European Association of Lawyers for Democracy and Human Rights (ELDH)
Lawyers for Democracy (LawDem), Belgrade
in cooperation with
Lawyers Committee for Human Rights (YUCOM), Belgrade

International conference

Human Rights and Democracy in the Context of EU Enlargement – Western Balkan Perspectives

Friday, June 6th 2014, Belgrade

Conference venue: **Centre for Cultural Decontamination** (http://www.czkd.org/)

Birčaninova 21, 11000 Beograd, Tel: +381 11 3610270

Conference Reader

- ★ **Programme**
- ★ **Speeches (as far as available)**
- ★ **Speakers cv**

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Content

AGENDA

10:00 Registration

10.30 Conference Opening and Words of Welcome

Prof. Stevan Lilić, President, Lawyers for Democracy (LawDem), Belgrade

Prof. Bill Bowring, Barrister, President, ELDH, London

Thomas Schmidt, Lawyer, Secretary General of ELDH, Düsseldorf

11.15 – 12.30

Session One – Human Rights in the Western Balkans

Moderation: Mr. Milan Antonijević, Belgrade

1. **Prof. Alan Uzelac**, Zagreb: *Does the EU Accession Process Really Help the Establishment of the Rule of Law?*
2. **Dejan Marković**, President of the Forum Roma of Serbia, Belgrade: *Human Rights of Roma in Serbia and in Other Western Balkan Countries*
3. **Sebastian Baunack**, Lawyer, Berlin: *Protection of the Human Rights of Roma in the EU and in the Candidate Countries*
4. **Dražen Cerović**, Podgorica: *Human Rights and Democracy in Montenegro with special reference to the situation in the media*

Discussion

12.45 – 13.45

Session Two – EU Enlargement and Democratisation

Moderation: Prof. Bill Bowring

1. **Prof. Stevan Lilić, Mr. Marko Milenković,** Belgrade: *Democratisation and Europeanisation – the Case of Serbia*
2. **Dimiter Gotchev**, former Judge, European Court of Human Rights, Sofia: *Protection of Human Rights in Europe after the Treaty of Lisbon*
3. **Prof. Michelle Everson**, London: *The Quest for Citizenship as Universal Good*
4. **Yiorgos Vassalos**, Political scientist, Athens: *Safeguarding Democracy and the Rule of Law vs. EU Economic Governance: The Case of Peripheral EU Countries*

Discussion

14.45 – 16.00

Session Three – Social Rights and Labour Law under Threat in Europe

Moderation: Thomas Schmidt

1. **Prof. Guiseppe Palmisano**, Director of ISGI-CNR, Rome: *Social Rights Under Threat in Europe - The Standpoint of the European Committee of Social Rights*
2. **Aleksandar Lojpur**, Lawyer, Belgrade: *Overview on the Development of Labour Law in Serbia in Times of Neo-Liberalism*
3. **Domagoj Mihaljević**, Zagreb: BRID/OWID (Organization for Workers' Initiative and Democratization): *Changes of labour rights in Croatia: Growing polarization between labour and capital*
4. **John Hendy**, QC, Barrister, London, *The Trade Union Rights to Collective Bargaining and to Strike in Europe*
5. **Hajro Pošković**, Legal advisor to OESC, Sarajevo: Anti-Discrimination Legislation in Bosnia and Herzegovina and in Other Western Balkans Countries

16.30– 17.45

Session Four - Freedom of Assembly

Moderation: Prof. Stevan Lilić

1. **Prof. Bill Bowring**, Barrister, London: *The Right to Assembly under Threat: New Ways of Political Expression – Blockupy, Femen, Pussy Riots (Guarantees of the ECHR and the Charter of Fundamental Rights of the European Union)*
2. **Assist. Prof. Öznur Sevdiren**, Istanbul-Bursa, Lawyer: *Freedom of Assembly, Unlawful Use of Force and Culture of Impunity in Turkey*
3. **Dimitris Sarafianos**, Athens, Lawyer: *The Right of Assembly in Times of Austerity and Under the Influence of the Policy of the European Union*
4. **Ivana Stjelja**, Lawyer, Lawyers Committee for Human Rights (YUCOM), Belgrade: *Changes to Freedom of Assembly in Serbia*.

Discussion

17.45 – 18.45 Discussion, Final Remarks and Conclusions

Prof.Stevan Lilić, LawDem

Prof. Bill Bowring, ELDH

The speeches held at the conference (as far as available)

Session One – Human Rights in the Western Balkans

Does EU accession process really help the establishment of Rule of Law? 'Major improvements' or 'One step forward, two steps backwards'? Some Examples from the Neighbourhood

Prof. Dr. Alan Uzelac, Zagreb University

I. Introduction

Is EU accession process a good thing for human rights and access to justice? How useful is an active involvement of the EU bodies and the EU experts for the establishment and further development of the rule of law? These questions may at first sight seem to be undiplomatic, or even rude – a sign of bad manners and ungratefulness which are wide-spread in the Balkan region. Of course, everyone may think that EU commitment to democracy and rule of law is undisputable, and that therefore it is self-understood that those countries that, after years of negotiations and reforms, enter the exclusive EU club, have elevated their human rights standards, and improved their judiciaries. Yet, I think that both questions are legitimate, and that they deserve to be carefully examined in the light of the experiences in the process of accession in the previous enlargement rounds. My own experience is the experience of Croatia and, although it may perhaps not be representative for all candidate and potential candidates for the EU membership, it is certainly relevant for the current accession process of the

successor countries of former Yugoslavia (Serbia, Macedonia, Bosnia and Herzegovina, Montenegro and Kosovo).

To cut the long story short, I will start with the answer. Does EU accession process help to establish rule of law? Does it raise observance of human rights? Yes, to a certain extent – at least, we cannot safely assume that, without such a process situation would be (significantly) better. But, at the same time, I would like to point to the fact that benefits of international involvement in legal and judicial reforms are to a considerable degree ambivalent – at least in the light of the experiences so far.

Let me briefly summarize the main positive and negative sides of the involvement of the EU Commission involvement, and more generally, of the political involvement of the EU and its selected body of officials and experts for the judicial reforms in a candidate country like Croatia. Examples that are more concrete are to follow, but here is the general evaluation.

The positive sides may be notorious: they consist of the fact that, by and large, the national reformers may draw their inspiration from a vast gallery of good examples and best practices from a set of well organized and highly developed jurisdictions. The fact that they generally share some common features (eg continental European legal tradition) also helps to partly harmonize the legal system and narrow down the menu of possible options. It may be too ambitious to speak about 'legal harmonization' (though this is a notion that becomes more and more popular, in particular among legal scholars), however some modest harmonization may be reached, at least as a consequence of EU law (less) and the case law of the supreme European tribunals (more).

The involvement of 'international community' and the EU organs has also a catalyzing effect on the plans and reforms that were desired and plans by progressive reformists circles in the candidate country. The weight of EU accession on the political agenda may also help to suppress some internal opposition to changes, in particular by those who are fearing that reforms will adversely affect their privileges, economic wealth and power and influence in the society. The active participation of foreign experts in the design and planning of legal and judicial reforms may, to a certain extent, act like checks and balances against the efforts to twist the reforms in favor of particular professional and social groups, or distort their goals and desired changes. Finally, the EU involvement protects against forgetfulness – a feature that is significant in the South of Europe. While national politicians come and go, their reforms often last as long as their echo in public media. On the other side, the EU bureaucracy is persistent and stubborn in their objectives, so that reforms announced after negotiations with the EU negotiators are being monitored, reported and repeatedly being put on the agenda of political talks (also as 'benchmarks' and 'indicators' for the progress of EU accession).

The negative sides of the EU involvement in the national judicial reforms is less often discussed – but they should not be neglected. At the same time when a matter that was previously an object of attention of a limited circle of national politicians, lawyers and other professionals, the internationalization of judicial reforms causes the emergence of two different and often largely incompatible narratives: the announcement and execution of judicial reforms aimed to persuade the EU and other international observers that significant steps forward are being made, and declaration and explanation of changes for internal purposes, addressed mainly to pacify and console the domestic actors – telling them that mainly that things are not going to be significantly different. The separation of these two narratives has several by-effects. First, the ministries of justice start to act more and more as ministries of foreign affairs, negotiating and designing the judicial reforms in secluded circles of Brussels offices, with little or no inclusion of domestic professionals and experts. Second, when faced with the distrust and resistance from the domestic actors, the effects of the reforms are often poor. In order to secure support of at least some of those who were excluded in the original negotiations, but have enough effective power to block them, reform plans are often diluted by concessions which softening the edge of initially ambitious projects. Third, this leads to the need to explain why changes do not go at the desired pace to the EU partners. Sometimes they may have some understanding, but if this is repeated too often, and accompanied by general political pressure to move the accession process faster, the apologies will not be accepted any more. This can result in the ambition to demonstrate progress even if nothing has been improved. How? By fixing of the methodology in order to prove that the promises have been kept. As political pressure exists on the both sides (of course, at an oscillating pace), sometimes the EU bodies are prepared to close one or both eyes and accept this or that *Scheinreform* as granted even though the experts in the field are well aware that the submitted data (impressive statistics, optimistic reports) is doubtful or plainly fake.

Of course, the fake reforms are not always acceptable, so that some concrete steps in judicial reforms should be demonstrated by the governments of the candidate countries. They have to be part of the

final progress reports, and they should exist in the moment of the EU accession. But, how long lasting and irreversible will such reforms be? One of the favorite proverbs in the Balkan region is '*Drži vodu dok majstori ne odu.'* (Hold the water until the repairmen leave). And, indeed, the reforms which were accepted in a half-hearted manner, as a homework that primarily aimed to satisfy foreign observers, may have only a temporary nature. In spite of all the efforts, the post-accession monitoring of the judicial reforms lacks the powerful stick – there is no sanction in the form of delaying the negotiations any more. Therefore, the only remaining pressure takes the form of 'soft' means, such as 'judicial observatories' and 'scoreboards' – and that is often not enough to keep in place the reached changes. Especially so because many reforms agreed hastily and in a form of political compromise with foreign experts were not optimally designed in the first place, or contained only half-solutions – normative projects without effective implementation structures. If some structures were established and reforms turned into reality, it is also likely that at least some new elements will be perceived by local judicial circles as 'legal irritants'. This is particularly likely if some elements of reforms were discussed and agreed with experts from one set of countries (eg Germany and Austria) and the other with experts from the other set of countries (eg France and Belgium). 'Mixed' legal systems are not entirely impossible, but they are rare. Pigs with wings seldom fly, and therefore mixtures more often result in confusion than in a perfect match. The nature of EU expert involvement is in fact contributing to confusion. Under EU methods of contracting it is almost impossible to engage a single, consistent group of experts and empower it to closely monitor developments in a single jurisdiction, with which they are familiar. Instead, experts are engaged with a limited mandate, that has to be partly spent in efforts to familiarize with local peculiarities. As soon as they manage to learn sufficiently about the local needs and specificities, their mandate is over and they are replaced by another set of experts, often coming from a completely different tradition and background (but with equal initial ignorance about the environment that they should assist and observe). Can in such circumstances recommendations always be adequate? Not likely. But even if they were, the capacity to realize whether they were properly understood and transformed into practice is limited.

II. Croatian accession process – targets and achievements

a. Identified weaknesses of the justice system

I will skip here the whole debate about the powers of the EU to intervene in national civil justice systems. Indeed, this power is limited, and that may be an important part of the problem. But, this is not the objective of my speech. After this so far abstract set of findings about the positive and negative sides of the EU involvement in the national judicial reforms, I will rather focus on the concrete experiences from the Croatian EU accession process.

The main goal of this paper is to assess what were the judicial deficiencies diagnosed by the EU experts and politicians when EU negotiations were started, and then to analyze what has been achieved in these fields in a lengthy negotiation process (the Croatian accession process lasted almost a decade – from the Avis in April 2004 to the final entry into EU in July 2013).

Here is the list of weaknesses identified by the EU after initial screening of the Croatian judiciary. This list has been assembled by the first-tier experts of the EU Commission, and used for the purposes of the EU Delegation to Croatia (see M.H. Enderlin, N. Granfelt, S. Seppanen, Reform in the Croatian Justice System, in: Uzelac/van Rhee, Public and Private Justice, Antwerp 2007., p. 173-185).

- Lack of efficient continuous training of judiciary;
- Lack of transparency of judges/prosecutors recruitment procedure and career management;
- Lack of consultation of the legal profession while proceeding with judicial reform
- Lengthy proceedings, delays in enforcement of judgements, no real alternative dispute resolution which create huge backlog
- Difficult access to justice, Lack of proper/efficient legal aid system
- Insufficient financial flexibility for court management and no computerised case management system
- Need for rationalisation and territorial reorganisation of courts
- Difficult access to court decision/publication and relation with courts
- Insufficient infrastructure and computerisation of courts.

In a more detailed form, these findings found their way in the Opinion on Croatia's Application for Membership of the EU (so-called *Avis*), a document issued in Brussels on 20 April 2004 (COM (2004)

257 final). What is specifically mentioned are the issues that are essential for rule of law and protection of human rights, such as “widespread inefficiency of the judicial system”, “a large backlog of cases”, serious constraints in the judicial capacity to handle properly its workload, problems in the area of enforcement of judgments, but also some war-related issues, such as protection of human rights of other ethnic groups in Croatia, most prominently Serbs.

In short, the initial diagnosis of the EU delegation on the state of Croatian judiciary was not very flattering, and therefore it is not a surprise that notorious “Chapter 23” – a chapter on judiciary and human rights in the negotiations between the EU and the Republic of Croatia – turned to be the most difficult chapter, and also the chapter that was the last to be closed.

It may be important to note that the EU diagnosis was not out of line with other, independent evaluations. The research conducted about the trust in social institutions indicated in the beginning of 2000’s that, in Croatia, the courts are among the least trusted social institutions, and that they are also among the less trusted institutions comparatively, when the other countries of the region were concerned (Public Agenda Survey, IDEA Stockholm/PULS, Feb 2002), see **Figure I – Survey on trust in institutions in Balkan region**. Only in Croatia, the courts were at the very bottom of public trust (they scored lower than other least liked institutions such as mass media, local and national government, the parliament and the police). Only in Bulgaria the courts had a lower total score (12 v. 17 percent), but with generally significantly lower average trust in public institutions there (NGO’s and trade unions scored last in Bulgaria with 9 percent).

It may therefore be safe to conclude that Croatian judiciary was ripe for reforms, and that the targeted weaknesses diagnosed by the EU were well selected.

Now, what were the results in a not-so-short period of almost ten years (or almost a quarter of century since the transition and the manifestation of the common will to join the EU)?

There are six areas which were most prominent in the EU-Croatian efforts to reform the national justice system. They are: judicial training and recruitment of judges, length of proceedings, enforcement of court judgments, access to justice and legal aid, rationalization of court network and the use of alternative dispute resolution (mediation in particular).

As our main interests here are human rights and the rule of law, I will only very briefly touch upon the matters that relate specifically to the organization of judiciary and the use of ADR, although these matters may be of decisive importance for the efficient protection of human rights, and the rights in general. More attention will be paid to the access to justice and legal aid, length of proceedings and enforcement of court judgments, as these matters form integral parts of the most fundamental procedural human right – the right to fair trial within a reasonable time.

b. Judicial recruitment and training: likelihood of impact in already over-sized judiciaries?

In respect to recruitment and training of judges, I would only like to reflect about one fact. Namely, the re-constitution of the judiciaries in the successor countries of former Yugoslavia is a very difficult task, as the national judiciaries in Croatia, Serbia, Slovenia and other former Yugoslav republics share a common systemic malformation in comparison with the other judicial systems in Europe. Namely, the analysis of the number of judges in various European countries demonstrate that all post-Yugoslav judiciaries are oversized – they are by a wide margin at the very top of the list of European countries sorted by number of judges per capita. In the past decade this has not been changed at all (perhaps only in Bosnia and Herzegovina, but due to other factors) – see **Figure II – Number of judges per 100.000 inhabitants**. What does it say about the possibility of new recruitments? Only that it is very limited in its impact. What does it say about the possibility of training? As the notion of ‘training’ was used in the EU negotiations predominantly in the sense of ‘initial training’ – ie training prior to obtaining judicial prerogatives – the scope of changes is very limited here as well. It suffices to say that, in a judiciary of about 2000 judges, the first generation of judges educated by the national judicial academy graduated only in 2013, and that it had barely 20 candidates (with decreasing tendency for the future).

Obviously, without addressing the far-deeper roots of structural discrepancies between post-Yugoslav judicial landscape and the justice systems in other EU countries, the impact that small and modest steps regarding improvement of judicial recruitment and training can have on improving the rule of law may be almost insignificant.

c. Length of proceedings and non-enforcement of judgments

One of the most apparent and publicly admitted feature of the Croatian justice systems was the excessive length of proceedings. In this respect, the EU reports repeatedly mentioned the need to reduce the court backlogs (described as 'huge') and ensure court proceedings within reasonable time. Many of the efforts of the Croatian government were addressing in particular this feature.

Indeed, reducing excessive length can be effected by various means. Obviously, more efficient proceedings and faster adjudication would be one way. However, although the Ministry of Justice introduced various reforms to the basic procedural code, the effects that were reached in practice were not satisfactory, in particular not in the short-term perspective. As one can see on the example of the changes in the Code of Civil Procedure, the changes were introduced in a shy and partial manner. Such changes often touched only the surface of the problem. Though introduced in laws and regulations, normative changes often lacked appropriate sanctions and monitoring, and therefore some of them, such as time-limits for issuing judgments, deadlines for certain types of proceedings, and the prohibition of double remittals, were in real life often disregarded.

It seems therefore that the changes of procedural rules did not cause a more significant change in the actual length of judicial procedures. However, in the EU negotiations with Croatia, length of proceedings was apparently not causing too much problems, for a very prosaic reason. Though many citizens complained about the excessive length, and many judgments finding violations of Art. 6 were issued against Croatia before the European Court of Human Rights, effective monitoring of progress in respect of length of proceedings was not possible (and still isn't). The reason is the fact that Croatia, just like most of other members of the Council of Europe, does not collect systematically information on the length of proceedings, so that every information in this respect is, at its best, a more or less close approximation.

Due to failing reliable benchmarks, the indicators of progress in this area were limited to another area – monitoring of the state of court backlogs. In this aspect, the government was employing a strategy of 'outsourcing'. Namely, competency to deal with some of the proceedings which were previously in the hands of courts, such as inheritance proceedings, and proceedings for collection of uncontested debt, were transferred to other judicial professionals, in particular to public notaries. Did it help? From the perspective of the Ministry of Justice, the transfer of thousands and tens of thousands of payment orders to notaries played a good role in the national judicial statistics, that have displayed after 2006 a sudden surge in the number of resolved cases, and the equally impressive drop in the court backlogs. But, from the citizens' perspective, all the cases outsourced to public notaries were not resolved. They were still there, and they have become more costly. To make it even worse, some of the proceedings outsourced to notaries became even slower, due to the need to transfer cases from the court to notaries and back in the case of any contestation or dispute.

However, it seems that 'outsourced' cases were still not enough to display the ultimate defeat of court backlogs in the national judicial statistics. Therefore, a new method of monitoring 'finished' or 'resolved' cases was introduced, in particular for the payment order proceedings. While before, the case of collection of debt was considered closed when enforcement was effected, after about 2004 the Ministry of Justice instructed the courts to consider such cases closed right away when an enforceable title was issued. This move solely added tens of thousands of cases to the success of statistics. However, it also created a big systemic problem, as now, in many Croatian courts, court officials and judges work on thousands of legally non-existent cases – since all of the cases where an objection was launched after issuance of the payment order were effectively considered to be already finalized. The statistical engineering may be apparent in the statistical monitoring of the court backlogs according to the official statistics – see **Figure III – Development of backlogs**.

The special issue regarding the judicial efficiency and access to justice was non-enforcement and lengthy enforcement of court judgments and other enforceable titles. The assistance to the reform of the system of enforcement was the objective of several EU twinning projects. However, the enforcement has, until this date, remained to be the 'Achilles heel' of the Croatian justice system. Reforms in this area were often introduced only to be abolished. The last, and the most visible, example was the EU-sponsored introduction of the new Law on Bailiffs, that planned to establish a private profession of bailiffs, inspired by the experience of French *huissiers de justice*. However, after almost unanimous acceptance of that law in 2010 in Croatian Parliament, after the change of government in 2011, the whole project was first put on hold, and then abandoned in its entirety. Indeed, all those who were appointed as bailiffs could not start with their new job, and many of them had left their previous occupation in order to satisfy the conditions for appointment. This, however, was

coming at a relatively late stage in the EU negotiations, seemingly too late to have an effect on the closure of the process and Croatian entry into the EU.

d. Legal aid and access to justice

The most critical and for the debate about human rights most relevant example is the impact of the EU accession on the developments in the area of legal and access to justice. Ever since the European Court of Human Rights has issued its decision in Airey v. Ireland case (1999), proclaiming that effective legal aid is an integral part of the right of access to justice, not only in criminal but also in civil cases, the EU policies of judicial reforms in the candidate countries started to deal with the legal aid systems as well.

However, it seems that the development of a functional legal aid system was never very high on the European accession agenda, in particular since 2008 when the economic crisis hit many developed countries, and caused them to cut down their expenses in the legal aid area as well. Therefore, the EU negotiators mostly insisted on superficial elements, such as existence of special legislation on legal aid issues. In order to satisfy this requirement, the Croatian government enacted Legal Aid Act in 2008, after a short but heated debate with legal aid providers and practicing lawyers, whose demands and positions were finally generally disregarded. In the end, the Legal Aid Act 2008 proved to be a Potemkin's village for the EU spectators. Very long and detailed, this act spent almost 80 percent of the text to precise definition of many conditions that are needed to be fulfilled prior to any type of legal aid can be requested by the citizens. Instead of raising human rights standards, the effects of this act were disastrous for general access to justice. As the strictness of the conditions disqualified most of the applicants, for all providers of legal information and advice it was not possible to qualify more than 1 percent of their cases for state-supported legal aid. For the few cases which passed all filters, the level of financial compensation from the state legal aid scheme was negligible. The best indicator for the achieved level of support is the fact that, while in the EU the average investment for legal aid is 7 EUR, the investment for the same purpose in Croatia is less than 7 cents. See **Figure IV – Annual public budget allocated to legal aid.** Even this level of investment is doubtful, as a big part of it is spent on filtering legal aid applications, sometimes at the expenses of 10 hours of work of legal aid administration in order to check the eligibility of an applicant for the legal aid support in the amount not bigger than 20 EUR.

Indeed, the low public investment in access to justice and overly restrictive filters were not the only problem. As the actual need for legal aid, advice and information was and remained to be great, the providers were generally relying on the outside sources of financing. The international community invested millions of euros for the support of various legal advice and assistance providers during the war era, and continued to support substantively various human rights organizations that were actively helping vulnerable members and groups, also by legal help and advice. However, once when the chapter on human rights and judiciary was closed, and Croatia entered into the EU, it was taken as granted that the state assumed its obligations in providing mechanisms of access to justice. Consequently, a large number of sponsoring organizations left Croatia or reduced their support to the bare minimum. As a result, the whole sector of legal aid providers (once upon a time very active and agile) is increasingly fading away and closing their services, leaving behind huge empty space and unfulfilled legal needs of the population.

III. Conclusion

The involvement of the EU in the judicial reforms has benefits, but it has also its pitfalls. One should not expect too much: with current level of EU divergences, and the current powers of the EU Commission to intervene in the reforms of national judiciaries, without a very strong internal motivation and active civil society, changes in the level of protection of human rights will be less than impressive. Sometimes, the EU involvement may even make the things worse. This reminds us that justice is the thing too important to be left at the mercy of national, European and international bureaucrats. Already many years ago, it was pointed to a number of paradoxes regarding judicial reforms in the context of the EU enlargement process. It was stated that "such reforms require a strong and lasting political will from Governments and Pariliaments – but one may ask if such a will really exists, or even how consistent the EU itself has been in calling for such a commitment". The same statement remains to be true today.

ANNEXES

Figure I: Public Agenda Survey (IDEA Stockholm/PULS - II/2002): see *http://www.idea.int/europe_cis/balkans/*

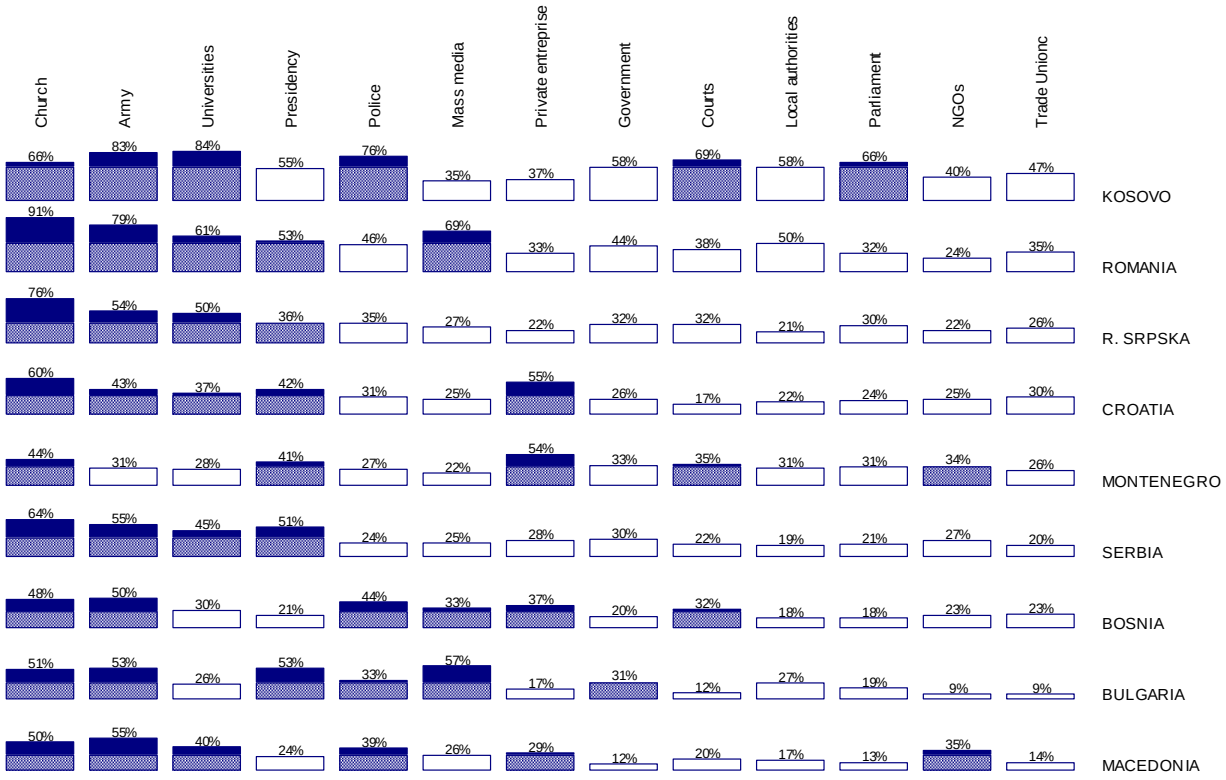


Figure II: Number of judges per 100.000 inhabitants in Europe – CEPEJ Data (see http://www.coe.int/t/dghl/cooperation/cepej/evaluation/default_en.asp)

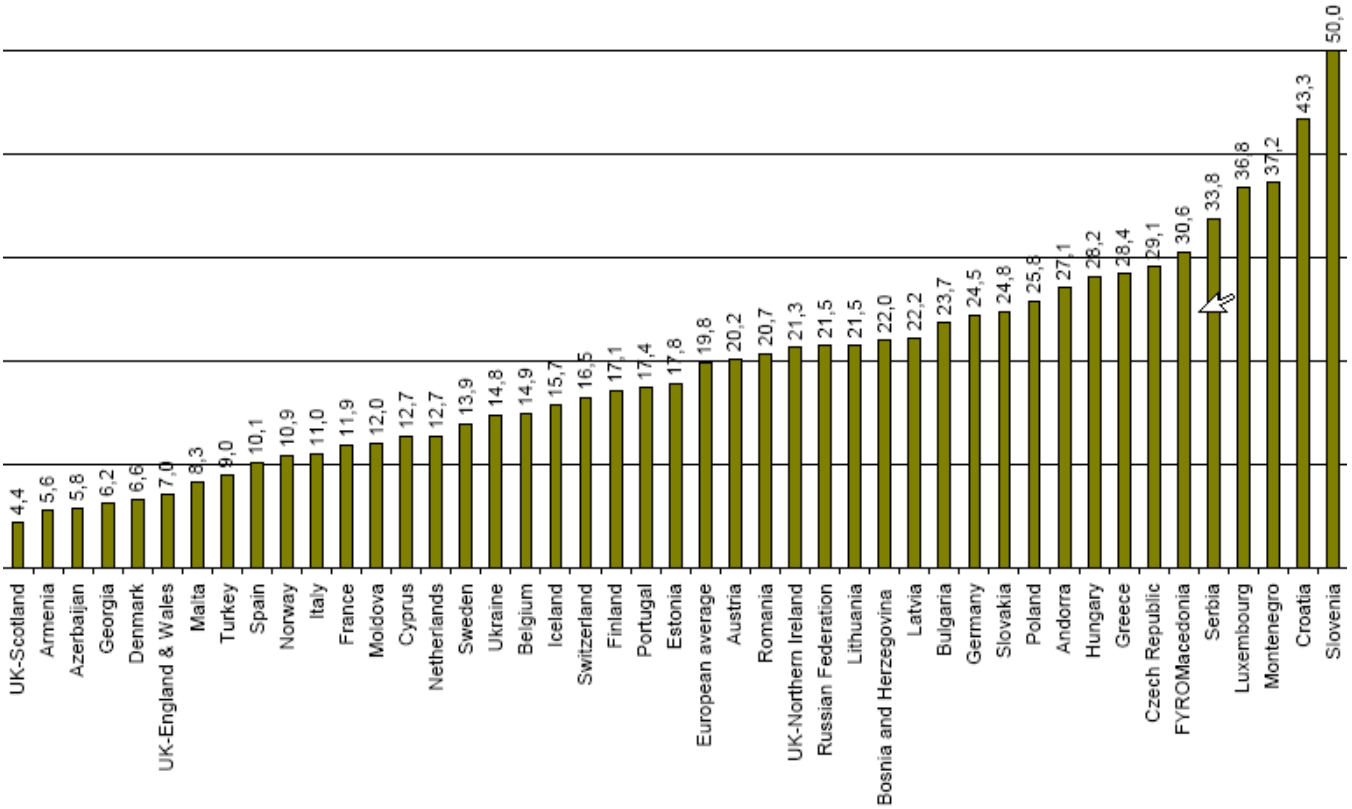


Figure III: Development of court backlogs in Croatia (1989-2010)

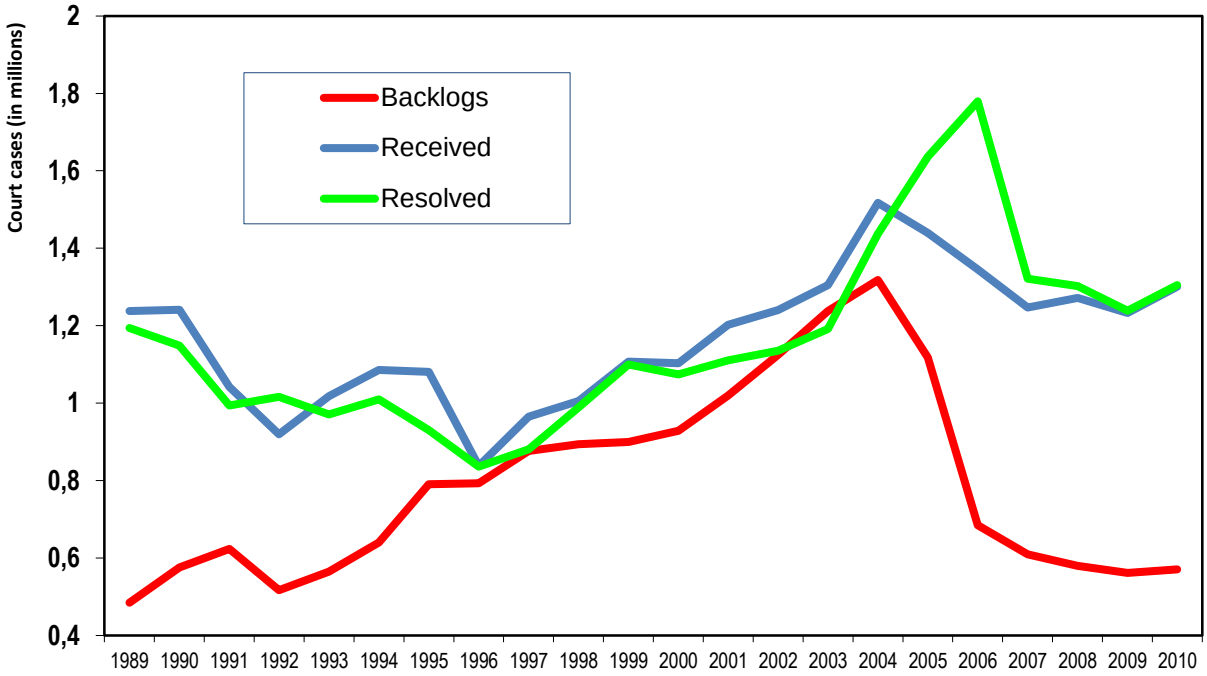
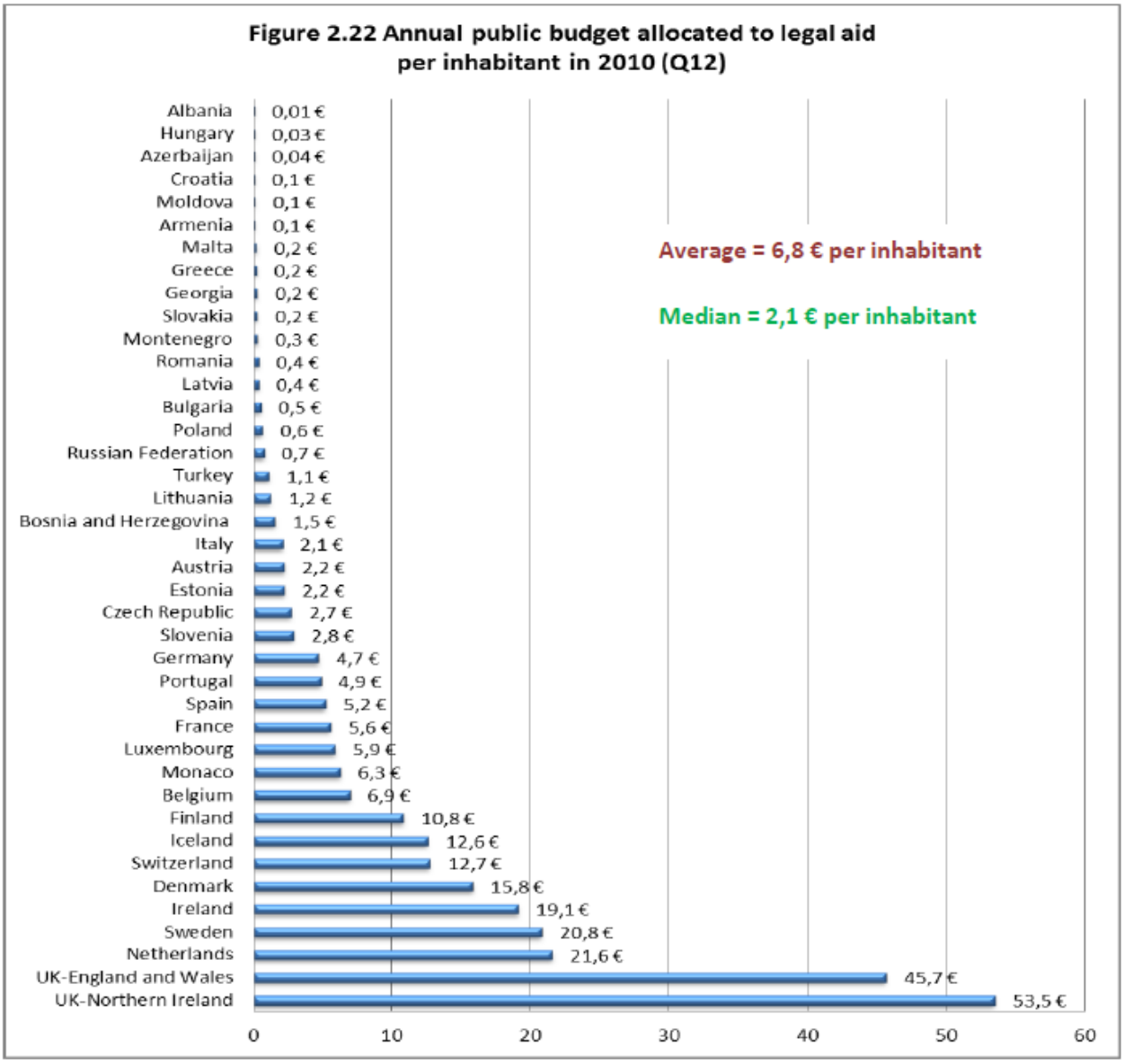


Figure IV: State investment in legal aid (CEPEJ data)



Human Rights of Roma in Serbia and in Other Western Balkan Countries

Dejan Marković, President of the Forum Roma of Serbia, Belgrade:

Ladies and gentlemen,

Thank you for inviting me to this important conference.

The problems faced by Roma are complex, and call for an integrated approach, in order to address low educational attainment, labour market barriers, segregation in education and in housing, and poor health outcomes simultaneously. Implementing such change is the responsibility of national, regional and, especially, local governments; but the EU also has an important role to play – improving legislation against discrimination, coordinating policy, setting common integration goals, and providing funding.

The survey conducted by the FRA together with UNDP and the World Bank in the 6 countries in the Balkans It provides us with valuable data for over 84,000 Roma. And for the first time, Roma and non-Roma living nearby were interviewed – people who basically share the same socio-economic conditions. This test is assumption that the so-called “Roma issues” are in reality simply poverty and social exclusion issues that affect both Roma and their non-Roma neighbours in the same way.

The results painted a different picture... Roma, in all countries surveyed, east and west, rich and poor, were worse off than their neighbours. Poverty, social exclusion, unemployment clearly affect Roma much more than their non-Roma neighbours. And to a large extent this is linked to discrimination and unequal treatment, which perpetuates the vicious circle of poverty and social exclusion: exclusion from education leads to exclusion from employment, which leads to increased poverty, which forces people to live in poor or segregated housing which, in turn, affects their educational and employment opportunities, as well as their health. And the vicious circle starts again and again.

The results showed that:

- We clearly see that Roma are much worse off than their direct neighbours. These systematic differences show that beyond poverty, it is the day-to-day racism and discrimination that has to be tackled for improving social inclusion
- about 90% live below their national poverty line;
- around 40% said that someone in their household had to go to bed hungry at least once a month, because they could not afford to buy food;
- on average, fewer than one out of three Roma were in paid employment;
- around 20% of the Roma could not read and write, while only about 15% of the Roma had completed any education beyond compulsory level.
- only one out of two Roma children attended pre-school or kindergarten, compared to around three out of four of their non-Roma neighbours;
- in some countries up to 35% of Roma children aged 7-15 were not attending compulsory school;
- and only about 15% of young Roma had completed any form of upper-secondary general or vocational education, compared to around 64% of their non-Roma neighbours;

This is the type of hard statistical evidence that can provide vital assistance to governments in designing evidence-based policies. The data confirms that much still needs to be done to ensure that Roma are equally treated.

To break this circle of poverty, social exclusion and discrimination, we need an integrated approach that promotes access to housing, access to employment, access to education and access to healthcare simultaneously.

But there is one particular issue that is still missing that I would like to focus on.

It is how to ensure the resources reach the communities that need them most, how the resources are used and how communities can be involved in projects to make the best use of them.

Of course, it is vital that local authorities in municipalities make the decisions in support of Roma integration with EU funding. But it is even more important for the funds to reach the communities in which the people are dealing with deprivation, exclusion and discrimination on a very daily basis. And all too frequently, this is not happening.

What is it we are dealing with here? It is like a ‘glass floor’. We all know the term of the ‘glass ceiling’ when women can't move on career matters. I think we have here a similar feature - a ‘glass floor’ which refers to resources that cease moving down to reach those in most dire need of those resources. Unless we break through this glass floor, I'm afarid the situation of the Roma won’t improve as much as it could.

Of course, I know this will not be easy. All of us have heard the phrase “nothing should be done for Roma without Roma.” But despite this, Roma inclusion at local level often remains very minimal, if it exists at all.

We also regularly hear the phrase “the communities do not have the capacity to implement funds.” And indeed, this is very often the case. So let’s develop that capacity and create it: not through endless training sessions or seminars, but through the direct involvement of the Roma population to achieve real change on the ground.

What is the evidence for this? What I really like about the mandate of the EU is that we have to look for what we call now "good practices" or "promising practices". So what are those promising practices? When I go through reports and the promising practices we have identified, I ask myself what is the common denominator of these promising practices? Not surprisingly, the projects that were successful were those where the Roma has been involved from the very beginning - and also when the majority population was involved as well. So local engagement is key and it comes out of in the interviews we have done with 300 municipalities.

I think there are some very low-hanging fruit out there that are waiting to be picked. It doesn't cost much.

The Roma Ngo-s will contribute to this with a new project that we call Local Engagement in Roma Inclusion. It tries to assist the Roma communities in improving their participation in designing, implementating and monitoring Roma integration policies at the very local level. Where programmes have already started, we will support the Roma communities to monitor the impact of these projects. Where they have already been planned but not yet started, we will assist local Roma to become more involved in their implementation. Not surprisingly, in the best case scenario, communities will become engaged at an early enough stage to contribute to the development of the concepts, the ideas and the goals.

We beleive we will only see results when the communities themselves participate in a meaningful way in deciding what is done with the funding being spent in their name.

And we will need sustained political will, efficient coordinated efforts, and effective monitoring and evaluation tools if we want to make a tangible difference to Roma people’s lives.

Thank you very much.

Protection of the Human Rights of Roma in the EU and in the Candidate Countries

Sebastian Baunack, Lawyer, Berlin

Dear Ladies and Gentlemen,

Dear colleagues,

My name is Sebastian Baunack and I work in Berlin, Germany, as a Barrister in the Law firm dka Fachanwälte. I am also a member of the executive board of the ELDH.

1. Introduction

One of the major topics that have been publicly discussed in the European Union since the Bulgarian and Romanian Republics joined the European Union in 2007 has been the potentially increasing entrance of poor citizens of Roma descent from these states into other states of the Union. Within the European Union 26 out of 28 Countries are part of the so called Schengen agreement. Within the boundaries of this agreement there is inscribed the freedom of all citizens to move, settle and work freely within any member-state. It could have been expected that the two new members in the European Union would be included into this agreement already in 2007. The same counts for Croatia, the newest Member of the Union. However, many EU-Member states restricted Freedom of Movement for citizens of these countries up to seven years.

Many ethnic Roma live in the Bulgarian and Romanian Republics in highly underprivileged and marginalized conditions and therefore emigrate to the old EU-Member states for better living conditions. Often they do not find them. Instead, Romanian and Bulgarian ethnic Roma often suffer from severe persecution. Of particular concern today is the segregation of Roma children in education. In Bulgaria, the Czech Republic, Hungary, Latvia, Poland, Romania, Slovakia and Croatia, a disproportionate number of Roma children attend remedial 'special' schools or classes for children with intellectual disabilities and are thereby segregated from the mainstream school system and receive an inferior level of education, which affects their life chances.

But ethnic Roma not only face structural discrimination, but as well physical violence. The maybe most famous incidents are the demolition of Roma habitations and the following Deportations under the former French Prime minister Mr. Sarkozy and following further actions by his successor Mr. Hollande in August 2012. Unforgotten are as well the pogroms against ethnic Roma that took place on the 17th of May 2008 in Naples, Italy.

On the 1st of January 2014 finally full Freedom of Movement of workers within the European Union took effect as well on Romanian as on Bulgarian citizens. Although until now no significant increase of immigration of ethnic Roma from the new member-states into the old states can be identified, still the mere possibility triggers harsh and often openly xenophobic reactions across the Union.

I would like to point out two crucial legal points concerning Bulgarian and Romanian citizens of ethnic Roma descent. First I would like to talk about their Freedom of Movement under Article 45 of the Treaty of the Functioning of the European Union (TFEU). Afterwards I would like to address the claim of ethnic Roma EU citizens to social benefits in other EU-Member states under Article 48 TFEU.

2. Claims of ethnic Roma for Freedom of Movement

First of all, Bulgarian and Romanian Citizens of Roma descent are EU-Citizens. And exactly like all others they acquire the permission to reside in other EU-Member states under EU-Legislature.

a)

Citizens of EU-Member states enjoy full freedom of movement under Article 45 TFEU. This article states the following:

> *"1. Freedom of movement for workers shall be secured within* the Union.
>
> *2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.*
>
> *3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health: (a) to accept offers of employment actually made; (b)to move freely within the territory of Member States for this purpose;*

Under these regulations EU-citizens have the right to work and seek work in any other State of the EU. The Commission wants to improve these rights even further. The Council has lately approved the proposal IP/13/372 drafted by the Commission. The proposal, as approved by the European Council, seeks help to ensure real and effective application of existing legislation. Member States shal be required to:

"Create national contact points providing information, assistance and advice so that EU migrant workers, and employers, are better informed about their rights,

Provide appropriate means of redress at national level,

Allow labour unions, NGOs and other organisations to launch administrative or judicial procedures on behalf of individual workers in cases of discrimination,

Give better information for EU migrant workers and employers in general."

Further regulations can be found in the Directive 2004/38/EC on the right to move and reside freely. This directive demands, that all Union citizens shall have the right to enter another Member State. Under no circumstances can an entry or exit visa be required. As well, Family members who do not have the nationality of a Member State enjoy the same rights as the citizen who they have accompanied. For stays of less than three months, the only requirement on Union citizens is that they possess a valid identity document or passport. The right of residence for more than three months remains subject to certain conditions. Most importantly, an Applicant may be granted permit for longer stay, if he is engaged in economic activity, no matter if on an employed or self-employed basis. Union citizens shall furthermore acquire the right of permanent residence in the host Member State after a five-year period of uninterrupted legal residence.

This directive has been implemented into national legislature in the EU-Member states. In the UK for example the directive has been implemented into national law by the Immigration (European Economic Area) Regulations 2006. In Italy the directive has been implemented through the Legislative Decree n. 30 of February 6th 2007. And in Germany it has been implemented by the Freizügigkeitsgesetz/EU. But National Parliaments have so far done little to ensure the realization of the Rights under Article 45 TFEU with special regard to marginalized groups. There have been made almost no efforts to actively support EU citizens from marginalized groups like ethnic Roma to find a suitable occupation in the other member-states. Quite the contrary has happened. Jurisdiction limits these rights of Article 45 TFEU. For example, the European Court of justice considers a time up to six month sufficient to search for an occupation in another EU-Member state (ECJ, 26th of May 1993 – C-171/91). This short Timespan makes it even more difficult for marginalized groups like ethnic Roma to make effective use of their Rights under Article 45 TFEU.

b)

Following these EU-regulations, ethnic Roma since the 1st of January 2014 are entitled to work as well as an employee, as well as self-employed in another EU-Member state. Social reality however shows, that due to a highly emotional and xenophobic public discourse many ethnic Roma from the Bulgarian and Romanian Republics have severe difficulties to find a suitable occupation. Most of them, as they often come from an underprivileged and marginalized position in their home countries, cannot find an occupation abroad before going there or even emigrate with a standing business. They have to emigrate and search in a foreign state for an occupation from the start. These member-states do no efforts to aid them in doing so. Still, if they cannot succeed doing so within six month of time, and proof, that they are not only actively searching for an occupation but as well have promising opportunities, they will not be granted a permission of residence. Considering the often hostile public discourse towards Roma in many EU-Member states, most ethnic Roma don´t fulfil this requirement. This discriminates ethnic Roma at least indirectly.

The six-month Time-restriction, the European Court of Justice imposes and national courts apply, is in no way backed by Article 45 TFEU. It is highly questionable, if such a general restriction is not at least suitable to have discriminating effects on social groups that are marginalized in mainstream society as ethnic Roma are. Jurisdiction, that is again as well the European Court of Justice as well as national Courts, so far has not considered enough the consequences that an allocation of a person to a marginalized group has on the possibilities of employment of that person. In the Case of ethnic Roma, the incidents in Naples and France show obviously, that being allocated as a member to the supposedly homogeneous Roma-group reduces possibilities to find an occupation, especially a good one. Such an indirect discrimination is however not be permissible under EU-legislature. It would mean a great progress already, if ethnic Roma would under these conditions be granted a longer timespan to find a suitable occupation and be actively aided by the Member-states in their efforts to make use of their rights. This is an aim, Human Rights lawyers in the old EU-Member states should pursue.

3. Right to social Benefits

As I said in the beginning, I would like to say some words as well about the Right of Bulgarian and Romanian citizen of Roma descent to social benefits in the Member states.

a)

Already Article 34 Paragraph 2 of the Charta of Fundamental Rights is very clear on the Claim of EU-citizens on social benefits within the Union. It states:

"Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices."

Following article 48 TFEU social benefits have to be provided to citizens of EU-Member states in order to ensure, that their Freedom of Movement can actually be fulfilled. Article 48 states the following:

"The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, they shall make arrangements to secure for employed and self-employed migrant workers and their dependants:
(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;
(b) payment of benefits to persons resident in the territories of Member States."

Article 18 TFEU states clearly:

> *"Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."*

Therefore by EU-Legislature EU-citizens cannot be excluded from social benefits.

However, the Directive 2004/38/EC brought further restrictions to claims to social benefits in the host country. Under No. 10 the directive states the following:

> *"Persons exercising their right of residence should not, however, become an unreasonable Burden on the social assistance system of the host Member State during an initial period of Residence. Therefore, the right of residence for Union citizens and their family members for Periods in excess of three months should be subject to conditions."*

This aim of the directive however is not meant to restrict workers Freedom of Movement in the EU-Member states. Accordingly No. 26 states the following:

"*As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion. In no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers as defined by the Court of Justice save on grounds of public policy or public security."*

The directive makes it clear, that although benefits to citizens of another EU-Member state should be no overwhelming burden to the Member state, still it must not use restrictions on social benefits to

restrict the Freedom of Movement itself. The directive ends with a declaration of the Freedom of its measures from discrimination:

"This Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In Accordance with the prohibition of discrimination contained in the Charter, Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinion, membership of an ethnic minority, property, birth, disability, age or sexual orientation"

The directive makes it clear, that working EU-citizens can by no means be discriminatingly excluded from social benefits.

b)

According to these regulations ethnic Roma citizens of Bulgaria and Romania at least since the 1st of January 2014 can demand social benefits as long as they are employed or self-employed in another Member-state. This is, why apparently most immigrants to the old EU-member states try to build up their own business as soon as they get to the host state. During times of unemployment social benefits so far are restricted. In Germany for example EU-citizens are by § 7 SGB II excluded from basic social benefits. Several German State Social courts have ruled this law non-conform to European Legislature. Therefore, the German Federal Social Court under the 12th December 2013, Az. B 4 AS 9/13 R, has consulted the European Court of Law for a decision, if a national legislature that excludes unemployed EU-citizens from basic social benefits conflicts with European legislature. Before the State social court of Hessen, Germany, decided, that it regarded EU-citizens eligible to receive social benefits in Germany, even if they are economically inactive (L 6 AS 378/12).

These questions are very important to ethnic Roma immigrants from the new EU-member states. As these immigrants often come from miserable conditions and without having neither the language and educational means, nor the cultural capital, they often cannot compete at once at the labour market of another EU-Member state. Taking into account these difficulties it is important for European advocates, to demand a judgement that takes into account, that withholding basic social benefits during times of unemployment can indirectly discriminate ethnic Roma as an ethnic Minority, something that No.31 of the directive targets to prevent. As well, Human Rights lawyers should promote unchangingly the Basic Right of every EU-citizen to receive unemployment benefits in the Member state, where they decide to settle. Such a new regulation would highly aid ethnic Roma to find time and the financial means to build up an existence in the other Member state.

4. Conclusion

The EU-Member states have decided to introduce the European Union as a free trades and free Economy Area. The states have agreed on granting their citizens Freedom of Movement in order to create a high availability of professionals across Europe in the places of need. These EU-citizens have under rightly understood EU-Legislation not only the Right to work in other Member states, but as well to move there and seek an occupation and during this time to be granted social unemployment benefits.

Ethnic Roma from Bulgaria and Romania have a history of Marginalization and Exclusion. One basis of their poverty are the segregated schools and classes they have to attend in their home countries. They therefore often neither have the means to find an occupation in another Member state already before emigrating, nor can they easily find an occupation in the new Member state after going there. Ethnic often Roma face an openly hostile public discourse in their host countries, as well as lacking language skills and education. However, they are EU-citizens and are granted the same Rights to

Freedom of Movement, to seek a sustainable occupation and claim social benefits during that time. Legislation has to become active to ensure these rights and aid immigrating ethnic Roma to effectively use them. And Jurisdiction has to regard these difficulties of the Roma as an ethnic minority when judging their residency and time to find an occupation or start a business and their claims to social benefits. Human Rights lawyers can use their means to support their way to equality.

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Berlin, June 2014

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Human rights and democracy in Montenegro in the context of EU enlargement, with special emphasis on the situation in the media

Doc. dr Dražen Cerović

Enlargement of the European Union, a process that is actual for a long time, and in recent years that issue has been particularly actualized across the Western Balkans. Besides all the other standards relevant to the membership, in the context of EU enlargement, particular attention is paid to the issue of human rights and democracy. In this regard, the issue of the media is of particular priority.

In the area of human rights and protection of minorities, Montenegro is required to act in order to change the laws and their compliance with the norms of international law, particularly in the area of minority rights guarantees, ensuring the freedom of press, preventing domestic violence, as well as in the context of the protection of vulnerable groups. Article 49 of the Treaty of the European Union foresees that any European country can apply for membership if it respects the democratic values of the EU and if it is dedicated to their promotion. The first group of the Copenhagen criteria speaks about the political criteria: stable institutions guaranteeing democracy, the rule of law, human rights and respect and protection of minorities. Despite the fact that the candidate country meets the requirements (when it meets), the EU must be able to integrate new members, because of which it retains right to decide when it is ready to accept them. EU member countries have given a perspective to the Western Balkan for the EU membership. Countries that make it are now in various stages of the enlargement process, and some, as Montenegro, have specific problems on that way within the media sector.

The issue of media and the right to create public opinion in Montenegro

Very often in the analysis of the media situation in Montenegro and its impact on human rights can often be found statement that all cases of attacks on journalists have not yet been effectively investigated and prosecuted, as well as other cases of attacks on freedom of expression. This information is generally true, but itself does not mean much without giving a complete analysis, which is usually absent in those observations. Here, for the sake of complete insight into the real situation on the ground, a rather complicated explanation must be given of the issues of media freedom, public expression, and in particular the manner in which the tabloid journalism creates public opinion in Montenegro. In this sense, the vistas of this problematic in my presentation will move in a slightly different way than usual, to which we are accustomed, when we talk about freedom of the media. I will put the emphasis on the violation of human rights by unprofessional work of the media, because the adverse impact on the public interest has been unjustly undervalued in favour of those topics that are predominantly engaged in the protection of the media and groups who violate the rights and do not protect their victims.

If we agree that guarantee of the safety of journalists for the publicly spoken and written word in the media is really one of the basic indicators of respect of human rights, then we will, I am sure, agree that is at least equally important criterion in creating democratic public opinion - a professional responsibility for the publicly spoken statement and reported information, which must be supported by objective facts from at least two sources, independent of each other. Unfortunately, this is what a large number of media in Montenegro is missing. Moreover, there is a paradoxical situation - on the one hand, for reasons of harmonization of the laws with EU, from the Montenegrin criminal legislation was dropped defamation, while on the other side in the zone of under-regulated media sector, that caused chaos and proliferation of tabloid media who do not respect the rules of media profession, code of ethics and the rights of citizens. Absolute disregard of the presumption of innocence, endangering of the honour and reputation of an individual, the media campaign against political or business opponents in the tabloid media, public "judging" of individuals, not only before the official court epilogue, but even before the start of court proceedings, have become ordinary in the Montenegrin media space. During the expulsion of defamation as a criminal offense in our legal system, a huge oversight with far-reaching consequences was made. The fact that something in the area of non-regulated media sector will enable the human rights violations by the media and violating the public interest through pressure on the judiciary and other public bodies was not taken into account. So, on the one hand - the criminal prosecution of defamation and violation of honour and reputation were eliminated, and on the other hand, the media can now do whatever they want, with no respect of professional standards.

So, formally and substantially, the media in Montenegro are not only free, but also free as in no other country on the European continent. They are free from the respect of professional mores, free from respect of journalistic standards, free from obeying the law, free to conduct defamation, violation of the honour and reputation of the people, free to influence the decisions of judicial and other public authorities, not to respect the presumption of innocence, to reveal the identity of minors, to form parties, that through the false information which they place - unlawfully influence the state of the stock market and thus unlawful enrich, free to lead the party's campaign, so – they are free from everything!

In such a situation, the one whose reputation and honour has been disturbed is forced to achieve his rights only in a civil lawsuit. In countries that do not have a long democratic tradition, violation of someone's honour and reputation through media, can cause unpredicted reactions. Expectation that the individual in such a system will be exposed to long legal processes, which, for the purpose of pressure on the judiciary, are unprofessional commented in the media prior to the court decision, and a person seeking judicial protection, during the process, is further discredited by the media, almost one hundred percent causes a negative reaction and that leads to a dangerous position to take justice "into his own hands." That is almost always with a bad outcome. The mentality of the people in the Western Balkan, which is violent, can always lead to negative reactions.

Mistakes in the approach to the problem and constructive solutions

The aforementioned situation can not be considered as one-dimensional, and without making a big mistake. Interpretation of the application of European standards on the Balkans, at the same time ignoring the specificities of the region, means to act irresponsibly. To ignore the protection of journalists and their freedom of expression would be disastrous. But to close eyes in front of the worst media manipulation and failing to follow the code of journalism, disregard for the presumption of innocence, harming of the reputation and honour of innocent people just because they found themselves "at gunpoint" of the certain political and business organizations - is equally or even more devastating! Many media, instead of professionally and objectively reporting, they actually create public opinion *pro* or *contra* certain political parties, for the or against certain companies, and the like, thus clearly placing themselves in service of certain pretenders, either for taking over or retaining the levers of power. At the same time, that leads to despicable insult, discredit, defamation, violation of the rights of privacy and many other everyday examples of irresponsible behaviour of the media, with the aim of increasing circulation, readership, listening, and rating of certain media. But the ultimate goal is not really in it, but in something much bigger. It is about hidden political pretensions, on which, of course, everyone has the right, but that does not mean that he is entitled to do so by the illegal means.

Democracy is not anarchy and that knows everyone who lives in democratic countries. Unfortunately, the attitude of some EU officials to such state of the media in Montenegro is very unusual. I would say that is even one-dimensional. Such one-dimensional view of some of our European friends on the area of responsibility of the media for the publicly spoken and written word cause major problems in Montenegro. On the one hand, trying to contribute to the democratization of the political process, unfortunately they reflexively support the so-called and self-proclaimed independent media, neglecting groups that backed them and inappropriate methods used by such media in their reporting. Without taking into account all, but only some aspects of the problem, leads to situation that some influential European officials, *de facto* in Montenegro uncritically support what they despise in their home countries. It is non-objective, unprofessional, tendentious reporting, journalism that does not respect professional codes and standards. These are of course things that won't be *de jure* said publicly, but from concrete actions and statements not only indirectly, but very directly they can be understood. Sometimes the gap between the proclaimed value system and concrete acting is so evident in the politics towards the media in Montenegro. So, the journalism which European officials despise in their countries, in Montenegro they often proclaimed as a model? Can you imagine a situation in which political and financial support of the European Commission receives a British or a German newspaper that chronically lies and does not published denials, insults the whole nations does not respect the presumption of innocence, reveals the identity of minors, establishes the party, manipulates the stock market, leads the party campaign and makes similar professional offenses? Of course not! But in Montenegro such a thing, unfortunately, is not only possible, but it is a reality that is easily verifiable fact.

But of course, the focus of the problem is in Montenegro itself, and of course, our European friends should not be entirely blamed because, in our domestic chaos, they can not successfully handle. We cannot often handle ourselves even we much better understand the chaos than them and in the final - we produced it as a society. What would be still desirable, it is to provide a constructive approach,

which will represent help and wouldn’t be at the expense of the introduction of rules in the media sector. This will is the best way to contribute to the protection of human rights and European values, as well as establishing of accountability for publicly spoken word, as the basis of proper creation of public opinion, which is the basis of democracy.

Therefore, it is necessary in the coming period to work hard on legal regulation and responsibility of the media sector, and also on protection of media and journalists. Thus, and only thus we will realize the synergistic effect of measures that we want to achieve. Thereby the area of respecting the media freedom, but also the protection of human rights in the accession process, on only proper way will be successfully absolved.

Session Two – EU Enlargement and Democratisation

Protection of Human Rights in Europe after the Treaty of Lisbon

Dimiter Gotchev, former Judge, European Court of Human Rights, Sofia:

THE TREATY OF LISBON AND THE PROTECTION OF FUNDAMENTAL RIGHTS

Abstract

The Treaty of Lisbon introduces some new elements in the system of protection of the fundamental rights of EU citizens.

Above all, by the introduction of the Nice Charter of Fundamental Rights into the Treaty its provisions become part of Union's law. Thus the Charter becomes applicable law which all bodies of the Union are bound by in exercising their specific functions.

In this way, non-violation of the rights of EU citizens is guaranteed.

This is true also for the European Court of Justice. It is also bound by the rules for protection of fundamental rights contained in the Charter when resolving disputes within its competence.

There is lack of a mechanism for approaching the Court with a complaint and, accordingly, initiation of proceedings for establishment by the Court of a violation of fundamental rights, like the one contained in the European Convention of Human Rights and Fundamental Freedoms.

Therefore, by applying the Charter when deciding cases within its competence, the European Court of Justice does not become a human rights court and there is no duplication of competence with the Court in Strasbourg.

The fundamental rights of the citizens of the Union can find judicial protection in consequence of Union's accession as a whole to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which implies that the citizens of the Union will have the right to file complaints against violations of their rights by the bodies of the Union and the decisions of the European Court of Human Rights will have binding force for the Union.

The Quest for Citizenship as Universal Good

(this article will be published in the "The German Law Journal" **http://www.germanlawjournal.com/)**

Prof. Michelle Everson, London:

A Citizenship in Movement

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I. The quest for citizenship as universal good

From its inception, the philosophical-legal vehicle of citizenship has exhibited Janus-like qualities. For Karl Marx, the "first" citizenship of the classical world was a lodestone in the edifice of the "symbolic city"; a legally-delineated status that, just as surely as it included Greeks within the unitary *polis*, condemned the vast mass of the classical population to servility.[1] The particularism within an originating citizenship paradoxically survived the Enlightenment, following, and as a result of which, the figure of the *citoyen* became the point at which a co-opted Judaic-Christian preoccupation with the inalienable personality of man, could be conceptually reconciled with the perceived need to maintain a secular community of horizontal bondage within the republican state. Exclusionary impulses similarly only hardened in an age of nationalism, wherein even the most inclusive of "industrial" citizenships, just as it expanded the liberating potential of socialized belonging,[2] continued to exclude the alien from its New Jerusalem with direct reference to his lack of communitarian, contractual or "accidental"[3] concordance with the nation.

The philosophical-legal vehicle of Citizenship encompasses its own tragedy, as well as its own persisting project. Its failure is not merely a conceptual one: the miscarriage of the universalizing Enlightenment aspiration, or its dissolution within the territory and the history of the particularizing nation, as well as the subsequent creation of a nationalized focus for socially-liberating redistribution, have generated their own very real victims. Hannah Arendt's "spatiality", her emphasis upon the temporal and geographical parameters of belonging, or her regretful observation that "freedom", or the freedom of the politically-enabled and protected citizen, "where it existed as tangible reality, has always been spatially limited",[4] must now remind us, not only of the murdered dead, or "non-citizens" of the Europe of the dictators, but also of the non-western casualties, first, of a subjugating colonialism, and then of the blind distributive neglect of the decolonizing, post-colonial and neo-colonial eras. By this very same token of the paradox of exclusionary tragedy, however, the citizenship *telos* endures, determined both to restore the Enlightenment promise of universality and to establish universal welfare.

Such potent aspirations may in part explain the impossible expectations levelled at the new legal status of "citizenship of the European Union" established by the Maastricht Treaty of 1992. Outside of the colonial context, EU citizenship represents the first attempt to establish a formal status for, initially, Europeans above and beyond their own national communities. To this extent, it is also unsurprising that EU citizenship, for all that its adoption owed largely, if not wholly, to a functional need to establish an ancillary status for EU citizens, in order to ease completion of the single market,[5] has generated a vast aspirational literature of its own, dedicated to philosophical perfection of this novel form of post-national citizenship.[6] At the same time, however, and importantly so, the emergence of EU citizenship

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[1] D. Heater, Citizenship: The Civic Ideal in World History, Politics and Education (1990).
[2] T. H. Marshall, Citizenship and Social Class (1953) and Ralf Dahrendorf, Der Moderne Soziale Konflikt (1992).
[3] In the case of British citizenship, an accident of birth,D. Heater, Citizenship: The Civic Ideal in World History, Politics and Education (1990). .
[4] Hannah Arendt, Eichmann in Jerusalem: A Report on the Banality of Evil 262 (1994) and Hans Lindahl, *Finding a Place for Freedom, Security and Justice: The European Union's Claim to Territorial Unity*, 29 European Law Review 461 (2004).
[5] Michelle Everson, *The Legacy of the Market Citizen* in Jo Shaw and Gillian More (eds.), New Legal Dynamics of European Union (1995).
[6] Jürgen Habermas, *Citizenship and National Identity: Some Reflections on the future of Europe* 1:12 Praxis international 1-12 (1992) and E.O. Eriksen, Making the European Polity: Reflexive Integration in the EU (2005).

has been accompanied by a counter-moment, which, on the academic level, disdains philosophical re-entrenchment of "deep" concepts of citizenship at the European level, even in their most universal, or contractarian variants;[7] as well as, in pragmatic institutional-judicial terms, pursues the realization of European citizenship with a notable lack of regard for the conceptual restraints of the past.

EU citizenship is not like any other.[8] To this day, the core of EU citizenship is formed – all federalist aspirations apart – not by grand concepts, but by the economically-oriented rights of free movement laid down in the European Treaties.[9] With its functional emphasis, EU citizenship appears to offer a new potential for pursuit of a universal citizenship unfettered by exclusionary conceptual concerns. Above all, for the Court of Justice of the European Union (CJEU), the imperative of free movement has overcome all barriers to the enjoyment of the entitlements that were historically posed by nationality law, establishing a new emphasis in citizenship matters upon the tangible, or the real circumstances of individual want, rather than the posited communal gains of deep concepts of national citizenship. In its functionalist, universalizing character and its preoccupation with the real rather than the imagined, the legal-functional vehicle of EU citizenship might accordingly be argued to embody one part of a post-modern *zeitgeist*, wherein universality is no longer sought in philosophical design, but, rather, in material circumstance.

The achievements of a tangible European citizenship cannot be doubted. Nevertheless, with its emphasis upon the material circumstances of free movement, EU citizenship also raises its very own points of concern. Above all, for primary European law, fact-based judicial activism has not only strained the conceptual coherence of law,[10] but more importantly has also placed in doubt the quality of the *interpositio auctoritatis*, or the authoritative judicial intervention; concomitantly implicating EU constitutional jurisprudence and architecture within the posited, but false universalisms of science, or modern economics. Rights to free movement coalesce seamlessly with the efficiency postulates of new economic liberalisms, presenting opportunities for new forms of citizenship participation,[11] but simultaneously undermining the socially-cohesive achievements of traditional citizenship.[12] Accordingly, it will be argued here, that although we must continue to seek to address the exclusionary externalities of the deep conceptual citizenships of the national era, tangible citizenship constructs, forged in functionality, should never be pursued without continuing regard for the insolubly confrontational couplets of individualism versus community, sovereignty versus subjection and entitlement versus provision,[13] which have historically accompanied citizenship discourse, both in theory and, vitally, in reality.

II. EU Citizenship: a material achievement

For Adrian Favell writing from the sociological perspective, the collation of market rights of free movement and concomitant declaration of the miraculous birth of European citizenship by the Treaty of European Union merely made the EU a hostage to fortune: "[T]hey thus engaged in a dangerous game of rhetoric in relation to this core notion at the heart of the modern nation state", triggering, on the part of scholarship, "grandiose cosmopolitan illusions of a post-national European state and polity",[14] as well as furnishing Eurosceptic thinkers with a further stick with which to beat European

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[7] Adrian Favell and Virginie Guiraudon, *The sociology of the European Union: an agenda*, 10:4 European Union Politics 550-576 (2009).
[8] Richard Bellamy, *The Identities and Rights of European Citizens* in Richard Bellamy and Uta Staiger (eds.), EU Citizenship and the Market (2011).
[9] See, above all, the European Commission's general treatment of citizenship, whereby its major resources are dedicated to ensuring the free movement of European citizens and only ancillary resources are dedicated to realising the political content of EU citizenship, Report From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region on progress towards effective EU Citizenship 2011-2013 (COM(2013) 270 final).
[10] Niamh Nic Shuibhne, *Editorial*, 36 European Law Review 161 (2011).
[11] Adrian Favell, *European citizenship in three Eurocities: a sociological approach to the European Union*, 30 Politique Européenne 187-224 (2010).
[12] Michelle Everson, *A very Cosmopolitan Citizenship; but Who Pays the Price?* in Michael Dougan, Niamh Nic Shuibhne and Eleanor Spaventa (eds.), Empowerment and Disempowerment of the European Citizen (2012) and Neil Fligstein, Euro-clash: The EU, European Identity and the Future of Europe (2008).
[13] Michelle Everson, & U.K. Preuß, *Konzeptionen von Bürgerschaft in Europa*, 26:4 Prokla 543-564 (1996).
[14] Adrian Favell, *European citizenship in three Eurocities: a sociological approach to the European Union*, 30 Politique Européenne 192 (2010).

integration processes. The packaging of functional market rights as a European citizenship unleashed a normative maelstrom of overblown expectations and matching skepticism. A market-based citizenship could never mimic the contractarian allegiance of individual to the state, especially as regards political inclusion within EU decision-making processes, that had historically been postulated in the national setting,[15] and which ambitious scholarship now sought to re-establish at EU level.

Refreshingly, Favell, in a sociological agenda for European citizenship research, calls for an academic divorce from an "industry", which is preoccupied, on the basis of Eurobarometer data, with the perceptions of individual Europeans citizen of their own identities.[16] Instead, a new material focus should be one of how Europeans exercise their rights in practice. For Favell, though not yet constructed or even construed as a polity, the EU may be considered to be a "space in reality"; or, to have established its own material counterpoint to conceptual spatiality, and this, to the exact degree that individuals have used European rights or "opportunities" to "do new things across national borders; go shopping for cheaper petrol or wine; buy cottages in charming rustic villages; look for work in a foreign cosmopolitan city; take holidays in new destinations, move to retire in the sun, buy cheaper airline tickets; plan international rail travel; join cross-national associations between twinned towns; use a common currency without having 5% stolen by the bank – and a thousand other actions facilitated by the free movement accords".[17]

The demand for a "behaviorally-", rather than "attitudinally"-based approach to European citizenship, is a distinct methodological choice.[18] At the same time, however, for Europeanists, the academic approach also evokes the political functionality of the Community Method; or does so, at least to the degree that the grand normative schemes of European Union are routinely pursued, not as stated projects, but in the incrementalism of limited integrationalist steps, such as functionalist completion of the free market, wherein behavioral change throughout European civil society becomes the platform for a further deepening of Europeanization. Similarly, pragmatic behavioralism also recalls the legal methodology of the CJEU, or its efforts to secure the rights of individual Europeans – and non-Europeans - to do what European treaties promise them that they can do, and thereby to extend the reach of EU citizenship beyond many institutional expectations.

Returning briefly to the level of the philosophical, the recent history of EU citizenship accordingly reveals a vital disjunction between the attitudes of the member states of the European Union, in their guise as the Council, and the CJEU, wherein the Court has sought to expand the benefits of European Union citizenship often against the wishes of national authorities. Hans Lindhal has written of Europe's renewed political recourse to spatiality. For Lindahl, the notion of space is a powerful one. It is:

> [N]ot merely a geographical term. It relates not so much, and not primarily, to a piece of land as to the space between individuals in a group whose members are bound to, and at the same time separated and protected from each other by all kinds of relationships, based on a common language, religion, a common history, customs, and laws.[19]

Spatiality, with its emphasis upon identity writ large, is commensurate with deep concepts of national citizenship and may be argued to find a renewed place in the differentiations made between individuals present within the European space by European legislation on the movement of persons. For, Lindahl, a regime whereby Union citizens are afforded specific rights of free movement, third country nationals are afforded limited recognition,[20] and asylum seekers are subject to a common framework of control,[21] has not ended exclusion in Europe, but has rather reinforced it within a binary legal code, whereby the "legally resident" take their stratified place within a European space, which protects individual Europeans, one from the other, and Europeans from the other, such that "the

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[15] Michelle Everson, *The Legacy of the Market Citizen* in Jo Shaw and Gillian More (eds), New Legal Dynamics of European Union (1995).
[16] See *e.g.*, Neil Fligstein, Euro-clash: The EU, European Identity and the Future of Europe (2008).
[17] Adrian Favell, *European citizenship in three Eurocities: a sociological approach to the European Union*, 30 Politique Européenne 190 (2010).
[18] Id. note 5.
[19] Hans Lindahl, *Finding a Place for Freedom, Security and Justice: The European Union's Claim to Territorial Unity*, 29 European Law Review 461 (2004).
[20] As family members under Directive 2004/38 on the rights of Union Citizens and their family members O.J. 1994 L158/77; and long-term residents under Directive 2003/109 concerning the status of third country nationals who are long-term residents O.J. 2004 L16/44.
[21] For full details, see, Lindahl n 19.

illegal", both within Europe and without, are left bereft, knocking at the firmly closed doors of recognition and solidarity. The European other dies daily in the waters of the Mediterranean, or languishes in the no-man's-land of detention centers, just as the Lisbon Treaty promises its citizens "an area of freedom, security and justice" without internal frontiers (Article 67 TFEU).

It is this renewed recall to notions of European belonging, whereby only certain individuals, defined by their positive legal status, are given access to European benefits, that is so strikingly absent from the jurisprudence of the CJEU. By now, the cases are legendary, but still deserve brief recall here, insofar as the Court has rejected establishment of a nation of European belonging and has instead responded, both materially and emotionally, to the constellation of facts thrown up by the movement of individuals into and throughout the European continent. From the inception of Union citizenship in the Maastricht Treaty, the Court's citizenship jurisprudence has acted as counterweight to the establishment of European spatiality: first, decoupling the right of free movement of European citizens (Article 20(2a) TFEU) from the more restrictive status of "European as worker" under Article 45 TFEU (*Maria Martinez Sala*);[22] secondly, cutting the Gordian knot between citizenship and nationality, extending "associative" rights of EU citizenship to TCNs or third country nationals (*Zhu and Chen*);[23] thirdly, questioning constructed solidarity and opening up closed national benefits systems to EU nationals and their associates (*Baumbast*);[24] and latterly, albeit in a very restricted formulation, even seeming to suggest that rights of EU citizenship have "substance" of their own and will accrue even where there is no question of movement across national borders (*Ruiz Zambrano*).[25]

More specifically, at the level of legal methodology, where the Court has made unlimited use of its own *effet utile* doctrine and has borrowed extensively from the universal jurisdiction of human rights, the CJEU has broken down the exclusionary "blind-side" of traditional citizenship constructs to treat persons in movement within the European space, not as philosophical constructs, but rather as individuals captured in their own material circumstances which dictate their need for enjoyment of European rights. In this construction, facts, but also emotions, matter. The decoupling of enjoyment of citizenship rights from nationality follows as the CJEU responds emotionally to a simple human happening, or to the birth of a child within the EU, allowing her mother and "primary carer", a Chinese national, to travel freely with her across Member State frontiers so that she might in fact enjoy her newly won EU citizenship, granted by virtue of then unlimited Irish *ius soli*. The nation founded either in pre-communitarian bounds of belonging or in concordance with the ideals of the founding republican moment, is hostile to both child and mother. The CJEU and its EU citizenship are not: the human right to a family life demands that Mrs. Zhu must be allowed to travel with her daughter (*Zhu and Chen*).

Hostile meaning and indifferent history is similarly forgotten, as the *ius Europeaum* furnishes a "good" outcome, or engages with a visible and tangible other far beyond imagined solidarity communities, thereby extending the EU citizenship regime to matters of access to welfare. Directive 2004/38 on free movement predictably re-emphasizes the closed nature of the national solidarity collective – or the exclusionary notion that the redistributive social benefits of citizenship are reserved for members of the nation alone – by granting EU citizens and their family members a right of residence throughout Europe only "as long as they do not become an unreasonable burden on the social assistance system of the host Member State" (Article 6). The operative word here, the measure of the willingness of the Member States to open up national solidarity to afford real succor to the indigent Union citizen, is to be found in the word "unreasonable";[26] and it is here, too, that the determination of the CJEU to pry that door further open is demonstrated. Prior to the implementation of Directive 2004/38, the Court had already firmly signaled its universalist welfare aspirations in cases such as *Grzelczyk*.[27] In *Baumbast*, where a German national had not satisfied UK requirements that he maintain sufficient sickness

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[22] Case C-85/96, *Maria Martinez Sala v Freistaat Bayern,* 1998 E.C.R. I-2691.
[23] Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, 2004 E.C.R. I-9925.
[24] Case C 413/99, *Baumbast and R v Secretary of State for the Home Department*, 2002 E.C.R. I 7091.
[25] Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)* (Grand Chamber) of 8 March 2011.
[26] Michael Dougan, *The Constitutional Dimension to the Case Law on Union Citizenship*, 36 European Law Review 613 (2006).
[27] Case C-184/99, *Grzelcyk v Centre Public d''aide sociale d''Ottignies-Louvain-la-Neuve,* 2001 E.C.R. I-6193, stating that the fact that Dir 93/96 regulating movement of students (O.J. 1993 L317/59) did not provide for benefits for students, similarly did not preclude extension of national benefits to EU students where such students found themselves in the same needy circumstances as national students.

insurance for himself and his family, the Court accordingly declared that national legislation must be proportionate. The imposition of the Union law principle of proportionality to all subsequent national legislation implementing Directive 2004/38 thus also amounts to a "constitutional review" of Council efforts set the legislative limits to national solidarity through the judicial frontline assessment of the impacts of a notion of "unreasonable burden" in the light of everyday cases in individual Member States.[28]

And it is here that the Court's factual-emotional response to citizenship adjudication becomes most apparent, Contractual citizenship and solidarity is blind to Mr. Baumbast's, or the geographical stranger's, need for immediate medical care for his family. This need not be so declares the CJEU: the measure of solidarity within Europe is not to be negated by spatially-bounded belonging. Instead, a miracle of extra-European recognition is invoked into being as the Court's sympathetic act of observing and responding to the needs of individual citizens transforms proportionality from a technical yardstick of procedural legal review into a far more indistinct instrument of material adjudication, open to an emotionally-founded response to individual circumstance, and an *interposito auctoritas* within which a miracle of European solidarity might be born.

A burgeoning – judicially-driven – citizenship, founded in response to material circumstance, is an undoubted achievement; above all, because it begins to answer the final demand, famously made by Ralf Dahrendorf, that traditional notions of citizenship should be opened up in response to globalization and social fragmentation.[29] A material universalism, given force by functionality and emotion, seemingly allows us to escape the double-binds of conceptual history, and to respond to a real world of material circumstance. Nevertheless, the approach is vulnerable in various respects, especially in terms of the European legal system, which, in addition to precipitating its own embroilment in a vast number of technical cases on social assistance,[30] now also suffers from powerful critique, highlighting the inconsistency and incoherence in own jurisprudence.

The primary focus for this criticism has been the case of *Zambrano*, which, whilst generally regarded has having furnished the "correct result" in simple terms of reactive justice, also causes concern within formalist legal thinking, seemingly overturning the CJEU's established line of jurisprudence limiting enjoyment of EU citizenship rights to instances of cross-border movement.[31] As a consequence, the Court has been required to clarify and limit its revolutionary jurisprudence, whereby Mr. and Mrs. Zambrano, failed Colombian asylum seekers in Belgium, who had never moved across European frontiers, were nevertheless afforded the protection of the *ius Europeaum* as primary carers of their children who had become Belgian by virtue of their birth in that country. In the Austrian case of *Dereci*[32], the Court re-iterated that, in *Zambrano*, the operative point was one that the children of the *Zambrano* family remained dependent upon their parents, such that, as Union citizens, they would still have been required to leave the European continent. The five TCNs of *Dereci*, wishing to join their families in Austria, were non-dependants and therefore not so fortunate. As much as family re-unification might be desirable, it was not "necessary" for the settled Austrian families to maintain their residency within the European space.

Reserving for itself, rather than national courts, the right to review each individual set of facts, the *Dereci* Court decisively foreclosed the potential for a human right of enjoyment of family life to become an automatic basis for the universalization of EU citizenship. At the same time, however, and in addition to increasing its own emotional workload, the Court also unmasked its own particularism, the continuing tension between norms and fact within EU law, and the inherent weakness within an emotionally-founded *interpositio auctoritatis*, which inexorably makes "Judge-Kings" of courts.[33] The question of who guards the guardians is a perennial one, becoming a critical one where the selfsame

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[28] Michael Dougan, *The Constitutional Dimension to the Case Law on Union Citizenship*, 36 European Law Review 613 (2006).
[29] Ralf Dahrendorf, *Citizenship and Social Class,* in Ralf Dahrendorf, The Modern Social conflict: the Politics of Liberty (2008).
[30] Michelle Everson, *A very Cosmopolitan Citizenship; but Who Pays the Price?* in Michael Dougan, Niamh Nic Shuibhne and Eleanor Spaventa (eds.), Empowerment and Disempowerment of the European Citizen (2012).
[31] Niamh Nic Shuibhne, *Editorial*, 36 European Law Review 161 (2011).
[32] Case C-256/11, *Murat Dereci and Others v Bundesministerium für Inneres* (Grand Chamber) of 15 November 2011.
[33] Michelle Everson, *A very Cosmopolitan Citizenship; but Who Pays the Price?* in Michael Dougan, Niamh Nic Shuibhne and Eleanor Spaventa (eds.), Empowerment and Disempowerment of the European Citizen (2012).

primary legal – or quasi-constitutional – jurisdiction that reserves to itself the right to review the subjective interpretation by member states of the term "unreasonable burden", also takes unto itself a highly emotional function of ascertaining the exact nature of the personal circumstances which will force removal, voluntary or otherwise, from the Union. The potential for empathy failure is ever present: the Court's *ratio* in a second qualifying case, whereby Mrs. McCarthy, a UK national, whose Jamaican husband was denied leave to remain in the UK, on the basis that she was not exercising her right of free movement under Directive 2004/38, such that an ancillary citizenship status could not be established for her husband,[34] leaves us with continuing concerns. Certainly the Court might state that Mrs. McCarthy, unlike the Zambranos, will not be forced by UK law to leave the EU; but surely she will be so by sentiment. Equally, it would prove difficult to regularize the residency of Belgium children in Colombia; but, so too, might it prove difficult to regularize the status of Mrs. McCarthy in Jamaica. Max Weber's eternal concerns about the inconsistency of material jurisprudence returns to haunt a European law which, even in its qualifying jurisprudence, strays from strictly formalist paths:[35] how might it maintain its own legitimacy in a necessarily irrational process of emotional response to the tangible demands for universal justice thrown up by globalization processes?

III. Scientific universalism and the entrenchment of *homo economicus*

Karl Deutsch, paraphrased by Neil Fligstein,[36] reminds us of the calculated cynicism inherent to the development of deep concepts of national citizenship: "[T]he historical 'trick' to the rise of a nation state will be to find a horizontal solidarity for the existing [class] stratification and a rationale that using a state apparatus to protect the nation makes sense." And, once again, in his technical choice of sociological methodology, Adrian Favell cannot but also implicitly hint at the far broader normative point that the "Marshallian triptych"[37] of industrial citizenship, in its deification of the progressive historical emergence of civic, then political, and finally, social rights, can be seen as entrenching outmoded and oppressive constructs of social organization. Social stratifications extend far beyond divisions of labor to shape and control – in nationalized narratives – dominant modes of cultural expression. Should, paraphrasing Favell, "doing new things," buying into bucolic dreams, motoring across the border to locate cheaper wine, be viewed, in accordance, for example, within the UK, class-based narrative as an act of betrayal, as a siding with the propertied classes of a golden pre-war era?

The point is far from being a facetious one: the ossification of historically-conditioned stratifications within bounded societies, governed by their own inspirational, and often class-based, narratives of citizenship evolution, have similarly obscured a myriad of social cleavages founded, for example, in gender, sexual orientation or ethnicity, and have, perhaps, played their own part in retarding material claims for justice that are not expressed within traditional national narratives of belonging and cohesion.[38] The ability to engage in "new" acts – e.g. the explicit sexualization of consumption within the establishment of a highly visible pink lifestyle[39] – might, by the same token, be viewed as *avant-garde* establishing of potential for vital social change. The Janus-like character of citizenship, or its exclusionary potential, is not limited to exclusion on the basis of nationality. Instead, exclusion may also occur – sometimes in a highly oppressive manner – within the spatial confines of an "inclusive" citizenship narrative.

Set against this background of internal, as well as external exclusion, the liberating emphasis – also implicit in Favell's research – upon transaction and exchange opportunities, is thus far from a surprising one. Market forces are famously non-philosophical, blind to the antecedents, characters, desires and intentions of producers, service-providers, employees or consumers. To this degree, the rights of free movement at the core of EU citizenship, designed to facilitate establishment of the single

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[34] Case C-434/09 *McCarthy v Secretary of State for the Home Department*, judgment of 5 May 2011, nyr (Grand Chamber).

[35] Michelle Everson, *A very Cosmopolitan Citizenship; but Who Pays the Price?* in Michael Dougan, Niamh Nic Shuibhne and Eleanor Spaventa (eds.), EMPOWERMENT AND DISEMPOWERMENT OF THE EUROPEAN CITIZEN (2012).

[36] NEIL FLIGSTEIN, EURO-CLASH: THE EU, EUROPEAN IDENTITY AND THE FUTURE OF EUROPE 130 (2008).

[37] Adrian Favell, *The Changing Face of "Integration" in a Mobile Europe,* in COUNCIL FOR EUROPEAN STUDIES NEWSLETTER (2013).

[38] Ralf Dahrendorf, *Citizenship and Social Class,* in RALF DAHRENDORF, THE MODERN SOCIAL CONFLICT: THE POLITICS OF LIBERTY (2008).

[39] F. C. MORT, CULTURES OF CONSUMPTION. MASCULINITIES AND SOCIAL SPACE IN LATE-TWENTIETH CENTURY BRITAIN (1996).

market, might be argued – and this in isolation from a judicial activism which has also diluted the economic character of EU citizenship (*Martinez Sala*) – to contain their own material universalism of opportunity; allowing EU citizens in their characters as workers, entrepreneurs or simple shoppers to challenge the established stratifications of their own and adopted member states, not simply in theory, but also in fact. Nonetheless, a citizenship grounded within the fact of market process also poses its own dangers.

At least since financial crisis, new forms of social organization, founded in liberalizing market forces have often found themselves under attack, all-too-easily dismissed as neo-liberal chimeras that mask the disenfranchising interests of private economic power. The argument has validity, especially as regards the misdeeds of various sectors of the banking sector. Nevertheless, with an equal eye to liberating marketing potential, the risks inherent to a marketized society necessarily also deserve a more differentiated treatment, especially insofar as institutionally-driven transition from concepts of political citizenship to notions of market citizenship may also be identified as a part of a materializing trend; one which continues to seek a universal justice in its treatment of the individual and individual rights, but which does so in processes, which – initially at least – are founded not in conceptual restraint, but rather in scientific appraisal of the circumstances of exchange.

In the recent case of *Alfa Vita,* Advocate General Poiares Maduro has re-iterated the close connection within the European Union between the rights-driven evolution of the European market and the establishment of European citizenship:

> [I]t would be neither satisfactory nor true to the development of the case law to reduce freedom of movement to a mere standard of promotion of trade between member states. It is important that the freedoms of movement fit into the broader framework of the objectives of the internal market and European citizenship. At present, freedoms of movement must be understood to be one of the essential elements of the "fundamental status of nationals of the member states". They represent the cross-border dimension of the economic and social status conferred on European citizens.[40]

Considering the centrality of the European market within the integration project, it is equally unsurprising that the jurisprudence of the CJEU has similarly endowed and continues to endow the individual European with an economic character. From the very inception of the EEC, judicial extrapolation of the European treaties has perforce entailed the re-allocation of economic opportunities within an emerging European market. Individual economic potential is no longer constrained by national borders. Instead, reformulation of primary EU laws guaranteeing cross-border movement of labor, services, economic undertakings and capital, as individual rights (the "four freedoms"), is an indispensable weapon within a judicial armory dedicated to the dismantling of the barriers to trade that distinctive national regulatory regimes constitute. The European economic citizen accordingly emerged, in its infant form, as a "frontier-busting" pioneer of European market formation.[41]

The persona of the European economic citizen must likewise be viewed in a positive light; or, at least, must be so to the degree that promotion of her rights by the CJEU has often freed the European from the "infantilizing" excesses of post-war regulation.[42] Equally, the surprising degree of acceptance won by an activist court for its ground-breaking judgments may be argued to have been a reflection of the Court's ready deployment of the universal truths of the scientific discipline, or the happy marriage established by the CJEU between science and the principles of European law, and especially so, between science and the principle of proportionality. Where the Court deployed the forensic power of science to unmask fiction, or the paternalistic incoherence of member state regulation, national legal systems were persuaded to lend it their implementing vigor: a ban on whole-meal pasta could not, after all, be demonstrated to be proportionate; could not be shown to protect the health of Italian diners.[43] In short, in a quest for materialization beyond mere emotionalism, the scientific *interpositio auctoritatis* reveals its own legitimating universality, as legal norm is informed by scientific methods of fact recognition. Nevertheless, in its materialization efforts, the historic Court also imbued its jurisprudence with a scientific outlook, which has subsequently hardened – or been misapplied – with the notable result that the CJEU has slowly de-natured the European Economic Citizen, and finally

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[40]Opinion of AG Poiares Maduro in Cases C-158 & 159/04, *Alfa Vita Vassilopoulos AE* v *Greece*, 2006 E.C.R. I-8135.

[41] Marco Dani, *Assembling the Fractured European Consumer*, 36 EUROPEAN LAW REVIEW 362–384 (2011).

[42] Id.

[43] Id.

remodeled individuals throughout the Continent as the highly troubling *homo economicus* of cases such as *Laval* and *Viking*.[44]

A core problem in this regard, however, is also one of the growing dominance of a form of economic liberalism, which construes itself as a science, locating its claim to a universal applicability and justice within the posited facts of market operations alone, rather than the place that the market is afforded within society as whole. The impact of this form of economic liberalism, or, in Michel Foucault's language, "anarcho-liberalism",[45] is most strongly felt – and also most strongly critiqued[46] – in the sphere of application of the precepts of the law & economics movement, but also extends to influence, by means of application of efficiency postulates, national constitutional jurisdictions; as well as, in the case of the CJEU, the quasi-constitutional jurisprudence of post-national law. For critical opponents, in particular those of a Hayekian persuasion,[47] the law & economics movement – to the degree that it mimics anarcho-liberal faith in the ability of rational market exchange to maximize individual and joint outcomes – represents, *grosso modo,* "a legal theory without law". In all of its materializing over-ambition, or its "idolatry of the factual", law & economics has emerged as a totalizing force all of its own, negating of an original economically-liberal (and legal) project to limit state power through "normative" delineation of an (economic) civil society, and fatally disregarding of the Hayekian demand for a re-establishment of moment self-limitation within rational choice analysis. Where cost-benefit analysis can be and is applied far beyond limited spheres of rational individual interaction, it too becomes a "counterfactual", with the result that the scientification of law project is traduced and reversed. Where it is modelled or applied to operations where markets and competition are "arbitrarily mimicked",[48] the claim to re-found legal morality in universal reality is displaced by a totalizing rationality that makes its impossible claim to capture all uncertainty within human relations in its counterfactual models of operation. Where Foucault warns of the "bio-power" inherent in a form of economic liberalism that construes all of human actions as market operations, hinting also that such an operation might overcome all human subjectivity, or potential for political voice, Ernst-Joachim Mestmäcker, remaining true to his Hayekian roots, forcefully dismisses a positivistic scheme of law that allows individual judges to dispense with a core rule of legal certainty in line with a *Grundnorm* of modelled economic transactions, as acceptance of "ideology in the service of unlimited government and socialism [sic]; the refutation of a concept of justice ignoring viable negative tests of justice that identify unjust norms".[49]

The totalizing impacts of efficiency postulates within the quasi-constitutional jurisdiction of the CJEU may thus also be identified in its increasingly undifferentiated approach to economic citizenship, and in its pursuit of an absolute universal justice within the factual. Where European jurisprudence once paid due attention to delineation of its own Economic Constitution, the normative measure of which was the degree to which the European economic order continued – in the absence of its own redistributive function – to co-exist with residual national social competences given their own democratic legitimation,[50] recently radical CJEU market jurisprudence has recalibrated the principle of proportionality, ironed out "efficiency-jarring" elements within precedent and moved explicitly to a marketized conception of redistribution as redistributive opportunity. Such jurisprudence might be attributable to the pressures of eastern enlargement, or the need to bind new member states quickly

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[44] Case C-438/05, *International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP, OÜ Viking Line Eesti*, 2007 E.C.R. I-1079; Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, 2007 E.C.R. I-11767.

[45] MICHEL FOUCAULT, BIRTH OF BIOPOLITICS: LECTURES AT THE COLLEGE DE FRANCE, 1978-79 (2008).

[46] Michelle Everson, *The Fault of (European) Law in (Political and Social) Economic Crisis* 24:59 LAW & CRITIQUE (2013).

[47] Ernst-Joachim Mestmäcker, *A Legal Theory Without Law - Posner v. Hayek on Economic Analysis of Law*, BEITRÄGE ZUR ORDNUNGSTHEORIE UND ORDNUNGSPOLITIK (2007).

[48] Id.

[49] Id. 55.

[50] Christian Joerges, What is left of the Integration Project? A Reconstruction in Conflcts Law Perspective, in Stefan Kadelbach (eds), LEGAL CULTURES, LEGAL TRANSFER AND LEGAL PLURALISM (Frankfurt/New York: Campus 2013)

into the Union.[51] Nonetheless, it is still striking that recent free movement case law and the growing power of a new jurisprudential logic that national regulation – regardless of its purpose – must cede to the European principle of the free movement of goods where a product would otherwise be impeded in its access to the market, transforms the principle of proportionality from a revealing rule of reason applied to national regulatory motivations, into an absolute standard of "trade above all".[52] Similarly, by now infamous judgments on services provision have also subjected conduct of industrial disputes to marketized proportionality,[53] revealing the extent to which economic efficiency postulates have emerged within CJEU thinking as a putatively universal yardstick against which national regulation will be measured.

For many, the most concerning aspect within the *Laval & Viking* cases, is the CJEU's failure to maintain the European legal tradition that labor and economic constitutions are distinct orders which may not be weighed against one another within the adjudicative balance:[54] collective bargaining agreements may no longer be imposed upon "posted" workers, through regulation or strikes, if they are deemed to impact disproportionately on cross-border trade. Seen together with the Court's new market access test for goods, however, *Laval* and *Viking* – as Attorney General Maduro's economic evocation of citizenship demonstrates – are also one further example of the manner in which orders governing citizenship, as well as those governing the economic, have now coalesced within CJEU jurisprudence in accordance with a "justice standard" of allocative efficiency. The emergence of this standard has its own inspirational roots. The posted workers of *Laval* and *Viking* were from the new member states, and found themselves denied access by western labor practices to the sole route to prosperity which the old member states had afforded them: their competitive labor advantage. Compensating perhaps for the lack of a European Marshall plan, but establishing a compensatory measure of justice for new member states that is founded in an idolatry of a factual of cheap labor, the Justices of the CJEU have similarly undone the collectively-established universalisms of the social legal entitlements enshrined within national social orders, and replaced them with European rights which deny western European workers access to their own jobs, just as they empower eastern European workers to work for less money.

However, the most jarring note in this rebirth of the European Economic Citizen as a *homo economicus*, whose life chances are to be pursued and determined within the totalizing rationality of law as an economic technology may be noted, not in the market itself, but rather in a sphere of political citizenship. Just as development of the *homo economicus* conditions individual behavior within the market, it similarly limits the sphere of opportunity for effective political expression in relation to and outside that market. Primary European law may promote the "confident" consumer, but, ensconced within its own scientific outlook it cannot even recognize the political concerns of the "ethically-informed" consumer.[55] Equally, in limiting strikes, the EU legal order has similarly deprived the European *homo economicus* of a final means of politically asserting her collectively established values above market forces in the traditionally – disproportionate - manner.

III. An economy of exclusion

The emergence of a European *homo economicus* within CJEU jurisprudence allows us to relativize critique made of the existing academic industry of European citizenship. Above all, the facts and impacts of *Viking* and *Laval* confirm the perceptions of an industrial class within Europe of skilled and unskilled workers, identified by Neil Fligstein,[56] that they are, in good measure excluded from the benefits of European Union. Exclusion is not simply due to the fact that a west European industrial class is unwilling to make use of its European rights through movement. Instead, exclusion extends to the sphere of the political, as protest in defense of local jobs against agency workers is easily dismissed, for example, in the case of UK protests against agency workers:

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[51] Michelle Everson & Christian Joerges, *Reconfiguring the Politics–Law Relationship in the Integration Project through Conflicts–Law Constitutionalism,* 18:5 EUROPEAN LAW JOURNAL (2012)

[52] Alina Tryfonidou, *Further steps on the road to convergence among the market freedoms,* 35:1 EUROPEAN LAW REVIEW 36-56 (2010).

[53] Brian Bercusson, *The Trade Union Movement and the European Union: Judgment Day*, 13:3 EUROPEAN LAW JOURNAL 279 (2007).

[54] A. Supiot, *A legal perspective on the economic crisis of 2008*, 149:2 INTERNATIONAL LABOUR REVIEW (2010).

[55] Michelle Everson & Christian Joerges, *Consumer Citizenship in Postnational Constellations?* in Kate Soper and Frank Trentmann (eds.), CITIZENSHIP AND CONSUMPTION (2007).

[56] NEIL FLIGSTEIN, EURO-CLASH: THE EU, EUROPEAN IDENTITY AND THE FUTURE OF EUROPE (2008).

For many, complaints about foreign workers coming here and taking their jobs are disturbingly reminiscent of the atmosphere whipped up in Britain's cities during the 1960s and 1970s, when the backlash against Commonwealth immigration was reflected both in the ballot box — in support for extreme right-wing parties — and, in many cases, in street violence.[57]

The tragedy inherent to traditional notions of industrial citizenship is undoubtedly one of structural exclusion and racism: the differentiated welfare capitalisms of the post-war era,[58] just as surely as they ossified hierarchies of class within the nation state, also consolidated existing stratifications of global economic and social inequality. To the degree that nationalized welfarism erected its own regulatory barriers to trade and an original allocation of global resources, the class struggles of the socially-democratic nation state, universalist in aspiration, but still bounded in spatiality, were likewise to be felt outside a dominant west as an extension of colonial domination into a decolonizing and post-colonial era. Yet, in our modern European struggles of adaptation to allocative efficiency across a former iron curtain, tragedy nonetheless persists; and does so, above all, in our depiction of a subjective and collectively-expressed act of protest against the persona of the *homo economicus*, solely and uniquely as an act of xenophobia. Foucault's hints and concerns about the spread of bio-power, made at the dawn of our new economically-liberal era, would appear to have found their practical expression in the totalizing scientification of current public discourse. Perceptions do matter, and do so to the degree that materializing rationalism can and does pre-empt human subjectivity, can and does make us wholly blind to the manifestation of any form of political discourse or human expression founded in opposition to a dominant *homo economicus*.

The material treatment of a functionally-founded European citizenship has brought positive gains, especially as regards the position of the indigent stranger in a position of real need. Yet, the obvious limits to the universality of the emotionally-founded *interpositio auctoritatis*, and the lure of the putative universalisms of scientific and economic discourse may be argued to have established their own economy of exclusion. Importantly, however, this form of exclusion may not be limited to those who do make use of their rights of movement, typically an (western) industrial class. Instead, a citizenship founded in movement may also, to the degree that it promotes the character of the *homo economicus*, disenfranchise the "stars", or cosmopolitan and pro-active citizens of European integration identified by Favell,[59] on whom our hopes for future political union within Europe are based.

The ambivalence inherent within Adrian Favell's ground-breaking research on European citizenship, on how Europeans exercise their rights, has often been noted.[60] However, perhaps too much emphasis has been placed upon Favell's conclusion that very few of the Eurostars of the continent, exercising their movement-based rights of European citizenship within the most cosmopolitan and Europe friendly of European cities, establish any form of connection to the traditional structures of local political discourse. Favell is correct: the act of politics extends far beyond our presence in the voting booth, and just as the strike asserts a collective voice outside the parliamentary chamber, purchasing run-down houses to rejuvenate inner city areas, establishing and supporting new cultural ventures, or exercising purchasing power impacts just as surely on general cultural discourse, changing the societies in which we live. Yet, in the limits of Favell's methodologies, we also find a seed of concern: certainly very few of his Eurostars, explicitly reveal themselves in interviews to be the "bandits" of neo-liberal critique of rights of free movement, concerned only for their own material betterment, and with no regard for the societies in which they briefly settle; but what of the unrecognized unsaid in personal Eurostar narratives? To what degree are our "political" acts of exchange and transaction subjective acts of cultural liberation, undertaken on our own part, both as a means of escape from our own experience of cultural stagnation, as well as, with an informed eye to the "betterment" of society around us; and to what degree are they simply our sole option, an expression of the only unthinkingly "efficient" impact which we can have in a denatured world of scientification?

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[57] The Times, *Editorial Comment* (January 30, 2009), relating to protest by UK workers of importation of (skilled) labour from Portugal and Italy and typical of public comment on the dispute both on the rights and on the left.

[58] G. ESPING-ANDERSEN, THE THREE WORLDS OF WELFARE CAPITALISM (1989).

[59] Adrian Favell, EUROSTARS AND EUROCITIES: FREE MOVEMENT AND MOBILITY IN AN INTEGRATING EUROPE (2008).

[60] Ch. Joppke, *EU Citizenship and Identity: Sociological and Legal-Institutional Views* in Richard Bellamy and Uta Staiger (eds.), EU CITIZENSHIP AND THE MARKET (2011).

IV. Beyond and towards citizenship

Deep concepts of national citizenship are exclusionary. Nevertheless, at least insofar as the quasi-constitutional jurisdiction of the CJEU reflects the materializing scientification of governing social relations throughout Europe, the material liberation of EU citizenship may also be argued to be accompanied by its own form of economic exclusion. The problem is complex, far more than a mere neo-liberal matter of the powerful dominance of one form of economic interest. Instead, the de-naturizing and de-politicizing potential of *homo economicus* has its own inspirational roots: the continuing quest for a universal form of justice to govern relations within a globalizing world that recognizes the negative exclusionary externalities[61] of the traditional nation state. The chimera of universalism promised by the efficiency postulates of our new economic liberalism has been partially revealed by financial crisis. However, the false lure of universalizing scientification remains powerful, especially where it coalesces with the liberating potential of markets experienced by a variety of once disregarded identities since the period of economic liberalization of the 1980s, and still presents itself to the law as a ready tool to prosecute the Enlightenment project of universalism beyond its conceptually-bounded limitations.

Nevertheless, the lure of universalism is also its curse, and, in a real world of response to material circumstance and want, the effort to move beyond the constraints of traditional notions of belonging might, in a final assessment, better be approached with a vital shift in emphasis away from the universal potential of citizenship, to a renewed concern with its institutional status as an impossible fulcrum, holding irreconcilable interests and values in fragile equilibrium. In addition to its redistributive characteristics, the often overlooked functionality of T.H. Marshall's sociologically-established conception of industrial citizenship resides in its reconciliation, but equal perpetuation of historical and contemporary antagonisms between the market and those who reject its inequalities, in its provision of stable institutions within which perpetual agonism might unfold. The current obsession with pursuit of universal justice similarly detracts from the existence of confrontational citizenship couplets of individualism versus community or sovereignty versus subjection; as well as, in the language of Ralf Dahrendorf, entitlement versus provision, wherein provisions capture the entrepreneurial impulse of a citizenship which encourages individual (economic but contingent) enterprise, and entitlements represent a collective counter-interest – existing in permanent tension with individualism – in the permanent guarantee of subjective rights.

Seen in this confrontational light, one in which the citizenship emphasis is shifted away from philosophical concerns with communitarian or contractual belonging, the primary issue at European, but also at global level, must be one of which are the institutions which both reconcile and perpetuate the impossible, but also creative, tensions of a world in movement. Real and never imagined tensions between traditional or class-based expressions of collective interest and the cosmopolitan and entrepreneurial impulses of the global citizen; between the wealth-creating provisions of a globalized market and demands, not only, in the terms deployed by Karl Polayni,[62] for the "market-embedding" entitlements that mitigate revolutionary rejection of market inequalities, but also – and vitally so – for the space to create "different" exchange relations, or emerging markets, outside of, and in collective defense – including environmental defense – against totalizing economic technologies and brute economic power; and finally, between an always extant human desire to rebel, escape, renew and destroy in an expression of (self-) sovereignty against an equally necessary human want for the security and stability found in (collective) subjugation.

Adrian Favell is right to call for evolution of sociological research agendas which reveal the material circumstances of a world in movement. Yet, a norming and normative response to globalization is also indispensable. In a prosaic world of law, this response must per force be cautious and tedious; first, reigning in the universalist aspirations of grandiose, rights-based legal methodologies; and secondly, working slowly, and in response to wider European and global cultural, political and economic

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[61] Christian Joerges, *What is left of the Integration Project? A Reconstruction in Conflcts Law Perspective*, in Stefan Kadelbach (eds), LEGAL CULTURES, LEGAL TRANSFER AND LEGAL PLURALISM (Frankfurt/New York: Campus 2013)

[62] See, for details in the EU context, Christian Joerges, *What is left of the Integration Project? A Reconstruction in Conflcts Law Perspective*, in Stefan Kadelbach (eds), LEGAL CULTURES, LEGAL TRANSFER AND LEGAL PLURALISM (Frankfurt/New York: Campus 2013).

discourses, to create the institutions of a perpetually agonistic citizenship within the globalized legal order. There is no space here to detail a new legal research agenda for a citizenship of “global agonism”. Nevertheless, one immediate observation is one that the institutions of European and global citizenship must be embedded across the entire material of the legal systems that make up European and global legal orders. That is, from competition law to labor law, from state aids law, or the law of economic subvention (e.g. traditionalized trading regimes) to social security law, from nationality law to voting law and from consumer law to the law of environmental protection.

Safeguarding Democracy and the Rule of Law vs. EU Economic Governance: The Case of Peripheral EU Countries

Yiorgos Vassalos, political scientist

By the term “EU economic governance”, I mean the ensemble of economic policies and economic policy decision making mechanisms adopted in the European Union after the break out of the financial and economic crisis in 2008. This includes legislative and treaty reforms but also the ad hoc mechanism of the Troika, formalised later through the European Stability Mechanism (ESM) treaty that amended the TFEU.[63] All these reforms took place from 2010 onwards.

These economic policies but also the way that decisions are made had major implications in the fundamental rights situation and therefore in the rule of law and the quality of democracy, mostly felt in the countries hit harder by the crisis, notably in the south of the Eurozone. In my presentation I will try to lay out these consequences by focusing on the case I know best, that is, the case of Greece.

But let’s first look at the set of reforms that we will call here “economic governance”.

EU economic governance

Since 2010, the EU started implementing a series of reforms in order to centralise economic policies in Brussels. One of the first reforms was the Six Pack on economic governance - built on the text of a political agreement called the Pact for the Euro (2011) - was passed in 2011. The Six Pack did two

[63] Swedish Institute for European Policy Studies ‘‘The European Treaty Amendment for the Creation of a Financial Stability Mechanism” http://www.eui.eu/Projects/EUDO-Institutions/Documents/SIEPS20116epa.pdf

things: 1) it made penalties to countries violating deficit limits much more automatic, thus providing a tool that can force member states into much more radical and quick cuts in welfare and public services. If one looks at Commission's policy recommendations to member states since 2012, one will clearly see that it is exactly through such cuts that "fiscal consolidation" is achieved; 2) it set a brand new framework of macroeconomic surveillance that gives Brussels the right to intervene in many economic policy fields. The most important tool is capping the evolution of labour unit cost in relation to the GDP. This should not increase by more than 9% for Euro Zone countries and 12% for non-Eurozone countries in three consecutive years. What is effectively banned through this rule is redistribution of the GDP from capital to labour through wages.

The Six Pack on economic governance was followed up by the Two Pack that actually obliges all member states to submit their draft budgets to the Commission and accept its amendments on them in case they are in excessive deficit (which is the case for the majority of member states) under the threat of fines. This way, the unelected European Commission acquires one more tool to impose cuts. The Commission has also the right to ask members states in difficulty to request the Troika's "help". So, the ECB doesn't need any more to threaten governments with cutting liquidity to their banks, as it did in the cases of Portugal and Italy: the Commission can now formally ask a country to enter the mechanism, and the latter doesn't dispose of much margin to refuse.

Greece was the first country to enter the ad hoc Troika mechanism with the creation of the European Financial Stability Mechanism in May 2010. The core idea was that other Eurozone and IMF member states would lend money to the indebted country that couldn't any more borrow from the markets, in a lower interest rate and in return, three institutions representing the lenders, the European Commission, the ECB and the IMF would determine the economic policies to be followed through detailed texts annexed to the loan agreements called "Memoranda". The three institutions would also permanently scrutinize the implementation of the Memoranda through a Commission's «Task Force» permanently established in the country's capital. Portugal and Ireland followed, and after the entry into force of the ESM, this model was formalised and used later on partly in the case of Spain and fully in Cyprus.

With the most recent revision of the so-called EU cohesion funds, the EU can also freeze them if countries don't follow the economic policy recommendations of the Commission. Cohesion funds are supposed to be a redistributive mechanism from richer to poorer countries, albeit still very marginal, since they concern a very small percentage of GDP. The structure of cohesion funds leaves a lot of space for criticism regarding whether they have a real redistributive effect. In any case, even this limited tool is now put under economic policy conditionality.

The Treaty on Stability, Convergence and Economic Governance obliges all countries to integrate a 0.5% structural deficit limit in their primary legislation and appoints the EU Court of Justice as their watchdog. The next reform that EU leaders wish to put forward in the field of EU economic governance is the following: the economic programs submitted every year by member states to the Commission, even before their draft budgets are there, would, once agreed with the Commission, take the form of a binding contract whose violation may be sanctioned by the EU Court of Justice in Luxemburg.

So, while Troika policies were implemented in five countries, permanent mechanisms were put in place concerning all EU member states and mostly the ones sharing the Euro as a single currency, which radically expanded Brussels' competences on socio-economic policies. EU treaties, including in their Lisbon version, provide that social and fiscal policies remain national competences. The EU economic governance reforms come to put this into question, since strict limitations are imposed to freedom of choice of national governments regarding wage setting policies, pension systems and social spending. In the case of countries under the ESM mechanism even the choice regarding the type of ownership of basic infrastructures, such as water, becomes a condition for getting a Eurozone loan or not. Besides issues around the democratic legitimacy of these policies, their specific content often contradicts EU member states' existing obligations under international law, including ILO Conventions, CoE European Social Charter or even the EU's own Charter of Fundamental Rights. Contrary to economic governance policies, the mechanisms and sanctions for violating these principles vary from legally and practically ineffective to inexistent.

Rights diminishing

The Committee on Employment and Social Affairs of the European Parliament recently concluded that when drafting its policies vis-à-vis five countries, the Troika has «*completely overlooked Article 151 TFEU, which establishes that measures implemented by the Union and its Member States shall be*

consistent with the fundamental social rights enshrined in the 1961 European Social Charter (which was signed by the four countries subject to economic adjustment programmes) and with the 1989 Community Charter of the Fundamental Social Rights of Workers and other basic ILO conventions signed by the Member States.»[64] Let's note here that the Troika is the EU, but it is completely unclear whether and which of the EU institutions can hold it responsible for overlooking this article of the TFEU. The plenary of the Parliament adopted a much watered down version of this Employment Committee report. Unfortunately, the EU's Fundamental Rights Agency (FRA) hasn't up to now undertaken any initiative to further examine the existence and scale of violations.

In the case of Greece specifically, the Committee of Ministers of the Council of Europe and the Independent Expert of the UN Human Rights Council, Cephas Lumuna, have both concluded that there are serious violations of social and economic rights and the latter of civil and political rights, as well.[65] Amnesty International[66] and the European Trade Union Confederation (ETUC)[67] have documented many of those violations. All the above institutions and organisations point clearly to the Troika (composed by 2/3 of EU institutions) and its policies as being responsible for the listed violations, together with the Greek governments, during the last four years.

Direct violations by the Troika programs

In February 2012, as a condition for the second Eurozone loan, the EU and the IMF demanded cutting minimum wage in Greece by 22%. This brought youth salary at 440 Euros net per month, that is, below the official poverty line in Greece. One year later, the Committee of Ministers of the Council of Europe unanimously concluded that Greece violated the right to a fair and decent salary – contained in the 1961 European Social Charter - for young people. It also concluded the Charter was violated as far as protection against unfair lay-offs was concerned, since the test period during which the employer could fire an employee without notice was fixed as far too long.

ETUC stresses that "the whole system of free collective bargaining in Greece has been dismantled" through the Troika's intervention. In November 2012, as a condition in the program's mid-term review, a law was passed allowing the government to adopt the level of minimum wage by decree without following the "social partners' " opinion. Already since February collective bargaining in sector and enterprise level had been radically weakened since, in case there was no deal between the employees and the employer, the old collective agreement ceased to be in force. Furthermore, Individual contracts and contracts with non-representative "associations of persons", supposedly representing employees, were allowed.

In order to curve resistance to making use of all these provisions, the government also attacked the right to strike. Three strikes have been banned under a 'civil mobilisation' or 'civil conscription' provision. According to the Greek constitution this provision can be used in cases of war, natural

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[64] « Report on Employment and social aspects of the role and operations of the Troika » (ECB, Commission and IMF) with regard to euro area programme countries (2014/2007(INI))
http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2014-0135&language=EN

[65] Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephas Lumina - Mission to Greece (22 – 27 April 2013)
http://www.google.be/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCYQFjAA&url=http%3A%2F%2Fwww.ohchr.org%2FEN%2FHRBodies%2FHRC%2FRegularSessions%2FSession25%2FDocuments%2FA-HRC-25-50-Add1_en.doc&ei=SCCQU-OGC-ax0AWijIDwBQ&usg=AFQjCNGSF1E_7je7aX8-PyEphRJag_h2BA&bvm=bv.68235269,d.d2k&cad=rja

[66] "A law unto themselves: A culture of abuse and impunity in the Greek police" 3 April 2014
http://amnesty.org/en/library/info/EUR25/005/2014/en

[67] «This report however, makes it abundantly clear that these particular key principles of the Treaty, along with other key principles, such as the principle to promote living conditions and social protection, have not been respected at all». The functioning of the Troika: a report from the ETUC
http://www.etuc.org/sites/www.etuc.org/files/press-release/files/the_functioning_of_the_troika_finaledit2.pdf

disaster or major risk to public health. None of these had occurred in the cases of Athens metro workers, maritime transport staff and secondary education teachers' strikes, so the government clearly acted against the Constitution.[68] Besides that, in 2009, Greece made a commitment before the ILO's Committee on Freedom of Association to use the provision of 'civil emergency' only in times of war.[69] Strikers had to return to work under the threat of immediate lay off and a three year prison sentence. In the Athens Metro they were fighting against the abolition of their collective agreement while the teachers protested against lay-offs imposed by the Troika conditions attached to the loan agreement.

The right of collective bargaining and action (art. 28), the protection in the event of unjustified dismissal (art. 30), fair and just working conditions (art. 31) should be protected according to the EU Charter of fundamental rights that entered into force with the Lisbon Treaty. But EU policies in this case contributed to the exactly opposite direction.

Worsening the conditions for democracy and the rule of law

The Troika had already imposed 30% salary cuts in the public sector and generalized austerity that launched a recession spiral that goes on for seventh year now (-25% since 2008). There are 1.5 million unemployed officially in an economically active population of 5.7 million and according to estimations 1.1 million of those who work are not regularly paid. Around 3 million in 10.5 million of inhabitants don't have health insurance. Households purchase power reduced by 37% per cent and social exclusion increased by 23%. Youth unemployment is at 60%.

This creates an explosive social situation in which immigrants are used as the scapegoats; first, by the ruling parties themselves and in a second stage by the Neonazi organisation Golden Down. It is important to stress that the extreme right gained a lot of political legitimacy in 2011, when, for the first time since the dictatorship, an extreme-right, anti-Semitic and racist party, LAOS participated in a government of "national unity" after heavy pressure by the European Union, again as a condition for a loan.

I won't get into the vast documentation available on racist crime impunity in Greece in the last years. The rule of law is directly put into question when victims of physical criminal attacks can't address themselves to the police or the courts to protect them, even when they are asylum status holders. It can't be claimed that the EU has a direct legal responsibility, but it is legitimate to ask ourselves in which direction it has contributed.

Emergency governance and violation of the rule of law

There has been extensive use of the Article 44 of the Greek Constitution - which is reserved for "emergency cases of extremely urgent and unpredictable need" in order to rule through what is called" acts of legislative content" which are issued by the President of the Republic on proposal by the government and don't need a previous parliamentary approval. Such a special act was used to close down of the national TV and Radio broadcaster (ERT). The European Commission then issued a statement saying this was a government decision. That's true, but it's also true that a radical reduce of the public broadcaster's staff was included in the Memorandum of Understanding with the Troika, and there was pressure from the task force to achieve the target of laying off 15,000 public sector employees by the end of 2013.

Special acts also provided for the shutdown of public agencies, fiscal consolidation of Ministries and other public bodies' controls and involuntary layoffs. Right now the government is refusing to enforce

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[68] The Constitution of Greece is available here

[69] Leigh Phillips "More on the rise of labour conscription in Europe" http://blogs.euobserver.com/phillips/2013/02/06/more-on-the-rise-of-forced-labour-in-europe/

two Court decisions that order the Ministry of Finance to re-integrate more than 500 cleaners illegally fired.

The government has also ignored Court decisions which found unlawful the penalty of disconnection from the power grid in case a property tax imposed through the electricity bill was not paid. Answering a parliamentary question in this respect, the EC Energy Commissioner stated that such a penalty also violated the EU legislation on energy markets, yet the Commission has taken no steps to call the Greek government to respect EU legislation.

Unlawful forced DNA tests of anti-gold mine activists and detentions for several months without a valid reason add up in this picture of rule of law degradation, especially as far as it concerns the action of the government and of law enforcement agents.

Parliament disgraced

The approval of the agreements with the Troika themselves has been a disgrace for democratic procedures. More than once, MPs have been presented hundreds of pages of badly written and translated agreements with the Troika often with “details” – like the exact cost of the banks’ recapitalization scheme – missing and have been given merely twelve hours to study them and make up their minds.

Conclusion

The case of Greece - and to a lesser extent the cases of other “peripheral” Eurozone countries – demonstrates that entering the European Union doesn’t guarantee an improvement in respecting human rights and respecting the rule of law and democracy. To the contrary, the straight-jacket of economic policies imposed to all member states - through the economic governance reforms - can easily subjugate new member-states to policy recommendations or programs under ESM loan agreements that are reportedly designed overlooking the negative consequences they can have on fundamental rights and democracy.

There’s a sharp contrast between the new competences the EU has acquired for intervening into national socio-economic policies and its non-responsibility for the political and social repercussions of these policies. Civil rights like the freedom of assembly are also constantly put into question. But there’s practically no institutional way to take action against these violations. According to article 7 of the Treaty on the European Union, a country that doesn’t respect fundamental rights can lose its voting rights in the Council. But this provision has never been activated. Violations are a direct result of the implementation of EU programs but the EU just can’t be held accountable. Only national governments can, but are politically protected by the leadership of the EU institutions on that respect, which try to avoid any discussion on this issue. Example: the essentially non-response by Martin Schulz to a letter by unions and the European association for the defense of human rights on Greece.[70]

The Commission is now proposing a new pre-article 7 procedure on rule of law violations, in which it interprets the rule of law in a way that excludes in practice pure human rights’ violation from being acted upon and examines exclusively whether justice is independent in a systemic way. As if formal independence of justice per se could guarantee the respect of human rights - the latter are, according to several international texts a standard and integral part of the rule of law. The reaction of the Commission to the constitutional judgment in Portugal a few days ago, which ruled anti-constitutional certain public spending cuts, shows furthermore that it only shows its commitment to the rule of law when the latter does not touch upon its economic policy choices.

The EU will soon become member to the European Convention of Human Rights. Still, EU citizens will not really be able to go against it before the Strasbourg Court, since the EU's own draconian standing rules will continue to apply in that case too (ex. Article 230 par. 4 on individual and direct effect). The EU will be more or less free to choose when to enter a conflict when a member state is attacked and EU law is involved. In case it does, victims of violations will have to face both the member state in question and the EU in courts.

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[70] Unions & NGOs urge Parliament to scrutinise Greece’s Human Rights record http://www.aedh.eu/Unions-NGOs-urge-Parliament-to.html

Contrary to its declarations about being the worldwide defender of democracy and human rights, the European Union is contributing on their degradation in its own member states through the economic programs it imposes and the political support it provides to governments making extensive use of authoritarian practices.

Session Three – Social Rights and Labour Law under Threat in Europe

Social Rights Under Threat in Europe - The Standpoint of the European Committee of Social Rights

Prof. Guiseppe Palmisano, Director of ISGI-CNR, Rome:

Outline of the speech

Subject: A few reflections on some of the major risks for social and labour rights in Europe, in the aftermath and as a consequence of the economic crisis and austerity measures adopted by States and the EU. The proposed reflections will be limited in their scope: in fact, they will essentially be drawn on questions and problems raised in cases before the European Committee of Social Rights, in the context of monitoring implementation of the European Social Charter.

After a short introduction on the basic features of the system of protection of social rights established by the European Social Charter, four “scenarios” will be presented as examples of the above mentioned risks:

Scenario 1. Welfare rights in times of economic crisis. How international legal rules and standards on so called welfare rights (e.g. right to protection of health, right to social assistance and to benefit from social welfare services, right of persons with disabilities to social integration/inclusion, right of the family to social and economic protection) tend to be substantially disregarded by European States in times of economic and budget crisis. And how this risks to lead to an erosion of the legally binding character of such rules and standards.

Scenario 2. The Troika diktats: austerity measures and their impact on social rights. How constraints imposed by international “institutions”, and based on economic theories and models of development, may force a State to the adoption of legislation and practices which are not in conformity with international obligations to respect, protect and fulfil social security and labour rights.

Scenario 3. Laval or not Laval: economic liberties v. labour rights. How priorities and policies motivated by the goal of achieving full exercise of economic liberties within a common market can actually influence the balance of social rights against other legal obligations of European States, and cause an infringement of labour and trade unions rights to collective bargaining and to strike.

Scenario 4. Widening the personal scope of the European Social Charter. On the lack of protection of social rights for non-European nationals and “irregular” migrants: how insistence by “beneficiaries” of the rights and interest groups, together with the value-oriented approach by the ECSR, may overcome limits of application of social rights which have been established by States parties in the European Social Charter.

Overview on the Development of Labour Law in Times of Neo-Liberalism

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Workers' rights, or, if we use terminology of so called neo-liberalism – employees' rights, make very important part of human rights recognized and respected in democracy. No wonder, therefore, why organizers of this conference devoted important part of the conference to this issue.

Can a community, or a state, in which workers have no rights, or their rights are not respected and/or protected, call itself democracy. Answer, of course, is negative.

Unfortunately, in Serbia, this important part of human rights, workers' rights, for more than 50% of labor active population is neither respected nor protected. Hence, although on paper we have all laws and institutions in place needed for workers' rights to be granted and guaranteed, respected and protected, Serbia is not yet a democracy.

Document called Labor Law is a very well written document, as we do have indeed another nicely written document called Constitution. But the problem is, that our Government does not enforce the labor legislation, or, to be more precise, does so little in enforcement of the law that we can freely say that that it does not do anything.

When a law is not applied in practice, in our Serbo Croat language we say that it is "mrtvo slovo na papiru" – literal translation of this expression into English would be "dead word on the paper." That is exactly what it is, Serbian Labor Law, for majority of those who are supposed to relay on it.

And here my contribution to this conference might come to its end. However, to end with this bitter conclusion would not be constructive at all. Let us, therefore, see what does this dead word on paper say, how come we say it is dead and let us try to make some analysis why it is dead.

Before we go into details, let us see who are participants in Serbian labor market.

Transition in Serbia failed. We did not succeed in transforming the economy and the country as whole into a democracy. The best analysis of this failure I read was given by Goran Musić in his book recently published by Serbian office of Rosa Luxemburg Foundation in 2013 under title "Serbia's Working Class in Transition 1998-2013, available at the web site www.rosalux.rs. http://www.rosalux.rs/userfiles/files/Goran_Music_Working_Class_Serbia.pdf

I strongly recommend this book to anybody interested in socio economic developments in post Yugoslav sphere.

Here is what Musić's analysis says about working force in Serbia:

The first thing that catches one's attention is the relatively high percentage of economically non-active citizens. In 2009, the share of active citizens stood at 49 per¬cent of the total working age population. In comparison, the average share of economically active citizens in the EU countries that same year was 71,3 percent.33 At the same time, more than 16 percent of the Serbian population, still registered as economically active, was officially unemployed.

This leaves the country of 6,5 million inhabitants above 15 years of age, with merely 2, 9 million officially economically active citizens, among which more than half a million were officially unemployed and only around 1,7 million were wage workers.34 Keeping in mind that the number of pensioners reached 1,6 million people by the end of 2009, one can conclude that Serbia has almost 2 million citizens, between the age of 15 and 65, who either slipped into the informal the informal sector or remain long term unemployed with no personal income.

Now, let us see shortly what does the dead word on paper say

1. The Law

Serbia is signatory of all relevant international conventions.

"The country has ratified 72 ILO International Labour Standards (Conventions), including the eight fundamental Conventions." Quote from web site of International Labor Organization.

Serbia, as candidate member for the EU since 2012 ratified in 2009 also European Social Charter.

Serbian Constitution in its Art 16 section 2 says: Generally accepted rules of international law and ratified international treaties shall be an integral part of the legal system in the Republic of Serbia and applied directly.

This provision of the Constitution means that above mentioned treaties, that is 72 ILO Conventions and European Social Charter have the same force as any law adopted by the Serbian Parliament. Therefore, these documents are also part of the Serbian labor legislation.

Finally, the most important part of the labor legislation of Serbia is Law on Labor.

The Labor Law in force today has been adopted in the Parliament on 2005, and it has been amended in 2009 and 2013. Very soon this law will be changed, most probably in the next two to three weeks. Some of the rights granted to workers by the law in force today will be decreased.

Part of Serbian Labor law are also collective agreements concluded on the basis of the Law on Labor between representative organizations of employers and representative workers associations, in Serbia known as "sindikati" or in English- trade unions.

The law in force today gives to workers all rights as provided for in ILO conventions and European Social Charter, I shall mention here some of them:

- Limited working hours (40 hours a week)

- Increased payment for work after hours
- Increased payment for work during night, weekends and holidays
- Collective bargaining
- Right to paid daily break, right to aid weekly break and paid yearly vacations (minimum 20 days)
- Remuneration for meal during the working day
- Remuneration for expense for transportation from home to work
- Minimal wage
- Protection from discrimination
- Protection from discriminatory termination of contract
- Right to organize in trade unions
- Right to compensation (otpremnina) in the case of unprovoked termination of employment contract for every year of work experience,

The law in force today says that employment contract may be permanent, for a unlimited term, and under specified conditions defined by the law (seasonal works, work on a project for limited time, business of employer is expected to be more work force demanding for certain period of time) temporary or for limited period of time. If the contract is concluded for limited period of time, maximum time is one year. If the employee continues to work after one year of limited time contract for five working days limited time contract will be transformed into permanent employment contract.

As we speak today there is a vivid debate about changes of the Labor Law. Government adopted the policy of “flexible labor market”, in hope that decreasing or lightening the financial burden for employers by decreasing rights of employees, will have as a result raise of employment rate. Few days ago, on Monday this week (June 2, 2014), government announced that text of the new law has been agreed with two major trade unions and representative employers association. Employers requested that limited term employment contract may be for three years, trade unions requested that it remains as it is, one year, and compromise has been achieved that it will be two years. Employers requested that minimal wage be erased from the law, this has not been adopted. Compensation for unprovoked termination of contract is to be paid only for the time of work with the last employer. Very important change, about which trade unions say that there was no consent is the obligatory application of collective agreements. According to draft law submitted this week to the parliament, application of collective agreements concluded between representative associations of employers and workers’ unions is not mandatory. Two major workers associations issued joint statement that this has not been agreed in the three months negotiation process and that government misinformed the public when it announced that agreement has been achieved.

The Reality

Now, after we saw what is written on the paper, what labor legislation says, we came to the point when I have to give more clarification why I said at the beginning that these words, written in legislation, are, as we say in our Serbo Croat language “dead words on paper” or “mrtvo slovo na papiru”, at least for majority of workers.

The state simply does not have enough resources to implement these laws. On the web site of Democratic Center “Politickiforum.org” I found protocols of a conference “Work with dignity in Serbia, Standards and Practice” (“Dostojanstven rad u Srbiji, standardi i praksa”) that took place in 2012. Representatives of government, trade unions and organizations of employers analyzed labor laws standards and practice in Serbia. According to Deputy Labor Minister at that time, Radmila Bukumirić — Katić, there are only 260 labor inspectors in the whole of the country. The Ministry estimates that

there are about 650.000 informally employed workers. Labor inspectors made in first six months some 15.000 inspections and discovered some 3000 unregistered workers. At the same conference, former chief of labor inspectors Radovan Ristanovic said that breach of legal provision that labor contract for a limited period of time may last only one year, became so massive that labor inspectors could not even initiate procedure of inspection and subsequent punishment for these breaches.

We had here in Serbia very specific way of transition (from unique socialist self-management system which was more free market oriented than today's unique system of state controlled capitalism we have now). It had three phases, I am not going to analyze them, I will just enumerate them: From 1988 – 1991 (so called Ante Markovic reforms), From 1992 – 2000 and from 2001- until today (that Musić defined as period of colapse of neo-liberal model). I suggest to members of audience at our conference today to read very good analysis of Mr. Musić presented in his above mentioned study "Serbia's Working Class in Transition 1998-2013".

The analysis of self-management system is presented in my paper "Kardelj – Tvorac utopije ili alternative 'Liberalnoj demokratiji'" ("Kardelj – Creator of utopia od alternative to 'Liberal Democracy'") available in Serbo-Croat language at www.lojpur.eu.

Recommendations

In conclusion, allow me to present my views on further development of labor law.

Firstly, the government should cease the policy of attracting new investments by lowering the cost of labor. No serious investor will come because of low wages for his workers. Rights of workers should remain the same, if not increased. Instead of trying to decrease work conditions and workers' rights in public sector the government should enforce the labor law in private sector and secure that labor rights and social benefits given to employers in public sector be granted to workers in private sector.

Secondly, the government should encourage establishing of workers shareholding companies with presently unemployed workers, and in cooperation with trade unions. Sectors which government sees as priority for development should be developed by governmental subsidies, cheap loans from development bank, given to interested unemployed workers.

Thirdly, there are presently 153 big enterprises "under restructuring" employing 52000 workers and some 900 enterprises which are not yet privatized or that were unsuccessfully privatized. Instead of spending estimated billion euros yearly on keeping these companies alive, the government should offer these companies to employees free of charge in the case there is interest on the side of employees that these enterprises continue to work. The amount of billion euros yearly instead should be used for state guarantees for loans to those companies that do have profit making possibility.

Changes of labour rights in Croatia: Growing polarization between labour and capital

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Changes of labor rights in Croatia: Growing polarization between labor and capital

Croatian economy is now in the sixth consecutive year of recession. The current ruling coalition with social-democrats in charge in two years has adopted a series of fiscal measures and legislative mechanisms to ensure the recovery and stimulate an economic activity.

But the implementation of these measures has still not produced any positive effects. Such positive effects primarily should involve the creation of new, better-paid and more secured jobs and not the destruction of existing ones what is often the case.

Government expects that the change of current depressive trends will be initiated by often invoked and vastly mythologized the figure of foreign investor. That is why the government insists on adopting the new Labor Law that introduces so-called necessary flexibilization of employment. The aim of the law is to reduce workers' rights which would lower the costs of business and preserve the profits, but also to attract potential investors by promoting lower labor costs. The law is currently in the parliamentary procedure while government is trying to win over the trade unions. There are two key features of the new labor law and several minor ones.

Key features of labor law

First prominant feature is that the new law promotes deregulation of employment agencies by allowing that the agency workers may have fewer labor rights than permanent workers employed for same work task. Also collective agreements can no longer prevent hiring of temporary workers from employment agencies. As a consequence this can only lead to the competition between agency workers and permanent workers with an aim to destroy the acquired rights of permanent ones. Such cases have already been reported: permanent workers are being pressured to sign contracts with agencies for the same work position.

Also duration of employment through an agency is extended from one to three years and in exceptional cases even longer. This is even worse because the law doesn't prevent the possibility of hiring another agency worker for the same position after the expiration of the three-year period. The possibility of longer employment than three years opens up space for additional pressure on the rights of permanent employees and prolonges uncertainty and exploitation of agency workers whose rights rights are already minimum.

The second key feature of new labor law is in the area of working time. It introduces an easier rearrangement of working time and allows for prolonged overtime on a weekly and an annual basis. On an annual basis overtime would increase from 160 hours to 250 hours, virtually an entire new month of work. Given the rather complex way of determining normal time and overtime it will significantly broaden the space for additional hiper-exploitation. It's needles to say that all of this will make it more difficult for workers to exercise the right to vacation and properly paid overtime.

In addition to these changes, under the new labor law, collective bargaining agreements will cease to be valid three months after its expiration in contrast to the current situation where its validity remains until the termination or signing of a new collective agreement.

Government also limits the reasons for intiating the strike. So far, it was possible to start the strike due to various economic and social interests of workers and now the possibility of a strike has been reduced to failure to pay wages or failure to sign collective agreement.

Historical context of social degradation

With all these changes of labor law workers will be forced to fully adapt to the demands of employers in the aspect of daily and weekly schedule, constant physical availability and meeting labor standards. Therefore time spent at work becomes utterly unpredictable and fluid, amorphous and undefined, completely subjected to the needs of capital reproduction. A life outside of work under these conditions appears just as irrelevant existential residual with extremely limited opportunity of its planning.

But to understand what is happening to the workers it is necessary to broaden the perspective and analyze historical context that pushed us here where we are currently. While the neoliberal capitalism in the last 30 years received a powerful impetus, institutions and organizations best equipped and most competent to oppose the disastrous consequences that capitalism manifests completely weakened, or even disappeared, and thus disappeared our knowledge of their strategic role.

Historical context of the restoration of capitalism on the territory of former Yugoslavia had a nationalist and wartime outfit which only emphasized the negative effects of the privatization process and fanatical hostility to any form of collective organizing, which was considered as the socialist residual.

To the extent it was possible trade unions during the nineties tried to put a fight against disastrous privatization process but they lost. As one factory disappeared after another trade unions became more bureaucratized and more easily cooped by politics or capital. Today in Croatia trade unions outside public enterprises and public services virtually don't exist. When they act against government encroachment of labor rights it is done only through institution of social dialogue and this is simply not enough any more to protect workers rights.

Disappearance of left forces

But the blame should not only be put on the side of trade unions for dire situation of labor. In fact they are probably the only institutions that still have infrastructure to organise mass ressistence. What is missing here are the left forces which could support and give backing for more radical trade union stance.

Progressive left forces were heavily beaten in the ninties and with them left ideas completely vanished from public discourse. It was a sacrilege to mention any kind of need for solidarity, god forbids invoke living standard of yugoslav period. So left faces today disastorous consequences that transition period brought but left forces don't have neither material means nor representativness that is needed to oppose this calamitous developments.

It faces unpleaseant awareness that nationalist neoliberal attack did not only destroy workplaces and leave workers without jobs. Because neoliberalism is also a powerful ideological discourse and workers subjectivity came to be determined primarily through new discursive fields of political legitimacy: first the nation, later the europe, the citizens, the rule of law, the human rights. This combination of destructive privatization process on the one side and ideological offensive on the other led to the social breakdown and political regression of the working class subjectivity.

Rebuilding class solidarity and political influence

Situation improved a litle bit for the left forces since the oubreak of the crisis but those who represent left goals of solidarity, equality or working cooperatives are still on very distant margin. And without stable left forces there can't be strong trade union resistence nd without strong trade union resistence there can't be strong working class.

So it is on all of us who can help in any way to support the eastablishment of political and economic controls over the circulation and accumulation of capital. Since workers do not control the capital but can only adapt to its movements trade union action is very limited within such a system of social relations and it needs broader political backing to resist the power of capital.

If we want to change this ruinous direction Europe is heading we have to begin to challenge the harsh realities of life under capital, to raise awareness of its consequences and to shore up and land a hand to workers and trade unions in their rightful manifestation of discontent through strikes and protests. It is the only way workers can reclaim their labor rights and restore social dignity.

Without broadening the resistance and building necessary progressive networks and structures protest after protest we will repeat the same platitudes with no visible effects, while the entire political spectrum moves to the right and creates a fertile ground for reactionary ideas.

Trade union rights in Europe under neo-liberalism

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Trade union rights in international law

Trade union rights are recognised at various different levels: national, regional and international. Obviously, at national level these rights are not equivalent in content or in enforcement. Indeed, one of the motivators of globalisation is the attraction of capital and multinational corporations to States with weak trade union rights. At regional level too there are vast differences in the structure of trade union rights ranging from the non-existent to the extensive. However, at the global level there is much more conformity in the content of trade union rights though effective enforcement is lacking and national application of global standards varies enormously.

The international recognition of trade union rights as a species of law rather than moral, industrial or political claims is important. It provides a platform of legitimacy, respectability, and, indeed, a degree of indisputability for at least some of the claims of labour.

Given the dominance today of neoliberalism and its drive to an unregulated free market in labour it might be thought curious that international legal standards still remain in its way.

Neoliberalism gives a central role to industrial relations and the labour market and how it is to be structured (or, rather, unstructured). Neoliberalism regards trade unions and collective bargaining as impediments to the free labour market. This is not new, of course; a similar view dominated courts and legislatures during the eighteenth and nineteenth centuries – and much of the twentieth century too. But neoliberalism in its modern form was born in 1948. It aimed to roll back a relatively brief phase in the 400 years or so of capitalism when a state-dominated, vaguely egalitarian post-war economic settlement took hold across western and northern Europe, as well as Australia, New Zealand and Canada. Neoliberalism aimed to destroy that post-war settlement and to replace it with a return to fully

free markets and inequality on a massive scale. In this enterprise neoliberalism has been astonishingly successful. It is the dominant ideology across most of the globe – even after the crash of 2008 and the stagnation and slump since. Its hideous defects are masked by the propaganda that 'there is no other way' and 'things will get better'. Meanwhile, so adaptable is it that it has used the recession it caused as justification to push its objectives of privatisation, deregulation and attacks on trade unionism yet further. In consequence, living standards have dropped for the mass of the people, wealth has increased for the tiny minority, inequality has accelerated, and the markers of a civilised society are being systematically destroyed.

However, one of the achievements of those few years of post-war liberation was the creation of a series of international human rights treaties. Significantly, those treaties contain within them essential trade union rights.

It is relevant to observe that the establishment of trade union (and other labour and human) rights as a form of law is closely associated with war. This is because the political and economic situation at the end of (and largely in consequence of various aspects of) the two great wars was such as to give rise to the demand for recognition of these rights.

The International Labour Organisation was created by the Treaty of Versailles after the First World War and its two most important Conventions on trade union rights, Convention 87 on freedom of association and the right to organise and Convention 98 on collective bargaining, came into existence after the Second World War. It was the Second World War too which led to the Universal Declaration of Human Rights and the European Convention on Human Rights. Though a generation later, the International Covenant on Civil and Political Rights and the International Covenant of Economic, Social and Cultural Rights and, at European level, the European Social Charter can still be seen as part of the post-war settlement.

Of course, war itself was not the cause of the establishment of the international legal recognition of these rights. Rather the settlement of the new order after each war was thought (by those who had power) to require that certain concessions, on an international basis, be made to organised labour to avert the possibilities of disorder (such as in the Great Labour Unrest of 1911-1914) or even revolution (as in the Soviet Union in October 1917 and in Germany 9 November 1918 to 11 August 1919, and the threat of revolution in Glasgow January 1919). The new order after each war was also in response to the demands of post-war trade unions which were able to influence governments and parliaments containing many on the left and from the trade unions who had fought, as regulars and partisans. But it was also founded on the widespread recognition by governments and big employers (as well as trade unions) of the success of industry-wide collective bargaining during and before each war (especially as a means of helping economic recovery from the depression in the 1930s in Europe, North America and Australia). These various factors pointed to the constitutionalisation of trade union rights as fundamental human rights in international law and, in particular, the right to strike and to collective bargaining.

The edifice of international trade union rights never enjoyed much by way of consensus support or assiduous application but it did survive well into the twenty first century, sustained in a precarious balance by the cold war. As late as 2000 the EU adopted a Charter of Fundamental Rights of the EU which included explicitly trade union rights to freedom of association, collective bargaining and to strike. ILO standards were still being adopted in twenty first century multi-lateral trade agreements (though with little or no enforcement mechanism). However, the collapse of the Soviet Union and the near global hegemony of neo-liberalism, has allowed capitalism to begin a systematic dismemberment of the international trade union rights established over half a century ago. Once the global underpinning of these rights is destroyed, national laws will be under yet greater pressure to abandon trade union rights than they currently are. It is this process in Europe which is considered below.

However, it cannot be emphasised enough that the attack on trade union rights is global. Nowhere is this more evident than in the denial by the Employers' Group at the International Labour Organisation of the very existence of the right to strike in Convention 87 - after 60 years of acceptance! It cannot be doubted that, though different in form, that attack is part of an assault (orchestrated to a greater or lesser extent) on trade union rights at national, regional and global levels. This is most certainly evident in Europe. Certainly shadowy business lobbyists are concerned about labour (and other) standards. The European Round Table of Industrialists, for example is a keen lobbyist for the Trans-Atlantic Trade and Industry Partnership (TTIP) which threatens many international standards, not least labour and trade union rights.

International law

The United Nations

The UN Declaration of Human Rights 1948 provides at Article 23(1) that everyone is entitled to "just and favourable conditions of work" and at Article 23(4) that "everyone has the right to form and to join trade unions for the protection of his interests." This latter phraseology is reproduced in the European Convention on Human Rights in which the European Court of Human Rights (ECtHR) has held (see below) that that general right contains "essential elements" including the right to collective bargaining and the right to strike.

This is reinforced by the International Covenant on Civil and Political Rights 1966 which provides by Art 22 that 'Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests'. It has been accepted that this includes the right to strike and to collective bargaining.

The International Covenant on Economic, Social and Cultural Rights 1966 by Article 8(1)(a) protects "the right of everyone … to join the trade union of his choice … for the promotion and protection of his economic and social interests." Article 8(1)(d) specifically protects the right to strike. Whilst the right to bargain collectively is not specifically mentioned, it has been recognised as inherent in the right to trade union membership.

The International Labour Organisation is the starting point for specific trade union rights under international law. The tripartite ILO was created in 1919 and is an UN agency, responsible for setting labour standards. ILO Convention C87 protects the right of trade unions to organise their activities. The ILO has held for 60 years that this includes the right to strike. ILO Convention C98, requires States to encourage and promote the full development and utilisation of machinery for collective bargaining, with a view to the regulation of terms and conditions of employment by means of collective agreements.

Europe

It is necessary to recall that, from a legal point of view, there are two Europes. There is the European Union with 27 member States. It is primarily an economic union, a common market. Its laws are in the Treaty of the European Union and the Treaty on the Functioning of the European Union (as well as Regulations and Directives). Its court is the Court of Justice of the European Union (CJEU).

The other Europe is Council of Europe consisting of 47 member States. It is the body which has given us the European Convention on Human Rights and the European Social Charter. It has its court, the European Court of Human Rights (ECtHR).

The European Union

The origins of the EU are to be found in treaties regulating the coal and steel industries of Europe. These arrangements had a purely economic purpose, though also reflecting a political rationale in bringing former Second World War enemies together. They certainly had no social dimension.

When the economic aspects of the coal and steel industries were enlarged to the objective of a European ‘Common Market’ by the Treaty of Rome 1957, a social dimension merited merely a mention. The Common Market became the European Economic Community, subsequently named the European Union. The EU was always a business oriented organisation in which the interests of the citizens of the States which made it up were very much of secondary interest.

It was not until the 1970s (after the events of 1968 and destabilising oil price rises) that it was appreciated “that the Union required a human face to persuade its citizens that the social consequences of growth were being effectively tackled and that the Union was more than a device enabling businesses to exploit the Common Market.” An Action Programme was drawn up in consequence of which Directives were adopted on sex discrimination, health and safety, mass redundancies, transfers of undertakings, and insolvent employers. With the election of Mrs Thatcher and the UK’s adoption of an overt and aggressive neo-liberal stance advocating de-regulation of the labour market to drive down labour costs, further development of social policy in the EU froze.

In 1986 the EU adopted the Single European Act with the objective of a Single Market across Europe in 1992. Again, to sugar-coat this pill some social measures were felt necessary and a majority vote (instead of the previous unanimity) was instituted to pass social measures and side-step (particularly UK) objection. Jaques Delors, then President of the europ[ean commission, wooed the British Trades Union Congress with his description of the “social dimension”:

It would be unacceptable for Europe to become a source of social regression, while we are trying rediscover together the road to prosperity and employment.

The European Commission has suggested the following principles on which to base the definition and implementation of these rules:

First, measures adopted to complete the large market should not diminish the level of social protection already achieved in the member states.

Second, the internal market should be designed to benefit each and every citizen of the Community. It is therefore necessary to improve worker’s living and working conditions, and to provide better protection for health and safety at work.

Third, the measures to be taken will concern the area of collective bargaining and legislation.

He set out his proposals including:

The establishment of a platform of guaranteed social rights, containing general principles, such as every worker’s right to be covered by a collective agreement, and more specific measures concerning, for example, the status of temporary work…

In 1989 the EU adopted the Community Social Charter for the Rights of Workers which proclaimed, amongst other things the right to freedom of association, to negotiate and conclude collective agreements, and a right to resort to collective action in the event of a conflict of interests including the right to strike. In the UK Mrs Thatcher called it a “Marxist Charter”. With such bitter opposition it was doomed to be given no free standing legal effect and was no more than a “solemn proclamation”.

However, a Social Charter Action Programme was adopted which led to Directives on workplace safety, work equipment, personal protective equipment , VDUs, manual handling, proof of the employment contract, posted workers, pregnant workers, young workers, and working time.

The Maastricht Treaty, the Treaty on European Union 1992, gave greater prominence to what was called the Social Chapter. To this the UK promptly secured an opt-out. Amongst other things the Social Chapter provided for European level collective agreements between the “social partners” to be enforced as EU law. In fact very few such agreements have ever been reached because of the attitude of the employers. By the time Labour was elected and the UK opted back in again only four Directives

had been adopted under the Social Chapter: on European Works Councils, parental leave, part-time work and burden of proof.

The Treaties underpinning the EU were tweaked by the Amsterdam Treaty in 1997 and the Lisbon Treaty in 2000. They gave the illusion of a greater social dimension but little of substance in that regard. They identified as fundamental social rights those in the 1889 Charter and those in the European Social Charter 1961 of the Council of Europe (see below) but no legal effect was given to them. Documents were published by the EU Commission speaking of the need to foster equal opportunities for citizens even if equal outcomes could not be guaranteed. But little was done. The Nice Treaty of 2001 was significant for its adoption of a Charter of the Fundamental Rights of the EU. Again the UK (and Poland) secured what was thought to be an opt-out.

The Lisbon Treaty 2007 took time to be adopted because France and Holland had rejected its forerunner in the form of an EU Constitution so necessitating a revised formula to avoid further rejection. This then required a second referendum in Ireland in order to secure a majority. Clearly the perception that the sugar on the pill was wearing thin was widespread. The Lisbon Treaty was particularly significant in the field of social rights since it gave legal effect to the Charter of the Fundamental Rights of the EU. Had the Charter really given protection to EU citizens and workers by way of the "[t]he establishment of a platform of guaranteed social rights, containing general principles, such as every worker's right to be covered by a collective agreement" and more, it might have ameliorated the reaction of the European people to the policies of privatisation and asset stripping of cherished State services and the vicious policies of austerity which have since been adopted. But, as we will see, the Charter has not had that effect.

Before we come to that we need to note two points. The first is that at the core of the EU Treaties are four pillars, four fundamental freedoms for business to:

- provide services,
- establish business,
- move capital,
- move labour,

from one member State to another. The objective of ensuring that there is no distortion of competition (the very heart of neo-liberalism) is to be found in the Treaties. As we will see these four freedoms practically trump all other rights.

The second is to point out that the Directives passed by the EU on individual employment rights were and are valuable, not least because EU laws are binding on EU member States so that it was and is not open to UK (or other) governments to opt out of them. But on the other hand the limited scope of these individual rights is notable. They have little application to most terms and conditions of employment to protect or encourage good pay and decent jobs. They say nothing about pensions nor about dismissal (save in particular circumstances such as in a transfer of undertaking). They neither promote nor protect collective bargaining. They do nothing to protect the right to strike. And there appears to be little initiative to protect workers' rights much further. Jacques Delors' speech appears now as no more than window dressing. The Agency Workers Directive appears helpful but in fact has led to a massive increase across Europe in the number of workers employed through agencies and hence without the full rights of directly employed workers. Nothing is being done to stem the rising tide of self-employment and zero hours contracts.

The Charter of the Fundamental Rights of the EU

The Charter appears to be of great significance. The Charter of Fundamental Rights of the EU 2000 provides in Article 28 that:

Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

This is significant but not perhaps as significant as Article 12 which provides that everyone has a right to freedom of association, said to imply 'the right of everyone to form and to join trade unions for the protection of his or her interests'.

The Charter now "has same legal value as the [EU] Treaties" by virtue of Article 6(1) of the Consolidated Version of the Treaty on European Union. Furthermore by Article 6(3) of that Treaty the rights guaranteed by the European Convention "shall constitute general principles of the [European] Union's law."

Article 12 of the EU Charter corresponds directly with Article 11 of the ECHR, so it should mean the same as in Demir and Baycara v Turkey, above. The importance of this correspondence with the ECHR is found in the provisions of Article 52(3), which provides that:

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

If Article 12 of the EU Charter is both of equal value to the EU Treaties and to be read consistently with the ECHR and if, in turn, Article 11 of the ECHR is to be read consistently with ILO Convention 98 (see Demir and Baykara v Turkey discussed below), the implications for the right to collective bargaining ought be obvious.

However, the reality may be different. It is true that the CJEU protected the right of collective bargaining from falling foul of EU competition law in Albany cases, though not apparently for those who are self-employed. The CJEU has also recognised the right to collective bargaining as a fundamental principle of EU law: see the Laval case. However, enforcement of a collective agreement by taking industrial action against a business exercising one of the four freedoms is subject to stringent conditions which essentially make the human right to collective bargaining defer to the business freedom to enjoy an undistorted labour market in which it can bring workers from a low wage EU State to a high wage State, ignore collectively agreed terms there and pay instead wages at back-home levels.

The CJEU has also held that industrial action to protect terms and conditions for workers brought from a low wage EU State to a high wage State is also subject to similar stringent conditions: the Viking case. That is notwithstanding that the Court in both cases recognised the fundamental nature of the right to strike, protected amongst other things by the Charter of Fundamental Rights of the EU:

[t]he right to take collective action, including the right to strike, must … be recognised as a fundamental right which forms an integral part of the general principles of Community law.

The ILO has rejected the central restriction on the right to strike in Viking. On 20 November 2013 the European Committee of Social Rights held that Swedish legislation, introduced in effect to implement the Laval judgment, was in breach of Article 6 of the European Social Charter 1961.

The CJEU has not reacted to these criticisms. However, its attitude to fundamental trade union rights may be viewed in the light of its judgment in the case of Alemo-Herron. There a private employer which took over a group of workers hived off from a public employer was held to be entitled to disregard a term in the workers' contracts of employment requiring adherence to national collective agreements as amended from time to time. The employers' takeover of the business and workforce was subject to UK Regulations which implemented the EU Acquired Rights Directive EC 23/2001 which provides that the transferee employer is bound by pre-existing contracts of employment and collective agreements. The CJEU held that the Directive had to be read consistently with Article 16 of the Charter of Fundamental Rights of the EU which guarantees the right to conduct a business. Consequently, the CJEU held, the new owner had to have the freedom "to assert its interests effectively in a contractual process to which it is party and to negotiate the aspects determining changes in the working conditions of its employees with a view to its future economic activities." Because the private owner could not participate in the continuing collective bargaining machinery (which was confined to public employers and unions) its "contractual freedom is seriously reduced to the point that such a limitation is liable to adversely affect the very essence of its freedom to conduct a business."

Nothing was said about the employer's contractual freedom to decline to enter the hiving–off agreement if it did not like the terms on which it would inherit the workers. The use of Article 16 (the right to conduct a business) so as to permit an employer to renege on its contractual obligations is extraordinary enough. And the court's use of the Article to abrogate employee's rights appears to be contrary to previous CJEU case-law. But most strikingly, the right of the workers to the benefit of collective bargaining in the Charter, in the ECHR and in the ILO was not mentioned at all. Nor was any reference made to the widespread use of sector wide collective bargaining throughout Europe in which it is common for employers (and workers) to be bound by collective agreements to which they were not party. ILO jurisprudence supports such arrangements which were the norm, even in the UK, for ¾ of a century.

The court's distortion of a human rights instrument, its naked disregard of the trade union rights within it and its unashamed preference for the interests of the employer over the workers perfectly illustrates the well-known comment of Mario Draghi (President of the European Central Bank) in 2012 that "[t]he European social model has already gone." The case is at least as serious as Viking and Laval.

However, the EU attack on trade union rights is yet more extensive than that. The glamorous gown of the social dimension, already worn bare, has now been ripped into rags and discarded by the policies of neo-liberalism under cover of austerity.

Sector level bargaining remains a common feature of the northern and western European States. But it is now the policy of the EU, in consequence, clearly, of its adoption of neo-liberalism – amplified by the economic crisis into the policy of austerity – to attack collective bargaining structures in Europe. In this the EU follows a similar goal pursued by the neo-liberal Conservative and Labour governments of the UK over the last 35 years.

Until very recently, the United Kingdom was isolated in the EU as the only country with collective bargaining coverage below 50%. Though it is now the second lowest in the EU, there are several other countries with levels of below 50%.

The UK level of collective bargaining coverage (including wages councils) has dramatically declined because of government neoliberal policy over 35 years as can be seen from the following table. As the then government put it in a White Paper (People, Jobs and Opportunities) in 1992, collective bargaining was an "outdated personnel practice" which had become "increasingly inappropriate" so that the government "will continue to encourage employers to move away from traditional, centralised collective bargaining." The figures for the UK are:

1950	71-73%
1960	70-74%
1970	76-80%
1975	84-86%
1979	82%
1984	70%
1990	54%
1998	40%
2000	36%
2004	29%
2011	23%

The last figure is likely to fall still further. In 2013 the UK government abolished the last extant Wages Council, the Agricultural Wages Board, so abolishing sectoral collective bargaining for some 200,000 workers. That loss will not be substituted by enterprise level bargaining because of the nature of that industry.

One of the most significant features of these figures is the fact that the continuous slump in collective bargaining coverage in the UK has relentlessly continued - regardless of the introduction of a statutory recognition scheme which came into effect in June 2000. The statutory recognition scheme is, in any event, riddled with defects as others have shown (just like the US scheme on which it was based – though the defects are different).

Collective bargaining coverage in Europe is also falling under pressure from the neo-liberal policies of the Troika (the European Commission, the European Central Bank and the International Monetary Fund), especially the European Commission and in the shadow of the EU-US Transatlantic Trade and Investment Partnership (TTIP). Schulten has revealed that a report prepared by the European Commission's Directorate General for Economic and Financial Affairs (DG ECFIN) lists the following measures under the heading of 'employment friendly reforms':

- General decentralisation of wage setting and collective bargaining.
- Introduction of or wider scope for opportunities to derogate from industry-level agreements at workplace level.
- Limitation or abolition of the 'favourability principle', under which the most favourable agreed term provision in a hierarchy of agreements will apply to employees. Typically, this means that workplace agreements may not provide for poorer terms and conditions than those negotiated at industry level. Limitations and reduction in the scope for the extension of collective agreements to non-signatory employers.

In addition, the recommendations also refer directly to:

- 'decreasing bargaining coverage' and
- 'an overall reduction in the wage-setting power of trade unions'.

The principal means of achieving reduction of collective bargaining coverage in Europe has been the decline in national and sector level bargaining and limitations on the extension of collective agreements to non-signatories. Yet industry-wide agreements and the extension of more limited agreements has been a central feature of European industrial relations and one reason for the

success hitherto of the European economy and the standard of living enjoyed by its peoples. Indeed, there is evidence that collective agreements have alleviated some of the impact of the financial crisis.

Schulten and Müller have identified four main constituents of the strategy advanced by the Troika. The first is the termination or abolition of national-level collective agreements. The second aspect is the extension of the scope for workplace derogation from industry-level collective agreements so allowing workplace agreements to have unrestricted priority over terms and conditions agreed at a higher level. The third aspect has been the introduction of more stringent preconditions for extending collective agreements by legislative means to non-signatory employers. Finally, the fourth element is the dismantlement of the trade union monopoly over collective agreements and encouraging non-union employee groups to conclude workplace collective agreements.

The consequences of the strategy of radical decentralisation advocated by the Troika are already evident. Systems of collective bargaining that were once robust have been systematically eroded and destroyed. The collective agreement itself – as an instrument for collectively regulating wages and other employment conditions – is 'manifestly now at risk.' In this it has been suggested that the Troika is acting illegally since it contravenes the EU Charter.

Thus in Greece, the Troika has demanded decentralisation and fragmentation of collective bargaining activity, away from national and sectoral levels to enterprise level. Part of the effect of decentralising collective bargaining in this way is, of course, that many employers take the opportunity to opt out. In consequence, collective agreement coverage has haemorrhaged. The Troika have also sought opportunities for bargaining to be conducted by non–union based employee representatives.

The ILO sent a High Level Mission to Greece as a result of which these changes were documented and strongly criticised by the Committee of Experts as violating the obligations of the Greek government under ILO Convention 98. The Committee in particular criticised the procedures for the decentralisation of collective bargaining, and in particular the procedures permitting derogation from sectoral agreements by non-union associations of workers at enterprise level. It expressed "deep concern" that the changes "aimed at permitting deviations from higher level agreements through 'negotiations' with non-unionized structures" were "likely to have a significant – and potentially devastating – impact on the industrial relations system in the country." Indeed, the Committee expressed the fear "that the entire foundation of collective bargaining in the country may be vulnerable to collapse under this new framework."

Similar initiatives have been undertaken in Romania, Spain and Portugal. In Romania the national collective agreement was abolished and sector level agreements much restricted in coverage. The effect on collective bargaining coverage has been catastrophic, a reduction from 98% in May 2011 to 36% at the end of 2012.

Notwithstanding the ravages of the Troika, and the insidious influence of the dogma of neo-liberalism, which flourishes despite the overwhelming economic evidence demonstrating its perniciousness, it remains the case that sector-level bargaining remains a common and thriving feature of the northern and western European States. Obviously the precise industrial relations structure differs from one country to another. On average across the EU, 62% of workers continue to be covered by collective bargaining. There are 11 countries with collective bargaining coverage of 70% or more including France (at 98%), Belgium (at 96%), Austria (at 95%), Portugal (at 92%) and Slovenia (at 90%), the Netherlands, Italy, Sweden, Finland, Norway, Spain. Below them come Greece (65%), Malta (61%), Croatia (61%), Germany (59%), Luxembourg (50%), Ireland (44%), Czech Republic (38%), Romania (36%), Slovakia (35%), Latvia (34%), Estonia (33%), Hungary (33%), and Bulgaria (30%), Poland (25%), the UK (23%), and Lithuania (15%).

The Council of Europe

Finally a word must be said about Article 11 of the European Convention on Human Rights and Fundamental Freedoms 1951 says:

Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

The European Court of Human Rights (ECtHR) made clear in recent landmark judgments that Article 11 includes the right to bargain collectively, the right to strike, the right of unions to decide their own constitutions and membership, and the right of members not to be penalised for seeking union support. In a most important judgment in Demir and Baykara v Turkey, the ECtHR made clear that workers must have (and States must protect) the right to collective bargaining.

However, in RMT v UK (Appn No. 31045/10) in a judgment of 8 April 2014 the ECtHR, whilst upholding the right to strike (indeed upholding the right to take secondary industrial action) as protected by Article 11, declined to hold that the right to strike was an "essential element" of that Article. Chiming with the trends identified above, the Court held that notwithstanding ILO and ESC jurisprudence to the contrary, the UK total ban on secondary action fell within its "margin of appreciation" and was proportionate and justifiable.

It is difficult not to conclude that the judgment represents nothing short of an appeasement by the ECtHR of the UK government's threats to withdraw from European Convention and its repeated attacks on the ECtHR so evident in the UK stance at the 2013 Committee of Ministers' meeting in Brighton which lead to the Brighton Declaration and the subsequent inclusion of the references to 'margin of appreciation' and 'subsidiarity' in the Preamble to the Convention. Certainly, there is no doubt that the judges of the ECtHR have been eager to reassure the UK government, British judges and elements of the English media that little or no threat is posed to the autonomy of the British legal system by the ECtHR or the Convention.

But as British trade union leader, Len McLuskey, has said: if workers cannot strike lawfully, they may well decide to do so unlawfully.

The European Social Charter 1961 is also a Treaty of the Council of Europe (a sort of little sister). Article 6(2) requires ratifying States to promote collective bargaining with a view to the regulation of terms and conditions of employment by means of collective agreements. Article 6(4) of the Charter provides for the right to strike for the purpose of collective bargaining. The quasi-judicial body supervising the Charter is the European Committee of Social Rights. It has found that the United Kingdom is now one of the countries most seriously in breach of its obligations under the Charter, particularly in relation to its laws on strikes, the ECSR having repeatedly held that:

the scope for workers to defend their interests through lawful collective action is excessively circumscribed; the requirement to give notice to an employer of a ballot on industrial action, in addition to the strike notice that must be issued before taking action, is excessive; the protection of workers against dismissal when taking industrial action is insufficient.

In a recent decision the ECSR has held that even the police should have the right to strike: European Confederation of Police v Ireland (Complaint 83/2012, 17 May 2014). No doubt the forces of darkness are even now considering ways in which the ECSR may be neutered.

Conclusion

Neo-liberalism is a globalised epidemic. It has infected the institutions which might be thought to protect the basic human rights of citizens. The EU, in particular, has become a disaster area for the collective rights of workers and their unions. The results of the European Parliament elections at the end of May illustrate the contempt for the EU now felt by the people of Europe. Those social democratic and 'socialist' parties which adopted diluted neo-liberalism in the hope of some remedy to counter the financial crisis brought about by the disease itself have found that the people reject those parties and turn elsewhere. In the absence of a well-organised and prominent left speaking with one coherent voice they have turned elsewhere (save in Greece).

We are now returning to a nineteenth century conception of the legality of trade unions and trade union action. The workers will take their own course in response - the employers and the institutions they control should be aware of the potential consequences of their actions. For lawyers, it is essential that the institutions of international human rights law be upheld in an effort to give a legal basis for working people and trade unions across Europe achieve the solidarity necessary to improve the condition of their working lives.

London, 5 June 2013

Session Four - Freedom of Assembly

The Right to Assembly under Threat: New Ways of Political Expression – Blockupy, Femen, Pussy Riots (Guarantees of the ECHR and the Charter of Fundamental Rights of the European Union)

Professor Bill Bowring, barrister, London

Notes

- Class struggle and political dissent have always found expression in public assembly.
- Ancient Rome the *secessio plebis* -

  an informal exercise of power by Rome's plebeian (free) citizens, similar to a general strike. During a *secessio plebis*, the plebs would simply abandon the city en masse and leave the patricians to themselves.
- 494 BC – first secession – creation of the Tribune of the Plebs
- 449 BC – secession which forced the Twelve Tablets – published laws
- 287 BC – the last secession which forced the *Lex Hortensia*, which gave plebiscites the force of law.
- 73-71 BC – the Third Servile War - Spartacus

  See G. E. M. De St Croix *The Class Struggle in the Ancient Greek World: From the Archaic Age to the Arab Conquests*
- Age-old tension or conflict between popular mobilisation and the preservation of public order

- 1789 – French Declaration – no provision on freedom of assembly – but

  2. The final end of every political institution is the preservation of the natural and imprescriptible rights of man. These rights are those of liberty, property, security and *resistance to oppression*.

- 1789 – US Bill of Rights –

  Amendment I

  Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; *or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances*.

  Amendment II

  A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

- 1819 – Peterloo Massacre - cavalry charged into a crowd of 60,000–80,000 that had gathered to demand the reform of parliamentary representation. 15 killed, 400 injured.

- 1819 – Percy Bysshe Shelley – *The Masque of Anarchy*

  Rise like Lions after slumber

  In unvanquishable number,

  Shake your chains to earth like dew

  Which in sleep had fallen on you-

  Ye are many — they are few

- 1882 – *Beatty v Gillbanks* - 9 QBD 308 – "an otherwise lawful meeting cannot be forbidden or broken up by magistrates simply because the meeting may probably or naturally lead to a breach of the peace on behalf of wrongdoers" – but – "the absolute necessity for preserving the King's peace" (A.V. Dicey *Introduction to the Study of the Law of the Constitution* 1885, p.272-3)

- Dicey at p. 267 "No better instance can indeed be found of the way in which in England the constitution is built up upon individual rights than our rules as to public assemblies. The right of assembling is nothing more than a result of the view taken by the Courts as to individual liberty of person and individual liberty of speech."

- 1950 – ECHR –

  Article 11 – Freedom of assembly and association

  1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

  2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others…

- 2000 – Charter of Fundamental Rights of the European Union

  Article 12

  Freedom of assembly and of association

  1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.

2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.

- 1989 – *MC v Germany* – No.13079/87 - admissibility –

  the applicant had participated in a demonstration in front of the US military barracks on 12 December 1982 on the occasion of the third anniversary of the NATO Twin-Track Agreement (NATO-Doppelbeschluß). The demonstrators had blocked the road to the barracks every full hour for a period of twelve minutes. During these sit-ins the traffic had been closed by US military forces and the police. The applicant had participated in one blockade at about 11.58 hours. The police had ordered that the demonstrators should leave the road. The applicant and other demonstrators who did not comply with this order were then carried away. At 12.06 hours the road was again opened for traffic. Applicant convicted of attempted coercion – fined 100 DM.

  "the applicant's conviction for having participated in a sit-in can reasonably be considered as necessary in a democratic society for the prevention of disorder and crime. In this respect, the Commission considers especially that the applicant had not been punished for his participation in the demonstration . . as such, but for particular behaviour in the course of the demonstration, namely the blocking of a public road, thereby causing more obstruction than would normally arise from the exercise of the right of peaceful assembly. The applicant and the other demonstrators had thereby intended to attract broader public attention to their political opinions concerning nuclear armament. However, balancing the public interest in the prevention of disorder and the interest of the applicant and the other demonstrators in choosing the particular form of a sit-in, the applicant's conviction for the criminal offence of unlawful coercion does not appear disproportionate to the aims pursued."

- 1 May 2001 – use by British police of "kettling" – see *Austin and Others* below

- 22 October 2010 – *Alekseyev v Russia* (Applications nos. 4916/07, 25924/08 and 14599/09) – Applicant, gay rights activist alleged a violation of his right to peaceful assembly on account of the repeated ban on public events he had organised in 2006, 2007 and 2008.

  "any measures interfering with the freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities – do a disservice to democracy and often even endanger it."

- 22 February 2012 - *The Mayor Commonalty and Citizens of London -v- Samede (St Paul's Churchyard Camp Representative) and Others*, Court of Appeal

  The camp consisted of between 150 and 200 tents at the time of the judge's hearing in December 2011; many were used either regularly or from time to time as overnight accommodation and several larger tents were used for other activities and services such as meetings, the provision of a "university", a library, a first aid facility a place for women and children and a place where food and drink was served. Many of the demonstrators had designated their organisation the "Occupy Movement"

  "… factors included (but were not limited to) the extent to which continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which they occupied the land, and the extent of the actual interference the protest caused to the rights of others, including the property rights of the owners of the land and the rights of any members of the public. The judge accepted that the topics of concern to the defendants were of very great political importance. That was something which could fairly be taken into account. However, it could not be a factor which trumped all others"

- 15 March 2012 – *Austin and Others v UK* (Applications nos. 39692/09, 40713/09 and 41008/09) – by 14 to 3, no deprivation of liberty, no violation of Article 5 ECHR

  Kettling case

  Majority

"It must be underlined that measures of crowd control should not be used by the national authorities directly or indirectly to stifle or discourage protest, given the fundamental importance of freedom of expression and assembly in all democratic societies. Had it not remained necessary for the police to impose and maintain the cordon in order to prevent serious injury or damage, the "type" of the measure would have been different, and its coercive and restrictive nature might have been sufficient to bring it within Article 5."

Dissenting judgements – Tulkens, Spielmann, Garlicki:

" In the present case, the applicants were confined within a relatively small area, together with some 3,000 other people, and their freedom of movement was greatly reduced; they were only able to stand up or sit on the ground and had no access to toilet facilities, food or water. The cordon was maintained through the presence of hundreds of riot police officers and the applicants were entirely dependent on the police officers' decisions as to when they could leave. Furthermore, the police could use force to keep the cordon in place, and refusal to comply with their instructions and restrictions was punishable by a prison sentence and could lead to arrest. All the applicants were contained in those conditions for six to seven hours. In conclusion, we consider that there was a deprivation of liberty within the meaning of Article 5 of the Convention and that there has been a violation of that Article in the present case."

- 22 January 2013 - the ECtHR communicated 15 cases to Russia concerning Article 11 – *Lashmankin and 14 others*.
- USA and international – Occupy

  17 September 2011, Occupy Wall Street - By 9 October 2011, Occupy protests had taken place or were ongoing in over 951 cities across 82 countries, and over 600 communities in the United States.

- Germany - Blockupy

  A new coalition, inspired by the enthusiasm and militancy of the Occupy movement, attempted to build a broader movement against austerity. Calling itself "Blockupy," the coalition consists of both reformist and revolutionary currents - its annual protest in 2012 was the biggest anti-capitalist demonstration of the year. Four German cities on 17 May 2014.

- Ukraine, France – Femen

  Feminist protest group founded in Ukraine in 2008, forced to leave in 2013, now based in France. Topless protests against sex tourism, religious institutions, sexism and other social, national and international topics: "fighting patriarchy in its three manifestations - sexual exploitation of women, dictatorship and religion".

- Russia – Pussy Riot

  Founded in Moscow in August 2011 – feminist punk rock protest group - unauthorised provocative guerrilla performances in unusual public locations - feminism, LGBT rights, opposition to Putin, and links between Putin and the leadership of the Russian Orthodox Church. n21 February 2012, five members of the group staged a performance in Moscow's Cathedral of Christ the Saviour. On August 17, 2012, three members were convicted of "hooliganism motivated by religious hatred", and each was sentenced to two years imprisonment. Tolokonnikova and Alyokhina were released on 23 December 2013. Subjected to assaults since. Case at Strasbourg.

Freedom of Assembly, Unlawful Use of Force and Culture of Impunity in Turkey

Assist. Prof. Dr. Öznur Sevdiren

Abstract

Turkish police's excessive use of force against peaceful demonstrations is notoriously well known, reaching a peak point during *Gezi* demonstrations. During the aforementioned demonstrations 8 persons were killed, and according to the report of the Turkish Medical Association, as of the 12th June 2013, at least 7478 persons were seriously injured including loss of an eye and organ. A significant number of injuries were caused by the unlawful use of tear gases. During the demonstrations, nearly always, police officers fired (and still do) tear gas canisters directly at demonstrators and at close range entailing the risk of death and injury. The manifest pattern of Turkish police's unlawful use of teargases was most explicitly pointed out by a recent decision of the European Court of Human Rights (*Abdullah Yasa and Others v. Turkey,* 16th July 2013). Again, beating of the arrested demonstrators in police autos, garages and in other public places has increasingly become a new methods of torture. The official attitude of the incumbent government towards the violent police action, which constituted murder, injury and torture in different occasions, effectively amounted to praising police action. It might be hard to believe but even, in June 2013, the Prime Minister expressed his gratitude for the "heroic" action of the Turkish police. Hence, it is not surprising that none of the cases involving death and injuries, effective investigation was carried out. Of these, only in one case, one police officer was detained. This is due to the fact that so far many of these killings and injuries have been considered as a legitimate use of the powers as laid down in the Law on Police Duties and Powers and Law on Demonstrations and Public Meetings. In my presentation, I will provide a brief outline of the legal framework of the right to hold peaceful assembly in Turkish law. I will then go on to consider the means and instruments of the police dispersal of peaceful demonstrations and their practical use, results and implications in Turkey since the 1990s. Finally, through a number of cases revealing the systemic violence of Turkish police's violent use of force, I will discuss the issue of 'impunity' for offences committed by police.

The Right of Assembly in Times of Austerity and Under the Influence of the Policy of the European Union

Dimitris Sarafianos, Athens, , PhD, Attorney at Law:

As ECHR constantly asserts, freedom of peaceful assembly constitutes one of the essential foundations of democratic society.[71] Moreover, by multiplying exponentially the power of each individual, the right to assembly constitutes: a) fertile ground for the exercise of constitutionally embedded rights, b) an apposite means for the unmediated expression of citizens and their coming to the political foreground, c) ultimately, a *quasi* guarantee of popular sovereignty (without losing its character as individual freedom to be necessarily exercised collectively).

This is why it has always been treated with mistrust by those in power. Especially at times marked by the (institutional or actual) dismantling of democratic conquests, as today in times of austerity and economic crisis, the right to assembly is bound to come under attack.

There is an essential contradiction in the relationship between right of assembly and EU policy. On one hand the right of assembly is quite well protected first through art. 11 of ECHR (especially through Council of Venice Guidelines) and secondly through art. 12 of the Charter of Fundamental Rights of the EU. On the other hand EU is being used as a pretext to impose new restrictions to the freedom of assembly:

[71] Djavit An vs Turkey, Berladir et al. vs Russia, Galstyan vs Armenia et al.

First, according to ECJ jurisprudence the four fundamental freedoms laid down in the TFEU (freedom of movements of goods, capital, services and people) are considered as restrictions to the freedom of assembly.[72]

In the Schmidberger case ECJ pointed that the fact that the competent authorities of a Member State did not ban a demonstration which resulted in the complete closure of a major transit route such as the Brenner motorway for almost 30 hours on end is capable of restricting intra-Community trade in goods and must, therefore, be regarded as constituting a measure of equivalent effect to a quantitative restriction which is, in principle, incompatible with the Community law obligations arising from Articles 30 and 34 of the Treaty, read together with Article 5 thereof. Concerning the justification of the restriction ECJ took in consideration that by that demonstration, citizens were exercising their fundamental rights by manifesting in public an opinion which they considered to be of importance to society; that the purpose of that public demonstration was not to restrict trade in goods of a particular type or from a particular source; that various administrative and supporting measures were taken by the competent authorities in order to limit as far as possible the disruption to road traffic and those authorities, including the police, the organisers of the demonstration and various motoring organisations cooperated in order to ensure that the demonstration passed off smoothly; that the economic operators concerned were duly informed of the traffic restrictions applying on the date and at the site of the proposed demonstration and were in a position timeously to take all steps necessary to obviate those restrictions ; that the isolated incident in question did not give rise to a general climate of insecurity such as to have a dissuasive effect on intra-Community trade flows as a whole and finally that all the alternative solutions which could be countenanced would have risked reactions which would have been difficult to control and would have been liable to cause much more serious disruption to intra-Community trade and public order, such as unauthorised demonstrations, confrontation between supporters and opponents of the group organising the demonstration or acts of violence on the part of the demonstrators who considered that the exercise of their fundamental rights had been infringed; ECJ concluded that this particular restriction on the free movement of goods o ruled was justified

Similarly in the Viking Line case (C-438/05 11-12-2007) ECJ ruled that that the fundamental nature of the right to take collective action is not such as to render Article 43 EC inapplicable and that it cannot be considered that it is inherent in the very exercise of trade union rights and the right to take collective action that the fundamental freedoms will be prejudiced to a certain degree. Also in this case ECJ found that the restrictions imposed (concerning the use of flags of convenience) might be justified

Eventually ECJ used the said jurisprudence to find unjustified a blockade ('blockad') of sites, to force a provider of services established in another Member State to enter into negotiations with a trade union on the rates of pay for posted workers and to sign a collective agreement the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the legislative provisions, save for minimum rates of pay (Laval C-341/05 11-12-2007).

This jurisprudence is considered so well established that in a recent case[73], the Swedish Arbetsdomstolen didn't even asked ECJ to examine whether a Swedish trade union action to block the unloading and uploading of a Norwegian ship flying Panama flag were compatible with EU law . In his opinion, the general advocate pointed out that the free movement of services covers also a ship flying a third country flag if the company that owns and exploits it is being established in an EEA country.

Moreover, EU summits (as G8 summits) are being used as an excuse to imply severe measures restraining freedom of assembly, even beyond the provisions laid down in the law or in the Constitution of EU member states. This is not at all surprising, concerning that anti-globalization movements were initially the reason–even before 11/9- to initiate the legislative procedure concluded with the EU framework decisions on European arrest warrant and on combating terrorism[74]

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[72] Commission vs France C-265/95, Schmidberger C-112/00. Therefore, neoliberalism can be found in the EU DNA

[73] Fonnship , C-83/13

[74] See for example the relevant Watson report (A5-0273/2001)

There is a well documented tendency to ban an assembly or impose certain restrictions (usually creating a red zone around the place where a summit is being held) so as to protect the life and physical integrity of foreign visitors or even the feeling of safety of foreign visitors. In certain cases member states laws provides for permanent forbidden places of demonstrations[75].

First of all "location is one of the key aspects of freedom of assembly. The privilege of the organiser to decide which location fits best for the purpose of the assembly is part of the very essence of freedom of assembly. Assemblies in public spaces should not have to give way to more routine uses of the space, as it has long been recognised that use of public space for an assembly is just as much a legitimate use as any other. Moreover, the purpose of an assembly is often closely linked to a certain location and the freedom of assembly includes the right of the assembly to take place within "sight and sound" of its target object".[76] "Blanket restrictions such as a ban on assemblies in specified locations are in principle problematic since they are not in line with the principle of proportionality which requires that the least intrusive means of achieving the legitimate objective being pursued by the authorities should always be given preference."[77] Although art. 11 ECHR hardly justifies such restrictions, any attempt to challenge them culminates in an extensive repression and police brutality.[78]

Anti-austerity demonstrations is another usual target for the police. Amnesty International has documented many incidents involving the use of excessive force, abuse of "less-lethal" weapons (especially tear gas, which does not discriminates between demonstrators or not demonstrators, violent or not violent ones, healthy or not healthy etc.), obstructing access to medical assistance and arbitrary detention in several countries including Greece, Romania, and Spain[79]. In many cases, officers have repeatedly hit peaceful demonstrators with batons, including on the head and neck,and caused serious injuries. In most cases criminal investigations against accused police officers are not thorough and effective (even if such an investigation is initiated at all). On the other hand many demonstrators have been charged and condemned for attending an assembly "which turned violent" or for carrying "arms" (especially flags). Usually when a demonstrator is been beaten by the police, he is always charged for resisting arrest[80].

We should point out that although many EU Regulations impose sanctions against "rogue states" and foreign officials due to "repression of demonstrations"[81]; this is not the case regarding member states (or other "friendly" states)/

Secondly," the reasons for suspension, ban or termination of an assembly should be narrowed down to a threat to public safety or danger of imminent violence"[82]. A serious threat to public safety implies

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[75] Comparison on the rights, limitations and procedures related to public gatherings and demonstrations across Europe, prepared for the Helsinki Committee

[76] Joint Opinion on the Law on Public Assembly of Serbia by the Venice Commission and OSCE/ODIHR§32 CDL-AD (2010) 031

[77] Joint Opinion on the Amendments to the Law on the Rights of Citizens to Assemble Peaceably, Without Weapons, to Freely Hold Rallies and Demonstrations of the Kyrgyz Republic by the Venice Commission and OSCE/ODIHR§22 CDL-AD (2008) 025

[78] Genoa and Gothenburg are the most renowned cases, but not the only ones. Police zeal could exceed even the seriousness of the circumstances: In a recent anti-Ecofin summit demonstration in Greece, a well known syndicalist has been arrested for denying to move away from a square –far away from the summit, but nevertheless inside the red zone formed by the police. Even the Court asked the police officer who arrested him, whether he was forming a prohibited demonstration all by himself

[79] Policing Demonstrations in the European Union, October 2012

[80] To disperse a non- prohibited demonstration in Syntagma sq., police forces has been involved in a massive violent operation, throwing tear gas even inside the metro station. Videos of demonstrators dancing surrounded by tear gas and attacked by police forces has been circulated around the globe.

[81] Concerning Libya, Iran, Syria, Belorussia etc.

[82] Opinion on the Draft Law on Meetings, Rallies and Manifesations in Bulgaria§58 CDL-AD (2009) 035

that the ability of citizens to enjoy their rights is at stake – in other words, the assembled engender a serious situation (not in the short run and not based on isolated incidents) whereby citizens are unable to enjoy their constitutionally embedded rights. The most typical example is massive protests that can lead to uncontrolled rioting threatening the lives and physical integrity of non-participants. Again, proper reasoning should include the intention of a significant number of those assembled (documented by acts of preparation) to engage in such rioting. Although ECHR has pointed out that the notion of a peaceful assembly does not cover a demonstration where the organizers and participants have violent intentions (G vs Germany), the usual (vague) allegation of information about potential infiltration by rioters is not sufficient grounds for prohibiting an assembly if not accompanied by an explanation of why isolated incidents cannot be repressed or if the risk of large-scale rioting is not substantiated[83]. Extensive rioting is not the automatic corollary of any assembly. Does the feeling of safety of foreign visitors fall within the scope of public safety (considering also that foreign visitors might be scorned by participants)? Obviously not[84]. Certainly, protecting the life and physical integrity of foreign visitors no doubt qualifies as public safety. But in this case the reasoning for prohibiting the assembly on such grounds – more so in any extended area - must substantiate the risks against life or physical integrity posed by the assembly (not on grounds of "infiltration") and explain why such risks cannot be avoided by means other than prohibition. "Furthermore, dispersal should not occur unless law enforcement officials have taken all reasonable measures to facilitate and to protect the assembly from harm and unless there is an imminent threat of violence"[85]. A different issue is the repression of criminal acts that may be committed by members of the assembly. This can be addressed without breaking the assembly.

On the other hand, any gathering will undoubtedly cause some degree of disruption to the usual course of social life in any area; it will interfere with public transport and/or normal commercial activity. Hence it will disrupt public order. Is this sufficient ground for prohibiting the gathering? To say so is to fully undermine the right to assembly. This is not what the Greek Public Prosecutor thinks. In his Opinion 4/99 takes the position "it would be insane to argue that freedom of assembly overrides road safety when the latter concerns life, property, etc.", therefore assemblies must be arranged so as not to disturb road traffic or cause as little disturbance as is absolutely necessary[86]. Broadly speaking, this balancing exercise involves political assessments about the terms within which freedom of assembly can be practiced and reintroduces discretionary powers to the police, but now on the level of containment, not prohibition, of the assembly

There has been a long discussion whether new phenomena (such as the restructuring of socialization, forms of social integration or political expression) undermine the significance of the right to assembly. The purpose of assemblies is, on the one hand, to communicate claims and views to the wider public with a view to inviting others to join (by participating) and, on the other hand, to reflect the range of such claims and views on the political process. It is questionable whether other ways to achieve these goals are available at the current juncture. The media (even when – rarely – allowing unfettered expression) do not involve the public. The Internet and social media may enable participation to those with access to the information society, who get to obtain knowledge (in the chaos of the information society) about how to join in voicing their claims and opinions but it falls short of the immediacy, interaction and personal involvement of an assembly. Besides, what illustrates historically the political importance of the freedom of assembly is precisely the threat against the normality of social life. The right to assembly, ultimately a right to challenge dominant political choices, remains a yardstick against which a political system's response to the imperatives of freedom is measured.

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[83] ECHR in its Ziliberberg vs Moldova decision states that an individual does not cease to enjoy the right to peaceful assemply as a result of sporadic violence or other punishable acts commited by others in the course of the demonstration, if the individual in question remains peaceful in his or her intentions or beahaviour

[84] Greek Supreme Administrative Court thought otherwise in its 633/99 Ruling

[85] Opinion on the Draft Law on Meetings, Rallies and Manifesations in Bulgaria§58 CDL-AD (2009)

[86] e.g. proceed through a single lane or on the sidewalk – as provided by the Greek Junta act on demonstrations and as recently provided by a greek law on small demonstrations

Changes to Freedom of Assembly in Serbia

Ivana Stelja, Lawyer, Lawyers Committee for Human Rights (YUCOM), Belgrade:

Summary:

Discrepancies and inconsistencies of the Law on Public Assembly with accepted international standards, and in particular the European Convention on Human Rights and Fundamental Freedoms are main challenges regarding exercising citizens' right to freedom of assembly in Serbia. Freedom of assembly is guaranteed by the Constitution and Law on Public of Assembly. Constitutional Court made several important decisions on freedom of assembly over the past years. It is encouraging that the Court is willing to refer to the case law of the European Court of Human Rights and to apply the principles established through its practice. The competent authorities have not modified their practice to be consistent with the views of the Constitutional Court, in particular Ministry of Internal Affairs. Constitutional Court is currently deciding on constitutionality of the Law on Public Assembly with power of local authorities to decide on banning assemblies as one of the pressing issues. Possibilities of improvement of this freedom in Serbia are related to the both, legal framework and practice of relevant institutions.

Short Biographies of the speakers (as far as available and in alphabetical order)

Sebastian Baunack,

born in 1980, works as a Labour Lawyer in Berlin, Germany. He is member of the Association on Democratic Lawyers. Apart from his legal work he actively supports anti-racist and anti-fascist movements in Germany.

Professor Bill Bowring, barrister, London, ELDH President

Bill Bowring is an expert on human rights and Russian law. He was appointed Professor of Law at Birkbeck College, University of London in September 2006 and is a practising barrister. He previously taught at University of East London, Essex University and London Metropolitan University. Bill founded and is Chair of the European Human Rights Advocacy Centre (EHRAC), which, in partnership with the Russian NGO Memorial and the Bar Human Rights Committee, is assisting with many cases against Russia and other FSU countries to the European Court of Human Rights. As a barrister, he has represented applicants before the ECHR in cases against Armenia, Azerbaijan, Estonia, Georgia, Latvia, Russia, and Turkey.

Bill has acted as expert for the Council of Europe on human and minority rights issues, and works as a trainer and expert for the Council, the European Union, the UN, Amnesty International and others. He has over 90 publications on topics of international law, human rights, minority rights and Russian law. His latest book is *Law, Rights and Ideology in Russia: Landmarks in the Destiny of a Great Power* (Routledge 2013).

Bill is International Secretary of the Haldane Society of Socialist Lawyers, and President of the European Lawyers for Democracy and Human Rights. He is a founder and Executive Committee Member of the Bar Human Rights Committee of England and Wales, and a Trustee of the Redress Trust, working for torture survivors.

Bill speaks fluent Russian and has been travelling to Russia and FSU since 1983.

Dr Dražen Cerović, assistant professor

Dražen Cerović graduated from the Faculty of Law, University of Montenegro, in Podgorica in 1999, as one of the best students in his generation. He completed postgraduate studies at the Faculty of Law, University of Belgrade, and received the title of LLM. He defended his MA dissertation with Summa Cum Laude/With Highest Honor. He defended his PhD with highest honours in 2008. He works at the Faculty of Law, University of Montenegro, where he was employed as an assistant in 2000. He has been assistant professor since 2009. He teaches Administrative Law, Constitutional Procedural Law and Police Law at the Faculty of Law, University of Montenegro. He was a vice-dean for the teaching process at the Faculty of Law from 2009 to 2011. He was an advisor to the President of the Constitutional Assembly of the Republic of Montenegro from 2006 to 2008. He was also an advisor of the Government of Montenegro in the Coordination Team for the Strategy of Euro-Atlantic Integrations from 2008 to 2011. He is a member of the Institute for Public Policy since 2013. He is president of the Association for Democratic Legal System which brings together professionals in the field of legal science. He is a member of the Senate in Lawyers Association of Montenegro. He was an academic director of the Centre for Public Administration from 2003 to 2005. He is an associate at the University

of Texas in Dallas and Arlington. He was also a national coordinator of the European Agency for Reconstruction for the project of the reform of public administration in Montenegro in 2001 and 2002. He is a member of a number of expert teams and working groups of the Parliament and the Government of Montenegro. He is a law consultant of the Centre for Monitoring Elections. He is a member of Advisory board in a scientific journal „Media Dialogues“. He is an author of a larger number of scientific, prefessional and other papers and publications. He speaks English and Russian. His fields of interests are the following: Parliamentary control of public administration, Constittutional protection of civil rights and freedoms, Administrative law of the European Union, Reform of security services and security management.

Professor Michelle Everson

Professor of Law, Birkbeck, University of London

School Ethics Officer, Programme Director & Admissions Tutor – LLM QLD

Biographical details

Michelle Everson, LLB (Exeter), PhD (EUI, Florence) is Professor of European Law in the School of Law, Birkbeck and Assistant Dean for Programme Development.

She has previously held posts as the Managing Editor of the European Law Journal at the European University Institute in Florence, as a lecturer in Law and Political Science at the University of Bremen and as a fellow at the Centre for European Legal Policy at the University of Bremen.

Currently, Michelle Everson also sits on the editorial boards of Law and Critique and the Journal for Socio-Legal Studies. She is also Vice-Chair of the Academic Board for Social Sciences of the Austrian Academy of Sciences.

Dimitar Gotchev

Vice president of the Union of Bulgarian Jurists

Born – 27.02.1936 Sofia, Bulgaria

1949 - 1953 – Secondary school in Sofia

1954 - 1959 – Law School – University of Sofia “St. St. Cyril and Methods”

1960 – 1961 – Lawyer’s practice – Sofia

1962 – 1966 – Jurist consult

1966 – 1990 – Judge in State Court of Arbitration – Commercial Industrial Chamber – Sofia

1990 – 1994 – Judge in Supreme Court of Republic of Bulgaria (1992 – President of Commercial department of the SC, 1993 – vice president of the SC)|

1992 – 1998 – Judge in the European Court of Human Right – Strasbourg

Since 1995 – member of Court of Arbitration – ICC – Paris

1994 – 2003 - Judge in the Constitutional Court of Rep. of Bulgaria

Since 1998 – up to now - vice president of the Union of Bulgarian Jurists

Since 2001 up to now – member of the Administrative Council of EAJDH

Languages – Bulgarian and English, German, Russian, French

John Hendy QC

John Hendy QC was called to the Bar in 1972 and took silk in 1987.

Without doubt he is best known for his work in industrial relations and employment law, having appeared in most of the leading collective labour law cases in the last 30 years. However, his practice also includes:

- representing doctors in disciplinary cases (starting with Wendy Savage in 1986)
- public inquiries and inquests
- other cases involving injunctions or judicial review applications

John has appeared in the European Court of Human Rights and in the European Court of Justice. He has appeared in 12 cases in the Supreme Court (including the House of Lords and the Privy Council), and has 63 reported cases in the Court of Appeal and 74 in the High Court.

He has also appeared in many high-profile inquests and inquiries, including:

- the Lakanal House fire inquest (for the bereaved and injured) 2013
- The Leveson Inquiry (for the NUJ), 2011-2012 (see his cross examination of Rupert Murdoch at http://www.youtube.com/watch?v=38X4EUaJExY)
- The Potters Bar train crash inquest (for the bereaved), 2010
- the Ladbroke Grove Train Crash inquiry (for the victims), 2000
- the Southall Train Crash inquiry (for the victims), 1999
- the Street Markets inquiry for LB Tower Hamlets (chaired), 1991
- the Woolf inquiry into the Strangeways Prison Riot (for the POA), 1990
- the Kings Cross Fire disaster (for the Association of London Local Authorities) 1986

He is also:

- Visiting Professor in the School of Law, Kings College, London
- Visiting Professor in the Faculty of Law, University College, London
- President of the International Centre for Trade Union Rights
- Chair of the Institute of Employment Rights
- Fellow of the Royal Society of Medicine
- Fellow of the Society of Advanced Legal Studies

Stevan Lilić

Prof Stevan Lilić is a full professor of University of Belgrade Faculty of Law and President of Lawyers for Democracy. Prof Lilić teaches courses in Administrative Law, Public Administration, EU Administrative Law and Environmental Law. He has published widely on these topics. He was a Fulbright scholar and visiting professor in many Universities. Prof Lilić was active in peace movement during the 1990es, founder of several prominent human rights NGOs, active politician and member of Serbian Parliament.

Aleksandar Lojpur, Belgrade, 1958

Citizenship: Serbia, Israel

Law offices in Belgrade and Prague

e-mail: aleksandar@lojpur-advokati.com

Education:

1980 Faculty of Law, Belgrade University, Diploma

1983 Faculty of Law, Belgrade University, Postgraduate Studies in Civil Law

1985 Bar examination in Belgrade

1993 Bar examination for lawyers who graduated outside of Israel, Israeli Bar Association

1999 Bar examination for lawyers who graduated outside Czech Republic, Czech Bar Association

Experience:

From 1981-until today a practicing lawyer in commercial law, civil litigation, foreign investments and real estate development and investments, criminal law (human rights related cases and "white collar crimes" related cases).

From 2012 representing clients before General Court of the EU

From 2005 representing clients before the International Court of Arbitration of ICC Paris .

2002 – 2003 legal consultant to OSCE, mission to Yugoslavia.

1999 – 2002 rule of law consultant and project manager for the democratization program in FR Yugoslavia in the Prague Centre of the EastWest Institute (New York based international NGO).

1997-1999 Staff Attorney, Rule of Law Programm, ABA/CEELI (American Bar Association, Central and East European Law Initiative) office in Belgrade.

1991-1995 Branch of the law office in Israel

30 years as practicing lawyer in former Yugoslavia and Serbia.

Dejan Markovic

has a degree in political sciences. He was an elected member of the Belgrade City Assembly from 2000 to 2004 and a member of the Council of the Belgrade Municipality of Rakovica. He was the Ombudsman in the Municipality of Rakovica from 2005-2010. In 2012, he was acting Head of the Group for improvement of the position of Roma in the Office of Human and Minority Rights of the Government of the Republic of Serbia. Based on his experience of work in local administration, he became aware of the necessity of the position of local Roma coordinator in local self-governments and was one of the initiators of its introduction in Serbia. During his work in the Office of Human and Minority Rights, he participated in development of a document aimed at defining duties of local Roma coordinators as regular members of municipality administration.

His current position is President of the Forum Roma of Serbia.

Domagoj Mihaljevic

was born in Zagreb, Croatia. He studied law and economics and received his BA from the Faculty of Economics and Business, University of Zagreb. He is active in the Zagreb-based Organization for Workers' Initiative and Democratization (BRID). His research interests focus mainly on economic and social history. He has written for Le monde diplomatique (Croatian edition), Kurswechsel, Dani, Zarez, Bilten, Slobodni filozofski, Filmonaut.

Marko Milenković

Marko Milenković is a junior researcher at the Institute of Social Sciences in Belgrade and PhD candidate at the University of Belgrade, Faculty of Law. He holds master degrees from the University of Belgrade and University of Cambridge. His research interests include Administrative Law, Environmental Law and EU integration process. PhD June 2014

Giuseppe Palmisano, Rome, 1963

Director of the Institute for International Legal Studies (ISGI) of the National Research Council of Italy (CNR).

Member of the European Committee of Social Rights (Council of Europe).

Graduated in Law at “Sapienza” University of Rome. PhD in International Law, University of Milan.
Assistant to the Special Rapporteur on State Responsibility (Prof. Gaetano Arangio-Ruiz), at the International Law Commission of the United Nations, from 1989 to 1996.
Researcher in International Law at “Sapienza” University of Rome, from 1993 to 2000. Lecturer on International Law and International Organization at the University of Sassari in 1997.
Associate Professor of EU Law, University of Camerino, from 2000 to 2002.
Professor of International Law, University of Camerino, from 2002 to 2011.
Director of the Department of Legal and Political Studies of the University of Camerino, from 2004 to 2008.
Director of the Master in “International Jurisdictions” (University of Camerino, University of Rome “Tor Vergata”, and SIOI, Italian Society for International Organization), from 2004 to 2007.

From 2004, Professor of International Law and International Organization in the Course of Advanced Studies in International Relations, organized in Rome by the SIOI (Italian Society for International Organization).
From 2008, “Chargé de cours” in International Law and International Jurisdictions at the University of Roma Tre.

HAJRO POŠKOVIĆ, Mostar 1972

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EDUCATION

September 1991	B.Sc in Law – December 1997
	Faculty of Law, University of Mostar, BIH
April 2006	Ministry of Justice of the Federation BIH, Sarajevo, BIH
	Bar Exam
December 2013	Faculty of Law, University of Mostar, Master Science
	„European integration and transition of the BIH legal system“

Work experience

July 1998	OSCE, Legal adviser. Job description:
	- monitoring of the property repossession by the DPs and refugees, including drafting of the laws and bylaw and its implementation
	- monitoring of court cases both criminal (war crimes, juvenile delinquency, politically sensitive cases) and civil cases (labor, property, politically sensitive cases);

- participating in drafting of the Amendments to the Civil Procedure Code, Law on Prohibition of Discrimination, Law on Social Protection, Law on Protection of Families with Children, etc..
- monitoring of the judiciary system reform;
- monitoring of the administrative organs in realization of laws and bylaws in the field of social protection, health and pension insurance, legal property affairs, domestic violence, gender equality, etc;
- analysis of the domestic legislation compliance with the international human rights standards;
- work with clients;
- cooperation with judicial and administrative organs as well as cooperation with Ombudsman, NGOs, international organizations, etc;
- drafting of the new Mostar statute as a legal adviser of the Special Envoy of High Representative for BIH.
- giving legal advises to the human right department employees,
- prepare presentations and conducts training for HRD and local authorities

December 1997

Attorney's office, Lawyer Mensud Đonko, Junior barrister. July 1998

OTHER SKILLS Computer litarate (Microsoft Office application)

Language skills: English (fluent),

Öznur Sevdiren

I. Education

4/2005-4/2010 Ph.D.

University of Cologne, Faculty of Law (G ermany)

Thesis Title: Alternatives to Imprisonment in England and Wales, Germany and in Turkey

Supervisor: Prof. Dr. Thomas Weigend.

9/2002 – 10/2003 M.A.

University of Sheffield, Faculty of Law (England)

Dissertation Title: Juvenile Courts in England and Wales, and Turkey

Supervisor: Prof. Dr. Jim Dignan.

7/2002 Criminology Course (England)

Birkbeck College/University of London.

3/2002-6/2002 Academic English Course (England).

University of Westminster

11/1998 – 12/ 1999 Legal Clerkship at the Istanbul Bar.

1994 – 1998 B.A. in Law, Istanbul University, Faculty of Law

1988 – 1994 Istanbul Haydarpaşa Lycee.

2

II. Professional Experience

9/2011- Uludag University Faculty of Law (full-time)

Instructed Undergraduate Courses: Criminal Law (General Provisions), Fall 2012.

Criminal Procedure Law Fall 2011, 2012.

Criminology Spring 2012.

Instructed Postgraduate Courses: International Criminal Law, Fall 2011, Spring 2012

9/2011- Bogazici University Faculty of Economics and Administrative Sciences (part-time)

International Criminal Law Fall 2011, Spring 2012.

1/2011-4/2011 Member of the Curriculum Commission of the Faculty of Law of the Turkish-German University.

6/2004-10/2005 Research Assistant at the International and Foreign Law University of Cologne.

1/2000 – 3/2001 Legal practice at the Istanbul

11/1998-3/2001 Member of the Centre for Human Rights, Istanbul Bar.

III. Administrative Positions

1/2012- Member of Uludag University Law Faculty Bologna

Working Group.

11/2011- Erasmus Coordinator

Uludag University/Faculty of Law.

IV. Fellowships/Research Grants

8-9/2012 Visiting Scholar at the International and Foreign Law Institute at

University of Cologne, Cologne, and Max Planck Institute of

International and Foreign Law Institute, Freiburg.

12/2006-6/2010 Doctorate Scholarship of the Friedrich-Ebert-Stiftung.

3

7/2006 Doctorate Grant of the German Academic Exchange Service at

the University of Cologne.

10/2005-6/2006 Research Grant of the German Academic Exchange Service

(DAAD).

V. Organised Conferences

11/2012 Criminal Justice and Human Rights (Uludag University), in

progress.

5/2012 Hate Crimes Symposium (Uludag University).

5/2010 Criminal Law Reforms Congress (Istanbul University,

Kultur University and Gazi University).

9/2009 “European Criminal Law on the Honour of Prof. Dr. Hans-

Heinrich Jescheck Europäisches Strafrecht – Symposium zu

Ehren von Prof. Dr. Hans-Heinrich Jescheck” (Istanbul

University).

VI. Research and Teaching Interests

Criminal law in international and comparative context, criminal procedure law, penal enforcement law, juvenile criminal law, criminology, international humanitarian law, human rights and constitutional law.

VII. Languages _____

Turkish (native), English and German (advanced), French (basic).

Prof. dr. sc. Alan Uzelac

Alan Uzelac is Professor of Civil Procedural Law at the Zagreb University, Faculty of Law, where he teaches Civil Procedure, Arbitration, ADR, Organization of Judiciary, and Protection of Human Rights in Europe. He holds degrees in law (LL.B., LL.M., LL.D.) and social sciences (M.A. (phil.), M.A. (literature)) from Zagreb University. He was visiting researcher and scholar at a number of universities, including Harvard Law School (Fulbright grant), and universities of Vienna (Austria), Maastricht (the Netherlands), Oslo (Norway), Kazan (Russia), and Pavia (Italy). As an active member of the International Association of Procedural Law and the German Association for International Procedural Law, he serves on the chief advisory bodies of both organizations (Council, *Rat*). He was involved in various activities of the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe, where he held different functions (*inter alia:* Bureau member from 2003-2006, President of the Task Force on Timeframes of Proceedings – TF-DEL 2005-2006). Since mid-90s, Dr. Uzelac was engaged as national delegate of Croatia in the work of UNCITRAL Working Group for Arbitration and Conciliation were he participated in drafting of the several international instruments in the field of alternative dispute resolution. Throughout his career, he was often engaged as expert in various legislative projects, which include significant contribution to the drafting of the Croatian Law on Arbitration, Mediation Act, Law on Courts, Law on State Judicial Council, Legal Aid Act, Rules for Arbitral Dispute Resolution Regarding Internet Domain Names in .hr domain, and various other laws and regulations. As an international expert he worked in the region and Europe, assisting legal reforms and legal collaboration in Serbia, Bosnia and Herzegovina, Montenegro, Russia and Kosovo. Currently, Professor Uzelac is also member of the highest body for judicial appointments and discipline, the State Judicial Council.

For publications and further info see http://alanuzelac.from.hr.

Yiorgos Vassalos

is a political scientist specialised in the European Union.

He studied International Relations in Rhodes, Greece and European Politics in Brussels, Belgium.

From 2006 to 2012 he worked as a researcher at Corporate Europe Observatory in Amsterdam and Brussels. He was the main author of several reports on the role of the European Commission's expert

groups in drafting EU legislation, revealing excessive influence from corporate interests.[87] He also wrote studies and articles on the EU economic governance reform, which started in 2010 and is still underway.[88]

In the framework of his activity in the Greek solidarity movement in Western Europe, he contributed, among others, in the drafting of a letter aiming to highlight important fundamental rights violations in Greece in the course of the implementation of the Troika programs to the President of the European Parliament.[89]

He is currently a PhD researcher in the University of Strasbourg, focusing on the drafting process of EU financial regulation, and in particular the Markets on financial instruments Directive II.

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[89] "Unions & NGOs urge Parliament to scrutinise Greece's Human Rights record", January 2014 http://www.aedh.eu/Unions-NGOs-urge-Parliament-to.html