisbon Treaty up to now, where the Charter has acquired a legal force same as the EU Treaties.

When the Charter was adopted by the Biarritz Convention and signed in the Nice European Council, it was unequivocally declared to be just a political act, legally non binding. However, even in this first phase different approaches to the legal force of Charter and its authority were made, mainly by the Advocates General. As Mojin has noted, there have been cases, such as Z. v. Parliament\textsuperscript{19}, Baumbast and R.\textsuperscript{20}, Mulligan and Others\textsuperscript{21}, Überseering\textsuperscript{22}, Commission v. Italy\textsuperscript{23} etc, where Advocates General referred to the Charter, but they explicitly stressed the non binding nature of the Charter\textsuperscript{24}. Other times

\textsuperscript{18} Oddvar Eriksen, Erik, ibid: 5.
\textsuperscript{20} Case C-413/99, Baumbast and R., [2002], ECR I-07091 par. 59 and 110 and footnote 58.
\textsuperscript{21} Case C-313/99, Mulligan and Others, [2002], ECR I-05719 para. 28.
\textsuperscript{22} Case C-208/00, Überseering, [2002], ECR I-09919, par. 59.
\textsuperscript{23} Case C-224/00, Commission v. Italy, [2002], ECR I-02965 par. 58.
the reference was made to the Charter, but nothing was mentioned on its non-binding nature or although silent on its nature, Advocates General has lead attention to the Charter by referring to its provisions along with other Treaty provisions. Some Advocates-General have also used the democratic nature of the drafting process in an attempt to strengthen their argument that attention should be paid to the Charter and to show that the Charter is the catalogue of the fundamental rights/or the highest common values guaranteed at the Community legal order.

On the other hand, the Court of Justice reluctantly followed these references. The first reference arose where the Court had to interpret the Directive 2003/86/EC on the right to family reunification. In this judgment, the ECJ stated:

“The Charter was solemnly proclaimed by the Parliament, the Council and the Commission in Nice on 7 December 2000. While the Charter is not a legally binding instrument, the Community legislature did, however, acknowledge its importance by stating, in the second recital in the preamble to the Directive, that the Directive observes the principles recognised not only by Article 8 of the ECHR but also in the Charter. Furthermore, the principal aim of the Charter, as is apparent from its preamble, is to reaffirm ‘rights as they result, in particular, from the constitutional traditions and international obligations common to the member states, the Treaty on European Union, the Community Treaties, the ECHR, the Social Charters adopted by the Community and by the

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26 Morijn, John, ibid : 13. “AG Tizzano in BECTU stressed the approval of the Heads of State and Government, oftenon the basis of an express and specific mandate from national parliaments.” AG Léger in Council v. Hautala and AG Ruiz-Jarabo Colomer in Überseering observed that the values listed in the Charter have in common the fact of being unanimously shared by Member States.” And AG Mischo in Booker Aquaculture considered the Charter worthwhile referring to given the fact that it constitutes the expression, at the highest possible level, of a democratically established political consensus on what today must be considered as the catalogue of fundamental rights guaranteed by the Community legal order”.


28 ibid.
The Court after that continued to refer to the Charter in a series of cases concerning judicial protection. After the signature of the Lisbon Treaty, but before its entry into force, the Court in Viking and Laval, was ready to accept that the Charter could create legal obligations and, second that in case of conflict between fundamental rights and fundamental economic freedoms established by the treaties the later might prevail. However, as it is observed, the Charter has played a “confirmative role” in the system of rights protection based on constitutional common traditions as interpreted by European Courts. Whenever the Charter has been quoted by the ECJ, it has been mentioned after and not before the fundamental rights inferred by the Court. What is more significant, there are no decisions based only on the EUCFR.

The first attempt to include the Charter into EU primary law was made through the Constitutional Treaty, by incorporating its provision in the Treaty itself. The negative vote in Netherland and France, withdraw the entering into force of the Constitutional Treaty and left the Charter without any legal binding force. The European Council of December 2007 agreed that the Charter should be compulsory for the community institutions and should have legal force.

29 ibid, footnote 4.
31 Case C-341/05, Lval un Partneri Ltd. V Byggnadsarvetareförbundet, [2007], ECR I-11, 767.
33 Gianfrancesco, Eduardo The Charter of Fundamental Rights of the Union as a source of law, Editors Hermann-Josef Blanke and Stelio Mangiameli, The European Union after Lisbon, Springer-Verlag Berlin Heilderberg 2012: 295. See cases: See recently, Case C-47/07P Masdar (ECJ 16 December 2008), para 50; Case C-402/05P e C-415/05P Kadi v Council and Commission (ECJ 3 September 2008), para 335; Case C-450/06 Varec (14 February 2008), para 48; Case C-275/06 Promusicae (ECJ 29 January 2008), para 69; Case C-341/05 Laval un Partneri Ltd (ECJ 18 December 2007), para 90 and 91; Case C-438/05 International Transport Workers’ Federation, Finnish Seamen’s Union, v Viking Line ABP, OÜ Viking Line Eesti, (ECJ 11 December 2007), para 43 and 44; Case T-194/04 Bavarian Lager v Commission (CFI 8 November 2007), para 14; Case C-303/05 Advocaten voor de Wereld VZW (ECJ 3 May 2007), para 46; Case C-432/05 Unibet (ECJ 13 March 2007), para 37; Case T-228/02 Organisation des Modjahedines du peuple d’Iran v Council (CFI 12 December 2006), para 71; Case 47/07P.
through the Lisbon Treaty. With few amendments, the Charter was formally signed in Strasbourg the 12 December 2007 by the Presidents of the European Parliament, the Council and the Commission, and was published later in the Official Journal. The draft Lisbon Treaty provided by its Article 6(1) that the Charter would have the same legal force as the Treaties “The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2001, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties”. After a long process of ratification the Lisbon Treaty entered into force in 1 December 2009.

What is the scope of the application of the Charter? What does it mean to have the same legal force as the Treaties?

There are authors, who try to read the phrase “same value as the Treaties” in a restrictive away. According to them the Charter does not have by its nature the status of primary law; it is primary law only because the TEU accords it “the same legal value as the Treaties”. Moreover, the recognition that the Charter should have the same legal value as the treaties is immediately balanced by text limiting the scope of the Charter and its interpretation. Article 6.1 TEU. Further, according to TEU post-Lisbon Article 6.3, the “rights, freedoms and principles set out in the Charter” are put on the same level as “fundamental rights, as guaranteed by the European Convention of Human Rights and as they result from the constitutional traditions common to the member states” which constitute general principles of Union’s law.” This means that the Court of Justice and the Court of First Instance (“CFI”) (now named the General Court) may supplement the substantive provisions of the Charter by using other

34 OJ 2007 C 303/1.
35 Dutheil de la Rochere, Jacqueline, op.cit, :1781.
36 This Article reads “The provisions of the Charter shall not extend in any way the competence of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions”.

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sources of fundamental rights as long as they qualify as general principles of Union law\textsuperscript{37}.

However, there are other authors that think differently on the value of the Charter and say that “Article 6(1) provides that the Charter is on the highest level of EU Law…it is at least part of the EU primary law, but even a more elevated position is possible”\textsuperscript{38}. An indication of such higher rank of the Charter can be found in Kadi\textsuperscript{39} case, where the Court included the principle that all Community acts must respect fundamental rights among the constitutional principle of the Treaty\textsuperscript{40}.

Further a mere question we may pose is whether the doctrine of supremacy and direct effect would be applicable for the articles of the Charter. In the case of a positive answer, different concern may raise, having in mind how these principles affected the application of the Treaty articles in the member states internal legal order, and how they served to give to the Community/Union an even more supranational nature.

Since we are in the very first years of the Charter’s application as a legal binding document, with same value as the Treaties, it is hard to predict the course of interpretation of the Court of Justice in this regard, furthermore when we take in mind the original and unpredictable judgment of this body. However, since the Charter is now part of the EU Law and legally binding, it would be subject to normal teleological, dynamic and effectiveness-oriented rules of interpretation that the Court applies to EU Law.

Article 51 till 54 of the Charter stipulates the scope of application of this instrument, in the so-called horizontal clauses. Article 51 relates to the subject to which the Charter is binding: the institutions and bodies of the Union and to the member states only when they are implementing Union law. Regard-

\textsuperscript{37} Dutheil de la Rochere, Jacqueline, op.cit.; 9.
\textsuperscript{38} Kokkot Julianne and Sabotta Christoph, op.cit.: 1782.
\textsuperscript{40} Kokkot, op.cit.; 6.
ing to the member states, from the doctrine of the Court of Justice, emerges that
member states should respect community fundamental rights not only when
“implementing” Community Law\(^41\), but also when endeavouring to derogate
from\(^42\) or claim to fall outside the remit of the latter\(^43\) according to the justifica-
tions allowed by same\(^44\).

In order to ease the concerns of some member states, that through the
Charter the EU is “subtracting” competences that the member states did not
transfer with the Treaties, Article 51(1) second sentence, clarifies that these
subjects shall respect the rights, observe the principles and promote the ap-
plication thereof in accordance with their respective powers. Moreover, Article
51(2) explicitly declares that “this Charter does not establish any new power or
task for the Community or the Union, or modify powers and tasks defined by
the Treaties”.

Article 52(1) and 52(2) of the Charter stipulates the relation of the
Charter provision with other provisions or objectives of the Treaties. Article
52(1) makes the rights and freedoms in the Charter subject of limitations, pro-
vided that they are made by law and the proportionality test is applied success-
fully\(^45\). According to the Explanations\(^46\) of the Charter on this provision it is a
reflection of the ECJ practice, which has stated that “… it is well established
in the case law of the Court that restrictions may be imposed on the exercise
of fundamental rights, in particular in the context of a common organization of
the market, provided that those restrictions in fact correspond to objectives of

\(^{42}\) Case C-260/89, ERT case, 18 June 1991.
\(^{43}\) Case C-368/95, Familiapress case, 26 June 1997.
\(^{44}\) Alonso, García Ricardo. The General Provisions of the Charter of Fundamental Rights. Jean
Monnet Working Paper 4/02:4 of the European Union NYU.
\(^{45}\) Article 52(1) reads: “Any limitation on the exercise of the rights and freedoms recognised by
this Charter must be provided for by law and respect the essence of those rights and freedoms.
Subject to the principle of proportionality, limitations may be made only if they are necessary
and genuinely meet objectives of general interest recognised by the Union or the need to protect
the rights and freedoms of others.
\(^{46}\) Text of the explanations relating to the complete text of the Charter as set out in CHARTE
4487/00 CONVENT, Brussels, 11 October 2000 (18.10)(OR. fr).
general interest pursued by the Community and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights” (judgment of 13 April 2000, Case C-292/97, paragraph 45 of the grounds)\(^47\). However today it is difficult to say if the EU is going in the “marketization” of the human rights, or the human rights are going to reshape the market. Although the last alternative seems to run counter Article 52(1) of the Charter and its Explanations, the Court of Justice in Omega \(^48\) case, gave advantage and superiority to fundamental rights, via the right of dignity, in relation with freedom to provide services. However, if right results from the Treaties it is subject to the conditions and limits lay down by them, the Charter does not alter the system of rights conferred by the Treaties (Article 52(2)).

Article 52(3) stipulates the relation of the Charter with the European Convention of Human Rights. This Article reads: “Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection”. We can understand that the protection granted in the ECHR is going to be considered the minimum protection, beyond which a restriction is not justified. The meaning of the different rights and the scope of their protection would be inferred – as said in the Explanation – by the text of the Convention itself, its protocol and the cases of European Court of Human Rights and EU courts. A lot o debates have run on the divergent interpretation Court of Justice and the ECtHR of the same rights, especially in cases of EU Competition Law. The accession of the EU in the ECHR is believed to serve somehow in the reduction of divergent application; however it is even more difficult to predict how this could be reached, having in minded the different organization of the Courts and their jurisdiction\(^49\).

\(^47\) Ibid.
\(^48\) Case C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn, ECR II.
\(^49\) It is beyond the scope of this paper the analysis of the different scenarios of the accession of EU in the ECHR.
3. Implications on the Candidate Countries

In the first fundamental treaties the sole condition to be a member of the Communities was the “European identity”. Article 98 of the Paris Treaty and Article 237 and 205 of the respective Rome Treaty for the European Economic Community and Euro-atom, explicitly provide that “every European state may apply to adhere in this Treaty”. The Treaty of Amsterdam added another criterion, a political one, in order to be member state of the European Union. This change made was related to the biggest enlargement European Union has ever encounter, that of 2004, where ten countries from Eastern and Central Europe acceded in the EU. In the new Article 49 TEU it was written “any European state which respects the principles set out in Article 6(1) may apply to become a member of the Union”. Thus, every European state should respect the “principles of liberty, democracy, respect for human rights and fundamental freedoms, and the Rule of Law, principles which are common to the member states”\(^{50}\) in order to be part of the club. The introduction of the political criterion was on one hand a reflection of the evolution of the European Union, from an organization purely economic in an organization with a political profile as well. It was the tendency of the EU to show to the external world that it does not only itself respect the principle of democracy; Rule of Law and human rights which are it’s the principle in which it is founded\(^{51}\), but that can also contribute in exporting these values in other European states.

The Copenhagen European Council of 1993\(^{52}\), articulated three criteria for the states that want to enter the EU: i) the political criteria that consist in respect for Rule of Law, human rights and protection of minority; ii) the economical criteria which consist in having a functional trade with capacities able to handle the competitive pressure of the EU internal market and iii) the capacity to adopt and implement the acquis communautaire. The conditions set

\(^{50}\) Article 6(1) of the TEU, Official Journal of the European Communities C 325/11 EN2, 24.12.2002.

\(^{51}\) Article 6(1) was introduced with the Maastricht Treaty.

in the Copenhagen European Council 1993 is said to have a two-fold effect: on one hand they aim to prevent that the new member states may endanger the economic and political situation of the current member states and the EU; on the other hand they set some standards the new member states have to fulfil before entering the EU, in order that they may be fully integrated in the European family and avoid possible economical and political problems53.

With respect to the Copenhagen criteria, special focus is given to the political criterion. In the Helsinki European Council54 it was emphasized that the respect of the political criteria is essential and necessary for the opening of negotiation with the EU. Although, the formulation of the Copenhagen criteria is vague and not specific, the Commission has done efforts in different documents to specify its content. According to the Commission in Agenda 2000, the Copenhagen political criteria entailed that the constitution guarantees democratic freedoms, including political pluralism, the freedom of expression, the freedom of religion, the need for democratic institutions and independent judicial and constitutional authorities. Concerning human rights and minority protection, membership to the Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocol allowing citizens to take cases to the European Court of Human Rights together with the adoption of the Framework Convention for the Protection of National Minorities and recommendation 1201 adopted by the Parliamentary Assembly of the Council of Europe in 1993, emerged as necessary elements of the political criteria55. Also the Commission reports assessing the Stabilization and Association Process in South East Europe refer especially to protection of minority rights, civil and political rights including the freedom of expression, freedom of assembly, prison conditions, right to property etc.56 The political criterion is

so important that the accession of Bulgaria and Rumania was postpone in 2007, the negotiation with Croatia and Serbia were suspended in 2004 due to the non compliance.

Different methods of scrutiny regarding the Copenhagen criteria were applied towards the Central East European countries, such as the Europe agreements and its monitoring institutional framework, the questionnaire, the white papers, the yearly reports or the security mechanism clause. As a consequence a lot of criticism rose against the EU enlargement policy and conditionality. Some denounced the schizophrenia afflicting the EU in its external and internal policy; others have spoken for "bifurcation" of EU policy on human rights. This situation among others justified the need of a document that would collect and confirm all the common values and principle of EU by giving them visibility internally and also externally. It was time for the EU institutions themselves meanwhile scrutinizing the candidate countries for respect of human rights - to have a clear document that would bind their activities. The European Parliament in its report on the situation of fundamental rights in Europe in 2003 stated that: “…it is the particular responsibility of the European Parliament by virtue of the role conferred on it under the new Article 7(1)...to ensure (in cooperation with the national parliaments and the parliaments of the applicant countries) that both the EU institutions and the member states uphold


61 It is exactly one of the Charter’s aims to show that the Union contributes to the preservation of these common values, to strengthen the protection of human rights by making them more visible. See Recital 3-4 of the EU Charter of Fundamental Rights.
the rights set out in the various sections of the Charter”\textsuperscript{62}. However, till the entering into force of the Lisbon Treaty, the Charter was not formally binding, and still there was room to argue on of double standard approach of EU towards human rights internally and externally.

How does the entering into force of Lisbon Treaty and the gaining of binding effects to the Charter affect third member states, especially candidate countries? Is the Charter binding only internally or does it also somehow have an external dimension?

The Charter, since it is addressed to the ‘the institutions and bodies of the Union […] and to the member states only when they are implementing Union law’, is formally binding only for these subjects. However, although there is no explicit reference to its possible external dimension, the Charter is believed to have some implication and affect somehow the relationship between EU and third countries, specifically the candidate countries, for different reasons.

First, in its preamble it is stated: “the people of Europe in creating an ever closer union amongst them are resolved to share a peaceful future based on common value”\textsuperscript{63} It could be inferred from the use of the term “people of Europe”, rather than “EU citizens”, the idea of a greater Europe, beyond EU borders. After all it is precisely to these subjects that the Charter will apply\textsuperscript{64}.

Besides, the external dimension of the Charter also seems to be implied in a number of its provisions\textsuperscript{65}. Thus, it is clear from Article 2(2) (‘No one shall be condemned to the death penalty, or executed’) that, since all member states have meanwhile ratified Protocol No. 6 to the European Convention on Human Rights and the death penalty has therefore been effectively abolished

\textsuperscript{63} EU Charter of Fundamental Rights [2007], OJ C 303/1, recital 1.
\textsuperscript{64} Ficchi L. op.cit: 113.
throughout the EU, universal abolition of the death penalty is one of the objectives of the CFSP, both in bilateral contacts with third countries\textsuperscript{66} and within the context of the United Nations\textsuperscript{67}. Further, Article 15(3) of the Charter provides that “nationals of third countries who are authorized to work in the territories of the member states are entitled to working conditions equivalent to those of citizens of the Union”. From the wording of this article it is clear that the Charter extends also in relations between EU/member states and third countries (candidate countries included).

Thirdly, the Charter may have specific implication on the process of accession of new member states. Although the Charter does not aim to add new requirements for membership, through Article 49 TEU - which subject membership application with the respect of EU principles, including human rights, it sets a higher standard of human rights for new EU candidates. Even before their accession, the candidate countries should be familiar with this set of values, and we can see this rational evident in the composition of the Convention for the drafting of the Charter, where the Central European countries were invited to participate, although in the status of observer. An illustrative example of what said above on the external influence of the Charter on the candidate countries can be found on the Law of Anti-discrimination enacted in Albania in 2010\textsuperscript{68}. Article 1 of this law prohibits the discrimination on basis of gender, race, color, ethnicity, language, gender identity and sexual orientation, political, religious or philosophic beliefs, economic and social status, education, pregnancy, parentage, genetic features, age, civil status, medical status, location, disabilities, or belonging in a special group. This Article was enacted in the framework of the approximation of legislation and the assistance of the European experts. If


\textsuperscript{67}Wouters, Jan., ibid:4.

\textsuperscript{68}Law No.10 221, dated 4.2.2010 “Protection against discrimination”, Official Journal No.15, p. 482.
we compare this Article with Article 18 of the Albanian Constitution on protection against discrimination, it is obvious that this Article is more similar to Article 21(1) of the Charter than to the Albanian Constitution. New grounds against discrimination such as gender identity and sexual orientation or the genetic features are new categories, not found in the Albanian Constitution, and that seems to have drove inspiration from the Charter.

Moreover, the Lisbon Treaty seems to have brought on a higher level the importance of respect for fundamental principles in order for new member states to apply. Article 49 TEU reads “any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union”. In comparison with Article 49 of the Amsterdam Treaty, mentioned above, we can notice the slight amendment of the wording of the provision. By adding the item “committed to promoting them”, the Treaty seems to ask the new candidate countries to have an active role in the protection of fundamental rights and not just passing the “joist of minimal standards”.

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1. An Introduction to the Racial Equality Directive

1.1 The Racial Equality Directive and Article 19 TFEU (ex-Article 13 TEC)

The European Union (‘EU’) has played an increasing role in the prevention of discrimination and protection of equality. For many years the focus of EU action in the field of non-discrimination was on preventing discrimination on the grounds of nationality and sex. In 1997, however, the member states approved unanimously the Treaty of Amsterdam. Article 13 of this Treaty granted the Community new powers to combat discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Since the Treaty of Amsterdam came into force in 1999, two new Directives have been enacted in the area of anti-discrimination on

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1 Please note that the European Commission refers to sex discrimination as ‘gender’ discrimination.
3 Apart from discrimination on the basis of sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation, Article 21 of the Charter of Fundamental Rights also prohibits discrimination on the basis of color, social origin, genetic features, language, political or any other opinion, membership of a national minority, property and birth.

Now-after the adoption of the Lisbon Treaty\(^6\)-Article 19 TFEU (ex-Article 13 TEC) reads as follows:

- Without prejudice to other provisions of this Treaty and within the limits of the powers conferred by it on the Community, the Council may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation;

- By way of derogation from paragraph 1, when the Council adopts Community incentive measures, excluding any harmonisation of the laws and regulations of the member states, to support action taken by the member states in order to contribute to the achievement of the objectives referred to in paragraph 1, it shall act in accordance with the procedure referred to in Article 251.

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Gabriel Toggenburg notes that Article 19 TFEU ‘combats’ discrimination but does not, at least not expressly, aim at the positive establishment of substantial equality. As such, it remains unclear whether Article 19 TFEU provides a legal basis for the Council to undertake positive action in the field of anti-discrimination. Article 19 TFEU only provides a legal basis, rather than a self-executing prohibition or a freestanding principle. It was carefully worded so as to ensure that it would not have direct effect.

1.2 The Racial Equality Directive and the New Article 10 TFEU

The Racial Equality Directive has regained importance after the adoption of the Lisbon Treaty, which introduced the Charter of Fundamental Rights into EU primary law. The increased attention for the importance of the Charter, with a Chapter dedicated to ‘Equality’ and with its Article 21 prohibiting discrimination on the grounds of racial and ethnic origin generated also renewed attention for the importance of the Racial Equality Directive. The Directive, even though adopted a decade ago and thus long before the entry into force of the Lisbon Treaty, is presented as a key measure and an essential tool to guarantee the respect of the value of equality and non-discrimination on which the EU is founded.

The Directive especially regained importance in the light of the adoption of the new Article 10 TFEU and the obligation for the EU flowing from this article to adopt policies aiming at combating discrimination based on racial or

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ethnic origin. Legal scholars, such as Toggenburg, argue that the Lisbon Treaty can be seen as introducing a legal obligation for the EU to develop EU secondary law in a way that it respects and protects persons belonging to national minorities\textsuperscript{12}. This clearly becomes evident in the context of anti-discrimination. Whereas the former Article 13 TEC stipulates that the Union may take action to combat discrimination, with the new Article 10 TFEU the EU is set under an obligation to combat discrimination, it shall aim to combat discrimination in defining and implementing its policies and activities\textsuperscript{13}.

This obligation for the Union to combat discrimination in defining and implementing policies and activities goes a lot further than Article 21 of the Charter of Fundamental Rights, which does not impose an obligation but merely prohibits the Union to discriminate. The new horizontal clause of Article 10 TFEU thus calls for an active engagement of the Union in the field of anti-discrimination rather than a mere avoidance of discrimination\textsuperscript{14}.

It is too early to tell whether and to what degree the new horizontal clause enshrines a positive duty for the EU to introduce positive measures aiming at substantial equality\textsuperscript{15}. In any case, the new horizontal obligation has a lot of potential regarding the “direction, content and equality driven creativity of


\textsuperscript{13} Article 10 TFEU reads as follows: “In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.” (stress added)

\textsuperscript{14} According to Gabriel Toggenburg, this is evidenced “by the fact that the new horizontal clause is based on the wording of the enabling competence base, as now enshrined in Article 19 TFEU, and not on the merely prohibitive clause in Article 21 of the Charter of Fundamental Rights.” Toggenburg, Gabriel. “The New Treaty of Lisbon and the Protection of Minorities – Some Introductory Remarks.” In Sind wir alle Europäer oder ist noch Platz für Volksgruppen?, edited by Peter Karpf et. al.. Klagenfurt am Wörthersee: Land Kärnten, Amt der Kärntner Landesregierung, 2010: 131 footnote 9.

Union legislation, and consequently national legislation when implementing Union legislation\(^{16}\).

It should be noted that, since the new mainstreaming obligation builds on the enabling provision in Arts 10 TFEU and 19 TFEU, and not on the prohibitive provision of Article 21 of the Charter, it does not cover discrimination on the grounds of language and membership of a national minority\(^{17}\).

The Treaty of Lisbon thus puts persons belonging to (racial and ethnic) minorities in an “unprecedented prominent position”\(^{18}\). EU Law in general, the EU institutions and member states when they are implementing Union Law are explicitly precluded from discriminating against persons belonging to national, linguistic, ethnic and religious minorities. The Union is now obliged to actively combat social exclusion\(^{19}\) and discrimination in defining and implementing its policies and activities. The fact that persons belonging to national minorities are now explicitly referred to in the Charter, which is primary law\(^{20}\), is accord-


\(^{17}\) Gabriel Toggenburg underscores that this asymmetry is not new but rather inherent from the pre-Lisbon era: linguistic discrimination and discrimination on the grounds of membership of a national minority were supposedly already prohibited by the general principle of equality. Yet, the EU had no explicit competence to actively combat these forms of discrimination via Article 13 TEC. Toggenburg, Gabriel. “The New Treaty of Lisbon and the Protection of Minorities – Some Introductory Remarks.” In Sind wir alle Europäer oder ist noch Platz für Volksgruppen?, edited by Peter Karpf et. al.. Klagenfurt am Wörthersee: Land Kärnten, Amt der Kärntner Landesregierung, 2010: 131 footnote 11.


\(^{19}\) A reference to combating social exclusion can be found in the new horizontal provision of Article 9 TFEU. This provision obliges the Union to “take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health [in defining and implementing its policies and activities]”. Also in the context of the Union’s overall objectives, Article 3 TEU declares that the Union “shall combat social exclusion and discrimination […].”

\(^{20}\) The legal value of the Charter of Fundamental Rights is the same as the legal value of the TEU and the TFEU (see Article 1 para. 1 TEU) and the Charter consequently forms part of primary
ing to Toggenburg “a timely classification that the Union is concerned with persons belonging to national minorities not only in the context of the Copenhagen criteria (thus in the context of its enlargement policy) but also in the framework of the vast variety of its internal policies”21.


The Racial Equality Directive prohibits discrimination on grounds of racial or ethnic origin in respect of all persons, not only minorities, so in principle it applies universally. However, certain target groups were in the mind of the legislator at the time the Directive was negotiated22, such as ethnic minorities, which are explicitly mentioned in Recital 823.

The personal scope of application of the Racial Equality Directive is defined in the first and second paragraph of Article 2, which reads as follows:

1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.

2. For the purposes of paragraph 1:

   (a) direct discrimination shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;

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21 Ibid.
23 Recital 8 reads as follows: “the Employment Guidelines 2000 agreed by the European Council in Helsinki, on 10 and 11 December 1999, stress the need to foster conditions for a socially inclusive labour market by formulating a coherent set of policies aimed at combating discrimination against groups such as ethnic minorities.”
(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

The concept of ‘racial or ethnic origin’ is not defined in the Directive. It is thus left up to the Member States to define ‘racial or ethnic origin’ in their national laws implementing the Directive, if they wish to do so.

2.1 All Persons: Natural and Legal Persons?

Article 3 of the Racial Equality Directive states that the “directive shall apply to all persons, as regards both the public and private sector, including public bodies”24. This must be read in conjunction with Recital 16, which mentions the protection of “all natural persons” and of “legal persons where they suffer discrimination on grounds of the racial and ethnic origin of their members”. Therefore the term “all persons” refers both to natural persons and legal persons.

2.2 Protected Grounds: Racial and Ethnic Origin

2.2.1 Criticism towards the Notion of ‘Race’

There is no generally accepted definition of the terms ‘race’ or ‘ethnic origin’. The 1966 International Convention on the Elimination of all Forms of Racial Discrimination (‘ICERD’)25 contains a definition of ‘racial discrimination’ in its Article 126, which includes a reference to color, descent and national

26 Article 1 (1) ICERD reads as follows: “In this Convention, the term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or
or ethnic origin. Scholars such as Patrick Thornberry underline that this wider notion of race is to be considered as a definition for the purpose of the ICERD only, as it implies a strong deviation of the usual meaning of ‘race’\textsuperscript{27}.

Some governments have taken the view that including the term ‘race’ or ‘racial origin’ in anti-discrimination legislation reinforces the perception that humans can be distinguished according to ‘race’, whereas there is no scientific foundation for such categorization. In Recital 6 of the Racial Equality Directive, it is clearly stressed that “the European Union rejects theories which attempt to determine the existence of separate human races. The use of the term ‘racial origin’ in this Directive does not imply the acceptance of such theories”. However, in spite of this clear statement, some Member States remain skeptical and keep opposing the use of the term ‘race’ or ‘racial origin’\textsuperscript{28}.

2.2.2 Discrimination Based on Racial and Ethnic Origin: ‘Race’ and ‘Ethnic Origin’ as Separate Grounds of Prohibited Discrimination

The two concepts of ‘race’ and ‘ethnic origin’ tend to be blurred to a certain extent, due to the recognition that both race and ethnic origin are social or cultural constructs that do not correspond to an objective reality independent

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national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”


\textsuperscript{28} For example, the Finnish Non-Discrimination Act refers to ‘ethnic or national origin’ in its Section 6 (1), whilst the Swedish 1999 Ethnic Discrimination Act refers to ‘ethnic affiliation’ (Section 3) and defines it as follows: “Ethnic affiliation means that someone belongs to a group of people who have the same race, colour, national or ethnic background, or religious belief”. Austria also rejects the idea of separate races and therefore the notion of ‘race’ has been removed from all legal documents and has been replaced by the notion of ‘ethnic affiliation’. In Germany, vivid criticism and opposition have arisen, probably related to the abuse of the term during Nazi regime. See Chopin, Isabelle and Do, Thien Uyen. European Network of Legal Experts in the non-discrimination field. Developing Anti-Discrimination Law in Europe: The 27 EU Member States, Croatia, Macedonia and Turkey compared. Brussels: European Commission, DG Justice, 2010: 22. Available at http://www.migpolgroup.com/public/docs/192.DevelopingAntiDiscinEurope_Comparativeanalysis_V_11.10_EN.pdf (accessed on June 9, 2012).
from either self-identification by the individual concerned or labeling by external observers\textsuperscript{29}. For scholars such as Olivier De Schutter, the fact that both ‘race’ and ‘ethnic origin’ are used alongside one another in Article 19 TFEU (ex-Article 13 TEC) and in the Racial Equality Directive suggests that the concepts should not be treated as synonyms\textsuperscript{30}. It was the clear intent of the drafters of the 1997 Amsterdam Treaty to distinguish ‘race’ from ‘ethnic origin’ as separate grounds of prohibited discrimination\textsuperscript{31}, making clear that discrimination is not only prohibited when it is based on physical characteristics but also when it is based on cultural traits\textsuperscript{32}.

The distinction between ‘race’ and ‘ethnic origin’ has been addressed by the European Court of Human Rights (‘ECtHR’) in its judgment \textit{Timishev v. Russia} of 13 December 2005 in the following terms:

ethnicity and race are related and overlapping concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies according to morphological features such as skin color or facial characteristics, ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, re-


\textsuperscript{30} Ibid at 18.


\textsuperscript{32} De Schutter, Olivier. Links between migration and discrimination. Brussels: European Commission, DG Employment, Social Affairs and Equal Opportunities, 2009: 18. Available at http://www.non-discrimination.net/content/media/Links%20between%20migration%20and%20discrimination.pdf (accessed on June, 9 2012). Because the prohibition of discrimination on the ground of membership of an ‘ethnic group’ coexists with the prohibition on the ground of ‘race’, this results in a dual form of protection, as has been recognized explicitly by certain jurisdictions, such as the New Zealand Court of Appeal in \textit{King-Ansell v. Police} ([1979] 2 NZLR 531) or the United Kingdom House of Lords in the 1983 case of \textit{Mandla v. Dowell Lee} ([1983] IRLR 209). See O de Schutter, Links between migration and discrimination. Brussels: European Commission, DG Employment, Social Affairs and Equal Opportunities, 2009: 18 footnotes 41 and 42. Available at http://www.non-discrimination.net/content/media/Links%20between%20migration%20and%20discrimination.pdf (accessed on June, 9 2012).
religious faith, shared language, or cultural and traditional origins and backgrounds.33

For a better understanding of both concepts, it might also be helpful to analyze the notions of race and ethnicity when used as qualifying terms together with the concept ‘minority’. The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities decided in 1950 to systematically replace the term ‘racial’ by ‘ethnic’ in references to minority groups34. The reason behind this, according to certain member of the UN Sub-Commission, is that the term ‘racial’ would not be a scientifically justified criterion of distinction. ‘Ethnic’ seemed more appropriate as it is broader and encompasses all biological, cultural and historical characteristics, whereas ‘racial’ would only refer to innate physical features35.

Scholars advocate the combination of both concepts to prevent potentially undesirable gaps regarding the field of application36.

2.2.3 Nationality Excluded from the Concept of Race or Ethnicity

The difference of treatment based on nationality is specifically excluded in Article 3 (2) of the Directive. This is not because discrimination on the grounds of nationality is permitted under EU Law, but rather because the way in which EU Law has evolved has made that discrimination on the grounds of nationality is regulated in the context of the law relating to the free movement of persons.

33 Timishev v Russia (ECtHR) Reports 2005-XII 169, para. 55.
35 Ibid.
36 Ibid. Henrard notes that certain authors connect ‘racial’ exclusively with certain physical features while ethnic communities would rather refer to broader groups determined by cultural, religious or linguistic ties. That differentiation apparently refers to the distinction between immutable identity features on the one hand and those identity features that become apparent through signal behavior on the other hand.
Whereas the jurisprudence of the ECtHR can give guidance on the scope of the concepts of ‘racial and ethnic origin’, one should note the difference between EU Law and the wording of the European Convention of Human Rights (‘ECHR’) when it comes to discrimination on the ground of nationality: whereas the latter is explicitly excluded from the scope of application of the Racial Equality Directive, nationality is listed in Article 14 ECHR as a separate ground of discrimination37.

2.2.4 Scope of ‘Racial and Ethnic Origin’: Areas of Ambiguity

Isabelle Chopin notes that one of the areas of ambiguity in the Racial Equality Directive is the extent to which characteristics such as membership of a national minority, language or social origin fall within the scope of ‘racial and ethnic origin’. Many national laws include, as a minimum, color and national origin within legislation implementing the Racial Equality Directive. Some states, such as Hungary, Poland and Slovenia, have specific and detailed laws on the protection of national minorities. It is often unclear whether the concept of ethnic/national minority found within these laws will be relied upon when national courts interpret anti-discrimination legislation.38


3.1 The Scope of Non-Discrimination Law under the Racial Equality Directive: 4 Key Areas

Although its scope is obviously limited to the powers conferred upon the EU, the Racial Equality Directive nevertheless applies to a broad range of situations: employment; access to welfare and forms of social security; access to supply of goods and services; and access to justice. The Article defining the


38 Ibid.
material scope of the Racial Equality Directive is its Article 3, which reads as follows:

1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

   (a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

   (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;

   (c) employment and working conditions, including dismissals and pay;

   (d) membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations;

   (e) social protection, including social security and healthcare;

   (f) social advantages;

   (g) education;

   (h) access to and supply of goods and services which are available to the public, including housing.

2. This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of member states, and to any treatment which
arises from the legal status of the third-country nationals and stateless persons concerned.

The meaning and interpretation of Article 3 Racial Equality Directive has been discussed extensively elsewhere. Important to note is that Article 3 Racial Equality Directive raises several questions of interpretation. First, it is unclear whether volunteer work, internships and pensions fall within the scope of the Directive. Second, the concept of ‘social protection’ it invokes in Article 3 (1) (e) is not defined, and it is thus unclear whether the supply of services by the State is also covered, or to what extent it is covered.

Discrimination in the exercise of public functions and discrimination in the participation in social and cultural life and in associations are not covered by the Directive.

3.2 Defenses of Less Favorable Treatment: Article 4 Racial Equality Directive: Genuine Occupational Qualifications

The Directive does not prevent difference of treatment based on ethnic or racial characteristics if the latter “constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.” In its explanatory memorandum, the Commission states that this exception, inspired by similar clauses in national legislation, shall be highly exceptional and must be interpreted restrictively:

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42 Ibid.
Based on similar provisions in national legislation (DK, IRL, NL, UK) and in the Equal Treatment Directive of 1976, Article 4 provides that differences of treatment based on racial or ethnic origin which are related to a genuine occupational qualification are not to be considered as discrimination. The term ‘genuine occupational qualification’ should be construed narrowly to cover only those occupational requirements which are strictly necessary for the performance of the activities concerned. In the case of differences of treatment based on racial and ethnic origin, such cases will be highly exceptional.\(^{44}\)

Examples of differences of treatment based on racial or ethnic origin which are related to a genuine occupational qualification are theatre roles, where a person of a certain ethnic or racial origin is required for the sake of authenticity, or jobs where the provision of personal service promoting the welfare of a particular ethnic group can most effectively be provided by a person of that group.\(^{45}\)


The Racial Equality Directive conceptualizes discrimination as direct or indirect discrimination in its Article 2, which reads as follows:

1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.

2. For the purposes of paragraph 1:

   (a) direct discrimination shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;


\(^{45}\)Ibid.
(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary;

3. Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the member states.

4. An instruction to discriminate against persons on grounds of racial or ethnic origin shall be deemed to be discrimination within the meaning of paragraph 1.

The article thus identifies and regulates four different specific categories of discrimination, which are direct discrimination, indirect discrimination, harassment, and instruction to discriminate. They will be briefly discussed below. However, it does not specifically address structural discrimination (segregation and institutional discrimination) on the basis of racial or ethnic origin.

4.1 Direct and Indirect Discrimination

The Racial Equality Directive addresses both direct and indirect discrimination, which are defined in Article 2. Direct discrimination shall be taken to occur, when one person is treated less favorably than another is, has been or would be treated in a comparable situation on ground of racial or ethnic origin and indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons.
Thus, in order to establish the existence of either form, a comparator is needed. While in cases of direct discrimination one person is compared to another person, in cases of indirect discrimination it is the treatment of a group of persons which is compared to the treatment of another group of persons\(^{46}\).

The parallels and differences between direct and indirect discrimination have been summarized by Kristin Henrard in a very concise manner. She distinguishes four common elements of discrimination when comparing these two definitions of direct and indirect discrimination: a question of (1) a harm or disadvantage, (2) a causal relationship between the less favorable treatment and the disadvantage, (3) a protected ground (in the Racial Equality Directive obviously racial or ethnic origin), and (4) a comparison with comparable cases\(^{47}\).

Then Henrard goes on to identify the main differences between direct and indirect discrimination. One main difference lies in the causal relationship between the harm and the protected ground\(^{48}\). For direct discrimination, the harm or disadvantage consists in less favorable treatment, and there is a direct causal link with the protected ground. Direct discrimination is defined by reference to the comparator concept. It shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation. Unfortunately, this definition leaves the question how a comparison shall be established unresolved\(^{49}\).

\(^{46}\) Cf. the wording of Article 2 (2) where in (a) is referred to ‘one person’ and in (b) is referred to ‘persons’.


\(^{48}\) In this context Henrard notes the following: “[t]o be precise, there are actually two kinds of causal relationships that need to be present, not only one between the protected ground and the challenged treatment (the one which is the most well known), but there should also be one between the harm suffered and the challenged treatment (provision, criterion or practice). In this respect an interesting elaboration can be made in relation to direct versus indirect discrimination: while the first causal link is essential in relation to direct discrimination, it is often the second one which plays in cases of indirect discrimination.” Henrard, Kristin. “The First Substantive ECJ Judgment on the Racial Equality Directive: A Strong Message in a Conceptually Flawed and Responsively Weak Bottle.” Jean Monnet Working Paper 09/09: 11 footnote 31.

For indirect discrimination, according to Henrard, the harm is rather identified at group level, namely anything that would put persons of a racial or ethnic group at a particular disadvantage, whereas the causal link between the harm and the protected ground is more indirect. This causal link is established by the actual or potential negative (disadvantageous) and disproportionate impact of a (seemingly) neutral measure on a group of ‘persons of a racial or ethnic origin’. Typical for indirect discrimination is thus that it focuses on the effects of a neutral measure on a particular group of persons\(^{50}\).

Another main difference between direct and indirect discrimination lies in the possibility for the person or institution responsible for the disparate impact to objectively justify the difference in treatment. In cases of direct discrimination under the Racial Equality Directive, there is no room for the objective justification test. Only indirect discrimination can be objectively justified. There is one exception: in the very rare case of genuine and determining occupational requirements, as stipulated in Article 4 Racial Equality Directive\(^{51}\) instances of direct discrimination can also be objectively justified.

The modalities of the objective justification test are defined in Article 2 paragraph 2 (b) in fine: “a less favorable treatment can be objectively justified by a legitimate aim and the means of achieving that aim should be appropriate and necessary.”

Dagmar Schiek stresses that national legal orders and doctrine differ as to whether this is a ‘justification proper’ or whether the objective justification


51 The exception of ‘genuine and determining occupational requirements’ is defined in Article 4 Racial Equality Directive. This article reads as follows: “Notwithstanding Article 2 (1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to racial or ethnic origin shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.” This means that there is room for an objective justification in cases of direct discrimination where the characteristic on which the differential treatment is based consists in a genuine and determining occupational requirement.
test rebuts the assumption that there is indeed discrimination, i.e. is an element of proof of causation\textsuperscript{52}. According to the latter theory, objective justification is used to establish a causal link between discriminatory effects and the criterion, rule or practice which led to the discriminatory effect. In cases of indirect discrimination, disparate impact or factual disadvantage establishes a prima facie case, a presumption of discrimination, which can be rebutted by the person or institution responsible for the disparate impact.

The jurisprudence of the Court of Justice of the European Union (‘CJEU’) in cases of gender discrimination shows that the distinction between direct and indirect discrimination is not always a clear one. Henrard notes that this is “probably related to the fact that the conceptualization of direct and indirect discrimination by the ECJ has happened on a case by case basis, and did not depart from a clear theoretical paradigm”\textsuperscript{53}. This lack of a clear theoretical paradigm might explain the uncertainty of national courts\textsuperscript{54} in applying national law into which the Directive was transposed.

Finally, it should also be stressed that discriminatory intent is not necessary\textsuperscript{55} in order to establish indirect discrimination, where direct discrimination automatically implies the presence of an intention to discriminate.


\textsuperscript{54} See for instance the preliminary question asked to the CJEU by the Brussels Labor Court of Appeal in the Case C-54-07 Centrum voor Gelijkheid van Kansen en Racismebestrijding v Firma Feryn NV [2008] ECR I-5187.

\textsuperscript{55} Cf for instance the reasoning of the Croatian Constitutional Court Ustavni sud Republike Hrvatske in the case U-III3138/2002 of February 2007 (Official Gazette no. 22 of 26 February 2007), in which the Croatian Constitutional Court has addressed the question “whether the continued existence of Roma-only classes in the upper grades of elementary school was caused by the defendants’ [read: the government’s] intent to discriminate [against] those pupils on the basis of their racial or ethnic origin”. See ECtHR, Oršuš and Others v. Croatia, Chamber Judgment of 17 July 2008, para. 29. One of the main reasons why the Croatian Constitutional Court held that, in the present case, the Roma children were not discriminated against, was the fact that, according to the Court, none of the facts submitted had lead to the conclusion that the defendants’ practice was aimed at discrimination of the Roma pupils on the basis of their racial or ethnic origin, thus the lack of the intent to discriminate. This reasoning is not a valid argument in the light of the Racial Equality Directive and EU equality law.
4.2 Harassment and Instruction to Discriminate

The prohibition of harassment and of the instruction to discriminate as part of EU non-discrimination law is relatively new developments, which were introduced to allow for more comprehensive protection.

4.2.1 Harassment

Harassment features as a specific type of discrimination under the EU non-discrimination Directives. It had previously been dealt with as a particular manifestation of direct discrimination. Its separation into a specific head under the Directives is based more on the importance of singling out this particularly harmful form of discriminatory treatment, rather than a shift in conceptual thinking. It should be noted that, unlike in cases of direct and indirect discrimination, there is no need for a comparator to prove harassment. This essentially reflects the fact that harassment of itself is wrong because of the form it takes (verbal, non-verbal or physical abuse) and the potential effect it may have (violating human dignity)\(^5\).\(^6\)

Paragraph 3 of Article 2 - Racial Equality Directive deals with the notion of harassment. Such conduct can take different forms, ranging from spoken words and gestures to the production, display or circulation of written words, pictures or other material. In order for harassment to be caught by the Directive, it must be of a serious nature, creating a generally disturbing or hostile working environment. Harassment on grounds of racial or ethnic origin seriously undermines people’s rights in professional, economic and social spheres and therefore should be deemed to constitute discrimination.

When the conditions as defined in Article 2 (3) Racial Equality Directive are fulfilled, that is when the harassment “has the purpose or effect of creating an intimidating, hostile, offensive, or disturbing environment”, it amounts to discrimination.

4.2.2 Instruction to Discriminate

Paragraph 4 of Article 2 Racial Equality Directive stipulates that “an instruction to discriminate against persons on grounds of racial or ethnic origin shall be deemed to be discrimination within the meaning of paragraph 1.” This paragraph was not included originally in the Commission’s proposal but was introduced on the request of the European Parliament57.

5. Proof of Discrimination: Evidential Issues

In order to be able to substantiate a claim of discrimination, the claimant must prove to have received a less favorable treatment than other individuals in a comparable situation. However, this information is often difficult to obtain.

How proof in cases of discrimination is to be provided concretely is regulated by Article 8 Racial Equality Directive. The Article reads as follows:

1. Member states shall take such measures as are necessary, 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, before a court or other competent authority, 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;

2. Paragraph 1 shall not prevent member states from introducing rules of evidence which are more favorable to plaintiffs;

3. Paragraph 1 shall not apply to criminal procedures;

4. Paragraphs 1, 2 and 3 shall also apply to any proceedings brought in accordance with Article 7(2);

5. Member states need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.

Article 8 (1) thus shifts the burden of proof in civil cases once a claimant has established “facts from which it may be presumed that there has been direct or indirect discrimination”. This means that once a claimant established a prima facie case of discrimination, the burden shifts to the defendant.

A prima facie case of disparate impact can be established by the claimant by means of either statistical or non-statistical evidence, as the wording of Article 2 (2) b clearly makes it possible for the claimant to use both qualitative and quantitative means of proof. In contrast to the Burden of Proof Directive\(^58\), there is no mention of “substantial higher proportions”. The thesis that the definition of indirect discrimination abandons the necessity to establish a prima facie case of indirect discrimination on a statistical basis is supported by Recital 15 of the Directive. The recital reads as follows:

(15) The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence.

The exact reach of this recital is unclear and it is questionable whether member states have the choice whether or not to allow victims to rely on statistics in order to establish a presumption of discrimination\(^59\). Even though the


recital appears to leave it up to the member states to decide which kinds of proof are acceptable, it is debatable, according to Marjolein Busstra, whether the current state of EU equality law actually allows for the exclusion of claims of indirect discrimination solely based on statistical evidence\(^60\). Other scholars confirm that member states may be forced by the CJEU to accept statistics on ground of ensuring the effectiveness of the general principle of equality\(^61\). In its proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation, the Commission stresses that:

In the field of sex discrimination, the European Court of Justice has required statistical evidence to prove indirect discrimination. However, adequate statistics are not always available. For example, there may be too few persons in a firm who are affected by the provision in question or where the provision, criterion or practice has just been introduced, statistics may not yet be available. The definition of indirect discrimination in paragraph 2(b) is inspired by the case-law of the European Court of Justice in cases involving the free movement of workers. According to this definition, an apparently neutral provision, criterion or practice will be regarded as indirectly discriminatory if it is intrinsically liable to adversely affect a person or persons on the grounds referred in Article 1. The ‘liability test’ may be proven on the basis of statistical evidence or by any other means that demonstrate that a provision would be intrinsically disadvantageous for the person or persons concerned\(^62\).

For De Schutter it is clear from this last sentence that the Commission intended to allow for victims of discrimination to present statistical data in or-


der to establish a presumption of discrimination, shifting the burden of proof on the defendant.63

Dagmar Schiek notes in this context that there are diverging views on the desirability of the definition of indirect discrimination as it figures in the Racial Equality Directive, even though most commentators are positive:

On the one hand, statistical proof has been considered a viable tool to expose practices having detrimental effects. On the other hand, there are cases in which the relevant statistics are just not available, although it is reasonable to assume that detrimental effects are occurring. The new formula [of indirect discrimination] will make bringing a claim for indirect discrimination easier in these cases, enabling the applicants to rely on related statistics instead of forcing them to conduct fully fledged quantitative research.64

In any case, the fact that according to Article 2 (2) b qualitative arguments are admitted in addition to quantitative arguments must be welcomed, as it gives more opportunities for victims to establish a prima facie case and reverse the burden of proof on the defendant.

In the meantime, more than one third of all EU member states65 allow for ‘situation testing’ to be used in order to prove the existence of discrimination, subject to certain criteria. ‘Situation testing’ is a method according to which pairs (of applicants for accommodation or a job vacancy or clients of a restaurant, a nightclub, etc.) are established in such a way that they differ solely

63 De Schutter, Olivier. “Three models of equality and European anti-discrimination law.” Northern Ireland Legal Quarterly (2007): 15. See also the Grand Chamber case before the ECtHR of D.H. and Others v. Czech Republic, in which the Grand Chamber considered that reliable and significant statistics are sufficient means to constitute a prima facie case of indirect discrimination. ECtHR, D.H. and Others v. Czech Republic, Grand Chamber Judgment of 13 November 2007, para. 188.
65 Belgium, Bulgaria, Czech Republic, Finland, France, Hungary, Latvia, the Netherlands, Sweden and the UK, See Rorive, Isabelle. Proving discrimination cases – the role of situation testing. Sweden and Brussels: Centre for Equal Rights and Migration Policy Group, 2009: 56.
on the basis of a single characteristic reflecting the discriminatory ground (gender, ethnicity, age, disability, religion or belief, sexual orientation) under scrutiny. If one of the members of the pair faces different treatment, the distinction points to discriminatory behavior. In other words, the method of testing means setting up a situation, a sort of role play, where a person is placed in a position where s/he may discriminate without suspecting that s/he is being observed. This person is presented with fictional ‘candidates’, some of whom possess a characteristic which may incite discriminatory behavior. Observers aim to measure his or her behavior towards people bearing this characteristic compared to others without it\(^66\).

The evidence of this discriminatory behavior collected during situation testing has been accepted as proof of discriminatory treatment by courts. Situation testing is particularly useful for proving incidents of direct discrimination; its application for indirect discrimination may be more limited given the need to show that apparently neutral measures, rules or practices have an impact on a group sharing particular characteristics as a whole\(^67\).

While the member states are not obliged under the Racial Equality Directive to introduce the device of ‘situation testing’, they are encouraged to do so by the Fundamental Rights Agency of the EU (‘FRA’), as it constitutes a valuable measure in promoting equality.\(^68\)

6. Promotional Measures

The Racial Equality Directive aims also at combating discrimination through measures that actively promote equality. This can be given effect in two ways: firstly, through ‘positive action’; secondly through adopting a pre-


ventive approach to indirect discrimination. The two approaches are described and commented on in a 2012 FRA Report discussing the application of the Racial Equality Directive through the laws and practices in the 27 EU member states.

Firstly, Article 7 Racial Equality Directive expressly authorizes the EU member states to take ‘positive action’, “maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin”69. The permissibility of such measures is also recognized under United Nations human rights treaties70 to which all member states are party, which refer to these applying the concept of ‘temporary special measures’71. However,


71 In some situations the adoption of ‘positive action’ or ‘temporary special measures’ may result in members of the majority population receiving less favorable treatment than the targeted minority. This could occur, for instance, if policies of preferential treatment for members of minority groups were applied in the context of employment. Where this is the case, the UN treaty bodies and the CJEU have underlined the need to ensure that such measures do not extend in scope beyond what is strictly necessary to achieve the goal of eliminating inequalities. See UN Committee on the Elimination of Racial Discrimination, General Recommendation 32, paras 21-26; UN Committee on the Elimination of Discrimination Against Women, General Comment No. 25, para. 22. In concrete terms, the CJEU has maintained that, in the context of employment, consideration should be given on a case-by-case basis without applying an automatic and unconditional priority for minority candidates. Case C-450/93 Kalanke v. Freie Hansestadt Bremen [1995] ECR I-3051; Case C-409/95 Marschall v. Land Nordrhein-Westfalen [1997] ECR I-6363; Case C-407/98 Abrahamsson and Leif Anderson v. Elisabet Fogelqvist [2000] ECR I-5539.
there is no obligation for member states to take positive action and most member states are very reluctant to do so.

Secondly, the FRA stresses in its 2012 Report discussing the application of the Racial Equality Directive that the prohibition of indirect discrimination contained in Article 2 Racial Equality Directive could be approached preventively, rather than in reaction to specific disputes:

[...] indirect discrimination requires a more ‘positive’ approach in that rules and practices must be adapted to take into account the differences that flow from a protected characteristic. This could include, for instance, making allowances for variations in rest days, dress codes, dietary requirements or working hours to reflect the different ethnic backgrounds of workers. Indirect discrimination can be addressed in a preventive manner by reviewing existing practices and laws to ensure that apparently neutral rules do not create less favorable results for minorities. This in turn may pre-empt resort to complaints mechanisms. Similarly, the principle of racial and ethnic equality could be mainstreamed into policy-making to ensure that new rules and practices are adjusted as appropriate to take into account differences that may result from racial or ethnic origin72.

The mainstreaming at all stages of the policy process (policy making, policy implementation and policy review) of the principle of racial and ethnic equality is actively promoted by the EU. Non-discrimination/equality mainstreaming placing equality and non-discrimination at the heart of all stages of the policy process is a very challenging concept to implement. The European

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Commission has recently commissioned\textsuperscript{73} and published a compendium\textsuperscript{74} designed to assist policy makers and programme managers, in all policy fields, to implement this mainstreaming as an integral part of their work. It offers guidance on supporting and implementing this mainstreaming and sets out a broad range of practice examples from different member states.

Important for effective mainstreaming of equality is to ensure that the actors involved in the mainstreaming process do not have differing understandings of key equality concepts and of mainstreaming itself\textsuperscript{75}.

As the required support infrastructure for the mainstreaming of equality in the member states has yet to be put in place, it is too early to tell whether the efforts of the Commission in the field of the promotion of mainstreaming equality bare fruit.

7. **Equal Treatment Bodies**

Article 13 of the Racial Equality Directive requires member states to establish a body or bodies responsible for the promotion of equal treatment. Such bodies are to be assigned three tasks to be carried out on an independent basis: firstly, to offer assistance to victims in pursuing their complaints; secondly to conduct surveys on discrimination; thirdly to publish reports and make recommendations on discrimination\textsuperscript{76}.

\textsuperscript{73} This compendium was commissioned by the European Commission as a consequence of a recommendation from the Non-Discrimination Governmental Expert Group good practice exchange seminar on non-discrimination/equality mainstreaming. This seminar was held in Helsinki in September 2009. It concluded that there was an inconsistent understanding of the concept of non-discrimination/equality mainstreaming across the Member States and that there was only limited implementation of this mainstreaming in the policy processes at Member State level. It highlighted the need for European Union level guidance to further the practice of non-discrimination/equality mainstreaming.


\textsuperscript{75} Ibid at 26.

All member states have designated either one or more equality bodies to deal with racial or ethnic discrimination\(^{77}\). In a number of member states, bodies dealing with ethnic and racial discrimination already existed prior to the introduction of the Directive\(^{78}\). In others, either a new body was established\(^{79}\), or the mandate of an existing body or bodies was expanded to deal with racial or ethnic discrimination across the areas required by the Directive\(^{80}\).

In some cases the extent of activity of the equality bodies may be more difficult to gauge because they became operational relatively recently\(^{81}\), or because the three tasks are divided over several different bodies\(^{82}\). In the majority of member states the designated equality body or bodies cover not only racial and ethnic discrimination, but also grounds of discrimination covered by the Employment Equality Directive 2000/78/EC\(^{83}\). This practice contributes towards ensuring equal protection against discrimination on all grounds in a manner consistent with the European Commission proposal for a ‘horizontal’ Directive\(^{84}\). The latter proposal aims at ensuring that discrimination on the basis

\(^{77}\) With the exception of Poland where, although no entities have been specifically ‘designated’ the three tasks currently lie within the remit of a range of existing bodies.

\(^{78}\) Belgium, Ireland, the Netherlands, Sweden and the UK.

\(^{79}\) For example, France, Germany, Italy and Spain.

\(^{80}\) For example, Cyprus and Latvia.

\(^{81}\) For example, Luxembourg in 2008, Spain in 2009, Czech Republic in 2010.

\(^{82}\) For example, Austria, Finland, Ireland and Poland. Although the relevant bodies in Poland have not been formally designated as such, they are competent to perform the tasks required by the Directive.

\(^{83}\) These other grounds of discrimination are religion or belief, disability, age and sexual orientation, which at the moment enjoy mandatory protection from discrimination only in the field of employment. FRA. The Racial Equality Directive: Application and Challenges. Luxembourg: Publications Office of the European Union, 2012: 10-11.

\(^{84}\) European Commission. “Communication on non-discrimination and equal opportunities.” COM(2008)420. This communication provides a comprehensive approach through which the Commission is renewing its commitment to further non-discrimination and equal opportunities in the EU. It presents the latest developments and aims to strengthen the legal framework against discrimination as well as the policy tools for promoting equal opportunities. It is accompanied by a proposal for a new directive prohibiting discrimination on grounds of age, disability, sexual orientation and religion or belief outside the employment sphere. The landmark proposal opens the way for the completion of the legal framework for Europe-wide action against all form of discrimination as provided in Article 19 TFEU (ex-Article 13 TEC). See European Commission. “Proposal for a Council Directive on implementing the principle of equal treatment between per-
of religion or belief, disability, age or sexual orientation is also prohibited in access to goods and services (including housing), social protection, education and health care, and not only in the sphere of employment, as is currently the case. The present ‘hierarchy of discrimination grounds’, according to which discrimination on the ground of racial and ethnic origin is prohibited in all the said areas, but discrimination on the other mentioned grounds is only prohibited in the sphere of employment was harshly criticized by human rights activists, NGOs and civil society. The proposal for a horizontal Directive is to end this ‘hierarchy of discrimination grounds’ by ‘leveling up’ protection and by bringing the other grounds on the same level as race and ethnic origin. However, so far the proposal has not been adopted because of lack of unanimity at the European Council\textsuperscript{85}.

8. The Racial Equality Directive in the Context of EU Enlargement

In the explanatory memorandum of the Proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin\textsuperscript{86}, the Commission stresses the need for European intervention in the field of racism, while respecting the principles of subsidiarity and proportionality. It also refers to the Directive as being a solid basis for the enlargement of the European Union, which must be founded on the full and effective respect of human rights. The process of enlargement will bring into the EU new and different cultures and ethnic minorities. To avoid social strains in both existing and new member states and to create a common Community of

\textsuperscript{85} The main opposition against the proposed Directive is coming from Germany. Germany’s opposition is essentially articulated around the cost of implementation of laws and the burden of ‘red-taping’ on businesses. While Germany has been singled out as the main opponent to the new directive, other countries also had a lukewarm attitude towards a new directive, expressing their concerns related to encroachment into areas of national competences like education. See ILGA. “EU debates new anti-discrimination Directive.” Magazine of ILGA-Europe 8/2 (Autumn 2008). Available at http://ilga-europe.org/home/publications/magazine/2008 (accessed on June, 15 2012).

respect and tolerance for racial and ethnic diversity, it is essential to put in place a common European framework for the fight against racism.  

In May 2004, the Commission presented a Green Paper on ‘Equality and non-discrimination in an enlarged European Union’. In the Green Paper, the European Commission analyses the progress made in the fight against discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation and seeks views on how the EU can step up its efforts in this area. The Green Paper was published shortly after the enlargement of the European Union to include ten new member states. Non-discrimination is not only relevant to the old and new member states, but also to those that have applied to join the EU.

As such, non-discrimination is one of the so-called ‘political criteria’ for membership agreed by the member states at the 1993 Copenhagen European Council. In the Presidency Conclusions of the European Council in Copenhagen of June 1993, there is no explicit reference to the principle of equality or non-discrimination as a fundamental right part of the EU acquis, but there is an explicit reference to the need to respect human rights in general and minority rights in particular. A key reference point in the EU’s monitoring of candidate

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87 Ibid at 4 (stress added).
89 The 10 new Member States which joined the EU on May 1st 2004 were expected to have transposed the two anti-discrimination directives before joining the EU, as they form part of the acquis communautaire.
90 The Copenhagen criteria are the criteria defining whether a country is eligible to join the European Union. The criteria require that a State has the institutions to preserve democratic governance and human rights, has a functioning market economy, and accepts the obligations and adheres to the aims of the EU. These membership criteria were laid down at the June 1993 European Council in Copenhagen, Denmark, from which they take their name.
91 The only (indirect) reference to non-discrimination in the Presidency Conclusions of the European Council in Copenhagen is the confirmation by the Council of “the commitment to protect everybody, including immigrants and refugees, against violations of fundamental rights and freedoms as embodied in constitutions and laws of Member States, the European Convention on Human Rights and other international conventions, including the United Nations Convention on the Elimination of all forms of Racial Discrimination.”
92 In the Presidency Conclusions, the European Council concludes that: “[m]embership requires
countries’ respect for and protection of minorities is the Framework Convention for the Protection of National Minorities (‘FCNM’)\textsuperscript{93}, which has played a significant role in the EU pre-accession strategy.

Even though the EU institutions monitor the protection of minorities by candidate countries, they cannot rely on specific EU instruments or standards to verify the candidates’ progress in the field. This is where the Racial Equality Directive (or also the principle of non-discrimination in general) can come into play, as some parts of the EU acquis, such as the Racial Equality Directive, may indirectly contribute to promote the protection of minorities\textsuperscript{94}. It should be kept in mind, however, that the EU lacks general competence to establish and develop a minority policy\textsuperscript{95}.

\textsuperscript{93} The Framework Convention was opened for signature by the Council of Europe’s Member States on February 1\textsuperscript{st} 1995 and entered into force on February 1\textsuperscript{st} 1998, subsequent to its ratification by twelve Council of Europe Member States. By today, it has—with 39 States Parties—emerged as a genuinely pan-European instrument. Belgium, Greece, Iceland and Luxembourg have signed but not ratified the FCNM. Andorra, France, Monaco and Turkey have neither signed nor ratified the FCNM.


\textsuperscript{95} Christophe Hillion notes in this context “that the FCNM has become a significant element of the normative basis of the EU [as] [t]he absence of EU competence and a fortiori of secondary legislation in this field has entailed that the EU has had to rely on external sources to articulate and operationalise its accession conditionality, and to ensure effective monitoring”. Hillion, Christophe. “The Framework Convention for the Protection of National Minorities and the European Union.” (Report prepared for the Conference ‘Enhancing the Impact of the Framework Convention’, Strasbourg, France, 9-10 October 2008). Available at http://www.coe.int/t/dghl/monitoring/minorities/6_resources/PDF_IAConf_Report_CHillion_Wshop2_en_12nov08.pdf (accessed on June 14, 2012).
Table 1: The table presented below gives an overview of all countries of South Eastern Europe, members of the South East European Law School Network, and their status of ratification of the Framework Convention for the Protection of National Minorities (Council of Europe) on the one hand, and their EU membership status on the other hand.

<table>
<thead>
<tr>
<th>State</th>
<th>FCNM Ratification</th>
<th>EU Membership Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Albania</td>
<td>28-09-1999</td>
<td>Potential Candidate</td>
</tr>
<tr>
<td>Bosnia and Herzegovina</td>
<td>24-02-2000 (accession)</td>
<td>Potential Candidate</td>
</tr>
<tr>
<td>Croatia</td>
<td>11-10-1997</td>
<td>Acceding on 1 July 2013</td>
</tr>
<tr>
<td>Montenegro</td>
<td>06-06-2006 (accession)</td>
<td>Candidate Country</td>
</tr>
<tr>
<td>Serbia</td>
<td>11-05-2001 (accession)</td>
<td>Candidate Country</td>
</tr>
<tr>
<td>Macedonia</td>
<td>10-04-1997</td>
<td>Candidate Country</td>
</tr>
<tr>
<td>Kosovo</td>
<td>23-8-2004 (agreement CoE/UNMIK signed)</td>
<td>Potential Candidate</td>
</tr>
</tbody>
</table>


The European Commission has set up a network of legal experts in the non-discrimination field\(^{96}\) to support its work by providing independent information and advice on relevant developments in the member states related to non-discrimination. The network brings together 27 country experts-one for each member state-and five coordinators for each ground of discrimination: race and ethnic origin, religion, disability, age and sexual orientation. It replaces the three previous specialized groups of experts which focused on the grounds of racial and ethnic origin and religion, disability, and sexual orientation, and which operated up to June 2004 prior to EU enlargement.

The network’s specific tasks are to provide information and indepen-

dent analysis on: the transposition of the Racial Equality Directive where not yet complete; on practical implementation and application of national laws introducing the Racial Equality Directive; on national initiatives and related political developments in the field; on national case law and its conformity with EU Law; on relevant judgments by the CJEU and by the ECtHR. The network also produces comparative analyses, comparing the information set out in the country reports. These country reports are written by independent national expert from each member state and are a valuable source of information on national anti-discrimination law.

In addition to the EU member states, the candidate countries Croatia, Macedonia and Turkey have been part of the network since December 2009.

10. The Way Forward: Challenges

In spite of the numerous reports produced by the network of legal experts in the non-discrimination field, it is impossible to paint an overall picture of the progress made in combating racial discrimination in the EU. This is largely due to the fact that member states do not collect ethnically disaggregated data.

97 Ibid.

98 Country reports for the candidate countries Croatia, Macedonia and Turkey have been drafted by their respective national experts (see also http://www.non-discrimination.net) and these countries are also included in the last comparative analysis of all 27 EU Member States. See Chopin, Isabelle and Do, Thien Uyen. European Network of Legal Experts in the non-discrimination field. Developing Anti-Discrimination Law in Europe: The 27 EU Member States, Croatia, Macedonia and Turkey compared. Brussels: European Commission, DG Justice, 2010: 46. Available at http://www.migpolgroup.com/public/docs/192.DevelopingAntiDiscinEurope_Comparativeanalysis_V_11.10_EN.pdf (accessed on June, 14 2012).

99 In some Member States like France, Germany and Portugal it is illegal to collect statistics about racial or ethnic minorities. In part this is because governments believe it is an interference with privacy to identify whether an individual belongs to a minority. However, research shows that most members of minority groups are willing to include information about their ethnicity in a census, if this is made anonymous and used to combat discrimination. See FRA. “Combating Racial Discrimination.” Factsheet, s.d.. Available at http://fra.europa.eu/fraWebsite/attachments/FRA_Factsheet_RED_EN.pdf (accessed on June, 15 2012).
It is also impossible to determine how often discrimination occurs. Not all EU member states keep statistics on how many complaints are made specifically on racial discrimination and not all victims file a complaint when discrimination occurs\textsuperscript{100}.

10.1 Lack of Statistics and of Ethnically Disaggregated Data

The ways in which statistical and other data can support the implementation of equal treatment law, how international and European Law, in particular Data Protection Law, regulates the collection of such data, the extent to which the EU member states engage in the collection of data and the question whether statistical data is made use of in legal proceeding at the national level are all topics which have been investigated and discusses extensively by Timo Makkonen in his 2006 report on ‘Data Collection and EU Equality Law’\textsuperscript{101}.

The EU has acknowledged the crucial role played by statistics in activating anti-discrimination policies and increasing its capacity to ensure social cohesion and promote diversity and equality. Ethnic data—as one component within disaggregated data—can be generated and used in ways that protect the privacy of individuals and groups while providing critical information to help policymakers fight racism and discrimination and draft viable equality programs\textsuperscript{102}.

Member states often invoke the argument of privacy and data protection as a reason not to collect ethnically disaggregated data. However, the above mentioned report by Timo Makkonen clearly confirms that the oft-stated

\textsuperscript{100} Ibid.


perception that international and European laws on the right to privacy and the protection of data prohibit the collection of personal data relating to the equality grounds is false: the pertinent laws only set out the legal framework and the qualitative criteria that must be met when data is collected or otherwise processed. Accordingly, the report recognizes the need to engage in data collection in order to work towards the realization of equal treatment in practice103.

In the context of the implementation of the new EU Framework for National Roma Integration Strategies104, the FRA is to offer increased support105 to the member states in collecting ethnically disaggregated data. Whether this increased FRA support will boost member states to start collecting these data remains to be seen. So far the Commission has always taken the stance that it is for the member states to decide whether or not ethnic data should be collected.

10.2 Varying Levels of Compensation

Levels of compensation in cases of racial discrimination vary considerably between EU member states. It seems that these differences cannot be explained just by the variation in living costs in different countries. Moreover, in some member states, the level of compensation may not be high enough to discourage people from discriminating or to make up for the damage done to victims106.


Member states could look into levels of compensation for racial discrimination to make sure that these are adequate\(^{107}\).

10.3 **Awareness Raising of Equality Legislation**

Article 10 Racial Equality Directive requires member states to disseminate information about provisions in place to give effect to the Directive. Awareness of equality legislation and complaints procedures is important for potential victims so that they are able to enforce their right to equal treatment. It is also important for potential perpetrators in order to act as a deterrent. Research conducted by the FRA\(^ {108}\) shows that awareness-levels in the EU are very low, which results in low numbers of complaints. Continuation and intensification of awareness raising activities by national and local authorities, NGOs, trade unions, employers and equality bodies can help to remedy these low awareness levels\(^ {109}\).

10.5 **The Important Role of the CJEU**

Academic studies\(^ {110}\) reveal that the Racial Equality Directive still has a lot of unused potential, especially when it comes to minority protection. A study conducted by Marjolein Busstra concludes that quite a portion of the mi-

\(^{107}\) Ibid.


Minority protection potential of the Racial Equality Directive can be realized by the interpretation of certain provisions of the Directive in a minority-sensitive manner\textsuperscript{111}. The interpretation of the provisions of the Racial Equality Directive is a role which is reserved to both judges at a national level and the CJEU. The latter has been criticized by scholars for having “applied an ad hoc approach to equality law, dealing only with the matter that rise before it, and not necessarily paying much attention to overall consistency and stability of the developing acquis”\textsuperscript{112}. Considering the relative inexperience with anti-discrimination law at the member state level, it would be beneficial if the CJEU would give more guidance as to the member states on how to read certain provisions of the Racial Equality Directive, giving the latter more substance.

Finally, as a general conclusion, it should be stressed that even though enforcement mechanisms by means of court litigation are crucial in ensuring the effectiveness of the prohibition on discrimination, they are primarily geared towards individualized remedies and therefore not ideal for addressing broader disadvantage experienced by entire population groups\textsuperscript{113}. The disadvantaged position of persons belonging to racial or ethnic minorities is mostly due to several connected and intertwined factors that cannot be remedied by mere litigation. Persons from minority groups often live in poor (housing) conditions because of their inferior economic position, their bad connection to the job markets or public services like healthcare and education. These factors create a vicious circle of poverty and exclusion. It is impossible to solve these issues by (supporting individuals in) going to court and receiving compensation. The interlocking nature of discrimination in the area of health, education, housing and employment reveals the need for holistic policies to improve the socio-

\textsuperscript{111} Ibid at 358.
\textsuperscript{112} Ibid at 358. One serious deficiency in this respect is the inconsistent and conceptually inappropriate way in which the CJEU has approached the delineation of the concept of direct discrimination versus indirect discrimination. See Henrard, Kristin. “The First Substantive ECJ Judgment on the Racial Equality Directive: A Strong Message in a Conceptually Flawed and Responsively Weak Bottle.” Jean Monnet Working Paper 09/09. Henrard also severely criticizes the lack of ‘system reasoning’ by the CJEU (cf. the criticism by Busstra above of the fact that the CJEU has rather adopted an ad hoc approach to equality law).
economic position of (members of) minorities. Therefore member states should not only make sure that they correctly implement EU equality legislation, but they should also consider adopting a holistic minority policy by taking measures to simultaneously address the housing, educational and healthcare needs of disadvantaged minorities.
1. Introduction

Enjoyment of political rights, their acknowledgment and protection are essential part of a broad list of elements that define democracy and Rule of Law. The first premise of democratic political system is the participation of the people (citizens of the state) in governance achieved through active and passive voting rights, the right to choose the competent authority in the state and the right to be chosen as competent authority with the political and legal authority to regulate social relations on the state territory. Elections are bound by the universal principles of generality, equality, immediacy and secrecy. Political election is realized through periodic secret, free, democratic and fair elections regulated by the state laws. The minimum required by the principle of democracy is the freedom to choose between at least two political parties, preconditioned by acknowledgment, enjoyment and protection of fundamental freedoms, without whom the realization of political rights is impossible. These freedoms are: freedom of thought, speech and conviction, freedom of assembly and freedom of political association, in short characteristics of democratic political system. Political rights, put in the context of the Rule of Law, underline the importance of legitimate authority – one that is based on the peoples will (both of those chosen as the competent authority and those that chose them), one that is obtained and executed within the legal procedure where the voluntary forms of governing are bordered by the existence of independent judiciary. There relations can be summed up in the following postulation: Political rights are bounded for legitimacy (freely expressed will of the people) and legality (based on the law and legal procedure).
The most important application of the Rule of Law is the principle that Governmental authority is legitimately exercised only in accordance with written, publicly disclosed laws adopted and enforced in accordance with established procedural steps that are referred to as due process. The principle is intended to be a safeguard against arbitrary governance, whether by a totalitarian leader or by mob rule. Thus, the Rule of Law is hostile both to dictatorship and to anarchy. Rule of Law cannot exist without a transparent legal system, the main components of which are a clear set of laws that are freely and easily accessible to all, strong enforcement structures, and an independent judiciary to protect citizens against the arbitrary use of power by the state, individuals or any other organization.

Upon translating these terms into the real political context of Bosnia and Herzegovina arise the challenges regarding the possibility of exercising human rights and fundamental freedoms in a post-conflict and ethnically plural society that does not belong to the circle of “new democracies”, i.e. the state whose constitutional system and territorial organization have been imposed as the part of international agreement whose purpose was stopping the war in Bosnia and Herzegovina.

The aim of this paper is to critically analyze and assess the situation in three phases: Socialist Republic of Bosnia and Herzegovina, according to the Constitution from 1974, was one of the six federal units that formed the Socialist Federal Republic of Yugoslavia; Republic of Bosnia and Herzegovina existed from proclamation of independence until the signing of the General Framework Agreement for Peace; and from 1995 we speak about Bosnia and Herzegovina.

Regarded from the perspective of political rights and the possibility of political representation, during the first time period i.e. until the first free democratic elections, enduring political culture and dominant political matrix have been established. The second time period, between 1990 until 1995, is characterized by the fall of communism, the beginning phase of political pluralism and the establishment of political matrix that caused the dissolution of

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Yugoslavia and wars on its former territory. The influence of nationalist political matrixes has determined the post-war political tendencies in Bosnia and Herzegovina. The third phase is linked to Bosnia and Herzegovina, determinations and political repercussions of the current Constitution, Annex IV of The General Framework Agreement for Peace in Bosnia and Herzegovina. A strong interaction can be noticed between the presented time periods that determine the political rights, the possibility and the manner of political representation in Bosnia and Herzegovina.

2. The general framework for analysis of recognition, enjoyment and protection of political rights in Bosnia and Herzegovina

Recognition, enjoyment and protection of political rights, and fundamental freedoms linked to it are always referred to in regard of the state territory, its population and the manner of Government organization. In case of Bosnia and Herzegovina, we can speak with certainty of the state area within its internationally acknowledged borders. Open questions refer to: the real size of its population, the amount of members of constitute people - ethnic groups, their territorial distribution and the manner of political representation. Furthermore, questions of forming the collective Entities, interrelation of collective Entities, collective rights and political representation, questions of relation between constitute peoples; others and national minorities in the light of political representation and the gender dimension of political representation remain open. The next group of open questions refers to the territorial organization of the Government, the amount of state budget designated to the existing organization of the Government and its relation with the financial capabilities of the state to realize its goals in the domain of security, economy and social sphere of life in Bosnia and Herzegovina. Then there is a question of the relation between political elites and their reasonability for political, economical and safety situation in the state. The final, but not the least important question is the attitude of international community towards Bosnia and Herzegovina i.e. the attitude of Bosnia and Herzegovina towards European integrations and its status in the region. The mere recital of open theoretically and politically challenging questions suggests their complexity and perorates that their complete analysis cannot be fully done in this paper and that their complexity goes beyond the frames of this paper.
Time distance from the events themselves, the growth of bibliographical units for each group of mentioned questions, the increased academic interest for the study of the case of Bosnia and Herzegovina must be taken into consideration during their analysis. The questions and solutions that seemed understandable at the time became problematic and questionable with the dynamics of political events and the resulting changes in Bosnia and Herzegovina, on the regional, European and global level. The context of the analysis is changing constantly. As an illustration we can take the verdict of the European court for Human Rights in the case of Sejdic and Finci v. Bosnia and Herzegovina. At the time when the primary goal of the international community was stopping the war in Bosnia and Herzegovina, as a result of political compromise, an ethnic discrimination was made part of the Constitution of Bosnia and Herzegovina, with the assumption that this political goal can be interpreted as a legitimate aim for restriction of human rights. The passage of time and the change in political aim results in today’s situation where the Council of Europe conditions the subsistence of Bosnia and Herzegovina as its member and becoming a member of EU, with change of discriminating Constitutional clauses. Another example are the minimal jurisdictions of the state institutions, and the assumption of jurisdiction in favor of the Entities as stipulated by the Constitution of Bosnia and Herzegovina, that have become questionable in the light of the demand for efficient state capable to legislate and form policies necessary for participation of Bosnia and Herzegovina in European integrations.

Finally, the mere identification of regional belonging of Bosnia and Herzegovina and the terminology used: one of the states created with the dissolution of former Yugoslavia, the state of Southeastern Europe, state of Western Balkans and finally Bosnia and Herzegovina, suggests the dynamics of broader political context changes. In this paper the usage of the terms and their analysis is adapted to the level that corresponds to the goal of this paper – the analysis of the political rights and political representation in Bosnia and Herzegovina.

2.1 Area and population

Bosnia and Herzegovina has the area of 51,197 square kilometers. Based on the last 1991 census, 4,377,033 people lived in the state, specifically
2,193,238 female and 2,183,795 male, that is there were 9,443 more females. The ethnic structure, according to the census is:

<table>
<thead>
<tr>
<th>Ethnicity</th>
<th>Number of members</th>
<th>Percentage in the total population</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bosniaks (Muslims by nationality)</td>
<td>1,902,956</td>
<td>43.47 %</td>
</tr>
<tr>
<td>Serbs</td>
<td>1,366,104</td>
<td>31.21 %</td>
</tr>
<tr>
<td>Croats</td>
<td>760,852</td>
<td>17.38 %</td>
</tr>
<tr>
<td>Yugoslavs</td>
<td>242,682</td>
<td>5.54 %</td>
</tr>
<tr>
<td>Montenegrins</td>
<td>10,071</td>
<td>0.23 %</td>
</tr>
<tr>
<td>Macedonians</td>
<td>1,596</td>
<td>0.03 %</td>
</tr>
<tr>
<td>Slovenes</td>
<td>2,190</td>
<td>0.05 %</td>
</tr>
<tr>
<td>Albanians</td>
<td>4,295</td>
<td>0.10 %</td>
</tr>
<tr>
<td>Czechs</td>
<td>590</td>
<td>0.01 %</td>
</tr>
<tr>
<td>Italians</td>
<td>732</td>
<td>0.02 %</td>
</tr>
<tr>
<td>Jews</td>
<td>426</td>
<td>0.01 %</td>
</tr>
<tr>
<td>Hungarians</td>
<td>893</td>
<td>0.02 %</td>
</tr>
<tr>
<td>Germans</td>
<td>470</td>
<td>0.01 %</td>
</tr>
<tr>
<td>Poles</td>
<td>526</td>
<td>0.01 %</td>
</tr>
<tr>
<td>Roma</td>
<td>8,864</td>
<td>0.20 %</td>
</tr>
<tr>
<td>Romanians</td>
<td>162</td>
<td>0.01 %</td>
</tr>
<tr>
<td>Russians</td>
<td>297</td>
<td>0.01 %</td>
</tr>
<tr>
<td>Ruthenians</td>
<td>133</td>
<td>0.01 %</td>
</tr>
<tr>
<td>Slovaks</td>
<td>297</td>
<td>0.01 %</td>
</tr>
<tr>
<td>Turks</td>
<td>267</td>
<td>0.01 %</td>
</tr>
<tr>
<td>Ukrainians</td>
<td>3,929</td>
<td>0.09 %</td>
</tr>
<tr>
<td>Other</td>
<td>17,592</td>
<td>0.40 %</td>
</tr>
<tr>
<td>Undecided</td>
<td>14,585</td>
<td>0.33 %</td>
</tr>
<tr>
<td>Regional</td>
<td>224</td>
<td>0.01 %</td>
</tr>
<tr>
<td>Unknown</td>
<td>35,670</td>
<td>0.81 %</td>
</tr>
</tbody>
</table>

The size of the territory, the size of the population and territorial organization of the state enable the comparison of the existing solutions in regard
to the territorial organization of states with similar area and population or with
the states with complex ethnic structure. Taking these parameters into consid-
eration, regional comparison can be made with Slovenia, Macedonia, Monten-
egro, Kosovo, Croatia, and in European frame with Belgium, Switzerland,
Denmark and Slovakia. Putting Bosnia and Herzegovina into the comparative
frame for analysis, in light the economic growth level, political stability, devel-
opment of democracy is an important component in addressing the well spread
myth of a small, unique, specific and exceptional state. Comparative analysis
would show that neither the area nor the population size are an obstacle to the
economic development, nor is the ethnic complexity an obstacle for the exis-
tence and functionality of the state. However, specific political and legal solu-
tions, with no other stronghold, are based on the political myth of the unique-
ness of Bosnia and Herzegovina.

The official data from the 1991 census cannot be taken with certainty
today, for they were followed the war (1992-1995) whose destructive conse-
quences reflected on the demographic structure. The official assessment made
by the Agency for Statistics in Bosnia and Herzegovina, the current population
is 3,839,737 people, similar to the EUROSTAT data estimate of 3,843,000 peo-
ple. According to the Institute of Statistics in the Republic of Srpska, 1,433,038
people live in that entity and according to Federal Office of Statistics in the
Federation of Bosnia and Herzegovina, 2,338.00 life in that entity. The sum
of official number of population in the Entities (3,771,038) differs from the
assessments given by the Agency for Statistics in Bosnia and Herzegovina and
EUROSTAT. Central Intelligence Agency of USA estimates the size of the pop-
ulation to be 4,600,000 people. The census planned for 2013 will give the infor-
mation about the real population size². Unlike other Balkans states that held the
census in 2011, in Bosnia and Herzegovina will be held in 2013. The decision

² Novi Pogledi, - Popis u BiH Koliko nas je? Časopis Asocijacije Alumni centra za interdisciplin-
arne studije – proljeće 2012 , broj XIX. U razgovoru sa novinarem Pogleda Zdenko Milanović,
direktor Agencije za staistiku BiH je izjavio “Mi smo imali još jednu naknadnu procjenu
stanovništva koja je pokazivala da imamo manje stanovnika nego 3 miliona i 800 hiljada koju mi
objavljujemo, međutim ona nije prihvaćena od Statističkog zavoda RS-a- Nisu prihvatili da se ta
procjena objavi, tako da mi sada objavljujemo ono što objavljujemo i upravo je značajno da što
prije imamo stvarni broj stanovništva.
for the census in 2013 was made as a result of the pressure from EU, while the existing political controversies manifested in local debate.

2.2 Organisation of Government

According to the Constitution of Bosnia and Herzegovina i.e. Annex IV of the General Framework Agreement for Peace in Bosnia and Herzegovina reached at Wright-Patterson Air Force Base near Dayton on November 21, and signed in Paris on December 14, 1995, the state territory consists of two Entities: Federation of Bosnia and Herzegovina and Republic of Srpska, and the third region of Brčko District as a Federation of Bosnia and Herzegovina and Republic of Srpska condominium. Federation of Bosnia and Herzegovina consists of 10 cantons, five of which (Unsko-sanski, Tuzlanski, Zeničko-dobojski, Bosansko-podrinjski, Sarajevski) have Bosnian majority, three have Croat majority (Posavski, Zapadnohercegovački and Canton 10) while the remaining two have mixed population of Bosniaks and Croats (Srednjobosanski i Hercegovačko-neretvanski). Together cantons have 79 municipalities and cities (Sarajevo, Bihać, Tuzla, Mostar). Republic of Srpska consists of 61 municipalities and two cities (Banja Luka and Istočno Sarajevo - that incorporated 6 municipalities). In 2012 a proposal was defined that municipalities of Bijeljina, Doboj, Prijedor i Trebinje become cities but has not yet been enforced. On the territory of Bosnia and Herzegovina there are a total of 139 municipalities. Hence, the governance is divided on local, city, canton, entity and state level. All cities do

3 Medina Malagić Debate over BiH census continues. Controversy revolved around the inclusion of religion, ethnicity, language, and refugee and IDP return. When political talks began in 2008, many Bosniaks, along with several Croat politicians, were understandably adamantly opposed to the census on the grounds that it would legitimise the systematic campaign of ethnic cleansing and mass expulsion in the areas formerly occupied by Bosnian and Croat civilians on the territory of what is today the RS. The political parties Alliance of Independent Social Democrats (SNSD) and Serbian Democratic Party (SDS) advocated the inclusion of data on ethnicity and religion as an inviolable right to declare ethnic and religious identity. What followed was an incessant battle over Article 48, which stipulated that despite the results of the census, the ethnic quotas currently being used to fill administrative positions would continue to rely on 1991 census. The final agreed upon provisions by all three constituent ethnic groups amounted to a compromise on all sides. Article 48 will not be included in the census law, and the results of the 2003 census on ethnicity will not be used one refugee and IDP return has been accomplished. / Pogledi, navedeni broj.
not have the same administrative division, electoral model and jurisdiction. On general elections BiH Presidency members are elected and the representatives for: Parliamentary Assembly of Bosnia and Herzegovina (total of 42), House of Representative of the Parliament of the Federation of Bosnia and Herzegovina (total of 98), National Assembly of the Republic of Srpska, (total of 83), Cantonal assemblies (total of 289), City Councils (total of 31) and Municipal councils (in 2008 elections there were 3186 regular mandates and 37 mandates for representatives of national minorities4). In total, representatives are elected for: 79 Municipal councils in Federation of Bosnia and Herzegovina and 61 in Republic of Srpska. Furthermore, on local elections Municipality Mayors are elected (139 in total), representatives in Assembly of Brčko District (total of 31, two of which are reserved for national minorities), and City Mayors (in Federation of Bosnia and Herzegovina: Sarajevo, Bihać, Tuzla, Mostar and in Republic of Srpska/BiH: Istočno Sarajevo and Banja Luka). The total amount of people that take part in legislative on all levels of governance is 3797.

The executive power on state level is exercised by BiH Presidency (consisting of three members) and Council of Ministers of BiH (nine members). On entity level the executive power is exercised by: the President of the Federation of Bosnia and Herzegovina (with two vice-presidents) and the Government of Federation of Bosnia and Herzegovina (consisting of 14 ministers) and in Republic of Srpska by the President of the Republic of Srpska (with two vice-presidents) and the Government of the Republic of Srpska (consisting of 14 ministers). In Brčko District the executive power is exercised by the Mayor (with one deputy mayor) and the District Government (11 ministers). On cantonal level the executive power is exercised by 10 Prime Ministers of cantons (included in the total number of 100 cantonal ministers), and on local level it is exercised by 139 municipality mayors. The total amount of people that take part in executive power on all levels of governance is 304 (156 peoples consisted of: members of the Presidency, mayors, and municipality mayors plus 148

4 Data taken from the official web page of the Central Election Commission of Bosnia and Herzegovina.
ministers). The total number of politicians that take part in legislative and executive power on all levels of governance in Bosnia and Herzegovina is 4191.

Provisions of the Election Law of Bosnia and Herzegovina that regulate the elections for the Parliamentary Assembly of Bosnia and Herzegovina and the Presidency of Bosnia and Herzegovina are discriminating in regard of active and passive voting rights restrictions for BiH citizens. Members of the Government authority on the state level (Parliamentary Assembly of Bosnia and Herzegovina and the Presidency of Bosnia and Herzegovina) are elected from the Entities: Serb from the Republic of Srpska, Bosniak and Croat from the Federation of Bosnia and Herzegovina. Members of the Government authority whose territorial jurisdiction extends to the entire state territory do not have the legitimacy of voters from the entire state territory. Furthermore, the assumption that the citizens will vote for the candidate that has the same nationality as they do created a problem in the last elections, where current Croat member of the Presidency got the majority of votes but not in municipalities with Croat majority. Hence he has civil legitimacy but he lacks legitimacy as a representative of Croatian ethnic group. Question remains whether this is a step forward in the development of the political situation or a setback.

In regard of the election for the members of the Presidency (verdict of the European court for Human Rights in the case of Sejdic and Finci v. Bosnia and Herzegovina) it remains unclear whom do they represent: the entity from which they are elected from or the ethnic group they belong to. If they represent the entity, their ethnicity is irrelevant for they represent the interests of all citizens from that entity. If they are regarded as the representatives of an ethnic group, it is irrelevant what entity they are elected in because Serbs, Croats

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5 Regarding the legitimacy of members of The Presidency, the following data is should be considered: Bosnian member Bakir Izetbegović SDA – Stranka demokratske akcije gained 162831 votes or 34.86% out of the total number gained by all Bosniak candidates. Croat member Željko Komšić – SDP – Socijaldemokratska partija BiH gained 337065 votes or 60.61% out of the total number gained by all Croat candidates. Serb member Nebojša Radmanović SNSD –DP Savez nezavisnih socijaldemokrata i Demokratska partija gained 295629 or 48.92% out of the total number gained by all Serb candidates. According to the Bosnia and Herzegovina Agency for Statistics at the time of the election there were 3.126.599 registered voters.
and Bosniaks are constitutional peoples on the entire state territory\(^6\), and it is assumed that they have an equal political interest in protection of their rights related to the collective identity. All those that do not belong to the constituent peoples (Serbs, Croats and Bosniaks) cannot be elected neither as members of the Presidency nor as representatives in the Parliamentary Assembly of Bosnia and Herzegovina.

**Election of Members of the Presidency of BiH**

The members of the Presidency of BiH (hereinafter: The Presidency of BiH) directly elected from the territory of the Federation of BiH – one Bosnian and one Croat shall be elected by voters recorded in the Central Voters Register to vote for the Federation of BiH. A voter recorded in the Central Voters Register in the Federation of B&H may vote for either the Bosnian or Croat Member of the Presidency, but not for both. The Bosnian and Croat member that gets the highest number of votes among candidates from the same constituent people shall be elected. The member of the Presidency of BiH that shall be directly elected from the territory of RS - one Serb shall be elected by voters recorded in the Central Voters Register to vote in the RS. Candidate who gets the highest number of votes shall be elected. The mandate for the members of the Presidency of BiH shall be four years.\(^7\)

**Election for House of Representatives of the Parliamentary Assembly of BiH**

The House of Representatives of the Parliamentary Assembly of BiH shall consist of 42 members; 28 shall be directly elected by voters registered to vote for the territory of the Federation of BiH and 14 shall be directly elected by voters registered to vote for the territory of the Republic of Srpska. The mandate of members of the House of Representatives of the Parliamentary As-

\(^6\) Decision of Constitutional Court of Bosnia and Herzegovina no. U 5/98 about the constituency of the people– Službeni glasnik BiH”, broj 36/00.

The analysis of budget spending in BiH has showed that 47.1% of planned budget expenditure was allocated to cover the cost of employees and administrative expenditure on all levels of governance in BiH. For the sake of comparison, 2.9% of planned budget expenditure was allocated for public investment. For further comparison, in pre-war Bosnia and Herzegovina, the total cost of salaries for the employees in the institutions of BiH, FBiH, RSBiH and all 10 cantons in 2010 amounted to 2.57 billion KM, that is 826 million more than in 2006. The administrative costs for the employees in 2010 amounted 620 million, that is 192 million more than in 2006.

Together, the planned cost of employees and administrative expenditure in 2010 amounted 3.19 billion that is 47.1% of planned budget expenditure for 2010.

On the other hand, the planned budget expenditure allocated for public investment amounted to 209.2 million or 2.9% of total budget expenditure. This is the lowest amount in the past four years, even 8.9 million less than in 2006 the year when leading political parties, during the pre-election campaigns, promised significant asset allocation for financing the policies presented in the “Građanska platforma za izbore 2006” a document stating goals and recommendations for future development created by NGOs.

In 2007, 2008, 2009 and 2010 the total amount of state budgets was 24 billion and 718 million KM. where the cost of state institutions employees was 9, 6 billion, cost of transfers and grants amounted to 9, 1 billion, cost of material and services was 2,1 billion, and investment cost was 1,1 billion and 2,5 billion was allocated to other budget expenditure including credit payments, credit interests, budget reserves and other.

During their mandate, the authorities allocated 11,8 billion for financing socioeconomic policies, while the remaining 12,8 billion was spent on financing the work of executive power (public services, defense, police and security) and other public policies (roads, sports, culture...)

Within the frame of financing socioeconomic policies largest amount of assets was allocated for education 4,5 billion, where only 154 million or 3.4 was allocated for investments in education. Social protection policies were funded with 4,2 billion where 2,3 billion was spent on war veterans (not counting the spending from non budget funds), while 1,5 billion was spent on protection of other socially endangered categories. 287 million was allocated for the process of repatriating displaced persons while 94 million was allocated to other social programs.

Only 367 million was spent on employment policies and 968 million for pension policies, 409 million on healthcare, 714 million for agriculture, 14 million for youth policies, 5 million for the reform of administration, 31 million for enforcing the process of EU integrations, 539 million for the work of public companies, and 30 million for attracting foreign investments.

The analysis of budget spending shows that the local government failed to deliver the promises made in 2006 and that they continued to finance socioeconomic policies in a non efficient, unjust and unsustainable manner jeopardizing financial stability of BiH.

Taken from the “Analysis of the budget for BiH institutions, Entities and cantons for 2010” By Meliha Gačanin found on the web page :http://www.budzet.ba/index.php?Itemid=92&catid=17:vijesti&id=52:analiza-budeta-institucija-bih-entiteta-i-kantona-za-2010-godinu&option=com_content&view=article
and Herzegovina the governance was divided on local and republic level. Local governance was divided between 109 municipalities, while on the republic level existed: Assembly of Socialist Republic of Bosnia and Herzegovina that consisted of two councils: Council of Citizens and Council of Municipalities\textsuperscript{10}, the Presidency of Bosnia and Herzegovina (seven members: two Serbs, two Bosniaks, two Croats and one from the others), Executive Council as a executive authority of the Assembly of Socialist Republic of Bosnia and Herzegovina\textsuperscript{11} consisting of a president, one or more vice-presidents and members elected by the Assembly of Socialist Republic of Bosnia and Herzegovina. Described organization of political authority in Bosnia and Herzegovina and its analysis manifests the direct consequences of the war in regard to the territorial governance division, ethnic homogenization of the population and internal contradictions that made BiH one of the least developed countries in Europe. Organization of political authority in Bosnia and Herzegovina is a result of Washington agreement, signed on 1 March, when Federation of Bosnia and Herzegovina was created in order to reconcile Bosniaks and Croats. The General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement) included Republic of Srpska, created in 1992, to the state territory in a form of one of its Entities, and therefore legalized its existence. Existing Bosnia and Herzegovina was created by the merge of the two Entities, created as a direct result of the war and realization of war goals directed to the destruction of the Republic of Bosnia and Herzegovina\textsuperscript{12}.

**Continuation** “The Republic of Bosnia and Herzegovina, the official name of which shall henceforth be “Bosnia and Herzegovina,” shall continue its legal existence under international law as a state, with its internal structure modified as provided herein and with its present internationally recognized bor-

\begin{footnotesize}
\begin{enumerate}
\item Rule of procedure of the Assembly of Socialist Republic of Bosnia and Herzegovina Službenom listu SRBiH 8/91 od 15 marta 1991 godine.
\item Constitution of Socialist Republic of Bosnia and Herzegovina paragraph 186.
\item The character of war goals can be observed from the large ICTY documentation collected and published during the trials for crimes committed on the area of former Yugoslavia by the UCTY.
\end{enumerate}
\end{footnotesize}
ders. It shall remain a Member State of the United Nations and may as Bosnia and Herzegovina maintain or apply for membership in organizations within the United Nations system and other international organizations\textsuperscript{13}. The result is an unusual, dysfunctional state structure that aims to reconcile the opposites.

**Composition** “Bosnia and Herzegovina shall consist of the two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska (hereinafter “the Entities”)”\textsuperscript{14}.

Bearing in mind the Constitutional provisions and political aims inherited from the war period, political struggle is visible through terminology used for the authorities on the state level. Are the political authorities in Bosnia and Herzegovina on state level joint authorities, implying the sovereignty of the Entities with the power to determine the competencies of the state or are they state authorities i.e. does sovereignty belong to the Entities or does it belong to the state?

Usage of the terms state authority and state institutions implies the sovereignty of BiH, and marks the Entities as territorial units or as territorial governance divisions. If they are marked as territorial units then they form the state territory. If marked as territorial governance divisions, they can be considered as model of territorial governance organization. Another contradiction observed from the Constitution provisions is the ethnic discrimination built into the normative part of the Constitution, primarily in regard to the exercising political rights (election of members of the Presidency and election of representatives in the House of Peoples in The Parliamentary Assembly of Bosnia and Herzegovina) by the citizens that do not belong to the constitutional peoples (Serbs, Croats, Bosniaks). Conditioning the exercising of political rights by ethnicity is a form of indirect compulsion for ethnic identification with constitutes peoples. On the other hand the Constitution unambiguously acknowledges human rights and the principle of nondiscrimination.

\textsuperscript{13} Constitution of Bosnia and Herzegovina, http://www.ohr.int/dpa/default.asp?content_id=372.
\textsuperscript{14} Ibid.
“Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms. To that end, there shall be a Human Rights Commission for Bosnia and Herzegovina as provided for in Annex 6 to the General Framework Agreement.”\(^{15}\)

The Constitution acknowledges the following rights:

All persons within the territory of Bosnia and Herzegovina shall enjoy the human rights and fundamental freedoms referred to in paragraph 2 above; these include:

a) The right to life;

b) The right not to be subjected to torture or to inhuman or degrading treatment or punishment;

c) The right not to be held in slavery or servitude or to perform forced or compulsory labor;

d) The rights to liberty and security of person;

e) The right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings;

f) The right to private and family life, home, and correspondence;

g) Freedom of thought, conscience, and religion;

h) Freedom of expression;

i) Freedom of peaceful assembly and freedom of association with others;

j) The right to marry and to found a family;

k) The right to property;

l) The right to education;

m) The right to liberty of movement and residence;

n) The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in the Annex to this Constitution secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

“The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.”

Alongside the European Convention on Human Rights (formally the Convention for the Protection of Human Rights and Fundamental Freedoms) 15 other international instruments for protection of human rights are made part of the Constitution, yet their provisions are contradictory to the normative part of the Constitution, for the provisions of international instruments connote citizenry and the people in the political connotation (all citizens regardless of race, skin color, gender, religion, political or any other conviction) whereas in BiH the political rights are exercised by Bosniaks, Croats, Serbs and others (15 national minorities)\(^\text{16}\). We can observe the directly opposition of collective and individual identity, where the individual identity has been merged into the collective political representation.

Alongside The European Convention on Human Rights the following international instruments are made part of the Constitution:

- 948 Convention on the Prevention and Punishment of the Crime of Genocide;

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\(^{16}\) The Law on Amendments to the Law on Protection of the Rights of Members of National Minorities (“Official Gazette of BiH”, no: 76/05), protecting members of national minorities: Albanian, Montenegrin, Czechs, Italians, Jews, Hungarian, Macedonian, Germans, Poles, Roma, Rumanians, Russians, Ruthenians, Slovaks, Slovenians, Turks, Ukrainians and others, fulfilling conditions from Article 3 (1) of the Law on Protection of Rights of National Minorities in BiH.
- 1951 Convention relating to the Status of Refugees and the 1966 Protocol thereto;
- 1957 Convention on the Nationality of Married Women;
- 1961 Convention on the Reduction of Statelessness;
- 1965 International Convention on the Elimination of All Forms of Racial Discrimination;
- 1966 Covenant on Economic, Social and Cultural Rights;
- 1979 Convention on the Elimination of All Forms of Discrimination against Women;
- 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- 1987 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;
- 1989 Convention on the Rights of the Child;
- 1990 Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;
- 1992 European Charter for Regional or Minority Languages;
Territorial organization of the state and the repercussions of a changed ethnic map of BiH are visible through the composition of the entity parliaments and municipality councils within the Federation. The House of Representative of the Parliament of the Federation of Bosnia and Herzegovina holds 98 representative positions, majority of members are Bosniaks (60 or 61.2%), after that Croats (26 or 26.5%), others (7 or 7.1%) and Serbs (5 or 5.1%). The National Assembly of Republic of Srpska holds 83 representative positions, majority of members are Serbs (72 or 86.7%), after that Croats and Bosniaks (each 4 or 4.8%) followed by others (3 or 3.6%)17.

The data clearly shows that Bosniaks and Croats disappeared from Republic of Serbia same as the Serbs disappeared from the Federation of Bosnia and Herzegovina, where that their political participation equals the participation on Others. Even though they have the status of constitutional peoples in reality they became ethnic minority both in Entities and as the analysis of the composition of cantonal assemblies’ shows, on certain territories of Bosnia and Herzegovina18.

Existence of political minority that includes woman and young adults is evident so we can speak not only ethnic but also gender (women) and age (young adult) minorities. Ethnic minorities are the result of ethnic homogenization (consequence of ethnic cleansing and politically motivated internal migrations), while gender and age minorities resulted as a consequence of patriarchal political culture that traditionally gives power of decision making to older males. Woman have not reached the quota of 30% representatives (considered to be the critical mass for political influence in decision making) in any of the cantons.

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17 Data taken from the official web page of the Bosnia and Herzegovina Agency for Statistics
18 See page 206 of this paper
<table>
<thead>
<tr>
<th>Authority level</th>
<th>Total</th>
<th>Bosniaks</th>
<th>Croats</th>
<th>Serbs</th>
<th>Others</th>
<th>Women</th>
<th>Age 18-29</th>
<th>Dominant age group</th>
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<td>FBiH</td>
<td>98</td>
<td>60 (61.2%)</td>
<td>26 (26.5%)</td>
<td>5 (5.1%)</td>
<td>7 (7.1%)</td>
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<td>1 (1%)</td>
<td>50-59 (43.9%)</td>
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<td>4 (4.8%)</td>
<td>72 (86.7%)</td>
<td>3 (3.6%)</td>
<td>18</td>
<td>0</td>
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<td>3 (10%)</td>
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<td>0</td>
<td>40-49 (50%)</td>
</tr>
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<td>Posavski</td>
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<td>16 (76.2%)</td>
<td>1 (4.8%)</td>
<td>0</td>
<td>40-49</td>
<td>12 (57.1%)</td>
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<tr>
<td>Tuzlanski</td>
<td>35</td>
<td>30 (85.7%)</td>
<td>3 (8.6%)</td>
<td>2 (5.7%)</td>
<td>6 (17.1%)</td>
<td>4</td>
<td>11 (4%)</td>
<td>50-59 (31.4%)</td>
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<tr>
<td>Zenicko Dobojski</td>
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<td>26 (74.3%)</td>
<td>7 (20%)</td>
<td>2 (5.7%)</td>
<td>5 (14.3%)</td>
<td>2</td>
<td>50-59</td>
<td>14 (40%)</td>
</tr>
<tr>
<td>Bosansko Podrinjski</td>
<td>25</td>
<td>19 (76%)</td>
<td>2 (8.0%)</td>
<td>1 (4%)</td>
<td>3 (12%)</td>
<td>6</td>
<td>24 (8%)</td>
<td>50-59 (48%)</td>
</tr>
<tr>
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<td>30</td>
<td>15 (50%)</td>
<td>13 (43.3%)</td>
<td>1 (3.3%)</td>
<td>3 (3.3%)</td>
<td>7</td>
<td>23 (3%)</td>
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<tr>
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<td>14 (46.7%)</td>
<td>2 (6.7%)</td>
<td>2 (6.7%)</td>
<td>7</td>
<td>23 (3%)</td>
<td>40-49 (1033.3%)</td>
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<tr>
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<td>1 (4.3%)</td>
<td>21 (91.3%)</td>
<td>1 (4.3%)</td>
<td>4 (17.4%)</td>
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<td>4 (3%)</td>
<td>30-39 (1043.5%)</td>
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<td>24 (68.6%)</td>
<td>2 (5.7%)</td>
<td>3 (8.6%)</td>
<td>6 (17.1%)</td>
<td>6</td>
<td>17 (1%)</td>
<td>40-49 (1542.9%)</td>
</tr>
<tr>
<td>Livanjski</td>
<td>25</td>
<td>2 (8.0%)</td>
<td>19 (76%)</td>
<td>4 (16%)</td>
<td>2 (8%)</td>
<td>1</td>
<td>4 (0%)</td>
<td>50-59 (1248%)</td>
</tr>
</tbody>
</table>

Data taken from the official web page of the Bosnia and Herzegovina Agency for Statistics.

3. **Political subjects in Bosnia and Herzegovina**

Political scene in Bosnia and Herzegovina cannot be observed without taking into account the political climate of the time, causes and the manner of dissolution of the former Yugoslavia, among other things marked by the fall of communism in Europe symbolized by the fall of Berlin Wall i.e. the defeat of the communist political ideology, one party systems and totalitarian regimes.
that marked the second half of 20 century on the political East Europe. In Yu-
goslavia the communist party matrix was replaced by national ideologies, the
driving force of its dissolution. Due to the multiethnic structure of the popula-
tion, citizens of Bosnia and Herzegovina were made to choose between loyalty
to the state and loyalty to their ethnic group, consequentially making the politi-
cal choice for or against Bosnia and Herzegovina. Since the 1990 it is possible
to observe ethnicization of politics, manipulation of historic memories, and
demonization of “others” resulting in political matrix that served as a base for
creation of ethnic homogenization.

Communist idea wore out and social democracy had no political space
for development in its European form. The ideas of social justice, equal pos-
sibilities, respect of differences, human rights and the Rule of Law, regardless
of the frequency of the term usage have not been fully understood and accepted
in their essence. Political culture is still dominated by submissive mentality,
authoritative decision making within the political parties, loyalty to the party
leaders, and lack of political responsibility, political exclusiveness and the fear
of state repression. Pluralisation of political scene took place since the first
democratic elections in November 1990 when anticomunist coalition (com-
posed of SDA - Party of Democratic Action, SDS - Serb Democratic Party, and
HDZ - Croat Democratic Union) won, but most of the new parties have ethnic
character. Only a few parties are multiethnic, largest one being SDP –Socialist
Democratic Party and few smaller ones.

On the 1990 election parties with ethnic character won total of 84%
of representative seats on state level (SDA 35,85 % (86 representatives), SDS
30% (72 representatives), HDZ 18,35% (44 representatives)) while seven re-
maining parties won 15,8% of representative seats - 24 representatives. In the
Council of Municipalities parties with ethnic character won 95% of representa-
tive seats and 75% in Council of Citizens. Out of seven electoral units, in three
with Bosniak majority SDA won most of the votes (Sarajevo, Zenica, Bihać), in
two with Serb majority it was SDS (Banja Luka i Doboj), and in one with Croat
majority (Mostar) HDZ won most of the votes. This trend, started in 1990 con-
continues until today but with notable growth of votes won by the SDP – Socialist Democratic Party in Federation of Bosnia and Herzegovina and SNSD – Milorad Dodik in Republic of Srpska.

Today 12 political parties are present in Parliamentary Assembly of Bosnia and Herzegovina where SDP and SNSD - Milorad Dodik won the highest number of mandates (eight each). Representatives from 10 political parties constitute the House of Representatives of FBiH. Representatives from ten political parties constitute the National Assembly of RS in the next four year mandate. Regardless of the ethnic homogenization, political pluralism is present but with an ethnic character.

4. Conclusion

State organization, created as a result of political compromise that ended the war in Bosnia and Herzegovina, has shown itself to be discriminatory, costly and inefficient. This organization where 47% of state budget is spent solely on administration on all levels of governance results in backward economical development, rise of poverty and the inability to realize socioeconomic goals. It also creates an obstacle in the process of European integrations for the extent of governance division and the deficit of competence on state level complicates the realization of conditions for joining the EU.

Ethnic affiliation is the condition for political participation and the existing system of organization of political authority based on ethnicity is discriminatory in regard to the citizens that do not belong to the constitute people. Individual as a political subject is replaced by ethnic collective as a political subject. Dilemma remains whether the political aim is the exclusive representation of an ethnic collective, requiring ethnic based electoral system, or this principle can be seen as affirmative action. Ethnic homogenization on territorial level made the constitute peoples minorities on different areas in the state.

Analysis of the power map showed that the political authority is held by older males whereas the females and young adults have been marginalized.
to the extent where they do not have the critical mass for influencing the decision making process. Political culture is still dominated by submissive mentality, authoritative decision making within the political parties, loyalty to the party leaders, and lack of political responsibility, political exclusiveness and the fear of state repression.

It is a paradox that the huge amount of politicians taking part in legislative and executive power on all levels of governance in Bosnia and Herzegovina (4191) does not contribute to the democratization of the society and the authority. The political profession is the most profitable for it incorporates social and economic power not followed by public responsibility. Dominant political ideologies indicate the lack of contribution by the politicians to the state stability, its economic growth and their negative influence on the EU integration of BiH. Heavy political reliance on the political scene in neighboring countries contributes to the difficulty of political consolidation in Bosnia and Herzegovina.
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2. Constitution of Socialist Republic of Bosnia and Herzegovina;

3. Decision of the Constitutional Court of Bosnia and Herzegovina No U5/98 about the constituency of the people – Official Gazette of BiH, No 36/00;


5. The Law on Amendments to the Law on Protection of the Rights of Members of National Minorities - Official Gazette of BiH No: 76/05);

6. “Analysis of the budget for BiH institutions, Entities and cantons for 2010” By Meliha Gačanin available at:


8. General election statistic available at


Official web pages:


CONCLUSIONS AND FUTURE SCENARIO

The first Summer Academy “Rule of Law, Human Rights and EU” organised by the South East European Law School Network (SEELS) and supported by GIZ Open Regional Fund for South East Europe-Legal Reform took place on June 25th and 26th in Bečići (Montenegro). It gathered seven regional, two international experts and seventeen Master and PhD students from South East European (SEE) countries to share knowledge and experiences on the Rule of Law and protection of human rights, as well as EU values and standards.

Human rights, democracy and the Rule of Law are core values of the European Union and are seen as universal and indivisible. Embedded in the EU’s founding treaty, these principles have been reinforced by the adoption of a Charter of Fundamental Rights. Respect for human rights is a prerequisite for countries seeking to join the European Union and a precondition for countries wishing to forge trade and other agreements with the EU. Since March 2002, the European Commission reports regularly to the Council and the Parliament on progress made by the countries of the SEE region. This report is focusing on progress made by countries preparing for EU membership. Among others the report analyses the situation in the countries in terms of the political criteria for membership, which includes chapter for human rights and protection of minorities as well as another chapter for democracy and Rule of Law. Progress is measured on the basis of decisions taken, legislation adopted and measures implemented. SEE countries are in the process of fulfilling EU standards in the protection of the human rights.

Key topics of the Summer Academy were the:

- Rule of Law;
- Human rights protection;
- Prohibition of discrimination;
- Minority rights;
- The concept of fundamental rights; and

Throughout the interactive sessions, debates between the lecturers and participants were developed regarding:

- The constitutional pluralism and double standards in the process of the implementation of the EU Chapter for Human rights;
- Affirmative actions and political participations of the minorities;
- Protection of the national minorities, power sharing model and skepticism regarding the effectiveness of the protection of the national minorities in Europe;
- Derogation of rights during the crisis;
- Horizontal effect of the fundamental rights; and
- Distinction should be made between derogable and non-derogable rights.

The participants at the Summer Academy identified several relevant areas for future work and cooperation under the SEELS Network:

- The **constitutional justice and case law**, while **education and training and research** are relevant activities for possible human rights projects.
- **Networking among the students** of the Faculties with the main focus on fundamental rights.
- **Research** regarding **compatibility of the national and constitutional law with the EU law**.
- **Creation of a regional data base.**

- Greater involvement in the area of *international law* and assignment of external experts.

- **Networking** among University professors working in the area of human rights and regular meetings in different countries to further discuss and exchange knowledge on: development of human rights, constitutional rights, and possible joint curricula and joint Master degree in human rights. In early phase *joint teaching materials* could be developed. As interesting topic the *right of the minorities* and *constitutional judiciary* were proposed.

- The position of the **religion and the religions’ influence in the Balkans**, as well as **separation between religion and education and public schools**, as a possible topic.

At the end of the Summer Academy the following conclusions and recommendations were agreed:

1. The principle of cooperativeness among ECHR, EU Court and Constitutional Courts of the member states is needed;

2. The EU Chapter of Fundamental Rights has positive influence on the SEE counties with regards of the protection of HR;

3. The issue of “double standards” has negative impact;

4. Full minority protection is the best way for long-term peace and stability;

5. The problem of derogation of human rights during crisis should be topic of continuous discussion;

6. Respect for human rights is a prerequisite for countries seeking to join the European Union;
7. Free civil society, Rule of Law, usable state bureaucracy, institutionalized economic society and valued political society are preconditions for effective Rule of Law;

8. The Rule of Law principle is critical precondition for SEE countries;

9. Implementation mechanisms for protection of Human Rights need to be improved;

10. Leading concept with regards to the human rights of the minorities should be integration without forced assimilation;

11. Measures for anti-discrimination need to be implemented;

12. Positive discrimination (actions) to be taken, especially towards the Roma population;

13. The Rule of Law principle has to be fully implemented in the SEE countries.
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