YEARBOOK ON EUROPEAN LAW, POLICIES AND INSTITUTIONS

Volume 1

2022

European Policy Institute. Skopje

YEARBOOK ON EUROPEAN LAW, POLICIES AND INSTITUTIONS

Volume 1

2022

Yearbook on European Law, Policies, and Institutions

Vol 1, 2022

Authors:
Biljana Kotevska
Jovan Ananiev
Besa Arifi
Ardita Abazi – Imeri
Arta Selmani – Bakiu
Jadranka Denkova
Jordanka Galeva
Julijana Karai

Editor:
Biljana Kotevska

Assistant to the Editor:
Ardita Vejseli

Published by:
European Policy Institute - Skopje

For the publisher:
Simonida Kacarska

Proofreading:
https://www.englishproofread.com

Graphic design and print:
Relativ

Year of publication:
2022

Place of publication:
Skopje

ISBN:
13-978-608-4702-62-7

DOI:
10.13140/RG.2.2.11592.19206

CIP - Каталогизација во публикација
Национална и универзитетска библиотека "Св. Климент Охридски", Скопје

341.171(4-672ЕУ:497.7):35.077(058)
341.171(4-672ЕУ:497.7):34(058)

YEARBOOK on european law, policies and institutions [Електронски извори]. Vol. 1, 2022 / [authors Biljana Kotevska ... и др.]. - Skopje : European policy institute, 2022. - 106 стр. : граф. прикази ; 30 см

Начин на пристапување (URL): https://epi.org.mk/wp-content/uploads/Yearbook-on-European-Law-Policies-and-Institutions.pdf. - Фусноти кон текстот. - Други автори: Jovan Ananiev, Besa Arifi, Ardita Abazi-Imeri, Arta Selmani-Bakiu, Jadranka Denkova, Jordanka Galeva, Julijana Karai. - Библиографија: стр. 106

ISBN 978-608-4702-62-7

1. Kotevska, Biljana [автор] 2. Ananiev, Jovan [автор] 3. Arifi, Besa [автор] 4. Abazi-Imeri, Ardita [автор] 5. Selmani-Bakiu, Arta [автор] 6. Denkova, Jadranka [автор] 7. Galeva, Jordanka [автор] 8. Karai, Julijana [автор] а) Македонија -- Јавни политики -- Хармонизација -- Стандарди на ЕУ -- Годишници б) Македонија -- Правна рамка -- Хармонизација -- Стандарди на ЕУ -- Годишници

COBISS.MK-ID 58850821

This publication was supported by the CIVICA Mobilitas Program. The views expressed in this publication are those of the authors and do not necessarily reflect the views of CIVICA Mobilitas, the Swiss Agency for Development and Cooperation (SDC) and its implementing organizations.

TABLE OF CONTENTS

EDITORIAL STATEMENT.....VII

BENEFITS OF MEDIATION – AWARENESS IN THE PUBLIC ADMINISTRATION AND BUSINESS SECTOR IN NORTH MACEDONIA.....9
Ardita Abazi - Imeri

Introduction.....10
1. The legal framework.....12
2. Use of mediation.....14
3. Perceptions of mediation.....17
4. Way forward – what we need to do.....19

ANALYSIS OF PUBLIC POLICIES AND LEGAL CHANGES IN THE ADMINISTRATIVE FUNCTIONS OF THE REPUBLIC OF NORTH MACEDONIA, AIMED AT HARMONIZATION WITH THE PRINCIPLES AND STANDARDS OF THE EUROPEAN UNION.....23
Jadranka Denkova and Jovan Ananiev

Introduction.....24
1. Analysis of indicators for the effectiveness of the administration.....26
2. Analysis of administrative laws relevant to the functioning of the administration.....27
Conclusion and recommendations from the research.....30

EUROPEAN INTEGRATION POLICY CHALLENGES FOR ETHNIC INTEGRATION IN THE REPUBLIC OF NORTH MACEDONIA.....35
Jordanka Galeva

Introduction.....36
1. Minority protection as a condition for European integration.....36
   1.1. A brief historical overview of Macedonia's relations with the EU.....36
   1.2. Minority protection in EU support programmes.....37
2. Definitions and theoretical aspects of multiculturalism in the public sphere.....39
   2.1. Conceptual definitions.....39
   2.2. Theoretical aspects of multiculturalism promotion in public sphere.....42
3. Policies for the promotion of multiculturalism in the public sphere in Macedonian society.....43
   3.1. Macedonian multiethnic society and legal framework for development.....43
   3.2. The impact of the OFA on multiethnicity in public life.....46
Conclusion.....50

PUBLIC SERVICE AND HUMAN RESOURCES MANAGEMENT:
STATE OF PLAY AND CHALLENGES.....55
Juliana Karai

Introduction.....56
1. Reporting on public service employees.....57
2. Employment in the public sector.....58
3. Procedure for the recruitment of administrative servants.....60
4. Access to senior civil service positions.....63
5. The salary system of administrative servants.....64
6. Integrity and anti-corruption measures for the civil service.....66
Conclusions and recommendations.....67

NOT THERE YET: POSITIVE ACTION IN THE CASE LAW
OF THE EUROPEAN COURT OF HUMAN RIGHTS AND
THE EUROPEAN COURT OF JUSTICE.....69
Biljana Kotevska

Introduction.....70
1. Positive action in the case law of the ECtHR.....72
1.1. Legal framework and approach to adjudication.....72
1.2. Case law.....76
2. Positive action in the case law of the ECJ.....81
2.1. Legal framework and approach to adjudication.....81
2.2. Case law.....84
3. Comparative overview of the two Courts.....88
Conclusion.....90

A LEGAL FRAMEWORK FOR SURROGATE MOTHERHOOD
IN THE REPUBLIC OF NORTH MACEDONIA.....95
Arta Selmani - Bakiu and Besa Arifi

Introduction.....96
1. General characteristics of surrogate motherhood.....97
2. Surrogate motherhood as a means of establishing parenthood in the RNM.....98
3. Parental rights and the status of the surrogate mother and the married couple.....101
4. Prohibited acts and criminal offences in the process of surrogacy, according to the Law on Amendments to the Law on Biomedical Assisted Fertilization.....102
Conclusions and recommendations.....104

EDITORIAL STATEMENT

The *Yearbook on European Law, Policies and Institutions* publishes research on contemporary issues related to law, policies and institutions at national and international level in Europe. As a publication of the Research Group "European Law, Policies and Institutions", founded by the European Policy Institute - -Skopje (Skopje), University "Goce Delčev" (Štip), and South East European University (Tetovo), the Yearbook is to serve as a catalyst for policy - academic dialogue. The research included in this yearbook reflects this aim. The Yearbook gives priority to chapters that evaluate the status of the enlargement policy and process in general or in specific to an EU *acquis* chapter or an issue falling within one of the EU *acquis* chapters.

EDITORIAL BOARD

BENEFITS OF MEDIATION – AWARENESS IN THE PUBLIC ADMINISTRATION AND BUSINESS SECTOR IN NORTH MACEDONIA

Ardita Abazi Imeri

Abstract

Mediation is an alternative means of resolving disputes, enabling parties to settle disputes through negotiation and increasing flexibility in the dispute resolution process, as compared to more conventional approaches (e.g., court proceedings). Mediation helps build trust and mutual respect between entities and is also a useful tool, which can relieve the pressure on judicial institutions with case backlogs putting a heavy burden on their time and human and technical capacities.

The concept of mediation in North Macedonia was introduced in early 2006. However, this tool for dispute resolution is not widely recognized and used in North Macedonia, especially by representatives from the business sector and public institutions.

The amendment to the law in 2013 set a good basis for improved use of mediation. However, the three-year gap in its practical implementation (at the end of 2016) impeded uptake. Additionally, some provisions of the law which are interpreted differently by stakeholders have created unfavourable ground for promotion and usage. In 2019, the government recommended that bodies of the state administration, other state institutions and local self-government units should use mediation when resolving disputes arising within their scope of work. Furthermore, recently (2020), an additional attempt was made to promote successful functioning of mediation in the Republic of North Macedonia and establishment of a modern legal framework through the preparation of a new draft law on mediation.

Data show that the usage rate for mediation by state bodies, the business sector and citizens remains low, with only 1943 cases resolved through mediation as of 2020 ("Mediation – for a new culture in dispute resolution" conference, 2021).[1] This points to a lack of awareness of the benefits provided by this tool. Through use of mediation, the public administration and business sector in particular could save resources, achieving desired results in a shorter time in dispute situations. In order to determine the main reasons for this, this research looked at available data on the current situation regarding use of mediation by the public administration and business sector; their perceptions of mediation and level of awareness of the mediation process; their experience, opinions and readiness to promote mediation as a procedure for resolving disputes; and other relevant issues. This is important foremost in order to get an accurate picture of the situation and future possibilities for development and promotion of mediation.

Key words

mediation, public administration, business sector, promotion

Contact

Ardita Abazi Imeri, PhD
Programme Director, European Policy Institute – Skopje, Skopje
✉ ardita.abazi-imeri@epi.org.mk

1 Discussed by the Minister of Justice, Bojan Maricik.

Introduction

According to the Law on Mediation (2021), "Mediation" is a way of resolving disputes arising between two or more parties, enabling them to resolve these amicably, through a neutral third party mediator(s), with the opportunity to reach a mutually acceptable written agreement (art. 3 (a), Law on Mediation). The procedure for resolving disputes should allow parties to resolve disputes in a voluntary, efficient, expeditious and economical manner, in separate or joint meetings with the mediator and other parties involved, and it is different from a court procedure (art. 3 (c), Law on Mediation). Depending on the kind of mediation in question, it may be voluntary, contractual or legally determined (art. 4 (1), Law on Mediation).

Mediation has numerous benefits, which may outweigh other options (e.g., litigation), such as voluntariness, equality, informality, impartiality, confidentiality, access to information, fairness, efficiency and economy of the process (art. 5 (13), Law on Mediation). However, the main benefits are as follows:

- Cost: mediation is more cost-effective than litigation. For private companies and public enterprises conducting mediation rather than court proceedings, the savings range from 1 to 8 in favour of mediation (Mladenovski, 2019).
- Confidentiality: during litigation, parties are exposed to the public, whereas in mediation, parties involved in the dispute are guaranteed privacy, meaning that the details can be kept out of the public eye.
- Control: in litigation, the outcome of a dispute relies on interpretation and application of the law, while in mediation, parties can express their opinions and agree mutually beneficial terms.
- Speed: a mediation procedure is quicker, and a timeline can be drawn up to suit the needs of those involved (Kiprovska Lukic, 2020).

The key benefits of mediation over court proceedings are as follows:

Differences	Mediation	Court proceedings
Initiation	Requested Anyone can make an informal submission. This should contain information about both parties, the basis of the dispute, value and a brief description of the dispute.	Lawsuit A clear and precise statement of the clams being made is submitted to initiate a lawsuit, which must contain annexes and evidence; this is usually prepared by a legal expert.
Public	The procedure is confidential, and the public is excluded.	The procedure is public, except in certain circumstances where exclusion is permitted by law.
Implementation	The process is conducted in a calm and relaxed atmosphere; parties have the main say and the right to request a break when needed; participants can speak freely, without time constraints, and the procedure is based on the parties' best interests.	In court, there is likely to be a tense atmosphere; the judge has the main say, and authorized parties can only speak when evidence is being presented or testimony is being given; minutes are mandatory, and proceedings must comply with the legal framework and relevant protocols.
Time	The process lasts up to 60 days but may be completed in just a few hours.	Court proceedings are likely to last longer, sometimes even years.
Evidence	Mediation does not involve a two-stage procedure; a completion/agreement statement is registered with the Ministry of Justice, recording that the case has been resolved (res judicata).	Court action is a two-stage procedure, and legal remedies may be sought where allowed.

Differences	Mediation	Court proceedings
Cost	Mediation is a financially cost-effective procedure, with lower costs than court proceedings (a ratio of between 1:3 and 1:5).	Litigation will incur costs in accordance with the provisions of the Law on Court Fees, lawyers' tariffs and other additional costs.
Legal Importance	The agreement is voluntarily executed or enforceable at the request of the parties.	A judge's ruling is final, and an enforceable title may be sought to ensure performance of the judgement.

Source: Chamber of Mediators of North Macedonia, 2019; http://www.kmrsm.org.mk/vest-statija/79840/prednosti-na-medijacijata-pred-sudskata-postapka

Under the law (art. 4 (1), Law on Mediation), mediation can be applied to the following: property disputes arising from probate proceedings; family disputes; labour disputes; trade disputes; consumer disputes; insurance disputes; disputes arising from the procedures of notary payment orders; disputes in the field of education; disputes in the field of safety and health at work; disputes in the field of healthcare; disputes in the field of environmental protection; disputes relating to discrimination; disputes relating to civil liability for slander or defamation; and in other instances where mediation is an appropriate recourse for disputes involving domestic and/or foreign natural and legal persons. Mediation can also be applied in criminal cases (art. 2 (3), Law on Mediation).

In North Macedonia, the Law on Mediation was enacted for the first time in 2006, as a result of the country's efforts to promote integration with European policy, planned with the National Programme for Adoption of the Acquis (NPAA) and monitored through European Commission (EC) annual country reports. The importance of mediation in out-of-court settlements for economic disputes is also reflected in numerous international documents adopted by the EU and the Council of Europe (Kiprovska Lukic, 2020).

In the past 16 years, the law has been changed and amended several times, with major changes adopted via amendments in 2013 and 2021.[2] Over the years, the EC has noted that despite several changes in the law and campaigns for promotion of mediation, uptake of alternative methods of dispute resolution is still very low (European Commission, 2012). EC reports note that there has been little use of mediation (European Commission, 2015 and 2016), despite several initiatives to promote it (including under the 2009 Law on Mediation). The 2013 Law on Mediation provides a legal framework for alternative dispute resolution, but in practice, the system remains underdeveloped. More awareness-raising measures will be needed to bring it into the mainstream (European Commission, 2014) and to further promote use of alternative dispute resolution, including through the relevant chambers. In 2019, the EC noted that the effects of implementation of the new Law on Mediation (adopted in 2013) had yet to be assessed (European Commission, 2019) and that the number of mediation cases had decreased in recent years, notably as regards labour disputes (European Commission, 2020). A shift in the number of cases resolved through mediation was noted in the 2021 report, where the EC noted that in 2020, the number of mediation cases rose by 55%, compared to 2019, while still stressing that permanent efforts are needed to promote use of alternative forms of dispute resolution (including for commercial cases).

In order to increase use of mediation as an alternative means of resolving disputes, the National Programme for Adoption of the Acquis 2021–2025 (Secretariat for European Affairs, 2021) and the Strategy for Reform of the Judiciary 2017–2021 (Ministry of Justice of the Republic of North Macedonia, 2017) foresaw adoption of a new Law on Mediation.

2 Official Gazette of the Republic of Macedonia, Nos. 22/2007, 114/2009, 188/2013, 148/2015, 192/2015, 55/2016 and 294/2021.

1. The legal framework

Mediation was introduced in 2006 as a system of alternative dispute resolution, and the Law on Mediation was adopted in 2006. The law was partially harmonized with EC Directive EC 2008/52 on Mediation in Civil and Commercial Disputes. The partial level of harmonization, however, was not seen as a major impediment in implementation of the law (European Policy Institute – Skopje, 2013).

A key challenge has been the lack of practical implementation of the law and the then dysfunctional Chamber of Mediators, which hampered the reform process ("Mediation – for a new culture in dispute resolution" conference, 2021).[3] Other challenges related to the lack of a system for professionalization of mediators and standards of practice, lack of supervision of mediator training and a lack of continuous training. Other deficiencies related to improvement of promotional efforts beyond seminars and ad hoc news about its benefits.

For these reasons, efforts were made[4] to reset the system, creating a critical mass of mediators and supporting the quality, integrity and professionalism of mediation and mediators. The new Law on Mediation was enacted in 2013 in order to introduce a quality system for mediators. The new 2013 law was further harmonized with the EC 2008/52 Directive on Mediation in Civil and Commercial Disputes in relation to the principle of competence in mediation, quality assurance of mediation services, termination of obsolescence and preclusion deadlines, as well as giving citizens access to information about mediation. The new law sought to ensure profiling of mediators and to resolve the issue of too many mediators due to pre-liberal access to mediator status which did not correspond to the real needs of the country (170 mediators) (European Policy Institute – Skopje, 2013). In this direction, additional criteria and conditions for acquiring mediator status were foreseen, built into the system for ensuring quality standards for mediation services.

Nevertheless, practical implementation of the 2013 law was hampered by introduction of the concept of electronic exams, thus postponing implementation of the law until the end of 2016. The law had been implemented in its entirety by July 2017. According to the Ministry of Justice ("Mediation – for a new culture in dispute resolution" conference, 2021),[5] practical implementation of the law revealed loopholes, firstly regarding functioning and composition of the Mediation Board (in terms of ensuring, monitoring and evaluating the quality of mediation work) and lack of data in the Register of Mediation Proceedings and Mediators, which did not adequately report/register proceedings. According to the Strategy for Reform of the Judiciary Sector 2017–2022, the key deficiencies relating to mediation and the 2013 law are "the shortage of licensed mediators, primarily due to the complex and inadequate examination of mediators, the non-functional Mediation Board and the delayed process of establishing the Chamber of Licensed Mediators" (Ministry of Justice of the Republic of North Macedonia, 2017). Additionally, the strategy emphasizes that the number of reported and registered cases in the register for mediation proceedings (kept by the Ministry of Justice) does not match the number of registered cases in individual registers of mediators due to the ambiguities of the law regarding mediators' obligation to report such cases to the Ministry of Justice, and different interpretations of the requirements (Ministry of Justice of the Republic of North Macedonia, 2017).

3 Discussed by Malinka R. Jordanova, member of EPI's management board.

4 The changes were initiated by the European Policy Institute in cooperation with Dutch experts and the Ministry of Justice in the "Support for implementation of mediation in Macedonia" project (November 2011–2013), financed by the Embassy of the Kingdom of the Netherlands in Skopje.

5 Discussed by Radica Lazarevska Geroska, State Advisor at the Ministry of Justice.

According to the strategy, the strategic directions for improvement of mediation are as follows (Ministry of Justice of the Republic of North Macedonia, 2017):

- Advancing the concept of mediation through revision of mediators' exams to take into account the necessary competencies and skills that they should possess; introduction of electronic submissions for mediation; and harmonization of record keeping for mediation procedures conducted by the Ministry of Justice and mediators.
- Frequent use of mediation by public bodies by encouraging them to resolve disputes through mediation.
- Promoting use of mediation in court proceedings in cases of child justice, litigation against journalists for defamation and slander, consumer disputes and insurance disputes.
- Promoting the benefits of mediation and raising awareness, in accordance with the European Commission Directive on Mediation in Civil and Commercial Disputes of 2008 and the Consumer Mediation Directive.

The most recent law on mediation was adopted in December 2021. This law advances the concept further. The law is now even more harmonized with the EC 2008/52 Directive on Mediation in Civil and Commercial Cases and follows the guidelines set by the European Commission for the Efficiency of Justice (CEPEJ) in development of mediation, as well as European Parliament recommendations. The purpose of this law is to facilitate access to mediation as an alternative procedure for resolving disputes, as well as to promote greater awareness of the benefits of mediation and to encourage use by guaranteeing a balanced relationship between mediation and court proceedings (art. 1 of the Law on Mediation).

To avoid duality of data between the Ministry of Justice and the Board of Mediators, the current law provides that the Ministry of Justice maintain a register of received mediation requests in electronic form (art. 16 (1) of the Law on Mediation). Approved mediators can access the register and data regarding requests submitted (art. 16 (2) of the Law on Mediation). Mediators are obliged to enter data on mediation requests immediately (no later than three days from the day such requests are received), and they must continue to update the register with all necessary data, including the final outcome of procedures (art. 16 (3) of the Law on Mediation). The new law provides for some of the costs of mediation to be subsidized, under certain conditions. It also foresees establishment of the "National Mediation Council", a government body which will ensure, monitor and evaluate the quality of mediation services and mediators. This represents an attempt to resolve problems relating to the composition, number and profile of members of the body responsible for quality assurance. The number of representatives in the new body (council) has been reduced from 10 to 6 and should now consist of a national mediation coordinator, four members and a secretary (art. 64 of the Law on Mediation). The law also foresees organization of promotional debates to promote mediation and its benefits as an alternative means of resolving disputes (Secretariat for European Affairs, 2021).

Efforts to increase use of mediation have also been bolstered by amendments to other laws, such as the Law on Civil Procedure, where the number of cases referred for mediation by courts is significant. Factors contributing to this include training for judges on mediation referral, incorporation of mediation as a subject in programmes for initial and continuous training of judges and public prosecutors, free mediation projects and establishment of mediation offices in courts, etc.

In order to affirm alternative ways of resolving disputes (as set out in the 2021 Law on Mediation), the Government of the Republic of North Macedonia has adopted a programme for the development of mediation, setting out measures for mediation initiatives and the means to provide support for mediation (art. 34 of the Law on Mediation).[6] The special programme for support of mediation has been adopted by the Judicial Council of the Republic of North Macedonia (Supreme Court of the Republic of Macedonia, 2018),[7] and the state subsidizes some mediation costs under specified conditions (art. 35 of the Law on Mediation).

Besides the need to amend relevant laws, additional measures are needed to promote the concept of mediation. Since July 2019, in cooperation with the Chamber of Mediators, the Government of the Republic of North Macedonia has required all state bodies, institutions, state- owned public enterprises and local self-government units to try and resolve disputes through mediation before initiating court proceedings (Conevska Vangelova & Kamberi, 2021).[8]

Additionally, in July 2019, the Republic of North Macedonia signed the "United Nations Convention on International Settlement Agreements Resulting from Mediation", known as the Singapore Convention on Mediation (Chamber of Mediators, 2019). It is expected that the signing of this convention will bring numerous benefits to foreign investors and companies through alternative, out-of-court settlement of international trade disputes, and will ensure cross-border enforcement and compliance with mediation agreements, providing companies and international investors with greater legal certainty and increasing international trade (Akademik.mk, 2019).

2. Use of mediation

Despite being introduced as early as 2006, uptake of mediation in North Macedonia has been low and slow. One of the reasons for this, common to most countries and also North Macedonia, is the litigation culture and desire among citizens and legal entities for disputes to be settled in court. This is compounded by a lack of knowledge of this instrument and insufficient information on the potential for dispute resolution through mediation in an efficient and more economical way (Mladenovski, 2019). The delay in practical implementation of the 2013 Law on Mediation (which was fully implemented in July 2017) has also played a major role in hampering uptake of mediation. Prior to 2013, only 21 cases were registered with the Ministry of Justice. Since 2017, there has been a significant increase in the number of cases referred for and resolved through mediation.

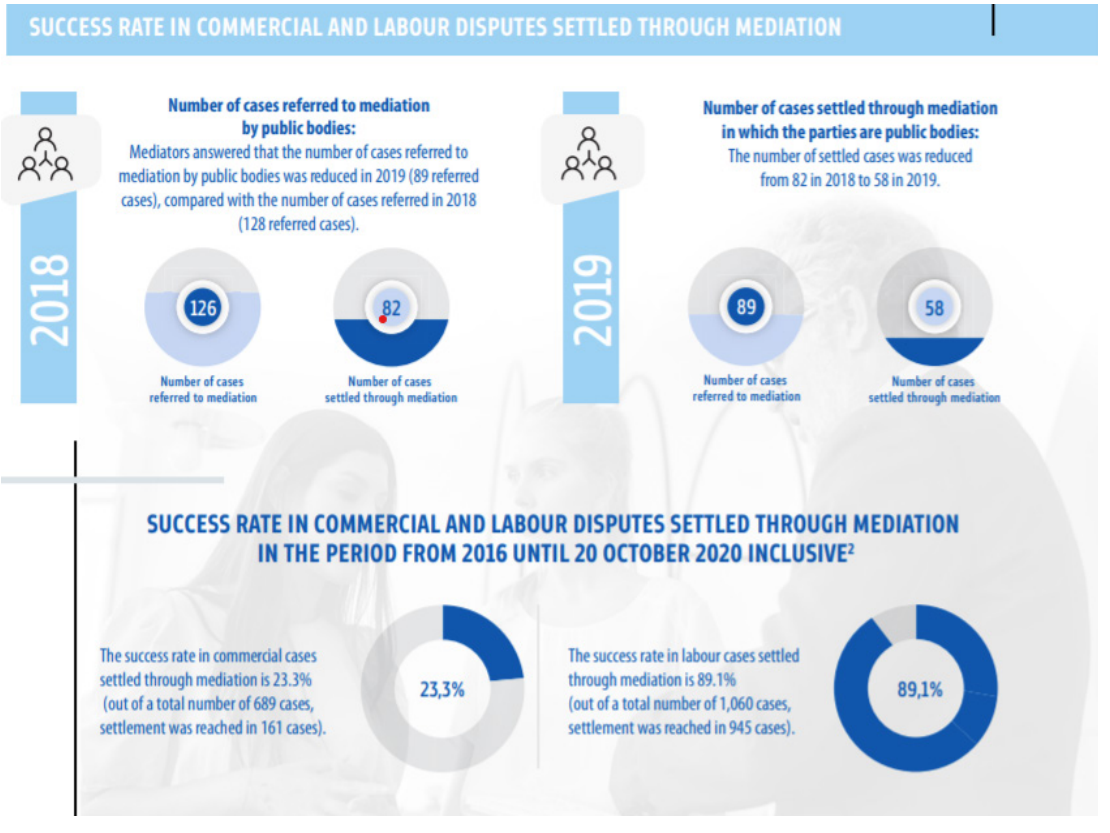
6 In 2012, the Government of the Republic of Macedonia's action plan for overcoming obstacles to successful implementation of the concept of mediation was prepared under the "Support for improvement of implementation of mediation in Macedonia" project, implemented by the EPI. Other programmes and/or action plans are not available. For more on this, see https://epi.org.mk/docs/resete_go_sporot_-_da,_za_medijacija.pdf.

7 Under the previous law, as well as the Judicial Council, the Supreme Court also adopted a programme to support mediation, which is not the case with the 2021 Law on Mediation. For more on this, see https://akademik.mk/programata-za-poddrshka-na-medijatsijata-donesena-od-vrhovniot-sud/.

8 The political will to advance the sphere of mediation also existed in the previous period. In 2012, the government (as part of the activities of the European Policy Institute in the "Support for implementation of mediation in Macedonia" project, 2011–2013) adopted an action plan for improvement of mediation and a plan for monitoring of the implementation of the action plan, as well as a conclusion regarding the obligation for the State Attorney's Office to propose mediation in disputes, as a means of achieving more efficient and cheaper dispute resolution. For more on this, see https://epi.org.mk/docs/resete_go_sporot_-_da,_za_medijacija.pdf.

According to the 2021 EC report (European Commission, 2021), permanent efforts are needed to promote use of alternative methods for dispute resolution, including for commercial cases. The report noted that in 2020, the number of mediation cases rose by 55%, compared to 2019, when the number of mediation cases decreased for labour disputes (European Commission, 2020).

Surveys conducted with mediators in 2019 and 2020 (Conevska Vangelova & Stamboliska -Popovska, 2021)[9] by the European Policy Institute show that there was an increase in the number of cases referred for mediation by public authorities in 2020 (133 cases), compared to 2019 (89 cases). Cases resolved in this way in 2020 (128 cases) also increased, compared to 2019 (58 cases). Cases referred for mediation under the Law on Child Justice increased in 2020 (4 cases), compared to 2019, when no cases were referred (as reported by mediators). Labour and trade cases referred and resolved through mediation in 2020 significantly increased. In 2019, the register kept by the Ministry of Justice showed 87 mediations in trade disputes, and 16 of these disputes ended with a settlement. In 2020, there was a significant increase in the number of mediations sought for trade disputes (189 mediations, 37 of which ended with a settlement), unlike in 2019, when not a single case of mediation was registered with the Ministry of Justice in respect of labour disputes. In 2020, there were 126 mediations, 89 of which ended with a settlement (Conevska Vangelova & Kamberi, 2021).[10]



Source: How often is mediation used in our country? European Policy Institute (EPI) – Skopje, 2021; https://epi.org.mk/wp-content/uploads/Matra_infographic_hyperlink_eng.pdf

9 22 mediators answered the first survey for 2019, and 21 mediators answered the survey for 2020.

10 The data presented in the report were obtained at the time of writing (2020) by the European Policy Institute. The latest data from the Ministry of Justice, presented in November 2013, show a slightly higher number of cases for disputes, which is due to late entry of cases for the given year.

The latest figures regarding mediation cases from the Ministry of Justice for the end of 2021 show a significant increase in the number of cases where mediation was sought. The difference between these figures and those from the early days is huge.

Mediation Chart Table 2016-2021 by types of cases and settlement status (E-REG. 02.11.2021)

	type of dispute	2016			2017			2018			2019			2020			1.01.2021- 31.10.2021				TOTAL	
		total	agree	no agree	total	agree	no agree	total	agree	no agree	total	agree	no agree	total	agree	no agree	total	active	agree	no agree	Total	agree
1	trade/commercial disputes	123	34	89	88	34	54	152	32	120	202	26	176	246	31	215	165	0	13	152	**976**	**170**
2	labor disputes	16	14	2	867	867	0	38	38	0	24	22	2	210	101	109	104	0	99	5	**1259**	**1141**
3	insurance disputes	5	5		33	8	25	25	4	21	13	1	12	15	1	14	16	0	2	14	**107**	**21**
4	property legal disputes				1	0	1	3	1	2	3	1	2	5	3	2	4	0	2	2	**16**	**7**
5	diferent grounds	8	1	7	11	5	6	160	36	124	17	2	15	11	4	7					**207**	**48**
6	fammily cases							1	1	0				1	0	1					**2**	**1**
7	consumers protction													1	0	1	1	0	0	1	**2**	**0**
8	criminal cases													1	0	1					**1**	**0**
	TOTAL	**152**	**54**	**98**	**####**	**914**	**86**	**380**	**113**	**267**	**259**	**52**	**207**	**490**	**140**	**350**	**290**	**0**	**116**	**174**	**2571**	**1389**
										1380						749						

Source: Ministry of Justice, presented at the conference on mediation (03.11.2021), organized by the European Policy Institute (EPI) – Skopje

The key factors that have contributed to this are mainly related to interventions provided for in the legislative framework in 2013, which have produced more cases. By November 2021, a total of 2571 cases had been referred for mediation (1389 of which ended with an agreed settlement). In terms of the types of disputes, most cases referred for mediation were labour disputes (1259 cases, 1141 of which ended with an agreement). Next in line were trade/commercial disputes (with 976 referred cases, 170 of which ended with an agreement). However, despite the large number of trade/commercial disputes referred for mediation, the success rate tends to be very low. Furthermore, the high number of labour cases referred and resolved through mediation cannot be taken as a benchmark, due to a one-off increase in referrals for such disputes in 2017.

According to the Ministry of Justice, these figures do not provide an accurate picture of the situation. The referral figures reported by the Ministry do not tally with those of the Board of Mediators (2571 versus more than 3,500, respectively) ("With mediation to better access to justice" conference, 2021).[11] Since August 2020, mediators have been able to input data on applications received. The electronic system undoubtedly contains quality data, but technical difficulties have been reported by mediators when entering information. Taking into account the importance of unique and accurate records on use of mediation, the law of 2021 foresaw legal changes in this respect, obliging mediators to enter mediation requests within three days of receipt of applications (art. 16 (3), Law on Mediation).

11 Discussed by Radica Lazarevska Gerovska, State Adviser at the Ministry of Justice.

3. Perceptions of mediation

According to available research, the public in the North of Macedonia is not informed about the opportunities for dispute resolution provided by mediation. Neither the Chamber of Mediators nor any other competent institution has a communication strategy through which to promote mediation, and in certain areas and population groups, there is resistance to mediation as a result of misinformation. Additionally, there is a lack of transparency regarding activities on the part of the entities involved and those responsible for the development of mediation (European Policy Institute – Skopje, 2013). The EC has noted that efforts are needed to further promote use of alternative forms of dispute resolution, including through the Chamber (European Commission, 2020).

The Chamber of Mediators, as foreseen with the 2013 Law on Mediation, was formed in 2017 and has since been engaged in activities to promote mediation, information and education among citizens but also the business sector. In this direction, the Chamber has signed memoranda of understanding (MoUs) with the Government of North Macedonia and also the Association of Chambers of Commerce and the Chamber of Commerce of North Macedonia, indicating clear commitment to the promotion of mediation and its benefits among the business sector.

There is limited research on mediation overall, its use and perceptions of mediation. The available research is ad hoc, project-based[12] and/or relates to monitoring of the few measures relating to mediation in the Strategy for Reform of the Judicial Sector 2017–2022.

The European Policy Institute carried out a recent poll (2021) among representatives of the public administration and the private sector (companies) on their perceptions of the benefits and use of mediation in North Macedonia, to examine their attitudes towards the current situation in terms of mediation in the country. The main goal of this research was to try to ascertain the key facts pertaining to this issue, as well as to provide an overview of the aspects that need to be improved, be they institutional and/or legal (Rating Agency, 2021). Representatives of both the public administration and the private sector reported in this poll that the institutions in which they worked had participated in court proceedings to resolve a dispute with another private company or a natural person outside the company but not with a public enterprise in the previous three years.

The poll results indicated that most institutions had received expert legal advice on the use of mediation as an out-of-court procedure for resolving disputes in the public administration, and 100% of those that had received information and advice to opt for dispute resolution through mediation received this from a lawyer. In the private sector, companies did not receive expert legal advice on the use of mediation as a procedure for dispute resolution rather than court proceedings. The key reason for this, according to the results of the survey, was a lack of motivation to participate in mediation in the public administration and the private sector.

According to the survey results, in general, a large number of representatives of both the public administration and the private sector are not informed about mediation as an out-of-court dispute resolution mechanism.

12 The research covered the following topics: 1. general data on respondents and characteristics of the legal entity; 2. involvement in court proceedings; 3. awareness of mediation; 4. characterization of mediation; 5. experience with mediation; 6. opinions on certain legal solutions relating to mediation; and 7. recommendations for mediation.

Regarding the kind of information about mediation, representatives of the public administration are most often informed by employees of state bodies and lawyers (including lawyers in the institution itself), as well as by portals and social media, while representatives of the private sector are informed via printed and electronic media, educational materials and company lawyers.

The poll results showed that most representatives of the public administration are informed about the work of the Chamber of Mediators, but at the same time, a considerable number of representatives are not informed about this. The private sector is largely uninformed regarding the work of the Chamber of Mediators.

Furthermore, the public administration is familiar with the Government Conclusion of 2019 recommending trying to resolve disputes primarily through mediation. However, most respondents felt that the desire to make use of mediation is small or non-existent. In the private sector, there is a high level of uniformity with regard to this conclusion. Only a small percentage of private sector representatives reported being informed about the activities of the government for the promotion of mediation.

It is concerning that according to the findings of this research, neither the public administration nor the private sector view mediation very positively, although both groups agree that there is a need for greater promotion of the benefits of mediation. The public administration at local level is not ready to resolve disputes through mediation, while private sector representatives would primarily opt for mediation.

The most common types of disputes in public administration are trade disputes, family disputes and disputes in the field of education. In the private sector, the most common are labour disputes (80% of cases) and trade disputes (58% of cases).

Representatives of both the public administration and private sector groups reported that before starting a court procedure, attempts were initially made to resolve the dispute through mediation. However, for the most part, these procedures did not result in a signed agreement. The reason given by the public administration was that the parties had not been ready for an agreement, while in the private sector, it was because the mediator had not handled the procedure competently or the mediator had withdrawn from the process because of a lack of expediency.

A notable difference was found relating to drawing up contracts with other parties, with the public administration including an article on dispute resolution primarily through mediation, while the private sector omits such an article from its contracts.

The private sector is generally familiar with the legal proviso that when it comes to commercial disputes up to one million denars, before filing a lawsuit, the parties are obliged to try to resolve the dispute through mediation.

Both groups reported that there should be a mandatory attempt at mediation before initiating labour dispute proceedings in court and that there should be a legal solution for resolving low-value cases with mediation.

4. Way forward – what we need to do

Available research shows that the public knows little about mediation, generally and professionally. The public administration is now more informed than before, but it is important to target and familiarize the part of the public administration that works on mediation. The public administration, however, has established channels of information relating to use of mediation, and its promotion through these channels should be targeted.

The business sector remains largely uniformed about the benefits of mediation, despite the Chamber of Mediators' efforts to cooperate with the Chamber of Commerce and the government decision of 2019 regarding referring disputes involving institutions for mediation. Mediation remains by far the best option, which can give companies a complete package of benefits, such as confidentiality, consideration of their interests, satisfaction and preservation of good relations between parties. It also gives them the opportunity to continue the cooperation that has been established and creates conditions for continuation of partnerships in the future (Mladenovski, 2019).

Judges and prosecutors are informed through the training academy for judges and prosecutors, and solid information channels have been established, which should continue.

An important task remains concerning mediators themselves and parties/users, especially since the above-mentioned research shows that not all mediators are sufficiently competent in handling disputes. This indicates that a focus should be placed on maintaining the quality of mediators, monitoring their track record and providing adequate training (including opportunities for ongoing professional development). The Chamber of Mediators is now more visible than before. However, its activities must go beyond cooperation with the Ministry of Justice, which does not suffice.

Data also show that some mediators have begun conducting mediation online, e.g., during the COVID-19 pandemic ("With mediation to better access to justice" conference, 2021).[13] The opportunities offered by this mode of working should be tapped for further development and promotion of mediation.

Efforts are currently being made to disseminate information on the benefits of mediation. In January 2022, the Ministry of Justice started its "There is a solution" campaign to promote mediation as an alternative dispute resolution mechanism, especially "attractive for the business sector" (Chamber of Mediators, 2022). However, a systematic, widespread and targeted information campaign, accompanied by a targeted communication strategy, is needed, addressing the use and benefits of mediation as an alternative dispute resolution mechanism.

13 Discussed by Radica Lazarevska Gerovska, State Adviser at the Ministry of Justice.

Bibliography

Akademik.mk. (7 August 2019). *Ministry of Justice: The signing of the Singapore Convention on Mediation is a historic event* [Министерство за правда: Потпишувањето на Сингапурската конвенција за медијација е историски настан]. Available at https://akademik.mk/ministerstvo-za-pravda-potpishuvaneto-na-singapurskata-konventsija-za-medijatsija-e-istoriski-nastan/

Chamber of Mediators. (14 August 2019). *The Republic of North Macedonia signed the Signapore Convention on Mediation* [Република Северна Македонија ја потпиша Сингапурската Конвенција за медијација]. Chamber of Mediators of the Republic of North Macedonia. Available at https://www.kmrsm.org.mk/vest-statija/78344/republika-severna-makedonija-ja-potpisha-singapurskata-konvencija-za-medijacija

Chamber of Mediators. (15 January 2022). *"There is a solution" campaign of the Ministry of Justice for promoting mediation as an alternative way of resolving disputes* ["Има Решение" кампањата на Министерството за правда за промоција на медијацијата како алтернативен начин за решавање на споровите]. Chamber of Mediators of the Republic of North Macedonia. Available at https://www.kmrsm.org.mk/vest-statija/96186/ima-reshenie-kampanjata-na-ministerstvoto-za-pravda-za-promocija-na-medijacijata-kako-alternativen-nachin-za-reshavanje-na-sporovite

Conevska Vangelova, I. & Kamberi, I. (2021). *Shadow Report for Chapter 23 for the period between April 2020 and September 2021*. European Policy Institute – Skopje. Available at https://epi.org.mk/wp-content/uploads/Shadow-report-for-Chapter-23-for-the-period-between-April-2020-and-September-2021.pdf

Conevska Vangelova, I. & Stamboliska-Popovska, Z. (2021). *2020 Report on the results of the implementation of the 2017–2022 strategy for reform of the judicial sector*. European Policy Institute – Skopje. Available at https://epi.org.mk/wp-content/uploads/2020-REPORT-ON-THE-RESULTS-OF-THE-IMPLEMENTATION-OF-THE-2017-2022-STRATEGY-FOR-REFORM-OF-THE-JUDICIAL-SECTOR-en.pdf

"With mediation to better access to justice" conference. (3 November 2021). European Policy Institute – Skopje. Available at https://epi.org.mk/post/18126?lang=en

"Mediation – for a new culture in dispute resolution" conference. (9 June 2021). European Policy Institute – Skopje. Available at https://epi.org.mk/post/17015

European Commission. (2012). *The former Yugoslav Republic of Macedonia 2012 Progress Report* (Commission Staff Working Paper). Commission of the European Communities. Available at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2012/package/mk_rapport_2012_en.pdf

European Commission. (2014). *The former Yugoslav Republic of Macedonia 2014 Report* (Commission Staff Working Paper). Commission of the European Communities. Available at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2014/20141008-the-former-yugoslav-republic-of-macedonia-progress-report_en.pdf

European Commission. (2015). *The former Yugoslav Republic of Macedonia 2015 Report* (Commission Staff Working Paper). Commission of the European Communities. Available at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2015/20151110_report_the_former_yugoslav_republic_of_macedonia.pdf

European Commission. (2016). *The former Yugoslav Republic of Macedonia 2016 Report* (Commission Staff Working Paper). Commission of the European Communities. Available at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_the_former_yugoslav_republic_of_macedonia.pdf

European Commission. (2019). *North Macedonia 2019 Report.* Available at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-north-macedonia-report.pdf

European Commission. (2020). *North Macedonia 2020 Report* (SWD(2020) 351 final). European Commission. Available at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/north_macedonia_report_2020.pdf

European Commission. (2021). *North Macedonia 2021 Report* (Commission Staff Working Document). Available at https://ec.europa.eu/neighbourhood-enlargement/north-macedonia-report-2021_en

European Policy Institute – Skopje. (2013). *Resolve the dispute – Yes, through mediation* [Решето го спорот – Да, со медијација]. Available at https://epi.org.mk/docs/resete_go_sporot_-_da,_za_medijacija.pdf

Kiprovska Lukic, F. (March 2020). *Financial and legal aspects of the mediation in the Republic of North Macedonia.* Available at http://pf.ukim.edu.mk/wp-content/uploads/2020/03/8.-Frosina-Kiprovska-Lukic.pdf

Ministry of Justice of the Republic of North Macedonia. (2017). *Strategy for reform of the judicial sector for the period 2017–2022 with an Action Plan.* Available at https://www.pravda.gov.mk/Upload/Documents/Strategija%20i%20akciski%20plan_ANG-web.pdf

Mladenovski, S. (19 October 2019). *Mediation is discreet and preserves privacy and good relations between people* [Младеновски: Медијацијата е дискретна и ја чува приватноста и добрите односи меѓу странките]. Chamber of Mediators of the Republic of North Macedonia. Available at https://www.kmrsm.org.mk/vest-statija/80492/mladenovski-medijacijata-e-diskretna-i-ja-chuva-privatnosta-i-dobrite-odnosi-megju-strankite

Law on Mediation, Official Gazette of the Republic of North Macedonia No: 294/2021 from 27.12.2021. Available at https://dejure.mk/zakon/zakon-za-medijacija-2

Rating Agency. (2021). *Perception of the public administration and the private sector for mediation as a way of settling disputes in the Republic of North Macedonia* [Перцепција на јавната администрација и приватниот сектор за медијацијата како начин за решавање на спорови во Република Северна Македонија]. Rating Agency. Available at https://epi.org.mk/wp-content/uploads/02-%D0%98%D0%B7%D0%B2%D0%B5%D1%88%D1%82%D0%B0%D1%98-%D0%9C%D0%B5%D0%B4%D0%B8%D1%98%D0%B0%D1%86%D0%B8%D1%98%D0%B0-%D0%95%D0%9F%D0%98.pdf

Secretariat for European Affairs. (2021). *National programme for adoption of the European Union Acquis (NPAA) 2021–2025.* Available at https://www.sep.gov.mk/data/file/NPAA/NPAA%20ENG%20Final_compressed%20(1).pdf

Supreme Court of the Republic of Macedonia. (2018). *Programme for supporting mediation* [Програма за поддршка на медијацијата]. Supreme Court of the Republic of Macedonia. Available at http://www.vsrm.mk/wps/wcm/connect/vsrm/659cbb96-6d09-46ee-8704-bfcbe0ae6419/Programa-medijacija.PDF?MOD=AJPERES&CVID=mrOKdzj&CVID=mrOKdzj&CVID=mrOKdzj&CVID=mrOKdzj&CVID=mrOKdzj&CVID=mrOKdzj&CVID=mrOKdzj&CVID=mrOKdzj&CVID=mrOKdzj

ANALYSIS OF PUBLIC POLICIES AND LEGAL CHANGES IN THE ADMINISTRATIVE FUNCTIONS OF THE REPUBLIC OF NORTH MACEDONIA, AIMED AT HARMONIZATION WITH THE PRINCIPLES AND STANDARDS OF THE EUROPEAN UNION

Jadranka Denkova and Jovan Ananiev

Abstract

We can conclude that great progress has been made in terms of public administration reform policies, but weaknesses are still detected as regards political neutrality, accountability, motivation and training within the administration. There is a need to measure the results of the administration, divert certain administrative activities and review the functionality of state bodies. Special emphasis should be placed on the slow adaptation of laws, specifically the law on General Administrative Procedure, the establishment of the one-stop-shop system and the appointment of responsible persons to manage procedures. Regarding the Law on Administrative Dispute, the applicability of some provisions will ensure efficiency in the judiciary, but in general, we cannot agree that the scope of work will be reduced and the efficiency of the Administrative Judiciary increased. Although the legislature seeks to increase the efficiency of correspondence between the administration in administrative bodies, which resolve administrative cases and the administrative court, time is wasted while waiting for the original documents relevant to the hearing to be delivered.

Keywords

administration, policies, laws, principles, efficiency, accountability

Contact

Prof Dr Jadranka Denkova
Professor, University "Goce Delčev", Faculty of Law, Štip
✉ jadranka.denkova@ugd.edu.mk

Prof Dr Jovan Ananiev
Professor, University "Goce Delčev", Faculty of Law, Štip
✉ jovan.ananiev@ugd.edu.mk

Introduction

For the consistent implementation of state administration reforms, the Government continuously strives to improve the instruments for strategic planning, policy analysis and coordination. In February 2007, the General Secretariat of the Government of the Republic of Macedonia adopted guidelines on the manner, form and content of the preparation of strategic plans of the ministries and other state administration bodies. For an easier implementation of the guidelines, the General Secretariat of the Government has developed a Strategic Planning Manual. The Strategic Planning Manual identified the legal basis in the Law on Budgets, Article 15, paragraph 3, according to which budget users are obliged to prepare a three-year strategic plan containing programmes and activities, aimed at achieving the strategic priorities of the Government of the Republic of Macedonia, as well as priorities and the budget user's goals for that period (art 15 (3) Law on Budgets).The legal framework that regulates the system for planning and policy-making consists of the Law on the Government of the RNM (art 4. Law on the Government)[1] and the Rules of Procedure of the Government of the RNM, (Rules of Procedure of the Government of the Republic of Macedonia) which establish the foundations for the processes of strategic planning, policy analysis and coordination. The methodology for policy analysis and coordination sets out the basic principles for policy-making, and together with the published Policy-Making Manual are the basis for continuous training in the state administration.[2] Ensuring full consistency of the established strategic planning mechanisms, including the budget process with its mechanisms and instruments, is one of the key objectives set by the Government. This implies harmonization and the consistent implementation of established administrative procedures, supported by the electronic system of operation of the Government, as well as capacity building, both at central Government level and in the state administration bodies. Regarding the strengthening of central coordination mechanisms, the Government tries to contribute to the changed position and the functioning of the General Secretariat as a professional service of the Government.[3] The role of the General Secretariat of the Government in the strategic planning process is defined in Article 24, according to which the General Secretariat is responsible for coordinating the process and ensuring the harmonization of the strategic plans of the ministries and other states administration bodies. The Strategic Planning Methodology and the preparation of the annual work programme of the Government define the phases and procedures in the strategic planning process, including the time frames for the implementation of specific measures and activities, as well as the association with the budget process. Here, the competencies of the General Secretariat and the Ministry of Finance, as bodies responsible for coordinating these processes, are clearly defined. The development of strategic plans and policy coordination has been a priority goal of all Government strategies from 1999 until the present day. A survey was conducted (Denkova & Denkova, 2016) on the situation across all the state bodies regarding the realization of strategic plans; interviews were conducted in 20 state bodies with over 30 respondents, involving civil servants with various categories of titles. The focus of the research was the

1 The Government determines the economic and development policy, determines measures for its realization and proposes Assembly measures for the realization of the policy that is within its competence. The Law also determines the policy of execution of the laws and other regulations of the Assembly, monitors their execution and performs other activities determined by law. Within the framework of their rights and duties determined by the Constitution and law, the Government and each of its members are accountable for their work before the Assembly

2 Policy-making manual issued by the General Secretariat of the Government, developed and funded by the NORMAK project, Norwegian support of the Republic of Macedonia in the field of European integration and public administration reform, with the contribution of SIGMA, Skopje, 1997

3 With the amendment of the Law on the Government, Article 40-a ("Official Gazette of the Republic of Macedonia" no. 55/05) the General Secretariat was established as an expert service of the Government, to provide coordination and professional support for the needs of the Government, the Prime Minister, his deputies, as well as the members of the Government in exercising their competencies

documents, operational plans and procedures related to strategic planning and the research questions considered the following: have strategic plans been prepared? Have the plans been formulated from procedures and standards? How is their realization monitored? How is success or failure evaluated? Are there procedures for determining responsibility in this domain? The answers have shown that the respondents are familiar with strategic planning in one body, primarily since the last amendment to the "Decree on the principles of the internal organization" was made mandatory. Such departments are established in almost all state bodies but there is a lack of trained people in this field. Regarding the preparation of strategic plans, the respondents believe that they are largely familiar with the role of the strategic plan in the institutions, but to what extent it will be implemented in reality is understood as a formal obligation, without reflecting the progress of institutions. This approach is due to the frequent deviations from the adopted strategic plans at the expense of those activities that have not even been foreseen in the strategic plan. An indicator that signals a deviation from the strategic plans, is a deviation from the budgets, which often do not contribute to the realization of the strategic plans and are reduced to the detriment of planned activities or activities that have already been initiated. In this context, the respondents pointed out that, very often, the budgets are reduced in cases where contracts have been concluded, based on published tenders, and the Ministry of Finance has been notified.

The system of evaluation and the monitoring of the implementation of Government policies should be developed to establish a circle of responsibility, facilitating the accurate monitoring of the process from policy-making to implementation, the reasons for deviating from this process and the identification of those responsible for this deviation. Therefore, at this stage, we consider the predictability of Government policy as the highest act in the hierarchy of responsibility. When we look down the hierarchy of competencies, there should be indicators and set rules for the lower ranks, which are an extended arm of the realization of Government policy, through which we will easily determine the responsibility of the state administration, which, despite the ideally set policy negative impact in public administration. This means that the civil servants participating in the implementation of the policy are aware of their power and responsibilities and the way in which they act with regard to the performance of their tasks, especially when these are associated with the provision of services to citizens, thereby reflecting the expertise, competence, confidentiality and responsibility of the former.

Concerning human resource management in state bodies, in 2007, a legal provision was introduced for the first time, which required the establishment of organizational units for human resource management and strategic planning in all state bodies. The applicability of these provisions has been slow, with numerous studies pointing to the elaboration and concretization of the provisions for human resource management in the administration. In the "Law on Administrative Servants 2014", (Law on Administrative Servants) the competencies for human resource management are distributed in a clear and precise way. To successfully carry out the work of the organizational units for human resources management, the "Law on Administrative Servants" provided for the establishment of a "Network of organizational units for human resource management". It is important to note that the Ministry of Information Society and Administration takes the lead in the legal management process, appointing the State Secretary for the Information Society and Administration to chair this network. The network adopts rules of procedure for its work, which details the questions relating to the way in which this network operates. Research (Denkova et al., 2017) has shown that these organizational units are established in all state bodies but lack professional and competent people, i.e., these units do not contain all the positions necessary for efficient human resource management.

1. Analysis of indicators for the effectiveness of the administration

In terms of increasing the efficiency of the administration through the administrative laws, we have observed changes in terms of improving the criteria for the selection of public/civil servants, training, evaluation, etc. As a result, the psychological test and the integrity test were introduced, which should be structured, so as to evaluate the profile of a candidate for a certain job, i.e., to select the most appropriate candidate. In this respect, the trial work for one year has been introduced, for each job. During the trial period, the public/civil servant has a mentor who assigns him/her various tasks and monitors his/her work. The final grade for the work of the public/civil servant is awarded by the mentor and the former must take a professional exam. Moreover, the Ministry of Information Society and Administration introduced several instruments for training, micro-learning, etc. The new Law on Administrative Servants made a clear distinction between what is meant by experience in the profession, which was not the case in the previous laws, however, this was perceived negatively. The new Law on Administrative Servants gives priority to all those who have experience as administrative servants over those who have limited work experience. In addition, this Law enabled advancement in the state service, as well as a transition from one state announcement to another through an internal announcement by the state body. The Law on Administrative Servants expresses the merged system in the civil service through the introduction of cabinet officials, who elect responsible persons, primarily based on political commitment. The motivation of the civil servants depends on the knowledge and abilities of the responsible persons, i.e., their immediate superiors, however, the state administration bodies do not have a procedure or any criteria for motivation. Some of the respondents in managerial positions stated that they try to apply other methods as a means of motivation, such as overtime work leave on days when the employee urgently requests it, involvement in work tasks which are important for the body, a desire for training or professional development, etc. If we analyse the efficiency through research conducted in the state bodies, we will note that in the state bodies there are no procedures for monitoring the effectiveness of the administration. Another very important question that indicates the effectiveness of the administration concerns how the realization of the work tasks of the administration is measured. Indicators measuring the effectiveness of an individual are the number of completed cases, the deadline for realization, the classification of cases according to the complexity of the work, etc. From the interview, it can be concluded that such indicators have not been established. The annual strategic plans are the only basic indicators used to monitor the implementation of activities in the state body, from which an annual work programme is devised. This method of monitoring only refers to the group effectiveness of the organizational units in the institution and the only means of monitoring the individual work of administrative workers is the ledger. According to the Law on Archive Material in all state bodies (Law on Archive Material), records are only kept in this book, namely details relating to the origin of the case, the person in charge of the case and the date of receipt and completion of the case. These data are only used for records purposes but do not measure the effectiveness of the administration. Frequent changes to the Rulebook on job systematization in state bodies also affect the monitoring of the effectiveness of administrative staff. Moreover, research showed that the evaluation of administrative staff is realized according to the hierarchy of competencies; the superiors evaluate their subordinates, but this process is not based on measurable indicators that show the individual and group effectiveness of the organization. A system for monitoring the complaints and grievances from citizens has not been established in the state bodies as an indicator relating to the individual effectiveness of the employees. Although the civil diary has been established as an obligation of every state body by which to receive complaints and appeals from citizens regarding the services of administrative staff, there is no analysis of these data to indicate the effectiveness of the administration (Denkova, J. et al., 2015).

2. Analysis of administrative laws relevant to the functioning of the administration

The role and significance of the administrative dispute through the work of the Administrative Court relates to a decision made in 2006. The introduction of such a specialized court is a novelty in the judicial system in RNM (Open Society Foundation - Macedonia, 2012). These changes form part of the reforms in the judiciary, envisaged by the Strategy for Reform of the Judicial System and adopted by the Ministry of Justice in 2004, to achieve an independent and efficient judiciary. As stated in the Strategy, (*Justice Sector Reform Strategy,* 2017) the need to create a separate, specialized court in the field of administrative disputes is justified by the inability of the Supreme Court to deal with them effectively. The continental model of judicial control of the administration is a systemic solution that allows judicial control of the administration to be performed by a special Administrative Court, so as to effectively protect the rights and freedoms of citizens. Thus, the protection of citizens' rights can be seen in the basic provisions of the Law on General Administrative Procedure, which refers to the needs and goals of the Law, namely, to protect the rights and legal interests of natural and legal persons. Of course, the specific laws governing special administrative procedures must not reduce the protection of the rights and legal interests of the parties, guaranteed by the basic Law on General Administrative Procedure (art. 1, Law on General Administrative Procedure). Contrary to the decisions of the public bodies that decide in the first instance, citizens and legal entities have several legal remedies that they can use against different institutions: independent bodies, commissions, line ministers, and in some cases, they can immediately initiate an administrative dispute with a lawsuit. In the Law on General Administrative Procedure of 2015, a new regular legal remedy was introduced, that of "objection", the application of which will be the subject of future research and analysis in the coming years. It is assumed that if the objection justifies its function, this will affect the reduction of lawsuits before the Administrative Court. An administrative dispute with a lawsuit, brought before the Administrative Court, is permitted against the decisions of the appellate bodies, and an appeal can be filed before the Higher Administrative Court against the decisions of the Administrative Court. The changes in the new Law on Administrative Disputes refer to strengthening the powers of judges as regards efficient decision-making on the one hand and strengthening the rights of citizens in proving the procedure on the other, by introducing a public hearing that allows citizens to exercise their rights to submit evidence during the proceedings. Regarding the competencies of judges in the process of ruling on administrative disputes, these are the same as the previous Law on Administrative Disputes; a novelty comprises two lines which are of great importance in terms of independence in decision-making. Thus, judges have the right to decide on the legality according to a free assessment - the discretionary right and on the legality of the administrative act of a public body in a procedure following an objection against real acts or their omission. Exceptions, when an administrative dispute cannot be conducted, are further specified, which protects the public body from the proper application of a free assessment by a public body (discretionary authority), through the adoption of an individual administrative act but can be guided by the legality of such an act and the limits of such authority. An administrative dispute may not be conducted against an individual administrative act that decides on issues of procedure, however, such an act may be challenged with a lawsuit against the individual administrative act that decided on the main issue, unless otherwise provided by law (art 3 (9) Law on Administrative Disputes). The new Law on Administrative Disputes determines the principles in the procedure that indicate the changes aimed at strengthening the evidentiary procedure through the principle of legality, the hearing of the parties and the oral hearing. The principle of legality, contained in Article 7, confirms the constitutional provisions for lawful operation (art 7, Law on Administrative

Disputes).[4] The principle of hearing the parties, contained in Article 8 of the Law on Administrative Dispute, refers to the possibility of the party to exercise his/her right to be heard during the entire procedure, to be able to present evidence to prove the material truth and to correctly determine the factual situation (art. 8, Law on Administrative Disputes).[5] The principle of an oral hearing is a new principle that was not contained in the previous Law. An oral hearing was left to a judge's decision in exceptional cases. The amendments to the Law on Administrative Dispute introduce the oral hearing, as a result of the harmonization of legislation with European legislation, to give the parties in the fair trial procedure the opportunity to express their requests, opinions and views, which are of an evidentiary nature and could influence the determination of the factual situation, as stated in Article 9 of the Law on Administrative Dispute. This allows the possibility to review decisions in the first instance administrative procedure, which gives both the party and the judge the right and the opportunity to establish new facts and evidence, and thus, the possibility for effective judicial control of the administration (Denkova et al., 2020). The principles of contradiction and proportionality complement the commitment of the legislator to the realize the rights of the parties in the procedure. As a result, in Article 10, following the principle of adversarial proceedings, the court will enable the parties to rule on the allegations and motions of the opposing party. According to the principle of proportionality, the court will enable the parties to exercise and protect their rights and legal interests, if these are not to the detriment of the rights and legal interests of other parties or third parties and are not to the detriment of the public interest determined by law. To increase the efficiency of the Administrative Court, a novelty is the obligation of the public bodies ex officio to submit all required information, documents and materials relevant to the court case. New solutions are provided in the provisions for the Law on Administrative Disputes, which regulate the situation when the court makes decisions without the case file. These will supersede the current situation in practice, whereby the respondent body often does not submit the case file, despite the urgency of the court to make a decision; consequently, the court upholds the lawsuit and annuls the disputed act, but this has no positive effect on the party who filed the lawsuit. Unlike the existing situation whereby the court is expected to decide without the files if it has twice addressed a request to the defendant body, according to the new law, the court now has no such obligation and it is enough for the body not to submit the case file within the deadline or to state that it could not submit the same. Thus, Article 36 of the Law on Administrative Dispute states that at the request of the court, each public body is obliged by law to submit all documents and data at its disposal, which are of interest in resolving the specific case, to the court within a specified timeframe. If the public body does not submit the required documents, the court has the right to impose a fine of up to 20% of the monthly salary of the authorized person, i.e., the responsible person in the public body who, for unjustified reasons, did not submit the documents, i.e., the available data. As a novelty with the new law on administrative disputes, a model procedure is introduced, which is a procedural article of the law, allowing the court to facilitate and deal more quickly with a large number of lawsuits already filed. A condition for conducting such a procedure is to file lawsuits against more than 20 administrative acts in which the rights and obligations are based on an equal or similar factual situation and the same legal basis, according to Article 49 of the Law on Administrative Dispute. This procedure is carried out by the court by applying the principles of urgency and priority, with the obligatory holding of a public hearing, at which a factual situation is determined. The fact that no special appeal is allowed against the decision to terminate the procedure, due

4 The court decides on an administrative dispute on the basis of the Constitution and the laws and international agreements ratified in accordance with the Constitution of the Republic of North Macedonia, monitoring the consistency of its decisions, which ensures legal certainty and equal application of laws.

5 In accordance with the principle of hearing, before making its decision, the court shall allow the parties to rule on the allegations in the lawsuit and the response to the lawsuit, as well as on all facts and legal issues raised in the administrative dispute, except in cases determined by law.

to the implementation of a model procedure, and that in these cases, the court decides according to time priority, indicating that the legislator's goal is to shorten the procedure and to facilitate the resolution of a large number of cases in a shorter period, there should be no negative reflection on the quality of decision-making guaranteed by the established factual situation at a mandatory public hearing. The legislator allowed the citizen to initiate a procedure for the silence of the administration, should the case not be resolved within 30 days, however, within the state bodies, no procedure analyses the speed at which cases are resolved. It is the responsibility of the administration whether it acts promptly and whether the citizen suffers damage from the delay of cases. Thus, Article 111 of the Law on General Administrative Procedure allows the party to appeal to the second instance body, in cases of silence of the administration. When the second instance body determines that the first instance body has not adopted the administrative act within the legal deadline, it should order the first instance body to adopt an administrative act and set a deadline of up to 30 days after receiving the order. When the appellate body determines that the reasons for the first instance administrative act not being adopted are not justified, the body will decide on the request of the party within 30 days of receiving the appeal or will order the first instance body to adopt the requested administrative act within 15 days of receiving the order. In the case of re-silence of the first instance body, the second instance body is obliged to solve the matter itself.

Regarding the responsibility, a novelty in the law indicates that the cases in the administrative procedure are signed by an authorized official; this is a good basis from which to locate the person responsible for solving the case. In Article 24 of the Law on General Administrative Procedure, (Law on General Administrative Procedure) the state body must appoint a department or an expert who will sign the cases that it resolves. In paragraph 2, which reads: "this obligation is valid only if otherwise determined by another law", the legislator allows derogation from this article, which indicates the possibility to resolve the special law in another way. Should the special law provide for the administrative cases to be signed by the minister or the mayor, then the motivation and responsibility of the authorized officials will again decrease, if they are aware that someone else will sign and take responsibility for their work. However, if the official and responsible person of the body signs, then the officer will have shared responsibility. This is especially important for the professional approach of administrative staff in handling cases. In that case, the authorized member, i.e., the official, shall act as an authorized official and shall submit a proposal for the administrative act to the collegial public body, in writing, unless otherwise determined by a special law. Therefore, the personal responsibility of the administrative officers should constitute a motivating factor for administrative officers, who solve cases efficiently (faster in terms of time and solve a larger number of cases compared to their colleagues within the same period) and do not damage the reputation of the body; they will be rewarded at the expense of those who work inefficiently and irresponsibly. In this regard, by comparison with 2019, there was a 5% increase in the number of institutions that had prepared appropriate amendments to their acts for the internal organization and systematization of jobs in 2020. This was carried out so as to comply with the provision of Article 24 of LGAP and to determine the organizational unit for conducting the administrative procedure or for systematizing at least one job in order to conduct the administrative procedure. In addition to the established organizational forms for conducting administrative procedures in 18 institutions, 16 institutions have appointed persons to conduct the administrative procedure.

Conclusion and recommendations from the research

Regarding the preparation of strategic plans for the implementation of public policies, the conclusion is that the state bodies are faced with a lack of experts, material and technical means to establish the effective and efficient implementation of strategic plans. Moreover, the lack of clear procedures renders it impossible to close the circle of responsibility in the field of strategic planning of the bodies. This is due to the fact that there is no strategic human resource planning in state bodies, although it is well-known that strategic human resource management is an important factor for the efficiency of the organization. Due to the lack of this strategy, state bodies face the problem of a lack of professional staff in the field of strategic planning. The lack of clear procedures for strategic planning results in an inconsistent approach to this activity, due to the frequent deviations from the adopted strategic plans, at the expense of activities that are not foreseen in the strategic plan.

The conclusion is that very often the budgets of the state bodies are reduced without considering any criteria or procedures, even in cases when a tender or an agreement is announced. Due to a lack of clarification as to why the budget has been reduced or reallocated, the responsibility is blurred and the realization of the strategic plans of the state bodies is prevented. A very important element, absent from the process of strategic planning in the public sector in RNM, is an analysis of the strategic plans, by measuring the achievements and considering the reasons for deviating from the realization of the strategic plans. As a result, there is a need to establish a serious approach to the strategic planning process by the Government and state bodies. From the last Government Report in 2020, it can be seen that the elaboration of strategic plans and the coordination of policies have not been realized entirely. In terms of statistics, the progress of this general goal is measured by an indicator of the compliance of the draft acts and strategic planning documents (strategic plans and sector strategies) with the priorities and objectives of the documents created alongside the long-term planning documents. The percentage of draft strategic plans, prepared by the legal framework for strategic planning, has improved by more than 10% from 2018 to 2020, i.e., 60% of the state bodies have realized this activity (Ministry of Information Society and Administration, 2021). Regarding the efficiency of the administration, the following conclusions have been drawn: 1. the administrative staff are not involved in setting the goals of the organization; 2. there is no measurable system for the individual effectiveness of the administrative staff; 3. there is no comparative analysis of the effectiveness of state bodies in relation to the needs of citizens; 4. there is no established system of external evaluation on the part of the citizens, which would highlight indicators of satisfaction with the services provided by administrative staff. The organization can measure the effectiveness of the administration for certain periods, daily, monthly, quarterly, semi-annually, nine-monthly, while comparing the individual achievements of the employees, as well as determining the percentage of participation in terms of group effectiveness. To obtain the results for the realized activities of the administrative workers quickly, effectively and impartially, it is necessary to have an electronic management system. This system should include workflows, work orders, execution times and measurable performance indicators. These measurable indicators are the most important tool for impartial and realistic assessment and will reduce the bias of the human factor. To obtain complete information on the effectiveness of administrative staff, it is mandatory to introduce an external evaluation by service users, namely, citizens. Such an external evaluation should be compared with the indicators of employee achievement, obtained from established indicators within the organization. Regarding the external indicators for assessing the effectiveness, the results indicate the need for an analysis of the complaints and grievances of citizens in relation to the quality of services provided by administrative

staff. This analysis must be compared with the effectiveness indicators shown through the measurable indicators; these measurable indicators should be linked to the payroll software, so as to reward or punish the administration.

Hence, all indicators in the analysis so far point to the need for a detailed elaboration of the administrative processes in state bodies to calculate individual and group effectiveness. This means that a new approach to managing the effectiveness of state bodies needs to be put in place. Despite the priority goal of the state administration reform in RNM, setting the legal framework for the functioning of a new system of state administration, there is a lack of provision for a clear set of duties and responsibilities for all those involved in the policy-making process (political and administrative functions). It requires the establishment of specific procedures, proving the responsibility of all stakeholders involved in policy-making decisions.

Regarding the administrative procedure, it is recommended that indicators be introduced demonstrating the omissions of the administrative officer when conducting the procedure, which resulted in an illegal final act with harmful consequences; such an indicator will determine the personal responsibility of the administrative officer and the basis for compensation. Such a legal commitment will affect the professional and responsible work of the administration (Denkova et al., 2019). The commitment of the Legislator harmonizes the Administrative Judiciary in RNM with the principles in the European administrative system. The applicability of some provisions will ensure efficiency in the judiciary, however, in general, we cannot agree that the scope of work will be reduced and the efficiency of the Administrative Judiciary increased, given that the public hearing is being introduced. Although the legislator seeks to increase the efficiency of correspondence between the first instance administrative bodies of the administration and the administrative court, time is wasted while waiting for the original documents relevant to the hearing to be delivered. The law introduces provisions for punishing the public bodies, i.e., should the administration that conducts the procedures not submit the files to the administrative judge in a timely manner, it will be exposed to material responsibility. Further research will show how the application of this provision will work, whether judges will resort to punishment or whether solidarity and cooperation with public bodies will continue. Given that the legislator instructs the judge to resolve the case without the files, except for the right to issue a decision on a fine, it is debatable how judges will act in such situations. The question is whether they will use the provisions to return the case to the body that passed it for a retrial, whether the defendant body decided at its discretion or whether the nature of the administrative work does not allow a decision in full jurisdiction, i.e., cannot fully establish the facts on the essential issues, therefore, the real factual situation must be determined in the administrative procedure. The amendments to the Law on Administrative Disputes have resulted in an efficient Administrative Judiciary that will largely rule in full jurisdiction; indeed, we should also consider the motivation of judges who will decide in full jurisdiction on a larger number of cases or with a higher percentage of efficiency. The introduction of the public hearing opens the possibility for both judges and citizens to provide all additional documents and evidence, as well as statements, so as to determine the factual situation and properly establish material truth. For this reason, the legislator established provisions on the mandatory presence of the parties, the obligation of the court to inform it, as well as all other provisions that refer to informing and gathering relevant evidence. Regarding the infrastructural conditions, spatial accommodation and staffing, there is an urgent need to approach the Administrative Judiciary and to provide all the necessary material and technical means, as well as professional and competent staff for the efficient and swift resolution of cases. These measures will increase the satisfaction of the citizens, strengthen the image of the country and will ensure a higher ranking of its systems when being evaluated by the relevant European institutions.

Bibliography

Annual Report on Work, Senior Administrative Court for the period 2019.

Annual Report on Work, Administrative Court for the period 2018.

Berman, J., Pwest, L., (2000) Human Resource Management in Public Service-Paradoxes, Processes and Problem, Sage publication, United States.

Code for Administrative Servants "Official Gazette of the Republic of Macedonia", No. 183, 12.12.2014.

Bossaert, D., Demmke, C., Nomden, K., Polet, R., (2002) Civil services in the Europe of Fifteen - Trends and New Development, European Institute for Public Administration.

Berman, J., Pwest, L., (2000)Human Resource Management in Public Service-Paradoxes, Processes and Problem, Sage publication, United States, 2000.

Denkova, J., Ananiev, J., & Stojanovski, S (2015). Clear rule and regulation in state department basic for effectiveness public administration. *Holistica, Journal of Business and Public Administration Bucuresti, 6*(1), 20–31.

Denkova, J., Ananiev, J., & Stojanovski, S (2017). *Human resource management challenge for effective local government. Book of proceedings, International May Conference on Strategic Management– IMKSM17.* University of Belgrade, Tehnical Faculty in Bor, Management Department. https://eprints.ugd.edu.mk/19118/

Denkova, J., Ananiev, J., & Stojanovski, S (2019). *The responsibility of the administration is a basic principle in the administrative procedure (Одговорноста на администрацијата основен принцип во управната постапка).* Social changes in the global world. https://js.ugd.edu.mk/index.php/scgw/article/view/3127/2838

Denkova, J., & Denkova, B (2016). *Strategic management of the public sector in the Republic of Macedonia. XII International May Conference on Strategic Management.* https://eprints.ugd.edu.mk/17073/

Denkova, J., Mahojsev, A., & Stojanovski, S (2020, September). *Advantages and disadvantages of the Administrative Dispute in the Macedonian legal system (Предности и недостатоци на управниот спор во македонскиот правен систем).* Seventh International Conference - Social

Dupelj, Z., (2003) "Decision Making in Administrative Disputes", Law and Taxes, no. 3, Belgrade

Decree on the description of the titles for civil servants, "Official Gazette of the Republic of Macedonia", no. 106/2007 and 146/2009).

Change in the Global World, Stip. https://js.ugd.edu.mk/index.php/scgw/article/view/4039/3624

Justice Sector Reform Strategy with Action Plan for the period 2017-2022 (Стратегија за реформа на правосудниот сектор со Акциски план за периодот 2017-2022 година) (2017). Ministry of Justice. https://rm.coe.int/action-plan-for-implementation-of-the-judicial-sector-for-the-period-2/16808c4383

Gocevski, D.,(2017) Legal protection of citizens and employees in public administration, Center for Change Management, Skopje

Ilic, A (2011). Disciplinary and material responsibility of civil servants in the legal system of the Republic of Serbia. University of Nis - Faculty of Occupational Safety in Nis.

Ivancevic, V., (1983)"Institutions of Administrative Law", Book I., Faculty of Law in Zagreb, Zagreb,

Jacobini, H., (1991)"An Introduction to Comparative Administrative Law", Oceana Publications, New York, London.

Jones, G.R., George, J.M., (2008) Modern Management, Project of the Government of Republic of Macedonia, Skopje.

Kostić, L (1999). Relationship between criminal and disciplinary responsibility of public servants. Judiciary 7-8: 4-7. Belgrade: (Pancevo: Napredak).

Kulic, Z., Васиљеевић, Д (2009). Labour relations in state administration bodies. Belgrade: Criminal Police Academy.

Kostov, S., New public management, Center for quality Skopje, 2005.

Law on Administrative Disputes (Закон за управни спорови), Official Gazette of the Republic of North Macedonia (Службен весник на Република Северна Македонија) No. 96/2019.

Law on Administrative Servants (Закон за административни службеници), Official Gazette of the Republic of Macedonia No. 27/14.

Law on General Administrative Procedure (Закон за општата управна постапка), Official Gazette of the Republic of Macedonia No. 59/2000, 12/2003, 55/2005 and 37/2006.

Ministry of Information Society and Administration (2021). *Annual report on the implementation of the action plan of the Public Administration Reform Strategy for the period 2018-2022 for the period January-December 2020 (Годишен извештај за спроведување на акциониот план на Стратегијата за реформа на јавната администрација за периодот 2018-2022 за периодот јануари-декември 2020 година).* Ministry of Information Society and Administration. https://www.mioa.gov.mk/sites/default/files/pbl_files/documents/reports/izveshtaj_za_srja_za_2020_godina.pdf

Law on General Administrative Procedure, Official Gazette of Republic of Macedonia, no. 124/2015.

Law on Archive Material (Закон за архивски материјал), Official Gazette of the Republic of Macedonia, No.36/90, 36/95, 86/08.

Law on Budgets (Закон за буџетите), Official Gazette of the Republic of Macedonia No. 64/05.

Le May, M., Public administration-clashing values in the administration in public policy, Wadsworth, United States, 2005.

Law on Changes and Supplements Law on Improving Sports, which the Croatian Parliament donated to its neighbours on 31 October, 2017. Class: 011-01 / 17-01 / 11 Urbroj: 71-06-01 / 1-17-2 Zagreb, 31 January, 2017.

Law on the Use of Data from the Public Sector, "Official Gazette of the Republic of Macedonia", No. 27 of 05.02.2014.

Law on the Government of Republic of Macedonia *(Закон за Влада на РЕпублика Македонија)* Official Gazette of the Republic of Macedonia, No. 59/2000, 12/2003, 55/2005 and 37/2006),

Open Society Foundation - Macedonia (2012). *More work for a better court–Judicial protection of human rights in an administrative dispute (Повеќе труд за подобар суд- Судската заштита на човековите права во управен спор).* Open Society Foundation - Macedonia. https://fosm.mk/wp-content/uploads/publications/Poveke_trud_za_podobar_sud_MK.pdf

Mandić, M., Disciplinary responsibility of workers and civil servants, in Dukić-Mijatović, M (ed.), 2011, Current changes in the legal system of countries in the region, Novi Sad, Faculty of Law, Faculty of Economics and Justice, p. 551.

Rules of Procedure of the Government of the Republic of Macedonia (Деловник за работа на Владата на Република Македонија), Official Gazette of the Republic of Macedonia No. 36/08.

Radojčić, V (2010). European standards of the legal status of civil servants. Belgrade: Faculty of Law.

Radjenovic, M., (2010)"Law of Administrative Dispute", Faculty of Law, University of Banja Luka, Banja Luka,

Simović, V (2003). Disciplinary responsibility of employees according to the new Labor Law of the Republic of Montenegro, Pravni život, 10, p. 872.

Shafritz, J.M., Russell, E.V., Borik, K.P (2009). Introduction to Java Administration. Academic Press, Skopje.

Salamon, L., Global Civil Society: An Overview, The John Hopkins Comparative Nonprofit Sector Project, 2003

Stewart, B., Richard, S., Stewart, B., Sunstein, Administrative Law Regulatory Policy, Asjen Law Business, United States 2006.

Shafritz, J., Hyde, A., Parkes, S., Classics of Public Administration, Wadsworth, United States, 2003.

Systems of judicial control of administration, Ratko Radošević, assistant at the University of Novi Sad, Faculty of Law in Novi Sad, 347.998.85: 35.075 DOI: 10.5937 / zrpfns47-4840.

Selected decisions of the Federal Constitutional Court of the Federal Republic of Germany, Jubilee edition, Profitable edition: Prof. retired Dr Jürgen Schwabe, ISBN: 978-9989-2241-4-0, Rule of Law Program / Part of South-East Europe Konrad Adenauer Foundation, no. Association.

How to get administrative justice, Nikolina Toshanova, Center for Change Management, ISBN 978-608-4818-19-9, Design Brigade Skopje 2017.

Pecijareski, L.J., Selected problems of the human resource management, Faculty of Economics, Prilep, 2007.

Questions and answers on the application of the Law on General Administrative Procedure, Ministry of Information Society and Administration. Prepared by: Zarko Hadzi Zafirov, lawyer and expert in administrative law, Jugoslav Georgievski, State Adviser at MISA, ISBN 978-608-65602-9-4, Skopje 2017.

Wore, H., Miller, C., Wegener, F., Miller, L., Effective Police Supervision, Nexis Matthew Bender, United States, 2003. International May Conference on Strategic Management - IMKSM2016, 28–30 May, 2016, Bor, Serbia 354.

EUROPEAN INTEGRATION POLICY CHALLENGES FOR ETHNIC INTEGRATION IN THE REPUBLIC OF NORTH MACEDONIA

Jordanka Galeva

Abstract

The purpose of this paper is to better understand the impact of European integration policies on the position of ethnic minorities in the Republic of North Macedonia and the development of an integrative society. The study was based on an examination of the Ohrid Framework Agreement, which served as one of the primary indicators of success in areas identified as critical to development and compliance with European standards. The paper particularly focuses on the third principle, which relates to the preservation and reflection of society's multiethnic character in public life, and its implementation and contribution to the European integration process.

Keywords

ethnic integration, multiculturalism, public sphere, Ohrid Framework Agreement, EU integration

Contact

Ass Prof Dr. Jordanka Galeva
Assistant Professor, University "Goce Delčev", Faculty of Law, Štip
✉ jordanka.galeva@ugd.edu.mk

Introduction

At the Zagreb Summit in November 2000, it was announced that all participants in the Stabilization and Association Process (SAP) were potential candidates for European Union (EU) membership. The reform of public institutions and legislation proposed by member candidates was intended to strengthen the rule of law and respect for human and minority rights in order to improve inter-ethnic relations and democratic stability. The Republic of Macedonia (RM[1]) was the first country to sign the Stabilization and Association Agreement (SAA) (during the armed conflict) in April 2001 and the Ohrid Framework Agreement (OFA) four months later in August 2001 (which ended the conflict). While the SAA established the framework of relations between the EU and Western Balkan countries for SAP implementation, the OFA was an agreed framework for securing the future of Macedonia's democracy and allowing the development of closer and more integrated relations between the RM and the Euro-Atlantic community. This Framework was intended to promote the peaceful and harmonious development of civil society, respect for ethnic identity and the interests of all Macedonian citizens. Four years later (December 2005), the country was designated as a candidate for EU membership. This year (2022) marks the 31st anniversary of the Republic of North Macedonia's (RNM) independence, the 21st anniversary of the OFA and the 17th anniversary of gaining candidate status. It is valid to examine Macedonia's status in the EU integration process and the level of ethnic integration within society.

1. Minority protection as a condition for European integration

1.1. A brief historical overview of Macedonia's relations with the EU

The Cooperation and Transport Agreement (CTA), signed in April 1997 in Luxembourg, formalized the political and economic relations between the RM and the EU. On this occasion, the European Council of Ministers established political and economic conditions for the development of bilateral relations between the EU and the region's states. In January 1998, following the entry into force of the CTA, the Macedonian Parliament approved the Declaration for the Development of Relations with the EU, which stated that 'becoming a member of the European Union represents the Republic of Macedonia's strategic goal'. The European Commission proposed a regional approach programme (the SAP) in May 1999. The goal of the SAP strategy is to promote cooperation programmes (via the signing of SAAs) and to provide economic and financial assistance (via the Community Assistance for Reconstruction, Development and Stabilisation (CARDS) programme) to candidate countries in order to support their development processes. The Country Strategy Paper was planned for the period 2000-2006, divided into three-year plans (2002-2004), two-year plans (2005-2006) and annual programmes. The main goal of these programmes was to support government agencies at the national and local levels, as well

1 The author uses the term 'Republic of Macedonia' and the abbreviation 'RM' for the period until February 2019; and 'Republic of North Macedonia' and 'RNM' for the period after February 2019 when Amendment 33 to the Preamble introduced/added the term 'North'.

as civil society institutions, in order to strengthen democracies and economic and institutional stability in the countries. In fact, the SAA did not include any provision for minorities' protection; however, following the events of 2001 (the armed conflict), the CARDS programmes were supplemented with priorities derived from the OFA, such as the provision for the preservation and reflection of society's multiethnic character in public life. The implementation of OFA began immediately with the adoption of amendments to the Macedonian Constitution and the SAA was ratified by all EU member states in February 2004. Macedonia's EU membership application was submitted on 22 March, 2004, the Commission issued a positive opinion on 9 November, 2005 and the Council granted the country candidate status in December 2005. Based on the Commission's analysis, the European Council decided to grant Macedonia candidate country status, citing the significant progress made in completing the legislative framework related to the OFA and the country's track record in implementing the SAA since 2001. Following the completion of the CARDS programme, the RM began to receive financial assistance through the Instrument for Pre-Accession Assistance (IPA), which was divided into IPA I (2007-2013) and IPA II (2014-2020). The measures funded are primarily concerned with the promotion of democracy, good governance, the rule of law and the protection of fundamental rights. Three years after being granted status, the Council adopted the revised Accession Partnership with the RM on 18 February, 2008. One of the political criteria was the continuation of OFA implementation, which includes the promotion of inter-ethnic trust. The following year, in October 2009, the Commission recommended starting accession talks and moving to the second stage of the SAA. On 10 February 2010, the European Parliament adopted the Resolution on the 2009 Progress Report with the RM, in which it called on the Council to confirm the Commission's recommendation, at the March 2010 Summit, to decide on the opening of negotiations for membership with the RM. The decision was made 10 years later (2020), having regarded the fulfilling of the conditions identified in June 2018 by the Council conclusion on enlargement and stabilization and association process, and after having examined the Commission's updated report of 2 March 2020 on the progress made by the Republic of North Macedonia (RNM). However, in November, Bulgaria vetoed the decision to open EU membership negotiations with the RNM (because of historical and linguistic reasons) and in May and October 2021, ruled out reversing its veto. In July 2022, the process for membership negotiations of the RNM finally was opened.

1.2. Minority protection in EU support programmes

The SAA did not include a clause regarding minority protection, but it did impose guarantees and respect for minority rights in accordance with European and international norms. However, this issue was later incorporated into the CARDS programme objectives. Following the signing of the OFA, the purpose of the assistance was to support its implementation by assisting refugees and displaced people in their return, with the goal of reducing inter-ethnic tensions and promoting communication between and within communities. This will necessitate measures to protect the legitimate rights of the ethnic Albanian minority while also ensuring the state's territorial integrity. The OFA's Preamble states that the Framework will promote the peaceful and harmonious development of civil society while respecting the ethnic identity and interests of all Macedonian citizens. Its points form an agreed framework for securing the future of Macedonia's democracy and allowing the RM and the Euro-Atlantic community to develop closer and more integrated relations. One of these points is the provision for the preservation and reflection of society's multiethnic character in public life. In order to implement this and other provisions, the CARDS programme of 2001 aimed primarily to provide the restoration of trust and the promotion and development of good inter-ethnic relations. In order to

fund projects that will lead to the restoration of trust and interpersonal tolerance, and the overcoming of existing prejudices, the CARDS programme for 2002 planned to involve government organizations and the population in mixed-ethnic communities in the fields of culture, conflict and youth. Subsequently, the European Commission reiterated in all CARDS programmes that the implementation of the OFA was critical, stating that the biggest challenges in the CARDS programme for 2003 were the implementation of the decentralization process, the principle of equal and equitable representation, the promotion and consolidation of civil society, and the maintenance of good inter-ethnic relations. In 2004, the CARDS programme aimed to provide assistance to several aspects of inter-ethnic relations, including improving the situation of municipalities where various ethnic groups live, commencing the process of cooperation between municipalities and ethnic groups, implementing the provision for equal and equitable representation, completing the project for the establishment of the state university in Tetovo, and supporting dual use of language in courts and the public prosecutor's office. The Council of the EU adopted the Council regulation n.533/2004 on the establishment of European partnership for Western Balkan countries on 22 March of the same year, to support efforts to move closer to the EU. The CARDS programmes for 2005-2006 included projects to enable: (i) an increase in the number of employed members of non-majority communities in state institutions (via training of 250 non-majority community experts and 100 translators for the Macedonian and Albanian languages), in order to strengthen communication between citizens from non-majority communities and administrative bodies and to provide better and quality translation; (ii) participation of the Roma community in public life; strengthening civil society and participation and awareness-raising of members of the Turkish non-majority community; (iii) reducing the negative effects of administrative stratification, such as ethnic isolation; (iv) improving the quality of life of multiethnic communities through the effective functioning of the democratic model in the division of power.

Following the completion of the CARDS programme, the RM became a beneficiary country of the IPA, which was implemented in accordance with Council Regulation n.1085-2006 and which replaced a series of financial programmes (Poland and Hungary Assistance for the Restructuring of the Economy (PHARE); CARDS) aimed at potential/candidate countries for EU membership. Through IPA, potential candidate countries were assisted in gradually aligning themselves with EU legislation, including the *acquis communautaire* and in supporting the promotion and protection of human rights and fundamental freedoms, and greater respect for the rights of minorities, gender equality and non-discrimination. The comprehensive IPA assistance programmes in the RM addressed reforms in various sectors while also meeting SAA commitments and ensuring equal representation in accordance with the OFA.

The research in the present paper will devote detailed analysis of the implementation of the OFA's principle related to the preservation and reflection of society's multiethnic character in public life. The following section provides definitions and theoretical perspectives on the concepts of multiculturalism, multiethnicity and public sphere (life).

2. Definitions and theoretical aspects of multiculturalism in the public sphere

2.1. Conceptual definitions

Culture as a term can be defined in several ways. Some theorists define it as being something learnt—what gives people 'a sense of who they are, of belonging, of how they should behave, and of what they should be doing' (Moran, Harris and Moran, 2011)—or as a learned meaning system that consists of patterns of traditions, beliefs, values, norms, meanings and symbols passed on through generations and shared to varying degrees by interacting members of a community (Ting-Toomey and Chung, 2012). Article 1 of the United Nations Educational, Scientific and Cultural Organization (UNESCO) Universal Declaration of Cultural Diversity states that culture takes different forms across time and space and that diversity is embedded in the uniqueness and plurality of identities of groups and societies making up humankind. Cultural diversity is also considered a common heritage of humanity and should be recognized and affirmed for the benefit of the present generation and future generations.

When talking about cultural diversity or cultural differences within a society, the terms *cultural pluralism* and *multiculturalism* are the most commonly used. These terms refer to a set of multiple cultures, but differ in their role and meaning. The term *biculturalism* is limited to two cultures or ethnic traditions (e.g., one of ethnic heritage and one of culture lived in). Language is one of the most important parts of any culture. The terms bilingualism/multilingualism are used in different circumstances, to describe multi/bilingual individuals (who speak two or more languages from birth or early age), for institutions such as schools (bilingual education), or for public signs (street signs written in two or more languages). Language is also one of the basic elements to define a society as bilingual or multilingual, or a state as binational or multinational. In the first case, it means that the society is inhabited by people who speak different languages, while the second case indicates that the state is constituted by two or more language communities (e.g., Canada, Switzerland). According to John Edwards, personal and social manifestations of bilingualism are important, and it should be noted that the emphases are quite different: individual bilingualism involves, for example, linguistic and psycholinguistic dimensions which figure much less prominently, while at the social level, other dimensions (historical, educational, political) arise (Edwards, 2006).

In this context it would be valuable also to explain cultural heritage. Olimpia Niglio proposes that the timeline of history is traced by the heritage each generation receives, as a gift handed down via a transaction based on a concept that intimately links to matters of inheritance and identity. *'Generally, the community describes the "cultural heritage" such as historic, artistic, scientific and traditional. These definitions often coincide with the attribution of "value" and "identity". Many answers about what "cultural heritage" could be are explained as a set together with their specific value, such as landscape and architecture of high artistic value and historic materials of scientific value'* (Niglio, 2014). In her opinion, it is fundamentally important to know and analyse individual cultural identities, and therefore the heritage bequeathed to them, favouring the capability of each individual to recognize and place value on their own specific identity, which is also an expression of freedom and social equality.

Scholars are careful to distinguish between the concepts of cultural pluralism and multiculturalism when discussing general cultural distinctions registered in a modern society. According to the Italian sociologist Vincenzo Cesareo, cultural pluralism acknowledges the existence of different cultures within the same social reality, while also attempting to draw a rigid boundary between the public sphere, which is governed by universally accepted laws, and the private sphere, which allows for the free expression of differences (Cesareo, 2000, p.35-37). He argues that cultural pluralism, in its *conflicting version,* emphasizes the existence of counter-cultural universes, i.e., opposition between dominant and dominated cultures or a dialectic between an educated culture and folk culture. In its *consensual version,* he points to the typical American pluralism of various groups that have retained their traditional aspects while adapting to certain models that are widely shared and related to the 'American way of life'. Cesareo distinguishes these two versions from multiculturalism, which is based on demands for the recognition of cultural differences and the affirmation of the equal dignity of particular cultural identities, i.e., the affirmation of the equal value of different cultures.

Giovanni Sartori elaborates on the distinction between the meanings of these two terms. In his article *Pluralism, Multiculturalism and Foreigners,* he emphasizes the differences and similarities between pluralism and multiculturalism, promoting the former while criticizing the latter (Sartori, 2000). Pluralism, in his opinion, supports and nurtures an open society that reflects spontaneous order and respects the multicultural society that exists, has existed and will always exist. Its primary goal is to ensure intercultural peace, not to incite cultural enmity. According to Sartori, pluralism is born of tolerance, which does not exalt the *other* and *otherness,* but rather accepts them. This means that pluralism both defends and hinders diversity, because tolerating means to be peaceful and to fight against disintegration, and thus recommends assimilation to the extent necessary to create integration. He claims that multiculturalism multiplies differences, is not based on tolerance, is anti-assimilation and reflects a widespread desire for authenticity and recognition through modern subjectivity. It could be understood as a wide range of languages, cultures and ethnic groups, and as a carrier of an ideology, i.e., as an ideological project. As a result, if multiculturalism is understood as an accepted existing fact, as a diction that simply registers the existence of numerous cultures, it poses no problems to the pluralistic worldview, because it is only one of a number of possible historical configurations of pluralism. However, when multiculturalism is expressed as a priority value, pluralism and multiculturalism clash.

The concept of multiethnicity refers to the coexistence of multiple ethnic groups in a larger society where each group is set apart and bound together by common ties of race, language, nationality or culture. The meanings of the terms *ethnicity* and *nation* are frequently complementary and intertwined. The term *ethnos* is of Greek origin and was used to distinguish non-Greek communities in antiquity. Weber's definition of an ethnic group refers to a set of characteristic features, whereas the term *nation* refers to the political capacity to constitute a state. He contends that not all ethnic groups are nations and not all nations are ethnic (Marta, 2005a). The anthropologist Arnold L. Epstein, on the other hand, maintains that an ethnic group is a group equivalent by extension to the nation, not a segment or a subgroup of larger units (Marta, 2005b). According to historian Herbert Adams Gibbons, for the nation, geographical features are more important than blood: the terms *nation, nationality* and *nationalism* all legally refer to a people living within defined boundaries, recognized as defined by nations of the world; it is assumed that people living within established political boundaries recognized by other nations have some social reason to stay together; the fact of the place of residence presupposes that they accept the common sovereignty, to live loyally under such sovereignty, sharing any privileges or obligations (Gibbons, 1930, as cited in Tosevski, 2003).

Although originally denoting the same thing, the terms *ethnicity, nation* and *people* differ in their definitions of who constitutes a state's nation or people, as well as the status attributed to minority communities living within its borders. *Nation* is used in modern democratically liberal states in both a political civic and a state sense. However, the same term is used in ethnic, linguistic and cultural contexts, as was the case in former socialist Eastern European countries. In modern language, *ethnos* refers to the uniqueness of a community and thus its linguistic, cultural and traditional characteristics, whereas *multiethnicity* refers to a social community that includes multiple ethnic groups that coexist and share the same space. Recently, multiethnicity has been promoted as a modern civil society concept that is required to promote inter-ethnic coexistence, equal status and mutual respect among ethnic groups who live in the same country.

As highlighted above, one of the OFA's fundamental principles is the preservation and reflection of society's multiethnic character in public life. This means it is necessary to examine the related terms of public life, public sphere, public sector and public affairs.

According to Wessler and Freudenthaler (2018), the *public sphere* is generally conceived of as the social space in which different opinions are expressed, problems of general concern are discussed and collective solutions are developed communicatively. Thus, the public sphere is the central arena for societal communication.

Similarly, to public sphere, *public life* includes all aspects of social life that are (happening in) public, in the open, governed by shared norms and values, as opposed to more private social interaction within families, private clubs, etc., that are governed by intimacy, personal identity and free will (Chandler and Munda, 2011). The vast collection of political, cultural, social and economic structures, organizations and institutions, including the workplace, that comprise cohesive societies is referred to as *public life*.

The right to participate in political and public life was first set out in Article 21 of the Universal Declaration of Human Rights (UDHR) and further elaborated in Article 25 of the International Covenant on Civil and Political Rights (ICCPR). According to Article 21 of the UDHR, the right guarantees all citizens the right and the opportunity, without unreasonable restrictions, to take part in the conduct of public affairs directly or through freely chosen representatives, to vote and to be elected at genuine periodic elections, and to have equal access to public service. Article 25 of the ICCPR recognizes the right to participate in *public affairs,* including the right to take part in the conduct of public affairs, the right to vote and to be elected, and the right to have access to public service.

The term *public sector,* in its broader sense, represents the public administration, i.e., all public institutions that perform public functions and activities. These institutions are financed from public funds and are established by the state (including the professional services of the government, the assembly and the judicial authorities) or the municipalities. It excludes the private institutions (private hospitals, private schools, private kindergartens, etc.) and private companies that provide public services.

2.2. Theoretical aspects of multiculturalism promotion in public sphere

In the classical liberal distinction between the public sphere (which characterizes common life) and the private sphere (which concerns primary socialization), British sociologist John Rex proposes that requests for recognition of differences must be favoured in order to find full expression in the private sphere, but the state, as the main actor in the public sphere, must primarily guarantee equality in individual opportunities (Colombo, 2002). Rex distinguishes between the various institutional and cultural sets that exist in each society. He distinguishes between public and political institutions aimed at promoting equality of opportunity for all individuals, and private or community institutions referring to language, religion, family customs, cultural and ethnic traditions (Cesareo, 2000). According to Rex, public and political institutions constitute a type of civic culture, which means that this area cannot be called into question in order to adapt to the needs of minority cultures.

The American academic Amy Gutman, writing on the same subject, wonders whether public institutions should do more to recognize the identities of cultural and discriminated minorities. In this context, she contends that citizens of various identities will be represented equally if public institutions do not recognize our specific identities, but only our universal interests. In support of this argument, Gutman cites the neutrality of the public sphere as a guarantee of civil liberty and equality, that is, universal needs such as health protection, education, freedom of faith, freedom of conscience, freedom of the press, freedom of association, justice, the right to vote, and the rights of public function (Gutman, 2004). Since these liberties are common to all, public institutions are not required to formally recognize them based on ethnic, racial, cultural, or religious grounds.

The Italian professor Enzo Colombo also distinguishes between the public sphere, which characterizes common life (common interests), and the private sphere, which includes primary socialization, or the acquisition of basic social skills. According to his distinction, education, like laws, politics and economics, belongs to the public sphere, at least in terms of skill selection, skill transmission and civic culture reproduction, that is, activities that have to do with the transmission, development and conservation of a shared culture that allows for a certain degree of identification and development of solidarity. In this regard, Colombo contends that every individual and every group has the right to maintain and manifest their differences in private spaces, because public spaces must be devoid of differences, guided by universalism and equality ideals (Colombo, 2002).

Considering this last statement, the French sociologist Alain Touraine, an advocate of egalitarian multiculturalism (also known as liberal multiculturalism), contends that a society's democracy is measured by the extent and quality of cultural, social, ethnic and religious differences, and its ability to manage and include these aspects in public space. A society with a diversity of values, judgements and perspectives on reality allows for greater freedom of choice, thereby expanding individual possibilities and opportunities. As a result, the high degree of individual freedom is important. The public sphere must be able to accept some degree of difference. However, for this to be compatible with an effective liberal democracy, it must be understood and accepted as an individual right rather than a collective right. According to Touraine, the freedom of choice necessitates recognition and respect, rather than belonging to a specific group in order to make claims of preferential treatment or self-determination. Requests for recognition of differences, he believes, must be heard and possibly accepted in the public sphere (Colombo, 2002).

3. Policies for the promotion of multiculturalism in the public sphere in Macedonian society

3.1. Macedonian multiethnic society and legal framework for development

Macedonian society is defined as a multiethnic society because of the ethnic diversity of the population. According to new census data from 2021[2], 1,836,713 of the population in the RNM are resident citizens and 260,606 are non-resident citizens. The total enumerated population is 2,097,319 citizens, of which 54.21% declared themselves as Macedonians (representing 58.44% of the resident population and 24.45% of the non-resident population), 29.52% as Albanians (24.30% of resident and 66.36% of non-resident population), 3.98% as Turks (3.86% of resident and 4.79% of non-resident population), 2.34% as Roma (2.53% of resident and 1.02% of non-resident population), 1.18% as Serbs (1.30% of resident and 0.35% of non-resident population), 0.87% as Bosniaks (0.87% of resident and 0.81% of non-resident population) 0.44% as Vlachs (0.47% of resident and 0.19% of non-resident population), 0.98% are members of other ethnic communities (non-nominated), 0.02% non-stated and 0.03% unknown.

According to religious affiliation, 46.14% of the RNM population are Orthodox Christians, 32.17% Muslims, 0.37% Catholics, 13.21% Christians, 0.07% Protestants, 0.04% Evangelist, 0.05% Evangelist – Methodist, 0.06% Jehovah's Witnesses, 0.48% atheists, 0.12% non-stated, 0.07% others and 0.5% unknown (persons whose data are taken from administrative sources are 7.2%).

Considering the mother tongue, 61.38% of the population speaks Macedonian, 24.34% Albanian, 3.41% Turkish, 1.73% Romani, 0.61% Serbian, 0.85% Bosniak and 0.17% Vlach, while the rest of the population declared other languages, including English, Polish, Italian, Serbo-Croatian, Croatian and Russian.

Given these cultural differences, Macedonian society can be defined not only as multiethnic, but also as multiconfessional and multilingual. Multicultural diversity has always existed in Macedonian society and has been protected by various measures within various social and political systems. According to the Preamble of the newly adopted Constitution of the Independent Republic of Macedonia from 1991, the RM is constituted as a national state of the Macedonian people, ensuring full civil equality and permanent coexistence of the Macedonian people with Albanians, Turks, Roma, Vlachs and other nationalities living within. According to Article 7 of the Constitution, the Macedonian language and its Cyrillic alphabet are the official languages of the country, and the official use of the nationalities' languages can be applied in units of local self-government where they live in significant numbers, as well as in primary and secondary education. Article 19 guaranteed religious freedom and free and public expression of faith, whether alone or in community with others, and equality of religious communities and groups with the Macedonian Orthodox Church. Article 48 was fully committed to nationalities, guaranteed the right to free expression, nurturing and developing identity and national characteristics, and the Republic guaranteed the protection of nationalities' ethnic, cultural, linguistic and religious identities.

2 Census of the population, households and apartments in the RNM, 2021 - first set of data, 30 March, 2022. Within the framework of the 2021 Census, Macedonian citizens living and staying abroad for more than a year were enabled to register themselves through a web application that was available on the Census website. Some data were taken from the administrative sources.

Ten years after the adoption of the Constitution, in 2001 constitutional and legal changes were made in accordance with OFA provisions, with the goal of promoting and developing civil society, respecting ethnic identity and the interests of Macedonian citizens. The OFA brought about several modifications, discussed below.

The Preamble content was changed twice, once in 2001 with Amendment IV and again in 2019 with Amendment XXXIV. According to Amendment IV, the citizens of the Republic of Macedonia, the Macedonian people, as well as citizens living within its borders who are part of the Albanian people, the Turkish people, the Vlach people, the Serbian people, the Romani people, the Bosniak people and others… in accordance with the tradition of the Krushevo Republic, the decisions of the Anti-fascist Assembly for the National Liberation of Macedonia (ASNOM) and the Referendum of 8 September, 1991, have decided to establish the Republic of Macedonia as an independent, sovereign state. Amendment XXXIV deleted the words 'as well as citizens living within its borders who are', replaced the words 'the decisions of the ASNOM' with 'the legal decisions cited in the Proclamation of the First Session of the ASNOM to the Macedonian people about the said session of the ASNOM' and added the words 'which expressed the will to create an independent sovereign state and the Ohrid Framework Agreement'.

Regarding the expression of identity, point 7.1 of the OFA determined that with respect to emblems, next to the emblem of the RM, local authorities will be free to place on the front of local public buildings emblems marking the identity of the majority community in the municipality. To that end, Amendment VIII replaced Article 48, stating that members of communities have the right to freely express, foster and develop their identity and community attributes, as well as to use their community symbols. It also clarified that the Republic guarantees the protection of all communities' ethnic, cultural, linguistic and religious identities. Concerning the use of non-majority community symbols, two laws were passed: the Law on the Use of Community Flags in the Republic of Macedonia (in 2005) and the Law on Amending and Supplementing the Law on the Use of the Flags of the Communities in the Republic of Macedonia (in 2011). According to Article 4 of the Amended Law, in units of local self-government where citizens belonging to the community constitute more than 50% of the population, the flag of the RM and the flag of that community are constantly displayed in front of and inside the buildings of local government organizations. Furthermore, in order to reflect multiculturalism in society and strengthen ethnic identity, an amendment to the Law on Holidays of the Republic of Macedonia (2007) introduced new holidays, classified as 'state holidays of the Republic of Macedonia' and 'holidays of the Republic of Macedonia'. Orthodox Christmas and Easter, and Islamic Eid al-Fitr, are celebrated as 'holidays of the Republic of Macedonia'. Every religious community in Macedonia, including Orthodox Christians, Catholics and Muslims, observes their most important holidays, while each constitutional non-majority community (including the Jewish community) observes one holiday per year.

In terms of religious issues, in addition to the Macedonian Orthodox Church, Amendment VII to Article 19 cites the Islamic Religious Community in Macedonia, the Catholic Church, the Evangelical Methodist Church, the Jewish Community and other religious communities and groups.

In terms of language, Amendment VI that replaced Article 7 states that the Macedonian language and its Cyrillic alphabet is the official language throughout the RM and in its international relations. Any other language spoken by at least 20% of the population is also an official language, written using its alphabet, as specified in the Constitution and laws. In accordance with the Annex B of the OFA, the new Law on the use of the languages from 2018 (enforced from 2019) states that throughout the RM and its international relations the official language shall be the Macedonian language and its Cyrillic alphabet, other language spoken by at least 20% of the citizens (Albanian language) and its alphabet is also the official language, in accordance with this Law. In local self-government units, in

addition to Macedonian and its Cyrillic alphabet, the language and alphabet spoken by at least 20% of the citizens is also the official language; autonomous decisions (by the organs of units of local self-government) are made regarding the use of languages spoken by less than 20%. The new Law broadened the spheres of use of language spoken by at least 20% of the citizens and its alphabet and mandated that banknotes, coins, postage stamps shall contain symbols representing the cultural heritage of the citizens speaking Macedonian language and its Cyrillic alphabet and the language spoken by at least 20% of the citizens and its alphabet (Art.8).

OFA point 6.2 declares that state funding will be provided for university level education in languages spoken by at least 20% of the population Macedonia. In accordance, a Law on the establishment of a state university in Tetovo was passed in 2004, allowing the legalization of the University of Mala Rechica (which was founded in 1994 and had operated illegally). In accordance with Article 5, the status of current students at the University of Tetovo, organized as a civic initiative, will be decided in accordance with Article 198 of the Law on Higher Education from 2000, Article 46 of the Law on Amending and Supplementing the Law on Higher Education from 2003, and the University's statute.

Amendment VI has added new fundamental values to Article 8: equitable representation of people from all communities in public bodies at all levels and in other areas of public life. The essence of this principle is the full respect for the principle of non-discrimination and equal treatment of all persons before the law, which will be especially applied in public administration, public enterprises, the military and the police. In terms of implementation, item 5 of Annex C of the OFA lists the activities that should have been carried out to increase the representation of members of communities that do not constitute the majority in the RM. The international community organized training for police officers and civil servants to begin the implementation of this principle, while several laws were reformed and strategies, plans and work programmes were developed. Every year, the state institutions prepare an Annual Plan for Equitable Representation in collaboration with the Secretariat for Framework Agreement Implementation, while the National Strategy for Equality and Non-Discrimination, the Ombudsman's Reports, the Committee's recommendations Inter-community relations and the Agency for Exercising the Rights of Communities and other non-governmental organizations are continually analysing the situation.

In order to put some of these provisions and laws into effect, the Law on Local Self-Government (2002) and the Law on Territorial Organization of Local Self-Government (2004) were passed. The first improved the use of community languages at the municipal level by lowering the official use threshold from 50% to 20% and allowing languages spoken by less than 20% of the local population to be recognized as an official language within the municipality. In accordance with Article 90, besides the Macedonian language and its Cyrillic alphabet, the language and the alphabet, used by at least 20% of the inhabitants of the municipality shall be official language in the municipality. The council of the municipality shall decide on the use of the languages and alphabets spoken by less than 20% of the inhabitants of the municipality. The second Law resulted in the merging, dividing and changing of municipality borders, leading to the reduction of municipalities from 120 to 84, plus the city of Skopje, which saw further reduction to 80 in 2013 when four municipalities became part of the municipality of Kichevo.

3.2. The impact of the OFA on multiethnicity in public life

Considering the previous definitions related to terms *culture* and *public* (life/sphere/sector), emphasis is given to provisions related to language and symbols of non-majority communities, and principles relating to discrimination and equitable representation. The results of OFA implementation have had several impacts, discussed below.

According to the Constitution amendments, the state's constitutive element has several characteristics: on the one hand, it is based on and promotes the civic principle (citizens of the RM), while on the other hand, it retains and emphasizes the ethnic element (descriptions of the citizens as Macedonian, Albanian, Turkish, Vlach, Serbian, Romani, Bosniak and other people). In addition to ethnic differences, citizens differ in their definitions of being a *people* and *parts of a people.* The determination of *parts of a people* indicates that they are part of a nation that exists outside of Macedonia; some have a 'mother' country (Albanians, Turks and Bosniaks) and others do not (Roma and Vlachs). Aside from ethnic distinctions, the Constitution uses the term *communities,* while certain laws distinguish between *communities* and *non-majority communities*, emphasizing the size of the community. The language spoken by the communities is used as a criterion for determining community size. The term *spoken* refers to a person's ethnic/linguistic community membership. Thus, according to OFA provisions, those who are part of a people, i.e., who belong to non-majority communities, are divided into communities according to the 20% threshold for language use, which reflects the requirement for official use of the language at a national or local level.

Article 1 (2) (3) of the new Language Law implies that Albanian, in addition to Macedonian, is also an official language 'in all organs of the central government in the Republic of Macedonia, central institutions, public enterprises, agencies, directorates, institutions and organizations, commissions, legal entities that discharge public authorities in accordance with the law and other institutions' (Opinion No. 946 / 2019). It therefore appears that the Law promotes bilingualism and in accordance with the official Opinion of the Venice Commission, there is a lack of clarity and precision. Therefore, the Commission has invited the legislator to re-examine some provisions of the Law, in particular regarding bilingualism in judicial proceedings and use of Albanian in internal and interinstitutional communication, e.g., by limiting its scope to written official communication (Opinion No. 946 / 2019). It is also noted that it is not always clear which provisions of the Law ('language(s) spoken by at least 20 % of the citizens'; 'the official language spoken by the citizens'; 'an official language other than Macedonian') refer to Albanian only and which also apply to other community languages (Turkish, Vlach, Serbian, Bosnian, Romani etc).

According to Article 8, banknotes, coins and postal stamps must contain symbols representing the cultural heritage of citizens speaking Macedonian and a language spoken by at least 20% of the population. The Venice Commission commented that the Article provides bilingualism, but perhaps a more appropriate term is biculturalism. The symbols currently in circulation are part of the common cultural heritage, as frescoes from churches, symbols and artistic elements of churches and mosques, and as flora and fauna (e.g., shepherd dog, trout, lynx, peacock). The new Law specifies that they should contain symbols of Macedonian and Albanian cultures, ignoring the other smaller communities.

In contrast, the new Law on flags (from 2005) allows reflection of multiculturalism in a public sphere and promotion of ethnic diversity in the RNM. This Law determines the use of flags (chosen by communities) through which the members of the communities in the RNM express their identity and particularity. This provision explains why the flags of Turkey, Albania and Bosnia and Herzegovina are displayed on certain occasions and in certain places. The council of the local self-government de-

cides on the use of the flags in public and official life, if citizens who are members of that community constitute more than 50% of the local population. The Law mandates that the flag of the community is displayed together with flag of the RNM. However, certain examples of non-compliance with the rules for displaying flags and the use of languages demonstrate that in some cases, ethnicity takes precedence over state affiliation[3].

The new Law on languages also encourages multiculturalism at the local level in units of local self-government where at least 20% of citizens speak a language other than Macedonian. Thirty of the 81 municipalities, including the City of Skopje, are required to ensure official use of one of the non-majority languages. In 2014, in 27 municipalities the Albanian community made up at least 20% of the population, some significantly so, with over 50 % or close to 90% (Blizanakovski, 2014). Three municipalities are required to provide official use of Turkish. Furthermore, Turkish has been made official in five municipalities, despite the fact that the Turkish population there is less than 20%. In one municipality, 28.56% of the population are Serbian and another municipality adopted Serbian as an official language in 2010. The Romani community has a majority in one municipality (60.60%) and has the legal right to use the Romani language officially. From 2010, one municipality introduced both Serbian and Romani as working languages of the Municipality Council. In one municipality where the Vlach language has been made official by a Council decision, the Vlach community makes up 10.53% of the population. In another municipality, the Bosniak community accounts for 17.54% of the population, and the Bosniak language has been designated as official. Thus, 22 of the 31 municipalities have official multilingualism; two non-majority languages are officially used in seven of these municipalities, and three non-majority languages in two of these municipalities.

Results related to education language (OFA Review on Social Cohesion, 2015) show that students from the Albanian community learn primarily in their mother tongue in primary and secondary school; in primary school, more than half of the Turkish community studies in their mother tongue; Serbian is the language of instruction for a small number of Serbian communities; there is some experimental teaching in other languages, but curricula for the Roma, Vlach and Bosniak languages have been developed and came into effect from 2016/17. Higher education is offered Macedonian and Albanian, and state universities offer degrees for teachers in Albanian, Turkish and Serbian.

Implementation of principles of non-discrimination and equitable representation started immediately after the signing of the OFA and has continued for 20 years. There are several pieces of research and reports relating to this principle, but in the present paper, the results obtained by the Ministry of Information Society and Administrations (MISA) of the RNM and by the Ombudsman of the RNM are considered. Several data sources showing the level of implementation in the public sector are explored.

According to MISA's most recent annual report (Register of Public Sector Employees for 2020), the public sector employs 111,589 people, of which 72.49% are Macedonians, 20.85% Albanians, 2.18% Turks, 1.40% Roma, 1.16 % Serbs, 0.51% Bosniaks, 0.49% Vlachs and 0.91% others (or not declared). Albanian community members have highest proportion in the Ombudsman (36.36%) and Ministries (36.14%), particularly in the Ministry of Political System and Inter-Community Relations (85.58%) which

3 Article 8 of the amended Law regulates the manner of displaying community flags, while Article 8-a stipulates that the flag of the RM is displayed with other flags in accordance with the law, a third larger than the other flags. There have been numerous examples of non-compliance: in 2012, a 6m Albanian flag on a 35m mast was placed in Kichevo during Albanian flag day; in a three-month period in 2013 in Kichevo, an Albanian flag with the same dimensions as the state flag was flown; 20m masts with Albanian flags were placed on the Kicevo-Zajas road and in front of the municipality of Arachinovo, in front of the memorial centre (of the victims from 2001) ; in 2020, during Albanian flag day in Kichevo and Tetovo, the Macedonian flag was not displayed; in 2017, some municipality websites (Chair, Saraj, Bogovinje, Studenichani, Vrapchishte and Zhelino) only had data in Albanian.

replaced the Secretariat for the Implementation of the Ohrid Framework Agreement. The Ministry of Self-Government has 46.15% Albanian employees and the Ministry of Economy has 50% Albanian employees. Albanians make up 29.09% of the Government's Secretariat, 28.57% of Public Prosecutors (PAP), 26.85% of Parliament, 24.53% of legal entities with public authorities and 21.26% of Public Institutions (PI). Bosniaks are most represented in the Ombudsman's Office (3.90%), the Secretariat of the Government (1.82%), the Government (1.25%) and the Ministries (0.93%; 5.77% in the Ministry of Self-Government, 1.97% in the Ministry of Economy and 1.41% in the Ministry of Culture). Vlachs are most represented in the institution of President of the State (3.51%), the Ombudsman (2.60%), the Government Secretariat (2.73%) and Government (1.25%). Roma are most represented in Government (6.56%), followed by the PI (4.43%), the Ombudsman (2.60%) and the President of the State (1.75%). Serbs have the highest representation in the Judicial Council (5.88%), the Constitutional Court (5%), the Ombudsman (3.90%) and the Independent State Authority (ISA) (1.93%). Turks have the highest representation in the Government (4.06%), the Secretariat (3.64%) and the Ministries (3.28%).

In December 2021, the Ombudsman of RNM published the *Status monitoring report for principle of adequate and equitable representation of 2020.* In 1209 institutions/bodies (89.89% of the 1345 institutions that have a duty to present this kind of report), 75.6% are Macedonians, 17.7% Albanians, 1.6% Turks, 1% Roma, 1.7% Serbs, 1.7% Vlachs, 0.5% Bosniaks and 0.3% others. Compared to 2018, there has been a noticeable decrease of Macedonians (1.2%) and Serbians (0.1%), and an increase of Albanians (1.1%) and Turks (0.2%).

In summary, the OFA's implementation has led to important changes, but in both reports (of MISA and the Ombudsman) it is noted that in some institutions, there is still inadequate representation of minority communities. For the biggest non-majority community (Albanians), inadequate representation was registered in the Government of the RNM (9.38%), Public Prosecutor's Office (10.79%), Public Enterprises (16.73%), National Bank (9.74%), President of the RNM (8.77%), Regulatory Body (12.73%), ISA (16.82%), Government Service (6.53%), Court (15.07%) and Judicial Council (8.82%). For other non-majority communities, there is no representation in the Council of Public Prosecutors, nor in the Judicial Council and the Constitutional Court with the exception of Serbs (5.88% and 5.00%, respectively). In some institutions, all but one of the smaller non-majority communities have less than required representation. Examples include PIs, in which, apart from Vlachs (0.42%), show low figures for Bosniaks (0.45%), Roma (0.69%), Serbs (1.04%) and Turks (2.11%); Public Enterprises, in which, with the exception of Roma (4.43%), show low figures for Bosniaks (0.66%), Vlachs (0.44%), Serbs (1.44%) and Turks (2.27%); the Ministry, in which, apart from Turks (3.28%), show low figures for Bosniaks (0.93%), Vlachs (0.53%), Roma (1.88%) and Serbs (1.25%).

In the following institutions, with the exception of the Vlachs, there is inadequate representation among all other non-majority communities: Government Service (Vlachs 1.26%, Albanians 6.53%, Bosniaks 0.75%, Roma 1.01%, Serbs 0.75%, Turks 0.50%); Independent Body of State Administration (Vlachs 0.67%, Bosniaks 0.64%, Roma 1.36%, Serbs 1.88%, Turks 2.27%); Independent State Body (Vlachs 1.93%, Bosniaks 0.39%, Roma 1.03%, Serbs 1.93%, Turks 0.77%); President of the RSM (Vlachs 3.51%, Bosniaks 0.00%, Roma 1.75%, Serbs 0.00%, Turks 1.75%)

In the Courts, there is a higher representation of Bosniaks (1.07%) and Vlachs (1.16%), and a smaller representation of other non-majority communities (Albanians 0.49%, Roma 0.89%, Serbs 1.56 %, Turks 0.44%). The same situation is registered in the Public Prosecutor's Office, where Bosniaks (0.87%) and Vlachs (0.58%) are adequately represented, but Roma (1.46%), Serbs (0.58%) and Turks (2.04%) are less represented. In the Government Secretariat, Bosniaks (1.82%), Vlachs (2.73%) and Turks (3.64%) are represented more than required, while Roma (0.91%) and Serbs (0.00%) are less represented.

There are examples of inadequate representation in several Ministries, including: Ministry of Agriculture, Forestry and Water Management (a lower representation of Albanians (16.88%), Roma (1.39%) and Vlachs (0.40%), while Bosniaks (0.70%), Serbs (2.09%) and Turks (2.98%) are better represented); Ministry of Information Society and Administration (Albanians 21.28%, Bosniaks 0.43%, Vlachs 0.43%, Roma 1.70%, Serbs 1.70%, Turks 2.13%); Ministry of Defence (Albanians 12.39%, Bosniaks 0.70%, Vlachs 0.42%, Roma 0.70%, Serbs 1.27%, Turks 2.25%); Ministry of Finance (Albanians 13.07%, Bosniaks 0.34%, Roma 0.85%, Serbs 0.34%, Turks 1.87%); Ministry of Foreign Affairs (Bosniaks 0.46%, Vlachs 0.23%, Roma 0.68%, Serbs 1.14%, Turks 2.28%; Albanians (22.55%) almost reach the required percentage).

In the Ministry of Economy, there is a lower representation of Roma (0.66%) and Serbs (0.66%), while in the Ministry of Environment and the Ministry of Culture there is inadequate representation of Roma (0.00%) and Turks (0.49% and 0.70%, respectively). Serbs (0.90%) and Turks (2.69%) are less represented in the Ministry of Justice. In the Ministry of Health, Turks have 0.88% representation, while Roma and Serbs are not represented. A similar situation of complete underrepresentation exists in the Ministry of Local Self-Government, where the representation of Serbs is 1.92%, while Roma and Turks are not represented at all.

In the Ministry of Education and Science, the lowest representation is registered among Roma (0.84%), with Serbs (2.11%) and Turks (2.95%) also less represented. Macedonians (1.20%), Vlachs (0.14%) and Serbs (0.35%) are inadequately represented in the Ministry of Political System and Inter-Community Relations. In the Ministry of Transport and Communications, Albanians (13.82%), Serbs (1.63%) and Turks (1.63%) are inadequately represented, while in the Ministry of Labour and Social Policy, Albanians (19.51%), Bosniaks (0.41%) and Turks (0.81%) are inadequately represented.

These data confirm that the smaller ethnic communities are not represented at all in some institutions, once again corroborating a lack of desire and capacity to fully implement the principle of adequate and equitable representation. The Ombudsman's research over the last 14 years (2007-2020) quantitatively indicates apparent progress, but no qualitative progress. However, it is important to note that the number of employees in the public sector has more than doubled since 2007 (from 59,629 to 134,979). The biggest increase is registered among Albanians (9.7%), with increases also seen among Turks (1%), Roma (0.5%) and Bosniaks (0.2%). There has been a large decrease of the number of ethnic Macedonians (10.4%) and Serbs (0.4%), while the number of Vlachs is unchanged. In its report, the Ombudsman directs public criticism towards the Public Prosecutor's Office of the RSM, the Council of Public Prosecutors of the RSM, the State Commission for the Prevention of Corruption and the Higher Administrative Court of RSM, who are responsible for implementing annual employment plans according to proper application of the principle of equitable and adequate representation.

In light of the EU Commission's most recent report (6 October 2020), the Council applauds the progress made in advancing the EU reform agenda, but emphasizes the importance of a depoliticized and merit-based public administration. The Council emphasizes the importance of good inter-ethnic relations and welcomes a number of steps taken to increase community trust and further implement the OFA. Special care must be taken to ensure that the rights of smaller non-majority communities are respected and that underrepresentation is addressed. The new Ministry of Political System and Inter-Community Relations should actively implement the 'One Society for All' strategy and work closely with stakeholders to build social cohesion.

Conclusion

Given that the EU is a collection of different nations that work together to shape the Union's future, each new potential member should promote harmony and mutual participation within its national borders, in order to accept differences within the Union. As a result, as in the criteria and in all other European documents, one of the key principles is the rights, respect and protection of minorities in member states. In accordance with the report of the Arbitration Commission of the European Community (Badinter Commission) from 1992, the Macedonian Constitution met the requirements regarding the protection of minorities. Nevertheless, since 2001 the OFA has become one of the basic instruments for supplementing those rights (according to the needs and demands of minorities) and for measuring the progress achieved in the European integration process. In the present research, emphasis is given to the OFA's principle of preservation and reflection of society's multiethnic character in public life. Considering Macedonian multiculturalism (the coexistence of Macedonians, Albanians, Turks, Serbs, Romani, Vlachs, Bosniaks and others, each with their own culture, mother language and religion) and the definitions related to term public, the analysis has explored equitable and adequate representation in the public sector, and the provisions related to use of non-majority language and symbols in public life. The analysis was guided by two questions: whether these provisions have been implemented and whether the results of implementation have led to inter-ethnic integration.

The preservation and reflection of multiethnicity is enabled by the Constitution and various legal norms which guarantee use of non-majority symbols in public places, languages in education, state and public institutions at national and local levels, celebratory holidays and public sector employment levels. The results show that the principle of equitable and adequate representation is partially but not completely implemented, as non-majority communities are not adequately represented in all institutions. This inadequacy may also be due to the lack of adequately educated staff, which is the biggest problem with this type of employment. In recent years, the emphasis in employment processes was on reaching the adequate percentage, which neglected the merit system and can result in quantity over quality.

The theoretical analysis raised the question of whether this approach (in the Macedonian case) is consistent with theoretical views on the preservation and reflection of diversity. Macedonian multiculturalism corresponds to the possible situation Sartori speaks of, in which multiculturalism is expressed as a priority value (its reflection in the public sphere); in such a form, it conflicts with pluralism, which supports and nurtures an open society that reflects spontaneous order, defending but also hindering diversity. This departs from Rex's democratic model of multiculturalism, as there should be a clear distinction between the public sphere (where public and political institutions should provide/promote equal opportunity) and private spheres (where the institutions of the private or community sphere refer to language, religion, family customs, cultural and ethnic traditions). In the Macedonian case, the position for the public sphere argued by Rex, is achieved by respecting the principle of adequate and equitable representation of all citizens belonging to all communities in state bodies and in all public institutions at all levels. However, the application here does not correspond to Rex's model, as it is realized through ethnic employment that disregards the merit principle. This contradicts Rex's claims that public and governmental institutions constitute a kind of civic culture, which is why this area cannot be questioned in order to adapt it to the needs of minority cultures. In this context, the Macedonian model does not correspond to Gutman and Colombo, who argue that public institutions should not recognize specific identities in order to represent citizens equally, because public space must be blind to differences and guided by ideals of universalism and equality. To justify the policy implemented in the Macedonian case, we can refer to Touraine's claim that democracy can be measured

by the ability to manage and include differences in the public sphere, and that it can accept a certain degree of difference but only in the form of individual rights rather than collective rights. Again, this is not the case with the Macedonian example, because the language condition and the '20%' rule are examples of collective rather than individual rights.

Regarding the provisions related to the use of language and symbols of non-majority communities, the results show that their implementation contributed to the reflection of multiculturalism in public life, primarily at the local level. Although there is a requirement of 20% for the use of the languages in the municipalities, a positive example is that in many municipalities the languages of smaller ethnic communities represented by less than 20% are also in official use, by decision of local government. Regarding the use of language at a national level, the present study highlights the newest Law on language (2018) and the comments of the Venice Commission. The key provision is in Article 1 (2), in which, in addition to 'the language spoken by at least 20% of the population', it is specified in parentheses that it is the 'Albanian language'. Two dilemmas arise here. The first is whether the provision will ensure official use of Albanian if the percentage of the population that speaks Albanian falls below 20%. The second is what will happen if another ethnic community reaches the 20% threshold and thus whether the 'Albanian language' clause hinders realization of the language right of the other ethnic community. The Venice Commission also commented that some parts of the Law are confusing and recommended that the legislator re-examine them. However, in its official Opinion, it specified that many provisions of the Language Law go beyond the European standards (defined especially in the Framework Convention for the Protection of National Minorities and the European Charter for Regional and Minority Languages) and welcomed the willingness of the authorities of the RNM to improve the linguistic situation of communities. The legal provision specifying which two cultural symbols must be used on banknotes alludes to the promotion of biculturalism rather than multiculturalism. However, although the provision of use of flags contributes to the reflection of multiculturalism in the public sphere, it is confusing to see other national flags flying (e.g., Albania, Turkey and Bosnia and Herzegovina).

One of the main questions in the present study is whether the implementation of these laws led to integration. According to the dictionary, integration is defined as the incorporation of a certain ethnic entity into a society, with the exclusion of any racial discrimination; or the insertion of the individual within a community, through the process of socialization. In the Macedonian case, the main instrument for incorporation is the principle of equitable and adequate representation. Considering the definition of integration as incorporation, in the Macedonian case this is conducted via principle of positive discrimination, i.e., with respect for equitable and adequate representation of all communities in the public sector. Although the issue of ethnicity and employment conflicts with certain theoretical views, it is possible that in the Macedonian case it was the best alternative for integration.

Unlike this principle, the provisions related to use of communities' language and symbols represent instruments for expressing ethnic identity, rather than mechanisms for integration. This seems to foster ethnic identity and contributes to the neglect of common citizen identity. Certain examples of non-compliance with rules for displaying flags and use of languages demonstrate that in some cases, ethnicity takes precedence over state affiliation.

Another key question is whether the use of languages and symbols led to inter-ethnic integration. It seems that these provisions are a double-edged sword; they contribute to the social incorporation, promotion and reflection of each minority community culture separately, but this is not a contribution to common multiculturalism that would be recognizable as Macedonian multiculturalism. Common values in which every community would be recognized are missing.

It may be concluded that the European integration process continues to represent a challenge for the RNM. Achieving the European standards, set through conditions for implementing the OFA, is one of the basic challenges that led to the promotion of multiculturalism and the inclusion of ethnic communities in many social spheres. This means that the European integration challenges directly affect the implementation of each provision, including the promotion of multiculturalism, inclusion in society and inter-ethnic tolerance that the EU requires. Some inclusion processes are still in progress, but generally the state has taken important steps in fulfilling the European conditions.

Bibliography

Blizanakovski, J., *Local Language policies for non-majority communities, Possibilities for more effective implementation,* Skopje, IDSCS, April 2014, https://idscs.org.mk/wp-content/uploads/2009/08/ljp-nemnozinski-zaednici-eng.pdf

CARDS assistance programme, Former Yugoslav Republic of Macedonia, 2002-2006, European Commission, https://www.esiweb.org/pdf/macedonia_EU-CARDS_assistance%20strategy%20FYROM_july2002.pdf

Cesareo, V., *Società multietniche e multiculturalismi,* Milano, Vita e pensiero, 2000

Chandler, D., Munda, R., *Dictionary of Media and Communication,* Oxford University Press, 2011

Colombo, E., *Le società multiculturali,* Roma, Carocci, 2002

Commission reports on progress made by Albania and North Macedonia, European Commission, 02.03.2020, https://ec.europa.eu/commission/presscorner/detail/en/IP_20_347

Commission staff working document, North Macedonia 2020, Brussels, European Commission, 06.10.2020, https://ec.europa.eu/neighbourhood-enlargement/system/files/2020-10/north_macedonia_report_2020.pdf

Council conclusions on enlargement and stabilisation and association process - Albania and the Republic of North Macedonia, n.7002/20, Brussels, Council of the European Union, 25 March 2020, https://data.consilium.europa.eu/doc/document/ST-7002-2020-INIT/en/pdf

Council conclusion on enlargement and stabilisation and association process, Brussels, Council of the European Union, 26.06.2018, https://www.consilium.europa.eu/media/35863/st10555-en18.pdf

Council Decision of 18 February 2008 on the principles, priorities and conditions contained in the Accession Partnership with the former Yugoslav Republic of Macedonia and repealing Decision 2006/57/EC (2008/212/EC), *Official Journal of the European Union 19.3.2008,* L 80/32, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:080:0032:0045:EN:PDF

Council regulation (EC) on the establishment of European partnerships in the framework of the stabilisation and association process, n.533/2004, *Official Journal of the European Union, L 86/1,* 24.3.2004, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004R0533

Council regulation (EC) n.1085/2006 of 17 July 2006, establishing an Instrument for Pre-Accession Assistance (IPA), *Official Journal of the EU L 210/82*, 31.07.2006, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:210:0082:0093:EN:PDF

Council regulation (EC) n.2666/2000 of 5 December 2000, *Official Journal of EC, L 306, vol.43,* 07.12.2000, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2000:306:TOC

Декларација за развој на односите на Република Македонија со Европската Унија, *Службен весник на РМ бр. 07/98* од 10.02.98

Draft Programme, Additional Support Programme for the Former Yugoslav Republic of Macedonia in 2001, European Commission, 2001 http://ec.europa.eu/enlargement/pdf/financial_assistance/cards/publications/macedonia_additional_support_programmeme_en.pdf

Edwards, J., Bilingualism and multilingualism: Some central concepts, in Bhatia, T.K., Ritchie, W.C. (Eds), *The Handbook of Bilingualism.* Blackwell publishing, 2006, https://medien.umbreitkatalog.de/pdfzentrale/978/144/433/Leseprobe_l_9781444334906.pdf

Guidelines for states on the effective implementation of the right to participate in public affairs, United Nations Human Rights, Office of the High Commissioner, https://www.ohchr.org/sites/default/files/Documents/Issues/PublicAffairs/GuidelinesRightParticipatePublicAffairs_web.pdf

Gutman, A. (Ed), Multukulturalizam, ogledi za politikata za priznavanje, Eurobalkan press, Skopje, 2004

Instrument Pre-Accession Assistance, A new focus to EU assistance for enlargement, European Commission, 2009, DOI 10.2794/65266, https://europa.rs/images/publikacije/21-IPA.pdf

International Covenant on Civil and Political Rights, United Nations, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights

Извештај од регистерот за вработени во јавниот сектор за 2020, Министерство за информатичко општество и администрација на Република Северна Македонија, Март 2021, https://mioa.gov.mk/?q=mk/node/3287

Закон за употреба на знамињата на заедниците во Република Македонија, Службен Весник на РМ бр. 58/2005 од 19.07.2005 (Law on the Use of Community Flags in the Republic of Macedonia, Official Gazette n. 58/2005, 19.07.2005), https://www.slvesnik.com.mk/Issues/8EDCC32A9E7D654C949C24BD18E63775.pdf

Закон за изменување и дополнување на Законот за употреба на знамињата на заедниците во Република Македонија, Службен Весник на РМ бр. 100/2011 од 25.07.2011 (Law on amending and supplementing the Law on the Use of the Flags of the Communities in the Republic of Macedonia, Official Gazette n.100/2011, 25.07.2011), http://www.slvesnik.com.mk/Issues/47D56301AAB3324281A085DAAC0AEF98.pdf

Закон за измена на законот за празниците во Република Македонија, *Службен Весник на Р.Македонија бр. 18/2007,* од 15.02.2007 година (Law on amending the Law on Public Holidays in the Republic of Macedonia, Official Gazette n.18/2007, 15.02.2007)

Закон за употреба на јазиците, *Службен весник, бр.07/2019,* од 14.01.2019 (Law on the use of languages, Official Gazette No 07/2019, 14.01.2019)

Закон за основање на Државен универзитет во Тетово, *Службен весник бр.08/2004*, од 23.02.2004 (Law on establishing the State University of Tetovo, Official Gazette No 08/2004)

Закон за високото образование, *Службен весник, бр. 64/2000* од 03.08.2000 (Law on Higher Education, Official Gazette of the Republic of Macedonia, n. 64/2000, 03.08.2000)

Закон за високото образование, *Службен весник, бр. 49/2003* од 25.07.2003 (Law on amending and supplementing the Law on Higher Education, Official Gazette of the Republic of Macedonia 49/2003, 25.07.2003)

Закон за локалната самоуправа, *Службен весник бр.05/2002* од 29.01.2002 (Law on Local Self-Government, Official Gazette 05/02, 29.01.2002)

Закон за територијалната организација на локалната самоуправа во Република Македонија, *Службен весник бр.55/2004* од 16.08.2004 (Law on Territorial Organization of Local Self-Government in the Republic of Macedonia, Official Gazette no. 55/2004, 16.08.2004)

Marta, C., *Relazioni interetniche, prospettive antropologiche,* Napoli, Guida, 2005

Modification to the Action Programme 2004 for the Former Yugoslav Republic of Macedonia, 19 October 2004, https://www.esiweb.org/pdf/macedonia_CARDS-MK%20annual%20programme%202004%20ammended.pdf

Ohrid Framework Agreement, Organization for Security and Co-operation in Europe, 13.08.2001, https://www.osce.org/skopje/100622

Ohrid Framework Agreement, Review on Social Cohesion, Skopje, European Institute of Peace, 2015, https://www.eip.org/ohrid-framework-agreement-review-on-social-cohesion/

Opinion n.946/2019, North Macedonia opinion on the Law on the use of language, European Commission for Democracy Through Law (Venice Commission), Strasbourg, 09.12.2019

Report on monitoring the application of the principle of adequate and equitable representation for 2018, Ombudsman of RNM, 2019, http://ombudsman.mk/upload/documents/SPZ/SPZ-2018-Mk.pdf

Moran, R. T., Harris, P. R., Moran, S.V., *Managing Cultural Differences: Leadership Skills and Strategies for Working in a Global World,* Oxford: Routledge, 2011

Niglio, O, Inheritance and identity of Cultural Heritage in *Advances in Literary Study, 2 (1),* 2014, https://www.scirp.org/journal/ALS/

Sartori, G, *Pluralismo, multiculturalismo e estranei,* Milano, Rizzoli, 2000

Stabilisation and Association Agreement between the European Communities and their Member States and the former Yugoslav Republic of Macedonia, *Official Journal of the European Union, L84, Vo. 47,* 20.03.2004, , https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2004:084:TOC

Ting-Toomey, S., Chung, L.C., *Understanding intercultural communication,* New York: Oxford University Press, 2012, ISBN 978-0-19-973979-0

Tosevski, I., *Nacija ili nacija,* Skopje, Mi-AN, 2003

UNESCO Universal Declaration on Cultural Diversity, General Conference of UNESCO, November 2001

Universal Declaration of Human Rights, United Nations, https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf

PUBLIC SERVICE AND HUMAN RESOURCES MANAGEMENT: STATE OF PLAY AND CHALLENGES

Juliana Karai

Abstract

The research will be focused on the shortcomings in the laws for state and public administration basically related to the employment procedure, producing reports, as well as appointments and dismissals of senior civil servants and will try to offer concrete solutions for overcoming of those shortcomings which persist for a long time period.

The competence of the Ministry of Information Society and Administration (MISA), to establish and maintain a single Register of all employees in public sector institutions is stipulated in the Law on Public Sector Employees (LPSE) (National PAR Monitor for North Macedonia 2019/2020, p.22). The reporting regarding data on public service employees is comprehensive, however there are no publicly available reports about the entire public service policy, including for 2019 (Ibid). Also, the reports do not include substantiated information concerning the quality and/or outcomes of the public service (Ibid), which is an issue which persists for a long time (National PAR Monitor for North Macedonia 2017/2018, p.68).

The heads of state administrative bodies may fill a position by concluding a fix term contract. The utilisation of agencies for temporary employments is to a great extent a deviation from the LPSE, having in mind that the employees are not obliged to meet the same criteria as administrative servants and enter the public service without a public announcement, contrary to the merit-based principle (Ibid). Another breach of the merit-based principle is the occurrence of extension of such contracts for more than e year and it later leads to a position as an administrative servant (Ibid). The overall procedure for engaging personnel on a fix-term contract is to a great extent not transparent (National PAR Monitor for North Macedonia 2019/2020, p.22).

Public announcements for administrative servants are published on the website of the Agency of Administration and in at least three daily newspapers using a clear and understandable language (Ibid). The selection procedure is organised in three stages, but more than 5 documents are requested to be attached to the online application which makes the procedure burdensome (National PAR Monitor for North Macedonia 2019/2020, p.22) and it discourages the interest of external candidates, which has been detected (National PAR Monitor for North Macedonia 2017/2018, p.68).

Senior civil service appointments are under a highly discretionary system, based on political appointment and dismissal. A new Law on Senior Civil Service is in pipe-line, which will introduce the merit-based principle and open competition for top management positions.

Integrity and anti-corruption measures for the civil service are formally established in the central administration and there is comprehensive legal framework (Ibid). The integrity policy encompasses the entire public service, and the policy contains clear objectives (Ibid.)

Keywords

public service, human resources management, recruitment, evaluation

Contact

Juliana Karai, MA
Senior Researcher, European Policy Institute – Skopje, Skopje
✉ juliana.karai@epi.org.mk

Introduction

The research will focus on the shortcomings in the laws for state and public administration relating to the employment procedure, such as the compiling of reports, as well as the appointment and dismissal of senior civil servants. It will aim to offer concrete solutions to overcome these shortcomings which have persisted over a long time-period.

The competence of the Ministry of Information Society and Administration (MISA) in establishing and maintaining a single Register of employees in public sector institutions is stipulated in the Law on Public Sector Employees (LPSE). *Reporting regarding data on public service employees* is comprehensive, however, there are no publicly available reports regarding the entire public service policy. Moreover, the reports do not include substantiated information concerning the quality and/or outcomes of the public service, which has been a long-term issue (Mojsovski, A., Karai, J., 2021).

In relation to *employment in the public sector,* the administrative bodies of the heads of state may fill a position by concluding a fixed-term contract or by involving agencies specializing in temporary employment. The utilization of agencies for temporary employment is a deviation from the LPSE, bearing in mind that the employees are not obliged to meet the same criteria as administrative or public servants, and enter public service without a public announcement, contrary to the merit-based principle. Another breach of the merit-based principle is the occurrence of an extension of such contracts for more than a year, which subsequently, leads to a position as an administrative/public servant. The overall procedure for engaging personnel on a fixed-term contract is to a great extent not transparent (Mojsovski, A., Karai, J., 2021).

Public announcements for administrative servants are published on the website of the Agency of Administration and (in at least) three daily newspapers, using clear and understandable language. The selection procedure is organized into three stages, however, more than five documents are requested to be attached to the online application, which renders the procedure burdensome and discourages the interest of external candidates (Mojsovski, A., Karai, J., 2021).

Senior civil service appointments are subject to a highly discretionary system, based on political appointment and dismissal. A new Law on Senior Civil Service is in the pipeline, which will introduce the merit-based principle, as well as open competition for top management positions (Mojsovski, A., Karai, J., 2021).

The salary system of administrative servants is assessed as being simply structured, consisting of a table with clearly defined points for levels of education, position supplements and work experience supplements, with tables for relevant categories, as well as a clear and limited set of rules and formulas for calculating supplements.

Integrity and anti-corruption measures for the civil service are formally established in the central administration and there is a comprehensive legal framework. The integrity policy encompasses the entire public service and the policy contains clear objectives (Mojsovski, A., Karai, J., 2021).

1. Reporting on public service employees

The competence of the MISA in establishing and maintaining a single Register of employees in public sector institutions is stipulated in the LPSE. The Register is created by filling in the Human Resources Management Information System (HRMIS) which contains the following data: name, date of birth, gender, incumbent position, education and termination of employment. Regarding the public service positions held, the HRMIS has the functionality to keep track of previous employees' jobs. Historical data relating to previous jobs are partially kept, given that the system has been established and maintained at the MISA since 2016. This system contains a module for the calculation of salaries and bonuses, which is actively used by 27 public sector institutions (Mojsovski, A., Karai, J., 2021).

The HRMIS has the functionality for data entry relating to performance assessment results and disciplinary sanctions. However, although the system has various functionalities/modules, data have not been regularly entered and updated by the institutions. The 2019 Report offers detailed information regarding the ethnic and gender structure of employees and presents crosscutting data where possible, by type of institution. Data on the ethnic structure are also provided across the institutions of the central administration. However, these data are not fully segregated, considering that they are not ordered into rank and position.

The central HRMIS is still underperforming. While very robust and complete on paper, the database still lacks important information from various public bodies, despite the legal obligation to submit these data. Consequently, the Annual Report 2020 – Register of Public Employees is only partially based on the central HRMIS and is mainly statistical, not analytical, encompassing only limited dimensions (OECD, 2021).

The current use of a HRMIS shows that although data are collected by the institutions, there is not a data-driven culture in the construction of the HR strategy to date, either at central level or within the public bodies themselves (OECD, 2021).

Regarding the reporting on public service policy, the in-line institutions are the Agency for Administration (AA) and the MISA. In its Annual Report, the AA reports on the following key issues: recruitment (job announcements, selection procedures and exams); disciplinary procedures and decisions; corruption/integrity issues and measures. Furthermore, the Annual Report contains information regarding activities aimed at improving the work of the AA and measuring the service user satisfaction level, etc. On the other hand, according to the Law on Administrative Servants (LAS), the MISA reports on assessments and training. The MISA is responsible for the Register of Assessments and for providing generic training, according to the Annual Programme. However, the Annual Programme on generic training does not provide analytical data on delivered training (number of trained administrative servants, evaluation of the training, etc.), providing solely information relating to the topics, the manner of conducting the training, the categories of servants for whom training is intended, the time-period in which to conduct the training and the budget. Moreover, there is no Report regarding the implementation of the Annual Programme of Generic Training.

Although reporting relating to the public service is relatively comprehensive, there have been no publicly available reports regarding the entire public service policy for three consecutive years prior to the measurement, including for 2019. The reports do not include substantiated information concerning the quality and/or outcomes of the public service. Moreover, there is no institution, which reports on career development (promotions and demotions) and salaries. The reports in relation to career development should be delivered by the AA and data on salaries should be reported by the Ministry of Finance (Mojsovski, A., Karai, J., 2021). These issues have not been addressed in the latest amendments of LAS, published in ENER on 17.09.2021.

2. Employment in the public sector

The head of a public institution may fill a position in the administration by concluding a contract for employment on a fixed-term basis, on the grounds of: 1. replacement of a temporarily absent employee, who is absent for more than one month; 2. a temporarily increased workload; 3. seasonal work; 4. unpredictable short-term activities that occur during the performance of the predominant activity of the employer; 5. project work or 6. the creation of special positions/appointment of special advisors in the offices of the President of the Republic of North Macedonia, the Speaker of the Parliament, the Vice Speakers of the Parliament, the Prime Minister, the Deputy Prime Ministers, the Ministers and the Secretary General of the Government (Mojsovski, A., Karai, J., 2021).

As regards unpredictable short-term activities that occur during the performance of the predominant activity of the employer, for a duration of up to 30 days, the head of the institution will announce the need for employment through the Employment Agency, free of charge, by referring persons for employment from the records of unemployed persons, in accordance with the Labour Law. This can be done up to a maximum of twice a year and the number of persons employed in this manner cannot exceed 5% of the total number of employees in the institution (Mojsovski, A., Karai, J., 2021).

The maximum number of positions of special advisors permitted in the offices is as follows: Office of the President of the Republic of North Macedonia (five positions), Office of the Speaker of Parliament (five positions), Offices of the Vice Speakers (VS) of Parliament (one for each VS), Office of the Prime Minister (15), Offices of the Deputy Prime Ministers (three for each DPM), Offices of Ministers (three for ministries with over 100 employees, two for ministries with under 100 employees and one for each minister without a portfolio) and the Office of the Secretary General of the Government (three positions) (Mojsovski, A., Karai, J., 2021). The LPSE does not prescribe limitations on employment under items 1, 2, 3, 5 of Article 22 para. 1.

Nevertheless, the lack of limitation is reasonable in the case of item 1 since it refers to the replacement of temporarily absent employees. Additionally, Article 8 of the Law on Transformation into Regular Employment states that institutions must not hire persons to temporarily perform physical and/or intellectual work, who account for more than 1% of the total number of employees at the end of the previous year, i.e., more than three persons at institutions in which the total number of employees is less than 300 persons (Mojsovski, A., Karai, J., 2021).

However, the overall system is not transparent and does not provide for at least a 10% limitation. There is no single limit at administration level, only at institutional level, and the criteria allow this limit to change every year ("more than 1% of the total number of employees at the end of the previous year"). Finally, Article 9 of the Law on Transformation into Regular Employment, allows the authority to engage more people temporarily, as well as for longer periods, when approved by the Ministry of Finance (Mojsovski, A., Karai, J., 2021).

Employment under item 1 lasts until the expiration of the approved leave of the absent employee, and for a maximum of two years. Employment under items 2, 3 and 4 shall last as long as is required by the institution, and for a maximum period of one year. The employment referred to under item 5 shall last until the completion of the project and for a maximum of five years. Employment under item 6 shall last until the end of the term of office of the official to whose Office the employee has been assigned, therefore, the duration is limited, but exceeds the period of a year.

Under items 1, 2, 3, 5 and 6, the head of the institution publishes an announcement in accordance with the Labour Law or concludes a contract for the leasing/transfer of an employee with the agency for temporary employment. The private employment agency is not allowed to lease/transfer a worker to perform the same tasks with the same employer for more than two years, with or without interruption. The LPSE (Article 22) stipulates that the duration of the contract for the assignment of employees to perform the same temporary works may be concluded for the required period, but not longer than a year. Regarding employment under item 4, for a period of up to 30 days, the head of the institution will inform the service responsible for mediation in employment (Employment Agency) of the need for employment, free of charge, by referring persons for employment from the records of unemployed persons, in accordance with the Labour Law. This can be done up to a maximum of twice a year and the number of persons employed in this manner cannot exceed 5% of the total number of employees at the institution (Mojsovski, A., Karai, J., 2021).

Recruitment in the public sector is carried out by publishing an announcement and, using a transparent, fair and competitive selection procedure, the most professional and competent candidate for the job will be selected. Article 17, para. 2 of the LPSE stipulates that the document on the systematization of jobs determines the general and special conditions relating to the job and provides a description of duties and tasks for each job position (Mojsovski, A., Karai, J., 2021).

Regarding temporary employment on the grounds referred to in items 1, 2, 3, 5 and 6, the head of the institution shall publish an announcement in accordance with the general regulations for employment or shall conclude an agreement with the agency for temporary employment to engage an employee through the agency.

The utilization of agencies for temporary employments, although legalized under the LPSE, can be assessed as a deviation from the LPSE, since the employees are not obliged to meet any criteria and enter the public service without any announcement, which is a breach of the merit-based principle.

There are no references to the merit-based criteria for temporary engagement. In terms of temporary engagement specifically through agencies, no evidence has been found to suggest that agencies apply certain criteria. Documents on the systematization of jobs and special laws make provision for criteria relating to the employment of administrative servants on a permanent basis, but no evidence has been found that the same conditions are applied to temporary employment.

The procedure by which private employment agencies are used, is performed without publishing announcements. The assignment of workers to perform temporary work is conducted based on a contract for the assignment of a worker and concluded by a private employment agency with a license for temporary employment and constituting an employer-beneficiary, which can be assessed as a deviation (Mojsovski, A., Karai, J., 2021). In the recently published amendments to the LPSE on ENER, MISA has announced several changes to the Law regarding temporary employment, to overcome the shortcomings in the current Law, such as the ban on the use of private employment agencies (Draft Law on Public Sector Employees, 2021).

The lack of clearly defined goals and competencies within the Human Resources Management Network, especially the restriction of the activity of administrative employees alone and the slow "revival" of its function, is envisaged to be resolved by establishing a sound internal structure and/or appointing adequately trained administrative servants for efficient human resources management. This issue is also expected to be addressed by establishing a network of units for Human Resources Management (HRM) in public sector institutions and in the Council for coordination of the network (Draft Law on Public Sector Employees, 2021).

Other proposals, which are assumed will improve the current functioning of public sector institutions are the limitation of the number of designated posts in the systematization acts and their compatibility with previously prepared functional analysis.(Draft Law on Public Sector Employees, 2021) To date, there have been frequent changes to the internal organizational acts, and it has been proposed that changes be permitted just once quarterly, if the functional analysis does not suggest any changes (Draft Law on Public Sector Employees, 2021).

As previously mentioned, one of the shortcomings also assessed as a deviation from the LPSE is the absence of limitations and the overall employment procedure for temporary employments via agencies for temporary employment. Consequently, this has been misused and instead of permanent employment, temporary employment has been used even for the recruitment of managerial positions, which is a notorious breach of the law. In that regard, the latest proposal envisages precise limitations on temporary employment, therefore, it will not be possible to recruit staff via agencies in cases of temporary employment (Draft Law on Public Sector Employees, 2021).

Moreover, the current LPSE does not have a focal point for publishing announcements relating to public sector employment, which renders the procedure ununified since there are differences in the content of public announcements even for the same type of institutions. In addition, it is impossible to follow up on the procedure for publishing announcements (which institution is responsible for certain announcements, the number of announcements and the number of posts for which the announcement is being published), etc (Draft Law on Public Sector Employees, 2021).

Currently, there is inconsistency regarding the rights and obligations of the cabinet servants/advisors, who are administrative servants and the special advisors who are employed outside the administration, both of whom carry out the same or similar functions. This creates a legal gap in their status since there is no job description, and their position in the organizational structure is not specified precisely. This leads to difficulties in terms of coordination and collaboration with the state secretaries and employees in the institution (Draft Law on Public Sector Employees, 2021).

3. Procedure for the recruitment of administrative servants

Regarding the procedure for the recruitment of administrative servants pursuant to the LAS, the public announcements are published on the website of the AA, as well as in at least three daily newspapers, one of which is a newspaper published in the language spoken by at least 20% of citizens, who speak an official language other than the Macedonian language. The newspapers in which the announcement is published are selected, depending on the institution that has submitted the request for publication. The deadline for applying for the announced positions is between 15 and 20 days from the date of publication in the daily newspapers. Internet portals also re-publish announcements, namely, they copy them from the AA site (Mojsovski, A., Karai, J., 2021). However, the publication of announcements in newspapers is a financial burden for institutions with a small budget (the costs of publishing an announcement in the daily newspapers is around EUR 1,500), especially with regard to advertising numerous positions (Mojsovski, A., Karai, J., 2021).

Internet portals also publish announcements by downloading ads from the AA website. Regarding the legal possibility/obligation of each institution to publish any announcements, the entire public sector has over 1,300 institutions, but 20% of them are not bound by preconditions for publication, as they do not have a website (e.g., kindergartens, nursing homes, small municipalities). However, in such cases, there is a possibility to publish announcements on their bulletin board (Mojsovski, A., Karai, J., 2021).

Public announcements are written using clear and understandable language, meaning they have stated the following: the institution which has the need for an employee; the sector within the specific institution to which the position relates and the specific position to be filled/announced; general conditions; specific conditions; general work competencies; specific work competencies; working hours and net salary. However, these announcements lack job descriptions (Mojsovski, A., Karai, J., 2021). At the end of each announcement, there is a clarification section, in which it is stated that the announcement is envisaged for a concrete ethnic community, according to the institutions' Annual Employment Plan. Furthermore, the application procedure is clarified, as well as the stages of selection (Mojsovski, A., Karai, J., 2021).

During the public competition procedure, clarification procedures are possible and are provided in practice, but replies are not made publicly available, except in the form of FAQ, which can be found on the AA website. In addition, information regarding the potential to send requests for clarification is not included in the announcements. There are often issues and ambiguities regarding the medical certificate – who issues it, the validity period, etc.; consequently, the candidates are unsure as to which type of medical certificate is required, resulting in different applicants submitting a different type of medical certificate.

However, the AA has taken the standpoint that it accepts the same certificate for several different job positions for which the applicant has applied; it is attached to the candidate's profile and is valid for a year. Interviewees believe that the issue of calculation of work experience should be regulated precisely, as well as the classification of jobs, since the data relating to the Employment Agency and the AA do not correlate (Mojsovski, A., Karai, J., 2021).

Moreover, during the administrative selection, if the AA establishes the need for submission of additional documents, it will notify the candidate by e-mail on his/her created profile and he/she must submit these on the day of the interview. The AA has pointed out that no questions remain unanswered (Mojsovski, A., Karai, J., 2021).

The mandatory requirements are set, such as: proof of citizenship; medical certificate; internationally recognized certificate of proficiency in one of the three most commonly used languages in the European Union (English, French, German); certificate/diploma indicating a completed degree of education; proof of an unspecified ban on involvement in a profession, activity or duty, etc. There are also optional documents which candidates can attach, such as recommendations from previous employers, certificates of training sessions attended, professional certificates proving other professional qualifications and specializations, papers and publications, an internationally recognized certificate of proficiency in one of the six official languages of the United Nations, etc. Having completed the application, applicants receive an identification code linking them with the results in the selection stages (Mojsovski, A., Karai, J., 2021).

The selection panel prepares a final ranking list of candidates, who have successfully passed the selection stages and announces this on the AA website within three days of the interviews, according to the points allocated for: administrative selection, the administrative servant exam and the interview, candidates, who have acquired a minimum of 60% of the total, i.e., the maximum number of

points in all previous stages of the selection procedure. The panel selects the best ranked applicant and proposes this applicant to the secretary/manager of the institution. The secretary (or manager of institutions, where no secretary has been appointed) decides on the selection within five days of receipt of the proposal (Mojsovski, A., Karai, J., 2021).

Therefore, the selection procedure is organized into three stages, however, more than five documents are requested to be attached to the online application (before the first stage - administrative selection procedure). Hence, the procedure is cumbersome at the beginning and discourages external candidates. The list of required documents, which should be submitted at an early stage should be revised and narrowed down, and only selected candidates should be obliged to provide the required documents (Mojsovski, A., Karai, J., 2021).

Furthermore, there is no possibility of supplementing the required obligatory documents; this is only possible in the case of documents that candidates may optionally attach with the online-application or documents required by the AA during the verification process of evidence reliability or at the interview stage. For instance, if the AA establishes the need for submission of additional documents, it notifies the candidate by e-mail on his/her created profile and he/she should submit these on the day of the interview (scheduled after the exam and within 10 days). At the interview, the candidate is obliged to bring all the documents that he/she has attached and possibly an additional document required by the AA for clarification purposes. If the candidate has attached a diploma/certificate to his/her profile and does not provide it on the day of the interview, he/she will be eliminated from the recruitment process (Mojsovski, A., Karai, J., 2021).

Decisions on appointments are available on the website of the AA. Details on the reasoning behind these decisions is not provided, except for a formal statement on the appointment, available on the AA website. The LAS only states the grounds for the annulment of public announcements but does not provide the reasoning behind the selection process or public availability. However, information regarding annulled announcements is made publicly available. If the announcement is stayed, the AA informs candidates on their profiles that the procedure has been stayed at the request of the institution (Mojsovski, A., Karai, J., 2021).

In the latest amendments to the LAS, published on ENER, the MISA has envisaged several proposals for overcoming the current shortcomings recognized by the stakeholders. One of these relates to the definition of the term 'overall work experience' in the profession, vis-à-vis 'recorded work experience' in the evidence relating to the Pension Insurance Fund. In practice, there are people who cannot apply for public announcements for administrative servants because they were engaged in projects or consultancy, etc. with no recorded evidence in the Pension Insurance Fund (Draft Law on Administrative Servants, 2021).

Moreover, one of the shortcomings is the number of state advisors vis-à-vis the areas of competence of the ministry, which is not properly regulated, since there are numerous state advisors for the same area of competence of the ministry. The suggestion is that these be limited (Draft Law on Administrative Servants, 2021). As previously mentioned, there is inconsistency regarding the rights and obligations of cabinet advisors and special advisors, bearing in mind that they are regulated differently by two separate laws (Draft Law on Public Sector Employees, 2021).

One of the shortcomings of the current laws is that it is impossible to take the exam for an administrative servant position before the announcement is published. Furthermore, the procedure for the initiation and repetition of the public announcement is rather unclear (Draft Law on Administra-

tive Servants, 2021). The exam for administrative management is a precondition for employment or promotion, which complicates the procedure and does not ensure that the candidates have additional qualifications and/or competencies (Draft Law on Administrative Servants, 2021).

The legislative framework of recruitment has not evolved much over the last four years. A small adaptation was made to the eligibility criteria to define the former generic formulation "to be in general good health", so as to correct this minor weakness. One remaining issue is the flaw in the Acts of Systematisation, as the MISA exerts weak, yet effective control over the content of the acts. The system can be abused by including eligibility criteria in job descriptions, tailor-made to benefit a specific candidate. In practice, a public body can apply different academic background or work experience requirements for the same job (OECD, 2021).

4. Access to senior civil service positions

The principle of merit is included in the civil service legislation as a criterion for access to senior civil service positions. According to the LAS, the senior civil servant, who is an administrative servant of category B, i.e., B4 - head of unit, shall be appointed by the minister/head of the institution/mayor. He/she should meet the special conditions for the job position of head administrative servant of level B4. Hence, he/she enters the civil service on the principle of merit. However, the system is only based on merit to a certain extent with regard to senior civil servants, still being highly discretionary: the sole condition for an individual to be appointed as a state secretary or secretary general of an institution is to hold a job position at B4 level (Mojsovski, A., Karai, J., 2021).

The secretary, who is an administrative servant under category B, i.e., a managerial employee, is appointed by the minister and he/she should meet the special conditions for the job position of head administrative servant of level B4. The civil service legislation contains unobjective criteria for the termination of employment of senior civil servants, namely, their term of office expires along with the term of the appointing political authority. After the expiry thereof, he/she shall be assigned to a job position at a level equal to the job position he/she held prior to his/her appointment as a senior civil servant (Mojsovski, A., Karai, J., 2021).

The discretionary appointment and dismissal of senior managers remains the weakest area. Based on the LAS or on the sector legislation, even if there are formal public calls for some agencies, the entire system of senior managerial positions is not competitive or merit-based. The Government is preparing a Law on Top Management Service (LTMS) to overhaul the system (OECD, 2021).

Vacancies have been filled with a similar level of effectiveness over the last few years: 65.10% in 2018, 67.68% in 2019 and 63.15% in 2020. Considering the pandemic situation, the 2020 score is reassuring. However, the small number of eligible candidates and the fact that in recent years, around 35% of the vacancies were not filled by the end of the recruitment process, are considerable weak points. Key positions remain unoccupied for long periods. The attractiveness of the civil service is low, even though salaries appear to be competitive, according to official statistics (OECD, 2021).

In Macedonian legislation there is no clear distinction between political and professional levels in the administration, i.e., the scope for the senior management service is not clearly defined and determined, although LAS has made the first step towards professionalization of the executive managers in the administrative service, by including them in the highest category "A" (state, general secretaries and secretaries in the municipalities and the City of Skopje) (Mojsovski, A., Karai, J., 2021). However, general and specific conditions are regulated by LAS, but the same conditions regarding the directors in the state administrative bodies are regulated by separate laws (Mojsovski, A., Karai, J., 2021), hence, the necessity for a single law, which will enshrine the rules for the senior civil service. The general conditions for the appointment and dismissal of persons, which will be covered by the forthcoming Law on Senior Civil Servants are currently regulated by special substantive laws for specific areas of the public sector. These laws contain insufficient regulation (usually only provisions for publishing a public announcement and general conditions) and do not provide for the criteria, the selection procedure and the selection of candidates for managerial positions. It is evident that there are no clear rules regarding the appointment and dismissal of directors and secretaries or open competition for most of these positions, which violates the principle of merit (Mojsovski, A., Karai, J., 2021). The main objective for establishing a senior civil service is to differentiate the political from the professional level and to establish the lines of accountability of senior managers, which will lead to the promotion of public services and will strengthen good governance as an immanent principle of public administration. Senior managers will be employed through a system of merits and public announcement procedures, in an open competition available to all citizens with higher education. Each senior manager will be elected through an individualized procedure (Draft Law on Senior Civil Service, 2019). The initiative for filling the position of senior civil servant will be the responsibility of the minister, i.e., the body of the government that is responsible for the management and monitoring of the service or the body in which the managerial position is foreseen. The initiator will give a description of the responsibilities and duties of that position. The senior management service will have a specific legal status, separate and different from LAS and the new law will replace the provisions of special laws, in which the legislator only partially regulates the procedure and conditions for the appointment of managerial functions (Draft Law on Senior Civil Service, 2019).

5. The salary system of administrative servants

According to LAS, the salary of an administrative servant is composed of a basic and an extraordinary component. It also provides for a clear structure of basic salary components, with tables for relevant categories. The salary components are expressed in points and there is a method of determination of the point value. The salary of an administrative servant is composed of a general and an extraordinary component. The general salary components consist of one element relating to the level of education and another element concerning the position supplement and work experience supplement, with tables for relevant categories (Mojsovski, A., Karai, J., 2021). The extraordinary component comprises a salary supplement for special working conditions, a salary supplement due to adjustment to the labour market and/or a salary supplement for night-time work, shift work and overtime (Mojsovski, A., Karai, J., 2021).

The salary components are expressed in points, and Article 88 envisages the manner in which the value of a point is determined. The value of the point for the calculation of the salaries of civil servants is determined each year, based on a Government decision, adopted by the proposal of the Minister of Finance, which is implemented within 10 days of the announcement of the budget. The Government decision on the value of the point for the purposes of calculation of the salary of civil servants is a publicly available document, published in the Official Gazette (Draft Law on Senior Civil Service, 2019).

The LAS clearly defines and limits the number of supplements for special working conditions to two types: high-risk jobs and working in the office of an appointed/elected official. It vaguely defines the conditions under which a labour market adjustment supplement can be requested. It does not set an upper limit and partially regulates the conditions, bearing in mind that part of Article 91 (para. 3) has been annulled by the Constitutional Court, and para. 2 refers to the annulled para. 3, which remains in the Law, an oversight that should be corrected when the next amendments to the LAS are made (Draft Law on Senior Civil Service, 2019).

There are also five additional types of supplements: for night-time work; shift work; weekend work; work on public holidays and overtime. The LAS sets out the rules for awarding these supplements and their upper limit. These supplements are not mutually exclusive, which is not a shortcoming, considering that these supplements are cumulative, (e.g., an employee could be carrying out shift work over a weekend and on a public holiday). The lack of an upper limit for the labour market adjustment supplement justifies the rationale for awarding one point (Draft Law on Senior Civil Service, 2019).

Public announcements contain information regarding the salary of each announced job post. Job announcements on websites contain information about the net salary, and this is also the case concerning job announcement samples received from the Agency of Administration for the period from 1 January to 31 December 2019 (Draft Law on Senior Civil Service, 2019).

An administrative servant who has been awarded an annual "A" grade for performance shall be awarded a bonus for his/her success, based on the amount of salary that he/she received in the last month of the year in which the evaluation took place, provided that the budget of the institution has funds allocated for such purpose (Draft Law on Senior Civil Service, 2019).

The remuneration system is assessed as being simply structured, as it consists of a table with clearly defined points for levels of education, position supplements and work experience supplement, with tables for relevant categories, as well as a clear and limited set of rules and formulas for calculating supplements (salary supplement for special working conditions; salary supplement due to an adjustment to the labour market and/or salary supplement for night-time work, shift work and overtime), expressed as a percentage of the basic salary (Draft Law on Senior Civil Service, 2019).

However, the amendments of LAS, which are published on ENER, envisage certain changes to the alignment of the salary system and to the Law relating to the minimum wage, as well as a regulation of the supplements of salaries, due to the retention of staff in an area where there are staff shortages or high dropout rates (Mojsovski, A., Karai, J., 2021).

The remuneration system is rational, based on job classification and has reasonable seniority progression and limited performance-related bonuses. However, the very basic job classification system does not properly differentiate the levels of responsibility, creating opportunities for unfair remuneration differences. Additionally, several salary supplements, linked to vague criteria, have been created to benefit certain public bodies and groups of staff. Salaries are not sufficiently transparent (OECD, 2021).

6. Integrity and anti-corruption measures for the civil service

Integrity and anti-corruption measures for the civil service are formally established in the central administration under the Law on the Prevention of Corruption and Conflict of Interest (LPCCI), the Law on the Protection of Whistle Blowers, the LAS, the Ethical Code for Administrative Servants, as well as the Criminal Code. The scope of the integrity policy covers the entire public service, and the policy contains clear objectives, based on the analysis of the current situation under the LPCCI. A new National Strategy for the Prevention of Corruption and Conflict of Interest was adopted in 2021, its predecessor having expired in 2019 (State Commission for Prevention of Corruption, 2020). Furthermore, there has been a vacuum period until the election of the new members of the SCPC (Mojsovski, A., Karai, J., 2021).

The State Commission for the Prevention of Corruption (SCPC) is a strong integrity body, focusing on the political authorities (OECD, 2021). There is no integrity policy for the civil service, and the MISA is not involved in this area. According to the Balkan Barometer survey, bribery in the public sector remains widespread compared to other countries in the region (OECD, 2021).

Conclusions and recommendations

In North Macedonia, the public must be informed of official data and reports on the civil service and employees in the central state administration. This is a legal obligation deriving from the LAS and the LPSE. Within the context of properly designing and implementing a HRM policy, it is of utmost importance that in-line authorities possess complete and reliable data regarding their human resources (Mojsovski, A., Karai, J., 2021). This does not mean that all HRM information should be made publicly available, since there are certain types of information that may not be provided publicly, such as personal data. However, the lack of effort relating to the promotion and dissemination of data on the civil service may suggest that governments either do not recognize the importance of accountability or they are concerned about the potential public reaction to what can be seen as oversized and inadequately efficient administrations.

A modern civil service must be governed by specific, codified rules, which set standards and procedures to ensure that the civil service remains merit-based and apolitical, while guaranteeing the integrity and accountability of civil servants, as well as job security, with a view to protecting them from politically motivated dismissals (Mojsovski, A., Karai, J., 2021).

Announcements relating to employment vacancies should publish details of a contact person, responsible for dealing with clarification issues regarding the vacancy, the language of announcements should be more citizen friendly, any excessive administrative or financial burdens on candidates should be avoided and comprehensive reasoning as to why a certain candidate has or has not been selected, must be provided; The number of temporary engagements should be limited by law, their usage should be revised and the Law on Senior Civil Service should be adopted.

The MISA should continuously provide data on temporary employments, which should be contained in the Report on Public Employees, and qualitative and comparative data that should be contained in reports must be developed in accordance with the LAS. The MISA should also publish reports on the career development (promotions and demotions) of public sector employees.

The MISA should, in short term, provide a clear definition of the conditions under which labour market adjustment supplements can be requested, bearing in mind that part of the article (para. 3) has been annulled by the Constitutional Court, and para. 2 refers to the annulled para. 3, which still remains in the LAS; the MISA and SCPC should continuously analyse and monitor the effectiveness of integrity and anticorruption measures.

Bibliography

Draft Law on Senior Civil Service [Закон за висока раководавна служба], Ministry of Information Society and Administration (2019). https://ener.gov.mk/Default.aspx?item=pub_regulation&subitem=view_reg_detail&itemid=51541

Draft Law on Administrative Servants [Предлог Закон за административни службеници], Ministry of Information Society and Administration (2021). https://ener.gov.mk/Default.aspx?item=pub_regulation&subitem=view_reg_detail&itemid=60140

Draft Law on Public Sector Employees [Предлог закон за вработени во јавниот сектор], Ministry of Information Society and Administration (2021). https://ener.gov.mk/Default.aspx?item=pub_regulation&subitem=view_reg_detail&itemid=60142

Mojsovski, A., Karai, J. (2021). National PAR Monitor for North Macedonia 2019/2020. European Policy Institute (EPI) – Skopje. https://epi.org.mk/wp-content/uploads/National-Par-Monitor-Macedonia_Final_eng.pdf

OECD. (2021). Sigma—The principles of Public Administration Republic of North Macedonia. https://www.sigmaweb.org/publications/Monitoring-Report-2021-Republic-of-North-Macedonia.pdf

State Commission for Prevention of Corruption. (2020). National strategy for preventing corruption and conflict of interest 2021—2025 [Национална стратегија за спречување на корупцијата и судирот на интереси 2021-2025]. State Commission for Prevention of Corruption. https://dksk.mk/wp-content/uploads/2021/01/Nacionalna-strategija-DKSK-KONECNA.pdf

NOT THERE YET: POSITIVE ACTION IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE EUROPEAN COURT OF JUSTICE

Biljana Kotevska

Abstract

This article examines the European Court of Human Rights and the European Court of Justice case law on positive action. It revisits the development milestones and the current state of affairs on the approaches of the two Courts on this matter. The article highlights the unsettled jurisprudence of both Courts and finds that the ECtHR has been slow, and the ECJ reluctant, to embrace and adjudicate on positive action. It also finds that the jurisprudence and the relationship between the two Courts has the potential for collaborative learning and mutual growth, while preserving the specificities of the two systems. However, the much-needed push for this is prevented by the current impasse at the European Union level, including the drought in producing further equality legislation.

Key words

positive action, European Court of Human Rights, European Court of Justice

Contact

Dr. Biljana Kotevska
Senior Fellow, European Policy Institute – Skopje, Skopje
✉ kotevska.biljana@gmail.com

Introduction

Positive action is a key issue of importance for the substantive pursuit of equality. This article[1] revisits the approaches to positive action of the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ), focusing on case law analysis to identify developmental milestones and the current state of affairs. An analysis of the case law of the two Courts shows that the ECtHR has been slow and the ECJ reluctant to embrace and adjudicate on positive action. Further, this article argues that the jurisprudence and the relationship of the two Courts has the potential for a collaborative learning and mutual growth, while preserving the specificities of the two systems.

Based on a critical reading of the existing literature,[2] the author defined positive action as 'undertaking well-timed measures of a temporary nature on grounds of, or related to, one or more protected characteristics or statuses, in order to address an issue or achieve a goal related to any of the four dimensions of substantive equality – redistribution, recognition, participation and transformation'.[3] This definition is the backbone for the analysis of the case law presented in this article.

In order to analyse positive action, contextualization markers and existing taxonomy of positive action can be useful. On both points the work of Christopher McCrudden stands out as highly relevant. McCrudden identifies six contexts in which positive actions arise. These are: helping to prevent current discrimination and addressing stereotyping; compensation for past discrimination; egalitarian/redistributive arguments; identity and recognition; diversity; social cohesion.[4] These markers can be used to detail the historical background of the positive action, which is of value for the historical institutionalism aspect of the present research. The other useful tool is a taxonomy of such actions. McCrudden proposes the following: activity preventing and remedying direct discrimination; activity taken proactively to remove indirect discrimination, systemic and institutional discrimination; reasonable accommodation measures; indirectly inclusionary measures; targeted advertising and training; tie-break policies; preferential treatment; redefining merit.[5] This very broad conceptualization enables a wide net to be cast when collecting data. Throughout time, the historical context shapes the design and aim of the undertaken positive actions. Their implementation largely depends on wider societal support, the specific efforts vested in the implementation and the diligence with which they are followed through.

Positive action is particularly important for the most vulnerable. This is well exemplified in Koldinska's research on addressing multiple inequalities in the case of Romani women in the Czech Republic. She found that legal instruments need to be supported by proactive measures because a legal set-up grounded only in an individual complaints-led model cannot produce results for Romani women.[6] Positive

1 The article was originally presented at the conference 'Human Rights in a Changing Europe – Colliding Spheres of Justice?' at Queen's University Belfast (15 June 2018, Belfast, United Kingdom). Sections 2 and 3 contain parts from the author's unpublished LL.M. thesis 'Principle of Equality in the Jurisprudence of the European Court of Human Rights and the European Court of Justice: Focus on Substantive Equality"' (University of Essex, 2012).

2 Marc Bossyut, 'Comprehensive Examination of Thematic Issues Relating to the Elimination of Racial Discrimination: The Concept and Practice of Affirmative Action' in Joshua Castellino (ed), *Global Minority Rights* (Ashgate 2011) 351.; Kristin Henrard, 'Non-Discrimination and Full and Effective Equality' in Marc Weller (ed), *Universal Minority Rights* (OUP 2007) 129.; Sandra Fredman, *Discrimination Law* (2nd ed, OUP 2011).; Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015) 68; Christopher McCrudden, 'A Comparative Taxonomy of "Positive Action" and "Affirmative Action" Policies' in Reiner Schulze (ed), *Non-Discrimination in European Private Law* (Mohr Siebeck 2011).

3 Biljana Kotevska, 'Equality and Non-Discrimination in the Post-Yugoslav Space: Intersectionality under Law in Croatia, Macedonia and Slovenia' (PhD Thesis, School of Law, Queen's University Belfast 2020).

4 McCrudden, 'A Comparative Taxonomy of "Positive Action" and "Affirmative Action" Policies' (n 2).

5 Ibid.

6 Kristina Koldinska, 'EU Non-Discrimination Law and Policies in Reaction to Intersectional Discrimination against Roma Women in Central and Eastern Europe' in Dagmar Schiek and Anna Lawson (eds), *European Union Non-Discrimination Law and Intersectionality* (Ashgate 2011) 256.

action is, thus, also important because of its potential to contribute to addressing intersectional inequalities[7] beyond such an individual complaints-led model.[8] For this reason, it is of utmost importance for the Macedonian national context.

Contrary to the United Nations (UN) Committee on the Elimination of Discrimination against Women (CEDAW) (Article 4) and Convention on the Rights of Persons with Disabilities (CRPD) (Article 6), which both require positive action, European Union (EU) law only permits rather than requires such action.[9] If the principle of proportionality is observed,[10] undertaking positive action on one or more grounds, including for groups suffering intersectional discrimination, will most probably be considered in accordance with EU law.[11] European Convention of Human Rights (ECHR) law relies on single provisions outlawing discrimination on an open-ended list of grounds and, as such, does not specifically regulate positive action. In order to ascertain the status of positive action in ECHR law, one must look at the case law of the ECtHR, which is in the focus of the next section of this article.

Methodologically, the present article presents an exploratory case study of positive action under the jurisprudence of the ECtHR and the ECJ. It has been treated as a case study in the sense of a 'well-defined aspect of a historical episode that the investigator selects for analysis, rather than a historic event itself.'[12] According to George and Bennett, this method includes both within-case analysis of a single case and comparisons of small number of cases.[13] It has been treated as an exploratory study as it does not aim to test a hypothesis, but to take a very broad look at the phenomenon of interest.[14] The contribution of this research is towards enhancing understanding and knowledge of the law[15] by clarifying the understanding and the treatment of positive action under the ECtHR and the ECJ. All data were collected via desk research. Data analysis was conducted through interpreting

7 Sandra Fredman, 'Positive Rights and Positive Duties: Addressing Intersectionality' in Dagmar Schiek and Victoria Chege (eds), *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (Routledge-Cavendish 2009) 84; Koldinska (n 6).

8 Sandra Fredman, *Making Equality Effective: The Role of Proactive Measures* (European Commission 2009).

9 Council Directive 2000/43/EC Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin 2000 Art. 5; Council Directive 2000/78/EC Establishing a General Framework for Equal Treatment in Employment and Occupation 2000 Art. 7; Council Directive 2004/113/EC Implementing the Principle of Equal Treatment between Men and Women in the Access to and Supply of Goods and Services 2004 Art. 6; Directive 2006/54/EC of the European Parliament and of the Council on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast) 2006 Art. 3. Also 'The Charter of Fundamental Rights of the European Union' (2000) C OJ 1, Art. 23; Treaty on the Functioning of the European Union (OJ C 326) Art. 157.

10 Ruth Nielsen, 'Is EU Equality Law Capable of Addressing Multiple and Intersectional Discrimination Yet?' in Dagmar Schiek and Victoria Chege (eds), European Union Non-Discrimination Law: *Comparative Perspectives on Multidimensional Equality Law* (Routledge-Cavendish 2009) 45.

11 Ibid.

12 Alexander L George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (MIT Press 2005) 18.

13 Ibid.

14 Gary D Bouma and GBJ Atkinson, A Handbook of Social Science Research – *A Comprehensive and Practical Guide for Students* (OUP 1995) 110.

15 Gerhard Dannemann, 'Comparative Law: Study of Similarities or Differences?' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 405.at least to some degree, exploring both similarities and differences. For some writers, this forms part of the definition of comparative law. Some comparative lawyers have generally emphasized differences, while others see similarities, particularly in problems and their results, and a third group has sought to strike a balance between observing and analysing similarities and differences. Drawing on a debate in comparative history, this article argues that the proper balance between looking for similarities and for differences depends on the purpose of the comparative enquiry. Furthermore, it links the issue of difference or similarity to the various steps which are involved in a comparative legal enquiry, suggesting that some steps require more focus on similarity, others on difference, and many call for a balance of both.","container-title":"The Oxford Handbook of Comparative Law","ISBN":"978-0-19-929606-4","language":"en","page":"382-420","publisher":"OUP","source":"DOI.org (Crossref

documents and a qualitative content analysis, which enabled context preservation while elucidating the author's perspective on the meaning of the texts.[16] An additional layer of a cross-case analysis was added, meaning that an explanation is given 'for each case singly and knowing the acceptable levels of modifications in the original explanation as new cases are identified'.[17] This approach enhanced the potential generalizability of the research, but also left room for comparison with other cases;[18] it reduced the possibility of conceptual overstretching, which is a danger in comparative legal studies.[19]

The article addresses the ECtHR and the ECJ in an identical manner. It first discusses the law on which the two Courts are directly bound to adjudicate, followed by an analysis of the case law. There then follows a section comparing the approaches of the two Courts, before closing with concluding remarks.

1. Positive action in the case law of the ECtHR

This section presents the findings from the analysis of the case law of the ECtHR. It first considers the legal framework and the ECtHR approach to adjudication, then presents analysis of the ECtHR positive action case law.

1.1. Legal framework and approach to adjudication

The ECHR provisions of relevance for the discussion herein are Article 14 and Article 1 Protocol 12.[20] Article 14 prohibits discrimination on any ground in relation to the enjoyment of Convention[21] rights. Its function is tied to the other substantive provisions, so it has no independent existence.[22] It is an autonomous provision (its application does not presuppose a breach of a Convention right) and a parasitic provision (meaning it can only be applied in cases of discrimination related to a 'Convention

16 Alan Bryman, *Social Research Methods* (4th edition, OUP 2012) 560–561.

17 Tim May, Social Research (4th edn, OUP 2011) 236.

18 Ibid.

19 Dannemann (n 15).at least to some degree, exploring both similarities and differences. For some writers, this forms part of the definition of comparative law. Some comparative lawyers have generally emphasized differences, while others see similarities, particularly in problems and their results, and a third group has sought to strike a balance between observing and analysing similarities and differences. Drawing on a debate in comparative history, this article argues that the proper balance between looking for similarities and for differences depends on the purpose of the comparative enquiry. Furthermore, it links the issue of difference or similarity to the various steps which are involved in a comparative legal enquiry, suggesting that some steps require more focus on similarity, others on difference, and many call for a balance of both.","container-title":"The Oxford Handbook of Comparative Law","ISBN":"978-0-19-929606-4","language":"en","page":"382-420","publisher":"OUP","source":"DOI.org (Crossref

20 Article 5 of Protocol 7 is also an equality provision and deals with a very specific type of equality (equality of rights between spouses during and after marriage, re. children and property). No case law exists yet on this provision. Source: P van Dijk and others, *Theory and Practice of the European Convention on Human Rights* (Fifth edition, Intersentia 2018) 991–995.

21 Under the Convention rights, it is meant the text of the ECHR and its First, Fourth, Sixth and Seventh Protocol. Source: Article 14 of ECHR, Article 5 of Protocol 1, Article 6(1) of Protocol 4, Article 6 of Protocol 6, and Article 7 of Protocol 7.

22 *Abdulaziz, Cabales and Balkandali v the United Kingdom* (1985) 7 EHRR 471, para.71.

right').[23] Article 14 has been applied in various fields, provided that it falls 'within the ambit' of a Convention right.[24]

Protocol 12 was adopted to address the shortcomings of Article 14.[25] It introduced in Article 1 a general prohibition of discrimination of 'any right set forth by [national][26] law',[27] and a prohibition of discrimination by a public authority on any ground.[28] It is considered as an additional article to the Convention,[29] so it does not substitute Article 14, nor vice versa. It also does not extend the State's positive obligations to an extent that will require States 'to prevent or remedy all instances of discrimination in relations between private persons [...] [P]urely private matters would not be affected. Regulation of such matters would also be likely to [raise Article 8 issues].'[30]

Article 14 of the ECHR is an extremely powerful provision. With fewer than 50 words, it serves as the ground on which the entire equality and non-discrimination case law of the ECtHR was developed, and has served as an inspiration for the equality provisions in the constitutions of several European countries, such as the post-socialist countries. This means that the legal framework under which the ECtHR operates is quite general. It does not discuss forms of discrimination, issues such as burden of proof, or positive obligations of States, nor does it close the list of protected grounds. Article 14 is proof that a general provision on equality can serve as ground for developing a full and complex body of equality jurisprudence, and that a general provision on its own does not necessarily limit and disable the potential for the development of jurisprudence.

The ECtHR jurisprudence in relation to equality and non-discrimination has developed slowly. According to the ECtHR, 'discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations.'[31] It employs a four-part test,[32] which was first laid out in the *Belgian Linguistic*[33] and *Marckx*[34] cases. A clear outline of the test and the ECtHR's methodology can be found in *Rasmussen.*[35] In summary, the Court posed the following questions as cumulative[36] criteria: do the facts of the case fall within the ambit of one or more of the other ECHR

23 Ibid., para.71. It should be noted here, however, that it took the Court sometime to arrive at this position. It was troubled for some time with the challenge of how tied should the issue arising under Article 14 and a Convention right be, as well as whether there should be a violation of the Convention right in order for a violation under Article 14 to arise. For more, see chapters on discrimination in: Bernadette Rainey, Elizabeth Wicks and Clare Ovey, Jacobs, White and Ovey: *The European Convention on Human Rights* (Eighth edition, Oxford University Press 2021); DJ Harris and others, Harris, O'Boyle & Warbrick: *Law of the European Convention on Human Rights* (Fourth edition, Oxford University Press 2018); Philip Leach, *Taking a Case to the European Court of Human Rights* (Fourth edition, Oxford University Press 2017); Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights* (Sixth edition, Thomson Reuters/Sweet & Maxwell 2019).

24 Leach (n 23) 401.

25 It came into force in 2005 and is signed by 37 and ratified by 20 countries. Source: Chart of signatures and ratifications of Treaty 177: Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 177) - Status as of 12/09/2022, available at https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=177 .

26 Explanatory Report: Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (2000), para.22.

27 Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 177), Art 1(1).

28 Ibid., Art 1(2).

29 Ibid., Art 3.

30 Explanatory Report (n26) paras. 25, 28.

31 *Willis v the United Kingdom* (2002) 35 EHRR 21, para.48.

32 The test is considered by some authors to be too technical. See: Harris and others (n 23).

33 Case *"Relating To Certain Aspects Of the Laws On the Use Of Languages In Education In Belgium" v Belgium* (1979-80) 1 EHRR 252

34 *Marckx v Belgium* (1979) 2 EHRR 330

35 Harris and others (n 23).

36 Dijk and others (n 20).

substantive provisions; was there a difference of treatment; was it an analogous situation; did the difference of treatment have an objective and reasonable justification.[37] However, as noted by Arnardóttir, it needs to be considered that this test is not uniformly applied, which makes its content rather unclear.[38] Variations of the test have remained in jurisprudence.

The 'within the ambit' requirement, which considers how tied Article 14 should be to Convention rights, would, according to O'Connell, normally not be 'an issue which divides formal and substantive theories of equality.[39] However, given the content of the ECHR, it becomes more challenging. 'Within the ambit' is a significant restriction[40] because the ECHR primarily focuses on civil and political rights, while discrimination is often experienced in relation to social and economic matters.[41] Thus, it is important for the ECtHR to stay open to the possibility of extending the ambit of the rights included in a manner that will enable it to address cases of discrimination. Very rarely has an application been denied because of non-applicability of another substantive provision *(Botta[42]).*[43] The ECtHR deliberated on the 'ambit' issue in the *Belgian Linguistics* case. It stated that if a State provides for a right which is not directly established under the ECHR (and goes well beyond it), it must do so in a non-discriminatory manner.[44] It cited the famous Article 6 example: although the ECHR does not require that States institute a system of appeal courts, a State which does set up such courts consequently goes beyond its obligations under Article 6, but will violate Article 14 if it 'debar[s] certain persons from these remedies without a legitimate reason while making them available to others in respect of the same type of actions.'[45]

O'Connell[46] and others note that the scope of the ambit has been gradually extended beyond issues which seem like 'Convention rights'. *Gaygasuz,*[47] *Stec*[48] and *Carson*[49] are examples of cases that confirm this tendency. In these cases, the ECtHR has extended the ambit to include social rights, such as welfare payments, including non-contributory ones and demanded that if such payments are made, they should be made in a non-discriminatory manner.[50] However, the requirement remains and a case will be turned down as manifestly ill-founded if it fails to specify a relevant substantive right.[51]

The requirement of a comparator, revealed through the comparable/analogous/similar situation test,[52] is also problematic. The approach of the ECtHR to this issue is not clear and not well established.[53] For example, in the *Belgian Linguistics* case, after considering the difference between

37 Rasmussen v Denmark (1984) 7 EHRR 371, paras. 29-42
38 For discussions on the different applications of the test, see: Oddný Mjöll Arnardóttir, *Equality and Non-Discrimination under the European Convention on Human Rights* (MNP 2003) 16.
39 Rory O'Connell, 'Cinderella Comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR' (2009) 29 Legal Studies 211, 215.
40 Harris and others (n 23) 580.
41 O'Connell (n 39) 216.
42 Botta v Italy (1998) 26 EHRR 241.
43 Dijk and others (n 20) 1031.
44 Harris and others (n 23) 581.
45 Case *"Relating To Certain Aspects Of the Laws On the Use Of Languages In Education In Belgium" v Belgium* (1979-80) 1 EHRR 252, para.9.
46 O'Connell (n 39) 216.
47 *Gaygusuz v Austria* (1997) 23 EHRR 364.
48 *Stec v the United Kingdom* (2006) 43 EHRR 47.
49 *Carson v the United Kingdom* (2010) 51 EHRR 13.
50 *Stec v the United Kingdom* (2006) 43 EHRR 47.
51 O'Connell (n 39) 217.
52 *Van der Mussele v Belgium* (1984) 6 EHRR 163; *Marckx v Belgium* (1979) 2 EHRR 330; *Larkos v Cyprus* (1999) 30 EHRR 597, as cited in: Reid, 366.
53 Frédéric Edel, *The Prohibition of Discrimination under the European Convention on Human Rights* (Council of Europe 2010) 88–90.

the French and English version of the ECHR, the ECtHR proceeded immediately to assessing the legitimacy of the actions.[54] There has been no consistency in the consideration of 'different situation' – sometimes it is considered separately, or ignored altogether.[55] Regarding comparability, some consider 'equality of cases' as another, separate element of the comparability test from difference in treatment, but conclude that the evaluation of this element often spills over to the 'objective and reasonable justification' test.[56] *Van der Mussele* established that the comparators need to be set appropriately in order for difference of treatment to be established. In this case, the Court found that there are fundamental differences between the legal profession and other professions, rejecting the invocation of a comparability of situations.[57]

Requirement for the existence of a comparator as such is one of the most problematic aspects of formal equality. There seems to be some development on this issue, as the ECtHR now appears to require only justification for the differentiation.[58] However, some authors rightfully note that this is not a replacement of the comparator with the justification test, but rather, tying the two closely together.[59]

The difference in treatment needs to be based on a protected ground,[60] which according to Reid are personal characteristics by which persons are distinguishable from each other,[61] which do not have to be innate or inherent.[62] *Sidabras* (a case where KGB officers were barred from employment in the private sector) is often cited as an example showing that this criterion is not as clear as it seems.[63] There is a tendency of attaching a requirement for very weighty reasons to some of the grounds.[64] Through its practice, the ECtHR introduced so-called 'suspect grounds' upon which it will be very reluctant to find any differential treatment to be objectively and reasonably justified (race, ethnicity, sex, illegitimacy[65]).

These main parts of the test that the ECtHR employs in discrimination cases show how the Court deals with the issue of discrimination in general. In its first Protocol 12 case (*Sejdić and Finci*), the ECtHR underlined its intention to deal with Protocol 12 in the same manner as Article 14 cases.[66] This is, in essence, a new procedural economy on the rise. In the early days, procedural economy was identifiable before the ECtHR started to clearly treat Article 14 as an autonomous provision;[67] i.e., that the ECtHR needs to consider the possible violation of Article 14 alone, irrespective of whether it finds a violation on the Convention right in relation to which a claim on grounds of Article 14 is made. Now, it is apparent that after the ECtHR finds a violation of a claim under Article 14, it considers it unnecessary to examine separately whether there has also been a violation under Article 1 of Protocol 12.[68] Later cases raising Article 1 of Protocol 12 claims reflect this (*Vučković,*[69] *Savez Crkava 'Riječ Života'*[70]).

54 Karl Josef Partsch, 'Discrimination' in Ronald Macdonald and Franz Matscher (eds), *European System for the Protection of Human Rights* (MNP 1993) 585.
55 Edel (n 53) 88–90.
56 Dijk and others (n 20) 1036–1037.
57 *Van der Mussele v Belgium* (1984) 6 EHRR 163, para.46.
58 Harris and others (n 23) 579.
59 O'Connell (n 39) 219.
60 Also called 'prohibited', 'discriminatory', or 'badge of differentiation'.
61 Reid (n 23) 367.
62 Leach (n 23) 402.
63 *Sidabras and Dzjautas v Lithuania* (2004) 42 EHRR 104.
64 O'Connell (n 39) 228.
65 Gerards adds to these also nationality, sexual orientation, disability, HIV positive status, chronic illness and religion. She classifies sex as gender.
66 *Sejdić and Finci v BiH* [GC] ECHR (22.12.2009).
67 Partsch (n 54) 583.
68 *Sejdić and Finci v BiH* [GC] ECHR (22.12.2009), para.51.
69 *Vučković and Others v Serbia* App no. 17153/11 [SS] ECtHR (28.08.2012), para.89
70 *Savez Crkava'Riječ Života'and Others v Croatia* App no. 7798/08 [FS] ECtHR (2010), para.115.

Arnardóttir considers this approach to be justified because, 'from the perspective of the Convention, discrimination in conjunction with other protected rights is a more serious violation than discrimination in other fields of life.'[71] The ECtHR has been explicit that 'the same standards developed by the Court in its case-law concerning the protection afforded by Article 14 are applicable to cases brought under Article 1 of Protocol No. 12'.[72] With this statement, it confirmed that not only the understanding of discrimination is identical, as was quite clear from the Explanatory Memorandum of Protocol 12, but that also the approach to interpretation will be the same. The author of the present article is of the view that this disregards the importance of the national level where a judgement finds discrimination in relation to national legislation, or that a piece of legislation that has discriminated will resonate differently and will be of different value. Nevertheless, *Sejdić and Finci* and the subsequent case law give us little room to hope that the ECtHR will abandon procedural economy and understand the larger importance of Protocol 12.

1.2. Case law

The analysis of the case law presented in this section confirms that positive action is still a developing concept. Gerards finds that there are very few special standards used in the particular context of positive measures.[73] The cases identified and discussed above herein were mainly from the areas of social benefits, education and electoral rights. Thus far, positive action remains a developing concept. Yet, O'Connell[74] and Arnardóttir[75] argued that a more substantive approach by the ECtHR, which can also be beneficial for positive action, can be noted.

Case law on positive action could be summarized to state that reasonable and objective measures aimed at redressing a pre-existing situation of inequality are a legitimate objective for differential treatment under the ECHR system. These are not a requirement but in certain cases their absence might result in a breach of the ECHR. The legitimacy of an intervention when a situation of inequality is identified was discussed in ECtHR early case law, in the *Belgium Linguistics* case. In this example, the ECtHR underlined that it cannot ignore legal and factual features of the life of the society, but also that in the course of this assessment it cannot assume the role of the competent national authorities, *'for it would thereby lose sight of the subsidiary nature […][so the] national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention.'*[76] In these instances, the role of the Court would be to assess the conformity of these measures with the requirements of the Convention.[77] This showed that in the understanding of this Court, there can be an asymmetry in the approach to equality issues and that not all differences in treatment are prohibited.[78]

Lindsay challenged a policy according to which sole women breadwinners paid less tax than men in the same position. Although a Commission case, it is important to mention here as the Commission clearly outlined how positive actions can fight prejudice. It stated that prejudice surrounding

71 Oddný Mjöll Arnardóttir, 'Discrimination as a Magnifying Lens: Scope and Ambit Under Article 14 and Protocol 12' in Eva Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP 2013) 334.

72 Toplak and Mrak v Slovenia, App nos. 34591/19 and 42545/19 (26.10.2021), para.81.

73 Gerrards, 2018.

74 O'Connell (n 39) 211.

75 Arnardóttir (n 38).

76 *Case "Relating To Certain Aspects Of the Laws On the Use Of Languages In Education In Belgium" v Belgium* (1979-80) 1 EHRR 252, para.10

77 Ibid., para.10

78 Fredman, Discrimination Law (n 2) 258.

the capabilities of women to work was one of the principal causes blocking the equality of the sexes, arguing that they can be broken only by 'women obtaining work and demonstrating that any belief that they are less capable is wholly prejudiced.'[79] In the end, this was considered a legitimate aim, pursued through a proportional action that did not discriminate against men.[80] The Court has dealt with other cases where applicants alleged special treatment of women to discriminate against men. Although in the beginning it seemed that it favoured a symmetrical approach, in *Petrovic* a shift towards an asymmetrical approach can be noted.[81] In this case, the ECtHR held that the policy of parental leave allowance had no common denominator amongst Member States, thus one cannot say that the gradual introduction of this policy by Austria was in breach of Article 14; on the contrary, it judged it to be reflexive of the evolution of society.[82]

DH affirmed (and subsequent case law reiterated) the position that differential treatment is sometimes necessary in order to correct factual inequalities. In brief, the ECtHR stated that 'Article 14 does not prohibit a Member State from treating groups differently in order to correct "factual inequalities" between them [and that][...] in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article.'[83] A similar line of reasoning followed in *Horvath and Kiss,*[84] where the applicants were placed in a special school following an assessment of readiness to follow the curricula, on grounds of alleged mental disability, making them unfit to follow the regular curriculum in regular schools. Both applicants are of Roma ethnic origin, as were over fifty per cent of the students in the special school where the applicants received their education.

The proportionality of the differential treatment applied would seem to be the key test.[85] In *Taddeucci and McCall,* the ECtHR reiterated the approach established previously in other cases such as *Baio,*[86] *S.A.S.*[87]*, DH, Sampanis* and *Horvat and Kiss.* This held that 'where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group and there is no discriminatory intent. Such a situation may amount to "indirect discrimination". This is only the case, however, if such policy or measure has no "objective and reasonable" justification.'[88] There is case law which suggests the possibility of an obligation of the State to monitor the impact of measures in order to prevent possible disproportionate impact on the most vulnerable segments of society (*Kajrtan Asmundsson*).[89] This is also true for the need to establish a reasonable relationship of proportionality between an aim and its realization.[90]

In *Stec* first, then in *Runkee and White*[91] and other cases, the ECtHR confirmed the need for accommodating difference laid out in *Thlimmenos,*[92] stating that failure to apply different treatment to groups aiming to correct factual inequalities can constitute a breach of Article 14.[93] Pretty brings

79 *Lindsay v the United Kingdom* App no 11089/84 (EComm 16 August 1984).
80 Ibid.
81 Henrard (n 2) 135.
82 *Petrovic v Austria* (2001) 33 EHRR 14, paras. 41-43.
83 *DH and Others v The Czech Republic* (2008) 47 EHRR 3, para.175.
84 *Horváth and Kiss v Hungary*, App.no.11146/11 (29.01.2013).
85 Fredman, Discrimination Law (n 2) 258.
86 *Baio v Denmark,* App no. 38590/10 (10.04.2018), para. 91.
87 S.A.S. v France, App no. 43835/11 (01.07.2014), para. 161.
88 Taddeucci and McCall v Italy, App no. 51362/09 (30.06.2016).
89 Olivier De Schutter, 'Positive Action' in Dagmar Schiek, Lisa Waddington and Mark Bell (eds), *Non-Discrimination Law: Cases, materials and texts on national, supranational and international non-discrimination law* (Hart 2007) 794.
90 *Posti and Rahko v Finland* (2003) 37 EHRR 158, as in White, 547.
91 *Runkee and White v the United Kingdom*, App no.42949/98 (10.05.2007).
92 *Thlimmenos v Greece* (2001) 31 EHRR 411, para.44.
93 *Stec v the United Kingdom* (2006) 43 EHRR 47, para. 51.

this discussion forward by showing that this obligation can be circumvented only if there are objective and justifiable arguments for ignoring the differences in the treatment.[94] This is a case of assisted suicide where the applicant complained that physically impaired persons were discriminated against by a provision which criminalized assisted suicide, as they could not carry out the suicide themselves. The ECtHR found the government was right not to differentiate between suicide and assisted suicide in this case, as it was protecting vulnerable people from being forced to end their lives and decreasing the risk of abuse.[95]

Some have considered the relationship of positive action with positive obligations, questioning whether positive action gives rise to positive obligations. O'Connell found that it does, via discussion of a line of cases under Articles 2 (right to life) and 3 (prohibition of torture), and where allegations of prejudicial motivation exists for the criminal acts.[96] *Angelova* contains a literal expression of this duty, stating that authorities need to reach out to the minorities who are victims of such violence, and protect them,[97] This was later explicitly confirmed in *Nachova*, which seems to stand for racial violence as well as for sectarian violence.[98]

This leads us to a case which to some can be labelled as a 'positive action? Case'. As long as one's understanding of positive action includes measures 'to arrive at a more proportionate representation of certain groups,'[99] *Sejdić and Finci* will need to be considered as such a case. This case was brought to the ECtHR by Dervo Sejdić and Jakob Finci (originally as two applications), Bosnian citizens of Roma and Jewish origin, respectively. It concerns passive voting rights (right to stand as a candidate in elections) in Bosnia and Herzegovina (BiH) for the House of Peoples (one of the two parliamentary houses) and for the Presidency (collective Head of State). BiH is a federation with a form of power-sharing focused on the three largest ethnic groups, Bosniaks, Croats and Serbs (so-called 'constituent peoples'). The main federal political institutions are two parliamentary houses and the Presidency. This case contests the fact that only a person declaring to ethnically belong to the 'constituent peoples' can stand for the House of Peoples and for the Presidency.[100] This institutional arrangement is contained in the BiH Constitution, compiled and annexed to the Deyton Peace Agreement, brokered and guaranteed by the USA and the EU, as part of the peace process that ended the war. This is the same text of the Constitution which was under examination in *Sejdić and Finci*.

The applicants claimed, as principal complaints, violations of Article 14 in conjunction with Article 3 of Protocol 1, Article 1 of Protocol 12 and Article 3 of Protocol 1 alone, for the inability to stand as candidates for the House of Peoples, and violation of Article 1 of Protocol 12 for their inability to stand as candidates for the Presidency. The claims raised under Article 3 and Article 13 were found to be manifestly ill-founded.[101] The applicants argued that the present institutional arrangement discriminates against them. As both applicants are prominent public people in BiH, the Court considered it entirely coherent to say that they would stand for elections were they not prevented in doing so by the Constitution. Therefore, the Court found that they can rightfully claim to be victims of alleged discrimination.[102] It left aside discussion of the issue of whether the respondent State is responsible

94 Alastair R Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004) 203.
95 Pretty v the United Kingdom (2002) 35 EHRR 1.
96 O'Connell (n 39) 227.
97 *Angelova and Iliev v Bulgaria* (2008) 47 EHRR 7, para.117.
98 *Nachova and others v Bulgaria* (2006) 42 EHRR 933; 97 *members of the Gladni Congregation of Jehovah's Witnesses v Georgia (*2008) 46 EHRR 30; as cited in: O'Connell (n 39) 227.
99 Gerards, 2018, 1012.
100 There are restrictions also among these three groups for elections on cantonal level.
101 *Sejdić and Finci v BiH* [GC] ECHR (22.12.2009), para.57-60
102 Ibid., para.29.

for implementing the contested provisions, as it considered that it can be at least found responsible for maintaining them.[103]

The Court begins its consideration of whether the difference in treatment by the constitutional provisions can be objectively and reasonably justified. It repeated that this will be so if there is a legitimate aim and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realized; application of margin of appreciation will vary according to the circumstances of the case.[104] After confirming that discrimination on ground of ethnicity is considered to be a form of racial discrimination, the Court goes on to state that:

> *"Racial discrimination is a particularly egregious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment."*[105]

The Court considered that where a difference in treatment is based on race or ethnicity, the notion of objective and reasonable justification must be interpreted as strictly as possible, and that 'no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures'[106] (as in *Timishev*). It distinguishes this from actions undertaken as affirmative measures.[107] Some authors have rightfully argued that the ECtHR could have hardly found otherwise;[108] this position is expected from the Court as it 'would simply not set any precedent that could justify such inequality in some vaguely defined exceptional circumstances'.[109]

The Court went on to find that there is at least one compatible aim arising from the differential treatment, which is restoration of peace, tied to the ECHR Preamble. It highlighted that the constitutional arrangements reviewed were a product of the efforts to end the war in BiH and stated that this explained the established difference in treatment, without necessarily justifying it.[110]

The ECtHR did not enter a discussion of the public interest (cf. *Zarb Adami*) or on striking a fair balance between the protection of the community and the respect for the rights and freedoms safeguarded by the Convention (cf. *Belgian Linguistic*). It also did not discuss the legitimate aim (neither did it in *Petrovic*), because it found that 'the maintenance of the system in any event does not satisfy the requirement of proportionality.'[111] The Court seriously considered the opinion of the Venice Commission on reforming the power-sharing system and the alternatives proposed therein which will not discriminate against minorities. It recalled that the existence of alternative means achieving the same end is an important factor in this sphere[112] (akin to the position it held in *Glor*; also, cf. *Inze* and *Rasmussen*). It repeated that BiH has voluntarily agreed to the standards against which its actions were assessed

103 Ibid., para.30.
104 Ibid., para.42.
105 Ibid., para.43.
106 Ibid., para.44.
107 Ibid., para.44.
108 Bederman, David and Marco Milanovic. 'Sejdic and Finci v BiH', AJIL, 104, 4 (October 2010). 636-641.638
109 Marco Milanovic, 'Grand Chamber Judgment in Sejdic and Finci v Bosnia'. *EJIL Talk*. <http://www.ejiltalk.org/grand-chamber-judgment-in-sejdic-and-finci-v-bosnia/>.
110 *Sejdić and Finci v BiH* [GC] ECHR (22.12.2009), para.45.
111 Ibid., para.46.
112 Ibid., para.48.

and to meeting the relevant standards within one year of its acceding to the ECHR with the assistance of the Venice Commission.[113] It further justifies this by claiming recent improvement of the domestic situation (on the basis of information from the EU and the North Atlantic Treaty Organization).

When concluding on the existence of a breach of Article 14 taken in conjunction with Article 3 of Protocol 1, the Court placed an accent on the duration of the ineligibility to stand for election to the House of Peoples for the applicants, labelling it as 'continued'. Such continued ineligibility was found to lack objective and reasonable justification. As there does not seem to be 'any pertinent distinction to be drawn in this regard between the House of Peoples and the Presidency', in the merits regarding the right to stand for elections for the Presidency, the Court found immediately that there was a breach of Article 1 of Protocol 12; the notions of discrimination under Article 14 and Article 1 of Protocol 12 'are to be interpreted in the same manner' and it had already found discrimination on an 'identical constitutional pre-condition' under Article 14.[114]

The Court's general approach to the margin of appreciation, as O'Connell notes, follows the line from *EB,* which implicitly disapproved the invocation of the margin of appreciation from *Frette*.[115] This was reflected in *Sejdić and Finci,* in which the line of reasoning repeated that the margin of appreciation will not be applied to relax the standards of review where the matter is based on a suspected ground and where it 'calls for a difficult balancing of interests'[116] (see also *Alajos Kiss*).

To summarize, the main arguments for finding discrimination in *Sejdić and Finci* were severity of the protected ground, duration of the treatment and existence of alternative means. These rendered the margin of appreciation inapplicable, regardless of the seriousness of events that were the reason for the different treatment in the first place. McCrudden and O'Lary summarise this as: 'States therefore have to negotiate a narrow path between doing too much and not doing enough. The issue in Sejdic and Finci was whether Bosnia had negotiated that path successfully. The Court concluded that it had failed to do so.'[117]

Sejdić and Finci proves beyond doubt the seriousness the Court attaches to racial discrimination. The weight of the prohibited ground (race, ethnicity) dominated the reasoning of the Court and, when combined with the duration of the treatment, left no room for reluctance in finding that there can be no objective and reasonable justification for the difference in treatment. Additionally, the judgement placed large focus on the possibility to achieve the aim through alternative means, namely alternative models of power-sharing, labelled by the Court as an 'important factor'.[118] This confirms and further strengthens the position from *Glor,* and strays from previous jurisprudence where existence of alternative measures was not considered a strong argument towards non/existence of an objective and reasonable justification for the difference in treatment. It is also a case which still leaves doubt as to the correctness of the Court's approach to equalize power-sharing mechanisms with positive action. This is a discussion which is of great importance for the Macedonian context, where such mechanisms are in place, albeit rarely in an exclusive manner limited to three groups and three groups only, as they are in BiH.

113 Ibid., para.49.
114 Ibid., para.56.
115 O'Connell (n 39) 225.
116 Ibid.
117 Christopher McCrudden and Brendan O'Leary, 'Courts and Consociations, or How Human Rights Courts May de-Stabilize Power-Sharing Settlements' (2013) 24 European Journal of International Law 477, 96.
118 *Sejdić and Finci v BiH* [GC] ECHR (22.12.2009), para.48.

Jacobs, White and Ovey note the beginnings of a collective approach, at least when it comes to dealing with minority cases.[119] They point to the early stages of discussion around 'delimitation between discrimination which can never, or hardly ever, be justified, and other areas of differential treatment where the heart of the debate will be about the legitimacy of choices made by Contracting Parties in State Policies.'[120]

In conclusion, positive action remains a developing concept, but according to the approach of the ECtHR, it can be summarized to state that reasonable and objective measures aimed at redressing a pre-existing situation of inequality are a legitimate objective for differential treatment under the ECHR system. These are not a requirement but in certain cases their absence might result in a breach of the ECHR.

2. Positive action in the case law of the ECJ

This section focuses on findings from the analysis of the case law of the ECJ and follows the same structure as section 2. It first considers the legal framework and the ECJ approach to adjudication, followed by a presentation and analysis of the ECJ positive action case law.

2.1. Legal framework and approach to adjudication

Following the Lisbon Treaty, there are five tiers of EU law: constituent Treaties and the Charter of Fundamental Rights of the EU (the Charter); general principles of law; legislative acts; delegated acts; implementing acts.[121] The legal grounds for equality are laid out in the Treaties, the Charter and the relevant directives.

The founding Treaties position equality as an EU founding value, with combating social exclusion and discrimination, and achieving equality between the sexes, as its objective.[122] Articles 8 and 10 of the Treaty on the Functioning of the European Union (TFEU) discuss mainstreaming of gender equality and non-discrimination on the basis of sex, racial and ethnic origin, religion or belief, disability, age and sexual orientation. Article 19 of the TFEU introduced legal grounds for the Union's actions in relation to equality and non-discrimination. This article expanded the competences of the EU beyond sex equality in employment and introduced competences for the EU to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.[123] Articles 153 and 157 of TFEU are relevant for gender equality as the basis for sex equality related directives.

119 White et al, 568.
120 Ibid., 569
121 Paul Craig and Grainne De Búrca, *EU Law: Text, Cases, and Materials* (5th ed, Oxford University Press 2011) 103.
122 Consolidated Version of the Treaty on the Functioning of the European Union, Arts. 8, 9.
123 Ibid., Art. 19.

The Charter contains a Preamble and seven parts (titles), one of which is 'Equality'. The Charter became legally binding with the entry into force of the Lisbon Treaty,[124] which in its Article 6(1)[125] proclaimed that 'the Union recognises the rights, freedoms and principles set out in the Charter [...]which shall have the same legal value as the Treaties'[126], adding that the Charter provisions 'shall not extend in any way the competences of the Union as defined in the Treaties.'[127] This makes a valid claim that the Charter has the potential to work towards enhancing equality in the EU, as the 'ECJ can review the acts of the EU institutions, the EU legislation and the acts and legislation of Member States when implementing EU measures, in accordance with the provisions of the Charter.'[128]

The Charter provides for equality in Article 20 and prohibits discrimination in Article 21. It includes a specific rule on cultural, religious and linguistic diversity.[129] Equality of women and men is contained in Article 23, including in paragraph 2 which allows positive action. Other Articles in this Charter address equality of three groups: children, elderly and persons with disabilities. The Charter is implemented by the 'institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law'[130] and should be interpreted 'in accordance with the general provisions in Title VII,'[131] including the accompanying explanations.[132] Under a general derogation clause, any limitation in its application must be 'provided for by law and respect the essence of those rights and freedoms,'[133] and must be 'necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.'[134]

The relationship of the Charter with the Treaties, the ECHR and the constitutional traditions common to the Member States are set out in Article 52(2,3,4), according to which in all cases the rights in the Charter are to be interpreted. For the rights which correspond to those in the ECHR, the Charter rights shall have the same meaning and scope as the ECHR, which will not prevent the EU from adding more protection. This provision does not, however, resolve the relationship between the jurisprudence of the ECJ and the ECtHR (although, one has to note here that the explanatory memorandum refers to the ECtHR as determining in part the meaning of the ECHR rights).[135]

The EU directives[136] are legally binding documents (in terms of results which should be achieved) addressed to the Member States.[137] The four key provisions regarding positive action are Article 5 of the Racial Equality Directive, Article 7 of the Framework Equality Directive, Article 6 of the Goods and Services Directive and Article 3 of the Recast Directive. Mirroring Articles in the Race Equality Directive and in the Framework Equality Directive state that '[w]ith a view to ensuring full equality

124 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon (Eur-Lex 13 December 2007), Art. 6.
125 Ibid., Art. 6(1).
126 Ibid., Art. 6(1).
127 Ibid., Art. 6(1).
128 Interights, *Non-Discrimination in International Law – a Handbook for Practitioners* (2011th edn, Interights 2011) 49.
129 The Charter of Fundamental Rights of the European Union (2000), Art. 22.
130 Ibid., Art. 51(1).
131 Consolidated Version of the Treaty on the Functioning of the European Union, Art. 6(1).
132 The explanations themselves, however, open by stating that although 'they do not as such have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter.' Source: Explanations relating to the Charter of Fundamental Rights of the European Union (2007/C 303/02) 2007.
133 The Charter of Fundamental Rights of the European Union (2000), Art. 52(1).
134 Ibid., Art. 52(1).
135 Craig and De Búrca (n 121) 398.
136 Consolidated Version of the Treaty on the Functioning of the European Union, Art. 288.
137 Evelyn Ellis and Philippa Watson, *EU Anti-Discrimination Law* (OUP 2012) 17.

in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to [the Directives grounds]'[138]. A variation of this is included in the Recast Directive Article 3. Aside from these provisions, Article 7(2) in the Framework Equality Directive prescribes special provision on disability.[139] From these Articles it is clear that there is room, but not an obligation, for Member States to undertake positive action. A comparative overview of the transposition of all these directives shows that all EU and European Economic Area (EEA) countries, and the accession countries, have introduced some positive action, with the grounds and fields of application varying largely.[140]

The ECJ has played a vital role in developing the EU equality and non-discrimination law through its jurisprudence. This is a supranational system whose laws might be directly applicable in domestic courts and can have a direct effect on Member States.[141] Regardless of the advanced EU equality legal framework, as noted in the above discussion, there are concepts in EU equality law that are either broadly defined or undefined. These are left 'in the hands of the ECJ,'[142] which although does not set precedents, has shaped most of the EU anti-discrimination legislation through its preliminary rulings.[143] The positioning of equality as a general principle of EU law was introduced by the ECJ as early as the 1970s,[144] regardless of the rather late formalization of equality and non-discrimination in EU law.[145]

In conclusion, under EU law, positive action is not required, but it is permitted. It can also sometimes even be requested or encouraged by the European Commission from Member States,[146] despite the lack of clear legal ground.

138 Council Directive 2000/43/EC Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin 2000, Art. 5; Council Directive 2000/78/EC Establishing a General Framework for Equal Treatment in Employment and Occupation 2000, Art. 7; Council Directive 2004/113/EC Implementing the Principle of Equal Treatment between Men and Women in the Access to and Supply of Goods and Services 2004, Art. 6; Directive 2006/54/EC of the European Parliament and of the Council on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast) 2006, Art. 3.

139 "With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.". Source: Council Directive 2000/78/EC Establishing a General Framework for Equal Treatment in Employment and Occupation 2000, Article 7(2).

140 See, for example: *European Commission, 'Developing Anti-Discrimination Law in Europe The 28 EU Member States Compared' (European Commission 2017); Christopher McCrudden, 'Gender-Based Positive Action in Employment in Europe - A Comparative Analysis of Legal and Policy Approaches in the EU and the EEA' (European Commission 2019).*

141 Interights (n 128) 26.

142 Ellis and Watson (n 137) 18–19.

143 Ibid.

144 See cases *C-117/76 and C-16/77 Ruckdeschel v Hauptzollamt Hamburg-St Annen [1977] ECR 1753, [7]; C-28/76 Milac GmbH v Hauptzollamt Freiburg [1978] ECR 1721, [18]; C-442/00 Caballero v Fondo de Garantia Salarial (Fogasa) [2002] ECR I-11915. [30]-[32], as cited in: Craig and De Búrca (n 121) 539–540.*

145 Takis Tridimas, The General Principles of EU Law (2nd edition, OUP 2007).

146 McCrudden, 'Gender Positive Action' (n 140).; Christopher McCrudden, 'Resurrecting Positive Action' (2020) 18 International Journal of Constitutional Law 429.one more in keeping with the insights of regulatory theory in other contexts.","container-title":"International Journal of Constitutional Law","DOI":"10.1093/icon/moaa031","ISSN":"1474-2640, 1474-2659","issue":"2","language":"en","page":"429-433","source":"DOI.org (Crossref

2.2. Case law

The ECJ was cautious in building its jurisprudence in relation to positive action,[147] but has greatly developed its position in this area, albeit with inconsistencies. The case law largely comes from the field of employment, which is understandable considering the material scope of EU law on the matter. The ECJ has been seen by other authors as fluctuating between positive action and other concepts for which it seems to have no need, considering that it has several explicit Articles to rely on, including an Article to help it draw a distinction between reasonable accommodation and positive action (Waddington and Bell).

In *Commission v France,* measures adopted by France to enable better positions for women in the job market were challenged. The ECJ commented that the provisions regarding positive action measures in the equality directives were 'specifically and exclusively designed to allow measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life.'[148]

A seminal case on positive action in EU law is *Kalanke,* albeit one with a negative impact. The case was raised by a Mr. Kalanke whose job application was unsuccessful as preference was given to a female candidate. He challenged the complementarity of measures implemented in Germany within the frame of positive action programmes adopted on the basis of Directive 76/207 and giving preference to the underrepresented sex in the field of employment. The ECJ read that the absolute and unconditional preference given to women was in fact contrary to the equality principle. AG Tesauro's opinion in this case, which is frequently cited, challenges the nature and the idea of positive action. He states that '[f]ormal, numerical equality is an objective which may salve some consciences, but it will remain illusory and devoid of all substance unless it is goes together with measures which are genuinely destined to achieve equality.'[149] He went on to conclude that this was not the case in *Kalanke* and that what is necessary for genuinely achieving equality is 'a substantial change in the economic, social and cultural model which is at the root of the inequalities, a change which will certainly not be brought about by numbers and dialectical battles which are now on the defensive.'[150] This judgement posed great damage for positive action measures, triggering a reaction of the European Commission through a communication to the European Parliament, in which it offered an interpretation of *Kalanke* to end the uncertainty over the scope of positive action.[151] It suggested legislative amendments to clarify the meaning of positive action.[152]

The case that was supposed to rectify the damage done with *Kalanke* was *Marschall,* which introduced a notion of acceptance of quotas as long as they contain an 'öffnungsklausel',[153] i.e., a savings clause. The ECJ found the savings clause condition to be fulfilled, as women were 'not to be given priority in promotion if reasons specific to an individual male candidate tilt the balance in his favour.'[154] The judgement further read that in this case, a preference rule for women with a savings clause is in line with EU law 'if such a rule may counteract the prejudicial effects on female candidates

147 Tridimas (n 145) 111.
148 Case C-312/86 Commission v France [1988] ECR 6315, para.15.
149 Opinion of Advocate General *Tesauro in Kalanke v Bremen* (6 April 1995) <http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d0f130def6f51f415ca24ed1953cbc2396815ba9.e34KaxiLc3eQc40LaxqMbN4NchyKe0?text=&docid=99456&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=103557>; C-450/93 Kalanke v Freie and Hansestadt remen (1995)
150 Ibid.
151 Erika Szyszczak, 'Positive Action after Kalanke' (1996) 59 The Modern Law Review 876, 881–882.
152 Ibid., 882.
153 C-409/95 *Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363, para.24.
154 Ibid.

of the attitudes and behaviour described above and thus reduce actual instances of inequality which may exist in the real world.'[155] In *Badeck,* the ECJ summarized the checklist for assessing the compliance of positive action measures with EU law in relation to gender as a protected ground in the field of employment. It found that a measure that gives priority in promotion to women in public service sectors where they are under-represented will be considered as compatible with Community law if 'it does not automatically and unconditionally give priority to women when women and men are equally qualified, and [if] the candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates.'[156] According to O'Connell, *Marschall* and *Badeck* can be seen as suggesting a new proportionality approach,[157] which allows for preferential treatment if an individual merit assessment is available.[158]

In *Abrahamson* and *Anderson,* the ECJ ruled that it is contrary to EU law if, under national legislation, an absolute preference is given to 'a candidate for a public post who belongs to the under-represented sex and possesses sufficient qualifications for that post [over][…] a candidate of the opposite sex who would otherwise have been appointed,'[159] for the sake of securing the appointment of a candidate of the under-represented sex, and where 'the difference between the respective merits of the candidates is not so great as to give rise to a breach of the requirement of objectivity in making appointments.'[160] According to Kristin Henrard, this means that the ECJ is not willing to assess affirmative measures more asymmetrically, i.e., more leniently.[161]

Lommers[162] challenges positive action measures designed to counter sex discrimination. It is a case against a policy allowing access to nursery facilities for women employees in one of the Dutch ministries, while limiting this access for male employees only to exceptional cases. the Ministry's explanation for introducing this measure was that it wanted to increase the number of female employees; the ECJ found that the measure is not contrary to the equality principle, as long as men placed in a similar position to women could enjoy the same services.[163] The *Lommers* position was further clarified in *Roca Álvarez*. The ECJ restated that a measure from which women employees can benefit, but male employees could not, was not in line with equality legislation. It went on to suggest that such measures would essentially be contrary to the goal of the measure.[164] Furthermore:

> *'[such measure] is liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties […][;] a measure such as that at issue in the main proceedings cannot be considered to be a measure eliminating or reducing existing inequalities in society […] nor as a measure seeking to achieve substantive as opposed to formal equality by reducing the real inequalities that can arise in society and thus, in accordance with Article 157(4) TFEU, to prevent or compensate for disadvantages in the professional careers of the relevant persons.'*[165]

155 Ibid., para.31.
156 C-158/97 Badeck and Others [2000] ECR I-1875, para.23.
157 Colm O'Cinneide, 'Positive Action and EU Law' (ERA Academy of EU Law, November 2011) <http://www.era-comm.eu/oldoku/SNLLaw/04_Positive_action/2011-111DV20-O'Cinneide_EN.pdf >, 10.
158 Ibid.
159 C- 407/98 *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist* [2000] ECR 1-5539.
160 Ibid.
161 Henrard (n 2) 135.
162 C-476/99 *Lommers v Minister van Landbouw, Natuurbeheer en Visserij* [2002] ECR I-2891.
163 Ibid.
164 C-104/09 *Roca Alvarez v Sesa Start Espana* ETT SA [2011] 1 CMLR 28, paras.36-39.
165 Ibid., paras.36-39.

The ECJ tries to keep a balance between assisting the existence and implementation of national positive action measures and employing a mechanism of proportionality that will control tougher effects of these measures.[166] For example, *Schnorbus* challenged positive measures as potentially causing indirect discrimination against women, in a case questioning the priority granted under French legislation to persons that have completed military service for admission in vocational training. Since women were not required to do military service, they automatically could not benefit from these measures.[167]

In later cases, the ECJ shows 'a shift away from a formal approach towards a greater embrace of substantive equality thinking.'[168] In *Briheche,* a French case on access of widowers to public services, the ECJ makes some strong statements in relation to the ability of positive action measures to contribute to substantive equality. It states:

> *'[EU law allows for] national measures relating to access to employment which give a specific advantage to women with a view to improving their ability to compete on the labour market and to pursue a career on an equal footing with men. The aim of that provision is to achieve substantive, rather than formal, equality by reducing de facto inequalities which may arise in society and, thus, in accordance with Article 141(4) EC, to prevent or compensate for disadvantages in the professional career of the persons concerned.'*[169]

The ECJ goes on to cite *Kalanke* and *Abrahamsson and Anderson.*[170] This case clearly shows a tendency for the positioning of the ECJ within the realm of substantive equality and that the Court is persuaded by the potential of positive actions to achieve equality.

The proportionality principle and its centrality in the ECJ's adjudication over positive action has been unchanged to date. The principle requires that there are targets tied to the positive action and that one can follow these in a clear manner and that, if no results are achieved,[171] the Court can find the measure not to be in line with EU law. In this case, in the words of Waddington and Bell, 'the Court held: "the measure at issue in the main proceedings does not appear to be of a nature such as to offset the disadvantages to which the careers of female civil servants are exposed by helping those women in their professional life".'[172]

In the recent case *Milkova,*[173] the Court confirmed that Article 7(2) has to be understood as permitting States to prescribe measures in relation to disability which will apply to employees only, but not to civil servants, but not if the distinction is made in such a way so as to discriminate. If this was the case, the measures should be extended to civil servants. The ECJ requested that if the national court establishes unjustified unequal treatment, it will need to extend the measures to civil servants instead of taking them away from other employees.[174]

166 Tridimas (n 145) 116.
167 C-79/99 *Schnorbus v Land Hessen* [2000] ECR I-10997, paras.38-39.
168 O'Cinneide (n157) 11.
169 C-319/03 *Briheche v Ministre de l'Interieur* [2004] ECR I-8807, para25
170 Ibid., para.25.
171 As was the case in C-366/99 *Joseph Griesmar v Ministre de l'Économie, des Finances et de l'Industrie and Ministre de la Fonction publique, de la Réforme de l'État et de la Décentralisation*, OJ C 366 [1999].
172 Waddington and Bell, p.1513.
173 C-406/15 Petya Milkova v Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen control (09.03.2017).
174 Ibid.

Citing *Cresco Investigation GmbH*, de Vos finds that 'the CJEU [Court of Justice of the European Union] has created a straightjacket for policy makers, companies or organizations wanting to consider positive discrimination in the EU.'[175] This means 'that derogations remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued.'[176]

Some authors read the ECJ's approach to affirmative actions as if they are an exception to the principle of formal equality and restrictively interpreted,[177] thus closer to formal equality rather than substantive equality.[178] However, other authors consider otherwise; Takis Tridimas concludes that the approach of the ECJ has moved from equality of opportunity to equality of result,[179] which in the terms explored here would mean towards more substantive equality. He argues that the ECJ reads positive actions as part of a wider social agenda and concludes that it will rely more on proportionality to outlaw inflexible systems (such as in *Badeck*), or to strike at the hard core of equality *(Abrahamson and Anderson)*.[180] He draws a parallel of the task the ECJ has set for equality non-discrimination in relation to positive actions and the task in relation to free movement, stating that as equality assisted changing consumer habits, positive action case law assists challenging social assumptions and stereotypes.[181]

However, after initial rapid development, the case law of the ECJ and the EU standard on positive action is now stuck. De Vos observed that 'the Court's case law on positive discrimination has been frozen in time for well over a decade'.[182] McCrudden has recently argued that positive action in EU law needs 'resurrecting'.[183] Some radical moves on the part of the EU are needed to move beyond this impasse, first and foremost in further legislating.[184]

To conclude, this section discussed the case law of the ECJ on positive action. How the findings presented herein fare in comparison to the ECtHR case law findings is the topic of the next section.

175 Marc De Vos, 'The European Court of Justice and the March towards Substantive Equality in European Union Anti-Discrimination Law' (2020) 20 International Journal of Discrimination and the Law 62, 75–76.procedural Aristotelian approach to equality, driven by seminal European case law and incorporated into a body of EU non-discrimination directives. The academic literature has criticized this approach as formalistic and static (Formal equality, non-discrimination and European Union (EU

176 C-193/17, Cresco Investigation GmbH v. Markus Achatzi (22.01.2019), para. 65, cited in de Vos.

177 Henrard (n 2) 134.

178 Nuria Elena Ramos Martín, *'Positive Action Measures in European Union Equality Law'*, (Conference article, University of Antwerp 2006) 19 <http://www.uva-aias.net/uploaded_files/publications/NuriaRamosMartin.pdf>.

179 Tridimas (n 145) 117.

180 Ibid.

181 Ibid.

182 De Vos (n 175) 75.procedural Aristotelian approach to equality, driven by seminal European case law and incorporated into a body of EU non-discrimination directives. The academic literature has criticized this approach as formalistic and static (Formal equality, non-discrimination and European Union (EU

183 McCrudden, 'Resurrecting Positive Action' (n 146).one more in keeping with the insights of regulatory theory in other contexts.","container-title":"International Journal of Constitutional Law","DOI":"10.1093/icon/moaa031","ISSN":"1474-2640, 1474-2659","issue":"2","language":"en","page":"429-433","source":"DOI.org (Crossref

184 Ibid.one more in keeping with the insights of regulatory theory in other contexts.","container-title":"International Journal of Constitutional Law","DOI":"10.1093/icon/moaa031","ISSN":"1474-2640, 1474-2659","issue":"2","language":"en","page":"429-433","source":"DOI.org (Crossref

3. Comparative overview of the two Courts

The two Courts and their respective organisations, originated in very different contexts, are based on very different grounds and were created to serve different goals. This is reflected in the legal framework within which they operate and in the ways in which they have dealt with Human Rights cases in general, and equality cases specifically. The Council of Europe (CoE) system is largely focused on democracy, human rights, local government and culture, while the EU began as an economic community and only recently extended beyond the common market. The ECtHR was set up to ensure 'observance of the [ECHR] engagements undertaken by the High Contracting Parties.'[185] It is not, as is often repeated, a court of third instance, nor a supranational court. The ECJ, on the other hand, was established to ensure that EU laws are observed 'in the interpretation and application' of the Treaties.[186] In this sense, it is a supranational court.

The ECtHR has built its equality jurisprudence largely on the grounds of two Articles (Article 14, and Article 1 of Protocol 12). These provisions do not close the list of grounds, nor do they discuss forms of discrimination or standards of proof. This can lead both to a conclusion that the ECtHR has been very innovative as it managed to enhance Article 14, or that the course of development of its jurisprudence simply came with the territory. For the ECJ context, it is important to note that at the beginning, human rights and equality were not of primary interest to the (then) European Economic Community (EEC). Equality gradually found its place as a founding principle in EU law, starting from equal pay issues (*Defrenne*),[187] calling on common constitutional traditions, the transformation of the EEC into an EU and later developments (including the adoption of the Treaties of Amsterdam and Lisbon, and of the Charter that was entered into force with the Treaties). EU law has since developed substantially and now contains permissibility of positive actions, but also introduces some positive obligations for the Member States (for example, in relation to equality bodies, cooperation with Civil Society Organizations, etc).

Mark Bell argues that with the new developments in EU law and the entering into force of Protocol 12, a complementary area of law is forming.[188] This was later confirmed with the entry into force of the Charter. The horizontal provisions provide that the Charter rights will have the same meaning and scope as the ECHR, but will not prevent the EU from adding more protection.[189] However, as discussed above, this does not resolve the relationship between the jurisprudence of the ECJ and the ECtHR.[190] It is a different issue whether the pending accession of the EU to the ECHR might resolve this, and one which goes beyond the scope of this article to discuss.

It is also worth noting that, to the different material scope, positive action has developed differently in the practice of the two Courts. The material scope of the protection under ECHR, sans Protocol 12, was limited to the rights falling within the ambit of a Convention right. This meant that one of the most important fields for positive action – employment – was mainly outside its reach. Thus, as noted by Gerards within the context of the ECHR and by Schiek and Kotevska within the context of Article 23 of the Charter, the ECHR is left with very underdeveloped case law on positive

185 Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Art. 19.
186 Consolidated Version of the Treaty on the European Union, OJ C 326/13, Art. 19(1).
187 C-43/75 *Defrenne v Sabena* (1976) ECR 455.
188 Mark Bell, *'The relationship between EU law and Protocol No.12' in Council of Europe, Non-discrimination: a human right - Proceedings, Seminar marking the entry into force of Protocol No. 12 to the European Convention on Human Rights* (CoE Publishing 2006) 66.
189 The Charter of Fundamental Rights of the European Union (2000), Art. 52.
190 Craig and De Búrca (n 121) 398.

action. With the caveat to the very specific definition of positive action used herein (see Introduction of the present paper), O'Connell's work shows several cases in relation to social benefits and protection of relevance for the present discussion. This is specifically a field marked by Waddington and Bell as one towards which the biggest challenges for the conceptualization of positive action will arise, if the horizontal directive is adopted.

Additional space for mutual learning and cooperation may arise because of the potential for enlarging the material scope of the EU and because of the already enlarged material scope of the ECHR with Protocol 12, i.e., an extension of the prohibition of discrimination to national law that is further away from what until now was the 'within the ambit' criteria of the parasitic nature of Article 14. In practice this means that, while the ECJ might look at ECtHR's cases on social benefits (to learn positive or negative lessons) the ECtHR can look at the ECJ's employment related cases now that employment as a field has opened. Further legislating on the part of the EU regarding positive action, as argued for by McCrudden,[191] will additionally enlarge this space.

Both Courts seem to show fluctuating tracks of development regarding positive action. Regardless of the fact that the ECtHR discussed positive action in its very early equality jurisprudence (*Belgian Linguistics*),[192] it took it a long time to develop an understanding of positive action and its importance. The first discussion of positive action where the ECtHR demonstrates an understanding from a clearly substantive equality perspective was in *DH.*[193] A very encouraging development in this regard with the ECtHR is that it seems that it is no longer ready to extend the margin of appreciation if racial violence is at stake and that it imposes an obligation upon the States to investigate such cases (*Nachova*).[194] The ECJ had its shifts on positive action too. This court demonstrated a clear understanding of the need of positive action in earlier case law (*Commission v France*).[195] But, *Kalanke*[196] shook the ground for positive action. ECJ managed to rectify this move through its case law, but continued to demonstrate reluctance in its understanding of positive action (*Abrahamson and Anderson*),[197] including by a savings clause requirement (*Marschall).*[198] In later case law, however, it clearly tied positive actions to achieving substantive equality, which, in its view, should result in decreasing inequalities in society (*Briheche*).[199]

In conclusion, recent jurisprudence from the two Courts shows that they are embracing positive action as necessary for achieving substantive equality, but it is not yet well developed. The lack of a steady flow of cases on positive action in front of the ECJ contributes to this. Further legislating positive action under EU law might provide additional motivation (and legal ground) for the ECJ case law to enhance its development, which, in turn, can support discussion with the ECtHR. Considering that the ECtHR continues to develop its case law and that it covers many more countries than the ECJ, a collaborative effort of learning and mutual growth could beneficial for both institutions and for the areas under their jurisdiction.

191 McCrudden, *'Resurrecting Positive Action' (n 146).one more in keeping with the insights of regulatory theory in other contexts.","container-title":"International Journal of Constitutional Law","DOI":"10.1093/icon/moaa031","ISSN":"1474-2640, 1474-2659","issue":"2","language":"en","page":"429-433","source":"DOI.org (Crossref*

192 Case *"Relating To Certain Aspects Of the Laws On the Use Of Languages In Education In Belgium" v Belgium* (1979-80) 1 EHRR 252.

193 *DH and Others v The Czech Republic* (2008) 47 EHRR 3.

194 *Nachova and Others v Bulgaria* (2006) 42 EHRR 933.

195 C-312/86 *Commission v France* [1988] ECR 6315.

196 C-450/93 *Kalanke v Freie and Hansestadt remen* (1995).

197 C- 407/98 *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist* [2000] ECR 1-5539.

198 C-409/95 *Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363.

199 C-319/03 *Briheche v Ministre de l'Interieur* [2004] ECR I-8807.

Conclusion

The present article revisited the approaches of the ECtHR and the ECJ focusing on case law analysis in order to identify the developmental milestones and the current state of affairs regarding how the two Courts have approached the issue of positive action. The jurisprudence and the relationship between the two Courts has the potential to grow into a collaborative effort of learning and mutual growth, while preserving the specificities of the two systems. However, the current impasse at the EU level, including the drought in producing further equality legislation, is hindering progress.

The legal frameworks on which the two Courts rely are quite different. The ECtHR relies on a provision of fewer than 50 words, and Protocol 12 has, thus far, not resulted in a different approach, partially because it has been stifled by procedural economy. The ECJ has three branches of pieces of legislation which provide a more detailed treatment of equality and non-discrimination. However, with the strict observance of the material scope of EU law, ECJ cannot progress in its approach and treatment of equality and non-discrimination, including positive action, if the current impasse on equality and non-discrimination legislation at the EU remains.

The comparison between the two Courts shows that the jurisprudence of both on positive action is not well developed and that the ECtHR has been slow and the ECJ reluctant to embrace and adjudicate on positive action. The notion of positive action under the two Courts has come a long way, but has much more room for development, and for a collaborative effort of learning and mutual growing.

Bibliography

Arnardóttir OM, *Equality and Non-Discrimination under the European Convention on Human Rights* (MNP 2003)

——, 'Discrimination as a Magnifying Lens: Scope and Ambit Under Article 14 and Protocol 12' in Eva Bell M, 'The relationship between EU law and Protocol No.12' in Council of Europe, *Non-discrimination: a human right - Proceedings, Seminar marking the entry into force of Protocol No. 12 to the European Convention on Human Rights* (CoE Publishing 2006).

Brems and Janneke Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP 2013)

Bossyut M, 'Comprehensive Examination of Thematic Issues Relating to the Elimination of Racial Discrimination: The Concept and Practice of Affirmative Action' in Joshua Castellino (ed), *Global Minority Rights* (Ashgate 2011)

Bouma GD and Atkinson GBJ, *A Handbook of Social Science Research – A Comprehensive and Practical Guide for Students* (OUP 1995)

Bryman A, *Social Research Methods* (4th edition, OUP 2012)

Craig P and De Búrca G, *EU Law: Text, Cases, and Materials* (Fifth edition, Oxford University Press 2011)

Dannemann G, 'Comparative Law: Study of Similarities or Differences?' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006)

De Schutter O, 'Positive Action' in Dagmar Schiek, Lisa Waddington and Mark Bell (eds), *Non-Discrimination Law: Cases, materials and texts on national, supranational and international non-discrimination law* (Hart 2007)

De Vos M, 'The European Court of Justice and the March towards Substantive Equality in European Union Anti-Discrimination Law' (2020) 20 International Journal of Discrimination and the Law 62

Dijk P van and others, *Theory and Practice of the European Convention on Human Rights* (Fifth edition, Intersentia 2018)

Edel F, *The Prohibition of Discrimination under the European Convention on Human Rights* (Council of Europe 2010)

Ellis E and Watson P, *EU Anti-Discrimination Law* (OUP 2012)

European Commission, 'Developing Anti-Discrimination Law in Europe The 28 EU Member States Compared' (European Commission 2017)

Fredman S, *Making Equality Effective: The Role of Proactive Measures* (European Commission 2009)

——, 'Positive Rights and Positive Duties: Addressing Intersectionality' in Dagmar Schiek and Victoria Chege (eds), *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (Routledge-Cavendish 2009)

——, *Discrimination Law* (2nd ed, OUP 2011)

George AL and Bennett A, *Case Studies and Theory Development in the Social Sciences* (MIT Press 2005)

Harris DJ and others, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (Fourth edition, Oxford University Press 2018)

Henrard K, 'Non-Discrimination and Full and Effective Equality' in Marc Weller (ed), *Universal Minority Rights* (OUP 2007)

Interights, *Non-Discrimination in International Law – a Handbook for Practitioners* (2011 edition, Interights 2011)

Khaitan T, *A Theory of Discrimination Law* (OUP 2015)

Koldinska K, 'EU Non-Discrimination Law and Policies in Reaction to Intersectional Discrimination against Roma Women in Central and Eastern Europe' in Dagmar Schiek and Anna Lawson (eds), *European Union Non-Discrimination Law and Intersectionality* (Ashgate 2011)

Kotevska B, 'Equality and Non-Discrimination in the Post-Yugoslav Space: Intersectionality under Law in Croatia, Macedonia and Slovenia' (PhD Thesis, School of Law, Queen's University Belfast 2020)

Leach P, *Taking a Case to the European Court of Human Rights* (Fourth edition, Oxford University Press 2017)

May T, *Social Research* (Fourth edition, OUP 2011)

McCrudden C, 'A Comparative Taxonomy of "Positive Action" and "Affirmative Action" Policies' in Reiner Schulze (ed), *Non-Discrimination in European Private Law* (Mohr Siebeck 2011)

——, 'Gender-Based Positive Action in Employment in Europe - A Comparative Analysis of Legal and Policy Approaches in the EU and the EEA' (European Commission 2019)

——, 'Resurrecting Positive Action' (2020) 18 International Journal of Constitutional Law 429

Milanovic M, 'Grand Chamber Judgment in Sejdic and Finci v Bosnia'. *EJIL Talk.* <http://www.ejiltalk.org/grand-chamber-judgment-in-sejdic-and-finci-v-bosnia/>.

Ramos Martín N E, 'Positive Action Measures in European Union Equality Law', (Conference article, University of Antwerp 2006) 19 <http://www.uva-aias.net/uploaded_files/publications/NuriaRamosMartin.pdf>.

Mowbray AR, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004)

Nielsen R, 'Is EU Equality Law Capable of Addressing Multiple and Intersectional Discrimination Yet?' in Dagmar Schiek and Victoria Chege (eds), *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (Routledge-Cavendish 2009)

O'Cinneide C, 'Positive Action and EU Law' (ERA Academy of EU Law, November 2011) <http://www.era-comm.eu/oldoku/SNLLaw/04_Positive_action/2011-111DV20-O'Cinneide_EN.pdf>.

O'Connell R, 'Cinderella Comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR' (2009) 29 Legal Studies 211

Partsch KJ, 'Discrimination' in Ronald Macdonald and Franz Matscher (eds), *European System for the Protection of Human Rights* (MNP 1993)

Rainey B, Wicks E and Ovey C, *Jacobs, White and Ovey: The European Convention on Human Rights* (Eighth edition, Oxford University Press 2021)

Reid K, *A Practitioner's Guide to the European Convention on Human Rights* (Sixth edition, Thomson Reuters/Sweet & Maxwell 2019)

Schiek D and Kotevska B, 'Article 23' in Peers S et al., *The EU Charter of Fundamental Rights: A Commentary* (Second edition, Hart, 2021).

Szyszczak E, 'Positive Action after Kalanke' (1996) 59 The Modern Law Review 876

Tridimas T, *The General Principles of EU Law* (2nd edn, OUP 2007)

Statutes

Charter of Fundamental Rights of the European Union (2000) C OJ 1

Consolidated Version of the Treaty on the European Union, OJ C 326/13.

Consolidated Version of the Treaty on the Functioning of the European Union.

Council Directive 2000/43/EC Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin 2000.

Council Directive 2000/43/EC Implementing the Principle of Equal Treatment between Persons Irrespective of Racial or Ethnic Origin 2000

Council Directive 2000/78/EC Establishing a General Framework for Equal Treatment in Employment and Occupation 2000.

Council Directive 2000/78/EC Establishing a General Framework for Equal Treatment in Employment and Occupation 2000.

Council Directive 2004/113/EC Implementing the Principle of Equal Treatment between Men and Women in the Access to and Supply of Goods and Services 2004.

Council Directive 2004/113/EC Implementing the Principle of Equal Treatment between Men and Women in the Access to and Supply of Goods and Services 2004.

Directive 2006/54/EC of the European Parliament and of the Council on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast) 2006.

Directive 2006/54/EC of the European Parliament and of the Council on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast) 2006.

Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 177).

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon (Eur-Lex 13 December 2007).

Treaty on the Functioning of the European Union (OJ C 326).

Chart of signatures and ratifications of Treaty 177: Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 177) - Status as of 12/09/2022, available at https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=177.

Explanations relating to the Charter of Fundamental Rights of the European Union (2007/C 303/02) 2007.

Explanatory Report: Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (2000).

Case law

97 members of the Gladni Congregation of Jehovah's Witnesses v Georgia (2008) 46 EHRR 30.

Abdulaziz, Cabales and Balkandali v the United Kingdom (1985) 7 EHRR 471.

Angelova and Iliev v Bulgaria (2008) 47 EHRR 7.

Baio v Denmark, App no. 38590/10 (10.04.2018).

Botta v Italy (1998) 26 EHRR 241.

C- 407/98 *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist* [2000] ECR 1-5539.

C-104/09 *Roca Alvarez v Sesa Start Espana ETT SA* [2011] 1 CMLR 28.

C-117/76 and C-16/77 Ruckdeschel v Hauptzollamt Hamburg-St Annen [1977] ECR 1753, [7].

C-158/97 *Badeck and Others* [2000] ECR I-1875.

C-193/17 *Cresco Investigation GmbH v. Markus Achatzi* (22.01.2019).

C-28/76 Milac GmbH v Hauptzollamt Freiburg [1978] ECR 1721, [18].

C-312/86 *Commission v France* [1988] ECR 6315.

C-319/03 *Briheche v Ministre de l'Interieur* [2004] ECR I-8807.

C-366/99 Joseph Griesmar v Ministre de l'Économie, des Finances et de l'Industrie and Ministre de la Fonction publique, de la Réforme de l'État et de la Décentralisation, OJ C 366 [1999].

C-406/15 *Petya Milkova v Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen control* (09.03.2017).

C-409/95 *Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363.

C-43/75 *Defrenne v Sabena* (1976) ECR 455.

C-442/00 *Caballero v Fondo de Garantia Salarial (Fogasa)* [2002] ECR I-11915. [30]-[32].

C-450/93 *Kalanke v Freie and Hansestadt remen* (1995).

C-476/99 *Lommers v Minister van Landbouw, Natuurbeheer en Visserij* [2002] ECR I-2891.

C-79/99 *Schnorbus v Land Hessen* [2000] ECR I-10997.

Carson v the United Kingdom (2010) 51 EHRR 13.

Case "Relating To Certain Aspects Of the Laws On the Use Of Languages In Education In Belgium" v Belgium (1979-80) 1 EHRR 252.

DH and Others v The Czech Republic (2008) 47 EHRR 3.

Gaygusuz v Austria (1997) 23 EHRR 364.

Horváth and Kiss v Hungary, App no.11146/11 (29.01.2013).

Larkos v Cyprus (1999) 30 EHRR 597.

Lindsay v UK App no. 11089/84 (EComm 16 August 1984).

Marckx v Belgium (1979) 2 EHRR 330.

Nachova and Others v Bulgaria (2006) 42 EHRR 933.

Petrovic v Austria (2001) 33 EHRR 14.

Posti and Rahko v Finland (2003) 37 EHRR 158.

Pretty v the United Kingdom (2002) 35 EHRR 1.

Rasmussen v Denmark (1984) 7 EHRR 371.

Runkee and White v the United Kingdom, App no. 42949/98 (10.05.2007).

S.A.S. v France, App no. 43835/11 (01.07.2014).

Savez Crkava'Riječ Života'and Others v Croatia, App no. 7798/08 [FS] ECtHR (2010).

Sejdić and Finci v BiH [GC] ECHR (22.12.2009).

Sidabras and Dzjautas v Lithuania (2004) 42 EHRR 104.

Stec v the United Kingdom (2006) 43 EHRR 47.

Taddeucci and McCall v Italy, App no. 51362/09 (30.06.2016).

Thlimmenos v Greece (2001) 31 EHRR 411.

Toplak and Mrak v Slovenia, App nos. 34591/19 and 42545/19 (26.10.2021).

Van der Mussele v Belgium (1984) 6 EHRR 163.

Vučković and Others v Serbia, App no. 17153/11 [SS] ECtHR (28.08.2012).

Willis v UK (2002) 35 EHRR 21.

Opinion of Advocate General Tesauro in *Kalanke v Bremen* (6 April 1995) <http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d0f130def6f51f415ca24ed1953cbc2396815ba9.e34KaxiLc3eQc40LaxqMbN4NchyKe0?text=&docid=99456&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=103557>.

A LEGAL FRAMEWORK FOR SURROGATE MOTHERHOOD IN THE REPUBLIC OF NORTH MACEDONIA

Arta Selmani-Bakiu and Besa Arifi

Abstract

The institution of surrogate motherhood is a novel concept within the science of family law and biomedicine in the Republic of North Macedonia and is incorporated into national legislation according to international practice in this field. In this article, the authors analyse the institution of surrogate motherhood from two aspects: family law and criminal law. Analysing the family law aspect of this institution, the authors offer detailed information with regard to obtaining the parental right of legal parents through surrogate motherhood and highlight the legal consequences for the woman-surrogate. The authors especially focus on the legal status of a child, born from a surrogate pregnancy, exploring the legal conflicts from the perspective of the right of the child to know his/her genetic origin, as well as the donor's right to anonymity, in situations when the child is conceived with donated genetic material. On the other hand, analysing the criminal law aspect of this topic, the authors will address the fulfilment of legal requirements in the process of assisted biomedical fertilization with a surrogate woman, the legal prohibition of buying and selling the embryo and the obligation of protecting classified information (personal, medical and genetic information). Moreover, the authors will examine the storing of information on donors relating to genetic material and embryos, the threats, deceptions and violent acts against women who bear a child for someone else, the initiation of the surrogacy process for material benefits, as well as other criminal offences contained within the criminal legislation of the Republic of North Macedonia. The article recommends that the achievements of biomedicine should be used in favour of family planning, as opposed to implementing these achievements in contradiction to the ethical standards of humanity.

Keywords

altruistic and commercial surrogate motherhood, buying and selling of children, legal and ethical aspects

Contact

Ass Prof Dr. Arta Selmani-Bakiu
Assistant Professor, Faculty of Law, South East European University, Tetovo
✉ arta.selmani@seeu.edu.mk

Prof Dr Besa Arifi
Full Professor, Faculty of Law, South East European University, Tetovo
✉ b.arifi@seeu.edu.mk

Introduction

Family law in general and relations within the family are usually perceived as relatively static as regards social change and progress. Nevertheless, by incorporating new concepts, contemporary legislation attempts to address the developing needs of society and the individual.

In the past, typical family law topics have included: extra marital union, divorce, adoption, sterilization, infertility, giving birth to extra marital children, etc. However, in modern times, developments in science, technology and biomedicine enable sexual and reproductive rights, which enhance the freedom of family planning. New methods of artificial reproduction, such as *in vitro* fertilization, artificial insemination, surrogacy, the birth of a child by a woman with donated genetic material, the conceiving a child by three persons, etc. has enabled many couples to solve the problem of infertility and has resulted in changes in the family model.

Based on these developments, it cannot be said that the only family model is the nuclear family (the family that includes the father, the mother and the children). In modern times, various modifications of families can be identified, such as artificial families, recomposed families, extra-marital families, mono-parent families, families formed by a single woman with donated genetic material, homosexual families and post-mortem families.

This article focuses on one of the modes of creating a family through artificial reproduction methods, namely, surrogacy. The article provides detailed information on surrogate motherhood, the initiation of the procedure and the persons who can benefit from this. It also examines the impact that the procedure has on the family and the privacy rights of the child, as well as the obligations and rights of the surrogate mother, with a focus on giving birth to the surrogate child. Moreover, the article examines the abuses that can take place during this process, which according to the Law on Biomedically Assisted Fertilization, are considered criminal offences.

The authors of this article raise several important issues that need to be addressed by the lawmakers, including the following: the regulation of the legal status of children born by a surrogate mother with donated genetic material or donated embryos; the regulation of conflicts which arise from the right of the child to know his/her genetic identity, the protection of the interests of the woman who obliges to bear and give birth to a child for another person and respect for the principle of equality regarding all individuals involved in the process of using assisted biomedical insemination methods. Based on the research results derived from an analysis of the national legislation, comparative analysis and international documents, the authors provide concrete recommendations aimed at overcoming certain contradicting situations, which they believe will cement the legal status of the child born to a surrogate mother, the parents who have commissioned the surrogacy and the surrogate mother herself.

1. General characteristics of surrogate motherhood

Surrogacy represents a process which is regulated by legal provisions, and which can lead to parenthood. Surrogacy is defined as the process of bearing a child and giving birth on behalf of others, based on a previous agreement between two parties: the gestational carrier/surrogate mother and the legal parents/contracting couple.

Typical traditional families are usually established between so called "four walls" by a woman and a man, who, when ready to have a child, would conceive that child in the traditional way. After the birth of the child, it is supposed that the man is the father of the child and the woman that gives birth is the mother of the child. Many partners who are not able to have children in the "traditional" way opt for adoption or accept their destiny to be childless. However, through assisted reproduction technologies (ART), modern science has enabled many couples to become parents through third persons and has established families through surrogacy, should this not be achievable by traditional methods (Rosenberg, 2010, p.9). Therefore, the new and revolutionary methods in the field of reproductive medicine have had a great impact on the lives of many infertile couples, enabling them to become parents through artificial insemination; *in vitro* fertilization; surrogate motherhood; giving birth to a child conceived from donated genetic material; post-mortem reproduction, etc.

Although artificial insemination is considered a contemporary innovation, certain cultures, even at the beginning of the third century, have been aware that women can become pregnant without sexual intercourse (the story of Talmudik). The first artificial insemination of a woman took place two centuries ago, when, in 1785, the Scottish anatomist and surgeon, Dr John Hunter, reported that he had successfully inseminated a woman from London, using her husband's sperm. One hundred years later, in 1884, Dr William Pancoast performed artificial insemination on a woman with donated sperm for the first time. Nevertheless, artificial insemination was not commonly accepted until 1940. However, the desire to raise the birth rate after World War II, the progress of birth control as well as the "liberation of social norms" resulted in artificial insemination becoming more popular (Gill, 2013, p.1720).

Surrogacy, which offers the possibility of bearing and giving birth to children, has spread across different cultures and can be traced back to the old Babylonian laws of 1800 BC (Ali, Kelley, cited by Oraiz, 2013, p.129). However, the first internationally recognized case of giving birth to a child by a surrogate mother is that of Pat Anthony. On 1 October, 1987, a gestational surrogate in South Africa gave birth to her own grandchildren. Their story illustrates the complications that surrogacy can cause within the traditional family structure, and also highlights the family values that surrogacy upholds. Pat Anthony bore triplets from ova supplied by her daughter, Karen and fertilized *in vitro* by Karen's husband's sperm. Mrs Anthony is recognized as the legal mother in South Africa, even though she has a weaker case for motherhood than the surrogate who provides the egg, as well as the incubation. Karen, the egg donor, legally has three new siblings (Field, 1990, p.36). Another internationally well-known case is that of Baby M, "who was the product of a contractual arrangement between William and Elizabeth Stern and Mary Beth Whitehead. Baby M was genetically related to both Mary Beth Whitehead and William Stern. According to the contract, after the birth of the child, Mrs Whitehead was to relinquish parental rights and custody of the baby to the Sterns. She was to receive a $10,000 fee for her services. Mrs Whitehead decided she wanted to keep the baby and the infamous custody case ensued" (Markens, 2007, p.3).

Williams-Jones points out that "Assisted reproduction has contributed to the fragmentation of motherhood. Historically, the social and biological aspects of motherhood resided in one person.

Maternity is now divisible into genetic, gestational, and social motherhood, and these roles can be spread amongst a number of women. This division is most apparent in the case of surrogate mothers, where at least three (and possibly as many as five) women can attempt to claim parental rights over a child. If Mrs A is infertile and Mrs B agrees to provide ova to be fertilized *in vitro* with semen from Mr A, and embryos are transferred to Mrs C, who agrees to carry the baby to term and hand it over to Mrs A and her husband after birth, the situation becomes extremely complex and the basic tenets of family law uncertain" (Williams-Jones, 2002, p.3).

In the Republic of North Macedonia (RNM), the institution of surrogate motherhood is a novel concept within family law and biomedicine sciences. Surrogate motherhood, as one of the biomedical solutions to the problem of infertility of a couple, was prohibited by the Law on Biomedically Assisted Fertilization of 2008. However, in October 2014, the Parliament of the Republic of Macedonia adopted the 'Law on Amendments to the Law on Biomedically Assisted Fertilization'. This law established a legal and medical solution, enabling all couples who are unable to reproduce in the natural way, to gain parenting rights.

When surrogate motherhood is discussed, it is important to distinguish between two aspects, depending on the genetic association between the child and the gestational carrier. Surrogate motherhood can be executed under the principles of the traditional or the gestational model. Regarding traditional surrogate motherhood, the egg cell of the surrogate mother is inseminated through an intra-uterus process. Apart from being the carrier of the pregnancy, the surrogate mother also provides her genetic material (the egg cell) in the process. In this case, the child has no genetic bond with his/her legal mother, but instead with his/her surrogate mother. On the other hand, gestational surrogate motherhood is executed through an *in vitro* fertilization process, in which the embryo is created with the genetic materials of the contracting man and woman, and that embryo is placed in the uterus of the gestational carrier. In this case, the surrogate mother has no genetic bond with the child; she is the woman who carries the embryo in her uterus. This kind of surrogate motherhood is also established in our national legislation. The child cannot have a genetic association with the surrogate mother. If the insemination cannot be conducted using the genetic material of one or both contracting parents, then the insemination will be executed with donated genetic material, never with the egg cell of the surrogate mother (Zendeli et al., 2021, p.112).

2. Surrogate motherhood as a means of establishing parenthood in the RNM

Surrogate motherhood is regulated in detail in the Law on Amendments to the Law on Biomedically Assisted Fertilization. This process is formalized by a previously notarized agreement between two parties: gestational carrier/surrogate mother and the legal parents/contracting couple. In this artificial way, parenthood can be established exclusively using the genetic material of the contracting couple, never using the egg-cell of the gestational carrier. In cases when the use of the genetic material of the contracting party is not possible, a procedure of biomedically assisted fertilization (BAF) can be completed in the following cases:

> *inseminating a donated egg-cell with the sperm of the man in the contracting couple which has applied for BAF with a gestational carrier and donated egg-cell; using donated sperm in the creation of the embryo through fertilizing the egg-cell of the woman in the contracting couple which has applied for BAF with a gestational carrier and donated sperm; and using donated egg-cell and donated sperm (see art. 6-a).*

Thus, to preserve the concept of genetic identity, the positive legislation in the RNM does not allow the use of the egg-cell of the surrogate mother, regardless of the circumstances. According to the law in the RNM, the gestational carrier serves only as an "incubator" of the embryo, created with the genetic material of the contracting parents or donated genetic material.

The Law on Amendments to the Law on Biomedically Assisted Fertilization explains in detail the entire process of surrogacy, starting from the initiation of the procedure up until the birth of the child, the conditions to be fulfilled by the interested parties (the parenting couple and the surrogate mother), the formal requirements, from the request of the contracting couple to the signing and notarizing of the agreements and the competences of the commission for legal counselling. The law also clarifies the commission on psychological counselling before the execution of the BAF procedure, the parenting rights of the contracting couple and the status of the surrogate mother, as well as the rights and obligations of the surrogate mother.

According to art. 12-a of this law, *only a man and a woman who are married and are citizens of the Republic of Macedonia have the right to request BAF through surrogate motherhood* (gestational carrier). Persons living in an extra-marital union or in any other form of partnership, a single woman or a single man cannot request the procedure of BAF through a gestational carrier. These persons are discriminated against in terms of the opportunity to create a family through surrogacy, as their circumstances prevent them from doing so in a natural way. Thus, different from artificial insemination or *in vitro* fertilization (IVF) in which married couples, couples living in an extra-marital union or single women can appear as users of BAF and even posthumous reproduction, the legislator has limited surrogate motherhood only and exclusively for married couples (Mickovik, Ristov, Ignovska, 2016, p.360).

A married couple can initiate the process of surrogate motherhood via BAF if the following medical and legal requirements are met:

> *if the woman in the married couple has absence of the uterus or an anomaly of the uterus which cannot be corrected with surgery according to medical proof, or uncorrectable damage of the uterus; if the woman in the married couple has absence of ovaries or anomaly of the ovaries which cannot be corrected with surgery according to medical proof, or uncorrectable damage of the ovaries; if the man in the married couple is diagnosed with infertility which cannot be treated with modern procedures according to medical proof; if the woman in the married couple has had at least three unsuccessful pregnancies, when all other factors and causes of miscarriages are excluded, apart from a damaged uterus (art. 12-a, para. 5, 6 and 7 of the Law on Amendments to the Law on Biomedically Assisted Fertilization).*

The current law only regulates the obligations of the woman who has decided to carry out an altruistic and noble act. The law does not regulate the rights of the surrogate-mother, apart from the right to paid medical leave from work, for pregnancy and birth-giving for 45 days after the birth of the child.

According to the law, the surrogate mother or gestational carrier can be a woman who fulfils the following conditions:

> *is a citizen of the Republic of Macedonia, is in a good psycho-physic and general medical state, is of age 25 or upwards to any age in which the woman is in a good psycho-physic and general medical state, which enables her to have a healthy pregnancy and give birth to a healthy child; is a mother to at least one child at the time of initiating the BAF procedure; has not been subjected to limited or restricted parenting rights, has not been effectively sentenced to imprisonment for a criminal offence for longer than six months, has not been subjected to a limited or restricted contractual capacity, does not suffer from mental illness or does not have impediments in her intellectual development, is not addicted to drugs or other psychotropic substances or alcohol, and does not suffer from serious chronical disease or any incurable contagious disease (art. 6-a, para. 2, LBAF):*

The married couple is obliged to receive the child even if the child is born with a disability for which reason he/she has specific needs, which have not been revealed during pregnancy through standard medical procedures (art. 12-a, LBAF). The following question arises: what happens if the married couple does not receive the child if he/she has anomalies? These situations are unpredictable, however, they result in certain consequences, especially for the child who may feel unwanted after his/her birth.

Another discussion topic is the insecurity related to the objective implementation of the altruistic model of surrogate motherhood in this state.

A question that is posed is the following: can the predicted altruism in the entire procedure be effectively implemented, thus, is it only declaratory or practically realistic? Bearing a child for another person is a serious physical and emotional endeavour, which includes not only medical procedures and time management, but also an obligation for healthy nourishment and quality of life. Therefore, it is unclear whether there will be women who will comply to such altruism, or whether those that are willing to comply will receive adequate compensation for this, which does not have to be reported; this brings us back to the old issue of adjusting the human body or its parts. Unpredicted and unwanted scenarios should also be taken into consideration such as threats of abortion by the surrogate woman, in order to receive compensation or for other reasons (Ignovska, 2015).

The surrogate mother is entitled to receive gifts up to a value of 100 Euros from the married couple during the pregnancy and up until giving birth (art. 12-g, para. 15, LBAF). Thus, the remaining question is the following: is it possible that this altruistic act is implemented thoroughly and how does this process of gifting a child reflect in the ethics of family law? Opposers of this altruistic process emphasize the possibility of valorising the uniqueness of giving birth to a child by a woman. Reproductive contracts and techniques, such as surrogate arrangements, have also created national traffic in women exploited for their reproductive faculties and functions. Literally, this is a system in which women are movable property objects of exchange, brokered by go-betweens and mainly serving the buyer. Surrogate contracts are not simply individual arrangements between women and supposedly desperate couples. They are reproductive purchase orders, whereby women are procured as instruments in a system of breeding. The language and reality of surrogacy as reproductive trafficking cuts through its accepted image as a simple contractual agreement between giving women and despondent couples. In the Third World, this procurement is known as baby farming; in the First World, it is called surrogacy (Raymond, 1995, p.22).

3. Parental rights and the status of the surrogate mother and the married couple

It should be emphasized that the Law on Amendments to the Law on Biomedically Assisted Fertilization focuses more closely on fulfilling the wish of the couples to become parents, rather than the status of the surrogate mother and the child who is born through this method. The law enumerates in detail the parenting rights of the parents (contractors) and the parenting status of the surrogate mother.

According to legal provisions, the gestational carrier does not have parenting rights or obligations towards the child or the children to whom she will give birth. The given statement whereby the acceptance to become subjected to BAF is indicated, is legally binding and emphasizes the withdrawal from the right to be recognized as the mother of the child which is born (art. 12-v, para. 1). Thus, the surrogate mother does not have the right to request recognition of motherhood or to request any parenting rights over the child.

However, if a child born within a BAF procedure remains without parental care from the married couple, whose residence is unknown for more than one year, or the married couple do not execute their parenting rights and obligations, including in cases where the man and the woman of the married couple have lost their parenting rights or their contracting capacity, the woman who is the gestational carrier of the child has the right to be registered as the mother of the child, if she fulfils the conditions for adoption required in family law legislation. If the woman who is the gestational carrier is not registered as the mother of the child, other family law procedures will apply, with the aim of protecting the rights and the interests of the child or children born with BAF (art. 12-v, para. 2).

After the birth of the child, the married couple who have initiated the procedure for BAF with the gestational carrier are registered in the Birth registry as the parents of the child.

> *The eligible office which supervises the Birth registry will register the woman and the man of the married couple, who have initiated the procedure for BAF with the gestational carrier, as the parents of the child, based on the confirmation issued by the Ministry of Health (art. 12-v, para. 6).*

In the case of death of the woman and the man within the married couple, who have initiated the procedure for BAF with a gestational carrier, which occurred during the pregnancy of the gestational carrier, the married couple who initiated the procedure for BAF with the gestational carrier are registered as the parents of the child after the birth, whereas the right to custody over the child is administered according to the provisions of family law:

> *If the child has no other living close relatives, the gestational carrier can become his/her custodian. If the marriage of the married couple who have initiated the procedure for BAF with a gestational carrier has terminated during the pregnancy of the gestational carrier, the issue of custody, care and education of the child is decided in the divorce procedure (art. 12-v, para. 8).*

This method is similar to the method of the adoption of the child, however, the chances of having a genetic child are higher with surrogacy, when fertilization is performed successfully using the genetic material of the contracting parents. As can be noted within legal provisions, the parenting rights and obligations regarding a child born from surrogacy are the same as the parenting rights

and obligations of biological parents. Problems may occur in situations when fertilization cannot be achieved using the genetic material of the contracting parents and, instead, donated genetic material must be used. According to the provisions of the Law on Family, in these cases, the child cannot initiate a procedure for recognition of fatherhood/motherhood, as he/she is born through the method of artificial reproduction (see art. 71 of the Law on Family). On the other hand, this is in contradiction to art. 7 of the Convention on the Rights of the Child, which guarantees the right of the child to know his/her origin and identity, in relation to art. 8 of the European Convention on Human Rights and the right to privacy and family life.

4. Prohibited acts and criminal offences in the process of surrogacy, according to the Law on Amendments to the Law on Biomedical Assisted Fertilization

Apart from regulating in detail the surrogacy process and the rights and obligations deriving from it, the Law on Amendments to the Law on Biomedical Assisted Fertilization renders certain acts prohibited and punishable. Regarding prohibitions related to the BAF procedure with a gestational carrier and the prohibition of sale of *in vitro* embryos, art. 27 of the Law on BAF prohibits advertising the request or offer to bear a child for another person in an open call, in public media or in any other way. It is prohibited to buy, give or receive an offer to buy or to advertise the selling of *in vitro* embryos. It is also prohibited to establish a trade company, aimed at recruiting women who wish to be gestational carriers, as indicated in art. 27 of the Law on BAF.

The law indicates penal sanctions for criminal offences related to the surrogacy process:

> *The penal sanctions consist of up to three years imprisonment for natural persons and fees for legal persons for those, who with use of force, serious threat, fraud or in any other way lure one or more women into becoming gestational carriers or mediate the process of surrogacy in order to gain profit (art. 69-a).*
>
> *If somebody organizes a group, band or other form of organization to commit the above-mentioned offences, they will be punished with imprisonment of between one and ten years (art. 69-b, para.1).*

The law prohibits the advertising of the surrogacy process, as well as the recruitment of surrogate mothers and penally sanctions these criminal offences. Specific sanctions apply to the organized forms of these crimes. The law indicates that a person who, using a public call, public medium or another similar form of advertisement, requests or offers the service of giving birth for someone else for compensation, will be fined or will be sentenced to imprisonment of up to three years:

> *A person who recruits and lures a woman younger than 25 years of age to become a gestational carrier will be sentenced to imprisonment of between one and five years. A person who provides the service or makes use of the service of surrogacy for compensation will be fined or sentenced to imprisonment of between one and three years (art. 69-c).*

The material expenses related to the surrogacy are covered by the contracting couple on a monthly basis, ensuring that this does not exceed the average monthly salary in the RNM. The contracting couple are obliged to inform the Ministry of Health of these expenses once a month, providing receipts for their expenses. In order to avoid the commercialization of surrogacy, the law penalizes the act of requesting or receiving compensation, money, valuables, real estate or any other kind of material profit in exchange for surrogacy. with a risk of imprisonment of between six months and five years (art. 69-d). Furthermore, the *married couple cannot give gifts to the gestational carrier which exceed the amount of 100 Euros during the entire process of BAF up until after the birth of the child* (art. 12-g, para. 15).

The law also regulates the protection of data during the surrogacy process, as well as the identity of the parties involved in this process. The law penalizes the revealing and transmission of personal, medical and genetic information relating to the gestational carrier, the married couple and the child born from a BAF procedure by a gestational carrier. This offence is penalized with imprisonment of between three months and one year. Should any protected information be revealed in the press, radio, television or other public information media or in a public rally, the perpetrator will be fined or imprisoned for up to three years. *If the publication of such protected information has had or might have serious consequences for the damaged party, the perpetrator will be imprisoned for between three months and three years* (art. 69-z, para. 1, 2, 3).

Conclusions and recommendations

Surrogate motherhood is generally considered a process in favour of humankind and the family. As a process that develops under artificial conditions with biomedical techniques, it has enabled many couples to become parents. Despite an abundance of positive aspects, surrogacy has also raised certain legal, philosophical and ethical dilemmas. Other sensitive aspects related to this process include the valorisation of the natural process of pregnancy, as well as the deviation from the well-known roman maxim *Mater semper certa es* (the mother is always known – she who gives birth to the child), which is also accepted in our national family law legislation.

The authors of this article have focused on the regulation of surrogacy within the positive legislation of the RNM, analysing the legal provisions related to this process. Certain problems and contradictions related to surrogacy have been analysed. There are two important aspects related to surrogacy: respect for the best interests of the child born by a surrogate mother, as well as the rights and interests of the woman who becomes a key factor in the creation of a family for other persons.

It is evident that according to the Law on BAF, the contracting parents are registered in the Birth registry as the parents of a child born from a surrogate mother. This means that the name of the surrogate mother is never registered in the Birth registry, which is in contradiction with the aforementioned roman maxim, 'The mother is she who gives birth to the child'. The authors agree completely with the practice of registering the contracting parents as the parents of a child born from a surrogate mother, however, they propose that the name of the surrogate mother is also evidenced in the Birth registry. In the section in which additional information is registered in relation to the status of the child, it should be stated that the child was born from a surrogate mother and all the information related to the surrogate mother and the contracting parents should be registered here. On the other hand, information regarding the gestational carrier should be available to the child once he/she reaches five years of age, which would ensure complete transparency of this process.

An additional problem arises in situations when the child has no genetic association with the contracting parents, because the fertilization has been executed using donated genetic material(s) or a donated embryo has been used in the process of surrogacy. It should be emphasized that such cases represent a violation of the fundamental right of the child to know his/her genetic identity. Thus, the Law on Family does not correlate with the Convention on the Rights of the Child and the European Convention of Human Rights, which promote the principle of protecting the best interests of the child from the perspective of the right to know his/her genetic origin.

An additional problem is the altruistic model of surrogate motherhood in our country. According to the Law on Amendments to the Law on Biomedical Assisted Fertilization, the surrogacy process should be executed without compensation. The contracting couple are obliged to cover the expenses of the pregnancy and giving birth, whereas the gestational carrier has the right to accept gifts of up to 100 Euros during the entire surrogacy process. The questions that arise are the following: is there a control mechanism which will ensure that surrogacy will be executed without material profit? Do we have a guarantee that the contracting couple and the surrogate mother will not enter into an internal agreement for compensation for this process? From a legal perspective, what would be the interest, aim or motive of the surrogate mother, who has no other association with the contracting couple? Since the law does not indicate any limitations regarding the family relations of the surrogate mother, will the family bond of the surrogate mother and the contracting couple influence those family relations, or will this be considered noble assistance for family members who cannot become biological parents?

Since most of these questions remain unanswered, the recommendation is the inclusion of a provision in the Law on BAF, which will indicate that the woman who agrees to become a surrogate mother will receive monthly compensation comparable with the average salary in the RNM during the surrogacy process. This proposed provision is not at variance with the altruistic model, but enables a control mechanism within this process, which is very important, not only for family law but for the rule of law in general.

In this article the legal limitations regarding surrogacy are also criticized with regard to the marital status of the contracting parents. The fact that under current legal provisions only married couples can initiate the process of surrogacy is discriminatory on the basis of marital status in relation to extra-marital unions, as well as regarding single men and women. On the other hand, the law is discriminatory on a gender basis, as it does not allow for single men to become parents through artificial reproduction methods. More precisely, the law indicates that married couples, couples who live in extra-marital unions and single women can become parents through artificial insemination, *in vitro* fertilization and posthumous reproduction. Single men cannot use these procedures for artificial reproduction. This limitation relates to the fact that a single man cannot contract a surrogate woman, as this constitutes a legal impediment.

Bearing in mind that the Law on BAF is an advanced and liberal law, the right to use BAF should also be granted to single men. Considering that artificial reproduction methods have significantly liberalized reproductive rights and freedoms, there should be no gender-based or marital status-based limitations in these processes. Motherhood is indeed considered sacred by many, however, it should not be treated as superior in comparison to fatherhood as regards parental responsibilities or the aspect of establishing parenthood.

Bibliography

Field, M.A. (1990). Surrogate motherhood - The legal and human issues. Harvard University Press.

Fixmer-Oraiz, N. (2013). Speaking of Solidarity: Transnational Gestational Surrogacy and the Rhetoric of Reproductive (In)Justice. Frontiers: 126-163.

Raymond, J.G. (1993). Women as Wombs: Reproductive Technologies and the Battle Over Women's Freedom. Spinifex Press Pty Ltd.

Gill, L. (2013). Who's your daddy? Defining paternity rights in the context of free, private sperm donation. William and Mary Law Review: 1717-1751.

Ignovska, E. (2015). Правно-етичките дилеми за новите репродуктивни технологии како начин на настанување на семејството. Akademik.

Markens, S. (2007). Surrogate motherhood and the politics of reproduction. University of California Press.

Mickovik, D.; Ristov, A. and Ignovska, E. (2016). Новите репродуктивни технологии и правото. Ss. Cyril and Methodius University. Skopje.

Rosenberg, M.B. (2010). Who's Your Mommy, Who's Your Daddy? Legal Complexities of ART and Third-Party Reproduction. American Journal of Family Law: 95-98.

Williams-Jones, B. (2002). Commercial Surrogacy and the Redefinition of Motherhood. The Journal of Philosophy, Science & Law. Volume 2, Issue 2: 1-6.

Zendeli, E.; Selmani-Bakiu, A.; Mickovik, D. and Ristov, A. (2020). E drejta familjare. Arberia Design. Tetovo.

Law on Family (1992). (Consolidate Version, 2015). http://www.slvesnik.com.mk/

Law on Amendments to the Law on Biomedically Assisted Fertilization, Official Gazette of RM, no. 149/2014, http://www.slvesnik.com.mk/

Law on Biomedical Assisted Fertilization (Consolidate Version), Official Gazette of RM no. 37/2008, 164/2013, 149/2014, 192/2015 and 37/2016). https://www.akademika.com.mk/

The European Convention on Human Rights (1950). https://www.echr.coe.int/Documents/Convention_ENG.pdf

UN Convention on the Rights of the Child (1989). https://www.ohchr.org/en/professionalinterest/pages/crc.aspx