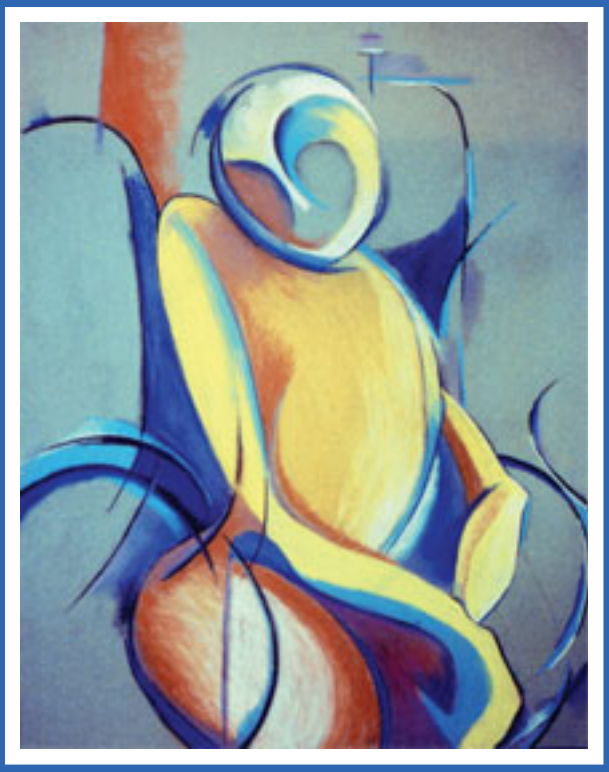
Univerzitet u Beogradu
Pravni fakultet

UKRŠTENA DISKRIMINACIJA ŽENA I DEVOJČICA SA INVALIDITETOM I INSTRUMENTI ZA NJIHOVO OSNAŽIVANJE

INTERSECTIONAL DISCRIMINATION OF WOMEN AND GIRLS WITH DISABILITIES AND MEANS OF THEIR EMPOWERMENT

Ljubinka Kovačević / Dragica Vujadinović / Marco Evola (ur./eds)



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PREDGOVOR

Pre nešto više od tri decenije, profesorka Kimberle Krenšo je uvela u pravnu teoriju koncept intersekcionalnosti, omogućivši pravilnije razumevanje kumulativnog dejstva više različitih osnova diskriminacije i pravnih problema koji se s tim u vezi pojavljuju. To je podstaklo autore iz različitih diciplina (posebno sociologije i političkih nauka) na razmatranje mogućnosti i granica primene intersekcionalnog pristupa. Isto vredi i za pravnu nauku, posebno što je u međuvremenu osmišljena koncepcija višestruke diskriminacije, koja kao posebnu vrstu uključuje i ukrštenu diskriminaciju. Ipak, pravna nauka baštini srazmerno manji broj radova o primeni intersekcionalnog pristupa nego što je to slučaj s drugim disciplinama, što je bio jedan od razloga da ovaj zbornik radova posvetimo, upravo, pitanju ukrštene diskriminacije. Naša pažnja je, pritom, usmerena na ukrštenu diskriminaciju žena i devojčica sa invaliditetom, jer smo želeli da čitaocima ponudimo knjigu u kojoj će položaj ove ugrožene i marginalizovane grupe biti razmotren iz ugla različitih grana prava (prava ljudskih prava, antidiskriminacionog prava, građanskog prava, porodičnog prava, kompanijskog prava, radnog prava, prava socijalne sigurnosti, poreskog prava i krivičnog prava), kao i iz ugla nekih vanpravnih disciplina (socijalne politike, ekonomske analize prava, prava i religije, sociologije i kriminologije). Osim toga, želeli smo i da u knjizi ponudimo ocenu pravnih odgovora na ukrštenu diskriminaciju žena i devojčica sa invaliditetom.

Objavljivanjem ove knjige Pravni fakultet Univerziteta u Beogradu nastavlja niz značajnih koraka koje je u poslednjoj deceniji preduzeo u cilju unapređenja inkluzivne kulture u visokoškolskom kontekstu. S uverenjem da se danas ne može govoriti o akademskoj i naučnoj izvrsnosti, ako visokoškolsko obrazovanje nije inkluzivno, Pravni fakultet Univerziteta u Beogradu je, naime, ostvario više aktivnosti vezanih za obrazovanje studenata i studentkinja o načelima i vrednostima jednakosti i borbe protiv diskriminacije. To je obuhvatilo, između ostalog, i obogaćivanje studijskih programa predmetom Manjinska prava, kao i pravnim klinikama koje se istrajno i uspešno bave osposobljavanjem studenata i studentkinja za pravilno i potpuno razumevanje diskriminacije. To posebno važi za Pravnu kliniku za pitanja diskriminacije, koja je i osnovana s idejom da bude oslonac za osetljive grupe stanovništva, odnosno za pružanje podrške ovim licima u situacijama u kojima su njihova prava najugroženija. Osim toga, ova pravna klinika je omogućila polaznicima da reaguju na sistemsku diskriminaciju, kao i da pišu dopise nadležnim državnim organima i da ih upozoravaju na propuste u formulisanju merodavnih pravnih propisa i njihovu nedoslednu primenu u praksi.

Nastojanja Pravnog fakulteta da unapredi inkluzivnu kulturu u visokoškolskom kontekstu ogledaju se i u organizovanju letnjih škola i konferencija posvećenih pojedinim osetljivim grupama. Tako je u 2010. godini, u saradnji s Fondom za otvoreno društvo u Beogradu, Pravnim fakultetom i Međunarodnim institutom za ljudska prava i mir iz Kaena (Francuska), Zaštitnikom građana, Ministarstvom za ljudska i manjinska prava, Ministarstvom rada i socijalne politike i Nacionalnom organizacijom osoba sa invaliditetom Srbije, bila organizovna petodnevna letnja škola „Zabrana diskriminacije osoba sa invaliditetom". Škola, koju je pohađalo ukupno 100 studenata, imala je za cilj da odgovori na otvorena pitanja diskriminacije osoba sa invaliditetom, da na sistematski i multidisciplinaran način osvetli sadašnje stanje, da naznači puteve prevazilaženja slabosti pravne regulative u oblasti zaštite osoba sa invaliditetom, kao i da olakša implementaciju novih normativnih rešenja usklađenih s međunarodnim i evropskim standardima u ovoj oblasti. Jedan od rezultata ove izuzetno uspešno organizovane letnje škole bilo je i objavljivanje zbornika radova *Zabrana diskriminacije osoba sa invaliditetom*, koji su priredili prof. dr Jovica Trkulja, prof. dr Branko Rakić i dr Damjan Tatić (Pravni fakultet Univerziteta u Beogradu / Nacionalna organizacija osoba sa invaliditetom Srbije / JP Službeni glasnik, Beograd, 2012).

Jedanaest godina kasnije, Pravni fakultet Univerziteta u Beogradu je, uz podršku Agencije Ujedinjenih nacija za rodnu ravnopravnost i osnaživanje žena *UN Women*, organizovao konferenciju „Rodna (ne)ravnopravnost osoba sa invaliditetom". Konferencija je održana pod okriljem naučnog projekta "New Quality in Education for Gender Equality – Strategic Partnership for the Development of Master`s Study Program Law and Gender (LAWGEM)", u čijoj implementaciji učestvuju Univerzitet u Beogradu i univerziteti u Zarlandu (Nemačka), Kadizu (Španija) i Erebru (Švedska), kao i Univerzitet *LUMSA* iz Italije. Ključni zadatak istraživača na ovom projektu predstavlja izgradnja studijskog programa master akademskih studija „Pravo i rod", dok su ostali rezultati vezani za objavljivanje udžbenika, u kom su sadržani tekstovi za sve obavezne i opcione predmete novog studijskog programa, formiranje pravne klinike za rodnu ravnopravnost, uspostavljanje onlajn platforme za celoživotno učenje o rodnoj ravnopravnosti, te izrada upitnika za empirijsko istraživanje stavova nastavnikâ i saradnikâ o važnijim aspektima rodne ravnopravnosti.

Imajući u vidu značaj rizika ukrštene diskriminacije žena i devojčica za stvaranje uslovâ za delotvornu primenu načela rodne ravnopravnosti, Pravni fakultet Univerziteta u Beogradu je organizovao konferenciju posvećenu ovom pitanju. Uredнički odbor konferencije činili su: prof. dr Dragica Vujadinović (Univerzitet u Beogradu – Pravni fakultet), prof. dr Ivana Krstić (Univerzitet u Beogradu – Pravni fakultet), prof. dr Ljubinka Kovačević (Univerzitet u Beogradu – Pravni fakultet), doktorand Ana Pavlović (Univerzitet u Beogradu – Pravni fakultet), prof. dr Tomas Gigerih (Univerzitet u Zarlandu – Institut Evropa), dr Marajke Fruhlih (Univerzitet u Zarlandu – Institut Evropa), prof. dr Marko Evola (Univerzitet *LUMSA* u Rimu/Palermu), prof. dr Marija Izabel Ribes Moreno (Univerzitet u Kadizu – Fakultet za studije rada) i prof. dr Suzan Strand (Univerzitet u Erebru – Fakultet za pravo, psihologiju i socijalni rad). U radu konferencije učestvovali su i predstavnici više udruženja osoba

sa invaliditetom (Centralnoazijski forum za osobe s invaliditetom, Udruženje žena s invaliditetom *Ширак*, Ženska fondacija *CERMI* iz Španije, *Disability Rights International*, NVO "Iz kruga – Vojvodina"), kao i studenti i studentkinje sa invaliditetom, koji su ukazali na najozbiljnije probleme s kojima se susreću, naročito u oblasti obrazovanja i zapošljavanja. Izlaganja na konferenciji bila su praćena živom diskusijom, iz koje je proistekao, između ostalog, i zaključak da inkluzija osoba sa invaliditetom nije moguća bez podizanja svesti nosilaca pravosudnih funkcija, donosilaca političkih odluka i društva u celini o ovim pitanjima. Takođe je zaključeno da je neophodno podsticati nastavnike, saradnike i studente pravnih fakulteta na produbljeno bavljenje pitanjima ukrštene diskriminacije, posebno diskriminacije osoba sa invaliditetom.

Ostvarivanju nekih od naznačenih ciljeva trebalo bi da doprinese i objavljivanje zbornika radova *Ukrštena diskriminacija žena i devojčica sa invaliditetom i instrumenti za njihovo osnaživanje / Intersectional Discrimination of Women and Girls with Disabilities and Means of their Empowerment*. Ova knjiga nudi teorijske i praktične uvide u pitanja od značaja za pravni položaj osoba sa invaliditetom uopšte, a posebno žena i devojčica sa invaliditetom. Radovi obuhvaćeni zbornikom omogućavaju, naime, razumevanje načina na koji se invaliditet i pol/rod ukrštaju u kontekstu društvenih, političkih i ekonomskih procesa, kao i pravnih instrumenata koji doprinose stvaranju uslovâ za delotvorno uživanje ljudskih prava i osnovnih sloboda za sve. Ostaje nada da će objavljivanjem ovog zbornika biti učinjen stabilan korak napred u nastojanjima Pravnog fakulteta Univerziteta u Beogradu da unapredi vidljivost problema ukrštene diskriminacije, kao i da doprinese njegovom rešavanju sistematizacijom dosadašnjih znanja u ovoj oblasti, ali i metodološkim inovacijama i razmatranjem mnoštva tema iz svih važnijih pravnih disciplina i nekih vanpravnih naučnih disciplina. Takođe, nadamo se da će radovi objavljeni u zborniku inspirisati druge pravnike, kao i naučnike iz drugih naučnih oblasti, da razmatraju invaliditet kao analitičku kategoriju i da je redovno uključuju u svoja istraživanja.

Radovi su grupisani u deset poglavlja, pri čemu je broj radova u okviru svakog poglavlja različit. To, u izvesnom smislu, odražava prevalencu i incidencu diskriminacije žena i devojčica sa invaliditetom u pojedinim segmentima društvenih odnosa. Svi radovi, pritom, čine jedinstvenu celinu, budući da su povezani tematski, kao i svojim usmerenjem ka istom cilju - kritičkom sagledavanju sadržine i ograničenja merodavnih propisa i javnih politika i mera koje se preduzimaju radi uspostavljanja suštinske ravnopravnosti u društvu.

Zbornik otvara rad redovne profesorke Pravnog fakulteta Univerziteta u Beogradu *dr Dragice Vujadinović*, koji je posvećen teorijsko-metodološkim pretpostavkama kritičke analize rodno zasnovane diskriminacije u opštem smislu i vezano za žene i devojčice sa invaliditetom. Autorka istražuje pojam invaliditeta, kao i mesto intersekcionalnog pristupa u feminističkom bavljenju rodnom ravnopravnošću. Posebna pažnja u ovim razmatranjima posvećena je kritičkoj dekonstrukciji i prevazilaženju intersekcionalne diskriminacije, uz ukazivanje na neophodnost usvajanja inkluzivnog intersekcionalnog pristupa rodnoj pravdi i pravdi za osobe sa invaliditetom u demokratskim društvima.

Sadržina Zbornika obogaćena je i s više radova iz oblasti prava ljudskih prava i antidiskriminacionog prava, počevši od rada pod naslovom "Zaštita žena s invaliditetom u antidiskriminacijskom pravu Europske unije", koji je napisala redovna profesorka Pravnog fakulteta Univerziteta u Zagrebu *dr Ivana Grgurev*. Autorka polazi od postavke da osobe s invaliditetom nisu adekvatno zaštićene od diskriminacije u pravu Evropske unije, pri čemu vidljivost posebno nedostaje ženama sa invaliditetom. Ovo stoga što unutar prava Evropske unije, zaštita osoba sa invaliditetom pokriva samo njihovu zaštitu u području zapošljavanja, radnih odnosa i obavljanja zanimanja, dok se višestruka diskriminacija žena spominje samo u preambulama dveju direktiva, a i Sud pravde Evropske unije u presudama ne prepoznaje koncept ukrštene diskriminacije. Istovremeno je ukazano na obavezu Suda pravde Evropske unije da tumači pravo ove organizacije u skladu s Konvencijom o pravima osoba sa invaliditetom, a što bi, zbog primene modela ljudskih prava, moglo da obezbedi zaštitu žena sa invaliditetom od diskriminacije. Stoga je u radu brižljivo i pouzdano analizirana i kritički preispitana relevantna sudska praksa Suda pravde Evropske unije, kao i njene posledice na položaj žena sa invaliditetom na tržištu rada Evropske unije.

Naučni saradnik Instituta za uporedno pravo u Beogradu *dr Mario Reljanović* posvetio je svoj rad obavezama koje proizlaze iz člana 6 Konvencije o pravima osoba sa invaliditetom. Reč je, preciznije, o obavezama koje države preuzimaju u pogledu višestruke diskriminacije devojčica i žena sa invaliditetom, s tim što je istraživanje dr Reljanovića ograničeno na njihovu diskriminaciju u obrazovanju i zapošljavanju. Ove oblasti autor, naime, smatra indikativnim za uočavanje dobrih i loših praksi, kao i sistemske i strukturne diskriminacije. U tom smislu je u radu ispitana neophodnost proaktivnog delovanja država i sankcionisanja višestruke i ukrštene diskriminacije devojčica i žena sa invaliditetom. Za tim je usledilo i preispitivanje obaveza država da izgrade solidan pravni okvir za zaštitu od diskriminacije i da deluju merama koje teže povećanju vidljivosti i postizanju faktičke jednakosti devojčica i žena sa invaliditetom.

Primena Konvencije o pravima osoba sa invaliditetom analizirana je i u radu *dr Damjana Tatića*, pravnog savetnika Nacionalne organizacije osoba sa invaliditetom Srbije i ranijeg potpredsednika Komiteta za prava osoba sa invaliditetom. Dr Tatić je posvetio svoj rad preporukama koje je ovo ugovorno nadzorno telo Organizacije ujedinjenih nacija uputilo Republici Srbiji 2006. godine, u pogledu položaja žena i devojčica sa invaliditetom. Autor je naročito razmatrao pitanje postupanja po preporukama Komiteta za prava osoba sa invaliditetom, uz identifikaciju konkretnih mera koje mogu doprineti sprečavanju diskriminacije i većoj uključenosti žena i devojčica sa invaliditetom u društvo.

Dr Valentina Genadijevna Mikrina, vanredna profesorka Univerziteta Ministarstva spoljnih poslova Ruske Federacije sagledava uticaj višestruke diskriminacije na ostvarivanje ljudskih prava od strane žena i devojčica sa invaliditetom. Ovo pitanje razmotreno je u svetlu najvažnijih izvora prava međunarodnog porekla, kao i merodavnog zakonodavstva Ruske Federacije. To je samo jedan u nizu radova koji nude detaljnije uvide u zakonodavstvo

i praksu pojedinih država, a koji su dragoceni za poređenja ovih rešenja, za uočavanje specifičnih nacionalnih rešenja, ali i za identifikovanje problema koji optrećuju ostvarivanje ljudskih prava žena i devojčica sa invaliditetom u bezmalo svim evropskim državama. Identifikacija tih problema i uvidi u pravne i druge mere za njihovo prevazilaženje, kao i saznanja o delotvornosti tih mera, omogućavaju, naime, uočavanje rešenja koja mogu poslužiti kao inspiracija ili model drugim zakonodavcima, ali i identifikaciju najozbiljnijih prepreka koje prate ostvarivanje ljudskih prava od strane ugroženih i marginalizovanih pojedinaca i grupa.

Pošavši od činjenice da posledice ugrožavanja i narušavanja kvaliteta životne sredine posebno teško pogađaju žene i devojčice sa invaliditetom, *Ljubomir Tintor*, doktorand Pravnog fakulteta Univerziteta u Beogradu, razmatra režime zaštite životne sredine u kojima je prepoznata rodna dimenzija ravnopravnosti. Reč je, preciznije, o režimima klimatskih promena, biodiverziteta i dezertifikacije. Oni su u radu kolege Tintora analizirani iz perspektive načela rodne ravnopravnosti i iz perspektive invaliditeta, s posebnim osvrtom na merodavne međunarodne instrumente. Poseban značaj ovog rada ogleda se u činjenici da je autor učinio korisne predloge *de lege ferenda* za unapređenje položaja žena i devojčica sa invaliditetom, naročito u pogledu prevazilaženja štetnih uticaja klimatskih promena.

Iako se i rad Ljubomira Tintora bavi prisilnim migracijama (i to zbog štetnih uticaja klimatskih promena), pravilno i potpuno sagledavanje položaja žena i devojčica sa invaliditetom pretpostavlja svestrano sagledavanje položaja žena i devojčica u mešovitim migracionim tokovima. Tom pitanju posvećen je rad *Bojana Stojanovića, Bogdana Krasića i Zorana Stojanovića* iz Beograda, koji su iscrpno analizirali prava tražiteljki azila, izbeglica i migrantkinja sa invaliditetom. Dokazano je da ova lica predstavljaju jednu od najugroženijih grupa, čiji je položaj dodatno pogoršan izbijanjem pandemije zarazne bolesti *Covid-19*.

U radu studentkinje doktorskih studija na Pravnom fakultetu Univerziteta u Beogradu *Ivane Nikolić* izloženi su rezultati istraživanja međunarodnih instrumenata od značaja za zabranu prinudne sterilizacije žena i devojčica sa invaliditetom. Kako se ovo sredstvo za sistemsku diskriminaciju marginalizovanih grupa još uvek koristi u praksi, autorka je objasnila razloge za takvo postupanje, kao i osnovne probleme koji omogućavaju postojanje prinudne sterilizacije. Na to se nadovezuje i istraživanje nesposobnosti međunarodnog prava da iskoreni prinudnu sterilizaciju, uz predloge mera koje mogu doprineti uspostavljanju alternativnog režima.

Deo zbornika koji je usko posvećen ljudskim pravima zaokružuju dva rada mladih autora koji su istraživali zaštitu prava žena i devojčica sa invaliditetom, i to u posebnom upravnom postupku pred ombudsmanom, kao i u sudskom postupku. Istraživač pripravnik Instituta za uporedno pravo u Beogradu *Vasilije Marković*, tako, piše o ulozi ombudsmana u borbi protiv ukrštene diskriminacije žena sa invalditetom. Kao posebne prednosti ovog pravnog sredstva uočeni su fleksibilnost i širok spektar delovanja ombudsmana, dok je osnovni predlog za unapređenje njegovog rada vezan za delovanje jedne, integrisane institucije koja bi obezbeđivala zaštitu od diskriminacije po

svim propisanim osnovima. Potonji predlog je formulisan na osnovu razmatranja problema koji se tiče određivanja odgovarajućeg uporednika u slučaju ukrštene diskriminacije, kao i na osnovu analize rešenja iz švedskog i hrvatskog pravnog sistema, te detaljnog razmatranja zakonodavnog okvira i prakse Poverenika za zaštitu ravnopravnosti u Republici Srbiji.

S druge strane, rad *Milice Midžović*, asistentkinje Pravnog fakulteta Univerziteta u Prištini s privremenim sedištem u Kosovskoj Mitrovici, bavi se marginalizacijom žena sa invaliditetom u pravosudnom sistemu Republike Srbije. Ratifikacijom niza međunarodnih konvencija, Republika Srbija je, naime, preuzela obavezu da na svojoj teritoriji, svakom obezbedi svaku potrebnu zaštitu u slučaju diskriminacije, dok su, po mišljenju autorke, osnovne prepreke za delotovorno ostvarivanje sudske zaštite prava na ravnopravnost vezane za dugotrajnost sudskih postupaka, izostanak poverenja u pravosuđe, i nedovoljnu obučenost i nesenzibilisanost sudija za pitanja diskriminacije. Za tim slede i neobaveštenost osoba sa invaliditetom o mogućnosti ostvarivanja sudske zaštite od diskriminacije, kao i nepristupačnost sudova.

Treći deo zbornika posvećen je građanskom i porodičnom pravu. U okviru njega, *prof. dr Katarina Dolović Bojić* i *doc. dr Snežana Dabić Nikićević* sa Pravnog fakulteta Univerziteta u Beogradu razmatraju položaj osoba sa invaliditetom na polju poslovne sposobnosti. Ova klasična, ali i aktuelna tema sagledana je iz ugla mogućeg lišenja poslovne sposobnosti, kao i iz ugla ideje o pravnoj pomoći (asistenciji) punoletnim licima. Jedan od povoda za pisanje ovog rada je i predstojeća inkorporacija rešenja i ideja iz Konvencije o pravima osoba sa invaliditetom u pravo Republike Srbije, kroz izmene i dopune Porodičnog zakona. Autorke ukazuju na pretpostavljene razloge promena, ali i na njihove očekivane pravne posledice i rezultate, uz argumentovano razmatranje različitih shvatanja koja postoje u literaturi povodom ovih pitanja.

Vanredni profesor Pravnog fakulteta Univerziteta u Beogradu *dr Uroš Novaković* istražuje problem nasilja u porodici iz ugla položaja žena sa invaliditetom. Autor se, pritom, opredelio za multidisciplinarni pristup, te predmetni problem razmatra iz ugla krivičnog, porodičnog i radnog prava. Istraživačkim uzorkom su obuhvaćeni kako izvori prava međunarodnog porekla, tako i izvori prava Republike Srbije. Posebno je ukazano na širinu spektra ponašanja kojima se može uspostaviti nasilje u porodici u slučaju žena sa invaliditetom. Takođe, identifikovane su i sve važnije prepreke s kojima se žene sa invaliditetom suočavaju u pogledu korišćenja usluge smeštaja u sigurnu kuću – od nepristupačnosti ovih objekata do izostanka tumača za znakovni jezik.

Zbornik sadrži i dva rada iz kompanijskog prava, budući da se u ovoj oblasti mogu pronaći važna sredstva za osnaživanje žena sa invaliditetom. Redovni profesor Pravnog fakulteta Univerziteta u Beogradu *dr Nebojša Jovanović*, tako, minuciozno analizira pravni položaj preduzeća za zapošljavanje osoba sa invaliditetom u Republici Srbiji. Ovo pitanje je sagledano kako iz ugla pravnog režima nastanka, oblika i delatnosti ovih preduzeća, tako i iz ugla ekonomskih povlastica koje ona uživaju, naročito u vidu državne pomoći. To je uključilo i poređenje pravnog položaja preduzeća za zapošljavanje

osoba sa invaliditetom s položajem ostalih poslodavaca koji imaju obavezu zapošljavanja osoba sa invaliditetom, ali nemaju iste povlastice.

Osnaživanju žena sa invaliditetom može doprineti i osnivanje socijalnih preduzeća, zbog čega studentkinja doktorskih studija Pravnog fakulteta Univerziteta u Beogradu *Tijana Kovačević* analizira ključne pravne aspekte zapošljavanja osoba sa invaliditetom u socijalnim preduzećima. To je uključilo i razmatranje prednosti i nedostataka razvoja tzv. trećeg sektora, kao i sličnosti i razlika između socijalnih preduzeća, s jedne strane, i "tradicionalnih" preduzeća i drugih pravnih lica, s druge strane. Time je omogućen uvid u način i uslove pod kojima socijalna preduzeća doprinose stvaranju poslova, kao i u način na koji podržavaju i/ili supstituišu državu blagostanja, posebno u pogledu pitanja vezanih za socijalnu zaštitu.

Zbornik obuhvata i više radova koji razmatraju zapošljavanje i rad žena sa invaliditetom, imajući u vidu teškoće s kojima se one tradicionalno suočavaju prilikom traženja i očuvanja zaposlenja, kao i napredovanja u profesionalnoj karijeri. Redovna profesorka Pravnog fakulteta Univerziteta u Beogradu *dr Ljubinka Kovačević* istražuje rizik diskriminacije osoba sa invaliditetom u svetu rada, modele njihovog zapošljavanja (zaštićeno zapošljavanje, zapošljavanje na otvorenom tržištu uz razumno prilagođavanje, i kvote za zapošljavanje osoba sa invaliditetom) i sadejstvo negativnih stereotipa vezanih za invaliditet i negativnih rodnih stereotipa koji prate zapošljavanje i rad žena sa invaliditetom. Poseban deo rada posvećen je osnovnim postavkama koncepcije intersekcionalnosti, kao i pojmu, pravnom uređivanju i razumevanju ukrštene diskriminacije, te izazovima u primeni intersekcionalnog pristupa u pravu. U radu prof. dr Kovačević preispitane su i prednosti i izazovi primene intersekcionalnog pristupa u radnom pravu, uz zaključak da njegovo prihvatanje može pomoći nastojanjima da se unaprede zapošljivost i uslovi rada žena sa invaliditetom. Istovremeno je ukazano na teškoću da se u slučaju ukrštene diskriminacije odredi uporednik, kao i na neodređenost pojma intersekcionalnosti, zbog čega nije moguće jasno odrediti područje primene antidiskriminacionog zakonodavstva, kao ni intenzitet njegove intervencije u društvene odnose. Konačno, ukazano je i na proaktivne dužnosti državnih organa i poslodavaca koje su usmerene na promovisanje jednakosti, kao i na socijalni dijalog, kao moćne instrumente za sprečavanje ukrštene diskriminacije.

Dr Lazar Jovevski, redovni profesor Pravnog fakulteta "Justinijan Prvi" Univerziteta "Sveti Ćirilo i Metodije" u Skoplju je rad posvetio nedoumicama vezanim za položaj i postupanje prema ženama na radu i u radnim odnosima uopšte, kao i za položaj i postupanje prema ženama sa invaliditetom. Pored pravne analize, istraživanje prof. dr Jovevskog obuhvatilo je i razmatranje širih društvenih, psiholoških i etičkih pitanja vezanih za dilemu da li su žene posebna grupa u svetu rada ili su potpuno jednake s muškarcima. Osim toga, autor razmatra i potrebu za posebnom dvostrukom zaštitom žena sa invaliditetom na tržištu rada.

Položaj žena sa invaliditetom na tržištu rada istraživala je i profesorka Univerziteta u Kadizu *dr Tais Gerero Padron*. Autorka je posvetila posebnu

pažnju pitanju integracije žena sa invaliditetom u tržište rada u Španiji, što je posmatrano kroz prizmu nalaza Komiteta Ujedinjenih nacija za prava osoba sa invaliditetom o usklađenosti španskog zakonodavstva i prakse s Konvencijom o pravima osoba sa invaliditetom. Zaključeno je da su u Španiji, koncept invaliditeta i njegov tretman na političkom i pravnom nivou razvijani paralelno s promenom pristupa invaliditetu na međunarodnom i evropskom nivou, zajedno s afirmisanjem urodnjavanja politike invaliditeta. Osim toga, u radu su brižljivo analizirane važnije skorašnje pravne mere koje su usvojene kao odgovor na nalaze Komiteta za prava osoba sa invaliditetom, uz vispreno razmatranje njihove stvarne delotvornosti na tako osobenom tržištu rada kakvo je špansko. To je uključilo i preispitivanje rešenja sadržanih u Zakonu 15/2022 od 12. jula 2022. godine, kojima je u špansko pravo uvedena koncepcija ukrštene diskriminacije žena sa invaliditetom.

Docentkinje Univerziteta u Kadizu *dr Vanesa Hervias Pareho* i *dr Fransiska Bernal Santamaría* napisale su rad posvećen diskriminaciji mladih žena sa invaliditetom na tržištu rada. Ova tema razmatrana je iz ugla teorije roda i intersekcionalnosti, a na osnovu ideje da se položaj mladih žena sa invaliditetom ne može razumeti i objasniti uzimanjem u obzir samo rodne perspektive, već to zahteva i artikulaciju višestrukih varijabli koje su međusobno povezane i koje se reprodukuju kroz taj međuodnos. Ova pitanja razmatrana su u svetlu merodavnih normi i javnih politika u Španiji, kao i iz ugla postavki feminističkog socijalnog rada. Posebna pažnja u istraživanju posvećena je uticaju porodičnog okruženja i strategija za pomirenje ličnog, porodičnog i profesionalnog života na obuku i zapošljavanje žena sa invaliditetom.

Položaj žena sa invaliditetom na španskom tržištu rada razmatran je i u radu profesorke Univerziteta u Kadizu *dr Marije Izabel Ribes Moreno*. Posebna pažnja u toj analizi posvećena je izuzetno značajnom pitanju diskriminacije u pogledu ostvarivanja prava na zaradu, pri čemu su u istraživački uzorak uključene Španija i druge države članice Evropske unije. To je obuhvatilo i dragocena razmatranja inicijativa za usvajanje direktive o odgovarajućim minimalnim zaradama u Evropskoj uniji i direktive o transparentnosti zarada. Ove inicijative razmotrene su iz ugla zarada žena sa invaliditetom. Osim toga, autorka je ponudila i predloge za unapređenje situacije u Španiji i Evropskoj uniji. Njeni zaključci su ubedljivo ilustrovani statističkim podacima o stopi nezaposlenosti, stopi zaposlenosti i stopi aktivnosti u Evropskoj uniji, uz isticanje problema vezanih za nepostojanje pouzdane i uporedive statistike od značaja za pravilno i potpuno razumevanje stvarnog uticaja invaliditeta na zarade.

Dr Valentina Franca, vanredna profesorka Fakulteta za javnu upravu Univerziteta u Ljubljani i *Adrijana Mitrić*, asistentkinja Ekonomskog fakulteta ovog univerziteta istražuju problem nasilja na radu od strane trećih lica. Njihovim istraživačkim uzorkom su obuhvaćeni zaposleni u javnim visokoškolskim ustanovama u oblasti društvenih nauka u Sloveniji, pri čemu je posebna pažnja posvećena zaposlenim ženama sa invaliditetom. Ovaj rad nudi uvide u način regulisanja nasilja na radu preduzetog od strane korisnikâ poslo-

davčevih usluga i ostalih trećih lica u međunarodnom i slovenačkom pravu. Poseban kvalitet radu daju predlozi za zaštitu osetljivih kategorija zaposlenih od nasilja preduzetog od strane trećih lica.

Grupu radova posvećenih radnopravnim aspektima položaja žena sa invaliditetom obogatio je i rad «Uloga sindikata u suzbijanju višestruke i ukrštene diskriminacije žena sa invaliditetom», koji su napisali *dr Tijana Ugarković* i *Marko Jović* iz Beograda. U radu je sagledan presek invaliditeta i roda u oblasti radnog i socijalnog prava. To je naročito uključilo ispitivanje značaja povezivanja udruženja osoba sa invaliditetom sa sindikatima, koji, iako nisu prepoznati u Konvenciji o pravima osoba sa invaliditetom, raspolažu mehanizmom socijalnog dijaloga, koji se kroz princip participacije, najefikasnije ostvaruje u praksi. Autori vešto ukazuju na činjenicu da u postizanju društvenih promena koje se tiču ravnopravnosti moraju učestvovati svi građani, pri čemu posebna odgovornost, pored države, leži na socijalnim partnerima. Ovo stoga što bez aktivnosti sindikata nije moguće ni postizanje preobražajne jednakosti, niti jačanje društvene solidarnosti i participativne demokratije.

U radu *dr Mile Petrović*, docentkinje Pravnog fakulteta Univerziteta "Union" u Beogradu, izloženi su rezultati istraživanja pravnog položaja zaposlenih čiji je invaliditet uzrokovan povredom na radu ili profesionalnom bolešću, s posebnim osvrtom na srpsko pravo. Ovaj istraživački problem zaslužuje naročitu pažnju imajući u vidu da su u Republici Srbiji, lica s ograničenom radnom sposobnošću suočena s nepovoljnim položajem na tržištu rada, ali i uskraćena za davanja iz penzijskog i invalidskog osiguranja. Posebna pažnja u istraživanju posvećena je ženama sa invaliditetom koji je, tokom pandemije zarazne bolesti *Covid-19,* uzrokovan profesionalnim rizicima.

Jovana Rajić-Ćalić, istraživačica saradnica Instituta za uporedno pravo u Beogradu, preispitavala je pitanje diskriminacije devojčica i žena sa invaliditetom u oblastima obrazovanja i zapošljavanja, budući da se njihova diskriminacija u oblasti obrazovanja neretko "preliva" na oblast zapošljavanja. Stoga se i problemi nezaposlenosti i siromaštva žena sa invaliditetom mogu objasniti, između ostalog, i njihovim nedovoljnim obrazovanjem, odnosno nedostatkom ili zastarevanjem potrebnih znanja, veština i umeća, usled diskriminacije osoba sa invaliditetom u oblasti obrazovanja, kao i neusklađenosti obrazovnog sistema sa zahtevima tržišta rada. S tim u vezi, važno je uočiti da devojčice i devojke s invaliditetom češće napuštaju osnovnu i srednju školu, ali i ređe diplomiraju na fakultetima od dečaka, odnosno mladića sa invaliditetom, koji se, dalje, mnogo češće podstiču na traženje posla, dok se devojčice i žene sa invaliditetom češće usmeravaju na korišćenje socijalnih prestacija.

Rodni sterotipi koji prate rad žena sa invaliditetom se, kao i u slučaju žena uopšte, vezuju i za teškoće usklađivanja profesionalnih i porodičnih dužnosti. To u slučaju žena sa invaliditetom postaje posebno ozbiljno, ako se ima u vidu otežani pristup uslugama vezanim za brigu o deci, kao i činjenica da su odgovarajuće usluge često skupe, tako da i kada postoje, ne olakšavaju integraciju žena sa invaliditetom u tržište rada. Takođe, majke koje su oso-

be sa invaliditetom se neretko suočavaju s predrasudom da nisu sposobne da budu dobri roditelji, a što ih, dalje, može odvraćati od korišćenja usluga pomoći, zbog straha da će im zbog toga dete biti oduzeto. Na neke od ovih problema ukazano je u radu *Mine Kuzminac*, demonstratorke na Pravnom fakultetu Univerziteta u Beogradu.

Na ova istraživanja nadovezuje se i istraživanje ključnih socijalnopravnih aspekata položaja žena sa invaliditetom. U radu *dr Filipa Bojića*, docenta Pravnog fakulteta Univerziteta u Beogradu je, tako, analizirano mesto žena sa invaliditetom u sistemu penzijskog i invalidskog osiguranja. To je naročito obuhvatilo istraživanje uslovâ za ostvarivanje prava na starosnu i invalidsku penziju, posebno uslova koji se tiče minimalnog staža osiguranja, budući da nezaposlenost ili povremeno učešće u radnoj snazi sprečavaju žene sa invaliditetom da jednako doprinose finansiranju penzijskog i invalidskog osiguranja. S druge strane, žene sa invaliditetom koje ispune uslove za ostvarivanje prava na ove prestacije nailaze na problem njihovog skromnog iznosa, budući da se nejednako plaćanje muškaraca i žena za isti rad redovno odražava na visinu penzije. U tom smislu, autor čini nekoliko važnih predloga *de lege ferenda* za unapređenje zaštite žena sa invaliditetom od rizika starosti, invalidnosti i smrti izdržavaoca, kako u okviru obaveznog socijalnog osiguranja, tako i kroz njihovo učešće u dobrovoljnim penzijskim fondovima.

Zbornikom su obuhvaćena i tri rada posvećena (formalnoj i neformalnoj) nezi lica zavisnih od tuđe nege i pomoći, budući da osobe sa invaliditetom mogu imati potrebu za čitavim nizom usluga u oblasti zdravstvene i socijalne zaštite, a koje se mogu pružati bilo u kući, bilo u institucijama. Aktuelnost ovog predmeta istraživanja uslovljena je porastom broja lica kojima je zbog starosti, bolesti i invaliditeta potrebna pomoć za normalno funkcionisanje. Docentkinja Pravnog fakulteta Univerziteta u Nišu *dr Marija Dragićević*, otud, kritički preispituje sistem dugotrajne nege u državama članicama Evropske unije, kao i u Republici Srbiji. Ovo istraživanje je posebno dragoceno zbog autorkinih predloga za unapređenje srpskog sistema dugotrajne nege, budući da ostvarivanje odgovarajućih prava prati niz problema i izazova jer dugotrajna nega nije izdvojena kao posebna grana socijalnog osiguranja, a prisutni su i razni oblici neformalne pomoći. Stoga se argumentovano predlaže veštije balansiranje između institucionalne i vaninstitucionalne podrške, između materijalne i nematerijalne pomoći, te između aktivnosti na republičkom i lokalnom nivou.

Za ovim slede dva rada posvećena (neformalnoj) porodičnoj nezi, koja je razmatrana u svetlu načela solidarnosti i jednakosti, s posebnim osvrtom na jednakost polova, budući da se žene redovno pojavljuju kao pružaoci porodične nege. Naučna saradnica Instituta društvenih nauka u Beograd *dr Sanja Stojković Zlatanović,* naime, istražuje mogućnosti za rekonceptualizaciju (neformalne) porodične nege u periodu nakon pandemije, i to na primeru Japana, Nemačke i Švedske, kao država u kojima je pravno uređen položaj porodičnih negovatelja. Na osnovu ovih uvida, formulisani su predlozi za uređivanje položaja negovatelja u radnom i socijalnom pravu Republike Srbije. Posebna pažnja u istraživanju je, pritom, posvećena izazovima priznavanja, ostvarivanja i zaštite osnovnih radnih i socijalnih prava ranjivih druš-

tvenih grupa, uzimajući u obzir ograničenja savremenog sistema socijalne sigurnosti u procesu prilagođavanja promenjenim okolnostima u svetu rada i društvu uopšte.

Pitanjem neformalne porodične nege bavi se i rad *Kristine Balnožan,* više sudijske saradnice Osnovnog suda u Pančevu. Autorka posebno ukazuje na problem neplaćenog rada žena vezanog za negu osoba sa invaliditetom, kao i drugih članova porodice zavisnih od tuđe nege i pomoći, a u svetlu postavke da delotvorna zaštita osoba sa invaliditetom pretpostavlja i obezbeđivanje odgovarajuće podrške negovateljima ovih lica. Autorka razmatra i uticaj krize izazvane pandemijom zarezne bolesti *Covid-19* na uređivanje položaja negovatelja, budući da je ova kriza, pored prouzrokovanja više negativnih posledica, uticala i na povećanje interesovanja za neformalnu negu. U tom smislu je ukazano na neophodnost osmišljavanja i primene niza radnopravnih i socijalnopravnih mehanizama od značaja za očuvanje i unapređivanje veština i sposobnosti negovateljâ, kao i za obezbeđivanje njihove ekonomske i socijalne sigurnosti.

Budući da je za sprečavanje ukrštene diskriminacije osoba sa invalditetom značajan i njihov položaj u poreskom sistemu, posebna celina u Zborniku posvećena je poreskom pravu. Načelo sposobnosti plaćanja nalaže, naime, odmeravanje poreskog tereta srazmerno ekonomskom kapacitetu poreskog obveznika, zbog čega poreski sistemi treba da vode računa, između ostalog, i o uticaju koji invaliditet može imati na ekonomski kapacitet poreskog obveznika. Isto vredi i za ekonomski kapacitet poreskih obveznika koji pružaju negu i finansijsku podršku članovima porodice koji su osobe sa invaliditetom. Docentkinja Pravnog fakulteta Univerziteta u Kadizu dr *Tereza Ponton Ariča* je istraživala ovo pitanje u svetlu pravnog režima poreza na dohodak građana u Španiji, uz ukazivanje na njegov doprinos sprečavanju dvostruke diskriminacije žena sa invaliditetom. U tom smislu, učinjeni su i važni predlozi za unapređenje zakonskih rešenja u ovoj oblasti, a u cilju postizanja pune jednakosti u poreskom sistemu.

Naznačeno pitanje razmatrano je i iz ugla poreskog sistema Republike Srbije, i to u radu asistentkinje Pravnog fakulteta Univerziteta u Beogradu *Lidije Živković*. Autorka, preciznije, ispituje podobnost srpskog poreskog sistema da vodi računa o uticaju invaliditeta na ekonomski kapacitet poreskog obveznika, kao i na ekonomski kapacitet poreskih obveznika koji pružaju negu i finansijsku podršku osobama sa invaliditetom. To je uključilo i ocenu šireg poreskopravnog okvira iz ugla potreba osoba sa invaliditetom, kao i pojedinačnih poreskopravnih odredaba posebno namenjenih unapređenju (ekonomskog) položaja ovih lica. Poseban značaj rezultata ovog istraživanja leži u tome što je ukazano na neosetljivost kreatora srpske poreske politike na potrebe građana koji se zbog svog pola, invaliditeta ili drugih ličnih svojstava nalaze u ekonomski nepovoljnom položaju.

Premda je pitanje kvota za zapošljavanje osoba sa invaliditetom već razmatrano u više radova sadržanih u delu Zbornika posvećenom radnom pravu i politici zapošljavanja, pravilno i potpuno sagledavanje ovog problema nije moguće bez njegovog razmatranja iz ugla ekonomske analize prava. Rad nacionalnog koordinatora Međunarodne organizacije rada u Republici Srbiji *dr*

Jovana Protića posvećen je, upravo, delotvornosti sistema kvota za zapošljavanje osoba sa invaliditetom u Republici Srbiji. Autor, pritom, ne analizira samo sposobnost kvota za zapošljavanje da povećaju stopu zaposlenosti osoba sa invaliditetom, već i delotvornost i ekonomske aspekte kvota za zapošljavanje uopšte. Rezultati ovog istraživanja su značajni za razumevanje položaja osoba sa invaliditetom, budući da sistem kvota omogućava integraciju ovih lica u tržište rada, pre svega zahvaljujući povećanju ponude radne snage, snižavanju troškova za socijalne transfere i povećanju bruto društvenog proizvoda po stanovniku. Verujemo da će čitaocima Zbornika biti korisni autorovi predlozi za unapređenje pravnog okvira u pravcu obezbeđivanja veće delotvornosti kvota za zapošljavanje osoba sa invaliditetom, odnosno za obezbeđivanje veće zaposlenosti ovih lica.

Iako je krivičnopravna zaštita osoba sa invaliditetom krajnja mera u odnosu na ostale mehanizme, za pravilno i potpuno razumevanje pravnog položaja žena i devojčica sa invaliditetom neophodno je i razmatranje ovog pitanja. U tom smislu, redovni profesor Pravnog fakulteta Univerziteta u Beogradu i sudija Ustavnog suda Srbije *dr Milan Škulić* i vanredna profesorka istog fakutleta *dr Vanja Bajović* istražuju ključne aspekte seksualnog nasilja nad ženama sa invaliditetom u srpskom krivičnom pravu i pravnoj praksi. To je naročito uključilo minuciozno razmatranje obeležja krivičnog dela obljube nad nemoćnim licem, kao i mogućnosti za njegovo redefinisanje u skladu s Konvencijom Saveta Evrope o sprečavanju i borbi protiv nasilja nad ženama i nasilja u porodici (Istanbulska konvencija). Ovo istraživanje čini se posebno značajnim zbog činjenice da su žene sa invaliditetom često izložene različitim oblicima svih vidova nasilja, uključujući i seksualno nasilje, ali da su zvanični statistički podaci vezani za prijavljivanje i vođenje krivičnog postupka za krivično delo obljuba nad nemoćnim licem poražavajući. S druge strane, ukazano je i da Krivični zakonik Republike Srbije definiše krivično delo obljuba nad nemoćnim licem u korelaciji sa krivičnim delom silovanja, kao prinudne obljube. Stoga je osnovno obeležje ovog krivičnog dela iskorišćavanje stanja nemoći pasivnog subjekta, što preti da inkriminiše i dobrovoljne seksualne odnose lica koja se pravno smatraju "nemoćnim". Ovo tim pre što Porodični zakon svrstava seksualni odnos s nemoćnim licem u jedan od oblika porodičnog nasilja. Takođe, kritički je preispitan i problem dobrovoljnog pristanka osoba sa invaliditetom koje usled zavisnog položaja od učinioca krivičnog dela često i nemaju drugu mogućnost do da, u strahu od posledica odbijanja, pristanu na obljubu.

Složenu problematiku seksualnih delikata učinjenih prema ženama i devojkama sa invaliditetom produbljeno razmatraju i redovna profesorka i naučna saradnica Instituta za uporedno pravo u Beogradu *dr Nataša Mrvić Petrović* i naučni saradnik i sudija Višeg suda u Valjevu *dr Dragan Obradović*. U njihovom radu ukazano je na rešenja iz nemačkog i slovenačkog prava, kao i na relevatnost odredaba Istanbulske konvencije. Pored najvažnijih materijalnopravnih pitanja, u radu su osvetljene i osetljive tačke postupka u kom su žrtve osobe sa invaliditetom, posebno osobe sa psihičkim poremećajima. Žene i devojčice sa invaliditetom se, naime, suočavaju s visokom rizikom od seksualnog nasilja, a nailaze i na brojne teškoće u pogledu ostvarivanja kri-

vičnopravne zaštite. Autori, otud, analiziraju najvažnije prepreke u krivičnom gonjenju i suđenju, uz ukazivanje na potrebu promene pristupa propisivanju krivičnih dela seksualnog nasilja (silovanje i prinudni snošaj bespomoćne osobe). Promene u krivičnom zakonodavstvu mogu, međutim, unaprediti zaštitu seksualnog integriteta žena sa invaliditetom samo ako su praćene izmenjenim društvenim pristupom ovoj grupi lica.

Položajem osoba sa invaliditetom u krivčnom pravosuđu bavi se i *Aleksandar Stevanović,* istraživač saradnik Instituta za kriminološka i sociološka istraživanja u Beogradu. Autor razmatra pravne i kriminološke aspekte ovog pitanja, zbog čega identifikuje materijalne i procesne odredbe krivičnog zakonodavstva koje mogu dovesti do posredne diskriminacije osoba sa invaliditetom. Takođe, razmatra i sadržaj značajnih kriminoloških teorija, aktuelnu paradigmu antikriminalne reakcije, kao i praktičnu primenu krivičnopravnog mehanizma u slučaju osoba sa invaliditetom.

Kako se koreni diskriminacije žena sa invaliditetom nalaze, između ostalog, i u idejnim i vrednosnim sistemima koje uspostavljaju religije, posebno one tradicionalne, *dr Branko Rakić*, redovni profesor Pravnog fakulteta Univerziteta u Beogradu, posvetio je svoj rad stavovima (istočnog i zapadnog) hrišćanstva, islama i judaizma o položaju žena i osoba sa invaliditetom, kako u okviru organizacione strukture i delatnosti crkava i verskih zajednica, tako i u društvu uopšte. Autor vispreno zaključuje da se stavovi tzv. avramovskih religija o položaju žena i osoba sa invaliditetom u kontekstu primene religijskih pravila kao državnih pravila ili uticaja religija na izgradnju državnih pravnih sistema – moraju posmatrati u svetlu istorijskih uslova u kojima su ove religije nastale i razvijale se. Uz to, potrebno je imati u vidu i suštinu njihovih učenja, tj. činjenicu da su tzv. avramovske religije – religije ljubavi, milosrđa i jednakosti.

Konačno, čitaoci Zbornika imaju i priliku da se upoznaju rezultatima istraživanja sociološke perspektive položaja žena i devojčica sa invaliditetom. U radu koji su napisale Gordana Rajkov, koja je nažalost preminula u 2022. godini, i Sanja Nikolin, razmatrano je pitanje učešća osoba sa invaliditetom u političkom životu. Ova važna tema razmatrana je u kontekstu izbora održanih u Republici Srbiji, tokom pandemije zarazne bolesti *Covid-19*, uz analizu uticaja pandemije na ponašanje osoba sa invaliditetom, kao glasača, i šire, kao aktivnih građana. Autorke ukazuju na potrebu hitne primene kratkoročnih i srednjoročnih mera za otklanjanje nedostataka koji u ovoj oblasti postoje u pravnom sistemu, kao i za unapređenje pristupačnosti i bezbednosti glasačkih mesta. To je naročito obuhvatilo predloge vezane za uključivanje alternativnih glasačkih metoda i inkluzivnu pravnu reformu.

Mila Đorđević, asistentkinja Pravnog fakulteta Univerziteta u Beogradu razmatra pitanje pristupačnosti gradova ženama sa invaliditetom u Republici Srbiji. Ovo pitanje je istraživano iz perspektive socijalne održivosti, kao koncepcije, koja pretpostavlja punu integraciju svih stanovnika jednog prostora, bez obzira na njihove pojedinačne karakteristike. U tom smislu je ispitana interakcija pola i invaliditeta u odnosu na socijalnu održivost gradova, naročito imajući u vidu bezbednost žena i osoba sa invaliditetom i njihove mogućnosti za kretanje u gradovima.

Rad *dr Filipa Mirića* iz Niša skreće pažnju na stvarne probleme osoba sa invaliditetom, posebno u pogledu njihove adaptacije u društvenom okruženju. Autor jasno ukazuje na ključne probleme i daje mišljenje i preporuke za njihovo prevazilaženje ili ublažavanje. Pored naučne vrednosti, nalazi dr Mirića imaju i praktičnu vrednost, jer su razmotrena bezmalo sva važnija pitanja od značaja za uspešnu komunikaciju sa osobama sa invaliditetom. Ovaj rad je posebno dragocen zbog činjenice da daje ideje za dalje opsežno naučno istraživanje na uzorku koji bi obuhvatio znatniji broj osoba s različitim oblicima invaliditeta.

Pavle Novevski, advokatski pripravnik iz Beograda, razmatra ulogu medija u oblasti diskriminacije žena i devojčica sa invaliditetom, budući da mediji imaju važnu ulogu u dizajniranju savremenog društva, pre svega u smislu uticaja na stvaranje ideja i na određivanje šta je prihvatljivo, a šta nije u jednom društvu. Vidljivost u medijima je, otud, postala pretpostavka sveukupne vidljivosti, zbog čega autor ukazuje na činjenicu da mediji, po pravilu, ne obezbeđuju vidljivost marginalizovanim i ugroženim grupama. Stoga je u radu, iz srpske i međunarodne perspektive, analizirana uloga medija u diskriminaciji žena i devojčica sa invaliditetom. Autorovi nalazi ilustrovani su medijskom slikom žena sa invaliditetom, s fokusom na (nedostatak) prostora koji je ostavljen za njihovo prisustvo i njihov glas, a učinjeni su i korisni predlozi za unapređenje takvog stanja.

Urednici Zbornika duguju najdublju zahvalnost svim autorima i autorkama za pokazani entuzijazam, za veliki trud i za sjajne radove kojima su obogatili i ukrasili naš zbornik. Imajući u vidu važnost participacije u stvaranju istinski inkluzivnog društva, među autorima i autorkama nalaze se i osobe sa invaliditetom. Takođe, krug autora i autorki uključio je i studente i studenkinje doktorskih akademskih studija. To nam čini veliko zadovoljstvo, posebno zbog značaja senzibilizacije mladih za sprečavanje diskriminacije osoba sa invaliditetom i zbog važnosti njihovog usmeravanja na uočavanje istraživačkih problema i istraživanja u ovoj oblasti.

Kvalitetu objavljenih radova značajno su doprineli i ugledni recenzenti Zbornika, kao i ugledni recenzenti pojedinih radova iz Bosne i Hercegovine, Crne Gore, Italije, Meksika, Poljske, Portugala, Republike Srpske, Severne Makedonije, Slovenije, Srbije, Hrvatske i Španije. Njihov veliki trud, kolegijalna predusretljivost i umesne i podsticajne sugestije bili su, malo je reći, dragoceni. Bez njihovog doprinosa ne bi bilo moguće obezbediti neophodan kvalitet radova iz našeg zbornika, na čemu im se i ovom prilikom najdublje zahvaljujemo.

Najveću zahvalnost dugujemo i Upravi i Centru za izdavaštvo Pravnog fakulteta Univerziteta u Beogradu na nesebičnoj podršci prilikom pripreme i objavljivanja ovog zbornika. Takođe, srdačno zahvaljujemo i dragim kolegama iz izdavačkog studija "Dosije" za uspešnu i lepu saradnju.

prof. dr Dragica Vujadinović
prof. dr Ljubinka Kovačević
prof. dr Marko Evola

FOREWORD

A little over three decades ago, Professor Kimberlé Crenshaw introduced the concept of intersectionality into legal theory, providing a better understanding of the cumulative effect of several different grounds of discrimination and the legal problems that arise thereof. This encouraged authors from various disciplines (especially sociology and political science) to consider the possibilities and the limits of the intersectional approach. The same applies to law especially as the concept of multiple discrimination, which includes intersectional discrimination, has been coined in the meantime. Nevertheless, legal science inherited a smaller number of publications on implementation of the intersectional approach than other disciplines, which is one of the reasons that this edited volume is dedicated to the issue of intersectional discrimination. Our attention is focused on the intersectional discrimination of women and girls with disabilities, because we wanted to offer readers a book in which the position of this vulnerable and marginalized group will be considered from the point of view of different branches of law (human rights law, anti-discrimination law, civil law, family law, company law, labour law, social security law, tax law and criminal law), as well as from the point of view of several other disciplines (social policy, economic analysis of law, law and religion, sociology, and criminology). We also wanted to offer an evaluation of legal responses to intersectional discrimination of women and girls with disabilities.

By publishing this book, the University of Belgrade Faculty of Law continues the series of significant steps, taken over the last decade, in promoting inclusive culture in higher education. With the conviction that we can't talk about academic and scientific excellence today, if higher education is not inclusive, the University of Belgrade Faculty of Law carried out several activities related to the education of students on the principles and values of equality and the fight against discrimination. This included the enrichment of study programs by adding Minority Rights as a new course, as well as introducing legal clinics that have been consistently successful in training students in understanding discrimination. This is especially important for the Legal Clinic for Discrimination Issues, which was founded in order to be a support for vulnerable population, i.e. to provide support to these persons in situations where their rights are most threatened. In addition, this legal clinic gave their participants the opportunity to react to the systemic discrimination, as well as to write letters to the relevant state authorities to warn them about omissions in the formulation of relevant regulations and their inconsistent application in practice.

The Faculty of Law's efforts to promote an inclusive culture in higher education are also reflected in the organization of summer schools and conferences dedicated to vulnerable groups. In 2010, a five-day summer school named "Prohibition of discrimination against persons with disabilities" was organized in cooperation with the Open Society Fund in Belgrade, the Faculty of Law and the International Institute for Human Rights and Peace from Caen (France), the Ombudsman, the Ministry of Human and Minority

Rights, the Ministry of Labour and Social Policy and the National Organization of Persons with Disabilities of Serbia. The school, which was attended by a total of 100 students, aimed to answer the unresolved questions of discrimination of persons with disabilities, to shed light on the current situation in a systematic and multidisciplinary manner, to indicate ways of overcoming the weaknesses of regulations in the field of protection of persons with disabilities, as well as to facilitate the implementation of new normative solutions aligned with international and European standards in this field. One of the results of the very successful summer school was the publication of the edited volume *Prohibition of Discrimination against Persons with Disabilities*, prepared by Prof. Dr. Jovica Trkulja, Prof. Dr. Branko Rakić and Dr. Damjan Tatić (Faculty of Law, University of Belgrade / National Organization of Persons with Disabilities of Serbia / Službeni glasnik, Belgrade, 2012).

Eleven years later, the University of Belgrade Faculty of Law, with the support of the UN Agency for Gender Equality and Women's Empowerment UN Women, organized the conference "Gender (in)equality of persons with disabilities". The conference was held under the auspices of the scientific project "New Quality in Education for Gender Equality – Strategic Partnership for the Development of Master`s Study Program Law and Gender (LAWGEM)", which is being implemented by the University of Belgrade and the Universities in Saarland (Germany), Cádiz (Spain) and Örebro (Sweden), as well as the Italian University *LUMSA*. The key task of the researchers in this project is to establish the study program for the master's academic studies "Law and gender", while other tasks are related to the publication of a textbook, which contains texts for all mandatory and optional courses of the new study program, the establishment of a legal clinic for gender equality, establishment of an online platform for lifelong learning about gender equality, and the creation of a questionnaire for the empirical research of the views of lecturers on the most important aspects of gender equality.

Bearing in mind how important the risk of intersectional discrimination against women and girls with disabilities is to the creation of conditions for effective implementation of the principle of gender equality, the University of Belgrade Faculty of Law organized a conference dedicated to this issue. The Scientific Committee of the conference consisted of: Prof. Dr. Dragica Vujadinović (University of Belgrade Faculty of Law), Prof. Dr. Ivana Krstić (University of Belgrade Faculty of Law), Prof. Dr. Ljubinka Kovačević (University of Belgrade Faculty of Law), Ana Pavlović, Ph.D. candidate (University of Belgrade Faculty of Law), Prof. Dr. Thomas Giegerich (*Universität des Saarlandes – Europa Institut*), Dr. Mareike Fröhlich (*Universität des Saarlandes – Europa Institut*), Prof. Dr. Marco Evola (*Libera Università degli Studi Maria Ss. Assunta di Roma/Palermo*), Prof. Dr. Mª Isabel Ribes Moreno (*Universidad de Cádiz – Facultad de Ciencias del Trabajo*) and Prof. Dr. Susanne Strand (*Örebro universitet – Institutionen för juridik, psykologi och socialt arbete*). Representatives of several associations of persons with disabilities (Central Asian Forum for Persons with Disabilities, Association of Women with Disabilities *Шырак*, Women's Foundation *CERMI* from Spain, *Disability Rights International*, NGO "Iz kruga – Vojvodina"), as well as students with disabilities participated in the conference, and pointed out the biggest problems they're facing, especially in the field of education and employment.

Presentations at the conference were followed by a lively discussion, concluding that the inclusion of persons with disabilities is not going to be possible without raising awareness of the judicial office holders, political decision makers and the society as a whole about these issues. It was also concluded that it is necessary to encourage lecturers and students of law schools to deal more deeply with issues of intersectional discrimination, especially discrimination of persons with disabilities.

The publication of the edited volume *Ukrštena diskriminacija žena i devojčica sa invaliditetom i instrumenti za njihovo osnaživanje / Intersectional Discrimination of Women and Girls with Disabilities and Means of their Empowerment* should contribute to the achievement of some of the indicated goals. This book offers theoretical and practical insights into issues of importance for the legal position of persons with disabilities in general, and women and girls with disabilities in particular. The papers included in the book will help explain how disability and sex/gender intersect in the context of social, political and economic processes, as well as expound on legal instruments that contribute to the creation of conditions for effective enjoyment of human rights and fundamental freedoms for all. The hope remains that with the publication of this edited volume, a firm step forward will be made in the efforts of the University of Belgrade Faculty of Law to improve the visibility of intersectional discrimination, and to contribute to its solution by systematizing the existing knowledge in this field, as well as through methodological innovations and consideration of a multitude of topics from all of the basic legal disciplines and some other scientific disciplines. We are also hoping that the contributions published in the edited volume will inspire other scholars to consider disability as an analytical category and to include it in their research on a regular basis.

The articles are grouped into ten chapters, with a different number of articles within each chapter. In a sense, this reflects the incidence and prevalence of discrimination against women and girls with disabilities in certain segments of social relations. At the same time, all the articles together form a whole, since they are connected thematically, and are aiming towards the same goal – a critical assessment of the content and limitations of the relevant regulations and public policies and measures undertaken to establish essential equality in society.

The edited volume starts with the paper by *Dr. Dragica Vujadinović*, Full Professor of the University of Belgrade Faculty of Law, which is dedicated to the theoretical and methodological assumptions of a critical analysis of gender-based discrimination in the general sense and related to women and girls with disabilities. The authoress explores the concept of disability, as well as the place of the intersectional approach in feminist work on gender equality. Special attention is paid to the critical deconstruction and overcoming of intersectional discrimination, while pointing out the necessity of adopting an inclusive intersectional approach to gender justice and justice for people with disabilities in democratic societies.

Our book has been enriched with several papers in the field of human rights law and anti-discrimination law, starting with the contribution entitled "Protection of women with disabilities in the anti-discrimination law of the European Union", written by Full Professor of the University of Zagreb Faculty of Law *Dr. Ivana Grgurev*. The authoress starts from the premise that persons with

disabilities are not adequately protected from discrimination in the EU law, with low visibility of women with disabilities. This is because under the EU law, the protection of persons with disabilities only covers their protection in the field of employment and occupation, while the multiple discrimination of women is only mentioned in the preambles of two directives, and the Court of Justice of the European Union does not recognize the concept of intersectional discrimination in its judgements. At the same time, it points out the obligation of the Court of Justice of the European Union to interpret the law of this organization in accordance with the Convention on the Rights of Persons with Disabilities, which, due to the implementation of the human rights model, could ensure the protection of women with disabilities from discrimination. Consequently, the paper carefully and accurately analyzes and critically reviews the relevant case law of the Court of Justice of the European Union, as well as its consequences on the position of women with disabilities in the EU labour market.

Research associate of the Institute of Comparative Law in Belgrade *Dr. Mario Reljanović* devoted his paper to the obligations arising from Article 6 of the Convention on the Rights of Persons with Disabilities. More precisely, it is about the obligations that the states take on regarding the multiple discrimination of girls and women with disabilities, bearing in mind that Dr. Reljanović's research is limited to their discrimination in education and employment. Namely, the author considers these fields indicative of good and bad practices, as well as systemic and structural discrimination. In this sense, the paper examines the necessity of proactive actions by the states and introducing sanctions for multiple and intersectional discrimination against girls and women with disabilities. This is followed by a review of the states' obligations to build a solid legal framework for protection against discrimination and to act with measures aimed at increasing the visibility and achieving the factual equality of girls and women with disabilities.

The implementation of the Convention on the Rights of Persons with Disabilities was also analyzed by *Dr. Damjan Tatić*, legal advisor to the National Organization of Persons with Disabilities of Serbia and former Vice-president of the Committee for the Rights of Persons with Disabilities. Dr. Tatić devoted his paper to the recommendations that this supervisory body of the United Nations sent to the Republic of Serbia in 2006, regarding the position of women and girls with disabilities. The author particularly discussed the issue of acting on the recommendations of the Committee for the Rights of Persons with Disabilities, and identifying concrete measures that can contribute to the prevention of discrimination and greater inclusion of women and girls with disabilities in society.

Dr. Valentina Gennadyevna Mikrina, Associate Professor at the MGIMO (U) of the Russian Ministry of Foreign Affairs (Odintsovo branch), examines the impact of multiple discrimination on the exercise of human rights by women and girls with disabilities. This issue was discussed in the context of the key sources of law of international origin, as well as the relevant legislation of the Russian Federation. This is just one in a series of papers offering a more detailed insight into the legislation and case law of certain countries, which are very valuable for comparing different solutions, and for identifying

problems that impede the realization of human rights of women and girls with disabilities in almost all of the European countries. Identifying these problems and gaining insight into legal and other measures to overcome them, as well as learning about the effectiveness of those measures, will help in finding the solutions that can serve as inspiration or a template for other legislators, but also with identifying the major obstacles that accompany the realization of human rights by the vulnerable and marginalized individuals and groups.

Starting from the premise that the consequences of endangering and damaging the environment hit women and girls with disabilities particularly hard, *Ljubomir Tintor*, a Ph.D. student at the University of Belgrade Faculty of Law, analyses the environmental protection regimes that take gender equality into account. More specifically, these are the climate change, biodiversity and desertification regimes. They were analyzed in this paper from the perspective of disability as well as the principle of gender equality, with special reference to relevant international instruments. Importance of this paper is reflected in the fact that the author made useful *de lege ferenda* proposals for improving the position of women and girls with disabilities, especially in terms of overcoming the harmful effects of climate change.

Ljubomir Tintor's paper also deals with forced migrations (due to the harmful effects of climate change), but a proper evaluation of the position of women and girls with disabilities has to include a comprehensive assessment of the position of women and girls in mixed migration flows. The paper written by *Bojan Stojanović, Bogdan Krasić and Zoran Stojanović* from Belgrade is dedicated to this issue, as they exhaustively analyzed the rights of female asylum seekers, refugees and migrants with disabilities. It has been proven that the aforementioned persons represent one of the most vulnerable groups, whose position has been further aggravated by the Covid-19 pandemic.

Ivana Nikolić, a Ph.D. student at the University of Belgrade Faculty of Law presents in her contribution the results of research related to international instruments that can facilitate the prohibition of forced sterilization of women and girls with disabilities. As this tool of systemic discrimination of marginalized groups is still used in practice, the authoress explains the reasons behind such actions, as well as the fundamental problems that are causing it. The paper then continues with the research into the inability of international law to eradicate forced sterilization, and proposes measures to establish alternatives.

The part of the edited volume that is closely devoted to human rights is rounded off by two papers written by young authors who researched the protection of the rights of women and girls with disabilities, in special administrative proceedings before the ombudsman, as well as in court proceedings. *Vasilije Marković*, a Research Assistant at the Institute of Comparative Law in Belgrade, writes about the role of the ombudsman in fighting intersectional discrimination against women with disabilities. The advantages of this legal instrument are flexibility and wide range of actions of the ombudsman, and the key proposal for its improvement is to have a single, integrated institution that would provide protection against discrimination on all prohibited grounds. This proposal has been formulated upon detailed analysis of the problem of establishing an appropriate comparator in intersectional discrimination, as well as upon analysis of solutions in the Swedish and Croatian legal

systems, and a detailed consideration of the legal framework and case law of the Commissioner for the Protection of Equality in the Republic of Serbia.

On the other hand, the paper of *Milica Midžović*, a Teaching Assistant at the University of Priština with a temporary seat in Kosovska Mitrovica Faculty of Law, deals with the marginalization of women with disabilities in the judicial system of the Republic of Serbia. By ratifying a series of international conventions, the Republic of Serbia undertook to provide everyone on its territory with all the needed protection against discrimination, while the main obstacles to the effective realization of judicial protection of the right to equality are, in the opinion of the authoress, related to the length of the court proceedings, the lack of trust in the courts, and insufficient training and insensitivity of judges to discrimination. This is accompanied by the lack of information of persons with disabilities about the possibility of obtaining judicial protection against discrimination, as well as the inaccessibility of courts.

The third part of the edited volume is dedicated to civil and family law. In this part, *Prof. Dr. Katarina Dolović Bojić* and *Doc. Dr. Snežana Dabić Nikićević* from the University of Belgrade Faculty of Law analyse the position of persons with disabilities in the field of legal capacity (legal agency). This traditional, although very much current topic is viewed from the position of possible deprivation of legal capacity, as well as from the position of providing legal aid (assistance) to adults. One of the reasons for writing this paper is the upcoming incorporation of solutions and ideas from the Convention on the Rights of Persons with Disabilities into the legislation of the Republic of Serbia, through amendments to the Family Law. The authors point to the presumed reasons for the changes, but also to the expected legal consequences and results, with arguments for the different interpretations found in literature.

Associate Professor of the University of Belgrade Faculty of Law *Dr. Uroš Novaković* investigates the problem of domestic violence from the perspective of women with disabilities. At the same time, the author opted for a multidisciplinary approach, and considered the problem in question from the perspective of the criminal, family and labour law. The research sample includes sources of law of international origin, as well as sources of law of the Republic of Serbia. The paper emphasizes the breadth of the spectrum of behaviour that can be used to establish domestic violence over women with disabilities. Also, all the major obstacles that women with disabilities face in terms of using the safe house accommodation have been identified – from the inaccessibility of these facilities to the absence of sign language interpreters.

The edited volume also contains two papers on company law, since important instruments for empowering women with disabilities can be found in this field. *Dr. Nebojša Jovanović*, Full Professor at the University of Belgrade Faculty of Law, meticulously analyzed the legal position of companies for employment of persons with disabilities in the Republic of Serbia. This issue is analysed both from the perspective of the legal regime of company creation, legal form and activity, as well as from the perspective of the economic privileges these companies enjoy, especially in the form of state aid. This includes a comparison of the legal position of companies for employment of persons with disabilities with the position of other employers who have the obligation to hire persons with disabilities, but do not have the same privileges.

The establishment of social enterprises can contribute to the empowerment of women with disabilities, which is why *Tijana Kovačević*, Ph.D. student at the University of Belgrade Faculty of Law, analyzed the key legal aspects of employing people with disabilities in social enterprises. This included the advantages and disadvantages of the development of the so-called third sector, as well as similarities and differences between social enterprises, on the one hand, and "traditional" enterprises and other legal entities, on the other hand. This gives an insight into the manner and conditions under which social enterprises contribute to the creation of jobs, as well as the manner in which they support and/or substitute the welfare state, especially with regard to issues related to social protection.

The edited volume also includes several papers that analyse the employment and work of women with disabilities, including the difficulties they traditionally face when seeking and maintaining employment, as well as difficulties with advancement in their professional careers. *Dr. Ljubinka Kovačević*, Full Professor at the University of Belgrade Faculty of Law, examines the risk of discrimination against persons with disabilities in the world of work, their employment models (shelterted employment, open market employment with or without reasonable accommodation, and quotas for employment of persons with disabilities) and the combination of negative stereotypes related to disability and negative gender stereotypes that accompany the employment and work of women with disabilities. A part of this paper is dedicated to the fundamental concepts of intersectionality, as well as the definition, regulation and comprehension of intersectional discrimination, and the challenges with implementation of the intersectional approach in law. In her paper, Prof. Dr. Kovačević reviews the advantages and challenges of implementing the intersectional approach in labour law, and concludes that accepting this approach could help with the efforts to improve the employability and working conditions of women with disabilities. At the same time, the paper points out the difficulty of establishing a comparator in intersectional discrimination, as well as the fact that the concept of intersectionality is somewhat vague, making it impossible to establish a clear scope of application of anti-discrimination legislation, or the intensity of its impact on social relations. Finally, the authoress points to the proactive duties of public authorities and employers aimed at promoting equality, and to social dialogue, as powerful instrument for preventing intersectional discrimination.

Dr. Lazar Jovevski, Full Professor at the "Ss. Cyril and Methodius" University "Iustinianus Primus" Faculty of Law, devoted his paper to issues related to the position and treatment of women at work and in employment relationships in general, as well as the position and treatment of women with disabilities. In addition to the legal analysis, the research of Prof. Dr. Jovevski includes wider social, psychological and ethical issues in relation to the dilemma of whether women are a special group in the world of work or are completely equal to men. The author also analyses the need for special double protection of women with disabilities in the labour market.

The position of women with disabilities on the labour market was also analysed by the University of Cadiz Professor *Dr. Thais Guerrero Padrón*. The authoress paid special attention to the issue of integration of women with disabilities into the labour market in Spain, which was viewed through the prism

of the findings of the United Nations Committee on the Rights of Persons with Disabilities regarding compliance of Spanish legislation and case law with the Convention on the Rights of Persons with Disabilities. It was concluded that in Spain, the concept of disability and the treatment of disability at the political and legal level were developed in parallel with the change of approach to disability at the international and European level, together with the affirmation of the genderization of the disability policy. Furthermore, the paper carefully analyzes recent legal measures adopted in response to the findings of the Committee on the Rights of Persons with Disabilities, with delicate consideration of their actual effectiveness in such a peculiar labour market as the Spanish one. This includes a review of the Law 15/2022, of July 12, 2022, which introduced the concept of intersectional discrimination against women with disabilities into the Spanish law.

Associate Professors at the Cádiz University *Dr. Vanesa Hervías Parejo* and *Dr. Francisca Bernal Santamaría* wrote a paper dedicated to the discrimination of young women with disabilities in the labour market. This topic was analysed from the perspective of intersectionality, based on the idea that the position of young women with disabilities cannot be understood or explained by only taking into account the gender perspective, and that it is necessary to articulate multiple variables that are interconnected and reproduced through their mutual relationship. These issues were discussed in the light of the relevant norms and public policies in Spain, as well as from the point of view of feminist social work. Special attention in the research was paid to the influence of the family environment and strategies for reconciling personal, family and professional life on the training and employment of women with disabilities.

The position of women with disabilities in the Spanish labour market is also discussed in the paper of the Cadiz University Professor *Dr. M.ª Isabel Ribes Moreno*. The main focus of the paper is the wage discrimination, where Spain and other EU Member States were included in the sample. It also includes valuable analysis of the initiatives for adoption of the Minimum Wage Directive in the European Union and the Pay Transparency Directive. These initiatives were analysed in relation to the earnings of women with disabilities. In addition, the authoress offered suggestions for improving the situation in Spain and the European Union. Her conclusions are convincingly illustrated by statistical data on the unemployment rate, employment rate and activity rate in the European Union, while highlighting the problems related to the absence of reliable and comparable statistics, which is crucial for complete understanding of the real impact of disability on wages.

Dr. Valentina Franca, Associate Professor of the University of Ljubljana Faculty of Public Administration and *Adrijana Mitrić*, Teaching Assistant at the University of Ljubljana School of Economics and Business investigate the problem of workplace violence by third parties. Their research included employees in public institutions for higher education in the field of social sciences in Slovenia, with special attention paid to employed women with disabilities. This paper offers insight into the way workplace violence by users of the employer's services is regulated in international and Slovenian law, and gives proposals for the protection of vulnerable categories of employees from third-party violence.

The group of papers dedicated to the labour law aspects of the position of women with disabilities was enhanced by the paper "The role of trade unions in tackling multiple and intersectional discrimination of women with disabilities", written by *Dr. Tijana Ugarković* and *Marko Jović* from Belgrade. The paper examines the intersection of disability and gender in the field of labour law and social security law. It delves into the importance of connecting associations of persons with disabilities with trade unions, which, although not recognized in the Convention on the Rights of Persons with Disabilities, do have a mechanism for social dialogue, most effectively realized in practice through the principle of participation. The authors skilfully point out that all citizens must participate in achieving social change concerning equality, and that the special responsibility lies with the state and with the social partners. Also, it wouldn't be possible to achieve transformative equality without the trade unions, nor to strengthen social solidarity or participatory democracy.

The paper written by *Dr. Mila Petrović*, Assistant Professor at the "Union" University Faculty of Law in Belgrade, offers the results of the research into the legal position of employees whose disability was caused by workplace injury or by occupational disease, with notable reference to Serbian law. This research problem deserves special attention, considering that in the Republic of Serbia, persons with limited capability for work have a disadvantageous position on the labour market, but are also denied benefits from the pension and disability insurance. Special attention in the research has been devoted to women with disabilities that were caused by occupational risks during the Covid-19 pandemic.

Jovana Rajić-Ćalić, Research Assistant at the Institute of Comparative Law in Belgrade, examined the issue of discrimination against girls and women with disabilities in the fields of education and employment, since discrimination in the field of education often "spills over" into the field of employment. Therefore, the problems of unemployment and poverty of women with disabilities can be explained, among other things, by their insufficient education, i.e., the lack or obsolescence of knowledge, skills and abilities, due to discrimination of persons with disabilities in the field of education, as well as by the mismatch between the education system and the demands of the labour market. In this regard, it is important to note that girls and young women with disabilities drop out of primary and secondary school more often, but also less often graduate from colleges than boys and young men with disabilities, who are much more often encouraged to look for work, while girls and women with disabilities are more often directed towards the social benefits.

Gender stereotypes that accompany the work of women with disabilities, as well as women in general, are often related to the difficulties of harmonizing professional and family duties. This is particularly serious for women with disabilities, especially when we take into account the difficult access to child care services, as well as the fact that such services are often expensive, so even when they do exist, they do not facilitate the integration of women with disabilities into the labour market. Also, mothers with disabilities often face the prejudice that they are not capable of being good parents, which can further deter them from using assistance services, for fear that their child will

be taken away from them. Some of these problems were pointed out by *Mina Kuzminac*, Teaching Assistant at the University of Belgrade Faculty of Law.

These studies are accompanied by research into key social security law aspects of the position of women with disabilities. *Dr. Filip Bojić*, Assistant Professor at the University of Belgrade Faculty of Law, analyses the place of women with disabilities in the pension and disability insurance system. This includes the research of the conditions for exercising the right to old-age and disability pensions, in particular the conditions concerning the minimum length of insurance, since unemployment or intermittent participation in the labour force prevent women with disabilities from contributing equally to the financing of pension and disability insurance. On the other hand, women with disabilities who meet the conditions for exercising the right to these benefits encounter the problem of their modest amount, since unequal pay for men and women for the same work is reflected in the amount of the pensions. In this sense, the author makes several *de lege ferenda* proposals for improving the protection of women with disabilities against the risk of old age, disability or death of a family member, both within the framework of mandatory social insurance and through their participation in voluntary pension funds.

There are three papers in the edited volume dedicated to the (formal and informal) care of persons who are dependent on the care provided by others, since persons with disabilities may need a whole range of services in the field of healthcare and social protection, which can be provided either at home or in institutions. The topicality of this research is conditioned by the increase in the number of people who, due to old age, illness and disability, need help for normal functioning. *Dr Marija Dragićević,* Assistant Professor at the University of Niš Faculty of Law, provides a critical review of the system of long-term care in the EU Member States, as well as in the Republic of Serbia. This research is very valuable because of the author's proposals to improve the Serbian long-term care system, since exercise of the relevant rights is accompanied by a series of problems and challenges, as long-term care hasn't been set up as a separate branch of social insurance, and because various forms of informal assistance exist. Consequently, a more skilful balancing between institutional and non-institutional support, between material and non-material aid, and between activities at the national and local level is suggested.

This is followed by two papers examining family (informal) caregiving, which is discussed in the light of the principles of solidarity and equality, with special reference to gender equality, since women regularly appear as family caregivers. *Dr. Sanja Stojković Zlatanović*, Research Fellow at the Institute of Social Sciences in Belgrade, investigates the possibilities for the reconceptualization of family (informal) caregiving in the period after the pandemic, using the examples of Japan, Germany and Sweden, as countries where the position of family caregivers has been legally regulated. Based on these insights, proposals were formulated for regulating the position of caregivers in the labour and social security law of the Republic of Serbia. Special attention in the research has been devoted to the challenges of recognizing, realizing and protecting the basic labour and social rights of vulnerable social groups, taking into account the limitations of the mod-

ern social security system in the process of adapting to changed circumstances in the world of work and society in general.

The paper written by *Kristina Balnožan,* Senior Judicial Associate for the Basic Court in Pančevo, deals with the issue of family (informal) caregiving. The author deals with the problem of unpaid work of women related to the care of persons with disabilities, as well as other family members who are dependent on the care provided by others, and in the light of the premise that effective protection of persons with disabilities presupposes the provision of appropriate support to the caregivers. The author also analyses the impact of the crisis caused by the Covid-19 pandemic on the regulation of the position of caregivers, since the crisis, besides causing more negative consequences, also influenced the increased interest in informal care. In this sense, the necessity of designing and implementing a series of labour law and social security law mechanisms of importance for preserving and improving the skills and abilities of caregivers, and for ensuring their economic and social security, has been pointed out.

A separate chapter in the edited volume has been dedicated to tax law, since the position of persons with disabilities in the tax system is important for prevention of intersectional discrimination. The ability-to-pay principle mandates the assessment of the tax burden in proportion to the taxpayer's economic capacity, which is why tax systems should take into account the impact that disability can have on the taxpayer's economic capacity. The same applies to the taxpayer's economic capacity of persons who provide care and financial support to disabled family members. *Dr. Teresa Pontón Aricha,* Associate Professor at the Cadiz University Faculty of Law, investigated this issue in light of the personal income tax regulations in Spain, and detailed its contribution to preventing double discrimination of women with disabilities. In this sense, important proposals were made for the improvement of legal solutions in this field, with the aim of achieving full equality in the tax system.

The aforementioned issue was also considered from the perspective of the tax system of the Republic of Serbia, in the paper written by *Lidija Živković*, Teaching Assistant at the University of Belgrade Faculty of Law. The authoress examines the ability of the Serbian tax system to take into account the impact of disability on the taxpayer's economic capacity, as well as on the economic capacity of taxpayers who provide care and financial support to persons with disabilities. This included an assessment of the broader tax related legal framework from the point of view of the needs of persons with disabilities, as well as individual tax related legal provisions specifically intended to improve the (economic) position of these persons. Importance of the results of this research lies in the fact that the insensitivity of the creators of the Serbian tax policy to the needs of citizens who are economically disadvantaged due to their gender, disability or other personal characteristics is pointed out.

Although the issue of employment quotas for persons with disabilities had already been discussed in several papers in the chapter of the edited volume devoted to the labour law and employment policy, a proper understanding of this problem requires that it be considered from the perspective of law and economics. The paper of the National Coordinator of the International Labour Organization in the Republic of Serbia *Dr. Jovan Protić* is dedicated to

the effectiveness of the quota system for the employment of persons with disabilities in the Republic of Serbia. The author doesn't only analyze the ability of employment quotas to increase the employment rate of people with disabilities, but also the effectiveness and economic aspects of employment quotas in general. The results of the research are significant for understanding the position of persons with disabilities, since the quota system enables the integration of these persons into the labour market, primarily thanks to the increase in labour supply, the reduction in expenditures for social transfers and the increase in GDP *per capita*. We believe that the readers of the Edited volume will find the author's suggestions for improving the legal framework towards ensuring greater effectiveness of employment quotas for persons with disabilities, that is, ensuring their greater employment, useful.

Although protection of persons with disabilities under the criminal law is the last resort (*ultima ratio*), it has to be considered to get a full understanding of the legal position of women and girls with disabilities. It is from this perspective that the Full Professor of the University of Belgrade Faculty of Law and Judge of the Constitutional Court of Serbia *Dr. Milan Škulić*, and Associate Professor at the same faculty *Dr. Vanja Bajović*, decided to investigate the key aspects of sexual abuse against women with disabilities in Serbian criminal law and case law. This included a meticulous consideration of the features of the criminal offence of sexual abuse of a helpless person, as well as the possibility to redefine it in accordance with The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention). This research seems significant due to the fact that women with disabilities are often exposed to various forms of abuse, including sexual abuse, but that the official statistics related to reporting and conducting criminal proceedings for the crime of sexual abuse of a helpless person are defeating. On the other hand, it was pointed out that the Criminal Code of the Republic of Serbia defines the criminal offense of sexual abuse of a helpless person, in correlation with the criminal offense of rape, as non-consensual sexual acts. Therefore, the basic feature of this criminal offense is exploitation of the victim's helplessness, which threatens to incriminate voluntary sexual relations of persons who are considered "helpless". It's important to point out that Family Law classifies sexual relations with a helpless person as a form of domestic abuse. Voluntary consent of persons with disabilities has also been critically re-examined, as they often have no other option but to agree to the sexual abuse, in fear of consequences of refusal and due to their dependent position on the perpetrator.

The complex issue of sexual offenses committed against women and girls with disabilities is discussed in depth by *Dr. Nataša Mrvić Petrović*, Full Professor and Principal Research Fellow at the Institute of Comparative Law in Belgrade, and *Dr. Dragan Obradović*, Research Associate and Judge of the High Court in Valjevo. Their paper cites solutions from German and Slovenian law, and emphasizes the relevance of the provisions of the Istanbul Convention. In addition to the key substantive legal issues, the paper also illuminates sensitive points of the procedure in which the victims are persons with disabilities, especially persons with mental disorders. Namely, women and girls with disabilities face a high risk of sexual violence, and they encounter numerous difficul-

ties in terms of obtaining criminal protection. The authors, therefore, analyze the crucial obstacles in criminal prosecution and trial, and indicate the need for changes in the approach to regulating crimes of sexual violence (rape and forced intercourse with a helpless person). Changes in criminal legislation can, however, improve the protection of sexual integrity of women with disabilities only if they are accompanied by changes in the social approach to this group of people.

Aleksandar Stevanović, Research Associate at the Institute for Criminological and Sociological Research in Belgrade, analyzed the position of persons with disabilities in the criminal justice system. The author considered the legal and criminological aspects of this issue, and identified material and procedural provisions of the criminal legislation that can lead to indirect discrimination of persons with disabilities. He also analyzed the content of major criminological theories, the current paradigm of anti-criminal reaction, as well as the practical application of the criminal justice mechanism in case of persons with disabilities.

As the roots of discrimination against women with disabilities are found, among other places, in the ideological and value systems established by religions, especially the traditional ones, *Dr. Branko Rakić*, Full Professor at the University of Belgrade Faculty of Law devoted his paper to the Christian (East and West), Islamic and Jewish views of women and persons with disabilities, both within the organizational structure and activities of the church and religious communities, and society in general. The author cleverly concludes that the views of the so-called Abrahamic religions about the position of women and persons with disabilities in the context of implementation of religious rules as state rules or the influence of religions on the construction of state legal systems – must be analyzed through the historical conditions in which these religions originated and developed. In addition, it is necessary to take into account the essence of their teachings, i.e. the fact that the so-called Abrahamic religions are the religions of love, mercy and equality.

Finally, the readers of the Edited volume have the opportunity to get to know the results of the research of the position of women and girls with disabilities from the sociological perspective. The paper written by *Gordana Rajkov*, who unfortunately passed away in 2022, and *Sanja Nikolin*, offers the results of the research of participation of persons with disabilities in political life. This important issue was examined in the light of elections held in the Republic of Serbia during the Covid-19 pandemic, with the analysis of pandemic impact on the behavior of persons with disabilities in Serbia as voters and more generally, as active citizens. The authors suggest urgent short- and medium-term measures for eliminating irregularities in the legal system, as well as measures for the improvement of polling stations' accessibility and safety. This particulary included proposals concerning inclusion of alternative voting methods and inclusive legal reform.

Mila Đorđević, Teaching Assistant at the University of Belgrade Faculty of Law, discusses the issue of accessibility of cities in the Republic of Serbia for women with disabilities. This issue was investigated from the perspective of social sustainability, as a concept that presumes full integration of all residents of a territory, regardless of their individual characteristics. In this sense, the interaction between gender and disability in relation to the social sustainability

of cities was examined, especially taking into account the safety of women and persons with disabilities and their opportunities for movement within cities.

The work of *Dr. Filip Mirić* from Niš draws attention to the real problems of people with disabilities, especially regarding their adaptation in the social environment. The author clearly points out the key problems and gives his opinion and recommendations for how to overcome them or mitigate their impact. In addition to the scientific value, Dr. Mirić's findings also have a practical value, because almost all issues of importance for successful communication with persons with disabilities have been considered. This paper is particularly valuable because it provides ideas for further extensive scientific research on a sample that would include a significant number of people with different forms of disability.

Pavle Novevski, a trainee lawyer from Belgrade, analyzes the role of the media in the field of discrimination against women and girls with disabilities, since the media play an important role in shaping modern society, primarily by influencing the creation of ideas and determining what is acceptable in a society and what isn't. Visibility in the media has therefore become a presumption of overall visibility, which is why the author points out that the media, as a rule, do not provide visibility to the marginalized and vulnerable groups. Therefore, the paper analyzes the role of the media in the discrimination of women and girls with disabilities from both the Serbian and international perspective. The author's findings are illustrated by the media image of women with disabilities, with a focus on the (lack of) space that is given to their presence and their voice; the author also provided useful suggestions to improve this situation.

The editors of the Edited volume owe their deepest gratitude to the authors for their enthusiasm, for their great effort and for the excellent papers that enriched our collection. Having in mind the importance of participation in creating a truly inclusive society, some of the authors are persons with disabilities. Also, some of the authors are Ph.D. students. This gives us great pleasure, especially because of how important it is to sensitize young people regarding prevention of discrimination of persons with disabilities and because of how important it is to get them accustomed to noticing research problems in this field.

Distinguished reviewers of Edited volume and distinguished reviewers of papers from Bosnia and Herzegovina, Montenegro, Italy, Mexico, Poland, Portugal, Republic of Srpska, North Macedonia, Slovenia, Serbia, Croatia and Spain made significant contributions to the published papers. Their hard work, helpfulness and appropriate and encouraging suggestions were very valuable. Without their contribution, the papers in our Edited volume wouldn't have been as good, for which we would like to express our deepest gratitude.

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UVOD

INTRODUCTION

Prof. Dr. Dragica Vujadinović,
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THEORETICAL FRAMEWORK FOR CONSIDERING INTERSECTIONAL DISCRIMINATION OF WOMEN AND GIRLS WITH DISABILITIES*

Abstract

Persons with disabilities deserve the same treatment by the state and society as all other citizens, as well as special care for their physical and/or mental health problems, in order to get the equal concern and respect for their human dignity. People with disabilities have human rights that they are entitled to enjoy on an equal basis with non-disabled people. However, persons with disabilities remain mostly invisible in law and political/social/economic developmental strategies at the international, European, and national levels, as well as in all spheres of social life. The medical model of disability as illness must be replaced with the social model of inclusion, which critically reconsiders the reduction of disability to illness and weakness/disadvantage. The social model of disability criticizes the isolationist treatment of persons with disabilities as created by society, and pledges to change society in that regard. The social model of disability emphasizes the full inclusion of persons with disabilities in the social, political, economic, and cultural life, as well as the removal of physical, social, legal, political, and attitudinal barriers that prevent persons with physical or mental impairments from taking an active part in social life, on an equal footing with all other social subjects.

The introductory part will outline the basic categorical apparatus and clarify the sense, content, and importance of addressing the intersectional context of combined gender-based and able-based discrimination. The first chapter is devoted to the theoretical-methodological assumptions of critical analysis within feminist disability studies of gender-based discrimination in general, particularly discrimination against disabled women and girls. The second chapter focuses on the concept of disability, attempting to differentiate its traditionalist meaning within social theory and practice from its critical deconstruction within feminist disability studies. The third chapter explores the meaning of the intersectional approach within feminist considerations of gender equality/ gender justice, with

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an emphasis on intersectional discrimination against female persons with disabilities/ disability justice. The main focus is on the critical deconstruction and overcoming of intersectional discrimination, and its embeddedness in multiple and mutually overlapping power relations. The fourth chapter expands on the content, insights, and theoretical-methodological framework of feminist disability studies. The concluding remarks emphasize how democratic societies must take an inclusive and intersectional approach to gender justice and disability justice in their efforts to promote and achieve social justice.

Key words: *Disability; Discrimination; Power relations; Gender justice; Disability justice.*

I INTRODUCTION

This paper's theoretical aim is to highlight how the discrimination of female persons with disabilities as well as of all persons with disabilities continues to go unnoticed. In other words, the aim is to use feminist disability studies to deconstruct the power relations inherited in different grounds of discrimination against all disabled vulnerable groups, particularly disabled female persons (the case in which patriarchal power relations overlap with economic, political, and cultural power relations). The practical and political aim of this paper is to highlight the importance of fighting against multiple forms of discrimination against female persons and all persons with disabilities, fighting against power relations in the context of intersectional discrimination, and to advocate for the protection of the human rights and dignity of these vulnerable groups. Feminist disability studies have critical and deconstructing theoretical aims, as well as activist and practical aspirations. Feminist disability studies shed light on intersectional discrimination and its embeddedness in power relations, and inform policymakers about the roots of discrimination and ways to overcome and improve the real living conditions of female persons and persons with disabilities. Critical disability studies attempt to raise public awareness about the importance of viewing female and all persons with disabilities as "normal" members of the community, as well as to promote the social model of disability as critical for changing the dominant mindset and overcoming the marginalization and exclusion of these vulnerable groups.

The general public, as well as the political, economic, and intellectual elites, are not fully aware of the large number of people living with disabilities. The United Nations (UN) reports that around 10 per cent of the world population (around 700 million people) is living with disabilities, while the World Health Organization (WHO) reports that about 15 per cent of the world population (1 billion) is disabled, and states that this figure is increasing due to population growth, medical advances, and the ageing process.[1] Ac-

1 UN reports about the world's largest minority—10% of the world population. World Health Organization (WHO) reports about 15% of the world population (see: *projectasha.org*).

cording to the Organization for Economic Co-operation and Development (OECD), disability rates are significantly higher among groups with lower educational attainment: on average, 19 per cent of less educated people have disabilities, compared to 11 per cent among the better educated. Persons with lower education, persons living in poverty, children, and women are all more vulnerable to the disability problem. In this context, the World Bank estimates that 20 per cent of the world's poorest people are living with some kind of disability. On average, 19 per cent of less educated people have disabilities, compared to 11 per cent among the better educated. According to UNICEF, 30 per cent of street youth have some form of disability, and the World Bank reports that mortality for children with disabilities may be as high as 80 per cent in countries where under-five mortality as a whole has decreased below 20 per cent. UNESCO reports that 90 per cent of children with disabilities in developing countries do not attend school. According to the International Labor Organization (ILO), an estimated 386 million of the world's working-age people have some kind of disability, while unemployment among persons with disabilities is as high as 80 per cent in some countries. Oftentimes, employers assume that persons with disabilities are unable to work.[2]

Persons with disabilities have historically been subjected to egregious human rights violations. Yet despite well-documented and widespread harm, 700 million or even as much as one billion persons with disabilities remain largely neglected by the international laws, legal processes, and institutions that seek to address those violations, including crimes against humanity. Comparative studies on disability legislation show that only 45 countries have anti-discrimination and other disability-specific laws.[3]

In most OECD countries, women report higher incidents of disability than men. Generally speaking, female persons with disabilities are among those less educated, unemployed, and more exposed to discrimination and abuse. Women with disability are denied sexuality, but they are often sexually abused, even more frequently than other women.[4]

Concerning the EU framework, according to the report of the European Commission's (EC) department for Employment, Social Affairs and Inclusion[5], "people with disabilities are more likely to be out of work and living on low incomes than their non-disabled counterparts. They also find it more difficult to access the goods and services that most people take for granted. All this means that disabled people are at significant risk of poverty and social isolation... (P)articipation in the labor market represents a challenge for

2 Cited from UN Department of Economic and Social Affairs, "Disability. Factsheet on Persons with Disabilities", *https://www.un.org/development/desa/disabilities/resources/factsheet-on-persons-with-disabilities.html.*

3 *Ibid.*

4 Beleza, Maria Leonor, *Discrimination against women with disabilities*, Strasbourg, Council of Europe Publishing, 2003, *https://rm.coe.int/16805a2a17*.

5 European Commission, Employment, Social Affairs and Inclusion, "People with disabilities fighting poverty and social isolation", *https://ec.europa.eu/social/main.jsp?catId=89&furtherNews=yes&newsId=806&langId=en*.

many disabled people. One-sixth of the European Union's working age population is classed as disabled, but they struggle to find jobs. The employment rate for disabled people in the EU is about 50% compared to 68% for the rest of the population. And only around 20% of people with severe disabilities participate in the labor market... Even disabled people with a higher education are much less likely to be employed in high-level jobs than their non-disabled counterparts. Unfortunately, social isolation is as much of a danger as economic marginalization for people with disabilities. For example, one in two disabled people has never participated in leisure or sporting activities. One-third of Europe's disabled population has never travelled abroad or even taken a daytrip because of problems caused by inaccessible premises and services. Even socializing is a challenge as disabled people are less likely to see their friends and family on a regular basis compared to the non-disabled."[6]

The European Disability Forum (EDF) estimates that there are 100 million persons with disabilities in Europe, among which around one million segregated in residential institutions.[7]

The mentioned report on bad living conditions for persons with disabilities is from 2010. However, it seems that a systemic attempt to overcome the obvious discrimination of persons with disabilities is still lacking in the EC policy making. To give a recent example: in 2021, the President of the European Commission called for the Conference for the Future of Europe, and in May 2022, this Conference[8] announced the creation of a significant number of proposals that would lead to a more green, social, gender equality-based, digital, and solidary future Europe. However, despite a clear focus on social justice in these visionary proposals, the final outcomes and propositions of this important initiative have failed to address persons with disabilities. We could say that taking disability justice seriously is lacking here.[9]

Uldru and Mahlmaki[10] remark critically that women with disabilities remain invisible in social policies related to employment. They point additionally to the necessity of taking disability issues in the EU seriously: "Women with disabilities constitute 25.9 per cent of all women in the European Union and over 55 per cent of all persons with disabilities. There are thus more than 50 million women with disabilities in Europe, without counting those seg-

6 See European Commission, *People with disabilities – fighting poverty and social isolation*, 2010, https://ec.europa.eu/social/main.jsp?catId=89&furtherNews=yes&newsId=806&langId=en.

7 EDF, How many persons with disabilities live in the EU?, *https://www.edf-feph.org/newsroom-news-how-many-persons-disabilities-live-eu/*.

8 Council of the European Union, Joint Declaration on the Conference on the Future of Europe: Engaging with citizens for democracy – Building a more resilient Europe, *https://data.consilium.europa.eu/doc/document/ST-6796-2021-INIT/en/pdf*.

9 See: Alejandro Moledo and Alvaro Conceiro, `The Conference on the Future of Europe failed to address persons with disabilities`, *Social Europe*, 31st May, 2022, *https://socialeurope.eu/does-the-future-of-europe-include-disability3*.

10 Marine Uldru and Pirkko Mahlmaki, `Unemployed, underpaid, excluded – women with disabilities remain invisible in social policies related to employment`, *Social Europe,* 2 December 2022, *https://socialeurope.eu/making-women-with-disabilities-visible*.

regated in institutions (who are not even included in the statistics). Despite comprising a majority of persons with disabilities, however, European social policy does not often consider women with disabilities specifically, even though they endure lower employment and higher poverty."[11]

Evidently, there are important tasks ahead for critical disability theory, as well as states and societies in general, in terms of affirmative social policy and political and economic decision-making aimed at creating a better life for all persons with disability.

The disabled academic Mike Oliver[12] first coined the term "social model of disability" in 1983. Disability activism has its seeds in the civil rights movement of the late 20th century. Until 1960s and 1970s, persons with disabilities were mostly excluded from social life. Impacted by the civil rights movement, persons with disabilities started to question their status of discrimination and isolation, and to ask for a change in the societal and attitudinal treatment of disability, subsequently developing a social approach to disability.

The fact is that persons with disability are still socially invisible and excluded. It is also a fact that even feminist thought, which has deconstructed gender-based discrimination through its various streams, does not pay enough attention to issues of disability and the complex spectrum of discrimination faced by female disabled persons.

The social model of disability[13] insists on the social inclusion of persons with disabilities, and argues that society has created the content and meaning of disability, i.e. a stereotypical, stigmatizing, and prejudiced understanding of disability. In contrast to the medical model of disability[14], which holds that people are disabled because of their impairments or conditions, this view asserts that it is society that creates disability, because the existing barriers are constructed by society and are not eliminated by society. "Disability isn't something that exists inside your body or your mind. It's something that is created by an inaccessible society."[15] The social model critically considers equating disability with illness and weakness/disadvantage, which leads to the consequential isolation of those living with disability. The social model of disability criticizes the isolationist treatment of persons with disabilities as created by society, and pledges for a change in society in that respect. The social model of disability focuses on the full inclusion of persons with disabilities in social, political, economic, and cultural life, as well as removing the physical, social, legal, political, and attitudinal barriers that prevent persons with disabilities

11 For gender-based and disability-based disparities in employment rates for women and men with disabilities and women and men without disabilities, see *https://eige.europa.eu/gender-equality-index/2022/domain/intersecting-inequalities/disability/work*.

12 Mike Oliver, `The Individual and Social Model of Disability`, presented in 1990, *disability-studies.leeds.ac.uk*; Mike Oliver, 'The Social Model of Disability: Thirty Years on', *Disability and Society*, 28(7), 1024-1028.

13 See: SENSE, What is the social model of disability?, *https://www.sense.org.uk/about-us/the-social-model-of-disability/*.

14 *Ibid.*

15 *Ibid.*

from taking an active part in society and being on an equal footing with all other social subjects. The social model of disability differentiates the notions of impairment and disability. According to the charity association/foundation Sense[16], "[a]n impairment is a functional difficulty someone experiences in their body or mind. If you have a hearing impairment, for example, you might need sounds to be louder for you to hear them, or you may not be able to hear them at all."[17] Also: "Disability is the experience of not being able to take part in society because the barriers you face with your impairment. For example, if a video doesn't have subtitles, and you can't hear it."[18] As already said, the medical model of disability does not separate impairment and disability; what is more, it considers disability a consequence, an outcome of an impairment, meaning that persons have been marked with disability because of their impairment and that their status of impairment defines them. Impairment as the pre-given state of affairs determines their destiny and quality of life, making them isolated and discriminated.

Persons with disability who take part in public activism and politicize the issue of disability as discrimination and social exclusion based on impairment engage in self-mobilization and civil society. Jenny Morris, a disabled feminist, explains that critical feminist studies of disability have an empowering role and act as a mobilizing force for persons with disability. Morris became disabled at the age of 33, but she had already spent a decade studying feminist theory and practice. After experiencing spinal injury and hemiplegia, she started reconsidering her feminist standpoint from a disability perspective. She immediately became aware that disability is treated as a side issue within the feminist movement and among feminist activists and authors. She even had to clarify the key differences between disability and impairment to herself, i.e. to distinguish between the social model of disability as oppression on the one hand, and the value-free concept of impairment as one that merely describes our body features. However, she did notice a rising interest for the mentioned issue in the 1980s. She alone contributed to the feminist disability theory due to the alignment between her feminist intellectual background and personally experienced disability condition. She remarked that the "disabled people's politicization has its roots in the assertion that 'the personal is political', that our personal experiences of being denied opportunities are not to be explained by our bodily limitations (our impairments) but by the disabling social, environmental and attitudinal barriers which are a daily part of our lives. The social model of disability has given us the language to describe our experiences of discrimination and prejudice and has been as liberating for disabled people as feminism has been for women."[19]

16 SENSE is the British charity association for supporting persons with disabilities, and represents a part of Sense International, a leading global charity supporting people with disabilities regarding their access to education, healthcare, and work. (see: *sense.org.uk*, *senseinternational.org.uk*).

17 *Ibid.*

18 *Ibid.*

19 Jenny Morris, Feminism, gender and disability, Paper presented at a seminar in Sydney, Australia, February 1998, 3.

A proper understanding of the life circumstances of women and girls with disabilities requires critical feminist legal and political theory as well as feminist methodology, which are (or should be) enriched with an intersectional approach. Critical feminist theory and methodology should be viewed in their various versions and meanings, but there are common features to all of these versions, all of which are related to highlighting the patriarchal roots of gender inequality and the importance of an intersectional approach. The fundamental theoretical and methodological presumptions will be clarified in more detail in the first chapter. The following two chapters will be devoted to clarifying the concept of disability, particularly gender-based disability, as well as the meaning of intersectionality. These are crucial theoretical-methodological concepts for developing a fully-fledged theoretical and methodological framework for understanding and studying gender-based disability from a feminist perspective.

As already mentioned, the following chapter will outline the most general theoretical-methodological framework of a feminist analysis, as the basic framework for disability consideration. The second and third chapter will clarify the relevant discourse of disability and intersectionality. The mentioned three chapters will serve as a fruitful background for a more concrete elaboration of the theoretical-methodological framework, the meaning and content of feminist disability studies, i.e. critical studies of gender-based discrimination against female persons with disabilities.

II THE THEORETICAL AND METHODOLOGICAL FRAMEWORK FOR DISABILITY CONSIDERATION

A critical feminist theory of disability seeks to protect the human rights of women and girls with disabilities, without excluding men and boys with disabilities. The normative context is related to the promotion and protection of all persons with disabilities' full and equal enjoyment of all human rights and fundamental freedoms, as well as respect for their inherent dignity, respect for their difference, and acceptance of them as part of human diversity. Feminist disability studies are related to the normative strategic viewpoint in which persons with disabilities are not considered "objects" of charity, medical treatment, and social protection, but rather "subjects" with equal rights as others, capable of claiming those rights and making decisions about their lives with their free and informed consent, as active members of society. The feminist disability approach is also related to the normative standpoint that full and effective participation and inclusion are important in order to empower individuals and enrich society. It is also related to an epistemological viewpoint that disability results from the interaction of persons with impairments and the attitudinal and environmental barriers that prevent full and effective participation in society on an equal basis with others, i.e. without considering their impairment as determinant, dominant, and representative for their personality. It is also related to the methodological-epistemological

stance that all activities (including research) should include the participation of persons with disabilities in line with the slogan: "Nothing About Us Without Us."[20]

A special focus of the critical feminist disability theory is on the additional gender-based discrimination of female persons with disabilities. Patriarchal heredity has a significant impact on the status of women and girls with disabilities, because it adds the causes and consequences of female subordination in the private life, at home and in the domestic sphere, in the family, at work, and in all aspects of public life (the media, services, political participation, political party membership and activity, cultural life and creativity within culture) to all other possible bases of discrimination and oppression. Gender-based discrimination against female persons makes living conditions for female persons with disabilities generally worse when compared with male persons with disabilities. What is more, gender-based discrimination against female persons with disabilities is experienced also in their relationship with male persons with disabilities, because the male power domination within the patriarchy has its effects in these binary male/female relations as well. In addition, the feminist disability theory must address power relations and their patriarchal background in the case of even stronger discrimination and worse living conditions experienced by trans-gender and homosexual persons with disabilities. It is worth repeating the above-mentioned methodological-epistemological stance that all activities (including research) must include the participation of female persons with disabilities as well as transgender and homosexual persons with disabilities. The slogan "Nothing About Us Without Us" reminds researchers and feminist scholars and activists that personal experiences of female and transgender disabled persons have to be taken into account, and their voices must be listened to and truly heard. They themselves must take part in this in order to influence relevant decision-making, and to experience their own empowerment through personal participation in academic research, civil society activism, political participation, and the relevant policy-making.

Understanding the general dialectics of patriarchy and emancipation from patriarchy constitutes the first methodological layer of feminist theories, enabling the most general logic of considering gender issues to be framed. "When attempting to analyze the contemporary position of women, it is necessary to take into consideration each concrete case of gender relations in the context of the concrete-historically determined dialectic of patriarchy and emancipation. This means that the mentioned mutually counterpoised civilizational tendencies have been differently manifested in particular cultures, regions, societies, social groups and social strata."[21]

20 Tina Goethals, Elisabeth De Schauwer and Gert Van Hove, "Weaving Intersectionality into Disability Studies Research: Inclusion, Reflexivity and Anti-Essentialism", *Journal of Diversity and Gender Studies*, Vol. 2, No. 1-2/2015, 77–78.

21 Dragica Vujadinović, "The Widening Gap Between Proclaimed Gender Equality and Real State of Affairs In Times of COVID-19 Pandemic", *Annals Belgrade Law Review*, Vol. 70, No. 4/2022, 1017–1047.

Another methodological feminist layer points to the fact that the mentioned dialectics of patriarchy and its overcoming in the contemporary epoch has been expressed differently in different societies, depending on the political order (whether it leaned toward an authoritarian or democratic one), the dominant political culture and general cultural heredity, as well as social class, race, culture, religion, customs, mentality. The concrete historical approach to the contradictory tendencies of patriarchy and emancipation from patriarchy must be intersectional in the case of each individual, social group, and referential phenomenon.[22]

This general level needs to be diversified by pointing out differences among individual women and girls, because none of the particular manifestation of the mentioned contradictory tendencies affect each individual person equally. Diversity in this context must also be viewed from a non-binary perspective, and women and girls must not be *a priori* identified based on the mainstream binary understanding of gender; rather, critical thought must be open for a revised approach to homosexual women and transgender persons who identify as female.[23]

Even more generally, the feminist approach aims at transcending the categorical discourse based on the binary opposition of male/female, private/public, which is typical for the Western logocentric tradition that celebrates

22 "Gender-based discrimination must be combined with other discriminatory factors, i.e., analyzed in the context of other relevant bases of discrimination, such as class, race, religious orientation, cultural heredity, individual and collective systems of values. This theoretical-methodological premise informs us that the critical analysis of gender relations has to be intersectional always, meaning that it should recognize all mutually overlapping discrimination factors (e.g., race, class, religion, culture) as combined with discrimination based on sex and gender. In the case of countries and regions with a stronger authoritarian political order and/or a rigid religious and traditionalist cultural heredity, there could be proportionally more dominant elements of patriarchy, and more difficulties for emancipatory elements to sustain under rising suppression during any crisis. Subordination of women exists in all social classes and strata within the mentioned circumstances, but the conditions of huge poverty, impoverishment, and hunger, as well as wars, natural catastrophes and crises, have represented additional factors of influence that have a much greater effect on women from lower classes and strata. In short, the burden of gender-based discrimination has been mostly manifested among individuals who have been discriminated against in a multilayered fashion (poor, uneducated, unemployed, encumbered by rigid religious and traditional norms in the private sphere, to the particular dressing code, devoid of the right to education and work, such as Afghanistan women under Taliban rule, economic or even personal dependence on male family members, exposure to violence and rape with impunity, belonging to non-white races, persons with disabilities and LGBTQ+ persons." (*Ibid*).

23 "An openness for all concrete expressions of non-binary gender identities implies theoretical and practical readiness for understanding and protecting the equal human rights of the vulnerable LGBTQ+ population. It has been fully opposite to the pejoratively interpreted "gender ideology", which is promoted by extreme right-wing academics and right-wing social movements. These opponents of gender and trans-gender equality attempt to derogate the principles of gender equality as well as neglect the human rights of transgender persons and persons of different sexual orientation by designating the struggle for their protection as a false, artificial, imposed "gender ideology." (*Ibid*).

reason and the Enlightenment. However, as Sheila Benhabib remarks, instead of throwing aside these categories altogether, "we can ask what these categories have meant for the actual lives of women in certain historical periods, and how, if women are to be thought of as subjects and not just as fulfillers of certain functions, the semantic horizon of these categories is transformed."[24] Feminist transformation of the main political categories leads to compromising the universality of ideals and delegitimizing male power.[25]

There is an additional, highly important aspect of the mentioned diversified feminist methodology and knowledge production, and it is tied to intersectionality. It is critical to accentuate right away that intersectionality should not be reduced to the issue of inclusion, as in a methodological demand to take into consideration all relevant features of the concrete person with disability. If this is done, the issue of intersectionality is wrongly reduced to identity politics. Instead, intersectionality must be understood from the feminist perspective of deconstructing power relations that are grounded in patriarchy, racism, the logic of capital, traditionalist habits, clerical norms, etc., and which define the multiple forms of discrimination faced by disabled persons. For example, let us consider a female person that is black, poor, gay, and has a disability. A feminist disability analysis for this specific case of multiple discrimination would include critical highlighting patriarchal power relations based on gender and sexual orientation, along with racist power relations and class capitalist power relations that critically affect her living condition as well as social, political, cultural, and health status. Intersectionality must maintain its activist, mobilizing, and de-constructivist potential, which it possessed and always should possess in critical disability studies. As Goethals, De Schauwer, and Van Hove argue, "(p)eople have multiple roles and identities and being members of more than one 'group', they can simultaneously experience privilege and oppression. By no longer considering, for example, 'disability' in isolation from other categories (gender, religion, income, age, cultural background, family status, and many others), dynamic and contradictory power dynamics become more apparent and it becomes clear that no one social category is more important than any other. Second, intersectionality offers us a lens through which categories are viewed as mutually constituting processes. Rather than simply adding categories to one another, intersectionality strives to understand the unique experiences and perspectives at the intersection of two or more social or cultural categories and positions that intertwine as complex, overlapping, interacting, and often contradicting systems. Third, the concept of intersectionality can be used to analyze how power and power relations are maintained and reproduced. Intersectionality scholars tend to look to the perspectives and experiences of unmarked and unheard groups."[26]

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24 Sheila Benhabib, `On Hegel, Women and Irony`, in Mary Shanley Lyndon and Carole Pateman (eds.), *Feminist Interpretations and Political Theory* (1991), 130.

25 Vujadinović (2022).

26 Goethals, De Schauwer and Van Hove. *op. cit.*, 77–78.

Before further expanding on the theoretical-methodological framework of feminist disability studies, disability and intersectionality need to be additionally explained.

III DISABILITY AND DISABLISM/ABLEISM

In traditional medical, social security, and legal discourses, disability is considered a health problem, or illness, and implicitly or explicitly a disadvantage-, impairment-, and/or inferiority-related-feature. There are two main models that attempt to explain disability—the medical model and the social model. The medical one is a theoretical framework that considers disability an undesirable medical condition that requires specialized cure and medical treatment. The social model does not neglect the medical aspect of an impairment, but it does view disability as a societally imposed limitation upon individuals who do not have the same abilities as the majority of other people.[27]

The United Nations Convention on the Rights of Persons with Disabilities defines disability as "long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder (a person's) full and effective participation in society on an equal basis with others."[28]

The British Council of Disabled People recently adopted a definition that puts a stronger and more direct accent on embedded discrimination: "Disability is the disadvantage or restriction of activity caused by a society which takes little or no account of people who have impairments and thus excludes them from mainstream activity. (Therefore, disability, like racism or sexism, is discrimination and social oppression)."

While the starting point for defining disability is often the characterization of individuals' impairments, the International Classification of Functioning Disability and Health (ICF) offered by the World Health Organization (WHO) currently defines disability not as an "attribute of the individual" but rather as a state resulting from the interaction between the person and the environment.[29] Following the lead of the ICF, scholars often divide disabilities into three subgroups: physical limitations, mental health and/or cognitive limitations, and sensory limitations, with the latter being mostly either vision or hearing impairments. For example, Ustun et al.[30] recall the UN Conven-

27 Francis, Leslie, Anita Solvers, `Perspectives on the Meaning of „Disability"`, *AM Journal of Ethics*, 18, October 2016, 1025–1033.

28 See UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106.

29 World Health Organization, International Classification of Functioning Disability and Health, *https://www.who.int/standards/classifications/international-classification-of-functioning-disability-and-health*.

30 The UN Convention on the Rights of Persons with Disabilities (2006) states that "(d)isability is an evolving concept and that disability results from interaction between persons

tion definition according to which "(p)ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments...," and highlight that the extent to which these impairments disable someone depends on the level of barriers encountered in society.[31]

Critical scholars use the differentiations mentioned in this definition as factual evidence, while normatively insisting on the mentioned social model of understanding disability and fully overcoming the prejudiced approach to "illness"/non-normal life conditions as opposed to "normalcy."

According to Turnbull & Turnbull (2002), "the new paradigm of disability is contextual and societal. A person has an impairment that becomes a disability as a result of the interaction between the individual, and the natural, built, cultural and societal environments. Accordingly, research into the natural, cultural and social environments is warranted and is targeted at enhancing enablement and preventing disablement..."[32] Here disability is understood as a social construct; that is, not a unified, singular thing or condition, but rather a "quintessential post-modern concept, because it is so complex, so variable, so contingent and so situated. It sits at the intersection of biology and society and of agency and structure. Disability cannot be reduced to a singular identity: it is a multiplicity, a plurality."[33]

Impairment (hearing, visual, mental, and/or physical) does not define a person; rather, a person creates and re-creates their identity/personality in a variety of modalities and through the interaction between their different features and capacities (intersection of impairment with other personal features), the interaction between their different grounds of discrimination (critical feminist meaning of intersectionality), and social interactions with other persons and social groups. The social, political, and economic contexts are all critical in how intersectional discrimination against a particular person with disability is constructed. Different bases of discrimination combine different sources and grounds/roots of power relations present in the specific societal framework of the disabled person's life.

The concepts of disablism and ableism also have to be considered here. Disablism and ableism are terms used to describe disability discrimination and prejudice, similar to how sexism and racism are used to describe discrimination against men or women and different ethnic groups. Although they both refer to disability discrimination, they place a different emphasis. Disablism highlights discrimination against disabled people, while ableism

with impairments and attitudional and environmental barriers that hinders their full and effective participation in society on an equal basis with others". See UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106.

31 Tevfic B Ustun, Somnath Chatterji, Jerome Bickenbach, Nenad Kostanjek, and Marguerite Schneider, `The intellectual classification and functioning, disability and health: a new tool for understanding disability, D*isability & Rehabilitation*, Vol. 25, No. 11–12, 2003, 565–571.

32 Goethals, De Schauwer and Van Hove, *op. cit*., 80.

33 *Ibid.*

highlights discrimination in favor of non-disabled persons.[34] For example, a disablist stance would be that employing blind persons in the library would disturb others and slow down the work dynamic, whereas an ablest stance would be that non-blind persons in the library feel more comfortable and work more efficiently with no blind librarians around. Both approaches are ultimately discriminatory, with the same outcomes in terms of a stereotyped, exclusionary, and segregationist treatment of persons with disabilities.

Scholars in feminist disability studies and the sociology of disability generally conceptualize disability as a social category in its own right; that is, individuals may have diverse impairments, but they all experience exclusion and marginalization, i.e. they are all subject to disablism and/or ableism that results in their exclusion and marginalization.[35] Disability as a social expression of oppression against disabled persons, as discrimination against persons with impairment, is sometimes replaced or synonymously designated as ableism.

The social model of disability, which differentiates the fact of impairment from interaction between society and the state with persons with impairment, has been on the agenda. The social model of disability presumes that having disability is a consequence of a dynamic interaction between a person's health and other personal factors (such as age, sex, personality, or level of education) and the social and physical environment in which they find themselves. The aforementioned interaction should be primarily based on complete inclusion in accordance with the democratic principles of equality, liberty, and solidarity.

Feminist disability studies conceptualize and articulate the social model of disability approach with a special emphasis on the gender-based patriarchal ground of discrimination in the case of female disabled persons. They highlight patriarchal legacy as a critical factor in the worsening of all-encompassing discrimination of female persons with disabilities when compared with male persons with disabilities, as all manifestations of patriarchal subordination of women have always been reproduced in this context as well. However, there are also relevant feminist disability insights that converge with the critical theory of masculinity, and that highlight discriminatory impacts of patriarchal gender-based stereotypes associated with the macho-male-model and with regard to male persons with disabilities.[36] Male persons with disabilities suffer significantly because of their lack of power, which is stereotypically expected from male persons in general.

Critical feminist disability studies teach us to avoid impairment-specific or medical diagnostic categories when thinking about disability, and to resist falling back on essentialist definitions of disability as inferior embodiment and/or as a primary ascriptive feature of the person, which are based on a predetermined factor rather than individual achievements. Being disabled

34 Nancy A. Naples, Lura Mauldin, Heather Dillaway, "Gender, Disability, and Intersectionality", *Gender&Society*, Vol. 33, Issue 1, 2019.

35 *Ibid*., 3.

36 Morris (1998), *op. cit*.; Jenny Morris, *Pride Against Prejudice* (1991), 63–65.

does not mean being ill and does not mean being inferior. It also does not mean being reduced to that feature, because each individual is the construct and the creation, and the constructor and creator, and there are principally no limits to overcoming any constraints, including those linked to disability.

This does not mean that the medical dimension of disability should be ignored. On the contrary, it must be taken seriously and followed by institutional structural reforms and official medical, social policy, legal, and other relevant policy measures for improving the living conditions of persons with disabilities. Moreover, medical ascription must be considered in all measures focused on combatting multiple discrimination roots embedded in individual disability health cases. The point is that the medical aspect should be strictly connected to the impairment, without reducing a disabled person to their impairment, and with careful consideration for and attempts towards deconstructing and combating able-based and multiple discrimination grounds and power relations in their background.

Morris emphasized the importance of critical feminist studies incorporating critical studies of masculinity, as previously mentioned. It is critical to understand the interrelationship between gender and disability as a multifaceted issue that is not limited to women and girls. "It could not be, for both are social constructs which affect men as well as women. Gender as a social construct can be experienced in an oppressive way by men and boys as well as by women and girls and there is a danger that if we do not acknowledge the influence and interaction of both in men and women's lives any analysis or account of disabled people's lives can only be incomplete.... It's clear that masculinity as a social construct can be extremely oppressive for disabled men. Masculinity is about a celebration of strength, of bodies that perform, and of being a family's breadwinner. To be masculine is the opposite of being vulnerable and dependent."[37] The concepts of masculinity and femininity are overburdened with stereotypes when applied to both disabled men and women.

A special focus will be on considering the multiple discrimination of women and girls with disabilities, because this gender perspective clarifies that female persons with disabilities have a more difficult position and a harsher experience of discrimination than male persons with disabilities. This gender-based analysis will be grounded on and supported by the aforementioned theoretical-methodological framework. Patriarchy and female subordination, which have a long history, have systemically worsened the living conditions of women and girls with disabilities. A combination of the manifestation of patriarchal forms of power relations between men and women, and the reproduction of the aforementioned patriarchal power structure within the societal and political, economic, and cultural framework of female public life, more negatively and profoundly affects female than male persons with disability. The aforementioned context of patriarchy and disability when combined with other cultural and economic grounds of discrimination and

37 *Ibid.*

power relations, demonstrated in contrasting non-disabled and disabled individuals, represents an intersectional framework of multiple discrimination against women and girls with disabilities.

IV INTERSECTIONALITY – MEANING AND IMPLICATIONS FOR THE ISSUE OF DISABILITY

The intersectional approach assumes considering mutually crossed factors of discrimination, i.e. a combination of discrimination and subordination on the grounds of not only gender and sexual orientation, but also race, culture, religion, and social class in each particular critical feminist analysis.

The concept of intersectionality was inspired by black feminist analyses of black women's lives in an attempt to critically reconsider the limitations of white feminist critical thought, which failed to recognize the specific and multilayered problems faced by women of color. The concept of intersectionality has enriched our understanding of the complexity and contextual embeddedness of discrimination against different groups of women. "It enables a complex understanding of the ways in which race, gender, class, sexuality, and ability among other dimensions of social, cultural, political, and economic processes intersect to shape everyday experiences and social institutions."[38]

Intersectionality highlights the "multidimensionality" of individuals' lived experiences[39], and the systems of oppression shaping them. It is adopted in feminist theories to examine the role of race, gender, and class in molding individual, collective, and structural conditions.[40]

Csanyi and Kovats[41] offer crucial criticism, which helps to avoid simplified and misleading interpretations of intersectionality. These authors state: "Since its emergence intersectionality has had various interpretations and uses, yet through leftist activism and policy-making in the United States, and its export worldwide, the hegemonic understanding has concentrated solely on discrimination (on more than one ground) and on positionality along the so called axes of oppression." They claim that this approach is theoretically shallow and politically problematic, because it does not adequately grasp the root causes of inequalities, is individualized in a neoliberal sense, and undermines solidarity among disabled individuals. They clarify that this individualized and solely discrimination-based interpretation of intersectionality, rather than also targeting the roots of discrimination and inequality, unwittingly contributes to the popularity of right-wing contestation of any recog-

38 Naples, Mauldin, Dillaway, *op. cit*., 1.

39 Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics", *University of Chicago Legal Forum*, Vol. 1989, Issue 1, 1989, 139.

40 Naples, Mauldin, Dillaway, *op. cit.,* 10.

41 Gergely Csanyi and Eszter Kovats, Intersectionality: Time to rethink, *Social Europe,* September 16, 2020, *https://socialeurope.eu/intersectionality-time-for-a-rethink*.

nition claims. "Instead, we should strive to make sense of injustices, beyond discrimination and positionalities, and attempt to influence policy-making in challenging the structures of oppression."[42]

The authors point to the fact that intersectionality used to be a critical response to practices of identity-politics movements of the 1980s. However, today's identity politics has become intersectional, and the current stream of individualist intersectional approaches to disability has turned into an ahistorical and static standpoint (besides being theoretically shallow and politically problematic). They argue that, "(f)or instance, old age can be a source of respect or of discrimination and this can be true for all other dimensions."[43] This individualist political practice raises new problems, like reducing issues of gender inequality (which nowadays include also non-binary and transgender people) to individual identity, disadvantages, and experiences rather than to the system (patriarchy). Class analysis seems impossible without analyzing production conditions, market situation, and capital relations. However, the "interlocking matrix of oppression" approach has restricted the concept of class to earnings and lifestyles. Even those who are in favor of structural analysis frequently confine their arguments to the gender pay gap or other forms of economic discrimination. These authors remind us that such oversimplified and harmful interpretations are existent even in the official documents of the European Commission.

The authors offer a nuanced conclusion and a strong theoretical-political statement: "The current practice of intersectionality thus does not seem suitable for understanding inequalities analytically or eliminating them politically. If we want to retain the benefits of intersectionality, we need to get rid of these misconceptions. The focus should not be on ahistorical intersections of differences and repressed groups of identities, but on examining how distinctions and hierarchies are established between them. Identities should not be interpreted as some kind of inner, intimate, unquestionable substance, but as a personal experience of a relative position in a system of social relations. And it is impossible to take action against structural inequalities if we blame the categories themselves and look for a way out and emancipation in individual identities, rather than addressing the totality of historically established relations—and changing the system."[44]

The intersectional framework of feminist studies and disability studies have to integrate an inclusive, reflexive, and anti-essentialist approach in their research methodology.[45]

The inclusion of lived experience of discrimination and oppression of persons with disabilities into research and an interactive exchange of experiences between researchers of disability and persons with disabilities have

42 *Ibid*.

43 *Ibid*.

44 *Ibid*.

45 Goethals, De Schauwer and Van Hove, *op. cit*., 82.

become increasingly embraced as an important strategy in disability studies. A leading question in disability studies is how to capture and fully include the voices of persons with disabilities and how to enable traditionally marginalized perspectives to be heard.[46]

This is accompanied by "reflexivity," meaning "storying" (story-telling) the lived experiences of both the subject and the researcher. This refers to the co-constructing and negotiating "between the people involved as a means of capturing complex, multi-layered, and nuanced understandings."

The feminist methodology acknowledges the narratives and life experiences of victims of discrimination as critical grounds for understanding and deconstructing that same discrimination. Benhabib calls this feminist deconstructing method a "feminist discourse of empowerment." This method also entails questioning the male power-related context, or asking "how would the history of ideas look like from the standpoint of the victims?" The result of this delegitimization of the alleged universality of ideas and ideals, as well as their questioning from the standpoint of victims, is the rejection of certain ideas as dead-ends.[47]

The anti-essentialist perspective on human differences, viewed as social constructions, is also critical for disabilities studies. "Throughout history, the impairment label served as the signifier for exclusion, and a pathology where pre-social biological differences are suggested to mark off the 'impaired' from the 'normal'. Within the anti-essentialist outlook, according to Thomas, "disability theory centers on the interrogation of cultural categories, discourses, language, and practices in which 'disability', 'impairment' and 'being normal' come into being through their social performance, and on the power that these categories have in constructing subjectivities and identities of self and other."

Methodologically speaking, taking into consideration the position of the "victim," or better said a subordinated invisible and devaluated subject, introduces a new perspective into knowledge production, the perspective of female and all other disadvantageous and vulnerable groups—the perspective of empowerment of the powerless. The feminist perspective leads to empowering the powerless, while also affirming their human dignity and political relevance.

The feminist perspective places a new conception of truth on the agenda, one that is linked to storytelling and the personal and collective experiences of the "other," as well as to the relevant "partiality." As Zara Saeidzadeh ex-

46 See Christine E. Ashby., `Whose "voice" is it anyway?: Giving voice and qualitative research involving individuals that type to communicate`, *Disability Studies Quarterly*, Vol. 31, No. 4/2011, 1723–1771; Paul Atkinson, `Narrative turn or blind alley?`, *Qualitative Health Research*, Vol. 7, No. 3, 1997, 325344; Len Barton, `Emancipatory Research and Disabled People: Some Observations and Questions`, *Educational Review,* Vol. 57, No. 3/2005, 317–327; Tim Booth and Wendy Booth, `Sounds of Silence: narrative research with inarticulate subjects, *Disability & Society*, Vol. 11, No. 1/1996, 55–69; Rosemarie Garland-Thomson, `Feminist disability studies`, *Signs*, Vol. 30, No. 2/2005, 1557–1587; Dan Goodley, *Disability Studies: an Interdisciplinary Introduction* (2010).

47 Benhabib, *op. cit.* 132.

plains, "central to this endeavor is situated knowledge, a kind of knowledge that reflects a particular position of the knower. Situated knowledge means that situatedness of the subject in relation to the power structure produces a type of knowledge that problematizes the 'universal' male-dominated knowledge," or "patriarchal knowledge."[48]

Disabled activists, mostly black feminist disabled authors, have conducted academic and activist work related to their own experience, factually contributing to the visibility of disablism/ableism and demonstrating the importance of raising awareness about discrimination based on disability *per se* as well as within the intersectional context of discrimination.[49] For example, queer and trans people of color with disabilities contribute to a better understandings of the social model of disability and, in particular, the disadvantages of the health system for them through their activism and academic work, which uses the explanatory power of self-experience.[50] That is how self-experience of disabled activists and scholars transforms the position of "object" or "victim" into the subject of innovative knowledge production about disablism/ableism, which obtains legitimating power based on personal narratives and self-awareness about experienced discrimination. This situated knowledge also serves to make persons with disabilities visible, to make them socially and politically relevant subjects, as well as policy-making relevant subjects. It serves, as already said, to empower the powerless.

V FEMINIST DISABILITY STUDIES

When applied to the case of women and girls with disabilities, all of the mentioned factors of the intersectional approach to feminist research become combined with the factor of disability, implying that the worst possible living conditions have been experienced by girls and women who are poor, who belong to the impoverished Third world population, who belong to non-white races, who have non-binary sexual orientation, who live in authoritarian regimes and traditionalist cultures, and may also live in an un-urban traditionalist setting with primarily conservative families and surroundings characterized by clericalism, traditionalism, patriarchy, populism.

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48 Zara Saeidzadeh, `Methodologies and Gender Research`, in Dragica Vujadinović, Mareike Froehlich and Thomas Giegerich (eds.), *Gender – Competent Legal Education* (2022, in print).

49 Patricia Berne, Disability justice: A working draft,10 June 2015, *http://sinsinvalid.org/blog/disability-justice-a-working-draft-by-patty-berne*; Jane Dunhamn, Jerome Harris, Shancia Jarrett, Leroy Moore, Akemi Nishida, Margaret Price, Britney Robinson, and Sami Schalk, `Developing and reflecting on a black disability studies pedagogy: Work from the National Black Disability Coalition`, *Disability Studies Quarterly*, Vol. 35, No. 2/2015; Harriet Tubman Collective, `Disability solidarity: Completing the vision for black lives`, 4 September, 2016. *https://harriettubmancollective.tumblr.com/post/150415348273/disability*; Leah Lakshmi Piepzna-Samarasinha, *Care work: Dreaming disability justice* (2018).

50 See Naples, Mauldin, Dillaway, *op. cit.,* 13.

However, despite its analytical power to explain/incorporate diverse and concurrent forms of power relations and discrimination, disability has remained largely absent from the majority of contemporary intersectional studies. Disability justice deserves a prominent place in feminist intersectional analysis, because it adds a critical level of intensity to all other ground/s of vulnerability and discrimination. Disability by definition means vulnerability in physical and/or mental terms. Members of vulnerable groups who are discriminated on one or multiple grounds are all the more disadvantaged and vulnerable when they are also disabled persons.

The traditional focal points of mainstream disability studies research tend to essentialize people with disabilities. People in this category are frequently assumed to share the same views, experiences, and priorities, regardless of their gender, age, cultural background, sexual orientation, socio-economic status, religion, and other differences.[51]

Nevertheless, a growing number of disability studies have started to take into account differential features. However, they often do this by introducing various variables as isolated and dichotomous factors rather than interactive and mutually interdependent. An inclusive approach to disability studies is better/more advanced, but it is not sufficient; it also has to be reflexive and anti-essentialist to allow for appropriate critical and intersectional disability studies research.[52]

Inclusive, reflexive, and anti-essentialist approaches are required for conducting critical, intersectional, and feminist disability research.[53]

In contrast to traditionalist mainstream disability studies, which essentialize "disability,"[54] the anti-essentialist view tends to regard disability as a construct and creation within the context of the given person's various features, capabilities, and capacities.[55] It is important to avoid essentializing any group or assuming that all members of a single social group have similar experiences, perspectives, and needs.[56]

Evidently, women with disabilities vary based on their specific individual experiences and differences in income, sexual orientation, religious af-

51 *Ibid.*; Goethals, De Schauwer and Van Hove, *op. cit.*, 75.

52 Goethals, De Schauwer and Van Hove, *op. cit*., 76.

53 *Ibid*.

54 "Throughout history, the impairment label served as the signifier for exclusion, and a pathology where presocial biological differences are suggested to mark off the 'impaired' from the 'normal'. In this view, social categories and dichotomies (impaired/non-impaired, normal/abnormal) are perceived as 'real' and fixed." *Ibid*, 85.

55 "We seek to challenge dominant assumptions about living with a disability, and constitute disability as sites of construction and creativity rather than determination; we are thus opposed to the great binary aggregate: abled/disabled. With the latter, we make connection with feminist disability studies... in tending to avoid impairment-specific or medical diagnostic categories to think about disability, and resist falling back on essentialist definitions of disability as inferior embodiment. By considering feminist disability studies, we go beyond explicit disability topics such as illness, beauty, genetics, etc..., and 'reimagine disability'." *Ibid*, 76.

56 Olena Hankivsky and Renee Cormier, `Intersectionality and Public Policy: Some Lessons from Existing Models`, *Political Research Quarterly*, Vol. 64, Issue 1, 2010.

filiation, and so on. On the other hand, categories such as disability, gender, income, class, ethnicity, geography, sexual orientation, religious affiliation, family status, etc. have a fluid and flexible character. In other words, "in the intersectional anti-essentialist perspective, we see that social categories are dynamic, historically grounded, socially constructed, and work at both micro and macro structural levels."[57]

Butler points to the fact that postmodern feminist theories have posited these categories as "performative,"[58] because they are re-written and reformed anew every day in daily acts and interactions.

Critical and intersectional disability studies research pursues "a postmodern version of disability studies where different models of disability (medical, social, cultural) are considered and have their own right to exist." The existence of various perspectives on disability is acknowledged, and so a thorough critical reflection on both the positive and negative sides of each approach must be undertaken. Dominant assumptions that disability is a determination are rejected, the binary opposition abled/disabled is also rejected, impairment and medical diagnostic categories are disregarded, as are essentialist definitions of disability as inferior embodiment. Topics directly related to disability such as illness, genetics, aesthetic deformity are also ignored.[59]

Feminist disability studies must be promoted, views about disability and its intersectional perspective must be heard, widely disseminated, and thoroughly considered. Feminist theory provides an adequate space for developing in-depth theoretical frameworks for understanding disability, especially when the intersectionality approach has been used to this end. Feminist disability studies emerged as a result of mutual influence and interconnectedness of feminist critical racial theory, feminist theories, and disability studies. In recent years, the intersection between queer and disabled theories, as well as black studies and disability, has also been on the agenda. Considering feminist theory through the lens of disability has significantly enriched it.

Critical and intersectional postmodern disability studies encompass and/or derive from feminist intersectional studies. Intersectional feminist scholarship is central to the field of disability studies, and analyses attentive to disability advance the intersectional feminist goal and add new and valuable perspectives to knowledge production.

Critical disability studies have remained on the margins of feminist critical thought, which must be overcome. On the other hand, the intersectional approach, which is increasingly gaining acceptance within feminist critical thought, has not been clearly defined in terms of methodology, nor is it apparent how to use intersectionality as a conceptual and analytical tool. Ac-

57 Amanda Burgess-Proctor, `Intersections of Race, Class, Gender, and Crime: Future Directions for Feminist Criminology`, *Feminist Criminology*, Vol. 1, Issue 1, 2006, 27–47; Lynn Weber and Deborah Parra-Medina, `Intersectionality and Women's Health: Charting a Path to Eliminating Health Disparities` in Marcia T. Segal, Vasilikie Demos and Jennie J. Kronenfeld (eds.), *Advances in Gender Research: Gendered Perspectives on Health and Medicine* (2003).

58 Judith Butler, *Gender Trouble* (1990).

59 *Ibid.*

cording to some authors who accept the intersectional approach, for a successful intersectional analysis, "a researcher must clearly specify what makes the study intersectional, discuss why certain methodologies chosen for the study are the most productive for intersectional research, and reflect on which aspects of intersectionality are brought into the frame and which are left out or treated less centrally in the analysis."[60] Despite the diversity of conceptualizations and disciplinary approaches, which often makes identifying the most effective intersectional perspective and model for research difficult, it is clear that feminist consideration of the problems faced by women and girls with disabilities needs to be intersectional, at the very least in the sense of considering mutual crossing of discrimination based on gender and disability with patriarchal power relations. Of course, a more complex and multilayered intersectional approach is necessary and must be applied where there is additional discrimination against women and girls with disabilities that is based on one more or several more, or even all possible grounds of discrimination, such as race, culture, class, age, non-binary gender, sexual orientation, etc.

The logic of intersecting disability with other mentioned discriminatory factors has informed us that the more grounds of discrimination and covert power relations there are in cases of disabled female persons, the worse their living conditions are. For example, women and girls of color, who are also poor, elderly, homosexuals, and who have a particular disability or even several disabilities, have harsher living conditions than persons who belong to the same vulnerable groups but do not have disabilities. In addition, men and boys with disabilities also experience harsher living conditions than persons who belong to the same above-mentioned vulnerable groups but do not have disabilities, although not as harsh as women and girls with disabilities. In short, gender-based discrimination adds a specific burden of discrimination and hardship to disablism, and disablism adds a specific burden of hardship and worsened living conditions to all other grounds of discrimination, either together or in particular combinations. Simply said, being a disabled woman while also being very poor, old, subjected to racism because of skin color, uneducated, and unemployed, is much worse than not being disabled while also being discriminated on the above-mentioned grounds.

VI CONSLUSION

The main premise as well as conclusion of this paper is that people with disabilities have human rights that they are entitled to on an equal basis with non-disabled people. A background empirical statement is made regarding the continued stereotyped and discriminatory treatment of persons with disabilities in the public sphere, private life, public policies, as well as decision making, law, politics, and economics. The resulted normative stance is that the exclusion, isolation, marginalization, discrimination, and oppression of persons with disabilities must be overcome.

60 Nancy A. Naples, `Pedagogical practice and teaching intersectionality intersectionally`, in Kim A. Case (ed.) *Intersectional pedagogy: Complicating identity and social justice* (2017), 113.

Disability is still under-theorized and marginalized within feminist and intersectional critical analysis. Disability justice for women and girls has to be considered intersectionally and seriously (in depth), and must constantly be viewed through the lens of referential power structures.

Intersectional analyses of racism and female disablism/ableism, for example, rarely go beyond the social determinants of health perspective, despite the fact that disablism/ableism and racism interact as powerful forces. In addition, gender-based discrimination and racism both contain powerful patriarchal forces, with worse effects for disabled women and girls of color. When poverty, religion, sexual orientation, or some other discriminatory basis are factored in, disabled women and girls usually suffer more than disabled men and boys because of the patriarchal heredity of female subordination and its strengthening as a result of other mentioned power structures.

Overcoming discrimination and power relations, which overburden persons with disabilities, presupposes and requires a change in the dominant political culture of society. It is necessary for society to evolve so that impairment and disability are not viewed as the inferiorizing determinant, the pre-given disadvantage, the primary denominator of personal identity, but as part of the social "normalcy." The social model of disability implies that persons with disabilities are included in social relations as individuals and groups with equal rights, duties, and decision-making impacts. This model implies that disabled persons, just like all others, create themselves through personal relationships with other people in the social, political, and professional environment. As such, they are part of the "normalcy," free of stigma and stereotypes. It also implies that society and the health system as well as all institutional mechanisms and structures consider their impairment a social fact that requires the appropriate care, support, social assistance, and affirmative measures.

The public and the media have to listen to the voices of persons with disabilities to understand their needs. On their side, persons with disabilities have to have the space and opportunity to express their opinion, requirements, and to take part in decision-making and policy-making pertaining to their particular needs.

Critical disability theory and practice must be developed and conducted by persons with disabilities in cooperation with all other individuals, because the voice of those with personal experiences of impairment provides authentic insights and serves to empower them. This occurs in a twofold manner: first, by experiencing themselves as creators/subjects instead of objects and victims; and second, by encouraging those without disability to share experiences, better understand the problems that disability brings, change their mindsets, and act in solidarity with persons with disabilities, with the goal of resolving the relevant dimensions of structural discrimination.

The state and society have an obligation to protect the constitutional rights of disabled persons as they do regarding all other people's rights. At the same time, they must protect them from falling behind and suffering dis-

crimination due to impairment, and they must do so through all affirmative action means available in law, politics, economics, culture, education, social policies, and the media.

Changing society and dominant mindsets means overcoming assumptions held by persons without disabilities in the mainstream public sphere and culture that persons with disabilities' lives "are not worth living." That is how Jenney Morris, a feminist author and activist who suffered spinal injury and hemiplegia at the age of 33 while jumping from a wall to help a child in danger, believes. In her book *Pride Against Prejudice – Transforming Attitudes to Disability, Celebrating Differences*[61], she informs us that the mentioned (cruel and harsh – *D. V.*) attitudes are only possible when subjective realities of persons with disabilities "find no place in mainstream culture, where disability is represented in the general culture primarily from the point of view of the non-disabled and so their fears and hostility, and their own cultural agendas, dominate the way we (persons with disabilities – *D. V.*) are presented."[62]

"Nothing about us without us" is a disability-related version of the slogan "private is political." It calls for always considering the issue of disability—as individuals, the society, the state—through the lenses and experiences of disabled persons. It also encourages the professional public, the general public, experts responsible for disability, as well as state authorities, to consider how critical disability studies and feminist disability studies view the disability issue in general and in many concrete cases. It also requires that state authorities and social policies take seriously the activist and political messages, insights, and guidelines of critical disability studies. It invites for substantial changes in mainstream societal mindsets and cultural matrixes, in order to encourage sharing experiences about disability as a constitutive part of "normalcy," and in order to enhance the social model of disability, promote democratic participation of persons with disabilities, and affirm the solidarity approach in the legal, political, economic, and social policy systems.

Following on from the previously expressed importance of the right of persons with disabilities to voice their messages and needs, and to have them heard by society and the state, this quotation from Jenny Morris will serve to summarize the finishing message: "The problem is that if we don't express the experience of our bodies, others will do it for us. If we don't confront what we need as a result of illness, pain, chronic conditions which inhibit our lives, then health services and support services will continue to be run in ways which disempower us. If we don't engage in the debates about old age then when we get there, we will find that the battles we thought we had won as younger disabled people are of no use to us whatsoever."

Adrienne Rich said it all in her poem:

> *The problem, unstated till now, is how*
> *to live in a damaged body*

61 Morris (1991), *op. cit.*

62 *Ibid*, 13.

in a world where pain is meant to be gagged
uncured, un-grieved-over. The problem is
to connect, without hysteria, the pain
of anyone's body with the pain of the body's world.[63]

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63 Morris (1998), *op. cit*.

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TEORIJSKI OKVIR ZA RAZMATRANJE INTERSEKCIJSKE DISKKRIMINACIJE ŽENA I DEVOJČICA SA INVALIDITETOM

Apstrakt

Osobe sa invaliditetom zaslužuju ravnopravan tretman sa svim ostalim građanima, a zaslužuju i posebnu pažnju države i društva za zdravstvene teškoće mentalne i/ili fizičke prirode. Osobe sa invaliditetom su, ipak, u manjoj ili većoj meri, i dalje nevidljive u pravu i razvojnim političkim/socijalnim/ekonomskim strategijama, i to u međunarodnom, evropskom i nacionalnom kontekstu. Medicinski model tretiranja problema invaliditeta kao bolesti mora biti zamenjen socijalnim modelom inkluzije, koji kritički razmatra svođenje invaliditeta na bolest i slabost/nedostatak. Socijalni model invaliditeta kritikuje izolacionistički tretman osoba sa invaliditetom, smatra ga rezultatom konstrukcije koja dolazi od društva, i zalaže se za promenu samog društva u tom pogledu. Socijalni model invaliditeta stavlja fokus na puno uključivanje osoba sa invaliditetom u socijalni, politički, ekonomski i kulturni život, kao i na eliminisanje fizičkih, socijalnih, pravnih, političkih i idejnih prepreka, koje

sprečavaju osobe sa fizičkim i mentalnim teškoćama da aktivno i sa jednakim šansama u odnosu na druge socijalne aktere učestvuju u društvenom životu.

U uvodnom delu će biti predstavljen bazični pojmovni aparat i ukazaće se na smisao, suštinu i značaj bavljenja intersekcijskim kontekstom kombinovane diskriminacije zasnovane na rodu i invaliditetu. Prvo poglavlje je posvećeno teorijsko-metodološkim pretpostavkama kritičke analize rodno zasnovane diskriminacije u opštem smislu i vezano za žene i devojčice sa invaliditetom, u okvirima feminističkih studija invaliditeta. Drugo poglavlje se bavi pojmom invaliditeta, s namerom da se napravi razlika između njegovog tradicionalističkog razumevanja u okvirima društvene misli i prakse, i njegovog kritičkog dekonstruisanja u okvirima feminističkih studija invaliditeta. Treće poglavlje istražuje značenje intersekcionalnog pristupa u okvirima feminističkih bavljenja rodnom ravnopravnošću/rodnom pravdom, sa posebnim akcentom na intersekcijskoj diskriminaciji osoba sa invaliditetom ženskog pola/pravdom za osobe sa invaliditetom. Glavni fokus je na kritičkoj dekonstrukciji i prevazilaženju intersekcionalne diskriminacije i njene utemeljenosti u višestrukim i međusobno preklapajućim odnosima moći. Četvrto poglavlje dodatno elaborira sadržaj, uvide i teorijsko-metodološke smernice feminističkih studija invaliditeta. Zaključna razmatranja ukazuju na neophodnost da demokratska društva – u svojim nastojanjima da afirmišu društvenu pravdu – usvoje inkluzivan intersekcionalni pristup rodnoj pravdi i pravdi za osobe sa invaliditetom.

Ključne reči: *Invaliditet; Diskriminacija; Odnosi moći; Rodna pravda; Pravda za osobe sa invaliditetom.*

PRAVO LJUDSKIH PRAVA

HUMAN RIGHTS LAW

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PROTECTION OF WOMEN WITH DISABILITIES IN EU NON-DISCRIMINATION LAW

Abstract

Protecting persons with disabilities against discrimination is a limited concept within EU law. It covers only their protection in the field of employment and occupation, leaving persons with disabilities unprotected from discrimination in other areas of social life (social security, access to goods and services, education). Furthermore, multiple discrimination against women is mentioned only in the preambles of the Racial Directive and the Equality Framework Directive, and the CJEU has failed to recognize the concept of intersectional discrimination in its case-law. Taking this into account, one can conclude that persons with disabilities are not adequately protected against discrimination and women with disabilities in particular lack visibility in EU law.

In 2011, the UN Convention on the Rights of Persons with Disabilities entered into force for the EU. This Convention applies a human rights model of disability and recognizes multiple discrimination of women with disabilities. Since there is an obligation of the CJEU to interpret the EU law in line with this Convention, the expected implication of this obligation is the improved protection of women with disabilities from discrimination in EU.

The focus of this contribution is on the analysis of the relevant case-law of the CJEU and its repercussions on the position of women with disabilities in the EU labour market.

Key words: *Women; Disability; Discrimination; EU law; Employment and occupation.*

I INTRODUCTION

Protecting persons with disabilities against discrimination is a limited concept within EU law. It includes only their protection in the field of employment and occupation, leaving persons with disabilities unprotected from discrimination in other areas of social life (social security, access to goods and services, education). Persons with disabilities are considered a vulnerable group because the society creates numerous obstacles that prevent them from participating in the world of work on an equal footing with persons without disabilities. Women with disabilities are particularly vulnerable in

the labour market: women (with disabilities) suffer discrimination more often than men because of their gender roles.[1] However, multiple discrimination against women is mentioned only in the preambles of the Racial Directive (Recital 14)[2] and the Equality Framework Directive (Recital 3).[3] It means that there is no obligation of the EU member states to address it because the recitals are not legally binding. Furthermore, the CJEU has failed to consider the intersection of protected characteristics and to recognize the concept of intersectional discrimination stating expressly that there is no new category of discrimination resulting from the combination of more than one of prohibited grounds.[4] Taking this into account, one can conclude that there is a lack of visibility of women with disabilities in EU law, i.e., they are not adequately protected against discrimination resulting from the combination of protected characteristics of gender and disability. However, since 2011, when the EU became a party to the UN Convention on the Rights of Persons with Disabilities (CRPD) and this Convention entered into force for the EU,[5] there has been some improvement in the protection of persons with disabilities from discrimination in the case-law of the CJEU, mostly related to the concept of reasonable accommodation. The Convention, as a modern international source of law, applies a human rights model of disability. It means that persons with disabilities are considered as rights holders who are entitled to rights and freedoms on an equal footing with able-bodied persons.

This contribution will examine the EU legislation on the prohibition of disability discrimination, and the CJEU case-law in this area, focusing on the CJEU case-law on the protection of women with disabilities. In the closing

1 For instance, in Croatia there are almost no women with disabilities in leadership positions, while there is only one woman with disabilities in the Croatian Parliament. The Croatian Disability Ombudsperson reports that women in Croatia are marginalized in all areas of social life. Report on the Work of Disability Ombudsperson, 2021, 83, *https://posi.hr/izvjesca-o-radu/*. For more details about the prohibition of disability discrimination in Croatia see: Ivana Grgurev, 'Zabrana diskriminacije osoba s invaliditetom u hrvatskom radnom pravu', *Delavci in delodajalci, revija za delovno pravo in pravo socialne varnosti*, Vol. 7, 2007, 139–151. See also: Ivana Grgurev, 'Diskriminacija na temelju tjelesnih ili duševnih poteškoća u radnom pravu', *Zbornik Pravnog fakulteta u Zagrebu*, Vol. 54, No. 3–4, 2004, 651–679.

2 European Union: Council of the European Union, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *Official Journal of the European Union* L 180, 19.7.2000.

3 European Union: Council of the European Union, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *Official Journal of the European Union* L 303, 2.12.2000.

4 Case 443/15, 24.11.2016, *David L. Parris v. Trinity College Dublin and others*, ECLI:EU:C:2016:897, para. 80. In *Parris* case the CJEU failed to recognize intersectional discrimination in which age and sexual orientation produced a distinct form of discrimination in a sense that it was different from the discrimination based solely on age or based solely on sexual orientation.

5 European Union: Council of the European Union, Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities, *Official Journal of the European Union* L 23, 27.1.2010.

section of this contribution, some suggestions for the improvement of the legal protection of women with disabilities will be offered.

II PROHIBITION OF DISSABILITY DISCRIMINATION IN EU LAW

1. Equality Framework Directive

Compared to the protection of victims of sex discrimination, which has been the focus of the EU non-discrimination law from the very beginning of its development,[6] the protection of victims of disability discrimination occurred rather late in the EU law. Namely, the Equality Framework Directive was adopted in 2000 with the implementation period of six years on disability (and age) discrimination.[7] As already mentioned, this Directive prohibits discrimination only in employment and occupation. Taking into account this fact, together with the fact that the EU non-discrimination directives do not prohibit multiple and intersectional discrimination,[8] one can conclude that women with disabilities are not adequately protected by the EU non-discrimination legislation.

Conte criticizes the 'single-ground approach' in EU law as a limited concept which 'jeopardise[s] the effective protection of persons with multidimensional identity.'[9] No one has a single-dimensional identity, we all have multidimensional identities; however, the complexity of identity is more noticeable in certain groups, where the combination of characteristics that make

6 It is a well-known fact that the Rome Treaty of 1957 contained a provision on equal pay for equal work of men and women (ex art. 119, now art. 157 of the TFEU) to protect victims of this specific form of sex discrimination in the employment relationship. The EU is still trying to reduce the gender pay gap. There are two Proposals for Directives meant to reduce it: Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, COM(2012) 614 final, and Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, COM/2021/93 final. Likewise, the recently adopted Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union (*Official Journal of the European Union* L 275, 25.10.2022) aims, among others, to reduce the gender pay gap (see art. 5).

7 The legal basis for the adoption of this Directive is art. 19 of the TFEU. See more about the widening of the scope of EU anti-discrimination law in the years 1997, 2000 and in particular in 2009 when the EU Charter of Fundamental Rights (which includes a chapter devoted to equality) as a primary EU law source came into force in Mark Bell and Ann Numhauser-Henning, 'Equal Treatment', in Teun Jaspers, Frans Pennings and Saskia Peters (eds), *European Labour Law* (2019), 133.

8 As mentioned above, the Equality Framework Directive lists multiple discrimination against women only in Recital 3 and recitals are not legally binding.

9 Carmine Conte, *The UN Convention on the Rights of Persons with Disabilities and the European Union, The Impact on Law and Governance* (2022), 21.

up their identity will more often position them as victims of discrimination and make them more vulnerable in a society that does not value diversity. As explained above, women with disabilities belong to a vulnerable group that faces multiple discrimination due to their gender roles and to the number of obstacles built by the society that make it difficult for people with disabilities to participate in the world of work on an equal basis with people without disabilities.

2. Proposal for a Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation of 2008

The Proposal for a Directive meant to prohibit discrimination based on disability, age, sexual orientation and religion and belief outside employment was first broached in 2008,[10] but unfortunately since then there has been a lack of political will among the EU member states to adopt it. In the context of the protection of women with disabilities, it is worth mentioning the European Parliament's Proposal for the Article 1 of the Directive,[11] which includes a prohibition of multiple discrimination. This Proposal includes the prohibition of intersectional discrimination as well, although it does not use the notion of intersectionality. Instead, it proposes to define multiple discrimination as 'discrimination based on any one or more of the [prohibited] grounds', and 'discrimination based on any combination of the [prohibited] grounds'.[12] The latter represents the content of the notion of intersectional discrimination.[13]

According to Burri and Schiek there is no need for a specific definition of multiple discrimination in EU law because it would prevent the flexible development of the concept.[14] They see the development of the concept of gen-

10 The proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM(2008)0426 – C6-0291/2008 – 2008/0140(CNS).

11 European Parliament legislative resolution of 2 April 2009 on the proposal for a Council directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM(2008)0426 – C6-0291/2008 – 2008/0140(CNS)), *https://www.europarl.europa.eu/doceo/document/TA-6-2009-0211_EN.pdf*.

12 Proposal for the Directive art. 1(2) states: 'Multiple discrimination occurs when discrimination is based: (a) on any combination of the grounds of religion or belief, disability, age, or sexual orientation, or (b) on any one or more of the grounds set out in paragraph 1, and also on the ground of any one or more of (i) sex (in so far as the matter complained of is within the material scope of Directive 2004/113/EC as well as of this Directive), (ii) racial or ethnic origin (in so far as the matter complained of is within the material scope of Directive 2000/43/EC as well as of this Directive), or iii) nationality (in so far as the matter complained of is within the scope of art. 12 of the EC Treaty)'. *Ibid*.

13 For more about the concept of intersectional discrimination, see Shreya Atrey, *Intersectional Discrimination*, (2019).

14 Susanne Burri and Dagmar Schiek, *Multiple Discrimination in EU Law. Opportunities for legal responses to intersectional gender discrimination?* (2009), 24.

der mainstreaming[15] as an adequate response to multiple discrimination.[16] However, the concept of gender mainstreaming, in particular the concept of mainstreaming in relation to the other grounds of discrimination, seems to be rather underdeveloped although it is part of the EU primary legislation.[17]

Schiek and Mulder emphasize the problem of finding an adequate comparator as a major difficulty in cases of intersectional disadvantage.[18] As a potential solution of this problem, they draw a parallel with pregnancy where it has been established that there is no need to find a comparator.[19] Neither the need for the flexible development of the concept of intersectional discrimination nor the problem of finding an adequate comparator have prevented certain national legislators from prohibiting intersectional discrimination, as will be shown later in this paper.

III THE ROLE OF THE CJEU IN THE PROTECTION OF VICTIMS OF DISABILITY DISCRIMINATION

1. Adequate comparator in disability discrimination cases

Finding an adequate comparator is not a problem only in the cases involving intersectional discrimination. It crops up when disability discrimination is to be established as well, but fortunately this has not prevented the EU legislator from prohibiting disability discrimination in employment.[20] Judgments in *Milkova*[21] and *VL v. Szpital Kliniczny*[22] are illustrative in this context. In both those cases, certain groups of persons with disabilities were

15 Gender mainstreaming is defined as 'the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels'. UN Women, Handbook on gender mainstreaming for gender equality results, 2022, *https://reliefweb.int/report/world/handbook-gender-mainstreaming-gender-equality-results*, 11.

16 Burri and Schiek, *op. cit*., 24.

17 The concept of mainstreaming is contained in art. 10 of the TFEU which states: '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.'

18 Dagmar Schiek and Jule Mulder, 'Intersectionality in EU Law: A Critical Re-appraisal', in Dagmar Schiek and Anna Lawson (eds), *European Union Non-Discrimination Law and Intersectionality, Investigating the Triangle of Racial, Gender and Disability Discrimination* (2011), 270. Conte emphasizes the same problem. Conte, *op. cit*., 21.

19 *Ibid*.

20 The CJEU sometimes errs when it needs to find an adequate comparable person to establish discrimination based on religion or belief, too. This was the case in *Achbita*. See the criticism of this judgment in Ivana Grgurev, 'Dismissal as Ultima Ratio in the Case-Law of European Supranational Courts' in Koen Nevens, Kristof Salomez, Evelin Timbermont and Guido Van Limberghen (eds), *Liber Amicorum Wilfried Rauws* (2021), 367–375.

21 Case 406/15, 9.3.2017, *Petya Milkova v Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol*, ECLI:EU:C:2017:198.

22 Case 16/19, 26.1.2021., *VL v. Szpital Kliniczny*, ECLI:EU:C:2021:64.

treated unfavourably compared to other groups of persons with disabilities. In *Milkova*, the Bulgarian legislation provided employees with disabilities with a higher level of protection from dismissal compared to the dismissal protection of civil servants with disabilities. Thus, an employer in the private sector could terminate the contract of employment of a disabled employee only with the prior authorisation of the labour inspectorate which was not needed for the dismissal of civil servants with disabilities.[23] On the other hand, in *VL v. Szpital Kliniczny*, the employer decided to grant the allowance only to workers who had submitted their disability certificates after a certain date and the workers who had submitted their disability certificates to the employer before that date did not receive that allowance.[24] The issue was whether one can establish disability discrimination in these cases since until then, the CJEU case-law established disability discrimination in comparison with an able-bodied person, i.e., an able-bodied person was considered as an adequate comparator.

The CJEU in the *Milkova* case ruled that a differentiation between different groups of persons with disabilities does not represent discrimination based on disability but it could represent an infringement of the principle of equal treatment, and it is up to the national court to determine this. When making that determination it has to consider the purpose of the protection against dismissal for both categories of disabled persons, i.e. private sector and public sector employees.[25] On the other hand, in *VL v. Szpital Kliniczny*, the CJEU ruled that that the Directive 2000/78 is not limited only to differences in treatment between persons who have disabilities and persons who do not have dsabilities, i.e., 'that directive does not limit the circle of persons in relation to whom a comparison may be made in order to identify discrimination on the grounds of disability, for the purposes of that directive, to those who do not have disabilities'.[26] Furthermore, 'that directive would be diminished if it were to be considered that a situation where such discrimination occurs within a group of persons, all of whom have disabilities, is, by definition, not covered by the prohibition of discrimination laid down thereby solely on the ground that the difference in treatment at issue takes place as between persons with disabilities'.[27] Despite the positive impact of this ruling on the protection of persons with disabilities, it seems wrong from the viewpoint of the very basic tenets of anti-discrimination law, which were, on the other hand, taken into account by the CJEU in their legal reasoning adopted in *Milkova*. Discrimination does not mean every differentiation, it means unjustified differentiation based on prohibited ground(s) directly or indirectly, which, logically, could be proven in comparison with the comparator not possessing the protected characteristic. The final goal of the prohibi-

23 *Ibid*.

24 *Ibid*., para. 15.

25 Case 406/15, 9.3.2017, *Petya Milkova v Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol*, ECLI:EU:C:2017:198, para 64.

26 Case 16/19, 26.1.2021, *VL v. Szpital Kliniczny*, ECLI:EU:C:2021:64, para 31.

27 *Ibid*., para. 35.

tion of discrimination is to achieve equality, and this can be achieved in different manners, not only by applying the principle of non-discrimination, as proven in *Milkova* case.

Even in *VL v. Szpital Kliniczny*, the adequate protection of unfavorably treated persons with disabilities could have been achieved by applying the principle of equality before the law enshrined in Article 20 of the Charter of Fundamental Rights of the European Union,[28] instead of claiming that disability discrimination could be proven by comparing different groups of persons with disabilities since both the victims of discrimination and the comparators possess the protected characteristic – disability.

Muir agrees with the legal reasoning in *Milkova* because the CJEU, by differentiating between the equality before the law (Article 20 of the Charter of Fundamental Rights of the European Union) and the principle of non-discrimination (Article 21 of the Charter of Fundamental Rights of the European Union), 'avoids any confusion on the relationship between these various tools and ensures coherence'.[29] The ruling in *VL v. Szpital Kliniczny* is not consistent with the settled case-law of the CJEU and does not contribute to the clarity of EU non-discrimination law. On the contrary, Xenidis agrees with the reasoning in *VL v. Szpital Kliniczny* because the CJEU 'has focused on actual disadvantages rather than differences between groups and included intergroup discrimination within the personal scope of the Directive'.[30] She claims that the groups are not homogeneous, there are intergroup differences, and within the groups there are privileged and disadvantaged members. Hence, she advocates for the comparison with the best protected subgroup.[31] I agree that the groups are not homogeneous and that there are subgroup differences, but for the sake of consistence in the application of established concepts of anti-discrimination law it would be better to distinguish between the principle of non-discrimination and the principle of equality before the law.

However, if the CJEU continues comparing subgroups, this could have another positive repercussion: it opens the door for the acknowledgment of intersectional discrimination by the CJEU. If it is possible to make a com-

28 In his opinion Advocate General Pitruzzella claims the opposite. According to Pitruzzella, there is a clear distinction between the situation in *VL v. Szpital Kliniczny* and that examined by the CJEU in *Milkova*. He differentiates the criterion of 'nature of the employment relationship' used in *Milkova* from the criterion applied in *VL v. Szpital Kliniczny* which although 'apparently neutral' (in that it does not expressly and directly refer to disability), places 'at a particular disadvantage' (the withholding of the allowance certainly fits that concept) 'persons having ... a particular disability' 'in comparison with other persons' and, in a way ... equates them with persons having no disability (paras. 79 and 80). This argument is not convincing. In both cases the unfavorably treated groups of disabled employees were put in a same situation as persons without disabilities.

29 Elise Muir, 'The Essence of the Fundamental Right to Equal Treatment: Back to the Origins', *German Law Journal*, 20, 2019, 838.

30 Raphaële Xenidis, 'The polysemy of anti-discrimination law: The interpretation architecture of the Framework Employment Directive at the Court of Justice', *Common Market Law Review*, Vol. 58, No. 6, 2021, 1659.

31 *Ibid*., 1661.

parison between subgroups, then finding an adequate comparator in cases of intersectional discrimination is no longer a problem. For instance, in case of the unfavorable treatment of a female employee with a disability on a ground which represents an intersection of gender and disability, the adequate comparator could be a male employee with a disability (although he is a member of the same protected group, i.e., persons with disabilities) who is not treated unfavorably or a female employee without a disability (although she is a member of the same protected group – women) who is not treated unfavorably.

In *Milkova*, the legal basis for the differentiation between different categories of workers with disabilities was contained in the law. On the other hand, in *VL v. Szpital Kliniczny*, the basis for the differentiation between different categories of workers with disabilities was not part of legislation but was created by the employer. Therefore, *stricto sensu*, different categories of workers with disabilities were treated equally by the law but were treated differently by the employer. However, when the law which guarantees equality is not properly applied by the employer when s/he decides on employees' rights, the equality before the law is not achieved. The employer needs to apply merit-based criteria. If s/he applies criteria which are 'illogical and lacking in objectivity'[32], resulting in the differentiation within the group of employees sharing a protected characteristic, s/he infringes the principle of equality before the law. Although AG Pitruzzella, in the context of facts in the *VL v. Szpital Kliniczny* case, calls the comparison of a person with disability with a person without disability formalistic and traditional as opposed to his innovative interpretation of the comparator, [33] which involves a comparison between different sub-groups of persons with disabilities, I am not convinced that this is the direction in which the CJEU should go when establishing disability discrimination. The CJEU should use both tools for achieving equality, the principle of equality before the law and the principle of non-discrimination and make a clear distinction between them. Such an approach of the CJEU coupled with the explicit prohibition of intersectional discrimination by the EU legislation would provide adequate protection to the victims of discrimination.

It is worth mentioning in this context that the Constitutional Court of the Republic of Croatia needed to compare two groups of persons with disabilities as well, when it was called upon to rule on whether the provision granting the right to a disability allowance guaranteed by the Social Assistance Act of 1997 (amended in 2001, 2003, 2006 and 2007) was discriminatory.[34] The contested provision of the Social Assistance Act stipulated that a person with a severe physical or mental disability is entitled to a personal disability allowance if their disability occurred before the age of 18. There-

32 Opinion of Advocate General Pitruzzella in Case C–16/19, 18.06.2020, *VL v Szpital Kliniczny im. dra J. Babińskiego, Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie*, para. 56.

33 *Ibid*, paras. 81 and 82.

34 The Constitutional Court of the Republic of Croatia, U-I-4170/2004, 29.9.2010.

fore, persons who developed such a disability after the age of 18 were put in an unfavourable position. The Constitutional Court established that 'in this particular case it is not a question of 'classic' discrimination based on disability, since it is not about inequality between disabled and non-disabled people, but about inequality within the same group of disabled people with the same degree of disability. The only thing that distinguishes them in the exercise of the said right is the time (age) of the occurrence of that disability, according to which criteria they are treated differently'.[35] The age requirement was abolished as discriminatory, since the Constitutional Court did not find any objective and reasonable justification for such a requirement.

2. From Chacon Navas *case to* XXXX v. HR Rail SA *case*

2.1. The concept of disability

The first case in which the CJEU dealt with the definition of disability discrimination was *Chacon Navas.*[36] In this case the CJEU did not recognize long-term illness as a protected ground of discrimination.[37] The female employee was dismissed because she had taken long-term sick-leave. The Spanish court asked the CJEU whether this represented disability discrimination or whether sickness could be added to the list of grounds prohibited by the Directive 2000/78. The CJEU was reluctant to broaden the protection of victims of discrimination beyond the grounds expressly listed in the Directive 2000/78 although the line between long-term sickness and disability is not always clear.[38] Although the role of the CJEU is to interpret the EU law and not to replace the legislation and establish new prohibited grounds of discrimination, there are cases in which it has broadened the protection of victims of discrimination. In this regard, we can mention the judgment *P. v. S* in which the CJEU interpreted the prohibition of sex discrimination as the prohibition of gender discrimination and consequently protected a transgender employee from unfair dismissal caused by her gender reassignment.[39]

In some cases, in which the CJEU ruled after the CRPD entered into force for the EU, the victims of disability discrimination did not receive adequate protection from the CJEU, quite unexpectedly. According to Conte, in *Daoudi*,[40]

35 *Ibid*., para. 12.

36 Case13/05, 11.7.2006, *Sonia Chacon Navas v. Eurest Colectividades SA*, ECLI:EU:C:2006:456. See more in Mark Bell and Ann Numhauser-Henning, *op. cit*., 147-148.

37 It is worth mentioning that some national legislations prohibit discrimination based on health status, including the Croatian legislator in art. 1(1) of the Croatian Anti-Discrimination Act (*Official Gazette* Nos 85/2008, 112/2012).

38 In Croatia, apart from the prohibition of disability discrimination, it is also prohibited to discriminate against a person based on their health status (art. 1 of the Anti-Discrimination Act of 2008, amended in 2012). Furthermore, taking sick leave does not constitute a just cause for dismissal (art. 117(1) of the Labour Act of 2014, last amended in 2019).

39 Case 13/94, 30.4.1996, *P v S and Cornwall County Council*, ECLI:EU:C:1996:170.

40 Case 395/15, 1.12.2016, *Daoudi v. Bootes Plus SL and others*, ECLI:EU:C:2016:917. In this case, the claimant was temporary incapacitated to work due to an accident at work. 23 days after the accident, he received the notice of dismissal. The CJEU ruled that in a case

Ruiz Conejero,[41] *Kaltoft*[42] and *Z. v. A Government Department*[43] 'the CJEU restored the medical model of disability in EU equality law by classifying disability as a medical condition merely located within the individual'[44] instead of applying the human rights model of disability contained in the CRPD.

2.2. The concept of reasonable accommodation

In *HK Danmark*[45] the CJEU broadened the concept of reasonable accommodation. The CJEU in this case strengthened the argument that shortening working hours is a form of reasonable accommodation of working conditions and that it is an obligation of the employer to provide it to the employees with disabilities, by referring to the provisions of the CRPD.

In *DW*,[46] the CJEU protected a female employee with disabilities from indirect discrimination which resulted from the apparently neutral criteria for the selection of persons who were to be dismissed: productivity below a given rate, a low level of multi-skilling in the undertaking's posts and a high rate of absenteeism.[47] However, if the employer had provided that employee with reasonable accommodation beforehand, this would not have been considered as indirect discrimination.[48]

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of temporary incapacity for work, for an indeterminate amount of time, as the result of an accident at work, it does not mean, in itself, that the limitation of that person's capacity can be classified as being 'long-term', within the meaning of the definition of 'disability' laid down by the Directive 2000/78.

41 Case 270/16, 18.1.2018, *Carlos Enrique Ruiz Conejero v. Ferroser Servicios Auxiliares SA, Ministerio Fiscal,* ECLI:EU:C:2018:17. The Spanish legislation allows an employer to dismiss a worker on the grounds of intermittent absences from work, even if the absences are justified and are the consequence of illnesses attributed to that worker's disability. The CJEU ruled that combating absenteeism is a legitimate aim but if the legislation goes beyond what is necessary in order to achieve that aim, it constitutes a breach of the Directive 2000/78.

42 Case 354/13, 18.12.2014, *Fag og Arbejde (FOA) v Kommunernes Landsforening (KL),* ECLI:EU:C:2014:2463. Mr Kaltoft claimed he was dismissed due to his obesity. The CJEU left it to the national court to establish whether in this case the obesity entails a limitation resulting in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of Mr Kaltoft in professional life on an equal basis with other workers. If so, obesity constitutes a disability within the meaning of the Directive 2000/78. See the criticism of this judgment in Carmine Conte, *The UN Convention on the Rights of Persons with Disabilities and the European Union* (2022), 80.

43 Case 363/12, 18.3.2014, *Z. v A Government department and The Board of management of a community school,* ECLI:EU:C:2014:159. See also Mark Bell and Ann Numhauser-Henning, *op. cit*., 140–141.

44 Carmine Conte, *op. cit*., 151.

45 Case 335/11 and Case 337/11, 11.4.2013, *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S*, ECLI:EU:C:2013:222.

46 Case 397/18, 11.9.2019, *DW v Nobel Plastiques Ibérica SA*, ECLI:EU:C:2019:703.

47 *Ibid*., para. 75.

48 *Ibid*.

In *XX v. Tartu Vangla*,[49] a prison officer with a hearing impairment was dismissed because he did not meet the minimum standards of sound perception prescribed by the prison's internal rules. These standards were prescribed to guarantee the safety of persons and public order, which was legitimate. The use of corrective aids to assess the compliance with these standards was not allowed. On the other hand, the use of glasses and contact lenses was allowed.[50] The CJEU emphasized the importance of reasonable accommodation in combating discrimination on grounds of disability in the workplace and stressed that the concept of reasonable accommodation should be understood broadly as the means of 'the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with other workers'.[51] A failure to adopt such measures when ascertaining whether that officer is capable of fulfilling his duties represents a breach of the Directive 2000/78.

In *XXXX v. HR Rail SA,*[52] a trainee was employed as a specialist maintenance technician for railway tracks. He was diagnosed with a heart condition that required the fitting of a pacemaker. Since this device is sensitive to the electromagnetic fields present on railway tracks, he could not perform his job anymore. Disabled employees with permanent contracts in a similar situation are entitled to be reassigned to another job within the company. The claimant's contract of employment was terminated because trainees with disability who are no longer capable of performing their duties are not entitled to be reassigned within the company.[53] The concept of reasonable accommodation should be considered as 'effective and practical measures, taking each individual situation into account, to enable a person with disability to have access to, participate in, or advance in employment, or to undergo training, unless such measure would impose a disproportionate burden on the employer'.[54] One such measure is a reassignment to another vacancy – a position for which the disabled employee has the necessary competence, capability and availability, unless that measure imposes a disproportionate burden on the employer.[55]

The settled case-law of the CJEU shows that the Court has developed the concept of reasonable accommodation and highly appreciates it as a mechanism of achieving equality of persons with disabilities in the world of work. Although the inclusion of a reassignment to another vacancy on the list of reasonable accommodation measures represents a step towards the equality of employees with disabilities with employees without disabilities, the limits of this measure are considerable. Few employers have vacancies for which

49 Case 795/19, 15.7.2021, *XX v. Tartu Vangla*, ECLI:EU:C:2021:606.

50 *Ibid*., para. 45.

51 *Ibid*., para. 48.

52 Case 485/20, 10.2.2022, *XXXX v. HR Rail SA*, ECLI:EU:C:2022:85.

53 *Ibid*., para. 21.

54 *Ibid*., para. 37. See also Recital 20 of the Directive 2000/78.

55 *Ibid*., paras. 41, 43 and 48.

disabled employees have the necessary competence, capability, and availability. Therefore, in many cases the obligation of the employer to offer their disabled employee another post will be undoable. It is worth mentioning that the Employment Appeal Tribunal in London, in *Chief Constable of South Yorkshire Police v Jelic*, ruled that swapping jobs could be reasonable adjustment, i.e., even in a case when another employee is employed in a position which could be filled by an employee with disability, a swap should be considered by the employer. [56]

3. EU as a party to the CRPD and its repercussions on the jurisprudence of the CJEU

As mentioned above, in 2011 the EU became a party to the UN Convention on the Rights of Persons with Disabilities and this Convention entered into force for the EU. It means that the CJEU is obliged to interpret the EU law in line with the CRPD. The CRPD adopts an evolving, flexible, wide, and dynamic concept of disability.[57] However, the CRPD's provisions are seen by the CJEU as programmatic. According to Conte 'the CJEU exhibits 'minimalist' approach with regard to the direct effect of international agreements in the EU legal framework'.[58]

The CRPD recognises both multiple and intersectional discrimination. Multiple discrimination of women with disabilities is mentioned in Article 6 expressly, and the UN Committee on the Rights of Persons with Disabilities explained that 'state parties must address multiple and intersectional discrimination against persons with disabilities.'[59] Although the CRPD does not mention intersectional discrimination expressly, the prohibition of this form of discrimination derives from the fact that this Convention prohibits 'discrimination on all grounds' (Article 5(2)). 'Protection against 'discrimination on all grounds' means that all possible grounds of discrimination and their intersections must be taken into account.'[60] Furthermore, the UN Committee on the Rights of Persons with Disabilities clarifies that 'Article 6 ... must be regarded as illustrative, rather than exhaustive, setting out obligations in respect of ... multiple and intersectional discrimination.'[61] Taking this into account, the CRPD could represent a valuable tool for the CJEU to be used to improve the position of women with disabilities on the EU labour market, when applied properly.

56 *Chief Constable of South Yorkshire Police v Jelic*, Employment Apeal Tribunal in London, UKEAT/0491/09/CEA, 24.2.2010. For more details, see Ivana Grgurev, 'Dosezi razumne prilagodbe (u domaćem, anglosaksonskom i pravu EU)', *Zbornik Pravnog fakulteta u Zagrebu,* Vol. 70, No. 2-3, 287–314.

57 Carmine Conte, *op. cit*., 80–81.

58 *Ibid*., 108.

59 Committee on the Rights of Persons with Disabilities, General comment No. 6 (2018) on equality and non-discrimination, para. 19, *https://digitallibrary.un.org/record/1626976*.

60 *Ibid.*, para. 21.

61 *Ibid.*, para. 36.

IV WOMEN WITH DISABILITIES IN THE CASE LAW OF THE CJEU (DISABILITY PLUS GENDER DISCRIMINATION)

1. Coleman case – a step forward in achieving equality

The *Coleman* case[62] is relevant in the context of multiple discrimination of women with disabilities because it concerns a working mother who was discriminated against based on her care for a child with disability. The judgment of the CJEU in the *Coleman* case is highly appreciated in the legal doctrine because the CJEU broadened the protection against discrimination to the persons (in this case, a mother) associated with the persons (a child) with disabilities. Although the female employee did not possess the protected characteristic, namely, she was not a person with disability, she was put in an unfavorable position by her employer because of her relationship with a person with disability, i.e., because she was taking care of her disabled child. In this judgment, the CJEU prohibited for the first time the so-called discrimination by association as a form of direct discrimination. The judgment recognized the burden of family responsibilities of working mothers of disabled children and the obstacles created in the working environment which render the reconciliation of their professional and family life impossible.

There are other cases involving women taking care of their disabled family members which were adjudicated by the CJEU interpreting the Directive 79/7/EC[63] which deserve to be mentioned. For instance, in the *Drake*[64] case, Mrs Drake was not, according to British legislation, entitled to an invalid care allowance when she gave up her work in order to look after her mother although it was paid in corresponding circumstances to a married man. It represented a breach of the Directive 79/7/EEC.[65]

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62 Case 303/06, 17.7.2008, *S. Coleman v Attridge Law and Steve Law*, ECLI:EU:C:2008:415.

63 European Union: Council of the European Union, Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, *Official Jurnal of the European Union* L 6, 10.1.1979, 24–25.

64 Mrs Drake was not, according to British legislation, entitled to an invalid care allowance when she gave up her work in order to look after her mother although it was paid in corresponding circumstances to a married man. It represented a breach of the Directive 79/7/EEC. Case 150/85, *Jacqueline Drake v Chief Adjudication Officer*, 24.6.1986, ECLI:EU:C:1986:257.

65 On the other hand, in *Zuechner*, Mrs Zuechner was not entitled to a payment in respect of the therapeutic treatment provided by her for her disabled husband. She was not considered a member of working population and this fact excluded her from the scope of the Directive 79/7/EC. According to Ellis and Watson, in this case the Court was reluctant to recognize the true financial value of work undertaken in the home. Evelyn Ellis and Philipa Watson, *EU Anti– Discrimination Law* (2012), 446. Case 77/95, *Zuechner v Handelskrankenkasse Bremen*, 1996, ECLI:EU:C:1996:425.

2. Z v. A Government Department *case – two steps back in achieving equality*

The judgment in *Z v. A Government Department* is relevant in the context of multiple discrimination of women with disabilities. In this case, the biological mother of a child born by a surrogate mother was not entitled either to maternity leave or to adoption leave. Since she did not give birth to child – a precondition for taking maternity leave – she was not entitled to it. Similarly, since she did not adopt a child, she was not entitled to adoption leave. She claimed she was a victim of disability and sex discrimination. The CJEU did not find the national (Irish) law discriminatory in this case. Her disability – the fact that she was born without a uterus – did not prevent her from performing her professional activities and therefore in the context of employment and occupation, she was not considered as a person with disability. She also failed to prove she had been a victim of sex discrimination, because a male claimant in a similar situation would be treated in the same manner. Although such a decision was expected in this case, because a different ruling would amount to the indirect judicial recognition of surrogacy, the fact is that the working mother and her child were not adequately protected by the judgment of the CJEU in this case.

According to Conte 'EU law does not comply with the CRPD, which under Article 6 requires multiple and intersectional discrimination against women and girls with disabilities to be addressed.'[66] He concludes that 'EU anti-discrimination law does not take into account the disability aspects of gender discrimination or the gender aspect of disability discrimination.'[67]

In the legal doctrine, the CJEU is often criticized for lacking a coherent approach in the non-discrimination cases and for the reluctance of use of its potential to broaden the protection of victims of discrimination.[68] According to Mulder, 'EU non-discrimination law is capable of promoting substantive gender equality although the CJEU seems sometimes uncertain about its own, occasionally progressive, approach.'[69] Similarly, Moon notes that 'different approaches to different grounds had developed in an ad hoc way without the consistency and coherence that ought to underpin an effective equality law.'[70]

66 Carmine Conte, *op. cit*., 153.

67 *Ibid*., 105.

68 'The CJEU in this area is frequently criticised as incoherent, contradictory and merely reacting to individual cases.' Jule Mulder', *EU Non-Discrimination Law in the Courts* (2017), 271.

69 *Ibid*., 255.

70 Gay Moon, 'Justice for the Whole Person. The UK's Partial Success Story', in Dagmar Schiek and Anna Lawson (eds), *European Union Non-Discrimination Law and Intersectionality*, *Investigating the Triangle of Racial, Gender and Disability Discrimination* (2011), 157.

V PROHIBITION OF MULTIPLE AND INTERSECTIONAL DISCRIMINATION IN ANGLO-SAXON LEGAL SYSTEMS

The influence of the North America on European equality and anti-discrimination law is unquestionable.[71] This is due to the fact that anti-discrimination law was introduced in the North America several decades before its introduction in the EU and it had enough time to develop in the case-law of national courts.[72]

The Canadian Human Rights Act explicitly prohibits intersectional discrimination in section 3(1): 'For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.'[73] 'The Ontario Human Rights Commission has noted that taking an intersectional approach leads to a greater focus on society's response to the individual and a lesser focus on the category into which the person may fit. This enables a Court to make a more person-specific analysis of the effect of the treatment in question...'[74]

In the UK's Equality Act 2010, Section 14 prohibits combined discrimination, i.e., discrimination based on dual characteristics.[75] However, this provision prohibits only direct discrimination on a maximum of two grounds.

An analysis of selected comparative legal systems has proven that, despite the potential difficulties in tackling multiple and intersectional discrimination by legislation, some legislators have decided to prohibit these forms of discrimination explicitly and this can serve as a model for the EU legislator.

VI CONCLUSION

Although the EU has become an important player in the field of fundamental rights protection,[76] in the context of non-discrimination protection there is room for further development, in particular in the context of protection of victims against multiple and intersectional discrimination.

71 Grainne De Burca, 'The Trajectories of European and American Antidiscrimination Law', *The American Journal of Comparative Law*, Vol. 60, No. 1, 2012, 1–22.

72 *Ibid*.

73 The Canadian Charter of Human Rights, *https://laws-lois.justice.gc.ca/eng/acts/h-6/page-1.html*.

74 Gay Moon, *op. cit*.,163.

75 UK's Equality Act 2010, *https://www.legislation.gov.uk/ukpga/2010/15/section/14*.

76 Šejla Imamović, *The Architecture of Fundamental Rights in the European Union* (2022), 43. She emphasises the potential of the CJEU, as opposed to the ECtHR, in setting the fundamental rights standards. According to Imamović, 'the Luxembourg Court could be more progressive when it comes to fundamental rights protection, because it operates in a less diverse environment than the ECtHR and it has a stronger enforcement mechanism'. *Ibid*., 202.

The analysis of the both the EU legislation and the case-law of the CJEU has proven that the issue of multiple and intersectional discrimination is not addressed adequately in EU law. There is a considerable number of cases on disability discrimination ruled by the CJEU and only a few cases related to the discrimination of disabled female employees because of their care responsibilities. Although disabled women share an unfavorable position in society with disabled men, the specificities of their discrimination caused by their gender roles in society should be recognized by law. The analysis of the CJEU case-law in this context has proven that the reasonings in the CJEU rulings are sometimes incoherent and even lack the clarity of conceptual framework (different models of disability applied; ambiguities in defining an adequate comparator in disability discrimination cases), and it is unrealistic to expect that the concept of multiple and intersectional discrimination would be developed any time soon in the case-law of the CJEU. An explicit provision on the prohibition of multiple and intersectional discrimination like the ones introduced in the comparable Anglo-Saxon legal systems would guarantee a higher level of protection of women with disabilities and ease their position on the labour market.

The inconsistency of the CJEU case-law on disability discrimination confirms not only the need to recognize women with disabilities as a target group for protection against discrimination, but the need to address the needs of all persons of disabilities and protect them from discrimination in different areas of social life. A separate directive dealing solely with the protection of persons with disabilities which would explicitly recognize multiple and intersectional discrimination could be an appropriate tool for achieving this goal. Meanwhile, a more active role of the CJEU in the interpretation of EU law in line with the CRPD would be helpful.

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ZAŠTITA ŽENA SA INVALIDITETOM U ANTIDISKRIMINACIJSKOM PRAVU EVROPSKE UNIJE

Apstrakt

Zaštita osoba s invaliditetom od diskriminacije ograničen je koncept unutar prava Evropske unije. Pokriva samo njihovu zaštitu u području zapošljavanja, radnih odnosa i obavljanja zanimanja, ostavljajući osobe s invaliditetom nezaštićene od diskriminacije u drugim područjima društvenog života (kao što su socijalna sigurnost, pristup dobrima i uslugama, obrazovanje). Nadalje, višestruka diskriminacija žena spominje se samo u preambulama Rasne direktive i Okvirne direktive o jednakosti, dok je Sud pravde Evropske unije u svojoj praksi propustio prepoznati koncept intersekcijske diskriminacije. Uzimajući to u obzir, može se zaključiti da osobe s invaliditetom nisu adekvatno zaštićene od diskriminacije, a osobito ženama s invaliditetom nedostaje vidljivosti u pravu Evropske unije.

Konvencija UN o pravima osoba s invaliditetom stupila je na snagu za Evropsku uniju 2011. godine. Ova konvencija primjenjuje model ljudskih prava na invaliditet i priznaje višestruku diskriminaciju žena s invaliditetom. Budući da postoji obaveza Suda pravde Evropske unije da tumači pravo Evropske unije u skladu s tom konvencijom, očekivana implikacija te obaveze je bolja zaštita žena s invaliditetom od diskriminacije u Evropskoj uniji.

Fokus ovog rada je na analizi relevantne sudske prakse Suda pravde Evropske unije i njenih posledica na položaj žena s invaliditetom na tržištu rada Evropske unije.

Ključne reči: *Žene; Invaliditet; Diskriminacija; Pravo Evropske unije; Zapošljavanje; Radni odnosi.*

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INTERSEKCIJSKA I VIŠESTRUKA DISKRIMINACIJA DEVOJČICA I ŽENA SA INVALIDITETOM U OBRAZOVANJU I PRI ZAPOŠLJAVANJU: OBAVEZE DRŽAVA POTPISNICA PREMA ČLANU 6. KONVENCIJE O PRAVIMA OSOBA SA INVALIDITETOM

Apstrakt

Članom 6. Konvencije o pravima osoba sa invaliditetom obuhvaćena je višestruka diskriminacija devojčica i žena sa invaliditetom. Njime se državama potpisnicama nameće obaveza da preduzmu 'sve odgovarajuće mere kako bi obezbedile potpun razvoj, napredak i osposobljavanje žena da bi im se garantovalo vršenje i uživanje ljudskih prava i osnovnih sloboda sadržanih u ovoj konvenciji'. Ove obaveze predmet su detaljnijeg razmatranja u Opštem komentaru broj 3 Komiteta za prava osoba sa invaliditetom od 2016. godine.

Istraživanje je fokusirano na dva specifična cilja. Prvi je da se analiziraju i na detaljan način obrade potencijalne obaveze država na osnovu člana 6. Konvencije. Drugi cilj je usmeren na kritičko posmatranje praktičnih aktivnosti koje su države preduzele u pogledu ispunjenja navedene obaveze.

Osnovni istraživački zadaci postavljeni su u skladu sa opisanim ciljevima: da se ispita neophodnost proaktivnog delovanja država i sankcionišu intersekcijska i višestruka diskriminacija devojčica i žena sa invaliditetom, odnosno kontinuirani napor i dinamična reakcija na intersekcijsku i višestruku diskriminaciju; da se preispita realnost postizanja dualne pozicije države koja istovremeno mora normirati pravni okvir zaštite od diskriminacije i deluje merama koje su usmerene ka povećanju vidljivosti, odnosno merama koje moraju da postignu cilj faktičke jednakosti devojčica i žena sa invaliditetom.

Istraživanje je ograničeno na diskriminaciju u oblastima obrazovanja i zapošljavanja, imajući u vidu obim ovog rada, kao i činjenicu da se ove dve komponente funkcionalno prepliću, kao i da su indikativne za uočavanje dobrih i loših praksi, sistemske i strukturne diskriminacije.

Ključne reči: *Devojčice i žene sa invaliditetom; Intersekcijska i višestruka diskriminacija; Pravo na obrazovanje; Pravo na rad; Konvencija o pravima osoba sa invaliditetom.*

I UVODNA RAZMATRANJA

Konvencija o pravima osoba sa invaliditetom (u daljem tekstu: *CRPD*, Konvencija) jedan je od najšire prihvaćenih međunarodnih instrumenata, sa 185 ratifikacija.[1] Članom 6. Konvencije obuhvaćena je višestruka diskriminacija devojčica i žena sa invaliditetom. Njime se državama potpisnicama nameće obaveza da preduzmu „sve odgovarajuće mere kako bi obezbedile potpun razvoj, napredak i osposobljavanje žena da bi im se garantovalo vršenje i uživanje ljudskih prava i osnovnih sloboda sadržanih u ovoj konvenciji". Ove obaveze predmet su detaljnijeg razmatranja u Opštem komentaru broj 3 Komiteta za prava osoba sa invaliditetom od 2016. godine.

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Osnovni istraživački zadaci postavljeni su u skladu sa opisanim ciljevima: da se ispita neophodnost proaktivnog delovanja država i sankcionišu intersekcijska i višestruka diskriminacija devojčica i žena sa invaliditetom, odnosno kontinuirani napor i dinamična reakcija na intersekcijsku i višestruku diskriminaciju; da se preispita realnost postizanja dualne pozicije države koja istovremeno mora normirati pravni okvir zaštite od diskriminacije i deluje merama koje su usmerene ka povećanju vidljivosti, odnosno merama koje moraju da postignu cilj faktičke jednakosti devojčica i žena sa invaliditetom.

Kritička analiza ima za cilj da ukaže na dobre i loše prakse primene nacionalnih mehanizama suzbijanja intersekcijske diskriminacije devojčica i žena sa invaliditetom, odnosno na kapacitete, strategije i akcije država da percipiraju i preveniraju ovu vrstu diskriminacije. U tu svrhu će se uglavnom koristiti normativni metod ali i metod studije slučaja. Istraživanje je ograničeno na diskriminaciju u oblastima obrazovanja i zapošljavanja, imajući u vidu obim rada, kao i činjenicu da se ove dve komponente funkcionalno preplićу, kao i da su indikativne za uočavanje sistemskih i strukturnih problema koji dovode do (nesankcionisane) intersekcijske i višestruke diskriminacije. U daljem tekstu će se pod izrazom „žene sa invaliditetom" podrazumevati i devojčice sa invaliditetom, u skladu sa Opštim komentarom 3 Komiteta za prava osoba sa invaliditetom.

II UKRŠTANJE IDENTITETA I INTERSEKCIJSKA DISKRIMINACIJA ŽENA U OBRAZOVANJU I PRI ZAPOŠLJAVANJU

Višestruka i intersekcijska diskriminacija rezultat je neopravdanog različitog tretmana lica po nekoliko različitih ličnih svojstava istovremeno, od-

1 Zakon o potvrđivanju Konvencije o pravima osoba sa invaliditetom, *Službeni glasnik RS – Međunarodni ugovori*, br. 42/2009. Stanje ratifikacija navedeno je na dan 6.5.2022. Lista ratifikacija dostupna je na: *https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html*.

nosno ukrštanja identiteta koji podstiču stereotipe i predrasude, što rezultira negiranjem prava na jednakost i ravnopravnost u više socijalnih sfera istovremeno (Fredman to naziva „sinergijskim razlikovanjem"[2]). Tako žene sa invaliditetom trpe posledice kako stereotipnog rodnog ponašanja, tako i stereotipnog ponašanja prema osobama sa invaliditetom. One su češće izložene nasilju, uključujući i porodično nasilje, i njima se u najvećoj meri uskraćuju pravo na obrazovanje, zapošljavanje odnosno pristup tržištu rada, kao i na korišćenje zdravstvenih usluga.[3]

U korenu ovakve vrste diskriminacije su pogrešna i neutemeljena verovanja o osobinama žena i osoba sa invaliditetom. Kako se ističe u izveštaju Komiteta za ukidanje diskriminacije žena[4], svaki pojedinac istovremeno vrši nekoliko društvenih uloga, u kojima se nalazi prema nekom ličnom svojstvu koje poseduje. Ove uloge, identiteti, omogućavaju mu da ostvari neke aspekte svoje biološke ili društvene ličnosti i kao takve su nerazdvojne od samog pojedinca bez ozbira na to da li su urođene ili izabrane, odnosno da li su stvorene svojevoljno ili kao nužna posledica okolnosti u kojima pojedinac živi i razvija se.[5] One međutim mogu dovesti do diskriminacije lica, u i tom slučaju neće biti predispozicija već prepreka za ostvarivanje određenog prava, odnosno realizaciju određene društvene potrebe ili funkcije. Kod žena sa invaliditetom ukrštaju se identiteti koji su već pojedinačno izloženi različitom tretmanu u društvu – rodnoj neravnopravnosti i marginalizaciji osoba sa invaliditetom. Ovakva zabrinjavajuća situacija dodatno se pogoršava ukoliko se na primer radi o ženama koje dolaze iz ruralnih i slabije razvijenih područja, iz sredina u kojima je dominantno partijarhalno shvatanje podele rodnih uloga, ili ako su u pitanju žene pripadnice seksualnih manjina.

Rasprostranjenost višestruke diskriminacije proističe i iz činjenice da se ženama sa invaliditetom često uskraćuju različita prava koja su formalno garantovana kao funkcionalna predispozicija za ravnopravno ostvarivanje određenih ljudskih prava. Pa se tako u odnosu na njihov rodni identitet javljaju: tradicionalna shvatanja da se ženama ne treba dozvoliti visoko obrazovanje, ili čak obrazovanje uopšte, zbog njihove uloge u porodici i domaćinstvu; predrasude pri zapošljavanju koje su vezane za planiranje porodice i porodične dužnosti žena; nevidljive prepreke u napredovanju koje su utemeljene u stereotipnom posmatranju žena kao manje sposobnih da se nađu na rukovodećim mestima; nejednakost zarada, odnosno negacija standarda „jednaka zarada

2 Sandra Fredman, *Discrimination Law* (2011), 139. Navedeno prema: Meghan Campbell, "CEDAW and Women's Intersecting Identities: A Pioneering Approach to Intersectional Discrimination", *Oxford University Working Paper* Vol. 2, No. 3, February 2016, 8.

3 *Report of the Special Rapporteur on violence against women, its causes and consequences*, General Assembly A/67/150 od 3.8.2012., 6–7.

4 Meghan Campbell, *op. cit.,* 7.

5 U feminističkom promišljanju višestruke diskriminacije žena se veoma dobro identifikuje kao pojava „slojevitih identiteta", koji nastaju kao posledica socijalnih odnosa, istorijskih prilika i načina delovanja struktura na vlasti. Association for Women's Rights in Development, 'Intersectionality: A Tool for Gender and Economic Justice', *Women's Rights and Economic Change* No. 9, August 2004, 2.

za jednaku vrednost uloženog rada"; diskriminacija po osnovu trudnoće i nakon povratka sa porodiljskog odsustva i odsustva radi nege deteta[6], i tako dalje. Kao osobe sa invaliditetom, žene se susreću sa dodatnim problemima: segregaciji u obrazovanju i onemogućavanju učenja u redovnom obrazovanom sistemu; uvreženim shvatanjima da ne mogu uopšte ili ne mogu dovoljno kvalitetno obavljati (bilo koji) posao; da je njihov rad manje vredan jer su manje efikasne, i tako dalje. Trebalo bi pomenuti i pravo na razumno prilagođavanje kao jedno od osnovnih prava osoba sa invaliditetom kako kada je reč o obrazovanju, tako i kada je reč o zapošljavanju i korišćenju različitih javnih usluga, koje je često uskraćeno u potpunosti ili je samo formalno proklamovano dok njegova implementacija faktički izostaje. Ovo su svakako osnovni problemi kada je reč o aktivnoj ulozi države, koja bi morala da usvoji i implementira standarde dostupnosti osobama sa invaliditetom u najširem mogućem obimu.

Jedna od dimenzija koje neće biti u direktnom fokusu daljeg istraživanja ali je vredna pomena, jeste odnos ukupnog kvaliteta života žene sa invaliditetom i ostvarivanja prava na obrazovanje i zapošljavanje. Žene koje trpe porodično nasilje najčešće neće dobiti priliku da se obrazuju, kao ni da se zaposle. Specijalna izvestiteljka za nasilje prema ženama Rashida Manjoo sasvim pravilno primećuje: „Žene sa invaliditetom koje su žrtve nasilja u većem su riziku od nezaposlenosti zato što bi nasilnici mogli da ih uznemiravaju ili zastrašuju na radnom mestu, uznemiravaju druge zaposlene, ili ih spreče da uopšte odu na posao, kao mehanizam kontrole koji može rezultirati gubitkom zaposlenja."[7] Važno je dakle primetiti da je ukupan položaj žena sa invaliditetom determinisan nizom faktora koji se odnose na podršku sredine, ili odsustvo iste, materijalno stanje, finansijsku samostalnost, i slično. Oni moraju u svakom trenutku biti uzeti u obzir u celom kontekstu reagovanja države u skladu sa obavezama iz člana 6. *CRPD* – da bi se omogućilo istinsko i efikasno ostvarivanje prava za obrazovanje i zapošljavanje, potrebno je preduzeti daleko veći broj koordinisanih i komplementarnih mera podrške ženama sa invaliditetom, nego što su one koje su ograničene na ove dve specifične oblasti. U tom smislu je važno ukazati i na intersekcijska prirodu ovog nasilja, koje potiče iz različitih pobuda ali istovremeno utiče na mnoge sfere života.[8] Jasno je da su Frohmader, Dowse i Didi u potpunosti u pravu kada konstatuju da država može dozvoliti nasilje propuštanjem da ga normira na adekvatan način, ili propuštanjem da primeni normativni okvir koji je usvojen.[9]

6 U odnosu na ovu vrstu diskriminacije, videti uporednu analizu u: Jovana Rajić Ćalić, „Posebna zaštita žene za vreme trudnoće, porodiljskog odsustva i odsustva radi nege deteta u Srbiji i u uporednom pravu", *Radno i socijalno pravo*, 2/2019, Udruženje za radno pravo i socijalno osiguranje Srbije, 337–353.

7 Human Rights and Disabled Persons (United Nations publication, Sales No. E.92.XIV.4), citirano prema: *Report of the Special Rapporteur on violence against women, its causes and consequences*, *op. cit.,* 17.

8 Carolyn Frohmader, Leanne Dowse and Aminath Didi, *Preventing Violence against Women and Girls with Disabilities* (2015), 9.

9 *Report of the Special Rapporteur on violence against women, its causes and consequences*, *op. cit.,* 10.

III ČLAN 6. *CRPD* I OPŠTI KOMENTAR 3. KOMITETA ZA PRAVA OSOBA SA INVALIDITETOM

Član 6. *CRPD* glasi:

> Žene sa invaliditetom
>
> *1. Države strane ugovornice su svesne toga da su žene i devojke sa invaliditetom izložene višestrukoj diskriminaciji i u tom pogledu će preduzeti mere kako bi im obezbedile potpuno i ravnopravno ostvarivanje svih ljudskih prava i osnovnih sloboda.*
>
> *2. Države strane ugovornice će preduzeti sve odgovarajuće mere kako bi obezbedile potpun razvoj, napredak i osposobljavanje žena da bi im se garantovalo vršenje i uživanje ljudskih prava i osnovnih sloboda sadržanih u ovoj konvenciji.*

U Opštem komentaru broj 3, Komitet za prava osoba sa invaliditetom (u daljem tekstu: Komitet) jasno naglašava da upotrebljeni izraz „žene" (engl. *women*) podrazumeva i obuhvata i odrasle žene i devojčice. Dalje, dok izraz „pol" (engl. *sex*) podrazumeva biološko određenje, izraz „rod" (engl. *gender*) upućuje na karakteristike (uloge) koje društvo ili kultura jedne zemlje označava kao muške ili ženske. Komitet se osvrnuo i na neke druge pojmove koji se koriste u *CRPD*. Višestruka diskriminacija je situacija u kojoj osoba može iskusiti diskriminaciju po dva ili više osnova istovremeno, na način da je rezultat takve diskriminacije naglašeniji nego da se ona dešava samo po jednom od osnova. Intersekcijska diskriminacija sa druge strane podrazumeva situacije u kojima dolazi do interakcije između nekoliko osnova za diskriminisanje, tako da oni funkcionišu zajedno i međusobno su neodvojivi.[10]

Komitet jasno izražava nužnost aktivnog pristupa antidiskriminacionim merama koje će uspostaviti jednakost i ravnopravnost žena sa invaliditetom. U tom smislu se zahteva od država da iskorače dalje od formalnog uzdržavanja od diskriminatornog postupanja i ukazuje se da one moraju usvojiti mere aktivne podrške ženama sa invaliditetom u cilju njihovog razvoja i osnaživanja.[11] Funkcionalna povezanost člana 6. odnosno obaveza koje se nameću državama na ovaj način, i ostatka teksta *CRPD*, prema Komitetu je evidentna i nezaobilazna o njegovom tumačenju: „Član 6. služi kao alat za tumačenje pristupa odgovornostima država članica širom Konvencije, da promovišu, štite i ispunjavaju ljudska prava žena i devojčica sa invaliditetom, iz pristupa zasnovanog na ljudskim pravima i razvojne perspektive."[12]

Da bi se postigao cilj razvoja, napredovanja i osnaživanja žena sa invaliditetom, koji je praktično zacrtan u članu 6. stavu 2. *CRPD*, potrebno je da države preduzmu sve potrebne mere kako bi osigurale pretpostavke da žene

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10 Committee on the Rights of Persons with Disabilities, *General comment No. 3 (2016), Article 6: Women and girls with disabilities*, CRPD/C/GC/3, 2, para. 4.

11 *Ibid.,* 2, para. 7.

12 *Ibid.,* 2–3, para. 7.

sa invaliditetom mogu da uživaju sva ljudska prava na ravnopravan način, odnosno na način koji ih praktično izjednačava u uživanju prava sa muškom populacijom, kao i ženskom populacijom bez invaliditeta. Mere koje se odnose na obrazovanje i zapošljavanje, smatraju se merama u domenu ekonomskog osnaživanja žena.[13]

„Države članice Konvencije imaju obavezu da poštuju, štite i ispunjavaju prava žena sa invaliditetom prema članu 6. i svim drugim materijalnim odredbama, kako bi im se garantovalo uživanje i ostvarivanje svih ljudskih prava i osnovnih sloboda. Ove dužnosti podrazumevaju preduzimanje pravnih, političkih, administrativnih, vaspitnih i drugih mera."[14] Komitet u ovom smislu ne odstupa od klasične podele obaveza države prilikom stvaranja preduslova za nesmetano vršenje nekog ljudskog prava. Država se najpre mora *uzdržati* od mešanja u vršenje prava, njegovim neopravdanim uslovljavanjem ili ograničavanjem koje u praksi obesmišljava njegovo postojanje i otežava njegovu realizaciju. Pravni okvir, kao i praksa njegove primene, moraju biti takvi da omoguće svima uživanje prava na jednak i ravnopravan način. Osim pasivnog ponašanja, država mora u određenim situacijama i u odnosu na pojedina prava da ima i aktivnu ulogu. Ta uloga se odnosi na dva aspekta njenog delovanja. Najpre, država mora zaštititi titulara prava, kako bi ona/on mogli neometano da ga uživaju bez ograničavanja trećih strana. Ova obaveza se funkcionalno nastavlja na prvu. Dok je kod uzdržavanja država dužna da pasivno omogući vršenje prava odnosno da ne čini ništa što bi moglo onemogućiti ili ugroziti vršenje prava, kod *zaštite* je dužna da to čini na aktivan način, otklanjajući okolnosti i delovanja koja negiraju ili ugrožavaju vršenje prava. Zaštita se takođe ne svodi samo na ustanovljen normativni okvir zaštite prava, već i na njegovo efikasno sprovođenje tako da može opravdati svoju svrhu i tako da igra aktivnu ulogu u ostvarivanju prava uprkos potencijalnim štetnim uplivima sa treće strane. Zaštita dakle omogućava titularu neometano vršenje prava u praksi, odnosno brzo reagovanje i stvaranje uslova da se pravo efektivno vrši u okolnostima kada neka treća strana svojim delovanjem privremeno ugrozi ili obustavi vršenje prava, suprotno propisima. Konačno, treća uloga – istovremeno i dužnost – države u pogledu stvaranja uslova za vršenje nekog ljudskog prava, funkcionalno je povezana sa prethodne dve dužnosti i svodi se na *aktivno delovanje* države kako bi se omogućili preduslovi za vršenje prava. Ono se razlikuje od prethodne dve obaveze jer je ovde država aktivna (za razliku od prve grupe obaveza gde je pasivna) da bi svojim pozitivnim delovanjem (a ne sprečavanjem negativnog delovanja treće strane kao što je slučaj kod druge grupe obaveza) načinila preduslove da se neko pravo zaista uživa na način i u kvalitetu koji je zamišljen prilikom njegovog normiranja na međunarodnom i nacionalnom nivou. Kvalitet uživanja pra-

13 One su komplementarne merama koje su usmerene da postignu njihovu participaciju u drugim oblastima društva, kao što su kultura, sport, politika, zdravstvena zaštita. *Ibid.*, 7, para. 21.

14 *Ibid.*, 8, para 24.

va podrazumeva i ravnopravnost u njegovom vršenju, kao i kreiranje potencijala pomoću kojih dolazi do potpunog i efektivnog vršenja prava. Na ovo upozorava i Komitet, razmatrajući položaj i ulogu države u postupku ostvarivanja prava žena sa invaliditetom, a u kontekstu implementacije člana 6. *CRPD*. „Države članice moraju usvojiti pristup dvostrukog koloseka: (a) sistematskim uključivanjem interesa i prava žena i devojčica sa invaliditetom u sve nacionalne akcione planove, strategije i politike koje se tiču žena, detinjstva i invaliditeta, kao i u sektorske planove koji se tiču, na primer, rodna ravnopravnost, zdravlje, nasilje, obrazovanje, političko učešće, zapošljavanje, pristup pravdi i socijalnoj zaštiti; i (b) preduzimanje ciljanih i praćenih akcija koje su posebno usmerene na žene sa invaliditetom."[15]

Trebalo bi napomenuti da država nije ograničena na slučajeve zaštite od diskriminacije koju počinje njeni organi i institucije; zaštita je univerzalna i opšta, a ukoliko ne pruži zadovoljavajući stepen zaštite država može biti odgovorna za svoje nečinjenje u situaciji kada se od nje očekuje upravo suprotno. Ovaj princip ustanovljen je Opštom preporukom broj 19 Komiteta za eliminaciju svih oblika diskriminacije žena, koji je konstatovao da su države odgovorne i za postupanja privatnih entiteta ako je diskriminacija posledica propuštanja države da sa dužnom pažnjom pristupi prevenciji kršenja prava, ili da istraži i sankcioniše kršenje i dodeli naknadu štete žrtvama.[16]

Komitet u Opštem komentaru broj 3 dalje ukazuje na povezanost člana 6. sa članovima 24. koji se odnosi na pravo na obrazovanje i člana 27. koji se odnosi na pravo na zapošljavanje i rad.

U odnosu na član 24. Komitet ističe da se u oblasti obrazovanja ukrštaju klasični rodni stereotipi, kao što je davanje većeg značaja obrazovanju dečaka nego devojčica, sa nizom drugih stereotipa i prepreka sa kojima se devojčice susreću u najranijem, školskom dobu, usled čega u značajno manjem procentu stiču određeni stepen obrazovanja: dečji brakovi, ženske porodične dužnosti, žene u ulogama porodičnog negovatelja, ali i sa stereotipima u samom obrazovanog sistemu (udžbenicima, stavovima nastavnika) i sa nedovoljno prilagođenim školskim prostorijama (na primer nedostatak prostorija i materijala za menstrualnu higijenu).[17] Borba za ostvarivanje prava na obrazovanje devojčica sa invaliditetom u mnogim krajevima sveta je i borba sa predrasudama zbog kojih se ovoj deci odriče svaka budućnost.[18]

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15 *Ibid.,* para. 27.

16 *In-depth study on all forms of violence against women*, Report of the Secretary-General, General Assembly A/61/122/Add.1, 6.7.2006, 73, para. 257.

17 Committee on the Rights of Persons with Disabilities, *op. cit.*, 16, para. 56. i dalje (para. 36): „...dečji brak doprinosi većoj stopi napuštanja škole i ranim i čestim porođajima. Devojčice sa invaliditetom doživljavaju društvenu izolaciju, segregaciju i eksploataciju unutar porodice, uključujući isključenje iz porodičnih aktivnosti, sprečenost da napuštaju dom, prisiljavanje da obavljaju neplaćene kućne poslove i zabranu pohađanja škole."

18 Za primere iz Burkine Faso, Nigera i Malija, videti: Handicap International (Humanity & Inclusion), *Education, girl, disability: an equation to solve, Ensuring the right to education for girls with disabilities in the Sahel*, Factsheet January 2021.

U odnosu na zapošljavanje i član 27. *CRPD*, Komitet naglašava da se žene sa invaliditetom pored opštih prepreka sa kojima se osobe sa invaliditetom generalno suočavaju kada pokušavaju da ostvare svoje pravo na rad, suočavaju i sa jedinstvenim preprekama za ravnopravno učešće na radnom mestu, uključujući seksualno uznemiravanje i nejednaku platu, nedostatak mogućnosti obeštećenja zbog pretrpljene diskriminacije, kao i različite fizičke, informacione i komunikacione barijere.[19]

Komitet naglašava nekoliko osnovnih načina da država ispunjava svoje obaveze prema članu 6. *CRPD*: ukidanje diskriminatornih propisa i donošenje novih antidiskriminatornih propisa; usaglašavanje prakse primene propisa sa novodonetim propisima i načelima jednakosti i ravnopravnosti; rešavanje svih problema koji se tiču postojećih prepreka kako bi žene sa invaliditetom uživale svoja osnovna prava na jednak i ravnopravan način; prikupljanje statisitčkih i drugih podataka koji su od važnosti za implementaciju pravnog okvira i donetih mera, kako bi se one usavršile i prilagodile faktičkim okolnostima na terenu; komunikacija i saradnja sa drugim nacionalnim i međunarodnim akterima na poboljšanju položaja žena sa invaliditetom, odnosno podrška stvaranju mreža ovih organizacija i institucija.[20]

Opšti komentar broj 3 ne sadrži konkretne mere koje se odnose na dostizanje jednakosti i ravnopravnosti žena sa invaliditetom u pogledu obrazovanja i zapošljavanja. Međutim, pojedine mere koje Komitet navodi jasno (ponekad i primarno) se mogu primeniti upravo na ove oblasti diskriminacije. Takođe, tamo gde Komitet navodi specifične primere kršenja određenih prava žena sa invaliditetom, odnosno modalitete njihove diskriminacije, jasno se može videti koje mere država može, odnosno mora, preduzeti da bi takve negativne prakse sprečila, ili otklonila njihove posledice.

Tako u paragrafu 15 Komitet naglašava značaj razumnog prilagođavanja potrebama žena sa invaliditetom. Ono se može primeniti na dostupnost javnih objekata (na primer suda ili zdravstvene ustanove), kao i na druge oblasti društvenog života[21], ali je svakako funkcionalno vezano za dostupnost institucija obrazovanja i rada, kao i uređenost prostora za učenje i rad. U komentaru Opšteg komentara broj 3, koji je izradila organizacija *Women Enabled International*, standard razumnog prilagođavanja navodi se uz primer prilagođavanja radnih prostorija na način da žena sa invaliditetom može da doji dete[22]. Važno je napomenuti i da Komitet u pomenutom paragrafu 15 Opšteg

19 Committee on the Rights of Persons with Disabilities, *op. cit.,* 16–17, para. 58.

20 *Ibid*., 17–19, para. 62.

21 Razumno prilagođavanje nastalo je na temeljima unapređenja vršenja religijskih prava pojedinaca, da bi se zatim proširilo i na druge oblasti, a naročito postalo značajno u odnosu na domen rada. Videti: Jovana Rajić Ćalić, Miloš Stanić, „Nošenje verskih obeležja na radnom mestu, razumno prilagođavanje i slučaj Eveida", u: *Beogradski ustavnopravni forum: Preispitivanje klasičnih ustavnopravnih shvatanja u uslovima savremene države i politike* (ur. Miroslav Đorđević), 2021, 363–373.

22 *Women Enabled International Guide to CRPD General Comment No. 3: Women and Girls with Disabilities*, 2017, 2. Ovaj primer naveden je i od strane Komiteta u Opštem komentaru 3, 5, para. 15.

komentara ukazuje da odsustvo razumnog prilagođavanja može predstavljati ne samo kršenje člana 6. *CRPD* već i člana 5. u delu koji se odnosi na principe jednakosti i zabrane diskriminacije. Drugim rečima, svesno zanemarivanje obaveza iz člana 6. od strane države, koje dovede do kršenja člana 5. – može predstavljati sistemsku ili strukturnu diskriminaciju.[23]

Dalje, Komitet u nekoliko situacija prepoznaje razne vrste diskriminacije koje se mogu dogoditi ženama u oblasti rada a koje su uzrokovane nedostatkom razumnog prilagođavanja u drugim oblastima, kao što je na primer situacija u kojoj žena sa invaliditetom ne može da ostvari pravo na razumno prilagođavanje na radnom mestu jer nema pristup medicinskoj ustanovi kod koje bi pribavila odgovarajuću medicinsku dokumentaciju.[24]

Važno je napomenuti i da Komitet sasvim pravilno uočava postojanje takozvane diskriminacije prema asocijaciji, kada sama osoba ne poseduje određeno svojstvo ali se vezuje za drugo lice koje poseduje svojstvo u odnosu na koje su razvijene predrasude koje dovode do diskriminacije. U slučaju žena moguće je na takvim primerima uočiti i višestruku diskriminaciju, na primer poslodavac ne želi da zaposli ženu koja ima dete sa invaliditetom, pretpostavljajući da će se ona brinuti o detetu kao i da će zdravstveno stanje deteta uzrokovati njena češća odsustva sa rada, nego što bi to bio slučaj sa drugim zaposlenima.[25]

Komitet naglašava suštinsku povezanost *CRPD* (i naročito člana 6.) sa Konvencijom o eliminaciji svih oblika diskriminacije žena (u daljem tekstu: CEDAW).[26] Ova veza prepoznata je uzajamno u domenu višestruke i intersekcijske diskriminacije. U opštem komentaru 28 Komitet za eliminaciju svih oblika diskriminacije žena naglašava neraskidivu povezanost u diskriminaciji po više osnova istovremeno.[27]

Konačno, Dubinska studija o oblicima nasilja nad ženama UN[28] skreće pažnju na još jedan važan aspekt kada je reč o diskriminaciji žena, uključu-

23 Videti Opšti komentar broj 2 Komiteta u odnosu na član 9. CRPD: CRPD General Comment No. 2 (CRPD/C/GC/2), General comment No. 2 (2014), Article 9: Accessibility. Samu strukturnu i sistemsku diskriminaciju Komitet definiše u Opštem komentaru, para. 17(e): „Strukturalna ili sistemska diskriminacija su skriveni ili očigledni obrasci diskriminatornog institucionalnog ponašanja, diskriminatorne kulturne tradicije, društvene norme i/ili pravila." Navodi se dalje da takvi štetni stereotipi najčešće dovode do zatvaranja tržišta rada ženama sa invaliditetom za obavljanje pojedinih profesija. Više o pojmu strukturne diskriminacije u: Milica V. Matijević, *Substantive Equality and the Limits of Law,* PhD dissertation, Faculty of Law, University of Florence, Florence 2018, 132–139.

24 Committee on the Rights of Persons with Disabilities, *op. cit.*, 6, para. 17(d).

25 *Ibid*, para 17(c).

26 CEDAW, čl. 1.

27 CEDAW Committee, General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, UN Doc. CEDAW/C/ GC/28, 16 December 2010, para 18. Citirano prema: Ivona Truscan and Joanna Bourke-Martignoni, 'International Human Rights Law and Intersectional Discrimination', *The Equal Rights Review*, Vol. 16, 2016, 124.

28 Report of the Secretary-General, *op. cit.,* 68, paras. 233-234.

jući i žene sa invaliditetom gde je prema nekim izveštajima još izraženiji problem seksualnog uznemiravanja. S pravom se konstatuje da je u većini država (nepouzdani) izvor informacija o seksualnom uznemiravanju na radu ministarstvo nadležno za rad, kao i da u onim državama u kojima seksualno uznemiravanje nije posebno inkriminisano kao nedozvoljeno, podaci o njemu ne postoje. I više od toga, tamo gde postoje zvanični podaci realno je očekivati da oni ne otkrivaju pravu sliku o obimu problema, odnosno da seksualnog uznemiravanja ima daleko više od onoga što je zvanično prijavljeno.[29] U tom kontekstu se jasno konstatuje obaveza država da formiraju normativni okvir ali i prate njegovu primenu, odnosno preduzmu mere za efikasno sankcionisanje počinilaca sa jedne strane i osnaživanje i ohrabrivanje žena da prijave slučajeve seksualnog uznemiravanja sa druge strane. Kroz problem seksualnog uznemiravanja moguće je dakle sagledati sva tri aspekta delovanja države kako bi ispunila zahteve iz člana 6. *CRPD*, a naročito u odnosu na elemente efikasne zaštite i stvaranja preduslova za nesmetano uživanje prava.

Čini se da je u trojstvu uzdržavanje – zaštita – aktivno delovanje, najznačajniji segment obaveza države upravo u poslednjoj komponenti. Iako suštinski ne navodi konkretne primere aktivnosti i mera koje se mogu smatrati zadovoljavajućim, Komitet kroz Opšti komentar 3 ukazuje na nekoliko važnih aspekata:

- Višestruka diskriminacija žena sa invaliditetom postoji, ona je uglavnom neprepoznata i nije posebno targetirana, i takvo stanje predstavlja jedan od osnovnih početnih zadataka država potpisnica CRPD – normirati višestruku diskriminaciju i posvetiti pažnju intersekcijskoj diskriminaciji žena sa invaliditetom.
- Mere koje će biti preduzete u konkretnom slučaju zavise od okolnosti u kojima se diskriminacija odvija. Svakako je važno primetiti relacije koje uvek postoje: na primer, vezu između porodičnog nasilja i uskraćivanja prava na rad; vezu između dečjih brakova i uskraćivanja prava na obrazovanje; i slično.
- Preduzete mere moraju imati normativnu osnovu i to je nesumnjivo. Zakonodavac međutim može predvideti samo opšti okvir antidiskriminacionog delovanja, koji se zasniva na međunarodnim standardima poštovanja i uživanja ljudskih prava. Sociološki, kulturološki, i drugi aspekti uticaće značajno na izbor mera i njihovo prilagođavanje konkretnim slučajevima. Koja god mera da bude izabrana, važno je da bude efikasna i efektivna.
- Osim mera u pojedinačnim slučajevima, potrebno je raditi na promeni svesti onih koji su u poziciji da diskriminišu. Ove mere neće se razlikovati od bilo kojih drugih antidiskriminacionih mera. Međutim, kod višestruke intersekcijske diskriminacije od presudne je važ-

29 Ovo je svakako slučaj i u Srbiji. Videti: Marija Babović i Mario Reljanović, *Seksualno uznemiravanje u Republici Srbiji*, OEBS, 2020, *https://www.osce.org/files/f/documents/d/5/473256.pdf*, 27–28.

> nosti delovati u više pravaca istovremeno, uz potpuno razumevanje položaja diskriminisane grupe i predrasuda koje su efektivno dovele do neopravdanog različitog tretmana. Svaka od ovih mera upućena je uobičajeno najširoj grupi slušalaca, opštoj populaciji. One međutim po pravilu sadrže i posebne poruke za pojedince koji podržavaju stereotipe koji se žele izmeniti – i upravo u ovom delu se mora učiniti sve da se u takvim porukama sadrže ključni elementi adresirani na više faktora (indentiteta) koji su relevantni za promenu načina razmišljanja.

Ovako postavljene mere svakako deluju opšte i kao što je već rečeno to je posledica raznolikosti socijalnih podloga na kojima moraju da budu primenjene. One se ipak mogu konkretizovati kroz različite prakse država.

IV KONKRETIZACIJA OBAVEZA DRŽAVE U OBLASTI OBRAZOVANJA I ZAPOŠLJAVANJA

Kada se promišlja o tome kako se suprotstaviti intersekcijskoj i višestrukoj diskriminaciji, obično se napominje nužnost „obrnutog" razmišljanja. Umesto razmatranja posledica činjenja ili nečinjenja, određenih faktora koji dovode do diskriminacije, treba se zapitati kako žene i muškarci zapravo žive svoje živote sa višestrukim identitetima.[30] Ovo praktično znači da se istraživanje o diskriminaciji žena sa invaliditetom fokusira na niz socijalnih faktora koji (u početku) ne uključuju lična svojstva roda i invaliditeta. Kreće se od socijalne slike pojedinke koja se gradi na osnovu njenog materijalnog statusa, sredine u kojoj živi, dostupnosti javnih usluga, pripadnosti drugim ranjivim grupama (migrantima, seksualnim manjinama, i slično). Kada se njen položaj definiše na osnovu ovih parametara, razmatraju se i ona osnovna lična svojstva koja želimo da istražimo. U Jordanu je, na primer, pismenost i stopa zaposlenosti žena generalno niska ali ona dodatno opada kada se posmatraju žene u ruralnim područjima, a još više kada te žene imaju i umanjenu radnu sposobnost, odnosno neku vrstu invaliditeta.[31] Ovakav specifičan pristup daje nam mogućnost da se suočimo sa čitavom lepezom faktora koji utiču na ukupan položaj žene sa invaliditetom; parcijalno i pojedinačno identifikovanje negativnih faktora ne može dati odgovarajuće rezultate.[32] Tako se dolazi

30 Association for Women's Rights in Development, *op. cit.,* 5.

31 Ove podatke je moguće pronaći u: United Nations Economic and Social Commission for Western Asia, *Mapping Inequity: Persons with Physical Disabilities in Jordan*, 2010, 38, a preuzeti su i interpretirani prema: Stefanie Ziegler, *Desk study on the intersection of Gender and Disability in international development cooperation* (2014), 45.

32 Na primer, ukoliko ustanovite kvote za zapošljavanje žena sa invaliditetom, to se može smatrati merom koja će doprineti poboljšanju njihovog položaja na tržištu rada, odnosno većoj potražnji za njihovim radom. Međutim ukoliko prethodno ne obezbedite da se žene sa invaliditetom adekvatno pripreme za konkurentno pojavljivanje na tržištu rada, pre svega kroz obrazovanje i stručno usavršavanje, ne samo da nećete mnogo doprineti njihovom ekonomskom osnaživanju već će takve žene biti unapred osuđene na rad na najbazičnijim poslovima, po pravilu izuzetno slabo plaćenim i u izuzetno nepo-

do nužnog zaključka da je intersekcijski pristup zapravo istovremeno i način opažanja višestruke diskriminacije ali i način delovanja protiv nje koji se suštinski razlikuje od klasičnog jednodimenzionalnog pristupa posmatranja kvaliteta uživanja ljudskih prava.[33] Ili drugim rečima, kada se osmišljavaju mere koje bi trebalo da doprinesu ravnopravnosti žena sa invaliditetom, postupak je dvostepen: one se moraju uključiti u sve aktivnosti a posebne aktivnosti se moraju kreirati samo za njih.[34]

Takav pristup očekuje se i od država-potpisnica *CRPD* u implementaciji člana 6. Komitet je u zaključnim razmatranjima u izveštajnim ciklusima pojedinačnih država potpisnica, uglavnom potencirao slične preporuke.[35]

Prva grupa preporuka odnosi se na formiranje efikasnog sistema reagovanja na kršenje prava žena sa invaliditetom.[36] Obaveza država da ustanove normativni i strateški okvir delovanja protiv diskriminacije ne daje uvek rezultate kada je reč o intersekcijskoj diskriminaciji. Jednodimenzionalnost pristupa zakonodavaca očigledna je čak i u razvijenim državama koje imaju antidiskriminatornu normativnu tradiciju. Tako na primer Nacionalna strategija za osobe sa invaliditetom Australije ne prepoznaje rodnu komponentu, što dovodi do situacije da zakonodavstvo, politika i različite socijalne službe imaju tendenciju da percipiraju žene sa invaliditetom kao izdvojenu ranjivu grupu, čije su potrebe izuzetne ili dodatne u odnosu na centralnu agendu prevencije[37] umesto kao grupu pojedinki čiji različiti identiteti mogu da se

voljnim uslovima rada, što će samo multiplicirati njihovo dalje osiromašenje i sprečiti njihovo prevođenje iz kategorije socijalno ugroženih u kategoriju socijalno zbrinutih radnika.

33 Vivian M. May, *Pursuing Intersectionality. Unsettling Dominant Imaginaries* (2015), 82. Navedeno prema: Ivona Truscan and Joanna Bourke-Martignoni, *op. cit.*, 105.

34 Cristina López Mayher, *Bridging the Gap II: The Empowerment of Women and Girls with Disabilities, A Compilation of Implemented Activities and Identified Best Practices 2018-2020* (2021), 9. Više o antidiskriminacionim merama u oblasti rada u: Mario Reljanović, *Značaj antidiskriminacionih mera u oblasti rada u pristupnim pregovorima Republike Srbije sa EU u okviru poglavlja 19 i 23*, u: Nataša Mrvić Petrović i Nikolina Grbić Pavlović (ur.), „Usaglašavanje pravne regulative sa pravnim tekovinama (*Acquis Communautaire*) Evropske unije – stanje u Bosni i Hercegovini i iskustva drugih (III međunarodni naučni skup)", Banja Luka, 2019, 197–214.

35 U istraživanju su obrađena ona zaključna razmatranja Komiteta koja su kasnije višestruko pominjana u različitim izveštajima drugih tela UN, a koja sadrže osvrte na neka osnovna i ključna pitanja kada je reč o odnosu država potpisnica Konvencije prema obavezama iz člana 6., kao i povezanih čl. 24. i 27. koji se odnose na obrazovanje, odnosno zapošljavanje osoba sa invaliditetom. Pored njih, obrađena su i Zaključna razmatranja Komiteta u odnosu na inicijalni izveštaj Republike Srbije.

36 *Concluding observations on the initial report of Australia, adopted by the Committee at its tenth session (2-13 September 2013),* CRPD/C/AUS/CO/1, 21.10.2013. (u daljem tekstu: Australia 2013), paras. 16-17, 2; *Concluding observations on the initial report of Mauritius, Adopted by the Committee at its fourteenth session (17 August-4 September 2015),* CRPD/C/MUS/CO/1, 30.9.2015. (u daljem tekstu: Mauritius 2015), paras. 11-12, 2–3; *Concluding observations on the initial report of Brazil, Adopted by the Committee at its fourteenth session (17 August-4 September 2015),* CRPD/C/BRA/CO/1, 29.9.2015. (u daljem tekstu: Brasil 2015), 2–3, paras. 14-15.

37 Carolyn Frohmader, Leanne Dowse, Aminath Didi, *op. cit.*, 18–19.

pojave u različitim segmentima negativne prakse kada je reč o kršenju prava na jednakost i ravnopravnost. Intersekcijska diskriminacija se dakle mora posmatrati kao odraz međuzavisnosti samih prava koja su onemogućena ili ugrožena, ne kao niz nezavisnih epizoda u životu žene, u kojima je dovoljno opredeliti pretežno nadležnu instituciju koja bi mogla da pruži neku vrstu asistencije, pomoći i podrške.

Druga je posvećena efikasnoj percepciji višestruke i intersekcijske diskriminacije – njenom prepoznavanju u normativnom okviru u odnosu na rod i invaliditet (ali i neka druga lična svojstva, kao što je migranstki ili izbeglički status), odnosno u praksi primene propisa kroz statističke podatke u uključivanju ovih žena.[38] Ovo je logičan fokus kada je reč o obavezama države da prate „život" norme. Ukoliko se ne može videti putem postojećih instrumenata nadzora nad primenom zakona – kako je često slučaj u praksi – država ne može adekvatno reagovati na neprimenu, ili lošu primenu, normativnog i strateškog okvira, odnosno na odsustvo rezultata primenjenih mera i programa.

Kada je reč o obrazovanju, Komitet najčešće ukazuje na probleme razumnog prilagođavanja[39], posebnih obuka za nastavnike koji rade sa decom sa invaliditetom[40], mera protiv bulinga[41] i donošenje inkluzivnih politika[42] u cilju povećanja učešća dece sa invaliditetom u obrazovnom sistemu.

Otežan pristup ženama sa invaliditetom tržištu rada prepoznat je kroz neke karakteristične probleme, kao što su nedostatak inicijativa za veće uključivanje osoba sa invaliditetom na tržište rada[43], diskriminacija u vrednova-

38 *Concluding observations on the initial report of Sweden, Adopted by the Committee at its eleventh session (31 March–11 April 2014),* CRPD/C/SWE/CO/1, 12.5.2014. (u daljem tekstu: Sweden 2014), 3, para. 13-14; *Concluding observations on the initial report of Germany, Adopted by the Committee at its thirteenth session (25 March–17 April 2015),* CRPD/C/DEU/CO/1, 13.5.2015. (u daljem tekstu: Germany 2015), 3, paras. 15-16; *Concluding observations on the initial report of the Czech Republic, Adopted by the Committee at its thirteenth session (25 March–17 April 2015),* CRPD/C/CZE/CO/1, 15.5.2015. (u daljem tekstu: Czech Republic 2015), 2–3, paras. 13-14; Mauritius 2015, 2–3, paras. 11–12.

39 Australia 2013, 6, paras. 45-46; *Concluding observations on the initial report of Denmark, Adopted by the Committee at its twelfth session (15 September–3 October 2014),* CRPD/C/DNK/CO/1, 30.10.2014. (u daljem tekstu: Denmark 2014), 8, para. 52–53; *Concluding observations on the initial report of New Zealand, Adopted by the Committee at its twelfth session (15 September–3 October 2014),* CRPD/C/NZL/CO/1, 31.10.2014. (u daljem tekstu: New Zealand 2014), 6, paras. 49-50; Germany 2015, 8, paras. 45–46; Brasil 2015, 6, para. 44–45; Mauritius 2015, 6, para. 33–34.

40 Denmark 2014, paras. 52–53, 8; Germany 2015, paras. 45-46, 8; Mauritius 2015, paras. 33-34, 6.

41 New Zealand 2014, 6, paras. 49–50; Sween 2014, 6, paras. 47–48.

42 Australia 2013, 6, para 45-46; Denmark 2014, 3, paras. 19; Germany 2015, 8, paras. 45–46; Brasil 2015, 6, paras. 44-45. Češkoj i Mauricijusu se zamera segregacija kao posledica nedovoljnih napora da se kroz politike i praksu stvore uslovi za inkluziju dece sa invaliditetom u redovno obrazovanje: Czech Republic 2015, 6–7, paras. 47–48; Mauritius 2015, 6, paras. 33–34.

43 Australia 2013, 7, paras. 49–50; Denmark 2014, 3, paras. 19; Czech Republic 2015, 7, paras. 51–52; Brasil 2015, 7, paras. 4849; Mauritius 2015, 7, paras. 37–38.

nju rada osoba sa invaliditetom[44], nepostojanje jasnih odredbi o razumnom prilagođavanju radnog prostora kod poslodavca[45]. Komitet je u odnosu na neke države naročito izrazio zabrinutost zbog segregacije na tržištu rada ali i nedovoljnih mera da se osobe sa invaliditetom pripreme za konkurentan nastup na tržištu rada[46], dok je u nekim slučajevima naročito ukazivao na značajno niži procenat radne angažovanosti žena sa invaliditetom, u odnosu na muškarce sa invaliditetom[47], kao i na nepoštovanje uspostavljenog sistema kvota pri zapošljavanju osoba sa invaliditetom[48].

Nepostojanje efikasnog nacionalnog sistema za praćenje implementacije odredaba CRPD, takođe predstavlja jedan od češćih zaključaka Komiteta.[49] U tom kontekstu se Komitet naročito zalaže za detaljno i pravovremeno informisanje organizacija civilnog društva o implementaciji Konvencije, a naročito pristup organizacijama osoba sa invaliditetom sistemima praćenja implementacije.[50] Statistička obrada i desegregacija podataka u odnosu na više faktora, od ogromne su važnosti. Tako, kao i na primeru Jordana koji je naveden u prethodnom delu teksta, praksu višestruke diskriminacije otkrivaju i podaci o stopama zaposlenosti muškaraca i žena sa invaliditetom u manje i srednje razvijenim državama. U ispitanih 29 država, rodni jaz u stopi zaposlenosti iznosio je u Centralnoj Aziji 26%, 12% in Podsaharskoj Africi, 11% u Okeaniji i 12% u Latinskoj Americi i na Karibima, u korist muškaraca sa invaliditetom.[51]

Mogu se uočiti razni negativni trendovi kada je reč o višestrukoj diskriminaciji žena sa invaliditetom. Na njih se ukazuje i u najvećem broju pojedinačnih razmatranja mera koje su države sprovele, ili propustile da sprovedu. Svakako je najznačajnije primetiti da se države i dalje pretežno rukovode jednodimenzionalnim pristupom u sprečavanju diskriminacije, kao i da drugačije inicijative koje su fokusiraju na više faktora istovremeno, za sada pretežno proističu iz rada međunarodnih i nacionalnih organizacija civilnog društva. Sprečavanje diskriminacije svakako zavisi i od opšteg stanja razvoja

44 Australia 2013, paras. 49-50, 7; New Zealand 2014, para. 57–58, 7; Czech Republic 2015, para. 51–52, 7.

45 Denmark 2014, 8, paras. 58–59.

46 Germany 2015, 8, paras. 49–50; Mauritius 2015, 7, para. 37–38. U vezi sa ovim problemom trebalo bi naglasiti i da su sve učestalija mišljenja da ni specijalizovana preduzeća za zapošljavanje osoba sa invaliditetom ne predstavljaju adekvatno rešenje, jer suštinski dovode do segregacije i izolacije ovih lica. Videti: Jovana Rajić, „Problem zapošljavanja lica sa invaliditetom", *Strani pravni život,* 3/16, 173–189.

47 Czech Republic 2015, paras. 51–52, 7; Brasil 2015, 7, para. 48–49.

48 Brasil 2015, 7, paras. 48–49.

49 Australia 2013, 8, paras. 57–58; Denmark 2014, 10, para. 66–67; Sweden 2014, 8, para. 61–62; Germany 2015, 10, para. 61-62; Czech Republic 2015, 8, paras. 61–62; Mauritius 2015, 8, paras. 4546.

50 Ove preporuke se u pojedinim razmatranjima Komiteta direktno vezuju za žene sa invaliditetom. Videti na primer: New Zealand 2014, 3, para. 16; Brasil 2015, 8, paras. 59–60.

51 Commonwealth Disabled People Forum (CDPF), *Disabled Women and Girls Policy Paper 2020*, 7.

u državi – kako ekonomskog tako i društvenog, naročito u smislu razvijene kulture poštovanja ljudskih prava. Krizsan, Skjeie i Squires međutim navode da ni među evropskim državama stanje nije zadovoljavajuće, odnosno da čak ni one najnaprednije među njima, kao što su skandinavske zemlje, uglavnom poznaju samo jednodimenzionalni koncept diskriminacije. U nekim drugim delovima Evrope, kao što su istočnoevropske države, tek se razvijaju redovne antidiskriminacione politike, a ni u nekim drugim državama u kojima one već postoje (Italija, Španija, Portugal) njihova implementacija ne ide kako je planirano.[52]

Međutim, postoji trend percepcije i suočavanja sa intersekcijskom diskriminacijom, koji je aktuelan pre svega u pojedinim državama Evrope ali se takav model može lako i brzo primeniti i u drugim delovima sveta. U tom smislu se može reći da se sve države pri potencijalnom rešavanju ovog problema suočavaju sa identičnim izazovima koji inače postoje u borbi protiv diskriminacije – sa jedne strane su prisutne duboko ukorenjene predrasude i stereotipno posmatranje grupa sa nekim ličnim svojstvom; sa druge strane, one tradicionalno sporo reaguju i u organizacionom smislu (kao kada je reč o statističkom posmatranju intersekcijske diskriminacije) i pri usvajanju suštinski mera za koje bi trebalo izdvojiti značajnija finansijska sredstva (kao kada je reč o razumnom prilagođavanju). Za sada nije moguće sačiniti neki globalni model uspešnih aktivnosti države ali je važno primetiti da pojedinačni napori u određenim okolnostima mogu dati zadovoljavajuće rezultate.

V OSNOVE SISTEMA U KOJEM JE PREPOZNATA INTERSEKCIJSKA DISKRIMINACIJA ŽENA SA INVALIDITETOM

Kako bi izgledao sistem koji prepoznaje intersekcijsku diskriminaciju i štiti žene sa invaliditetom od višestruke diskriminacije?

Prvi korak je percepcija da žene sa invaliditetom nisu homogena grupa.[53] Njih spajaju dva lična svojstva; mnoga druga, uključujući i ona koja imaju znatan uticaj na njihov ukupan položaj i ostarivanje niza prava, ne moraju se podudarati ili čak mogu biti dijametralno suprotna.[54] Žene sa invaliditetom koje dolaze iz socijalno ugroženih porodica mogu se smatrati višestruko ranjivim. Sa druge strane, žene sa invaliditetom koje dolaze iz finansijski dobro

52 Andrea Krizsan, Hege Skjeie, Judith Squires, *A Theoretical Framework in Institutionalizing Intersectionality. The Changing Nature of European Equality Regimes*, 2012, 34. Preuzeto iz: Konstantina Davaki, Claire Marzo, Elisa Narminio, Maria Arvanitidou, *Discrimination Generated by the Intersection of Gender and Disability*, European Parliament – Directorate General for Internal Policies, Brussels, 2013, 34.

53 Cristina López Mayher, *op. cit.*, 26–27.

54 Ovo se odnosi i na različite vrste invaliditeta. Primer dobre prakse je iz Burkine Faso, gde je obuka žena sa invaliditetom bila usmerena ka ženama sa različitim oblicima invalidnosti te su se istovremeno koristili naratori, znakovni jezik i druge vrste pomagala kako bi se poruke jasno prenele svim učesnicama. *Ibid.,* 28–29.

situiranih porodica neće imati iste probleme kao pripadnice prethodno navedene grupe. Materijalno bogatstvo koje im stoji na raspolaganju svakako pri tome nije ni jedina, ni ključna tačka razdvajanja. Žena sa invaliditetom koja ima podršku porodice i prijatelja, lakše će prevazići neke prepreke i ostvariti se na nekom polju društvenog života, nego ona koja trpi odbacivanje porodice i/ili porodično nasilje – i ovde finansijska sigurnost ne igra važnu ulogu. Ukoliko međutim država ignoriše njihove potrebe za razumnim prilagođavanjem javnog prostora, nijedna od njih neće moći da ostvari – na primer – pravo na zdravstvenu zaštitu ili pravo na pristup pravdi (određenim državnim institucijama). Njihov invaliditet je identitet koji one dele; mere koje ciljaju na njihove druge lične karakteristike ne moraju međutim dati podjednake rezultate – naprotiv to se najčešće neće dogoditi. Lokalni i mikro (porodični, poslovni) kontekst svake pojedinke je takođe izuzetno važan, jer direktno utiče na način na koji će ona doživeti neku meru podrške, primeniti je (ili ne) i kako će ta mera efektivno promeniti njen položaj u smislu lakšeg uživanja nekog prava i vršenja neke društvene uloge. Ne treba pri tome zanemariti rodnu dimenziju koja je zajednička svim ženama – ni jedna ni druga žena iz primera neće moći da ostvare pravo na beneficije iz neplaćenog kućnog rada.

Sledeći korak trebalo bi da bude mapiranje relevantnih aktera. Države imaju obavezu da primene član 6. kao i osnovne standarde uživanja ljudskih prava, kroz tri vrste ponašanja o kojima je već bilo reči. Ali velika podrška državi moraju biti organizacije civilnog društva, kao i drugi akteri koji imaju informacije o stvarnim problemima i stvarnim potrebama ciljnih grupa. To mogu, na primer, biti strukovna udruženja nastavnika, koji će inicirati posebno usavršavanje za rad sa devojčicama sa invaliditetom. Ili privredna komora koja će pomoći u monitoringu mera pozitivne akcije usmerene ka zapošljavanju žena sa invaliditetom, koje su njeni članovi dužni da primene. Mogu biti i lekarske komore, ili komora lekara medicine rada, koji će se zalagati za drugačiji pristup proceni radne sposobnosti. Akteri su dakle izuzetno raznovrsni i ne može se unapred govoriti o nekom njihovom univerzalnom pobrojavanju, jer će svakako specifične okolnosti u jednoj zemlji, ili jednom regionu, diktirati ko ima iskustvene i organizacione kapacitete da učestvuje u kreiranju i realizaciji ovih politika.

Mere koje se preduzimaju moraju se adaptirati potrebama na terenu. One ne smeju biti statične, zakasnele, okoštale i formalne, već moraju biti noveli-rane u skladu sa podacima koji se dobijaju o njihovoj implementaciji. Ako su podaci nezadovoljavajući, moraju se identifikovati problemi u primeni – da li su oni u samoj meri (koja je neefikasna, neprimenjiva, ili jednostavno ne čini nikakvu razliku na terenu) ili u okolnostima u kojima se ta mera sprovodi. Tokom vremena, potrebe i prioriteti će se menjati, i to se mora konstatovati i kroz adaptaciju stanju u praksi. Ovo se ne odnosi samo na početni period primene neke mere, koji je svakako kritičan u smislu praćenja efekata, već i na kasnije periode kada se – možda baš zbog uspešnosti preduzetih mera – potrebe žena sa invaliditetom menjaju, razvijaju, usmeravaju ka nekim drugim ciljevima nakon što su bazični standardi uživanja nekog prava dosti-

gnuti. Uloga samih žena sa invaliditetom koje dele razmenjuju informacije sa donosiocima odluka, neprocenjivo je važna.

Efikasnost sistema koja je već više puta pomenuta, samo je jedna od važnih komponenti. Druga, podjednako značajna, jeste njegova merljivost i izvodljivost. Zbog toga je na primer u Paragvaju izvršena revizija Nacionalnog akcionog plana za prava osoba sa invaliditetom, koja je uključila sistem indikatora dostignute implementacije, kao i mehanizme prikupljanja podataka i njihove obrade kako bi se realizacija indikatora verno predstavila i objektivno evaluirala.[55] Smisao ovakvih intervencija jeste pre svega u tome da se faktički promeni stanje na terenu, tretman i dostupnost prava ženama sa invaliditetom. Formalno priznanje tih prava, kako je već naglašeno, samo je jedna – i to početna – karika u lancu obaveza države, koja se mora starati o tome da se proklamovana prava zaista i uživaju, i to na način koji odgovara njihovom smislu postojanja. (Ne) realizacija određenih indikatora jasno ukazuje na sistemske ili druge nedostatke koji se moraju otkloniti. Sa druge strane, uspešna realizacija indikatora daje jasnu sliku u kojem pravcu se moraju usmeriti dalji napori ka sledećim stepenima kvaliteta uživanja prava. Konačno, samo postojanje sistema indikatora koji se redovno prate podrazumeva da postoji i institucija (jedna ili više njih) koja poseduje kapacitete i znanja potrebna za prikupljanje i obradu podataka vezanih za realizaciju indikatora, što podstiče i transparentnost rada državnih institucija ali i njihovo osnaživanje za obavljanje ovakvih kompleksnih zadataka.[56]

Dakle, praćenje i razvrstavanje podataka od izuzetne je važnosti za praćenje potreba i rizika, ali i efekata preduzetih mera. Razvrstavanje podataka prema važnim faktorima je od suštinskog značaja – i sam Komitet insistira na razvrstavanju podataka prema polu, kako bi se utvrdilo eventualno postojanje višestruke diskriminacije. I Komitet za eliminaciju svih oblika diskriminacije žena u opštem komentaru 18 daje državama istu preporuku.[57]

U situaciji kada je otežan ili onemogućen pristup obrazovanju i zapošljavanju ženama sa invaliditetom rezultat kulturoloških predrasuda koje su duboko utemeljene u svesti ljudi, države moraju reagovati u pravcu promene načina razmišljanja i vrednosnih uzora koji se upotrebljavaju. Budući da se takva vrsta promena ne dešava brzo i da je ponekad potrebno raditi decenijama da bi se došlo do merljivih, konkretnih rezultata, često se primenjuje strategija da se uvode kvote u obrazovanju i pri zapošljavanju kao vrsta kratkoročnog rešenja, dok se uporedo radi na trajnijim i dugoročnijim merama. U kombinaciji sa treninzima i edukacijama ljudi kako bi se percepcija žena sa

55 *Ibid.,* 13.

56 U Paragvaju se uporedo sa stvaranjem sistema indikatora radilo i na osnaživanju mreže organizacija civilnog društva koje se bave pravima i problemima osoba sa invaliditetom i one koje se bave pravima žena, a koje su prepoznate kao važni saveznici u ostvarivanju preuzetog zadatka praćenja ispunjenja postavljenih ciljeva. *Ibid*., 14.

57 CEDAW Committee and the CRC Committee, Joint General Recommendation No. 31/ General Comment No. 18 on harmful practices, UN Doc. CEDAW/C/GC/31-CRC/C/ GC/18, 14 November 2014.

invaliditetom promenila, one mogu dati zadovoljavajuće početne rezultate.[58] Ne čudi stoga što sistem kvota poznaju mnoge evropske zemlje. Kvote u zapošljavanju su uglavnom postavljene fleksibilno, imajući u vidu veličinu poslodavca i realnu ponudu radne snage određenog radnog profila. Varijabilne kvote postoje u Nemačkoj, Austriji, Holandiji. Sa druge strane, u Mađarskoj, Poljskoj, Austriji, Nemačkoj, Češkoj i Rumuniji, poslodavci mogu umesto poštovanja kvota pristati da uplaćuju određene novčane iznose. U situacijama kada nema dovoljno adekvatno obrazovanih osoba sa invaliditetom na tržištu rada za delatnost kojom se poslodavac bavi, ili ukoliko sama delatnost nije poveziva sa većim brojem formi invaliditeta, ovakvo rešenje omogućava benefite za osobe sa invaliditetom na posredan način, kroz finansiranje programa njihovog obrazovanja, osnaživanja, uključivanja u društvene aktivnosti na druge načine. U Nemačkoj postoji i posebna kvota za žene sa invaliditetom ali samo u javnom sektoru.[59] Problem je međutim što ovakvi sistemi ne prepoznaju višestruku diskriminaciju (osim Nemačke koja poznaje poseban sistem kvota za žene ali samo u javnom sektoru). To dovodi do posledica da žene sa invaliditetom u određenim nepovoljnim okolnostima mogu doći u poziciju da ne mogu imati koristi niti od kvota za osobe sa invaliditetom, niti od onih koje se uvode radi uspostavljanja rodne jednakosti.

Preduslov pojavljivanja na tržištu rada, kako bi se kvote uopšte mogle primeniti, jeste da žene sa invaliditetom ostvare određeni stepen i vrstu obrazovanja, odnosno stručnog osposobljavanja ili usavršavanja. Inkluzivno obrazovanje je stoga prvi korak ka stvaranju boljih preduslova za zapošljavanje žena sa invaliditetom, i predstavlja dugoročno ulaganje u rešavanje više problema koji se vezuju za ostvarivanje prava na obrazovanje i potom funkcionalno povezanog prava na rad, ali i za ostvarivanje veće finansijske, profesionalne i socijalne samostalnosti žena sa invaliditetom. Konačno, i u obrazovanju i na radu država mora ne samo nametnuti kroz normativnu obavezu, već i podržavati i asistirati u realizaciji prava na razumno prilagođavanje mesta za učenje, odnosno za rad. Država to može činiti kako direktnim davanjima, tako i indirektno kroz predviđanje određenih benefita obrazovnim ustanovama i poslodavcima.

VI ZAKLJUČNA RAZMATRANJA

Države moraju učiniti suštinske napore kako bi se suprotstavile intersekcijskoj diskriminaciji. Ovo pre svega znači odreći se jednodimenzionalnog pristupa i prepoznati osnovne antidiskriminacione standarde pri višestrukoj diskriminaciji. Oni će naravno biti opšteg tipa; pojedinačne kategorije intersekcijske diskriminacije treba prepoznati u strateškim i podzakonskim dokumentima, i na osnovu njih pokrenuti aktivnosti u pravcu prevencije, rekacije i sankcije. Osnovi ovakvog sistema leže u pristupu da treba staviti ženu sa invaliditetom u centar i mrežu podrške i zaštite graditi oko njenih potreba. A neke od tih potreba su već sasvim prepoznate.

58 Konstantina Davaki, Claire Marzo, Elisa Narminio, Maria Arvanitidou, *op. cit.*, 57.

59 *Ibid.,* 47–48.

Da bi država *zaštitila*, mora se obezbediti pristup pravdi, efikasni i dostupni mehanizmi zaštite koji će suštinski uticati na sankciju ali i na prevenciju ponavljanja diskriminatornog ponašanja. U tom smislu se može govoriti ne samo o sudskim i kvazisudskim telima i postupcima, već i o nezavisnim telima (kao što je ombudsman) koja pored procene kršenja principa jednakosti i ravnopravnosti imaju i edukativni potencijal, naročito prilikom obraćanja javnosti i javnih analiza slučajeva intersekcijske diskriminacije.

Konkretne mere, kao što su opisani sistem kvota, svakako daju rezultate na kratak rok. One međutim moraju biti komplementarno implementirane sa nizom drugih mera, koje su usmerene na promenu svesti, dakle na duži rok. Treninzi za stručno osoblje koje pruža usluge ženama sa invaliditetom, ili je na drugi način povezano sa ostvarivanjem nekog njihovog prava, mogu biti odlična investicija u razbijanje predrasuda o ženama sa invaliditetom koji dovode do njihovog diskriminisanja. Ne treba se pri tome zadržati samo na osoblju u školama – iako je to važan segment koji Komitet posebno ističe u više navrata – već bi trebalo edukovati sve učesnike u sistemu, kao što su zdravstveni radnici, socijalni radnici i drugi pružaoci usluga socijalne zaštite. Poslodavci bi mogli preko svojih poslodavačkih udruženja ili komora da budu edukovani o radnim i stručnim sposobnostima žena sa invaliditetom.[60]

Intersekcijska diskriminacija je kompleksne prirode i često obuhvata i dopunske negativne faktore koji utiču na položaj pojedinca. Ne smeju se zbog toga zaboraviti ni drugi identiteti žena sa invaliditetom. Samo sistem koji je načinjen kao dovoljno fleksibilan da obuhvati i/ili da se suprotstavi svim faktorima koji dovode do diskriminacije na adekvatan način, pri tome jasno razlikujući jednokratne od stalnih potreba, kao i domete kratkoročnih intervencija u odnose na dugoročne postavljene ciljeve, može imati šanse za dugoročni uspeh. Takvog sistema u oblastima obrazovanja, zapošljavanja i rada za sada nema, ali se njegovi obrisi mogu sasvim jasno potcrtati kroz proučene dobre prakse.

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60 *Ibid.,* 71.

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INTERSECTIONAL AND MULTIPLE DISCRIMINATION OF GIRLS AND WOMEN WITH DISABILITIES IN EDUCATION AND EMPLOYMENT: STATE PARTIES' OBLIGATIONS ACCORDING TO ARTICLE 6 OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Abstract

Article 6 of the Convention on the rights of persons with disabilities (CRPD) considers multiple discrimination of girls and women with disabilities. It imposes state parties obligation to "take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention". These obligations are discussed and further developed in the General Comment No. 3 of the Committee on the Rights of Persons with Disabilities in 2016.

The research is focused on two specific goals. The first is to explore perception and analyse in greater details individual types of obligations of states based on Article 6 of the CRPD. The second part of the research aimed on critical observation of the practical activities of states in this regard, with a special focus on Serbia.

The basic research tasks that have been set are related to: the necessity of proactive action of states in order to prevent and sanction intersectional and multiple discrimination of girls and women ("The obligation to fulfill imposes an ongoing and dynamic duty to adopt and apply the measures needed to secure the development, advancement and empowerment of women with disabilities."); the duality of the action of the state, which at the same time must normatively shape protection against discrimination and act on measures that will be aimed at developing awareness and measures to encourage *de facto* equality of girls and women with disabilities.

The research is limited to discrimination in education and labour market, having in mind the breadth of the potential scope of work, as well as the fact that these two functionally related components are indicative when good and bad practices, systemic and structural discrimination are observed.

Key words: *Girls and women with disabilities; Intersectional and multiple discrimination; Right to education; Right to employment; Convention on the Rights of Persons with Disabilities.*

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AN ANALYSIS OF THE IMPLEMENTATION OF THE COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES RECOMMENDATIONS TO THE REPUBLIC OF SERBIA PERTAINING SPECIFICALLY TO WOMEN AND GIRLS WITH DISABILITIES

Abstract

In December 2006, the UN General Assembly unanimously adopted the Convention on the Rights of Persons with Disabilities and the Optional Protocol. Both treaties entered in force in May 2008. The Convention guarantees effective protection from any form of discrimination to all persons with disabilities. It furthermore addresses situation of women with disabilities (Article 6) and of boys and girls with disabilities (Article 7). Committee on the Rights of Persons with Disabilities made recommendations to the Republic of Serbia upon review of its Initial Report to the Committee in April 2016. All recommendations which the Committee made to Serbia are relevant for persons with disabilities of both male and female gender; however, some recommendations are pertaining specifically to women and girls with disabilities. The paper analyses the implementation of these recommendations. In the conclusion, the author finds out that progress has been made towards implementing some of the recommendations, but that Serbia still needs to take number of measures in order to implement recommendations for the prevention of discrimination and enable better inclusion of women and girls with disabilities.

Key words: *Convention on the Rights of Persons with Disabilities; Women and girls with disabilities; Committee on the Rights of Persons with Disabilities; The Republic of Serbia; Intersectional discrimination; Employment; Healthcare and reproductive care.*

I INTRODUCTION

In the first ever world report on disability, produced jointly by the World Bank and the World Health Organization in 2011, it was found out that persons with disabilities constitute fifteen percent of the total world population.[1] However, the report also pointed out that those individuals were excluded, discriminated and segregated in many societies and faced different barriers in enjoyment of their basic human rights and fundamental freedoms set forth in the Universal Declaration of Human Rights. According to the World disability report, "across all countries, vulnerable groups such as women, those in the poorest wealth quintile, and older people had higher prevalences of disability".[2] Interestingly enough, the report itself has not dealt with the gender dimension in depth. The instances of discrimination and lack of opportunities for integration still today mark the life of persons with disabilities.[3]

A society cannot aspire to the claim of being a democratic one if some of its members remain excluded, discriminated and segregated.[4] Bearing in mind the situation of persons with disabilities, it became necessary to adopt a legally binding international human rights instrument under the auspices of the United Nations, a treaty that would prescribe measures necessary for ensuring the full and equal enjoyment of rights from the Universal Declaration by persons with disabilities. Convention on the Rights of Persons with Disabilities that was adopted in 2006 was such an instrument. The Convention *inter alia* set up the Committee on the Rights of Persons with Disabilities as the international monitoring body that reviews implementation of the Convention in different state parties. The Committee on the Rights of Persons with Disabilities made recommendations to the Republic of Serbia upon a review of its initial report submitted to the Committee in April 2016.[5] All recommendations which the Committee made to Serbia are relevant both persons with disabilities of both sexes. However, some recommendations are pertaining specifically to women and girls with disabilities. The paper aims to analyze the implementation of these recommendations

II. THE CONVENTION OF THE RIGHTS OF PERSONS WITH DISABILITIES

In December 2006, the UN General Assembly unanimously adopted the Convention on the Rights of Persons with Disabilities and the Optional Pro-

1 World Health Organization and World Bank, World Report on Disability, Malta, 2011.

2 *Ibid.*

3 See Committee on the Rights of Persons with Disabilities, General Comment number 6 on Art. 5: Equality and non– discrimination, CRPD/C/GC/3 (2018), and European Disability Forum (2021), European human rights report: Issue 5 – 2021 – Impact of Covid-19 on persons with disabilities, Brussels, European Disability Forum.

4 Damjan Tatić, *Zastita ljudskih prava osoba sa invaliditetom* (2012), 37.

5 Committee on the Rights of Persons with Disabilities, Concluding Observations to Republic of Serbia, CRPD/C/SRB/CO/1, (2016).

tocol. Both treaties entered into force in May 2008. Until now, the Convention has been ratified or acceded to by 185 state parties. [6]The Optional Protocol to the Convention on the Rights of the Persons with Disabilities has been ratified or acceded to by 100 state parties.[7] Today, the Convention on the Rights of the Persons with Disabilities is one of the human rights treaties with the greatest number of state parties and is approaching its universal ratification.[8]

1. The purpose and underlying principles of the Convention

The purpose of the Convention is to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and foster respect for their inherent dignity" (Article 1). The Convention is the first international human rights treaty which "comprehensively codifies and consolidates the universal rights of persons with disabilities".[9] It guarantees effective protection from any form of discrimination to all persons with disabilities. The Convention is based on the following principles, set forth in Article 3:

a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons with disabilities;
b) Non-discrimination;
c) Full and effective participation and inclusion in society;
d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
e) Equality of opportunity;
f) Accessibility;
g) Equality between men and women;
h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

The equality between men and women is one of the underlying principles of the Convention on the Rights of Persons with Disabilities. Like the principle of non-discrimination, the principles of full and effective participation and inclusion in society, equality of opportunity, equality between men

6 Committee on the Rights of Persons with Disabilities, *www.ohchr.org/en/treaty-bodies/crpd.*

7 *Ibid*.

8 International Convention on the Elimination of All Forms of Racial Discrimination has 182 state parties but has been adopted in 1966. International Covenant on Economic, Social and Cultural Rights has 171 state parties, International Covenant on Civil and Political Rights has 173 state parties, Convention on the Elimination of All Forms of Discrimination against Women has 189 state parties but has been adopted in 1979, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has 173 state parties, Convention on the Rights of the Child has 196 state parties, and Convention on the Protection of the Rights of the All Migrant Workers and Members of their Families has 57 state parties.

9 Coomara Pyaneandee, *International Disability Law: A Practical Approach to the United Nations Convention on the Rights of Persons with Disabilities* (2018), 23.

and women are principles that are present in other human rights documents. Accessibility is a new principle specific to persons with disabilities and is a pre-condition for full and equal participation of those persons in society.[10]

2. Equality and non-discrimination in the Convention

State Parties recognize that "all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law" (Article 5, para. 1). State Parties shall "prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds" (Article 5, para. 2).

The Convention guarantees effective protection from any form of discrimination, including direct discrimination, indirect discrimination, multiple and inter-section discrimination, and denial *of reasonable accommodation*, to all persons with disabilities. Article 2 defines reasonable accommodation as:

> "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."

"Accommodation" relates to the adaptation of the normal operating procedures, processes or facilities to the needs of a person with disability.[11] However, as noted by Pyaneandee, the defence of 'disproportionate or undue burden' has been very broadly interpreted by the State Parties with resultant negative consequences for the rights of persons with disabilities.[12] In its General Comment No. 6, the Committee on the Rights of Persons with Disabilities elaborated concepts of direct discrimination, indirect discrimination, harassment and systemic discrimination.[13]

The Convention also addresses multiple, intersectional discrimination. Such discrimination occurs when an individual belonging to several different marginalized groups is being discriminated on different grounds that may interact in negative way and reinforce the effects of discrimination. For example, a company intends to hire a male, non-disabled CEO so it discriminates against a woman with disability applying for that position.[14] In its work, the Committee on the Rights of Persons with Disabilities pays special attention to the intersectional discrimination of women with disabilities face.[15]

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10 For more details see art. 9 of the CRPD and General comment number 2 of CRPD Committee.

11 Coomara Pyaneandee, *op. cit*., 31.

12 *Ibid*.

13 Committee on the Rights of Persons with Disabilities, General Comment number 6 on art. 5: Equality and non– discrimination, CRPD/C/GC/3 (2018).

14 *Ibid*.

15 See Committee on the Rights of Persons with Disabilities, General Comment number 6 on Art. 5: Equality and non– discrimination, CRPD/C/GC/3 (2018) and Committee on

3. Women and girls with disabilities

The Convention explicitly addresses the position of women with disabilities (Article 6). Pyaneandee notes that throughout history, women and girls with disabilities have been the subject of violence, abuse and exploitation. He insists that rape, sexual assaults, victimisation and discrimination of women and girls with disabilities have all contributed to their marginalisation in the society.[16]

Other forms of discrimination to which women and girls with disabilities may be subjected deny them autonomy over their own sexual and reproductive lives, notes Pyaneandee. Laws and policies often have the effect of depriving women with disabilities of their legal capacity to open bank accounts, to inherit or manage property, or even to marry the person of their choice.[17] Thus, it is important that the Convention explicitly addresses the position of women with disabilities in Article 6.[18]

Both Article 6 of the Convention and the General Comment No. 3 on Women and Girls with Disabilities address the issue of multiple or aggravated forms of discrimination.[19] General Comment No. 3 offers an analysis of the situation of women and girls with disabilities and also examines the interplay between the different elements of society.[20] Kakoulis and Johnson highlight how international treaties interact with and influence particular cultural contexts in different countries. State parties implement international agreements in different political, cultural, social, and economic context.[21] In addressing the situation of women and girls with disabilities, one has to take into account different identity layers of those persons and cultural context in which they live and attitudes of different societies towards them.

Gupta observes that only recently, with the coming into force of the Convention on the Rights of Persons with Disabilities, the specific concerns of women with disabilities have been addressed. To combat double discrimination faced by women and children with disabilities, Gupta notes, the Convention relies on a twin track approach, where a specific provision is dedicated to the problems affecting the vulnerable group while, and at the same time,

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the Rights of Persons with Disabilities, General Comment number 3 on art. 6: Women and Girls with Disabilities, CRPD/C/GC/3 (2016) for more details.

16 Coomara Pyaneandee, *op. cit*., 36.

17 *Ibid*., 37.

18 Art. 6 of CRPD: "States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms. States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention".

19 Coomara Pyaneandee, *op. cit*., 38.

20 Committee on the Rights of Persons with Disabilities, General Comment No. 3 on Art. 6: Women and Girls with Disabilities, CRPD/C/GC/3 (2016).

21 Emily Julia Kakoulis and Kelley Johnson, *Recognizing Human Rights in Different Cultural Contexts, The United Nations Convention on the Rights of Persons with Disabilities* (CRPD) (2020), 2.

its concerns are addressed in several other provisions of the Convention.[22] Article 6 of the Convention requires the use of affirmative action measures by the States Parties to ensure that women and girls with disabilities can develop to their full potential in order to participate fully in their respective societies, concludes Pyaneandee.[23] Affirmative measures aim at ensuring de facto equality of women and girls with disabilities in society and include quotas in education for girls with disabilities and quotas in employment for women with disabilities.

However, women and girls with disabilities continue to face multiple and intersectional discrimination, on the one hand by virtue of being women, and on the other hand by virtue of being persons with disabilities.[24] Della Fina *et al*. note that scholars have highlighted the difference between the concepts of "intersectional discrimination" and "multiple discrimination." They further elaborate both concepts and highlight that "[w]omen and girls with disabilities are often confronted with intersectional discrimination which means that several forms of discrimination based on various layers of identity intersect and produce new forms of discrimination which are unique and cannot be correctly understood by describing them as double or triple discrimination". As such, Della Fina *et al.* point out, „[i]ntersectionality is a form of multiple discrimination."[25]

III RECOMMENDATIONS OF THE COMITEE ON THE RIGHTS OF PERSONS WITH DISABILITIES TO THE REPUBLIC OF SERBIA

The Committee on the Rights of Persons with Disabilities made recommendations to the Republic of Serbia upon a review of its initial report submitted to the Committee in April 2016. All recommendations which the Committee made to Serbia are relevant for persons with disabilities of both sexes. However, some recommendations are pertaining specifically to women and girls with disabilities.

The Committee was concerned with the lack of specific actions implemented by the State Party to prevent and combat the multiple and intersectional discrimination that women and girls with disabilities face, particularly in access to justice, protection against violence and abuse, education, health and employment.[26] It was also concerned with the lack of sufficient or transparent funding and employment-related measures tailored to the needs of women with disabilities, and that women with disabilities are not consulted

22 Raadhika Gupta, 'Twin Tracking for Women with Disabilities in Disability Legislation', 2020, *http://www.disabilitystudiesnalsar.org/bcp-wwd.php*.

23 Coomara Pyaneandee, *op. cit*., 38.

24 *Ibid*., 39

25 Valentina Della Fina, Rachele Cera and Guiseppe Palmisano, *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (2017), 181–182.

26 Committee on the Rights of Persons with Disabilities, Concluding Observations to Republic of Serbia, CRPD/C/SRB/CO/1, para. 11.

in the design of programmes and measures aimed at women in general or at persons with disabilities.[27]

The Committee recommended to Serbia to:

a) Incorporate the perspective of women and girls with disabilities into its gender equality policies, programmes and strategies and the gender perspective into its strategies on disability, and to eradicate multiple and intersectional discrimination in all areas of life;
b) Take appropriate measures to prevent and combat the multiple and intersectional discrimination that women and girls with disabilities face, particularly in access to justice, protection against violence and abuse, education, health and employment;
c) Ensure consultation with women and girls with disabilities, through their representative organizations, on the design, implementation and evaluation of programmes and measures in all matters that affect them directly;
d) Provide sufficient resources for the improvement of the status and the employment of women with disabilities.

1. Incorporating disability perspective into gender policies and vice versa

In its analysis of implementation of the recommendations of the Committee on the Rights of Persons with Disabilities to the Republic of Serbia, the National Association of Persons with Disabilities of Serbia noted that the new National Disability Strategy of Serbia for the period 2020/2024 fully incorporates gender perspective and prescribes different measures for enhancing situation of women with disabilities.[28]

In the previous National Gender Equality Strategy of the Republic of Serbia for the period 2016/2020 women with disabilities were explicitly recognized as one of groups of women at risk of facing multiple and intersectional discrimination. However, the Action Plan for implementing National Gender Equality Strategy in 2019/2020 has not been adopted. [29]

Gender Equality Law does not include specific provisions on women with disabilities.[30] However, all its general provisions apply to women with disabilities too.

2. Combating intersectional discrimination and violence

In its analysis of implementation of the recommendations of Committee on the Rights of Persons with Disabilities to Republic of Serbia, the National Association of Persons with Disabilities of Serbia noted that amendment of

27 *Ibid*.

28 Damjan Tatić, *Analiza sprovođenja preporuka Komiteta za prava osoba sa invaliditetom u Republici Srbiji* (2020), 12.

29 *Ibid*.

30 *Ibid.* Analysis pertained to the draft law that was presented at public debate in 2019.

the Criminal Code to increase penalties for acts of sexual violence against persons with disabilities is an important step in the right direction. The new Law on Preventing Domestic Violence does not include specific provisions on women with disabilities.[31] However, all its general provisions apply to women with disabilities too. The Law on Prevention of Discrimination that had been adopted prior to the review of Serbia's initial report already prohibited intersectional discrimination as an aggravated form of discrimination that has to be sanctioned more severely.

As an example of a program contributing to the better implementation of the National Disability Strategy one should mention the annual training provided by the Legal Clinic of the Faculty of Law of the University of Belgrade on issues such as intersectional discrimination and disability-based discrimination, which constitutes an excellent action contributing to the continuous awareness raising among experts. This and other similar examples, such as the training for judiciary conducted by Equality Commissioner, show that some progress has been made in the field of prevention of discrimination against women and girls with disabilities, but that Serbia still needs to take number of specific measures in that direction.

3. Consulting organizations of women with disabilities

Women and girls with disabilities, through their representative organizations, such as the National Association of Persons with Disabilities of Serbia, and the organization of women with disabilities Out of circle, have been actively involved in the process of drafting and adoption of the new National Disability Strategy of Serbia for the period 2020/2024, thus providing excellent example of implementation of Article 4.3 of the Convention on the Rights of Persons with Disabilities on consulting persons with disabilities, including women and girls with disabilities, through their representative organizations. National Association of Persons with Disabilities of Serbia was one of the key actors in the adoption of the new National disability strategy of Serbia, with its experts participating in the working group that drafted Strategy. The Strategy fully incorporated gender perspective and prescribed specific measures for improving the situation of women and girls with disabilities, drawing inspiration from Committee's recommendations to Serbia.

Women and girls with disabilities, through their representative organizations, such as the National Association of Persons with Disabilities of Serbia, and the organization of women with disabilities Out of circle, played a key role in the advocacy efforts preceding the above-mentioned amendments of the Serbian Criminal Code.

4. Employment of women with disabilities

In its analysis of implementation of the recommendations of the Committee on the Rights of Persons with Disabilities to the Republic of Serbia, the National Association of Persons with Disabilities of Serbia quoted data

31 *Ibid.*

from the National Employment Service, according to which 2148 women with disabilities have been included in different programs aimed at promoting employment in 2016/2017, with self-employment subsidies for 33 women with disabilities, employment subsidies for 105 unemployed women with disabilities, subsidies for 200 women with disabilities without work experience, subsidies for work place adaptation for 6 women with disabilities, while 754 women with disabilities were engaged in public works in 2016.[32] One may deduce that some progress has been made in the field of employment of women with disabilities, but Serbia still needs to take number of specific measures to support employment of women with disabilities such as stepping up the subsidies for work place adaptation.

IV CONCLUSION

The above analysis provides grounds for the conclusion that progress has been made towards implementing some recommendations of the Committee on the Rights of Persons with Disabilities, such as amendments to the Criminal Code increasing penalties for acts of sexual violence against persons with disabilities, or training provided by the Legal Clinic of the Faculty of Law of the University of Belgrade on intersectional discrimination and disability-based discrimination. Serbia still needs to take number of measures in order to implement recommendations pertaining specifically to women and girls with disabilities, some of the most urgent being to ensure a more efficient transition for girls moving from institutions into families, specific measures to support employment of women with disabilities and stepping up prevention of disability– and gender– based violence against women and girls with disabilities.

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32 Damjan Tatić (2020), *op. cit*., 12.

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ANALIZA SPROVOĐENJA PREPORUKA KOMITETA ZA PRAVA OSOBA SA INVALIDITETOM REPUBLICI SRBIJI, S POSEBNIM OSVRTOM NA ŽENE I DEVOJČICE SA INVALIDITETOM

Apstrakt

U decembru 2006. godine, Generalna Skupština UN usvojila je Konvenciju o pravima osoba sa invaliditetom i Opcioni protokol uz nju. Oba instrumenta stupila su na snagu u maju 2008. godine. Konvencija garantuje efikasnu zaštitu od svih oblika diskriminacije svim osobama sa invaliditetom. Konvencija, dalje, uređuje položaj žena sa invaliditetom (član 6.) i položaj dečaka i devojčica sa invaliditetom (član 7.). Komitet za prava osoba sa invaliditetom razmatrao je izveštaj Republike Srbije u aprilu 2016. godine i potom joj uputio preporuke. Sve preporuke Komiteta Srbiji relevantne su kako za muškarce, tako i za žene sa invaliditetom, ali je Komitet uputio i neke preporuke koje se odnose samo na žene i devojčice sa invaliditetom. Ovaj rad analizira sprovođenje tih preporuka. Autor zaključuje da je postignut određeni napredak u sprovođenju pomenutih preporuka, ali da bi Srbija trebalo da preduzme izvestan broj konkretnih mera kako bi sprečila diskriminaciju i omogućila bolju uključenost žena i devojčica u društvo.

Ključne reči: *Konvencija o pravima osoba sa invaliditetom; Žene i devojčice sa invaliditetom; Komitet za prava osoba sa invaliditetom; Republika Srbija; Intersekcijska diskriminacija; Zapošljavanje; Zdravstvena zaštita i reproduktivno zdravlje.*

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THE EFFECTS OF MULTIPLE FORMS OF DISCRIMINATION IN THE EXERCISE OF HUMAN RIGHTS BY WOMEN AND GIRLS WITH DISABILITIES

Abstract

This article looks at the problems of exercise of human rights faced by women and girls with disabilities. The study of this issue is based on international legal sources, in particular, the landmark acts on the protection of the rights of persons with disabilities have been reviewed, and special attention is given to the legislation of the Russian Federation.

Key words: *Multiple forms of discrimination; Women with disabilities; Girls with disabilities; The Russian Federation.*

The international community now clearly recognises the impact of intersecting forms of discrimination in realization of fundamental human rights by women and girls. However, practice of various states shows numerous violations against the above categories of persons and proves the legal vulnerability of women and girls with disabilities[1].

Regarding the "intersection" concept, it is essential to understand what is meant by the terms "multiple, mixed and/or intersecting forms of discrimination." According to the Committee on the Elimination of Discrimination against Women, "intersection" covers the effects of two or more mixed systems of discrimination and reveals the mechanism by which they create different levels of equality[2]. At the same time, the social and legal phenomenon under discussion may be regarded as the multifaceted vulnerability of an individual, which includes internal and external factors expressed in quantitative terms. This approach allows devising mechanisms at the state level that

1 Valentina Gennadyevna Mikrina, *Protection of the labor rights of the most vulnerable groups of the population in the international law* (2021), 232.

2 Report of the Expert Group Meeting on Gender and Racial Discrimination, Zagreb, November 21-24, 2000.

consider all attributes in aggregate and separately, to protect and promote the rights of such individuals. For example, according to Paola Uccellari, multiple discrimination is discrimination against one person on several attributes, i.e., a black woman with a disability may face discrimination based on her disability, race and gender[3]. The issue of multiple forms of discrimination was raised at the 1993 Vienna Conference on Human Rights and, following the Vienna Declaration and its stated principles, the Fourth World Conference on Women, Beijing and the Third World Conference against racism, racial discrimination, xenophobia and related intolerance addressed the issue of multiple discrimination in Durban[4].

The Durban Declaration (Chapter 1) notes that racism, racial discrimination, xenophobia and related intolerance can be among the factors that lead to a lower standard of living for women and girls, poverty, violence, multiple forms of discrimination and the limitation or exclusion of women and girls' enjoyment of their human rights[5]. Women and girls subjected to intersecting forms of discrimination based on gender, race, ethnicity, occupation, origin or religion, often lack economic opportunities and decent work and are too often in low-paid jobs, often in exploitative conditions, in domestic service[6]. Women experience severe consequences of intersecting forms of discrimination in employment and the workplace. There may be implicit or explicit stereotypes of employers, colleagues, or business partners during the recruitment or employment process. An experiment carried out in France showed that during job search women with a surname sounding Senegalese had 8.4% chance to be invited for a job interview against 13.9% for men with a surname sounding Senegalese, and 22.6% for women with a surname sounding French[7]. Women may be encouraged to conceal their cultural or religious background and be harassed or dismissed if they do not comply. Furthermore, they may be asked to comply with additional selection requirements, refuse promotion, do a lower-level job or receive a lower salary for the same work.

"Thematic Study on Violence against Women and Girls with Disabilities" has come to our attention, prepared by the Office of the United Nations High Commissioner for Human Rights on behalf of the Human Rights Council[8].

3 Paola Uccellari, 'Multiple Discrimination: How Legislation Can Reflect Reality', *The Equal Rights Review*, No. 1-7 (2008-2011), 11. Paola Uccellari is a consultant to The Equal Rights Trust. This article was written based on research commissioned by the Fund and is part of a significant research project.

4 Всемирная конференция по борьбе против расизма, расовой дискриминации, ксенофобии и связанной с ними нетерпимости 31 августа – 7 сентября 2001 года, Дурбан, *https://www.un.org/ru/conferences/racism/durban2001*.

5 UN, *https://documents-dds-ny.un.org/doc/UNDOC/GEN/N02/215/45/PDF/N0221545.pdf.*

6 25 лет борьбы за права женщин: девочки по-прежнему подвергаются насилию и дискриминации, *https://news.un.org/ru/story/2020/03/1373701.*

7 European Network against Racism, Afrophobia in Europe: ENAR Shadow Report 2014–2015.

8 Thematic Study on Violence against Women and Girls with Disabilities, Human Rights Council, 30 March 2012, 20; OHCHR, *https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-5_ru.pdf.*

The study found that women with disabilities are more exposed to forms of violence that women without disabilities do not experience. Acts of violence against women and girls with disabilities include such forms of physical and psychological abuse as ignoring the need for taking medicine, refusing to help to ease oneself by carers, psychological manipulation, causing or threatening to cause harm. They are also vulnerable to forced sterilization and other medical interventions without their consent. A particular problem for women and girls with disabilities is the social barriers that restrict access to justice on an equal basis with other members of society. The research recommends the states to train judges, prosecutors and lawyers on the matters of forms and types of violence experienced by persons with disabilities to improve access to justice. In addition, legal advice and assistance should be made available to women and girls with disabilities.

In conclusion, the case study found that the violence experienced by women and girls with disabilities remains invisible in many cases; current legislative, administrative and policy measures do not adequately link gender and disability; there is a lack of systematic and disaggregated data on violence against women and girls with disabilities, and none of them is inconsistent and incomplete; finally, state programmes on violence against women do not designate the specific vulnerability of women and girls with disabilities in a sufficient context. The study suggests a two-pronged approach to improve this situation: programmes to prevent violence against women and specific programmes and policies relating to women and girls with disabilities[9].

This study argues that a legal approach to protecting the rights of women and girls with disabilities should be oriented towards the creation of unified and special provisions in a larger number newly adopted international legal acts. Therefore, it is interesting to examine the international legal framework that currently governs the legal position of women and girls with disabilities. Having studied international legal standards, it is clear that, unfortunately, there is no standard instrument for the protection of this category of individuals at this stage, i.e. the protection of the rights of women and girls with disabilities is only addressed in some provisions contained in universal international legal acts. For example, international human rights standards provide for the legal protection from the violence of all individuals without discrimination, and such equality principle is enshrined in the provisions of the 1966 International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights[10]. Several significant acts on the protection of the rights of persons with disabilities have subsequently been adopted:

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9 Report of the Office of the UN High Commissioner for Human Rights. Case Study on violence against women and girls and disability. Promotion and protection of all human rights, civil, political, economic, including the right to development, March 30, 2012, paragraph 52, Chapter V, 18.

10 The right to physical and moral immunity and the right to freedom and security of an individual.

1) Declaration on the Rights of Mentally Retarded Persons (1971)[11]
1) Declaration on the Rights of Disabled Persons, adopted in 1975[12]
1) World Programme of Action concerning Disabled Persons (1982);
1) Standard Rules on Equalisation of Opportunities for Persons with Disabilities (1993)[13];
1) Convention on the Rights of Persons with Disabilities and its Optional Protocol, 2006[14];
1) ILO Invalidity Insurance (Industry, etc.) Convention, 1933 (No. 37)[15];
1) ILO Invalidity Insurance (Agriculture) Convention, 1933 (No. 38)[16]
1) Invalidity, Old-Age and Survivors' Benefits Convention, 1967 (No. 128)[17].
1) Convention No. 159 on Vocational Rehabilitation and Employment (Disabled Persons), 1983[18].

Most notably, the Convention on the Elimination of All Forms of Discrimination against Women establishes standards of gender equality in the political and public life of the state, guarantees the right to represent their governments at the international level and to participate in international organisations, and ensures equal rights in education, and employment[19]. Unfortunately, the provisions of this Convention do not address disability issues of women, so it is reasonable to analyse the provisions of

11 Declaration on the Rights of Mentally Retarded Persons, *https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-rights-mentally-retarded-persons*.

12 Declaration on the Rights of Disabled Persons, *https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-rights-disabled-persons*.

13 Standard Rules on the Equalization of Opportunities for Persons with Disabilities, *https://www.un.org/development/desa/disabilities/standard-rules-on-the-equalization-of-opportunities-for-persons-with-disabilities.html*.

14 United Nations, Convention on the Rights of Persons with Disabilities (CRPD), *https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html*.

15 International Labour Organization, C037 – Invalidity Insurance (Industry, etc.) Convention, 1933 (No. 37), *https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C037*.

16 International Labour Organization, C038 – Invalidity Insurance (Agriculture) Convention, 1933 (No. 38), *https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0:::55:P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:CON,en,C038,/Document*.

17 International Labour Organiaztion, C128 – Invalidity, Old-Age and Survivors' Benefits Convention, 1967 (No. 128), *https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0:::55:P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:CON,en,C128,/Document*.

18 International Labour Organization, C159 – Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159), https://www.ilo.org/dyn/normlex/fr/f?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:CON,en,C159,/Document-.

19 Convention on the Elimination of All Forms of Discrimination against Women. 1979. Part II, art. 7.

international instruments that attach the rights of persons with disabilities in general (but not of women with disabilities or girls with disabilities). The Convention on the Rights of Persons with Disabilities recognises that women and girls with disabilities, both inside and outside the home, are often at greater risk of violence, injury or abuse, neglect or negligent treatment, mistreatment or exploitation. It expresses concern that persons with disabilities face difficult situations as they experience multiple or aggravated discrimination[20]. Article 16 of the Convention requires from states to adopt legislation and policies, including those targeting women and girls, to ensure that cases of exploitation, violence and abuse against persons with disabilities are identified, investigated and prosecuted. Article 28(b) of the Convention calls the states to ensure that persons with disabilities, particularly women, girls and older persons with disabilities, have access to social protection and poverty reduction programmes.

Article 19 of the Convention on the Rights of the Child requires from the member-states to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse. The Committee on the Rights of the Child has recognised that children with disabilities may be subjected to particular forms of physical violence, including forced sterilisation (especially girls); and violence under the pretext of treatment (for example, electroshock treatment and electric shocks used as «means to evoke aversion» to control children's behaviour)[21].

Article 23 of the Convention on the Rights of the Child addresses the rights of children with disabilities, stating that a mentally or physically disabled child should enjoy a full and decent life in conditions that ensure dignity, promote self-reliance and facilitate the child's active participation in society. In general comment No. 9 on the rights of children with disabilities, the Committee on the Rights of the Child noted that girls with disabilities are more vulnerable to discrimination and requested from the member-states to take additional measures, as necessary, to ensure that girls with disabilities are adequately protected, have access to all services and are fully integrated into society[22].

We conclude that, in principle, the protection of the rights of women and girls with disabilities is not sufficiently regulated. At the current stage, the global community must conclude that adopting a single convention within the United Nations framework and its further ratification by member-countries would ensure the empowerment of women and girls with disabilities. Moreover, since 2016, the Guidelines (General Comment) for 166 countries that have ratified the Convention on the Rights of Persons with Disabilities

20 Preamble (q) and art. 6 (1).

21 General Comment No. 13 (CRC/C/GC/13), paras. 21–22, *https://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx.*

22 CRC/C/GC/9, para. 10.

have been in place as part of the work of the Committee on the Rights of Persons with Disabilities. The Guidelines[23] note that three main areas affect women and girls with disabilities:

1) Physical, sexual, psychological violence, both institutional and interpersonal;
2) Restrictions on sexual and reproductive rights, including the right to access information and communication, the right to motherhood and child-rearing responsibilities;
3) Numerous manifestations of discrimination.

The General Comment[24] calls the member-states to repeal or amend all laws that discriminate directly or indirectly against women and girls with disabilities and calls for public campaigns to overcome and transform long-standing discriminatory attitudes towards women with disabilities. UN experts point out that women and girls with disabilities need more empowerment, not pity[25].

In the Russian Federation, as in many other countries around the world, the legal approach to protecting the rights of persons with disabilities is based on the provisions of federal laws, but only concerning a category of persons who enjoy special protection from the state. However, it is worth noting that Russian legislation does not emphasize the protection of the rights of women and girls with disabilities. Several legislative acts are currently in force in the Russian Federation: Federal Law N 181-FZ of November 24, 1995 "On Social Protection of Disabled Persons in the Russian Federation" (the latest version), Federal Law N 178-FZ of July 17, 1999 "On State Social Assistance" (the latest version), Federal Law N 442-FZ of December 28, 2013 "On the Basis of Social Services for Citizens in the Russian Federation" (the latest version). Also, an essential step in establishing public policy is the adoption of a state programme by the Ministry of Labour and Social Protection, taking into account the decision taken by the President of the Russian Federation to extend the Accessible Environment Programme for 2021–2025. The so-called 'subprogramme' will aim to improve the system of comprehensive rehabilitation and habilitation for people with disabilities[26]. Prospects of drafting a bill on

23 CRPD/C/GC/3: General comment No. 3 on women and girls with disabilities, 25 November 2016, Part 2, 1.

24 *Ibid*., Part 63, 20.

25 The Committee's Concluding Observations are an independent assessment of states' compliance with their human rights obligations under the treaty. More information on the CRPD: Комитет по правам инвалидов, *http://www.ohchr.org/RU/HRBodies/CRPD/Pages/CRPDIndex.aspx*.

26 Rehabilitation of persons with disabilities is the system and process of restoring the full or partial abilities of persons with disabilities to domestic, social, occupational and other activities. Habilitation of persons with disabilities is a system and a process of formation of capabilities of persons with disabilities, that they previously lacked, for domestic, social, occupational and other activities. Rehabilitation and habilitation of persons with dis-

'distributed guardianship' by the Ministry of Justice of the Russian Federation will reduce the number of people with mental disabilities in psycho-neurological residential institutions (PNIs), and guardianship could provide for 'full' and 'partial' guardianship between different persons. In other words, the responsibility for guardianship beside psycho-neurological residential institutions will be shared by entities which have been legally established, thus enabling people with mental disabilities to live in the society rather than in an institution – in other words, several people can act as guardians for one ward. This state programme aims to have a law passed shortly.

The Russian Federation signed the Convention on the Rights of Persons with Disabilities in 2008 and ratified it by Federal Law No. 36-FZ of May 3, 2012, which entered into force for the Russian Federation on October 25, 2012. The decision to accede to the Convention complies fully with the provision contained in Article 7 of the Constitution of the Russian Federation that the Russian Federation shall provide state support for persons with disabilities (along with other categories of persons), develop a system of social services and establish state pensions, allowances and other social protection guarantees. As the Convention has the status of an international treaty, its provisions are binding, including in cases where they do not coincide with national law (Article 15(4) of the Constitution of the Russian Federation)[27].

The Committee on the Rights of Persons with Disabilities has analysed reports from the Russian Federation, made several positive comments and raised critical concerns about implementing the Convention on the Rights of Persons with Disabilities. The Committee recommended that the State ratify the Optional Protocol to the Convention concerned, as it contains a provision to the effect that a State party to the present Protocol ("the State party") recognises the competence of the Committee on the Rights of Persons with Disabilities ("the Committee") to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State party of the provisions of the Convention. The Committee shall not receive communication if it concerns a State Party to the Convention that is not a party to the present Protocol. Therefore, it would be advisable to become a party to this international instrument, as this would enable citizens with disabilities to seek appropriate assistance when their legal rights are violated.[28]

abilities aim to eliminate or compensate as fully as possible for persons with disabilities to achieve their social adaptation, including their material independence and integration into society.

27 Report on measures taken to implement the obligations under the UN Convention on the Rights of Persons with Disabilities and on the progress made in respecting the rights of persons with disabilities within two years of its entry into force for the Russian Federation. CRPD/C/RUS/1 13 March 2015.

28 Committee on the Rights of Persons with Disabilities Concluding remarks on the initial report of the Russian Federation. KPI/S/RUS/SO/1 Preliminary Unedited Version March 7, 2018, Part III, A. (5), *https://2017.perspektiva-inva.ru/protec-rights/oon/2018-05-04-09-09-09.*

Particular attention should also be paid to terminology. The Committee notes that the official translation of the term "persons with disabilities" into Russian does not reflect the human rights model. But here it is worth referring to the definition in international documents and disagreeing with the position of the Committee's experts. The WHO approach of distinguishing between defect, disability and incapacity for work is interesting:

- "Defect" is any loss of mental, physiological or anatomical structure or function; or deviation from it;
- "Disability" is any limitation or absence (as a result of a defect) of the ability to perform an activity in a way or within a framework that is considered normal for a person;
- "Disability" is a limitation of a particular individual, arising from a defect or disability, which prevents or disables him or her from performing a role considered normal for that individual according to age, gender, social and cultural factors." [29]

Moreover, the Convention 2006 on the Rights of Persons with Disabilities itself states that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others. While the term "disability" is internationally established, the Committee recommends that the State party amend the official translation of the Convention to use terms that fully reflect the human rights model. We believe that the terminology used in Russian law cannot speak to the ineffectiveness of the human rights model, hat is, no matter how the terminology sounds in Russian legislation, people with disabilities still enjoy sufficient social protection.

The Committee notes the State party's continued reliance on health care and rehabilitation and that its efforts remain focused on the development of specialized services, which may lead to segregation. While noting Federal Act No. 419 of 2014 on the rights of persons with disabilities, the Committee is concerned about insufficient efforts to harmonize legislation on persons with disabilities with the Convention and the lack of mechanisms to implement existing legislation[30]. It is difficult to agree with this comment because the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, adopted by the UN General Assembly in 1993, contain Rule 7, which regulates the employment of persons with disabilities. The rule calls for full and free access to the national labour market. In addition to overcoming negative attitudes and prejudices towards working persons with disabilities, states are encouraged to create incentive quotas, creating small economic units in various programmes for persons with disabilities. And in

29 The World Programme of Action concerning Disabled Persons was adopted by UN General Assembly Resolution 37/52 of December 3, 1982.

30 Council for the Rights of Persons with Disabilities, Concluding remarks on the initial report of the Russian Federation, CRPD/C/RUS/CO/1.

the Russian Federation, the Federal Law No. 181-FZ of 24.11.1995 «On Social Protection of Disabled People in the Russian Federation» and the Moscow City Law No. 90 of 22.12.2004 «On Job Quotas» oblige employers to create and allocate jobs for people with disabilities. In some countries in Europe and the United States, job quotas are considered discrimination altogether.

In line with ILO recommendations, Russian legislation classifies persons with disabilities as having difficulties finding work and provides them with additional employment guarantees (Articles 5,13 of the Employment Act). Russian legislation has developed the following mechanisms to regulate the employment of persons with disabilities: «setting quotas in organizations, regardless of their organizational and legal status or form of ownership, for hiring persons with disabilities and the minimum number of unique jobs for disabled persons; reserving careers in professions most suitable for hiring persons with disabilities; and encouraging enterprises, institutions and organizations to create additional jobs (including special jobs) for hiring persons with disabilities; creation of working conditions for persons with disabilities in accordance with individual rehabilitation programmes for persons with disabilities; creation of conditions for entrepreneurial activities of persons with disabilities; and organization of training of persons with disabilities in new professions[31].

For example, Article 7.1 of the employment law includes in the powers of the public authorities of the constituent entities of the Russian Federation in the promotion of employment, supervision and control over the employment of persons with disabilities within the established quota, with the right to carry out checks, issue binding orders and draw up protocols, and register persons with disabilities as unemployed.

Article 13 of the Employment Act provides for additional guarantees for citizens experiencing difficulties in finding work by developing and implementing employee assistance programmes, creating other jobs and specialized organizations (including workplaces and organizations for disabled persons), setting quotas for the employment of disabled persons, and providing training through special programmes and other measures.

Most of the additional employment guarantees for persons with disabilities apply to wage labour. Based on Article 3 of the Labour Code of the Russian Federation, it does not constitute discrimination for persons with disabilities to be hired on the basis of their health condition, the establishment of rehabilitative working conditions, guarantees for working time and rest time, the preferential right to enter into an employment contract for home-based work. This is due to the state's special concern for persons in need of increased social and legal protection. Local government acts, social partnerships, local labour regulations, and employment contracts support the employment of persons with disabilities.

31 Law of the Russian Federation of April 19, 1991 N 1032-1 (as amended on November 19, 2021) "On Employment in the Russian Federation" (as amended and supplemented, effective from March 1, 2022), Art. 13. Additional employment guarantees for certain categories of the population.

Persons with disabilities can be employed both in the open labour market, where the impact of the first concept of employment for persons with disabilities is noticeable and in the closed labour market. In the open labour market, employment quotas for persons with disabilities are facilitated, including creating special jobs for persons with disabilities in organisations. The executive authorities of the constituent entities of the Russian Federation provide for a minimum number of special jobs for the employment of persons with disabilities for each organization within the established quota (Article 22 of FZ No. 181 of November 24, 1995).

One of the areas of state policy for promoting employment is the promotion of employers who maintain existing jobs and create new ones, especially for citizens who have difficulties in finding work (Article 5 (2) of the Employment Act).

In addition to the statements made, the Committee on the Rights of Persons with Disabilities noted the accession of the Russian Federation positively to the 2013 Marrakesh Treaty to facilitate access to published works by blind persons with visual or other print disabilities. The Treaty requires Contracting Parties to provide a standard set of limitations and exceptions to copyright so that published works may be reproduced, distributed and made generally available in formats accessible to persons with visual or other print disabilities, and to enable the transnational exchange of these works through organizations that serve these beneficiaries[32].

Returning to the theme of the submitted article, the Committee is concerned about the lack of a legal framework to address multiple and intersectional discrimination against women and girls with disabilities, including in access to justice and complaint mechanisms to ensure the development, advancement and empowerment of women and girls with disabilities. Experts are also concerned about many boys and girls with disabilities living in institutions. Therefore, in line with its general comment No. 3 (2016) on women and girls with disabilities and taking into account targets 5.1, 5.2 and 5.5 of the Sustainable Development Goals, the Committee recommends that the State party develop a legislative framework to address multiple and intersectional discrimination against women and girls with disabilities in close collaboration with their representative organizations[33].

32 Марракешский договор об облегчении доступа слепых и лиц с нарушениями зрения или иными ограниченными способностями воспринимать печатную информацию к опубликованным произведениям, *https://www.wipo.int/treaties/ru/ip/marrakesh/index.html.*

33 During its sixteenth session, the Committee adopted its general comment No. 3 (2016) on women and girls with disabilities (CRPD/C/GC/3) and No. 4 (2016) on the right to inclusive education (CRPD/C/GC/4). At its thirteenth session, the Committee held a half-day general discussion on the right to inclusive education. Its fifteenth session held a day of general discussion on the right to independent living and involvement in the local community. At its fourteenth session, the Committee adopted guidelines on the right to liberty and security of persons with disabilities under Article 14 of the Convention, which consist of a compilation of recommendations made under the Committee's general procedure for reporting on the issue.

By November 25, 2022, the Russian Federation will submit its second and third periodic reports and provide data on the implementation of the recent comments on national policy modelling, taking into account the views of disabled people's organizations.

Based on our analysis, we conclude that multiple and intersectional discrimination is a relevant legal phenomenon that impedes the realization of fundamental human rights and freedoms, particularly for women and girls with disabilities due to both their legal and general human vulnerability. It is clear from the example of several states that these categories of persons are in principle excluded from state protection, which creates instability in their legal situation and further adaptation in all spheres of life.

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POSLEDICE VIŠESTRUKE DISKRIMINACIJE PO VRŠENJE LJUDSKIH PRAVA OD STRANE ŽENA I DEVOJČICA SA INVALIDITETOM

Apstrakt

Ovaj rad razmatra probleme s kojima se suočavaju žene i devojčice prilikom ostvarivanja ljudskih prava. Izučavanje ovog pitanja zasnovano je na izvorima prava međunarodnog porekla, naročito na razmatranju najvažnijih instrumenata za zaštitu prava osoba sa invaliditetom. Osim toga, posebna pažnja u istraživanju poklonjena je zakonodavstvu Ruske Federacije.

Ključne reči: *Višestruka diskriminacija; Žene sa invaliditetom; Devojčice sa invaliditetom; Ruska Federacija.*

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INTERSECTIONAL DISCRIMINATION OF WOMEN WITH DISABILITIES AND LEGAL REGIME OF ENVIRONMENTAL PROTECTION

Abstract

This article will analyze three legal regimes that serve the protection of the environment, and which recognize the importance of the gender dimension of equality – the regime of climate change, the regime of biodiversity and the regime of desertification seen through the context of disability. The relationship between intersectional discrimination of women with disabilities and environmental protection will be examined.

The paper will explain the concept of intersectional discrimination. Also, it will examine which model of approach to disability is appropriate when it comes to improving the position and empowerment of women with disabilities. It will be considered whether and in which way the international instruments related to the legal regimes of climate change, biodiversity and desertification regulate the position of persons with disabilities.

People with disabilities are one of the most vulnerable categories when it comes to the effects of climate change. Women and girls with disabilities are in an even more unenviable position. Forced migrations due to the harmful effects of climate change, which will certainly happen in the future, will be especially difficult for this category of people, so it can be said that this group of people is discriminated against. The second part of the paper will present proposals on how it is possible to strengthen and improve the position of women and girls with disabilities in these regimes.

Key words: *Women with disabilities; Intersectional discrimination; Environment; Climate change; Biodiversity.*

I INTRODUCTION

People with disabilities are the most vulnerable category of people to the consequences of environmental damage. This category of people often faces discrimination because of their vulnerable position. Women and girls with disabilities are in an even more unenviable position, because in addition to the usual barriers and prejudices faced by people with disabilities in general, they face additional discrimination based on their gender and gender identity,

which leads to intersectional discrimination. The Convention on the Elimination of All Forms of Discrimination against Women and other human rights instruments reflect the specific obligations of states to achieve gender equality, promote women's empowerment and fulfil women's rights.[1] Hence, the obligations of states to apply to all their actions, including those taken in relation to the environment, and include an affirmative obligation to prevent foreseeable human rights violations that may result from environmental degradation.[2]

It can be noticed that the branch of international environmental law is more gender sensitive than other branches of public international law. Legal instruments and agreements adopted over the past decades have begun to integrate language that recognizes and promotes gender equality and human rights, including key multilateral environmental agreements (MEAs) such as the Biodiversity Convention (CBD), the United Nations Framework Convention on Climate Change (UNFCCC), the Paris Climate Agreement,[3] the Convention to Combat Desertification (UNCCD).[4] These legal instruments have recognized the vital role that women play in environmental management and the importance of their full participation in achieving environmental risk reduction goals. Women being disproportionately affected by climate change, they play a crucial role in climate change adaptation and mitigation. Women have the knowledge and understanding of what is needed to adapt to changing environmental conditions and to come up with practical solutions. But they are still a largely untapped resource. Unleashing the knowledge and capability of women represents an important opportunity to craft effective climate change solutions for the benefit of all.[5] According to the provisions of these agreements, gender equality is the key to maximizing the efficiency, effectiveness and fairness of initiatives, programs and projects aimed at reducing biodiversity loss and tackling climate change. This paper will point out the position of women and girls with disabilities in the legal regime of environmental protection.

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1 Countries must work to change harmful gender stereotypes about women and girls and men and boys that perpetuate discrimination and limit opportunities for women and girls to achieve their full potential. Convention on the Elimination of All Forms of Discrimination against Women, art. 5. The United Nations adopted CEDAW on 18 December 1979. New York.

2 For All Coalition: For the Promotion of Gender Equality and Human Rights in the Environment Agreements, *http://www.oas.org/es/cim/docs/ConceptNote-ForAllCoalition [EN].pdf*, 2.

3 Paris Agreement, C.N.92. 2016.TREATIES-XXVII.7. d of 17 March 2016, arts. 7(5) and 11(2).

4 Principle 20 of the Rio Declaration on Environment and Development, General Assembly, A/CONF.151/26 (Vol. I), 12 August 1992. Similar formulation, although targeting the specific role that women have in the conservation and sustainable use of biological diversity and combating deforestation is contained in the Preamble to the 1992 Convention on Biological Diversity (United Nations, *Treaty Series*, vol. 1760, 79) and the Preamble of the Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (A/RES/53/191 of 18 February 1999).

5 International Union for Conservation of Nature, Gender and climate change, *https://www.iucn.org/resources/issues-briefs/gender-and-climate-change*.

Firstly it will be considered which concept of disability can contribute the most to reducing intersectional discrimination. Next, the notion of intersectional discrimination of people with disabilities will be analyzed and clarified. Afterwards, it will be examined to what extent the most important international instruments related to the legal regimes of climate change, biodiversity and desertification regulate the position of persons with disabilities and to what extent they are committed to gender equality of women with disabilities. A special part of the paper will be dedicated to the participation of women and girls with disabilities in the development of climate action plans. Forced migration due to the harmful effects of climate change, which will certainly happen in the future, will be especially difficult for people with disabilities. In the concluding remarks, proposals will be presented on how it is possible to strengthen and improve the position of women and girls with disabilities in the legal regime of environmental protection.

II MODELS OF DISABILITY AND ENVIRONMENTAL PROTECTION

As regards the theoretical considerations of the disability model, it is noticeable that the two models play a dominant role. These are the medical and sociological methods. This chapter will analyze which model is best to apply when it comes to the position and participation of people with disabilities in environmental protection.

According to an influential but widely criticized medical model, disability can be understood in terms of the functional limitations of a person with a disability caused by a clinically visible pathological condition. Disability is something that needs to be diagnosed, treated and cured through rehabilitation or normalization.[6] This model has been heavily criticized given the fact that it is too much based on medical findings, bodily damage and injuries, completely ignoring the social context and barriers that society places on people with disabilities.

Due to the shortcomings of the medical model, a social model of disability emerged. The social model claims that disability is not a physical condition of an individual, but the result of "socially produced inequality and dependence".[7] Disability understood in this way is a social category: a means of classifying and treating people in ways that lead to discrimination. The disadvantages of both models of disability are reflected in the fact that they completely ignore personal experiences in dealing with and overcoming barriers faced by people with disabilities. The social model has good reasons to

6 Adrienne Asch and David Wasserman, "Bioethics" in Gary L. Albrecht (ed.), *Encyclopedia of Disability* (2006), 165–171.

7 Karen Beauchamp-Pryor, 'Visual impairment and disability: a dual approach towards equality and inclusion in UK policy and provision' in Nike Watson, Alan Roulstone, and Carol Thomas (eds.) *Handbook of Disability Studies,* (2022), 185.

highlight marginalization, exclusion and oppression of people with disabilities from full participation in wider society.[8] However, such a focus threatens to obscure attention on how the life experience of a person with a disability is shaped by their physical impairments.[9]

A critical realist model of disability has emerged as a form of response to the vulnerability of people with disabilities to the impact of climate change. There are four elements of the critical realist model of disability climate justice: contextual and environmental features that cause vulnerability; adaptive capacity and resilience to climate change; perceptions of and information gathering about climate change risk; and climate action and policy.[10] The critical realist model suggests the value of an interactional approach between individual (medical conditions, impairment, disposition, etc.) and structural (environment, discrimination, support systems, policy, culture, etc.) factors. This approach forms the foundation for a critical realist model of climate justice, which centers the disability experience in developing an empirically testable theory of how people with disabilities adapt to climate change and develop resilience for climate-related disasters.[11] Existing research has paid insufficient attention to what factors support the adaptive capacity of woman with disabilities, with twice the number of studies focusing on their vulnerability.[12] Critical realist model of disability represents an upgrade of the social model adapted to the specific challenges posed by climate change, with the fact that many elements of this model can be used for other environmental problems faced by people with disabilities.

III DEFINITION OF INTERSECTIONAL DISCRIMINATION

For the purpose of understanding how sensitive and difficult the position of persons (women) with disabilities is, it is necessary to explain and define the concept of intersectional discrimination and determine its connection with gender identity.

Analyzing discrimination in the traditional way takes one factor as the basis of discrimination, completely ignoring possible discrimination on several grounds. This approach does not take into account the specifics of the

8 See Ljubomir Tintor, *Osobe sa invaliditetom i problem pristupačnosti*, master's thesis, University of Belgrade Faculty of Law, Belgrade, 2018, 6.

9 Jonas-Sébastien Beaudry, "Beyond (Models of) Disability?", *The Journal of Medicine and Philosophy*, Vol. 41, No. 2, 210–220.

10 Molly M. King and Maria A. Gregg, Disability and climate change: 'A critical realist model of climate justice' (2021), 2.

11 *Ibid.*

12 Cadeyrn J. Gaskin, Davina Taylor and Susan Kinnear, "Factors Associated with the Climate Change Vulnerability and the Adaptive Capacity of People with Disability: A Systematic Review", *Weather, Climate, and Society*, Vol. 9, Issue 4, 801–814.

position of a person who has simultaneously been discriminated against on several grounds that are so intertwined that they cannot be separated.[13] This form of discrimination is called intersectional discrimination. The term was first used by Kimberlé Crenshaw in 1989 in an article dealing with the experiences of black women. Crenshaw developed concepts of intersectionality mainly by considering discrimination based on racial diversity and discrimination based on gender identity.[14] From Crenshaw's analysis, it can be concluded that the position of women with disabilities is extremely sensitive. The position of a woman with a disability is not comparable to the position of a man with a disability, nor can it be compared to the position of a woman without a disability. Intersectional discrimination should be distinguished from other forms of discrimination, especially multiple discrimination that occurs when one person is discriminated against on several grounds, but in a way that these grounds can be separated – a person is discriminated on different grounds at different times.[15]

Intersectional discrimination had a significant impact on the creation of environmental protection policy and the creation of measures in the climate crisis. As a result of that influence, Intersectional environmentalism was born. Intersectional environmentalism is an inclusive version of environmentalism that advocates for both the protection of people and the planet. It identifies the ways in which injustices happening to marginalised communities and the earth are interconnected.[16] Women with disabilities may be particularly affected by intersectional discrimination due to disability and less able to evacuate or migrate due to limited mobility or sensory impairment.

When considering the intersectional discrimination of women with disabilities in the legal regime of environmental protection – it is unquestionable. This claim is supported by the fact that there is no participation of persons with disabilities in the creation of multilateral environmental agreements, as well as the non-participation of this vulnerable category in the creation and implementation of measures to reduce environmental risks. Disabled women are also more likely to find it difficult to get involved with activist groups and decision making. Although their experience is extremely important to establish adequate measures to prevent environmental degradation.

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13 Mirjana Dokmanović, 'Višestruka i intersekcionalna diskriminacija – Koncept, definicije i uvođenje u zakonodavstvo', *Pravni život,* Vol. 66, No. 10, 2017, 211–226.

14 Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics", *University of Chicago Legal Forum*, Vol. 1989, Issue 1, 1989, 139167. In her analysis, Crenshaw suggests that the position of a person where race and gender intersect is more difficult and unfavorable than the social position of a person who suffers from discrimination on one grounds.

15 Dokmanović*, op. cit*., 218.

16 Fran Haddock, What is Intersectional Environmentalism, and why is it so Important? *https://curious.earth/blog/what-is-intersectional-environmentalism/*.

IV THE SITUATION OF WOMEN WITH DISABILITIES AND MULTILATERAL ENVIRONMENTAL AGREEMENTS

Every seventh person in the world has some form of disability, but like indigenous communities and other marginalized groups, they are routinely left out of conversations and actions to protect the right to a clean and healthy environment.[17] It is necessary to involve all people with disabilities in the drafting of environmental agreements. With a unique insight into their own situation and barriers, women and men with disabilities have an important role to play in proposing creative and relevant solutions for the advancement of their communities and the protection of our common planet.[18] People with disabilities are often deprived of their rights, face stigma and discrimination, and suffer the consequences of environmental degradation in a unique way. Policies to mitigate the impacts of environmental degradation frequently fail to consider disability rights. For example, during climate change-related emergencies, people who are deaf or blind may not have equal access to warning alerts, and persons with mobility issues are not always able to access shelters. Due to the lack of understanding of the position of persons with disabilities, they are very often more exposed to the greater impact of environmental degradation. Very often, when creating a contract, the negative consequences of degradation on disability are not considered at all. The goal of organizations of persons with disabilities is to involve the international community more intensively in the creation of the MEA. Every disability and experience creates a unique situation, and even well-trained responders will need a way to communicate with individuals about their specific needs.[19]

The Stockholm Declaration, as the first international instrument dealing with environmental protection, only mentioned man as a right holder, completely ignoring other categories such as people with disabilities or women. The Rio Declaration adopted 20 years later recognized the importance of women as well as their ability to participate effectively in the economic and social processes of their countries as an essential condition for sustainable development.[20] It should be noted that this international instrument does not highlight the position of women with disabilities and the importance of their participation in the creation of environmental policy. The participation

17 Persons with Disabilities and the Environment, *https://www.greengrants.org/meettheactivists/disabilities_and_environment/*.

18 *Ibid*.

19 Climate-xchange, Climate Justice for All, Including the Disability Community, *https://climate-xchange.org/2021/08/12/climate-justice-for-all-including-the-disability-community/*.

20 Tuohy Honor, "Where Gender Equality and Environmental Law Meet: Appointing a Gender Focal Point for Ireland", *University College Dublin Law Review*, No. 19, 2019, 34–35. Women have a vital role in environmental management and development. Their full participation is therefore essential to achieve sustainable development. Rio Declaration on Environment and Development – The United Nations Conference on Environment and Development, Having met at Rio de Janeiro from 3 to 14 June 1992, principle 20.

of women with disabilities in the creation of environmental protection policy is also minimal due to gender stereotypes. In the continuation of this paper, it will be pointed out to what extent international conventions that deal with environmental protection and recognize the importance of gender equality emphasize the gender equality of women and girls with disabilities and regulate their position.

1. The impact of desertification on discrimination of women with disabilities

United Nations Convention to Combat Desertification is the only legally binding international agreement linking environment and development with sustainable land management. Land degradation has a much greater impact on women than on men as gender stereotypes reduce access to arable land, water and food. Nowhere in the Convention does it explicitly list persons with disabilities as a particularly vulnerable category of people, but it is clear that all barriers faced by women can be applied by analogy to women and girls with disabilities.

„When land is degraded and usable land becomes scarce, women are affected differently and disproportionately due to their significant role in agriculture and food production, greater vulnerability to poverty, and typically weaker legal protection and social status."[21] Gender inequality is in fact a great contribution to increasing the vulnerability of women to environmental damage. Due to poor inclusion, women with disabilities have narrowed access to information so that they cannot access adequate technology to combat desertification and / or mitigate the effects of drought, with the aim of contributing to sustainable development in the affected areas. Desertification has a significant impact on access to adequate food and drinking water, which can endanger the lives of a large number of people (women) with disabilities, given their poor health.

The text of the Convention emphasizes the important role of women in regions affected by desertification and / or drought, especially in developing countries, and the importance of ensuring the full participation of men and women in efforts to combat desertification.[22] In addition to emphasizing the important role of women in its Preamble, the importance of ensuring "full participation of both men and women at all levels in anti-desertification programs" was recognized and provisions on women's rights were introduced in the operational part of the agreement. Thus, consideration of women's needs and their specific status has become an integral part of the responsibilities of affected countries. Of particular importance for women with disabilities is Article 19, which regulates the adoption of measures designed to raise public

21 UN Woman, *https://www.unwomen.org/en/how-we-work/intergovernmental-support/climate-change-and-the-environment/united-nations-convention-to-combat-desertification*.

22 UN Woman, United Nations Convention to Combat Desertification, *https://www.unwomen.org/en/how-we-work/intergovernmental-support/climate-change-and-the-environment/united-nations-convention-to-combat-desertification*.

awareness and ensure adequate capacity building. A key factor in overcoming discrimination against women with disabilities in the fight against desertification is their involvement in the creation of national programs to combat desertification. People with disabilities know best what form of measures in national plans would facilitate the position of this vulnerable group. Article 13 of the Convention on Desertification, which provides for the cooperation and support of states in drafting action plans, may also be important for women with disabilities.[23] States could contribute to reducing intersectional discrimination by raising the awareness of persons with disabilities about desertification factors in order to take adaptation measures as adequately as possible.

At the end of this part, it is necessary to mention the Abidjan Declaration made at COP15. This Declaration emphasizes the importance of gender equality as a means of accelerating land renewal. States have set a reduction in the gender gap as one of their main goals, among other things, by eradicating discrimination based on disability.[24] This objective includes Facilitating access to technology, services and resources to enable effective participation in land renewal efforts.

2. Convention on Biological Diversity and the status of women with disabilities

Of all the major MEAs, the CBD has a relatively long and substantial history of recognizing the links between advancing gender equality and effectively meeting the Convention's goals.When implementing the provisions of the CBD, especially for the period from 2020, it was emphasized that addressing gender equality and the role of women is relevant for achieving different global outcomes of biodiversity. It was pointed out that women are underrepresented in decision-making processes related to biodiversity and natural resource management and have much less access, ownership and control over land and natural resources and related benefits compared to men.[25] This means that women have less capacity to support the achievement of biodiversity goals, and their knowledge, experience and interests may not be taken into account. This puts women with disabilities at a particularly disadvantageous and discriminatory position, as they are often unable to express their views due to their health condition and, as a result, contribute to the achievement of biodiversity goals.[26] Gender norms and stereotypes, many of which

23 The United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (UNCCD), adopted by General Assembly UN, 14 October 1994, art. 13.

24 Abidjan Declaration on Gender and Report from the Gender Caucus, Conference of the Parties Fifteenth session 9–20 May 2022.

25 Towards a gender-responsive post-2020 global biodiversity framework: Imperatives and Key Components, A submission by the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women) as an input to the development of the post-2020 global biodiversity framework 1 May 2019.

26 *Ibid*.

are rooted in the cultural patterns of states, and ingrained discrimination against women with disabilities dictate whether women can own or have access to property, land and other resources.

Vision 2050: living in harmony with nature, adopted as part of the new Strategic Plan, can also serve as a solid basis for enhanced consideration of the gender perspective in the global biodiversity framework after 2020.[27] The more gender equality of women and girls with disabilities is emphasized in global and national strategic plans, the better the intersectional discrimination will be suppressed. That it is necessary to include persons (women) with disabilities in the implementation and creation of measures to implement the objectives of the CBD is evidenced by the fact that biodiversity loss is not only the extinction of plant and animal species, but a serious threat to human health. Major changes in biodiversity increase risks to human health. Potential consequences of biodiversity loss include the spread of human disease, the loss of medical models, reduced supplies of raw materials for drug discovery and biotechnology, and threats to food production and water quality.[28] Reducing biodiversity leads to ecosystem damage that can contribute to the spread of infectious diseases. If it is known that women with disabilities are often of more sensitive health, they are certainly more susceptible to the stated harmful effects of reducing biodiversity. For this reason, women with disabilities have an increased interest in participating in the implementation of the objectives of the Convention and it should be worked on strengthening them and promoting gender equality. Ownership and control of natural resources is essential for the independence and autonomy of women with disabilities and increases their ability to contribute to the conservation of biodiversity.

The Zero draft for a global biodiversity framework after 2020 could be a milestone in improving the position of people with disabilities, especially women, given their importance for biodiversity development. This document is also important in that it explicitly states that the rights of nature should be considered and adopted.[29]

Considering the reports on the implementation of the CBD and the Convention itself, it can be seen that, as in the case of the Convention to Combat Desertification, the role, importance and position of people with disabilities in the fight to achieve the Convention's goals are not directly mentioned. Also, the gender equality of women with disabilities is not explicitly mentioned anywhere. The gender equality of women with disabilities in this Convention can only be spoken of indirectly. For this reason, states could make biodiversity information accessible.

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27 *Ibid*.

28 Eric Chivian, 'Global Environmental Degradation and Biodiversity Loss: Implications for Human Health' in Francesca Grifo and Joshua Rosenthal (eds.) *Biodiversity and Human Health* (1997), 49.

29 Ljubomir Tintor, 'Subjektivitet prirode u međunarodnom pravu – između fikcije i realnosti', *Strani pravni život*, No. 2/2022, 305–325.

3. Discrimination of women with disabilities caused by climate change

There are approximately 800 000 000 people with disabilities living in poor countries. Consequently, climate vulnerability and the right to health of people with disabilities are increasingly recognized.[30] Climate change affects men and women differently. In every country climate change has a greater impact on those sections of the population that rely mostly on natural resources for life and/or that have the least capacity to respond to natural hazards, such as droughts, landslides, floods and hurricanes. Women usually face higher risks and higher burdens due to the effects of climate change. Since the first climate agreement UNFCCC in 1992, significant progress has been made in promoting gender equality and combating intersectional discrimination against women. The Community for Women's Rights and Gender Equality, as well as women leaders within the UNFCCC, have initiated a strong change in the way gender is included in climate agreements. The 1992 UNFCCC does not mention people with disabilities. Influenced by these campaigns, The Cancun Agreement, adopted in 2010, is the first climate agreement that explicitly lists people with disabilities as one of the segments of the population whose human rights are acutely affected by the effects of climate change.[31] the Paris Agreement adopted at the 21st session of the COP 2015 calls for gender equality and women's empowerment, and its provisions on adaptation and capacity building efforts encourage States parties to adopt gender-responsive approaches to mitigating and adapting to climate change.[32] The preamble to the Paris Agreement affirms that "Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights," including the rights of persons with disabilities.[33] Disabled people being 'systematically ignored' on climate crisis, the vast majority of countries have not considered how people with disabilities can be included in climate plans.Yet women with disabilities were among the most vulnerable to climate impacts, partly because of the nature of their disabilities and also because of the social disadvantage that often accompanies this.[34]

The Paris Agreement, later adopted, continues this trend and states in its preamble that, when taking steps to tackle climate change, the parties are

30 Climate change and the right to health of people with disabilities, *https://www.thelancet.com/action/showPdf?pii=S2214-109X%2821%2900542-8*.

31 Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010.

32 UNDP, Overview of linkages between gender and climate change, UNDP Human Development Report 2011, 2–6.

33 Preamble of the Paris Agreement under the United Nations Framework Convention on Climate Change, 22 April 2016.

34 The Sendai Framework, a strategic plan to reduce natural disaster risk for 2015-2030, was adopted at the same time as the Paris Agreement, which fully incorporated key recommendations on gender-sensitive disaster risk reduction (DRR) and promoted a stronger role for women in building resilience to risky situations. The Sendai Framework for Disaster Risk Reduction 2015-2030, Third UN World Conference on Disaster Risk Reduction in Sendai, Japan, on March 18, 2015, *https://www.undrr.org/publication/sendai-framework-disaster-risk-reduction-2015-2030*.

obliged to respect, promote and consider their human rights obligations, including those towards people with disabilities. Given the obvious gender dimension of the Paris Agreement, it can be concluded that this agreement is the first to clearly indicate the importance of gender equality of women and girls with disabilities in terms of environmental protection. However, subsequent provisions omit disability inclusion as an essential principle in action against climate change. Persons with disabilities remain largely excluded from decision-making processes and plans to address and prevent climate change and the responses to climate-related disasters and emergencies at sub-national, national, regional, and international levels.[35]

Human Rights Watch is noted that girl with disability were identified as a very vulnerable category of people to the consequences of climate change until the Cancun Agreement, yet they were not in the focus of concrete initiatives to respect and fulfill their gender rights, such as those created for other groups (Indigenous Peoples' Platform or Gender Action Plan).[36] Women with disabilities around the world often have the least capacity to adapt to climate change, and their position and contribution to the fight against climate change is practically ignored in preparations and response measures.[37] This is mainly due to poorly designed registers of people with disabilities around the world and the lack of data on how climate change affects individual forms of disability.[38]

Another problem that is observed is that the organizations of persons with disabilities that are most aware of the problems of this group of people are only partially or inadequately involved in negotiations on new measures for adaptation and mitigation of climate change, either internationally or nationally. The participation of people with disabilities, especially women, will impose the obligation of states to guarantee the rights of people with disabilities and, at the same time, improve the state's response to climate change, as people with disabilities are extremely educated and resourceful in designing adaptive solutions to complex problems.[39]

The 2006 UN Convention on the Rights of Persons with Disabilities (CRPD) requires the protection of persons with disabilities in situations of risk and requires their participation in policy development. The inclusion of people with disabilities is a theme that covers all areas for all sustainable development goals, including goal 13 on climate action.[40] Taking these facts into account,

35 Disability-Inclusive Climate Action, *https://gladnetwork.net/search/working-groups/disability-inclusive-climate-action*.

36 *Ibid.*

37 UNHCR: Rights of Persons with Disabilities in the Context of Climate Change, A/HRC/44/30, §§4-5, 2020, *https://undocs.org/A/HRC/44/30*.

38 Some people with disabilities experience greater health problems due to extreme weather conditions than other people with disabilities depending on the degree of disability. For example, some people with severe spinal cord injuries have less ability to sweat, which makes them more sensitive to high temperatures.

39 The Council of Canadians with Disabilities, *The Rights of Persons with Disabilities in the Context of the UN Framework Convention on Climate Change,* Framework paper, 2019, 21–24.

40 EDF, How the SDGs Support the CRPD, *http://old.edf-feph.org/how-do-sdgs-support-convention-rights-persons-disabilities*.

the UN Human Rights Council called for a "comprehensive, integrated, gender-sensitive approach to climate change that includes access to disability".[41] Inadequate inclusion of the specific needs of persons with disabilities in action plans violates Article 4 of the CRPD.[42] The fact that no state mentions persons with disabilities in the mitigation plans, while in the plans for climate adaptation 35 countries in general mentions persons with disabilities, but does not provide for special measures that would correspond to the vulnerability of persons with disabilities to the negative effects of climate change.[43] An additional problem is the fact that the documents use the medical model of disability, so it is unlikely that the envisaged adaptation measures will be effective.When creating measures of adaptation and mitigation to climate change, states should create measures based on the principle of universal design so that they are acceptable for persons (women) with disabilities.[44]

In 2019, the UN Human Rights Council adopted Resolution 41/21 on climate change and human rights. The Resolution emphasizes that climate change is a common concern of humanity and that the parties must promote and consider their obligations regarding human rights, health rights, rights of persons with disabilities and persons in vulnerable situations when taking mitigation and adaptation measures.[45] The Resolution notes that persons with disabilities are particularly affected by intersectional discrimination. States are invited to pay special attention to women with disabilities and to take into account their specific needs, pointing out that sudden-onset natural disasters and slow-onset events seriously affect the access of persons with disabilities to food and nutrition, safe drinking water and sanitation, health-care services and medicines, education and training, adequate housing and access to decent work.

Thus, during 2020, a study was conducted – the first gender-sensitive document exclusively dedicated to the position of persons with disabilities in the context of the impact of climate change. This document emphasizes that inclusive climate action is necessary, which requires meaningful, informed and efficient participation of persons with disabilities, as well as the participation of their representative organizations.[46] This would certainly lead to the improvement of men, and especially women with disabilities,

41 *Ibid*.

42 Sébastien Jodoin, Persons with Disabilities and Climate Action: how we can be more inclusive?, *https://www.internationaldisabilityalliance.org/videos/persons-disabilities-and-climate-action-how-we-can-be-more-inclusive*.

43 States make plans for a decarbonized society, instead of including people with disabilities, they further isolate them. The position of women with disabilities is even more unfavorable due to their sex and gender stereotypes that have not yet been eradicated.

44 The practical application of universal design principles helps people, regardless of age and physical ability, to be safe and independent. It is especially important for people with disabilities. Universal design improves the quality of life. People with disabilities achieve equality only if they can use all aspects of the built environment.

45 Human Rights Council, Resolution 41/21 adopted by the Human Rights Council on 12 July 2019.

46 Resolution adopted by the Human Rights Council on 16 July 2020, Human Rights Council Forty-fourth session.

particularly in terms of social protection, then resilience to climate change and, finally, raising the awareness of emergency services about the vulnerability of this category of people. Inclusive action would involve tailored access to information.[47]

Unfortunately, women with disabilities are mostly marginalized in the decision-making process and their implementation. There are no indications of future progress on this issue, because obviously the inclusion of persons (women) with disabilities in climate actions is a dead letter on paper in most countries of the world. It is paradoxical that countries that are most vulnerable to the negative impacts of climate change, which are also the poorest, are working on intensive inclusion, so it is not realistic to expect them to persevere in the efforts to include people with disabilities. Women and girls with disabilities must play a key role in planning for climate change disasters long before they happen because they know their own needs best. As such, policy makers and local actors need tools and resources to engage women and girls with disabilities in emergency planning initiatives. More active participation of women and girls with disabilities in climate litigation is also necessary, and states should offer more concrete measures to improve their position in action plans for adaptation to climate change, which is currently lacking.[48]

Such cases would certainly contribute to reducing the effects of intersectional discrimination against women and girls with disabilities, to which the consequences of climate change also contribute. For climate action to be effective, the whole society must be engaged and no one must be left behind. This has made the coronavirus disease pandemic (*COVID-19*) even more visible by revealing inequalities in all societies and highlighting the link between human health and the health of the planet.[49] Adverse health aspects related to climate change may include heat-related disorders, such as heat stress and the economic consequences of reduced work capacity; respiratory disorders, including those exacerbated by air pollution.[50] Sudden disasters, including cyclones, floods, heat waves, and fires are responsible for bodily injuries, an increase in water-borne diseases, cases of hyperthermia and heat stroke, heat-related deaths, and disrupted access to critical medical services.[51] Adapting to climate change provides a global opportunity to increase health equality for people with disabilities in line with the UN's sustainable development

47 Human Rights Council, Panel discussion on promoting and protecting the rights of persons with disabilities in the context of climate change, Forty-sixth session 22 February–19 March 2021, 2–3.

48 See more about climate litigation in Ljubomir Tintor, 'Značaj slučaja Urgenda za razvoj klimatskih parnica na području Evrope', *Strani pravni život*, No. 2/2021, 249–265.

49 Human Rights Council, *op. cit*.

50 Alyssa Gutnik and Marcie Roth, *Disability and Climate Change: How climate-related hazards increase vulnerabilities among the most at risk populations and the necessary convergence of inclusive disaster risk reduction and climate change adaptation* (2017), 22–23.

51 Muluken Azage, Abera Kumie, Alemayehu Worku, Amvrossios C. Bagtzoglou and Emmanouil Anagnostou, 'Effect of climatic variability on childhood diarrhea and its high risk periods in northwestern parts of Ethiopia', *PLoS ONE*, Vol. 12, No. 10, 2017.

goals through adequate inclusion, empowerment, non-discrimination and accessibility.

At the panel discussion, it was decidedly emphasized that persons with disabilities face serious intersectional discrimination. It was concluded that intersectional discrimination can lead to some people with disabilities being more exposed to the harmful effects of climate change, thus limiting their rights. Global warming could limit access to adequate food, water, sanitation, health, adequate housing and decent work.[52]

The pandemic showed that the previous Sendai Framework for Disaster Risk Reduction was inadequate for the needs of people with disabilities, and that insufficient attention was paid to inclusiveness during its development. People with disabilities did not receive information in accessible formats on how to get involved in the action climate and were not included in the emergency action plans. This has put their lives in danger, as the current pandemic has shown.[53]

Surprisingly, the global mortality rate of people with disabilities in natural disasters is up to four times higher than that of people without disabilities due to a lack of inclusive planning, available information, early warning systems, transport and discriminatory attitudes within institutions and among individuals.[54]

All people, including women with disabilities, must be recognized as rights-holders and obstacles to their inclusion, such as discrimination, must be eliminated. An intersectional approach that has taken into account the specific requirements of people with disabilities should contribute to the development of adequate registers of categorization of persons with disabilities in order to better adapt climate action plans to their needs. It is essential that these plans are gender-sensitive, bearing in mind the special characteristics of women, and that women and girls make up a total of 2/3 of people with disabilities.

States should design their climate actions to encourage the empowerment of women with disabilities. In recent years there have emerged interesting proposals that people with disabilities and their organizations have a separate delegation that would participate on an equal basis in the COP. This way, people with disabilities would become more visible, and the public and contracting states would become aware of the intersectional discrimination faced by women with disabilities.. The fact that the Israeli minister did not participate in COP26 shows that the voice of women with disabilities is systematically ignored due to their disability.[55]

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52 Human Rights Council, *op. cit*., 4.

53 *Ibid*.

54 Takashi Izutsu, Disability-inclusive disaster risk reduction and humanitarian action: an urgent global imperative: United Nations World Conference on Disaster Risk Reduction and the Progress, 29 November 2019, 17–19.

55 Keiligh Baker, Climate change: Why are disabled people so affected by the climate crisis?, *https://www.bbc.com/news/disability-59042087*. States should ensure the accessibility of

3.1. Climate migration as an example of intersectional discrimination against women with disabilities

The effects of climate change – such as storms, rising sea levels and droughts – can often force people to find new homes in safer and more stable climates. This "climate migration" can happen for several reasons. The consequences of climate change can be reflected in the reduction of resources needed for survival, such as limited food or water in regions affected by drought. Leaving areas experiencing chronic flooding due to rising oceans. This is especially relevant in low coastal areas.

According to the International Organization for Migration (IOM), there are likely to be more than 100 million "climate migrants" in the coming decades – and that number could reach nearly a billion by 2050 under the worst of circumstances.[56] People with disabilities face serious problems during migration. They have serious difficulties in finding adequate transport, finding a job, and adequate health care. People with disabilities may face even more obstacles when relocation is unplanned or occurs in the short term, as is often the case with climate-related migration. Some of the many problems that people with disabilities may experience during climate migration include: poor accessibility of transport that is adequate to transport their mobility equipment and necessary supplies while migrating. This can be difficult enough with time to plan, but it is especially difficult when people have to escape from extreme weather conditions in short time frame. Clear evidence from the past and current natural disasters and refugee situations show that people with disabilities have a low survival rate and in many situations are even neglected or left to die.[57]

Another barrier that may arise during climate migration is finding adequate accommodation to meet disability needs, including physical accessibility and proximity to public transport and medical/social services. In many cases, people may be forced to live in emergency shelters for extended periods of time, without adequate physical access and services necessary for the existence of people (women) with disabilities.[58] An additional problem is the possibility of separating people with disabilities from their family members and personal assistants. One of the crucial obstacles is that people with disabilities face two to three times more poverty and are unable to cover the costs of migration.

Women with disabilities are in an even more difficult position as their employment is even lower. All of this puts women with disabilities at in-

meeting venues, shelters and work places. Strengthen the capacities of people with disabilities to respond to climate change by ensuring that information is made available in accessible formats.

56 World Institute of Disability, Climate-Related Migration and Displacement, *https://wid.org/2018/09/26/climate-related-migration/*.

57 Adrien Weibgen, "The Right to Be Rescued: Disability Justice in an Age of Disaster", *The Yale Law Review*, Vol 124, No. 7, 2015, 2412–2416.

58 Dhaka Declaration 2015+1 Adopted at the Dhaka Conference 2018 on Disability and Disaster Risk Management Dhaka, Bangladesh, May 15 –17, 2018, 1–3.

creased risk, as the world's poorest people continue to experience the most severe impacts of climate change through income loss, displacement and hunger.[59] Very often people with disabilities are faced with all these problems, especially women who give up migration. Thus, they are forced to live in a degraded and devastated environment, which further impairs their health.

Intersectional discrimination against women with disabilities in the context of climate migration can also be reflected in difficult employment. Women with disabilities can very easily face limited employment opportunities that match an individual's personal abilities, or in some cases there may be subtle or explicit discrimination in employment. Discrimination is most oftenly based on gender. In the context of natural disasters where people are displaced to escape insecurity and violence, the relationship between disability and forced displacement is even more complicated. Disability may be the result of forced displacement; on the other hand, migrant women with disabilities are more likely to be sidelined in all aspects of humanitarian assistance due to physical, environmental and social barriers to accessing information, health and rehabilitation services.[60]

One of the key problems that women with disabilities face as migrants is invisibility as a migrant with disabilities in the international normative framework. At present, international instruments on migrants have not yet directly integrated the disability dimension into the normative language. It is noticed that people with disabilities in modern discourses on climate migration are classified as migrants – victims.[61]

Simply strengthening existing human rights and disability laws and policies can benefit climate migrants, even if international agreements on climate migration and disability do not yet exist. Guaranteeing access to health and social services, protection against discrimination, employment support, etc. will benefit migrants who might otherwise face obstacles.[62] In addition, women with disabilities could be considered a priority group in need of migration assistance. Solutions to improve the position of women with disabilities should be sought within the climate regime, so that action plans for adaptation and mitigation will be adapted to this vulnerable group.

59 Weibgen, *op. cit*. 2412–2416.

60 Mansha Mirza, *Unmet needs and diminished opportunities: disability, displacement and humanitarian healthcare*, Research Paper No. 212, 2011, 9–14.

61 UNHCR, Disability, Displacement and Climate Change, April 2021. *https://www.unhcr.org/protection/environment/60896a274/disability-displacement-climate-change.html*. Many forcibly displaced people settle in camps and in slums, where infrastructure and services are weak and inaccessible, impacting the autonomy and dignity of persons with disabilities, especially when there has been loss or damage of assistive devices. The barriers for people with disabilities in such environments are heightened. For example, climate change is expected to expose hundreds of millions of people to increased water stress. Forcibly displaced women and girls with disabilities already face barriers accessing safe water for drinking, sanitation and hygiene.

62 UNHCR, Conclusion on refugees with disabilities and other persons with disabilities protected and assisted by UNHCR, Executive Commitee 61st session (2010), *https://www.unhcr.org/excom/exconc/4cbeb1a99/conclusion-refugees-disabilities-other-persons-disabilities-protected-assisted.html*.

V CONCLUSION

After the presented arguments, it can be concluded that the gender equity of women and girls with disabilities has a key role in causing intersectional discrimination. The social model of disability in combination with the critical realist model of disability is the most acceptable so that persons with disabilities can actively participate in environmental protection and the fight against climate change.

The position of women and girls with disabilities in the legal regime of environmental protection is very unfavorable. As people with disabilities, they suffer extremely grave consequences caused by environmental disasters. Although international law on the protection of environment is more sensitive to gender than other branches of international law, it is noticeable that the position of women with disabilities is not regulated. From the provisions of the Convention on Biological Diversity we can indirectly conclude the importance of the participation of women with disabilities in environmental protection and the fight against climate change. The committees that oversee the implementation of agreement commitments in their reports do not analyze the issue of women with disabilities and their importance in the fight for environmental protection. The only international instrument that mentions people with disabilities in the context of environmental protection is the Paris Agreement on Climate Change. In the future, these Committees will have to play more attention to this vulnerable group in their reports when it comes to environmental degradation. Better solutions will have to be offered in terms of evacuation plans for people with disabilities in crisis situations in order to overcome the intersectional discrimination that is now very noticeable. It is necessary to actively involve women with disabilities in the creation of climate change adaptation measures and to base the on universal design. Adaptation measures should be based on the concept of universal design as it enables movement without barriers.

Today, the prevailing view is that the experience that women with disabilities have in overcoming everyday obstacles would be of fundamental importance in the fight for environmental protection, primarily adaptation to climate change. For these reasons, it is necessary to include women with disabilities in the creation of climate policies. Effective inclusion would certainly reduce the effects of intersectional discrimination.

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INTERSEKCIJSKA DISKRIMINACIJA ŽENA SA INVALIDITETOM I PRAVNI REŽIM ZAŠTITE ŽIVOTNE SREDINE

Apstrakt

U ovom radu biće analizirana tri pravna režima koji služe zaštiti životne sredine, a koji prepoznaju značaj rodne dimenzije ravnopravnosti – režim klimatskih promena, režim biodiverziteta i režim dezertifikacije posmatrani kroz kontekst invaliditeta. Biće ispitan odnos između intersekcijske diskriminacije žena sa invaliditetom i zaštite životne sredine. U radu će biti objašnjen koncept intersekcijske diskriminacije. Takođe, biće ispitano i koji je model pristupa invaliditetu prikladan kada je u pitanju unapređenje položaja i osnaživanje žena sa invaliditetom. Razmotriće se da li i na koji način međunarodni instrumenti koji se odnose na pravne režime klimatskih promena, biodiverziteta i dezertifikacije regulišu položaj osoba sa invaliditetom. Osobe sa invaliditetom jedna su od najranjivijih kategorija kada su u pitanju efekti klimatskih promena. Žene i devojčice sa invaliditetom su u još nezavidnijem položaju. Prisilne migracije zbog štetnih uticaja klimatskih promena, koje će se svakako dešavati u budućnosti, posebno će biti teške za ovu kategoriju ljudi, pa se može reći da je ova grupa diskriminisana. U drugom delu rada biće izneti predlozi kako je moguće ojačati i unaprediti položaj žena i devojčica sa invaliditetom u ovim režimima.

Ključne reči: *Žene sa invaliditetom; Intersekcijska diskriminacija; Životna sredina; Klimatske promene; Biodiverzitet.*

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RIGHTS AND STATUS OF GIRLS AND WOMEN WITH DISABILITIES IN MIXED MIGRATION FLOWS – (IN)VISIBLE PROBLEMS OF VULNERABLE GROUPS

Abstract

The aim of this article is to consider the status and rights of girls and women asylum seekers, refugees and migrants with disabilities. The first part of the article presents the determinants of the categories of vulnerable groups – persons with disabilities, women, children, asylum seekers, refugees and migrants, followed by the outline of the legal framework regarding these categories that are on the move. The second part analyses the situation regarding these categories of people in the world in the context of migration, with particular reference to forced migration and the overall mixed character of modern migration. In the context of mass mixed migration in the modern world, girls and women with disabilities are some of the most vulnerable groups. The third part of the article presents and analyses the risks and challenges of modern mixed migration, which is of great importance for creating a realistic picture and problems faced by these categories of people, especially given their exposure to multiple discrimination and neglect risks. In addition to sharing their fate with other displaced people, girls and women face particular disability and gender-based risks as an additional burden. The risks to these vulnerable groups have been further exacerbated with the outbreak of the Covid-19 pandemic, and there are still many open challenges to which these groups are exposed.

Key words: *Vulnerable groups; Children; Girls; Women; Persons with disabilities; Asylum seekers; Refugees; Migrants; Human rights; Mixed migration.*

I INTRODUCTION

According to the United Nations High Commissioner for Refugees (UNHCR), in 2021, 89,3 million persons were forcibly displaced worldwide due to persecution, conflict, violence, human rights violations or events seriously disturbing public order.[1] According to UNHCR estimates, that number exceeded 100 million forcibly displaced people in the middle of 2022.[2] The number of forcibly displaced people is increasing, ten years ago, there were 45.2 million forcibly displaced people worldwide.[3] The statistics indicate the massiveness of modern migrations and the seriousness of migration management issues, bearing in mind the number of forcibly displaced people around the world with a tendency for further growth.

Contemporary international migrations are mass and mixed – refugee-migrant movements.[4] Especially since the second decade of this Millennium, mass mixed migration crises come with many specific characteristics. Many refugees and migrants pass through more than one country before arriving at the territory of the country of destination. Usually, they pass through two, three or more countries, and many refugees and migrants take their journey by sea (Mediterranean Sea, Caribbean Sea, etc.). Also, many became smuggling and human trafficking victims, causing numerous injuries and even loss of lives during journeys.

The mixed character of contemporary migration is expressed in the composition of the population in migration – many refugees and migrants are adult men. However, a small part of the refugee-migrant population comprises women (girls and women), people with disabilities, older people, etc. According to UNHCR data, in 2020, an estimated 12 million persons with disabilities were forcibly displaced by persecution, violence and human rights violations.[5]

The mentioned population is exposed to numerous perils both in the country of origin and after they migrate during transit to the country of destination. The difficulties are different, from security risks – exposure to smuggling and human trafficking, including risky crossings of borders, frequent exposure to discriminatory treatment in transit and destination countries when exercising rights, especially to hate speech and hate crimes, problems related to status regulation, integration into the host country's society, and many others.

1 UNHCR, *Global Trends – Forced Displacement 2021* (2022), 2.

2 UNHCR: Ukraine, other conflicts push forcibly displaced total over 100 million for the first time, 23 May 2022, *https://www.unhcr.org/news/press/2022/5/628a389e4/unhcr-ukraine-other-conflicts-push-forcibly-displaced-total-100-million.html*.

3 UNHCR, *Global Trends* 2012 (2013).

4 See Bojan Stojanović, "Contemporary International Refugee Law and New Development Tendencies", in Vesna Petrović (ed.), *Seven Decades of Legal Protection of Refugees – Collection of papers marking the 70th anniversary of the adoption of the Convention Relating to the Status of Refugees (*2022), 48–50.

5 UNHCR, *Global Report 2020* (2021), 192.

II VULNERABLE CATEGORIES

There is no single definition of vulnerable groups, however, depending on the situation, many categories of people can be considered vulnerable – people with disabilities, children, women, older people, asylum seekers, refugees, migrants, and others. One of the problems faced by these groups is exposure to multiple forms of discrimination due to personal characteristics (female gender, minors, disability, and the like). Exposure to multiple forms of discrimination makes their position in society difficult. Also, they are often exposed to intersectional discrimination precisely because of the combination of personal characteristics, and their exposure to discrimination is happening because of inseparable personal characteristics, which together represent a more difficult position. Exposure to risks and their vulnerability increases depending on the situation in which they find themselves, and migration, certainly, whether it is voluntary, but especially when it is forced, represents one such situation.

The combination of personal characteristics and forced migration, to which girls and women with disabilities are exposed, makes them highly vulnerable. To present the normative framework that refers to the mentioned categories of people in forced migration, definitions are provided in the following. The explanations will be further placed in the context of forced migrations, which will shed light on the risks and challenges faced by girls and women with disabilities who are on the move and who, in modern times, are mixed (refugee-migrant).

1. Persons with disabilities

The definition of a person with a disability is given in Article 1, paragraph 2 of the Convention on the Rights of Persons with Disabilities [6] as follows:

> "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."

The rights of people with disabilities are based on their needs, from the need for access to adequate health care, education, employment, and inclusion in society on an equal basis. Their special needs and the inability of societies to respond to their needs make them vulnerable. Consequently, people with disabilities face difficulty with access to justice and the realization of numerous rights, primarily due to the discriminatory attitude of the state or individuals.

Judging by the estimated number of people with disabilities, these people make up a significant percentage of the planet's total population. Thus, according to estimates by the World Health Organization (WHO), as many as 15% of the total population in the world are persons with disabilities.[7]

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6 Convention on the Rights of Persons with Disabilities, United Nations, *Treaty Series*, vol. 2515, p. 3, New York, December 13, 2006.

7 World Health Organization, *World Report on Disability* (2011), 29.

2. Women

The position of women in many countries of the world is at an inadequate or unsatisfactory level. Even in economically developed countries, there are cases of discrimination in various areas affecting women. There is a long history of the struggle for women's rights, and only in the 20th century did serious developments take place, from the possibility of equal access to education and work to obtaining the right to vote, equal access to the right to citizenship and other rights. The gender aspect, prejudices and different cultural patterns make women often discriminated against and disenfranchised.

Forced migration[8] makes women one of the most vulnerable categories of people on the move, especially since they usually acquire several different personal characteristics (disability, old age, etc.) or social roles (wife, mother, etc.). Bearing in mind that the characteristic of contemporary forced migration is that the movement includes people from different parts of the world, who belong to different religions, cultures and the like, the position of women in their countries of origin is different. In some countries of origin, women have significantly limited fundamental rights compared to men. In recent times, we are also witnessing changes in legislation and practice that can be considered backwards, such as the latest changes in Afghanistan and the massive disenfranchisement of minority groups, including girls and women. The influence of religious rights in many countries of the world contributes to the disenfranchisement and poor position of women, which is often the cause of forced cross-border migration.

3. Children

According to the Convention on the Rights of the Child,[9] a child is defined as:

> "[E]very human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."[10]

Children are, without a doubt, persons who can be considered vulnerable in various situations. In the context of migration, their vulnerability increases even more, whether it is about children forced to migrate together with their families or unaccompanied and separated children. During forced migration, children are thus exposed to risks related to access to the territory of the re-

8 A migratory movement which, although the drivers can be diverse, involves force, compulsion, or coercion. While not an international legal concept, this term has been used to describe the movements of refugees, displaced persons (including those displaced by disasters or development projects), and, in some instances, victims of trafficking. At the international level the use of this term is debated because of the widespread recognition that a continuum of agency exists rather than a voluntary/forced dichotomy and that it might undermine the existing legal international protection regime. IOM, *Glossary of Migration* (2019), 77.

9 Convention of the Rights of the Child, United Nations, *Treaty Series*, vol. 1577, New York, November 20, 1989.

10 Art. 1 of the Convention of the Rights of the Child.

ceiving country, asylum procedures, and many other essential aspects necessary for the child's daily life and development, such as the right to education. In this regard, the gender aspect of migration is also of great importance, that is, the need to pay special attention to girls and teenage girls in migration, especially those unaccompanied by parents or relatives who find themselves in migration, whether it is forced or voluntary migration.

4. Refugees

The definition of a refugee is given in Article 1 (A) (2) of the Convention on the Status of Refugees as follows:

> "As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

The Protocol to the Convention on the Status of Refugees (1967 Protocol) serves to extend the temporal and geographical purview of the Convention, thus providing a more comprehensive framework for the protection of individuals who have been forced to flee their home countries due to persecution, conflict, or other forms of violence. This extension, which encompasses events occurring after the 1951 threshold and refugees arriving from regions outside of Europe, reinforces the principle of non-refoulement, which prohibits the return of individuals to places where their lives or freedoms may be threatened. As such, the adoption of the 1967 Protocol represented a crucial step in efforts to uphold the fundamental rights of displaced persons.[11]

Refugees, by virtue of their forced displacement from their country of origin, often find themselves in a state of *de facto* statelessness. This precarious legal status, which arises from their inability to rely on the protection of their country of origin, exposes them to a range of vulnerabilities and challenges. As de facto stateless persons, refugees may be viewed as foreigners by the countries where they transit and seek asylum, thus exacerbating their marginalization and exclusion. Furthermore, the lack of a clear legal status may hinder their access to essential services, such as healthcare and education, and may render them susceptible to exploitation and abuse. Recognizing and addressing this issue is crucial to upholding the rights and dignity of refugees and mitigating the adverse impacts of forced displacement.

Persons who leave their country of origin for various reasons and who do not fall under the definition of a refugee in accordance with the 1951 Refugee Convention have at their disposal various protection mechanisms known as complementary forms of protection. The shortcomings of the 1951 Refugee

11 See art. 1, paras. 2 and 3 of the 1967 Protocol.

Convention can be attributed to the period when the said convention was adopted and to various circumstances that occurred in the subsequent decades. Complementary types of protection have contributed to the fact that persons who do not fall under the definition of a refugee, and there is a reason that their lives and safety would be threatened, still receive protection in the host country. Regarding the definition of a refugee and the protection mechanisms of persons forced to leave their country of origin, there are also dilemmas characteristic of the last few decades. It is about an issue of the so-called "environmental" refugees.

5. Asylum seekers

Asylum seekers are persons who are in the process of determination of their refugee status. As a result, they are enjoying a lower level of protection and rights when compared to persons who have already been recognized as refugees. In contemporary times, there is a large number of asylum seekers worldwide. According to UNHCR data, in 2020, there were 4.1 million asylum seekers in the world, which is 3.8% of the total number of forcibly displaced people globally. The duration of the asylum procedure, which determines refugee status or other forms of protection, can span several months or even years if all legal remedies are pursued, thereby increasing the susceptibility of asylum seekers to exploitation and abuse. This is particularly concerning given the level of protection afforded to these individuals during the procedure. Of course, the most important is the protection against illegal expulsion (principle of *non-refoulement*), but also other rights that, which may vary depending on the host country's domestic legal framework, are available to asylum seekers.

6. Migrants

The concept of a migrant is not defined in international law.[12] There are many colloquial ways to describe migrants, but the definition given by the International Organization for Migration (IOM) can be considered the most general, which reads:

> "An umbrella term, not defined under international law, reflecting the common lay understanding of a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons. The term includes a number of well-defined legal categories of people, such as migrant workers; persons whose particular types of movements are legally defined, such as smuggled migrants; as well as those whose status or means of movement are not specifically defined under international law, such as international students."[13]

12 The definition given in the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families refers only to migrant workers and members of their families, but not to other migrants. This represents a major limitation regarding the domain of this convention as it only applies to one category of migrants.

13 IOM, *Glossary on Migration* (2019), 132.

Migrants, as foreign citizens lands, are subject to a unique set of challenges and vulnerabilities. The rights afforded to them by the countries where they reside are often circumscribed compared to those enjoyed by the native-born. As a result, migrants, despite being in voluntary migration, may find themselves exposed to a range of hazards due to their status as outsiders in the host society. This constitutes a significant concern, as it shows how the experience of migration can be fraught with peril for those undertaking it.

The problem migrants face in practice is the lack of access to free legal aid, leaving them to navigate the complexities of the legalization of residence and the exercise of other rights in the destination country on their own. This lack of access to legal assistance renders migrants exceptionally vulnerable, exposing them to many risks, such as smuggling, human trafficking, forced labour, and other forms of exploitation. The consequence of this lack of access to legal aid is a perpetuation of the marginalization and disenfranchisement of migrants, undermining their agency and the ability to assert their rights. Therefore, addressing the problem of access to legal aid for migrants must be a priority to mitigate their vulnerability and facilitate their integration into the host society.

III LEGAL FRAMEWORK

After the Second World War, under the auspices of the United Nations, the adoption of international legal instruments protecting human rights began. The Charter of the United Nations (1945) laid the foundation for further development in terms of the protection of human rights so that the first international legal document proclaiming human rights was adopted not long after – the Universal Declaration of Human Rights (1948)[14], which includes a catalogue of fundamental human rights (both civil and political and economic, social and cultural rights).

After the adoption of the Universal Declaration of Human Rights, almost twenty years had to pass until two international human rights pacts were adopted – International Covenant on Civil and Political Rights[15] and International Covenant on Economic, Social and Cultural Rights,[16] both adopted in 1966.[17] The Covenants prescribe fundamental civil, political, economic, social and cultural rights that apply to all persons under the jurisdiction of the respective state. Therefore, these rights apply not only to citizens of the respective country but also to foreign nationals and stateless persons under the jurisdiction of the respective country. In addition to those mentioned earlier, international legal instruments and other instruments protecting human rights were adopted.[18]

14 UN GA, Resolution 217 A.

15 United Nations, International Covenant on Civil and Political Rights, *Treaty Series,* vol. 999, p. 171 and vol. 1057, p. 407.

16 United Nations, International Covenant on Economic, Social and Cultural Rights, *Treaty Series,* vol. 993, p. 3.

17 Previously adopted International Convention on the Elimination of All Forms of Racial Discrimination New York, 7 March 1966, United Nations, *Treaty Series*, Vol. 660, p. 195.

18 See more at official web site of the OHCHR: *https://www.ohchr.org/en/instruments-listings*.

The application of international human rights treaties is common to all people on the move. However, their ratification is not entirely universal (apart from the CRC). The most significant number of universal international treaties that protect human rights offer special procedures through which individuals can initiate proceedings before supervisory bodies, thereby establishing a system of individual petitions. This system allows for the promotion and protection of human rights on an individual level, serving as a crucial safeguard against potential violations.

Regional international legal instruments in the field of human rights are adopted in Europe,[19] the Americas[20] and Africa.[21] They envisage numerous mechanisms for the protection and monitoring of human rights, including communication procedures – judicial and quasi-judicial bodies, in varying degrees of development.[22] Before certain judicial bodies, there is also the possibility of submitting individual petitions, which is of great practical importance for protecting human rights. At the regional level, when it comes to the European continent, the European Court of Human Rights, a judicial body of the Council of Europe, has generated extensive practice relevant to asylum seekers, refugees and migrants.

1. Rights of persons with disabilities

The most important international treaty relating to persons with disabilities is the Convention on the Rights of Persons with Disabilities (CRPD), adopted in 2006 and its Optional Protocol,[23] adopted the same year. The preamble of the CRPD refers to the Universal Declaration of Human Rights and other important universal international treaties that protect human rights,[24] building on the already existing legal architecture that protects the human rights of all human beings.

The activities of the Committee on the Rights of Persons with Disabilities (CRPD Committee) and the practice generated by this Committee are of great importance, bearing in mind that proceedings can be conducted before the Com-

19 Convention for the Protection of Human Rights and Fundamental Freedoms, *European Trety Series*, No. 5, and its Protocol. Also, it is very valuable jurisprudence of the European Court of Human Rights.

20 American Convention on Human Rights (Pact on San Hose, Costa Rica), United Nations, *Treaty Series*, Vol. 1144, p. 123.

21 African Charter on Human and Peoples' Rights, Organization of African Unity, United Nations, *Treaty Series*, vol. 1520, p. 217. African Charter on the Rights and Welfare of the Child, adopted by the 26th Ordinary Session of the Assembly of Heads of State and Government of the OAU, Addis Ababa, Ethiopia – July 1990. Entered into force on 29 November 1999.

22 At the regional level, within the framework of regional organizations dealing with the protection of human rights, the following bodies are active, among others: European Court of Human Rights, Inter-American Commission on Human Rights, African Court on Human and People's Rights.

23 United Nations, the Convention on the Rights of Persons with Disabilities, *Treaty Series,* vol. 2518 , p. 283. Asst. A/61/611 .

24 Convention on the Rights of Persons with Disabilities, Preamble, paras. b and d.

mittee for the Rights of Persons with Disabilities based on an individual petition.[25] Also, the general comments of the CRPD Committee are a valuable source of interpretation. For girls and women with disabilities in migration, General Comment No. 3 is especially important, bearing in mind that it recognizes girls and women with disabilities who are asylum seekers, refugees or migrants as persons who, in practice, face additional obstacles in achieving rights.[26]

2. Rights of women

In terms of women's rights, several international treaties have been adopted. Of particular importance is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),[27] which was adopted in 1979. It contains numerous important civil, political, economic and social rights of women. The CEDAW Committee monitors the implementation of CEDAW at the national level and periodically adopts concluding observations in relation to the respective states. The CEDAW Committee adopts the general comments. The following general comments of CEDAW are important for girls and women who are in forced migration: General recommendation No. 38 (2020) on trafficking in women and girls in the context of global migration,[28] General recommendation No. 26 on women migrant workers,[29] General recommendation No. 18: Disabled women,[30] General recommendation No. 33 on women's access to justice,[31] but also other general comments depending on the areas of importance for women in migration. CEDAW has provided that individuals can initiate proceedings on individual petitions before the CEDAW Committee.

3. Rights of the child

The Convention on the Rights of the Child (CRC)[32] was adopted in 1989 and entered into force in 1990. It is the most ratified international human rights treaty.[33] In addition to the definition of a child, the CRC contains a number of

25 The Optional Protocol to the Convention gives the Committee competence to examine individual complaints regarding alleged violations of the Convention by States parties to the Protocol.

26 Committee on the Rights of Persons with Disabilities General comment No. 3 (2016) on women and girls with disabilities, CRPD/C/GC/3, 25 November 2016, para. 39.

27 United Nations, Convention on the Elimination of All Forms of Discrimination Against Women, *Treaty Series,* vol. 1249, p. 13.

28 CEDAW, General recommendation No. 38 (2020) on trafficking in women and girls in the context of global migration, CEDAW/C/GC/38, 20 November 2020.

29 CEDAW, General recommendation No. 26 on women migrant workers, CEDAW/C/2009/WP.1/R, 5 December 2008.

30 CEDAW, General recommendation No. 18: Disabled women, tenth session (1991), Contained in document A/46/38.

31 CEDAW, General recommendation No. 33 on women's access to justice, CEDAW/C/GC/33, 3 August 2015.

32 United Nations, Convention on the Rights of the Child, *Treaty Series,* vol. 1577 , p. 3.

33 Until May 25, 2022, 196 states are bound by this convention, which makes this international treaty the most widespread international instrument protecting human rights.

children's rights. The principle of the best interest of the child, contained in Article 3 of the CRC, is of extremely great importance. Also, in a few articles, CRC protects the rights of children with disabilities and the rights of girls.

The Committee of the Rights of the Child (CRC Committee) adopted a series of general comments that interpreted several rights set forth in the CRC but also comments that filled the gaps in the formulations of the articles (for example, HIV/AIDS, migrant children, right to environment, rights of the child in the digital environment and other). Of importance for girls in migration are the following general comments of the CRC: General Comment No. 6 on the Treatment of Unaccompanied and Separated Children Outside Their Country of Origin,[34] Joint general comment No. 18 of CRC and joint general recommendation No. 31 of CEDAW on harmful practices,[35] Joint General Comment No. 3 of CMW and No. 22 of CRC in the context of International Migration: General principles and Joint General Comment No. 4 of CMW and No. 23 of CRC in the context of International Migration: States parties' obligations in particular concerning countries of transit and destination.[36]

Also of great importance is the possibility that proceedings can be conducted before the CRC on an individual application,[37] regardless of the status of the child, which is relevant in terms of forced migration because, in this way, the rights of children of asylum seekers and refugees can be protected.

4. Rights of refugees

Soon after the Second World War, in 1951, the Convention relating to the Status of Refugees[38] (1951 Refugee Convention) was adopted. This convention defines refugees and prescribes the rights of refugees and the duties of states relating to the international protection of refugees. The lack of definition of a refugee is restriction *ratione temporis* and *ratione personae*. As already noted, the 1951 Refugee Convention applies to persons who became refugees before January 1, 1951, and only to refugees from Europe. Due to these restrictions, in 1967, the Protocol to the Convention on the Status of

34 Committee on the Rights of the Child (CRC), General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6.

35 CEDAW, CRC, Joint general recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices, CEDAW/C/GC/31-CRC/C/GC/18, 4 November 2014.

36 Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Committee on the Rights of the Child, Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, CMW/C/GC/3-CRC/C/GC/22, 16 November 2017.

37 The procedure is carried out under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, A/RES/66/138, New York, 19 December 2011. As of 1 November 2022, 50 countries have ratified the said Optional Protocol.

38 United Nations, Convention relating to the Status of Refugees, *Treaty Series,* vol. 189, p. 137, Geneva, 28 July 1951.

Refugees, known as the New York Protocol or 1967 Protocol, was adopted. It removed the mentioned restrictions.

The 1951 Refugee Convention provided for a number of refugee rights (Art. 2-34 1951 Refugee Convention), *inter alia*, the principle of *non-refoulement*, right of association, freedom of movement, identity and travel documents, etc. However, the 1951 Refugee Convention did not prescribe a procedure for obtaining refugee protection but left it up to the states. The 1951 Refugee Convention did not prescribe the asylum procedure, but it was left to the states to regulate it through internal legislation. However, in 1979, UNHCR published the Handbook on Procedures and Criteria for Determining Refugees Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol, which provided guidelines related to the procedure for recognizing refugee status.[39]

As mentioned, human rights are also regulated in other international legal instruments, which certainly also apply to refugees, bearing in mind the territorial validity of those international agreements, especially the universal and regional international agreements provisions. Also, the right to asylum is prescribed in many of them as a particular human right.

5. Rights of migrants

There is no legally binding international treaty in the field of International Migration Law (IML), unlike with International Refugee Law, where there is a Refugee Convention and its Protocol. In the field of IML, there is only the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families,[40] but this convention regulates only the *rights of all migrant workers and members of their families*.[41] Also, a small number of states have ratified this convention.[42]All of the above results in the fact that the rights of migrants are not protected by one but by a larger number of international treaties that protect human rights and, to a lesser

39 UNHCR, *Handbook on Procedures and Criteria for Determining Refugees Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1979).

40 United Nations, Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, *Treaty Series*, vol. 2220, p. 3; Asst. A/RES/45/158 .

41 In the midst of refugee and migrant crises, in 2016, the New York Declaration for Refugees and Migrants was adopted. On the basis of the Declaration, two years later, two compacts were adopted – Global Compact on Refugees and Global Compact for Safe, Orderly and Regular Migration (Global Compact for Migration/GCM). However, we are talking about soft law sources of law, which are an expression of the attitudes of states that aim to preserve as high a degree of their sovereignty as possible, and are more less likely to decide to commit themselves to the application of international legal instruments. On the crisis of multilateralism in the management of contemporary mass and mixed migration, see Stojanovic Bojan, "Multilateralism Crisis in Contemporary Mass and Mixed Migration Management and International Community Response", *Serbian Yearbook of International Law*, Vol. 1, Issue 1, 2022 (forthcoming).

42 By May 25, 2022, 57 states have committed to implementing this convention, which is just over a quarter of the states that make up the modern international community.

extent, compared to the rights of refugees. Also, the Convention that protects the rights of migrant workers and members of their families is limited as many countries that receive a large number of migrant workers are not obliged to apply it.[43] Thus, migrants are subject to the minimum standards prescribed by universal and regional international treaties that regulate human rights and the provisions of customary international law and *ius cogens* norms.

IV RISKS AND CHALLENGES OF CONTEMPORARY MIXED MIGRATIONS

1. Mixed and mass migrations

A characteristic of modern migrations is the mass and mixed composition of people on the move. Especially since the second decade of this century, there have been several migratory waves from different parts of the world – in Africa, the Middle East, from the southern parts of Asia, and Central and South America. There are various causes of these mixed migrations – armed conflicts, massive and systemic violations of human rights, environmentally caused migrations, and all the way to economic reasons for migrating. Therefore, regarding the causes of mixed migration, it can be concluded that it is a combination of forced and voluntary migration.

Compared to the previous decades, there is a greater number of refugees and migrants, who in the last ten years, have been moving along the same routes, whether it is by land (the Middle East, the Balkan Peninsula, migration from South and Central America via Mexico, etc.) or by sea, by road (mostly via the Mediterranean and the Caribbean Sea), to migration by air, mostly by airplane flights to Western European countries and North American countries. Due to the outbreak of armed conflicts in Ukraine, there are millions of forcibly displaced persons in forced migration throughout the country or outside it.[44]

Mass and mixed migrations have created a great challenge for the international community, and under the auspices of the UN, the New York Declaration for Refugees and Migrants was adopted in 2016. It envisaged the adoption of two legal documents – one that would refer to refugees and the other to migrants, which was done in 2018 when the Global Compact on Refugees (GCR) and Global Compact for Safe, Orderly and Regular Migration (GCM). All the mentioned legal documents contain provisions related

43 It is worth noting that many countries that receive a large number of foreign workers, such as the USA, Russia, etc., are not obliged to apply this convention, but neither are the member states of the European Union, which represents an additional, factual limitation to this convention.

44 In the middle of 2022, about 5.4 million refugees from Ukraine found themselves outside the borders of their homeland. UNHCR, *Mid-Year Trends* (2022), 2.

to vulnerable groups within the refugee-migrant population. The importance of the mentioned documents, even though they belong to soft law sources of law, is that the implementation of the provisions of those documents is placed on a horizontal plane, unlike other international legal documents with states and international organizations as subjects. This further means that in the implementation of these documents, other actors are involved in addition to states and international organizations, non-governmental organizations, universities, sports clubs, religious organizations, and refugees and migrants themselves. Global compacts provide mechanisms for monitoring their implementation and cooperation among actors.[45]

2. Challenges facing people in migration with a focus on girls and women with disabilities

Refugees and migrants on their way from their country of origin to their country of destination often face a large number of challenges. Especially when it comes to irregular migration (refugees and migrants who do not have personal documents), refugees and migrants are exposed to excessive force by state security authorities, then to smuggling and human trafficking, and often life-threatening risks, e.g., migrations by sea.[46] There are frequent cases of the suffering of refugees and migrants in the Mediterranean, where since 2014, according to IOM estimates, 24,039 migrants, including children and women, are considered missing.[47]

Refugees are faced with the risk of being denied access to the territory of safe countries and expulsion (in violation of the principle of *non-refoulement*), as well as being denied access to the asylum procedure. This entails numerous risks, from the fact that in this way, they are exposed to serious threats to their lives and safety if they were to be returned to their country of origin or another country where their life and safety would be in question.

Also, when entering the territory of a safe country, refugees and migrants face illegal deprivation of liberty. This most often happens in the international zones of airports and at the borders. Due to the intensification of refugee-migrant crises in the second decade of the 21st century, many countries have changed legislation or are violating existing laws, as well as international law and standards, erecting walls and wire fences, and applying force and unlawfully depriving refugees and migrants of

45 See more Bogdan Krasić and Bojan Stojanović, "Global Compact on Migration: Legal Nature and Potential Impact on the Development of International Migration Law", *Pravni zapisi,* Vol. 11, Issue 2, 2020, 645–662; Bojan Stojanović, "First meeting of the Global Forum for Refugees, Geneva, 16-18. December 2019", *Collection of Papers of the Faculty of Law in Niš,* Vol. LIX, Issue 86, 2020, 195–198; Zoran T. Stojanović, "The First Session of the Forum for Consideration of International Migration, New York, 17-20 May 2022", *Collection of the Faculty of Law in Niš*, Vol. LXI, Issue 95, 155–158.

46 UNHCR, Rescue at Sea: A Guide to Principles and Practice as Applied to Refugees and Migrants, January 2015, *https://www.refworld.org/docid/54b365554.html*.

47 IOM, Migration within the Mediterranean, *bit.ly/3lDDopb*.

their freedom. Also, especially in border areas, they prevent refugees and migrants from accessing interpreters, legal representatives, as well as doctors and UNHCR staff, which further worsens the situation of refugees and migrants. This particularly complicates the position of vulnerable groups of refugees and migrants – children, women, persons with disabilities, and older persons.

The deleterious effects of migration on individuals with disabilities cannot be overstated. In order to adequately address the unique challenges faced by this vulnerable population, it is necessary upon aid providers to exhibit a heightened degree of sensitization. This is particularly true in cases of involuntary migration, where the exigencies of the situation are compounded by the pre-existing impediments faced by individuals with disabilities. Therefore, aid providers must tailor their approach to accommodate the specific needs of this demographic to ensure that their fundamental rights and dignity are upheld.

The inadequacies of healthcare systems in countries of origin, transit, and reception pose significant challenges for refugees and migrants with disabilities. In many cases, the precariousness of healthcare in the country of origin serves as a catalyst for migration, as individuals seek to escape the threat to their health and well-being.[48] However, the deficiencies of healthcare in countries of transit and reception often compound the difficulties faced by these individuals, undermining their ability to remain in these countries and effectively exercise their rights and freedoms. When considered in the context of intersecting forms of discrimination, such as gender-based disparities, the situation becomes increasingly complex, further impeding the ability of refugees and migrants with disabilities to access essential healthcare and realize their full potential.

3. Multiple discrimination

Multiple discrimination can be defined as unequal treatment based on multiple grounds. There are two types of multiple discrimination. The first type is cumulative discrimination, when a person is discriminated against on several grounds because all the grounds that exist in a specific case are taken into account.[49]Another form is intersectional discrimination. Cross-discrimination is a type of discrimination made due to a unique combination of factors because it is the combination of identities that can lead to a unique form of discrimination that can expose a person to suffering.[50]

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48 See more Bojan Stojanović, Bogdan Krasić and Zoran T. Stojanović, "International Protection and Application of the Non-refoulement Principle in Countries with Ineadequate or Inaccessible Healthcare", *Collection of Papers of the Faculty of Law in Niš*, Vol. LX, No. 93, 2021, 127–152.

49 See more Ivana Krstić, *Zabrana diskriminacije u domaćem i međunarodnom pravu* (2018), 29–30.

50 *Ibid*.

Asylum seekers, refugees and migrants are often at risk of discrimination. In addition to the problem of status regulation and discrimination that the issue of their status entails, the possession of another personal characteristic is an additional difficult position. As asylum seekers, refugees, and migrants navigate the fraught terrain of forced displacement, they often encounter the pernicious problem of multiple discrimination based on their gender and, in some cases, their physical or mental abilities. This intersectional dynamic exacerbates the already-difficult challenges that these individuals face as they seek safety, security, and acceptance in new and unfamiliar environments. Despite the inherent human rights of all persons, regardless of their identity or background, these marginalized individuals are frequently subject to discrimination, prejudice, and violence, which can compromise their physical, mental, and emotional well-being. This happens in different areas – from the problem of access to education, employment through access to other rights – for example, the right to health, social and other services, etc. Compared to other girls and women in the same situation (citizens of the transit or receiving country), a different treatment can be observed, which is unfavourable for girls and women on the move.

Discrimination against girls and women with disabilities takes place, as well as concerning other refugees and migrants in terms of status. Bearing in mind that from the point of view of the country of transit or reception, they are, in fact, foreigners, this is reflected in the enjoyment and scope of their rights. True, the extent of the rights of refugees, on the one hand, and migrants, on the other, is different. Also, the duration of the status determination procedure is of great importance. In recent years, especially since the pandemic outbreak, the procedures for determining the status have been lengthy and often ineffective in many countries of the world. This is best seen in the example of the procedure for determining refugee status.

In light of the aforementioned challenges faced by women and migrants in countries of transit and destination, it becomes evident that the obstacles faced by these individuals often present almost insurmountable obstacles. This, in turn, exposes them to discriminatory treatment by the authorities of the nations in which they find themselves under the purview of. This state of affairs is particularly concerning, given the pernicious effects such treatment can have on the well-being and agency of these individuals. As such, it is necessary for both governments and civil society to take proactive steps to address this issue and to provide support and protection to those who are most vulnerable.

4. Procedures for regulation of the status

It is crucial to consider the distinction between the legal frameworks governing the rights and protections afforded to asylum seekers and refugees, on the one hand, and migrants, on the other. This distinction is grounded in the different motivations and circumstances surrounding an individual's decision to migrate, with the former group typically fleeing persecution or vio-

lence in their country of origin. At the same time, the latter may be motivated by a range of factors, including economic opportunities or familial ties. As such, the legal regimes governing each group differ, with asylum seekers and refugees afforded certain rights and protections under international law that may not extend to migrants. Therefore, it is essential to consider the specific legal status and corresponding regime applicable to individuals on the move to assess their rights and address their needs adequately.

As already explained, refugees are subject to the norms of refugee law, primarily the 1951 Refugee Convention and the 1967 Protocol, for states that have ratified these international legal instruments. Bearing in mind that the 1951 Refugee Convention and the 1967 Protocol did not prescribe the asylum procedure, the states were left to regulate it themselves. With regard to persons with disabilities, as a reason for leaving the country of origin, in addition to other grounds (persecution for political, religious, national and other motives), they may find themselves in refugee status due to belonging to *a particular social group* – persons with disabilities. Also, girls and women can fall under a particular social group category due to their gender. Therefore, the grounds of persecution can be different, and there can be more of them in the process.

The determination of persecution on the grounds of gender, disability, or any other protected characteristic is a complex and fraught process, one that has given rise to a great deal of debate and scholarship within the fields of refugee law and human rights. In recent years, however, there has been a growing consensus around the notion that girls, women, and persons with disabilities should be granted refugee protection based on their vulnerability to discrimination and violence. This shift in theoretical and practical approaches has been driven in part by a recognition of the intersectional nature of marginalization, as well as by a growing awareness of the specific challenges and needs faced by these groups. While much work remains to be done in this area, developing a more robust and nuanced framework for protecting these vulnerable populations is an important step forward.[51]

Migrants of different categories (migrant workers, undocumented migrants, etc.) face a large number of problems when regulating their status and legalizing their stay in the host country. In addition to the language barrier, the degree of availability of rights, but also due to the often-absent help from the state whose citizenship they possess, they are most often left to fend for themselves. This problem is particularly visible among citizens whose countries do not have diplomatic-consular representations in many countries where their citizens are located (e.g., the Republic of Serbia does not have a diplomatic representation in Malta even though there is a sizeable Serbian migrant community in this island state). Also, the problem is particularly pronounced among migrants who do not have personal documents. All

51 See more Cathrine Dauvergine, 'Women in Refugee Jurisprudence', in Cathryn Costello, Michelle Foster and Jane McAdam (eds.), *The Oxford Handbook of International Refugee Law* (2021), 728–744; Mary Crock, 'Protecting Refugees with Disabilities', in Cathryn Costello, Michelle Foster and Jane McAdam (eds.), *The Oxford Handbook of International Refugee Law* (2021), 778–796.

of the above also applies to the stay and enjoyment of fundamental human rights and freedoms in the countries where they are located, which are not their country of origin. When considering the intersection of personal characteristics that are frequently the basis of discrimination, such as disability, sex, or gender, it becomes evident that we are addressing particularly vulnerable categories of individuals.

5. The Covid-19 pandemic and the challenges facing vulnerable groups on the move

The emergence of the novel coronavirus at the end of 2019, the millions infected and dead, and the declaration of a pandemic on March 11, 2020, brought many difficulties in people's daily lives in all parts of the world. Those difficulties especially affected vulnerable groups – children, older people, people with disabilities, refugees, migrants and other members of vulnerable groups. Thus, people on the move, in addition to being exposed to the coronavirus and all the risks that infection carries with it, are exposed to numerous other risks. Refugees and migrants are exposed to the prevention of access to the territories of many countries, unlawful deprivation of liberty, placement in overcrowded collective centres, and the inability to access free legal aid, and they are prevented from accessing numerous other rights – the use of health care, social protection, often the right to education and similar to that. This made the situation particularly difficult for people exposed to multiple and intersectional discrimination due to the combination of personal characteristics, including girls and women with disabilities, who are also refugees or migrants.[52]

The recent pandemic has not only had a profound impact on global health and economic stability but has also exposed the deep-seated prejudices and biases that continue to plague many segments of society. There has been a rash of hateful and discriminatory behaviour directed towards minority groups, particularly those perceived as foreign or "other." This trend of the complete lack of empathy has manifested itself in the form of hate speech and hate crimes, as well as xenophobic outbursts directed towards asylum seekers, refugees and migrants in transit countries and receiving countries. Such actions only exacerbate the already tenuous position of these vulnerable populations and threaten to undermine the foundations of the social fabric.

6. The necessity of determining the needs and an adequate response in terms of ensuring the rights of girls and women in migration

As the sociocultural and economic landscape continues to evolve and shift, girls and women with disabilities who are part of the migratory process are increasingly confronted with a myriad of challenges and obstacles. From

52 For challenges regarding asylum seekers, refugees and migrants, and the relationship between the right to health and the right to asylum, see more Bojan Stojanović, Bogdan Krasić and Zoran T. Stojanović (2021*), op. cit*., 127–152.

discrimination and marginalization to the inherent risks associated with physical and psychological health, these individuals must navigate a complex and often hostile environment in order to secure their place within the global community. It is, therefore, necessary for all stakeholders, including scholars, policymakers, and advocates, to critically examine the needs of this vulnerable population and implement strategies using a multi-faceted and intersectional approach aimed at mitigating the negative consequences of their experiences.

In various domains, there are special needs that must be met so that these groups of people can enjoy their human rights unhindered. With regard to the risk of becoming victims of smuggling and human trafficking, it is necessary to pay special attention, recognize the risk in a timely manner and adequately respond to the mentioned risks. In this sense, the document jointly prepared by IOM and UNHCR, which provides identification procedures and adequate response to the phenomenon of human trafficking among the refugee-migrant population, is of great use.[53]

In order to ensure the preservation of the principle of *non-refoulement*, potential asylum seekers and refugees must be afforded the opportunity to access the territory and regulate their status without fear of expulsion. This is essential in order to prevent the potential threat to their life and safety in the event of denial of access and illegal return back to the country of origin. By providing a means for these individuals to avoid the risk of expulsion, we are able to uphold the fundamental principle of protecting the rights and well-being of those seeking asylum.

As refugees and migrants enter the territory of the receiving country, it is of utmost importance to ensure that their accommodation is adequate and suitable for their needs. In particular, consideration must be given to the specific needs of girls and women with disabilities in accordance with the highest international standards. This includes ensuring that the technical conditions of their accommodation meet their requirements, such as the presence of ramps and accessible toilets, as well as ensuring that they have access to all of the rooms and facilities necessary for their normal functioning. Additionally, these individuals must have access to other public services, such as social and health services, in order to facilitate their integration and well-being in the receiving society.

The ongoing global coronavirus pandemic has exposed several weaknesses and shortcomings in the existing asylum and migration systems around the world. The closure of national borders, coupled with the restriction of movement for many asylum seekers, refugees, and migrants, has threatened the rights of this population in multiple ways. Among the most significant

53 See *IOM-UNHCR Framework document on developing standard operating procedures to facilitate the identification and protection of victims of trafficking* (2020). For clarification, see Bojan Stojanović, "IOM-UNHCR Framework Document on Developing Standard Operating Procedures to Facilitate the Identification and Protection of Victims of Trafficking", *Collection of Papers of the Faculty of Law in Niš*, 2020, Vol. 59, Issue 89, 391–395.

of these threats is the right to freedom of movement, which is closely tied to other fundamental rights, such as the right to education and the right to work. As such, it is upon receiving countries to invest special attention to the needs of refugees and migrants, particularly those who are most vulnerable, such as girls and women with disabilities. This requires not only ensuring that these individuals have access to suitable accommodation and necessary public services but also providing them with the support and resources they need to exercise their rights and participate fully in society.

V CONCLUSION

The risks to which persons on the move (in voluntary or forced migration) are exposed are multiple and have dramatic consequences for them. Among them, the most vulnerable groups, such as girls and women and people with disabilities, face inadequate treatment in transit and reception countries. The risks they are exposed to are numerous, from becoming victims of smuggling and human trafficking, as well as problems with status regulation. The problem is particularly emphasized if there is a combination of personal characteristics that lead to discrimination, i.e., when it comes to cross (intersectoral) discrimination. In order to overcome the risks to which persons who may become victims of intersectional discrimination are exposed, it is necessary to undertake a series of preventive measures, and if acts of discrimination do occur, measures to eliminate the consequences.

The inherent vulnerability of children with disabilities in the context of migration necessitates a heightened level of attention regarding upholding the principle of the best interests of the child, as well as providing adequate legal protection throughout the process of status regulation. Furthermore, basic needs such as adequate accommodation and education must be met, and that family unity must be preserved and safeguarded. Failure to adequately address these issues not only undermines the fundamental rights of these individuals but also has the potential to exacerbate existing disparities and marginalization.

Women with disabilities in migration face a unique set of challenges and vulnerabilities, particularly in regard to their exposure to human smuggling, trafficking, and labour exploitation. The complex nature of contemporary migration, with its mix of diverse religions, cultures, and nationalities, only exacerbates the sensitivity of women with disabilities in this context, as they may find themselves seeking refuge in countries with vastly different cultural norms and values from their own.

Additional vulnerability in the case of girls and women with disabilities, these groups of people on the move represent one of the most vulnerable categories of the population, and it is necessary that all actors involved in the management of mixed migration, from states to international organizations and other actors, pay special attention when working with them. It is necessary to do this in order to avoid discriminatory behaviour towards them, in

order to achieve the full enjoyment of the rights of girls and women with disabilities who are on the move and to avoid the numerous risks they are exposed to during migration.

The international legal framework provides the possibility of international protection and the protection of human rights for people in forced and voluntary migration. While there are shortcomings in the current legal framework, such as the fact that not all countries have ratified relevant treaties or protocols, there are still guarantees for the enjoyment of the human rights of refugees and migrants in many universal and regional international treaties. These treaties often provide for the possibility of initiating proceedings based on an individual petition, allowing for the protection of vulnerable groups. However, the effectiveness of these norms is questionable, as many countries have not ratified these treaties or protocols, limiting their applicability. In conclusion, while the existing legal framework offers potential for the protection of vulnerable groups, there are significant challenges and shortcomings that must be addressed in order to ensure the effective implementation and enforcement of these norms.

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PRAVA I STATUS DEVOJČICA I ŽENA SA INVALIDITETOM U MEŠOVITIM MIGRATORNIM TOKOVIMA – (NE)VIDLJIVI PROBLEMI RANJIVIH GRUPA

Apstrakt

Cilj ovog rada je da se razmotre status i prava devojčica i žena-tražiteljki azila, izbeglica i migranatkinja sa invaliditetom. U prvom delu članka date su odrednice kategorija ranjivih grupa – osobe sa invaliditetom, žene, deca, tražioci azila, izbeglice i migranti, a zatim je dat pregled pravnog okvira u vezi sa ovim kategorijama koje su u pokretu. U drugom delu analizira se stanje u vezi sa navedenim kategorijama u svetu, u kontekstu migracija, s posebnim osvrtom na prisilne migracije i ukupan mešoviti karakter savremenih migracija. U kontekstu masovnih mešovitih migracija u savremenom svetu, devojčice i žene sa invaliditetom su jedna od najugroženijih grupa. U trećem delu članka predstavljeni su i analizirani rizici i izazovi savremenih mešovitih migracija, što je od velikog značaja za stvaranje potpune slike problema sa kojima se suočavaju ove kategorije ljudi, posebno s obzirom na njihovu izloženost višestrukoj diskriminaciji i rizicima zanemarivanja. Pored toga što svoju sudbinu dele sa drugim raseljenim licima, devojčice i žene iz ovih kategorija se suočavaju sa posebnim rizicima vezanim za invaliditet i rodno zasnovanim nasiljem, kao dodatnim teretom. Rizici za ove ranjive grupe dodatno su pogoršani izbijanjem nove pandemije zarazne bolesti *Covid-19*, a i dalje postoje mnogi otvoreni izazovi sa kojima se ove grupe suočavaju.

Ključne reči: *Ranjive grupe; Deca; Devojčice; Osobe sa invaliditetom; Tražioci azila; Izbeglice; Migranti; Ljudska prava; Mešovite migracije.*

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INTERNATIONAL LEGAL FRAMEWORK FOR THE PROHIBITION OF FORCED STERILISATION OF WOMEN AND GIRLS WITH DISABILITIES

Abstract

This paper aims to examine the current international legal framework for the prohibition of forced sterilisation. Forced sterilisation has a deeply rooted history as a tool for systemic discrimination of marginalized groups. In time, forced sterilisation has been phased out from most national legal systems. However, for women and girls with disabilities worldwide it is still considered a common solution for reproductive health, menstruation management and protection against sexual assault. Thus, it is necessary to explore the reasons why such an invasive procedure is still being applied. The paper will outline the main problems which allow the existence and perpetuation of forced sterilisation. It will explore the failure of international human rights law in eliminating forced sterilisation. The paper will offer some insights and recommendations for what could be done to efficiently prohibit the use of forced sterilisation.

Key words: *Forced sterilisation; Women and girls with disabilities; Legal capacity; Discrimination; Reproductive rights.*

I INTRODUCTION

Women and girls with disabilities still face intersectional discrimination based on their gender and disability. They don't have equal opportunities to participate on an equal basis with others in all aspects of society.[1] Such limitations are especially prevalent in the full realization of their sexual and reproductive health and rights (SRHR). One form of SRHR violation is forced sterilisation. Forced sterilisation is the involuntary or coerced removal of a person's ability to reproduce, frequently through a procedure known as tubal ligation.[2] Forced sterilisation is carried out on many individuals with disabilities regardless of gender but women and girls with disabilities are disproportionally affected. Forced sterilisation particularly targets women and girls with psychosocial and/or intellectual disabilities.

1 Jan Grue, The high cost of living in a disabling world, 2021, *https://www.theguardian.com/society/2021/nov/04/the-high-cost-of-living-in-a-disabling-world*.

2 International Justice Resource Center (IJRC), Forced Sterilisation as a Human Rights Violation, *https://ijrcenter.org/forced-sterilisation/*.

While sterilisation is used as an efficient contraceptive, the procedure must be based on the free and informed consent of the individual[3]. Without a clear expression of will, sterilisation violates many fundamental human rights. Those rights include the right to personal autonomy, the right to equal recognition before the law, the right to be free from exploitation, violence and abuse, the right to found a family, the right to the highest attainable standard of physical and mental health and so on. International and regional human rights bodies have recognized that sterilisation of people with disabilities without their consent constitutes discrimination, violence and torture, cruel, inhuman or degrading treatment.[4] Patel sees the use of forced sterilisation as an inherently discriminatory practice with its main motivation laying in denying specific groups within the populations the ability to procreate due to a perception that they are less than ideal members of society.[5] Despite the human rights violations and possible harm, forced sterilisation is still legal and enforced around the world.[6]

Today's use of forced sterilisation is still founded on wrongful stereotypes of disability and gender. Such groundless stereotyping of disability and gender represents a form of discrimination that has a particularly serious impact on the enjoyment of SRHR and the right to found a family.[7] The most perpetuated stereotypes are the belief that women with disabilities are asexual, incapable, irrational, hyper-sexual and/or lacking control.[8] In addition, society deems women with disabilities unable to fulfil the traditional social standards set for motherhood. Common arguments for the use of forced sterilisation are: menstrual management, a protection against pregnancy or sexual abuse and easing the burden on the caretakers. None of the arguments take into account the actual preferences of disabled women and girls, looking at them as objects.

3 FIGO – International Federation of Gynecology & Obstetrics, Female Contraceptive Sterilisation, 2011, art. 2, *http://www.wunrn.org/news/2011/06_11/06_27/062711_female.htm.*

4 African Commission on Human & Peoples' Rights, General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), 2017, para. 58; UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health), A/54/38/Rev.1, Chap. I, 1999, para. 22, UN Committee on the Rights of the Child (CRC), General comment No. 13: The right of the child to freedom from all forms of violence, CRC/C/GC/13, 2011, para. 23, para. 41(d), UN Committee on the Rights of Persons with Disabilities, General Comment No. 3 (2016) on Women and Girls with Disabilities, CRPD/C/GC/3 25, 2016, para. 32.

5 Priti Patel, 'Forced Sterilisation of Women as Discrimination', *Public Health Reviews*, Vol. 38, No. 15/2017, 9.

6 European Disability Forum (EDF), Why is forced sterilisation still legal in the EU?, 2022, *https://www.edf-feph.org/why-is-forced-sterilisation-still-legal-in-the-eu/,* National Women's Law Center, Forced Sterilisation of Disabled People in the United States, Sterilisation Report, 2022, *https://nwlc.org/wp-content/uploads/2022/01/f.NWLC_SterilisationReport_2021.pdf*, 18.

7 UN Committee on the Rights of Persons with Disabilities, General comment No. 3 (2016), Article 6: Women and girls with disabilities, CRPD/C/GC/3, 2016, para. 38.

8 *Ibid.*, para. 30.

All these stereotypes lead to a high level of discrimination for women with disabilities in the health sector. Statistically, the health and reproductive care given to women with disabilities is usually worse on all levels compared to other women or even men with disabilities.[9] Faced with constant struggles to access their reproductive rights, some might conclude that sterilisation may be the only possible option. For example, the barriers to accessing information and the lack of education might lead the caretakers to decide on sterilisation as a solution for menstrual management. This is a clear indication that the problems regarding the use of forced sterilisation might be a direct consequence of a systemic problem i.e., highly inadequate reproductive health services. The EDF report confirms this, by stating that: "Forced sterilisation forms part of a wider paternalistic model and patriarchal system in which women with disabilities are denied their human and reproductive rights."[10]

Another prominent problem is the restriction or loss of legal capacity of disabled women. The prominent model in cases of loss of legal capacity is still the substitute decision-making model. The law concerning substitute decision-making model authorizes either a guardian, a legal representative, an administrator or even a doctor to consent to the sterilisation of a person with disabilities.[11] The decision of the third party is legally valid and forced interventions can occur without the individual even knowing it.

The current international and regional legislative and policy framework regulates forced sterilisation through multiple human rights treaties. Particularly important for forced sterilisation are: UN Convention of the Rights of People with Disability (CRPD), UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and The Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention). The Istanbul Convention even expressly prohibits forced sterilisation, defining it as a specific gender-based form of violence.[12] However, the treaty bodies are not able to force the implementation of the Conventions. The instruments given to them are not enough to bring forth change without the Member States' political will. The European Commission is proposing new legislation on combating violence against

9 UN Women, Making the SDGs Count for Women and Girls with Disabilities, *Issue Brief,* 2017, *https://www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2019/10/Making-SDGs-count-for-women-with-disabilities.pdf*; Laura H. Taouk, Michael F. Fialkow and Jay A. Schulkin, 'Provision of Reproductive Healthcare to Women with Disabilities: A Survey of Obstetrician–Gynecologists' Training, Practices, and Perceived Barriers', *Health Equity*, Vol. 2, No. 1/2018, 207–215.

10 CERMI Women's Foundation and the European Disability Forum (EDF), *Ending forced sterilisation of women and girls with disabilities* (2017), 12.

11 EDF, Forced sterilisation of persons with disabilities in the European Union, EDF Report, European Disability Forum (EDF), 2022, 7.

12 Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), *CETS* No. 210, 11 May 2011, art. 39, para. 1, subpara. b.

women and domestic violence.[13] Violence in this directive would encompass forced abortions or sterilisation as well. Nevertheless, this action is simply not enough to eliminate forced sterilisation in national legislation. European Disability Forum (EDF) has put forth a petition to directly criminalize forced sterilisation in a new article as well as guarantee that such procedures require consent.[14] The EDF writes that at least 14 EU Member States still authorize forced sterilisation.[15]

This article will start by introducing and defining forced sterilisation as well putting forth a short historical overview of its evolution. The next section will analyze justifications on why forced sterilisation is still being used today. These arguments are founded on deeply rooted stereotypes and misconceptions about gender and disability. They perpetuate systemic discrimination and put forth an image of women as objects of the procedure. The wishes of disabled women and girls are ignored and substituted by arguments brought by third parties i.e., medical professionals, courts, family members etc. The third part will examine and analyze the most important international legal acts dealing with forced sterilisation. It will show that international law prohibits the use of forced sterilisation, except in very limited circumstances. Free and informed consent must be the basis of any medical procedure. Any exceptions bring with it a gross intervention in the rights of women with disabilities. The article puts forth the most relevant human rights bodies' instruments which deal with forced sterilisation and showing their inherent weakness. The last section will present the most prevalent problems with forced interventions. Those are: the use of the substitute decision making model and the legal incapacity of women with disabilities. Women with disabilities have faced the loss of their decision-making capabilities by the limitation or total restriction of their legal capacity. Frequently, the loss of legal capacity has led to a substituted decision-making model being applied. Such a model has resulted in abuse and the gross violation of human rights. Forced medical interventions, such as forced abortion or sterilisation, are legitimized by a third-party decision. Again, women with disabilities are barred from expressing any decision regarding their own body. The author agrees with most scholars in this sphere and calls forth the shift to a supported decision-making model. With such a model, the will of those involved will finally be heard. Unfortunately, as with any deep-rooted practice, it is not enough simply to give agency to women with disabilities. Systemic changes must happen.

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13 European Commission, Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence, COM/2022/105 Final, 2022.

14 European Disability Forum (EDF), End forced sterilisation in the EU now!, *https://you.wemove.eu/campaigns/end-forced-sterilisation-in-the-eu-now*; EDF, Why is forced sterilisation still legal in the EU?, 2022, *https://www.edf-feph.org/why-is-forced-sterilisation-still-legal-in-the-eu/*.

15 Uldry and EDF Women's Committee, *op. cit.*, 6.

II FORCED STERILISATION, GENDER AND DISABILITY

The term "sterilisation" is defined as "a process or act that renders an individual permanently incapable of sexual reproduction".[16] The procedure is considered as one of the most important options for individuals to regulate and control their fertility. Yet, when it becomes involuntary, the rights of individuals with disabilities are frequently violated. While both men and women have been involuntarily sterilized, women are disproportionately affected.[17] Marginalized groups are particularly vulnerable.[18] Sterilisation of women with disabilities is happening at three times the rate of the general population.[19] Furthermore, the intersectionality of women' multiple identities plays a prominent role in the use of forced sterilisation.

Historically, reproductive rights for individuals with disabilities largely consisted of preventing reproduction as part of eugenics-based practice. A population control policy was implemented in the early 20th century. Many countries like Australia, United Kingdom, Japan and Sweden implemented forced sterilisation into their national laws. In the USA, over 60,000 people were sterilized without consent by 1963.[20] However, the atrocities of the Nazi regime painted a negative perception of the eugenics movement and states have started to move away from the practice. However, that doesn't mean that they have stopped permitting them completely. In USA, 31 States still allow forced sterilisation of persons with disabilities.[21] The UN has named Belgium, Croatia, Czech Republic, France, Germany, Lithuania, and Slovakia as countries whose legislation enables the forced sterilisation of disabled women and girls.[22] On the other hand, some countries are trying to remedy

16 C.V. Mosby, *Mosby's Medical Dictionary* (2016), 9859–9860.

17 Ronli Sifris, 'The Involuntary Sterilisation of Marginalised Women: Power, Discrimination, and Intersectionality', *Griffith Law Review*, Vol.25, No. 1/2016, 54. The main reason being the continuously existing power dynamic between men and women. Such dynamic perpetuates social norms which subordinates women and objectifies women's bodies as property.

18 Committee on Economic, Social and Cultural Rights, General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/22, 2016, para. 30.

19 Rowena Kosher, Sterilisation of People with Disabilities: Acknowledging the Past and Present History, Rhetoric, and Effects of a Harmful Practice, 2019, *https://blogs.cuit.columbia.edu/rightsviews/2019/01/27/sterilisation-of-people-with-disabilities-acknowledging-the-past-and-present-history-rhetoric-and-effects-of-a-harmful-practice/*.

20 Ashwin Roy, Ameeta Roy and Meera Roy, 'The human rights of women with intellectual disability', *Journal of the Royal Society of Medicine*, Vol. 105, No. 9/2012, 385.

21 National Women's Law Center, Forced sterilisation of disabled people in the United States, 2022, *https://nwlc.org/resource/forced-sterilisation-of-disabled-people-in-the-united-states/*.

22 CERMI Women's Foundation and the European Disability Forum (EDF), *op. cit.*, 39–40; Women's Media Centre, The Fight to End Forced Sterilisation of Disabled Women and Girls in Europe, 2022, *https://womensmediacenter.com/news-features/the-fight-to-end-forced-sterilisation-of-disabled-women-and-girls-in-europe.*

the past. Sweden has ended its forced sterilisation program in 1976 with official commission to compensate the victims while Spain ended its program in 2020.[23] Furthermore, States might not have forced sterilisation in their law anymore but legal systems still support this procedure through the substituted decision-making model. For instance, the Australian legal system doesn't have any mention of forced sterilisation but it's still being recommended as a common remedy for disabled women and girls.[24]

Women with disabilities belong to a marginalized group, which is frequently excluded from the decision-making space. They are left vulnerable and open to being exploited and abused. Particularly, women with intellectual disabilities are at risk of being victims of violence from those closest to them.[25] Forced sterilisation is still a pervasive form of gender-specific violence. The World Medical Association and International Federation of Health and Human Rights Organizations have condemned forced and coerced sterilisation as "forms of violence that severely harm physical and mental health and infringe human rights."[26] Despite such grave consequences, little consideration is given to the will of the individual involved.

Forced sterilisation is closely linked to the problem of legal capacity. Frequently, an individual without legal capacity is subjected to sterilisation under the guise of "best interest". A third party decides in the name of a disabled person to undergo a life changing medical procedure. Even when the court authorization is needed, usually the person involved is not asked about their own preferences. The fact that they don't have legal capacity is considered as evidence enough of their decision-making capacity. Everything is done in the "best interest" but whose interest? The States, the medical professionals, the caretakers or the disabled individual involved? In *Wentzel*[27], the girl had an IQ of 25-30 but she could sing and play the piano. Yet, the Court had authorized her sterilisation based only on her IQ as proof of her inability to take care of herself. In comparison, what about the situation of a deaf woman who wanted to start a family, but had found out later that she had gone through sterilisation as a child?[28]

While the world moves toward a more inclusive society, enabling the full participation of disabled women and girls, accepting a third party's decision

23 Women's Media Centre, The Fight to End Forced Sterilisation of Disabled Women and Girls in Europe, 2022 *https://womensmediacenter.com/news-features/the-fight-to-end-forced-sterilisation-of-disabled-women-and-girls-in-europe.* In December 2020, Spain adopted a bill to prohibit forced sterilisation in its Penal Code. Previously, national laws was authorising such practice by the decision of a doctor.

24 CERMI Women's Foundation and the European Disability Forum (EDF), *op. cit.*, 27.

25 Kenneth Foster and Mark Sandel, "Abuse of Women with Disabilities: Toward an Empowerment Perspective", *Sexuality and Disability,* Vol. 28, No. 3/2010, 177–178.

26 World Medical Association, Global Bodies Call for End to Forced Sterilisation, 2011, *https://www.wma.net/news-post/global-bodies-call-for-end-to-forced-sterilisation/* .

27 Court of Appeals of Maryland, 1982, *Wentzel v. Montgomery General Hospital, Inc,* 293 Md. 685 (Md. 1982),447 A.2d 1244.

28 CERMI Women's Foundation and the European Disability Forum (EDF), *op. cit.*, 31.

for a serious medical procedure becomes debatable. The problem of the substitute decision-making method and the lack of legal capacity for the persons involved will be analyzed further in the following sections.

III MODERN JUSTIFICATIONS FOR THE USE OF FORCED STERILISATION ON WOMEN AND GIRLS WITH DISABILITIES

The justifications for using forced sterilisation rest upon an archaic notion of disability, founded upon myths and stigmas. Most of them support a medical model of reasoning which postures disability primarily as an illness. In these justifications, we see common gender and disability stereotypes. Those stereotypes frequently lead to systemic or structural discrimination against women and girls with disabilities.

They can be broadly divided into four categories: the genetic/eugenics arguments, the arguments for the good of the state, community, family (caretakers) or even women themselves, the unfit for motherhood argument and the argument for the prevention of sexual abuse.[29]

The first category's primary argument is that women with disabilities will give birth to children with the same undesirable genetic 'defects. Increased understanding of genetics and heritability have proven this statement false but disabled women are still discouraged from pregnancy out of misplaced fear that their children will have the same disabilities. This fear stems from a eugenic understanding of society which believes that the human race can be improved by controlling reproduction as a way of "cleansing" the human gene pool of negative or less desirable traits found in "less desirable" people.[30] These arguments are connected to the burden argument, as the potential future child with disability will place an "unfair" burden on the state, community and family. The case *Buck v. Bell*[31] perfectly encapsulates this by stating: "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or let them starve for their imbecility, society can prevent those who are manifestly unfit from breeding their kind ... Three generations of imbeciles are enough."

As stated above, the second justification is based on the idea of a "burden" being placed on the state or family.[32] This burden is seen in the form

29 Laura Elliott, "Victims of Violence: The Forced Sterilisation of Women and Girls with Disabilities in Australia", *Laws,* Vol. 6, Issue 8, No. 3/2017, 8; CERMI Women's Foundation and the European Disability Forum (EDF), *op. cit.*, 22–23.

30 Disability Justice, The Right to Self-Determination: Freedom from Involuntary Sterilisation, 2022, *https://disabilityjustice.org/right-to-self-determination-freedom-from-involuntary-sterilisation/*.

31 U.S. Supreme Court, 1927, *Buck v Bell, Superintendent*, 274 US 200.

32 Anita Silvers, Leslie Francis and Brittany Badesch, "Reproductive Rights and Access to Reproductive Services for Women with Disabilities", *AMA Journal of Ethics,* Vol. 18, No. 4/2016, 433.

of helping of girls/women with disability in managing their menstruation and reproductive health or taking care of potential future disabled children. The state sees this burden as the use of resources in providing social services, additional health care or educational programs. Thus, for the states this is an economic burden. In comparison, the lack of a support system for reproductive health for families and caretakers is one of the primary reasons for choosing forced sterilisation.[33] The lack of information, barriers to access health services or a lack of adequate reproductive services leads them to conclude that forced sterilisation is the only rational choice. Sometimes these decisions are made quite early. It is not rare that girls undergo forced sterilisation to terminate their menstruation. The main purpose being to relieve the caretaker of personal hygiene burdens.[34] However, the possible consequences of the procedure, the irreversibility and the intrusion upon the individual's rights can't be justified by the arguments of menstruation management and personal hygiene. The consequences of menstruation upon the disabled women must be severe for it to require sterilisation as a solution. Alternative measures for the successful management of menstruation exist and should be used primarily. As Human Right Watch stated:" Sterilisation should never be used as a substitute for proper education about family planning, the use of reversible contraceptive measures, and support during menstruation."[35] States are obliged under international human rights law to provide adequate and accessible reproductive health services including information on options available to them.

The unfit mother justification is a social construct that perceives women with disability as incapable in taking care of children. Regardless of the type of disability, incompetence is one of the descriptors most often equated with disabled individuals.[36] These individuals are being perceived as "less intelligent, less able to make the right decisions, less realistic, less logical and less able to determine [their] own life than a non-disabled person."[37] Especially, women with

33 UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/22, 2016, para. 2: "Due to numerous legal, procedural, practical and social barriers, access to the full range of sexual and reproductive health facilities, services, goods and information is seriously restricted".

34 Madhur Pradhan, Kavita Dileep, Abhijit Nair and Khalid M. Al Sawafi, 'Forced Surgeries in the Mentally Challenged Females: Ethical Consideration and a Narrative Review of Literature', *Cureus*, Vol. 14, No. 7/2022; Karen Andrae, Disability and gender-based violence, ADD international's approach, A learning paper, 2016, 17.

35 Human Rights Watch, Letter to United Nations CRPD on Half Day of General Discussion on Women and Girls with Disabilities, 2013, *https://www.hrw.org/news/2013/04/03/letter-united-nations-crpd-half-day-general-discussion-women-and-girls-disabilities.*

36 Jill M. Coleman, Amy B. Brunell and Ingrid M. Haugen, "Multiple Forms of Prejudice: How Gender and Disability Stereotypes Influence Judgments of Disabled Women and Men", *Current Psychology*, Vol. 34, No. 1/2015, 178.

37 Constantina Safilios-Rothschild, 'Disabled persons: self-definitions and their implications and for rehabilitation' in: G.L. Albrecht (ed.) T*he Sociology of Physical Disability and Rehabilitation* (1976), 39.

intellectual disability have been infantilized and stigmatized as being unable to live without the help of others. On the other hand, the gendered stereotype of women being inherently good caretakers and mothers is still deeply rooted in today's society. Women are still considered the family's main caretaker. Such stereotypical notions put unjust pressure on all women. The criteria of a good mother are in most cases subjective and arbitrary. It's an unreasonable standard. Therefore, for women with disability, society takes a preemptive stance on the capability of women with disability to be mothers. Usually, basing the capacity solely on the fact that they are disabled.

The worst justification brought forth is the protection against sexual abuse. Women with disabilities are vulnerable to sexual exploitation. They are vulnerable to multiple and repeated acts of abuse.[38] Because of the close relationship with the abuser, the reliance upon them or just the difficulty in identifying the perpetrator.[39] Not only are they not able to physically defend themselves, in some cases they might not be able to recognise the actions as sexual abuse. The high level of isolation and exclusion of women with disabilities from society lowers the possibility of them reporting the abuse. By using forced sterilisation as a protection against sexual abuse, the weight of responsibility is transferred from the state to the victim. Their disability is seen as a weakness, a cause of the sexual abuse and the cure is forced sterilisation. However, the self-evident conclusion on the nature of this argument is that it's not about protection against sexual abuse but against the consequences of abuse, i.e., unwanted pregnancies.[40] The typical victim blaming mentality towards victims is used here as well. It insinuates that the victims were at fault for not protecting themselves or the caretakers were at fault for not protecting them. Such stances minimize the role of the state and its responsibility to take preemptive measures. In light of the overwhelming evidence, showing the high number of the disabled women and girls being victims of sexual abuse, the state needs to make decisive actions. On the other hand, ironically, this justification is frequently used to hide existing sexual abuse. Sadly, pregnancy remains the most common method of discovering sexual abuse and exploitation of disabled women and girls. In 2014, Disability Rights International (DRI) visited "Casa Hogar Esperanza" which had a policy of involuntary sterilisation of every girl institutionalized there.[41] Regardless of the sterilisation, the DRI found that sexual abuse was happening frequently in the institution.

Likewise, we must mention the harmful stigma of women with disability as being asexual[42] or hyper-sexual. Such harmful stigmas influence

38 Foster and Sandel, *op. cit.*, 177.

39 *Ibid.*

40 Elliott, *op. cit.*,10.

41 Disability Rights International (DRI) and Colectivo Chuhcan, *Twice Violated, Abuse and Denial of Sexual and Reproductive Rights of Women with Psychosocial Disabilities in Mexico* (2015), 2–3.

42 Linda A. Thomson, A new report highlights the scandal of the forced sterilisation of women in Europe, *Equal Times*, 8 March 2018, *https://www.equaltimes.org/a-new-report-*

the access to reproductive healthcare for women with disabilities. The myth of asexuality leads society to a wrongful conclusion that there is no need for women with disabilities to have reproductive health services. Usually summed up in – why should there even be reproductive health care for people who will not have intimate contacts? The consequence is a lack of any options and information for women with disabilities or caretakers. Which in turn leads them to sterilisation as the only choice. The myth of hyper-sexuality causes the misconception of a heighten risk of sexual abuse.[43] The fear of possible sexual abuse and pregnancy prompts the caretakers to decide upon forced sterilisation as a solution. There are multiple examples of institutions which sterilize girls with disabilities as a precaution based on faulty misconceptions.

None of the stated justification can truly warrant the forced sterilisation of disabled women and girls. There are plenty of effective alternative measures for contraception. The CEDAW Committee declared that the State should prohibit sterilisation of girls and women with disabilities, without their fully informed and free consent, except where there is a serious threat to life or health.[44] In addition, the principle of free and informed consent must be upheld even in cases where women lack legal capacity. Many international norms specifically mention that the decision-making must be left in the hand of the disabled persons regardless of their disability. None of the aforementioned justifications can validate the use of involuntary sterilisation.

IV INTERNATIONAL HUMAN RIGHTS FRAMEWORK DEALING WITH FORCED STERILISATION

The rights and freedoms of women and girls with disabilities are guaranteed in numerous international human rights treaties. However, the intersectionality of gender and disability is most prevalent in the Convention on the Rights of Persons with Disabilities (CRPD), the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the Council of Europe Convention on preventing and combating violence against women and domestic violence, particularly when dealing with SRHR.

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highlights-the?lang=en#.YynFVC0Rp-X. Lucy Watts, a UK-based disability rights activist states: "We're seen as asexual; we're seen as not having the ability, the right or the need to explore that side of our life. We're seen as people that should be lonely, isolated and uninvolved". Linda A. Thompson, A new report highlights the scandal of the forced sterilisation of women in Europe, *https://www.equaltimes.org/a-new-report-highlights-the?lang=en#.Y4tD4XbMJPY*.

43 While a very high risk of the disabled being victims of sexual abuse or exploration exists, the reason is not hyper-sexuality.

44 CEDAW Committee, Concluding observations of the Committee on the Elimination of Discrimination Against Women: Australia, CEDAW Forty-sixth session, CEDAW/C/AUS/CO/7, 2010, para. 43.

1. Forced sterilisation under the Convention on the Rights of Persons with Disabilities

The purpose of the CRPD is to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities."[45] It reflects a change of perspective in the global community from viewing disability through a medical model to a social model. The medical model perceives disability as a deficiency or disorder that causes dependency on others.[46] Disability is seen as a critical personal trait. On the other hand, the social model perceives disability as a social construct. It emphasizes the social meaning imposed upon the individual's role in society.[47] The Convention promotes this view by recognizing that "disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others."[48] The social model is apparent in the use of the principle of individual autonomy with the "nothing-about-us-without-us" doctrine. They have become the foundation of the Convention.[49]

In light of this, individuals should have the freedom and support to make their own decisions regarding their reproductive health. Involuntary sterilisation goes against the ideas of the social model by taking away any input of the individual involved. It routinely takes away the decision-making capacity from the subject of the sterilisation and gives it to a third party. When women with disabilities do make decisions, their will could be coerced or manipulated. The CEDAW Committee urges States Parties to "not permit forms of coercion, such as non-consensual sterilisation that violate women's rights to informed consent and dignity."[50]

Forced sterilisation represents a form of double discrimination for disabled women and girls. The justifications mentioned above present prevailing stereotypes and harmful myths on gender and disability. CRPD recognises "that women and girls with disabilities are subject to multiple forms of discrimination."[51] Intersectional discrimination is essential and must be taken into consideration in cases of forced sterilisation. As individuals with

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45 UN General Assembly, Convention on the Rights of Persons with Disabilities, A/RES/61/106, 2007, art. 1

46 Office of Developmental Primary Care, Medical and Social Models of Disability, 2018, *https://odpc.ucsf.edu/clinical/patient-centered-care/medical-and-social-models-of-disability.*

47 Directorate General for Internal Policies, Policy Department C: Citizens' Rights And Constitutional Affairs, Discrimination Generated by the Intersection of Gender and Disability (Study), 2013, 8.

48 UN General Assembly, Convention on the Rights of Persons with Disabilities, A/RES/61/106, 2007, Preamble.

49 *Ibid*., art. 3 para. 1, art. 4 para. 3.

50 UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health), A/54/38/Rev.1, Chap. I, 1999, para. 22.

51 *Ibid*., art. 6.

multiple identities are more susceptible to forced interventions. State parties are obliged to adopt measures that enable the full and equal enjoyment of all human rights and fundamental freedoms.[52] In order to fulfil this aim, such measures should eliminate any discrimination aimed at disabled girls and women.[53] The main goal being to enable women and girls with disabilities to exercise their bodily autonomy, free from violence and coercion.

Article 12(1) of CRPD provides that persons with disabilities "have the right to recognition everywhere as persons before the law."[54] The article recognizes that persons with disabilities enjoy legal capacity on an equal basis with others in all spheres of life.[55] It sets forth an obligation to guarantee the legal capacity of individuals with disabilities. The Committee CRPD specified that a person's status as disabled or the existence of a disability can't be grounds for the denial of legal capacity.[56] Disability alone is not enough to deprive a person of legal capacity. Furthermore, the human rights' model requires a shift from the substitute decision-making method to a supported decision-making method. Article 12(3) puts forward the basis for supported decision-making.[57] The Committee interprets the article to mean that substitute decision-making model should be changed to supported decision-making model.[58] This shift is seen in a change from regarding people with disabilities, as "objects of charity" to "subjects of rights" and thus active participants in society.[59] The supported decision-making model makes the will and choices of the individual with disabilities primary. The presumption is always in favour of the individual with disabilities who will be affected by the decision. Different forms of support should be established to enable the individual to exercise his or her legal capacity to the greatest extent possible, according to the will of the individual.[60]

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52 *Ibid*.

53 *Ibid*., art. 5 para. 2, subpara. 3.

54 UN General Assembly, Convention on the Rights of Persons with Disabilities, A/RES/61/106, 2007, art. 12 para. 1.

55 *Ibid*., art. 12, para. 2.

56 UN Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the law, CRPD/C/GC/1, 2014, para. 9.

57 UN General Assembly, Convention on the Rights of Persons with Disabilities, A/RES/61/106, 2007, art. 12 para. 3.

58 UN Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the law, CRPD/C/GC/1, 2014, para. 26; UN Committee on the Rights of Persons with Disabilities, Concluding observations on the combined second and third periodic reports of Spain, CRPD/C/ESP/CO/2-3, 2019, para. 23.

59 Louise Arbour, Statement by Louise Arbour UN High Commissioner for Human Rights on the Ad Hoc Committee's Adoption of the Convention on the Rights of Persons with Disabilities, 2006, *https://www.ohchr.org/en/statements/2009/10/statement-louise-arbour-un-high-commissioner-human-rights-ad-hoc-committees.*

60 UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health), A/54/38/Rev.1, Chap. I, 1999, para. 22.

On multiple occasions, forced sterilisation has been condemned as a grave violation of human rights. The CEDAW Committee and The Committee on the Rights of the Child have clarified forced sterilisation as a form of violence against women and girls.[61] Likewise, the Committee on the Rights of People with Disabilities has stated that any kind of involuntary sterilisation is not only considered a form of violence, exploitation and abuse but cruel, inhuman or degrading treatment or punishment as well.[62] As forced sterilisation is viewed in international law as a form of violence, necessary measures must be put forth to prevent it. Article 16 of the CRPD *r*equires States to adopt "all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities from all forms of exploitation, violence and abuse, including their gender-based aspects."[63] Member States should protect individuals with disabilities by prohibiting forced sterilisation through legislative measures, allowing the use for limited exceptions. While as the Committee on the Rights of the Child stated State Parties have to prohibit forced sterilisation on children by law.[64]

In addition, CRPD requires States to "provide information, education, assistance and support for persons with disabilities and their families on how to avoid, recognize and report instances of exploitation, violence and abuse."[65] States should implement programs to educate and inform individuals with disabilities about sexual and reproductive care, contraceptives and sterilisation. Lack of information can often lead to a confirmation bias that women with disabilities are incapable of making decisions.[66] Special attention should be given to training and educating both public and private medical practitioners to provide such support and assistance. As they are the first contact of the disabled individuals with the health system and need to be aware of intersectional issues facing them.

However, multiple problems plague the implementation of this article on forced sterilisation. Firstly, there is still a serious lack of data regarding the number of conducted forced sterilisation. Secondly, the sexual and reproduc-

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61 *Ibid*.; UN Committee on the Rights of the Child (CRC), General comment No. 13: The right of the child to freedom from all forms of violence, CRC/C/GC/13, 2011, para. 23, para. 41, subpara. d).

62 UN Committee on the Rights of Persons with Disabilities, General Comment No. 3 (2016) on Women and Girls with Disabilities, CRPD/C/GC/3 25, 2016, para. 32.

63 UN General Assembly, Convention on the Rights of Persons with Disabilities, A/RES/61/106, 2007, art. 16.

64 UN Committee on the Rights of the Child (CRC), General comment No. 9 (2006): The rights of children with disabilities, CRC/C/GC/9, 2007, para. 60: "The Committee is deeply concerned about the prevailing practice of forced sterilisation of children with disabilities, particularly girls with disabilities. This practice, which still exists, seriously violates the right of the child to her or his physical integrity and results in adverse lifelong physical and mental health effects. Therefore, the Committee urges States parties to prohibit by law the forced sterilisation of children on grounds of disability."

65 UN General Assembly, Convention on the Rights of Persons with Disabilities, A/RES/61/106, 2007, art. 16 para. 2.

66 Oana Georgiana Girlescu, *Sexuality and disability: an assessment of practices under the. Convention for the Rights of People with Disabilities* (2012), 38.

tive health services are inadequate for the needs of disabled women and girls. Any policy that should regulate or prohibit forced sterilisation needs to deal with the systemic lack of sexual and reproductive care for women with disabilities. In situations where those services exist, the quality is not adequate for disabled women and girls. States are obligated to ensure access to quality health-care services which are adapted to the needs of disabled women/girls.

Article 23(1)(c) of CRPD requires States to "take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that persons with disabilities, including children, retain their fertility on an equal basis with others."[67] The right to "retain their fertility on an equal basis with others" in connection with article 12 CRPD encompasses decisions women with disabilities make regarding their own fertility and health. Disabled women and girls have a right to family and private life. They have the freedom to be in a relationship and found a family. They have the right to decide about their own sexual and reproductive health care, including contraceptive use and family planning.[68] Any involuntary practices related to fertility, such as forced sterilisation, violates article 23 and must be prohibited.[69] This article applies equally to all, including individuals with intellectual disabilities.

Article 25 of CRPD states that "free and informed consent should be the basis for providing health care to people with disabilities."[70] This is in line with the internationally recognized medical standards regarding medical procedures.[71] Free and informed consent must be a prerequisite to any medical procedure.[72] The UN Special Rapporteur on the right to health clarifies that "While consent for simple procedures may sometimes be implied by a patient, more complex, invasive treatments require explicit consent."[73] Sterilisation is a highly invasive procedure and in most cases irreversible. Thus, the

67 UN General Assembly, Convention on the Rights of Persons with Disabilities, A/RES/61/106, 2007, art. 23 para. 1, subpara. c).

68 UN, Article 23: List of illustrative indicators on respect for the home and the family, *The Human Rights Indicators on the Convention on the Rights of Persons with Disabilities (CRPD)*, Office of the United Nations High Commissioner for Human Rights, 2–3.

69 This formulation of art. 23 is the direct result of a compromise on the topic of prohibition of forced sterilisation. During the negotiations on the CRPD, a number of states wanted to include direct mentions of forced sterilisation. However, some participants such as the Holy See were against it. This fact bring a clearer view of the intention of the parties involved. More about the negotiations for CRPD in: Marta Schaaf, "Negotiating Sexuality in the Convention on the Rights of Persons with Disabilities", *SUR International Journal on Human Rights*, Vol. 8. No. 14/2011, 113–131.

70 UN General Assembly, Convention on the Rights of Persons with Disabilities, A/RES/61/106, 2007, art. 25.

71 World Health Organization, Amsterdam Declaration on Patients' Rights, ICP/HLE 121, 1994, para. 3.

72 *Ibid*., paras. 2.2; 3.1.

73 Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Report on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/64/272, 2009, para. 13.

explicit informed consent of the individual is paramount for performing it. What's more, the poor state of sexual and reproductive services worldwide requires an even stricter approach when dealing with the issue of consent. Particularly, in regards to girls or women with disabilities under guardianship, as their will is frequently ignored. The requirements for consent must be carefully followed through, regardless of the current medical situation of the individual. CEDAW Committee even states that there must be a period of minimum seven days given to the patient to express her decision on sterilisation.[74]

Additionally, Special Rapporteur on the Right to Health has expressed that "guaranteeing informed consent is a fundamental feature of respecting an individual's autonomy, self-determination and human dignity in an appropriate continuum of voluntary health care services."[75] Hence, informed consent may be regarded as an expression of personhood. Any denial of consent is seen as dehumanizing and objectifying disabled girls and women. This has led to various degrees of suffering for the individual.

2. Forced sterilisation under the Convention on the Elimination of All Forms of Discrimination Against Women

CEDAW obligates Member States to "respect, protect, promote and fulfil the right to non-discrimination for women and to ensure the achievement of equality between men and women."[76] CEDAW requires States parties to adopt "additional, special measures for women subjected to multiple forms of discrimination, including women and girls with disabilities."[77] As some of the arguments for justifying forced sterilisation are based on stereotypes, thus concrete state action is needed for their elimination. The Convention specifies that States Parties need to "modify any social and cultural practices that are based on suppositions about the superiority of either of the sexes or on stereotyped roles of men and women."[78] States must combat the prevailing stereotypes of women in healthcare such as them being irrational, weak and indecisive.[79] If not, the existing stereotypes will result in negative conse-

74 UN Committee on the Elimination of Discrimination against Women, concluding observations in relation to reports of the Czech Republic, CEDAW/C/CZE/CO/5, 2010, para. 35.

75 Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Report on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/64/272, 2009, 2.

76 Committee on the Elimination of Discrimination against Women, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2, CEDAW/C/2010/47/GC.2, 2010, para. IV(A).

77 Committee on the Elimination of Discrimination against Women, General recommendation No. 25, on article 4, paragraph 1 of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, 2004, para. 12.

78 UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, United Nations, Treaty Series, Vol. 1249, 1979, art. 5.

79 Simone Cusack and Rebecca J. Cook, "Stereotyping Women in the Health Sector: Lessons from CEDAW", *Washington and Lee Journal of Civil Rights and Social Justice*, Vol. 16, No. 1/2009, 55–56.

quences for women. As in *I.V. v. Bolivia*, where the involuntary sterilisation was based on the physician stereotypical rationale of women as indecisive and in need of protection.[80]

Article 16(1)(e) of CEDAW guarantees women equal rights in deciding "freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights." This article represents one of the core ideas of reproductive rights.[81] Women should be enabled to make their own decisions and "not be limited by spouse, parent, partner, or government."[82] States Parties should prevent coercion in regard to fertility and enable the women and girls with disabilities to choose for themselves. To fully enjoy this right, the States should provide women with disabilities with adequate support systems for pregnancy, maternity and childcare.

Article 10 of CEDAW indicates that women's right to education includes "access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning." The article specifies an important aspect of the consent for forced sterilisation. Consent for any medical intervention, particularly invasive ones, must be informed. General Recommendation No.21 of the CEDAW Committee indicates that "in order to make an informed decision about safe and reliable contraceptive measures, women must have information about contraceptive measures and their use, and guaranteed access to sex education and family planning services."[83] This stance was confirmed in *AS v Hungary*, citing the right of an individual to "specific information on sterilisation and alternative procedures for family planning in order to guard against such an intervention being carried out without her having made a fully informed choice."[84] Sterilisation is just one of many contraception options, and it's not justified to push it forward as the only solution based primarily on the women/girls' disability. Furthermore, they should be informed about their reproductive rights and additional support services. In the aforementioned case, the Committee stated that the State failed to provide appropriate information and advice on family planning leading to the violation of the individual's right.[85] This attests to the particular significance that the right to information on reproductive

80 Case No. 12.655, *I.V. v Bolivia*, IACtHR judgment of 30 November 2016, 236.

81 ICPD, Programme of Action of the International Conference on Population and Development, Cairo, Egypt, Sept. 5–13, 1994, A/ CONF.171/13/Rev.1, 1995, para. 7.3, principle 8. ICPD defined the term reproductive rights as "the basic rights of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health".

82 UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations, 1994, para. 22.

83 *Ibid.*

84 Committee on the Elimination of Discrimination against Women, A.S. v. Hungary, Communication No. 4/2004, Views of the Committee on the Elimination of Discrimination, CEDAW/C/36/D/4/2004, 2006, para. 11, subpara. 2.

85 *Ibid.*

health has for reproductive care. The article should be read with art. 25 of *CRPD* in mind.

Article 12(1) guarantees the right to health, stating that States Parties shall adopt "all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning." Concerning disabled women in particular, the CEDAW Committee has called on States to ensure that health services are accessible and sensitive to their needs, while respecting their human rights.[86] The States must provide "adequate services", which for sterilisation includes the requirement for a full informed consent.[87] The right to be free from nonconsensual medical treatment has been recognized by the Committee on Economic, Social and Cultural Rights (CESCR) as one of the freedoms incorporated in the right to the highest attainable standard of health.[88]

In *AS v Hungary*[89], the Committee has found that the forced sterilisation of a woman without her informed consent during an emergency procedure is a violation of her rights to access information (article 10), health (article 12) and to decide the number and spacing of her children (article 16) under *CRPD*. Confirming the stance that the specific articles are indispensable for the protection of reproductive right of women, specifically in the context of forced sterilisation.

3. Prohibiting forced sterilisation under the Istanbul Convention

Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) protects women against all forms of violence and prevents, prosecutes and eliminates violence against women.[90] The Convention is particularly important because it prohibits forced sterilisation directly through article 39 (2)(b). The article obliges State to adopt necessary legislative or other measures to criminalise preforming any surgery that can terminate a woman's reproductive capacity without her prior and informed consent or understanding of the procedure.[91] Member States are obliged to prohibit forced sterilisation by making it a punishable criminal offence. It is not enough to just eliminate sterilisation from

86 UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health), A/54/38/Rev.1, Chap. I, 1999, para. 22. 6.

87 *Ibid.*

88 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), E/C.12/2000/4, 2000, 8.

89 Committee on the Elimination of Discrimination Against Women, *A.S. v. Hungary,* Communication No. 4/2004, Views of the Committee on the Elimination of Discrimination, CEDAW/C/36/D/4/2004, 2006, paras. 11.2 – 11.4.

90 Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), *CETS* No. 210, 11 May 2011, art. 1 para. 1 subpara. a).

91 *Ibid*. art. 39 para. 1 subpara. b).

existing legal norms. This form of sterilisation must be expressly stated as prohibited. Nonetheless, a small number of countries have a prohibition of forced sterilisation in their criminal law.[92] For the prohibition to be effective, victims must have equal recognition before the law and access to justice.[93] The right of access to court must be especially guarantied, as it's frequently being abused. They must be guaranteed effective remedies and compensation scheme must be made for victims.

4. Is the existing international framework suitable for the prohibition of forced sterilisation?

The idea exists for a comprehensive international framework system regulating forced sterilisation of women with disabilities. The fundamentals have been set for broader regulation of reproductive rights of women with disabilities. The importance of the issue has been stated in multiple human rights bodies' recommendations. However, the treaty bodies' enforcement mechanisms are ineffective. The Conventions' analysis before us rely on recommendations and observations to influence the States into implementing changes. It's not true that such tools are without any power but they require the active role of the State. For example, Spain has changed its legislation after *CRPD* Committee's observations reports and GREVIO's evaluation report from 2020.[94] On the other hand, political will is still missing in numerous states to expressly prohibit forced sterilisation and shift its framework to a supported decision-making model. Australia has been urged multiple times by international treaty bodies to change their laws regarding forced sterilisation.[95] Nothing has been done.[96] As Graeme Innes, Disability Discrimination Commissioner, has stated that treaty bodies' instruments are soft law and unenforceable.[97] The prevailing image seems to be that of voluntary recommendations rather than obligations for the State.

92 EDF, Forced sterilisation of persons with disabilities in the European Union, European Disability Forum –Report, 2022, 10.

93 Commissioner for Human Rights, Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities, Issue Paper, Council of Europe Publishing, 26.

94 GREVIO, Baseline Evaluation Report Spain, 2020, para. 238; CRPD Committee, Concluding observations on the initial report of Spain, CRPD/C/ESP/CO/1, 2011, 38, and CRPD Committee, Concluding observations on the combined second and third periodic reports of Spain, CRPD/C/ESP/CO/2-3, 2019, 33–34.

95 Women with Disabilities Australia (WWDA), Dehumanised – The Forced Sterilisation of Women and Girls with Disabilities in Australia, WWDA Submission to the Senate Inquiry into the Involuntary or Coerced Sterilisation of People with Disabilities in Australia, 2013, 70, *https://tbinternet.ohchr.org/treaties/cat/shared%20documents/aus/int_cat_ngo_aus_18673_e.pdf*.

96 Linda Steele and Beth Goldblatt, 'The Human Rights of Women and Girls with Disabilities: Sterilisation and Other Coercive Responses to Menstruation', in C. Bobel, I.T. Winkler, B. Fahs, K.A. Hasson, E.A. Kissling and T.A. Roberts, (eds), *The Palgrave Handbook of Critical Menstruation Studies* (2020), 78.

97 Senate Standing Committees on Community Affairs, Involuntary or coerced sterilisation of people with disabilities in Australia, First Report, Parliament of Australia, Australia, 2013, 87.

On the other hand, there is no international case law that deals with forced sterilisation of women with disabilities specifically. There was one attempt in the case *Gauer and others v. France*[98] before the European Court of Human Rights, but the case was declared inadmissible. The lack of cases could be because of the lack of data on forced sterilisation, institutional or caretakers' isolation of the disabled individual and the difficulty of accessing legal remedies.[99] Thus, we should look into case law dealing with forced sterilisation of women. Here we might find some patterns that apply to all cases of forced sterilisation.

In the *V.C. v. Slovakia,*[100] *I.G., M.K. and R.H. v Slovakia*[101] and *N.B. v. Slovakia*[102], young Roma women were sterilized during childbirth without their voluntary consent. They were not fully informed about the nature of the procedure, its consequences or any other alternatives. In all the cases, the European Court of Human Rights found a violation of article 3 prohibition of torture or to inhuman or degrading treatment or punishment and article 8 the right to a respect for private and family life.[103] Both of these articles are relevant for forced sterilisation of women and girls with disabilities.

Ill-treatment under article 3 requires a minimum level of severity. This criteria is relative and depends on the specific circumstances of the case.[104] Forced sterilisation violates the physical integrity of women and leaves them mentally scarred.[105] It's a highly intrusive procedure, described by the Court as a "major interference with a person's reproductive health status."[106] In the cases discussed, the main focus was on the mental anguish and suffering of the applicants which had reached the required level for article 3.[107] In *I.G., M.K. and R.H. v Slovakia,* the Court highlighted the degrading nature of involuntary sterilisation.[108] Describing it as debasing and humiliating for the applicants.[109] The Court has taken in account the social consequences those applicants have suffered through their devaluation as women.[110]

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98 *Gauer and others v. France,* Application no. 61521/08.

99 Girlescu, *op. cit.,* 48; Manfred Nowak, Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, para. 69, U.N. Doc. A/63/175 (July 28, 2008).

100 *V.C. v. Slovakia*, Application no. 18968/07, 8 November 2011.

101 *I.G., M.K. and R.H. v. Slovakia*, Application no. 15966/04, 13 November 2012.

102 *N.B. v. Slovakia*, Application no. 29518/10, 12 June 2012.

103 *V.C. v. Slovakia*, para. 189, *I.G., M.K. and R.H. v. Slovakia*, para. 175, *N.B. v. Slovakia*, para. 131.

104 *V.C. v. Slovakia,* para. 101.

105 In *I.G., M.K. and R.H. v Slovakia,* the applicants described the procedure as a violation of their "physical and psychological dignity" and that it had "lasting consequences in terms of physical and mental suffering".

106 *V.C. v. Slovakia,* para. 106.

107 *I.G., M.K. and R.H. v Slovakia,* paras. 123–126.

108 *Ibid.,* paras. 121–122.

109 *Ibid.*

110 *V.C. v. Slovakia*, paras. 20, 118, *I.G., M.K. and R.H. v Slovakia,* para. 17, *N.B. v. Slovakia,* paras. 68, 79, 80.

The Government has claimed medical necessity for the sterilisation. In previous case law, the Court had specified that a "measure which is of therapeutic necessity from the point of view of established principles of medicine cannot in principle be regarded as inhuman and degrading."[111]However, in these cases the Court indicated that such a procedure is "incompatible with the requirement of respect for human freedom and dignity."[112] Declaring that there was no imminent risk of irreparable damage to the applicant's life or health and that her consent must be a prerequisite to the procedure even if it was "necessary".[113] Finally, the Court has found a breach of article 3, citing that the medical staff "displayed gross disregard for her right to autonomy and choice as a patient" which in turn has aroused the "feelings of fear, anguish and inferiority and to entail lasting suffering" in the applicant.[114]

The term "private life" in art.8 was broadly defined in the case law of the European Court of Human Rights. While it does include physical and psychological integrity of a person, it also includes the right to decide on having or not having children.[115] In *Y.F. v Turkey*, the Court has stated that a person's body is the most intimate aspect of one's private life.[116] Forced sterilisation affects individual's reproductive health and has consequences on the private and family life of the individual. In *Jehovah's Witnesses of Moscow and others v. Russia*, the Court stated that "the imposition of medical treatment without the consent of a mentally competent adult patient would interfere with his or her right to physical integrity and impinge on the rights protected under Article 8 of the Convention."[117] Article 8 gives States a margin of appreciation and for an interference to be lawful it must be done according to the law, with a legitimate aim and to be necessary in democratic society.[118] The only way it can be justified is if sterilisation was direly needed to save the life of the individual. However, the Court has stated that sterilisation is not a life-saving operation as the danger in case of future pregnancy may be mitigated by alternative means.[119] Thus this argument fell apart. The Court found a violation of article 8.

Two things are left out of these cases that would be important for disabled women and girls in similar situations. Firstly, women and girls with disabilities frequently face systemic discrimination in the health sector. One of the results of this discrimination is forced sterilisation. However, the case

111 *V.C. v. Slovakia*, para. 103.

112 *Ibid*., para. 112.

113 *Ibid.,* para. 110.

114 *Ibid.*, paras. 118–120.

115 *Ibid.*, para. 106, *P. and S. v. Poland*, Application no. 57375/08, 30 October 2012, para. 111.

116 *Y.F. v Turkey,* Application no. 24209/94, 22 July 2003, para. 33.

117 *Jehovah's Witnesses of Moscow and others v. Russia*, Application no. 302/02, 10 June 2010, para. 135.

118 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, ETS 5, 1950, art. 8, para. 2.

119 *V.C. v. Slovakia*, para. 110.

law on forced sterilisation doesn't often consider the existence of systemic discrimination towards women. In *L.M. and Others v. Government of Namibia*[120], the Court dismissed the claims of systemic discrimination towards HIV positive women. In the aforementioned cases of the European Court of Human Rights, the decision to not even analyze the possibility of discrimination is particularly strange. Considering that systemic discrimination against Roma is an acknowledged as a widespread problem in Europe.[121] The Court even mentions that Roma women are particularly vulnerable to such abuses.[122] Forced sterilisation is an inherent discriminatory practice. It's not applied equality to all but historically targets marginalized groups in society. This is a missed opportunity to analyze a social problem facing those women and bring forth a systemic reform.

Secondly, in the cases regrading young Roma women, consent was coerced but what we see often in disability cases is that consent is rarely even sought after. This is clearly a big difference and indicates the problem of legal capacity and the freedom to make informed decisions of people with disabilities. It's particularly relevant for individuals with mental disabilities who often have guardians. Some Court's views could be found in *Shtukaturov v. Russia*.[123] The Court in this case has confirmed his previous stance that the person whose autonomy is being restricted "must be allowed to be heard either in person or, where necessary, through some form of representation."[124] The person's will must be taken into account when limiting his or her fundamental right.[125] Hence, restricting an individual's reproductive capacity should only happen with the individual's explicit informed consent regardless of his or her disability. A further analysis of third-party consent in cases regarding a disabled person without capacity is required.

In spite of all stated, the Court still needs to reconsider consent issues in the specific case of forced sterilisation of women and girls with disabilities. The international standards governing requirements for informed consent of invasive medical procedures are strictly defined. The core idea is that the disabled individual's will is above all others. Exceptions must be interpreted

120 Supreme Court of Namibia, *L.M. and Others v. Government of the Republic of Namibia,* Case No. SA 49/2012, NASC 19 Namibia, 2014.

121 Vlad Makszimov, Data reveals 'shocking hardship' of Romani people in Western Europe, EURACTIV, 2021, *https://www.euractiv.com/section/non-discrimination/news/data-reveals-shocking-hardship-of-romani-people-in-western-europe/*; Tamás Kádá, and Niall Crowley, Equality For Roma And Travellers: Time To Deliver, EQUINET, 2020, *https://equineteurope.org/equality-for-roma-and-travellers-time-to-deliver/*.

122 *V.C. v. Slovakia*, paras. 146–149, 152–153.

123 *Shtukaturov v. Russia,* Application no 44009/05*,* 27 March 2008.

124 *Ibid.,* para. 71.

125 *Ibid.* para. 94; Center For Reproductive Rights, European Disability Forum, International Centre for the Legal Protection of Human Rights (Interights), International Disability Alliance, Mental Disability Advocacy Center, In the European Court of Human Rights *Joëlle Gauer and Others v France* Written Comments, 2011, *https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Gauer%20v%20%20France%20Submission%20ECHR%20FINAL.pdf, 9.*

narrowly. In addition, the Court must consider the effects of gender discrimination combined with disability stereotypes in the reproductive health sector. As well as, taking into account the possibility of the forced sterilisation being systemic discrimination towards women and girls with disabilities. Archaic eugenic understandings are not completely removed from all legal systems. As such, some cases will require systemic reforms to national law.

Nonetheless, the lack of comprehensive case law on forced sterilisation of women and girls with disabilities does present a large gap in understanding of the efficiency of international law on its protection.

V THE PROBLEM OF LEGAL (IN)CAPACITY AND THE SUBSTITUTE DECISION-MAKING MODEL

Legal capacity is necessary for ensuring that all people are able to participate equally in society.[126] Legal capacity is needed in accessing all fundamental rights and freedoms. Particularly, legal capability is significant when making life-changing decisions in areas such as work, education or health. Historically, numerous marginalized groups have been denied legal capacity including women. Today individuals with disabilities still remain a group that is most commonly denied legal capacity. Women with disabilities are more often, compared to men with disabilities or women in general, denied the right to legal capacity.[127]

In numerous cases where women with disabilities have been legally incapacitated, it results in a loss of autonomy in the public and private spheres. They are put under substitute decision-making regimes, such as conservatorship, and lose their ability to actively participate in society. Additionally, most health laws allow third party consent for forced treatment.[128] Even without an official substitute decision-making regime, the legal system can indirectly support it by rejecting the will and preferences of the woman/girl involved in favour of a "best interests" standard. The main purpose of these regimes should be to offer protection and help to women but in practice they frequently end up facilitating abuse from guardians and third parties.[129] Notably forced sterilisation falls under such abuse. Consent from the caretaker may result in medical interventions and/or hospitalization being deemed as "voluntary", despite the clear absence of consent from the individual with disabilities.[130] Even when the individual has explicitly decided against such

126 Women Enabled International Facts, Legal Capacity of Women and Girls with Disabilities, 2021, *https://womenenabled.org/wp-content/uploads/2021/02/Women-Enabled-International-Legal-Capacity-of-Women-and-Girls-with-Disabilities-English.pdf.*

127 UN Committee on the Rights of Persons with Disabilities (CRPD), General comment No. 3, Article 6: Women and girls with disabilities, CRPD/C/GC/3, 2016, para. 51.

128 Women Enabled International Facts, Legal Capacity of Women and Girls with Disabilities, *op. cit.*

129 Commissioner for Human Rights, Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities, *op. cit.*, 14.

130 *Ibid.*, 16.

interventions, the caretaker's decision is still considered legal. In some countries, guardians or other legal representatives cannot make health care decisions for individuals with disabilities. However, involuntary interventions are still possible in most States if a doctor considers them a medical necessity and a court confirms this decision.

Sterilisation, like any medical procedure, requires the individual going through it to give consent. Only through legal capacity is it possible to express a legally valid decision such as consent for a medical procedure. Free and informed consent should be a prerequisite to any medical intervention.[131] Sterilisation as a highly invasive medical procedure should require an express, free and informed consent from the individual. Frequently, the consent of the disabled women and girls involved is not used as a basis for sterilisation. The arguments and justifications for such procedures follow the patterns of rationale already mentioned in past sections. A common thread that connects them all could be found in the principle of "best interests". However, justifications based on their "best interests" frequently have nothing to do with the rights of women and girls with disabilities and more to do with economic and social factors. These factors are for example minimizing caregivers' burden, the absence of adequate measures to ensure the safety of women/girls with disabilities against the sexual abuse and the inadequacy and lack of appropriate services to support women with disabilities with pregnancy and parenthood.[132] The Australian Senate Community Affairs References Committee has described the best interest test as "malleable concept that can fail to address the needs and human rights of persons with disabilities".[133]

Furthermore, legal capacity is often decided only on the mental capacity of an individual. CRPD General Comment has stated that mental capacity and legal capacity are different and distinct but often conflated concepts.[134] Thus, such comparisons should be made with caution. Taking only mental capacity in consideration results in a perception that the individual is incompetent to receive and process information thus not able to make decisions. The perception is spread to the individual's competence in all spheres of life. The consequence of the initial judgment is seen through the individual's total exclusion from the procedure. There is no room to investigate the actual wishes of the disabled women and girls that will go through forced sterilisation. In judicial proceedings, the disabled individual doesn't appear before the court. Other circumstances about the individual, except their mental capacity, don't seem to matter for the final decision. Priority is given to the third parties' decision.

131 World Health Organization, Amsterdam Declaration on Patients' Rights, ICP/HLE 121, 1994, 11.

132 Human Rights Watch, Sterilisation of Women and Girls with Disabilities, A Briefing Paper, 2011, *https://www.hrw.org/news/2011/11/10/sterilisation-women-and-girls-disabilities.*

133 Senate Community Affairs References Committee, Parliament of Australia, *Involuntary or Coerced Sterilisation of People with Disabilities in Australia*, First Report, 2013, para. 5, subpara. 93.

134 UN Committee on the Rights of Persons with Disabilities, General Comment No. 1 – Article 12: Equal recognition before the law, CRPD/C/GC/1, 2014, para. 13.

This approach is part of the substitute decision-making model. The Committee on the Rights of Persons with Disabilities has recognized that "restricting or removing legal capacity can actually facilitate forced interventions, such as sterilisation, abortion or contraception."[135] For that end, the existing model perpetuates violations of human rights and needs to be changed. Flynn and Arstein-Kerslake have stated that "irrespective of decision-making ability, every person has an inherent right to legal capacity and equal recognition before the law."[136] This statement is echoed in international law.

In article 12(3) of CRPD, a new model was brought forth, the supported decision-making model. The article states that "parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity."[137] The core idea being that with the right support disabled individuals will be able to express their will and preference. Support can be given in different forms, from representation to instituting easy-to-read formats for information. For instance, Sweden has instituted a legal mentorship model in which a mentor is appointed through court proceedings with the consent of the individual involved.[138] This system doesn't result in the loss of legal capacity and the individuals may terminate the mentorship at any moment.

The core principles of CRPD, respect for inherent dignity, individual autonomy and the full and effective participation and inclusion in society, necessitates the use of a supported decision-making model.[139] Some problems have slowed down the implementation process. Reservations put upon the article 12, suggest that states are not ready for a complete change.[140] The

135 UN Committee on the Rights of Persons with Disabilities (CRPD), General comment No. 3, Article 6: Women and girls with disabilities, 2 September 2016, CRPD/C/GC/3, 2016, para. 44.

136 Eilionoir Flynn and Anna Arstein-Kerslake, 'Legislating personhood: Realising the right to support in exercising legal capacity', *International Journal of Law in Context*, Vol. 10, No. 1/2014, 83.

137 UN General Assembly, Convention on the Rights of Persons with Disabilities, A/RES/61/106, 2007, art 12(3).

138 Therése Fridström Montoya, Supported Decision-Making in Swedish Law – Is the »Good Man« a Good or Bad Guy in Light of the CRPD?, 2019, *https://psychiatrie-verlag.de/wp-content/uploads/2019/01/919-Fridström-Montoya-English-version.pdf* .

139 UN General Assembly, Convention on the Rights of Persons with Disabilities, A/RES/61/106, 2007, art. 3, para. 1, subpara. 3.

140 UN Treaty Collection, 15. Convention on the Rights of Persons with Disabilities, *https://treaties.un.org/pages/ViewDetails.aspxchapter=4&clang=_en&mtdsg_no=IV-15&src=IND*. For example: Canada declares its understanding that Article 12 permits supported and substitute decision-making arrangements in appropriate circumstances and in accordance with the law; The Arab Republic of Egypt declares that its interpretation of article 12, with regard to the concept of legal capacity dealt with in paragraph 2 of the said article, is that persons with disabilities enjoy the capacity to acquire rights and assume legal responsibility but not the capacity to perform, under Egyptian law; The Republic of Estonia interprets article 12 of the Convention as it does not forbid to restrict a person's active legal capacity, when such need arises from the person's ability to understand and direct his or her actions, etc.

States usually interpret the article as allowing the use of both decision-making models. This erodes the effectiveness of the article and goes against the nature of the Convention. The practical application is lagging behind the international law norms. The framework for the implementation of the supposed decision-making model is deficient. Implementing the model for all types of disabilities is a complex operation requiring complex strategies, solutions, training programs as well as financial means. There is a high risk of coercion or manipulation that might happen in this model. In some situations, consent is impossible to be determined. For example, asserting the true will of non-responsive individuals. It might lead back to a substitute decision-making model.[141] Then, we should examine the consent of the individuals who attempted serious self-harm. Should their choices be considered, even if they might harm them?[142]

No decision-making process is untouched by others' influence but the supported decision-making model is closer to the individual's will. The risks form abuse should be lowered by implementing adequate safeguards detailed under article 12(4). Nevertheless, regardless of the model some general principles should always followed. Those are the use of less intrusive alternatives to legal guardianship, the idea of maximum preservations of a person's legal capacity, necessity of a proportionality analysis to determine whether measures are necessary and correspond to the needs, the need for respect for the wishes of the individual concerned and the need to limit the duration of any restrictive measure.[143] One thing is for certain, at least in regards to medical procedures, the will of the individual must be followed.

VI CONCLUSION

Sterilisation is a valid medical solution for fertility control. However, without the consent of the individual involved, it becomes a form of violence. Historically, forced sterilisation has been seen as a common medical procedure for decades. It disproportionately targeted marginalized groups, the disabled being primary targets. In modern times, it should have been phased out but it is still being practiced all over the world. Disabled women and girls are disproportionally affected by forced sterilisation.

The arguments for forced sterilisation mentioned in previous sections are based on stereotypes and stigmas. Due to deeply rooted fears and misconceptions about disability, women are being perceived as incapable and irrational. Gender social roles give greater scrutiny to women's ability to make decisions and take care of herself and others. Resulting in preemptive deci-

141 Flynn and Arstein-Kerslake, *op. cit.*, 98.

142 *Ibid.*

143 Committee of Ministers of the Council of Europe, Recommendation R(99)4 adopted by the Committee of Ministers of the Council of Europe concerning the protection of the human rights and dignity of persons with mental disorder, 1999.

sions on their reproductive health, sexuality and motherhood. Such justifications are discriminatory and can't legitimize the use of forced sterilisation. The only exception that would justify its use is a serious or life-threatening health condition. Thus, free and informed consent must be a prerequisite for the use of sterilisation.

International law has turned towards a human rights approach for individuals with disabilities. Norms from *CRPD*, CEDAW and the Istanbul convention are significantly important for the development of an international framework prohibiting the use of forced sterilisation. Article 12 of *CRPD* establishes a new decision-making model. CEDAW deals with the elimination of stereotypes, guaranties SRHR and deals with the right to bodily autonomy and family planning. Istanbul convention defines forced sterilisation as an act of violence. It obligates states to criminalize forced sterilisation. The limitation as always remains the weak enforcement mechanism, the complexity of organizing an efficient framework for all disabilities and the financial costs.

The successful termination of forced sterilisation in practice requires states to implement a few significant measures. Firstly, the flaws in the sexual and reproductive health care must be addressed. The lack of adequate services, access to information, education as well as the bad quality of the reproductive health care significantly influence the decision of disabled women, caretakers, medical professionals for sterilisation. Sterilisation as an invasive operation shouldn't be the only option for contraception and menstruation management. It should not be accepted as a common operation without consequences. Thus, there needs to be a sexual and reproductive health care tailored to the needs of disabled women and girls. Secondly, States should prohibit or restrict the use of forced sterilisation. This recommendation is in line with the article 39 from the Istanbul Convention on the criminalizing of forced sterilisation. Thus, closing the routes to possible abuse from third party's decision on sterilisation. Thirdly, there needs to be a shift towards a supported decision– making model. This will guarantee that disabled women will be part of the decision-making process regarding their bodily autonomy. Particularly, concerning medical interventions such as forced abortion or sterilisation. The principle of free and informed consent must be upheld.

As seen from the given recommendations, the road to prohibition of forced sterilisation is long and full of obstacles. It requires long-term planning and systemic changes. However, as Sanger stated:" No woman can call herself free who does not own and control her body. No woman can call herself free until she can choose consciously whether she will or will not be a mother."[144] For women and girls with disabilities to be truly free they must have bodily autonomy. To this end, forced sterilisation must be a thing of the past.

144 Margaret Sanger, "Birth Control – A Parent's Problem or Woman's?", *https://www.bartleby.com/1013/8.html.*

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MEĐUNARODNOPRAVNI OKVIR ZA ZABRANU PRINUDNE STERILIZACIJE ŽENA I DEVOJČICA SA INVALIDITETOM

Apstrakt

Ovaj rad ima za cilj da ispita postojeći međunarodnopravni okvir za zabranu prinudne sterilizacije žena i devojčica sa invaliditetom. Prinudna sterilizacija ima duboko ukorenjenu istoriju kao sredstvo sistematske diskriminacije marginalizovanih grupa. Vremenom je prinudna sterilizacija uklonjena iz nacionalnih pravnih sistema. Međutim, za žene i devojčice sa invaliditetom širom sveta još uvek se prinudna sterilizacija smatra uobičajenim rešenjem za reproduktivno zdravlje, kontrolisanje menstruacije i zaštitu od seksualnog napada. Stoga je neophodno istražiti razloge zašto se ovakva invazivna procedura još uvek primenjuje. U radu će biti prikazani glavni problemi koji omogućavaju postojanje i održavanje prinudne sterilizacije. Istražiće se neuspeh međunarodnog prava ljudskih prava u eliminisanju prinudne sterilizacije. Rad će ponuditi i neke uvide i preporuke o tome šta može biti učinjeno na putu ka efikasnoj zabrani upotrebe prinudne sterilizacije.

Ključne reči: *Prinudna sterilizacija; Žene i devojčice sa invaliditetom; Pravna sposobnost; Diskriminacija; Reproduktivna prava.*

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INTERSECTIONAL DISCRIMINATION OF WOMEN AND GIRLS WITH DISABILITIES AND THE INSTITUTION OF OMBUDSMAN: A TRAFFIC WARDEN AT CRENSHAW'S INTERSECTION

Abstract

Intersectional discrimination, as still young, and the prevailing theoretical concept does not cease to challenge the classical notion of discrimination, and the anti-discrimination legislation and case law based on it. Therefore, the issue related to the conceptual delimitation of different forms of discrimination that occurs on two or more grounds will be considered first. For this purpose, using Maconen's classification, by intersectional discrimination we mean its notion in a narrower sense. Also, the problem of choosing comparators will be considered, through the evaluation of different models present in comparative judicial and constitutional court practice, since this problem has its direct impact on how differently organized ombudsmen can respond to the challenge of intersectional discrimination. The role of the ombudsman in the fight against intersectional discrimination against women with disabilities is proving to be very important, especially given the advantage that comes with the flexibility and wide range of activities of this institution. Therefore, the paper considers various organizational alternatives when it comes to the response of the ombudsman institution to this problem. The basic hypothesis is that a single, integrated institution that covers all prescribed grounds of discrimination is more suitable for multi-layered challenges that intersectional discrimination bring. This conclusion was reached after considering the problem of determining the comparator, but also after comparative legal analysis of the solutions contained in Sweden and Croatia. Finally, the paper will present the Serbian legislative framework and cases from the practice of the Commissioner for the Protection of Equality, as an (umbrella) single purpose ombudsman in the field of discrimination.

Key words: *Intersectional discrimination; Women, Persons with disabilities; Ombudsman; Single purpose ombudsman.*

> „I can never experience gender discrimination other than as a person with a disability; I can never experience disability discrimination other than as a woman. I cannot disaggregate myself nor can anyone who might be discrimating against me. I do not fit into discrete boxes of grounds of discrimination. Even when only one ground of discrimination seems to be relevant, it affects me as a whole person."
>
> Dianne Pothier, „Connecting Grounds of Discrimination to Real Peoples′ Real Experiences"

I INTRODUCTION

The notion of intersectional discrimination was introduced into scientific, particularly legal discourse through the efforts of feminist-oriented authors, primarily Kimberle Crenshaw. Encouraged by the unenviable position of black women in the United States, she vividly compared this phenomenon to a car accident at an intersection. Namely, just as a traffic accident can be much more severe if cars come from several, or even all directions at one intersection, so the consequences of discrimination against black women can be drastically more serious if they occur due to intersectional, i.e., discrimination on several grounds.[1] The concept of intersectional discrimination continues to cause considerable misunderstandings and difficulties in practice. Some of the reasons may lie in the fact that this is a newer and still predominantly theoretical concept, but also in the insistence on a qualitatively different experience that it implies. This makes it especially difficult to distinguish between intersectional, not only from conventional – uniaxial understandings of discrimination, but also from other forms of discrimination on several grounds. However, intersectional discrimination, which occurs on two or more grounds, but in such a way that these grounds act not successively, but at the same time inseparably, respects the fact of multi-layered identities, which, since they cannot be separated, thus form a single and indivisible whole of one person's experience.[2] Also, it would be wrong to assume that the experience of intersectional discrimination is as young as the notion of it in legal science. On the contrary – the long historical experience of blacks, but also women with disabilities,[3] members of national minorities, etc. in bearing

1 Dagmar Scheik, 'Executive Summary' in Susanne Burri and Dagmar Scheik (eds.), *Multiple discrimination in EU law opportunities for legal responses to intersectional gender discrimination?* (2009), 4.

2 Mirjana Dokmanović, 'Višestruka i intersekcionalna diskriminacija: koncept, definicije i uvođenje u zakonodavstvo, *Pravni život,* Vol. LXVI, No. 10/2017, 225; Shreya Atrey, *Intersectional discrimination* (2019), 46.

3 One of the most illustrative historical examples of intersectional discrimination is the case of forced sterilization or abortion to which women with disabilities and/or members of certain ethnic groups have been subjected. (Scheik, *op. cit.,* 4.). The practice of forced sterilization of Roma women has been taken on particularly systemic proportions in Czechoslovakia, to the extent that the Czech ombudsman, who played an important and

the disproportionately large burden of discrimination proved as crucial in the theoretical shaping of intersectional discrimination.[4]

Regarding women with disabilities as frequent victims of intersectional discrimination, it is pointed out that they have been invisible in the public sphere for too long due to the refusal to recognize their experience of discrimination a status different from that experienced by men with disabilities or women without disabilities.[5] Although intersectionality as a concept was partially recognized by acts such as the Durban Declaration, a significant normative shift on this issue in the international legal field was made with the adoption of the Convention on the Rights of Persons with Disabilities, whose art. 6 directly refers to women with disabilities and recognizes the exposure of women and girls to multiple discrimination. However, certain problems related to the response to the challenge of intersectional discrimination have been remained. Therefore, in addition to the reactive approach based on resolving complaints, the importance of the preventive approach through proactive duties and measures that can be used to address the problem of intersectional inequalities has been increasingly emphasized.[6]When it comes to the reactive measures, for the problem of intersectional discrimination, theory strongly suggests the establishment of a single anti-discrimination body, instead of several that are responsible for protection against uniaxial, i.e. discrimination based on one ground only.[7]

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active role before relevant international forums, found in 1991 that the practice was motivated by eugenics. This infamous historical case is at the same time an example of the positive role of the ombudsman institution in disclosing cases of intersectional discrimination and mitigating its consequences (See Gwendolyn Albert and Marek Szilvasi, 'Intersectional Discrimination of Romani Women Forcibly Sterilized in the Former Czechoslovakia and Czech Republic', *Health and Human Rights Journal,* Vol. 19, No. 2/2017, 28). Also, due to long-standing historical circumstances, black women with disabilities in South Africa are marked, due to triple-based marginalization, as the most marginalized group in society, with empirically confirmed negative effects in education, employment and access to social protection. Jacqueline Moodley and Lauren Graham, 'The importance of intersectionality in disability and gender studies', *Empowering women for gender equity-Disability & Gender,* Vol. 29, No. 2/2015, 25–26.

4 Sarah Hannett, 'Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination', *Oxford Journal of Legal Studies*, Vol. 23, No. 1/2003, 81.

5 Kosana Beker, *Višesruka diskriminacija žena u Srbiji i odabranim državama* (2019), 508. The practical repercussions of this view were reflected in the absence of significant integration of women with disabilities, both in organizations dealing with the promotion of the rights of persons with disabilities and in the movement dealing with women's rights. The representative of persons with disabilities in Finland, in laconic and at the same time devastating manner, as the cause of such practices cited the fact that organizations dealing with women's rights in Finland simply did not consider women with disabilities to be women. Compare with Tony Emmet and Erna Alant, 'Women and disability: exploring the interface of multiple disadvantage, *Development Southern Africa*, Vol. 23, No. 4/2006, 445. and Timoo Makkonen, *Multiple, compound and intersectional discrimination: Bringing the experiences of the most marginalized to the fore* (2002), 20.

6 Johana Kantola and Kevät Nousianen, 'Institutionalizing Intersectionality in Europe' *International Feminist Journal of Politics – Institutionalizing Intersectionality*, Vol. 11, No. 4/2009, 469.

7 Compare with Beker, *op. cit.,* 508. and Hannett, *op. cit.,* 85.

The institution that can equally cover both the preventive and the reactive segment of the combat against intersectional discrimination, specifically women with disabilities, is the ombudsman institution.[8] The main argument in support of this claim lays not only in the fact that ombudsmen are increasingly mentioned as independent bodies within the Convention on the Rights of Persons with Disabilities[9], but in the high degree of flexibility and adaptability[10] that adorns the ombudsman institution, as a result of its long development. In theory, there is a position according to which the development of the ombudsman institution went through three phases. The first was the phase of proliferation, followed by the phase of diversification within which the so-called specialized or *single purpose* ombudsmen appeared. Their activities were first focused on one specific field of life, such as health, and then their focus moved towards the needs of certain social groups, such as people with disabilities. Finally, the phase of evolution took place, within which a hybrid, or so-called the Human Rights Ombudsman shown up.[11] The request thus facing the ombudsman within the third, evolutionary phase, to made itself visible to particularly vulnerable groups[12], is of special importance in the context of intersectional discrimination. In the same context, the existence of an extensive network of specialized ombudsmen within the diversification phase raises the crucial question of this paper: which organizational form of

8 Although in the literature dedicated to gender studies the term *ombudsperson* can often be found instead of *ombudsman*, in this paper we have opted for the term *ombudsman*. We did so bearing in mind the fact that the word *ombudsman* in the Swedish language is gender neutral, which was also confirmed by the International Ombudsman Association as well as Swedish parliamentary ombudsman himself. Tim Moore, 'Ombudsman Gender Neutral?', Northern Ireland Assembly, 81/15 from 9 June 2015, *http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2015/ofmdfm/8115.pdf?fbclid=IwAR3tAw2g9nhuzS4ri_ev5drEsoBP-9W9mMlpkB-HzPGxuuofLN_aRb2LZS4*.

9 Linda Reif, Enhacing the Role of Ombudsman Institutions in the Protection and Promotion of the Rights of Persons with Disabilities, Conference paper from 10th International Ombudsman Institute Conference, Wellington, 12-16 November 2012., 3, *https://www.theioi.org/downloads/apb7s/Wellington%20Conference_14.%20Working%20Session%20B_Linda%20Reif%20Paper%20%26%20Slides.pdf*

10 For example, the institution of the ombudsman proved to be particularly important during the COVID-19 epidemic, which was accompanied by numerous restrictions and derogations of human rights. For more on the actions of the ombudsman during the state of emergency in Serbia caused by the COVID– 19 epidemic, see Vasilije Marković, Marko Romić, "Vorgehen der Bürgerbeauftragten zur Zeit der COVID-19-Pandemie – die Erfahrung der Republik Serbien" in Wolfgang Rorbach (ed.) *Wertewandel und Werterenaissance in Zeiten der Pandemie und Klimakrise* (2022), 339–343.

11 Roy Gregory and Philip Giddings, 'The Ombudsman Institution: Growth and Development' in Roy Gregory (ed.) *Righting Wrongs: The Ombudsman in Six Continents* (2000), 8–15. More on a certain reverse or negative aspects of these development phases, especially the first one reflected through the proliferation of the ombudsman institution, see Victor Ayeni, Typology of Ombudsman Institutions, Occasional paper 30, International Ombudsman Institute, September 1985, *https://www.theioi.org/downloads/9r7ft/IOI%20Canada_Occasional%20Paper%2030_Victor%20Ayeni_A%20Typology%20of%20OM%20Institutions_1985.pdf*.

12 Daniel Jacoby, 'The Future of Ombudsman' in Linda Rief (ed.) *International Ombudsman Angology* (1999), 33.

the ombudsman institution is more suitable for the complex challenge of intersectional discrimination against women with disabilities – general or single purpose ombudsmen? In case a single purpose ombudsman is a better solution, an additional question arises, what is the adequate measure of specialization?

However, before a more comprehensive consideration of this problem, it is necessary to consider in more depth the related and important issues concerning the distinction between intersectional and other forms of discrimination, as well as the difficulties in determining the comparator.

II INTERSECTIONAL DISCRIMINATION – CERTAIN CONCEPTUAL DILEMMAS

1. Terminological and conceptual clarifications

Incorporating an intersectional approach when addressing discrimination can lead us from a binary to a more global human rights perspective,[13] since it emphasizes multiple identities and heterogeneities that exist within a single, ostensibly monolithic, identity group. However, in order to arrive at such a broader picture, it seems that significant terminological and conceptual ambiguities need to be resolved first, followed by the problem of insufficient recognition of intersectional discrimination at the level of national legislation and practices.[14] In that sense, it is inevitable to mention the almost revolutionary significance of the decision of the Constitutional Court of the Republic of South Africa from November 2020 in the Mahlangu Case.[15] With this decision, Constitutional Court for the first time explicitly confirmed the prohibition of intersectional discrimination, using appropriate theories as a way of interpreting the rights guaranteed by the Constitution. Referring to the historical circumstances that led to the gender implications of the racist apartheid system, the Constitutional Court made that "... *the importance of intersectional analysis becomes unavoidable*",[16] thus becoming a reputable example in a broader comparative context.

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13 Emmet and Alant, *op. cit.*, 459.

14 Makkonen, *op. cit*,. 10, 55.

15 In this particular case, the Constitutional Court ruled on the constitutionality of the provisions of the Compensation for Occupational Injuries and Diseases Act 1993, which expressly excluded domestic workers from the definition of an employee when accessing social security assistance in case of injury, disablement or death at workplace. Ms. Mahlangu, partially blind and unable to swim domestic worker, drowned in the pool of her employer. Her daughter, financially dependent on her mother, has filed a lawsuit with the Constitutional Court, arguing that the law has led to indirect intersectional discrimination, as housekeepers in South Africa are predominantly black women. See Shreya Atrey, 'Beyond discrimination: Mahlangu and the use of intersectionality as a general theory of constitutional interpretation', *International Journal of Discrimination and Law*, Vol. 21, No. 2/2021, 169–170.

16 *Ibid*., 173–174.

The conceptual definition[17] of intersectional discrimination can be approached in an easiest way with *per genus et differentiam* approach, where Makonen's classification is of valuable importance. The first and easiest step in the conceptual analysis of intersectional discrimination is its delimitation towards "classical", uniaxial discrimination. Classical discrimination is based on the historical heritage according to which social groups are determined by only one identity category (gender, religion, ethnicity, disability), and thus one person is discriminated on the basis of (only) one identity characteristic.[18] In contrast, intersectional discrimination involves multiple grounds. Thus, both "classical" and intersectional discrimination represent putting people in an unequal position, but the number of personal characteristics on the basis of which unequal treatment is performed differs. A much more subtle challenge, however, is to distinguish between intersectional and those forms of discrimination in which there are also more than one personal characteristic that serves as the basis of discrimination. Related to this is the question of the genus term for these forms of discrimination – is it more appropriate to classify all of them under the mutual name of *multiple* or *intersectional discrimination in a broader sense*? Although there is a different point of view among vast majority of Serbian scholars,[19] for the purposes of this paper, we opt for, in accordance with Makonen's classification, the term intersectional discrimination in a broader sense. This is not only because intersectional discrimination, as a genus term, is more frequent in academic writing,[20] but also because the term multiple discrimination carries with it a certain mathematical, i.e. overtone of addition the grounds of discrimination,[21] which is undoubtedly suitable for describing one type of intersectional discrimination in

17 Conceptual analysis is undoubtedly the most useful and prevailing method in legal research today. An example of the use of this scientific method, in the case of an another complex and multi-layered concept, could be found in one earlier paper of ours: Vasilije Marković, "Pojam sekularnosti – istorijski, pravni i aksiološko-etimološki aspekti", *Bogoslovlje,* Vol. 79, No. 2/2020, 103–126.

18 Kantola and Nousianen, *op. cit.* 461.

19 For example, Kosana Beker, starting from the former version of the Law on Prohibition of Discrimination, uses the term multiple discrimination for the genus term of discrimination that occurs on the basis of several personal characteristics. Given the plurality of forms of multiple discrimination, this author then distinguishes between (ordinary) multiple discrimination, additive/compound discrimination and intersectional discrimination. Within this classification, (ordinary) multiple discrimination refers to the exposure of one person to discrimination on several grounds, but not at the same time and not in the same situation. This form corresponds to the notion of multiple discrimination in Maconen's classification. Additive or compound discrimination exists when several grounds act simultaneously, but in such a way that the grounds are building on, and as an example of this form of discrimination, the case of a migrant woman in a difficult search for a gender-segregated occupation is cited. Finally, in the case of intersectional discrimination within this classification, personal characteristics as the basis of discrimination are intertwined so that discrimination in a particular case cannot be analyzed by separate characteristics. This form corresponds to Makonen's notion of intersectional discrimination. See Beker, *op. cit*., 82–87.

20 Makkonen, *op. cit.*, 55.

21 Dokmanović, *op. cit.*, 217.

a broader sense, but can prove to be extremely seductive and inaccurate when it comes to describing the phenomenon we are dealing with in this paper.

So, in accordance with Makonen's classification, intersectional discrimination in a broader sense, i.e., discrimination that occurs on several grounds encompasses *multiple*, *compoun*d and *intersectional discrimination in the narrower sense*, and what can be considered as a watershed between them is the way in which the characteristics that appear as grounds for discrimination interact.

Thus, in the case of *multiple* discrimination, several grounds of discrimination appear, but in a way that they act independently of each other, in temporally and contextually different situations of unequal treatment. In this way, discrimination takes place on one basis in a specific situation, but there is an accumulation of experience of discrimination. A common example is discrimination against women with disabilities on the basis of gender through denial of access to certain jobs, as well as discrimination against them on the basis of disability through the lack of technical conditions for access to public authorities buildings.[22] In some CoE documents, this form of discrimination is also named sequential multiple discrimination.[23] Another form of intersectional discrimination in a broader sense is compound discrimination, recognized in CoE documents as additive multiple discrimination. In this form of intersectional discrimination, the grounds of discrimination coincide, i.e., they happen at the same time, but in a way that one personal characteristic that is the basis of discrimination leans on or adds to another. However, in this form of intersectional discrimination there is no fusion, so each of the personal characteristics that are the grounds of discrimination can be recognized as such independently.[24] Finally, we come to intersectional discrimination in the narrow sense. What is *differentia specifica* of this form of intersectional discrimination is the simultaneous action of the grounds of discrimination in a way that causes a fundamentally different experience of unequal treatment that cannot be stratified into one cause.[25] The grounds of discrimination here interact in such a way putting a person in a specific position, and this position, when it comes to women with disabilities, is qualitatively different from the position of men with and without disabilities.[26] A frequent example of this form of discrimination is the mentioned case of forced sterilization of women with disabilities, especially if they at the same time belong to the certain ethnic group.[27] Thus, the difference in relation to multiple discrimination is obvious and is reflected in the fact that the grounds of discrimination do not occur in different situations, but at the

22 Makkonen, *op. cit*., 10.

23 Council of Europe, *Intersectionality and Multiple Discrimination*, *https://www.coe.int/en/web/gender-matters/intersectionality-and-multiple-discrimination*.

24 *Ibid.*

25 Emmet and Alant, *op. cit*., 458; Kantola and Nousianen, *op. cit.,* 462.

26 Ana Horvat, 'Novi standardi hrvatskoga i europskoga antidiskriminacijskog zakonodavstva', *Zbornik Pravnog fakulteta u Zagrebu*, Vol. 58, No. 6/2008, 1468.

27 Makkonen, *op. cit.,* 11.

same time. On the other hand, the difference in relation to compound discrimination is more nuanced and is reflected in the fact that the grounds of intersectional discrimination cannot be distinguished, since they participate in creating a unique experience of discrimination not cumulatively, but synergistically and pervasively. An aggravating circumstance in distinguishing between compound and intersectional discrimination in the narrower sense is that the existence of cumulative or substantive interaction of grounds of discrimination is very often an empirical, i.e. an issue that depends on the circumstances of the particular case.[28]

When it comes to the Serbian positive legal framework, the first legal act passed in the field of discrimination was the 2006 Law on Prevention of Discrimination of Persons with Disabilities, and even then its relevance in this area was recognized by scholars, due to multiple discrimination of women with disabilities.[29] Shortly afterwards, the Law on Prohibition of Discrimination was adopted as a kind of *lex generalis* in the field of anti-discrimination legislation. This act, as one of the more severe forms of discrimination, prescribed discrimination of persons on the grounds of two or more personal characteristics (multiple or intersecting discrimination). Although this is not specified in the legal text itself, the Commissioner for the Protection of Equality stated in his Handbook for Recognizing Cases of Discrimination before Public Authorities that multiple discrimination is considered as simultaneous discrimination based on two or more personal characteristics, and intersecting discrimination is considered as simultaneous exposure of person to the different forms of discrimination.[30] Thus, not only did the legal text not sufficiently distinguish between multiple and intersectional (intersecting) discrimination, but the Handbook also failed to bring the intersecting more closely to the notion of intersectional discrimination. It is not surprising then the reaction of the UN Committee on the Elimination of Discrimination against Women, which four years after the adoption of the Law on Prohibition of Discrimination, stated in its Concluding Observations the absence of the concept of intersectional discrimination in Serbian legislation and called for its introduction.[31] That is why, inter alia, the Committee encouraged the Republic of Serbia to adopt a new draft Law on Prohibition of Discrimination.[32]

Amendments to the Law on Prohibition of Discrimination (hereinafter: LPD) from 2021 unambiguously introduced and clarified the notion of inter-

28 Emmet and Alant, *op. cit.,* 458. Kimberlé Crenshaw notices this difference in the experience of black women, who, while experiencing discrimination similar to that of white women or black men, are more likely to be discriminated on the grounds of race and gender, and sometimes experience intersectional discrimination that cannot be reduced to the simple sum of racial and gender discrimination. Cited according Hannett, *op. cit.,* 67.

29 Ivana Krstić, 'Pozitivna diskriminacija žena – mera ostavrenja ravnopravne participacije u društvu' in M. Jovanović (ed.), *Kolektivna prava i pozitivna diskriminacija u ustavnopravnom sistemu Republike Srbije* (2009), 152.

30 Brankica Janković, Jelena Kotević and Marijana Pavjančić, *Priručnik za prepoznavanje slučajeva diskriminacije pred organima javne vlasti* (2016), 115.

31 CEDAW/C/SRB/CO/2-3, from July 2013., paras. 10b, 11b.

32 CEDAW/C/SRB/CO/4, from March 2019, para. 12a.

sectional discrimination into Serbian legislation. Thus, the LPD now in Art. 13 subpara. 5, mentions as one of the severe forms of discrimination the one that occurs on the ground of two or more personal characteristics, regardless of whether the influence of certain personal characteristics can be differentiated (multiple) or not (intersectional discrimination). Therefore, in the legal definition of intersectional discrimination, the criterion of interaction of personal characteristics that are the grounds of discrimination is accepted. This also drew a clearer distinction in relation to multiple discrimination[33], which is certainly a commendable step forward.

2. Comparator paradox

Apart from the unambiguous conceptual definition, the most serious obstacle, in theory and legislation, in the combat against intersectional discrimination is the approach in determining the comparator.[34] In anti-discrimination legislation, a comparator is a person or group who is in the same or similar situation with a discriminated person / group, provided that the comparator differs from that person or group in the presence or absence of a personal characteristic that was grounds for discrimination.[35] The existence of a (hypothetical) comparator in defining and examining the existence of discrimination helps to establish a link between discriminatory action and its cause contained in the grounds of discrimination, since "*comparative activity is inherent*" in determining (in)equal treatment.[36] Basically, the problem of determining the comparator in uniaxial, either direct or indirect discrimination does not exist, and to examine whether a person is discriminated on the grounds of disability, it is relevant experience of a person without disability as a comparator in the same or similar situation. Problems, however, arise in determining comparators in cases of multiple, and especially intersectional, discrimination For example, when it comes to determining discrimination against a woman with a disability, is it, as a comparator, more appropriate a woman without a disability, a man with a disability, or even a person who does not share any of the personal characteristics, such as a man without a disability? The position of a man without a disability is undoubtedly more privileged, but the reason for this may lie in the synergistic action of two

33 It is descriptively defined in the LPD as discrimination in which the influence of certain personal characteristics can be differentiated, and which, it seems, should include both time delimitation and delimitation of the effects that individual personal characteristics produce in the experience of discrimination. Or, to put it differently, the legal formulation of multiple discrimination includes both sequential and additional multiple discrimination. One of the further *de lege ferenda* steps towards a more comprehensive and precise legal recognition of different forms of intersectional discrimination could be the separation and closer explanation of these forms, in accordance with the dominant theoretical classification used in this paper.

34 Scheik, *op. cit.,* 19.

35 Beker, *op. cit.,* 518.

36 Hannet, *op. cit.,* 84, as well as Shreya Atrey, "Comparison in Intersectional Discrimination", *Legal studies,* Vol. 38, No. 3/2018, 379.

personal characteristics (gender and disability), which makes the position of women with disabilities particularly difficult.[37] And maybe, due to the described features of intersectional discrimination, it is incompatible with the notion of comparator? Legislative and judicial practice has not yet been able to offer an unambiguous answer to these questions.

So far, through the effort to solve the problem of comparators in intersectional discrimination in judicial and constitutional case law, several models have been offered – strict, flexible, and contextual comparison, which has proved particularly exemplary in the case law of the Constitutional Court of South Africa in *Hassan Case*. The strict comparison insists on the existence of a comparator even in the case of intersectional discrimination, and considers it a person who shares with the applicant all relevant characteristics, except those listed as the ground of discrimination. In the case of intersectional discrimination against women with disabilities, this may mean either that her comparator is a man without a disability, or that her comparators are a man with a disability and a woman without a disability. Both variations of the strict comparison model have been severely criticized for petitions alleging intersectional discrimination as they ignore the fact that the applicant may share one or more grounds with certain already disadvantaged groups. Thus, by requiring strict comparison, the court may stray too far from the particular nature of intersectional discrimination.[38]

In attempts to make up for the shortcomings of the strict, a model of flexible comparison, present in one case of the Ontario Court of Appeals, appeared. In the Falciner Case, the court started from the postulate of strict comparison in terms of providing separate comparators for each of the grounds of discrimination, but the flexibility, whose role was to take into account the complexity of specific cases, was reflected in the court's ability to either by widening or narrowing, redefines the comparators offered by the applicant. The main shortcoming of this model, in addition to the opportunity for judicial reasoning to intervene in the determination of comparators, was that it maintained the separation of comparators for each of the grounds

37 Beker, *op. cit.,* 88.

38 Atrey (2018), *op. cit.,* 383–386. Particularly problematic in this regard are the practices of Anglo-Saxon courts, which, in order to simplify the complexity of cases of potential intersectional discrimination, insisted that the claimant decide on one personal characteristic by reducing intersectional to uniaxial discrimination, or to designate one comparator for each of the grounds of discrimination. This approach was present in the case of *Bahl v. The Law Society*, where a woman of Asian descent is required to designate a man as a comparator in one part of the request and a person of non-Asian descent in another. Another problematic practice was the doctrine of "sex plus", by which US courts prejudged predominantly personal characteristics (gender), and required that the claimant invoke only one other personal characteristic, in order to prevent a situation in which anti-discrimination demands became like the mythological multi-headed Hydra. The problem with this judicial approach, which equates intersectional with additve multiple discrimination, is that while it allows for a claim based on a larger but still limited number of grounds, it easily overlooks the possibility that, in the complex totality of life, a person can put its identities, such as religious, racial, etc. in front of his comprehensive identity (see Hannett, *op. cit*., 76, as well as Beker, *op. cit*., 520).

of discrimination. Such separation may prove adequate in single or multiple, but not when it comes to the intersectional discrimination.[39]

Finally, it is necessary to mention the contextual comparison inaugurated by the Constitutional Court of the Republic of South Africa in the case of legal exclusion from the inheritance of Muslim widows from polygamous marriages (*Hasan case*). The peculiarity of this model is that, starting from the historical experience and the context of South African society, a Muslim widow from a polygamous marriage was placed at the centre of the intersection of groups composed of 7 comparators that share one, two or no common characteristics. This comprehensive inclusion in the consideration of a spectrum of comparators wider than those offered by the applicant, as well as the non-fragmentation of identity, proved to be helpful in determining the specific nature of the intersectional deficiency. Contextual comparison, thus, unlike strict, is not based on one or separate bases of comparison, nor, unlike flexible comparison, excludes or limits certain relevant comparators *a priori* and without explanation. It was noticed that this model is based on equality of results,[40] which is a process that in the next step could lead to the termination of the need for a comparator in the definition of (intersectional) discrimination.[41] While the role of judges in this process is to, with indisputable knowledge, reputation and skills, bolder enter into the creation of practices based on contextual comparison, [42] the question of the role of the ombudsman in the same process arises. In that sense, it seems that the organizational scheme, which includes a multitude of single purpose ombudsmen, does not correspond to the desired tendencies, but on the contrary, is more in line with logic of strict comparisons, which proved as quite unsuitable to the intersectional discrimination.

III THE INSTITUTION OF THE OMBUDSMAN AS AN EQUALITY BODY IN COMPARATIVE LAW

It is already stated that the process of diversification in the development of the ombudsman institution is characterized by the appearance of the so-called single-purpose ombudsmen, or ombudsmen who specialize either in one area of social life or for particular social group. In principle, single-purpose ombudsmen are compatible with the general-purpose ombudsman, and their functions are identical or complementary.[43] However, the reverse of this process was evident in the inflation of the name ombudsman, which began to be used to denote various institutions and practices, to the extent that in France this increase in the number of "mediators" was characterized as "*ba-*

39 Atrey (2018), *op. cit*., 387–390.

40 *Ibid*., 391–394.

41 Horvat, *op. cit.,* 1464, Kantola and Nousianen, *op. cit.,* 466.

42 Beker, *op. cit*., 523.

43 Compare Marko Davinić, *Evropski ombudsman i loša uprava* (2013), 70., and Dragan Radinović, *Ombudsman i izvršna vlast* (2001), 157.

nalization of the institution of mediator and their powers."[44] Such criticism is especially directed at the executive, or at ombudsmen formed by state or non-state administration bodies with the aim of reacting to the complaints of the users of the services of the body that appointed them. The former are often given the epithet *quasi,* [45] while the latter are even denied the right to the title of ombudsman.[46] In foreign theory also, for the same reasons, it was emphasized that in order to harmonize single and general-purpose ombudsmen, it is necessary to adopt and implement universally accepted principles. One of the most important of these is the adoption of the classic characteristics of ombudsman independence in terms of appointment, funding, work and accountability.[47] On the other hand, the position according to which no institutional form of ombudsman is *a priori* an undoubted guarantor of independence and freedom of decision seems quite well-founded.[48] This is all the more so since the manner of election or appointment of the ombudsman is still socio-culturally conditioned, and does not have to, *eo ispo*, imply the inevitable existence of the independence of this institution.[49]

Based on the arguments presented, we consider the position which would deny the executive model of the ombudsman the name and dignity of that institution to be too exclusive. Therefore, considering the subject of the paper, the comparative analysis took into account both the parliamentary (Republic of Croatia) and some ombudsmen who belong to the executive model (Kingdom of Sweden). An additional reason why these two countries were selected for comparative analysis lies in the fact that they has appointed its own ombudsmen as the body in charge of promoting equality in accordance with Art. 13 of the EU Racial Equality Directive,[50] but through a different and even opposite organizational approach.

In the context of intersectional discrimination against women with disabilities, the activities of equality bodies have proven to be extremely important and useful, according to research.[51] Moreover, within the so-called institutionalization of intersectionality in the European framework are increasingly present attitudes that prefer a single or unified body for equality, with competence on all grounds and in all social areas, as an effective mechanism in the combat against intersectional discrimination.[52]

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44 Cited according Dragaš Denković, "Medijator – francuski ombudsman", *Anali Pravnog fakulteta u Beogradu* Vol. 31, No. 1–4/1983, 266.

45 See Davinić, *op. cit.,* 64.

46 Dragan Milkov, "Specijalizovani ombudsmani", *Zbornik radova Pravnog fakulteta u Novom Sadu* Vol. 41, br. 3/2007, 112,113.

47 Brian Elwood, "How to harmonize general ombudsman activities with those related to specialized ombudsman", *The International Ombudsman Yearbook* (1999), 203–205.

48 Ayeni, *op. cit.,* 17.

49 For more on the *pro et contra* views of executive ombudsman models, see Davinić, *op. cit.,* 64–69.

50 Horvat, *op. cit.,* 1475.

51 Beker, *op. cit.,* 540

52 Kantola and Nousianen, *op. cit.,* 460, 470, as well as Isabelle Chopin and Catharina Germaine, *A comparative analysis of non discrimination law in Europe 2019* (2020), 105.

1. Kingdom of Sweden

The Kingdom of Sweden was a pioneer country when it comes to the institutions of the modern ombudsman. At the same time, Sweden was the country where single-purpose ombudsmen appeared for the first time, through the constitution of a single-purpose ombudsman for military personnel in 1915, after the special need to protect their rights arose.[53] However, in 1968, the parliamentary and single-purpose military ombudsmen were integrated, laying the foundations for the current organizational structure of the parliamentary ombudsman institution in Sweden. Today, this structure consists of four ombudsmen elected in Parliament, who form a single institution, and one of whom is the main parliamentary ombudsman with the task of coordinating the work of the entire institution, and each of the four parliamentary ombudsmen has separate areas of responsibility based on social life. and controlled institutions, instead of categories of vulnerable persons.[54]

In addition to the development of the parliamentary ombudsman institution presented at the end of the 20th century, there were numerous single-purpose ombudsmen in Sweden with a very narrowly defined field of activity (ethnic discrimination, disability, sexual discrimination, press, consumer protection).[55] Among them, the Ombudsman for Equal Opportunities was of special importance, due to his competence in matters of discrimination related to gender-based work, which was a consequence of the legal solution according to which gender equality was protected only in the field of labor market. The significant number of proceedings conducted by this Ombudsman during the 1990s indicated the justification for its introduction into the Swedish legal system,[56] but was also an indication of the need for organizational changes that followed.

Although the practice of these single-purpose ombudsmen in cases of potential intersectional discrimination was very scarce, one case in which the Ombudsman for Ethnic Discrimination acted, concerning discrimination based on sex and ethnicity, was brought before the Labor Court. Although the court found no discrimination in this case, the previous question was whether the Ombudsman for Ethnic Discrimination was competent to address the court at all, ie. whether he had active legitimacy. The court answered this question in the affirmative, considering that there were no legal obstacles for the Ombudsman for Ethnic Discrimination to address the court, but, no less important, he pointed out that in this particular case cooperation

53 Milkov, *op. cit.,* 114.

54 Claes Eklundh, "Švedski parlamentarni ombudsmani", *Zbornik radova Pravnog fakulteta u Novom Sadu*, No. 3–4/1990, 8–11; Milkov, *op. cit*., 102., as well as Dejan Milenković, „Uporedni pregled institucije Ombudsmana" in Stevan Lilić, Dejan Milenković, Biljana Kovačević-Vučo (eds.) *Ombudsman– međunarodni dokumenti, uporedno pravo, zakonodavstvo i praksa* (2002a), 45–49.

55 Milkov, *op. cit.,* 116.

56 Dejan Milenković, „Ostale specijalne vrste ombudsmana" in Stevan Lilić, Dejan Milenković, Biljana Kovačević-Vučo (eds.) *Ombudsman– međunarodni dokumenti, uporedno pravo, zakonodavstvo i praksa* (2002b), 232–234.

between Ombudsman for Ethnic Discrimination and Ombudsman for Equal Opportunities was necessary.[57]

In the context of the position of women with disabilities, it is necessary to emphasize the role that the Office of the Ombudsman for Persons with Disabilities, established in the mid-90s of the 20th century, played in solving their problems, since that special emphasis on the problems of women with special needs was put in the work of this single-purpose ombudsman.[58] The reason why the work of this single-purpose ombudsman focuses on the situation of particularly vulnerable groups such as women with disabilities, at a time when the concept of intersectional discrimination is just beginning to break through among scholars, may lie in the fact that the Nordic countries, especially Sweden among them, were pioneers in the concept of gender equality and its institutionalization.[59] Moreover, Sweden was among the top five countries in the world in terms of a quantified representation of equality between women and men.[60]

At the beginning of 21st century, reform processes of harmonization of anti-discrimination legislation and integration of bodies for its implementation has began in the Scandinavian countries, and this process was the most complete in Sweden.[61] From the documents of the Swedish committee preparing the reform, it can be seen that the intention was not so much harmonization as codification of fragmented anti-discrimination legislation into one, more efficient and comprehensive act, so that protection would be as similar as possible for different grounds of discrimination.[62] Also, the Swedish committee mentioned intersectionality as one of the ten arguments in favour of the integration of single-purpose ombudsmen into one institution, which was also proposed as part of the reform, believing that such an institution could improve the situation of people who suffered multiple discrimination. It was stated actually, as one of the examples, that a woman with a disability in that case would no longer have to choose an ombudsman to whom she would like to submit a complaint.[63] The epilogue of the reform was a

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57 Cited according to Ann Numhauser-Henning, Sweden, in Dagmar Scheik, Susanne Burri (eds.) *Multiple Discrimination in EU Law. Opportunities for legal responses to intersectional gender discrimination* (2009), 121.

58 Milenković (2002b), *op. cit.*, 231.

59 Anette Borchorst, Freidenvall Lenita, Johanna Kantola, Liza Reisel and Mari Teigen, "Institutionalizing Intersectionality in the Nordic Countries: Anti-Discrimination and Equality in Denmark, Finland, Norway, and Sweden" in A. Krizsan, H. Skjeie & J. Squires (eds.) *Institutionalizing Intersectionality: The Changing Nature of European Equality Regimes* (2012), 60.

60 Liza Reisel, "Legal Harmonization and Intersectionality in Swedish and Norwegian Anti-discrimination Reform", *Social Politics: International Studies in Gender, State & Society*, Vol. 21, No. 2/2014, 221.

61 Borchorst, Lenita, Kantola, Reisel and Teigen, *op. cit.,* 70.

62 Reisel, *op. cit.*, 232–233.

63 *Ibid.,* 234–238. On the other hand, the Gender Equality Ombudsman pointed out that he did not see how an intersectional perspective could prove useful when it came to the proposed integration. (*Ibid*). The Gender Equality Ombudsman thus articulated the fear

new, unified law on discrimination and the integration of four single-purpose ombudsmen into one institution of the Equality Ombudsman. However, in this 2009 Act, unlike the Norwegian solution, there is no provision that would explicitly determine the competence of the Equality Ombudsman in cases of intersectional discrimination, which, according to some authors, is one of the necessary preconditions for effective combat against intersectional discrimination.[64] While such an explicit legal provision would undoubtedly be helpful, its absence does not necessarily mean a significant reduction in the effectiveness of the fight against intersectional discrimination. First of all, because the competence to act in cases when the allegation of discrimination was based on several grounds was not denied to the ombudsmen before integration, so a fortiori it could not be renounced even after the establishment of the Equality Ombudsman. Also, although it has not found its place in the Act itself, intersectional discrimination and the combat against it have been highlighted in expert reports in the reform process as an important argument in favor of unifying legislation.[65] Finally, some authors are of the opinion that the harmonization of Swedish legislation in the field of discrimination came as a consequence of the integration of single-purpose ombudsmen into one institution, and not *vice-versa*.[66] If such a position is accepted, the importance of intersectionality is even greater, since overcoming doubts about the competence of single-purpose ombudsmen in cases of intersectional discrimination was, perhaps, the reason for the integration of specialized into a single ombudsman for equality.

The impression after a year of work of the integrated Ombudsman for Equality, appointed by the executive, proved to be overwhelmingly positive, and the effectiveness in dealing with multiple discrimination was emphasized (through a noticeable increase in the number of complaints by Roma women).[67] However, the practice related to this problem did not become too widespread,in the following period, and such a trend, at least when it comes to intersectional discrimination based on gender and disability, has not changed significantly in the past few years. Namely, in the Report on Statistics of Complaints to the Equality Ombudsman, which was prepared by the Office of the Equality Ombudsman for the period 2015-2019. it can be noticed that cases of discrimination on the grounds of gender and disability do not exceed one-digit percentage within the total number of applications

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of integration of the ombudsman and resistance to it, which was widely present among gender equality activists. At this point, however, it should be pointed out that it is recognized in theory that the reason for resisting integration, although declaratively based on the interest of particularly vulnerable groups, may often lie in the desire to maintain their own status and position. Richard Carver, "One NHRI or Many? How Many Institutitions Does it Take to Protect Human Rights?– Lessons from the European Experience", *Journal of Human Rights Practice* Vol. 3, No. 1/2011, 3.

64 Borchorst, Lenita, Kantola, Reisel and Teigen, *op. cit*., 78.

65 Reisel, *op. cit.*, 234.

66 Borchorst, Lenita, Kantola, Reisel and Teigen, *op. cit.,* 82.

67 Richard Carver, Srdjan Dvornik and Denis Redžepagić, *The Rationalization of the Croatian Human Rights Protection System* (2010), 22.

in this period, which, according to the Report, was 9364. The report states that out of a total of 3,631 complaints submitted due to discrimination on the grounds of disability, only 4% contained gender as a basis for discrimination, while out of 1,711 complaints regarding discrimination based on sex and gender, only 8% cited disability as grounds for discrimination too.[68] If we take into account the understandable barrier stated in the Report on the impossibility to statistically express how many within this percentage there were complaints related to multiple, compound and how many to intersectional discrimination stricto sensu, it can be assumed that the percentage of complaints due to intersectional discrimination was even lower.

Despite the underdeveloped practice, the advantage of the integrated over separate organizational approaches in the ombudsman's work on intersectional discrimination may be confirmed by the principle followed by the Swedish Ombudsman for Equality in cases where the complaint does not clearly state the grounds for discrimination. In such situations, the Equality Ombudsman considers that the complaint of alleged discrimination applies to all those grounds that may be relevant in a particular case.[69] Such a proactive and contextual approach simply would not be possible if the complaint was submitted to separate single-purpose ombudsmen for sexual or disability discrimination. Moreover, by applying this principle, the Equality Ombudsman will help to improve the statistics of the share of complaints related to intersectional discrimination in the total number of complaints, but also to find a more adequate answer to the problem of comparators in intersectional discrimination.

2. Republic of Croatia

Just as Sweden in global terms, Croatia is a pioneer among the countries of the former Yugoslavia. Namely, in Croatia, the institution of the ombudsman (called *Pučki pravobranitelj*), was introduced by the 1991 Constitution and the 1992 Law.[70] In addition to this parliamentary general purpose ombudsman, there is an extensive network of single purpose ombudsmen in the Croatian legal system (for gender equality, children and persons with disabilities).[71] The adoption of the new Anti-Discrimination Law has expanded the powers of general and single purpose ombudsmen, as all four institutions have been inaugurated as equality bodies under the EU Racial Discrimination Directive.[72] However, the competence of the general purpose ombudsman is defined as the broadest, since Articles 12 and 13 of this Law stipulate that single purpose ombudsmen perform certain tasks if determined

68 Diskrimineringsombudsmannen, *Diskriminering 2015–2019 Statistik över anmälningar som har inkommit till DO* (2020), 26–28.

69 *Ibid.*

70 Milenković (2002a) *op. cit*., 117.

71 All of them are being elected in the parliament, while the government of Croatia has a certain role in the election of the ombudsman for persons with disabilities and gender equality.

72 Horvat, *op. cit*., 1454.

by a special law, except for those tasks related to the collection and statistical analysis of discrimination cases, submitting regular and and extraordinary reports on cases of discrimination to Parliament, conducting research and giving opinions and recommendations, and proposing appropriate legal and strategic solutions to the Government.[73]

What is still correctly pointed out in theory as the main problem of the organizational scheme of the ombudsman institution in Croatia is the absence of legal regulation of the case of positive conflict of jurisdiction, which is especially important when it comes to multiple and intersectional discrimination. Moreover, they were pointed out as one of the main motives for pleading for unification into one ombudsman institution. In case single purpose ombudsmen remain, dealing with intersectional discrimination would recquire adopting complicated guidelines on cooperation, depending on the specific grounds of discrimination, while placing cases of intersectional discrimination in the competence of the general purpose ombudsman (*Pučki pravobranitelj*) would necessarily require his close cooperation with narrow professional services, which would also raise the question of the existence of single purpose ombudsmen.[74] The existence of numerous single purpose ombudsmen, with the inevitable impression of complications among citizens due to guidelines for the distribution of competencies, in the context of intersectional discrimination would reopen the problem of choosing a comparator when submitting a complaint.

Since anti-discrimination legislation does not solve the problem of potential positive conflict of jurisdiction, general and single purpose ombudsmen signed an Agreement on Interinstitutional Cooperation in 2013, which provides for mutual notification of cases in which there is a suspicion of overlapping or simultaneous jurisdiction of two or more institution, and the need to exchange information and cooperate in resolving such cases.[75] In addition to the fact that the question of the vague legal nature of this agreement could possibly be raised, it has been criticized in theory with the claim that it does not solve the problem of cases of intersectional discrimination. This is because the division of competencies on the grounds of discrimination prevents the accumulation of coherent experience within one institution. Besides, it was pointed out that in the period from the signing of the agreement until 2018, there was no joint case management by the signatories of the Agreement.[76] The proposal that, regardless of the signed agreement, in cases of intersectional discrimination against women, competent institution is one with adequate experience and ability to see all the complexity of such cases,[77] seems to us too legally imprecise.

73 Zakon o suzbijanju diskriminacije, *Narodne novine* No. 85/08, 112/12.

74 Horvat, *op. cit*., 1477.

75 Sporazum o međuinstitucionalnoj suradnji Pučkog i specijaliziranih pravobranitelja od 10.12.2013. godine, *http://ombudsman.hr/attachments/article/360/Sporazum%20o%20međuinstitucionalnoj%20suradnji.pdf.*

76 Beker, *op. cit.,* 510, 541.

77 *Ibid.,* 241.

Another problem related to the issue of intersectional discrimination is the absence of conceptual differentiation in Croatian anti-discrimination legislation. Unlike the recent amendments in Serbia, the Croatian Anti-Discrimination Law does not distinguish between different forms of intersectional discrimination, but in Art. 6 states that multiple discrimination, as discrimination against a person on several grounds, is one of the more severe forms of discrimination. One of the consequences of such an undifferentiated legal approach to the complex problem of intersectional discrimination is the non-withdrawal of the difference between intersectional and multiple discrimination in the work of the general purpose ombudsman. This logically entails the impossibility of obtaining statistical data on the number of complaints in which the complainant referred to something that could be characterized as intersectional discrimination.[78] What, however, can be read from the statistical data when it comes to complaints related to multiple, and thus certainly in one unknown part and intersectional discrimination, is the avoidance of special and turning primarily to the general purpose Ombudsman, which can be additional signal to the need for the integration of single-purpose ombudsmen in Croatia. Namely, according to the general purpose Ombudsman's report, in 2019, out of a total of 77 on the basis of multiple discrimination, 75 complaints were sent to the general purpose Ombudsman, and only two to the Ombudsman for Children, while the Ombudsmen for Persons with Disabilities and Gender Equality did not receive any complaints on the basis of multiple discrimination. In this context, it is valuable to mention that the Ombudsmen for Persons with Disabilities and Gender Equality in 2019 were addressed by 28, i.e., 308 women.[79] Even in 2020, out of 319 women who addressed the Gender Equality Ombudsman, none of them did so due to multiple discrimination. In 2020, there were 2 complaints before the Ombudsman for Children addressing multiple discrimination, while there were 3 such complaints before the Ombudsman for Persons with Disabilities. The overwhelming majority of such complaints, as many as 54 of them, were submitted to the general purpose Ombudsman (*Pučki pravobranitelj*) in 2020.[80]

The low percentage of citizens addressing single-purpose ombudsmen in cases of multiple discrimination, which may be conditioned by confusion in determining comparators, as well as the insufficiently resolved problem of positive conflict of competences clearly speak in favor of the need for organizational reform of the ombudsman institution in Croatia. In response to the perceived need, it was proposed to either merge into one institution, or at least increase the functional coordination of the existing ones.[81] Between these two possibilities, in the context of intersectional discrimination, we consider full integration as a more adequate solution. If any future reform really goes in that direction, we should not be surprised by the resistance of single-purpose ombudsmen. Such resistance, as the Swedish experience

78 *Ibid.,* 245.

79 Izvješće pučke pravobraniteljice za 2019, Pučki pravobranitelj, Zagreb 2020, 8.

80 Izvješće pučke pravobraniteljice za 2020, Pučki pravobranitelj, Zagreb 2021, 10.

81 Carver, *op. cit.,* 7. as well as Carver, Dvornik and Redžepagić, *op. cit.,* 50.

teaches us, would be partly due to a legitimate suspicion that a unified approach could cover all vulnerable social groups and problems, but it would not be completely devoid of certain much more prosaic motives.

IV LEGAL FRAMEWORK AND PRACTICE OF OMBUDSMAN IN THE REPUBLIC OF SERBIA

In the Republic of Serbia, unlike Croatia, there is no such a wide and extensive network of ombudsman institutions. In addition to the Protector of Citizens (*Zaštitnik građana*), as a general purpose ombudsman, there is also the institution of the Commissioner for Protection of Equality (hereinafter the Commissioner), established by the Law on Prohibition of Discrimination, whose role is to be a specialized ombudsman exclusively in charge of one human right – the right to equality.[82] Although the position of the Commissioner is (still) not regulated by Constitution, he is in all his characteristics a single purpose ombudsman, whose efficiency, just like that of the general purpose ombudsman, should be based on a mixture of personal and institutional authority.[83] Also, the efforts to regulate the mutual relations and actions of the Protector of Citizens and the Commissioner with an agreement similar to the one in Croatia did not bear fruit, but that fact does not represent an obstacle to resolving the problem of a positive conflict of jurisdiction. This is because in practice the Protector of Citizens reacts to complaints for violation of rights which the Commissioner protect with his scope of competences only after citizens use the opportunity to address the Commissioner first, unless there are special circumstances provided by Art. 28 par. 9 of the Law on the Protector of Citizens.[84] This practice undoubtedly contributes to avoiding the problem of conflicts of jurisdiction, and to strengthening the Commissioner as a central institution for protection against discrimination. However, the legal basis for such conduct is not entirely indisputable. Namely, it is based on Art. 28 of the Law on the Protector of Citizens, which determines the protection of rights before the Protector of Citizens as subsidiary in relation to legal proceedings before administrative bodies. The Commissioner, however, is not an administrative body, but a control body that enjoys independence.[85] Analogue treatment of the Commissioner with the administrative body could be overcome by introducing a provision on cooperation of the Protector of Citizens with independent control bodies in the section of the law in which

82 Nevena Petrušić and Aleksandar Molnar, "The Status and Correlations Between the Ombudsman and the Commissioner for the Protection of Equality in the Serbian Legal System" in Miroslav Lazić and Saša Knežević (eds.) *Legal, Social and Political Control in National, International and EU Law* (2016), 86.

83 Marko Davinić, *Nezavisna kontrolna tela u Republici Srbiji* (2018), 275.

84 Redovan godišnji izveštaj Zaštitnika građana za 2020. godinu, 126.

85 Of lesser importance is the fact that the Commissioner's independence is in theory interpreted as just an explanation of his organizational autonomy, and not the systemic independence that the Protector of Citizens enjoys under the Constitution. More about the quasi-constitutional position of the Commissioner and proposals for amending the constitutional text on this issue see Petrušić, Molnar, *op. cit,*. 83.

the same was done when it comes to the regional and local ombudsmen (Articles 40-41 of mentioned Law). In addition to the mentioned practice, as a very positive example of mutual cooperation between the Protector of Citizens and the Commissioner, we should point out the case of joint request for assessing constitutionality and legality of some provisions of the Law on Determining the Maximum Number of Employees in the Public Sector before Constitutional Court. Disputed provision meant sex discrimination against women employed in the public sector, compared both to men in the public sector and women outside the public sector.[86]

How can the described relationship between the Protector of Citizens and the Commissioner affect the position of women with disabilities who are victims of intersectional discrimination? In answering this question, the emphasis should be further shifted to examining the activities of the Commissioner, since this institution is, on behalf of the Republic of Serbia, a member of the EQUINET organization that brings together European equality bodies. Also, the competence of the Commissioner is very broad, so that it covers all grounds for discrimination provided for in Art. 2 of Law on Prohibition of Discrimination.

The new Government Strategy for Gender Equality for the period 2021-2030 points out that the problem of lack of complete data on the challenges faced by particularly vulnerable groups affected by multiple discrimination, including women with disabilities, has not yet been eliminated.[87] Another strategic document went a step further with the assessment that by not establishing a mechanism for monitoring and responding to cases of multiple discrimination, the system remains without an intersectoral mechanism for monitoring these cases, which could be useful for gaining insight into the phenomenon and eliminating its causes and consequences.[88]

From the regular reports of the Commissioner in previous years, we can see a trend of increasing the number of complaints addressing to multiple discrimination (116 of them in 2019, and as many as 177, or almost a quarter of the total number of complaints filed in 2020). However, both reports point out that such information should be taken with a grain of salt because it often happens that complainants list more personal characteristics, especially when they are not sure which personal characteristic was the exact ground for discrimination. Thus, it does not necessarily mean that in each of the complaints there was indeed discrimination on the basis of several personal characteristics.[89] The first special report published by the Commissioner since its establishment, which referred to discrimination against persons with disabilities,

86 Davinić (2018), *op. cit.,* 119.

87 Nacionalna strategija za rodnu ravnopravnost za period 2021–2030. sa akcionim planom za 2021–2023, 61, 100,

88 Polazne osnove za izradu nove strategije prevencije i zaštite od diskriminacije za period 2020–2025, 25.

89 Redovni godišnji izveštaj Poverenika za zaštitu ravnopravnosti za 2019 godinu, 250; Redovni godišnji izveštaj Poverenika za zaštitu ravnopravnosti za 2020 godinu, 212.

emphasized that the patriarchal and traditional character of Serbian society greatly complicates the position of women with disabilities, because they are denied the possibility of *"fulfilling traditionally imposed social roles"*. Also, the exposure to violence and the denial of access to health, especially gynaecological services, were singled out as particularly significant problems that this vulnerable group faces with.[90] The Commissioner's Special Report on Discrimination against Women points out that violence against women with disabilities is very widespread, and that women with intellectual and then various forms of physical disability are in the worst position. Also, as another aspect of the difficult position of women with disabilities, the problem of full deprivation of legal capacity, ie very rare use of the institute of partial deprivation of legal capacity, was noticed. The Commissioner saw the reason for this practice in the persistence in the medical approach to disability, which in the international context has been largely replaced by the social approach, which views disability primarily as a socially conditioned problem.[91] One example from the practice of the Commissioner, in which the discriminatory treatment of the Center for Social Work in Rakovica was established, can show very vividly how severe the consequences of deprivation of legal capacity can cause to women with disabilities. Namely, temporary guardian was appointed for a woman in the procedure of deprivation of legal capacity, as well as for her minor child who, based on a temporary conclusion on providing accommodation, should have been placed in the Center for Protection of Infants, Children and Youth in Belgrade. The Center based this decision on the position that it is a person whose "*... intellectual functioning is at the level of mild mental retardation*", and that due to "*..infantility and lack of intellectual capacity for counseling work is not able to independently care for her minor child "*. However, the Commissioner in his Opinion established the existence of discrimination, assessing that allegations of this type have no objective basis.[92] Although in his Opinion the Commissioner did not explicitly address this possibility, in theory this case is characterized as an example of multiple discrimination against women with disabilities.[93]

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90 Redovni godišnji izveštaj Poverenika za zaštitu ravnopravnosti za 2020 godinu, 58–59.

91 Poseban izveštaj o diskriminaciji žena iz 2015. godine, 172. More on the social approach to the phenomenon of disability and its advantages over the medical one, see: Emmet, Alant, *op. cit.,* 446.

92 Mišljenje Poverenika br. 07-00-290/2014-02.

93 Kosana Beker, „Zaštita višestruko diskriminisanih žena, majke sa invaliditetom u sistemu socijalne zaštite: studije slučaja iz prakse Poverenika za zaštitu ravnopravnosti", in Miomir Kostić, Darko Dimovski, Zdravko Grujić (eds.) *Deca i mladi kao deo sistema: zaštita ili sekundardna traumatizacija*, (2016), 173–174. In one another case concerning the refusal of the Clinic for Gynecology of the Central Committee of Serbia to schedule a gynecological examination for an elderly disabled woman who was deprived of legal capacity, the Commissioner also failed to unequivocally establish the existence of multiple discrimination in the specific case. Here, however, some progress was made by the fact that the Opinion specifically pointed out the worse position of women with disabilities "*...who face many obstacles when providing health care and are often exposed to the risk of multiple discrimination*" Mišljenje Poverenika br. 07-00-437/2014-02.

The same reluctance of the Commissioner to investigate whether there were elements of multiple discrimination against women with disabilities is also noticeable in some other cases.One of them is the determination of the discriminatory behavior of the Commission for the assessment of work ability and the possibility of employment or maintaining employment of persons with disabilities. The Commission thus denied the disabled woman the right to work by determining her the status of a disabled person who cannot maintain employment under any conditions, despite the fact that the complainant previously had work experience.[94] In another similar case, members of the Commission grossly insulted the complainant with inappropriate questions and humiliating approaches.[95] In both cases, the Commissioner pointed out that the actions and decisions of the Commission were based on stereotypes towards people with disabilities, but he did not dare to take a step further, so the question of the existence of stereotypes towards women with disabilities, unfortunately, remained unanswered. Moreover, this action of the Commission can be considered questionable from the point of view of constitutionality, since the Constitution of the Republic of Serbia in Art. 60 st. 5 prescribes a special constitutional guarantee of protection at work for youth, *women* as well as *persons with disabilities*![96] Nevertheless, in another case, the Commissioner issued an Opinion in which indications of a more determined consideration of multiple and intersectional discrimination against women with disabilities can be seen. It is about a complaint submitted by two civil society organizations, adressing discrimination based on gender and disability which occured in the video shown on a public service as part of a humanitarian campaign. The controversial moment in the video was the line spoken by the boy about how, since she became a disabled person, her mother cannot take care of him anymore. In their complaint to the Commissioner, the applicants pointed out that citing illness and gender as grounds for neglecting children represents discrimination against women and people with health problems. What should be especially emphasized in connection with this case is that in the explanation of the Opinion, the Commissioner pointed out that special attention should be paid to the position of women with disabilities who are mothers or want to become mothers, and whose additional problem is their "*social invisibility*" In addition, in the explanation significant attention is devoted to the analysis of stereotype according which women are unable to fulfill the role of mothers due to disability, and that the degree of disability of a woman in a patriarchal society is measured by this very fact. The commissioner considered it "*inadmissible that the public portrayal of mothers with disabilities has been placed in the context of their inability to take care of*

94 Mišljenje Poverenika br. 685/2011.

95 Mišljenje Poverenika br. 07-00-484/2017-02.

96 For more on the constitutional guarantee of special protection at work, see Jovana Misailović, "Posebna radnopravna zaštita materinstva", *Zbornik radova Pravnog fakulteta Niš*, Vol. 59, No. 86, 2020, 238–240; Jovana Misailović, "Zaštita žena od otkaza ugovora o radu" in Dejan Mirović (ed.) *Pravo u funkciji razvoja društva* (2019), 706.; as well as Jovana Rajić Ćalić, "Posebna zaštita žene za vreme trudnoće, porodiljskog odsustva i odsustva radi nege deteta u Srbiji i u uporednom pravu", *Radno i socijalno pravo*, Vol. 23, No. 1/2019, 339–342.

their children".[97] Although in this particular case, intersectional discrimination was still treated indirectly, this case can really be considered as a turning point and a signpost towards a bolder approach in the coming period. Therefore, in theory, the standpoint of the Commissioner in this case is rightly stand out for its contribution to increasing public awareness of the multiple marginalization of women with disabilities.[98]

Certainly, the Commissioner's reluctance to deal more decisively with issues of multiple, and especially intersectional discrimination, which is much more challenging to determine, was also greatly favored by the recent very unclear legislative framework of this more severe form of discrimination. In that sense, the amendments to the anti-discrimination legislation from 2021, which for the first time precisely defined the difference between multiple and intersectional discrimination, can have, along with the existing very adequate organizational scheme and competences of the ombudsman institution, especially that single purpose one, a beneficial effect on the future more proactive and successful resolution of this problem women with disabilities are facing with in the Republic of Serbia. Also, as another potentially very effective tool available to the Commissioner in strengthening awareness of the complexity of the problem of intersectional discrimination of women with disabilities, is the institute of strategic litigation. Strategic litigation is a special type of litigation, by which the Commissioner is actively legitimized to file a lawsuit, with the written consent of the person to whom the discriminatory act refers, if he deems the matter to be of strategic or broader social and public interest.[99] Some scholars also points out that an important advantage of strategic litigation is that it can be used as a lever to influence judicial practice and public policies in improving the position of discriminated groups, and that it therefore equally protects discriminated persons and promotes equality.[100] To put it differently, strategic litigation as an instrument achieves equally effective both reactive and preventive action of the ombudsman institution. If we take into account the most common characteristics that in comparative law determine the motivation to initiate strategic litigation, it will quite obvious that the problem of intersectional discrimination meets most of these alternative criteria. Some of those criteria are the potential of a legal issue to later serve for dealing with a social problem or a legal gap, the possibility of a reversal or a more far-reaching effect on courts practice, understanding of the problem in the wider media and public sphere, and above all that, the Commissioner in Serbia in his current practice also took into account whether

97 Mišljenje Poverenika br. 07-00-354/2014-02.

98 Beker (2019), *op. cit.*, 455.

99 Davinić (2018), *op. cit.*, 271.

100 Brankica Janković, Ivana Krstić, „Značaj i uloga strateških parnica u zaštiti od diskriminacije u Republici Srbiji", in *Jačanje kapaciteta institucije ombudsmana za ljudska prava u borbi protiv diskriminacije – Zbornik radova sa konferencije 'Razmjena najboljih iskustava u rješavanju kršenja ljudskih prava sa posebnim fokusom na borbu protiv diskriminacije'* (2018), 80.

discrimination was carried out against particularly vulnerable groups.[101] It is out of question that this last criterion specifically and directly refers to the position of victims of multiple and intersectional discrimination, including women with disabilities.

V CONCLUSION

Even after almost three decades since it was introduced into scientific discourse, intersectional discrimination is not devoid of certain doubts, both theoretical and practical. In the conceptual recognition of this specific form of discrimination on two or more grounds, the criterion of the manner of interaction of personal characteristics that appear as grounds for discrimination proved to be very useful. In intersectional discrimination in the narrower sense, with all the difficulty of its clear recognition in practice, personal characteristics that appear as the basis of discrimination in this case act permeative and inseparable. It is very commendable that the Serbian anti-discrimination legislation has recently adopted this criterion and thus laid the foundations for better recognition and resolution of cases of intersectional discrimination. Another important problem, equally important both for defining intersectional discrimination and combating it in practice, is that the issue of determining the comparator is far from an unambiguous and definitive solution. It seems, however, that until the obsolescence of determining comparators in cases of intersectional discrimination becomes generally accepted, the most adequate solution to this problem is offered by contextual comparison, which has emerged from case law.

What should be the organizational response of the ombudsman institution to the complex challenge of intersectional discrimination, or, using Crenshaw 's metaphor, how many traffic wardens are enough to prevent accidents at a risky intersection, is essentially a functional question. A key argument in favor of more single purpose ombudsmen is based on easier identification with the specific needs of vulnerable groups, whose members place the most trust in institutions whose staff can show empathy and understanding of their particular situation. However, even if we leave aside the prosaicness of other motives that can be found in the practice of single purpose ombudsmen,

101 *Ibid.*, 86–87. Moreover, in 2017, the Commissioner filed a strategic lawsuit specifically regarding the discrimination of a female person based on her health condition and disability, whose employer canceled her employment contract, after she was diagnosed with leukemia. In the statement on the complaint, the defendant employer pointed out that there is no space for employees who have health problems to perform their work. The High Court accepted the claim, but the judgment was changed by the Court of Appeal. The procedure for revising this verdict was not completed until the submission of the Commissioner's regular annual report for 2020 (see Redovni godišnji izveštaj Poverenika za zaštitu ravnopravnosti za 2017 godinu, 170. and Izveštaj za 2020 godinu, 48). Pending the final outcome of this strategic litigation, its initiation alone may signal the use of this procedural mechanism by the Commissioner in other cases where multiple, and especially intersectional, discrimination is even more noticeable.

such an approach to the back door inevitably introduces an implicit hierarchy of rights and needs of vulnerable groups.[102] It is practically impossible for every vulnerable group to get an institution that would be entirely dedicated to it, and then the position on the degree of vulnerability in a society that requires the establishment of an ombudsman institution inevitably depends on the discretion of the authorities, which can sometimes be arbitrary. The best example of this is Croatia, where, despite a very wide network of single purpose ombudsmen, the most vulnerable social group – national minorities – has never received its own single purpose ombudsman. The porosity of the argument about a better focus on vulnerable groups by more single purpose ombudsmen is most evident in the example of intersectional discrimination. Namely, if such an argument is consistently accepted to its extreme logical limits, then, in the context of intersectional discrimination, the door would be opened to further and unbridled diversification of the ombudsman institution. What makes victims of intersectional discrimination so particularly vulnerable is the inability to identify their experience with vulnerable groups with whom, in a wider concentric circle, they share only some of their personal characteristics. Thus, women with disabilities cannot be fully identified only with women, but also only with the experience of persons with disabilities. If the specialization of the ombudsman institution is a solution for the special experiences of certain vulnerable categories, then it would have to continue to include those groups that are invisible and additionally discriminated within already marginalized social categories. We are witnesses that, fortunately, such a situation does not seem to happen due to very practical reasons.

Metaphorically speaking, while too many traffic wardens at one intersection, due to uneven signalization and / or poor distribution of work, can only increase the risk of accidents, such a danger does not exist if there is only one traffic warden at the intersection. Therefore, data collection and coherent practice in dealing with different grounds of discrimination within one ombudsman institution, which certainly does not mean the impossibility of a quality and empathetic approach to each case separately, seem, especially after the Swedish experience, as a significant advantage of an integrated institution over more specialized ones. Such an integrated institution would, without a doubt, face the multi-layered problem of intersectional discrimination more easily and efficiently, since there would be no issues of disputed jurisdiction, but also no difficulties in determining comparators.

On the other hand, one should be aware of the fact that in some countries of Southeast Europe, the establishment of a single body that would cover several grounds of discrimination was the result of utilitarian reasons, and not the need to really solve the problem of intersectional discrimination.[103] When it comes to Serbia, that was not the case, but only recent legal changes that clarify the concept of intersectional discrimination, with the previously broad

102 Carver, *op. cit*., 8–11.

103 Kantola and Nousianen, *op. cit.,* 472.

competence of the Commissioner, and the practice of subsidiary actions of the Protector of Citizens in cases of discrimination, have laid a solid foundation for clearer strategy and addressing intersectional discrimination. Whether the Commissioner, partly by using the institute of strategic litigation, will succeed in that, will be shown by the practice in the following period.

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INTERSEKCIJSKA DISKRIMINACIJA ŽENA I DEVOJAKA SA INVALIDITETOM I INSTITUCIJA OMBUDSMANA: SAOBRAĆAJAC NA RASKRSNICI KRENŠOOVE

Apstrakt

Intersekcijska diskriminacija, kao još uvek mladi, i preovlađujuće teorijski koncept ne prestaje da predstavlja izazov klasičnom poimanju diskriminacije, i na njemu utemeljenom antidiskriminacijskom zakonodavstvu i sudskoj praksi. Stoga će najpre biti razmotreno pitanje koje se odnosi na pojmovno razgraničenje različitih oblika diskriminacije do koje dolazi po dva ili više osnova. U tu svrhu, služeći se Makonenovom klasifikacijom, pod intersekcijskom diskriminacijom podrazumevamo njen pojam u užem smislu. Takođe, biće razmotren i problem odabira uporednika, kroz prikaz različitih modela prisutnih u uporednoj sudskoj i ustavnosudskoj praksi, budući da ovaj problem ima i svoj direktni uticaj na to kako različito organizovani ombudsmani

mogu odgovoriti na izazov intersekcijske diskriminacije. Uloga ombudsmana u borbi protiv intersekcijske diskriminacije žena sa invaliditetom pokazuje se kao veoma značajna, posebno imajući u vidu prednost koju sa sobom donose fleksibilnost i široki spektar delovanja ove institucije. Stoga se u radu razmatraju različite organizacione alternative kada je u pitanju odgovor institucije ombudsmana na ovaj problem. Osnovna hipoteza je da višeslojnosti izazova intersekcijske diskriminacije više odgovara jedna, integrisana institucija, koja pokriva sve propisane osnove diskriminacije. Do ovakvog zaključka došlo se nakon razmatranja problema određenja uporednika, ali i uporednopravne analize rešenja u Švedskoj i Hrvatskoj. Naposletku, u radu će biti prikazani srpski zakonodavni okvir i slučajevi iz prakse Poverenika za zaštitu ravnopravnosti, kao (krovnog) specijalizovanog ombudsmana u oblasti diskriminacije.

Ključne reči: *Intersekcionalna diskriminacija; Žene; Osobe sa invaliditetom; Ombudsman; Specijalizovani ombudsmani.*

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COURT ACCESS RIGHTS OF PERSONS WITH DISABILITIES IN THE LEGISLATION OF THE REPUBLIC OF SERBIA

Abstract

People with disabilities, especially women, experience intersectional discrimination, which places them at higher risk of gender-based violence, sexual abuse, neglect, maltreatment and exploitation. They occupy extreme marginalized position in our society, that make them more vulnerable to violence and abuse than other women. They also experience inequality in hiring, promotion rates and payment for work. Therefore, persons with disabilities often find themselves marginalized by society and by justice systems. It is of high importance for Serbian legislation to give every person with disabilities the right to equal opportunities, in particular the right to judicial protection. Exercising the right to equality and non-discrimination requires that victims of discrimination are able to seek legal protection for violations of these rights before judicial or administrative bodies including specialized equality bodies.

However, there are certain underdeveloped areas of Serbia's judicial system that impede the effective implementation of anti-discrimination laws and the protection of persons with disabilities. The underdeveloped areas are related to duration of the proceedings, the lack of public confidence in the judiciary and the need for additional training on anti-discrimination laws. In addition, the problems are that many persons in Serbia are not aware of the possibilities for protecting their right to equality, they can't afford to seek for legal removal of consequences when a violation of rights occurs, while some of them have difficulty to physically reach the courts. Therefore, for the sake of normative and factual improvement, an analytical overview of the current situation is necessary. The author will also analyze the case law of ECtHR concerning infringements of the rights of persons with disabilities, as well as compliance of domestic legislation with the provisions of the Convention on the Rights of Persons with Disabilities in order to give de lege ferenda *proposals.*

Key words: *Persons with disabilities; Women with disabilities; Judicial protection; Gender-based violence; Discrimination; Vulnerability; The right of access to court.*

I INTRODUCTIONARY REMARKS

Given the fact that people with disabilities are often marginalized and harmed by society, their protection is considered as necessary. Therefore the United Nations Convention on the Rights of persons with Disabilities[1] (CRPD) is the first international treaty in the field of protection of human rights, which in the 21st century is aimed at protecting the rights of persons with disabilities, among other things, through the work of the Committee for the Rights of Persons with Disabilities. It is important to emphasize that CRPD, according to the number of countries that signed it, exceeded that of any previous UN convention.[2] The biggest "leap" in the protection of the rights of persons with disabilities occurred with the adoption and entry into force of this convention (CRPD) within the framework of the United Nations in 2007. By ratifying and implementing this convention, the member states took on a new dimension of protecting the rights of persons with disabilities. Therefore, the CRPD does not introduce new human rights in relation to persons with disabilities, but clarifies the obligations of states and provides enhanced protection in relation to violations or denial of certain of their rights. It is also stated that according to Article 1 of the Universal Declaration of Human Rights, adopted by General Assembly Resolution 217 (III) of 10 December 1948[3], everyone has all the rights and freedoms listed in those documents, without distinction on any basis. Also, the CRPD had a great importance on the jurisprudence of the ECtHR in last decades, which led to the creation of rights for the protection of persons with disabilities. Also, the universality, indivisibility and mutual dependence of all human rights and fundamental freedoms are highlighted here and the need to guarantee people with disabilities their full enjoyment without discrimination.[4] Despite the progress made in the past decade, people with disabilities

1 UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution/ adopted by the General Assembly, 24 January 2007, A/RES/61/106. World Programme of Action Concerning Disabled Persons is the type of international legal document that academics generally characterize as "soft" law, in the sense that its provisions are not binding on states or organizations outside of the UN's own internal bodies. However, as the first major international legal document posing a comprehensive platform that conceptualizes disability as a political, medical, and social phenomenon, it would be an error to dismiss it as lacking any wider practical import. The World Programme largely prioritized the ideal of "equalization of opportunities," which it defined as follows: "Equalization of opportunities means the process through which the general system of society, such as the physical and cultural environment, housing and transportation, social and health services, educational and work opportunities, cultural and social life, including sports and recreational facilities and others, are made accessible to all." For more see: United Nations, World Programme of Action Concerning Disabled Persons, *http://www.un.org/esa/socdev/enable/diswpa00.htm*.

2 Beth Ribet, "Emergent Disability and the Limits of Equality: A Critical Reading of the UN Convention on the Rights of Persons With Disabilities", *Yale Human Rights and Development Journal*, Vol. 14, Issue 1, No. 1, 2014, 155.

3 UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

4 Sanja Grbić, „Pravni transplanti i razvoj prava: zaštita prava osoba s invaliditetom i Europska konvencija o ljudskim pravima", *Harmonius: Journal of legal and social studies in South East Europe*, Vol. VIII, 2019, 147.

are still facing significant barriers and are at greater risk of poverty and social exclusion including the inability to fully realize their rights. Given the fact that a large number of the world's population has some form of disability, it is necessary that the fight against all forms of discrimination and the promotion of equality involves the application of a greater number of instruments at different levels. In the Republic of Serbia, people with disabilities make up 8% of the total population, and among them there are 58% women with various forms of disability. Women with disabilities[5] are often exposed to intersectional discriminations and face numerous obstacles in exercising their rights, as well as with various types of gender-based violence, because they are women and have a disability. Some authors, regarding intersectional discrimination, even though not explicitly mentioning it, claim the Convention on the Elimination of All Forms of Discrimination Against Women recognizes the intersection of different grounds, as for example it recognizes the worsened position of women with disabilities or women living in poverty. Additionally, the standards provided by the CEDAW were further developed by the CEDAW Committee. In this sense the General Recommendation No. 28 stipulates that gender-based and sex-based discrimination "is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, disability and sexual orientation and gender identity".[6] At the very core of all acts, both international and domestic, is the fundamental right of persons with disabilities: to live within the community and participate in it without any form of discrimination. Also, the CRPD had a great importance in the creation of new ECtHR jurisprudence, which led to the creation of rights protecting persons with disabilities guaranteed by the European Convention for the Pro-

5 The term "disability" is no longer associated with aid and dependency, but increasingly implies autonomy and integration. Addressing the risks of multiple disadvantages faced by women, children, the elderly, refugees, people with disabilities and those with socioeconomic difficulties, it promotes an intersectional perspective in accordance with the United Nations Agenda for Sustainable Development and the Sustainable Development Goals (SDGs). The European Commission also adopted the strategy for the rights of persons with disabilities 2021-2030. The strategy builds on the results of the previous European Disability Strategy 2010-2020, which paved the way for a barrier-free Europe and empowering people with disabilities to enjoy their rights and participate fully in society and the economy. See European Commission, Union of equality: Strategy for the rights of persons with disabilities 2021-2030, *https://ec.europa.eu/social/main.jsp?catId=1484&langId=en#navIt*.

6 UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 28 on the Core Obligations of States Parties under Art. 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, CEDAW/C/GC/28), para 18; Also see: Kimberlé Crenshaw, Why intersectionality can't wait, 2015, *https://www.washingtonpost.com/news/in-theory/wp/2015/09/24/why-intersectionality-cant-wait/*: "Intersectionality is an analytic sensibility, a way of thinking about identity and its relationship to power. Originally articulated on behalf of black women, the term brought to light the invisibility of many constituents within groups that claim them as members, but often fail to represent them. Intersectional erasures are not exclusive to black women. Intersectionality has given many advocates a way to frame their circumstances and to fight for their visibility and inclusion. Intersectionality has been the banner under which many demands for inclusion have been made, but a term can do no more than those who use it have the power to demand. And not surprisingly, intersectionality has generated its share of debate and controversy."

tection of human rights and fundamental freedoms. This happened due to the use of the provisions of the CRPD when deciding on the violation of the rights of persons with disabilities before the ECtHR. Regarding the above mentioned, this paper points out the significant features of the protection of persons with disabilities, especially women who should be provided with adequate judicial and other protection in order to prevent intersectional discrimination against persons with disabilities and improve their legal protection.

II UNIVERSAL LEVEL OF PROTECTION OF RIGHTS OF PERSONS WITH DISABILITIES

The Republic of Serbia as a member of the United Nations (UN) and the legal successor of the former state, is a signatory of the Charter of the United Nations (1945), the Universal Declaration of Human Rights (1948) and basic international treaties on human rights, which have an impact on the position of persons with disabilities, such as: the International Covenant on Civil and Political Rights with Optional Protocols, the International Covenant on Economic, Social and Cultural Rights[7], the Convention on the Elimination of All Forms of Racial Discrimination[8], the Convention against Torture and Other Cruel, Inhuman and Degrading Punishments[9] and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Also, shortly after its entry into force, the Convention on the Rights of Persons with Disabilities and the Optional Protocol to the CRPD were ratified.[10] The CRPD is the first legally binding international instrument for the protection of human rights, by which the signatory states undertook to protect and promote all human rights and basic freedoms of persons with disabilities. Proceeding from the need to ensure and promote the realization of all human rights and basic freedoms for all persons with disabilities, without discrimination of any kind, the CRPD is based on the following general principles: a) respect for inherent dignity, individual independence, including freedom of choice and independence of persons; b) prohibition of discrimination; c) full and effective participation and inclusion in society; d) respect for differences and acceptance of persons with disabilities as part of human diversity and

7 Law on the Ratification of the International Covenant on Civil and Political Rights, "Official Gazette of the SFRY", no. 7/1971; Law on Confirmation of the Optional Protocol to the International Covenant on Civil and Political Rights, "Official Gazette of the FRY – International Treaties", No. 4/2001.

8 Law on the Ratification of the Convention on the Elimination of All Forms of Racial Discrimination, "Official Gazette of the SFRY – International Treaties and Other Agreements", No. 6/67.

9 United Nations, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, "Official Gazette of the SFRY – International Treaties", No. 9/1991.

10 The Law on Ratification of the Convention on the Rights of Persons with Disabilities and the Law on Ratification of the Optional Protocol to the Convention on the Rights of Persons with Disabilities, "Official Gazette of the RS – International Treaties", No. 42/09.

humanity; e) equal opportunities; f) accessibility; g) equality of women and men and h) respect for the developmental abilities of children with disabilities as well as respect for the rights of children with disabilities to preserve their identity.[11] The CRPD contains provisions related to: equality, prohibition of discrimination and equality; position of women and children with disabilities; raising awareness; accessibility; risky situations and humanitarian disasters; equal recognition before the law; access to justice; absence of abuse and exploitation; freedom of movement, thought and expression; independent living; respect for privacy, home and family; education; health; work and employment; living conditions and social protection; participation in political, public, cultural life, etc.[12] The Republic of Serbia is also a member of the Council of Europe, and regional documents on human rights are important for this area, especially the European Convention for the Protection of Human Rights and Fundamental Freedoms[13] and Protocol No. 12 (2000) to the European Convention. That Convention regulates the prohibition of discrimination, which is extremely important for the position of persons with disabilities, and Protocol No. 12 recognizes the right to non-discrimination for the exercise of all rights guaranteed by the national legislation of the signatory states. Also, in 2009, the Revised European Social Charter was ratified[14], which is the basic document of the Council of Europe in the field of labour and social rights. Other important documents of the Council of Europe are the European Action Plan for Persons with Disabilities for the period from 2006 to 2015 (2006) and the new Strategy of the Council of Europe on Persons with Disabilities 2017-2023, which set the general goal of achieving equality, dignity and equality for persons with disabilities, through five priority areas: equality and prohibition of discrimination; raising the level of awareness; accessibility; equal recognition before the law and freedom from exploitation, abuse and neglect. The European strategy for people with disabilities 2010-2020: Europe without barriers[15] is also of great importance. This strategy represents an extremely important EU document that defines the general policy framework for improving the position of persons with disabilities, as well as more specific measures and activities in certain areas. For the Republic of Serbia, the concluding observations and recommendations of the UN mechanisms for human rights, especially the Committee for the Rights of Persons with Disabilities, as well as the recommendations from the Universal Periodic Review of the UN Human Rights Council, within which

11 Art. 3, CRPD.

12 Also see: Strategy for improving the situation of persons with disabilities in the Republic of Serbia 2020-2024 (Strategija unapređenja položaja osoba sa invaliditetom u Republici Srbiji), "Official Gazette of the RS", No. 44/2020.

13 Law on the Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms, "Official Gazette of SMN – International Treaties", No. 9/03, 5/05 and 7/05 and "Official Gazette of RS – International Agreements", No. 12/10.

14 Law on Confirmation of the Revised European Social Charter, "Official Gazette of the RS – International Treaties", No. 42/09.

15 Council of Europe, Disability Strategy 2017–2023, *https://rm.coe.int/16806fe7d4.*

recommendations were made regarding improving the situation, are very significant for a person with a disability. It should also be noted that the national legal framework regarding the rights of persons with disabilities is solid. Numerous laws regulate the position and exercise of the rights of persons with disabilities. Discrimination is prohibited by the Constitution of the Republic of Serbia, which stipulates that everyone is equal before the Constitution and the law, that everyone has the right to equal legal protection, without discrimination, that any discrimination, direct or indirect, on any basis, including psychological or physical disability.[16]

In the Republic of Serbia anti-discrimination legal framework consist of, along with the Constitution of the Republic of Serbia, the Law on Prevention of Discrimination of Persons with Disabilities[17], the Law on Gender Equality[18] and the Law on Prohibition of Discrimination[19]. All three laws contain rules of a substantive legal nature, as well as rules that regulate the procedure for providing legal protection. The purpose of these legal regulations is the prohibition of discrimination, which is a right that represents the foundation of a modern democratic society. In order to realize this right, different mechanisms of legal protection are available – constitutional, criminal law, civil law and misdemeanor law protection, as well as protection before the independent state authority – the Commissioner for Protection of Equality.[20] It

16 Constitution of the Republic of Serbia ("Official Gazette of the RS", Nos. 98/2006, 115/2021) prohibits any discrimination, direct or indirect, on any grounds, especially on the basis of race, sex, nationality, social origin, birth, religion, political or other belief, property, culture, language, age and mental or physical disability (art. 21, para. 3). The highest legal act of the Republic of Serbia guarantees everyone the right to equal legal protection, without discrimination (art. 21, para. 2).

17 The Law on Prevention of Discrimination against Persons with Disabilities, "Official Gazette of the RS", No. 33/06.

18 The Law on Gender Equality, "Official Gazette of the RS", No. 52/2021.

19 The Law on the Prohibition of Discrimination ("Official Gazette of the RS", No. 22/2009, 52/2021) defines discrimination and discriminatory treatment as "any unjustified distinction or unequal treatment, i.e. omission (exclusion, limitation or priority), in relation to persons or groups as well as members of their families, or persons close to them, in an open or covert manner, which is based on race, skin color, ancestry, citizenship, national or ethnic origin, language, religious or political beliefs, sex, gender identity, sexual orientation, property status, birth, genetic characteristics, health status, disability, marital and family status, convictions, age, appearance, membership in political, trade union and other organizations and other real or assumed personal characteristics" (art. 2, para. 1). Discrimination against a person based on two or more personal characteristics is called multiple or cross discrimination by the Law and is treated as a severe form of discrimination (art. 13, para. 5).

20 According to the Reports of the Commissioner for the Protection of Equality, which as an independent state body continuously implements activities aimed at promoting equality and preventing discrimination of all, including persons with disabilities, 26.4% of the total number of complaints refer to discrimination based on disability. In 2017, disability was also in first place, and for years it has been at the top in terms of the number of complaints submitted to the Commissioner for the Protection of Equality. Trend of growth in the number of complaints on this basis, shows that persons with disabilities and/or organizations of persons with disabilities feel empowered to seek protection of their rights. How-

may happen, however, that an individual or the group cannot enjoy the protection.[21] The Law on Prohibition of Discrimination[22], the so-called the umbrella anti-discrimination law, stipulates that discrimination exists if a person or group of persons is unjustifiably treated worse than others are treated or would be treated, exclusively or mainly because they have sought or intend to seek protection from discrimination or because they have offered or intend to offer evidence of discriminatory treatment.

Historically, the legal approach to the problem of persons with disabilities is long and thorny. From the complete devaluation and disenfranchisement of persons with disabilities as human beings to a certain level of social respect. This level of social appreciation only comes with a significant development of the concept of human rights. In such a development, the state, as the guarantor of the protection of human rights, should determine in each individual case to what extent the guaranteed rights of persons with disabilities will be respected. The right to access the court, as one of the basic rights guaranteed to all citizens, is not adequately provided for persons with disabilities. CRPD plays an important role in solving this problem. When member states sign the Convention, they are obliged to ensure effective access to court for persons with disabilities under equal conditions with other persons,

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ever, it should be born in mind that the number of complaints addressed to the Commissioner for the Protection of Equality is still relatively small, as well as that the number of submitted complaints does not necessarily reflect the real level of discrimination in society. The largest number of complaints due to discrimination on the basis of disability in 2018 was filed due to discrimination in the provision of public services or in the use of facilities and areas (79.8%), which indicates the systemic obstacles that people with disabilities face when it comes to accessibility facilities and services, information and communications, followed by complaints due to discrimination in proceedings before public authorities, in the field of work and employment, provision of public services and education and professional training. Women and girls with disabilities are in a particularly disadvantaged position, bearing in mind that they often face multiple and intersectional discrimination, due to their gender, disability, and often other personal characteristics (sex, age, nationality, etc.). Women and girls with disabilities face obstacles in access to justice, protection from violence and abuse, exercising the right to family and parenting, education, health care, employment, etc. Persons with disabilities, especially women and children with disabilities and persons placed in institutions, may be exposed to an increased risk of violence, abuse, and exploitation. Women with disabilities in institutions are exposed to specific forms of gender-based violence. People with disabilities, especially women with disabilities, face violence both in the family and in the institutional environment, and the continuous action of all competent authorities and other actors is necessary to ensure timely and effective protection. See Commissioner for the Protection of Equality, Regular annual report of the Commissioner for the Protection of Equality for 2018, Belgrade, 2019.

21 Anđelija Tasić, "Prohibition of invoking liability in anti-discrimination legislation: national and European standards", *Collection of papers of the Faculty of Law, University of Niš,* No. 70, Vol. LIV, 2015, 980.

22 The Law on Prohibition of Discrimination does not distinguish between two different forms of intersectional discrimination, additive and intersectional. Judicial and other bodies that respond to cases of discrimination lack guidelines on how to act in the case of intersectional discrimination, which can lead to its non-recognition and treatment as 'uniaxial' discrimination. In this context, victim of intersectional discrimination may be denied the right to appropriate legal protection.

including the provision of modifications in the procedure appropriate to the age of the persons, to facilitate their roles as direct or indirect participants, including them as witnesses in legal proceedings, or in investigative proceedings and other preliminary stages of the procedure.[23] Paragraph 2 of the same CRPD Article determines how to ensure effective access to court for persons with disabilities, an obligation of the state to promote training and education of persons working in the field of administration of justice, including the police and prison staff. What need to be point out is practical problem i.e. the problem of impossibility of physical accessibility to courts and other state courts bodies. It is still, to a large extent, present, especially because of misunderstanding the concept of accessibility, that is, reasonable adaptation. It should represent necessary and appropriate modifications and adjustments, which do not constitute disproportionate or inappropriate burden, in order to do such a thing in an individual case, where it is necessary to ensure the enjoyment of all human rights and fundamental freedoms on an equal basis with others".[24] However, due to the lack of space and inappropriateness society's attitude, it is much more difficult for people with disabilities to achieve their goals rights. Until recently, access ramps to public institutions were a real rarity. Only the last few years, adaptation of the space to people has been started with disabilities and access to the largest number of state and local government buildings they got ramps for people with disabilities. Therefore, when we talk about freedom of movement for persons with disabilities, it is noted that there is no awareness of legal obligations and the necessity of adapting the space to all citizens equally.[25] This is a big problem because, for example, people in wheelchairs, although they can hardly enter the building, they cannot move around the building and still cannot exercise their right to effective access to the court. In accordance with the aforementioned, the Convention therefore defines the obligations of states in ensuring the accessibility of the physical environment and the accessibility of the courts. Likewise, Art. 9, para 1. indicates the obligation of all member states to enable persons with disabilities to live independently and participate fully in all areas of life, to take appropriate measures to ensure their access, which include the identification and removal of accessibility barriers, which refer, among other things, to: (a) buildings, roads, transport and other closed and open spaces, including schools, residential buildings, health facilities and workplaces."[26]

23 Art. 13, CRPD; art. 9 of the CRPD requires States to ensure equal access to facilities and services, including access to public spaces, institutions, schools, websites, etc.

24 Art. 2, para. 1, subpara. 4, CRPD.

25 The goal of construction adapted to persons with disabilities must be the accessibility of all public spaces buildings and institutions, regardless of whether they are new buildings, upgrades, partitions or renovation, to persons with disabilities. It should also be taken into account that public buildings and institutions should be accessible not only to wheelchair users, but also to persons with other types of disabilities.

26 Sanja Grbić, Dejan Bodul and Vanja Smokvina, "Diskriminacija osoba s invaliditetom i njihova uključenost u društvo s naglaskom na pravo pristupa sudu", *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, Vol. 33, No. 2/2012, 673.

III CHALLENGES FOR ENJOYMENT OF RIGHTS OF PERSONS WITH DISABILITIES

About 650 million people in the world or 10 per cent of the world's population live with disabilities, and frequently encounter a myriad of physical and social obstacles. They often lack the opportunities of the mainstream population and are usually among the most marginalized in society.[27] Women face barriers to full equality and advancement because of such factors as race, age, language, ethnicity, culture, religion or disability. Persistence of certain cultural, legal and institutional barriers makes women (and girls) with disabilities the victims of two-fold discrimination: as women and as persons with disabilities.[28]

"Girls and women of all ages with any form of disability are among the more vulnerable and marginalized of society. There is therefore need to take into account and to address their concerns in all policy-making and programming. Special measures are needed at all levels to integrate them into the mainstream of development." [29]

One of the basic principles of contemporary law is reaffirmed in the Universal Declaration of Human Rights: "[a]ll human beings are born free and

27 Leonardo Despouy, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, "Human rights and Disabled persons", *Human rights Studies Series*, No. 6, United Nations Publication, No. E. 92, XIV, 1993, para. 140.

28 See WomenWatch: Feature on Women with Disabilities, *https://www.un.org/womenwatch/enable/*. As mentioned above in the paper, the rights of persons with disabilities are grounded in a broad human rights framework based on the United Nations Charter, the Universal Declaration of Human Rights, international covenants on human rights and other human rights instruments. The Convention on the Rights of Persons with Disabilities and the Optional Protocol to the Convention which entered into force on 3 May 2008, contains an article on women with disabilities, as well as several references to girls, women, and gender issues. Also the EU has decided to introduce stricter measures to prevent and eliminate intersectional discrimination, as well as to establish measures for equal protection against discrimination on all grounds protected by EU legislation in areas other than employment, as intended by the proposed "horizontal directive" of the European Commission. The proposal of this Directive establishes a framework for combating discrimination, including intersectional discrimination based on religion or belief, disability, age and sex orientations in areas outside of employment. As for EU member states, Greece, Italy, Romania, Slovenia, Austria, Bulgaria, Croatia, Germany and Sweden have introduced the issue of intersectional discrimination into their legislation. See Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM, July 2008, 426; European Union Agency for Fundamental Rights, Fundamental Rights Report, Vienna, 2017, 69.

29 Further actions and initiatives to implement the Beijing Declaration and Platform for Action, General Assembly Resolution S-23/3 of 10 June 2000, annex, paragraph 63. Also, the girls and women according to the text of Convention "are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status; are often at greater risk, both within and outside the home of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation." Preamble of the CRPD.

equal in dignity and rights".[30] This provision, based on a grand humanistic notion of inherent dignity and equality of all members of the human family, reaffirms that everyone is entitled to inalienable and inviolable rights, with the obligation of the State to make those rights available to all, under equal conditions. The principle of non-discrimination and the principle of equality are applied in a number of areas, including employment. Moreover, they represent the fundamental principles of labour law, together with the freedom of work and the principle of tripartism. At the same time, equal employment opportunity and dignity at work[31] is a key element of freedom of work and right to work (in addition to free choice of profession and employment as well as prohibition of forced labour), while equal conditions of work and equal career advancement opportunities represent an integral part of the right to fair and just conditions of work. Equality at work was added to the list of the most important employment and social policy issues (objectives, in fact), mainly because of the social changes from the past few decades (changes in demographic structure, acceleration of globalisation, changes in production and organisation methods etc.) that helped widen the gap between the proclaimed equality in employment and labour relations (formal equality) on the one hand, and the actual ability and willingness to effectively apply this principle in practice, on the other hand. In addition, intense activities of international organisations (International Labour Organization[32], Council of

30 Universal Declaration of Human Rights, art. 1. At the operational level, the core principles that follow from a rights-based approach have been identified as: Equality and Non-Discrimination: All individuals are equal as human beings and by virtue of the inherent dignity of each human person. All human beings are entitled to their human rights without discrimination of any kind, such as race, colour, sex, ethnicity, age, language, religion, political or other opinion, national or social origin, disability, property, birth or other status as explained by the human rights treaty bodies. Participation and Inclusion: Particular attention must be paid to the empowerment of vulnerable groups so that they can claim their own rights. Accountability and the Rule of Law: Rights can only be upheld if there are mechanisms to enforce the duty-bearers' obligation to meet the claims of right holders. These mechanisms must be in accordance with the rules and procedures provided by law. See Disability Rights, Gender, and Development, A Resource Tool for Action Secretariat for the Convention on the Rights of Persons with Disabilities of the Department of Economic and Social Affairs/United Nations United Nations Population Fund Wellesley Centers for Women (2008), Module 1–5.

31 For more about dignity at work see Slobodanka Kovačević Perić, *Pristojan rad*, Ph.D. thesis, Pravni fakultet Univerziteta u Nišu, 2011, 36–43; Jovana Misailović, Iva Tošić, "O dostojanstvenom radu" in: *Aktuelna pitanja savremenog zakonodavstva i pravosudja: Zbornik savetovanja pravnika u Budvi*, 2022, 285.

32 The evolution of international labor standards, from the aspect of modern and civilizational notions of freedom and human rights, can only be discussed with the establishment of the International Labour Organization. Since its founding in 1919, the ILO has focused all efforts on promoting the right to work, freedom of work, eradicating all forms of forced labor, especially child labour, then on equality and eliminating discrimination, social security, social dialogue, industrial relations, and others. In the last century, opportunism towards the ILO dominated, the attitude that the need to adopt new conventions and recommendations was overcome, embodied in opinions that all the most important issues in the field of working conditions have already been regulated in the largest number of countries. However, in the conditions of the modern development of production forces and labor productivity, new problems and the need to further improve the level of

Europe, European Union), aimed at creating conditions for equal opportunities and equal treatment at work, represent an important reason that the fight against discrimination was made a priority in the contemporary labour law and public policy.[33]

Persons with disabilities belong to a group of people who are facing significant obstacles in exercising and enjoying their right to work.[34] Many countries are facing high rates of unemployment of persons with disabilities, which can be explained by employment discrimination as well as their lack of education, caused, to a large extent, by discrimination in the education system. In addition, the cause of high unemployment rates amongst the disabled can be found in a reduced demand for unskilled labour as well as their fear of forfeiture of social benefits upon entering into employment.[35] The same

workers protection have arisen and will arise, so it will be necessary to adopt new international norms (which means new conventions and recommendations), i.e. to revise the existing ones that have been overcome. It is a process that is important for us as a society, and for the labor law of the Republic of Serbia, because by ratifying and accepting conventions, recommendations and documents of the ILO, which are adopted in the field of work, we can improve labour standards and adopt certain standards that are primarily *in favorem laboratoris*, but also with elements of protection aimed at vulnerable groups. For more see Milica Midžović, "Promena zakonodavnih okvira radnopravnih instituta" in Duško Čelić (ed.) *Zbornik radova Pravna tradicija i integrativni procesi* (2020), 185. Also ILO promotes equality of opportunity and treatment for persons with disabilities in the world of work. Access of persons with disabilities to decent work is important both as an essential right and in terms of the economic advantages it brings. To achieve this goal, the ILO works to increase the employability of persons with disabilities, to support employers becoming more inclusive and to promote enabling legislative and policy environments. For more see ILO, ILO and disability inclusion, *https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/publication/wcms_407645.pdf*.

33 Ljubinka Kovačević, "Protection of persons with disabilities from employment discrimination, with a focus on serbian legislation and practice", *Pravni vjesnik*, Vol. 30, No. 2/2014, 58.

34 People with disabilities are the world's largest minority, representing 15% of the world's population. 80% of this population lives in developing countries. Unemployment rates are highest among women with disabilities. The United Nations estimates that 75% of women with disabilities are unemployed, and women with disabilities who are employed often earn less than their male counterparts and women without disabilities. Gender disparities also exist in education. While the overall literacy rate for people with disabilities is 3%, UNESCO estimates that it is only 1% for women and girls with disabilities. Women and girls with disabilities often face disproportionately high rates of gender-based violence, sexual abuse, neglect, maltreatment and exploitation. Studies show that women and girls with disabilities are twice as likely to experience gender-based violence compared to women and girls without disabilities. Discrimination against persons with disabilities hinders economic development, limits democracy and erodes society. See U.S. Agency for International Development, Advancing women and girls with disabilities, *https://www.usaid.gov/what-we-do/gender-equality-and-womens-empowerment/women-disabilities*.

35 Many women and girls with disabilities depend on others for care, but are often also caregivers themselves. They are therefore disproportionately affected by the lack of recognition and social support for unpaid care and domestic work. In addition, stereotypical views of women with disabilities as "unfit" mothers may lead to the termination of parental rights by social service agencies or in child custody and protection proceedings following divorce. See UN Women, Making the SGDs count for women and girls

problem exists in The Republic of Serbia, where there are between 700.000 and 800.000 persons with disabilities; around 300.000 of them are older than 15 and younger than 65, and only 13% of them are employed. Such low rate of employment of persons with disabilities in Serbia can be explained by various factors, including their lack of education (more than 50% of persons with disabilities have completed only primary school), indirect discrimination in the education system, as well as their fear of forfeiture of social benefits upon entering into an employment contract. A particularly important reason for massive unemployment of persons with disabilities is the employment discrimination.[36] The Belgrade Center for Human Rights published a study on women's labor rights in Serbia, according to which it follows that women in Serbia have had a very difficult time in the last two decades to exercise their labor rights despite the great changes and successes in the legislative process level (adoption of many conventions, membership in the Council of Europe, adoption of the Law on Labour in 2005).[37] This situation is even worse when it comes to women who have a certain type of disability, they experience intersectional discrimination, which places them at higher risk of gender-based violence, sexual abuse, neglect, maltreatment and exploitation. It has already been said that the international context of the development of human rights last starting with the Universal Declaration of Human Rights from 1948, and especially from adoption of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women of 1979, it makes civilizational advances in the sense of improvement international legal and national protection of women's rights. International law and the law of the European Union are continuously improving the legal system regarding equality and protection of women. The European Union in its primary law – from the first founding acts, and especially in the Lisbon Treaty, nurtures the principle of gender equality. Also, in the directives that the European Communities and EU have adopted since 1975 until today, the areas in which special protection for women is introduced are constantly being enriched (from initial measures related to employment to current measures related to violence, sexual harassment, maternity, balancing work and family obligation).[38]

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with disabilities, *https://www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2019/10/Making-SDGs-count-for-women-with-disabilities.pdf*.

36 Kovačević (2014), *op. cit.,* 59. Confirmation of the principle of equality is not enough to eliminate all cases of inequality in the field of employment and labor relations. The state, therefore, must intervene in order to create conditions for the establishment of real equality in this area. That intervention, in particular, involves taking measures that facilitate the sending of persons who traditionally face a disadvantageous position to labour market. These measures include special protection, assistance or some other form preferential treatment, which should contribute to the establishment of complete and real the equality of persons who, due to a certain characteristic, are placed in a less favorable position or bear the consequences of past or current discrimination in any other way. See: Ljubinka Kovačević, "Zapošljavanje lica sa invaliditetom" in Drenka Vuković, Mihail Aradarenko (eds.), *Socijalne reforme, sadržaj i rezultati* (2011), 195.

37 Jovana Zorić, Nevena Dičić, Nenad Petković, *Radna prava žena u Srbiji* (2008).

38 Also, the most important strategic documents significantly contribute to tracing gender equality as an EU priority: EU Roadmap for Gender Equality, European Charter

The Article 6 of The Law on Prevention of Discrimination against Persons with Disabilities prescribes that discrimination also exists in the event that the person discriminated against is treated worse than he/she is treated or would be treated according to another, solely or mainly because he was discriminated against sought, or intends to seek, legal protection against discrimination or because he/she has offered or intends to offer evidence of discriminatory treatment. The Law on the Prohibition of Discrimination stipulated that every person is entitled to the equal access and equal protection of their rights before the courts and public administration bodies. Discriminatory actions by an official or a person in charge in a public authority body are considered a grave breach of duty. The Law explicitly defines the discrimination as any unwarranted difference making or unequal treatment (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 genetic characteristics, health and disability *inter alia*.[39]

When talking about the rights of people with disabilities, first of all, we should point out the fact that about 15% of the total population of the member states of the Council of Europe are people with disabilities. Although the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) [40] does not contain provisions on the protection of persons with disabilities, this does not mean that persons with disabilities should be deprived of the protection of their threatened rights. We can say that the ECHR protects rights that can be classified as political and civil, but social and cultural rights are beyond its protection. Specifically, Article 14 of the ECHR, which refers to the prohibition of discrimination, requires the state to explain why it treats people with disabilities differently, emphasizing that people who are in significantly different situations should be treated differently, therefore appropriately. It is also possible to refer to Art. 3 of the ECHR if the victims reach a certain degree of suffering with regard to gender, age and health, but a broader interpretation of private life allows us to use Art. 8 of the ECHR. Art. 6 of the ECHR does not explicitly state the right to ac-

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on to women (EU Women's Charter), Strategy for equality between women and men 2010–2015, European Gender Equality Pact 2011–2010. See Dragica Vujadinović, Vojislav Stanimirović, "Rodni odnosi u Srbiji u doba tranzicije – Između repatrijarhalizacije i emancipacije" in Goran Dajović, Bojan Vranić (eds.), *Demokratska tranzicija Srbije – (re)kapitulacija prvih 20 godina* (2016), 202.

39 UN Agency for Gender Equality, within the project "Autonomy, Voice and Participation of Persons with Disabilities in Serbia", supported and aided the girls and the women with disabilities to exercise their rights in 2018, encouraged them and motivated them to improve their daily life and supported them by means of mentorship in pursuing their career and in professional development. See Inputs from the Protector of Citizens of the Republic of Serbia for the special rapporteur on the rights of persons with disabilities concerning good practices to ensure effective access to justice for persons with disabilities, Republic od Serbia, Belgrade, No. 346-159/19.

40 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

cess the court, but it is one of the most important tacit principles from Art. 6 of the ECHR established and elaborated in detail by the European Court of Human Rights.[41] The Committee for the Rights of Persons with Disabilities is concerned about the absence of specific activities aimed at preventing and combating the multiple and intersectional discrimination that women and girls with disabilities face, especially in access to justice, in education, health care and employment, protection from violence and abuse, because there is not enough transparent financing and measures related to employment, adapted to the needs of women with disabilities, and because women with disabilities are not consulted when developing programs and measures aimed at women or people with disabilities in general. Therefore, it is recommended to the Republic of Serbia to[42]: (a) include the perspective of women and girls with disabilities in policies, programs and strategies of gender equality and the gender perspective in strategies on disability, to eradicate multiple and intersectional discrimination in all spheres of life; (b) take appropriate measures to prevent and combat multiple and intersectional discrimination faced by women and girls, especially in access to justice, education, health care and employment, protection against violence and abuse; (c) ensure consultation with women and girls with disabilities, through their representative organizations, in connection with the development, implementation and evaluation of programs and measures for all issues that directly concern them and (d) ensure sufficient funds for improving the status and employment of women with disabilities and the promotion of programs related to gender equality.[43]

IV RIGHT TO COURT ACCESS FOR PERSONS WITH DISABILITIES ACCORDING TO ECHR AND JURISPRUDENCE OF ECtHR

According to the key provisions of Article 12 on equal recognition before the law and Article 13 on access to justice of the ECHR, States must: "(a) recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life; (b) take appropriate measures to provide access to persons with disabilities to the support they may require in exercising their legal capacity; (c) ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse, including by ensuring that measures relating to the exercise of legal

41 Therefore, a great progress has been made in the practice of the European Court of Human Rights.

42 According to fact that states agree to respect, protect and fulfil the human rights contained in treaties or conventions: a) to respect means that states must not interfere with or restrict human rights; b) to protect involves passing laws and creating mechanisms to prevent violation of rights by state authorities and by non-state actors; c) to fulfil means that states must take positive action to ensure the enjoyment of human rights. See: *European Convention on Human rights Guide for the Civil and Public Service*, Irish Human Rights Commission, Dublin, (2012), 17.

43 CRPD/C/SRB/CO/1, May 2016, paras. 11. and 12.

capacity respect the rights, will and preferences of the person; (d) ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.[44] Articles 12 and 13 of the ECHR represent a paradigm shift in the legal recognition of the autonomy of persons with disabilities. The Convention rejects historically entrenched understandings of disability that deprive persons with disabilities of any means to exercise their will and preferences, which in many countries have effectively resulted in denying their access to justice and procedural safeguards on an equal basis with others. Unlike other international instruments for the protection of human rights, there is no general duty of non-discrimination in the ECHR beside Art. 14 which guarantees additional protection for other material rights provided by the Convention. However, the ECHR stated that, even if it is established that the state has not violated its obligations in respect of any of the material rights which is in question in a certain case, it can still be determined that it is the same right violated in connection with Art. 14. This is closely related to the question of whether injury may occur of the ECHR, i.e., Art. 14. in connection with some other protected right if contracting states behave differently without objective and reasonable justification towards persons with disabilities, thus hindering them in exercising their guaranteed rights.[45] That's how the European Court of Human Rights is in the case *Thlimmenos v. Greece*[46] established that discrimination also exists when "contracting states do not treat people who are in significantly different situations, differently, without objective and reasonable justification." However, ECHR was always considered the so-called adaptable instrument in the sense of adaptation to newly emerging needs, that is that's why in court practice it is also called a ″living instrument″. Although ECHR does not explicitly mention disability (except exceptionally in Art. 5, para. 1), requests that applicants with disabilities submitted to the former European Commission for years and to the European Court of Human Rights "create" significant judicial practice and principles in this area.[47] After that, a big "leap" in the protection of the rights of persons with disability was made with the passing of the judgment *Glor v. Switzerland*.[48] European Court of Human Rights "con-

44 UN, Committee on the Rights of Persons with Disabilities, General Comment on Article 12: Equal recognition before the law (2014).

45 Art. 14 of the ECHR: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

46 *Thlimmenos v. Greece*, App. No. 34369/97, 06.04.2000.

47 Loukis Loukaides, "The European Convention on Human Rights and the rights of persons with disabilities", in: "Human Rights, Disabililty – Children, Towards international instruments for disability rights: The special case of disabled children", *Proceedings of the Conference*, Council of Europe Publishing (2004), 38.

48 *Glor v. Switzerland*, App. No. 13444/04, 30.04.2009.

sidered that there is a consensus at the European and world level and a need to protect people with disabilities from discriminatory treatment". Here for the first time, the European Court found discrimination against people with disabilities and established a violation of Art. 14 in connection with Art. 8 because Switzerland declared the applicant incompetent for the performance of military service and therefore imposed on him the obligation to pay taxes. Switzerland established that *Mr. Glor* cannot serve in the army due to the fact that he is ill from diabetes that requires appropriate medical assistance that cannot be given to him in the army.[49]

In the case of *Price v. United Kingdom* which is the most significant case of violation of Art. 3 in relation to persons with disabilities, The European Court of Human Rights claimed that there had been humiliating treatment of the applicant since the United Kingdom has not fulfilled its obligation to accommodate the special needs of *Ms. Price* due to her disability. Due to the disease, her limbs were shortened and she had a related health problems, including kidney problems. Since she refused to answer to the questions raised in the proceedings before the District Court, she was sentenced to prison for three days. She was denied the right to use electric wheelchair charger, she spent the night in a very cold cell, she could not even use the bed, and it was also difficult for her to use the toilet, which was not adapted for people with disabilities. The European Court of Human Rights found that there was a violation of Art. 3 of ECHR and issued a judgment which determined that states must adjust prison conditions to people with disabilities. States must take into account the different circumstances and provide appropriate treatment to persons with disabilities. That shows the need to comply with reasonable adjustments when preventing violations of the absolute right from Art. 3, prohibitions of torture and degrading and inhuman treatment. However, the of range this right is very narrow and allows persons with disabilities protection within the framework of its exact content.[50] On the other hand, in the case *Malone v. United Kingdom*[51], women with disability claimed that, due to a dispute related to the purchase and sale of an apartment, she had to attend

49 However, they did not consider that his illness was serious enough in order to exempt him from paying taxes for a certain number of years. Also, he did not enable to replace military service with civilian service because according to Swiss law he did not meet certain conditions for that. Mr. Glor stated that there was a violation of art. 14 together with art. 8. because he was discriminated against on the basis of a disability that prevented him from serving in the army. The European Court of Human Rights found a violation of art. 14 due to discrimination based on disability. That's how the ECtHR in 2009 for the first time in the *Glor v. Switzerland* judgment established that it had occurred to the discrimination of a person with a disability solely because of his disability. Until then, all judgments related to injuries to persons with disabilities were based exclusively on the determination of injuries on the same grounds as all other victims of violation of the rights provided by ECtHR. Also see Grbić, *op. cit.,* 164.

50 *Price v. United Kingdom*, App. no. 33394/96, 10.07.2001.

51 *Malone v United Kingdom*, App. No. 8691/79, 02.08.1984. Therefore, we can say that the right to access the court is in terms of "reasonable accommodation" from art. 1., para 2. ECHR achieved by applying the provisions of the European Convention as well as the protection of the European Court of Human Rights, mainly by referring to the provisions of art. 14. and connection with arts. 8 and 6 of the ECHR.

the trial in the premises of the court, which was unavailable to her. She had to travel a long journey to get to the court hearing started at 4:30 in the morning. That caused her great pain, because of which she later had to lie down in bed for days. The court building itself was also inaccessible, and not equipped with toilets for the persons with disability, which is why she also had big problems since she used to wait six hours for a hearing. She claimed to the European Court of Human Rights that the case should have been transferred to court in the place where she lived and which was adapted to the needs of persons with disability. She pointed out that there was a violation of Art. 6 of the Convention. However, the European Court of Human Rights declared the case inadmissible because the applicant did not take appropriate action measures and requested the transfer of the case to another court before it was assigned to the court in London. From the abovementioned decision, it can be seen that the European Court of Human Rights wasn't willing to change its practice related to Art. 6 and persons with disabilities can say that it is a very unsatisfactory decision. People with disabilities are required to inform the court about their problems, but this should not exempt the state's duty of reasonable accommodation, as it was in the *Malone* case.

In the 2016 decision in the *Çam v. Turkey* case, the ECtHR for the first time stated the "reasonable adjustment" criterion from Art. 2 of the CRPD which includes "necessary and appropriate changes and adjustments that do not impose a disproportionate and inappropriate burden are required in the specific case, to ensure that people with disabilities enjoy and use all human rights equally with other persons". Namely, the ECtHR determined that the prohibition of discrimination also includes situations in which a reasonable adjustment is refused, so in this particular case that was the refusal to enroll a blind student in music injury academy.[52]

Regarding the abovementioned cases and claims to the right to a fair trial as well as the right of access to a court (which is tacitly contained in the ECHR and created and elaborated in detail by the European Court of Human Rights in its jurisprudence) must exist and must be insured by law. Because of its great importance, the European Court of Human Rights elaborated in detail the content of the right of access to the court. Regarding this paper, we should point out that each specified part of the right of access to the court cannot be exercised without a reasonable accommodation that makes possible access to the court for persons with disabilities. Unfortunately, the practice of the European Court of Human Rights here still remains limited.

V ACCESS TO JUSTICE FOR PERSONS WITH DISABILITIES

A large number of the world's population has some form of disability so it is necessary that the fight against all forms of discrimination and the promotion of equality involves the application of a greater number of instru-

52 *Çam v. Turkey*, App. No. 51500/08, 23.02.2016.

ments at different levels. In terms of disability, it is necessary to define the same as a condition when permanent changes in a person's state of health occur that cannot be removed by treatment or medical rehabilitation measures, and which cause a loss or reduction of work ability, and also general abilities in everyday life situations. In the wider European context, perhaps the best definition was given by the independent lawyer *Geelhoed* in a case before the European Court of Justice in Luxembourg, in which he said that persons with disabilities are those who have serious functional limitations due to physical, psychological or mental effects, which are of longer duration or of a permanent nature. [53] Although the CRPD introduces the social model of disability, there are still doubts regarding the demarcation of illness and disability.[54] At the very core of all legal acts, both international and domestic, the fundamental right of persons with disabilities is: living within the community and participating in it. That includes appropriate access to court. However, the problem of the concept of the right to access the court is widely understood, to the extent that "in a democratic society, the right to fair conduct of court proceedings, in the sense given to it by the ECtHR, occupies such an important place, that a restrictive interpretation of Article 6, paragraph 1, does not meet the goal and the purposes of those provisions. "[55]

In order to achieve a complete concept of the right to a fair trial and access to court[56] as a human right in the context of this paper, it is necessary

53 Sanja Grbić, Dejan Bodul and Vanja Smokvina„"Diskriminacija osoba s invaliditetom i njihova uključenost u društvo s naglaskom na pravo pristupa sudu", *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, Vol. 33, No. 2, 1991, 670.

54 It should also be noted here that persons suffering from rare diseases enjoy special protection in the field of work and employment in accordance with the special law protection of persons with disabilities, in many laws in the world. But, this should be separated because people suffering from rare diseases requires a more individualistic approach in regulating their labour law status with adequate application of the provisions of the law regulating the right to work and employment of persons with disabilities. Persons suffering from rare diseases as well as persons with disabilities should not be seen through the prism of disability diseases, but should strive to create such conditions in their environment in which everyone will be equal and have the conditions for the realization and enjoyment of guaranteed rights, including labour rights. See Milica Midžović, "Pravo na zapošljavanje i rad osoba obolelih od retkih bolesti" *Radno i socijalno pravo*, Vol. XXIV, No. 2/2020, 241, 251.

55 *Delcourt v Belgija*, App. No. 2689/65, 17.01.1970; On the other hand, *Perez v France,* App. No. 47287/99, 12.02.2004: "the right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6 of the Convention restrictively".

56 Universal Declaration of Human Rights, although it does not explicitly use the term "right of access to the court", in several articles indicates its proclamation. Art. 7 indicates that every person is equal before the law and everyone has the right to equal legal protection, without any discrimination. Art. 8 proscribes that everyone has the right to an effective legal remedy, while Article 10 indicates that everyone is equally entitled to a fair and public hearing by an independent and impartial court. International Covenant on Civil and Political Rights United Nations adopted by the General Assembly of the United Nations on 19 December 1966 indicates that everyone must be equal before the court. Paragraph 3, point 7 of the same article suggests that everyone has the right to free help of an interpreter if they do not understand or speak the language which is used

to analyze the provisions of the ECHR, but also jurisprudence of the European Court of Human Rights. Article 6 of the ECHR proclaims: the right to a trial within a reasonable time, the public nature of the trial, the independence of the competent authority bodies, the right of the accused to be informed about the nature and reasons of accusations, to examine the witnesses against him and to allow witnesses in his favor, as well as the law to the defender.[57] Despite all of this persons with disabilities often find themselves marginalized by society and by our justice systems.[58]

While access to justice is fundamental for the enjoyment and fulfilment of all human rights, many barriers prevent persons with disabilities from accessing justice on an equal basis with others. Such barriers include restrictions on the exercise of legal capacity; lack of physical access to justice facilities, such as courts and police stations; lack of accessible transportation to and from these facilities; obstacles in accessing legal assistance and representation; lack of information in accessible formats; paternalistic or negative attitudes questioning the abilities of persons with disabilities to participate during all phases of the administration of justice; and lack of training for professionals working in the field of justice. In the justice system, persons with disabilities are often considered to be unworthy of, unable to benefit from or even likely to be harmed by due process protection provided to all other citizens. When interacting with the justice system and law enforcement officials, a person may be confronted with individual and system biases and structural inequality on a variety of grounds. While recognizing that these intersecting variables cannot be disentangled and must be challenged as a whole we have to take into account the unequal access to justice that is the consequence of bias, stigma and the lack of understanding about persons with disabilities by

in court. Likewise, the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on 19 December 1966, although it does not contain a specific provision on the right to access to court, indicates that an effective judicial and administrative legal remedy is irreplaceable. UN Econ. & Soc. Council, General Comment 9: Domestic Application of the Covenant, paras. 9-10, U.N. Asst. E/C/1998/24 December 3 (1998).

57 Art. 6 of the ECHR.

58 Working to ensure that persons with disabilities have access to justice, that they are not excluded or marginalized by our justice system can be both fulfilling and frustrating. We can improve access to justice by removing physical and architectural barriers. As our daily lives become increasingly dependent on technology, we can also improve access to justice (which, arguably, includes not merely access to justice systems, but equal access to the quality of life that others enjoy—a "just life") by ensuring that information and activities that can be accessed only via technology are available to persons with disabilities. See examples of how technology is being used to support these efforts and suggestions regarding additional ways in which technology could be employed at: David Allen Larson, "Access to Justice for Persons with Disabilities: An Emerging Strategy", *Laws,* No. 3/2014, 220–238. Everyone is equal before the law – people with disabilities have the right to be included in all parts of the justice system: to go to court, take other people to court, take part in the work of the police and courts. But often this does not happen. See: The rights of people with disabilities, *https://www.ohchr.org/sites/default/files/Documents/Issues/Disability/SR_Disability/GoodPractices/Access-to-Justice-easy-en.pdf*.

officials in the justice system. In the context of defendants and suspects in criminal cases, wrongful convictions can result from false confessions, mistaken identification and official misconduct, which may be the consequence of coercion and lack of information and understanding by persons with disabilities. All persons with disabilities have legal capacity and, therefore, no one shall be denied access to justice on the basis of disability. And author will underline the need to "recognize and assume the full capacity and right of persons with disabilities to participate in the proceedings of all courts, tribunals and forums."[59]

Achieving equality implies equal access to justice, without obstacles and discrimination, ensuring that persons with disabilities exercise all their rights under equal conditions and on an equal basis, while ensuring the appropriate adjustment of procedures in order to exercise the right to a fair trial, the imposition of adequate sanctions and compensation for victims with disabilities, and statistical monitoring and review of these procedures. The provision of legal aid, including free legal aid, must also be adapted to persons with disabilities and conditions must be ensured for them to exercise their right to judicial protection on an equal basis. This means that the buildings of courts, prosecutor's offices and the police should be accessible, as well as lawyers' offices and offices where free legal aid is provided. In addition, this includes providing interpreters whenever necessary, as well as obtaining court documents in customized formats. It also implies adjustments to the court procedure, taking into account the needs of the disabled person, their age and gender. According to the data of the Ministry of Justice, there are 22 permanent court interpreters for the hearing impaired in the records of permanent court interpreters, while a total of 49 courts in the Republic of Serbia are equipped for access by persons with disabilities.[60] Concerns were expressed about the

59 "Facilities and services must be universally accessible to ensure equal access to justice without discrimination of persons with disabilities: To guarantee equal access to justice and non-discrimination, States must ensure that the facilities and services used in legal systems are built, developed and provided on the basis of the principles of universal design by taking, at a minimum, the following actions: (a) Enacting and implementing enforceable laws, regulations, policies, guidelines and practices that guarantee the accessibility of all facilities and services used in the justice system, based on the principles of universal design, including: (i) Courts, police facilities, prisons, detention and forensic facilities, jury facilities, administrative offices and other such places (including toilets, cells, offices, entrances, lifts, canteens and recreational spaces in those places); (ii) Information, communications and other services, including information and communications technology and systems; (b) Ensuring that all means of transportation used in the justice system are accessible; (c) Ensuring that adequate financial resources are available to make the justice system physically accessible to persons with disabilities in accordance with the principles of universal design; (d) Guaranteeing the provision of procedural accommodations when facilities and services fail to ensure access to the existing physical environment, transportation, information and communications for persons with disabilities." International Principles and Guidelines on Access to Justice for Persons with Disabilities, Geneva, August 2020, 13.

60 Report from the Ministry of Justice of the Republic of Serbia of October 2019.

lack of information on special measures and protocols to ensure appropriate procedural, gender and age adjustments in court proceedings, including the provision of sign language interpreters for the deaf and communication formats accessible to the deaf and blind, people with mental disabilities and people with psychophysical disorders, especially in civil litigation. At the same time, concern was expressed that women with disabilities are not protected from sexual violence on an equal basis with others.[61] Therefore, The Committee for the Rights of Persons with Disabilities recommended Serbia to take steps to ensure unhindered and non-discriminatory access to justice by providing procedural and age-appropriate adjustments based on the free choice and determination of persons with disabilities, as well as to establish protective mechanisms in this regard. It was also recommended to adopt measures aimed at ensuring the access of deaf people to civil proceedings, on an equal basis, as well as a review of the Criminal Procedure Code to ensure that procedures, sanctions and compensation for victims with disabilities are aligned with the CRPD.[62]

VI CONCLUSION

Persons with disabilities are not a homogenous group and that results in a complex web of factors creating barriers for accessing justice. Their experience of disability and therefore the barriers they face differ because of their disadvantaged social and economic conditions, the additional disadvantages they may experience because of their identification with other groups, for example, ethnic groups, further disadvantages they may experience due to the status they are accorded within these groups, for example, status resulting from age, gender, and sexual orientation; intersectional discrimination the type and severity of the disabilities they experience, and other disadvantages experienced because of the way that laws are written and implemented. Despite the obvious difficulties of introducing an intersectional approach in anti-discrimination laws and policies, without it one cannot properly see society or the position of individuals and groups who are discriminated against simultaneously on several grounds intertwined in such a way that they cannot be separated. The first step in the introduction of this approach into the national legislation is the formulation of a clear and precise definition of the discrimination and its forms: additive, intersectional, complex and pre-collapsing discrimination. These forms of discrimination should be defined in a way that they can be easily distinguished, and on the other hand, to prevent arbitrary interpretations in practice, which would create doubts and confusion in the application of the respective provisions. Further elaboration of intersectional discrimination in laws and policies should provide victims of

61 Art. 178 and 179, The Law on Amendments to the Criminal Code, "Official Gazette of the RS", No. 35/19.

62 Paras. 23 and 24 of the CRPD/C/SRB/CO/1, May 2016.

intersectional discrimination with effective legal protection against discrimination and fair compensation.

Traditionally, the rights of persons with disabilities fall under social rights. Therefore, today, the advancement and improvement of the rights and position of persons with disabilities, both internationally and nationally, takes the form of political pressure on competent bodies, which consists in the adoption of special measures (in the form of constitutional provisions, appropriate legislation on disability, etc.). Such measures are aimed at improving the conditions and quality of life of persons with disabilities, so there is a necessity for support from state funds, the establishment of special institutions for people with disabilities through health insurance, day care, rehabilitation, education, employment, etc. In the Republic of Serbia, in the field of improving the position of persons with disabilities, in the broadest sense, significant progress has been made so far, but bearing in mind that the numerous risks of social exclusion of persons with disabilities tend to multiply, it is necessary, by applying a multidisciplinary and multisectoral approach, to constantly act by undertaking various activities to minimize these risks. It is necessary to improve the overall social and economic position of persons with disabilities in the Republic of Serbia and their equal participation in society, by removing obstacles in the areas of accessibility, participation, equality, employment, education and training, social protection, health and other aspects that contribute to equalizing their opportunities and achieving inclusive equality. Measures from social law are necessary here in order to improve the conditions and quality of life of persons with disabilities, but also they should be guaranteed equal civil and political rights.

The Committee for the Rights of Persons with Disabilities is concerned about the absence of specific activities aimed at preventing and combating the multiple and intersectional discrimination that women and girls with disabilities face, especially in access to justice, in education, health care and employment, protection against violence and abuse, because there is not enough transparent financing and measures related to employment, adapted to the needs of women with disabilities, and because women with disabilities are not consulted when developing programs and measures aimed at women or people with disabilities in general. The Republic of Serbia is encouraged to conduct a comprehensive analysis to assess the situation, special needs and aspirations of vulnerable groups of women, including women with disabilities, in order to collect data for the improvement of the legislative framework and policy development. Achieving equality implies equal access to justice, without obstacles and discrimination, ensuring that persons with disabilities exercise all their rights under equal conditions and on an equal basis, while ensuring the appropriate adjustment of procedures in order to exercise the right to a fair trial, the imposition of adequate sanctions and compensation for victims with disabilities, and the statistical monitoring and review of these procedures. The provision of legal aid, including free legal aid, must also be adapted to persons with disabilities and conditions must be ensured for them to exercise their right to judicial protection on an equal basis. This means that the buildings of courts, prosecutor's

offices and the police should be accessible, as well as lawyers' offices and offices where free legal aid is provided. In addition, this includes providing interpreters whenever necessary, as well as obtaining court documents in customized formats. It also implies adjustments to the court procedure; more elaborate and specified conclusion is desirable. By comparative analysis of practice of the European Court and the national legislation of Serbia, it can be determined that, nor with its own legal regulations, nor their compliance in practice, Serbia did not fully succeed in this. There are indisputably positive developments on that path, but on the issue of protection of persons with disabilities, especially their judicial protection as well as access to court and justice, additional mechanisms should be undertaken.

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PRAVO NA PRISTUP SUDU OSOBA SA INVALIDITETOM U ZAKONODAVSTVU REPUBLIKE SRBIJE

Apstrakt

Osobe sa invaliditetom, posebno žene, suočavaju se s rizikom intersekcionalne diskriminacije, što ih stavlja u veći rizik od rodno zasnovanog nasilja, seksualnog zlostavljanja, zanemarivanja, maltretiranja i eksploatacije. One zauzimaju krajnje marginalizovanu poziciju u našem društvu, što ih, u poređenju s drugim ženama, čini ranjivijim na nasilje i zlostavljanje. Osobe sa invaliditetom češće doživljavaju nejednakost u zapošljavanju, napredovanju i plaćanju za rad, a često su i marginalizovane u društvu, kao i u pravosudnom sistemu. Za srpsko zakonodavstvo je od velikog značaja da se svakoj osobi sa invaliditetom pruži pravo na jednake mogućnosti, a posebno u pogledu ostvarivanja prava na sudsku zaštitu. Ostvarivanje prava na jednakost i zaštitu od diskriminacije zahteva da žrtve diskriminacije mogu da traže pravnu zaštitu za kršenje ovih prava pred sudskim ili upravnim organima ili specijalizovanim telima za zaštitu ravnopravnosti. Međutim, postoje određene nerazvijene oblasti u pravosudnom sistemu Srbije koje ometaju delotvornu primenu antidiskriminacionih zakona i zaštitu žena i drugih osoba sa invaliditetom. Nerazvijene oblasti se odnose na trajanje postupka, nedostatak poverenja u pravosuđe i potrebu za dodatnom obukom o diskriminaciji. Osim toga, problem predstavlja i to što mnoge osobe sa invaliditetom u Srbiji nisu svesne mogućnosti zaštite svog prava na ravnopravnost i zaštitu od diskriminacije,

ne mogu sebi da priušte da traže pravno otklanjanje posledica kada dođe do povrede njihovih prava i teško fizički mogu da dođu do sudova. Autorka će u radu analizirati i praksu Evropskog suda za ljudska prava u vezi sa povredama prava osoba sa invaliditetom, kao i usklađenost domaćeg zakonodavstva sa odredbama Konvencije o pravima osoba sa invaliditetom u cilju davanja predloga *de lege ferenda*.

Ključne reči: *Osobe sa invaliditetom; Žene sa invaliditetom; Sudska zaštita; Rodno zasnovano nasilje; Diskriminacija; Pravo na pristup sudu.*

GRAĐANSKO I PORODIČNO PRAVO

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POLOŽAJ LICA SA INVALIDITETOM NA POLjU POSLOVNE SPOSOBNOSTI*

Apstrakt

Prednacrtom zakona o izmenama i dopunama Porodičnog zakona predložene su izmene u odnosu na pozitivnopravno rešenje u pogledu materije kojom se reguliše ustanova lišenja poslovne sposobnosti. U nekoliko odredaba kojima se predlaže uređenje mogućnosti tzv. ograničenja poslovne sposobnosti, uvode se, na prvi pogled, važne izmene. Međutim, iako u izvesnom smislu donose napredak u odnosu na važeće rešenje, detaljnija analiza predloženog rešenja čini se da pokazuje da se položaj pojedinih lica čija bi poslovna sposobnost bila ograničena neće u bitnom razlikovati od položaja lica koja se po važećem rešenju potpuno i delimično lišavaju poslovne sposobnosti. Osim analize predloženih rešenja, u radu se pažnja posvećuje i pitanju koliko je uopšte opravdana ideja o ukidanju mogućnosti potpunog lišenja poslovne sposobnosti, da li lišenje predstavlja diskriminaciju lica sa invaliditetom, te da li bi se njihov položaj zaista poboljšao ukoliko bi došlo do ukidanja te ustanove ili rešenje treba tražiti na planu sveopšte humanizacije postojećih ustanova.

Ključne reči: *Poslovna sposobnost; Lišenje poslovne sposobnosti; Lica sa invaliditetom; Starateljstvo; Zamensko odlučivanje; Odlučivanje uz podršku.*

I UVOD

Objavljivanjem Prednacrta zakona o izmenama i dopunama Porodičnog zakona[1] ponovo je, makar iz ugla pravne nauke, u žižu interesovanja dospelo pitanje uređenja ustanove lišenja poslovne sposobnosti. Naime, odredbama Prednacrta predložene su nezanemarljive izmene u pogledu uređenja te usta-

* Članak predstavlja rezultat rada prof. dr Katarine Dolović Bojić i doc. dr Snežane Dabić Nikićević na projektu Pravnog fakulteta Univerziteta u Beogradu pod nazivom „Savremeni problemi pravnog sistema Srbije" za 2023. godinu.

1 Prednacrt zakona o izmenama i dopunama Porodičnog zakona, *https://www.paragraf.rs/dnevne-vesti/260721/260721-vest10.html*, u daljem tekstu: Prednacrt.

nove. Kao najvažnija, ali ne i jedina, u uvodnom delu rada može se pomenuti izmena kojom se Prednacrtom predlaže ukidanje mogućnosti potpunog lišenja poslovne sposobnosti. Takvo rešenje je u velikoj meri posledica, s jedne strane, usvajanja Zakona o potvrđivanju Konvencije o pravima osoba[2] sa invaliditetom,[3] a s druge strane, prilično glasnih kritika (primene) postojećeg rešenja predviđenog Porodičnim zakonom.[4]

Upravo iz tog razloga, čini se umesnim najpre ukratko prikazati ideju koja prožima Konvenciju o pravima osoba sa invaliditetom, a koja je kod nas ratifikovana još 2009. godine. Čini se da bi nakon toga moglo biti jasnije koliko je rešenje predloženo Prednacrtom inspirisano odredbama pomenute Konvencije. Potom ćemo preći na prikaz i analizu odredaba Prednacrta. Dalje, pažnja će biti posvećena opravdanosti ideje o ukidanju mogućnosti potpunog lišenja poslovne sposobnosti. U okviru podnaslova posvećenog opravdanosti ideje o ukidanju pomenutog instituta, bavićemo se, između ostalog, i pojmom lica sa invaliditetom, dovodeći ga u vezi sa zakonskom formulacijom lica koja se lišavaju poslovne sposobnosti (potpuno ili delimično), kako bi došli do zaključka, a uz pomoć i statističkih podataka, koja je to kategorija lica sa invaliditetom u riziku od lišenja poslovne sposobnosti. Nešto manje prostora, ali nikako iz razloga jer to pitanje smatramo manje bitnim, u poslednjem odeljku rada posvetićemo položaju žena sa invaliditetom, te pitanju da li su one u težoj situaciji u odnosu na muškarce sa invaliditetom.

II ČLAN 12 KONVENCIJE O PRAVIMA OSOBA SA INVALIDITETOM – OD „OBJEKTA ZAŠTITE" DO „SUBJEKTA PRAVA"

U pogledu poslovne sposobnosti osoba sa invaliditetom posebno je značajan čl. 12 (Zakona o potvrđivanju) Konvencije o pravima osoba sa invaliditetom.[5] On predstavlja jedan od najkontroverznijih članova Konvencije jer je, kako se objašnjava, trebalo naći balans između težnje da se obezbedi potpuna poslovna sposobnost za lica sa invaliditetom i realnosti u pogledu ograničenja u vršenju te sposobnosti u slučajevima starateljstva i zakonskog zastupništva.[6]

U članu 12 Konvencije se, najpre, propisuje da su države strane ugovornice dužne da priznaju da „osobe sa invaliditetom ostvaruju svoj prav-

2 Lubarda upozorava da bi u kontekstu ustaljene terminologije domaćeg pravnog sistema, bilo primerenije koristiti termin „lica" umesto „osoba", analogno pojmovima fizičkog i pravnog lica. Branko Lubarda, *Radno pravo – rasprava o dostojanstvu na radu i socijalnom dijalogu* (2012), 64.

3 Zakon o potvrđivanju Konvencije o pravima osoba sa invaliditetom, Sl. glasnik RS – Međunarodni ugovori br. 42/2009, u daljem tekstu: Konvencija.

4 Kasnije u tekstu ćemo se detaljno osvrnuti na pomenute kritike, pokušavajući da dođemo do rešenja koje bi u najvećoj meri štitilo pojedine kategorije lica sa invaliditetom.

5 Odnosno čl. 12 Konvencije.

6 Damjan Tatić, „Usklađivanje domaćeg zakonodavstva sa odredbama Konvencije o pravima osoba sa invaliditetom" u Jovica Trkulja, Branko Rakić, Damjan Tatić (ur.), *Zabrana diskriminacije osoba sa invaliditetom* (2012), 66-67.

ni kapacitet ravnopravno sa drugima u svim aspektima života", kao i da će preduzeti „odgovarajuće mere kako bi osobama sa invaliditetom omogućile dostupnost pomoći koja im može biti potrebna u ostvarivanju njihovog pravnog kapaciteta".[7] Konvencija takođe predviđa i da će države ugovornice obezbediti odgovarajuće i efikasne garancije radi sprečavanja zloupotrebe u pogledu ostvarivanja pravnog kapaciteta osoba sa invaliditetom, da se merama koje se odnose na ostvarivanje pravnog kapaciteta „poštuju prava, volja i prioriteti odnosne osobe, kao i da ne dođe do sukoba interesa i neprimerenog uticaja, da budu proporcionalne i prilagođene okolnostima odnosne osobe, u najkraćem mogućem trajanju i da podležu redovnom preispitivanju nadležnog nezavisnog i nepristrasnog organa ili sudskog tela."[8] Konačno, da će države strane ugovornice „preduzeti sve odgovarajuće i efikasne mere kako bi se osobama sa invaliditetom obezbedila jednaka prava da budu vlasnici imovine ili da je nasleđuju, da kontrolišu svoje finansije i da imaju ravnopravan pristup bankarskim kreditima, hipotekarnim zajmovima i drugim oblicima finansijskog kreditiranja, kao i da osobe sa invaliditetom ne budu lišene svoje imovine nečijom samovoljom".[9]

Sa ciljem sprovođenja Konvencije u državama članicama osnovan je Komitet za prava osoba sa invaliditetom[10] (*Commettee on the Rights of Persons with Disabilities*) kao nadzorno telo. Komitet je usvojio Opšti komentar (OK) povodom nerazumevanja čl. 12 Konvencije (General Comment No. 1 (2014)).[11]

Kada se čita čl. 12 Konvencije, a naročito usvojen OK, očigledno je da se polazi od toga da bi sva odrasla lica, bez izuzetka, trebalo da imaju ne samo pravnu već i potpunu poslovnu sposobnost. U tom smislu, čini se važnim napomenuti da je u OK objašnjeno da se termin „pravni kapacitet" (*legal capacity*) iz čl. 12 Konvencije upotrebljava u širem značenju, tako da obuhvata ne samo sposobnost da se bude nosilac prava i obaveza (*legal standing*) već sposobnost da se izvršavaju ta prava i obaveze (*legal agency*).[12] Drugim rečima,

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7 Čl. 12 st. 2 i 3 Konvencije.

8 Čl. 12 st. 4 Konvencije.

9 Čl. 12 st. 5 Konvencije.

10 Čl. 34 Konvencije.

11 General Comment No. 1 (2014), Convention on the Rights of Persons with Disabilities, (u daljem tekstu: Opšti komentar ili OK), CRPD (2014) General comment No. 1 on equal recognition before the law, CRPD/C/GC/1 • Page 1 • Atlas of Torture (atlas-of-torture.org).

12 Opšti komentar, 3. Inače, pre usvajanja Opšteg komentara postojao je problem tumačenja pojma pravni kapacitet (*legal capacity*) koji se koristi u čl. 12 Konvencije. Tako, primera radi, u hrvatskom prevodu čl. 12 Konvencije termin *legal capacity* preveden je kao „pravna sposobnost" dok se u srpskom prevodu zadržao termin „pravni kapacitet" koji su pojedini naši pravni pisci tumačili kao poslovnu sposobnost. Vid. Olga Cvejić-Jančić, „Pomaci u zaštiti lica sa intelektualnim i psihosocijalnim teškoćama, *Pravni život* br. 10, 2016, 6-7; Draškić je, pak, isticala da se, po njenom mišljenju, st. 1 čl. 12 Konvencije odnosi na pravnu, a st. 2 čl. 12 na poslovnu sposobnost. Marija Draškić, „Novi standardi za postupak lišenja poslovne sposobnosti: aktuelna praksa Evropskog suda za ljudska prava", *Anali Pravnog fakulteta u Beogradu*, br. 2, 2010, 366-367.

Originalni tekst Konvencije, kao i hrvatski prevod dostupni su na linku: *https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with%20disabilities.html#Fulltext.*

termin pravni kapacitet se upotrebljava u znatno širem značenju od onoga što se u građanskom pravu smatra poslovnom sposobnošću (o čemu će biti reči kasnije), time što obuhvata i pravnu sposobnost.

Konvencija je, naime, zasnovana na stavu da su kako pravna tako i poslovna sposobnost univerzalna, ljudska prava koja pripadaju svima, bez izuzetka, samim tim što su ljudska bića.[13] U tom smislu i Strategija unapređenja položaja osoba sa invaliditetom u RS polazi od toga da je poslovna sposobnost univerzalno pravo svakog pojedinca koja proističe iz činjenice da je u pitanju ljudsko biće.[14] Štaviše, iako se priznaje da nemaju svi pojedinci isti nivo sposobnosti odlučivanja, smatra se da to „nije nešto što treba bilo kako da utiče na pravo pojedinca na poslovnu sposobnost",[15] te da član 12 Konvencije „samo traži da osoba sa invaliditetom treba da je jednako slobodna da ostvaruje svoju poslovnu sposobnost i donosi odluke bez obzira na to da li te odluke spoljnom svetu deluju kao „dobre" ili ne."[16] U skladu s tim, ukoliko je u određenim situacijama određenim licima, zbog njihovog (zdravstvenog) stanja, teško ili čak nemoguće da samostalno ostvaruju svoja prava i izvršavaju preuzete obaveze, smatra se da im zbog toga ne treba oduzimati poslovnu sposobnost već im treba pružiti neophodnu pomoć kako bi ih ostvarili/izvršili.[17]

Vladajući trend je, dakle, kritika prakse oduzimanja poslovne sposobnosti licima sa invaliditetom, a ujedno se smatra neprihvatljivim da umesto lica sa invaliditetom volju izjavljuju njihovi zakonski zastupnici ili staratelji. Naravno, zagovornici takvog stava su svesni da ta lica ne mogu sama preduzimati pojedine pravne poslove. Ipak, oni predlažu, pozivajući se na tekst Konvencije, da se napusti model zamenskog (zastupničkog/starateljskog) donošenja odluka u ime lica sa teškoćama, a da se umesto njega uvede model podrške u odlučivanju koju u punoj meri kontroliše samo lice sa invaliditetom.[18] I više

13 Opšti komentar, 4. Nevena Petrušić, „Postupak za lišenje poslovne sposobnosti u pravu Srbije u kontekstu međunarodnih Standarda o pravima osoba sa invaliditetom", *Zbornik radova Pravnog fakulteta u Nišu*, br. 70, 2015, 905.

14 „*Jednako priznanje pred zakonom je osnovni opšti princip zaštite ljudskih prava i neophodan je za ostvarivanje ljudskih prava. Odredbama čl. 12 Konvencije o pravima osoba sa invaliditetom opisuje se sadržaj ovog građanskog prava i fokusira se na oblasti u kojima je osobama sa invaliditetom obično uskraćivano pravo (npr. lišavanje poslovne sposobnosti)*". Strategija unapređenja položaja osoba sa invaliditetom u Republici Srbiji za period od 2020. do 2024. godine (u daljem tekstu: Strategija), 6, 31. *https://www.minrzs.gov.rs/sr/dokumenti/predlozi-i-nacrti/sektor-za-zastitu-osoba-sa-invaliditetom/strategije.*

15 Opšti komentar, 2; Anna Arstein-Kerslake, „Poslovna sposobnost i odlučivanje uz podršku: poštovanje prava i osnaživanje ljudi" u Biljana Janjić, Kosana Beker, Milan Marković (ur.), *Zbirka radova i preporuka – Poslovna sposobnost i život u zajednici: zaštita prava osoba sa invaliditetom* (2014), 77.

16 „*Article 12 of the Convention on the Rights of Persons with Disabilities, however, makes it clear that "unsoundedness of mind" and other discriminatory labels are not legitimate reasons for the denial of legal capacity (both legal standing and legal agency). Under article 12 of the Convention, perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity.*" vid. Opšti komentar, 3; Arstein-Kerslake, *op. cit*., 74.

17 Opšti komentar, 4.

18 Petrušić, *op. cit*., 905; Milan Marković, „Poslovna sposobnost kao univerzalno ljudsko pravo i determinanta društvenog položaja lica sa mentalnim invaliditetom", *Stanovništvo*, br. 2, 2012, 73-74.

od toga, smatraju da bi svako lišenje poslovne sposobnosti trebalo da bude osnov pritužbe za diskriminaciju.[19] Model asistiranog odlučivanja temelji se na potpunoj poslovnoj sposobnosti lica sa invaliditetom kome sud određuje pružaoca pomoći, koji ne odlučuje umesto osobe sa invaliditetom, već ta osoba odlučuje sama uz savete i tehničku podršku[20] asistenta.[21] Pritom bi, asistenti ili pomoćnici trebalo da budu lica iz kruga ljudi kojima korisnik veruje i koji mu se dodeljuju po pristanku.[22] Kako se ističe, „pojedinac je u centru procesa odlučivanja i pružalac podrške nije ovlašćen da uspostavlja svoju volju umesto volje pojedinca" – on je „naprosto tumač volje i želje pojedinca".[23] U kom obliku će se ta podrška pružati zavisi u velikoj meri od toga kakav vid podrške je potreban konkretnoj osobi sa invaliditetom – „podrška" je u tom smislu širok pojam.[24] U onim, pak, slučajevima u kojima se ne može sa sigurnošću utvrditi volja lica kome se pruža podrška, uprkos svim naporima, trebalo bi uzeti u obzir „najbolje tumačenje volje i preferencija" a ne ono što je u „najboljem interesu" tog lica, kako bi se obezbedilo da lice sa invaliditetom uživa svoju pravnu i poslovnu sposobnost na isti način kao i druga lica.[25]

Kao što se može zaključiti, krajnji cilj Konvencije je, dakle, potpuno napuštanje instituta lišenja poslovne sposobnosti.[26]

III REŠENJE PREDLOŽENO PREDNACRTOM ZAKONA O IZMENAMA I DOPUNAMA PORODIČNOG ZAKONA

Posmatrajući način na koji su skrojene odredbe u Prednacrtu Zakona o izmenama i dopunama Porodičnog zakona, na prvi pogled se čini da su suštinske promene koje on donosi formalno ukidanje ustanove potpunog li-

19 Vid. na primer: Petrušić, *op. cit*., 907; Strategija, 33.

20 Takođe, postavlja se pitanje da li je takva podrška neophodna samo licima sa invaliditetom – drugim rečima, nije li neophodno obezbediti podršku i osobama koja nemaju invaliditet, ali se nalaze u specifičnim socijalnim situacijama. Amita Dhanda, „Uticaj Konvencije UN-a o pravima osoba sa invaliditetom na zakonodavne izmene: kako treba izmeniti zakon da prepozna pravo sadržano u članu 12 Konvencije – transkript prezentacije sa Konferencije" u Biljana Janjić, Kosana Beker, Milan Marković (urednici), *Zbirka radova i preporuka „Poslovna sposobnost i život u zajednici: zaštita prava osoba sa invaliditetom* (2014), 44.

O zamenskom i donošenju odluka uz podršku više i u Nevena Petrušić, Kosana Beker i Dragana Ćirić Milovanović, *Smernice za postupanje sudija u slučajevima lišavanja poslovne sposobnosti* (2016), 15-17.

21 Opšti komentar, 4; Marković (2012), *op. cit*., 75.

22 Milan Marković, „Univerzalnost poslovne sposobnosti u kontekstu prava i društvenog položaja lica sa mentalnim teškoćama" u Biljana Janjić, Kosana Beker, Milan Marković (ur.), *Zbirka radova i preporuka „Poslovna sposobnost i život u zajednici: zaštita prava osoba sa invaliditetom* (2014), 58.

23 Anna Arstein-Kerslake, *op. cit*.,72.

24 Opšti komentar, 4-5.

25 Opšti komentar, 5.

26 Marković (2014), *op. cit*., 57.

šenja poslovne sposobnosti i uvođenje mogućnosti odlučivanja uz podršku. Naime, u Prednacrtu se, umesto potpunog i delimičnog lišenja poslovne sposobnosti, govori zapravo o *ograničenju poslovne sposobnosti.*[27] Kao što će se videti, to ograničenje poslovne sposobnosti po svojoj suštini u dobroj meri odgovara onome što je trenutno Porodičnim zakonom uređeno kao mogućnost delimičnog lišenja poslovne sposobnosti. Međutim, detaljnija analiza predloženih rešenja, naročito u pogledu načina utvrđivanja obima ograničenja poslovne sposobnosti, vodi zaključku da se njima ipak ostavlja mogućnost da određenom licu bude u toj meri ograničena poslovna sposobnost da se njegov položaj praktično (u posledicama) gotovo izjednačava sa položajem lica potpuno lišenog poslovne sposobnosti, imajući u vidu važeća pravila kojima se uređuje potpuno lišenje poslovne sposobnosti.

Prema rešenju predloženom Prednacrtom, materija tzv. ograničene poslovne sposobnosti bila bi regulisana u četiri člana.

Prvi član bi nosio naziv „Ograničenje poslovne sposobnosti" i njime bi se u pet stavova uredili, najpre, uslovi pod kojima se nekom licu može ograničiti poslovna sposobnost, potom, krug poslova koje to lice može, odnosno ne može samostalno preduzimati, odnosno može preduzimati uz podršku i prethodnu saglasnost postavljenog staratelja, potom, trajanje ograničenja poslovne sposobnosti, te konačno, rok u kome mora otpočeti i završiti se postupak preispitivanja ograničenja poslovne sposobnosti.

Tako, prema stavu 1 tog člana određuje se da „punoletnom licu koje svojim postupcima neposredno ugrožava sopstvena prava i interese ili prava i interese drugih lica može biti ograničena poslovna sposobnost".

Ako se uporedi sa odredbama kojima se, prema pozitivnopravnim propisima, uređuje potpuno i delimično lišenje poslovne sposobnosti, može se jasno uočiti da se u novom predlogu ograničenje poslovne sposobnosti određuje samo prema tome da li punoletno lice *svojim postupcima neposredno ugrožava sopstvena prava i interese ili prava i interese drugih lica*.

Kao što se može videti, u novom predlogu se, s jedne strane, uopšte ne pominje formulacija iz Porodičnog zakona kojom se uređuje potpuno lišenje poslovne sposobnosti,[28] a kada je reč o važećoj odredbi o delimičnom lišenju poslovne sposobnosti,[29] može se jasno uočiti da je (u novom predlogu) izbačena formulacija „zbog bolesti ili smetnji u psiho-fizičkom razvoju" kao uzroka koji je doveo do toga da lice svojim postupcima neposredno ugrožava sopstvena prava i interese ili prava i interese drugih lica. Pretpostavlja se da su tome prethodila dva razloga. Prvi razlog ogleda se u kritici koja se upućuje

27 Vid. čl. 43 Prednacrta.

28 Vid. čl. 146 st. 1 Porodičnog zakona, *Službeni glasnik RS* br. 18/2005, 72/2011 – dr. zakon i 6-2015 (u daljem tekstu PZ): „Punoletno lice koje zbog bolesti ili smetnji u psihofizičkom razvoju nije sposobno za normalno rasuđivanje te zbog toga nije u stanju da se samo stara o sebi i o zaštiti svojih prava i interesa može biti potpuno lišeno poslovne sposobnosti".

29 Vid. čl. 147 st. 1 PZ: „Punoletno lice koje zbog bolesti ili smetnji u psiho-fizičkom razvoju svojim postupcima neposredno ugrožava sopstvena prava i interese ili prava i interese drugih lica može biti delimično lišeno poslovne sposobnosti."

trenutnom rešenju: da baca prejako svetlo upravo na taj deo formulacije – da je ugrožavanje sopstvenih ili tuđih prava i interesa posledica *bolesti ili smetnji u psiho-fizičkom razvoju* – i na taj način prouzrokuje da invaliditet, a posebno mentalni i psihosocijalni invaliditet, postane glavni (štaviše jedini) razlog za lišenje.[30] Drugi razlog, koji se nadovezuje na prvi, jeste u tome da se novim predlogom želi preći na drugačiji sistem utvrđivanja da li postoji potreba za ograničenjem poslovne sposobnosti: umesto primene tzv. statusnog principa, kog kojeg se nesposobnost utvrđuje na osnovu medicinske[31] dijagnoze,[32] želi se preći na princip ishoda (prema kome se nesposobnost utvrđuje na osnovu loših odluka koje je lice donosilo), a naročito funkcionalni pristup, kod koga se utvrđuje nesposobnost za pojedine oblasti i/ili pojedine odluke.[33] Kako je pretpostavka da svako punoletno lice ima poslovnu sposobnost, za bilo kakvo ograničenje poslovne sposobnosti mora postojati ozbiljan razlog s jedne strane, a s druge strane, treba nastojati da se sa što manjim ograničenjem postigne željeni cilj – zaštita pojedinih kategorija lica.

Prebacivanje fokusa na utvrđivanje da li određeno lice svojim postupcima neposredno ugrožava sopstvena ili tuđa prava i interese nesumnjivo bi moglo da doprinese tome da u postupku ograničenja poslovne sposobnosti sud više pažnje posveti samim postupcima određenog lica, a ne toliko tome šta je prouzrokovalo takve postupke. Ipak, čini nam se da je teško zamisliti da neko može preduzimati postupke kojima neposredno ugrožava svoja ili tuđa prava i interese a da takvo ponašanje nije istovremeno posledica neke bolesti ili smetnje u psihofizičkom razvoju.

Osim toga, važno je pomenuti da je odredba stava 1 istog člana Prednacrta formulisana na takav način da se uslov za ograničenje poslovne spo-

30 Kako se navodi, istraživanja su pokazala *„da su odluke kojima se osobe lišavaju poslovne sposobnosti veoma kratke (2-3 strane), obrazloženja odluka su štura i nedovoljno jasna, te se često ne može zaključiti na koji način je sud procenio poslovnu sposobnost osobe, osim na osnovu medicinske dijagnoze, što ukazuje da je samo postojanje intelektualnih ili psihosocijalnih teškoća dovoljno za oduzimanje poslovne sposobnosti.*" Ivana Krstić i Kosana Beker, *Situaciona analiza; Poslovna sposobnost i osobe sa invaliditetom u Srbiji*, u okviru projekta „Poslovna sposobnost kao preduslov ravnopravnosti osoba sa invaliditetom pred zakonom", Beograd 2017, 25. Slično i u Kosana Beker, „Pravni okvir lišavanja poslovne sposobnosti u Srbiji – trenutno stanje i izazovi" u Biljana Janjić, Kosana Beker, Milan Marković (urednici), *Zbirka radova i preporuka – Poslovna sposobnost i život u zajednici: zaštita prava osoba sa invaliditetom* (2014), 84; Kosana Beker i Tijana Milošević, *Poslovna sposobnost; Sudska praksa i zakoni u Srbiji* (2016), 34; Marković (2014), *op. cit*., 54.

31 Pojedini autori, s pravom, upozoravaju da iako se u definisanju lica sa invaliditetom odbacuje medicinski model, nesporno je da je tim licima potrebna zaštita u brojnim slučajevima i mnogo češće nego ostalom stanovništvu. Hajrija Mujović Zornić, „Pravna pitanja zdravstvene zaštite osoba sa invaliditetom" u Jovica Trkulja, Branko Rakić, Damjan Tatić (ur.), *Zbornik radova Zabrana diskriminacije osoba sa invaliditetom*, (2012), 305-324.

32 *„Prema podacima iz analize sudske prakse o poslovnoj sposobnosti iz 2011. godine, lišenje poslovne sposobnosti zasniva se isključivo na medicinskom modelu, odnosno u 99% analiziranih odluka jasno je navedena vrsta invaliditeta, najčešće kao medicinska dijagnoza*." Krstić i Beker, *op. cit*., 18.

33 To se jasnije može videti iz stava 2 istog člana Prednacrta, prema kome se sudskom odlukom ima odrediti koje poslove lice može, odnosno ne može preduzimati samostalno. Više o tome biće reči dalje u radu.

sobnosti ispunjava tek ukoliko se već pokazalo da određeno lice svojim postupcima neposredno ugrožava sopstvena prava i interese ili prava i interese drugih lica. Čini se, dakle, da ograničenje poslovne sposobnosti ne bi bilo moguće samo na osnovu bojazni da bi neko u perspektivi mogao da ugrozi svoja ili tuđa prava/interese. I takvo rešenje rezultat je kritike koja se u teoriji iznosila zbog načina na koji se oduzima poslovna sposobnost, da se odluka gotovo potpuno zasniva na medicinskoj dijagnozi bez obzira na to da li je lice lišeno poslovne sposobnosti u dotadašnjem postupanju zaista ugrozilo svoja ili tuđa prava/interese. U vezi sa tim, iznosilo se mišljenje da sud mora da vodi računa o tome da svaka osoba ima pravo na rizik i na grešku, te da to ne mora da bude razlog za lišenje poslovne sposobnosti.[34] Ipak, otvara se pitanje gde je granica: koliko grešaka neko mora da napravi, odnosno kakve one po prirodi moraju biti, da bi se sa kakvom-takvom sigurnošću moglo tvrditi da određeno lice ugrožava svoja i tuđa prava/interese i sledstveno tome doneti sudska odluka o ograničenju poslovne sposobnosti.

Prema predloženom rešenju, dakle, nije moguće preventivno delovati, čak ni onda kada je na osnovu nečijeg stanja gotovo izvesno da svojim postupcima može da ugrozi svoja ili tuđa prava/interese. Ipak, kao kontraargument može se izneti da je poslovna sposobnost punoletnih lica pravilo, te da do njenog ograničenja mora doći izuzetno. Osim toga, ako neko (formalno poslovno sposobno) lice i preduzme posao kojim je nesumnjivo ugrozio svoja ili tuđa prava/obaveze, takav posao se prema opštim pravilima obligacionog prava može naknadno napadati, doduše samo ako se dokaže da saugovarač nije bio sposoban za rasuđivanje u momentu kada je posao preduzet,[35] mada u tom slučaju postoji rizik da li će biti moguć povratak u pređašnje stanje u pravom smislu te reči.

Stavom 2 istog člana Prednacrta, predviđeno je da će se sudskom odlukom o ograničenju poslovne sposobnosti odrediti: prvo, pravni poslovi koje lice ograničene poslovne sposobnosti *ne može* samostalno preduzimati; drugo, pravni poslovi koje lice ograničene poslovne sposobnosti *može* samostalno preduzimati; treće, pravni poslovi koje lice ograničene poslovne sposobnosti može preduzimati *uz podršku i prethodnu saglasnost* postavljenog staratelja.

Tim stavom se, najpre, potvrđuje ono što je već rečeno: težnja jeste da se pređe na funkcionalni princip utvrđivanja (ne)sposobnosti, tako da se u odnosu na svako lice mora proceniti koje pravne poslove može, odnosno, ne može preduzimati samostalno, sa idejom da se poslovna sposobnost ograniči u potrebnoj meri, ali ujedno i najmanjoj mogućoj meri; drugim rečima, ne ograničavati više nego što je neophodno![36]

Takav stav nastaje kao posledica kritika upućivanih na račun (relativno indikativnih) podataka dobijenih na osnovu analize sudske prakse: istraživanja su, naime, pokazala da je u 84.23% slučajeva, u odnosu na ukupan broj podnetih predloga, doneta odluka o potpunom lišenju, u 6.35% slučajeva o

34 Petrušić, Beker i Ćirić Milovanović, *op. cit*., 27.

35 Obren Stanković i Vladimir Vodinelić, *Uvod u građansko pravo* (1996), 62.

36 Kosana Beker, *Lišenje poslovne sposobnosti, Zakoni i praksa u Republici Srbiji* (2014), 42.

produženju roditeljskog prava (koje se u posledicama izjednačava sa potpunim lišenjem), dok je u svega 9.42% slučajeva doneta odluka o delimičnom lišenju poslovne sposobnosti.[37] Ti podaci mogu biti indikacija da se sud mnogo lakše odlučuje za potpuno umesto delimičnog lišenja poslovne sposobnosti.[38] Iako je, dakle, potpuno lišenje poslovne sposobnosti „najrestriktivnija mera kojom se ozbiljno zadire u život jedne osobe, gotovo da je u Srbiji pravilo".[39]

Predloženom stavu bi se, međutim, moglo zameriti nekoliko stvari.

Prvo, nije jasno da li sud ima dužnost da u svakom pojedinačnom slučaju odredi sve tri grupe poslova ili se može opredeliti da odredi samo jednu grupu – primera radi, da sud odredi samo šta neko lice ne može samostalno da preduzme, a da se onda putem *argumentum a contrario* smatra da sve ostale poslove može; i obratno.

Drugo, ako je ideja da se poslovna sposobnost ograničava u što manjoj meri, nije najjasnije zašto su se redaktori Prednacrta ipak opredelili da zadrže mogućnost da sud odredi šta određeno lice *može* da preduzima, naročito ukoliko bi se prihvatilo shvatanje da sud može da se opredeli i samo za tu mogućnost prilikom ograničavanja poslovne sposobnosti (da se u rešenju odredi samo šta određeno lice može samostalno da preduzima). Imajući u vidu da deluje da je namera ukidanje mogućnosti potpunog lišenja poslovne sposobnosti, daleko logičnijim rešenjem se čini da sud određuje samo šta konkretno lice *ne može* samostalno da preduzima, a što je u skladu i sa idejom da je ograničenje poslovne sposobnosti izuzetak u odnosu na pravilo da se smatra da je svako punoletno lice poslovno sposobno. Osim toga, određivanje samo kruga poslova koje neko lice *može* samostalno da preduzima može u praksi dovesti do toga da određenom licu poslovna sposobnost bude u velikoj meri ograničena, da se u posledicama praktično izjednači sa onim što po važećim

37 Vid. Ljiljana Plazinić, *Istraživački nalazi o praksama centara za socijalni rad u vezi sa lišavanjem poslovne sposobnosti* (2020), 18.

38 Tako visok procenat slučajeva u kojima je u praksi došlo do potpunog lišenja poslovne sposobnosti može biti posledica i nejasnoća u tumačenju i primeni zakonskih odredaba kojima se definišu razlozi za potpuno i delimično lišenje poslovne sposobnosti.

Naime, PZ u čl. 146 st. 1 propisuje da „*punoletno lice koje zbog bolesti ili smetnji u psihofizičkom razvoju nije sposobno za normalno rasuđivanje te zbog toga nije u stanju da se samo stara o sebi i o zaštiti svojih prava i interesa može biti potpuno lišeno poslovne sposobnosti*", dok u čl. 147 st. 1 propisuje da „*punoletno lice koje zbog bolesti ili smetnji u psihofizičkom razvoju svojim postupcima neposredno ugrožava sopstvena prava i interese ili prava i interese drugih lica može biti delimično lišeno poslovne sposobnosti*". Primećujemo, dakle, da zakonodavac kao uzrok i potpunog i delimičnog lišenja poslovne sposobnosti vidi bolest ili smetnju u psihofizičkom razvoju. Distinkcija postoji samo u odnosu na to da se lica koja nisu sposobna za normalno rasuđivanje te da se sami staraju o sebi i o zaštiti svojih prava i interesa mogu potpuno lišiti poslovne sposobnosti, dok se ona koja svojim postupcima neposredno ugrožavaju sopstvena/tuđa prava i interese mogu delimično lišiti. Ipak, tu bi se moglo postaviti pitanje: u čemu je razlika između osobe koja nije u stanju da se stara o sebi i zaštiti svojih prava i interesa od one koja svojim postupcima ugrožava svoja/tuđa prava i interese? Nije li logično da onaj ko ugrožava svoja prava i interese ujedno nije u stanju da se sam stara o sebi? I obrnuto, da onaj ko nije u stanju da se stara o sebi i svojim pravima i interesima njih ujedno i ugrožava?

39 Beker, *op. cit*., 84.

propisima predstavlja potpuno lišenje poslovne sposobnosti. Stoga, nama se čini da bi, iako na prvi pogled deluje da se Prednacrtom ukida mogućnost potpunog lišenja poslovne sposobnosti, ta mogućnost teorijski i praktično ipak postojala, sa čime se načelno i slažemo jer smatramo da je potpuno lišenje poslovne sposobnosti ponekad zapravo jedina odgovarajuća opcija, kada je reč o kategoriji lica čija je zajednička karakteristika da su nesposobna za rasuđivanje (odnosno nesposobna da shvate značaj pravnih poslova koje preduzimaju i dejstva koja će preduzeti poslovi proizvesti).

Treće, nije potpuno jasno šta se praktično podrazumeva pod određivanjem kruga pravnih poslova koje lice ograničene poslovne sposobnosti *ne može* samostalno preduzimati. Da li to znači da te pravne poslove preduzima neko umesto njih ili da im je za takve poslove samo potrebna saglasnost zakonskog zastupnika/staratelja? Trenutno pozitivnopravno rešenje je u tom smislu jasnije: kada je reč o licima potpuno lišenim poslovne sposobnosti, pravne poslove za njih i umesto njih preduzimaju zakonski zastupnici ili staratelji, dok kada je reč o licima koja su delimično lišena poslovne sposobnosti, pravne poslove preduzima to lice, ali mu je potrebna saglasnost staratelja da bi ti poslovi mogli da proizvode pravna dejstva (naknadna saglasnost ima retroaktivno dejstvo).[40] Na postavljena pitanja se nadovezuje još jedno: koja je razlika između pravnih poslova koje lice ograničene poslovne sposobnosti *ne može* samostalno preduzimati i pravnih poslova koje lice ograničene poslovne sposobnosti može preduzimati *uz podršku i prethodnu saglasnost* postavljenog staratelja? Činjenica je da u oba slučaja nema samostalnosti lica kome se ograničava poslovna sposobnost. Nama se čini da jedini logičan odgovor jeste da se pod „pravne poslove koje lice ograničene poslovne sposobnosti *ne može* samostalno preduzimati" podrazumevaju poslovi koje staratelj preduzima *umesto* lica kome se ograničava poslovna sposobnost, tj. u njegovo ime i račun, bez ikakvog formalnog učešća lica ograničene poslovne sposobnosti. A da je s druge strane, kod „pravnih poslova koje lice ograničene poslovne sposobnosti može preduzimati *uz podršku i prethodnu saglasnost* postavljenog staratelja", reč o poslovima koje preduzima ograničeno poslovno sposobno lice, ali da mu je neophodna i (prethodna) saglasnost staratelja. Konačno, pitanje može biti i kakve će biti pravne posledice u slučaju da lice ograničene poslovne sposobnosti preduzme posao za koji je određeno da mu je potrebna podrška i *prethodna* saglasnost staratelja, a on to učini bez te saglasnosti. Drugim rečima, postavlja se pitanje kakav će biti pomenuti pravni posao u pogledu punovažnosti.

Prema stavu 3, sudskom odlukom o ograničavanju poslovne sposobnosti određuje se rok trajanja ograničenja, pri čemu on ne može biti duži od tri godine. Sam po sebi, takav predlog se ne razlikuje od trenutnog pozitivnopravnog rešenja.[41] Ipak, Prednacrt donosi dve velike novine. Najpre, u stavu 5 je predviđeno da se postupak ograničenja poslovne sposobnosti mora započeti najkasnije 60 dana pre isteka roka trajanja ograničenja, pri čemu se mora i

40 Vid. čl. 146 i 147 PZ.

41 Vid. čl. 40 st. 2 Zakona o vanparničnom postupku, Službeni glasnik SRS br. 25/82 i 48/88 i Službeni glasnik RS br. 46/95 – dr. zakon, 18/2005, 85/2012, 45/2013 – dr. zakon, 55/2014, 6/2015, 106/2015 – dr. zakon i 14/2022) – dr. zakon u daljem tekstu: ZVP.

okončati najkasnije do dana isteka roka trajanja ograničenja. Takvo ograničavanje momenta okončanja postupka preispitivanja takođe je posledica kritike upućene trenutnom pozitivnopravnom rešenju, a koje potencijalno može dovesti do toga da se postupak preispitivanja okonča i mnogo nakon što je istekao trogodišnji rok, čime potpuno/delimično lišenje poslovne sposobnosti zapravo faktički može i mnogo duže da traje.[42] Dalje, još važnije, u Prednacrtu se posebnim članom, koji nosi naziv „Prestanak ograničenja poslovne sposobnosti", predviđa ne samo da se punoletnom licu ograničene poslovne sposobnosti može vratiti poslovna sposobnost kada prestanu razlozi zbog kojih mu je ograničena, već i da ograničenje poslovne sposobnosti prestaje po sili zakona ukoliko se postupak preispitivanja ne pokrene najkasnije 60 dana pre isteka roka od tri godine, odnosno ukoliko se postupak preispitivanja ne okonča najkasnije sa danom isteka trogodišnjeg roka.[43]

Ipak, iako postoji mogućnost da se i pre isteka roka od tri godine pokrene postupak vraćanja poslovne sposobnosti, ako su prestali razlozi zbog kojih je ograničena, ni Prednacrtom se ne propisuju kriterijumi na osnovu kojih će sud odrediti dužinu trajanja mere ograničenja poslovne sposobnosti unutar propisanog trogodišnjeg roka. Jedino što je predviđeno jeste da se o dužini trajanja ograničenja poslovne sposobnosti mora izjasniti sudski veštak u svom nalazu i mišljenju. To je, inače, još jedna od kritika pozitivnopravnog rešenja imajući u vidu da su istraživanja pokazala da je sud u 95% slučajeva odredio maksimalan rok od tri godine.[44] Sud, dakle, maksimalni rok određuje gotovo po automatizmu, a pretpostavlja se da to čini prvenstveno iz praktičnih razloga – da se sudski aparat ne opterećuje – što je svakako nauštrb prava i interesa lica lišenih poslovne sposobnosti. Čini se da bi takva praksa mogla da se nastavi i nakon što bi bile usvojene izmene i dopune predložene Prednacrtom.

Konačno, u stavu 4 se novim predlogom predviđa da se o obimu, sadržaju i dužini trajanja ograničenja poslovne sposobnosti izjašnjava sudski veštak u svom nalazu i mišljenju. Time se uvode najmanje dve suštinske izmene u odnosu na trenutno pozitivnopravno rešenje.[45] Prvo, sud će biti dužan da zatraži nalaz i mišljenje samo jednog sudskog veštaka, a ne najmanje dvojice kako je sada slučaj. Drugo, fokus u nalazu i mišljenju veštaka biće na obimu, sadržini i dužini trajanja ograničenja poslovne sposobnosti, a ne na stanju mentalnog zdravlja i sposobnosti lica za rasuđivanje, iako se čini da prvo bez drugog ne može (teško da veštak može da proceni obim, sadržinu i dužinu trajanja ograničenja poslovne sposobnosti ako prethodno ne proceni, između ostalog, i mentalno zdravlje i sposobnost lica za rasuđivanje). Ipak, precizira-

42 Osim toga, skrenuta je pažnja na to da pozitivnopravni propisi ignorišu dejstvo pravnosnažne sudske odluke kojom se *privremeno* ograničava poslovna sposobnost – trebalo bi smatrati da takva odluka prestaje da važi čim istekne rok na koji je mera lišenja poslovne sposobnosti određena. Petrušić, *op. cit*., 914.

43 Vid. čl. 46 Prednacrta.

44 Vid. Krstić i Beker, *op. cit*., 27; Petrušić, *op. cit*., 912.

45 Vid. čl. 38 st. 1 ZVP: „Lice prema kome se postupak za lišenje poslovne sposobnosti vodi mora biti pregledano od najmanje dva lekara odgovarajuće specijalnosti, koji će dati nalaz i mišljenje o stanju mentalnog zdravlja i sposobnosti tog lica za rasuđivanje."

nje da se od veštaka očekuje da dâ svoje mišljenje i nalaz u pogledu činjenica u kojoj meri bi trebalo ograničiti poslovnu sposobnost, koje poslove lice jeste ili nije sposobno da izvrši, kao i koliko bi trebalo da traje ograničenje, trebalo bi da vodi tome da se veštak ne zadrži *samo* na proceni mentalnog zdravlja i sposobnosti za rasuđivanje već da ode i korak dalje – kako bi, imajući u vidu sve okolnosti, pa i mentalno zdravlje i sposobnost za rasuđivanje, trebalo ograničiti njegovu poslovnu sposobnost.

Ostale odredbe Prednacrta se ne razlikuju od pozitivnopravnih rešenja, osim terminološki – umesto pojmova „lišenja" i „vraćanja" poslovne sposobnosti autori teksta Prednacrta se opredeljuju za „ograničenje" i „prestanak ograničenja" poslovne sposobnosti.[46] Prednacrtom je takođe predviđeno i da odluku o ograničenju i prestanku ograničenja poslovne sposobnosti donosi sud u vanparničnom postupku, da se pravnosnažna sudska odluka dostavlja bez odlaganja organu starateljstva, kao i da se upisuje u matičnu knjigu rođenih, ali i javni registar prava na nepokretnostima ukoliko lice ograničene poslovne sposobnosti ima nepokretnosti.

IV O OPRAVDANOSI IDEJE O UKIDANJU MOGUĆNOSTI POTPUNOG LIŠENJA POSLOVNE SPOSOBNOSTI

U traženju odgovora na pitanje da li je institut lišenja poslovne sposobnosti neophodan u jednom pravnom sistemu, a naročito da li bi trebalo ukinuti mogućnost potpunog lišenja poslovne sposobnosti sa idejom zaštite lica sa invaliditetom od diskriminacije, neophodno je najpre utvrditi koja su to lica sa invaliditetom u riziku da budu lišena poslovne sposobnosti. Nakon toga čini se prilično važnim objasniti u nekoliko redova razliku između pravne i poslovne sposobnosti, te koja je njihova funkcija, jer se čini da se nažalost, čak i u stručnim tekstovima, ta dva pojma često mešaju ili posmatraju kao jedno, iako među njima postoje krucijalne razlike. To će pomoći da se jasnije sagleda slika opravdanosti ideje o ukidanju mogućnosti potpunog lišenja poslovne sposobnosti, te dođe do odgovora da li se poboljšanje položaja osoba sa invaliditetom i njihova zaštita može postići na drugi, mnogo adekvatniji način.

1. Pojam osobe sa invaliditetom i rizik od lišenja poslovne sposobnosti

U teoriji se lice sa invaliditetom obično definiše kao lice koje usled medicinske ili biološke disfunkcije ima određena ograničenja i prepreke za puno učešće u društvu.[47] I u Zakonu o potvrđivanju Konvencije o pravima osoba sa invaliditetom se polazi od toga da u pojam osobe sa invaliditetom ulaze i one koje imaju dugoročna fizička, mentalna, intelektualna ili čulna oštećenja koja u interakciji sa raznim preprekama mogu ometati njihovo puno i efikasno učešće u društvu na jednakoj osnovi sa drugima.[48] Slično i Zakon o

46 Vid. čl. 149 i 150 PZ, kao i čl. 47 i 48 Prednacrta.

47 Ljubinka Kovačević, *Zasnivanje radnog odnosa* (2021), 235.

48 Čl. 1 st. 2 Konvencije.

sprečavanju diskriminacije osoba sa invaliditetom[49] definiše pojam osoba sa invaliditetom „kao osobe sa urođenom ili stečenom fizičkom, senzornom, intelektualnom ili emocionalnom onesposobljenošću koje usled društvenih ili drugih prepreka nemaju mogućnosti ili imaju ograničene mogućnosti da se uključe u aktivnosti društva na istom nivou sa drugima, bez obzira na to da li mogu da ostvaruju pomenute aktivnosti uz upotrebu tehničkih pomagala ili službi podrške".[50]

Dakle, da bi bilo reči o licu sa invaliditetom, neophodno je postojanje određene disfunkcije, odnosno određenog vida fizičkog, mentalnog, intelektualnog ili čulnog oštećenja koji dovode do nemogućnosti da to lice bude uključeno u društvo na isti način kao i lica koja ne poseduju pomenute vidove oštećenja, odnosno disfunkcije. Ipak, čini se da te prepreke na koje lice sa invaliditetom[51] nailazi u društvu, nisu posledica samo određenih oštećenja/bolesti koje lice poseduje, već i nerazumevanja, neprihvatanja, ali nesporno i predrasuda društva. Upravo zbog toga, postoji težnja da se na različite načine, a pre svega donošenjem pravnih akata na međunarodnom nivou, lica sa invaliditetom učine što ravnopravnijim sa svim ostalim članovima društva, te da im se na taj način omogući integracija u društvo.[52]

Primećujemo da je pojam lica sa invaliditetom prilično široko postavljen budući da se odnosi na lica sa najrazličitijim vidovima oštećenja/oboljenja koje usled toga, kao i nerazumevanja društva, mogu imati najrazličitije probleme da se integrišu u društvo. Nesporno je da lica sa invaliditetom ne predstavljaju homogenu grupu, te da postoje velike razlike među njima u pogledu starosti, sposobnosti za život i rad i slično.[53] Kada je reč o integraciji možemo

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49 Čl. 3 st. 1 Zakona o sprečavanju diskriminacije osoba sa invaliditetom, Službeni glasnik RS br. 33/2006 i 13/2016.

50 Na polju radne sposobnosti i uključivanja na tržište rada, relevantna definicija osobe sa invaliditetom bila bi ona sadržana u Zakonu o profesionalnoj rehabilitaciji i zapošljavanju osoba sa invaliditetom, Službeni glasnik RS br. 36/2009, 32/2013, i 14/2022 – dr. zakon. U smislu ovog Zakona lice sa invaliditetom je „lice sa trajnim posledicama telesnog, senzornog, mentalnog ili duševnog oštećenja ili bolesti koje se mogu otkloniti lečenjem ili medicinskom rehabilitacijom, koje se suočava sa socijalnim i drugim ograničenjima od uticaja na radnu sposobnost i mogućnost zaposlenja ili održanja zaposlenja i koje nema mogućnosti ili ima smanjene mogućnosti da se, pod ravnopravnim uslovima, uključi na tržište rada i da konkuriše za zapošljavanje sa drugim licima". Dakle, osoba sa invaliditetom po ovom zakonu bila bi ona kod koje postoji uzročna veza između određenog vida oštećenja ili bolesti i nemogućnosti funkcionisanja na tržištu rada na isti način kao i sva druga lica.

51 "*Invaliditet predstavlja činjenicu koja je, u načelu, trajna i čije nastupanje proizvodi lakše ili teže posledice po zdravlje i životnu sposobnost određenog lica.*" „*...invaliditet pretpostavlja postojanje oštećenja tela, gubitak dela tela, oštećenje, onesposobljenost ili gubitak organa, odnosno promene u zdravstvenom stanju...ograničenje, smanjenje ili gubitak sposobnosti za obavljanje fizičke aktivnosti ili psihičke funkcije, odnosno smanjenje mogućnosti za zadovoljenje ličnih potreba*." Borivoje Šunderić i Ljubinka Kovačević, *Radno pravo* (2017), 273-274.

52 Više o pojmu invaliditeta, prelasku sa primene medicinskog modela na tzv. socijalni model invaliditeta, kao i distinkciji između pojmova invaliditeta i invalidnosti u Kovačević, *op. cit*., 234–241.

53 Radoje Brković i Bojan Urdarević, *Radno pravo sa elementima socijalnog prava* (2020), 170.

opet govoriti o različitim poljima na kojima se može postaviti pitanje kako će funkcionisati lica sa pojedinim zdravstvenim problemima, te u kojoj meri će im položaj biti otežan u odnosu na sva druga lica. Imajući u vidu predmet ovog rada, nas pre svega zanima kakva je poslovna sposobnost lica sa invaliditetom, te na koji način će pojedina oštećenja/bolesti/disfunkcije tih lica uticati na mogućnost da samostalno preduzimaju pravne poslove odnosno vrše svoju poslovnu sposobnost.

U vezi sa tim, neophodno je naglasiti da nisu sva lica sa invaliditetom u riziku od lišenja (potpunog ili delimičnog) poslovne sposobnosti. S jedne strane, postoje lica čiji invaliditet ni na koji način ne utiče na njihovu poslovnu sposobnost. Preciznije, njihov invaliditet ne utiče na, kako zakonodavac predviđa kao razlog za potpuno lišenje poslovne sposobnosti, njihovu sposobnost za rasuđivanje i sposobnost da se samostalno staraju o sebi i zaštiti svojih prava i interesa,[54] odnosno njihov invaliditet ne dovodi do toga da svojim postupcima ugrožavaju svoja ili tuđa prava i interese, što bi bio razlog za delimično lišenje poslovne sposobnosti.[55] S druge strane, pak, kada je reč o nekim vidovima invaliditeta, poslovna sposobnost lica može biti tangirana na takav način da se usled toga ta lica mogu delimično, pa čak i potpuno lišiti poslovne sposobnosti. Praksa pokazuje da su u riziku od lišenja poslovne sposobnosti najčešće osobe sa mentalnim (intelektualnim, psihosocijalnim) invaliditetom.[56] Tako, oduzimanje poslovne sposobnosti najviše pogađa osobe sa intelektualnim teškoćama (40%), a odmah iza njih su po brojnosti osobe sa psihosocijalnim teškoćama (33%). Na trećem mestu su osobe sa kombinovanim smetnjama (13%).[57] U zbiru osobe sa pomenutim smetnjama čine 86% ukupnog broja lica lišenih poslovne sposobnosti.

Ako se ti podaci posmatraju zajedno sa podacima da se u preko 90% slučajeva, u odnosu na ukupan broj podnetih predloga, potpuno oduzima poslovna sposobnost, dok se u manje od 10% slučajeva poslovna sposobnost oduzima delimično,[58] postaje jasno da je pomenuta kategorija lica sa mentalnim invaliditetom u najvećem riziku od lišenja (uglavnom potpunog) poslovne sposobnosti.

Jedan od razloga za to može biti i u načinu utvrđivanja nesposobnosti lica sa invaliditetom kao osnova za lišenje poslovne sposobnosti. Naime, u uporednom pravu zastupljena su tri pristupa: prvo, statusni (medicinski) princip kod kojeg se nesposobnost utvrđuje na osnovu medicinske dijagnoze da postoji invaliditet; drugo, princip ishoda kod kojeg se nesposobnost utvrđuje na osnovu loših odluka koje je lice donosilo; treće, funkcionalni pristup

54 Čl. 146 st. 1 PZ.

55 Čl. 147 st. 1 PZ.

56 Krstić i Beker, *op. cit*., 3.

57 *Ibid*., 22.

58 Istraživanja su, naime, pokazala da je u 84.23% slučajeva, u odnosu na ukupan broj podnetih predloga, doneta odluka o potpunom lišenju, u 6.35% slučajeva o produženju roditeljskog prava (koje se u posledicama izjednačava sa potpunim lišenjem), dok je u svega 9.42% slučajeva doneta odluka o delimičnom lišenju poslovne sposobnosti. Vid. Plazinić, 18.

podrazumeva utvrđivanje nesposobnosti za pojedine oblasti i/ili pojedine odluke, pri čemu se u vezi s tim procenjuje da li je lice sposobno da shvati prirodu i posledice donošenja takvih odluka.[59]

Svakom od pomenutih pristupa se iznosi zamerka: statusnom jer se smatra da se uloga suda svodi na potvrđivanje da postoji dijagnoza (invaliditet), principu ishoda jer se smatra da se odluke drugih lica (bez invaliditeta) ne procenjuju tako strogo, uz uskraćivanje mogućnosti greške i preuzimanja rizika, a funkcionalnom zato što se smatra da premalo pažnje pridaje značaju podrške.[60]

U našoj zemlji su u praksi najčešće u primeni statusni i princip ishoda.[61]

Oduzimanje poslovne sposobnosti zasniva se uglavnom na tzv. medicinskom modelu – u odlukama se navodi, po pravilu, dijagnoza osobe sa invaliditetom kao osnov i opravdanje lišenja poslovne sposobnosti.[62] Drugim rečima, lišenje poslovne sposobnosti je potpuno zasnovano na medicinskom veštačenju uz, s jedne strane, mogućnost da se veštačenje obavi bez prisustva sudije i uz mogućnost da sud ne sasluša osobu o čijoj poslovnoj sposobnosti odlučuje, s druge strane.[63] Kritika se upućuje i da se sudije preterano oslanjaju na nalaz i mišljenje veštaka, umesto da isti cene na isti način kao i sve ostale dokaze i u vezi sa ostalim dokazima.[64]

Princip ishoda, koji podrazumeva da se nesposobnost utvrđuje na osnovu loših odluka koje lice donosi, takođe se primenjuje u našoj zemlji jer se u odlukama o lišenju često navodi da bi određeno lice trebalo lišiti poslovne sposobnosti jer je ono donelo neku lošu odluku – preduzelo pravni posao koji joj nije bio u interesu. Smatra se da to jeste svojevrsni signal da bi je trebalo lišiti poslovne sposobnosti.

Upravo zato što su ta dva principa najčešće u primeni, naročito statusni, nije ni čudo zašto je i procenat lica sa mentalnim invaliditetom tako veliki u odnosu na ukupan broj lica lišenih poslovne sposobnosti.

Ipak, imajući u vidu trendove savremenog prava i ciljeve borbe za zaštitu lica sa invaliditetom, u kojima se kao jedan od najvažnijih postavlja cilj da se ukine mogućnost (naročito potpunog) lišenja poslovne sposobnosti, postavlja se pitanje: da li se time zaista može poboljšati položaj lica sa invaliditetom i obezbediti njihova najadekvatnija zaštita? Da li bi uopšte bezizuzetno priznavanje potpune poslovne sposobnosti svim (punoletnim) licima, pa i licima

59 Petrušić, Beker i Ćirić Milovanović, *op. cit*., 12-13;

60 *Ibid*.; Komentar, 4.

61 *Ibid*., 13.

62 Krstić i Beker, *op. cit*., 18.

63 Beker i Milošević, *op. cit*., 24.

64 Takva kritika je svakako opravdana i ne stoji samo ovde – nekada će sud potpuno pokloniti veru veštaku inženjeru saobraćajne ili građevinske struke; ne mora da bude reč samo o medicinskom veštačenju. Međutim, koliko god te zamerke bile opravdane, ne bi trebalo zaboraviti činjenicu da sudija nije lekar niti inženjer građevinske struke. Otuda, njemu, kao pravniku, jedino i ostaje da se osloni na struku veštaka i pouzda u valjanost njegovog nalaza. Sud, pod uslovima propisanim zakonom, može tražiti od veštaka da dopuni nalaz i mišljenje ili, pak, novo veštačenje drugog veštaka, ali će po pravilu svoju odluku zasnovati na nalazu budući da ne poseduje znanja iz oblasti koje su predmet veštačenja.

sa invaliditetom, predstavljalo (neophodan) civilizacijski napredak? Ili bi nesumnjivo važnu potrebu za poboljšanjem položaja lica sa invaliditetom ipak trebalo ostvariti na drugačiji način?

2. O pojmovima, funkciji i odnosu pravne i poslovne sposobnosti

Pre nego što se pređe na razmatranje opravdanosti ideje o ukidanju ustanove lišenja poslovne sposobnosti, naročito potpunog lišenja, neophodno je, najpre, objasniti u nekoliko redova šta se podrazumeva pod pravnom i poslovnom sposobnošću, te koja je njihova funkcija. Naime, nažalost, čak i u stručnim tekstovima prisutno je neprecizno definisanje te neuočavanje krucijalnih razlika između pomenutih pojmova. Sama poslovna sposobnost neretko je i pogrešno definisana, pa nam autori pojedinih tekstova pod definicijom poslovne sposobnosti nude definiciju pravne sposobnosti. Razlog za to je i u nedovoljno preciznim, a nekada i pogrešnim prevodima pojma „*legal capacity*" sadržanog u Konvenciji. A osim toga, kao što je na samom početku ovog rada skrenuta pažnja, nakon objavljivanja Opšteg komentara Konvencije o zaštiti osoba sa invaliditetom postalo je jasnije da se formulacija „pravni kapacitet" (*legal capacity*) (neopravdano) ima tumačiti u jednom širem značenju – tako da obuhvata ne samo sposobnost biti nosilac prava i obaveza već i sposobnost vršenja tih prava i obaveza; drugim rečima, da se pod „pravnim kapacitetom" (*legal capacity*) podrazumeva i pravna i poslovna poslovna sposobnost.[65]

Naime, da bismo objasnili pojam poslovne sposobnosti, neophodno je napre definisati pravnu sposobnost. To je nužno kako bi se uočile ključne razlike između pomenutih pojmova, te isključila mogućnost njihove zamene.

Kada je reč o pravnoj sposobnosti, važno je naglasiti da svaki čovek ima pravnu sposobnost. Stiče je rođenjem,[66] a gubi smrću. Pravna sposobnost svakog čoveka oslikava jednakost među ljudima i uslov je ljudskog dostojanstva – suprotno od toga predstavljalo bi nedopuštenu diskriminaciju među ljudima.[67] Ona predstavlja sposobnost da se bude imalac prava i obaveza. Svaki čovek je od rođenja do smrti sposoban da bude nosilac svih prava i obaveza koja pravni poredak priznaje.

Kada je, pak, reč o poslovnoj sposobnosti logika ide u potpuno suprotnom smeru – činjenica da pojedini ljudi nemaju poslovnu sposobnost ne znači da su oni diskriminisani; naprotiv, predstavljalo bi diskriminaciju da su svi podjednako sposobni da preduzimaju pravne poslove.[68]

65 Opšti komentar, 3.

66 O pravnoj sposobnosti nasciturusa (*nasciturus*) više u Vladimir Vodinelić, *Građansko pravo – Uvod u građansko pravo i opšti deo građanskog prava* (2012), 337.

67 *Ibid*., 329.

68 *Ibid*. Stvar je još jednostavnija ukoliko se umesto o poslovnoj sposobnosti povede rasprava o deliktnoj – sposobnosti da se odgovara za prouzrokovanu štetu. Naime, pojedini ljudi koji su lišeni deliktne sposobnosti nisu time diskriminisani, već suprotno – izuzeti su od odgovornosti za naknadu štete koju su prouzrokovali. Da li je logično reći da je diskriminisano lice kome je oduzeta mogućnost da odgovara za naknadu štete? Ili je su-

Poslovna sposobnost je sposobnost preduzimanja pravnih poslova. Ukoliko se pođe od toga da se pravni posao definiše kao izjava volje kojom se proizvode pravna dejstva – stiču, menjaju, prenose i gase prava i obaveze – onda se poslovna sposobnost može definisati i kao sposobnost izjavama volje stvarati, prenositi, menjati i gasiti prava i obaveze. Poslovna sposobnost se može definisati i kao sposobnost da se svojim radnjama realizuje pravna sposobnost.[69]

Poslovna sposobnost podrazumeva izvestan stepen pravne „zrelosti" volje izjavioca.[70] Da bi volja imala pravnu „zrelost", odnosno da bi bila pravno relevantna, neophodno je da fizičko lice dostigne zrelost na intelektualnom i voljnom planu.[71] Poslovna sposobnost, dakle, za osnov ima jednu faktičku sposobnost – sposobnost rasuđivanja u poslovnim odnosima koja podrazumeva sposobnost lica da shvati značaj i posledice svojih radnji (svest), da hoće da one nastupe (volja), kao i da je sposobno da se samo stara o svojim interesima,[72] odnosno, posmatrano iz drugog ugla, da svojim radnjama (postupcima) ne ugrožava svoja ili tuđa prava i interese.

Upravo zbog toga smatramo ispravnim Vodinelićev stav da posedovanje poslovne sposobnosti nosi sa sobom rizike kojima nisu svi dorasli, te da upravo zbog toga ukidanje instituta lišenja poslovne sposobnosti nije merilo napretka jednog društva, već je upravo suprotno – u interesu je određenih lica da nemaju poslovnu sposobnost ili da imaju ograničenu poslovnu sposobnost i da budu u pogledu pravnih poslova zavisni od drugih koji se o njima i njihovim interesima staraju.[73]

Zbog toga, za razliku od pravne sposobnosti, poslovna sposobnost se stiče postepeno: najpre postoji period tzv. poslovne nesposobnosti,[74] zatim period ograničene poslovne sposobnosti[75] i na kraju period potpune po-

protno – lice koje je lišeno deliktne sposobnosti iz određenog razloga (godina ili bolesti) je zaštićeno time što ne može odgovarati za štetu po principu subjektivne odgovornosti jer nije ni sposobno da bude krivo, a nije sposobno da bude krivo jer nije sposobno za rasuđivanje, to jest nije sposobno da upravlja svojim postupcima i da shvati značaj posledica koje će proizaći iz njegovih dela. Naime, da li bi bilo ispravno smatrati da je dete od 4 godine odgovorno za prouzrokovanu štetu i da je za istu krivo? Dalje, da li bi bilo racionalno smatrati da je osoba koja zbog svoje duševne bolesti nije sposobna da rasuđuje kriva, a samim tim i odgovorna za prouzrokovanu štetu? Više o deliktnoj sposobnosti vid. Marija Karanikić Mirić, *Krivica kao osnov deliktne odgovornosti u građanskom pravu* (2009), 88-90; Snežana Dabić, „Pojam roditelja u domenu građanskopravne odgovornosti za štetu", *Pravni život*, br. 10, 2013, 693-707.

69 Dragoljub Stojanović, *Uvod u Građansko pravo (opšti deo)* (1976), 231.

70 Jožef Salma, *Obligaciono pravo* (2007), 226.

71 Radmila Kovačević Kuštrimović i Miroslav Lazić, *Uvod u građansko pravo* (2008), 120.

72 Vodinelić, 354.

73 *Ibid*., 329.

74 Prilog „takozvani" se na ovom mestu koristi jer hoće da ukaže da u našem pravnom sistemu zapravo i ne postoji apsolutna poslovna nesposobnost o čemu će više reči biti dalje u radu.

75 Pravni poslovi koje zaključe lica ograničene poslovne sposobnosti spadaju u grupu tzv. hramajućih pravnih poslova koje je neophodno razlikovati od rušljivih (iako se u teoriji, a i u zakonu, nažalost, ta razlika često ne pravi) budući da rušljivi kada nastanu proiz-

slovne sposobnosti.[76] Uslov za sticanje poslovne sposobnosti, kako potpune tako i delimične, jesu na prvom mestu godine. Sa 14 godina lice stiče delimičnu poslovnu sposobnost, sa 15 godina dodatno i radnu i testamentalnu sposobnost,[77] dok sa punoletstvom lice stiče potpunu poslovnu sposobnost. Osim toga, uslov postojanja poslovne sposobnosti jeste i sposobnost za rasuđivanje, s tom razlikom da se pretpostavlja da takva sposobnost postoji čim se ispuni uslov u pogledu uzrasta, a suprotno se mora dokazivati.[78] Uslov u pogledu godina je potpuno jasan i lako odrediv kriterijum. Daleko je teže utvrditi postojanje (ne)sposobnosti za rasuđivanje, te postojanje razloga koji bi opravdali delimično ili potpuno lišenje poslovne sposobnosti.

Izuzeci od pravila da se potpuna poslovna sposobnost stiče sa 18 godina mogu ići u više pravaca. S jedne strane, potpuna poslovna sposobnost se može steći i pre punoletstva, ako su ispunjeni zakonom predviđeni uslovi.[79] S druge strane, ono što nas zanima, može se desiti da punoletno lice ne stekne, odnosno bude lišeno poslovne sposobnosti, uprkos tome što je dostignuta uzrasna zrelost. To je najpre slučaj kada lice sa navršenih 18 godina ne postane poslovno sposobno već nad njim bude produženo roditeljsko pravo.[80] Drugi je slučaj kada nakon sticanja punoletstva i sticanja poslovne sposobnosti nastupe razlozi zbog kojih lice bude lišeno delimično ili potpuno poslovne sposobnosti.[81] Do potpunog lišenja može doći, kako zakon predviđa, ukoliko je lice zbog bolesti i smetnji u psiho-fizičkom razvoju nesposobno za rasuđivanje, te nije u stanju da se samo stara o sebi i o zaštiti svojih prava i obaveza.[82] Neophodno je da ti uslovi budu kumulativno ispunjeni. Nesposobna za rasuđivanje su, drugim rečima, lica čija izjava volje ne proizvodi pravno dejstvo, a to je izjava volje lica koje ne poseduju svest i volju – svest o značaju pravnog posla koji se preduzima i dejstvima koje će taj posao pro-

vode pravno dejstvo, dok hramajući ne proizvode pravno dejstvo sve dok ne dobiju neophodno odobrenje. O razlici između rušljivih i tzv. hramajućih pravnih poslova vid. više kod: Katarina Dolović, Snežana Dabić, „Mogućnost vansudskog poništenja ugovora u srpskom pravu", *Pravo i privreda*, br. 4-6, 2015, 140-141.

76 Vid. čl. 64 PZ.
Inače, po pozitivnopravnim propisima naše zemlje, da bi pravni posao lica lišenog poslovne sposobnosti bio punovažan neophodno je da za njega i umesto njega volju izjavi njegov zakonski zastupnik. Međutim, u slučaju da je reč o starijem maloletniku, odnosno licu koje je delimično lišeno poslovne sposobnosti stvar je drugačija. Oni samostalno izjavljuju volju. Ali, da bi njihova izjava volje bila pravnorelevantna, ona mora biti odobrena od strane njihovog zakonskog zastupnika/staratelja, koji će dati ili prethodnu saglasnost u vidu dozvole ili će se naknadno saglasiti u vidu odobrenja – ratifikacije. Katarina Dolović Bojić, *Pravno nepostojeći ugovori* (2021), 117.

77 Vid. čl. 64 st. 3 PZ i čl. 79. Zakona o nasleđivanju, *Službeni glasnik RS* br. 46/95, 101/2003 – odluka USRS i 6/2015" (u daljem tekstu: ZN).

78 U tom smislu, smatra se da je sposobno za rasuđivanje lice koje ima 18 godina, suprotno se dokazuje.

79 Pod uslovima tačno propisanim zakonom, lice može i pre 18. godine, a sa najmanje 16, steći potpunu poslovnu sposobnost. Vid. čl. 11 st. 2 i 3 PZ.

80 Vid. čl. 85 PZ.

81 Vid. čl. 146 i 147 PZ.

82 Čl. 146 st. 1 PZ.

izvesti i volju usmerenu na preduzimanje pravnog posla i njegova dejstva. To su lica ometena u razvoju i duševno bolesne osobe.[83] U tom smislu, bilo bi veoma opasno takvim licima, koje ulaze u krug lica sa invaliditetom, umesto pružanja zaštite ustanoviti odgovornost i to zbog postupaka kojih oni možda nisu mogli biti svesni, odnosno čije posledice nisu mogli unapred sagledati te ispravno rezonovati da li je preduzimanje nekog pravnog posla u njihovom interesu. Do delimičnog lišenja, pak, prema zakonskom tekstu, može doći ukoliko lice zbog bolesti ili smetnji u psihofizičkom razvoju svojim postupcima neposredno ugrožava sopstvena prava i interese drugih lica.[84] Imajući u vidu razliku u odnosu na uslove za potpuno lišenje, „kandidati" za delimično lišenje poslovne sposobnosti bi očigledno trebalo da budu lica koja su sposobna za rasuđivanje, ali svojim postupcima neposredno ugrožavaju sopstvena prava i interese drugih lica. Ipak, čini se da je u praksi teže uočiti razliku između te dve kategorije lica, o čemu svedoče i statistički podaci koji ukazuju na to da se sud mnogo češće opredeljuje za potpuno lišenje poslovne sposobnosti u odnosu na delimično. Da li je razlog za to u nejasnim zakonskim odredbama ili je stanje u praksi baš takvo – da postoji daleko manje onih koji ugrožavaju svoja i tuđa prava i interese u odnosu na one koji su nesposobni za rasuđivanje – ostaje otvoreno pitanje.

Konačno, važno je istaći da je jedna od bitnih funkcija poslovne sposobnosti (posebno bitna na planu zaštite prava lica sa invaliditetom) tzv. zaštitna funkcija: njome se žele zaštititi pojedina lica od rizika koje preduzimanje konkretnog pravnog posla sa sobom nosi. Naime, pojedina lica u određenim situacijama nisu u mogućnosti da shvate značaj i posledice preduzimanja određenog pravnog posla, te da li je taj posao za njih koristan, odnosno da li su njegova dejstva u skladu sa njihovim interesima.[85]

Činjenica da lice sa invaliditetom poseduje pravnu sposobnost (jer nju, između ostalog, poseduju svi ljudi), ali ne i poslovnu, ne znači da to lice ne može postati, na primer, vlasnik neke stvari. To samo znači da će umesto njega volju izjaviti njegov zakonski zastupnik/staratelj, ali da sva prava i obaveze iz takvog ugovora pripadaju licu sa invaliditetom jer će se upravo to lice smatrati kupcem, prodavcem ili možda poklonoprimcem, korisnikom kredita itd.

Zaključili bismo da je stvar mnogo kompleksnija nego što se nekada čini iz radova zagovornika ideje o ukidanju mogućnosti potpunog lišenja poslovne sposobnosti. Institut poslovne sposobnosti isuviše je kompleksan da bi se tako olako moglo govoriti o potrebi da sva odrasla lica budu potpuno poslovno sposobna, a da je lišavanje pojedinaca poslovne sposobnosti pokazatelj njihove diskrimacije. Plašimo se da nedovoljno poznavanje te ustanove preti da se kroz borbu za zaštitu lica sa invaliditetom upravo ugroze njihovi interesi. Potrebno je samo poći od toga da zakonodavac propisuje određene norme

83 Vodinelić, *op. cit*., 362. Još je Živojin Perić isticao da volja duševno bolesnih lica nije pravno relevantna te da bi eventualni pokušaj zaključenja ugovora ovih lica bio smatran tzv. nepostojećim ugovorom. Više o tome vid. kod: Katarina Dolović Bojić, „Živojin Perić o postojanju i punovažnosti ugovora" u Marija Draškić i Nina Kršljanin (ur.), *Zbornik radova Živojin M. Perić – ličnost i delo* (2021), 80.

84 Čl. 147 st. 1 PZ.

85 Više o zaštitnoj funkciji u Vodinelić, *op. cit*., 363–365.

ne da bi pojedinu kategoriju lica obespravio (zašto bi?!), već suprotno – da bi ih zaštitio pa makar od njih samih.

3. Da li su lica lišena poslovne sposobnosti potpuno isključena iz pravnog života?

Veoma bitna stvar koja se očigledno zaboravlja[86] jeste da nakon donošenja Porodičnog zakona 2005. godine, kategorija lica koja su potpuno poslovna nesposobna, faktički, više ne postoji – drugim rečima, ne postoji nijedna osoba kojoj zakonodavac ne dozvoljava da preduzme bar neke pravne poslove. Otuda kritika da su lica sa invaliditetom koja su potpuno lišena poslovne sposobnosti „etiketirana", „marginalizovana", „izopštena iz društva" i slično, ne stoji u potpunosti. Naime, do donošenja PZ važio je Zakon o braku i porodičnim odnosima[87] po kojem maloletnici do 14. godine života i lica sa njima izjednačena (punoletna lica koja su potpuno lišena poslovne sposobnosti) nisu mogli sami preduzimati pravne poslove, a eventualno preduzeti pravni poslovi nisu mogli biti naknadno osnaženi – reč bi bila o tzv. nepostojećim pravnim poslovima. Međutim, nakon donošenja PZ ne postoji više kategorija lica koja je potpuno poslovno nesposobna. Naime, čl. 64 PZ propisano je da deca do 14. godine starosti (i punoletna lica izjednačena sa njima sudskom odlukom u pogledu poslovne sposobnosti, odnosno punoletna lica potpuno lišena poslovne sposobnosti) mogu samostalno preduzimati pravne poslove malog značaja[88], poslove kojima stiču isključivo prava[89] i neutralne pravne poslove.[90] Reč je, dakle, o

86 Budući da se o njoj skoro uopšte ne piše u stručnim tekstovima posvećenim ukidanju instituta lišenja poslovne sposobnosti.

87 Zakon o braku i porodičnim odnosima (u daljem tekstu: ZBPO), prestao da važi 1. jula 2005. godine.

88 Kada je reč o „poslovima malog značaja" slikovito bi se moglo reći da su to tzv. „bagatelni", odnosno „sitni" poslovi koji se obavljaju po određenom automatizmu i nužni su za svakodnevni život: primera radi, mogu kupovati novine, prehrambene proizvode, autobusku/tramvajsku kartu i voziti se autobusom/tramvajem, primati i davati poklone male vrednosti, i slično. Andrija Gams, *Uvod u građansko pravo – opšti deo* (1974), 102.

89 Reč je o odredbi koja ima za cilj zaštitu ovih lica od eventualnog preduzimanja poslova iz kojih bi nastale za njih različite obaveze. Stoga im je dozvoljeno da samostalno zaključuju, na primer, ugovor o posluzi i poklonu budući da je reč o ugovorima kojima stiču samo prava, naravno samo onda kada se nalaze u ulozi poklonoprimca odnosno poslugoprimca.

90 Reč je o tzv. neutralnim poslovima, odnosno poslovima iz kojih se ne stiču ni prava ni obaveze. Jedan deo teorije smatrao je da pojam neutralnih pravnih poslova predstavlja *contradictio in adjecto*, obrazlažući takav stav definicijom samog pravnog posla koji predstavlja izjavu volje sa ciljem proizvođenja pravnog dejstva, najčešće stvaranje prava i obaveza (ali i prenos, promena, gašenje prava i/ili obaveza). O tome u Oliver Antić, *Obligaciono pravo* (2007), 213.

Ipak, čini se da drugi s pravom upozoravaju da ideja neutralnog pravnog posla ne znači da iz tog posla uopšte ne nastaju prava i obaveze, već da za onoga ko ih preduzima – u našem slučaju maloletnik do 14. godina ili lice izjadnačeno sa njim – taj posao ne stvara ni prava ni obaveze. Tako, na primer, ako se ovo lice nađe u ulozi zastupnika ono preduzima pravni posao u tuđe ime i za tuđi račun, a pritom ne stiče ni prava ni obaveze iz takvog posla. Više o neutralnim pravnim poslovima u Dejan Đurđević, „Neutralni pravni poslovi", *Anali Pravnog fakulteta u Beogradu*, br. 2, 2010, 81.

poslovima koji su uobičajeni u svakodnevnom životu i koji predstavljaju veliki deo ukupnog broja pravnih poslova koje preduzimamo.

Drugim rečima, u pravnom sistemu Republike Srbije ne postoji više kategorija lica koja je potpuno poslovno nesposobna, već sva lica mogu samostalno preduzimati određenu vrstu pravnih poslova i ti poslovi će biti punovažni bez ikakve naknadne saglasnosti/odobrenja. Međutim, uprkos tome PZ i dalje zadržava terminologiju iz ZBPO te u nedostatku adekvatnijih pojmova kojima bi obuhvatao lica do 14 i od 14 godina starosti (kao i one izjednačene sa njima) zadržava podelu na lica potpuno i ograničeno poslovno sposobna, odnosno potpuno i delimično lišena poslovne sposobnosti. Ponavljamo, uprkos korišćenoj zakonskoj terminologiji lica potpuno lišena poslovne sposobnosti nisu potpuno „udaljena" iz pravnog života već mogu samostalno – svojom izjavom volje – preduzimati sve pravne poslove koji spadaju u pomenute tri grupe zakonom određenih pravnih poslova, a koji su nužni ali i uobičajeni za svakodnevni život.

Često se, međutim, može naići na argument da su lica potpuno lišena poslovne sposobnosti ujedno lišena i mogućnosti da vrše i neka druga prava (kao što su, samo primera radi, izborno pravo, pravo da sklope brak, prava da vrše roditeljsko pravo),[91] te da je to još jedan važan argument zašto bi trebalo ukinuti ustanovu potpunog lišenja poslovne sposobnosti. Nama se, ipak, čini da rešenje nije u tome – u ukidanju ustanove potpunog lišenja poslovne sposobnosti – već u pravilnoj primeni pravila o potpunom i delimičnom lišenju poslovne sposobnosti. Ako je neko lice nesposobno za rasuđivanje, što predstavlja uslov za potpuno lišenje poslovne sposobnosti, onda bi to trebalo da znači da ono nije svesno ni toga šta podrazumeva vršenje izbornog prava, roditeljskog prava, zaključenje braka i slično. A ukoliko je pak svesno značaja i dejstva vršenja tih prava, onda se postavlja pitanje: da li bi to lice uopšte trebalo potpuno lišiti poslovne sposobnosti?

Ono sa čime se nesumnjivo slažemo jeste da sud mora, u svakom konkretnom slučaju, imati individualni pristup, odnosno posmatrati svako lice ponaosob, te utvrđivati da li se ono može podvesti pod zakonsku formulaciju lica koja bi trebalo lišiti poslovne sposobnosti. U tom individualnom pristupu kojem bi trebalo težiti vidimo neophodnu humanizaciju ovog instituta. Osim toga, neophodno je poći od toga da je pravilo da se sva punoletna lica smatraju poslovno sposobnim, te da se pojedinci samo izuzetno mogu lišavati ove sposobnosti (potpuno ili delimično). Kada govorimo o zaštiti koja je neophodna tim licima mislimo, s jedne strane, na zaštitu od „njih samih", u smislu što svojim postupcima mogu ugroziti sopstvena prava i interese, ali i zaštitu na način da se spreči da lica sa invaliditetom postanu žrtve zloupotrebe sopstvenog stanja, što je i te kako moguće na polju preduzimanja pravnih poslova. Osim zaštite koja se pruža njima samima, a o čemu smo upravo govorili, nekada je lišenje poslovne sposobnosti neophodno i iz razloga zaštite drugih lica. Naime, nije nemoguće da lica sa invaliditetom upravo zbog svojih disfunkcija (posebno mentalnih) nekada mogu ugroziti interese, ali i bezbednost drugih lica.

91 U vezi sa tim vid. čl. 17 PZ, čl. 77 st. 1 PZ, čl. 52 st. 1 Ustava RS, *Službeni glasnik RS* br. 98/2006 i 115/2021, ali i čl. 40 st. 3 ZVP. O tome i u Opštem komentaru, 2.

Putem humanizacije instituta lišenja poslovne sposobnosti pošlo se i izmenama Zakona o vanparničnom postupku. Naime, ZVP je pretrpeo izmene u maju 2014. godine u delu koji se tiče lišenja poslovne sposonosti. Te izmene, su s pravom, dočekane sa odobravanjem jer se smatra da predstavljaju pozitivan pomak u procesu reforme domaćeg zakonodavstva koja bi licima sa invaliditetom pružila neophodnu zaštitu. Ipak, vladajući stav je da one same nisu dovoljne za suštinsko poboljšanje položaja lica lišenih poslovne sposobnosti.[92]

4. Osnovana kritika instituta lišenja poslovne sposobnosti ili nepoverenje u institucije?

Čitajući kritike postojećeg zakonskog rešenja Republike Srbije ne možemo a da se ne zapitamo sledeće: ne provejava li možda kroz tekstove zagovornika ideje o ukidanju instituta lišenja poslovne sposobnosti nepoverenje u domaće sudstvo i ostale institucije?

Naime, ukoliko se pomenuta ideja pravda mogućnošću zloupotreba, diskrimacije lica sa invaliditetom, ukoliko se nebrojeno puta govori o tome da se po automatizmu, samim tim što postoji invaliditet, usvajaju zahtevi za lišenjem poslovne sposobnosti, sve to ukazuje samo na jedno – ne postoji poverenje u sudstvo, odnosno postoji sumnja da će sudovi u svakom konkretnom slučaju ispitati činjenično stanje i doneti pravičnu odluku zasnovanu na zakonu. Taj fenomen, međutim, ne uočava se samo ovde. Brojne su situacije kada se pojedini instituti kritički ispituju, te donose zaključci da bi ih trebalo ukinuti ili, u najmanju ruku, drugačije regulisati. Neretko se radi o institutima, tačnije odredbama zakona koje regulišu pojedine institute na način što sudovima ostavljaju odrešene ruke u odlučivanju.[93] Ipak, problem ne može biti rešen time što ćemo brisati odredbe zakona uvek kada osetimo bojazan da bi sudovi njihovom primenom mogli da se „ogreše“ o neku od strana. Taj problem se mora rešavati sistemski, na nivou države, a ne pojedinih odredaba zakona. Neophodno je da se povrati poverenje u pravosuđe, a to je moguće transparentnim i nadasve valjanim izborom sudija – izborom po stručnosti, adekvatnim koracima na planu edukacije sudija o položaju lica sa invaliditetom, te usmeravanjem da se postojeći instituti primene u skladu sa okolnostima svakog konkretnog slučaja, uz najmanje moguće ograničavanje poslovne sposobnosti.

Kritika instituta lišenja poslovne sposobnosti nije pokazatelj samo nepoverenja u sudstvo, već i u institut zastupanja koji podrazumeva preduzimanje pravnih poslova u tuđe ime i za tuđi račun. Čini se da se zaboravlja činjenica da se za staratelja određuju, kad god je to moguće, najpre članovi porodice koji ionako brinu o osobi sa invaliditetom. Tek ukoliko to nije moguće, izbor bi trebalo da padne na neku drugu osobu, a u krajnjem i na staratelja koga postavi organ starateljstva iz redova svojih zaposlenih. Osim toga, trebalo bi

92 Umesto mnogih vid. Petrušić, *op. cit.,* 909 i dalje.

93 Nažalost, svedoci smo toga da kod naših zakonodavaca postoji manir da sudovima daju široka ovlašćenja. Ovde, po nama, nije reč o velikom poverenju koje zakonodavac ima u sudove, već često lakšem načinu da se pojedine zakonske odredbe formulišu.

da se radi na planu poboljšanja načina kontrole postavljenih staratelja kako bi se utvrdilo da li se u dovoljnoj meri i na adekvatan način staraju o interesima štićenika, a sa ciljem poboljšanja njihovog položaja.[94]

Dalje, pomenuta kritika znak je nepoverenja i u ustanove namenjene licima sa posebnim potrebama, ili smemo reći, svedoči o lošem radu (nedovoljnoj brizi o korisnicima) u pomenutim ustanovama, što je opet sistemski problem – ko je na čelu takvih ustanova, izbor dovoljno (odnosno nedovoljno?!) stručnog kadra koji vodi brigu o korisnicima, način ophođenja prema ovoj posebno osetljivoj kategoriji lica i slično. Takođe, trebalo bi razmisliti i o tome da se ove osobe u što manjoj meri institucionalizuju.

Oduzimanje poslovne sposobnosti je etiketiranje lica sa invaliditetom – reći će zagovornici ukidanja ovog instituta. Mi se pitamo – da li je onda bolje dati mogućnost osobi koja nije sposobna da shvati značaj, na primer, ugovora o poklonu da zaključi jedan takav ugovor sa trećim licem i na taj način ostane bez prava svojine na nepokretnosti u kojoj je živelo? Nije li to otvorena mogućnost za zloupotrebe stanja svesti tih lica od strane svih trećih „eventualnih" poklonoprimaca?

Zagovornici ukidanja mogućnosti potpunog lišenja poslovne sposobnosti smatraju da je kompromisno rešenje u tome da se prihvati model odlučivanja uz podršku, umesto modela zamenskog odlučivanja. Ipak, teško da bi to bilo adekvatno u svakom konkretnom slučaju. Šta ako neko lice nije sposobno da razume značaj konkretnog pravnog posla čak i uz svu podršku koju dobije? Iz tih razloga ideja da odlučivanje uz podršku u potpunosti zameni zamensko odlučivanje deluje utopistički. Osim toga, čak i ako bi se prihvatilo da model odlučivanja uz podršku stoji, kao mogućnost, uz model zamenskog odlučivanja, veoma je važno utvrditi kako bi se taj model primenjivao. Ako bi on podrazumevao ono što se u Opštem komentaru naglašava,[95] da je pružalac podrške dužan da pruži podršku određenom licu poštujući njegove želje i volju, ali da u krajnjem odluku ipak donosi lice kome se podrška pruža, da li se uopšte može reći da mu je na bilo koji način ograničena poslovna sposobnost? I više od toga, kako bi se time pružila zaštita od toga da lice kome se pruža podrška ne donese odluku koja nije u njegovom interesu?[96] S druge strane, ako bi donošenje odluke uz podršku značilo i to da mora postojati prethodna ili naknadna saglasnost pružaoca podrške, onda tu nema potpune samostalnosti u donošenju odluka i ravnopravnosti u pogledu poslovne sposobnosti u odnosu na lica kojima nije ograničena poslovna sposobnost. Ta težnja da se postigne potpuna ravnopravnost niti je realna niti bi suštinski

94 Možda bi mogao da se preuredi i način na koji se kontrolišu staratelji, da se smanji broj štićenika koji su pod njihovim starateljstvom, da se održavaju bliži odnosi sa štićenikom kako bi se utvrdile njegove želje i slično.

95 Opšti komentar, 5.

96 U teoriji ima predloga da bi se u tim slučajevima moglo predvideti da pružalac podrške ima pravo da osporava pred sudom pravni posao koji je lice preduzelo bez njegovog učešća. Marković (2012), *op. cit*., 75. Ipak, pitanje je koliko bi takav predlog bio praktičan (pođimo samo od toga ko bi snosio troškove vođenja postupka za osporavanje punovažnosti pravnog posla).

donela boljitak, u tom smislu joj ne treba težiti po svaku cenu. Rešenje ne bi trebalo tražiti u tome da se ukine institut lišenja poslovne sposobnosti već da se lišenjem/ograničenjem poslovne sposobnosti ne ide dalje od onoga što se proceni da je neophodno u svakom konkretnom slučaju! Osim toga, čini se da ovde nema mesta bilo kakvoj vrsti generalizacije, u smislu da se ne može tek tako govoriti o ukidanju mogućnosti lišavanja poslovne sposobnosti svih lica sa invaliditetom. Neophodno je najpre utvrditi o kojoj vrsti invaliditeta je reč, odnosno šta je razlog da se jednom licu, koje inače ima status lica sa invaliditetom, oduzme poslovna sposobnost. Pojam poslovne sposobnosti se ne sme shvatati suviše široko, a ako smemo reći ni pogrešno (kao što se neretko čini u stručnim tekstovima), u toj meri da obuhvati pojam pravne sposobnosti. Pretpostavlja se da se zato u Prednacrtu model odlučivanja uz podršku samo dodaje uz model zamenskog odlučivanja.

Ključ bi, dakle, mogao biti u humanizaciji instituta lišenja poslovne sposobnosti i stručnosti u radu sudova i drugih institucija.

V TEŽI POLOŽAJ ŽENA SA INVALIDITETOM U POGLEDU POSLOVNE SPOSOBNOSTI

Na kraju, čini se važnim, makar ukratko, skrenuti pažnju na činjenicu da je položaj žena sa invaliditetom u pogledu poslovne sposobnosti unekoliko teži od položaja muškaraca.[97] Naime, iako istraživanja pokazuju da nema značajnih razlika u pogledu broja žena odnosno muškaraca lišenih poslovne sposobnosti,[98] lišenje poslovne sposobnosti ima nesagledive posledice na žene sa invaliditetom. Razlog je u tome što, u slučaju institucionalizacije, one ne mogu da odlučuju samostalno o svom reproduktivnom zdravlju već o tome odluke donose zaposleni ustanova u kojima su smeštene uz saglasnost staratelja.[99] Osim toga, žene su češće izložene fizičkom, verbalnom, psihološkom i seksualnom nasilju, kako od strane drugih korisnika ustanove, tako i od zaposlenih, ali i osoba van ustanove.

Inače, Republika Srbija je 2009 godine ratifikovala Konvenciju o pravima osoba sa invaliditetom. U pogledu rodne ravnopravnosti značajan je čl. 6 Konvencije u kojem stoji da su „države ugovornice svesne toga da su žene i devojke sa invaliditetom izložene višestrukoj diskriminaciji i u tom pogledu će preduzeti mere kako bi im obezbedile potpuno i ravnopravno ostvarivanje svih ljudskih prava i osnovnih sloboda". U drugom stavu istog člana stoji da će države ugovornice „preduzeti sve odgovarajuće mere kako bi obezbedile potpun razvoj, napredak i osposobljavanje žena da bi im se garantovalo vršenje i uživanje ljudskih prava i osnovnih sloboda sadržanih u ovoj konvenciji". Osim toga,

97 Primere iz prakse videti kod: Lepojka Čarević Mitanovski i Violeta Kočić Mitaček, „Žene sa invaliditetom" u Jovica Trkulja, Branko Rakić, Damjan Tatić (ur.), *Zbornik radova Zabrana diskriminacije osoba sa invaliditetom* (2012), 215-224.

98 Beker i Milošević, *op. cit*., 33-34.

99 O tome više u Krstić i Beker, *op. cit*., 19-20.

država Srbija je potpisnica Konvencije o eliminisanju svih oblika diskriminacije žena.[100] Ustav Republike Srbije takođe proklamuje jednakost bez obzira na pol.[101] Uprkos svemu tome, i dalje postoji potreba da se postigne rodna ravnopravnost, ne samo na planu zakonskog uređenja već i u praksi.

VI ZAKLJUČAK

Kao odgovor na usvajanje Zakona o potvrđivanju Konvencije o pravima osoba sa invaliditetom i, u poslednje vreme, sve glasnijih kritika teorije na račun instituta lišenja poslovne sposobnosti regulisanog važećim PZ, usledio je Prednacrt Zakona o izmenama i dopunama PZ. Kao najveće novine Prednacrta izdvajaju se ukidanje instituta lišenja poslovne sposobnosti i uvođenje mogućnosti odlučivanja uz podršku. Tako Prednacrt umesto potpunog i delimičnog lišenja poslovne sposobnosti poznaje i reguliše samo mogućnost ograničenja poslovne sposobnosti. Iako to ograničenje poslovne sposobnosti u dobroj meri odgovara onome što je trenutno Porodičnim zakonom uređeno kao mogućnost delimičnog lišenja poslovne sposobnosti, detaljnija analiza predloženog rešenja neminovno vodi zaključku da se novim rešenjem ipak ostavlja mogućnost da određenom licu bude u toj meri ograničena poslovna sposobnost da se njegov položaj praktično izjednačava sa položajem lica potpuno lišenog poslovne sposobnosti, imajući u vidu važeća pravila kojima se uređuje potpuno lišenje poslovne sposobnosti. Sa takvim rešenjem se načelno i slažemo budući da smatramo da je potpuno lišenje poslovne sposobnosti ponekad zapravo jedina odgovarajuća opcija, kada je reč o licima koja su, najčešće zbog mentalnih ili psihosocijalnih smetnji nesposobna za rasuđivanje. Naime, institut poslovne sposobnosti isuviše je kompleksan da bi se tako olako moglo govoriti o potrebi da sva odrasla lica budu potpuno poslovno sposobna, a da je lišavanje pojedinaca poslovne sposobnosti pokazatelj nji-

100 Zakon o ratifikaciji Konvencije o eliminisanju svih oblika diskriminacija žena, *Sl. list SFRJ – Međunarodni ugovori* br. 11/81.

101 Čl. 15 Ustava RS nosi naziv „Ravnopravnost polova": „Država jemči ravnopravnost žena i muškaraca i razvija politiku jednakih mogućnosti".

To je posledica činjenice da položaj žena nije oduvek bio izjednačen sa muškarcima kada je reč o poslovnoj sposobnosti te je postojala potreba da se takva jednakost najpre formalnopravno obezbedi. Tako je, na primer, par. 920 Srpskog građanskog zakonika izjednačavao, u pogledu poslovne sposobnosti, žene sa starijim maloletnicima i licima lišenih uma, raspikućama, propalicama i prezaduženima: „Mladoletnima udobljavanju se i svi oni, koji ne mogu, ili im je zabranjeno sopstvenim imanjem rukovati; takvi su svi uma lišeni, raspikuće sudom proglašene, propalice, prezaduženici, kojih je imanje pod stecište potpalo, udate žene za života muževlja". Sa tačke gledišta današnjeg savremenog prava citirana odredba je najblaže rečeno skandalozna, posebno onaj deo u kojem se žene izjednačavaju sa maloletnicima i licima lišenim uma. Drugi deo je više interesantan jer se možemo zapitati zašto izjednačavati žene sa raspikućama i prezaduženima kada su u praksi u daleko većem procentu zavisnici od alkohola i kocke muškarci – što se uglavnom uklapa u pojam raspikuća i prezaduženih; dok su žene, s druge strane, u najvećem procentu te koje „drže kuću". Vid. §920 Srpskog građanskog zakonika. *https://www.harmonius.org/sr/pravni-izvori/jugoistocna-evropa/privatno-pravo/srbija/Srpski_gradjanski_zakonik_1844.pdf.*

hove diskrimacije. Plašimo se da nedovoljno poznavanje te ustanove preti da se kroz borbu za zaštitu lica sa invaliditetom upravo ugroze njihovi interesi

Takođe, korisno je podsetiti na nešto o čemu se malo (ili čak uopšte ne) govori u tekstovima zagovornika ideje o ukidanju ovog instituta: u važećem zakonskom rešenju naše zemlje ne postoji kategorija lica koja je u pravom smislu te reči potpuno lišena poslovne sposobnosti (osim terminološki), budući da i maloletna lica do 14. godine, kao i punoletna izjednačena sa njima mogu preduzimati poslove malog značaja, poslove kojima stiču samo prava, kao i poslove kojima ne stiču ni prava ni obaveze.

Neophodno je naglasiti da nisu sva lica sa invaliditetom u riziku od od lišenja (potpunog ili delimičnog) poslovne sposobnosti. Sud mora, u svakom konkretnom slučaju, imati individualni pristup, odnosno posmatrati svaku osobu ponaosob, te utvrđivati da li se ona može podvesti pod zakonsku formulaciju lica lišenih poslovne sposobnosti. U tom individualnom pristupu kojem bi trebalo težiti vidimo neophodnu humanizaciju ovog instituta. Osim toga, neophodno je poći od toga da su sva lica poslovno sposobna, te da se pojedinci samo izuzetno mogu lišavati ove sposobnosti (potpuno ili delimično) i to samo onda kada je to isključivo u njihovom interesu – kada im je neophodno pružiti zaštitu.

Smatramo da je pojedinim kategorijama lica sa invaliditetom (posebno onim sa mentalnim i psihosocijalnim smetnjama) neophodno pružiti zaštitu kao posebno ranjivoj kategoriji stanovništva. Ipak, nismo sigurni da će zaštita biti ostvarena na način što ta lica neće biti lišena poslovne sposobnosti. Smatramo da je nekada, u naravno izuzetnim slučajevima, ključ zaštite upravo u lišenju poslovne sposobnosti. Naravno sam institut lišenja sposobnosti bi, po našem mišljenju, trebalo dodatno humanizovati – prvo, na polju zakonske regulative, kada je reč o postupku lišenja poslovne sposobnosti; drugo, u pogledu postupanja sudova u pokrenutim postupcima, u smislu stručnosti i neophodnog individualnog pristupa svakom pojedinom slučaju i na kraju, na polju kontrole rada postavljenih staratelja, ali i ustanova u koje bi ta lica trebalo smeštati samo onda kada to predstavlja jedinu mogućnost.

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POSITION OF PERSONS WITH DISABILITIES IN THE FIELD OF LEGAL CAPACITY (LEGAL AGENCY)

Abstract

The preliminary draft of the Law on Amendments to the Family Law proposed changes in relation to the positive legal solution regarding the matter regulating the institution of deprivation of legal capacity (legal agency). In several provisions that propose the regulation of the so-called restrictions on legal capacity (legal agency), at first glance, important changes are being introduced. However, although in a certain sense they bring progress in relation to the current solution, a more detailed analysis of the proposed solution seems to show that the position of certain persons whose legal capacity (legal agency) would be limited will not differ significantly from the position of persons who, according to the current solution, are completely and partially deprived of legal capacity (legal agency). In addition to the analysis of the proposed solutions, in this paper the attention is also paid to the question of how justified the idea of abolishing the possibility of complete deprivation of legal capacity (legal agency) is in general, whether deprivation constitutes discrimination against persons with disabilities, and whether their position would really improve if the institution were to be abolished or the solution should be sought on the plan of general humanization of existing institutions.

Key words: *Legal capacity (legal agency); Deprivation of legal capacity (legal agency); Persons with disabilities; Guardianship; Substitute decision making; Decision making support.*

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NASILJE U PORODICI I ŽENE SA INVALIDITETOM

Apstrakt

U radu se analizira nasilje prema ženama sa invaliditetom kroz krivičnopravni, porodičnopravni i radnopravni aspekt, kao i međunarodni i nacionalni okvir zaštite žena sa invaliditetom od nasilja. Postoje dva modela shvatanja invaliditeta koja direktno utiču na državnu politiku u vezi sa osobama sa invaliditetom, kao i na načine na koje društvo posmatra ovu kategoriju građana – medicinski i socijalni model. U Konvenciji o pravima osoba sa invaliditetom se menja pristup osobama sa invaliditetom – od posmatranja osoba sa invaliditetom kao „objekata zaštite" prelazi se na sagledavanje osoba sa invaliditetom kao subjekata prava. Ženama sa mentalnim invaliditetom nasilnici mogu lakše da manipulišu i da ih zlostavljaju, bez posledica, posebno usled manjka kognitivnih sposobnosti ili otežanog kretanja ili komunikacije. U slučajevima nasilja prema ženama koje nemaju invaliditet, one su u mogućnosti da pruže otpor, da se odupru nasilniku, pobegnu iz porodičnog doma i zatraže pomoć nadležnih organa. Žena sa invaliditetom, posebno fizičkim invaliditetom, po pravilu, ne može prostorno napustiti porodični dom – ona ne može "pobeći" od nasilnika. Ženama sa invaliditetom u slučaju nasilja koje se odvijalo u porodičnom okuženju usluga sigurne kuće nije u potpunosti dostupna niti pristupačna, kao što je to slučaj sa ženama koje nemaju invaliditet.

Posmatrajući norme krivičnog i građanskog prava, delotvornija zaštita omogućena je Porodičnim zakonom. Podzakonski akti u Republici Srbiji daju prilično široku listu mogućih radnji nasilja prema ženama sa invaliditetom. Radnje nasilja u porodici obuhvataju širok spektar ponašanja. Invaliditet povlači znatno širi krug mogućih radnji nasilja u odnosu na žene bez invaliditeta. Kod žena sa invaliditetom, nastaje problem jer smeštaj u sigurnu kuću ili je otežan, ako postoje samo neki od fizičkih uslova potrebnih za svakodnevno funkcionisanje žena sa invaliditetom (prilagođena kupatila i životni prostor), ili je u potpunosti onemogućen, zbog razloga kao što je nedostatak tumača u slučaju gluvonemih osoba.

Ključne reči: *Nasilje u porodici; Diskriminacija; Žene; Osobe sa invaliditetom; Porodica; Socijalne ustanove; Porodični zakon.*

I UVOD

Osobe sa invaliditetom su, usled ranjivosti i njihove zavisnosti od drugih članova društva, jedna od najviše ugroženih i diskriminisanih društvenih grupa, a ako imamo u vidu da su žene najčešće žrtve nasilja u porodici, nesporno je da su žene sa invaliditetom u posebnom riziku i nepovoljnom položaju da budu žrtve nasilja. Prema Popisu u Republici Srbiji iz 2011. godine, oko 8% stanovništva čine osobe sa invaliditetom, a žena je znatno više nego muškaraca, 58% prema 42%.[1]

Postojanje psihičkih ili fizičkih nedostataka kod osoba sa invaliditetom povlači da se nasilje može odvijati, kako u porodičnom okruženju, tako i u ustanovama socijalne zaštite u kojima borave žene sa invaliditetom. U radu će se analizirati nasilje prema ženama sa invaliditetom kroz krivičnopravni, porodičnopravni i radnopravni aspekt, kao i međunarodni i nacionalni okvir zaštite od nasilja žena sa invaliditetom.

Nasilje nad ženama predstavlja jedan od najtežih oblika kršenja ljudskih prava žena. Uzroci nasilja nad ženama nalaze se u istorijski nejednakom odnosu moći izmedu muškaraca i žena koji dovodi do diskriminacije žena u svim oblastima javnog i privatnog života. Patrijarhalni obrasci ponašanja, diskriminatorne kulturne norme i ekonomska nejednakost dovode do nasilja prema ženama.[2]

Postoje dva modela shvatanja invaliditeta koja direktno utiču na državnu politiku u vezi sa osobama sa invaliditetom, kao i na načine na koje društvo posmatra ovu kategoriju građana. Medicinski model posmatra invaliditet kao individualnu patologiju koju treba (iz)lečitii na izvestan način rehabilitovati. Smatra se da je problem u samoj osobi koja ima invaliditet, te je samim tim, fokus na medicinskoj dijagnozi, a ne na osobi kao individui –osoba sa invaliditetom je pasivna i dobija pomoć koja joj se pruža od strane drugih članova društva. Sa druge strane,postoji socijalni modelkoji pomera fokus sa dijagnoze na osobu, odnosno, na okruženje koje treba da pruži ravnopravnemogućnosti za učešće svih članova društva, pa i onih građana sa izvesnim teškoćama i nedostacima, među koje spadaju i osobe sa invaliditetom.[3] Invaliditet je rezultat odgovora društva na taj nedostatak osobe.[4]Invaliditet je direktno srazmeran stepenusocijalneintegracije, te se osoba sa invaliditetom posmatra kao proaktivna osobakoja ima pravo da odlučuje o svom životu, uz izvestan stepen podrške, i da bira usluge u zajednici koje smatra da su joj potrebne – fokus je na osobi.

1 Republički zavod za statistiku, *Žene i muškarci u Republici Srbiji* (2017), 28.

2 Judith E. Tucker, *Women, Family, and Gender in Islamic Law* (2008), 27: o diskriminaciji žena u islamskom pravu.

3 Da je XX vek, nakon Drugog svetskog rata, doba u kome do izražaja dolazi promovisanje socijalnih prava, zdravstvene zaštite, obrazovanja, socijalne sigurnosti svih članova društva: Brid Featherstone, *Gender, Rights, Responsibilities and Social Policy* u Julie Wallbbank, Shazia Choudhry, Jonathan Herring (eds), *Rights, Gender and Family Law* (2010), 26.

4 UN Women report, *Sexual Harasment against Women with Disabilities in the World of Work and on Campus* (2020), 7.

I pored prilično iscrpnog i sadržajnog pravnog okvira u Republici Srbiji, u redovnim godišnjim izveštajima Poverenika za zaštitu ravnopravnosti, invaliditet je osnov usled koga se podnosi najviše pritužbi za diskriminaciju – diskriminacija po osnovu invaliditeta nalazi se pri vrhu broja pritužbi.[5] Imajući u vidu da su osobe sa invaliditetom zavisne od izvesnog stepena društvene podrške, to se nasilje nad ovom kategorijom građana pokazuje kao još opasnije i suptilnije u odnosu na nasilje nad osobama koje nemaju invaliditet.

II UNIVERZALNI MEĐUNARODNI OKVIR

Na međunarodnom planu doneti su neki od najznačajnijih dokumanata koji se odnose na zaštitu kako osoba sa invaliditetom, tako i žena, kao ranjivih kategorija. Najvažniji međunarodni dokument o pravima žena je Konvencija o eliminisanju svih oblika diskriminacije žena (*CEDAW* konvencija) koja je usvojena 1979. godine,[6] a naša država je ratifikovala 1981. godine,[7] dok je Opcioni protokol uz *CEDAW* konvenciju ratifikovan 2002. godine.[8]

Deklaracijom Ujedinjenih nacija o eliminaciji nasilja nad ženama,[9] države su pozvane da osude nasilje nad ženama i ukazano im je da ne treba da se pozivaju na bilokakve običaje, tradiciju, religijska ili druga uverenja u cilju izbegavanja eliminacije nasilja nad ženama.Nedugo zatim, u Pekingu je 1995.godine održana IV svetska konferencija o ženama na kojoj je usvojena Pekinška deklaracija i Platforma za akciju.[10] Komisija Ujedinjenih nacija za ljudska prava usvojila je i Rezoluciju o eliminaciji nasilja nad ženama,[11] kojom su osuđeni svi akti nasilja nad ženama i devojčicama, koji predstavljaju kršenje ljudskih prava i osnovnih sloboda žena i umanjuju ili onemogućavaju žene i devojčice u uživanju prava i sloboda. Komitet Ujedinjenih nacija za ekonomska, socijalna i kulturna prava, u svom Opštem komentaru br. 16. na član 3. Međunarodnog pakta o ekonomskim, socijalnim i kulturnim pravima[12] naveo je značaj ravnopravnosti muškaraca i žena u uživanju svih

5 Poverenik za zaštitu ravnopravnosti, Redovan godišnji izveštaj Poverenika za 2021. godinu, 2022, *http://ravnopravnost.gov.rs/wp-content/uploads/2022/04/Poverenik-za-zastitu-ravnopravnosti-Godisnji-izvestaj-za-2021-compressed.pdf*.

6 *CEDAW* konvenciju je usvojila Generalna skupština Ujedinjenih nacija u decembru 1979.

7 Zakon o ratifikaciji Konvencije o eliminisanju svih oblika diskriminacije žena, „Službeni list SFRJ", br. 11/81. Nakon raspada SFRJ, Savezna Republika Jugoslavija dala je u martu 2001. godine sukcesorsku izjavu Ujedinjenim nacijama da prihvata potpisane međunarodnopravne akte, uključujući i *CEDAW* konvenciju.

8 Opšti protokol uz Konvenciju o eliminisanju svih oblika diskriminacije žena, „Službeni list SRJ – Međunarodni ugovori", br. 13/2002.

9 Deklaracija UN o eliminaciji nasilja nad ženama, Generalna skupština UN, A/RES/48/104 od 20. decembra 1993. godine.

10 Tekst dostupan na: *http://www.e-jednakost.org.rs/kurs/kurs/download/pekinska_deklaracija.pdf*.

11 Rezolucija Komisije UN za ljudska prava 2003/45 od 23. aprila 2003. godine.

12 Opšti komentar br. 16 na član 3 Međunarodnog pakta o ekonomskim, socijalnim i kulturnim pravima – Ravnopravnost muškaraca i žena u uživanju svih ekonomskih, socijalnih i kulturnih prava, E/C. 12/2005/4 od 11. avgusta 2005. godine.

ekonomskih,[13] socijalnih i kulturnih prava i ukazao je na obaveze država da obezbede žrtvama porodičnog nasilja, koje su uglavnom žene, pristup uslugama, stanovanju, kao i naknadu štete usled fizičkih, mentalnih i emotivnih povreda i bola.[14] I u ovom komentaru je navedeno da je rodno zasnovano nasilje oblik diskriminacije koji onemogućava ravnopravno uživanje prava i sloboda, uključujući ekonomska, socijalna i kulturna prava, zbog čega države treba da preduzmu adekvatne mere za eliminaciju nasilja i da postupaju sa dužnom pažnjom kako bi sprečile nasilje, istražile slučajeve nasilja, kaznile počinioce i obezbedile naknadu žrtvama nasilja.

Najvažniji međunarodni ugovor kojim se garantuju prava osobama sa invaliditetom je Konvencija o pravima osoba sa invaliditetom sa Opcionim protokolom uz konvenciju, koje je Republika Srbija ratifikovala 2009. godine.[15] Zabrana diskriminacije i ravnopravnost žena i muškaraca proklamovani su kao osnovna načela Konvencije. Promena pristupa prema osobama sa invaliditetom vidi se i kroz definisanje pojma invaliditeta, koji se od usvajanja ovog dokumenta posmatra kao koncept koji se razvija, a ne kao lična karakteristika osobe. U Konvenciji se menja pristup osobama sa invaliditetom – od posmatranja osoba sa invaliditetom kao „objekata zaštite", prelazi se na sagledavanje osoba sa invaliditetom kao subjekata prava, nešto slično kao u Konvenciji o pravima deteta gde se deca posmatraju kao osobe koje mogu da uživaju sva prava kao i odrasle osobe.[16] U potpunosti se primenjuje socijalni model. Konvencija polazi od pretpostavke sposobnosti umesto pretpostavke nesposobnosti osoba sa invaliditetom. Države su se obavezale da će obezbediti ravnopravnost u ostvarivanju zdravstvene zaštite i pristupa zdravstvenim uslugama, uključujući oblasti seksualnog i reproduktivnog zdravlja, kao i socijalne zaštite, kojima će se obezbediti da devojčice i žene sa invaliditetom imaju pristup programima socijalne zaštite i programima za smanjenje siromaštva. Jasno je istaknuto da su devojčice i žene sa invaliditetom posebno izložene višestrukoj diskriminaciji, a od država se traži da preduzmu sve mere kako bi im obezbedile ravnopravno ostvarivanje ljudskih prava i uživanje sloboda.

U Opštem komentaru br. 3 – Žene i devojčice sa invaliditetom,[17] Komitet, kao organ koji se stara nad primenom Konvencije, naveo je njihov lošiji

13 Za ravnopravnost žena i muškaraca u imovinskom, ekonomskom delu: Uroš Novaković, „Diskriminacija žena u domenu imovinskih odnosa supružnika", u Dušan Popović (ur.), *Liber Amicorum profesor dr Mirko Vasiljević* (2021), 751.

14 Tako, ističe se da se žene nakon odlaska u penziju nalaze u težem položaju od muškaraca – imaju niže prihode od muškaraca, imaju pristup manjem broju socijalnih usluga: Deborah Chambers, *A Sociology of Family Life: Change and Diversity in Intimate Relations* (2012), 101.

15 Generalna skupština Ujedinjenih nacija, Konvencija o pravima osoba sa invaliditetom i Opcioni protokol uz Konvenciju, A/RES/61/106 od 13. decembra 2006. godine. Zakon o potvrđivanju Konvencije o pravima osoba sa invaliditetom, „Službeni glasnik RS – Međunarodni ugovori", br. 42/2009.

16 Jane Fortin, *Children's Rights and the Developing Law* (2009), 19.

17 Opšti komentar br. 3 – Žene i devojcice sa invaliditetom, Komitet za prava osoba sa invaliditetom, CRPD/C/GC/3 od 2. septembra 2016. godine. Pored Komiteta za prava osoba sa invaliditetom i *CEDAW* komitet je usvojio Opštu preporuku br. 18 – Žene sa invaliditetom.

položaj i prepreke sa kojima se suočavaju, a koje stvaraju situacije višestrukih i intersekcijskih oblika diskriminacije, posebno u pogledu ravnopravnog pristupa obrazovanju, ekonomskim mogućnostima, društvenim odnosima, pristupu pravdi i ravnopravnosti pred zakonom, političkoj participaciji, kao i mogućnostima da imaju kontrolu nad sopstvenim životima. Pored seksualnog i reproduktivnog zdravlja i diskrimninacije, nasilje je navedeno kao jedan od tri glavna problema sa kojima se susreću žene i devojčice sa invaliditetom.

III SAVET EVROPE I EVROPSKA UNIJA

Na evropskom pravnom području, najpre, potrebno je istaći da je doneta Konvencija Saveta Evrope o sprečavanju i borbi protiv nasilja nad ženama i nasiljau porodici,[18]poznata i pod nazivom Istanbulska konvencija, koja je usvojena u maju 2011. godine u Istanbulu, a stupila je na snagu u avgustu 2014. godine, nakon desete ratifikacije. Srbija je ratifikovala ovu konvenciju 2013. godine.[19] Konvencijom je prepoznato da je nasilje nad ženama jedan od ključnih društvenih mehanizama pomoću kojih se žene prisilno stavljaju u podređeni položaj u odnosu na muškarce. Konvencija se bavi prevencijom, zaštitom i podrškom žrtvama, delotvornom istragom, gonjenjem i kažnjavanjem za akte nasilja kao integrisanim javnim politikama i monitoringom. Na trećoj Evropskoj ministarskoj konferenciji o ravnopravnosti žena i muškaraca koja je održana 1993. godine u Rimu, usvojena je Deklaracija o politikama suprotstavljanja nasilju prema ženama u demokratskoj Evropi.[20]Preporukom 1450 (2000) – Nasilje nad ženama u Evropi,[21]ukazuje se na porastnasilja nad ženama u državama Saveta Evrope, kao i na činjenicu da je svaka peta ženau Evropi žrtva nasilja. Ukazano je da je nasilje u porodici jedan od najčešćih oblika nasilja nad ženama, a da ovo nasilje nije dovoljno vidljivo, kao i da u Evropi svake godine više žena premine ili bude ozbiljno povređeno usled nasilja u porodici, nego usled kancera ili saobraćajnih nesreća.

Preporukom 1582 (2002) – Nasilje nad ženama u porodici,[22] konstatovano je da je nasilje u porodici široko rasprostranjen društveni fenomen u evropskim zemljama koji nije ograničen na neku posebnu društvenu grupu, a koje se još uvek često posmatra kao privatna stvar. Preporuka Komiteta ministara državama članicama Saveta Evrope o zaštiti žena od nasilja,[23] sadr-

18 Tekst Konvencije dostupan na srpskom i engleskom jeziku na: *http://www.parlament.gov.rs/upload/archive/files/lat/pdf/zakoni/2013/2246-13Lat.pdf*.

19 Zakon o potvrđivanju Konvencije Saveta Evrope o sprečavanju i borbi protiv nasilja nad ženama i nasilja u porodici, „Službeni glasnik RS – Međunarodni ugovori", br. 12/13.

20 Deklaracija o politikama suprotstavljanja nasilju nad ženama u demokratskoj Evropi, III Evropska ministarska konferencija, Rim, 1993.

21 Preporuka 1450 (2000) – Nasilje nad ženama u Evropi, Parlamentarna skupština Saveta Evrope (Recommendation 1450 (2000) – Violence against women in Europe).

22 Preporuka 1582 (2002) – Nasilje nad ženama u porodici, Parlamentarna skupština Saveta Evrope (Recommendation 1582 (2002) –Domestic violence against women).

23 Preporuka Rec (2002)5 o zaštiti žena od nasilja, Komitet ministara Saveta Evrope (Recommendation Rec (2002) 5 and documents concerning violence against women).

ži preporuke državama da preispitaju zakone sa ciljem da garantuju ženama uživanje i zaštitu ljudskih prava i osnovnih sloboda, kao i da preduzmu sve neophodne mere kako bi obezbedili ženama slobodno uživanje ekonomskih i socijalnih prava.

Parlamentarna skupština Saveta Evrope izrazila je krajnju zabrinutost zbog stepena i porasta nasilja nad ženama u porodici u Preporuci 1681 (2004) – Kampanja zaborbu protiv nasilja nad ženama u porodici u Evropi.[24] Nasilje u porodici treba posmatrati kao nacionalni politički problem, te se mora rešavati u širokom političkom okviru, uz učešće svih grana vlasti i građana. Komitet ministara Saveta Evrope usvojio je deklaraciju "Da rodna ravnopravnostpostane realnost",[25] u kojoj osuđuje to što su žene izložene kršenju ljudskih prava. Navedeno je da su žene žrtve različitih oblika nasilja, uključujući seksualnu eksploataciju, kao i akata koji se mogu okarakterisati kao mučenje i nečovečno postupanje. Poslednji u nizu dokumenata Saveta Evrope u vezi sa nasiljem nad ženama je StrategijaSavetaEvrope o rodnoj ravnopravnosti za period 2014-2017,[26] kojom je promovisan holistički pristup rodnoj ravnopravnosti i kojom su državama date smernice za kreiranje politika koje odgovaraju na izazove u primeni postojećih standarda u oblasti rodne ravnopravnosti. Dalje, EU je određenim direktivama i rezolucijama regulisala oblast nasilja nad ženama –Direktiva 2011/36/EU o prevenciji i borbi protiv trgovine ljudima i zaštiti žrtava trgovine ljudima, kojom je posebno regulisano postupanje u slučajevima nasilja nad ženama u vezi sa trgovinom ljudima;[27] Direktivom 2004/81/EC o izdavanju dozvola boravka državljanima trećih zemalja koji su žrtve trgovine ljudima,[28] posebno se obezbeđuje podrška žrtvama trgovine ljudima koje su voljne da sarađuju sa vlastima protiv trgovaca ljudima; Direktiva 2012/29/E o uspostavljanju minimalnih standarda za prava, podršku i zaštitu žrtavakrivičnih dela;[29]Direktiva 2011/99/ EU[30] o Evropskom zaštitnom nalogu, takođe, obezbeđuje zaštitu ženama žrtvama nasilja,tako što uspostavlja pravila kojima se sudskom ili drugom organu države članice u kojoj je doneta zaštitna mera sa ciljem za-

24 Preporuka 1681 (2004) – Kampanja za borbu protiv nasilja nad ženama u porodici u Evropi, Parlamentarna skupština Saveta Evrope (Recommendation 1681 (2004)1 Campaign to combat domestic violence against women in Europe).

25 Deklaracija Komiteta ministara Saveta Evrope – Da rodna ravnopravnost postane realnost, 2005. godine.

26 Strategija Saveta Evrope o rodnoj ravnopravnosti 2014-2017.

27 Direktiva 2011/36/EU o prevenciji i borbi protiv trgovine ljudima i zaštiti žrtava trgovine ljudima (*Official Journal of the European Union*, L 101, 15.4.2011).

28 Direktiva 2004/81/EZ o dozvoli boravka izdatoj državljanima trećih zemalja koji su žrtve trgovine ljudima ili koji su korišćeni za delovanja kojima se omogućuje nezakonito useljavanje, koji sarađuju s nadležnim telima (*Official Journal of the European Union*, L 261/19, 6.8.2004).

29 Direktiva 2012/29/EU o uspostavljanju minimalnih standarda za prava, podršku i zaštitu žrtava krivičnih dela (*Official Journal of the European Union*, L 315, 14.11.2012).

30 Direktiva 2011/99/EU o Evropskom zaštitnom nalogu (*Official Journal of the European Union*, L 338, 21.12.2011).

štite osobe od krivičnog dela koje može da joj ugrozi život, fizički ili psihički integritet, dostojanstvo, slobodu ili seksualni integritet, da izda Evropski zaštitni nalog kojim se omogućava državnim organima u drugoj članici da nastave sa zaštitom osobe na svojoj teritoriji; Direktiva 2006/54/ECo primeni principa jednakih mogućnosti i jednakog tretmana u vezi sa zaposlenjem i zanimanjem;[31] Direktiva 2004/113/EC o primeni principa jednakog tretmana žena i muškaraca u pristupu i korišćenju dobara i usluga sadrži definiciju i osudu uznemiravanja i seksualnog uznemiravanja; Rezolucija o nasilju nad ženama,[32] u kojoj je Evropski parlament tražio od Saveta EU i Evropske komisije da preduzmu mere, kao i da istraže pojave nasilja nad ženama u privatnoj i javnoj sferi, posebno seksualno uznemiravanje, trgovinu ljudima, zaštitu pripadnica manjinskih grupa i žena izbeglica; Rezolucijom o eliminisanju nasilja nad ženama iz 2009. godine pozvana je Evropska komisija da predloži direktivu o prevenciji i borbi protiv svih oblika nasilja nad ženama;[33] U Rezoluciji o prioritetima i nacrtu novog EU okvira za borbu protiv nasilja nad ženama iz 2011. godine,[34] Evropski parlament je predložio kreiranje novog sveobuhvatnog pristupa rodno zasnovanom nasilju, naveo je da je prostitucija oblik rodno zasnovanog nasilja i pozvao Evropsku komisiju da prikuplja godišnje podatke o nasilju nad ženama, te da nastavi sa naporima za borbu protiv nasilja nad ženama kroz EU programe; Rezolucijom o borbi protiv nasilja nad ženama,[35] zatraženo je od Evropske komisije da do kraja 2014. godine donese predlog akta o merama za promociju i podršku aktivnostima država članica u sprečavanju nasilja nad ženama i devojčicama, da revidira Predlog propisa o evropskoj statistici tako da obuhvati nasilje nad ženama u sklopu krivičnih dela nasilja; u Rezoluciji iz 2015. godine o EU strategiji ravnopravnosti žena i muškaraca posle 2015, novoizabrani Evropski parlament ponovio je ciljeve prethodnih rezolucija, a pozvao je Evropsku komisiju da započne sa kampanjama za podizanje svesti o nultoj toleranciji na nasilje nad ženama.[36]

Savet Evrope usvojio je novu strategiju za osobe sa invaliditetom – Ljudska prava: Realnost za sve, Strategija Saveta Evrope o pravima osoba sa invaliditetom 2017-2023. U ovoj strategiji je navedeno da se žene i devojčice sa

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31 Direktiva 2006/54/EC o primeni principa jednakih mogucćosti i jednakog tretmana u vezi sa zaposlenjem i zanimanjem (*Official Journal*, L 204/23, 26.7.2006).

32 Rezolucija o nasilju nad ženama (*Official Journal of the European Union*, C 176/73, 14.7.1986).

33 Rezolucija o eliminisanju nasilja nad ženama od 26. novembra 2009. godine, P7_TA (2009)0098 (*Official Journal of the European Union*, C 285E, 21.10.2010).

34 Rezolucija o prioritetima i nacrtu novog EU okvira za borbu protiv nasilja nad ženama od 5. aprila 2011. godine, (2010/2209(INI)).

35 Rezolucija Evropskog parlamenta od 25. februara 2014. godine sa preporukama Evropskoj komisiji o borbi protiv nasilja nad ženama (2013/2004(INL)).

36 Rezolucija Evropskog parlamenta od 9. juna 2015. godine o EU strategiji ravnopravnosti žena u muškaraca posle 2015 (2014/2152(INI)) (The EU Strategy for equality between women and men post 2015).

invaliditetom susreću sa dodatnim preprekama i višim nivoom diskriminacije kod ostvarivanja ljudskih pravau poređenju sa muškarcima, kao i da su u većem riziku od svih oblika nasilja, u porodičnom domu, ali i izvan doma.

IV NACIONALNI OKVIR

Pored međunarodnog, predmet analize u ovom radu jeste i nacionalni okvir u oblasti zaštite od nasilja nad ženama sa invaliditetom. Najpre, Ustav Republike Srbije[37] jamči ravnopravnost polova i razvija politiku jednakih mogućnostii zabranjuje svaku diskriminaciju, neposrednu ili posrednu, po bilokom osnovu, a naročito po osnovu rase, pola, nacionalne pripadnosti, društvenog porekla, rođenja, veroispovesti, političkog ili drugog uverenja, imovnog stanja, kulture, jezika, starosti i psihičkog ili fizičkog invaliditeta.

Zakon o zabrani diskriminacije[38] propisuje da diskriminacija i diskriminatorno postupanje označavaju svako neopravdano pravljenje razlike ili nejednako postupanje, odnosno propuštanje (isključivanje, ograničavanje ili davanje prvenstva), u odnosu na lica ili grupe kao i na članove njihovih porodica, ili njima bliska lica, na otvoren ili prikriven način, a koji se zasniva na rasi, boji kože, precima, državljanstvu, nacionalnoj pripadnosti ili etničkom poreklu, jeziku, verskim ili političkim ubeđenjima, polu, rodnom identitetu, seksualnoj orijentaciji, imovnom stanju, rođenju, genetskim osobenostima, zdravstvenom stanju, invaliditetu, bračnom i porodičnom statusu, osuđivanosti, starosnom dobu, izgledu, članstvu u političkim, sindikalnim i drugim organizacijama i drugim stvarnim, odnosno pretpostavljenim ličnim svojstvima. Kao poseban oblik diskriminacije, propisana je zabrana diskriminacijeosoba sa invaliditetom, koja postoji ako se postupa protivno načelu poštovanja jednakih prava i sloboda osoba sa invaliditetom u političkom, ekonomskom, kulturnom i drugomaspektu javnog, profesionalnog, privatnog i porodičnog života, a način ostvarivanja izaštita prava osoba sa invaliditetom uređuje se posebnim zakonom. Izmenjeni Zakon o zabrani diskriminacije, 2021. godine je unapređen jer je proširena lista zaštićenih ličnih svojstava – zabranjeni su segregacija, navođenje na diskriminaciju i seksualno uznemiravanje, utvrđena je obaveza poslodavaca u pogledu pristupa i razumnog prilagođavanja radnog mesta, i obaveza organa javne vlasti da prilikom pripreme novog propisa izvrši procenu uticaja propisa ili politike i njihove usaglašenosti sa načelom ravnopravnosti.

Zakonom o rodnoj ravnopravnosti,[39] propisano je da se jemči rodna ravnopravnost. Neposredna diskriminacija postoji ako se lice ili grupa lica, zbog njihovog pola, polnih karakteristika, odnosno roda, u istoj ili sličnoj situaciji, bilo kojim aktom, radnjom ili propuštanjem, stavljaju ili su stavljeni u ne-

37 Ustav Republike Srbije, „Službeni glasnik RS“, br. 98/06 i 115/21.

38 Zakon o zabrani diskriminacije, „Službeni glasnik RS“, br. 22/09 i 52/21.

39 Zakon o rodnoj ravnopravnosti, „Službeni glasnik RS“, br. 52/21.

povoljniji položaj, ili bi mogli biti stavljeni u nepovoljniji položaj. Posredna diskriminacija postoji ako na izgled neutralna odredba, kriterijum ili praksa stavlja ili bi mogla da stavi lice ili grupu lica u nepovoljniji položaj u poređenju sa drugim licima u istoj ili sličnoj situaciji, osim ako je to objektivno opravdano zakonitim ciljem, a sredstva za postizanje tog cilja su primerena i nužna.

Zakonom o sprečavanju diskriminacije osoba sa invaliditetom[40] uređen je opšti režim zabrane diskriminacije na osnovu invaliditeta, posebni slučajevi diskriminacije osoba sa invaliditetom, postupak zaštite osoba izloženih diskriminaciji i mere koje se preduzimaju radi podsticanja ravnopravnosti i socijalne uključenosti osoba sa invaliditetom. Iako ovaj zakon ne spominje posebno žene sa invaliditetom, u njemu su sadržane važne odredbe za sprečavanje diskriminacije osoba sa invaliditetom u oblasti bračnih i porodičnih odnosa, a čije su žrtve najčešće žene, naročito kada se radi o vršenju roditeljskog prava. Propisano je da se diskriminacijom u ostvarivanju prava iz bračnih i porodičnih odnosa zbog invaliditeta smatra uskraćivanje prava na brak osobama sa invaliditetom, ostavljanje posebnih uslova za zaključenje braka osoba sa invaliditetom i postavljanje posebnih uslova osobama sa invaliditetom za vršenje roditeljskog prava.

Zakonom o socijalnoj zaštiti,[41] propisano je da korisnik ima pravo na socijalnu zaštitu koja se zasniva na socijalnoj pravdi, odgovornosti i solidarnosti, koja se pruža uz poštovanje fizičkog i psihičkog integriteta osobe, bezbednosti, kao i uz uvažavanje moralnih, kulturnih i religijskih ubeđenja, u skladu sa zajemčenim ljudskim pravima i slobodama. Ovim zakonom uređena je i posebna usluga socijalne zaštite –usluga smeštaja, te je u okviru nje uređen smeštaj korisnika u srodničku, hraniteljsku ili drugu porodicu za odrasle i starije,[42] domski smeštaj, smeštaj u prihvatilište i druge vrste smeštaja.

Zakon o zaštiti lica sa mentalnim smetnjama,[43] zabranjuje diskriminaciju u zaštitiosoba sa mentalnim smetnjama, između ostalog, i na osnovu pola. Pored toga, odredbama ovog zakona garantovano je pravo svake osobe sa mentalnim smetnjama kojaje smeštena u psihijatrijsku ustanovu da zavisno od pola, bude smeštena i da spava u odvojenim prostorijama. Kad je reč o medicinskim merama, propisano je da se lečenje lica sa mentalnim smetnjama u zdravstvenim ustanovama prilagođava svakom licu posebno, u zavisnosti od medicinskih indikacija i zasniva se na individualnom planu lečenja koji utvrđuje i sprovodi stručni tim zdravstvene ustanove, uz ucešće tog lica, odnosno, njegovog zakonskog zastupnika.

40 Zakon o sprečavanju diskriminacije osoba sa invaliditetom, „Službeni glasnik RS“, br. 33/06.

41 Zakon o socijalnoj zaštiti, „Službeni glasnik RS“, br. 24/11 i 117/22.

42 Poseban vid nasilja jeste nasilje nad starijim osobama. U svetlu ovoga rada, žene sa invaliditetom mogu biti i starijeg životnog doba, te su one ugrožene i po ovom osnovu. Trend starenja na globalnom nivou, dovodi do povećanog rizika od zlostavljanja starijih osoba: Stanka Stjepanović, „Hraniteljstvo za starija i odrasla lica“, *Pravni život*, br. 10/2017, 174.

43 Zakon o zaštiti lica sa mentalnim smetnjama, „Službeni glasnik RS“, br. 45/13.

Krivičnim zakonikom Republike Srbije,[44]propisana su krivična dela protiv polne slobode, a među njima se sledeća krivična dela odnose na zaštitu žena žrtava nasilja: silovanje, obljuba zloupotrebom položaja, obljuba sa detetom, nedozvoljene polne radnje, nasilje u porodici, polno uznemiravanje, proganjanje, i mera bezbednosti zabrana približavanja i komunikacija sa oštećenom.[45] Zakonom o izmenama i dopunama Krivičnog zakonika,[46] izjednačene su kazne za silovanje i obljubu nad nemoćnim licem, ali je nejasno zašto se silovanje žene sa invaliditetom u zakonu i dalje naziva obljuba, kada je faktički u pitanju krivično delo silovanje, a jedina razlika između ova dva dela je u ličnom svojstvu žrtve, odnosno činjenici da žrtva krivičnog dela obljuba nad nemoćnim licem ima invaliditet. Krivičnim zakonikom propisano je krivično delo zlostavljanje i mučenje, te je propisano da onaj ko zlostavlja drugog ili prema njemu postupa na način kojim se vređa ljudsko dostojanstvo, biće kažnjen kaznom zatvora do jedne godine. Propisano je i krivično delo napuštanje nemoćnog lica koje izvršava onaj ko nemoćno lice koje mu je povereno ili o kojem je inače dužan da se stara ostavi bez pomoći ustanju ili prilikama opasnim za život ili zdravlje, te određuje da će izvršilac biti kažnjen zatvorom od tri meseca do tri godine.

Zakon o sprečavanju nasilja u porodici[47] na opšti i jedinstveni način uređuje organizaciju i postupanje državnih organa i ustanova i time omogućava delotvorno sprečavanje nasilja u porodici i hitnu, blagovremenu i delotvornu zaštitu i podršku žrtvama nasilja u porodici. Značajna novina koju uvodi Zakon o sprečavanju nasilja u porodici jesu hitne mere koje izriču policijski službenici.

Porodični zakon[48] definiše nasilje u porodici i kao nasilje nad nemoćnim licem, među kojima spadaju i žene sa invaliditetom. Protiv člana porodice koji vrši nasilje sud može odrediti jednu ili više mera zaštite od nasilja u porodici, kojom se privremeno zabranjuje ili ograničava održavanje ličnih odnosa sa drugim članom porodice.

Za suzbijanje nasilja nad ženama relevantan je i Zakon o sprečavanju zlostavljanjana radu.[49] Pod zlostavljanjem na radu podrazumeva se svako aktivno ili pasivno ponašanjeprema zaposlenom ili grupi zaposlenih kod poslodavca koje se ponavlja, a koje za cilj ima ili predstavlja povredu dostojanstva, ugleda, ličnog i profesionalnog integriteta, zdravlja,položaja zaposlenog i koje izaziva strah ili stvara neprijateljsko, ponižavajuće ili uvredljivo okruženje, pogoršava uslove rada ili dovodi do toga da se zaposleni izoluje ili navede da na sopstvenu inicijativu raskine radni odnos ili otkaže ugovor o radu ili drugi ugovor.

44 Krivični zakonik, „Službeni glasnik RS“, br. 85/05, 88/05 – ispr., 107/05 – ispr., 72/09, 111/09, 121/12,104/13, 108/14, 94/16 i 35/19.

45 Vid. Lepojka Čarević Mitanovski i Violeta Kočić Mitaček, „Žene sa invaliditetom“, u Jovica Trkulja, Branko Rakić, Damjan Tatić (ur.), *Zabrana diskriminacije osoba sa invaliditetom* (2012), 222.

46 Zakon o izmenama i dopunama Krivičnog zakonika, „Službeni glasnik RS“, br. 94/16.

47 Zakon o sprečavanju nasilja u porodici „Službeni glasnik RS“, br. 94/16.

48 Porodični zakon, „Službeni glasnik RS“, br. 18/05, 72/11 – dr. zakon i 6/15.

49 Zakon o sprečavanju zlostavljanja na radu, „Službeni glasnik RS“, br. 36/10.

U Nacionalnoj strategiji za rodnu ravnopravnost za period od 2016. do 2020. godine sa Akcionim planom za period od 2016. do 2018. godine,[50] nasilje prema ženama je podvedeno pod Opšti strateški cilj 1.

Opštim protokolom o postupanju i saradnji ustanova, organa i organizacija u situacijama nasilja nad ženama u porodici i u partnerskim odnosima Vlade Republike Srbije iz 2011.godine, bliže se određuju obaveze, oblici, način i sadržaj saradnje između nadležnih ustanova, organa i organizacija, kao i drugih učesnika koji učestvuju u otkrivanju i suzbijanju nasilja i pružanju zaštite i podrške osobama koja trpe nasilje u porodici.[51]

Posebni protokol Ministarstva rada, zapošljavanja i socijalne politike Vlade Republike Srbije o postupanju centara za socijalni rad – organa starateljstva u slučajevima nasilja u porodici i ženama u partnerskim odnosima iz 2013. godine,[52] usmeren je na strukturiranje postupaka koji se realizuju u centru za socijalni rad, a ucilju momentalnog zaustavljanja nasilja, sprečavanja ponavljanja nasilja, obezbeđivanja bezbednosti žrtve nasilja, zadovoljavanja osnovnih egzistencijalnih uslova žrtve nasilja, osnaživanja i osposobljavanja žrtve nasilja, da uz podršku, ili bez podrške, preuzme odgovornost za kvalitet i organizaciju sopstvenog života bez nasilja.

Posebni protokol Ministarstva unutrašnjih poslova Vlade Republike Srbije o postupanju policijskih službenika u slučajevima nasilja nad ženama u porodici i u partnerskim odnosima iz 2013. godine, usvojen je sa namerom da se uspostave jedinstveni standardi u postupanju policijskih službenika u slučajevima nasilja nad ženama u porodici i u partnerskim odnosima, kao i da omogući specijalizaciju policijskih službenika koji neposredno postupaju u ovim slučajevima.

Posebni protokol Ministarstva zdravlja Vlade Republike Srbije o postupanju u slučajevima nasilja nad ženama u porodici i u partnerskim odnosima iz 2010.godine, definiše procedure i precizirane uloge zdravstvenih radnika u vezi sa nasiljem.

Posebni protokol za pravosuđe u slučajevima nasilja nad ženama u porodici i u partnerskim odnosima Ministarstva pravde i državne uprave iz 2014. godine, donet je sa ciljem prepoznavanja, sprečavanja, pružanja pravne i druge stručne pomoći ženama žrtvama nasilja u porodici i partnerskim odnosima, unapređenja saradnje sa svim učesnicima sprečavanja ove vrste nasilja.[53]

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50 Nacionalna strategija za rodnu ravnopravnost za period od 2016. do 2020. godine sa Akcionim planom za period od 2016. do 2018. godine, "Službeni glasnik RS", br. 4/16.

51 Opšti protokol o postupanju i saradnji ustanova, organa i organizacija u situacijama nasilja nad ženama u porodici i u partnerskim odnosima Vlade Republike Srbije usvojen je na sednici Vlade održanoj 24. novembra 2011. godine.

52 Posebni protokol Ministarstva rada, zapošljavanja i socijalne politike Vlade Republike Srbije o postupanju centara za socijalni rad – organa starateljstva u slučajevima nasilja u porodici i u partnerskim odnosima donelo je Ministarstvo rada, zapošljavanja i socijalne politike u martu 2013. godine.

53 Vredno je napomenuti još nekoliko akata na nacionalnom nivou: Odluka o Programu za zaštitu žena od nasilja u porodici i partnerskim odnosima i drugih oblika rodno zasnovanog nasilja u Autonomnoj pokrajini Vojvodini za period od 2015. do 2020. godine;

V NASILJE U PORODIČNOM OKRUŽENJU

U oblasti prava osoba sa invaliditetom pokazuje se koliko je teško definisati porodicu, usled toga što širok krug osoba, posebno onih koje nisu povezane krvnom vezom, pledira da budu obuhvaćene ovim pojmom. Pojam porodice treba da bude proširen usled činjenice da žene sa invaliditetom vrlo često zavise od više osoba koje im pružaju pomoć u obavljanju različitih svakodnevnih aktivnosti, a koje se *de facto* smatraju članovima njihovih porodica. Stoga se porodicom žena sa invaliditetom, pored roditelja, emotivnih partnera i drugih članova porodice, smatraju i osobe koje im pružaju personalne usluge, odnosno, koji im pružaju pomoć i podršku u svakodnevnom funkcionisanju – personalni asistenti, prevoznici, tumači, lekari, medicinsko osoblje, socijalni radnici, terapeuti, savetnici, osobe zaposlene u rezidencijalnim institucijama.

Žene sa invaliditetom su zavisne, u većoj ili manjoj meri, od ovih osoba, bez čije podrške bi im svakodnevno funkcionisanje bilo ili otežano ili u potpunosti onemogućeno. Ženama sa mentalnim invaliditetom nasilnici mogu lakše da manipulišu i da ih zlostavljaju, bez posledica, posebno usled manjka kognitivnih sposobnosti ili otežanog kretanja ili komunikacije. Različite radnje nasilja nad ženama sa invaliditetom dolaze u obzir, posebno jer je usled oblika invaliditeta proširen krug radnji koje mogu biti okarakterisane kao radnje nasilja: oduzimanje pomoćnih sredstava koja su im neophodna za kretanje ili funkcionisanje (invalidska kolica), pretnja da će ta sredstva biti uništena, zanemarivanje, odbijanje pomoći u obavljanju svakodnevne higijene, hranjenja ili odbijanje davanja lekova koji su svakodnevna medicinska terapija, pružanjepomoći na neadekvatan ili čak okrutan način (kupanje u vreloj ili ledenoj vodi), preuzimanje kontrole nad njihovim finansijama. Usled navedenih radnji nasilja koje u sebi sadrže odnos nemoći žene sa invaliditetom i nadređenosti nasilnika, ženama sa invaliditetom je izuzetno teško da napuste nasilnika, te je za ovu kategoriju osoba sa invaliditetom izlazak iz porodičnog nasilja neuporedivo teži u odnosu na žene koje nemaju invaliditet, jer se pomenuta zavisnost od nasilnika u fizičkom, komunikacijskom, finansijskom i medicinskom kontekstu javlja kao ozbiljna prepreka prekidanja ciklusa nasilja. Protek vremena, kao veoma važna činjenica u postupcima nasilja u porodici posebno dolazi do izražaja kod žena sa invaliditetom. Naime, posebno radnje fizičkog nasilja, teže je dokazati ukoliko od vremena nanošenja povrede do odlaska kod lekara ili dolaska policijskih službenika, protekne duži vremenski period (nekoliko dana ili čak duže). Dokazivanje nasilja u po-

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Strategija prevencije i zaštite od diskriminacije, kojom je predviđena, u cilju iskorenjivanja diskriminatornih praksi vezanih za lični i porodični život osoba sa invaliditetom, potreba podizanja svesti o pravima osoba sa invaliditetom na seksualnost, osnivanje porodice i rađanje dece. Potrebno je obezbediti uslove da porodično okruženje bude primarno i najbolje rešenje za osobu sa invaliditetom uz snažnu podršku procesu deinstitucionalizacije i kontinuirani razvoj, unapređivanje i obogaćivanje podrške porodicama dece sa invaliditetom i smetnjama u razvoju; Nacionalna strategija za rodnu ravnopravnost za period od 2016. do 2020. godine, gde je istaknuta potreba da se eliminiše višestruka diskriminacija i poboljša položaj višestruko diskriminisanih žena, među kojima su i žene sa invaliditetom.

rodici, ukoliko se ne odvija pred svedocima, članovima porodice ili drugim licima, znatno je teže ako se ne ustanovi lekarskim pregledom, policijskim zapisnikom ili na drugi materijalno dokaziv način. Nemogućnost kretanja ili nepostojanje svesti kod žene sa invaliditetom da se vrši nasilje, omogućava nasilniku da najpre komunikacijski izoluje žrtvu, koja nije u mogućnosti u trenutku kada se nasilje odvija ili neposredno nakog toga, da pozove državne organe koji bi došli u porodični dom i utvrdili postojanje nasilja. U slučajevima nasilja nad ženama koje nemaju invaliditet, one su u mogućnosti da pruže otpor, da se odupru nasilniku, pobegnu iz porodičnog doma i zatraže pomoć nadležnih organa. Žena sa invaliditetom, posebno fizičkim invaliditetom, ne može prostorno napustiti porodični dom – ona ne može "pobeći" od nasilnika. Ova činjenica dodatno biva usložnjena time da zavisnost žene sa invaliditetom od nasilnika može biti tolika da psihičko nasilje dovede do toga da ona nije svesna da se prema njoj vrši nasilje. U Republici Srbiji, iskustva korisnica usluge SOS telefona za žene sa invaliditetom koje su u situaciji nasilja u porodici, pokazuju da je najzastupljenije verbalno nasilje (28%), zatim ekonomsko (24%), prinudna izolacija (22%), fizičko (10%) i seksualno (5%), a da su u najvećem riziku žene sa intelektualnim invaliditetom. Nasilnici su u 87% slučajeva muškarci i to članovi najuže porodice od kojih žene sa invaliditetom zavise.[54] Još jedna specifičnost nasilja nad ženama sa invaliditetom, sa kojom se ne susreću žene bez invaliditeta, jeste nasilje koje žene trpe od svojih personalnih asistenata.

Kada je reč o nasilju u porodici prema ženama sa invalidtetom, analiziraćemo kakav je odnos porodičnog i krivičnog zakonodavstva u odnosu na to ko se smatra članom porodice, te kakve su mogućnosti da žene pokrenu postupak za zaštitu od nasilja u porodici. Prema Krivičnom zakoniku, žena bi mogla da podnese krivičnu prijavu za nasilje u porodici protiv svog personalnog asistenta ili staratelja samo ukoliko je on njen supružnik, dete, srodnik supružnika u pravoj liniji krvnog srodstva, vanbračni partner ili njihovo dete, usvojilac ili usvojenik, hranitelj ili hranjenik, brat ili sestra, njihovi supružnici i deca, bivši supružnik ili njihovo dete ili roditelj bivših supružnika, pod uslovom da žive u zajedničkom domaćinstvu, kao i osoba sa kojom žena ima zajedničko dete ili je dete na putu da bude rođeno, iako nikada nisu živeli u istom porodičnom domaćinstvu. Dakle, ukoliko je personalni asistent ili staratelj osoba sa kojom žena nije u krvnom ili tazbinskom srodstvu, bračnoj ili vanbračnoj zajednici i ako nemaju dete, ona ne bi mogla da protiv te osobe vodi krivični postupak za krivično delo nasilje u porodici. To nam govori da je krivičnopravna zaštita žena sa invaliditetom manjeg obima u odnosu na građanskopravnu zaštitu. Nešto je drugačija situacija sa određivanjem mera zaštite od nasilja u porodici u parničnom postupku prema Porodičnom zakonu. Ovaj zakon pravo na zaštitu od nasilja u porodici priznaje i licima koja žive ili su živela u istom porodičnom domaćinstvu, ne navodeći pri tom prirodu odnosa između tih osoba. Iz navedenog proizlazi da ukoliko žena sa invaliditetom ne stanuje ili nikada nije stanovala sa svojim personalnim asi-

54 Kosana Beker i Tijana Milošević, *Nasilje nad ženama sa invaliditetom u rezidencijalnim ustanovama* (2017), 72.

stentom ili starateljem, a ta osoba nije njen srodnik ili intimni partner, nasilje koje trpi ne smatra se porodičnim nasiljem. Ipak, Porodični zakon pruža veći stepen zaštite ženama sa invaliditetom te omogućava da pokrenu postupak za određivanje mera zaštite od nasilja u porodici iako nisu u srodničkom odnosu sa svojim personalnim asistentom i ne žive niti su živele sa njima u istom porodičnom domaćinstvu, tako što je to obuhvaćeno najširom mogućom zakonskom formulacijom – lica koja su bila ili jesu u emotivnoj ili seksualnoj vezi. Emotivni odnos, teorijski posmatrano, postoji između svih ljudi, onih koji se nalaze u prijateljskim ili poslovnim odnosima, bez obzira na to da li su emocije pozitivne ili negativne.

U ovom delu ćemo se osvrnuti na mogućnosti boravka žena sa invaliditetom u drugom smeštaju od onoga u kome je boravila tokom odvijanja nasilja u porodici (porodičnog doma). To je posebno važno, jer se usled ograničenosti kretanja ili psihičkih nedostataka, postavlja pitanje gde će žena sa invaliditetom boraviti nakon napuštanja nasilnika. Krizne intervencije za žene koje su zbog rodno zasnovanog nasilja u situaciji da im je ugrožen život mogu uključivati privremeni smeštaj u sigurnu kuću ili, pak, trajno napuštanje nasilnog partnera. Ove opcije mogu biti otežane ili čak neostvarive za žene sa invaliditetom, naročito ukoliko su kriterijumi za prijem u sigurnu kuću diskriminatorni, ako su sigurne kuće nepristupačne, ako se ženi ne može obezbediti podrška personalnog asistenta kad je potrebno, kao i ako nema pristupačnog prevoza do sigurne kuće ili ako zaposleni u sigurnoj kući nisu obučeni da komuniciraju sa ženom koja ne čuje ili ima poteškoća sa govorom.

U posebno teškoj situaciji se nalaze žene sa invaliditetom koje zavise od asistencije nasilnog partnera, a nemaju porodicu ni prijatelje kod kojih bi mogle da stanuju, kao i žene koje ne mogu same da ispune sigurnosni plan, kao što je pakovanje neophodnih stvari, vožnja automobila ili organizovanje prevoza do sigurne kuće ili drugog smeštaja. Konačno, može se dogoditi i da žena sa invaliditetom, iz različitih razloga, ne može ili nema mogućnosti da povede svoju decu sa sobom, zbog čega ostaje pitanje bezbednosti dece koja ostaju sa nasilnikom, posebno ako se nasilje odvijalo pred decom ili su deca bila, takođe, žrtve nasilja od strane oca ili partnera majke. Kada je reč o boravku žena sa invaliditetom u sigurnim kućama, čak ni ekonomski i pravno najrazvijenije države nemaju zadovoljavajuće standarde. Tako, u Engleskoj manje od trećine sigurnih kuća pristupačno je za žene korisnice invalidskih kolica. Žene kojima je potrebna personalna asistencija mogu biti smeštene u 18% sigurnih kuća, dok samo 4% sigurnih kuća obezbeđuje bilo kakav vid podrške za žene sa teškoćama u učenju. Sigurne kuće su odbile prijem čak 21% žena sa invaliditetom jer nisu mogle da obezbede pristupačnu uslugu.[55] Prosečan broj dece koja borave sa majkama u sigurnim kućama u poslednje tri godine je 21 dete. Period boravka žena u sigurnim kućama kreće se od 30 dana do šest meseci, dok je prosečan period zadržavanja žena na smeštaju oko 50 dana. Nema razlike u zadržavanju u sigurnoj kući između žena sa

55 Katie Smith and Charlotte Miles, *Nowhere to turn – Findings from the first year of the No Woman Turned Away project* (2017), 39 i dalje.

invaliditetomi žena bez invaliditeta. Uslovi za boravak žena sa invaliditetom u sigurnim kućama, usled oblika invaliditeta i potrebne podrške, drugačiji su u odnosu na žene koje nemaju invaliditet. Opšti uslovi za prijem gotovo su isti u svim sigurnim kućama. Osnovni uslov je da je osoba žrtva porodičnog nasilja koja se nalazi u situaciji akutnog nasilja, kao i da postoji saglasnost za prijem u sigurnu kuću. Pored opštih uslova, postoje i izvesne razlike u kriterijumima za prijem u sigurne kuće, koji se mogu svrstati u kategoriju onih koji se mogu posebno odnositi na osobe sa invaliditetom. Tako, zdravstveni kriterijumi različito su propisani – od opšteg zdravstvenog pregleda do zahteva da buduća korisnica ne boluje od psihijatrijske bolesti. U slučaju psihijatrijske dijagnoze angažuju se zdravstvene ustanove ili druge ustanove socijalne zaštite jer su neke dijagnoze prepreka za smeštaj (psihoza, manija gonjenja, šizofrenija). Ako žena ima psihosocijalni invaliditet, prvo se organizuje zdravstveno zbrinjavanje, a tek nakon toga se obezbeđuje smeštaj u sigurnu kuću, što pokazuje da su žene sa psihosocijalnim invaliditetom suočene sa mnogim preprekama kada se dogodi nasilje.[56] Praktično, potrebno je da se kod žena sa invaliditetom ispune „prethodni" medicinski uslovi za prijem u sigurnu kuću. U vezi sa adekvatnim obezbeđivanjem prijema za žene sa invaliditetom, potrebno je uklanjanje arhitektonskih barijera u svim prostorijama, nabavka senzornih i audio pomagala, adaptacija postojećih kupatila i nabavka pomagala za žene sa fizičkim invaliditetom (invalidska kolica, štap, hodalica). Pored materijalnih sredstava neophodno jeda postojii dodatno osoblje, kao što su: medicinske sestre, tehničari, personalni asistenti, tumači za znakovni jezik. Iz navedenih činjenica zaključujemo da ženama sa invaliditetom u slučaju nasilja koje se odvijalo u porodičnom okuženju usluga sigurne kuće nije u potpunosti dostupna niti pristupačna, kao što je to slučaj sa ženama koje nemaju invaliditet. Zanimljivo je napomenuti da pored personalnog asistenta, kao oblika podrške ženama sa invaliditetom, postoji i personalni ombudsman koji predstavlja profesionalno, visoko kvalifikovano lice koje radi isključivo po nalogu žene sa invaliditetom i nije u vezi sa psihijatrom, socijalnom službom, rođacima ili članovima njene porodice.[57]

Kad je reč o vršenju roditeljskog prava, mnogim ženamasa invaliditetom, naročito onim sa mentalnim invaliditetom, nadležne službe oduzimaju decu odmah po rođenju, pre nego što im pruže priliku da pokažu svoje roditeljske kompetencije.[58] Pored lišenja roditeljskog prava odmah po rođenju deteta, žene sa invaliditetom u Srbiji suočavaju se i sa velikim rizikom da im u postupku razvoda braka deca neće biti poverena na samostalno vršenje roditeljskog prava, opet iz razloga što imaju invaliditet.

56 Kosana Beker, Tijana Milošević, Andrijana Čović, *Sigurne kuće – Kapaciteti za pružanje pristupačne i dostupne usluge ženama sa invaliditetom* (2020), 63 i dalje. Istraživanje je rađeno u sigurnim kućama u Kragujevcu, Leskovcu, Priboju, Smederevu, Zrenjaninu i Sremskoj Mitrovici.

57 Olga Cvejić Jančić i Melanija Jančić, „Jednako priznanje pred zakonom lica sa mentalnim i intelektualnim oštećenjima", u Jelena S. Perović Vujačić (ur.), *Unifikacija prava i pravna sigurnost. Zbornik radova Kopaoničke škole prirodnog prava – Slobodan Perović* (2020), 86.

58 O diskriminaciji žena u Engleskoj tokom XX veka kod vršenja roditeljskog prava: Stephen Cretney, ‚What Will the Women Want Next?' The Struggle for Power within the Family, 1925-1975", u Stephen Cretney (ur.), *Law, Law Reform and the Family* (1998), 180.

VI NASILJE U RADNOM OKRUŽENJU

U pravu Republike Srbije opšta zdravstvena sposobnost više ne predstavlja opšti uslov za zasnivanje radnog odnosa, te se, u skladu sa tim, prilikom ocene sposobnosti za rad utvrđuju činjenice koje su odlučujuće za postojanje invalidnosti u vreme njenog nastanka.[59] Invalidnost se definiše kao gubitak radne sposobnosti usled promena u zdravstvenom stanju uzrokovanih povredom na radu, profesionalnom bolešću, povredom van rada ili usled bolesti koju nije moguće otkloniti lečenjem ili rehabilitacijom. U pitanju je nesposobnost za obavljanje bilo kog posla. U tom kontekstu nema posebnih opštih ograničenja za zapošljavanje osoba sa invaliditetom, pa samim tim, ni žena sa invaliditetom. Međutim, postoji značajna nesrazmera kod zapošljavanja žena i muškaraca sa invaliditetom.

Žene sa invaliditetom se zapošljavaju na slabije plaćenim poslovima i sa lošijim uslovima rada u odnosu na muškarce sa invaliditetom. Stopa zaposlenosti žena sa invaliditetom je tri puta manja u odnosu na muškarce sa invaliditetom.[60] Takođe, manje pažnje se posvećuje profesionalnoj rehabilitaciji žena nego muškaraca sa invaliditetom.[61] Nasilje nad ženama sa invaliditetom u radnom okruženju može imati i obeležja seksualnog nasilja.[62]

Kada se zaposli osoba sa invaliditetom ona, prema standardima usvojenim u SAD, treba da bude tretirana na isti način kao i zaposleni bez invaliditeta.[63] Ističe se da je nezaposlenost žena jedan od faktora koji utiču na to da je veća verovatnoća da žena bude žrtva nasilja u porodici.[64]

Razmotrićemo u okviru delatnosti zaposlenih u sistemu socijalne zaštite koje su to radnje koje su zabranjene tokom obavljanja poslova podrške osobama sa invaliditetom. Najpre, zaposlenima u ustanovama socijalne zaštite je zabranjena eksploatacija korisnika koja predstvalja niz aktivnih radnji, kao i zanemarivanje, koje podrazumeva nepreduzimanje – pasivnost u ponašanju kojim se nanosi šteta korisnicima. Nasilje zaposlenih koji se brinu o osobama sa invaliditetom, u okviru obavljanja svojih profesionalnih dužnosti, može imati različite oblike. Prema Pravilniku o zabranjenim postupanjima zaposlenih u socijalnoj zaštiti, eksploatacijom korisnika smatra se naročito: 1) korišćenje korisnika za obavljanje poslova koji donose materijalnu il inematerijalnu dobit, a koji nisu u interesu korisnika, već u interesu zaposlenog, pružaoca usluge ili trećeg lica, korišćenjem prisile, prevare, nasilnih metoda ubeđivanja, zavisnog

59 Ljubinka Kovačević, *Zasnivanje radnog odnosa* (2021), 239.

60 UN Women report, *Sexual Harassment against Women with Disabilities in the World of Work and on Campus* (2020), 9.

61 Maria Leonor Beleza, *Discrimination against women with disabilities* (2003), 36.

62 Devyani Tewari, „Tales of a disabled woman working at ableist, sexist workplaces", *Jindal Global Law Review*, br. 12/2021, 426.

63 Mario Reljanović, „Diskriminacija na radu – zakonodavstvo i iskustva u SAD", *Strani pravni život*, br. 1/2009, 121.

64 Helen Reece, „Michael Freeman and Domestic Violence", u Alison Diduck, Noam Peleg, Helen Reece (eds), *Law in Society: Reflections on Children, Family, Culture and Philosophy* (2015), 319.

položaja korisnika, njegovog zdravstvenog, imovnog ili drugog stanja, zloupotrebom poverenja i moći; 2) uključivanje korisnika u rad koji je fizički, mentalno, psihički, socijalno, moralno opasan ili štetan; 3) uključivanje korisnika ili njegovo podsticanje od strane zaposlenog na devijantne i društveno neprihvatljive oblike ponašanja; 4) korišćenje finansijskih i drugih sredstava korisnika za potrebe drugih; 5) upotreba korisnika u medicinske ili naučne svrhe; 6) korišćenje korisnika za prostituciju, podsticanje ili dozvoljavanje da se bavi prostitucijom; 7) navođenje i korišćenje korisnika da učestvuje u pornografskim sadržajima; 8) zloupotreba korisnika u političke svrhe.

Zanemarivanje korisnika je nemar ili propust zaposlenog, s obzirom na standarde usluge, pravila struke, etičke standarde, odnosno pravila svog posla, da obezbedi adekvatno zadovoljavanje potreba, zaštitu korisnika i razvoj deteta u oblastima zdravlja, ishrane, smeštaja i bezbednih životnih uslova i emocionalnog razvoja i obrazovanja deteta. Zanemarivanje obuhvata i propust u obavljanju pravilnog nadzora i zaštite korisnika od povređivanja i samopovređivanja.

VII NASILJE U INSITUCIJAMA SOCIJALNE ZAŠTITE

Žene sa invaliditetom, naročito kategorija žena koje žive u ustanovama socijalne i zdravstvene zaštite, neretko su izložene višestrukoj diskriminaciji i suočavaju se sabrojnim preprekama u ostvarivanju svojih prava, kao i sa raznim vidovima rodno zasnovanog nasilja. Ako su, rodno posmatrano, žene pretežno u opasnosti od nasilja u odnosu na muškarce, a žene sa invaliditetom u još težem položaju u odnosu na žene bez invaliditeta, ondasu žene sa invaliditetom koje se nalaze u ustanovama socijalne zaštite, treća kategorija žena koja se nalazi u najtežem položaju u pogledu vršenja nasilja. Posebno su ugrožena njihova reproduktivna i seksualna prava, kao i pravo na informisan pristanak na određene medicinske mere. U socijalnim institucijama postoje posebni oblici nasilja od strane drugih korisnika usluga kao i od zaposlenih u ustanovama.

Smeštaj u instituciju socijalne zaštite predstavlja samo jednu od usluga socijalne zaštite koje su propisane Zakonom o socijalnoj zaštiti. Sama činjenica da je osoba sa invaliditetom smeštena negde protiv svoje volje predstavlja akt nasilja. Ipak, u određenim slučajevima, i protivno volji osobe, ako je oblik invaliditeta takav da nije moguće zbrinjavanje u porodičnom okruženju, smeštaj u ustanovu se pokazuje kao jedino moguće rešenje i rešenje koje je u najboljem interesu osobe sa invaliditetom.

Postoje dva osnovna tipa specijalizovanih ustanova u koje se smeštaju osobe sa invaliditetom u Republici Srbiji: ustanove socijalne zaštite i psihijatrijske ustanove. Glavna razlika između ova dva tipa smeštaja je što su psihijatrijske ustanove, uglavnom, medicinskog tipa, finansiraju se iz budžeta za zdravstvenu zaštitu, a osnova za prijem osobe u ustanovu je medicinska dijagnoza, dok je svrha boravka terapeutska. Za razliku od psihijatrijskih ustanova, ustanove socijalne zaštite ili domovi za smeštaj osoba sa psihičkim smetnjama su nemedicinske ustanove izamišljene su tako da odgovaraju na

potrebe pojedinaca za socijalnom zaštitom kao što je podrška u svakodnevnom životu. Po prirodi stvari, usled intelektualnog invaliditeta, posebno se javljaju kao sporni slučajevi fizičkog nasilja nad ženama, ali je moguće, i pored umanjenog kapaciteta ovih osoba, emocionalno i seksualno zlostavljanje. Jedno istraživanje navodi da žena sa invaliditetom ima duplo veće šanse da bude žrtva seksualnog nasilja nego žena bez invaliditeta,[65] dok drugo ide čak toliko daleko da se žene sa invaliditetom suočavaju sa deset puta više nasilja nego žene bez invaliditeta.[66]

Pravilnikom o bližim uslovima za primenu fizičkog sputavanja i izolacije lica sa mentalnim smetnjama koja se nalaze na lečenju u psihijatrijskim ustanovama bliže se uređuju uslovi za primenu fizičkog sputavanja i izolacije lica sa mentalnim smetnjama koja se nalaze na lečenju u psihijatrijskim ustanovama. Prema ovom pravilniku, fizičko sputavanje i izolacija označavaju svaku manuelnu metodu ili svako fizičko ili mehaničko sredstvo, materijal ili opremu prikačenu na lice sa mentalnim smetnjama u psihijatrijskoj ustanovi ili stavljenu u njegovu blizinu koje ono ne može lako da ukloni, a koje mu ograničava slobodu pokreta ili normalni pristup svome telu i koje nije standardna terapija za njegovo psihičko ili fizičko stanje. Fizičko sputavanje predstavlja svako fizičko ograničenje koje onemogućava osobu da reaguje fizički, odnosno, koje sputava njene pokrete i reakcije. Osoba može biti sputana na taj način što je druge osobe drže za ruke, ramena ili noge, a može biti sputana i upotrebom različitih sredstava, kao što su lisice, kaiševi i kanapi kojim se korisnici vezuju za krevet. Oblačenje korisnika u zaštitne košulje i držanje u kavezima i krevetima sa rešetkama takođe se smatra oblikom fizičkog nasilja.

Mere fizičkog sputavanja osoba sa mentalnim smetnjama su manuelno, fizičko i mehaničko ograničenje. Merom fizičkog sputavanja ne smatra se korišćenje bočnih stranica ili ograda na krevetu radi sprečavanja osoba sa mentalnimsmetnjama da padne ili sklizne sa svog kreveta. Mere fizičkog sputavanja osoba sa mentalnim smetnjama, imajući u vidu rizik od mogućih povreda, primenjuju se pod uslovom da se: 1) osoba sa mentalnim smetnjama ne dovodi u položaj licem okrenutim nadole vezivanjem nogu i ruku; 2) ne primenjuju mere fizičkog ili mehaničkog sputavanjakoje ometaju rad njegovih organa za disanje ili varenje; 3) ne primenjuju mere fizičkog ili mehaničkog sputavanja koje imaju za cilj disciplinovanje nanošenjem bola, istezanjaili zavrtanja zglobova, pritiska na grudi, zglobove ili ekstremitete; 4) ne nanosi bol, odnosnoda se ne preti bolom; 5) ne uspostavlja kontakt sa osetljivim delovima tela lica sa mentalnim smetnjama (vrat, grudni koš, preponsko područje); 6) ne koristi tehnika spuštanja na pod pri kojoj osoba sa mentalnim smetnjama nema oslonac i podršku tako da je omogućen njegov slobodan pad dok se spušta na pod; 7) ne koristi položaj koji bi mogao dovesti do naprsnuća ili preloma kostiju osobe sa mentalnim smetnjama.

Značajno je istaći da se, za razliku od nekih zakona koji uređuju nasilje prema ženama, daju prilično iscrpne definicije fizičkog, emotivnog i seksu-

65 Beleza, *op. cit.*, 47.

66 UN Women report, *Sexual Harassment against Women with Disabilities in the World of Work and on Campus* (2020), 11.

alnog nasilja nad ženama sa invaliditetom. Tako, prema Pravilniku o zabranjenim postupanjima zaposlenih u socijalnoj zaštiti,[67] zaposlenima je zabranjeno fizičko zlostavljanje korisnika, pod kojim se smatra svako postupanje kojim se ugrožava ili dovodi u rizik korisnikovo fizičko zdravlje, opstanak, fizički integritet ili bezbednost.[68]

Emocionalno zlostavljanje je postupanje zaposlenog koje korisniku nanosi emocionalnu patnju, pod čime se podrazumeva: 1) izolacija, odnosno ograničavanje kretanja korisnika, zabrana kontakata sa drugim korisnicima, osobljem, članovima porodice i drugim značajnim osobama; 2) omalovažavanje i ismevanje korisnika; 3) pretnje, zastrašivanja ili drugi oblici nefizičkog, neprijateljskog postupanja prema korisniku; 4) diskriminacija u postupanju prema korisnicima i drugima zaposlenima po osnovu državljanstva, etničke pripadnosti, kulturnih i jezičkih razlika, verskih, rodnih, socio-ekonomskih razlika, te različitosti sobzirom na invaliditet i seksualnu orijentaciju ili neku drugu ličnu osobenost; 5) verbalnozlostavljanje, što uključuje neprimereno vikanje na korisnika, nazivanje korisnika pogrdnim imenima, kao i druga ponašanja koja mogu da umanje samopoštovanje i dostojanstvo korisnika; 6) izlaganje zbunjujućim ili traumatskim događajima i interakcijama (nasilju); 7) korumpiranje; 8) primoravanje korisnika da se oblači u odeću koja ne odgovara njegovom uzrastu i polu; 9) nagrađivanje ako napada druge korisnike. Na kraju, pod seksualno zlostavljanje i zloupotrebu podvodi se: 1) uključivanje korisnika u bilo kakvu, kontaktnu ili nekontaktnu, seksualnu aktivnost sa zaposlenim; 2) navođenje korisnika na bilo kakvu, kontaktnu ili nekontaktnu, seksualnu aktivnost; 3) prisiljavanje korisnika na bilo kakve, kontaktne ili nekontaktne, seksualne aktivnostisa drugim licima. Seksualno nasilje kod žena sa invaliditetom je posebno opasan i suptilan vid nasilja, jer neretko kod mentalnog invaliditeta, žene žrtve nisu u potpunosti svesne izvođenja radnji i može se desiti da „pristaju" na seksualni odnos ili seksualne radnje, ali je nji-

67 Pravilnik o zabranjenim postupanjima zaposlenih u socijalnoj zaštiti, „Službeni glasnik Republike Srbije", br. 8/2012.

68 Daju se opisi fizičkog nasilja: 1) udaranje korisnika o zid ili druge predmete, bacanje korisnika o čvrste predmete i udaranje čvrstim predmetima, vučenje za kosu; 2) udaranje korisnika pesnicom ili šakom, kaišem, prutom ili drugim predmetima; 3) prisilno uvijanje ili snažno povlačenje delova korisnikovog tela, štipanje; 4) sprečavanje i onemogućavanje kretanja vezivanjem ili na drugi način, osim po posebno propisanom postupku na najkraći vremenski period i pod nadzorom ovlašćenog lica; 5) prinuđivanje korisnika da duže stoji na jednom mestu; 6) sprečavanje korisnika da diše tokom kratkih vremenskih perioda; 7) uskraćivanje korisniku hrane ili vode; 8) sprečavanje korisnika da spava; 9) sprečavanje korisnika da ide u toalet; 10) prinuđivanje korisnika da ostane napolju po hladnom, izrazito vrućem vremenu ili pri atmosferskim padavinama; 11) zatvaranje, odnosno izolacija korisnika u posebnu prostoriju; 12) protresanje korisnika; 13) prinuđivanje na neprimerenu fizičku aktivnost; 14) nesmotreno korišćenje opasnog sredstva i oruđa u blizini korisnika; 15) vožnja u pijanom stanju sa korisnikom; 16) kupanje ili pranje korisnika hladnom ili izuzetno vrućom vodom; 17) gušenje, odnosno onemogućavanje disanja i uzrokovanje zagrcnjavanja korisnika (nasilno hranjenje); 18) izlaganje korisnika udaru struje; 19) unošenje u korisnikovo telo, izuzimajući kada je medicinski određeno, bilo koje supstancije koja privremeno ili stalno može ugroziti funkcije jednog ili više organa ili tkiva (neodgovarajuća upotreba lekova i velikih količina alkohola).

hov pristanak samo prividan i ne odražava izraz stvarne volje. Nepostojanje svesti o ovim radnjama, povlači da je potrebno da se omogući, u meri koliko je to moguće, da žena sa mentalnim invaliditetom shvati značaj budućih seksualnih radnji, a ne da seksualno opštenje bude izraz zloupotrebe poverenja ili izigravanja žene sa mentalnim invaliditetom, imajući u vidu njenu umanjenu kognitivno-intelektualnu spoznaju seksualnih odnosa. Sa druge strane, ne treba ići u drugu krajnost i zabranjivati seksualne odnose žena sa mentalnim invaliditetom, posebno u socijalnim ustanovama, te time uskraćivati pravo na roditeljstvo ovih žena.

Imajući u vidu da su žene sa mentalnim smetanjama u posebno zavisnom položaju od prijema terapije, posebna vrsta nasilja odnosi se na upotrebu lekova u socijalnim ili medicinskim ustanovama. Zloupotreba lekova se najčešće manifestuje kroz hemijsko ili farmakološko sputavanje korisnika na smeštaju u rezidencijalnim institucijama. Iako je uzimanje lekova ponekad potrebno kao vid terapijske procedure za pojedine korisnike, ima situacija u kojima se lekovi koriste da bi se korisnik disciplinovao ili držao u mirnom stanju u cilju smirivanja i stišavanja korisnika koji ima napade. Izolacija predstavlja proces kojim se osoba odvaja od spoljašnjih stimulacija i mogućnosti da ostvari bilo kakav vid socijalne interakcije sa drugim ljudima, osim sa zaposlenima u instituciji. Osnovne karakteristike mere izolacije su zavisnost korisnika od zaposlenih u instituciji, kao i potpuna kontrola i nadgledanje aktivnosti osobe koja je podvrgnuta ovojprinudnoj meri. Ženama sa invaliditetom koje su smeštene u rezidencijalnim institucijama može biti uskraćeno ili ograničeno pravo na slobodu kretanja, iako se protiv njih ne vodi krivični postupak, ne ugrožavaju javni red i mir, ne šire zarazne bolesti, niti su pretnja za bezbednost Republike Srbije, dok oni često borave u zaključanim sobama i odeljenjima, bez mogućnosti da samoinicijativno izađu iz kruga ustanove ili čak iz svoje sobe.

Poseban oblik nasilja nad ženama sa invaliditetom u ustanovama jeste horizontalno nasilje, koje se definiše kao psihičko, fizičko ili seksualno nasilje koje jedan ili više korisnika sprovodi kako bi kaznili, povredili ili kontrolisali druge korisnike na smeštaju. S obzirom na to da se ovaj oblik nasilja događa u institucijama, često ima odlike nasilničkog delovanja u grupi i pokazuje mnogo sličnosti sa manifestacijama vršnjačkog nasilja i nasilja u porodici.[69]

69 Na kraju ovog dela koji se odnosi na različite oblike nasilja nad ženama sa invaliditetom, navodimo statističke podatke iz uporednog istraživanja koje je sprovedeno u različitim godinama na međunarodnom nivou. Australija (2016. godina): 67% žena sa invaliditetom prijavilo je seksualno ili druge oblike uznemiravanja tokom hospitalizacije, a skoro polovina (45%) je prijavila da je doživela seksualni napad tokom boravka u bolnici; Kanada (2018. godina): 39% žena sa invaliditetom iskusilo je nasilje od strane supružnika, 38% je prijavilo fizički ili seksualni napad pre 15. godine, a 18% je prijavilo seksualno zlostavljanje od strane odrasle osobe pre 15. godine; Evropska unija (2015. godina): 34% žena sa invaliditetom doživelo je fizičko ili seksualno partnersko nasilje, u poređenju sa 19% žena bez invaliditeta; Holandija (2018. godina): 61% žena sa invaliditetom prijavilo je seksualno nasilje, u poređenju sa 33% žena bez invaliditeta; Španija (2015. godina): 23,3% žena sa zakonski priznatim invaliditetom doživelo je nasilje, u poređenju sa 15,1% žena bez invaliditeta; Kolumbija (2019. godina): 72% žena sa invaliditetom iskusilo je barem jednu vrstu nasilja od strane svojih muževa ili vanbračnih partnera, a najčešće

U maju 2021. godine u Republici Srbiji je formirana „Platforma Ravnopravne u zajednici", koja je posvećena ostvarivanju prava i poboljšanju položaja žena sa invaliditetom sa iskustvom nasilja u rezidencijalnim ustanovama, sadržanim u Konvenciji UN o pravima osoba sa invaliditetom, Konvenciji o eliminaciji diskriminacije žena (CEDAW) i ostalim relevantnim međunarodnim i regionalnim propisima i dokumentima. Cilj je sprovođenje aktivnosti koje su usmerene na ostvarivanje prava i poboljšanje položaja žena sa invaliditetom sa iskustvom nasilja u rezidencijalnim ustanovama, odnosno sprečavanje nasilja prema ženama sa invaliditetom u institucijama, a koja bi obuhvatila pitanja prisilnih intervencija, deinstitucionalizacije i ukidanja mogućnosti lišenja poslovne sposobnosti, kao i direktno uključivanje žena sa invaliditetom sa iskustvom nasilja u institucijama o svim pitanjima koja se tiču kvaliteta njihovog života i zdravlja.[70]

VIII PROCESNI POLOŽAJ ŽENA KOJE SU ŽRTVE NASILJA

U pogledu građanskopravne zaštite od nasilja nad ženama sa invaliditetom, možemo konstatovati da je položaj žena sa invaliditetom kojesu lišene poslovne sposobnosti, a koje žele da pokrenu parnicu, veoma težak. Samo osoba koja je potpuno poslovno sposobna i ima parničnu sposobnost može sama da preduzima radnje u postupku, dok punoletnaosoba kojoj je ograničena poslovna sposobnost, odnosno, koja je delimično lišena poslovne sposobnosti, parnično je sposobna u granicamasvoje poslovne sposobnosti.[71]Osobu koja je potpuno lišena poslovne sposobnosti, odnosno, nema parničnu sposobnost, zastupa njen zakonski zastupnik. Ako je za podnošenje ili povlačenje tužbe,priznanje, odnosno za odricanje od tužbenog zahteva, zaključenje poravnanja, izjavljivanje, povlačenje ili odricanje od pravnog leka, posebnim propisima predviđeno da zastupnik mora da ima posebno ovlašćenje, zastupnik može te radnje da preduzima samo ako ima ovlašćenje. Problem

je to bilo psihološko (69%), fizičko (42%), ekonomsko (39%) i seksualno (11%) nasilje; Kenija (2013. godina): 51% žena sa invaliditetom prijavilo je seksualno zlostavljanje, 51% izvršilaca su bili članovi porodice – staratelji i drugi bliski srodnici; Nepal (2015. godina): studija sprovedena među 475 žena sa invaliditetom starosti 16 i više godina pokazala je da 57,7% žena doživelo nasilje, uključujući emocionalno nasilje (55,2%), fizičko nasilje (34%) i seksualno nasilje (21,5%), dok je 42% doživelo nasilje tokom 12 meseci koji su prethodili istraživanju; Tajvan (2017. godina): žene sa invaliditetom su prijavile seksualni napad u čak 2,7 puta više slučajeva od žena bez invaliditeta. Za navedene podatke videti: UN Women report, *op. cit.,* 12. Iako je istraživanje sprovedeno od strane prestižne međunarodne organizacije, ne možemo da ne primetimo da se procenti navedeni za nasilje u Nepalu ne uklapaju u matematičke zakone.

70 Kosana Beker i Biljana Janjić, *Smernice za pružanje usluga: Pristupačne i dostupne usluge za žene sa invaliditetom sa istorijom institucionalizacije* (2021), 54.

71 Za lišenje poslovne sposobnosti i standarde Evropskog suda za ljudska prava: Uroš Novaković, „Lišenje poslovne sposobnosti u praksi Evropskog suda za ljudska prava" u Stevan Lilić (ur.), *Perspektive implementacije evropskih standarda u pravni sistem Srbije* (2012), 285–301.

kod potpunog lišenja poslovne sposobnosti žena sa invaliditetom sastoji se u tome kada je isto lice, najčešće kao član porodice, zakonski zastupnik žene a ujedno i vrši nasilje nad njom. Tada je usled procesne nesposobnosti žene lišene poslovne sposobnosti nemoguće da ona podnese tužbu za zaštitu od nasilja u porodici, a njen staratelj to neće učiniti s obzirom na to da on vrši nasilje. Međutim, ako zastupnik nema potrebno ovlašćenje zapreduzimanje nekih parničnih radnji, za osobu lišenu poslovne sposobnosti to ne menja situaciju kad je reč o njenim mogućnostima da samostalno preduzima radnje u postupku, već će to opet učiniti neko umesto nje, odnosno, sud će zatražiti da nadležni organ starateljstva postavi staratelja parnično nesposobnom licu. Dakle, osoba koja je smeštena u instituciju potpuno je lišena poslovne sposobnosti, ne može samostalno da preduzme nijednu radnju u parničnom postupku i tako pokrene određeni mehanizam građanskopravnezaštite, već u potpunosti zavisi od svog staratelja.

IX ZAKLJUČAK

Kad je reč o nasilju nad ženama, žene sa invaliditetom nalaze se u još težem položaju od žena bez invaliditeta, pre svega, usled zavisnosti od članova porodice ili osoba od kojih dobijaju neposrednu svakodnevnu pomoć. Ako je u pitanju telesni invaliditet, ili ozbiljniji oblici mentalnog invaliditeta, nemogućnost samostalnog kretanja, kao i nemogućnost potpunog rasuđivanja, povlače da je samostalan život žene sa invaliditetom gotovo nemoguć, te je zavisnost od članova porodice koji vrše nasilje prepreka prekidanju ciklusa nasilja. Za razliku od uobičajenih radnji nasilja, radnje nasilja nad ženama sa invaliditetom obuhvataju i suptilne oblike nasilja koji se mogu javiti prilikom vršenja obaveznih radnji pomaganja ženama sa invaliditetom, kao što su: kupanje, šetanje, ishrana, davanje lekova. Krug osoba koje se smatraju članovima porodice, prema Porodičnom zakonu, omogućava znatno bolji procesnopravni položaj ženama sa invaliditetom jer personalni asistenti, širim tumačenjem pojma porodice, mogu biti obuhvaćeni tužbom za određivanje mera zaštite. Posmatrajući norme krivičnog i građanskog prava, delotvornija zaštita omogućena je Porodičnim zakonom. Podzakonski akti u Republici Srbiji daju prilično iscrpnu listu mogućih radnji nasilja prema ženama sa invaliditetom. Radnje nasilja u porodici obuhvataju širok spektar radnji. Invaliditet povlači znatno širi krug mogućih radnji nasilja u odnosu na žene bez invaliditeta.

Iseljenje nasilnika iz stana ili zabrana prilaska na određenu udaljenost, odnosno, zabrana daljeg uznemiravanja, pokazuju se kao neophodne mere, ali u slučaju žena sa invaliditetom javlja se dodatni problem ako je osoba koja vrši nasilje ista osoba koja i pruža negu i pomoć ženi sa invaliditetom. Tada je potrebno, osim udaljavanja osobe koja je vršila nasilje, pronaći osobu koja će pružati pomoć ženi sa invaliditetom. U tome se sastoji osnovna razlika u odnosu na to kada se nasilje vrši prema ženama bez invaliditeta. Potrebna je, pored pravne, i socijalna podrška za žene sa invaliditetom, jer samostalan život nije moguć. Stepen zavisnosti od člana porodice koji je ujedno i nasil-

nik, značajno je veći kod žena sa invaliditetom, što je činjenica koja zahteva dodatni plan podrške nakon završetka postupka od nasilja u porodici. Samo odvajanje nasilnika od žene sa invaliditetom i prekidanje ciklusa nasilja nije dovoljno da se obezbedi potrebna zaštita i podrška.

Kada su u pitanju ozbiljni slučajevi fizičkog nasilja, te se zahteva izmeštanje žene sa invaliditetom iz porodičnog doma, redovan put smeštaja žene u sigurnu kuću javlja se kao moguće rešenje. Međutim, kod žena sa invaliditetom, nastaje problem jer smeštaj u sigurnu kuću ili je otežan, ako postoje samo neki od fizičkih uslova potrebnih za svakodnevno funkcionisanje žena sa invaliditetom (prilagođena kupatila i životni prostor), ili je u potpunosti onemogućen, kao što je nedostatak tumača u slučaju gluvonemih osoba. Još jedan vid jeste i ekonomsko nasilje, tj. upravljanje sredstvima žena sa invaliditetom i kontrolisanje trošenja sredstava.

Dodatni mehanizmi socijalne podrške nameću se kao imperativ radi uspešne zaštite žena sa invaliditetom od nasilja, pored zaštite pružene kroz pravnu proceduru.

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DOMESTIC VIOLENCE AND WOMEN WITH DISABILITIES

Abstract

The paper analyzes violence against women with disabilities through criminal law, family law and labor law aspects, as well as the international and national framework of protection against violence of women with disabilities. There are two models of disability that directly affect the state policy regarding disabled people, as well as the ways in which society views this category of citizens – the medical and social model. The Convention on the Rights of Persons with Disabilities changes the approach to persons with disabilities – from observing persons with disabilities as "objects of protection", it moves to viewing persons with disabilities as subjects of rights. Women with mental disabilities can be more easily manipulated and abused by abusers, without consequences, especially due to lack of cognitive abilities or difficulties in movement or communication. In cases of violence against women who do not have a disability, they are able to resist the abuser, escape from the family home and ask for help from the competent authorities. A woman with disabilities, especially with physical disability, in principle cannot physically leave the family home – she cannot "escape" from the abuser. For women with disabilities in the case of domestic violence, services of safe houses are not fully available or accessible, as it is in the case of women without disabilities.

Observing the norms of criminal and civil law, more effective protection is provided by the Family Law. Other documents in the Republic of Serbia provide a fairly comprehensive list of possible acts of violence against women with disabilities. Acts of domestic violence encompass a wide range of acts. Disability involves a significantly wider range of possible acts of violence compared to women without disabilities. Women with disabilities have additional problem which arises because placement in a safe house is either difficult, if there are only some of the physical conditions necessary for the daily functioning of women with disabilities (adapted bathrooms and living space), or it is completely impossible, such as the lack of interpreters in the case of deaf and mute women.

Key words: *Domestic violence; Discrimination; Women; Persons with disabilities; Family; Social institutions; Family Act.*

KOMPANIJSKO PRAVO

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PRAVNI POLOŽAJ PREDUZEĆA ZA ZAPOŠLjAVANjE OSOBA S INVALIDITETOM U SRBIJI*

Apstrakt

Pisac u ovom radu razmatra položaj preduzeća koja zapošljavaju osobe s invaliditetom u pravu Srbije. U radu se posebno istražuju preduzeća koja imaju svrhu profesionalnu rehabilitaciju i zapošljavanje osoba s invaliditetom (skr. preduzeća za zapošljavanje invalida), kao posebne vrste preduzeća u Srbiji uz ostale privredne subjekte. Autor postavlja pitanje da li je ova vrsta preduzeća u skladu sa ustavnim načelom ravnopravnosti učesnika na tržištu, naročito imajući u vidu pravila o zaštiti tržišne utakmice. Kako preduzeća za zapošljavanje osoba s invaliditetom uživaju ekonomske povlastice po važećim propisima Srbije, naročito u obliku državne pomoći, pitanje je da li njihov povlašćeni položaj znači diskriminaciju ostalih učesnika na relevantnom tržištu u smislu propisa o zašiti konkurencije. U tom cilju pisac objašnjava pojam osoba s invaliditetom, terminološke nedoumice, sisteme zapošljavanja osoba s invaliditetom, pojam preduzeća za zapošljavanje invalida, pravni režim njihovog nastanka, oblika i delatnosti, razloge njihovog posebnog zakonodavnog uređenja i povlastice koje uživaju ova preduzeća. On upoređuje njihov pravni položaj sa položajem ostalih poslodavaca koji imaju obavezu zapošljavanja osoba s invaliditetom, ali nemaju iste povlastice. U radu se razmatra srpsko i uporedno pravo uz kratak osvrt na propise Evropske unije u ovom pitanju. Zaključak mu je da su preduzeća za zapošljavanje invalida u skladu sa ustavom, iako uživaju povlastice koje nemaju ostala preduzeća. Njihova ustavnost se izvodi iz ustavnog pravila o pojačanoj zaštiti invalida.

Ključne reči: *Osoba s invaliditetom; Preduzeće; Zapošljavanje.*

I UVOD

Pored zdravih i radno sposobnih lica u društvu postoje i lica koja su nesposobna za rad ili su manje radno sposobna. Oni se jednim imenom zovu invalidi, odnosno osobe s invaliditetom. U poslednje vreme se u svetu, pa i

* Rad se objavljuje kao prilog projektu „Savremeni problemi pravnog sistema Srbije“ Pravnog fakulteta Univerziteta u Beogradu za 2022. godinu.

u Srbiji, čine napori da im se olakša život, kako bi se što više osamostalile, bile manje zavisne od pomoći drugih ljudi i uključile u društvene tokove kao korisni članovi društvene zajednice. Time se ujedno nastoji da se osobe s invaliditetom oslobode usamljenosti u kojoj se često nalaze, te da vode srećan život. Zapošljavanje je jedan od načina na koji se nastoji da im se pomogne da vode samostalan život, pored mnoštva drugih načina (mera) kao što su, recimo, arhitektonsko-građevinske mere uređivanja prostora i otklanjanja smetnji radi omogućavanja samostalnog kretanja i pristupa građevinskim objektima, tehnička pomagala i drugo.[1] U tom cilju se zakonima uređuju razni sistemi njihovog radnog osposobljavanja (rehabilitacije) i zapošljavanja.

Jedan od sistema je i zapošljavanje u preduzeću za profesionalnu rehabilitaciju i zapošljavanje osoba sa invaliditetom. Osobenost ove vrste preduzeća u odnosu na ostale privredne subjekte jeste u tome što je ono specijalizovano za delatnost profesionalne rehabilitacije i zapošljavanja osoba s invaliditetom, uz obavezu da ima u stalnom radnom odnosu propisani veći broj invalidnih lica, kao i da ima stručnjake i opremu za poslove koje obavlja u svojoj delatnosti. Takvom preduzeću se zakonima priznaje niz povlastica u obavljanju delatnosti, koje ne uživaju ostali privredni subjekti (npr. subvencije za zarade, poreske olakšice i drugo). Time mu se omogućava jeftinije poslovanje, čime se dovodi u povoljniji položaj na tržištu u odnosu na ostale privredne subjekte, kojim se u Srbiji takođe nameće obaveza zapošljavanja osoba s invaliditetom. Kako je ustavno načelo u Srbiji da „svi imaju jednak položaj na tržištu", da su „pred ustavom i zakonom svi jednaki", te da je zabranjena svaka diskriminacija po bilo kom osnovu, uključujući i invalidnost, javlja se pitanje da li su preduzeća za zapošljavanje invalida protivna Ustavu zbog svoje povlašćenosti na tržištu u odnosu na ostale njegove učesnike.[2] Drukčije rečeno, da li su ostali privredni subjekti diskriminisani u odnosu na ovu vrstu preduzeća, kao povlašćenog privrednog subjekta, odnosno da li su propisi kojim se uređuju povlastice i olakšice u njihovom poslovanju protivni Ustavu?

II OPRAVDANJE POVLAŠĆENOG ZAPOŠLJAVANJA OSOBA S INVALIDITETOM

Iako su pravno pojačano zaštićene i pomognute, osobe s invaliditetom su u stvarnom životu u podređenom položaju u odnosu na ljude bez ivaliditeta, i to u većini oblasti društvenog života, uključujući i zapošljavanje. To dokazuju statistički podaci. Ima tvrdnji da je u Srbiji u 2007. godini bilo između 700.000 i 800.000 osoba s nekom vrstom poteškoće (invaliditeta), pri čemu je njih 300.000 bilo u životnom dobu između 15 i 65 godina starosti, kao radno aktivnom dobu zdravih (neinvalidnih) lica. Od toga je bilo zaposleno samo njih 13%, dok ih je u 2015. godini bilo prijavljeno na u evidenciji Nacional-

1 Stewen S. Weiss, "Equal Employment and the Disabled: A Proposal", *Columbia Journal of Law and Social Problems*, No. 4, 1974, 488-495.

2 Ustav Republike Srbije, *Sl. glasnik RS,* br. 98/2006 i 115/2021, čl. 31 i 84.

ne službe za zapošljavanje samo 22.438 (nezaposlena lica koja traže posao).[3] Procenjuje se da je učešće osoba s invaliditetom u svetu oko 10% od ukupnog broja ljudi u životnom dobu od 15 do 65 godina starosti.[4] U Evropskoj uniji (skr. EU) je 50,6% osoba s invaliditetom *zaposleno*, dok su lica bez poteškoća zaposlena u postotku od 74,8. Učešće osoba s invaliditetom u *nezaposlenom* stanovništvu EU u životnom dobu od 20. do 64. godine starosti je 17,1%, dok je učešće lica bez poteškoća 10,2%. Ovi statistički podaci ukazuju da su osobe s invaliditetom procentualno manje zaposlene, a više nezaposlene u poređenju sa licima bez poteškoća.[5]

Imajući u vidu ove statističke pokazatelje, povlašćeno zapošljavanje osoba s invaliditetom se pravda filozofskim, ali i praktičnim razlozima. Filozofski razlozi se svode na nužnost što humanijeg postupanja društvene zajednice prema ljudima s poteškoćama (npr. slepi, gluvi, zaostali u duševnom razvoju, slabo pokretni ili osakaćeni ljudi), kako bi im se olakšao život. On se sastoji u pravnom zahtevu njihove ravnopravnosti s ljudima bez poteškoća, te zabrane njihove diskriminacije u svakom pitanju društvenog života, uključujući i njihovo zaposlenje. Time im se omogućava da se uključe u društvo, te da budu njegovi korisni članovi, a ne postiđena i ponižena ljudska bića koja zavise od milostinje drugih. Zbog toga je nužno i opravdano da se pravom nametnu pojačane dužnosti državi i poslodavcima u zapošljavanju osoba s invaliditetom, kao i da se za takve osobe predvide pojačana prava u zapošljavanju u odnosu na zdrava lica. Zbog toga se posebne mere koje država uvodi radi postizanja potpune ravnopravnosti suštinski određenih lica, uključujući i „invalide", po Ustavu Srbije ne smatraju diskriminacijom (čl. 21).[6]

Praktični razlog se svodi na makro-ekonomsku korist koju društvo ima od zapošljavanja osoba s invaliditetom. Naime, nisu sve osobe s invaliditetom jednake u svojoj nesposobnosti za rad. Neke su potpuno radno nesposobne, zbog čega je nužno da ih društvo izdržava putem invalidskih penzija ili socijalne pomoći. Druge osobe s invaliditetom su delimično radno nesposobne, jer im je preostala radna sposobnost za sve poslove, istina umanjeno, ili samo za neke poslove. Osoba s invaliditetom sa preostalom radnom sposobnošću za neke (ne sve) poslove, može da bude za njih potpuno radno sposobna (npr. informatički poslovi ili poslovi projektovanja visoko obrazovanog inženjera s otežanim kretanjem), ili da za njih bude ograničeno radno sposobna (npr.

3 Ljubinka Kovačević, „Novelirani pravni okvir za zapošljavanje licâ sa invaliditetom", *Pravo i privreda*, br. 12-13, 2013, 170; Strategija unapređenja položaja osoba s invaliditetom u Republici Srbiji, *Službeni glasnik RS,* br. 1/2007, prema Ljubinka Kovačević, "Protection of Persons with Disabilities from Employment Discrimination, with a Special Focus on Serbian Legislation and Practice", *Pravni vjesnik,* br. 2, 2014, 59.

4 Ljubinka Kovačević, *Zasnivanje radnog odnosa* (2021), 1001; Predrag Jovanović, „Zaštita invalida u radnoj sredini", *Zbornik radova Pravnog fakulteta u Novom Sadu*, 3/2015, 931, 932.

5 Marie Lecerf, "Employment and Disability in the European Union", European Parliament Research Service, *https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2020)651932* (9.10.2022), 2.

6 Konvencija o pravima osoba s invaliditetom (*Sl. glasnik RS – Međunarodni ugovori*, br. 42/2009), čl. 1 i 3; Lj. Kovačević (2014), *op. cit*,, 58, 59.

rukovođenje građenjem na gradilištu inženjera otežanog kretanja).[7] Dok je izdržavanje potpuno radno nesposobnih lica nužnost i trošak za društvenu zajednicu u kojoj žive (npr. za poreske obveznike), dotle izdržavanje lica s preostalom radnom sposobnošću nije nužnost, jer ona mogu da rade, te time da se sâma izdržavaju doprinoseći društvenoj zajednici. Time se postižu uštede u državnom budžetu, odnosno u penzijskim fondovima i fondovima socijalnog osiguranja u troškovima izdržavanja invalidnih lica. Zbog toga je za društvenu zajednicu, ekonomski gledano, korisnije da delimično radno sposobne invalide zaposli, nego da ih izdržava. Zaposleni radno sposobni invalidi ne samo da se sami izdržavaju zarađujući za život, već su i poreski obveznici, te obveznici doprinosa socijalnog osiguranja, istina u umanjenim iznosima, čime doprinose poboljšanju ekonomskog stanja cele društvene zajednice.[8] Njihovi doprinosi društvenoj zajednici su prosečno gledano manji, jer im je radni učinak obično slabiji nego potpuno radno sposobnih ljudi. Najzad, sa stanovišta tržišta (berze) rada za poslodavce je povoljnije da se poveća ponuda radne snage, makar i uključivanjem delimično radno sposobnih invalida, jer se time obara njena cena u slučaju da tražnja za njom ostane ista.

III OTPOR POSLODAVACA

Uprkos opravdanosti zapošljavanja invalidnih lica, poslodavci često nisu voljni da ih zaposle, pravdajući tu nespremnost isticanjem više razloga. Prvi su razlozi bezbednosti na radu, jer smatraju da su invalidi ugroženiji u radnoj sredini, kao i da svojim poteškoćama u obavljanju radnih zadataka izazivaju povećani rizik po ostala zaposlena lica u svom okruženju. Drugo, premije osiguranja zaposlenih invalida koje poslodavci moraju da plaćaju osiguračima se povećavaju zbog povećanog rizika od povreda na radu i nastanka šteta u poslovanju. Time se stvaraju veći troškovi poslovanja, čime se ono poskupljuje. Treće, ostala zaposlena lica u radnom okruženju invalida pružaju otpor njihovom zapošljavanju, bilo zbog straha po svoju bezbednost, bilo zbog nevoljnosti da im pomažu u radu. Četvrto, stereotip je da je invalidno lice ili nesposobno da obavlja svoje poslove, ili da je njihov učinak slabiji od potpuno radno sposobnih lica.[9] Peto, invalidu su često potrebni posebni radni uslovi na radnom mestu da bi uspešno mogao da obavlja zadate mu poslove. Zbog toga je nužno da se ono prilagodi njegovim potrebama (npr. lift za savladavanje stepeništa na ulazu u zgradu, kompjuter za slepe), a to izaziva povećane troškove u poslovanju koje poslodavac nema kad zapošljava zdravo lice.

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7 Jovanović (2015), *op. cit,*, 939, 940.

8 Andreas Konig, Robert L. Schalock, "Supported Employment: Equal Opportunities for Severely Disabled Men and Women", *International Labour Review*, No. 1, 1991, 25; J. E. Linster, "Employment of the Handicapped", *Insurance Counsel Journal*, 2/1967, 304; Amir A. Majid, "Employment of Disabled People and the British Projective Legislation", *Journal of Legal Technology Risk Management,* No. 1, 2008, 45, 46.

9 Weiss, *op. cit.*, 457, 458.

Zbog opisanog otpora poslodavaca države su bile prinuđene da preduzmu niz zakonodavnih mera, kako bi ih podstakle, pa i pravno obavezale (naterale) da više zapošljavaju invalide s preostalom radnom sposobnošću.[10] Neke od tih mera su podsticajne, jer poslodavcima država daje olakšice u poslovanju kad zapošljavaju invalide. Druge od tih mera su prinudne, jer ih ona sankcioniše u slučaju da neopravdano odbijaju da zapošljavaju invalide.

IV OSOBA S INVALIDITETOM

1. Jezičke nedoumice

Izrazi „osoba s invaliditetom", „invalid", „invalidno lice", „lice s invaliditetom" i „lice (osoba) s poteškoćama" u ovom radu se koriste kao sinonimi, iako mogu da imaju različita značenja. U Ustavu Srbije se koristi izraz „invalid", dok se u zakonu Srbije kojim se uređuje zapošljavanje invalida, te Konvenciji UN o pravima osoba s invaliditetom iz 2006. godine u našem jeziku u prevodu koristi izraz „osoba s invaliditetom" (engl. *person with disabilities*). U Republici Srpskoj se u statistici koristi izraz „lice sa poteškoćama", dok se u propisima koristi izraz „invalid".[11] Čini se da je „statistički izraz" iz Republike Srpske najprimereniji duhu srpskog jezika i značenju koje želi da mu se dâ. Naime, izrazom „osoba s invaliditetom" želi se ukazati na lice koje ima poteškoće (fizičke ili duševne smetnje) u obavljanju svakodnevnih životnih aktivnosti, ali je radno sposobna, ako ne za sve, onda bar za neke vrste poslova. Znači, invaliditet je samo jedna od njegovih osobina, koja ukazuje na njegovu umanjenu (preostalu) radnu sposobnost, a ne na potpuno radno nesposobno lice, na koje bi upućivao izraz „invalid". Zbog toga se čini da je reč „poteškoća" bliža duhu srpskog jezika, nego što je reč „invaliditet". Reč invaliditet, osim toga, potiče iz stranog jezika, a više ukazuje na to da je nešto bezvredno, odnosno nevažeće (engl. „*invalid*").[12]

10 Izgleda da su u razbijanju predrasuda poslodavaca o štetnosti zapošljavanja osoba s invaliditetom prilično doprinela osiguravajuća društva u zapadnim zemljama, a posebno u SAD. Ona su sredinom prošlog veka počela da sprovode niz programa profesionalne rehabilitacije (tj. radnog osposobljavanja) osoba s invaliditetom u industriji, jer su ih finansirali iz svojih fondova osiguranja od nesrećnog slučaja. U takvim programima su se osobe s invaliditetom osposobljavale da uspešno obavljaju poslove kojim su programi bili namenjeni. Time su uspela da umnogome uklone tri predrasude poslodavaca, a one su bile: 1) da su invalidi podložniji nesrećama nego ostali radnici; 2) da se premije osiguranja od povreda na radu za poslodavce povećavaju u slučaju zapošljavanja invalida; i 3) da osiguravajuća društva nisu voljna da svojim osiguranjem „pokrivaju" štete usled povreda na radu invalida. Vid. Linster, *op. cit.*, 304, 305.

11 Statistički godišnjak Republike Srpske za 2021. godinu, Republički zavod za statistiku RS, 83, *https://www.rzs.rs.ba/static/uploads/bilteni/godisnjak/2021/StatistickiGodisnjak_2021_WEB.pdf* (10.1.2022); Zakon o profesionalnoj rehabilitaciji i zapošljavanju invalida Republike Srpske iz 2004. godine (Službeni glasnik RS, br. 98/04,...39/09)), vid. *https://www.fondacijazajednickiput.org/files/Zakon%20o% 20profesionalnoj*%20rehabilitaciji%20i%20zaposljavanju%20invalida%20Srpske.pdf (10.1.2022).

12 U engleskom jeziku se ranije koristio izraz „hendikepirano lice" (*handicapped person),* ali je napušten zbog pogrdnog značenja njegovog porekla („prosjak" od "*hand in cap*"

2. Pojam

Razlikuje se naučni od zakonskog pojma osobe s invaliditetom. Naučno gledano, osoba s invaliditetom je čovek koji zbog svojih telesnih ili duševnih mana (smetnji) ima suštinske poteškoće u obavljanju svakodnevnih aktivnosti u životu, ali ga to ne sprečava u obavljanju poslova na kojim je zaposlen.[13] Nije značajno da li mu je mana urođena ili ju je stekao tokom života (npr. zbog bolesti ili povrede). Sa stanovišta stepena njegove radne sposobnosti, on može da bude potpuno radno nesposoban, zbog čega nema pravo na rad, a time ni na zaposlenje. Takvo lice ima pravo na socijalna davanja, te ga društvo izdržava putem socijalne pomoći ili invalidske penzije u slučaju kad je na radu ili van njega postao invalid. On, međutim, može i da bude umanjeno radno sposoban, u kom slučaju ima pravo na rad, a time i na zaposlenje, i to ravnopravno sa zdravim licima u skladu sa svojom preostalom radnom sposobnošću.[14] I kad je ozbiljno onesposobljena, osoba s invaliditetom ima pravo na ravnopravno zaposlenje sa ostalim licima, s tim što mu se tada mora omogućiti pomoć drugog lica ili drugi vid pomoći u obavljanju poslova za koje je sposoban (tzv. pomognuto ili podržano zaposlenje; engl. *supported employment*).[15]

Zakonski pojam osobe s invaliditetom je složeniji od naučnog, jer se njime nastoji sprečiti njegova zloupotreba u praksi, odnosno da se zdrava lica zapošljavaju pod povlašćenim uslovima kao da su invalidna lica. Time bi izigravanjem propisa ostvarili neopravdanu korist i za sebe, i za svog poslodavca (npr. ovaj bi po tom osnovu dobijao državnu pomoć). Na primer, u našem pravu se osobom sa invaliditetom smatra „lice sa *trajnijim* posledicama telesnog,... ili duševnog oštećenja ili bolesti koje se ne mogu otkloniti lečenjem ili medicinskom rehabilitacijom, koje se suočava sa socijalnim i drugim ograničenjima od uticaja na radnu sposobnost i mogućnost zaposlenja...", ako nema mogućnosti da se, pod ravnopravnim uslovima, uključi na tržište rada sa drugim licima (*aut. nap.* – definiciju skratio i prilagodio autor). Da bi osoba

– kapa u šaci). Danas se koriste izrazi „onesposobljeno lice" (*disabled person*), ili „lice s poteškoćama" (*person with disabilities*), koji su u upotrebi i u SAD. U francuskom jeziku se i dalje koristi izraz „hendikepirano lice" (*personne handicapée*). Vid. Jovanović (2015), *op. cit.*, 933. O kritici izraza „osoba s invaliditetom" vid. Branko A. Lubarda, *Radno pravo* (2013), 68.

13 Weiss, *op. cit.*, 457, 458.

14 Jovanović (2015), *op. cit.*, 933-935, 936-938. U pravu SAD se zdravstvenom poteškoćom (manom) po zakonu smatra slepilo, gluvoća, alkoholizam, srčana bolest, rak, mišićna distrofija, cerebralna paraliza, paraplegija, šećerna bolest, SIDA, *HIV*, pa i preterana gojaznost (dva puta veća težina od normalne za visinu „debeljka"). Invalidima se ne smatraju kleptomani, transvestiti, transeksualci, pedofili, piromani, egzibicionisti, kockarski i narkomanski zavisnici, te oni ne uživaju zaštitu po osnovu svojih „poteškoća". Vid. Rodger LeRoy Miller, Frank B. Cross, *Business Law* (2013), 639; David P. Twomey, Marianne Moody Jennings, *Anderson's Business Law* (2011), 951, 953. Ne smatra se invaliditetom smetnja koja se može savladati tehničkim pomagalima, kao što je slušni aparat za ljude sa slabijim sluhom, ili naočare ili sočiva za one sa slabijim vidom. Vid. Carl Raskin, "Employment Equity for the Disabled in Canada, *International Labour Review*, No. 1, 1994, 76.

15 Konig and Schalock, *op. cit.*, 22, 23.

s invaliditetom uživala zakonske povlastice u zapošljavanju mora još da bude nezaposlena, starija od 15 godina (uzrast sticanja radne sposobnosti), mlađa od 65 godina (starost za sticanje prava na penzionisanje), te da iskaže spremnost da radi prijavom u zvaničnu evidenciju nezaposlenih lica.[16]

V PRAVNI IZVORI

Glavni pravni izvor kojim se u Srbiji uređuje preduzeće za zapošljavanje invalida je Zakon o profesionalnoj rehabilitaciji i zapošljavanju osoba s invaliditetom iz 2009. godine (dalje u tekstu: Zakon). Pošto ono mora da bude u obliku privrednog društva, na sva pitanja koja njime nisu uređena primenjuje se Zakon o privrednim društvima iz 2011. godine, kao opšti zakon za sva privredna društva.[17] U pitanju zabrane diskriminacije invalida u zapošljavanju primenjuje se Zakon o zabrani diskriminacije iz 2009. godine[18], Zakon o radu iz 2005. godine,[19] Zakon o sprečavanju diskriminacije osoba sa invaliditetom iz 2006. godine.[20] Pošto država iz budžeta pomaže preduzeća za zapošljavanje invalida, nužno je da ona bude u skladu sa propisima o državnoj pomoći.[21] Povlastice u poreskim i drugim fiskalnim pitanjima uređene su Zakonom o porezu na dohodak građana iz 2001. godine (čl. 21g)[22] i Zakonom o doprinosima za obavezno socijalno osiguranje iz 2004. godine (čl. 45b).[23] Od podzakonskih propisa značajan je Pravilnik o kriterijumima, načinu i drugim pitanjima od značaja za sprovođenje mera aktivne politike zapošljavanja Nacionalne službe za zapošljavanje iz 2015. godine (čl. 108, 111 i 114).[24] Naravno, vrhovni pravni izvor je Ustav Srbije, jer se njime predviđa ravnopravnost invalida, zabrana njihove diskriminacije i njihova pojačana zaštita.

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16 U Srbiji se zakonom nabrajaju sledeće vrste osoba s invaliditetom, koji mora da bude utvrđen da bi uživale povlašćeni položaj u zapošljavanju. To su ratni i mirnodopski vojni invalidi, civilni invalidi rata i lice kome je utvrđena invalidnost (npr. po propisima o invalidskom osiguranju ili drugim propisima). Vid. Zakon o profesionalnoj rehabilitaciji i zapošljavanju osoba s invaliditetom (dalje u fusnotama: ZPRZOI; *Sl. glasnik RS,* br. 36/2009 i 32/2013), čl. 3.

17 *Sl. glasnik RS*, br. 36/2011..., 109/2021.

18 *Sl. glasnik RS*, br. 22/2009 i 52/2021, čl. 16 i 26.

19 *Sl. gasnik RS*, br. 24/2005..., 95/2018, čl. 18-23. Vid. Jovanović (2015a), 939, 940.

20 *Sl. glasnik RS*, br. 33/2006 i 13/2016.

21 Propisi o državnoj pomoći merodavni za davanje pomoći preduzećima za zapošljavanje invalida u Srbiji su: 1) Zakon o kontroli državne pomoći (*Sl. glasnik*, br. 73/2019); 2) Uredba o uslovima i kriterijumima usklađenosti horizontalne državne pomoći (*Sl. glasnik*, br. 62/2021); 3) Uredba o pravilima za dodelu državne pomoći (*Sl. glasnik,* br. 13/2010..., 119/2014), čl. 50 i 51; i 4) Uputstvo za ocenjivanje usklađenosti državne pomoći za zapošljavanje (*Sl. glasnik* 114/2021). Vid. Nebojša Jovanović, „Državna pomoć preduzećima u teškoćama u pravu EU i Srbije", *Usklađivanje poslovnog prava Srbije sa pravom EU*, Pravni fakultet Univerziteta u Beogradu, Beograd 2021, 265, 270.

22 *Sl. glasnik RS*, br. 21/2001..., 5/2015.

23 *Sl. glasnik RS*, br. 84/2004..., 5/2015.

24 *Sl. glasnik RS*, br. 102/ 2015..., 9/2018, dalje u fusnotama (Pravilnik o kriterijumima).

Od međunarodnih izvora prava u pitanju zapošljavanja osoba s invaliditetom najznačajnija je Konvencija UN o pravima osoba s invaliditetom iz 2006. godine, koju je Srbija ratifikovala 2009. godine (čl. 1-3, 5, 26 i 27).[25] Njom se ne uređuju prava osoba s invaliditetom samo u pitanju zapošljavanja, nego i u drugim pitanjima njihovog života (npr. zabrana zlostavljanja, sloboda kretanja, zdravlje, socijalna zaštita i drugo). Srbija je obavezna da usklađuje svoje pravo sa propisima Evropske unije po osnovu sporazuma o svom pridruživanju koji je zaključila sa njom, zbog čega oni mogu da budu značajan izvor u stvaranju našeg prava. EU, međutim, nema značajnijih propisa kojim se za sve njene države članice ujednačeno uređuje pitanje zapošljavanja invalida. Zbog toga je to pitanje uglavnom u zakonodavnoj nadležnosti država članica, te je uređeno njihovim nacionalnim pravima. Postoji samo Uputstvo (direktiva) EU 2000/76 o uspostavljanju opšteg okvira za jednak tretman u zapošljavanju i zanimanjima, ali se njime ne uređuje preduzeće za zapošljavanje invalida, već zabrana njihove diskriminacije u zapošljavanju i dopuštanje državne pomoći poslodavcima i invalidima.[26] Osim tog uputstva, postoji niz političkih opštih akata kojim se planira unapređenje pojačane zaštite invalida, kao što je Strategija jednakosti EU za prava osoba s invaliditetom za razdoblje od 2021. do 2030. godine utvrđena Saopštenjem br. 2021/2021 i Evropska socijalna povelja Saveta Evrope.[27]

Mnoge strane države uređuju pitanje zapošljavanja invalidnih lica, s tim što su im načini njegovog uređivanja različiti. SAD uređuju zapošljavanje invalida Zakonom o Amerikancima s poteškoćama iz 1990. godine sa izmenama iz 2008. godine (*Americans with Disabilities Act*; skr. ADA),[28] a Ujedinjeno Kraljevstvo Zakonom o zabrani diskriminacije po osnovu invaliditeta iz 1995. godine (*Disability Discrimination Act*, skr. DDA).[29] Francuska je zapošljavanje invalida uredila jednim poglavljem (odnosno zakonom) u okviru Zakonika o radu iz 2007. godine (*Code de travail*).[30] Nemačka je njihovo zapošljavanje uredila Zakonom o licima sa poteškoćama iz 1953. godine sa izmenama iz 2001. godine (*Schwerbehindertengesets*, skr. *SchwBG*) i Zakonom protiv diskriminacije iz 2006. godine. Nemački Zakon o licima sa poteškoćama je 1986. godine postao deo Socijalnog zakonika IX (*Sozial Gesetzbuch*;

25 Kovačević (2021), *op. cit.*, 1001, 1002; Branko Lubarda, *Uvod u radno pravo* (2021), 23; P. Jovanović, „Posebna radnopravna zaštita pojedinih kategorija radnika", *Zbornik radova Pravnog fakulteta u Novom Sadu*, br. 4, 2015, 1475.

26 O prevazilaženju neujednačenih nacionalih prava država članica EU u pitanju zapošljavanja osoba s invaliditetom vid. Josh Bernstein, "The Enforcement of European Union Directives on Employment of the Disabled", *Texas International Law Journal*, No. 3, 1995, 604-609.

27 Strategiju vid. na *https://ec.europa.eu/commission/presscorner/detail/en/ip_21_810* (10.1.2022), a Povelju na *https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900* 00168048b059 (11.1.2021). Vid. Jovanović (2015a), *op. cit.,* 1475.

28 Miller and Cross, *op. cit.*, 638; Twomey and Jennings, *op. cit.*, 950.

29 Majid, *op. cit.*, 37.

30 O kritici francuskog sistema zapošljavanja invalida vid. Eric A. Besner, "Employment Legislation for Disabled Individuals: What Can France Learn from the Americans with Disabilities Act", *Comparative Labor Law Journal*, No. 3, 1995, 404, 406-408.

skr. SGB).[31] Kanada je ovo pitanje uredila Zakonom o pravednom zapošljavanju iz 1986. godine (*Employment Equity Act*; skr. *EEA*).[32]

VI SISTEMI ZAPOŠLJAVANJA OSOBA S INVALIDITETOM

1. Sistemi u svetu

U svetu postoje tri sistema kojim se podstiče zapošljavanje osoba s invaliditetom, pri čemu njihova primena zavisi od težine invaliditeta. Prvi je sistem zaštićenog zapošljavanja, drugi je tzv. kvotni sistem, a treći je sistem zabrane diskriminacije invalidnih lica.

Prvi i najstariji sistem je u podsticanju stvaranja radnih sredina *specijalizovanih* za radno osposobljavanje i za zapošljavanje invalida. To je tzv. zaštićeno zapošljavanje invalida, koje se najčešće sprovodi osnivanjem preduzeća za zapošljavanje invalida. Ovaj sistem je namenjen invalidima sa ozbiljnijim poteškoćama, ali koji mogu da se osposobe za rad koji odgovara njihovoj preostaloj sposobnosti. Ovakvo preduzeće mora da zapošljava propisani veći broj invalidnih lica, zbog čega uživa povećanu pomoć države (npr. u novčanim davanjima, poreske olakšice), kako bi moglo da bude konkurentno na tržištu. Za najteže oblike invalidnosti postoje specijalizovane ustanove njihove rehabilitacije i zapošljavanja, kao što su zaštićene radionice, radne grupe, radni centri ili socijalna preduzeća. One uživaju najveću pomoć države u njihovom radu.[33] Ciljevi sistema zaštićenog zapošljavanja invalida su trojaki: 1) omogućavanje licima s ozbiljnijim poteškoćama da se radno uključe u širu društvenu zajednicu, te da se osete njenim korisnim članovima; 2) omogućavanje invalidnim licima obuke za obavljanje poslova koji su primereni njihovim sposobnostima; i 3) omogućavanje invalidnim licima da ostvare zaradu i druge koristi jednake sa ostalim radnicima i sa jednakim radnim obavezama i odgovornostima.[34]

Drugi i savremeniji sistem zapošljavanja invalida je tzv. *kvotni sistem* koji se sastoji u zakonskoj obavezi svih poslodavaca da zaposle propisani postotak invalidnih lica s obzirom na ukupan broj lica koja zapošljavaju (npr. 1-6%).

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31 Nigel Foster and Satish Sule, *German Legal System and Laws* (2010), 593; Wendler, Tremml and Buecker, *Key Aspects of German Business Law*, 2008, 281; Lubarda (2013), *op. cit.*, 69.

32 Raskin, *op. cit.*, 78.

33 Sistem zaštićenog zapošljavanja invalida se masovno javio najpre radi zbrinjavanja ratnih invalida. Do tada se u istoriji javljao sporadično, kao izraz dobročinstva. Na primer, u Britaniji je u Edinburgu još 1793. godine osnovano Carsko utočište slepih (*Royal Blind Asylum*), da bi nakon Prvog svetskog rata opštine i gradovi dobili ovlašćenje da osnivaju radionice za zbrinjavanje i zapošljavanje ratnih invalida. Uspešan primer zapošljavanja ratnih, a kasnije i drugih vrsta invalida je Korporacija za zapošljavanje invalidnih lica (skr. *Remploy* od *Disabled Persons Employment Corporation*), koju je osnovao Parlament UK zakonom u 1945. godini, a postoji do danas. Iako stvara gubitke u poslovanju, država mu ih pokriva, jer bi inače troškovi izdržavanja zaposlenih invalida bili znatno veći. Vid. J. L. Edwards, "Remploy: An Experiment in Sheltered Employment for the Severely Disabled in Great Britain", *International Labour Review,* No. 2, 1958, 147-150.

34 Konig and Schalock, *op. cit.*, 23-24.

Države propisuju postotak zapošljavanja invalidnih lica svakom poslodavcu srazmerno procentualnom učešću „radno sposobnih" invalidnih lica u ukupnom broju radno sposobnog stanovništva u zemlji (npr. u Francuskoj je 6%).[35] Ovaj sistem je namenjen invalidnim licima koja su sposobnija za rad nego ona kojim je namenjen sistem njihovog zaštićenog zapošljavanja. Poslodavci mogu da izbegnu obavezu njihovog zapošljavanja na jedan od dva načina. Prvi je osnivanjem i finansiranjem specijalizovanog preduzeća za zapošljavanje invalida (zaštićeno zapošljavanje), a drugi je uplatom propisanih novčanih doprinosa u javni fond koji služi finansiranju lečenja, radnom osposobljavanju i zapošljavanju invalida. Ovaj sistem podstiče invalidna lica da se uključe u tržište rada, te da kod poslodavaca traže posao ravnopravno sa zdravim licima. Njime se nastoji da se invalidna lica uključe u šire radno okruženje i društvenu zajednicu sa ostalim ljudima, kako bi se izbegla njihova izolacija u „zatvorenim" radnim sredinama zaštićenog sistema zapošljavanja.[36]

Treći sistem je sistem zabrane diskriminacije invalidnih lica u zapošljavanju, ako dokažu da su radno sposobni (npr. stručni) za posao za koji konkurišu kod poslodavca. U ovom sistemu se ne propisuje „kvota", kao u kvotnom sistemu, već se poslodavcu zabranjuje da odbije da zaposli invalida samo zbog njegove invalidnosti, ako je jednako ili bolje radno sposoban od zdravog tražioca posla. Ako ga odbije samo zbog njegovog invaliditeta, invalid ima pravo na zaštitu u parnici protiv poslodavca. Poslodavcu je dopušteno da odbije invalida i po osnovu njegove invalidnosti (tzv. isključenje zabrane), ali samo u propisanim opravdanim slučajevima, kao na primer, kad dokaže da proces rada nužno zahteva potpuno zdravu osobu, ili da bi zaposlenje invalida ugrozilo njegovo zdravlje ili bi ugrozilo ostale radnike u istoj radnoj sredini. Poslodavac ne sme da odbije da zaposli invalidno lice ni kad njegov nedostatak zahteva da mu prilagodi radno mesto (radnu sredinu) njegovim potrebama (npr. pristup poslovnoj zgradi, posebno uređen prostor radnog mesta, prilagodljivo radno vreme i drugo). Prilagođavanje mora da bude delotvorno, odnosno da invalidu omogući uspešno obavljanje posla, ali razumno, što znači da ne sme da izaziva preteran trošak ili drugu prekomernu teškoću poslodavcu.[37] Poslodavac ima pravo da od države naknadi sve ili deo troškova koje je razumno snosio radi prilagođavanja radnog mesta. Ovaj sistem se primenjuje u SAD i UK.[38]

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35 Besner, *op. cit.*, 403.

36 Kvotni sistem ima dva podsistema, zavisno od propisa svake pojedine države. Prvi je podsistem obaveznog zapošljavanja invalida, koji se sastoji u tome što se poslodavac novčano kažnjava za manjak zaposlenih invalida od propisanog postotka, pri čemu se novčana kazna uplaćuje u javni fond za pomaganje invalidima. Ovaj podsistem se primenjuje u Nemačkoj i Mađarskoj, a primenjivao se i u Srbiji do izmena ZPRZOI u 2013. godini. Drugi podsistem kvotnog sistema se sastoji u tome što država samo preporučuje poslodavcima da zaposle propisani postotak invalida, ali bez njihovog sankcionisanja (npr. Holandija). U ovaj podsistem se ubraja i sistem obaveznog zapošljavanja propisanog postotka invalida, ali bez propisivanja sankcije za prekršioce (npr. Kanada). Vid. Kovačević (2013), *op. cit.*, 171-173; Lubarda (2013), *op. cit.*, 68; Foster and Sule, *op. cit.*, 593; Raskin, *op. cit.*, 75, 78 i 79.

37 Kovačević (2013), 176; Majid, *op. cit.*, 49, 52.

38 Na primer, u SAD opisana zabrana diskriminacije važi za svakog poslodavca s 15 ili više zaposlenih. U slučaju njene povrede, invalid ima pravo da dokaže u parnici da mu je tuženi

2. Sistem u Srbiji

U praksi se pokazalo da se invalidna lica najviše zapošljavaju u javnom i neprofitnom sektoru, a da se u privatnom sektoru ređe zapošljavaju, i to obično u državom podržanim sistemima njihovog zapošljavanja.[39] Kako bi omasovila zapošljavanje invalida, Srbija kombinuje kvotni sistem, kao opšti i obavezan za sve poslodavce, sa sistemom zaštićenog zapošljavanja, koji je neobavezan, odnosno koji zavisi od volje osnivača organizacije za rehabilitaciju ili i zapošljavae invalida.

Kvotni sistem se sastoji u tome što svaki poslodavac koji ima 20 ili više zaposlenih, mora da ima bar dva posto zaposlenih invalida. Znači, do 19 zaposlenih, ne mora da zaposli nijednog invalida. Ako ima 20 do 49 zaposlenih, onda mora da ima bar jedno zaposleno invalidno lice. Ako ima 50 do 100 zaposlenih, mora da ima bar dva zaposlena invalidna lica, kao i što mora da ima još jedno zaposleno invalidno lice na svakih narednih 50 zaposlenih lica. Nije značajno da li je poslodavac privredno društvo, drugo pravno lice (npr. država, opština, javno preduzeće, zadruga, škola) ili preduzetnik. Novonastali poslodavac nema obavezu zapošljavanja invalida u prve dve godine svog postojanja.[40] Poslodavac se može osloboditi obaveze zapošljavanja invalida na dva načina. Prvi je da uplati propisani novčani iznos (doprinos) u budžetski fond za rehabilitaciju i zapošljavanje invalida.[41] Drugi način je da nabavlja („kupuje“) robu ili usluge od preduzeća za zapošljavanje invalida u propisanoj novčanoj vrednosti, a po osnovu ugovora koji je zaključio sa njim (npr. ugovor o saradnji, ugovor o kupovini, ugovor o trgovinskom zastupanju, ugovor o delu).[42] Ako poslodavac mora zaposlenom

poslodavac odbio zaposlenje samo zbog invaliditeta. U tom slučaju, poslodavac mora da ga zaposli, da mu isplati zarade koje bi do ponovnog zaposlenja zaradio, kao i da plati odgovarajuće novčane kazne. (Vid. Miller and Cross, *op. cit.*, 638-643; Twomey and Jennings, *op. cit.*, 950-953). Na primer, u parnici *Consolidated Rail Corporation v. Darrone* (Docket no. 82/862), železnička kompanija je odbila da vrati na posao Lestrejndža, inače svog inženjera za lokomotive, koji je u nesreći u svojoj kući izgubio šaku i deo ruke, iako je posle bolovanja bio i dalje sposoban da radi svoj posao u njoj. Lestrejndž ju je tužio, tvrdeći da je otpušten samo zbog svoje invalidnosti. Sud mu je usvojio tužbeni zahtev, ali se parnica odužila, te je on umro pre njenog okončanja. Vid. Christine Godsil Cooper, "Rehabilitation Act: How Much Protection from Employment Discrimination against Disabled Workers", *Preview of United States Supreme Court Case 1983,* No. 23, 1984, 396.

39 Uprkos tome, smatra se da su najveće mogućnosti za njihovo zapošljavanje u velikim kompanijama, kao što je, recimo, *IBM*. Vid. Ramy Rabby, "Employment of the Disabled in Large Corporations", *International Labour Review,* No. 1, 1983, 23, 24.

40 ZPRZOI, čl. 24, 25.

41 Ovaj doprinos iznosi 50% prosečne bruto zarade u Srbiji za svakog „manjkajućeg“ invalida u odnosu na propisani broj (ZPRZOI, čl. 26, 28).

42 Poslodavac se oslobađa obaveze zapošljavanja jednog invalidnog lica u trajanju od godinu dana, ako od preduzeća za zapošljavanje invalida nabavi robu ili usluge u jednoj poslovnoj godini u vrednosti od 20 prosečnih zarada u Srbiji. Ispunjavanje obaveza u veletrgovini prema preduzeću za zapošljavanje invalida se ne priznaje kao način oslobađanja od obaveze njihovog zapošljavanja (ZPRZOI, čl. 27). Ovaj način oslobođenja od obaveze zapošljavanja invalida poslodavcu daje mogućnost za još jednu pogodnost. Ona se sastoji u tome što može da osnuje preduzeće za zapošljavanje invalida, kao svoje društvo ćerku,

invalidu da prilagodi radno mesto, ima pravo da od države naknadi razumne troškove koje je snosio u tu svrhu u skladu sa propisima o državnoj pomoći. Ako za stalno zaposli invalida bez radnog iskustva, ima pravo na subvenciju njegove zarade od države u trajanju od godinu dana.[43]

U sistemu zaštićenog zapošljavanja postoje tri moguća oblika njegove primene u praksi. Prvi je preduzeće za zapošljavanje invalida, drugi je radni centar, a treći je socijalno preduzeće, odnosno organizacija. Dok je preduzeće za zapošljavanje invalida zamišljeno kao privredni subjekt (trgovac) koji konkuriše na tržištu ostalim privrednim subjektima, radni centar nije privredni subjekt. On je, u stvari, ustanova koja se bavi lečenjem težih invalida radnom terapijom. Teži je invalid onaj čiji radni učinak u obavljanju poverenih mu poslova ne doseže ni trećinu uobičajenog učinka zdravog čoveka na istom radnom mestu. Njega može da osnuje samo država, njena teritorijalna jedinica (npr. opština) i organizacija invalida (npr. udruženje), odnosno njihovih zakonskih zastupnika. Socijalno preduzeće je privredno društvo koje obavlja delatnost za zadovoljavanje potreba invalida, a zapošljava bar jedno invalidno lice (npr. zbrinjava ih, pomaže im u svakodnevnom životu ili proizvodi pomagala za njih). Ono je dužno da deo svojih prihoda ulaže u poboljšanje položaja invalida, kao što je, recimo, unapređenje uslova njihovog rada, njihovih radnih veština, životnog standarda i drugo.[44]

VII PREDUZEĆE ZA ZAPOŠLJAVANJE OSOBA S INVALIDITETOM

1. Pojam i delatnost

Preduzeće za zapošljavanje invalida je privredno društvo čija je delatnost profesionalna rehabilitacija invalidnih lica i njihovo zapošljavanje.[45] Znači, reč je o specijalizovanoj vrsti privrednog društva, s obzirom na delatnost kojom se bavi, slično kao što su banke ili osiguravajuća društva specijalizovana za obavljanje svojih delatnosti. Međutim, za razliku od banaka i osigurava-

da u njega „prebaci" invalidna lica koja su do tada radila kod njega, a da zatim od „ćerke" nabavlja robu, odnosno usluge koje su mu potrebne u obavljanju delatnosti, kao društvu majci. Time poboljšava i svoje poslovanje, i poslovanje preduzeća za zapošljavanje invalida, a ako ono ostvari dobit, može da učestvuje i u njenoj deobi.

43 Subvencija zarade za stalno zaposlenog invalida bez radnog iskustva je 75% bruto zarade za jednog zaposlenog, ali najviše do iznosa minimalne bruto zarade u Srbiji, i to u skladu sa propisima o državnoj pomoći (ZPRZOI, čl. 30–33; Pravilnik o kriterijumima, čl. 108, 111 i 114).

44 ZPRZOI, čl. 34, 35, 43–45. U praksi se pokazalo da su najefikasnije za rehabilitaciju i zapošljavanje invalidnih lica tri organizaciona oblika. Prvi oblik se sastoji od samozapošljavanja invalida (npr. preduzetnik), drugi je radna jedinica, kao mala grupa invalidnih lica koja rade u kompaniji sa ostalim radnicima, a treći je pokretna radna grupa, kao male grupe invalidnih lica koja rade na raznim mestima gde postoji potreba za njihovim radom (npr. u poljoprivredi ili građevinarstvu). Vid. Konig and Schalock, *op. cit.*, 23, 27-29.

45 ZPRZOI, čl. 35.

jućih društava, kojim je zabranjeno da se bave drugom delatnošću osim one za koju su specijalizovana i za koju su dobila dozvolu od države, preduzeće za zapošljavanje invalida ima veću slobodu u izboru svoje delatnosti. Naime, njegova delatnost ima dva elementa, od kojih je jedan obavezan za njih, a drugi podleže njihovom slobodnom izboru.

Obavezan element njegove delatnosti je profesionalna rehabilitacija invalidnih lica. To je skup programa, mera i poslova kojim se postiže osposobljavanje invalidnih lica da obavljaju poslove koji odgovaraju njihovim fizičkim i psihičkim osobinama. Ona podrazumeva ne samo obuku za odgovarajući posao koji invalidno lice nije nikad obavljalo, nego i njegovu obuku i pripremu za novi posao, jer stari posao više nije sposobno da obavlja (tzv. prekvalifikacija). Ona uključuje i unapređenje njegove stručnosti za posao za koji je inače bio obučen i sposoban da obavlja do nastupanja invalidnosti (tzv. dokvalifikacija). Profesionalna rehabilitacija ne uključuje samo obuku invalidnih lica, kao skup radnji sticanja znanja i radnih veština, nego i njihovo održavanje i usavršavanje.[46] Preduzeće za zapošljavanje invalida ne obavlja navedene poslove rehabilitacije samo za svoje zaposlene, već može da ih obavlja, kao svoje usluge (uz ili bez naknade), i za ostala invalidna lica. U njemu mogu da sprovode „praksu" (praktičnu obuku) i učenici srednjih škola koji se obučavaju za rad sa licima sa smetnjama u razvoju u skladu sa propisanim programima nastave i obuke.[47]

Drugi element delatnosti preduzeća za zapošljavanje invalida sastoji se u njihovom zapošljavanju, te održavanju tog zaposlenja ili njegovoj promeni u skladu sa njihovim radnim sposobnostima. U ovom elementu svoje delatnosti, ova vrsta specijalizovanog preduzeća je slobodna da izabere svaku delatnost u kojoj su njegova zaposlena invalidna lica sposobna da obavljaju bilo sve, bilo neke vrste poslova, a u cilju istupanja na tržištu radi prodaje svojih „proizvoda" (roba ili usluga) i sticanja dobiti. To može da bude proizvodna, uslužna, pa i intelektualna delatnost (npr. škola za obuku invalida). Znači, za razliku od drugih vrsta specijalizovanih privrednih društava (npr. banaka), čija je pravna sposobnost posebna, jer je ograničena delatnošću kojom se bave, preduzeća za zapošljavanje invalida imaju opštu pravnu sposobnost, jer su slobodna da obavljaju svaku delatnost koja služi svrsi zbog koje su osnovana.[48]

2. Osnivanje

2.1. Sistem dozvole

Preduzeće za zapošljavanje invalida se osniva po sistemu državne dozvole (odobrenja). To znači da osnivač mora ne samo da ispuni propisane uslove za njegovo osnivanje, nego i da mu osnivanje dozvoli nadležni državni organ.[49] U sistemu osnivanja pravnog lica uz dozvolu, državni organ ima ovlašćenje da po

46 ZPRZOI, čl. 12–14.

47 ZPRZOI, čl. 39.

48 O opštim i posebnim privrednim društvima i njihovoj pravnoj sposobnosti vid. Nebojša Jovanović, u Nebojša Jovanović, Vuk Radović i Mirjana Radović, *Kompanijsko pravo* (2021), 103.

49 O sistemu državne dozvole kao jednom od mogućih načina nastanka privrednog subjekta vid. N. Jovanović, *op. cit.*, 66-69.

svom nahođenju (diskrecionom ovlašćenju) odlučuje o tome da li će osnivaču, kao podnosiocu zahteva, izdati dozvolu za osnivanje, odnosno dozvolu za obavljanje delatnosti (tzv. dozvolu za rad). Otuda, on može da uskrati dozvolu i kad osnivač ispuni sve propisane uslove, jer ima pravo da ceni svrsishodnost osnivanja pravnog lica (npr. korist za opšti interes), a ne samo njegovu zakonitost.

Nahođenje državnog organa u dopuštanju osnivanja preduzeća za zapošljavanje invalida, međutim, uređeno je na poseban način. Naime, u postupku dopuštanja njegovog osnivanja učestvuje više ministarstava. Glavno je ministarstvo nadležno za poslove zapošljavanja (tzv. „ministarstvo rada"), jer ono osnivaču izdaje dozvolu. Ono, međutim, nije samostalno u odlučivanju u tom pitanju, jer prethodno mora da pribavi mišljenja još tri ministarstva, i to ministarstva zdravlja, ministarstva socijalne politike i ministarstva obrazovanja.[50] Ministarstvo rada ne mora da uvaži njihova mišljenja, ali je dužno da ih pribavi, mada će obično da ih poštuje.

Pitanje je, međutim, da li ono po Zakonu ima pravo da odbije dozvolu za osnivanje preduzeća, ako su mišljenja ostalih ministarstava pozitivna, a osnivač je u postupku pribavljanja dozvole dokazao da je ispunio sve zakonske uslove. Zakonske odredbe u ovom pitanju nisu dovoljno jasne, ali iz njihovog smisla proističe da u tom slučaju ministarstvo rada ne uživa nahođenje, te da je dužno da izda dozvolu osnivaču.[51] Naime, u Zakonu se kaže u prvom stavu člana, kojim se uređuje izdavanje dozvole, da se preduzeće za zapošljavanje osoba sa invaliditetom „upisuje u registar privrednih subjekata nadležnog organa, uz prethodno pribavljenu dozvolu ministarstva nadležnog za poslove zapošljavanja". Nadalje se u drugom stavu istog člana kaže: „Dozvola iz stava 1. ovog člana *izdaje se* po pribavljenom mišljenju ministarstva....". (odredbu skratio autor i naglasio reči „izdaje se"; čl. 37, st. 1 i 2). Jezičko tumačenje citiranih pravila ne ukazuje da ministarstvo rada „može" da izda dozvolu, što bi upućivalo na njegovo diskreciono ovlašćenje u ovom pitanju, već da ono „izdaje dozvolu", što upućuje na zaključak da mora da je izda. Znači, ministarstvo rada je ovlašćeno da proveri samo da li je osnivač ispunio zakonom propisane uslove za osnivanje preduzeća, ali nema pravo da ceni i svrsishodnost njegovog osnivanja, jer su za njegovu ocenu nadležna ministarstva od kojih je dužno da pribavi mišljenje. Otuda je ono nadležno samo da proveri zakonitost osnivanja preduzeća za zapošljavanje invalida, a ocenu njegove svrsishodnosti daju u svojim mišljenjima ostala propisana ministarstva. Zbog toga je ministarstvo rada dužno da izda dozvolu, kad ostala propisana ministarstva daju pozitivna mišljenja, a osnivač dokaže da je ispunio sve propisane uslove u postupku njenog pribavljanja. Ako ga ono uprkos tome ne izda, osnivač uživa pravnu zaštitu u upravnom sporu.[52]

50 Pošto su trenutno pitanja rada i socijalne politike objedinjena u nadležnosti istog ministarstva po Zakonu o ministarstvima, Ministarstvo za rad ne mora da pribavlja mišljenje ministarstva socijalne politike, jer je ono nadležno i za tu oblast društvenih odnosa. Ministar rada, naravno, može da pribavi mišljenje odseka za socijalnu politiku u „svom" ministarstvu. Vid. Zakon o ministarstvima (*Sl. glasnik RS*, br. 128/2020), čl. 2.

51 ZPRZOI, čl. 37.

52 Ovakav zaključak je logičan u slučaju da su za rad i za socijalna pitanja nadležna posebna ministarstva. Kako je danas po Zakonu o ministarstvima iz 2020. godine za obe oblasti

Ministarstvo rada vodi evidenciju izdatih dozvola preduzećima za zapošljavanje invalida. Ono je dužno da oduzme dozvolu u slučaju da preduzeće prestane da ispunjava uslove propisane za svoje osnivanje, jer ono mora da ih ispunjava sve vreme svog postojanja.[53]

2.2. Uslovi za osnivanje

Osnivač preduzeća za zapošljavanje invalida može da bude svaki pravni subjekt, ako je poslovno sposoban. Znači, to može da bude privredno društvo, drugo pravno lice (npr. zadruga), preduzetnik, drugo fizičko lice, pa i država ili njena teritorijalna jedinica (npr. opština). On, međutim, mora da ispuni propisane uslove i da dobije dozvolu ministarstva rada, nakon čega mora da preduzeće upiše u Registar privrednih subjekata kod Agencije za privredne registre.[54]

Kako preduzeće za zapošljavanje invalida mora da bude privredno društvo, uslovi za njegovo osnivanje se dele na opšte i posebne. Opšti su oni koji moraju da se ispune za osnivanje oblika privrednog društva u kojem će preduzeće obavljati delatnost (npr. za društvo s ograničenom odgovornošću ili akcionarsko društvo).[55] Oni se tiču forme i sadržine osnivačkog akta, vrste uloga i njegovog unošenja, minimalnog osnovnog kapitala i drugog. Posebni uslovi su oni koji su propisani samo za preduzeće za zapošljavanje invalida, kako bi se osiguralo da ono, kao specijalizovano privredno društvo, bude u stanju da ostvari svoju svrhu, odnosno da se bavi profesionalnom rehabilitacijom i zapošljavanjem invalidnih lica. Oni se dele na tri grupe, zavisno od prirode činjenica na koje se odnose.

Prva grupa posebnih uslova se tiče najmanjeg broja invalidnih lica zaposlenih na neodređeno vreme („stalno zaposlena lica"). Preduzeće za zapošljavanje invalida mora da ima najmanje pet stalno zaposlenih invalida. Ako ima veći broj stalno zaposlenih, pri čemu su neki od njih zdrava lica, onda učešće stalno zaposlenih invalida u ukupnom broju stalno zaposlenih mora da bude najmanje polovina. Među stalno zaposlenim invalidima mora najmanje 10% da budu oni invalidi koji su zaposleni „pod posebnim uslovima". To su invalidi kojim je nužno da se radno mesto prilagodi njihovim potrebama, da bi mogli uspešno da obavljaju poslove za koje su zaduženi (npr. kompjuter za slabovide, širi prostor radnog mesta za osobu u kolicima, promenjivo radno vreme i drugo).[56]

Druga grupa posebnih uslova se odnosi na prostor i opremu preduzeća. Ono mora da ima odgovarajući prostor, te tehničku i drugu opremu potrebnu za radno osposobljavanje i rad invalidnih lica.

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nadležno isto ministarstvo, zaključuje se da ono uživa nahođenje u oceni svrsishodnosti osnivanja preduzeća za zapošljavanje osoba s invaliditetom u pitanju socijalne politike.

53 ZPRZOI, čl. 37, st. 3 i 4.

54 ZPRZOI, čl. 36, 37,

55 ZPRZOI, čl. 38.

56 ZPRZOI, čl. 22, 23 i 36 st. 2.

Najzad, treća grupa uslova se tiče stručnog kadra, jer preduzeće za zapošljavanje invalida mora da ima odgovarajuće stručnjake za obavljanje poslova u svojoj delatnosti, a posebno za obuku i pomaganje invalidnim licima. Zbog toga ono mora da ima najmanje po jedno stručno lice: 1) za praktičnu nastavu i obuku za poslove za koje se osposobljavaju invalidna lica; 2) za pružanje profesionalne pomoći zaposlenim invalidnim licima; i 3) za pružanje saveta za uključivanje zaposlenih invalidnih lica u radnu sredinu („na radnom mestu"). Način na koji preduzeće upošljava stručni kadar zavisi od broja zaposlenih invalida. Ako ono zapošljava više od 20 invalida, onda navedeni stručnjaci moraju kod njega da budu zaposleni, odnosno da budu u radnom odnosu. Ako ih ima manje, oni ne moraju da budu zaposleni kod njega, već može da ih uposli po osnovu ugovora o delu ili nekog drugog ugovora.[57]

2.3. Povlastice

Preduzeća za zapošljavanje invalida uživaju tri vrste povlastica, kako bi im se omogućilo da opstanu na tržištu u nadmetanju sa ostalim privrednim subjektima. Njihove povlastice se opravdavaju time što se podrazumeva da radni učinak njihovih zaposlenih invalida jeste manji od onog potpuno radno sposobnih lica. Otuda se smatra da ona ne mogu da budu toliko uspešna u obavljanju svoje delatnosti na relevantnom tržištu kao što su to privredni subjekti koji nisu opterećeni velikim brojem zaposlenih invalida. Osim toga, ona imaju povećane troškove u poslovanju, jer redovno moraju da prilagođavaju svoju radnu sredinu i radna mesta potrebama zaposlenih invalida. Otuda je potrebno i korisno da im država pomogne davanjem odgovarajućih povlastica u odnosu na ostale privredne subjekte, jer se na taj način izjednačavaju sa ostalim takmacima na tržištu.

Prva vrsta povlastica se tiče subvencija za zarade zaposlenih invalida. Preduzeće za zapošljavanje invalida ima pravo da iz državnog budžeta dobije mesečni novčani iznos, kao subvenciju za svakog zaposlenog invalida, u visini 75% njegove bruto zarade. Bruto zarada je zarada sa porezima i doprinosima za socijalno osiguranje. Da preduzeće ne bi preterivalo u visini zarada svojih zaposlenih i time prekomerno trošilo novac u budžetu države, subvencija na zarade mu je ograničena na iznos polovine prosečne bruto zarade po zaposlenom u Srbiji. Znači, ako bi 75% zarade po zaposlenom u preduzeću bilo veće od polovine prosečne zarade u zemlji, ono ima pravo najviše na iznos polovine prosečne zarade u Srbiji po svakom zaposlenom invalidu. Ukupan iznos državne pomoći koju preduzeće može da dobije za ovu svrhu za jednu godinu za sve zaposlene invalide je 10 miliona evra.[58]

Druga vrsta povlastica se odnosi na unapređenje njihove delatnosti. Preduzeće za zapošljavanje invalida ima pravo na naknadu troškova koje je snosilo radi unapređenja svoje delatnosti u korist invalidnih lica. Troškovi, međutim, moraju da budu opravdani. Takvim se smatraju sledeći troškovi: 1) za prilagođavanje prostorija preduzeća; 2) za zapošljavanje osoblja za podrušku

57 Isto.

58 ZPRZOI, čl. 40; Uredba o uslovima i kriterijumima usklađenosti horizontalne državne pomoći (dalje u fusnotama; Uredba o horizontalnoj pomoći), čl. 50; Pravilnik o kriterijumima, čl. 108.

invalidima, te njihove obuke; 3) za prilagođavanje ili nabavku opreme koju invalidna lica koriste u radu ili rehabilitaciji; 4) za prevoz zaposlenih invalida u vezi s njihovim zaposlenjem, kao i invalida koji se u preduzeću rehabilituju; 5) za naknadu zarada invalida koji su na rehabilitaciji u preduzeću; 6) za izgradnju, instaliranje i osavremenjivanje proizvodnih linija preduzeća; 7) za administraciju u vezi sa zaštićenim zapošljavanjem invalida. Preduzeće ima pravo na potpunu naknadu opravdanih troškova unapređenja svoje delatnosti, ali najviše 10 miliona evra u jednoj poslovnoj godini. Novac za ovu svrhu se daje iz Budžetskog fonda za rehabilitaciju invalida.[59]

Treća vrsta povlastica se odnosi na olakšice u obavezama plaćanja javnih prihoda. Preduzeće za zapošljavanje invalida ima pravo na poresku olakšicu u vidu oslobođenja od obaveze plaćanja poreza za isplaćenu zaradu za svakog invalida kojeg zaposli na neodređeno vreme u trajanju od tri godine od kad je sa njima zasnovalo radni odnos. Ono se oslobađa i od obaveze plaćanja doprinosa za obavezno socijalno osiguranje za svakog invalida kojeg zaposli na neodređeno vreme, takođe, u trajanju od tri godine od zasnivanja radnog odnosa.[60]

2.4. Položaj preduzeća za zapošljavanje osoba s invaliditetom na tržištu

Ako se razmotre zakonske prednosti i nedostaci pravnog režima preduzeća za zapošljavanje invalida, uočava se da je reč o povlašćenom privrednom subjektu na tržištu. Takav zaključak se izvodi metodom upoređivanja povlastica (posebnih prava), ali i obaveza, koje po zakonu ima preduzeće za zapošljavanje invalida sa onim koje imaju ostali privredni subjekti, kao poslodavci.

Ako se uporede posebna prava preduzeća za zapošljavanje invalida u odnosu na ostale privredne subjekte, uočava se da je glavna njegova povlastica u državnim subvencijama za zarade zaposlenih invalida. Ona je veća po obimu i trajnija, nego što je imaju ostali privredni subjekti, kao poslodavci invalida. Naime, preduzeće za zapošljavanje invalida ima pravo na subvenciju od 75% bruto zarade za stalno zaposlenog invalida, pri čemu ona traje dok je on kod njega zaposlen. Za razliku od toga, ostali privredni subjekti imaju pravo na ovu subvenciju u istom procentu, ali samo za stalno zaposlenog invalida bez radnog iskustva, i to samo u trajanju od godinu dana. Osim toga, dok je gornja granica subvencije zarade invalida kod preduzeća koje ga zapošljava polovina prosečne bruto zarade po zaposlenom u Srbiji, ona je kod ostalih privrednih subjekata samo minimalna zarada po zaposlenom u Srbiji. Kako

59 Zaštićeno zapošljavanje invalida postoji kad poslodavac zapošljava najmanje 30% invalida u ukupnom broju svojih zaposlenih. Pošto preduzeće za zapošljavanje invalida mora da ima najmanje polovinu invalida u ukupnom broju zaposlenih, svakako da ispunjava uslov sa uživanje ove vrste povlastica. Vid. ZPRZOI, čl. 41; Uredba o horizontalnoj pomoći, čl. 51.

60 Ovu vrstu povlastica nemaju poslodavci koji su budžetski korisnici, kao što su državni organi, državne organizacije (npr. Komisija za zaštitu konkurencije), državne ustanove (npr. škole) i javna preduzeća, jer se inače finansiraju ili mogu da se finansiraju iz budžeta. Vid. Zakon o porezu na dohodak građana, čl. 21g; Zakon o doprinosima za obavezno socijalno osiguranje, čl. 45b.

je polovina prosečne zarade obično veća od minimalne zarade, zaključuje se da je i maksimalna subvencija za stalno zaposlene invalide kod preduzeća za njihovo zapošljavanje veća od one za ostale privredne subjekte.[61]

Dodatna prednost preduzeća za zapošljavanje invalida u odnosu na njihove ostale poslodavce, za koje važi kvotni sistem, tiče se prava na naknadu troškova koje je snosilo za unapređenje svoje delatnosti radi zaštićenog zapošljavanja invalida. To su troškovi izgradnje, instalacije i osavremenjivanja proizvodnih linija, troškovi prevoza i administrativni troškovi nastali usled zapošljavanja invalida. Pravo na njihovu potpunu naknadu od države preduzeće za zapošljavanje invalida ima uvek, jer ispunjava zakonski uslov za njegovo sticanje, pošto mora da ima polovinu zaposlenih invalida u ukupnom broju svojih zaposlenih. Ostali privredni subjekti to pravo imaju samo ako zaposle najmanje 30% invalida u ukupnom broju svojih zaposlenih. Pošto su ostali privredni subjekti obavezni da zapošljavaju samo dva posto invalida od ukupnog broja svojih zaposlenih, retko koji od njih će ispuniti uslov za sticanje ove vrste povlastice.[62]

U ostalim posebnim pravima prema državi po osnovu zapošljavanja invalida preduzeće za njihovo zapošljavanje je pravno izjednačeno sa ostalim privrednim subjektima. Reč je o pravu na olakšice u obavezama plaćanja javnih prihoda (poreza i socijalnih doprinosa) i pravu da od države naknade troškove koje su snosili za prilagođavanja radnih mesta za zaposlene invalide, te troškove upošljavanja trećih lica koja im pružaju pomoć u radu, kao i o maksimalnom ukupnom iznosu od 10 miliona evra godišnje koje kao naknadu mogu da dobiju za navedene troškove. Ova tvrdnja je tačna ako se navedena prava posmatraju jedinično, odnosno po glavi zaposlenog invalida. U praksi je, međutim, ukupan zbir svih novčanih iznosa jediničnih pomoći i olakšica preduzeća za zapošljavanje invalida obično veći od onog koje imaju ostali privredni subjekti, iz razloga što ono po pravilu srazmerno zapošljava veći broj invalida.

Preduzeće za zapošljavanje invalida ima povlastice, ali i *pojačane obaveze* u odnosu na ostale privredne subjekte. Prvo, ono mora da zaposli srazmerno veći broj invalida od ostalih privrednih subjekata. Najmanje polovina njegovih zaposlenih moraju da budu invalidna lica, dok ostali privredni subjekti moraju da zaposle najmanje dva posto invalida. Drugo, preduzeće za zapošljavanje invalida svakako mora da ima najmanje pet stalno zaposlenih invalida, dok ostali privredni subjekti koji imaju manje od 20 zaposlenih, ne moraju da zaposle nijednog invalida. Ako plate doprinos u Budžetski fond za rehabilitaciju invalida, ili ako nabave od preduzeća za invalide robu ili usluge u propisanoj novčanoj vrednosti u jednoj godini, oslobođeni su za tu godinu da zaposle jednog invalida, iako imaju dvadeset ili više zaposlenih. Treće, ostali privredni subjekti ne moraju da zaposle nijednog invalida za koje je

61 Prosečna bruto zarada po zaposlenom u Srbiji za oktobar 2021. godine bila je 91.132 dinara (vid. *Sl. glasnik RS*, 127/2021), dok je za isti mesec minimalna zarada bila 45.470,70 (*Sl. glasnik*, br. 87/2021). Iz tog se zaključuje da je gornja granica subvencije po zaposlenom invalidu kod preduzeća za njihovo zapošljavanje za navedeni mesec neznatno viša od one za ostale poslodavce.

62 Uredba o horizontalnoj pomoći, čl. 51.

potrebno prilagođavanje radnog mesta, ako poštuju njegovu ravnopravnost u zapošljavanju sa zdravim licima. Naprotiv, preduzeće za zapošljavanje invalida mora da zapošljava najmanje desetinu takvih invalida od ukupnog broja svojih zaposlenih. Četvrto, ono mora da uposli najmanje tri stručna lica za rad sa invalidima, dok ostali privredni subjekti ne moraju da ih uposle. Oni moraju da uposle „pomagača" za invalida, samo ako je to potrebno zbog prirode njegove poteškoće.

Objašnjenje povećane obaveze preduzeća za zapošljavanje invalida su, u stvari, diskriminatorske zakonske mere u njegovom položaju na tržištu u odnosu na ostale privredne subjekte, kao njegove konkurente.[63] Zbog toga, ova vrsta preduzeća redovno može da postigne slabiji radni učinak i rezultate u poslovanju, kao i što ima povećane troškove u svom poslovanju u odnosu na ostale privredne subjekte.

VIII ZAKLJUČAK

Upoređivanjem mera povlašćivanja i mera diskriminacije preduzeća za zapošljavanje invalida sa položajem ostalih privrednih subjekata, zaključuje se da ono jeste povlašćen privredni subjekt (učesnik na tržištu), ali ne bitno. Njegove povlastice bitno se „ništе" (potiru) povećanim obavezama koje imaju radi rehabilitacije i zapošljavanja osoba s invaliditetom, a koje nemaju ostali privredni subjekti. Iako je njihova povlašćenost na tržištu neznatna, može se postaviti pitanje da li je ona u skladu sa ustavnim načelom ravnopravnosti svih učesnika na tržištu (čl. 84 Ustava). Može li se zbog toga osporiti i ustavnost zakonskih i podzakonskih pravila kojim se uređuju povlastice, ali i povećane obaveze preduzeća za zapošljavanje invalida u odnosu na ostale privredne subjekte?

Utisak je, ipak, da takvo osporavanje nije opravdano, ne samo iz ljudskih, već i iz pravnih razloga. Osnovni pravni razlog sadržan je u dva ustavna pravila o položaju invalida. Prvo pravilo je opšte, a to je zabrana diskriminacije (Ustav, čl. 21). Ono se ne odnosi samo na invalide, već i na sve ostale ljude i društvene grupe koje su u suštinski lošijem društvenom položaju u odnosu na ostale građane (npr. deca, žene, siromašni, izbeglice). Ovim pravilom se izričito određuje da se diskriminacijom ne smatraju posebne mere (tj. propisi i njihova primena), koje država može da preduzme radi otklanjanja suštinske neravnopravnosti spomenutih grupa lica, uključujući i invalide. Drugo pravilo je posebno i njima se posebno uređuje pojačana zaštita na radu invalida, ali i žena i dece (Ustav, čl. 60 st. 3). Njim se određuje da se invalidima omogućava posebna zaštita na radu i posebni uslovi rada, a što se detaljnije uređuje zakonom. Jedan od načina posebne zaštite invalida i omogućavanja posebnih uslova rada jeste preduzeće specijalizovano za njihovo radno osposobljavanje i zapošljavanje. Iz toga se zaključuje da je ono u skladu sa našim ustavom.

63 Lj. Kovačević, takođe, smatra da su nerazumno nametnuti troškovi prilagođavanja radnih mesta diskriminacija poslodavca na tržištu u odnosu na ostale poslodavce. Vid. Kovačević (2013), 177.

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LEGAL STATUS OF COMPANIES FOR EMPLOYMENT OF PERSONS WITH DISABILITIES IN SERBIA

Abstract

In this paper, the author contemplates the status of companies, which employ persons with disabilities, within the legislation of Serbia. His research in this topic is stressed especially to the companies with a purpose of professional rehabilitation and employment of persons with disabilities. He puts a question if these companies are in accordance with the constitutional principle of equality of all commercial entities on the market, especially having in mind the rules of fair competition. Since the companies for professional rehabilitation and employment of persons with disabilities enjoy economic privileges under the current legislation of Serbia, especially in the form of state aid, the question is if their status means discrimination of other market participants. The author explains the notion of persons with disabilities, terminological dillemas, systems of employment of persons with disabilities, companies for employment of persons with disabilities, the legislative motives for their special status on the market and their privileges. He compares the legal status of such companies with the status of other employers, who have the general legislative obligation to employ persons with disabilities, but does not have the same privileges. His analyse is based on the Serbian and comparative law, with a special insight of the law of the European Union in this field. The final conclusion is that the companies for employment of persons with disabilities are constitutional ones, in spite of the fact that their privileges are not provided in the same volume to other employers of persons with disabilities, due to the constitutional rules on social protection of persons with disabilities.

Key words: *Persons with disabilities; Companies; Employment.*

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SOCIAL ENTERPRISES AS A MEANS OF EMPOWERING WOMEN WITH DISABILITIES – KEY LEGAL ASPECTS

Abstract

Social enterprises ensure so called sheltered employment for persons with disabilities along with organizations, workshop centers and enterprises for occupational rehabilitation and employment of persons with disabilities. This is a relatively new form of employment for persons with disabilities in Serbian law, while in some other legal systems it has been used since the 1980's. In particular, the term social enterprise, in national legislation was established by the Law on Occupational Rehabilitation and Employment of Persons with Disabilities (2009), while in 2021 Draft Law on Solidarity Entrepreneurship was created with the aim of encouraging the employment of marginalized groups including persons with disabilities.[64] *It is a necessary precondition for the development of the third sector, which is considered to be determining in correcting market failures, hence employment of persons with disabilities in the open market. The paper will point out the shortcomings that social enterprises face in practice (inadequate and/or non-existent legislation, lack of financial resources), but also the positive circumstances that contribute to the economic security of hard-to-employ groups, including persons with disabilities, because of the assumed prejudices related to their lower work efficiency. Therefore, social enterprises are seen as a powerful instrument of social policy and empowerment of persons with disabilities. Since disability is perceived not only through the optics of the degree of impairment of individuals working abilities, but also through the reaction of society in terms of providing equal opportunities with guaranteed rights. This concept is of particular importance for women with disabilities who, due to intersectional discrimination in the labor market, face the problem of finding suitable employment. Furthermore, the differences will be analysed between social and traditional companies and other legal entities i.e. organizations, associations, cooperatives. Particularly because social enterprises operate in different forms depending on national circumstances, and that in comparative law but also in Serbian law, the notion social enterprise is determined primarily on the basis of certain characteristics of this type of business.*

Key words: *Women with disabilities; Employment in the open market; Sheltered employment; Social entrepreneurship; Social enterprise.*

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* At the time of submitting the paper, the Draft Law on Solidarity Entrepreneurship had been proposed, but in the meanwhile the Law on Social Entrepreneurship was adopted.

I INTRODUCTION

Despite protection guaranteed by antidiscrimination legislation, persons with disabilities are still unemployed, underemployed and excluded from the labor market. The employment situation is even worse when it comes to women with disabilities who are cumulatively disadvantaged and marginalized.[1] Namely, women with disabilities are treated less favorably in the recruiting process and at workplace than their male counterparts and women without disabilities. This is because women with disabilities are often seen as not capable enough to deal with demanding work assignments and thus sufficiently contribute to the enterprise.[2] It means that employers' bias, prejudice and stereotypes vary by how disability interacts with other characteristics such as gender. The combination of these categories creates a negative synergy which leads to the multiple discrimination in practice.[3] That is to say that women with disabilities may be powerless as a result of structural factors associated with the intersection of multiple layers of difference like gender paired with disability.[4] Hence, the empowerment of women with disability to access employment opportunities of their choice is at the center of public policy. Originally, policy holding on persons with disabilities was based on a personal tragedy point of view to disability in which impairment was conceived as a personal problem, not a social one.[5] Such lopsided conceptual orientation was placed to stop disabled men and women from work in industries. The huge shift came with the observation of disability from a social angle which takes into account necessity of exercising fundamental rights for persons with disabilities including right to work.[6] Certainly, public enlightenment on appropriate attitude toward persons with disabilities has contributed to the rapid growth of a sheltered employment workshops.[7] However, the

1 Karolina Pawłowska Cyprysiak and Maria Konarska, 'Working life of women with disabilities – a review', *International Journal of Occupational Safety and Ergonomics*, Vol. 19, No. 3, 2013, 409; David Pettinicchio and Michelle Maroto, 'Employment outcomes among men and women with disabilities: how the intersection of gender and disability status shapes labor market inequality', *Research in Social Science and Disability*, Vol. 10, No. 11, 2017, 4.

2 *Cf.* Ljubinka Kovačević, *Zasnivanje radnog odnosa*, (2021), 235.

3 Instead of using one-dimensional approach professor Kimberlé Crenshaw was the first to underline the importance of multidimensionality in analysing discrimination. Regrettably, the Convention on Elimination of all Forms of Discrimination against Women is still using outdated one-dimensional approach in determing the existence of discrimination in each case. United Nations Committee on the Rights of Persons with Disabilities, General discussion on women and girls with disabilities, (2014), 14, *https://fundacioncermimujeres.es/sites/default/files/general_discussion_on_women_and_girls_with_disabilities.pdf*.

4 See study on intersection of gender and disability in shaping labor market outcomes among persons with different types of disabilities. Pettinicchio and Maroto, *op. cit.*, 5.

5 Kovačević, *op. cit.*, 236.

6 *Ibid*.

7 Before the sheltered employment was put in place by governments in scientific circles disability was already started to be conceived as a restriction of activity and injury of entitlements for persons with disabilities caused by social organizations, public institu-

defining features of a sheltered workshops appear similar to that of a social enterprise therefore we will begin with elucidating the notion of social enterprise. Social enterprises are the innovative entrepreneurial initiatives directed to yield social benefit for marginalized groups. Depending on the goals of their establishment, social enterprises can be of great significance in combating unemployment of persons with disabilities particularly women with disabilities. Overall, we hypothesize that expansion of employment choices through legally recognized social enterprise model may economically empower women with disabilities.[8]

II DEFINING SOCIAL ENTERPRISE: A DIFFICULT OR IMPOSSIBLE TASK

Interest in social enterprises and social entrepreneurship might be encountered in many disciplines, such as law, economy, sociology, management, political science etc. In spite of that, the term social enterprise is not used with a single meaning. The absence of a comprehensive social enterprise definition (both theoretical and statutory) becomes an international subject matter amongst scholars and practitioners as well.[9] The reason for non-consensus, not just in one field of research, but in general, can be found in a fact that social enterprise is not a name for one specific type of enterprise.[10] Rather it is a new name for already existing forms of business operations and nonprofit organizations with a difference concerning theirs activities which are permeated with mixed socio-economic goals.[11] Therefore, social enterprises

tions and private undertakings. Vera Gelashvili, Eva Aguilar Pastor, María Jesús Segovia Vargas, María del Mar Camacho-Miñano and Teresa Blanco Hernández, 'Social entrepreneurship in sheltered employment centres: a case study of business success' in Saiz-Álvarez, José Manuel (eds) *Handbook of research on social entrepreneurship and solidarity economics* (2016), 446.

8 As a matter of fact there is evidence of social enterprises breaking down the dichotomy between 'the empowerer' and 'the empowered'. See British Council, Activist to entrepreneur: The role of social enterprise in supporting women's empowerment (2017), 8, *https://www.britishcouncil.org/society/social-enterprise/activist-entrepreneur-role-social-enterprise-supporting-women%E2%80%99s-empowerment*.

9 Mišo Dokmanović, Goran Koevski, Darko Spasevski, 'Is social entrepreneurship achievable in Macedonia? An analysis of the historical background, potentials and perspectives for concept development', *Revija za socijalnu politiku*, Vol. 23, No. 2, 2016, 197; Jay Weerawardena and Gillian Sullivan Mort, 'Investigating social entrepreneurship: a multidimensional model', *Journal of World Business*, vol. 41, no. 1, 2006, 22; Ana María Peredo and Murdith McLean, 'Social entrepreneurship: a critical review of the concept', *The Journal of World Business*, vol. 41, no.1, 2006, 54; Carlo Borzaga and Jacques Defourny, 'Conclusions: social enterprises in Europe, a diversity of initiatives and prospects' in: C. Borzaga and J. Defourny (eds), *The emergence of social enterprise* (2001), 365.

10 Agreement is emerging that understanding of social entrepreneurship and social entrepreneurs is fundamental. Of course those expressions can be used as determinants in clarifying social enterprise concept but not as its replacement although being an easier approach than social enterprise designation. Weerawardena and Mort, *op. cit*., 24.

11 Peredo and McLean, *op. cit.,* 60.

are associations, foundations, organizations whose main objective is to have a social impact based on non-profit principles. That is why it was necessary to set an all-embracing category for a wide range of juridical entities undertaking economic activities in the social field. In other words, social enterprise is a generic term for a variety of legal structures operating in a third sector of economy which is considered to be placed between the state (first sector) and market (second sector).[12] That means that the third sector is gathering together different models of institutions which combine entrepreneurial and social or societal features. In that sense social enterprises can be regarded as a subdivision of third sector, in spite that they also set out the process, the new entrepreneurial spirit with social mission.[13]

Introduction of third sector economy is significantly connected with the loss of the welfare state.[14] That has lead to the recomposition between state, market and civil society in relation to the provision of public services and work integration.[15] Moreover, it can be said that social enterprises are taking on a rule of the welfare state in providing social services and creating new jobs for disadvantaged people. This process is markedly connected with the shift in labour market policies in terms of giving primacy to active interventions while inquiring complementarity of active and passive support. According to the profit-making school of thought, the position of the state in the social policy field has to be changed with the intention to increase the responsibility of an individual for their own prosperity.[16] Our attitude is diametrically opposed to that thinking since everyone has right to live a life worthy of human dignity. On the same basics stands the emerging language for building a movement to transform economic life.[17]

Today we live in era of 'capitalism', 'industrialism', 'corporatism', 'market system' or 'free-market capitalism' as a twofold name for current economic edifice. As specified, even the simplest version of the competitive market story

12 Yet before the emergence of so-called economic heterogeneity theory the social sciences were denying the value of the third sector in correcting both market and government failures. Borzaga and Defourny, *op. cit.,* 352.

13 Borzaga and Defourny, *op. cit.,* 351.

14 Historically, the welfare state replaced the *laissez-faire* state in which individuals on condition that they act in good faith are free to make decisions and use opportunities to make their own economic and social welfare. Within an idea of having a collective development and economic progress for a long time period flourished the system of state interventionism. Kovačević, *op. cit.,* 36.

15 At this point it is important to achieve a fair redistribution of wealth and an equilibrium in assignments and duties among for-profit providers, public authorities and third-sector organizations. For in-depth examination of 'welfare trinagle' representation see Jacques Defourny and Victor Pestoff, 'Towards a European conceptualization of the third sector' in Ericka Costa, Lee Parker and Michele Andraeus (eds), *Accountability and social accounting for social and non-profit organizations* (2014), 31.

16 *Ibid.*, 39.

17 Ethan Miller, 'Solidarity economy: key concepts and issues' In Emily Kawano, Tom Masterson and Jonathan Teller-Ellsberg (eds) *Solidarity economy I: Building alternatives for people and planet* (2010), 31.

is called with myriad names. The basic building blocks of the market economy are self-oriented individuals or exceptionally groups whose members share the same interests.[18] Undeniably, human beings and decision-making processes are more complex than presented. Rational choice theory is a solid foundation that requires amelioration simply because it does not correspond to reality. In most of the cases people are not united by interest, rather by understanding and compassion, albeit the rational component being naturally present and accompanying. Recognition of interdependence is also important for building sustainable economic framework, while sharing the same values strengthens the nexus between people.[19] For this reason, participants of solidarity entrepreneurship, whether it is a legal entity or a natural person, put solidarity on a pedestal. The existence of a prior sense of belonging as well as collective identity plays a decisive catalytic role.[20] In such a spirit, solidarity economy is seen as an alternative to capitalism which implies transformation of market economy provided that it does not end there.[21] In fact, it must be related with the exact levels of social cohesion so that community dynamics take precedence on individual strategies.[22] Furthemore, the affirmation of the solidarity economy is often accompanied by a scrutiny of neoliberal policies and structural adjustment plans.[23] Proactive approach towards the change of the social environment presupposes invention of business strategy which will give the financial stability and autonomy if necessary to the business organizations. Drawing upon these threads, the solidarity economy is seen as a new form of production and relation between capital and labor, even as a vector of social transformation.[24] Nevertheless, the juxtaposition of social and solidarity economy shows that this two concepts are in tune but different in the main.[25] Hence, conceptual clarification is the first thing on the list to deal with.

18 *Ibid.*, 38.

19 *Ibid.*, 36.

20 Laurent Fraisse, Isabelle Guérin and Jean-Louis Laville, 'Économie solidaire: des initiatives locales à l'action publique. Introduction', *Revue Tiers Monde*, Vol. 2, No. 190, 2007, 247.

21 A group of authors have looked from a different perspective on the subject as they stated that 'the activation of the principle of solidarity is more of an opportunity to improve precarious living conditions than a discerning critique of how the economy works'. It seems more valid to admit and pursue interconnection and subsequent nature between economy and livelihood instead of just disparting them. *Ibid.*, 249.

22 *Ibid*.

23 *Ibid*.

24 Consequently, where socioeconomic innovation does not lead to public recognition through the employment protection measures and redistribution of economic power, its contribution to the renewal of relationships between economy and democracy becomes more fragile. *Ibid.*, 251.

25 Unfortunately, terminological confusion is ubiquitous. Simultaneous use of the term solidarity has commenced in Latin America, in particular in Brazil, while in Ecuador the solidarity and social economy system is organised under the premise of *Buen Vivir*. The demand for an economy anchored in 'tradition' and 'community' is seen in India too, although under a different name – name 'human economy' which is defined both as individual strategies of resourcefulness and survival as well as collective self-organizing initiatives. This new coined term at the local level is used by a minority of organiza-

To begin with, the *solidarity economy* includes the civil, public and private sector, while the *social economy* is for the most part identified with the third sector. Secondly, the solidarity economy strives to change the social and economic system. It has an anti-capitalist character and offers a different paradigm based on the principle of solidarity. On the contrary, the concept of social economy is seen as a corrective and complementary to the current economic system.[26] However, selfishness and greediness are at the heart of economic behavior which is why *homo oeconomicus* should be replaced with another for the social economy more suited concept.[27] It means that philosophical base of social entrepreneur is not corresponding to mainstream economic thought. As correctly remarked in part of the literature, individualism overlooks the second dimension of human nature – the social being.[28] By suppresing philanthropy and morality in behaviour human nature becomes deprived of its basic function. Concurring with that, alternative *homo socio-oeconomicus* construct is proposed with other-centered, public-spirited, communal and altruistic characteristics of a person.[29] Moreover, the efforts to define social entrepreneurship have conceptualized it in terms of the characteristics of a social entrepreneur with reference to the results that social entrepreneurship generates. Social entrepreneurship outcomes are social enterprises, including social businesses using commercial means and non-profit organizations i.e. organizations not owned by shareholders. The same counts for solidarity entrepreneurship since it embraces cooperatives, mutual societies, associations and foundations. Despite, the specificity of the solidarity economy consists in going beyond the legal categories (cooperatives, mutuals, associations) through which the economy was previously defined as social.[30]

In the reports of the International Labour Organization above mentioned organizations are called *Social and Solidarity Economy Organizations*.[31] That

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tions. The absence of unified terminology for these unique form of solidarity action in that country does not mean absence of movements which reestablishment of cooperatives confirms. Mauricio León Guzmán, *Buen vivir en Ecuador: conceptualización, operacionalización, instrumentalización e implicaciones para las métricas y la transformación económica, social y ecológica*, (2020), 194; Fraisse, Guérin and Laville, *op. cit.*, 252.

26 The term social economy derived from French terminology and dates back to the practices of interclass solidarity as a reaction to the economic and social transformations of the industrial revolution influenced by the thought of the utopian socialists of the 19th century. Sorin Cace, *The Social Economy in Europe*, (2010), 14.

27 *Cf.* Edward J. O'Boyle, 'Homo Socio-Economicus: Foundational to social economics and the social economy', *Review of Social Economy*, Vol. 63, No. 3, 2005, 485.

28 *Ibid.*, 489.

29 Tijana Kovačević, 'Aktuelne tendencije u razvoju radnog prava: između deregulacije i pravne sigurnosti', in Jelena Perović Vujačić (ed.), *Zbornik radova 34. susreta Kopaoničke škole prirodnog prava Slobodan Perović „Primena prava i pravna sigurnost"* (2021), 173.

30 Anders Lundström and Chunyan Zhou, 'Rethinking social entrepreneurship. Introduction' in Anders Lundström, Chunyan Zhou, Yvonne von Friedrichs and Elisabeth Sundin (eds), *Social entrepreneurship: leveraging economic, political, and cultural dimensions* (2014), 7.

31 Carlo Borzaga, Gianluca Salvatori and Riccardo Bodini, *Social and solidarity economy and the future of work*, (2017), 16.

is the main reason why solidarity entrepreneurship is identified with social entrepreneurship, while social and solidarity-based enterprises confluence. Given this, maybe the social entreprise is the embryo of the desired solidarity-based enterprise descendant. In any case, social enterprise phenomenon fits perfectly into the idea of developing a social or solidarity economy if it is possible.[32] It should be borne in mind that social enterprises are more than simply a new development of third sector or the solidarity economy and that therefore they deserve separate, far-reaching analyses. Apart from that, social enterprises help in solving the problem of unemployment of persons with disabilities, especially women with disabilities. The ultimate goal of social enterprise is to benefit the society as a whole or only certain members such as persons with disabilities or more precisely women with disabilities. The well-being of that segment of population can be achieved by direct or indirect measures.[33] Direct measures are any kind of assistance for women with disabilities through social services programs, health care system, food banks and others. Indirect measures are more specific and include in the first place employment for women with disabilities.[34] The latter measure is the most accentuated one since dependence on social benefits withdraws negative consequences while employment enables financial stability and independence. Also, job creation policy can be induced with an intention to employ a select group of people in order to provide services to others. For instance, a company might recruit women with disabilities with the aim of raising funds for training and professional development for members of the association of women with disabilities.[35] In that sense, social enterprise is oriented to improve quality of life of the vulnerable groups together with the creation of participatory governance model as a mean of additional empowerment.[36]

As stressed before, social enterprises are demonstrating not only the attractiveness and curiosity of this concept but also the ambiguity surrounding its theoretical definition.[37] Actually, the best way to present the social enterprise concept is through its main attributes. Initially, it was the starting point of the first international researching group on the matter.[38] But with time it

32 *Ibid.*, 14.

33 Socialis – Research Center on Social Cooperatives, Social Enterprises and Non-Profit Organization, Benchmarking Study on Social Entrepreneurship. Austria, Bulgaria, Hungary, Greece, Italy, Serbia, Slovenia, Ukraine (2012), 84 *https://www.ess-europe.eu/en/publication/benchmarking-study-social-entrepreneurship-austria-bulgaria-hungary-greece-italy-serbia.*

34 *Ibid.*, 40.

35 *Ibid.*

36 *Ibid.*, 84.

37 Lundström and Zhou, *op. cit.,* 7.

38 According to the Research Network for Social Enterprise (EMES), the key features of social enterprises are divided into two main groups. One group is made of criteria that are more economic while the other category consists of prevailing social indicators. Basically, all of them can be reduced to the three central indicators: 1) simultaneously achieved financial and social results under the market rules 2) distribution of profit in constrained

becomes the only safe way to successfully integrate all crucial elements in one place. This does not mean that a clear-cut definition of the social enterprise is unnecessary. Clear intrepretation of social entreprise concept will exclude residual entities which have some of the characteristics of social enterprises but not fall under its definition.[39] To illustrate, social enterprises are *inter alia* conceived not only as an organizational and/or institutional figure of the voluntary sector, but also as a commercial companies, even those listed on the stock exchange as long as they comply with the elements of the definition.

Wide range of social enterprise definitions are offered in academic literature and popular discourse. Most of them significantly rely on the approach used by the European Research Network. For example, Defourny and Nyssens proffer social entreprise idea as an institutional arrangement explicitly aimed at pursuing a social goal, through the carrying out of economic activities, in a stable and continuous way.[40] In the minority are the experts who do not insist on continuance while conducting entrepreneurial activities for social enterprise denotation. By contrast, authors from US perfer to say that social entreprises are 'running commercial activities not necessarily linked to the social mission, but with the goal of collecting incomes to fund a social activity'.[41] For the sake of preservation of clarity within the social enterprise concept this approach should not be accepted leaving aside the fact that it weakens the core basis of social entrepreneurship.

Interestingly, the concept of social enterprise is also viewed as unique and peculiar way in doing business which means that social enterprises are considered to be businesses in their nature.The emphasis on the entrepreneurial element in the social enterprise syntagm is given especially in the law of the UK.[42] Consequently, this viewpoint can blur the boundaries between traditional enterprises and social enterprises.[43] In a nutshell, difference can be made in respect of the purpose of the companies presence in the market. Traditional companies are established and conduct businesses with the aim of

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fashion and 3) employees and other stakeholders are involved in making the strategic decisions influencing in that way the governance of the organization. Barrera Duque Ernesto 'La empresa social y su responsabilidad social', *INNOVAR. Revista de Ciencias Administrativas y Sociales*, Vol. 17, No. 30, 2007, 63.

39 *Cf.* Katherine Isabel Rostron, 'Defining the Social Enterprise: A tangled web', *International Journal of Management and Applied Research,* Vol. 2, No. 2, 2015, 87.

40 For extended definition of social enterprise given by same scholars see Giulia Galera and Carlo Borzaga 'Social enterprise: An international overview of its conceptual evolution and legal implementation', *Social Enterprise Journal*, Vol. 5, No. 3, 2009, 225.

41 Galera and Borzaga, *op. cit.,* 214.

42 Rostron, *op. cit.,* 88.

43 Pearce's orientation of social enterprises is distinct since he claims that there is no space for false dichotomy between social enterprises and traditional companies. These two businesses organizations, unlike non-profit organizations, occupy adjacent room within the market driven economy. However, the blurring line arises if every commercial enterprise needs to satisfy two inseparable requests deep-rooted in a way how social enterprise operate. The first one is the social relevance of its activity while the second is long-term financial viability. Rostron, *op. cit.,* 94.

gaining profit for its members.[44] On the other hand, social enterprise tends to create social value and therefore benefit the society as a large, rather than benefit just one person or shareholders as a separate group.[45] Indeed, behind social enterprise stand philanthropic mission and radically new way of managing, functioning and thinking. In short, what is unattractive and unprofitable to commercial enterprise for social enterprise is a good opportunity for action.[46] Furthermore, sharing a piece of a financial pie in social enterprises is restricted in order to save resources and bring it back to the organization.[47] In the case of a closure of social enterprise, transferring of assets and liabilities to one or more enterprises registered as social enterprises is mandatory.

Generally speaking, we can distinguish social enterprises on a couple of levels. First are the social enterprises driven by the aim of tackling specific socio-economic problems, regardless of whether they rely on entrepreneurial business structure. The antagonistic position on the scale is taken by social enterprises that strive to achieve social goals but subdue them to the financial objectives. In between are placed social enterprises which tend to achieve social goals and those which pursue social goals together with others related to them or not companies targets.[48] In essence, selection criteria is the company's attitude towards social problems and the ranking position of the strategies to resolve them. In all, defining social enterprise is not an easy task not just because some of its features are overlapping with the features of conventional enterprise but also because the mode of operation within that legal entity can defer.

III INEQUALITIES IN THE EMPLOYMENT OF WOMEN WITH DISABILITIES

The right to work is one of the basic human rights by which exercising an individual can acquire not only means for its living needs, but also the means with it can significantly improve its quality of life. Hence, this right is essential for realizing other human rights and constitutes an inseparable and inherent part of human dignity. At a time when the right to work was still in its infancy the ardent advocate for its constitutionalization Charles Fourier held that 'we have lost centuries in petty human rights disputes, but we have not even thought about recognizing the most basic right, such as the right to work, without which all other rights become nothing'.[49] This quotation

44 Tijana Kovačević, 'Pravilo poslovne procene', *Strani pravni život*, Vol. 64, No. 2, 2020, 144.

45 Borzaga and Defourny, *op. cit.,* 354; Galera and Borzaga, *op. cit.,* 213.

46 Galera and Borzaga, *op. cit.,* 216.

47 The legal framework for social entreprises in Finland is the exception of a rule of restricted participation in profit. *Ibid*.

48 Fulfilling the request of meeting the public pressure to demonstrate a social commitment does not define an enterprise as a social. It is more a *corporate social responsibility* conduct of a traditional company. Peredo and McLean, *op. cit.,* 65.

49 Ratko Pešić and Vlajko Brajić, *Radno pravo* (1979), 197. The right to work is confirmed in the most important UN and ILO documents: UN Charter, Universal Declaration of

is truly perpetuated considering the position which right to work takes in the system of human rights classification. The Declaration of Philadelphia (1944) recalls that 'labour is not a commodity', and that 'all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity'.[50] Although right to work was given the stamp of approval this essential right continues to be denied to persons with disabilities especially women with disabilities. From a gender perspective, men with disabilities are better integrated in the labour force than women with disabilities which does not mean that they do not face challenges in the labour market either.[51]

Continuous databases that use fixed indicators and regularly monitor changes related to the number, employment status, social inclusion and life satisfaction of persons with disabilities do not exist in the Republic of Serbia. Dealing with this group of the population is sporadic, relevant data is either not widely available or does not exist at all.[52] The only information we could find is that out of the total number of persons with disabilities which represent approximately 8% (7.96) of entire population, more than 58% (58.2) are women, while men are slightly less than 42% (41.8).[53] It remains unknown how many of them are really working and on what legal basis that work is performed, whether it is a open-ended employment contract, fixed-term or casual, full-time or part-time perhaps.

In 2011 only 23 202 persons with disabilities were registered with the National Employment Service, which is unrealistic since it is assessed that almost 69% of persons with disabilities are inactive.[54] The reason for such a high percentage of inactivity among persons with disabilities is explained by the employer's assumed prejudices related to their lower work efficiency. Financial costs of adapting the workplace to the needs of persons with disabilities disincentives employers to give them working opportunities.[55] Consequently, persons with disabilities are discouraged from looking a job in the formal economy. Precisely, this part of the population is often engaged in unpaid forms of employment including indoor housework. Hence, the only source of income are unemployment benefits, since there are few countries in the world which provide disability benefits for persons with disabilities who

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Human Rights, International Covenant on Economic, Social and Cultural Rights, ILO Constitution. Also, the right to work is the cornerstone of the idea of developing a single European market better known as social Europe.

50 ILO Declaration of Philadelphia, part II.

51 Cyprysiak and Konarska, *op. cit.,* 410.

52 Milan M. Marković, Popis stanovništva, domaćinstava i stanova 2011. u Republici Srbiji: Osobe sa invaliditetom u Srbiji, (2014), 20, *http://publikacije.stat.gov.rs/G2014/Pdf/G20144013.pdf*.

53 On the contrary, women with disabilities remain a minority in the USA, representing 48.3% of all disabled individuals able to work. For detailed comparative employment rate statisticts see Cyprysiak and Konarska, *op. cit.,* 409.

54 Marković, *op. cit.*, 70 *et seq.*

55 Kovačević, *op. cit.*, 242.

are able to work but they can not find suitable employment on their own neither through the state employment programs.[56] Fundamentally, the decision to participate in the labour market may be influenced by the availability of other sources of income not derived from work (disability benefits, unemployment benefits, spouse's income). Therefore, extremely low work participation of persons with disabilities worldwide is an issue of a complex nature.

When it comes to work integration of both women and men with disabilities in the USA labour market, men with disabilities are almost twice as likely to have jobs than women with disabilities. Among working aged adults with disabilities, three out of 10 (32%) work full or part-time, compared to eight out of 10 (81%) of those without disabilities.[57] However, three out of every four (76.5%) disabled women of working age are out of the labour force.[58] In addition, statistics are done in regard to degree and type of disability since it may affect working ability. Remarkably, 24.7% of women with a severe disability and 27.8% of men with a severe disability are employed, while women with a non-severe disability have an employment rate of 68.4% and men with a non-severe disability have an employment rate of 85.1%.[59] Regrettably, the unemployment rate among women with disabilities is not lower in other countries.[60] Actually, it becomes a matter of concern since some legal regimes are looking for employment status as a precondition to obtain health care treatment. Fulfillment of that precondition might be almost unachievable for women with disabilities taking into account that they often experience unequal hiring and promotion standards. Moreover, at the time of the crisis caused by the pandemic, access to social insurance based on employment became even more problematic for women with disabilities.

IV SOCIAL ENTERPRISE MODEL OF EMPLOYMENT

Social enterprises involve the continuation of an enclave or sheltered model which was established after the Second World War to provide sup-

56 *Ibid*.

57 Results of the research conducted in Croatia in 2009 show that women with disabilities are more at risk of social exclusion and that their quality of life is more endangered. Situation is identical even in developed countries. Namely, a study conducted in Michigan found that the predictors of quality of life of women with chronic illness or disability are health and social well-being. The findings of studies that focus on the quality of life of women with intellectual disabilities place emphasis on the very often denied right to be independent while making decisions. M. M. Marković, *op. cit.*, 72; Gordana Rajkov, Prepreke za jednakost – dvostruka diskriminacija žena sa invaliditetom: Sažetak zbirke tekstova o ženama sa invaliditetom i izvod iz informativne publikacije o ženama sa invaliditetom Svetske organizacije osoba sa invaliditetom DPI, (2004), 9 *et seq*, *http://www.cilsrbija.org/ebib/Zene_sa_invaliditetom.pdf*.

58 Marković, *op. cit.*, 73.

59 *Ibid*.

60 On a global scale women with disabilities are excluded from the paid labor market in 75% of cases, and up to 100% in developing countries. *Ibid*.

ported employment to recovering wounded or disabled soldiers.[61] However, sheltered workshops have evolved so that they become a segregated organizational spaces for workers who are unable to take up work in the open labour market whatever the cause of barrier may be. In other words, sheltered employment is 'an alternative to conventional employment for those individuals who, for a variety of reasons, are unable to secure or remain in employment as a direct result of exclusionary practices attributed to their disability'.[62] Given this, sheltered employment can be described as employment in a segregated facility where most people have disabilities, with permanent work-related guidance, assistance and supervision. Some scholars validly criticize the sheltered employment model to be pro-corporate as it does not challenge the way in which work activities are coordinated by mainstream industrial organization.[63] More it seems that sheltered workshops, where persons with disabilities assemble production-line, segregate 'less able' workers from ordinary organizations. Instead of integration, persons with disabilities are offered with isolation from society and able-bodied people in a allegedly supportive environment.[64]

Sheltered workshops should not be closed spaces for 'outsiders' who are due to their disability excluded from the 'ordinary world' but work-oriented institution in which job performance of disabled workers are controlled with precisely defined professional goals of each individual that enable them to gain work experience in order to advance in the sense of socialization and professional status.[65] Moreover, the very basis of the word 'sheltered' refers to a protective setting where persons with disabilities can undertake paid meaningful employment to cover their basic needs. But because sheltered employment has its inherent limitation in the spheres of self-determination, autonomy and empowerment, an alternative employment choice was put forward. Figuratively speaking, in the twilight of the rigid sheltered employment

61 Labor enclave represents a specific legal agreement between an ordinary company called a collaborating company and a sheltered workshop for the realization of tasks that have derived from the normal activity of the company. José Barea Tejeiro and José Luis Monzón Campos, *Economía social e inserción laboral de las personas con discapacidad en el País Vasco*, (2008), 42.

62 Gemma L Bend and Vincenza Priola, 'There is nothing wrong with me: The materialisation of disability in sheltered employment', *Work, Employment and Society*, Vol. 1, No. 9, 2021, 3.

63 Ariella Meltzer, Rosemary Kayess and Shona Bates, 'Perspectives of people with intellectual disability about open, sheltered and social enterprise employment: Implications for expanding employment choice through social enterprises', *Social Enterprise Journal*, Vol. 14, No. 2, 2018, 227; Bend and Priola, *op. cit.,* 5.

64 Bend and Priola, *op. cit.*, 5.

65 'Paid work itself has the obvious benefit to individual workers of enhancing one's financial well-being and combating poverty, but other benefits to traditionally marginalized people include greater integration and interaction in the community, improved health and hygiene, and other feelings of self actualization, efficacy and empowerment that come with the pursuit of purposeful, meaningful activity'. Rosemary Lysaght, Terry Krupa and Melanie Bedore, *Social enterprise as an employment option for adults with intellectual and developmental disabilities*, (2004), 4.

model the more flexible social enterprises model gave birth. Actually, it may be said that through social entreprises sheltered workshops are taking the new role since the latter were previously designed as a transit mechanism to regular labour market.[66]

On one side, there are a set of sheltered workshops depending on the type of disability, while on the other side, there are no sheltered workshops established for the employment of women with disabilities. By contrast, some social enterprises are developing with the aim to promote social and professional inclusion of women with disabilities. For instance, Nuneaton Signs based in Warwickshire, is one of the foremost signs making organizations in the UK which actively employs disabled people, with women making up a quarter of its workforce.[67] Except for this example, in general, a small portion of the social sector is contributing to the economic empowerment of women with disabilities to a satisfactory extent, albeit it has the potential. Remain firmly *entrenched* that social enterprises are capable of generating profit to address socioeconomic issues of women with disabilities particularly when that has been a specific objective of their establishment. Regrettably, social enterprises rarely list empowering women with disabilities among theirs core objectives.[68] That being the case proves the relatively high proportion in unemployment which is taken by women with disabilities in comparison to the men of same physical condition. Some authors have shown that social enterprise is an under-utilized source of funding for gender equality.[69] Relatedly, the primery goal of social enterprises should be achieving gender parity in employment.

V VIEW FROM SERBIA

Serbian Law on Occupational Rehabilitation and Employment of Persons with Disabilities (2009) is an example of good legislative practice towards employment in segregated work settings.[70] According with the Law employment of persons with disabilities in the open market must take precedence, while sheltered employment is used for persons who, due to the level of their disability, cannot fulfill their need for economic security in the manner previously indicated.[71] It means that jobs can fall along a spectrum with open employment at one end and sheltered workshops at the other, as long as the

66 Meltzer, Kayess and Bates, *op. cit.*, 227.

67 British Council, *op. cit.*, 11 *et seq.* See related blog *https://www.socialenterprise.org.uk/blogs/social enterprises-supporting-gender-empowerment-what-does-it-mean-and-how-do-we-get-there/*

68 *Ibid.*, 5.

69 *Ibid.*

70 The Law on Occupational Rehabilitation and Employment of Persons with Disabilities, *Official Gazette of the Republic* of *Serbia*, Nos. 36/2009 and 32/13. Long-running tradition in providing protection to persons with disabilities last from the period of Nemanjić dynasty (Zakonopravilo or Krmčija Svetog Save).

71 Kovačević, *op. cit.*, 244.

impairment is sever. Notably, this regulation was brought in line with ratified Convention on the Rights of Persons with Disabilities.[72] In terms of work and employment, Article 27 of the Convention on the Rights of Persons with Disabilities requires that States parties recognize the right of persons with disabilities to work on an equal basis with others, including their right to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible.[73]

Serbian law which regulates the position of persons with disabilities stipulates that the special forms of employment and work opportunities of persons with disabilities can be run as social enterprises, but also as companies for professional rehabilitation and employment of person with disabilities and workshop centres.[74] In this regard, a distinction should be made between special forms of employment of persons with disabilities and employment of persons with disabilities under special conditions, which means adjusting working conditions to the needs of employees with disabilities. To be precise, adjustment of work means accommodating the work process and work tasks to the level of working ability of a person with disability. On the other hand, adaptation of the workplace includes conforming technical and technological equipment to the capabilities and needs of each disabled worker.[75]

More importantly, Serbian Law on Occupational Rehabilitation and Employment of Persons with Disabilities was the first to use the term social enterprise which, according to this act, refers to 'a company established to perform activities aimed at meeting the needs of persons with disabilities, and which, regardless of the total number of employees, has at least one person with disabilities employed'.[76] Besides cited definition of social enterprise in Serbia proper legal framework for this type of business has not been adopted. Unfortunately, Draft Law on Social Entrepreneurship (2021) failed to be approved due to lack of public support.[77] Instead, Draft Law on Solidarity En-

72 The Law on Ratification of Convention on the Rights of Persons with Disabilities, *Official Gazette of the Republic of Serbia,* No. 42/09.

73 The Convention on the Rights of Persons with Disabilities adopted by the United Nations General Assembly in December 2006.

74 The Law on Occupational Rehabilitation and Employment of Persons with Disabilities, art. 34.

75 The Law on Occupational Rehabilitation and Employment of Persons with Disabilities, art. 23.

76 It also stipulates that the social enterprises operate in accordance with the regulations of the Law on Partnerships and Companies. The Law on Occupational Rehabilitation and Employment of Persons with Disabilities, art. 45. 'Such provisional regulation leaves plenty of room for its arbitrary implementation and therefore quibbles with the basic idea of establishing social enterprises'. Slobodan Cvejić, 'Public policies as a framework for development of social entrepreneurship in Serbia' in Slobodan Cvejić (ed.), *Social economy, civil society and the Serbian welfare system* (2013), 52.

77 The same thing happened with the Draft Law on Social Entrepreneurship and Employment in Social Enterprises (2012). Evidently, there is a certain mistrust towards companies that have the label 'social' in their name that because the term migrated from socialist law. In keeping with Marxist ideology, the social enterprise was owned and controlled

terpreneurship is made, without so ever mentioning social entreprises.[78] Lack of tailor made legislation for social enterprises will bring about the constant usage of legislation that was designed specifically for associations and cooperatives.[79] Moreover, without a precise legal definition of social entreprise, it is not clear whether Serbia has taken broad or narrow approach towards social entreprise concept. The first facet considers social enterprise to be a polyvalent organization mostly oriented towards social objectives, while the second channels social enterprises towards work integration social enterprises that are designed particularly to alleviate unemployment and/or to facilitate the incorporation of persons with disabilities into the labour market.

A vague understanding of the role of those organizations at the institutional level, makes the notion of social enterprises double-edged or brings it down to one particular type of social enterprise. Under the provision of Law on Occupational Rehabilitation and Employment of Persons with Disabilities social enterprises in Serbia can be established only to meet the needs of persons with disabilities – not other socially vulnerable groups (elderly people, Roma, addicts, etc.). Thus, the concept of social enterprise is reduced to the so-called social enterprises of type "B". On contrary, Draft Law on Solidarity Entrepreneurship is created with the aim of encouraging the employment of marginalized groups including persons with disabilities. Social enterprise sector has been mapped by Cvejić, Babović and Vuković, but still there is no clear idea on how many models of social enterprises are currently operating in this country.[80] Besides inadequate and/or non-existent legislation, social enterprises in Serbia suffer from difficulty to generate enough financial revenue. Consequently, they often demand external supports in order to be sustainable which is partially opposed to the mode how these type of enterpise should operate. It is almost indisputable that organizations established as social enterprises require open access to a deep pool of capital for the realization of the social purposes embedded in theirs business policies.[81] In addition, not-for profit entities like business ventures should have different financial strategies, ranging from income diversification to full financial self-sufficiency.

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not by private owners but by workers themselves, while its fundamental organizational purpose was to support the prosperity of the workers and thus serve collective benefit.

78 In case that the Law on Solidarity Entrepreneurship enters into force, articles 28, 34 and 45 of the Law on Occupational Rehabilitation and Employment of Persons with Disabilities shall cease to apply.

79 The Law on Cooperatives, *Official Gazette of the Republic of Serbia,* No. 112/2015; The Law on Associations, *Official Gazette of the Republic of Serbia,* Nos. 51/2009, 99/2011 and 44/2018.

80 Slobodan Cvejić, Marija Babović and Olivera Vuković, *Mapiranje socijalnih preduzeća u Srbiji* (2008), 29.

81 In comparative law, loan guarantees, quasi-equity debt, pooling funds and social impact bonds are provided as a mechanisms for reduction of costs and resource maximization in social enterprises. Antony Bugg-Levine, Bruce Kogut and Nalin Kulatilaka, 'A new approach to funding Social Enterprises' (2012) 6 *et seq*, *https://hbr.org/2012/01/a-new-approach-to-funding-social-enterprises*.

VI CONCLUSION

Misconceptions and discriminatory practices against women with disabilities hinder the realization of the principle of equal access to labour market opportunities. Therefore, disability intersected with gender expand the accumulation of disadvantage in determining economic outcomes. First step in removing numerous employment barriers faced by women with disabilities has been taken in the direction of uprising holistic approach towards disability, thus creating tools for social integration through work. In this respect, social enterprises are means of enhancing employment participation through the creation of jobs for hard-to-place people. Implementing entrepreneurial strategies and plans for achieving work integration for the disabled users this legal entity blends social benefit with financial revenue.

By contributing to both social and economic goals social enterprises are represented as an instrument of empowering disadvantaged groups. However, there is no clear idea which business or organization is eligible for classification as a social enterprise. Instead of a clear definition, a typology of social enterprises is used, which covers almost all existing legal entities and hybrid organizations. Hence, social enterprises can perform under different legal forms which means that this concept includes nonprofit and for-profit ventures *pari passu*. Although legal structures whitin which social enreprise operates can vary the purpose of certain social enterprise impact model is unequivocal. For instance, social enterprise employment model represents the business like organization which contributes to economic security of persons with disabilities through job creation within adequate work facilities. Indeed, the social enterprise employment model which originated from sheltered employment workshops has a potential to pave the way to open market and upper-level jobs for persons with disabilities including women, making them in such wise economically empowered.

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SOCIJALNA PREDUZEĆA KAO INSTRUMENT ZA OSNAŽIVANJE ŽENA SA INVALIDITETOM – KLJUČNI PRAVNI ASPEKTI

Apstrakt

Socijalna preduzeća omogućavaju tzv. zaštićeno zapošljavanje osoba sa invaliditetom, zajedno sa organizacijama, radnim centrima i preduzećima za profesionalnu rehabilitaciju i zapošljavanje osoba sa invaliditetom. Ovo je kod nas relativno novi oblik zapošljavanja osoba sa invaliditetom, dok je u svetu korišćen još osamdesetih godina prošlog veka. Naime, termin socijalno preduzeće se u našem pravu prvi put pominje u Zakonu o profesionalnoj rehabilitaciji i zapošljavanju osoba sa invaliditetom (2009), dok je 2021. godine izrađen Nacrt zakona o solidarnom preduzetništvu sa ciljem podsticanja zapošljavanja marginalizovanih grupa u koje se ubrajaju i osobe sa invaliditetom. Reč je o nužnoj pretpostavci za razvoj tzv. trećeg sektora koji se smatra vodećim u otklanjanju tržišnih nepravilnosti, te zapošljavanju osoba sa invaliditetom na otvorenom tržištu. U radu će se ukazati na nedostatke sa kojima se socijalna preduzeća suočavaju u praksi (manjkava i/ili nepostojeća zakonska regulativa, nedostatak finansijskih sredstava), ali i na pozitivne okolnosti koje doprinose ekonomskoj sigurnosti teže zapošljivih grupa, među kojima se nalaze i osobe sa invaliditetom, zbog sveprisutnih predrasuda vezanih za njihovu manju radnu efikasnost. Otuda se socijalna preduzeća vide

kao snažan instrument socijalne politike i osnaživanja osoba sa invaliditetom budući da se invaliditet ne sagledava isključivo kroz optiku stepena umanjenosti individualnih radnih sposobnosti, već i kroz reakciju društva, u smislu obezbeđivanja jednakih mogućnosti za ostvarivanje garantovanih prava. To je od posebnog značaja za žene sa invaliditetom koje se zbog višestruke diskriminacije na tržištu rada suočavaju sa problemom pronalaska odgovarajućeg zaposlenja. Dalje će se razmotriti razlike između socijalnih i tradicionalnih preduzeća, ali i drugih pravnih lica tj. organizacija, udruženja, zadruga. Ovo pre svega iz razloga što socijalna preduzeća posluju u različitim formama, u zavisnosti od nacionalnih okolnosti, i što se u uporednom, ali i u domaćem pravu pojam socijalnog preduzeća određuje prvenstveno na osnovu određenih obeležja karakterističnih za tu vrstu preduzeća.

Ključne reči: *Žene sa invaliditetom; Zapošljavanje na otvorenom tržištu; Zaštićeno zapošljavanje; Socijalno preduzetništvo; Socijalno preduzeće.*

RADNO PRAVO I POLITIKA ZAPOŠLJAVANJA

LABOUR LAW AND EMPLOYMENT POLICY

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INTERSECTIONAL DISCRIMINATION OF WOMEN WITH DISABILITIES IN THE WORLD OF WORK: ADVANTAGES AND CHALLENGES OF APPLYING AN INTERSECTIONAL APPROACH

Abstract

In all contemporary legal systems in all parts of the world, persons with disabilities encounter significant obstacles in enjoying their right to work. To eradicate their discrimination it is necessary to recognize that the discriminatory treatment can be based on two or more grounds of discrimination, or on their combined effect. This is especially true for the combination of sex and disability, because, for decades, judicial protection against discrimination meant separate treatment of discrimination (based on one personal characteristic). This makes it difficult to fully understand the causes and the (cumulative) consequences of discrimination against women with disabilities, which can make them legally invisible and lead to the denial of their proper protection. In addition, no legal system has introduced quotas for employment of women with disabilities, which may result in women with disabilities not having the opportunity to exercise their right to work either based on quotas for employment of women or based on quotas for employment of persons with disabilities. On the other hand, the gender insensitivity of reasonable accommodation of working conditions to the needs of persons with disabilities can cause feelings of humiliation and anxiety and other serious consequences for the daily life of employees. The same goes for not recognizing the harmful consequences of impairments typical for the female population.

These and other shortcomings of the traditional approach to protection against discrimination are sought to be eliminated by the concept of intersectionality and the concept of intersectional discrimination. Namely, they affirm the view of the interaction of disability and sex, as a basis for (systematic) unjustified disctinction among job candidates and employees. Consequently, the article first discusses the risk of discrimination of persons with disabilities in the world of work and models for their employment (sheltered employment, employment in the open market, with or without reasonable accommodation and quotas). Then, we analyze the combination of negative stereotypes related to disability and negative sex/gender stereotypes that accompany the employment and work of women with disabilities. A special section of the paper is dedicated to the basic

principles of the concept of intersectionality, as well as the concept, legal regulation and understanding of intersectional discrimination, and challenges in applying the intersectional approach in law. In addition, the advantages and challenges of applying an intersectional approach in labour law were reviewed, with the conclusion that accepting this approach can help efforts to improve the employability and working conditions of women with disabilities. Although the advantages of applying an intersectional approach are indisputable, we mustn't lose sight of its limitations. The limitations are particularly related to the difficulty of determining a comparator in the case of intersectional discrimination, as well as to the vagueness of the concept of intersectionality, which is why it is not possible to clearly determine the scope of application of anti-discrimination legislation, as well as the intensity of its intervention into social relations. Finally, the proactive duties of state authorities and employers aimed at promoting equality, as well as social dialogue, were pointed out as powerful instruments for discovering and preventing intersectional discrimination as well as institutional and structural reasons for inequality of women with disabilities.

Key words: *Employment; Women with disabilities; Concept of intersectionality; Intersectional discrimination.*

1. THE RISK OF DISCRIMINATION OF PERSONS WITH DISABILITIES IN EMPLOYMENT AND THE IMPORTANT LABOUR LAW RESPONSES

1. Disability based discrimination of job candidates and employees

Human beings are by nature free. In the world of work, this manifests itself through the freedom of an individual to perform a professional activity of their choice, i.e. to look for and find employment that best matches their abilities, professional aspirations, and life and work experience. This is because work enables an individual to provide himself/herself and his/her family members with means of support, but also to develop his/her personality through work. Therefore, everyone must be able to choose the employment that will give their life meaning, as well as to manage and use their skills and their labour as they wish. Without the ability to enjoy these rights and freedoms, it is not possible to effectively exercise all other human rights and fundamental freedoms, nor is it possible for the individual to participate fully in the (social, economic and political) life of the community.

In this sense, the provisions of the Convention on the Rights of Persons with Disabilities confirmed that all persons with all types of disabilities must enjoy all human rights, including the right to work and employment, and the right to an adequate standard of living.[1] Nevertheless, people with disabilities, who make up about 15 percent of the world's population,[2] encounter signifi-

1 Convention on the Rights of Persons with Disabilities, art. 27-28.

2 *World report on disability* (2011), 27.

cant obstacles in realizing and enjoying their right to work. This is important because of the negative stereotypes that are often related to their employment, the lack of appropriate transportation to work and back, the inadequacy of the workplace, work process, equipment and working conditions for the needs of these workers.[3] Moreover, establishing special occupational requirements carries the risk of indirect discrimination on the basis of disability, since employers sometimes set requirements that are not necessary for successful performance in a job, but are difficult or impossible for persons with disabilities to fulfil (e.g. putting a driver's license or special physical ability as a occupational requirement for a job where such things are not necessary for successful perfomance of duties).[4] We shouldn't lose sight of the fact that the hiring process, for many jobs, includes health examinations which are not relevant for evaluation of the candidate's professional abilities for work. The same is true for the practice of employers who, even when there's no occupational need, resort to intelligence tests and psychological tests, which may lead to discrimination and discourage persons with disabilities from participating in competitions or from informing employers of their disability (and consequently to the absence of adaptation of working conditions to the needs of such workers).[5] On the other hand, statistical stereotypes are often used as a starting point for physical ability tests that are used to evaluate abilities of candidates, regardless of their gender and/or disability. These tests are designed according to the model of a male worker without disability, as a kind of a "universal worker", against which the abilities of all workers are evaluated, although women and people with disabilities (of both sexes) regularly achieve lower results than the male candidates without disability. This is despite the fact that the application of differently designed tests could also provide a reliable assessment of the candidates' ability, as well as eliminate or mitigate the negative consequences the tests have on workers with disabilities.[6]

Negative stereotypes related to disability are reflected in the belief that hiring people with disabilities will threaten the productivity of the company, because supposedly they are, compared to other workers, less successful in achieving objectives and performing their tasks, and less prepared to adapt to changes in the company.[7] There is, also, a prevailing belief that people with

3 See: Paul Abberley, *The significance of work for citizenship of disabled people* (1999), *https://disability-studies.leeds.ac.uk/wp-content/uploads/sites/40/library/Abberley-sigof-work.pdf*.

4 Brian Doyle, 'Employment rights, equal opportunities and disabled persons: The ingredients of reform', *Industrial Law Journal*, Vol. 22, No. 2, 1993, 94.

5 *Maintaining standards: Promoting equality – Professional regulation within nursing, teaching and social work and disabled people`s access to these professions* (2007), 189, *https://dera.ioe.ac.uk/1985/1/maintaining_standards_formal_investigation_full_report.pdf*.

6 Stephen H. Courtright, Brian W. McCormick, Bennett E. Postlethwaite, Cody J. Reeves and Michael K. Mount, 'A meta-analysis of sex differences in physical ability: revised estimates and strategies for reducing differences in selection contexts', *Journal of Applied Psychology*, Vol. 98, No. 4, 2013, 633-634.

7 Michael Ashley Stein and Ilias Bantekas, 'Including disability in business and human rights discourse and corporate practice', *Business and Human Rights Journal*, Vol. 6, No. 3, 2021, 502-503.

disabilities are often absent from work, i.e. that they use sick leave entitlement more often or that they use extended sick leave,[8] and that hiring them is expensive due to the need to adapt the working conditions to their needs. When it comes to people with serious mental disorders, employers assume that they are incompetent and uncompetitive, and that they regularly cause conflicts in the workplace, etc.[9] Many employers, however, have nothing against disabled people *per se*, but believe that, on average, disabled people are less productive, less flexible, etc. This includes stereotypes, which reflect statistical data on workers with disabilities, as a whole, but do not necessarily reflect the situation of specific workers.[10] These assumptions are too broad, which can lead to unfavourable decisions regarding particular job candidates or employees, due to characteristics believed to be typical of their group.[11] These and other stereotypes shape the way the employers consider the applications of persons with disabilities for job vacancies, as well as their requests for career advancements, and also the way they make all other decisions about their employment rights, obligations and responsibilities. Moreover, even employers who have had positive experience with the employment of people with disabilities, see it as an exception to the rule, rather than as an opportunity to reconsidering the aforementioned stereotypes.[12] These stereotypes create prejudices, which ultimately lead to discrimination against workers with disabilities.

The emergence and severity of the aforementioned and other obstacles for effective exercise of the right to work will largely depend on the type of disability of a particular worker. This is because people with disabilities are not a homogeneous group, and some of them are workers whose employment rate, as a rule, is similar to the average employment rate on the labour market (e.g. workers with skin damage[13]). Conversely, employment opportunities for

8 In certain countries, using extended sick leave is a valid reason for termination of employment. This is the case in Denmark, where an employee can be dismissed (with a shorter notice period) for being absent due to illness for more than 120 days in a calendar year. In such legal systems, the rules on wrongful dismissal will put certain categories of persons with disabilities in an unfair position, specifically those who are often prevented from working due to their condition, such as workers with multiple sclerosis or cancer. This is especially problematic, as people with disabilities should enjoy special protection against dismissal. Lisa Waddington, '*HK Danmark (Ring and Skouboe Werge)*: Interpreting EU equality law in light of the UN Convention on the Rights of Persons with Disabilities', *European Anti-discrimination Law Review*, No. 17, 2013, 22.

9 Mark Bell and Lisa Waddington, *The Employment Equality Directive and supporting people with psychosocial disabilities in the workplace. A legal analysis of the situation in the EU Member States* (2016), 76.

10 Alexandra Timmer, 'Gender stereotyping in the case law of the EU Court of Justice', *European Equality Law Review*, No. 1, 2016, 38.

11 International Labour Conference, 75th Session, Report III (Part 4B), Equality in employment and occupation. General Survey by the Committee of Experts on the Application of Conventions and Recommendations (1988), para. 97.

12 Marie Mercat-Bruns, *Discrimination at work. Comparing European, French, and American law* (2016), 234.

13 In certain legal systems, skin damage qualifies as a disability not only because of the functional limitations it causes, but also if it causes disfigurement to the worker. For ex-

workers with other types of disabilities are far more modest, e.g. the risk of workers with severe mental disorders being unemployed is 6-7 times higher than for workers without these disorders, while the risk of unemployment is 2-3 times higher for people with common mental disorders.[14] Despite these differences, we can conclude that workers with disabilities, regardless of the type of each disability, often face the risks of discrimination, exclusion and marginalization.[15] The fact is that the employment rate and the activity rate of persons with disabilities is lower than the employment rate and the activity rate of persons without disabilities, all over the planet, including all contemporary countries.[16] In addition, people with disabilities face disadvantages even when they're employed, since the vast majority perform low-paid and insecure jobs and are often isolated from other employees, while employers often use disability as an excuse to pay unfair wages and shrink their legal protection.[17]

2. Forms of employment of persons with disabilities

2.1. **Sheltered employment**

Sheltered employment represents a form of employment for persons with disabilities, which was widely used in the past because it reflected the dominant medical model of disability at the time. More precisely, it is a disability model that is primarily focused on treatment, rehabilitation and social protection of people with disabilities, in accordance with the belief that the limitations faced by people with disabilities can and should be removed, above

ample, type 1 cutaneous neurofibromas are tumours that grow on nerves and, in addition to high blood pressure and learning difficulties, are accompanied by changes in skin pigmentation and the appearance of skin deformities. Similarly, progressive psoriasis may qualify as a disability, both because of the hyperpigmentation and skin lesions, and because of the increased risk of infection through skin damage in certain jobs (e.g. ambulance healthcare assistant). On the other hand, progressive vitiligo can also qualify as a disability, since it can be a cause of employment discrimination, harassment at work or an obstacle to advancement (especially in jobs that involve working with clients). The criterion concerning severity of disfigurement can be interpreted differently in practice, which can lead to unacceptable treatment. Hannah Saunders, 'The invisible law of visible difference: Disfigurement in the workplace', *Industrial Law Journal*, Vol. 48, No. 4, 2019, 487-514.

14 Acc. to: Sandra Fredman, *Discrimination law* (2011), 100; Mark Bell and Lisa Waddington, *The Employment Equality Directive and supporting people with psychosocial disabilities in the workplace. A legal analysis of the situation in the EU Member States* (2016), 46; see: Goran Obradović, 'Pravo na jednak tretman u zapošljavanju osoba sa mentalnim poremećajem', *Temida*, 2007, 47-50.

15 Nancy A. Naples, Laura Mauldin and Heather Dillaway, 'Gender, disability, and intersectionality', *Gender & Society*, Vol. 33, No. 1, 2019, 9.

16 Vincenzo Pietrogiovanni, 'Disability at work: The international and supranational legal framework', *Revista Derecho Social y Empresa*, No. 1, 2015, 53. In most countries, the rate of unemployment of the disabled is two to three times higher than the rate of unemployment of people without disabilities (Committee on Economic, Social and Cultural Rights, *General Comment No. 5: Persons with Disabilities*, adopted at the Eleventh Session, on 9 December 1994, E/1995/22, para. 20).

17 Committee on Economic, Social and Cultural Rights, paras 20, 25.

all, by medical treatment, and failing that, by physical and technological processes. Thus, subjecting an individual to treatment and medical rehabilitation was one of the essential elements for legal qualification of disability.[18] Regarding employment, the implementation of the medical model of disability meant, above all else, exercising the right to social security, as a substitute for income or as a supplement to income, and getting employment in protective workshops, in companies for the professional rehabilitation of persons with disabilities and in social enterprises.

In recent years, many authors have criticized the concept of sheltered employment, primarily because, in practice, it is often accompanied by unsuitable (undignified) working conditions, especially in relation to low pay and ghettoization of workers.[19] Today, this form of employment seems acceptable primarily for employment of persons with the most severe forms of disability, or with a substantial limitation of ability to work, but even then only as preparation and transition point towards employment on the open market.[20] In addition, sheltered employment must under no circumstances be used for turning the therapeutic work of persons with disabilities into forced labour, nor can it be used as an excuse for failing to provide just and favourable conditions of work or for denying the possibility of unionization of persons with disabilities.[21]

In recent years, supported employment, organized as paid work in "classic" working environments and under working conditions that are as similar as possible to the working conditions of other employees, has been affirmed as an alternative to sheltered employment of persons with the most severe types of disabilities, accompanied by developed support services, and state subsidies for pay and other labour costs.[22]

The new tendencies reflect the ideas of the social model of disability, which, unlike the medical model, is not focused primarily on health restrictions for employment of people with disabilities. Instead, in the social model, disability is viewed as a cultural interpretation of human differences, rather than as innate inferiority or a pathological condition to be treated.[23] This means that disability is viewed as a socially created disadvantage and marginalization experienced by a person who has, or is considered to have, certain impairments.[24]

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18 Dagmar Schiek, 'Intersectionality and the notion of disability in EU discrimination law', *Common Market Law Review*, Vol. 53, No. 1, 2016, 44-45.

19 Carla Spinelli, 'The right to work of disabled persons: A comparative study on legal framework and policies in some European Union Member States', *Revista Derecho Social y Empresa*, No. 1/2015, 336.

20 *Ibid*., 335.

21 Committee on Economic, Social and Cultural Rights, *op. cit*., paras. 25-26.

22 Spinelli, *op. cit.,* 336.

23 Rosemarie Garland-Thomson, 'Feminist disability studies', *Signs*, Vol. 30, No. 2, 2005, 1557.

24 Anna Lawson and Angharad E. Beckett, 'The social and human rights models of disability: towards a complementarity thesis', *International Journal of Human Rights*, Vol. 25, No. 2, 2021, 348.

Finally, we should bear in mind that the social model widely relies on a rights-based approach, which is why countries are obliged to remove all kinds of obstacles that prevent people with disabilities from fully participating in social, cultural, political and economic life.[25] Over the last few years, the human rights model of disability is being developed against this background, which some authors consider to be an improved version of the social model, while according to another group of authors, they are two complementary models of disability.[26]

2.2. Employment on the open market, with reasonable accommodation

In the spirit of the social model, contemporary labour law encourages employment of persons with disabilities in the open market. This includes cases in which it is necessary to make adjustments regarding the job description, workflow, schedule and organization of working hours, workplace, machines and other tools to the capabilities and needs of people with disabilities (e.g. adjusting the chair to the needs of an employee with spinal column damage; assigning assistants, reducing working hours, modifying tasks and training, or providing a quiet workplace for an employee with mental disabilities; adapting the air conditioner to the needs of an employee with psoriasis, because both cold and dry air can worsen the symptoms of the disease; adjusting workplace lighting to the needs of an employee whose illness causes photo-dermatological skin conditions).[27]

In this regard, it is possible to see two large groups of adjustment measures: the first being the *technical* measures, such as providing auxiliary devices or adjusting the workplace. The second group of measures consists of *organizational* measures, which refer to the adjustment of working schedules (including reducing working hours, if working full time is painful and exhausting for the employee due to disability), reallocation of tasks, remote work, the right of leave and extended or additional vacation time, provision of assistance (e.g. a specialized personal assistant or mentor who will prepare the employee for daily duties), or transfer to another office, another job or another geographical place of work.[28]

The cited examples of adjustment show that the enjoyment of labour rights is not possible if the workplace is not accessible. *Accessibility* means the physical accessibility of the workplace, the availability of suitable transportation from home to work and back, but also includes the requirements to enable workplace communication, advertise vacancies, work related notifications and the candidate selection process in sign language, Braille and accessible

25 Pietrogiovanni, *op. cit*., 37.

26 See: Lawson and Beckett, *op. cit*., 360-364.

27 Examples acc. to: Saunders, *op. cit*., 508; *Achieving equal employment opportunities for people with disabilities through legislation: Guidelines* (2007), 30.

28 Delia Ferri and Anna Lawson, *Reasonable accommodation for disabled people in employment – A legal analysis of the situation in EU Member States, Iceland, Liechtenstein and Norway* (2016), 10.

electronic formats and forms of communication.[29] On the other hand, in British case law, employer's failure to prevent the abuse of an employee with severe facial disfigurement qualifies as a violation of the obligation to make reasonable accommodation. Unequal treatment was established in a case of abuse of several employees, which included the aforementioned female employee with facial disfigurement, because the employer should have been aware of her increased sensitivity to abuse, as she was put in an unfavourable position in relation to persons without disabilities, due to the employer's oversight.[30] Reasonable accommodation in this case would have included the obligation of the employer to react as soon as possible to unacceptable behaviour, by, for example, adopting a code on disability risk management in the workplace, and organizing appropriate training for employees.

In the Convention on the Rights of Persons with Disabilities, failure of the employer to make reasonable accommodation is expressly qualified as a form of discrimination, defining this term as "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms".[31] On the other hand, International Labour Organization Recommendation No. 168 reminds states that "reasonable adaptations to workplaces, job design, tools, machinery and work organisation" represent an important measure for improving the employment of persons with disabilities,[32] while Council Directive 2000/78/EC states that "employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned".[33] EU Member States have to establish the obligation of reasonable accommodation in favour of job candidates, employees and persons undergoing professional training,[34] and the European Court of Justice case law has confirmed that the

29 Committee on the Rights of Persons with Disabilities, Eleventh session 31 March –11 April 2014, *General comment No. 2 (2014). Article 9: Accessibility*, CRPD/C/GC/2, para. 41.

30 *Smith* v. *HM Prison Service*, Unreported, 10 August 2004, acc. to: Saunders, *op. cit.*, 509-510.

31 Convention on the Rights of Persons with Disabilities, art. 2.

32 Vocational Rehabilitation and Employment (Disabled Persons) Recommendation, 1983 (No. 168), para. 11, subpara. a).

33 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (*OJ L* 303, 2.12.2000, 16-22), art. 5.

34 Elise Muir and Lisa Waddington, 'Directive 2000/78/EC', in Edoardo Ales, Mark Bell, Olaf Deinert and Sophie Robin-Olivier (eds), *International and European labour law – a commentary* (2018), 536. The legal obligation of reasonable accommodation has been introduced by all European countries, except Liechtenstein and Iceland, where it is not clearly and explicitly articulated. However, very different nomothetic solutions have been applied in countries that recognize this obligation. Introducing reasonable accommoda-

accommodation measures are a consequence of disability, not a constitutive element of disability.[35]

Accommodation requests cannot be unlimited. The issue of what can be considered (un)reasonable accommodation is extremely delicate, but the prevailing view is that the burden shall not be disproportionate when it is sufficiently remedied by subsidies or other measures that lower the costs of adjustment or help the employer in executing it.[36] Although the prevailing opinion is that reasonable accommodation means taking action that will not create significant expense, difficulty or problems for the employer,[37] this is not the only interpretation. In Dutch, Irish and French legislation, reasonable accommodation is viewed as a requirement for *effective adaptation*, i.e. for adaptation that *actually* enables a person with a disability to perform the entrusted tasks.[38] This criterion precedes, but also complements the requirement that the adjustment does not impose undue hardship, and clarifies the complex procedure of establishing the (non)existence of the obligation to adjust in each specific case.[39] The most significant advantage of the *effectiveness criterion* is that the reasonable accommodation request is linked to the actual possibility of employment and work of a person with a disability, for a specific employer. Only if this type of accommodation is possible, it is justified to ask what certain changes in working conditions would mean for the employer. In answering the question, the following things should be taken into account: the type of business, the financial situation and the size of the employer, the possibility of reimbursement of adaptation costs, the impact of adaptation on the manufacturing/service process, the period of time the disabled person was hired for, and the total number of people with disabilities working for the said employer.[40] Accommodation cannot be considered

tion in favour of certain categories of self-employed persons and volunteers (e.g. in Denmark and France) can be viewed as an advanced solution. Ferri and Lawson, *op. cit*., 56.

35 Case C-335/11, 11.4.2013, *HK Danmark, acting on behalf of Jette Ring* v *Dansk almennyttigt Boligselskab*, Case C-337/11, 11.4.2013, *HK Danmark, acting on behalf of Lone Skouboe Werge* v *Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S*, ECLI:EU:C:2013:222, paras. 45-46.

36 Ivana Grgurev, 'Dosezi razumne prilagodbe (u domaćem, anglosaksonskom i pravu Europske unije)', *Zbornik Pravnog fakulteta u Zagrebu*, Vol. 70, No. 2-3, 2020, 292.

37 Lisa Waddington and Anna Lawson, *Disability and non-discrimination law in the European Union. An analysis of disability discrimination law within and beyond the employment field* (2009), 26.

38 *Ibid*.

39 Lisa Waddington, 'When it is reasonable for Europeans to be confused: Understanding when a disability accomodations is 'reasonable' from a comparative perspective', *Comparative Labor Law & Policy Journal*, Vol. 29, No. 3, 2008, 330-334.

40 In this respect, it is interesting to look at Canadian case law, where the concept of undue hardship is explicitly set as the limit for reasonable accommodation. The concept in question is related to situations in which the implementation of adjustment measures will be accompanied by significant organizational difficulties or expense. In addition to economic arguments and undue hardship for proper company operation, the courts will, in their evaluation, also take into account the conditions for effective exercise of rights of other workers, including the rights from the relevant collective agreements, as well as the risks that the implementation of adjustment measures produces in terms of health and

reasonable if, upon assessment, it is shown to impose undue burden. As an example, a judgement by the Maritime and Commercial Court of Denmark confirmed that reasonable accommodation of the workplace to the needs of a colour-blind seafarer would include the employer having to hire another seafarer, who would spend two weeks per month at sea, together with the dismissed worker.[41] The court concluded that such an accommodation would represent undue burden for a small maritime company with a total of five employees. On the other hand, in a case before the Committee for the Rights of Persons with Disabilities, the hiring of a visually impaired lawyer who used a computer using screen-reading software was deliberated.[42] The lawyer submitted a job application at the Swedish National Social Insurance Agency, but wasn't included in the list of candidates, because it would be too expensive for her to use intranet. During the proceedings, the court concluded that the required adaptation of equipment to the needs of the worker would represent undue burden on the employer. The majority of members of the Committee for the Rights of Persons with Disabilities viewed it the same way, while five members of the Committee expressed a different opinion, based on the fact that the Swedish court did not notice the employer's failure to consider the implementation of alternative measures that would enable the worker to perform her duties, such as subsidies. Especially as the implementation of alternative measures could have a positive impact on the employment of new visually impaired candidates, notably considering that the employer is a public institution responsible for the implementation of the national policy on persons with disabilities in Sweden.

Finally, the issue that needs addressing is *from which moment in time does the employer's obligation to make reasonable accommodation start*. International instruments do not provide an explicit answer to this question, and the same is true for national legislations, which, with the exception of Great Britain, do not expressly engage in its regulation. In practice, there are three possible solutions.[43] The first solution includes the employer having an obligation to make adjustments only if employer is aware or should be aware that the employee is a disabled person. More precisely, the premise of this solution is that the job candidates and employees should notify the employer of their needs. If they fail to do so, the employer cannot be obliged to make the adjustments. Especially as employers are prohibited from asking questions and collecting information from job candidates and employees related to their physical, psychological or mental state. If, however, an employer becomes aware of the employee's disability, he will be obligated to make reasonable accommodations. For that reason, it is important to note the difference between an obvious disability and one that is not. In certain countries, such

safety of workers and third parties. Laurène Joly, 'L'égalité à l'aune du handicap', *Revue de droit comparé du travail et de la sécurité sociale*, No. 2, 2015, 54-55.

41 Maritime and Commercial Court, Judgement no. F-2-13, 22 December 2014, U2015.1053S, acc. to: Ferri and Lawson, *op. cit.*,76.

42 Committee on the Rights of Persons with Disabilities, Communication No. 5/2011 (*Jungelin* v. *Sweden*), Decision of of 2 October 2014, UN Doc CRPD/C/12/D/5/2011.

43 Ferri and Lawson, *op. cit.*, 67-69.

as Estonia, appropriate medical documentation must be submitted along with the request for accommodation, in case of a disability that is not obvious, because an employer will be deemed aware of the disability only if previously informed of it from a medical report or a written recommendation from a health professional.[44] According to the second solution, the mere fact that an employer is aware that a job candidate or an employee is a person with a disability will not be enough to impose the accommodation requirement, which can be imposed only if a person with a disability submits a request for adaptation to the employer. And finally, the third approach, according to which an employer is obliged to make the adjustments only if so required by the competent authority (e.g. the competent healthcare authority in Bulgaria, or the authority in charge of determining disability in Luxembourg, where the obligation of reasonable accommodation exists only for workers with a disability of at least 30 percent).[45] In professional literature, only the first approach is considered to correspond to the spirit of the Council Directive 2000/78/EC and the Convention on the Rights of Persons with Disabilities, or rather that the employer is obliged to make adjustments from the moment he/she became aware that a person with a disability needs adjustments.[46]

2.3. Quotas for employment of persons with disabilities

Employment quotas represent an important measure for encouraging employment of persons with disabilities. These affirmative action measures, as a rule, include an obligation or a recommendation for medium and large enterprises to employ a certain percentage of persons with disabilities as a minimum (typically 2-7% of the total number of their employees).[47]

The main advantage of quotas is reflected not only in establishing an employment relationship with the disabled, but also in raising awareness (of employers, employees and the general public) of the problems they face when looking for and maintaining employment, as well as in terms of advancing in their professional careers.[48] Opponents of the quota system warn, however, that mandatory quotas do not facilitate integration of persons with disabili-

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44 *Ibid*., 69.

45 *Ibid*.

46 Muir and Waddington, *op. cit.*, 536. We should bear in mind that in the literature, as a prerequisite for successful accommodation, the view that employers refrain from collecting excess information from workers who require reasonable accommodation is encouraged. This is necessary in order to create an environment where workers won't feel uncomfortable disclosing information about their invisible disability, because they will know that it will be handled delicately and that they will have the support of the employer. It often happens in practice that employees with mental disabilities, in the absence of such environment where they can notify their employer of their disability and due to fear of stigmatisation, will continue to work in unsuitable conditions, which will oftentimes worsen their mental health. Bell and Waddington, *op. cit.*, 13.

47 Spinelli, *op. cit.*, 333.

48 Council of Europe Committee on the Rehabilitation and Integration of People with Disabilities, *Employment strategies to promote equal opportunities for persons with disabilities on the labour market* (2000), 16.

ties into the world of work; on the contrary, they favour the entrenchment of stereotypes that these workers are less productive and that, apparently, they can only be employed if that's the employers' obligation. Then, there is the dilemma of the real impact of quotas, since an alternative to the employment obligation is usually provided in the form of payment of a fine, which is then used to further support employment of persons with disabilities (through funds managed by public authorities, and less often by the social partners /e.g. in France/).[49] Some contend that the quotas only provide short-term results, which is why they must be accompanied by other mechanisms, such as providing support for people with disabilities, primarily through training programs.[50] In addition, employers try to avoid hiring persons with disabilities and look to fulfil alternative obligations instead, or to pay the fines. Certain employers will put pressure on their employees to register as persons with disabilities, especially older workers. Due to the aging population and increased life expectancy, they often have employees in that category who are also more likely to become disabled.[51]

Although experience from different legal systems shows that the increase in fines for failing to employ persons with disabilities is not necessarily accompanied by their higher employment rate, some believe that their mass employment can be expected when the fines reach the level at which it would be cheaper to employ persons with disabilities than to pay the fines.[52] The prevailing trend in modern legal systems is to harden the sanctions for non-fulfilment of the employment quotas, and to include a number of other obligations for employers, since the employment obligation does not have to be fulfilled by direct employment of persons with disabilities. This is especially true for getting traineeships, employing interns with disabilities or adapting the working conditions and the workplace to their needs.[53] Also, *outsourcing* is an alternative in some countries, i.e. referral of employees with disabilities, for whose employment, despite reasonable accommodation, working conditions couldn't be met – to work in companies for employment of persons with disabilities.[54]

The effectiveness of employment quotas depends on the circle of employers, as well as on the circle of persons to whom they apply. When it comes to employers, the rule that the quotas apply only to medium and large

49 Spinelli, *op. cit.*, 334.

50 Konstantina Davaki, Claire Marzo, Elisa Narminio and Maria Arvanitidou, *Discrimination generated by the intersecton of gender and disability* (2013), 11.

51 Peer Review on "Work-capacity assessment and employment of people with disabilities" (2018), 10.

52 Lisa Waddington, 'Reassessing the employment of people with disabilities in Europe: From quotas to anti-discrimination laws', *Comparative Labor Law & Policy Journal*, Vol. 18, 1996, 69.

53 *Achieving equal employment opportunities for people with disabilities through legislation*, *op. cit.,* 38.

54 Peer Review on "Work-capacity assessment and employment of people with disabilities", *op. cit.,* 9.

employers can significantly reduce their impact on increasing the employment of people with disabilities, especially in countries dominated by small employers.[55] When it comes to the circle of protected persons, some legal systems have had cases where this measure was reserved only for people with severe disabilities or only for people with mental health problems.[56] The latter solution seems justifiable, because fulfilling the employment obligation is oftentimes, in practice, reduced to direct employment of persons with minor impairments, i.e. persons who, even without the affirmative action measures, would not have had significant difficulties in finding and keeping employment. In this regard, it can be concluded that limiting the employment obligation to persons with a certain type of disability is justified in cases where the main objective of the quota system is to facilitate employment of persons facing the biggest problems on the labour market. Conversely, the need to reduce the number of beneficiaries of social benefits speaks in favour of establishing a general obligation to employ persons with disabilities, which can also help in avoiding discrimination between the members of a vulnerable group.[57] The aforementioned would suggest that the strengthening of solidarity between persons with different types of impairments is needed, which is why it is unacceptable to discriminate between people based on the type or severity of their impairment.[58]

Finally, the justification of quotas should take into account the need to establish a delicate balance between the employer's freedom to choose associates, on the one hand, and the right of persons with disabilities to work, on the other hand. This is what is particularly problematic with numerical requirements for employment of persons with disabilities, which is something that has been examined before the Constitutional Court of Italy, due to the belief that the state should bear the costs of mandatory employment of persons with disabilities.[59] The Constitutional Court concluded that the quotas are not aimed at providing charity, but rather at the real employment agreements, where persons with disabilities will fulfil their duties in accordance with their abilities, in order to eliminate obstacles to their full participation in the economic and social development of the country, while fulfilling the duty of solidarity as required by the Constitution.[60] According to the Constitutional Court, these are sufficient reasons to allow quotas, especially because their application does not affect the economic organization of the company,

55 Spinelli, *op. cit.,* 335.

56 *Achieving equal employment opportunities for people with disabilities through legislation*, *op. cit.,* 41; Spinelli, *op. cit.,* 334.

57 Ljubinka Kovačević, 'Protection of persons with disabilities from employment discrimination, with a focus on Serbian legislation and practice', *Pravni vjesnik,* Vol. 30, No. 2, 2014, 66.

58 Lawson and Beckett, *op. cit.,* 355.

59 Decision of Italian Constitutional Court no 38, 15 June 1960, acc. to: Pierluigi Digennaro, 'Anti-discrimination legislation and work placement for persons with disabilities. A comparison between Italy and Japan', *Italian Law Journal*, 2018, 43.

60 *Ibid.,* 43-44.

and because they are quite low, compared to the total number of employees in a company.[61] The Constitutional Court of Croatia reasoned in a similar way, when it concluded that the legal provisions concerning the obligation to employ persons with disabilities or pay the fines, provided a balance between the public interest, which is to achieve the legitimate goal of the Law on Professional Rehabilitation and Employment of Persons with Disabilities, and the interests of employers, by introducing acceptable burdens within the policy of encouraging employment of persons with disabilities and developing employment strategy.[62]

II COMBINATION OF NEGATIVE STEREOTYPES RELATED TO SEX AND DISABILITY OF FEMALE JOBSEEKERS AND EMPLOYEES WITH DISABILITIES

To eradicate discrimination against workers with disabilities, we need to recognize all the specifics of their position. This also applies to the specifics that are manifested as a consequence of other personal characteristics of these workers, but also as a consequence of the intersection of disability and other personal characteristics of these workers. It is often assumed that all persons with disabilities have the same experiences, views and priorities in relation to employment, regardless of their sex, age, socio-economic position, their cultural milieu and other categories to which they belong.[63] Giving "priority" to disability in relation to other personal characteristics, when regulating the prevention and protection against discrimination of persons with disabilities, has the effect of neglecting other factors, which can affect the position of job candidates and employees with disabilities.[64] This is especially true for the sex of workers with disabilities, since the law often does not recognize the need to acknowledge and overcome the challenges faced by women with disabilities in the labour market. Namely, people with disabilities of both sexes encounter many common problems when trying to find and keep employment and to advance in their professional careers, but female workers with disabilities face both negative disability-related and gender-related stereotypes.

We should bear in mind that women make up the majority of persons with disabilities (54%).[65] This trend is likely to continue, especially given

61 The same was argued by the Constitutional Court of Italy in Decision No. 449 of December 23, 1994 and Decision No. 86 of March 21, 1996. Digennaro, *op. cit*., 44.

62 Decision of Croatian Constitutional Court U-I-2976/2014, U-I-292/2015, U-I-1683/2016, 21 February 2017.

63 Tina Goethals, Elisabeth De Schauwer and Geert Van Hove, 'Weaving intersectionality into disability studies research: Inclusion, reflexivity and anti-essentialism', *DiGeSt. Journal of Diversity and Gender Studies*, Vol. 2, No. 1-2, 2015, 75.

64 *Ibid.*

65 Manuela Samek Lodovici *et al*., *Discrimination and access to employment for female workers with disabilities* (2017), 40.

the aging of the population and the increase in life expectancy, and the fact that women, on average, live longer than men and that older people are more prone to disability than younger people. Women's disability is more often degenerative, while men's disability is more often caused by an injury at work or an occupational disease.[66] Also, women make up the majority of people suffering from chronic illnesses accompanied by a high level of pain, as well as the majority of people suffering from arthritis, depression, diabetes and chronic fatigue syndrome.[67] The literature indicates that some of these conditions are not qualified as disabilities, which means that there's no obligation of reasonable accommodation for people with these conditions, which affects women the most.[68]

Furthermore, it should be noted that men with disabilities are encouraged to find employment more often than women with disabilities. This is because women with disabilities are often thought of as having a passive role in society, i.e. through a stereotype that work allows them to "somehow fill their time" rather than ensure their economic security and autonomy. In professional rehabilitation programs for persons with disabilities, more attention is often paid to men than to women with disabilities, in terms of encouraging men to look for work, to attend retraining and additional education, while women are directed more towards social benefits.[69] In addition, the gender stereotypes that accompany disabled female workers are, as in the case of women in general, linked to the difficulties of balancing professional and family duties. This is particularly serious for women with disabilities, if we take into account the difficult access to services related to the care of children, elderly, infirm persons and other persons dependent on the care and assistance of others.[70] Those services are often expensive and even when they exist, they don't facilitate the integration of women with disabilities into the labour market.[71] Although this is beyond the subject of this paper, we should mention that mothers with disabilities often face the prejudice that they are not capable of being good parents. This prejudice can deter them from using support services, due to the fear that their child might be taken from them as a result.[72]

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66 *Ibid.*, 25.

67 Acc. to: Schiek, *op. cit.,* 49. When it comes to the aforementioned psychosocial disorders, we should bear in mind that they can be qualified as a disability only if the corresponding psychosocial impairments, in interaction with other obstacles, lead to disability. This is the case with anxiety, phobias, eating disorders, bipolar disorders and personality disorders (Bell and Waddington, *op. cit.,* 7).

68 Fredman (2016), *op. cit.,* 50; Schiek, *op. cit.,* 53.

69 *Ibid.*, 26; Rannveig Traustadóttir, Obstacles to equality: The double discrimination of women with disabilities, *https://www.independentliving.org/docs3/chp1997.pdf*.

70 *Cf.* Angela Frederick, 'Mothering while disabled', *Context*, vol. 13, no. 4, 2014, 30-35.

71 Samek Lodovici *et al.*, *op. cit.,* 13.

72 Jenny Morris, "Feminism, gender and disability", 1998, 9, *https://disability-studies.leeds.ac.uk/wp-content/uploads/sites/40/library/morris-gender-and-disability.pdf*.

These and other negative stereotypes have resulted in women with disabilities having significantly fewer opportunities to find employment, as well as greater chances of being economically inactive.[73] Namely, the vast majority of modern countries are facing the problem of unemployment among women with disabilities, with the extent of this problem varying from one country to another. For example, in EU Member States, the employment rate of women with disabilities ranges from 16% in Bulgaria to 74.9% in Sweden (as a country that achieved not only a high rate of employment of women with disabilities, but also a high rate of employment of women in general).[74] When it comes to the unemployment rate, women with disabilities are more likely to be unemployed than women without disabilities. At the same time, there is a greater probability that men with disabilities will be unemployed than women with disabilities.[75] On the other hand, there are fewer women with disabilities employed in the so-called public sector, than is the case with men with disabilities.[76]

In addition to the factors that affect the general rate of (un)employment, the problem of unemployment of women with disabilities can be explained by the double jeopardy stereotype, i.e. intersectional discrimination based on sex and disability. Besides, unemployment of women with disabilities can be explained by their insufficient education, i.e. the lack or obsolescence of knowledge, skills and abilities, due to discrimination of persons with disabilities in the field of education, as well as the mismatch of the education system with the demands of the labour market. In this regard, it is important to note that girls with disabilities drop out of high school more often, and are less likely to graduate from college than men with disabilities.[77] Furthermore, we recognize the reasons for unemployment of women with disabilities in the insufficient development of the support system, and in some cases – in their dependence on the social security, or rather in their fear of losing their social benefits for having found employment.[78]

In addition to unemployment, the negative stereotypes that employers attach to women with disabilities can often result in professional segregation. More precisely, women with disabilities often get hired in low paying and insecure jobs,[79] and are often denied the opportunity for promotion or professional advancement. Also, women with disabilities are less likely to work in

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73 Instead of others see: Eun Jung Kim, Tina Skinner, Susan L. Parish, 'A study on inersectional discrimination in employment against disabled women in the UK', *Disability & Society*, Vol. 35, No. 5, 2020, 715-737.

74 Samek Lodovici *et al*., *op. cit.,* 52.

75 *Ibid.*, 53.

76 Davaki, Marzo, Narminio and Arvanitidou, *op. cit.,* 47. Counterpoint: Michael Hirst, Patricia Thorton and Melissa Dearey, *The employment of disabled people in the public sector: A review of data and literature* (2004), 26.

77 Samek Lodovici *et al*., *op. cit.,* 44-45.

78 Arthur O'Reilly, *The right to decent work of persons with disabilities* (2007), 66.

79 More precisely, this is called double professional segregation, which resulted in a large number of women with disabilities being employed in health and social care, somewhat less in trade, while men with disabilities most often work in the production sector. Samek Lodovici *et al*., *op. cit.,* 68.

managerial positions than men with disabilities, as well as women and men without disabilities.[80] In addition, women with disabilities work full-time less often than men with disabilities and women and men without disabilities, although for workers with certain types of disabilities, part-time work may appear as a suitable form of employment, e.g. in case of epilepsy, mental and other progressive diseases.[81] Also, data on home based work, from the period preceding *Covid-19* (which started the widespread use of home-based work to prevent the spread of the virus) show that women with disabilities worked from home more often than men with disabilities and women without disabilities.[82] In addition, the work of women with disabilities is often accompanied by risks of abuse and sexual harassment at work.[83]

Finally, *associative disability discrimination* needs to be addressed. This means that the prohibition of direct discrimination and harassment on the basis of disability cannot be limited only to the protection of workers with disabilities, but must include workers who are not disabled, but are discriminated against because of the disability of a close person they care for. The concept of associative discrimination was built on a case concerning an employee who believed that she was discriminated against because she cared for her son, who is disabled, which the European Court of Justice qualified as discrimination on the basis of disability.[84]

III INTERSECTIONAL APPROACH IN THE FIELD OF EMPLOYMENT OF WOMEN WITH DISABILITIES

1. Content and goals of the intersectional approach

In contemporary law, protection against workplace discrimination requires identification of one reason for unequal treatment of job candidates or employees. However, in practice, discriminatory treatment may be based on two or more discriminatory grounds, or on their combined effect. This form of discrimination is significantly different from the discrimination that arises

80 Jung Kim, Skinner and Parish, *op. cit.,* 723; see: Alan Roulstone and Jannine Williams, 'Being disabled, being a manager: 'glass partitions' and conditional identities in the contemporary workplace', *Disability & Society*, Vol. 29, No. 1, 2014, 16-29.

81 Jung Kim, Skinner and Parish, *op. cit.,* 723.

82 *Ibid.*, 14.

83 *Gender Equality Index 2021* (2021), 72.

84 Case C-303/06, 17.7.2008, *Coleman* v *Attridge Law*, ECLI:EU:C:2008:415; for comments see: Marcus Pilgerstorfer, 'Transferred discrimination in European law', *Industrial Law Journal,* Vol. 37, No. 4, 2008, 384-393; Andrea Eriksson, 'European Court of Justice broadening the scope of European nondiscrimination law', *International Journal of Constitutional Law*, Vol. 7, No. 4, 2009, 749-750. More on the emotional experience of employees who, due to care for a disabled child, have had their work opportunities and working methods changed, as well as prospects for professional career development, can be found in: Ellen K. Scott, 'I feel as if I am the one who is disabled: The emotional impact of changed employment trajectories of mothers caring for children with disabilities', *Gender & Society*, Vol. 24, No. 5, 2010, 672-696.

from the effect of each individual grounds of unequal treatment of workers. This difference, however, has not been sufficiently recognized in contemporary law. This is because protection against workplace discrimination is traditionally achieved in court proceedings, initiated by a person who believes that he/she has been discriminated against, and who needs to specify personal characteristic that represents the alleged grounds of discrimination. This form of protection against discrimination is, however, accompanied by numerous difficulties, as the victim is under a considerable burden when we take into account the money, time and energy that have to be invested in the court case, especially a long-lasting one.[85] Furthermore, legal remedies for protection against discrimination are regularly limited to modest damages, i.e. the obligation to eliminate institutional and structural failures that lead to discrimination, is often left out.[86] The focus of contemporary law on only one ground of discrimination can render persons, who are put in a disadvantageous position due to the simultaneous action of two or more grounds of discrimination, legally invisible. This is especially the case since their legal invisibility may also be a reflection of a deeper structural problem, since the categories on which certain grounds of discrimination are based often focus on privileged members of certain groups (e.g. on white women in the case of sex discrimination, or on men with disability in case of discrimination based on disability).[87] For example, a woman with a disability who cares for a young child would encounter additional difficulties if she wanted to attend a professional training or development program, compared to a man with a disability, as well as compared to a woman without a disability. An employer who is sued for protection against discrimination based on sex and disability could prove that his employment practices are non-discriminatory by having men with disabilities among his employees, as well as by the fact that many women without disabilities have had successful professional careers in the company.[88]

The intersectionality theory tries to remove the shortcomings of the traditional mechanism of protection against discrimination. It rests on the premise that certain experiences of multiple discrimination cannot be adequately understood, nor can adequate legal protection against this form of discrimination be provided – if these experiences are not considered from the point of view of "synergy" of different discriminatory grounds that influence discriminatory behaviour in a particular case.[89] The intersectional approach

85 Sandra Fredman, 'Positive rights and positive duties. Addressing intersectionality', in Dagmar Schiek and Victoria Chege (eds), *European Union non-discrimination law. Comparative perspectives on multidimensional equality law* (2009), 79.

86 *Ibid.*

87 Sandra Fredman, *Intersectional discrimination in EU gender equality and non-discrimination law* (2016), 7.

88 *Cf.* Ruth Nielsen, 'Is European Union equality law capable of addressing multiple and intersectional discrimination yet? Precautions against neglecting intersectional cases', in Dagmar Schiek and Victoria Chege (eds), *European Union non-discrimination law. Comparative perspectives on multidimensional equality law* (2009), 32.

89 Raphaële Xenidis, 'Multiple discrimination in EU anti-discrimination law towards redressing complex inequality', in Uladzislau Belavusau and Kristin Henrard (eds), *EU anti-discrimination law beyond gender* (2018), 41.

tends to facilitate understanding of the complex nature of multiple discrimination, including intersectional discrimination, as well as understanding of the real causes of discrimination, which often go beyond the boundaries of an individual's identity, especially in the case of workplace discrimination.[90] This calls into question the logic of traditional anti-discrimination law,[91] especially if we bear in mind that in civil law proceedings for protection against discrimination, plaintiffs who believe that they have been discriminated against on the basis of two or more personal characteristics have less chance of obtaining protection, compared with persons who made it likely that they were discriminated against only on the basis of one personal characteristic.[92] In some cases of intersectional discrimination, even when the court is considering two or more grounds of discrimination, they often find the existence of discrimination based on only one personal characteristic in the judgment.

For a long time, intersectional discrimination hasn't been treated as a research problem in literature, while legal regulation of preventing discrimination and achieving equality has, in principle, long been aimed at preventing and protecting against discrimination based on individual characteristics.[93] This approach can be explained by the social, historical and economic marginalization of women with disabilities.[94] This even included their marginalization in the movement for the rights of persons with disabilities, which in its initial stages, asserted the "male perspective" of persons with disabilities, without taking into account the specific needs of women from this group.[95] Besides, women with disabilities were marginalized in the feminist movement, which in the first stages of development asserted a one-dimensional perspective of women's reality, i.e. the idea that all women are oppressed and that all women share the same fate, which is why the universal advocacy for improving the position of women, as such, was emphasized.[96] This had the effect of ignoring the gender perspective of discrimination of persons with disabilities and disregarding the fact that in the labour market, women with disabilities were exposed to the combined discrimination based on disability and sex. This ultimately reduced the struggle against workplace discrimination to a struggle of members of minority groups, which was accompanied by the risk of dividing the society into different interest groups and deepening the mistrust towards the state.[97]

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90 Mercat-Bruns, *op. cit.,* 234.

91 *Ibid*.

92 *Ibid*., 242.

93 Samek Lodovici *et al*., *op. cit.,* 15.

94 Jung Kim, Skinner and Parish, *op. cit.,* 719.

95 Rannveig Traustadóttir, Obstacles to equality: The double discrimination of women with disabilities, *https://www.independentliving.org/docs3/chp1997.pdf*; Morris (1998), *op. cit.,* 2.

96 Devon W. Carbado, Cheryl I. Harris, 'Intersectionality at 30: Mapping margins of anti-essentialism, intersectionality, and dominance theory', *Harvard Law Review*, Vol. 132, No. 8, 2019, 2199.

97 Marie Mercat-Bruns et Jeremy Perelman (dir.), *Les juridictions et les instances publiques dans la mise en œuvre de la non-discrimination: perspectives pluridisciplinaires et comparées. Note de synthèse* (2016), 10.

At the end of the 1980s, *intersectional approach* was designed, which allows us to see the interaction of disability and sex/gender, as a basis for (systematic) unfair discrimination of job candidates and employees.[98] The application of this approach rests on the idea of multidimensionality of the life experiences of individuals, which shapes the multidimensionality of the "system" of unfair discrimination of people.[99] Kimberlé Crenshaw started from the premise that the experiences of African-American women are often the product of the intersection of racism and sexism, but this, as a rule, is not taken into account in either the feminist discourse or the anti-racist discourse, because both are concentrated around white women from certain social classes, or around black men.[100] In this sense, the need to change the legal and institutional framework in relation to black women was noticed, in order to take into account their specific experiences.[101]

This further means that the fact that different biological, social and cultural categories, such as sex, race, class, disability and age, can act together on multiple levels, contributing to the establishment of systematic inequality, has traditionally been ignored.[102] We should also point out that the use of sex/gender as the only analytical category[103] is very limited, and that an intersectional approach should enable the correction of mistakes that were made because sex, gender and other aspects of identity were considered mutually exclusive.[104] This inspired Jenny Morris in the early 1990s, to start researching the intersection of disability and gender as the basis of discrimination,[105] which would later be expanded in the works of other authors to include other personal characteristics, such as ethnic and social origin of persons with disabilities. The concept of intersectionality was originally conceived by a law professor (Crenshaw), but that later, with this author's participation, it was developed as a socio-legal concept, which over time would acquire more and more extralegal elements. In that sense, the concept of intersectionality has become the subject of consideration in a number of other sciences, especially sociology and political science, where it is used as an instrument for analyzing the unfavourable positions in society.[106] Nevertheless, the last decade has

98 Jung Kim, Skinner and Parish, *op. cit.,* 719.

99 Naples, Mauldin and Dillaway, *op. cit.,* 9. See: Kimberlé Crenshaw, 'Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics', *University of Chicago Legal Forum*, No. 1, 1989, 138-167.

100 Vanessa Tanguay, 'La Charte québécoise des droits et libetés permet-elle de mobiliser l`intersectionnalité comme cadre d`analyse de la discrimination? Quelques pistes de réflexion', *Canadian Journal of Law and Society / Revue Canadienne Droit et société*, Vol. 36, No. 1, 2021, 49.

101 Kosana Beker, *Višestruka diskriminacija žena u Srbiji i odabranim državama Evropske unije: uporedna analiza* (2019), 49.

102 Davaki, Marzo, Narminio and Arvanitidou, *op. cit.,* 19.

103 Leslie McCall, 'The complexity of intersectionality', *Signs*, Vol. 30, No. 3, 2005, 1771.

104 Beker, *op. cit.,* 43.

105 See: Jenny Morris, 'Feminism and disability', *Feminist Review*, Vol. 43, No. 1, 1993, 57-70.

106 Mercat-Bruns, *op. cit.,* 234.

been marked by an increasingly intense affirmation of the concept of intersectionality, as a legal concept, although this approach is criticized, which will be discussed later.

The intersectional approach rests, therefore, on the assumption that the consequences of discrimination based on disability and sex cannot be fully understood if considered in isolation, or if simply added together. Instead, the comprehensive consequences of discrimination should be seen in the light of the structural relationship between disability and sex, their impact on the access of women with disabilities to employment, as well as the risks that these workers face on the labour market.[107] This further means that the implementation of the intersectional approach aims at "adequate appreciation of the `reality' of discrimination, in all its complexity".[108] In the field of law, this goal is linked to the assumption that without respect for the "reality" of discrimination, without a comprehensive analysis of the motives of discrimination and without corresponding changes in the understanding of the meaning of the right to equality – victims of discrimination will remain deprived of appropriate legal protection.[109] In this regard, the appropriate labour law protection against discrimination implies that, instead of considering discrimination against workers on the basis of each personal characteristic, additional marginalization of persons with disabilities, arising from the intersection of discrimination on two or more different grounds, must also be taken into account.[110]

2. Intersectional discrimination in the workplace – definition, regulation and understanding

The concept of *intersectional discrimination* was conceived from the concept of intersectionality. It can be defined as a type of multiple discrimination, emerging from different directions, as an individual simultaneously faces discrimination based on several personal characteristics that form their identity, which interact in unison without the possibility of mathematically precise demarcation: "all these parts of identity exist together, act individually and collectively, intersect and intertwine in certain situations, sometimes in similar and sometimes in completely different ways".[111] As intersection of different grounds of discrimination can create specific negative consequences that are more pronounced than if it were a simple sum of these grounds, intersectional discrimination can also be defined as discrimination on multiple grounds, which, taken together, result in prejudices that are bigger than prejudices caused by different grounds when considered separately.[112]

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107 Davaki, Marzo, Narminio and Arvanitidou, *op. cit.,* 25.

108 Tanguay, *op. cit.,* 50.

109 *Ibid*., 50.

110 Samek Lodovici *et al*., *op. cit.,* 13.

111 Beker, *op. cit.,* 38-39.

112 Gauthier de Beco, *Disability in International Human Rights Law* (2021), 22.

Designing the concept of intersectional discrimination made it possible to see the rule that different forms of unfair differentiation between job seekers and employees – overlap and interpenetrate, i.e. that they cause and/or reinforce each other. The fight against workplace discrimination, therefore, must be aimed at a complete and proper understanding of the conglomerate of different reasons, due to which workers who do not have the characteristics of the imagined "regular worker", are put in a disadvantageous position.[113] This is emphasized by the fact that in case of intersectional discrimination at work, an attempt to prove discrimination on the basis of individual personal characteristics may be unsuccessful, most often because it is not possible to establish discrimination by comparison based on one personal characteristic.[114] For this reason, workers who believe that they have been discriminated against often choose to cite only one personal characteristic as the basis of discrimination in the lawsuit. It will most likely be the personal characteristic that they believe may lead them to win the lawsuit.[115]

In disputes for protection against discrimination, it is necessary to find a *comparator*, because the concept of equality is traditionally based on the principle that likes should be treated alike.[116] Consequently, a worker, who is in the same or a similar situation, and does not have a personal characteristic that is the ground of discrimination, is often the comparator. Victims of intersectional discrimination, however, regularly find themselves in a situation that cannot be compared to the situation of people that have only one protected characteristic (sex or disability). In this context, if a female worker with a disability believes that she is a victim of intersectional discrimination, it would be necessary to compare her situation with the situation of a male worker without disability. However, this way it isn't possible to see all aspects of unfavourable treatment of a female disabled worker, because it can be motivated not only by her sex or her disability, but also by the interaction of the two characteristics. And that is what makes her position unique, not only in relation to workers without disabilities, but also in relation to female workers without disabilities. This further means that in the case of intersectional discrimination, the comparison of two workers who are in a similar situation, except that only one of them has one protected characteristic, e.g. disability, leads to all other aspects of identity of the person who feels discriminated against being ignored in the dispute for protection against discrimination.[117]

Contemporary legal systems, as a rule, do not use an intersectional approach when regulating employment and labour relations. Fortunately, there are exceptions, which are visible in the formulation of appropriate goals in strategic documents, as well as in, otherwise slow, changes to the legal frame-

113 Elisabeth Holzleithner, 'Intersecting grounds of discrimination: Women, headscarves and other variants of gender performance', *Juridikum,* No. 1, 2008, 33-34.

114 Beker, *op. cit.,* 89.

115 *Ibid*., 519.

116 Fredman (2016), *op. cit.,* 8.

117 *Ibid.*

work in certain European countries (e.g. Germany, Spain and Italy).[118] These countries are joined by Austria, whose laws, including the Law on the Employment of Persons with Disabilities, stipulate that established multiple discrimination must be taken into account when establishing damages.[119] However, despite these rules, victims of discrimination are often awarded meagre compensation.[120] This example and others show that the concept of intersectional discrimination is not easy to integrate into the legal system. European countries that do not prohibit intersectional discrimination explicitly provide protection against this type of discrimination based on the premise that if discrimination based on sex and discrimination based on disability are prohibited, that certainly means that discrimination based on gender and disability together is prohibited.[121]

However, when it comes to *national case law,* we should bear in mind that the intersectional approach requires, in case of lawsuits for protection against discrimination, that the possible intersection of two or more grounds of discrimination is investigated. That requirement, however, is very vague.[122] For this reason, but also due to insufficient knowledge and insufficient sensitivity of judges to the problem of intersectional discrimination, judges, as a rule, do not use or extremely rarely use the intersectional approach, except when describing the factual context of disputed events.[123] As the law does not offer an answer to the question of who is the appropriate comparator in these cases, the courts regularly compare the situation of the alleged victim with the situation of the comparator, but only in relation to one personal characteristic. Besides, other legal techniques, used to prove discrimination, such as the statistical method of proof, are also accompanied by problems. This is because official statistics often do not contain information on the work force classified by gender, disability, ethnicity and other personal characteristics, which is why members of certain minorities (e.g. members of ethnic minorities with disabilities) may remain invisible in official statistics.[124] In addition, judgments often lack an evaluation of the combined effects of two or more

118 Samek Lodovici *et al*., *op. cit.,* 136. See: Judith Brockmann, Minou Banafsche, 'Integration and participation of disabled persons in the labour market – the legal instruments in German law', *Revista Derecho Social y Empresa*, No. 1, 2015, 102-103.

119 Beker, 166-168. A similar solution is seen in the Croatian anti-discrimination legislation (Act on Suppression of Discrimination, *Official Gazette*, no. 85/08, 112/12, article 6, paragraph 2, *https://www.zakon.hr/z/490/Zakon-o-suzbijanju-diskriminacije*), as well as in Liechtenstein legislation (Behindertengleichstellungsgesetz, *Liechtensteinisches Landesgesetzblatt*, no. 2006/243, article 23, *https://www.gesetze.li/konso/2006243000*), with a caveat that Liechtenstein legislation requires taking into account multiple discrimination when establishing compensation for non-material damage only when it comes to the protection of persons with disabilities from discrimination. Acc. to: Fredman (2016), *op. cit.,* 52.

120 Beker, *op. cit.,* 167-168.

121 *Ibid.*, 166.

122 *Ibid.*, 49.

123 Tanguay, *op. cit.,* 51.

124 Fredman (2009), *op. cit.,* 78.

different personal characteristics, as well as an explanation of the special consequences faced by victims of intersectional discrimination, while in the rare judgments in which the existence of intersectional discrimination is established, its consequences are not taken into account when determining the damages. Also, judgments in which the judge tried to identify, among several grounds of discrimination, the main or predominant ground of discriminatory treatment are not rare.[125] For the reasons described, intersectional model is also a challenge for the authorities responsible for protection of equality.[126]

Certain authors proposed abandoning the rule on establishing the comparator, in order to overcome the problem of proving intersectional discrimination. Instead, the use of a contextual approach is promoted, according to which the judge should contextualize each individual case and explain the disadvantageous position of women who belong to multiple marginalized groups, without having to find a comparator.[127] More precisely, this would mean the introduction of the rule, which has been affirmed in certain case law (e.g. the French Court of Cassation), that the impossibility to compare the situation of a person who feels has been discriminated against at work and the situations of other people, does not eliminate discrimination, nor does discrimination cease to exist because of it.[128] Namely, it is believed that the comparability of situations is only one *modus operandi*, which the prosecutor can use to make the existence of discrimination probable, and not the *conditio sine qua non* of establishing discrimination.[129]

When it comes to *international law*, we have to mention the General Comment of the Committee for Economic, Social and Cultural Rights in which it is pointed out that people with disabilities are sometimes treated as if they were "genderless human beings", which results in neglecting the double discrimination of women with disabilities.[130] The Committee called on the states to deal with the issue of the position of women with disabilities and to set implementation of programs for effective realization of their economic, social and cultural rights as one of their priorities.[131]

Furthermore, the Beijing Declaration called on the countries to ensure equal enjoyment of all human rights and fundamental freedoms for all women and girls, who face multiple obstacles that stand in the way of their empowerment and advancement, because of their race, age, language, ethnicity, culture, religion, disability or indigenous origin.[132] When it comes to legally

125 *Ibid.*

126 Beker, *op. cit.,* 50.

127 *Ibid*., 517-524.

128 Mercat-Bruns, *op. cit.,* 245.

129 *Ibid*., 244-245.

130 Committee on Economic, Social and Cultural Rights, *op. cit*., para. 19.

131 *Ibid.*

132 The Fourth World Conference on Women, Beijing Declaration, adopted at the 16th plenary meeting, on 15 September 1995, point 32.

binding acts, the preamble of the Convention on the Rights of Persons with Disabilities expresses concern regarding difficulties faced by persons with disabilities who are exposed to multiple or aggravated forms of discrimination, including on the basis of sex.[133] Furthermore, this act expressly recognized that "women and girls with disabilities are subject to multiple discrimination", which is why the contracting states should take "measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms", as well as their "full development, advancement and empowerment".[134] The aforementioned provisions reflect the spirit of the concept of disability, which recognizes the interaction between impairments, on the one hand, and social and other obstacles that hinder the full participation of persons with disabilities in society, on the other hand.[135] The gender of a person with a disability is one of those obstacles, just as, on the other hand, the guarantee of the right to equal respect for physical and mental integrity[136] protects the disabled people in their entirety, including all their characteristics (and not just their disability).[137] Finally, the parties to this convention are expressly required to take measures to combat stereotypes, prejudices and harmful practices based on the gender and age of persons with disabilities.[138]

The need to protect women and girls with disabilities is also recognized in the jurisprudence of the Committee on the Elimination of Discrimination Against Women, which points out that "intersecting factors", disability being one of them, make access to justice difficult for women from this and other minority groups.[139] Furthermore, the Committee's General Recommendation No. 28 explicitly confirms that intersectionality is a basic concept for understanding the obligations of the contracting states of the Convention on the Elimination of All Forms of Discrimination against Women. Namely, it was confirmed that discrimination against women based on sex or gender is "inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity". For this reason, "discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways than men".[140] The contracting states are therefore obliged to prohibit intersectional discrimination by law and to take measures to eliminate it.

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133 Convention on the Rights of Persons with Disabilities, preamble, recital 16.

134 *Ibid*., art. 6.

135 Acc. to: Fredman (2016), *op. cit*., 36.

136 Convention on the Rights of Persons with Disabilities, art. 17.

137 Fredman (2016), *op. cit*., 36.

138 Convention on the Rights of Persons with Disabilities, art. 8, para. 1, subpara. b).

139 Committee on the Elimination of Discrimination against Women, General recommendation on women's access to justice, CEDAW/C/GC/33, para. 8.

140 General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28, para. 18.

However, when it comes to EU law, despite the solid anti-discrimination framework, the necessary attention to the issue of intersectional discrimination in employment is lacking. The reasons for this are, above all, related to the fact that the EU directives regulate protection against discrimination based on individual personal characteristics, that they have different areas of application, that they allow different exceptions for different grounds of discrimination, and that they do not leave room for expanding the catalogue of grounds for discrimination without amending directives.[141] Nevertheless, the preamble of the Council Directive 2000/78/EC does mention multiple discrimination. This drew the attention to the risk of intersectional discrimination in the field of employment, while cumulative negative consequences of discrimination based on sex and disability were only directly identified in rare non-legally binding acts.[142] Also, with the European Union's accession to the Convention on the Rights of Persons with Disabilities in 2010, the importance of protecting women and girls with disabilities from multiple (therefore, also intersectional) discrimination was underlined. However, this wasn't enough, because the EU legal system lacks a directive that would directly regulate the issue of multiple and intersectional discrimination. Especially because the desired results cannot be achieved by filling the gap in EU law, but rather by doing it at the national level. This is because different national legislations offer different solutions and approaches, which cannot ensure compliance of EU law with the Convention on the Rights of Persons with Disabilities.[143] Finally, the role of the European Court of Justice in this area should also be taken into account, especially as it's been applying the intersectional approach in its recent judgements. This is particularly visible in the judgments in which the Court dealt with the concept of disability and its relationship with illness and obesity.[144]

141 Fredman (2016), 10.

142 Council Directive 2000/78/EC, preamble, recital 3; see: Richard Whittle, 'The Framework Directive for equal treatment in employment and occupation: an analysis from a disability rights perspective', *European Law Review*, Vol. 27, No. 3, 2002, 303-326.

143 Lisa Waddington and Andrea Broderick, *Combating discrimination and realising equality. A comparison of the UN Convention on the Rights of Persons with Disabilities and EU equality and non-discrimination law* (2018), 90.

144 When it comes to obesity, the Court considers that obesity, in itself, does not constitute a disability, but it can be qualified as such, if it leads to a long-term limitation, which, in conjunction with other obstacles, makes it difficult for workers to participate in professional life, e.g. if the worker, due to obesity, has limited mobility or his state of health is so impaired that he/she cannot perform his/her work without discomfort (Case C-335/11, 18.12.2014, *Fag og Arbejde /FOA/* v *Kommunernes Landsforening /KL/*, ECLI:EU:C:2014:2463, paras. 58-60). At the same time, the court did not engage in the medical specification of the type of obesity that can be qualified as a disability, although the Advocate General considered that such a qualification can always be made for most severe forms of obesity (class III obesity, per World Health Organization standards). Opinion of Mr Advocate General Jääskinen in Case C-354/13, 17.7.2014, *Fag og Arbejde (FOA)* v *Kommunernes Landsforening (KL)*, ECLI:EU:C:2014:2106, para. 56; see: Joseph Damamme, 'How can obesity fit within the legal concept of 'disability'? A comparative analysis of judicial interpretations under EU and US non-discrimination law after *Kaltoft*', *European Journal of Legal Studies*, Vol. 8, No. 1/2015, 147-179; Zofia Bajorek, Stephen Bevan, *Obesity and work. Challenging stigma and discrimination* (2019).

3. Challenges of implementing the intersectional approach in law

The steps that have been taken so far in terms of regulating protection against intersectional discrimination are important, bearing in mind that decades ago, protection against discrimination included a separate treatment of discrimination based on each individual personal characteristic and a fragmented legal framework for preventing and protecting against discrimination on those grounds. This made it difficult to properly and fully understand the causes and (cumulative) consequences of discrimination against women.[145] Adopting an intersectional approach, therefore, can help efforts to improve the employability of women with disabilities and alleviate their dependence on parents, partners and other family members, especially if anti-discrimination and labour law measures are accompanied by social law measures of importance for creating conditions for independent living of persons with disabilities.[146] This way, *the application of the intersectional approach and the concept of intersectional discrimination strengthen the capacity of labour law to respond appropriately to social reality.*

Although the advantages of the intersectional approach are indisputable, we must not lose sight of the warnings of certain authors, who believe that insisting on this approach leads to the so-called *degenderization of labour law*. It is believed that the application of an intersectional approach unjustifiably narrows the attention that public policy makers and legislators pay to sex/gender as the basis of discrimination.[147] There are, however, opposing opinions, especially among feminist activists, according to which the concept of intersectional discrimination, on the contrary, strengthens gender equality, because women are most often the victims of intersectional discrimination.[148] However, even the latter point of view is not without critics, especially among activists who represent interests of other vulnerable groups. More precisely, the view is that the promotion of the intersectional approach, as a kind of a feminist instrument, leads to the understanding of multiple discrimination as a hierarchical phenomenon. This phenomenon is linked to various forms of discrimination, which is added on to sex-based structural discrimination, which is not acceptable for many non-governmental organizations that represent, protect and promote the interests of other vulnerable groups.[149]

The very content of the intersectional approach requires some caution, since there is no precise and widely accepted *definition of intersectionality*.[150]

145 Eleonore Kofman, Judith Roosblad and Saskia Keuzenkamp, 'Migrant and minority women, inequalities and discrimination in the labour market', in Karen Kraal, Judith Roosblad, John Wrench (eds), *Equal opportunities and ethnic inequality in European labour markets – Discrimination, gender and policies of diversity* (2009), 49.

146 Davaki, Marzo, Narminio and Arvanitidou, *op. cit*., 15.

147 Joanne Conaghan, 'Labour law and feminist method', *International Journal of Comparative Labour Law*, Vol. 33, No. 1, 2017, 99. Emanuela Lombardo and Lise Rolandsen Augustin, 'Framing gender intersections in the European Union: What implications for the quality of intersectionality in policies? ', *Social Politics*, Vol. 19, No. 4, 2012, 482-512.

148 Xenidis, *op. cit*., 51; Beker, *op. cit*., 44.

149 *Ibid*., 51.

150 Tanguay, *op. cit*., 49.

This is because the concept of intersectionality "encourages complexity", as it concerns the multi-layered dimensions of social life, but because of this intersectionality itself remains undefined and open.[151] Certain authors indicate the modest importance of the concept of intersectionality for law, precisely because of its vagueness. The principle of legal certainty, namely, presupposes the precise determination of the grounds of discrimination, because otherwise it is not possible to clearly determine the area of application of anti-discrimination law, nor the intensity of the intervention of this branch of law in social relations.[152]

The complexity of intersectionality is also linked to *methodological problems*. Namely, different authors use different methods for researching intersectional discrimination, which further leads to different understandings of this term. Thus, for example, one group of authors decides to deconstruct (actually, to reject) analytical categories (primarily gender and disability categories).[153] The second group of authors, on the contrary, does not deny the importance of analytical categories, but uses them strategically, in the sense of concentrating research around the processes in which these categories are created, reproduced and revived in everyday life.[154] Finally, there are authors who place inequality that exists among already constructed categories at the centre of their research. Explaining inequality now becomes the basic task of the research. This inevitably involves the use of analytical categories, but not for the sake of simply defining gender, disability or other categories, but for the sake of understanding the nature and dynamics of the relationships, which are established between different social groups.[155]

It's also pointed out in literature that one of the problems of the intersectional approach is its primary orientation towards the position of black women, as well as absence of reliable empirical research.[156] Therefore, calls for action to reconsider the intersectional approach are made, but not to underestimate its importance or its potential, but rather to improve it. Certain authors propose, as a way to overcome the problem of proving intersectional discrimination, to abandon the rule on establishing comparators, while pushing for the *contextual approach*, where judges need to contextualize each individual case and explain the unfavourable position of women from multiple marginalized groups, without the obligation to find a comparator.[157] Other authors, on the other hand, believe that the procedural position of workers who consider themselves discriminated against can be improved by *reducing the number of grounds of discrimination to a minimum, primarily to sex,*

151 Beker, *op. cit*., 43.

152 Schiek, *op. cit*., 49.

153 McCall, *op. cit*., 1775-1784.

154 *Ibid*.

155 *Ibid*., 1784-1794.

156 Jennifer C. Nash, 'Re-thinking intersectionality', *Feminist Review*, Vol. 89, No. 1, 2008, 1.

157 Beker, *op. cit*., 517-524.

race and disability.[158] This is because other personal characteristics can be assimilated into one of the three "basic" grounds of discrimination, e.g. health status and in some cases, the age of the worker (in a limited sense),[159] can be "added onto" disability, as grounds for discrimination; gender, sexual orientation and pregnancy can be added to sex as a basis for discrimination,[160] while origin and nationality can be added on to race.[161] In this regard, it is considered that the "grouping" of personal characteristics could make the grounds for discrimination more transparent and, consequently, facilitate its establishing. This is especially true for EU law, in which special directives regulate protection against discrimination on the basis of individual personal characteristics, with the catalogue of personal characteristics being limited, with the possibility of adding new characteristics only through amendments to existing directives.[162]

158 Mercat-Bruns, *op. cit*., 243.

159 In several of its rulings, the European Court of Justice was devoted to fine-tuning of the concept of disability, starting from the position that disability includes a "limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life" (Case C-13/05, 11.7.2016, *Sonia Chacón Navas* v. *Eurest Colectividades SA*, ECLI:EU:C:2006:456, para. 43). In order for a limitation to be considered a disability, it has to meet the requirement that it is likely to be long-term; also, disability should be distinguished from illness, so the workers won't be protected from discrimination on the grounds of disability as soon as they develop any kind of illness (Case C-13/05, para. 44). The turning point in the understanding of disability came after EU joined the Convention on the Rights of Persons with Disabilities. Since then, this term has been understood to mean a long-term "limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers" (Joint cases C-335/11 and C-337/11, para. 38). The aforementioned definition testifies to the determination of the Court to move from the medical to the social model of disability in EU law, resulting in the *boundaries between the concepts of disability and illness becoming softer*. Thus, the court subsumed under the concept of disability both curable and incurable diseases, which cause long term limitations. More precisely, it's a limitation that does not necessarily entail complete exclusion from professional life, but makes professional life difficult, as would be the case, for example, with a worker who is able to work only part-time, due to illness (Muir and Waddington, *op. cit*., 523). To summarize: in the European Court of Justice case law, disability is understood as *a long-term (not permanent) impairment, which hinders, to a certain extent, an individual from participating in professional life*. Minor impairments and impairments that don't affect the ability to work, even when they have significant consequences on other aspects of the worker's life, won't be qualified as disability.

160 The issue of indirect gender discrimination is particularly delicate with regard to the discrimination of workers based on marital status. According to the interpretation of the International Labour Organization standards, discrimination on the basis of marital status includes discrimination against a worker because he/she is single, or married, or married but is separated from the spouse, or divorced, or a widow(er), or is the *de facto* spouse of another person. International Labour Conference, *op. cit*., para 40.

161 Mercat-Bruns, *op. cit*., 243.

162 Schiek, *op. cit*., 52; Fredman (2016), 60; *Cf.* Isabelle Daugareilh, 'Les discriminations multiples', *Hommes & migrations*, No. 1292, 2011, 34-46.

4. Challenges of applying the intersectional approach in labour law

To apply the intersectional approach in employment of persons with disabilities, we need to have proper understanding of how sex and disability, as grounds of discrimination, intersect. Consequently, we should bear in mind that a considerable number of women with disabilities decide against employment on the open market, and go for *sheltered employment* instead. This is because women with disabilities are often viewed through a stereotype of having a passive role in society, i.e. as belonging to a category of persons with disabilities who enjoy the social benefits, and even if they do work, the work allows them to "somehow fill their time", rather than ensure their economic security. In addition, mothers with disabilities are often not provided with adequate support, which makes them particularly vulnerable as workers. In this regard, the literature is lacking on the topic of gender differences in relation to the types of employment of persons with disabilities, including sheltered employment, which corresponds to the medical model of disability. The concept of intersectionality is compatible with the social model of disability, since it does not reduce disability to impairments, takes into account the fact that social relations and social structures shape the "transformation" of impairments into disability, and takes into account the relationship between genders.

When it comes to quotas for employment of persons with disabilities, it is important to note that *no legal system has quotas for employment of women with disabilities*. This may result in women with disabilities not having the opportunity to exercise their right to work either based on quotas for employment of women or based on quotas for employment of persons with disabilities.[163] This is because a system with separate quotas for employment of women and quotas for employment of persons with disabilities, as a rule, favours employment of men with disabilities and women without disabilities, because a considerable number of employers, when fulfilling their obligation to employ women, as a group at increased risk from discrimination, give priority to women without disability. On the other hand, in case of quotas for employment of persons with disabilities, most employers fulfil the obligation of employment – by employing men with disabilities, precisely because of the stereotypes associated with the work of women with disabilities.

When it comes to the intersectional approach in the field of employment of women with disabilities in the open market, with *reasonable accommodation*, the jurisprudence of the European Court of Human Rights attracts attention, although its judgments in this area are extremely rare. Namely, in one case, the court examined the violation of the obligation of reasonable accommodation, in light of the violation of the right to respect for private life and the prohibition of discrimination. The case concerned a tax clerk with an amputated leg, who required his employer to adapt the men's toilet to his needs; the employer proposed that he use the women's toilet, which already met the accessibility requirement. Although the submittal was rejected be-

163 Davaki, Marzo, Narminio and Arvanitidou, *op. cit.*, 11.

cause all legal remedies in Turkey had not been exhausted, the Court found a direct connection between the adaptation, requested by the employee, and his private life. This is because not having a suitable toilet in the workplace can have serious consequences for the daily life of the employee, such as feelings of humiliation and anxiety, which certainly affect the quality of private life.[164]

On the other hand, the literature points to the failure of the European Court of Justice and the courts of EU Member States to recognize the harmful consequences of impairments that are typical for the female population or members of certain ethnic groups when determining the grounds of discrimination.[165] The main reason for this can be seen in the failure of the judges to notice the intersection of disability and sex/gender, as grounds of discrimination.[166] Although the position of the European Court of Justice on the relationship between illness and disability was changed in later judgments, it is worth mentioning the case of two secretaries who became ill with illnesses that caused back pain, for which they demanded from their employer to allow them to work part-time and to provide them with ergonomic desks.[167] Failure of the employer to make the required adjustments resulted in their frequent absences from work, and after using the leave for the length of time that, according to the applicable law, represented a justified reason for termination of employment, they were fired. The European Court of Justice referred to one of its earlier judgments, in which it was confirmed that a long-term illness does not constitute a disability, concluding that there is no violation of Council Directive 2000/78/EC in this case either. In the literature, this case stands out as an example in which the application of an intersectional approach could've lead to a decision that would've been in the spirit of the principle of gender equality. This is because the condition that leads to chronic back pain is most often caused by office work, which is primarily done by women.[168] Also, in the judgment on qualifying obesity as a disability, the Court did not take into account that women make up the majority of obese people in Europe and that obesity has more negative consequences for women's ability to find a job than it does for men.[169] More precisely, this means that disregarding the circumstances of the employer's decision not to hire a candidate with a certain weight can represent an obstacle that turns a certain body weight into a disability, and makes the employer's decision discriminatory. The aforementioned practice can lead to more women being denied protection against discrimination at work than men.[170]

164 Judgement *Bayrakci* v *Turkey*, 5.2.2013 (application no. 2643/09), para. 26.

165 Schiek, *op. cit.*, 36-37.

166 *Ibid.*, 37.

167 Joint cases C-335/11 and C-337/11.

168 Schiek, *op. cit.*, 59-60.

169 Case C-354/13, 18.12.2014, *Fag og Arbejde (FOA)* v *Kommunernes Landsforening (KL)*, ECLI:EU:C:2014:2463.

170 Schiek, 61.

Finally, it should be noted that the legal system provides mechanisms for eliminating or mitigating the consequences of unfavourable treatment of workers with disabilities, but, like other social systems, in some cases, also makes it impossible to prevent or mitigate unfavourable treatment, e.g. due to a vague or overly complicated legal framework, due to legal gaps, or due to insensitivity and insufficient training of judges on issues of (multiple) discrimination.[171] Fortunately, prevention and protection against workplace discrimination is not limited to the reactions of judicial authorities to *ad hoc* lawsuits. In addition, proactive duties of state authorities that create and implement public policy, as well as proactive duties of employers to promote equality, contribute to prevention of and protection against discrimination.[172] Moreover, achieving real change in this area isn't possible without fulfilling these proactive duties, as a complement to the procedures for protection against discrimination.[173] In particular, we can point to the duty of the representatives of public authorities to identify groups of workers who are particularly exposed to the risk of discrimination, to establish the goals of achieving equality, and to provide measures for achieving these goals. That way, systematic changes can be achieved in this area, especially because institutional and structural causes of inequality can be diagnosed and addressed collectively and institutionally.[174] Furthermore, tripartite bodies can contribute to the achievement of equality by giving opinions on draft strategic acts and draft laws, in the areas that concern the assessment of the impact of their application on certain vulnerable categories of workers. Also, public employment services participate in the design and implementation of programs that can help women with disabilities to join or improve their position in the labour market, especially through the implementation of measures for employment of sensitive and other difficult to employ categories of workers. On the other hand, training can be organized for employees in private employment agencies to recognize and prevent discrimination and promote equality, which will also contribute to the fight against discrimination against women with disabilities.

Collective agreements represent a powerful instrument for achieving equality in the world of work, especially as the role of laws, as instruments in achieving equality, is quite limited.[175] This is because the normative part

171 The normative framework in this area has grown so much that certain authors suggested its separation into a special academic discipline called the Disability Law. Its main subject matter would be the role of the law and the justice system in producing, consolidating, contesting and affirming disability, as well as the role of the law and the justice system in facilitating, but also in hindering, access to social justice for persons with disabilities. Anna Lawson, 'Disability Law as an academic discipline: towards cohesion and mainstreaming', *Journal of Law and Society*, Vol. 57, No. 4, 2020, 558-587; *cf.* Neil Lunt and Patricia Thornton, 'Researching disability employment policies', in Colin Barens and Geof Mercer (eds), *Doing disability research* (1997), 108-122.

172 Fredman (2009), *op. cit.*, 79.

173 *Ibid.*, 73.

174 *Ibid.*, 80.

175 Greater prospects for promoting equality through collective bargaining and social dialogue exist in countries with a solid legal framework for combating discrimination, as

of the collective bargaining agreement can regulate issues of importance for prevention and protection against intersectional discrimination, and also because there is a possibility that, in the process of collective bargaining, all working conditions are reviewed from the point of view of the prohibition of intersectional discrimination (e.g. pay, working hours, overtime, health and safety at work, dignity at work, internal complaint procedure).[176] The same is true for reviewing the conditions for advancement, balancing employees' professional and private duties and other issues where it is important to take into account the special needs of women with disabilities.

However, we should bear in mind that issues related to sex and disability are rarely regulated by collective bargaining agreements. A major reason for this is the underrepresentation of women, persons with disabilities and, especially women with disabilities, in trade unions, although the International Labour Organization standards recognize the right to establish trade unions without discrimination.[177] Although a considerable number of national trade union confederations have women's sections, it can be observed that female workers are represented in smaller numbers as union members, and especially as members of union committees that participate in negotiations with employers, and also as members of union bodies that make important decisions.[178] The reasons for this can be different, from women being burdened with family duties and not having enough time to participate in trade union activities, professional segregation and insufficient determination and training of women for participation in trade union activities, to gender stereotypes and the fact that the trade unions, due to dominance of men in membership and leadership, are insufficiently sensitive to the needs of their female members.[179] The effective implementation of the principle of equality, therefore, presupposes *equal participation of men and women with and without disabilities in trade unions and in their organs and bodies*, which, if necessary, can be ensured by affirmative action in favour of the categories less represented. In addition, trade unions can play a significant role in developing a culture of tolerance in working environments, as well as in sensitizing workers and employers to the problems of women with disabilities. Also, trade unions have a crucial role (and responsibility) in identifying and fighting against in-

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well as with legislative incentives for regulating discrimination issues at the company level, that is, at the sectoral level, as is the case in France and Spain. Linda Briskin and Angelika Muller, *Promoting gender equality through social dialogue: Global trends and persistent obstacles – Working Paper No. 34*, 8-9.

176 *ABC of women workers' rights and gender equality* (2007), 70. *Cf.* Adelle Blackett and Colleen Sheppard, 'Collective bargainig and equality: Making connections', in Mark Lansky, Jayati Ghosh, Dominique Méda and Uma Rani (eds), *Women, gender and work. vol. 2: Social choices and inequalities* (2017), 669.

177 Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), art. 2.

178 Briskin and Muller, *op. cit.*, 12; see: 'Trade union action: Integrating disabled persons into working life', *Labour Education*, no. 4, 1-70.

179 *ABC of women workers' rights and gender equality*, *op. cit.*, 70; Briskin and Muller, *op. cit.*, 14-15.

tersectional discrimination in the company, through organizing training on recognition and protection in case of discrimination, as well as through providing protection, help and support to members who believe they have been discriminated against.

In addition to strengthening the role of trade unions, it is also necessary to strengthen the role of *employers and employers' associations* in this area. This is especially true for overcoming cultural, social and economic obstacles that prevent or make it difficult for women with disabilities to become managers and employers. Employers and their associations, therefore, should affirm gender equality in the world of work, especially in terms of encouraging women's self-employment, keeping sensitive statistics and adopting codes of conduct and other instruments of importance for achieving equality.[180] This will contribute to the improvement of the position of workers, as well as employers, because consistent implementation of the principle of equality will lead to a better working environment and higher productivity of workers, who are more productive the more satisfied they are with their working conditions. In this sense, the importance of adopting action plans for achieving equality of persons with disabilities, as well as codes and other acts of importance for managing the risk of disability in the workplace, should be underlined.[181]

Finally, permanent employer's supervision over the structure of employees can contribute to the implementation of the principle of equality, in order to ensure that all vacant jobs are made available to the members of vulnerable groups, in addition to organizing meetings between employers and their representatives who are interested in working in a certain field. If there are persons with disabilities among the employees, their employer should pay special attention to whether they are represented in managerial positions. If this is not the case, the principle of equality dictates that the employer review its employment policy and sources of autonomous law, in order to see if there are possibly discriminatory criteria or other obstacles for professional advancement of workers from vulnerable groups. In addition, employers should consult with union representatives about ways to improve the career development of women with disabilities, such as introducing mentorships, designing programs to improve skills and abilities, and the like.

All citizens must participate in achieving social change that concerns equality, while special responsibility lies with the social partners.[182] This is because women with disabilities are underrepresented not only in the membership and bodies of trade unions, but also in tripartite bodies and employers' associations bodies, even though it cannot be reliably stated that the greater representation of women with disabilities at these levels would contribute to better representation of their interests in the (bipartite and tripartite) social dialogue.[183] But even with this stipulation, there is a need for

180 *ABC of women workers' rights and gender equality*, *op. cit.*, 67-68.

181 See: *Managing disability in the workplace: ILO code of practice* (2002).

182 *Social dialogue at work: Voices and choices for women and men* (2009), 2.

183 Briskin and Muller, *op. cit.*, 8.

collective labour law to become sensitive to the problems faced by women with disabilities. The application of collective agreements, codes and other autonomous acts should lead to *transformative equality*, since the changes made possible by these acts contribute to the empowerment of women with disabilities, as well as to the strengthening of social solidarity and participatory democracy.[184]

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UKRŠTENA DISKRIMINACIJA ŽENA SA INVALIDITETOM U SVETU RADA: PREDNOSTI I IZAZOVI PRIMENE INTERSEKCIONALNOG PRISTUPA

Apstrakt

U svim savremenim pravnim sistemima u svim delovima sveta, osobe s invaliditetom nailaze na značajne prepreke prilikom ostvarivanja i uživanja prava na rad. Iskorenjivanje njihove diskriminacije pretpostavlja, međutim, i uvažavanje činjenice da diskriminatorsko postupanje može biti zasnovano na dva ili više osnova diskriminacije, odnosno na njihovom kombinovanom dejstvu. Ovo naročito vredi za sadejstvo pola i invaliditeta, budući da je decenijama unazad, sudska zaštita od diskriminacije podrazumevala zaseban tretman diskriminacije na osnovu jednog ličnog svojstva. Time je otežano pravilno i potpuno razumevanje uzrokâ i (kumulativnih) posledica diskriminacije žena sa invaliditetom, što može da ih učini pravno nevidljivim i da dovede do uskraćivanja njihove potpune i delotvorne zaštite. Osim toga, ni u jednom pravnom sistemu nisu uvedene kvote za zapošljavanje žena sa invaliditetom, što može imati za posledicu da u praksi, žene sa invaliditetom ne budu u prilici da ostvare pravo na rad ni na osnovu kvota za zapošljavanje žena, niti na osnovu kvota za zapošljavanje osoba sa invaliditetom. S druge strane, rodna nesenzitivnost razumnog prilagođavanja uslovâ rada potrebama osoba s invalditetom može prouzrokovati osećanje poniženosti i uznemirenosti i druge ozbiljne posledice po svakodnevni život zaposlenih. Slično vredi i za nepriznavanje štetnih posledica oštećenja, koja su tipična za žensku populaciju.

Ove i druge nedostatke tradicionalnog pristupa zaštiti od diskriminacije nastoje da otklone koncepcija intersekcionalnosti i koncepcija ukrštene diskriminacije. One, naime, afirmišu sagledavanje interakcije invaliditeta i pola/roda, kao osnovâ za (sistematsko) neopravdano razlikovanje kandidatâ za zaposlenje i zaposlenih. U članku su, otud, najpre razmotreni rizik diskriminacije osoba sa invalditetom u svetu rada i modeli njihovog zapošljavanja (zaštićeno zapošljavanje, zapošljavanje na otvorenom tržištu, uz razumno prilagođavanje, i kvote za zapošljavanje osoba sa invaliditetom). Nakon toga je analizirano sadejstvo negativnih stereotipa vezanih za invaliditet i negativnih rodnih stereotipa koji prate zapošljavanje i rad žena sa invaliditetom. Poseban deo članka posvećen je osnovnim postavkama koncepcije intersekcionalnosti, kao i pojmu, pravnom uređivanju i razumevanju ukrštene diskriminacije, te izazovima u primeni intersekcionalnog pristupa u pravu. Osim toga, preispi-

tane su i prednosti i izazovi primene interesekcionalnog pristupa u radnom pravu, uz zaključak da prihvatanje ovog pristupa može pomoći nastojanjima da se unaprede zapošljivost i uslovi rada žena sa invaliditetom. Iako su prednosti primene intersekcionalnog pristupa nesporne, ne smeju se gubiti iz vida ni njegova ograničenja. Ona se posebno vezuju za teškoću da se u slučaju ukrštene diskriminacije odredi uporednik, kao i za neodređenost pojma intersekcionalnosti, zbog čega nije moguće jasno odrediti područje primene antidiskriminacionih odredaba, kao ni intenzitet njihove intervencije u društvene odnose. Konačno, ukazano je na proaktivne dužnosti državnih organa i poslodavaca koje su usmerene na promovisanje jednakosti, kao i na socijalni dijalog, kao moćne instrumente za otkrivanje i sprečavanje ukrštene diskriminacije i institucionalnih i strukturnih razloga nejednakosti žena sa invaliditetom.

Ključne reči**:** *Zapošljavanje; Žene sa invaliditetom; Koncepcija intersekcionalnosti; Ukrštena diskriminacija.*

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DISCRIMINATION OF WOMEN WITH DISABILITIES IN LABOUR MARKET

Abstract

This paper presents a scientific analysis through which the author exposes modern and current dilemmas related to the position and treatment of women at work and in employment relationship. In the analysis, attention is paid to the etymology of the phenomenon of women's inequality in society, especially in labour relations. The author analyses the employment, advancement and remuneration of women, distinguishing stigmatization, segregation, discrimination and victimization as separate aspects of the inappropriate and prohibited treatment of women in the world of work. Special attention followed by empirical data is given in relation to women with disabilities, as a special category, in the paper.

The author unequivocally goes beyond the margins of legal analysis and methodology, opening wider social, psychological, as well as ethical issues related to the dilemmas of whether women are a special category in labour or completely equal to men, while not limiting himself to analysing the influence and role of feminism in the process. On the other hand, the fact is unequivocally underlined that women with disabilities, as a special discriminated group on two grounds, gender, and disability, should also have double special protection within the framework of labour relations.

In the paper, the issue of discrimination against women in general and women with disabilities is considered through the prism of international and European norms and practices, but Macedonian current conditions are also analysed. The paper contains court proceedings that are relevant and important in relation to discrimination at the European and national levels.

Key words: *Discrimination; Women; Employment; Protection; Disabilities.*

I INTRODUCTION

Discrimination is one of the essential problems the labour market is facing. The fight against discrimination occupies a large and significant place in modern labour relations, while the reasons that lead to discrimination are numerous. Discrimination is contrary to the concept of equality, which im-

plies in the broadest sense of the understanding, based on the equal value and dignity of all human beings. However, when we talk about equality, a distinction should be made between formal and material equality[1]. Formal equality implies formal (legal) recognition that all persons have equal rights and freedoms guaranteed by law or another legal act. Given that, *mutatis mutandis*, within the framework of labour relations, the legal jurisdiction insists on the acceptance and respect of exactly this type of equality. But in practice, discrimination usually occurs in another direction, and that is in relation to material equality. That is, the non-implementation of legal equality in daily work and the etymological understanding of the notion of equality, which is actually defined as material equality. From there, discrimination in labour relations is manifested as a violation of either formal or, more often, material equality.

The goal of a society with developed labour relations and a culture of social dialogue strives to achieve material equality. It is the multidimensionality of material equality that is manifested by the protection of a large number of subgroups of marginalized workers, including women with disabilities. That is why, when we talk about discrimination against female workers with disabilities, we must take into account the multifaceted nature of the issue, the manifestation of discrimination, and the types, that is, legal and other instruments of protection.

Persons with disabilities represent one of the most marginalized groups of citizens, not only in the world of work, but in general. Globally, it is estimated that more than 650 million people suffer from some form of disability. It is estimated that around 52% of people with disabilities in Europe do not participate in the labour market at all even though they represent an active population, and every year more than 20 million women become disabled as a result of complications during pregnancy and childbirth[2]. Globally, the situation becomes worse if the sex and gender, nationality, or age of these persons are taken into account. To the extent that there are still no truly effective and sustainable instruments for the protection and integration of women with disabilities within the labour force and outside of it.

The figures regarding gender inequality continue to be overwhelming even in the 21st century. The gender gap is a constant feature of the labour market globally. Women's unemployment is still high, even when they are employed, women work in hierarchically lower jobs. They are also paid less and often face some form of discrimination during their working life. There is still a certain diversification in terms of professions, so we have many professions that are predominantly "male", while women remain more numerous in the traditional so-called "female" professions. It is much more difficult for women to return to the labour market, especially those with disabilities. For exam-

1 Popovska Zaneta anda Jovevski Lazar, *Antidiscrimination law* (2017), 14.

2 From exclusion to equality: Accomplish of the rights of persons with disabilities, *http://www.un.org/disabilities/documents/toolaction/ipuhb.pdf*

ple, in 2006, the UK Government invested £360 million in a program entitled "Pathways to Work" to support people with disabilities' efforts to move back into the labour market. In order to reduce the estimated 2.7 million people claiming disability benefits, this program includes work-focused interviews and access to personal advisers. To date, over 25,000 disabled people have transitioned back to work contributing to a rising employment rate of 29%.[3]

The growth of discrimination between women who are also persons with certain disabilities should be seen through the general framework for discrimination against women, but also specifically in the context of the subtype of discrimination that occurs among women with disabilities in the labour market. The fight against discrimination against women with disabilities begins by addressing their problems and delving deeper into the causes of this phenomenon. The paradigm for equality between people, translated through labour relations into the very essence of labour, rests deeply on the principles of humanity, morality, and ethics without which the concept itself has no meaning. The eschatological depth of equality springs deeply from the understanding of man as God's creation created in God's image, hence discrimination itself represents the antipode of what is good, true, and acceptable, contrary to the understanding of law in its meta-legal manifestation.

II HISTORICAL DEVELOPMENT OF WOMEN'S INEQUALITY IN THE WORLD OF WORK

Systemic inequality and discrimination is a process that female workers have been facing for a long time. History remembers the struggle of women for their rights and place in the legal and labour law system.

Europe remembers that despite the high values of the normative system set through the *leightmotiv* of the European Union after the Great War, in the past, but also today there are cases of discrimination against people with disabilities, especially women. Thus, in England, which, despite the form of government that is represented, makes it a democratic country, counts in its history a large number of discriminatory phenomena committed against women, especially in employment. The famous case of *Bebb v The Law Society*[4] reached the Court of Appeal after in 1913 the Law Society refused to give permission to four women to take exams. What is interesting about this case is that the Court of Appeal upheld the decision, reasoning that women were not in fact "persons" within the meaning of the Advocates Act 1843. It took six long years and the passing of the Sex Disqualification (Removal) Act in 1919 for women to become human.[5]

3 Disability Discrimination at Work, *https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_decl_fs_87_en.pdf*

4 A women is not a "person": A review of *Bebb v the Law Society* 1914, *https://first100years.org.uk/a-woman-is-not-a-person-a-review-of-bebb-v-the-law-society-1914/*

5 *Ibid.*

During the First World War, there was a drastic increase in the activity of women in the labour market especaly in Europe. This is largely due to the fact that men were forced to fight, so the burden of earning fell on women, but also due to the fact that production during that period experienced expansion. The needs of the war dictated the opening of a large number of factories for the production of weapons and ammunition, which became the largest employers of women. The employment rate among women increased from 23.6% of the working-age female population in 1914 to between 37.7% and 46.7% in 1918.[6]

However, in addition to the increase in employment among women, the problem of discrimination remains where they are paid much less compared to men. In this context, there was even some concern that after the end of the war employers would not want to hire men who would have to be paid higher wages against the lower costs they have to pay women workers. This opinion turned out to be largely unfounded.

The period of the Great Recession brought a large number of job losses in which women were not spared. As a relatively more vulnerable category, women were the first to be hit for dismissals by employers who justified the fact of their role as wives and mothers in households. But with the start of the Second World War, recruitment and campaigning for women in the workplace took off again. Already in 1941, it became mandatory for women to register and record together with their family occupations. Each woman was asked to choose one of a number of jobs. Pursuant to the Law on National Service of 1941 (No. 2) the recruitment of women to work has been declared legal. At first, only single women in their twenties were called up, but within two years almost 90% of single women and 80% of married women were employed in essential jobs to meet the needs of the war.[7]

The actualization of the issue of equality between the sexes is largely due to the French influence and the insistence of the French lobby groups when we can say that the development of the anti-discrimination process on European soil begins.[8]

The socialist system brought certain improvements to the situation, but despite that there are certain challenges and difficulties. Women actively and equally (at least declaratively) got involved in the labour market and actively participated in work processes, as well as decision-making in work groups. In certain socialist legal systems such as the Yugoslav one, women were equally part of the labour relations system both within the framework of work and in terms of decision-making. However, statistics show that in the decision-making process in socialist enterprises, more than 70% of senior management positions are held by men. Actual inequality also exists in the socialist system of organizing labour relations. However, under the pressure of the

6 Women in work: A brief history of women in the workplace, *https://www.futureofwork-hub.info/comment/2021/7/6/women-in-work-a-brief-history-of-women-in-the-workplace*

7 *Ibid*.

8 Popovska and Jovevski, *op. cit*., 95.

socialist countries, on the international level, there was an increase in the normative activity related to the protection of women in labour and the affirmation of disability as something that is not in individual but outside him. Such a doctrine led to the creation of a different mentality and understanding of women's disability (but also disability in general), where the era of creating adequate (reasonable) working conditions for persons (including women) with disabilities at workplaces, overcoming architectural barriers and creation of protective labour legislation that will apply to persons with disabilities.

On the other hand, there is formal and material discrimination against women in general, as well as with disabilities within the framework of the employment relationship in legal systems that lean towards Sharia law, such as S. Arabia, the Emirates, Afghanistan, Bahrain, etc. From there, we can undoubtedly put forward a thesis that in the world it is not a question of harmonized international legal standards, as well as cultural differences that see women in a different context in work, but also in society in general.

However, more than 50 years after equal pay legislation was introduced, the world has seen an almost continuous increase in the percentage of women in the workplace. This increase in the number of women in the workplace is largely the result of a huge change in work patterns at certain points in the life cycle. Today, more and more women are employed throughout their mid-20s and early 30s. To a large extent, this is because women now cohabit and have children usually less often and relatively later in life.

III DISCRIMINATION AGAINST WOMEN WITH DISABILITIES AS A SPECIAL LEGAL PHENOMENON

Discrimination as a problem is deeply rooted in various aspects of daily living and work. It can be manifested on a variety of grounds, the most gradual of which is discrimination based on gender or nationality, and if we talk in a broader framework, there is also discrimination based on race.

However, although in reality women with disabilities are a special marginalized group in the labour market, from a normative point of view there are no special provisions that refer to the prevention of discrimination only against women with disabilities. From there, the rhetoric itself includes a general understanding of discrimination in labour relations and the labour market, for women, without making a normative difference for the subtype of discrimination – women with disabilities.

Disability discrimination in many cases cannot be immediately recognized, which is very common and a big problem. In certain cases, it is direct and unambiguous, for example when we have a *de facto* non-provision of the necessary funds for persons with disabilities and because of this, they cannot exercise their rights and a situation where due to the state of disability these persons are treated separately in relationship with others. Here the question is, where is the border, that is, how far is the humane attitude towards persons with disabilities, and where does discrimination begin?

Discrimination due to disability implies different treatment of persons during their employment because of the degree of disability they have or even because of their relationship with certain persons with disabilities.

The labor market has never been immune to discrimination, and despite all attempts to limit it, no matter on what basis it is, it is still very present. In times of crisis, these problems only deepened. After the declaration of the pandemic caused by Covid-19, a large number of jobs were lost, and the first to be hit were female workers and all workers who were in lower-level jobs.

Women with disabilities are mostly low-skilled workers, who work in places where direct contact with customers is required, and precisely because of this, they were also among the most affected by the Corona crisis. The problem with the qualification of these persons begins already in the education process, it is necessary to provide equal opportunities for education to children with disabilities as to all others. Already at the stage when persons with disabilities are children, certain efforts should be made to integrate them into regular educational programs, providing them with all the necessary additional conditions for smooth education.

Today there is an acute problem of the lack of inclusion of persons with disabilities in the labour market, and even more so the way in which the existing problem is solved. To a large extent, the issue of persons with disabilities is still being regulated by special decrees and legal acts, instead of approaching a comprehensive inclusion of persons with disabilities in legal legislation, policies, and strategies are adopted in order to promote the various spheres of social life, especially employment.

In addition, the abuse of women with disabilities in employment is also a problem. Abuses can be of a very different nature, mostly in terms of accessibility, that is, inaccessibility to facilities and infrastructure, as well as the lack of adequate or reasonable adaptation. It is necessary for employers to take the initiative and make the appropriate changes in the workplace so that employees with disabilities can perform their work tasks smoothly. Such changes are usually not too big of a financial burden and they consist in the provision of ramps, movement directions for visually impaired people, provision of a larger screen for people with partial vision impairment, etc.

Abuses can also refer to completely cheating the system, i.e. registering a person with a disability as an employee, for which they usually receive some financial support from the state, while they do not perform their duties, i.e. they are sent home and only receive a monthly allowance, part of which is returned to the employer. This situation represents the destruction of the potential that can be offered by a woman with a disability, who usually has the necessary qualifications and skills for the given workplace for the further development of the company due to stigma and discriminatory behaviour.

IV PSYCHOLOGICAL, SOCIOLOGICAL AND ETHICAL ASPECTS OF DOUBLE DISCRIMINATION

The status and role of women in labour legislation have changed significantly. The change is, first of all, in relation to the legal arrangement of protection at work and the emancipation of women as participants in the labour market. That is why we are not surprised by the "feminization" of labour and the increasing importance of women, but it makes us ask in more detail and essentially some questions and dilemmas that arise. After all, the main question is whether and until when the process of "equalization" of female and male labour will develop in terms of discrimination and protection at work, and what will it bring?

The European tendency to exclude protective norms at work for women exceeds its limits. The process is global (planetary). This process is not only significant for labour relations but has a much broader and more subtle meaning and impact. It reflects and will reflect on family relations, economic relations, on the collective consciousness of women, and overall social relations. It causes social sensations in all spheres of life, of course, due to the fact that labour (especially in capitalism) is the centre of social life. That is why we believe that the processes within labour and labour relations will be crucial in relation to the so-called female jobs. This is happening in a number of countries and is strongly reflected in and through labour legislation. It is precisely the reduction of the scope of women's rights of protection at work based on physical characteristics that indicate that many things have changed in society and will continue to change. It directly reflects on the equality system, where the understanding of the content of the discriminatory grounds changes.

The absence of awareness about women with disabilities and their active inclusion in the labour market has profound consequences on the psychological health of women. This type of equal treatment based on gender and disability doubly excludes women from the workforce. Unfavourable external factors such as low awareness of the inclusion of women with disabilities in the labour market, architectural barriers, inadequate and non-fixed legal framework, stereotypes, and prejudices negatively affect the improvement of the conditions of women with disabilities. However, in addition to external factors, there are also internal negative limitations arising from the person with a disability. They are based on self-perception, which directly implies whether a woman with a disability respects herself, whether she has an optimistic attitude towards life, and whether she sees herself as a victim. The self-view, especially if a woman with a disability perceives herself as a victim, often implies in her life and in labour to live as a victim. In many ways, this complicates the process of raising awareness about the protection of the rights of women with disabilities in the workplace, because such women often do not demand their rights, suffer illegal treatment from their employers or colleagues, and are victims of mobbing. Therefore, it is crucial to improve

the external factors, but also to work with the internal limitations of the person in order to generally improve and achieve the well-being of women with disabilities in the labour process.

V INTERNATIONAL, EUROPEAN AND NATIONAL LEGAL FRAMEWORK

International documents that set the pillars of equal principles have a great impact on the reduction of the gender gap and discrimination against women in labour. So Article 141 of the Treaty of Rome, like Convention no. 100 for Equal Remuneration[9] of the International Labour Organization contain the principle that men and women should be paid an equal amount for the same work of equal value.[10]

Initiatives taken at individual workplaces have led to increased interest in the gender pay gap. More and more companies are looking for ways they can reduce the existing wage gap. (Positive action involves taking targeted steps to address under-representation or disadvantage experienced by people with characteristics protected by the Equality Act 2010, including sex. For example, increasing under-representation of women in work.) [11]

The issue of disability is recognized and already normatively treated in the United Nations, the Council of Europe and the European Union acts. In these acts, discrimination is very often connected and perceived in terms of labour relations and equal opportunities for these persons in labour.

1. General international standards

One of the basic legal instruments that refer to persons with disabilities, and regulates the issue of discrimination in a broader framework than the previous ones that referred to the employment relationship, is the International Convention on the Rights of Persons with Disabilities adopted in 2006 by UN.[12]

This convention applies to all persons with disabilities and focuses on rights that would mean greater overall integration of these persons such as education, free movement, independent life in the community, employment, access to information, obtaining adequate health care, participation in politics, cultural and sports events, independent decision-making, etc. The Convention singles out women and children with disabilities as special groups within the framework of persons with disabilities. Discrimination is prohibited on all grounds, that is, unequal treatment in all spheres of regulation of

9 *www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_Ilo_Code:C100.*

10 Popovska and Jovevski, *op. cit.,* 96.

11 Women in work: A brief history of women in the workplace, *https://www.futureofworkhub.info/comment/2021/7/6/women-in-work-a-brief-history-of-women-in-the-workplace*.

12 The Convention was adopted by consensus on December 13, 2006 by the General Assembly. Entered into force on May 3, 2008. More at: *htpp://www.ohchr.org.*

the Convention, and accordingly in labour. But why was the adoption of this convention necessary? Basically, people with disabilities are still denied their basic rights and fundamental freedoms in practice, and disability is taken for granted by most people. Primarily, people with disabilities are still seen as 'objects' for care or medical treatment rather than as rights holders. The Convention therefore emphasizes that persons with disabilities enjoy the same human rights as anyone else and that persons with disabilities are capable of leading their lives as full-fledged citizens who can make significant contributions to society if given the same opportunities as others.[13] These values were also transferred to the section on employment regulated in Article 27 of the Convention.

Through this article, the aim is to open the way for the employment of persons with disabilities, a way that means working on an equal basis with others (paragraph 1). Work should be accessible to persons with disabilities, and employment should be promoted, above all, by the public sector in member states (paragraph 1). With the latter, it is made clear that the state should be the one that will have the initial role in the employment of persons with disabilities. This should be done through direct employment in the public sector and through a legal framework that will stimulate employment in the private sector.

Otherwise, employers often resist hiring people with disabilities or *a priori* reject their applications in the employment procedure, thinking that they will not be able to perform their work tasks and/or that it will be too expensive to hire them. It is about fear and stereotypes, with much more attention being paid to the handicapped than to the abilities of the disabled. On the other hand, a large body of empirical data suggests that persons with disabilities have a higher degree of work performance and endurance, as well as greater regularity than their non-disabled counterparts. But more than that, the cost of accommodating workers with disabilities is often minimal, and very often no additional accommodation is needed at all.

All of this was taken into account during the adoption of the Convention, so we are not surprised by the provisions in Article 27, which foresees the measures for employment and integration through labour that should be taken by the state. Any type of discrimination is prohibited in all forms of employment and labour relations, as well as in relation to safe and healthy working conditions for the disabled (Article 27, paragraph 1, point 1).[14] Also, unequal remuneration for equal working hours for work of equal value is prohibited. Collective rights are also guaranteed, and the states parties are required to promote and advance the employment and career of persons with special needs. A significant field where not only discrimination is prohibited, but also incentive measures are foreseen, is the sphere of education, professional guidance, professional training, as well as professional rehabilitation. It

13 *From exclusion to equality: Realizing the rights of persons with disabilities* (2007), 4-5.

14 See: E. Lucas, 'Adjusting to disability rules', *Professional Manager Magazine*, Vol. 13, No. 5, 2004.

is necessary, among other things, that the states parties provide appropriate policies and measures that will encourage the employment of these persons (point 8). The Convention also provides for the provision of reasonable accommodation for persons with special needs (item 9).

All these measures should be undertaken with one, unique goal, which is to increase the employment of the disabled and protect them from discrimination in employment. In support of the employment of people with special needs, a large number of studies have shown that the benefits of those who employ people with disabilities are increasing, among which the most representative is the improvement of the working environment and the increase in the mood of consumers.

A significant place in the entire system of the Convention regarding the promotion of the employment of the persons with diabilities is the introduction of opportunities for self-employment, entrepreneurship and starting one's own business, as important elements for the independence of persons with disabilities (item 6).[15] This Convention additionally regulates the issue of women with disabilities in Article 6, which recognizes double discrimination and in that regard foresees the taking of various measures in order to ensure the full and equal enjoyment of all human rights and freedoms. Countries must take appropriate measures to ensure the continued development and advancement of women's rights.

2. Women with disabilities in the ILO acts

The International Labour Organization has adopted a series of documents that deal with the issue of discrimination against people with disabilities, which apply to women. So we have C111 Discrimination (Employment and Occupation) Convention, 1958; C128 Invalidity, Old-Age and Survivors' Benefits Convention, 1967; C135 Workers' Representatives Convention, 1971; C142 Human Resources Development Convention, 1975 and C159 Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983, Convention 183 as well as a series of other recommendations passed over the years.

Within the framework of the International Labour Organization, the issue of protecting women against discrimination and in case of disability is treated through two basic starting points. One is a professional training and professional orientation, and the second starting point is professional rehabilitation and employment. In terms of personalization and orientation, two recommendations were adopted, namely no. 99 and 150, while rehabilitation and employment are important in Convention 159 for vocational rehabilitation and employment (disabled persons) and Recommendation 168 for Vocational rehabilitation and employment (disabled persons).

According to the Convention, the definition of who is a disabled person is largely the same as in Recommendation 99 with the difference that it is

15 Z. Stojkova, *From idea to reality: Comprehensive and integral international convention for the protection and promotion of the rights and dignity of persons with disabilities*, (2005), 64.

now said to be: "a person whose chances of securing, retaining and advancing work are significantly reduced due to a duly recognized disability". In the Recommendation, only the reduction of physical and mental abilities was sufficient without requiring official recognition of the disability.

The main goal to be achieved with the Convention is building a framework for empowering people with disabilities so that they can secure employment, keep it and progress in their work. A secondary goal, which in our opinion is also of great importance, is to ensure the integration and reintegration of these persons into society.

This Convention is not large in terms of content and regulates the basic principles of vocational rehabilitation and employment policy for disabled persons, as well as the actions and measures to be taken at the national level for the development of vocational rehabilitation and vocational rehabilitation services. The most significant are several provisions of the Convention that govern these issues.

The member state that ratified this Convention should implement and enable, as well as implement, a special national policy for professional rehabilitation and employment of persons with disabilities (Article 2). That policy should be based on the principles of equal opportunities between persons with disabilities and other workers regarding the possibility of employment in the free labour market (Article 4). Policies should apply to all groups of persons with disabilities, regardless of sex (Articles 3 and 4). In this Convention, it is particularly important the stated that this national policy must not be considered as a discriminatory attitude in relation to other workers, which also confirms our commitment that was previously presented.

During the drafting of this policy, which, by the way, is part of the social policy of the member state, in addition to the representative organizations of workers and employers, it is planned to consult the organizations of persons with disabilities, which are mostly in the non-governmental sector.

For the implementation of those policies (rehabilitation and employment) appropriate activities at the national level are needed, which should be comprehensive[16], as well as the existence of appropriate services that will work on the rehabilitation, employment, retention, and advancement in the work of these persons. That system should cover both rural and urban areas and enable the availability of rehabilitation counsellors and other professional personnel who will be available to persons with disabilities within the framework of fulfilling the aforementioned goal.

In addition to this Convention, Recommendation 168 was adopted at the same session of the International Conference. The general framework contained in Convention 159 is expanded and supplemented by this Recommendation. Otherwise, we are talking about one of the most extensive recommendations made by the ILO. Thus, on the one hand, we have a Convention that contains only basic postulates and principles, and on the other hand, there is

16 This usually happens with the preparation of national action plans for professional rehabilitation and employment of the persons with disabilities.

a Recommendation that provides extensive material related to the vocational rehabilitation and employment of disabled persons. Why is this so?

Such a normative system, in fact, reflects the real situation within the ILO, the mood and awareness among the member states, i.e. their representatives, regarding the rehabilitation and employment of the disabled. In 1983, there was still no need and awareness to regulate the majority of issues in this area with a convention that would give it greater legal weight. Thus, the largest number of questions took the form of a recommendation that has no binding force and, in fact, provides a certain projection of how relations in this normative field should develop in the future.

From today's distance of analysing the norms, we believe that the time has come for certain principles and relationships in the field of professional rehabilitation and employment of disabled people to receive greater and more serious international treatment. But what ideas and settings did Recommendation 168 cover in 1983 and are they still relevant and applicable today?

The Recommendation contains several general principles and definitions that we have encountered before. The definition (paragraph 1) of a disabled person is the same as that contained in Convention 159. Like the previous ones, this recommendation, i.e. the measures it provides for, refer to all categories of disabled people, and the professional rehabilitation and employment services provided for other workers should also be available for people with disabilities, of course, if this is possible, otherwise certain adaptations should be made (paragraph 5).[17] The recommendation refers to the urgency of starting professional rehabilitation, and also refers to cooperation between these services and health care services and other authorities for medical and social rehabilitation.

In the section on professional rehabilitation and employment opportunities, the principle of equal employment opportunities, and retention of job promotion (paragraph 7) is retained, both for women and men workers with disabilities. The principle from the Convention that these measures should not be considered discriminatory in relation to other employees is maintained.

However, in terms of the measures to be taken, some novelties are foreseen in relation to the previous acts (Recommendation 99 and the Convention). Paragraph 11 lists several measures, of which the measures that provide financial incentives for employers in order to create new jobs on the labour market should be singled out. Also, government support is provided for protective employment for the disabled[18], as well as for professional training, retraining, and retraining services.[19] As new measures stand out those

17 Borivoje Šunderić, *Pravo Međunarodne organizacije rada* (2001), 449.

18 This measure was foreseen with a similar content in Recommendation 99.

19 We believe that governmental (state) assistance and participation in the system of protection of persons with disabilities in the employment relationship is very important, and perhaps at the moment also crucial for developing a wider positive social affirmation and creating awareness for the needs of these persons, as well as for realizing the rights of employment relationship of these employees. The state, with its mechanisms of coercion and

that foresee: *opening cooperatives of the disabled and for the disabled; government support for the opening and development of small enterprises and workshops; removal of architectural barriers not only at the workplace, but also more broadly in society, and especially in rehabilitation and training services; providing suitable means of transportation; promoting successful examples of disabled employees; fiscal exemptions and relief of different nature and purpose; part-time employment and other flexible forms of employment; government support to eliminate possible exploitation during work or in protective workshops; research and analysis of the results about the possibilities and the way of including the disabled in the labour process.*

From this range of new measures, it can be seen that they refer to several sectors of employment and professional rehabilitation. These measures aim to help the disabled to rehabilitate and get employed, and thus integrate into society. That's why here we also find atypical measures that have a wider social meaning and role, than only specifically in employment and rehabilitation (for example, removal of architectural barriers, specific transportation, etc.). The fact that this Recommendation has a wider scope is also indicated by paragraph 12, which, in the interest of the integration and reintegration of the disabled, stipulates that special measures should be taken not only for training for work but also for a regular and normal life. In fact, the employment and daily life of these persons form an unbroken and connected circle that functions as a whole. In order for these people to be able to get a job and keep their job, they must function successfully in other areas of life, in other daily activities, and vice versa. Thus, if these persons can perform their daily duties normally, then they are able to perform their work tasks as well. That is why the vision contained in the Recommendation promotes measures of broader social action that will ultimately result in employment, and thus integration and reintegration of the disabled.

In the Recommendation, a great deal of attention is paid to the arrangement of professional rehabilitation services. In relation to them, several important solutions are foreseen, namely regarding the organization and functioning of the services, for professional rehabilitation in rural areas, for the training of the employees in the services, as well as for the contribution of the organizations of workers, employers and the disabled in the development of the services for vocational rehabilitation.

Within the framework of the organization of the services, the contribution of the community is emphasized by participating in the functioning of the services and informing the disabled and members of the community (paragraph 16). The community should finance services and identify the needs of the disabled in the various spheres of its competence (paragraphs 17 and 18).

In the Recommendation in paragraphs 20 and 21, it is said that special attention should be paid to the services in the rural areas, in relation to the determination of such services in the village, and if this is not possible, then

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other tools, is uniquely capable of rapid and decisive change in this particularly important social field, which is the protection of disabled employees and their social inclusion.

in the city, there should be mobile units in charge of professional rehabilitation, to train adequate staff, to encourage the creation of village cooperatives for the disabled, to include the disabled in the development of the municipality and to provide them, if possible, an apartment at a reasonable distance from the workplace.

With regard to the training of the employees in the services, the employment and development of professional and qualified personnel who will have knowledge about disability and its limiting effect is foreseen (paragraph 23). It is also recommended to provide appropriate training to these service employees, as well as equal treatment with service employees who are engaged in regular training, and in particular, migration between services is encouraged.

As we mentioned, the Recommendation contains guidelines regarding the involvement of competent organizations of workers, employers and disabled people in the development and functioning of professional rehabilitation services. Generally speaking, their role and contribution should consist of the inclusion of these organizations in the process of integration and reintegration of the disabled in the labour process and in society.[20] In that sense, employers' organizations should make efforts to: give advice to professional rehabilitation services; to provide information about working conditions and about their needs and conditions that disabled workers have to meet; to encourage their members for some reorganization in order to keep the disabled in their jobs (paragraph 36). With regard to workers' organizations (the trade union), it is recommended that, within their competencies, they put the problems of disabled workers on the agenda of trade union meetings, include them in the workers' councils, propose guidelines for professional rehabilitation and protection of the disabled, such as and to regulate some issues in collective agreements (paragraph 37). The organizations of the disabled, on the other hand, should have the incentive to participate in the establishment and work of the services and other organizations whose purpose is professional rehabilitation, and the government should provide support in the development of such organizations the disabled and the organizations whose purpose is the development of educational programs for the public that project a positive image of the abilities of disabled persons (paragraph 38).

The Recommendation refers to the connection of its provisions with the acts relating to the social insurance system, that is, to the conventions in that area adopted by the ILO. It states that the social insurance system should include the financing and development of programs for training, mediation, and employment of the disabled, as well as measures that would make it easier for the disabled to join the free labour market (paragraphs 40 and 41).

The last part of the Recommendation refers to "coordination of the measures to be undertaken for professional rehabilitation and employment of persons with disabilities with other social, and above all political, economic and legal policies and development programs to achieve the previously mentioned goals".

20 See more: paras. 31-35.

We can say that the system of norms adopted by the International Labour Organization for employment, vocational training, and rehabilitation of the disabled only partially meets the expectations and needs. However, this system has two weak points. First of all, it is formed in such a way that its main part (content) does not have a mandatory form, that is, it was adopted through recommendations, instead of conventions. On the other hand, from 1983 until today[21], there have been neither revised nor new provisions in any form on these issues, which is not good considering the changes in labour relations and the new scientific knowledge about the inclusion of the disabled in the labour process, which also reduces their practical applicability.

3. The normative `treatment` of women with disabilities in the EU

In terms of European legislation, we have several norms, here are the European Accessibility Act, EU Directive 2019/882 on accessibility requirements for products and services, regulations on the rights of passengers with reduced mobility in the main means of transport, EU Directive 2016/2102 on accessibility to websites and mobile applications of public sector bodies, the EU Disability Card, the EU Parking Card, as well as the EU Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

The most significant legal act of the European Union regarding the prohibition of discrimination and employment of persons with disabilities is undoubtedly Directive 2000/78 EC[22] on the general framework for equal treatment in employment and work prohibits any type of discrimination, including discrimination based on disability, both direct and indirect. The directive applies to all employees, which means that it directly applies to women with disabilities in employment and labour relations. For this purpose, an Action Program (2001–06)[23] was adopted, which provided for the support of member states in the fight against discrimination, which included campaigns, studies, mutual connection, cooperation, etc. In the meantime, a special European Action Plan (2004-2010) was adopted, which has several phases, and the main goal is to implement political measures that will enable the economic and social integration of people with disabilities.[24] Although this directive applies to all types of discrimination, in Article 5 it is specifically reserved for persons with disabilities. It is said that *"to achieve the principle of equality in the treatment of persons with disabilities, it is necessary to provide reasonable accommodation.* A reasonable accommodation is understood as the employer's obligation to take appropriate measures that would enable disabled

21 By October 2016.

22 [2000]OJ L303/16; Philipa Watson, *EU Social and Employment Law* (2009), 298, 400.

23 Council Decision 2000/750/EC of 27 November 2000.

24 More: Commission Communication of 30 October 2003, *Equal opportunities for people with disabilities: a European action plan* [COM (2003) 650 final – Not published in the Official Journal]; Commission Communication of 28 November *2005*, *Situation of disabled people in the enlarged European Union: The European Action Plan 2006-2007* [COM (2005) 604 final – Not published in the Official Journal].

persons to access, participate and advance in employment or training, with the exception if such measures would not represent a disproportionate cost for the employer. In addition to this Directive, previously, in 1986, Recommendation 86/379 EEC on the employment of persons with disabilities was adopted, which affirms the importance of appropriate education and training that persons with disabilities should achieve in order to be competitive in the labour market.

In terms of protection against discrimination in terms of health and safety at work, Directive 89/654 EC[25], which refers to minimum standards for safety and health in the workplace, stipulates that the workplace must meet standards, that is, be adapted to the needs of people with disabilities.[26] Also, the concept of lifelong learning is widely promoted, which applies to all employees, and especially to employees with disabilities and older employees. In addition to this, the Union pays attention to monitoring and following the situation, as well as building the concept.

It is obvious that within the European community law, more attention is paid to creating a framework and strategy for the protection of persons with disabilities from discrimination. The main emphasis is placed on the development of a system of inclusion (inclusion) of persons with disabilities in the labour process itself and afterward, and less on the construction of a normative system of benefits (special protection) within the framework of the employment relationship itself.

On the other hand, the concept of development and improvement of national legislation is promoted in relation to the system of special protection of this, however, a special category of employees.[27] Thus, the member states have special labour law norms that refer to these employees, thus filling the communitarian gap.

Among the other acts, we would single out the Resolution of the Council on Encouraging Employment and Social Integration of Persons with Disabilities from 2003.[28] This Resolution promotes the full integration and participation of the disabled in all spheres of social life, recognizing that they have the same rights as other citizens.[29] The act states that the inclusion of issues in the field of disability when developing the national plans of the member states related to social issues and poverty, as well as paying special attention to issues related to women with disabilities should be on the future national normative agenda.[30] The resolution calls on the Member States, the Commis-

25 [1989] OJ L393.

26 Equal opportunities for people with disabilities: A European action plan (2004-2010), 5.

27 The fact that it concerns special categories of employees is confirmed by the very systematization within the framework of the Community law, as well as the national legislations of the member states that protect persons with disabilities and older workers with special norms within the framework of the labour codes.

28 [2003] OJ C175/1.

29 Z. Stojkova, *International norms and standards for persons with disabilities: comparative analysis* (2004), 113.

30 *Ibidem.*

sion and the social partners to make efforts to remove barriers to the integration and participation of the disabled in the labour market by implementing measures for equal treatment and improving the integration and their participation at all levels in the education and training system.[31] These measures exclude discrimination against persons with disabilities in terms of accessibility to jobs. This means that the workplace should be adapted according to the needs and possibilities of persons with disabilities.

Directive 76/207/EEC on equal treatment, which was replaced by Directive 2002/73/EC, was on the line of prohibition of discrimination.[32] The new Directive is a basic equality directive that prohibits discrimination on several grounds, including disability. The directive stipulates that employers should refrain from discrimination in the employment relationship with respect to persons with disabilities, as well as provide appropriate conditions and accommodation at the workplace and equal treatment. In relation to the professional integration of the disabled, the Joint Declaration was adopted in 1999, which states that discrimination based on reasons that are not relevant to the performance of work tasks is socially unacceptable and economically unjustified. Of course, disability was meant. In relation to the employment of persons with disabilities, the Recommendation 86/379EEC[33] was first adopted, which, of course, was not binding for the member states. With this recommendation, the ways of job creation, special employment, professional rehabilitation and training, etc. were affirmed.

The 1996 Council resolution on equal employment opportunities for persons with disabilities[34] provided for a special emphasis on the promotion of employment opportunities in the national policies of member states, in coordination with social partners and the non-governmental sector. Equal opportunities for employment are implemented through adjusting the workplace, developing the qualifications and skills needed for work, access to employment services, access to new information technologies, which is rather reminiscent of Resolution no. 3 of 2001 of the Council of Europe.

Within the framework of the Union, numerous other acts have been adopted that prohibit discrimination of persons with disabilities and provide appropriate rights for social and professional integration of these persons. On this occasion, we would like to underline that the Charter of Fundamental Rights of the European Union of 2000[35] (adopted in Nice) prohibits discrimination on the basis of disability, which is a higher level of protection than that provided for by Article 14 of the Treaty of Amsterdam. In addition to these, acts were passed regarding the prohibition of discrimination for access to information technologies, violence against persons with disabilities, access in the field of culture, for the integration of children and young people with

31 Watson, *op. cit*, 112.

32 [2002] OJ L303.

33 Council Recommendation 86/379 [1986] OJ L225/43.

34 Council Resolution on Equal Employment of Disabled Persons [1996] OJ C 12/1.

35 [2000] OJ L303.

disabilities in the permanent education system, recognition of parking tickets, equal opportunities for education of pupils and students with disabilities, etc.[36]

With this normative system in the Union, an attempt is made to round off the protection of persons with disabilities from discrimination, and especially from discrimination in employment and labour relations. Slowly, but surely, in the European Union, the importance and role played by the non-discriminatory protection of persons with disabilities and the affirmative measures and actions that should be taken for the full integration of these persons are being understood. Acts regarding employment and health security with the acts adopted on the basis of the non-discrimination agenda should be seen as an inseparable whole, and this is especially visible in the area of creating appropriate conditions for employment and appropriate accommodation within the framework of the employment relationship.

4. National solutions (general framework)

The national framework for the employment of persons with disabilities in North Macedonia includes the Constitution as the highest legal act, the Law on Labour Relations, the *lex generalis* in relation to labour relations, the Law on the Employment of Persons with Disabilities (as *lex specialis*) and the Law on Prevention and Protection against Discrimination.

The Constitution proclaims the equality of all citizens who enjoy equal rights and freedoms and are equal before the Constitution and laws. According to this guarantee, citizens are equal in freedoms and rights regardless of gender, race, skin colour, national and social origin, political and religious belief, property and social position.[37] This article itself does not cover disability. In Article 32, the Constitution provides for the right to work for every person under equal conditions, including the free choice of profession, job protection and material security for temporarily unemployed persons, equal opportunities for employment (clause for anti-discrimination), adequate earnings and rest. In addition, the Constitution guarantees the state's obligation to ensure the inclusion of persons with disabilities in society.

The Law on Labour Relations regulates issues for persons with disabilities starting with working hours, that is, persons with disabilities may be employed part-time and be socially insured just like other full-time employees. These persons have the right to salary, paid annual leave and all the rights arising from the employment relationship. In addition, employed persons with disabilities and employed persons who have and take care of a child with disabilities are entitled to three additional days of annual leave per year. The Law provides for additional measures aimed at protecting the health of employed persons with disabilities, who are also considered a special group of persons at risk. According to the letter of the Law, these persons must not be placed in jobs that harm their health and put them in danger.

36 All acts adopted within the European Union, and indicated in this part of the paper, are available at: *http://europa.eu.int/eur-lex/en/lif/reg/en_register_1640.html.*

37 Constitution of the RM, 1991.

Employers, in addition to having the obligation to provide adequate conditions for these persons to be able to perform their work tasks without interruption, also have the obligation to provide protection for persons with disabilities during employment, training/vocational training and rehabilitation.

The Law on Employment of Persons with Disabilities is a special law that contains the legal provisions for the employment of persons with disabilities in the private and public sector, as well as self-employment in accordance with the Law on Commercial Companies. This law also provides for the establishment of a protective company which is established for the purpose of employing persons with disabilities. It also regulates the special fund for improving the conditions for employment and work of persons with disabilities.

Thus, the national framework of the Republic of Macedonia is advanced and in accordance with a large number of international and European documents. It provides adequate protection to persons with disabilities in a normative sense, but practical application encounters difficulties. But the challenges at the national level are not in the legislation but in its practical application. There is a lack of efficient application of the provisions, which in turn stems from insufficient awareness in society and the lack of an efficient system of supervision and control. Of course, the need for continuous amendment and upgrading of the existing legislation is indisputable, the conditions are changing, and thus the needs of people with disabilities.

V MORE THAN A CONCLUSION

The issue and general theme of equal treatment of women with disabilities in labour relations, but also in everyday life itself, is the basis for building a truly mature society, where the physical or mental weaknesses of the neighbour will not be seen as part of his/her problem, but as a part of the problem of the environment that must react to overcome it. Disability should not be understood as part of the person, although it may be visible and manifest, but as part of personal perception and understanding of what is right and what is wrong, what an ability is, and what a disability is.

Instead of just talking, each individual should act to overcome stereotypes, bridge barriers, and improve the working conditions of women with disabilities, but most of all build awareness that will mean a mature society that develops inclusive labour relationships. It should be manifested through the legal norm, and through the personal example of the practice of everyone who works with women with disabilities.

The message has been sent, the words have been spoken, but what needs to be done practically and concretely is the following: we believe that reasonable accommodation represents a *modus vivendi* of the concept of non-discrimination of women and persons with disabilities in general and the basis of the possibility for these persons to be employed and to work. But not only that, the health of disabled people is protected through reasonable adjustments in the area of labour relations. This is very important because

even if they have the opportunity to work without special adjustments in the workplace, it is a completely different question whether such conditions will not affect their health. In the end, we should see the conditions necessary for a reasonable accommodation as part of the concept of non-discrimination of persons with disabilities in the employment relationship and part of the special protection in employment. For this purpose, the European and international normative system, as well as the very idea of protecting persons with disabilities, is being developed on such a basis.

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DISKRIMINACIJA ŽENA SA INVALIDITETOM NA TRŽIŠTU RADA

Apstrakt

Rad sadrži naučnu analizu kroz koju autor izlaže moderne i trenutne dileme vezane za položaj i postupanje prema ženama na radu i u radnim odnosima. U toj analizi, pažnja je poklonjena etimologiji fenomena nejednakosti žena u društvu, posebno u radnim odnosima. Autor analizira zapošljavanje, napredovanje i primanja žena, kao i njihovu stigmatizaciju, segregaciju, diskriminaciju i viktimizaciju, kao posebne aspekte neodgovarajućeg i zabranjenog postupanja prema ženama u radnom procesu. U ovom radu, posebna pažnja poklonjena je empirijskim podacima vezanim za žene sa invaliditetom, kao posebnu grupu.

Autor u analizi naznačenih pitanja prelazi granice pravne analize i metodologije, te otvara šira društvena, psihološka i etička pitanja vezana za dilemu da li su žene posebna grupa u svetu rada ili su potpuno jednake s muškarcima. Autor se u tom razmatranju ne ograničava na analizu uticaja feminizma. S druge strane, nedosmisleno je potcrtano da žene sa invaliditetom, kao grupa koja je diskriminisana po dva osnova – po osnovu roda i invaliditeta, takođe treba da uživaju dvostruku posebnu zaštitu u okviru radnog odnosa.

Pitanje diskriminacije žena uopšte i diskriminacije žena sa invaliditetom je u radu razmotreno kroz prizmu međunarodnih i evropskih normi i prakse, ali i u svetlu trenutnih uslova u Severnoj Makedoniji. Rad, otud, analizira i sudske predmete od značaja za odnos prema diskriminaciji na evropskom i nacionalnom nivou.

Ključne reči: *Diskriminacija; Žene; Zapošljavanje; Zaštita; Invaliditet.*

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WOMEN WITH DISABILITIES AND LABOUR MARKET INTEGRATION IN SPAIN

Abstract

In April 2019, the UN Committee on the Rights of Persons with Disabilities assessed Spain's compliance with the 2006 Convention on the Rights of Persons with Disabilities. Its observations reveal the direction disability policy has been taking in recent years to make visible the unique position of women with disabilities and the obstacles they face, especially in the field of employment. Even today, despite the efforts made by public authorities and the legislator in order to provide appropriate solutions, official statistics and various studies highlight the fact that women with disabilities have lower levels of education, lower activity and employment rates, and high unemployment.

The concept of disability and its treatment at a political and legal level has evolved in Spain in parallel to what has happened at an international and European level, from an individual medical care model towards a social model of human rights in which disability is the result of the interaction between people with a functional deficit and the barriers of the environment. The progressive application of the mainstreaming principle, which is helping to apply the gender approach in disability policy and vice versa*, is a step forward that may result in a more favourable treatment of women with disabilities in the Spanish labour market. This paper shows some recent legal measures adopted by Spain in response to the Observations of the UN Committee on the Rights of Persons with Disabilities wondering about their real effectiveness in a labour market as peculiar as the Spanish one.*

Key words: *Multiple discrimination; Intersectional discrimination against women with disabilities; Integration into the labour market; Job reserve quota.*

I A STILL PHOTOGRAPH

In April 2019, the UN Committee on the Rights of Persons with Disabilities assessed Spain's compliance with the 2006 Convention on the Rights of Persons with Disabilities.[1] Its observations were a snapshot of the political

1 Concluding observations on the combined second and third periodic reports of Spain of 9 April 2019 on compliance with the International Convention on the Rights of Persons

and, above all, legal treatment of disability in Spain in accordance with the commitments arising from the ratification of the Convention.

On a positive note regarding the area of employment and occupation of persons with disabilities[2], the Committee highlighted that Spain has adopted legislative measures of interest. On the one hand, the Law on the Rights of Persons with Disabilities and their Social Inclusion (Royal Legislative Decree 1/2013)[3], which aims to increase the activity, employment and integration rates of persons with disabilities by improving the availability of decent jobs and combating discrimination. And on the other hand, Spain had reformed the Public Sector Contracts Act (2017)[4] which introduces various measures to promote compliance with the legal obligation to establish a quota of reserved jobs for people with disabilities as set out in Art.42 of Royal Legislative Decree 1/2013.[5]

However, the Committee was concerned about other aspects, in respect of which it made some recommendations to Spain. In general terms, these aspects and the corresponding recommendations reveal the direction disability policy has been taking in recent years to make visible the unique position of women with disabilities and the obstacles they face, especially in the field of employment.

First, there was concern about the lack of explicit recognition of multiple discrimination and intersectional discrimination based on disability and gender (as well as other factors). In this case, the Committee recommended revising national legislation to incorporate these issues.

Secondly, the Committee was concerned that public policies on disability and gender equality respectively do not include measures to combat intersectional discrimination against women with disabilities, who face multiple forms of discrimination on the basis of their gender and disability. Spain was therefore recommended to review its legislation to bring it in line with the Convention and explicitly recognise and prohibit multiple and intersectional discrimination on the grounds of disability and gender. The Committee also recommended Spain act urgently to adopt effective measures to identify, prevent and protect against this type of discrimination, and to incorporate a gender perspective in its legislation and policies on disability.

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with Disabilities, *http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhslxq2MulDp%2FqMKQ6SGOn0%2FM2iqPHauvLINGLuCsnFfZ4vRELH5%2FNh4FYriSa2QosgWlomBNlf3Iidy8dmP2sajaD4jyCm5OYfQAamFv1l%2F5o.*

2 Art. 27 of the UN Convention on the Rights of Persons with Disabilities.

3 Royal Legislative Decree 1/2013, of 29 November, approving the Consolidated Text of the General Law on the Rights of Persons with Disabilities and their Social Inclusion. BOE no. 289, of 3 December 2013.

4 Law 9/2017, of 8 November, on Public Sector Contracts, transposing into Spanish law the Directives of the European Parliament and of the Council 2014/23/EU and 2014/24/EU, of 26 February 2014. BOE no. 272, of 9 November 2017.

5 David Gutiérrez Colominas, "La regulación española de la cuota de empleo de personas con discapacidad y medidas alternativas: reflexiones y propuestas de mejora a propósito de su compatibilidad con la Convención Internacional sobre los Derechos de las Personas con Discapacidad", *Documentación Laboral*, Vol. II, núm. 120, 2020, 55.

Third, regarding labour and employment, the Committee was concerned that no progress has been made to address the low employment rate of persons with disabilities in the open labour market, which particularly affects women with an intellectual disability and women in rural areas. In this regard, the Committee recommended that regulations and policies be reviewed and amended to promote the employment of persons with disabilities in the public and private sectors, with special attention to women and persons with disabilities residing in rural areas.

Fourth, another warning of the Committee was the non-compliance with the quota for the reservation of jobs for persons with disabilities in the field of public sector contracts. It recommended Spain to adopt concrete measures in order to fully implement the legal quota provided for in the Consolidated Text of Law 9/2017 on Public Sector Contracts.

Finally, the Committee noted that there is a lack of information on the implementation of anti-discrimination laws in the workplace, including information on the denial of reasonable accommodation. In this regard, it recommended ensuring the availability and accessibility of the provision of reasonable accommodation for persons with disabilities, in particular in cases of occupational accidents resulting in disability.

II DISABILITY AND THE LABOUR MARKET

Disability is undoubtedly part of the human condition. People in any society may be affected by foreseeable permanent functional limitations of a physical, intellectual or sensory nature which, in interaction with various barriers, may prevent their full and effective participation in society, reducing their chances of integration and remaining into the labour market.

People with disabilities are at a social disadvantage. It is well known that situations of poverty, lower levels of education, lack of employment or social vulnerability affect people with disabilities to a greater extent. This situation is aggravated when the disabled person is also a woman.

Indeed, there are considerable differences between women and men with disabilities, and between women with and without disabilities. Even today, despite the efforts made by public authorities and the legislator in order to provide appropriate solutions, official statistics highlight the fact that women with disabilities have lower levels of education, lower activity and employment rates, and high unemployment.[6] The percentage of people with disabilities who are in employment is much lower than their proportion in society as a whole. In the case of women with disabilities, the figures are even lower when compared to the level of employment of women without disabilities and to that of men with disabilities. This situation suggests that women with disabilities suffer from a double reason that hampers their access to the

6 National Institute of Statistics, *Employment of People with Disabilities (EPD),* updated 28.02.2022 *https://www.ine.es/prensa/epd_2020.pdf*.

labour market and limits their chances of getting a suitable job, keeping it and advancing in their careers.

Having a job is not only a way to have resources to live on. It is also a way to participate in society and to be able to fulfil oneself. For people with disabilities – particularly women – entering the labour market can be a means to achieve social integration. However, the picture is not easy for people with disabilities, especially women. They face obstacles arising from their own disability that hinder, condition or limit their job opportunities, or their possibilities to take up suitable employment in the public or private sector and to progress professionally.

Indeed, such barriers may be due to having a chronic illness or health problem, or limitations in hearing, sight, movement, ability to concentrate or to communicate. They may be due to a lack of qualifications or lower vocational skills, or little or no work experience. In the work environment, obstacles derive from physical and architectural barriers in the workplace. Finally, we must consider the social environment, the attitudes and behaviour of the staff towards the disabled worker, which are not always appropriate, possibly due to a lack of social awareness of the disability issue.

It is clear that respecting the rights of persons with disabilities is a constant challenge for our society. The limitations that disability entails require adjustments to the environment in order to guarantee that persons with disabilities can fully exercise their rights in conditions of equality and non-discrimination. When disability interacts with gender, a sui generis reason for possible discrimination arises, which requires specific treatment by the public authorities in order to provide appropriate solutions.

In any case, in order to avoid or tackle situations of inequality, public authorities, legislators, social agents and private associations collaborate in the design and implementation of specific actions and measures to eliminate these social imbalances. It is true that some of the aforementioned obstacles have been overcome with public policies aimed at inclusive education or at promoting a better understanding by society of what disability implies for people and their environment.

However, the integration into the labour market of people with disabilities who are fit for work has not been achieved to the extent expected. The real challenge is still to facilitate their access to employment, or self-employment, and to maintain, promote and grow professionally, without disability being a limitation. All this in a labour market such as the Spanish one, which suffers from structural problems that successive governments of democracy have not managed to solve adequately. Temporariness and unemployment characterise our labour market, particularly affecting young people, who tend to double the unemployment figures for adults, and other vulnerable groups such as people with disabilities, with worse figures for women with disabilities. These figures worsen in times of crisis, placing our country among the Member States of EU with the highest unemployment rates.

III LEGAL TREATMENT OF DISABILITY IN SPAIN

The legal treatment of disability has undergone a progressive humanisation that has culminated in the implementation of a model of rights at universal level (United Nations Convention on the Rights of Persons with Disabilities, 2006), at European level (Directive 78/2000/EC) and at national level (General Law on the Rights of Persons with Disabilities). [7]

In Spain, the Constitution (1978) has established the necessary framework for the development of the rights of persons with disabilities. Firstly, by recognising that "the dignity of the person, the inviolable rights inherent to him/her, the free development of the personality, respect for the law and the rights of others are the basis of political order and social peace" (Art. 10.1). Secondly, urging the public authorities to "promote the conditions to ensure that the freedom and equality of the individual and of the groups to which he/she belongs are real and effective; to remove obstacles that prevent or hinder their full realisation; to facilitate the participation of all citizens in political, economic, cultural and social life" (Art. 9.2). Thirdly, indicating that the public authorities "shall carry out a policy of prevention, treatment, rehabilitation and integration" of persons with disabilities, providing them with specialised care and protecting their citizenship rights (Art. 49), especially the right to work and to social protection. Finally, the Spanish Constitution enshrines the principle of equality and the prohibition of discrimination on various grounds, including sex and disability (Art. 14).[8]

Indeed, the concept of disability and its treatment at a political and legal level has evolved in Spain in parallel to what has happened at an international and European level. If initially disability was considered a physical condition of the individual that demanded medical care, it has evolved towards a social model of human rights in which disability is the result of the interaction between people with a functional deficit and the barriers of the environment. From this approach, the aim of public authorities and regulations is to achieve the personal autonomy and full development of people with disabilities on an equal basis with other citizens. In this process, it is worth mentioning the progressive application of the mainstreaming principle, which is helping to apply the gender approach in disability policy and vice versa, i.e. the disability approach in equality policy. All of which results in regulations that are particularly sensitive to the phenomenon of double discrimination affecting women with disabilities.

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7 José Fernando Lousada Arochena, "Enfoque de discapacidad, y en especial su aplicación en la jurisdicción social", *Revista de Jurisprudencia,* No. 36, 2022.

8 On disability as a cause of discrimination in Art. 14 Spanish Constitution: Miguel Rodríguez-Piñero Bravo Ferrer and María Fernanda Fernández López, "Discriminación de género y otras discriminaciones: la discriminación múltiple y las mujeres", Jesús Cruz Villalón, Eva Garrido Pérez, Carmen Ferradans Caramés (ed.) *Tutela y promoción de la plena integración de la mujer en el trabajo, Libro homenaje a la profesora Teresa Pérez del Río* (2015), 25.

1. The historical individual medical care model

Law 13/1982 of 7 April 1982 on the social integration of the disabled[9] is the first law approved in Spain dedicated to the care and support of people with disabilities and their families within the framework of the aforementioned articles of the Constitution. This law was a relevant advance for the time in the care and support of people with disabilities from an individual medical care approach, based on complementary support, technical aids and specialised services that would allow them to lead a normal life in their environment. The law established a system of economic benefits and services, labour integration measures, accessibility and economic subsidies, and a series of principles that were later incorporated into health, education and employment laws.

In particular, the law recognises that social integration is possible with suitable employment, so that one of its objectives is the labour integration of people with disabilities on equal terms with other workers, prohibiting direct and indirect discrimination on the grounds of disability.[10] It should be noted that the law enshrines the principle of equal opportunities in the labour sphere at a time when unemployment rates in Spain were really alarming. [11]

With this Law, the labour integration of people with disabilities becomes a priority in the Spanish employment policy, either through the incorporation into the ordinary work system or, failing that, through sheltered employment through the so-called "special employment centres". In the field of employment, it incorporates positive action measures to prevent or compensate for the disadvantages or special difficulties that people with disabilities have in entering and remaining in the labour market. Specifically, it obliges employers to adopt appropriate measures in the workplace to enable people with disabilities to access employment, perform their work, progress professionally and access training, unless these measures would represent an excessive burden on the employer.

Coinciding in time with the European Year of People with Disabilities, Law 51/2003 of 2 December 2003 on equal opportunities, non-discrimination and universal accessibility for people with disabilities was approved in Spain.[12] It is a law of transition towards the social model. This Law is justified because inequalities persist in society despite the unequivocal constitutional proclamations and the meritorious effort made since Law 13/1982 on the social integration of the disabled. The way in which the phenomenon of dis-

9 BOE" no. 103, 30 April 1982.

10 On protection against indirect discrimination: Thais Guerrero Padrón, "Justificación de la discriminación indirecta por razón de sexo en la Seguridad Social. Doctrina del TJCE", Ministerio de Trabajo y Asuntos Sociales (ed) *La igualdad ante la Ley y la no discriminación en las relaciones laborales, XV Congreso Nacional de Derecho del Trabajo y de la Seguridad Social* (2004), 517-536.

11 M. Aznar López, P. Azua Berra and E. Niño Ráez, *Integración Social de los Minusválidos. Comentarios a la Ley 13/1982, de 7 de abril, Instituto Nacional de Servicios Sociales* (1982), 133-162.

12 BOE no. 289, of 3 December 2003.

ability is understood began to change. In effect, the law gave a new impetus to policies for the equalisation of people with disabilities, focusing especially on two intervention strategies: the fight against discrimination and universal accessibility. It is now understood that the disadvantages of a person with a disability are rooted in his or her personal difficulties, but also and above all in the obstacles that society itself (which was designed for people without such difficulties) poses to the full participation of these citizens.

The approval of Organic Law 3/2007, of 22 March, for the effective equality of women and men,[13] will be innovative in the subject we are dealing with, as it refers to cases of double discrimination and the unique difficulties faced by women with disabilities. In this way, disability and gender are present in Spanish legislation, specifically urging the public authorities to act to address the difficulties of this particularly vulnerable group.

2. The current humanising social model

On the occasion of Spain's ratification in November 2007 of the International Convention on the Rights of Persons with Disabilities (UN, 2006)[14], Law 26/2011, of 1 August, was passed to adapt the legislation to the aforementioned Convention. [15]

Spain undoubtedly embraces the social approach. The medical model of disability is definitively abandoned in favour of a new model of disability based on human rights, in line with the trend at international and EU levels. It assumes the social, rights and capabilities perspective that configures disability as a complex set of conditions, many of which are caused or aggravated by the social environment. From now on, people with disabilities are fully considered as rights holders in the same way as other citizens and public authorities must guarantee that their exercise is full and effective.

The aforementioned Law expressly recognises that women with disabilities objectively suffer a greater degree of discrimination or have fewer equal opportunities than others, which will justify the adoption of additional positive action measures by the public authorities.

However, the decisive step in the regulation of disability in Spain is the approval of the Consolidated Text of the General Law on the Rights of Persons with Disabilities and their Social Inclusion (Royal Legislative Decree 1/2013, of 29 November; hereinafter, LGPD). This is the current legislation on disability in Spain, which is progressively being updated and its content improved with the aim of effectively guaranteeing the right to equal opportunities and treatment of persons with disabilities with the rest of the citizens through the promotion of personal autonomy, universal accessibility, access to employment, social inclusion and independent living and the eradication of all forms of discrimination.

13 BOE no. 71, of 23 March 2007.

14 Into force 3 May 2008.

15 BOE no. 184, of 2 August 2011.

The LGPD has as its guiding principles, among others, the principle of equality between men and women and the mainstreaming principle of disability policies. It recognises that women with disabilities are a particularly vulnerable group (Art.7.4) and urges public authorities to adopt positive action measures to combat the multiple discrimination they suffer. This provision has contributed to the fact that the group of women with disabilities is beginning to be visible and, more importantly, to be treated in statistics and to be the target of specific actions undertaken by public authorities. However, the LGPD does not formally incorporate intersectional discrimination based on gender and disability. This concept is introduced by Law 15/2022, of 12 July, on equal treatment and non-discrimination[16], which we analyse below.

IV THE INCORPORATION OF THE GENDER PERSPECTIVE IN THE TREATMENT OF DISABILITIES

The mainstreaming principle of disability policies entails taking into account the needs and demands of people with disabilities in the general policies and actions of public authorities in any field and not only in those specific plans, programmes and actions dedicated to people with disabilities. In the same way, the mainstreaming principle of equal treatment and non-discrimination entails applying the principle of equal treatment "in the formulation, implementation and evaluation of public policies, coordination between the different public administrations and collaboration between them, social agents and organised civil society".[17] The confluence of both principles in the actions and policies of public authorities has the concrete result of raising awareness of the phenomenon of intersectional discrimination affecting women with disabilities.[18]

The interaction between gender and disability as a new cause of discrimination reflects the consequences of the combination of both grounds of discrimination and refers to the way in which these contribute to creating situations of inequality, particularly for women with disabilities. Indeed, this type of discrimination has an impact on the enjoyment of human rights by women with disabilities, which requires public authorities to articulate specific protection adapted to women with disabilities.[19]

16 BOE no. 167, of 13 July 2022.

17 Extract from the Explanatory Memorandum to Law 15/2022 of 12 July on Equal Treatment and Non-Discrimination.

18 Cayetano Núñez González, "La tutela antidiscriminatoria por razón de la discapacidad en el ordenamiento jurídico laboral" en María Amparo Ballester Pastor (ed.) *La transposición del principio antidiscriminatorio comunitario al ordenamiento jurídico laboral español* (2010), 180.

19 Impact of multiple and intersecting forms of discrimination and violence in the context of racism, racial discrimination, xenophobia and related intolerance on the full enjoyment of all human rights by women and girls, Report of the United Nations High Commissioner for Human Rights,

In the field of employment, this type of discrimination affects women as job seekers or in the workplace. The stereotypes created have an impact on women with disabilities during the recruitment process or in the work environment. They may have to meet additional selection requirements, may find promotion more difficult, may be assigned lower-ranking tasks, or may be paid less for the same type of work.

The "Action Plan for Women with Disabilities 2007", approved by the Spanish Council of Ministers on 1 December 2006[20] envisaged the objective of adapting employment policies to the situation of double discrimination. Probably, this forecast at this date was propitiated by the approval of the United Nations Convention on the Rights of Persons with Disabilities (2006). The actions proposed in the Spanish Plan consisted, firstly, of carrying out a study of job profiles, creating an integrated statistical information system on the activity and employment of people with disabilities with a gender perspective. Secondly, to analyse the professions in which women with disabilities are under-represented in relation to women in general and men with disabilities, in order to propose measures aimed at facilitating their professional diversification. Finally, to study the attitudes of employers and the working environment in relation to the recruitment of women with disabilities.

The application of the gender and disability perspective by public authorities has become more widespread, at least formally. One example is the "Spanish Disability Strategy 2022-2030" which incorporates the gender perspective as a cross-cutting issue to ensure that disability actions and policies take into account women and girls with disabilities and that gender policies take disability into account.[21]

However, the problem regarding the multiple and intersectional discrimination suffered by women with disabilities lies in recognising real and effective protection for victims and establishing the necessary guarantees for the equal exercise of rights.[22] In this respect, the recent Law 15/2022 on Equal Treatment and Non-Discrimination, which aims to place Spain among the States with the most effective and advanced institutions, instruments and legal techniques in the field of equal treatment and non-discrimination, is important in the Spanish legislative framework.

The aforementioned Law responds to some of the recommendations that the UN Committee on the Rights of Persons with Disabilities made to Spain in 2019. Thus, Law 15/2022 introduces as a novelty the definition of multiple discrimination (*which occurs when a person is discriminated against simultaneously or consecutively for two or more of the causes foreseen in this law*) and intersectional discrimination (*which occurs when several of the causes foreseen*

20 https://sid-inico.usal.es/idocs/F8/FDO18244/pamcd2007.pdf

21 *https://www.consaludmental.org/publicaciones/Estrategia-Discapacidad-2022-2030.pdf*

22 *Cf.* Fernando Rey Martínez, "La discriminación múltiple, una realidad antigua, un concepto nuevo*", Revista Española de Derecho Constitucional*, núm. 84, 2008, 266-268. Bravo Ferrer and Fernández López, *op. cit.,* 33-35. José Fernando Lousada Arochena, "Discriminación múltiple: El estado de la cuestión y algunas reflexiones", *Aequalitas*, núm. 41, 2017, 30.

in this law concur or interact, generating a specific form of discrimination). According the Law, in both cases the reasons for the difference in treatment must be given in relation to each of the grounds of discrimination (gender and disability, for example) and affirmative action measures must take into account the concurrence of the different grounds of discrimination.

Another relevant aspect of Law 15/2022 is its intention to "*transpose more adequately*" the aims and objectives of the Employment and Occupation Discrimination Directives (2000/78/EC and 2000/43/EC). Consistent with this, it makes it clear that the denial of reasonable accommodation to people with disabilities is direct discrimination. For these purposes, reasonable accommodation means necessary and appropriate modifications and adaptations to the physical, social and attitudinal environment that do not impose a disproportionate or undue burden (on the employer). Such modifications must be necessary in each individual case in an effective and practical way, with the aim of facilitating accessibility and participation of persons with disabilities and ensuring that they can exercise all rights on an equal basis with others[23].

V RECENT MEASURES TO SUPPORT EMPLOYMENT INTEGRATION OF PERSONS WITH DISABILITIES

The LGPD considers persons with disabilities to be, on the one hand, those who have foreseeably permanent physical, mental, intellectual or sensory impairments (which excludes illness and other transitory situations) which, interacting with various barriers, may prevent their full and effective participation in society, on equal terms with others and, specifically, reduce their chances of integration in the labour market.

On the other hand, this concept includes those persons who have been recognised as having a degree of disability equal to or greater than 33 percent. These are Social Security pensioners who have been recognised as having a permanent disability pension to the degree of total, absolute or severe disability, and pensioners of the special Social Security regime of "passive classes" (civil servants) who have been recognised as having a retirement pension due to permanent incapacity for service or uselessness.

In other words, the legal concept of person with disabilities includes both persons with limitations or impairments that are not directly related to work, and others with impairments or injuries that, due to their objectivity, are easily qualified for the world of work.

The participation in the labour market may be way to achieve the social inclusion of people with disabilities. To this aim, the LGPD indicates three main routes: first, as an employee in regular employment; second, in sheltered employment for people with disabilities, and last, as a self-employed person.

23 Núñez González, *op. cit.,* 184.

Without prejudice to the possibilities of entrepreneurship and self-employment of people with disabilities as a means of access to the labour market, the LGPD sets out a series of measures that should create the necessary conditions for people with disabilities who are fit for the job to be able to access and maintain employment, to be promoted and to grow professionally. The possibilities of employability and permanence as employees in the ordinary labour market and in sheltered employment have been developed extensively in Spain and still give rise to the approval of new positive action measures, albeit not absolutely novel ones. Some of the recently approved measures are as follows.

1. People with disabilities in regular employment

Disadvantages caused by disability in private or public[24] regular employment can be prevented or compensated if appropriate measures are taken.

Employers must take the necessary measures to facilitate accessibility to the company and adaptation to the workplace for workers with disabilities according to the needs of each specific situation. The employee must be able to perform his or her job, progress professionally and have access to training, unless such measures place an undue burden on the employer. In determining whether a burden is excessive, the LGPD takes into account whether it is sufficiently alleviated by public measures, aids or subsidies for people with disabilities, the financial and other costs of the measures and the size and total turnover of the organisation or company.

A specific measure applicable to public and private companies with 50 or more employees consists in reserve two percent of posts for people with disabilities. In the same way, public employment offers must include a reserved quota for people with disabilities[25] .

The job reserve quota is probably an appropriate measure to promote access to the labour market for people with disabilities. In the sector of public administration contracting, Law 9/2017 on Public Sector Contracts has set a two percent reserve quota for persons with disabilities in companies with at least 50 employees. Although this measure is not having the expected effects (as the UN Committee warns Spain) it may be more effective in combination with other measures.

Indeed, Law 9/2017 provides for a series of "dissuasive" measures to ensure the application of the reservation quota and the employment of persons with disabilities in companies contracting with the public administration, for example:

24 In the field of public employment, the reference standards are Law 7/2007, of 12 April, on the Basic Statute of the Public Employee, Law 53/2003, of 10 December, on Public Employment of the Disabled, and Royal Decree 2271/2004, of 3 December, which regulates access to public employment and the provision of jobs for people with disabilities.

25 In this respect, the "Action Plan for Women with Disabilities 2007" (cited above) was concerned with "promoting the access of women with disabilities to public employment", for which it proposed to inform them of the public employment offer, the reservation of vacancies and facilities for adapting posts. It also emphasised training, giving priority to women with disabilities in access to courses.

a) Companies with more than 50 employees that fail to meet this reserve quota shall not be allowed to contract with public sector entities.
b) Offers submitted by bidders to the public administration must comply with the obligations arising from the regulations on the social and occupational integration of people with disabilities, in particular the obligation to recruit a specific number or percentage of people with disabilities.
c) Regarding the conditions of subrogation in employment contracts, when the company that was carrying out the service that was the object of the contract to be awarded was a Special Employment Centre, the new company awardee will have the obligation to subrogate itself as the employer of all the persons with disabilities that were carrying out their activity in the execution of the aforementioned contract.
d) Criteria valued for awarding contracts are the promotion of the social integration of people with disabilities and their socio-occupational integration.
e) In the event of a tie between several bidders, the tie-breaking criteria are, first, having a higher percentage of workers with disabilities and, in addition, that they are permanent workers; and second, having a higher percentage of women in the workforce.

There is no doubt that people with disabilities have the same rights as other citizens, particularly in terms of employment. However, since disability is a factor that conditions or limits the possibilities of integration into the labour market, the public authorities must guarantee the exercise of rights under equal conditions, including through the adoption of specific positive action measures to avoid, prevent or compensate for the disadvantages caused by disability. The aim is to accelerate or achieve full equality at work and to ensure integration at work. There are several examples of such measures in Spanish legislation:

a) Financial subsidies for indefinite full-time contracts with persons with borderline intellectual disabilities. [26]

This measure is intended to promote their access to employment and favour their expectations and options for integration into the ordinary labour market, in accordance with their personal and professional profile. In addition to the subsidy, there are bonuses on the employer's social security contributions, of a variable percentage depending on the worker's age (70 percent if the worker is under 45 and 90 percent if he/she is 45 or over). Compatible

26 Royal Decree 368/2021, of 25 May, on Positive action measures to promote access to employment for people with limited intellectual capacity. People with limited intellectual capacity are those who have this situation officially recognised, are registered in the Public Employment Services as unemployed job seekers who officially accredit, according to the scales in force for assessing the situation of disability, at least 20 percent of intellectual disability and who do not reach 33 percent. Beneficiary employers are companies and self-employed workers who hire them; labour companies and cooperatives.

with the above, there are subsidies charged to the State Public Employment Service, aimed at adapting jobs, or to provide personal protection equipment necessary to prevent accidents at work or to remove barriers or obstacles that prevent or hinder their work.

b) Public aid or subsidies provided for in the "Programme of labour integration through works or services of general and social interest" to finance the hiring of disabled people in the ordinary labour market. The subsidised measures are given in the following cases:[27]

- When fixed-term, temporary and training contracts signed with workers with disabilities are converted into permanent contracts. The general subsidy is increased when the measure concerns a woman with a disability.
- If people with disabilities are hired on an indefinite-term basis by companies, self-employed workers or private non-profit organisations in the ordinary labour market. People with disabilities must be registered as job seekers in the public employment office unless cases of transition from the protected labour market to the ordinary company. As in the previous instance, the subsidy is higher if a disabled woman is hired.
- When workers with disabilities move from employment in special employment centres to employment in companies in the ordinary market, especially through labour enclaves.[28]
- If there is an adaptation of jobs, including measures of universal physical, sensory, cognitive and communication accessibility, and appropriate measures according to the needs of each specific situation, unless these measures place an excessive burden on the entity. Likewise, if there is a provision of personal protective equipment to prevent occupational risks for workers with disabilities and to remove barriers that prevent or hinder their work.
- When specialised job trainer carry out guidance and individualised accompanying actions in the workplace to facilitate the social and labour adaptation of workers with disabilities. In this case, the public subsidy finances the salary and social security costs of hiring the trainer.

2. People with disabilities in sheltered employment

Sheltered employment for people with disabilities is implemented through "special employment centres" and "labour enclaves". The purpose of

27 Royal Decree 818/2021, of 28 September, Regulating the common activation programmes for employment of the National Employment System, which regulates the Programme for the integration of people with disabilities into the ordinary labour market.

28 Royal Decree 290/2004, of 20 February, which regulates Labour enclaves as a measure to promote the employment of people with disabilities, providing incentives for them to be hired on an indefinite basis. BOE no. 45, of 21 February 2004.

the former is to ensure paid employment for people with disabilities, providing them with the personal and social adjustment services they require in each case to overcome the obstacles they encounter in the process of joining a job, during their permanence and in the process of professional promotion. Hiring in special employment centres is a means of access to ordinary employment.

With regard to "work enclaves", they serve to facilitate the transition from sheltered employment in the special employment centre to ordinary employment. The work enclave allows the disabled worker to complete and improve his or her professional experience with tasks appropriate to his or her situation and in an environment typical of the ordinary labour market, which aims to integrate disabled workers with special difficulties into the ordinary labour market. From the point of view of the collaborating company, this measure allows a better understanding of the abilities and possibilities of these workers and leads to their incorporation into the company's staff, benefiting from a series of aids. It is necessary that 60 percent of the workers in the enclave present special difficulties in accessing the ordinary labour market. This group expressly includes women with disabilities.

A paradigmatic example is the "Programme for the inclusion of people with disabilities in the sheltered labour market"[29] which provides for the granting of public subsidies aimed at promoting the creation and maintenance of jobs in special employment centres with a workforce of 70 percent or more disabled workers, not including staff dedicated to the provision of personal and social adjustment services.

The measures supported are as follows:

- Fixed investment linked to the creation of permanent employment in the protected labour market, both for new permanent contracts and for the transformation of fixed-term contracts into permanent contracts for people with disabilities.
- The wage cost of people with disabilities working in special employment centres, without prejudice to the bonuses on the employer's social security contributions.
- Expenses arising from the adaptation of jobs, including measures of universal physical, sensory, cognitive and communication accessibility and appropriate measures according to the needs of each specific situation, unless such measures place an excessive burden on the entity, as well as the provision of personal protective equipment to prevent occupational risks for employees with disabilities and the removal of barriers or obstacles that prevent or hinder their work.
- The implementation of guidance and individualised accompanying actions in the workplace, provided by specialised job trainers, for certain workers with disabilities (mainly those with intellectual disabilities).

29 Royal Decree 818/2021.

VI WHAT FUTURE DO WE HAVE? SPANISH STRATEGY ON DISABILITY 2022-2030

In addition to the aforementioned mainstreaming principle, the Spanish Disability Strategy 2022-2030[30] aims to drive the employment and activity of people with disabilities, increase their activity rate and ensure decent employment in open, inclusive and accessible work environments, enabling the promotion and labour development of people with disabilities under equal conditions.

This policy document sets out the roadmap for disability in Spain. In its development, it takes into account the recommendations and observations made by international and European organisations and the data and results obtained from labour force surveys and our labour market. In some aspects the Strategy is probably innovative, for example when it mentions the need to "*draw up a White Paper on Employment and Disability that offers a framework for the implementation of new models and instruments for the labour inclusion of people with disabilities in companies from an ecosystem approach of support for people and companies*".

However, reading between the lines, the aforementioned Strategy gives a glimpse of the real problems in the application of disability regulations in Spain. The legislation may be comprehensive, advanced, even exemplary. But the Strategy itself reveals that the legislation does not produce the expected effect. There is still unequal treatment in the labour market and people with disabilities suffer from it, especially if they are women. For this reason, the strategy returns to aspects that were regulated decades ago, but which do not work as expected. Some examples are:

a) The reserve quota. The Strategy states that it is necessary to ensure that companies effectively comply with the employment reserve quota for people with disabilities in companies. And to demand compliance as a requirement for access to public contracts. It also states that it is necessary to promote access to public employment for people with disabilities by developing, extending and improving the application of the reserve quota (seven percent, and two percent in the case of intellectual disabilities) in all public employment offers.

b) Access to employment. It is necessary to strengthen access to employment for people with disabilities through the various forms of the social economy by promoting investment, lifelong learning, incentives for hiring and support, renovation and modernisation of special social initiative employment centres.

c) Reasonable adjustments. It is necessary to regulate reasonable adjustments that allow access to and permanence in employment for people with disabilities and facilitate the means and support to make

30 Estrategia española sobre discapacidad 2022 – 2030, *https://www.consaludmental.org/publicaciones/Estrategia-Discapacidad-2022-2030.pdf*

this possible; combat discrimination based on disability in employment, generating channels for complaints and mechanisms for information, control and monitoring of situations of discrimination.

d) Self-employment. It is necessary to promote and support new business, entrepreneurship and self-employment opportunities for people with disabilities. Among others, in the care economy, traditional professions that are not going to disappear, emerging economic activities linked to the development of rural environments, opportunities in the digital and knowledge economy and the ecological transformation.

VII TO CONCLUDE

Despite the efforts of the legislator, the figures reveal that women with disabilities are still at a disadvantage in the Spanish labour market and in some ways the United Nations Committee on the Rights of Persons with Disabilities has warned us of this in its 2019 Observations.

Spain's extensive and detailed disability and equal treatment legislation is not proving sufficient to address the disadvantage faced by women with disabilities in the labour market. Or at least, it has not been as effective as expected. Perhaps the new measures will provide better data. However, when looking at these measures, it is clear that they are in fact old measures that have been renovated to give a new impetus to the employability of people with disabilities, especially women.

Something is still wrong. Possibly, the Spanish labour market suffers from structural defects (high unemployment, temporary employment, etc) that slow down or make ineffective or, at least, reduce the effectiveness of the measures implemented by the legislator with regard to particularly vulnerable groups, such as women with disabilities. Even more so when a crisis situation arises. A difficult problem to solve.

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ŽENE SA INVALIDITETOM I INTEGRACIJA U TRŽIŠTE RADA U ŠPANIJI

Apstrakt

U aprilu 2019. godine, Komitet UN za prava osoba sa invaliditetom ocenio je usklađenost španskog zakonodavstva i prakse s Konvencijom o pravima osoba sa invaliditetom od 2006. godine. Njegovi nalazi otkrivaju pravac u kom je politika invaliditeta poslednjih godina razvijana u cilju vidljivosti jedinstvenog položaja žena sa invaliditetom i prepreka s kojima se one suočavaju, naročito u oblasti zapošljavanja. Čak i danas, uprkos naporima javnih vlasti i zakonodavca da obezbede odgovarajuća rešenja, zvanična statistika i različite studije potcrtavaju činjenicu da žene sa invaliditetom imaju niži nivo obrazovanja, niže stope aktivnosti i zaposlenosti i višu nezaposlenost.

U Španiji, koncept invaliditeta i njegov tretman na političkom i pravnom nivou razvijani su paralaleno sa onim što se dešavalo na međunarodnom i evropskom nivou, od modela individualne medicinske nege ka socijalnom modelu ljudskih prava, u kom se invaliditet posmatra kao rezultat interakcije ljudi s funkcionalnim nedostatkom i prepreka koje postoje u njihovom

okruženju. Postepena primena načela urodnjavanja, koja pomaže u primeni rodnog pristupa u politici invaliditeta predstavlja korak napred koji može imati za posledicu povoljnije postupanje prema ženama sa invaliditetom na španskom tržištu rada. U ovom radu su predstavljene neke skorašnje pravne mere koje su usvojene u Španiji kao odgovor na nalaze Komiteta UN za prava osoba sa invaliditetom, uz razmatranje njihove stvarne delotvornosti na tako osobenom tržištu rada kakvo je špansko.

Ključne reči: *Višestruka diskriminacija; Ukrštena diskriminacija žena sa invaliditetom; Integracija u tržište rada; Kvote za rezevisani posao.*

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DISCRIMINATION OF YOUNG WOMEN WITH DISABILITIES IN THE LABOUR MARKET

Abstract

This paper aims to study the discrimination suffered by young women with disabilities in the labour market, from the perspective of gender and intersectionality theory, based on the idea that their employment situations cannot be understood, explained and overcome by taking into account gender alone, but rather the articulation of multiple variables that are interlinked and reproduced in an interrelated manner. Thus, firstly, the socio-occupational inclusion of women with disabilities in today's society will be considered from a human rights perspective. Secondly, for the study of the principles of non-discrimination and equality, taking into account the diversity of young women with disabilities, norms and public policies will be analysed from the perspective of gender and intersectionality. Thirdly, affirmative action policies and the demand for differential treatment in legal systems will be studied in line with these approaches.

The effectiveness of the disability standard in ensuring the employability of these women will also be addressed in mainstream employment. Fourthly, specific situations of inequality, barriers and discrimination, direct, indirect and multiple that young women with disabilities encounter in the workplace will be investigated. Fifthly, family environments, strategies for reconciling their personal, family and work life and their use of time will be investigated in order to see how it influences their training and work environments. Sixthly, spaces for participation in the search for empowerment and social networks that can be useful in their working life will be examined. This paper shows the importance of promoting employment contracts and clauses that favour a society that is as inclusive as possible in real markets and in two key areas: training and employment with support and accompaniment from Feminist Social Work.

Key words: *Diverse capacities and agency; Discrimination; Feminist Social Work; Labour market; Young women with disabilities.*

I WOMEN WITH DISABILITIES: AN INTERSECTIONAL ANALYSIS OF MULTIPLE DISCRIMINATION

Intersectionality concept is based on the idea that there is no single category of women. Moreover, women's multiple identities are affected in different ways by the multiple forms of discrimination that exist in society[1]. When we look at women's group with disabilities we have to pay attention to their diversity and heterogeneity. First, there are different types of disability. For instance, there are different degrees of severity and the situation of a woman with an intellectual or mental disability is not comparable to that of a woman with a physical or sensory disability. This is coupled with the diversities of age, race, ethnicity, social class, origin and place of residence, sexual orientation, culture, values, family traditions and social status[2]. In addition to the above, there are the different realities that these women face in terms of their possible participation in family and social networks and in the fabric of associations, as well as their degree of social and political activism. Also, different life trajectories, educational backgrounds and work demands and expectations, although they may be similar, are not always comparable.

But beyond this diversity, women with disabilities do share a common nexus that, in some cases, is marked by terms such as: vulnerability, inequality, barriers, discrimination and social exclusion. Another notable aspect common to women with disabilities is that, in comparison with other women and men, they suffer greater employment inequalities. Thus, women with disabilities suffer more discrimination and are subjected to different and more intense forms of violence. This happens, for example, when they are deprived of access to certain productive activities. They also suffer violence when they are not allowed access to, and promotions in, the labour market[3]. Likewise, in the field of employment, women with diversity are subject to greater precariousness, lower activity rates and lower salaries[4]. These inequalities condemn these women to poverty and social exclusion, and make them professionally invisible[5]. Based on the above, public policies and action plans for young women with disabilities should include more diversified

1 Aisha Nicole Davis, "Intersectionality and international law: Recognizing complex identities on the global stage", *Harvard Human Rights Journal*, Vol. 28, 2015, 207-208.

2 V. Hervías Parejo, and Mª Á. Minguela Recover, "Women with disabilities who are victims of gender-based violence" in C. Ferradans Caramés (ed.), *Women especially vulnerable to gender-based violence: women with disabilities and older women* (2021), 88.

3 Miriam Arenas Conejo, *The activism of women with disabilities* (2017), 25.

4 Rafael Navarro González and Juana Núñez Ruiloba, "Inclusive public administrations? the implementation of regulations for the access of women with disabilities to public employment", *Public policy management and analysis,* No. 28, 2022, 116.

5 Francisca Bernal Santamaría, "Women particularly vulnerable to gender-based violence: women with disabilities and active employment policies" in C. Ferradans Caramés (ed.), *Women especially vulnerable to gender-based violence: women with disabilities and older women* (2021), 223.

strategies. This would enable social work professionals accompanying and assisting these women to work together with them to improve their employment opportunities and living conditions.

In this analysis, we approach the socio-occupational and gender reality of women with disabilities as a differentiated social group, and we make emphasis on young women of working age. To this end, we will address the different types of discrimination suffered by women with disabilities in the workplace. The analysis by typology is due to the fact that they are subjected to cumulative forms of discrimination, i.e. being a woman, having a disability and being young, the tactics that are being implemented to combat this and the paths that still need to be taken can be different.

II SOCIO-OCCUPATIONAL AND GENDER CONTEXT OF YOUNG WOMEN WITH DISABILITIES AND PROGRESS MADE BY THE LEGISLATOR

Young women with disabilities face discrimination in the educational, social, personal and employment spheres. They are thus systematically excluded from full citizenship. Nevertheless, progress has undoubtedly been made, both formally and legally. These improvements have led to important recognition of social and labour rights. However, young women with disabilities continue to face inequalities.

Thus, the inadequacies remain diverse, and this severely limits the real exercise of their basic rights. However, if we take into account that social, occupational, physical and cultural barriers still persist, there is a gap between the legal framework and the socio-occupational reality of these women. We will now look at the legislator's impetus in designing legislation to overcome the barriers faced by these women.

1. The Convention as reference for the legislator

Today, the reference instrument remains the 2006 Convention on the Rights of Persons with Disabilities (the Convention)[6], which is certainly not a specific standard for women with disabilities. The Convention is a landmark text, linked to human rights and fundamental freedoms, which recognises the need to ensure that persons with disabilities can exercise their rights fully and without discrimination. To this end, it is imperative to remove the countless obstacles and barriers faced by women with diversity. In this sense, the purpose of the Convention is to promote, protect and ensure the full and equal enjoyment by all persons with disabilities of their human rights and fundamental freedoms, and to promote respect for their inherent dignity. Another vital aspect of the Convention is that it has been the turning point for the development of a wide range of national and international legislation.

6 The Convention on the Rights of Persons with Disabilities was adopted by the United Nations General Assembly on 13 December 2006.

2. European policy protecting women with disabilities

Various initiatives have been enacted in Europe to address the needs of people with disabilities[7], not only Directive 2000/78/CE[8], but there are other instruments worth mentioning[9]. The most recent is the European Disability Strategy 2021-2030[10], which has been guided by the principles of the Convention.

The Disability Strategy is the specific Action Plan of the so-called European Pillar of Social Rights[11]. The Disability Strategy takes into account the diversity of disabilities, their invisibility, the barriers that remain and it acknowledges that certain groups of people with disabilities, such as women, need special attention and diversified public strategies.

In this vein, the Disability Strategy calls on Member States to use the Reinforced Youth Guarantee (YG+) to support young people with disabilities and specifically women. This is driven by the development of policies for inclusive entrepreneurship initiatives targeting under-represented groups, such as women and youth. The philosophy behind YG+ is that all young people should be able to receive good offers of employment, further education, apprenticeships and traineeships after leaving formal education or becoming unemployed[12].

In relation to young women with disabilities, the YG+ aims to mainstream the principle of discrimination in all actions, including discrimination on the basis of disability. The mainstreaming of the principle of equality

7 Attention should be paid to the work carried out by the Executive Committee of the European Disability Forum, by the Office of the European Commissioner for Equality, by the European Parliament and by the European Institute for Gender Equality. Some initiatives are: the European Accessibility Act (EU Directive 2019/883 on accessibility requirements for products and services; the EU Directive 2016/2102 on the accessibility of websites and mobile applications of public sector bodies, or the European Disability Card).

8 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

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10 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – An Equality Union: A strategy on the rights of people with disabilities 2021-2030. Brussels, 3.3.2021 COM (2021) 101 final.

11 The European Pillar of Social Rights was created to address economic, technological and social challenges and changes. The Pillar sets out 20 principles organised in 3 chapters. Chapter II contains a specific principle (No. 17) for the inclusion of people with disabilities. Information on the European Pillar is available at: *https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people/jobs-growth-and-investment/european-pillar-social-rights/european-pillar-social-rights-20-principles_es*

12 The implementation of the Reinforced Youth Guarantee by Member States is based on the Council Recommendation and a Commission proposal. The Youth Guarantee is part of the Youth Employment Support Package. The Youth Guarantee is an instrument to facilitate young people's access to the labour market and contains clear opportunities for young women with disabilities, *https://ec.europa.eu/social/main.jsp?langId=es&catId=1079.*

and non-discrimination is approached through the service for persons with disabilities. The service for people with disabilities is a programme aimed at strengthening the transition from education to work through supported employment. In fact, one element to be highlighted is the commitment to hiring job coaches who are trained in this methodology. This action is in line with the aim of achieving a place for integration in the labour market that promotes respect for fundamental rights. This integration must be based on the diversity of people and on the guarantee of the right to non-discrimination on any grounds. In addition, the objectives of the Youth Employment Shock Plan still include attention to particularly vulnerable groups, such as people with disabilities and especially young women with disabilities due to the triple discrimination to which they are subjected.

The Youth Employment Shock Plan is divided into several axes. These axes focus on the configuration of guidance services specialised in specific themes. The Plan is also aimed at developing comprehensive actions for the employment of young people with disabilities. The instruments used by the YG+ related to disability, are: (-) The support to the figure of the mediator or socio-labour counsellor. This professional must be specifically trained in the field of disability; (-) The availability of budget for actions for the visibility and inclusion of disability in the framework of employment, above all, to promote Corporate Social Responsibility policies; (-) The implementation of awareness-raising campaigns in the business sphere on the situation of people with disabilities through forums, fairs, events and meetings between companies and young people with disabilities. Finally, it should be noted that YG+ supports the achievement of the Sustainable Development Goals of the 2030 Agenda. The 2030 Sustainable Development Goals are related to gender equality (SDG 5) and decent work and economic growth (SDG 8), which necessarily include the goals pursued by young women with disabilities[13].

In line with the UN 2030 Agenda and the International Convention, the Disability Strategy calls on States to respect, protect and fulfil the rights of young women with disabilities. Thus, the Strategy is a declaration of good intentions that is materialised, for example, in the initiatives for the next decade, which revolve around elements such as: human rights, neighbourhood policies, humanitarian action, cooperation, inclusion and integration.

In the light of the above, the work of the European Union is geared towards intensifying measures to combat all forms of discrimination faced by people with disabilities. The main focus of these plans is on combating multiple and intersectional discrimination[14].

13 See the scope of the Reinforced Youth Guarantee in Resolution of 24 June 2021, of the Secretary of State for Employment and Social Economy, which publishes the Agreement of the Council of Ministers of 8 June 2021. This agreement approves the Youth Guarantee Plus Plan 2021-2027, which promotes decent work for young people and pays special attention to young people with disabilities.

14 Joint Communication: EU Action Plan for Human Rights and Democracy 2020-2024 [JOIN (2020) 5 final]; Joint Communication: EU Gender Action Plan (GAP) III. This initiative is an ambitious programme for gender equality and women's empowerment in

3. Spanish policy on young women with disabilities

First of all, it is worth mentioning the following regulations that protect young women with disabilities in Spain: Royal Legislative Decree 1/2013, of 29 November, approving the Consolidated Text of the General Law on the Rights of Persons with Disabilities and their Social Inclusion (LGPCD in its Spanish acronym)[15]; Law 39/2006, of 14 December, on the promotion of personal autonomy and care for persons in a situation of Dependency; Organic Law 2/2018, of 5 December, which amended the General Electoral System to guarantee the right of suffrage of persons with disabilities; Organic Law 2/2020, of 16 December, amending the Criminal Code to eradicate forced or non-consensual sterilisation of women with disabilities who are judicially incapacitated; as well as Law 8/2021, of 2 June, reforming civil and procedural legislation to support persons with disabilities in the exercise of their legal capacity. As noted above, the philosophy of this body of law is present in the Spanish legal system with varying degrees of success. In this area of analysis, the socio-occupational norm and the announced policies for young women with disabilities will be discussed.

III DISCRIMINATION OF YOUNG WOMEN WITH DISABILITIES IN THE LABOUR MARKET AND PUBLIC STRATEGIES TO COMBAT IT

A real problem for women with disabilities is their scarce presence in the labour market and the precariousness and temporary nature of their professional situation. Training opportunities for young women with disabilities are linked to public employment policies and employment promotion programmes. Their design and implementation must take into account a dual approach that violates the exercise of equal rights, i.e. on the grounds of disability and gender. The reality of young women with disabilities is very different from that of young women without disabilities. Therefore, programmes and policies aimed at promoting their equal participation in the labour market should be more focused on the concrete and specific needs of these women, also taking into account the types of discrimination to which we will refer later on.

1. Discrimination and inequalities in the workplace

The sources of the legal system in the field of disability are based on the principle of equality and the principle of dignity. This link is essential in order to offer young women with disabilities autonomy and their own space to

the EU's external action for the period 2021-2025; The EU's Generalised System of Preferences.

15 Royal Legislative Decree 1/2013, of 29 November 2013, approving the Consolidated Text of the General Law on the Rights of Persons with Disabilities and their Social Inclusion (*BOE* no. 289, of 3 December 2013).

enjoy their inherent rights. However, the principle of equality has undergone a process of reconstruction aimed at increasing it. This broadening has gone from formal equality (proclaimed in Article 9.2 of the Spanish Constitution) to material equality. Thus, it focuses not only on the formal protection provided by law, but also on the attention paid to combating any kind of discrimination.

Progress towards substantive equality could mean that young women with disabilities can exercise and develop their personalities and participate in society with equal opportunities. The new scope of the principle of equality translates into the obligation of public authorities to guarantee the material content of this principle. Such progress could prevent or counteract irrational and arbitrary inequalities, and requires the prohibition of any form of discrimination that violates the human rights of young women with disabilities.

The problem raised by the doctrine is that material equality is not a reality in the daily lives of these women. At present, despite the fact that the law proclaims equal rights, women with disabilities, especially young women, do not enjoy the true and full exercise of their rights[16]. If we refer to the terms discrimination and inequality of young women with disabilities, it is wise to define them, and then note the different types of discrimination they are suffering.

The ILO (International Labour Organization) Convention No. 111 on Discrimination (Employment and Occupation, 1958) understands discrimination as comprising two manifestations: closed and open. Disability could be included in the second of the meanings of the Convention. The open manifestation of discrimination includes any other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

At the European level, as mentioned above, Directive 2000/78/EC stands out, it defines the principle of equal treatment as the absence of any direct or indirect discrimination based on disability (among other grounds). In this paper we will focus only on disability discrimination as regulated by the Directive. The Directive considers direct discrimination to exist when a person is, has been or would be, treated less favourably than another person in a similar situation on the basis of disability. Whereas, indirect discrimination exists when an apparently neutral provision, criterion or practice can cause a particular disadvantage to people with different abilities compared to other people.

For indirect discrimination, the Directive maintains the exception of direct discrimination when such a provision, criterion or practice can be objectively justified by a legitimate aim, provided that the means of achieving that aim are appropriate and necessary. In relation to persons with disabilities, the Directive warns about the duty of the organisation or employer to take reasonable accommodation to eliminate disadvantages which may be caused by such a provision, criterion or practice[17].

16 Luis Cayo Pérez Bueno and Gloria Álvarez Ramírez "The Principles" in Lorenzo García, R. and de Cayo Pérez Bueno, L (eds). *Disability Law Fundamentals*, 151.

17 Francisca Bernal Santamaría, "Persons with disabilities: the need for reasonable accommodation for equality and non-discrimination", *General Journal of Labour and Social Security Law*, No. 59, 536.

The Spanish legal system reproduces the European Union statements. However, it is appropriate to refer to the specific legislation on disability, specifically the LGPCD. This regulation, in harmony with the concept set out in the Convention, understands disability as the situation resulting from the interaction between persons with foreseeable permanent impairments and any type of barriers that limit or prevent their full and effective participation in society, on an equal footing with others. Thus, both texts focus on the foreseeable permanent nature of disability and on linking disability to a society that limits it.

In relation to equal opportunities, the LGPCD considers that it is the absence of any direct or indirect discrimination on the grounds of disability. This includes any distinction, exclusion or restriction that has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on equal terms. For young women with disabilities it implies the free exercise of all human rights and fundamental freedoms, in the political, economic, social, labour, cultural, civil or any other field. It also underlines that one aspect of equal opportunities is the adoption of affirmative action measures aimed at these women as long as everyday inequalities persist.

The LGPCD also specifies that direct discrimination exists when a woman with a disability is treated less favourably than another woman in a similar situation because of or by reason of her disability. Indirect discrimination exists when a legal or regulatory provision, a conventional or contractual clause, an individual agreement, a unilateral decision, a criterion or practice, or an apparently neutral environment, product or service may cause a particular disadvantage to a woman with a disability compared to others, on the basis of or because of her disability.

Directive 2000/78/EC maintains the requirements of objectivity, reasonableness and proportionality and allows for a difference in treatment without it being discriminatory. The differences of treatment, in favour of women with disabilities, which are not allowed are those which objectively do not respond to a legitimate aim; and when the means for the achievement of this aim are not appropriate and necessary.

In terms of types of discrimination, the diversity and heterogeneity of women with disabilities was pointed out at the beginning of this study. In this regard, it was pointed out that when several factors and determinants concur and these are added to disability, women can be doubly and triply subjected and deprived of freedom and autonomy. Such impediments to freedom subject young women with diversity to an increased risk of poverty and social exclusion.

Multiple discrimination arises when a person is discriminated on two or more grounds. Up to three distinct situations have been distinguished. The first is when discrimination occurs on the basis of several factors operating separately. An example of this would be a woman with an intellectual or mental disability who is discriminated against in access to employment. Another example is the case of a woman with a physical disability who experiences discrimination because of the lack of accessibility of a building. The second is

compound discrimination which occurs when the person with a disability is discriminated against by two or more factors at the same time. An example of the latter would be the case of a woman who is discriminated against on the basis of sex, disability and age or one who is discriminated against because of the conjunction of the above with other factors or determinants such as race, sexual status or social class.

Another type of discrimination relevant for women with disabilities is discrimination by association, as defined in the LGDPC. This discrimination exists when a person, or group, is subject to discriminatory treatment due to their relationship with another person on the grounds, or because, of their disability. It is also known as transferred or reflex discrimination, to which the principle of equal treatment applies. In these cases, the prohibition is not only limited to persons with the protected personal condition (disability), but the protection of the principle reaches and is applicable to anyone who suffers unfavourable treatment for the same reason, even if they are not the person with a disability[18]. Therefore, this type of discrimination is caused by the association of a person with another person who does have the traits or characteristics protected as a cause of prohibited discrimination (in our case, disability).

This implies a broad interpretation of the scope of the cases set out in Directive 2000/78/EC. We refer to the keystone STJUE C-303/06 of 17 July 2008 (Coleman case), which considered the existence of direct discrimination when a person is treated less favourably because of one of the protected traits or characteristics. This occurs if the reason for the less favourable treatment is based on that characteristic (even if it is not present in him/herself). For instance, the negative discrimination is extended to a worker which son or daughter has a disability. In similar terms, the European Court of Human Rights declared in its judgment of 22 March 2016 (Guberina v. Croatia) the existence of a form of discrimination on the grounds of disability. The judgment showed situations of less favourable treatment of a female worker because of her child's disability. This ruling is based on the fact that discrimination is prohibited by Article 14 of the European Convention on Human Rights[19].

In view of the types of discrimination described above, and in order to compensate for or avoid the associated disadvantages, Directive 2000/78/EC recognises the need to adopt measures for the social and economic integration of people with disabilities. In turn, the Directive states that the adoption of measures to accommodate the needs of people with disabilities in the workplace plays an important role in combating discrimination on the grounds of disability. In relation to positive measures, it states that the prohibition of discrimination does not preclude the adoption or maintenance of such measures. The rationale is that these measures are intended to prevent or compensate for

18 STS n.º 79/2020, 29 January 2020, ECLI:ES:TS:2020:416.

19 Discriminación directa e indirecta por razón de sexo*, https://www.iberley.es/temas/discriminacion-directa-indirecta-refleja-razon-sexo-65352.*

disadvantages suffered by people with disabilities. Furthermore, it promotes the existence of organisations of people with disabilities, taking into account that their main purpose is to give voice to their specific needs.

At the same time, and in order to combat such discrimination, the LGPCD proposes the need for affirmative action measures. These are conceived as an instrument to achieve real equality (beyond formal equality) for people with disabilities, and their full participation in the spheres of political, economic, social, educational, labour and cultural life. Finally, it warns that attention should be paid to the different types and degrees of disability, a key idea given the diversity that the LGPCD had already presented.

Another basic term in the study is independent living. The LGPCD understands it to be the situation in which the person with a disability exercises the power of decision over their own existence and actively participates in the life of their community. This occurs in accordance with the right to free development of the personality. In turn, this term is associated with two principles: the principle of normalisation and the principle of social inclusion. Following the principle of normalisation, women with disabilities should be able to lead an equal life. That is, they should be able to have access to the same places, areas, goods and services as other people. On the other hand, through the principle of social inclusion, society must promote shared values oriented towards the common good and social cohesion. This must ensure that women with disabilities have the same opportunities for full participation in political, economic, social, educational, labour and cultural life. It must also ensure that women with disabilities have the necessary resources to enjoy full and equal living conditions.

In order for the above to be fulfilled, and taking into account the LGPCD, a series of conditions must be met, including: universal accessibility, reasonable adjustments, social dialogue and mainstreaming of disability policies. Accessibility includes, for example, barrier-free access to environments, goods, services, tools and devices. Accessibility also implies that they are understandable, usable, safe and comfortable, and provide as autonomy and as naturally as possible. Reasonable adjustments refer to the necessary and appropriate modifications and adaptations to the physical, social and attitudinal environment of people with specific needs.

In relation to women with disabilities, the aim is to facilitate their participation in society and to enable them to exercise their rights on an equal basis. As usual, these measures are limited by the requirement that they do not impose a disproportionate or undue burden. Social dialogue with the representative organisations of people with disabilities must govern the drafting, implementation, monitoring and evaluation of legislation and policies affecting women with disabilities. The mainstreaming of disability policies calls on public administrations to devise specific plans, programmes and actions for people with disabilities. These tools encourage the design of general policies and lines of action that take into account the needs and demands of young women with disabilities.

2. Actions and support for young women with disabilities

In all the lines we have discussed above, there is no doubt of the importance of the university environment and the associative fabric of people with disabilities. Thus, for example, Spanish universities (from the Disability Care Services, SAD in its Spanish acronym) and some social organisations, such as the Spanish Committee of Representatives of People with Disabilities (CERMI in its Spanish acronym), have set up social mentoring programmes for young women with disabilities. These programmes are an impulse for them to become active citizens in society, in a commitment to full social inclusion and as a tool to fight discrimination[20]. The main objective of the mentoring programmes is to enable women with disabilities to lead independent lives and to promote their participation and social mobilisation.

Mentoring is a commitment between the mentor and the young woman with a disability. The commitment between the mentor and the mentee is reached when the mentee achieves her social, personal and/or employment inclusion. Furthermore, the programme empowers the mentor in different areas such as education, training, employment and motherhood. The learning content is framed in accompanying actions such as active job search, interviews, training on new technologies and other aspects related to motherhood, leisure and decision making. Finally, an important line of action of the mentoring programmes, in relation to discrimination by association, is the extension of paid leave for the birth and care of children with disabilities. In this sense, CERMI, for example, is calling for direct economic aid for childcare and the articulation of solutions that allow the reconciliation of family and work life for carers of young women with disabilities. All these strategies could open up spaces and opportunities to overcome the impoverishment, invisibility and exclusion of young women with disabilities in Spain. However, these advances do not seem to be sufficient in all cases.

IV PERSONAL ASSISTANCE AND AGENCY FOR YOUNG WOMEN WITH DISABILITIES: PATHS TO BE TAKEN

The situation of women is not the sum of all their identities, but the consequence of these identities. In the case of young women with disabilities, it is not their identities that are problematic, but the social consequences and the way they are treated on the basis of the social construction of their identities[21]. The latter is embodied, for example, in the concept of social choice

20 The Mentoring Programme has its corresponding subsidy within the framework of the programmes of general interest of the Secretary of State for Social Services and Equality, charged to the tax allocation of the Personal Income Tax. This is a programme that has been developed since 2012 under different names. For more information, see the following link: *https://www.cermi.es/es/mujeres*.

21 Catharine A. MacKinnon, "Intersectionality as a Method: A Note". *Signs*, Vol. 38, No. 4, 2013, 1019.

which is traditionally based on ability and the interpersonal comparison of being useful or not and for what[22]. In this sense, the construction of the concept of social choice delegitimises young women with disabilities to make free and equal choices. This is because young women with diverse abilities are dispossessed of some or all of their abilities. This is undoubtedly another violation of their fundamental rights. These dispossessions, whether premeditated or not, could be solved, for example, by extending the right of access to a personal assistant without limitations.

Personal assistance is defined as the service provided by a personal assistant who performs or collaborates in the daily life tasks of a person in a situation of dependency, with a view to fostering his/her independent life, promoting and enhancing his/her personal autonomy (article 2, Law 39/2006, of 14 December, on the Promotion of Personal Autonomy and Care for Persons in a Situation of Dependency). The personal assistant is also a person who, under the direction of the person in need of assistance, to one degree or another, carries out certain basic tasks of daily life and/or accompanies them to facilitate their access to employment, training, leisure and social participation. In this respect, social workers are the ones who can offer the most suitable and specialised personal assistance services to young women with disabilities from the Feminist Social Work perspective.

Alongside the need to universalise personal assistance services for young women with disabilities who request them, it would be necessary to enhance their agency. However, the agency of young women with diverse abilities is barely recognised and made visible. Agency empowers us to be able to identify and reflect on the situations to which we are subjected. With agency we provide ourselves with the ability to judge what is of value in our lives, transforming what necessarily detracts from them and making our lives worth living[23]. The agency of young women with diverse capacities is that which is prepared to combat the situations of subordination inherent in the personal, family, economic, social and political situation in interaction with the structure of androgynous domination.

The road ahead must be oriented towards the recognition of young women with disabilities as agents in the processes of change in the societies we inhabit, rather than mere recipients and beneficiaries of the legislative and political changes that have taken place. In addition to the above, the importance of recognising the differences and multiple identities of young women with diverse abilities also has to do with valuing their multiple experiences as subjects. Women with disabilities are endowed with knowledge and life and professional experiences that have to be valued, so far, scarcely used by societies and public authorities.

Young women with disabilities are also demanding to be protagonists of their life processes, with full capacity for social and affective interaction and for work and career advancement. Thus, families, the social network and citi-

22 Amartya Sen, *Inequality Reexamined* (1992), 183.

23 Belvedresi, R. E. "Women's history and female agency: some epistemological considerations", *Epistemology and History of Science*, Vol. 3, No. 1, 2018, 11.

zens as a whole must learn that young women with disabilities have the right to decide how and with whom they want to be. Furthermore, these women, in freedom and with full autonomy, must be able to build their lives and become active participants against any kind of subordination. This undoubtedly entails the necessary creation of professional and professionalising spaces where young women with disabilities can be trained and develop a career that meets all their expectations.

Agency is not unconnected to the different social categories and power hierarchies defined by the structure of patriarchal domination. However, it emphasises how the exercise of agency can challenge these structures and reconvert them according to the needs of young women with diverse capacities[24]. The recognition and self-recognition of these women as protagonists of their processes is also to accept and understand them/themselves as political, social and economic agents, with the capacity to exercise full citizenship. In this respect, young women with disabilities are participating in social organisations that can give voice to their specific needs and make their demands for equal opportunities visible.

As political actors, young women with disabilities are also demanding spaces for social participation, visibility and political activism. In these spaces, women are questioning the assumptions made in the international legal framework that protects them. In this regard, they are raising objections and calling for revisions so that their freedom and equality are truly enforced in an objective, neutral and universal manner. The agency of young women with disabilities is also making legislation at the international level increasingly inclusive and inclusive. However, the road is still to be travelled and its achievement is everyone's responsibility.

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DISKRIMINACIJA MLADIH ŽENA SA INVALIDITETOM NA TRŽIŠTU RADA

Apstrakt

Ovaj rad ima za cilj razmatranje diskriminacije s kojom se suočavaju mlade žene sa invaliditetom na tržištu rada, i to iz perspektive teorije roda i intersekcionalnosti, a na osnovu ideje da njihov položaj u oblasti zapošljavanja ne može da se razume, objasni i prevaziđe samo uzimanjem u obzir rodne

perspektive, već zahteva artikulaciju višestrukih varijabli koje su međusobno povezane i koje se reprodukuju kroz taj međuodnos. Stoga će, najpre, biti razmatrana socio-profesionalna inkluzija žena sa invaliditetom u savremeno društvo, i to iz perspektive ljudskih prava. Drugo, u cilju izučavanja načela zabrane diskriminacije i jednakosti, norme i javne politike će biti analizirane iz perspektive roda i intersekcionalnosti, uz uzimanje u obzir različitosti mladih žena sa invaliditetom. Treće, biće ispitivane i mere afirmativne akcije i potreba za različitim postupanjem u pravnim sistemima. Takođe, biće ispitivano i pitanje delotvornosti standarda o invaliditetu, i to iz ugla obezbeđivanja zapošljivosti ovih žena. Četvrto, biće istraživane i specifične situacije nejednakosti, prepreka i neposredne, posredne i višestruke diskriminacije s kojom se mlade žene sa invaliditetom suočavaju na mestu rada. Peto, biće ispitivani porodično okruženje, kao i strategije za pomirenje ličnog, porodičnog i profesionalnog života i njihova primena, u cilju sagledavanja načina na koji utiču na njihovu obuku i radno okruženje. Šesto, biće analizirana i uloga participacije u osnaživanju i društvenom umrežavanju od značaja za njihov profesionalni život. Ovaj rad ukazuje na značaj promovisanja ugovora o radu i klauzula koje podstiču najinkluzivnije moguće društvo u dvema ključnim oblastima: obuci i zapošljavanju uz podršku, i to u svetlu postavki feminističkog socijalnog rada.

Ključne reči: *Različite sposobnosti; Diskriminacija; Feministički socijalni rad; Tržište rada; Mlade žene sa invaliditetom.*

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WAGE DISCRIMINATION AGAINST WOMEN WITH DISABILITIES: MYTH OR REALITY?*

Abstract

The employment situation of people with disabilities shows very bleak figures. However, women with disabilities are in an even less advantageous situation. This paper analyses the employment situation of women with disabilities by first looking at their situation in Spain and in the EU framework. Secondly, it will address the problem of wage discrimination, studying different legislative initiatives and trying to clarify the reality of their situation. Finally, proposals for improvement will be offered. Specifically, the Member States should include detailed data to assess the true impact of disability on wages, including concrete benchmarks and measurable indicators. Regarding this issue, the Directive of equal pay would contribute to identify pay discrimination cases.

Key words: *Women with disabilities; Discrimination; Labour market; Wages.*

I THE REGULATORY FRAMEWORK OF NON-DISCRIMINATION IN REMUNERATION FOR PEOPLE WITH DISABILITIES AT THE INTERNATIONAL, SUPRANATIONAL AND SPANISH LEVEL

The protection of people with disabilities and their right to equality and non-discrimination is a priority objective in the international framework, as is the case in both the European Union (hereinafter EU) and the different Member States.[1] In the same vein, achieving their full integration requires, as

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1 An in-depth study can be found in Vanessa Cordero Gordillo, *Igualdad y no discriminación de las personas con discapacidad en el mercado de trabajo* (2011).

an indispensable element, the encouragement of their participation in society and the economy. Therefore, it is essential to reinforce their integration in the labour market, given that their low level of employability is confirmed as a generalized fact, not only in the EU countries, but also in all countries of the world.[2]

In this scenario, although from a generalist perspective, the action of the United Nations has had a significant impact. In fact, the adoption of the Convention on the Rights of People with Disabilities and its Optional Protocol is an important milestone (hereinafter UN Convention).[3] The UN Convention is an international human rights instrument open for the first time to ratification by regional organisations. Within the EU framework, the UN Convention was ratified not only by the different Member States but also by the supranational European Institution.[4]

The UN Convention includes, amongst others, specific provisions in the socio-labour field. In particular, the Convention convers work and employment issues.[5] The regulation provides expressly the need to "*protect the rights of people with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value (...)*."[6]

In this respect, the drive to ensure the equality and non-discrimination of people with disabilities in employment has also been – and is – part of the International Labour Organization's work (hereinafter ILO). Currently, Convention No. 159 deals with vocational rehabilitation and employment (people with disabilities)[7] and promotes equal treatment.[8] Additionally, Convention No. 100 on equal remuneration is also applicable, together with the Code of Practice on

2 50.8% of people with disabilities participate in the labour market, compared to 75% of people without disabilities. There is also an appreciable difference in the percentage of inactive people, which rises to 37.6% for disabled people, while the percentage drops to 17.6% for non-disabled people. These data are stated in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *An Equality Union: A strategy on the rights of people with disabilities 2021/2030*, Document COM (2021) 101 final, Brussels, 3 March 2021.

3 Both instruments were adopted on 13 December 2006 at UN Headquarters in New York and opened for signature on 30 March 2007.

4 The UN Convention has been in force in Spain since 2 May 2008. The instrument of ratification, dated 23 November 2007, was published in *BOE,* No. 96 of 21 April 2008.

5 Article 27.

6 Article 27.1b).

7 The Convention, as adopted in 1983, maintains the term "disabled persons", language that is no longer in use. The C-159 relates to the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), which is not explicitly intended for disabled persons but also includes the group as a protection target against discrimination.

8 The Convention aims to promote national employment policies. In addition, all actions should aim at ensuring the principle of equal opportunities and equal treatment, *https://www.ilo.org/public/spanish/standards/relm/gb/docs/gb282/pdf/tmemdw-2.pdf* (last accessed 1 October 2022).

Managing Disability in the Workplace.[9] The set of standards assures, inter alia, to people with disabilities non-discrimination in wages at work.

In the European area, both the Council of Europe and the European Union have taken steps to strengthen non-discrimination and integrate people with disabilities into the labour market. First, the regulatory instruments of the Council of Europe regarding this issue are, on the one hand, the European Convention for the Protection of Human Rights and Fundamental Freedoms that includes the prohibition of discrimination. And on the other hand, as the counterpart of the European Convention on Human Rights in the sphere of economic and social rights, the European Social Charter stated the right to fair remuneration and recognise the right of men and women workers to equal pay for work of equal value.

The Council of Europe set up that the states must ensure the absence of discrimination between men and women with regards to remuneration. In this vein, as a result of the European Committee of Social Rights decision on the merits the Committee developed a criteria about equal pay and equal opportunities for women in employment. The criteria reinstate the need to respect the legislative framework and promote equality in remuneration between men and women.[10]

Secondly, regarding the EU legal framework, on the basis of the primary EU legislation, the Charter of Fundamental Social Rights of the EU similarly refers to equality and non-discrimination, which includes, in line with the provisions of the European Pillar of Social Rights, the guarantee of fair wages that provide a decent standard of living. Hence, a minimum wage adequate to meet the needs of the worker. On the other hand, in 2009 the Council of the EU acceded to the Convention on the Rights of People with disabilities.[11] Likewise, the EU Court of Justice has expressed its inclusion in the acquis Communautaire.[12] Article 17 of the Treaty on the EU states that the Commission "*shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union*". More specifically, both the EU and the signatory states of the Convention should recall that its articles provide for the need to take appropriate measures, including the enactment of legislation to, amongst other things, ensure adequate pay that is not subject to discrimination on the grounds of disability.

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9 Tripartite Meeting of Experts on Managing Disability in the Workplace Geneva, October 2001, document TMEMDW/2001/2.

10 These criteria are based on the ECSR's decisions on the merits in the collective complaints lodged by the international NGO University Women Europe (UWE), adopted by the ECSR on 5 and 6 December 2019, became public on 29 June 2020. The decisions affect to the 15 States which had accepted the complaints procedure (Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Slovenia and Sweden).

11 Council Decision 2010/48/EC of 26 November 2009, concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of People with disabilities (*JO* No. L23 27 January 2010).

12 CJEU 11 April 2013, Joined Cases C-335/11 and C-337/11, ECLI:EU:C:2013:222, para. 30.

In short, the UN Convention, giving its binding nature, impacts on the secondary EU law. This applies, in particular, to one of the objectives of Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation and referring expressly to workers with disabilities. It should be noted that the Directive, as Article 3.1(c) stated, shall apply to all persons –with or without disabilities-, in relation to (...) "*employment and working conditions, including (...) pay*".

Furthermore, on 7 June 2022, the European Parliament, members of the different governments and the European Commission reach a provisional agreement on the new directive on adequate minimum wages in the European Union. As stated by MEP Agnes Jongerious, "*Workers are the biggest winners*."[13] The Council of the EU, on 4 October 2022, approved the new EU rules that will promote the adequacy of statutory minimum wages. It is an innovative directive that aims to achieve decent working and to raise living standards for employees in a coordinated way in the Member States.[14]

The institution of the minimum wage does not have a uniform profile in the legal systems of the EU states. On the one hand, not all countries have a minimum wage; only 21 of the 27 EU member states have one. On the other hand, the States that have incorporated it into their legal systems also have enormous differences concerning its amounts and how it is calculated.[15] In the same vain, a recent Eurostat report establishes the different minimum wage amounts that are referenced in Europe, classifying the countries into two groups: group 1 or those States that have a minimum wage that is above the so-called PPS or *purchasing power standard*, which includes Spain, and group 2, which is made up of those that do not reach the index mentioned above,[16] whose formula for establishing it also presents differences between them.

The Directive represents a profound change in the EU framework. Amongst others, one aspect pointed out as an integrating element is that of people with disabilities or special needs. Indeed, the directive does not forget women with disabilities, referring to one of the problems encountered in their incorporation into the labour market. Thus, its recital (8) states that "*Women, young and low-skilled workers and people with disabilities have a higher probability of being minimum wage or low wage earners than other groups*." A further concern is that, although non-discrimination is guaranteed, in practice there is a certain tolerance for non-compliance. In this context, the recital (12) of the Directive explicitly mentions that "*in particular, such non-compliance has*

13 Agnes Jongerius, Member of the European Parliament, elected MEP and negotiator on the Directive.

14 About the impact of the Directive, see Jesús Villalón Cruz, *Política de Rentas Salariales: salario mínimo y negociación colectiva* (2022).

15 Available data for the report as of January 2022 can be found on Eurostat's website at: *https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Minimum_wage_statistics* (last accessed 30 September 2022).

16 The states with minimum wages in group 1 are Luxembourg, Germany, the Netherlands, Belgium, France, Ireland, Slovenia, Poland, Lithuania and Spain. Those in group 2 are Romania, Portugal, Malta, Croatia, Greece, Hungary, Czech Republic, Estonia, Slovakia, Latvia and Bulgaria.

been found to affect notably women, young workers, people with disabilities and agricultural workers" apparently receiving lower pay than the rest.

Accordingly, the EU has presented a proposal for a directive on pay transparency,[17] in order to achieve effective compliance with equal pay. In this regard, the new proposal focuses on two fundamental elements: On the one hand, it establishes transparency measures in companies and their workforces, and, on the other hand, it provides better access to justice for victims of discrimination in this area. The proposal addresses the problematic intersection of various axes in gender-based pay discrimination. As an example, the wording of the proposal includes specifically the disability. Although this is a significant step forward, its limited scope cannot be ignored. Thus, the reporting obligation will only apply to companies with a minimum workforce of 250 people, which is a modest target. Nevertheless, it is a starting point that will contribute, where appropriate, to identifying the specific problems affecting women who are subject to wage discrimination.

In Spain, at the national level, the legal framework guarantees equal treatment and non-discrimination for people with disabilities, and the protection includes equal pay. Spain has ratified the Convention and has transposed the different directives. As a result, the laws grant the corresponding protection to people with disabilities. The Royal Legislative Decree 1/2013, of 29 November,[18] approving the Revised Text of the General Law on the Rights of People with Disabilities and their Social Inclusion guarantees the right to work on an equitable and non-discriminatory basis.[19] It is quite clear that remuneration is one of the elements that play a fundamental role in the interests of equal treatment.

With respect to the labour legislative framework, a set of rules guarantees equality, such as the Workers' Statute,[20] which establishes the principle of equal pay for work of equal value. In the same vein, the Royal Decree 902/2020, of 13 October of equal pay for women and men,[21] established the need to analyse pay gaps through pay audits for all companies that are required to negotiate equality plans, mandatory in companies with more than 50 employees. Furthermore, Law 15/2022, of 12 July, comprehensive for equal treatment and non-discrimination,[22] specifically refers to workers with dis-

17 See COM (2021) 93 final 2021/0050(COD) Proposal for a directive of the European Parliament and the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms. To be informed about the legislative procedure see: *https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=COM:2021:93:FIN* (last accessed 7 October 2022).

18 Royal Legislative Decree 1/2013, of 29 November, Consolidated Text of the General Law on the Rights of People with disabilities and their Social Inclusion, published in *BOE,* No. 289, of 03/12/2013.

19 Included in Chapter VI.

20 Royal Legislative Decree 2/2015, of 23 October, Consolidated Text of the Law of Workers' Statute, published in *BOE*, No. 255, of 24/10/2015.

21 Royal Decree 902/2020, of 13 October, of equal pay for women and men, published in *BOE*, No. 272, of 14/10/2020.

22 Law 15/2022, of 12 July, comprehensive for equal treatment and non-discrimination, published in *BOE*, No. 167, of 13/07/2022.

ability and establishes the need for equal treatment without discrimination. Thus, the Law provides that by regulations, the companies with more than 250 employees may be required to publish wage information to analyse their factors, if necessary, to identify pay discrimination.[23]

Consequently, a priori, it may seem that people with disabilities are protected by non-discrimination and their integration into the labour market is encouraged, especially in the EU States. Nevertheless, full integration is still at an early stage,[24] which has led to the adoption of a new Disability Rights Strategy 2021-2030,[25] which recommended strengthening systems to improve the employment rates and narrow the gap between persons with and without disabilities.

The fact is that disabled persons are currently facing a major barrier to employment and suffer wage differentials. And it is considered that women with disabilities are victims of double discrimination, on grounds of both gender and disability. Therefore, these pages will be focused on the situation of women with disabilities at work. First, we will examine the employment gap between women and men with disabilities in Spain and in the EU framework. Second, we will address the potential gender wage gap between women and men with disabilities in Spain and from an EU perspective. Lastly, we shall draw conclusions about these issues.

II DISCRIMINATION IN THE EMPLOYMENT OF WOMEN WITH DISABILITIES: A COMPLEX ANALYSIS

Data on disability are limited and heterogeneous, so it is difficult to carry out a comparative analysis. As the ILO highlights "*There is no consistent series of internationally comparable, reliable and valid data on people with disabilities*."[26] This insufficiency of data statistics is an issue highlighted not only by the ILO[27] but also by the EU.[28] Notwithstanding, we will study the

23 The Article 9.6 of the Law 15/2022 stated that by regulations, the employers whose companies have more than 250 workers may be required to publish the wage information necessary to analyse the factors of wage differences.

24 More information is accessible in the equality and disability factsheets published after the European Semester 2020-2021 offering a reality that is far removed from the international proposals.

25 An Equality Union: A Strategy on the Rights of People with Disabilities 2021-2030, May 2021.

26 *Decent work for people with disabilities: promoting rights in the global development agenda,* International Labour Organization, Geneva, 2015, 128.

27 The ILO's Strategy and Action Plan on Disability Inclusion, the latest for 2014-2017, addresses again this issue by calling for reliable and comparable statistics on their situation in the labour market, which is necessary to find appropriate solutions.

28 See the equality and disability factsheets published after the European Semester 2020-2021, *https://ec.europa.eu/social/BlobServlet?docId=25393&langId=en,* 26 (last accessed 7 October 2022).

employment data of people with disabilities, both in Spain and in the rest EU countries, to determine whether there is a positive or negative trend concerning women with disabilities.

1. Spain

People with disabilities in Spain, according to the latest available data, have lower employment and wider unemployment rates than persons without disabilities, resulting in more precarious access to the labour market.

With reference to the information published by the Spanish National Institute of Statistics (hereinafter INE), in 2020 the total number of persons between the ages of 16 and 65 with a disability are of 1.58 million.[29] This figure can be broken down into 765,500 men and 818,200 women. Amongst them, 23.7% of men and 23.5% of women are employed; that is, one person in four.[30] Compared to those without disabilities, their activity rate is 34.3%, 41.8 percentage points lower than the participation rate of the non-disabled population. The employment rate was 26.7%, less than half that of the non-disabled population (64.3%). Furthermore, the unemployment rate was 22.2%, 6.8 percentage points higher than that of the non-disabled population.[31]

Taking the statistics as a reference, although the activity and employment rates of people with disability are substantially lower than the rate for persons without disabilities, the differential ratio between women and men with dis-

29 *Vid*. Press release of the INE 2020, 19 April 2022, Encuesta de Discapacidad, Autonomía personal y Situaciones de Dependencia (EDAD – Survey on Disability, Personal Autonomy and Situations of Dependence), *https://www.ine.es/prensa/edad_2020_p.pdf* (last accessed 7 October 2022). There are other institutions and surveys that offer data on disability, such as the Labour Force Survey (LFS), the EU Household Panel EUHP (currently inactive), the Living Conditions Survey (LCS), which replaced the EUHP. This number of statistics contributes to the difficulty of analysing the data. Vid. Miguel Ángel Malo, "Discriminación salarial y discapacidad: de los datos a la política de empleo", *Panorama Social*, No. 26, 2017, 70-72; Vanesa Rodríguez Álvarez, "Fuentes de información sobre discapacidad y empleo en España", *Revista Española de Discapacidad*, Vol. 1, No. 1, 73-95. Similarly, other statistics are provided by the State Public Employment Service (SEPE), the Observatory on Disability and the Labour Market of the ONCE Foundation (ODISMET).

30 Although it is possible for a person to suffer from more than one disability, according to the INE press release Survey on Disability, Personal Autonomy and Situations of Dependence, they are distributed as follows: those referring to vision reach a percentage of 28.0% (of which 24.8% are men and 31.0% women); with hearing problems, 33.2% (men 37.9% and women 28.7%); with regard to communication problems, 8.1% (men 9.4% and women 7.0%); for learning, knowledge application and task performance, 4.0% (men 4.6% and women 3.5%); for mobility, 31.7% (men 25.7% and women 37.2%). Finally, self-care (7.1%, of which 6.1% for men and 8.2% for women); domestic life 17.0% (men 13.8% and women 20.0%), and finally those referring to disability in personal interactions and relationships 8.0% (9.9% for men and 6.2% for women).

31 Data from the statistic "El empleo de personas con discapacidad 2020" (The Employment of People with Disabilities 2020) referred to the population aged 16 to 64, updated in February 2022. See the press release of the INE of 15 December 2021, *https://www.ine.es/prensa/epd_2020.pdf* (last accessed 1 October 2022).

abilities is very small. According to the data, there are no significant gender differences in labour force participation, employment and unemployment rates amongst people with disability.

Additionally, referring to the type of employment, 10.6% of the employed are self-employed and the remaining 88.0% are employees. Of the latter, seven out of ten had a permanent contract, and 76.3% were full-time. Other data provided, albeit of a partial nature, is the level of occupation, where 30.4% of the workers were engaged in elementary activities, 17.5% in technical jobs and 15.9% in clerical jobs. Therefore, the data indicate that self-employment is at a clear disadvantage and suggest that people with disability are mainly full-time workers in basic activities. Nevertheless, when it comes to women with disabilities, the data also show that they are mostly employed in part-time jobs, perpetuating the existing inequality of women without disabilities.

2. The situation in the framework of the European Union

Data on the employment, unemployment and activity rate corresponding to the Member States correspond to the reports from national labour surveys available in the European Disability Expertise (EDE) country fiches of disability equality.[32] Using these data, and those contained in the latest European Semester 2020-31 synthesis report on disability equality, we draw an approximation to a comparative analysis. While Eurostat data are available for 2021, we will use the data in the above-mentioned documents for 2018, as they are easier to analyse in this study and there is no significant data variation.

According to such data, the average employment rate in 2018 in the EU was 75.0%, although women had a lower employment rate than men, with a ratio of 68.8% compared to 81.2% for men. Nevertheless, when it comes to people with disabilities the ratio was 50.8%, with women accounting for 47.8% and men for 54.3%. Therefore, there was a significant negative difference not only between people with and without disabilities but also between women and men with disabilities. The unemployment rate demonstrated the same trend. People without disabilities had a ratio of unemployment of 8.8%, distributed between women and men at 9.4% and 8.2%, respectively. In the case of people with disabilities, the percentage of unemployment was 18.6%, and women had a lower rate of 18.3%, while the rate for men was 18.9%.

Notwithstanding, it is particularly significant that the percentage differences, both in employment and unemployment, were much smaller for women with disabilities than for those without.

32 In July 2020 the European Commission established the European Disability Expertise (EDE) with the aim of collecting, analysing and providing independent scientific information data related to national policies and legislation, linked to EU-level provisions, as well as providing information on the situation of people with disabilities.

Based on the available information of the country fiches for each Country, albeit in some cases limited,[33] we can outline the employment situation of disabled people in general and of women in particular. Given the data, there was an enormous casuistry that may be analysed into three categories. On the one hand, (a) there were certain States where the labour market integration of women with disabilities was higher than that of men. On the other hand, (b) most countries showed the opposite trend: women with disabilities had a lower level of employment than men, with particular negative incidence in some of them. Finally, (c) countries where, paradoxically, the gender gap in employment was, in general, lower for women with disabilities than for women without disabilities.

(a) Women with disabilities have a higher employment rate than men in countries such as Bulgaria, Estonia, Finland, Latvia, Lithuania, Sweden and Cyprus. Cyprus is the only country between them with an equal employment gap between women and men with and without disabilities, although the employment rate of people with disabilities is slightly lower. (b) In Belgium, Czech Republic, Croatia, Denmark, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Slovenia and Belgium women have low employment rates. However, a more detailed examination of the data reveals that Austria, Denmark, Greece, Italy, Luxembourg, Malta and Romania have the largest gender gap between men and women with disabilities.[34] (c) Lastly, the gender gap in employment is lower between women and men with disabilities than when they are not, with the exception of Germany, Belgium and Denmark.

33 Indeed, the reports highlight this deficiency in many countries in the EDE Country fiches on disability equality. Thus, the Austrian report emphasises that the lack of data and research does not allow for a more detailed and comprehensive analysis. In general, people with disabilities are often not mentioned as a specific target group in reports on labour market development. It is also indicated that Germany should pay attention to data collection, as the absence of data makes a study difficult, which was highlighted by BMASGK (2019), Final report– "The impact of digitalization on labour market inclusion of people with disabilities. Lessons from two case studies on Austria and platform work", 65, on the possibility of including digitised work for workers with disabilities. Cyprus also mentions the difficulty of statistical analysis, due to the scarcity of data. In Finland there is no register of people with disabilities and therefore no up-to-date data on the employment rate of people with disabilities is available. In Hungary there is also a shortage of data, so it would be essential to generate new data on the specific situation of people with disabilities.

34 Estimated at more than 9 percentage points.

Table 1: Employment rate[35]

Country	People without disability				People with disability			
	Total	Women	Men	Gender gap rate	Total	Women	Men	**Gender gap rate**
Austria	77,5	71,1	83,9	**12,8**	56,5	51,3	61,9	***10,6***
Belgium	75,6	72,3	78,9	**6,6**	43,8	40,5	47,6	**7,1**
Bulgaria	75,5	71,5	79,2	**7,7**	35,4	36,5	34,5	**-2**
Croatia	68,3	61,9	74,8	**12,9**	34,3	32,3	36,2	**3,9**
Cyprus	76	24,5	16	**-8,5**	60,4	24,5	16	**-8,5**
Czechia	80,6	73,3	91,2	**17,9**	51,9	50,7	54,1	**3,4**
Denmark	81	79,5	82,2	**2,7**	60,9	56,8	66,3	***9,5***
Estonia	85,2	82,1	88,9	**6,8**	64,3	65,3	63,2	**-2,1**
Finland	75,9	73,2	78,1	**4,9**	58,3	61,7	54,4	**-7,3**
France	75,4	72,2	78,6	**6,4**	57,2	57,1	57,3	**0,2**
Germany	81,4	77,4	85,5	**8,1**	50	46,1	54,4	**8,3**
Greece	60,7	50	71,8	**21,8**	31,1	26,7	36,1	***9,4***
Hungary	79	73	84	**11**	48	47	50	**3**
Ireland	77,6	71,4	83,9	**12,5**	37,3	34,2	40,7	**6,5**
Italy	67,1	55,9	78,4	**22,5**	51,9	42,5	62,3	***19,8***
Latvia	80	76,1	84,3	**8,2**	61,1	62,4	59,5	**-2,9**
Lithuania	80,3	78,3	82,4	**4,1**	49,8	50,9	48,4	**-2,5**
Luxemburg	70,1	63,4	76,6	**13,2**	51,1	44,2	59,6	***15,4***
Malta	74,8	61,8	86,9	**25,1**	42,5	31,3	53,7	***22,4***
Netherlands	83,5	79	87,6	**8,6**	60,6	57,1	65	7,9
Poland	75,2	66,7	84,7	**18**	40,2	37,6	43	**5,4**
Portugal	77,4	74,1	80,5	**6,4**	58,4	57,9	59,2	**1,3**
Romania	74,2	62,8	84,7	**21,9**	45,5	37,1	56,2	***19,1***
Slovakia	79,7	74,3	84,9	**10,6**	56,5	54,2	59,1	**4,9**
Slovenia	74,5	69,5	79,2	**9,7**	55,6	54,9	56,4	**1,5**
Sweden	81	78,1	83,5	**5,4**	52,7	54,4	50,4	**-4**

With regard the unemployment rate, the data also show that, although unemployment is higher for people with disability, it is possible to differentiate three situations in the sample studied. First (a) countries where the unemployment rate is higher for men than for women. Second (b) countries where women with disability suffer less unemployment than men. And third (c) the contrary situation, women without disabilities whose situation is better in comparison with men.

(a) Women have lower unemployment rates in all circumstances in Austria, Estonia, Finland, Hungary, Latvia, Lithuania, Romania and Sweden. Notwithstanding, Hungary and Romania have the same unemployment gap between men and women in any event, with or without disability. On the

35 The employment rate is the percentage of employed persons in relation to the comparable total population. For the overall employment rate, the comparison is made with the population of working-age. Is the result of dividing the number of employed people by the number of people over 16 years of age. Source: Compiled by the author based on the data of the different EDE Country fiche of disability equality.

other hand, Belgium, Cyprus, Croatia, France, Netherlands, Poland and Portugal have lower unemployment rates for women with disabilities, although women without disabilities are not in the same advantageous position. Slovenia has the same unemployment rate for women and men with disabilities. (c) Lastly, Bulgaria, Germany, Ireland, Luxemburg, Malta and Slovakia show better data for women without disabilities, whose unemployment is lower than men in the same situation, but women with disabilities have a higher level of unemployment. Lastly, Czechia, Denmark, Greece and Italy exhibit bad outcomes for women in both circumstances.

Table 2: Unemployment rate[36]

Country	People without disability				People with disability			
	Total	Women	Men	Gender gap rate	Total	Women	Men	Gender gap rate
Austria	5	4,7	5,3	**0,6**	15,6	14,7	16,3	**1,6**
Belgium	5,7	5,9	5,5	**-0,4**	17,5	14,2	20,5	**6,3**
Bulgaria	12,9	12,8	13	**0,2**	21,8	24,3	18,7	**-5,6**
Croatia	16,9	20	14,1	**-5,9**	33	32,4	33,6	**1,2**
Cyprus	11,3	12,8	9,8	**-3**	24,7	23	26,1	3,1
Czechia	3,6	4,4	2,7	**-1,7**	15,6	15,6	15,5	**-0,1**
Denmark	5,1	5,2	4,9	**-0,3**	12,6	12,8	12,4	**-0,4**
Estonia	4,8	4,4	5,2	**0,8**	8,9	6,8	11,3	**4,5**
Finland	8,2	7,7	8,6	**0,9**	18,8	14,1	24,3	**10,2**
France	8,5	8,8	8,2	**-0,6**	17,1	16,7	17,6	**0,9**
Germany	3,7	3,6	3,9	**0,3**	22,8	23,3	22,3	**-1**
Greece	21,8	26,3	18,2	**-8,1**	32,8	35,3	30,6	**-4,7**
Hungary	5	5	5	**0**	15	15	15	**0**
Ireland	7	6,7	7,3	**0,6**	22,1	24,9	19,4	**-5,5**
Italy	13,3	14,9	12,2	**-2,7**	16,7	16,7	16,6	-0,1
Latvia	8,3	7	9,5	**2,5**	13,6	12,2	15,2	**3**
Lithuania	8,9	7,5	10,4	**2,9**	20	15,6	24,9	**9,3**
Luxemburg	6,2	6,1	6,3	**0,2**	13,4	15,7	11,3	**-4,4**
Malta	1,6	1	2,1	**1,1**	5,6	8,6	3,9	**-4,7**
Netherlands	2,6	3,2	2,1	**-1,1**	6,9	5,7	8,2	**2,5**
Poland	7	8,8	5,3	**-3,5**	14,3	13,8	14,7	**0,9**
Portugal	11	12,2	9,9	**-2,3**	18,6	18	19,5	**1,5**
Romania	0,8	0,5	1,1	**0,6**	0,9	0,6	1,2	**0,6**
Slovakia	6,9	6,7	7,1	**0,4**	13,2	13,8	12,6	**-1,2**
Slovenia	8,9	11,6	6,6	**-5**	19	19	19	**0**
Sweden	5,1	5,1	5,2	**0,1**	22,7	18,7	27,8	**9,1**

At last, taking the activity rate data into account, only Bulgaria, Finland and Latvia have better figures for women than men with disabilities. On the

36 This figure indicates the percentage of the population that wants to work but cannot find a job. The unemployment rate is the number of people unemployed as a percentage of the labour force. Is the result of dividing the number of unemployed people by the active population (the result of adding the unemployed and the employed). Source: Compiled by the author based on the data of the different EDE Country fiche of disability equality.

contrary, none of them has better results for women without disabilities in comparison with men.

Table 3: Activity rate[37]

Country	People without disability				People with disability			
	Total	Women	Men	Gender gap rate	Total	Women	Men	Gender gap rate
Austria	81,6	74,6	88,6	**14**	66,9	60,2	73,9	**13,7**
Belgium	80,2	76,8	83,4	**6,6**	53,1	47,2	60	**12,8**
Bulgaria	86,7	82	91,1	**9,1**	45,3	48,2	42,2	-6
Croatia	82,2	77,3	87,1	**9,8**	51,2	47,7	54,4	**6,7**
Cyprus	84,7	79,1	90,7	**11,6**	66	59,4	72,5	**13,1**
Czechia	83,7	76,7	93,7	**17**	61,5	50	64	**14**
Denmark	85,3	83,9	86,5	**2,6**	69,7	65,1	75,7	**10,6**
Estonia	89,5	85,9	93,7	**7,8**	70,6	70	71,2	**1,2**
Finland	82,6	79,2	85,5	**6,3**	71,8	71,8	71,8	**0**
France	82,4	79,1	85,6	**6,5**	69	68,6	69,5	**0,9**
Germany	84,6	80,3	88,9	**8,6**	64,7	60,1	69,9	**9,8**
Greece	77,6	67,8	87,7	**19,9**	46,3	41,3	52	**10,7**
Hungary	83	78	89	**11**	57	56	59	3
Ireland	83,5	76,5	90,6	**14,1**	47,9	45,6	50,4	**4,8**
Italy	77,5	65,7	89,3	**23,6**	62,3	51	74,7	**23,7**
Latvia	87,3	81,9	93,2	**11,3**	70,6	71	70,2	**-0,8**
Lithuania	88,2	84,7	91,9	**7,2**	62,2	60,3	64,5	**4,2**
Luxemburg	74,7	67,4	81,7	**14,3**	59	52,4	67,2	**14,8**
Malta	76,1	62,4	88,8	**26,4**	45,1	34,2	55,8	**21,6**
Netherlands	85,8	81,6	89,5	**7,9**	65	60,6	70,8	**10,2**
Poland	80,8	73,2	89,5	**16,3**	46,9	43,6	50,4	**6,8**
Portugal	86,9	84,4	89,4	**5**	71,8	70,5	73,5	**3**
Romania	74,8	63,1	85,6	**22,5**	45,9	37,3	56,8	19,5
Slovakia	85,6	79,6	91,3	**11,7**	65,1	62,9	67,6	**4,7**
Slovenia	81,8	78,6	84,8	**6,2**	68,6	67,7	69,6	**1,9**
Sweden	85,4	82,3	88,1	**5,8**	68,1	66,9	69,7	**2,8**

To conclude, women have lower participation in the labour market, which leads to lower incomes and fewer opportunities for economic independence. Nevertheless, it would be better to have more data samples, introducing more factors and variables, with easy access. This would allow further analysis, an issue that has been repeatedly pointed out by the ILO.

37 It is the rate that identifies the level of employment in a country. The activity rate is the percentage of active persons in relation to the comparable total population. The economically active population comprises employed and unemployed persons. It is calculated by dividing the total active population by the total working-age population. Source: Compiled by the author based on the data of different EDE Country fiche of disability equality.

III DO WOMEN WITH DISABILITIES SUFFER WAGE DISCRIMINATION? THE PROBLEMATIC COMPARATIVE APPROACH

As the ILO points out "*Throughout the world there is an undeniable link between disability, poverty and exclusion around the world*."[38] In this connection, the European Parliament issued a resolution on women with disabilities, urging the Member States to consider the importance of "*mainstreaming the disability dimension in gender policies, programmes and measures to strengthen the recognition and understanding of the intersectional nature of gender and disability*."[39] And women with disabilities typically experience multiple forms of discrimination in the workplace, and they often receive lower wages.

Notwithstanding, some studies have indicated, in relation to the existence of wage discrimination, that it cannot be automatically inferred that the differences are solely due to discriminatory reasons. That means that the different factors involved should be evaluated.[40]

In Spain, the latest available data on the remuneration of people with disabilities refers to 2019. The data are included in the INE's annual wage structure survey. According to the figures, the estimated wage of workers without disabilities is 24,512.2 euros, 16.1% higher than the average annual wage of workers with disabilities. This same downward trend is confirmed in the hourly wage, which is 15.9 euros per year for workers without disabilities and 13.7 euros for workers with disabilities.

Another crucial element to examine is the type and intensity of the disability. Mental disorders have the most significant negative impact on wages, as this is directly proportional to their severity.[41] In that regard, the INE survey shows that people with mental and intellectual disabilities have the most prominent "wage gap".[42]

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38 *Decent work for people with disabilities: Promoting rights in the global development agenda*, International Labour Office, Geneva, 2015, xii. Furthermore, the rest of the countries offer a pessimistic panorama concerning the labour integration and wage equality of the disabled collective; however, numerous States prohibit pay discrimination on the grounds of disability. Some maintain a system of differentiated minimum wages of reduced nature, as in Australia, New Zealand, the United States and Israel. *Vid. ibid.*, 104-105.

39 European Parliament resolution of 11 December 2013 on women with disabilities (2013/2065(INI)), para. U.2.

40 Malo, *op. cit.,* 73. Similarly, Miguel Á. Malo and Ricardo Pagán, "Wage differentials and disability across Europe: Discrimination and/or lower productivity?", *International Labour Review*, Vol. 151, No. 1-2, 2012, point out in a study on 11 EU countries, taking as a reference the data provided by the European Union Household Panel, that workers with disabilities but without limitations in their daily lives earn the same as non-disabled workers (except British men and Belgian and Finnish women).

41 The same problem arises when it comes to employment, persons with mental and intellectual disabilities have more difficulties to be employed. *Vid.* data included in the Country fiches of disability equality.

42 Lower by 36.1% and 14.8%, respectively, than the collective average.

On the other hand, regarding the type of occupation performed, those in high occupations (directors and managers; technicians and scientific, technical, intellectual and support professionals) have a lower pay by 10.1%. The ratio is also lower in medium (clerks, artisans and skilled workers) and low (operators and unskilled workers) occupations, with 1.7% and 16.9%, respectively. Additionally, it would be relevant to have information on the educational level.[43] Finally, there are no differences of interest in the sectors of activity analysed, although the size of the centre does have an appreciable effect since the most significant differences are found in medium-sized centres (from 50 to 199 workers).[44]

In sum, the average gross annual wage of employed workers with disabilities was 20,574.1 euros, a slight increase from the previous year, quantifying a rise of 3.1%.

Specifically, when gender is the variable observed, paradoxically the data show a narrow wage gap in workers with disabilities than when they are not. Women's salaries are 13.7% lower than men's being disabled workers. Furthermore, the data establish that men with disabilities earn 19.3% less than men without disabilities, however, the pay gap between women with and without disabilities is smaller, at 13.3%. Notwithstanding, the difference is greater in the case of women without disabilities, due to their wages being 19.7% lower. The Spanish data are surprising because being a disabled woman is a textbook case of discrimination.

In this respect, it is essential to note that some authors considered that this trend existed not only in Spain but in other European countries. Indeed, they also claimed that the pay gap between men and women in non-disabled and disabled people was lower in the latter.[45] Currently, although there is a significant amount of data referring to the employment of people with disabilities in EU countries, is truly hard to find information about their wages to prove that statement. Even more, if the data are related to gender pay discrimination. Notwithstanding, the information provided in the European Semester 2020-2021 synthesis report on disability equality (hereinafter synthesis report) and the EDE country fiches on disability equality have given us some basic ideas about this issue.

After a review of the existing information, it can be partly confirmed that there is a gender pay gap in the case of disabled workers in some EU countries. For instance, the synthesis report evidenced the UN CRPD Committee requested Austria and Sweden to narrow or reduce the gender pay gaps.[46] Additionally, the EDE country fiche of Sweden offers more detailed information about this issue. The report indicates that women with disabilities are

43 An interesting assessment of the cause-effect relationship of higher education on employment can be found in Carmen Ferradans Caramés and Eva Garrido Pérez, "Discapacitados, Universidad y Empleo", *Derecho y sociedad*, No. 37, 2011, 81-90.

44 Up to 49 workers there is a difference of 15.6%, from 50 to 199 workers a difference of 28.9% and in companies or centres with 200 workers or more a difference of 18.2%.

45 Malo and Pagán, *op. cit.* 43-60.

46 European Semester 2020-2021 synthesis report on disability equality, 33-34.

over-represented in the group whose disposable income is below 60% of the median, the relative poverty line. The survey, on which the report is based, shows that women with disabilities fare worse than men with disabilities in both labour market participation and working conditions, and therefore have lower incomes and fewer opportunities for economic independence. This leads to many women with disabilities living in financial insecurity and vulnerability, as well as identifying the existence of discriminatory attitudes, yet not detailed, which can lead not only to difficulties in accessing employment, the use of less qualified positions or even the allocation of lower pay conditions. Furthermore, in the EDE country fiche of Romania, it is mentioned that people with disabilities, once employed, are technically paid the same as the general population, although they seem to be mainly relegated to the lowest-paid jobs.

On the other hand, it would also be appropriate to mention the problems arising when analysing the situation of people with disabilities in special employment centres. In fact, the conclusions could differ from the above, depending on the place where they are located or whether they are men or women, although this is an aspect that will not be dealt with in these pages due to its complexity.

Nevertheless, we should have more data since, as stated, "*more detailed information is needed to obtain results in which discrimination does not appear mixed with the effect of other variables.*"[47] To summarise, the comparisons between countries are useful to build and implement adequate policies. So valid bases for comparison are needed.

IV THE DIFFICULT CHALLENGE TO IDENTIFY THE CAUSES OF THE GENDER PAY GAP FOR WOMEN WITH DISABILITIES

Precisely for the above reasons, it is also difficult to determine the causes of the gender pay gap for women with disabilities. There are some studies on the double discrimination experienced by disabled women, but only the Anglo-Saxon countries had further analysed the gender pay gap for people with disabilities.[48]

According to the data, wage discrimination against disabled women is significant, but there is no consensus about its reason. On the one hand, it is a fact that disabled women mostly have access to positions of lesser responsibility, since most of them carry out activities of a basic nature. On the other hand, it is also confirmed that they have a lower educational background. All this contributes to lower pay, which leads to negative wage consequences. In addition, employer prejudices may also have an impact on their lower pay.

47 Malo, *op. cit.,* 73.

48 Simonetta Longhi, *The disability pay gap*, Equality and Human Rights Commission, 2017.

For some authors,[49] this is due to double discrimination. In contrast, others consider that most of the discriminatory differences are due to gender and, to a lesser extent, their status as disabled.[50] At the same time, some studies indicate that it cannot be said that there is "pure" double discrimination when considering disability and gender together. In fact, when it comes to wage discrimination against disabled women with or without limitations in their daily lives, different responses are observed depending on whether these factors are assessed jointly or separately.[51] In the first place, they considered that the most pronounced difference occurs in women with disabilities that limit their daily life, which can be attributed to their lower productivity.[52] And second, the studies indicate that disabled women without limitations, although with nuances, suffer double discrimination.[53]

Consequently, a reliability analysis requires considering a larger number of factors together with gender, such as personal ones (age, degree and type of disability, training) and employment variables (type of contract, type of the working day and occupation), as they all have a significant impact. Additionally, it is necessary to take into account the impact of disability on productivity and its cause-effect relationship with the activity carried out.[54] All elements can influence on a lower salary without discriminatory nature.[55] Accordingly, a careful analysis of whether the principle of equal pay for work of equal value has been complied is required[56] and be able to identify, where appropriate, if are the biases of employers that lead the differences.

The European Committee of Social Rights additionally stated that "the collection of high-quality pay statistics broken down by gender as well as sta-

49 Arthur O'Reilly, *The Right to Decent Work of Persons with Disabilities*, IFP/Skills Working Paper No. 14, International Labour Organization, 2003, *https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_bk_pb_93_en.pdf* (last accessed 10 October 2022).

50 On this aspect see Malo *op. cit.,* 75-76. Also Miguel Ángel Malo and Ricardo Pagán, "Existe la doble discriminación salarial por sexo y discapacidad en España? Un análisis empírico con datos del panel de hogares", *Moneda y crédito*, No. 225, 2007, 7-42.

51 Malo and Pagán, *op. cit.,* 36-38.

52 *Ibid.*

53 *Ibid.*

54 *Ibid*, 43-60.

55 *Ibid*, 37-38.

56 The direct impact of the minimum wage on people with disabilities cannot be overestimated either. According to data from the Wage Structure Survey 2019 published by the INE, which includes all groups with and without disabilities, only 18.18% of workers were paid the minimum wage or less. However, once part-time employment is subtracted from this percentage, the figure drops to 3.19%. The 2020 survey, the latest published by the INE, shows an increase in workers earning the minimum wage or less as the percentage is 19.36% which, after deducting part-time work, the figure is 5.57%. This percentage constitutes a low incidence for people with disabilities due to the improvements introduced by collective bargaining, as was already pointed out by Daniel Pérez del Prado, "El salario mínimo interprofesional en el debate jurídico y económico", *Revista de Información Laboral,* No. 1, 2017, 22; Malo, *op. cit.,* 73.

tistics on the number and type of pay discrimination cases are crucial. The collection of such data increases pay transparency at aggregate levels and ultimately uncovers the cases of unequal pay and therefore the gender pay gap."[57]

In this respect, the proposal for a Directive of the European Parliament and of the Council reinforcing the application of the principle of equal pay would be very effective in practice in some countries. It should be noted that, in the explanatory memorandum of this instrument, the need to guarantee the respect of the fundamental right to equal pay throughout the EU, as well as to introduce rules on pay transparency, is indicated as a fundamental objective. Notwithstanding, the eventual entry into force of the Directive would benefit women in general, and women with disabilities in particular. Its provisions, in line with the United Nations 2030 Agenda and the Sustainable Development Goals, in particular SDG 5, the European Pillar of Social Rights and its Action Plan and the Charter of Fundamental Rights of the European Union, directly related to the provisions of Article 157(3) of the Treaty on the Functioning of the European Union, aim to provide a regulatory framework to improve the principle of pay transparency in the interests of equality.

However, the initiative, although very positive, is not very encouraging, as the rule will, in principle, only apply to companies with more than 250 employees, so its impact will be limited. The proposal has also been criticised by the ETUC trade union, which has highlighted its shortcomings, not only because of its limited scope to large organizations. Additionally, the trade union highlight that some States have a stringent and targeted regulation and tighter supervision[58].

The trade union also argued that it "allows employers to define which jobs can be compared when it comes to equal pay for work of equal value"[59] and refers "to "workers' representatives" instead of trade unions, which would open the door to fake unions set up by bosses, and even 'workers representatives' chosen by bosses".[60] Nevertheless, it provides a starting point for identifying discriminatory behaviour which, in cases of a difference of at least 5% of average pay between the sexes, not justified by objective and neutral factors, will lead to the obligation to carry out a joint pay assessment.

Spanish labour law decisively ensures the need for wage transparency. The Workers' Statute,[61] and the Royal Decree on equal pay set up the obligation to carry out wage records in companies with 50 or more employees. The purpose of the regulatory framework is to identify pay differentials and identify the possible existence of discriminatory factors between men and women.

57 Criteria developed by the European Committee of Social Rights reinstate the need to respect the legislative framework and promote equal pay.

58 Ten States in the EU area have lower thresholds (50+ or lower) as Belgium, Denmark, Estonia, Finland, France, Spain, Lithuania, Luxemburg, Portugal and Sweden. Other two, as Italy and Austria have a threshold of 100 and 150 respectively.

59 Pay Transparency Directive: good principles, inadequate tools, *https://www.etuc.org/en/pressrelease/pay-transparency-directive-good-principles-inadequate-tools* (last accessed 15 October 2022).

60 *Ut supra*.

61 Article 28.

Thus, these verifications will be effective instruments against gender-based wage discrimination for women with and without disabilities.

It must be recognised that the equal pay and equal opportunities is an obligation for all Member States of the EU. In conclusion pending further analysis, the entry into force of the Equal Pay Directive will, in principle, make an appreciable difference to the current situation, especially for those States with less demanding legal systems in this area.

V CONCLUSIONS

First, according to the abovementioned data, it is a fact that people with disability have a more precarious access to the labour market. They have lower employment rates and higher unemployment rates than people without disabilities, which results in lower participation in the labour market. Even the employment gap is extraordinarily wide, it is complicated to decide what measures could be taken to reduce this gap and improve labour market integration. In order to improve the employment and occupational status of men and women with disabilities, comparable statistics disaggregated by sex should continue to be developed, analysed and made available at the appropriate levels.

In this vein, the different EU and national strategies have tried to improve the figures, although the results are not yet satisfactory. Simply providing statistical data does not explain the extent of the problem of the unemployment of people with disabilities.

Secondly, regarding the problem of the gender wage gap, the results are insufficient to make statements about the possible existence of discriminatory behaviour. In our opinion, it is necessary to improve and complete the information provided in all States. Therefore, it is not enough to provide statistical data, but comprehensive studies are needed which combine different parameters, distinguish data on the basis of the disability suffered and, specially, make an analysis of the gender impact on the situation of people with disabilities.

In short, considering the underlying reality, a higher quality of information will allow to identify and tackle the problem in depth. Consequently, the eventual approval of the proposal for a directive on pay transparency will introduce the gradual – and limited – implementation of pay audits to an in-depth analysis, detecting the need for improvement or the need to eliminate conduct contrary to the principle of non-discrimination. As Ms. Von der Leyen said: "Equal work deserves equal pay. And for equal pay, you need transparency. Women must know whether their employers treat them fairly. And when this is not the case, they must have the power to fight back and get what they deserve".[62]

62 President Ursula von der Leyen, European Parliament's Committee on Women's Rights and Gender Equality, 4 March 2021.

The proposal for a directive on pay transparency could help to improve the situation by identifying situations of pay differentials based on discriminatory grounds for both gender and the disabled. Notwithstanding, it would be desirable to require the introduction of a wage audit in companies with more than 50 workers, as is set up in Spain and other EU States, which make it possible to analyse these factors.

To conclude, detailed data are required to assess the true impact of disability on wages, including concrete benchmarks and measurable indicators. Due to these circumstances, any research in the regulatory frameworks must take into account the gender difference in their impacts. To this end, an assessment system including quality data and/or company-level salary audits is needed to analyse the factors. This enhancement would identify more precisely the real causes of the pay gap of women with disabilities, enabling the design of appropriate policies and strategies, as well as combating prejudices and stereotypes.

Nevertheless, there is a key question here. Can mechanisms be put in place to foster integration and address employment issues of people with disabilities, especially women? In my opinion, this is a priority. Social dialogue and collective bargaining at all levels would enable solutions to be found to problems which arise in general. The rights of people with disabilities must be firmly assumed and the measures set out in the UN Convention and in the various EU regulations must be implemented, strengthening social dialogue in close collaboration with disabled people's organisations. This will reinforce labour market integration, the possibility of career progression and the need to establish equal pay for work of equal value for women with disabilities.

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DISKRIMINACIJA ŽENA SA INVALIDITETOM U POGLEDU ZARADA: MIT ILI STVARNOST?

Apstrakt

Položaj osoba sa invaliditetom u oblasti zapošljavanja obeležavaju vrlo obeshrabrujući podaci. Ipak, žene sa invaliditetom se nalaze čak i u nepovoljnijem položaju. U ovom radu, položaj žena sa invaliditetom u oblasti zapošljavanja je, najpre, analiziran kroz razmatranje njihovog položaja u Španiji i u okviru EU. Drugo, ovaj rad ukazuje na problem diskriminacije u pogledu zarada, i to kroz razmatranje različitih zakonodavnih inicijativa i pokušaj da se pojasni realnost ovog problema. Konačno, ponuđeni su i predlozi za unapređenje situacije. To je posebno ukljuilo predlog da države članice EU uključe detaljne podatke u procenu stavrnog uticaja invaliditeta na zarade, uključujući konkretna merila i merljive indikatore. U pogledu ovog pitanja, Direktiva o jednakim zaradama bi mogla da doprinese uočavanju slučajeva diskriminacije u pogledu zarada.

Ključne reči: *Žene sa invaliditetom; Diskriminacija; Tržište rada; Zarade.*

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THE PROBLEM OF THIRD-PARTY VIOLENCE IN THE WORKPLACE IN HIGHER EDUCATION INSTITUTIONS: THE VULNERABILITY AND PROTECTION OF WOMEN AND GIRLS WITH DISABILITIES

Abstract

One aspect of a person's vulnerability is the exposure to workplace violence by third parties with whom workers come into contact in the course of their work. In this paper, workplace violence by third parties in higher education institutions is addressed, highlighting the vulnerability of workers in terms of the position of power and the inadequate (legal) protection of workers vis-à-vis third parties. In this regard, women and people with disabilities may be even more exposed to third party violence due to their personal characteristics over which they have no control. The problem of third party violence has been scarcely explored in research. The legal analysis highlights the general features of international and specifically Slovenian legal regulation of third party violence in the workplace. International legislation mostly regulates third party violence in a general and meaningful way, with some special provisions in recent international legal acts. From the point of view of national regulation, the case of Slovenia is considered, where a research of the legal regulation of third party violence in the workplace was conducted on a sample of public social science higher education institutions (HEI). Social science HEI differ from natural science HEI also in terms of gender structure, as women predominate as a more vulnerable group in all forms of violence.

The findings of the study show that workers in HEI are most likely to experience verbal and psychological violence. The HEIs included in the research rely on the reasonable use of the general provisions in the common HEI rules on harassment and bullying, so there is no specific legal provision for third party violence.

General awareness and understanding of the problem of third party violence should be raised and, in this context, it is necessary to draw attention to the protection of vulnerable groups in the work environment, such as women and people with disabilities. A necessary step to protect workers from third

party violence is to propose solutions to universities in the field of regulation of third party violence.

Key words: *Third-party violence; Harassment; Bullying; Higher education institutions; Labour law protection.*

I INTRODUCTION

It was far from surprising when Wendell evidenced that women with disabilities were fighting patriarchal oppression as well as that engendered by disability in environments dominated by 'the capable' in 1989, and this is still the case[1]. According to the International Labour Organization (ILO), persons with disabilities, conditions that require special treatment due to established impairment, form the largest minority in the word and it is estimated that they constitute approximately 15%, or one billion, of the world's population, and of these at least 785 million are of working age[2]. According to World Bank data, the estimated number of women and girls with disabilities globally in 2011 was 325 million[3]; no newer data are available. In its Strategy for the Rights of Persons with Disabilities 2021–2030, adopted in 2021, the European Commission evidenced that approximately 87 million persons with disabilities were living in Europe[4] and approximately 46 million of these were women and girls with disabilities, representing approximately 16% of Europe's total female population and 60% of those with disabilities[5]. The right of persons with disabilities to equal access to societal service must be enshrined in international and national legislation because they are even more exposed to socially deviant behaviour, such as workplace violence, than those without disabilities, and this is even more marked for women with disabilities pursuant to patriarchy and inadequate legal protection in relation to third parties. Research shows that the risk of third-party violence whilst engaged in providing education is perceived as elevated, representing an increased risk of violence in the workplace.[6] Persons with disabilities engaged in service provision are more exposed to third-party

1 Tammy Bernasky, "International Human Rights and Women with Disabilities: Recognizing Our Diverse Identities", *Canadian Woman Studies*, Vol. 33, No. 1.-2, 2018, 52.

2 ILO, 2020.

3 Dan Goodley, Bill Hughes and Davis Lennard, *Disability and social theory: New developments and directions* (2012), 290.

4 European Commission, 2021.

5 European Parliament resolution on the situation of women with disabilities, 2018, Art. A.

6 The education sector is in second place, immediately after the health sector, with regard to detected violence (8%) and harassment in the workplace (12%) according to Eurofound research from 2007 (EU27). We found those at the higher levels of academia, such as university professors, to predominantly be the perpetrators of third-party violence, not co-workers (Parent-Thirion *et al*., 2007). In the educational sector, hostile social behaviour is largely expressed verbally (Parent-Thirion *et al*., 2017). European research data on working conditions based on the interactive presentation of Eurofound's tool in 2017 show that a quarter of workers in administration, education, and health' sector in Slovenia are exposed to hostile social behaviour.

violence, as aforementioned, with those employed in the health sector being most exposed to hostile social behaviour, followed by those in public administration, transport, and education respectively[7]. Gender and disability are not the only factors determining workplace violence, but they are important.

A recent study[8] found no significant difference in terms of exposure to workplace mobbing and bullying between male and female academics. Lampman evidences academic mobbing directed towards professors by students and found that a third of the women in his study reported serious cases of bullying, aggression, and unwanted sexual attention[9]. Another study shows that women were two to three times more likely than men to suffer voiced death threats from students[10]. Lampman *et alia*'s 2016 study on academic mobbing highlights gender, in addition to being a member of a racial or ethnic minority, youth, and not having a doctorate, as a significant predictor of bullying in the academic setting, and that women in academia are consequently more exposed to mobbing than men[11]. The majority of studies by international organisations[12] evidence that women are more exposed to workplace mobbing than men and have lower economic and social standing, even though the majority of general definitions describe mobbing as gender-neutral, showing that gender is not necessarily the main predictor of mobbing, but some older studies highlight the issue of female aggression in environments where women are prevalent[13]. 'Akahara'[14], or academic harassment, the abuse of power by senior faculty members directed at junior faculty members, particularly limits the ability of women to rise through the ranks[15]. Cyberbullying is also ubiquitous and on the increase[16]. To best understand worker vulnerability,

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7 Parent-Thirion *et al.*, 2017.

8 Ahmad Saima, Rukhsana, Kalim and Ahmad Kaleem, "Academics' perceptions of bullying at work: Insights from Pakistan", *International Journal of Educational Management*, Vol. 31, No. 2, 2017.

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10 Chad Prevost and Elena Hunt, "Bullying and mobbing in academy: a literature", *European Scientific Journal*, Vol. 14, No. 8, 2018.

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12 Parent-Thirion Agnes, Fernández-Macías Enrique, Hurley John and Vermeylen Greet, "Eurofound Fourth European Working Conditions Survey", Office for Official Publications of the European Communities, 2007, *https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef0698en.pdf*.

13 Kaj Björkqvist, Karin Österman and M.J. Kiristi Lagerspetz, "Sex differences in covert aggression among adults", *Aggressive Behavior*, Vol. 20, No. 1, 1994.

14 An unusual form of oppression or academic harassment of women-young researchers that includes verbal abuse and insidious gossip and other forms of harassment and intimidation by affiliated groups. "Akahara" is used to make life so difficult for the victim that she leaves the work environment on her own. In this way, those who have an established academic position gain space for a new job (Craft, 2006).

15 Keashly Loraleigh, "Workplace bullying, mobbing and harassment in academy: Faculty experience", in D'Cruz, P., Noronha, E., Keashly, L., Tye-Williams, S. (eds), *Special topics and particular occupations, professions and sectors. Handbooks of workplace bullying, emotional abuse and harassment* (2019).

16 Turk & Franca (2013).

third-party violence in the workplace must be addressed, including that faced by women and girls with disabilities.

This chapter presents and analyses the legal protection extended to women and girls with disabilities by reviewing the relevant international and Slovenian legislation in this field and empirical research on the legal regulation of third-party violence, one of the risks women and others with disabilities face, in selected higher education institutions.

We then present self-protection from violence in terms of internal legal rules, third-party violence in practice, prevention and elimination of third-party violence using preventive and curative measures, and solutions and examples of best practice. The conclusion presents the protection extended to women and others with disabilities with an emphasis on empowerment and raising awareness.

II WORKER VULNERABILITY: THIRD-PARTY VIOLENCE AND THE (LEGAL) PROTECTION OF WOMEN AND GIRLS WITH DISABILITIES

This chapter presents vulnerability to third-party violence and, in this context, the legal protection extended to women and girls with disabilities by international and Slovenian legislation. Each worker is potentially exposed to acts of violence by co-workers and superiors on a daily basis and, as aforementioned, educational activity is a high-risk activity in terms of third-party violence. Pursuant to this issue being insufficiently studied, we conducted empirical research, finding women, especially those with a disability, generally more vulnerable than men to such risk, including negative acts of violence[17] committed by external perpetrators. In the continuation, we appropriately address third-party violence vis-à-vis higher education institutions in Slovenia, highlighting the (legal) protection extended to women and girls with disabilities, who are even more exposed to violence due to personal trait. Based on our research, measures and solutions can be used to empower women and girls with disabilities when faced with third-party violence.

1. International regulation

The Convention on the Rights of Persons with Disabilities[18] and the Convention on the Elimination of All Forms of Discrimination against Women[19] adopted by the United Nations (UN) are the international legal bases for the

17 Based on the research conducted, the following cases of violent acts by external perpetrators were identified: verbal attacks on faculty members, public defamation of members of the administration in public networks, hate speech (calls to shoot members of the administration), proven intention to forcefully enter the premises of the administration, electronic threats with the aim of intimidation, insults, the intention of a physical attack by a man on a female employee of the department, theft in the library, increased tone and impatience in communication, physical acts against property.

18 CRPD, 2006.

19 CEDAW, 1979.

protection of fundamental human rights in the field of disability and gender. Article 1 of the Convention on the Rights of Persons with Disabilities defines persons with disabilities as those with long-term physical, mental, intellectual or sensory impairment which may, in interaction with various barriers, hinder their full and effective participation in society on an equal basis, and the Convention is legally binding for all States Parties. The adoption of the Convention is based on the awareness that women and girls with disabilities face a higher risk of falling victim to violence, injury, abuse, maltreatment, and exploitation both inside and outside their domestic environments[20]. Pursuant to Article 6 of the Convention, women and girls with disabilities are subject to multiple forms of discrimination, so it is important to emphasise that States Parties are legally bound to adopt active policies and measures to ensure the full and equal enjoyment of all human rights and fundamental freedoms to ensure the full development, advancement, and empowerment of women[21]. The Convention on the Elimination of All Forms of Discrimination against Women explicitly prohibits discrimination against women and restriction based on gender, or any other distinction[22].

The International Labour Organization (ILO) adopted the Violence and Harassment Convention No. 190 to protect women and girls with disabilities in 2019[23] and Recommendation No. 206 of the same name[24], setting the international standard for the protection of workers and others against violence in work environments by placing special emphasis on gender-based violence (see Article 9), but without specifically highlighting third-party violence. Pursuant to this Article, everyone, including persons with disabilities, has the right to work in an environment free from violence and harassment. An important finding has been confirmed that discrimination on the basis of disability significantly increases the risk of workplace violence and harassment[25], and that such violence is often overlooked. Furthermore, Convention No. 190, the most recent, and Recommendation No. 206 are based on the finding that women and girls are more frequently and disproportionately subject to workplace gender-based violence and harassment because of gender-related stereotypes and patriarchy[26]. The ILO's findings lead us to conclude that gender is an additional risk factor for those with disabilities and that said women and girls are doubly exposed to physical and psychological violence, and this is why a responsive, comprehensive approach to effectively tackle its causes is of paramount importance. The Convention states that Member States shall adopt such policies, legislative acts, and implement regulations to ensure the right to equality and equal treatment in the world of work to

20 CRPD, 2006, Art. 6.

21 CRPD, 2006, Art. 6.

22 CEDAW, 1979, Art. 1.

23 C190, 2019.

24 R206, 2019.

25 ILO, 2016.

26 C190, 2019.

women and others disproportionately affected by violence and harassment in the world of work and said measures shall not limit their access to occupation fields[27]. Recommendation No. 206 states that employers shall take into account factors that increase the likelihood of violence and harassment, including psychosocial hazard and risk. Point 8, Section II of Recommendation No. 206 specifically highlights the hazards and risks associated with third parties, including clients, customers, service providers, users, patients, and other members of the public and Point 9 focuses on activities and professions in which exposure to violence and harassment may be more likely, including night work, work in isolation, health, hospitality, social services, emergency services, domestic work, transport, and education.

The European Union (EU), wishing to better enhance and additionally protect its citizens' fundamental rights, adopted the Charter of Fundamental Rights of the European Union[28], which legislates for gender employment equality[29]. Any kind of discrimination, including disability and gender, is strictly forbidden[30]. The Charter emphasises zero tolerance to workplace violence[31], protecting the fundamental right to safe working environments and healthy and safe working conditions free from insult and indignity. The Charter recognises the right of persons with disabilities to fully benefit from measures designed to ensure their independence, social integration, and participation in the life of the community[32]. Furthermore, the EU addresses gender and disability inequality, and protection in Council Directive 2000/78/EC, which establishes a general framework for employment and occupation equity[33] and ensures protection from discrimination based on physical attributes, such as disability, age, and sexual orientation. Pursuant to Article 5 of said Directive, those with disabilities must be provided reasonable accommodation based on their physical status and equal employment opportunities. It is thus prohibited to expose persons with disabilities to increased risk of violence, which may be related to inappropriate working conditions in which, *inter alia*, acts of violence are more likely. The provision of equal treatment and opportunity in the field of work, a fundamental principle underpinning EU legislation, is realised with Directive 2006/54/EC of the European Parliament and Council[34], which fundamentally protects labour market gender equality and explicitly prohibits direct or indirect discrimination based on gender in the field of employment, including that related to working conditions, access to employment, dismissal, pay, training, promotion, and membership of worker and employer organisations. An exception which allows for the different treatment of men and women based on the nature of oc-

27 C190, 2019, Art. 6.

28 C364, 2000.

29 C364, 2000, Art. 23.

30 C364, 2000, Art. 21.

31 C364 2000, Art. 31.

32 C364, 2000, Art. 26.

33 Council Directive 2000/78/EC.

34 Directive 2006/54/EC.

cupational activities or context in which they are carried out, provided that the objective is legitimate and the requirement proportionate, is determined by Article 14 of the Directive and this could be used to protect women from third-party violence when executing high-risk occupational activities, including night shift work at remote locations, such as service stations.

The European Council adopted a resolution on the situation of persons with disabilities in the EU (6941/08 in 2008), prepared by the Republic of Slovenia (RS) during its presidency of said Council, which calls for ensuring anti-discriminatory measures focused on women with disabilities, and adopting measures to better support the employment of said women and enforce their right to equal opportunities. The aim of this resolution being the development of appropriate policy, regulation harmonisation, and an increase in awareness of what is suffered by people with disabilities in social and employment environments[35].

The European Commission (EC) established its Advisory Committee on Safety, Hygiene and Health Protection at Work in 1997, which provides a technical definition of workplace violence and highlights how gender and disability discrimination enhance the possibility of violence by people inside and outside working environments[36]. In the context of the Commission Communication to the European Parliament, Council, European Economic and Social Committee, and the Committee of the Regions in 2021, the Commission adopted *Union of equality: Strategy for the rights of persons with disabilities 2021–2030*, which emphasizes that special attention and increased protection should be focused on women because women with disabilities are two to five times more likely to be victims of violence than those without[37]. One of the findings underpinning the Resolution is that women and girls with disabilities often face multiple forms of discrimination on the grounds of, amongst others, gender identity and expression, and sexual orientation, which further contributes to the feminisation of poverty[38]. Especially worrying is that, despite the numerous international conventions and provisions of European law, persons with disabilities do not fully enjoy their rights and that conventions and provisions are systematically disregarded while the rights of said workers continue to be violated[39].

The Council of Europe endeavours to establish the legal respect of the most basic rights, democracy and the rule of law in the European area, the shared values of all Member States. The European Convention on Human Rights and Fundamental Freedoms (ECHR) ensures the most basic rights, such as the right to life[40], and the rights to liberty and security[41], and prohib-

35 Cveto Uršič, "Človekove pravice invalidov v mednarodnih dokumentih", in Cveto Uršić (ed.), *Vodnik po pravicah invalidov* (2015), 16.

36 EC, 2020.

37 European Parliament Resolution on the situation of women with disabilities 2018, Art. F.

38 European Parliament Resolution on the situation of women with disabilities, 2018, Art. L.

39 European Parliament Resolution on the situation of women with disabilities, 2018, Art. Q.

40 ECHR, Art. 2.

41 ECHR, Art. 5.

its discrimination[42]. The rights and freedoms extended by ECHR are more precisely defined in the Council's European Social Charter of 1965, its second most important document, which substantively supplements ECHR and addresses various paradigms, including health, employment, and working conditions. The European Social Charter recognised and raised social rights to the level of fundamental human rights and members of the Council, its institutions, social partners, and civil society are especially obliged to realise the rights arising from the European Social Charter[43]. The most basic and fundamental human right related to work in the European Social Charter is the right to work and earn a living from occupations entered freely; furthermore, the right to free vocational guidance for people with disabilities to solve problems related to occupational choice with due regard given to individual characteristics and abilities is emphasised[44], the same applying to the vocational training of persons with disabilities[45]. In accordance with Right/Principle 3 of the European Social Charter and the requirement for safe and healthy working conditions for all workers, Member States have made commitments to prepare, implement, and periodically review national policy compliance in terms of occupational safety and health, and working environment after consultation with employer and worker organisations. Pursuant to Principle 15 of ESC, disabled persons have the right to independence, social integration, and involvement in the life in the community. Principle 20 of the ESC also highlights protection against discrimination in the field of employment, meaning equal opportunities and equal treatment without discrimination based on sex. Protection from violence in the workplace is ensured by the right to dignity at work. Pursuant to Principle 26 of the ESC, Member States are obliged to increase awareness, notification, and protection in terms of sexual harassment in the workplace, based on consultation with employer and worker organisations, and to adopt appropriate action to protect workers from said conduct. In recognising the right to dignity at work by ratifying ESC, contracting states shall provide appropriate legislative protection from sexual harassment and offence.

2. The Slovenian context

Slovenia's Constitution guarantees equal human rights and fundamental freedoms irrespective of circumstance, including sex and disability[46]. Safety and dignity are constitutionally guaranteed by Article 34 of the Constitution of the Republic of Slovenia and incitement to violence is deemed inadmissible and unconstitutional[47]. The Constitution's statutory provisions include many different definitions of such violence, including mobbing, bullying, harassment, and psychosocial risk, with the common denominator being that said

42 ECHR, Art. 14.

43 Končar, 2015.

44 European Social Charter, principle/right 9.

45 European Social Charter, Article 10.

46 Art. 14.

47 Art. 63.

violence further amplifies the indignity suffered by victims of said conduct. A special constitutional provision[48] guarantees the right of disabled persons to employment protection and training.

Slovenia's Employment Relationships Act, its fundamental legislation in this field, uses the terms *harassment* and *bullying*, whereby *harassment* is defined as any undesired behaviour associated with any personal circumstance with the effect, or intent of adversely affecting the dignity of a person, or of creating an intimidating, hateful, degrading, shaming, or insulting environment[49] and *bullying* as any repeated, or systematically objectionable, or clearly negative and offensive treatment, or behaviour directed at individual workers in the workplace, or in connection with work[50]. Pursuant to Article 47 of the ZDR-1, employers shall be obliged to provide working environments in which none are subject to sexual and other forms of harassment, or bullying on the part of employers, line managers, and co-workers and to take appropriate steps to protect workers from undesired behaviour. Third-party violence is not explicitly included in the provision, which is a downside of Slovenia's legislation, meaning there is a risk that protection against third-party violence may not be addressed, while dignity is a constitutionally guaranteed universal right which should be protected from third-party violence. The Act prohibits discrimination based on disability in relation to employment relationships and employment contract conclusion procedures. Workers with a disability have the right to extraordinarily cancel employment contracts if they believe they have been subject to discrimination and employers are obliged to prove that no such breach occurred.

Health and safety at work in the Republic of Slovenia is fundamentally regulated by the Health and Safety at Work Act[51]; based on which workers are protected from the risk of third-party violence at work. Pursuant to Article 23 of ZVZD-1, employers shall provide arrangements and equipment to mitigate the risk of violence, enable workplace access, and develop procedures and measures to deal with such violence and inform those affected thereof.

International provisions prohibiting discrimination are implemented in the Republic of Slovenia's Protection Against Discrimination Act[52], which includes the individual categories and personal circumstances that may engender discrimination, or unequal treatment when exercising human rights and fundamental freedoms. The act commits state authorities, local communities, public authorisation holders, and legal and natural persons to ensuring protection against discrimination and unequal treatment in relation to third parties[53]. Work process equality is ensured by providing for the equal inclusion and treatment of all persons, be they prospective employees or workers

48 Art. 52.

49 ZDR-1, Art. 6.

50 ZDR-1, Art. 7.

51 ZVZD-1.

52 ZvarD.

53 ZvarD, Art. 2.

engaged in training, and ensuring access to equal employment conditions, which is particularly important in terms of people with disabilities. It is noteworthy that third-party discrimination against workers is not specifically highlighted, despite its global prevalence, particularly in higher education institutions; and putting workers in unequal, degrading positions pursuant to discrimination is a violent insult to human dignity, and it is particularly important to expose such discrimination to raise awareness of the inadmissibility of such behaviour.

Pursuant to the Slovenian Criminal Code[54], 'workplace mobbing' is an offence against employment relationships and social security[55], whereby those who degrade and frighten others at the workplace pursuant to discrimination shall be criminally liable and sentenced to imprisonment for not more than two years. Furthermore, any public provocation of hatred, strife, or intolerance based on discrimination, or any other kind of difference, including gender and disability, shall be prohibited[56]. Any obstruction of the performance of official acts, or revenge against officials shall also be criminally prosecuted[57].

Slovenia's Equalisation of Opportunities for Persons with Disabilities Act[58], adopted in 2010, is specifically aimed at preventing and eliminating disability-based discrimination, with disability being defined as long-term physical, mental, and sensory impairment, and mental development disorders which limit said persons' ability to equally and fully cooperate in society, that is to create equal opportunities for disabled persons in all aspects of their lives[59]. And on this legal basis, the competent ministry periodically prepares an Action Programme for Persons with Disabilities, the current one being in effect for 2022–2030, which sets forth measures for particularly vulnerable groups of persons with disabilities, such as women. The goals of the Action Programme 2022–2030 related to women with disabilities include the financial-social security of persons with disabilities, including optimally providing access to increased social security transfers and other poverty reduction mechanisms to women with disabilities during the COVID-19 epidemic[60], the elimination of violence and discrimination particularly focused on women with disabilities, and the raising of awareness with regard to said violence and abuse.

A more detailed means to implement equal social integration to better enable those with disabilities to enjoy the same rights as those without is provided for by 2018's *Social Inclusion of Disabled Persons Act*[61], which

54 KZ-1.

55 KZ-1, Art. 197.

56 KZ-1, Art. 297.

57 KZ-1, Art. 299.

58 ZIMI.

59 ZIMI, Art. 1.

60 GOV, 2021.

61 ZSVI.

defines, *inter alia*, a range of disabilities and disorders which endow disabled person status, including mental development disorder, including that deemed moderate, severe autistic disorders, deafblindness, and brain damage, which is a much broader definition of disability than in earlier legislation. According to data provided by the Slovenian Government, approximately 170,000 disabled persons and persons with physical impairment currently reside in Slovenia[62].

The Public Employees Act[63], when addressing the special position of public employees, including those in academia, to protection against violence, includes a professional interest protection principle[64], which legally determines employer's obligation to protect public employees from mobbing, threats, and similar treatment which places work performance at risk.

In the Republic of Slovenia, violence is also addressed when implementing regulations, such as the *Decree on administrative operations*, which also applies to public universities, and the concretisation of legislative provisions needs to be executed to ensure the safety of people and their assets and oblige employers to provide for the safety of all located at their business premises. Workers must report any security incident, or suspected security incident to their superiors, or security departments. The Decree strictly forbids bringing any firearms, or other dangerous objects, such as ammunition and explosives, to workplaces, stating that employers shall establish building access controls if necessary to ensure the safety of people and property; if a safety risk is identified, specially arranged premises and equipment shall be provided to ensure third-party reception to reduce such risk and to enable immediate access to assistance if necessary.

III RESEARCH ON THE LEGAL REGULATION OF THIRD-PARTY VIOLENCE AT SELECTED HIGHER EDUCATION INSTITUTIONS

Research to date evidences that third-party violence in the Slovenian higher education setting has not been addressed, yet third-party violence in said setting is present,[65] which is why we have designed our own research to evaluate how legislative protection against third-party violence is implemented in practice in selected higher education institutions in Slovenia by internal rule mechanisms, and to determine how violence manifests itself in the selected higher education institutions and what action is taken to prevent such violence. The research sample includes all of the social science institu-

62 GOV, 2021, p. 3.2

63 ZJU.

64 ZJU, Art. 15.

65 In 2019, the police processed several death threats made to professors in Maribor by an anonymous person via e-mail (Hanžič, 2019). Two years later, it was found that this was a matter of identity theft with the aim of sending threats to professors (*Delo*, 2021a).

tions under the auspices of Slovenia's public universities,[66] and is purposive and based on common social science methodology, which differs markedly from natural science methodology, to address less mandatory practical work, for example, and gender structure, as women[67] are the most vulnerable to all types of violence. We designed an authorial written questionnaire based on relevant findings on the issue to obtain research data, setting the following research questions:

1. *Which internal legal acts are used by the selected higher education institutions to regulate third-party workplace violence?*
2. *How do the selected higher education institutions perceive third-party workplace violence?*
3. *Which preventive and curative measures do the selected higher education institutions apply to regulate third-party workplace violence?*

On this basis, we subdivided the questionnaire into the following three sets: i) internal legal acts; ii) third-party violence in practice; and iii) third-party violence prevention and management.

We conducted individually-guided structured interviews, based on the questionnaire, with representatives of higher education institutions, encompassing deans and secretaries, by telephone or other web tools, including Zoom and Skype, or in written form, or a combination of both, informing research participants that cooperation was anonymous.[68] The questions were accurately formulated and participants answered them in the same sequence, sub-questions were added for better guidance and understanding and answers were not pre-determined. We utilized guided interviews to find out which internal legal acts were used by higher education institutions to protect workers from third-party violence and here, at least, reasonable connection with third-party violence was addressed and to obtain as comprehensive an insight into the issue of workplace violence as possible, and this evidences the iniquitous exposure of women to violence. Pursuant to soft measures being

66 University of Ljubljana – Faculty of Economics, Faculty of Law, Faculty of Social Sciences, Faculty of Public Administration, Faculty of Education, Faculty of Social Work, Faculty of Arts, and Faculty of Sport; University of Maribor – Faculty of Economics and Business, Faculty of Organizational Sciences, Faculty of Tourism, Faculty of Criminal Justice and Security, Faculty of Arts, Faculty of Education and Faculty of Law; University of Primorska – Faculty of Humanities, Faculty of Management, Faculty of Education, Faculty of Tourism Studies; The New University; and the European Faculty of Law.

67 SiStat's data on 'Human resources in tertiary education', cover the gender structure of pedagogical and other staff, including management, and expert-technical and administrative staff, for all higher education institutions in 2015. Slovenia's higher education institutions employ 6,214 female workers and 6,075 male workers (SURS, 2020). Data separately presenting worker gender structure in social science and natural science institutions are not available, hence the previous data are generalised for all higher education institutions in Slovenia.

68 Institution anonymity is ensured by using abbreviations, such as HEI1 and HEI2, with HEI standing for "higher education institution", with the number randomly selected so it does not point to any feature of an institution and identify said institution.

important when regulating acts of violence, we wanted to find out what preventive and curative measures higher education institutions use in practice.

Out of the total number of 20 higher education institutions, the full sample, research cooperation was confirmed by 10, of which 8 agreed to individually-guided interview via either the telephone, or Zoom and two wanted to provide written answers to the questions to better clarify the purpose of said questions[69]. A response rate that was deemed adequate. The records of guided interviews were analysed using the content analysis method, and it took one month to conduct all the interviews and gather the data for analysis.

Whilst conducting the research, we encountered the procedural obstacle of not being able to conduct personal interviews with research participants because of the COVID-19 epidemic and the consequent increased work volume. Another obstacle encountered was related to how the term 'violence' was perceived; research participants initially and primarily understood 'violence' in the physical sense, so we explained that it also includes the so-called soft forms, such as threats, raised voices, provocation, inappropriate verbal approaches, physical pressure exertion on workers and the like, ostensibly highlighting that behaviour and treatment leading to physical contact are of utmost importance.

1. Self-protection against violence and internal legal regulation

In terms of self-protection against violence, we were interested in whether higher education institutions had adopted special internal legal acts and rules to regulate third-party violence and how said acts and rules mitigated third-party violence in the workplace.

All participating higher education institutions attested that they had never adopted any internal legal acts to directly, or specially regulate third-party violence in the workplace. All the higher education institutions concerned apply the relevant acts and rules, but they do not have their own rules for third-party violence.

Set 1's second question addresses employer obligation to ensure special workplace arrangements to address third-party violence risk and develop procedures to mitigate such risk. The Safety Statement with Risk Assessment is the basis and baseline for developing safety documents to assess third-party violence risk in the Republic of Slovenia and we found that the Safety Statements and Risk Assessments of half of the participating higher education institutions had done so. Higher Education Institute 3 (HEI3) claims that in tandem with job classification, workplaces exposed to higher third-party violence risk are subject to measures such as video surveillance, security services, special intervention by authorised security services during money transfer, and, in the context of the Appendix to the Statement, instructions

69 The research sample includes all 20 public social science higher education institutions under the umbrella of public universities in Slovenia: University of Ljubljana (UL), University of Maribor (UM), University of Primorska (UP) and the New University in Nova Gorica.

for action to be taken in the eventuality that such risk is manifest; HEI4 attests that third-party violence is particularly evident in workplaces where staff work directly with clients, including libraries and student affairs' departments; and HEI5 defines third-party violence risk as hazardous and harmful, including third-party attacks, but such risk was evaluated as being low.

Given that employers are legally obligated to adopt measures to prevent, eliminate, and manage acts of violence, harassment, and other types of psychosocial risk in the workplace, we asked higher education institution management representatives if they addressed third-party violence in the relevant rules directly and/or indirectly when setting them. Slovenia's higher education institutions regulate violence, bullying, harassment, and psychosocial risk by applying, *mutatis mutandis*, rules which address workplace violence in general to third-party violence. We found no examples of direct legal protection for particularly vulnerable groups of workers, including persons with disabilities, in any of the rules.

2. Third-party violence in practice

The second set of research questions addresses detecting violence and collating exemplars of such violence. All the concerned higher education institution representatives state that third-party violence does not pose a serious threat to their workers, but they are aware that such violence exists, with most claiming such events are rare and not periodic. Those in higher education institutions in the field of legal sciences and from spatially smaller higher education institutions feel the least threatened by third-party violence and largely safe. All the concerned management representatives claim they properly familiarise themselves with such cases and deal with them adequately, with zero tolerance for violence. For example, action or behaviour that constitute criminal offences are immediately reported to the police and the perpetrators of actions and behaviour not covered by criminal law are officially disciplined and have to clarify the circumstances of said activity to the relevant management representatives.

Third-party verbal and psychological violence are most prevalent, followed by cyber violence, then physical violence. Students were predominantly the perpetrators of external workplace violence, followed by persons unknown, either physically or electronically. Two of our ten fully participating higher education institutions highlighted that increased pressure and intolerance directed at student affairs staff were especially present when 2016's Bologna Programme students were concluding their studies; six reported that negative media coverage concerning bonuses was a possible reason for an increase in the number of third-party violence cases in general and specifically against management; and two highlighted an increase in cyber violence against management. Severe cases reported by HEI15 include a public call for violence against management staff on social media networks and offensive online comments regarding the visual appearance of female managerial staff members, for which the perpetrators were prosecuted. HEI2 attributes

hostile social conduct to unresolved ideological disputes escalating and becoming unreasonable expectations and HEI5 attributes third-party attacks via electronic sources and physical mail on management staff to distress and the need to release such tension, and not to dissatisfaction with the work of the institutions. Verbal attacks pursuant to gender discrimination practised by students from the Middle East against female workers in student offices is also evident, as is the degradation of women and their work in relation to men, such as said students requesting their applications be processed by male workers (in the case, this failure to understand gender equality is due to cultural differences). The increased number of third-party security incidents at one higher education institute, especially against its most vulnerable group of workers – women –, is attributable to one of its faculties being in close proximity to a location where marginal social groups, including the homeless and drug addicts, assemble.

The aim of our research was, *inter alia*, to highlight the most critical determiners of third-party violence to better focus employers' attention and encourage them to especially protect staff in exposed units, primarily student affairs' departments and secondly libraries. Five of the ten fully participating higher education institutions' pedagogical staff additionally reported recurring third-party violence during cabinet and disciplinary committee meetings, in common areas and via email.

3. Third-party violence prevention and elimination

Our third set of the research questions addresses soft, legally non-binding methods for regulating third-party violence, such as guidelines, instructions, and recommendations, the advantage of which being that no special procedures are required for adoption thereof.

In terms of prevention, higher education institution management organize internal and external workshops and educational events to primarily address mobbing. One of the concerned higher education institutions issued written instructions for action in the event of third-party conflict pursuant to a physical attack of an assistant and multiple attacks on professors. Visual awareness campaigns, including classroom etiquette posters and notices on screens, emphasizing zero tolerance to violence, including that resulting from sexual discrimination, also prove to be of benefit, as does the physical separation of student affairs' staff from clients by glass partitions and raised counters. Informal daily management and staff communication and coordination vis-à-vis potential threat is also seen to be of utility. In terms of unfavourable spatial locations, special cards with chips have been introduced to prevent the entry of members of the aforementioned marginal groups.

Curative measures taken pursuant to third-party violence, including eliminating the harmful consequences of violence but not criminal prosecution, are executed to mitigate the consequences of said events and analyse them so such events can be anticipated and better prepared for. An example of quick and determined curative action concerns the verbal and physical sexual har-

assment of female students perpetrated by a professor at two different higher education institutions, which received much media attention[70], whereby informal internal procedures were immediately activated to obtain as much information as possible, and such instances of sexual harassment serve as a reminder and to increase the importance of a zero-tolerance approach, strict measure implementation, and the pursuit of all acts of violence. In cooperation with the competent trade union, higher education institution management bodies were tasked with setting out clear and transparent measures to mitigate harassment. Furthermore, said trade union believes that awareness raising, rules, and protocols are not enough and that expert information on how to identify sexual harassment and bullying needs to be provided to increase the official reporting of such cases, which is the basis for initiating proceedings, including prosecution, as abuse will otherwise persist[71].

Our findings evidence that the range of curative measure executed is relatively narrow compared to the range of preventive measures, and that three of the concerned higher education institutions have no curative measures in place, which they attribute to a smaller number of security incidents. Managements usually hold discussions with the perpetrators of violence to eliminate the damage done, because they believe this to be a serious message to the perpetrators and the general public alike that zero tolerance to violence is extant.

4. Third-party violence, solutions, best practice, and the protection of women and persons with disabilities

The opinions of higher education institution representatives regarding the regulation of violence in the workplace are strongly divided. Opponents of additional regulation claim that academia's specific features require specific and different behaviour and approaches, and that legal rule inflation will have a negative impact, as attested by HEI2: 'People in the academic environment are not used to actions being taken regarding their work method, which is why people in this sphere need to be trusted to do well in various life situations.' According to HEI5, one of the reasons for not formally regulating such violence is: 'Norms are a poor safeguard in certain fields because action is only taken once an event has occurred.' Most of all, those not in favour of further formal regulation want to implement more soft measures and to better discuss this issue because people are generally not sufficiently aware of what constitutes violence, seeing it only in its physical iteration, meaning its other aspects are inadvertently tolerated. Conversely, supporters of regulation believe that decision makers should formally address the issue because they have the power to do so. Academia is said to be indifferent to establishing legal regulation because it does not consider it as important as its fundamental priority of pedagogical process implementation. On the other hand, sexual

70 *Delo* (2021b); *Dnevnik* (2021).

71 Vojko Urbančić, "Pravilnik Univerze v Ljubljani ni dal pravih rezultatov", *Delo*, 2021, *https://www.delo.si/novice/slovenija/spolno/*.

violence perpetrated against female students raised the issue of the appropriateness of the procedures and internal rules to protect worker dignity, which were subsequently better and more accurately formalized, including specific protocols, to best protect staff and students from harassment.

Higher education institutions also see solutions in increasing student affiliation by increasing the amount of informal contact between students and staff, placing third-party violence central to health and safety at work courses and introducing specific rules and criteria for special committees to address acts of violence. After several cases of academic harassment directed at women were disclosed, one of the universities appointed a special group for gender equality to address such violence and adopted a Gender Equality Plan, in April 2022 (that members are obliged to respect and implement in their work practices), which emphasizes the need for regulating gender-based violence, raises vulnerable group awareness, and better enables protection. The purpose of the plan is to better ensure working and study environments sensitive to gender and other types of discrimination, such as that related to disability, gender identity, sexual orientation, and other features which may lead to the maltreatment of workers, specifically female students.

V RESEARCH FINDINGS AND CONCLUSION

Anyone present in working environments is exposed to workplace violence and vulnerability risk, and service sector workers are especially exposed to such risk from co-workers, superiors, and third parties. On the other hand, we note that the authors of international studies are not united regarding the exposure of women to violence at the workplace – compared to men[72] or that mobbing is more widespread in female prevalent sectors: the majority of the general definitions of mobbing are gender neutral and gender is not considered the primary cause of mobbing[73]. In the meantime, we note that the majority of general definitions are considered to be gender neutral/or they do not include gender as a factor. Even so, we do not want to wrongfully claim that the general definitions of mobbing ignore gender identity because findings show that women are generally in a weaker position than men and consequently more exposed to mobbing. Lampman's study on the mobbing of professors by students provides evidence that as many as 13.1% of the female staff concerned reported serious bullying, aggression, and unwanted sexual attention. Third-party workplace violence is a special, unpredictable type of violence because it is impossible to predict third-party behaviour, which is why it needs to receive special attention and critical positions need to be set. In the context of third-party violence, female vulnerability needs to be highlighted from two perspectives; namely, from that of young women and girls and that of women and girls with disabilities, because both groups are more exposed to third-party violence than others. According to its most recent

72 Saima, Kalim and Kaleem, *op. cit.*

73 Björkqvist, Österman and Lagerspetz, *op. cit*.

Strategy for the rights of persons with disabilities, the European Commission will pay particular attention to and enhance the protection of women with disabilities, as they are between two and five times more likely to face violence than women without disabilities, meaning women and girls with disabilities are twofold exposed to violence and bullying. Third-party workplace violence is seldomly addressed in studies, be they conducted in Slovenia or abroad, resulting in low third-party violence awareness. Consequently, it is difficult to best discuss professional and public awareness of the increased exposure of women and girls with disabilities to third-party violence.

International legal regulation, the basic legal foundation, addresses third-party violence generally, so it is applicable, *mutatis mutandis*, to all iterations of third-party violence. Only ILO Recommendation No. 206, the most recent, emphasises the risk of third-party violence and views educational activity as a profession whose practitioners face higher risk in terms of exposure to violence and harassment. Violence and harassment based on gender and disability is recognised internationally and addressed in relevant international and domestic acts and documents, be they initiated by the UN, national action plans, or internal university provision.

We found that none of the participating higher education institutions have special rules in place to regulate third-party violence and that third-party violence is not mitigated by universities' general rules on mobbing and harassment in any way, since third-party violence is professionally and legally less directly addressed and regulated, resulting in poor worker awareness of this issue. International legal acts address the issue of workplace violence based on disability and gender, but data collected by the ILO[74] evidence that persons with disabilities are less aware of violence in general and, even if violence is reported, fear of stigmatisation, violence continuation, and harassment still persists. The European Parliament in its *Resolution on the situation of women with disabilities* identified as one of the reasons for its adoption the fact that, despite there being a profusion of extant regulations, international conventions, and provisions included in European Union legislation and strategy on disability, persons with disabilities still do not fully enjoy their civil and social rights, international conventions are systematically disregarded, and the fundamental rights of people with disabilities continue to be violated, and women and girls with disabilities are considered marginal in terms of gender equality decision-making and progress.

Our research raises awareness of third-party violence in the academic environment, better facilitates higher education institution self-protection against said violence, and highlights the need to protect vulnerable groups in the working environment, such as women and persons with disabilities, as we found them subject to twofold discrimination. Accordingly, women are more exposed to third-party violence because of gender discrimination, but said violence could also be a result of the prevailing female-oriented employment structure in Slovenia's higher education sector. In terms of exposure to third-party, or external violence in Slovenia's higher education sector, self-

74 ILO, 2020.

protection is of concern because the majority of such environments contain vulnerable groups of workers, such as women and persons with disabilities, who, due to personal trait, are even more exposed to such violence, meaning the need to raise awareness and better enable self-protection against violence is even greater. Furthermore, the fact that extant curative measures, which only occur after violence has been perpetrated, are insufficient is especially worrying. This is a particularly poor message to those who have been exposed to violence and those potentially at risk, and the reason why workers do not speak up about violence and stigmatisation is on the increase. The most vital and basic measure is raising awareness of the zero-tolerance approach to violence at the level of those who have the power to influence, that is, management. Management can maximally contribute to raising awareness and mitigating stigmatisation by establishing two-way communication between themselves and their staff to better engender trust. Violence is unpredictable, physical, and psychological, meaning it is inappropriate to claim that verbal violence over the telephone is insignificant. It is difficult to foresee the distress caused by people who use violent methods of communication and this is why mitigation needs to be planned and tailored in terms of social circumstances. For example, workers were subject to third-party violence and not appropriately protected from such violence during the COVID-19 epidemic because it was unforeseen.

We believe the first step to be taken to mitigate this injustice is to raise awareness of third-party violence and related public criticism, especially by experts in this field, so it can be dealt with nationally then systematically. In this context, vulnerable groups of people who, by virtue of their physical or emotional characteristics, lack the ability to defend themselves, must be empowered to do so. At this point, a statement made by a research participant should be pointed out, namely that norms are poor safeguards in certain fields because remedial action is only possible after the fact. More emphasis needs to be placed on raising critical awareness of the issue and detecting victim distress, which will better enable identification of breaches and lead to the application of law, so harmful events are reported and action taken, as evidenced by the aforementioned sexual harassment cases. This led to internal rule change and the setting of clear protocols for dealing with such violence, including appointing a zero-tolerance gender equality support group to better ensure women are treated as equals in the academic community. Continuously addressing the topic during mandatory health and safety at work training also raises awareness and empowers the vulnerable.

We see more opportunities for follow-up research on this topic. Our research on higher education institution third-party violence is the first of its kind to be conducted in Slovenia; it is based on a limited sample of higher education social sciences institutions so it represents a first step, hopefully leading to further analysis of a broader sample of higher education institutions, focusing on women and girls with disabilities. Likewise, there is ample evidence for simultaneously conducting research in several countries, including e-violence, that is, violence perpetrated electronically and digitally. Third-party violence mitigation must be strengthened academically and practically.

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PROBLEM NASILJA NA MESTU RADA PREDUZETOG OD TREĆEG LICA U VISOKOŠKOLSKIM USTANOVAMA: OSETLJIVOST I ZAŠTITA ŽENA I DEVOJAKA SA INVALIDITETOM

Apstrakt

Jedan aspekt osetljivosti pojedinca tiče se njegove izloženosti nasilju na mestu rada koje preduzimaju treća lica s kojima radnici dolaze u kontakt tokom svog rada. U ovom članku, razmatrano je pitanje nasilja na mestu rada preduzetom od strane trećih lica u ustanovama viskog obrazovanja,

uz potcrtavanje vulnerabilnosti radnika u odnosima moći i neodgovarajuće (pravne) zaštite radnika u odnosu na treća lica. U tom smislu, žene i druge osobe sa invaliditetom mogu biti još izloženije ovom vidu nasilja, zbog svojih ličnih svojstava koja ne mogu da kontrolišu. Problem nasilja od strane trećih lica jedva da je istraživan u naučnoj literaturi. Stoga, pravna analiza u ovom članku naglašava opšta obeležja međunarodnih i naročito slovenačkih izvora prava o nasilju od strane trećih lica na mestu rada. Međunarodno pravo, naime, pretežno uređuje nasilje od strane trećih lica na opšti način, uz neke posebne odredbe sadržane u nedavno usvojenim aktima međunarodnog porekla. Kada je pak reč o uređivanju ovog pitanja na nacionalnom planu, razmatran je primer Slovenije, pri čemu je istraživanje pravnih pravila o nasilju na mestu rada od strane trećih lica zasnovano na uzorku javnih visokoškolskih ustanova u oblasti društvenih nauka. Visokoškolske ustanove u oblasti društvenih nauka se razlikuju od visokoškolskih ustanova u oblasti prirodnih nauka, između ostalog, i po polnoj strukturi, budući da žene dominiraju, kao ugroženija grupa, u pogledu svih oblika nasilja.

Rezultati istraživanja pokazuju da postoje veći izgledi da se radnici u visokoškolskim ustanovama suoče sa verbalnim i psihološkim nasiljem. Visokoškolske ustanove koje su bile obuhvaćene istraživanjem se, pritom, oslanjaju na korišćenje opštih odredaba u zajedničkim pravilima o uznemiravanju koja važe za visokoškolske ustanove, budući da ne postoje posebna pravna pravila o nasilju od strane trećih lica.

Postoji potreba da se unapredi opšta svest i razumevanje problema nasilja od strane trećih lica i da se, u tom kontekstu, posveti pažnja zaštiti osetljivih grupa na mestu rada, poput žena i drugih osoba sa invaliditetom. Neophodan korak u zaštiti radnika od nasilja preduzetog od strane trećeg lica predstavljalo bi i upućivanje predloga univerzitetima vezanim za uređivanje nasilja od strane trećih lica.

Ključne reči: *Nasilje od strane trećeg lica; Zlostavljanje; Uznemiravanje; Visokoobrazovne ustanove; Radnopravna zaštita.*

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ULOGA SINDIKATA U SUZBIJANjU VIŠESTRUKE I UKRŠTENE DISKRIMINACIJE ŽENA SA INVALIDITETOM

Apstrakt

Konvencija o pravima osoba sa invaliditetom je prva konvencija o ljudskim pravima koja je usvojena u 21. veku. Ujedno, to je i najbrže ispregovarana konvencija u čijem su pisanju učestvovale nevladine organizacije – predstavnici osoba sa invaliditetom. Moto 'Ništa o nama bez nas', pod kojim su se aktivno uključili u izradu ove značajne konvencije, podvlači važnost participacije u stvaranju istinski inkluzivnog društva. Sveobuhvatnija zaštita žena sa invaliditetom neophodan je uslov uklanjanju prepreka u mnogim oblastima društvenog života sa kojima se žene suočavaju više od muškaraca. Naime, žene su češće nego muškarci izložene višestrukoj i ukrštenoj diskriminaciji, usled socijalnih struktura i uspostavljenih odnosa moći. Ovu društvenu činjenicu priznaje međunarodno pravo apelujući na države da osnaže poziciju žena, između ostalog, i kroz primenu principa participacije. Imajući u vidu da je Konvencija o pravima osoba sa invaliditetom usvojila socijalni model invaliditeta, nasuprot medicinskom i industrijskom, u radu se, u svetlu ovog novog modela, analizira položaj osoba sa invaliditetom u Republici Srbiji. Presek invaliditeta i roda u oblasti radnog i socijalnog prava otvara novu perspektivu sagledavanja socioekonomskih problema na osnovama pitanja identiteta. Služeći se normativnim, komparativnim i sociološkim metodom autori naročitu pažnju posvećuju pitanju identiteta, te mogućnostima njegovog priznanja i zaštite unutar pravnog poretka Srbije. Ako inkluzija znači pravo pojedinca da punopravno pripada društvu i njegovim institucijama, invaliditet, kao socijalni konstrukt, računa sa mogućnošću promene u društvenim odnosima. Jedan način promene, naročito važan za radno pravo, jeste čvršće povezivanje udruženja osoba sa invaliditetom sa sindikatima, koji, iako nisu prepoznati u Konvenciji o pravima osoba sa invaliditetom, raspolažu mehanizmom socijalnog dijaloga, koji se, kroz princip participacije, najefikasnije ostvaruje u praksi.

Ključne reči*: Diskriminacija; Sindikat; Identitet; Participacija.*

I UVODNE NAPOMENE

Konvencija o pravima osoba sa invaliditetom je usvojena od strane Organizacije ujedinjenih nacija 2006. godine kao prva konvencija koja je za predmet imala zaštitu ljudskih prava u 21.[1] veku. Ova konvencija je najbrže ispregovarana konvencija i prva koja je direktni produkt lobiranja putem interneta.[2] Veliku zaslugu za njeno oblikovanje imaju nevladine organizacije – udruženja osoba sa invaliditetom. Zalaganje više od 400 udruženja doprinelo je tome da je prvi put u istoriji Ujedinjenih nacija pokret nevladinih organizacija učestvovao u pisanju konvencije koje unutar ove organizacije usvajaju države.[3] Ovaj veliki uspeh koji su nedržavni subjekti postigli, a to je da su oblikovali tekst koji u prvom redu obavezuje države, dao je povoda da se potvrdi važnost „nove diplomatije" naročito u pogledu ograničavanja politike pomoću ljudskih prava.[4] Ipak, uprkos činjenici da je više od 160 država u svetu ratifikovalo ovu konvenciju, procenjuje se da je svega 1/3 država uvela u svoj pravni poredak antidiskriminacijsko zakonodavstvo koje se tiče invaliditeta.[5] Štaviše, za većinu građana čak i usvojene antidiskriminacijske norme nisu garant njihove delotvorne primene u praksi. Razlog tome, između ostalog, predstavlja i pristup sudova u ispitivanju postojanja višestruke diskriminacije, kao i njihovo oklevanje da se u praksi bave problemom ukrštene diskriminacije.

Najveću posvećenost u doslednom sprovođenju normi ove konvencije pokazale su razvijene države Evrope. Pre svega, Evropska unija je 2010. godine pristupila ovoj konvenciji uvodeći je u svoj pravni poredak pod uslovima po kojima funkcioniše Evropska unija.[6] U tom smislu, Evropska unija prihvata da u svetlu odredbi konvencije reguliše pitanja funkcionisanja svoje administracije, kao što su, primera radi, uslovi zapošljavanja osoblja ili uslovi rada i zarade. Takodje, Evropska unija uzima u obzir odredbe konvencije i u pogledu pitanja u kojima Evropska unija deli nadležnost sa državama članicama, te u pogledu strategija zapošljavanja, s tim što je Evropska unija stavila rezervu na član 27 Konvencije, isključujući njegovu primenu saglasno čl. 3 Direktive o uspostavljanju opšteg okvira za jednako postupanje u zapošljavanju i obavljanju zanimanja 2000/78/EZ.

S druge strane, Evropski sud za ljudska prava izneo je stav da norme Konvencije o pravima osoba sa invaliditetom treba primeniti kada se pod norme Evropske konvencije podvode osobe sa invaliditetom, naročito u domenu prava na dom i prava na privatnost.[7] Konvencija za zaštitu prava i osnovnih

1 The Convention on the Rights of Persons with Disabilities (A/RES/61/106), adopted on 13 December 2006 by the UN General Assembly.

2 Maya Sabatello and Marianne Schultze, *Human Rights and Disability Advocacy* (2014), XI.

3 Arlene S. Kanter, *The Development of Disability Rights under International Law* (2015), 7.

4 Sabatello and Schultze, *op. cit.*, 254-257.

5 Dan Goodley, *Disability studies, An Interdisciplinary Introduction* (2011), 2.

6 2010/48/EC, Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities *OJ* L 23, 27.1.2010, 35–36.

7 Eilionoir Flynn, *From Rhetoric to Action, Implementing the UN Convention on the Rights of Persons with Disabilities* (2011), 62-63.

sloboda je živi instrument, koji se između ostalog, razvija i u sklopu prihvaćenih međunarodnih pravnih pravila. Sud u Strazburu pravo na privatni život iz čl. 8 Konvencije shvata tako da ono obuhvata i pitanje moralnog i fizičkog integriteta. S druge strane, moralni i fizički integritet se pojima tako da pored fizičke i psihičke dobrobiti, obuhvata i ličnu samostalnost.[8] Ove promene u tumačenju čl. 8 Konvencije sve više konkurišu čl. 5 Konvencije koji postaje prevaziđen, uzimajući u obzir vreme donošenja Konvencije. Naime, čl. 5 Konvencije prihata medicinski pojam invaliditeta, te tako predviđa da je moguće zadržavanje (lišavanje slobode) radi nege i lečenja. Imajući u vidu zabranu diskriminacije po osnovu invaliditeta, odluka o zadržavanju sada mora biti donesena na pravnom osnovu koji je neutralno definisan tako da važi ravnopravno za sve, odnosno odluka ne sme biti vezana za invaliditet.[9]

Zabranu diskriminacije propisuju najvažnije međunarodne konvencije, kao što su Međunarodni pakt o građanskim i političkim pravima, Međunarodni pakt o ekonomskim, socijalnim i kulturnim pravima[10], Konvencija o eliminaciji svih oblika diskriminacije žena[11], Konvencija o eliminaciji svih oblika rasne diskriminacije[12], Konvencija o zabrani mučenja i drugog okrutnog, nehumanog i ponižavajućeg ponašanja ili kažnjavanja[13]... Kada je medjunarodnom konvencijom utvrdjeno načelo zabrane diskriminacije, ono se po pravilu primenjuje u pogledu prava koja su propisana tom konvecijom. Proširenje primene tog načela na sva prava koja garantuje dotična država omogućilo je tumačenje čl. 26 Međunarodnog pakta o gradjanskim i političkim pravima, koje je postalo deo Opšteg komentara br. 18 uz pomenutu konvenciju.[14] Ipak, državama je ostavljena mogučnost da naruše princip zabrane diskriminacije predvidjajući drugačiji tretman odredjenih kategorija lica pod uslovom da je kriterijum razlikovanja objektivan i razuman, te da je cilj koji se takvim razlikovanjem želi postiči legitiman. Takodje, posebni problem u garantovanju ekomomskih i socijalnih prava predstavlja pravilo da se ova prava u državama imaju ostvarivati progresivno, po meri napretka i razvoja date države.[15]

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8 Saša Gajin, *Prava osoba sa mentalnim invaliditetom* (2014), 55.

9 *Ibid.*, 20.

10 Zakon o ratifikaciji Međunarodnog pakta o građanskim i političkim pravima i Zakon o ratifikaciji Međunarodnog pakta o ekonomskim, socijalnim i kulturnim pravima, oba objavljeni u *Sl. list SFRJ*", br. 7/71.

11 Zakon o ratifikaciji Konvencije o eliminisanju svih oblika diskriminacije žena (*Sl. list SFRJ – Međunarodni ugovori*, br. 11/81).

12 Zakon o ratifikaciji Međunarodne konvencije o ukidanju svih oblika rasne diskriminacije (*Sl. list SFRJ*, br. 31/67).

13 Ukaz o proglašenju Zakona o ratifikaciji Konvencije protiv torture i drugih surovih, neljudskih ili ponižavajućih kazni i postupaka (*Službeni list SFRJ – Međunarodni ugovori,* br. 9/91).

14 UN Human Rights Committee (HRC), CCPR General Comment No. 18: Non-discrimination, adopted on 10 November 1989, paras. 12-13.

15 International Covenant on Economic, Social and Cultural Rights, GA Resolution 2200A (XXI), adopted on 16 December 1966, art. 2.

Ipak, treba imati u vidu da su Ujedinjene nacije, kao najvažnija medjunarodna organizacija, pored uloge očuvanja mira u svetu, preuzele ulogu razvoja i zaštite ljudskih prava.[16] Dalje, rasteće stanovište postaje to da su ljudska prava pomenuta u Univerzalnoj deklaraciji o ljudskim pravima deo važećeg medjunarodnog prava i da obavezuju države bez obzira na to da li su one ratifikovale odgovarajuće medjunarodne konvencije koje ih preuzimaju.[17] Naposletku, kako bi osigurale poštovanje ljduskih prava, koje se često nalaze "u tenziji" sa suverenitetom država, budući da su države najčešće prekršioci ljudski prava, Ujedinjene nacije su predvidele opcione protokole uz najvažnije konvencije, kao bi omogućile civilnom sektoru da odgovarajućim nadzornim telima signaliziraju kršenje ljudskih prava. Potreba za osnaženjem i oživljenjem ljudskih prava prepoznata je u Bečkoj deklaraciji i programu akcije iz 1993. godine.[18] Njome je izričito potvrđeno da su osobe sa invaliditetom titulari ljudskih prava, te da i njima kao i svim ostalim licima pripada pravo na život, blagostanje, obrazovanje, rad, samostalan život i aktivnu participaciju u svim aspektima društvenog života. Ova deklaracija je prvi put pozvala na uklanjanje socijalno ustanovljenih barijera koje sprečavaju punopravnu participaciju osoba sa invaliditetom. Time je najavljeno udaljavanje od medicinskog modela invaliditeta koji je do tada bio preovlađujući u međunarodnoj zajednici.[19]

Pod uticajem dominantnog shvatanja pojma osoba sa invaliditetom, Ujedinjene nacije su u Deklaraciji o pravima osoba sa invaliditetom iz 1975. godine dale definiciju osoba sa invaliditetom.[20] Saglasno ovoj Deklaraciji, osoba sa invaliditetom je lice koje ne može u potpunosti ili delimično samostalno da obezbedi potrebe ličnog ili socijalnog života usled urođenog ili stečenog nedostatka, mentalnih ili fizičkih sposobnosti. Promenu kursa u sagledavanju invaliditeta definitivno će utvrditi tek Konvencija o pravima osoba sa invaliditetom, koja ne samo da je zajemčila osnovna ljudska prava bez razlike osobama sa invaliditetom već je i ustanovila socijalni model invalididteta kao osnovni model u njegovom sagledavanju.

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16 Simon Chesterman, Ian Johnstone and David M. Malone, *Law and Practice of the United Nations, Documents and Commentary* (2016), 477.

17 Olivier de Schutter, *Internation Human Rights Law* (2010), 49-55.

18 Vienna Declaration and Programme of Action [63-64].

19 Medicinski model invaliditeta (eng. *medical model of disabiliy*) ili model deficita (eng. *deficit model*) posmatra osobe sa invaliditetom kao bolesne osobe kojima je potrebna medicinska pomoć, Arlene S Kanter, *The Development of Disabilitz Rights Under International Law*: *from Charity to Human Rights* (2014), 7-8. Pošto uzrok problema nalazi u pojedincu, osnovni način resavanja problema vidi se u lečenju ili rehabilitaciji. Za razliku od socijalnog modela, ovaj model se ne osvrće na probleme društva koje ne ukida barijere sa kojima se osobe sa invaliditetom suočavaju u potrebi da ostvare osnovna ljudska prava i i razviju svoje sposobnosti.

20 Declaration on the Rights of Disabled Persons, General Assembly Resolution 3447 (XXX), 9 December 1975, art. 1.

II SOCIJALNI MODEL INVALIDITETA

1. Terminološko određenje invaliditeta

Engleski termin koji se koristi za invaliditet – *disability* denotira fizičke ili mentalne uzroke koje onemogućavaju pojedinca da se kreće, oseća ili dela, s jedne strane, i nepovoljni položaj u kome se pojedinac našao pod uticajem pravnih normi, ili drugih njemu nenaklonjenih uslova ili ograničenja, sa druge strane.[21] Drugo značenje ove reči naročito ističe Konvencija Ujedinjenih nacija o pravima osoba sa invaliditetom usvajajući upravo socijalni model invaliditeta. Kao što je već istaknuto, međunarodno pravo je ovaj termin koristilo u smislu medicinskog modela invaliditeta, zbog čega su osobe sa invlaiditetom u društvu bile percipirane kao bolesne osobe kojima je potrebna medicinska pomoć, ali je sa jačanjem pokreta osoba sa invaliditetom došlo do pomeranja ka drugom značenju engleske reči *disability*. Naime, pokreti osoba sa invaliditetom su pozvali da se za subjektivnu, biološki izazvanu ometenost u normalnom razvoju pojedinca koristi engleska reč *impairment*, a engleska reč *disability* za pretežno socijalno uslovljeni invaliditet. Pod uticajem ovih apela, Ujedinjene nacije su prihvatile da se englesku reč *impairment* koristi u čisto medicinskom smislu, dok je engleska reč *disability* pored medicinskog dobila i socijalno značenje.[22] Interesantna je činjenica da je razdvajanje pomenutih pojmova došlo na temelju feminističkih pokreta koji su uspeli da razluče pol (eng. *sex*) od roda (eng. *gender*).[23] Posle teorijske obrade, pojam pola vezuje se za biološko obeležje ljudskog bića, dok se pojam roda vezuje za njegovu (sub)kulturnu interpretaciju, odnosno socio-kulturnu razliku između muškog i ženskog. Čineći paralelu sa ovim pojmovima, pokreti osoba sa invaliditetom, su utvrdili distinkciju između pojma ometenost (eng. *impairment*) i invaliditet (eng. *disability*), vezujući prvi za biološke faktore, a drugi za socijalne.

U srpskom pravničkom jeziku napravljena je razlika između reči invalidnost i invaliditet. Invalidnost nosi medicinsko značenje, a u pravu se manifestuje potpunim gubitkom radne sposobnosti, dok invaliditet takođe ima medicinsko značenje, ali sa sobom ne povlači potpuni gubitak radne sposobnosti.[24] Ako se ima u vidu intencija Ujedinjenih nacija da se podrže osobe sa

21 Disability, *https://www.merriam-webster.com/dictionary/disability.*

22 Convention on the Rights of Persons with Disabilities, Preamble [e].

23 Tom Shakespeare, *Disability Rights and Wrongs* (2014), 12.

24 Ljubinka Kovačević, *Valjani razlozi za otkaz ugovora o radu* (2006), 104-106; Zakon o penzijskom i invalidskom osiguranju (*Sl. glasnik RS*, br. 34/2003, 64/2004, 84/2004, 85/2005, 101/2005, 63/2006, 5/2009, 107/2009, 101/2010, 93/2012, 62/2013, 108/2013, 75/2014, 142/2014, 73/2018, 46/2019, 86/2019, 62/2021), čl. 21. definiše invalidnost kao gubitak radne sposobnosti do koje je došlo zbog promena u zdravstvenom stanju prouzrokovanih povredom na radu, profesionalnom bolešću, povredom van rada ili bolešću koje se ne mogu otkloniti lečenjem ili medicinskom rehavilitacijom, dok Zakon o profesionalnoj rehabilitaciji i zapošljavanju osoba sa invaliditetom (*Sl. glasnik RS*, br. 36/2009, 32/2013, 14/2022) u čl. 3. definiše osobu sa invaliditetom kao lice sa trajnim posledicama telesnog, senzornog, mentalnog ili duševnog oštećenja ili bolesti koje se ne mogu otk-

invaliditetom na način što će se uklanjanjem, pre svega socijalnih barijera, omogućiti njihovo potpuno uključivanje u društvo, to onda postojanje dva termina u srpskom jeziku isključivo iz razloga diferencijacije lica sa i bez radne sposobnosti ne pogađa suštinu novog socijalnog modela invaliditeta. Ono stoji na stanovištu shvatanja invaliditeta u industrijskom značenju, koje biološki peh pojedinca sagledava kao uzrok njegove neproduktivnosti u društvu. U ovom značenju, na engleskom govornom području najčešće se upotrebljavala reč *handicap*, koja se vezivala, između ostalog, za nemogućnost da se pojedinac obuči za tržište rada.[25]

2. Socijalna marginalizacija i invaliditet

Socijalni model invalididteta, za razliku od medicinskog, primećuje da je invalididtet socijalni konstrukt koga čine društveni odnosi, životna sredina i zakoni koji stvaraju barijere van pojedinca koji je invaliditetom u biološkom smislu pogođen.[26] Skrećući pažnju upravo na ove faktore koji svoj uzrok ne nalaze u pojedincu, socijalni model invalididteta nameće negativne i pozitivne obaveze društvu u pogledu osoba sa invaliditetom. Negativna obaveza sastoji se u dužnosti da se dosledno primeni princip zabrane diskriminacije, dok pozitivna obaveza podrazumeva aktivno uklanjanje socijalnih barijera.

Uzroci nastanka socijalnih barijera su kompleksni, ali se u konačnom mogu svesti na socijalno uslovljenu diskriminaciju. Naime, usled uspostavljenih struktura moći u društvu, pojedinci koji nemaju društveno poželjno lično svojstvo bivaju marginalizovani.[27] Razlozi za marginalizaciju su često ideološki, što ih čini pogodnim za obradu od strane političkih teoretičara. Jednom postavši deo političkog diskursa, društveni odnosi i ustanovljene društvene strukture koje doprinose marginalizaciji bivaju podložni promeni. Dokaz tome je pomeranje shvatanja invaliditeta dalje od medicinskog pojma.

Na ovom mestu valjalo bi pomenuti i teoriju o invaliditetu kao opresiji. Budući proizvodom razmišljanja o vezi (medicinske) nauke i društvenih normi, ova teorija je ne samo najkontraverznija, već i najdalekosežnija. Nastala na temelju filozofije Mišel Fukoa (Paul-Michel Foucault), ova teorija je napravila razliku između opresije i eksploatacije. Pomerajući problem invaliditeta dalje od pitanja (ne)produktivnosti, ona je okrenuta ustaljenim hijerarhijskim odnosima i strukturama moći. Moć koju stvaraju socijalne i pravne norme, a koje se pojedincu nameću kao standard i prinuda, u visokorazvijenom druš-

loniti lečenjem ili medicinskom rehabilitacijom, koje se suočava sa socijalnim i drugim ograničenjima od uticaja na radnu sposobnost i mogućnost zaposlenja ili održanja zaposlenja i koje nema mogućnosti ili ima smanjene mogućnosti da se, pod ravnopravnim uslovima, uključi na tržište rada i da konkuriše za zapošljavanje sa drugim licima.

25 Alan Walker, *Unqualified and Underemployed, Handicapped Young People and the Labour Market* (1982), 5.

26 Barbara Arneil, "Disability in Political Theory *versus* Internation Practice: Redefining Equality and Freedom" in Barbara Arneil and Nancy J. Hirschmann (eds), *Disability and Political Theory* (2016), 39-41.

27 Paul Abberley, "The Concept of Oppression and the Development of a Social Theory of Disability", *Disability, Handicap and Society*, Vol. 2, No. 1, 1987, 12.

tvu često dovode do rađanja problema "bio-moći" koji postaje sve veći u meri u kojoj se "normalizacija društva" fokusira na život u njemu.[28] Ova opomena važna je za sve mislioce koji se bave ljudskim pravima, a naročito garantovanim ljudskim slobodama.

Industrijsko društvo, a naročito kapitalistički odnosi koji su se u njemu razvijali, doprineli su da invaliditet dobije pre svega industrijsko značenje koje reflektuje i srpsko pravo budući da je sposobnost za produktivni rad upravo ta vododelnica koja deli invaliditet od invalidnosti u čisto medicinskom smislu.[29] Sa industrijalizacijom i promenama u porodičnim odnosima, medicinski model invaliditeta je modifikovan tako što su umesto milosrđa humanih ljudi i brige porodice, položaj osoba sa invaliditetom počele da regulišu norme socijalnog prava. Doprinosni princip socijalne sigurnosti donekle je ublažen primenom principa solidarnosti, te razvojem države blagostanja. Razvoj države blagostanja, oslonjene na poštovanje ljudskih prava, vodio je socijalnom modelu invaliditeta koji se zasniva na svesti da ljudski život ima vrednost, te da su svi ljudi jednako obdareni pravima. Paradoksalno, kapitalističko privređivanje koje je akcenat stavilo na produktivnost, dovelo je do razvoja tehnologije koja stavljajući na probu klasične radnopravne institute i koncepte, raspolaže mogućnošću da osobe sa invaliditetom oslobodi društvenih stega. Naime, računari, te drugi tehnički uređaji omogućili su fleksibilizaciju radnog odnosa, pružajući mogućnost osobama sa invaliditetom da upravo kroz rad obezbede ekonomsku i socijalnu sigurnost, te svoj društveni status. Uzimajući u obzir sve prethodno rečeno, socijalni model invaliditeta postaje interesantna koncepcija na koju se najviše treba osvrtati sa stanovišta ljudskih prava, a naročito vrednosti života. Ovo ne samo zbog toga što norme, naročito kada se primenjuju u domenu biologije i medicine mogu da dovedu do posledica na koje filozofija Fukoa upozorava, već i zbog toga što svaka norma neminovno sadrži i akt isključivanja (eng. *act of exclusion*) koje inkluzivno društvo pokušava da ublaži, pa i ukine.

III ZABRANA DISKRIMINACIJE

1. Direktno dejstvo načela zabrane diskriminacije

Socijalni model invaliditeta poziva na ravnopravnost i punu socijalnu uključenost, a prvi korak ka tome jeste dosledno sprovođenje negativne obaveze države da delotvorno primeni princip zabrane diskriminacije.

Zabrana diskriminacije je pravno načelo koje je direktno primenljivo, odnosno ne pripada krugu pravnih normi koja se imaju postepeno i progresivno ostvarivati.[30] Dakle, ono je direktno primenljivo i kada je sastavni deo

28 Shelley Tremain, "Foucault, governmentality, and critical disability theory: An introduction" in Shelley Tremain (ed.), *Foucault and the Government of Disability* (2008), 5.

29 Paul Abberley, "The Concept of Oppression and the Development of a Social Theory of Disability", *Disability, Handicap and Society*, Vol. 2, No. 1, 1987, 16.

30 Ben Saul, David Kinley and Jaqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights, A Commentary*, *Cases and Materials* (2014), 657.

konvencija koje uređuju ekonomska, socijalna i kulturna prava. Tako, saglasno normama Međunarodnog pakta o ekonomskim, socijalnim i kulturnim pavima, načelo zabrane diskriminacije direktnu primenu nalazi i u svim aspektima prava na rad. Pravo na rad osigurava socijalni status i daje socijalnu sigurnost, a za njega su posebno zainteresovana lica sa invaliditetom, budući da je stopa njihove nezaposlenosti dva do tri puta viša od osoba koje nemaju invaliditet.[31] Treba napomenuti da Međunarodni pakt o ekonomskim, socijalnim i kulturnim pravima eksplicitno ne pominje osobe sa invaliditetom, no opštu zabranu diskriminacije treba razumeti tako da ona podrazumeva i zabranu diskriminacije po osnovu invaliditeta.[32] U tom smislu, zabrana diskriminacije po osnovu invaliditeta jeste razlikovanje, isključivanje ili davanje prednosti, te odricanje razumnog prilagođavanja koje izaziva efekat poništavanja ili uskraćivanja priznavanja, ostvarivanja i uživanja ekonomskih, socijalnih i kulturnih prava.[33] Budući da su aktima diskriminacije, ali i radnjama zanemarivanja, neznanja, predrasuda i lažnih pretpostavki osobe sa invalididtetom onemogućavane da učestvuju na ravnopravni način u društvenom životu, Komitet za ekonomska, socijalna i kulturna prava je kao naročito osetljive pomenuo grupe koje diskriminacija pogađa po više osnova. Jednu od tih grupa predstavljaju žene sa invaliditetom. Priznajući kumulativni efekat diskriminacije koji na specifičan način pogađa diskriminisano lice, Komitet je praktično pozvao na rešavanje problema ukrštene diskriminacije.[34]

2. Razlikovanje ukrštene od višestruke diskrininacije

Žene sa invaliditetom predstavljaju osetljivu kategoriju lica koje se više nego druga suočavaju sa preprekama ka uzimanju punog učešća u društvenom životu. Samim tim što su osobe ženskog pola i što su pogođene invaliditetom, ove osobe poseduju dva lična svojstva (socijalne kategorije/obeležja identiteta) od kojih svako ponaosob predstavlja i nedozvoljeni osnov isključivanja ili stavljanja u nepovoljni položaj. Na teži položaj žena sa invaliditetom posebno obraća pažnju Opšti komentar uz čl. 6 Konvencije o pravima osoba sa invaliditetom. Član 6 ove Konvencije priznaje da su žene izložene višestrukoj diskriminaciji, dok Opšti komentar uz ovaj član navodi da žene trpe i ukrštenu diskriminaciju. Opšti komentar, naime, uvodi razliku između višestruke i ukrštene diskriminacije, objašnjavajući da se višestruka diskriminacija odnosi na situacije u kojima je lice diskriminisano po više od jednog osnova, dok se ukrštena diskriminacija odnosi na situaciju u kojoj se više osnova diskriminacije presecaju tako da njihovo dejstvo ne može biti posmatrano odvojeno.[35]

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31 Ben Saul, David Kinley and Jaqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights, A Commentary*, *Cases and Materials* (2014), 304-305.

32 General Comment No. 5: Persons with Disabilities, E/1995/22, UN Committee on Economic, Social and Cultural Rights, 9 December 1994. [5].

33 *Ibid*. [15].

34 General Comment No. 20, Non-discrimination in Economic, Social and Cultural Rights, UN Committee on Economic, Social and Cultural Rights,E/C.12/GC/20, 2. July 2009, [17].

35 General Comment No. 6: On equality and non-discrimination, Committee on the Rights of Persons with Disabilities, CRPD/C/GC/6, 26 April 2008, [19].

Problemom razlikovanja ukrštene i višestruke diskriminacije najviše se bave stručnjaci u oblasti ljudskih prava, koji su među prvima obratili pažnju na pitanje identiteta. Osobe koje imaju više ličnih svojstva zbog kojih se nalaze u društveno nepovoljnijem položaju retko uspevaju da poprave svoj položaj, jer se njihov identitet ne razmatra celostno. Naime, pravni sistemi, čak i najnaprednijih država, osnove diskriminacije sagledavaju odvojeno, a vrlo često postoji i ograničenje u pogledu broja osnova diskriminacije na koje se lice pred sudom može pozvati.

Zabrana diskriminacije odnosi se na neopravdano pravljenje razlike ili nejednako postupanje uzrokovano nekim od ličnih svojstava lica koje se diskriminiše. Neka zakonodavstva, kao što je britansko, iscrpno nabrajaju osnove diskriminacije,[36] dok srpsko pravo te osnove navodi *exempli causa*.[37] Iscrpno, odnosno egzemplarno navođenje osnova diskriminacije tako postaje prva razlika između pravnih sistema. Ako se lična svojstva navode kao *numerus clausus*, neminovno se izostavljaju neki socijalni identiteti čija kompleksnost leži upravo u njihovom presecanju. Štaviše, pravni sistemi ne uspevaju da zahvate čak ni više od dva osnova diskriminacije kada se na njih pozove osoba pred sudom.[38] Razlog tome leži u problemu pronalaženja pravog upoređenika. Na primer, ako bi se žena sa invaliditetom pozvala na diskriminaciju po oba svoja lična svojstva, sud bi prvo trebalo da pronađe lice u odnosu na koje će izvršiti komparaciju. Kao prvo, to može biti osoba koje ne deli ni jedno lično svojstvo sa tužiocem kakva je muškarac bez invaliditeta. Ali, to može biti i lice koje ne deli jedno od ličnih svojstva – osnova diskriminacije. U konkretnom primeru to bi bili žena bez invaliditeta i muškarac sa invaliditetom. Uzimajući kao komparatore ženu bez invaliditeta kako bi ispitao invaliditet kao osnov diskriminacije, odnosno muškarca sa invaliditetom kako bi ispitao postojanje polne diskriminacije, sud osnove diskriminacije ispituje odvojeno, čime neminovno "cepa" identitet lica na delove koji u sintezi često ne oslikavaju položaj u kome se lice sa mnogobrojnim ličnim svojstvima nalazi u društvu.

IV DOKAZIVANJE (UKRŠTENE) DISKRIMINACIJE

1. Od striktne komparacije ka kontekstualnom poređenju

Na kompleksnost ukrštene diskriminacije prva je ukazala Kimberle Krenšou (Kimberlé Crenshaw). Istražujući predrasude vezane za rasu i rod, ova autorka je skovala termin *intersectionality* (ukrštenost) kako bi ukazala na to da neke grupe lica bivaju teže socijalno pozicionirane, jer poseduju više ličnih svojstava zbog kojih bivaju marginalizovane. Novi termin je bio potre-

36 Equality Act (2010), UK Public General Acts, 2010, c. 15, Chapter 1, Protected Characteristics.

37 Zakon o zabrani diskriminacije (*Službeni glasnik RS*, br. 22/2009, 52/20021), čl. 2.

38 Shreya Atrey, "Comparison in Intersectional Discrimination", *Legal Studies*, Vol. 38, No. 3, 2018, 382.

ban s obzirom da Krenšou nije socijalne identitete proučavala kao inherentne karakteristike svakog pojedinca, već kao socijalne konstrukte i nosioce privilegija, odnosno nedostataka koje uzrokuju bolje ili gore pozicioniranje osobe unutar socijalnih, kulturnih, političkih, ekonomskih i pravnih struktura moći datog društva.[39] Proučavajući rasizam i seksizam, ova autorka je zaključila da socijalna nepravda ima onoliko slojeva koliko ima preseka ličnih svojstva zbog kojih osoba može da bude isključena, odnosno diskriminisana.[40] Neposredni povod za razmišljanje na temu ukrštene diskriminacije bio je sudski spor kojeg je vodila afroamerikanka Ema de Grafenrajd (Ema De Graffenreid) protiv preduzeća *General Motors*. Ona je ovo preduzeće tužila zbog diskriminacije navodeći da nije zaposlena usled toga što ima crnu boju kože i što je žena. Sud je tužbu odbio, s obzirom da je dokazano da preduzeće zapošljava afroamerikance muškarce kao industrijske radnike i bele žene kao sekretarice. Razmatrajući pitanje rase odvojeno od pitanja pola, sud nije uvažio specifičan položaj tužilje, između ostalog, i zbog toga što bi, kako je smatrao, tužilji dao preferencijni tretman da je dozvolio njihovo kombinovanje.[41] Tačnije, sud je izneo mišljenje da bi time stvorio novu podkategoriju koja izlazi iz okvira onih osnova (kategorija) koje predviđa američko zakonodavstvo. Ne uvažavajući činjenicu da su žene afroamerikanke ujedno i lica ženskog pola i crne boje kože, sud je propustio da sankcioniše jedinstvenu formu diskriminacije koja ne pogađa ni žene bele boje kože, ni muškarce afroamerikance. S obzirom da je ovaj slučaj ogolio sociološku činjenicu da preduzeća u Americi zapošljavaju afroamerikanke na poslednjem mestu, on je dao povoda da intersekcijska istraživanja zadobiju snažnu sociološku komponentu, a u cilju otkrivanja onih društvenih struktura moći koje uzrokuju potiskivanje, a time i marginalizovanje određenih društvenih grupa.[42]

Važne rezultate u istraživanju ukrštene diskriminacije pokazuje i Šreja Atrej (Shreya Atrey). Njena istraživanja imaju poseban značaj, s obzirom da, kao britanski teoretičar, prati ne samo anglosaksonsku pravnu praksu, već i praksu evropskih sudova u ovoj materiji. Saglasno istraživanju ovog autora, osnovno polazište anglosaksonskih sudova je primena principa striktne komparacije.[43] Ipak, kako se princip striktne komparacije koristi u situacijama kada se dokazuje jedan osnov diskriminacije, on se ne može adekvatno transponovati na slučajeve višestruke diskriminacije. Problem predstavlja pronalaženje jednog uporednika koji bi se nalazio u sličnoj situaciji kao i diskriminisano lice, ali koje ne bi delio lična svojstva sa diskriminisanim. Najčešći izlaz iz situacije višestruke diskriminacije sudovi traže u pojedinačnim poređenjima ličnih svojstva diskriminisanog sa uporednikom, što dovodi do specifične so-

39 Grace Ajele and Jena McGill, *Intersectionality in Law and Legal Contexts* (2020), 5.

40 Kimberlé Crenshaw, *The Urgency of Intersectionality*, TedWomen, 2016.

41 Shreya Atrey, "Illuminating the CJEU's Blind Spot of Intersectional Discrimination in *Parris v Trinity College Dublin*", *Industrial Law Journal*, Vol. 47, No. 2, 2018, 282-283.

42 Više u: Kimberlé Williams Crenshaw, "Race, Reform, and Retrenchment, Transformation and Legitimation in Antidiscrimination Law", *Harvard Law Review*, Vol. 101, No. 7, 1988, 1331-1387.

43 Atrey, *Comparison*, *op. cit.*, 383.

cijalne nepravde na koju je prvo skrenula pažnju Kimberle Krenšou. Imajući u vidu da je ukrštena diskriminacija ušla u anglosaksonski naučni diskurs, Šreja Atrej pokazuje da postoje naznake da će se striktna komparacija proširiti.[44] Na primer, kanadski sudovi razmatraju pitanje fleksibilne diskriminacije, dok južnoafrički primenjuju princip kontekstualnog poređenja. Suština fleksibilne diskriminacije sastoji se u tome da sudovi bilo traže ne jednog nego više uporednika, bilo odustaju od komparacije; dok se suština kontekstualne komparacije upravo sastoji u napuštanju uporednika u korist razumevanja šireg društvenog okvira koji obuhvata istoriju i kulturu datog društva.

2. Praksa evropskih sudova

Na putu tzv. fleksibilnog, pa i kontekstualnog pristupa problemu diskriminacije nalazi se Evropski sud za ljudska prava. Polazeći od društvene ranjivosti usled specifičnog socijalnog statutsa lica, Evropski sud za ljudska prava sve više proširuje opseg primene čl. 14 Konvencije za zaštitu ljudskih prava i osnovnih sloboda kada presuđuje da su države propustile da preduzmu razumne mere da osiguraju jednak tretman takvih lica.[45] Slikovit primer pruža slučaj *BS v Spain* kada je Sud presudio da je došlo do kršenja čl. 14 u vezi sa čl. 3 Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda.[46] Slučaj je pred sud iznela seksualna radnica nigerijskog porekla koja je zakonito boravila na teritoriji Španije, a koja je od strane policajca, koji je izašao iz okvira svojih službenih ovlašćenja, bila diskriminisana. Sud je našao da je Španija propustila da preduzme razumne mere kako bi ispitala da li se slučaj desio usled rasističkih motiva, što je bilo nedopustivo uzimajući u obzir specifičnu ranjivu poziciju žrtve, a to je da je radila kao prostitutka i da je afričkog porekla. Primećujući da države imaju posebnu obavezu prema licima kod kojih se preseca više svojstava koje to lice stavljaju u negativni položaj, sud je kontekstualno proširio primenu norme koja zabranjuje diskriminaciju. Suočen sa slučajevima tzv. institucionalnog seksizma – dubokih ukorenjenih stavova i ponašanja profesionalaca u institucijama sistema zasnovanih na stereotipima i predrasudama, Sud je oblikovao standard „dužne pažnje" (eng. *due diligence*), koji se primenjuje i u situaciji kada država propusti da radi na iskorenjavanju stavova, običaja i postupaka koje podstiču nasilje nad ženama i onemogućavaju iskorenjavanje rodnih predrasuda.[47] Ovo je veoma važno, budući da su žene često žrtve rodno zasnovanog nasilja koje se može kvalifikovati i najtežim oblikom diskriminacije, čiji su najčešći uzrok kulturni obrasci, ali i neadekvatni napori vlasti na unapređenju svesti. Vodeći se pomenutim, Evropski sud za ljudska prava je dozvolio intervenciju u porodične odnose, ocenjujući da se nasilje u porodici kada dostigne određeni prag suro-

44 *Ibid*., 388-392.

45 Colm O'Cinneide, "The Potential and Pitfalls of Intersectionality in the Context of Social Rights Adjudication" in Shreya Atrey and Peter Dunne (eds), *Intersectionality and Human Rights Law* (2020), 64.

46 Case *B.S. v. Spain*, HUDOC, 24.07.2012., Application No. 47159/08, paras. 58-63.

47 Nevena Petrušić, *Poseban izveštaj Poverenika za zaštitu ravnopravnosti o diskriminaciji žena* (2015), 125-126.

vosti, mora kvalifikovati kao nehumano postupanje iz čl. 3 Konvencije. Ovo je od naročitog značaja i za poziciju žena u Srbiji, s obzirom da se procenjuje da je svaka treća žena bila žrtva fizičkog, a svaka druga psihičkog nasilja.[48] Ipak, shvatanju problema nasilja kao društvenog, umesto ličnog problema, smetaju institucionalna inercija i patrijarhalni stereotipi koji preovlađuju u srpskom društvu. Na ovu činjenicu naročito je skretao pažnju Povernik za zaštitu ravnopravnosti[49], kritikujući podržavanje stereotipne slike o ženama i njenim rodnim ulogama. Naime, prilikom analize medijskih sadržaja, Poverenik je našao da se žene najčešće pominju u kontekstu zabave ili uloge majke/supruge/domaćice.[50] Ako se zna da žene u poređenju sa muškarcima daleko više obavljaju one aktivnosti koje spadaju u neplaćeni kućni rad i staranje o članovima porodičnog domaćinstva, zbog čega i redukuju broj radnih sati, žene su izložene i riziku siromaštva. Ovakav ranjiv položaj žena u Srbiji nije na adekvatan način tretiran, budući da rehabilitacija žena žrtava nasilja nije praćena programima ekonomskog, socijalnog i psihloškog osamostaljivanja. Stereotipne slike o ženama mogu doprineti stvaranju izuzetno nepovoljnog okruženja za adekvatno radno angažovanje žena sa invaliditetom. Naime, osobe sa invaliditetom veoma su ranjive za sve vidove radne eksploatacije, koja u konačnom, može preći i u trgovinu ljudima.[51] Specifična ranjivost ovih lica proizilazi iz strukturalnih i ličnih mreža opresije koje se stvaraju u interakciji mnogih faktora: objektivne teškoće u nalaženju zaposlenja, neverici drugih lica u iskaze žrtve, socijalne izolacije, ismevanje ili nipodaštavanje.[52]

48 *Ibid*., 129.

49 Povernik za zaštitu ravnospravnosti uveden je u pravni sistem Republike Srbije odredbama Zakona o zabrani diskriminacije (*Sl. glasnik RS,* br. 22/2009, 52/21). Poverenika bira Narodna skupština, a njegove osnovne nadležnosti vezane su za pitanja diskriminacije. On postupa po pritužbama lica koja smatraju da su diskriminisana i ukoliko nađe da je do diskriminacije došlo, upućuje preporuku prekršiocu. U slučaju da lice kome je preporuka upućena po njoj ne postupi, Poverenik tom licu može izreći meru opomene, nakon čega može izvestiti javnost. Takođe, poverenik može u ime diskriminisanog lica podneti tužbu nadležnom sudu, po prethodno pribavljenoj saglasnosti diskriminisanog lica, ili bez prethodno date saglasnosti ako je u pitanju grupa lica koja je diskriminisana, dok su sudovi u obavezi da najkasnije do 31. marta tekuće godine dostave Povereniku sve presude i odluke donete u postupcima zaštite od diskriminacije u prethodnoj godini.

50 Petrušić (2015), 141.

51 Ekspolatacija ranjivosti drugog lica glavni je motiv trgovine ljudima, koja često prevazilazi okvire jedne države, zbog čega je na međunarodnom planu usvojena Konvencija za borbu protiv transnacionalnog organizovanog kriminala. Ovoj konvenciji pridodata su tri potokola, među kojima se izdvaja Protokol o prevenciji, suzbijanju i kažnjavanju trgovine ljudima (tzv. Palermo protokol), budući da dozvoljava da se pristanak na rad lica koje nema nikakve realne i prihvatljive alternative osim te da se potčini već postojećem odnosu dovede u vezu sa navedenim protokolom. Srbija je ratifikovala ovaj protokol zajedno sa Zakonom o potvrđivanju Konvencije Ujedinjenih nacija protiv organizovanog kriminala i dopunskih protokola (*Sl. list SRJ – Medjunarodni ugovori*, br. 6/2001), Tijana Ugarkovic i Vladimir Božić, "Uloga socijalnih partnera i nevladinih organizacija u borbi protiv radne eksploatacije", u Mario Reljanović, Ljubinka Kovačević (ur.) *Pravni i institucionalni okvir borbe protiv radne eksploatacije, Zbornik studentskih radova* (2018), 171.

52 Andrea Nichols and Erin Heil, "Human Trafficking of People with Disabilities, An Analysis of State and Federal Cases", *Dignity. A Journal of Analysis of Exploitation and Violence*, Vol. 7, No. 1, 2022, 4-5.

Ova lica često targetiraju trgovci ljudima kako bi ostvarili profit koristeći ranjiv položaj žrtve, mada njihovu nepovoljnu situaciju mogu da zloupotrebe i njima najbliži, pa se iza porodičnog nasilja može skrivati i neki vid radne ili seksualne eksploatacije.

Za razliku od Evropskog suda za ljudska prava, Sud pravde Evropske unije podržava koncept striktne komparacije, te zauzima stanovište da ukrštene diskriminacije nema ako diskriminacija ne postoji po svakom osnovu ponaosob.[53] Zaljučak da se pred Evropskim sudom pravde može dokazivati višestruka, ali ne i ukrštena diskriminacija nastao je na temelju slučaja *Parris v. Trinity College Dublin*.[54] Slučaj je pred Sud izneo profesor koji je tri decenije živeo u stabilnoj istopolnoj zajednici sa svojim partnerom, a povodom odbijanja irskih vlasti da prihvate njegovog partnera za uživaoca porodične penzije nakon njegove smrti. Pravni osnov odbijanja njegovog zahteva ležao je u činjenici da je Irska usvojila zakon koji je omogućio istopolnim zajednicama sva prava kao i bračnim nekoliko godina nakon što je podnosilac predstavke navršio 60 godina, zbog čega je aplikant uložio predstavku pozivajući se na diskriminaciju po osnovu godina i seksualne orjentacije. Evropski sud pravde u konkretnom slučaju nije našao da postoji diskriminacija, obzirom na to da su države članice slobodne da propišu uslove u materiji braka i penzija. Kako je Irska donela zakon o istoplonim zajednicama nakon što je podnosilac predstavke napunio 60 godina, a kako partner može naslediti penziju samo ako je u zajednicu stupio pre nego što je ostavilac navršio 60 godina, aplikant nije uspeo da dokaže postojanje diskriminacije pred sudom, jer sud nije pronašao da postoji diskriminacija ni po jednom osnovu uzetom pojedinačno. Po mišljenju Šreje Atrej, Sud pravde Evropske unije je uradio isto što je učinio i američki sud presuđujući u slučaju *Ema De Graffenreid v. General Motors*: propustio je da uvaži specifičan položaj aplikanta, koji je u nepovoljan položaj došao zbog svoje seksualne orjentacije i godina istovremeno.[55] Ipak, treba naglasiti, da je Sud pravde Evropske unije uveo u evropsku praksu zabranu povezane diskriminacije (eng. *discrimination by association*). Presedan je bio slučaj *Coleman v. Attridge Law* u kom je Evropski sud pravde presudio u korist aplikantkinje, našavši da postoji diskriminacija po osnovu invaliditeta iako ona nije bila osoba sa invaliditetom već njen sin.[56] Pošavši od toga da je zabrana diskriminacije po osnovu invaliditeta u oblasti rada opšta, odnosno da nije ograničena samo na lica sa takvim ličnim svojstvom već da se prostire i na lica koja se o njima brinu, Sud je presudio da je prema aplikantkinji došlo do neposredne diskriminacije, odnosno da je aplikantkinja u odnosu na druge zaposlene u uporedivoj situaciji bila drugačije tretirana upravo zbog nedozvoljenog osnova razlikovanja, tj. postojanja invaliditeta.

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53 *Illuminating*, *op. cit*., 278.

54 Case 443/15, 24. 11. 2016, *David L. Parris v Trinity College Dublin and Others*, ECLI:EU:C:2016:897. paras. 57-60.

55 *Illuminating*, *op. cit.,* 284.

56 Case C– 303, 31.07. 2008, *S. Coleman v Attridge Law and Steve Law*, ECLI:EU:C:2008:415, para. 63.

3. Dokazivanje diskriminacije u pravnoj praksi Republike Srbije

Pred srpskim sudovima nije se mnogo raspravljalo o postojanju višestruke, još manje ukrštene diskriminacije. Sudovi pri utvrđivanju diskriminacije polaze od postojanja najbitnije karakteristike diskriminacije, a to je pravljenje razlika između lica koje tvrdi da je diskriminisano i drugih lica u istoj ili uporedivoj situaciji, koje pri tom mora biti neopravdano i mora biti vezano za neko lično svojstvo diskrimisanog lica.[57] Ukoliko neopravdano nejednak treman nema za osnov lično svojstvo, sudovi smatraju da je reč o nekom drugom zabranjenom protivpravnom ponašanju, ali ne i o diskriminaciji. Takođe, pod uticajem prakse Evropskog suda za ljudska prava,u domaćoj pravnoj praksi je u upotrebi i tzv. test diskriminacije. Za primenu ovog testa potrebno je da za učinjeno razlikovanje (nejednako postupanje) ne postoji objektivno i razumno opravdanje. Da li postoji takvo opravdanje procenjuje se prvo, po tome da li se učinjenim razlikovanjem težilo legitimnom cilju, a zatim ako takav cilj postoji, ispituje se da li postoji odnos srazmernosti (proporcionalnosti) između učinjenog razlikovanja i cilja kome se težilo.[58] Pritom, sudovi polaze od ovlašćenja države da, u skladu sa procenjenim mogućnostima i potrebama, donosi zakone i uređuje odnose u raznim oblastima života, pružajući određenim kategorijama onaj obim prava koji smatra pogodnim. Smatrajući da državi pripada slobodna procena u donošenju propisa, redovni sudovi ne nalaze diskriminaciju u tome što je u različitim propisima dat različit obim prava, ponekad čak držeći da je njima ostvarena zaštita određenih kategorija lica, odnosno da se njima težilo postizanju pune ravnopravnosti lica koja su suštinski u nejednakom položaju sa ostalim građanima. Pravilnost ovakvog rezonovanja morala bi se stoga ispitivati pred Ustavnim sudom koji bi onda odlučivao o ustavnosti ovako uvedene pozitivne diskriminacije.

Problemom višestruke diskriminacije više se bavio Poverenik za zaštitu ravnopravnosti, ali se čini da u njegovim postupanjima nije do kraja razrađen mehanizam provere ove diskriminacije. Naime, u situaciji kada se žena pozove na diskriminaciju po osnovu pola, Poverenik za uporednika ne uzima samo muškarca, već i ženu koja se ne nalazi u istoj poziciji sa diskriminisanom. Na primer, u Pritužbi K.K. protiv J.P. Poverenik je osobu koja se pozvala na diskriminaciju po osnovu pola upoređivao i sa drugim ženama koje su u posmatranom periodu proglašene tehnološkim viškom, a nisu bile na porodiljskom odsustvu.[59] Za razliku od ove situacije, u Pritužbi M.Š. protiv NZS, Poverenik je diskriminaciju na osnovu pola sagledavao u kontekstu statistike, odnosno ukupog broja muškaraca i žena koje su od strane službe za zapošljavanje upućene na razgovor za posao.[60] Kako je na razgovor upućeno 100 žena i 71 muškarac, Poverenik nije našao da je bilo diskriminacije po osnovu pola. Valja napomenuti da je statistika osnovno sredstvo dokazivanja

57 Presuda Vrhovnog kasacionog suda Rev. 3237/2021 od 22.09.2021.

58 Presuda Vrhovnog kasacionog suda Rev. 4993/2020 od 28.04.2021.

59 Pritužba K.K. protiv J.P. zbog višestruke diskriminacije u oblasti rada, br. 07-00-124/2015-02 od 26.06.2015.

60 Pritužba M.Š. protiv NZC zbog višestruke diskriminacije u oblasti zapošljavanja, br. 07-00-485/2014-02 od 12.06.2015.

diskriminacije u praksi, ali da njome često ne raspolažu osobe koje diskriminaciju dokazuju pred sudom. Zbog toga, u svetu se razvijaju prakse situacionog testiranja. Situaciono testiranje je metod dokazivanja zasnovan na eksperimentu koji se sprovodi uz poštovanje sledećih principa: preciznost u planiranju i dokumentovanju diskriminacije, reprezentativnost i uporedivost, nepristrasnost i objektivnost, poštovanje zakona, neizazivanje štete.[61] Kako se ovim eksperimentom dokazuje diskriminacija u konkretnom slučaju, s jedne strane, odnosno pribavljaju se podaci o razmeri diskriminacije u određenim sferama društvenog života, Poverenik za zaštitu ravnopravnosti ohrabruje udruženja da se upoznaju sa načelima situacionog testiranja kako bi pomogla licima koje se usled društveno prisutnih stereotipa nalaze na marginama srpskog društva. Treba imati u vidu da je situaciono testiranje imalo veliki uspeh u anglosaksonskim zemljama, koje kontrolnu grupu formiraju tako da ona u najvećoj meri bude ista sa grupom prema kojoj se diskriminacija testira, osim u pogledu jednog ličnog svojstva. Sa stanovišta dokazivanja diskriminacije žena sa invaliditetom to bi značilo da kontrolna grupa moraju biti muškarci sa invaliditetom, odnosno žene bez invaliditeta. Dakle, situaciono testiranje bi se moglo koristiti za dokazivanje višestruke, ali ne i ukrštene diskriminacije. Ipak, u prilog uvažavanja postojanja ukrštene diskriminacije govori slučaj koji je pred Poverenika iznela organizacija za zaštitu prava i podršku ženama sa invaliditetom. U pitanju je sadržina video spota koji se emitovao na Javnom servisu Srbije sa ciljem prikupljanja finansijskih sredstava za rad domova za decu bez roditeljskog staranja, koji je od strane Poverenika okarakterisan diskriminatorskim po osnovu pola i invaliditeta u oblasti javnog informisanja.[62] Poverenik u vezi sa ovim slučajem nije ni tražio uporednika, već je problem posmatrao u kontekstu dominantnih društvenih stereotipa. Naime, pošavši od toga da je srpsko društvo patrijahalno, odnosno da je u njemu tradicionalna uloga žene da bude uzorna supruga i majka, Poverenik je našao da je slika žene u kolicima koja sugeriše da je jedini razlog izmeštanja dece u hraniteljske porodice nemogućnost žena sa invaliditetom da se o deci staraju po modelu dominantnog stereotipa, povredila dostojanstvo žena sa zdravstvenim problemima. Ovaj primer pokazuje spremnost da se problemu diskriminacije posebno ranjivih kategorija lica pristupi kontekstualno.

V DOMETI POZITIVNIH OBAVEZA DRŽAVE U PRIMENI SOCIJALNOG MODELA INVALIDITETA

1. Prepoznavanje socijalne marginalizacije od strane zakonodavca

Efekti usvajanja socijalnog modela invaliditeta imaju svoj negativni i pozitivni vid. Negativni podrazumeva da država treba da obezbedi delotvorno sprovođenje zabrane diskriminacije, dok pozitivni zahteva da se država aktivno uključi u uklanjanje socijalnih barijera.

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61 Brankica Janković, *Priručnik za situaciono testiranje diskriminacije* (2018), 31-33.

62 Pritužba organizacija I.B. i M.ž.p.n. protiv F.S. zbog diskriminacije po osnovu pola i invaliditeta u oblasti javnog informisanja, br. 07-00-354/2014-02 od 28.10.2014.

Kao što je već napred primećeno, žene sa invaliditetom poseduju dva lična svojstva zbog kojih mogu da budu izložene diskriminaciji: pol i invaliditet. Neravnopravni položaj žena na tržištu rada uslovljen je predrasudom da žene, usled porodičnih dužnosti, ne doprinose poslovnom poduhvatu poslodavca u onoj meri u kojoj to čini muškarac. Potvrdu činjenice da žene globalno i po pravilu neravnopravno učestvuju u političkom, društvenim, ekonomskom i kulturnom životu najbolje pruža Konvencija o eliminisanju svih oblika diskriminacije žena.[63] Ova konvencija je postavila izričit zahtev državama da unesu princip ravnopravnosti muškarca i žena u svoje zakonodavstvo, te da primenom odgovarajućih mera osiguraju praktičnu primenu tih pricipa. U tom smislu, Konvencija nalaže državama da preduzmu sve podesne mere kako bi se otklonile predrasude o inferiornosti žene i njenim tradicionalnim ulogama koje u modernom društvu doprinose feminizaciji siromaštva.[64]

Republika Srbija je usvojila Zakon o rodnoj ravnopravnosti, koji je definisao pojmove roda i pola na sledeći način. Pol predstavlja biološku karakteristiku na osnovu koje se ljudi određuju kao žene ili muškarci, dok rod označava društveno određene uloge, mogućnosti, ponašanja, aktivnosti i atribute, koje određeno društvo smatra prikladnim za žene i muškarce, uključujući i međusobne odnose muškaraca i žena i uloge u tim odnosima koje su društveno određene u zavisnosti od pola.[65] Zakonsko definisanje pojmova uvažava dometa humanističkih nauka koje su se interesovale za „sistem vlasti koji uspostavlja razlike i hijerarhiju između muškarca i žene i sisteme vrednosti koje im se pripisuju".[66] Intencija humanističkih nauka na polju istraživanja roda bila je ta da se, kroz proučavanje društvenih odnosa, uoče procesi koji se reprodukuju putem socijalizacije i institucionalizacije, a koji sprečavaju ostvarenje ideala socijalne pravde, odnosno jednako uživanje garantovanih ljudskih prava. Sâm Zakon o rodnoj ravnopravnosti je, između ostalog, kao osetljive grupe apostrofirao žene sa sela, te lica koja se zbog psihičkog i/ili fizičkog invaliditeta nalaze u nejednakom položaju. Žene sa sela su više nego drugi izložene riziku siromaštva usled toga što poziciju nosioca gazdinstva prepuštaju muškarcu, dok same obavljaju poljoprivrednu aktivnost kao članovi porodice najčešće bez ikakve naknade.[67] Kao pomažući članovi domaćinstva, žene sa sela pristupaju penzijskom i invalidskom osiguranju preko registrovanog poljoprivrednika, te se penzija prvo uplaćuje nosiocu gazdinstva, a tek kada se ostvari minimalni obavezni fond uplaćuje se penzija za ženu. Ako se uzme u obzir i činjenica da je obrazovna struktura žene sa sela izrazito nepovoljna, žene u ruralnim područjima snose veći rizik od socijalne marginalizacije. Slična situacija pogađa i lica sa invaliditetom, budući da je manje od 15% ovih lica zaposleno, između ostalog i zbog toga što u srpskom društvu preovlađuje stereotip da su lica sa invalidi-

63 Convention on Elimination of All Forms of Discrimination against Women, General Assembly Resolution 347/80, 18 December 1979.

64 Petrušić, *op. cit.,* 145.

65 Zakon o rodnoj ravnopravnosti (*Službeni glasnik RS*, br. 52/2021), čl. 6 st. 1 tač.1 i 3.

66 Ljubinka Kovačević, *Zasnivanje radnog odnosa* (2021), 1062-1063.

67 Petrušić, *op. cit.*, 105-107.

tetom nesposobni pasivni primaoci socijalne i humanitarne pomoći.[68] Položaj žena sa invaliditetom je još nepovoljniji, jer su izložene predrasudama u vezi sa njihovim rodnim ulogama, a često su i žrtve psihičkog, fizičkog, seksualnog, ekonomskog i institucionalnog nasilja.[69]

Zakon o rodnoj ravnospravnosti je rodnim stereotipom označio sve tradicijom formirane i ukorenjene ideje prema kojima su ženama i muškarcima proizvoljno dodeljene karakteristike i uloge koje određuju i ograničavaju njihove mogućnosti i položaj u društvu. Ovaj Zakon je, uz uvažavanje specifičnosti koje proizilaze iz prirode posla i drugih objektivnih razloga, akcentirao potrebu uravnotežene zastupljenosti polova u javnom i privatnom sektoru i to posebno u organima upravljanja i nadzora, kao i na položajima.[70] Naime, u Srbiji je već duži niz godina izražen tzv. efekat staklenog plafona, koji naizgled ženama pruža mogućnost za unapređenje, ali ih od karijernog rasta deli nevidljiva društvena barijera (stakleni plafon).[71] Žene su u srpskom društvu potcenjene, s obzirom na dominantnu predrasudu da su žene manje sposobne od muškaraca, nezainteresovane i emocionalno nestabilne. Ove predrasude rezultiraju činjenicom da žena nema dovoljno na pozicijama na kojima su koncentrisane moć i vlast. Imajući u vidu da se socijalna inkluzija ostvaruje participacijom i podsticanjem rodne ravnospravnosti, uravnoteženju zastupljenosti polova u svojim organima treba da teže i političke partije, sindikati i druga udruženja, zbog čega je zakonom predviđena njihova dužnost da na svake četiri godine donose plan delovanja koji sadrži posebne mere za uspostavljanje ravnopravnosti.[72] Statistički podaci pokazuju da je u Srbiji veća zaposlenost muškaraca, s obzirom da je među tom populacijom posao našlo 56,6% lica, dok je unutar ženske populacije samo 42% žena zaposleno.[73] Takođe, među osobama koje su bez škole, gotovo da je četvorostruko više žena.[74] Muškarci i žene u Srbiji su u približno jednakom položaju u situaciji kada poslove obavljaju kao samostalna lica, s tim da postoji naglašeno samostalo zanimanje muškaraca na zanatskim poslovima, odnosno žena na uslužnim i trgovačkim zanimanja. Ipak, ono što statistički podaci otkrivaju je i to da su ova lica najčešće samozaposlena (60%), odnosno da im u poslu pomažu članovi porodice (28%).[75] Budući da se retko odlučuju da zaposle makar samo jednog radnika (10%), može se izvući zaključak da je za većinu građana Republike Srbije temelj sigurnosti radni odnos.

68 Ove predstave donekle imaju objektivno uporište u nedovoljno osmišljenom sistemu socijalne sigurnosti koje stvaraju tzv. zamke olakšica (eng. *benefit trap*), koje nastaju u situaciji kada se pred korisnika novčane pomoći stavi izbor između radnog angažovanja i gubitka novčane pomoći, *Thematic study on the work and employment of persons with disabilities,* Human Rights Council, 22nd session, A/HRC/22/25, 17 December 2012, paragraph (61).

69 Petrušić, *op. cit.,* 170.

70 Zakon o rodnoj ravnopravnosti, čl. 30.

71 Petrušić, *op., cit.,* 76-77.

72 Zakon o rodnoj ravnopravnosti, čl. 48.

73 Bilten, Anketa o radnoj snazi u Republici Srbiji (2021), 15.

74 *Ibid.,* 19.

75 *Ibid.,* 38.

2. Neefikasnost borbe protiv (ukrštene) diskriminacije na institucionalnom nivou

Republika Srbija je ratifikovala Opcioni protokol uz Konvenciju o zabrani svih oblika diskriminacije žena,[76] koji pruža mogućnost da Komitetu za primenu ove konvencije predstavke upućuju pojedinci, kao i grupe koje smatraju da su žrtve kršenja njenih odredbi. Poseban mehanizam kontrole dodatno je osnažen time što je uspostavljena direktna veza između ekspertskog komiteta i Ekonomskog i socijalnog saveta Ujedinjenih nacija. Slučaj koji se često pominje u literaturi, a koji pokazuje volju međunarodnih tela da kontekstualno pristupe problemu diskriminacije jeste slučaj *Alyne da Silva Pimentel v. Brazil*[77] koji je pred Komitet iznelo udruženje za reproduktivna ljudska prava. Zbog neblagovremene medicinske pomoći, došlo je do smrti trudnice afroameričkog porekla koja je živela u skromnim uslovima u ruralnom kraju Brazila. Razmatrajući slučaj, Komitet je našao da je došlo do višestruke diskriminacije po osnovu pola, rase i socio-ekonomskog stanja. Istraživači slučajeva ukrštene diskriminacije u ovom slučaju pronalaze ne samo višestruku, već i ukrštenu diskriminaciju, s obzirom da je sticaj različitih identiteta brazilke doprineo njenom tragičnom položaju.[78]

Osobe sa invaliditetom imaju dugu istoriju borbe sa diskriminacijom, koja ih je često ostavljala bez adekvatne zaštite pred sudom. Naime, u situaciji kada se na problem invaliditeta gleda iz medicinske perspective, ne stvara se prostor za obraćanje osobama sa invaliditetom sa stanovišta ljudskih prava. Tek je 20. vek, obeležen ratovima koji prouzrokovali masovnu pojavu ratnih vojnih veterana ali i razvojem države blagostanja, omogućio da se neka osnovna gradjanska prava osoba sa invaliditetom zaštite pravnim aktima. Do tada, čak i sa stanovišta državnih politika, tema osoba sa invaliditeom imala je i svoja maltuzijanska skretanja, od praksi prinudnih sterilizacija inagurisanih Eugeničkim sterilizacijskim zakonom iz 1907. godine u nekim američkim državama, do eutanazije koju je sprovodila nacistička Nemačka. Užasi drugog svetskog rata pobudili su osećaje da ljudski život ima vrednost, ali nisu odmah uslovili i drugačiji odnos prema osobama sa invaliditetom, posobno onih sa mentalnim poremećajima. Ova lica su, do današnjih dana, ostavljana bez širokog opsega uživanja ljudskih prava, dozvoljenom praksom stavljanja pod starateljstvo od strane državnih odrgana. Posebni problem predstavljaju pravni sistemi koje ne poznaju institut delimičnog lišenja poslovne sposobnosti, kao i situacije kada lica bez objašnjenja ostaju bez pravne pomoći. Slikovit primer predstavlja slučaj *Dragusin v. Romania*.[79] U postupku koji se vodio

76 Zakon o potvrđivanju Opcionog protokola uz Konvenciju o pravima osoba sa invaliditetom (*Sl. glasnik RS – Međunarodni ugovori,* br. 42/2009).

77 *Alyne da Silva Pimentel Teixeira v. Brazil,* 2011, Communication No. 17/2008, Committee on the Elimination of Discrimination Against Women. 49th Sess.

78 Gauthier de Beco, „Harnessing the Full Potential of Intersectional Theory in Intersectional Human Rights Law", in Shreya Atrey and Peter Dunne (eds), *Intersectionality and Human Rights Law* (2020), 43.

79 *Dragusin v. Romania*, HUDOC, 11 October 2011, Application No. 36815/02.

pred Evropskim sudom za ljudska prava, aplikantkinja, koja je lišena poslovne sposobnosti je bezuspešno pokušavala da opozove odluku o postavljenju svoga staratelja. Slučaj je precrtan sa liste, jer je aplikantinja obustavila svaki kontakt sa Sudom iako je pre donošenja takve odluke bila nekoliko godina u redovnoj komunikaciji. Budući da ni Sud nije uspeo da obezbedi pravnog zastupnika, lice je ostalo bez pravne zaštite, što između ostalog, govori i o postojanju ranjivosti ove grupe lica na strukturalnom nivou.[80] Srpsko pravo poznaje institut delimičnog lišenja poslovne sposobnosti, a lice delimično lišeno poslovne sposobnosti ima poziciju starijeg maloletnika. Zakon o vanparničnom postupku, kojim je uređen postupak lišavanja lica poslovne sposobnosti, predviđa da krug poslova koje lice samostalno može da obavlja određuje sud koji odlučuje o lišavanju poslovne sposobnosti, a da lice bez obzira na stanje svog mentalnog zdravlja, može izjaviti žalbu protiv odluke suda.[81] Ipak, treba napomenuti da sud u većini slučajeva donosi odluku o potpunom lišenju poslovne sposobnosti, te da ovu odluku donosi bez saslušanja i vizuelnog kontakta sa osobom koju lišava poslovne sposobnosti.[82] Takođe, odluke suda opredeljuje činjenica da je osobi postavljena medicinska dijagnoza koja ukazuje na invaliditet, što upućuje na to da sudovi podržavaju medicinski pristup invaliditetu, umesto socijalog koji inauguriše Konvencija o pravima osoba sa invaliditetom.[83] Kao pozitivnu činjenicu, valja istaći da je Zakon o besplatnoj pravnoj pomoći omogućio svim licima sa invaliditetom pravnu pomoć bez naknade. Takođe, u slučajevima koji se tiču diskriminacije, besplatnu pravnu pomoć mogu da pruže i udruženja građana.[84]

Loš položaj lica sa invalididtetom u društvu je često uslovljen predstavom da su nesposobni da radno doprinose, što je naročito izraženo u kapitalističkim državama koje imaju jaku radnu etiku baziranu na teoriji da je društvo pravičan sistem kooperacije u kom nema mesta za invalide, jer nisu sposobni da na ravnopravnoj osnovi sarađuju sa drugima.[85] Dramatičan položaj, posebno lica sa mentalnim poremećajima, ogoljavali su slučajevi pred sudom. Jedan od najilustrativnijih bio je *Buck v. Bell*, koji se odigrao pred Vrhovnim sudom Sjedinjenih Američkih Država 1927. godine, budući da je konstatovano da mentalno oboleli ne zaslužuju pravo građanstva i treba da budu prinudno sterilisani.[86] Napuštanje medicinskog pristupa invaliditeta u

80 Anna Lawson, "Disabled People and Access to Justice: From Disablement to Enablement?" in Peter Blanck and Elionoir Flyn (eds), *Routledge Handbook of Disability Law and Human Rights* (2017), 111-112.

81 Zakon o vanparničnom postupku (*Službeni glasnik SRS*, br. 25/82, 48/88 i *Službeni glasnik RS*, br. 46/95, 18/2005, 85/2012, 45/2013, 55/2014, 6/2015, 106/2015), čl. 40 i 41.

82 Petrušić, *op. cit.,* 173.

83 *Poseban izveštaj o diskriminaciji osoba sa invaliditetom u Srbiji* (2013), 38.

84 Zakon o besplatnoj pravnoj pomoći (*Službeni glasnik RS*, br. 87/2018), čl. 4. st. 3 t. 8. i čl. 9 st. 2.

85 Arneil and Hirschmann, *op. cit.*, 22.

86 Lucy Series, Anna Arstein-Kerslake and Elizabeth Kamundia "Legal Capacity" in Peter Blanck and Elionoir Flyn (eds), *Routledge Handbook of Disability Law and Human Rights* (2017), 125.

korist shvatanja invaliditeta zasnovanog na ljudskim pravima, učinilo je razliku između mentalne sposobnosti koja je stvar medicinske profesije, i poslovne sposobnosti, koja se tiče političkog i društvenog konteksta.[87] Usled toga, sve više se razvija paradigma potpomognutog odlučivanja, namesto odlučivanja umesto osobe sa invaliditetom. Naime, brojni sudski sporovi su dokazivali da je primena instituta starateljstva često išla na štetu osnovnih ljudskih prava, između ostalog i zbog toga što je primenjivan princip najboljeg interesa umesto volje lica koje je pogođeno slučajem invaliditeta.[88] Štaviše, pravni poreci mahom i zahtevaju da pravni zastupnici iznose svoje tvrdnje sa stanovišta objektivno najboljeg interesa lica koje zastupaju. Doktrinu najboljeg interesa kritikovao je Komitet za prava osoba sa invaliditetom smatrajući da je suprotna čl. 12 ove konvencije, koji garantuje ravnopravnost pred zakonom.[89] Tek je skorija sudska praksa mentalno obolelim licima priznala tzv. *de facto* predstavljanje (eng. *de facto representation*), odnosno zastupanje od strane udruženja koja se bore za njihova prava.[90] Ova udruženja sada mogu zastupati interese lica i kada ne postoji izričito data pisana saglasnost, a zbog toga što postoji javni interes da se spreče dalja kršenja ljudskih prava koje mogu dovesti do fatalnih posledica, nakon smrti žrtve kršenja ljudskih prava one mogu imati i *locus standi* pred sudom.

3. Obazriva intervencija prava u socijalnu sferu društva

U situaciji kada međunarodne sudske i kvazisudske instance oklevaju, a nacionalne odbijaju da sankcinišu slučajeve ukrštene diskriminacije, ukrštena diskriminacija postaje pre svega predmet interesovanja prava ljudskih prava. Štaviše, teškoću u široj primeni principa zabrane diskriminacije je predvidela i Kimberle Krenšou prebacivši problem ukrštene diskriminacije sa pravnog na kulturni teren.[91] Naime, ukrštena diskriminacija se dešava u preseku pojmova koji nose ne samo pravno već i kulturloško značenje. U kontekstu potonjeg, ti pojmovi nose identitet, ali i društveno uobličene predstave, koje budući da sadrže vrednosti uvrežene u datom društvu, dovode do stvaranja društvene hijerarhije, odnosno do grupisanja moći na strani jednih i potpadanje u subordiniran položaj drugih. Dakle, marginalizacija određenih društvenih grupa je socijalno uslovljena, što je čini naročito nepodesnom za pravno tretiranje.

Obeležje prava je njegova efikasna primena koju u prvom redu osigurava prinuda. No, psihološka i sociološka teorija prava nas uče da pravo itekako

87 Gajin, *op. cit.,* 25-26.

88 Elionoir Flyn, *Disabled Justice, Access to Justice and the UN Convention on the Rights od Persons with Disabilities* (2015), 68-69.

89 Blanck and Flyn /eds/ (2017), *op. cit.*, 113.

90 *Ibid*., 107. Prelomna tačka je bio slučaj *Câmpeanu v Romania* (Application no. 47848/08), kada je Evropski sud za ljudska prava dozvolio da jedna nevladina organizacija podnese predstavku iako nije bila ni žrtva kršenja ljudskih prava, ni bliski rođak žrtve – mentalno obolelog lica, koje je u vreme suđenja preminulo usled kršenja njegovih ljudskih prava.

91 Kimberlé Crenshaw, "Mapping the Margins, Intersectionality, Identity Politics and Violence against Women of Color", *Stanford Law Review*, Vol. 43, No. 6, 1991, 1296-1297.

mnogo zavisi od društvene svesti u kojoj se oblikuju kategorije i pojmovi koje pravo može ili ne mora da preuzme. Ukoliko je disparitet veći, i prinuda bi takođe morala biti veća. Kako se država ne bi pretvorila u represivni aparat prinude, u domenu socijalnih prava država interveniše podsticajnim merama. U oblasti radnog prava to su pogodnosti za zapošljavanje lica određenih kategorija, stvaranje novih poslova, sprovođenje prekvalifikacije i raznih obuka. Istina, mere mogu da budu i odvraćajuće, kakve su penali za nerad. Uzimajući u obzir specifičan položaj radnosposobnih lica sa invaliditetom, uz primenu podsticajnih mera kakve su sistemi kvota i podsticaji za zapošljavanje lica sa invaliditetom, preduzimaju se i mere prilagođavanja (eng. *accommodation*). Država najčešće na sebe preuzima obavezu da osigura pristupačnost vitalnim uslugama, postupajući u tom cilju sa *ex ante* stanovišta, koje je grupno orijentisano. Privatnim licima, pak, država nameće obavezu razumnog prilagođavanja (eng. *reasonable accommodation*), koje je individualno i situaciono orijentisano.[92] Dakle, poslodavac ima obavezu da prilagodi radno mesto na način koji će omogućiti licu sa invaliditetom koje je kvalifikovano za dati posao da ga izvršava samo ako takva prilagođavanja ne predstavljaju neopravdani teret za poslodavca. Treba primetiti da je Komitet za prava osoba sa invaliditetom izneo stav da odbijanje pružanja razumnih prilagođavanja treba kvalifikovati kao zabranjeni akt diskriminacije.[93] U Republici Srbiji zvanično nije bilo pritužbi u kojima bi se ukazivalo na uskraćivanje razumnih prilagođavanja, ali je Nacionalna organizacija osoba sa invaliditetom Srbije predložila izmenu propisa u skladu sa sugestijama Komiteta, s tim što je naglasila da bi pojam „razumno prilagođavanje" bilo potrebno definisati zbog svoj neodređenosti.[94]

VI SARADNJA SINDIKATA I UDRUŽENJA OSOBA SA INVALIDITETOM

1. Implementacija Pariskih principa

Uvažavajući činjenicu da je radno pravo osnovno pravo koje osigurava ne samo egzistenciju, već i socijalni status pojedinca, ali i uzimajući u obzir da se ukrštena diskriminacija dešava u socijalnom kontekstu u kome vladaju uvrežene predstave, društvene snage koje mogu da dovedu do željene društvene promene, odnosno inkluzije marginalizovanih grupa, u prvom redu jesu sindikati. Ovo, zato što sindikati raspolažu mehanizmom socijalnog dijaloga i sa privatnim i sa javnim sektorom. Za razliku od njih, udruženja osoba sa invaliditetom predstavljaju puku grupu za pritisak, koja, istina, može da dovede do značajnih promena, budući da na međunarodnom planu uživaju određena prava. Pre svega, to su prava kolektivnih predstavki, ali i pravo me-

92 Flynn (2015), *op. cit.,* 56.

93 Olivier de Schutter (2010), *op. cit.,* 640-641.

94 Damjan Tatić, *Analiza sprovođenja preporuka Komiteta za prava osoba sa invaliditetom u Republici Srbiji* (2020), 11.

đunarodnog organizovanja. Pravo organizovanja zajemčuju najvažnije konvencije Ujedinjenih nacija kao što su Medjunarodni pakt o gradjanskim i političkim pravima, Međunarodni pakt o ekonomskim, socijalnim i kulturnim pravima, Konvencija MOR 87,[95] Konvencija MOR br. 98,[96] te Evropska konvencija za zaštitu osnovnih ljudskih prava i sloboda[97] i (Revidirana) evropska socijalna povelja koje je Srbija ratifikovala[98]. Pravo na kolektivne predstavke unutar Ujedinjenih nacija, odnosno Medjunarodne organizacije rada tradicionalno je zagarantovano sindikatima, mada Opcioni protokoli uz paktove, kao i Konvenciju o pravima osoba sa invaliditetom ovo pravo daju i drugim udruženjima civilnog sektora. Na unutrašnjem planu, udruženja osoba sa invaliditetom mogu imati pravo predstavljanja svojih članova pred sudom, te pravo učešća u dijalogu sa državnim ministarstvima. Nacionalna organizacija osoba sa invaliditetom Srbije sarađuje sa najznačajnijim evropskim i međunarodnim organizacijama osoba sa invaliditetom (članica je organizacija *European Disability Forum* i *Disability People International*), kao i sa Komitetom za prava osoba sa invaliditetom Ujedinjenih nacija. Na unutrašnjem planu, značajna je saradnja sa Zaštitnikom građana i Poverenikom za zaštitu ravnopravnosti, kojima šalje pritužbe na kršenje prava osoba sa invaliditetom. Posebno je značajan rad Poverenika na promeni pristupa modelu invalidnosti od strane najvažnijih državnih organa koji rešavaju o pravima osoba sa invaliditetom. Na primer, Poverenik je izneo stav da praksa procenjivanja radne sposobnosti lica sa invaliditetom bez konsultacije tog lica i bez uzimanja u obzir njegovog stava predstavlja akt diskriminacije.[99] Ovo ne samo zbog toga što socijalni model invaliditeta podrazumeva davanje podrške licima sa invaliditetom umesto odlučivanja umesto njih na osnovu procene najboljeg interesa, već i zbog toga što je protivan cilju Zakona o profesionalnoj rehabilitaciji i zapošljavanju osoba sa invaliditetom Republike Srbije, a to je olakšavanje društvenog uključivanja osoba sa invaliditetom, a ne otežavanje njihovog

95 Uredba o ratifikaciji Konvencije MOR br. 87 o sinidkalnim slobodama i zaštiti sindikalnih prava (*Sl. list FNRJ – Međunarodni ugovori,* br. 8/58).

96 Uredba o ratifikaciji Konvencije MOR br. 98 o primeni principa prava organizovanja i kolektivnog pregovaranja (*Međunarodni ugovori FNRJ,* br. 11/1958).

97 Zakon o ratifikaciji Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda, izmenjene u skladu sa protokolom broj 11, protokola uz Konvenciju za zaštitu ljudskih prava i osnovnih sloboda, Protokola broj 4 uz Konvenciju za zaštitu ljudskih prava i osnovnih sloboda kojim se obezbeđuju izvesna prava i slobode koji nisu uključeni u konvenciju i prvi protokol uz nju, Protokola broj 6 uz Konvenciju za zaštitu ljudskih prava i osnovnih sloboda o ukidanju smrtne kazne, Protokola broj 7 uz Konvenciju za zaštitu ljudskih prava i osnovnih sloboda, Protokola broj 12 uz Konvenciju za zaštitu ljudskih prava i osnovnih sloboda i Protokola broj 13 uz Konvenciju za zaštitu ljudskih prava i osnovnih sloboda o ukidanju smrtne kazne u svim okolnostima (*Sl. list SCG – Međunarodni ugovori*, br. 9/2003, 5/2005 i 7/2005 – ispr. i *Sl. glasnik RS – Međunarodni ugovori*, br. 12/2010 i 10/2015).

98 Zakon o potvrđivanju Revidirane evropske socijalne povelje (*Službeni glasnik RS – Međunarodni ugovori*, br. 42/2009).

99 Pritužba J. Č. protiv Nacionalne službe za zapošljavanje zbog diskriminacije u utvrđivanju statusa osobe sa invaliditetom, br. 685/2011 od 15.06.2011.

položaja donošenjem rešenja da ne mogu da se zaposle ni pod opštim ni pod posebnim uslovima. Na kraju, ali ne i manje važno, Nacionalna organizacija osoba sa invalidtetom Srbije učestvuje u radnim grupama za izradu nacrta pravnih propisa i nacrta strateških akata. Ipak, imajući u vidu da se sfere uticaja i delovanja sindikata i udruženja osoba sa invaliditetom presecaju, od obostranog je interesa da uspostave saradnju.

Još je Opšti komentar br. 5 uz Međunarodni pakt o ekonomskim, socijalnim i kulturnim pravima predvideo obavezu države da se konsultuje sa licima prema kojima namerava da preduzme mere.[100] U tom smislu, preporuka je bila da se obrazuju nacionalna koordinaciona tela koja bi se uključila u impelementaciju progresivnih mera koje bi imale za cilj smanjenje strukturalne nejednakosti, odnosno ostvarenje pune participacije lica sa invaliditetom u datom društvu. Primera radi, Švedska federacija prava lica sa invaliditetom (*Funktionsrätt Sverige*) se na nacionalnom nivou uključuje u konsultantski proces, dok engleski predstavnici lica sa invaliditetom učestvuju u radu kabineta koji se nalazi u sastavu ministarstva rada.[101] U Republici Srbiji Nacionalna organizacija osoba sa invaliditetom učestvuje u radu Saveta osoba sa invaliditetom pri kancelariji Zaštitnika građana.[102] Uzimajući u obzir da se lica sa invaliditetom bore za priznavanje osnovnih ljudskih prava, u pogledu njihovih udruženja oformljenih na nacionalnom nivou trebalo bi da važe Pariski principi, koje je podržala Generalna skupština Ujedinjenih nacija. Ovi prinicpi omogućavaju udruženjima da vladi države predlože izmenu zakona, te da upozore na kršenje ljudskih prava u društvu. Štaviše, ovakva nacionalna udruženja mogla bi imati i kvazi-sudske funkcije uključujući pravo da se angažuju u postupku posredovanja (medijacije).[103] Nacionalna organizacija osoba sa invaliditetom se u Republici Srbiji angažuje u procesu predlaganja zakona, dok se u pitanjima diskriminacije lica sa invaliditetom oslanja na Zaštitnika građana i Poverenika za zaštitu ravnopravnosti, koji su u Srbiji nezavisni državni organi, zaduženi za kontrolu primene propisa. Ipak, saglasno Pariskim principima, ova udruženja bi, radi svoje legitimnosti, trebalo da ostvare veze sa drugim udruženjima civilnog sektora. Polazeći od činjenice da je najvažnije udruženje u sferi socijalnih prava reprezentativni sindikat, Komitet za prava osoba sa invaliditetom je baš na slučaju Srbije, podsetio da, u situaciji kada udruženje osoba sa invaliditetom ne može steći reprezentativnost, poželjno da se ova udruženja uključe u rad reprezentativnih sindikata kako bi osigurali bolji položaj za svoje članove na tržištu rada.[104]

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100 General Comment No. 5, Persons with Disabilities, Eleventh Session (1994), [14].

101 Flynn (2011), *op. cit.*, 214-218.

102 Zaštitnik građana, saglasno čl. 2 st. 2 Zakona o zaštitniku gradjana (*Sl. glasnik RS,* br. 105/2021) obavlja poslove nacionalnog nezavisnog mehanizma za praćenje sprovođena Konvencije o pravima osoba sa invaliditetom.

103 *Assessing the Effectiveness of National Human Rights Institutions* (2005), 7.

104 Ilias Bantekas, Facundo Pennilas and Stefan Trömel, "Work and Employment" in Ilias Bantekas, Micheal Ashley Stein and Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities, A Commentary* (2018), 784.

2. Otvoreno tržište i zaštitne radionice

Iako veze sindikata i udruženja osoba sa invaliditetom nisu nepoznate istoriji, iskustva mnogih država pokazuju da saradnja sindikata i udruženja osoba sa invaliditetom nije na zavidnom nivou. Razlog tome je to što sindikati ovu saradnju ne vide kao prvorazrednu, zbog čega često ne razrađuju strategije inkluzije lica sa invaliditetom.[105] Opadanje zainteresovanosti sindikata za veći rad na polju poboljšanja položaja lica sa invaliditetom može se dovesti u vezu sa većim angažovanjem država na tom polju. Naime, usvajanje Konvencije o pravima osoba sa invaliditetom doprinelo je tome da iz zakonodavstva država kao diskriminatorne otpadnu odredbe koje su zasnivanje radnog odnosa uslovljavale potvrdom o opštoj zdravstvenoj sposobnosti. Osnovni uzrok ovih zakonskih izmena je promena pristupa invaliditetu, odnosno zamena medicinskog i industrijskog modela invaliditeta socijalnim. Posredni je kritika koja u svakom dijagnostifikovanju vidi odraz opresije, s obzirom da je ono ključni element strukturisanja.[106]

Međunarodno pravo priznaje osobama sa invaliditetom pravo na rad, na način što ovim licima garantuje otvoreno, inkluzivno i pristupačno radno okruženje, ali ne zabranjuje postojanje zaštitnih radionica (eng. *sheltered workshop*). Poreklo ovih radionica može se dovesti u vezu sa prvim centrima namenjenim osposobljavanju lica sa mentalnim problemima koje je osnovao sensimonista Eduard Segjan (Edouard Séguin), budući da je čvrsto verovao da se društvo mora organizovati u cilju poboljšanja položaja, moralnog i egzistencijalnog, najugroženijih lica.[107] Osposobljavanje za rad, a zatim i zapošljavanje lica sa invaliditetom, stajalo je u službi više ciljeva. Najvažniji su smanjenje slučajeva skitnjičenja i prosjačenja, te pružanje socijalne zaštite.[108] Više od ostvarenja prava na rad, zapošljavanje ovih lica je bilo motivisano hrišćanskim i humanim razlozima. Verovalo se da je iskustvo koje im je u ovim radionicama pruženo dovoljno da u jednom trenutku, ako se ukaže prilika, ova lica promene poslodavca, i time značajnije poprave svoj socijalni status, budući da su nadnice u radionicama bile tradicionalno niske. Štaviše, zaštitne radionice se dugo nisu ni smatrale mestima rada već pre mestima gde se licima sa invaliditetom pruža pomoć. Ovaj tzv. "terapeutski model" (eng. *therapeutic model*), koji je oslonjen na medicinsko shvatanje pojma invliditeta, zadržao se u državama Latinske Amerike u kojima je jako delovanje hrišćnske katoličke crkve. Primera radi, u Argentini ili Kostariki, zaštitne radionice ne potpadaju pod norme radnog prava.[109]

Moderno stanovište je da su zaštićene radionice protivne načelu otvorenog tržišta, te da predstavljaju nedozvoljenu praksu segregacije, zbog čega

105 *Trade Union Action on Decent Work for Persons with Disabilities. A Global Overview* (2017), 15.

106 Shakespeare (2014), *op. cit.*, 63.

107 Roy Hanes, Ivan Brown and Nancy E. Hansen, *The Routledge History of Disability* (2018), 28-29.

108 *Ibid*., 301-302.

109 Trade Union Action, Integrating Disabled Persons into Working Life, Labour Education 1998/4, No. 113, International Labour Office, Geneva, 1998, 33.

treba da budu zabranjene.[110] Ovo, iz razloga što se unutar ovih radionica focus pažnje smešta na rehabilitaciju/terapiju, a ne na ljudska prava i načelo zabrane diskriminacije. Usled odvojenosti ovih radionica od otvorenog tržišta rada, ovi centri se ponekad nazivaju i getima (eng. *ghetto*).[111] Zbog toga, država bi trebalo da teži da primenom mera pozitivne diskriminacije integriše osobe sa invaliditetom na otvoreno tržište rada. Izuzetak bi predstavljalo zapošljavanje lica sa težim oblicima invaliditeta kojima je integracija u proizvodne tokove objektivno otežana. Izdvojenosti od otvoreng tržišta rada, a samim tim o od primene normi radnog prava, doprinosi i to što ove radionice često osnivaju udruženja, neretko roditelja osoba sa invaliditetom.[112] U situaciji kada udruženje, osnivač radionice, nema za cilj stvaranje profita već pomoć licima sa invaliditetom, nema suprotstavljenosti interesa koja je karakteristična za tipične radne odnose. Samim tim, potreba za primenom radnog prava slabi. Posebno, ako su osnivači zaštitnih radionica udruženja osoba sa invaliditetom. U ovom slučaju bi bilo upitno i samo osnivanje sindikata, budući da bi dolazilo do svojevrsne konfuzije poslodavca i zaposlenih usled čega bi se narušila i osnovna uloga sindikata – uloga zastupnika radnika. Naime, osnovne konvencije Medjunarodne organizacije rada u materiji sindikalizma, Konvencija br. 87 i 98 za sindikate priznaje samo ona udruženja koja su nezavisna kako od države, tako i od poslodavca. Kako nezavisnost i samostalnost mora biti potpuna, sindikalno osnivanje, finansiranje i upravljanje mora da bude odvojeno od drugih pravnih lica sa kojima bi sindikati mogli doći u sukob interesa.

Ipak, uzimajući u obzir činjenicu da otvoreno tržište rada često ne doprinosi većem zapošljavanju lica sa invaliditetom, formiranje ovakvih radionica ili radnih centara može da bude legitimna mera država u cilju osiguranja njihove veće zapošljivosti. Na ovom stanovištu stoji i Revidirana evropska socijalna povelja, koja je meru otvaranja zaštitnih radionica predvidela kao izuzetak, menjajući time odredbe Evropske socijalne povelje koje su ovu meru smatrale pravilom.[113] Dakle, zapošljavanje u zaštitnim radionicama treba posmatrati kao izuzetak, prihvatljiv u pogledu lica sa ozbiljnijim stepenom invaliditeta, a ne kao pravilo koje važi za sve osobe sa invaliditetom bez obzira na njivove realne mogućnosti za pronalaženje i očuvanje zaposlenja na otvorenom tržištu. Najčešće se u njima upošljavaju lica sa mentalnim oboljenjima ili lica se teškim oblicima invaliditetom. U ovim slučajevima izuzetno je dozvoljeno upošljavanje ovih kategorija lica i u dužem vremenskom periodu.

Moderna društva teže ograničavanju osnivanja zaštitnih radionica, pa i njihovom prevazilaženju u korist dosledne primene principa otvorenog tržišta. Treba napomenuti da Konvencija o pravima osoba sa invaliditetom ove radionice ne pominje, zbog čega je njihovo postojanje upitno. Radionice ne pominje ni Konvencija Međunarodne organizacije rada br. 159 o profesional-

110 Blanck and Flynn /eds/ (2017), *op. cit.*, 77-82.

111 Laurent Visier, „Sheltered Employment for presons with disabilities", *International Labour Law*, Vol. 137, No. 3, 1998, 348.

112 *Ibid*., 349

113 Blanck and Flynn /eds/ (2017), *op. cit.*, 81.

noj rehabilitaciji i zapošljavanju lica sa invaliditetom. Njih ekcplicitno pominje samo Preporuka Međunarodne organizacije rada br. 168 o profesionalnoj rehabilitaciji i zapošljavanju lica sa invaliditetom, te Evropska socijalna povelja. Preporuka Međunarodne organizacije rada br. 168 pokušava da uspostavi vezu između ovih radionica i uobičajenih mesta rada na način što bi uposleninici u ovim radionicama dobili prilike da deo prakse steknu u prostorijama poslodavca,[114]odnosno da poslodavci u dogovoru sa predstavnicima zaposlenih i osoba sa invaliditetom ustanove programe osposobljavanja i rehabilitacije koje bi se odvijale unutar same firme.[115] Ovo odredjenje radionica zamenilo je prethdno predloženo osnivanje zaštićenih radionica iz Preporuke medjunarodne organizacije rada br. 99 koje je pretežno bilo upućeno državama. Naime, Preporuka br. 99 je sugerisala državama da osnivaju radionice pod medicinskim i stučnim nadzorom sa ciljem da lica sa invalidietom osposobe za uključivanje na otvoreno tržište rada.[116] Pritom, saglasno preporukama Medjunarodne organizacije rada, lica uposlena u zaštitnim radinicama bi trebalo da uživaju osnovna prava iz radnog odnosa kao i zaposleni kod uobičajenog poslodavca. Primer dobre prakse, saglasne preporukama Medjunarodne organizacije rada, mogla bi da bude brazilska organizacija osoba sa invaliditetom AVAPE, koja je uz oslanjanje na sindikate, razvila saradnju sa poslodavcima kao što je *Mercedes*.[117] Ovaj model uposlenja osoba sa invaliditeom se razlikuje od terapeutskog, budući da ova lica ostvaruju osnovna prava iz radnog odnosa, pre svega pravo na zaradu, pa se naziva "modelom zarade" (eng. *wage-earning model*)[118].

Zakon o socijalnoj zaštiti i Zakon o profesionalnoj rehabilitaciji i zapošljavanju osoba sa invaliditetom Republike Srbije ostavljaju mogućnost otvaranja radionica (radnih centara), kao posebnih oblika zapošljavanja i radnog angažovanja osoba sa invaliditetom.[119] U ovim radionicama se samo izuzetno, u slučaju kada ne mogu naći zaposlenje na slobodnom tržištu, radno angažuju lica sa invaliditetom. Iako radionice, pored javne vlasti, mogu da osnuju organizacije osoba sa invaliditetom ili organizacije njihovih zakonskih zastupnika, one nisu u značajnoj meri zaživele u praksi.[120] Takođe, treba imati u vidu da se o radnim centrima negativno izjasnio Poverenik za zaštitu ravnopravnosti. Naime, on je naveo da njihov cilj treba da bude unapređenje veština i znanja kako bi se osoba sa invaliditetom uključile na tržište rada. Suprotno tome, radni centri se osnivaju kao dugotrajni oblici rehabilitacije, što je ne samo suprotno svrsi

114 Vocational Rehabilitation and Employment (Disabled Persons) Recommendation, 1983 (No. 168), para. 25.

115 *Ibid*., para. 31-35.

116 Vocational Rehabilitation (Disabled) Recommendation, 1955 (No. 99), para 33.

117 Trade Union Action, Integrating Disabled Persons into Working Life, *op. cit.,* 33.

118 *Ibid*., 33.

119 Zakon o socijalnoj zaštiti (*Službeni glasnik RS*, br. 24/2011), čl. 61, Zakon o profesionalnoj rehabilitaciji i zapošljavanju osoba sa invaliditetom (*Službeni glasnik RS*, br. 36/2009, 32/2013), čl. 43.

120 Tatić, *op. cit.,* 67.

rehabilitacije, već dovodi do veće društvene segregacije.[121] Dakle, zaštitne radionice treba da predstavljaju prelaznu fazu, u kojoj se osobe sa invaliditetom angažuju kako bi se pripremile za otvoreno tržište rada na kome bi se radno angažovale u radnom kolektivu zajedno sa osobama koje nemaju invaliditet. Imajuću u vidu krajnji cilj, bolji vid podrške uključivanju lica sa invaliditetom jeste angažovanje lica na obukama u uslovima otvorenog tržišta, gde specijalizovani "trener" pruža podršku kako poslodavcu, tako i licu sa invaliditetom sa ciljem uspostavljanja dugoročnog radnog odnosa.[122]

Kada se o ovim radionicma razmišlja u kontekstu uključivanja na otvoreno tržište rada, ove radionice treba posmatrati kao svojevrsne centre obuke u kojima značajnu ulogu mogu da dobiju i sami sindikati. Naime, čak i podaci razvijenih država, kakva je primera radi Francuska, pokazuju da više od polovine nezaposlenih osoba sa invaliditeom nema odgovarajuće obrazovanje, dok je značajan procenat ovih osoba nepismen.[123] Moderni sindikati u svojim agendama često imaju izradjene programe za prekvalifikaciju i dokvalifikaciju radnika, koje najčešće teže da ostvare oslanjanjem na mehanizme socijalnog dijaloga. S obzirom da se ciljem javlja integracija osoba sa invaliditom na mesta rada poslodavca čiju aktivnost pokreće želja za profitom, na značaju, pored vaspitne uloge sindikata, dobijaju društvena i zastupnička uloga sindikata.[124] Položaj na tržištu rada direktno se može dovesti u vezu sa stepenom obrazovanja i obučenošću radnika, pa su programi obuke veoma važna stavka u agendama sindikata. Program obuke može biti uveden i putem socijalnog dijaloga. Na primer, Francuska demokratska konfederacija rada (*CFDT*) je uspela da u saradnji sa savetom zaposlenih i menadžmentom unutar postrojenja otvori zaštitne radionice kao prvi stepen integracije osoba sa invaliditetom. Ovim sporazumom osobe sa invaliditeom su dobile i pravo na participaciju u radu saveta zaposlenih.[125] Kolektivno pregovaranje jeste jedna od prvih funkcija sindikata, izvojevana u proslosti uz pomoć snage sindikalnog članstva koja se često naspram poslodavca odmeravala štrajkovima. Međutim, budući da je moderno društvo prigrlilo ideju demokratije, do socijalnog dijaloga može se doći kompetentnom agitacijom. Naime, budući delom civilnog društva, sindikat na institucionalnizovani način, artikuliše svoje ciljeve i stavove, koje može da saopšti javnosti. U slučaju kada je uprava sindikata stručna i kredibilna, a članstvo lojalno, sindikat može da postane forum pred kojim će se raspravljati o širim društvenim pitanjima koja idu dalje od pitanja zarada. Pre svega, sa stanovišta intersa lica sa invaliditetom, to mogu biti pitanja prilagodjavanja radnog mesta potrebama radnika, te uklju-

121 *Poseban izveštaj* (2013), *op. cit.,* 33.

122 *Thematic study on the work and employment of persons with disabilities*, A/HRC/22/25, 17 December 2012, paras. [16-17].

123 U jednom trenutku, u Francuskoj je od ukupnog broja osoba sa invaliditetom na tržištu rada 60% bilo sa slabim osnovnim obrazovanjem, dok je čak 20% bilo nepismeno, *Trade Union Action Integrating* (1998), 3.

124 Tijana Ugarković, *Participativna prava radnika kao vid ograničavanja poslodavčeve vlasti i pretpostavka industrijske demokratije*, doktorska disertacija (2021), 126-139.

125 *Trade Union Action Integrating* (1998), 69.

čivanja ovih lica na otvoreno tršište rada, izmedju ostalog i putem zaštitnih radionica. Priznavanje svih radnih prava osobama sa invaliditetom uposlenim u zaštitnim radionicama, uključujući pravo na sindikalno organizovanje i pravo na participaciju, predstavlja najviši stepen uključenosti ovih lica na tržište rada. U Evropi ova prava unutar zaštitnih radionica garantuju Belgija, Norveška, Švedska i Velika Britanija.[126] Većina evropskih država, pak, zauzima neku srednju poziciju, izmedju potpunog odricanja radnopravnog statusa osobama sa invaliditetom i potpunog izjednačavanja sa zaposlenim na otvorenom tržištu rada. To znači da se osobi sa invaliditetom priznaje status zaposlenog koji ima pravo na sindikalno udruživanje i predstavljanje, ali se u praksi retko dešava da uzimaju učešća u participaciji u širem smisu te reči. Naime, obično u zaštitnim radionicama nema sindikata, pa su kolektivni ugovori retkost. Ipak, s obzirom da ova lica imaju status zaposlenih, na njih se primenjuju kolektivni ugovori zaključeni na granskom, regionalnom ili nacionalnom nivou.[127] Ovaj "mešani" model često dovodi u vezu zaradu i penziju, te tako osobe sa invaliditetom mogu uporedo da ostvaruju pravo na zaradu i invalidsku penziju, čija isplata može da bude prekinuta u sučaju da zarada dostigne odredjeni nivo. Unutar ovog modela može biti dozvoljena i isplata zarade koja je niža od minimalne, no tada država obično nadoknadjuje razliku do njenog punog iznosa.

3. Veze udruženja osoba sa invaliditetom sa sindikatima

Međunarodni standardi predviđaju da, u slučaju da se u datoj državi obrazuju zaštitne radionice, osobama sa invaliditetom moraju biti garantovana ista radna i socijalna prava koja imaju lica bez invaliditeta. U ovim radionicama se mogu osnivati i posebni sindikati, iako bi bilo poželjnije da veze sindikata i udruženja osoba sa invaliditetom budu strukturalne.[128] Razlozi nepostojanja ovakvih čvrstih veza nalaze se u nedovoljnom poznavanju problema osoba sa invaliditetom, odnosno neprepoznavanje važne uloge koju imaju sindikati. Primerima dobre povezanosti sindikata sa problemima osoba sa invaliditetom mogu biti engleski, norveški i nemački sindikati. Tako, u Norveškoj su socijalni partneri zaključili sporazum o inkluziji lica sa invaliditetom, dok u Nemačkoj, kod poslodavca koji zapošljava najmanje pet lica sa invaliditetom, ova lica imaju pravo na svog ombudsmana koji, sa jedne strane, nadzire i savetuje poslodavca, dok sa druge učestvuje u sastancima sindikata.[129] U prvoj industrijskoj državi sveta, veze sindikata sa udruženjima osoba sa invaliditetom oformljene su još početkom 20. veka. Godine 1899, u Velikoj Britaniji, formirana je Nacionalna liga slabovidih, sa krilaticom "Pravda, ne milostinja" koja se borila za pravo na rad i socijalnu zaštitu slabovidih ljudi, a već 1902. godine, postala je članica federacije sindikata, zadržavajući svoje posebnosti, kakve su, primera radi, ograničenje članstva na ona lica koja

126 Laurent Visier, „Sheltered Employment for presons with disabilities", *International Labour Law*, Vol. 137, No. 3, 1998, 354.

127 *Ibid*., 359-362.

128 *Trade Union Action* (2017), *op. cit.,* 20-21.

129 *Ibid*., 18.

su slabovida ili slepa, bez obzira na to da li su ili nisu radno angažovana.[130] Ovo udruženje je svoju autonomiju zadržalo sve do 2000. godine, kada se u potpunosti spojilo sa engleskom konfederacijom sinidikata za gvožđe i čelik. Pripajanje udruženja osoba sa invaliditetom sindikatima je posledica prakse sindikata u Velikoj Britaniji da tradicionalno održavaju posebne konferencije posvećene problemima osoba sa invaliditetom, omogućavajući na taj način osobama sa invaliditetom da iznesu pred sindikat specifične probleme sa kojima se suočavaju. Plod ovakve saradnje je i osmišljavanje specifičnog pisanog akta koji bi sastavio radnik i menadzer uz pomoć sindikalnog predstavnika. Naime, na konferenciji posvećenoj problemima osoba sa invaliditom, održanoj u 2018 godine, od strane britanske federacije sindikata dat je model sporazuma koji bi potpisali poslodavac i sindikat, a u kome bi se konstatovalo da se on ima primeniti na radnike koji su osobe sa invaliditetom ili mogu postati osobe sa invaliditetom.[131] Na osnovu ovako zaključenog sporazuma, svaki radnik bi imao mogućnost da u skladu sa svojim individualnim potrebama predloži izmenu radnih uslova. Bez opasnosti od stigmatizacije, svaki radnik bi dobio pravo da inicira kontakt sa menadzerom, dok bi poslodavac imao obavezu da na predlog odgovori u razumnom vremenu u pisanoj formi sa datim obrazloženjem ukoliko neke od predloženih mera odbija da uvede. Pisana saglasnost na promenjene uslove rada mogla bi da bude preispitana u period od šest meseci, ili kraće ukoliko se promene okolnosti. Specifična istorija sindikalizma u Velikoj Britaniji, a naročito negovanje uloge zastupništva, engleske sindikate je pripremila i za ulogu zastupnika interesa svojih članova pred medjunarodnim nadzornim telima, pred kojima, izmedju ostalog, skreću pažnju na izuzetno ranjiv položaj osoba sa invaliditetom. Tako, u predstavci na primenu Konvecije MOR br. 111, ovi sindikati su skrenuli pažnju na seksualno uznemiravanje radnica sa invaliditetom.[132] Statistički podaci do kojih je sindikat došao, pokazali su da je čak 7 od 10 radnica sa invaliditetom bilo seksualno uznemiravano na radnom mestu.

4. Borba sindikata za bolji položaj žena

Statistički podaci pokazuju da osobe sa invaliditetom imaju dva do tri puta veće šanse da budu nezaposlene, te da su, naročito u državama u kojima su predrasude jake, gde nema adekvatne obuke i efikasnih državnih mera, osobe sa invaliditetom prepuštene sebi, postajući samozaposlena lica.[133] Najvećim preprekama u zapošljavanju izložene su žene, koje u uporedivoj situaciji imaju i do duplo niže šanse da nađu zaposlenje nego muškarci.[134] Žene sa invalidite-

130 *Ibid*., 13.

131 *Reasonable adjustments disability passports*, *Policy proposal*, Trade Union Congress and GMB, London, 2019, 11-13.

132 Discrimination (Employment and Occupation) Convention, 1958 (No. 111) – United Kingdom of Great Britain and Northern Ireland (Ratification: 1999), Direct Request (CEACR) – adopted 2021, published 110th ILC session (2022).

133 Juhn Stewart Gordon, Johann Christian Poder and Holger Burkhart, *Human Rights and Disability, Interdisciplinary Perspectives* (2017), 2.

134 *Disability at a Glance* 2015, *Strengthening Employment Prospects with Disabilities in Asia and Pacific*, United Nations, ESCAP, 2016, 16.

tom u svetu rada se suočavaju sa sličnim izazovima kao i žene bez invaliditeta.[135] Naime, žene se uopšte upošljavaju na niže plaćenim poslovima, a na mestima rada često su izložene seksualnom uznemiravanju i zlostavljanju. Ovim pitanjima uspešno su se obratili sindikati, uspevši da kroz proces kolektivnog pregovaranja urede i pitanja ravnoteže između privatnog i poslovnog života, te pitanja rodne ravnopravnosti i jednakosti zarade. Danas ne predstavljaju retkost kolektivni ugovori koji regulišu mogućnosti rada od kuće uz pomoć računara, smanjenje broja radnih sati i do dve godine uz garantije vraćanja na stari režim posle određenog vremenskog perioda, ugovaranje dužeg odsustva sa rada radi nege deteta ili bolesnih članova porodice. Takođe, nisu retki ni sporazumi sa poslodavcem kojima se predviđa osnivanje ustanova za brigu o deci, te zabrane zaključivanja aneksa ugovora koje podrazumavaju rad u drugom mestu koje je udaljeno od mesta boravka zaposlenog više od 30 km. Poslednjih godina primetan je porast aktivnosti žena u sindikatima, koji sa svoje strane usvajaju kvote kojima bi se podstakla veća participacija žena u sindikalnim organima odlučivanja. Primera radi, španska konfederacija radnika *CGT* je propisala kvotu od 40% učešća žena u sindikalnim organima zaduženim za odlučivanje.[136] Noviju praksu sindikata predstavlja i obraćanje pitanju porodičnog nasilja. Priznajući da porodično nasilje proizvodi posledice i van sfere privatnog života, mnogi sindikati osnivaju specijalne kanale komunikacije, a u slučaju apsentizma zalažu se kod poslodavaca za razumevanje za žrtve nasilja, sprečavajući umanjenje naknada zarada i otkaz.[137] Na kraju, a imajući u vidu prisutne stereotipe o društvenim ulogama žena i muškaraca, mnogi sindikati se angažuju na njihovom razbijanju, podstičući žene da se oprobaju u oblastima tradicionalno "muških" poslova.

5. Uključivanje osoba sa invaliditetom na otvoreno tržište rada

U rešavanju pitanja koja specifično pogađaju lica sa invaliditetom, sindikati ne ostvaruju onaj nivo rezultata koje imaju u pogledu ostvarenja rodne ravnopravosti na tržištu rada. Retki su sindikati koji su uspeli da razviju programe koji bi bili direktno adresovani ka licima sa invaliditetom, iako je spektar u kom mogu da ostvare uticaj zaista širok: od angažovanja oko programa obuke koje nude javne službe za zapošljavanje, do kolektivnog pregovaranja sa pojedinačnim poslodavcem. Treba imati u vidu da su naročito sindikati industrijskih radnika razvili programe "povratka na posao" (eng. *return to work programs*), koji mogu da budu uspešno upotrebljeni i prilikom prvog regrutovanja osoba sa invaliditetom, budući da ih prate planovi prilagođavanja radnog mesta. Takođe, pojedini sindikati su uspeli da u kolektivne ugovore ugrade klauzule koje se tiču socijalnih davanja za ličnu samostalnost (eng. *independent living*), kao i klauzule dopunskog zdravstvenog osiguranja.[138] Imajući u vidu da lica sa invaliditetom imaju više problema u pogledu pro-

135 *Thematic study* (2012), *op. cit.*, para [24].

136 *Ibid*., para. [17].

137 International Labour Organization, *Empowering Women at Work, Trade Union Policies and Practices for Gender Equality*, Geneva, 2021, 27-28.

138 Trade Union Action (2017), *op. cit*., 25-27.

nalaska i zadržavanja posla, brojna međunarodna tela apeluju na, pre svega nacionalne reprezentativne sindikate, da uspostave saradnju sa nacionalnim organizacijama osoba sa invaliditetom, s obzirom da bi najbolji pristup rešavanju specifičnih problema osoba sa invaliditetom bilo direktno angažovanje predstavnika udruženja osoba sa invaliditetom na strani sindikata u procesu njihovog kolektivnog pregovaranja sa predstavnicima poslodavaca.[139]

U Republici Srbiji je registrovano oko 800.000 osoba sa invaliditeom, što čini oko 10% ukupnog stanovništva. Međutim, svega oko 13 000 ovih lica aktivno učestvuju u traženju posla. Razlozi nezaposlenosti vezuju se za nepovoljnu obrazovnu (54,7% ima završenu srednju školu, a čak 38,8% su lica bez završene srednje škole) i starosnu strukturu (46,7% lica ima više od 50 godina starosti, dok je 41,8% strosti između 30 i 49 godina).[140] Žene sa invaliditetom čine 42,6% nezaposlenih, ali se prilikom sprovođenja mera aktivne politike zapošljavanja vodi računa o tome da one budu dostupne osobama ženskog pola. Mere aktivne politike preduzimaju se sa ciljem zapošljavanja lica sa invaliditetom na otvorenom tržitu rada, a one obuhvataju: subvencije za samozašošljavanje, subvencije za zapošljavanje, subvencije zarade za osobe sa invaliditetom bez radnog iskustva, refundacije primerenih troškova prilagođavanja radnog mesta, refundacija troškova licu angažovanom na pružanju podrške, javne radove. Procenjuje se da je 44% nezaposlenih lica sa invaliditetom bilo obuhvaćeno ovim merama, od čega su žene činile oko 40%.[141] Međutim, treba imati u vidu da žene većinom samostalni posao započinju iz ekonomske nužde, odnosno slabih šansi da nađu zaposlenje.[142] Kako ova činjenica nije u dovoljnoj meri prepoznata prilikom dodele subvencija za samozapošljavanje, dešava se da žene preduzetnice gase svoja preduzeća u trostruko većem broju u odnosu na pripadnike muške preduzetničke populacije. Jedan od uzroka nedovoljnog uspeha žena u preduzetništvu, kao i uopšte u nedovoljnoj radnoj angažovanosti lica sa invaliditetom na tržištu rada, jeste i dominantna kulturna matrica koja utiče kako na predstavu koje osobe koje su društveno označene inferiornim imaju o sebi samima, tako i na poslodavce.[143] Uprkos učinjenim napomenama, podaci iz Srbije pokazuju da postoji pomak u pogledu uspostavljanja ravnopravnosti žena na tržištu rada, pogotovo kada se u vidu imaju izveštaji iz drugih država koji stižu Komitetu za prava osoba sa invaliditetom. Primera radi, posebno su od strane Komiteta za prava osoba sa invaliditetom kritikovane prakse koje unapred određuju dostupna zanimanja nekim kategorijama lica sa invaliditetom (npr. u Kini slepa lica tradicionalno postaju maseri)[144], ili ih iz nekih zanimanja isključuju (npr. u Japanu lica sa invalididtetom nisu mogla da dobiju licencu za obavljanje

139 *Thematic study* (2012), *op. cit.*, para. [57].

140 Strategija zapošljavanja u Republici Srbiji za period od 2021. do 2026. godine (*Službeni glasnik RS*, br. 18/21 i 36/21), 28.

141 Tatić, *op. cit.,* 65-66.

142 Petrušić, *op. cit.,* 98, Akcioni plan za period od 2021. do 2023. godine za sprovođenje strategije zapošljavanja u Republici Srbiji za perod od 2021. do 2026. godine (*Službeni glasnik RS*, br. 30/21), 33.

143 *Poseban izveštaj* (2013), *op. cit.,*31.

144 Bantekas, Pennilas and Trömel, *op. cit*., 772.

profesije lekara, veterinara, pa čak i kuvara i kozmetičara).[145] Naročitu kritiku zaslužile su i norme onih država koje pravo na rad žena sa invaliditetom uslovljavaju prethodno dobijenom saglasnošću muškog staratelja.[146] Ovo, jer su diskriminatorne po dva osnova: po osnovu jednakosti žena i muškaraca i prava na rad.

6. Prepoznavanje ukrštene diskriminacije kao katalizatora društvene transformacije

Konvencija o pravima osoba sa invaliditetom je prva koja je obratila pažnju na ukrštenu diskriminaciju, prepoznajući osobito težak položaj žena, koje su zbog svojih različitih identiteta potiskivane i marginalizovane. Primena principa ukrštene diskriminacije otvara novu perspektivu, jer ispituje uticaj diskriminacije koja je smeštena u preseku identiteta osobe koja poseduje više ličnih svojstava (invaliditet, pol, rasa...).[147] Ovakva promena perspektive bila je moguća tek nakon usvajanja novog modela invaliditeta, koji više ne nalazi uzrok problema u ličnosti, već u društvu u kome se dešava diskriminacija. Štaviše, usvajanje novog modela dovelo je do borbe udruženja za uspostavljanje tzv. transformativne ili inkluzivne jednakosti (eng. *transformative or inclusive equality*) koja podrazumeva prevazilaženje zamki marginalizacije putem uvažavanja dostojanstva ličnosti, te preduzimanje strukturalnih promena kojima se može dostići socijalna i politička inkluzija i participacija.[148]

Transformacija društva nemoguća je bez osnaženja položaja žena sa invaliditetom koje, zbog toga što trpe višesturku i ukrštenu diskriminaciju, ostaju na marginama društva. Štaviše, implementacija Konvencije o pravima osoba sa invaliditetom, koja za ključne faktore koje doprinose transformaciji društva uzima inkluziju i participaciju, podrazumava i jače oslanjanje na sistem kvota.[149] Na ovu činjenicu ukazuje Opšti komentar br. 3 uz Konvenciju o pravima osoba sa invaliditetom, napominjući da udruženja žena sa invaliditetom moraju da značajnije participiraju u donošenju odluka, jer se formiranje konsultativnih tela koji se bave problemom invaliditeta ne smatra dovoljnim.[150] Samo osnaženje žena, koje zbog svog pola imaju niži ekonomski i socijalni status u društvu može dovesti do inkluzivne jednakosti, odnosno do razbijanja stega društveno koncentrisane moći koja uslovljava diskriminaciju. Lep primer inkluzije žena daje sam Komitet za prava osoba sa invaliditetom, koji u izboru svojih članova, između ostalog, vodi računa o tome da to budu eksperti sa invaliditetom, a da među njima ravnomerno budu zastupljene žene.

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145 Disability at a Glance (2016), *op. cit.,* 19. Ova praksa je u Japanu ukinuta tek 2001. godine.

146 Bantekas, Pennilas and Trömel, *op. cit.*, 774.

147 *Ibid*., 184.

148 *Ibid*., 141.

149 *Ibid*., 170.

150 *General Comment no. 3: Article 6*, *Women and girls with disabilities*, CRPD/C/GC/3, 2 September 2016, para. [23].

Promena pristupa, te obraćanje više pažnje na identitetske razlike u društvu treba da utiče i na sindikate, koji treba da prepoznaju da njihova društvena borba ne može biti zasnovana samo na klasi, već i na iskustvima različitih identiteta koji ne pripadaju standardnoj kategoriji lica od kojeg sindikati tradicionalno polaze – zdravom muškarcu koji je radno angažovan puno radno vreme.[151] Koliko više sindikati budu uspešni u svojoj borbi na novim osnovama, toliko je društvo bliže ostvarenju transformativne, odnosno inkluzivne jednakosti, koju naročito osobe sa višeslojnim identitetima željno iščekuju.

VII ZAKLJUČAK

Socijalni model invaliditeta prepoznaje društvo kao kamen spoticanja ka punoj inkluziji osoba sa invaliditetom, budući da su u njemu duboko ukorenjeni stereotipi, odnosno negativna i paušalna uverenja o čitavim grupama lica kojima se bez stvarnih činjenica i argumenata pripisuju određene karakteristike. Jedna od društvenih grupa koja je naročito izložena socijalnoj marginalizaciji jesu žene sa invaliditetom, s obzirom da poseduju dva lična svojstva zbog kojih bivaju diskriminisane. Akte diskriminacije zasnovane na nekom ličnom svojstvu zabranjuju pravne norme, ali usled nemogućnosti efikasnog dokazivanja diskriminacije pred sudom, mnoge žrtve ne uspevaju da se oslanjanjem na sudski mehanizam ravnopravno sa drugim licima uključe u razne sfere društvenog života. Imajući u vidu da je oblast rada veoma važna, jer obezbeđuje egzistenciju i socijalni status pojedincu, veliku pomoć u ostvarenju prava na rad i prava po osnovu rada mogu da imaju udruženja civilnog sektora. To su pre svega udruženja osoba sa invaliditetom i sindikati.

Fina granica između sindikata koji, po pravilu, zastupa interese zaposlenih i udruženja gradjana koje pre svega obavljaju društvenu funkciju, skrećući pažnju na specifičan položaj određene grupe lica u datom društvu, može da bude prekoračena na način što bi sindikat dozvoljavao članstvo i licima koja trenutno nisu zaposlena. Naime, kako Komitet za slobodu udruživanja Medjunarodne organizacije rada ne smatra da je sloboda učlanjenja u sindikat i učestvovanja u njegovom radu licima koja su nezaposlena suprotna odredbama Konvencije MOR br. 87,[152] bilo bi poželjno da udruženja osoba sa invaliditetom iniciraju čvršću saradnju sa sindikatima, pa i prepletanje njihovog članstva. Ovo, prvenstveno zbog poboljšanja uslova rada koji se tiču bezbednosti i zdravlja na radu, te mogućnosti da se osmilsi akt koji bi omogućio individualno prilagođavanje radnog mesta potrebama zaposlenih, a koji bi štitili sindikati kao u slučaju britanske federacije sindikata. Imajući u vidu da svaki zaposeni potencijalno može postati osoba sa invaliditetom, potrebno je razmotriti participaciju sindikata u pogledu donošenja akta o proceni rizika

151 *Trade Union Action* (2017), *op. cit.,* 32.

152 Compilation of decision of the Committee o Freedom of Association, para. 395, *https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70002:0::NO::P70002_HIER_ELEMENT_ID,P70002_HIER_LEVEL:3943847,1*

koji je u srpskom pravu isključivo u nadležnosti poslodavca,[153] te zaštite osoba sa invaiditetom i zaposlenog sa zdravstvenim smetnjama, koji u slučaju da poslodavac ne može da im obezbedi ogovarajući posao, mogu biti proglašeni viškom.[154] Ova žaštita bi mogla biti ostvarena obaveznim konsultovanjem predstavnika zaposlenih i poslodavca oko mera koje se mogu preduzeti kako bi se radno mesto prilagodilo potrebama zaposlenog, a koje bi između ostalog, mogle da obuhvate prekvalifikaciju, skraćenje radnog vremena, uvođenje kliznog radnog vremena, ili razmatranje mogućnost rada od kuće.

Sindikati i udruženja osoba sa invaliditetom predstavljaju značajan rezervoar iskustava lica slojevitog identiteta na osnovu kojih je moguće formirati statistiku, kao i sprovoditi situaciono testiranje. Povoljnu društvenu klimu u Republici Srbiji stvaraju napori Poverenika za zaštitu ravnospravnosti, koji je više puta upozoravao da je praksa procenjivanja radne sposobnosti lica sa invaliditetom bez konsultacije tog lica i bez uzimanja u obzir njegovog stava akt diskriminacije, kao i da poslovnu sposobnost lica treba razmatrati sa stanovišta volje samog lica, a bez isključivog oslanjanja na medicinsku dokumentaciju. Takođe, ovaj organ je često upozoravao da na državi leži obaveza postupanja shodno standardu dužne pažnje, odnosno da ona mora aktivno da radi na iskorenjavanju stavova, običaja i postupaka koje onemogućavaju suzbijanje predrasuda koje čine uzrok diskriminacije. Na udruženjima civilnog sektora je da potpomognu tendenciju napuštanja koncepcije uporednika u korist razumevanja šireg društvenog okvira, kao i da u istom uspostave čvršće oblike saradnje koje, naročito ako se oslone na mehanizam socijalnog dijaloga, mogu da postanu alatka društvene transformacije.

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THE ROLE OF TRADE UNIONS IN TACKLING MULTIPLE AND INTERSECTIONAL DISCRIMINATION OF WOMEN WITH DISABILITIES

Abstract

The Convention on the Rights of Persons with Disabilities is the first human rights convention adopted in the 21st century. At the same time, this is the fastest negotiated human rights treaty. Moreover, the non-governmental organizations of persons with disabilities actively participated in the drafting of this important convention. Acting under the slogan 'nothing about us without us' they underscored the importance of participation in creating a truly inclusive society. More comprehensive protection of women with disabilities is the prerequisite for removing obstacles in many areas of social life that women face more than men. Namely, women are more often than men exposed to multiple and intersectional discrimination due to social structures and established power relations. The international law recognizes this social fact and appeals to the states to strengthen the position of women, inter alia, through the application of the principle of participation. Bearing in mind that the Convention on the Rights of Persons with Disabilities adopted a social model of disability, as opposed to medical and industrial ones, the paper analyzes the position of persons with disabilities in the Republic of Serbia in the light of this new model. The intersection of disability and gender in the fields of labor law and social security law opens a new perspective of looking at socio-economic problems as based on the identity issues. Using the normative, comparative, and sociological methods,

the authors pay particular attention to the issue of identity, and the possibilities of its recognition and protection within the legal order of Serbia. If inclusion means the right of an individual to fully belong to the society and its institutions, disability as a social construct reckons with the possibility of change in social relations. One way of change, especially important for labor law, calls for the associations of persons with disabilities to link up more closely with trade unions. Although the latter are not recognized in the Convention on the Rights of Persons with Disabilities, they have a social dialogue mechanism that is most effectively implemented in practice through the principle of participation.

Key words: *Discrimination; Trade union; Identity; Participation.*

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LEGAL STATUS OF EMPLOYEES WITH DISABILITIES CAUSED BY WORK INJURIES OR OCCUPATIONAL DISEASES IN THE REPUBLIC OF SERBIA – LAST AMONG EQUALS?

Abstract

This paper deals with the status of the employees whose health was impaired due to a work injury or due to an occupational disease. It is a notorious fact namely, that people whose health is impaired and who, because of that, are incapable to work to a certain extent (totally or in part), have to face some smaller or greater difficulties on a day to day basis. Those persons who are totally incapable for work in the Republic of Serbia, in that sense, depend on the functionality of the social insurance system. This therefore calls for an adequate social insurance policy of the state. On the other hand, those persons in the Republic of Serbia whose work incapacity is partial, find themselves in a position which implies them facing different obstacles at the labour market. The latter being the constant struggle to acquire the status of an employed person, as well as the struggle to mantain such a status without further consequences to their health or their work capacity. These struggles, however, are the kind of struggles that cannot and should not be entirely left to these persons. That is why it is up to the state to put them in a position that is relatively similar to that of the other persons. Whether the Republic of Serbia has succeeded in that, or whether it is another one in a series of omissions by the Serbian legislator (which also goes for the matter of functionality of the social insurance system), is a question to which this paper should provide certain answers. From the gender perspective this paper is, however, also particularly relevant due to the newly emerged situation caused by the COVID-19 pandemic. Women represent a predominant part of the frontline work force within the healthcare, as well as the social protection and trade activities. Those activities however, it is a notorious fact, also imply high risk of an infection, thus making these women more prone to contagion, and at an increased risk of facing the consequences of the COVID-19 disease (some sort of disability being one of them). We'll, therefore, in part, also explore how can the current situation in Serbian legislative potentially affect them in this respect, in these unusual times.

Key words: *The Republic of Serbia; Work injury; Occupational disease; Disability; Discrimination.*

I INTRODUCTION

Disability, be it partial or total, certainly presents an obstacle for the normal daily life of an individual – which hence also implies his/her ability to work and earn money, and, therefore, to provide a decent life for himself/herself and his/her family. And while in the Republic of Serbia persons with partial incapacity for work have to struggle to acquire the status of an employed person or to retain such a status without further deterioration of their already impaired health, persons who are fully incapable to work (total incapacity), on the other hand, strive for the possibility to continue to live a life worthy of a human being with compensation which social insurance is supposed to provide them. This, after all, is also the reason why the state should take the appropriate steps in order to help these persons accomplish these aspirations. The latter not only in principle, but in reality as well, and in the best possible way (in accordance with the economic and other possibilities of the state). In other words, the state cannot topple the burden of this struggle entirely onto the shoulders of persons with disabilities, but has to make an attempt to put them in a position that is relatively similar to that of persons without such health problems. This again, on the other hand, implies the existence of appropriate legal regulative (designed in such a way that enables its adequate exercise), along with the will for it to be exercised – and sometimes it is precisely that political determination, i.e., the lack of that will, that is the reason why the formal legal deficiencies do exist. In this sense, the question raised in this paper is in which way and, if successful, to what extent, did the Republic of Serbia approach this issue.

II WHAT IS DISSABILITY ACCORDING TO SERBIAN REGULATIONS?

It was mentioned earlier that disability, in one part, also implies the reduced capacity or, in worst cases, total incapacity to perform work and earn a living. In this sense, the working capacity of a person with a disability will depend on the degree of the disability of the individual in question, which will define what and how much that person can or cannot do. In other words, the capacity to work, in its part, in addition to certain knowledge and skills, also has to include the appropriate psychophysical ability of the employee to perform his/her work tasks on a daily basis. It is therefore consisted of that "what one person can do, what one person knows, and what one person wants."[1] This, of course, does not mean that every single employee is absolutely healthy, nor that the health capacity of each individual employee will be the same. Therefore, for example, an employee who has to perform high risk tasks has to meet special requirements such as: impeccable heart function, certain lung capacity, stable nervous system, etc.[2] Also, an employment

1 Predrag Jovanović, 'Radnopravni tretman zdravstvene, radne sposobnosti i ličnog integriteta zaposlenih', *Zbornik radova Pravnog fakulteta u Novom Sadu*, No. 3, 2014, 39.

2 Zoran Ivošević and Milan Ivošević, *Komentar Zakona o radu*, 5th edition (2018), 211.

relationship can be established with a person who has a certain disability while, according to the logic of things, it can also not be excluded that the health condition of an employee changes or worsens even after he/she has established an employment relationship without making him/her totally incapable for work. Again, on the other hand, the fact is that sometimes the capacity to work can be completely absent due to the severity of the disability as such – thus causing the need for a response from the state or, more precisely, the mandatory social insurance system. Thus, in other words, disability can be the basis for exercising various rights – that is, both those in the sphere of labor law and those within the framework of mandatory social insurance. In this respect, however, due to peculiarities of the Serbian legislative system,[3] disability, in the sense of the legislations that regulate the labour law position of employed persons in the Republic of Serbia and the position of persons who seek employment, is not the same thing as disability in the sense of the regulations on mandatory pension and disability insurance.

Therefore, in accordance with the Law on Pension and Disability Insurance (LPDI),[4] disability as such exists only then when the insured person suffers a complete loss of his/her capacity to work, that is, when a professional military person suffers a loss of his/her capacity for professional military service or when a police officer suffers a complete loss of work capacity for his/her professional performance of police duties, and all of this due to changes in the state of health due to a work injury or an occupational disease, as well as due to an injury or a disease which are not caused by work, which, as such, cannot be eliminated by treatment or medical rehabilitation.[5] In other words, this Law defines disability as a complete incapacity for work, and only such a degree of incapacity for work can be the basis for the protection provided within the framework of pension and disability insurance in case of disability.[6] Thus, due to the fact that not every degree of disability as such creates total incapacity to work, this directs such persons to a further labour active life – which therefore entails certain labour law protection.[7] Such protection is primarily

3 Which will be explained in the following text.

4 *Official Gazette of RS*, No. 34/2003, 64/2004 – decision CCRS, 84/2004 – other law, 85/2005, 101/2005 – other law, 63/2006 – decision CCRS, 5/2009, 107/2009, 101/2010, 93/2012, 62/2013, 108/2013, 75/2014, 142/2014, 73/2018, 46/2019 – decision CCRS, 86/2019 and 62/2021.

5 LPDI, art. 21.

6 Contrary to the current solution, in earlier Serbian legislative, disability was divided into three categories for a long period of time. The first category of disability, therefore, implied total work incapacity, while the remaining two categories (second and third) were reserved for persons who, despite the disability, still had certain work capacity. More on this subject in: Mila Petrović, *Radnopravna i socijalnopravna zaštita zaposlenih od povreda na radu i profesionalnih bolesti* (2020), 310-317.

7 It is important to say however that, even though it is the state of fact that the shift of the remaining capacity to work into the framework of labor law certainly can contribute to the extension of the working life of an individual who is not completely incapable of working, it is indisputable as well that, in this way, he/she is also deprived of the right to a wage compensation due to his/her reduced ability to earn a living, as well as – in certain cases, the right to a disability pension – which are the rights that were guaranteed by previous legislations. Ljubinka Kovačević, 'Zapošljavanje lica sa invaliditetom' in Drenka Vuković,

provided by the Labor Law (LL),[8] that is, its referring provision which guarantees special protection to persons with disabilities,[9] and its provisions which establish the prohibition of discrimination (either indirect or direct) of persons seeking employment and employees with regard to disability.[10] The same Law also represents the legal framework for regulating the employment of such persons.[11] However, LL does not define neither the term of disability nor the term of a person with a disability. On the other hand, the Law on Occupational Rehabilitation and Employment of Persons with Disabilities (LOREPD)[12] (as a special law that regulates issues such as: incentives for employment in order to create conditions for the equal inclusion of persons with disabilities in the labor market, assessment of their work capacity, obligation of employing them, etc.),[13] contains the definition of a person with a disability. Thus, a person with a disability, in the sense of the LOREPD, is defined as "a person with permanent consequences of physical, sensory, mental or psychical impairment or a disease that cannot be eliminated by treatment or medical rehabilitation, and who faces social and other limitations that affect the work capacity and the possibility of employment or maintaining employment, and who does not have the opportunity or has reduced opportunities to join the labor market under equal conditions and to apply for employment with other persons."[14] In terms of this regulation, therefore, a person with a disability is not a person who is completely incapable of working.

Nevertheless, the partial work capacity of permanent type in such a person is a factor that affects his/her possibility to get an employment or to keep such an employment. This, on the other hand, is the reason why it is necessary to apply the principle of positive discrimination, which will bring such a person to at least a seemingly equal position with other persons. The consistent application of the principle of equal opportunities and equal treatment, namely, would be completely unfair if certain categories of persons, such as

Mihail Arandarenko (eds), *Socijalne reforme – sadržaj i rezultati* (2011), 201. In this sense, the fairness of such a solution can certainly be subjected to a more detailed review.

8 *Official Gazette of RS*, No. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014. 13/2017 – decision CCRS, 113/2017 and 95/2018 – authentic interpretation.

9 LL, art. 12, para. 4.

10 LL, art. 18-20. The issue of discrimination in connection with employment and the labour relationship as such is also regulated by the Law on Prevention of Discrimination against Persons with Disabilities (*Official Gazette of RS*, No. 33/2006 and 13/2016) – in the following text: LPDPD, art. 21-26.

11 This due to the fact that: „a person with a disability establishes the employment relationship under the conditions specified by this Act, unless otherwise specified by a special law." LL, art. 28.

12 *Official Gazette of RS*, Nos. 36/2009 and 32/2013 and 14/2022 – other law.

13 LOREPD, art. 1.

14 LOREPD, art. 3. A similar definition is contained in the LPDPD, according to which persons with disabilities are "persons with congenital or acquired physical, sensory, intellectual or emotional disabilities who, due to social or other obstacles, do not have opportunities or have limited opportunities to participate in the activities of society on the same level as others, regardless of whether they can perform the mentioned activities with the use of technical aids or support services. LPDPD, art. 3.

persons with disabilities, were to be treated as persons who do not have such disabilities (or another feature that puts them at a disadvantage compared to the others).[15] Therefore, positive discrimination appears as a legitimate corrective to the principle of non-discrimination, and in this sense it implies making exceptions in certain areas of work, such as employment, in order to achieve full equality of persons who are in a fundamentally unequal position in relation to other persons – when a legitimate interest for that exists.[16]

The presented differences in disability as a basis for exercising a certain right, again, are also the reason why the term "disabled worker" is often used in theory. In that sense, the scope of that term, as such, implies both those persons who, due to certain biological or occupational causes, may be *completely incapable to work (total incapacity),* as well as those persons who are faced with *reduced prospects of finding and keeping a job (partial incapacity)*.[17] Again, depending on the fact whether the disabled worker belongs to the first or the second category, we have seen, it also further depends whether he will rely exclusively on the protection provided by the regulations governing the issue of mandatory social insurance, or on the protection provided within the framework of labour law. Such a sharp division in Serbian legislative is actually a consequence of one of the more radical changes in the field of pension and disability insurance, which consisted in the definitive cancellation of all rights on the basis of the remaining working capacity (partial working capacity). Such a process did not happen "overnight" and it lasted for a relatively long time (around 7-8 years),[18] and it definitively ended in the year of 2003, when the right to requalification or additional qualification and the right to assignment, i.e. to employment at an another appropriate full-time job, as well as to the related fees on that basis, were abolished.[19] After that, the remaining working capacity ceased to be the basis for the eventual exercise of rights from pension and disability insurance and disability, in this sense, began to imply exclusively "complete loss of working capacity due to changes in the state of health caused by a work injury, occupational disease, injury out of work or disease, which cannot be eliminated by treatment or medical rehabilitation."[20] And while such a solution did not affect the already existing

15 Branko Lubarda, *Radno pravo – rasprava o dostojanstvu na radu i socijalnom dijalogu* (2013), 139.

16 Predrag Jovanović, 'Aktuelni aspekti principa zaštite zaposlenih', *Zbornik radova Pravnog fakulteta u Novom Sadu*, No. 3, 2011, 146.

17 Predrag Jovanović, 'Zaštita invalida u radnoj sredini', *Zbornik radova Pravnog fakulteta u Novom Sadu*, No. 3, 2015, 936.

18 More on the process of abolishment of the rights based on the remaining capacity to work within the framework of pension and disability insurance in: Mila Petrović (2020), *op. cit.*, 315–317.

19 Ljiljana Radifković, Dunja Važić and Danijela Rajković, *Komentar Zakona o penzijskom i invalidskom osiguranju* (2003), 22.

20 Law on Pension and Disabillity Insurance (*Official Gazette of RS*, No. 34/2003), art. 21. The presented solution of the Serbian legislator is actually a product of the financial burden that was caused by a large number of disabled pensioners at the beginning of the second millennium (32.2% of the total number of pensioners in Serbia), as a result of attempts to overcome the problem of surplus labor from the 1990s by "sending" employees

users – to whom a certain conversion of the rights based on the previously existing second and third categories of disability into other appropriate rights has been made,[21] it certainly made it impossible to further acquire rights on that basis. Previously said, because the loss of work capacity began to be valued in relation to any job, and not in relation to "one's job" as it was done before, due to what disability began to imply a permanent, total loss of work capacity, which is related to any job whatsoever.[22]

Therefore, today the rights that can be acquired within the framework of pension and disability insurance based on the occurrence of the risk of disability, are guaranteed only in the event of the occurrence of total disability. Such emergence of total incapacity for work is also the cause of the termination of the employment relationship *ex lege* and, from then on, the possibility of further employment does not exist.[23] Thus, in these cases, there is also no more room for further labour law protection. In other words, in the year of 2003, it was definitively defined (except for the already existing beneficiaries – who still enjoy, based on their remaining capacity to work, both the rights provided within the social insurance and the right to appropriate labor law protection)[24] that the rights within the mandatory social insurance system based on disability as such can be realized only on the basis of the onset of total incapacity for work, thus leaving persons partially capable of work exclusively to the protection provided by labor law.[25]

III WHAT ARE WORK INJURIES AND OCCUPATIONAL DISEASES IN ACCORDANCE WITH THE SERBIAN REGULATIONS?

In the Republic of Serbia, a work injury is defined as "an injury of the insured that occurs in spatial, temporal and causal connection with the performance of work on the basis of which he/she is insured, which is caused by immediate and short-term mechanical, physical or chemical effects, sudden

into a disability retirement. More on this subject in: Senad Jašarević, *Social security law – Serbia* (2016), 89.

21 More on this subject in: Ljiljana Radifković, 'Novine u Zakonu o penzijskom i invalidskom osiguranju', *Radno i socijalno pravo*, No. 4-7, 2003, 208-209, 218-219.

22 Radifković, Važić and Rajković, *op. cit.,* 27-28.

23 Namely, in accordance with the LL, an employee's employment relationship is terminated regardless of his/her will and the will of his/her employer if, in the manner prescribed by law, it is established that the employee has lost his/her work capacity (and that on the day of delivery of the legally binding decision on determining the loss of his/her capacity to work). See: LL, art. 176, para. 1.

24 The LOREPD also covers persons who were, in accordance with the legislation on pension and disability insurance, determined with a category of disability, i.e., remaining working capacity. LOREPD, art. 4, para. 2, subpara. 5.

25 LOREPD thus guarantees a number of different rights to persons with disabilities (as they are prescribed by this law), such as the right to employment under general or special conditions, the right to encouragement of the employment of these persons, etc. LOREPD, art. 6.

changes in body position, sudden load on the body or other changes in the physiological state of the organism."[26] In other words, a work injury always has to be a consequence of some external event of limited duration, which is related to the work that the person performs (an accident at work).[27] Such a causality between a sudden external event related to work and the health damage itself is also a *conditio sine qua non* for this qualification, as only an injury, disease or damage that is really the result of an accident at work can be qualified as a consequence of work.[28] In this sense, an injury caused in the manner presented, and which the employee suffers while performing a job to which he/she is not assigned, but which he/she performs in the interest of his/her employer, as well as an injury that the insured person suffers during the regular trip from home to work and vice versa, will also be considered as a work injury.[29] Also, an injury on the trip undertaken for the purpose of carrying out official duties (work-related trip), as well as an injury on the trip undertaken for the purpose of accession to work, will also be considered as a work injury.[30] The same thing goes for the disease of the insured that occurred directly or as an exclusive consequence of an accident or force majeure during the performance of the work on the basis of which he/she was insured, or in connection with it.[31] Additionally, an injury suffered by the insured person in the manner prescribed by the law, and in connection with the exercise of the right to health care on the basis of the occurrence of a work injury or an occupational disease, will also be considered as a work injury.[32] And, finally, the same goes for the injury suffered: during the action of rescue or defense against natural disasters or accidents, during a military exercise or during the performance of other obligations in the field of defense of the country, in a work camp or competition, and in other jobs and tasks of general interest.[33]

Occupational diseases, on the other hand, are the product of long-term exposure to harmful substances and processes at work and not a consequence of an isolated and short-term event of the sudden type. Thus, in accordance with the LPDI, occupational diseases are the diseases that arose during the insurance period and that were caused by long-term direct influence of processes and working conditions at workplaces, i.e., the jobs that the insured

26 LPDI, art. 22, para. 1. Law on Health Insurance (*Official Gazette of RS*, No. 25/2019), art. 51, para. 3.

27 Work injury, as an institute, implies „any personal injury, disease or death resulting from an occupational accident." An occupational accident, on the other hand, is „an unexpected and unplanned occurrence, including acts of violence, arising out of or in connection with work which results in one or more workers incurring a personal injury, disease or death." International Labour Organization, *Sixteenth international conference of labour statisticians – report of the conference* (1998), 75.

28 Konstatinos Kremalis, *Social security law in Greece*, 2nd edition (2015), 112.

29 LPDI, art. 22, para. 2-3. 33O, art. 51, paras. 4-5.

30 LPDI, art. 22, para. 3.

31 LPDI, art. 22, para. 4. 33O, art. 51, para. 6.

32 LPDI, art. 22, para. 5.

33 LPDI, art. 23.

performed.[34] Similarly, occupational disease is defined by the Law on Health Insurance (LHI) as a disease that occurred due to prolonged exposure to harmful effects in the workplace.[35] The requirement of long-term exposure to harmful effects at work is also completely logical, due to the fact that many occupational diseases are completely identical to those diseases that arose as a result of factors that are in no way related to the work that the employee performed.[36] However, on the other hand, given the fact that the damage caused to the employee's health in the case of an occupational disease can manifest itself after a long period of time has passed, and even when the labor law relationship between the employee and the employer has long been terminated (unlike work injuries where damage occurs, as a rule, immediately), determining the causal link between the performance of work and the disease itself can be a challenge. The Serbian legislator therefore found the answer to such difficulties in the creation of a list of diseases in which there is a pronounced and proven occupational causality, which makes them eligible to be qualified as occupational diseases. In author's opinion, however, the essential flaw of this system is the impossibility of qualifying a certain disease as an occupational disease if it has not found its place on this list, even if the disease in question is a disease that actually is a product of work.[37] Admittedly however, this observation may not actually have any significance, since in the Republic of Serbia, occupational diseases are not reported in practice at all.[38] This practice of non-reporting of occupational diseases, again, is a product of the inadequate policy of the Serbian legislator, which not only does not encourage their reporting, but actually prevents their qualification almost entirely.[39] This, therefore, also implies some other consequences, such as *lesser rights that are provided within the framework of social insurance* and the *lack of possibility to form an adequate preventive policy in terms of the protection of health and safety at work*. The same also goes for *the matter of possible demands for an*

34 LPDI, art. 24, para. 1.

35 LHI, art. 51, para. 7.

36 Occupational illness in OECD countries*, https://www.oecd.org/els/emp/4343111.pdf.*

37 More on this subject in: Mila Petrović, 'Pravni režim povrede na radu i profesionalnog oboljenja u domaćem i u uporednom pravu', *Strani pravni život*, Vol. 63, No. 1, 2019, 107-110.

38 Not one case of an occupational disease was reported to the Labor Inspectorate in 2020 and 2019, while only one occupational disease was reported in 2018 (Izveštaji o radu/ Plan inspekcijskog nadzora, *https://www.minrzs.gov.rs/sr/dokumenti/ostalo/izvestaji-o-radu/plan-inspekcijskog-nadzora*). At the same time, in Germany, the status of an occupational disease was confirmed in tens of thousands of reported cases (Occupational diseases (ODs), *https://www.dguv.de/en/facts-figures/ods/index.jsp.)* Again, it is perhaps more expedient to compare the Serbian situation to the one in Croatia, where 137 cases of occupational diseases were registered in 2018, 135 in 2019, and 264 in 2020. See: Registar profesionalnih bolesti – hzzzsr, *http://www.hzzzsr.hr/wp-content/uploads/2021/05/Registar-profesionalnih-bolesti-za-2020.pdf.* Anyhow, what is indisputable, and what can also be seen here, is that the problem certainly exists.

39 More on this problem in: Bojan Urdarević and Mila Petrović (2021)*, Izveštaj o stanju radnih prava u Srbiji za 2021. godinu*, *http://www.centaronline.org/sr/publikacija/1874/izvestaj-o-stanju-radnih-prava-u-srbiji-za-2021-godinu.*

appropriate compensation for the damage caused at the employer for whom the employee works (or for whom he/she used to work) and because of whom he/she was exposed to the harmful effects that caused the disease.

IV WHICH RIGHTS FROM EMPLOYMENT RELATIONSHIP BELONG TO WORKERS WHO HAVE BECOME DISABLED DUE TO A WORK INJURY OR AN OCCUPATIONAL DISEASE IN THE REPUBLIC OF SERBIA?

In the previous part of the text, it was clarified that the term disabled worker, as such, implies both those persons who are *completely incapable to work (total incapacity),* as well as those persons who are faced with *reduced prospects of finding and keeping a job (partial incapacity).* Since, as already explained, the employment of the first group of disabled persons ends *ex lege,* labour law protection can only be provided to the second group, i.e., persons who are faced with reduced prospects of finding and keeping a job. Such protection for these persons is guaranteed above all by the Constitution of the Republic of Serbia (RS Constitution),[40] in the part where it speaks about special protection at work and about special working conditions that, in accordance with the law, are being enabled for the disabled.[41] This linguistic construction, if considered more carefully, includes both disabled employees who have entered an employment relationship as such, as well as disabled employees who became disabled during their employment. Such disability again, according to the logic of things, can be both the product of performing work, as well as the product of a certain disease or an injury that is not related in any way to the occupational activities of the employee. In other words, the shown special protection is guaranteed to all persons who have become disabled workers, regardless of the cause of such health deterioration. In addition, the legislator goes a step further, by providing special protection in the field of labor relations to "employees with health disturbances"[42] as well, in which, unlike persons with disabilities, there is only the possibility of the occurrence of a disability.[43] This policy of the Serbian legislator though, is relatively well-established, since earlier regulations also knew of a somewhat similar institute, then named as "danger from the occurrence of disability".[44] Anyhow, in accordance with the current regulations, an employee with health disturbanc-

40 *Official Gazette of RS*, No. 98/2006.

41 RS Constitution, art. 60, para. 5.

42 LL, art. 81, para. 2 and art. 101.

43 On the difference between persons with health disturbances and persons with disabilities in: Radoje Brković and Bojan Urdarević, *Radno pravo sa elementima socijalnog prava* (2020), 171.

44 Predrag Jovanović, 'Posebna radnopravna zaštita pojedinih kategorija radnika', *Zbornik radova Pravnog fakulteta u Novom Sadu*, No. 4/2015b, 1483.

es, which have been determined by the competent health authority, cannot perform tasks that would cause a deterioration of his/her health condition or dangerous consequences to his/her environment.[45] The employer, on the other hand, *is obliged to provide that that same employee, as well as an employee with a disability, may perform his/her work tasks according to his/her work capacity.*[46] After all, such a solution is in accordance with the provision of the same regulation (LL), which decisively prohibits discrimination against persons seeking employment, as well as the employees, for reasons of their health condition, i.e. disability.[47] However, the special protection which is guaranteed in this way completely loses its purpose when it is noted that in the following text of the LL, the legislator prescribes that, if the employer *cannot provide suitable work for such persons in accordance with their working capacity,* such employees shall be considered as redundant.[48] The situation becomes visibly worse upon further reading of the text of the law. This because the legislator guarantees priority for entering into employment contract to other employees whose employment relationship was terminated due to the fact that they have been declared as redundant (this within three months from the date of termination of the employment relationship), without providing the same guarantee to disabled persons and persons with health disturbances whose employment relationship has been terminated for being declared as redundant.[49] At the same time, as Jovanović correctly observes, the provision according to which if the employer *cannot* provide a job for a disabled person, he can declare that disabled person redundant and terminate his/her employment contract, completely nomo-technically deviates from the provision in which it is said that the employer is *obliged* to ensure the performance of work for a disabled person.[50] In this way, not only did the legislator put the disabled workers in the same position as that of the other employees when the employer is unable to provide them with a suitable job, but he essentially put them in a less favorable position than the one that the other employees are in. Such a solution is therefore not only unfair, but it also completely contradicts the principle of positive discrimination of persons with disabilities when it comes to their employment – as it should, in its essence, indirectly imply the stimulation of employers to preserve the employment of such persons.[51] The entire injustice of the presented situation is perhaps the most obvious when we talk about persons whose health impairments or disabilities are actually the product of work, that is, the result of a work injury or an occupational disease. After all, accidents at work are often the product of an inadequate organization of work

45 LL, art. 81, para. 2.

46 LL, art. 101.

47 LL, art. 18.

48 LL, art. 102, para. 2.

49 LL, art. 182, para. 1.

50 Predrag Jovanović, 'Pozitivna diskriminacija (s osvrtom na oblast rada)', *Radno i socijalno pravo*, No. 1, 2018, 15.

51 *Ibid.*, 14-16.

at the employer, as well as unsafe practices.[52] The fact that LOREPD guarantees certain advantages in employment of persons with disabilities (within the meaning of this Law) and that it tries to encourage their employment, does not therefore diminish the tragicomic nature of this entire issue.

V THE POSITION OF VICTIMS OF WORK INJURIES AND OCCUPATIONAL DISEASES IN THE COMPULSORY SOCIAL INSURANCE SYSTEM OF THE REPUBLIC OF SERBIA

Protection against work injuries and occupational diseases (as well as protection against injuries and diseases not related to work), within the framework of mandatory social insurance, is provided both within the framework of health insurance (the right to health care and financial compensation), as well as within the framework of pension and disability insurance (the right to a disability pension, the right to a family pension, the bodily impairment compensation and the right to compensation for assistance and care of another person). Work injuries and occupational diseases, however, traditionally, in the mandatory social insurance system of the Republic of Serbia, do have a certain preferential (privileged) treatment in relation to injuries and diseases that are not caused by work. Generally speaking, such a practice is not uncommon and it is justified by various reasons such as: 1) the high value which society places on work; 2) the fact that employees are obliged to obey their employers and the latter have ultimate control over conditions in the workplace and matters of safety and 3) the need to provide an incentive for people who carry out dangerous but essential work.[53] Again, the fact that such a practice is not uncommon does not simultaneously mean that it is universal, nor that it is not subject to debate. Thus, at one time, its fairness was questioned by Lord Beveridge as well, who considered this kind of preference of the employed over the unemployed as an "anomaly of treating equal needs differently."[54] The position of opponents of preferential treatment of such injuries and diseases, that is, of the employed over the unemployed, is therefore essentially that the financial needs caused by a certain injury or a disease are the same regardless of the fact if they were caused by work or not. For that reason, the benefits within the social insurance system should be made dependent exclusively on the needs of the victims, that is, on the seriousness of the injury or the disease itself.[55] In the end, essentially,

52 Valentina Forastieri, 'Prevention of psychosocial risks and work-related stress', *International Journal of Labour Research*, Vol. 8, No. 1-2, 2016, 18.

53 Chris Parsons, 'Liability rules, compensation systems and safety at work in Europe', *The Geneva Papers on Risk and Insurance*, Vol. 27, No. 3, 2002, 359.

54 William Beveridge, *Social insurance and allied services: report by Sir William Beveridge* (1942), 38.

55 See: Gerhard Wagner, 'Tort, social security, and no-fault schemes: lessons from real-world experiments', *Duke Journal of Comparative & International Law*, Vol. 23, No. 1, 2012, 34-35.

there are certainly plenty of reasons for and against the application of such preferential treatment, and the author will not go into them in this paper.

The mentioned preferential treatment of work injuries and occupational diseases within the social insurance system of the Republic of Serbia is again reflected in the various benefits that their victims can count on. Thus, an employee who has suffered a work injury or who has suffered from an occupational disease does not need any previous mandatory health insurance period (which is a prerequisite for exercising rights from this insurance in other cases)[56] while, when it comes to the compensation due to the temporary incapacity for work, he/she can count on 100% of the basis for wage compensation.[57] Additionally, if the insured person's disability occurred precisely because of a work injury or because of an occupational disease, he/she can exercise the right to a disability pension regardless of the length of insurance period and regardless of his/her age,[58] while the right to the bodily impairment compensation is prescribed exclusively for the case of a work injury and an occupational disease. Namely, bodily impairment, in accordance with the regulations, exists when the insured person, i.e. the person who is provided with rights in the event of bodily injury caused by a work injury or an occupational disease, suffers a loss, significant damage or significant disability of certain organs or parts of the body – which hinders the normal activity of the organism and requires greater efforts in achieving life's needs, regardless of whether it causes disability.[59] In other words, bodily impairment does not constitute incapacity for work and must not be confused with disability. Thus, a person's capacity for work can be fully preserved even if he/she has a bodily impairment due to a work injury or an occupational disease.[60] A similar solution, for example, can be found in Italian law, according to which an em-

56 Such previous insurance period, in other cases, amounts to three months continuously or six months with interruptions in the last 18 months before the beginning of exercising the rights from the mandatory health insurance, starting with the day when the status of an insured person was acquired in accordance with the law, and for which contribution was paid. LHI, art. 50, paras. 1-3.

57 In other cases (injury or disease outside of work), this type of compensation is significantly lower (65% of the wage compensation basis). LHI, art 95, para 1-2. Additionally, while in the case of a work injury or an occupational disease, the insured person can count on such compensation for the entire duration of the temporary incapacity for work (even after the termination of the employment relationship), in other cases (injury or disease outside of work) such period will be shorter and will last only for the duration of the employment relationship, that is, for the period in which the insured would actually receive wage in accordance with labor regulations. LHI, art. 77, paras. 3, 5.

58 When it comes to a disability caused by an injury or disease outside of work, on the other hand, the insured person acquires the right to a disability pension upon fulfillment of other, additional conditions: 1) if he/she has not reached the age prescribed as a condition for exercising the right to an old-age pension in accordance with the appropriate provision of LPDI, with the additional requirement of having completed five years of insurance period; 2) if the disability occurred before the insured person reached the age of 30, if he/she fulfills the corresponding cumulative requirements regarding age at the time of disability, as well as the length of the insurance period. See. LPDI, art. 25-26.

59 LPDI, art. 37.

60 More on the nature of this compensation in: Mila Petrović (2020), *op. cit.,* 303-305.

ployee can exercise the right to certain social security benefits in the event of a biological injury which, as such, entails the loss of physical or mental faculties of the person which can be legally assessed, and which are, by their nature, independent of the victim's capacity to earn money (e.g. disfigurement).[61] All in all, the benefits that are provided within the framework of mandatory social insurance to insured persons who have suffered a work injury or an occupational disease are not negligible. However, the path to exercising these rights is not always easy. It is, namely, full of thorns, challenges, and sometimes (unfortunately) looks more like a "dead end" than a path.

This claim is especially true when it comes to occupational diseases which, if the above statistics are to be believed in, do not exist in the Republic of Serbia. The practice of non-reporting of occupational diseases in the Republic of Serbia as such, is the product of various factors. First, employers are in no way encouraged to report occupational diseases. A determined occupational disease for the employer is, first of all, a source of various expenses. This starting with the right to the compensation of wages in cases of temporary incapacity for work (which, in accordance with the regulations, is provided at the employer's expense for the entire duration of the temporary incapacity for work, for as long as the employment relationship of the insured lasts),[62] up to the compensation for damages suffered by the employee due to a work injury or an occupational disease.[63] The preposterousness of the entire situation is particularly obvious when it is taken into account that the legal basis for overcoming such a problem already exists, and for a long time at that,[64] since the formation of a special insurance scheme against these two social risks could imply certain privileges both for employers as well as for employees.[65] An additional obstacle is the procedure of determining the occupational disease itself as well. The legislator can thus be held responsible for an unallowable legal gap that actually prevents occupational medicine doctors from determining the existence of an occupational disease, since no relevant regulation regulates the question of who can make a diagnosis of an occupational disease, nor the question of who bears the costs of such diagnostics,[66] while the costs of occupational medicine are not covered by

61 Simonetta Renga, *Social security law in Italy* (2010), 93.

62 LHI, art. 101, para. 3. In the opinion of the author, this solution calls into question the very nature of this benefit – since, even though it is a right guaranteed by the legislation on health insurance, it is, on the other hand, usually a right that is provided out of the pocket of the employer.

63 Law on Obligations (*Official Gazette of SFRY,* Nos. 29/78, 39/85, 45/89 – decision CCY, 57/89, *Official Gazette of FRY*, n. 31/93 and *Official Gazette of RS*, No. 18/2020), art 189, para. 1, art. 190. LL, art. 164.

64 Law on Safety and Health at Work (*Official Gazette of RS*, Nos. 101/2005, 91/2015 and 113/2017 – other law), art. 53.

65 More on this subject in: Mila Petrović, 'Compensation of work injuries and occupational diseases – a comparative approach', *Strani pravni život*, Vol. 63, n. 4/2019, 105-107; Petrović (2020), *op. cit.,* 278-279.

66 Petar Bulat and Milan Petkovski, *Bezbednost i zdravlje na radu: projekat Povećanje kapaciteta i jačanje uloge regionalnih organizacija civilnog društva za poboljšanje uslova rada i socijalnog dijaloga sa javnim institucijama – Studija Srbija* (2018), 64.

health insurance.[67] In this way, occupational medicine doctors can start the process of determination of an occupational disease only on the basis of the regulations that regulate the matter of pension and disability insurance, that is, more precisely, on the basis of the request of the Fund for Pension and Disability Insurance, and this for the purpose of exercising rights within the framework of pension and disability insurance. Certainly, both the employer, as well as the employee, can embark on the "adventure" of determining the occupational disease at their own expense, by contacting the Institute of Occupational Medicine of Serbia on their own initiative[68] which, according to the logic of things, is not a realistic solution. Namely, bearing in mind the high costs of such diagnostics as well as all other costs that a determined occupational disease implies for the employer, it is difficult to even consider the possibility of the employer deciding on this move. On the other hand, the employee will not be able to use this option precisely because of the diagnostics costs – regardless of whether he/she can justifiably believe that his/her disease is a consequence of performing work for his/her employer. This whole situation, moreover, is the cause of additional problems that, in a way, draw attention to a sort of "vicious circle" caused by this kind of oversight of the legislator.

First of all, the key assumption of an adequate preventive occupational safety and health strategy is having clear knowledge regarding the number of accidents and diseases, their severity and causes, as well as the workplaces and industries where they occurred.[69] Therefore, since such data, certainly at least in terms of occupational diseases,[70] are not available in the Republic of Serbia, it is unrealistic to expect that a possibility to determine adequate incentives for employers' economic investments in the prevention of occupational diseases exists.[71] This situation, on the other hand, creates a suitable ground for the "growth and development" of various occupational diseases which, again, as a rule, will not be determined. Furthermore, the impossibility of qualifying a certain disease as an occupational one, will deprive these persons of both the preferential treatment they would be entitled to within the framework of mandatory social insurance, as well as the right to sue employers for compensation of the damage caused to them by such a disease. Thus, the "short end of the stick" in this whole story, as expected, will almost always go to the employees. This entire situation, again, as it was shown by

67 LHI, art. 110, 131.

68 More on the Institute of Occupational Medicine of Serbia at *http://www.imrs.rs/*.

69 International Labour Organisation, *Improvement of national reporting, data collection and analysis of occupational accidents and diseases* (2012), 3.

70 It should be borne in mind that work injuries, that is, serious work injuries, as well as work injuries with a fatal outcome, are much more difficult to conceal (which certainly cannot be said for minor injuries).

71 More on the matter of economic incentives for investments in prevention of work injuries and occupational diseases in: Mila Petrović, 'Prevencija povreda na radu i profesionalnih oboljenja – pojam, troškovi i ekonomski podsticaji za ulaganje u prevenciju', *Pravo i privreda*, No. 7-9, 2019, 679-690.

the COVID-19 pandemic, could possibly also be the cause of gender unequal practices in exceptional cases – which will be discussed in more detail below.

VI PERSONS WITH DISABILITY CAUSED BY THE COVID-19 DISEASE, AS A CONSEQUENCE OF INFECTION WITH THE SARS-COV-2 VIRUS AT WORK

The COVID-19 pandemic has opened a number of questions for jurists. Specifically in the field of labor and social law, these issues were particularly tricky and started with the question of how to organize work so that the standards of safety and health at work are respected in the best possible way,[72] and ended with the question of whether it is possible to qualify the consequences of getting sick with COVID-19, as a consequence of work (where the virus infection originated from work). The last question, at the same time, turned out to be a particularly delicate one in the practice of the Republic of Serbia and, at least to the knowledge of the author, it has not been given a concrete answer to to this day.

Namely, the qualification of the COVID-19 disease as a work injury or as an occupational disease carries a lot of questions with it. On one hand, for a person to become infected, a short period of exposure to the SARS-CoV-2 virus is sufficient – which supports the characterization of the infection as a form of occupational accident that resulted in COVID-19 as a work injury.[73] On the other hand, in support of the qualification of COVID-19 as a type of occupational disease, speaks the practice of recognizing certain infectious diseases as occupational, regardless of the fact that they are not the result of long-term exposure to harmful effects at work.[74] After all, even in comparative law, such problematics has led to a very varied practice – from the quali-

72 That led to the expansion of the practice of working at home and, consequently, to some new open questions for the jurists in the Republic of Serbia. See: Bojan Urdarević and Aleksandar Antić, 'Neka otvorena pitanja u pogledu rada kod kuće za vreme pandemije virusa *Covid-19* u Republici Srbiji', *Radno i socijalno pravo*, No. 2/2020, 32-38. Later, after the discovery of the vaccine, the question of the possibility of establishing mandatory vaccination (especially in activities that were at increased risk of infection) was raised, which again led to, from a legal point of view, extremely questionable pressures on employees and to a very controversial practice. More on this subject in: Mila Petrović, 'Obavezna vakcinacija protiv kovida-19 u radnoj sredini – ključni radnopravni aspekti', *Radno i socijalno pravo*, No. 2, 2021, 19-52.

73 We have already seen that the cause of a work injury has to be an external event, of limited (short) duration, which is related to the work performed by the employee. We have also seen that the disease of the insured, which occurred directly or as an exclusive consequence of an accident or force majeure during the performance of work on the basis of which the insured person is insured or in connection with it, can also be qualified as a work injury.

74 This, for example, is the case with Hepatitis B and AIDS which, as diseases caused by blood-borne viruses, make healthcare workers particularly vulnerable. See. Mirjana Aranđelović and Jovica Jovanović, *Medicina rada* (2009), 205-207, 209.

fication of this disease as a work injury, through its qualification as an occupational disease, up to the possibility for it to be qualified as both, depending on the period of exposure to the virus, as well as the activities in which the employee works.[75]

The lack of practice in this regard in the Republic of Serbia has also led to the dissatisfaction of employees in those activities that were particularly affected by the epidemiological situation. For that reason, some of the trade unions have repeatedly appealed for the amendment of the Rulebook on the Determination of Occupational Diseases (Rulebook),[76] by adding COVID-19 to the list determined by it.[77] Such a, from a formal legal point of view, essentially unnecessary amendment however,[78] one has to admit, would perhaps represent a step that would definitively determine the direction of practice regarding the qualification of this disease as a consequence of infection with the SARS-CoV-2 virus in the working environment. However, this can only be a matter of debate, since such an amendment was not made. The lack of practice in this regard, again, potentially led to discrimination of employees who fell ill with COVID-19 precisely due to performance of their work and who, in connection to that, had suffered some serious health deteriorations (e.g., if they became incapable to work any further).[79] Additionally, it possibly even led to further deepening of the differences within that group.

In the Republic of Serbia, after the outbreak of the COVID-19 disease, and during the state of emergency, which was declared for the purpose of being able to fight against the epidemic more efficiently, civil requisition (an obligation of work) was introduced in the healthcare.[80] This measure, although necessary at the given moment, was, at the same time, carried out in a completely contro-

75 More on this subject in: Mila Petrović, 'Oboljenje kovid 19 – povreda na radu ili profesionalna bolest?', *Strani pravni život*, Vol. 66, No. 1, 2022, 43-58.

76 *Official Gazette of RS*, No. 14/2019.

77 Inicijativa za hitnu dopunu propisa i klasifikovanje *COVID–19* virusa profesionalnom bolešću, *http://www.sindikatlfs.rs/inicijativa-za-hitnu-dopunu-propisa-i-klasifikovanje-covid-19-virusa-profesionalnom-bolescu/.;* Zahtev za izmenu i dopunu Pravilnika o utvrđivanju profesionalnih bolesti kako bi se bolest Kovid-19 proglasila kao profesionalno oboljenje zaposlenih u zdravstvu, *https://www.smsts.org.rs/2021/10/07/zahtev-za-izmenu-i-dopunu-pravilnika-o-utvrdjivanju-profesionalnih-bolesti-kako-bi-se-bolest-kovid-19-proglasila-kao-profesionalno-oboljenje-zaposlenih-u-zdravstvu/*. This due to the fact that only the diseases found on the list contained within the Rulebook have the possibility of being qualified as occupational.

78 Since paragraph 50 of the Rulebook (in the section of the Rulebook which deals with diseases caused by biological agents) provides the possibility of such a qualification, even though COVID-19 per se is not on the list. This due to the fact that it mentions "diseases caused by direct contact with other biological agents at work which are not previously listed and for which there is scientific/literal evidence or for which there is evidence from practical experiences."

79 Bearing in mind the fact that, as already mentioned, in the case of a disability caused by a work injury or an occupational disease, social insurance rights are to be exercised on more favorable terms.

80 Decree on Measures during the State of Emergency (*Official Gazette of RS*, No. 31/2020, 36/2020, 38/2020, 39/2020, 43/2020, 47/2020, 49/2020, 53/2020, 56/2020, 57/2020, 58/2020, 60/2020, 126/2020 – decision CCRS), art. 3a.

versial manner, i.e., with potential violations of the labor rights of healthcare employees.[81] In this way, women found themselves in a particularly vulnerable position, since they make up the majority of the frontline workforce within the healthcare,[82] while it can be justifiably suspected that a large part of them, in fear of losing their jobs, worked even in cases when adequate safety and health protection measures at work were not applied.[83] Therefore, it is legitimate to expect that they were also more susceptible to infection – although such statistical data are not available for the territory of the Republic of Serbia. However, this conclusion can be supported, in a way, by the statistics that are available in this regard for some other countries. In that sense, greater representation of women in the healthcare has reflected on the number of requests for recognition of COVID-19 as a consequence of work for the purpose of obtaining the right to social insurance benefits in Italy,[84] Germany[85] and Croatia.[86] Moreover, the whole situation is not helped by the fact that women in the Republic of Serbia also make up the majority of the workforce in other activities that have also proven to be high risk activities for contracting COVID-19.[87] Therefore, bearing in mind that the practice in the Republic of Serbia has not yet taken a stand regarding the eventual qualification of the COVID-19 disease as a work injury, that is, as an occupational disease, it can be reasonably expected that

81 Again, this is not surprising, bearing in mind the fact that civil requisition as such, is an institute primarily governed by military regulations and not by labor regulations, as well as that it has a peculiar nature, i.e., that it cannot be considered to be an employment relationship. More on this subject in: Sarita Bradaš, Mario Reljanović and Ivan Sekulović, *The impact of the COVID-19 epidemic on the position and rights of workers in Serbia with particular reference to frontline and informal economy workers and multiply affected worker categories* (2020), 21-23.

82 Women make up as much as 76.75% of employees in the healthcare. Marijana Pajvančić, Nevena Petrušić, Sanja Nikolin, Aleksandra Vladisavljević and Višnja Baćanović, *Rodna analiza odgovora na Kovid-19 u Republici Srbiji* (2020), 115.

83 After all, the pandemic has produced a lack of personal protective equipment at work on a global level. Talha Burki, 'Global shortage of personal protective equipment', *The Lancet/Infectious diseases*, Vol. 20, No. 7, 2020, 785–786. *https://doi.org/10.1016/S1473-3099(20)30501-6*.

84 In the period between the first of March and the 31 of October of the year of 2020, the ratio between requests submitted by women and the number of requests submitted by men, was 45.914: 19.890. Alessandro Marinaccio, Adelina Brusco, Andrea Bucciarelli, Silvia D'Amario and Sergio Iavicoli, 'Temporal trend in the compensation claim applications for work-related COVID-19 in Italy', *La Medicina del Lavoro*, Vol. 112, No. 3, 2021, 224.

85 Among the reported cases of people suffering from COVID-19 in the healthcare, in the period up to May 25, 2020, a significant majority of those affected were women (73%). Albert Nienhaus and Rozita Hod, 'COVID-19 among healthworkers in Germany and Malaysia', *International Journal of Environmental Research and Public Health*, Vol. 17, No. 13, 2020, *https://doi.org/10.3390/ijerph17134881*.

86 Hrvoje Lalić, 'COVID-19 as occupational disease in healthcare workers: a brief review of cases in the Clinical Hospital Centre Rijeka, Croatia', *Archives of Industrial Hygiene and Toxicology*, Vol. 72, No. 3, 2021, 241.

87 They make up as much as 76.75% of employees in the social protection activities, while in the trade activities the share of women in the number of employees is 55.23%. Pajvančić, Petrušić, Nikolin, Vladisavljević and Baćanović, *op. cit.*, 115.

women employed in certain activities (such as the healthcare) have been placed in a particularly disadvantageous position. This in light of the fact that they will not be entitled to the mentioned preferential treatment within the social insurance, which they would have the right to if such a disease was to be qualified as a work injury or an occupational disease. The unfairness of this position is probably visible the most in those cases where the disease itself produced serious consequences to the health of the employees (disability followed by total incapacity for work). In this way therefore, within an already particularly vulnerable category (the disabled), in the conditions inherent to the COVID-19 disease epidemic an additional vulnerable subgroup (diseased women) was potentially created.

Admittedly though, for some employees (including the ones who work in activities which proved to be the most vulnerable ones, and which mostly employ women) some benefits have been granted. This, however, primarily in the public sector and regarding the right to a wage compensation on the basis of temporary incapacity for work. Namely, some of the special collective agreements in certain activities within the public sector (such as healthcare and social protection), have established the entitlement of the employees (the ones with disabilities included) to an increased compensation on the basis of temporary incapacity for work.[88] However, the reason which makes this practice particularly important for this part of the research is the fact that, according to the LHI, in the event of prolonged incapacity for work caused by an illness or an injury, and at the latest after the expiration of every six months of continuous incapacity for work, i.e. if the insured has been incapacitated for 12 months with interruptions in the last 18 months, the obligation exists for that person to be referred to the disability commission which will determine if that persons has suffered the loss of working capacity or not.[89] Because of that, therefore, if the incapacity which resulted from the COVID-19 disease has not yet been determined in an employee that works within those particular activities within the public sector (in some of which women employees make up the majority) which are covered by such collective agreements, he/she will at least have the right to a compensation of wages he/she would practically be entitled to if he/she suffered a work injury or an occupational disease. However, this practice proved to be a controversial one. This, due to the fact that the introduction of the Conclusion of the government,[90] which essentially represents the legal basis for this practice, raised the question of the potential discrimination of the employees who work in the private sector, as well as the discrimination of the employees who were not vaccinated against COVID-19.[91]

88 Special collective agreement for health institutions whose founder is the Republic of Serbia, an autonomous province and a local government unit, (*Official Gazette of RS*, Nos. 96/2019 and 58/2020 – Annex I), art. 101a; Special collective agreement for social protection in the Republic Serbia (*Official Gazette of RS*, Nos. 29/2019 and 60/2020), art. 64a.

89 LHI, art. 80, para. 2.

90 Conclusion of the Government of the Republic of Serbia, 05 No. 53-3008/2020-2, (*Official Gazette of RS*, Nos. 50/2020 and 46/2021).

91 More on this subject in: Urdarević and Petrović (2021).

VII CONCLUSION

The position of disabled workers, that is, of those persons who are *completely incapable of working*, as well as of those persons who are *faced with reduced prospects of finding and keeping a job*, in the Republic of Serbia is, at first glance, regulated in detail. However, there are many omissions when it comes to legislative, due to which, a seemingly adequate formal legal protection of these persons, in practice can prove to be discriminatory and unfair. Not only that are disabled people who are not completely incapable of working deprived of social security benefits, but they are, at the same time, also placed in a fundamentally unequal position in their working environment (which goes against the principle of positive discrimination, which should also include stimulation of employers to preserve the employment of these persons). On the other hand, due to omissions, that is, due to legal gaps in the legislations concerning social insurance, the preferential treatment that that same system is supposed to provide to persons who have become completely incapable to work precisely due to performance of their work tasks, is also seriously questioned. This, in turn, further leads to other consequences, such as the impossibility of establishing an adequate preventive safety and health policy at work, as well as the impossibility of employees demanding compensation for damages caused in this way from their employers. In this sense, employees, as usual, in the end in practice become a "collateral damage" of exactly those regulations that should, in principle, provide them with protection. The epidemic of the COVID-19 disease only thus placed an additional burden on the already insufficiently functional system, potentially creating an additional vulnerable subgroup (disabled women) within an already particularly vulnerable category (the disabled). This, considering the fact that the most worrisome subject of the research, where the probable consequences for the disabled women may be felt, is definitely the pension and disability insurance in which, due to the COVID-19, a danger of particular discrimination in relation to this group lies.

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PRAVNI POLOŽAJ ZAPOSLENIH SA INVALIDITETOM PROUZROKOVANIM POVREDAMA NA RADU ILI PROFESIONALNIM BOLESTIMA U REPUBLICI SRBIJI – POSLEDNJI MEĐU JEDNAKIMA?

Apstrakt

Predmet ovog rada jeste položaj zaposlenih sa trajnim zdravstvenim posledicama prouzrokovanim povredom na radu ili profesionalnom bolešću. Naime, notorna je činjenica da se lica čije je zdravlje pogoršano i koja zbog toga u određenoj meri nisu radno sposobna (u potpunosti ili delimično) svakodnevno suočavaju sa određenim poteškoćama manjeg ili većeg obima. U Republici Srbiji, tako, lica koja su potpuno nesposobna za rad zavise od funkcionalnosti sistema socijalnog osiguranja, a što nameće zahtev za odgovarajućom politikom socijalnog osiguranja. S druge strane, lica čija je nesposobnost za rad delimična (preostala radna sposobnost), suočavaju se sa različitim preprekama na tržištu rada – od borbe za zaposlenje do borbe da se status zaposlenog lica održi bez daljih posledica po njihovo zdravlje ili radnu sposobnost. Ovakva borba opet ne može i ne treba u potpunosti biti prevaljena na pleća takvih lica, zbog čega je zadatak države da ih stavi u poziciju koja je relativno slična onoj u kojoj se nalaze ostala lica.

Normativni okvir u Republici Srbiji, s druge strane, u tom smislu ima mnogo propusta, zbog čega se naizgled adekvatna formalnopravna zašti-

ta ovih lica u praksi može pokazati kao diskriminatorna i nepravedna. Ne samo da su lica sa preostalom radnom sposobnošću lišena prava na davanja u okviru penzijskog i invalidskog osiguranja po tom osnovu, već se ona istovremeno u radnoj sredini nalaze u suštinski nepovoljnijem položaju u odnosu na ostale zaposlene. S druge strane, zbog pravnih praznina koje postoje u propisima kojima se uređuje socijalno osiguranje, ozbiljno se dovodi u pitanje i preferencijalni tretman koji bi taj sistem trebalo da pruži licima koja su postala potpuno nesposobna da rade, upravo, zbog izvršavanja svojih radnih zadataka. Epidemija bolesti *COVID-19* samo je stoga dodatno opteretila već ionako nedovoljno funkcionalan sistem, potencijalno stvarajući dodatnu ranjivu podgrupu (žene sa invaliditetom) u okviru već posebno ranjive grupe (osobe sa invaliditetom).

Ključne reči: *Republika Srbija; Povreda na radu; Profesionalna bolest; Invalidnost; Diskriminacija.*

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DISCRIMINATION OF GIRLS AND WOMEN WITH DISABILITIES IN EDUCATION AND EMPLOYMENT

Abstract

In labour law, women with disabilities belong to the vulnerable category, faced with double discrimination. Unequal treatment is based on sex and disability, which poses a double burden when accessing rights, institutions, education and finally employment. In this paper, the authoress stands that unequal treatment at the earliest age for girls compared to boys with disabilities in medical help, education and vocational training make a lower representation of women with disabilities in the labour market. This results in living in poverty, financial dependence on other family members and the social security system, abuse and sexual harassment. In theory, education, vocational training and employment are considered crucial for getting out of the isolation of this group. Mutually connected, education will set forth for vocational training, which will contribute to the possibility of getting to know new skills that are needed for employment. Earnings make women with disabilities financially independent and less at risk of poverty. Research has shown that more is invested in improving the health of boys with disabilities than girls. Furthermore, girls with disabilities are almost excluded from education. This is due to the lack of inclusive measures such as the mismatch of learning resources, transport and classrooms. The literacy rate of this category is as low as the education rate. As a result, women with disabilities are less likely to be employed, as well as to have the same earnings as colleagues with or without disabilities. The work of this category is insufficiently evaluated under the influence of the stereotype that women with disabilities are not intelligent enough for education, that education is unnecessary for them, that they are not able to earn, and that their place is at home, which makes them financially dependent on other family members, bringing them to poverty.

Key words: *Women with disabilities; Unequal treatment; Double discrimination; Vulnerable categories.*

I INTRODUCTION

Persons with disabilities, both men and women, are faced with discrimination because of their impairment, forming „a stigmatized minority group".[1] Girls and women are especially vulnerable and this is caused both by gender and disability. We can say that their vulnerability caused by disability is reinforced by the fact that they are female. Some authors stressed the importance of gender as a dimension, that differs the position of women and men in society, due to unequal access to resources and roles in households.[2] Others explain that this „double handicap" is caused by the impossibility of women with disabilities to fulfil the role given by society.[3] Gender does matter, having in mind a lower proportion of employment of this category, women with disabilities are less likely to work full time, as well as opportunities to work in low-status jobs.[4] It is estimated that there are one billion people in the world who belong to the group of disabled, and the prevalence is on the female side.[5] Men and women differ when it comes to disability since women have a higher rate of disability in comparison to men.[6] This double discrimination has an impact on the lives of this particular group. Some of the authors stand that they represent the most isolated group in society.[7] Beyond double discrimination, women with disabilities are usually connected with the stigma of „weakness", which is the product of their gender and disability, sometimes and race.[8] It is also argued that women with disabilities are not able to live everyday life independently compared to men with disabilities and women without impairments.[9] Research of their position is therefore highlighted by the fact that we need to get to know their

1 Katherine E. McDonald, Fabricio E. Balcazar, Christopher B. Keys, "Youth with disabilities", in D. L. DuBois & M. J. Karcher (eds.), *Handbook for youth mentoring*, SAGE publication (2005), 493. For more see: Mario Reljanović, "Iskustva država članica Evropske unije u sprečavanju diskriminacije pri zapošljavanju", *Strani pravni život*, No. 3, 2010.

2 Mitch Loeb and Lisbet Grut, *Women with disabilities sharing knowledge: education, employment, reproductive history* (2005), 5.

3 *Ibid.*, 4.

4 Jennifer Hoganson, Eleanor Gil-Kashiwabara, Sarah Geenen and Laurie Powers, *Supporting girls with disabilities as they transition to adulthood, an awareness document for parents, youth, advocates and professionals*, *https://pathwaysrtc.pdx.edu/pdf/pbSupportingGirlswithDisabilities.pdf* (06.09.2022), 2.

5 *The empowerment of women and girls towards full and effective participation of gender equality* (2018), 10.

6 Christopher McLaren, David Rosenblum, Meredith DeDona *et al., Spotlight on women with disabilities* (2021), 4.

7 *Integrating women and girls with disabilities into vocational mainstream vocational training, a practical guide* (1999), 2.

8 Carol Boyer, "Job challenges of women with disabilities 25 years after the A.D.A.", *Regional Labour Review*, Vol. 17, No. 2, 14.

9 Loeb and Grut, *op. cit.*, 3.

position to improve it. It is mentioned the need for „a paradigm shift", that will enable women with disabilities to be entailed to their rights.[10] Women with disabilities are not a homogenous group, they defer through their impairments and as a result, they are put to „extreme margins and experience profound discrimination."[11] As for that, they can not be treated equally, so they are looking for an individual approach. They have different manifestations of a disability, such as mental, physical and sensorial. It seems that there are systematic barriers that prevent women with disabilities from accessing full education, the health system, information and service, justice and employment and they face violence, abuse, and sexual violence.[12] For some authors, women with disabilities are in the circle of neglect, isolation, and poverty, pointing to three areas that are crucial for getting out.[13] Those are seen in education, vocational training, and employment. The prerequistite of getting opportunities in the labour market is seen in education. Getting knowledge from school is the base for vocational training. New skills could open the possibility of finding a job more easily or a well-paid job. That is why the author stressed that unequal treatment in education and vocational training causes unequal treatment in employment and society, depriving women with disabilities of abilities and opportunities.

Discrimination is not the only thing that girls and women with disabilities are facing. This group is recognized as the one at high risk of violence. Not only do they face the same violence as girls and women without disability, but they are also victims of special forms of violence that is „particular to their situation of social disadvantage, cultural devaluation and increased dependency."[14] Moreover, women with disabilities are proportionally more faced with abuse and violence than men with disabilities or women without impairment. One research shows that 83 per cent of women with disability have experienced sexual violence.[15] There is also a connection between sexual violence and education because this kind of violence is recognized as a significant problem for girls with disabilities in schools in the USA, Kenya, and Tanzania.[16] It is noted that girls with disability are at higher risk of becoming victims of sexual harassment and violence, particularly girls with multiple disabilities in comparison to non-disabled girls. The risk of violence is seen as one of the limits for girls with disabilities to get an opportunity to educate because girls with disabilities are seen as helpless and in

10 *Achieving gender equality, women's empowerment and strengthening development cooperation* (2010), 146.

11 *The empowerment of women and girls towards full and effective participation of gender equality*, *op. cit.,* 11.

12 *Ibidem.*

13 *Integrating women and girls with disabilities into vocational mainstream vocational training, a practical guide*, *op. cit.,* 4.

14 Women with disabilities in Australia, *Stop the violence, background paper* (2013), 25.

15 Boyer, *op. cit.,* 15.

16 Harilyin Rousso, *Education for all: a gender and disability perspective* (2003), 11–12.

constant need of protection.[17] According to some reports, parents are hesitant to send their daughters with disabilities to school. Their fear might be seen as a stereotype nowadays and does not justify the isolation of girls with disabilities to be safe.

II LEGAL FRAMEWORK

Legal intervention for protection of women with disabilities started with recognizing people with disabilities as members of society in need of provisions.[18] There was a long path from taking the lives of children who were born with some kind of disabilities, through the neglect of their existence until accepting them as part of society.[19] The last one is still a goal to achieve in modern societies.

The legal protection of girls and women with disabilities is based on several international documents. Convention on the Rights of the Child (UNCRC)[20] is one of the most important legal documents issued by the United Nation. Even though it does not concern women with disabilities, it is related to children with disabilities by imposing the ban on discrimination. As in the past decades, children with disabilities were not likely to survive, the right to live and to live with their parents should be understood as a milestone. As for children with disabilities, the important proclamation is the one that is constituted, as well as regarding the prohibition of violence, to save health status. This document also provides the right to a decent life for children with disabilities, as well as the right to special medical care.

The Convention contains article 23 that guarantees the rights of children with disabilities. This document guarantees special care for children with any type of disability, as well as all other rights that are stipulated in the Convention and that are necessary for independent living.[21] UN especially points to Beijing Declaration and platform for action, providing activities for independence, inclusion, and development of girls with disabilities.[22]

Last but not least, we should also mention the Convention on the Rights of Persons with Disabilities and its optional protocol (CRPD)[23]. It is

17 *Ibid.*, 12.

18 Jasmina Petrović, "Pravni status osoba sa invaliditetom", in Tatjana Stefanović-Stanojević and Ninoslav Krstić (eds), *Osobe sa hendikepom, prava, mogućnosti i razvoj*, Odbor za građansku inicijativu, Niš, 2005, 25.

19 *Ibid.*, 13.

20 Convention on the Rights of the Child (1989) Treaty no. 27531. *United Nations Treaty Series*, 1577, *https://www.ohchr.org/en/professionalinterest/pages/crc.aspx* (05.11.2021).

21 *The empowerment of women and girls towards full and effective participation of gender equality*, *op. cit.*, 12.

22 *Ibidem.*

23 Convention on the Rights of Persons with Disabilities, *United Nations Treaty Series* 2515, 2006, *https://www.un.org/development/desa/disabilities/convention-on-the-rights-*

one of the most important documents that stipulate various forms of discrimination against women with disabilities, providing measures for their empowerment.[24] Article 6 recognizes women with disabilities as double discriminated group in a need of special measures for full and equal employment.[25] Committee on the Rights of Persons with Disabilities stands that this article provides a way of implementing antidiscriminatory measures to provide human rights to women with disabilities.[26] This article aims to protect women with disabilites and to encourage and help them to advance in employment. That is why measures enacted by national law must be economical.[27] The Committee is concerned about the boundaries that girls with disabilities are facing in education, because of the stereotypes that encourage discrimination.[28] Huge problems for women with disabilities remain in employment, besides the problems of all persons with disabilities, such as unequal opportunities to enter the labour market, sexual harassment, and unequal pay.[29]

III DISCRIMINATION OF GIRLS WITH DISABILITIES IN EDUCATION

At the beginning of this chapter, it should be noted that children with disabilities were excluded from education for decades since the prevalence of the medical method for understanding disability.[30] This method was widely accepted and has led to total social isolation for both girls and boys with disabilities, including education.

Education is important for all members of society, especially for girls and women with disabilities. Equal opportunities for taking part in the state school education system is the first step for making equal treatment in society. For girls with disabilities, it is the way to get out of the invisible zone and represents a starting point for vocational training. Vocational training aims to finding employment that is appropriate and adequate for the knowledge and education of women with disability. New skills are crucial for finding a decent job.

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of-persons-with-disabilities/convention-on-the-rights-of-persons-with-disabilities-2.html (14.11.2022).

24 *The empowerment of women and girls towards full and effective participation of gender equality*, *op. cit.,* 12.

25 Convention on the Rights of Persons with Disabilities, article 6.

26 *General comment No. 3 (2016), Article 6: Women and girls with disabilities,* Committee on the Rights of Persons with Disabilities, CRPD/C/GC/3, 2, para. 7.

27 *Ibid.*, 7, para. 21.

28 *Ibid*., 16, para. 56.

29 *Ibid.,* 16-17, para. 58.

30 *Situaciona analiza: Položaj dece sa smetnjama u razvoju i invaliditetom u Srbiji* (2017), 20.

Even though education is highly valued, it is notable that there is a lack of children with disabilities who take part in the education system. Some authors stand that this is the result of the stereotype that children with disabilities are not able to learn and they should not be put through the stress of learning.[31] Earlier in Serbia, there were incoherences of legal provisions, that did not provide the inclusion of children with disabilities in the education system.[32] The last century was marked by special education for children with disabilities, who attended special schools and separated classes within regular schools. It was notable that boys with disabilities were more likely to attend special education in elementary and secondary school and some authors stressed that this overrepresentation is the result of discrimination. In education, boys with disabilities are seen as future breadwinners of the family, considering that it is more important for them to learn new skills, than girls with disabilities.[33] One research in the USA has shown the significance of gender roles in special education, therefore, boys often have different, advanced education than girls with disabilities.[34] The latest statistics available for Serbia from 2014 have shown that 38 per cent of girls with disabilities attended primary and secondary education.[35] The gap between girls and boys in education is still present in Africa, having in mind the statistics published in 2021.[36] This statistic shows the low rate of girls involved in primary schools, and also a small per cent of women with disabilities who can write and read. The situation in most countries in Africa is specific and obstacles for girls with disabilities to get an education are multiple: girls with disabili-

31 Nora Groce and Maria Kett, *Youth with disabilities* (2014), 7.

32 Mirna Kosanović, Saša Gajin and Dejan Milenković, *Zabrana diskriminacije u Srbiji i ranjive društvene grupe* (2010), 96. In Serbian law, in Act on Primary Education and Upbringing, *Official Gazette* No. 55/2013, 101/2017, 10/2019, 27/2018, 129/2021, has been prescribed that children with disabilities are taking part in the education system together with the children without disabilities, or in separated schools, only when that is in their best interests. In order to get inclusive education for children with disabilities, schools are permitted to hire tutors from schools that are specialised for education of children with disabilities. The school rule of education, accordnig to this Act, must be adapted to the needs of children with disabilities, including books, and there can be up to two children with disabilities in one class.

33 Rannveig Traustadottir and Perri Harris, *Women with disabilities: issues, resource, connections revised* (1997), 18-19.

34 *Ibidem.*

35 *Situaciona analiza: Položaj dece sa smetnjama u razvoju I invaliditetom u Srbiji*, *op. cit.,* 41. There is also a record of Commissioner for Protection of Equality in 2016 that 80 percent of girls with disabilities in Serbia never took part in education system in Serbia, for more: Održan skup "Prava žena i devojčica sa invaliditetom", Tim za socijalno uključivanje i smanjenje siromaštva, *https://socijalnoukljucivanje.gov.rs/sr/%D0%BE%D0%B4%D1%80%D0%B6%D0%B0%D0%BD-%D1%81%D0%BA%D1%83%D0%BF-%D0%BF%D1%80%D0%B0%D0%B2%D0%B0-%D0%B6%D0%B5%D0%BD%D0%B0-%D0%B8-%D0%B4%D0%B5%D0%B2%D0%BE%D1%98%D1%87%D0%B8%D1%86%D0%B0-%D1%81/* (17.11.2022).

36 *Prepreke obrazovanju devojčica sa invaliditetom u Africi*, *http://portaloinvalidnosti.net/2021/02/prepreke-obrazovanju-devojcica-s-invaliditetom-u-africi/* (17.11.2022).

ties are badly treated at home because they are a "shame" for the family, they are forced to beg and that is one of the income of the family, their body is known as magical and because of that, girls with disabilities are victims of sexual harassment, and eventually, the education of girls with disabilities in Africa is nothing but a cost.[37] Stereotype that girls with disabilities don't need education is a stereotype permanently present in other cultures.[38]

Also parents have different attitudes regarding their children with disabilities and boys will be allowed to use multiple kinds of transportation, considering that they are more reasorsful and willing to take a risk to overcome obstacle, friendly and not fragile in comparison with girls with disabilities.[39] As for higher education, women face obstacles as men with disabilities, such as the lack of accommodation entry to a building, and reference materials and books. But, women with disabilities face other, additional obstacles, that are peculiar only to them. They are challenged with the stereotypes related to gender roles and occupational segregation. They struggle if they have the motivation to educate in the fields that are „male-dominated." For that reason, they are usually advised to focus on traditional female fields, such as special education and humanities.[40]

Women with disabilities are less educated in comparison to men with and without disabilities.[41] Some authors point to the reasons for the invisibility of disabled girls.[42] Their biggest barrier is that they are not in the focus of those who make decisions in the employment system, nor those who care about educational equity. There is a study confirming how the stereotype „women with disabilities don't need education" actually affects the decision of this category to take part in the school system.[43] Similarly, there are opinions that education is not for girls with disability, their place is at home, although there is doubt that women with disabilities can take the role of mothers, nurtures, wives, and homemakers.[44] Other researcher calls it „cultural bias", referring to the fact that boys with or without disabilities are the main earners and why the opportunities for new knowledge should be given to brothers in families, rather than sisters.[45] Other authors agree with that adding that these cultural biases reduce

37 *Ibidem.*

38 Nguyen Thi Nhu Trang *et al*., "Promoting inclusive education for girls with disability: reviewing theoretical and legal framework", *VNU Journal of Science: Policy and management studies*, Vol. 37, No. 4, 2021, 16.

39 Rousso, *op. cit.*, 15.

40 Traustadottir and Harris, *op. cit.*, 21.

41 *Ibid.,* 18.

42 Rousso, *op. cit.*, 4.

43 Belaynesh Tefera, MarloesL. van Engen, Alice Schippers, Arne H. Eide, Amber Kersten-Jacvan der Klink, "Education, work and motherhood in low and middle-income countries: a review of equality challenges and opportunities for women", *Social Inclusion*, Vol. 6, No. 1, 2018, 86.

44 Rannveig Traustadottir, *Women with disabilities: issues, resources, connections* (1990), 13.

45 Rousso, *op. cit.,* 7.

family expectations and resources for schooling girls with disabilities.[46] Also, some parents don't think that education is important for girls with disabilities, since they are not likely to get married and therefore they stay hidden at home. Some views create the stigma that disability is „punishment for past sins, misfortune or witchcraft."[47] This stereotype leads girls with disabilities to isolation, because parents, to protect them, hide them at home or in institutions, making distance from social life and sometimes from their own. In addition, there is research that shows that girls with disabilities in the USA do not take part in after-school activities because of the „patronizing attitudes by the school" and fear of parents of sexual and physical abuse from male assistants, as well as the thinking that their daughters are not able to take their own decisions.[48] Some claim that reason of the lower rate of women in education is caused by the stigma that they are unable or unworthy of education.[49] It is also interesting to notice, that parents of children with disabilities connect the cost of education and gender, considering that the education of girls will be more expensive due to transportation or accommodate equipment.[50] Transportation is also seen as a burden for girls with disabilities to educate.[51] This is meant for a family with a limited budget, therefore there is a stereotype that transportation for girls with disabilities is more expensive than for boys because of the accompaniment that is needed only for girls. The costs might be higher for additional help for girls with disabilities in transportation that is not adjusted to their needs, as well in the case when girls are not able to walk to school.[52] In our opinion, the underrepresentation of girls with disabilities in the education system can't be explained by different costs, because this fact is not gendered determined, and listed support may be needed on the same terms for girls and boys with disabilities. Some authors stressed that there is a relationship between the type of disability and education.[53] As a result, girls with mobility disabilities may have more opportunities, i.e access to education, rather than those who are blind and deaf. In addition, girls with disabilities living in rural places are not given the same chance as those living in bigger cities to educate.[54] In the last decade, women with disabilities have decreased the employment gap compared to men, but the difference is still significant, especially when it comes to bachelor's degrees and higher education.[55]

46 Groce, Kett, *op. cit.*, 8.

47 *Ibid.,* 5.

48 Donna M.Mertens, Amy Wilson and Judit Mounty, "Gender equity for people with disabilities", in Susan S. Klein, Barbara Richardson, Dolores A. Grayson, Lynn H. Fox, Cheris Kramarae, Diane S. Pollard, Carol Anne Dwyer (eds), *Handbook for achieving gender equity through education* (2007), 591-592.

49 Tefera, Van Engen, Schippers, H. Eide, Kersten and Der Klink, *op. cit.,* 86.

50 Rousso, *op. cit.*, 7.

51 *Ibid.,* 16.

52 *Ibidem.*

53 *Ibid.*, 6.

54 *Ibidem.*

55 Christopher McLaren, David Rosenblum, Meredith De Dona *et al.*, *Spotlight on women with disabilities* (2021), 8.

IV DISCRIMINATION OF WOMEN WITH DISABILITY IN EMPLOYMENT – STATISTICS AND REASONS

The right to work is essential for every human being since „the right to work is an inherent part of human dignity."[56] That statement is the reflection of the fact that work is a source of existence of an individual and his family, but also provides development of a working person, recognition in society, as well as matter of the fact that health status, housing, etc. depends on the implementation of this right.[57]

The importance of work is considered crucial for women with disabilities. Some of the authors stressed that work is fundamental for improving their human rights, and bringing successful community living.[58] In theory, we can find information that men with disabilities are more likely to find and keep a job compared to women with disabilities and that is seen in the employment proportion.[59] Therefore, it is no wonder that the latest statistics show a prevalence of employment of men with disabilities.[60] Rate of unemployment is 50% higher when it comes to women with disabilities and it doubles when we compare it with their non-disabled colleagues.[61] Women with disabilities face several types of discrimination in employment: the rate of unemployed women with disabilities is higher than men with a disability; earning less, they are employed in lower status than men with disabilities and are less likely to find full-time employment compared to their male counterparts.[62] Besides the fact that it is a way to earn a salary, employment for women with disabilities constitutes an opportunity to get social connections, interact with other people, and get new knowledge.[63] This is also seen in other authors' opinions.[64] Therefore, professional inclusion contributes to better quality of life.[65] Besides that, it affects self-confidence and in that way, women with disabilities become part of society. That may be seen in the result of one

56 Ljubinka Kovačević, "Protection of the persons with disabilities from employment discrimination, with a focus on Serbian legislation and practice", *Pravni vjesnik*, Vol. 30, No. 2, 2014, 69.

57 *Ibidem.*

58 Sandrine Gaymard, "Social representation of work by women and young girls with intellectual disabilities", *Life Span and Disabilities*, Vol. XVII, No. 2, 2014, 150.

59 Traustadottir and Harris, *op. cit.*, 16. For more see: Jovana Rajić, "Problem zapošljavanja lica sa invaliditetom", *Strani pravni život*, No. 3/2016.

60 McLaren *et al., op. cit.*, 7.

61 Groce and Kett, *op. cit.*, 9.

62 M. Mertens, Wilson and Mounty, *op. cit.,* 593.

63 *Integrating women and girls with disabilities into vocational mainstream vocational training, a practical guide*, *op. cit.,* 5.

64 Gaymard, *op. cit.,* 161. Serajul Haq finds that employment for women with disabilities brings economic independence, social connections, and integration among non-disabled communities.

65 *Ibid.,* 152.

research, that unemployment is especially hard for women with disabilities, who feel less valuable and rejected by society.[66] There is a special connection between education and employment, besides the fact that the quality of a job is determined by the level and quality of education. There is an „education to employment transition" that leads to independence. Some authors stand that societies should do more to make this transition easier and more successful.[67] The significance of this relationship is also seen in the quality of life and bears the risk of poverty. Families with disabled members have more financial demands for medical care and other disability-related costs.[68] Lower-educated women with disability are faced with the difficulty of finding a job or they work for a salary of a lower rate. On the other hand, highly educated women with a college degree are less likely to live in poverty compared to women with disability who have less than high school.[69] Some authors confirm that women with disabilities are in concerning situation than men when it comes to poverty, including education as an indicator.[70]

Discrimination of women with disabilities in employment is caused, among other things, by gender stereotypes including women and men with or without disabilities. The place for women is seen at home and that is especially meant for those with disabilities. Their job is less valued, and that is the result of gender roles that are arranged for women and men. As men are seen as breadwinners and decision-makers, there are fewer opportunities for women with and without disabilities to work and be earners. Some of the authors stand that women with disabilities are disadvantaged because their work is seen as secondary to men's.[71] There is also a stereotype that women with disabilities are not valuable as workers. Because of their health, it is presumed that they use frequently sick leave and that employer needs to have substitution. Some of the authors add stereotypes such as those that they are helpless, childlike, and incompetent.[72] On the contrary, when women with disabilities are given the opportunity to work, they show loyalty and are highly motivated and reliable to prove their skills, to earn money but also this is a chance for them to become an active member of society.[73]

Even when women with disabilities are given the chance to work, they are faced with another type of discrimination. Unequal pay for the same job for men and women is present in the performance of the job of women with disabilities. Research in the USA has shown that women with disability earn

66 Andreja Barišin, Tomislav Benjak and Gorka Vuletić, "Health-related quality of life of women with disabilities in relation to their employment status", *Croatian Medical Journal*, No. 52, 2011, 551.

67 Boyer, *op. cit.,* 16.

68 Groce and Kett, *op. cit.*, 6.

69 Boyer, *op. cit.,* 16.

70 Tefera, Van Engen, Schippers, H.Eide, Kersten and Der Klink, *op. cit.,* 86.

71 *Integrating women and girls with disabilities into vocational mainstream vocational training, a practical guide*, *op. cit.,* 3.

72 Rousso, *op. cit.*, 4.

73 *Integrating women and girls with disabilities into vocational mainstream vocational training, a practical guide*, *op. cit.,* 4.

72 cents to every dollar that is earned by men with disability and 80 cents to one dollar earned by women without disabilities.[74] Also, women with disabilities are not given the same chances to choose the type of job. Statistics have shown that women with disabilities are given the opportunity to work in service or sales, rather than in management and other related occupations that are well-paid.[75] The specific challenge is seen in lower opportunities for women with disability to live in rural places for employment compared to nondisabled women living in the same place.[76] It is believed that obstacles that women with disability in rural places face are reinforced, especially opportunities for education and isolation.

As a result of unequal treatment, women with disabilities are more likely to be poor. Poverty is described as a lack of „money, knowledge, skills, and social connections."[77] There is no doubt that women with disabilities without equal opportunities for education are limited when it comes to employment, and they become dependent on other family members or the social security system for an indefinite period of time. That is why it is pointed out that societies must create inclusive politics that will be attractive to people with disabilities and will retain them in labours market, together with changes in the environment that will ensure equal treatment both to men and women with disabilities.[78]

V CONCLUSION

What should we do? Starting from changing parental attitudes when it comes to girls with disabilities in education, parents must be encouraged to give equal opportunities to their male and female children in all spheres of life. There should be more attention paid to prevent harassment and violence in school. The information data on sexual harassment and abuse in schools are minimum and insufficient for getting familiar with the position of girls with disabilities in education. Education should be more available, due to the fact that the distance of schools might be a limitation for some girls with disabilities to take part in the education system. As for the fact that girls with disabilities are at high risk of sexual violence in schools, specific strategies and politics must be designed in order to lift the awareness of society and prevent it. Improvement of the education-employment transition might be posted as an aim, all together with the strategy of full inclusion and spreading the opportunities for internship and post-secondary education. In order to reach the following goal, there is a need to promote the employment of

74 Boyer, *op. cit.,* 14.

75 McLaren *et al., op. cit.,* 3.

76 M. Mertens, Wilson and Mounty, *op. cit.,* 594.

77 *Integrating women and girls with disabilities into vocational mainstream vocational training, a practical guide*, *op. cit.,* 3.

78 International Labour Organization, *Labour market inclusion of people with disabilities*, Buenos Aires, 2018, 19.

women with disabilities and to make their hiring more attractive to employers through social security benefits. Last but not the least, there is a need for training of teachers in schools on gender and disability, as well as an idea for recruitment of women with disabilities as teachers.

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DISKRIMINACIJA DEVOJČICA I ŽENA SA INVALIDITETOM U OBRAZOVANJU I ZAPOŠLJAVANJU

Apstrakt

Žene sa invaliditetom spadaju u ranjivu kategoriju u teoriji radnog prava, budući da su suočene sa rizikom dvostruke diskriminacije. Nejednak tretman je zasnovan na polu i invaliditetu, što predstavlja dvostruko opterećenje prilikom pristupa pravima, institucijama, obrazovanju i, konačno, zapošljavanju. U ovom radu autorka ističe da nejednak tretman devojčica u odnosu na dečake sa invaliditetom u njihovom najranijem uzrastu, u pogledu pristupa medicinskoj pomoći, obrazovanju i stručnom osposobljavanju utiče na manju zastupljenost žena sa invaliditetom na tržištu rada. To dovodi do siromaštva, finansijske zavisnosti od drugih članova porodice i sistema socijalne zaštite, zlostavljanja i seksualnog uznemiravanja. U teoriji, obrazovanje, stručna obuka i zapošljavanje smatraju se ključnim za izlazak ove grupe iz izolacije. Uzajamno povezano, obrazovanje omogućava stručno osposobljavanje, koje, dalje, omogućava sticanje novih znanja i veština potrebnih za zapošljavanje. Zarada čini žene sa invaliditetom finansijski nezavisnim i manje izloženim riziku od siromaštva. Istraživanja su pokazala da se više ulaže u unapređenje zdravlja dečaka sa invaliditetom nego devojčica. Štaviše, devočica sa invaliditetom skoro da su isključene iz obrazovanja, jer 1/3 dece koja ne idu u školu su devojčice sa invaliditetom. Ovo je uzrokovano, pre svega, nedostatkom inkluzivnih mera, uključujući neusklađenost resursa za učenje, prevoza i učionica. Stopa pismenosti ove kategorije je niska kao i stopa obrazovanja. Zbog toga je manja verovatnoća da će žene sa invaliditetom biti zaposlene, kao i da će ostvarivati istu zaradu kao kolege sa ili bez invaliditeta. Rad ove kategorije zaposlenih je redovno nedovoljno vrednovan pod uticajem stereotipa da žene sa invaliditetom nisu dovoljno inteligentne da se obrazuju, da im je obrazovanje nepotrebno, da ne mogu da zarade, da im je mesto kod kuće, što ih sve čini finansijski zavisnim od drugih članova porodice, i dovodi do siromaštva.

Ključne reči: *Žene sa invaliditetom; Nejednako postupanje; Dvostruka diskriminacija; Osetljive kategorije.*

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EMPOWERMENT OF WORKING WOMEN WITH DISABILITIES REGARDING MOTHERHOOD – FINDING AN EXIT FROM A LABYRINTH OF STEREOTYPES AND DISCRIMINATION

Abstract

Pregnancy and taking care of an infant creates a whole labyrinth of issues for women in the world of work. The entrance into the labyrinth is often associated with the moment when the employer becomes aware that the female employee is pregnant, while leaving the labyrinth with the preserved employment for the woman at hand remains an uncertainty until the very last moment. The number of obstacles on the way out from the labyrinth exponentially grows when it comes to women with disabilities. Namely, these women face multiplicity of injustices, i.e, intersectional discrimination in general and in the world of work. Considering the overruling lack of tolerance and understanding, it is very common for employers to think they should consider themselves "lucky" for even having a chance to work and that taking maternity and/or leave for nursing a child shows a certain "ingratitude" towards the employer. Therefore, it is no surprise that the terms "gender", "disability", "maternity" and "poverty" are often used in the same context. With so many gaps to close and glass ceiling(s) to break, the road towards equality for women with disabilities who are mothers seems to look more as a labyrinth. In light of the mentioned, the paper deals with the legal framework – guarantees of human rights, International Labour Organization standards, the European Social Charter (Revised), and the European Union law, but also puts an emphasis on the problems in their implementation. In this regard, by analyzing on one hand the issues that working women face in general and regarding maternity, while on the other hand discrimination of persons with disabilities, the paper shows drastic consequences of intersectional discrimination women with disabilities are subjected to as mothers. The paper also includes certain de lege ferenda *and other proposals. Finally, the author emphasizes that as long as the society does not break the straight line which "forgets" to provide labour and social rights to women with disabilities, any proposal remains only in the sphere of ideas, miles away from practice.*

Key words: *Intersectional discrimination; Gender stereotypes; Maternity; Disability; World of work.*

The worst labyrinth is not that intricate
form that can entrap us forever,
but a single and precise straight line.
Jorge Luis Borges

I INTRODUCTORY REMARKS

People are both actors in and co-authors
of their own life-stories and their positions are not static or given,
but sites of constant struggle and negotiation.[1]

The situation of women in the world of work encompasses many obstacles on the path towards equality. When it comes to employment, women are faced with many stereotypes and bias regarding their competencies, which often results in gender-based discrimination.[2] Namely, gender-based discrimination is present at almost "every corner", as women tend to be paid less, work in lower positions, as well as in unstable and underpaid jobs.[3] Further on, women who are mothers or plan to become mothers are often faced with the so-called "motherhood penalty" their situation is especially difficult in this sense, as they tend to be perceived as "more expensive" workers by the employers.[4] In other words, the issues women are faced with exponentially grow in relation to maternity.[5]

On the other hand, persons with disabilities are faced with many challenges posed by the society in different areas of life, and their position in the world of work is no exception to the "rule". Namely, "people with disabilities

1 Tina Goethals, Elisabeth De Schauwer and Geert Van Hove, "Weaving Intersectionality into Disability Studies Research: Inclusion, Reflexivity and Anti-Essentialism", *Journal of Diversity and Gender Studies*, Vol. 2, No. 1-2/2015, 87.

2 Michel Ferrary, "Gender Diversity in the Labor Market: Employer Discrimination, Educational Choices and Professional Preferences", *@GRH*, Vol. 27, No. 2/2018, 83.

3 Smita Das and Aphichoke Kotikula, *Gender-based Employment Segregation: Understanding Causes and Policy Interventions*, Jobs Working Paper, Issue 26, (2019), 1–10. As if this wasn't "enough", precisely due to the fact that gender-based discrimination prevents women from finding a job, they often work in informal economy, meaning they work without any labour and social security rights. UN Women, Women in Informal Economy, *https://www.unwomen.org/en/news/in-focus/csw61/women-in-informal-economy#notes*. For more about the issue see Florence Bonnet, Joann Vanek and Martha Chen, *Women and Men in the Informal Economy: A Statistical Brief* (2019), 11.

4 Shelley J Correl, Benard Stephan and In Paik, "Getting a Job: Is There a Motherhood Penalty?", *American Journal of Sociology*, Vol. 112, No. 5/2007, 1297. In this regard, it is important to have in mind that, "the motherhood penalty is higher, and it contributes more significantly to the overall gender wage gap when policies are unsupportive of maternal employment". Ewa Cukrowska-Torzewska and Anna Lovász, The impact of parenthood on the gender wage gap: A comparative analysis of 26 European countries, Budapest Working papers on the labour market, BWP 2017/15, 31.

5 Furthermore, this issue is especially emphasized by the fact that family obligations continue to be perceived primarily or even solely "women's obligations", and as a repercussion the issue of reconciling the professional and family sphere of life is often perceived as an issue only related to women. Catherine Hein, *Reconciling Work and Family Responsibilities, Practical Ideas from Global Experience* (2005).

make up an estimated one billion, or 15 per cent, of the world's population" and "about 80 per cent are of working age".[6] However, they are often marginalized and without any support and possibility to gain education and socialize from an early age, which further on has repercussion when they try to find a job, i.e., to participate in the labour market. [7] What is more, many employers have stereotypes in relation to employing persons with disabilities, leading to even a widespread opinion that persons with disabilities should consider themselves "lucky" to have any job at all, regardless of the fact whether they are sufficiently paid or have labour rights that should be guaranteed to any worker.[8]

Taking into account the abovementioned, one must wonder how many challenges does a situation of a (working) woman with disabilities, who is also a mother, encompass. Even though there is no precise answer to this question, one is certain – the situation of this woman is in the is by no means easy, and the *complexity* of her situation refers to *intersection of grounds* on which she is often discriminated. Understanding the situation of this woman, whose voice is a voice of millions of women around the world, requires taking into account the fact the difficulties she faces are *not a simple sum* of the previously mentioned challenges referring to women, mothers and persons with disabilities. Precisely in this sense, the concept of intersectional discrimination helps us understand the situation of this women in all spheres of life, including employment, and understanding someone's situation is the first step towards empowerment.[9]

The concept of intersectional discrimination, was primarily constructed and developed by Kimberlé Crenshaw, who focused on the experience and situation of Afro-American women.[10] When speaking about this issue, she states the following:

> "Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectiona-

6 International Labour Organization, Disability and Work, *https://www.ilo.org/global/topics/disability-and-work/lang--en/index.htm*.

7 "Historically, children with disabilities have been excluded from the general education system and placed in 'special schools'. In some cases, they are separated from their families and placed in long-term residential institutions where they are educated in isolation from the community, if they are educated at all". Persons with Disabilities, *https://www.right-to-education.org/issue-page/marginalised-groups/persons-disabilities*.

8 Discrimination of persons with disabilities is present in every sphere of life as it is not "unusual" that persons with disabilities are denied their right "to vote, to participate in sport and cultural activities, to enjoy social protection, to access justice, to choose medical treatment and to enter freely into legal commitments such as buying and selling property". Office of the United Nations High Commissioner for Human Rights, Human Rights of Persons with Disabilities, *https://www.ohchr.org/en/disabilities*.

9 In this regard, terminology in this case plays a great role as the terms "intersectional discrimination", "multiple discrimination", and "compound discrimination", are not, even though referring to discrimination based on multiple grounds, synonyms. Sandra Fredman, *Intersectional Discrimination in EU Gender Equality and Non-discrimination Law* (2016a), 27.

10 Namely, "interest in intersectionality arose out of a critique of gender-based and race-based research for failing to account for lived experience at neglected points of intersection – ones that tended to reflect multiple subordinate locations as opposed to dominant or mixed locations". Leslie McCall, "The Complexity of Intersectionality", *Signs*, Vol. 30, No. 3, 2005, 1780.

> lity into account cannot sufficiently address the particular manner in which Black women are subordinated. Thus, for feminist theory and antiracist policy discourse to embrace the experiences and concerns of Black women, the entire framework that has been used as a basis for translating 'women's experience' or 'the Black experience' into concrete policy demands must be rethought and recast".[11]

In light of the mentioned, it can be said that the distinctive characteristic of intersectional discrimination is its "synergic nature' and in this regard the work of Kimberly Crenshaw points out the fact that "the reliance by discrimination law on a single ground analysis rendered invisible those who were at the intersection of two grounds".[12] The concept of intersectionality has become more "popular" in the recent years and today it can be considered that "recognizing intersectionality has become synonymous with quality in the equality architecture".[13] The concept of intersectionality can and *should* be applied when analyzing both the legal framework and the situation in practice regarding (working) women with disabilities, who are also mothers.[14]

II THE INTRICATE RELATION BETWEEN "DISSABILITY", "GENDER" AND "MATERNITY"

When discussing and dealing with the situation of women with disabilities in the world of work in general, and especially in relation to maternity, it is crucial to take into account their situation in a comprehensive manner, i.e., to apply the intersectional approach.[15] Also, it is important to have in mind the general context, i.e., the fact that both the international organizations, as well as states, have recognized that the demographic changes, globalization and other social factors and changes affect the existence of the gap between formally proclaimed equality and the situation in practice.[16]

11 Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics", *University of Chicago Legal Forum*, Vol. 1989, Issue 1, 1989, 140.

12 Fredman, (2016a), *op. cit*., 27–28.

13 Sigtona Halrynjo, "Naming and Framing of Intersectionality in Hijab Cases — Does It Matter? An Analysis of Discrimination Cases in Scandinavia and the Netherlands", *Gender, Work and Organization*, Vol. 23, No. 3, 2015, 1.

14 "Whether the narrative is literary, historical, discursive, ideological, or autobiographical, it begins somewhere, and that beginning represents only one of many sides of a set of intersecting social relations, not social relations in their entirety, so to speak". McCall, *op. cit*., 1782.

15 "The greater vulnerability of disabled women can thus be understood through an intersectional perspective as simultaneous discrimination relating to disability and gender". Manuela Samek Lodovici and Nicola Orlando, "Discrimination and Access to Employment for Female Workers with Disabilities" (2017), 25. In other words, when tackling this issue, we must have in mind that "people have multiple roles and identities and being members of more than one 'group', they can simultaneously experience privilege and oppression". Goethals, De Schauwer and Van Hove, *op. cit*., 77.

16 Ljubinka Kovačević, *Zasnivanje radnog odnosa* (2021), 980.

When it comes to *gender*, there is no doubt that the issue of gender has influenced and continues to influence the world of work. Even though it can be said that formal (gender) equality is promoted and guaranteed in today's world, substantive equality often "misses out".[17] The consequences of gender inequality present in the world of work manifest as "glass ceiling", gender pay gap[18], professional segregation etc. When it comes to professional segregation, "many stereotypes 'made of steel' are responsible for defining certain professions as being male of female without any professionally justified basis for such a determination".[19] However, even though it is of great importance to analyze the gender perspective, "feminist researchers have been acutely aware of the limitations of gender as a single analytical category."[20] Precisely such understanding has helped the development of the concept of intersectionality so today it can be said that "intersectionality is the most important theoretical contribution that women's studies, in conjunction with related fields, has made so far". [21]

If we take the category of gender as one of the "starting points" in the case at hand, it can be said that the other "starting point" for analyzing the situation of women with disabilities as mothers is the category of *maternity*.[22] First of all, women are often being discriminated during pregnancy, i.e., prior to childbirth in different spheres, and particularly in the sphere of employment. Further on, it is important to emphasize that tending a child and having family duties should not be considered to be related *only* to women.[23] However, taking into account the fact that such obligations are as a rule considered to be woman's obligations, it can be stated that the fact a woman is

17 UN Women, Women in the Changing World of Work, *https://interactive.unwomen.org/multimedia/infographic/changingworldofwork/en/index.htm*. As for understanding substantive equality, even though there are different points of view in this regard, it can be argued that "the right to substantive equality should not be collapsed into a single formula, such as dignity, or equality of opportunity or results. Instead, drawing on familiar conceptions, a four-dimensional approach is proposed: to redress disadvantage; address stigma, stereotyping, prejudice, and violence; enhance voice and participation; and accommodate difference and achieve structural change". Sandra Fredman, "Substantive Equality Revisited", *International Journal of Constitutional Law*, Vol. 14, No 3, 2016b, 712.

18 International Labour Organization, The Gender Gap in Employment: What's Holding Women Back?, February 2022*, https://www.ilo.org/infostories/en-GB/Stories/Employment/barriers-women#global-gap*.

19 Mina Kuzminac, "The Relation between Family Duties and Gender Pay Gap as Manifestation of Gender Inequality in the European Union" in Isabel Ribes Moreno (ed.), *Law and Gender in Practice and Education* (2022), 74.

20 McCall, *op. cit*., 1771.

21 *Ibid.*

22 As stated, "pregnancy might seem to be a subset of gender, rather than bringing together two different grounds. However, on closer inspection, this is a misconception. Not all women are pregnant, and some women might never have been or become pregnant. Thus, it might be argued that pregnant women are arguably not discriminated against on grounds of sex because nonpregnant women are not subject to detrimental treatment". Fredman, (2016a), *op. cit*., 73.

23 Laura Addati, Naomi Cassirer and Katherine Gilchrist, *Maternity and Paternity at Work: Law and Practice across the World* (2014).

also a mother who tends a child often puts her in an especially difficult position in the world of work.[24] In that sense, "bearing in mind that in modern (European) society, the emphasis is placed on the professional sphere of the individual, in comparison to the private and family spheres, the reconciliation of family duties with work obligations becomes imperative, especially in the European legal area".[25] Taking into account the mentioned, the concept of intersectionality is applicable as the situation in which a woman who is also a mother is in, regarding employment, given the fact that her situation is more than a simple sum of the fact that she is a woman and she is a mother.

Finally, the third crucial "starting point" refers to the fact that persons with *disabilities* are often victims of discrimination. In that sense, the single-axis approach tends to analyze "'disability' over other key elements, i.e., "despite the fact that some researchers do incorporate other variables in their research, many continue to limit their analysis to comparing people 'with' and 'without' disabilities, producing binary data".[26] Therefore,

> "Women with disabilities have historically been neglected both in policymaking and in the disability and gender equality literature, as well as by the disability and women's movements. Research often assumes the experience of disabled men to be representative of the disabled experience in general and consequently the majority of research on people with disabilities has not included a gender perspective". [27]

In order to have a comprehensive outlook on the issue relating to persons with disabilities in employment, it is important to incorporate the intersectional approach and also take into account the category of gender.[28]

24 The clear relation between gender and family duties, and the repercussions of such a relation can be seen through many issues, for example gender pay gap. In that sense, according to data provided by the European Institute for Gender Equality in 2019: "the biggest gap in earnings is among couples with children – showing that the financial cost of having a family fall heavily on women's shoulders". European Institute for Gender Equality, Better work-life balance would shrink the gender pay gap, May 2019, *https://eige.europa.eu/news/better-work-life-balance-would-shrink-gender-pay-gap*.

25 Ljubinka Kovačević and Uroš Novaković, „Mirno rešavanje sporova povodom diskriminacije zaposlenih na osnovu porodičnih dužnosti", *Pravo i privreda*, Vol. 56, No. 7-9/2018, 432.

26 Goethals, De Schauwer and Van Hove, *op. cit*., 75.

27 Samek Lodovici and Orlando, *op. cit*., 25.

28 Eun Jun King, Susan L. Parish and Tina Skinner, "A Study on Intersectional Discrimination in Employment against Disabled Women in the UK", *Disability and Society*, Vol. 35, No. 5, 2019, 18. However, although the intersectional approach has been developed, even today "disability [...] remains undertheorized and underrepresented in gender and intersectional feminist scholarship". Nancy E. Naples, Laura Mauldin and Heather Dillaway, "Gender, Disability, and Intersectionality", *Gender & Society*, Vol. 33, No. 1, 2019, 9. The other side of the coin shows the gender dimension in relation to men with disabilities. One interesting outlook on the challenges men are being faced with states the following: "In *Pride against Prejudice* I looked at concepts of masculinity and feminity and how they were applied to disabled men and women. It's clear that masculinity as a social construct can be extremely oppressive for disabled men. Masculinity is about a celebration of strength, of bodies that perform, and of being a family's breadwinner. To be masculine

Namely, "discrimination based on the intersection of disability and gender can be identified by a gender-sensitive look at disability on the one hand, and where disability has different effects on men and women on the other hand".[29] Further on, the situation becomes more complex when the aspect of maternity is also taken into account. Women with disabilities are often forcibly sterilized and generally considered "not to be suited" to be mothers.[30] Besides being put in such a situation in relation to maternity in general, becoming a mother for a woman with disabilities also means facing *additional* obstacles in employment. Therefore, the barriers for women with disabilities are many, and as a rule constructed by society, having as a further repercussion living in poverty and "outside" of the society.[31]

III RELEVANT LEGAL FRAMEWORK FOR WOMEN WITH DISSABILITIES IN GENERAL AND IN RELATION TO MATERNITY

1. Introductory remarks

The universal legal framework relevant for the issue at hand is very complex as it includes the universal human rights instruments, but also the International Labour Organization (ILO) standards. When it comes to universal human rights instruments, both the Universal declaration of human rights[32], as well as the International Covenant on Economic, Social and Cultural Rights[33] are legal instruments of great importance in this regard.[34] However,

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is the opposite of being vulnerable and dependent [...] All this creates additional barriers for disabled men to contend with. There remains much scope for exposing the way disabled men and boys experience cultural stereotypes". Jenny Morris, *Feminism, gender and disability*, Paper presented at a seminar in Sydney, Australia, February 1998.

29 *Ibid.*, 29.

30 "The UN has recognized the forced sterilization of persons with disabilities as torture; nevertheless, legal systems in many countries allow judges, healthcare professionals, family members and guardians to consent to sterilization procedures on behalf of people with disabilities, 'for their own interest'". Office of the United Nations High Commissioner for Human Rights, Sterilization a form of "systemic violence" against girls with disabilities, November 2017, *https://www.ohchr.org/en/stories/2017/11/sterilization-form-systemic-violence-against-girls-disabilities*.

31 United Nations, Ending poverty and hunger for all persons with disabilities (Goals 1 and 2), *https://www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2019/11/poverty-hunger-disability-brief2019.pdf*. This issue is especially present in the developing countries. For more about this see Sophie Mitra, Aleksandra Posarac and Brandon Vick, *Disability and Poverty in Developing Countries: A Snapshot from the World Health Survey*, Social Protection and Labor Discussion Paper, No. 1109.

32 UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

33 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, Vol. 993.

34 Especially important are the comments of the Committee for Economic, Social and Cultural Rights. In this regard, Comment No. 5 focuses on the prohibition of discrimination

given the complexity of the legal framework, special emphasis shall be the provisions of the Convention on the Rights of Persons with Disabilities[35] (CRPD) as well as Convention on the Elimination of All Forms of Discrimination Against Women[36] (CEDAW), as they are precisely related to relevant issues in this regard: gender, disability and maternity. On the other hand, particular attention shall also be devoted to ILO conventions relevant for the issue at hand. Besides the standards and guarantees at the universal level, the focus in this regard shall also be at the legal instruments of Council of Europe, as well as the European Union law.

2. Universal human rights standards

2.1. Convention on the Rights of Persons with Disabilities

The CRPD is a convention of great importance as it guarantees equality and protection of persons with disabilities. It stipulates that "disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others" [37] The importance of such a definition, i.e., social model of disability is reflected in the statement:

> "[...] disabled people's politicisation has its roots in the assertion that 'the personal is political', that our personal experiences of being denied opportunities are not to be explained by our bodily limitations (our impairments) but by the disabling social, environmental and attitudinal barriers which are a daily part of our lives. The social model of disability has given us the language to describe our experiences of discrimination and prejudice and has been as liberating for disabled people as feminism has been for women".[38]

The preamble of this convention emphasizes the existence of "difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, *sex* [...] or other status"[39]. Furthermore, it states that "discrimination against any person on the

– direct, indirect and systemic, in employment, while right to work and the importance of equality in this sense is also reiterated through the Comment No. 18.

35 UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106.

36 UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, Vol. 1249.

37 Preamble, para. e) of the CRPD. For more about the issue of the adopted disability model see United Nations: Department of Economic and Social Affairs, Disability, Status of Ratification Interactive Dashboard (OHCHR Human Rights Indicators Work), *https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html#:~:text=The%20Convention%20is%20intended%20as,human%20rights%20and%20fundamental%20freedoms*.

38 Morris, *op. cit.*

39 Preamble, para. p) of CRPD.

basis of disability is a violation of the inherent dignity and worth of the human person".[40] What is more, in relation to employment, it is clearly stated that:

> "States Parties recognise the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities"[41].

In relation to gender, it is important to emphasize that the CRPD stipulates that: "states Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms"[42]. Further on, the importance of gender dimension is especially emphasized as part of the intention to promote employment for persons with disabilities and the convention reiterates the importance of combatting stereotypes and prejudices based on, among other grounds, sex.[43] Finally, the CRPD also touches upon the family life, by stipulating that discrimination in prohibited "against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others", and by further dealing with this issue in more detail.[44] Based on the mentioned, it can be concluded that the CRPD recognizes the gender dimension in relation with disability, even though recognizing only the term (and concept of) "multiple discrimination" and not "intersectional discrimination". Also, it does not recognize the issue of maternity and more generally family life in relation to employment, which is of great importance when taken into account the widely present discrimination of persons with disabilities in employment, but also the generally present discrimination of persons with family duties in employment.

2.2. Convention on the Elimination of All Forms of Discrimination Against Women

It can be said that CEDAW is to be considered an instrument of crucial importance when it comes to guarantees of equality for men and women.[45]

40 Preamble, para. h) of CRPD. In this regard, it is important to have in mind that "the CRPD appears to be a 'single axis' convention, focusing specifically on people with disabilities. However, this has not meant that it ignores or neutralizes other disadvantaging aspects of an individual's social location." Samek Lodovici and Orlando, *op. cit*., 36.

41 Art. 27 para. 1 of the CRPD.

42 Art. 6 para. 1 of the CRPD.

43 Art. 8, para. 1 subpara. b) of CRPD. Finally, when speaking of the environment in which recovery, rehabilitation and social reintegration are ought to happen, Art. 16 para. 4 of the CRPD emphasizes that it is the environment that fosters "respect, dignity and autonomy of the person and takes into account gender– and age-specific needs".

44 Art. 23 of CRPD.

45 In accordance with this convention, the states are obliged to incorporate the principle of equality between women in men in their constitutions, to adopt legislation prohibiting discrimination, but also to create policies and mechanisms aimed at prohibiting discrimination in practice.

Namely, CEDAW requires states "to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women"[46]. Also, special attention is devoted to achieving equality in the sphere of employment.[47] What is more, it is especially important to mention that CEDAW, in its preamble stipulates the following:

> Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole.

Further on, it is emphasized that the adoption of measures aimed at providing special protection regarding maternity shall not be considered discrimination[48], while the states are also obliged to take measures aimed at preventing discrimination against women on the basis of marriage or maternity "and to ensure their effective right to work".[49] When it comes to disability, CEDAW does not explicitly refer to it, however General recommendation No. 18 of the CEDAW Committee[50] refers to "disabled women".

Regarding intersectional discrimination, some authors in this regard argue, that even though not explicitly mentioning it, CEDAW recognizes the intersection of different grounds, as for example it recognizes the worsened position of women living in poverty. What is more, the standards provided by the CEDAW were further developed by the CEDAW Committee – in this sense General Recommendation No. 28[51] stipulates that gender-based and sex-based discrimination "is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity"[52]. In that sense, it can be

46 Art. 5 para. subpara. a) of CEDAW.

47 In this regard, the convention in Art. 11 para. 1 subpara. c) guarantees "the right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training".

48 Art. 4 para. 2 of CEDAW.

49 Art. 11 para. 2 of CEDAW.

50 UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendations Nos. 16, 17 and 18, adopted at the Tenth Session, 1991.

51 UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, CEDAW/C/GC/28.

52 Part 3 para. 18 of General Recommendation No. 28 on the Core Obligations of States Parties under Art. 2 of the Convention on CEDAW (UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 28 on the

stated that this recommendation recognizes the importance of intersectionality in determining a person's situation by clearly stating that "discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways than men".[53]

3. International Labour Organization standards

When it comes to ILO standards, ILO has, since its founding in 1919, continuously contributed to equal chances for *each and every person* when it comes to employment.[54] In this regard, the protection guaranteed by ILO conventions and recommendations has over time changed and evolved. Even though many ILO instruments are of importance for the issue at hand, particular attention shall be dedicated to ILO Convention No. 111[55], ILO convention No. 156[56], ILO Convention No. 183[57] and ILO Convention No. 159[58].

Namely, ILO Convention No. 111 deals with equality in employment and occupation and speaks of the clear intention of ILO to guarantee equality for men and women. According to this convention, the term discrimination refers to "any distinction, exclusion or preference made on the basis of race, colour, *sex*, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation"[59]. It is also stated that member states can "determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, *disablement*, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance, shall not be deemed to be discrimination"[60]. In this regard, it is important to recognize that fact that this convention, even though primarily dealing with the issue of equality of men and women, also refers to "disablement", as well as family obligations. Finally, it is important to address the fact that the ILO Committee of Experts on Application of Conventions and Recommendations, has referred to "intersectional nature" of gender inequality as an obstacle to the implementation of the ILO Convention No. 111.[61]

Core Obligations of States Parties under Art. 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 16 December 2010, CEDAW/C/GC/28).

53 *Ibid.*

54 International Labour Organization, History of the ILO, *https://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm*.

55 C111 – Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

56 C156 – Workers with Family Responsibilities Convention, 1981 (No. 156.)

57 C183 – Maternity Protection Convention, 2000 (No. 183).

58 C159 – Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159).

59 Art. 1 para. a) of the ILO Convention No. 111.

60 Art. 5 para. 2 of the ILO Convention No. 111.

61 In the report regarding Nigeria, it was mentioned that the obstacles refer to "gender stereotypes, social norms and cultural barriers; lack of enough up-to date gender disaggre-

When it comes to maternity, the crucial ILO instrument in this regard is ILO Convention No. 183 referring to maternity protection. Namely, this convention provides protection to women during pregnancy and after childbirth. The convention guarantees the minimum period of maternity leave[62], the prohibition of dismissal of woman in relation to maternity[63], the monetary compensation[64] and deals with other relevant aspects in this regard. In light of the prohibition of discrimination, it is stipulated that each member state has the obligation to take "measures to ensure that maternity does not constitute a source of discrimination in employment"[65].

Further on, ILO Convention No. 156 referring to workers with family responsibilities has great importance, as it, one hand promotes gender equality in performing family obligations, while on the other hand its significance lies in the fact that it refers to creating a balance of professional and family life. As stated in this convention "each Member shall make it an aim of national policy to enable persons with family responsibilities who are engaged or wish to engage in employment to exercise their right to do so without being subject to discrimination and, to the extent possible, without conflict between their employment and family responsibilities"[66].

Finally, ILO Convention No. 159 refers to persons with disabilities and dedicates special attention to the issue of vocational training and employment of persons with disabilities.[67] As stated in this convention "each Member shall, in accordance with national conditions, practice and possibilities, formulate, implement and periodically review a national policy on vocational rehabilitation and employment of disabled persons"[68]. Furthermore, the importance of *equality* is specifically emphasized – as stated, "equality of opportunity and treatment for disabled men and women workers shall be respected"[69].

As can be concluded, ILO conventions are an instrument of great importance in regard to the question at hand, as each of the (potential) grounds of discrimination regarding women with disabilities and family obligations is tackled in detail and in order to truly provide protection and guarantee

gated data; addressing the *intersectional nature of gender inequality*; inadequate funding to implement programmes and policies...". ILO Committee of Experts on Application of Conventions and Recommendations, Observation (CEACR) – adopted 2019, published 109th ILC session (2021), *https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:4025364*.

62 Art. 4 of the ILO Convention No. 183.

63 Art. 8 para. 1 of the ILO Convention No. 183.

64 Art. 6 of the ILO Convention No. 183.

65 Art. 9 of the ILO Convention No. 183.

66 Art. 3 para. 1 of the ILO Convention No. 156.

67 The ILO Committee of Experts on Application of Conventions and Recommendations has in 2007 requested from Republic of Serbia to provide data, with the concern regarding the situation of persons with disabilities, especially in the rural areas.

68 Art. 2 of the ILO Convention No. 159.

69 Art. 4 of the ILO Convention No. 159.

equality.[70] Finally, it should be noted that ILO is constantly putting in more efforts with the aim of combatting discrimination and also in addressing, even though not stipulated through the mentioned conventions, the concept of intersectional discrimination – in that sense, it is the stance of the ILO that:

> "crises can also open opportunities to address existing gender-based and intersectional discrimination, and violations of rights, and as countries emerge from crisis situations, opportunities arise to develop social and economic recovery policies and strategies that are gender-inclusive".[71]

4. European law

Besides the universal human rights and labour standards, it is significant to recognize also the importance that the guarantees provided by legal instruments of Council of Europe, as well as the European Union law have.

4.1. Legal instruments of Council of Europe

European non-community law regarding the issue at hand refers to legal instruments of Council of Europe. Crucial instrument of Council of Europe in this sense is the European Social Charter (Revised)[72]. When it comes to equality of men and women, as stipulated in the Charter, "all workers have the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex"[73], while this right is further elaborated in terms of access to employment, vocational guidance, working conditions, career development etc. Mothers are guaranteed special protection in relation to maternity, while the Charter also refers to family obligations by stipulating equality between men and women workers with family responsibilities, and ensuring, through its guarantees, the achievement of such equality.[74] On the other hand, the Charter also emphasizes "the right of persons with disabilities to independence, social integration and participation in the life of the community"[75]. Besides referring to measures that states need to take in order to promote and guarantee protection and social integration of persons with disabilities, the states are required:

70 However, it can also be noticed that the principle of intersectionality as such is not, at least explicitly, recognized through these conventions. Of course, this is understandable, as at the time that some of these conventions were adopted, the concept of intersectional discrimination has not yet existed. Of course, in this there is a great role of the Committee of Experts on the Application of Conventions and Recommendations.

71 International Labour Organization, Panel discussion on women's empowerment in the world of work in fragile settings, *https://www.ilo.org/global/topics/employment-promotion/recovery-and-reconstruction/WCMS_837865/lang--en/index.htm*.

72 Council of Europe, European Social Charter (Revised), 3 May 1996, *ETS* 163.

73 Preamble, para. 20 of the European Social Charter (Revised).

74 Art. 27 of the European Social Charter (Revised).

75 Preamble, para. 15 of the European Social Charter (Revised).

> "to promote their access to employment through all measures tending to encourage employers to hire and keep in employment persons with disabilities in the ordinary working environment and to adjust the working conditions to the needs of the disabled or, where this is not possible by reason of the disability, by arranging for or creating sheltered employment according to the level of disability".[76]

Particular importance of the Charter is reflected in the fact that it tackles the issues of equality between men and women, maternity, but also family obligations in general, as well as disability in one document. The fact that all of the mentioned issues are dealt with in one legal instrument has a great symbolic value. However, it is also important to have in mind that the Charter also does not recognize and include the principle of intersectionality in the text of the document.

Besides the Charter, it is also important to mention the European Convention on Human rights.[77] Even though this convention is primarily concerned with the issues of political and civil rights, what gives this convention special importance in regard to the issue at hand is the case law of the European Court of Human Rights. Namely, through its holistic approach, the Court has recognized in its case law, the intersection of grounds that a person can be subjected to discrimination.[78]

4.2. European Union law

When it comes to European Communities, i.e., European Union law, it is important to take into account that even the founding treaties are important for guaranteeing prohibition of discrimination and recognizing *sex* and *disability* as potential grounds of discrimination. [79]

Namely,

> "It started in the 1950s and has developed considerably with the addition of a new article 13 TEC in the Amsterdam Treaty in 1997, now 19 TFEU. Since then, the focus on discrimination has been con-

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76 Art. 15 para. 1 subpara. 2 of the European Social Charter (Revised).

77 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, *ETS* 5.

78 For an example, in the case *B.S. v Spain* which concerned an Afro-American woman working as a prostitute, the Court has taken into account several issues, stating in para. 59 that there is a need to investigate "a possible link between racist attitudes and an act of violence". What is more, the Court has noted, in para. 62, the fact that "the decisions made by the domestic courts failed to take account of the applicant's particular vulnerability inherent in her position as an African woman working as a prostitute". By such reasoning, it can be concluded that the Court has, even though not mentioning the term "intersectionality" recognized the different aspects of a person's identity. *B.S. v Spain*, App. No. 47159/08, 24.07.2012.

79 Raphaële Xenidis, "Multiple Discrimination in EU Anti-Discrimination Law Towards Redressing Complex Inequality?" in Uladzislau Belavusau and Kristin Henrads (eds.), *EU Anti-discrimination Law beyond Gender* (2018), 42.

> stant [...] Many directives, communications, actions, strategies and programmes have been adopted both in the field of gender discrimination as well as in that of disability" [80]

As stipulated in the Treaty on the Functioning of the European Union (TFEU)[81]: "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"[82]. Furthermore, the principle of "equality between men and women with regard to labour market opportunities and treatment at work" [83] is especially emphasized.[84] When it comes to disability, besides the above-mentioned, it is also stated that the EU "may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation"[85]. In this regard, it can be said that "it is a stance of the EU that achieving equality in practice, i.e., the greater role of women in the labour market is not 'only' necessary for a more just world, but also a benefit for the economy".[86]

Furthermore, the Charter of Fundamental Rights of the EU[87] recognizes the measures relating to persons with disabilities, aimed to "ensure their independence, social and occupational integration and participation in the life of the community"[88], while it also guarantees prohibition of discrimination based on disability, as well as sex[89]. As for the secondary EC/EU Law, particular importance has the Employment Equality Directive (Directive 2000/78/EC)[90] which prohibits both direct and indirect discrimination based on disability. It also stipulates that "the provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combatting discrimination on grounds of disability"[91]. In that regard, it

80 Konstantina Davaki, Claire Marzo, Elisa Narminio and Maria Arvanotidou, *Discrimination Generated by the Intersection of Gender and Disability* (2013), 22.

81 European Union, Consolidated version of the Treaty on the Functioning of the European Union, 26.10.2012, *Official Journal of the European Union*, L 326/47-326/390.

82 Art. 10 of the TFEU.

83 Art. 153 para. 1 subpara. i) of the TFEU.

84 Such principle is further developed by the guarantee of equal pay for equal work, as well as the possibility to introduce affirmative measures.

85 Art. 19 of the TFEU.

86 Mina Kuzminac, "The Path towards Equality in Serbia – How to Overcome Gender-based Discrimination in Employment" in Silvo Devetak (ed) *The Students' Views on the European Integration of the Western Balkans*, 2022, 265.

87 European Union, Charter of Fundamental Rights of the European Union, 18.12.2000, *Official Journal of the European Union*, C 364/1– 364/22.

88 Art. 26 of the Charter of Fundamental Rights of the European Union.

89 Art. 21 of the Charter of Fundamental Rights of the European Union.

90 European Union: Council of the European Union, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, 02.12.2000, *Official Journal of the European Union*, L 303–303/22.

91 Preamble, para. 16 of the Directive 2000/78/EC.

is stated in the Directive that: "[...] employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer"[92]. Besides disability, particular attention in the Directive is also paid to principle of equality between men and women.[93] Further on, in the sense of relevant directives, it is also important to take into account the provisions of the Directive 2006/54/EC[94] which refers to equality of men and women in employment and occupation, but also the Work-life balance directive (Directive 2019/1158)[95], dealing with reconciliation of professional and family life, while putting a special emphasis on equality of men and women. These and other directives are of great importance for the issue of prohibition of discrimination, however, even though commendable that such attention has been devoted to the issue of discrimination, sometimes the multiplicity of legal instruments in this regard can create a confusion in interpretation of provisions of different directives by the court.[96] Based on the mentioned, it can be stated that the principle of non-discrimination is present and developed in the EU law, however, it can also be noticed that the issue of discrimination is tackled in, to a certain extent, fragmented manner, and that it could be further developed by incorporating in an explicit way, the principle of intersectionality.[97]

The case law of the Court of Justice of the European Union (CJEU) has significantly contributed to interpretation and further development of guarantees provided in the EU law. In that regard, it could be said that "court's approach to claims that have been brought on single grounds but involve more factors, even though no mention of either 'multiple discrimination' or 'inter-

92 Art. 5 of the Directive 2000/78/EC.

93 Constant efforts of the EU in this sense can be seen from the fact that the European Commission has adopted the Gender Equality Strategy 2020-2025 – this strategy is of crucial importance when it comes to fighting against gender-based violence, but also has the aim to ensure the rights of women with disabilities in employment.

94 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), 26.7.2006, *Official Journal of the European Union* L 204/23–204/36.

95 Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, 12.07.2019, *Official Journal of the European Union*, L 188/79–188/93.

96 "The segmentation of workplace anti-discrimination law into three different sets of directives – one concerning race and ethnic origin, one concerning religion or belief, disability, age, or sexual orientation, and one concerning gender discrimination – presents an obstacle, as claims brought to the CJEU which span different directives may have to be brought under more than one of them". Cara Donegan, "Thinly veiled discrimination: Muslim women, intersectionality and the hybrid solution of reasonable accommodation and proactive measures", *European Journal of Legal Studies*, Vol. 12, No. 2/2020, 154.

97 "By contrast to fragmentary legislation, intersectionality has been a blossoming concept in policy and academic debates at the EU level". Xenidis, *op. cit*., 15.

sectionality' is made".[98] In relation to disability, a very important case is the *HK Danmark case*[99]. In this case, the Court has provided protection to a person who was dismissed due to his absence which was directly related to disability. CJEU referred to CRPD and the Employment Equality Directive and has taken the stance that these instruments "envisage not only material but also organisational measures".[100] The Court has given a broad definition of disability by stating that disability also "entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one" and has emphasized the importance of accommodation.[101] Finally, precisely when dealing with the issue of accommodation, the Court has taken the stance that an employer cannot "sanction" the employee with dismissal if the employer has failed to provide accommodation.

When it comes to principle of intersectionality, in an interesting case concerning the issues of maternity and disability, *Z v. A Government Department and the Board of Management of a Community School*[102], a woman was not granted leave equal to maternity or adoption leave, due to the fact that she became a mother with the help of a surrogate. In this regard, the Court was to decide whether this case falls under the category of discrimination based on disability. As the Court stated, "it cannot be disputed that a woman's inability to bear her own child may be a source of great suffering for her", but has, nonetheless concluded that the issue at hand does not amount to disability in accordance with the Employment Equality Directive.[103] Also, many authors critique the stance of CJEU regarding head scarves Muslim women wear in more that one case, by stating that the Court has failed to recognize an "obvious" example of intersectional discrimination.[104]

98 *Ibid*., 33.

99 Case 335/11 and Case 337/11, 11.04.2013, *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S*, ECLI:EU:C:2013:222. For more about the case law of the CJEU see Mark Bell and Lisa Waddington, *The Employment Equality Directive and supporting people with psychosocial disabilities in the workplace: A legal analysis of the situation in the EU Member States* (2016), 35–36.

100 *Ibid*., para. 55.

101 *Ibid*., para. 43

102 Case 363/12, 26.9.2013, *Z. v A Government department and The Board of management of a community school*, ECLI:EU:C:2013:604.

103 *Ibid*, para. 79.

104 For an example see Case 157/15, 14.03.2017, *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, ECLI:EU:C:2017:203. Some authors share the opinion that such a lack of understanding and recognizing the principle of intersectionality by the CJEU is present not "only" regarding head scarves, but also in other cases. For an example, in the *David L. Parris v Trinity College Dublin and Others*, David Parris considered that, given the fact that he was a member of the Trinity College pension scheme, his civil partner should be entitled to full survivor's pension as such a right was guaranteed if individuals were married, i.e., of different sexes, or have entered the civil partnership under the age of 60. In this regard, the Irish Labour

Based on the mentioned, one thing can be concluded. The CJEU has so far significantly contributed to protection of persons with disability, as well as the guarantee of gender equality, while it remains to be seen whether the principle of intersectionality shall be elaborated in the future case law of the Court. In this regard, by further recognition and providing protection to victims of intersectional discrimination, the case law of the CJEU can be a "tool" of great importance when it comes to intersectionality.

IV WOMEN WITH DISSABILITIES IN THE WORLD OF WORK – THE SITUATION IN PRACTICE

1. Discrimination of mothers with disabilities in the world of work

On one hand "the contemporary epoch has brought about the awareness of the need to overcome patriarchal subordination of the female gender and to implement in law and societal life an idea of universal equality among human beings, equal respect for each individual and protection of universal human rights".[105]

On the other hand, there is a centuries and decades long "tradition" of women being prevented from achieving equality in employment. In that regard, it is important to have in mind that labour law and social law were built on the "model" of a male worker, i.e., male breadwinner.

Persons with disability are also, as a rule, victims of discrimination in the labour market.[106] Even though it seems that unfavorable treatment is almost "guaranteed" to persons with disability, women with disability are however "more likely" to face challenges in the labour market, "more likely" to

Court has referred to CJEU which dealt with the issue of whether there is discrimination at the case at hand. When considering this issue, the Court has come to the conclusion that "no new category of discrimination resulting from the combination of more than one of those grounds, such as sexual orientation and age, that may be found to exist where discrimination on the basis of those grounds taken in isolation has not been established" (para. 80). Case 443/15, 24.11.2016, *David L. Parris v Trinity College Dublin and Others*, ECLI:EU:C:2016:897.

105 Dragica Vujadinović, "Gender Mainstreaming in Law and Legal Education", *Anali Pravnog fakulteta u Beogradu*, Vol. 63, No. 3/2015, 72.

106 United Nations: Department of Economic and Social Affairs, Gender perspectives on disability and the disability perspective on the situation of women and girls with disabilities, *https://www.un.org/development/desa/disabilities/issues/women-and-girls-with-disabilities.html#:~:text=Women%20and%20girls%20with%20disabilities%20experience%20double%20discrimination%2C%20which%20places,study%20(see%20footnote%203)%20*. "Overall, people with disabilities experience common patterns of discrimination. They suffer high unemployment rates, are confronted with prejudices regarding their productivity and are often excluded from the labour market. They also face discrimination at the hiring stage. A survey carried out in France shows that less than 2% of those having mentioned their disability in their CV were called for an interview". International Labour Organization, Disability Discrimination at Work, *https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_decl_fs_87_en.pdf*, 1.

be paid less, "more likely" to not get promoted. The reflection of the intricate relation between gender and disabilities in employment is manifested through the following: "employment differences between women with and without disabilities are higher compared to gender differences among people with disabilities".[107] As a result, "women and girls with disabilities are often pushed to the extreme margins and experience profound discriminations". [108]

Firstly, women with disabilities face many challenges as job seekers, as they often prevented from finding a job due to deeply-rooted stereotypes.[109] They are often not even considered by the employers, and if the legislation in a certain country allows for an option to pay a certain penalty instead of employing a person with disability, many employers opt for such an option, which clearly speaks of the position of women with disabilities as job seekers.

Even if they are "lucky enough" to find a job, women with disabilities are faced with both direct and indirect discrimination. In this regard the challenges persons with disabilities face have their roots in many prejudices and stereotypes that manifest through language and general "attitude" of the society, i.e., as social barriers. As a result, such barriers lead to isolation, i.e., "invisibility". It is relevant to have in mind that, besides being discriminated when it comes to pay, promotion and other aspects, persons with disability "may also perceive unfair treatment in the procedures of organizational decision making".[110] The fact that the situation of women subjected to intersectional discrimination is not some sort of "exception to the rule" can be seen through the following data of the European Institute on Gender Equality (EIGE):

- 22% of women with disabilities are at risk of poverty, comparing to 20% of men with disabilities and 16% of women without disabilities
- 20% of women with disabilities are in full-time employment, comparing to 29% of men with disabilities and 48% of women without disabilities
- 15% of women with disabilities graduate tertiary education, comparing to 17% of men with disabilities and 30% of women without disabilities
- 7% of women with disabilities have unmet needs for medical examination, comparing to 6% men with disabilities and 2% women without disabilities.[111]

107 Samek Lodovici and Orlando, *op. cit*., 51.

108 United States Agency for International Development, Advancing women and girls with disabilities, May 2019, https://www.usaid.gov/what-we-do/gender-equality-and-womens-empowerment/women-disabilities.

109 International Labour Organization, Disability: A Human Rights Issue, *https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/publication/wcms_229918.pdf*, 2.

110 Lori Anderson Snyder, Jennifer S. Carmichael, Lauren V. Blackwell, Jeanette N. Cleveland and George C. Thornton III, "Perceptions of Discrimination and Justice Among Employees with Disabilities", *Employee Responsibilities and Rights Journal*, Vol. 22, No. 5/2010, 9.

111 European Institute for Gender Equality, Gender Equality Index, *https://eige.europa.eu/gender-equality-index/2021*. It is also crucial to mention the fact that one of the issues that the Gender Equality Index is based on refers to intersectional inequalities.

Even so, one must take into account that hearing such data has an especially "unsettling" sound when considering the fact that "the synergistic nature of intersectional discrimination also makes it difficult to monitor".[112] Without questioning the importance of the statistical data, as the core of intersectionality lies in the specific personal experience and position of each person, it is also especially important to be careful when taking into account the statistical data, i.e., to have in mind that they show only a part of the picture, as the whole picture revolves around *personal experiences.*[113]

Situation for women with disability exponentially worsens if they are mothers. Namely, further consequences of the deeply-rooted understanding that women with disabilities are not "capable" of being mothers is widely present forced sterilization, contraception and abortion.

Through such "procedures" so many fundamental human rights of women with disabilities are being violated starting from right to physical integrity and ending with prohibition of torture.[114] If they are "lucky enough" not to be subjected to such treatment and they do become mothers, women with disabilities are faced with many challenges. The so-called "motherhood penalty" which relates to working women becoming mothers is that much more severe when it concerns women with disabilities. As a result, women with disabilities as mothers often live in poverty, without any economic and social rights, marginalized and "invisible".[115]

Based on the mentioned, it can be concluded that there is no aspect of employment, where women with disabilities as mothers, either as job seekers,

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Based on the data from 2017, "on average, at the EU level more than one-third of women with disabilities (38.5 % compared to 16.6 % of men with disabilities according to definition 1) are employed as clerical support workers or service and sales workers, while most men with disabilities work as skilled manual workers (40.8 % compared to 10.7 % of women with disabilities). Samek Lodovici and Orlando, *op. cit*. 29.

112 Fredman, (2016a), *op. cit*., 28.

113 The obstacles regarding methodologies used in order to gain data and have an insight regrading intersectional discrimination, among other, refer to the fact that the researches themselves, even without realizing it, have their own, already formed opinions and bias. For example, in one research conducted couple of years ago, interviewing a person with visual visibility, as part of the research, included the following issue: "At a given moment, the interviewer asks Titus how he types on his computer and if he needs a special keyboard for his visual impairment. Titus looks right into her eyes and responds very seriously: 'I type blind (touch typing), just like you do I suppose?'". Goethals, De Schauwer and Van Hove, *op. cit*., 89.

114 "Such practices are commonplace around Europe as can be seen in numerous concluding observations of the CRPD Committee and reports of GREVIO, for example concerning Belgium, France, Serbia and Spain. It is shocking that legislation in many European countries allows for forced sterilisation, contraception and abortion, considering that these practices are clearly based on eugenicist assumptions about the value of the lives of persons with disabilities or stereotypes concerning the capacity of persons with disabilities to be mothers". Council of Europe, Addressing the invisibility of women and girls with disabilities, April 2022, *https://www.coe.int/en/web/commissioner/-/addressing-the-invisibility-of-women-and-girls-with-disabilities*.

115 United Nations, The link between Poverty, Gender and Disability, *https://www.un.org/disabilities/documents/workshops/link-poverty-gender-disability.pdf*.

or as employees are not faced with a number of challenges. The complexity of their situation makes the challenges they are faced with specific as they do not coincide completely with the challenges faced by women, with the challenges faced by women as mothers or with the challenges faced by persons with disabilities, yet their position encompasses all of those challenges. Such a situation is to be considered even, to some extent, a paradox, given the fact that employment can be an instrument of great importance for achieving inclusion and also creating a path for achieving equality in other spheres of life.

2. De lege ferenda *and other proposals*

When speaking about steps further in terms of achieving equality, and in order to gain a comprehensive outlook, it is, besides *de lege ferenda* proposals, also necessary to devote attention to "non-legal" mechanisms. In this sense, it is crucial to have in mind that "any non-intersectional approach not taking into account the intersections of disability, gender and poverty would lead to invalid conclusions".[116]

As for the legal framework and policy-making process, even though it is of crucial importance that it recognizes the challenges faced by women, the challenges faced by mothers and the challenges faced by persons with disabilities, it seems that generally there is a need of going "a step further". Such step would refer to general recognition of *intersectionality as a concept*, i.e., intersectional discrimination and the specifics of the situation in which a person subjected to intersectional discrimination is put in. Namely, the intersectional approach allows for empowerment as "it involves the creation of coalitions and strategic alliances to alleviate social exclusion, marginalization, and subordination".[117]

In other words, the crucial step forward in terms of revising the legal framework, both globally and in Europe, would refer to further embodiment of principle of intersectionality and, as a consequence, measures and guarantees that include the understanding of complexity of the concept, as well as the repercussions of social norms on the legal framework.[118] An important amendment in this regard would also refer to recognizing the possibility that discrimination exists despite the fact that there is no so-called "comparator" –"thus, individuals so far excluded from legal protection due to an absent comparator would have enhanced chances to successfully pursue their claim".[119] In that regard, even though the comparison of situations is in the

116 Davaki, Marzo, Narminio and Arvanotidou, *op. cit*., 36.

117 Goethals, De Schauwer and Van Hove, *op. cit*., 87.

118 In this sense, certain authors propose the introduction of new potential grounds for discrimination that would be "intersectional", i.e., that would represent intersecting of different grounds as one – an example would be discrimination of Afro-American women or at case at hand of woman with disability. Even though such an approach would certainly contribute to the most precise determination of a person's position, the risks and obstacles of such an approach seem to prevail. Namely, it would not be possible to have a definitive list in this regard and the risks regarding the implementation of such a principle of non-discrimination would be overly complex or sometimes even impossible.

119 Stephie Fehr, "Legal Perspectives on the Intersections of Religion, Race and Gender – Problems and Solutions", *Mediterranean Journal of Social Sciences*, Vol. 3, No. 8, 2012, 20.

very core of the general definition of discrimination, it would be necessary to, at least, have, as wide as possible, interpretation of the issue of comparison. That would be of extreme importance for victims of intersectional discrimination as the distinctive characteristic of their situation lies precisely in the specific intersection of grounds.

Further on, it is important to take a proactive attitude and proactive measures in the policy-making process, and in amending the legislation. Namely:

> "the term 'proactive measures' denotes many forms of organized action aiming at institutional change. In such a scheme, initiative lies with policy makers to mount political pressure with the aim of achieving structural change and to implement educational measures to promote understanding about issues such as intersectional discrimination and the need for substantive equality."[120]

Some of the questions that should be raised when amending legislation and, in the policy– making process, are:

- Does the policy foster social inclusion of people who are being discriminated against on the basis of different grounds;
- Is the policy gendered, i.e. is gender equality one of the aims of the policy and is there an explicit reference to how men and women are each concerned by the policy; or is the policy de-gendered, i.e. differences between men and women are not tackled by the policy;
- Does the policy reflect the method of intersectionality, i.e., are the different inequalities experienced by disabled women and the way in which they influence their living conditions thoroughly examined?
- Is it possible to make predictions as to the degree the policy will address their concerns.[121]

Of course, there is no specific answer to the question of how the legislation is to be amended, however such parameters and previously mentioned issue, can, at least, help in finding the way for legislation to provide protection for the ones being the victims of intersectional discrimination.

When it comes to non-legal mechanisms, their importance in this regard is twofold. On one hand, they are important as such, as it is impossible to speak of equality, of decent work and of universal human rights, if society keeps creating the social barriers for certain persons. On the other hand, their importance is reflected in the fact that taking into account the importance of such mechanisms, as well as the lack of such mechanisms, greatly affects the legal framework, i.e., *de lege ferenda* proposals.

Namely, "since symbolic violence and material inequalities are rooted in relationships that are defined by race, class, sexuality, and gender, the project

120 Donegan, *op. cit*., 173.

121 Davaki, Marzo, Narminio and Arvanotidou, *op. cit*., 35.

of deconstructing the normative assumptions of these categories contributes to the possibility of positive social change".[122] In this sense, in is necessary to fight against stereotypes and bias through education, vocational training, media and generally by creating an environment of tolerance in which all are equal.[123] Despite of the "utopistic" sound such proposals carry, their importance should not minimized, but to the contrary, as without them legal framework remains only an empty shell.

As stated over three decades ago:

> "It is not necessary to believe that a political consensus to focus on the lives of the most disadvantaged will happen tomorrow in order to recenter discrimination discourse at the intersection. It is enough, for now, that such an effort would encourage us to look beneath the prevailing conceptions of discrimination and to challenge the complacency that accompanies belief in the effectiveness of this framework".[124]

Despite the fact that three decades have passed, the conclusion remains the same and particularly important for the sphere of employment.

V CONCLUDING REMARKS

The situation of women in general, women as mothers particularly, and women with disabilities especially in the world of work is by no means easy and requires taking into account many challenges on the path towards equality, which can be metaphorically considered to be "a path with rose thorns". However, the situation of a woman with disabilities, who is a mother, in this sense is a lot more complex than "simply" adding a couple of conjunctions "and". In order to understand the situation of this woman, it is necessary to apply an intersectional approach, i.e., to understand the fact that this woman is subjected to intersectional discrimination in different spheres of life.

In this regard, employment is a sphere is which the challenges are especially present and especially difficult as many stereotypes and bias exist in relation to women, in relation to women regarding maternity and in relation to persons with disabilities, but especially in relation to women with disabilities as mothers. Given the fact that the concept of intersectionality is relatively "new", this concept has not (yet), at least in general, been fully embodied in the legal framework. However, it is important to have in mind that universal human rights legal instruments, as well as ILO standards, provide for protection and guarantee equality in regard to gender dimension, disability, as well

122 McCall, *op. cit*., 1777.

123 "Finally, the fight against discrimination, especially intersectional discrimination is not possible if society is not ready to fight against stereotypes and prejudices, which are the main obstacles on the path towards equality". Mina Kuzminac, „Položaj migrantkinja iz perspektive zapošljavanja i radnih odnosa – put ka ravnopravnosti i izazovi pored puta", *Eudaimonia*, No. 2/2021, 20.

124 Crenshaw, *op. cit*., 167.

as maternity. Such guarantees and standards are also provided through (Revised) European Social Charter.

Even so, it seems that a "step further" has to be recognizing the intersectional discrimination, i.e., the intersectionality of different grounds that affect a person's situation in a particular manner. This seems necessary as intersectional discrimination is present at almost "every corner" and almost "every day". Contrary to that, the victims of intersectional discrimination often remain invisible for both the legislators and society in general.

In light of the mentioned, it is important for the legislators to recognize the complexity of the situation of the ones facing intersectional discrimination, but perhaps even more, or at least equally important, is for society to *notice* and *recognize*. Namely, when it comes to "noticing" persons with disabilities, it is especially important as they are often "invisible" in different spheres of life, in particular employment. The issue of "invisibility" becomes that much more present if the person in question is a woman, has a disability and is also a mother. On the other hand, it seems that recognizing means taking a step further and trying to understand the situation this woman is in, as well as recognizing that there is a long way to go on the path towards equality. As long as the society "nurtures" bias and stereotypes towards persons with disabilities, towards women, towards mothers, there is not much that legal framework can *de facto* change. As this process is by no means easy, it requires constant efforts and strong will that contradicts opinions present for decades and centuries. No matter how difficult the task and how many efforts have already been made, the society must use its strengths and efforts in this sense and in order for all human beings to live "free and equal in dignity and rights".

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OSNAŽIVANJE ZAPOSLENIH ŽENA SA INVALIDITETOM U VEZI SA MATERINSTVOM – PRONALAZAK IZLASKA IZ LAVIRINTA STEREOTIPA I DISKRIMINACIJE

Apstrakt

Trudnoća i nega deteta stvaraju lavirint problema za žene u svetu rada. Ulazak u lavirint je, po pravilu, vezan za trenutak kada poslodavac sazna da je zaposlena trudna, dok izlazak iz lavirinta sa „očuvanim" zaposlenjem predstavlja za ovu ženu neizvesnost do poslednjeg trenutka. Broj prepreka koje stoje na putu pronalasku izlaza iz lavirinta eksponencijalno raste kada je reč o ženama sa invaliditetom. Žene se invaliditetom se suočavaju sa intersekcijskom diskriminacijom, uopšte i u svetu rada. Kada se uzme u obzir opšteprisutno odsustvo tolerancije i razumevanja, ne iznenađuje to što je poslodavci veoma često veruju da bi žene sa invaliditetom trebalo da smatraju sebe „srećnim" što su uopšte dobile priliku da se zaposle, te da korišćenjem porodiljskog i/ili odsustva radi nege deteta pokazuju izvesnu „nezahvalnost" poslodavcu. Stoga ne čudi što se termini „rod", „invaliditet", „materinstvo" i „siromaštvo" često koriste u istom kontekstu. Sa toliko izazova koje je neophodno premostiti i staklenih plafona koje treba prevazići, put ka ravnopravnosti za žene sa invaliditetom koje su majke više izgleda kao lavirint. U svetlu navedenog, rad se bavi pravnim okvirom – garantijama ljudskih prava, standardima Međunarodne organizacije rada, Revidiranom evropskom socijalnom poveljom i pravom Evropske unije, ali takođe stavlja akcenat i na sferu primene prava. S tim u vezi, analizom problema sa kojima se zaposlene žene suočavaju uopšte i u vezi sa materinstvom, s jedne strane, i diskriminacije osoba sa invaliditetom, sa druge strane, rad ukazuje na izuzetno teške posledice intersekcijske diskriminacije kojoj žene sa invaliditetom, koje su i majke, bivaju izložene. U radu su, takođe, obrađeni i određeni *de lege ferenda* i drugi predlozi. Naposletku, autorka naglašava da sve dok društvo ne „prekine" pravu liniju koja se odnosi na „zaboravljanje" obaveza u pogledu garantija radnih i socijalnih prava ženama sa invaliditetom, svaki predlog ostaje samo u sferi ideja, miljama udaljen od prakse.

Ključne reči: *Intersekcijska diskriminacija; Rodni stereotipi; Materinstvo; Invaliditet; Svet rada.*

SOCIJALNO PRAVO I SOCIJALNA POLITIKA

SOCIAL SECURITY LAW AND SOCIAL POLICY

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SOCIAL SECURITY FOR WOMEN WITH DISABILITIES IN THE PENSION AND DISABILITY INSURANCE SYSTEM

Abstract

The author tries to analyze the position of women with disabilities in the event of any of the social risks covered by the pension and disability insurance system. The question arises as to how the protection of women with disabilities can be ensured in the event of social risks of old age, disability or death of the breadwinner. The main problem is the re-examination of the conditions for exercising the basic rights from the pension and disability insurance, determined by the valid regulations of the Republic of Serbia, which envisage as one of the conditions the previous insurance period of the insured. However, it is evident that women with disabilities have high unemployment rates, as well as frequent work for others without a legal basis, as a result of which they are not paid contributions for compulsory social insurance, and therefore the question arises whether they will be able to obtain a minimum of social security under the auspices of the mandatory pension and disability insurance system, or it is much more realistic to provide them with a minimum of protection within the social protection system. An additional problem that stands out is that women with disabilities work in low-paid jobs, and, assuming they meet the conditions for old-age pension, they will receive the minimum amount of pension, based on which they cannot provide a dignified life in old age. Therefore, as a possible solution emerges de lege ferenda *– it is necessary to envisage more favorable conditions within the framework of pension and disability legislation for women with disabilities, both in terms of previous insurance period and in terms of determining the amount of pension. The author will therefore try to point out certain solutions from foreign legal systems, but also international standards that guarantee the rights of persons with disabilities, using a comparative legal research method. Finally, the paper will briefly discuss the voluntary insurance of women with disabilities, i.e. the possibilities of their participation in voluntary pension funds, on the basis of which they could exercise a greater scope of rights in relation to the rights guaranteed through the system of mandatory pension and disability insurance.*

Key words: *Women with disabilities; Pension and disability insurance system; Old age; Disability; Survivor's pension; Unemployment.*

I INTRODUCTION

In general, people with disabilities belong to the category of workers, who encounter significant obstacles when realizing and enjoying the right to work.[1] However, the impossibility of earning income based on work is not the only problem faced by people with disabilities, when it comes to ensuring their economic and social security. As an additional problem, the difficulties in ensuring the appropriate level of social security within the mandatory social security system are highlighted. In the Republic of Serbia, the concept of social insurance rests mostly on the concept of Bismarck's model of professional insurance, created in Germany in the eighties of the XIX century. In particular, most rights from pension and disability insurance can only be exercised if the conditions regarding the previous insurance period are met. Therefore, it must be borne in mind that without exercising the right to work, i.e. without establishing an employment relationship or some other form of work engagement, persons with disabilities will not be paid contributions for mandatory social insurance by the employer, and will not be able to exercise social insurance rights either due to the realization of some of the social risks. As a result, they will not be able to exercise all those rights, which ensure social security in our legal system, and for which previous insurance period is provided as a condition.

At the very beginning of the research, the concept of persons with disabilities should be defined. It is noted that there are no significant disagreements in the literature when it comes to this term. According to Tatić, persons with disabilities "are persons with congenital or acquired physical, sensory, intellectual and psychosocial impairments who, due to various barriers in society, are completely disabled or partially limited in the performance of life activities and full and equal participation in all spheres of social life".[2] Professor Lubarda is of a similar opinion, who claims that persons with disabilities are persons with physical, sensory or mental disabilities, and not a loss of working ability, i.e. disability.[3] Deakin and Morris see people with disabilities as people who have a certain disability, a physical or mental impairment which has a substantial and long-term adverse effect on ability to carry out normal day-to-day activities".[4] According to Dean, who in his works does not define the concept of a person with disabilities, but the concept of disability, "disability is something that may be experienced when people are born with a genetic impairment, if they suffer illness or injury that limits their functioning, or if the suffer from degenerative conditions as they grow older".[5] In principle, it follows from the above that a certain number of people with disabilities, despite their disabilities, can earn income based on work, provided that they have not been diagnosed with a loss of working ability.

1 Ljubinka Kovačević, *Zasnivanje radnog odnosa* (2021), 241.

2 Damjan Tatić, *Zaštita ljudskih prava osoba sa invaliditetom* (2013), 49.

3 Branko Lubarda, *Radno pravo, rasprava o dostojanstvu na radu i socijalnom dijalogu* (2012), 64.

4 Simon Deakin and Gillian S. Morris, *Labour Law* (2009), 662.

5 Hartley Dean, "Welfare, Identity, and the Life Course", in J. Baldock, N. Manning and S. Vickerstaff (eds), *Social Policy* (2007), 225.

When it comes to legal definitions, the domestic Law on Professional Rehabilitation and Employment defines a person with a disability as "a person with permanent consequences of a physical, sensory, mental or psychic impairment or disease that cannot be eliminated by treatment or medical rehabilitation, who faces social and other limitations affecting the ability to work and the possibility of employment or maintaining employment and who has no possibility or a reduced possibility to join the labor market under equal conditions and to apply for employment with other persons".[6] The Croatian Law on the Register of Persons with Disabilities defines a person with a disability as "a person who has long-term physical, mental, intellectual or sensory impairments that, in interaction with various obstacles, may prevent their full and effective participation in society on an equal basis with others".[7] The German Sozialgesetzbuch defines persons with disabilities as "people who have physical, mental, intellectual or sensory impairments which, in interaction with attitudinal and environmental barriers, can prevent them from participating in society with a high degree of probability for more than six months".[8]

What both the theoretical and legal definitions have in common is, among other things, that persons with disabilities are exposed to certain limitations, in terms of exercising basic economic and social rights. The mentioned restrictions or obstacles also refer to the equal participation of persons with disabilities in the labor market, as well as to the exercise of rights from pension and disability insurance, and for the stated reason, the paper will analyze the obstacles that arise when ensuring the basic level of social security of persons with disabilities in the pension and disability insurance system. In connection with the mentioned obstacles, it should be borne in mind that Professor Kovačević rightly claims that "the occurrence and severity of these obstacles significantly depends on the type of disability, since people with disabilities do not form a homogeneous group, but among them there are workers whose employment rate is similar to the average employment rate on the labor market, while the opportunities for employment of workers with some other type of disability are far less".[9] Also, despite all these differences, it must be borne in mind that the vast majority of countries face a high unemployment rate of persons with disabilities, which is, among other things, a consequence of discrimination of these persons in employment, insufficient education, reduced demand for unqualified workers, dependence of persons with disabilities from social benefits.[10]

Despite this, the economic and social rights of persons with disabilities are guaranteed by a large number of domestic and international regulations.

6 Law on Professional Rehabilitation and Employment of Persons with Disabilities (*Official Gazette of RS*, No. 36/2009 and 32/2013), Article 3, para. 1.

7 Law on the Register of Persons with Disabilities of the Republic of Croatia (*Official Gazette,* No. 63/2022), Article 2, para. 1, subpara. 1.

8 Socialgezetzbuh, part IX, Article 2, para. 1.

9 Kovačević, *op. cit*., 241.

10 *Ibid*.

The most important international document, which regulates the rights of persons with disabilities, is the Convention on the Rights of Persons with Disabilities from 2006, which was ratified by the Republic of Serbia in 2009. It should be borne in mind that this Convention does not create new rights for persons with disabilities, but foresees what measures will be undertaken by the state in order to enable persons with disabilities to effectively exercise, among other things, their economic and social rights.[11] The Convention stipulates the right to adequate living conditions and social protection, and among other things it states that "states Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability".[12] The creators of this article of the Convention mainly focused on the rights provided in the social protection system, ignoring the fact that the right to social security can also be provided through the social insurance system. Therefore, we must not forget that social rights also include rights from pension and disability insurance, which are realized in the event of realization of the social risk of old age, disability or death of the family breadwinner and through which the insured or family members of the deceased insured ensure an appropriate level of social security.

It is indisputable that in the Republic of Serbia there is a good normative framework when it comes to the protection of persons with disabilities.[13] However, the situation in practice is worrisome, and there are quite a few cases when people with disabilities are on the brink of existence, due to the lack of adequate income, necessary to meet basic life needs. As Professor Trkulja rightly claims, "in Serbia, there is a discrepancy between the normative and actual position of persons with disabilities, due to the fact that many of the proclaimed rights of persons with disabilities are not realized due to objective reasons, an underdeveloped and poor society".[14] Therefore, it is stated in certain studies that "experience and available data show that when it comes to poverty, unemployment and social exclusion, people with disabilities belong

11 *Vodič kroz prava osoba sa invaliditetom u Republici Srbiji* (2015), 7.

12 Convention on the Rights of Persons with Disabilities, United Nations, 2006, Article 28, para. 1.

13 In the Republic of Serbia, the legal framework regarding the rights of persons with disabilities is solid, numerous laws regulate the position and exercise of the rights of persons with disabilities. In addition to the Constitution of the Republic of Serbia, which prohibits discrimination, we have the Law on the Prohibition of Discrimination, the Law on the Prevention of Discrimination against Persons with Disabilities, the Law on Labor, the Law on Professional Rehabilitation and Employment of Persons with Disabilities, the Law on Health Care, and the Law on the Basics of the Education System, the Law on the Rights of Patients, the Law on the Protection of Persons with Mental Disabilities, the Law on Movement with the Help of a Guide Dog and the Law on the Use of Sign Language.

14 Jovica Trkulja, "Različiti, ali ravnopravni – od objekta zaštite do nosioca prava" in J. Trkulja, B. Rakić and D. Tatić (eds), *Zabrana diskriminacije osoba sa invaliditetom* (2012), 45.

to the most vulnerable parts of our society".[15] It should be borne in mind that generally speaking persons with disabilities experiences of poverty have been shaped by the nature of welfare state capitalism.[16] Some authors think that "industrialization and the wage labour system made it more difficult for disabled people to play a productive part in society and turned them, into paupers".[17] It is also considered that the modern welfare state has failed to promote anything more than rather limited labour market participation by disabled people, while sustaining them as benefit and care recipients.[18]

The risk of poverty is also related to the fact that, in addition to the need to meet basic life needs, people with disabilities also have additional needs that are reflected in a special diet, treatment, and rehabilitation. It must be borne in mind that persons with disabilities, i.e. families that include a person with a disability, occupy a special place among the poor, because the living expenses of these families are far higher than the expenses of families without disabled members.[19] According to available World Bank data from the beginning of this century, 70% of people with disabilities in the Republic of Serbia have extremely low incomes and could be considered poor.[20] Consequently, it is necessary to point out the problem faced by persons with disabilities, and when it comes to ensuring a minimum of social security, with a special framework for ensuring social security through the system of pension and disability insurance.

In particular, the position of women with disabilities in the pension and disability insurance system will be considered within the framework of the research, because it has almost been proven that women are in a significantly less favorable position compared to men with disabilities, and when it comes to exercising the right to work, but also realization of certain rights from pension and disability insurance. As Nancy Mudrick rightly argues "Disabled women and men have different patterns of eligibility for and utilization of public transfer programs".[21] It is precisely on the basis of these transfer programs that the appropriate level of social security is ensured, and when persons with disabilities are unable to earn income based on work. According to the same author "Women are primarily beneficiaries of the means-tested public assistance programs, whereas disabled men receive transfers from the non-means-tested social insurance programs-Disability Insurance, Workers Compensation, and veteran's pensions".[22] Even though the eligibility criteria of these disability-related income support programs do not explicitly differentiate applicants by gender, assumptions underlying the social insurance and

15 *Istraživački izveštaj o kvalitetu života žena sa invaliditetom u Vojvodini* (2012), 9.

16 Dean, *op. cit*., 226.

17 *Ibid*.

18 *Ibid*.

19 Tatić (2013), *op. cit*., 214.

20 *Ibid*., 213.

21 Nancy Mudrick, "Disabled Women and Public Policies for Income Support" in M. Fine and A. Asch (eds) *Women with Disabilities, Essays in Psychology, Culture and Politics* (1988), 253.

22 *Ibid*.

public assistance programs affect the receipt of program benefits, and according to the data from the end of the eighties of the last century, nearly 60 percent of disabled social insurance beneficiaries are men, and more than 60 percent of disabled public assistance beneficiaries are women.[23] Because the social insurance benefits are usually larger than the public assistance benefits, disabled men and women also receive different levels of support, which puts women with disabilities at greater risk of poverty, which confirms the thesis about their difficult financial situation.

There are numerous reasons that put women with disabilities in a significantly worse financial position compared to men with disabilities. In a large number of cases, they are unemployed and economically dependent on the family or the state, and in addition to all that, they also have additional costs caused by disability.[24] Also, there is an established opinion among the authors that, women with disabilities, compared to those women without disabilities obtained lower salaries and were also less likely to find a job when unemployed.[25] Also, as an additional problem, and what the statistics indicate, is that women with disabilities have much less chance of being covered by pension and health insurance than men with disabilities.[26] Consequently, it is more difficult for them to realize guaranteed rights from pension and disability insurance.

And the mentioned Convention on the Rights of Persons with Disabilities of the United Nations stipulates that women and girls with disabilities are exposed to intersectional discrimination and in this respect the contracting states are obliged to take measures to ensure the full and equal realization of all human rights and fundamental freedoms.[27] Also, states are obliged to take all appropriate measures to ensure the full development, progress and training of women in order to guarantee them the exercise and enjoyment of human rights and fundamental freedoms, which are contained in the Convention on the Rights of Persons with Disabilities.[28] With regard to the intersectional discrimination of women with disabilities, it is considered that the discrimination is twofold, because women with disabilities are discriminated against on the basis of both gender and disability, and therefore it is more dif-

23 *Ibid*.

24 Lepojka Čarević Mitanovski and Violeta Kočić Mitaček, "Žene sa invaliditetom", in J. Trkulja, B. Rakić and D. Tatić (eds), *Zabrana diskriminacije osoba sa invaliditetom* (2012), 218-219.

25 Karolina Pawlowska-Cyprysiak and Maria Konarska, „Working Life of Women with Disabilities – a Review", *International Journal of Occupational Safety and Ergonomics*, Vol. 19, No. 3/2013, 411.

26 According to available data from 1981, 24% of women with disabilities were covered by pension and health insurance, compared to 41.6% of men with disabilities. Also, 46% of women with disabilities were not covered by any type of insurance during that period. According to: Nancy Felipe Russo and Mary A. Jansen, „Women, Work and Disability: Opportunities and Challenges" in M. Fine and A. Asch (eds.) *Women with Disabilities, Essays in Psychology, Culture and Politics* (1988), 236.

27 Convention on the Rights of Persons with Disabilities, Article 6, para. 1.

28 Convention on the Rights of Persons with Disabilities, Article 6, para. 2.

ficult for them to find suitable employment through which they will be provided with both rights from pension and disability insurance, and when one of the social risks is realized.[29] Therefore, in the paper, focus will be placed on the types of provision for women with disabilities in the pension and disability insurance system of the Republic of Serbia. Also, in order to show the shortcomings in the providing of women with disabilities in the pension and disability insurance system of the Republic of Serbia, a comparative legal research method will be used in the research, all with the aim of pointing out good legal solutions from foreign legal systems, which the domestic legislator could implement in the future.

II THE PROBLEM OF EMPLOYMENT OF WOMEN WITH DISABILITIES

Before pointing out the problem that woman with disabilities face when exercising their rights from pension and disability insurance, it would be appropriate to refer briefly to the issue of employment of women with disabilities. The above is necessary, and if it is taken into account, as previously established, that the condition for acquiring most of the rights from pension and disability insurance in the legal system of the Republic of Serbia is previous insurance period, especially when considering the conditions for exercising the right to old-age pension. It is a well-established point of view that it is more difficult for people with disabilities to find suitable employment. Some of the barriers to work include: low levels of occupational and basic skills (including gaps in literacy and numeracy); holding few or no qualifications; poor work records with long periods of unemployment or sickness absence; work experience concentrated in peripheral sectors characterized by low-paid and unstable job opportunities; fewer social networks linked to people in work; low household incomes and recurrent experiences of poverty; limited or no access to transport.[30]

According to data from the World Bank from the beginning of this century, only 13% of people with disabilities were employed in Serbia, of which

29 *Prepreke za jednakost, dvostruka diskriminacija žena sa invaliditetom*, (2004), 5. "As for the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), in General Recommendation No. 18 of 1991 on 'Disabled women', the CEDAW Committee expressed its concern about the situation of disabled women 'who suffer from a double discrimination linked to their special living conditions' and recommended States Parties to provide information on disabled women in their periodic reports, in particular, on measures taken to deal with their specific situation, including special measures to ensure equal access to education and employment, health services, and social security, and to guarantee the participation in all areas of social and cultural life". Valentina Della Fina, Rachele Cera and Giuseppe Palmisano, *The United Nations Convention on the Rights of Persons with Disabilities, A Commentary* (2017), 179.

30 According to: Colin Lindsay and Donald Houston, "Fit for Work? Representations and Explanations of the Disability Benefits 'Crisis' in the UK and Beyond" in C. Lindsay and D. Houston (eds), *Disability Benefits, Welfare Reform and Employment Policy* (2013), 8.

10% were employed in the civil sector, mostly with organizations of people with disabilities, 1% in the public sector, 1% in the private sector and 1% in protective workshops.[31] A somewhat better situation was observed in 2007, when according to available statistical data, 21% of persons with disabilities were employed.[32] Data from the 2011 Census indicate that in that year 12.4% of persons with disabilities were economically active, and only 9% were employed.[33] The situation has generally improved with the adoption of the Law on Professional Rehabilitation and Employment of Persons with Disabilities in 2009, but it is still not possible to discuss the full inclusion of persons with disabilities in the labor market.[34] It is believed that a special contribution to the employment of persons with disabilities will be made by the recently adopted Strategy for the Improvement of the Position of Persons with Disabilities in the Republic of Serbia for the period from 2020 to 2024, which envisages as its main goal "the improvement of the overall social and economic position of persons with disabilities in the Republic of Serbia and their equal participation in society, through the removal of obstacles in the area of accessibility, participation, equality, employment, education and training, social protection, health and other aspects that contribute to equalizing their opportunities and achieving inclusive equality".[35]

However, it must be borne in mind that it is even more difficult for women with disabilities to find any form of employment, compared to men with disabilities. According to statistics from the 1980s, men with disabilities found work twice as easily as women with disabilities, i.e. almost 42% of men with disabilities were willing to be employed in that period compared to 24% of employed women with disabilities.[36] One of the main problems when it comes to the employment of women with disabilities is the lack of appropriate education.[37] According to some authors, higher education is still a challenge for women with disabilities.[38] As a result, we come to the conclusion that women with disabilities in most cases work in lower-paid jobs, which are associated

31 Tatić (2013), *op. cit*., 213.

32 *Ibid*.

33 Strategy for improving the position of persons with disabilities in the Republic of Serbia for the period from 2020 to 2024, 13.

34 This is also confirmed in the Strategy for improving the position of persons with disabilities in the Republic of Serbia for the period from 2020 to 2024.

35 Strategy for improving the position of persons with disabilities in the Republic of Serbia for the period from 2020 to 2024, 1.

36 According to data from 1982, only 20% of disabled women in the United States had a job. *Prepreke za jednakost, dvostruka diskriminacija žena sa invaliditetom, op. cit*., 16, 18.

37 Statistics from the first decade of this century indicate that 51.5% of persons with disabilities in the Republic of Serbia are without school or with primary education, and that in that period only 13% of persons with disabilities were employed, and 90% of these person depended on social transfers. According to: Gordana Rajkov, „Sistemi podrške osobe sa invaliditetom" in J. Trkulja, B. Rakić and D. Tatić (eds), *Zabrana diskriminacije osoba sa invaliditetom* (2012), 50-51.

38 *Prepreke za jednakost, dvostruka diskriminacija žena sa invaliditetom*, *op. cit*., 15.

with low incomes, often even minimum wages, and therefore cannot even expect to have adequate incomes, when one of the social risks is realized, provided that they meet the condition regarding previous insurance period.

Also, as another problem that women in general face on the labor market, and especially women with disabilities, is that women in a greater number of cases are hired on the basis of contracts that do not establish an employment relationship, as well as on the basis of fixed-term work contracts and the part-time contracts, which means that there is no job security, and in addition, the possibility to fulfill the conditions for old-age pension, which are related to the previous insurance period. The mentioned statistics indicated that of the total number of employed women with disabilities, only 12% work full-time.[39] Additionally, women working full-time earn only 56% of what men with disabilities earn for the same job.[40] Also, women with disabilities are often hired to work without a legal basis, as a result of which employers do not pay them appropriate social security contributions. All the mentioned problems are implied in the possibility of exercising basic rights from pension and disability insurance, both in domestic law and in comparative law, especially in those countries that opted for Bismarck's model of professional social insurance, where as a basic condition in addition to years of life, also distinguishes previous insurance period.

III PROVIDING OF WOMEN WITH DISABILITIES THROUGH OLD-AGE PENSION

In the case of realization of the social risk of old age, the right to an old-age pension is guaranteed to insured persons who have fulfilled the conditions stipulated by law. In the law of the Republic of Serbia, the conditions for old-age pension are determined by the Law on Pension and Disability Insurance. These conditions are alternatively set, and the insured can exercise the right to old-age pension provided that he has reached the age of 65 and has at least 15 years of insurance period, i.e. 45 years of previous insurance period, regardless of age.[41] It seems almost impossible for a woman with a disability, if we keep in mind all the problems that this category of insured faces in the labor market, to fulfill this second, alternatively set condition, for exercising the right to an old-age pension. However, with the first condition, the question arises as to whether it is possible to fulfill the condition that is overlooked by the valid domestic regulations on pension and disability insurance, which is a minimum of 15 years of insurance period. The aforementioned results from the previously identified problems, which relate to the low employment rates of women with disabilities, as well as the frequent

39 *Ibid*., 16.

40 *Ibid*.

41 Law on Pension and Disability Insurance of the Republic of Serbia, (*Official Gazette of RS*, No. 34/2003... 62/2021), Article 19.

employment of women with disabilities without a legal basis, as a result of which they are not covered by mandatory social insurance, which means that the person who hired them does not pay them contributions for pension and disability insurance, which is an obligation arising from the provisions of the Law on Contributions for Compulsory Social Insurance.

Several alternative possibilities arise for solving this problem. As the first appropriate solution for providing social security in old age to persons with disabilities, it is proposed to introduce a social pension institute, on the basis of which these persons will be provided with a minimum of social security in the period when, in the middle of the realization of the social risk of old age, they are unable to earn income based on work. The basic characteristic of social, i.e. universal pensions is reflected in the fact that all residents exercise the right to a pension, regardless of whether they have already exercised that right based on the payment of contributions to mandatory social insurance systems or payments to private pension funds.[42] This would be a significant solution, because in the majority of the Social Security System, where the social pension institute was established, previous insurance period is not provided as a condition, which in most cases disabled people are not able to fulfill due to the reasons mentioned above. There are questions as to whether this concept would apply to all citizens who did not meet the requirements for an old-age pension and have reached the age of 65, or whether this type of benefit would be guaranteed only for persons who, for a justified reason, could not exercise their right to this social welfare. Bearing in mind all the problems that disabled people, and especially women with disabilities, face on the labor market, it seems like a completely justified solution to provide this category with an appropriate income in old age through this social benefit.

It is observed that the model of social, i.e. universal pensions is mainly chosen by economically developed countries that have accepted the concept of the welfare state and that have stable budget revenues, from which allocations can be provided for all residents who reach certain years of life, provided for by the law.[43] In those countries, women with disabilities are guaranteed a minimum of social security in old age, regardless of whether they had a period during their life in which they earned income based on work. Also, it should be borne in mind that in systems where social pension institutes are regulated by law, as a condition in addition to years of life, the first period of residence is often provided for, which means that an individual can exercise the right to a social pension if he has a minimum period of residence in the territory of the state, which ensures the payment of this benefit. Also, in some countries, as an additional condition, the implementation of the income test is foreseen, based on which it is assessed whether the person who submitted a request for the realization of this right is really in a difficult financial situation, as a result of which he cannot meet the basic needs of life. In this regard, it should be borne in mind that this type of security system is regulated by the regulations of the Republic of Serbia, more precisely, by the provisions of the Law on Social

42 Filip Bojić, *Pravo na socijalnu penziju u sistemu soijalne sigurnosti* (2018), 292-293.

43 *Ibid*., 292.

Protection. This law foresees various forms of social protection whose beneficiaries are also persons with disabilities.[44] However, the provisions of this law stipulate too strict conditions for exercising the right to cash social assistance, that is, increased cash social assistance, which certain persons with disabilities are certainly not able to achieve.[45] The main problem is that the social protection system of the Republic of Serbia is still not sufficiently equipped to provide quality services for people with disabilities, because it is a system that is aimed at different user groups, and therefore one cannot speak of a special social protection system for persons with disabilities.[46]

In the event that the state does not have enough funds to provide social pensions for all those persons who did not meet the requirements for an old-age pension, i.e. did not meet the condition regarding previous insurance period, an alternative *de lege ferenda* solution is the provision of special conditions for an old-age pension in the system of pension and disability insurance for persons with disabilities. These conditions would exclusively refer to previous insurance period, which could be 5 years of insurance instead of the stipulated 15 years of insurance period. It should be borne in mind that this model is applied in Germany and was established with the idea of providing old-age pensions to as many people as possible as a basic form of social security when the social risk of old age occurs.[47] It goes without saying that in this case, the rules on the guaranteed amount of the minimum pension would be applied to this category of insured persons, which ensures an appropriate level of social security in old age. This institute is provided for both by the domestic regulations on pension and disability insurance, which determine that the insured person who realizes the right to an old-age, early old-age, or disability pension is entitled to the lowest amount of pension, provided that the pension determined for him is less than the granted amount of the pension.[48]

Finally, as a third alternative solution for providing social security in old age to women with disabilities, a solution is imposed that is somewhat accepted in our legal system, and it refers to insurance pensionable service with increased duration. This solution is foreseen for certain categories of insured persons, including persons with disabilities in the domestic system of pension and disability insurance. Based on this model, the right to an old-age pension can be exercised by an insured person whose employment with the right to a pension ends before fulfilling the conditions stipulated by law, if he has reached at least 55 years of age and 25 years of insurance period, of

44 Damjan Tatić, "Pravni okvir Republike Srbije za ravnopravnost osoba sa invaliditetom", in J. Trkulja, B. Rakić and D. Tatić (eds), *Zabrana diskriminacije osoba sa invaliditetom* (2012), 148.

45 See: Law on Social Protection of the Republic of Serbia (*Official Gazette of RS*, No. 24/2011), Articles 82-85.

46 Vladan Jovanović, "Zakon o socijalnoj zaštiti i socijalna zaštita osoba sa invaliditetom", in J. Trkulja, B. Rakić and D. Tatić (eds), *Zabrana diskriminacije osoba sa invaliditetom* (2012), 184-185.

47 See: Grega Strban, „Pravna vprašanja predvidenih reform pokojninskega zavarovanja", *Pravna praksa*, Vol. 28, No. 46/2009, 10.

48 Law on Pension and Disability Insurance, Article 76, para. 1.

which at least 15 years have been effectively spent in workplaces for which the insurance period is calculated with an increased duration.[49] According to the provisions of the Law on Pension and Disability Insurance, the insurance period with an increased duration is also counted for insured persons who spent the time at work, on the basis of which they were compulsorily insured, working, as insured persons with a physical impairment of at least 70%, military invalids from the first to the sixth groups, civilian war invalids from the first to sixth groups, blind persons, persons suffering from dystrophy or related muscular and neuromuscular diseases, from paraplegia and cerebral and infantile paralysis and from multiple sclerosis.[50] For these insured persons, every 12 months effectively spent at work on the basis of which they are insured is counted as 15 months of insurance period.[51] For all insured persons, in general, the insurance period is counted with an increased duration, provided that they have effectively spent a total of at least 10 years at workplaces where the insurance period is counted with an increased duration, i.e. a total of at least 5 years if a disability has been established.[52]

It is interesting that in the laws governing pension and disability insurance in the states created on the territory of the SFR Yugoslavia, the concept of persons with disabilities is almost never used, and not even in the provisions that provide for an extended period of insurance for persons suffering from certain diseases, and which indisputably represent a disability. The exception is the Law on Pension Insurance of the Republic of Croatia, which explicitly establishes that insured persons with disabilities are granted an extended period of insurance based on a special regulation, the Law on Extended Period of Insurance.[53] This Law stipulates that the status of the insured person with a disability is determined by a decision of the Croatian Institute for Pension Insurance based on the findings and opinions of the Institute for Expertise, Professional Rehabilitation and Employment of Persons with Disabilities, at the request of the insured person with a disability, on the condi-

49 Law on Pension and Disability Insurance, Article 43.

50 Law on Pension and Disability Insurance, Article 58, para. 1.

51 Law on Pension and Disability Insurance, Article 58, para. 2.

52 Law on Pension and Disability Insurance, Article 54, para. 1.

53 As insured persons with disabilities the legislator classifies persons suffering from dystrophy and related muscular and neuromuscular diseases, those suffering from paraplegia, cerebral palsy, multiple sclerosis and related diseases, blind persons, deaf persons, deafblind persons, persons suffering from rheumatoid arthritis and other systemic inflammatory diseases of the joints and connective tissue, persons with functional disorders due to which they cannot move independently without the use of a wheelchair, and persons with Down's syndrome. Law on the insurance period with Increased Duration of the Republic of Croatia (*Official Gazette*, No. 115/18, 34/21), Article 1, para. 1, subpara. 3.
It should be noted that the Republic of Croatia was the fourth country in the world to sign and the third country to ratify the United Nations Convention on the Rights of Persons with Disabilities. At the same time, it was the first in the region, and among the first in the European Union, to adopt the National Strategy on the Rights of Persons with Disabilities in 2003. According to: Vesna Škulić, "Ljudska prava osoba sa invaliditetom u Republici Hrvatskoj", in J. Trkulja, B. Rakić and D. Tatić (eds), *Zabrana diskriminacije osoba sa invaliditetom* (2012), 135.

tion that their health condition causes permanent consequences for life and work.[54] For these insured persons, every 12 months of insurance period is counted as 15 months.[55] Also, according to the regulations of the Republic of Croatia, the age limit for exercising the right to an old-age pension is lowered for insured persons with disabilities by one year for every five years spent in insurance, which counts as 12 months as 15 months.[56]

The last solution, which foresees an insurance period with an increased duration for people with disabilities, seems to be the least favorable for this category of insured, because the previous insurance period is emphasized as a condition, which people with disabilities, especially women with disabilities, can hardly achieve. Consequently, in the case of an insurance period with an increased duration, the only advantage is the possibility of submitting a request for exercising the right to an old-age pension at an earlier age, which represents a favorable opportunity for people with disabilities, whose health conditions in a large number of cases, over the years worsens, and therefore they cannot do the jobs they started doing at a younger age.

Also, determining the amount of old-age pension for people with disabilities is an important issue. The current Law on Pension and Disability Insurance of the Republic of Serbia stipulates that for determining the amount of old-age pension for a woman insured, the completed insurance period will be increased by 6%.[57] Also, when it comes to determining the amount of the disability pension, and if the cause of the disability is an injury at work or occupational diseases, 40 years of pensionable service is taken into account when determining personal points.[58] Consequently, when determining the amount of the old-age or disability pension of an insured person with a disability, it would be appropriate to provide for one of the aforementioned modalities, which would contribute to the appreciation of the amount of the pension that the beneficiary will receive. This is of particular importance, if it is taken into account, as previously stated, that people with disabilities are often exposed to additional living expenses due to the resulting disability, and it is necessary to provide them with a larger amount of social benefits in old age.

IV POSSIBILITY OF PARTICIPATION OF WOMEN WITH DISABILITIES IN VOLUNTARY PENSION FUNDS AND PLANS

Bearing in mind that women with disabilities are mostly tied to the secondary labor market, it is almost impossible for them to be included in some of the voluntary pension funds and plans.[59] In the legal system of the

54 Law on the Insurance Period with Increased Duration, Article 26, para. 2.

55 Law on the Insurance Period with Increased Duration, Article 26, para. 3.

56 Law on the Insurance Period with Increased Duration, Article 27, para. 3.

57 Law on Pension and Disability Insurance, Article 69, para. 1.

58 Law on Pension and Disability Insurance, Article 69, para. 2.

59 Mudrick, *op. cit*., 262.

Republic of Serbia, voluntary pension insurance is regulated by the special Law on voluntary pension funds and pension plans, adopted in 2005. This Law regulates the organization and management of voluntary pension funds in the Republic of Serbia, as well as the establishment, activities and operations of the company for the management of voluntary pension funds.[60] Analyzing the legal text, it can be seen that the possibility of more favorable investment conditions for people with disabilities is not foreseen, and it is more than unrealistic to expect that, if the level of income is taken into account, people with disabilities will be included in one of these types of pension insurance thus providing an appropriate form of social security in old age. As previously stated, women with disabilities generally work in lower-paid jobs, and therefore are not in a position to pay additional contributions to special voluntary funds, which operate on the territory of the Republic of Serbia.

V PROVIDING OF WOMEN WITH DISABILITIES THROUGH DISABILITY PENSION

The right to a disability pension has a strong foothold in the comparative and domestic legal tradition, and the provision and protection of persons with a social risk of disability is one of the basic postulates of modern social security systems.[61] However, when it comes to ensuring the social security of persons with disabilities through the disability pension institute, there are noticeable doubts regarding this type of insurance. Therefore, it is important to note at the very beginning that a person with a disability can exercise the right to a disability pension, only if the disability occurred after establishing an employment relationship, which means that a person with a disability who was not employed and who did not earn income based on work, and therefore, no contributions for pension and disability insurance were paid for her, cannot exercise the right to a disability pension under any conditions. It should be borne in mind that disability is determined in relation to the state of health and working ability of the employee at the time when she acquired the status of insured person of mandatory pension and disability insurance, which further means that the right to a disability pension will be exercised only by a person with a disability whose disability is determined by establishing an employment relationship or some other form of employment.[62] In this regard, the Law on Professional Rehabilitation and Employment of Persons with Disabilities foresees the assessment of work ability and the possibility of employment or maintaining employment, which includes medical, social and other criteria that determine the possibilities and abilities of a person with disabilities necessary for inclusion in the labor market and performing specific tasks

60 Law on Voluntary Pension Funds and Pension Plans (*Official Gazette of RS*, No. 85/2005 and 31/2011), Article 1.

61 Filip Bojić, „Pravci reforme sistema invalidskog osiguranja u Srbiji", *Srpska politička misao*, Vol. 54, No. 4, 2016, 404.

62 Kovačević, *op. cit*., 239.

independently or with a support service.[63] Therefore, there will be no possibility to exercise the right to a disability pension, if a person with a disability has been determined during the aforementioned assessment of work capacity to not have the work capacity to establish an employment relationship.

The Domestic Law on Pension and Disability Insurance clearly states that disability exists when the insured person has a complete loss of working ability, due to a change in the state of health caused by an injury at work, occupational disease, injury outside of work or disease, which cannot be removed by treatment or medical rehabilitation.[64] As a result of the above, it is possible for a person with a disability to exercise the right to a disability pension, but only if he has met the conditions for a disability pension, which are provided by the current regulations on pension and disability insurance. Statistics in the Republic of Serbia indicate that disease is the most common cause of loss of working ability, on the basis of which the right to a disability pension is realized.[65]

When exercising the right to a disability pension, different conditions for this termination are observed, and accordingly, whether the cause of disability is an injury at work, that is, an occupational disease, or the cause of disability is an injury outside of work or a disease. If the cause of disability is an injury at work, i.e. an occupational disease, the insured person will exercise the right to a disability pension regardless of previous insurance period.[66] This right will be exercised not only by persons who were employed, but also by persons who perform temporary and occasional jobs through the youth cooperative, up to the age of 26, provided that they are in education; persons undergoing professional training, retraining or retraining directed by the organization responsible for employment; pupils and students, when they are on compulsory production work, professional practice or practical teaching; persons who are serving a prison sentence while working in an economic unit of an institution for serving a prison sentence and persons who perform certain tasks on the basis of a voluntary work contract.[67] On the other hand, insured persons whose disability is the result of an injury outside of work or disease will be entitled to a disability pension provided that they have completed at least 5 years of insurance period.[68] On the basis of the above, it can

63 Law on Professional Rehabilitation and Employment of Persons with Disabilities, Article 8, para. 1.

64 Law on Pension and Disability Insurance, Article 21.

65 It should be borne in mind that in Serbia there is no precisely prescribed nomenclature of diseases on the basis of which the loss of working capacity is realized. According to: Vesna Stojanović, *Socijalni i radnopravni položaj osoba sa invaliditetom* (2016), 369.

66 Law on Pension and Disability Insurance, Article 25, para. 1.

67 Law on Pension and Disability Insurance, Article 17.

68 Law on Pension and Disability Insurance, Article 25, para 2. Somewhat more favorable conditions are foreseen if the disability occurred before the age of 30, in which case the insured under the age of 20 will be entitled to a disability pension provided that he has one year of insurance period; if he is younger than 25 years of age, he will exercise the right to a disability pension on the condition that he has two years of insurance period,

be concluded that a person with a disability can exercise the right to a disability pension, if he meets the conditions established by law and if the expert of the Republic Fund for Pension and Disability Insurance determines a complete and permanent loss of work ability. This means that due to the nature of the disability, certain changes in the state of health are possible, which can lead to a complete loss of working ability and, therefore, the realization of the right to a disability pension. In all other situations, a person with a disability will not be able to exercise the right to a disability pension. The above is confirmed by Professor Kovačević, who asserts that "a person who, at the time of establishing a working and social legal relationship, had a certain change in his health condition can exercise the right to a disability pension, only after the deterioration of his health condition compared to the previous condition, of course in a measure that implies that it has become completely and permanently unable to work".[69]

Beneficiaries of the disability pension are also faced with the problem of losing the right to this benefit in the event that the beneficiary of the right is engaged in work and has previously been diagnosed with a loss of working capacity. The Law on Pension and Disability Insurance does not explicitly regulate when the beneficiary of a disability pension can lose his right to this benefit. It is stated only that changes in the state of disability that have an impact on the right to a disability pension recognized by a legally binding decision are determined in a procedure initiated at the request of the insured, i.e. ex officio.[70] More precise provisions can be found in the Rulebook on the Formation and Mode of Work of the Expertise Body of the Republic Fund for Pension and Disability Insurance, which stipulates that the expertise of changes in the state of disability, which affect the right recognized by a legally binding decision, is performed ex officio in the case of employment or performance of the independent activity of the beneficiary of the right to a disability pension.[71] This procedure can be initiated at the initiative of the authority responsible for resolving rights, the expert authority, upon petitions from citizens, organizations and on the basis of warnings from other authori-

and if he is younger than 30 years of age, he will exercise the right to this benefit if he has at least three years of insurance period before the onset of disability. Law on Pension and Disability Insurance, Article 26. A similar condition is provided for in German legislation, where the right to a disability pension will be exercised by those who have been in employment subject to social insurance contributions, for at least five years of previous insurance pensionable service or for at least three years during five years preceding the inception of their disability. According to: Martin Brussig and Matthias Knuth, „Germany: Attempting to Activate the Long-Term Unemployed with Reduced Working Capacity" in C. Lindsay and D. Houston (eds), *Disability Benefits, Welfare Reform and Employment Policy*, 2013, 155; MISSOC Tables: *https://www.missoc.org/missoc-database/comparative-tables/results/*

69 Kovačević, *op. cit*., 239.

70 Law on Pension and Disability Insurance, Article 96, para. 1.

71 Rulebook on the Formation and Working Methods of Expert Bodies of the Republic Fund for Pension and Disability Insurance (*Official Gazette of RS*, No. 58/2019 and 66/2021), Article 42, para. 1.

ties, who, in the course of their activities, have come to know that there are changes in the state of health.[72]

It is also a justified question whether the beneficiary of the disability pension will be able to continue using the disability pension in the case of any form of employment, and at the same time whether he will be able to use this right again, if by any chance his work engagement ceases. Although the above is not explicitly regulated by the current domestic legislation, in practice it is possible for the beneficiary of the disability pension to be engaged on the basis of a work contract or a contract for temporary and occasional jobs, and in this way to provide additional income, which will enable him to receive a supplementary form of social security.[73] Bearing in mind that our legislator did not regulate this issue to a sufficient extent, as a result of which certain doubts arise in practice, it would be appropriate to point out below how this problem was resolved in the laws of selected states.

It is noticeable that a large number of countries have taken appropriate measures, all with the aim of not disincentivizing people with disabilities to seek appropriate employment or any other form of employment.[74] *Exempli causa*, in Spain it is explicitly established by the regulations that in case of termination of the employment relationship, i.e. termination of employment, the beneficiary whose right to a disability pension or any other benefit, which is realized on the basis of disability, has previously ceased, will be able to use the benefit again which he had been receiving until the moment of re-employment.[75] In Finland, it is stipulated that disability benefits can be suspended for a maximum of two years, and if the beneficiary starts training or resumes employment.[76] In Switzerland, the beneficiary of a disability pension is allowed to work, but this right will only be exercised if the disability occurred in the last year of the insured person's work.[77] Also, in Canada, it is allowed for the beneficiary of a disability pension to be employed, provided that the earnings he earns from work do not exceed a certain financial gross amount.[78] Otherwise, the further payment of the disabil-

72 Rulebook on the Formation and Working Methods of Expert Bodies of the Republic Fund for Pension and Disability Insurance, Article 42, para. 1.

73 The above was also confirmed in the recent position of the Fund for Pension and Disability Insurance of the Republic of Serbia, in which it is stated that the beneficiary of the disability pension can conclude a contract for work, a contract for temporary and occasional jobs, an author's contract, and in that case it will not be carried out for a reassessment of working capacity nor will his disability pension be suspended. Conversely, in the event that a disabled pensioner concludes an employment contract, as a result, he may be called for an examination to determine a change in his disability status, which may result in the termination of his right to a disability pension. Published in: *Glas osiguranika*, No. 8/2022, 25.

74 Arthur O'Reilly, *The Right to Decent Work of Persons with Disabilities* (2007), 89.

75 The same will later be established in the Croatian law, and when it comes to the suspension of the right to a survivor pension for family members who are persons with disabilities. *Ibid.*

76 *Ibid*.

77 Stojanović, *op. cit*., 390.

78 *Ibid*.

ity pension will be suspended, and the beneficiary will be sent for another medical examination.[79]

The mentioned novelties are largely related to the model, which is accepted in certain social security systems, and which is related to the reintegration of disability pension beneficiaries into the labor market. The Netherlands went the furthest in the above, which with great success in the period from 2004 to 2009 implemented a comprehensive audit program of 345,000 disability pension beneficiaries, and on that occasion 20% of disability pension beneficiaries were left without any rights, and 12% of beneficiaries were reduced rights.[80] In Great Britain, the concept of reintegration is implemented especially for persons with partial disability, which is linked to the fact that medicine has advanced a lot in the last two decades and that certain diseases are no longer considered fatal, and that a certain number of social welfare beneficiaries through professional rehabilitation measures can gradually reintegrate into the labor market.[81] These measures have a positive effect on people with disabilities, because they encourage inclusion, and at the same time relieve the burden on social security systems, which often face the problem of financial sustainability. What is important about all these programs is that people with disabilities, who have been re-established as capable of working, are not left without any income due to the termination of the right to social benefits paid on the basis of a previously established disability, but it is important that different measures enable them to find appropriate employment, as well as professional rehabilitation.

Finally, with regard to exercising the right to a disability pension for persons with disabilities, there is no need to differentiate between men with disa-

79 *Ibid*.

80 According to: Ivana Vukorepa, *Mirovinski sustavi, kapitalno financiranje kao čimbenik socijalne sigurnosti* (2012), 129-130. It is interesting that according to Van Berkel „the Dutch disability system consists of two separate schemes, the main scheme is a benefit for (former) employees who, after a certain period of receiving sickness benefits (currently two years), may claim disability benefits: the *WAO* (*Wet of de Arbeidsongeschiktheidverzekering*, Disability Insurance Act) and its successor since 2006, the WIA (Wet werk en inkomennaarbeidsvermogen, Act for Work and Income according to Work Capacity)". In addition to this scheme, there are separate benefits for 'early disabled', i.e. for people who are disabled when they reach the age of 17, or people who become disabled during their studies but before reaching 30 years of age (Wet Arbeidsongeschiktheidsvoorzieningjonggehandicapten of Wajong, Act Disability Provision for the Young Handicapped). According to: Rik van Berkel, „From Dutch Disease to Dutch Fitness? Two Decades of Disability Crisis in the Netherlands" in C. Lindsay and D. Houston (eds), *Disability Benefits, Welfare Reform and Employment Policy* (2013), 200.

81 Frits Van Wel, Trudie Knijn, Ruud Abma and Mira Peeters – Bijlsma, „Partially Disabled Employees: Dealing with a Double Role in the Netherlands", *European Journal of Social Security*, Vol. 14, No. 2, 2012, 87-88. In Great Britain, the key reforms to disability benefits were carried out in the first decade of this century, which included: a tougher medical test, the re-testing of existing claimants, new requirements to engage in work-related activity, time-limiting the entitlement to non-means-tested benefit. According to: Christina Beatty, Steve Fothergill and Donald Houston, „The Impact of the UK's Disability Benefit Reforms" in C. Lindsay and D. Houston (eds), *Disability Benefits, Welfare Reform and Employment Policy* (2013), 135.

bilities and women with disabilities, and regarding the acquisition of the right to this social benefit. The aforementioned results from the fact that the basic condition is not linked to the previous insurance period, but to the cause of the resulting disability. Possibly, only the condition concerning the previous insurance period of women with disabilities could be reduced when the cause of disability is injury outside of work or illness, because it seems that it is difficult to achieve, especially for certain categories of people with disabilities, who have certain mental, physical or sensory impairments, which prevent them from easily finding suitable employment. In this regard, it seems a possible solution to determine more favorable conditions for women with disabilities in terms of previous insurance period when the cause of disability is an illness, and to establish *exempli causa* three years of insurance period as a condition for disability pension if a disabled woman with diagnosed disability older than 25 years of age and if she was diagnosed with a disability at the time of starting the employment relationship. This would provide an additional type of protection for women with disabilities in the pension and disability insurance system, and when it comes to exercising the right to a disability pension.

VI PROVIDING OF WOMEN WITH DISABILITIES THROUGH SURVIVOR PENSION

The institute of survivor pension is foreseen by the social legislation, in order to provide an appropriate level of social security to the family members of the deceased insured person, that is, the beneficiary of the pension. It seems that in domestic law, through this institute, social security can be ensured for women with disabilities, who are unable to earn income based on work, and do not have the possibility to provide the minimum social security through the institute of disability or old age pension.

According to the Law on Pension and Disability Insurance, the right to a survivor pension can be exercised by members of the immediate and extended family of the deceased insured person, i.e. pension beneficiary. The legislator classifies the widow, widower and children of the deceased insured as members of the immediate family. Consequently, it is possible for a disabled woman, as the widow of a deceased insured person, to exercise the right to a survivor pension, under the following conditions, alternatively set by law: that she has reached the age of 53 at the time of the death of the insured person, that she has become completely unable to work in at the moment of the death of the insured or one year after the death of the insured or to perform parental duties towards one or more children, beneficiaries of the right to a survivor pension.[82] Also, the law stipulates that a widow who did not reach the age of 53 before the death of her spouse or common-law partner, but reached the age of 45, acquires the right to a survivor pension when she

82 Law on Pension and Disability Insurance, Article 29, para. 1.

reaches the age of 53.[83] It seems that women with disabilities could exercise the right to a survivor pension and thereby provide an appropriate level of social security, if they are found to be incapable of work, which is possible, if the woman is found to have a form of disability that makes it impossible to establish an employment relationship or some other form of employment, or if at the time of the death of the insured they have reached the age of life stipulated by the Law, which is at least 53 or 45 years of age. However, statistical data show us that women with disabilities remain unmarried more often, marry later, and divorce more often if they do get married, compared to women without disabilities.[84] Therefore, it seems that this form of security for women with disabilities is questionable, that is, it is difficult to ensure an appropriate level of social security for this category of insured persons. Also, it should be borne in mind that according to domestic regulations governing family relations, marriage cannot be solemnized by a person who is incapable of reasoning, which means that persons with severe intellectual disabilities are excluded from enjoying the right to marriage, and therefore cannot exercise the right on a survivor pension as a widow or widower.[85]

Another possibility for ensuring social security in the system of pension and disability insurance for women with disabilities, through the survivor pension institute, is possible if the insured child is a disabled person, who can exercise this right after the death of one of the parents. Our legislator has foreseen that children can use the right to a survivor pension as long as they are in full-time education, and up to the age of 26 at the most.[86] However, here too we come to a problem, and if we keep in mind that a small number of people with disabilities continue their education, after finishing high school, due to various factors. Also, here we come to the problem of the impossibility of employment, if the inability to work has been established due to disability, that is, the inability to earn income based on work. Therefore, the legislator provided that the child acquires the right to a survivor pension and it belongs to him as long as the incapacity for independent life and work lasts, and on the condition that the incapacity occurred up to the age by which children are guaranteed the right to a survivor pension, which means that in this case the incapacity for work must be created before the age of 26.[87] In the event that the incapacity for independent living and work occurred after the age up to which children are guaranteed the right to a survivor pension, and before the death of the insured person, i.e. the beneficiary of the right, the child of

83 Law on Pension and Disability Insurance, Article 29, para. 2.

84 According to data from the end of the last century, 49% of women with disabilities get married, while according to a survey from the beginning of the 1980s, out of 45 interviewed women with disabilities, only 5 were married. The situation is similar with lesbians with disabilities, who, just like heterosexual women with disabilities, have difficulties in establishing intimate, long-term relationships with their partners. *Prepreke za jednakost*, *dvostruka diskriminacija žena sa invaliditetom*, *op. cit*., 8.

85 Tatić (2013), *op. cit*., 217.

86 Law on Pension and Disability Insurance, Article 31, paras. 1-2.

87 Law on Pension and Disability Insurance, Article 31, para. 3.

the deceased will exercise the right to a survivor pension, provided that the insured person, i.e. the beneficiary of the right sustained until his death.[88] On the contrary, if the inability to live and work independently occurs after the age up to which children are guaranteed the right to a survivor pension, but even after the death of the insured person, i.e. the beneficiary of the right, the child will not be able to exercise the right to a survivor pension on that basis.[89] It is possible that in that case he will exercise the right to a disability pension, provided that he meets the conditions stipulated by law for this social benefit.

This provision is also observed in the pension and disability legislation of the countries created on the territory of the former SFR Yugoslavia, so the Law on Pension Insurance of the Republic of Croatia and the Law on Pension and Disability Insurance of Montenegro, and the Law on Pension and Disability Insurance of the Republic of Srpska contain an identical solution, which was foreseen by the domestic legislator.[90] In addition, the regulation on pension and disability insurance of the Republic of Srpska specifies that incapacity for independent living and work exists when a person cannot be trained to perform the simplest tasks due to type and severity of physical or mental impairment or type and severity of mental illness.[91] The above implies that a person with a disability is unable to work and cannot earn income based on work to ensure economic and social security, and therefore the survivor pension is the only type of social benefit that can ensure an appropriate level of social security in the pension and disability insurance system, and when the inability to work is determined due to disability. Other forms of security, i.e. old-age and disability pension, are excluded due to incapacity, which prevents any form of employment.

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88 Law on Pension and Disability Insurance, Article 31, para. 4. The aforementioned has been confirmed in the judicial practice of domestic courts. According to the decision of the Supreme Court of Serbia of 1971, the right to a survivor pension was exercised by a child after deceased parent, incapable of earning, who got married before the death of his parent, and on the condition that the parent from whom he derives this right until the end of his life supported him. The same was confirmed in the judgment of the Supreme Court of Yugoslavia of 1973, in which it is stated that "the fact that the child was previously married and that his incapacity for work occurred after reaching the age of 26 is not an obstacle for acquiring the right to a survivor pension". The right to a survivor pension in the practice of the Yugoslav courts is also guaranteed to the sister of the deceased insured person, provided that her incapacity for earning occurred before the death of the sister-deceased insured person, provided that the insured sister supported her until death, and that the sister who submits the request for survivor pension do not have enough means to support herself. Decision of the Supreme Court of Serbia, U. 2676/71; Decision of the Supreme Court of Yugoslavia, Uis. 1176/73; Decision of the Supreme Court of Yugoslavia, UIS, 552/69; According to: Dragoljub Simonović, *Radnopravna čitanka* (2009), 392-393.

89 See: Decision of the Federal Court, UISS, 1008/80, according to: Simonović, *op. cit*., 396.

90 Law on Pension Insurance of the Republic of Croatia (*Official Gazette*, No. 157/2013 ... 84/2021), Article 69, para. 3; Law on Pension and Disability Insurance of Montenegro (*Official Gazette*, No. 54/2003... 80/2020), Article. 46, para. 7; Law on Pension and Disability Insurance of the Republic of Srpska (*Official Gazette*, No. 134/2011 ... 15/2022), Article 74, para. 5.

91 Law on Pension and Disability Insurance of the Republic of Srpska, Article 74, para. 7.

However, the Law on Pension Insurance of the Republic of Croatia also contains a very good solution, which explicitly refers to the provision of social security to persons with disabilities through the survivor pension institute. It is foreseen that the right to a survivor pension after the death of a parent has a child with the status of a disabled person with remaining working capacity, which is determined according to the regulations on professional rehabilitation and employment of disabled persons, regardless of whether the insured or the beneficiary of the right supported him until his death.[92] In the event that this user of the right to a survivor pension enters into employment or begins to perform activities as a person with disabilities with remaining working capacity on the basis of which there is an obligation to apply for pension and disability insurance, the payment of the survivor pension will be suspended, which will start again to provide to the beneficiary the rights, and in the event of termination of the insurance.[93] The legislator also foresees that if a child with the status of a person with disabilities with residual ability entered into employment before the death of the parent or began to perform a certain activity on the basis of which there is an obligation to provide insurance, after the death of the parent, he has the right to submit a request for exercising the right to a survivor pension.[94] By interpreting these provisions, we come to the conclusion that the Croatian legislator, unlike the domestic legislator, has regulated in detail the issue of providing for persons with disabilities through the survivor pension institute, and that *de lege ferenda* this should be done in the domestic regulations on pension and disability insurance as well.

However, it should be borne in mind that in the legislation of Socialist Yugoslavia it was to some extent provided for the provision of disabled persons through the survivor pension institute, so the Republican Law on Pension and Disability Insurance of Workers of the Republic of Serbia from 1983 provided that an employed disabled child can, upon termination of employment, exercise the right to survivor pension.[95] An almost identical provision is also observed in the Law on the Basics of Pension and Disability Insurance of the Federal Republic of Yugoslavia from 1996, in which it is stated that a disabled child acquires the right to a survivor pension and it belongs to him from the termination of employment, i.e. self-employment.[96] And the current Law on Pension and Disability Insurance of the Republic of Serbia stipulates that a disabled child, in accordance with the regulations on the classification of developmentally disabled children, acquires the right to a survivor's pension even after termination of employment, i.e. self-employment.[97] However,

92 Law on Pension Insurance of the Republic of Croatia, Article 69, para. 5.

93 Law on Pension Insurance of the Republic of Croatia, Article 69, para. 6.

94 Law on Pension Insurance of the Republic of Croatia, Article 69, para. 7.

95 Law on Pension and Disability Insurance of Workers (*Official Gazette of SRS*, No. 13/83 ... 20/90), Article 58, para. 3.

96 Law on the Basics of Pension and Disability Insurance (*Official Gazette of FRY*, No. 30/96...5/2003-state law), Article 69, para. 4.

97 Law on Pension and Disability Insurance, Article 31, para. 7.

all these provisions seem quite imprecise in relation to the solution contained in the current Croatian legislation, which, as noted, regulates in detail the position of beneficiaries of the survivor pension, for whom the status of a person with a disability has been determined.

As a result of the above, and based on the use of comparative legal research methods, it is concluded that the providing of women with disabilities through the institute of survivor pension in the system of pension and disability insurance of the Republic of Serbia is not satisfactory and that it is necessary to carry out the determination of legal changes, and based on the existing solutions from Croatian legislation. This would create a clear demarcation in the pension and disability legislation between survivor pension beneficiaries, who are disabled and can still earn income based on work, and survivor pension beneficiaries who have been determined to be incapable of work.

VII CONCLUSION

Based on the analysis carried out, we conclude that in the Republic of Serbia the rights from pension and disability insurance of persons with disabilities are insufficiently regulated and that the current Law on Pension and Disability Insurance does not contain any provision that would foresee more favorable conditions under which persons with disabilities can exercise these rights.

Therefore, it is necessary to change and amend this Law, in order to ensure a minimum level of social security for people with disabilities due to the realization of social risks of old age, disability and death of the family breadwinner. In particular, more favorable conditions should be foreseen for women with disabilities, because it was noticed that it is much more difficult for women to realize the aforementioned rights compared to men, and keeping in mind that statistics indicate that women with disabilities are significantly less represented on the labor market compared to men with disabilities.

It seems that the basic idea of our legislator was to provide the minimum social security to persons with disabilities through the Social Protection System, ignoring the possibility that the minimum social security can also be provided through the social insurance system, specifically the Pension and Disability Insurance System. Therefore, certain changes to the existing normative framework are necessary, all with the aim of better providing for persons with disabilities. The above would, possibly, encourage people with disabilities to join the labor market, knowing that through any form of employment they can be provided with an appropriate level of social security.

With regard to exercising the right to an old-age pension, it would be appropriate, as part of some future amendments to the Law on Pension and Disability Insurance, to provide for the possibility of exercising the right to a so-called national or social pension for persons with disabilities who do not meet the conditions regarding previous insurance period, and who have completed conditions for old-age pension provided by law, which refer to the insured's years of life. It was established that due to various factors, women with dis-

abilities often do not meet the requirement regarding previous insurance period, and for this reason it is necessary to find an opportunity for their social security in old age, all in order to avoid referral to the social protection system. An alternative to national, i.e. social pensions could be both reducing the requirements regarding previous insurance years for certain categories, or for all categories, and providing the lowest amount of pension, which is provided for by the current regulations on pension and disability insurance of the Republic of Serbia. The third possibility, which was also discussed in the paper and is to some extent provided for by the current regulations, refers to the provision of insurance pensionable service with an increased duration for people with disabilities, which could also ensure social security in old age under more favorable conditions, but the specified model after the implementation research seems to be the least favorable solution for women with disabilities.

In terms of voluntary pension insurance, more favorable investment conditions should be foreseen for people with disabilities, in order to enable them to provide an appropriate level of social security in old age.

Likewise, as part of future legal changes, it would be necessary to specify the conditions under which the beneficiary of a disability pension can be engaged in work. It is indisputable that disability is an obstacle to establishing an employment relationship, but also the engagement of disability pension beneficiaries through work contracts or contracts on temporary and occasional jobs seems more than justified, and therefore this issue deserves to be regulated in detail by current regulations, and in order to avoid frequent doubts that appear in practice. Possibly, it should be considered determining more favorable conditions for women with disabilities, and when the cause of disability is an injury outside of work or disease, because it is possible that according to the current conditions, women with disabilities may not realize the right to a disability pension due to the high unemployment rates of this category of insured persons.

When it comes to providing for persons with disabilities through the survivor pension institute, there is a more than reasonable solution from the law of the Republic of Croatia, which guarantees persons with disabilities an appropriate level of social security, with the possibility of being temporarily employed themselves. Also, this type of insurance seems to be the most acceptable for those categories of persons with disabilities, who cannot earn income based on work, and therefore cannot realize either the right to an old-age pension or the right to a disability pension. Bearing in mind the small number of women with disabilities entering the marriage union, the right to a survivor pension will generally be realized after the death of one of the parents, and it will be realized as long as the incapacity for work lasts.

Finally, it is necessary in the domestic system of pension and disability legislation to recognize the existence of persons with disabilities and to determine their rights. The main problem is that the concept of a person with a disability is almost invisible in the regulations on pension and disability insurance of the Republic of Serbia. The current law contains a whole series of

gaps, when it comes to persons with disabilities, and therefore it is necessary to amend this regulation, in order to provide certain rights to persons with disabilities, which will ensure them an appropriate level of social security, in situations where they are unable to earn income based on work.

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SOCIJALNO OBEZBEĐENJE ŽENA SA INVALIDITETOM U SISTEMU PENZIJSKOG I INVALIDSKOG OSIGURANJA

Apstrakt

Autor u radu nastoji da izvrši analizu položaja žena sa invaliditetom u slučaju nastupanja nekog od socijalnih rizika obuhvaćenih sistemom penzijskog i invalidskog osiguranja. Otvara se pitanje na koji način se može obezbediti zaštita žena sa invaliditetom u slučaju nastupanja socijalnih rizika starosti, invalidnosti ili smrti izdržavaoca porodice. Osnovni problem predstavlja preispitivanje uslova za ostvarivanje osnovnih prava iz penzijskog i invalidskog osiguranja, utvrđenih važećim propisima Republike Srbije, a kojima se kao jedan od uslova predviđa i prethodni staž osiguranja. Međutim, evidentno je da su kod žena sa invaliditetom prisutne visoke stope nezaposlenosti, kao i često obavljanje rada za drugog bez pravnog osnova, usled čega im se ne uplaćuju doprinosi za obavezno socijalno osiguranje, te se stoga postavlja pitanje da li će uopšte moći da im se obezbedi minimum socijalne sigurnosti pod okriljem obaveznog sistema penzijskog i invalidskog osiguranja ili je znatno realnije da im se minimum zaštite obezbeđuje u okviru sistema socijalne zaštite. Kao dodatni problem izdvaja se i to što žene sa invaliditetom rade na slabo plaćenim poslovima, te će, pod pretpostavkom i da ispune uslove za starosnu penziju, primati najniži iznos penzije, na osnovu kojeg ne mogu da obezbede dostojan život u starosti. Nameće se stoga kao moguće *de*

lege ferenda rešenje predviđanje povoljnijih uslova u okviru penzijskog i invalidskog zakonodavstva za žene sa invaliditetom, kako u pogledu prethodnog staža osiguranja, tako i u pogledu utvrđivanja iznosa penzije. Autor će stoga nastojati da u radu, upotrebom uporednopravnog metoda istraživanja, ukaže na pojedina rešenja iz stranih pravnih sistema, ali i na međunarodne standarde kojima se jemče prava osoba sa invaliditetom. Konačno, u radu će biti reči i o dobrovoljnom osiguranju žena sa invaliditetom, odnosno o mogućnostima njihovog učešća u dobrovoljnim penzijskim fondovima, na osnovu kojeg bi mogle da ostvare veći obim prava u odnosu na prava garantovana kroz sistem obaveznog penzijskog i invalidskog osiguranja.

Ključne reči: *Žene sa invaliditetom; Sistem penzijskog i invalidskog osiguranja; Starost; Invalidnost; Porodična penzija; Nezaposlenost.*

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THE LONG-TERM CARE SYSTEM FOR THE CARE-DEPENDENT PERSONS IN THE REPUBLIC OF SERBIA*

Abstract

The primary goal of this paper is to analyse the rights belonging to persons in case of need of assistance and care of another person in the Republic of Serbia. Given that the aforementioned rights, viewed from the viewpoint of comparative law, are provided, by default, within the so-called long-term care system, we shall analyse the stated rights taking into consideration the major characteristics and deficiencies of the national long-term care system, and, based thereupon, giving proposals for the enhancement thereof. For the purpose of implementing the stated goal, the author in her paper, first sets out the definitions of the long-term care system and its basic characteristics, and, then, provides an overview of the rights within the long-term care system in the Republic of Serbia and implicates challenges, barriers and deficiencies that the stated system encounters (or at least some of its elements). Finally, the author gives proposals for the system's enhancement.

Key words: *Need; Assistance; Long-term care.*

I INTRODUCTION

A great many people are unable to take care of themselves due to their old age, illness, disability and similar reasons, so they need to be assisted in normal functioning of life.[1] Their family members often have no possibility to provide them with such services, thus they need organised help by the community. Since the income of helpless people is often poor, and their need to be assisted and cared of another person entails additional expenses, they need to be supported by the state in such financing. Therefore, many countries have developed long-term care systems.

Such long-term care implies an entire range of services provided to persons with decreased functional abilities of mental or physical nature, and who, consequently, depend on custodial care in performing basic daily

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1 Senad Jašarević, *Socijalno pravo* (2010), 275.

activities.[2] The long-term care system is comprised of medical care, prevention-related services, rehabilitation, palliative care, assistance at home, or in performing instrumental daily activities. The aim of long-term care is to ensure that an individual, who cannot completely take care of themself, may maintain the best possible life quality, still keeping the highest possible degree of independence, autonomy, personal fulfilment and human dignity. This long-term care is not aimed at eliminating one's disease, but to alleviate suffering, reduce discomfort, offset the effects of limitations caused by disease and disability, and maintain the best possible levels of physical and mental functioning of people.[3]

The current legal framework for long-term care in Europe is the European Social Charter (Revised), a binding document of the Council of Europe, where article 23 regulates the right of elderly people to social protection. Although any person (not only elderly) may find themself in the state of necessitating care and assistance of another person, the Member States of the Council of Europe have built their long-term care systems on the basis of this article, undertaking to enable elderly persons (but also all other persons depending on care and assistance of another person) to lead independent life in their familiar surroundings by means of provision of health care and the services necessitated by their state. The European Union countries implement this policy by way of an open method of coordination; thereupon, the provision of long-term care is characterised by significant differences between (and inside) these countries, mainly in the way such system is organised (by public, non-profitable, or profitable service providers); according to the type/kind of the right to provision (cash benefits or services), and how the resources are generated (through general taxation, compulsory social security or voluntary private insurance).[4] Whereby, the benefits provided within the framework of the long-term care system, by default, do not depend on sex or age, but most frequently on medical (healthcare status) and/or functional (necessary number of hours of support) criteria.

The Republic of Serbia, which ratified article 23 of the European Social Charter (Revised)[5] and is in the accession process to the European Union, is also obliged to perform harmonisation with the European Union legal standards. Despite the foregoing, Serbia does not have an integrated long-term care

2 Similarly: Maria Michela Gianino, Jacopo Lenzi, Maria Martorana, Marco Bonaudo, Maria Pia Fantini, Roberta Siliquini, Walter Ricciardi and Gianfranco Damian, 'Trajectories of long-term care in 28 EU countries: evidence from a time series analysis', *The European Journal of Public Health*, Vol. 27, No. 6, 2017, 948–954.

3 Marija Dragićević, 'Novčana davanja u sistemu dugotrajne nege', *Radno i socijalno pravo,* No. 1, 2020, 242; Marija Dragićević, 'Comparative Law Review of Long-Term Care Systems in some European Countries', *Facta universitatis. Series Law and Politics*, Vol. 18, No. 3, 2020, 185-186.

4 See: Slavina Spasova, Rita Baeten, Stéphanie Coster, Dalila Ghailani, Ramón Peña-Casas, Bart Vanhercke, *Challenges in long-term care in Europe – A study of national policies*, European Commission (August 2018), 6-9; Caroline Glendinning, Bleddyn Davies, Linda Pickard and Adelina Comas-Herrera, *Funding Long-term Care For Older People: Lessons From Other Countries* (2004), 29–32.

5 Act on ratification of Revised European Social Charter, *Official Gazette of the RS – International Treaties*, No. 42/09.

system that would encompass all the segments of its activities. The goals appearing in the social and healthcare protection match the goals of the long-term care policy of the European Union. However, they are strictly isolated per sectors and non-coordinated. Furthermore, the awareness of the need and significance of leading a clear and defined long-term care policy has not been developed in Serbia yet.

II BASIC NOTIONS AND CHARACTERISTICS OF THE LONG-TERM CARE SYSTEM

There is a number of different definitions of long-term care concepts existing parallelly within the community of European countries. As the broadest baseline, the definition of the Organisation for Economic Cooperation and Development (OECD) is used, defining long-term care (protection) as: "a cross-cutting policy issue that brings together a range of services for persons who are dependent on help with basic activities of daily living over an extended period of time."[6] Long-term care includes healthcare and social protection services provided at home or in an institutional environment to individuals who need support in performing activities of daily living over an extended period of time.[7] Such support implies: 1) assistance in performing basic activities of daily living (ADLs) such as mobility, eating, dressing, personal hygiene; 2) assistance in performing instrumental activities of daily living (IADLs), such as meal preparation, shopping, transportation, etc. 3) nurses' assistance and palliative care (wound dressing, decubitus prevention and treatment, administering medicines, alleviating pain, following-up health status).[8] Long-term care definitions differ in the European countries from the standpoint of determining the length of use, specifying a beneficiary's profile, as well as the scope and types of services. There are also differences in

6 The Organisation for Economic Co-operation and Development (OECD), Long-Term Care for Older People, OECD Health Project (2005), 10, *https://read.oecd-ilibrary.org/social-issues-migration-health/long-term-care-for-older-people_9789264015852-en#page11*. Besides the aforementioned definition, as a useful start for providing an answer to the question what exactly long-term care exactly is, the definition of the Institute for Medicine of Washington 1986 is also used, according to which this is "a variety of ongoing health and social services provided for individuals who need assistance on a continuing basis because of physical or mental disability". Iain Carpenter, John P. Hirdes, Naoki Ikegami, Long term care: a complexity challenge, OECD Observer (2001), 27, *http://oecdobserver.org/news/archivestory.php/aid/558/Long_term_care:_a_complex_ challenge.html*.

7 Long-term care is provided to helpless elderly persons and persons with physical or mental disabilities, who need support and assistance in their basic activities of daily living. Tim Muir, 'Measuring social protection for long-term care', *OECD Health Working Papers*, No. 93, OECD Publishing, Paris (2017), 14.

8 Franceska Colombo, Ana Llena-Nozal, Jerome Mercier, Frits Tjadens, 'Help Wanted? Providing and Paying for Long-term Care', *OECD Health Policy Studies*, OECD Publishing, Paris (2011), 39, *https://read.oecd-ilibrary.org/social-issues-migration-health/help-wanted_9789264097759-en#page3*; Barbara Lipszyc, Etienne Sail, Ana Xavie, „Long-term care: Need, use and expenditure in the EU-27", *Economic Papers 469*, European Commission, Directorate-General for Economic and Financial Affairs, Brussels (2012), 7-8.

the long-term care concepts, as to how "dependency" of a person who is a beneficiary of such services is perceived, as well as whether such support is provided as a financial benefit or a concrete service.[9] Also, there is no concordance between the states in regard to defining beneficiaries of such services (e.g. whether it will be an individual or a family), or relation to general demarcation of who the service providers for the entire population of potential beneficiaries will be, that is to say what the role of of public and private sectors and family is and what it is like. So, there is primarily a *horizontal division of responsibilities* in the organisation of long-term care between the healthcare and social welfare sectors in terms of regulating, financing, and providing such services (e.g., Austria, Belgium, France, Norway, Great Britain [excluding Scotland]). This horizontal division obstructs the coordination of the system, and it even restrains the provision of services in some countries, due to political disagreements about who should pay for the services provided (e.g., Lithuania). However, there are countries that have managed to organise their systems in a relatively integrated manner between health care and social welfare (e.g., Ireland, Denmark).[10] Such horizontal division between the healthcare and social sectors is very often followed by a *vertical division of responsibilities*, where the powers are divided between different institutional levels: national, regional, and local. Healthcare services in a long-term care system are usually regulated and financed at the national level (e.g., France, Great Britain), and also at the regional level in some countries (e.g., Denmark, Italy). Social protection, which includes care services aimed to assist a person dependent on custodial care in performing some basic daily and instrumental activities, is financed and regulated at the national level (e.g., Bulgaria, Hungary, Italy, Slovenia); at the regional and local levels (e.g., Denmark, Finland, Norway), and frequently as a combination of the three levels (e.g., Austria, Belgium, France).[11]

In theory, long-term care is most frequently defined as an entire range of services provided to persons who need help continually over an extended period of time due to existing physical or mental disorders.[12] In a broader sense, long-term care system includes non-cash benefits (services) and cash benefits. *Non-cash benefits*/services can be viewed upon the type/kind of service provided irrespective of the place where it is provided. So, we differ

9 Republički zavod za socijalnu zaštitu – Jedinica za monitoring i evaluaciju, O evropskom konceptu dugotrajne zaštite i praktičnim iskustvima u pilot projektu akreditacije programa usluga dugotrajne zaštite u Srbiji (On the European Long-term Protection Concept and Practical Experiences in the Long-term Protection Services Programme Accreditation pilot project), *Socijalna misao*, br. 60, 2008.

10 In Norway, recent efforts have been made to improve the coordination between healthcare and social aspects of long-term care. To this end, the role of municipalities (including also financial responsibility) has been intensified. The Netherlands, however, since 2015, have moved into the opposite direction for the purpose of providing financial sustainability: from an integrated national scheme to a scheme that involves various levels of administration and responsibilities divided between healthcare and social protection. Spasova *et al*., *op. cit*., 12.

11 *Ibid*.

12 Gianino *et al*., *op. cit*., 948–954.

health care and, within it, palliative care and hospice care, personal care service, help with instrumental activities of daily living and other social protection services (support in participating social activities, socializing, etc.). *Cash benefits* allow for flexibility and choice to the beneficiary and/or support for informal family care. *Lundsgaard*[13] differs three basic groups of cash benefits: 'personal budgets',[14] cash allowance paid to the beneficiary,[15] which they spend at their own choice, and cash allowance paid directly to the caregiver.[16]

III THE LONG-TERM CARE SYSTEM IN THE EU COUNTRIES

The classification of long-term care system is rather complicated. There are two basic reasons thereof. First, long-term care systems are complex, since the concerned area includes both healthcare and social welfare sectors, combines cash benefits with services along with various service providers and the manner of their selection, etc. Second, long-term care systems appeared rather late, save for the Scandinavian countries; so, the question arises if their background differences are present and evident, as for instance in pension or healthcare systems. When speaking about the European Union countries, we can conclude that, save for the Nordic model that clearly differs from the others, all the other countries have very different systems, based on various combinations of social benefits, methods of financing, organising, the criteria for acquiring the rights, a different role of the healthcare system; therefore, it is very difficult to classify and define them. The closest system to the Nordic model, in terms of responsibility of the state and generosity of the sys-

13 Jens Lundsgaard, *Consumer Direction and Choice in Long-Term Care for Older Persons, Including Payments for Informal Care: How Can it Help Improve Care Outcomes, Employment and Fiscal Sustainability?*, OECD Health Working Papers, No. 20, OECD Publishing (2005), 14.

14 '*Personal budgets*' and "direct payments" are cash benefits that the beneficiary is obliged to use for purchasing a service from a professional agency or directly from an individual caregiver. Such benefits also exist in the Netherlands, the USA and in Great Britain where there is a possibility to opt for the so-called "direct payments" instead of services at the local level. In the Scandinavian countries, there is a possibility where the municipality directly employs a caregiver of the beneficiary's choice instead of the common practice of using services organised by the local community. Parvaneh Rabiee, Nicola Moran, Caroline Glendinning, 'Individual Budgets: Lessons from early users' experiences', *British Journal of Social Work,* Vol. 39, No. 5, 2007, 3-5.

15 *Allowance for assistance and care of another person* is granted to the beneficiary and is intended to covering a portion of long-term care costs, where principally there is no obligation to employ a caregiver. Such kind of cash benefits exists in Germany, Austria, Great Britain and Luxembourg. In most cases, such allowance is spent within the family budget. Lundsgaard, *op. cit*., 14.

16 *Caregiver allowance* is aimed at compensating partially the caregiver's missed income. This allowance is usually low and it often implies some additional material criteria in order to be granted. Such kind of compensation exists in Australia, Ireland and England. Caroline Glendinning, Nicola Moran, *Reforming Long-term Care: Recent Lessons From Other Countries* (2009), 3.

tem, is the Dutch system, although it is organised within the framework of healthcare insurance and its largest part is financed from contributions. On the other hand, although the English model is very frequently distinguished as a special one and classified as a model of social aid or a residual model, it should be mentioned that it is such only in regard to services, while cash benefits have a universal character. Besides the two models, the Southern and Eastern European model is distinguished in theory, which is primarily based on the family care. Finally, for the largest number of countries, the mixed model with a mix of services and cash benefits is characteristic, where various ways of organisation and various coverage of long-term care coverage are present.[17] Hereinafter, a brief review of the most important developed models of long-term care within the framework of the European Union is presented.

The Netherlands. – This is the first country that, by enacting *Exceptional Medical Expenses Act – AWBZ*, introduced a universal compulsory social and healthcare insurance for covering a broad spectre of long-term care services. While public insurance for long-term care was introduced in the Netherlands in 1968, other countries only did it not so long ago, e.g. Germany in 1995, and Japan in 2005.[18] The basic philosophy of the Dutch model is that the state is responsible for providing long-term care services. Long-term care insurance system exists as a part of healthcare insurance, more exactly within the framework of compulsory insurance in case of "irregular" medical expenditures. Besides long-term care, this insurance also covers costs linked to all types of chronic diseases, more exactly all higher costs that would not be covered by private insurance.[19] Before a person is allowed to use long-term care services in compliance with the AWBZ, it is necessary to establish if this care is really needed, and if it is, what type of care is needed and how long it should be provided. The idea was to make the needs assessment for custodial care and assistance more objective, uniform and independent of personal interests of healthcare service providers.[20] The criterion for accessing the system of long-term care is health – the functions that a potential beneficiary cannot perform (as in Germany) and it does not depend on their income and property (as the *Medicaid* programme in the USA). There are no general classifications of disability level, yet the needed support assessments are carried out on the basis of clear instructions for each beneficiary individually. As far as long-term care services are concerned, the AWBZ covers personal and healthcare, daily care, personal assistants and institutional care, including institutions for accommodation of

17 Markus Kraus, Monika Riedel, Esther Mot, Peter Willemé, Gerald Röhrling and Thomas Czypionka, *A Typology Long-Term Care Systems in Europe*, ENEPRI Research Report No. 91, European Network of Economic Policy Research Institutes (2010), 30.

18 Frederik T. Schut and Bernard van den Berg, 'Long-Term Care Insurance in the Netherlands', in Joan Costa-Font, Christophe Courbage (eds), *Financing Long-term Care in Europe – Institutions, Markets and Models* (2012), 103.

19 Esther Mot, Ali Aouragh, Marieke De Groot and Hein Mannaerts, *The Dutch System of Long-term Care*, ENEPRI Research Report No. 90, European Network of Economic Policy Research Institutes, The Hague (2010), 6.

20 *Ibid*., 7.

persons with disabilities, as well as mental health institutions. *Cash allowance* is paid in a form of "*personal budget*" the value of which is 25% lower than the service value. If the beneficiary opts for cash allowance, he/she must present how it was spent, e.g. must prove that he/she used it to buy such service (when buying he/she is free in selecting the service provider). The AWBZ is funded from contributions, participations, and taxes in the event of deficit. The contribution rate amounts to 12.25% of total income.[21]

France. – Long-term care system in France is mixed and based on two pillars. The first pillar is healthcare insurance that covers healthcare costs in residential care, long-term inpatient care units and in in-home nurse assistance. The second pillar is cash benefits system (*Allocation Personnalisée d'Autonomie – personal allowance for autonomy* (*APA*)), aimed at financing costs of care that are not covered by healthcare insurance.[22] Needs assessment for custodial care is within the local communities' mandate, as well as defining the needed package of services for each beneficiary, monitoring and service evaluation and financing a larger portion of the *APA allowance* (Joël et all, 2010: 6).

In France, therm "dependency" is used rather than long-term care. It directly refers to age of individual persons, particularly to people over 60 years of age. People under 60 are included in the long-term care system if they enter the category of disabled or handicapped persons.[23] Needs assessment for long-term care is carried out on the basis of national standardised dependency scale, the so-called AGGIR (*Autonomie Gerontologie Groupes Iso-Ressources*) scale. According to this scale, elderly people are classified in six dependency degrees, where AGGIR 1 is a fully dependent person, while AGGIR 6 is an independent person.[24] Cash benefits for elderly people, the so-called APA, is allocated to people over 60 who are classified in the first four AGGIR groups, regardless of being accommodated in residential care or at home. This is universal allowance, but its size, besides the category of dependency, also depends on the size of beneficiary's income.[25] A significant characteristic of APA is that its manner of use is controlled. Beneficiaries must pay professional assistance or hire a member of family, but it may not be his/her spouse.[26] APA can be paid in several ways. One is *direct payment for services of assistance at home*, the providers of which can be municipalities, non-profit organisations, as well as commercial companies. APA can also be paid as *cash benefit to the beneficiary's*

21 Peter Donders and Hans Maarse, *Pensions, Health Care and Long-term Care – The Netherlands*, Annual National Report 2011, European Commission, DG Employment, Social Affairs and Inclusion, Brussels (2011), 24.

22 Bruno Palier, Marek Naczyk and Nathalie Morel, *Pensions, Health Care and Long-term Care – France*, Annual National Report 2010, European Commission, DG Employment, Social Affairs and Inclusion, Brussels (2010), 22.

23 Christophe Courbage and Manuel Plisson, 'Financing Long-term Care in France' in Joan Costa-Font, Christophe Courbage (eds), *Financing Long-term Care in Europe – Institutions, Markets and Models* (2012), 126.

24 *Ibid*., 126, 127.

25 *Ibid*., 127.

26 *Ibid.*

bank account, but he/she must confirm that the money is spent for purchasing professional services or hiring a caregiver. Another way of APA payment is through a voucher for employing (*CESU – Chèques emploi service universel*) that facilitates such formal employment of workers for the need of "personal services", such as help in house, baby-sitting, etc.[27]

As far as financing is considered, *APA* is financed from the local level; but since 2004, one portion (approximately 30% of the *APA* total income) is financed and paid by the National Solidarity Fund for Autonomy (*CNSA*),[28] which is financed from contributions for healthcare insurance, taxes and a special 0.1% "solidarity tax", which is basically a tax on salaries fund. Also, the *CNSA* introduced the so-called "solidarity contribution for autonomy" in a form of one "national solidarity day", which is granted by companies working for "free" that day, i.e. all the employees renounce one wage a year.[29]

Germany. – January 1995, after the multiannual public debate originating back in the 1970-s, Germany established a long-term care system by introducing mandatory insurance for long-term care, as the fifth pillar of the social security system.[30] Long-term care insurance is directly linked to healthcare insurance, so that anyone who is insured by the healthcare insurance (either public or private) is automatically "registered" in the long-term care insurance. Since insurance is mandatory for all employees, and those who are not employed are insured through their family members, the right to long-term assistance is practically universal. This right may be exercised by all those who paid contributions at least for two years within a ten-year long period preceding the filing of application, and who meet medical requirements for long-term care regardless of their age and property status.[31] The insurance covers three types of remuneration: care allowance, home care and residential care. Beneficiaries select the type of allowances, and they may opt for a combination of cash allowance and service. Cash allowance (care allowance) is considered remuneration for informal care, while services and residential care are considered formal care.[32]

Long-term care is financed from a special contribution. To ensure financial sustainability of this branch of social insurance, Germany has increased

27 *Ibid*., 132.

28 The National Solidarity Fund for Autonomy – *CNSA* was founded in 2004. It is responsible for providing financial support and financing long-term care services to persons who cannot function on their own any longer. Marie-Eve Joël, Sandrine Dufour-Kippelen, Catherine Duchêne, Mathilde Marmier, *The Long-term Care System for the Elderly in France*, ENEPRI Research Report No. 77, European Network of Economic Policy Research Institutes (2010), 6.

29 Palier *et al*., *op. cit*., 23-24.

30 Andy Zuchandke, Sebastian Reddemann and Simone Krummaker, 'Financing Long-Term Care in Germany' in Joan Costa-Font, Christophe Courbage (eds), *Financing Long-Term Care in Europe – Institutions, Markets and Models* (2012), 214.

31 Winfried Schmähl, Boris Augurzky and Roman Mennicken, *Pensions, health and long-term care – Germany*, Country Document Update 2014, European Commission, DG Employment, Social Affairs and Inclusion, Brussels (2014), 21-22.

32 *Ibid*., 22.

rate of social contributions since the scheme started in 1996, up to 2.55% (2.80% for insurance members who are childless) in 2017.[33]

Austria. – The Austrian long-term care system is comprised of two universal schemes of care allowances for persons who need long-term protection and services of professional protection within the jurisdiction of (nine) provinces of Austria (*Länder*).[34] Any individual having physical, mental or psychological disability, including sensory disability, is entitled to the right to care allowance, under two additional conditions: 1) it is to be expected that invalidity/disability will last at least during the next six months, 2) care lasting over 50 hours a month is needed (1993–2010) or over 60 hours a month (for applications filed since January 2011). This right is only conditioned with the need itself, independently of financial situation of an individual/family, old age or how the invalidity occurred.[35] Depending on the degree of invalidity, there are seven levels of cash benefits ranging from category one (for perople who require care between 65 and 95 hours per month) to category seven (for people who care for more than 180 hours, if they cannot purposefully move their arms and legs or there is a similar situation)).[36] Since 1 July 2007, in addition to these seven levels of benefits aimed at providing support to home-based 24-hour care, *financial co-funding* has been introduced for employment agreement or self-employment agreement.[37] The Austrian long-term care system in a narrower sense, i.e. without services covered by the healthcare system and private funds, is 100% financed from taxes.[38]

IV THE LONG-TERM CARE SYSTEM IN THE REPUBLIC OF SERBIA

The long-term care in Serbia is not singled out as a separate branch of social security. The largest portion of the long-term care services in Serbia is provided within the social welfare and healthcare insurance systems. Since the end of 2010, cash elements of the long-term care system dependent on care and assistance of another person have been re-introduced in the pension and disability insurance system. One part of long-term care is also transferred to the private security sphere, by means of engaging private, both profit and non-profit sectors. Thus, although there is no a separate system for long-term care, some of its elements exist, and this in the form of cash and non-cash

33 Spasova *et al*., *op. cit*., 36.

34 Birgit Trukeschitz and Ulrike Schneider, 'Long-term Care Financing in Austria' in Joan Costa-Font, Christophe Courbage (eds), *Financing Long-term Care in Europe – Institutions, Markets and Models* (2012), 187-188.

35 *Ibid*., 188.

36 European Commision, *Your Social Security Rights in Austria*, European Commission, DG Employment, Social Affairs and Inclusion, Brussels (2020), 18.

37 Trukeschitz and Schneider, *op. cit*., 190.

38 Marcel Fink and Katarina Valkova, *ESPN Thematic Report on Challenges in long-term care – Austria*, European Social Policy Network (ESPN), European Commission, DG Employment, Social Affairs and Inclusion, Brussels (2018), 12-13.

benefits. Cash benefits fall within the mandate of the Republic Government and are financed by the republic budget and the Republic Pension and Disability Insurance Fund. The Republic Government mandate also includes the service of institutional accommodation, while the provision of services in the community falls within the local self-governments' mandate. Healthcare services of long-term care are within the Republic Government mandate and are financed from the Republic Healthcare insurance fund.

1. Social welfare and health care services

Non-cash benefits, as an element of long-term care of persons dependent on care and assistance of another person, are mostly covered by the social welfare and healthcare protection systems.

In the social welfare system, long-term care of persons dependent on care and assistance of another person is provided on two "tracks": national and local. The segment of services provided at the national level is regulated by the Act on Social Welfare[39] and includes the following: 1) *Evaluation and planning services* – assessment of condition, needs, strengths and risks of a beneficiary and other important persons in their surroundings; assessment of the guardian, foster care and adoptive parents; development of an individual/ family plan for the provision of services and measures of legal protection and other assessments and plans; 2) *Advisory and social-educational services of foster parents and adoptive parents*; 3) *Supported housing for persons with disabilities*, save for the local self-government units where the level of development, determined in compliance with the regulations regulating the classification of local self-government units according to their level of development is above the republic average; 4) *Accommodation services* – accommodation in a relative, foster care or other family for adults and elderly (family accommodation)[40], accommodation in a shelter[41] and other types of accommodation[42].

39 Act on Social Welfare (*Official Gazette of the RS*, no. 24/2011). The problematics of long-term care policy, within the social welfare context, is elaborated within the framework of the Social Welfare Development Strategy (*Official Gazette of the RS*, no. 108/2005) and the National Strategy on Ageing (*Official Gazette of the RS*, no. 76/2006), which are approximated, at least in principle, with the goals of long-term care as proclaimed for the European Union Member States.

40 Care, protection and conditions for optimal development in family surroundings are provided with the provision of services of family accommodation to children and young persons temporarily, until the completion of regular education, i.e. until they turn 26 years of age. Family accommodation to adults and elderly persons enables maintenance or improvement of the quality of their lives. Art. 48 of the Act on Social Welfare.

41 Home accommodation is provided to a beneficiary who cannot stay in the family, cannot be provided with the services in the community or family accommodation, or it is not at their best interest. A child under three of age is not provided with a home accommodation, unless there are no particularly reasonable causes thereof. In that case, it cannot stay there longer than two months, except there is the consent of the ministry in charge of social welfare. Art. 52 of the Act on Social Welfare.

42 The services of family accommodation, advisory services and educational services for foster parents or adoptive parents, home accommodation services and support services for independent living of persons with disabilities, are supported from the budget of the Republic of Serbia, save for the local self-government units where the level of

Under the Act on Pension and Disability Insurance valid until 1 January 2011,[43] the payment of compensation for assistance and care had been suspended to beneficiaries of home accommodation, while the latest amendments to the legal regulations re-established this right. According to the Act on Social Welfare, allowance and increased allowance for assistance and care of another person belong to a beneficiary accommodated in an institution as well. However, beneficiaries exercising the right to allowance and the right to increased allowance for assistance and care of another person, i.e., the right to cash compensation for assistance and care of another person on any basis, participate with at least 20% of the amount of such allowance/compensation in the social welfare service costs if such a service is also directed to satisfying the need for assistance and care, save for the service of home and family accommodation.[44]

Among the social welfare services falling within the mandate of self-governments, there are: 1) *Daily services in the community;* 2) *Support services for independent living*, save for housing services with the support for persons with disabilities; 3) *Housing services with the support for persons with disabilities* in self-governments units where the level of development, determined in compliance with the regulations regulating the classification of local self-government units according to their level of development is above the republic average; 4) *Advisory-therapeutic and social-educational services*, save for advising and training of foster parents and adoptive parents; 5) other social welfare services in accordance with the local self-government's needs.[45]

development, determined in compliance with the regulations regulating the classification of local self-government units according to their level of development is above the republic average. The budget of the Republic of Serbia also provides for the funds for supporting the work of institutions for home accommodation whose founder is the Republic of Serbia, i.e. its autonomous province. By the law, a relative who is obliged by law and able to support the beneficiary, a person who has taken the obligation to pay the costs for the provision of such service, and the Republic of Serbia, its autonomous province, i.e. a self-government unit participate in the social welfare services costs, in compliance with this law. A beneficiary of home accommodation participates in the accommodation costs with all of their benefits, income, and assets, save for the income exercised on the basis of child allowance, parental allowance, assistance and care of another person and increased allowance for assistance and care of another person, cash benefits for bodily damage, income from awards and retirement severance pay, as well as income based on pupils and students' standard allowance. If the beneficiary's benefits and income are insufficient for settling the accommodation costs, such accommodation costs are settled from the beneficiary's immovable property. Art. 212 of the Act on Social Welfare.

43 Act on Pension and Disability Insurance (*Official Gazette of the RS*, no. 34/2003, 64/2004 – RS Constitutional, Court (RS CC) Decision, 84/2004 – other act, 85/2005, 101/2005 – other act, 63/2006 – RS CC Decision, 5/2009, 107/2009).

44 Art. 212, para. 7 of the Act on Social Welfare.

45 The provision of service in the community falls within the mandate of local self-governments that support such service, determine the price of service, as well as the criteria for selecting beneficiaries. For an additional incentive for developing non-institutional services at the local level, the new law introduces possibilities to provide a part of funds for such services in the community from the central level, through special purpose transfers. Art. 207 and 209 of the Act on Social Welfare.

Daily services in the community are primarily significant for a person's long-term care. Such services involve the activities that support the beneficiary's stay in the family and immediate surroundings.

In the social welfare system, long-term care and treatment are regulated by the Act on Healthcare Protection[46], and, for the time being, it is performed in the healthcare facilities at primary and secondary levels. Implementation and provision of palliative care at the primary level is organised through home treatment and care services at healthcare centres. Additionally, the Act provides for the possibility of founding Gerontology and palliative care institute and Institute for palliative care, as healthcare institutions where healthcare protection is performed and measures for preservation and enhancement of health and prevention of diseases are implemented, the activity of home treatment and health care and rehabilitation, as well as the jobs of palliative care, with the difference that elderly persons are taken care of in the first type of institutions, while persons of all ages are taken care of in the second type of institutions.[47] However, slightly over 40% of healthcare centres do not have home treatment and care service, and the activities of such services are carried out as healthcare protection activities (general medicine, emergency medical care, polyvalent domiciliary care service), and there is a specialized institution for home treatment, care and palliative care of elderly persons only in Belgrade – the City Institute for Gerontology and Home Treatment and Care.[48]

2. Cash benefits for the care-dependent persons

Article 69 paragraph 1 of the Constitution of the Republic of Serbia[49] prescribes that the citizens and families that require welfare for the purpose of overcoming social and existential difficulties and creating conditions to provide subsistence are entitled to social welfare the provision of which is based on social justice, humanity and respect of human dignity.

The exercising of the rights to cash benefits for assistance and care of another person for persons not included in the provisions of the Act on the Rights of Soldiers, Disabled Veterans, Civilian Disabled Veterans and Family Members[50] (which guarantees special rights) is regulated by the Act on Pen-

46 Act on Healthcare Protection (*Official Gazette of the RS*, No. 25/2019).

47 *Ibid*, Art. 84 and 85.

48 In 2009, the Strategy on Palliative Care was developed and adopted in Serbia (*Official Gazette of the R*S, no. 17/2009). In the Strategy, the recommendations for palliative care organisation refer to integration of palliative care into the healthcare system, enhancement and exercising the best life quality for patients and their families, setting up the national standards, approximation of national regulations with relevant international documents, etc.

49 Constitution of the Republic of Serbia (*Official Gazette of the RS*, No. 98/2006).

50 Act on the Rights of Soldiers, Disabled Veterans, Civilian Disabled Veterans and Family Members (*Official Gazette of the RS*, no. 18/2020). According to the provisions of this Act, military and war-related civilian persons with disabilities are entitled to the right to care allowance, who due to physical or sensory injury, intellectual difficulties or changes in

sion and Disability Insurance[51] and the Act on Social Welfare. In this way, the right to assistance and care of another person is exercised per two different bases, within the framework of two different systems – pension and disability insurance system and social welfare system. In both systems, the right to assistance and care of another person is cash benefit, intended for persons who due to disease or disability are not capable of performing basic activities of daily living. What is common for both systems is that this right is conditioned exclusively on one's healthcare status, and not on the beneficiary's material situation or the number of hours for such needed support. Also, it is also common that the fulfilment of requirements, i.e., the existence of the need for care and assistance of another person both in the framework of insurance and the framework of social welfare, is assessed by the expert authority – the Republic Pension and Disability Fund. Finally, the purpose of spending such cash funds is not prescribed by any system.

2.1. Cash compensation for assistance and care of another person

Cash compensation for assistance and care of another person represents a specific social prestation, which, in a broader interpretation, is not strictly related to social risk of ageing. However, the largest number of beneficiaries are exactly elderly persons who are not able any longer to take care of themselves, and in such a situation the state intervenes by paying special prestations, which are financed out of the funds of the Pension and Disability Fund, but also out of the budget assets.[52] In that case, one prestation does not exclude the other one, and elderly persons may, along with their old age pension, exercise the right to cash compensation for assistance and care of another person, which is implemented in the Serbian legal system in compliance with the provisions of the Act on Pension and Disability Insurance and the Act on Social Welfare. *Numerous domestic authors* claim that the need for care and assistance of another person represents a social risk in the group of new social risks and that, in the course of years, the number of persons who will be exercising the right to prestation is going to increase, bearing in mind that the duration of average life cycle is extended, as well as the stratification of the nuclear family, and that, consequently, elderly persons, who are in need of assistance and care of another person increasingly more often, remain living alone in their households without proper care and assistance. Among the authors, however, there is no consensus on the position which branch of social welfare should cover this risk. Some of them deem that the

health status need assistance and care of another person to satisfy their basic necessities of life. The aforementioned persons are classified in five grades for the purpose of exercising their right to care allowance, and such care allowance is determined in a specified percentage (180%, 119%, 83%, 36%, 24%) of the base. Art. 53-56 of the Act on the Rights of Soldiers, Disabled Veterans, Civilian Disabled Veterans and Family Members.

51 Act on Pension and Disability Insurance (*Official Gazette of the RS*, no. 34/2003, 64/2004 – RS CC Decision, 84/2004 – other act, 85/2005, 101/2005 – other act, 63/2006 – RS CC Decision, 5/2009, 107/2009, 101/2010, 93/2012, 62/2013, 108/2013, 75/2014 and 142/2014, 73/2018, 46/2019 – RS CC Decision, 86/2019, and 62/2021).

52 Filip Bojić, *Pravo na socijalnu penziju u sistemu prava socijalne sigurnosti* (2018), 303.

right to cash compensation for assistance and care of another person belongs to social welfare, and within it, by the nature of things, to disability insurance.[53] Some other ones, however, consider the need for assistance and care of another person is not a risk that is inherent only to insured persons of pension and disability insurance and to pension beneficiaries, but that it also affects a much broader circle of persons, thus it should be covered within the framework of a special branch of social welfare insurance. In support of this claim, it is reported that an increasingly higher number of the European Union Member States also provide with their national regulations a system of long-term care insurance as a special form of insurance that does not depend on pension and disability insurance or healthcare insurance (as in Germany, for example).[54] Also, "the International Labour Conference indicated the need for adopting universal standards for insurance in case of long-term care, which would ensure the protection against the risk of increasing the costs faced by persons who are not able to take care of themselves."[55] *Another group of authors*, however, deems "that the institute of assistance and care of another person to insured persons and pensioners who are unable to care about themselves is not a specificity of pension and disability insurance, but it belongs to all people, so it is necessary to classify it in the social welfare area, as it has been done by all the states (meaning the states successors of the SFRY), save for Slovenia and Serbia."[56]

In the Serbian legal system, the need for care and assistance of another person is a risk that, so far, has not had a steady place in the social insurance system. According to the earlier regulations, before the current Act on Pension and Disability Insurance 2003 came into force, the need for care and assistance had been foreseen as a social risk and an adequate right to cash compensation for such care and assistance had been provided for. This social risk was not included in the pension and disability insurance with the adoption of the current Act 2003, but the right to cash compensation was retained as an acquired right of insured persons and pension beneficiaries. According to the provisions of art. 244 of the Act, the right to cash compensation for assistance and care of another person exists for an insured person and pension beneficiary, till the adoption of relevant regulations, whereby the right to assistance and care of another person is exercised under the terms stipulated by the regulations on pension and disability insurance, which were in effect until the application of the aforementioned Act.[57] It was construed that, according to the Act 2003, the right to cash compensation for assistance and care of another person was exercised in the aforementioned manner – until the

53 Predrag Jovanović, *Radno pravo* (2015), 470.

54 See: Boris Augurzky, Winfried Schmähl and Harald Tauchmann, *Pensions, Health Care and Long-term Care – Germany*, Annual National Report 2011, European Commission, Brussels (2011), 25.

55 Ljubinka Kovačević, *Normiranje socijalne sigurnosti u međunarodnom pravu* (2007), 316.

56 Velizar Golubović, *Reforme penzijskih sistema u državama sukcesorima* (2009), 123.

57 Opinion of the Ministry of Labour and Social Policy, no. 117-00-382/2010-07 of 13.9.2010.

adoption of adequate regulations. Namely, it was considered that this risk had no place in the pension and disability insurance system, but in the system of social welfare and social law, where appropriate regulations related to the aforementioned risk were expected. However, as it did not happen, the later amendments to the Act on Pension and Disability Insurance 2010, the need for care and assistance of another person was re-introduced as a social risk in the compulsory pension and disability insurance.

According to the current Act on Pension and Disability Insurance, *an insured person and pension beneficiary,* identified as having the need for assistance and care of another person due to the nature and gravity of injury and disease and for performing the activities for satisfying basic necessities of life, is entitled to cash compensation for assistance and care of another person.[58] It means that the holder of title entitled to this prestation will not be a person who has no previous years of insurance, i.e. who has not acquired the right to pension. "The need for assistance and care of another person exists for a disabled person, or who is unable to move independently due to the gravity and nature of permanent diseases and incapable of moving on his own neither inside his apartment with the aid of appropriate aids nor to undress, dress or maintain personal hygiene, with a blind person who has lost the sense of light with an exact projection and with a person who achieves acuity with a correction of 0.05."[59]

Cash compensation for assistance and care of another person falls within the scope of compensations based on pension and disability insurance and is supported from the contributions of the insured persons, which are collected by the Republic Pension and Disability Insurance Fund. Contribution for this right is not specifically determined and allocated, but the compensation is financed from contributions for compulsory pension and disability insurance, which have been calculated and paid since January 2022 at a rate of 25% of the monthly base. When the contributions are paid simultaneously from the base and to the base, the calculation of contribution is conducted per rate of 14% for the category of the insured persons employees, and 11% for employers, i.e., any other payer of income to employees[60]

Besides beneficiaries who exercise the right to legally defined compensation amount, there are also the so-called *existing beneficiaries* in the pension and disability system. The former pension regulations provided for, for instance, that children with disabilities whose parents are insured persons may be beneficiaries of cash compensation for assistance and care of another

58 Art. 41a, para. 1 of the Act on Pension and Disability Insurance (2003).

59 Art. 41a, para. 2 of the Act on Pension and Disability Insurance (2003).

60 Act on Contributions for Compulsory Social Insurance (*Official Gazette of the RS*, no. 84/2004, 61/2005, 62/2006, 5/2009, 52/2011, 101/2011, 7/2012 – harmonised RSD amount, 8/2013 – harmonised RSD amount, 47/2013, 108/2013, 6/2014 – harmonised RSD amount, 57/2014, 68/2014 – other act, 5/2015 – harmonised RSD amount, 112/2015, 5/2016 – harmonised RSD amount, 7/2017 – harmonised RSD amount, 113/2017, 7/2018 – harmonised RSD amount, 95/2018 and 4/2019 – harmonised RSD amount, 86/2019, 5/2020 – harmonised RSD amount, 153/2020, 6/2021 – harmonised RSD amount, 44/2021 and 118/2021).

person. When this right was abolished with statutory amendments in 1992, a number of beneficiaries remained who are paid compensation as "*disabled children*" even nowadays, given that – according to the RS Constitution with the amendment to regulations and abolishing the basis for exercising individual rights – the existing beneficiaries keep all the prerogatives defined under former regulations.

2.2. Allowance for assistance and care of another person

Allowance for assistance and care of another person is regulated with the Act on Social Welfare. This right falls within the Republic Government's mandate and is supported from the republic budget. Thus, the beneficiaries exercise the right to allowance for assistance and care of another person excluding the payment of insurance, i.e., contributions. The right to allowance exists for a person who, on the basis of physical or sensory damage, intellectual difficulties or changes in healthcare status, needs assistance and care of another person to satisfy their basic necessities of life.[61] The need for assistance and care of another person exists for a person who, due to physical damage, damage of the sense of sight that causes loss of the sensation of light with accurate projection or the acuity is achieved with correction of 0.05, intellectual difficulties or change in health status, needs assistance and care of another person for satisfying basic necessities of life and who is bed-ridden, cannot move inside the apartment without using aids, cannot take food, undress, dress or maintains personal hygiene without being helped by another person.[62]

Allowance for assistance and care of another person is exercised by a person who cannot exercise this right on any other basis. Exceptionally, a beneficiary of cash compensation for assistance and care of another person who has exercised this right as a disabled child in an organisation for pension and disability insurance under the regulations on pension and disability insurance, which were in force until 1 June 1992, exercises this right to allowance for assistance and care of another person in the amount of the difference between the allowance for assistance and care of another person determined in compliance with this law and the amount of such exercised cash compensation for assistance and care of another person. The need for assistance and care of another person is established on the basis of regulations on pension and disability insurance.[63]

2.3. Increased allowance for assistance and care of another person

The right to increased allowance for assistance and care of another person is also regulated by the Act on Social Welfare. This right exists for a person who, on the basis of the regulations on pension and disability insurance, has been found to have a physical injury up to 100% on a single basis or to have a permanent organic disorder of neurological or mental type or for a person having a number of damages, whereby the level of damage amounts to 70%

61 Art. 92, para. 1 of the Act on Social Welfare.

62 Art. 92, para. 5 of the Act on Social Welfare.

63 Art. 92, paras. 2 and 3 of the Act on Social Welfare.

or more per cent at least per two bases.[64] A "disabled child" or a person who has exercised the right to cash compensation for assistance and care of another person according to the regulations on pension and disability insurance and meets the aforementioned requirements, may also exercise the right to increased allowance for assistance and care of another person in the amount of the difference between the amount of the increased allowance for assistance and care of another person determined in compliance with this law and the amount of the cash compensation for assistance and care of another person exercised pursuant to the regulations on pension and disability insurance.[65]

3. The amount of cash benefits and the beneficiaries

The amount of cash allowance for assistance and care of another person according to the Law on Pension and Disability Insurance is determined in the amount of harmonised cash allowance for assistance and care of another person of the existing beneficiaries of this right in the insurance of employees and is harmonised in the manner foreseen for the harmonisation of pensions. Cash allowance for assistance and care of another person has amounted to RSD 22,030.99 since the last harmonisation of pensions on November 1, 2022.[66] This allowance has been harmonised with the same dynamics and at the same percentage as well as the pensions, implying that it will be additionally increased as of January 1, 2023. In 2021, this remuneration was received by over 75000 beneficiaries. The largest number of beneficiaries (over 80%) comes from the insurance of employees, which is held by the largest number of insured persons. This figure is from year 2012 with the data for professional military persons.[67]

Table 1. Number of beneficiaries of cash allowance for assistance and care of another person in 2021

BENEFICIARIES	NUMBER OF BENEFICIARIES
Employees	62,530
Sole traders	3,581
Farmers	9,947
All categories	75,608

Source: Republic Fund for Pension and Disability Insurance, *Statistički godišnji bilten*, Belgrade, June 2021

64 Art. 94, para. 1 of the Act on Social Welfare.

65 Art. 94, para. 2 of the Act on Social Welfare. For the purpose of supporting the deinstitutionalisation process, this Act (art. 64, paras. 6-8) also introduces a special cash compensation for parents who have not exercised the right to pension and have directly taken care with the highest level of disability for at least 15 years. Such special compensation is paid after the age limit for pension has been reached, in the form of a life-long monthly income in the amount of the lowest pension.

66 *https://www.pio.rs/sr/novchane-naknade*

67 Republic Fund for Pension and Disability Insurance, *Statistički godišnji bilten,* Belgrade, June 2022, *https://www.pio.rs/sr/godishni-bilten.*

The number of beneficiaries has gradually increased in the last twenty years. The largest number off beneficiaries was recorded in 2019, when it equalled 79,949. In 2021, this number fell down to 75,608 beneficiaries.

Table 2. Number of beneficiaries of cash allowance for assistance and care of another person, 2014-2021

Year	2014	2015	2016	2017	2018	2019	2020	2021
Number of beneficiaries	75.000	73.626	76.105	77.712	78.857	79.949	78.822	75.608

Source: Republic Fund for Pension and Disability Insurance

The amount of allowance and increased allowance for assistance and care of another person according to the Law on Social Welfare is determined in the nominal monthly amount and harmonised with the consumer price index in the previous six months, on the basis of statistical data, twice a year, on April 1 and October 1.[68] The nominal amount of allowance for assistance and care of another person, rounded in RSD, is determined by the minister in charge of social welfare affairs. The Decision of the Ministry of Labour, Employment, Veterans' and Social Issues dated 14.10.2022 determined the allowance for assistance and care of another person in the amount of RSD 13,071.00, and the increased allowance for assistance and care of another person in the amount of RSD 32,254.00.[69]

Substantial delays in payments, as well as devalued and low amounts of social allowances caused large reduction of the number of beneficiaries of all the rights in social welfare in the course of the 90's. Gradually, the number of beneficiaries of the right to assistance and care in the social welfare system and the pension and disability insurance has increased since 2000. The most powerful growth was recorded after the amendments to the Law on Social Welfare 2005 and the introduction to the right to increased allowance. The increased allowance, which overcome the amount of the net minimum income, certainly represented a powerful boost for the increase in beneficiaries number.

Table 3. Number of beneficiaries of allowance and increased allowance for assistance and care of another person, 2014–2021

Year	2014	2015	2016	2017	2018	2019	2020	2021
Number of beneficiaries	52.348	51.773	50.921	51.576	52.408	51.992	52.684	51.381

Source: The Ministry of Labour, Employment, Veteran and Social Affairs

68 According to the Law, the monthly amount of the allowance is RSD 7,600 and of the increased allowance is RSD 20,500. The nominal amount of the allowance for assistance and care of another person, rounded in RSD, is determined by the minister in charge of social welfare affairs. Art. 93, paras. 2 and 4, art. 94, paras. 3 and 5 of the Law on Social Welfare.

69 The Decision on the nominal amounts of cash benefits for assistance and care of another person dated October 2022 of the Minister of Labour, Employment, Veterans' and Social Issues, number: 401-01-008/15/2022-09 of 14.10.2022.

V PROPOSALS FOR THE IMPROVEMENT OF LONG-TERM CARE SYSTEM OF THE REPUBLIC OF SERBIA

This analysis of legal regulations, relevant national strategic documents and expert literature leads to the conclusion that the need for social response to the manifested problems of persons who depend on care and assistance of other persons is recognised in Serbia. The need to develop services in the community, healthcare facilities for long-term care and domiciliary care is also recognised, and also the need for correlating healthcare and social welfare services is highlighted in some documents. In reality, there are some elements of such system in Serbia, but the long-term care system actually does not exist. As the previous analysis has shown, a part of long-term care is regulated through cash benefits, another part through institutional protection and services in the community, and one part is only being established within the healthcare system. However, these segments are not correlated into one integrated system of long-term care.[70]

First of all, as indicated above, both the Act on Pension and Disability Insurance and the Act on Social Welfare prescribe that the need for assistance and care of another person exists for a person who, due to physical damage, damage of the sense of sight that causes loss of the sensation of light with accurate projection, or the acuity is achieved with correction of 0.05, intellectual difficulties or change in health status, needs assistance and care of another person for satisfying the basic necessities of life, and who is bedridden, cannot move in his apartment without using aids, cannot take food, undress, dress or maintains personal hygiene without being helped by another person. From the aforementioned, it clearly follows that in terms of content, this is the matter of the same right, the requirements for its exercising in regard to one's health status are identically prescribed; and the fulfilment of these requirements, i.e., the health status and the existence of one's need for "care and assistance of another person" is assessed by the same expert authority – the commission of the Republic Pension and Disability Fund. Notwithstanding that, there are three amounts of cash benefits for assistance and care of another person in the Serbian legal system, which are realised upon two different legal grounds, and before two different authorities – before the Republic Pension and Disability Fund and before the Social Welfare Centre. The boundary between the two rights is set by the Act on Social Welfare according to which the right to allowance for assistance and care of another person may be exercised "*if such right cannot be exercised on any other legal ground*." The consequence of this insufficiently clear and precise legal for-

70 The lack of a systemic approach results in oversights such as the one in the National Strategy on Ageing that does not analyse cash benefits for assistance and care, which, at least by public expenditures, represent the most significant of long-term care in Serbia. Consequently, there is no mention on the concern that these costs are going to increase significantly in future due to ageing of population.

mulation is that citizens, within a specified time period, exercise the right to "care and assistance of another person" before both of these authorities, and consequently, in compliance with the current legal regulations, they become debtors of the social welfare centres that charge them with repayment of the disbursed funds. The consequence of such regulation of exercising the right to cash benefits for assistance and care of another person in the described manner is the creation of legal uncertainty and adverse consequences, which eventually pass on the burden to citizens, making this benefit, as well as the social welfare guaranteed by the Constitution of the Republic of Serbia, completely meaningless. Acting upon citizens' complaints that referred to exercising the right to cash benefits for assistance and care of another person, the Ombudsman identified numerous problems encountered by citizens, because of which he submitted an Initiative for amending the regulations regulating the exercise of the rights to cash benefits for assistance and care of another person to the Government of Serbia in May 2018.[71]

Furthermore, such establishing of the right to cash benefits primarily on the basis of medical criteria and not on the basis of the intensity of support can also be evaluated as inadequate. Additionally, the span between the amounts of benefit and increased benefit is big, and the non-existence of a grading scale, which would enable determining other amounts between these two, not only that cannot reflect a realistic state in regard to individual needs, but it also may encourage medical commissions to classify a higher number of beneficiaries into the higher amount category. The amendments to the cash benefits system should then envisage a multiple grading scale for assistance amounts, which would be related to different intensity of support that individuals need.[72] The implementation of such changes must also be harmonised with the budget possibilities; while certainly, an extended economic crisis is not the best moment for additional budget expenditures. Also, it should be borne in mind that the total contributions for pension and disability insurance are relatively low and that the contributions for assistance and care are not allocated separately. Under such circumstances, a question arises whether with relatively low contributions the insured persons are in-

71 Ombudsman of the Republic of Serbia, Initiative, file no. 13372 of 24. 04. 2018, 1, *https://www.ombudsman.rs/index.php/zakonske-i-druge-inicijative/5762-inici-iv-z-iz-nu-pr-pis-i-s-r-gulish-pr-v-n-n-vc-n-d-v-nj-z-p-c-i-n-gu-drug-g-lic*.

72 According to the stand of the Ombudsman, there should be no difference in the amounts of cash contributions for "care and assistance of another person" depending on whether this right is exercised before the social welfare centre or before the Pension and Disability Insurance Fund, with all due respect to the fact that it was caused by the contributions of the insured persons. Namely, the size of cash benefits for assistance and care of another person should not depend on whether and how much contributions for pension and disability insurance have been paid. Cash benefits for assistance and care of another person is not existential source of income with which the beneficiaries should meet their primary necessities of life, but the financial means with which the beneficiary should provide assistance and care of another person. Consequently, any difference in the amount of benefits should not be made because the need for assistance and care for carrying out activities exists equally both for those who have paid and for those who have not paid the contributions for pension and disability insurance. Ombudsman of the RS, *op. cit*., 2.

deed insured, not only against the risk implying the payment of pensions, but also the payment of compensation for assistance and need of another person and some other rights.

Although the proposals for amending regulations in the area of long-term care are very hard to formulate within the framework of one research, it seems from the current perspective that the most logical choice is to finance cash benefits for long-term care only from the budget funds for social welfare and to stop the illusion that cash fees for these purposes are realised as the right on the basis of pension and disability insurance. In this way, all cash benefits would be regulated with one regulation, implemented before one authority, and paid in amounts that would be mutually harmonised. That would solve the issue of complex administration that now exists and would prevent any occurrences existing now in practice where one person receives compensations before two different authorities on two different legal grounds for the same risk. Additionally, this is, from comparative law viewpoint, one of the most common ways to finance cash benefits. In the longer run, in a different economic reality, perhaps the return to the idea of a new form of social insurance may also be possible.[73]

In addition, according to the existing legal solutions, cash benefits are granted only to beneficiaries who need support in performing basic activities of daily living both in the pension and disability insurance system and in the social welfare system. It is clear, however, that it is very difficult to observe these legal solutions in practice, and that they cannot be fully implemented as long as medical criteria are used for granting the right to compensation (allowance and increased allowance) for assistance and care of another person, and not functional criteria (support grading scales). Such functional criteria should be used by the commissions of the Republic Pension and Disability Insurance Fund, but also by the Social Welfare Centres when assessing their beneficiaries' needs. Similarly as in Austria, it would be additionally important to link the levels of benefits to the necessary number of hours of support, which would also facilitate combining services and cash benefits.

Irrespective of the system in which cash benefits would be granted, the solution where the right is assessed by the Republic Pension and Disability Insurance Fund's Commission should be retained so as not to increase the number of different commissions dealing with the disability issues. These commissions are also in charge of assessments relating to exercising the right of persons with disabilities, as well as the work capability assessment for employing persons with disabilities. To the extent in which these commissions are also used for the assessment of rights arising from other laws, they should also be partially paid from the budget funds, and not, as it has been so far, only from the funds of the Pension and Disability Fund.

73 This type of insurance exists, for example, in Germany. In 1995, after many years of public debate dating back to the 1970s, the country introduced compulsory social insurance for long-term care (*SLTCI*) in Germany as the fifth pillar of the social insurance system. See: Andy Zuchandke, Sebastian Reddemann and Simone Krummaker, „Financing Long-term Care in Germany" in Joan Costa-Font, Christophe Courbage (eds), *Financing Long-term Care in Europe – Institutions, Markets and Models* (2012), 214.

Finally, the amount of cash benefits, specifically of the increased allowance and the cash benefits for assistance and care of another person is not inadequate in comparative and in relative sense (in relation to minimum earnings), but in the longer run, there are grounds to consider some other amount of benefits between the highest and the lowest levels. The existing solution is inadequate due to the big span between the amounts that does not correspond to the differences in the level of necessary support, which additionally prompts granting the right to the highest amount.

VI CONCLUSION

The concepts of long-term care of persons dependent on care and assistance of another person in the European countries are numerous and mutually different. Viewed more broadly, they include rehabilitation, providing basic healthcare services, home care, daily care, social support, occupational and supporting activities (such as assistance in basic and instrumental activities of daily living), institutional accommodation and various types of cash benefits. Thus defined, long-term care in Serbia is not singled out as a separate branch of social security. The largest portion of the long-term care services in Serbia is provided within the social welfare and healthcare insurance systems. Since the end of 2010, cash elements of the long-term care system dependent on care and assistance of another person have been re-introduced in the pension and disability insurance system. One portion of the long-term care is also transferred to the private security sphere, by means of engaging private both profit and non-profit sectors. Furthermore, significant role of family is still noticeable, i.e. various forms of informal assistance. The existing and projected demographic trends, social situation, as well as the healthcare status of the population, require an integrative approach to long-term care and imply numerous challenges of the existing concept. They equally refer to the access and the quality thereof, as well as to the financial sustainability of the programmes and measures. The main issues in the sphere of cash benefits lie in the fragmentation of the system, in the fact that essentially the same need for assistance and care of another person is regulated under two different regulations and is exercised before two authorities, in relying on medical and not functional criteria for the assessment of needs, in the non-existence of consent on the place of this social risk within the system of social welfare and on the resources from which they should be financed. The observed deficiencies in the existing system of the long-term care in Serbia indicate the need for changing the existing solutions, along with addressing the reasons pro and contra for each offered proposal more adequately, while also the necessary balancing between institutional and non-institutional support, material and non-material benefits and services, republic and local competences.

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SISTEM DUGOTRAJNE NEGE LICA ZAVISNIH OD TUĐE NEGE I POMOĆI U REPUBLICI SRBIJI*

Apstrakt

Primarni cilj ovog rada je analiza prava koja pripadaju licima za slučaj potrebe za pomoći i negom drugog lica u Republici Srbiji. Budući da se navedena prava, uporednopravno posmatrano, po pravilu, pružaju u okviru tzv. sistema dugotrajne nege, analizu ovih prava izvršićemo razmatranjem glavnih osobina i manjkavosti nacionalnog sistema dugotrajne nege i, na toj podlozi, davanjem predloga za njegovo unapređenje. Radi ostvarenja navedenog cilja, autorka u radu, najpre, navodi definicije sistema dugotrajne nege i njegove osnovne karakteristike, a, potom, daje pregled prava iz sistema dugotrajne nege Republike Srbije i ukazuje na izazove, prepreke i manjkavosti sa kojim se suočava navedeni sistem (ili neki njegovi elementi). Na kraju, autorka daje predloge za unapređenje ovog sistema.

Ključne reči: *Potreba; Pomoć; Dugotrajna nega.*

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EXPLORING THE POSSIBILITIES OF RE-CONCEPTUALISING THE FAMILY (INFORMAL) CAREGIVING IN POST-PANDEMIC PERIOD – SOCIAL VALUES, ECONOMIC OBJECTIVES AND LEGAL PRINCIPLES

Abstract

Approaching the concept of family caregiving presupposes the analysis of different theoretical standpoints and public policy frameworks regarding family, state, or both family and state i.e. share responsibility to care, by identification of best practice model. Furthermore, the principles of solidarity, equity, particularly gender equity, having in mind that women's involvement in caregiving is dominated, followed by holistic and human-centered approaches, need to be considered adequately, particularly as a part of the Building Back Better concept in the post-Covid period. The recent economic objectivities invoked by the international policymakers before the Covid-19 crisis and settled as sustainable economic growth point to the importance of reducing socio-economic inequalities with respect to vulnerable populations such as, certainly, women and people with disabilities. By clarifying the socio-economic and legal status of family caregivers, in terms of universal ethical values of the society, economic objectives, and legal principles, the inequality, discrimination, and exclusion issues of both categories of vulnerable populations could be addressed by targeting measures to mitigate the economic and social impact of the crisis on the most vulnerable ones. Given that, the paper aims to contribute to the ongoing scholarly debate of human rights and policy challenges regarding different categories of vulnerability in the social security systems due to weaknesses of communities, countries, and institutional structures to recover from hazards and become more resilient to future disasters.

Key words: *Family (Informal) caregiving; Gender equity; Socio-economic values; Legal principles; Comparative policy research.*

I INTRODUCTION AND BACKGROUND OF THE STUDY

The Covid-19 pandemics undoubtedly caused multiple negative implications to individuals' daily life, particularly, to those considered as vulnerable populations, i.e. adults with chronic health conditions and individuals with physical and cognitive impairments. Additionally, the burden of public health

crisis has been also transmitted to those considered as multiple vulnerable i.e. elderly populations, meaning that many older individuals experience acute or chronic medical conditions that require assistance and support on daily bases. On the other side, the limitation of access to health and social protection care facilities, as well as support services for care recipients in terms of implementing the social distances policies during the pandemic period, impact deeply the socio-economic status of those who provide the long-term care to their family members i.e. the family (informal) caregivers by exacerbated the caregiving crisis. Given that, many studies[1] have shown that family caregiving will be the most challenging issue of the social policies of almost every country in the post-pandemic period, having in mind the phenomena of population aging that is expected to progress in the future. The research questions that arise in this regard are predominantly linked to the underlying values embedded in social welfare state policy concept, in its broad sense. The ethical, cultural, and social values of the state impact the core questions of drafting conceptual and policy framework of the institute of family caregiving, particularly referring to the responsibility to care (debates regarding Family *versus* State responsibility to care), economic objectives of the cost-effectiveness publicly financing the family caregiving, and following legal consideration of the notion. Thus, from a legal standpoint, the principles of solidarity, equity, particularly gender equity, and autonomy of family caregivers are crucial to address. It will consequently impact exercising basic socio-economic rights – the right to work, the right to non-discrimination[2] as well as the right to balance work and family life of family caregivers. Considerably, middle-aged women are most affected by family caregiving — predominantly forced to choose between leaving jobs and caring for care-needy family members – requiring an adequate normative solution. In contemporary, industrial society there is an increase of women providing care to those who suffer from long-term and complex health problems including the older ones, in a completely unpaid, informal way.[3] It does not mean that men are not affected, but much less than women, while some studies (dealing with analyzing court decisions) in the United States (US) have shown that men like women face prejudice and discrimination practice in the workplace when trying to fulfill both, work and family caregiving responsibilities.[4]

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1 See Yoko Niimi, *Juggling paid work and elderly care provision in Japan: does a flexible work environment help caregivers cope? (2021),* 1-16; Nicolle P. G. Boumans and Elisabeth Dorant, 'The relationships of job and family demands and job and family resources with family caregivers' strain', *Scandinavian Journal of Caring Sciences*, Vol. 35, No. 2, 202; Sean Fahle and Kathleen McGarry, *Caregiving and work: The relationship between labor market attachment and parental caregiving* (2017).

2 The development of modern labour law presuposses the increase in the scope and level of protection of vulnerable workers as well as the introduction of additional measures to avoid discrimination practice. Sanja Stojković Zlatanović, *Genetički i drugi zdravstveni osnovi diskriminacije na radu* (2019), 155.

3 Patricia Frericks, Per H. Jensen and Birgit Pfau-Effinger, 'Social rights and employment rights related to family care: Family care regimes in Europe', *Journal of Aging Studies*, Vol. 29, 2014, 66.

4 Joan Williams, Shauna Shames and Raja Kudchadkar, *Ending Discrimination Against Family Caregivers* (2003), 1.

While a number of studies have dealt with empirical analyses of sociodemographic and mental-health status characteristics (such as increased depression, anxiety, and lower quality of life), including overall well-being of family caregivers, far too little attention has been paid to revealing legal situation and the quality and level of social rights for family caregivers. Among them, studies analyzing social care policies and normative solutions of providing (informal) family care to those in need in European countries are dominated, by finding differences in the institutional framework and family care regime among representative European countries.[5] Furthermore, the debates continuos about the best policy approach toward setting the financial support regime for caregivers, arguing two different models – providing direct or indirect financial support through the fiscal, and social security system or by expanding the protection measures, and providing additional rights through amending employment and labour regulation. However, undoubtedly, many findings showed rapid changes in labour and social protection regimes and consequently in family caregiving impacted by both demographic, and changes in economic policy, having a serious effect on working status, attachment to the labour market, and well-being in general of those who provide long-term care. Having said that, achieving sustainable development goals determined by the 2030 United Nations Agenda of Sustainable Development (2015) in terms of SDG 8 (decent work and economic growth), SDG 5 (gender equity), and SDG 10 (reduced inequalities) presuppose rethinking the institute of family caregiving, by revisiting current normative framework and filling the gaps of status-protection measures for family caregivers. After all, the digital transformation and Industry 4.0 will inevitably change the labour market, business model, and work organization. Greater flexibility of work arrangements with portable devices (computers, tablets, and smartphones), and improvements in internet connectivity and infrastructure will impact on standard employment relationship model introducing the novel, hybrid model of working 'anywhere, anytime'. Accordingly, Niimi has already drawn attention to the relationship between flexible work arrangements and the ability to combine paid work with family caregiving responsibilities, by analiying the Japanese legislation on the support systems for caregivers.[6] The Japanese social legislation is rare because introduces flexible work arrangements designed specifically for working caregivers which could represent a legislative interesting model for consideration. On the other side, in most European countries, the (conservative) welfare model of the state dominates where social rights mostly derive from formal employment relationships, but recently many European countries have supported the formalization of family caregiving introducing or extending the social rights of those who provide

5 See Frericks, Jensen and Pfau-Effinger, *op. cit*., 66-77; Janice Keefe and Beth Rajnovich, 'To Pay or Not to Pay: Examining Underlying Principles in the Debate on Financial Support for Family Caregivers', *Canadian Journal on Aging / La Revue canadienne du vieillissement*, Vol. 26, 2007, 77–90.

6 Yoko Niimi, *Juggling paid work and elderly care provision in Japan: does a flexible work environment help family caregivers cope?* (2021), 1-16.

care by providing cash payments through social security system or paid care leave options through labor regulation.[7] The formalization of family caregiving is grounded on collective i.e. shared responsibility approach, and concepts of universalism and de-familiarization of care in terms of debates of choosing the best-practice model – model of family obligation, state responsibility, or shared – family and state responsibility to care.[8] Moreover, the gender gap in family caregiving is identified as a significant indicator of gender inequality impacted on women's labour status needed to be properly addressed by anti-discrimination legislation.

The aim of this study is to draw attention on importance of legal formalization of the family caregiving by introducing a mixture of social rights and work-related rights for family caregivers due to contemporarly concept of achieving the sustainable development goals in post-pandemic period. The family caregiver is defined broadly, as an employed person who provides a broad range of financially uncompensated ongoing care to family members in need due to physical, cognitive, or mental health conditions, regardless of the care recipient's age.[9] According to Eurostat the participation rate of women in family care activities is significantly higher than that of men in all countries and quite stable – between 94% and 98 %[10] so in the paper, the issue of gender discrimination and protection measures will be particularly address. The in-depth and holistic analysis of underlying societal values and legal principles of family care in the context of approaching a functional/integrated human rights paradigm has been applied, accompanied by the legal comparative method of reviewing the social care policies of various representative countries in terms of (normative) framing the family caregiving. The paper has been divided into four parts. In the first section, demographic and societal changes that influenced increasing family caregiving, followed by a review of the literature examining the impact of the caregiver's responsibilities on workforce participation, and consequently individual employment status will be presented. The second and third sections of the study will deal with legal considerations of the institute of family caregiving aiming to explore more workable solutions to combine work and family responsibilities in terms of basic human rights protection and the development of non-discrimination practice. An overview of the comparative family caregiving models of various representative countries points to offering a best-practice model by setting valuable recommendations in the national domain, thus, filling the current regulative gap.

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7 Frericks, Jensen and Pfau-Effinger, *op. cit*., 67.

8 Keefe and Rajnovich, *op. cit*., 80-81.

9 Linda Duxbury, Christopher Higgins and Bonnie Schroeder, *Balancing Paid Work and Caregiving Responsibilities: A Closer Look at Family Caregivers in Canada* (2009), 25.

10 Martina Schonard, Ina Sokolska and Johannes Heezen, *Women's rights and well-being in a post-Covid world: Internet of things (IoT) and related abuses, new ways of working, teleworking, tele-learning, unpaid care and housework, women in leadership and decision-making process* (2021), 5.

II SOCIO-ECONOMIC DETERMINANTES OF FAMILY CAREGIVING – CHALLENGES AND OPPORTUNITIES

The phenomenon of population aging is expected to progress in the future by increasing the need for daily care in a long run, but changes in the nature of family structure (lower fertility rates and smaller families, decrease in the marriage rate and the parent-child co-residence rate, higher rates of childlessness, divorce) as well as women's growing participation in the workforce are expected to reduce the availability of family member to provide care to those in need.[11] The statistics showed that on average 34.3% of the total population in 20 European countries are family caregivers[12] while according to the Caregiving USA Report, 53 million Americans (accounting for 17,6% share of the total population) are providing unpaid care for relatives and friends, where 61% of them are female.[13] Hence, these overlapping shifts affect women in particular, who make up approximately two-thirds of family caregivers.[14] At the same time, the labor force participation rate of women has increased requiring the introduction of a care policy model that will provide a way for female caregivers to keep working while also meeting caregiving needs.

As mentioned above, population aging has become the most socioeconomic challenge of the century. According to Eurostat, the share of the population aged 65 years and over is increasing in every European Union Member State (EU), EFTA, and candidate country. Furthermore, the population of the EU-27 is projected to continue to age according to Eurostat's baseline projections. Between 2020 and 2050, the share of the working age contingent (20-64 years) in the total population is expected to decline – from 59.1% to 52.0%, and the share of the population aged 65 and above to increase – from 20.6% to 29.5%. Accordingly, the old-age dependency ratio[15] for the EU-27 is projected to increase from 34.8 % in 2020 to 56.7 % by 2050, and the total-age dependency ratio from 69.1% in 2020 to 92.2% by 2050.[16] The indicators of demographic aging indicate similar trends in Serbia. According to the baseline sce-

11 Boumans and Dorant, 568.

12 *Ibidem*.

13 Nationale Alliance for Caregiving, *Report – Caregiving in the USA* (2020), 11.

14 National Academies of Sciences, Engineering, and Medicine, *Reducing the Impact of Dementia in America: A Decadal Survey of the Behavioral and Social Sciences* (2021), 3.

15 The old-age-dependency ratio is defined as the ratio between the number of persons aged 65 years and more over the number of working-age persons (20-64 years); the total-age dependency ratio is defined as the ratio between the sum of the young (aged below 20 years) and the old (aged 65 years an above) over the number of working-age persons (20-64 years).

16 Eurostat, EUROPOP2019 – Population projections at national level (2019-2100), Demographic balances and indicators by type of projection, *https://ec.europa.eu/eurostat/databrowser/explore/all/popul?lang=en&subtheme=proj.proj_19ne&display=list&sort=category&extractionId=PROJ_19NDBI__custom_3380670*

nario of population projections presented in the UNDP's most recent *Human development report for Serbia*, the share of old population (aged 65 and above) will rise from 21.4% in 2020 to 27.1 by 2050. Consequently, the old-age dependency ratio for Serbia is expected to increase from 36.0% in 2020 to 50.0% by 2050, and the total-age dependency ratio from 69.0% in 2020 to 84.0% by 2050.[17] It could be noted that the pace of aging is expected to be somewhat slower in Serbia than in the EU-27 despite similar current level of the process. This is explained by comparatively shorter life span of people in Serbia both current and projected, which means that aging will be mostly fueled from the bottom of population pyramid (low birth rates) in contrast to the EU.[18]

While increased life expectancy contribute to achievement of sustainable development goals,[19] almost all countries are faced with the social, economic, and public health costs and challenges of population ageing, and according to the OECD projected population aging rise in old-age dependency ratios will put the financing of pensions, health and long-term care under high pressure.[20] The pressure is not only financially expressed in directed cost but also the shortages of human resources (care providers) could not be neglected. In terms of healthcare system functionality, many clinical practice guidelines, also, advocate for the engagement of caregivers in healthcare plans.[21] Futhermore, the recommendations of the OECD are set to expand the coverage of social security systems, on one side, and advocate better labor market inclusion of women, and other vulnerable populations, on the other, suggesting a mixture of policy measures devided within different sectors (both, health care and social care). All this considered, as the population of older increases over time, the need for care, and the number of those providing care will also increase, policymakers need to offer a comprehensive, integrated, multi-sectoral, and long-term policy framework for family caregivers, by highlighting the importance of taking gender into account when formulating policies in this area. A report of the European Parliament regarding women's rights and well-being in the post-pandemic period stresses the issue of the gender gap in unpaid family care by indicating the principal reason for women's uninvolved in labour market is unpaid care work, where '606 million women of working age have declared themselves to be unavailable for employment or not seeking a

17 Vladimir Nikitović, 'Višeslojna priroda depopulacije u Srbiji – noviji trendovi i izgledi' in D. Vuković (ed.), *Nacionalni izveštaj o ljudskom razvoju – Srbija 2022 – Ljudski razvoj kao odgovor na demografske promene* (2022), 70.

18 *Ibid*., 56.

19 In the 2013 UN Agenda of sustainable development, the population aging has been mentioned related to the protection of older population as vulnerable group, requiring the adequate policy measures. Pawel Jarzebski *et al*., 'Ageing and population shrinking: implications for sustainability in the urban century', *NPJ Urban Sustainability*, 1 (2021), 17.

20 OECG, *Ageing and demographic change, Fiscal challenges and inclusive growth in ageing societies*, *https://www.oecd.org/economy/ageing-inclusive-growth/*

21 Patricia M. Davidson, Martha Allison Abshire, Glenn Paull and Sarah L. Szanton 'Family caregivers: Important but often poorly understood', *Wiley Journal of Clinical Nursing*, Vol. 27, No. 23, 2018, 4242-4244.

job due to unpaid care work, while only 41 million men are inactive for the same reason'.[22] Moreover, according to the International Labour Organization (ILO), the involvement of women in unpaid homework and family care contribute to the higher gender gaps in labour force participation rates while the statistics show that in the developed countries with comprehensive equity and anti-discrimination legislation additional measures of protection such as maternity and childcare benefits encourages women to keep jobs and stay active at the labour market.[23] Having said that, there was also the proposal for the introduction of policy and legal framework for family caregivers, highlighting particularly the position of female caregivers, setting the additional benefits schemes that dates back to the 1990s, when Hyland (1990) pointed to the population aging trends in America, and suggested 'eldercare benefits' that include a mixture of policy measures such as paid care leave for the employed caregivers, and flexible work schedules (e.g. job sharing, reduced work hours).[24] Many scholars have, also, argued that providing financial support through social security system and respite for employed family caregivers is necessary because caregiving spans not only families but has broader social implications, particularly in workforce participation.[25] Given that, a number of empirical studies examined the effect of caregiving on workforce participation, pointing out the consensus among researchers that have been reached about the adverse effects of caregiving on employment rate, particularly among women.[26]

III LEGAL INSIGHTS INTO FAMILY CAREGIVING – A GLIMSE TO UNDERLYING VALUES, PRINCIPLES AND RIGHTS

Legal understanding of the institute of family caregiving is mainly linked to the inherent issues of parenthood and parenthood rights and obligations in Family law. The legal construction of caregiving as parenthood meaning equating caregiving with parenthood has been derived from the moral, social, cultural, as well as religious values and beliefs in a particular time period that further impacted on decision-makers to set up the conceptual framework for the model of providing additional benefits to caregivers i.e. whether or not financial support will be introduced and if does would it be from the economic (costs) or social reasons (valuing the care and well-being that is expected to be provided to the population affected).[27] For a very long time,

22 Schonard, Sokolska and Heezen, *op. cit*., 4.

23 Claire Harasty and Martin Ostermeier, *Population ageing: Alternative measures of dependency and implications for the future of work* (2020), 10.

24 Stephanie Hyland, 'Helping Employees with Family Care', *Mountly Labour Review*, Vol. 113, No. 9, 1990, 25.

25 Particia Davidson and Michelle DiGiacomo, 'Family caregiving: benefits and burdens', *Circulation: Cardiovascular Quality and Outcomes*, Vol. 8, No. 2, 2015, 133–134.

26 Niimi, *op. cit*., 4.

27 Keefe and Rajnovich, 80.

the conservative approach has been accepted in that regard, grounded in a belief that the natural family, particularly women has the primary obligation to care for dependants without any material compensation.[28] The proponents argued the moral incompatibility between the love for family members, considered a part of 'nature' family responsibility, and cash and other benefits for caregiving that could lead to emotional distance and even abuse of dependent family members.[29] On the other side, the criticisms of the conservative approach advocate for rethinking the traditional social construct of caregiving by creating an alternative legal status that will coexist with parenthood in a legal regime for caregiving.[30] Kapp (2012), based on the recent American case law, argued that 'the morality and materiality are not incompatibile', and caregiving could be both, the act of love and the act of pecuniary expectations considering the changes in societal, cultural, moral and family values and beliefs. He found in terms of analyzing court practice i.e. legal claims alleged the cash or other financial benefits by family caregivers, that the legal ground for most of these claims was based on the 'legal theory of value' where caregivers' labour must be compensated on the principle of fairness, and to be paid on the equal bases considering the value of services/care provided.[31] According to the legal theory of value, in the essence of every legal judgment is the issue of how values and rational choice among them should be interpreted, which further impact the public policy we collectively adopt as well as legal standards that courts choose.[32] In that regard, the fair distribution of burdens among all parties concerned is a core question needed to be properly addressed when it comes to the drafting of (family care) public policy and interpretation of often confronting values of the society, particularly in terms of the legal transition process. Although the primary responsibility of providing care to a family member (regardless of the age of the care recipient – child, the old or disabled parent, or another close family member) still stays within the family, contemporary trends and changes in societal values supports the equitable sharing of caregivers responsibilities between family and the state, as well as within the family by advocating the so-called caregiver's networks.[33] Shifts in societal values and derived legal construction of family caregiving are grounded on the development and prevailing of the value of equity (by affirming gender equity and non-discrimination), and the principle of rational choice of every person regardless of biological differences, also pointing to the need to change the legal construction of 'ideal worker'

28 *Ibidem*.

29 *Ibidem.*

30 Melissa Murray, 'The networked family: reframing the legal understanding of caregiving and caregivers', *Virginia Law Review*, Vol. 94, 2008, 390.

31 Marshall B. Kapp, *For Love, Legacy, or Pay: Legal and Pecuniary Aspects of Family Caregiving* (2012), 8.

32 Richard H. Pildes, 'Conceptions of Value in Legal Thought', *Michigan Law Review*, Vol. 90, No. 6, 1992, 1527.

33 Lashewicz *et al*., *op. cit.,* 91.

in a capitalistic society as a person who has no caregiving responsibilities.[34] Thus, it could be noted, that the process of reframing the traditional-conservative legal construction of family caregiving started with the affirmation of the principle of gender equity and the right to non-discrimination due to the status of caregivers that most affect women in the area of labour, followed by the principle of autonomy and proclamation of the right to work-family balance. Regarding the principle of autonomy, ordinarily, the caregiving has been provided on a voluntary basis but the question arises – is this actually true or the caregiver does not objectively make a choice considering the prevailing moral, social, and cultural beliefs and the discrimination practice that prevails in a community and workplace? The studies have showed that many caregivers declared being the subject of discrimination based on caregiving responsibilities, where the discrimination exists when well-performing employees are targeted for personnel actions (such as falure to hire, reduced compensation, failure to promote, lay-offs) based on their roles as caregivers or on assumptions of how they will or could act as caregivers.[35] In order to combat the caregivers' discrimination at the workplace besides the statutory proclamation of prohibition of this type of discrimination, it is also important to fully provide the implementation of the right to balance work and family responsibilities. At the level of the EU, Directive 2019/1158 on work-life balance for parents and carers[36] was adopted in 2019 with the primary aim to address the women's underrepresentation in the labor market by introducing a set of policy and legal measures that ensure better sharing of family care responsibilities. In terms of family caregiving of importance is the adoption of so-called *carers'– leave*, where workers who provide personal care or support to a relative will be entitled to five days of leave per year as well as the right to request flexible working arrangements. The Directive reaffirms the principle of gender equity by promoting the shared responsibilities for care between men and women when drafting the work-life balance policy, in the light of demographic changes of population aging, and increasing the need for informal care in many member states. The aim is to secure remaining in the labor market of those workers with family responsibility, but the Directive when entitling the workers' right to carers' leave does not provide remuneration for the duration of this leave, transferring the burden of caregiving only to the caregiver. It does not support the principle of public-private i.e. shared responsibility to care needed to be grounded on both, economic and social objectives. Economic objectives of care cost-efficiency could also be satisfied by applying financial support policies arguing that it reduces institutionali-

34 Laura T. Kessler, 'The Attachment Gap: Employment Discrimination, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory', *University of Michigan Journal of Law Reform*, Vol. 34, No. 3, 2001, 375.

35 Joan Williams, Shauna Shames and Raja Kudchadkar, *Ending Discrimination Against Family Caregivers – Report*, Program on WorkLife Law (2003), 1.

36 Directive (EU) 2019/1158 of the European parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, *Official Journal of the European Union*, L 188/79, 12.7.2019.

zation of the care recipient and therefore reduces the cost of the health and social care system while social objectives are linked to the value of informal support and intergenerational solidarity of welfare state.[37]

The social values of equity, autonomy and solidarity matched with their legal counterpart – the right to protection from gender discrimination, the right to balance work and family life, and the right to social protection benefits are embedded in the current EU policy and normative framework of both childcare and long-term (elderly and disabled) care. Given that, we could agree with views mostly expressed in literature that the trends in EU Family Care policy and law derive from concepts of 'equal employment' and 'work-life balance', but have now been directed to the 'equal sharing of care' approach between the gender within the family, that also need to be empowered by 'public-private equal sharing' broader approach i.e. sharing care responsibilities between both, the family and state. The broader public-private equal sharing approach has also been linked to the value of solidarity but need to be considered in the context of current societal changes and new global social risks (population aging, public health threats, climate change issues). Thus, the equal sharing approach (at the level of family and at the higher level of family and the state) could be further analyzed in terms of Building Back Better concept. Building Back Better is a policy concept of post-disaster community recovery where the engagement of the state is crucial aiming not only to return to the pre-disaster level of development but also to improve physical, social, environmental, and economic conditions creating more resilient system.[38] The concept is linked to the so-called Care economy model (including child care, community-based care, paid family and medical leave, and is defined as system in which workers and families provide services vital to caring for the population impacted an increase in both, income and employment) introduced recently in the USA – by Building Back Better Act that significantly expanded the federal contribution to Medicaid's home and community-based care as a part of protection measures in pandemic and post-pandemic period. The Building Back Better Act introduces a new national paid family and medical leave program of up to 4 weeks for workers.[39] This paid leave program would allow individuals to take time to care for a newborn, care for a family member with a serious health condition, and care for themselves if struck by a personal health problem.[40] Care economy programs in the USA and wider (also stressed in the United Nations (UN) policy documents) aim to build resilient societies and systems by strengthening care policies with a gender lens, particularly addressing women's positions as care pro-

37 Keefe and Rajnovich, *op. cit*., 83.

38 Sandeeka Mannakkara, Suzanne Wilkinson and Tinu Rose Francis, '*Build Back Better* Principles for Reconstruction' in Beer, M., Kougioumtzoglou, I., Patelli, E., Au, IK. (eds) *Encyclopedia of Earthquake Engineering* (2014), 1.

39 *The economic evidence behind 10 policies in the Build Back Better Act*, The Washington Center for Equitable Growth (2021), *https://equitablegrowth.org/the-economic-evidence-behind-10-policies-in-the-build-back-better-act/*.

40 *Ibidem*.

viders. The strengthening measures are mainly a hybrid in nature combining traditional social protection benefits with work-related protection measures of employment and labor law while some countries are introducing also fiscal measures of tax relief for caregivers. The special focus is on gender issues of combating the discrimination practice based on caregivers' responsibilities.

It is important to note that, when comparing the current EU policy framework in Family (Informal) Care introduced by EU Directive 2019/1158 on work-life balance for parents and carers with its legal counterpart in the US – Building Back Batter Act, the normative provisions of the latter are far more favorable for family caregivers by entitling them to 4 weeks paid leave compared to only 5 days unpaid leave per year for EU family caregivers. Thus, the traditional dichotomy between the US liberal (market-oriented) policy approach in social care labeled as non-generous to the poor and vulnerable, and the EU social welfare approach (expressed in the catchphrase of the so-called 'European Social Model' that advocates both, economic growth and, social justice and cohesion) has been brought into question. Could the 'EU welfare state' objectively deal with the challenges of population aging and other global social risks i.e. provide social protection to all vulnerable groups while promoting sustainable economic growth, and addressing properly the ongoing public health, security, and economic crisis? It will be extremely challenging for EU policy-makers, particularly having in mind the differences in the adopted welfare model among EU member states in terms of introduced social protection measures as well as in the size of the budget devoted to the protection of vulnerable populations and redistribution. Van Kersbergen & Vis (2014) stays in the line with Esping-Andersen classification of welfare states by distinguishing three types of welfare state – 1. liberal (found in the US and United Kindom, market-orientated and favoring private social insurance, where redistribution function of the state in terms of social protection benefits and services to the vulnerable and poor are modest); 2. social democratic (found in the Nordic countries, also tax-financed but the benefits and services are more generous than that introduced in the liberal model with a much broader scope of the population affected) and 3. conservative type of welfare state (characterized for the states of Bismarckian social insurance model, primarily Germany and Austria, where qualification for the social protection benefits and services derivers from the pay contribution to the social funds as a part of employment engagements).[41] Given that, Van Kersbergen &Vis argue the fluid and flexible nature of the welfare regimes that depends a lot on the economic resources of the state while the effects of the welfare state on inequality depend on how social benefits and services are allocated and financed.[42] A strong state with a high labor participation rate and consequently optimal tax capacity will favor to more generous social benefits system, by lowering social inequalities, which could significantly contribute to the more generous benefits for family caregivers.

41 Kees van Kersbergen and Barbara Vis, *Comparative Welfare State Politics – Development, Opportunities, and Reform* (2013), 9-11.

42 *Ibid*., 15.

IV POLICY AND NORMATIVE FRAMEWORK OF FAMILY CAREGIVING – A COMPARATIVE PERSPECTIVE

Regardless of the very fragmented regimes of the welfare states around the globe, the proclamation of the UN sustainable development goals impacted many states to recognize the necessity of formalization the (informal) family caregiving in terms of reconciliation of family life, work, and care, particularly by improving the employability of women, making caring a visible option for potential carriers. Many European and non-European countries supported the strengthening of the care market, and introduced cash-for-care systems, by combining measures of the social security system (additional cash benefits for caregivers) and work-related measures of care leave options.[43] In this section, an overview of welfare regimes of family caregiving in representative countries will be presented, stressing the heterogeneity and diversity of adopted measures impacted mainly by the adopted financial model.

Germany is the country with an increasing need for long-term care services, where the burden of care mostly lies on women of working age, so recent studies point to the importance of finding a best-practice model of reconciliation work and care responsibilities.[44] German legislation framework comprises the protection of caregivers within the Long-term Insurance Act (SGX IX) implemented in 1995 and 1996 that announced the shift in the German care system from mostly unpaid family care to state organized care as a part of additional 'social insurance' program that was established as a new universal social right. However, the basic responsibility to care still stays on the family while statutory long-term insurance cover only part of the costs. Benefits are differentiated considering the level of care receiver's dependency, and the recipient could choose to receive care in cash or in kind (home care, attendance at day-care centers, and residence in nursing homes) or even combine both.[45] The option for the care recipient is also to choose care from his family member, where the care allowance amount is lower than that paid for official care from the state agency.[46] This Law was a pioneer important for German care policy by assigning the special status of 'carrier' for those who provide more than 14h weeks of care, and are not employed or are only part-time engaged.[47] The care relationship is grounded on a contract between the care insurance and the carer, and the status entitles the carer to old-age

43 Frericks, Jensen and Pfau-Effinger, *op. cit*., 67.

44 European Commision, Directorate-General for Employment, Social Affairs and Inclusion, *Peer Review on 'Work-Life Balance: promoting gender equality in informal long-term care provision'. Host Country Discussion Paper – Germany: Family care and paid work among working-age women and men in Germany: on the way towards more gender equality?* (2020), 1.

45 Wolfgang Keck and Chiara Saraceno, 'Caring for a parent while working for pay in the German welfare regime', *International Journal of Ageing and Later Life*, Vol. 5, No. 1, 2010, 112.

46 Frericks, Jensen and Pfau-Effinger, *op. cit*., 69.

47 Keck and Saraceno, *op. cit*., 113.

pension benefits as well as insurance from accidents at the workplace.[48] The caregiver is not entitled to protection against dismissal but has the right to unpaid four-week leave in case of sicknesses or for vacation.[49] In order to improve the caregiver status, particularly, in terms of work-life balance and gender equality, Germany started reform by adopting the Family Leave Act in 2008 and the Family Caregiver Leave Act in 2012, where the latter come into force in 2015. The main novelty was related to leave entitlements from work for family caregivers, divided for short-term, middle-term, and long-term care needs, with the right to claim wage compensation benefits or interest-free loans from the Federal Department for Family and Civil Society Affairs. Thus, for short-term care needs, the employed family member could claim up to 10 working days off with the right to wage compensation, for middle-term care needs, he has the right to a full or partial release from work up to 6 months, and has been entitled to an interest-free loan from the state official body, while for long-term care need, the employed family caregiver could claim so-called 'Family caregiver leave' – to be entitled to partial work release up to 24 months with a minimum working time of 15 hours per week, and also with the right to claim interest-free loan.[50] The legislation is flexible, the care responsibilities could be shared within the family and in the Covid-19 pandemic period, carers' grants and the leave for short-term needs were extended to 20 working days.[51] The German family care legislation has significantly been improved over time, and it could be noticed that now it provides a wide specter of social and work-related rights for family caregivers whose *sui generis* status was recognized within the system and formalized as such. Family caregivers enter into a special contract-based relationship with beneficiaries, and although the cash payments for caregivers are lower than those allocated for nursing-home care, and depends on the employees'/recipients' contributions during their working ages, the reform of 2008 and 2012 introduces different models of paid leave for caregivers, where the status of family (informal) caregivers were drastically improved – they became formally recognized in the system with the mix of social and work-related rights flexibly settled while the introduction of wage compensations guarantee a certain financial and job stability for both, women and men.

The model of the Sweden's regulation of family caregiving point to the integration of the principles of de-familiarization and universalism in the social welfare system with full state responsibility of providing care to older and dependent populations.[52] The main characteristics of family caregiving in Sweden are public financing, state responsibility where the family has the

48 Frericks, Jensen and Pfau-Effinger, *op. cit*., 69.

49 *Ibid*., 70.

50 European Commision, Directorate-General for Employment, Social Affairs and Inclusion, *op. cit*., 13.

51 *Ibid*., 14.

52 Petra Ulmanen, *Family care in the Swedish welfare state: extent, content and consequences*, Work in progress: Paper to the Transforming care conference (2017), *chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/http://www.transforming-care.net/wp-content/uploads/2017/06/TP13_a-Ulmanen.pdf*

autonomy to choose to care for dependants or not, and decentralization of care to local municipalities while the main sources of financing are local taxes.[53] This system is labeled as significantly generous among other European welfare states. It means that family members could voluntarily provide care but there is no legal obligation to care, and by amending the Social Services Act conducted in 2009, if the family member decides to provide care, the municipalities became obligated to support caregivers. Particularly, there are two measures introduced to support family caregivers – 1. Carers' allowance, implying the employment relationship between family caregivers and municipality, while the status of caregivers corresponds to the status of the employee in the municipal care services, entitled to the remuneration and social insurance claims; and 2. Leave for palliative care, where the potential caregiver could choose between full-time or part-time leave for maximum of 100 days per person in need with the right to claim the payment for caring during the care period.[54] Compared to the German policy approach and legislation framework where social insurance schemes do not guarantee the compensation of all costs related to caregiving, depending on wage contributions during the working age period, in Sweden, the costs are covered by the municipality i.e. the state from taxes. It could be noted that in the Sweden system, the principle of equality and autonomy of care providers has been implemented, meaning that the participation of working-age people in labour market has been seen as an important public policy goal while the state takes the responsibility to care for the elderly and dependant populations. It seems that the general conceptual idea is to transfer the traditional social risks such as sicknesses/disability and old age to the state while providing the protection of the status of those who are not at risk i.e. working age population stressing the complete voluntary of family caregiving, by avoiding the discrimination of employed family members.

Japan as a country with the world's most aged population, has approached the issue of increased need for family caregiving, by introducing the policy mechanisms of support to the working family member enacted in the Child Care and Family Care Leave Act (adopted in 1995 and entered into force in 1999).[55] The Act entitles employed caregivers to continuous leave for up to 93 days per family member in need for long-term needs, and up to 5 days off per year for short-term needs introduced by amending the Act in 2009 and 2010. The Child Care and Family Care Leave Act has been amended on January 2021 by allowing employees to take family care leave on an hourly basis that is also applies to the employees who work part-time (four hours or less per day).[56] The employed caregiver could opt for flexible working hours

53 Per Gunnar Edebalk, 'Ways of Funding and Organising Elderly Care in Sweden', in T. Bengtsson (ed.), *Population Ageing – A Threat to the Welfare State?* (2010), 76.

54 Sören Hoyer and Nele Reich, *Leave and financial support for family caregivers in EU member states* (2016), 25-26.

55 Niimi, *op. cit*., 3-4.

56 *Japan: More Flexible Family Care Leave Mandated* (2021), *https://www.shrm.org/resourcesandtools/hr-topics/global-hr/pages/japan-more-flexible-family-care-leave.aspx*

for up to three years and claim the exception from overtime and late-night work during this period.[57] As is the case in Germany, in Japan as well there is compulsory insurance for elderly care, while in Sweden the insurance system is not introduced, but there is a significant difference in the organization and financing of the insurance system between Germany and Japan. So, in Germany, the insurance is organized within the national sickness fund, and financed by the income of the insurers, while in Japan it is the responsibility of municipalities and financed through taxes.[58] Furthermore, in Japan, the insurance covers 90% of all costs, while in Germany the insurance covers a much lower amount, but in Japan, compared to Germany, family caregivers could not claim monetary compensation for caregiving within the social security system.[59]

V NOTE: LEGAL GAP IN SERBIAN REGULATION

In Serbian labour and social security legislation there is no provisions dealing with family caregiving. Although a number of civil society organizations dealing with the rights of vulnerable populations (people with rare diseases, people with disabilities, and those in need of palliative care) also supported by the unions (the Association of Independent Trade Unions of Belgrade has recently submitted a request to Serbian Government for the adoption of a special law on Family Caregivers[60]) advocating the family caregiving formalization and recognition within the social and labour system, there is still no moving forward. However, the development of innovative and flexible support programs for populations at risk based on public-private partnership has been argued as a sustainable policy response in terms of the reform process that is ongoing.[61]

The Serbian Labour Act provides paid leave for an employed person (those working in the standard employment relationship) for up to 5 days per year for obtaining the marriage status, childbirth, serious illness of a family member, as well as in other cases determined by the general act and employment contract.[62] Serious illness of a family member implies caregiving services but other more concrete provisions regarding family caregiving are lacking. Also, neither Labour Act nor any other employment regulation contains provisions of flexible work engagements for family caregivers, inferring

57 Niimi, *op. cit*., 3-4.

58 Per Gunnar Edebalk, *op. cit*., 77.

59 *Ibidem.*

60 Available at: *https://www.021.rs/story/Info/Srbija/300027/Status-roditelj-negovatelj-ponovo-aktuelizovan-roditelji-objasnjavaju-zbog-cega-im-je-neophodan.html*

61 Sanja Stojković Zlatanović, 'Alternative Care for Children in Social Welfare System – Policy and Legal Challenges', *Serbian Political Thought*, Vol, 74, No. 4, 2021, 138.

62 Serbian Labour Act, *Official Gazette*, No. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017 – Constitutional Court decision, 113/2017 and 95/2018 – authentic interpretation, Article 77.

that the status of family caregivers in Serbia is not formalized i.e. normatively framed or institutionalized. Moreover, the Old Age and Disability Insurance Act entitles the beneficiaries of a retirement pension to the right to monetary compensation for help and care of another person, who is due to the nature and severity of the injury or illness in need of assistance, and care to perform daily activities and meet basic life needs.[63] However, the provisions of the Old Age and Disability Insurance Act have not specifically referred to the family member who provides care to dependants. The payment would be made to the beneficiary of the pension, making the family caregivers unrecognized and invisible within the system. Given the lack of regulation of family caregiving, the German model could be the most adequate one for legal transplantation in Serbia. Both systems have been grounded on the Bismarckian model of social security, mostly relaid on employees' contributions during the working-aged period, pointing to a shared responsibility of care, among the contributor/beneficiaries, state, and family. However, in order to compile with the principles of (gender) equality and autonomy, caregiving must be voluntarily chosen by those in need and their family member such as the case in Sweden. A mix of social and work-related rights need to be introduced by special law approaching the subject of family caregiving from a holistic, integrated, and shared caregivers/care recipient-centered approach. In Serbia, there is a proposal to amend the Social Protection Act in terms of formalization of family caregiving but the contemporary approaches to the notion stresses also the importance of tackling the impact of labour participation, gender equality, and work-life balance. Thus, the issues of family caregiving need to be addressed by special legislation.

VI CONCLUSION

The societal phenomenon of population aging will definitely impact on increasing demand for caregiving services, so the role of a family member in providing care must not be neglected. Moreover, a gender issue in family caregiving is important to address, but also one should note that how women and men allocate unpaid care work depends on many factors such as social norms, gender stereotypes, and role ascriptions, as well as on institutional and normative frameworks and *vice versa*. The status of family caregivers must be formalized and recognized within the social security and labour system. Broader 'public-private equal sharing' and 'gender sharing' approach within the family has been seen as the fairest, grounded on the principles of solidarity, equality, and autonomy. Consequently, the broader shared approach to family caregiving supports the proclamation and the implementation of the right to work-life balance that has recently been promoted at the EU level by

63 Serbian Old Age and Disability Insurance Act, *Official Gazette,* No. 34/2003, 64/2004 – CCRS decision, 84/2004 – law, 85/2005, 101/2005 – law, 63/2006 – CCRS decision, 5/2009, 107/2009, 101/2010, 93/2012, 62/2013, 108/2013, 75/2014, 142/2014, 73/2018, 46/2019 – CC decision, 86/2019 and 62/2021, Article 41a.

the introduction of the so-called Work-life Balance Directive (Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU). The state-adopted social welfare regime significantly impacts family caregivers' status in terms of generosity and the assignation of social benefits and/or work-related rights. Family caregiving could be an employment model if has been voluntarily chosen by the family member but also additional engagement supported by both, the social security system through social benefits and labour system through paid leave options. Paid leave model needs to be settled considering the calculated period of care recipient need, i.e. short, middle, or long-term care need, such as implemented in the German family care system. Generally, the so-called Care economy sector is expected to grow meaning the demand for care for the elderly and disabled persons will increase drastically, requiring regulation that will ensure decent working and living conditions for potential caregivers', that in the post-pandemic period could provide an opportunity to 'Build back better' through sustainable investments in gender-responsible social security, care, and employment systems.

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ISTRAŽIVANJE MOGUĆNOSTI ZA REKONCEPTUALIZACIJU (NEFORMALNE) PORODIČNE NEGE U PERIODU NAKON PANDEMIJE – DRUŠTVENE VREDNOSTI, EKONOMSKI CILJEVI I PRAVNA NAČELA

Apstrakt

Analiza instituta (neformalnog) porodičnog negovatelja zahteva sagledavanje različitih teorijsko-konceptualnih stanovišta i javnopolitičkih okvira, a vezano za porodičnu, odnosno privatnu, državnu, odnosno javnu ili podeljenu javno-privatnu odgovornost, gde se kao cilj identifikuje utvrđivanje modela najbolje prakse. Teorijski osnov rada počiva na principima solidarnosti i jednakosti, sa fokusom na jednakost polova, a shodno primetnoj dominaciji žena kao pružalaca porodične nege, uz primenu holističkog pristupa predmetu istraživanja, kao i pristupa usmerenog ka čoveku-građaninu. Osim toga, primenom uporednopravnog metoda, odnosno analizom normativnih rešenja odabranih država – Nemačke, Švedske i Japana, koje su regulisale status porodičnih negovatelja, daje se predlog za definisanje socijalnopravnog, odnosno radnopravnog statusa ove kategorije u domaćem pravu *de lege ferenda*, budući da je primetna potpuna odsutnost pravnih pravila u ovoj oblasti. Istraživanje, u krajnjem, ima za cilj da doprinese akademskoj raspravi o izazovima priznavanja, ostvarivanja i zaštite osnovnih socijalnih i radnih prava ranjivih društvenih grupa, uzimajući u obzir slabosti i ograničenja savremenog sistema socijalne sigurnosti da se prilagodi promenjenim okolnostima transformacije ekonomsko-socijalnog modela neokapitalizma u pravcu uspostavljanja „otpornijeg“ modela održivog razvoja.

Ključne reči: *Institut porodičnog negovatelja; Jednakost polova; Socio-ekonomske vrednosti; Pravni principi; Uporednopravna rešenja.*

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INFORMAL FAMILY CAREGIVING AND WOMEN AND GIRLS WITH DISABILITIES – A THEORETICAL APPROACH

Abstract

We accept women's caregiving as the natural order. This invisible work is hidden in the roles of mothers, sisters, daughters and wives and is usually undervalued, inadequately compensated and under-explored. International standards emphasize the importance not only of support to persons with disabilities but to their families and caregivers, as well. Indeed, there is no unique definition of caregivers in the literature since care is not a traditional legal concept. In spite of this, the definition of informal family caregivers is of great value in making the importance and role of caregivers more visible in modern society. Therefore, the paperwork, firstly, tries to give the essential elements of the theoretical orientation and normative definition of informal family caregivers of women and girls with disabilities. Secondly, it follows the ILO's "5R framework for decent care work" as a step forward in order to recognize this "hidden" work and the impact of the apparent "care crisis" spurred on by the Covid-19 pandemic on unpaid care work. Even though this multifaceted crisis took to gender regression, it brought us an opportunity to put care work "in front and center". Lastly, the paper argues that support for family caregivers can improve the position of the people they care for and in this sense, it gives some suggestions. We concluded that because of their multi-faceted role, the family caregivers need a range of support services to remain healthy, improve their caregiving skills, and remain in their caregiving role.

Key words: *Informal family caregivers; Women; Disability; 'Care crisis'; Potential care progression.*

I INTRODUCTION

(Un) paid care work is at the heart of humanity.[1] The majority of care work is carried out "free" and informally, by family members in almost all countries,[2] and is also performed on an unpaid basis in the home.[3]

1 International Labour Office, *Care work and care jobs for the future of decent work* (2018), 5.

2 Catherine Hein, *Reconciling work and family responsibilities: Practical ideas from global experience* (2005), 76.

3 Tina Jonson, *Promoting women's economic empowerment recognizing and investing in the care economy* (2018), 8.

Traditionally, parents care for children, adult children care for aging parents and one partner cares for the other "in sickness and health."[4] Through history care work has been regarded "as the work of slaves, servants, and women",[5] and in a sort of apprenticeship women passed down caring techniques to their daughters, sisters, friends, and other female servants, similarly to what we do today in nursing.[6] Women are traditionally more likely to provide care, and in the main, care remains a gendered activity in both domestic and public sphere.[7] However, the persistence of the female caregiver model is not a model that comes naturally, it is maintained by social interactions. The legitimization of the patriarchal conception of work and workers contributed to the invisibility of women in (labour) law.[8] The family model of "men breadwinners, women caregivers"[9] remains the dominant global normative construction for gender relations. Most countries are culturally, socially and indeed often legally built on this family model rooted in the doctrine of two separate social spheres.[10] For most women, working for an employer is not the only work, it is accompanied by unpaid work in the household and caring for family members who are dependent on others' care,[11] due to disability or other reasons. While a man is an "ideal worker", a woman as "caring and submissive" is out of the ideal and her work remains undervalued. Undervaluing care work is closely linked to the idea that caring is a woman's responsibility within the household and that it is done for free.[12] Women do the majority of care for people with disabilities too, and for the most part, their efforts go unnoticed. Although central to family life,

4 Lee Adams, "The Family Responsibilities Convention reconsidered: The work-family intersection in international law thirty years on", *Cardozo Journal International and Comp*arative Law, Vol. XXII, No. 4, 2013, 205.

5 Julie Walbank and Jonathan Herring, *Vulnerabilities, care, and family law* (2015), 12.

6 June Como, "Care and caring: a look at history, ethics, and theory", *International Journal for Human Caring*, Vol. XI, No. 4, 2007, 37.

7 Eugenia Caracciolo di Torella and Annick Masselot, *Caring responsibilities in European law and policy*, (2020), 91.

8 Ljubinka Kovačević, *Zasnivanje radnog odnosa* (2021), 1056.

9 The traditional family model is part of a wider gender division into public and private spheres. The work issues belong to the public sphere and are the main domain of men, and the issues of caring for dependents belong to the domestic sphere the main domain of women. According to some authors, the basis of this dichotomy comes from ancient thought, according others it comes from theology and is a counterpart to the dichotomy of „heaven and earth". See: Eugenia Caracciolo di Torella, "Brave new fathers for a brave new world? Fathers as caregivers in an evolving European Union", *European Law Journal*, Vol. XX, No. 1, 2014, 92; Frances Olsen, "The family and the market: a study on ideology and market reform", *Harvard Law Review*, Vol. XCVI, No. 7, 1983, 1498.

10 International Labour Office, *Men, and masculinities: promoting gender equality in the world of work* (2013), 16.

11 Ljubinka Kovačević, „Ravnopravnost muškaraca i žena kao bitan element dostojanstvenog zapošljavanja: prilog diskusiji o Nacrtu zakona o rodnoj ravnopravnosti", *Radno i socijalno pravo*, Vol. XXII, No. 1, 2018, 99.

12 Blandine Mollard, Jakub Caisl, Davide Barbieri, Marre Karu, Giulia Lanfredi, Vytautas Peciukonis, Maria Belen Pilares, Jolanta Reingardė and Lina Salanauskaitė, *Gender inequalities in care and consequences for the labour market* (2021), 3.

caring is often invisible to those beyond the home, especially in the case of families caring for a member with a disability.[13] There is little consensus in the literature concerning how to best define a caregiver and care. Until recently care was understood as a presumed family responsibility. Therefore, there is no statutory definition of care, since it is not a traditional legal concept, because it has widely been taken for granted and has hardly ever been a concern of the legislator.[14] The state protected private life but did not interfere in the relationship between the caregiver and the dependent. The wide variety of definitions in the literature indicates that care relationships are diffuse rather than clearly defined, considering that the boundaries for care are difficult to draw in terms of what is done, by whom, for how long, to what intensity, and where it is done.[15] Moreover, the way we usually measure our economies ignores this "reproductive work", although it is valued and compensated when it is done outside the house.[16]

The conversation in the area of care should be located around equitable relationships between the women who are being cared for and the women who care.[17] Not all people with disabilities need care, but the caregivers of those who do often embark on a "lonely and challenging journey."[18] Many women care for their families without any appropriate support from their partners or society in general, and they are the subject of this research. Apart from the lack of data on informal caregivers that are still at the assessment level in most states, one of the problems is the lack of a generally accepted definition of a caregiver.[19] Although it is not a traditional legal concept, and despite the fact that defining caregiving is not an easy task, a clear definition is important to make this concept visible. In turn, this will enable fram-

13 Dary Higgins, Matthew Gray, Norbert Zmijewski, Marcia Kingston and Ben Edwards, *The nature and impact of caring for family members with a disability in Australia*, (2008), ix.

14 Caracciolo di Torella and Masselot (2020), *op. cit*., 11.

15 Duxbury Linda, Higgins Cristopher, Schroeder Bonnie, *Balancing paid work and caregiving responsibilities: a closer look at family caregivers in Canada*, (2009), 26.

16 Kate Power, "The COVID-19 pandemic has increased the care burden of women and families", *Sustainability: Science, Practice and Policy*, Vol. XVI, No. 1, 2020, 68.

17 The Center on Human Policy Syracuse, *Women and Disability: Women and Care, https://www.bing.com/ck/a?!&&p=a71c3a682d355058JmltdHM9MTY2NzY5MjgwMCZpZ3VpZD0zODBmOWNhMC0zODYxLTYxNDYtMTIzNC04ZGI4MzkxOTYwOGQmaW5zaWQ9NTE1NQ&ptn=3&hsh=3&fclid=380f9ca0-3861-6146-1234-8db83919608d&psq=Women+and+Disability%3a+Women+and+Care+-+The+Center+on+Human+Policy+%e2%80%93+Syracuse+University.&u=a1aHR0cHM6Ly90aGVjaHAuc3lyLmVkdS93b21lbi1hbmQtZGlzYWJpbGl0eS13b21lbi1hbmQtY2FyZS8&ntb=1*.

18 Andrew Lim, Justin Lee, Caring for caregivers of persons with disabilities, *https://www.bing.com/ck/a?!&&p=0d9b718159e4d164JmltdHM9MTY2NzY5MjgwMCZpZ3VpZD0zODBmOWNhMC0zODYxLTYxNDYtMTIzNC04ZGI4MzkxOTYwOGQmaW5zaWQ9NTE2MQ&ptn=3&hsh=3&fclid=380f9ca0-3861-6146-1234 8db83919608d&psq=hCaring+for+caregivers+of+persons+with+disabilities%2c+(ipscommons.sg).9i64j69i59i450l7...7.113j0j4%26FORM%3dANAB01%26PC%3dEDGEDB&u=a1aHR0cHM6Ly9sa3lzcHAubnVzLmVkdS5zZy9kb2NzL2RlZmF1bHQtc291cmNlL2lwcy90b2RheV9jYXJpbmctZm9yLWNhcmVnaXZlcnMtb2YtcGVyc29ucy13aXRoLWRpc2FiaWxpdGllcy5wZGY&ntb=1*

19 Nataša Todorović and Milutin Vračević, *Ja, neformalni negovatelj* (2019), 9.

ing and shaping a legal debate, support, and development of an appropriate policy and normative strategy,[20] for all informal caregivers, including those of women and girls with disability. Transforming care work starts by measuring and defining care work,[21] trying to "value the invaluable",[22] and by defining the ones by whom this work is done.[23]

II DEFINITION OF INFORMAL FAMILY CAREGIVERS

1. Key elements of the theoretical definition – a sociological perspective

Caring exposes humans' vulnerability and dependency on others. Everyone relies on others' care for most of their life. In order to define the informal caregiver, in the paper, the Fineman's concept of "vulnerable subject", has been employed as the conceptual background.[24] Thus, Fineman argued, all people are "vulnerable", which implies that everyone has a need to be taken care of by others, but also to take care for others, and each individual lives in a state of "active" or "potential" need for others' care. As the author further states, vulnerability is universal, constant, and characteristic of all people.[25] At some point in life, whether due to old age, illness, or disability, everyone will need care and most people will become caregivers, either as parents or as caregivers of adults.[26] All adults (and, in some cases, children) are or will be unpaid caregivers of other people at some point in their life cycle.[27] In this sense, the author *Caracciolo di Torella* points out that the inherent vulnerability is a consequence of four markers that qualify one relationship as a relationship between a caregiver and a person in need for care.[28] Without

20 Caracciolo di Torella and Masselot (2020), *op. cit*., 4.

21 Laura Addati, "Transforming care work and care jobs for the future of decent work", *International Journal of Care and Caring*, Vol. V, No. 1, 2021, 4.

22 UN Women and David Snyder, *Policy brief No 16. COVID-19, and the care economy: immediate action and structural transformation for a gender-responsive recovery* (2020), 2.

23 According to Margaret Mead, American anthropologist, the first sign of civilization was a broken femur that has healed, evidence that someone has taken time to stay with the one who fell, carried him to safety and tended him through recovery. Helping someone else through difficulty is where civilization starts, in the words of named aurthor. See: Becky Johen, We are at our best when we serve other, *https://authorbeckyjohnen.wordpress.com/2022/08/07/we-are-at-our-best-when-we-serve-others/*.

24 As Herring and Walbank state vulnerability is a key concept for many law disciplines and much of the work in law has been influenced by Fineman's paper, Walbank, Herring, *op. cit.*, 2.

25 Martha Albertson Fineman, "The vulnerable subject anchoring equality in the human condition", *Yale Journal of Law and Feminism*, Vol. XX, No. 1, 2008, 179.

26 Caracciolo di Torella and Masselot (2020), *op. cit*., 1.

27 International Labour Office (2018), *op. cit.*, 7.

28 Caracciolo di Torella and Masselot (2020), *op. cit*., 8.

denying that these markers are not exhaustive, the author points out that: 1) constant ongoing responsibilities inherent in care, 2) actual or perceived absence of choice, 3) financial, physical, and emotional costs involved in caring, especially when it is informal and 4) the nature of caring for another as a "labor of love", which implies an emotionally sensitive, personal relationship between the caregiver and the person who is cared for, qualify one person as a caregiver.[29]

Constant ongoing responsibilities inherent in care comprise different experiences, but most authors agree that care includes personal care, physical care, nursing care, support and care management.[30] In other words, care work consists of two overlapping and complementary activities: direct, personal and relational care activities and indirect care activities.[31] Therefore, the care for others, defined in this paper, includes various activities aimed at ensuring the physical and psychological well-being of the woman with a disability in her best interest, regardless of her age (girl or adult), regularly including unqualified work similar to household work. Although caregivers of women with a disability are not always legally obliged to provide care, they usually do so under the pressure of solidarity or reciprocity. "The obligations and responsibilities inherent in the caring relationship are non-negotiable: in reality, caring is seldom a choice."[32] They choose how they will care and whether they will delegate these responsibilities to institutions or not, but once they decide to perform the caregiver's responsibility, they no longer can choose whether or not to take care for a dependent. Therefore, the actual or perceived absence of choice (due to the absence of other family members/ adequate social services who would perform those responsibilities) is an essential element of the theoretical definition of this category. Family caregiving is usually provided with love and compassion and brings a personal sense of satisfaction. The pleasure of seeing a person with a disability responding to care and developing their experiences is very powerful. Indeed, the fact that caring involves hard physical work and is very often provided on an unpaid basis implies that the care consequently leads to significant "hidden" *financial, physical and emotional costs involved in caring* for those who provide it. Informal family care is a particularly stressful activity that limits the caregiver's life activities and often affects the social, emotional, and financial well-being, as well as the health of the caregiver. It leads to physical and emotional strain, "time poverty", and missed opportunities and earnings as factors that potentially impoverish caregivers.

For this work purpose, the *criterion of the nature of caring for another as a "labor of love"* requires clarification. Experts from different fields agree that caring for others includes a multitude of situations and experiences, but also

29 *Ibid., op. cit*., 7-11.

30 Duxbury, Higgins and Schroeder, *op. cit*., 25.

31 Addati, *op. cit.,* 150.

32 Caracciolo di Torella and Masselot (2020), *op. cit*., 9.

that it is necessary to clearly define the concept of caregiver both in policy-making and social security legislation. Informal caregivers are usually family members who provide part or all of the necessary care to a dependent, and it is not excluded that care can also be provided by friends and other individuals who are not family members of the dependent's family. The research focus of this paper is on informal family caregivers. Informal care provided by friends without established family ties stipulated by law is not the subject of consideration. In other words, although caring for others is a "labor of love"[33] not all emotionally sensitive, personal relationships between a caregiver and a dependent are such that they qualify a person as a family caregiver. Numerous relationships have a personal character (friendship, emotional unions), and even some relationships that are considered kin from the point of view of custom, morality, and religion (spiritual kinship, godparents, milk kinship...) can not receive protection through family law regulations.[34] Therefore, if a caregiver assists a woman with a disability with whom he has a personal relationship, but not a relationship that receives protection through family law norms (e.g. neighbour, godfather), he is an informal caregiver, but not an informal family caregiver. In other words, informal family caregivers are only one possible type of a wider group of informal caregivers. Indeed, most informal caregivers, are family members such as spouses or adult children of a dependent person. The informal nature of care implies that care is provided by persons who do not have medical knowledge and who are not qualified to provide care. The unpaid nature of care implies that caregivers do not receive monetary compensation for their work.[35] Although the epithets "unpaid" and "informal" are criticized in the literature as inadequate because they do not reflect the complex nature of care, they are still used in the economic and medical literature to differentiate informal caregivers from formal ones who receive monetary compensation for the care they provide.[36]

To summarize, the essential theoretical elements of the considered category are: *constant ongoing responsibilities inherent in care*, *actual (or perceived) absence of choice*, *financial, physical and emotional costs, and nature of caring* as *"labor for love"* which implies emotionally sensitive, personal relationship between caregiver and women with a disability which is considered a family law relationship in the sense of family law regulations.

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33 Maria dos Anjos Coelho Rodrigues Dixe, Liliana Fernanda da Conceição Teixeira, Timóteo João Teixeira Camacho Coelho Areosa, Roberta Caçador Frontini, Teresa de Jesus Almeida Peralta and Ana Isabel Fernandes Querido "Needs and skills of informal caregivers to care for a dependent person: a cross-sectional study", *Bio-Med Central Geriatrics,* Vol. XIX, No. 22, 2019, 2.

34 Marko Mladenović, *Porodično pravo – Porodica i brak* (1982), 77.

35 According to Todorović and Vračević, formal care involves a professional relationship shaped by rules of conduct, it is a paid job, implies reciprocal monetary compensation, limited range of care activities, activities which are planned and regulated and this type of care is economically visible, it has defined working hours, and the caregiver has the right to rest and sick leave. Todorović and Vračević, *op. cit*., 16.

36 Richard Schulz, Jill Eden, *Families caring for an aging America* (2016), 1-4.

2. Key elements of the normative definition

The majority of unpaid family caregivers are women and most of them are employed, having the same status as workers with family responsibilities.[37] Family responsibilities are usually associated with a wide variety of unpaid care work, which has many different definitions,[38] as stressed above. The foundation for defining this term is given by international labour law standards.[39] Women's reproductive role and family responsibilities have been the subject of Twentieth-Century international regulation, culminating in International Labour Organisation Convention no. 156 concerning equal opportunities and equal treatment for men and women workers: workers with family responsibilities.[40] Thus, the ILO C-156, the accompanying Recommendation no. 165,[41] and the Council of Europe's Revised European Social Charter,[42] define workers with family responsibilities as workers with responsibilities to their "dependent children", but also as workers with responsibilities to "other members of their immediate family who clearly need their care or support". However, in the Convention's final version, the scope of the notion has been narrowed and determined that workers with family responsibilities are only those whose care responsibilities restrict their possibilities of preparing for, entering, participating, or advancing in economic activity.[43] In order to gain flexibility in approaching the notion, and considering the differences in the nature of family responsibilities among countries, the concept of "dependent child" or "another member of the immediate family who clearly needs care or support" has not been determined in international law. In other words, states decide which persons are affected by these definitions, given that the content of family responsibilities can take many forms in different contexts and societies.[44] Introducing this definition into the legislation is not the only way to address the rights of workers with family responsibilities, since their rights could also be guaranteed in the legislation without these definitions. Indeed,

37 International Labour Organization (2018), *op. cit.,* 8.

38 Norberto Pignatti, Levan Pavlenisvhili, Mariam Chachava, Mariam Tsulukidze and Erekle Shubitidze, *Regulatory impact assessment C156 – Workers with Family Responsibilities Convention* (2021), 16.

39 Kristina Balnožan, "Posebna zaštita zaposlenih s porodičnim dužnostima od otkaza ugovora o radu", *Glasnik Advokatske komore Vojvodine*, Vol. XCIII, No. 1, 2021, 170.

40 Adams*, op. cit*., 2; International Labour Organisation, Convention no. 156 concerning equal opportunities and equal treatment for men and women workers: workers with family responsibilities, Geneva, 67th ILC session – ILO C-156.

41 International Labour Organisation, Recommendation no. 165 concerning equal opportunities and equal treatment for men and women workers: workers with family responsibilities, Geneva, 67th ILC session – ILO R –165.

42 European Social Charter (Revised), *ETS* 163 – ESC.

43 International Labour Organization, *Report of the Committee of experts on the application of conventions and recommendations – Workers with family responsibilities* (1993), 36.

44 Adrienne Cruz, *Good practices and challenges on the maternity protection convention, 2000 (no. 183) and the workers with family responsibilities convention, 1981 (no. 156): a comparative study* (2012), 27.

the introduction of these definitions could potentially constitute the basis for some special entitlements and treatments.[45]

Additionally, as a basis for defining the considered category, the EU standards are also imposed, in which the considered category is defined in a similar, but not identical way. Thus, the EU Directive EU 2019/1158 on work-life balance for parents and carers,[46] recognize parents and adoptive parents as informal caregivers (workers with family responsibilities towards dependent children in the ILO and CE standards), and carers (workers with family responsibilities towards other family members of their immediate family who clearly need their care or support). In this sense carer means a worker providing personal care or support to a relative, or to a person who lives in the same household as the worker, and who is in need of significant care or support because of a serious medical reason, as defined by each Member State.[47] In other words, the law of the European Union also recognizes that workers with family responsibilities are not a unique category.[48] Unlike the ILO and CE standards, which do not define a family member according to whom family responsibilities are performed, the directive goes a step further and explicitly defines that a relative means a worker's son, daughter, mother, father, spouse, or, where such partnerships are recognized by national law, a partner in civil partnership.[49]

Historically speaking, the rights related to the work-life balance referred primarily to the standard employment relationship.[50] In the ILO C-156 and ILO R-165, workers are understood in the broader sense, and these standards explicitly determine that workers with family responsibilities are all workers regardless of the category and branch of their economic activity.[51] The terms "worker" and "employee" are defined differently in the EU law. In other words, the terms have different meanings in different directives, depending on whether a certain directive contains a reference norm that gives a specific meaning to a certain term or the term "worker" is used in the specific meaning that this term has in the jurisprudence of The Court of Justice of the EU.[52] In this sense, the EU Directive 1158/19 determines that it applies to all employees, men, and women, who have an employment contract or are in an employment relationship defined by law, collective agreement, or practice

45 Pignatti, Pavlenisvhili, Chachava, Tsulukidze and Shubitidze, *op. cit*., 14.

46 Directive (EU) 2019/1158 of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, *Official journal of the European Union* L 188/79 – Directive EU 1158/2019.

47 Directive EU 1158/2019, art. 3, para. 1, subpara. d).

48 Balnožan (2021), *op. cit*., 189.

49 Directive EU 1158/2019, art. 3, para. 1, subpara. e).

50 Elisa Chieregato, "A work-life balance for all? Assessing the inclusiveness of EU Directive 2019/1158", *International Journal of Comparative Labour law and Industrial Relations*, Vol. XXXVI, No. 1, 2020, 10.

51 Art. 2, ILO C-156.

52 Kovačević (2021), *op. cit.,* 452.

in each member state, respecting, at the same time, the European Court of Justice jurisprudence.[53] The provisions of this directive must be applied to all workers, whether they are in a standard or one of the atypical forms of work, which is particularly emphasized by civil society organizations of caregivers', which advocate an extensive definition. Due to labour market transformation in modern society in which flexible and new forms of work are gaining strength and also because non-standard forms of work are most often resorted to by those who are most burdened by family responsibilities – women, as justified in the literature, primacy should be given to a more extensive term – the term worker, when standardizing the guarantees of this category.

To summarize, caregivers of women with disability, are recognized in the ILO and CE legal documents, as workers with family responsibilities *in relation to their dependent children*, but also as workers with family responsibilities *in relation to adult family members who clearly need their care due to various reasons e.g. disability, old age or illness*, while in the EU legal documents they are recognized as carers of *persons who need significant care or support due to a serious health condition.* In both, international and regional legal documents mentioned above, caregivers are recognized as workers with responsibilities due to family members (dependent children, members of immediate family, relatives) – personal relationships recognized in family law. In other words, those standards address informal family caregivers, not informal caregivers in general.[54]

3. Women and girls with a disability as care recipients

Women are the major providers of long-term care, but they also have long-term care needs of their own.[55] The relationship between a dependent and a caregiver is unique and full of emotions that define the essence of being human. Indeed, in discussions about care, disability is often overlooked, due to the emphasis on providing care to children and the elderly,[56] although dependents with disability are "the largest minority in the world".[57] Although the one who is cared for does not need to reciprocate the care given, he does have to receive care or feel cared for.[58] Additionally, women with disabilities

53 Art. 2, Directive EU 1158/2019.

54 On the contrary, caregivers' organizations advocate for the use of an inclusive and comprehensive definition that goes beyond next of kin to include all people providing support and care voluntarily (e.g. friends, neighbours). In other words, they advocate for a broad definition of informal caregivers unrelated to family law regulations. See: European Association Working for Caregivers, *The work life balance Directive: what is in it for caregivers?*, (2019), 1-2; European Association Working for Caregivers, *Implementation of Work-life balance Directive and new caregivers' rights – Where do we stand?* (2020), 3.

55 Phyllis Mutschler, "Women and caregiving: facts and figures", *https://www.caregiver.org/resource/women-and-caregiving-facts-and-figures/*.

56 International Labour Office (2018), *op. cit*., 24.

57 Kovačević (2021), *op. cit.*, 1001.

58 Como, *op. cit*., 40.

have historically been neglected by disability studies which traditionally used a "gender-blind approach"[59] even though disability is higher among women.

Women with disabilities as dependents are heterogeneous group since the causes, forms of disability and age significantly vary. There are girls and women with disabilities of all ages, from urban and rural areas, with a diverse cultural heritage, regardless of their sexual orientation or the severity of a disability.[60] The concept of "disability" also covers a multitude of conditions, so the diversity of women with disabilities also includes all forms of impairment, physical, psychosocial, intellectual, or sensory, that may or may not come with functional constraints.[61] Thus, disability is a complex, multidimensional concept, with both medical and social components, it is an "umbrella term" for impairments, activity limitations, and participation restrictions, referring to the various barriers that may result from the interaction between a dependent with long-term impairments and that individual's contextual factors (environmental and personal). [62]Therefore, women with disabilities, as others, are inherently vulnerable, they have an "active need for care" due to disability that covers a multitude of conditions, but also a "potential" need of care due to other reasons, minority, old age, or an acute illness. *Nosek et al* even believe that women with disabilities are in a state of "increased vulnerability" due to different reasons including dependency on others for long-term care.[63] In terms of international law, they are caregiver's dependent children or members of his immediate family who need care or support, respectively caregiver's relatives which need significant care due to a serious health condition.

Indeed, they will remain, members of a "vulnerable" social group, until effective measures are taken to remove the barrier to their full integration and participation in society. One way of empowering women with disabilities is to empower their caregivers. In a modern society that faces different challenges, the need to support caregivers has been advocated in terms of health protection, but also practically, socially, financially, educationally and emotionally.[64] Their well-being has a direct impact on the overall care given to those in need and on the well-being of our society as a whole.[65]

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59 Rannveig Traustadottir and Harris Perri, *Women with disabilities: issues, resources, connections revised* (1997), 2.

60 Ivana Brstilo, Elizabeta Haničar, "Trostruka diskriminacija žena s invaliditetom na tržištu rada", *Hrvatska revija za rehabilitacijska istraživanja*, Vol. XLVII, No. 1, 2011, 87.

61 UN Women, *The empowerment of women and girls with disabilities: towards full and effective participation* (2019), 1.

62 International Labour Organisation (2018), *op. cit.,* 141.

63 Margaret Nosek, Catherine Clubb Foley, Rosemary Hughes and Carol Howland, „Vulnerabilities for abuse among women with disabilities", *Sexuality and Disability*, Vol. XIX, No. 3, 2001, 178.

64 Todorović and Vračević, *op. cit.,* 9.

65 Andrew Lim, Justin Lee, Caring for caregivers of persons with disabilities, *https://www.bing.com/ck/a?!&&p=0d9b718159e4d164JmltdHM9MTY2NzY5MjgwMCZpZ3VpZD0zODBmOWNhMC0zODYxLTYxNDYtMTIzNC04ZGI4MzkxOTYwOGQmaW5zaWQ9NTE*

III WOMEN'S EMPOWERMENT: RECOGNIZING THE "CORE ECONOMY"

It has been relatively recently that societies have moved beyond taking women's unpaid care work for granted and begun to recognize, reduce and redistribute the contribution made by unpaid caregivers.[66] Believing that the (un)paid care work is at the heart of humanity and that our civilization really started with helping others through difficulty, and knowing the fact that this work sustains families and communities on a day-to-day basis and from one generation to the next and makes a significant contribution to economic development,[67] it is justifiably called "core economy".[68] Access to care is a "crucial element of human well-being as well as an essential component of a vibrant, sustainable economy with a productive labour force". [69] The discourse is changing by focusing more attention on this, until recently, hidden work. After the post-war stronger inclusion of women in the labour market and the influence of the feminist method on the social sciences, the idea of the expected, permitted and valued roles of men and women began to be abandoned.[70] Crucial to conceptualizing care and addressing the workload was the "*Triple R Framework*" proposed by feminist researchers and activists to address care and domestic needs.[71] Recognizing women's unpaid care work and increasing the visibility of the care economy is the starting point of this strategy.[72] The "*1st R*"– *recognizing* involves challenging the social norms and gender stereotypes that undervalue the care work and calls for its inclusion in analysis and policies, the *"2nd R" – reducing* unpaid care work means shortening the time devoted to such work building an infrastructure of care, *the* "*3td R*" – *redistributing* care work means changing its distribution between women and men, and between households and society as a whole to ensure adequate provision of care services for working parents and caregivers. Recently, two additional "Rs" have been added,[73] the "*4th R*"– *representation* calls for caregivers to be represented in relevant policy-making settings

2MQ&ptn=3&hsh=3&fclid=380f9ca0-3861-6146-1234 8db83919608d&psq=hCaring+for +caregivers+of+persons+with+disabilities%2c+(ipscommons.sg).9i64j69i59i450l7...7.113j 0j4%26FORM%3dANAB01%26PC%3dEDGEDB&u=a1aHR0cHM6Ly9sa3lzcHAubnVzL mVkdS5zZy9kb2NzL2RlZmF1bHQtc291cmNlL2lwcy90b2RheV9jYXJpbmctZm9yLWNhc- mVnaXZlcnMtb2YtcGVyc29ucy13aXRoLWRpc2FiaWxpdGllcy5wZGY&ntb=1

66 International Labour Organization (2018), *op. cit*., 12.

67 UN Women and Snyder, *op. cit*, 2.

68 As Power states, this unpaid care work is variously called in the literature "the care economy", "the core economy", "the reproductive economy", or even "the hypocrisy economy". See: Power, *op. cit*., 67.

69 Jonson, *op. cit*., 6.

70 Kovačević (2021), *op. cit*., 1057.

71 Camilletti E. and Nesbitt A., "A feminist analysis of public policy responses to paid and unpaid care and domestic work", *International Labour Review*, Vol. CLXI, No. 2, 2022, 201.

72 Jonson, *op. cit*., 20.

73 Camilletti and Nesbitt-Ahmed, *op. cit*., 201.

and "*5th R*" – *rewarding* calls for paid care and domestic workers to be appropriately rewarded.[74] "A gamechanger", not only in labor statistics but also in the context of gender equality at work, as it makes the amount of unpaid care work performed by women and men, visible and measurable is a "new definition of work" that has been introduced to the International Conference of Labour Statisticians.[75] In addition to economic activity, this definition of work also means "*any activity performed by persons of any sex and age to produce goods or to provide services for use by others or own use*." In other words, they have typified unpaid care work and domestic services for household and family members as a new form of work.[76] These steps forward regarding unpaid care and domestic work were altered by a "multidimensional crisis" caused by the pandemic Covid-2019. While previous financial crises hit men harder, the consequences of the actual crisis are more severe for women, so it is not without cause that we are talking about "she-cession"[77] in the "gender regressive scenario".[78]

IV THE IMPACT OF COVID-19 PANDEMIC ON WOMEN CARE WORK: GENDER REGRESSION OR A STEP FORWARD?

In late December 2019, China officially announced the outbreak of a previously unidentified, zoonotic disease called Covid-2019, which soon expanded globally.[79] Two months later, many countries worldwide experienced a "dramatic change", the pandemic "hit the European Union economy hard"[80] and caused a "multidimensional crisis unprecedented in its scale and magnitude",[81] putting all in "uncharted waters" and leaving no country be-

74 *Ibidem.*

75 The "New framework for work statistics by the 19th International Conference of Labour Statisticians (ICLS)" is the side event at the Committee on Statistics, 4th session, Bangkok, 25-27 March 2015.

76 Addati, *op. cit*., 150-151.

77 „She-cession" is a term often used in the literature that indicates that the crisis hit women's employment more than men (opposite to the term „man-cession" used during the 2008 global financial crisis).

78 Anu Madgavkar, Olivia White, Mekala Krishnan, Deepa Mahajan, and Xavier Azcue, *COVID-19 and gender equality: Countering the regressive effects* (2020), 2.

79 Yi-Chi Wu, Ching-Sung Chen, Yu-Jiun Chan "The outbreak of COVID-19: An overview", *Journal of the Chinese Medical Association,* Vol. LXXXIII, No. 3, 2020, 217.

80 Carlo Carraro, Benoît Cœuré, Otilia Dhand, Barry Eichengreen,. Melinda Mills, Hélène Rey, André Sapir and Daniela Schwarzer, *A new era for Europe: How the European Union can make the most of its pandemic recovery, pursue sustainable growth, and promote global stability* (2022),13.

81 Esuna Dugarova, U*npaid care work in times of the COVID-19 crisis: Gendered impacts, emerging evidence, and promising policy responses*, Paper prepared for the UN Expert Group Meeting organized on 16-18. June 2020, online, „Families in development: Assessing progress, challenges and emerging issues. Focus on modalities for IYF+30", 1.

hind. This multidimensional crisis is characterized by interrelated economic, health and care effects. The "triple crisis" started like a "health crisis" that led to lockdowns, border closures and social distancing turnig into the inevitable "economic crisis", and finally along with closing creches and schools, these measures contributed to a "care crisis".[82] Parenthetically, it started when the union was already in a "vulnerable state", just a few years after the 2008-2013 financial crisis occurred.

The pandemic affected all workers, including those in the informal economy and informal family caregivers of women and girls with disability, as well. Even at this moment, it is clear that the pandemic has especially affected those in need of care and those providing care. Indeed, informal caregivers have rarely been subject of current academic research,[83] and at the moment of writing this work, the impact of the crises on caregivers' status has not been properly addressed. It is clear that the gender, disability and structural inequalities that underpinned societies before the crisis are now being exacerbated, particularly for those who experience intersecting forms of discrimination and exclusion, including women and girls with disabilities.[84] However, the specific impact on family caregivers are unknown, even though some differences in how the pandemic uniquely affected family caregivers compared to non-caregivers are identified.[85] Accordingly, *Sheth et al, have* highlighted that there is insufficient knowledge about how stress, depression, caregivers' well-being, finances, and routine social activities are changed during the pandemic,[86] while *Bergman* and *Wagner*, emphasized that we lack reliable, internationally comparable evidence regarding the challenges caregivers and care recipients are faced with.[87] Similarly, *MacLeavy* has concluded that it is not yet clear what impact the pandemic will have on labor market transition, nor the extent to which it will impact the distribution of care work in the long term,[88] and concludes that "assessing how race, disability, gender... impact caregiving practices is difficult... because a large proportion of care work occurs outside of the formal labor market".[89]

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82 Madgavkar, White, Krishnan, Mahajan and Azcue, *op. cit.,* 1.

83 Carraro, Dhand, Eichengreen, Mills, Rey, Sapir and Schwarzer, *op. cit*., 2.

84 UN Women, *Policy brief No 1, Women with disabilities in a pandemic COVID-19* (2020), 1.

85 University of Pittsburgh, *Effects of COVID-19 on family caregivers: A community survey from the University of Pittsburgh* (2020), 3.

86 Sheth, Lorig, Stewart, Parodi and Ritter, „Effects of COVID-19 on informal caregivers and the development and validation of a scale in English and Spanish to measure the impact of COVID-19 on caregivers", *Journal of Applied Gerontology*, Vol. XL, No. 3, 2021, 235.

87 Michael Bergmann and Melanie Wagner, "The impact of COVID-19 on informal caregiving and care receiving across Europe during the first phase of the pandemic", *Frontier Public Health*, Vol. XXI, No. 9, 2021, 2.

88 Julie MacLeavy, „Care work, gender inequality and technological advancement in the age of COVID-19", *Gender Work & Organization*, Vol. XXVIII, No. 1, 2019, 2.

89 *Ibid*., 3.

The Covid-19 crisis tends to have long-lasting impacts on the economy and society, both positive and negative, just as any other health or financial crisis. In general, "the Covid-19 crisis has posed a shock to social norms in terms of distribution of unpaid care work and altered daily living in such a way that may re-entrench gender roles, while also offering an opportunity to shift them."[90] On the one hand, the care crisis has exacerbated the unequal distribution of unpaid care work even further,[91] since women's jobs and livelihoods are more vulnerable to the Covid-19 pandemic,[92] although even before the pandemic women and girls across the world were responsible for most of the unpaid care work.[93] The pandemic has highlighted gender inequalities, increasing the amount of unpaid care weighing on women and the vulnerabilities faced by unpaid care workers, often women in the informal sector.[94] Women have been particularly impacted by the crisis due to various reasons. Lockdown measures have mostly affected sectors with a high concentration of female workers; closing schools and daycare centers and the implementation of remote learning have increased childcare;[95] deeply rooted inequalities in areas such as income, education, age, and race intersect with gender and further increased the unpaid care and domestic work burden for certain groups of women and girls.[96] Unlike the previous financial economic downturns since the Great Depression, which have had a greater impact on men's employment, the Covid-19 crisis, is with justification, often named as "she-cession"[97] in the "gender regressive scenario"[98] because it had a greater impact on women employment.

On the other hand, most authors agree, that the Covid-19 crisis has brought to the spotlight the essential role of unpaid caregivers.[99] Having said that, there is unprecedented awareness that good care for all is a foundational element of social and economic sustainability.[100]

Caregiving has been hidden for far too long in the private sphere, on the shoulders of women and girls, and invisible to the eyes of lawmakers. In other words, "it is always been a farce to think about caretaking and family responsibilities as personal life decisions that get handled outside of work

90 Dugarova, *op. cit.,* 7

91 Ana Carolina Ogando, Michael Rogan and Rachel Moussié, "The triple crisis: impact of Covid-19 on informal workers' care responsibilities, paid work and earnings", *International Labour Review*, Vol. CLXI, No. 2, 2022, 172.

92 Madgavkar, White, Krishnan, Mahajan and Azcue, *op. cit.,* 1.

93 Camilletti and Nesbitt, *op. cit*., 203.

94 *Ibidem*, 195.

95 Stefania Fabrizio, Diego Gomes and Marina Tavares, *COVID-19 She-cession, Working Paper: The Employment penalty of taking care of young children* (2021), 5.

96 Camilletti and Nesbitt, *op. cit*., 201.

97 Ogando, Rogan and Moussié, *op. cit*., 172.

98 Madgavkar, White, Krishnan, Mahajan and Azcue, *op. cit*., 2.

99 Dugarova, *op. cit*., 1.

100 MacLeavy, *op. cit*, 12.

hours. The current situation is almost prophetically designed to showcase the farce of our societal approach to separating work and family lives".[101] In other words, the current crisis has brought one brighter side – the possibility "to turn crisis into opportunity."

V EMPOWERING INFORMAL FAMILY CAREGIVERS AND CARE FOR FAMILY

It is important to understand the concept of disability, but also the role of informal family caregivers in the lives of women with disabilities. Most women and girls with disabilities can live independently, but some may need caregivers. Caregiving is a labor of love, but it can be overwhelming, and often is associated with many deleterious effects on the caregiver's physical and mental health as well as on his/hers well-being and social activities.[102]

The issues faced by informal caregivers can be divided into eight categories: psychological issues, physical issues, the inability to harmonise professional and family responsibilities, lack of education for quality care and public assistance, financial problems and lack of time.[103] Caregiving can affect a caregiver's emotional well-being, finances and social activities, as caregivers' often feel unprepared for their role due to a lot of personal factors and a lack of skills.[104] Indeed, caring for a disabled person is different than caring for children. It requires indefinite commitment, usually characterized by a growing burden and less ready access to respite services than it is normal.[105] The research performed by the National Council of Social Service indicates that nearly half of caregivers of persons with disabilities experienced poor mental health, while 4/10 reported being psychologically distressed, and 6/10 feeling burdened by caregiving.[106] Furthermore, women and girls with disabilities face discrimination and stigmatization, the effects of which are felt by caregivers as well. Moreover, changes in the labour market and within the family, as well as current social tendencies have blurred the boundary between family and work,

101 Power, *op. cit*., 68.

102 Patricia Rivera, Timothy Elliott, Jack Berry, Richard Shewchuk, Kimberly Oswald and Joan Grant, "Family caregivers of women with physical disabilities", *Journal of Clinical Psychology in Medical Settings,* Vol. XII, No. 4, 2006, 427.

103 Todrović and Vracević*, op. cit*., 19-20.

104 Sheth, Lorig, Stewart, Parodi and Ritter, *op. cit.,* 233.

105 European Association Working for Caregivers, *Informal care as a barrier to employment* (2017), 2.

106 Andrew Lim, Justin Lee, Caring for caregivers of persons with disabilities, *https://www.bing.com/ck/a?!&&p=0d9b718159e4d164JmltdHM9MTY2NzY5MjgwMCZpZ3VpZD0zODBmOWNhMC0zODYxLTYxNDYtMTIzNC04ZGI4MzkxOTYwOGQmaW5zaWQ9NTE2MQ&ptn=3&hsh=3&fclid=380f9ca0-3861-6146-1234 8db83919608d&psq=hCaring+for+caregivers+of+persons+with+disabilities%2c+(ipscommons.sg).9i64j69i59i450l7...7.113j0j4%26FORM%3dANAB01%26PC%3dEDGEDB&u=a1aHR0cHM6Ly9sa3lzcHAubnVzLmVkdS5zZy9kb2NzL2RlZmF1bHQtc291cmNlL2lwcy90b2RheV9jYXJpbmctZm9yLWNhcmVnaXZlcnMtb2YtcGVyc29ucy13aXRoLWRpc2FiaWxpdGllcy5wZGY&ntb=1*

frequently, leading to their conflict,[107] and this is felt by caregivers of women with disabilities as well.

The test for society is to figure out ways in which the effect of these issues can be decreased so families have the potential chance to encounter a positive result from the caring role, both on caregivers and on the dependent with the disability. For disabled women, home care is more than the provision of assistance that facilitates physical or emotional well-being, it is an essential prerequisite for achieving full citizenship. Without (in)formal care, they cannot access the world. Many women with long-term impairments require assistance with bathing and dressing before they can attend a class, go to work, participate in a community event, etc.[108]

Because of their multi-faceted role, family caregivers need a range of support services to remain healthy, improve their caregiving skills, and remain in their caregiving role, and the state must provide a mixture of support measures throughout the employment and social security systems. In this sense, care policy arrangements need to be complemented with labor market policies that improve work-life balance for gender equality to enable women to better reconcile their professional and care responsibilities, reduce gender wage gaps and protect the rights of workers in informal care.[109] To address the current and future crises, countries should: 1) improve the support provided for working caregivers by expanding access to paid family care leave in a way that does not stereotypically reinforce women's roles as caregivers, 2) provide quality care services, including those for persons with disabilities, 3) increase financial support, 4) invest in infrastructure to ensure adequate access to electricity, water and sanitation. Additionally, employment programs should: 1) improve flexible work arrangements for caregivers, including remote work, part-time work or, for instance, flexible/reduced work hours; and 2) secure living wages for care and domestic workers including those in informal sectors.[110] Finally, support for caregivers of persons with disabilities can potentially be as well achieved through: 1) emphasizing the importance of taking care of themselves and caregiving; 2) increasing the availability of disability-specific courses on caregiving, including those for foreign domestic workers who are employed to assist caregivers; 3) recognizing and supporting caregivers' initiatives to help one another.[111]

107 Kristina Balnožan, "Usklađivanje profesionalnih i porodičnih dužnosti i pravna sigurnost zaposlenih s porodičnim dužnostima u Srbiji", in Jelena Perović Vujačić (ed.), *Unifikacija prava i pravna sigurnost, Zbornik radova 33. susreta Kopaoničke škole prirodnog prava – Slobodan Perović* (2020), 588.

108 Karen Grant, Carol Amaratunga, Pat Armstrong, Madelline Boscoe, Ann Pederson and Kay Wilson, *Caring for/caring about: Women, home care, and unpaid caregiving* (2004), 115.

109 Dugarova, *op. cit.*, 15.

110 Camilletti and Nesbitt-Ahmed, *op. cit.*, 214.

111 Andrew Lim, Justin Lee, Caring for caregivers of persons with disabilities, *https://www.bing.com/ck/a?!&&p=0d9b718159e4d164JmltdHM9MTY2NzY5MjgwMCZpZ3VpZD0zODBmOWNhMC0zODYxLTYxNDYtMTIzNC04ZGI4MzkxOTYwOGQmaW5zaWQ9NTE*

VI CONCLUSION

Informal family caregivers make a valuable contribution to the well-being of women and girls who need care due to disability. For a very long time, the role of family caregivers' has not been recognized as a legal matter, while today "unpaid caregiving has become one of the most important social and economic policy issues worldwide".[112] Introducing the definition of workers with family responsibilities (informal family caregivers) into the legislation is not the only way to address their rights. However, the introduction of this definition could potentially constitute the basis for some special entitlements and treatments for this category.[113] Furthermore it is the responsibility of every ratifying country of C-156 to set the exact definition of this category,[114] and such a definition can frame and shape the legal debate and development of an appropriate policy and normative strategy for all informal family caregivers, including those ones of women and girls with disability. In this sense, to the already known "*5R of care work*" mentioned above, from our point of view, we should add one more "*R*" – the "*6th R*" – *(re)definition* of the legal status of caregivers in which a way care work will finally gain the legal character deserved many years ago. Caregivers are an important part of the lives of women with disabilities and they also need to be included a long with the person with a disability in any discussions to allow families to care for a person with a disability while minimizing the social, emotional and economic costs associated with caring. As seen during the "triple crisis", they were and still are "essential workers" and "front liners that run the homes."[115] They need a range of support services to remain healthy, improve their caregiving skills, and remain in their caregiving role. These services can be summarized in one "*R*" even more – the "*7th R*" – *reconciliation* of professional and family responsibilities of caregivers, since most caregivers are included in the labour market, that would involve the introduction of labor and social law mechanisms to ease the burden placed on caregivers, especially on women which are still primary caregivers. The current phase of the post-Covid economic framework is a window of opportunity to develop a gender-transformative and care-responsive policy framework. Now is the time to identify and implement innovative solutions to transform care work into "core work" as it should always have been. The success of every society is measured by the

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112 Allison Williams, Jeanne Bank "Support for working carers across the globe: the development of international standardized guidelines for the workplace", *International Journal of Care And Caring*, Vol. VI, No. 3, 2022, 458.

113 Pignatti, Pavlenisvhili, Chachava, Tsulukidze and Shubitidze, *op. cit*., 14.

114 *Ibidem.*

115 Morolake Adeagbo, „COVID-19 pandemic: mothers are also frontliners", project, June 2020, Faculty of Humanities: COVID-19 Student Voices 13.

extent to which persons with disabilities receive the needed care in a dignified way. There is no such way without dignified conditions for those who provide the care needed. Conclusively, we ourselves, "we are at our best when we serve others" due to disability or other reasons.

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NEFORMALNA PORODIČNA NEGA I ŽENE I DEVOJČICE SA INVALIDITETOM – TEORIJSKI PRISTUP

Apstrakt

Nega drugih lica je univerzalno prihvaćena kao prirodna obaveza žene i obično se preduzima u okviru porodične uloge sestre, supruge, kćerke ili unuke. "Nevidljivi" rad žena usmeren na brigu o drugima, bilo usled invaliditeta ili drugih razloga je nedovoljno istražen i stoga je u istraživačkom fokusu ovog rada. Međunardni standardi koji se odnose na osobe sa invaliditetom, naglašavaju ne samo potrebu podrške ovim licima, već i njihovim negovateljima. Nega drugih nije tradicionalni pravni koncept, te jedinstvene definicije nege i negovatelja u literaturi nema, uprkos potencijalnom značaju koji ovakva definicija može imati. U tom smislu, u radu se ukazuje na bitne elemente teorijskog, ali i normativnog definisanja neformalnih porodičnih negovatelja žena i devojčica sa invaliditetom, ali i na raznovrsnost kategorije žena, kao zavisnih lica o kojima se oni staraju. U nastavku rada, približava se i tzv. "5R okvir o dostojanstvenoj nezi" kao značajan iskorak ka većem prepoznavanju značaja neformalne nege, ali i razmatra uticaj krize izazvane pandemijom *COVID-19* na razmatranu kategoriju. Iako ova višedimenzionalna kriza ima brojne negativne aspekte, među pozivitnim aspektima krize izdvaja se znatno veće interesovanje za neformalnu negu nego ranije, ali i mogućnost da se neformalna nega stavi u središte društvenog interesovanja. Konačno, u radu se ukazuje i da podrška neformalnim porodičnim negovateljima može poboljšati položaj zavisnih lica o kojima se staraju i predlažu se moguća rešenja za unapređenje njihovog položaja. Neformalnim porodičnim negovateljima nephodan je niz radnopravnih i socijalnopravnih mehanizama kako bi unapredili svoje veštine, kako bi i sami ostali zdravi, ali i zadržali uloge negovatelja njihovih bliskih lica.

Ključne reči: *Neformalni porodični negovatelji; Žene; Invaliditet; 'Kriza neformalne nege'; Potencijalni napredak neformalne nege.*

PORESKO PRAVO I EKONOMSKA ANALIZA PRAVA

TAX LAW, AND LAW AND ECONOMICS

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DOUBLE DISCRIMINATION OF GENDER AND DISABILTY IN THE SPANISH LEGAL SYSTEM: THE PERSPECTIVE OF TAX SYSTEM

Abstract

This paper addresses the study of disability and gender in the Spanish legal system, analyzing, in addition, the role of the existing personal income tax in avoiding double discrimination that occurs in this case. It means that we offer a new vision from the perspective of tax law in Spain.

For this reason, it will be necessary to address the reality of disabled people from a gender perspective. This will allow us to affirm that there is double discrimination because women and girls are exposed to discrimination based on gender and disability.

For decades women and girls with disabilities have been invisible in general. They are especially vulnerable and present the worst data in all variables related to employment, increasing their risk of poverty and reducing their opportunities. It has been very relevant how they have appeared in government statistics through the declaration of personal income tax.

Therefore, a study of the current situation of this group in Spain is necessary. The legal framework relevant for these individuals will be determined, and with the help of official sources, we will determine the number of people affected by the described problems. Once general legal framework have been determined, we will analyse the tax regulations, with a special focus on Spanish personal income tax, and formulate the possible improvements and solutions to mittigate the described problems and achieve full equality.

Key words: *Personal income tax; Women and girls with disabilities; Double discrimination.*

I GENERAL CONCEPTS AND DOUBLE DISCRIMINATION

1. General ideas

Article 7 of the Universal Declaration of Human Rights[1] states, "Everyone is equal before the Law and is entitled, without distinction, to equal protection

1 UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

of the Law. Everyone is entitled to equal protection against any discrimination in violation of this Declaration and any incitement to such discrimination." It is not only a Human Right but a general principle of Law, a value of the international order that finds support in many national and international legal texts.

In Chapter III of the Charter of Fundamental Rights of the European Union[2], equality of all before the Law is established (article 20), and non-discrimination is developed in article 21 of the exact text. In Spain, equality is recognized in article 14 of the Constitution[3], which determines that "Spanish people are equal before the Law, without any discrimination based on birth, race, sex, religion, opinion or any other condition or personal or social circumstance".

With regards to the taxation of women and girls with disabilities, the Contitutional article sees a great deal in common in article 26 of the Charter of Fundamental Rights of the European Union "The Union recognizes and respects the right of disabled people to benefit from measures that guarantee their autonomy, their social and professional integration and their participation in the life of the community". Several articles of the Spanish Constitution protect the rights of the person regardless of their physical, mental or social condition. The obligation of the public powers is established in article 9.2 since they must promote the conditions so that the freedom and equality of the individual and of the groups in which they are integrated are genuine and effective and to remove the obstacles that prevent or hinder their observance. Furthermore, it facilitates the participation of all citizens in political, economic, cultural and social life. In article 49 it establishes that "the public powers will carry out a policy of provision, treatment, rehabilitation and integration of the physically, sensory and mentally handicapped, to whom they will provide the specialized attention they require and will protect them, especially for the enjoyment of the rights that this Title grants to all citizens." This text is currently under review, having published a Preliminary Draft in the Official Gazette of the Cortes Generales on May 21, 2021[4].

Once the general legislative framework has been determined, in the absence of the United Nations International Convention on the Rights of Persons with Disabilities[5], which we will address later, we will analyze the possibilities of the tax system to be used as a tool that allows what is ordered in these binding regulations.

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2 European Union, Charter of Fundamental Rights of the European Union, 18.12.2000, *Official Journal of the European Union*, C 364/1– 364/22.

3 The Spanish Constitution of 27 December 1978.

4 Proyecto de reforma del artículo 49 de la Constitución Española.

5 Law 58/2003, of December 17, General Tax Law.
Article 2. Concept, purposes, and classes of tributes.
1. The taxes are the public revenue which consists of pecuniary benefits required by a public administration as a result of the actual fact that the law binds the duty to contribute, with the primary purpose of to obtain the necessary revenue for the maintenance of public expenditure.
The taxes, in addition to being means to obtain the necessary resources for the maintenance of public expenditures, will be able to serve as instruments of general economic policy and to serve the realization of the principles and objectives contained in the Constitution.

2. Possibilities of the tax system and fiscal policy

Outlined above finds an ideal execution through the tax system, whose main objective, according to article 2.1 of the General Tax Law[6], is to contribute to the support of public expenses but also to attend to the realization of the principles and purposes contained in the Constitution that we have just enunciated. That situation gives us a privileged position in the fight to mitigating the double discrimination suffered by women with disabilities today.

This can be done in two different ways[7]: an expansive fiscal policy, which is the set of actions and actions carried out by governments in situations of economic decline or when there are high levels of unemployment, to try to reverse this situation, the purpose of which is to increase aggregate spending, to increase income in the hands of companies and citizens, or a contractionary fiscal policy that seeks reduced public spending, increasing taxes, or a combination of both, to curb aggregate demand, for example when the economy is in a period of excessive expansion and needs to be halted because of the excessive inflation that it is creating.

II WOMEN WITH DISABILITIES: DOUBLE DISCRIMINATION

Women with disabilities in Spain suffer double discrimination. In this paper, we are going to expose the data that led us to this conclusion and we are going to analyze the fiscal treatment for women and girls with disabilities in Spain. After that we are going to propose modifications and improvements that help to solve this situation. As indicated above, the tax system can do it based on article 2 of the General Tax Law[8] due to we have instruments that allow us to alleviate the limitations through exemptions, deductions or another type of tax benefits. Let us remember that society and the public authorities must integrate people with disabilities. We cannot go back to the old conception in which these people had to make an effort to join, which given their situation, further increased the existing discrimination.

1. Double discrimination

Traditionally, the woman who has a disability finds herself in a situation of enormous social, economic, educational and professional disadvantage, and we find that *per se*, for being a woman, there are higher levels of unemployment, lower wages, less access to health services, more remarkable lack of education, little or no access to programs and services aimed at women in general, greater risk of suffering situations of violence.

6 Law 58/2003, of December 17, General Tax Law.

7 Miguel Ángel García, "El sistema fiscal español ante la crisis: el pesado lastre de las decisiones adoptadas durante el ciclo expansivo", *Gaceta sindical: reflexión y debate*, No. 14, 2010 (Ejemplar dedicado a: Desarrollo sostenible y políticas públicas en España), 251–296.

8 Law 58/2003, of December 17, General Tax Law.

The described reality was ignored during the first World Conference on Women in 1975 in Mexico[9]. In 1980, during the second World Conference[10] held in Copenhagen, urged governments *"to* pay special attention to the needs of older women, women living alone and women with disabilities". In 1985, the third World Conference on Women in Nairobi finally recognized that women with disabilities constitute a group that deserves special attention, even when the latter cannot participate more than informally. On that occasion, women with physical or mental disabilities were described as "vulnerable". In 1992, the first United Nations report on human rights and people with disabilities addressed the problem of sexual violence and eugenic control of populations, in which the relevance of gender is evident. In 1993, a United Nations Declaration on the Elimination of Violence against Women[11] noted with concern that "certain groups of women, including minority women, Aboriginal women, refugee women, migrant women, women living in rural or remote communities, poor women, internees, detainees, girls, women with disabilities, older women and women living in areas where there is armed conflict, are particularly at risk of being subjected to violence". In Beijing, the fourth World Conference on Women held in 1995 adopts the Program of Action[12] that mandated governments to "ensure that women with disabilities have access to information on violence against women and to protection services". This program represents an essential change in the reality of women with disabilities because, for the first time, they gain visibility as the specific health needs of women and girls with disabilities are recognized, such as the importance of women with disabilities intervening in the development and anti-poverty projects. The document calls for action to reduce violence against women with disabilities, combat employment discrimination that affects them, and provide these women with full access to education and training, paying particular attention to the additional discrimination suffered by girls with disability.

In 1997, the European Disabled People's Forum adopted the Disabled Women's Manifesto[13] in Europe, specifying that "violence against girls and women with disabilities is a serious problem and that statistics show that women with disabilities are most frequently targeted for violence probably because of their vulnerability."

The International Convention on the Rights of Persons with Disabilities[14] of 2006 recognizes that women and girls are in a situation of greater

9 United Nations, World Conference of the International Women's Year 19 June-2 July 1975, Mexico City, *https://www.un.org/en/conferences/women/mexico-city1975*.

10 UN Women, World Conferences on Women, *https://www.unwomen.org/en/how-we-work/intergovernmental-support/world-conferences-on-women*.

11 General Assembly resolution 48/104, of December 20, 1993.

12 Beijing Declaration and Platform for Action was adopted at the 16th plenary meeting on 1995 of The Fourth World Conference on Women.

13 On February 22 1997, the European Disability Forum adopted the Manifesto by Women with Disabilities.

14 UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106.

vulnerability, which is why they dedicate article 6[15] to women with disabilities.

In the declarations of 2010, 2011 and 2020 made for the anniversary of the World Conference on Women and the Beijing Declaration and Plan of Action, it seems that the focus has been on other aspects. Having more impact in 2019, the launch of the 2019 United Nations Strategy for Disability Inclusion[16], which joins efforts with the development of the 2030 Agenda through the Sustainable Development Goals.

To delve deeper, we offer some data from the Survey on Disability, Personal Autonomy, and Dependency Situations by the National Institute of Statistics[17]. Their results for 2020 indicate that out of a total of 4.38 million people residing in Spanish households, and they stated they had a disability or any limitation. By sex, 1.81 million were men and 2.57 million were women.

The disability or limitation affected 94.9 people per thousand inhabitants and, to a greater extent, women (109.2) than men (80.1). By age, 75.4% of those with disabilities or limitations residing in households were 55 or older. Three out of five of these people were women.

Data of Women with disabilities show worse numbers than men with disabilities significantly; it is enough to look at the activity rate that the Survey mentioned above shows[18], in which we can observe that in 2020, 34.3% of people of working age with officially recognized disabilities were active; the employment rate was 26.7%. In 2020, the number of people with disabilities of working age was 1,933,400 people, representing 6.3% of the total working-age population, 56.1% men and 43.9% women. Of the employed population with disabilities, 56.2% are men, and 43.8% are women[19].

2. Concept of disability in the tax field

The concept of disability has evolved in recent decades[20] from a mere medical issue to a new social model of disability recognized for the first time in the Convention on the Rights of Persons with Disabilities, done in New York on December 13, 2006. In itself, it is a concept that is difficult to define

15 Article 6 – Women with disabilities

1. States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.

2. States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention.

16 The UN Disability Inclusion Strategy (UNDIS), adopted by the Secretary General in 2019.

17 INE, Encuesta de Discapacidad, Autonomía personal y Situaciones de Dependencia (EDAD), 2020, *https://www.ine.es/dyngs/INEbase/es/operacion.htm?c=Estadistica_C&cid=1254736176782&menu=resultados&idp=1254735573175*.

18 *Ibid.*

19 *Ibid.*

20 From a Spanish perspective: María Esther Pérez Dalmeda, Gagan Chhabra,"Modelos teóricos de discapacidad: un seguimiento del desarrollo histórico del concepto de discapacidad en las últimas cinco décadas", *Revista Española de Discapacidad*, Vol. 7, No. 1, 2019, 7–27.

since it must cover a multitude of very different circumstances. However, we are also currently in the course of review since, on May 11, 2021, the Council of Ministers presented the Preliminary draft of reform of article 49 of the Spanish Constitution, which is currently being processed. However, since it is a constitutional reform, it is necessary to have a qualified majority of three-fifths, as established in article 167 of the Magna Carta.

The legal definition of a person with a disability in the Spanish system is found in Royal Legislative Decree 1/2013, of November 29, which approves the Consolidated Text of the General Law on the rights of people with disabilities and their inclusion Article 4.1 of which establishes that "People with disabilities are those who present physical, mental, intellectual or sensory deficiencies, foreseeably permanent, which, by interacting with various barriers, may prevent their full and effective participation in society, on equal terms with others. the others" Expanding this concept in its second section by expressly including "for all purposes, those who have been recognized as having a degree of disability equal to or greater than 33 percent will be considered disabled persons. Social Security pensioners who have recognized a permanent disability pension in the degree of total, absolute or severe disability, and passive class pensioners who have recognized a retirement or retirement pension due to permanent incapacity for service or uselessness."

Nevertheless, focusing on the concept of people with disabilities that we find in the tax system, we must focus on article 60 of Law 35/2006, of November 28, on Personal Income Tax:

> "In particular, a degree of disability equal to or greater than 33 per cent will be considered accredited in the case of Social Security pensioners who have recognized a pension for total, absolute or severe permanent disability and in the case of pensioners of Passive classes that have recognized a retirement pension or retirement due to permanent incapacity for service or uselessness. Likewise, a degree of disability equal to or greater than 65 per cent will be considered accredited for people whose disability is declared judicially, even if it does not reach said degree".

This concept follows the line previously indicated by the 2013 regulation, being essential for the accreditation of the degree of disability, the need for help from third parties or reduced mobility with a certificate issued by the Institute for Older Persons and Social Services, *IMSERSO*, or by the competent body of the Autonomous Community.

III PERSONAL INCOME TAX

We will analyze this particular tax due to its importance in the Spanish tax system; in 2020, its collection amounted to 87,972 million euros[21]. Due to its nature and essential characteristics, this tax is a critical tool for correcting

21 Informe anual de la AEAT, 2020, *https://sede.agenciatributaria.gob.es/static_files/AEAT/Estudios/Estadisticas/Informes_Estadisticos/Informes_Anuales_de_Recaudacion_Tributaria/Ejercicio_2020/IART20_gl_es.pdf.*

inequalities that may exist in any area, whether a disability or any other type of discrimination, reducing poverty since it is undeniable the effect in Spanish population. One of the main tools to reduce inequality is its progressivity, which taxing the taxpayer's income directly, is in line with the principles outlined in article 31.1 of the Spanish Constitution[22].

The Constitution prohibits discrimination based on sex, but this tax measures towards a specific sector of the population are compatible with adopting actions ñ-that favour women (positive discrimination) to rebalance the pre-existing social situation, thus promoting the conditions for equality to be accurate and practical.

Personal income tax regulations contain various tax benefits aimed preferably at women, such as the deduction for maternity, the deduction for birth or adoption and the deductions that some autonomous communities offer to women entrepreneurs. These also benefit disabled persons, for which reason we will analyze them in the following lines.

1. Exempt incomes

Article 7[23] establishes a list of income subject to income tax but not taxed for reasons of social justice. It is a very extensive list, from the letter a to z in which they collect a multitude of assumptions, some specifically created for people with disabilities and others that affect women.

– Maternity benefits (Article 7.h) which until recently were only applicable to women, now correspond to maternity and paternity benefits. A working woman who gives birth is entitled to sixteen weeks of sick leave – known as maternity leave – which she can share in part with the father. During this period of maternity leave, Social Security is the one who pays the monetary amount through the so-called maternity benefit: "The maternity benefit is a subsidy that is recognized for workers, both employed and self-employed, who suspend their employment contract or cease their activity to enjoy rest periods for maternity, adoption, foster care and guardianship. legally established". This benefit is regulated in Royal Decree 295/2009 of March 6, which regulates the economic benefits of the Social Security system for maternity, paternity, risk during pregnancy and risk during breastfeeding. It can be received by mothers and fathers who temporarily cease their work as a replacement for the salary they should receive in other situations, but must fullfil the requirements of the contribution base that mother or father had in the previous month before start the leave. The contribution requirements for the maternity benefit vary according to the age of the worker, whether mother or father, depending on who benefits from the benefit:

22 "Everyone shall contribute to sustain public expenditure according to their economic capacity, through a fair tax system based on the principles of equality and progressive taxation, which in no case shall be of a confiscatory scope."

23 Law 35/2006 Of 28 November, Personal Income Tax.

- If the worker is under 21 years of age, there is no minimum contribution period required.
- If the worker is between 21 and 26 years old, a contribution of 90 days in working life is required in the previous seven years or 180 days.
- If the worker is over 26 years old, 180 days of contributions are required seven years prior to the start of the break or 360 days of contributions throughout their working life.

Regulations referring to maternity benefits include the woman's gestational period and the period of the birth of a child. Therefore, this benefit would also cover the different economic aids in cases of birth in the case of multiple births, large families, children with disabilities, pregnancy risk, lactation, maternity tax deductions, etc.

To sum up, the maternity benefit refers only to those economic aids that go directly to the parent, excluding those benefits linked to the children. The deduction for maternity reduces the differential quota of the personal income tax, regardless of whether the said quota is negative or positive. In other words, it is configured as a harmful tax because the deduction reduces the differential rate, which can be harmful. As expressed in the previous sections, this deduction is introduced in our tax system to compensate for the social and labour costs derived from maternity, which mothers who work outside the home and have minor children have to bear of three years.

– Economic benefits recognized by Social Security as a consequence of absolute permanent disability or major disability; family benefits regulated in chapter IX, Title II of Royal Legislative Decree 1/1994, General Law of Social Security and pensions and passive assets in favour of grandchildren and siblings incapacitated for all work. Also benefits that, in situations identical to the previous ones, are recognized for professionals not included in the special Social Security regime for self-employed or self-employed workers by the Mutual Insurance Societies that act as alternatives will also be exempt with the limit set by social security. The exempt amount is limited to the amount of the maximum benefit recognized by Social Security for the corresponding concept. The excess will be taxed as income from work (Article 7.f).
– Pensions for permanent disability or uselessness under the Passive Class regime provided that the injury illness that caused the recipient completely disabled of the pension for any profession or trade, and those paid equally by Passive Classes to favour of grandchildren and siblings unable to do any work (Article 7.g).
– The amounts received from public institutions for the fostering of persons with disabilities (permanent or pre-adoptive modalities or the equivalents provided for in the regulations of the regional territories), including fostering in the execution of the judicial measure of coexistence of the minor with a person or family (Article 7.i and 7.z).

- Financial aid granted by public institutions to people with a degree of disability equal to or greater than 65% to finance their stay in residences or day centers if the rest of their income does not exceed twice the public multiple-purpose income indicator[24].(Article 7.i).
- Unemployment benefits are obtained by people with disabilities who become self-employed when they are received in a single payment method, whatever the amount. (Article 7.i)
- Earnings from work derived from benefits obtained from income by people with disabilities correspond to contributions to the social security system set up in favour of them. Earnings from work derived from contributions to protected assets of people with disabilities are also exempt. The joint annual limit of this exemption is three times the IPREM (the IPREM for 2021: is €7,908.60, so the limit will be €23,725.80). (Article 7.i)
- Public economic benefits linked to the service, for care in the family environment and personalized assistance derived from Law 39/2006, of December 14, on the Promotion of Personal Autonomy and Care for people in situations of dependency. (Article 7.x)
- The amounts received as a result of the dispositions made of the principal residence (reverse mortgage) by people over 65 years of age, as well as people who are in a situation of dependency, will not be considered as income if it is carried out under the financial regulation on acts of disposition of assets to attend to the economic needs of old age and dependency.

2. Work performance

Article 17 deals with Work performance, it establishes that work performance will be considered through an open list of income, including some pensions related to disability. Certain pension plan benefits and the different social security systems will be considered income from work subject to personal income tax, also the benefits received by the beneficiaries of dependency insurance and the income obtained by workers with disabilities who provides their services in the Special Employment Centers (*CEE* in Spanish). The amounts contributed to the protected estates that exceed the exempt limits and are not subject to Gift Tax will receive the same qualification, as well as those corresponding to "advance" provisions by the owner of the protected estate (art. 17.2k).

Apart from the general reductions, people with disabilities who obtain income from work may apply the following reductions according to the article 19.f, but as a consequence of the application of the reduction for obtaining net income from work, the resulting balance may not be negative. If the taxpayer has a degree of disability equal to or greater than 33% and less than 65% can reduce €3,500. If degree of disability equal to or greater than 65%, as well as those with disabilities who, despite having a lower degree, prove that they need help from third parties or those with reduced mobility can reduce

24 The IPREM for 2021 is €7,908.60, so the limit will be €15,817.20.

€7,750. This reduction for disability of active workers will be applied when these two circumstances concur simultaneously:

- Individual is an active worker.
- Individual has the required degree of disability.

Contributions to the protected assets of people with disabilities (art.17.2 k) Law 41/2003, of November 18, on the protection of assets of people with disabilities and modification of the Civil Code of the Law of Prosecution Civil of the tax regulations for this purpose and is defined as that set of "assets and rights, contributed free of charge, to the assets of people with disabilities who are affected, as well as the fruits, products and yields of these, to the satisfaction of the vital needs of its holders", its holders being exclusively people with disabilities. Consultation V0363-14, dated February 12: "The purpose legally attributed to said estates and that justifies their special tax treatment, and that it should not be forgotten that it is the constitution of an estate and not the attention to the current needs of the disabled, for which other tax benefits are established in the IRPF, through the exempt and family minimums applicable in case of disability." The contributions made to the protected heritage of people with disabilities are income from work for the owner of the heritage with the following limits:

- When the contributors are personal income taxpayers, the amount will be considered income from work up to 10,000 euros per year for each contributor and 24,250 euros per year as a whole.
- Likewise, regardless of the limits indicated in the previous point, when the contributors are taxpayers of the Corporation Tax, contributions will be considered income from work provided that they have been deductible expense in the Corporation Tax with the limit of 10,000 euros annually.

These returns will be exempt up to a maximum joint annual amount of three times the public multiple-purpose income indicator (the IPREM for 2021 is 7,908.60 euros).

3. Economic activities performance

The benefits relating to the Performance of Economic Activities are settled in article 32. They are the following:

- The disabled taxpayer who, in the course of economic activity, can apply the remarkable reduction established for certain income from directly estimated activities (people in business or economically dependent professionals) may additionally reduce their net income by €3,500 per year, or €7,75 if the taxpayer proves that needs help from third parties, or a reduced mobility, or a degree of disability equal to or greater than 65%.
- To determine the result of the Economic Activity (RAE), under article 30.2.5ª of the Personal Income Tax Law, the health insurance

premiums paid by the taxpayer are considered deductible expenses. The part corresponds to the taxpayer's coverage and the taxpayer's spouse and children under 25 who live with him (or of any age, children with disabilities). The general deduction limit is €500 per year per person, which increases to €1,500/year for each person with a disability.

– Order HAC/1155/2020, of November 25, which develops, for the year 2021, the objective estimation method, contemplates the following reductions for the application of the modules:
  - "Non-salaried staff" module: Only 75% of the non-salaried staff module will be computed when a degree of disability of 33% or higher is accredited.
  - "Salaried staff" module: 40% of the salaried staff corresponding to people with disabilities, with a degree of disability equal to or greater than 33%, will be computed.
  - Correction rate for new specific activity when a taxpayer is a person with a disability

4. Capital gains and losses

The transmission of habitual residence by people over 65 years of age or with severe dependency or significant dependency following the Law for the promotion of personal autonomy and care for people in situations of dependency is exempt from personal income tax according to Article 33. 4 b). And letter e) settle that there is no capital gain or loss on the occasion of the contributions to the protected assets in favour of people with disabilities.

5. IGB Reductions

Article 53 establishes a reduction for Pension Plans and other Social Welfare Systems are constituted in favour of people with disabilities: contributions made to pension plans, social welfare mutual funds, insured pension plans, corporate social welfare plans, and dependency insurance constituted in favour of people with disabilities give the right to reduce the broad taxable base of the tax. The reduction will be applied when the social security systems are constituted in favour of people with disabilities who meet the following requirements:

1. People with a degree of physical or sensory disability equal to or greater than 65%.
2. People affected by a degree of mental disability equal to or greater than 33%.
3. People whose incapacity has been declared judicially, regardless of their degree.

The contributions (and the beneficiaries of the reduction) can be made by:

- By the person with a disability (and participant). In this case, the contributions will give the right to reduce the general tax base in the Declaration of the taxpayer with disability.
- Those who have a direct or collateral kinship relationship with the person with a disability up to and including the third degree, as well as the spouse or those who were in charge of them under guardianship or foster care (note that, for the time being, the said reduction is not allowed concerning the curator in case of conservatorship), provided that the person with a disability is designated beneficiary uniquely and irrevocably for any contingency.

In this regard, it should be clarified that the reduction will not be prevented if, due to the occurrence of the contingency of death of the disabled person, the right to widowhood or orphan benefits is generated or in favour of those who have made contributions in favour of the person with a disability in proportion to the contribution of these.

Limits of contributions and reductions:

- €24,250 per year for contributions made by participants with disabilities.
- €10,000 per year for the contributions made by each of the people with whom the participant with a disability has a family relationship, by the spouse or by those in their charge under guardianship or foster care. This reduction will be compatible with the contributions that these people could make to their respective social security systems.
- Additionally, a global or joint limit of €24,250 per year, calculating both the contributions made by the person with a disability and those made by all those others who make contributions in favour of the same participant with a disability. Thus, when several contributions concur in favour of the same person with a disability, the contributions made by the person with a disability have priority in the reduction if both concur.

Contributions that would not have given the right to the reduction, either because they exceed the limits or because of the insufficient tax base, may be reduced in the following four years.

Reductions for contributions to protected assets of people with disabilities are settle in Article 54. Contributions to the protected assets of the person with a disability made, in money or kind, by the following taxpayers will give the right to reduce the general tax base of the contributor's income tax:

- Those with a direct or collateral kinship relationship with the disabled person up to and including the third degree.
- The spouse of the person with a disability.
- Those in charge of the person with a disability under guardianship or foster care.

Likewise, the rule establishes a prevention according to which specific contributions do not generate the right to a reduction (elements related to economic activity, assets that the owner of the protected heritage would have

already disposed of, as well as the contributions made by the person disabled owner of the protected heritage).

The maximum contribution limits:

- €10,000 per year for each contributor and the set of protected assets to which they contribute.
- €24,250 per year for all the reductions made by all the people who make contributions in favour of the same protected heritage.

When there are several contributions in favour of the same protected assets and this last limit is exceeded, the reductions corresponding to said contributions will be reduced proportionally to the amount of the respective contributions so that the reductions do not exceed €24,250 per year.

On the authority of to Article 81 the taxpayer can ask for an advanced disposition of the assets or rights contributed. With few exceptions, the disposal in the tax period in which the contribution is made or in the following four tax period of any asset or right contributed to the aforementioned protected heritage will have consequences for the contributor (loss of the right to reduce the tax base) and for the owner of the protected patrimony (basically, integrate the arranged contributions as income from work subject to personal income tax).

According to administrative criteria (*DGT*[25]), the expenditure of money and the consumption of consumable goods integrated into the protected patrimony, when the expenditure and goods are made to meet the vital needs of the taxpayer, should not be considered as the disposition of goods or rights for the requirement of maintenance of the contributions made during the four years following the exercise of their contribution, established in article 54.5 of the IRPG Law. In plain words, except in exceptional cases, the use and disposition of heritage assets to meet the current needs of the person with a disability before the expiry of the period required in the personal income tax regulations is not allowed.

6. State quota deductions

Deductions for incentives for business investment in economic activities in direct estimation to reduce from the integral state quota are settle in Article 68.2. Taxpayers who carry out economic activities in direct estimation may apply the stimuli to business investment established or established in the Corporation Tax regulations with equal percentages and deduction limits, with certain exceptions. In this regard, within the existing deductions, article 38 of the Corporation Tax Law establish the deduction in quota for the creation of employment for workers with disabilities (€9,000 or €12,000 deduction per person and year).

Dealing with the differential fee deductions are established in Article 81 of the 58/2006 Law. It is only a deduction for dependent descendants or ascendants with disabilities. The following taxpayers may apply these deductions:

- Those who carry out an activity on their account or for another for which they are registered in the corresponding Social Security or mutual insurance scheme.

25 General Directorate of Taxes.

- Those who receive contributory and welfare benefits from the unemployment protection system. In the case of the unemployed, to be entitled to apply the deductions, it is necessary to receive a benefit, contributory or assistance, from the unemployment protection system. It is not enough to be registered as a job seeker.
- Those who receive pensions paid by the General Regime and the special Social Security Regimes or by the State Passive Classes Regime.
- Those who receive benefits similar to the previous ones recognized for professionals not included in the special Social Security regime for self-employed or self-employed workers by the Mutual Insurance Societies that act as alternatives to the aforementioned special Social Security regime, provided that they are benefits for situations identical to those provided for the corresponding Social Security pension.

Taxpayers who receive contributory and welfare benefits from the unemployment protection system, Social Security pensions or Passive Classes and benefits similar to the previous ones from alternative mutual societies do not have to comply with the registration requirement in the corresponding regime of the Social Security or Mutuality. In addition to the above and, depending on the deduction to be applied, those taxpayers who fulfill the following requirements will have the right to reduce the differential quota by an amount of €1,200 per year:

- For each descendant with a disability, the taxpayers who are entitled to the application of the family minimum for descendants.
- For each ascendant with a disability, the taxpayers who are entitled to the application of the family minimum for ascendants.

In Article 81.bis we can find deductions for ascendants/descendants with disabilities are compatible with the deduction for large families or single-parent ascendants with two dependent children. This is a special regimen in the minimum for disability of descendants or ascendants (Article 60.2) Let us not forget that the Autonomous Communities can increase or decrease the amounts of the taxpayer's minimum and the minimums for descendants, ascendants and disabilities to calculate the regional tax. An additional minimum is provided for when the descendants or ascendants who generate the right to apply the minimum are affected by a situation of disability.

- Descendant or ascendant with a degree of disability ≥ 33%: €3,000 per year.
- Descendant or ascendant with a degree of disability ≥ 65%: €9,000 per year.
- For assistance expenses: €3,000 per year if it is proven that the descendant or ascendant needs help from third parties, have reduced mobility or has a degree of disability ≥ 65%.

IV CONCLUSIONS

An essential tool to comply with the constitutional mandate contained in articles 14, 31.1 and 49 of the Spanish Constitution is fiscal policy and fiscal measures that can help alleviate this existing discrimination on the basis of gender and disability, which is endorsed in article 2 of the General Tax Law. Currently, the tax system offers numerous measures to achieve equality between women with disabilities and others effectively. However, they are designed for and focused on the individuals with disabilities, irrespective of their gender, i.e., without considering the double discrimination we discussed at the beginning of this work.

As reflected in the latest report published by the International Monetary Fund (IMF), although a certain degree of inequality is inevitable in a market economic system, when it is excessive, it can erode social cohesion, lead to political polarization and, ultimately, reduce growth. The IMF recognized that in recent years the progressivity of tax systems has been reduced and that the marginal tax rates applicable to the recipients of the highest incomes would have to be significantly higher than the current ones.

Personal income tax is practically the only redistributive tax. However, in recent years there has been a change in the tax structure that gives more weight to indirect taxes, so there has been an increase in inequality. Likewise, the latest tax reforms have shifted the focus from direct to indirect taxation, and within direct taxation, from capital income to labour income. If this trend is not reversed, the tax pressure will remain the same, or very similar, between all income brackets.

Due to these imbalances, we propose to return to the system in force between 1999 and 2006 that increased the family minimum according to the type of family and the characteristics of its members. It is true that the system currently includes the taxpayer's disability but it does not allow correcting double discrimination by not contemplating the gender option.

Progress has been noticeable in recent decades, and right now, it is favoured by what is called for in the 2006 Convention on the Rights of Persons with Disabilities but is not enough. The benefits have been created for individuals with disabilities regardless of their gender or for women in general, but not specifically for a group consisting of women and girls with disabilities, which are especially vulnerable due to the double discrimination to which they are subjected.

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DVOSTRUKA DISKRIMINACIJA NA OSNOVU RODA I INVALIDITETA U ŠPANSKOM PRAVNOM SISTEMU: IZ PERSPEKTIVE PORESKOG SISTEMA

Ovaj članak posvećen je izučavanju invaliditeta i roda u španskom pravnom sistemu, kao i ulozi postojećeg poreza na dohodak građana u izbegavanju dvostruke diskriminacije koja se u ovom slučaju pojavljuje. To, preciznije, znači da smo ponudili novi pogled na ovu temu iz perspektive poreskog prava u Španji.

Iz ovog razloga, biće neophodno da se posvetimo i realnosti osoba sa invaliditeotm iz rodne perspektive. To će nam omogućiti da potvrdimo postojanje dvostruke diskriminacije, budući da su žene i devojke izložene diskriminaciji na osnovu roda i invaliditeta.

Decenijama su žene i devojke sa invaliditetom bile nevidljive uopšte. One su naročito osetljive i za njih se vezuju najnepovoljniji podaci u svim varijablama koje se odnose na zapošljavanje, povećani rizik siromaštva i smanjene mogućnosti. Izuzetno je važno i to kako se predstavljaju u vladinim statistikama kroz objavu poreza na dogodak građana.

Izučavanje trenutnog položaja ove grupe u Španiji je, otud, neophodno. Uz pomoć zvaničnih izvora, biće određen pravni okvir relevantan za ove pojedince, a odredićemo i broj lica koje pogađaju opisani problemi. Nakon što bude određen opšti pravni okvir, analiziraćeno poreske propise, s fokusom na porez na dohodak građana u Španiji, i formulisati moguća unapređenja i rešenja za ublažavanje opisanih problema i postizanje pune jednakosti.

Ključne reči: *Porez na dohodak građana; Žene i devojke sa invaliditetom; Dvostruka diskriminacija.*

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WOMEN WITH DISABILITIES THROUGH THE LENS OF THE TAX SYSTEM – THE CASE OF SERBIA

Abstract

This paper analyses the position of women with disabilities from the perspective of a tax system. Being one of the most important principles on which modern tax systems are based, the ability-to-pay principle mandates that tax liability corresponds to the taxpayer's economic capacity. As a result, tax systems should ideally take into account the impact of disability on the economic capacity of a disabled taxpayer, as well as on the economic capacity of taxpayers providing care and financial support to family member(s) living with disabilities. The author attempts to assess to what extent the said aim is achieved in the Serbian tax system. She provides an evaluation of the general tax framework applicable in Serbia and considers various legislative provisions which are of specific relevance to individuals with disabilities and their carers. She concludes that disability-related considerations contained in the Serbian tax legislation are fairly unrefined and particularized, rather than a manifestation of a comprehensive policy approach. The described state of affairs could be understood as just one facet of the long-standing insensitivity of Serbian tax policy-makers to the needs of citizens who, for a variety of reasons – be it gender, disability or other – find themselves in, inter alia, economically disadvantaged positions.

Key words: *Ability to pay principle; Horizontal equity; Vertical equity; Disability; Tax benefits.*

I SETTING THE SCENE

According to the estimates of the World Health Organization, over a billion people across the world are living with disability.[1] In other words, individuals with disabilities make up approximately 15% of the world's population. Among the individuals living with disabilities, women represent a considerably larger share.[2] Although most of us are accustomed to the statis-

1 World Health Organization, World Report on Disability, 2011, 29, *https://www.who.int/teams/noncommunicable-diseases/sensory-functions-disability-and-rehabilitation/world-report-on-disability*.

2 Institute for Health Metrics and Evaluation, Findings from the Global Burden of Disease Study 2017, 2018, 13, *https://www.healthdata.org/sites/default/files/files/policy_report/2019/GBD_2017_Booklet.pdf*.

tics showing that women tend to live longer than men (although such a result may vary depending on the level of socioeconomic development of a specific country), we usually fail to recognize the fact that women spend many of these "extra" years in poor health, including in disability.[3] In other words, a large share of the world's population experiences the combined disadvantages associated with both gender and disability.[4]

If we take Serbia as an example, the relative share of individuals with disabilities is lower than it is at the global level and amounts to 7.96%.[5] However, it is questionable whether this is an adequate estimate, having in mind the data collection methodology used in the course of the 2011 population census,[6] which was the first ever population census in Serbia attempting to collect data on individuals with disability.[7] At the same time, the relative share of women in the overall number of persons with disabilities is consistent with the global estimates.

In Serbia, women with disabilities account for 58.2% of the total population living with a disability, in contrast to 41.8% of men.[8]

Considering the ever more pronounced trends in aging population and bellow-replacement fertility rates, it becomes clear that disability represents a quintessential issue of modern societies. Disability is a complex phenomenon which permeates all spheres of society. As such, it requires a multidisciplinary approach and cooperation between various levels of the government, public institutions, non-governmental organizations, media and, of course, the associations of individuals with disabilities.[9] Despite the obvious necessity of a multidisciplinary approach to the research of disability as a societal phenomenon, certain disciplines are far less likely to be recognized as a field of relevance in this respect. This is, for example, the case with tax law. Virtually all modern tax systems contain legal provisions which are of particular relevance for individuals with disabilities and those who provide and care for individuals living with disability. However, these legal provisions and the policy logic behind them are only seldomly addressed by tax scholars.

The described gap is even more pronounced when it comes to the relevance of tax law provisions for women with disabilities. The reason is that

3 *Ibid*., 15.

4 World Health Organization, *op. cit.,* 8.

5 Ivana Krstić and Kosana Beker, *Situaciona analiza: Poslovna sposobnost i osobe sa invaliditetom u Srbiji*, 2017, 6.

6 For a thorough explanation of the observed deficiencies of the data collection process, see Milan M. Marković, *Osobe sa invaliditetom u Srbiji*, 2014, 20–21, *https://pod2.stat.gov.rs/ObjavljenePublikacije/Popis2011/Invaliditet.pdf*.

7 The 2011 population census was also the last population census the results of which were made publicly available. Indeed, the 2022 population census has recently (November 2022) been completed, but the results are expected to be made public by mid-2023.

8 Marković, *op. cit.,* 21.

9 Ministarstvo za rad, zapošljavanje, boračka i socijalna pitanja, Vodič kroz prava osoba sa invaliditetom u Republici Srbiji, 2018, *https://www.minrzs.gov.rs/sites/default/files/2021-02/Vodic%20kroz%20prava%20osoba%20sa%20invaliditetom.pdf*, 1.

tax legislation in modern democratic societies rarely (if ever) explicitly differentiates between men and women as taxpayers.[10] Consequently, the so-called explicit gender biases are generally not common. On the other hand, implicit gender biases, which refer to situations in which the same tax law provision differently affects men and women, are fairly prevalent.[11] Nevertheless, they can be difficult to identify and even more problematic (not least because of the lack of political will) to address by tax policy-makers.[12]

II ADRESSING DISABILITY-BASED DISCRIMINATION: ANY ROLE OF THE TAX SYSTEM?

One of the crucial principles on which modern tax systems are based is the ability-to-pay principle.[13] The ability-to-pay principle presupposes that the level of tax burden a taxpayer is faced with should depend on his/her economic capacity. In the literature, two aspects of this principle are commonly identified: horizontal equity and vertical equity. Whereas horizontal equity implies that taxpayers who are similarly economically situated should be taxed equally, vertical equity presupposes that taxpayers who are in different economic positions should be taxed differently.[14] In a number of jurisdictions, the ability-to-pay principle is enshrined in the constitution. Some examples are the constitutions of Croatia,[15] France,[16] Greece,[17] Italy,[18] Serbia[19]

10 Janet Stotsky, Gender Bias in Tax Systems, 1996, 1, *https://www.elibrary.imf.org/doc/IMF001/02720-9781451852226/02720-9781451852226/Other_formats/Source_PDF/02720-9781455230235.pdf*.

11 *Ibid*.

12 For a comprehensive analysis of implicit gender biases in modern tax systems, see Marco Cedro, Eleonor Kristoffersson, Teresa Ponton Aricha and Lidija Živković, 'Gender Equitable Taxation' in Dragica Vujadinović, Mareike Fröhlich and Thomas Giegerich (eds.) *Gender-Competent Legal Education* (2023), 375–404.

13 This is, however, not to say that the concept of ability-to-pay is in any way a novelty as a benchmark for the assessment of equitable taxation. Vanistendael traces the idea behind this concept as far back as in the Bible. See Frans Vanistedael, 'Ability to Pay in European Community Law', *EC Tax Law*, Vol. 23, Issue 3, 2014, 121.

14 Richard A. Musgrave and Peggy B. Musgrave, *Public Finance in Theory and Practice* (1989), 223.

15 Art. 51(1), Ustav Republike Hrvatske, *Narodne novine*, no. 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14.

16 Art. 13, Déclaration des droits de l'homme et du citoyen de 1789, English translation available at: *https://www.open.edu/openlearn/ocw/pluginfile.php/612270/mod_resource/content/1/rightsofman.pdf*.

17 Art. 4(5), The Constitution of Greece, English translation available at: *https://www.hellenicparliament.gr/en/Vouli-ton-Ellinon/To-Politevma/Syntagma/*.

18 Art. 53 of the Constitution of the Italian Republic, English translation available at: *https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf*.

19 Art. 91(2), Ustav Republike Srbije, *Službeni glasnik RS*, no. 98/2006 and 115/2021.

and Spain.[20] In many others, the ability-to-pay principle is not explicitly provided for under the constitution, but was developed through the practice of constitutional courts as a concretisation of other principles, such as the concept of equality in taxation and/or the social state concept. A notable example in this respect is Germany.[21]

It is exactly the ability-to-pay principle that mandates tax policy-makers to take into account taxpayers' personal circumstances affecting their economic capacity. One of the circumstances capable of substantially affecting taxpayer's economic capacity is the fact that he/she is faced with disability or is affected by the disability of his/her family member(s). Consequently, modern tax systems usually presuppose a variety of measures intended to promote horizontal equity between taxpayers with disability and taxpayers without disability, as well as between taxpayers who provide support for disabled individuals and taxpayers who are not burdened with such obligations.[22] At the same time, some features of tax systems may be indirectly relevant for individuals with disabilities, as they have redistributional goals. This is where vertical equity comes into place.

III AN EXAMPLE: THE APPROACH OF THE SERBIAN TAX LEGISLATOR

1. General overview

In Serbia the so-called composite system of personal income taxation is applied. This means that different schedular taxes (applying different flat rates) are imposed upon the receipt of various categories of income, while complementary global tax (applying a progressive rate) is to be paid upon the end of the taxable period[23] provided that the taxpayer's combined income exceeds a specifically prescribed *de minimis* threshold. Due to the fact that this threshold is set at a relatively high level,[24] the complementary global tax is

20 Art. 31(1) of the Constitución Española, English translation available at: *https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf*.

21 Henry Ordower, 'Horizontal and Vertical Equity in Taxation as Constitutional Principles: Germany and the United States Contrasted', *Florida Tax Review*, Vol. 7, No. 5, 2006, fn. 83, 271 and 301–302; Marc Bourgeois, 'Constitutional framework of the different types of income' in Bruno Peeters, William B. Barker, Pedro M. Herrera and Cornelis van Raad (eds.) *The Concept of Tax* (2005), 157.

22 David G. Duff, 'Disability and the Income Tax', *McGill Law Journal*, Vol. 45, Issue 4, 2000, 797.

23 In the case of the complementary global tax, taxable period is one calendar year. Tax return is to be submitted by 15 May of the following calendar year.

24 The threshold is equivalent to three times the average annual salary paid out in Serbia for the respective taxable period (calendar year). See art. 87(1) of the Law on Personal Income Tax (hereinafter: PIT Law), *Official Gazette of the RS*, no. 24/2001, 80/2002, 80/2002 – otr. law, 135/2004, 62/2006, 65/2006 – corr., 31/2009, 44/2009, 18/2010, 50/2011, 91/2011 – Decision of the CC, 7/2012 – adjusted RSD amounts, 93/2012, 114/2012 – Decision of the CC, 8/2013 – adjusted RSD amounts, 47/2013, 48/2013 – corr., 108/2013,

paid by only 1% of all personal income taxpayers. Such state of affairs gravely diminishes the potential of the complementary global tax to bring about progressivity into the system of personal income taxation.

Having in mind that salaries account for more than ¾ of all income received by individuals in Serbia,[25] salary tax is by far the most important schedular tax. With the aim of mitigating the burden of salary tax on recipients of lowest salaries and indirectly inducing progressivity into taxation of salaries, the legislator presupposes a standard deduction. Nevertheless, since the amount of standard deduction is fairly low,[26] it fails to properly contribute to the (indirect) progressivity of salary taxation.[27] Moreover, due to the very low share of individuals with disabilities within the paid work-force (only 9% of all individuals with disabilities in Serbia are employed),[28] the importance of the standard deduction for them is rather limited. This is especially true for women with disabilities, who represent a substantially lower share of the workforce participants. Only a little more than a third of all employed individuals with disabilities are women.[29]

At the same time, neither salary tax, nor any other schedular tax take into account personal circumstances of their respective taxpayers. In other words, the fact that a taxpayer has dependents is completely ignored. In effect, salary (or other category of income) of a single individual and salary (or other category of income) of an individual providing and caring for a family member with disability are taxed in the same way, regardless of the fact that the economic capacity of the latter is lower. It is only in respect to individuals liable to complementary global tax that personal deductions for dependent family members are granted. However, the already noted narrow scope of this tax renders the overall significance of such personal deductions negligible. This is especially worrying having in mind that more than a fifth (20.5%) of all individuals with disabilities in Serbia have no income of their own, but are dependent on the financial support of their family members.[30] Again, it is women with disability who are far more likely to be fully dependent on financial support of other member(s) of the family. The data shows that women account for more than 70% of all individuals with disabilities who depend on the financial support of others.[31]

6/2014 – adjusted RSD amounts, 57/2014, 68/2014 – otr. law, 5/2015 – adjusted RSD amounts, 112/2015, 5/2016 – adjusted RSD amounts, 7/2017 – adjusted RSD amounts, 113/2017, 7/2018 – adjusted RSD amounts, 95/2018, 4/2019 – adjusted RSD amounts, 86/2019, 5/2020 – adjusted RSD amounts, 153/2020, 156/2020 – adjusted RSD amounts, 6/2021 – adjusted RSD amounts, 44/2021, 118/2021, 132/2021 – adjusted RSD amounts and 10/2022 – adjusted RSD amounts.

25 Milojko Arsić and Saša Ranđelović, *Ekonomija oporezivanja: teorija i politika* (2017), 94.

26 In 2022 the standard deduction amounted to RSD 19.300 (app. EUR 165).

27 Fiskalni savet Republike Srbije, Dve decenije Zakona o porezu na dohodak građana, 2021, 11, *http://www.fiskalnisavet.rs/doc/analize-stavovi-predlozi/2021/FS_2021_Reforma_poreza_na_dohodak.pdf*.

28 Marković, *op. cit.,* 72.

29 *Ibid.*, 82.

30 *Ibid.*, 78.

31 *Ibid.*, 84.

The end result is a rather low progressivity of the system of personal income taxation in Serbia.[32] This is problematic because the personal income tax is the type of tax considered to be the most suitable (and *de facto* capable) for introducing and maintaining the redistributive impact of a tax system as a whole.

On the other hand, similarly to other countries at a comparable level of economic development, Serbia relies to a considerable extent on consumption taxes (value added tax, excise duties and customs duties).[33] Of particular importance here is the value added tax, because the revenues it generates account for 25,7% of the total tax revenues[34] – the largest share of any tax applicable in Serbia.[35] The drawback of predominant reliance on consumption taxes is their regressivity.[36] Namely, since low-income individuals spend a larger share of their income on taxed commodities than do the high-income individuals, the burden of consumption taxes on the former is more severe in relative terms.[37]

Consequently, the Serbian tax system predominantly relies on taxes which are regressive (such as value added tax) or barely progressive (such as salary tax), for which reason it can be said that the ability-to-pay principle is not the major concern for the tax policy-makers. Of course, the fact that the Serbian tax system barely has any redistributive effect is not only problematic from the point of view of individuals with disabilities. Rather, it depicts the ongoing insensitivity of Serbian tax policy-makers to the needs of citizens who, for a variety of reasons – be it gender, disability or other – find themselves in, *inter alia*, economically disadvantaged positions. Nevertheless, despite this very general negative evaluation of the Serbian tax system vis-a-vis the position of individuals with disabilities, the following sections of this paper will provide an analyis of specific legislative measures contained in Serbian tax legislation, which do take into account (albeit to a limited extent) the specific position of individuals with disabilities.

In general, such tax provisions may be aimed at (1) taking into account the costs of disability for the disabled individuals and/or individuals providing care and/or financial support to disabled individuals, (2) increasing the disposable income of disabled individuals (or their carers) by exempting from tax certain social benefits they receive, or applying a lower tax rate on

32 Gorana Krstić, 'Why Income Inequality is so High in Serbia: Empirical Evidence and a Measurement of the Key Factors', *Economic Annals*, Vol. 61, No. 210, 2016, 40–42.

33 Reliance on consumption taxes in Serbia is not only considerably higher than in the EU, but is also above the averages in countries of Central and Eastern Europe. Saša Ranđelović, 'Ekonomske performanse poreskog sistema Srbije', *Revija Kopaoničke škole prirodnog prava*, Vol. 3, No. 1, 2021, 199.

34 *Ibid.*

35 Mandatory social security contributions are not considered here, as we regard them as a separate category of public revenue, in line with the classification of the International Monetary Fund's Government Financial Statistics Manual.

36 Howard Chernick and Andrew Reschovsky, 'Yes! Consumption Taxes Are Regressive', *Challenge*, Vol. 43, No. 5, 2000, 86.

37 In other words, the marginal propensity to save increases with the increase of income. Higer-income individuals are able to save (i.e. not consume) a larger share of their income than are lower-income individuals.

goods they consume, or (3) decreasing the cost of employers' who employ individuals with disabilities, thereby increasing the participation of the disabled individuals in the paid labour force.

The first two groups of measures are provided directly to individuals with disabilities themselves, or to their carers, while the latter type of measures targets employers of individuals with disabilities. The first two categories ensure that taxes are imposed in line with the ability-to-pay principle. The latter group of measures actually covers tax incentives which serve a broader social policy objective of integrating individuals with disabilities within the paid workforce.[38] As such, they too benefit the disabled individuals, albeit only indirectly – by making employment of individuals with disabilities less costly as compared to the employment of individuals without disabilities.[39]

The tax provisions of relevance for individuals with disabilities and their carers/providers are usually scattered in various tax laws and supplementary bylaws applicable in a specific jurisdiction. An analysis of such provisions may be systemized in various ways, e.g. on the basis of the diverse technical tools used by the legislator to address the specific position of individuals with disabilities (tax exemptions, deductions, credits, incentives, etc.) or on the basis of specific types of taxes within the scope of which these technical tools are utilized. For the purpose of this paper, we found the latter approach to be more appropriate.

2. Income taxes

In line with the provisions of the PIT Law, several categories of income relevant for individuals with disabilities and individuals providing care to individuals with disabilities are not subject to personal income tax. These categories include: (1) cash compensation received for the assistance and care of another person,[40] (2) child benefits, parental benefits and other income received in line with the legislation regulating financial support to families with children,[41] (2) income received in line with the legislation addressing the rights of disabled veterans,[42] as well as (3) disability pension.[43] Moreover,

38 Duff, *op. cit.,* 870.

39 This is the case for incentives provided to employers of individuals with disabilities present in the Serbian tax system, which we will analyse in the latter section of this paper. However, comparative tax systems also contain incentives intended to lower the cost of employment of individuals with disabilities by aligning such cost with the costs of employment of individuals without disabilities. Such is the case with e.g., the incentives directed at investments in tangible assets designed to make the workplace more accessible to individuals with disabilities. See Duff, *op. cit.,* 887–888; Theodore P. Seto and Sande L. Buhai, 'Tax and Disability: Ability to Pay and the Taxation of Difference', *University of Pennsylvania Law Review*, Vol. 154, No. 5, 2006, 1125.

40 Art. 9(1)(3) of the PIT Law. Cash compensation for assistance and care of another individual is paid out by the Republic Fund for Pension and Disability Insurance (hereinafter: the Fund), on the basis of a documented request and after the procedure of health assessment by the Fund is completed.

41 Art. 9(1)(2) of the PIT Law.

42 Art. 9(1)(1) of the PIT Law.

43 Art. 9(1)(17) of the PIT Law.

the salary of disabled individuals employed by undertakings authorised for professional training and employment of individuals with disabilities is not subject to salary tax.[44],[45]

Furthermore, in the case of salary tax, the PIT Law presupposes two kinds of itemized deductions. These itemized deductions may be relevant for employed individuals with disabilities, as well as employed carers of disabled family members. The first itemized deduction applies to the so-called solidarity allowance (ser. *solidarna pomoć*),[46] which is paid out by the employer to an employee in the case of illness, rehabilitation or disability of the receiving employee or his/her family member.[47] The precondition for the taxpayer (employee) to benefit from this itemized deduction is that the disability imposes increased costs for the maintenance of employee's (or his/her family member's) health, professional or working ability.[48] However, the amount of solidarity allowance which is not subject to tax on salaries is limited to app. EUR 370. The amount exceeding the prescribed limit is subject to salary tax at a rate of 10%. The second itemized deduction applies to monetary aid which is paid out by the employer to the employee for the purpose of covering the costs of his/her medical treatment, as well as related travel expenses.[49]

With the aim of increasing the participation of the disabled individuals in the paid labour force, the PIT Law introduces a tax incentive for employers of persons with disability. This tax incentive applies provided that the following conditions are fulfilled: (1) employment contract is concluded for an indefinite period of time, (2) disabled individual must be a newly employed worker, i.e. must not have been previously employed by an associated party, or by the founder of the current employer. Both of these preconditions are aimed at preventing the abuse of the tax incentive by dishonest employers. This tax incentive is available only to employers in the private sector. However, it is granted by way of a rather peculiar mechanism. As a rule, salary tax is paid by way of withholding. This means that an employer acts as the withholding agent (ser. *poreski platac*) and, as such, has the obligation to deduct the amount of salary tax from the employee's gross salary and pay it directly to the government, on behalf of the employee (who is actually the taxpayer). The tax incentive in question allows the employer to keep for himself the tax withheld from the salary of a disabled employee during the period of three

44 Art. 21 of the PIT Law.

45 The establishment of undertakings authorised for professional training and employment of individuals with disabilities is subject to previous approval of the Ministry of Labour, Employment, Veterans and Social Affairs.

46 Art. 18(1)(7) of the PIT Law.

47 In line with Art. 120(1)(1) of the Serbian Labour Law, the right of the employee to solidarity allowance may be stipulated under the collective labour agreement or the employment contract.

48 Art. 10(1)(3) of the Rulebook on the exercise of the right to tax exemption for income from aid due to the destruction or damage of property, for the organization of social humanitarian aid, students' scholarships and loans, food allowance for amateur athletes and the right to tax exemption due to solidarity allowance in the case of illness, *Official Gazette of the RS*, no. 31/2001 and 5/2005.

49 Art. 18(1)(10) of the PIT Law.

years after the employment contract was concluded. In other words, the employer is entitled to keep the funds that otherwise would have been indirectly paid by the taxpayer (employee) to the state coffers. The said mechanism in substance represents a subsidy for employers of individuals with disabilities.[50] However, the manner in which this tax incentive is designed lends itself to severe criticism. Namely, the fact that employers are granted the right to keep the amount of tax that lowers the employee's net salary in effect means that it is the disabled individuals themselves who subsidize their employers.[51]

An additional incentive is provided to employers of individuals with disabilities vis-à-vis mandatory social security contributions. Namely, in line with the Law on Mandatory Social Security Contributions (hereinafter: the MSSC Law), an employer who employs an individual with disability (1) for an indefinite period of time and (2) provided that the individual may be regarded as a new employee, will be freed from the obligation to pay mandatory social security contributions on that individual's salary during the period of three years.[52] In such a case, the cost of social security contributions is taken over by the National Employment Agency (ser. *Nacionalna služba za zapošljavanje*). As opposed to the previously described mechanism, this incentive does not presuppose the implicit "transfer" of funds from the disabled employee to the employer.

Obviously, in both preceding cases, the intention of the tax legislator was not to increase the disposable income of individuals with disabilities, but rather to lower the cost for employers who embrace employing individuals with disabilities. Such incentives are therefore expected to indirectly contribute to the wellbeing of disabled individuals by increasing their participation in the workforce. The described intention of the legislator is no doubt laudable bearing in mind the previously stated exceptionally low number of individuals (especially women) with disabilities who are in paid employment. However, at least in the case of the first-mentioned tax incentive, the mechanism chosen by the legislator to achieve the described goal appears to go against its own supposed purpose.

The Law on Corporate Income Tax (hereinafter: CIT Law) recognizes the specific position of undertakings authorised for professional training and employment of individuals with disabilities. It does so by stipulating that profits of such undertakings are not subject to corporate income tax. However, the exemption from corporate income tax is not absolute. The share of non-taxed profits corresponds to the share of individuals with disabilities in the overall number of employees of that specific undertaking.[53]

Other than legislation regulating taxes on income, measures aimed at easing the circumstances of individuals with disabilities may be found in laws dealing with consumption and property taxes. These are, however, limited in number and are, in the majority of cases, of modest significance. The following lines provide an analysis thereof.

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50 Dejan Popović, *Poresko pravo* (2020), 361.

51 Svetislav V. Kostić, 'Nepoštovanje ustavnosti u oblasti oporezivanja zarada u Srbiji', *Anali Pravnog fakulteta u Beogradu*, Vol. 66, Issue 3, 2018, 258–259.

52 Art. 45b of the SSC Law.

53 Art. 46 of the CIT Law.

3. Consumption taxes

When it comes to consumption taxes, the Law on Value Added Tax (hereinafter: the VAT Law)[54] presupposes that the supply of certain goods which might be of importance to persons with disabilities is subject to a special rate of value added tax (hereinafter: VAT), which is lower (10%) than the rate otherwise applicable (20%). This includes the supply of medicines, orthotic and prosthetic devices, medical devices which are surgically implanted, as well as materials for dialysis.[55] Moreover, the VAT Law exempts from tax the supply of certain services which are considered to be "meritorious".[56] Such supply is exempt without providing the taxpayer with the right to deduct input VAT. The end effect of the described mechanism is a lower price of such services for the final consumer.[57] Under Serbian VAT Law, such treatment is prescribed, *inter alia* (1) for services provided by medical facilities, including the provision of accommodation, care and food in those facilities,[58] (2) for services provided by medical professionals,[59] as well as (3) for services provided by social care and protection facilities.[60]

In regard to customs duties, the Customs Code[61] contains an exemption from customs duties for individuals with disabilities, as well as for associations of individuals with disabilities provided that they are importing goods which are to be used for the purpose of education, employment or improvement of the social position of individuals with disabilities, as well as in the case of importation of vehicles specifically designed and constructed to be used by individuals with disabilities.[62] In addition, the Customs Code presupposes that undertakings authorized for professional training and employment of individuals with disabilities will be exempt from customs duties on the importation of equipment which is to be used in the course of professional training and work of individuals with disabilities.[63]

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54 The VAT Law, *Official Gazette of the RS*, no. 84/2004, 86/2004 – corr., 61/2005, 61/2007, 93/2012, 108/2013, 6/2014 – adjusted RSD amounts, 68/2014 – other law, 142/2014, 5/2015 – adjusted RSD amounts, 83/2015, 5/2016 – adjusted RSD amounts, 108/2016, 7/2017 – adjusted RSD amounts, 113/2017, 13/2018 – adjusted RSD amounts, 30/2018, 4/2019 – adjusted RSD amounts, 72/2019, 8/2020 – adjusted RSD amounts and 153/2020.

55 Art. 23(2) of the VAT Law.

56 Alan A. Tait, *Value Added Tax: International Practice and Problems* (1988), 69.

57 The reason is that the value added by the providers of such services is not liable to VAT. Since value added in this "final" step, i.e., supply to the final consumer represents a considerable portion of the price of those services, exemption from VAT benefits the final consumer. *Ibid*., 56.

58 Art. 25(1)(6) of the VAT Law.

59 Art. 25(1)(7) of the VAT Law.

60 Art. 25(1)(11) of the VAT Law.

61 The Customs Code, *Official Gazette of the RS*, no. 95/2018, 91/2019 – other law, 144/2020 and 118/2021.

62 Art. 245(1)(11) of the Customs Code.

63 Additional precondition is that such equipment is not otherwise produced in Serbia, i.e. it is not available for purchase in the country. Art. 246(1)(8) of the Customs Code.

4. Property taxes

When it comes to taxes on property, the Law on Property Taxes,[64] which regulates immovable property tax, transfer tax, as well as inheritance and gift taxes, contains only a few provisions of potential (direct or indirect) relevance to individuals with disabilities. The legislator exempts from inheritance and gift taxes endowment funds and associations established with the aim of serving common good.[65] The exemption applies to endowment funds and associations conducting activities aimed at promoting and protecting human rights, gender equality, improving the position of individuals with disabilities, enhancing social and health protection, as well as child-care and care for the elderly, etc.[66] However, for these entities to be able to benefit from the said exemption, the property inherited or received by way of a gift deed must be used exclusively for the realisation of the aim for which the entity was established in the first place.

The Law on Property Taxes used to presuppose an exemption from tax on immovable property in the case of real estate which is used for e.g., social, medical and humanitarian purposes. However, this provision was deleted in 2004.[67] The reasons for the deletion were not specifically clarified, but were most likely of fiscal nature.

Within the general term of property taxes, another type of tax could be taken into consideration – the so-called tax on the use of motor vehicles. The Law on Taxes on the Use, Possession and Carriage of Goods, introduces an exemption from tax on the use of motor vehicles for individuals living with disabilities.[68]

However, the personal scope of this tax exemption is rather narrow, since the threshold regarding the disability of eligible individuals is fairly high. More specifically, the following categories of individuals may benefit therefrom: 1) individuals with (a) at least 80% physical disability, or (b) a physical condition that resulted in at least 60% disability of their lower extremities, 2) carers of developmentally disabled children and 3) organizations of disabled individuals active in helping individuals with disabilities, registered in line with the applicable law.

64 The Law on Property Taxes, *Official Gazette of the RS*, no. 26/2001, *Official Gazette of the FRY*, no. 42/2002 – Decision of the FCC and *Official Gazette of the RS*, no 80/2002, 80/2002 – other law, 135/2004, 61/2007, 5/2009, 101/2010, 24/2011, 78/2011, 57/2012 – Decision of the CC, 47/2013, 68/2014 – other law, 95/2018, 99/2018 – Decision of the CC, 86/2019, 144/2020 and 118/2021.

65 Art. 21(1)(5a) of the Law on Property Taxes.

66 Art. 3 of the Law on Endowment Funds and Foundations, *Official Gazette of the RS*, no. 88/2010, 99/2011 – other law and 44/2018 – other law.

67 See. 9 of the Law on Amendments of the Law on Property Taxes, *Official Gazette of the RS*, no. 135/2004.

68 Art. 5 of the Law on Taxes on the Use, Possession and Carriage of Goods, *Official Gazette of the RS*, no. 26/2001, 80/2002, 43/2004, 31/2009, 101/2010, 24/2011, 100/2011 – adjusted RSD amounts, 120/2012 – adjusted RSD amounts, 113/2013 – adjusted RSD amounts, 68/2014 – otr. law, 140/2014 – adjusted RSD amounts, 109/2015 – adjusted RSD amounts, 112/2015, 105/2016 – adjusted RSD amounts, 119/2017 adjusted RSD amounts, 104/2018 – adjusted RSD amounts, 86/2019, 90/2019 – adjusted RSD amounts, 156/2020 – adjusted RSD amounts, 118/2021 and 132/2021 – adjusted RSD amounts.

IV CONCLUDING REMARKS

It may be concluded that disability-related considerations contained in the Serbian tax legislation are rather unrefined and particularized. The topic of disability rarely factors in tax policy debates.[69] When it does, it is usually only viewed as a facet of a much wider and continuously present topic plaguing Serbian society – high unemployment. To date, no effort has been put into designing a comprehensive policy approach to the taxation of disabled individuals and the taxation of their carers. This is even more true when the issue of disability is seen from a gender perspective.

However, the described state of affairs is hardly surprising if we take into account the presented general overview of the Serbian tax system, especially the system of personal income taxation. The very crude and quite straightforward framework of personal income taxation is a result of a conscious and, for the time being, probably only practicable decision of Serbian tax policymakers to prioritize the efficiency of the tax system, to the detriment of its equity. Therefore, not only does the current tax system not recognize multiple discrimination suffered by women with disabilities, it hardly even contributes to attenuating the discrimination of persons with disabilities in general.

Indeed, the economic efficiency as one of the canons of a good tax system became worldwide increasingly important in the 1980s, relegating the fairness canon to a secondary role.[70] However, the case of Serbia should not only be perceived as a manifestation of this global trend. The described state of affairs has a lot to do with the acute underfunding of institutional capacities that are needed to withstand and facilitate the fairness aspect of the tax system. The implementation and proper functioning of tax breaks aimed at fulfilling social functions, among which are those improving the economic and societal position of individuals with disabilities, necessitate a far more capable and resourceful tax administration. It is therefore reasonable to expect that in Serbia, at least in the near future, the social functions will continue to be carried out via the expenditure, rather than the revenue side of the public budget.

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69 Legislative changes in the field of tax law are hardly even subject to public debates in Serbia. Urgent procedures are extensively used in the course of the legislative process, for which reason there is little room for holding public debates. See Lidija Živković, 'Taxpayers' Rights in Serbia: The Existing Framework and Much-Needed Improvements', *Tax Notes International*, Vol. 89, No. 9, 2018, 818, fn. 53.

70 Marjorie E. Kornhauser, "The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction", *Michigan Law Review*, Vol. 86, Issue 3, 1987, 468.

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ŽENE SA INVALIDITETOM IZ PERSPEKTIVE PORESKOG SISTEMA – SLUČAJ SRBIJE

Apstrakt

U radu se analizira položaj žena sa invaliditetom iz perspektive poreskog sistema. Princip sposobnosti plaćanja, kao jedan od ključnih principa u temelju modernih poreskih sistema, nalaže odmeravanje poreskog tereta u srazmeri sa ekonomskim kapacitetom poreskog obveznika. Posledično, poreski sistemi bi trebalo da vode računa o uticaju koji invaliditet može imati na ekonomski kapacitet poreskog obveznika, kao i na ekonomski kapacitet poreskih obveznika koji pružaju negu i finansijsku podršku članovima porodice sa invaliditetom. Autorka nastoji da ispita u kojoj meri je srpski poreski sistem podoban da realizuje pomenuti cilj. Stoga se u radu sprovodi ocena šireg poreskopravnog okvira iz ugla potreba osoba sa invaliditetom, kao i pojedinačnih poreskopravnih odredaba posebno namenjenih unapređenju njihovog (ekonomskog) položaja. Nalazi rada pokazuju da su poreskopravne odredbe usmerene na postizanje pomenutog cilja u srpskom poreskom sistemu krajnje rudimentarne i partikularizovane, odnosno da ne predstavljaju rezultat sveobuhvatnog pristupa zakonodavca pomenutom problemu. Opisano stanje stvari se može razumeti kao posledica kontinuirane neosetljivosti kreatora srpske poreske politike prema potrebama građana koji se iz različitih razloga (bilo da je reč o polu, invaliditetu, ili dr.) nalaze u ekonomski nepovoljnom položaju.

Ključne reči: *Princip sposobnosti plaćanja; Horizontalna pravičnost; Vertikalna pravičnost; Invaliditet; Poreske olakšice.*

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EFFECTIVENESS OF THE QUOTA SYSTEM FOR EMPLOYMENT OF PERSONS WITH DISABILITIES IN SERBIA

Abstract

The paper focuses on cost-effectiveness of the introduction of the quota for employment of persons with disabilities in Serbia, comparing the employment and financial effects in the first decade since the introduction of such system in this country. It praises the evolution of the perception of people with disabilities that led to employment as the ultimate means of appreciation and inclusion of this vulnerable group in the modern times, but it also exposes some of the caveats of introduction of the quota-levy employment system which require additional measures in order to become effective.

Key words: *Employment quota; Persons with disabilities; Rights-based approach; Assessment of working capacity.*

I INTRODUCTION

For us born in the last half of the 20th century, the era of development of human rights as the dominant approach, it might appear as though people with disabilities have always been treated with kindness and respect for their basic rights. Historically that has rarely been the case, whereby treatment and attitude toward people with disabilities has often been marked by societal fears, intolerance, ambivalence, prejudice, and ignorance regarding disability[1]. In the early societies the lack of medical understanding and technology led to very short lifespan of persons with disabilities (PwD), while many cultures, including the early Christianity, there were widespread religion-based fears, as many believed that a disability signified punishment from God for having sinned[2]. In the later centuries, all the way through Medieval times, medicine and the medical profession were poorly regarded because physicians were not well trained and often ineffective in treating people with vari-

1 Irmo Marini, "The History of Treatment Toward People With Disabilities", in Irmo Marini, Noreen M. Graf, Michael J. Millington (eds), *Psychosocial Aspects of Disability* (2017), 3, *https://connect.springerpub.com/binary/sgrworks/3ce651cb18b9b788/19ebcdf32238aa128ab3c8a15780c813159ac392e5fcd08452dbedb277316fd8/9780826180636_0001.pdf*

2 *Ibid*., 4.

ous diseases, so the people with disabilities often ended up in monasteries and hospitals where they were treated by methods such as exorcism, prayer, incantations, magical herbs, etc. Therefore, it is not without a sense of national pride that in Serbia reference is made to a very early recognition of PwD as a vulnerable group under the risk of poverty and social exclusion, which dates back to the XIII century. It was then that the first legal act called *Zakonopravilo* or *Krmčija Svetoga Save* aimed to provide respect and the legal protection of "the old, the powerless and to those with physical deformities".

Nevertheless, it will take several centuries until the legal protection and the need for social inclusion of PwD acquire a substance – medical care, social security and employment as one of the most powerful mechanisms for achieving social inclusion of marginalised groups. For centuries, most people with disabilities have been excluded from mainstream society, based on the notions that disability was something to be feared or pitied (linked to cultural taboos), or more recently, that disability was a problem of the individual – something that could be 'corrected' to a certain extent through medical and rehabilitative treatment, frequently in specialist, segregated centres[3]. The medical care emerged as a result of medical advancements in treating people with various illnesses, while the driving force behind it was the rapid industrialization which was geared to having healthy able-bodied people able to work long hours in mass production lines. The focus of assistance to PwD associated with understanding disability as a medical and social security issue was on charity and on the provision of services catering to their medical and associated rehabilitation requirement, as well as on welfare and social security provisions. These approaches are generally referred to as the charity model and the medical model of disability and they have actually led to the social exclusion of disabled persons.

In modern times and the era of human rights the societies have matured enough to realize that the traditional view of disability from the perspective of social welfare and rehabilitation, medical services and other forms of aid and protection ought to be surpassed by looking at disability through the spectrum of human rights (model based on human rights principles), by accepting and implementing the adopted international standards crowned by the United Nations Convention on the Rights of Persons with Disabilities[4]. The meaningful inclusion of PwD involved their employment as an indispensable element, which required policy interventions that would help overcome the environmental barriers and societal attitudes towards the labour force with disabilities.

One of the policy options inherited by a major number of countries to bolster the employment of PwD has been the requirement that each employ-

3 ILO, "Achieving Equal Employment Opportunities for People with Disabilities through Legislation", Geneva, 2011, 29, *https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/instructionalmaterial/wcms_162169.pdf*

4 Goran Lončar *et al*., "Employment of PwD in the Republic of Serbia", (2012), 6, *http://bgcentar.org.rs/bgcentar/wpcontent/uploads/2013/06/Employment_of_Persons_with_Disabilities_in_Republic_of_Serbia_2012.pdf*

er that employs a number of workers above the threshold established by the state is obliged to employ PwD in a certain proportion with the overall number of his employees. Such policy became familiar as the quota system and offered the employers other alternatives, too, such as the payment of a fee or purchase of goods produced by specific PwD employment companies as a replacement for the quota employment of PwD. The quota system is intended to encourage the employers to grasp for the jobseekers with disabilities and thus increase the labour supply, while at the same time allowing the state to lower the expenditures for social benefits of that vulnerable group. If such engagement of PwD at the open labour market would take place and lead to an elevated employment rate in the society, and it might also lead to an increase of the national GDP and the overall welfare. However, in order to be effective such system requires a range of well-designed support measures, that would help avoid unwanted outcomes of that policy, which could turn the employment of PwD goal into a tool for collection of parafiscal levies from the employers. Starting from the assumption that the introduction of the quota system in the Serbian PwD employment policy was geared towards providing jobseekers with disabilities with market-based employment, we will investigate to what extent has that goal been achieved and at what expense for the economy – comparing the relative progress made in the placement of jobseekers with disabilities and the financial (parafiscal) burden imposed on employers through the quota-levy system.

II VARIOUS APPROACHES TO EMPLOYMENT OF PERSONS WITH DISABILITIES

Employment of PwD has gained in significance after the First and especially after the Second World War, which had resulted in an unseen number of persons with physical impairments and a considerable number of people whose mental health suffered from the consequences of massive atrocities around them. As the prolonged armed conflicts also impoverished many affected nations poverty also threatened various cohorts of the population, and in particular those who have always been among the most vulnerable – PwD. Hence, the employment of PwD became not only a major issue when it comes to their status, but also the main pathway toward greater social inclusion and a source of income, which contributes to greater independence of PwD. The main reason for the phenomenon of social exclusion, as well as the emergence of poverty, lies in the fact that PwD had always been underestimated as employees and active participants in the society. Therefore, the employment of PwD in the mainstream labour market became a very important aspect of social inclusion of PwD, and it is seen as one of the major ways to combat social exclusion and promote their independent living and dignity[5]. In parallel with that, there has been a growing emphasis on the social and physical environmental factors constraining the participation of disabled persons in the world of work in society more generally. This trend has led to

5 Goran Lončar *et al., op. cit*., 8.

an increasing recognition of the rights of PwD and their status as citizens. Underlying this is a transformation in understanding of disability[6]. It is no longer being seen as a personal problem or tragedy, instead, there is now a recognition that many of the barriers to participation arise from the way in which society is built and organized, together with the way in which people think about disability and the assumptions they make. As the understanding evolved from the medical to the social model – more recently called the rights-based model – there has been a more general acceptance of disability. As a result, individuals with disabilities have been afforded more and more opportunity to fill their roles in society as productive citizens. This shift has taken considerable time to filter systematically through to laws, policies, programmes and services shift from the perception of disability as a social welfare issue wherein people with disabilities were marginalized within society. These changes were inspired by the modern perception of the individuals' well-being within a welfare state, which relies not only on social security system, but also on attainment of individual and collective rights of employees – including those with disabilities[7].

Nevertheless, as the people with disabilities have difficulties at their daily workplace routine, they have certain disadvantages relative to non-disabled persons when they seek employment in free markets. Employers, acting primarily in their own interest, often do not resort to employment of workers with disabilities without an additional incentive. Therefore, striving for inclusion of those workers into a free labour market, many countries have given considerable attention to the question of how to take into account the characteristics of people with disabilities and how to advance their employment. The approaches taken by these countries have varied, however, and could be classified into two broadly contrasting types. These two types are the "equality of opportunity approach", based on anti-discrimination laws, and the "employment quota approach"[8], which is based on employment quota systems[9]. Equality of opportunity approach was mostly taken up by the countries of Anglo-Saxon legal system – the United States (US), Australia, England and Canada. These countries attempt to boost the employment of the disabled by prohibiting employment discrimination on the basis of disabilities. As the US in 1990 became the first country to adopt antidiscrimination laws (*Americans with Disabilities Act*, enforced as of 1991), this approach can be viewed as relatively new.

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6 ILO, "Achieving Equal Employment Opportunities for People with Disabilities through Legislation", *op. cit*., 29.

7 Gordana Gasmi, Jovan Protić, „European social model and non-standard forms of employment", *Strani pravni* život, No. 4, 2017, 46.

8 Tamako Hasegawa, "Equality of Opportunity or Employment Quotas? — A Comparison of Japanese and American Employment Policies for the Disabled", *Social Science Japan Journal,* Vol. 10, No. 1, 2007, 41.

9 According to Japan Association for the Employment of Persons with Disabilities and the Organisation for Economic Cooperation and Development, a third approach is also emerging, in which a country institutes a general law relating to labour or the labour environment, and mandates employers to improve the workplace environment for people with disabilities in accordance with their needs. Northern European countries such as Sweden and Norway fall into this category.

Most other countries have adopted a different approach – that of employment quotas, and such policies have been in place for a longer time. In continental Europe Germany started implementing the quota in 1919 with legislation enforcing post-war employment of the disabled. Following several revisions to the laws, a 5% employment mandate and a penalty system have remained in place. In addition, other countries including France, Italy, Austria, Poland, Turkey and Korea have also adopted an employment quota system[10]. Japan, as well, has consistently abided by such a system following its 1960 adoption of an employment quota system (mandatory since 1976)[11]. In recent years, there has been a movement, centered mostly among European countries and seen for example in an EC Directive and in general anti-discrimination laws, to balance the two approaches.

The underlying legislative approach to promoting the employment of disabled people as such aims for raising or securing employment for different sub-groups of that population. However, in spite of that proclaimed objective, both the rights-based (anti-discrimination laws) and the obligations-based (quota) appear to benefit current employees with a disabling condition more than the actual job-seekers with disabilities. In the rights-based systems it is difficult for a new job applicant to establish legally that he or she was refused a job because of a disability, in spite of equal qualifications. Similarly, experience in "quota countries" shows that employees who become disabled and are thus eligible for counting towards the quota are more likely to be kept in a job, while quota schemes give little incentive to employ a disabled job applicant. This is certainly also the case for systems that encourage voluntary action, and for regulations that directly address the employer[12].

Thus, as there are no major differences in effectiveness and outcomes of the two approaches, the choice between anti-discrimination legislation and a mandatory employment quota largely seems to be based on cultural differences, attitudes and experiences. In the Scandinavian and the English-speaking countries, mandatory top-down policies are not considered appropriate or effective. In other OECD regions, such as Central, Western and Southern Europe but also Korea and Japan, on the contrary, such policy is well established. While these policies are sometimes considered to be diametrically opposed, they rather seem to be substitutes and – in the best case – even complements. A major difference is that quota policies tend to emphasise difference and incapacity rather than ability, which partly explains why some quota countries have recently introduced new anti-discriminatory policy elements as well[13].

While in the countries with anti-discrimination policies towards disabled the legislation contains special chapters that prohibit discrimination against disabled people in all aspects of employment or the employment process, in most of the employment quota systems the policy is based on a mandatory

10 OECD, "Transforming Disability into Ability – Policies to promote work and income security for disabled people", Paris, 2003, 104, *https://www.oecd-ilibrary.org/social-issues-migration-health/transforming-disability-into-ability_9789264158245-en*

11 Hasegawa, *op. cit*., 42.

12 OECD, *op. cit*., 105.

13 *Ibid.*, 106.

employment, whereby a quota is established by a special act on employing or promoting the employment of disabled people. According to such regulations, employers are obliged to have a certain proportion of disabled people among their staff, which can vary from 2% in countries like Korea and Spain, to 6% in France and Poland or even 7% of the workforce in Italy[14]. Only registered disabled people who fulfil the eligibility criteria count towards the quota, which applies only to employers, in both public and private sector, with a certain number of employees. Hence, if the primary objective of the quota policy is to employ jobseekers with disabilities, rather than to merely provide another source for financial subsistence of the disabled, the policy makers should carefully calculate the number and size of employers upon whom the quota would be imposed and make sure that it fits the number of real jobseekers with disabilities. This issue is very relevant due to the fact that in many countries, including Serbia, the number of economically active PwD is relatively low, so the caveat is that the quota might be set too high.

III POSITION OF PERSONS WITH DISABILITIES IN THE LABOUR MARKET OF SERBIA PRIOR TO THE REFORMS

Over previous decades, Serbia has accepted and ratified a number of international documents promoting protection of human rights, equal opportunities and inclusion of PwDs, including ILO Convention No. 159. It has also accepted the Recommendations No. 168 on Vocational Rehabilitation and Employment of PwD. The Convention obliges the member states to formulate, implement and periodically review a national policy on vocational rehabilitation and employment of disabled persons, aiming to ensure that appropriate vocational rehabilitation measures are made available to all categories of disabled persons, and promoting employment opportunities for disabled persons in the open labour market[15]. Serbia also adhered to the UN Standard Rules on the Equalization of Opportunities for People with Disabilities issued in 1993[16], which above all invite the states to encourage employers to make reasonable adjustments to accommodate PwD, as well as the measures to design and adapt workplaces and work premises in such way that they become accessible to persons with different disabilities[17]. In addition to that, the states' action programmes were supposed to include the support for the use of new technologies and the development and production of assistive devices that would enable PwD to gain and maintain employment, while the

14 *Ibid*., 104.

15 ILO Convention 159, article 3.

16 Regional Cooperation Council, "Professional rehabilitation and employment of Persons with Disabilities in Serbia", Sarajevo, 2017, 1, *https://www.esap.online/download/docs/Host%20Country%20Case%20Study%20Employment%20of%20PWDs%20in%20Serbia.pdf/c8852cc86855f0259ee11e64463a446f.pdf*

17 United Nations General Assembly Resolution 48/96, Standard Rules on the Equalization of Opportunities for PwD, Rule 7 (Employment), New York, 1994, points 2 and 3(a).

states as employers were going to create favourable conditions for the employment of PwD in the public sector. The objective of such approach to employment was to get the PwDs employed at the open labour market, while retaining the supported (*sheltered*) employment capacities only for the workers whose needs cannot be met in open employment.

Nevertheless, as in many other countries in the XX century, disability in Serbia was mainly treated as a medical rather than a social problem reflecting on both economic and social well-being of PwDs until the beginning of the new millennium. That was coupled with a rather loose disability legislation, which has oversimplified the procedure of disability determination and left a lot of room for doctors' discretion in deciding which person would receive the disability status. Such situation was still in place when the political changes in the year 2000 took place and led to a declared acceleration of the transition and European Union (EU) accession processes. On one hand, that initiated the adoption of new regulations with the EU *acquis* in mind as one of the main drivers of change; on the other, the transition required massive layoffs in state-owned companies that were about to be sold to new, private owners, as many of those companies represented an instrument of hidden unemployment in the pre-transition state-run economy. Combined with the fear of older workers that they might loose their jobs and income as a result of redundancy layoffs, the loose disability legislation and its implementation with a lot of room for discretion caused massive abuse of disability status, nearly one third of all pensioners in Serbia in 1997 – 2003 were invalidity pensioners[18].

IV NEW ANTI-DISCRIMINATION LEGISLATION ON EMPLOYMENT OF PERSONS WITH DISABILITIES IN SERBIA

In the following years this legislative and policy situation required prompt changes, so the disability retirement criteria were made far stricter with the adoption of the new Pension and Invalidity Insurance Law in 2003. The first strategic document focusing on their vulnerable position and setting specific goals directed at promotion of equal opportunities for this population in the fields of work, employment and education was the Poverty Reduction Strategy Paper, while the principle of non-discrimination and further recognition of vulnerable position of PwDs in the labour market were brought about by the National Employment Strategy Paper 2005-2010. The Strategy introduced a set of measures in support of enhancement of their activity in the labour market, employability and employment on the open labour market as well as through special forms of employment[19]. Prohibition of discrimination against PwD was

18 Pension and Disability Insurance Fund of Serbia, Annual Bulletin for 2011, Belgrade, 2012, 6. *https://www.pio.rs/images/dokumenta/statistike/godisnji%20bilten%202011-lat%206.7.pdf*

19 Regional Cooperation Council, "Professional rehabilitation and employment of persons with disabilities in Serbia", 2.

enshrined in Article 21 of the Constitution of the Republic of Serbia in 2006[20], as well as in the Labour Law, which provides special protection to jobseekers with disabilities and requires that they "shall enter into employment relationship under the conditions and manner stipulated in this law, unless a special law stipulates otherwise"[21]. Prohibition of discrimination against PwD was also prescribed in the Law on Prevention of Discrimination against PwD. This law, aligned with the *acquis communautaire* of the EU, detailed the protection system for PwD and introduced measures to promote equality of treatment in employment and occupation, as well as social inclusion[22]. It has been complemented by the midterm inclusion objectives detailed in the Strategy on Improving Handicapped Persons Position in the Republic of Serbia[23].

In spite of all these legislative and policy measures, various sources describe the overall labour market position of PwDs in Serbia in the first decade of the 21st century as rather weak, primarily due to their limited access to education and employment[24]. At the latest census in Serbia in 2011 out of 571,780 persons[25] (7.9% of the overall population) who declared themselves or were declared by their family members as PwD, only 71,107 were economically active, among whom there were 51,714 employed and 19,393 registered jobseekers with disabilities[26]. However, a more detailed look at the 2012 data of the National Employment Service of Serbia on the number of active jobseekers reveals that out of 19,142 unemployed PwD only 14,605 of them were in active search for a job[27]. Activity rate of this vulnerable group was only 8.93% – significantly lower than the national average. At the same time, the number of PwD whose main source of income were wages or earnings based on work was 38,724 or only 6.8% of their total number. Those figures point at a dramatic difference in comparison with several OECD market economy countries, where income from work accounts for between 40% of total personal income in Belgium and 65% in France and the United States – with over 50% on average across the countries for which comparable data are available[28]. This indicates that the declared objective of meaningful and sustainable inclusion of this vulnerable group at that stage was not yet achieved.

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20 Constitution of the Republic of Serbia, *Official Gazette of the Republic of Serbia*, No. 98/2006 and 115/2021.

21 Labour Law, *Official Gazette of the Republic of Serbia*, No. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017, 113/2017 and 95/2018.

22 Council Directive 2000/78/EC, *Official Journal L 303.*

23 Government of the Republic of Serbia, General Secretariat, Strategy on improvement of position of the handicapped persons in the Republic of Serbia, *Official Gazette of the Republic of Serbia*, No. 1/2007.

24 *Ibid.*

25 Milan M. Marković, "Osobe sa invaliditetom u Srbiji", National Statistical Office of Serbia, Belgrade, 2014, 71, *https://pod2.stat.gov.rs/ObjavljenePublikacije/Popis2011/Invaliditet.pdf*.

26 *Ibid*.

27 *Ibid*., 70.

28 OECD, *op. cit*., 28.

Hence, despite the reliance on principle of non-discrimination declared in the National Employment Strategy 2005-2010, the Ministry of Labour and Social Policy of Serbia resorted in 2009 to the introduction of the employment quota system. As in many other countries, the quota was introduced by a special law – the Law on Professional Rehabilitation and Employment of PwD (hereinafter referred to as "the Law"), which has set the 2-3% quota threshold at the level of at least 20 employees[29], applying to both the public and the private sector. The quota requires all companies and institutions with 20 and up to 49 employees to employ one PwD, all of those with between 50 and 99 employees to employ two PwD, those between 100 and 149 employees would employ three PwD, etc., which can be illustrated by the below table:

Table 1: The number of PwD to be employed according to the quota system of Serbia

Total number of employees	Persons with disabilities to be employed
1 do 19	0
20 – 49	1
50 – 99	2
100 – 149	3
...	...
500 – 549	11

The quota could have been set even higher – up to 5% such as in Germany[30], but before a quota was going to be set to a certain level an *ex-ante* analysis had to be done – comparing the number of jobseekers with disabilities with the number of jobs that would have been made available for them in line with the quota. There is no available evidence that such analysis has actually been performed, which inevitably leads to the questioning of adequacy of the quota.

The adoption of the Law represented the first step in the development of a comprehensive policy framework for the promotion of employment of PwD, as envisaged by the International Labour Organisation (ILO) Convention No. 159 – Vocational Rehabilitation and Employment, Disabled Persons[31], ratified by the Government of Serbia in 20/00. As a special law designed to complement the Labour Law in providing jobseekers with disabilities with the open labour market employment opportunities, the Law introduced several measures for their equal participation in the labour market and enhancement of their employability, such as professional rehabilitation, mandatory reason-

29 Law on professional rehabilitation and employment of persons with disabilities, *Official Gazette of the Republic of Serbia*, No. 36/2009, 32/2013, and 14/2022 – other law.

30 *http://www.bagwfbm.eu/page/quota*.

31 ILO, Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159).

able accommodation of workplaces and the employment quota[32]. The Law was later supported by a number of bylaws that were needed in order to ensure that the legal provisions translate into concrete procedures for introducing PwD into open employment. Those bylaws included the criteria for the assessment of individuals' capacity to work, the development of standards for the implementation of employment and vocational rehabilitation measures, the organisation of staff development programmes for employment service personnel, the establishment of indicators to monitor the performance of employment offices and the design, monitoring and evaluation of targeted active labour market programmes[33]. The Law also offered a new definition of disabled individuals: "a person with disabilities shall be the person suffering permanent consequences of bodily, sensory, mental and psychiatric impairment or sickness which cannot be eliminated by any treatment or medical rehabilitation and faced with social and other limitations affecting his/her working capacity and possibility to find or retain employment and who does not have the possibilities or has reduced possibilities to be included in the labour market or apply for employment on equal terms with other persons". The Law aimed to introduce a case management approach implemented by the National Employment Service for assisting PwD in finding work[34], and it is important to note that, due to a number of important changes that the Law has foreseen, the implementation of the quota was designated to commence one year after its adoption (in 2010). Finally, the introduction of the quota system entailed the establishment of a Budgetary Fund for professional rehabilitation and employment of PwDs (the Fund). Employers have thus been relived from the obligation to employ a PwD should they decide to participate in income of a PwD employed in enterprises for professional rehabilitation and/or social enterprises in the amount of not less than 50% of average income in the Republic of Serbia (Article 26). In addition, they had an option of being relieved from the obligation by signing business contracts and procurement agreements for purchase of products or services with an enterprise for professional rehabilitation and employment of PwDs in the amount of 20 average incomes per each PWD they are obliged to employ (Article 27)[35]. The Law also introduced active labour market measures for employment of PwD, such as the reimbursement of primary costs of reasonable workplace accommodation, and the subsidy amounting to 75% of the wage of the newly employed jobseeker with disabilities for the first 12 months. These measures could certainly incentivize the employers to reach out to this vulnerably

32 Ljubinka Kovačević, *Zasnivanje radnog odnosa* (2021), 701.

33 Nataša Krstić, Jovan Protić, „Law on Professional Rehabilitation and Employment of PwD through the Lens of Serbian Employers", *Ekonomika preduzeća*, Vol. 68, No. 7-8, 2017, 481.

34 Marković, *op. cit*., 70.

35 Regional Cooperation Council, 9.

groups of jobseekers, but in order for this incentive to yield results there are other preconditions that ought to be met – not least those related to availability of properly qualified jobseekers with disabilities, their readiness to actually perform work and their ability to reach their workplaces despite the general lack of disability accommodation of public transport and public facilities. It is also worth noting that the wage subsidy of 75% for the newly employed is not in line with the Article 32, paragraph 6, of the EC Regulation 651/2014, which among other regulates recruitment and employment aid for disadvantaged workers and workers with disabilities, and sets the aid intensity to a maximum of 50% of eligible costs, i.e. 50% of the wage cost for the first 12 months of employment[36].

However, some systemic challenges to employment of PwD remained. One of the evident shortcomings of the approach to employment of PwD at the open labour market has been *the procedure of assessment of the remaining working capacity*. Although the Law brough an important change – focusing on remaining rather than the working capacity lost, this procedure still entailed the medical approach, which has largely excluded the PwD from the labour market and left this vulnerable group constrained in terms of personal autonomy and dignity, social inclusion and decision-making about one's own life and economic activity[37]. The medical approach has also retained a lot of discretionary decision-making in assessment of remaining working capacity of PwD, which resulted in the fact that a lot of employers opted to meet their employment quota obligation by exposing their already employed staff to medical checks; those checks would often end up with some of existing employees losing part of their working capacity, which allowed the employers to meet the quota and in NES reports it significantly increased the number of allegedly employed PwD[38]. That discretionary decision-making and its consequences listed above have certainly degraded the incentives to employ PwDs, which had been intended by the introduction of various ways of fulfilment of the obligation to employ persons with disabilities, such as the payment of funds or purchase of goods or services from the enterprises for professional rehabilitation and employment of persons with disabilities prescribed by the Rulebook on the method of monitoring the fulfilment of the obligation to employ persons with disabilities[39].

36 *https://lexparency.org/eu/32014R0651/ART_32/.*

37 Poverenik za zaštitu ravnopravnosti, Poseban izveštaj o diskriminaciji osoba sa invaliditetom u Srbiji, Beograd, 2013, 33, *http://ravnopravnost.gov.rs/wp-content/uploads/2012/11/images_files_Poseban%20izvestaj%20%20osobe%20sa%20invaliditetom%20FINAL%209.5.2013.pdf.*

38 This is not unique to Serbia, according to the OECD study (*Transforming Disability into Ability – Policies to Promote Work and Income Security for Disabled People*) it is predominantly current employees with a disabling condition who receive protection, regardless of whether their approach is rights-based (anti-discrimination laws), obligations-based (quota) or incentives-based (voluntary action).

39 Rulebook on the method of monitoring the fulfilment of the obligation to employ persons with disabilities, *Official Gazette of the Republic of Serbia*, No. 101/2016.

The second important caveat for successful and effective implementation of this Law, in terms of employment of PwD as the key objective, was the relation between the number of registered jobseekers with disabilities and the number of companies that were subject to employment quota according to the Law. According to the National Employment Service (NES), the overall number of active registered jobseekers with disabilities has varied very little over the following ten years of implementation of the Law; that figure fluctuated from 13,809 in 2010, reaching the peak of 15,909 in 2015 and dropped to 13,331 in 2019[40]. These relatively low and very mildly fluctuating figures could be a result of a general discouragement of PwDs to register as jobseekers, but they also indicate that the overall policy and the combination of measures used by the NES did not lead to a visible change of trends in employment of this vulnerable group.

Table 2: The number of jobseekers with disabilities in the records of the NES

Year	Total	Women	Men
2010	13 809	4 197	9 612
2011	14 135	4 527	9 608
2012	15 010	4 998	10 012
2013	14 491	4 761	9 730
2014	14 257	4 852	9 405
2015	15 909	5 790	10 119
2016	15 778	5 804	9 974
2017	15 416	6 037	9 379
2018	14 562	5 861	8 701
2019	13 331	5 574	7 757
Average	**14 670**	**5 240**	**9 430**

Within the number of PwD employed under the auspices of this Law, which reportedly grew from 2,897 in 2011 to 6,476 in 2017, the number of women with disabilities was also on the rise – from 993 in 2011 to 2,570 in 2017. That still left them with a relatively smaller share than that of employed PwDs in the overall employment from the NES register (1.86% vs. 2.41% respectively in 2017)[41]. In parallel with that, the number of companies that have employed more than 20 employees and were thus subject to quota constantly grew from 7,578 in 2010 to 12,014 in 2019[42]. The Law has foreseen a quota exemption from the companies with more than 20 employees established and registered in the last two years, but the number of those companies was relatively small in comparison with these overall figures, and as such it does not affect the general ratio of the number of companies obliged to employ PwDs according to quota system and the number of registered jobseekers with disabilities.

40 National Employment Service statistical bulletins.

41 Regional Cooperation Council, 15.

42 Central Registry of Social Insurance archives.

Table 3: Number of companies employing 20 or more employees in 2010-2019

Year	Number of companies employing 20 or more employees
2010	7,578
2011	8,795
2012	9,226
2013	9,738
2014	10,304
2015	10,525
2016	10,762
2017	11,133
2018	11,627
2019	12,014
Average	**10,170**

A simple comparison of figures at the initial year of implementation of this law leads to a conclusion that there hasn't been an adequate *ex-ante* analysis of these important policy factors – the number of jobseekers with disabilities vs. the number of companies which were to be tasked with mandatory employment of those jobseekers through the quota system. Had this analysis be done, it would have clearly indicated that the companies obliged by the quota to employ people with disabilities would find it impossible to find that workforce in the registers of the NES. That would of course leave them with two more options that the Law has foreseen – financing the state Budgetary Fund with amount of not less than 50% of average income in the Republic of Serbia per each PwD not employed in line with the quota, or procurement of products or services from an enterprise for professional rehabilitation and employment of PwDs in the amount of 20 average incomes per each PwD they were obliged to employ. The outcome of such approach has been the fact that throughout the ten years of implementation of the Law only 50-60% of all companies obliged by the quota met their obligation by employing PwD[43], while nearly 40% opted to pay the contribution to the Budgetary Fund and only around 1% of them procured good and services from an enterprise for professional rehabilitation and employment of PwDs[44]. As the number of companies that paid the contribution steadily grew over the years to 4,047 in 2019, the amount collected into the Budgetary Fund peaked at 4.3 billion RSD in that year.[45]

43 Including those that have resorted to meeting the obligation by assessment of remaining working capacity of their existing employees, who were subsequently declared as PwD.

44 Data collected from the Tax Administration of Serbia.

45 *Ibid.*

Table 4: The number of employers paying the disability contribution according to the quota and the amounts paid in 2011-2019

Year	Number of employers paying the disability contribution	Amounts paid in million RSD
2011	2,728	1,985.5
2012	2,643	2,453.1
2013	2,501	2,249.9
2014	2,605	3,790.8
2015	2,780	2,981.3
2016	2,735	3,111.6
2017	3,592	3,721.1
2018	3,809	3,836.0
2019	4,047	4,306.1
Average	**3,049**	**3 159.5**

According to the Law, the contributions paid into the Budgetary Fund are supposed to support the employment and professional rehabilitation of unemployed PwD, subsidize the wages of PwD employed in the enterprises for professional rehabilitation and employment of PwD, or in social enterprises and organizations, as well as to improve the working conditions, enhance production programmes, introduce standards, improve the quality of products or services and for accommodation of workplaces. However, the cross-referencing of data collected from the Tax Administration and the NES indicates that out of 4.3 billion RSD paid into the Fund only 1.25 billion RSD were made available for employment of PwD – some 700 million RSD for the special forms of employment, and 550 million RSD for active labour market programmes (ALMPs)[46]. The fact that only around 30% of the revenue of the Fund is transferred to the line Ministry and the NES points at inconsistency in the enforcement of the Law and leaves the institutions responsible for employment of PwD with much smaller funds than envisaged by the Law.

A further look into the data on ALMPs indicates that their average delivery in 2011-2017 was only 67%, which means that only two-thirds of already very modest amount assigned to the ALMPs was actually used for that purpose[47]. According to the NES data, the delivery of those funds was subdivided among measures and activities of professional rehabilitation of PwDs (such as employment fairs, job clubs, active job search training, self-efficiency training, trainings for the labour market, etc.), programmes for enhancing employment of PwDs (such as subsidies for self-employment, subsidies for salaries of PwDs without work experience, subsidies for opening new jobs and public works) and support measures for PwDs, which include refunds for reasonable accommodation of workplace for PwDs, employment under

46 Data collected from the Tax Administration of Serbia and the National Employment Service.

47 Regional Cooperation Council, 11.

special conditions, refund of costs for engaging and professional assistance to PwDs[48]. The funds were very thinly spread not only onto a variety of measures and activities, but also over a relatively large number of clients – jobseekers with disabilities, whose number varied between 6,473 in 2011 and 8,465 in 2017[49]. By far the largest number of those clients have taken part in employment fairs (some two-thirds of the overall number), while the number of those who attended trainings for the labour market was very low (less than 10% of the overall number). Such use of funds and the distribution of measures, combined with other reasons of administrative nature which we in this article cannot elaborate in detail, resulted in a very stagnant number of active jobseekers with disabilities registered by the NES, which varied between 14,000 and approximately 15,900 throughout the entire decade of implementation of the Law[50].

V CONCLUSION

Recalling that the levies taken from the enterprises subject to employment quota amounted up to 4.3 billion RSD, and taking into account that the declared principle objective of the Law is activation and employment of PwD, a question that imposes itself is why has the use of a relatively significant funds yielded such a modest result? There are probably various factors that contribute to what appears to be a stagnant number of jobseekers with disabilities which we cannot reach or analyze in detail, but the predominant conclusion that imposes itself is that the enforcement of the quota system offers much more substantial financial effects to the general state budget (where some 70% of all the quota levies end up), with hardly any progress in employment of PwD. In parallel with that, the changes and amendments to the Labour Law in 2014 have allowed the employer to terminate the employment contract of a worker with disabilities if he is not in position to offer the worker the performance of labour duties in line with the assessed working capacity[51]. Such exposure of workers with disabilities to layoffs indicates at the lack of systemic intention to engage and retain this vulnerable group at work and adds up to other issues such as the quality of assessment of remaining working capacity of PwD, the lack of evidence (records) to what extent the public sector companies and institutions fulfil their quota obligation by employing the PwD[52], and the use of funds collected through the quota levy.

48 *Ibid*., 13.

49 *Ibid*., 14.

50 NES database.

51 Labour Law, *Official Gazette of the Republic of Serbia*, No. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017, 113/2017 and 95/2018.

52 In terms of the number of PwD who had been registered as jobseekers and received an employment contract.

Modest effects on activation and employment of PwD are probably caused by the absence of other measures of inclusion of PwD, such as the lack of systemic removal of barriers for their daily routine (including the commuting to their workplaces), the loss of entitlement to various social security support measures upon employment, low investments into reasonable accommodation of workplaces, etc. Such outcome, coupled with the relatively high quota levy, leads to a conclusion that the quota system alone is cost-ineffective, it does not lead to attainment of labour rights of PwD, and it appears to act as another parafiscal burden onto the private sector employers, which additionally alienates the employers from hiring the jobseekers with disabilities. Hence, in order for the quota system to yield visible and sustainable results in employment of PwD there are numerous other changes in approach to this vulnerable group that ought to take place. In the employment policy area what could certainly improve is the procedure for determination of remaining working capacity of PwDs, and the enforcement of the Article 7 of the Rulebook on the method of monitoring the fulfilment of the obligation to employ persons with disabilities, which ought to channel the funds collected through the quota/levy system into the Budgetary fund for professional rehabilitation and employment of PwD. The system would also benefit from improved monitoring of the status of jobseekers with disabilities covered by rehabilitation and employment measures, as well as from the more carefully scrutinized selection of employment measures, which should yield more cost-effective results.

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DELOTVORNOST SISTEMA KVOTA ZA ZAPOŠLJAVANJE OSOBA SA INVALIDITETOM U SRBIJI

Apstrakt

Članak se prevashodno bavi troškovnom delotvornošću uvođenja kvote za zapošljavanje osoba sa invaliditetom u Srbiji, poređenjem uticaja na zaposlenost i finansijskih efekata tokom prve decenije od uvođenja kvotnog sistema u ovoj državi. U radu se ističe evolucija percepcije osoba sa invaliditetom koja je vodila ka njihovom zapošljavanju kao konačnom vidu uvažavanja i inkluzije ove ranjive grupe u današnje vreme, ali se takođe razmatraju i određene teškoće pri uvođenju kvotnog sistema zapošljavanja, koje zahtevaju dodatne mere kako bi on zaista bio delotvoran.

Ključne reči: *Kvota za zapošljavanje; Osobe sa invaliditetom; Pristup zasnovan na pravima; Procena radne sposobnosti.*

KRIVIČNO PRAVO I KRIMINOLOGIJA

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SEXUAL ABUSE OF WOMEN WITH DISABILITIES IN SERBIAN CRIMINAL LEGISLATION AND LEGAL PRACTICE

Abstract

Authors analyze criminal offence (of) Sexual abuse of helpless person and its application in legal practice. The first part is dedicated to its normative construction while the second analyzes its possible redefinition in accordance with the Istanbul Convention and definition of rape as non-consensual sexual acts. The focus and central element of current definition is the "exploitation of the victim's helplessness" what sometimes in the practice could lead to punishment of mutually consensual sexual intercourses and indirectly threatens to incriminate all sexual intercourses with persons with disabilities who are mostly legally considered as "helpless". Sexuality of helpless persons and their right to partnership and intimacy is still a taboo topic, which is described in the third chapter. In the last part, authors analyze quite devastating statistics about reporting, prosecuting, and punishing this crime.

Key words: *Sexual abuse of helpless person; Disabled women; Sexuality; Sexual violence.*

I INTRODUCTION

There is a belief that "for a long time, the main issue in crimes against sexual freedom (for which the term 'sexual offences' are commonly used), was how to regulate them by law, i.e., where to set the border line between permitted and criminal." [1] From early society some sexual conduct has been considered as antisocial or criminal. Over the centuries, among the social reasons for trying to eliminate it have been to protect victims from sexual assaults, express society's strong sense of morality, promote health by avoid-

1 Zoran Stojanović, *Krivično pravo* (2009), 442.

ing the spread of venereal diseases or the transmission of genetic defects, and placate of gods. Today the same reasons may be given for the punishment of some kinds of sexual conduct, although the emphasis is now on protecting victims of sexual assaults.[2] This problem is especially underlined in the case of disabled women, who, on the one side, should be particularly protected, bearing in mind that they are usually not capable of resisting to sexual act, while on the other they must not be denied the right to 'intimacy and love"– free choice of partner, sexual intercourses, marriage and parenthood.

According to HRW, approximately 300 million women around the world have mental and physical disabilities and women with disabilities comprise 10 percent of all women worldwide.[3] In Serbia, eight to ten percent of the total population has some form of disability,[4] and many of them still face social and physical barriers, such as prejudices, inaccessibility of facilities, information and communication tools, unemployment, poverty, and exclusion from society.

The Criminal Code of Serbia (CC)[5] regulates as particular criminal offence "sexual abuse of disabled person" (according to CC terminology– sexual intercourse with a helpless person), which differs from rape in that it is not necessary for perpetrator to apply coercion or serious threat to the victim to force her to sexual intercourse, but instead of that the offender "uses the state of helplessness of the passive subject (victim)". The question is whether such definition indirectly incriminates any sexual intercourse with disabled persons, since the emphasis is on 'exploiting the state of helplessness', while the will and eventual consent of the victim is ignored. The Council of Europe Convention on preventing and combating violence against women and domestic violence (The Istanbul Convention)[6] requires redefinition of rape by placing a focus instead on coercion on the non-consent of the victim, which logically requires redefinition of the crime of sexual abuse with a helpless person. However, in that case, the central problem shifts to the question of the possibility of giving conscious, voluntary and relevant consent, especially by persons with mental disabilities.

Despite numerous research proving that women with physical or mental disabilities are more often exposed to sexual violence, Serbian official data

2 Steven R. Smith and Robert G. Meyer, *Law, Behaviour and Mental Health – Policy and Practice* (1987), 498.

3 Human Rights Watch, Women and Girls with Disabilities, *https://www.hrw.org/legacy/women/disabled.html.*

4 According to available data from the census of 2011, around 8% of the total population in Serbia have some form of disability. However, it should be added that the disability status is unknown for 119.482 citizens, which represents additional 1.66% of the total population. Out of the total number of persons with disabilities, more than 58% (58.2) are women, while a little less than 42% (41.8) are men. Milan M. Marković, *Person with Disabilities in Serbia – The 2011 Census of Population, Households and Dwellings in the Republic of Serbia* (2016), 20. The data from the last census of 2022 are not available yet.

5 Krivični zakonik, *Sl. glasnik RS*, br. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019.

6 Council of Europe, Convention on preventing and combating violence against women and domestic violence – *CETS* 210 (Istanbul Convention).

show that these crimes are rarely detected and reported, meaning that in the existing criminal justice system 'something is not quite right'.

II NORMATIVE CONSTRUCTION OF THE CRIMINAL OFFENCE SEXUAL ABUSE OF HELPLESS PERSON

The criminal offence of sexual abuse of helpless person is committed when the perpetuator has sexual intercourse or equal act by using mental illness, mental retardation or other mental disorder, disability, or some other permanent or temporary state of the passive subject (the victim),[7] due to which the victim is incapable of resistance.

The full legal name of this incrimination is *sexual intercourse* with helpless person, but it does not reflect the true essence of this crime, which focuses on punishing sexual violence and sexual abuse, not every sexual intercourse with a helpless person. This archaic name of incrimination (*sexual intercourse with a helpless person*) as well as the elements of this crime, dates back to 1929, and Criminal Code of the Kingdom of Yugoslavia, with the later 'modernization' and changes in the sense that the passive subject of this criminal offence can be not only female, but male person too, and that the criminal offences can also be committed between spouses, what initially was unthinkable and in the spirit of that time.[8]

The normative (legal) name of this criminal offence mentions only sexual intercourse, although the act of perpetration (*actus reus*) also includes other sexual abusive acts, analogous to the definition of rape.[9] Other sexual abusive acts can be understood restrictively, only in the sense of vaginal, oral or anal coitus, or extensively which would include all other types of penetration, such as retracting the finger, fist or some object in vagina or anus of passive subject. Serbian legal theory and practice takes a restrictive position in defining these acts, emphasizing that all other forcible acts, that arouse or satisfy the sexual instinct, should be considered as the criminal offence of Prohibited sexual acts, regulated by Article 182 of CC.[10]

Passive subject of this criminal offence is not only physically or mentally disabled person, but also a person who is only currently and temporary helpless, such as intoxicated person under the influence of alcohol or drugs.

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7 About the position of passive subject-victim in the Serbian criminal procedure see Vanja Bajović, "O položaju oštećenog u krivičnom postupku", *Pravni život*, No. 9/2018, 543–562.

8 Criminal offence of sexual intercourse with a helpless person was regulated, for the first time, by Article 270 of the Criminal Code of the Kingdom of Yugoslavia. Milan Škulić, *Krivična dela protiv polne slobode* (2019), 94–95.

9 Milan Škulić, "Krivično delo silovanja u krivičnom pravu Srbije – aktuelne izmene, neka sporna pitanja i moguće buduće modifikacije", *Crimen and Revija za kriminologiju i krivično pravo*, No. 2–3/2017, 411–414.

10 Zoran Stojanović, *Komentar Krivičnog zakonika* (2019), 587–588.

Depending on the duration of "helplessness" or the state of incapacity for the resistance of the passive subject, the conditions of helplessness could be divided on two categories:

1. Permanent "helplessness" of a passive subject, that exists before the commission of criminal offence, during the commission of criminal offence and after the criminal offence has been committed.
2. Temporary 'helplessness' of passive subject, that exists only during the commission of the criminal offence what could be caused by temporary mental disorder, severe intoxication by alcohol or drugs etc.

Depending on the causal character of the condition of 'helplessness' such conditions could also be divided in two categories:

1. Conditions arising from certain mental disorders of the passive subject, which include a) mental illness; b) backward mental growth and c) other mental disorders.
2. Conditions arising from certain physical deficiencies of the passive subject (physical disability).[11]

Contrary to the rape, which is in Serbian criminal law still defined as 'forced sexual intercourse', perpetrator here does not use coercion at all, but rather "exploits the state of helplessness" of the passive subject (victim). If the perpetrator uses force against a passive subject, it will be the classic rape, not this crime. Also, in the case when perpetrator with some previous action incapacitates a passive subject (e.g. pours some psychoactive drugs into the drink, etc.), it will also be the rape, not this crime.

Therefore, since the rape in Serbian criminal law still strictly requires that sexual intercourse occurred using force or by the treat of immediate attack on the victim's life or body, this implies that the victim of rape is capable of resistance. Only in that case it is necessary to use force or serious threat to achieve sexual intercourse or equal act. Opposite to that, the coercion is not necessary to force helpless person to sexual intercourse, but instead, the focus is on "exploitation of her/his helplessness". In this regard, legal theory quotes an interesting example of "helplessness" and inability of victim to resist, when the victim was previously raped by multiple perpetrators, which makes her in a state of exhaustion and disability to resist further, so following sexual intercourse with such victim legally will not be rape, but sexual intercourse with helpless person.[12] However, the prescribed punishments for both crimes are more or less the same with maximum prescribed penalty of 12 years of imprisonment for both crimes, and minimum penalty of 3 years for rape and 2 years for sexual abuse of helpless person.

Focus and central element of this crime is sexual intercourse (or equal act) against the free will or consent of passive subject, or a situation where

11 Škulić (2019), *op. cit*., 334–337.

12 Stojanović (2008), *op. cit*., 454; Milan Škulić, „Krivično delo obljube nad nemoćnim licem – normativna konstrukcija, neka sporna pitanja i moguće buduće modifikacije", *Crimen* (IX), 1/2018, 52–53.

the victim is unable to express her free will at all. Therefore, the accent is on the *exploration of the state of helplessness* of the victim. It is factual question (*question facti*) in the legal practice, whether there was an exploration of the victim's helplessness.

For example, in one case, a 16-year-old, mentally disabled girl, was sexually abused by three perpetrators. From the findings of expert-witnesses (neuropsychiatrist and psychologist), it was determined that the victim had light mental disability and IQ of 69, was naïve, suggestible, credulous, easily fell into unsafe intercourses and could be persuaded easily, and due to her mental disorder, she was unable to defend and protect herself. Expert witnesses further stated that any person with average mental abilities and average intelligence could very easily conclude, in the first sight, that the victim is mentally disabled person, because all above-mentioned characteristics are visible and cannot be hidden in any way. In their defence the perpetrators insisted that the victim voluntarily consented to sexual intercourse, but the court found that they were guilty explaining that juvenile and mentally disabled victim could not understand the meaning of sexual intercourse or to resist the sexual act. The Court further emphasized that "Consent to sexual intercourse or equal act by the mentally disabled person, and even her/his initiative in this regard, does not exclude the existence of this criminal offence."[13]

1. Aggravating forms of criminal offence sexual abuse of helpless person

More serious forms of this crime with longer penalty prescribed (5-15 years of imprisonment), exist in the following cases:

a) If the helpless person suffers serious bodily harm due to the criminal offence.
b) If the criminal offence has been committed by several persons.
c) If the criminal offence has been committed in a particularly cruel or humiliating manner.
d) If the criminal offence has been committed against a juvenile.
e) If the criminal offence resulted in pregnancy of a passive subject.

The most serious forms of this crime with penalty of minimum of ten years of imprisonment exist:

a) If the criminal offence resulted in death of a passive subject.
b) If the criminal offence was committed against a child (persons of 14 years old or younger).

Whenever the qualifying circumstance is the occurrence of the severe consequences (serious bodily injury or death of a passive subject), it is necessary that the offender acts negligently in relation to this consequence. In

13 Appellate Court in Kragujevac, Judgment Kž1 2560/2012, 18 June 2012.

the case that the more severe consequence is covered by the intent of the offender, then there would be the joinder of criminal offences sexual abuse of helpless person and serious bodily injury or murder. In legal practice certain specific situations occurred in terms of determining negligence in relation to more severe consequence. For example, to avoid rape, the victim jumps from the windows or from a moving vehicle, which leads to her death or serious bodily injury. It is difficult to take general rule in such situations, but they should be resolved depending on the circumstances of each particular case, what means that it is necessary to determine whether the more severe consequence could be attributed to the negligence of the offender.[14] In regard to serious bodily harm as the consequence of criminal offence, older Serbian case law took a view that serious damage of the mental health of the victim should be equalized with the serious bodily injury, representing the more serious form of this criminal offence.[15]

When it comes to pregnancy as a more severe consequence of this criminal offence, then the offender can act both intentionally or negligently regarding serious consequence, having in mind that causing pregnancy is not regulated as particular criminal offence, but if the offender intentionally caused victim's pregnancy, it would certainly be an aggravating circumstance.

Particularly cruel or humiliating manner of execution of criminal offence as aggravating circumstance is interpretated in the same manner as in the crime of rape. In this regard, any sexual intercourse contrary to the will of the victim may be considered humiliating, but the cruelty and humiliation of the victim should be present in a more intense degree, to compose a harder form of this crime. A particularly humiliating manner exists, for example, "when sexual intercourse is performed in the presence of other persons, especially family of the victim, when the victim is forced to sing, dance or otherwise entertain perpetrator, when an offender urinates or spills dirty liquids on the victim, etc."[16]

Aggravating circumstance of several perpetrators exist when the criminal offence was committed by at least two persons. Co-offending is interpreted in accordance with Article 33 of the CC. According to that provision, co-offending in the rape exists, alternatively:1) if the offender intentionally participates in the act of committing rape (because the rape cannot be negligent crime), or 2) realizing the joint decision by another act, intentionally contributes to the commission of rape.

In the case when the passive subject of this criminal offence is a child, there is a problem of distinction between the most severe form of this crime (with prescribed sentence of at least 10 years of imprisonment) and the criminal offence from article 180 of Serbian Criminal Code (sexual intercourse with a child, with prescribed sentence of 5 to 12 years of prison). Having in mind that the legislator has incriminated the sexual intercourse with a child as the most severe form of this crime, he implicitly implies that the child can-

14 Zoran Stojanović and Obrad Perić, *Krivično pravo-poseban deo* (2002), 176.

15 District Court in Belgrade, Judgment K. br. 14/88, 12 January 1989.

16 Ljubiša Lazarević, *Komentar Krivičnog zakonika Republike Srbije* (2006), 216.

not be identified with a helpless person. It follows that the most severe form of this crime will exist only when some other crime against sexual freedoms, whose passive subject is a child, does not exist, including:

Rape of child as the most severe form of rape (art. 178 par. 4 CC). Sexual abuse of helpless person, when the passive subject is a child would exist in the case when the child is completely incapable of resistance, due to his/her age, so neither the force nor serious threat were not necessary for sexual intercourse or equal act with such child. For both crimes (rape and sexual abuse of helpless person) the same punishment is prescribed, when the passive subject is a child (prison of at least 10 years or life-imprisonment)

Sexual Intercourse through Abuse of Position (art. 181 par. 3 CC) implies sexual intercourse or equal act with child by teacher, educator, guardians, adoptive parents, stepfathers, stepmothers or other persons who by abusing their position or authority copulate with a child or commit an equivalent act against a juvenile entrusted to them for instruction, education, guardianship or care.

Sexual intercourse with child (art. 180 CC) implies consensual sexual intercourse with a person younger than 14 years, so the passive subject of this crime can only be a child who, based on his/her age, maturity and other circumstances is capable of giving consent. Contrary to that, if the victim is a child who did not freely consent to sexual intercourse, or is not able to give a consent, it will be a criminal offence of sexual abuse of helpless person. In this regard the case law states thar a 6-year-old child has the status of helpless person who is not able to resist to the perpetrator to commit sexual intercourse or equal act. The judgment further states that it was established that the victim was of "average intellectual abilities in accordance with her age, with adequate social skills and social adaptation in her environment, that she doesn't suffer of mental illness or other mental disorder, that with regard to her age, emotional and psychological characteristics and lack of life experience, she could not freely decide, so she could be perceived as helpless person who was not able to resist the defendant."[17] Such decision, contrary to theoretical view, equalizes 6 year old child with a helpless person.

Serbian case law sometimes erroneously states, in accordance with the current definition of rape, that only a person who is not capable to resist could be considered as a helpless person. In that sense it is stated in one decision that the state of helplessness does not exist only because of the fact that the passive subject is 14 years old boy, but it is necessary to prove imbalance of power between defendant and the victim. "The minor victim was capable to provide adequate resistance to perpetrator, having in mind his physical and intellectual development, but he did not resist due to emotional relationship between him and perpetrator... Helpless person, in the sense of Criminal Code can be considered only a minor who is not able to resist at all."[18] In this particular case, if the victim was under the age of 14, there would exist the elements of criminal offence Sexual intercourse with a child.

17 Appellate Court in Kragujevac, Judgment Kž1. 849/2016, 23 June 2016.

18 District Court in Užice, Judgment K. 62/2003, 30 October 2003.

2. Mens rea – *the criminal state of mind*

The basic form of this crime can only be committed with intent. Intent must include perpetrator's knowledge of health condition of helpless person, or other condition due to which passive subject is incapable to resistance.

If the perpetrator wrongly supposed that the passive subject is not helpless, but able to resist, this issue shall be resolved according to general rules of factual error. Every factual error is characterized by the fact that the perpetrator has a misconception of a fact which is a necessary assumption of either realization of the elements of a crime or existence of some basis of justification of criminal offence.[19] According to the German legal theory, such error (*Tatbestandsirrtum*) exists when "perpetrator of the crime is not aware of some legislative factual element (*gesetzlichen Tatbestand*) of the crime."[20] Legal theory points out that factual error is "a misconception about some factual element of criminal offence that is prescribed by the law, and that a person who acts in this way does not act intentionally, so such an error excludes the intellectual element of the intent.[21]

In terms of awareness and will, Serbian courts generally accepts that it is sufficient that the offender is aware of the possibility that the passive subject is a helpless person, and the offender agrees to abuse such a condition, for the purpose of committing a sexual intercourse or an equal act. Therefore, sexual intercourse or equal act are always intentional acts that could be executed only with direct intent, but regarding the exploitation of the incapacity for resistance, the perpetrator could act with eventual intent (with an awareness that the passive subject is helpless person and acceptance of consequences). According to the Serbian Supreme Court decision:

> "The perpetrator of the criminal offence sexual abuse of helpless person is criminally responsible even when he is not sure whether the passive subject, due to mental conditions is not able to express her free will and consent on sexual intercourse, but the perpetrator is aware of the possibility that the passive subject does not consent to sexual acts, and despite engagers in sexual intercourse".[22]

In the case of more severe forms of the crime, when a qualificative circumstance is a more severe consequence (serious bodily injury or death), the perpetrator should act negligently in relation to this consequence. Otherwise, when the more severe consequence is covered by the intent of the offender, then there would be the joinder of criminal offences: sexual abuse of helpless person and serious bodily injury or murder.

In the case of more severe forms in which the qualificative circumstance is the age of victim (minor or child) or commission of the crime by several

19 Igor Vuković, *Krivično pravo, Opšti deo* (2021), 246.

20 Johannes Wessels, *Strafrecht – Allgemeiner Teil – Die Straftat und ihr Aufbau* (1996), 121–122.

21 Claus Roxin, *Strafrecht – Allgemeiner Teil, Band I, Grundlagen Aufbau der Verbrechenslehre* (1997), 405.

22 Supreme Court of Serbia, Judgment Kž1 1367/88, 30 September 1989.

persons, or particularly cruel or degrading manner of execution, the perpetrator must be aware of this circumstances that constitute a more serious forms of crime.

All these subjective facts are mostly determined indirectly – from objective facts, but also can be determined by the offender himself, when s(he) describes his/her inner life (e.g. confession) or by the other person (e.g. psychiatric or psychological examination, examination of the accused at the main trial, etc.).[23]

III "NEW" DEFINITION OF RAPE AND SEXUAL ABUSE OF HELPLESS PERSON

The Istanbul Convention defines rape as "*non-consensual* vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object".[24] Serbia ratified the Istanbul Convention in 2013, which requires redefinition of existing definition of rape that implies existence of coercion, in the sense of non-consensual sexual acts. Instead on coercion, the focus is on the lack of consent on sexual acts. It would logically require redefinition of the criminal offence sexual intercourse with a helpless person.

In this regard, two possible legislative solutions are mentioned, either to regulate non-consensual sexual acts as particular crime, or to regulate them as a particular form of rape, without force.[25]

Croatian and Montenegrin legislative solutions, that are, like Serbian, successors of Yugoslav criminal law, represent illustrative models of different legislative techniques in this regard.

Croatia implemented the Istanbul Convention by predicting non-consensual sexual intercourse and rape as separate crimes. Non-Consensual sexual intercourse (art. 152 of CC) is committed by a person who engages in sexual intercourse or an equivalent sexual act with another person without this person's consent, or who induces another person to engage without his or her consent in sexual intercourse or an equivalent sexual act with a third party or to perform without his or her consent a sexual act equated to sexual intercourse upon himself or herself. Rape implies the same actions committed using force or by threat of an imminent attack on the life or limb of the raped or other person (Art. 153). If the victim of both crimes is particularly vulnerable person because of disability or severe physical or mental disorder, separate, more severe crime, with harsher punishment would exist – serious criminal offence against sexual freedom (Art. 154). [26]

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23 Vanja Bajović, *O činjenicama i istini u krivičnom postupku* (2015), 28.

24 Council of Europe, Convention on preventing and combating violence against women and domestic violence – CETS 210 (Istanbul Convention), November 2014.

25 Zoran Stojanović, "Silovanje bez prinude – Usaglašavanje KZ Srbije sa članom 36 Istanbulske konvencije", *NBP-Žurnal za kriminalistiku i pravo*, Vol. 21, No. 1/2016, 2–4.

26 Kazneni zakon Hrvatske, *Narodne novine,* no. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21.

In Montenegro, by contrast, both non-consensual sexual intercourse and forced sexual intercourse are prescribed as various forms of rape (Art. 204.) with the most severe punishment prescribed in the case when the sexual intercourse was committed with the use of force or in the case of sexual intercourse without consent or by threat that something will be discovered what would harm the honour and reputation of the passive subject, or of some other evil, the punishment is lighter (1-8 years of imprisonment). Sexual abuse of helpless person is regulated as a separate criminal offence (Art. 205.) which is defined in the same manner as in Serbian Criminal Code, in the sense that it requires "exploitation of mental illness, backward mental development, mental disorder, helplessness or some other condition" due to which the victim is not capable to defend.[27] Therefore, the definition of this crime starts from the classic definition of rape as a forced sexual intercourse, so for the sexual abuse of helpless person is required that the passive subject is incapable to defend, while incapability for giving a free consent is not mentioned.

In Germany, that often serves as a model for Serbian criminal legislation, a casuistic approach, typical for common-law systems, was applied in the implementation of the Istanbul Convention and redefinition of crimes against sexual freedom. In 2016 Germany redefined the classical "forced" rape, what entailed the cessation of crime "sexual abuse of person incapable of resistance",[28] since this crime is now integrated into the new criminal offence "sexual assault; sexual coercion; rape" (Sec. 177 StGB).[29]

Non-consensual sexual intercourse has become a basic form of rape, and 'classical' rape (with use of force) is more serious form of this crime. This criminal offence covers the previous crime of 'sexual abuse of person incapable of resistance' because the emphasis is no longer on passive subject who is 'incapable to resist', but on the passive subject who is not capable to freely form or express will in relation to sexual act. In other words:

- The perpetrator misuses the conditions of passive subject who is not able to create or express his/her will to oppose sexual acts.
- The perpetrator misuses the condition of passive subject who, due to his/her physical or psychological conditions is significantly limited in forming or expressing free will.

In order to be a 'legally valid consent to sexual act', the will of the victim must be "freely formed", i.e. there must be both freedom in the formation

27 Krivični zakonik Crne Gore, *Sl. list RCG*, br. 70/2003, 13/2004-ispr. i 47/2006 i *Sl. list CG*, br. 40/2008, 25/2010, 32/2011, 64/2011– dr. zakon, 40/2013, 56/2013-ispr., 14/2015, 42/2015, 58/2015-dr. zakon, 44/2017, 49/2018 i 3/2020.

28 Passive subject of this crime was a person incapable of resistance due to: a) mental illness; or b) disability; or c) addiction; or d) due to severe disorders of consciousness or e) when the passive subject is physically unable to resist (Former section 179 of StGB).

29 Strafgesetzbuch-StGB, Criminal Code in the version published on 13 November 1998 (*Federal Law Gazette* I, p. 3322), as last amended by Article 2 of the Act of 22 November 2021 (*Federal Law Gazette* I, p. 4906).

of the will (*Freiheit der Willensbildung*) and freedom in expressing the will, which implies the possibility of expressing and implementing the decision.[30]

A serious form of sexual assault, sexual coercion and rape exists when the perpetrator misuses the victim's inability to form or express a will, due to the victim's illness or disability. Consequently, the former criminal offence of sexual abuse of person incapable of resistance is now a more serious form of sexual assault, sexual coercion or rape, in case of ill or disabled victim. In this regard, the Federal Court of Germany noted in one decision that this crime, after 2016, was not decriminalized only because it was formally deleted from the Criminal Code for legal and technical reasons, because all relevant elements of this crime are contained in the appropriate parts of the incrimination under section 177. of StGB. "The new provisions of sec. 177 StGB particularly regulate in paragraphs 1., 2., and 4. so-called "inheriting rules" of former article 179, in the sense that protected legal values and incriminating object of attack remained the same."[31]

In addition, one of the most severe forms of sexual assault, sexual coercion and rape exists in the case when perpetrator exploits helplessness of the victim, that is a situation when the victim is unprotected and left at the mercy of the offender. The situation of 'unprotected victim' (*Die Lage des Opfers ist schutzlos)* exists primarily when the victim cannot avoid the actions of the offender without someone else's help, or when (s)he cannot count on the help of another person at all.[32] This form would include sexual abuse of disabled (wo)men by a person who takes care about him/her, but not sexual abuses by employees in hospital or care facilities, because German StGB regulates, as a separate crime –the sexual abuse of prisoners, detained persons or sick or vulnerable institutionalized persons (Sec. 174a of StGB).

Serbian legal scholars show a slight revulsion towards these changes, emphasizing evidentiary difficulties in determining non-consensual, forceless rape.[33] In this regard, it is stated that even classical rape was very difficult to prove when any resistance was absent, what is possible in the situations when the victim is completely "paralyzed" by fear, when the rape is performed in some extremely isolated place and so on. Having in mind that, it would be even more difficult to prove rape that according to law does not include any coercion, but only requires the existence of clearly manifested non-consent from a passive subject. Then, the question would be how such non-consent was expressed, whether it was clear and unambiguous, whether there was any resistance in relation to sexual act and so on. In some situation could be disputable whether the perpetrator correctly understood the non-consent of a passive subject, who did not show any, even the slightest resistance to

30 Urs Kindhauser, *Strafrecht-Allgemeiner Teil* (2015), 118.

31 BGH 4 StR 366/16– Beschluss vom 9. Mai 2017 (LG Essen).

32 Heinrich Wilhelm Laufhute, Ruth Rissing-van Saan and Klaus Tiedemann (Hrsg), *Strafgesetzbuch– Leipziger Kommentar (Grosskommentar)* (2010), 955.

33 Škulić (2019), *op. cit.,* 324–326; Stojanović (2016), *op. cit*., 13-17; Veljko Delibašić, „Usklađivanje krivičnog zakonodavstva sa Istanbulskom konvencijom"", *Zbornik Srpskog udruženja za krivičnopravnu teoriju i praksu* (2016), 186–187.

a sexual act. Proving non-consensual rape in practice would probably most often come down to an extremely troubling situation – 'word of the offender against the word of the victim.'[34] Illustrative in this regard is the fact that new conception of rape in Sweden as non-consensual sexual intercourse, led to increased number of criminal reports, but also to increased number of non-guilty verdicts, having in mind evidentiary difficulties especially when non-consent was not clear and unambiguous.[35]

Additional problem is concerned with the standard application of non-consent to mentally disabled women. Simply put, the focus on the state of mind of the victim may be difficult to apply to some mentally disabled women who may not be able to recall or describe their state of mind at the time of the sexual act. "This is particularly true for women who may not realize that they have the right to refuse sexual acts. More broadly, there is a clear concern that some people with mental disabilities may consider acquiescence in sexual demands to be the cost of social inclusion. This may include agreeing to sexual activity in the belief that the man will be their boyfriend or will take them on a "date" if they comply."[36] J. Benedet and I. Grant give an example of the highly publicized rape trial in New Jersey, in which a young woman who was constantly rejected and humiliated by a group of young men was allowed to tag along with them to a basement. Once in the basement, she was pressured to engage in escalating and degrading sexual activity. After the young woman left the basement, she spent half an hour waiting at the park for one of the young men to arrive for their promised "date."[37]

However, the whole discussion of *pro and contra* forceless rape is fruitless having in mind that Istanbul Convention does not leave possibility for a national legislator to question its provisions, but rather dictates incrimination of all unwilling sexual acts, not just those taken under coercion.[38] The new definition of rape as non-consensual sexual act would also require redefinition of the crime „sexual intercourse with helpless person", by defining a passive subject as a person who, due to the condition s(he) is in, cannot express his/her non-consent to sexual intercourse or equal act. It also should be noted

34 Škulić (2019), *op. cit*., 325–326.

35 Linnea Wegerstad, 'Sex Must Be Voluntary: Sexual Communication and the New Definition of Rape in Sweden', *German Law Journal*, Vol. 22, No. 5, 2021, 741.

36 Janine Benedet and Isabel Grant, "A Situational Approach to Incapacity and Mental Disability in Sexual Assault Law", *Allard Faculty Publication* (2013), 8.

37 *Ibid,* 9.

38 In this regard Z. Stojanović reasonably criticizes the legislator for not analyzing the content of international treaties in process of ratification and because of a lack of public discussion, but the ratification of international treaty is reduced to mere formality. "International treaties increasingly impose on State Parties the obligations to prescribe new criminal offences or to spread existing ones. In this regard, regression is noted in terms of criminal intervention in the field of sexual freedoms: while until a few decades ago a liberal position was advocated in this area, things changed significantly at the beginning of the 21st century. Although the spread of repression in this area is sought to justify the wider protection of the freedom in this sphere, especially protection of children, this does not seem convincing, but it seems that punitive populism predominated, to a significant extent". Stojanović (2016), *op. cit*., 19.

that the Serbian court practice, despite existing legal provision, mostly takes a stand that the key marker of this crime is "non-consent of a passive subject" i.e. the fact that the passive subject is unable to form and express relevant consent to sexual intercourse or equivalent act.[39] But sometimes even the free consent of disabled person is put under question by the courts, denying these people the rights to sexual expression and fulfilling relationships, considering that any sexual intercourse with these persons is '*exploitation of their helplessness*', which is, according to the existing definition, the central element of the crime sexual abuse of helpless person.

IV SEXUALITY OF A DISABLED PERSON AS A TABOO

The United Nation Convention on the Rights of Persons with Disabilities (CPRD) guarantees disabled people the right to "enjoy legal capacity on an equal basis to others in all aspects of their lives." (Article 12).[40] ECHR also guarantees to everyone right to a private life, family life, personal development and right to develop healthy relationships with others (Art. 8). Some authors criticize CPRD provisions emphasizing that "analysis of CPRD negotiations, at the beginning of the twenty-first century, demonstrates how sexual rights were downgraded to focus on family life, resulting in no mentions of sexuality, sexual agency or non-hetero-patriarchal identities."[41] However, although not explicitly mentioned in the Article 12, there is a belief that "equal legal capacity in all the aspects of live" also include those pertaining to sex and relationships.[42] The UN Standard Rules on the Equalization of Persons with Disabilities argues that disabled people have a right to "experience sexuality, have sexual relationships..., information in accessible form on the sexual functioning of their bodies" (Rule 9.2).[43] Sexuality and sexual relationships are fundamental parts of every human life, and are critical to overall physical, emotional, and social health and well-being. According to the World Health Organization, "sexual health requires a positive and respectful approach to sexuality and sexual relationships, as well as the possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination and violence. For sexual health to be attained and maintained, the sexual rights of all persons must be respected, protected and fulfilled."[44]

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39 Škulić (2019), *op. cit.,* 359.

40 UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106.

41 Marta Shaaf „Negotiating sexuality in the Convention on the Rights of Persons with Disabilities", *International Journal on Human Rights*, Issue 14, 2011.

42 Sonali Shah, "Disabled People are Sexual Citizens Too – Supporting Sexual Identity, Well-being and Safety for Disabled Young People", *Frontiers in Education*, Vol. 2, 2017, 2.

43 UN General Assembly, Standard Rules on the Equalization of Persons with Disabilities, *https://www.un.org/disabilities/documents/gadocs/standardrules.pdf*.

44 World Health Organization, World Sexual Health Day, 2022, *https://www.who.int/news-room/events/detail/2022/09/04/default-calendar/world-sexual-health-day*.

Despite such proclamation, sexuality of disabled people is still a taboo topic. They are perceived as asexual (or in some cases hypersexual), incapable of sexual/marriage partnership or reproduction.

Even more, some legal provisions are such that directly or indirectly incriminate any sexual intercourse with a disabled person. For example, the Family Law of Serbia states, as one of the forms of domestic violence "incitement to sexual intercourse or sexual intercourse with a person younger than 14 years old or with a helpless person (Art. 197, par. 2, p. 4).[45] With this Article the legislator declares sexual intercourse with a helpless person (and this definition include all persons with physical or intellectual disabilities) as violence, which maintains the position that people with disabilities are asexual and that the relationship between sexuality and a person with disabilities is exclusively at the level of violence and crime.

The Criminal Code does not contain a similar provision, requiring, for the existence of criminal offence "exploitation of the state of victim's helplessness", but the judicial decisions often stand on the view that any sexual intercourse, even consensual, with a mentally disabled person, constitutes this criminal offence. Illustrative in this sense is one older judgment of Serbian Supreme Court which states:

> "Psychiatric expertise found that the victim suffered from schizophrenia and that her mental impotence was reflected in an increased sexual drive that she could not control, neither she was able to resist a person who wanted to have sexual intercourse with her... This increased sexual drive was a result of delusional ideas about her sexual attraction, and the victim could not control it, even though sexual intercourse itself did not mean any pleasure for her."[46]

Even in the recent judgments, the courts share the same view. In that sense is emphasized that "Consent to sexual intercourse or equal act by the mentally disabled person, and even her/his initiative in this regard, does not exclude the existence of this criminal offence."[47]

It is not just a Serbian problem, but at the global level, sexuality of disabled people is not accepted but seen as problematic under the public gaze. In that sense American author M. Gill gives an interesting example of two women with intellectual disabilities who lived together in residential home, entered in same-sex relationship and residential staff separated them in different rooms because of "inappropriate behavior". M. Gill concludes that such decision was based on assumptions about "not only when and where one can be sexual, but also who can be sexual".[48] Even the Criminal Code of Maryland provides that a person may not ... engage in sexual contact with another if the victim is a mentally defective individual, a mentally incapacitated indi-

45 Porodični zakon, *Sl. glasnik RS*, br. 18/2005, 72/2011, 6/2015.

46 The Highest Court of Serbia, Judgment Kž.1.1367/88, 30. September 1989.

47 Appeal Court of Kragujevac, Judgment Kž1 2560/2012, 18 June 2012.

48 Michael Gill, *Already Doing It– Intellectual Disability and Sexual Agency* (2015), 13–15.

vidual, or a physically helpless individual, and the person performing the act knows or reasonably should know the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual.[49]

This is supported by an old theoretical view that "sexual abuse of disabled children is OK, or at least not as harmful as sexual abuse of other children"[50] or "these children won't understand what's happened, therefore won't be damaged by it".[51] It goes without saying that such statements are unconfirmed and dangerous. Disabled young people have historically been excluded from dominant processes of socialization and learning that prepare people for love, sex, and reproduction.[52] Parents, educators, and health professionals often feel uncomfortable or unprepared to discuss issues around sexuality with them.[53] This is generally related to the perception that disabled people are eternal children "innocent, naïve, and asexual"[54] and incapable in any form of sexual expression and exchange.

Consequently, the legislator *de facto* allows sexual intercourses only between both mentally disabled partners, while intercourses between disabled and non-disabled partners could always constitute criminal offence, despite mutual consent of the partners. When it comes to sexual intercourses of both mentally disabled partners, then the offender cannot be held criminally liable according to general rules of guilt and intent, so the element of 'exploitation' of passive subject doesn't exist, consequently neither the criminal offence.

It is indisputably that disabled people should enjoy special protection, but at the same time disability should not diminish their right to express their own sexuality, what includes the right to marriage, parenthood, childcare, etc. A prerequisite for enjoying all these rights is the right to information and education that will help them to make a good decision. But people with disabilities are systematically denied access to knowledge about sexuality, sexual behaviour and services, what all together lead to their sexual marginalisation. "Obviously, it is the proper business of the state to stop sexual predators from taking advantage of developmentally disabled people. Less obviously, however, in doing so, the state has restricted the ability of developmentally disabled people to have consensual sex".[55]

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49 Md Code Ann, Criminal Law, §3-307 (West, Westlaw through all chapters of the 2011 Reg Sess).

50 Ruth Marchant, "Myths and facts about sexual abuse and children with disabilities", *Child Abuse Review*, Vol. 5, Issue 2, 1991, 22.

51 Margaret Kennedy, "Children with severe disabilities: too many assumptions", *Child Violation Review*, Vol. 1, Issue 3, 1992, 186.

52 Dominic Davies, "Sex and relationship facilitation project for people with disabilities", *Sexuality and Disability*, No. 18, 2000, 187–194.

53 Lauri J. East and Treena R. Orchard, "Somebody Else's Job: experiences of sex education among health professionals, parents and adolescents with physical disabilities in Southwestern Ontario", *Sexuality and Disability*, No. 32, 2014, 335–350.

54 East and Orchard, *op. cit.,* 336.

55 Benedet and Grant, *op. cit.,* 15.

The invisibility and oppression of disabled people's sexual lives in public spaces contributes to disabled young people's low levels sexual knowledge and inadequate sex education. However, it seems unreasonably to insist on sexual education in quite conservative society, where 12,2 % of disabled person had never attended primary school, and 32,8% of them have incomplete primary school education![56] Consequently, they are more vulnerable to all kinds of abuses, but they may not always recognize signs of violence, nor realize when they are being abused. Even if they realize that, their hands are often tied due to their dependence on the abuser himself and inability to report the crime. In this sense, the statistics related to reporting, prosecuting, and punishing the crime of criminal abuse of helpless person, are more than devastating.

V REPORTING AND PUNISHING SEXUAL ABUSE OF HELPLESS PERSON IN LEGAL PRACTICE

Numerous researches showed that disabled persons are more often exposed to sexual violence then people without disability.[57] It is explained by various factors, such as social isolation, limited sexual education, dependence on others including for intimate hygiene, reduced physical defenses and communication barriers that prevent disclosure of the abuse.[58] Despite the fact that similar researches are not performed in Serbia, it is reasonable to presume that the results would be similar in the sense that disabled people (especially women) are more exposed to sexual violence compared to non-disabled. Therefore, it is devastating fact that very few of these crimes are reported at all.

According to data from the Republic Statistical Office, during 2021 there were only four criminal reports for sexual abuse of helpless person and only two convictions.[59] In the same year two juvenile perpetrators were reported

56 According to last available census data from 2011, 12,2% (69043) persons with disabilities never attended primary school. This number represents 41.9% of the total population of the Republic of Serbia who never went to primary school, which means that more than 40 percent of the persons who never attended primary school today lives with some of the problems covered by the census (with disability), without a single year of education. This number should be added with 32,8 % of people with disabilities with incomplete primary school education! Marković (2016), *op. cit.,* 49, 53.

57 Monika Mitra, Vera E. Mouradian, Michael H. Fox and Carter Pratt, "Prevalence and characteristics of sexual violence against men with disabilities", *American Journal of Preventive Medicine*, Vol. 50, No. 3, 2016, 311–317; Diane L. Smith, "Disability, gender and intimate partner violence: Relationships from the behavioural risk factor surveillance system", *Sexuality and Disability,* No. 26, 2008, 15–28; Erika Harrell, "Crime against persons with disabilities, 2009–2015—Statistical tables" *Bureau of Justice Statistics,* U.S. Department of Justice (2017), *https://bjs.ojp.gov/redirect-legacy/content/%20pub/pdf/capd0915st.pdf.*

58 Ian Barron, Stuart Allardyce, Hannah Young and Rebecca Levit, "Exploration of the relationship between severe and complex disabilities and child sexual abuse: A call for relevant research", *Journal of Child Sexual Abuse*, Vol. 28, No. 7, 2019, 759–780.

59 Republički zavod za Statistiku*, Punoletni učinioci krivičnih dela u Republici Srbiji* (2021), 4, 8.

for this offence.[60] Therefore, in 2021. there was a total of six criminal reports for the criminal offence sexual abuse of helpless person, what is a negligible small number, especially compared to 79 rapes reported in the same year.

Likewise, according to official data, between 2011 and 2020 there were only 14 criminal reports for this criminal offence, five charges and five convictions.[61] It should be emphasized that within this "symbolic" number are those cases that do not relate only to disabled victims, but also to temporary helpless person under the influence of alcohol or drugs, bearing in mind that these persons also fall under the category of passive subject of the criminal offence of sexual abuse of helpless person. This number is negligibly small, and leads to conclusion that the highest number of sexual offences against disabled persons in practice remains unreported, unregistered, and unpunished.

This conclusion is supported by the research conducted in 2018 in Serbia, in which 136 disabled women participated. 10,1 % of women said that their partner often forced them to unwanted sexual activities, while 19,4 % said that he did that occasionally. According to survey, family members (occasionally 9,7%, often 1,4%), friends (occasionally 18,1%) and institutional employees (occasionally 1,6%) also requested unwanted sexual activities from them. In a far higher percentage women complained about other forms of non-sexual violence, including making jokes at their expense, neglecting their needs, leaving them without necessary help, insulting and threatening, hitting, and slapping, confiscating money and property, etc.

Some of the horrific testimonies of the interviewees are:

> "*My stepfather pimped me to his friend to get material for the house. He told me to be nice to his friend. I thought my mother did not know that, and I didn't tell her because I didn't want her to argue with my stepfather, but later I realized that she knew it, and then she also pimped me to my stepbrother.*"[62]
>
> *"There were some people coming to our house, and then I had to be in the garden, and when they left my mom let me in the house. I didn't know who these people are, but I realized when I grew up. Then, when I became a girl, my mom used to tell me that I must do the same, but I didn't want them, nasty and old, I wanted a young and nice guy.*"[63]

The findings of research showed that disabled women very rarely reported any kind of violence (only 19,8%), mainly to social workers, police, neighbors, women's organizations or health institutions. Accordingly, criminal legislation is not an obstacle in the protection of disabled women from sexual violence,

60 Republički zavod za Statistiku, *Maloletni učinioci krivičnih dela u Republici Srbiji*, (2021), 3.

61 Republički zavod za Statistiku, Bilten 677– *Punoletni učinioci krivičnih dela u Republici Srbiji 2011– 2020*, Beograd, (2021).

62 Iz Kruga – Vojvodina, Istraživački izveštaj o iskustvima žena sa invaliditetom sa porodičnim i rodno zasnovanim nasiljem, 2016, 7.

63 *Ibid.*

but the problem is reaching the court, as an 'final instance' that punishes such behavior. The problem remains invisible because disabled women often live in social isolation, they are dependent on 'abusers', so they have no way to report violence, nor do they know who to turn to. Some of the women do not recognize that what is happening to them is violence and many of them blame themselves for it, linking violence to their disabilities. Illustrative in this sense is the statement of one of the respondents who gave a negative answer regarding exposure to violence, with the following comment: "*My husband is a good man, he hits me from time to time, but only when I deserve it... And the money I get, I give him everything because I don't really understand much about money.*"[64]

Disabled women face obstacles to access justice due to widespread stereotypes, discrimination, and lack of procedural and reasonable adjustments. This can lead to doubts about the credibility of their statements, to the dismissal of their reports, which further leads to impunity and invisibility of the problem. In addition, they are afraid to report violence because of the fear of losing the necessary support.

A large number of persons with disabilities (especially mentally disabled persons) are deprived of legal capacity, contrary to Article 12 of the UN Convention on the Rights of Persons with Disabilities, that proclaims that people with disabilities have the right to equal recognition everywhere as persons before the law, and States Parties obliged to recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.[65]

A person deprived of legal capacity cannot make decisions on his/her own behalf, does not have the opportunity to choose where s(he) wants to live and with whom, cannot dispose of his/her property, cannot marry, cannot freely decide about giving a birth, does not have the right to vote.[66] In most cases the existence of disability, in the form of a medical diagnosis, is a reason for deprivation of legal capacity, and the practice of complete deprivation of legal capacity mostly affects people with intellectual and psychosocial disabilities.[67] In this way, these persons are put completely in a dependent position on others, often the abuser himself, who is then paradoxically expected to report the violence.

VI CONCLUSION

In spite of the fact that women with disability are more exposed to not only sexual but all kinds of violence, criminal reports and proceedings for

64 *Ibid.*, 8.

65 This problem is noticed by the United Nations Committee on the Elimination of Discrimination against Women who expressed concern about the deprivation of legal capacity and guardianship regime in the Serbia, which restricts the legal capacity of many women with disabilities, as a consequence of which they cannot marry, form a family, acquire access to justice or vote. CEDAW/C/SRB/CO/4, para. 45.

66 Kosana Beker, *Lišenje poslovne sposobnosti – Zakoni i praksa u Republici Srbiji* (2014), 7.

67 Kosana Beker and Tijana Milošević, *Nasilje nad ženama sa invaliditetom u rezidencijalnim institucijama – polazna studija* (2017), 111.

criminal offence "sexual abuse of helpless person" are quite rare in Serbian legal practice. People with disabilities and their lives are quite invisible both in life and in law. The Criminal Code provides them protection against sexual violence through the criminal offence "sexual intercourse with helpless person", which is defined in correlation with the rape, as forced sexual intercourse, so the central element of this crime, that excludes resistance because of the victim's helpless state, is 'exploitation of the victim's helplessness'. Such formulation could lead even to punishment of consensual sexual intercourses of persons who are legally considered 'helpless', thereby denying these people equal rights to have control over, choices about, and access to their sexuality and fulfilling relationships. Even more, the Family Law of Serbia classifies sexual intercourse with a helpless person as one form of domestic violence.

Implementation of Istanbul Convention would require a new definition of rape as non-consensual sexual acts, what would also require redefinition of the criminal offence sexual abuse of helpless person, focusing on the consent of the victim. It is questionable whether such definition would improve position of the victim or just increase evidentiary difficulties in proving the rape, in the sense of the word of the offenders against the word of the victim. The problem of 'voluntary consent' of disabled people is also pointed out, since such victim often has no other option but to agree to sexual acts, especially when she is dependent on the abuser. Besides, the focus on the state of mind of the victim could be difficult to apply to some mentally disabled women who may not be able to recall or describe their state of mind at the time of the sexual act. Some people with mental disabilities may consider sexual intercourse or similar acts as the cost of social inclusion or accept sexual activity because they are worried about the consequences of refusing.

However, regardless of the way of defining the rape and consequently the sexual abuse of helpless person, the official statistic data about this crime indicate that the problem is not in legal regulation on the normative level, but it should be sought at educational, financial, social, and other non-legal levels.

Despite the logical assumption and numerous research showing that disabled women are more often victims of sexual and all other forms of violence, the number of reported and prosecuted criminal offences sexual abuse of helpless person is negligible. The reasons for that lay in the facts that the victim is often fully dependent on the abuser, there is no one to turn to, and sometimes she even doesn't recognize the violence. Sexuality of disabled people is not accepted but seen as controversial issue. Disabled young people have law levels sexual knowledge and inadequate sex education. As a consequence, they are more vulnerable to sexual violence. However, it is illusionary insisting on sexual education of disabled women who even don't have primary education. Serbian statistic is devastating in this regard, bearing in mind that 12,2 % of disabled persons had never attended primary school, and 32,8% of them didn't complete primary school education. This fact further complicates their employment, making them fully economically dependent, so it is not surprising that a large number of disabled people in Serbia, contrary to the requirements of international conventions, are deprived of legal

capacity. It places them completely in an addictive position and isolates them from the "real world' outside their family or institutional 'shelters'. What happens within these 'shelters' stays within the 'shelters', even the violence!

Criminal law and procedure should always serve as *ultima ratio*, or a final measure applied only when all other measures did not give results. Therefore, it is unrealistic to expect that the new definition of rape and sexual abuse of helpless person in the sense of non-consensual sexual acts, will have any result in the protection of disabled women, without other non-legal measures directed to their social and educational inclusion.

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SEKSUALNO NASILJE NAD ŽENAMA SA INVALIDITETOM U SRPSKOM KRIVIČNOM PRAVU I PRAVNOJ PRAKSI

Apstrakt

Autori u radu analiziraju normativna obeležja krivičnog dela obljube sa nemoćnim licem, pitanje njegovog mogućeg redefinisanja u skladu sa Istanbulskom konvencijom, kao i pitanje njegove primene u pravnoj praksi.

Uprkos brojnim istraživanja koja pokazuju da su žene sa invaliditetom daleko češće izložene različitim oblicima svih vidova nasilja, pa i seksualnog, zvanični statistički podaci vezani za prijavljivanje i vođenje krivičnog postupka za krivično delo obljuba nad nemoćnim licem su poražavajući. Osobe sa invaliditetom i njihovi problemi su zanemareni i nevidljivi, kako u životu, tako i u pravu, uprkos činjenici da oko 8-10% populacije u Srbiji živi sa ne-

kim oblikom invaliditeta. Krivični zakonik im pruža zaštitu od seksualnog nasilja kroz krivično delo obljuba sa nemoćnim licem, koje je definisano u korelaciji sa krivičnim delom silovanja, kao prinudne obljube, te je osnovno obeležje ovog krivičnog dela iskorišćavanje stanja nemoći pasivnog subjekta. Ovakva formulacija preti da inkriminiše i dobrovoljne seksualne odnose lica koja se pravno smatraju "nemoćnim", a Porodični zakon, štaviše, seksualni odnos sa nemoćnim licem svrstava u jedan od oblika porodičnog nasilja.

Primena Istanbulske konvencije zahteva da se silovanjem smatra svaka nedobrovoljna obljuba ili sa njom izjednačen čin, što će, po logici stvari, podrazumevati i redefinisanje krivičnog dela obljuba nad nemoćnim licem, prebacivanjem akcenta na saglasnost žrtve i mogućnost davanja takve saglasnosti. Međutim, diskutabilno je da li će takva definicija zaista i poboljšati položaj žrtve ili pak samo nametnuti dokazne poteškoće kod utvrđivanja ovih krivičnih dela, koje će se neretko svoditi na reč učinioca protiv reči žrtve. Ukazuje se i na problem dobrovoljnog pristanka osoba sa invaliditetom koje, usled svog zavisnog položaja od učinioca, često i nemaju drugu mogućnost već da na obljubu pristanu, u strahu od posledica odbijanja.

Zanemarljivo mali broj krivičnih prijava i pokrenutih postupaka za ovo krivično delo ukazuje da problem nije u zakonskoj definiciji, već ga prevashodno treba tražiti u društvenim, ekonomskim, obrazovnim i drugim vanpravnim činiocima. Lica sa invaliditetom su neretko u potpunosti zavisna od zlostavljača, nemaju kome da se obrate, a neretko nisu u stanju ni da prepoznaju nasilje. Seksualnost osoba sa invaliditetom je još uvek tabu tema iako im brojni međunarodni instrumenti garantuju jednaka prava na privatni i porodični život. Ipak, iluzorno je insistirati na njihovom seksualnom obrazovanju koje bi im pomoglo da prepoznaju i prijave seksualno nasilje, kada zvanični podaci u Srbiji pokazuju da 12,2% osoba sa invaliditetom nikada nije pohađalo ni osnovnu školu, dok je 32,8% nije završilo. Time se onemogućava i njihovo zapošljavanje a neretko se i u potpunosti lišavaju poslovne sposobnosti. Na taj način se lica sa invaliditetom doživotno stavljaju u zavisan položaj i izoluju iz „stvarnog sveta" van porodičnih ili institucionalnih „zidina". Sve što se desi u okviru „zidina" tu i ostaje, te i nasilje.

U tom smislu, krivično pravo služi kao *ultima ratio* ili krajnja mera, ali nerealno je očekivati da bi normativna izmena opisa krivičnog dela silovanja i obljube nad nemoćnim licem doprinela boljoj zaštiti osoba sa invaliditetom, bez njihove prethodne društvene, ekonomske i obrazovne inkluzije.

Ključne reči: *Obljuba nad nemoćnim licem; Žene sa invaliditetom; Seksualnost; Seksualno nasilje.*

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DIFFICULTIES IN THE CRIMINAL PROTECTION OF THE SEXUAL INTEGRITY OF WOMEN AND GIRLS WITH DISABILITIES

Abstract

Women and girls with disabilities are at a high risk of sexual violence, and there are numerous difficulties when it comes to their protection in the field of criminal law. The authors analyze the most important obstacles in the prosecuting and trial on the example of a court case. In addition to the need to protect and empower persons with disabilities (vulnerable victims) in criminal proceedings in Serbia, it is necessary to change the approach to prescribing criminal acts of sexual violence (rape and enforced intercourse of a helpless person). Thus, better protection of the sexual integrity of persons with disabilities would be achieved, and in accordance with relevant international standards, their possible discrimination would be further prevented. The paper examines the proposed solutions according to the provisions of the Istanbul Convention of the Council of Europe (CETS 210) and comparable examples in the legislation from Germany and Slovenia. The authors state that changes in criminal law can improve the protection of the sexual integrity of women with disabilities only if they are accompanied by an altered social approach to women with disabilities.

Key words: *Person with disability; Female victims; Sexual violence; Enforced intercourse of helpful person.*

I INTRODUCTION

The standardization of acts of perpetration in sexual crimes is particularly sensitive due to the intimate nature of sexual relations and the unclear boundaries of permissible and unacceptable (and punishable) sexual behavior. Therefore, criminal protection of sexual integrity and sexual freedom is reduced to a minimum. It is regularly consistent with the given, historically and culturally conditioned, concept of human sexuality. In the Western cultural milieu, from 1960 (the so-called "sexual revolution") until today, espe-

cially in the period from 1980 to 2010 (decriminalization of homosexuality, protection of women's rights, etc.), the concept of sexuality has changed significantly in the direction of increasing respect for sexual diversity with the aim of expanding the protection of the sexual rights of the individual under the influence of human rights.[1] Each stage of a 'conquest' of sexual freedoms has been accompanied by an increasing variety of situations that require criminal intervention, which in turn complicated the 'task' of criminal law to protect sexual freedoms and sexual integrity.[2] A new step towards the fuller protection of women's sexual freedom, sexual integrity and privacy marks the adoption of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence[3] (hereinafter: CETS 210). The member states of the Council of Europe are mostly the signatories of CETS 210, including all members of the European Union (hereinafter: the EU), since the EU, although not a state, signed the convention to demonstrate its adherence to its standards. In fact, EU bodies continue legislative activities in order to achieve uniform and efficient implementation of CETS 210.[4] The Republic of Serbia, as a candidate country for EU accession, has signed and ratified the convention,[5] although it has not fully implemented it.

Changes in the concept of sexual violence against women under CETS 210 could also be important for girls and women with disabilities,[6] who are more often than others at constant risk of being victimized by violence and sexual abuse. The particular vulnerability of women with disabilities and their greater exposure to violence is an obvious consequence of the accumulation of personal and social risk factors. People with disabilities are usually treated in society as passive users of the care and social care services, which affects their social exclusion. At the same time, women with disabilities are discriminated against on the basis of gender and disability (and persons with intellectual disabilities even on the basis of the type of disability in relation to women with sensory or physical impairments).

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1 Dagmar Herzog, *Sexuality in Europe, A Twentieth-Century History* (2011), 195-197.

2 Beatriz Corrêa Camargo and Joachim Renzikowski, 'The Concept of an "Act of a Sexual Nature", Criminal Law,' *German Law Journal,* Vol. 22, No. 5, 2021, 768.

3 Council of Europe, Convention on preventing and combating violence against women and domestic violence (adopted 7 May 2011, entry into force 1 August 2014), *CETS* 210 (Istanbul Convention), available at: *https://rm.coe.int/168008482e.*

4 European Commission, Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence, Strasbourg, 8 March 2022 COM(2022) 105 final 2022/0066 (COD), available at: *https://ec.europa.eu/info/sites/default/files/aid_development_cooperation_fundamental_rights/com_2022_105_1_en.pdf.*

5 Zakon o potvrđivanju konvencije Saveta Evrope o sprečavanju i borbi protiv nasilja nad ženama i nasilja u porodici [Law on Ratification of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence], *Official Gazette of RS – International Agreements*, No. 12/2013.

6 A person with congenital or acquired long-term physical, sensory or intellectual impairments that limit their life activities and, in unison with various obstacles, prevent them from participating in social life under equal conditions.

Discrimination against women in terms of health and maintenance of social gender inequalities through the operation of institutions of the social health system[7] has the consequence that society fails to recognize the need to provide more favorable living conditions and a better social inclusion of women with disabilities. In terms of their own sexuality, they are discriminated against both in relation to non-disabled women and in relation to disabled men.[8] The circumstance of occupying a marginal economic and social position is conducive to establishing and maintaining a power imbalance between women with disabilities and their environment, thus increasing their likelihood of becoming victims of violence and sexual abuse. [9] This is especially true for women with intellectual disabilities, who due to reduced cognitive abilities, communication barriers and lack of social skills are not able to perceive danger, defend themselves and exercise the right to access to justice as well as others. With these circumstances, the perpetrator calculates in order to sexually exploit them, and does so with impunity.

According to Joan Petersilia,[10] numerous criminological research conducted at the end of the 20th century in the United Kingdom, the United States, Canada and Australia confirm that disabled people are generally at a greater risk of victimization, and that sexual assaults on women with disabilities are particularly common against females with developmental disabilities. A study from 2021 for the Anglo-American region shows that the prevalence of sexual violence among adults with intellectual disabilities was 32.9%, i.e. that every third person with an intellectual disability suffered sexual abuse in adulthood, most often from another such person in conditions of collective accommodation.[11] Similar results on the prevalence of physical and sexual violence against women with health problems or disabilities compared to other women were obtained in the first European survey on violence against women, conducted in 2014 by Joanna Goodey under the auspices of the European Union Agency for Fundamental Rights (FRA).[12] It concluded that the prevalence of violence

7 Ellen Kuhlmann and Ellen Annandale, 'Gender and Healthcare Policy' in Ellen Kuhlmann, Robert H. Blank, Ivy Lynn Bourgeault, Claus Wendt (eds), *The Palgrave International Handbook of Healthcare Policy and Governance* (2015), 578-579.

8 S. J. Usprich, 'A New Crime in Old Battles: Definitional Problems with Sexual Assault,' *Criminal Law Quarterly*, Vol. 29, No. 2, 1987, 206.

9 Sussana Niehaus, Paula Krüger and Seraina C. Schmitz, 'Intellectually Disabled Victims of Sexual Abuse in the Criminal Justice System,' *Psychology*, Vol. 4, No. 3, 2013, 374.

10 Joan R. Petersilia, 'Crime Victims with Developmental Disabilities: A Review Essay,' *Criminal Justice and Behavior*, Vol. 28, No. 6, 2001, 656, 662.

11 Raluca Tomsa *et al.*, 'Prevalence of Sexual Abuse in Adults with Intellectual Disability: Systematic Review and Meta-Analysis,' *International Journal of Environmental Research and Public Health*, Vol. 18, No. 4, 2021, 12.

12 A victimization survey based on the interviews of 42,000 women from 28 countries concluded that 61% of respondents over the age of 15 who had health problems or were disabled had experienced sexual abuse (compared to 54% of non-disabled women). Weighing the results for the entire female population in the countries covered by the survey, according to the data that women with disabilities make up 16% of the population in the EU, it was concluded that women with disabilities are 3-5 times more likely to be victims of physical and sexual violence than other women (European Union Agency for Fundamental

against women in European countries requires the fastest possible adoption and harmonization of national legislation with CETS 210.c

The harmonization of national legislation with CETS 210 partly coincides with the obligations of the signatory states to the United Nations Convention on the Rights of Persons with Disabilities[13] (hereinafter: CRPD). This involves the fact that when it regulates the human rights of persons with disabilities, CRPD starts from the social model of disability. Therefore, among other things, CRPD stipulates the obligation of the contracting state to provide special protection for women and girls with disabilities from the multiple discrimination to which they are often exposed (Article 6). It is required to ensure equality before the law of persons with disabilities (Article 12) and effective access to justice in all court proceedings (Article 13, para. 1). State members undertake to take legal and other measures to prevent the exploitation, violence and abuse of persons with disabilities, including gender-related aspects (Article 16, para. 1). This includes the obligation to ensure effective laws and policies, including for women and children, to ensure that cases of exploitation, violence and abuse of persons with disabilities are identified, investigated and, if necessary, prosecuted (Article 16 (5) CRPD).

The described modern approaches to regulating the sexual rights of women (including the position of women with disabilities) require rapid adjustments of criminal law. However, it is difficult to get rid of traditional concepts, even when they are contradictory.[14] It is reasonable to assume that the conservative paternalistic approach to marginalized groups (including women and girls with disabilities) that comes to the force in criminal law cannot be easily changed.

Rights – FRA, *Violence against women: an EU-wide survey* (2014), 186-188). The above data on the prevalence of sexual abuse among women with disabilities are taken from point 5.1.1. Opinions of the European Parliament raporteur (The situation of women with disabilities – exploratory opinion request by the European Parliament 11/7/2018 on the basis of which the resolution was passed (European Parliament resolution of 29 November 2018 on the situation of women with disabilities, 2018/2685(RSP)). The same data are stated in the act of the European Disability Forum (EDF), *Violence against women and girls with disabilities in the European Union,* Position Paper 2021, 7-8. It should be pointed out that the research defines sexual abuse more broadly – in addition to physical and sexual violence, it includes psychological violence, sexual harassment and persecution, as well as any sexual act undertaken without the consent of the woman. According to the same methodology, in 2018 the OSCE conducted a survey for the areas of the so-called Western Balkans (including Serbia), Albania, Kosovo*, Ukraine and Moldova.

13 UN Convention on the Rights of Persons with Disabilities, resolution adopted by the General Assembly, 24 January 2007, A/RES/61/106, available at: *https://refworld.org/docid/45f973632.html*. Ratified in the RS by the Law on the Ratification of the Convention on the Rights of Persons with Disabilities [Zakon o potvrđivanju Konvencije o pravima osoba sa invaliditetom], (*Official Gazette of the RS – International Agreements*, No. 42/2009).

14 A good example is the legal status of persons with mental disabilities who cannot be held responsible for a crime committed but are subject to criminal sanctions on the basis of which they are isolated in prison psychiatric institutions (Nataša Mrvić Petrović, 'Krivičnopravni položaj osoba sa mentalnim poremećajima', *Temida*, Vol. 10, No. 3, 2007, 41-43. The same controversy was also noted by Penelope Weller, 'Reconsidering Legal Capacity: Radical Critiques, Governmentality and Dividing Practice,' *Griffith Law Review*, Vol. 23, No. 3, 2014, 499, 504).

The paper examines whether full harmonization of Serbian criminal legislation in accordance with CETS 210 would contribute to reducing obstacles to equal access to justice for women and girls with disabilities. It is to be noted that the Criminal Code of the Republic of Serbia[15] (hereinafter: CC) was amended in 2016 in order to be harmonized with CETS 210, but no solution was adopted according to which sexual violence (including rape) implies any sexual intercourse or sexual activity without a woman's consent. Paradoxically, according to CETS 210, other criminal acts were prescribed in 2016: female genital mutilation, persecution, sexual harassment and forced marriage. The aim of this paper is to examine whether there is a legal gap in the legislation of Serbia that is detrimental to the protection of the sexual integrity of persons with disabilities and affects their discrimination in practice. Based on these analyzes and sound foreign examples, the most acceptable model of legislation and changes in practice should be recommended. The topic is all the more important because Serbia lacks empirical research on violence and sexual violence against women with disabilities,[16] while the legal features of sexual crimes are relatively well researched. Therefore, it was necessary to point out the obstacles that make it difficult for people with disabilities to access justice.

II THE IMPORTANCE OF CHANGING THE MODEL OF CRIMINAL PROTECTION OF WOMEN'S SEXUAL INTEGRITY

Sexual crimes have historically been understood as violent crimes that, in terms of criminal protection, equate situations of abuse of power of the victim, who is unable to resist or cannot make independent decisions about their sexual life. Unlike the traditional approach to the protection of sexual freedom, CETS 210 insists on the distinction between voluntary sex, which is considered acceptable behavior, as opposed to sex without the consent of another person, which is prohibited and punishable. Such a concept is more in line with the modern cultural pattern of permissible sexual behavior, which requires that even in criminal law discourse, sexual intercourse or sexual activity is to be understood as a matter of choice and communication in a sexual situation.[17]

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15 [Krivični zakonik], *Official Gazette of the RS*, nos. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019.

16 We refer to two studies: Olivera Ilkić and Lepojka Čarević Mitanovski, *Žene sa invaliditetom nevidljive žrtve nasilja – studije slučajeva...*, IZ KRUGA, Belgrade, 2008 and Kosana Beker and Tijana Milošević, *Nasilje nad ženama sa invaliditetom u rezidencijalnim ustanovama*, Inicijativa za prava osoba sa mentalnim invaliditetom MDRI-S, Belgrade, 2017. In the *Wellbeing and Safety of Women* report, the OSCE-led *Survey on Violence against Women: Serbia – Results Report*, *2019* women with disabilities are not mentioned at all (except that it is stated on page 6 that they have a marginal social and economic position). In fact, they are not even recognized as a special group of women.

17 Linnea Wegerstad, 'Sex Must Be Voluntary: Sexual Communication and the New Definition of Rape in Sweden,' *German Law Journal*, Vol. 22, No. 5, 2021, 743.

Article 36 of CETS 210 stipulates that a state member should prescribe as a criminal offense of sexual violence – including rape – any sexual intercourse or other sexual activity to which a woman denies consent. Incitement of a woman to involuntarily participate in sexual activities with a third party should also be considered as punishable behavior. Marital or emotional relationship or previous marital relationship should not be a reason to exclude the punishment of sexual violence committed against a woman by her ex-husband or partner. Voluntary consent to sexual intercourse or sexual activity must be the result of the free will of the person, which is assessed in the context of the given circumstances.[18]

Is it justified to equate involuntary sexual intercourse with violence? It seems so. The fact is that every human action that is understood under certain circumstances as a sexual act, by the nature of things violates the psychological integrity and privacy of another person. The same act, for example, hugging, kissing, touching a certain part of another's body may or may not have sexual significance, depending on the person targeted, the circumstances and with what motive it was undertaken.[19] The meaning of the action must be interpreted objectively, according to the generally accepted cultural pattern and morals, but also subjectively, considering the intentions of the perpetrator and the perception of the victim. Hence, it should be understood that sexual crimes are regulated to include the most serious encroachments on the privacy and sexual integrity of another individual without their consent – and this means regular coercion, as it is contrary to their free will – and the crimes are classified according to the gravity of the psychological consequences, and not according to the physical injuries on the victim's body.[20]

18 It should be noted that "free will" as a philosophical construction is usually understood normatively – as a possibility of choice (i.e. not doing something under duress) or as control over the choice made for which the subject must bear moral responsibility. Therefore, as soon as someone cannot act of their own free will, it means that they are forced to do something. Roberts thinks similarly when he says that every sexual assault is a crime with an element of violence (Roberts Julian V. 'Sexual Assault is a Crime of Violence,' *Canadian Journal of Criminology*, Vol. 37, No. 1, January 1995, 91).

19 Unlike sexual intercourse, whose sexual significance is obvious to everyone, the sexual connotation of acts of committing criminal acts of illicit sexual acts, sexual harassment or persecution does not have to be clearly expressed, as S. J. Usprich advises. We must not rule out the possibility that objectively neutral behavior, or what everyone else believes it to be, only motivates the perpetrator to take sexual action, as well as the fact that cultural differences affect the perception of permissible sexual behavior, and thus the perception of sexual assault (Usprich, *op. cit.*, 211). That is why in psychology, sexual assault is regularly associated with the wrong social communication between the perpetrator and the victim.

20 This involves the so-called formal criminal offenses whose features are realized as soon as the applicable illegal deed with a sexual connotation is undertaken. The perpetrator is to be severely penalized if there are serious consequences (injury or death of the victim). The deed is more regularly undertaken on the body of the victim, while the victim being forced to undertake sexual action on the body of the perpetrator is an exception. Prohibited behavior does not have to involve physical contact. This can occur, for example, when the victim is forced to watch other people's sexual acts or attend a sexual act committed by the perpetrator on himself.

How can criminal law adapt to new requirements? The change of the criteria according to which the limits of permitted sexual behavior are assessed requires the expansion of the zone of criminal intervention. Based on these changes, it will be possible to treat sexual violence as sexual situations that were in "the gray zone." In other words, when the perpetrator exploits a "vulnerable situation" in which the helpless victims find themselves, wherein, according to the circumstances of the case and their personal characteristics, they cannot be expected to offer resistance. Such an understanding is supported by the judgment of the European Court of Human Rights (ECHR) in the case of M. v. Bulgaria.[21] In para. 166 of the judgment, the court points out that there is a universal European trend towards recognizing the lack of consent of the victim as an essential element of rape and sexual abuse, even in European-continental legislation where traditional rape is associated with coercion, and that Bulgarian legislation was not harmonized with his trend, which is why there was no criminal prosecution of the perpetrators in this particular case.

It is clear that CETS 210 is the result of a different ideology that views sexual crimes in the broader social context of sexualized violence. It involves violence that is expressed in a sexual way, and is practiced by exploiting the imbalance of power that is established between the perpetrator and the victim on various grounds (gender, age, physical superiority, social status). Indeed, criminological research confirms that sexual crimes occur more regularly between acquaintances or even spouses and ex-partners, preceded by intimidation, psychological manipulation,[22] abuse of authority, power or position, and exploitation of the victim's powerlessness or subordinate position. Obviously, social circumstances have a affirmative effect on the perpetrators.

The question arises as to whether the changed concept of sexual violence under CETS 210 contributes to a better protection of the sexual integrity of girls and women with disabilities, especially those with intellectual disabilities, who are typical "vulnerable" victims of their environment.[23] The traditional

21 *M.C. v. Bulgaria*, application no. 39272/98, ECHR 621 of 4.12.2003, 3.

22 Coercion to sexual intercourse is applied as a last resort in a situation wherein the perpetrator has not previously gained sufficient trust from the victim. The manipulation strategy used by the perpetrator as a *modus operandi* to attract a woman to sexual intercourse determines the type of sexual crime committed by reducing the risk of coercion, as the perpetrator through the "seduction process" stops focusing on the woman as a victim and views her as a partner (Benoit Leclerc *et al.*, 'Offender-Victim Interaction and Crime Event Outcomes: *Modus Operandi* and Victim Effects on the Risk of Intrusive Sexual Offenses against Children,' *Criminology*, Vol. 47, No. 2, 2009, 607– 610). The perpetrator then applies coercion only when the woman's motivation to participate in sexual intercourse decreases (Benoit Leclerc *et al.*, *op. cit*., 613).

23 A 1994 study of sexual abuse of people with disabilities by the University of Alberta (Canada) found that 56.3% of perpetrators were members of the same social groups (neighbors, friends, family members, relatives) which is also valid in the case of abused non-disabled persons. The other 43.78% of perpetrators came into contact with the victim through the services they provided (psychological support, psychiatric services, health care, special transport, foster care), and it follows that the special ambience within which the disabled person resides increases the risk of sexual abuse. Dick Sobsey, 'Sexual abuse

approach to criminal protection, when it comes to women with disabilities, corresponds to the understanding that the subject matter are helpless, asexual persons who need to be protected from the possibility of leading a normal life within their means, and thus from sexual exploitation (even friendly), as this corresponds to the moral values of others.[24] It is reasonable to assume that the adoption of CETS 210, which entails a change in the traditional cultural pattern of (dis)allowed sexual behavior, must bring changes in that area as well. The question is, in which way? This remains to be seen based on the critical analysis that follows.

III THE LEGISLATION OF THE REPUBLIC OF SERBIA – BETWEEN THE MODEL OF COERCION AND THE MODEL OF CONSENT

The traditional approach towards crimes against women and sexual freedom which is based on coercion is shown in para. 269 (rape) and para. 270 (forced intercourse with a powerless person) of the Criminal Code of the Kingdom of Yugoslavia. The mentioned solutions, along with adjustments, were taken over in the later laws that were valid on the territory of Serbia. Rape was defined as forcing a woman to have sex (including having sex with a woman whom the perpetrator had incapacitated for defense), while according to para. 270, the accused was punished due to forcing intercourse on a woman not his wife and not capable of defense due to mental illness, dementia, impaired consciousness or for any other reason.[25] As can be seen, the state of powerlessness could have been caused by a physical or intellectual disability.

The exploitation of the victim's powerlessness in regards to sexual intercourse is now prescribed in Article 179 of the CC, under the same archaic name (forced intercourse with a powerless person) and with similar legal features as in the Criminal Code of the Kingdom of Yugoslavia. It differs in that the illegality does not exclude a marital relationship with the victim, marked as gender-neutral. Therefore, the act of execution is defined as any sexual intercourse, not just vaginal. Unlike rape, in the criminal offense under Article 179, the perpetrator exploits the state of incapacity of defense of a person who is considered incapable by law. As in the previous theory, it is not disputed that a helpless person is broadly recognized as a person with current or permanent disability, as well as other vulnerable people (due to illness,

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of individuals with intellectual disability' in Ann Craft (ed.), *Practice Issues in Sexuality and Learning Disabilities* (2004), 97.

24 Clare Graydon, Guy Hall and Angela O'Brien-Malone, 'The Concept of Sexual Exploitation in Legislation Relating to Persons with Intellectual Disability,' *eLaw Journal*, Vol. 13, No. 1, 2006, 166.

25 Mihail P. Čubinski, *Naučni i praktični komentar Krivičnog zakonika Kraljevine Jugoslavije od 27. januara 1929. godine, posebni deo* (1930), 209-210. There was legal discrimination – for the crime under para. 270 a sentence of up to 8 years in prison was stipulated, and up to 10 years for forced intercourse.

exhaustion from fatigue, consequences of childbirth, old age) who cannot put up any resistance, persons sound asleep, under the influence of alcohol or narcotics or disabled by the action of another person (not the perpetrator) – unconscious, tied up and the like.[26] The typical causes of incapacity are mental illness and mental retardation as forms of intellectual/mental disability, while incapacity or other conditions due to which a person is unable to resist may include physical disability or damage to the sensory organs. The general clause allows the state of powerlessness to be linked to other causes and situations, something which has been used amply by case or common law in the past and now, in order to among other things, achieve punishment in situations where the victim failed to resist even though they obviously did not consent to sexual intercourse. A more severe legal qualification can be applied in the case of a victim who is a minor or a child or if, incidentally, during sexual intercourse, the perpetrator negligently causes serious bodily injury or death to the victim.

From 2005 to 2016, a more severe punishment was prescribed for the criminal offense of rape (Article 178 CC) than for the criminal offense under Article 179. With the CC amendments from 2016, the legal ranges for the mentioned criminal offenses were equalized, which shows that the offenses are equally socially dangerous. This also eliminated the complaints of women's rights groups about discrimination against women with disabilities as victims of sexual intercourse against the infirm in relation to rape victims.[27] The ranges of punishments prescribed by law remained the same in the latest amendments to the CC from 2019, with stricter punishments prescribed for both crimes for more serious forms of crime committed against children or when death was incurred to the victim during the crime.[28] Despite the proposal to envisage involuntary sexual intercourse as a basic form of rape or, more appropriately, as a separate crime subsidiary to rape,[29] a solution that

26 Čubinski, *op. cit*., 210-211; Milan Škulić, 'Krivično delo obljube nad nemoćnim licem – normativna konstrukcija, neka sporna pitanja i moguće buduće modifikacije', *Crimen*, Vol. IX, No. 1, 2018, 44-45.

27 There are no obstacles to applying the legal qualification of rape to girls and women with disabilities nor to any other criminal offense from Chapter XVIII of the CC but it is easier to convict the perpetrator by applying the legal qualification of forced intercourse. 2021 statistical data on the sentences imposed on perpetrators of criminal offenses fails to confirm the assumption that the penalties for forced intercourse against a powerless person are milder than for rape (Republic Bureau of Statistics – RBS, *Bilten br. 677: Punoletni učinioci krivičnih dela u Republici Srbiji, 2020 [Bulletin No. 677*: *Adult perpetrators of criminal offenses in the Republic of Serbia, 2020]* (2021), 67). That it is easier to prove the existence of a criminal offense under Article 179 is confirmed by the data on the outcome of the accusation: in all five cases those accused for forced intercourse against a powerless person were convicted, while 34 were accused of accused, 24 persons were convicted, one was acquitted, and in other cases the proceedings were suspended (RBS, *op. cit*., 40-41).

28 For the mentioned most serious forms of criminal offenses from Article 178 and Article 179 of the CC, the amendments to the CC (*Official Gazette of RS*, No. 35/2019) prescribe a sentence of at least 10 years or life imprisonment. Previously, a prison sentence of at least 10 years and a prison sentence of 30 to 40 years were prescribed.

29 Milan Škulić, 'Teorijska podela krivičnih dela protiv polne slobode i njihovo mesto u krivičnopravnom sistemu Srbije' in Đorđe Ignjatović (ed.), *Kaznena reakcija u Srbiji.* VIII

is not in line with CETS 210 was retained. It is probable that it was considered sufficient to even out the ranges of the prescribed jail punishment for the mentioned crimes, and that the disputable situations of non-consent to sexual intercourse that was not performed with the use of coercion could be encompassed, with a broader interpretation, by the criminal offense of sexual intercourse with a powerless person.[30]

In order to apply the existing legal qualification from Article 179 of the CC, it is sufficient to prove that the forced sexual intercourse was committed or equated with another sexual act, that the perpetrator used a powerless person and that the perpetrator was aware of the victim's incapability. The most important difference in relation to rape is the absence of coercion: moreover, a crime also exists when the initiative for sexual intercourse was provided by the powerless victim, as well as if the person had consented to sexual intercourse, provided that the person is mentally ill or severely mentally retarded, with the assumption that they cannot exercise their free will independently.[31] Thus, the perpetrator then fully exploits the victim's powerlessness. However, if the victim, despite being mentally ill or mentally retarded or in a state of temporary disorder due to alcohol or psychoactive substance abuse, had a sufficiently preserved mental ability to give relevant consent to sexual intercourse, there is no criminal offense from Article 179. With regard to the perpetrator's intent, it is sufficient to prove that the perpetrator sought sexual intercourse, being aware of the possibility of the victim being an incapacitated person and agreeing to use the victim's condition for sexual intercourse.

Despite the fact that the CC does not prescribe sexual violence (rape) as involuntary sexual intercourse, Article 179 is usually applied to the situ-

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(2018), 82; Škulić, *op. cit*., 67-68. Stojanović believes that the situation when sexual intercourse is not desired should not be equated with forced sexual intercourse, especially since rape by the degree of wrongdoing stands out in relation to other sexual crimes, except for forced intercourse over a powerless person – for exploiting the state of powerlessness (Zoran Stojanović, 'Silovanje bez prinude. Usklađivanje KZ Srbije sa članom 36 Istanbulske konvencije', *Nauka, bezbednost, policija*, Vol. 21, No. 1, 2016, 3, 9).

30 According to Stojanović, in all situations when coercion was not used but the deed was performed against the will of the victim, there is the possibility of applying Article 179 of the CC, as "the only criterion is that the state of powerlessness of the victim has been exploited and that, as a rule, there is no defensive will of the victim in the forced intercourse" and it should be considered (Stojanović, *op. cit*., 8). Škulić confirms that in a part of criminal law theory, as well as in court practice, the inability to defy the perpetrator is often equated with the situation in which a powerless person cannot express consent with sexual intercourse, and when it is considered that the victim failed to give consent for sexual intercourse (Škulić, *op. cit*., 68). However, the application of the *intra-legem* analogy which extends the application of the standard of "infirm person" to many categories of persons is not in accordance with the principle of legality (Maša Hribar, 'Criminal Protection of Helpless Persons in the Light of the Provisions of KZ-1', *Pravnik: Revija za Pravno Teorijo in Prakso,* Vol. 75, No. 1-2, 2020, 71). It is more effective to stipulate a new criminal offense than to allow an overly broad and uneven interpretation of the legal standard of a powerless person in court practice.

31 Nataša Mrvić Petrović, *Krivično pravo – posebni deo* (2019), 135. Škulić cites an example from the practice of a sexually exploited woman suffering from schizophrenia with an increased sexual urge (due to irrational ideations about sexual attraction) which she could not control and direct (Škulić, *op. cit.,* 60).

ation when the victim fails to consent to sexual intercourse, as they could not under the given circumstances resist the perpetrator. As for the criminal offenses from Articles 178 and 179 the envisaged prison sentences are in the same ranges, it cannot be concluded that the existing legal gap can cause a lack of protection of the sexual integrity and sexual freedoms of women with disabilities. Therefore, expanding the boundaries of sexual behavior does not necessarily mean improving the protection of the sexual integrity of women with disabilities. The question is, why then would any changes occur?

By changing the concept of sexual assault (rape) according to CETS 210, the sexual abuse of a person with no free will to consent to sexual intercourse due to the nature of their disability or because they are temporarily prevented by external factors to express their disapproval of sexual intercourse should certainly be equated with involuntary sexual intercourse as a form of sexual violence or rape. Thus, the new concept of sexual violence is based on the consent model, demanding that the focus of proof shifts from the fact that sexual intercourse took place and that the sexually exploited woman was instable to determining the existence and content of free will. In a situation whereupon the victim could actually express such free will, it is important to consider when she could have consented to sexual intercourse, as well as whether she could have expressed her free will in defiance. The concept popularly called "no means no," when a woman clearly states or demonstrates by implicit action (body signal, behavior) that she does not consent to sexual intercourse is not applicable to situations where she cannot freely express her will or when she cannot correctly interpret other people's sexual behavior due to life inexperience or reduced cognitive abilities. The more comprehensive protection of the sexual integrity of a person who would not be able to give relevant consent is then necessary, even when the victim expresses her free will to have sex. The assumption is that this primarily pertains to children, minors up to the age when they can make decisions on their own sexual life, and people with severe mental illness or severe mental retardation (often with combined disability). Insisting on the consent of such persons would entail enabling their sexual exploitation.[32]

IV EXAMPLES OF EFFECTIVE FOREIGN LEGISLATION

Sexual violence or abuse of a person with a disability as well as other infirm persons can be defined as sexual intercourse or any sexual act committed against or required of such a person against their will or to which they cannot

32 Alan W. Bryant, 'The Issue of Consent in the Crime of Sexual Assault,' *Canadian Bar Review*, Vol. 68, No. 1, 1989, 133-134. He therefore recommends that special statutory rules regulate the responsibilities of guardians or managers of collective institutions in order to prevent sexual abuse and exploitation of minors or protégés with intellectual disabilities (*Ibid.*). Hewitt is of a similar opinion: severely mentally disabled people are unable to give consent or have the wherewithal to consent to sexual intercourse. As they lack understanding of the consequences of their consent, they should be protected by the stipulating of a special crime and special punishment should be provided for sexual abuse committed by persons in charge of their care (Stanley E. K. Hewitt, 'The Sexual Abuse of Young Persons with a Mental Handicap,' *Medicine and Law*, Vol. 8, No. 4, 1989, 410).

willfully consent due to physical, psychological, cognitive, or linguistic inferiority (to paraphrase the definition of child sexual abuse in Bange and Deegner's monograph[33]). It is *ratio legis* to penalize persons who take advantage of a victim's specific position and circumstances well known to the perpetrator, doing so covertly and using control over the victim and authority.

Considering that the criminal legislation of the Republic of Serbia belongs to the German variant of the continental legal system, we find effective foreign examples in German and Slovenian law.

Amendments to the German CC made in 2016[34] helped to harmonize the legislation with Article 36 of CETS. The Code envisages every involuntary sexual act as punishable, while the consent of the victim is given as an expression of free will. The provisions of Article 177 unite the criminal acts of sexual assault, sexual coercion and rape, which has created a conglomeration of different forms of punishable sexual relations committed against the free will of the victim, coercion or abuse of their powerlessness. The theory was determined in support of the aforementioned solution, which envisages 'gray areas' of sexual behavior as punishable acts of the crime of sexual violence (rape). The 'gray area' includes all events when the perpetrator fails to use coercion but exploits the passivity of the victim who is in a specific "vulnerable situation" due to which they cannot resist the abuse.[35]

The advantage of this legal solution is that the legal-technical sexual assault of a helpless victim (even one with a disability) is equated with other punishable sexual coercion (rape). Therefore, the accusation that persons with disabilities are discriminated against are dropped, which is further contributed to by the deletion of the definition of "mental disorder or mental illness or disability" from the list of the typical examples of victim powerlessness. Simply put, sexual assault always exists if the perpetrator recognizes the situation of the victim's powerlessness and uses their dominance for committing sexual intercourse, regardless of the reason why the victim is absolutely incapable of expressing their free will. The most important difference in terms of proof is that there will no longer be any need, as in the case of Serbian legislation, to prove the inability of a powerless victim to resist the perpetrator but rather, whether or not there is a possibility of expressing free will regarding sexual relations. Thus, a more subtle difference has been established between powerless persons in the sense that for example, a quadriplegic woman cannot contest sexual intercourse, but she is intellectually capable of expressing her free will clearly.[36] It is up to the legal practice to decide which way this will be carried it is a *questio facti*.

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33 Dirk Bange and Günther Degner, *Sexualler Mißbrauch an Kindern, Ausmaß, Hintergründ, Folgen,* (1996), 95.

34 German Criminal Code [Strafgesetzbuch] in der Fassung der Bekanntmachung vom 13. November 1998 (*BGBl.* I S. 3322), das zuletzt durch Artikel 2 des Gesetzes vom 22. November 2021 geändert worden ist.

35 Jörg Eisele, 'Das neue Sexualstrafrecht,' *Rechtspsychologie,* Vol. 3, No. 1, 2017, 9-10.

36 Jeisele, *op. cit.*, 14.

Para. 177 subpara. 2 (2) stiupulates that a perpetrator is exploiting a person severely restricted in expressing their will due to their physical or mental condition, unless they are convinced consent was given. The same terms of mental disorder are used as with the state of sanity (as per medical-psychological criteria). The solution is a step towards the "yes means yes" model in regards to people with disabilities whose implicit consent is necessary to take advantage of their sexuality, in which case the sexual partner should not be prosecuted. However, the requirement of a positive consent is more rigorous than in the previous legal solution (the same as in the current legislature of the Republic of Serbia), as it insists on the need to build up the protection of the sexual integrity of such a person. Restrictions in the expression of free will do not affect the validity of the consent given, so it may happen that the decision of relatives or guardians of these persons is not crucial in assessing the personal sexual needs of these persons, and that they may explicitly or implicitly withdraw their consent in the future or restrict certain sexual acts. The free will of a woman who has limited mental abilities to express her free will must be proven according to the concept of "no means no." In other words, it must be proven that a woman with a disability had not consented to sexual intercourse, which can be difficult in the case of a person with intellectual disabilities who can be very susceptible to manipulation.

Pursuant to CETS 210, the amendments to the Criminal Code of Slovenia[37] dated 30 June 2021 as per the "yes means yes" model have changed the features of the criminal offense of rape under Article 170 and sexual violence from Article 171. It is distinctive of both criminal offenses that direct perpetration (sexual intercourse or another sexual act) is undertaken without the consent of the victim, while there is more severe punishment when these acts are committed under duress or blackmail. The protection of sexual integrity is supplemented by the criminal offense of sexual abuse of an incapacitated person (Article 172). A powerless person is one who, due to mental illness, temporary mental disorder or severe intellectual disability, cannot give relevant consent to sexual intercourse or other sexual activity. According to the prison sentences (from one to eight years), the criminal offense under Article 172 is more dangerous for society in general and more severe than the basic forms of rape and sexual violence, for which there is a sentence of six months to five years in prison. As can be seen, according to the Slovenian decision from Article 172, only a woman with a severe intellectual disability can have the status of a "powerless person," while Article 170 or Article 171 would be applied in relation to women with physical disabilities who cannot contest sexual violence but can express resistance, as well as persons with mild intellectual disabilities.

In both legislations, the definition of sexual assault (rape) has been changed in accordance with CETS 210. At the same time, the legal solution has been retained wherein sexual intercourse with a powerless person who cannot express their free will regarding their sexual life is a distinct form of criminal offense (as in the German Criminal Code), or a distinct crime (as in the Slovenian Criminal Code), in accordance with the criminal law model

37 Kazenski zakonik, *Uradni list Republike Slovenije*, št. 50/12, 6/16, 54/15, 38/16, 27/17, 23/20, 91/20, 95/21, 186/21.

of coercion. The Slovenian solution has greater similarities with the existing CC of the Republic of Serbia and could be an acceptable model for making changes to the CC of the Republic of Serbia.

As the above examples show, a heterogeneous group of disabled persons (especially girls and women with intellectual disabilities) should be separated according to the criterion of whether they can understand the importance of sexual intercourse and make legally relevant decisions in this area of sexuality and express their free will. The first group are those who are physically unable to defy forced sexual intercourse but can form and express their defiance, usually verbally. The second group consists of those who have the possibility of physical defiance but are unable to understand the sexual situation and make a free decision. The changes require that women with disabilities are treated without the preconception that they are not *a priori* able to decide about their sexuality and that, being powerless, they should be protected from any sexual activity. The problem, however, is that a change of the concept does not necessarily enable a more effective criminal protection of persons with disabilities in practice.

A more psychologically adequate new concept of sexual violence from CETS 210 complicates the process of providing evidence for the existence of a crime. The problem is especially present in the continental legal systems in which the content of the standard of sexual intercourse and sexual activity are concretized by interpretation when applying the legal qualification. The intimacy and privacy of sexual relations makes it difficult to prove the commission and existence of a sexual crime. At the same time, the further we move away from actual or prevented violence, the more difficult it becomes to prove the facts according to which the existence of a crime is determined, as legal concepts and factual issues are intermingled when assessing whether or not a person has consented to sexual intercourse.[38] The accuracy of this assessment is documented by data from Sweden that the implementation of CETS 210 has affected the increase of reported rapes but that there was also an increase in acquittals, which indicates that the criterion by which consent is given (especially tacit) is unclear, and the court cannot easily assess whether participation in sexual intercourse was involuntary, especially if there were no clear signs of defiance and the victim's behavior was ambivalent.[39]

V OBSTACLES TO EFFECTIVE GAINING OF ACCESS TO JUSTICE FOR WOMEN WITH DISABILITIES

The experience of sexual abuse of all victims in general but especially girls and women with disabilities causes long-term psychological consequences (anxiety, depression, post-traumatic stress disorder, etc.) and an even larger withdrawal from society. As a rule, the consequences of a crime increase the functional limitations of a person with a disability or affect the

38 Bryant, *op. cit.*, 152.

39 Linnea Wegerstad, 'Sex Must Be Voluntary: Sexual Communication and the New Definition of Rape in Sweden,' *German Law Journal*, Vol. 22, No. 5, 2021, 741.

occurrence of a secondary disability. As sexual violence or abuse occurs in an isolated environment, the chances of the victim receiving help from others are slim. Because they are economically dependent on others and cannot take care of themselves, women with disabilities do not dare to report abusers if they are supported, cared for or assisted due to their disability, and thus the so-called dark figures of crime are high, especially if there is violence in the family or in a care institute.[40] Women with disabilities find it difficult to gain access to justice, both due to the limitations associated with disability and because of the reciprocal effects of their marginal social position. Therefore, CETS 210 emphasizes the mandate to help victims through cooperation with state bodies, as well as special support (Articles 20-22), the obligation to support victims of sexual violence (Article 25) and assistance in reporting violence (Article 27).

In the adversarial model of criminal procedure that dominates in modern legislation, the participation of the victim is most often reduced to the role of a witness. Thus the victim is obliged to participate in the stages of the procedure in which her character, reputation and propensity to lie are tested out. It is not enough for a witness to point out facts, but she must do so in an acceptable way, spontaneously and unprepared, in order to conclude from her behavior that she had testified credibly.[41] The position of the victim during the cross-examination is especially demanding, as she is exposed to questions and insinuations from the opposing party's lawyer and she may become confused, insecure and unconvincing and therefore leaves a bad impression on the jury, due to the fact that it appears that she was lying.[42]

The strongly contradictory character of the verbal inquiry and the importance of personal evidence for the outcome of the adversarial procedure complicates the position of sexual crime victims. There is a challenge to render proof in all sexual offenses, since the charge is based on the words of the victim against the words of the perpetrator and other evidence is rarely available. Even when it is possible to establish that there was sexual contact between the perpetrator and the victim on the basis of material evidence, the true nature of their relationship can only be ascertained from their conflicting statements. Therefore, the content or the quality of the given statements is crucial for proving the crime. An insufficiently convincing testimony of the victim, if there is no other evidence, may due to a lack of evidence affect the decision to suspend the criminal proceedings or even acquit.

The problem is exacerbated if a victim with a disability is unable to give a good quality statement, especially if, due to their limitations, they are unable to establish written or verbal communication. In that case, the help of an interpreter is necessary even in the pre-criminal procedure. In addition, people with intellectual disabilities find it difficult to understand the purpose

40 Filip Mirić and Aleksandra Nikolajević, 'Violence against Persons with Disabilities: the "Dark Number" of Crime,' *Facta Universitas – University of Niš,* 2021, Vol. 19, No. 2, 115-116.

41 Alan Cusack, 'Victims of Crime with Intellectual Disabilities and Ireland's Adversarial Trial: Some Ontological, Procedural and Attitudinal Concerns,' *Northern Ireland Legal Quarterly*, Vol. 68, No. 4, 2017, 440.

42 Nataša Mrvić Petrović, *Naknada štete žrtvi krivičnog dela* (2001), 78.

of the trial and the role they play in the proceedings and furthermore, they may be frightened by the courtroom setting and the presence of the public. In fact, they are often exposed to the risk of secondary victimization, i.e. mental suffering caused by frequent re-examination, inappropriate questions or an insensitive treatment by the authorities. Therefore, the state is obliged to protect the victim from secondary victimization and the discrediting of their identity during the cross-examination stage.[43] For example, due to the difficulty of obtaining credible testimony from rape victims, especially children, the US state of South Carolina has allowed a precedent in the form of excluding the public while questioning child victims, restricting the right to cross-examine, and prohibiting confrontation with the perpetrator.[44]

In the criminal proceedings in other countries, is is common that victims with intellectual disabilities have significant difficulties in communicating with state authorities during the reporting of criminal offenses and testifying in criminal proceedings.[45] If the questions asked in the proceedings are not adjusted to their level of cognitive abilities, the risks of secondary victimization increase, as the victim's statements may have to be repeated several times. On the other hand, deficiencies in the testimonies of victims with intellectual disabilities may affect the outcome of the evidentiary procedure and the possibility of procedural error.

The accuracy of these remarks is confirmed by an example from the practice of the Higher Court in Valjevo.[46] A 53-year-old accused man exploited his friendship with the mother of the plaintiff, then an under-aged girl (16 years old) with intellectual disabilities and forced intercourse on her while her mother slept in the same room, being under the influence of opi-

43 In the case of *Y. v. Slovenia* (Application No. 41107/10, judgment of 28 May 2015), the ECtHR held Slovenia responsible for violating Article 8 of the ECHR as during the cross-examination of the plaintiff in the course of a trial for sexual abuse, the court had failed to prevent the accused from making degrading and insulting remarks against the plaintiff. The court warned that cross-examination should not be used as a means of intimidating and humiliating witnesses (para. 108), as additional prohibitions would not unduly restrict the right to defend the plaintiffs who have been allowed detailed cross-examination but would certainly reduce the plaintiff's anxiety (para. 109).

44 Russell D. Ghent, 'Victim Testimony in Sex Crime Prosecutions: An Analysis of the Rape Shield Provision and the Use of Deposition Testimony under the Criminal Sexual Conduct Statute,' *South Carolina Law Review*, Vol. 34, No. 2, 1982, 589-590.

45 Researchers from Spain, Northern Ireland and Switzerland, independently of each other, agreed that people with intellectual disabilities have an unequal position in criminal proceedings compared to other participants. They have episodic memory and memory gaps, especially concerning details (time, place), they are suggestive and compliant, and as they fail to understand the legal terminology, they refute their earlier statements or arbitrarily leave the impression that they understood the question to avoid shame or embarrassment (Jacobo Cendra López *et al*., 'Victims with Intellectual Disabilities through the Spanish Criminal Justice System,' *New Journal of European Criminal Law*, Vol. 7, No. 1, 2016, 92-93, 96; Cusack, *op. cit.,* 435, 436, Niehaus *et al.*, *op. cit.,* 377).

46 Fully adjudicated case no. K 17/18, legal qualification: enforced intercourse with a vulnerable person from Article 179 para. 2 in connection with para. 1 CC, from the personal archives of Judge Dragan Obradović.

ates and alcohol. Due to combined disability, the victim was not able to offer adequate defiance. The defendant first touched the victim on the chest and body, and then had sex with her. The gynecological examination of the victim determined that she had had sexual intercourse during the previous 72 hours. What was crucial to the outcome of the proceedings was that the victim immediately informed her father, who filed a criminal complaint on her behalf, and a criminal proceeding was initiated relatively quickly and the necessary evidence was established.

The victim was born with cerebral palsy and hemiparesis of the right side, as a result of which she suffered an impairment of her psychomotor skills. She was diagnosed with mental retardation at the age of one and a half, needing psychiatric treatment since childhood. She attended a school for children with special needs. The victim was illegitimate, with a father living in Germany and visiting seldom. Due to the circumstances, as the father was in the country at that point in time, the victim related to her father what had happened to her and who the perpetrator was the day after the event. The mother was a chronic alcoholic, in good relations with the accused who was a neighbor, and with whom she drank together and occasionally had sexual relations. The relationship between the mother and the accused was the reason why he had access to their house both day and night and was able to remain alone with the victim. The mother's indifference towards the child was noted, even after she found out about the event. Due to the way she treated her daughter, and especially because she, as the only guardian, put herself in a situation where she could not render protection to her daughter from sexual abuse, she was convicted of neglect and abuse of a minor and received a long-term sentence.

The circumstances related to the committing of the crime were determined on the basis of the victim's testimony. She was questioned as a witness by a speech therapist or a court deaf interpreter and in the presence of an expert in the medical profession – a neuro-psychiatrist and a specialist of medical psychology. In the transcripts from the hearing of the victim at the main trial, the court council president stated that dialogue with the victim was very complicated, that questions were repeated several times, and that she gave incomprehensible or difficult to understand short answers. Only after questions were repeated several times by the deaf interpreter was it clear what the victim wished to say. Thus, the hearing had to be discontinued due to a difficult communication. The defense counsel and the court interpreter stated that the victim had better articulation three and a half years prior, when she had testified in the prosecutor's office, compared with the main trial.

The court claimed certain illogicalities in the victim's testimony and needed to expound on the reasons why it gave credence to her testimony, as opposed to the testimony of the accused. It referred to the results of the expertise of examining the victim's personality. A committee of experts stated that the victim was aware but communication with her was difficult due to her slurred speech, and that she was not able to give a timeframe for the

events that were the focus of the court trial, as well as that her knowledge was scarce. Also, she knew to recognize letters but could not read or count and she was not adept at abstract thinking, while her intellectual skills were at the level of moderate mental retardation. Thus, due to reduced intellectual skills, suggestibility and pliability were at an increased level. Decreased tolerance to frustration, frequent aggressive outbursts, a lack of critical thinking in social relationships, especially in heterosexual relationships, were observed. The mental retardation was manifested in underdeveloped cognitive abilities (underdeveloped abstract thinking, logical reasoning, understanding of cause-and-effect relationships) as well as in her personality traits (increased suggestibility, weakness of will, pronounced instinctive reactions whereupon instincts override the will, the inability to make decisions and reduced analytical thinking), which is why her ability to resist forced intercourse at the time of the event was significantly reduced. The expertise showed that her awareness was sustained quantitatively and qualitatively, that she had no tendency towards simulation but that her intellectual deficit affected her from distinguishing the essential from the irrelevant. Namely, she failed to understand the consequences but could reconstruct the event at the concrete level, with no precise timeframe.

During the main trial, the members of the expert committee conducted a diagnostic interview after the interruption of the hearing in the presence of the deaf interpreter and the victim's mother, who could understand her the best. It was concluded that she had no memory of past events and consequently, she responded to questions in an allusive manner, depending how they were posed. The expert witness also commented on the manner of record keeping during the hearing in the Public Prosecutor's Office, stating that the victim, according to her abilities and intellectual capacities, had no ability to speak as it was stated in the transcripts, or give such statement during the investigation, or understand them as they were presented to her but rather, she was directed towards a certain narration, i.e. the entire narrative in the transcripts was derived on the basis of what she had stated and the presumed meaning of what she had wished to say but had not ability to expand on it. The expert witness went on to explain that retardation is not only impaired intelligence as a mental function, but also an impairment of all cognitive and conative functions (psychological functions related to will and motives). Due to what the experts had determined, it was determined that at the time of the main trial the victim was not legally competent and failed to understand the real meaning of the trial. Thereby, her court examination was discontinued.

The data from the court case confirm the theory that factors from the immediate environment have a critical influence on the sexual victimization of a person with an intellectual disability.[47] In our example, these are the following: a broken family, the mother's alcoholism, the neglect of a child with disabilities, and the facilitated access of the accused to a disabled child, considering the accused was a family friend. Moreover, the accused was also fully apprised of the fact that the minor in question was mentally retarded and

47 Petersilia, *op. cit.*, 679.

suffered from cerebral palsy with hemiparesis on the right side, as her disabilities were evident.

In the mentioned case, the key problem was to establish contact with the victimized minor, as she was mentally retarded and deaf and dumb. This was why she was questioned during the investigation and at the main trial via a speech therapist – a court deaf interpreter. Her speech was more incomprehensible during the main trial phase and thereby, even the deaf interpreter and speech therapist failed to fully understand her, which was stated by the committee of medical experts who examined the victim party during the investigation and additional examination during the main trial in the presence of the deaf interpreter, which was also noted in the transcript during the main trial by the council president and later in the verdict's reasoning. Due to her physical condition, the victim also responded to some questions by using her hands, symbolically indicating how the critical event had occurred, which was noted in the transcript of the main trial. As regards informal communication with her, her mother, with whom the victim lived, provided the biggest support.

It seems that such victims would need to be provided with specialized services and comprehensive support at the first stage of reporting a crime. One of the important steps taken by the state to protect victims in criminal proceedings before regular courts is the establishment of the Service for Assistance and Support to Witnesses and Victims in Higher Courts, as well as in other courts designated by the High Judicial Council in 2016 by amendments to the Court Rulebook.[48] However, the establishment of the Service alone is not enough – it is necessary to keep in mind the experiences from other countries, as for example from the USA, that the centers for assistance to victims of rape or violence rarely have the conditions to provide support to mentally disabled persons.[49] In such cases, the victim's initiative cannot be awaited. Victim support organizations must act proactively in care institutions for persons with disabilities and together with the competent state authorities they must establish a system of structured support for victims in order to ensure timely detection and prevention of sexual abuse.[50]

48 Dragan Obradović, 'Respect for the right to human dignity of victims of criminal offenses during criminal proceedings in Serbia,' in Zoran Pavlović (ed), *Yearbook Human Rights Protection, the right to human dignity,* (2020), 228.

49 Petersilia, *op. cit.*, 688-689. Because communication with people with intellectual disabilities is a particular problem, it is suggested that support is given to people who have lived with persons with a disability (Weller, *op. cit.*, 506), which in turn may help reduce discrimination.

50 Cheryl Guidry Tuyska, 1998 Working with Victims of Crime with Disabilities, OVC Archive, NCJ 172838, *https://www.ncjrs.gov/ovc_archives/factsheets/disable.htm.* A good example is the Netherlands: sexual abuse in institutions for people with intellectual disabilities is prevented by the sexual education of the residents and educating staff on the psychological signs of abuse (Amelink Quirine *et al.*, 'Sexual abuse of people with intellectual disabilities in residential settings: a 3-year analysis of incidents reported to the Dutch Health and Youth Care Inspectorate, *BMJ Open* 2021, 7). On the other hand, the police, judicial and other bodies in pre-trial proceedings are mandated to cooperate with each other to protect the interests of the victim (Nataša Mrvić Petrović, 'Prava žrtava krivičnih dela u Holandiji,' *Strani pravni život*, No. 2, 2019, 20).

In the case from Serbia under analysis, there were no indications that any of the state bodies had treated the victim with any prejudice, although there may be stereotypes about women and prejudices about rape and women with (intellectual) disabilities in the police and judicial bodies, and even in the work of social services, and even among women with disabilities themselves. The ECHR judgment in the case of I. C. v. Romania corroborates this statement.[51] In fact, instructing the competent authorities about persons with disabilities and the ways in which credible and high-quality testimony of persons with intellectual disabilities could be achieved could reduce prejudices.[52]

From the aspect of the general prevention of sexual crimes committed against minors, it is important that in the Republic of Serbia the Law on Special Measures to Prevent Crimes against Sexual Freedom against Minors (hereinafter: the Law) was adopted in 2013. Article 3 of this Law applies to perpetrators who have committed one of the ten criminal offenses from the group against sexual freedom against minors, among which are rape and forced intercourse with a disabled person.[53]

It is important to note that criminal protection of the sexual integrity of migrant women and girls or asylum seekers is provided under the same conditions as for the local citizens. Given that Serbia is a transit country for migrants/asylum seekers, they are provided with the right to health care, which is guaranteed as one of the basic human rights of Article 48 item 4 of the Law on Asylum and Temporary Protection.[54] Upon admission to an asylum center or other accommodation facility, all applicants are medically examined, while appropriate health care is a priority for seriously ill applicants, applicants who are victims of torture, rape and other severe forms of psychological, physical or sexual violence, as well as a persons with mental disabilities.[55]

51 *I. C. v. Romania* (No. 36934/08; Judgment of 24 May 2016). The applicant, who was 14 years old at the time of the alleged rape, complained that Romania's criminal justice system was more inclined to trust male perpetrators than her, and that the authorities had not protected her or shown concern for the juvenile victim. The court found that there was a violation of Article 3 of ECHR, that the national courts failed to take into account the victim's youth and mild intellectual retardation when assessing her defiance. In addition, the psychological characteristics of the victim were not examined in order for her reaction to the sexual event to be understood, nor was extensive documentation of psychiatric treatment taken after the incident, which could testify to the trauma she had suffered (para. 58).

52 Cusack, *op. cit*., 443; Niehaus *et al., op. cit.,* 377.

53 [Zakon o posebnim merama za sprečavanje vršenja krivičnih dela protiv polne slobode prema maloletnim licima], *Official Gazette of the RS*, No. 32/2013, Article 3. There is a ban on mitigation of punishment and conditional release of the perpetrators, non-statute of limitations for criminal prosecution and execution of sentences, and legal consequences of convictions, some of which last 20 years, as well as a ban on acquiring public office and a ban on employment, i.e. calling or occupation related to work with minors. Also, special measures are implemented regarding the perpetrators of these crimes after serving a prison sentence that can last up to 20 years, and aim at special prevention – the protection of minors from persons convicted of sexual crimes against minors.

54 [Zakon o azilu i privremenoj zaštiti], *Official Gazette of the RS*, No. 24/18.

55 Dragan Obradović, Branka Antić and Marko Ognjenović, "Migranti – nova kategorija pacijenata u zdravstvenom sistemu Srbije i pojedini problemi', *Zbornik Instituta za kriminološka i sociološka istraživanja*, Vol. XXXVIII, No. 2, 2019, 192.

VI CONCLUSION

In Europe, due to the efforts of regional organizations, "victim reform" has been encouraged, primarily in the aim of preventing violence against women and children. When it comes to preventing sexual violence, the normative dimension of sexuality, although hidden, stems from a given cultural pattern of permissible sexual behavior. The adoption of CETS 210 implies a change in this pattern in the area of the sexual freedoms already acquired. As the boundaries of criminal law intervention expand, the task of criminal law becomes more complicated due to the fact that the model of coercion is being transferred to the model of consent. As it primarily serves to determine the free will of the victim, the new concept unquestionably complicates the burden of proving rape or other types of sexual assault. In theory, as well as in foreign practice, the problems caused by the comprehensive interpreting when there is involuntary participation in sexual intercourse and whether the perpetrator could have misunderstood the will of the victim according to the circumstances have already been pointed out.

Considering that the conceptual change at the level of the Council of Europe has already taken place, the legislation of the Republic of Serbia must adjust completely to it. It will be necessary to change the definition of the crime of rape (Article 178) and to adjust the features of the crime of sexual assault on a powerless person (Article 179). Supporting the new concept, the current legal solution from Article 179 of the RS Criminal Code enables a discriminatory outcome insofar as voluntary sex with a person who is considered "powerless" (and persons with intellectual disabilities are considered as such) can be illegal and punishable behavior. When a person is to be considered powerless depends on who is applying the standard. As can be seen, jurisprudence tends towards a broad interpretation of the "powerless state" of a person in order to gather all situations of sexual intercourse under the existing standard without the consent of that person.

By using examples from foreign legislation, we endeavored to assess whether the amended criminal law regulations would facilitate access to justice for women and girls with disabilities who are victims of sexual crimes. However, the formal relinquishment of the paternalistic attitude towards persons with disabilities in the area of the protection of their sexual integrity and sexual freedoms is more of an ideological goal to be pursued, and it does not necessarily mean the improvement of that protection in practice. Moreover, it can set it back if case law does not uniformly interpret the changed features of these crimes.

Given that there is a high "dark figure" of sexual crimes to the detriment of women with disabilities, it seems that the priority is to create conditions for them to enable the recognition of the sources of danger and resist sexual abuse, as well as to report it. It would, thereby, be necessary to provide systematic and comprehensive support and assistance to such victims through the proactive engagement of the NGO sector and social services. It is important to increase the sensitivity of state bodies and courts to the needs of victims with disabilities, especially when it comes to women with intellectual

disabilities in order to prevent the secondary victimization of such witnesses. It is necessary, then, to organize training for members of the police and judiciary in order to increase awareness about the causes and consequences of disability and combat the possible harmful effects of prejudices and stereotypes about women with (intellectual) disabilities as victims of sexual crimes. Interdisciplinary teams of experts (social workers, psychiatrists, psychologists, speech therapists) should be available to prosecutors and judges who, through joint efforts, can provide appropriate services to the victims in time, gain their trust, facilitate communication with competent state bodies and carry out high quality psychological expertise on women.

The changes in the depiction of crimes against sexual freedoms must be understood as an integral part of the broader efforts to prevent social discrimination against women, including those with disabilities. This includes activities regarding their education and empowerment (employment and raising functional autonomy), with a positive attitude towards the sexuality of women with disabilities and continuous sexual education in order that they can recognize the danger in time and learn from experience how to express their free will. Instead of denied sexuality and constant social exclusion that, paradoxically, contributes to a higher risk of violence and sexual abuse, we should strive for independence and the social inclusion of people with disabilities. It is slightly idealistic to advocate for greater financial support from the state in order to encourage changes in the direction of greater autonomy and independence, better education and increased employment of people with disabilities. However, it is up to the authorities to find ways to equate these persons, especially women, with others, both in their ability to lead a normal life and in gaining access to justice.

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TEŠKOĆE KRIVIČNOPRAVNE ZAŠTITE SEKSUALNOG INTEGRITETA ŽENA I DEVOJAKA SA INVALIDITETOM

Apstrakt

Žene i devojčice sa invaliditetom su u visokom riziku od seksualnog nasilja, a brojne su poteškoće kada je u pitanju njihova zaštita u oblasti krivičnog prava. Autori analiziraju najvažnije prepreke u krivičnom gonjenju i suđenju na primeru sudskog postupka. Pored potrebe zaštite i osnaživanja osoba sa invaliditetom u krivičnom postupku u Srbiji, neophodno je promeniti pristup propisivanju krivičnih dela seksualnog nasilja (silovanje i prinudni snošaj bespomoćne osobe). Time bi se postigla bolja zaštita seksualnog integriteta osoba sa invaliditetom, a u skladu sa relevantnim međunarodnim standardima, i, dalje, sprečena njihova eventualna diskriminacija. U radu se razmatraju predložena rešenja prema odredbama Istanbulske konvencije Saveta Evrope i uporedivi primeri u zakonodavstvu Nemačke i Slovenije. Autori navode da promene u krivičnom zakonodavstvu mogu unaprediti zaštitu seksualnog integriteta žena sa invaliditetom samo ako su praćene izmenjenim društvenim pristupom ženama sa invaliditetom.

Ključne reči: *Osoba sa invaliditetom; Ženske žrtve; Seksualno nasilje; Obljuba nad nemoćnim licem.*

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PERSONS WITH DISABILITIES AND CRIMINAL JUSTICE SYSTEM: ANALYZING DISCRIMINATORY TREATMENT

Abstract

The aim of the paper is to discuss some issues related to the criminological aspect of the position of persons with disabilities in modern criminal justice system. In an attempt to determine their exposure to discriminatory treatment when facing criminal law mechanism the author is comparing them to the persons without disabilities since any discrimination is necessarily comparative. The topic may be addressed from a number of perspectives, but the main focus is on three narrow issues. First, we considered the views of several dominant criminological theories that explain the etiological and phenomenological aspects of crime, analyzing particularly place and role of people with disabilities in the given context. Second, we stated that the criminal justice system has been subject to a great deal of change in a way that resocialization and reintegration do not play as important role as it used to play a few decades ago. Humanitarian concerns could hardly ever be seen as an issue in new, so called 'Actuarial justice', rather, perceptions of risk that only requires the most efficient and prompt control, prevails a new criminal justice paradigma. In such conditions of late modernity, we analyzed the position of persons with disabilities regarding discriminatory treatment they are exposed to. After that, we discussed some issues concerning well-practised procedural rights and obligations in criminal proceedings in order to examine whether or not justice system is friendly-designed to the needs and abilities of disabled people. In this context, special attention was given to persons with disabilities when they find themselves in the role of victims. In an effort to make our research on discriminatory treatment of persons with disabilities within the mechanisms of criminal justice more comprehensive, we have analyzed comparative legal solutions.

Key words: *Discrimination; Persons with disabilities; Criminal justice.*

I INTRODUCTORY CONSIDERATIONS

The criminal law mechanism by its very nature is limiting important human rights such as freedom of movement or property of a particular person. The system of criminal justice, which embodies the formal response to crime,

is for this reason a constant subject of academic discussions on its purpose, role in society, fairness, proportionality, and the like. Starting from different points of view, it seems that in a given moment every individual and collectivity can be considered deprived, neglected or discriminated in a certain sense. However, this intuitive sense is further intensified when it comes to people with disabilities, since their regular life activities are by nature already limited. According to some statistics more than one billion people in the world live with some form of disability and can be considered the largest minority in the world[1] which indicates a significant practical scope of the analyzed issue.

Criminal justice system is *per se* activity within the competence of the state which by its very nature must effectively ensure the safety and protection of basic social values. In this effort, the state often has to act pragmatically in order to achieve the expected results.

Since the 1960s, there have been many different models of disability in scientific literature, particularly Hence, disabilities come in many forms and the main model to conceptualize it are the medical (bio)-model, the social model, the economic model, the minority group model, the universalist model, the Nordic relational model, the capabilities model and others.[2]

The United Nations Convention on the Rights of Persons with Disabilities (hereinafter: CRPD)[3] from 2006 is the most importan relevant legal document at universal level and was designed around the medical (bio)-model. According to it, persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others. While not claiming that presented model is optimal, we will adapt our further analysis to the presented medical (bio)-model. This is a significant note since academic papers that analyze the issue of disabled people within the criminal justice system include race, poverty, sexual orientation, and gender identity under the term *disability*.

Discrimination as a legal concept is relatively new age phenomenon, although as a sociological phenomenon it is as old as society itself. It is a term that significantly correlates with the political, cultural and economic basis of a society. Taking that into account, it is clear at first glance that it is a complex concept that deserves certain terminological clarifications. The first problem arising from the previous statement concerns the fact that there is no universally accepted definition of discrimination.[4] In fact, it could be said that there is some agreement on a general level only when it comes to the grounds for discrimination.

1 Abello Jiménez and Ana Elena, "Criminalizing Disability: The Urgent Need of a New Reading of the European Convention on Human Rights", *American University International Law Review*, Vol. 3, Issue 2, 2015, 286.

2 Theresia Degener, "Disability in a human rights context", *Laws*, Vol. 5, Issue 3, 2016, 6.

3 UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106.

4 See also Wouter Vandenhole, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (2005).

Discrimination is necessarily comparative and the main point here is not how well or poorly a person (or group) is treated on some absolute scale, but rather how well is treated relative to some other person (or group).[5] As it was stated in the International Labour Organization Convention No. 111[6] from 1958 (Art. 1), mentioned discriminatory treatment refers to any distinction, exclusion or preference made on relevant and by law prescribed grounds. At the normative international level discrimination was defined in the context of persons with disabilities, and CRPD defines discrimination on the basis of disability as any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation (Art. 2). In the doctrine and normative practice, a distinction is made between direct and indirect discrimination. The first one is intentional discrimination although certain criticisms can be directed at this simplified point of view.

However, as a rule, discriminatory treatment towards persons with disabilities within the criminal justice system will be the one that is called *indirect* and that exists even without intention to disadvantage the members of the group or other objectionable mental state. The prevailing approach in defining indirect discrimination in the literature determines it through three main elements: equal treatment, a disproportionately exclusionary impact on those sharing a protected characteristic, and the absence of acceptable justification.[7]

Crime control policy cannot be analyzed outside the relevant economic and sociological framework.[8] In this regard, it should be noted that the current trends of general social globalization and the liberal model have their effects on crime control. Hence, adaptation of the criminal justice system model according to the needs of certain social groups depends on the mentioned factors as well as on the requirements of the given moment in terms of socio-political pragmatics and opportunity.

II CRIMINOLOGICAL THEORIES AND PERSONS WITH DISABILITIES

Not only that there are academic problems concerning systematization of criminological theories, but determining what criminological theory ought to be is a difficult endeavor and a matter of doctrinal contention.[9] The early

5 Andrew Altman, "Discrimination" in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (2011).

6 C111 – Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

7 Sandra Fredman, *Discrimination law* (2011), 1.

8 Snežana Soković, „Savremene globalne tendencije u kontroli kriminaliteta", *Crimen*, Vol. 2, No. 2/2011, 213.

9 Đorđe Ignjatović, *Teorije u kirminologiji* (2009), 17.

development of criminology is linked to *Lombroso's* concept of crime as an expression of the biological-psychological constitution of man.[10] Even in this positivist thought on crime, a certain discriminating position in which a persons with disabilities found themself, whose biological-psychological characteristics are not in accordance with the standard ones, could be recognized.

Focusing his studies, the famous Italian author, *Cesare Lombroso*, published his book in 1876 *L'uomo delinquente (On Criminal Man*) in which he defines a typical criminal man as an *atavist*, claiming that he differs from a non-criminal due to his physical disproportion, such as atypicality in the extremities, etc.[11] In addition to the so called *body type model*, he defines mentally ill persons also as criminals precisely because of their mental illness.[12] The study of physical characteristics as one of the factors of crime was further developed by *Raffaele Garofalo* and *Enrico Ferri*.

An idea arose at the end of the nineteenth century that criminality is inherited in the certain way as physical characteristics. In that sense, numerous authors have studied the impact of mental disorders on crime by analyzing members of the same families, trying to prove a certain correlation.

Regardless of the fact that the aforementioned theories of biological positivist orientation were abandoned when it comes to defining the causes of criminality, it is undeniable that they shaped the criminological heritage to a significant extent.

In contrast to the biological positivism stands the sociological one which famous representatives are authors such as *Emile Durkheim* and *Robert Merton*. This criminological orientation sees the basic factor of criminality in society itself. *Merton* has proposed that distinguishing between *cultural goals* and *institutionalized means* should have the central place in attempts to explain the occurrence of crime.[13] In other words, the violation of social norms occurs when an individual is not able to provide legally, through institutional means, what the cultural-economic model defines as necessary. In light of this, it is important to take into account that most people on a global level earn their income mainly based on their work, not from the capital (capital investment and renting). On the other hand, difficult employability of persons with disabilities is recognized as a global problem that countries cannot solve effectively through positive action and employment programs.

Newer theories that deal with the issue of violence emphasize an extremely large influence of unemployment and workplace stability on the appearance of the phenomenon of violence. Not to mention the fact that tackling the cause of crime with emphasizing structural social causes such as unemployment, was long time ago put in force when it comes to the political agenda and crime prevention policy.

10 *Ibid*, 17.

11 Roger Hopkins Burke, *An Introduction to Criminological Theory* (2018), 65.

12 *Ibid*, 66.

13 *Ibid*, 119.

With neoliberal ideology came the process of eroding government commitment to social welfare in favor of policies that focus on individual responsibility and market-based rationalities.[14] Hence, there are theoretical approaches that recognize crime as a quasi-economic phenomenon while individuals are seen as rational subjects governed by *rational choice*.[15] It is obvious at first glance that this thesis cannot be applied when it comes to those who have long-term physical, mental, intellectual impairments. For instance, when persons with mental illness are involved with drug markets they can become entangled with the criminal justice system although their ability to make rational decisions and risk/benefit calculations are compromised by their illness and/or addiction.[16]

III CRIMINAL JUSTICE SYSTEM, ACTUARIAL PARADIGM AND PERSONS WITH DISABILITIES

From the earliest forms of organizing and establishing a community with continuous common life, societies reacted in different ways to behaviors that threatened the basic values on which they were based. In the beginning, reaction was almost, often accompanied by symbolic signs without any restrictions provided for in legal regulations. Such reactions were mostly based on the moral principles and prevailing social understandings of a particular community.[17]

The increased fluctuation of people, goods and information and their free movement, in addition to the undoubtedly positive market and cultural consequences, also affects people's sense of social insecurity. In such conditions, the "moral individualism" immanent to the liberal-capitalist model sometimes causes uncontrollable fear which leads to the political opportunism, according to which is desirable to create an agenda of "criminal populism" that would be in line with the fear of criminality, which is particularly expressed and defined in modern society through the concept of "risk society"[18] which basically represents the state of permanent fear in which society finds itself due to the dangers that the modern way of life brings with it, i.e. society's reaction to them.

The position that the concept of crime control has undergone fundamental changes in the past four decades is fully academically affirmed, particularly when it comes to Western liberal democracies.[19] Those changes, as stated in the litera-

14 Sandra Leotti and and Slayter Elspeth, "Criminal Legal Systems and the Disability Community: An Overview", *Social Sciences*, No. 11, 2022, 5.

15 Ronald V. Clarke, „Situational crime prevention: Theory and practice", *British Journal of Criminology*, No. 20, 1980, 136.

16 Katherine Becket and Theodore Sasson, *The politics of injustice: Crime and punishment in America* (2000).

17 Đorđe Ignjatović, „Kriminalitet i reagovanje države", *Bezbednost*, Vol. 45, No. 4/2003, 1.

18 It is a concept that was developed through the academic work of two influential sociologists, Ulrich Beck and Anthony Giddens.

19 Barbara Hudson, „Punishment and Control" in Mike Maguire, Rod Morgan and Robert Reiner (eds), *The Oxford Handbook of Criminology* (2002).

ture, created a state that "governs at a distance" and accordingly "punishes at a distance" by introducing a commercial ethos into public (state) action.[20] As stated in the relevant literature ongoing tendency in criminal justice could be seen as gradual movement away from the traditional, retrospective,individualized model which prioritises a deliberated and personalized approach to pursuing justice and truth, towards a prospective, aggregated model, which involves a more ostensibly efficient, yet impersonal and distanced approach.[21]

The consequence of such a state of affairs is the desire to achieve the greatest possible result with minimal effort and resources. The so called Actuarial paradigm of the role and aim of criminal law is increasingly imposing itself as dominant, and its essence is reflected in turning towards the most effective methods of crime control. In that context, the primary goal is to protect society from all possible risks, while less attention is paid to the individual, i.e. the issues of "guilt", "diagnosis", "treatment" and the like.[22] One more significant consequences of the change in the concept of the approach to crime control is reflected in the dominant position of the preventive action. This means that until the seventies of the 20th century, a successful anticriminal response meant to be present and effective "on the spot"[23], while today the focus is on preventing the commission of a criminal offense at all even in the the earliest stage of preparation, which is not criminalized in most legislations.

When it comes to the persons with disabilities in such criminal justice system it could be argued that the current tendency is not in their favor precisely because society, and thus the reaction to crime, is preoccupied with defensive strategies that do not deal with persons with special needs and their social inclusion in order to achieve adequate normative conformism. There is a noticeable distancing from the traditional individualistic model of criminal justice, which raises the question of the role and aim of criminal law in general.

IV WHEN PERSONS WITH DISABILITIES ENCOUNTER CRIMINAL JUSTICE SYSTEM

The issue of potential discrimination to the persons with disabilities within the criminal justice system can be viewed from two aspects. The first concerns the application of certain material criminal law institutes, while the second concerns the application of procedural provisions.

When it comes to criminal law institutes in the context of persons with disabilities, one should first start from their legal capacity. CRPD for instance,

20 Amber Marks, Ben Bowling and Colman Keenan, "Automatic Justice? Technology, Crime and Social Contro" in Roger Brownsword, Eloise Scotford and Karen Yeung (eds), *The Oxford Handbook of the Law and Regulation of Technolog* (2015), 4.

21 *Ibid,* 4.

22 Đorđe Ignjatović, „Kontroverze kazne zatvora i njeno izvršenje", *Sociologija*, Vol. 60, No. 4/2018, 762.

23 Wiliam L. Sherman, „The Rise of Evidence-based Policing: Targeting, Testing, and Tracking", *Crime and Justice*, Vol. 42, 2013, 399.

requires that disabled people enjoy legal capacity on an equal basis with others or in other words, requires that legal capacity regimes do not discriminate against disabled people.[24] On the other hand, one of the basic requirement for establishing criminal responsibility and sentencing is mental competence. The general rule is that there is no criminal offence if it was committed in a state of mental incompetence.

Surprisingly or not, advocates for anti-discriminatory treatment on the disabled people are arguing abolition of the *insanity defense* that many disabled people rely on in criminal trials. The main reason for establishing this formal equality in addressing mental (in)competnece in criminal law even though it essentially does not exist is associated with the wider stigma endured by people with mental disabilities. However, it is stated that making a difference on related issue typically results not in release from detention but diversion into involuntary detention and treatment, aimed at protecting the public and treating the offender.[25] They propose a normative implementation of the *disability-neutral model*[26] when it comes to the subjective element of a crime.

When determining the punishment, viewed on a comparative level, disability in most cases was not treated as an expressly prescribed extenuating circumstance although it can be understood under the *personal circumstances of the perpetrator* or *other circumstances* as criteria prescribed in continental criminal law as a rule. However, disability is not particularly prescribed as a basis for mitigation of penalty in concrete cases. Pointing out these circumstances is of particular importance for disabled people (mental illness) whose disability is not sufficient according to its degree and intensity for the existence of mental incompetence, which would lead to the non-existence of a criminal offense.

Analyzing the modern system of sanctions, in most modern criminal codes there is community service as a punishment that aims to contribute to the reintegration and resocialization of a person. Depending on the degree and type of disability, a large number of disabled people are unable to perform community service work. As a result, it follows that this type of punishment cannot be imposed indirectly on a large number of offenders with disabilities. The same could be said for imposing a fine for the reason that the majority of persons with disabilities are beneficiaries of various social benefits or are supported by their relatives, if they cannot preform work because of their disability or belong to the category of difficult to employ persons.

The issue of imposing and enforcing institutional sanctions against persons with disabilities is particularly sensitive, since it requires adequate resources and infrastructure as well as professional staff capacities. In light of this, there are authors who are claiming that legal, law enforcement, and security professionals often lack experience and accurate knowledge about dis-

24 Lucy Series and Anna Nilsson, "Chapter Article 12 CRPD: Equal Recognition before the Law" in Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities* (2018), 16.

25 *Ibid*, 20.

26 *Ibid*, 16.

ability which can lead to misidentification of disabilities, inaccurate assumptions about competency and credibility, and a heightened risk of violence.[27]

In the jurisprudence of the European Court of Human Rights (hereinafter: ECHR) it was pointed out that the relevant provision does require the State to ensure that prisoners are detained in conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, *their health and well-being are adequately secured, for instance by providing them with the requisite medical assistance.*[28]For instance, in the case of *Vincent v. France*[29] the Court found the violation of ECHR provision which forbids inhuman or degrading treatment since the applicant who was paraplegic was serving a ten-year prison sentence in unsuited prison. In a possibly more serious case, the Court, for example, found a violation of the same provision in a situation where the applicant who was wheelchair-bound was serving prison sentence in a cell which was on the fourth floor of a building without an elevator.[30]

When procedural provisions are applied within the framework of criminal justice, a large number of situations can also be observed in which indirect discrimination against persons with disabilities is noticeable. Although, in accordance with the law, an adequate interpreter will be provided for disabled people, when it comes to disabled people, provisions that enter into the corpus of *due process guarantee* and concern the right of the arrested person to be informed immediately in a language he/she understands of the reason for arrest, obviously such a provision with regard to disabled people does not achieve its purpose in the same capacity as for people without disabilities.

When it comes to arrests, it happened that disability indirectly caused increased police brutality, i.e. inadequate treatment which result in *criminalizing disability* as it is stated in the literature.[31] Thus, in one case that later came before the ECHR, the police took a person with a disability (impaired hearing) who fell and hit his head on a stone during the arrest, thinking that the person was drunk. Consequently that person did not receive adequate medical care and later died.[32] Generally speaking, sensory disability is often mistaken for non-compliant or hostile behaviors by law enforcement professionals who are not trained in recognizing the signs of disability or intervening in disability-related crisis situations.[33] For instance, deaf or blind people cannot be expected to respond to commands of police in the same way that persons without sensory deficits would.

27 Elliot Oberholtzer, Police, Courts, Jails, and Prisons All Fail Disabled People, 2017, *https://www.prisonpolicy.org/blog/2017/08/23/disability/*.

28 *Grimailovs v. Latvia*, Application no. 6087/03, 25.09.2013.

29 *Vincent v. France*, Application no. 6253/03, 24.10.2006.

30 *Arutyunyan v. Russia*, Application no. 48977/08, 10.01.2012.

31 See Jiménez and Elena, *op. cit*., 285.

32 *Jasinskis v. Poland*, Application no. 45744/08, 21.12.2010.

33 Leotti and Elspeth, *op. cit.*, 4

In a case concerning the detention of a person suffering from kidney problems, the ECHR found humiliating treatment because the detainee asked officials to allow her to take with her a device to charge her wheelchair. Considering it a luxury and unnecessary item, her request was denied and she spent the night in more than inadequate conditions where she could not even use the toilet.[34]

It is indisputable that the discriminatory treatment of persons with disabilities within the criminal justice can be discussed from several aspects, however, there is no doubt that such treatment is most recognized when those persons find themselves in the role of victims. There are several reasons for this, generally oriented towards *psycho-physical* and *system-infrastructural* conditions. People with disabilities are usually "easy targets" for criminals due to their psycho-physical limitations which determine the degree of exposure to potential offenders. Furthermore, they are unable to report a criminal offense within a reasonable time for the reasons such as difficult access to the court due to infrastructural reasons, since many criminal justice institutions do not have adequate access for the persons with disabilities. In other words, they are with greater intensity unable to claim their rights due to lack of information, support and protection.[35]

As it was stated in literature, a disability can directly affect the capacity of individuals to protect themselves, to avoid or escape from victimization, and to seek help. For this reason, disability should be considered as one of the key factors of victimization when it comes to the creating an anti-criminal policy.

V CONCLUSION

From a historical perspective, it could be concluded that the issue of improving the status of persons with disabilities within criminal justice has taken a significant path from unacceptable to promising and encouraging. In this regard, the *charity model* which provides that only welfare programs or charity can care for disabled people is slowly being abandoned and moving towards a *rights based model* is some kind of ongoing process.

It seems that there is currently a certain lull in force, which is caused by the dominance of the Actuarial paradigm, which, as we pointed out above, represents a dominant concept in crime control and criminal justice. In this sense, issues that have an individual character are no longer a priority of criminal policy.

Regardless of which model (bio-medical, social and like) is taken as the basis for defining disability, we conclude that today it is almost impossible to find cases of direct discrimination towards people with disabilities. As a rule, indirect discrimination occurs most often in the application of certain procedural provisions for reasons related to the efficiency of criminal proceedings (arrests, detentions). Cases of indirect discrimination against persons with

34 *Price v. UK*, Application no. 33394/96, 10.10.2001.

35 EU Strategy on victims' rights (2020-2025), COM(2020) 258 final, Brussels, 24.6.2020

disabilities concerning inadequate infrastructure in prisons, i.e. the professional capacity of the staff, are also significant.

It is necessary to appreciate the indisputable fact that law in general, including criminal law, was created and adapted with regard to certain biosocial standards, whereby disability is imposed as an exception to the rule. Not only for the reason of humanity, but also for opportune political reasons (the largest minority in the world) it is necessary to give continuously efforts related to the improvement of the position of persons with disabilities within the criminal justice. This can be achieved by educating criminal justice officers as well as by investing in the relevant infrastructure.

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OSOBE SA INVALIDITETOM I SISTEM KRIVIČNOG PRAVOSUĐA: ANALIZA DISKRIMINATORNOG POSTUPANJA

Apstrakt

Cilj rada je da pruži uvid u pravne i kriminološke aspekte pitanja koja se tiču diskirminatornog tretmana osoba sa invaliditetom u okviru krivičnog pravosuđa. Ukazano je na postojanje određenih materijalnih i procesnih odredbi krivičnog zakonodavstva koje, u osnovi, mogu posredno diskriminisati predmetnu kategoriju lica. Kako rad nastoji da razmotri ovo pitanje na opštem planu, ono je načelno sagledano kroz tri celine i to: sadržaj značajnih kriminoloških teorija, aktuelnu paradigmu antikriminalne reakcije kao i praktičnu primenu krivičnopravnog mehanizma u slučaju osoba sa invaliditetom. U prvom slučaju su analizirane osnovne postavke izučavanja etiologije i fenomenologije kriminaliteta u kontekstu predmetne teme. Nakon toga, u radu se ukazuje na značaj dominantnog obrasca krivičnopravne reakcije koji je oblikovan modernim društveno-ekonomskim tendencijama, uz isticanje reperkusija takvog krivičnogpravnog sistema na osobe sa invaliditetom. Najzad, u radu se daje uvid i u praktične efekte direktnog i indirektnog dejstva pojedinih materijalnih i procesnih normi onda kada se predmetna kategorija lica nađe u ulozi učinioca, oštećenog ili žrtve krivičnog dela. Usled psiho-fizičkih karakteristika lica, naročita pažnja posvećena je viktimološkom apsektu.

Ključne reči: *Diskriminacija; Osobe sa invaliditetom; Krivično pravosuđe.*

PRAVO I RELIGIJA

LAW AND RELIGION

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THE POSITION OF WOMEN AND PERSONS WITH DISABILITIES IN ABRAHAMIC RELIGIONS

Abstract

Discrimination can have very different roots, some of which are short-lived and not very deep, while some are very deep and long-lasting. Among the deepest and longest-lasting roots of various types of discrimination are those found in the ideological and value systems that exist in some societies and that significantly affect morality, the content of legal norms and, in general, relations between people. Among those ideological and value systems, religions, especially traditional ones, have a special importance and influence, due to their longevity, number of believers and territorial distribution, comprehensiveness of content and deep rootedness in people's consciousness and feelings. As such, religions are apt to be at the root of discrimination against the same people on multiple grounds, the so-called multiple discrimination or the so-called intersectional discrimination. On the territory of the Republic of Serbia, traditionally, for centuries, there are three so-called Abrahamic religions, Christianity (East and West), Islam and Judaism, which significantly shaped the spiritual atmosphere and influenced the history of this area. The comprehensiveness of the views of those religions also includes certain attitudes about the position of women and persons with disabilities, both within the organizational structure and activities of churches and religious communities, as well as in society in general. Those attitudes have influenced and influence the construction of moral and legal rules. This paper deals with the issue of the position of women and persons with disabilities in the organizational structure and in the internal practice of Abrahamic religions and in those religious rules that have been declared as state law in some countries (which is the case with Sharia law), as well as the influence of religious teachings on national legal systems in modern states. When it comes to the internal organization of churches and religious communities, as well as the position of women and persons with disabilities within them, it falls within their autonomous sphere, and freedom of religion is guaranteed by the fact that citizens are enabled and guaranteed the freedom to profess their religion, access certain religious organizations and exit from them. When it comes to the position of women and persons with disabilities in the context of the application of religious rules as state law or the influence of religions on the construction of state legal systems, the only correct approach is the one that takes into account the historical conditions in which the religions in question arose and developed,

as well as the essence of their teachings, i.e. the fact that Abrahamic religions are religions of love, mercy and equality. Such an approach is equally in the interest of the Abrahamic religions themselves, on the one hand, and women and persons with disabilities, on the other.

Key words: *Christianity; Islam; Judaism; Sex; Gender; People with disabilities; Intersectional discrimination; Love; Mercy; Equality.*

"My creed is Love;
Wherever its caravan turns along the way,
That is my belief,
My faith."

Ibn Arab

I INTRODUCTION – RELIGION AND DISCRIMINATION

Female sex and gender, and disability belong to the most frequent personal characteristics that constitute the grounds for discrimination against persons possessing them. Since they are frequent grounds for discrimination in general, these characteristics are also frequent grounds for various forms of discrimination by both bases: for sequential multiple discrimination (discrimination based on various personal characteristics in different situations), for additive multiple discrimination (discrimination based on various personal characteristics in the same situation, when it is possible to distinguish the influence of individual personal characteristics) or for intersectional discrimination[1] (discrimination based on various personal characteristics in the same situation, when it is not possible to distinguish the influence of individual personal characteristics).[2]

1 The term "intersectional discrimination" was introduced in theory by Kimberlé Williams Crenshaw in her 1989 paper entitled "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (*University of Chicago Legal Forum*, Volume 1989, Issue 1, 139–167), and she elaborated the concept further in her 1991 paper entitled "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (*Stanford Law Review*, Vol. 43, No. 6, 1991, 1241-1299). See also: Devon W. Carbado, Kimberlé Williams Crenshaw, Vickie M. Mays and Barbara Tomlinson, "Intersectionality: Mapping the Movements of a Theory", *Du Bois Review*, Vol. 10, Issue 2, 2013, 303–312.

2 This categorization into "three main ways in which discrimination on more grounds than one can be conceptualised" was proposed by Sandra Fredman (see "Substantive equality revisited", *International Journal of Constitutional Law*, Vol. 14, No. 3, 2016, 712–738), while its use is suggested by the Council of Europe – Intersectionality and Multiple Discrimination, *https://www.coe.int/en/web/gender-matters/intersectionality-and-multiple-discrimination*.

The European Institute for Gender Equality provides a somewhat different division of the forms of discrimination on more grounds:

In addition to the possibility of exercising discrimination on the basis

"The term 'multiple discrimination' is used as an overarching, neutral notion for all instances of discrimination on several discriminatory grounds.
This phenomenon can manifest itself in two ways. First, there is 'additive discrimination', where discrimination takes place on the basis of several grounds operating separately. Second, there is 'intersectional discrimination', where two or more grounds interact in such a way that they are inextricable." European Institute for Gender Equality, Glossary & Thesaurus / A-Z Index – multiple discrimination, *https://eige.europa.eu/thesaurus/terms/1297*.

As it can be seen, Sandra Fredman's categorization is more complex because it introduces the criterion of simultaneity/non-simultaneity and distinction/non-distinction, while the categorization provided by the European Institute for Gender Equality is based only on the criterion of "separation" or "inextricability". Moreover, it is not certain whether in the categorization by the European Institute for Gender Equality "additive discrimination" includes both additive and sequential discrimination from Sandra Fredman's categorization or only additive discrimination (where sequential discrimination would not be included in the categorization at all) or, perhaps, only sequential discrimination (where additive and intersectional discrimination from Fredman's classification would be covered under the concept of intersectional discrimination). Finally, according to the classification by the European Institute for Gender Equality, intersectional discrimination is also classified within multiple discrimination, while in Fredman's classification, multiple discrimination includes sequential and additive, but not intersectional discrimination.

Serbian Law on the Prohibition of Discrimination ("Official Gazette of the Republic of Serbia", Nos. 22/2009 and 52/2021), in Article 13, Item 5, defines "severe forms of discrimination" as "discrimination on the grounds of more than one personal characteristic", dividing it into "multiple discrimination" and "intersectional discrimination":

"The following shall be considered to constitute severe forms of discrimination:

...

5. discrimination against individuals on the grounds of two or more personal characteristics, no matter whether the influence of individual personal characteristics can be separated (multiple discrimination) or not (intersectional discrimination);

..."

Therefore, our Law does not include the categorization with the distinction whether discrimination on different grounds occurs in different situations or in the same situation, but only with the distinction by the possibility of separating the influences of individual personal characteristics. Moreover, like Fredman, but unlike the European Institute for Gender Equality, our Law does not consider intersectional discrimination a form of multiple discrimination.

It is evident that the theory (as well as legislation) does not distinguish the cases of discrimination on the grounds of two or more personal characteristics in a completely identical manner. In this paper, we will use the above-mentioned categorization by Sandra Fredman as referred to the Council of Europe, with the reservation that the line of distinction between additive and intersectional discrimination is not clearest in that categorization either. Namely, it is not completely clear (or, rather, it cannot be determined in general terms) what is implied under the existence or non-existence of the possibilities for distinguishing of the grounds for discrimination, as the grounds for distinguishing additive and intersectional discrimination (but it should be mostly possible to establish in specific situations). It seems that the grounds for distinction should not be whether the discriminatory treatment would have occurred or not if there had not been two simultaneous different (two or more) personal characteristics, and not only one of them (it could be the grounds for some other categorization). One ground is sufficient in sequential discrimination respectively in each situation where discrimination occurs against a person (because one personal characteristic respectively constitutes the grounds for the discriminatory treatment in different situations, namely that different characteristic in each of those situations), but in additive and intersectional discrimination, there are two

of quite different personal characteristics (our Law on the Prohibition of Discrimination states that the grounds of discrimination may be "race, skin colour, ancestors, citizenship, 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, appearance, membership in political, trade union and other organizations and other real or presumed personal characteristics"[3]), out of which we are interested in two: being a woman (as a sex or gender) and disability, there is also an exceptionally wide range of potential reasons and motives leading to the discriminatory treatment of persons with some of these personal characteristics. These reasons may vary from a pure accident or mistake (when it can be difficult to establish the connection between discriminatory behaviour with the given personal characteristic); those may be strictly situational *ad hoc* reasons with no deeper motivation; those may be interest reasons etc.; medical reasons may also be in question (e.g., different forms of phobias); but also discrimination that is rooted in a deeper and better built system of thought, ideas and values (nationalism, racism, political ideology etc.).

Religions that are, according to Émile Durkheim, "a strongly connected system of beliefs and customs referring to the sacred, i.e., separated and forbidden things, i.e., a system of beliefs and customs uniting all its followers into the same moral community called church"[4] (« une religion est un système solidaire de croyances et de pratiques relatives à des choses sacrées, c'est-à-dire séparées, interdites, croyances et pratiques qui unissent en une même communauté morale, appelée Eglise, tous ceux qui y adhérent »), constitute exactly the deep and built systems of thought, based on the belief in the superhuman and otherworldly, which also includes in itself the solid systems of moral views and rules connected with a high degree of believers' devotion that goes to the level of complete commitment and faithfulness. The comprehensiveness of these systems of beliefs and worldviews also implies an

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or more personal characteristics in the same situation as the grounds for discrimination, whereas in one type (additive), it is possible to distinguish the contribution of each of the grounds to the occurrence of discrimination, while in the other type (intersectional), the state is more "blurred", whereas that blur does not necessarily demand the simultaneous existence of those personal characteristics for the existence of discrimination at all (therefore, it would be possible also in the event of existence of only one of those personal characteristics; two or more grounds would here probably affect the intensity of discrimination, the difficulty in its removal etc.). The fact that in Fredman's categorization intersectional discrimination is not considered a form of multiple discrimination may indicate that the above-mentioned "blur" has such an extent that, despite the presence of two or more personal characteristics as the grounds for discrimination, such discrimination assumes the nature of a unique act of discrimination, where it is not only impossible to distinguish the influence of each of the involved personal characteristics, but those characteristics act as a single characteristic. Nevertheless, it is again difficult to say in abstract terms what it means, but it is probably possible to recognize the existence of that form of discrimination in a specific case in practice.

3 Art. 2, para. 1, subpara. 1 of the Law on the Prohibition of Discrimination.

4 Émile Durkheim, *Les formes élémentaires de la vie religieuse* (first published in 1912), (1985), 65.

established attitude towards different human characteristics, including those ones that belong to the range of the above-listed (and unlisted) personal characteristics of people that may be the grounds for potential discrimination. The complexity of the attitudes of religious teachings and views towards the characteristics in question is significantly contributed to by the fact that the duration of great world religions, that can be measured by thousands of years, on the one hand, and necessary strength and consistence of religious beliefs, attitudes and teachings, as well as rules or behaviour, on the other hand, have resulted in non-uniform understanding and interpretation of religious dogmas, created at a certain time and in a certain space, and predestined for time and spatial universality.

All the above-mentioned (as well as other) characteristics of religions lead to the emergence of ideas and views within religious beliefs and rules of behaviour, which cause some people's discriminatory treatment of others. The said existence of the attitude of religious systems towards a wide range of people's different personal characteristics as potential grounds for discrimination leads to the existence of a number of cases of discrimination based on religious reasons against the same persons, based on more than one of their personal characteristics. Namely, the breadth, comprehensiveness and internal complexity and entwinement of religious systems make religious beliefs and rules a suitable basis for the occurrence of the cases of discrimination on two or more grounds, including intersectional discrimination as the most complex form of such discrimination.

Of special interest to us are three monotheistic religions called Abrahamic religions: Judaism, Christianity and Islam. It is primarily due to their overall importance (by the number of believers, territorial distribution, duration, influence on the overall human thought and the development of civilization etc.), and then due to the fact that the space we live in, the Republic of Serbia and the Balkans on the whole, is situated in the place of the presence and the meeting point of these three religions (including the meeting point of Eastern and Western Christianity).

Since the subject of this research is discrimination on the grounds of sex or gender (i.e., discrimination against women) and disability, we will deal with the specific influence of religious beliefs from the three above-listed religions on the potential occurrence of discrimination on the grounds of those two personal characteristics, including discrimination on the grounds of both characteristics at the same time.

The presence of religion in human lives and the functioning of human communities is quite broad and layered, and, thus, religious beliefs, teachings and practices may be reflected on potential occurrences of discrimination in the society at several levels: 1. First of all, discrimination (whereas we are interested in discrimination against women and persons with disabilities) is possible within religious organizations themselves, such as discriminatory treatment in the engagement in the service of religious organizations or in the performance of religious services etc. 2. Another possibility is discrimination in the application, at the state level, of legal rules contained in religious legal sources (this is particularly characteristic in the countries where sharia is still

applied, on a larger or smaller scale, as state law). 3. Finally, the large influence of religion on the relations in societies, even in completely secular societies, may lead to the emergence of certain norms of discriminatory nature in the legal rules of a given state, under the influence of religious understanding (the influence that may be difficult to observe); moreover, in the interpretation and application of the norms that are not discriminatory themselves, the influence of religious beliefs, can lead to discriminatory acting and, in the end, there can simply be discriminatory acting in practice under the influence of religious beliefs.

The mentioned third variant of the influence of religion on potential cases of discrimination is of particular importance for our topic, because in modern times, when there is a very small number of the countries in the world where religions rules are applied as state law, that is the most common case of potential discrimination under religious influence. In addition, it is this third version of the influence of religion on potential cases of discrimination, due to the wider and deeper scope of that influence, that there is a greater probability of the occurrence of discrimination on several grounds.

Of course, there is a special question in all cases of discrimination under religious influence, as to the actual extent in which there are grounds for it in the original teaching of these religions and to what extent is the discriminatory attitude actually a consequence of the distorted approach and understanding of these religious teachings. In our opinion, in the so-called Abrahamic religions, whose teachings are characterized by deep and omnipresent philanthropy, discrimination deriving from religious beliefs is always the consequence of wrong, distorted beliefs that deviate from the original teaching of the given religion.

In the end, what particularly complicates the issue we deal with is the encounter and the need for establishing harmony between the obligation of respect for a number of human rights – the prohibition of discrimination, freedom of religion, freedom of association etc.

II THE POSITION OF WOMEN AND PERSONS WITH DISABILITIES WITHIN THE ORGANIZATIONAL STRUCTURE AND INTERNAL PRACTICE OF ABRAHAMIC RELIGIOUS ORGANIZATIONS

The right to freedom of religion ("right to freedom of thought, conscience and religion") is one of the fundamental human rights, guaranteed by the most important international documents[5] and constitutions of almost all

5 Art. 18 of the Universal Declaration of Human Rights stipulates the following:
"Article 18
Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

countries in the world.[6] These documents prohibit discrimination of people in the enjoyment of this right (as well as other guaranteed rights), among others, on the grounds of sex and disability,[7] while in practice that prohibition is also extended to gender-based discrimination.

Despite proclaimed equality in the enjoyment of freedom of religion, protected by corresponding international and national judiciary or other

Article 18 of the International Covenant on Civil and Political Rights reads:
"Article 18
1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions."
Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe states the following:
"Article 9
Freedom of thought, conscience and religion
1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

6 This right is guaranteed by Article 43 of the Constitution of the Republic of Serbia as follows:
"Freedom of thought, conscience and religion
Article 43
Freedom of thought, conscience, beliefs and religion shall be guaranteed, as well as the right to stand by one's belief or religion or change them by choice.
No person shall have the obligation to declare his religious or other beliefs.
Everyone shall have the freedom to manifest their religion or religious beliefs in worship, observance, practice and teaching, individually or in community with others, and to manifest religious beliefs in private or public.
Freedom of manifesting religion or beliefs may be restricted by law only if that is necessary in a democratic society to protect lives and health of people, morals of democratic society, freedoms and rights guaranteed by the Constitution, public safety and order, or to prevent inciting of religious, national, and racial hatred.
Parents and legal guardians shall have the right to ensure religious and moral education of their children in conformity with their own convictions."

7 Art. 2 of the Universal Declaration of Human Rights, Articles 2 and 3 of the International Covenant on Civil and Political Rights, Art. 14 of the Convention on the Protection of Human Rights and Fundamental Freedoms of the Council of Europe, and Protocol No. 12 to that Convention, and Art. 21 of the Constitution of the Republic of Serbia.

bodies and despite the fact that the most important world religions, including three Abrahamic ones, essentially proclaim equality of all people before God, an objection can be heard that churches and religious communities within their internal organization and practice do not treat everyone equally.

1. The treatment of women in the organizational structure and internal practice of Abrahamic religious organizations

The above-listed objection due to unequal treatment most often refers to the unequal position and treatment of men and women, at the expense of women, and that objection is essentially acceptable.

Namely, in the majority of religious organizations within Judaism and Christianity, women cannot hold the position of priests. Exceptions to this are some protestant churches, although in them women have also begun being priests only in recent times,[8] and statistics shows that in these churches men are more present among priests than women,[9] while there is an approximately same number of men and women among believers. Additionally, in some Jewish communities outside traditional, so-called Orthodox Judaism, there are women performing the role of priests.

The basic legal grounds for reserving the priest status exclusively for men in Judaism and Christianity can be found in their common holy book, Old Testament, in the third book of the Pentateuch, or Jewish Torah, entitled *The Book of Leviticus*[10] or *The Third Book of Moses*,[11] in Chapter 21 that contains the "Rules for Priests" and begins (in the verse 1) with the following words: "The Lord said to Moses, 'Speak to the priests, the sons of Aaron ...'", while some of the rules from the same chapter by their nature can refer only to men, thus indicating that only men can be priests – for example, the rule from verse 5: "[5] Priests must not ... shave off the edges of their beards ..." or from verse 7: "[7] They must not marry women defiled by prostitution or divorced from their husbands ..." or from verses 13 and 14: "[13] The woman he marries must be a virgin.[14] He must not marry a widow, a divorced woman, or a woman defiled by prostitution, but only a virgin from his own people".

8 For example, in the Church of Scotland, the possibility for women becoming priests was introduced in 1968, and in the Church of England as late as 1992. According to: Alison Stuart, "Freedom of Religion and Gender Equality: Inclusive or Exclusive?", *Human Rights Law Review*, Vol. 10, Issue 3, 2010, 440.

9 In 2005, in the Church of England, there were about 25% women priests with the eparchy licence, while, as a rule, they did not serve in the most important and prestigious churches. According to: Stuart, *op. cit.*, 440.

10 According to the biblical tradition, Levites are one of twelve Jewish tribes claiming descent from Aaron, Moses' brother and supreme priest, and his descendant, Levi, the third son of Jewish Patriarch Jacob (also known as Israel). In the seizure of the Promised Land, this tribe did not gain its own territory, but the status of priests.

11 The book is believed to have been written by Moses (including the entire Pentateuch, which is also called Moses' Pentateuch or the Books of the Law; other Old Testament books are: Historical, Wisdom and Prophetic books).

Women are present among the monkhood in Orthodox Christianity and Catholicism, but not among the clergy (therefore, the role of priests is performed by men even in female monasteries, either from the circle of priests who are not monks or from the circle of monks who are priests – solely men in both cases). Speaking about the possibility of the existence of female priesthood in the Catholic Church, Pope John Paul II expressed himself through the following words in his apostolic letter on that topic from 1994, thus actually concluding the debate, at least concerning the organization headed by him: "I declare that the Church has no authority whatsoever to confer priestly ordination on women, and that this judgment is to be definitively held by all the Church's faithful."[12] The possibility of women being deacons (deaconesses) in Christianity is confirmed by the following words of Apostle Paul from the Epistle to the Romans, where he speaks about Phoebe, the deaconess, and recommends her: "1. I commend to you our sister Phoebe, a deacon of the church in Cenchreae. 2. I ask you to receive her in the Lord in a way worthy of his people and to give her any help she may need from you, for she has been the benefactor of many people, including me."[13] Although not numerous, deaconesses were present in the history of Orthodox churches.[14] Nevertheless, Dimšo Perić states that citing the existence of deaconesses in Orthodox Christianity has not effect on the fact that priests can be exclusively men, while deaconesses themselves, who were not priests but priest assistants, have not been present for a long time:

> "In the Church from the times of Christ, apostles, presbyters and subsequently deans were all men. There were no exceptions and concessions in that respect. Mentioning deaconesses who have long disappeared from the life of the Church, is unfounded."[15]

In any case, as for deacons, they do not belong to the priesthood *stricto sensu*, but have an auxiliary, serving role.

Curiously, in Islam, which is considered "tougher" towards women than Christianity and Judaism, women can be – and history from the emergence of Islam to date knows a large number of women who have been – experts on Islamic law, muftis (experts on religious and legal matters interpreting Islamic law, performing marriage rites in line with sharia and generally executing a type of religious authority) and Sufi sheiks (leaders and teachers

12 The Holy See, Apostolic Letter *Ordinatio Sacerdotalis* of John Paul II to the Bishops of the Catholic Church on Reserving Priestly Ordination to Men Alone, Vatican, May 22, 1994, *https://www.vatican.va/content/john-paul-ii/en/apost_letters/1994/documents/hf_jp-ii_apl_19940522_ordinatio-sacerdotalis.html*.

13 Rom 16:1-2.

14 About deaconesses in Orthodox Christianity, see: Kyriaki Karidoyanes FitzGerald, *Women Deacons in the Orthodox Church: Called to Holiness and Ministry* (2009).

15 Dimšo Perić, *Crkveno pravo* (*Church Law)* (1997), 80.
About the position of women and the possibility of the existence of female clergy in Christian Orthodoxy, see in more detail in the following collection of papers: Gabrielle Thomas and Elena Narinskaya (eds), *Women and Ordination in the Orthodox Church, Explorations in Theology and Practice* (2020).

of the Sufi group, as a rule, within a zāwiyah[16]).[17] Since Aisha, one of the wives of Prophet Muhammad, had great knowledge in the field of Islamic law and was a mufti herself,[18] and since the teaching and acting of Prophet Muhammad and the people close to him (his family and closest companions, so-called Aṣṣaḥābah) – called Sunnah – are the source of sharia that comes immediately after the Qur'an as the supreme legal act in sharia, it means that sharia can be considered to accept indisputably that women can be muftis. In patriarchal societies such as the majority of Islamic ones, where a certain distance between men and women outside the family circle is quite common, it is considered particularly suitable for female muftis to maintain communication with women believers and advise them about specifically female matters in which they possess more knowledge and sensibility than men, and can establish a relationship of greater trust with them. Women can also be dervishes and sheikhs, i.e., dervish leaders, in Sufi ranks, who are often compared to the monkhood in Christianity due to their extreme commitment to faith, high degree of spirituality and aspiration towards coming as close to God as possible. However, there is a large difference in many aspects, because dervishes lead a common civil life in their families (with the strict respect for Islamic rules regarding clothes, food and drinks, gender relations, charity and fulfilling other religious duties etc.), while their gatherings in zāwiyahs, where religious matters are studied and discussed and where rites are performed, are periodical, although in regular terms.

The question as to whether women can be imams, i.e., lead prayers and say khutbahs (sermons) is somewhat more complex. The Qur'an itself, as the supreme legal source, does not speak about it. Within the second most important legal source, the Sunnah, there is a number of hadiths (the sayings and acts of Prophet Muhammad, as well as his immediate circle, reflecting his attitudes, which were transferred through the tales of different witnesses) speaking about some women from Prophet Muhammad's circle (Aisha, Umm Salama and Umm Waraqa) who, with the Prophet's permission, led prayers (for female believers, standing together with them in the first row or, in the case of Umm Waraqa, even for mixed groups of believers, in their family and immediate cir-

16 "Zāwiyah, Persian khānqāh, Turkish tekke, generally, in the Muslim world, a monastic complex, usually the centre or a settlement of a Sufi (mystical) brotherhood." – The Britannica Dictionary online, topic: zawiyah, *https://www.britannica.com/topic/zawiya.*

17 Omaima Abou-Bakr and Huda As-Saa'dy, "Female Jurists, Muftis and Sheikhs in the Islamic History", Khotwa Center, February 25, 2021, *http://www.khotwacenter.com/female-jurists-muftis-and-sheikhs-in-the-islamic-history/* .

18 One of the testimonies about it is as follows:
"Masruq reported: It was said, 'Did Aisha have knowledge of the obligations?' Masruq said, 'By the one in whose hand is my soul, I saw the learned elders among the companions of Muhammad, peace and blessings be upon him, ask her about the obligations.'
Source: Muṣannaf Ibn Abī Shaybah 30387
Grade: *Hasan* (fair) according to Al-Haythami".
Daily Hadith Online, Masruq on Aisha: Companions seek Islamic knowledge from Aisha, *https://www.abuaminaelias.com/dailyhadithonline/2014/01/06/masruq-aisha-islamic-knowledge/*.

cle). However, the hadiths proving this practice are not the sufficiently reliable ones[19] because they have a weak transmission chain, but confirm one another.[20] Therefore, it is up to Islamic jurisprudence (*fikh*) to give its interpretation as to whether it is allowed to women to be imams and if yes, under what conditions and in what situations. Out of four great jurisprudence schools of Sunni Islam, so-called madhhab, one that is known as Maliki[21] believes that

19 In Islamic law there are several ranks of hadiths, depending on the extent of their validity and reliability and, accordingly, acceptability. The highest rank includes the so-called reliable hadiths, or sahih. There are detailed and precise conditions to be fulfilled by a hadith to be considered a sahih hadith. Briefly, since before the entry in written manuscripts hadiths had been spread verbally, it is necessary to have a strong chain of reliable transmitters and, in addition, the hadith in question must not be opposite to other reliable traditions and, finally, the hadith must not contain any internal hidden faults. Besides sahih hadiths, there are hassan hadiths, which are considered good, and with the properties of sahih ones, but characterized by a lower scale of preciseness, and da'if hadiths, or the weak hadiths. Sahih and hassan hadiths are accepted as a source (of course, sahih hadiths are assigned greater significance and trust), unlike da'if hadiths (although they are not considered inexistent and can serve to support the stronger and accepted elements of the Sunnah).

Moreover, the hadiths can also be divided into Mutawatir (continuous) ones and Ahad (solitary) ones. For a hadith to be considered Mutawatir, it needs to be reported by several narrators so that it is impossible that one of them has lied (in which case there would be contradictions), that the reports are connected into a chain of narration and based on sensory findings of their reporters, i.e., that the reporters have seen and/or heard what they report about. Ahad hadiths do not fulfil the above-listed conditions. Ahad hadiths can also be sahih, hassan and da'if. It is believed that Ahad hadiths themselves do not transfer positive knowledge, but that they need to be supported by other evidence. However, in Islamic jurisprudence there is a prevailing opinion that they are applicable and mandatory except for strict matters of creed, which requires complete certainty.

20 It should be noted that there is no uniformity regarding the classification of certain hadiths into the categories of sahih, hassan and da'if, particularly those hadiths that are not contained in the most important and reliable collections, such as *Sahih al-Bukhari* (a collection compiled by Muhammad ibn Isma'il al-Bukhari /810-870/) and Sahih Muslim (a collection compiled by Muslim ibn al-Ḥajjāj /815–875/). There are 4 high-ranking hadith collections that, together with the two above-mentioned ones, make the so-called *Kutub al-Sittah*, or six most appreciated hadith collections among the Sunni. Apart from *Sahih al-Bukhari* and *Sahih Muslim* (which are more appreciated than the other four), *Kutub al-Sittah* includes: *Sahih at-Tirmidhi*, compiled by Al-Tirmidhi (824–892), *Sunan ibn Majah*, compiled by Ibn Majah (824–887), *Sunan Abu Dawood*, compiled by Abu Dawud al-Sijistani (817– 889), *Al-Sunan al-Sughra*, also known as *Sunan an-Nasa'i*, compiled by Al-Nasa'i (829–915).

The different treatment of the level of authenticity of certain hadiths can be illustrated by the hadith referring to the prayer being led by Umm Waraqa, which is considered less reliable by some people, but authentic, or sahih, by others:

"Umm Waraqa reported: The Messenger of Allah, peace and blessings be upon him, would visit her in her house, he appointed a caller to prayer for her, and he ordered her to lead the people of her household in prayer. Abdur Rahman ibn Khallad said, "I saw her caller to prayer. He was an old man."

Source: Sunan Abī Dāwūd 591

Grade: Sahih (authentic) according to Ibn al-Qayyim".

Daily Hadith Online, "Hadith on Prayer: Women leading their household in prayer", *https://www.abuaminaelias.com/dailyhadithonline/2018/03/26/women-leading-prayer/*.

21 This jurisprudence school was founded by Islam theologist and legal expert from the 8th century, Malik ibn Anas. The school was particularly spread in North and West Africa, Chad, Sudan, Kuwait, Dubai Emirate, and in the north-east of Saudi Arabia.

women are strictly forbidden to lead prayers, while madhhabs Shaf'i'i[22] and Hanafi[23] believe that they are allowed to lead prayers in which only women believers participate and not by standing before other believers (as imams commonly do), but by standing in the first row, along with other believers from that row, and by leading the prayer from there. In contrast, the fourth jurisprudence school, or so-called madhhab Hanbali,[24] has the most liberal attitude, allowing women to lead joint prayers of men and women at home, in their families as well as public *tarawih*, or long nightly prayers with the break periods during the month of Ramadan, but by standing in the prayer row behind men. The difference between these jurisprudence schools is in the extent to which they assign or do not assign significance to mutual confirmation of the above-mentioned relatively week hadiths.[25]

The opinions about this matter are divided among the greatest Islamic scholars and experts for Islamic law when seen individually. Here, we will mention only the most important ones. For example, famous Arabian-Andalusian scientist (mathematician, doctor, astronomer etc.), philosopher and jurist Ibn Rushd, better known in the West for his Romanised name Averroes, when expressing the actual opinion of the majority, primarily in Maliki madhhab to which he belonged, explained the reasons why the prayer leading by women in front of both male and female believers was considered impermissible. The first reason is insufficient strength (authenticity) of the relevant hadiths (the prayer leading by women in front of the mixed group of believers is defined in the hadiths referring to Umm Waraqa), and particularly the fact that such practice was not recorded in the first century after Muhammad. The second reason is that it is illogical for a woman to lead the prayer in front of men, and there is Prophet Muhammad's instruction that, in case they are not in the space physically separated from the men's part, women should pray in the rows behind men.[26] Imam Abu Thawr (full name: Ibrahim ibn Khalid al-Kalbi

22 This jurisprudence school was founded by Islam theologist and legal expert from the end of the 8th and the beginning of the 9th centuries, Muḥammad ibn Idrīs al-Shāfiʿī). This school was dominant in Malesia, Indonesia and the area of East Africa and also present in Syria to a smaller extent.

23 This jurisprudence school was founded by Islam theologist and legal expert from the 8th century, Abū Ḥanīfa. It was spread particularly in Turkish, Central Asia, Russia, the Balkans, India, Pakistan, Bangladesh and, until the 16th century (and the adoption of Shia Islam) in Iran (i.e., Persia).

24 This jurisprudence school was founded by Islam theologist and legal expert from the end of the 9th century Ahmad ibn Hanbal. It was dominant in the largest part of Saudi Arabia, Qatar and minority communities in Iraq and Syria.

25 Ahmed Elewa and Laury Silver, "'I am One of the People': A Survey and Analysis of Legal Arguments on Woman-Led Prayer in Islam", *Journal of Law and Religion*, Volume 26, Issue 1, 2010, 154.

It is also spoken about by Hamza Yusuf, "Can Women Serve as Imams?", *Seasons: Semi-annual Journal of the Zaytuna Institute*, Vol. 3, No. 2 (Spring), 2007, 47–64.

26 This is contained in the following hadith:

"Abu Huraira reported: The Messenger of Allah, peace and blessings be upon him, said, "The best rows for men are the front rows and the worst are the back rows. The best rows for women are the back rows and the worst are the front rows."

al-Baghdadi /764–854/) based his view that women could lead the prayer in which men also took part on the fact that male slaves were allowed to lead the prayers for free male believers and, since male slaves were lower ranked than free women on the social ladder of early Islam, it derives that women can lead the prayers for male believers as well. In addition to the above-mentioned, this conclusion is also supported by the hadith according to which Prophet Muhammad said that imams should be the best-versed ones in the reading of the Qur'an, and that such skill could be possessed by women too.[27] Probably the greatest Islamic thinker, Sufi mystic and poet from Andalusia, Muḥyiddin ibn al-'Arabi /1165—1240/), also known as al-Shaykh al-Akbar (the Great Shaykh), believed that women could lead the prayers for male believers as well, quoting as the main reason the fact that Qur'an speaks of women who had reached perfection and who had been prophets (primarily those from the tradition of Judaism and Christianity that is taken over by Islam, with certain modifications, such as: Virgin Mary, Sarah, Hagar, Hawa (Eve), the mother of Moses, and the wife of the Pharaoh, and since "prophecy is leadership *(imama)*", then women can be leaders in the prayer regardless of the gender of the believers praying with them (here, the logic is applied from the logical interpretation of law by the method of *argumentum a fortiori*, namely *argumentum a maiori ad minus* – someone who can do more can also do less).[28]

Apart from the (im)possibility of women becoming priests, an element of discrimination that is often stated is the fact that women as believers do not have the same roles and position in religious services and regarding religious duties. For example, in traditional Jewish law (called Halakha), which is applied by Orthodox Jews, women are exempt from the duty to participate in time-dependent positive religious duties (*mitzvot*, singular: *mitzvah*),[29] such as *Kriat Shema* (uttering a statement of faith in one God, "The Lord is our

Source: Ṣaḥīḥ Muslim 440
Grade: *Sahih* (authentic) according to Muslim"
Daily Hadith Online, *op. cit*.

27 This haddis states as follows:
"Abu Mas'ud reported: The Messenger of Allah, peace and blessings be upon him, said, "The best versed in the recitation of the Quran should lead the prayer. If they are equal in their recitation, then the one most knowledgeable of them in the Sunnah. If are equal in knowledge of the Sunnah, then the one who first performed emigration. If they emigrated at the same time, then the one who first embraced Islam. No man should lead another man in prayer, nor sit in the honored place in his home, unless he has his permission."
Source: Ṣaḥīḥ Muslim 673
Grade: *Sahih* (authentic) according to Muslim" Daily Hadith Online, "Hadith on Imams: Most knowledgeable of Quran should lead prayer". *https://www.abuaminaelias.com/dailyhadithonline/2018/02/04/imam-most-knowledge-quran-salat/*.

28 Elewa and Silver, *op. cit.*, 155–158.

29 Jewish law prescribes that the religious duties, 613 in total, are assigned to people by God. There are positive and negative religious duties (commandments). The first are commandments to do something, and the second are commandments not to do something, i.e. prohibitions. Positive commandments can be non-time-dependent or time-dependent (i.e., must be performed at a precisely defioned time). In Orthodox Judaism women are exempt from the majority of time-dependent positive commandments.

God; the Lord is one", which, according to the instruction from the Torah, must be practised twice a day, in the morning and in the evening, or at the time of waking up and going to bed[30]); *Tefillin* (small black leather boxes with leather belts containing scrolls of parchment with the verses from the Thora, carried by adult Jews attached to their heads or arms during everyday morning prayers); *Sukkah* (an improvised booth made for the use during one-week Jewish holiday *Sukkot*; while there are no requirements regarding materials for making the walls, except for their being strong enough to stand against the wind, a sukkah must be covered by unprocessed materials growing from the soil, such as branches, hay, straw, palm or other leaves, etc.; sukkah symbolizes a make-shift wilderness shelter made by Jews during their wandering after the flight from Egypt; during the holiday of Sukkot, Jews spend time in these booths, pray and often sleep in them); *Aliyah* (upon invitation during the service, individual members of the Jewish congregation going to the raised podium in the synagogue, known as *bimah*, to receive a blessing and to read passages from the Thora); *Minyan* (a quorum of ten adult Jews in charge of participating in certain activities during religious services, primarily public prayers), as well as a series of other duties of this kind.[31] There are claims, or criticism, that the fact that, in Orthodox Judaism, women are exempt from most time-dependent positive commandments constitutes discrimination against women.[32] The answer to such criticism is that women are exempt from these commandments, but nor forbidden to perform them, as well as that the reason for such exemption is that women have duties related to children and family, which, by the nature of things, cannot be performed by men and which are incompatible with strictly time-dependent duties.[33]

There is a widespread opinion that women in Islam are forbidden to attend funerals, as well as a claim that such prohibition is of discriminatory nature. Nevertheless, matters are slightly more complex. Namely, in sharia, within Prophet Muhammad's tradition called the Sunnah, there is a *sahih* (authentic) hadith referring to this topic. It says as follows: "Narrated Um ʿAtiyya: We were forbidden to accompany funeral processions but not strictly."[34] From this hadith, seen independently, it can be concluded that women are not for-

30 Verses 4–7 from Chapter 5 of (Deuteronomy), i.e., the Fifth Book of the Holy Scriptures of the Old Testament (the Five Books of the Pentateuch or the Five Books of Moses).

31 A detailed presentation of the duty to fulfill or exceptions to the duty of women's participation in fulfilling religious commandments in Jewish law, with an indication of the legal foundations for those exceptions, is contained in Tirzah Meacham (leBeit Yoreh), "Legal-Religious Status of the Jewish Female", *The Shalvi/Hyman Encyclopedia of Jewish Women, Jewish Women's Archive,* July 13, 2021, *https://jwa.org/encyclopedia/article/legal-religious-status-of-jewish-female*.

32 Raphael Cohen-Almagor, "Discrimination against Jewish Women in Halacha (Jewish Law) and in Israel", *British Journal of Middle Eastern Studies*, Vol. 45, Issue 2, 2018, 294.

33 "After all, a woman cannot be expected to just drop a crying baby when the time comes to perform a commandment." The Role of Women, *https:// mechon-mamre.org/jewfaq/women.htm*.

34 Sahih al-Bukhari 1278, Book 23, Hadith 39, *https://sunnah.com/bukhari:1278*.
In the second, less significant collection of hadiths, the text of the same hadith is as follows:

bidden to attend funerals, but they are recommended not to do it. Therefore, it is neither something that is allowed and called *halal* in Islam nor something forbidden and referred to as *haram*, but a category of behaviour not looked upon favourably by Islam, but towards which it has a relationship between allowed and forbidden, i.e., of discouragement, and that category is defined by the word *makruh*. However, even behaviours that are *makruh* have two categories: "makruh tahrimi (close to haram)" and "makruh tanzihi (close to halal)". According to the members of all jurisprudence schools (all the madhhabs except for Hanafi school), the quoted hadith is interpreted in terms that women's presence at funerals is makruh tanzihi, or mildly not recommended.[35] This interpretation is supported by a hadith (despite being from the category of da'if ones) which says that women attended Prophet Muhammad's funeral: "It was narrated that Ibn 'Abbas said: '... When they had finished preparing him, on Tuesday, he was placed on his bed in his house. Then the people entered upon the Messenger of Allah (ﷺ) in groups and offered the funeral prayer for him, and when they finished the women entered, and when they finished the children entered, and no one led the people in offering the funeral prayer for the Messenger of Allah (ﷺ)...'"[36] However, the members of Hanafi school think that women's presence at funerals is *makruh tahrimi*, or almost forbidden, and they base their position on the following hadith (which also belongs to the weak, da'if, hadiths, which is why the members of the three other schools of fiqh ignore it), in the light of which they interpret the quoted sahih hadith originating from Umm 'Atiyya: "It was narrated that 'Ali said: "The Messenger of Allah (ﷺ) went out and saw some women sitting, and he said: 'What are you sitting here for?' They said: 'We are waiting for the funeral.' He said: 'Are you going to wash the deceased?' They said: 'No.' He said: 'Are you going to lower him into the grave?' They said: 'No.' He said: 'Then go back with a burden of sin and not rewarded.'"[37]

One of the elements of the internal organization and methods of the functioning of Abrahamic churches and religious communities to which there is an objecting of being of a discriminatory nature towards women is the separation of men and women during religious services in such a manner that is claimed to put women into a lower-ranking position.

The separation of men and women during religious services in Judaic tradition and Hebrew law (Halakha) is achieved by a physical division called *Meḥitzah*, which can have different forms (a separate gallery for women in synagogues, screens and other forms of division between the front and the rear, or the left-hand and the right-hand side of synagogues etc.). The separation of men and women was required in traditional, so-called Orthodox

"Umm 'Atiyah (RAA) narrated, 'We were forbidden to accompany funeral processions, but this prohibition was not mandatory for us.' Agreed upon." – Bulugh al-Maram 571, Book 3, Hadith 40, *https://sunnah.com/bulugh:571*.

35 Dr Usaama al-Azami, "Can Women Attend the Burial of the Deceased?", September 5, 2019, *https://muslimmatters.org/2019/09/05/can-women-attend-the-burial-of-the-deceased/*.

36 Sunan Ibn Majah 1628, Book 6, Hadith 196. *https://sunnah.com/ibnmajah:1628*.

37 Sunan Ibn Majah 1578, Book 6, Hadith 146.

Judaism, unlike other Judaic communities (so-called Reform Judaism, Reconstructionist Judaism, and Conservative Judaism). The reasons for such separation are primarily the general resistance towards mixing men and women in former times, particularly in public places, in line with the moral at that time and the fear from deviating from it, and the need, which still exists today, for avoiding the diversion of attention from the religious service itself and the creation of impure thoughts.

The practice of separating men and women in Judaism dates back to the era of the Second Temple, when in the Temple there was an Inner Court for men and a Women's Court, but men and women were allowed to mix in the Women's Court, closer to the altar, which could be entered by men in appropriate stages of the service in order to approach the altar and offer sacrifices. The separation was subsequently ordered mainly during the so-called Water-Drawing Ceremony, which was performed on the second day of the seven-day autumn holiday *Sukkot* with the aim of avoiding frivolous behaviour during the joyful festive atmosphere.[38] This is first spoken about by the Judaist legal source called the *Mishnah*, the written redaction of Jewish oral traditions from the first half of the 3rd century AD,[39] in the tractate *Sukkah* that refers to the above-mentioned holiday,[40] and then in the *Tosefta*, another written redaction of Jewish oral traditions from the time of the Mishnah, which is a supplement to the *Mishnah*[41] describing the construction of three balconies for women.[42] In a later source of Hebrew law, the *Babylonian Talmud* (*Talmud Bavli*),[43] in the tractate *Sukkah*, after transmitting what had been said in the *Mishnah* and the *Tosefta:*

38 Shira Wolosky, "Foucault and Jewish Feminism: The Meḥitzah as Dividing Practice", *Nashim: A Journal of Jewish Women's Studies & Gender Issues*, No. 17 (Spring), 2009, 11.

39 The Mishnah is also called the Oral Torah. It contains the debates of the group of the greatest Rabbi sages from the period from 70 AD (the year of the destruction of the Second Temple) to approximately 200 AD (that group was called Tannaim and this collection was compiled by Rabbi Judah ha-Nasi in about 220 AD. It is the first important written work of so-called Rabbi Judaism. As a legal source, only the Jewish Bible is hierarchically above it.

40 "At the conclusion of the first Festival Day the priests and the Levites descended from the Israelites' courtyard to the Women's Courtyard...". Mishnah Sukkot 5:2, *https://www.sefaria.org/Mishnah_Sukkah.5.2?lang=bi&with=all&lang2=en*.

41 The word "tosefta" means an addition or a supplement.

42 "Formerly when they were beholding the joy at the ceremony of the water drawing, the men were beholding it from within the Temple precincts and the women from without. But when the supreme court saw that they behaved in a frivolous manner they erected three balconies in the court, facing the three sides, that from them the women might behold the rejoicing at the ceremony. So, when they were beholding the rejoicing at the ceremony the sexes were not mixed up together." Tosefta Sukkkot 4:1, *https://www.sefaria.org/Tosefta_Sukkah.4.1?lang=bi&with=all&lang2=en*.

43 More precisely, in the part of the *Babylonian Talmud* called the *Babylonian Gemara* (since the entire Babylonian Talmud also includes the Mishnah and the Babylonian Gemara), which was written in the 7th century AD as a result of centuries-long analyzing and commenting the Mishnah in Jewish theological centres located mainly in the territory of today's Iraq (in Mesopotamia), known as the Talmudic Academies in Babylonia. There are also two centuries older Jerusalem Gemara and Jerusalem Talmud.

> "Initially, women would stand on the inside of the Women's Courtyard, closer to the Sanctuary to the west, and the men were on the outside in the courtyard and on the rampart. And they would come to conduct themselves with inappropriate levity in each other's company, as the men needed to enter closer to the altar when the offerings were being sacrificed and as a result they would mingle with the women. Therefore, the Sages instituted that the women should sit on the outside and the men on the inside, and still they would come to conduct themselves with inappropriate levity. Therefore, they instituted in the interest of complete separation that the women would sit above and the men below."[44]

a question was posed as to how it was possible to change the Temple structure when, according to the explicit statement in the Old Testament (First Chronicles 28:19), the layout of the Temple structure is God's work, while the answer was given through the words of the outstanding religious scholar Rav Abba Arikha (known only as Rav). He says that the Sages found a verse in the Old Testament, more precisely in the Book of Zechariah, which speaks about the sorrow after the war between Gog and Magog:

> "[12] The land will mourn, each clan by itself, with their wives by themselves: the clan of the house of David and their wives, the clan of the house of Nathan and their wives, [13] the clan of the house of Levi and their wives, the clan of Shimei and their wives,[14] and all the rest of the clans and their wives."[45]

Citing these verses from the Old Testament, Rav concludes (or, rather, quotes the conclusion of the Sages):

> "This indicates that at the end of days a great eulogy will be organized during which men and women will be separate. They (the Sages, added by the author) said: And are these matters not inferred *a fortiori*? If in the future, at the end of days referred to in this prophecy, when people are involved in a great eulogy and consequently the evil inclination does not dominate them, as typically during mourning inappropriate thoughts and conduct are less likely, and nevertheless the Torah says: Men separately and women separately; then now that they are involved in the Celebration of the Drawing of the Water, and as such the evil inclination dominates them, since celebration lends itself to levity, all the more so should men and women be separate."[46]

The separation of men and women, without physical divisions during the service (with women, as a rule, standing or sitting on the left, and men, as a rule, on the right) is common in both Orthodox and Catholic Christian churches.

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44 Talmud Bavli, Tractate Sukkah 51b, *https://www.sefaria.org/Sukkah.51b.12?lang=bi&with=all&lang2=en*.

45 Zechariah 12:12-14.

46 Talmud Bavli, Tractate Sukkah 52a, *https://www.sefaria.org/Sukkah.52a?lang=bi*.

In Islam, the practice of separating men and women during the service in mosques, where women are in the gallery, in case there is one in the mosque, or behind men, is founded on the following sahih hadith:

> "Abu Huraira reported: The Messenger of Allah, peace and blessings be upon him, said, 'The best rows for men are the front rows and the worst are the back rows. The best rows for women are the back rows and the worst are the front rows.'"[47]

As in Judaism, in Christianity and Islam, the key reason for the separation of female from male believers during the religious service is the effort that the presence of persons of the opposite sex and the view of them does not distract attention from the service they are attending and does not arouse an urge that is undesirable in such moments (this is especially pronounced in Islam where prayer is performed with prostration).

2. The treatment of persons with disabilities in the organizational structure and internal practice of Abrahamic religious organizations

As for the position of persons with disabilities within the organizational structures and activities of churches and religious communities, it should first be noted that persons with disabilities tend to be devoted to their churches and religious communities on a large scale and be present in them. This can probably be explained by a greater need of those people to expect help in their misfortune from the otherworldly, as well as their tendency, being motivated by their problems, to consider more deeply the ontological and existential questions to which religions offer answers. In churches and religious communities there is a visible presence of persons with disabilities among believers attending religious services and rituals, while churches and religious communities traditionally strive to meet their needs (for example, the places for sitting during religious services in Christian Orthodox churches, where believers as a rule stand during the service etc.). There are also persons with disabilities among the support staff in churches and religious communities, which is the indicator of the care of religious organizations for social problems of the most vulnerable groups of believers. This phenomenon is in a way symbolized by the literary character of the bell-ringer of the Church of Our Lady in Paris from Victor Hugo's novel *The Hunchback of Notre-Dame*. Nevertheless, as a rule, there are no many persons with disabilities among the priests of Abrahamic religions. The question arises whether there is a canonical basis for this.

First of all, the Old Testament, the Book of Leviticus, in its Chapter 21, verses 16-24, there is a prohibition for persons with a wide range of disabilities to approach the altar and offer sacrifices, which is one of the most important and sacred tasks of the clergy[48]:

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47 Ṣaḥīḥ Muslim 440. Grade: *Sahih* (authentic) according to Muslim. Daily Hadith Online, *op. cit.*

48 Julia Watts Belser, "Priestly Aesthetics: Disability and Bodily Difference in Leviticus 21", *Interpretation: A Journal of Bible and Theology*, Vol. 73, Issue 4, 2019, 355.

„16 And the Lord spoke to Moses, saying,

17 'Speak to Aaron, saying, None of your offspring throughout their generations who has a blemish may approach to offer the bread of his God.

18 For no one who has a blemish shall draw near, a man blind or lame, or one who has a mutilated face or a limb too long,

19 or a man who has an injured foot or an injured hand,

20 or a hunchback or a dwarf or a man with a defect in his sight or an itching disease or scabs or crushed testicles.

21 No man of the offspring of Aaron the priest who has a blemish shall come near to offer the Lord's food offerings; since he has a blemish, he shall not come near to offer the bread of his God.

22 He may eat the bread of his God, both of the most holy and of the holy things,

23 but he shall not go through the veil or approach the altar, because he has a blemish, that he may not profane my sanctuaries, for I am the Lord who sanctifies them.'

24 So Moses spoke to Aaron and to his sons and to all the people of Israel."[49]

Although primarily the Jewish holy book and legal source, the Torah is part of the Old Testament, which is also the Christian holy book, and the interpretations of the original and meaning of this prohibition for persons with disabilities (or *blemish*) to approach the altar can be found both in Judaic and Christian literature.

Accordingly, John Piper, a Christian, i.e., Protestant priest and author,[50] interprets the quoted God's orders to Moses through the spirit of both Old and New Testaments, or through the nature of God and the nature of Jesus Christ and his role in the resurrection of the dead:

> "In the Bible as a whole, there are two dimensions to God's nature that shape the way he deals with mankind. One is unapproachable holiness. That's one massive truth throughout the Bible. God is holy. Sinners can't approach him. Nothing imperfect can approach him. Nothing evil can approach God without being destroyed. So it's fitting that in the presence of God there can only be perfection — moral, spiritual, and physical perfection ... The other dimension of his nature is his overflowing mercy and grace. Those are the two: unapproachable holiness and overflowing mercy and grace. This overflowing mercy and grace reaches out to the physically, morally, and spiritually imper-

49 Leviticus 21:16-24.

50 John Piper pastor of Bethlehem Baptist Church in Minneapolis and chancellor of Bethlehem College & Seminary and founder and teacher of *desiringGod.org*. – "Does the Old Testament Alienate the Disabled?", Interview with John Piper, March 25, 2019, *https://www.desiringgod.org/interviews/does-the-old-testament-alienate-the-disabled*.

> fect and finds a way in Jesus Christ to declare them to be perfect. ... By sanctification, and then by the recreation of everything that's broken — physical dimensions of the world and moral dimensions of the world — God is also going to make everything in his presence perfect forever. ... There will be no defects morally, and there will be no defects physically in the presence of God in the age to come."[51]

In the interpretations only in the light of Jewish holy books and regulations, there is a different view of the matter, based on strictly Judaic sources. Julia Watts Belser, Professor of Theology at Georgetown University in Washington, a person with disabilities herself, points to the fact that Chapter 22 of the Book of Leviticus also contains the prohibition of offering as sacrifices those animals with physical blemishes, which means that "(p)riestly ritual is built upon pristine, perfect bodies who either offer divine service or are offered up for divine consumption",[52] and also the fact that many authors, as well as the Jewish tradition, attempt to interpret the said prohibition from Chapter 21 of the Book of Leviticus in such a manner that it has as few implications as possible to the exclusion of persons with disabilities. However, she draws the following conclusion:

> "...I prefer to face Leviticus 21 as a powerful, if disturbing text: one that makes visible the dynamics by which certain bodies are marked as inferior. Through these texts, the biblical author idealizes a certain kind of human body, articulating the contours of divine desire for a specific human form. ... (T)he disqualification of the blemished priest has a powerful cultural sway."[53]

However, seeing the above-listed prohibitions in the historical context and having in mind later sources of Hebrew law, a milder picture is provided, as this author also points out.[54] Namely, the Book of Leviticus (as well as the remainder of the Five Books of Moses) was created at the time of the forty-year-long wandering of the Jews in the desert after their flight from Egypt. At that time, the centre of religious life and religious rituals was the movable sanctuary of the Tabernacle (or the Tent of the Congregation), in the shape of a tent, or a movable arbour, which was carried along and which contained the holiest Jewish object – the Ark of the Covenant.[55] Thus, the prohibitions from this Chapter of the Book of Leviticus referred to that sanctuary, while after the arrival in the Holy Land and the construction of the Temple in Jerusalem, the prohibitions referred to the service in the Temple (the First and the Second). After the destruction of the Second Temple in 70 AD, the reli-

51 *Ibid.*

52 Belser, *op. cit.*, 355.

53 *Ibid.*, 356.

54 *Ibid.*, 362–366.

55 In it, two stone slabs were kept on which, as the legend has it, God himself wrote Ten Commandments and gave them to Moses, as well as some other holy objects of supreme importance.

gious life of the Jews did not have the centre such as previously the Temple, in which sacrifice was offered, but it was dispersed in synagogues as the places where religious services and rites were performed that, among other things, replaced the previous sacrifice in the Temple in Jerusalem. The above-listed limitations from Chapter 21 of the Book of Leviticus were adjusted to new conditions and the new rite that replaced sacrifice offering – the benediction, given by the priest to the believers by reciting the appropriate part of the Jewish Bible[56] and raising arms high in the air. In the tenth tractate of the Mishnah, known as the Mishnah Megillah, there is a following limitation:

> "A priest who has blemishes on his hands may not lift his hands to recite the Priestly Benediction. Because of his blemish, people will look at his hands, and it is prohibited to look at the hands of the priests during the Priestly Benediction. Rabbi Yehuda says: Even one whose hands were colored with *satis*, a blue dye, may not lift his hands to recite the Priestly Benediction because the congregation will look at him."[57]

As it can be seen, despite using the same word for the blemish as the Book of Leviticus (*blemish* or *mûm* in Hebrew), the quoted prohibition from the Mishnah is limited to the blemishes on the hands as a means for transferring God's blessing to believers, including in such blemishes hands coloured with a dye. In addition, there is an explanation for the reason for such prohibition – diverting the believers' attention from the essence of the ritual to the hands coloured with a dye (and other blemishes of the hands).

Later sources of Hebrew law introduce new alleviations. Thus, the Babylonian Talmud contains the following part that further alleviates the said prohibition:

> "Rav Huna said: A priest whose eyes constantly run with tears may not lift his hands to recite the Priestly Benediction. The Gemara asks: Wasn't there a certain priest with this condition in the neighborhood of Rav Huna, and he would spread his hands and recite the Priestly Benediction? The Gemara answers: That priest was a familiar figure in his town. Since the other residents were accustomed to seeing him, he would not draw their attention during the Priestly Benediction. This is also taught in a *baraita*: One whose eyes run should not lift his hands to recite the Priestly Benediction, but if he is a familiar figure in his town, he is permitted to do so
>
> Rabbi Yoḥanan said: One who is blind in one eye may not lift his hands to recite the Priestly Benediction because people will gaze at him. The Gemara asks: Wasn't there a certain priest who was blind in one eye in the neighborhood of Rabbi Yoḥanan, and he would lift his hands and recite the Priestly Benediction? The Gemara answers: That priest was a familiar figure in his town, and therefore he would not attract

56 Chapter 6, verses 2-7 of the Book of Numbers (the Fourth Book of Moses).

57 Mishnah Megillah 4:7, *https://www.sefaria.org/Mishnah_Megillah.4.7?lang=bi&with=all&lang2=en*.

> attention during the Priestly Benediction. This is also taught in a *baraita*: One who is blind in one eye may not lift his hands and recite the Priestly Benediction, but if he is a familiar figure in his town, he is permitted to do so.
>
> We learned in the Mishnah that Rabbi Yehuda said: One whose hands are colored should not lift his hands to recite the Priestly Benediction. It was taught in a *baraita*: If most of the townspeople are engaged in this occupation, dyeing, he is permitted to recite the Priestly Benediction, as the congregation will not pay attention to his stained hands."[58]

This passage from the Babylonian Talmud confirms that the diversion of the believers' attention, i.e., staring, became the basic reason and meaning of the prohibited participation of the priests with a certain physical disability in the benediction ritual, at least in the Judaic tradition after the destruction of the Second Temple. In the situation when it was certain that such disability will not make believers stare and divert their attention – and that is the situation in which the priest and his disability are known to the community of the religious service, i.e., believers attending the service, such disability itself is not an obstacle to the performance of the service.

Stating that the reason for the prohibition of the participation of priests with physical disabilities in some of the central segments of the religious service is the problem of diverting the believers' attention and their staring at that specific feature of the priest, Julia Watts Belser points out that there are similar reasons behind the limitation and prohibition of women's participation in some segments of religious rituals and activities:

> "Faced with the fear that the congregation might gaze at a priest's distinctive hands, the Mishnah forbids that priest from performing the blessing. It solves the problem of the stare by disbarring the person who provokes the stare. Such a move parallels a common means by which rabbinic culture responds to the "disruption" posed by women. Faced with other bodies that seem capable of undoing normative masculine control by generating disruptive sexual desires, rabbinic culture often chooses to impose limits on women's presence: to constrain women's movement, women's ritual participation, even women's voice. Rather than expecting men to govern and manage their desires, the most frequent response in the rabbinic repertoire is to neutralize the threat by removing women from the scene. So too with disability."[59]

In Orthodox Christianity, the issue of the possibility of persons with disabilities performing priestly functions is dealt with by the Canons of the Apostles, a set of rules approved by the highest councils of the early Christian Church dignitaries (containing a total of 85 canons, out of which the first 50 were accepted by both Orthodox and Catholic Christians, while the remain-

58 Bavli Megillah 24b, *https://www.chabad.org/library/article_cdo/aid/5448052/jewish/24b.htm*.

59 Belser, *op. cit.*, 356.

ing 35 are accepted only by Orthodox Christians) and mostly referring to the priesthood. Canons 77 and 78 do not set restrictions for persons with physical disabilities to become priests, unless their disability does not prevent them functionally to perform *de facto* their priestly duty. These disabilities include blindness and deafness (Canon 77: "If any cripple, or anyone with a defect in an eye or in a leg, is worthy of the episcopate, let him be made a bishop. For it is not an injury to the body that defiles one, but a pollution of the soul."; Canon 78: "Let no one that is deaf nor anyone that is blind be made a Bishop, not on the ground that he is deficient morally, but lest he should be embarrassed in the exercise of ecclesiastical functions."). On the other hand, according to Canon 79, disability of mental nature is an obstacle both to becoming a priest and participating in the prayer in the church with other believers as long as it lasts, but in the event of recovery, it will no longer be an obstacle (Canon 79: "If anyone is possessed of a demon, let him not be made a Clergyman, nor even be allowed to pray in company with the faithful. But after he has been cleansed thereof, let him be received, and if worthy be made one.").[60] Speaking of eunuchs, they are dealt with in Canons 21-23, envisaging that persons who have made themselves eunuchs cannot be priests, but those who were made eunuchs against their own will or guilt can perform the priestly duty.[61] This prohibition seems to be in opposition to Jesus Christ's own words from the Gospel of Matthew (Matthew 19:12). In it, besides the existence of those who were born as eunuchs or who were made eunuchs, Jesus Christ says that "there be eunuchs, which have made themselves eunuchs for the kingdom of heaven's sake", and these words led one of the greatest theologians of early Christianity, Origen of Alexandria, also known as Origen Adamantius (185 – 253) into self-castration in order to be completely dedicated to his faith. However, the above-quoted Christ's words are not interpreted literally today, but as renouncing and suppressing sexual urge and desire for the purpose of being dedicated to God and ministry.[62] There is also an opinion that Origen

60 The text of the Canons of the Apostles is available at the following website: *http://www.pravoslavlje.net/index.php?title=Канони_Светих_Апостола*, and in English at: *http://www.holytrinitymission.org/books/english/cannons_apostles_rudder.htm.*
Dimšo Perić adds that epileptics cannot be ordained. – Perić, *op. cit.*, 81.

61 "Canon 21
A Eunuch, whether he became such by influence of men, or was deprived of his virile parts under persecution, or was born thus, may, if he is worthy, become a Bishop.
Canon 22
Let no one who has mutilated himself become a clergyman; for he is a murderer of himself, and an enemy of God's creation.
Canon 23
If anyone who is a clergyman should mutilate himself, let him be deposed from office. For he is a self-murderer."
The text of the Canons of the Apostles is available at the following website: *http://www.pravoslavlje.net/index.php?title=Канони_Светих_Апостола*,
and in English at: *http://www.holytrinitymission.org/books/english/cannons_apostles_rudder.htm.*

62 *https://www.bibleref.com/Matthew/19/Matthew-19-12.html.*

himself was never ordained for a priest because of that act of self-castration,[63] which was considered an obstacle to gaining the priestly status at his time and which was later included in the canon and criticized by Origen himself in his subsequent works.

In the United States Conference of Catholic Bishops (USCCB) Guidelines, the section entitled "Holy orders & persons with disabilities", stipulates: "The existence of a physical disability is not considered in and of itself as disqualifying a person from holy orders. However, candidates for ordination must possess the necessary spiritual, physical, intellectual, emotional, and psychological qualities and abilities to fulfill the ministerial functions of the order they receive (Canons 1029 and 1041, n. 1)."[64]

In any case, having in mind that the Old Testament is both Jewish and Christian holy book of the highest rank, we think that all the above-listed rules in these two religious groups should be interpreted within a broader principle contained in Chapter 1, Verse 27 of the Book of Genesis (the First Book of Moses), called *b'tselem elohim*, which means "in the image of God". This verse goes as follows:

> "And God created the human in his image. In the image of God, He created him; male and female He created them." – Genesis 1:27

In her *Guide to Jewish Values and Disability Rights*, in the introductory part of the text, Julia Watts Belser points to the importance of the principle

63 "Origen, though still a layman, was effectively controlling the thought of near-eastern Christendom. The reason why he had never been ordained appears to be that in the immature enthusiasm of youth he had mutilated himself, an act which was taken in practice, as later canonically, to render him ineligible for the priesthood, and which he afterwards condemned with manifest feelings of self-reproach." – George Leonard Prestige, "Lecture 3: Origen: or, The Claims of Religious Intelligence", *Fathers and heretics: six studies in dogmatic faith with prologue and epilogue being the Bampton Lectures for 1940* (1940), 47.

64 USCCB Guidelines, Holy orders & persons with disabilities, para. 31, *https://catholicdos.org/holy-orders-persons-with-disabilities*.

Canon 1029 goes as follows:

"Can. 1029 Only those are to be promoted to orders who, in the prudent judgment of their own bishop or of the competent major superior, all things considered, have integral faith, are moved by the right intention, have the requisite knowledge, possess a good reputation, and are endowed with integral morals and proven virtues and the other physical and psychic qualities in keeping with the order to be received."

Canon 1041, n. 1 goes as follows:

"Can. 1041 The following are irregular for receiving orders:

1/ a person who labors under some form of amentia or other psychic illness due to which, after experts have been consulted, he is judged unqualified to fulfill the ministry properly; ..."

Of importance is also Canon 1041, n. 5, which goes as follows:

"Can. 1041 The following are irregular for receiving orders:

...

5/ a person who has mutilated himself or another gravely and maliciously or who has attempted suicide;"

Code of Canon Law, *https://www.vatican.va/archive/cod-iuris-canonici/eng/documents/cic_lib4-cann998-1165_en.html#Art._2*.

b'tselem elohim for the position and treatment of persons with disabilities in Judaism (as the topic of her research), where that principle is certainly applicable to the position and treatment of women as well, and generally to the question of equality and non-discrimination, both in Judaism and in Christianity:

> "The conviction that all people have been fashioned in God's image frequently grounds Jewish efforts to work for the full inclusion of people with disabilities. *B'tselem Elohim* affirms a fundamental equality between people, a recognition that all human beings are equally worthy of respect and dignity. The value of *b'tselem Elohim* anchors a Jewish call to ensure that people with disabilities have the opportunity to learn and to teach, to pray and to participate, to celebrate and to mourn, to care and to be cared for. *B'tselem Elohim* reminds us to ensure that all people have equal access and equal opportunity. ...
>
> ...In Jewish terms, this affirmation calls us to recognize that our value is intrinsic to our being. It isn't linked to our capacities.
>
> *B'tselem Elohim* aligns with a central value of the disability justice movement: a person is valued because of who they are, not because of what they can do or their capacity to earn money and be productive."[65]

The legal grounds for determining the attitude of Islam towards persons with disabilities can primarily be found in the supreme source of Islamic law, the Qur'an, which was, as muslims believe, compiled from Allah's words conveyed to Prophet Muhammad by Melek Gibril (Archangel Gabriel) and further revealed to people by the Prophet. Namely, in the 80th Qur'an Surah entitled 'Abasa (*He frowned*), contains the Allah's reproach to Prophet Muhammad because of neglecting a poor and blind man named 'Abdullah ibn Umm Maktoom. The Prophet was speaking to the pagan (idolatrous) leaders, trying to win them over for Islam when 'Abdullah ibn Umm Maktoom approached him to ask about Islam. The Prophet completely neglected him, dedicating his full attention to the idolatrous leaders. Allah reproached him in the first ten verses of this Surah,[66] and then the Prophet received ibn Umm Maktoom and included him in the ranks of his companions,[67] and on sev-

65 Julia Watts Belser, *Guide to Jewish Values and Disability Rights* (2016), 8.

66 Those verses go as follows:
„The Prophet frowned and turned away
Because there came to him the blind man, [interrupting].
But what would make you perceive, [O Muhammad], that perhaps he might be purified
Or be reminded and the remembrance would benefit him?
As for he who thinks himself without need,
To him you give attention.
And not upon you [is any blame] if he will not be purified.
But as for he who came to you striving [for knowledge]
While he fears [Allah],
From him you are distracted.
No! ..."

67 Prophet Muhammad, bearing in mind Allah's rebuke from Surah 'Abasa, greeted Abdullah ibn Umm Maktoom with the following words at every subsequent meeting: "Wel-

eral occasions, during his absence, appointed him temporarily in charge of Medina. There were other people with disabilities among Prophet Muhammad's companions and among the most influential people in the early Islam period, including some priests. For example, 'Ata ibn Abi Rabah, an exceptionally learned early Muslim jurist and narrator of hadiths, who was lame, was the mufti of Mecca. Abaan ibn 'Uthmaan ibn 'Affaan, son of Uthman, the third Rashidun caliph, who was deaf, had the paralysis of one side of the body, leprosy and squint, was a great authority in Islamic law and, thus, the governor of Medina and (sharia) judge. Imam al-Tirmidhi from the 9th century AD, an Islamic scholar best known for compiling *Sunan al-Tirmidhi*, one of the six most important collections of hadiths, was blind, but served as an imam. Therefore, in Muhammad's era and in early Islam, disability did not prevent learned people dedicated to faith from being appointed to important positions, including the highest religious functions, so it may be said that there were no legal obstacles to something like that in Islam, of course, within the physically feasible.[68] It is indicated by a number of sahih hadiths speaking about the message given by Prophet Muhammad to his followers at the time when he led the prayer but was ill (i.e., injured after falling from horseback) and could not stand. One of these hadiths goes as follows:

> "'A'isha reported: The Messenger of Allah (ﷺ) fell ill and some of his Companions came to inquire after his health. The Messenger of Allah (ﷺ) said prayer sitting, while (his Companions) said it (behind him) standing. He (the Holy Prophet) directed them by his gesture to sit down, and they sat down (in prayer). After finishing the (prayer) he (the Holy Prophet) said: The Imam is appointed so that he should be followed, so bow down when he bows down, and rise up when he rises up and say (prayer) sitting when he (the Imam) says (it) sitting."[69]

3. The proposal for state intervention for the purpose of removing discrimination and violation of the right to freedom of religion in religious organizations and the response to it

In the text below, we will speak about the criticism and proposals for the suppression of discrimination against women within churches and religious communities, as well as the answers to those proposals. However, these proposals and answers to them may also be applied to other discrimination on different grounds, including discrimination against persons with disabilities.

The absence of a small percentage of women priests and, in general, the patriarchal structure of churches and religious communities (for it is not only

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come unto him on whose account my Sustainer has rebuked me." – The text "Disability and Islam" from the website of the Canadian Association of Muslims with Disabilities, *https://camd.ca/publications/disability-and-islam/*.

68 "Disability and Islam" from the website of the Canadian Association of Muslims with Disabilities, *https://camd.ca/publications/disability-and-islam/*.

69 Sahih Muslim 412a, Book 4, Hadith 88, *https://sunnah.com/muslim:412a*.

the absence of the possibility for women to be part of the clergy that is subject to criticism by the advocates of men and women being equal within churches and religious communities, but various rules from the framework of church rituals and rules of conduct, some of which we have already mentioned, are also considered discriminatory), have been criticized in the literature as a form of discrimination against women in general, and particularly discrimination in the enjoyment of freedom of religion and, thus, as a form of violating that freedom. And since modern states are obliged, both by international law and national law respectively, to prevent and remove discrimination on any grounds, and to ensure respect for human rights in the territory within their jurisdiction, a requirement was addressed to the states to intervene in the internal structure and practices of churches and religious communities in order to prevent discrimination against women and protect their freedom of religion.

Thus, Alison Stuart states the following:

> „Being male dominated, religious institutions generally limit women's role within a religion, both in their doctrine and ability to be office holders, vis-à-vis men. ... Women and men have an individual and equal right to freedom of religion. If this right is interpreted and commonly understood as the right to practice one's religion, within the context of a recognised religion, and women are excluded from influencing the content and being a part of the power structure within that religion then, in effect, not only is their fundamental right to equality being violated but also their right to religion. While women may have the right to join or leave a religion, if only men dictate the content of that religion, they are disenfranchised within the religion that gives meaning to their lives. Given the influence that religion has on the lives of not only believers but society as a whole, this disenfranchisement has serious repercussions for gender equality. ... (A)s institutionalised religions are patriarchal, and women are unable to directly influence the content or structure of the religion they belong to, women have been effectively denied their right to freedom of religion. ... (W)omen's power and position within religion should be equivalent to men's to ensure the equal operation of Article 9 of the Convention (Convention for the Protection of Human Rights and Fundamental Freedoms, added by the author) between the sexes, in conjunction with Article 14. ... Therefore ... an intrinsic part of a State's obligation to secure women's equal right to freedom of religion is the facilitation of gender equality within religion."[70]

The said attitude of Alison Stuart (as well as of the like-minded people) is based on a wrong starting assumption. Namely, she treats freedom of religion in the same manner as the right to participate in political life, i.e., the right to democracy, where the possibility of accessing the decision-making places must definitely not be limited by gender or any other discrimination grounds. However, there are certain basic differences. A man does not have freedom

70 Stuart, *op. cit.*, 430–431.

to choose the state in which he will live, but he is free to choose his religion (which is the essence of freedom of religion). Furthermore, the essence of religion is in the religious dogma and religious canons, which are characterized by a substantial degree of immutability, and the survival of religion depends on the strict observance of that dogma and the canons.[71] The claim that a person's right to freedom of religion implies that person's right to "directly influence the content or structure of the religion" that person belongs to contains a logical contradiction, because religion itself is made up exactly of such "content and structure", so, if we change them, it is no longer that religion, or the unit we joined, but a different unit. The right to be a member of such unit does not imply the right to have the foundations of that unit destroyed and thus to deprive all other members of the unit of the right to that affiliation.

The European Court of Human Rights does not share the above-mentioned opinion either. In its judgement in the case *Hasan and Chaush v. Bulgaria*, it concludes that the European Convention guarantees autonomy to religious communities, considering it a prerequisite for observing the right of the members of those communities to freedom of religion, as well as that, concerning the organization of a religious community, freedom of religion from Article 9 of the European Convention on Human Rights must be seen and interpreted in the light of freedom of association from Article 11 of the Convention:

> „The Court recalls that religious communities traditionally and universally exist in the form of organized structures. They abide by rules which are often seen by followers as being of a divine origin. Religious ceremonies have their meaning and sacred value for the believers if they have been conducted by ministers empowered for that purpose in compliance with these rules. The personality of the religious ministers is undoubtedly of importance to every member of the community. Participation in the life of the community is thus a manifestation of one's religion, protected by Article 9 of the Convention.
>
> Where the organization of the religious community is at issue, Article 9 of the Convention must be interpreted in the light of Article 11, which safeguards associative life against unjustified State interference. Seen in this perspective, the believers' right to freedom of religion encompasses the expectation that the community will be allowed

71 Alison Stuart actually denies this characteristic of the religions, thinking that they are characterized by ideal pluralism, with identity unity founded on something else, and not on the unity of beliefs, i.e., the unity of dogma and canons:
"Religions are not a mass of people with one viewpoint or belief that their leaders espouse. They are a collection of different thoughts and beliefs, the holders of which all identify themselves as 'being of that religion'. What 'being of that religion' means, however, differs for each individual; human beliefs are individualised, as are human rights. Looking at religious beliefs in this context, the law's current approach to the right to freedom of religion is highly problematic." *Ibid*., 444.
According to Stuart, therefore, religions are identity units void of the stable content, so it is not known what their members identify with.

> to function peacefully, free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organization of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organizational life of the community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable."[72]

In an earlier case, *X v. Denmark*, in its decision of 8 March 1976, the European Commission of Human Rights stated that, by enabling churches and religious communities to organize and function autonomously, freedom of religion of its clergy and members, i.e., believers, is guaranteed, so that they can exercise their freedom of religion through free access to a church/religious community and service in it, and that such freedom guarantees their possibility of leaving the church/religious community in the event of disagreement with its organization and teaching and, unlike the state, churches and religious communities are not obliged to ensure freedom of religion to their clergy and believers:

> „A church is an organized religious community based on identical or at least substantially similar views. Through the rights granted to its members under Article 9, the church itself is protected in its right to manifest its religion, to organize and carry out worship, teaching practice and observance, and it is free to act out and enforce uniformity in these matters. Further, in a State church system its servants are employed for the purpose of applying and teaching a specific religion. Their individual freedom of thought, conscience or religion is exercised at the moment they accept or refuse employment as clergymen, and their right to leave the church guarantees their freedom of religion in case they oppose its teachings.
>
> In other words, the church is not obliged to provide religious freedom to its servants and members, as is the State as such for everyone within its jurisdiction."[73]

The advocates of the thesis that the right to freedom of religion includes the right to equal treatment within the organizational structure of churches and religious communities believe that such attitude of the Council of Europe bodies is contrary to the mission of this organization and, in general, the organization of the modern international community. Alison Stuart says:

> "The Council of Europe States, and indeed all States through membership of the United Nations (UN), have chosen the human

72 *Hasan and Chaush v. Bulgaria*, App. No. 30985/96, 26.10.2000.26.10.2000, para. 62.

73 European Commission, *X. v. Denmark*, App. No 7374/76, Decision of 8 March 1976 on the admissibility of the application, page 158.

> rights model and as such it is submitted that claims of religion are to be dealt with within this model and not as a competing ideology."[74]

Quoting Seyla Benhabib's words, according to which

> "(a)ll struggles against oppression in the modern world begin by redefining what had previously been considered 'private', non-public and non-political issues as matters of public concern, as issues of justice, as sites of power which need discursive legitimation",[75]

Gila Stopler concludes:

> "It is time to recognize that religion and community are sites of extensive power which currently serve as a shield for patriarchy and oppression, and that it is impossible to ensure equality, particularly equality for women, without subjecting these sites of power to equality obligations and putting an end to the free exercise of discrimination."

We believe that the approach advocated by the above-mentioned authors is not only legally unfounded (which is clearly proved by the European Commission of Human Rights and the European Court of Human Rights in the said decisions), but also dangerous on minimum two grounds. First of all, the above-mentioned "redefining" of what was considered non-public issues and their future treatment as a matter of public importance that the state was entitled and obliged to regulate (within which framework the autonomy of churches and religious communities would be essentially limited or even completely abolished regarding their own organization and teaching) would lead to totalitarianism and the pertaining "right" of the state and state authorities to interfere in everything. On the other hand, in case the above-listed proposals and suggestions were met and if the state, for the sake of "preventing discrimination" interfered in the so-far autonomous field of decision-making of churches and religious communities, the right to freedom of religion of the members of those churches and religious communities would be threatened, there would be a clash of the state and religious communities, and the very survival of given churches and religious, communities would be brought to question. Therefore, accepting the above-mentioned proposal, whose motivation is undoubtedly positive, would lead to a tectonic disturbance in the society, with unforeseeable harmful consequences.

Instead of the state intervention in the so-far autonomous field of teaching and decision-making of churches and religious communities for the sake of ensuring non-discrimination within their frameworks, it is necessary to aspire gradually towards the achievement of that goal, by realizing the greatest possible degree of equality of men and women in the fields belonging to the state jurisdiction (while internal organization and teaching of churches and religious communities do not belong to it) and by raising awareness and

74 Stuart, *op. cit.*, 439.

75 Seyla Benhabib, "Models of Public Space: Hannah Arendt, the Liberal Tradition, and Jurgen Habermas", in: Craig Calhoun (ed.), *Habermas and the Public Sphere* (1992), 84.

spreading the culture of equality (through upbringing, educational and informative means and in other appropriate manners). This might gradually lead to the change in the rules or practice in churches and religious communities, such as those that, for example, took place in protestant churches opening the possibility for women becoming priests. Perhaps, but not necessarily, because freedom of religion is guaranteed and protected, as well as the equality in the enjoyment of that freedom, as long as believers are entitled to choose freely, build and express their religious beliefs and freely join or leave churches and religious communities.

III DISCRIMINATION AGAINST WOMEN AND PERSONS WITH DISABILITIES IN THE COUNTRIES WHERE RELIGIOUS LAW IS ACCEPTED AS STATE LAW

Modern humanity is largely dominated by secular states, i.e., states in which public and religious institutions are separated and in which there is no official (state) religion. In such states, religious legal rules are applied in the autonomous domain of the internal organization and functioning of churches and religious communities, but not in other spheres of life. Of course, since religious beliefs have a significant effect on broader social views, morals and customs, religions have a certain effect, definitely not negligible at all, on legal systems in secular states as well. This will be discussed in the following chapter of this paper.

This chapter will deal with the direct application of religious law as state law in some countries. The situation like this is nowadays present only in Islam, i.e., in the application of sharia as state law in some countries. It is law that is "often represented as harsh, regressive and discriminatory".[76]

Here, we will look at several questions or several institutes from the framework of sharia, related primarily to the position of women, which are the subject of special controversies and accusations, and often of misunderstanding and misuse.

1. Stoning adulteresses

The first of those questions, which is the most pronounced because of its drastic consequences, is stoning adulteresses.

On the World Day against the Death Penalty, 10 October 2018, speaking about the position of women and girls on death row, a group of the United Nations experts pointed out, among other things, the significance of the problem of stoning:

> "In many cases, courts judge women not just for their alleged offences, but also for what are perceived to be their moral failin-

76 Souha Korbatieh, "Adultery Laws in Islam and Stoning in the Modern World." *Australian Journal of Islamic Studies*, Vol. 3, Issue 2, 2018, 1.

> gs: as 'disloyal' wives, 'uncaring' mothers, or 'ungrateful' daughters. Nowhere are transgressions of the social and cultural norms of gender behaviour punished more severely than in a capital trial. Further, some countries condemn women to death for 'crimes of morality' such as adultery, in contradiction to the most serious crimes threshold, which limits application of the death penalty to crimes involving intentional killing. The execution of the death penalty often involves methods amounting to cruel, inhuman or degrading punishment, or even torture, such as executions by stoning. Laws and policies that provide for these penalties moreover encourage family members and vigilante groups to execute women and girls including in the name of so-called 'honour'."[77]

The practice of stoning adulterers is called *rajm* in the Arabic language and considered to constitute part of the so-called *Hudud punishments*, or the sanctions prescribed by Allah in the name of Islam.[78] Namely, those are sanctions for "criminal acts against God" (unlike criminal acts against people[79]), and those acts are actually crossing "boundaries", which is the actual

77 "World Day Against the Death Penalty 10 October 2018, Women and girls on death row require specific gender-based responses and policies", *https://www.ohchr.org/en/taxonomy/term/726?page=8*.

78 Ziba Mir Hosseini lists the countries and regimes that have introduced the rules of the Islamic Criminal Code or arbitrarily applied them in the past fifty years: "*Fiqh*-based penal laws had already been revived in codified form Libya in 1972. After 1979, the same happened in Pakistan (Enforcement of *hudud* Ordinances, 1979), Iran (1979), Sudan (Penal Code, 1983, and Criminal Act, 1991), and Yemen (Penal Code, 1994). The same has occurred at a provincial level in Kalantan state in Malaysia (Syariah Criminal Code Act, 1993), several states in Nigeria (1999-2000), and Aceh Territory in Indonesia (2009). In other cases, such as Afghanistan under the Taliban (mid-1990s to 2001), in Algeria since the rise of the Islamic Salvation Front (FIS), and in Somalia for many years, there are reports of the arbitrary application of Islamic penal laws." Ziba Mir Hosseini, "Criminalizing Sexuality: Zina Laws as Violence Against Women in Muslim Contexts", *Sur – International Journal on Human Rights*, Vol. 8, Issue 15, 12.

Sanaz Alasti lists the countries that stipulate death penalty by stoning: "Stoning as a form of punishment is provided in the criminal codes of the following Muslim countries1: Iran, one province in Indonesia (Aceh), two federal states of Malaysia (Terengganu, Kelantan), twelve federal states in Northern Nigeria (Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto, Yobe, and Zamfara), Pakistan, Saudi Arabia, Sudan and the United Arab Emirates. However, provisions providing for stoning in the penal codes do not necessarily entail its strict application." Sanaz Alasti, "Comparative Study of Stoning Punishment in the Religions of Islam and Judaism", *Justice Policy Journal*, Vol. 4, No. 1/2007, 5–6.

We couldn't find more recent data than these.

For more about sharia as state law, see "Chapter 2, The Sharia as State Law", from the book Rachel M. Scott, *Recasting Islamic Law: Religion and the Nation State in Egyptian Constitution Making* (2021), 34-60.

79 Souha Korbatieh explains: "There are three categories of crime in Islam. First, *hudud*, which are crimes or violations against God, and by extension, the public interest; hence, are the worst crimes a Muslim may commit. Second, crimes against people fall under *qisas* (equality, retaliation) or *diyya* (pecuniary compensation), which are mainly offences of blood, such as homicide and assault. *Ta'azir* (discretionary punishments) are the third

meaning of the word *hudud* (singular *hadd*), established primarily in the Qur'an and partly within the Sunnah. These acts include, *inter alia*,[80] zina, or unlawful sexual relationship, such as adultery, fornication, prostitution, rape, sodomy, incest, and bestiality.

Assigning such significance to the criminal acts from the framework of zina, i.e., their raising to such a high level within sharia incrimination, is the result of the pronounced care during early Islam for the preservation of family relations and family morals, as a consequence, on the one hand, of the fact that the pagan, idolatrous society preceding Islam and in resistance to which Islam was founded, was characterized by debauchery and immorality, and, on the other hand, of the fact that members of early Islam were forced to take part in a number of armed conflicts, which meant long separation of family members, with all the challenges brought about by such separation. Therefore, the aim was primarily to protect the family, to which Islam assigns great significance.

It also needs to be noted that death penalty by stoning in the event of adultery at the time of early Islam still existed in Jewish law, and that it was prescribed in the Torah itself.[81]

category, consisting of offences in line with social change and not specified in the sources." Korbatieh, *op. cit.*, 2.

80 Apart from zina, this includes unfounded accusations of zina, drinking alcohol, highway robbery, and some forms of theft, while some experts also include apostasy from Islam by Muslims and the rebellion against the legitimate Islamic ruler.

81 In Chapter 22 of the Book of Deuteronomy (the Fifth Book of Moses), verses 13-30 refer to marriage violations and envisage death penalty by stoning, both for the girl who lost her virginity before marriage in case her husband manages to prove it, and for both adulterers in the event of adultery of a married woman or a promised girl, whereas not putting up resistance to rape, provided it was possible, was also considered an act of adultery by the raped girl. These verses go as follows:

"Marriage Violations

13 If a man takes a wife and, after sleeping with her, dislikes her 14 and slanders her and gives her a bad name, saying, "I married this woman, but when I approached her, I did not find proof of her virginity," 15 then the young woman's father and mother shall bring to the town elders at the gate proof that she was a virgin. 16 Her father will say to the elders, "I gave my daughter in marriage to this man, but he dislikes her. 17 Now he has slandered her and said, 'I did not find your daughter to be a virgin.' But here is the proof of my daughter's virginity." Then her parents shall display the cloth before the elders of the town, 18 and the elders shall take the man and punish him. 19 They shall fine him a hundred shekels[b] of silver and give them to the young woman's father, because this man has given an Israelite virgin a bad name. She shall continue to be his wife; he must not divorce her as long as he lives.

20 If, however, the charge is true and no proof of the young woman's virginity can be found, 21 she shall be brought to the door of her father's house and there the men of her town shall stone her to death. She has done an outrageous thing in Israel by being promiscuous while still in her father's house. You must purge the evil from among you.

22 If a man is found sleeping with another man's wife, both the man who slept with her and the woman must die. You must purge the evil from Israel.

23 If a man happens to meet in a town a virgin pledged to be married and he sleeps with her, 24 you shall take both of them to the gate of that town and stone them to death—the young woman because she was in a town and did not scream for help, and the man because he violated another man's wife. You must purge the evil from among you.

What are legal grounds for the application of the sanction of stoning for adultery, or are there such legal grounds at all in Islamic legal sources?

In the Qur'an itself, stoning is not mentioned.

In the revelations of the Qur'an, which took place gradually, one surah (chapter) after another (those revelations lasted for 23 years and their chronological order does not match with the order by which surahs are listed in the final redaction of the Qur'an), the fifteenth verse of the Surah an-Nisa (the fourth surah in the text of the Qur'an) first prescribes the sanction of imprisonment (life, except for a later act of God's mercy) for women who enter a forbidden sexual relationship:

> "˹As for˺ those of your women who commit illegal intercourse—call four witnesses from among yourselves. If they testify, confine the offenders to their homes until they die or Allah ordains a ˹different˺ way for them."[82]

The subsequently revealed[83] Surah an-Nur (in the text of the Qur'an it is Surah No. 24) prescribes the punishment by flogging both for adultery and for forbidden voluntary sexual relationship between two persons who are not

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25 But if out in the country a man happens to meet a young woman pledged to be married and rapes her, only the man who has done this shall die. 26 Do nothing to the woman; she has committed no sin deserving death. This case is like that of someone who attacks and murders a neighbor, 27 for the man found the young woman out in the country, and though the betrothed woman screamed, there was no one to rescue her.

28 If a man happens to meet a virgin who is not pledged to be married and rapes her and they are discovered, 29 he shall pay her father fifty shekels of silver. He must marry the young woman, for he has violated her. He can never divorce her as long as he lives.

30 A man is not to marry his father's wife; he must not dishonor his father's bed." – Deut 22: 13-30)

The New Testament also speaks about the practice of stoning adulterers in Christ's era and about his opposition to that practice., Chapter 8 of the Gospel of John says:

„To Throw the Stone

8 1-2 Jesus went across to Mount Olives, but he was soon back in the Temple again. Swarms of people came to him. He sat down and taught them.

3-6 The religion scholars and Pharisees led in a woman who had been caught in an act of adultery. They stood her in plain sight of everyone and said, "Teacher, this woman was caught red-handed in the act of adultery. Moses, in the Law, gives orders to stone such persons. What do you say?" They were trying to trap him into saying something incriminating so they could bring charges against him.

6-8 Jesus bent down and wrote with his finger in the dirt. They kept at him, badgering him. He straightened up and said, "The sinless one among you, go first: Throw the stone." Bending down again, he wrote some more in the dirt.

9-10 Hearing that, they walked away, one after another, beginning with the oldest. The woman was left alone. Jesus stood up and spoke to her. "Woman, where are they? Does no one condemn you?"

11 "No one, Master."

"Neither do I," said Jesus. "Go on your way. From now on, don't sin." (John 8: 1-11).

82 Surah an-Nisa, 4: 15.

83 Surah an-Nur, the 24th by chronological revelation order in the Qur'an, is the 102nd out of the total of 114.surahs, while Surah an-Nisa, which is the 4th in the Qur'an is, by revelation order, in the 92nd place.

married (fornication), and further legal consequences of such punishment are envisaged, as well as the conditions under which the punishment may be considered proven, including the consequences of the false accusation.

> "24:2 As for female and male adulterers or fornicators (al-zaniah wa al-zani)), give each of them one hundred lashes, and do not let pity for them make you lenient in ˹enforcing˺ the law of Allah, if you ˹truly˺ believe in Allah and the Last Day. And let a number of believers witness their punishment.
>
> 24:3 A male fornicator would only marry a female fornicator or idolatress. And a female fornicator would only be married to a fornicator or idolater. This is ˹all˺ forbidden to the believers.
>
> 24:4 Those who accuse chaste women and fail to produce four witnesses, give them eighty lashes ˹each˺. And do not ever accept any testimony from them—for they are indeed the rebellious – 24:5 except those who repent afterwards and mend their ways, then surely Allah is All-Forgiving, Most Merciful."[84]

It is considered that verse 24:2 from Surah an-Nur, which comes later by the time of its revelation, abrogated the provision from the fifteenth verse of Surah an-Nisa.

It should first be noted that the above-mentioned verse of Surah an-Nur that envisages punishment by flogging does not make any difference between men and women as culprits, i.e., that the same punishment is envisaged for both men and women. This non-distinction, i.e., the same treatment, is also present in the hadiths indicating different practice in relation to the above-mentioned Qur'an text applied by Prophet Muhammad and his successors, the so-called just (*rashidun*) caliphs,[85] and that is the practice of stoning. Nevertheless, in more recent practice of issuing and executing this sanction, as well as other sanctions for zina, they were, as a rule, applied to women.[86]

The Sunnah, or hadiths, say that Prophet Muhammad issued the punishment of stoning to death for adulterers. In the case of a bedouin's son who worked as a servant and had a sexual relationship with his master's wife, the Prophet issued the punishment of a hundred lashes and one-year exile, while the master's wife was sentenced to death by stoning.[87] The interpretation is

84 Surah an-Nur, 24: 2-5.

85 Four caliphs, Prophet Muhammad's contemporaries and companions, who ruled after his death. Those were: Abu Bakr, Umar ibn al-Khattab, Uthman ibn Affan and Ali ibn Abi Talib).

86 Ziba Mir Hosseini states as follows: "Actual instances of stoning as a result of judicial sentences remain rare; currently, they only occur in Iran. But wherever classical penal laws have been revived, and in whatever form, nearly all those sentenced under zina laws to lashing, imprisonment or death by stoning have been women. In many instances, women have been brought to court on the basis of false accusations by family members or neighbours, or have been punished by non-state actors and communities." Hosseini, *op. cit.*, 12.

87 That hadith goes as follows:
"Abu Hurairah and Zaid bin Khalid al-Juhani (RAA) narrated that a Bedouin came to the Prophet (ﷺ) and said, 'O Messenger of Allah! I beseech you by Allah, that you judge be-

that the different punishments for the culprits in this act were not related to their gender, but derive from the fact that the young man was not married and, thus, committed fornication, whereas the woman was married and, thus, committed adultery.[88] Another hadith speaks about two cases. The first one refers to a man named Ma'iz bin Malik al-Aslami who came to Prophet Muhammad and confessed to having committed adultery. When he repeated his claim four times (just as the accusation must be confirmed by four witnesses, the confession must be repeated four times by the accused) and when the Prophet asked the acquaintances of the accused and made sure that he was not deranged, he sentenced him to death by stoning and that sentence was executed. Then a woman from the Ghamid tribe came to Prophet Muhammad and confessed to having committed adultery. When she added that she was pregnant, the Prophet told her to go home and come again after childbirth. When she returned with her child, he sent her back home to breastfeed the child until weaning, and come again. When she did, the Prophet gave the child to one of the Muslims, sentenced the woman to death by stoning and that sentence was executed.[89]

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tween us according to Allah's laws' The man's opponent who was wiser than him got up and said, 'Yes, judge between us according to Allah's Law and kindly allow me (to speak).' The Prophet (ﷺ) said:

"Speak." He said, 'My son was a laborer working for that man (the Bedouin) and he committed illegal sexual intercourse with his wife, and I was informed that my son deserved to be stoned to death (as punishment for this offence). I ransomed him with one hundred sheep and a slave girl. But when I asked the knowledgeable people they told me that my son should receive a hundred lashes and be exiled for a year, and the man's wife should be stoned to death. The Messenger of Allah (ﷺ) replied, "By Him in Whose Hands my soul is, I shall judge between you according to the Law of Allah (i.e., His Book). The slave girl and the sheep are to be returned to you. As for your son, he has to receive one hundred lashes and be exiled for a year. O Unais! Go to this man's wife, and if she confesses, then stone her to death." Agreed upon, and this is Muslim's version." – Sunnah.com reference: Book 10, Hadith 1; English version: Book 10, Hadith 1244; Arabic version: Book 10, Hadith 1205, *https://sunnah.com/bulugh/10/1*.

88 Tafsir Ishraq al-Ma'ani, Quran Translation & Commentary by Syed Iqbal Zaheer, Surah 24. An-Nur, *https://islamicstudies.info/quran/ishraq.php?sura=24*.

89 That hadith goes as follows:

"'Abdullah b. Buraida reported on the authority of his father that Ma'iz b. Malik al-Aslami came to Allah's Messenger and said:

Allah's Messenger, I have wronged myself; I have committed adultery and I earnestly desire that you should purify me. He turned him away. On the following day, he (Ma'iz) again came to him and said: Allah's Messenger, I have committed adultery. Allah's Messenger (ﷺ) turned him away for the second time, and sent him to his people saying: Do you know if there is anything wrong with his mind. They denied of any such thing in him and said: We do not know him but as a wise good man among us, so far as we can judge. He (Ma'iz) came for the third time, and he (the Holy Prophet) sent him as he had done before. He asked about him and they informed him that there was nothing wrong with him or with his mind. When it was the fourth time, a ditch was dug for him and he (the Holy Prophet) pronounced judgment about him and he was stoned. He (the narrator) said: There came to him (the Holy Prophet) a woman from Ghamid and said: Allah's Messenger, I have committed adultery, so purify me. He (the Holy Prophet) turned her away. On the following day she said: Allah's Messenger, Why do you turn me away? Perhaps, you turn me away as you turned away Ma'iz. By Allah, I have become pregnant.

A significant majority (*jumhur*) of Islamic legal experts (from all four Sunnite *madhhabs*, as well as a substantial number of Shiites), with the exception of Kharijites, members of the Mu'tazillah school and some Shiites, traditionally thought and also think today, despite the fact that the above-mentioned verse from Surah an-Nur envisages the sanction of flogging both for unmarried and married fornicators and for married adulterers and adulteresses, that Prophet Muhammad's practice either partly abrogated or specified what is prescribed in the Qur'an, so that the punishment by flogging refers only to unmarried fornicators, while the punishment by stoning is envisaged for married adulterers and adulteresses.[90] That it is partial abrogation of the Qur'an provision is the opinion primarily of the members of the Hanafi madhhab, while others, or the majority, think that the Sunnah specified the Qur'an provision – according to them, the more general Qur'an provision incriminated certain acting and envisaged a certain sanction, while the Sunnah specified (and thus diversified) the sanction regarding married men and women. There are also testimonies that subsequent just (rashidun) caliphs, primarily Osman and Ali, continued the practice of stoning, whereas Osman also warned of the risk of renouncing such sanction with the passage of time exactly because it did not exist in the Qur'an (which, according to him, must not happen).[91]

He said: Well, if you insist upon it, then go away until you give birth to (the child). When she was delivered she came with the child (wrapped) in a rag and said: Here is the child whom I have given birth to. He said: Go away and suckle him until you wean him. When she had weaned him, she came to him (the Holy Prophet) with the child who was holding a piece of bread in his hand. She said: Allah's Apostle, here is he as I have weaned him and he eats food. He (the Holy Prophet) entrusted the child to one of the Muslims and then pronounced punishment. And she was put in a ditch up to her chest and he commanded people and they stoned her. Khalid b Walid came forward with a stone which he flung at her head and there spurted blood on the face of Khalid and so he abused her. Allah's Apostle (ﷺ) heard his (Khalid's) curse that he had hurled upon her. Thereupon he (the Holy Prophet) said: Khalid, be gentle. By Him in Whose Hand is my life, she has made such a repentance that even if a wrongful tax-collector were to repent, he would have been forgiven. Then giving command regarding her, he prayed over her and she was buried." – Sahih Muslim 1695b, Book 29, Hadith 35, *https://sunnah.com/muslim:1695b.*

90 For more about the notions of specification (*takhsis*) and abrogation (*naskh*) in Islamic law, their complexity and mismatch with the corresponding terms outside Islamic law, see Justin Parrott, *Abrogated Rulings in the Qur'an: Discerning their Divine Wisdom*, 2018, *https://yaqeeninstitute.org/read/paper/abrogated-rulings-in-the-quran-discerning-their-divine-wisdom.*

91 There is also evidence that Caliph Osman claimed that in an earlier version, before the determination of the final text of the Qur'an, there was a verse (within Surah Al-Ahzab, 33rd in the text of the Qur'an) that envisaged stoning, but that it was later abrogated and was not included in the final text of the Qur'an. Therefore, some believe that it is also the reason for applying the punishment by stoning of married adulterers (the verse was omitted from the text of the Qur'an, but the rule it contained remained). However, apart from the fact that there is no such verse in the text of the Qur'an, which is considered Allah's word and which, as such, is the supreme source of Islamic law (changing the text of the Qur'an as God's word would actually be unacceptable as an "act of disbelief"), the opponents of stoning also point out the fact that the man who narrated the alleged words of Caliph Osman, Said ibn al-Musayyib, was only two years old when Caliph Osman was killed. – Korbatieh, *op. cit.*, 7. Since such verse could be excluded from the text of the Qur'an only by Allah's order (because Allah is the author of the Qur'an and is the only

On the other hand, there is an opposite, minority interpretation that seems to gain support in recent times – that the said Qur'an text (Surah an-Nur, 24: 2-5), which does not distinguish between married and unmarried perpetrators, but envisages one hundred lashes for both, constitutes a rule to be applied in practice. The opponents of stoning dispute the claims of the advocates of this practice using largely the same legal argumentation as the advocates of two theses in favour of legality of stoning – the thesis of partial abrogation and thesis of specification – use in order to deny the second thesis. First of all, they believe that a provision of lower legal effect – and the Sunnah is of lower legal effect – cannot abrogate, either fully or partially, a provision of higher legal effect, in this case the provision from the supreme legal source, or the Qur'an, the provision that is clear and does not leave any room for interpretation (the so-called *muhkam ayah*)[92]. Furthermore, they believe that in this case it cannot be specification either, because "flogging can logically not be specified by death, which far exceeds flogging and the logical boundaries of 'specification'",[93] i.e., that "stoning to death is not a detail that any reasonable law giver, much less the all-knowing, all-wise Lord of the Universes, would leave out for the interpreters to deal with".[94] The advocates of the opinion that Prophet Muhammad's practice could not change, either by partially abrogating or specifying, what was envisaged by a clear Qur'an provision – the punishment of a hundred lashes both for unmarried fornicators and for married adulterers and adulteresses, also cite the fact that

entitled to introduce something new or leave something out from it), some authors properly state that it is pointless to exclude the verse from the text by God's will and that the rule contained in it should remain: "the notion that there was an addition to the Qur'an on stoning that God Most High ordered the Prophet to eliminate from the text while retaining its ruling sounds rather imaginary". Mohammad Hashim Kamali, "Stoning As Punishment of Zina: Is It Valid?", *Islam and Civilisational Renewal (ICR) Journal*, Vol. 9, No. 3, 2018, 310–311.

92 By the degree of clarity and the possibility of interpretation and the need for interpretation, the Qur'an verses are divided into two groups: the muhkam ayah, which are clear, i.e., have no several possible meanings and interpretations, and the mutashabih ayah, which can have several meanings, and there is a need to interpret them. For the muhkam ayah, there is a rule corresponding to the rule *in claris non fit interpretatio*.

The seventh verse of Surah Al-Imran talks about the mentioned two types of verses:

"It is He Who has revealed the Book to you. Some of its verses are absolutely clear and lucid, and these are the core of the Book. Others are ambiguous. Those in whose hearts there is perversity, always go about the part which is ambiguous, seeking mischief and seeking to arrive at its meaning arbitrarily, although none knows their true meaning except Allah. On the contrary, those firmly rooted in knowledge say: 'We believe in it; it is all from our Lord alone.' No one derives true admonition from anything except the men of understanding." – Surah Al-Imran, 7.

See more in:

– Imran Hosein, *Uvod u metodologiju proučavanja Kurana (An Introduction to Methodology for Study of the Qur'an)* (2017).

– Vojislav Stanimirović, *Uvod u islamsko pravo (Introduction to Islamic Law)* (2015).

93 Kamali, *op. cit.*, 310–311.

94 Ahmad Shafaat, "Punishment for Adultery in Islam, A Detailed Examination", February 2003, *http://www.islamicperspectives.com/stoning1.htm.*

the Sunnah does not answer the question whether Prophet Muhammad issued death penalty by stoning before or after the revelation of Surah an-Nur. There are hadiths confirming that the Prophet's friend and companion ʿAbd Allah bin Abi `Awfa, when asked about it, answered that he did not know.[95] Namely, the rule in the sphere of *hudud* is that, in the event of suspicion, the punishment (subject to such suspicion) should not be applied.[96]

Verse 25 of Surah An-Nisa also speaks in support of the fact that there is no death penalty by stoning for adultery in Sharia law. That verse reads:

> "But if any of you cannot afford to marry a free believing woman, then ˹let him marry˺ a believing bondwoman possessed by one of you. Allah knows best ˹the state of˺ your faith ˹and theirs˺. You are from one another. So marry them with the permission of their owners giving them their dowry in fairness, if they are chaste, neither promiscuous nor having secret affairs. If they commit indecency after marriage, they receive half the punishment of free women. This is for those of you who fear falling into sin. But if you are patient, it is better for you. And Allah is All-Forgiving, Most Merciful."[97]

This verse states that a female slave who commits indecency after marriage will be punished with half of the punishment prescribed for a free woman. As it is impossible to punish someone with half the death sentence (by stoning or by any other means), the conclusion can be drawn that this verse also contains confirmation that there is no basis in the Qur'an for the punishment of stoning for adultery, and that adulterers are sentenced to what is written in Surah an-Nur, 24:2, and that's a hundred lashes. However, it is a very common opinion among Islamic legal experts that in the sentence "If they commit indecency after marriage, they receive half the punishment of free women" what is translated as "free women" means "free unmarried women" (unmarried women who are not slaves), and not "free married women". It is stated that in that verse in two places, in the first sentence ("if any of you cannot afford to marry a free believing woman) and in the fifth sentence

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95 These hadiths, the first one from the collection Sahih Bukhari, and the second one from the collection Sahih Muslim, go as follows:
"Musa bin Ismaʿil related to us: ʿAbd al-W*a*hid related to us: Shayb*ani* related to us: I asked ʿAbd Allah bin Abi `Awf*a* about the stoning. He replied, "The Prophet carried out stoning." I asked, "Was that before or after the revelation of (S*u*rah) al-Nur?" He replied, "I do not know." (This tradition was also narrated by ʿAli bin Mus-hir, Kh*a*lid bin ʿAbd Allah, al-Mu<u>h</u>arib*i* and ʿAb*i*dah bin <u>H</u>umayd from Shaybani. Someone among them said, (Surah) al-M*a*`idah. But the first [reference, al-Nur] is sounder.) (Bukhari 8/824).
From Abu Is<u>h</u>*a*q Shaybani who said: I asked ʿAbd Allah bin Abi Awf*a* if the Messenger of God carried out stoning. He said: Yes. I said: After S*u*rah al-Nur was revealed or before that? He said: I do not know (Muslim 17/4218)." Taken from Shafaat, *op. cit*.

96 A rule similar to the rule "in dubio pro reo": "suspend the *ḥudūd* in all cases of doubt". For more about it, see Mohammad Hashim Kamali, *Crime and Punishment in Islamic Law: A Fresh Interpretation* (Part One, Chapter XVII – Doubt (*Shubha*) and Its Impact on Punishment) (2019), 225–230.

97 Surah An-Nisa, 4:25

("they receive half the punishment of free women"), as well as at the beginning of the previous verse (verse 24), where it is said who it is forbidden to marry ("Also ˹forbidden are˺ married women ...") the same word is used to denote a woman. That is the word "muhsanah", which denotes either a married woman (and married women are under the protection of their husbands) or a free female person who is unmarried and thus under the protection of her family (unmarried free girls normally have family protection, but not unmarried slaves). According to those Islamic legal scholars, in verse 24 the word "muhsanah" is used in the meaning of a married woman, and in verse 25 in both places in the meaning of a free unmarried woman (under family protection). Based on this, it is further concluded that verse 25 of Surah an-Nisa confirms the claim that the punishment of whipping from Surah an-Nur, 24:2, is prescribed only for unmarried male and female fornicators, and that for male and female married adulterers the punishment of stoning is prescribed (which the Qur'an does not mention at all!).[98]

We believe that this kind of reasoning, which is very widespread, is actually a mere stretching of the argument to justify one's own position that

98 Thus, for example, in one tafsir (tafsir – interpretation of the Qur'an) there is the following interpretation of verse 25 of Surah an-Nisa:

"A superficial reading of this verse can lead to the mistaken conclusion, as Khawarij and others have done, that stoning is not the prescribed punishment for adultery. Such people ask: If stoning is the prescribed punishment for extra-marital sexual intercourse, then how is it possible to halve that punishment with regard to slave-girls? Such people have not noted carefully the wording of this verse. In this section see (verses 24-5) the term muhsanat (protected women) is used in two different meanings. First, it is used in the sense of 'married women', that is, those who enjoy the protection of their husbands. Second, it is used in the sense of 'women belonging to families', i.e. those who enjoy the protection of families even though they may not be married. In the verse under discussion, the word muhsanat is used in the latter sense, i.e. in the sense of women who enjoy the protection of families as opposed to slave-girls. At the same time, the word is also used in the first meaning, when slave-girls have acquired the protection accorded by the contract of marriage (fa idha uhsinna), they will be liable to the punishment laid down in this verse if they have unlawful sexual intercourse.

It is therefore apparent that a free woman enjoys two kinds of protection. One is the protection of her family through which she remains protected even when she is not married. The second is the protection of her husband, which reinforces the protection of the family that she already enjoys. As long as the slave-girl remains a slave, she does not enjoy the protection of the family. However, when she is married she has the protection of her husband – and of her husband alone. This protection is partial. Even after marriage she is neither liberated from the bond of her master nor does she attain the status enjoyed by free women. The punishment prescribed for a married slave-girl is accordingly half the punishment of an unmarried free woman rather than half that of a married free woman. This also explains that the punishment for unlawful sexual intercourse (zina) laid down in (Surah al-Nur 24: 2) refers to the offence committed by unmarried free women alone, and it is in comparison with their punishment that the punishment of married slave women has been laid down as half. As for free married women, they deserve more severe punishment than the unmarried free women (muhsanat) for they violate the double protection. Even though the Qur'an does not specifically mention punishment by stoning it does allude to it in a subtle manner." Towards Understanding the Quran: Introduction to Tafheem, Surah An-Nisa 4:23-25, *https://www.islamicstudies.info/tafheem.php?sura=4&verse=23&to=25.*

married adulterers should be stoned. Because, how is it possible to draw a conclusion from the text of the Qur'an, which does not mention stoning at all, that the same Qur'an refers to stoning? Second, it is clear that verse 24 prohibits marrying a married woman (so "muhsanah" in that verse means a married woman) and it is clear that the first sentence of verse 25 refers to the possibility of marrying an unmarried free girl, because it is forbidden to marry a married woman (so the word "muhsanah" in that sentence means an unmarried free girl), and both are logical. But we do not see why the word "muhsanah" in the fifth sentence of verse 25 should not have its full meaning (and its full meaning is both a married woman and an unmarried girl under family protection) but should denote only single girl under family protection? And why choose that meaning (unmarried girl under family protection) and not the other meaning (married woman)? All the more so since the provision to which the sentence in question refers (Surah an-Nur, 24:2) does not make any distinction between married and unmarried perpetrators of zina. Referring to the fact that a free married woman (one who is not a slave) has two levels of protection (both from the family she comes from and from her husband) and that while committing an adultery she violates those two levels of protection, while a married slave violates only the level of protection of her husband (because that is the only protection she possesses), also does not make much sense and amounts to looking for some kind of basis for claiming that the Qur'an prescribes something that it does not prescribe. Here, we have to point out once again the rule that in the sphere of Hudud punishments, if there is doubt, the punishment will not be applied. And here, not only is there doubt about the existence of grounds for the death penalty, but on the contrary, there is no doubt that the Qur'an does not prescribe the death penalty by stoning for adultery. Therefore, according to our firm conviction, Surah an-Nisa 4:25 confirms the fact that the punishment of one hundred lashes in Surah an-Nur, 24:2, is prescribed for both unmarried fornicators and for married adulterers (of both sexes).[99]

Among modern Islamic legal experts, partly certainly striving to avoid drastic deviation from the currently applicable rules outside Islamic law (where an increasing number of the countries abolish death penalty and where adultery has long ceased to be a punishable act), there is greater openness than it was the case earlier for the understanding of Islamic legal sources, according to which death penalty by stoning is not envisaged for any form of zina.[100]

Finally, it should be noted that, even if the reading of legal sources is accepted according to which the punishment for adultery for married men and women is death by stoning (which, in our opinion, is not the case), the envisaged requirement that the committed act should be confirmed by the statements of at least four witnesses of the actual sexual intercourse, with the

99 See more in:
Shafaat, *op. cit.*
Asma Lamrabet, Is 'Stoning' the Punishment for Adultery in Islam?, *http://www.asma-lamrabet.com/articles/is-stoning-the-punishment-for-adultery-in-islam/*.

100 For example, see Kamali, *op. cit.*, 312–318.

threat of a strict punishment (eighty lashes) for unproven accusation (particularly the accusation against the woman) makes prosecution for this act quite unlikely, and almost impossible. As a rule, adultery is not committed in the presence of witnesses. It is not accidental that stoning from the times of Prophet Muhammad was executed over adulterers who confessed to it by repeating it four times (and the confession was motivated by their strong faith and wish to cleanse themselves of sins by confession). Moreover, in the history of Islamic law there is a very small number of cases when death penalty by stoning was issued and executed because of adultery.[101] Obviously, the key meaning of strict sanctioning for zina (as many as 100 lashes, let alone death penalty by stoning) is a general deterrent, i.e., effect on potential perpetrators not to commit those criminal acts. Paradoxically, nowadays there is an increased risk that some of the renegade regimes and organisations that, in the name of Islam, negate and compromise it, such as the Islamic State, Boko Haram etc., apply the above-mentioned sanction more frequently than formerly by stable Islamic regimes throughout history. Therefore, there is large responsibility in non-Islamic factors, primarily in the West, which, for the sake of realizing its illegitimate interests, create instability in the regions with Islam as a dominant religion, and even, in a concealed manner, participate directly in the formation of such extremist groups or at least support them.

2. Inequality of inheritance shares

One of the criticized rules of Islamic law that is claimed to be discriminatory refers to the sphere of inheritance. It is about the difference in the size of inheritance shares received by male and female children of the deceased, or the part inherited by husband after his wife's death and the part inherited by wife after her husband's death.

First, it should be noted that even some secular countries with the Muslim population also envisaged or now envisage that in the status, family and inheritance matters, members of Islam religion may, in case they want it, ask the application of sharia and sharia judges acting in the event of a dispute. This solution was, inter alia, envisaged within peace agreements concluded after World War One, for Greece (in Western Thrace) and the Kingdom of Serbs, Croats and Slovenes, in order to protect religious rights of the Muslim population in the predominantly Christian countries after the liberation from the Ottoman occupation.[102] Today, this solution exists in a number of coun-

101 Souha Korbatieh states:
"As Muslim civilisation meticulously documented judicial decisions, the Ottoman Empire is known to only once have ordered stoning to death of an adulterer in its 500-year history. Some argue no one in Islamic history has been punished for adultery as a result of the oral testimony of four witnesses and rare punishments occurred by confession. In fact, unlawful sexual intercourse was almost never punished in Islamic history at *hudud* level "due to [the] impossibly high evidentiary bar," but was punished under *ta'azir* by fines and lashings." – Korbatieh, *op. cit.*, 4.

102 Further details in Branko M. Rakić, "Sharia in the Balkans in the past and today – about the award of the European Court for Human Rights in the case *Molla Sali v. Greece* in

tries with large Muslim population, e.g., Nigeria, Kenya, Tanzania, Lebanon and, Indonesia and, since 2008, in the United Kingdom it has been possible to have special sharia courts (councils) decide about family and inheritance matters if the parties to the dispute agree to it.[103]

The rule about inheritance shares for male and female children is contained in the first sentence of the verse 11 of Surah an-Nisa (which means "woman") as follows:

> "Allah commands you regarding your children: the share of the male will be twice that of the female. ..."[104]

As it can be seen, male children inherit twice that of female children.

Even in the case of mutual inheritance of marital spouses, the man's inheritance share is twice that of the woman's. This is defined in the first four sentences of the verse 12 of Surah an-Nisa as follows:

> "You will inherit half of what your wives leave if they are childless. But if they have children, then ˹your share is˺ one-fourth of the estate—after the fulfilment of bequests and debts. And your wives will inherit one-fourth of what you leave if you are childless. But if you have children, then your wives will receive one-eighth of your estate—after the fulfilment of bequests and debts. ..."[105]

Here, as it can be seen, in mutual inheritance, the husband's share is also twice that of the wife's.

This determination of the twice larger inheritance share to heirs as compared to heiresses in the event of inheritance regarding members of a narrow family (when children inherit parents and when a spouse inherits a spouse) can be explained and justified.

However, first we should point to the fact that, in pre-Islamic pagan communities, women not only had no property, but were also considered men's property.[106] In those communities, female children were considered such a burden that they were buried alive, but the Qur'an condemned and prohibited such practice.[107] It is safe to say that the Qur'an provisions regarding the

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the light of the experience in the application of sharia in the Kingdom of Yugoslavia", in Ivana Krstić, Maja Lukić (eds.) *Identity Transformation of Serbia* (2018), 53–79.

103 Tony Johnson and Mohammed Aly Sergie, Islam: Governing under Sharia, July 25, 2014, *https://perma.cc/Q5LX-A9AL.*
Mackenzie Glaze, "Historical Determinism and Women's Rights in Sharia Law", *Case Western Reserve Journal of International Law*, Vol. 50, Issue 1, 349–376.

104 Surah an-Nisa, 4: 11.

105 Surah an-Nisa, 4:12.

106 Translation of Sahih Muslim, Book 11: Kitab Al-Fara'id (The Book Pertaining to the Rules of Inheritance), Introduction, *https://www.iium.edu.my/deed/hadith/muslim/011_smt.html.*

107 This is spoken about by Surah at-Takwir, the 81st Surah in the Qur'an, in verses 1-14: "(81:1) When the sun is put out, (81:2) and when the stars fall down, (81:3) and when

position of women in general, including property matters and, within them, inheritance, constitute a huge step forward in comparison to the conditions preceding the Qur'an.[108] In addition, it can be stated that in the 7th century Islamic women gained some property rights that women in the most developed European countries gained as late as the 19th or even 20th centuries.[109]

Surah an-Nisa, whose title itself indicates that it deals primarily with women, starts with a verse that puts both genders in the same rank and orders family respect:

> "O humanity! Be mindful of your Lord Who created you from a single soul, and from it He created its mate, and through both He spread countless men and women. And be mindful of Allah—in Whose Name you appeal to one another—and ˹honour˺ family ties. Surely Allah is ever Watchful over you."[110]

The seventh verse proclaims inheritance right of both men and women, which did not exist in pre-Islamic societies:

> "For men there is a share in what their parents and close relatives leave, and for women there is a share in what their parents and close relatives leave—whether it is little or much. ˹These are˺ obligatory shares."[111]

As it can be seen, the Qur'an particularly emphasizes that the right of both genders to inheritance is mandatory, i.e., cannot be denied to an heir, which was of special importance for women, having in mind their pre-Islamic position.

Why does the Qur'an, however, give twice as large inheritance share to male children than that to female children, and to husband who inherits his wife and not vice versa? The answer lies in the fact that the system, the foun-

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the mountains are blown away, (81:4) and when pregnant camels are left untended, (81:5) and when wild beasts are gathered together, (81:6) and when the seas are set on fire, (81:7) and when the souls ˹and their bodies˺ are paired ˹once more˺, (81:8) and when baby girls, buried alive, are asked (81:9) for what crime they were put to death, (81:10) and when the records ˹of deeds˺ are laid open, (81:11) and when the sky is stripped away, (81:12) and when the Hellfire is fiercely flared up, (81:13) and when Paradise is brought near— (81:14) ˹on that Day˺ each soul will know what ˹deeds˺ it has brought along." – (Surah at-Takwir, 81:1-14).

108 Shaista Maseeh states the following: "Before the advent of Islam, men enjoyed innumerous illogical privileges over women. They could marry as many times as they could. There were also no definite divorce laws set. It was primary a tool in the hands of menfolk to punish or to get rid of their wives. Islam set laws in marriage that favored women." Shaista Maseeh, "Islam and the Rights of Women According to Quran", *International Journal of Research and Humanities Studies*, Issue 1, (June) 2015, 29.

109 "It was not until the late 1870s onwards in England (and even later elsewhere in Europe) that married women achieved the right to enter contracts and own property. In France, these same rights were not recognized until 1938. "Position of Women in Islam: Economic Aspect", *https://islamonline.net/en/position-of-women-in-islam-economic-aspect/*.

110 Surah an-Nisa, 4:1.

111 Surah an-Nisa, 4:7.

dations of which were laid by the Qur'an and which is further elaborated by the Sunnah and Islamic jurisprudence (*fikh*), as well as general Islamic understanding of social relations and morals, implied complementarity of the roles of the man and the woman both in the family and in the broader society. As Shaista Maseeh observes: "Islam does not impose the authority of one person over another. In marriage man and women are to complement each other."[112] This complementarity is biologically conditioned, both by the physically more fragile constitution of women, and by their key and irreplaceable role in having children and looking after them, particularly in the earliest stage of life. Social conditions of the time gave man a more active role outside the narrow family nucleus, while woman had the main role in the immediate care for the family. This was also the time of frequent wars, when men were drawn away from home, but even in peaceful periods, men were somehow predestined to work and acquire means for keeping up their families. When we look at that time from today's perspective, we often forget that the degree of the development of production means was so low that a large majority of jobs demanded huge physical effort and strength and that the work ensuring normal sustenance of families (which were, as a rule, much larger than today, due to a greater number of children) took much more time than today's common and legally guaranteed working hours. In such conditions, it was natural for men, as stronger and with, by the nature of things, a secondary role in childcare, to work outside home and obtain funds for family sustenance, while women dedicated their time to families, primarily to their children. Therefore, the circumstances imposed such division and complementarity of the roles that, although to a much smaller extent, exists even today (so that even within feminism, one trend from the 1980s and 1990s, called "*difference feminism*", was based on the dichotomy of the "difference" and "equality", which implies accepting the difference in the characteristics of men and women and in their roles conditioned by those characteristics, but with the respect for their essential, moral, value and legal equality[113]).

Such understanding of the relationships and roles of men and women in Islam resulted in assigning increased responsibility of men in equality relations between men and women, which is, more or less explicitly, expressed in the Qur'an, inter alia, in 228th verse of Surah al-Baqara (the second surah in the Qur'an):

> "...Women have rights similar to those of men equitably, although men have a degree ˹of responsibility˺ above them. ..."[114]

112 Maseeh, *op. cit.*, 32.
The same is stated by Lawal Mohammed Bani and Hamza A. Pate in Lawal Mohammed Bani and Hamza A. Pate, "The Role of Spouses under Islamic Family Law", *International Affairs and Global Strategy*, Vol. 37, 2015, 110.

113 Maseeh points to this similarity: "Theoretically the status of women in Islam seems to resemble the difference feminism of America. Difference Feminism recognizes the men and women emphasizing a reverse gender polarity claiming a special place for women in society." Maseeh, *op. cit.*, 36.

114 Surah al-Baqara, 2:228.

One hadith conveys Prophet Muhammad's words regarding the division of roles and responsibilities in the Islamic society:

> "Narrated `Abdullah bin `Umar:
>
> Allah's Messenger (ﷺ) said, 'Surely! Everyone of you is a guardian and is responsible for his charges: The Imam (ruler) of the people is a guardian and is responsible for his subjects; a man is the guardian of his family (household) and is responsible for his subjects; a woman is the guardian of her husband's home and of his children and is responsible for them; and the slave of a man is a guardian of his master's property and is responsible for it. Surely, everyone of you is a guardian and responsible for his charges.'"[115]

The man has a special, both moral and material, responsibility towards his wife. The Qur'an, in Surah an-Nisa, verse 34, says:

> "Men are the caretakers of women, as men have been provisioned by Allah over women and tasked with supporting them financially. ..."[116]

Before marriage, i.e., at the moment of its conclusion, the man is also obliged to give a sort of a gift to the woman who will be his wife, as a sort of male dowry that becomes part of the woman's separate property:

> "Give women ˹you wed˺ their due dowries graciously. But if they waive some of it willingly, then you may enjoy it freely with a clear conscience."[117]

Moreover, after divorce, the man still has the obligation to provide for the woman:

> "Reasonable provisions must be made for divorced women—a duty on those mindful ˹of Allah˺."[118]

Taking into account the fact that the obligation of keeping up the family is only the responsibility of the man, which limits his freedom to use his property in the way he wants, while the woman has no obligation like that but has freedom to use her own property (obtained in the form of dowry, in-

115 Sahih al-Bukhari 7138, Book 93, Hadith 2, *https://sunnah.com/bukhari:7138*.

116 Surah an-Nisa, 4:34.

117 Surah an-Nisa, 4:4.

118 Surah al-Baqara, 2:241.
Special care is prescribed for a divorced woman, both during the three-month "waiting period" after the divorce (in order to establish potential pregnancy), and in the event of pregnancy, until childbirth and during breastfeeding period:
"Let them live where you live ˹during their waiting period˺, according to your means. And do not harass them to make their stay unbearable. If they are pregnant, then maintain them until they deliver. And if they nurse your child, compensate them, and consult together courteously. But if you fail to reach an agreement, then another woman will nurse ˹the child˺ for the father." Surah at-Talaq, 65:6.

heritance or any other form) at her own discretion, then the first impression about inequality of women is lost because of their twice smaller inheritance share than that of male heirs, in the event of inheriting parents or in mutual inheritance of spouses.

3. Polygyny

Islamic law and practice are particularly subject to criticism due to allowing polygyny.

Polygyny is, as a rule, associated with Islam, whose main legal sources actually allow such practice. However, the prior history and specific historical conditions that led to its permission in Islam law are usually unknown, forgotten or deliberately ignored, as well as the strict conditions under which it is permitted.

First of all, at the moment of its emergence, Islam found the already-existing practice of polygyny. The Old Testament prophets had several wives: Abraham had two wives at the same time,[119] Jacob four,[120] David several,[121] Solomon 700 wives and 300 concubines[122] etc. In pagan communities preceding Islam, polygyny was a widespread phenomenon without prescribed conditions and limitations. Islam tried to introduce limitations in this respect, both regarding the number of wives and the situation in which polygyny was allowed and the conditions under which it was permitted.

Furthermore, it should be taken into account that at the time of the formation of Islam, there was a number of wars (it is believed that the Surah an-Nisa, which, as we will see, envisages the possibility of polygyny, was revealed shortly after the Battle of Uhud in 625) resulting in a great difference between the number of women and the number of men losing their lives in battle. It was considered that one of the possibilities for a woman to get male protection was opening up the possibility for a man to have several wives. In addition, polygyny enabled the recovery of the population decimated by war suffering, childbirth in marriage and not in extramarital relationships forbidden in Islam.

In recent times, the phenomenon of polygyny is also typical of some other societies, and not only those in Islam. Thus, Shaista Maseeh reminds that, according to the 1961 census in India, the percentage of polygamous marriages among Muslims was lower than that in a series of other communities: "Adivasis: 15.25%, Buddhists:7.9%, Hindus: 5.8%, Muslims: 5.7.%".[123]

For the practice of polygyny, there are legal grounds in the Qur'an itself, in the third verse of Surah an-Nisa, as follows:

119 Sarah and slave Hagar, and after Sarah's death, he married Keturah. – Genesis 15:1-5; Genesis 16: 1-11, 13-16, Genesis 17: 1– 5, 15-16; Genesis 21: 1-3, 6, 8-19.

120 Rachel, Leah and their maids Bilhah and Zilpah. – Genesis 29-30.

121 "After he left Hebron, David took more concubines and wives in Jerusalem, and more sons and daughters were born to him." 2 Samuel 5:13.

122 "He (Solomon) had seven hundred wives of royal birth and three hundred concubines, and his wives led him astray." 1 Kings 11:3.

123 Maseeh, *op. cit.*, 33.

> "And if you fear that you shall not be able to deal justly with the orphans, marry women of your choice, two, or three, or four; But if you fear that you shall not be able to deal justly (with them), then only one, or (a captive) that your right hands possess. That will be more suitable, to prevent you from doing injustice."[124]

Seen separately, this verse is unclear as from which circle women should be selected for a marriage to a man, and in its interpretation, there is a dilemma whether those are orphan women, their mothers or other women chosen by the man who is getting married. Even the translations were adjusted to different ways of understanding the meaning of this verse. Some of the translations include widows in general, and not only those widows who are mothers to orphan women (by the way, the Arabic word *Yatama* used in this verse and translated as orphans refers to children whose father has died).[125] However, in any case it is clear that this possibility of polygyny is related to taking care of orphan women or, as Asma Barlas states (criticizing jurisprudence that goes beyond the boundaries of the meaning of the Qur'an provision in the interpretation): "*Fikh* treats it (polygyny, added by the author) as a universal right, while the Qur'an allows it only in the circumstances when it can ensure justice for orphans. The Qur'an verses address only male custodians of orphan women regarding this topic, and not all men."[126]

Another verse of the same surah (Surah an-Nisa, 4:127) seems to resolve this dilemma, indicating that it refers to marrying orphan women:

> "They ask you ˹O Prophet˺ regarding women. Say, "It is Allah Who instructs you regarding them. Instruction has ˹already˺ been revealed in the Book concerning the orphan women you deprive of their due rights but still wish to marry, also helpless children, as well as standing up for orphans' rights. And whatever good you do is certainly well known to Allah."[127]

Apart from the said condition regarding the need to take care of orphan women, the condition for getting married to a new wife (maximum four) is the consent of other wives,[128] as well as the consent of the new wife (in Islam, marriage cannot be concluded without the consent of the woman, i.e., women

124 Surah an-Nisa, 4:3.

125 Should they marry the orphans, their mothers, or other women? Surah An-Nisa (4:3*), https://www.answering-islam.org/Quran/Versions/004.003.html.*
The translation of this verse in Bosnian is available at *https://www.quran-for-all.com/translate-bs-4.html.*

126 Asma Barlas, "Islamska reforma i rodna ravnopravnost: fikh, feminiyam ili CEDAW (Islamic Reform and Gender Equality: Fiqh, Feminism, or CEDAW?)", in Ivan Ejub Kostić (ed.), *Savremena islamska misao /hrestomatija/ (Contemporary Islam Thought /Chrestomathy/)* (2019), 323.

127 Surah an-Nisa, 4: 127.

128 According to a hadith, the Prophet Muhammad did not allow Ali bin Abi Talib, who was both his cousin (whom he took care of since childhood) and his son-in-law, the husband of his daughter Fatimah, to marry another woman (as his second wife, besides Fatimah),

cannot be forced into marriage against their own will, which was the case in pre-Islamic times). Moreover, the quoted third verse of Surah an-Nisa explicitly states the condition to the man to be convinced of his being able to treat all his wives in a just manner. Although it is not stated anywhere what is implied by just treatment, in the first place it is considered to refer to material conditions – accommodation, food, clothes and other material necessities should be provided equally to all wives. Namely, what is called *nafaqah* in Islam, or material sustenance that should be provided by the husband to his wife, in the event of polygyny should be provided equally to all wives. However, there is an opinion that such just treatment must also include the husband's equal attention, love and tenderness.[129] On the other hand, there is an opinion that it is impossible to fulfil this condition and to share emotions in that way.[130] Another verse from the same surah of the Qur'an – Surah an-Nisa – seems to indicate that the requirement of the just treatment of wives in emotional terms does not imply equality (which is impossible) but excludes complete neglect of one at the expense of the others. This verse states as follows:

> "You will never be able to maintain ˹emotional˺ justice between your wives – no matter how keen you are. So do not totally incline towards one leaving the other in suspense. And if you do what is right and are mindful ˹of Allah˺, surely Allah is All-Forgiving, Most Merciful."[131]

Finally, the fact that Prophet Muhammad himself had 11 wives in his lifetime (up at 9 at the same time), it cannot be considered as grounds for

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considering that Fatimah is against this new marriage of her husband and that it would hurt her feelings:

"Miswar b. Makhramali reported that he heard Allah's Messenger (ﷺ) say, as he sat on the pulpit:

The sons of Hisham b. Mughira have asked my permission to marry their daughter with ʿAli b. Abi Talib (that refers to the daughter of Abu Jahl for whom ʿAll had sent a proposal for marriage). But I would not allow them, I would not allow them, I would not allow them (and the only alternative possible is) that ʿAli should divorce my daughter (and then marry their daughter), for my daughter is part of me. He who disturbs her in fact disturbs me and he who offends her offends me." – Sahih Muslim 2449a, Book 44, Hadith 137.

Although this is about the daughter of the Prophet Muhammad (who emphasizes his emotional attachment to her and his resistance to inflicting emotional pain on her) and about a relative and one of the closest companions of the Prophet Muhammad, and even more so because it is about members of the Prophet's family, this example from the framework of the Sunnah, viewed in the context of the other mentioned restrictions, speaks in favor of the fact that the marriage with a new wife requires the consent of the existing wife (or existing wives).

129 This attitude was advocated particularly by the members of the Mu'tazillah) school from the earlier history of Islam (founded in Basra in the 8th century), as well as some Islamic legal experts. However, this requirement logically derives from the text of the quoted verse (seeking a belief in the possibility of the just treatment of all wives), i.e., it is implied in a certain way, because the emotional relationship is the central factor in marital and family relationships and definitely has the priority over material things.

130 Rachel Jones, "Polygyny in Islam", *Macalester Islam Journal*, Vol. 1, Issue 1, 2006, 64–65.

131 Surah an-Nisa, 4: 128-129.

anyone's citing such entitlement to several wives as belonging to him as well. Namely, the Qur'an itself contains verses (Surah Al-Ahzab, 33: 50-51) that give Prophet Muhammad an exclusive right to certain types of marriage, prescribing conditions and limitations at the same time:

> "33:50 O Prophet! We have made lawful for you your wives to whom you have paid their ˹full˺ dowries as well as those ˹bondwomen˺ in your possession, whom Allah has granted you.[1] And ˹you are allowed to marry˺ the daughters of your paternal uncles and aunts, and the daughters of your maternal uncles and aunts, who have emigrated like you. Also ˹allowed for marriage is˺ a believing woman who offers herself to the Prophet ˹without dowry˺ if he is interested in marrying her—˹this is˺ exclusively for you, not for the rest of the believers.[2] We know well what ˹rulings˺ We have ordained for the believers in relation to their wives and those ˹bondwomen˺ in their possession. As such, there would be no blame on you. And Allah is All-Forgiving, Most Merciful.
>
> 33:51 It is up to you ˹O Prophet˺ to delay or receive whoever you please of your wives. There is no blame on you if you call back any of those you have set aside.[1] That is more likely that they will be content, not grieved, and satisfied with what you offer them all. Allah ˹fully˺ knows what is in your hearts. And Allah is All-Knowing, Most Forbearing."[132]

The possibility of polygyny in Islam constitutes, therefore, an exception that is allowed purely for the purpose of securing orphan women. In modern conditions, with the social mechanisms of care being ensured and when, generally speaking, there are no such risks of orphan women staying without care, it seems that there are no grounds for permitting polygyny by applying the third verse of Surah an-Nisa. However, there is a risk of men wanting to gain a "benefit" from this provision of the Qur'an, which is evidently of historical nature, without practical use and usability nowadays. That actually happens in practice.

4. The 'fundamentalist paradigm'

There are more examples from Islamic law that are considered discriminatory (primarily towards women). However, the three above-described ones are enough to draw a conclusion that, where sharia is applied, to a larger or smaller extent, as state law, by adequate interpretation of the Qur'an and the Sunnah we can reach the practice that will not be discriminatory. Therefore, we can agree with Asma Barlas's conclusion that the problem is in jurisprudence that demands a certain degree of review to be adjusted to the letter of the Qur'an and the Sunnah, i.e., the claim that the "fundamentalist paradigm mixes sharia and *fikh*, and that the manner of its conceptualizing them is

132 Surah Al-Ahzab, 33: 50–51.

often in conflict with the Qur'an and the Sunnah."[133] Of course, the knowledge and wisdom of Islamic jurists who, through the fourteen centuries of the development of Islam, have built Islamic jurisprudence (fikh), are a valuable guidepost for understanding and interpreting the Qur'an and the Sunnah, but that jurisprudence itself is not uniform in a number of questions, so there is clearly space for yet another return to the basic sources of sharia and adjusting the practice to the requirements of the modern era, in line with what is actually stipulated by the Qur'an and what is actually the heritage of the tradition of Prophet Muhammad and his immediate circle. Moreover, it is important not to misunderstand the requirements of the modern era, i.e., not to identify modernity with the dominant worldviews in the part of the world we call the West in an abbreviated and simplified way. In the conditions of accelerated globalization, one of the key imperatives facing modern humanity is to preserve cultural diversity, in which specific religious features have an important place. We believe that this requirement is not opposite to, but in agreement with the imperative of respecting universal values and universally applicable rights, including the prohibition of discrimination. This is certainly the case when Abrahamic religions, as religions of love, mercy and essential equality are concerned.

IV INFLUENCE OF RELIGIOUS TEACHINGS AND BELIEFS OF THE ABRAHAMIC RELIGIONS ON THE ATTITUDE TOWARDS WOMEN AND PERSONS WITH DISABILITIES IN THE SECULAR SPHERE

1. Renaissance of religions

After the fall of the Berlin Wall and the proclamation of the president of the only remaining super-power, George Bush, about the creation of the New World Order, an idea emerged in the West about the end of the time of ideological confrontations and that the final victory was won by the system of the Western liberal democracy, which was theoretically formed by Francis Fukuyama in his book entitled "The End of History and the Last Man".[134] In response to this idea, Samuel Huntington (Fukuyama's former professor), published first an article "The Clash of Civilizations?"[135] and went on to elaborate his idea in the book "The Clash of Civilizations and the Remaking of World Order".[136] According to Huntington, after the Cold War, the world was to experience conflicts and wars with cultural and religious identities in their roots, waged between members of different civilizational units into

133 Barlas, *op. cit.*, 323.

134 Francis Fukuyama, *The End of History and the Last Man* (1992).

135 Samuel P. Huntington, "The Clash of Civilizations?", *Foreign Affairs*, Vol. 72, No. 3, 1993, 22–49.

136 Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (1996).

which humanity was divided. And indeed, the course of events substantially proved that Huntington was right. As for religions, they underwent renaissance throughout the world, which can be explained by a number of reasons, such as vacated space after the end of the key ideological (political) confrontations, reactions to globalization and its tendency to suppress and displace cultural diversities, as well as to the Western aspiration to impose its civilizational model on others etc.

Religion has always had a huge influence on the human society. Entire civilizational models and civilizational units have been formed and shaped under the influence of religions.[137] In some epochs and in some parts of the world, that influence has been extremely direct, particularly in theocracies, while sometimes it is less direct and less visible. However, even in completely secular societies, religious beliefs affect people's behaviour, customs, morals, law and other elements of human spirituality. The longevity of religions that can be measured by millennia increases this specific influence by the cumulation effect. The modern era, in which religions assume importance once again, brings a renewed effect of religions on the human society and people's view of the world and life. In these conditions, there is also a greater possibility for religious teachings and beliefs, depending on their content and the manner in which people understand them, to affect positively or negatively, in quantitative and qualitative terms, the emergence of discrimination in the society, including gender-based and disability-based discrimination.

Although prejudice against women and persons with disabilities, including discrimination against them, are often associated with religious beliefs, i.e., discriminatory acts are often ascribed to the influence of religions, to an extent that even perpetrators of discriminatory acts themselves cite religious postulates and use them to justify their acts, we think, at least when it comes to the Abrahamic religions, that such conclusion is unfounded. On the contrary, the Abrahamic religions are, each in its own way and often in the same or similar way (because after all, they arose from one another), religions of love, mercy and equality.

We have already seen that discriminatory beliefs or beliefs that may lead to discrimination and that are ascribed to the Abrahamic religions are most often an expression of wrong interpretations deviating from basic postulates of the teachings and beliefs of these religions. Those wrong interpretations are made equally by those citing the teachings and beliefs of these religions and those disputing and criticizing them. Returning to the original teaching of the Abrahamic religions, and thus to their humane nature, is a way of con-

137 About the influence of Christian roots on European civilizational distinctiveness and European civilizational unity, see, for example, in: Branko M. Rakić and Marija Vlajković, "National Identities and European Identity (Identités nationales et identité européenne)", in Yves Petit (ed.) *The European Union and Eastern Europe: what prospects? (L'Union européenne el l'Europe de l'Est: quelles perspectives?)* (2022), 231–285.

Branko M. Rakić, "Globalisation as a historical pattern of the world society" in Duško Dimitrijević (ed.), *The Old and the New World Order – between European Integration and the Historical Burden: Prospects and Challanges for Europe of 21st Century* (2014), 29–61.

tributing to reducing discrimination in the world. Every attempt at suppressing the influence of religions, taking into account their deep millennia-long rootedness both at individual and collective levels, can only cause an opposite effect and a number of other unfathomable detrimental consequences.

2. Abrahamic religions as religions of love

When speaking of the attitude of religions towards love and the place of love in religious teachings, the most common association, at least in this part of the world, is love between God and man, and love of man for man, as preached by Jesus Christ. Yet, love is also found in the very foundations of Judaism and Islam, i.e., all three Abrahamic religions are permeated by love as their central element. David Nirenberg and Leonardo Capezzone state the following:

> "Christianity frequently presented itself as a religion of love, as opposed to 'loveless' Judaism and Islam. However, Judaism, Christianity, and Islam have all used love to imagine, contest, and represent relations both proper and improper between and among created beings and divine creator."[138]

Although in the Ten Commandments from the Old Testament love is mentioned only in the second commandment ("You shall not make for yourself an image...") where God says of himself: "I, the Lord your God, am ... showing love to a thousand generations of those who love me and keep my commandments",[139] and love for one's neighbour is not mentioned, such citation, i.e., commandment, can be found in another place in the Old Testament, in Chapter 19 of the Book of Leviticus, as follows:

> "19 The Lord said to Moses,[2] Speak to the entire assembly of Israel and say to them:
>
> ...
>
> 18 'Do not seek revenge or bear a grudge against anyone among your people, but love your neighbour as yourself. I am the Lord.
>
> ...
>
> 34 The foreigner residing among you must be treated as your native-born. Love them as yourself, for you were foreigners in Egypt. I am the Lord your God.'"[140]

Jesus Christ (as stated in Chapter 12 of the Gospel of Mark), when replying to the question of one of the Hebrew priests (who will agree with him), puts this commandment about love towards one's neighbour among the most important commandments, immediately after the one about love for God:

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138 David Nirenberg and Leonardo Capezzone, "Religions of Love: Judaism, Christianity, Islam", in Adam J. Silverstein and Guy G. Stroumsa (ed.), *The Oxford Handbook of the Abrahamic Religions* (2018), 518.

139 Exodus, Chapter 20, The Ten Commandments.

140 Leviticus, Chapter 19.

> "[28] And one of the scribes came, and having heard them reasoning together, and perceiving that he had answered them well, asked him, Which is the first commandment of all?
>
> [29] And Jesus answered him, The first of all the commandments is, Hear, O Israel; The Lord our God is one Lord:
>
> [30] And thou shalt love the Lord thy God with all thy heart, and with all thy soul, and with all thy mind, and with all thy strength: this is the first commandment.
>
> [31] And the second is like, namely this, Thou shalt love thy neighbour as thyself. There is none other commandment greater than these.
>
> [32] And the scribe said unto him, Well, Master, thou hast said the truth: for there is one God; and there is none other but he:
>
> [33] And to love him with all the heart, and with all the understanding, and with all the soul, and with all the strength, and to love his neighbour as himself, is more than all whole burnt offerings and sacrifices.
>
> [34] And when Jesus saw that he answered discreetly, he said unto him, Thou art not far from the kingdom of God. And no man after that durst ask him any question."[141]

Christ's teaching preaches love in the first place. The explanation is given most directly and convincingly in the following words from Chapter 4 of the First Epistle of John:

> "**7** Dear friends, let us love one another, for love comes from God. Everyone who loves has been born of God and knows God. **8** Whoever does not love does not know God, because God is love. **9** This is how God showed his love among us: He sent his one and only Son into the world that we might live through him. **10** This is love: not that we loved God, but that he loved us and sent his Son as an atoning sacrifice for our sins. **11** Dear friends, since God so loved us, we also ought to love one another. **12** No one has ever seen God; but if we love one another, God lives in us and his love is made complete in us."[142]

as well as in:

> "[16] And so we know and rely on the love God has for us. God is love. Whoever lives in love lives in God, and God in them. **17** This is how love is made complete among us so that we will have confidence on the day of judgment: In this world we are like Jesus. [18] There is no fear in love. But perfect love drives out fear, because fear has to do with punishment. The one who fears is not made perfect in love. [19] We love because he first loved us. [20] Whoever claims to love God yet hates a brother or sister is a liar. For whoever does not love their brother and sister, whom they have seen, cannot love God, whom they have not

141 Mark 12: 28-33.

142 First Epistle of John 4: 7-12.

> seen.[21] And he has given us this command: Anyone who loves God must also love their brother and sister."[143]

And in his Epistle to the Romans Saint Paul teaches us that "Love Fulfills the Law": "[8] Owe nothing to anyone, except to love one another; for the one who loves another has fulfilled the law. [9] The commandments, 'You shall not commit adultery; you shall not kill; you shall not steal; you shall not covet,' and whatever other commandment there may be, are summed up in this saying, [namely] 'You shall love your neighbor as yourself.' [10] Love does no evil to the neighbor; hence, love is the fulfillment of the law."[144]

If God is love, then love rules the world, the whole world is permeated by love and everyone's main obligation is to act always and everywhere with love and in line with the requirements of love. Such acting, as Jesus Christ preached in his Sermons on the Mount and on the Plain, implies praying for the one who curses you, offering the cheek to the one who strikes you on the other cheek, and wishing for the other one what you wish for yourself etc.[145]

Islam is essentially a religion of love as well. There is a special emphasis on love between God and man, but inextricably attached to it is also love among people. A number of the Qur'an verses speaks of different forms of love and promotes love, while it is similar within the Sunnah too.

According to Islamic beliefs, God (Allah in Arabic) has 99 known names. Those names describe him and his characteristics and represent his attributes. Many of those names indicate Allah's affection for man.[146] A special place among them is taken by His Name 'the Loving' ('Al-Wadud'), used in

143 First Epistle of John 4: 16-21.

144 Romans 13:8-10.

145 Jesus Christ's words from the Sermon on the Mount, the Gospel of Matthew:
"[38]You have heard that it was said, "An eye for an eye and a tooth for a tooth." [39]But I say to you, Do not resist the one who is evil. But if anyone slaps you on the right cheek, turn to him the other also. [40]And if anyone would sue you and take your tunic, let him have your cloak as well. [41]And if anyone forces you to go one mile, go with him two miles. [42]Give to the one who begs from you, and do not refuse the one who would borrow from you." — Jesus Christ's Sermon on the Mount, New Testament, Matthew 5:38–42.

And from the Sermon on the Plain, the Gospel of Luke:
"[27]But I say to you who hear, Love your enemies, do good to those who hate you, [28]bless those who curse you, pray for those who abuse you. [29]To one who strikes you on the cheek, offer the other also, and from one who takes away your cloak do not withhold your tunic either. [30]Give to everyone who begs from you, and from one who takes away your goods do not demand them back. [31]And as you wish that others would do to you, do so to them."— Jesus Christ's Sermon on the Plain, New Testament (Luke 6:27–31).

146 "However, God's Love is not merely one of God's acts or actions, but one of God's very Own Divine Qualities or Names. This can be seen by the many Divine Names in the Holy Qur'an which denote God's loving qualities (such as: 'the Gentle'—'*Al-Latif*'; 'the Kind'—'*Al-Raouf*'; 'the Generous'—'*Al-Kareem*'; 'the Forbearing'—'*Al-Haleem*'; 'the Absolutely Reliable'—'*Al-Wakil*'; 'the Friend'—'*Al-Wali*'; 'the Good'—'*Al-Barr*'; 'the Forgiving'—'*Al Ghafur*'; 'the Forgiver'—'*Al-Ghaffar*'; 'the Granter and Accepter of Repentance'—'*Al-Tawwab*', and 'the Pardoner'—'*Al-'Afu*'), and in particular by His Name 'the Loving' ('*Al-Wadud*') ..." – H.R.H. Prince (of Jordan) Ghazi bin Muhammad bin Talal, *Love in the Holy Qur'an* (2010), 15.

two verses by the Qur'an, the Holy Book that, according to Islamic scholar from the 12th century, Rashid al-Din Maybudi, deserves the title "the eternal love", while its content is "the story of love and lovers".[147] These verses read as follows: "...Truly my Lord is Merciful, Loving."[148] and "And He is the Forgiving, the Loving."[149] On the other hand, according to the Qur'an, man is expected to be committed to God and to love God, while God himself particularly loves those who love Him and who follow the road of His Messenger: "Say: 'If you love God, follow me (Mohammad, added by the author), and God will love you more, and forgive you your sins; God is Forgiving, Merciful.'"[150], those who are believers and act properly: "Truly those who believe and perform righteous deeds — for them the Compassionate One shall appoint love."[151]

Along with love for God, the Qur'an in many places calls for love and care towards our neighbours, particularly parents, the poor, but actually towards the whole humanity as, for example, in the following verse:

> "And worship God, and associate nothing with Him. Be kind to parents, and near kindred, and to orphans, and to the needy, and to the neighbour who is near, and to the neighbour who is a stranger, and to the friend at your side, and to the wayfarer, and to what your right hands own. Surely God loves not the conceited, and the boastful."[152]

From the Sunnah, we will mention, for example, the verse that speaks of Prophet Muhammad's teaching regarding an immeasurable reward, greater than the one intended for prophets and martyrs (suffering for the sake of faith and God), which will be given by Allah in the other world to those people who showed love for other people during their lifetime in this world:

> "Narrated Umar ibn al-Khattab:
>
> reported the Prophet (ﷺ) as saying: There are people from the servants of Allah who are neither prophets nor martyrs; the prophets and martyrs will envy them on the Day of Resurrection for their rank from Allah, the Most High.
>
> They (the people) asked: Tell us, Messenger of Allah, who are they? He replied: They are people who love one another for the spirit of Allah (i.e., the Qur'an), without having any mutual kinship and giving property to one. I swear by Allah, their faces will glow and they will be (sitting) in (pulpits of) light. They will have no fear (on the Day) when the people will have fear, and they will not grieve when the people will grieve.

147 William C. Chittick, "Islam: A Religion of Love", October 14, 2010, *https://www.huffpost.com/entry/islam-as-a-religion-of-lo_b_757352*

148 Surah Hud, 11:90.

149 Surah Al-Buruj, 85:14.

150 Surah Al 'Imran, 3:31.

151 Surah Maryam, 19:96.

152 Surah An-Nisa, 4:36.

> He then recited the following Qur'anic verse: 'Behold! Verily for the friends of Allah there is no fear, nor shall they grieve.'"[153]

Therefore, all three Abrahamic religions are connected by a thread of love as the foundation on which each of them is placed, so that it may be said that love is in the essence of what Ibn Arabi calls "the transcendental unity of religions" ("wahdat al-adyan")[154] and that Hafiz[155], the Persian poet from the 14th century, had every right to write the following verses:

> "Everyone, sober or drunk, is seeking a beloved,
> everywhere, mosque or synagogue, is the house of love."[156]

3. Abrahamic religions as religions of mercy

In all three Abrahamic religions, love is closely connected with mercy, because mercy, both God's mercy to man and man's mercy to another man, constitute one of the most important manifestations of love.

In Judaic tradition, both mercy and justice (fairness), which represent God's two attributes, are also closely connected and their concurrent existence and a sort of balance (with mercy having a certain advantage) are necessary for the survival of the world. Namely, the midrash "Genesis Rabbah"[157] contains the following words by God: "Thus said the Holy One, blessed be His name: 'If I create the world with the Attribute of Mercy, sin will abound; and if I create it with the Attribute of Justice, how can the world exist? Therefore I create it with both attributes, mercy and justice, and may it thus endure.'"[158] Since all people are sinful ("Indeed, there is not a righteous man on earth who *always* does good and who never sins."[159]), if God showed only his attribute of justice without the attribute of mercy, humanity would be perma-

153 Sunan Abi Dawud 3527, Book 24, Hadith 112, English translation: Book 23, Hadith 3520 (Grade: Sahih /Al-Albani/).

154 See:
Gholamreza Aawani, "The Transcendent Unity of Religion in the Sufism of Ibn 'Arabi", *Ishraq: Islamic Philosophy Yearbook* (2012), 159–166;
Media Zainul Bahri, "Ibn Arabi and the Transcendental Unity of Religions", *Al-Jami'ah*, Vol. 50, No. 2, 2012, 461–483.

155 Shams al-Din Muhammad Hafiz, 1325/26–1389/90.

156 Taken from Chittick, *op. cit.*

157 *Genesis Rabbah* is a midrash (exegesis in Judaism, i.e., interpretations of the Torah), created between 300 and 500 AD, which contains ancient rabbi interpretations of the Book of Genesis.

158 *Genesis Rabbah* 12:15. Taken from: Rabbi David Rosen, "The Mercy of God in Judaism", Mercy without Boundaries Panel – Salesian Pontifical University Jerusalem, March 10, 2016, *https://www.rabbidavidrosen.net/wp-content/uploads/2016/08/The-Mercy-of-God-in-Judaism-Mercy-without-Boundaries-Panel-Salesian-Pontifical-University-Jerusalem-March-10-2016.pdf* .
The same was said with regard to the creation of man in Genesis Rabbah 21: 8.
The text of *Genesis Rabbah* is available at: *https://archive.org/stream/RabbaGenesis/midrashrabbahgen027557mbp_djvu.tx*.

159 Ecclesiastes 7:20.

nently condemned and could not survive in that manner; if only the attribute of mercy were manifested, without the attribute of justice, the world would suffocate in the sin and could not survive either. That is why God manifests both attributes, allowing mercy to prevail regarding people who repent for their sins.[160]

God's mercy and mercy among people are mutually connected and conditioned. Namely, this is how the Book of Prophet Micah summarizes God's commandments:

"Do justice, love mercy and walk humbly with God."[161]

And this is how the meaning of the word "love mercy" (or "love kindness") is explained: "To love mercy is to show 'hesed', covenant faithfulness to one another. Micah 7:18 says God delights to show covenant faithfulness. It's who He is. Only because He has shown us great mercy can we do the same for others."[162]

In Judaism, God is considered "compassionate and gracious" (according to the Old Testament[163]) and has 13 Attributes of Mercy, which people should build on themselves as well.[164] People need to be reminded of the

160 Rabbi David Rosen, "The Mercy of God in Judaism", Mercy without Boundaries Panel – Salesian Pontifical University Jerusalem, March 10, 2016, *https://www.rabbidavidrosen.net/wp-content/uploads/2016/08/The-Mercy-of-God-in-Judaism-Mercy-without-Boundaries-Panel-Salesian-Pontifical-University-Jerusalem-March-10-2016.pdf.*

161 Micah 6:8.

162 Why Micah 6:8?, *https://www.westmont.edu/why-micah-6-8.*

163 The Bible says, quoting God's words to Moses: "**5** Then the Lord came down in the cloud and stood there with him and proclaimed his name, the Lord. **6** And he passed in front of Moses, proclaiming, "The Lord, the Lord, the compassionate and gracious God, slow to anger, abounding in love and faithfulness, **7** maintaining love to thousands, and forgiving wickedness, rebellion and sin. Yet he does not leave the guilty unpunished; he punishes the children and their children for the sin of the parents to the third and fourth generation."" – Exodus 34: 5-7.

164 Those 13 attributes of God's mercy are: 1. Hashem – God is consistent and unchanging so people should also be consistent, stick to their word and thus be trustworthy; 2. Hashem – when people make mistakes God gives them time to repent and accepts their repentance, so people should accept apologies from those who have hurt them; 3. All-Powerful – the almighty God overcomes his anger because of human sins, so even humans, when someone hurts them, should show the ability of self-control and self-restraint; 4. Compassionate – God has compassion on those who suffer so people should do what they can in order to alleviate other people's pains and sufferings; 5. Gracious – God does good even to does who do not deserve it so people should do the same; 6. Slow to Anger – God has patience and lets wrongdoers correct themselves, so people should act accordingly; 7. Bestows Abundant Kindness – God never stops doing kindness, so people should also people should also bestow abundant kindness to their fellow people; 8. Truthful and Faithful – God is loyal, keeps his word and rewards human efforts to improve, so man should also be loyal to another man and not do anything bad behind his back; 9. Preserves Kindness – God rewards man for obeying commandments and for good deeds, as well as to generations of his offspring, so people should also show gratitude and return good deeds to those who do good to them and to the families of their benefactors; 10. Lifts Sins – In judging, God gives priority to human merits in relation

God's attributes and to strive towards self-transformation by behaving in line with them, i.e., by building them in themselves (for man was created as God's image – "Elohim", or Divine Transcendence). Therefore, at the time of Yom Kippur, or the Day of Atonement (as well as Repentance, Redemption and Purification), there is a practice of reminding believers, at the begging of the prayer, of God's attributes of mercy, and that reminder in the prayer is ordered to Jews by the Talmud every time when they sin, because it is a way of receiving God's forgiveness: "... the Holy One, Blessed be He, wrapped Himself in a prayer shawl like a prayer leader and showed Moses the structure of the order of the prayer. He said to him: Whenever the Jewish people sin, let them act before Me in accordance with this order. Let the prayer leader wrap himself in a prayer shawl and publicly recite the thirteen attributes of mercy, and I will forgive them."[165]

In the Psalms, God's mercy is mentioned in many places,[166] and only in Psalm 136 it repeats in each of 26 verses (i.e., 26 times) invitation to express gratitude to God "for his mercy endureth for ever".[167]

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to their sins, and so people should position themselves in relation to the good and bad actions of other people; 11. Forgives the Rebellious – God gives those who oppose him and rebel against him the opportunity to repent and accepts their repentance, so people should accept repentance and forgive those who hurt them intentionally; 12. Forgives mistakes – God accepts appologies for unintentional sins, so people should do the same and forgive other people's people's wrongdoings that are due to carelessness; 13. Cleanses – God forgets the sins of repentant people as if they were never committed, so people should treat other people's bad deeds in the same way. Yom Kippur: Transform Yourself. Transform Your Year, September 21, 2015, on NCSY (the National Conference of Synagogue Youth), *https://ncsy.org/13-attributes-mercy-teshuva-yom-kippur/*.

165 Talmud, Tractate Rosh Hashanah 17b.

166 In Psalms, the word "mercy" appears over a hundred times, most frequently in the prayer for God's mercy ("Have mercy upon me"), but also in praising God's mercy and expressing gratitude for it, while the expression "loving kindness" appears more than twenty times.

167 Psalm 136 (King James Version).
136 O give thanks unto the Lord; for he is good: for his mercy endureth for ever. 2 O give thanks unto the God of gods: for his mercy endureth for ever. 3 O give thanks to the Lord of lords: for his mercy endureth for ever. 4 To him who alone doeth great wonders: for his mercy endureth for ever. 5 To him that by wisdom made the heavens: for his mercy endureth for ever. 6 To him that stretched out the earth above the waters: for his mercy endureth for ever. 7 To him that made great lights: for his mercy endureth for ever: 8 The sun to rule by day: for his mercy endureth for ever: 9 The moon and stars to rule by night: for his mercy endureth for ever. 10 To him that smote Egypt in their firstborn: for his mercy endureth for ever: 11 And brought out Israel from among them: for his mercy endureth for ever: 12 With a strong hand, and with a stretched out arm: for his mercy endureth for ever. 13 To him which divided the Red sea into parts: for his mercy endureth for ever: 14 And made Israel to pass through the midst of it: for his mercy endureth for ever: 15 But overthrew Pharaoh and his host in the Red sea: for his mercy endureth for ever. 16 To him which led his people through the wilderness: for his mercy endureth for ever. 17 To him which smote great kings: for his mercy endureth for ever: 18 And slew famous kings: for his mercy endureth for ever: 19 Sihon king of the Amorites: for his mercy endureth for ever: 20 And Og the king of Bashan: for his mercy endureth for ever: 21 And gave their land for an heritage: for his mercy endureth for ever: 22 Even an heritage unto

The New Testament, or the basic source of Christian tradition, also emphasizes the importance of God's mercy to people and mutual mercy among people, stating, among other things, their mutual conditionality. In that respect, of particular importance and fame are Jesus Christ's words from the Sermon on the Mount, from the Gospel of Matthew:

> "Blessed are the merciful for they shall receive mercy."[168]

Islam also assigns great importance to God's mercy and mercy among people. Out of 99 names (attributes) of Allah, the attributes "the Compassionate, the Merciful" ("ar-Rahman ir-Rahim") are most frequently used and mentioned. Out of 114 surahs (chapters) of the Qur'an, 113 begin with the words "In the name of Allah, the Compassionate, the Merciful" ("Bismillah ar-Rahman ir-Rahim"),[169] and the only one that does not begin with those words, Surah At-Tawbah ("The Repentance" – the 9th surah in the Qur'an) in its subsequent text reminds us of Allah's mercy in several places. And God's mercy is universal, i.e., He is merciful to everything he created:

> "... My mercy embraces all things ..."[170]

The extent to which mercy is in the centre of Divine essence is best shown by the fact that God himself identifies his attribute "Compassionate" with his very name of God:

> „Say: 'Invoke God or invoke the Compassionate One; whichever you invoke, to Him belong the Most Beautiful Names'..."[171]

Although mercy is an element of Divine essence or, rather, just because mercy is part of His essence, God expects people to be mutually merciful, both spouses ("... He created for you from yourselves mates that you might

Israel his servant: for his mercy endureth for ever. [23] Who remembered us in our low estate: for his mercy endureth for ever: [24] And hath redeemed us from our enemies: for his mercy endureth for ever. [25] Who giveth food to all flesh: for his mercy endureth for ever. [26] O give thanks unto the God of heaven: for his mercy endureth for ever.

168 Matthew 5:7, the Sermon on the Mount, the fifth Beatitude.

169 H.R.H. Prince Ghazi bin Muhammad bin Talal describes how Islamic experts, i.e., interpreters of the Qur'an, understand two above-mentioned notions and the difference between them, as well as their relation to the notion of love, in the following manner: **"**Muslim scholars and exegetes have disagreed about the exact differences between 'the Compassionate' (Al-Rahman) and 'the Merciful' (Al-Rahim), but they all affirm that the Divine Name 'the Compassionate' does not require an object, whilst the Divine Name 'the Merciful' does require an object to receive the mercy. This means that 'the Compassionate' is compassionate in His Essence, and 'the Merciful' is merciful in His actions. However, since love comes with mercy, and since mercy exists in both the Divine Names 'the Compassionate' and 'the Merciful', then love too is implied in both the Divine Names 'the Compassionate' and 'the Merciful'. Thus God's Love is twice implied—along with the double mention of Divine Mercy—at the beginning of the Holy Qur'an itself and the beginning of every one of its one hundred and fourteen chapters except the ninth (which is later compensated for).**"** – H.R.H. Prince (of Jordan) Ghazi bin Muhammad bin Talal, *op. cit.*, 15.

170 Surah Al-A'raf, 7:156.

171 Surah Al-Isra', 17:110.

find peace by their side, and He ordained between you affection and mercy. ..."[172]), and all other people, who he asks not only to do good in return for good ("Shall the recompense of goodness be other than goodness?"[173]), but also to do good in return for evil ("Repel thou the evil with that which is fairer. We Ourselves know very well what they describe."[174]). Finally, one of the Five Pillars of Islam,[175] or five duties to be observed by all Muslims,[176] is giving charity (*Zakat*, meaning "purification"), i.e., compulsory giving part of one's property as charity, usually in the amount of 2.5% for the needs of the Muslim community, primarily of those who are poor and needy. Along

172 Surah AlRum, 30:21.

173 Surah Ar-Rahman, 55:60.

174 Surah Al-Mu'minun, 23:96.

175 According to Islamic teaching, apart from *Islam* as a collection of external manifestations of faith, a Muslim must also possess *Iman*, as an internal segment of beliefs, and should strive towards *Ishan*, a higher level of belief that is not attainable to everyone. The following hadith speaks about it:

"It is narrated on the authority of Yahya b. Ya'mur ...:

Abdullah ibn Umar ibn al-Khattab... said: My father, Umar ibn al-Khattab, told me: One day we were sitting in the company of Allah's Apostle (peace be upon him) when there appeared before us a man dressed in pure white clothes, his hair extraordinarily black. There were no signs of travel on him. None amongst us recognized him. At last he sat with the Apostle (peace be upon him) He knelt before him placed his palms on his thighs and said: Muhammad, inform me about al-Islam. The Messenger of Allah (peace be upon him) said: Al-Islam implies that you testify that there is no god but Allah and that Muhammad is the messenger of Allah, and you establish prayer, pay Zakat, observe the fast of Ramadan, and perform pilgrimage to the (House) if you are solvent enough (to bear the expense of) the journey. He (the inquirer) said: You have told the truth. He (Umar ibn al-Khattab) said: It amazed us that he would put the question and then he would himself verify the truth. He (the inquirer) said: Inform me about Iman (faith). He (the Holy Prophet) replied: That you affirm your faith in Allah, in His angels, in His Books, in His Apostles, in the Day of Judgment, and you affirm your faith in the Divine Decree about good and evil. He (the inquirer) said: You have told the truth. He (the inquirer) again said: Inform me about al-Ihsan (performance of good deeds). He (the Holy Prophet) said: That you worship Allah as if you are seeing Him, for though you don't see Him, He, verily, sees you. He (the enquirer) again said: Inform me about the hour (of the Doom). He (the Holy Prophet) remarked: One who is asked knows no more than the one who is inquiring (about it). He (the inquirer) said: Tell me some of its indications. He (the Holy Prophet) said: That the slave-girl will give birth to her mistress and master, that you will find barefooted, destitute goat-herds vying with one another in the construction of magnificent buildings. He (the narrator, Umar ibn al-Khattab) said: Then he (the inquirer) went on his way but I stayed with him (the Holy Prophet) for a long while. He then, said to me: Umar, do you know who this inquirer was? I replied: Allah and His Apostle knows best. He (the Holy Prophet) remarked: He was Gabriel (the angel). He came to you in order to instruct you in matters of religion."Sahih Muslim 8a, Book 1, Hadith 1.

176 These five pillars, or duties that must be observed by Muslims are: 1. Shahada (shahādah, or testimony), which is a testimony of the oneness of God and the acceptance of Muhammad as God's messenger ("la ilaha illallah, muhammadur rasulullah" – "There is no god but God; Muhammad is the Prophet of God."); 2. Salat (Prayer) – the prayer five times a day; 3. Zakat (Almsgiving), i.e., a religious obligation regarding charity; 4. Sawm (Fasting), or the fasting period during Ramadan, and 5. Hajj (Pilgrimage), or going to Mecca during the twelfth month of the lunar calendar at least once in the believer's lifetime, in case his/her material situation allows it.

with this compulsory charity, Muslims can also give an amount they are not obliged to give, called *sadaqah* (charity).

This is how the Qur'an elaborates, along with other obligations, who should be given charity:

> "Righteousness is not in turning your faces towards the east or the west. Rather, the righteous are those who believe in Allah, the Last Day, the angels, the Books, and the prophets; who give charity out of their cherished wealth to relatives, orphans, the poor, ˹needy˺ travellers, beggars, and for freeing captives; who establish prayer, pay alms-tax, and keep the pledges they make; and who are patient in times of suffering, adversity, and in ˹the heat of˺ battle. It is they who are true ˹in faith˺, and it is they who are mindful ˹of Allah˺."[177]

Therefore, in all three Abrahamic religions, mercy, which is closely connected with love and represents a manifestation of love, makes the very essence of the relationship between God and man, and among people themselves.

4. Abrahamic religions as religions of essential equality

The foundations of religious teachings and key religious books of the Abrahamic religions were created in distant past and elaborated and built into human conscience throughout millennia. Therefore, the teachings of these religions contain a number of elements reflecting historical conditions and beliefs from the time of their creation, while their longevity has also left its trace in their content. Seen from the perspective of the topic dealt with in this paper, we may observe that religious teachings of the Abrahamic religions to a certain extent reflect the patriarchal nature and organization of societies, as well as the harshness of the conditions (wars, diseases, natural disasters, poverty, starvation etc.) in which those religions emerged and developed.

Nevertheless, in their essence, all these religions, apart from preaching love and mercy, and exactly because of preaching love and mercy, find all people equally valuable and mutually equal.

This is primarily due to the fact that, according to all three religions, God created man by his own image.

We have already mentioned the principle contained in Chapter 1, Verse 27 of the Book of Genesis, called *b'tselem elohim* ("And God created the human in his image. In the image of God, He created him; male and female He created them"), and that Julia Watts Belser pointed out that "*B'tselem Elohim* affirms a fundamental equality between people, a recognition that all human beings are equally worthy of respect and dignity", and that "a person is valued because of who they are, not because of what they can do or their capacity to earn money and be productive."[178]

177 Surah Al-Baqarah, 2:177.

178 Belser, 2016, *op. cit.*, 8.

The Qur'an, on its side, does not contain a statement similar to the Biblical one, while the words from Surah Al-Ikhlas that "...there is none comparable to Him (to Allah, added by the author)",[179] as well as more widely emphasized insistence in Islam, which was largely created in response to idolatry of pagan pre-Islamic tribes, on exceptionality and incomparability of God with its creature/creation, led Islamic religious experts in their interpretations of Prophet Muhammad's words from a number of hadiths[180] – that "Allah created Adam in His image" – to build some kind of a "duty, not to assimilate God to humanity not to slide into *tashbīh* – but to the contrary, to 'dis-assimilate' God – to maintain *tanzīh* – to sanctify God in sheer alterity."[181] However, we find completely suitable the following conclusion of Muhammad Talbi, the Tunisian Islamic expert and university professor from the 20th century:

> "In a way, and provided we keep humanity in its proper place as creature, we may as Muslims, along with the other members of Abraham's spiritual descendants, Jews and Christians, say that humanity was created in God's image. A *ḥadīth*, although questioned, authorizes this statement. So we can say that on the level of the Spirit all

179 Surah Al-Ikhlas, 112:4

180 Among other things:
"Narrated Abu Huraira:
The Prophet (ﷺ) said, "Allah created Adam in His picture, sixty cubits (about 30 meters) in height. When He created him, He said (to him), "Go and greet that group of angels sitting there, and listen what they will say in reply to you, for that will be your greeting and the greeting of your offspring." Adam (went and) said, 'As-Salamu alaikum (Peace be upon you).' They replied, 'AsSalamu-'Alaika wa Rahmatullah (Peace and Allah's Mercy be on you) So they increased 'Wa Rahmatullah' The Prophet (ﷺ) added 'So whoever will enter Paradise, will be of the shape and picture of Adam Since then the creation of Adam's (offspring) (i.e., stature of human beings is being diminished continuously) to the present time.". Sahih al-Bukhari 6227, Book 79, Hadith 1, *https://sunnah.com/bukhari:6227*.
"Abu Huraira reported Allah's Messenger (ﷺ) as saying:
Allah, the Exalted and Glorious, created Adam in His image with His length of sixty cubits, and as He created him He told him to greet that group, and that was a party of angels sitting there, and listen to the response that they give him, for it would form his greeting and that of his offspring. He then went away and said: Peace be upon you! They (the angels) said: May there be peace upon you and the Mercy of Allah, and they made an addition of" Mercy of Allah". So he who would get into Paradise would get in the form of Adam, his length being sixty cubits, then the people who followed him continued to diminish in size up to this day." Sahih Muslim 2841, Book 53, Hadith 32, *https://sunnah.com/muslim:2841*.
"This hadith has been transmitted on the authority of Abu Huraira and in the hadith transmitted on the authority of Ibn Hatim Allah's Apostle (ﷺ) is reported to have said:
When any one of you fights with his brother, he should avoid his face for Allah created Adam in His own image." Sahih Muslim 2612e, Book 45, Hadith 152, *https://sunnah.com/muslim:2612e*.

181 Lutz Richter-Bernburg, "'God created Adam in his likeness' in the Muslim tradition", in Katell Berthelot amd Matthias Morgenstern (eds.), *The Quest for a Common Humanity: Human Dignity and Otherness in the Religious Traditions of the Mediterranean* (2011), 73. Also see Christopher Melchert, "'God Created Adam in His Image'", *Journal of Qur'anic Studies*, Vol. 13, Issue 1, 2011, 113–124.

> persons, whatever their physical or intellectual abilities and aptitudes may be, are truly equal. They have the same breath of God in them, and by virtue of this breath, they have the potential to rise to God and to answer freely to His call. Consequently they have the same dignity and sacredness, and because of this dignity and sacredness they are wholly and equally entitled to enjoy the same right of self-determination on Earth and in the hereafter."[182]

Therefore, the Abrahamic religions preach the essential equality of people, equality in dignity and we will recall that the basic, initial act of the modern system of human rights protection, the Universal Declaration on Human Rights from 1948, in Article 1 proclaims equality of all people in dignity and rights as the basis of the entire system:

> "*Article 1*
>
> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

Since all people are God's creations, God treats them all equal – independently of their gender, abilities or other personal characteristics. This idea is present in all three Abrahamic religions. So, Verse 9 of Psalm 145 says that "The Lord is good to all and His tender mercies are over all his works"; Apostle Paul says the following in the Epistle to the Galatians: "...for in Jesus Christ you are all children of God through faith, ... There is neither Jew nor Greek, male nor female, slave nor free, for you are all one in Christ Jesus.", while the Qur'an emphasizes that: "It is He (Allah, added by the author) who created you (people, male and female, added by the author) from a single soul..."[183] and contains the following message by God: "... in My sight all of you are alike",[184] etc.

Apart from equality in the creation, or genesis, there is also equality at the eschatological level and, according to Jesus Christ's words, that is where equality becomes complete. So, when asked by some Sadducees, negators of the Resurrection, who will be husband to the wife with many husbands during the life in this world, by the law of levirate marriage, after the Resurrection, Jesus answers. "For when they rise from the dead, they neither marry nor are given in marriage, but are like angels in heaven."[185] Islam does not believe that in the other world equality between men and women will reach that degree, but envisages that they will be equally rewarded in the other world

182 M. Talbi, "Religious Liberty: A Muslim Perspective", in Leonard Swidler (ed.), *Religious Liberty and Human Rights in Nations and Religions* (1986), 175–87, esp. 177f. Taken from Lutz Richter-Bernburg, "'God created Adam in his likeness' in the Muslim tradition", in Katell Berthelot et Matthias Morgenstern (ed.), *The Quest for a Common Humanity: Human Dignity and Otherness in the Religious Traditions of the Mediterranean* (2011), 80–81.

183 Surah Al-A'raf, 7: 189.

184 Surah Al-Imran, 3:195.

185 Mark 12:25.

for the deeds during their life in this world: "Surely ˹for˺ Muslim men and women, believing men and women, devout men and women, truthful men and women, patient men and women, humble men and women, charitable men and women, fasting men and women, men and women who guard their chastity, and men and women who remember Allah often—for ˹all of˺ them Allah has prepared forgiveness and a great reward."[186] Moreover: "If any do deeds of righteousness,– be they male or female – and have faith, they will enter Heaven, and not the least injustice will be done to them."[187]

The Abrahamic religions in many places invite believers to treat others equally, regardless of their different personal characteristics. Thus, for example, in the Repeated laws from the Old Testament, there is an urge to people to be impartial, just as God is impartial: "**17** For the Lord your God is God of gods and Lord of lords, the great God, mighty and awesome, who shows no partiality and accepts no bribes. **18** He defends the cause of the fatherless and the widow, and loves the foreigner residing among you, giving them food and clothing. **19** And you are to love those who are foreigners, for you yourselves were foreigners in Egypt."[188] According to Jesus Christ's words, the positive attitude towards others and the different ones will be awarded at the moment of resurrection: "But when you give a feast, invite the poor, the crippled, the lame, the blind, and you will be blessed, because they cannot repay you. For you will be repaid at the resurrection of the just."[189] In the First Epistle to the Corinthians, Apostle Paul says: "Now I urge you, brothers and sisters, by the name of our Lord Jesus Christ, that you all agree and that there be no divisions among you, but that you be made complete in the same mind and in the same judgment."[190] The Qur'an says: "Your wives are a garment for you, and you are a garment for them.",[191] as well as "Wives have the same rights as husbands have on them"[192], while Prophet Muhammad said the following to his believers: "... the best of you are the best in behaviour to their women."[193]

We have already seen that in all Abrahamic religions there are women with an important role and a high position. There is a smaller number of those women than men, as a consequence of the fact that all these religions emerged in patriarchal conditions, but the fact that a major role is given to

186 Surah Al-Ahzab, 33:35.

187 Surah An-Nisa, 4/124.

188 Deuteronomy 10:17-19. Equal treatment of foreigners is also spoken about in Leviticus 19:33-34.

189 Luke 14:13-14.

190 1 Corinthians 1:10.

191 Surah Al-Baqarah, 2:187.

192 Surah Al-Baqarah, 2:228.

193 The hadith reads as follows:
"Abu Huraira reported: The Messenger of Allah, peace and blessings be upon him, said, "The most complete of believers in faith are those with the best character, and the best of you are the best in behavior to their women."
Sunan al-Tirmidhī, 1162
Grade: *Sahih* (authentic) according to Al-Tirmidhi".

women, despite their smaller numbers, clearly indicates that these religions place women in an equal position with men. Thus, in Judaism there are five prophetesses in the Old Testament: Miriam,[194] Deborah,[195] Huldah,[196] Noadiah[197] and Isaiah's wife.[198] In Christianity, apart from the prophetesses from the Old Testament, an extremely significant role is played primarily by Virgin Mary, but according to the Gospels, among all Christ's followers, women were those that stayed with him until his crucifixion and death on the cross;[199] women were those who were present when he was placed in his grave[200] and the first ones to learn that Jesus had resurrected on the third day after his death, when they found an empty grave and the angels next to it.[201] Furthermore, it was a woman (Maria Magdalena) to whom Jesus spoke first after his resurrection.[202] The Gospel of John records the encounter of Jesus Christ and the Samaritan Woman), who spoke to him about theological matters and who then told her fellow Samaritans of her conviction that she had met the Messiah and took them to Jesus.[203] Islam takes from Judaism and Christianity the teaching about prophetesses and women close to Jesus Christ, particularly pointing out the role of Virgin Mary, to whom one whole chapter of the Qur'an is dedicated.[204] Among Prophet Muhammad's companions, there was a large number of the so-called *Sahabiyat* (Women Companions), who played an important role in spreading faith and performing religious duties, in war campaigns, political activities, education, culture, economy, trade etc.[205]

194 Exod. 15:20.

195 Judg. 4:4.

196 2 Kgs. 22:14.

197 Neh. 6:14.

198 Isa. 8:3.

199 According to Matthew 27:55–56 – many women ... who had followed Jesus from Galilee, including Mary Magdalene and Mary the mother of James and Joseph and the mother of the sons of Zebedee. According to Mark 15:40 – many women ... including Mary Magdalene, and Mary the mother of James the younger and of Joses, and Salome. According to Luke 23:49 – the women who had followed Jesus from Galilee. According to John 19:25 – mother of Jesus and her sister, Mary the wife of Clopas, and Mary Magdalene.

200 According to Matthew 27:61 – Mary Magdalene and the other Mary. According to Mark 15:47 – Mary Magdalene and Mary of Joses. According to Luke 23:55 – the women who had come with Jesus from Galilee.

201 According to Matthew 28:1 – Mary Magdalene and the other Mary. According to Mark 16:1 – Mary Magdalene and Mary the mother of James and Salome. According to: Luke 24:10 – Mary Magdalene and Joanna and Mary the mother of James and other women. According to John 20:1 –13 – Mary Magdalene.

202 John 20: 14 –18.

203 John 4:1-42

204 Surah 19, Maryam, consisting of 98 verses (āyāt).

205 Particularly important among those women are Khadijah bint Khawaylid, Saudah bint Zam'ah, 'Aishah bint Abu Bakr, Hafsah bint 'Umar, Zainab bint Khazeemah, Umm Salamah bint Abu Umayyah, Zainab bint Jahash, Juveriah bint Harith, Safiyyah bint Huyayee, Umm Habibah Ramlah bint Abi Sufyan, Maimoonah bint Harith Al-Hilaliah, Fatimah

The Abrahamic religions assign special importance to the respect for both parents. Thus, one of the Ten Commandments from the Book of Exodus says: "Honour your father and your mother, so that you may live long in the land the Lord your God is giving you.",[206] while to a potential objection that the quoted commandment places father before mother, we may answer by stating that in the same commandment in the Book of Leviticus, the order is reversed: "Each of you must respect your mother and father ..."[207] The Qur'an orders something similar, while emphasizing the role of the mother: "And We have commanded people to ˹honour˺ their parents. Their mothers bore them through hardship upon hardship, and their weaning takes two years. So be grateful to Me and your parents. To Me is the final return."[208] Islam goes a step further in that respect, giving priority to mother, in the following hadith:

> "Narrated Abu Huraira:
>
> A man came to Allah's Messenger (ﷺ) and said, "O Allah's Messenger (ﷺ)! Who is more entitled to be treated with the best companionship by me?" The Prophet (ﷺ) said, "Your mother." The man said. "Who is next?" The Prophet said, "Your mother." The man further said, "Who is next?" The Prophet (ﷺ) said, "Your mother." The man asked for the fourth time, "Who is next?" The Prophet (ﷺ) said, "Your father.""[209]

Islam emphasizes the importance of mother to her children in the following hadith:

> "Mu'awiyah ibn Jahima reported:
>
> Jahima came to the Prophet, peace and blessings be upon him, and he said, "O Messenger of Allah, I intend to join the expedition and I seek your counsel." The Prophet said, "Do you have a mother?" He said yes. The Prophet said, "Stay with her, for Paradise is beneath her feet.""[210]

Persons with disabilities also have an important role and position in the Abrahamic religions.

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bint Prophet Muhammad, Fatimah bint Asad, Umm Rooman, Sumayyah bint Khabat, Umm Haram bint Malhan, Asma' bint Abu Bakr Siddique, Umm Sulaim bint Malhan Ansariah, Umm 'Ammarah Naseebah, Ar-Rabee' bint Ma' uwth, Faree'ah bint Malik, Umm Hisham bint Harithah bin Nu'man, Umm Salamah Asma' bint Yazid bin Sakan Al-Ansariah, Umm Sa'd Kabshah bint Rafi' Ansariah, Umm Munthir Salama bint Qais, Umm Waraqah bint 'Abdullah bin Harith Ansariah, Umm Aiman bint Tha'Iabah, etc.
About the role and importance of the mentioned women, see Mahmood Ahmad Ghadanfar, *Great Women of Islam Who Were Given the Good News of Paradise* (2014).

206 Exodus, 20:12.

207 Leviticus 19:3.

208 Surah Luqman, 31:14.

209 Sahih al-Bukhari 5971, Book 78, Hadith 2.

210 Source: Sunan al-Nasā'ī 3104.
Grade: Sahih (authentic) according to Al-Albani.

Some of the Old Testament prophets had some forms of disability. Moses, for example, had a speech impediment – he probably stammered.[211] Prophet Jacob limped due to hip dislocation in a wrestling match,[212] while Jacob[213]. Abraham's son Isaac,[214] Eli the High Priest[215] and Prophet Ahijah[216] became blind with age.[217] In the Book of Job, the Satan used God's permission to incapacitate rightous Job as he "smote Job with sore boils from the sole of his foot to the crown of his head".[218]

211 In the Old Testament Book of Exodus, there is part of Moses's conversation with God, when Moses expresses his fear that the Jewish people will not listen when he tells them God's messages because he has a speech impediment:
"10 Moses said to the Lord, "Pardon your servant, Lord. I have never been eloquent, neither in the past nor since you have spoken to your servant. I am slow of speech and tongue."
11 The Lord said to him, "Who gave human beings their mouths? Who makes them deaf or mute? Who gives them sight or makes them blind? Is it not I, the Lord? 12 Now go; I will help you speak and will teach you what to say."
13 But Moses said, "Pardon your servant, Lord. Please send someone else."
14 Then the Lord's anger burned against Moses and he said, "What about your brother, Aaron the Levite? I know he can speak well. He is already on his way to meet you, and he will be glad to see you. 15 You shall speak to him and put words in his mouth; I will help both of you speak and will teach you what to do. 16 He will speak to the people for you, and it will be as if he were your mouth and as if you were God to him. ..." – Exodus 4: 10-16.
According to one midrash, at the time of Moses's birth, the Jews lived in the difficult conditions of severe slavery in Egypt (where they had come fleeing from starvation and were well accepted in the beginning, but their status deteriorated drastically later on); the Jewish children were killed and Moses survived because he was adopted by the Pharaoh's daughter, who was delighted by his beauty and took him to the court. On one occasion, the Pharaoh wanted to hug little Moses (about three years old), who extended his hand, took off the Pharaoh's crown and put it on his own head. Some magicians of Egypt who witnessed it expressed their fear of the boy's gesture showing that he was the one who would overthrow the Pharaoh and suggested that the boy should be put to death. However, one of the present people, Jethro, Moses's father-in-law later on, said that they should test the boy by giving him a bowl with gold and a bowl with firecoals. If he took the gold, it would show that he was a threat to the Pharaoh and therefore killed, but if he took the coals, it would mean that he was not a threat. The boy reached out towards the bowl with gold, but angel Gabriel pushed his hand towards the bowl with burning coals. When touching the bowl, the boy burnt his hand and instincitvely put the fingers into his mouth, burning his lips and tongue with bits of burning coal that stuck to his fingers. That was the reawson why he became "slow of speech and tongue", as he would describe his condition when speaking to God. Midrash Shemot Rabbah, Exodus, Chap 1, Section 26, *https://www.sefaria.org/Shemot_Rabbah.1.26?lang=bi.*
See also Henry A Garfinkel, "Why did Moses stammer? and, was Moses left-handed?", *Journal of the Royal Society of Medicine*, Vol. 88 (May), 1995, 256–257.

212 Gen 32:31.

213 Gen 48:10.

214 Gen 27:1.

215 1 Sam 4:15.

216 1 Kgs 14:4.

217 Jeremy Schipper, "Disability in the Hebrew Bible", *Teaching the Bible*, Society of Biblical Literature, *https://www.sbl-site.org/assets/pdfs/TBv2i8_SchipperDisability.pdf.*

218 Job 2:7.

In the New Testament, Jesus Christ helps the sick and the disabled, i.e., according to Fintan Sheerin, "Jesus' ministry is marked, from the outset, by cures of those who have been disabled by disease (Mark 1:40-45), paralysis (Matt 9:1– 8; Luke 6:6-11), mental health problems (Mark 5:1-20), deafness (Mark 7:31-37), epilepsy (Luke 9:37-42), blindness (Matt 20:29– 34) and many others (Matt 15:29-31)."[219] Some of the people he had cured of disabilities joined Jesus and followed him during his sermons, and even until the moment of his death and resurrection, such as Maria Magdalena.[220] Of particular importance is Chapter 9 of the Gospel of John, where Jesus makes a young man who was born blind see. Before he did that, this is how Jesus had answered his disciples' question as to whether the young man was born blind because of his own sin or the sin of his parents: "Neither this man nor his parents sinned ... but this happened so that the works of God might be displayed in him. As long as it is day, we must do the works of him who sent me. Night is coming, when no one can work. While I am in the world, I am the light of the world."[221] Thus, Jesus denies the idea that a sin is the reason for the occurrence of a disability, the idea that is dangerous, among other things, because it can entice discrimination against persons with disabilities.

In the end, Islam accepts the teaching presented in the religious books of Judaism and Christianity, and it also treats as prophets the above-mentioned Biblical persons with some sort of disability and greets Jesus Christ's healing role. We have already seen that among Prophet Muhammad's companions, as well as among outstanding Muslims from subsequent epochs, there was a large number of persons with disabilities (ʻAbdullah ibn Umm Maktoom, ʻAta ibn Abi Rabah, Abaan ibn ʻUthmaan ibn ʻAffaan etc.), and that Allah himself in Sura `Abbas rebuked the Prophet Muhammad for not paying due attention to the blind `Abdullah ibn Umm Maktoom and not treating him equally with the pagan leaders with whom he spoke..

Therefore, by preaching the essential equality of people, i.e., their equality in dignity, by inviting believers to equal treatment of others, regardless of their different personal characteristics, and by placing a number of women and persons with disabilities among prophets and outstanding believers,

219 Fintan Sheerin, "Jesus and the Portrayal of People with Disabilities in the Scriptures", *Spiritan Horizons*, Volume 8, Issue 8, 65. In the fact that Jesus cures people with disabilities, Fintan Sheerin sees an indicator that the New Testament does not bring "acceptance of the humanness of disability", and that "inclusion in the Kingdom is predicated on the removal of blemishes and the conversion to bodily perfection". It seems that such a conclusion is a result of the formerly existing negative opinion about the attitude of the New Testament towards disabilities, and the search and construction of an acknowledgment of such opinion.

220 The Gospel of Luke says:
"Soon afterwards he went on through cities and villages, proclaiming and bringing the good news of the kingdom of God. The twelve were with him, as well as some women who had been cured of evil spirits and infirmities: Mary, called Magdalene, from whom seven demons had gone out, and Joanna, the wife of Herod's steward Chuza, and Susanna, and many others, who provided for them out of their resources." Luke 8:1-3.

221 John 9.

bearers and carriers of their religious teachings, the Abrahamic religions evidently create the foundation for equal treatment of all people, including equal treatment of men and women and equal treatment of persons with disabilities with other people.

5. An indispensable need to follow the essence of religious teachings

Religious teachings may have and actually have a strong influence on broader social beliefs and the establishment of moral and legal rules in a society, as well as on the practical behaviours in the application of the existing rules. In those parts of the world where the Abrahamic religions prevail, they also have a great influence due to their spatial distribution and comprehensiveness of their teachings and to their deep rootedness that has been established throughout their millennia-long duration.

The complexity of these idea and value systems can result in different views and understanding both of those systems on the whole and their segments.

In our opinion, seen from the perspective of the necessity for these religions not only to avoid contributing to the creation of discriminatory rules and practices, but also of the necessity to contribute to the removal of the atmosphere that might favour discrimination, it is quite important that idea, value and moral systems of these religions are seen in such a manner as to take care of the essence of their teachings, thus removing the risk of wrong and distorted understanding of certain elements of those teachings, torn from the whole and essence of the given teaching.. Unfortunately, practice shows that the cases of not seeing the forest for the tree are not rare in this respect.

If the Abrahamic religious systems are seen in such a way that puts their profoundly essential postulates first, a conclusion must be reached that these religions preach love, mercy and essential equality among people. In these religions, there is no room for discrimination and their influence on broader social beliefs, morals, law and practical behaviours will be directed solely towards removing risks and possibilities of the occurrence of discrimination.

V CONCLUSION

We have seen that in the organizational structure and functioning of Abrahamic churches and religious communities there are certain differences in the position of men and women, as well as some limitations regarding persons with disabilities. These differences and limitations are mostly explained by the historical conditions in which such religious organizations emerged and developed. However, what is important to note is the fact that such rules and practices cannot be considered discrimination contrary to the rules within the legal orders of modern states and modern international law. We have seen that the European Court of Human Rights believes that such rules and practices are within the autonomous sphere of organizational life of a religious community, and that through its existence and respect freedom of

religion and freedom of association are enjoyed by all members of that community. In addition, freedom of religion and right to non-discrimination of each individual believer, which must be taken care of by states and international organizations, are ensured through the guarantee of believers' freedom to join a religious community (or form a new religious community with the like-minded) and to leave it.

We have also seen that where certain religious rules are accepted as state law – which in modern times is the case only with sharia in some countries – it is extremely important to observe strictly the sources of such law and their hierarchy, while understanding and taking into account the historical context in which those rules emerged and developed. Namely, in practice there is a noticeable understanding and application of these rules deviating from what is actually prescribed in legal sources, as well as that in the interpretation of these norms the social conditions are not taken into account from the time when they emerged, or the changes in those conditions brought about by a long period of time to date.

In the end, we have also seen that in the centre of the teachings of all three Abrahamic religions there are love, mercy and equality, and that is necessary to look at those religions through the prism of the values lying in their essence.

The last segment is particularly important to the understanding of the attitude of the Abrahamic religions towards women and persons with disabilities and the potential influence of these religions on the emergence of a discriminatory behaviour towards these two groups, including discrimination against them based on these two characteristics simultaneously. As a matter of fact, as entire idea and value systems, with deep roots established throughout millennia, religions have a great effect on people's beliefs and behaviours and the social order, moral and legal norms and their application in practice. Thus, for example, discriminatory behaviour towards both women and persons with disabilities is often justified by the idea about the inferiority of women and persons with disabilities, whereas the strongholds for such idea are sought and wrongly found in religious books and religious teachings, i.e., in their distorted understanding and interpretation. Since the concept of sin, atonement for sin, forgiveness and punishment are present in religions, the basis for discriminatory treatment of both women and persons with disabilities is often associated with sin, i.e., sin is associated with those two categories of people, or their specific personal characteristics. We have already seen how Jesus Christ, according to Chapter 9 of the Gospel of John, denied the possibility that the young man whom he made see again was born blind because of his own sin or the sin of his parents. Discriminatory treatment of women because of being ascribed Eve's or original sin was spoken about by Jimmy Carter (born in 1924), almost certainly the most reputable American president (from 1977 to 1981) in the past half of the century and the winner of the Nobel Peace Award in 2002. This is how he explains the reason why in 2009 he decided "to sever (his) ties with the Southern Baptist Convention, after six decades":

> "It was ... an unavoidable decision when the convention's leaders, quoting a few carefully selected Bible verses and claiming that Eve was created second to Adam and was responsible for original sin, ordained that women must be 'subservient' to their husbands and prohibited from serving as deacons, pastors or chaplains in the military service. This was in conflict with my belief — confirmed in the holy scriptures — that we are all equal in the eyes of God.
>
> This view that women are somehow inferior to men is not restricted to one religion or belief. It is widespread. Women are prevented from playing a full and equal role in many faiths.
>
> Nor, tragically, does its influence stop at the walls of the church, mosque, synagogue or temple. This discrimination, unjustifiably attributed to a Higher Authority, has provided a reason or excuse for the deprivation of women's equal rights across the world for centuries. The male interpretations of religious texts and the way they interact with, and reinforce, traditional practices justify some of the most pervasive, persistent, flagrant and damaging examples of human rights abuses.
>
> At their most repugnant, the belief that women must be subjugated to the wishes of men excuses slavery, violence, forced prostitution, genital mutilation and national laws that omit rape as a crime. But it also costs many millions of girls and women control over their own bodies and lives, and continues to deny them fair access to education, health, employment and influence within their own communities.
>
> The impact of these religious beliefs touches every aspect of our lives. They help explain why in many countries boys are educated before girls; why girls are told when and whom they must marry; and why many face enormous and unacceptable risks in pregnancy and childbirth because their basic health needs are not met."[222]

Listing numerous examples not only of discriminatory, but also cruel treatment of women, based on the false claim of their inferiority in comparison to men, associated, among other things, with their responsibility for the "original sin", with the application of distorted "theological" explanations (whereas similar explanations may also be found when it comes to the justification of discriminatory treatment of persons with disabilities), Jimmy Carter presented the following conclusion, that will at the same time conclude this paper, in the hope that it has provided explanations and analyses in full compliance with Carter's words:

> "The truth is that male religious leaders have had — and still have — an option to interpret holy teachings either to exalt or subjugate women. They have, for their own selfish ends, overwhelmingly chosen the latter.

222 The Words of God Do Not Justify Cruelty to Women, July 11, 2009, The Carter Center, *https://www.cartercenter.org/news/editorials_speeches/observer_071209.html.* Francine Prose, "The Original Sin. Where misogyny comes from—and why it endures", *Lapham's Quarterly*, Vol. 3, No. 1, 2010.

> Their continuing choice provides the foundation or justification for much of the pervasive persecution and abuse of women throughout the world. This is in clear violation not just of the Universal Declaration of Human Rights but also the teachings of Jesus Christ, the Apostle Paul, Moses and the prophets, Muhammad, and founders of other great religions — all of whom have called for proper and equitable treatment of all the children of God. It is time we had the courage to challenge these views."[223]

The original teachings of the Abrahamic religions, which are essentially religions of love, mercy and equality, really create an unambiguous basis for a humane and equal treatment of women and persons with disabilities and do not contain any stronghold for their discrimination, on either of these grounds respectively, or on both grounds at the same time.

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223 *Ibid.*

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POLOŽAJ ŽENA I OSOBA SA INVALIDITETOM U AVRAMOVSKIM RELIGIJAMA

Apstrakt

Diskriminacija može da ima veoma različite korene, od kojih su neki kraćeg trajanja i ne mnogo duboki, dok su neki veoma duboki i dugotrajni. Među najdublje i najdugotrajnije korene različitih vidova diskriminacije spadaju oni koji se nalaze u idejnim i vrednosnim sistemima koji postoje u nekim društvima i koji bitno utiču na moral, na sadržinu pravnih normi i, uopšte, na odnose među ljudima. Među tim idejnim i vrednosnim sistemima poseban značaj i uticaj imaju religije, posebno one tradicionalne, zbog svoje dugotrajnosti, brojnosti vernika i teritorijalne rasprostranjenosti, sadržajne sveobuhvatnosti i duboke ukorenjenosti u svest i osećanja ljudi. Kao takve, religije su podobne da budu u korenu diskriminacije istih ljudi po više osnova, tzv. višestruka diskriminacija ili tzv. intersekcijska (ukrštena) diskriminacija. Na prostoru Republike Srbije vekovima su prisutne tri tzv. avramovske religije, hrišćanstvo (istočno i zapadno), islam i judaizam, koje su u značajnoj meri oblikovale duhovnu atmosferu i uticale na istoriju ovog prostora. Sveobuhvatnost pogleda tih religija uključuje i određene stavove o položaju žena i osoba sa invaliditetom, kako u okviru organizacione strukture i delatnosti crkava i verskih zajednica, tako i u društvu uopšte. Ti stavovi su uticali i utiču na izgradnju moralnih i pravnih pravila. U ovom radu, obrađeno je pitanje položaja žena i osoba sa invaliditetom u organizacionoj strukturi i u unutrašnjoj praksi avramovskih religija i u onim religijskim pravilima koja su u nekim državama proglašena za državno pravo (što je slučaj kod šerijatskog prava), kao i uticaj religijskih učenja na nacionalne pravne sisteme u modernim državama. Kada je reč o unutrašnjem ustrojstvu crkava i verskih zajednica, pa i o položaju žena i osoba sa invaliditetom u njihovom okviru, ono potpada u njihovu autonomnu sferu, a sloboda veroispovesti je zagarantovana time što je građanima omogućena i zagarantovana sloboda ispovedanja vere, pristupanja određenim religijskim organizacijama i istupanja iz njih. Kada se radi o položaju žena i osoba sa invaliditetom u kontekstu primene religijskih pravila kao državnih ili uticaja religija na izgradnju državnih pravnih sistema, ispravan pristup je jedino onaj koji uzima u obzir istorijske uslove u kojima su religije o kojima je reč nastale i razvijale se, kao i suštinu njihovih učenja, tj. činjenicu da su avramovske religije – religije ljubavi, milosrđa i jednakosti. Takav pristup je podjednako u interesu samih avramovskih religija, s jedne, i žena i osoba sa invaliditetom, sa druge strane.

Ključne reči: *Hrišćanstvo; Islam; Judaizam; Pol; Rod; Osobe sa invaliditetom; Intersekcijska diskriminacija; Ljubav; Milosrđe; Jednakost.*

SOCIOLOŠKA PERSPEKTIVA

SOCIOLOGICAL PERSPECTIVE

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POLITICAL PARTICIPATION OF PERSONS WITH DISABILITIES DURING COVID-19 PANDEMIC IN THE REPUBLIC OF SERBIA

This research is published in memory of Gordana Rajkov (1944–2022), one of the authors, the first wheelchair user who was Member of Parliament of the Republic of Serbia (2007–2012), a lifelong activist of the disability movement, and one of the strongest advocates for independent living and personal assistance service who helped spread the Independent Living philosophy and empower other disabled people around Europe and in Serbia. She was a founder and a president of the Center for Independent Living of Persons with Disabilities Serbia.

Throughout her life, Gordana Rajkov actively promoted human rights and women's rights and nondiscrimination, and she dedicated the last decades of her life to facilitating political participation of persons with disabilities in Serbia. She contributed to the European disability movement through her support to the European Network for Independent Living and Center for Independent Living Dublin. She also served as a president and vice-president of the Muscular Dystrophy Association of Yugoslavia. Her meaningful and significant life was told in a book `Vying for a Choice: Gordana Rajkov – a Life Story`[1].

Abstract

During the COVID-19 pandemic, the Republic of Serbia held elections on 21 June 2020. It was the second country in Europe[2] *to experience voting in this pandemic. Anecdotal evidence suggested that many persons with disabilities in Serbia have experienced increased isolation and exacerbated discrimination during the pandemic. The Center for Independent Living of Persons with Dis-*

1 The stated was recorded as a conversation with Milica Mima Ruzičić Novković, the founder of Centre Living Upright in Novi Sad.

2 In France, the first round of municipal elections took place on March 15 and the second round was postponed to 28 June. In Serbia, elections were scheduled for April 26, 2020 but were moved to June after a state of emergency was introduced on March 15 to be lifted only on May 6, 2020.

abilities (CIL) in Serbia, supported by International Foundation for Electoral Systems (IFES) investigated the link between the occurrence of elections in times of a pandemic and any demonstrable impact on the behavior of persons with disabilities in Serbia, as voters, and more generally, as active citizens. This research further analyzed political behavior of persons with different types of disabilities around the time of the election in June and up to August 30, 2020.

The research proves that the participation of women and men with disabilities in elections was lower as a result of COVID-19 pandemic compared to previous elections.

Based on the analysis findings, the research participants and authors suggest urgent short– and medium-term measures that must be instituted in order to eliminate any irregularities in the legal system and ensure the conditions for the improvement of the state response to future risks, as well as poling stations' accessibility, and health and safety of persons with disabilities.

These measures pertain to accessible polling stations and venues for political events; inclusion of alternative voting methods; accessible information; inclusive legal reform; and a need for ongoing dialogue with organizations of persons with disabilities and women and men with disabilities as bearers of direct experience.

Key words: *Access; COVID-19; Disabled people's organizations; Inclusive election process; Independent living; Political participation; Persons with disabilities.*

I RESEARCH METODOLOGY AND SAMPLE

Starting off from a list of 150 names in the sample obtained with the assistance from fellow DPOs, CIL sought to include 50 persons with disabilities based on the following considerations:

1. Type of disability;
2. Regional balance;
3. Gender balance.

The semi structured questionnaires were filled by 52 persons with disabilities. To ensure the health and safety of survey participants, researchers conducted 48 phone interviews and responses of 4 participants with auditory disabilities were collected by email. An important limitation of the survey stems from the fact that the sample is not representative of the general population of persons with disabilities in Serbia. Rather, it was boosted[3] to

3 Researchers use boosted sample when they want to ensure that a particular group is represented in the sample above its' representative of the general population or a national representation for that subgroup. In this case, the number of active persons with disabilities, i.e., those who are in employment and/or pensioners and use support services contributing to independent living is significantly above their numbers in the population

overrepresent women and men with disabilities who are more active and mobilized than the general sample, and all are members of disabled people's organizations (DPOs) who are or were active in the labor market[4] and committed to independent living philosophy. The researchers made an assumption at entry that it is more effective to look for differences in patterns of political participation among the participants in the boosted sample of active persons with disabilities because any changing patterns would be more easily identifiable in this group. However, the sample includes women and men living in rural and urban areas, as well as women and men living in residential institutions.

A further limitation of the research is that the participant sample does not include any participants with intellectual and/or psychosocial disabilities. As such, the data gathered in this research study, and the findings presented in this report, do not include information specific to the experiences of women and men with intellectual or psychosocial disabilities. At the time of data collection, CIL did not identify potential participants with these types of disabilities. This is an important data gap where further research is needed.

II ABOUT THE RESEARCH RESPONDENTS

The research respondents live in 18 different cities in Serbia Arilje, Belgrade, Bečej, Bor, Čačak, Gornji Milanovac, Jagodina, Kragujevac, Niš, Novi Sad, Novi Pazar, Pančevo, Smederevo, Sombor, Šabac, Trstenik, Valjevo, Užice. In the period of data collection, most respondents lived in their habitual place of residence. Only 5 respondents had moved to the countryside due to COVID-19. Four persons in the sample live in a residential institution. Respondents' age ranges are from 22 to 80. Of the total, 35% (18 persons) are aged under 40, 52% (27 persons) are aged below 65, and 13% (7 persons) are above the age of 65. Over a half (60% or 31 respondents) are women and 40% or (21 respondents) are men. Persons with physical disabilities predominate in the sample with 67% (35 persons). In addition, there are 14 persons with sensory and 3 persons with combined[5] disabilities.

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of persons with disabilities in Serbia. This was done because the purpose of the study was to examine to what extent COVID-19 situation wither adversely or positively affected political participation of persons with disabilities in Serbia. For this particular research topic, it was important to capture primarily the experiences of persons with disabilities who are active in the realm of civic and political participation in non-COVID-19 times. In this way, the research team was able to discover more accurately the incidence rates of COVID-19 influence on political participation of PWDs. This was also a cleaner methodological approach than a random sample that could not be representative for persons with disabilities in Serbia in any case because there are no accurate data on the number and geographic dispersion of persons with disabilities in Serbia.

4 Being "active in the labor market" was defined here as a person who is either employed or actively seeking employment. Inactive in the labor market are persons who are not employed, not registered as unemployed and not seeking employment.

5 The term 'combined' disabilities denotes multiple disabilities.

The majority of respondents (81% or 42 persons) live in urban areas, whereas six (12%) live in rural areas, one person lives in a suburban area and three persons live in a residential institution. Research participants are almost even split between those who live in apartments (25) and houses (22). As noted above, four respondents live in residential institutions and one respondent lives both in a house and an apartment, i.e. he moves between his apartment in a city and his house in a rural area. For 42 respondents their residence is fully accessible and for 4 respondents their residence is partially accessible, whereas 6 respondents live in inaccessible accommodation. Most of the respondents (37) live with their families, whereas nine persons live alone, and six live with someone other than a family member, e.g., a friend or a personal assistant. Out of that number 4 are in residential institutions.

All respondents are members of DPOs throughout Serbia and some are leaders of their respective organizations.

II ACCESS TO SERVICES FOR THE RESPONDENTS

In the sample, 13 respondents have access to the so called third person care, i.e. a financial transfer for purchase of support services; 18 respondents have both personal assistance service (PA) and third person's assistance; six persons use PA service, third person care and home care; ten respondents do not currently have access to any type of support service and among them are four people with hearing disabilities of whom two occasionally use sign language interpreter services; two persons have third person care and home care, one has third person care and uses physical therapy services on a weekly basis, and one has disability payment and PA service.

Type of services used by respondents

Third person care	13
Personal assistance service & third person care	18
Personal assistance service, third person care & home care	6
Without access to services at the time of data collection	10
	4 are with hearing disabilities
	2 of them occasionally use sign language interpreters
Third person care & home care	2
Third person care & physical therapy on a weekly basis	1
Disability payment & personal assistance (PA) service	1

In the words of male respondent with an auditory disability not a single support system is available to Deaf persons whose first language is sign language. "As a Deaf person, I have no right to additional financial support from

the state. I need 24/7 access to sign language interpretation in order to be able to communicate with the state services, including ER, the Police, firemen, SOS hotlines that are accessible to all other people. I need an online interpretation service that I could use from home via internet and via programs that support video calls as well as live in situations where online interpretation is a viable option."

There is a need to expand access to support services for many persons with disabilities in Serbia. Social services for people with disabilities are not developed enough in Serbia. Apart from institutional accommodation, which should be on the decrease as part of deinstitutionalization efforts, and day centers for children mainly with intellectual disabilities, there are only a few community-based social services for people with disabilities: home help, personal assistance (available only in ten cities), and escort for children with disabilities. These services exist in select municipalities and for a small number of beneficiaries. While participants did not directly highlight whether or how COVID-19 specifically affected their access to support services, many participants made comments such as "thankfully [I] did not need a doctor," suggesting that although they did not seek out a doctor's care during COVID-19, they were aware of a lack of equal access. It is also clear that no additional support services emerged to specifically address COVID-19 related issues, such as lower access to physical therapy, or additional need for support to informal care due to limitations and restrictions of movement to informal care takers many of whom are in the group of people aged 65 plus. During the state of emergency in Serbia, their movement was heavily restricted[6].

Access to sufficient, regularly available services that are based on the needs of persons with different types of disabilities and their life situations is a necessary precondition to ensure participation in political life for people with disabilities in Serbia. Although more community-based services are emerging, increased efforts coupled with greater financial commitments will result in a greater support service coverage of people with disabilities.

III EMPLOYMENT STATUS

In terms of their employment status, 18 respondents are employed full time, mostly in DPOs; three respondents work part-time, five work in temporary jobs or on a project basis; 14 have a disability pension, nine receive pensions based on their age, one has access to a deceased family member's pension; two respondents are students, and one is unemployed. A majority of respondents (46) claim to have access to regular income, and six do not.

The participants said that COVID did not affect their employment status or access to income. This is not surprising as 36 persons in the sample (72%) generate at least a part of their regular income from organizations of persons

6 For more information, please see Marijana Pajvančić, Nevena Petrušič, Sanja Nikolin, Aleksandra Valdislavljević and Višnja Baćanović, *Gender Analysis of COVID-19 Response in the Republic of Serbia* (2020).

with disabilities and that income is funded from the budget. However, stability of income is not a reality for all persons with disabilities in Serbia. That is why third person care allowance is often used for livelihood support and not as it is intended for procurement of support services. In order to offset the unfavorable position of persons with disabilities in the labor market, Serbia adopted the Law on Professional rehabilitation and employment of persons with disabilities[7] in 2009.

All insured persons and pensioners have a right to allowance for the care by a third person in cases of grave injuries or conditions that require care by a third person in order to support vital functions and satisfaction of basic needs. The law on pension and disability insurance guarantees this right to persons with disabilities. The actual transfer amounts to 18.090,85 RSD and it is paid to 80,000 beneficiaries every month. This transfer is not conditioned upon availability of other income or lack thereof.

Ability to ensure sufficient income to meet basic needs is another precondition of broader participation of persons with disabilities. In Serbia, social protection services are a main pillar of protection of persons with disabilities from poverty. Employment is still predominantly tied to DPOs, although this is gradually changing due to joint efforts by the state and employers, especially in large enterprises and DPOs. Increasing numbers of young men and women with disabilities are engaging in tertiary education to prepare them to enter the workforce. Still today, however, they face many obstacles in accessing university buildings and curricula. Removal of barriers to access—including physical, institutional, attitudinal and communication barriers—is another precondition to ensure meaningful participation of people with disabilities in public and political life.

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7 Law on professional rehabilitation and employment of persons with disabilities, *Official Gazette RS*, No. 36/2009 and 32/2013.

This Law introduced special measures to increase employment of persons with disabilities by imposing quotas for employment of persons with disabilities:

- Employers who employ between 20 and 49 employees must employ at least one person with disabilities;
- Employers with 50 employees must employ at least two persons with disabilities;
- Beyond the first 50 employees, for the next 50 employees, employers have to employ at least one additional person with disabilities;

The Law also provides incentives for employers as well as sanctions for failure to conform.

Incentives for a period of three years from the date of employment contract entry into force include:

- Waiver from mandatory payment of insurance to be paid by employers based on employee salary;
- Waiver from mandatory payment of social contribution paid by employers. The part to be paid by employee is covered by National Employment Service.

Failure to conform requires payment to the Fund for professional rehabilitation and support to employment of persons with disabilities the amount of 50% of average salary for the number of persons with disabilities who should have been employed in accordance with the Law.

IV ACCESS TO INTERNET

Access to Internet is very important across the country, particularly in rural areas, and especially during COVID-19. Information, services, learning opportunities and interactions have all migrated online. For people who do not have reliable and regular access to internet and/or computers or smartphones, the experience is very different in comparison with that of regular users of online-based services and applications. In the boosted sample of active people with disabilities, the situation is much better than in the general population of people with disabilities and above average for the Serbian population.

In the sample, all respondents have access to the internet but not all have the same quality of access. For 35 persons, Internet is fast, 11 respondents have access to a medium speed internet, and 4 persons have access to slow internet.

Practically all respondents also have access to laptops or computers, with 92% (48 respondents) who own a computer or laptop and 8% (4 respondents) who share a computer or laptop with other family members. Of course, statistics are lower for the general population and broader population of persons with disabilities. Strong access to Internet, computer and-or smart phone is a significant factor in participants' access to information and it reduces their dependency on traditional media as information sources.

According to National Statistics Office data on computer literacy in Serbia, 34,2% of persons over the age of 15 are computer literate, while 14,8% are partially literate. Participation of women and men among the computer literate individuals is almost equal (50,4% men and 49,6% women), while among the individuals who are not literate when it comes to the use of computers women outnumber men (54% vs. 46%).[8] Internet user penetration rate for Serbia as estimated by Statista[9] is at 75.55% for 2020. In the general population, 19,6% men and 25,9% women have never used a computer.[10] Serbia is a country with very strong smart phone penetration which, according to Statista, reached 51.5% in 2020.

The sample further suggests there is a high degree of digital literacy among people with disabilities in Serbia. At the same time, this very positive finding indicates an underutilized space by political parties and government in terms of information dissemination to persons with disabilities, especially during the pandemic. Through DPOs and social media, it is possible to increase outreach with specific information regarding services and opportuni-

8 'Computer literate' individuals are persons who can perform four basic functions: text processing, creating tables, sending and receiving emails and using Internet. Republički zavod za statistiku (National Statistics Office), *Statistički godišnjak Republičkog zavoda za statistiku za 2018. godinu* (2018).

9 Statista, Internet user penetration in Serbia from 2017 to 2026, *https://www.statista.com/statistics/567580/predicted-internet-user-penetration-rate-in-serbia/*.

10 Republički zavod za statistiku, *Upotreba informaciono-komunikacionih tehnologija u Republici Srbiji, 2018* (2018), 38.

ties specifically targeting different groups of people with disabilities in Serbia. A wide array of services may be developed through outlets that support social innovation, in cooperation with DPOs. An example of digital services might include up to date information on accessibility of health care facilities, transportation or availability of regular or additional support services for persons with different types of disabilities during crises, such as COVID-19.

V ACCESSIBLE TRANSPORTATION

Findings indicate that accessible transportation remains a barrier for many respondents. The research participants, although they belong the sample of very active persons with disabilities with greater than average access to information and services, still struggle with access to adapted transportation. Out of 52 persons, 21 own a fully accessible vehicle and 2 a partially accessible vehicle. Participants living in rural areas are left to their own devices when it comes to organizing transportation, as there is no specialized transport available to them. In urban areas, 9 participants have access to other forms of transportation combined with specialized transport. For 19 participants, public transportation is partially accessible and 14 have access to accessible service vehicle, while 10 have no access to any form of accessible transportation.

> *There is no specialized transport, I take a taxi if I have to but for the most part, I walk, a woman with visual disability, 38, living in a city. That is one of my biggest problems, I like to move a lot, to socialize, to go to a museum, to visit a beautiful spot in the nature, a woman, 54, living in a rural area. I use [a] specialized taxi but when I ask them for assistance, 90% of taxi companies refuse the call, a woman, 58, living in a city. I use a scooter in summer months from March to October for local transportation* (A man, 59, living in a rural area).

A well-functioning, affordable and accessible public transportation system would help to remove barriers to participation in public life encountered by people with disabilities. Transportation systems in Serbia should be designed to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. While the local transportation network seeks expansion, specialized transportation[11] is the next best alternative for persons with disabilities living in urban areas. However, specialized transportation is often not available in rural areas. Many persons with disabilities rely on their own personal means of transportation, but not all have access to cars and/or drivers' licenses. Accessible transportation remains as another area for improvement that has direct impact on political and civic activism of persons with disabilities. Without access to mobility, persons with disabilities

11 Specialized transportation is a service organized by the local government and/or disabled people's organizations. Accessible vans circulate within a given municipality either based on a standardized schedule or a schedule agreed a day before so that the persons with disabilities who need transportation are picked up and transported to their destination.

cannot be effectively engaged in civic and political participation at the local, regional and/or national level. Having restricted mobility during certain hours of the day or only on certain days is not aligned with article 9 of the Convention on the Rights of Persons with Disabilities[12].

The article 9 stipulates that "to enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas".

VI ACCESS TO HEALTHCARE

In this area, persons with disabilities in the sample mostly confirm availability of regular access to medication and health care (43 responses). There is a caveat emphasized by several respondents who stated that they presume to have access to health care even during the pandemic but that they have not actually used it:

> *Yes, but there was no need to see a doctor, man, aged 52, living in a city. Yes, but tough question because I have not used the health care system. When I need to see a doctor, I see a doctor in a private practice. The recommendation that was issued to us is not to go to health centers and hospitals* (A woman aged 51 living in a city).
>
> *Yes, although I use nothing but pads for incontinency. The home-based health care is very well organized in my city. A doctor and a nurse come to all who receive support for third person's care. You just need to call ahead very early if it is for the same day. The City sells property without a plan and the building where this service is also sold to a private entity and so I am not sure where they dislocated them now* (A woman aged 42 living in a city but who has now moved to a rural area).

It is concerning that there are four respondents who claim not to have access to health care and/or medicines. Many persons with disabilities belong to high-risk categories of COVID-19 infection and consequences. However, self-isolation seems to have been the most dominant defense mechanism against this threat. At the level of daily functioning, further restriction of contacts for persons with disabilities has made it difficult to ensure support in performing daily functions, such as eating, dressing up, maintaining personal hygiene. Regular access to health care is also a main contributing factor to quality of life of persons with disabilities. A message that persons with disabilities should abstain from seeking health care unless absolutely necessary, as mentioned by

12 UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106.

a research respondent, does not ensure equal access to care for persons with disabilities at this time of increased health risks during COVID-19.

It should further be noted that persons living in residential institutions have been banned from going out and/or having external contacts for long periods of time. Whereas complete isolation may be an effective way to curb incidence of virus spread, it is not a positive contributor to mental health and overall wellbeing of persons with disabilities or people of older age living in institutions.

Measures undertaken under the state of emergency have contributed to marginalization of persons with disabilities and their invisibility in society which is at odds with the intent of the Convention on the Rights of Persons with Disabilities.

As stated by Ms. Catalina Devandas Aguilar, Special Rapporteur on the rights of persons with disabilities: "Restrictions must be closely tailored, and they must pose least disturbance in order to protect public health. Limiting contact with the loved ones, leaves persons with disabilities completely without protection from any type of abuse or neglect in institutions".[13]

> *About 60% of medication for Glaucoma is not on the list*[14]*. I lost my vision aged 36. I buy medicines on my own, but I cannot cover the cost from my pension* (A woman aged 64 living in a city).
>
> *I have no access. For Cerebral Palsy the rehabilitation was discontinued in 2011. Social protection no longer approves annual rehabilitation based on the new Rules for rehabilitation* (A woman aged 37 living in a city).
>
> *No, because it all boils down to how they diagnose and I have been diagnosed with an epileptic incident though I do not have epilepsy. I have to take medication and I have had two surgeries. So, when I took a tooth out, I needed to be covered by antibiotic because a sinus opened and they gave me a medicine that drove my temperature down to 35,2 Celsius. They had to drive me from my city to Belgrade in an ambulance and the doctor said: "Is it even possible that they are that careless?" Everything goes through a personal connection. I know people but this was an emergency* (A man aged 24 living in a city).
>
> *We do not have access to services because doctors are busy treating COVID cases* (A woman aged 51 living in a city).

A generally eroding access to health care as a result of austerity and public sector employment decrease has been documented in the publication Our Eroded Rights[15]. It is important, however, not to use COVID-19 crisis as a justification for further budget cuts in the health care sector, especially with

13 United Nations, COVID-19: Who is protecting the people with disabilities? – UN rights expert, 2020, *https://www.ohchr.org/en/press-releases/2020/03/covid-19-who-protecting-people-disabilities-un-rights-expert?LangID=E&NewsID=25725.*

14 The list of medication approved by the Republic Fund for Health Insurance. Only the approved medication can be paid for in full or in part by this institution.

15 Marijana Pajvančić, Dubravka Valić Nedeljković and Sofija Mandić, *Naša urušena prava* (2019).

regards to prevention and health care protection of women and men with disabilities. A reduced access to health care has direct negative impact on worsening quality of life because persons with disabilities seldom have financial reserves that can be used to buy services from private sector providers. In conditions of a reduced mobility and lowered access to health care, gains in mobilization of persons with disabilities for civil and political participation can quickly be undone. It takes a very careful planning and monitoring to safeguard the fruits of past work on capacity building, awareness raising and networking for participation in the public sphere.

> *I got my son to help me to secure medication. Otherwise, I would not be able to do it the way I did it before, although volunteers did call from the municipality to ask if I needed anything* (A man aged 69 living in a city).
>
> *My health condition has completely deteriorated. Over the past three weeks I have been going to Kinesiotherapy – this is all due to lack of mobility during Corona* (A man aged 80 living in a city).

While major changes in access to and/or availability of supplies, services, medication, or support during COVID-19 pandemic did not occur, according to the participants, many considered themselves lucky not to have needed health care services in the period considered because they trust that it would have been difficult to get appropriate care had it been necessary. Thus, the participants stated both that major changes and disruption of normalcy occurred as a result of COVID, mostly with regards to support services and transportation, whereas they claimed that their access to health care services did not change, mostly because they did not try to access them.

VII ACCESS TO PROTECTION AND FEAR OF COVID-19

Most respondents (48) have regular access to recommended protection equipment to prevent the spread of COVID-19, including masks, gloves and disinfectants. Respondents either purchased this equipment on their own or received some from their service provider or DPO, mostly from CIL[16] and NOOIS. Four respondents do not have regular access to the recommended protection. They self-protect through self-isolation.

Twenty-eight respondents (54%) expressed some concern about the COVID-19 situation and most claim to be less concerned now than in the beginning of the pandemic. Fifteen respondents (29%) are very concerned about the COVID-19 situation. Four respondents (8%) are mostly not concerned and another three respondents are not at all worried. One respondent (2%) is undecided and another one is 'halfway between worried and not worried'.

16 The purchase of masks and gloves and disinfectants was financed by IFES and USAID through the Walk the Talk Project. This protection gear was distributed to users and providers of personal assistance service.

Whereas all persons with disabilities are aware and cautious of the risk of COVID-19 spread, it is impossible not to have any social contact over the extended periods of time. Therefore, it is necessary to procure and distribute protection gear to all at-risk populations, including persons with disabilities. Local municipalities should be in touch with DPOs to assess requirements for support through free protection for low-income persons with disabilities, service providers and household members. This investment can save lives and help to ensure people with disabilities can safely participate in public and political life throughout Serbia. Without access to adequate protection, persons with disabilities self-isolate and withdraw from public life. Also, without adequate protection, basic independent living services are a threat for persons with disabilities. These services, on the other hand are a precondition for political participation.

VIII CHANGES IN DAILY LIVES DUE TO THE COVID-19 PANDEMIC

Participants were asked if they've experienced changes in daily routines as a result of the pandemic. Over a half of respondents (32) have experienced changes and 20 have not.

It is worth noting that people over 65 years of age in urban areas and 70 years in rural areas were fully banned from going out during the state of emergency and eventually the ban was relaxed to one hour per week early in the morning and then gradually relaxed more. This has adversely affected persons with disabilities in two ways: those within the age group were not able to go out, and some of informal providers of care in the age group not living in the same household could not come to support persons with disabilities and elderly persons.

Below are perspectives shared by respondents during interviews regarding how COVID-19 has impacted their daily lives:

> *Previous personal assistant (PA) found another job. I was without a PA for three weeks. I got a replacement PA but it is tough because I am pregnant and I needed to rely on my family more* (A woman aged 39 living in urban area).
>
> *I was working from home and that was a challenge because I needed to secure a permit for my PA from the municipality. In the end a systemic solution was found. Also, in the beginning of the pandemic I did not want to use PA service. I wanted to see how things evolve* (A man aged 52 living in a city).
>
> *Yes, during the state of emergency when there was a ban on mobility, my PA had to come when it is not curfew* (A man aged 62 living in a city).
>
> *My work was a problem and it induced stress. We did not perform at first and then we started to perform five times a week. I am bothered by online education and I am not a fan of it as a student. Plus, I have to*

undergo an intervention related to my eyes and they recommended that I use computer as little as possible and I study law and everything is online, seminars and all (A man, musician and student aged 24 from a city).

Because of difficult access to transportation, services, a lesser level of independence and difficult participation on social activities (A woman aged 53, lives in a city).

I am lonely (A woman aged 36 living in a city).

Nobody comes to see me (A man aged 22 living in a city).

It was difficult for me to get organized (A woman aged 35 living in a rural area).

I have been forced to let my PA stay with me in the house – and I did not let anyone else in in order to self-isolate. I had to pay my PA for overtime work (A man aged 60 living in a city).

I have additional expenses for my service dog – when I come in front of the house, I have to spend more time cleaning the dog, not just his paws. I have reduced my activities – we do not exercise aikido, my dog should be outside all the time, but we cannot do that now (A woman aged 64 living in a city).

Home based assistance has been reduced. Since early March, I have been using their services once or twice per month and I think that they do it on their own and that the Center for Social Work has nothing to do with that, it is their own caprice. At first there were reasons for reduction during the state of emergency but not anymore. Because of lack of funds for PA I had fewer hours of assistance than realistically needed. I got out only when absolutely necessary and I had to ask friends for help (A woman aged 68 living in a city).

A lesser degree of independence for (people with auditory disabilities) due to use of masks in daily functioning and regular activities in shops, or participation in meetings (A man aged 43 living in a city).

Lesser access to everything, including education (A man aged 39 living in a city).

Enclosure – a complete change in way of life. My relationship collapsed – that was hard – and no visitors can come. For a while they could but not anymore (A man aged 43 living in a residential institution).

I feel discriminated against and I have no touch with the outside world. We cannot even order delivery. We have been locked up for 6 months. I do not think that this is fair, and it is humiliating – we are in a public nursing home – it is all good that they are protecting us, but there needs to be a limit, we must be able to go outside because this is not a closed institution. It was very difficult to accept that one cannot pass this gate (A woman aged 50 living in residential institution).

Daily lives of persons with disabilities have seen significant changes due to the pandemic. These changes are more explicit in the cities where persons with disabilities were accustomed to greater independence and an easier ac-

cess to support services before the pandemic. Lockdown measures and increased barriers accessing support services had a profound impact on the daily lives of people with disabilities in urban areas. In rural areas, the changes are not as noted simply because there is very limited access to services even without the pandemic.

IX ACCESS TO INFORMATION

The sources of information respondents rely on are very diverse. Most respondents rely on multiple sources of information, including national broadcasters and newspapers, internet, social media, government and other official web sites, DPOs, friends and family. Only rarely do the respondents listen to the radio or state local media as a key source of information. Men and women above the age of 40 rely less on social media as a primary source of information than younger women and men.

Almost all (51) respondents believe that they are well informed with regards to the COVID-19 situation. One person tries not to be informed because he feels overloaded by news on political issues. The sources of information that respondents rely on are very diverse. Most of them get their information and updates on COVID-19 from multiple sources, including national broadcasts and newspapers, internet, social media, government and other official websites, DPOs, friends and family. Only rarely do the respondents listen to the radio or local TV as a key source of information. In terms of age distribution, men and women above the age of 40 rely less on social media as a primary source of information than younger women and men.

Most people with disabilities in the sample claim to have received "a lot" of or "some" important information regarding prevention and services related to COVID-19 from the local level. However, respondents noted that local news sources are not a primary source of data on COVID-19.

This is a gap that can be filled in the future because all citizens, including persons with disabilities live at the local level most directly. The information they did receive at the local level pertains to preventive measures, health care, operation of hospitality industry, cultural institutions, curfew, activities of DPOs, distribution of assistance, transport-related information, functioning of services, contact numbers for different purposes, etc. This information is not translated into Serbian sign language and therefore not accessible for persons with auditory disabilities.

Respondents indicated that they rely predominantly on centralized sources of information from the COVID Crisis Committee[17] and national media, as well as the dedicated Covid19.rs website.[18] This information was

17 COVID-19 Crisis Committee for mitigation of infectious disease COVID-19 was established by the Government of Serbia on 13 March 2020. The legal basis for this Conclusion by the Government is in Law on Government arts. 33 and 43. The Crisis Committee is a mixed body consisting of medical and other professionals and political appointees.

18 *https://covid19.rs/*.

disseminated via television, radio and print/newspaper. The TV broadcasts included sign language. The COVID-19 website does not include audio format nor is it available in large font. Centralized information was disseminated to all in the same manner, disregarding needs of different groups, including persons with different types of disabilities, or a need for information in different formats. The COVID Crisis Committee and national media, as well as the dedicated website Covid19.rs have not addressed concerns specific to different subgroups of the population. For example, the total number of persons with disabilities who have contracted COVID-19 or who die from the disease was never published. Beyond COVID-19 related issues, media rarely provide coverage highlighting the perspectives of persons with disabilities on social, political and cultural issues. In the realm of political participation, persons with disabilities and their rights are not prioritized by national or local media.

DPOs play a very important role in the exchange of information between government stakeholders and people with disabilities but are often not included in consultations by government officials and thus two-way communication between DPOs and government communication remains limited. During COVID-19, the initial government response related to health safety measures, such as the establishment of a curfew, did not include accommodations for the diverse needs of persons with disabilities. As a result, DPOs advocated with the Crisis Committee to modify measures aimed at preventing the spread of COVID-19, such as a ban on movement during curfew, to be more inclusive of persons with disabilities. Following the advocacy of DPOs, the general ban on movement during curfew was modified to eliminate movement restrictions on providers of support services to persons with disabilities and to allow people who are on the autism spectrum to go for a walk during the curfew. DPOs further served as an important source of practical information about COVID relevant to daily functioning of persons with disabilities as well as information about the needs and experiences of people with disabilities for government stakeholders. However, not all persons with disabilities are members of a DPO and it is important to make this information publicly available in a variety of accessible formats, including easy-to-read, sign language, and audio, to ensure accessibility of information to people who have different types of disabilities.

Beyond COVID-19, persons with disabilities as well as other citizens, are interested in many other issues, such as inclusive culture, inclusive education, women's rights and other issues. As shown in the graph, most respondent in the sample believe that they are well informed (25) or mostly informed (20).

Persons with disabilities in the sample are proactive about getting their information. As in the case of information about COVID-19, almost all respondents said that they pursue information through a combination of data sources, including national TV, local TV, national and local newspapers, digital and social media, friends, DPOs, government offices, and other sources.

X PARTICIPATION IN ELECTIONS

Almost all respondents (48 out of 52, 29 women and 19 men) voted in the election[19] before the one held during the pandemic. Among those who did not vote (2 women and 2 men), a half (1 woman and 1 man) were below 18 at the time, and the other half (one woman and one man) felt that there was a lack of viable choices among the candidates. Predominant majority of respondents emphasized during the interview that they are regular voters and rarely miss an election. However, in the last election, only 34 respondents claimed to have cast their vote (23 women and 12 men), 16 did not (8 women and 9 men) but out of that number 2 (1 woman and 1 man) registered to vote from home and the election board never arrived, and finally 2 (women) preferred not to disclose if they voted.

Respondents who did cast their vote were asked to compare the experience in the last elections held on June 21, 2020[20] with previous elections of April 2, 2017[21] and on April 24, 2016.[22] Two research participants said that the experience between the two previous elections was somewhat better; twenty-two participants stated that it was the same, with the new requirement to wear masks while voting as the only observed difference between the two elections; another participant stated that it was the same because in every election he gets carried to vote as the polling station is inaccessible for wheelchair users. Those participants who noted a difference were asked to specify why they thought that it was different. Five participants said their experience was different because of the introduction of COVID-19 preventive measures, i.e. mandatory social distance and wearing masks in enclosed spaces; three research participants said that this experience simply was something else, something completely different because of a combination of factors including COVID-19, boycott of elections, and personal reasons; and one chose not to answer.

Out of the 35 participants who voted in the last elections, 76% voted in the polling station, 12% voted in a residential institution and 12% voted at home.

The following statements describe respondents' diverse experiences with regards to how this voting experience compared to previous ones:

> *I saw change. A man welcomed me and accompanied me and he was designated for assistance to older persons and persons with disabilities. He waited in the courtyard and assisted while we were inside. I could tell that he was trained. He is a member of the local board* (A woman aged 64, from a city).
>
> *Because of COVID-19 and isolation in the previous months, it was different. I simply voted so that they would not think that I boycotted*

19 June 21, 2020, parliamentary and local elections.

20 Parliamentary and local elections.

21 Presidential elections.

22 Parliamentary and local elections.

the elections and then my DPO would suffer consequences. I think that organizations ought to be apolitical and I did not want to give grounds for misinterpretation of absence to show up in an election as a political move. It is important for barriers to be removed, so that it no longer matters who is in power, says a man aged 60 living in a city.

I have not voted in a residential institution before, and also because of Coronavirus, as I was locked up in the previous three months – it is not pleasant to be in a lock up (A man aged 56 living in a residential institution).

My polling station is accessible but this time I voted from home (A man aged 52 living in a city).

Simply it was not like before – there were fewer people and I did not like that (A man aged 48 living in a city).

I emphasize that, unlike the parliamentary and presidential elections, where campaigns for candidates have been broadcast on national TV, local elections have been completely inaccessible. It was much worse because they did not respect Regulatory Body for Electronic Media's decisions and election program was not translated into sign language and therefore not accessible for Deaf people (A man aged 39 living in a city).

Since October 5 [2000][23] *voting is the same for me in any election. I am among those who insist on voting – I would introduce sanctions for people not voting in an election. I am not satisfied with the turnout. As much as I was upset by lack of pluralism before, I am now upset by apathy* (A man aged 80 living in a city).

Several statements suggest that attention was being paid to individual turnout in the elections and that DPOs whose leaders or known members did not get out to vote could face adverse consequences. This is alarming and it infringes on the individual's freedom to vote according to a person's free will, or to abstain. The elections were marked by a deep divide between the pro election and pro boycott camps. Unfortunately, persons with disabilities, as well as other citizens were negatively impacted by these political battles.

On the other hand, motivation of persons with auditory disabilities who were interested in political campaigns was negatively impacted by difficulties in obtaining data, especially at the local level because information was not consistently provided in accessible formats, including sign language for Deaf people. Also, very little attention was paid to the position of underrepresented groups in society, including persons with disabilities, in campaign content. While improvements continue to be noted at the level of parliamentary elections in terms of accessibility of campaigns, coverage of local elections needs to follow suite.

Distribution of answers for the question regarding polling station accessibility indicates that 80% of respondents (21 voters) claimed that the polling station was accessible and 20% stated that it was not. The 80% of respondents

23 Refers to October 5, 2000 and the overthrow of Slobodan Milošević.

recognize that 'there was a little obstacle' to access but 'they could overcome it'. Minimization of obstacles to full accessibility may be part of the problem and there clearly is a need to strengthen demand for polling station accessibility, rather than look for justifications for a sub-optimal status quo.

Five voters with disabilities voted in inaccessible polling stations and one other voter stated that they voted in partially accessible polling stations. Most out of those who voted at the polling station walked on the election day as they live close by the polling station and six people drove. Twelve persons reached the polling station with a member of their family, one person had a service dog, four persons came with their PAs, and one person came alone.

Despite mandatory social distancing measures, there were rarely any lines in front of the polling stations, according to survey participants. In the experience of 53% of respondents, there was a queue at the polling station and 47% stated that there was no line, and they could proceed without delay. In the words of the survey participants who waited in line, queues were small, consisting of a few people. One participant refereed to a line of approximately 30 people in front of the polling station. In any case, persons with disabilities did not experience a long wait, as they either went right through, waited for 2–3 people to cast their vote, or were given priority voting, according to six statements. Most voters in the sample voted in the morning and around noon, whereas fewer voted in the afternoon and in the evening. All or almost all voters wore masks but did not wear gloves, with one exception. Election board members also respected the recommended protection measures, except in a couple of instances reported where some of them wore masks under their noses.

Voters who voted from home had the option to register starting two days ahead of the elections. This was the first time that such an option was available owing to the efforts of Walk the Talk Project. Four voters benefited from this option and registered on a Friday for the election held on a Sunday. Another voter registered one day ahead and one more on the Election Day. These voters registered by phone (3), had someone register them at the polling station (2) or had a neighbor in the election board who registered them (1). Upon registration, election board members came on the Election Day in 3 cases and did not show up in two cases. This is alarming because all registered voters must be able to cast their vote and these voters were not able to vote in the last election. Of course, registration through a neighbor who is in the election board may have been done in a way that was not in line with the rules. Still no show at a dully registered voter's home is a major issue for concern as it can result in disenfranchisement. One voter said that at least three election board confirmed that they would show up to assist this person in voting from home, but that no one showed up. The other person stated:

> *Blame `mesna zajednica`*[24] *and election board because I phoned directly the election board and they said that they would come but did not arrange to come, that is their mistake not a mistake by the state. On TV they say 'register' – and I did but no one would come. I am sorry that*

24 Lowest level of government.

> *some people do not do their job. Some silly lie – if one wanted to pursue the truth – eh.... I accepted their fake excuse* (A woman aged 58 living in a city).

According to election rules, three election board members should come together and administer voting from home, in one case, there were only two members present. These breaches of rules are not acceptable on the Election Day as they can result in disenfranchisement of voters and erode voters' trust in free and fair elections.

Twenty-four voters stated that they felt completely safe at the polling station because both voters and the election board were protected, wearing masks, some wore gloves, they kept the distance and there were disinfectants available. Six voters did not feel safe because *it was very crowded; I could not enter the polling station and had to vote in front; because of fear of COVID-19; I got to vote with a strong conviction that elections were not necessary – it was wrong because of the pandemic;* at the polling station, there were no visual information *or information in sign language. The election board /persons who were entrusted with the work within the election board were not educated on how to communicate with Deaf people. They were all wearing protection masks that are the biggest barrier in communication with Deaf people.*

> *I was disappointed because when you sign in the voter registry you sign for local elections first and then parliamentary elections and I emphasized that I [have a visual disability] and asked that they show me where to sign. The first person did that and the person next to her who was in charge of signing for the parliamentary elections – and it is impossible that she did not hear me – pretended not to and I had to say it all over again. They really need awareness raising, at least in my city* (A man aged 24 living in a city).

The work on polling station accessibility has only just started. Now that the accessibility assessments have been completed by all municipalities, it is necessary to conduct an analysis of data and make a plan of action for upgrades to ensure polling station accessibility. The Republic Election Commission, local governments and disabled people's organizations should work together to develop a plan for accessibility upgrades based on cost estimates for infrastructure upgrades from public utility companies and contractors. Also, REC needs to update their procedures to require mandatory reporting regarding whether polling stations are fully accessible, partially accessible, or inaccessible. The partially accessible and inaccessible polling stations should not be reselected for the next elections unless upgrades are planned to make these polling stations accessible.

Training for election board members has started to include a segment on supporting voters with disabilities. Clearly, there is a need for more training of election board members in order to ensure that elections are inclusive for all persons with disabilities. More attention needs to be paid to communication with persons with sensory disabilities, especially Deaf persons. This can

be achieved through further implementation of available training for election board members on how to work with different groups of voters and through more dedicated accessibility monitoring of polling stations on the election day by election monitors who would need to deepen understanding of inclusive elections as well as procedures for verification of accessibility.

It is of utmost importance for election board members to respect all rules on the election day, including measures for protection of all voters. These measures were put in place for election board and voter protection. If they are not strictly enforced, all voters are at risk and the danger is greater for persons from vulnerable groups, including PWDs and elderly.

For the respondents who acknowledged that they did not vote in the last elections, there was a question why they decided not to vote. Twelve respondents answered:

> *The elections were not regular, plus there is a concern over COVID* (A woman aged 48 living in a city).
>
> *I told myself that I shall not go to the elections because I did not want to go again through the wait of 7 hours for the election board to come. I was waiting in an empty apartment that the furniture had been taken away from because I sold it. Before that, people used to carry me because I wanted to vote. Now, I did not want to have anything to do with them. I have submitted my proposals for improvements at the polling station in order to make it accessible. I asked that they move it to another location in a facility that is safe unlike now when I have to get to the first floor. They did not change the facility. They did not want to. When I saw that they did not do it, I decided not to vote. Plus, it is not normal to hold an election during a pandemic. But, if they moved it to another facility, I would have gone nevertheless* (A woman aged 42 living in a rural area now but originating from a city).
>
> *I did not want to have three persons come to my household and my bedroom during COVID-19 [to assist me in voting from home]* (A woman aged 75 living in a city).
>
> *I had no one to vote for* (A woman aged 23 living in a city).
>
> *My polling station was not accessible and I did not want to admit anyone at home* (A man aged 69 living in a city).
>
> *In my opinion, the elections were irregular* (A man aged 36 living in a suburban area).
>
> *It is just pointless all together. I am not a person who wants to get involved in politics. I am trying not to get involved. In the last 20 years of my life, I have dedicated attention to improvement of quality of life for [people with disabilities] and I am not giving up on that whoever may be in power, so I am just focusing on implementation of the program we have set for ourselves and that we are supporting* (A woman aged 68 living in a city).
>
> *I did not want to vote* (A man aged 43 from a city).
>
> *Lack of trust in the structure of politicians – simply stated – one goes another one like him comes* (A man aged 59 living in a rural area).

I do not want to vote – I think that my vote will not affect the outcome. Should Gordana Rajkov run, I may decide to vote (A man aged 39 living in a city).

Because of COVID but also, I never trusted the secrecy of vote with an assistant. I simply cannot trust that my will is respected, you cannot have full discretion and be absolutely sure what the assistant ticked. It is necessary to have voting in braille or electronic voting (A woman aged 38 living in a city).

I did not have a choice, I had no option that appeals to me (A man aged 42 living in a city).

There is a universal agreement among the participants in this research that there is a need to enhance opportunities for persons with disabilities to participate in political parties, in political leadership positions as candidates, and in the public sphere in general. However, this expectation relates more to others and not oneself. Only 14 out of 52 respondents have been members of a political party at some point in their lives, mostly a long time ago, before political party pluralism. In most cases, respondents who joined political parties after the introduction of pluralism do not have a very positive experience regarding political party openness and sensitivity to persons with disabilities and/or disability issues. One respondent stated a positive experience regarding greater access to media during her brief encounter with the world of politics.

Clearly, political parties need to take more concrete actions to ensure they are including people with disabilities among their ranks as well as to intensify outreach to this large group of citizens and voters who still remain in the margins of the right to vote and to be voted for. Within the Serbian disability movement, on the other hand, there is a maturing core group gathered around interest-based self-organization that seeks to push for disability movement priorities regardless of political party nomenclature. This is a good and innovative practice that needs closer attention by election process stakeholders. The central issue is how to ensure representation of the disability community and independent living principles in line with the CRPD in legislature when political parties continue to exclude people with disabilities. The disability movement in Serbia is experimenting with different modalities including joining ruling coalitions as a non-party candidate, advocacy through umbrella organizations of persons with disabilities, joining different parties and coordinating actions within the disability movement, integrating into broader civil society movements and building networks with CSOs, discussing quota for people with disabilities on election lists, etc. Further attention ought to be paid to the diverse public policy priorities of people with disabilities in line with international commitments including the CRPD.

Different types of incentives (special measures) to increase candidacy of people with disabilities can be implemented. In the United Kingdom, for instance, there is an Access to Elected Office Fund[25]. This fund provides sup-

25 For details, please see Government UK, Access to Elected Office Fund, *https://www.gov.uk/access-to-elected-office-fund*.

port for any additional costs candidates with disabilities might encounter, like for a sign language interpreter to interact with voters or extra travel or accommodation costs for a caregiver.

> One research participant described joining a political party as *a double-edged sword. We should be involved, but we could also be manipulated. Every citizen has the right to be involved but, it is a problem when party interests that are opposed to disability interests come first, especially when politicians want to present themselves as representatives of the disability movement* (A man aged 52 living in a city).
>
> *Because everyone has the right to vote and be voted for* (A woman aged 62 living in a city).

At the same time, the motto "*Nothing about us without us*" has taken deep root among the respondents. A Serbian variation states: *Without us, nothing good can be done for us. I think that nothing about us should be done without us – politics will deal with us if we do not deal with it. We should reach our own decisions and we should take part in decision making, or else they are not legitimate decisions* (A man aged 60 living in a city).

One respondent testifies to a personal change of views: *At first, I thought that we must not get involved in politics, especially as movement leaders because of revanchism, and now I think that it is most important for our voice to be heard in institutions* (A man aged 62 living in a city).

Speaking to the broader context, one respondent says: *If you are not in a party, you are nowhere*. Another one adds: *Parties decide* (A man aged 35 living in a rural area).

> *The voices of people with disabilities must be heard. We must have a representative. If we do not, we will not have significant participation in political life* (A man aged 69 living in a city).
>
> *I found out that there is not a single person with disabilities in the Parliament which is absurd because someone needs to represent us – how are we going to access our rights if we have nobody to represent us? Not everyone can fit into the same basket – if there was a person with a disability maybe s/he would have some influence, if that person decides to represent common interest as opposed to their own* (A woman, 50, living in a residential institution).
>
> *If we consider ourselves as members of this society, we should take part in its' activities daily, not just wait for them to visit us for memorial days, holiday and International Day of Persons with Disabilities* (A man aged 48 living in a city).

XI PARTICIPATION IN CRISIS MANAGEMENT AND THE AFTERMATH

When asked if politicians with disabilities can influence measures regarding COVID-19 and rehabilitation in the aftermath of the crisis, respondents

generally agree that there are very few politicians with disabilities and that their influence is individual but recognized nevertheless. The role of DPOs in crisis management and rehabilitation is emphasized by most respondents, especially the Center for Independent Living of Persons with Disabilities and National Organization of Persons with Disabilities. Also, respondents agree that this DPO involvement in crisis management and recovery should be even greater. Some respondents think that *a greater influence was exerted by individuals in important places* or *with a voice*. A third perspective recognizes that influence was exerted only by one small group or organizations and that it was not inclusive enough of local DPOs. *DPOs can influence, but they need to influence more. For example, now, regarding school, nothing is clear with regards to children with disabilities* says one participant.

Therefore, some influence by DPOs on decision making regarding COVID-19 was noted by respondents. However, there remain many gaps in access to decision making for people with disabilities during and post-COVID, and local DPOs are not sufficiently involved in policy planning, despite the unique perspectives and experiences of their members. Also, the capacity of DPOs ought to be strengthened in advocacy, strategic communications, and crisis management and response in order to ensure a more decisive, timely and comprehensive influence on decision and policy making in crises and disaster relief and rehabilitation. At the same time, COVID-19 situation served as a learning experience for the Crisis Committee that is the public face of crisis management. As part of the crisis aftermath, these lessons learned ought to be integrated into bylaws and procedures.

The actual contribution by CIL and National Organization of Persons with Disabilities in Serbia (NOOIS) during COVID-19 included the following items:

CIL was particularly trying to keep personal assistance service ongoing in Belgrade and in other nine local CILs throughout Serbia. This included providing written permissions for moving around during the curfew, providing every day written permissions for using restricted public transport and providing masks, gloves, disinfections for all users of PAs and PAs themselves. NOOIS was advocating for the free movement of children with disabilities, particularly persons with autism.

XII DISABLED PEOPLE'S ORGANIZATIONS OPERATE ONLINE

Disabled people's organizations suffered adverse consequences of this protracted crisis. In the words of research respondents, *there were fewer activities, fewer gatherings, no social activities*. There is general agreement that the crisis has resulted in reduced budgets for DPOs, but also in new activities and initiatives to overcome new limitations in the operating environment. The crisis also served as a teacher of new things: online meeting and seminars, new skills and ideas. However, stability of DPO work depends in part

on stability of their funding. It appears that budget cuts have quickly shifted resources away from DPOs. Instead, governments at national, provincial and local levels could have involved DPOs in the identification of priorities, problem solving for persons with disabilities and piloting of new services, such as counseling and online socialization, training and exchanges.

> *We work from home, we have to be very economical, flexible and able to adapt. There is no money, we cannot see our members and communication is by phone* (A woman aged 48 living in a city).
>
> *We are switching to online mode, focusing on issues concerning PA service, on the importance of informal service providers, which was a big issue for us. Especially the functioning of services during curfew. Routine of persons with autism was disrupted. Availability of information for persons with sensory disabilities-deaf persons was an issue that we addressed. There were also issues with financial allowances and one-off financial support for persons deprived of business capacity. There were many challenges* (A man aged 52 living in a city).
>
> *Members call nonstop. There is no travel, no seminars, events, just online meetings. Human contact is really lacking. We are trying new things. We have a solidarity week in October and we are going live regionally* (A woman aged 64 living in a city).
>
> *We introduced shifts and people took turns in the office so that we would have just between 1 and 3 persons in the office* (A woman aged 42 living in a rural area).
>
> *In addition to limited mobility, we had to adjust to the new situation and to extend assistance to our users to the best of our abilities so that they could cope with changes more easily* (A woman aged 35 living in a city).
>
> *A call for proposals that was supposed to be launched by the municipality in March had to be cancelled, everything was stopped, and it restarted only in July. A ban on public gathering, members are longing to see each other and to engage in activities – for many among them, this is the only way in which they socialize* (A woman aged 37 living in a city).
>
> *We have our Assembly in 15 days and we will see what will happen. Most probably we will have to close the association if this lasts for another year, members who are blind do not come to take part in activities now* (A woman aged 64 living in a city).

Political participation of persons with disabilities in Serbia in its most widely spread form concerns civic activism. That is why organizations of persons with disabilities play an immensely important role, along with other civil society organizations. Most successful advocacy actions related to COVID-19's impact on people with disabilities in Serbia have been supported by DPOs. However, the inability of DPOs to work and their shrinking funds is a threat to the current level of political participation. Although respondents in the sample did not indicate that they are adversely affected by the digital divide, their activity levels were lower in intensity and more modest in reach,

in comparison with normal circumstances. Despite these challenges, some activities have successfully migrated online and this approach has expanded the ways in which DPOs can continue to deliver their essential programming even in a pandemic setting. Still, COVID-19 has negatively affected freedom of association.

XIII LOCAL *VS*. NATIONAL POLITICS

Respondents were asked if they are more interested in local or national politics after COVID-19 experience. Twenty-two survey participants stated that they are equally interested in both, five participants selected 'neither', thirteen participants chose local elections and 7 opted for national elections. Illustrative examples of rationales provided are listed below:

> *You can get more done at national level and you can influence more local level* (A woman aged 48, living in a city).
>
> *Everything affects us equally* (A woman aged 39 living in a city).
>
> *Because I think of myself as a local leader and that is my sphere of interest* (A man aged 62 living in a city).
>
> *National strategy is really important because COVID brought uncertainty and local level is important for everyday life* (A woman aged 64 living in a city).
>
> *For global politics at the moment. The state is irrelevant. City and village matter because that is where people are* (A woman aged 42 living in a city).
>
> *I think one should start from their community, i.e. their city and make changes there, and then move upward* (A woman aged 39 living in a city).
>
> *Because basic parameters are set at the national level, including laws that matter to us. They are set at national level and then regulations and implementation occur at the local level. The second reason is that I have always worked at the national level* (A woman aged 75 living in a city).
>
> *National because it is all decided in one place* (A woman aged 23 living in a city).
>
> *I like to hear what is going on in the world and in my municipality* (A man aged 70 living in a city).
>
> *Members of local association of the deaf have not managed well, there were no information and organizations had to launch appeals to all institutions in order to inform them and to address the challenges encountered by some members. There was quite a lot of lack of understanding between institutions and deaf persons who had contracted COVID-19. Also, because of a shortage of accessible information many Deaf persons violated the curfew and were sanctioned and detained. In this sense, local politics are crucial for deaf people.* (A man aged 39 living in a city).
>
> *Because programs and projects are funded at the local level – that is what is important for us* (A man aged 38 living in a city).

Neither because I have no influence. Politics as politics – I do not think that is going to change. I am interested in people's wellbeing; I contribute as a member of my community in other ways (A woman aged 65 living in a city).

I am apolitical generally speaking, I support everything that is good for PWDs for as long as it benefits PWDs. (A woman aged 50 living in a residential institution).

Respondents in the sample are interested in politics and they balance between local level and national level. Respondents also understand the connection between national level frameworks (laws, strategies) and their implementation at the local level. Both have an impact on quality of lives of persons with disabilities. However, some participants feel powerless and do not believe that they can make a difference. Even so, they are interested in the wellbeing of persons with disabilities. Traditionally, local level is closer to local organizations of persons with disabilities. However, during COVID-19 crisis, much of the decision making was centralized, especially in the early days. In the COVID-19 aftermath, efforts should be made to regain the space for local decision making.

Respondents were further asked to state what political issues they are most interested in. They listed a range of issues, including:

Accessibility, support services, welfare and health protection were identified as top priorities by respondents. However, the most significant finding here perhaps is the fact that persons with disabilities have a wide variety of interests and cannot be reduced to information on social protection, though it is an important precondition of independent living. The society, the state at all levels and media ought to ensure the diversity of the disability community and their wide array of interests and priorities are fully represented.

XIV RESPONDENTS' RECOMMENDATIONS FOR INCLUSIVE ELECTION PROCESS

Answers to the question "What needs to be done so that elections and political participation are more accessible for persons with disabilities?" are clustered into the following categories:

a) Accessible polling stations and venues for political events;
b) Inclusion of alternative voting methods;
c) Accessible information;
d) Inclusive legal reform;
e) Dialogue.

Respondents touched on several categories in their answers but the predominant majority referred to interventions in category a. Accessible polling stations and venues for political events. The main issues raised by the participants include:

a) Accessible polling stations and venues for political events
   - Physical accessibility of polling stations, including ramps, lifts, accessible transportation to/from polling station, access to sign language interpreters and personal assistants.
   - Changes in the system of access to voter registry to accommodate people who do not have good internet.
   - Regular provision of sign language interpretation and titles and greater use of videos during elections.
   - Bridging architectural barriers, communication barriers and social barriers.
   - All places where political activities take place should be accessible, including municipalities, halls conferences, hotels, places where political and social activities take place.
   - Political content, election materials and political messages should be accessible in the way they are communicated (using braille, sign language interpretation, and titles).
   - Voting should be adjusted to people who are blind through use of braille or electronic voting and greater discretion – that is key.
   - More positive changes such as the earlier registration for voting at home.

b) Accessible information
   - Greater access to media for political participation of persons with disabilities and accessibility.
   - Awareness raising of people with disabilities on the importance of voice and representation.
   - Ensuring that all textual and audio information is available in Serbian sign language and subtitled. It is important that there is a translation into Serbian sign language and a subtitle because Serbian sign language and Serbian language are not the same languages. For Deaf people, Serbian is not the first language, and the subtitle would not meet their needs.
   - Supporting and motivating people with disabilities to become more involved in politics.

c) Political party inclusion
   - Creating conditions for participation of persons with disabilities and opportunities for the 'many smart and educated people with disabilities.
   - Sensitizing the leaders of political parties and parties about the importance of inclusion of people with disabilities.
   - Inclusion of people with disabilities in the electoral process at least a year or a year and a half before the elections in order to bring them closer to the election process.

- Introducing a quota for participation of people with disabilities such as for national minorities and women.
- Finding role models who can motivate others.
- Motivating, animating, supporting people with disabilities at local, provincial and national level through provision of support and training, seminars and projects, engaging in lobbying and advocacy.
- Awareness raising, general education for all citizens, not just people with disabilities.

d) Inclusive voter education
- Persons with disabilities, in the views of respondents need to be better educated about their rights in the election process.
- General population ought to understand more the notion of inclusive elections through more continuous media coverage and through support of inclusive elections by party leaders.

e) Inclusive legal reform
- Amending the law on financing of political activities so that a portion of the budget is set aside to stimulate political participation of people with disabilities.
- Introduction of special measures (quota) for political participation of persons with disabilities.
- Amendments to the Law on Elections.
- Changes in the Family Law to remove obstacles for political participation of persons who are deprived of the legal capacity. This is in line with the CRPD Committee recommendations, General Comment No. 1 in relation to the application of Article 12.
- Explore electronic voting.
- Review feasibility of elections on Sunday when the support and assistance services do not work.
- Ensure direct election of representatives to increase interest and turnout in elections by persons with disabilities and other citizens.

f) Dialogue
- Organizing broad consultations within the disability movement where leadership would listen to membership and national level organizations to local level organizations.
- Raising awareness of the general public and shifting focus from accessibility for people with disabilities to accessibility for all.

XV CONCLUSIONS AND RECOMMENDATIONS

1. Conclusions

1. COVID-19 pandemic was, and continues to be, a major disruption in the lives of persons with disabilities and their organizations. The adjustments

were significant for all and especially for persons with disabilities living in residential institutions and for persons who did not have access to support services during the state of emergency, until the services resumed.

2. Persons with disabilities in the sample did not experience significant changes in level of political participation resulting from COVID-19. In part this is due to high level of prior mobilization mostly through civic activism and to a lesser degree, through political parties. However, few persons in the sample are currently members of political parties. However, they did experience a lesser motivation and mobilization to vote on the election day.

3. Voting at the polling station was not perceived as an increased risk for persons who decided to go to the polling station. Most respondents said that they were let to go first by other voters and the election board. In this case, social solidarity, and possibly medical approach to disability mindset benefited voters with disabilities. However, that is not a sustainable way forward for voting in pandemic because it depends on individuals' free will.

4. Accessibility of polling stations is improving very gradually and polling station accessibility assessments, as well as participants' direct experiences, indicate that significant improvements are needed in this area before the next elections. It should be strongly emphasized that 'partially accessible' polling stations are, in fact, inaccessible.

5. According to the respondents who voted at the polling station, election board members were not more sensitive to voters with disabilities and there was no difference in their experience before this election and at this election.

6. Voting from home. Several persons who voted at the polling station in previous elections, now decided to vote at home. For the most of them, this seemed to be an easier way, while some of them (two) were not able to vote because members of the local election board did not come to their homes.

7. Voting for persons in institutions was provided by organizing special voting place within the institution itself. This was a good solution under the circumstances.

8. In the observed election cycle, political parties have not sufficiently increased their efforts to become more inclusive for voters who are persons with disabilities.

9. There is significant level of awareness among research participants regarding the necessity of a direct political engagement by persons with disabilities. Although actual involvement in political parties is low, different modalities are being explored to ensure an inclusive legislative policy process in the aftermath of the election day.

2. Recommendations

1. Local governments and line ministries should have in mind the requirements of persons with disabilities in emergency situations and they should co-create adequate, specific measures in consultation with organizations of people with disabilities.

2. The awareness of persons with disabilities and their organizations about the importance of political participation of persons with disabilities ought to be raised, both through campaigns, trainings, seminars, and promotion of good role models and good practices. Political parties should seek to become more inclusive including ensuring that political party campaigns and events are accessible.[26] They could create a reasonable accommodations policy for candidates; ensure party events/ meetings are held at accessible venues; include sign language interpreters of all events/venues not just some; include disability rights initiatives in party platform; produce programs in a variety of formats to accommodate different needs of persons with auditory, visual, psycho-social and intellectual disabilities and include content in their programs that responds to the priorities of the disability movement in Serbia.

Men and women with disabilities as citizens, professionals and bearers of direct expertise bring to political parties the important knowledge to help build inclusive party-specific action plans as well as community or country-wide action plans.

3. Experiences gained during the COVID-19 pandemic could be used for further crisis situation of any kind, and any subsequent election and voting process. More information in accessible formats and instructions should be provided in advance and in time, both to women and men in national and local electoral commissions and to women and men with disabilities. The issue of electronic voting should be considered as an alternative voting method.

4. Accessibility of polling stations is a key pillar of accessible elections. The Republic Election Commission (REC) has posted data resulting from accessibility assessments conducted in 2020[27]. It is now up to REC to compile main findings and recommendations and up to local governments to plan actions to remove those barriers or to select different premises to serve as polling stations. The decision of REC that the accessibility assessment has to be performed every two years, should be implemented.

5. Accessibility of elections for persons with sensory disabilities remains a significant challenge. A CIL-led Disability Inclusion Consultation Group has come up with a detailed analysis of comparative experiences in the region. Further steps ought to be undertaken before the next elections.

6. The Republic Election Commission should continue with training of election board members on disability issues to ensure inclusive elections. This training started with the election cycle considered in this report and whereas this is a welcome change, there is a need to expand reach and ensure further integration of knowledge on best practice in inclusive elections.

7. Although specific instructions were provided by REC about voting from home, it seems that not all local election commissions were aware of

26 For details, please see Vodič za pristupačnu izbornu kampanju (CIL's Guide on Accessible Election Campaign), *http://www.cilsrbija.org/ebib/201604062025320.vodic_za_pristupacnu_izbornu_kampanju.pdf*.

27 Republička izborna komisija, Pristupačnost biračkih mesta, Pristupačnost biračkih mesta, *https://www.rik.parlament.gov.rs/tekst/sr/3194/pristupacnost-birackih-mesta.php*.

that. A complaints mechanism and inspection function should be introduced to find out why these instructions were not implemented. On the other hand, for people who live in residential institutions, having a special voting place within the institutions themselves seems to be an emerging good practice. It could be considered as one of the good options in the future.

8. There are many underutilized opportunities for outreach to voters who are persons with disabilities, including online platforms and social media. However, it is necessary to invest greater efforts in ensuring that campaign messages, political programs and daily activities are accessible for citizens with different types of disabilities.

9. An ongoing dialogue is required to reach consensus regarding an array of possible solutions contributing to inclusive elections and representation of disability interest and rights in legislative and policy process. The Parliament, the Government and election stakeholders all have a role in supporting the disability movement in piloting, testing and advocating for the right solution in the Republic of Serbia.

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POLITIČKO UČEŠĆE ŽENA SA INVALIDITETOM U REPUBLICI SRBIJI TOKOM PANDEMIJE *COVID-19*

Apstrakt

Tokom pandemije *COVID-19*, Republika Srbija je 21. juna 2020. godine održala izbore. Bila je druga zemlja u Evropi koja je iskusila glasanje tokom ove pandemije. Empirijski dokazi sugerišu da su mnoge osobe sa invaliditetom u Srbiji doživele povećanu izolaciju i pojačanu diskriminaciju tokom pandemije. Centar za samostalni život osoba sa invaliditetom u Srbiji (*CIL*), uz podršku Međunarodne fondacije za izborne sisteme (*IFES*), istražio je vezu između održavanja izbora u vreme pandemije i promena u ponašanju osoba sa invaliditetom u Srbiji, kao glasača i kao aktivnih građana tokom izbornog procesa. Ovo istraživanje je, dalje, analiziralo političko ponašanje osoba sa različitim vrstama invaliditeta u vreme izbora u junu, pa sve do 30. avgusta 2020. godine.

Istraživanje dokazuje da je učešće žena i muškaraca sa invaliditetom na izborima bilo niže nego u prethodnim izbornim ciklusima i da je to rezultat odgovora na pandemiju *COVID-19*.

Na osnovu nalaza istraživanja, učesnici istraživanja i autorke predlažu hitne kratkoročne i srednjoročne mere koje je neophodno preduzeti kako bi se otklonile sve nepravilnosti u pravnom sistemu i obezbedili uslovi za bolji odgovor države na buduće rizike, dostupnost biračkih mesta, zdravlje i bezbednost osoba sa invaliditetom.

Ove mere se odnose na pristupačnost biračkih mesta i političkih skupova; uključivanje alternativnih metoda glasanja; dostupnost informacija u različitim formatima; inkluzivnost zakonskog okvira, i potrebu za stalnim dijalogom organa javne vlasti i političkih subjekata sa organizacijama osoba sa invaliditetom, kao i ženama i muškarcima sa invaliditetom, kao nosiocima neposrednog iskustva.

Ključne reči: *Pristupačnost; Inkluzivan izborni process; COVID-19; Organizacije osoba sa invaliditetom; Osobe sa invaliditetom; Političko učešće; Samostalni život.*

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ACCESSIBILITY OF CITIES TO WOMEN WITH DISABILITIES FROM THE SOCIAL SUSTAINABILITY PERSPECTIVE: THE CASE OF SERBIA*

Abstract

The notion of social sustainability assumes full integration of all residents, regardless of their characteristics. This paper examines the interrelation of gender and disability with regard to social sustainability of cities. First part of the paper discusses the 'genderness' of cities, with the emphasis on security of women and their ability to move in the cities. The second part analyzes the position of another disadvantaged group: disabled people who also face numerous obstacles to safe and free movement in the cities. The last part of the paper examines the legislative response to difficulties that face both women and disabled persons in EU and in Serbia. The conclusion is that women with disabilities face problems of both disadvantaged groups, which for them make living in today's cities very challenging. Legislative response which exists in both EU and in Serbia is just a first, but insufficient step toward achieving social sustainability of cities for women with disabilities.

Key words: *Social sustainability; City; Women; Disabilities; Women with disabilities.*

> Men – white middle-class men at least, and in particular – own the street without thinking about it. Women must always make a conscious claim, must each time assert anew their right to be "streetwalkers".
>
> (Wilson, 2001, 139)

I INTRODUCTION

City is sexist. It has long been established from numerous researches in the fields of urban geography, history, sociology, philosophy and urban plan-

* This paper is the result of a research conducted within the scientific strategic project of the University of Belgrade Faculty of Law for 2022, under the name: „Savremeni problemi pravnog sistema Republike Srbije" (Contemporary Problems of the Legal System of the Republic of Serbia, sub-topic: Historical and sociological context of contemporary challenges in the Republic of Serbia).

ning that space is not produced only in political and economic processes. Feminist geographers have a dynamic view of contemporary cities which recognizes that urban places are not simply containers within which women organize their daily lives.[1] The city is the outward manifestation of deeply held assumptions about women's role in society. Women have been seen stereotypically as suburban housewives or immobile and stationary wives, or simply as invisible.[2] These notions are transmitted onto the design of towns and cities through the urban planning system and through the decision-making powers of planners, architects, surveyors, engineers, and city managers. All these professions remain male-dominated and very few women have a voice at the policy-making level.[3] Nevertheless, women make up the majority of public transport users, of the elderly, the disabled, shoppers, care providers, and the ethnic minority population.[4] The female population includes a wide range of social-class groups, incomes, and levels of education.[5] The seemingly trivial but highly gender differentiated practices reflect the power structures of the everyday, confining women and men in different spaces, thus producing and (re)producing space as "gendered".[6] Spatial relations, including restricted access to public space and limited mobility, can be seen as a test for equality – a parameter of gender empowerment.

The ways that cities shape women's lives and the ways women shape cities have changed over time. Urban life initially had a liberating effect on women's lives.[7] In the city, women could become anonymous, and that freed them from restrictions and public scrutiny characteristics for more rural communities.[8] In the context of industrialization and more recent history, the fate of women in cities changed drastically.[9] Issues of safety, housing, economics, and the environment have become central to women's living in cities. In response to increased poverty, deteriorating infrastructure and environments, and increased gender-based violence on the streets and in homes, women are now organizing and using their community resources to challenge the urban form of cities and the social and political policies and processes that impact their lives.

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1 Valerie Preston, Ebru Ustundag, 'Feminist Geographies of the "City": Multiple Voices, Multiple Meanings' in Lise Nelson and Joni Seager (eds), *A Companion to Feminist Geography* (2005), 212.

2 Clara Greed, 'Non-sexist City' in Ray Hutchison (ed.), *Encyclopedia of Urban Studies*, (2010), 569.

3 *Ibid.*

4 *Ibid.*

5 *Ibid.*

6 Hille Koskela, 'Urban Space in Plural: Elastic, Tamed, Suppressed' in Lise Nelson and Joni Seager (eds), *A Companion to Feminist Geography* (2005), 257.

7 Elizabeth L. Sweet, 'Woman and the City' in Ray Hutchison (ed.), *Encyclopedia of Urban Studies*, (2010), 963; Lauren Elkin, *Flâneuse – Women Walk the City in Paris, New York, Tokyo, Venice, and London* (2017).

8 Elkin, *op. cit.*

9 Sweet, *op. cit.*, 963.

Gender is intersecting with other aspects of identity, such as class, ethnicity and race, disability, and sexual orientation.[10] This paper examines the intersection between gender and disability, with specific emphasis on the City of Belgrade and other Serbian cities. First part of the paper discusses the "genderedness" of cities, ability of women to move across the cities, their security in cities and disability of women as another obstacle in using cities. Afterwards, in the second part the position of disabled people in the city it is analyzed with emphasize on the women with disabilities. In the third part of the paper, legislative response to the difficulties that these groups face is examined and finally special attention is given to the case of the City of Belgrade and other Serbian cities and their accessibility to women with disabilities.

II GENDER AND THE CITY

Space shapes the way in which gender identities are formed and, reciprocally, gender identities and gendered social relations shape space.[11] The traditional focus on the experience, work, and problems of men among much of urban sociology, social policy, and urban criminology has led to the segregation of women in the cities which decreases their visibility, and often their mobility. In the long run, issue of spatial segregation and inequalities in domains of visibility and mobility make cities socially unsustainable. The notion of social sustainability of the city generally includes social characteristics and processes that contribute to the long-term and harmonious functioning of the city system.[12] The paradigm of sustainable development implies the need to strike a balance between the ecological, economic and social dimensions of development.[13] However, the study of the social aspect of sustainability was neglected until the very end of the twentieth century. The concept of social sustainability of the city was recently promoted among urban theorists, but it cannot be said that it is theoretically and methodologically fully shaped, since there are still certain dilemmas regarding the content of the concept and its operationalization.[14]

Dimensions of the city's social sustainability thatare of particular interest for the problem of visibility and movement of women are social inclusion and security, which are discussed in the following textr. Besides that, for the position of women in the city is significant city's social sustainability at the neighborhood level: social heterogeneity of its population[15] and the development of

10 Preston and Ustundag, *op. cit.,* 212.

11 Koskela, *op. cit* (2005), 257; Doreen Massey, *Space, Place, and Gender*, (2001), 186.

12 Anđelka Mirkov, *Socijalna održivost grada: izazovi neoliberalne urbane politike* (2017), 11.

13 *Ibid.*

14 *Ibid.*

15 Heterogeneity is often cited as an important principle of social sustainability of the city. It implies social diversity within a city or neighborhood, achieved through the presence and mixing of people who differ according to race and ethnicity, culture, education, occupation, income and socioeconomic status, family type, gender, age and health status (Anđelka Mirkov, 'Socijalna održivost grada: analiza koncepta', *Sociologija*, Vol. LIV, No. 1, 2012, 64; Emily Talen, *Design for Diversity: Exploring Socially Mixed Neighborhoods*, (2008), 4-5).

informal social ties inside and outside the neighborhood.[16] It is so women are more connected to neighborhood spaces than men, i.e. often their social exclusion is manifested through closedness at the neighborhood level.

1. Women and social inclusion in the city

Social inclusion is generally defined as a positive or desirable process in contrast to social exclusion.[17] In addition to poverty and material deprivation[18], social exclusion involves the cumulative action of number of factors (economic, political, social, cultural, spatial) that prevent individuals or social groups from participating in institutions that ensure normal life according to standards of certain society [19] Relation between neighborhoods and exclusion exist, because neighborhoods cause, affect, or intervene in exclusion processes in such a way that exclusion becomes exacerbated or limited, depending on what happens at the neighborhood level. The concentration of excluded people in a neighborhood may have an influence by itself on exclusion processes, and Paul Spicker therefore rightly claims that the problems of poor areas cannot be reduced to problems of poor people within those areas.[20]

One of the most important socially constructed are gendered divisions which prevent spaces from being socially inclusive for women and which feminist scholarship has challenged and attempted to overturn is division between the public and private (sphere and space).[21] The "public" is perceived as the white, middle– or upper-class, hetero sexual male domain and in many social constructions, women belong to the "private" only. These practices demarcate and isolate a private sphere of domestic, embodied activity from an allegedly disembodied political sphere that is predominantly located in public space. The public/private dichotomy is frequently employed to construct, control, discipline, confine, exclude and suppress gender and sexual difference preserving traditional patriarchal and heterosexist power structures. There is no question, however, that enclosure (both voluntary and forced) in private spaces contributes to a reduction in the vitality of the public sphere and diminishes the ability of women to claim a share in power.[22]

16 The concept of social sustainability of cities is often supplemented with the concept of social capital, which implies resources that are obtained through social contacts and participation in social networks. These are systems and structures that connect individuals within and outside a social group – at the informal, formal and institutional level (Mirkov, *op. cit* (2017), 71; Mirkov, *op. cit* (2012), 65).

17 Marija Babović, *Socijalno uključivanje: koncepti, stanje, politike* (2011), 26.

18 For more information on deference between poverty and material deprivation, see: Mila Đorđević, 'Uticaj državne pomoći na smanjenje siromaštva u Srbiji tokom pandemije virusa *Covid-19* u 2020. godini' (2022); Mila Đorđević, 'Siromaštvo i kašalj ne dadu se sakriti – uticaj virusa *Covid-19* na položaj ranjivih kategorija u Srbiji' (2022).

19 Mirkov, *op. cit.* (2017), 59; Mina Petrović, *Transformacija gradova – ka depolitizaciji urbanog pitanja* (2009), 136-137; Manuel B. Aalbers, 'Social Exclusion' in Ray Hutchison (ed.), *Encyclopedia of Urban Studies* (2010), 732.

20 Paul Spicker, 'Poor Areas and the 'Ecological Fallacy' (2001).

21 Massey, *op. cit.* (2001), 179-185.

22 Nancy Duncan, 'Renegotiating gender and sexuality in public and private spaces' in Nancy Duncan (ed.), *Body space – destabilizing geographies of gender and sexuality* (2005), 127–128.

In connection to this dichotomy, feminists have always recognized that women's access to resources depends on the ability to move among spaces.[23] Drawing on time–space geography, geographers documented the spatial constraints that limited women's movements across urban space and how women actively overcame the tyranny of distances.[24] The layout of cities, urban transport networks and timetables, as well as the internal layout of individual homes, are based on an assumption of permanent nine-to-five employment by a man, with a wife who combines housework and childcare in the local neighborhood.[25] Researchers about mobility confirms that many women still suffer material and symbolic limitations on movement among urban locations. This sometimes means that women in both Western and non-Western cities simply cannot wander around the streets, parks, and urban spaces alone, and in some cultures cannot wander around at all.[26] For example, limited access to an automobile usually constrains the mobility of middle-class mothers and women. Other women experience mobility limitations by virtue of their identities as women of color, immigrant women, lesbians, and women with disabilities.[27]

If women are limited to the private sphere and their neighborhoods which are significantly the sphere of home and immediate environment (which function as semi-private spaces), high level of social segregation creates spaces that significantly restrict women's movement, both for the upper classes and especially in poor ghettoized neighborhoods. Restriction of women's movements leads to restriction of their social contacts and networks which prevent them from social inclusion in wider social spaces and processes (especially if they are unemployed). These problems are just increased when they relate to limitations from disabilities.

2. Women, security and mobility in the city

The question of mobility in cities is very often connected with the question of security, as other segment of social sustainability of the cities important for women. Security implies a psychological sense of safety of citizens in their daily lives and activities, the absence of unnecessary dangers and risks in the physical environment, as well as the presence of measures to reduce the possibility of victimization.[28] Only a safe environment can be considered socially sustainable. Crime and fear of victimization are very detrimental to the reputation of cities and neighborhoods and this indirectly affects the social sustainability of the city. Women tend to move only around places which are

23 Doreen Massey, *Spatial Divisions of Labor: Social Structures and the Geography of Production* (1995).

24 Jacqueline Tivers, *Women Attached: The Daily Lives of Women With Young Children* (1985).

25 Linda McDowell, 'Space, place and gender relations: Part I. Feminist empiricism and the geography of social relations', *Progress in Human Geography*, Vol. 17, No. 2, 1993, 118.

26 Massey, *op. cit.* (2015).

27 Preston and Ustundag, *op. cit.*, 217.

28 Mirkov, *op. cit.,* 60.

known to them, they avoid distant and new areas of the cities in which they live.[29] The question of safety is an issue which acutely illustrates the gendered nature of space.

There is a long tradition of feminist research on "the geography of fear" and women's insecurity has both a structural and actors' dimension. It is now widely understood that there is no single female experience, but the patterns of structural vulnerability are of great importance.[30] Feelings of insecurity are bound into the structurally subordinate positions of some women, for example members of ethnic or sexual minorities.[31] Sexual harassment in the public sphere can be understood as a form of "noncriminal" street violence: women face a range of behavior that is perceived as offensive but would not necessarily be considered criminal. The contribution of such incidents to women's everyday lives is easily trivialized. However, harassment has a remarkable impact on how women perceive neighborhoods, and how freely they feel they are able to move around.[32] Women are twice as likely as men to report feeling unsafe even though men are far more likely to be the victims of crime in public spaces.[33] Women's fear in public spaces has many sources, but it relates first and foremost to social constructions of femininity and masculinity and men's and women's bodies.[34]

Women feel that their freedom to use urban spaces varies over the course of the day. In daytime urban space is not assumed by most women to be as contested, unpleasant, and frightening as nighttime. Spatiality makes a difference both to the images of place and to individual experiences. Eventually, temporality and spatiality are intertwined, creating a particular urban experience: space becomes elastic – it is different according to the circumstances, to the time of the day, to who is passing by, and to how you feel at that moment.[35] Judging whether a path across a dark park is safe to take is a practical question of everyday life, and it is a matter of personal feelings. Yet it also reveals the power structures that produce social space. The question of fear and courage – women's ability to use public space – is a question of (re) defining and (re)producing space as well as managing the self. In everyday life, the dynamics of fear and boldness form a constant, internal negotiation in three respects: a spatial dimension (where to go), a temporal dimension (when to go) and a social dimension (with whom to go).[36] Spatial relations, including restricted access to public space and limited mobility because of fear of violence, can be seen as a test for equality – a parameter of women's

29 *Ibid.*

30 Sweet, *op. cit.,* 966.

31 Koskela, *op. cit.* (2005), 258.

32 *Ibid.*

33 Gerda Wekerle, 'From Eyes on the Street to Safe Cities', *Places*, Vol. 13, No. 1, 2000, 47.

34 Preston and Ustundag, *op. cit.* 220.

35 Koskela, *op. cit.* (2005), 259.

36 *Ibid.,* 261.

empowerment.[37] Therefore, fear of violence is to be interpreted not only as a result of crime but also as a sensitive indicator of gendered power relations that constitute society and space.[38]

III DISABILITY AND A CITY

All along with difficulties that women face every day in their lives in cities, there is one even more disadvantaged group whose needs should be recognized in order to achieve socially sustainable cities and neighborhoods: people with disabilities. Disability is a diverse lived experience that is frequently shaped by barriers and exclusions in the context of the city.[39] Disability affects around 120 million citizens across European Union (EU) Member States and as their population age, that number will continue to grow.[40] Definitions of disability stress the way in which the organization of society serves to disadvantaged people by a devaluation of the disabled body and shed particular light on the barriers that shape disabled people's access to urban spaces and participation in city life. Inaccessible buildings and transport, or unclear signage, are some of the most obvious manifestations of these barriers.[41] Improving the mobility of people with disabilities includes some simple infrastructural interventions in cities, such as lowering the sidewalks (because it is somewhere (too) often only that one step (too) big obstacle for independent approach), introduction of audible traffic lights regulations, low-floor buses and trams, access ramps, providing affordable sanitation nodes, making an accessible entrance for persons with disabilities in cultural and sports venues and more.[42]

Housing of persons with disabilities is another aspect of challenges in the cities for them and also one of the requirements for achieving socially sustainable cities. Housing in the public sector or social housing[43] and issue of affordable and adequate housing for all categories of residents who cannot

37 Hille Koskela, 'Bold walk and breakings – Women's spatial confidence *versus* fear of violence', *Gender, Place and Culture*, Vol. 4, 1997, 302.

38 Koskela, *op. cit.* (2005), 261; Sweet, *op. cit.*, 964-966.

39 Ivan Leutar *et al.*, 'Uključenost osoba s invaliditetom u zajednicu', *Socijalne teme*, Vol. 1, No. 1, 2014, 89-114; Darijo Jurišić, 'Osobe s invaliditetom i ravnopravan život u zajednici', *Epoha zdravlja*, Vol. 14, No. 1, 2021, 20-22; Selma Šogorić, Vesna Štefančić and Ksenija Vitale, 'Osobe s invaliditetom – test pristupačnosti sustava zdravstva', *Acta medica Croatica*, Vol. 72, No. 2, 2018, 199-204.

40 European Commission, *Access City Award 2020 – Examples of best practice in making EU cities more accessible* (2020), 12.

41 Claire Edwards, 'Disability and the City' in Ray Hutchison (ed.), *Encyclopedia of Urban Studies* (2010), 218-220.

42 Jurišić, *op. cit.* 21.

43 Social housing is a collective term for the public service provision of decent and safe, subsidized shelter for eligible low-income families or other vulnerable groups, such as the elderly and persons with disabilities, in a society. Subsidies may be direct or indirect, in the form of direct housing subsidies, nonprofit housing, public housing, cooperative housing, or rent supplements for people living in private sector housing (Belinda Yuen, 'Social Housing' in Ray Hutchison (ed.), *Encyclopedia of Urban Studies* (2010), 735).

provide adequate housing on their own are necessary for a sustainable city.[44] The physical accessibility of residential buildings in different parts of the city allows social inclusion of people with disabilities and prevents their residential segregation in few neighborhoods. These people have an equal right to live independently and be included in the community, enjoying the possibility of choice, equally with others, regarding their place of residence and with whom and how they want to live. Independent living requires a differentiated landscape of quality, accessible, person-centered and affordable, community and family-based services comprising personal assistance, medical care and interventions by social workers, thereby facilitating everyday activities and providing choice to persons with disabilities and their families.[45]

Women with disabilities face obstacles of both disadvantage groups and in that particular category of citizens we can see double vulnerability. Women and girls with disabilities face multiple barriers to realizing their rights: environmental, physical and informational accessibility issues, including lack of resources and inadequate access to services, as well as widespread discrimination, stereotyping and social stigma.[46] Their problem with mobility comes from being women (facing safety and transport problems) enlarged with disability problems which makes operating and living independently in cities very difficult, if even possible. Housing of women with disabilities is another aspect of problem of living in the cities for this category, especially if they have children or are care providers to someone else.

In the context of living in the cities, women and girls with disabilities are disproportionately at risk of violence due to factors relating to systemic discrimination and stigma.[47] Women and girls with disabilities are often targeted for their perceived powerlessness and vulnerability, mostly by men they know and rely on for care, support and companionship in dependent professional and personal relationships.[48] Women with disabilities face numerous environmental, attitudinal and other barriers to political participation, and consequently remain largely excluded from decision-making and advocacy processes about issues that affect their lives.[49] Their views are often ignored or disregarded in favor of experts, professionals, parents and guardians.

IV INSTITUTIONAL RESPONSE IN EU

The notion of social sustainability and improving status of women and disabled people in the cities has led to number of strategic documents for

44 Yuen, *op. cit.* 735-738; Mina Petrović, *Sociologija stanovanja – Stambena politika: izazovi i mogućnosti* (2004).

45 European Commission, Union of Equality: Strategy for the Rights of Persons with Disabilities 2021-2030 (2021), 11.

46 Sophie Browne, *Making the SDGS count for women and girls with disabilities* (2019), 1.

47 *Ibid.,* 2.

48 *Ibid.*

49 *Ibid.*

improving their status. Women with disabilities are the citizens which face problems both of women in the cities and people with disabilities. For example, gender equity planning was developed as a response to all above biases about woman's role in society and they turn the attention of planners and publics to issues such as personal safety, child care, diverse and affordable housing, transportation, and public space to address many of the issues that women and girls face in their environments.[50] As an alternative to spread out, zoned, low-density cities, European women planners would like to see the "city of everyday life" – the non-sexist city, which they define as the city of short distances, mixed land uses, and multiple centers. The emphasis would be on the district (meso) level, with localized facilities, shops, schools, child-care facilities, and amenities. This would reduce the need to long distance travel in the first place and create sustainable, accessible, and equitable cities while fulfilling many of the criteria of the new urbanism.[51]

Many European cities are working to build their reputations as accessible, liveable cities that offer a warm welcome to all visitors, not simply by bolting it on to existing infrastructure, but by including it by design. Many European cities are paying close attention to urban engineering and the use of assistive technology to improve their city's overall accessibility for both residents and tourists. In order to raise awareness on the living conditions of persons with disabilities on the first place, the challenges they encounter in everyday life and tools to improve their lives, the European Commission organizes every year the European day of persons with disabilities conference, the Access City Award[52] and numerous other activities. The Access City Award rewards cities which have made outstanding efforts to become more accessible and some of the cities which are rewarded as accessible are: Breda (the Netherlands) for making cobble streets accessible[53], Rotterdam (the Netherlands) for making digital application which helps moving in city for people with disabilities[54], Lyon (France) for making sound beacons for visu-

50 Sue Hendler, 'Gender Equity Planning' in Ray Hutchison (ed.), *Encyclopedia of Urban Studies* (2010), 303.

51 Greed, *op. cit.,* 571.

52 For more information, see: *https://ec.europa.eu/social/main.jsp?catId=1141*.

53 Winner of the 2019 Access City Award, the medieval Dutch town of Breda is home to stretches of ancient cobblestone, which all add to the city's charm, but for wheelchair users, cobblestones are an accessibility nightmare. Breda, however, has achieved one of the biggest engineering feats in the realm of urban accessibility, by making historic cobbles accessible. The city has gone to great lengths to find a balance between maintaining its medieval aesthetic while still making it accessible for everyone. Throughout the streets of Breda, city planners have used machinery to pull up the inaccessible cobblestones. They've sliced them, flipped them over, and returned them to the ground. This allowed Breda to maintain its cobble aesthetic, while also making the pavements accessible for wheelchair users (Alex Lee, *How Europe's big cities can innovate for people with disabilities* /2019/).

54 The city of Rotterdam is using digital technology to improve accessibility for wheelchair users and those with mobility issues. Rotterdam, which has guidelines in place to ensure that walking routes have no unevenness greater than three centimeters, enables residents

ally impaired people[55], Ljubljana (Slovenia) for making wheelchair trailer attachments[56], Chester (United Kingdom) for making 700-year-old medieval Roman and Saxon walls wheel-chair accessible[57] etc.

The European Union and all its member states are signatories to the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)[58]. This important treaty entered into force for the EU in January 2011 and has guided the content of the European disability strategy 2010-2020[59] which was followed by Strategy for the rights of persons with disabilities 2021-2030[60]. The UNCRPD recognizes that women and girls with disabilities are often at greater risk, both within and outside the home, of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation. To address this concern, UNCRPD has also taken a two tracks approach to promoting gender equality and the empowerment of women with disabilities. It has equality between men and women as one of its principles, and it devotes two articles to women with disabilities (art. 3 and 6 of UNCRPD).

to report any mobility pitfalls using the city's Better Outdoors app. According to the municipality, any uneven pathing will be fixed within three days. The app lets a person with a disability take a picture of the paving issue on their smartphone, tag it with their phone's GPS, add a description and then send it off to Rotterdam's municipality. The user is also able to track the progress of the report so that they know when it is fixed and safe to travel down (*Ibid.*).

55 Every bus stop, 90 per cent of crossings and an estimated 200 public and private buildings – including local town halls, post offices, banks, insurance companies, shops and the two main train stations (*Part-Dieu* and *Perrache*) in Lyon are fitted with Okeenea's sound beacons. These sound beacons help guide visually impaired people in Lyon and can be activated with the use of a one-button remote control that is given for free to every visually impaired citizen in Lyon. When pressed, sound beacons within a ten-metre radius will make a verbal announcement. At bus stops and tram stops, for example, one button press will force the sound beacon to vocalize the next bus or tram to pull into the stop, another press will vocalize the destination and a final press will vocalize the waiting time before the next bus or tram (*Ibid.*).

56 The Slovenian capital has featured in the EU's Access City Award shortlist three times over the award's ten-year history. But Ljubljana has also worked on creating an inclusive environment for tourists with disabilities. The city has developed an app for wheelchair users, categorizing the most accessible hotspots, restaurants and hotels. But more interesting is the city's introduction of Ljubljana's SPEED3X wheelchair trailer attachments. These attachments, which let wheelchair users travel the city at 25 kilometers an hour and can be rented for free from the Slovenian Tourist Information Centre, have been made by Ljubljana-based RTS Medical (*Ibid.*).

57 Three kilometers of 700-year-old medieval Roman and Saxon walls stretch along the outside of Chester. It's no easy task making a national archaeological heritage site accessible, but that's exactly what planners did. The city, which was the winner of the 2017 Access City Award, has managed to make those ancient walls wheelchair accessible, within regulatory restrictions. Instead of having to access those walls using stairs, the city built in cascading ramps which lead up to the walls via access points (*Ibid.*).

58 Available at: *https://ec.europa.eu/social/main.jsp?catId=1138&langId=en*.

59 COM (2010) 636 final, Brussels, 15.11.2010, *https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM%3A2010%3A0636%3AFIN%3Aen%3APDF*.

60 COM (2021) 101 final, Brussels, 3.3.2021, *https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8376&furtherPubs=yes*.

V THE CASE OF BELGRADE AND SERBIA

The Republic of Serbia has adopted a great number of legal documents concerning the position of women in society. The new Law on Gender Equality[61] isthe umbrella law in the field of protection of women's rights, but there are also the Law on Amendments to the Law on Prohibition of Discrimination[62], the Strategy for Preventing and Combating Gender-Based Violence and Domestic Violence for 2021 – 2025[63] and a new national Strategy for Gender Equality[64]. In both strategies woman with disabilities are recognized as a specially vulnerable and more exposed to violence, abuse and neglect than women without disabilities.

The Republic of Serbia has also signed the UNCRPD in 2007 and ratified it in 2009. The UNCRPD obliges states to adopt all appropriate legislative, administrative and other measures to ensure the rights of persons with disabilities under the Convention. The key strategic document regarding the improvement of the position of persons with disabilities in accordance with the UNCRPD is the Strategy for the Improvement of the Position of Persons with Disabilities in the Republic of Serbia for the period from 2020 to 2024 (later: Strategy)[65]. Besides this strategy, Serbia has regulated status of people with disabilities by The Law on Prevention of Discrimination against Persons with Disabilities[66], The Law on Professional Rehabilitation and Employment of Persons with Disabilities[67] and Law on Pension and Disability Insurance[68]. Within its legislative framework, the Republic of Serbia provides the same level of rights as that contained in the UNCRPD. On the territory of the Autonomous Province of Vojvodina, provincial authorities responsible for the issues related to social policy, health care, urban planning and construction, education and employment, are working on the implementation of relevant provisions of the UNCRPD.[69]

The Strategy defines as a general goal the equalization of opportunities for persons with disabilities to enjoy all civil, political, economic, social and cultural rights, and the aim of the document is to increase the participation of persons with disabilities in society by 25%. The Strategy states that regardless of the existing regulations that are in line with European standards, persons with disabilities continue to face obstacles in performing daily activities when moving, using transport, entering and moving through various public buildings, as well as through residential buildings. Very important, this

61 *Official Gazette of RS,* No. 52/2021.

62 *Official Gazette of RS,* Nos. 22/2009 and 52/2021.

63 Available at: *http://www.pravno-informacioni-sistem.rs/SlGlasnikPortal/eli/rep/sgrs/vlada/strategija/2021/47/.*

64 Available at: *https://www.rodnaravnopravnost.gov.rs/index.php/sr/dokumenti/strategije-i-akcioni-planovi/nacionalna-strategija-za-rodnu-ravnopravnost-za-period-2021.*

65 *Official Gazette of RS,* Nos. 55/05 and 71/05.

66 *Official Gazette of RS,* No. 33/06 and 13/2016.

67 *Official Gazette of RS,* No. 36/09, 32/2013 and 14/2022.

68 *Official Gazette of RS,* No. 34/03.

69 CRPD Committee on the Rights of Persons with Disabilities, *Consideration of reports submitted by States parties under article 35 of the Convention – Initial reports of States parties due in 2011 – Serbia* (2011), 14.

document addresses the gender issue of persons with disabilities and status of women with disabilities as doubly deprived group. The Strategy has set up a special goal related to development and provision of equal opportunities for women with disabilities for equal and active participation in the life of the community, and within the framework of this goal and it has prescribed several measures[70]. The document recognizes that "women with disabilities are at risk of multiple discrimination, are invisible in the public sphere, do not participate sufficiently in public and political life, face difficulties in exercising their rights and are exposed to gender-based violence".

1. Mobility of women with disabilities in Serbia

The fifth objective of Strategy is to ensure access for people with disabilities to have built environment, transportation, information and communications and public-oriented services. The question of movement for women with disabilities is of particular interest in Serbia, since researches show that women in general, and women with disabled in particular, are less mobile than men.[71] Women rely less on private cars than men and more on public transport and walking.[72] Men drive a car on 40% of their trips, while women only drive on 16% of their trips. Furthermore, women are more often passengers than drivers of private cars: 16% of the women's trips are made as passengers in a car, in contrast to 6% of the men's car passenger trips. In women's overall mobility walking has higher share than among men's (39% vs. 32%), as well as public transport (23% vs. 14%).[73] Also, women are more prone to intermodal mobility behaviour that is, combining two or more transport modalities in one trip. Since women use intermodal transport means more frequently, they are also more exposed to stress that comes with it.[74] Gender differences in accessibility are the most prominent in relation to cultural and recreational activities as much more women than men reported that they give up of those activities due to the inaccessible transport.[75] There are no relevant data regarding specially women with disabilities in transport, but it can be expected that problems women face in that field are just aggravated in the case of disability.

The Law on Road Traffic Safety[76] prescribes rules that provide access for persons with disabilities, on equal terms with others. Road traffic should include installation of equipment for blind and visually impaired persons, which

70 For example: raising public awareness of the problem of violence and abuse of persons with disabilities, especially women with disabilities, in the family, partnership, institutional and non-institutional context and improving their information about protection mechanisms against all forms of violence and abuse, improving the conditions for women with disabilities to marry, establish extramarital unions, as well as ensure the conditions for women with disabilities to freely make decisions about having children.

71 Centar za samostalni život invalida Srbije, *Prepreke za jednakost – dvostruka diskriminacija žena sa invaliditetom* (2004), 16.

72 Dornier Consulting International, *Gender Equality in Transport in Serbia* (2019), 16-17.

73 *Ibid.*

74 *Ibid.*

75 *Ibid.*, 25.

76 *Official Gazette of RS,* Nos. 41/2009 and 53/2010.

shall serve to mark the space in public transportation and pedestrian areas, entrances to facilities, to enable movement in buildings for public use, as well as installation of special signaling devices which shall ensure undisturbed and oriented movement of blind and visually impaired persons. Equipment used for marking roads for the movement of the blind and visually impaired is the following: tactile strips with clearly marked path ends, tactile pedestrian push-buttons on traffic-light poles, audible signals for guiding, audible crossing signals and other technical means of similar purpose. Apart from the equipment enabling movement of the blind and visually impaired, additional aids may be installed like handrails, tactile guidance and other similar tools that will enable blind and visually impaired persons to move and orient themselves better and more easily in public areas or in public facilities.[77]

Amendments to the Law on Spatial Planning and Construction (LSPC)[78] which were initiated in April 2006, prescribe an obligation for investors to adhere to the standards of accessibility in construction of new facilities. A fine is prescribed for offenders. LSPC prescribes that public and business facilities, residential and combined residential and office buildings with 10 or more apartments must be designed and constructed in the manner that persons with disabilities, children and elderly persons can freely access, move, stay and work in them.[79] Approving implementation of these works is issued by the authority competent for granting the building permit and a request for initiating offence proceedings is submitted by the competent planning inspector. The Rulebook[80] further develops planning and technical conditions (for planning of public transportation and pedestrian areas, entrances to facilities and design of buildings: residential, facilities for public use...), and special devices within those buildings, which shall enable free movement of children, elderly, physically challenged and persons with disabilities.

On the legislation level, Serbia and Belgrade are in line with EU standards regarding women and people with disabilities, but implementation of these measures is yet to be done. The inaccessibility of public facilities is still pronounced despite numerous but unsystematic interventions, especially in those facilities in which various rights are exercised: centers for social work, local self-government units, post offices, police administrations, the units of Republic Pension Fund. Data from the Report on the accessibility of business buildings of state bodies to persons with disabilities[81] show that out of 23 state facilities in which accessibility was checked, only three buildings fully met accessibility standards. The accessibility map, which can be found on the website of the Protector of Citizens,[82] contains indications of the accessibility of various facilities throughout the Republic of Serbia. However, this map contains a

77 Arts. 100 to 102 of the Rulebook on Traffic Signalization, *Official Gazette of RS,* No. 26/2010.

78 *Official Gazette of RS,* No. 72/2009.

79 Art. 5 of the Law on Spatial Planning and Construction.

80 Rulebook on conditions for planning and design of facilities related to free movement of children, elderly, physically challenged and persons with disabilities.

81 Commissioner for the Protection of Equality – Report No. 021-01-22 / 2013-03.

82 Available at: *http://mapapristupačnosti.rs/*.

relatively small amount of information and it needs to be supplemented and constantly updated, in order to have more relevant data in this area.

The physical accessibility of the facilities where the professional services of the centers for social work in the local self-government units are located is still not adequate. Data from 2018 show that out of 170 surveyed centers for social work, 72 have (fixed or mobile) ramps, handrails have 94 centers, accessible ground floor has 118, elevator (if the building has more floors) has 156, while accessible toilet has 97 centers.[83] Also, safe houses are generally not fully accessible to women with disabilities,[84] which is an obstacle in providing protection from violence. The Commissioner for the Protection of Equality receives the highest number of complaints for discrimination against people with disabilities, mostly related to physical barriers preventing the use of services or facilities. According to the survey of civil society perception in the Western Balkans, only 6% of respondents (compared to 5% of the average for the Western Balkans) agree with the statement that "Administrative service provision is adapted to the needs of vulnerable groups".[85]

When observing the accessibility of roads and public areas, the existence of various obstacles such as potholes, open manholes, improperly placed urban furniture, high curbs, lack of tactile tapes and traffic lights, etc., prevents the smooth movement of people with disabilities. The issue of accessibility of transport remains open, because in practice, public transport is in most cases inaccessible and only in Belgrade there is the so-called specialized public transport for persons with disabilities, whose capacities are not sufficient to meet the needs of all potential users.[86]

2. Housing for women with disabilities in Serbia

Housing for women with disabilities is a special problem and directly affects their isolation and the extent of their social inclusion.[87] Adaptations of the place of residence of persons and women with disabilities are not systematically resolved, and persons with disabilities are forced to manage on their own to provide financial resources for adaptations, as well as to fulfill very complicated procedures for obtaining the necessary consent. In addition, work environments, including those in the business sector, are also largely inaccessible in physical terms, which further complicates the exercise of rights to free and equal access to employment by people with disabilities.

The Law on housing and maintenance of residential buildings[88] (which repealed the Law on Public Housing[89]) governs the conditions for sustainable

83 Letter from the Republic Institute for Social Protection of October 2019.

84 Commissioner for the Protection of Citizens – Ombudsman, *Report of the Commissioner for the Protection of Citizens – Ombudsman for 2018*, Novi Sad, 2019.

85 OECD, *op. cit.,* 47.

86 GSP Belgrade, *Transport of persons with disabilities*, *http://gsp.rs/specijalni_prevoz.aspx.*

87 Centar za samostalni život invalida Srbije, *op. cit.,* 14-17.

88 *Official Gazette of RS*, Nos. 104/2016 and 9/2020.

89 *Official Gazette of RS*, No. 72/2009.

development of public housing and the method of provision and use of funds for development of public housing, as well as other issues of importance for public housing. The funds for public housing shall be used to incite various forms of provision of flats for public housing of persons with disabilities, as well as of civilians disabled during war. The right to resolve housing needs in accordance with this Law shall be held by persons with no flats, and persons without flats of adequate standard, respectively, who cannot provide a flat at the market prices with the earnings they make. Disability is one of the basic criteria for establishment of priority list for settlement of housing needs of persons who accomplish the right to resolution of housing needs.

VI CONCLUSION

The notion of social sustainability means full integration of residents of all characteristics, i.e. availability of necessary resources for exercising basic social, civil and economic rights in scope and quality that is adequate to the achieved level of development and standard of living in a given social environment (city). These social characteristics and processes when achieved contribute to the long-term and harmonious functioning of the city system. The best indication of the city's social sustainability is the position of vulnerable groups, such as women with disabilities. In this paper, difficulties which women face in their everyday life regarding personal safety in the cities and difficulties in their movement across cities are analyzed. People with disabilities which also face numerous limits in moving across cities is another disadvantaged group which was analyzed. The conclusion is that women with disabilities face problems of both disadvantaged groups and therefore living in today's cities for them is very challenging. Yet, there is no data, formal and nonformal initiatives or any kind of institutional support for women with disabilities in Serbia. This vulnerable group discriminated on two grounds is practically invisible in Serbia, without any recognition (local, institutional, political or academic) about there needs in Serbian cities.

The legislative responses to these problems exist, as a first step toward making cities more socially sustainable, on EU level and in Serbia. In Serbia, two key strategies for improving status of women in Serbia are: Strategy for Preventing and Combating Gender-Based Violence and Domestic Violence for 2021 – 2025 and a new national Strategy for Gender Equality. Also, there is Strategy for the Improvement of the Position of Persons with Disabilities in the Republic of Serbia for the period from 2020 to 2024 which is key document for improving status of people with disabilities. In all tree strategies for Serbia, there is recognition that women with disabilities are in great need for improving their status and in high risk of discrimination, poverty and social inclusion. The normative prescriptions in Serbia concerning women with disabilities are in line with those at the EU level. However, the legislation is just the first step, which is insufficient for itself. In respect of implementation of these measures in Serbia, there is still plenty of room for improvement.

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PRISTUPAČNOST GRADOVA ŽENAMA SA INVALIDITETOM IZ PERSPEKTIVE SOCIJALNE ODRŽIVOSTI: SLUČAJ SRBIJE

Apstrakt

Pojam socijalne održivosti pretpostavlja punu integraciju svih stanovnika jednog podnevlja, bez obzira na njihove pojedinačne karakteristike. Ovaj rad ispituje interakciju pola i invaliditeta u odnosu na socijalnu održivost gradova. Prvi deo rada govori o „rodnosti" gradova, sa akcentom na bezbednost žena i njihovu mogućnost kretanja u gradovima. U drugom delu, analizira se položaj još jedne ugrožene grupe: osoba sa invaliditetom, koje se takođe suočavaju sa brojnim preprekama za bezbedno i slobodno kretanje u gradovima. Poslednji deo rada ispituje zakonodavni odgovor na ove teškoće u EU i Srbiji. Zaključak je da se žene sa invaliditetom suočavaju sa problemima obe grupe u nepovoljnom položaju, što za njih čini život u današnjim gradovima veoma izazovnim. Zakonodavni odgovor koji postoji i u EU i u Srbiji samo je prvi, ali nedovoljan korak ka postizanju socijalne održivosti gradova za žene sa invaliditetom.

Ključne reči: *Socijalna održivost; Grad; Žene; Invaliditet; Žene sa invaliditetom.*

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COMMUNICATION WITH PEOPLE WITH DISABILITIES

Abstract

Through verbal, non-verbal, written and electronic communication, people convey different messages that contain attitudes about interlocutors or whole groups of people. When these attitudes are based on wrong beliefs they represent prejudices or stereotypes depending on their (in) variability. Why is communication with people with disabilities such an important segment of their integration into society? Proper communication can help eliminate prejudices against people with disabilities and improve social awareness of their potential. Furthermore, respecting the unwritten simple rules of communication, we can make it more successful, and the people with different types of disabilities, as well as their interlocutors, will feel more satisfied.

The subject of this paper are these short and simple rules of communication with people with disabilities. They will guide readers through everyday simple situations. Indeed, communication with people with disabilities is usually simple, if the most important rule is followed – that the person with a disability is always in the center of communication, and not his personal assistant. Many of the rules set out in the paper may seem simple to readers. Their power is not in legal obligation, but in simplicity and efficiency. Through various everyday situations, described in the paper (handling, traffic, conversation, etc.), it will become quite clear that it does not take much to successfully communicate with people with disabilities. This truth is the main guiding idea of the author and at the same time the most important aim of the paper.

Key words: *People with disabilities; Communication; Social integration.*

I INTRODUCTION

Communication is the precondition of the progress of any society. It is a significant indicator of happiness in each society.[1] Through verbal, non-verbal, written, electronic communication, people convey different messages. They also contain attitudes about interlocutors, and even whole groups of people. These attitudes can be based on wrong beliefs and then they represent prejudices or stereotypes depending on their (in) variability.

1 Filip Mirić, 'Kvalitet života osoba sa invaliditetom u Srbiji', *Socijalna misao*, No. 2, 2014, 48.

Why is communication with people with disabilities such an important segment of their integration into society? Proper communication can help eliminate prejudices against people with disabilities and improve social awareness of their potential. And much more than that – respecting the unwritten simple rules of communication, we can make it more successful, and the people with different types of disabilities, as well as their interlocutors, will feel more satisfied. Abuse of language of disability will be also discussed in this paper.

The subject of this paper is these short and simple rules of communication with people with disabilities. It will guide readers through everyday simple situations. Indeed, communication with people with disabilities is usually simple, if the most important rule is followed – that the person with a disability is always in the center of communication, and not his personal assistant. Many of the rules set out in the paper may seem simple to readers. Their power is not in legal obligation, but in simplicity and efficiency. Through various everyday situations, described in the paper (handling, traffic, conversation, etc.), it will become quite clear that it does not take much to successfully communicate with people with disabilities. This truth is the main guiding idea of the author and at the same time the most important aim of the paper.

In the part og paper *Labeling of people with disabilities* some terminological and linguistic issues is discussed. Each of possible term for labeling people with disabilities requires special attention and explanation, so each of them will be briefly analyzed in the continuation of the paper, because their use is a central issue when it comes to the language of disability. Short, basic rules of communication with people with disabilities will be presented in this part of paper, through simply every day situation is a subject of next paper. . To emphasize their importance this rules will be presentend in short imperative sentences. Special part of paper is dedicated to rules of communication with people with psycho-social (mental) disability. Thus short, informal is very important due to people with psycho-social disabilities have many difficulties to comunicate with other people.

In part *Abuse of language of disability,* the results of empiric research about language of disability as a factor of discrimination of people with disabilities is discussed in short. According to our knowledge, there is a lack of data in the professional and scientific literature on people's attitudes about the language of disability and its impact on discrimination a person with a disability. Because misuse of language can encourage discrimination, it is important to examine people's attitudes on this issue.

Finally, in *Conclusion* basic findings presented in this paper are mantion. Comunication with people with disabilities are complex isue and should be explored by professional and scientiest of various scienties (linguistcs, law, psychology, criminology etc).

II LABELING OF PEOPLE WITH DISABILITIES

Persons with disabilities are a diverse group, who have different impairments and varied identities (for example, as women, indigenous persons, young adults, or children). The rights of persons with disabilities have been largely disregarded and they confront social and environmental barriers as a result. The exclusion and marginalization persons with disabilities frequently experience can be further compounded because of discrimination due to their gender identity, age, ethnicity, race, sexual orientation, origin, location, legal status, or on other grounds. Communication is important aspect of quality of everyday life of people with disabilities.[2] Because of that international movement of people with disabilities insisted to adoption an international legal obligatory document.[3] Convention on the rights of people with disabilities has been adopted by General Assembly of UN in 2006. According the UN Convention on the rights of people with disabilities "communication" includes languages, display of text, Braille, tactile communication, large print, accessible multimedia as well as written, audio, plain-language, human-reader and augmentative and alternative modes, means and formats of communication, including accessible information and communication technology".[4]

The way that a certain category of people is labeled is usually not just a linguistic question, rather reflects the overall attitude of society towards them. When it comes to the labeling of persons with disabilities, ie the language of disability, the situation is quite the same. In many modern societies, efforts are noticeable in finding the most appropriate term for designating persons with disabilities.[5] . This term should be clear enough on the one hand, and at the same time it should not lead to stigmatization and discrimination of those to whom it refers.

Each of these expressions requires special attention and explanation, so each of them will be briefly analyzed in the continuation of the paper, because their use is a central issue when it comes to the language of disability. Although a broad social consensus has not been reached on which term is most appropriate to refer to persons with disabilities, the following terms are most commonly used today:

1. The term "invalid" (lat. *Invalidus* – incapable of service, invalid) today has a pejorative meaning, having in mind its etymological meaning according to which persons with varying degrees of impairment are marked as incapable, ie invalid.

2 Disability-Inclusive Communications Guidelines*, https://www.un.org/sites/un2.un.org/files/un_disability-inclusive_communication_guidelines.pdf*.

3 Damjan Tatić, *Uvod u Međunarodnu konvenciju o pravima osoba sa invaliditetom* (2006).

4 Convention on the rights of people with disabilities, *https://treaties.un.org/doc/Publication/CTC/Ch_IV_15.pdf*.

5 See more: Jasmina Petrović, 'Jezik invalidnosti i dominantni teorijski okviri proučavanja kao indikator socijalnog položaja osoba sa invaliditetom', *Zbornik radova Filozofskog fakulteta*, 2006, Vol. 36, 259-270.

2. After this term, which is considered incorrect, the word "handicap / handicapped" comes into use in the same language area, which means hindrance, aggravation, and the derived term means hindered, hindered, developmentally hindered. The much broader meaning of the term produced negative associations when it referred to the persons with disabilities.[6] The negative associations that the use of this term produces are further emphasized by its etymological meaning. Namely, according to Oxford's dictionary of modern English, the word handicapped can also have a negative, disturbing meaning because it means a permanent condition that prevents someone from using their mind or part of the body.[7]
3. The term "person with disabilities" comes from the attitude that disability does not refer to the whole person, which is contained in the word disabled, but refers to one of its characteristics, ie. on a part of identity. This term originated in the United States; it is consistently used in the Americans with Disabilities Act, the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities, the International Convention on the Rights of Persons with Disabilities, and adopted by many states. According to the Convention, the term person with a disability includes persons with long-term physical, mental, intellectual or sensory impairments which, in cooperation with various barriers, may hinder the full and effective participation of these persons in society on the basis of equality with others.[8]
4. Of all these terms, the term "person with special needs" has the most negative meaning. This is because special needs really don't exist. The fact that a person satisfies his daily needs in a different way than others does not in any way indicate their "uniqueness". Therefore, in the opinion of the author, the use of this term should be avoided as well.
5. In the linguistic literature, there are opinions that it is best to describe people with disabilities descriptively. Also, there is a proposal to use the term "disabled person" instead of the term "person with a disability", which is often.[9] Although the term "person with a disability" is in official use in almost all legal documents of national and international character, this proposal should not be rejected in advance because it can make a significant contribution to resolving numerous terminological dilemmas that accompany the use of disability language because it emphasizes the social conditionality of

6 Petrović, *op. cit.,* 261.

7 Hornby, A. S. Oxford Advanced Learner' s Dictionary' (2000), 583.

8 Milica Mima Ružičić-Novković, *Predstavljanje osoba sa invaliditetom u medijskom diskursu Srbije* (2000), 10.

9 Ružičić-Novković, *op. cit*., 82.

disability. In resolving terminological issues related to the designation of persons with disabilities, a broader social consensus should be reached, bearing in mind the importance of this issue for the overall social position of this category of population.[10] Finding a correct labeling of people in disabilities is continous process because their social status are not always easy to estimate.

III ELEMENTARY RULES OF COMMUNICATION WITH PEOPLE WITH DISABILITIES

It is very important to know that some types of physical disability can cause speech problems. Speech and language therapy can help alleviate the negative affects a physical disability is having over speech production. This will be done by assessing a patient to discover where the problem is, and providing appropriate intervention for this problem. This may include new techniques for breathing, or strengthening exercises for the particular muscle groups involved in the production of speech and also swallowing.

There may be certain methods which require a new way of producing speech such as Augmentative and Alternative Communication (AAC) systems. AAC can include electrical devices used to initiate speech when someone does not have the capacity to produce natural speech. Training and demonstration would be integrated into the therapy, if such techniques were used.[11] AAC technology has significant importance for people with disabilities and their everyday living. For these reasons Facilitated Communication (FC) regardless of label or style, is not a form of AAC. Ideal communication outcomes often are difficult to attain with valid AAC systems and are unlikely to match the miraculous outcomes of FC. However, empirically supported AAC systems are consistent with values of independence and dignity for people with disabilities. We urge experts, professionals, consumers, and advocacy organizations to quell this resurgence by advancing disability rights and education agendas that value authentic self-expression via empirically validated AAC.[12] The main problem of implementation (AAC) are significant material resources, which are inherent in economically highly developed countries and are a major constraint for its successful implementation. Future exploration and explanation are crucial for development of AAC technologies. Future research is obviously required to test the validity and clinical viability of this conceptualization within the AAC field. As data emerge from such empirically based research, the definition will need to be

10 Mirić, F., 'Jezik invalidnosti kao faktor diskriminacije osoba sa invaliditetom', *Temida*, Vol. 18, No. 1, 2015, 116-118.

11 Physical disabilities, *https://www.slt.co.uk/conditions/physical-disabilities/*.

12 Jason C. Travers, Matt Tincani and Rusell Lang, 'Facilitated communication denies people with disabilities their voice', *Research and practice for persons with severe disabilities*, Vol. 39, No. 3, 2014, 200.

refined and modified. As the definition is refined, research will be required to operationally define the variables related to communicative competence. The development of valid and psychometrically sound measures will assist the interdisciplinary team in assessing the communicative competence of individuals using AAC systems and in developing appropriate intervention programs. Research will also be required to evaluate the effectiveness of these intervention programs in the development of communicative competence by clients.[13]

There is a lack of scientific papers in a field of communication with people eith disabilities. Nevertheless, author tried to collect and present informal rules of communication.[14] Short, basic rules of communication with people with disabilities will be presented in this part of paper, through simply every day situation. To emphasize their importance this rules will be presentend in short imperative sentences. Considering that these rules are very important, and that they represent the main part of the discussion, they should be interpreted by the author. Rules are not enough because their implementation depends on our understanding, our interpretation that can be different from person to person.

1. Communication should be focused on a person, not on disability.

It is the basic rule of everyday communication. On this way we show respection of dignity of people with disabilities.

2. It is acceptable to handle even if a person has restricted movements or uses a prosthesis.

Handling is a typical way of everday communication regardless person has restricted movements or uses a prosthesis.

3. It is correct to use everyday phrases:"SEE YOU!" or "WE'RE RUNNING!"

Using of everyday phrases aren't irritable to everyone.

4. Always ask a person with a disability if they need help before giving it to them. Sometimes help is unnecessary or unwanted!

Unnecessary or unwanted help to people with disabilities can be very dangerous and harmful for people with disabilities.

5. Speech directly to a person with a disability, not to a personal assistant or professionals who helps him/her!

Speaking directly to person with disability is a very important way to show respect of their dignity.

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13 Light, J., 'Toward a definition of communicative competence for individuals using augmentative and alternative communication systems', *Augmentative and alternative communication*, Vol. 5, No. 2, 1989, 142.

14 For more details about communication with people with disabilities see: Dawn O. Braithwaite and Teresa L. Thompson, *Handbook of communication and people with disabilities: Research and application* (1999).

6. If the conversation lasts a long time, try to allow visual contact with the wheelchair users!

This rule is very important because visual contact is sagnificant part of everyday communication.

7. The wheelchair is a part of the personal space of the people who use them. You shouldn't conduct wheelchair without the express permission of its user!

It is very important to respect a personal space of wheelchair users. Otherwise, it can be very dangerous for people with disabilities and their security.In this situation, person shouldn't try to speak louder, but turn to the person and allow him/her to send the interlocutor's facial expressions. If it is posible use a sign language. Lack of people who know rules of Serbian Sign language is another big problem in communication with people with hearing impairment.

8. When some people with disabilities explain a wide range of things, keep in mind that some of them may have a problem with its assessment.

Some people with disabilities have problems with orientation. It is crucial to help them in every day situations.

9. Respect the driver with a disabilities! Don't use marked parking spaces for people with disabilities! Extended duration of „psychic second".

These simply three rules are regardling to people with disabilities in traffic. Inappropriate using of parking spaces can make position of people with disabilities in traffic more difficult. It is good to knoe that psychic second (time of driver's reaction) can be extended caused by some disabilities.

10. It is forbidden to play with guide dogs who are trained to help to people with disabilities because they are „at work (service)".

Giude dogs have important roles in every day of people with visual impairmants. Due to that playing with them can endanger security of people with visual disabilities.

11. It is necessary to constantly re-examine the attitudes towards disability in the course of their improvement! When meeting a person with a disability, children should not be discouraged from asking questions. It is crucially important to improve the position of people with disabilities in every aspect of social life. At this way children will learn how to respect diversity and other people regardles their physical and psycho-social status. By obeying this rule we show respectation of people with disabilities their dignity and needs. It can improve their position in society and improve social integration and relationships.

Some of informal rules presented in this chapter of the paper is well-known, but it is extremly important for improving a quality of living of people with disabilities to become a part of everyday communication among people.

IV COMMUNICATING WITH SOMEONE WHO HAS A GUIDE, HEARING OR ASSISTANCE DOG

When you meet a person with a guide, hearing or assistance dog, it's important to remember that the dog is working. Keep in mind that even though it may appear that the team is not performing a task at that moment, the dog is still on call and must give their full attention to the person they are accompanying. Here are a few tips:

1. Speaking directly to person with disability (not to her /his personal assistant) showss respectation on dignity and it is sign of good behaviour.
2. These rules consider ones about guide dog and the otther one is about person who use a guide dog. It is very important to keep in mind that the dog has a very important job to do; know that the dog loves to work and is well treated; remember that the dog is highly trained; teach others that the dog is working;Be aware that guide, hearing and assistance dogs are allowed in public places and on public passenger vehicles; do not talk to, call, or make sounds at the dog; do not touch the dog without asking—and receiving—permission; not to be offended if asked not to pat the dog; do not feed the dog; do not give commands to the dog—this is the owner's job.
3. Don't ask personal questions about the person's disability or intrude on their privacy. People with disabilities have right to privacy. Respectation of other's rights is a ground of well-being in society regardless of any characteristics. It is maybe, most important aspect of communication.
4. Don't be offended if the person declines to chat about the dog.[15] Person with disability has a right not to chat about the dog its habits and behaviour. It is also part of privacy of persons with disabilities

Simply rules mentioned in this part of paper can improve the way of communication with people with visual disabilities.

V COMMUNICATION WITH PEOPLE WITH PSYCHO-SOCIAL (MENTAL) DISABILITY

The nature of psycho-social disability is very specific. Sometimes it is very difficult to understand some behaviours of people with this kind of disability becase other members of society have lack of information about this kind of disability. In this part of paper we will present short informal rules for communication with person with psycho-social disability. This list is informative, not final. It is very important to know that improving social position of person with all kind of disabilities is constant process.

15 Rules of communication according to Queensland Government – Better Communication, *https://www.qld.gov.au/disability/community/communicating*.

1. Speak directly to person.

Use clear simple communications. Most people, whether or not they have a mental health disability, needs to feel appreciated . If someone is having difficulty processing sounds or information, as often occurs in psychiatric disorders, your message is more apt to be clearly understood. Speak directly to the person; do not speak through a companion or service provider.

2. Offer to Shake Hands.

When you are introducing, a use the same good manners in interacting with a person who has a psychiatric disability that you would use in meeting any other person. Shaking hands is a uniformly acceptable and recognized signal of friendliness in American culture. A lack of simple courtesy is unacceptable to most people, and tends to make everyone uncomfortable.

3. Make Eye Contact and Be Aware of Body Language Like others, people with mental illness sense your discomfort.

Look people in the eye when speaking to them. Maintain a relaxed posture. Visual contact with people can make communication easier and more effective.

4. Listen Attentively.

If a person has difficulty speaking, or speaks in a manner that is difficult for you to understand, listen carefully — then wait for them to finish speaking. If needed, clarify what they have said. Ask short questions that can be answered by a "yes" or a "no" or by nodding the head. Never pretend to understand. Reflect what you have heard, and let the person respond.

5. Treat Adults as Adults Always use common courtesy.

Do not assume familiarity by using the person's first name or by touching their shoulder or arm, unless you know the person well enough to do so. Do not patronize, condescend, or threaten. Do not make decisions for the person, or assume their preferences.

6. Do Not Give Unsolicited Advice or Assistance.

If you offer any kind of assistance, wait until the offer is accepted. Then listen to the person's response and/or ask for suggestions or instructions. Do not panic or summon an ambulance or the police if a person appears to be experiencing a mental health crisis. Calmly ask the person how you can help.

7. Do Not Blame the Person.

A person who has a mental illness has a complex, biomedical condition that is sometimes difficult to control, even with proper treatment. A person who is experiencing a mental illness cannot "just shape up" or "pull himself up by the bootstraps." It is rule, insensitive, and ineffective to tell or expect the person to do so.

8. Question the Accuracy of the Media Stereotypes of Mental Illness.

The movies and the media have sensationalized mental illness. In reality, despite the overabundance of "psychotic killers" portrayed in movies and television. It is results of many prejudices and stereotipes againts people with this type of disability.

9. Relax!

The most important thing to remember in interacting with people who have mental health disabilities is to be yourself. Do not be embarrassed if you happen to use common expressions that seem to relate to a mental health disability, such as "I'm crazy about him" ask the person how he feels about what you have said. Chances are, you get a flippant remark and a laugh in answer.

10. See the PERSON.

Beneath all the symptoms and behaviors someone with a mental illness may exhibit is a person who has many of the same wants, needs, dreams and desires as anyone else. Don't avoid people with mental health disabilities. If you are fearful or uncomfortable, learn more about mental illness. Kindness, courtesy, and patience usually smooth interactions with all kinds of people, including people who have a mental health disability. This is the Last and Greatest Commandment: Treat people with mental health disabilities as you would wish to be treated yourself.[16]

At the end, we can conclude that these short rules can be easily implemented in order to improve every day life of people with disabilities.

VI THE ABUSE OF LANGUAGE OF DISABILITY

The abuse of language of disability can be a significant factor of discrimination of people with disability. In qualitiy empirical research about language of disability as a factor of discrimination, implemented in digital enviroment in 2015 (Mirić, 2015) took a part 20 respondents. For the purposes of this a survey was conducted on the attitudes of Facebook users on the language of disability and discrimination against people with disabilities inadequate terms. The main goal of the research was to determine to what extent Facebook users recognize language as a means of discrimination and notice the connection between language and the process of victimization of people with disabilities, when it comes to the crime of violation of equality. Assumption that was checked by research related to the fact that users of social networks recognize discrimination against persons with disabilities through language and recognize it as a criminal and socially dangerous act. An online survey was used as a research technique. Surveying respondents was conducted with an appropriate questionnaire. The questionnaire consisted of 13 questions. The questions were structured in such a way that eight questions had to be answered by choice one of the offered answers, and to five questions by entering the answers in free form. Respondents were first asked to state their gender, age, education and type of disability (if the respondent is a person with a disability), after which the respondents answered questions related to the subject of the research. The questions were formulated and structured in such a way that the respondents were on their own.

16 Rules of communication according to The ten commandments of interacting with people with mental health disabilities, *https://www.courts.ca.gov/partners/documents/5-Tips.pdf*.

The answers expressed views on the position of persons with disabilities in society, mislabeling of persons with disabilities as a significant part of the language of disability, its criminality and social danger, and the impact on the process of victimization of persons with disabilities. Also, the respondents presented certain proposals for improving the social position of persons with disabilities. Questionnaire was publicly available on the social network Facebook (on several online groups that bring together people with disabilities), so it was not possible to predict in advance what the sample would be. The questionnaire, as a tool for data collection, was primarily intended for users of the social network Facebook with disabilities, but was also available to other users (from 18 January to 31 January 2015), and participation in the survey was voluntary and anonymous. She had anonymity aims to contribute to the objectivity of the research itself and eliminate the possibility of giving socially desirable answers, which is very important given that the language of disability greatly affects the quality of life of people with disabilities.

A total of 20 Facebook users participated in the survey. Sixteen respondents stated that they have some form of disability. This research was qualitive. Numerous data presented in it can illustrate structure of respondents and their socio-demographic characteristics. Most of the respondents have some form of physical disability (13), sensory (2), one respondent did not want to declare the type of their disability, while four respondents do not have a disability. There were no persons with mental disabilities among the respondents. In terms of the gender structure of the respondents, males predominate (11). In terms of age structure, the largest number of respondents (13) belongs to the age group 36-49 years, five belong to the age group 18-35 years, while one respondent belongs to the age group 50-60 years and over 60 years of age. As for the level of education, the largest number of respondents completed high school (11), followed by college (6), master's studies (1), primary education (1), while one respondent earned the scientific title of PhD.[17] In *Conclussion* all findings are summarized and analyzed. At this way we tried to present complex phenomenon of communication with people with various types of disabilities.

Majority of respodents believe that the use of inadequate terms can make it easier for a person with a disability to become a victim of crime. Most of used terms are a reflection of the view that people with disabilities are less valuable (remember the still present term special needs"). It is also troublesome that some respondents do not have an opinion on this issue, and 6 believe that the use of inadequate language does not affect the victimization of persons with disabilities. Although the majority of respondents recognize the social danger and criminality of inadequate use of language resources when it comes to labelling persons with disabilities, so, not a few respondes are of the opinion not consider the use of inadequate terms a criminal offense. These results are a kind of alarm for criminologists, victimologists, but also

17 Results of this empirical research were previously published in Mirić, F. 'Jezik invalidnosti kao faktor diskriminacije osoba sa invaliditetom', *Temida*, Vol. 18, No. 1, 2015, 120-121.

scientists of other specialties and the wider community to pay more attention to raising public awareness of the need to create a non-discriminatory environment.[18] This problem should be studied and explored in some other researches in the future, based on wide sample of respondents.

Finally, it can be concluded that abuse of language of disability can be a specific form of psychological violence against people with disabilities because it can victimize them. Labelling of some group of people in society is never just lingustic issue.

VII CONCLUSION

Communication is the precondition of the progress of any society. In the process of seeking an adequate response to social phenomena, it is crucial that citizens are fully aware of and informed about its manifestations in order to recognize it.[19] Through verbal, non-verbal, written, electronic communication, people convey different messages. They also contain attitudes about interlocutors, and even whole groups of people. These attitudes can be based on wrong beliefs and then they represent prejudices or stereotypes depending on their (in) variability.

Why is communication with people with disabilities such an important segment of their integration into society? Proper communication can help eliminate prejudices against people with disabilities and improve social awareness of their potential. And much more than that – respecting the unwritten simple rules of communication, we can make it more successful, and the people with different types of disabilities, as well as their interlocutors, will feel more satisfied.

In this paper we try to show how short and simple nin-scribed rules of communication can positively influence on every day lives of people with disabilities. It is important to know that there is no specific codex of communication with people with disabilities, The source if strenght of these rule is in their usefulness, not in legal obligatory. All aspects of living cannot be proscribed by legal norms. Human has an innate need to respect the dignity of other people. Then, when we understand the necessity of respecting the equality and dignity of persons with disabilities, we can consider that we are on the path of inclusion and the creation of a society of equal opportunities for each member.

Finally, it can be concluded that people with disabilities have many problems in everyday communication caused by prejudices and stereotipes. Short and simply informal rules of communication gan sagnifically improved their communication can eliminate thise problems. Also, it is important to mention that language on disability can be a factor of discrimination of people

18 Mirić, *op. cit.,* 122-123.

19 Filip Mirić, 'Awareness of persons with disabilities of criminal justice protection against discrimination in the former SFRY countries', *Teme*, Vol. 43, No. 4, 2019, 1106.

with disabilities. Results of qualitive empirical research presented in this paper shown that respodents have noticed fact that violation of equality is a crime and can be commited by using inapropriate terms to label people with disabilities in intacion of discrimination. Communication with people with disabilities should be subject of more muldidisviplinary scientific researches in future.

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***, Queensland Government – Better Communication, *https://www.qld.gov.au/disability/community/communicating.*

***, The ten commandments of interacting with people with mental health disabilities, *https://www.courts.ca.gov/partners/documents/5-Tips.pdf*.

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KOMUNIKACIJA SA OSOBAMA SA INVALIDITETOM

Apstrakt

Komunikacija je preduslov napretka svakog društva. Putem verbalne, neverbalne, pisane, elektronske komunikacije ljudi prenose različite poruke. One u sebi sadrže i stavove o sagovornicima, pa i čitavim grupama ljudi. Ti stavovi mogu biti zasnovani na pogrešnim uverenjima i tada oni predstavljaju predrasude ili stereotipe u zavisnosti od njihove (ne)promenljivosti.

Zašto je komunikacija sa osobama sa invaliditetom toliko važan segment njihove integracije u društvo? Ispravna komunikacija može doprineti uklanjanju predrasuda prema osobama sa invaliditetom i unaprediti društvenu svest o njihovim potencijalima. I mnogo više od toga – poštujući nepisana jednostavna pravila komunikacije, možemo učiniti da se ona odvija nesmetano, a same osobe sa različitim vrstama invaliditeta, kao i njihovi sagovornici, će se osećati zadovoljnije.

Predmet rada su ta kratka i jednostavna pravila komunikacije sa osobama sa invaliditetom. Ona će čitaoce provesti kroz naizgled jednostavne situacije. I, zaista, komunikacija sa osobama sa invaliditetom je najčešće jednostavna, ako se poštuje najvažnije pravilo – da je uvek u centru komunikacije sama osoba sa invaliditetom, a ne njen personalni asistent. Mnoga od pravila iznetih u radu će se čitaocima možda učiniti jednostavnim. Njihova moć nije u pravnoj obaveznosti, već upravo u jednostavnosti i delotvornosti. Kroz različite svakodnevne situacije, opisane u radu (rukovanje, saobraćaj, razgovor itd), postaće sasvim jasno da za uspešnu komunikaciju sa osobama sa invaliditetom nije potrebno mnogo. Ova istina je i glavna autorova ideja vodilja i ujedno najvažniji cilj rada.

Ključne reči: *Osobe sa invaliditetom; Komunikacija; Socijalna integracija.*

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THE ROLE OF MEDIA IN THE SPHERE OF DISCRIMINATION OF WOMEN AND GIRLS WITH DISABILITIES – THE PATH TOWARDS VISIBILITY OR THE SEAL OF NON-EXISTENCE?

Abstract

Persons with disabilities are faced with discrimination in different spheres of life. Despite the efforts on both national and international levels, in certain parts of the world, persons with disabilities are deprived of basic rights that should be granted to each and every person.

When discussing the position of persons with disabilities in society, the aspect of gender plays a significant role. Specifically, women with disabilities are known to suffer discrimination on a multiple level, which only increases the disadvantages they are encountered with and the severity of discriminatory acts. Such multi-level discrimination has its foundation in two main forms – discrimination on the grounds of gender, i.e., because person with disability is a woman, and discrimination on the grounds of disability itself. Naturally, depending on different life circumstances, other levels of discrimination may coexist with the ones stated, the most common embodied through discrimination on the grounds of age.

Media plays an important role in designing of today's society. It has a strong influence in the process of creation of ideas, opinions and public determination of what is acceptable and what is not. Being visible in the media became the synonym for the overall visibility. However, it seems like this spotlight sheds the light upon anyone but marginalized groups, that are slowly fading away.

In this paper, the author analyses the role of the media in discrimination of women and girls with disabilities from both Serbian and international perspective. The media portrayal of women with disabilities will be shown, focusing on the (lack of) space left for their presence and their voice. Finally, the author will touch on the topic of the possibilities for change and the benefits arising from it.

Key words: *Media; Discrimination; Women; Girls; Visibility.*

I DISCRIMINATION OF WOMEN AND GIRLS WITH DISABILITIES

1. The notion of intersectional discrimination of women and girls with disabilities

A discussion on the issue of discrimination of women and girls with disabilities cannot commence without distinguishing the main elements out of

which this type of discrimination is consisted. Specifically, the forerunners of such discrimination can be recognized in the gender inequality and discrimination of persons with disabilities.[1]

Despite being used in such a neutral manner, which gives the impression that both genders experience inequality, the term *gender inequality*, typically refers to disadvantages faced by women in comparison to men.[2] The inequalities may have different forms and can be encountered in different fields of life. For instance, women still receive lower amount of salary for the same or comparable work, their access to education and healthcare system is limited in certain parts of the world, and generally – the role of women in society is strongly related to household activities and childcare.[3]

On the other hand, marginalized groups have always been prone to discrimination. Even though the notion of equality represents the base of human rights and the core value in creation of the world towards which should be strived, the physical abilities have always played a considerable role in creation of the social reality.[4] Consequently, in such a world where physical disadvantages imply social inequalities, persons with disabilities are condemned to suffer discrimination, and in that regard, they have come a long and difficult way throughout history – from complete invisibility and disenfranchisement to certain forms of appreciation.[5]

However, persons with disabilities cannot be viewed as a homogenous group to which the same social consequences are attached. On the contrary, they represent a very heterogeneous population structure, and their particularities are those that affect the level and intensity of discrimination.[6]

Within this diverse group, woman and girls with disabilities can be identified as especially vulnerable group, which suffers at least two-folded dis-

1 Dunja Mijatović, Addressing the invisibility of women and girls with disabilities, *https://www.coe.int/en/web/commissioner/-/addressing-the-invisibility-of-women-and-girls-with-disabilities*.

2 Cailin S. Stamarski and Leanne S. Son Hing, "Gender inequalities in the workplace: the effects of organizational structures, processes, practices, and decision makers' sexism", *Frontiers in Psychology,* September 2015, 2. One of the examples of gender inequality towards men can usually be seen in the fact that in most countries, the men are those who are forced to serve in the armed forces and who are sent into direct combat. However, it can also be argued that this same situation represents inequality towards women. See more: João Reis and Sofa Menezes, "Gender Inequalities in the Military Service: A Systematic Literature Review", *Sexuality & Culture*, Vol. 24, No. 3, October 2019, 1004.

3 Javier Cerrato and Eva Cifre, "Gender Inequality in Household Chores and Work-Family Conflict", *Frontiers in Psychology*, Vol. 9, August 2018, 2–3; World Health Organization, Disability and health – barriers to healthcare, *https://www.who.int/news-room/fact-sheets/detail/disability-and-health*.

4 Sanja Grbić, Dejan Bodul and Vanja Smokvina, 'Diskriminacija osoba s invaliditetom i njihova uključenost u društvo s naglaskom na pravo pristupa sudu', *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, Vol. 33, No. 2, 668.

5 *Ibid.*

6 Ivana Brstilo and Elizabeta Haničar, "Trostruka diskriminacija žena sa invaliditetom na tržištu rada", *Hrvatska revija za rehabilitacijska istraživanja*, Vol. 47, No. 1, 2011, 87, 94.

crimination.[7] Namely, apart from gender-based discrimination, the women and girls with disabilities also suffer discrimination on the basis of their physical incapacity.[8] This is, however, only a starting point for discussion about discrimination against this vulnerable group, since most of women can suffer even deeper, more subtle discrimination forms. That being said, if we take into consideration the economic sphere of life, it can be said that financial dependence and discrimination on the labour market are also relevant.[9] On the other hand, in certain undeveloped parts of the world, where the access to education and healthcare system is limited, women and girls with disabilities can be encountered with early pregnancy and infectious diseases such as HIV/AIDS, and further suffer discrimination on those grounds.[10] In both mentioned cases, we talk about triple discrimination taking place.

Finally, ableism[11] is regularly followed by other common forms of discrimination based on race, ethnicity, caste, religion and migration status among other factors.[12] In addition, ageism – as a final and inevitable discrimination form, particularly affects marginalized groups, as the women and girls with disabilities are, since they are systematically overlooked and underrepresented in development of policies, initiatives, programs, legislations and other humanitarian efforts.[13]

Therefore, women and girls with disabilities are subject to intersectional discrimination, meaning that discrimination against them is not simply based on some common element inherent to a homogeneous group, but they experience discrimination based on multidimensional layers of their identities, statuses, and life circumstances.[14] These different grounds function concurrently and interact with one another in such way that they are inseparable.[15]

In accordance with the World Report on Disability, around 15% of the world's population, *i.e.* around 1 billion people live with certain form of disability.[16] The number of women and girls within this population is consider-

7 *Ibid.*

8 *Ibid.*

9 *Ibid.*

10 Muriel Mac-Seing and Dorothy Boggs, Triple discrimination against women and girls with disability, *https://www.medicusmundi.ch/de/advocacy/publikationen/mms-bulletin/sexuelle-gewalt-und-hiv-zusammen-angehen/projektarbeiten-gegen-gender-based-violence/triple-discrimination-against-women-and-girls-with-disability*.

11 Discrimination against people who are not able-bodied, or an assumption that it is necessary to cater only for able-bodied people. See: Oxford Reference – Ableism, *https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095344235.*

12 UN Women, Gender, age and disability; addressing the intersection, *https://www.unwomen.org/sites/default/files/2022-06/Brief-Gender-age-and-disability-en.pdf.*

13 *Ibid.*

14 UN Committee on the Rights of Persons with Disabilities (CRPD), General comment No. 3 (2016), Article 6: Women and girls with disabilities, 2 September 2016, CRPD/C/GC/3 [16].

15 *Ibid.*, 5.

16 World Health Organization, World Report on Disability, 2011, *https://www.who.int/teams/noncommunicable-diseases/sensory-functions-disability-and-rehabilitation/world-*

able and even surpasses the number of men.[17] Therefore, there is a strong need to amplify the visibility of women and girls with disabilities and to shed a light on their reality of heightened disadvantage, caused by intersectional discrimination.[18]

Such visibility can be achieved in different manners and through different platforms, and the basic framework for all further steps has already been set out in 2008, when the Convention on the Rights of Persons with Disabilities and Optional Protocol (the 'Convention') entered into force, after the Convention received its 20th ratification, and the Optional Protocol received 10 ratifications. This represented a significant turning point in the protection and promotion of fundamental human rights and freedoms of people with disabilities.[19] The Convention recognized the vulnerable position of women and girls with disabilities and the need to address the problems they are encountered with.[20]

Therefore, the Article 6 of the Convention is dedicated to this vulnerable group, and it states the following:

> 'States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.'[21] Further on, its second paragraph stipulates that 'States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention.'[22]

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report-on-disability; Disability and health – barriers to healthcare, World Health Organization, *https://www.who.int/news-room/fact-sheets/detail/disability-and-health*.

17 Women more prone to disability than men, and particularly vulnerable to discrimination and violence, *https://www.womenlobby.org/Women-more-prone-to-disability-than-men-and-particularly-vulnerable-to*; Ahmad Reza Hosseinpoor, Jennifer Stewart Williams, Ben Jann, Paul Kowal, Alana Officer, Aleksandra Posarac and Somnath Chatterji, 'Social determinants of sex differences in disability among older adults: a multi-country decomposition analysis using the World Health Survey', *International Journal for Equity in Health*, No. 11, 2012; Carina Storrs, Women live longer, but not as well as men, in their golden years, study finds, *https://edition.cnn.com/2016/03/17/health/women-live-longer-more-disabilities-study/index.html*; Women and Girls with Disabilities, Women's Human Rights, *https://www.hrw.org/legacy/women/disabled.html*.

18 UN Committee on the Rights of Persons with Disabilities (CRPD), General comment No. 3 (2016), Article 6: Women and girls with disabilities, 2 September 2016, CRPD/C/GC/3 [16].

19 UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106.

20 Mijatović, *op. cit.*, *https://www.coe.int/en/web/commissioner/-/addressing-the-invisibility-of-women-and-girls-with-disabilities*.

21 UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106, art. 6.

22 *Ibid*.

In the General comment No. 3 from 2016, the Committee on the Rights of Persons with Disabilities (the 'Committee') indicated that the Article 6 is a legally binding anti-discrimination and equality provision that promotes equality of opportunity and equality of outcomes, and categorically prohibits discrimination against women with disabilities.[23] Moreover, the Committee identified three main subjects of concern when it comes to protection of women's human rights, and those are related to violence, sexual and reproductive health and rights, and discrimination.[24]

The reports submitted by the States Parties show that they face many different challenges when dealing with the task of protection of the rights of women and girls with disabilities, and the Committee therefore provided them with necessary guidelines to combat multiple discrimination and to ensure the development, advancement and empowerment of women with disabilities.[25] However, even though legislative efforts are not only required, but also highly needed for the improvement of the position of women and girls with disabilities, the reality of vulnerable groups does not always follow the legislative changes. Certain important changes, especially in relation to different social structures, often come from the sources that are outside the scope of legal ambit. One of the most potent agents of social control and change is the media,[26] and therefore, while the Convention sets out the framework for the exercise of rights and freedoms of women and girls with disabilities, it is the media that shapes their reality in a substantial way. It will be further analyzed how strong the influence of different types of media is and what are the consequences of its reach to the life of women and girls with disabilities.

II REPRESENTATION OF WOMEN AND GIRLS WITH DISABILITIES IN THE MEDIA

The media has always been the most powerful tool by which the ideas can be spread, visibility achieved, and desirable narrative created. Many influential and important people throughout the history shared their thoughts on the importance of media and its strength. In that sense, Malcom X, a human rights activist from the last century stated that '*the media is the most powerful entity on earth. They have the power to make the innocent guilty and to make the guilty innocent, and that's power. Because they control the minds of the*

23 UN Committee on the Rights of Persons with Disabilities (CRPD), General comment No. 3 (2016), Article 6: Women and girls with disabilities, 2 September 2016, CRPD/C/GC/3 [9].

24 *Ibid.*, 10.

25 *Ibid.*, 62.

26 Gülşah Başlar, 'The Influence of Media on the Reconstruction of Social Reality Through Asymmetric Information', VI International Congress Communication and Reality – Life Without Media, Barcelona, 30 June – 01 July 2011, 203-207, Reality_Through_Asymmetric_Information; Media, reality, truth, *https://en.hive-mind.community/blog/96,media-reality-truth*.

masses.' Similarly, American poet and writer Irwin Allen Ginsberg commented that '*Whoever controls the media, the images, controls the culture*'. There are many more similar ideas, which implies the same – that the media has a great impact on the people, their minds and lives.

The emergence of the Internet only increased the domain of the media and its dominance in the creation of public opinion. It was never so easy to spread the information, the idea, to reach unlimited audience within seconds,[27] but also to target certain population and create a desirable narrative. Such a narrative is not always benevolent towards minorities, which may be depicted in many different ways that do not reflect their reality.

Through the Internet, people are able to reach different content (the news, films, tv shows, photography, etc.) and the content shared on the network may stay there permanently.[28] The permanence of such content makes it challenging to alter public opinion once it has been formed and permits the perpetual dissemination of damaging content, to which minorities are frequently exposed.[29]

Therefore, it is of a great importance the way in which minority groups will be represented in the media. In the following lines, the author will briefly present examples of how women and girls with disabilities are portrayed in different forms of media (print news, film and books), while the particular attention will be given to the analysis of the headlines published by news outlets operating in the Republic of Serbia.

1. Representation of women and girls with disabilities in different types of media and its consequences

In 1995, Sydney Morning Herald reported about two tragical events that left two young people with severe disabilities. The first one happened to Jon Blake, an Australian actor with promising career, while the other one concerned an anonymous woman. Even though the consequences of two unfortunate events had similar impacts on the lives of these two individuals, the media reports and compensation of damages awarded by the court were quite different, showing how the spin of the 'disability lottery' wheel works.[30]

Concretely, in the first case, Australian media were full of the news in which it was highlighted that the world is deprived of a future Mel Gibson. Jon Blake was awarded by the court 38.1 million dollars in the name of compensation of suffered injuries. In the second case, the court was not that generous and awarded the woman who suffered a serious spinal injuries 100,000 dollars.[31] Nevertheless, it is not only the significantly lower amount of compensa-

27 Pavle Novevski, 'Limits on freedom of expression on the Internet and social media platforms', master thesis, University of Belgrade Faculty of Law, Belgrade, 2021, 23.

28 *Ibid*., 28.

29 *Ibid.*

30 Helen Meekosha and Leanne Dowse, "Distorting images, invisible images: gender, disability and the media", *Media International Australia*, No. 84, May 1997, 91.

31 *Ibid.*

tion that draws attention, but the reasoning behind granting such compensation. Sydney Morning Herald reported that Justice Barr awarded such amount of monetary compensation because of the woman's prospect of not marrying, concluding with the thoughts that '*the plaintiff's prospects of marrying have been lessened by her disabilities*' and that '*she is entitled to a reasonable sum to allow for the possibility that she may not marry*'. Apart from this, the article only mentioned that the young woman was 23 years old at the time.[32]

This simple example from the end of the last century shows that even in terms of disability, there is a clear distinguishment between the men and women. While the story of young man's tragic destiny was told through perspective of his achievements and strong potential that was terminated too early, in case of a woman – that same story was focused on traditionally established gender role and her potential to get married.[33] This narrative stems from the idea that the women are financially dependent on their husbands and that marriage is the way for them to achieve financial stability.[34] Such a stance may have a serious consequence on the lives of women and support the premise of women being in the ownerships of their partners[35], especially in case of women with disabilities.

Such a (mis)representation of women and girls with disabilities, which depicts them predominantly as dependent and submissive, results in women with disabilities being victims of different types of abuse more frequently than those without physical or mental limitations. Women with disabilities are in risk of rape which is up to three times higher in comparison with the women without disabilities.[36] They are also two to three times more likely to be survivors of domestic violence, as well as other forms of gender-based violence, and to experience abuse in higher intensity, over longer period of time and with more severe ramifications.[37]

Further on, the general portrayal of women through the lenses of marriage and family life affects even more the women with disabilities and contributes to the widespread stance that they are unable to fit into traditional role of a wife and a mother.[38] This perception of incapacity of women with disabilities to behave in accordance with social expectations is often por-

32 *Ibid.*

33 It needs to be recognized that the fame of the actor contributed to the reasoning of the court and the narrative in the media, which regularly focuses its reports on famous people. Nevertheless, these articles still show the tendency of the media to offer sensational stories about disability, attaching much more value to disability of a good-looking actor than to a woman, who is only relevant due to her lost opportunity to become a wife and mother, *i.e.* to fulfil the expected traditional gender role. See more: *Ibid*, 91.

34 Caroline Dryden, *Being Married Doing Gender* (1999), 10.

35 *Ibid.*

36 Stephanie Ortoleva and Hope Lewis, *Forgotten Sisters – A Report on Violence against Women with Disabilities: An Overview of Its Nature, Scope, Causes and Consequences*, Northeastern University School of Law Research Paper, No. 104-2012, 2012, 38.

37 *Ibid.*, 38.

38 Colin Barnes, *Disabling Imagery and the Media* (1992), 10.

trayed in the media as a justification for men's infidelity,[39] showing that even the most traditional patterns of gender roles are often unattainable for them.[40] Consequently, deviations from traditional values and choosing the life outside the framework of traditionalism is often a non-existing option.[41]

One additional misrepresentation and simultaneously a social taboo related to women with disabilities is their sexual life. The stereotypes and difficulties that women with disabilities are encountered with are realistically portrayed in the South Korean film called *Oasis*. It depicts the love story between a woman with severe cerebral palsy and a man with a mild mental disability. One of the most positive sides of this film is that it shows the woman with disability exactly as she is, without embellishment and attempts to make it less disturbing for the audience,[42] but quite contrary – it puts focus right on the topics to which there is a social stigma attached.

In the first place, the love between the main protagonists commences with the rape, showing the already mentioned exposure of women with disabilities to different types of abuse. Throughout the film, there are scenes which show the negative or even ignorant attitude that the society has when it comes to women's disability. There is a point in which the neighbors of the female protagonists have an intercourse right in front of her, considering that she is not of such mental capacity to comprehend what they were doing. Different point in film shows how the family of a male protagonist deems the women's disability unacceptable, disapproving the relationship between the two and completely ignoring the disability which is affecting the male character.[43]

Finally, the end of the film reveals one of the biggest stereotypes which is attributed to women with disabilities – their asexuality. Even though the scene shows the consensual love between the two main characters, when they are discovered by others, the female protagonist is automatically considered to be a victim of a rape. Until the very end, nobody is willing to hear the voice of the woman herself, who is visibly affected by the events happening around her and is unable to express her opinion. On the other hand – the male protagonist is viewed as mentally ill, since he is involved in a sexual intercourse with the women that has disability, which sends the message that

39 For instance, Colin Barnes mentions the couple of examples – Marylin French's book 'Bleeding Heart' which describes the affair between an able-bodied man and women, justifying this action on the basis that his wife has an impairment and is incapable of having sex. The other example are two BBC television dramas from 1992, 'Goodbye Cruel World' and 'A Time to Dance', which also depict non-disabled men engaging into affairs because their wives had impairments. See more *Ibid.,* 10.

40 Rannveig Traustadottir and group of authors Disability Awareness in Action, Prepreke za jednakost – dvostruka diskriminacija žena sa invaliditetom: Sažetak zbirke tekstova o ženama sa invaliditetom i izvod iz informativne publikacije o ženama sa invaliditetom Svetske organizacije osoba sa invaliditetom DPI, Centar za samostalni život invalida, 5.

41 *Ibid.*

42 Milesa Milinković, Žena sa invaliditetom u filmu (kao metafora upornosti i slabosti), *http://rizom.rs/2022/08/29/zena-sa-invaliditetom-u-filmu/*.

43 *Ibid*.

the intimate relationships between healthy people[44] and people with disabilities are something which fall under the scope of immoral and perverted.[45]

In a research conducted in Canada in 2016, which was performed through anonymous individual interviews of women with disabilities (including three young women with cerebral palsy that were able to take part in verbal exchanges and did not have cognitive impairments, and five women with motor disabilities), it was showed that the stereotypes presented on the screen accurately transmit the reality to which women with disabilities are faced.[46] The participants testified that there was a lack of understanding when it comes to this sphere of their lives, which is also present among the members of their families.[47]

This common opinion that women with disabilities are asexual is misleading, it promotes the false picture of their reality, and silences the voices speaking about abuses they had experienced.[48] Even in cases when they overcome the fear of speaking about the experienced abuse, their testimony is often not credible. In that sense, an accurate media representation of women with disabilities is important, not only because of their social visibility (which is undisputedly important factor), but also because of their legitimacy.[49] Specifically, due to the misportrayal of people with invisible disabilities (disabilities that are not apparent, such as mental illnesses), they are often considered as crazy, unpredictable, a danger to society that needs to be stopped or fixed. This concept is transmitted to reality and is one of the reasons why people with disabilities are discouraged from seeking justice when they experience abuse.[50]

The situation is even more complicated, when people with disabilities are actually not able to properly communicate what happened, or when women with disabilities, and women of colour with disabilities are affected, given that even women without disabilities have difficulties in bringing their perpe-

44 Even though the male character has a mild mental disability, this characteristic is not in focus.

45 In addition, in the film Snow Cake from 2006, maternity of the woman with autism is explained by other characters as the consequence of the possible rape. This reasoning of the characters may point out the frequency of rape over the women with disabilities, but also to show an ingrained opinion that women with disabilities may only be engaged in sexual relationships if they are violated.

46 Ernesto Morales, Veronique Gauthier, Geoffrey Edwards and Frederique Courtois, 'Women with Disabilities' Perceptions of Sexuality, Sexual Abuse and Masturbation', *Sexuality and Disability*, Vol. 34, No. 3, May 2016.

47 Furthermore, the lack of understanding is also present among medical services. Many doctors have difficulties in treating women that are both pregnant and have disability, while STD testing and sexual health is rarely addressed because of the idea that women with disabilities do not have sex. See more: Antigone Magazine, Women With Disabilities, Issue 9, 2010, 6.

48 Morales, Gauthier, Edwards and Courtois, *op. cit.*

49 Women with Disabilities: Understanding Media Representations to Empower one of the Most Victimized Groups in Society, *https://www.bwss.org/women-with-disabilities-understanding-media-representations-to-empower-one-of-the-most-victimized-groups-in-society/*.

50 *Ibid.*

trators to justice.[51] This is why many cases of violence remain unreported.[52] An experience shared by a woman from Canada, who was diagnosed with bipolar disorder, shows that she decided to stay silent after surviving the assault from an acquaintance. She commented that apart from the usual shame attached to rape, the whole other level of shame is reserved for *crazy* people. On the possibility to report the incident to the police, she concluded – 'I just kept picturing their faces once I ran down my list of medications. They wouldn't listen to a single word I said after that.'[53]

An important consideration for this case is that such a self-harming conclusion is brought by a woman who has a degree in journalism and sociology, and who is capable of understanding the inaccuracy of media representation of women with disabilities.[54] Still, the media was the one that shaped her view, as she stated that she had 'almost never seen a positive, or at least accurate portrayal of women with bipolar disorder'. In most cases, they would be represented as 'psycho people doing horrible, dangerous things, without empathy.'[55] Therefore, it only shows how powerful the media is and how burdensome is the task of distancing yourself from its reach and effect.

On the other hand, the picture of women and girls with physical disabilities is often portrayed in such a way to present them as innocent and helpless victims, or people who bravely and heroically overcome their disability.[56] The film 'A very long engagement' shows a young woman Mathilde, who suffers the consequences of a polio, but nevertheless, it does not stop her from the search of her fiancé who disappeared in a war. Mathilde even uses her disability to help her reach the desired goal, i.e., she uses the stereotypes attached to people with physical disabilities in her favour. She is an example of irrational and extraordinary perseverance and persistence, which enables this character to break out of the frameworks imposed by the society.[57]

It could be argued that the example given below inspires hope and faith among women with disabilities, which consequently gives the impression of a positive representation. Without stating that this point of view is entirely

51 *Ibid.*

52 According to the International Network of Women with Disabilities Document on Violence against Women with Disabilities from 2010, only 30% of the cases are reported. One of the reasons for such a low report rate is that in certain cases, woman is unable to properly communicate her report to a shelter social service and such shelters do not have adaptive communication methods in place and lack the capacity to assist the women with disabilities. In addition, some women cannot report the abuse over them, because the abuser is their caregiver and they fear that they will not be believed. See more in Antigone Magazine, *op. cit.*, 4.

53 *Ibid.*

54 *Ibid.*

55 *Ibid.*

56 Women with Disabilities: Understanding Media Representations to Empower one of the Most Victimized Groups in Society, *https://www.bwss.org/women-with-disabilities-understanding-media-representations-to-empower-one-of-the-most-victimized-groups-in-society/*.

57 Milinković, *op. cit.*

untrue, it should be noted that false representation, even if it is in a positive way, remains false and may harm the position of people affected by disability. Similarly, in some books which focus on disability, the cure for such condition is associated with character, and so – Clara in children's novel Heidi uses her will power to stand up from a wheelchair and to start walking.[58] If Clara's disability was only temporary and caused by the state of her mental health, such a development of events would probably make sense. However, if that is not the case, and her disability is caused purely by her physical condition, it is rather cruel to give a false hope to other children that are in a wheelchair and that may never be able to stand on their foot.[59]

With that being said, it needs to be emphasized that representation of each minority group should be in accordance with their reality. It should not be presented in more or less beautiful way, and it certainly should not be adjusted to the views and expectations of the general audience. Women and girls with disabilities form around one fifth of the world's women, and they still remain invisible and silent.[60] These women have their own voice, and it should be heard. Therefore, instead of creating a desirable version of such voice, women and girls with disabilities should be empowered to use their own, while the media should serve as a microphone that will help this voice to be spread.

2. Representation of women and girls with disabilities in Serbian news media

Even though the conclusions should not be drawn in advance, it would not be wrong to say that people with disabilities are almost absent from Serbian media. In cases when they are somehow included, the focus is on their disability and those people are rarely represented as individuals with all their characteristics.[61]

Serbian media, by a rule, classifies and identifies people with disabilities in accordance with their disability.[62] Taking this into account, it is not surprising that people without disabilities consider disability as the main characteristic of a person, while simultaneously – for person that lives with disability, this is only one part of its being.[63] Identifying a person with disability

58 See more: Ann Dowker, 'The Treatment of Disability in 19th and Early 20th Century Children's Literature', *Disability Studies Quarterly*, Vol. 24, No. 1, 2004.

59 Jeanne Willis, Going beyond the edelweiss: How Jeanne Willis retold Heidi for a new generation, *https://www.booktrust.org.uk/news-and-features/features/2019/december/going-beyond-the-edelweiss-how-jeanne-willis-retold-heidi-for-a-new-generation/*.

60 Mijatović, *op. cit.*; Council of Europe, Addressing the invisibility of women and girls with disabilities, *https://www.coe.int/en/web/commissioner/-/addressing-the-invisibility-of-women-and-girls-with-disabilities*.

61 Daliborka Malešić, Žene sa invaliditetom, nevidljive u društvu, nevidljive u medijima, *https://foruminfo.rs/15288-2/*.

62 *Ibid*.

63 Milica Mima Ružičić – Novković, *Predstavljanje osoba sa invaliditetom u medijskom diskursu Srbije* (2015), 79.

as such is important for understanding their needs in the right way, and for enabling them to equally take part in society and to exercise all the rights they are entitled to. However, it is not the main and only element of their identification as a person. Instead, the views that reduce the person to its disability, only reflect the attitude of a society towards disabilities, and in certain way justify the permanent endangerment of the dignity and rights of persons with disabilities.[64]

When it comes to women with disabilities, their representation in the media can be described by anything but accurate. In many instances, they are represented either through their disability or through their aggressor.[65] The headlines are often sensationalistic and exaggerated, emphasize the stereotypes of a violence, and create the narrative of a horror story as the reality of women with disabilities. In such a way, the media creates a feeling that the abuse over the women with disabilities happens somewhere else, in a different world from which the people feel detached.[66] Nevertheless, the reality is that this type of violence is far away from anything mystic – it is a part of our everyday life, and the perpetrators are people we see on the streets.[67]

The headlines describing violence against women with disabilities are brutal and written with the purpose of attracting audience, while objective reporting is not a common form. For instance, in 2016, Serbian portal *Telegraf* published the following headline: 'He would hit me in the head with a hammer, choked me and slaped me: Confession of a disabled women who was abused by her husband for years'.[68] It is emphasized in this article that the husband was kind and nice to others, and that he was careful even to his wife in earlier period. Such narrative is misleading and unnecessary. Domestic violence usually happens in waives and is not constant, and therefore – mentioning the nice behaviour of abusive husband seems like a justification of his abusive actions.[69]

It usually happens that other news portals take over the whole text of the article published on the first one but change its headline to attract more visitors. In that sense, online portal of the Serbian daily magazine *Blic* reported this same event with a headline: 'He asked our little daughter to hit me with a hammer' The horrifying confession of a women in a wheelchair who was abused by her husband for years'.[70] Finally, the third news portal called *Novo-*

64 *Ibid.*, 80.

65 Malešić, *op. cit.*, *https://foruminfo.rs/15288-2/*.

66 Marijana Čanak, Kako mediji izveštavaju o nasilju prema ženama s invaliditetom, *http://portaloinvalidnosti.net/2018/04/kako-mediji-izvestavaju-o-nasilju-prema-zenama-s-invaliditetom/*.

67 *Ibid.*

68 Tukao me je čekićem po glavi, davio i šamarao: Ispovest žene invalida koju je muž zlostavljao godinama, *Telegraf*, *https://www.telegraf.rs/vesti/2437417-tukao-me-je-cekicem-po-glavi-davio-i-samarao-ispovest-zene-invalida-koju-je-muz-zlostavljao-godinama*

69 Čanak, *op .cit.*

70 Dejana Kecić, „Terao je ćerkicu da me udara čekićem" – stravična ispovest žene u invalidskim kolicima koju je muž godinama zlostavljao, *Blic*, *https://www.blic.rs/vesti/*

sti reported the same story, also putting into focus that the violence happened before the eyes of their three-year-old daughter.[71]

It is also noted that certain portals justify the violence based on disability, or at least use the wording which serve to rationalize and explain the violent act (e.g., the woman was abused *because* she was in a wheelchair).[72] It is not uncommon to banalize the violent act in order to make it more sensational (e.g., the headline stating: 'He raped the girl with mental disability, then asked for a steak!'[73]). As mentioned, horror story scenarios meant to include a mystic element in reporting of serious criminal acts are very frequent (e.g., 'The house of horror: Here is where the married couple raped a women with disability for years[74], A monstrum: Raped a disabled girl and made her beg'[75]).

This type of reporting is harmful in many ways and its consequences can be seen right below the article itself – in the comments of the audience. In most of the comments, the invalidity is described as something negative, and the furious readers are referring to the aggressors as someone who is 'sick', who has a 'mental disability' or who is a 'disabled person', paradoxically defending the persons with disabilities by using the disability as a tool for the insult. In addition, certain comments show that not only the authors of the articles justify the violence and deem that disability is its cause, but that same point of view is also present within the audience.[76]

As the media is the one that creates the harmful, non-accepting, and even more dangerous environment for the women and girls with disabilities, it must be the one to commence with the changes. The first step in that change is the using of adequate terminology and reporting about disability as it really is.[77] If the focus of the story is not on disability itself and talking about disability does not serve any purpose, mentioning it as a characteristic of a person should be avoided.[78]

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hronika/terao-je-cerkicu-da-me-udara-cekicem-stravicna-ispovest-zene-u-invalidskim-kolicima/9h7044j.

71 Lj. Trifunović, Nasilniku određen pritvor: Suprugu, invalida u kolicima, tukao pred trogodišnjom ćerkom, *Novosti*, *https://www.novosti.rs/vesti/naslovna/hronika/aktuelno.291.html:632822-NASILNIKU-ODREDjEN-PRITVOR-Suprugu-invalida-u-kolicima-tukao-pred-trogodisnjom-cerkom*.

72 Čanak, *op. cit.*, *http://portaloinvalidnosti.net/2018/04/kako-mediji-izvestavaju-o-nasilju-prema-zenama-s-invaliditetom/*.

73 Silovao devojku ometenu u razvoju, pa tražio šniclu, *Telegraf*, *https://www.telegraf.rs/vesti/667290-uzasno-silovao-devojku-ometenu-u-razvoju-pa-trazio-sniclu* .

74 Kuća strave: Ovde je bračni par godinama silovao ženu sa invaliditetom, *Srbija Danas*, *https://www.srbijadanas.com/vesti/svet/kuca-strave-u-maloj-sobi-bracni-par-godinama-silovao-zenu-sa-invaliditetom-2017-04-04*.

75 Monstrum: Silovao devojku invalida i terao je da prosi, *Telegraf*, *https://www.telegraf.rs/vesti/1155665-monstrum-silovao-devojku-invalida-i-terao-je-da-prosi*.

76 Čanak, *op. cit.*

77 *Ibid*.

78 *Ibid*.

In the analysis of the various articles dealing with persons with disabilities, it is noticed that certain common linguistic means are used, which distinguish the disability as the main identification element of the person (e.g. *autistic girl, sick child, blind citizens, tied to a wheelchair*, etc.).[79] In addition, there are certain traits which are often used to describe a girl with disability – they are presented as kind, miserable and pitiful.[80] Their disability and/or unfortunate life is often used to create sensational headlines that will engage the public. For instance, in 2019, *Blic* published two headlines with the titles – 'A brave girl celebrates the New Year's Eve outside the hospital for the first time: Our biggest wish is to hear Sofia's voice', and 'The fate cruelly played with Ana (9), Petra (7) and Sara (5) Jovanović from Tolić, near Mionica: Our mother died right before my operation'.[81] This type of reporting flirts with the general public's perception that girls with disabilities are kind, modest and humble, despite the fact that they are faced with terrible and unfortunate destiny. It is not uncommon that they are photographed in hospital, making in such way a disability as a synonym for the sadness. Evocation of compassion among the readers often has for a goal to distract the readers from the genuine social factors which lie beneath the story of disability.[82]

Finally, the last stereotypic narrative presented by Serbian media in relation to women and girls with disabilities is their bravery. Such a reporting, even though superficially disguised as positive, also puts in its focus the negativity of the life with disability. The headlines are usually drafted in such way to transfer the sensation of the anguish and weight of such life (e.g., 'She overthrew all the prejudices – (...) after a serious accident, she has been tied to a wheelchair for ten years'). They present the people with disabilities either as superheroes or super cripples,[83] while the members of their society are depicted as the victims of the life circumstances and victims of the person with disability (emphasizing the care they need to take).[84] What is more, in many of the stories about women with disabilities, the interviewed person is their family member, and not the woman herself. In this way, the story that is told is someone else's perspective of how life of the women with disability is, while their role in their own life is in most instances in the second plan.[85]

As a conclusion, there are two main streams in which the media in Serbia contributes to discrimination of the women and girls with disabilities.

79 Ružičić – Novković, *op. cit.*, 74, 75.

80 Jovana Trajković, Predstavljanje osoba sa invaliditetom u srpskoj štampi: Analiza dnevnih novina Blic i Danas, *CM: Communication and Media*, Vol. XV, No. 47, 2020, 100; Colin Barnes, *Disabled People in Britain and Discrimination: A Case for Anti-Discrimination Legislation* (1991), 197.

81 *Ibid.*

82 *Ibid.*

83 Super cripple is a term used when the person with disability is assigned superhuman ability (*e.g.* blind people as visionaries). Alternatively, person with disabilities, especially children, are praised excessively for relatively ordinary achievements. See more: Barnes (1992), *op. cit.*, 12.

84 Ružičić – Novković, *op. cit.*, 54; Barnes, *op. cit.*, 197.

85 Trajković, *op. cit.*, 94.

The first one is inaccurate representation in the media, in which way the misfortune of women with disabilities is used to attract more audience. However, the accurate reporting about women with disabilities requires one simple thought to serve as a compass – *Disability is simply a part of life experience, and it needs to be presented as such, without any additional connotation, be it positive or negative*.[86]

The other contribution of the media to discrimination is in taking the women with disabilities their voice away. Whenever possible, the women themselves should tell their story, as they deem appropriate. And while it was previously mentioned that the media should serve as a microphone that can spread the voice of women and girls with disabilities, this particular microphone of Serbian media needs to be redirected, as it is directed towards everyone, except for the ones that should be speaking.

III ENDEAVOURS IN SERBIAN LEGISLATION TO IMPROVE THE VISIBILITY OF WOMEN AND GIRLS WITH DISABILITIES

After the insight into the representation of women and girls with disabilities in different forms of media, including Serbian print media, it will be briefly analyzed within this chapter what are the endeavours in Serbian legislation aimed at improving the visibility of this minority group, as well as the steps that may be taken in order to improve such visibility.

1. Serbian media legislative framework

Three media acts, including the Law on Public Information and Media, the Law on Electric Media and the Law on Public Service Media were adopted in 2014 as part of the media strategy.[87] When adopting these laws, Serbian legislator has to a certain extent recognized the problems persons with disabilities are faced with.

The Law on Public Information and Media serves as a general media act,[88] and in Article 12 it states that in order to protect the interests of persons with disabilities and ensure their equal enjoyment of the right to freedom of opinion and expression, the Republic of Serbia, an autonomous province and the unit of local self-government, should undertake the measures which would enable them to receive information intended for the public without hindrance, in an appropriate form and by applying appropriate technology. In addition, it is the obligation of the mentioned state authorities to provide part of the funds or other necessary conditions for the proper operation of the media which publish information in sign language or Braille, or which

86 Čanak, *op. cit.*, *http://portaloinvalidnosti.net/2018/04/kako-mediji-izvestavaju-o-nasilju-prema-zenama-s-invaliditetom/*.

87 Novevski, *op. cit.*, 62.

88 *Ibid.*, 62.

otherwise enable persons with disabilities to exercise their rights related public information.[89]

Further on, Article 15 of this law deals with the notion of public interest in the field of public information, and it explicitly indicates that informing the persons with disabilities and other minority groups, as well as the support of the media content which is aimed at protection and development of human rights, falls within the ambit of public interest.[90] Finally, the second paragraph of this Article provides for an obligation for the state authorities on every state level to encourage diversity of the media content, freedom of expression of ideas and opinion, and such development of the media which will satisfy the need of the general audience to be informed about all aspects of life without discrimination.[91]

Even though the inclusion of provisions that protect human rights (and specifically the rights of persons with disabilities) represents a positive step towards diverse and supportive community, this law does not prescribe the mechanisms for monitoring the compliance with Article 12, and neither imposes appropriate sanctions for its breach.[92] Without these elements, all the endeavours remain simply as an idea that requires further developments, while the possibilities made by the mentioned legal framework are insufficiently used in practice.

The Law on Public Service Media deals with the operation of public broadcasters – Radio Television of Serbia (as the state public media service) and Radio Television of Vojvodina (as the regional public media service of autonomous province of Vojvodina).[93] Article 7 of this law deals with the notion of public interest (in accordance with The Law on Public Information and Media) exercised by the public broadcasters through their program content. One of the core public interests proclaimed by this law is *meeting the needs in informing all parts of society without* discrimination, especially taking into account sensitive social groups such as persons with disabilities (among others). [94]

Finally, the Law on Electronic Media, which regulates the organization and operation of the Regulatory Authority of Electronic Media (the 'Regulator'), also deals sporadically with the discrimination of persons with disability and provides for appropriate grounds for its elimination.[95] The Regulator has

89 The Law on Public Information and Media ('Official Gazette of the Republic of Serbia', Nos. 83/2014, 58/2015 and 12/2016), Art. 12.

90 *Ibid.*, Art. 15, para. 1, subparas. 6, 7.

91 *Ibid.*, Art. 15, para. 2.

92 Ministarstvo za rad, zapošljavanje, boračka i socijalna pitanja – Sektor za zaštitu osoba sa invaliditetom, Vodič kroz prava osoba sa invaliditetom u Republici Srbiji, 61.

93 The Law on Public Service Media ('Official Gazette of the Republic of Serbia', Nos. 83/2014, 103/2015, 108/2016, 161/2020 and 129/2021), Art. 2, paras. 3, 4.

94 *Ibid.*, Art. 7.

95 The Law on Electronic Media ('Official Gazette of the Republic of Serbia', Nos. 83/2014, 6/2016 and 129/2021), Art. 1.

a duty to encourage improvement of accessibility of media services to persons with disabilities,[96] it needs to ensure that the program content of the media service provider does not contain a hate speech which is based on disability,[97] and encourages the media service providers to adjust their services in such way that they are available to people with impaired hearing or sight (in accordance with the financial and technical availabilities of the media service provider).[98] However, the potential of this law is also untapped, given the lack of monitoring mechanisms over certain obligations that are related to persons with disabilities, and the absence of sanctions for failure to comply with them.

Taking into account the aforementioned, it may be concluded that the first steps towards inclusive media environment for the persons with disabilities have been made almost ten years ago. Nevertheless, further legislative efforts and development of the existing legal framework are highly necessary. The main guidelines should be found within the principles proclaimed in the Law on Prohibition of Discrimination of Persons with Disabilities, and specifically within the one which stipulates that the persons with disabilities should be included in all spheres of social life on an equal basis. [99] Article 35 of this law, analogous to the provisions of previously mentioned media laws, determines that state authorities competent for the culture and media have a duty to undertake measures to make information available to persons with disabilities (particularly emphasizing communication of daily information).[100] The reach of this general anti-discrimination law ends here, leaving space for other specific laws to further elaborate on the topic of inclusive media environment. Nevertheless, this law remains as an anchor which reminds what is the starting point for protection of the rights of people with disabilities and shows the way to which all further endeavours should be directed.

2. Possible ways towards more inclusive media environment

After the analysis of both legal framework and reality of representation of women and girls with disabilities in Serbian media, it is evident that there is a wide discrepancy between these aspects. The list of potential measures that can be taken in order to change the current situation and improve the position of persons with disabilities in the media is extensive. However, their applicability usually depends on the existence of political will, in which absence – the whole process is drastically slowed down. In the following lines, the author will briefly present some of the possible ways which may lead towards more inclusive media environment.

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96 *Ibid.*, Art. 22, para. 1, subpara. 20.

97 *Ibid.*, Art. 51.

98 *Ibid.*, Art. 52, para. 2.

99 The Law on Prohibition of Discrimination of Persons with Disabilities ('Official Gazette of the Republic of Serbia', Nos. 33/2006 and 13/2016), Art. 2, para. 1, subpara. 3.

100 *Ibid.*, Art. 35.

The first potential measure and the precondition for all further improvements are the amendments of the existing media laws. As it was already discussed, current legal framework already sets out certain obligations of state authorities, regulators, public broadcasters and other media service providers, which are directed towards elimination of discrimination of persons with disabilities. Nevertheless, their vague terminology, absence of specific monitoring mechanisms and appropriate sanctions for failure to comply with the imposed obligations, leave the positive sides of these laws in the shadow of their impossibility to influence on the shaping of reality.

In this regard, the first necessary amendment should be the concretization and elaboration of the current provisions concerning the protection of persons with disabilities, with the inclusion of transparent and clear monitoring mechanisms, and the appointment of independent authority that will conduct such monitoring. This change of regulation would allow the introduction of appropriate sanctions, which can only be determined once the corresponding obligations are sufficiently clear and precise.[101]

The Action Plan for the Media Strategy adopted in 2020 (the "Action plan"), sets out the amendments of media laws as one of its goals, which is planned to enhance the freedom of expression, freedom of press and media pluralism, among other values[102]. However, two years after the adoption of the Action plan, it is evident that there is a considerable delay with expected amendments.[103] It is uncertain whether the provisions concerning the status of persons with disabilities will be reviewed and amended, but it was declared that the matter of project co-financing will be given particular importance.[104] This might be a good opportunity to emphasize the necessity of having open competitions for the co-financing of projects that are focused on producing media content for the persons with disabilities (on the level of state, autonomous province and local self-government), but it remains to be seen what changes will actually be brought by the announced amendments.

Another approach that may lead to a more transparent, ethical and democratic media environment, which protects the rights of minorities, can be achieved through operation of the Press Council, which was established in Serbia in 2009 (the "Press Council"). The Press Council is an independent, self-regulatory body which brings together publishers, owners of print and online media, news agencies and media professionals. Its main goal is

101 For instance, Art. 52, para. 1 of the Law on Electronic Media stipulates that 'the media service provider is obliged, *in accordance with its financial and technical capabilities*, to make its program and content accessible to people with impaired hearing or sight'. However, the sanction for non-compliance with this obligation is not provided and it is unclear what are the criteria for determining financial and technical capabilities of the media service providers in the first place.

102 Usvojen Akcioni plan za Medijsku strategiju, Ministarstvo kulture Republike Srbije, *https://www.kultura.gov.rs/vest/sr/5679/usvojen-akcioni-plan-za-medijsku-strategiju.php*.

103 Zakon o javnom informisanju i medijima: U pripremi izmene i dopune Zakona, *https://www.paragraf.rs/dnevne-vesti/070622/070622-vest2.html*.

104 *Ibid*.

monitoring the respect of the Journalist's Code of Ethics in both online and print media, and to solve complaints brought by individuals and institutions related to media content.[105] Generally, self-regulation of the media can be achieved only by those media houses whose journalists, editors and owners want to engage in responsible type of journalism, by maintaining quality and transparent dialogue with the public.[106]

The Press Council contributes to the position of women and girls with disabilities, and to the overall minority rights, by pointing out to the omissions made while reporting on the relevant issues. In this respect, the Press Council presented the results of the Commission for complaints, for the period between January and June 2022, and it was concluded that most of the complaints were related to the minority rights, discrimination, and the spread of stereotypes, which are all pertinent factors for the subject matter at hand.[107] It is also noted that journalists are often not aware of the prejudice and stereotypes they spread, which indicates that there is a lack of education in this field.[108]

Even though every individual, organization or institution may file a complaint, it seems that this self-regulatory body is not used up to its full potential. Thus, there is a space for improvement of the position of persons with disabilities, by filing the claims and pointing out to the omissions in reporting when it comes to this social group. In addition, media consumers may indirectly support the operation of the Press Council by following those media outlets that are the members of the Press Council and that respect the provisions of the Journalist's Code of Ethics.

Finally, education of both professionals engaged in media and the wider population, represents one of the ways in which the status of persons with disabilities can be improved. Appropriate education and knowledge in this field is an important prerequisite for the introduction of other possible measures – such is the administration of the comments posted on online platforms. Specifically, even though this would definitely reduce the number of insulting comments online, this action comprehends finding a subtle balance between certain fundamental rights (*e.g.* right to reputation) and limitation of the freedom of expression,[109] which is a difficult task even for those that are very well acquainted with the human rights principles.

105 Savet za štampu, *https://savetzastampu.rs/en/about-us/*; The Press Council receives complaints related to texts and photographs published in daily and periodical press, including their online platforms and comments written by the readers. When it comes to sanctioning of disputable content transmitted by the television or the radio, the competent authority is Regulatory Authority of Electronic Media. See more at *https://savetzastampu.rs/en/about-us/what-can-we-do-for-you*.

106 Miklós Haraszti, *The Media Self-Regulation Guidebook* (2008), 10.

107 Savet za štampu, Rezultati rada Komisije za žalbe u periodu januar – jun 2022. godine, *https://savetzastampu.rs/lat/izvestaji/rezultati-rada-komisije-za-zalbe-u-periodu-januar-jun-2022-godine/*.

108 *Ibid*.

109 Novevski, *op. cit.*, 44-51; See more: *Delfi AS v Estonia*, App. No. 64569/09, judgment of 16 June 2015.

Ultimately – the proper education is the key for the creation of awakened society, i.e., the society that would be able to recognize women and girls with disabilities as a unique group, that deserves particular attention in all aspects of life and that should be integrated in society equally to all other social groups.

IV CONCLUSION

Discrimination of persons with disabilities is an everyday phenomenon, and more importantly – the reality of over 1 billion of people. Women and girls with disabilities are particularly affected, since they experience discrimination on at least two levels, i.e., they experience the intersectional discrimination. Intersectional discrimination takes place when two or more different discrimination grounds are used in discrimination of an individual or group of individuals. These different discrimination grounds intertwine and form a different and unique type of discrimination.

Certain steps aimed at combating intersectional discrimination have already been made. In 2008, Convention on the Rights of Persons with Disabilities and Optional Protocol has entered into force, and it represents an important international anti-discrimination document. Nevertheless, the reality of women and girls with disabilities is often shaped by other factors, outside the scope of legal provisions. One of the most powerful sources which influences the lives of people is the media.

There are different platforms in which the content of the media can be shared. With the emergence of the Internet, most of the media content became available for everyone having the Internet access. Given that the content shared online may stay there permanently, in case of misrepresentation of minority groups – it may be difficult to change the opinion of general public, which creates a fertile soil for discrimination.

The analysis of representation of women and girls with disabilities in different media forms showed that women and girls with disabilities are often represented through various stereotypes. They are depicted mostly as dependent and submissive, while the marriage is considered to be their ultimate goal, in which way they achieve financial stability. Desires and needs of these women are regularly disregarded and not taken into consideration. On the other hand, different portrayal of these women goes in direction of mentally unstable persons that cause harm to other individuals without empathy. This may have a strong impact on women who belong to this population, since they may remain silent about the cases of abuse they experience, in the fear that their voice will lack legitimacy.

Approach of the Serbian print media and their online portals do not represent a positive reporting example. Most of the headlines are written in a sensational way, emphasizing the misfortune of the women and girls with disabilities, and aiming to attract more audience in such way. The life of women with disabilities is depicted as difficult and burdensome, which is

even increased by linguistic means that are used in reporting. Such manner of reporting is often transmitted to the audience that accepts the narrative of disability as a negative phenomenon and disseminates it further.

In 2014, Serbia has adopted a set of media laws as a part of its media strategy. Even though these laws established different obligations that favour the position of persons with disabilities, they lack monitoring mechanisms and corresponding sanctions, which results in an uncertain applicability of those provisions. Besides the necessary amendments of media laws, there are other possible ways in which the visibility of persons with disabilities can be achieved – by filing complaints to the Press Council (for the content published in press) or to the Regulatory Authority of Electronic Media (for the content transmitted by the television or the radio), including its proactive role in suppression of disputable content. Lastly, the education undoubtedly represents one of the most important factors in the correction of collective awareness regarding the status of persons with disability, and it is a prerequisite for all further endeavours in this respect.

The media as the factor that is able to pave the way of a social discourse and to shape the reality of people should also be the platform on which the positive changes in the attitude towards women and girls with disabilities should primarily occur. One of the fields on which the changes are already happening are the social media platforms, which gave the visibility to all minority groups, including the women and girls with disabilities. Nevertheless, the traditional media still has a strong influence on people, especially among older population, and should not be disregarded.

Finally, women and girls with disabilities are equal members of each society and deserve to exercise all human rights which are guaranteed to all the people regardless of personal differences. The history has shown that women with disabilities are capable of achieving goals of eternal and impermanent value, only if they are empowered enough to do so. And the media may serve as an engine for such empowerment. Because – as Helen Keller[110] once stated – 'I am only one, but still, I am one. I cannot do everything, but still, I can do something; and because I cannot do everything, I will not refuse to do something I can do'.

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ULOGA MEDIJA U OBLASTI DISKRIMINACIJE ŽENA I DEVOJČICA SA INVALIDITETOM – PUT KA VIDLJIVOSTI ILI PEČAT NEPOSTOJANJA?

Apstrakt

Osobe sa invaliditetom se suočavaju sa diskriminacijom u različitim sferama života. Uprkos naporima kako na nacionalnom, tako i na međunarodnom nivou, u pojedinim delovima sveta osobama sa invaliditetom su uskraćena osnovna prava koja bi trebalo da budu omogućena svakoj osobi.

Kada se govori o položaju osoba sa invaliditetom u društvu, pol ima značajnu ulogu. Naime, poznato je da žene sa invaliditetom trpe diskriminaciju na više nivoa, što samo pojačava intenzitet nepovoljnih situacija sa kojima se susreću i težinu diskriminatornih radnji. Ovakva višestepena diskriminacija ima svoje utemeljenje u dva glavna oblika diskriminacije – diskriminaciji na osnovu pola, odnosno usled toga što je osoba sa invaliditetom žena, i diskriminaciji na osnovu samog invaliditeta. Naravno, u zavisnosti od različitih životnih okolnosti, sa navedenim oblicima mogu koegzistirati i drugi oblici diskriminacije, najčešće oličeni kroz diskriminaciju na osnovu starosti.

Mediji igraju važnu ulogu u dizajniranju današnjeg društva. Oni imaju snažan uticaj u procesu stvaranja ideja, mišljenja, kao i javnog određivanja šta je prihvatljivo, a šta nije. Biti vidljiv u medijima je postalo sinonim za sveukupnu vidljivost. Međutim, čini se da ovaj reflektor medija baca svetlo na sve osim na marginalizovane grupe, koje se polako gube iz vidokruga.

U ovom radu, autor analizira ulogu medija u diskriminaciji žena i devojčica sa invaliditetom iz srpske i međunarodne perspektive. Biće prikazana medijska slika žena sa invaliditetom, sa fokusom na (nedostatak) prostora koji je ostavljen za njihovo prisustvo i njihov glas. Konačno, autor će se dotaći teme o mogućnostima za promenu i koristima koje iz takvih promena proizilaze.

Ključne reči: *Mediji; Diskriminacija; Žene; Devojčice; Vidljivost.*

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