Prohibition of Discrimination

Citizenship as a Possible Discrimination Basis

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Abstract

In modern society, the right to equality is not just a universal moral obligation; it is rather an expression of a generally accepted rule in international law that all people have equal rights, independently of differences based on innate or acquired personal characteristics. Prohibition of discrimination is a civilization heritage, and it is determined by systematically overcoming prejudices and stereotypes as key factors of discrimination, where educational institutions, media, public authority, and non-governmental organizations all have a vital role. Tackling with discrimination is not just the application of rules regulated by law and taking necessary measures towards social groups which are in an unequal position, but it is also a continuous development of tolerance when it comes to ethnicity, religion, gender, minorities, as well as acceptance of the existing interpersonal differences. It is well known that the area of West Balkans is often a breeding ground where stereotypes and prejudices thrive for decades. The strategic aim of the Republic of Serbia is membership in the European Union, and so nation-wide law regulation concerning this matter is directed at complying with the European Union Law since the prohibition of discrimination is one of the pillars of the European Union Law. In this article, the influence of the European Union Law and practical measures taken by the European Court of Human Rights in order to prohibit discrimination in a specific international and private domain are analyzed.

Keywords: anti-discrimination law, Serbian Law, harmonization, right to a personal name, European Court of Justice.

A Introduction

The equality principle represents the basis on which a complete system of human rights is built. Establishing an optimal level of social equality is an imperative of democratic societies around the world. *Social equality* entails that all individuals have the same social status, that is, they have equal rights, which are guaranteed by law (right to vote, freedom of speech, freedom of assembly, rights to property, equal access to education, health care, and social protection). In other words,

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social equality in its pristine form means that normative legal order does not differentiate between individuals according to the characteristics that are inalienable from one's identity – gender, age, sexual orientation, origins, possessions, language, religion, political affiliation, health condition or disability – and that which could result in an unequal treatment in the eyes of the law, that is, that which could diminish the individual's capabilities. Equality before law is a principle under which all people who are in the same position are treated as equal, and to those people certain rules and obligations are tied. Because of that, instead of the term *equality*, an expression *equal opportunity* is more often used for the participation in social, public, and professional spheres of those citizens who are exposed to discrimination on any basis. The term *equality* is closely related to the term *equivalence*, and they are often used interchangeably. However, equivalence is a concept that in itself contains equal rights to all and it is the prerequisite for the realization of formal equality in its emergent dimensions: gender, ethnicity, nationality, special needs, age, sexual orientation and religious and political beliefs. Equality in rights, duties and possibilities stands for the protection of specificity, with reference to differences between people, while equivalence refers to the proportionally equal presence in public and private life, equal status, equal possibilities for the realization of all rights, as well as for the equal benefit from the achieved results.

B Legal Framework of the Prohibition of Discrimination in Serbian Law

The right to equality and equivalence is the most important right from the group of personal freedoms and civil rights, which refer to a person as a human being and is dealing with his or her integrity and dignity in relationships with the state. Formal and legal equality of all citizenry is constituted by the Constitution of the Republic of Serbia, and it assumes the implementation of legal obligations, equally for all of the citizens.[1] All are equal before the Constitution and law. Everyone shall have the right to equal legal protection, without discrimination.[2]

I The Basic Provisions of the Anti-Discrimination Law in National Legislature

In the law of the prohibition of discrimination of the Republic of Serbia (2009), 'discrimination' is defined as any unwarranted inequality in treatment, that is to say, omission (exclusion, limitation or preferential treatment) in relation to individuals or groups, as well as members of their families or persons close to them, be it overt or covert, on the grounds of race; skin colour; origin; nationality; national affiliation or ethnic origin; language; religious or political beliefs; gender; gender identity; sexual orientation; financial position; birth; genetic characteristics; health; disability; marital and family status; previous convictions; age;

1 Art. 18 of the Constitution of the Republic of Serbia, 'Official Gazette of the Republic of Serbia', no. 98/2006.

2 Art. 21, paras. 1 and 2 of the Constitution of the Republic of Serbia.

appearance; membership in political, trade union and other organizations and other real or presumed personal characteristics.[3]

In the eyes of the law, the basic forms of discrimination are direct and indirect discrimination, as well as a violation of the principle of equal rights and obligations, calling to account, associating for the purpose of exercising discrimination, hate speech and disturbing and humiliating treatment.[4] Further, this law encompasses severe forms of discrimination which are related to causing and inciting inequality, hatred and enmity on the grounds of national, racial or religious affiliation, language, political opinions, gender, gender identity, sexual orientation or disability; advocating or exercising discrimination on the part of state organs or in the course of proceedings conducted before state organs; advocating discrimination through public organs; slavery, trafficking in human beings, apartheid, genocide, ethnic cleansing, as well as advocating any of the above; discrimination against individuals on the basis of two or more personal characteristics (multiple or intersecting discrimination); discrimination that is committed a number of times (repeated discrimination) or is committed over an extended period of time (extended discrimination) against one and the same individual or a group of persons; discrimination that results in severe consequences for the individual discriminated against, other persons or property, especially if it involves an act punishable by law, predominantly or solely motivated by hatred or enmity towards the aggrieved party on the grounds of a personal characteristic of his or hers.[5]

Direct discrimination occurs if an individual or a group of persons, on the grounds of his or her or their personal characteristics, in the same or a similar situation, are placed or have been placed or might be placed in a less favourable position through any act, action or omission (Art. 6 of the Law on the Prohibition of Discrimination). In opposition to the direct discrimination, indirect discrimination occurs if an individual or a group of individuals, on account of his or her or their personal characteristics, is placed in a less favourable position through an act, action or omission that is apparently based on the principle of equality and prohibition of discrimination, unless it is justified by a lawful objective and the means of achieving that objective are appropriate and necessary (Art. 7 of the Law on the Prohibition of Discrimination). Indirect discrimination is a more sophisti-

3 Art. 2, para. 1 of the Law on the Prohibition of Discrimination, 'Official Gazette of the Republic of Serbia', no. 22/2009.

4 Art. 5 of the Law on the Prohibition of Discrimination.

5 Art. 13 of the Law on the Prohibition of Discrimination. In addition to the basic definitions of discrimination, this law also encompasses special cases of discrimination related to certain social areas: discrimination in the course of proceedings conducted before public administration organs; discrimination in the sphere of labour; discrimination in the provision of public services and in the use of premises and spaces; the prohibition of religious discrimination; discrimination in the sphere of education and professional training; also some special cases of discrimination that are tied to a specific personal or group trait of certain social groups: discrimination on the grounds of gender; discrimination on the grounds of sexual orientation; discrimination of children; discrimination on the grounds of age; discrimination against national minorities; discrimination on the grounds of political party or trade union membership; discrimination of persons with disabilities; discrimination on the grounds of health (paras. 15-27).

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cated form of covert discrimination, which is very hard to detect because in the process of performing it (act, action, or omission) there are no signs of discrimination.[6] Indirect discrimination occurs when apparently neutral regulation, request, criterion, condition, or practice places an individual or a group in a less favourable position, unless the regulation, condition, or practice are justified by a lawful objective and the means of achieving that objective are appropriate and necessary.[7] Concerning the direct discrimination, consequences, not the act of performing it, are disproportionally disadvantageous to the specific group of people, *i.e.*, individuals belonging to that group. Unjustified denial of rights and freedoms, as well as the imposition of obligations that are not imposed upon another person or a group of persons in the same or similar situation, and if the objective and consequence of the taken measures are unjustified and if there is no proportionality between the measures taken and the objective that is realized by these measures, constitutes a violation of the principle of equal rights and obligations. To characterize distinction or unequal treatment as discriminatory, it is necessary that distinction or unequal treatment, or omission be unjustified.[8] In other words, there is no discrimination if means, *de jure* or *de facto*, have as a consequence unequal treatment, and if the means of achieving that objective are appropriate and necessary (condition of proportionality). The answer to the question if those means are *appropriate* depends on the estimation as to whether it is really essential for the achievement of objective, whereas the answer to the question if the means are *necessary* for the achievement of objective is determined by assessing if the objective can (or, at least, could) be achieved without those means in that specific case, that is, if some other means could be used to aid the achievement of that objective, which may possibly cause less harmful consequences of the means used.[9] Discrimination acts in the same way in unequal circumstances or different treatment when there is no relevant difference between two persons or two situations. This means that equality must not be only formal, but also constitutive.[10] Considerable strides in improving the legislative and institutional framework for combating discrimination in our country have been made through adoption of the Law on Prohibition of Discrimination (2009) along with numerous regulations stipulating the legal mechanisms for prevention and protection

6 D. Milenković, *Guide to the Anti-Discrimination Law*, Helsinki Committee for Human Rights in Serbia, Belgrade 2010, p. 27.

7 Art. 7 of the Law on the Prohibition of Discrimination.

8 N. Petrušić & K. Beker, *Practicum for the Protection against Discrimination*, Belgrade 2012, p. 17.

9 *Ibid*, pp. 34-35.

10 M. Poznatov, *Discrimination – The problem of Serbian society*, Internet presentation at: <www.euractiv.rs/ljudska-prava/4514-diskriminacija-problem-srpskog-drutva->.

from discrimination.[11] The national Anti-Discrimination Law has foreseen, by the provisions of numerous laws, protection from discrimination, but that did not lessen the need to adopt a systemic law that would uniquely integrate legal norms contained in sectoral laws. With the Anti-Discrimination Law, that goal is reached. It first began with the establishment and further work of the Ombudsman from 2007 and was further improved through the establishment of another independent body as a form of institutional prevention of discrimination – Commissioner for Protection of Equality. The adopted laws and established independent institutions are the bases for the creation of a comprehensive legal and institutional milieu against discrimination. In such a way, our country has joined the group of countries in which the prevention of discrimination and the achievement of equivalence is of utmost importance. The established international standards in this area say that the obligations of the state in the field of human rights are not only reflected in the adoption of normative regulations on the prohibition of discrimination, but also related to the effective implementation of these provisions, and also to the obligation of the state to protect all its citizens from discrimination.[12]

II Improvement of the Legal Framework in the Field of the Prohibition of Discrimination

Legal norms contained in laws of the domestic sector are, in a unique way, integrated into the strategy for prevention and protection against discrimination of 2013, as well as in the Action Plan of 2014 for the implementation of the strategy for prevention and protection from discrimination spanning from 2014 to 2018.[13]

The 2014-2018 strategy of prevention and protection against discrimination constitutes a harmonized system of measures, conditions and instruments of public politics that the Republic of Serbia needs to implement in order to prevent, that is, to decrease all forms and other special cases of discrimination, especially against certain persons or groups of persons regarding their personal characteristics.

11 *Law of Preventing Discrimination against People with Disabilities*, 'Official Gazette of the RS', No. 33/2006; *Gender Equality Law*, 'Official Gazette of the RS', No. 104/2009; *Protection of Rights and Freedoms of Minorities Law*, 'Official Gazette of the Federal Republic of Yugoslavia', No. 11/2002, 'Official Gazette of Serbia and Montenegro', No. 1/2003 – Constitutional Charter and 'Official Gazette of the RS', No. 72/2009 – State Law; *Law of Young people*, 'Official Gazette of the RS', No. 50/2011; *Law on the Basis of the Education System*, 'Official Gazette of the RS', Nos. 72/2009 and 52/2011; *The Law on Churches and Religious Communities*, 'Official Gazette of the RS', No. 36/2006; *Labor Law*, 'Official Gazette of the RS', Nos. 24/2005, 61/2005, and 54/2009; *Sports Law*, 'Official Gazette of the RS', No. 24/2011.

12 Strategy of prevention and protection against discrimination for the period from 2013 to 2018, p. 3, adopted by the Government of the Republic of Serbia at its meeting held on 27 June 2013, available at: <www.srbija.gov.rs>.

13 The Government of the Republic of Serbia has adopted the Action Plan for the implementation of the strategy for prevention and protection from discrimination spanning from 2014 to 2018 in the meeting held on 3 October 2014, and it is available at: <www.srbija.gov.rs>.

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Reasons that justify the adoption of this Strategy imply the following: the principles of equality and equal rights and prohibition of discrimination not only provide protection and promotion of human rights, but also provide all other rights that the law assumes; violation of human rights and other rights established by law in a very significant number of cases implies a violation of the principle of equality; quite often, 'vulnerable social groups' or a group of persons or individuals, members of the group, are exposed to violation of human rights and other rights established by law, due to their personal characteristics; with a proactive approach and with a successful fight against discrimination, the respect for the principle of equality and equal rights will be ensured and, thus, violations of human rights and other rights set forth by law will be prevented, which indirectly leads to their improvement.

The overall objectives of the Strategy are reflected in the respect of the constitutional principle of the prohibition of discrimination against a person or group of persons with respect to his or her personal characteristics, and particularly against vulnerable social groups (ethnic minorities, women, LGBT people, people with disabilities, the elderly, children, refugees, internally displaced persons and other vulnerable migrant groups, members of different religions, and persons with regard to their health status).[14]

Framework for the implementation of the strategic objectives has been specified by the Action Plan for the implementation of the strategy of prevention and protection against discrimination for the period from 2014 to 2018. A range of practical measures and activities necessary for the achievement of strategic objectives have been proposed. Furthermore, deadlines have been set, and responsible entities and resources for implementation have been specified. Indicators for evaluation of the degree of realization of activities have also been defined, and based on them, level or degree of realization will be monitored. Indicators for the assessment of the fulfilment of the set objectives have also been defined. The Action Plan, in contrast to the Strategy, foresees the activities and measures to implement this Strategy by areas and not by vulnerable social groups, which enables the competent national authorities to easily review the measures and activities.[15] Adoption of the Action Plan for the implementation of the strategy of prevention and protection against discrimination is a very important moment in the process of European integration and reforms in the area of anti-discrimination.

14 Strategy of prevention and protection against discrimination for the period from 2013 to 2018, p. 13. The task of the Strategy is to determine the objectives, measures and activities that will contribute to reducing the number of cases of violation of constitutional and legal law of the prohibition of discrimination, particularly directed towards vulnerable social groups. That can be achieved by or with legislative and regulatory reforms that will ensure the harmonization of the legal framework of the Republic of Serbia in the field of the prohibition of discrimination with the international documents that were adopted by the United Nations, the Council of Europe, and the European Union, especially those documents that the Republic of Serbia has ratified and that are legally binding.

15 Action Plan for implementation of the strategy of prevention and protection from discrimination from 2014 to 2018, p. 3.

C European Anti-Discrimination Law: Prohibition of Discrimination within the Council of Europe and the European Union

The problem of discrimination is already vastly present all over Europe, and that is the reason why European anti-discrimination law exists as a response to real needs in this field in all European countries. This is supported by the actions of the European Court of Human Rights, which was established by the Council of Europe and the European Court of Justice set up by the European Union. They issued a judgment against European countries for discrimination against certain groups or members of those groups. Intensive efforts to protect human rights resulted in an enormous number of documents that, on the European level, exist today in different legal sources that contain anti-discriminatory regulations, and supervisory bodies for the enforcement of regulated standards.[16]

European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) is one of the most important documents of the Council of Europe.[17] Within the Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, it is envisaged that the enjoyment of Convention rights and freedoms should be provided without discrimination on any grounds. The above Article prohibiting discrimination is accessory because it guarantees equal treatment only in relation to rights and freedoms acknowledged

16 Z. Meškić & S. Pürner, The significance of theme 'Protection Against Violation of Human Rights and Discrimination', *Practical Introduction to European Standards Against Discrimination*, Belgrade 2013, p. 23.

17 Law about ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms has been edited in accordance with Protocol 11 and Protocol 4 from the Convention for the Protection of Human Rights and Fundamental Freedoms, which enables certain rights and freedoms that are not included in Convention and its first Protocol, also in accordance with Protocol 6, Protocol 7, Protocol 12 from the convention on human rights and fundamental freedoms, and Protocol 13, 'Official Gazette of Serbia and Montenegro – International Treaties', Nos. 9/03, 5/05, and 7/05 – corrected and 'Official Gazette of Serbia and Montenegro – International Treaties', No. 12/10. The text of the Convention contains changes in accordance with the orders from Protocol 14 (CETS 194) since its coming into force on 1 June 2010. Prohibition of discrimination is the basic principle of many documents of the Council of Europe: Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, supplemented by Protocol 1 and Protocol 2 from the Convention, 'Official Gazette of Serbia and Montenegro – International Treaties', No. 9/2003; Revised European Social Charter, 'Official Gazette of the RS – International Treaties', No. 42/09; Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, 'Official Gazette of the RS – International Treaties', No. 12/10; Framework Convention for the Protection of National Minorities, 'Official Gazette of the FRY – International Treaties', No. 6/98; Council of Europe Convention on Action against Trafficking in Human Beings, 'Official Gazette of the RS – International Treaties', No. 19/2009; Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, 'Official Gazette of the RS – International Treaties', No. 012/13; Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers' Deputies; European Charter for Regional or Minority Languages, 'Official Gazette of the SMNE – International Treaties', No. 18/05, etc.

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by the Convention.[18] European Court of Human Rights is facing the challenge of the application of the Protocol 12 (from 2000) from Convention for the Protection of Human Rights, which prescribes the prohibition of discrimination in a general way that obligates member states to provide the enjoyment of all rights to all those who are under its jurisdiction, whether they are foreseen by the Convention or not, without discrimination on any ground, such as gender, ethnicity, skin colour, language, religion, political or any other beliefs, national or social background, connection to some social minority, property, birth or some other status (Art. 1 of Protocol 12).[19] The aim of establishing this Protocol is strengthening the protection against discrimination, and that is the key factor for the realization of the protection of human rights.

Charter of Fundamental Rights of the European Union[20] guarantees civil, political, economic and social rights – human dignity, freedom, equality, solidarity, rights of citizens and justice – and it has become legally binding for three members of EU by coming into force of the Treaty of Lisbon in 2009.[21] The Treaty of Lisbon requires from the EU to access the European Convention for the Protection of Human Rights and Fundamental Freedoms for the proper implementation of European standards for the protection of human rights.

Anti-discrimination law on the territory of EU began developing when the Treaty of Rome (an agreement that led to the foundation of the European Economic Community EEC in 1957) prescribed a provision prohibiting discrimination based on gender with the aim of removing obstacles for the free movement of goods, capital, people and services. Hence, in the original agreements, there was no word about the protection of human rights. The aim was to protect free

18 Art. 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms cannot be applied if it is applied without the other Article from the Convention. In case Rasmussen *v.* Denmark 8777/79 (<www.bgcentar.org.rs/documents/RASMUSEN%20v.%20Danska.doc>) dated 28 November 1984, it is clearly pointed out that Art. 14 supplements other essential Articles of the Convention. In other words, it has no meaning on its own because it is only efficient with enjoyment of rights and freedoms guaranteed by those Articles, and it cannot be applied if the facts in question are not related to one or more regulated rules. In case Hoffman *v.* Austria (<www.bgcentar.org.rs/documents/HOFMAN%20v.%20Austrija.doc>) remonstrance 12875/87 from 23 June 1993, European Court for Human Rights pointed out that when it comes to enjoyment of human rights and freedoms guaranteed by the Convention, Art. 14 provides protection against unequal treatment, but has no objective or reasonable justification for persons that are in similar positions. Because of that, it must be first ascertained whether there are reasons for the applicant to claim that discriminatory treatment happened. The difference in treatment is discriminatory if there is no 'objective and reasonable justification' for the difference, that is, if it is not justified with 'legitimate objective', and so there is no 'reasonable relationship of proportionality between the means employed and the aim sought to be realized'.

19 Judgement of the European Court of Human Rights in Case of Vučković and others *v.* Serbia, Application 17153/11, 25 March 2014, available at: <www.zastupnik.mpravde.gov.rs/lt/articles/presude/u-odnosu-na-rs/presuda-velikog-veca-evropskog-suda-za-ljudska-prava-u-predmetu-vuckovic-i-29-drugih-protiv->.

20 Charter of Fundamental Rights of the European Union C 303/1, *Official Journal of the European Union*, 14 December 2007.

21 Treaty of Lisbon was signed on 13 October 2007, and its official title is the Agreement on Amending the Treaty on European Union and the Treaty Establishing the European Community.

trade. However, as cases of human rights violations by legal acts of the Union began arriving at the European Court of Justice,[22] the Court established general principles, which are directed at the protection of human rights in the constitutions of national states and agreements on human rights, notably in the European Convention for the Protection of Human Rights and Fundamental Freedoms. The European Court of Justice emphasizes that they will ensure that the EU law is in line with the general principles. Up until 2000, the anti-discrimination law was applied in the EU in the field of employment and social security and included discrimination on grounds of gender, which would eventually spread to the sphere of racial and ethnic origin, sexual orientation, religious belief, age and disability.[23] Adoption of regulations by the EU on the prohibition of discrimination was operationalized with two directives from 2000: Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation[24] and Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.[25] Afterward, Council Directive 2004/113/EC for implementing the principle of equal treatment between men and women in the access to and supply of goods and services[26] was adopted, which widened the scope of the prohibition of gender discrimination to the area of goods and services. With the aforementioned directives discrimination is prohibited only in the context of employment, which means that they do not provide a comprehensive protection from discrimination. Further, Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)[27] was adopted.

The prohibition of discrimination in European terms, *i.e.*, at the level of the EU and the Council of Europe, does not include two parallel systems of protection. More precisely, they are systems that complement each other with their particularities: Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms says that the enjoyment of Convention rights and freedoms should be provided without discrimination on any grounds. Thanks to Protocol 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms, prohibition of discrimination has become an autonomous right, while in the EU anti-discrimination law the prohibition of discrimination is narrowly established as an independent right limited to certain areas such as

22 With the Treaty of Lisbon, the European Court of Justice became the Court of Justice of the European Union. *The Handbook on European Non-discrimination Law*, German Foundation for International Legal Cooperation, Belgrade 2014, p. 22, footnote 6. <www.echr.coe.int/Documents/Handbook_non_discri_law_SRP.pdf>.

23 *Ibid.*, pp. 21-22.

24 *Official Journal of the European Union*, L 303/16, 2 December 2000.

25 *Official Journal of the European Union*, L 180, 19 July 2000.

26 *Official Journal of the European Union*, L 373/37, 21 December 2004.

27 *Official Journal of the European Union*, L 204, 26 July 2006.

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employment, and particularly because the EU directives only offer protection to citizens of states that are members of EU.[28]

D European Private International Law

At the present time, the EU legislation in the field of the Private International Law (PIL) is certainly a well-rounded entity. Since the Treaty of Rome in 1957, the unification of civil rights and PIL was prescribed as an objective. European PIL comprises a set of norms and rules, which essentially provide answers to three important questions: (1) Which court established by member states is competent to resolve a private-legal dispute with a cross-border element?(2) Which country's law is applicable to the resolution of dispute? and (3) Under what conditions will the foreign decision be recognized and enforced in the domestic country?[29] European legislature has so far, mostly in the form of regulations, regulated many important PIL issues.[30] Regulations also represent the instrument for the unification of collision rules of the EU member states. In member states, rules are directly applied. However, considering the fact that there are certain issues that are not regulated by the European legislator, the existence of national legislation in the field of the PIL is still necessary. Over the past 15 years, not only many of EU member states, but also those that have clearly defined the path of European

28 *Handbook on European Non-discrimination Law*, p. 25.

29 I. Kunda & C. Melo Marinho, *Practical Handbook on European Private International Law*, Handbook elaborated within the project 'Improving the knowledge on new EU regulations of the members of the national Judicial networks in civil and commercial matters in the MS of the EU', Civil Justice Programme 2010, p. 3.

30 Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Regulation Rome I); Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Regulation Rome II); The Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Regulation Brussels I); The Regulation (EC) 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a 2/152 European Enforcement Order for uncontested claims, including cases; Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 ('Brussels II-bis') (OJ L 338, 23 December 2003, pp. 1-28); Council Regulation (EC) 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and co-operation in matters relating to maintenance obligations (OJ L 7, 10 January 2009, pp. 1-79); Council Regulation (EU) 1259/2010 of 20 December 2010 implementing enhanced co-operation in the area of the law applicable to divorce and legal separation ('Rome III') (OJ L 343, 29 December 2010, pp. 10-16); Regulation (EU) 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ L 201, 27 July 2012, pp. 107-134).

integration have reformed their existing legislation or enacted new laws in the matter of PIL.[31]

E Draft of the PIL Code of the Republic of Serbia

All countries of South-East Europe and the Western Balkans have made huge efforts to reform their PILs. In the Republic of Serbia, the codification of PIL and international civil procedure of 1982 (PIL Code 1982) is still in force.[32] After more than 30 years of its validity, opportunities came for its amendment. The working group engaged in drafting the new law views the current law as being an anachronistic codification for a long time, both formally and in terms of its content. Proposal of the new PIL Code of the Republic of Serbia was published in 2012,[33] and the final draft of the law was published in 2014, but it is still not in the parliamentary procedure.[34] One specific reason for the implementation of a new PIL Code is *the need for harmonization* of the PIL Code of the Republic of Serbia with the European PIL. Namely, 'Private International Law of the European Union' is part of *acquis communautaire*, and so the secondary sources, which are included in its composition, directly oblige each state that might become a member of the European Union. Consequently, the working group had regulations of the EU in mind all the time. Those regulations were from the domain of PIL. With the proposed draft, the working group made a partial *unification* and *harmonization* of the PIL Code of the Republic of Serbia with the European PIL.

The Draft is obviously based on an intensive legal comparison and has been prepared to take into account the developments in other recent European codifications, and especially the Regulations of the European Union in this field of the law.[35] The overall impression is, however, that the Draft is very systematic and well elaborated and constitutes an excellent basis for a modern codification of the Serbian PIL.[36] As regards this article, the principle of the prohibition of discrimination is of great importance. The following subheadings analyze the development of this principle in the specific PIL area referring to the legal category that for the first time takes its place in the Serbian law.

I Law Applicable to the Personal Name – Citizenship as a Point of Attachment

The right to a personal name is a personal non-property right of citizens, which cannot be transferred to another person and that does not expire. The personal

31 Albania 2011, Poland 2011, Germany 1999, Russia 2002, Slovenia 1999, Azerbaijan 2000, Lithuania 2000, Estonia 2002, Moldova 2002, Belgium 2004, Bulgaria 2005, Ukraine 2005, Macedonia 2011, Netherlands 2011, Czech Republic 2015... More in: S. Symeonides, *Codifying Choice of Law around the Word: An International Comparative Analysis*, Oxford University Press 2014, p. 14.

32 'Official GazetteSFRJ', 43/82 and 'Official GazetteSRJ', 46/96.

33 *See* <www.mpravde.gov.rs>, 25 July 2013.

34 *See* 'Final Draft of the Private International Law Code of the Republic of Serbia', June 2014, available at: <www.mpravde.gov.rs>.

35 C. Jessel-Holst & R. Farrugia, *Opinion on the Draft of Private International Law Code of the Republic of Serbia*, October 2012.

36 *Ibid.*

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name is one of the basic characteristics of an individual, and it is used to identify his or her personal status. It consists of the first and last names. *Name* (birth name) is a method of personal identification and individualization of one person to every other person in the context of a family, and *surname* (family name) signifies the attachment of that person to the family or the wider kinship group.[37] Personal name together with other personal characteristics (marital status, age, gender, ethnic origin, nationality, etc.) makes a corpus of personal characteristics, that is, the personal status of an individual. The right to the personal name is governed by national laws. In our case, this is governed by Article 13 of the Family Law Act of 2005.[38] Separately, the eleventh part of the Family Law Act (Arts. 346-356) bears the title *Personal name* and it refers to common provisions, the determination of the personal name, change of the name (who has and who has no right to change it), and the protection of the right to the personal name. This legal area in the Republic of Serbia is also regulated by other laws and sub-regulatory acts.

It is widely known that in comparative PIL there are points of attachment that have become typical of a certain legal domain. In terms of the status relationships, it is certainly *lex nationalis* (or *lexpatriae*). In certain laws *lex domicilii*, or the law of the domicile, stands mostly as the alternative solution. Domain of the status relations of individuals usually covers the following legal issues: personal name, proclaiming a missing person dead and proving death, guardianship and deprivation of legal capacity, and certainly the issue of the legal capacity of individuals.

The personal name as a legal category for the first time appeared in the PIL of the Republic of Serbia. Namely, a still valid PIL Code of 1981 does not contain the personal name as a separate legal category. The final draft of the PIL Code of the Republic of Serbia (hereinafter the Draft) dedicated six new Articles to the Personal name section (Arts. 57-62).

As already mentioned in respect of determining the law applicable to a personal name, it is the nationality of the person whose personal name is the question that largely occurs as an attachment point. That law represents a legal framework for determining the child's name (registering the name in registry), but also for the change of personal names that may result from any change in status (marriage, divorce or annulment of marriage, termination of marriage by death, in the event of a dispute about motherhood or fatherhood, in the case of establishment or termination of adoption), or independently of the status changes.

In practice, there are cases where it is not easy to determine the applicable law. Particular difficulties arise with persons without citizenship (stateless), as well as with persons who have more than one citizenship (dual or multiple citizenships). The problem of positive and negative conflicts of nationality, that is, of

37 M. Draškić, Compliance of the domestic law with the standards of the European Court of Human Rights in relation to Art. 8 of the European Convention, from the lecture held at the seminar for jurists on the application of the European Convention on Human Rights, Interights – The Netherlands Helsinki Committee – Helsinki Committee for Human Rights in Serbia, Vrnjačka Banja, 14-18 June 2006, p. 9.

38 'Official Gazette RS', No. 18/2005, 72/2001 – and the others 6/2015.

the emergence of persons with dual or multiple nationalities and stateless persons is due to the lack of coordination between national legislations on the topic of citizenship. For example, if a child is born in a state that has a system of attaining citizenship via place of birth (*ius soli*) and its parents are citizens of the state that adopted the system of attaining citizenship via the origin of parents (*ius sangvinius*), the child can have dual citizenship.[39] The question arises: Which citizenship is more relevant? Which one will be recognized as an attachment point in the conflict of laws rules?

When it comes to stateless persons, the subsidiary attachment point is introduced. In the modern European legislation, there is a trend whereby the residence (domicile) replaces habitual residence as a subsidiary point of attachment. A large step forward towards the eradication of the problem of statelessness can be seen on the international level. Our state has ratified two very important conventions: Convention Relating to the Status of Stateless Persons in 1954[40] and Convention and Protocol Relating to the Status of Refugees in 1951.[41] Article 9 of the Draft refers to the articles of the aforementioned conventions when it comes to stateless persons or refugees. Efforts made in the field of resolving the issues to do with statelessness have also yielded certain results with the help of the Convention of the UN on the Nationality of Married Women, which our state also joined.[42]

When it comes to persons with dual citizenship and one of those citizenships is domestic, local authorities will treat them as if they have only domestic citizenship. However, the question arises as to whether this solution is justified and when the relevant law on personal name is applied. If the person is a citizen of multiple foreign countries, it is necessary to ascertain the so-called *effective citizenship*, and that is the citizenship that the person in question uses in real life. When the effective nationality is determined, the actual relationship that the person has with the countries of his or her citizenship is taken into account, *i.e.*, residency and employment, etc. are investigated.

II Persons with Dual Citizenship – Latent Discrimination in Respect of Personal Names?

The solution that the European national legislation prescribes in case of dual citizenship, considering that one of the citizenships is of the domestic state, mainly pleads for the latter as relevant in terms of determining the point of attachment. The only real exception to the rule that national citizenship has primacy over another foreign nationality is Switzerland; in the Article 23 of its PIL, videlicet, Switzerland draws a distinction when it comes to the issue of determining the jurisdiction of its own courts and the recognition and enforcement of foreign judgments, on the one hand, or determining the relevant law (conflict of laws), on the other hand. While for the first two issues the citizenship of Switzerland is primary in the sense that it is sufficient for the establishment of the jurisdiction of

39 M. Stanivuković & M. Živković, *Private International Lao/General Part*, Belgrade 2004, p. 98.
40 'Official Gazette FNRJ' – addendum, 9/1959.
41 'Official Gazette FNRJ' – addendum, 7/1960, 'Official GazetteSFRJ' – addendum, 15/1967.
42 'Official Gazette FNRJ' – addendum, 1958.

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the Swiss judicial authorities, in the latter case Switzerland considers Swiss citizenship sufficient only if it is also the so-called effective citizenship, *i.e.*, the citizenship of the state with which the individual has the closest connection.[43]

Citizenship is an expression of the important connection or relationship between a person and the state, which also serves as the basis for attaining the widest status that the legal system of the State offers to its citizens. The process of European integration adds the concept of European citizenship to the concept of citizenship. This concept was introduced with the signing of the Maastricht Treaty in 1992.[44] Citizenship of the European Union has a supplementary character.

Article 12, Section 1 of the Treaty on the European Union (TEU) stipulates the prohibition of discrimination on grounds of nationality. It says, "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited." The European Court of Justice had to face the above regulation in the case of *Carlos Garcia Avello v. Belgian State*.[45]

The basic question that the Belgian *Conseil d'Etat* asked the Court was

> Are the principles of Community law relating to European citizenship and to the freedom of movement of persons, enshrined particularly in Articles 17 [EC] and 18 [EC], to be interpreted as precluding the Belgian administrative authority, to which an application to change the surname of minor children residing in Belgium who have dual Belgian and Spanish nationality has been made on the ground, without other special circumstances, that those children should bear the surname to which they are entitled according to Spanish law and tradition, from refusing that change by stating that that type of application is habitually rejected on the ground that, in Belgium, children bear their father's surname, particularly where the position usually adopted by the authority results from the fact that it considers that the grant of a different surname may, in the context of social life in Belgium, arouse questions as to the parentage of the child concerned, but that, in order to reduce the difficulties associated with dual nationality, it is suggested to applicants in that situation that they adopt only the father's first surname, and that, exceptionally, where there are few connecting factors to Belgium or it is appropriate to

43 M. Dika, G. Knežević & S. Stojanović, *Comment on the Law on Private International Law and Procedure*, Belgrade, Nomos 1991, p. 47.

44 Art. 20 of the Treaty on the Functioning of the European Union (TFEU), former Art. 17 of the Treaty on European Union:

"(1) Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

(2) Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties...".

45 Carlos Garcia Avello *v.* Belgian State, C-148/02 from 2 October 2003.

re-establish the same surname among siblings, a favorable decision may be taken?[46]

In this particular case, the arguments of the Belgian State in the decision with which a request to change the surname was rejected was based on Article 3 of The Hague Convention of 1930 on certain issues of conflicts of law on citizenship, which states that "...the person holding citizenships of two or more states, can be considered a citizen by those states." However, the Court held that this regulation does not create any obligation for all member states, but it rather just provides the ability to allow the citizenship preference to that citizenship in relation to any other citizenship. Under such circumstances, the Court held that children's prosecutor can invoke Article 12 EC so as not to be discriminated against on grounds of citizenship in regard to the rules that determine their name.

Elaborating on its decision, the Court stated that the prohibition of discrimination relates to the requirement that the same factual situations are not treated differently and that different factual situations are not treated equally. In this case, it is indisputable that the persons who, in addition to Belgian citizenship, possess the citizenship of another member state are treated in the same manner as the persons who have only Belgian citizenship. Hence, the Court held that Articles 12 and 17 of EC should be interpreted to exclude the possibility that the

46 The court first needed to determine whether the facts that are the subject of procedure *ratione materiae* are covered within the scope of application of Community Law. Although initially the right to the personal name belongs to the competence of member states, the Court held that the execution of these responsibilities belongs to the Community Law, particularly when it comes to dual citizenship. The Court found that this case has to do with the application of Art. 18, para. 1 (EC), which regulates the right to freedom of movement and residence, and which reads as follows: "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect." The facts of this case were as follows: G. Garcia Avello, a Spanish national, and Ms. I. Weber, who has Belgian nationality, are living in Belgium, where they were married in 1986. Both children who are from their marriage, Esmeralda and Diego, were born in 1988 and 1992, respectively, and have dual citizenship, Belgian and Spanish. In accordance with the Belgian Law (Art. 335 of the Belgian Civil Law, found in the Section VII, 'Kinship', chapter V, 'The effects of kinship' says, "A child for whom father or father and mother are known, bears the last name of father, unless he is married and acknowledges a child conceived with some other woman, with whom he is not in marriage."), the registrar wrote down last name of the father – Garcia Avello – as their last name. With the reasoned written request addressed to the Minister of Justice of 7 November 1995, Mr. Garcia Avello and his wife, acting as legal representatives of both children, asked for the change of the last name. (Art. 2 of the Belgian Law on names and surnames in Title II 'changes the names and surnames' says, "When someone has a reason to change the surname or name, can submit to the Minister of Justice a reasoned request. The request is submitted by the person concerned or by his legal representative.") Additionally, children are registered with the last name Garcia Weber in the consular section of the Spanish Embassy. With the letter dated 1 December, the Minister of Justice informed Mr. Garcia Avello that his request was denied and that the government considers that the mentioned reasons are not sufficient to make a proposal to his Royal Highness to allow the children to add mother's last name to father's last name, explaining that 'children in Belgium bear last name of the father'.

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administrative authorities of the member states in the circumstances of the main proceedings reject the request for change of the last name.

Although in the previous case the Court was very timidly calling for Article 18, paragraph 1 of the EC, it actually represented the basis for action in case of *Grunkin, Paul.*[47] In this case, the issue was that discrepancy existed in the PIL rules of the German Law and the European Law, which standardizes freedom of movement and residence of the citizens of EU on the territory of EU, which are harshly violated in this case, considering that the legal system of citizenship does not allow the identification of legal facts lawfully acquired on the basis of the right of domicile.

III Personal Name in the Draft of the PIL Code of the Republic of Serbia

It has been noted multiple times that the Draft, for the first time, includes the *Personal name* as a separate legal category, which contributes to a more detailed regulation of rights to the personal name. Namely, in the Constitution of the Republic of Serbia of 2006, for the first time in the constitutional and legal history of the Republic of Serbia, it is explicitly spoken about the right to the personal name in the context of the children's rights.[48] Reference Law for enforcing standards and principles related to the personal name is certainly the Family Law Act of 2005. By regulating collision matter concerning the right to the personal name, the Draft regulates those legal situations in which international element emerges. In the first Article (of six new Articles), the authority of the national authorities (administrative bodies) is regulated in proceedings related to the reg-

47 C-353/06, from 14 October 2008. The facts of this case are as follows: Leonhard Matthias is a son of Stefan Grunkin and Dorothee Paul. He was born in Denmark, where his parent lived together. Considering that both of his parents are German citizens and that Denmark does not use the model of attaining citizenship by the place of birth (*iure soli*), the child only attained the German citizenship. In accordance with Danish collision regulations, for the issues of personal status, law of the domicile of the person in question is applicable. Apropos, the boy was noted in registry under the last name Paul-Grunkin, which was later changed to Grunkin-Paul, again in accordance with the Danish Law. Several years later, after his parents divorced, the father moved to Niebüll, a settlement only few kilometres from the Danish border. The boy predominantly lived with his mother, but he also contacted his father on regular basis. The father addressed to the German parent service with a request to register the then three-year-old boy with the surname acquired by birth, and that was noted in the Danish registry books. German authorities refused this request, arguing that it is not in accordance with the domestic law. German law allows the selection of either the father's or mother's last name, but not the mutual last name or the combination of these two. This case has similarities with Garcia Avello, but also differences as it relates to the request for the recognition of the surname legally acquired in another member state, and not the request to change the name. Equally, the application for recognition of the last name could have been an issue in the case of Garcia Avello, considering the fact that the surname Garcia-Weber was noted in the registry of the Spanish consular office. In the view of the Court, the refusal of the German authorities to adopt requirements endangers personal integrity of the applicant and his right to freedom of movement.

48 Art. 64 'Rights of the child' of the Constitution of the Republic of Serbia.

istration and change of a personal name.[49] Three new articles (Arts. 58-60) are concerned with the issue of determining the applicable law. In determining or changing a child's name the following alternatives are relevant: (1) right of the state of which the child is a citizen at the moment of the application (by parents' choice) or (2) the Serbian law. Enabling the parents to determine of their own free will the framework of the applicable law is one of the biggest novelties in the Draft. It is also an expression of the European trend of expanding the domain of party autonomy outside the sphere of contractual relations (to the inheritance, family, status and non-contractual relationships). The Draft also regulates the situations in which parents cannot agree upon the personal name of their child or have not decided on the child's name within the time limit set by the law, or if the parents are unknown or deceased. In such situations, the personal name shall be determined by the guardianship authority (1) in accordance with the law of the State of the child's nationality or (2) in accordance with the Serbian law.[50] It is very important that the Draft contains an anti-discriminatory clause, for situations in which a child has two or more citizenships. So, if the child has two or more nationalities and the applicable law governing the determination or the change of the child's personal name is the law of the State of the child's nationality, the parents or the guardianship authority may choose the law of any of these States and the paras. 2 and 3 of Article 8 of this Act shall not apply.[51] Article 8, para. 2 states, "If a Serbian national holds the nationality of another State, that person is deemed to be holding only Serbian nationality unless otherwise provided in this Act." It is exactly Article 58, para. 2 that derogates this one, putting in an equal position all citizenships (two or more) that a person possesses at the time of the application. The same anti-discriminatory regulation found its place in Article 59, para. 3, which regulates the issue of applicable law for the change of marital or family status.

Another equally important issue is regulated by Article 61 of the Draft, and it deals with the recognition of foreign decisions concerning a change of surname or

49 Art. 57 of the Draft says:

"1. The authority of Serbia shall have jurisdiction to enter the personal name of the child in the civil registry if the child is born or found in Serbia, or one of the parents is a national of Serbia at the time of instituting the proceeding, or the child is born in a means of transport and the mother's travel ends in Serbia.

2. The authority of Serbia shall have jurisdiction to decide upon the parents' request on the change of the child's personal name irrespective of his/her family status changes if the child is a national of Serbia or was born in Serbia and is habitually resident in Serbia at the time of the submission of the request.

3. The authority of Serbia shall have jurisdiction to decide on the change of a surname following marital or family status changes if, at the time of the submission of the request or at the time of giving the statement, the person concerned is a national of Serbia or is habitually resident in Serbia, or if the authority of Serbia has jurisdiction to conduct the marriage ceremony.

4. The authority of Serbia shall have jurisdiction to decide on the request for the change of personal name irrespective of the marital or family status changes if the person concerned is a national of Serbia or is habitually resident in Serbia for a period of no less than five years prior to the submission of request."

50 Art. 58, para. 2 of the Draft.

51 Art. 58, para. 4 of the Draft.

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personal name of Serbian citizens. In accordance with a still valid law in terms of this issue, the so-called principle of equivalence has been adopted, which means that the foreign decision can be acknowledged even if the Serbian Law was not applied when that decision was made, "if that decision does not differ markedly from the Serbian Law, which is applied to such a relation".[52]

The proposed Article is significantly more flexible. Namely, a distinction is made between situations in which a change of the last name occurred after the change of marital or family status, or independent of these changes. In the first case, the change of the last name will be recognized in the Republic of Serbia if the foreign decision on the basis of which the change of status was carried out is recognized, with only one condition and that is that "the decision on changing the personal name is not **manifestly** contrary to the public policy of the Republic of Serbia" *[bold emphasis in original]*. In the second case, the criteria for recognition are somewhat stricter and relate to the fulfilment of the following two conditions: (1) that the person whose name is to be changed habitually resided for at least 5 years in the country where the change was made and (2) that the conditions for change as prescribed by the law of Republic of Serbia have been fulfilled. In practice, this implies stricter control of the merits than that provided by the public order.

F Conclusion

At the meeting held on 2 March 2012, the States and Governments Presidents of the 27 member states of the European Union decided to grant Serbia the status of EU candidate country. The process of harmonization with the norms and standards of the European Union formally began with opening the first chapter on 14 December 2015. The opening of the chapters 23 (*judicial reform*) and 24 (*justice, freedom, and safety*) is expected to commence in 2016. This will be an especially important stage in the process of joining the EU, considering the fact that these chapters are related to the rule of law and the protection of human and minority rights. In that context, one of the central legal issues that inevitably arise from the process of approaching the European Union is the prohibition of discrimination. To properly understand the concepts and standards of European law, it is not enough to change the current legislation and 'copy' European norms. *Aqius communitaire* presumes the practice of European Court of Justice which, *de facto*, is also the source of EU laws.

European regulations can only be understood in the light of judicature of the European Court of Justice. Hence, in the legal profession, not only in Serbia but also in neighbouring countries, insight into and a proper understanding of the interpretation of the European Court of Justice is of utmost importance. From the expression 'European Anti-Discrimination Law', it can be concluded that there exists one single legal concept that applies at the level of the European Union. However, this conclusion is wrong. European anti-discrimination law is a

52 Art. 93 of the PIL Code from 1982.

set of rules that are positioned horizontally, and they permeate the 'fabric' of legislation of the European Union in various fields giving *aqius communitaire*a specific value. The symbiosis of anti-discrimination legislation and regulations on a specific PIL area is exactly what is presented in this article. For countries joining the European Union, and which are harmonizing its legislation with the European, it is important to adopt the premise that human dignity, freedom, democracy, equality, the rule of law, and respect for human rights are the values 'which cannot be negotiated'.

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