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## **Sexual orientation in the Croatian labour market**

The legal framework for combating discrimination against LGBT people in the labour market in Croatia has significantly improved in 2008 by adopting the Anti-Discrimination Act and finally in 2014 by adopting the Same-Sex Civil Partnership Act. However, an appropriate legal framework and adequate legislation are only the first prerequisite to achieving institutional protection. A far more complex problem is the transition of a typical traditional society to the acceptance of diversity as true values of democracy and pluralistic thinking. The paper gives an overview of a few cases of discrimination based on sexual orientation in the Croatian labour market through the socio-legal discourse and an attempt to avoid the predominantly normative analysis of the existing legal solutions.

### **1. Introduction – Social perception of homosexuals in Croatia**

The best introduction to the issue of the legal treatment of homosexual persons in the Croatian labour market, as well as social perception and acceptance of homosexuals, can be given by results of the study published in 2010 by the Croatian Employment Service and the Institute of Social Sciences Ivo Pilar.<sup>1</sup> According to this study, 17.8% of unemployed and 10.9% of employers estimate that sexual orientation is important when deciding on employment,<sup>2</sup> although on the whole sample, sexual orientation is rarely considered a primary reason for not getting a job.<sup>3</sup> The above is not surprising given that the same research showed that sexual orientation of colleagues, friends or acquaintances is a feature employers have least knowledge about.<sup>4</sup> However, in practice, as well as in anthropological, sociological and other relevant studies, discrimination based on sexual orientation is phenomenologically even more intriguing because of its strictly individual character, which is usually not *prima facie* obvious or well-known and it does not have any impacts on the performance of the said persons. Croatian research results should therefore be seen in a wider context, because attitudes towards LGBT people differ significantly in other EU Member States as well. According to Eurobarometer, most positive responses of respondents were obtained when they were asked about whether they would like to have homosexuals as their neighbours, while most negative responses were given in terms

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<sup>1</sup> See: *Raširenost i obilježja diskriminacije na hrvatskom tržištu rada, Izvješće na temelju ankete među nezaposlenim osobama i ankete među poslodavcima*, Croatian Employment Service and Institute of Social Sciences Ivo Pilar, Zagreb, April 2014. Available at: [http://www.hzz.hr/UserDocsImages/HR\\_Survey.pdf](http://www.hzz.hr/UserDocsImages/HR_Survey.pdf) (last visited on 26 September 2014).

<sup>2</sup> *Ibid.*, Figure 11, p. 16. The survey included 1,674 unemployed persons (44.5% of whom or 746 persons refused to participate) and 946 representatives of employers whose offices are registered at 36 Croatian settlements and three employers whose offices are registered abroad (36.2% of whom or 342 people refused to participate).

<sup>3</sup> *Ibid.*, p. 20.

<sup>4</sup> *Ibid.*, p. 32.

of issues related to the possibility of the adoption of children by same-sex partners.<sup>5</sup> Furthermore, attitudes towards transgender people are far more negative than towards lesbian, gay and bisexual people<sup>6</sup>, and homophobic statements are immanent in almost all European societies when it comes to part of political structures and religious persons who describe them as “unnatural”, “deviant”, “immoral or socially destabilising”.<sup>7</sup> Croatia is in this sense not inferior because it is sociologically “*a patriarchal and sexist society with elements of homophobia*”, as shown by sociological research conducted from 2000 to the present day,<sup>8</sup> although in recent years small improvements in the modernisation of society have been noticed when it comes to alleviating attitudes regarding homosexuality, single parenthood and the traditional concept of marriage as a fundamental social institution.<sup>9</sup> Since the 1990s, the influence of the dominant Catholic Church in Croatia, especially after gaining independence and undergoing the process of democratisation, has been extremely high, because by strengthening its position it took over the initiative in social and political issues such as the possible legal regulation of marriage between same-sex partners, medically assisted procreation and/or legal determination of Sunday as a day off.<sup>10</sup> The aforementioned points out a lower degree of secularisation in Croatia in relation to states with the cultural dominance of Protestantism or those that are significantly marked by the communist legacy.<sup>11</sup> Moreover, non-governmental organisations close to the Catholic Church and with its direct and indirect assistance have played a major role in collecting the necessary signatures and carrying out a national referendum according to which in 2014 Croatia became one of the few EU Member States in which marriage is constitutionally defined as a “union between a man and a woman”.<sup>12</sup> The strongest motive for conducting the referendum and a constitutional definition of marriage as a union between a man and a woman is an attempt first to prevent the

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<sup>5</sup> See: *Homophobia and Discrimination on Ground of Sexual Orientation and Gender Identity in the EU Member States, Part II – The Social Situation*, Updated version, European Union Agency for Fundamental Rights, 2009, p. 10. Available at: [http://fra.europa.eu/sites/default/files/fra\\_uploads/397-FRA\\_hdgso\\_report\\_part2\\_en.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/397-FRA_hdgso_report_part2_en.pdf) (last visited on 26 September 2014).

<sup>6</sup> Ibid.

<sup>7</sup> Ibid., p. 11.

<sup>8</sup> Branka Galić, PhD, Head of the Department of Sociology, Faculty of Philosophy, University of Zagreb, in: *Skandaliziranje homoseksualnosti u Hrvatskoj*. Available at: [www.slobodnifilozofski.com/2011/07/skandalizirane-homoseksualnosti-u.html](http://www.slobodnifilozofski.com/2011/07/skandalizirane-homoseksualnosti-u.html) (last visited on 23 September 2014).

<sup>9</sup> Krunoslav Nikodem, Pero Aračić, Ivo Džinić, Važnost braka i obitelji u hrvatskom društvu, *Analiza osnovnih pokazatelja u razdoblju od 1998. do 2008. godine, Bogoslovska smotra*, Vol. 80, Issue 2, 2010, pp. 623-642.

<sup>10</sup> Krunoslav Nikodem, Pero Aračić, Obitelj u transformaciji, in: Josip Baloban (ed.) *U potrazi za identitetom: Komparativna studija vrednota: Hrvatska i Europa*, Golden marketing, Zagreb, 2005, pp. 145-178; Branka Galić, Željka Kamenov (eds.) *Rodna ravnopravnost i diskriminacija u Hrvatskoj, Istraživanje, iskustva i stavovi o rodnoj diskriminaciji u Republici Hrvatskoj*, Ured za ravnopravnost spolova Vlade Republike Hrvatske, Zagreb, 2011, p. 24.

<sup>11</sup> Galić, Kamenov, 2011, p. 24.

<sup>12</sup> Article 61, para. 2. The Constitution of the Republic of Croatia, Official Gazette No. 56/90, 135/97, 113/00, 28/01, 76/10, (Constitutional Court Decision SuP-O-1/14 January 2014) 5/14.

legal regulation of marriage between same-sex partners, and second, to hinder the recognition of the right granted to same-sex partners to adopt children.<sup>13</sup>

In such conditions, it is justifiable to question the divergent relationship between everyday practices and social perceptions of LGBT people on the one hand, and normative solutions and their actual application on the other.

## **2. National normative framework to combat discrimination based on sexual orientation**

When it comes to the Croatian normative framework, we cannot say that it lacks provisions aimed at preventing discrimination against LGBT people. In the Croatian Constitution, freedom, equality, national equality and gender equality, peace, social justice, respect for human rights and the rule of law are *inter alia* referred to as the highest values of the constitutional order and the basis for constitutional interpretation of the Constitution.<sup>14</sup> Everyone is entitled to rights and freedoms regardless of “*their race, colour, gender, language, religion, political or other opinion, national or social origin, property, birth, education, social status or other characteristics*”.<sup>15</sup> The said provision is effectively a constitutional *exempli causa* standard in terms of prohibiting unequal treatment, compared to (other) legal provisions using the *numerus clauses* principle.<sup>16</sup>

In the field of labour relations, Croatia’s ban on unequal treatment was first introduced in 1995 by adopting the first Labour Act in an independent state, but the legal foundations of the ban (on unequal treatment) did not tackle the issue of sexual orientation. The Act stipulated then that a person seeking employment as well as an employed person must not be treated less favourably than others on grounds of their *race, colour, gender, marital status, family responsibilities, age, language, religion, political or other opinion, national or social origin, property, birth, social status, membership or non-membership in a*

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<sup>13</sup> The Constitutional Court of the Republic of Croatia has played an important role in the whole process referring to the referendum because it proposed to the Croatian Parliament to act in accordance with Article 95 of the Constitutional Act on the Constitutional Court of the Republic of Croatia and request the assessment whether the referendum question (i.e., “Do you agree that a provision according to which marriage is a union between a man and a woman shall enter into the Constitution of the Republic of Croatia?”) is in accordance with the Constitution and whether the requirements for calling a national referendum are met. Croatian Parliament voted to adopt a decision rejecting the proposal of the Constitutional Court thus expressing its willingness to deem the referendum question compliant with the Constitution (*although there were very dissonant tones and interpretations by individual members of the Parliament that came from the parliamentary majority!*). However, in its statement, the Constitutional Court *mutatis mutandis* stressed that marriage and family life today are not synonymous and called for two legally binding sources: the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 12) and the Charter of Fundamental Rights of the European Union (Article 9). See: Priopćenje Ustavnog suda Republike Hrvatske o narodnom ustavotvornom referendumu o definiciji braka, Constitutional Court of the Republic of Croatia SuS-1/2013, 14 November 2014. Available at: <http://www.prs.hr/attachments/article/844/SuS-1-2013%20-%20PRIOP%C4%86ENJE.pdf> (last visited on 20 September 2014).

<sup>14</sup> See Article 3 of the Croatian Constitution.

<sup>15</sup> *Ibid.*, Article 14.

<sup>16</sup> Mario Vinković, New Croatian Anti-Discrimination Legislation – Harmonisation with the Acquis or even more? in: Karel Klima, Gerald Sander (eds.) *Grund- und Menschenrechte in Europa, Schriften zu Mittel- und Osteuropa in der Europäischen Integration*, Band 10, Verlag Dr. Kovač, Hamburg, 2010, p. 99.

*political party, trade union membership or non-membership, and physical and mental health.*<sup>17</sup> It was not until eight years later, in 2003, after several amendments to the Labour Act, that provisions specifying the prohibition of direct and indirect discrimination (as well as their legal definition) were included in the Act, and the prohibition of discrimination based on “*sexual orientation*” was included *expressis verbis* in a general clause prohibiting discrimination.<sup>18</sup> This was the first time harassment and sexual harassment were legally defined in employment relations<sup>19</sup>, exceptions to the prohibition of discrimination were specified by trying to implement and interpret the proportionality test<sup>20</sup> and the prohibition of discrimination was specified in relation to conditions of employment, including candidate selection criteria, career advancement, access to all types and levels of vocational training, additional training and retraining, employment and working conditions, including equal pay, termination of employment and the rights of members and participation in employee and employer associations.<sup>21</sup> Legislative amendments to labour legislation were initiated due to the intensification of negotiations of the Republic of Croatia on its membership in the European Union, and preparation for the entry into force of the Stabilisation and Association Agreement and the first attempts to harmonise with the *acquis communautaire* in the area of concern. In 2003, the Gender Equality Act<sup>22</sup> and the Same-Sex Cohabitation Act<sup>23</sup> were adopted for the same reasons. Both of these Acts contained definitions of non-discrimination, but some of them differed, creating in this way confusion at the level of the horizontal dis/harmonisation of Croatian legislation. Moreover, the Same-Sex Cohabitation Act was criticised as a kind of *contradictio in adjecto* by non-governmental organisations highlighting that its aim was to protect the rights of homosexual persons and prevent discrimination based on sexual orientation, but it actually prevented the practical realisation of a series of rights (inheritance, rights arising from the pension fund and health insurance, property rights, etc.),<sup>24</sup> retaining only a declaratory character.<sup>25</sup> This practically unenforceable provision will be replaced only upon entry into force of the Same-Sex Civil Partnership Act in 2014.<sup>26</sup>

Frequent amendments to labour legislation, a total lack of procedural provisions in the context of protection against employment and workplace discrimination, including discrimination based on sexual orientation, and the need to harmonise horizontal (labour) legislation have resulted in the adoption of the Anti-Discrimination Act,<sup>27</sup> and the new Labour Act.<sup>28</sup> The latter retained only the obligation of an employer to protect employees against discrimination and harassment, including the protection of

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<sup>17</sup> (The first Croatian) Labour Act, Official Gazette, No. 38/1995.

<sup>18</sup> Article 2, Labour Act, Official Gazette, No. 38/85, 54/95, 65/95, 17/01 and 114/03.

<sup>19</sup> Ibid., Article 2b.

<sup>20</sup> Ibid., Article 2a.

<sup>21</sup> Ibid., Article 2, para 4.

<sup>22</sup> Gender Equality Act, Official Gazette, No. 116/03.

<sup>23</sup> Same-Sex Cohabitation Act, Official Gazette, No. 116/03.

<sup>24</sup> The Act guaranteed only the right to mutual support and joint possession.

<sup>25</sup> Vinković, 2010, pp. 100-101.

<sup>26</sup> Same-Sex Civil Partnership Act, Official Gazette, No. 93/14.

<sup>27</sup> Anti-Discrimination Act, Official Gazette, No. 85/08, 112/12.

<sup>28</sup> Labour Act, Official Gazette, No. 149/09 and again the new Labour Act, Official Gazette, No. 93/14.

dignity at work, and the obligation to adopt appropriate rules of procedure, while all other previously mentioned institutes (discrimination, harassment, sexual harassment, etc.), as a result of horizontal harmonisation of national legislation and the pursuit of eliminating inconsistencies in its definition in various legal sources of the same horizontal position and hierarchical importance are “displaced” to the Anti-Discrimination Act as an organic law. This also overcame the apparent deficit in terms of procedural norms as that Act also implemented typologisation of the so-called discrimination lawsuits. The former extremely small number of lawsuits related to achieving the protection against workplace discrimination was linked to both distrust in the institutional forms of protection and lacking interpretive capacities of the Croatian courts in this area.<sup>29</sup>

The Anti-Discrimination Act is extended *inter alia* to the area of labour and employment, education, science, sports, social security, health care, access to goods, information and services, etc. Through the *numerus clausus* system, protection against discrimination is extended to almost 18 prohibited grounds of discrimination, including marital and family status, genetic heritage and gender identity, gender expression or sexual orientation.<sup>30</sup> This has extended the previously promoted ban on discrimination based on sexual orientation to gender identity and gender expression, which anticipates in the given terms the difference in the perception of sex and gender as biological givens and social constructs. Moreover, this offers legal protection not only in cases of discrimination against homosexual, heterosexual and bisexual people, but also transsexual (born as members of one sex, but with a sense of belonging to the opposite sex and a desire to achieve their unambiguous sexual identity by undertaking a variety of medical procedures), intersex (born with characteristics of both sexes) and transgender (who do not consider themselves either as women or as men, but feel that they belong to both sexes) persons.<sup>31</sup> Therefore, the clause prohibiting discrimination, although it contains a closed list of legal grounds, extends to a much wider range than the one axially regulated by secondary legislation, i.e., individual and framework directives, and approaches an open list of legal grounds from the Charter of Fundamental Rights of the European Union.<sup>32</sup> However, despite everything, the Anti-Discrimination Act has been criticised by the Ombudsman for Gender Equality of the Republic of Croatia as an inefficient legal source, because in 2011 Zagreb County Court brought two acquittals in respect of homophobic statements. In the first case, under which the “gay men cannot be imagined as footballers, but as ballet dancers and songwriters” and these people “would never play in (his) team”, the court described these statements as the “right to personal attitude”. In the second case, regarding statements by the then President of the Croatian Football Federation that “as long as he was the president of Croatian Football Federation, there would be no gay players in the national team” and that “only healthy people play football”, the judge concluded

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<sup>29</sup> Mario Vinković, Horizontalna harmonizacija hrvatskog (radnog) zakonodavstva – kamo je nestala zabrana diskriminacije i zaštita majčinstva/roditeljstva? in: *Novi Zakon o radu, Detaljni komentar novih odredaba*, Biblioteka Radno pravo, Rosip, Zagreb, 2010, p. 332 (in further text - Vinković, 2010b).

<sup>30</sup> See Article 1 of the Anti-Discrimination Act.

<sup>31</sup> Vinković, 2010b, p. 333.

<sup>32</sup> *Ibid.*, p. 334.

that the selection of players is formally decided by the Croatian Football Federation and not its president.<sup>33</sup> A question naturally arises as to whether in those individual cases one should have resorted to the exercise of legal protection through other regulations, especially in the field of criminal law, because the aforementioned statements could certainly be subsumed under a form of “hate speech”. The competent authorities and institutions remained silent.

The Anti-Discrimination Act came under justified criticism because of a large number of reasons for the exclusion of the illegality principle that the European Commission warned about,<sup>34</sup> and its amendments of 2012 provide that after the Croatia’s accession to the EU those provisions will no longer be applied that made it possible, by the rules of actuarial mathematics and statistical evaluation, to contract various insurance premiums based on age and gender.<sup>35</sup> However, relying on the practice of the Supreme Court of the USA, its authors went a step further in different parts of the legal text than the relevant European directives, defining qualified or particularly serious forms of discrimination - multiple, repeated and prolonged discrimination,<sup>36</sup> but the definition of segregation contained therein is in turn almost unusable because it involves “the forcible and systematic separation of people” based upon a legal ground of the prohibition against discrimination,<sup>37</sup> while today the real problem is, I dare say, segregation as a result of systemic indirect discrimination.<sup>38</sup> Legal regulation of particularly serious forms of discrimination is particularly significant for homosexual persons, as they were among the first affected by multiple discrimination, as suggested by feminist and critical race theory.<sup>39</sup>

The previously mentioned Same-Sex Civil Partnership of 2014 was passed<sup>40</sup> *inter alia* due to the complete ineffectiveness of the Same-Sex Cohabitation Act of 2003, based upon which no instances of same-sex unions have been officially recorded in

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<sup>33</sup> Snježana Vasiljević, *Slično i različito, Diskriminacija u Europskoj uniji i Republici Hrvatskoj*, TIM press, Zagreb, 2011, p. 240.

<sup>34</sup> Ibid.

<sup>35</sup> Amendments to the Anti-Discrimination Act, Official Gazette, No. 112/12.

<sup>36</sup> Anti-Discrimination Act, Article 6, para 1.

<sup>37</sup> Ibid., Article 5.

<sup>38</sup> Vinković, 2010b, p. 337.

<sup>39</sup> Kimberlé Crenshaw, Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, in: D. Kelly Weisberg (ed.) *Feminist Legal Theory: Foundations*, Temple University Press, Philadelphia, 1993, pp. 383-395; Diamond Ashiagbor, The Intersection between Gender and Race in the Labour Market: Lessons for Anti-discrimination Law, in: Ann Morris, Thérèse O’Donnell (eds.) *Feminist Perspectives on Employment Law*, Cavendish Publishing, 1999, pp. 139-160; Timo Makkonen, Multiple, compound and intersectional discrimination: bringing the experience of the most marginalized to the fore, Institute for Human Rights, Åbo Akademi University, 2002, pp. 1-59; Sandra Fredman, Double Trouble: multiple discrimination and EU law, *European Anti-Discrimination Law Review*, No. 2, 2005, pp. 13-18; Colleen Sheppard, Multiple Discrimination in the World of Work, Working Paper No. 66, International Labour Office, Geneva, 2011, pp. 1-41, available at: [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_170015.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_170015.pdf) (last visited on 19 August 2014) .

<sup>40</sup> Same-Sex Civil Partnership Act, Official Gazette, No. 93/14.

Croatia since 2003.<sup>41</sup> The Act regulates a same-sex civil partnership, its principles, the conclusion and termination of a civil partnership due to death of a partner, annulment and cancellation, keeping records of civil partnerships and legal effects of civil partnership in terms of personal rights, children, parental and partner's care, property, inheritance, tax status, the position of civil partnerships in relation to social security (health care, pension, social welfare), in the area of employment and labour relations, access to public and commercial services, and finally in terms of the legal position of civil partnership. The latter refers to a temporary residence permit for family reunification, freedom of movement within the European Economic Area and the position of same-sex civil partnerships concluded outside the European Economic Area.<sup>42</sup> The Act *expressis verbis* bans any form of direct and indirect discrimination based on a concluded civil partnership, sexual orientation and gender identity.<sup>43</sup> It also eliminates many problems that are the result of the previous lack of recognition of same-sex partners as members of the immediate family by the acts in the fields of health insurance, pension insurance and social welfare, while life partners have finally been equalised with spouses in relation to the right of inheritance.<sup>44</sup> Their right to acquire a survivor's pension after the death of a partner is also recognised,<sup>45</sup> and to protect the interests and welfare of their partner who is incapable of giving consent to any form of medical intervention, all the possibilities of giving consent available to spouses as well.<sup>46</sup> Unfavourable treatment based on the status of civil partnership in respect of access to all services on the market and in the public sector is treated as a form of illegal discrimination,<sup>47</sup> but what is particularly important for our discussion is the fact that any unfavourable treatment in respect of employment, working conditions and labour market participation, conditional upon the status of civil partnership is a form of discrimination based on sexual orientation,<sup>48</sup> which is also prohibited by the Anti-Discrimination Act as an organic law. The rights and obligations of partners can be changed on the labour only by special laws governing labour relations, but with due respect to the prohibition of unfavourable treatment of partners in terms of rights, privileges or obligations that are also guaranteed to spouses.<sup>49</sup>

Explaining the reasons for passing the Act the Government clearly emphasised that the existing legal framework is insufficient to provide legal protection for homosexuals and unharmonised with the practice of the European Court for Human Rights, in particular with regard to the recognition of a stable same-sex union as a "family unit", or a family entity enjoying protection pursuant to Article 8 of the

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<sup>41</sup> See: *Prijedlog Zakona o životnom partnerstvu*, Government of the Republic of Croatia (first reading), December 2013. Available at: <http://www.sabor.hr/prijedlog-zakona-o-zivotnom-partnerstvu-prvo-citan> (last visited on 20 August 2014).

<sup>42</sup> See Articles 1 to 79 of the Same-Sex Civil Partnership Act.

<sup>43</sup> *Ibid.*, Article 6(3).

<sup>44</sup> *Ibid.*, Article 55.

<sup>45</sup> *Ibid.*, Article 61.

<sup>46</sup> *Ibid.*, Article 67.

<sup>47</sup> *Ibid.*, Article 71.

<sup>48</sup> *Ibid.*, Article 69.

<sup>49</sup> *Ibid.*, Article 70.

European Convention on Human Rights,<sup>50</sup> and that the proposal reflects “a real social context in which the Republic of Croatia is at the moment” and introduces “democratic compromise as a basis for the Act” (as to the distinction between marriage and institutional arrangements referring to civil partnership as “a form of same-sex cohabitation”).<sup>51</sup> The right-wing part of the electoral body understood the legislation as a sort of circumvention of the will of the voters expressed in the referendum on the constitutional definition of marriage as a union between a woman and a man, although the most powerful Christian democratic party (Croatian Democratic Party, HDZ), which defends traditional values, supported the legislation in the relevant parliamentary committees.<sup>52</sup> Moreover, it was argued that this was a “gross assault on the Constitution of the Republic of Croatia because the constitutional arrangement of marriage as a union between a woman and a man is reduced to a mere concept (the name, trademark, copyright of the name of marriage, but not its content).”<sup>53</sup> A newly introduced institute of “informal civil partnership” as a “family form of a union between two persons of the same sex who have not concluded a civil partnership before the competent authority”, although in my opinion, this is a certain common-law marriage between same-sex persons, or linguistic bravura that substantially subsumes a common-law marriage between same-sex persons. This is particularly so, because for it to hold it is necessary that it lasted “three years” - as in a common-law marriage between heterosexual partners – “and that from the beginning it complied with the requirements prescribed for the validity of the civil partnership”.<sup>54</sup> However, through the traditionally Christian conservative discourse, a registered same-sex civil partnership is viewed as “sexual intercourse”.<sup>55</sup> The Croatian regulatory framework has undoubtedly profited by enacting legislation that aims to reduce the discriminatory effects of national treatment of same-sex unions by extending its scope of application to the field of social welfare, pension and health insurance and the labour market. In the context of the need for a greater degree of horizontal harmonisation of national legislation, it is a somewhat unusual approach one tries to justify by the aegis of a comprehensive regulation governing the status of same-sex partners and the prohibition of discrimination based on sexual orientation in the areas concerned. Therefore, we can only hope that the content of the Act will be properly identified, interpreted and implemented in the exercise of rights in the area of pension and health insurance, and in terms of access to services, the labour market and the rights to benefit from the social welfare system. From the viewpoint of labour and social law, I would not argue that the Act is revolutionary because in a politico-

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<sup>50</sup> See: *Prijedlog Zakona o životnom partnerstvu*, op. cit., p. 2.

<sup>51</sup> *Ibid.*, pp. 7 and 8.

<sup>52</sup> “HDZ obranio tradicijske vrijednosti, pa podržao registriranje gej zajednica”, A commentary by Marko Biočina, *Summa summarum*, *Večernji list* daily newspaper, 5 July 2014, p. 18.

<sup>53</sup> “O prijedlogu Zakona o životnom partnerstvu u svjetlu ustavne definicije braka”, Summary of commentaries by Petar Marija Radelja on the Proposal of the Same-Sex Civil Partnership Act, author Marinko Jurasić, *Večernji list* daily newspaper, 5 July 2014, pp. 12-13.

<sup>54</sup> Article 3 of the Same-Sex Civil Partnership Act.

<sup>55</sup> Petar Marija Radelj, *Komentar Prijedloga Zakona o životnom partnerstvu*, Glava III. Opažanja o pojmu životnog partnerstva, točka 25. Available at: <http://zdravstveniodgoj.com/news/pravna-analiza-prijedloga-zakona-o-zivotnom-partnerstvu> (last visited on 20 September 2014).

sociological discourse it is an approach advocated by the Croatian political scientist Kurelić, pursuant to which the activists who advocate equality do not insist on a public affirmation of the value of gay and lesbian lifestyle or the recognition of these differences, but on a society that does not perceive LGBT people “as something dramatically different.”<sup>56</sup> In that sense, the Act itself should be viewed as a necessary tool in the recognition and realisation of rights, rather than their mere perception as a political or legal narrative *credo*.

### **3. The role of the NGO sector in protecting the rights of LGBT people in the labour market**

The role of NGOs in the promotion and protection of LGBT people, including the protection against discrimination in the labour market, is extremely important from the standpoint of functional assistance through legal and psychological counselling, systematic support and promotion of rights of LGBT people, monitoring of violence and especially sensitising of the public that only in recent years does not approach the subject as a taboo.<sup>57</sup> In this regard, relevant associations act through the Centre for LGBT Equality as an activist alliance that works to achieve equality for LGBT people in Croatia, the Regional Lesbian Network and the Women’s Network of Croatia. Thanks to the financial assistance provided by the European Union and in cooperation with the Independent Trade Union of Croatia, the associations Kontra and Iskorak have developed a guide *Together for LGBT Equality in the Workplace* as a practical and comprehensive guide that aims to strengthen the capacity of trade unions, employers and local authorities to promote equality and combat discrimination against LGBT people in the workplace, including practical information on legal sources, institutions and a way to enjoy institutional protection.<sup>58</sup> A manual for trade unionists entitled “Invisible workers – how to protect LGBT individuals in the workplace” was also published within the framework of the same project.<sup>59</sup> The manual refers to the results of research conducted within the framework of the same project, and according to which only 17.2% of LGBT employees are members of Croatian trade unions. Trade unions can undoubtedly play an important role in the fight against discrimination based on sexual orientation and gender identity in the workplace and should be strengthened in such mission. LGBT employees should be

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<sup>56</sup> Zoran Kurelić, On the Unholy Public-Private Split, *Politička misao*, Vol. XLII, No. 5, p. 125.

<sup>57</sup> At the end of 2012, with the assistance of the Embassy of the United Kingdom, the Gender Equality Ombudsman of the Republic of Croatia organised a round-table discussion entitled “The position of same-sex unions - a new legal framework” as a sort of introduction to identify the problems that LGBT people face in the exercise of their rights due to the deficiencies of the then legal framework and unequal treatment of same-sex unions, i.e., their members, as family members in the realisation of their health, pension and social security rights. Available at: <http://www.prs.hr/index.php/suradnja/ocd-3/512-okrugli-stol-polozej-istospolnih-zajednica-novi-pravni-okvir> (last visited on 22 September 2014).

<sup>58</sup> Available at: [http://kontra.hr/cms/documents/Vodic\\_layout.indd.pdf](http://kontra.hr/cms/documents/Vodic_layout.indd.pdf) (last visited on 20 August 2014).

<sup>59</sup> Jasna A. Petrović, Nevidljivi radnici – kako zaštititi LGBT osobe na radnom mjestu – vodič za sindikaliste, 2011. Available at: [http://kontra.hr/cms/documents/Nevidljivi\\_radnici\\_27052011\\_3\\_ZA\\_TISAK.pdf](http://kontra.hr/cms/documents/Nevidljivi_radnici_27052011_3_ZA_TISAK.pdf) (last visited on 22 September 2014).

encouraged to become trade union members since this will enable them to exercise their labour rights much better.<sup>60</sup> However, as one of the main reasons for a rather low rate of membership of LGBT employees in trade unions, as well as addressing their union representatives in their respective workplaces, they mention a “macho heterosexual image” that’s been around for ages, which is a characteristic of Croatian trade unions.<sup>61</sup> The activities of non-governmental organisations have resulted in the publication of a special Guide for Employers on the LGB Rights.<sup>62</sup>

The importance of cooperation with the civil sector in promoting and strengthening the rights of LGBT people has also been emphasised for a number of years by the Ombudsman for Gender Equality from whose annual reports indicate close mutual cooperation and implementation of a series of activities with these organisations.<sup>63</sup> As part of the social scene, trade unions have numerous resources to combat discrimination, including discrimination based on sexual orientation, by encouraging a dialogue with employers, keeping records of incidents of discrimination, the possibility of proposing relevant provisions for collective agreements, the promotion of equality and non-discrimination in the workplace, including zero tolerance for discrimination, etc.<sup>64</sup>

In the European discourse, trade unions have been playing a more important role in combating discrimination against LGBT people in the workplace since 2008 when the ETUC organised the first conference on the promotion of equal rights, respect and dignity for workers regardless of their sexual orientation or gender identity, and published its first report under a similar title,<sup>65</sup> where it *expressis verbis* stresses the need for close cooperation between NGOs and trade unions. It is not less important that such cooperation can help identify good practices and the development of policies, initiatives and measures in collective bargaining procedures<sup>66</sup>, because of discrimination and harassment of LGBT people in the workplace are manifested through various forms: a refusal of employment, disabling professional development, promotion and advancement, homophobic harassment, bullying, denial of social benefits recognised to heterosexual partners, constant hiding of LGBT people and the fear of “coming out” leading to “self-exclusion”.<sup>67</sup> In such conditions, unions can do a lot by constructing their own mechanisms and policies, by engaging in relevant

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<sup>60</sup> Petrović, 2011, p. 29.

<sup>61</sup> Ibid.

<sup>62</sup> Kristijan Grđan, Sanja Juras, Vodič za poslodavce o LGB pravima. Available at: <http://www.iskorak.hr/wp-content/uploads/files/pt-spec-poslodavci.pdf> (last visited on 22 September 2014).

<sup>63</sup> See, for example, Croatian Gender Equality Ombudsperson Report for 2013, pp. 110-122. Available at: <http://www.prs.hr/attachments/article/997/Izvjescje%20o%20radu%20za%202013%20Pravobraniteljice%20za%20ravnopravnost%20spolova.pdf> (last visited on 28 September 2014).

<sup>64</sup> Petrović, 2011, p. 36.

<sup>65</sup> Jane Pillinger ETUC Report “Extending equality: Trade unions actions to organise and promote equal rights, respect and dignity for workers regardless of their sexual orientation or gender identity”. Available at: [http://www.etuc.org/sites/www.etuc.org/files/ETUC\\_inside-2\\_1.pdf](http://www.etuc.org/sites/www.etuc.org/files/ETUC_inside-2_1.pdf) (last visited on 28 September 2014).

<sup>66</sup> Pillinger, 2008, p. 9.

<sup>67</sup> Pillinger, 2008, p. 11.

discussions and initiatives at national and international levels, by the fight against prejudice and by systematic education.<sup>68</sup>

Since the non-governmental organisations, as well as the Ombudsperson for Gender Equality of the Republic of Croatia, each from their own perspective, keep records of incidents of discrimination based on sexual orientation, for understanding the socio-legal background and the actual situation in the Croatian society perhaps it would be good to take a look at a few cases of discrimination based on sexual orientation in relation to workplace.

#### **4. Several cases of discrimination based on sexual orientation in the workplace in Croatia**

In Croatia, it is currently almost impossible to get information about the number of cases relating to discrimination based on sexual orientation, because, although there is an obligation to keep such statistics in national courts, there is no systematic way of classifying objects to those associated with hate speech and other offenses associated with cases of discrimination based on gender identity and sexual orientation, mobbing and labour law cases associated with these legal foundations. The blame for this should not be *a priori* laid on the judicial authorities, but to a great extent it should be laid on insufficient infrastructure and software and computer support of Croatian courts, as well as non-existence of any mutual network or a uniform jurisprudence database. Moreover, data that can be obtained from several sources (Ministry of Justice, Ministry of Interior, Office of the Ombudsperson, Office of the Ombudsperson for Gender Equality, NGOs, etc.) are usually mutually incompatible. This may suggest both difficulties in processing the received data and the fact that part of the cases has not been processed for various reasons (fear, withdrawal of the applicant, inertia and ignorance by the competent authorities and bodies, etc.).

According to the report of the Ombudsperson for Gender Equality for 2013, discrimination against LGBT people in the labour market, goods and services is widespread, but not sufficiently visible, so her estimates are based on queries and complaints referred to her office, as well as information gathered from LGBT organisations.<sup>69</sup> Therefore, my paper will focus on three subjects that, in my opinion, best portray Croatian society and reality, i.e., that are thought-provoking and that initiate further discussion. In doing so, I want to emphasise that the two subjects remained only at the level of media articles and have not resulted in a judicial process, and one ended up with the final court verdict on discrimination based on sexual orientation in the largest Croatian university - the University of Zagreb, i.e., the Croatian capital.

I mentioned the first case once in one of my previous papers on discrimination in the Croatian labour market<sup>70</sup> and characterised it as a form of direct discrimination based on sexual orientation. With temporal distance, that case imposes a hypothetical discussion about its fate before the Court of Justice of the European Union and the

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<sup>68</sup> Petrović, 2011, pp. 36-43.

<sup>69</sup> Croatian Gender Equality Ombudsperson Report for 2013, p. 114.

<sup>70</sup> Vinković, 2010, p. 97.

debate about the relationship between fundamental rights and economic freedoms. It is a 2009 case that was poorly covered by the media and that did not result in litigation, because the victim did not want to go through secondary victimisation. A newspaper article entitled “I cannot work as a waiter because I am gay”,<sup>71</sup> sums up the case in a picturesque Croatian town where a young man was employed at the local inn on probation as a waiter who wanted to pay for his education. After two days of excellent work, the owner invited him for an interview and explained that could not work there anymore because he is gay and he “knows what kind of reputation he has in the town of Pregrada”. The owner also admitted that in the last six years, no one performed the job as good as the young man did, but he “cannot give him the job, because his regular guests are threatening not to come to the café” he earns his living by. He also pointed out that he had absolutely nothing against the young man’s sexual orientation. Moreover, he “frankly told him the reasons” and did not try to hide why he did not want to give him the job, explaining that “you cannot do anything against your guests”. The young man pointed out that in Pregrada no one had ever hurled insults at him and he had never had any problems because of his sexual orientation, but that all changed when he began to look for a job. Guests interviewed by a reporter gave similar answers, e.g., two girls said: “This is a small place.”, and “If I were the owner, I would do the same.” An older gentleman, a long-time customer at the café, after some deep thought, said he would “probably come if the waiter were very neat and clean, and did his job well.” The owner of the neighbouring café replied that the young man could not work in his café either “because he would lose his job, and nobody would want to come because of the waiter”. When asked hypothetically what would happen if the owners of all 24 cafés in Pregrada agreed to hire gay waiters, he confirmed that then someone would open the 25<sup>th</sup> café “where most probably everybody would go.”<sup>72</sup> This case really clearly reflects the problems faced by people of homosexual orientation - discrimination, prejudice, social condemnation, including isolation of the local, predominantly small, community when their sexual orientation becomes evident. Although there was no court epilogue to this case, there is no doubt that this was an example of direct discrimination. However, the eternal struggle between fundamental rights and economic freedoms in the EU, which was revived by the revolutionary *Laval* and *Viking* cases and which resulted in the expected victory of economic freedoms (primarily due to, I suppose, the economic dimension of the common market woven into the initial idea of European unification and its functioning) imposes a hypothetical question whether in the above case the Court of Justice of the European Union would find that the employer has taken appropriate measures with regard to the desire for economic survival in the market and whether such measures would be characterised as proportional? Moreover, even the national Anti-Discrimination Act provides that all exceptions to the exclusionary rule “should achieve their legitimate objective they were determined for, and must be appropriate and necessary to achieve that goal”.<sup>73</sup> Of course, personally I would remain the first

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<sup>71</sup> “I cannot work as a waiter because I am gay”, *Jutarnji list* daily newspaper, Sunday, 3 May 2009, p. 3.

<sup>72</sup> See: <http://www.jutarnji.hr/-ne-mogu-raditi-kao-konobar-jer-sam-gay-/204044/> (last visited on 29 September 2014).

<sup>73</sup> Article 9(3) of the Anti-Discrimination Act.

line of defence, as this is the case of direct discrimination or flagrant violation of fundamental human rights, on the one hand, and on the other hand, the simultaneous absence of any valid statistical, economic or similar assessment which would suggest that the conduct of the employer can be possibly, at least partially, justified. The employer did not suffer any damage in the aforementioned probation period of two working days, but bowed to pressure from a homophobic environment and thus further deepen the effects of discrimination on grounds of sexual orientation in the workplace. Moreover, he personally proved the existence of abstract fear and irrational actions that have nothing to do with the performance, competence and results, but rather with exclusively personal and private characteristics of the entity discriminated against.

The second case resulted in a final judgment of the court on discrimination based on sexual orientation at the Faculty of Organization and Informatics, University of Zagreb, i.e., in the academic community which would be expected to be, if not immune, then at least “more tolerant” to such practice. Unfortunately, the latter case has tarnished the image of the academic community. Dr. Dario Krešić who was employed at a local faculty after earning his PhD degree in Germany was prevented from advancing in his career because of his sexual orientation, while at the same time a “hostile, degrading, and offensive” environment was created at the faculty. In other words, he was a victim of discrimination because of a violation of the right to equal treatment and harassment on the grounds of sexual orientation, by his colleagues, including his immediate superior. Systemic harassment consisted of repeated jokes and remarks on account of his sexual orientation. The court issued a ruling prohibiting all actions that would prevent the plaintiff from advancing in his career.<sup>74</sup> It is worth mentioning that this faculty became the first employer in Croatia found by the court to discriminate against a person on the basis of his sexual orientation. However, professors who were obliged to apologise in writing to Krešić subsequently filed a lawsuit for breach of honour and reputation because Krešić spoke in public about his discrimination, and after the final judgment confirming him as a victim of discrimination, Krešić extraordinarily terminated his employment contract because the discriminatory practice did not stop. Rector of the University of Zagreb did not react even after the final judgment was passed, although he was repeatedly addressed by Krešić as well as the Ombudsperson for Gender Equality, nor condemned discrimination. The media claim that Krešić finally moved to “*one of the countries with a higher level of protection of rights*”.<sup>75</sup>

The third case also did not go beyond the headlines, but it clearly testifies that after five years of implementing the Anti-Discrimination Act, hard work and efforts to sensitize the public, not much has changed in everyday life. This is a recent case in the summer of 2014 when during the debate on the appointment of an acting intendant in a national theatre the discussion of councillors in the session of the Split City Council was reduced to sexual orientation of the candidate, an internationally recognised ballet

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<sup>74</sup> Varaždin Municipal Court, Decision No: 18 P-3153/10-89; Varaždin County Court, Decision No: Gž-5048/12-2.

<sup>75</sup> Available at: <http://www.novolist.hr/Vijesti/Hrvatska/Zagorje/Kontra-i-Iskorak-Zbog-diskriminacije-Dario-Kresic-otisao-s-varazdinskog-fakulteta> (last visited on 5 October 2014).

dancer, choreographer and dance educator.<sup>76</sup> Ultimately, the council called for an alleged lack of education of the candidate because he does not hold a college degree, although in the above case it was not necessary. The level of debate was condemned by prominent Croatian sociologist Professor Inga Tomić Koludrović who is the president of the Theatre Council in that theatre, assessing the discussion and its level “shameful” and “frightening”.<sup>77</sup>

The presented cases of discrimination on the grounds of sexual orientation in the labour market clearly reflect the actual situation and can help differentiate Croatian reality from the situation in the European Union. Moreover, they clearly confirm Wojciech Sadurski’s claim that “*the concept of legal equality is not just a neutral baseline upon which substantive controversies arise: disagreement about the very concept of equality, its meaning and parameters, is itself an element of these controversies*”.<sup>78</sup>

## 5. Where is Croatia in relation to the EU in terms of protection against discrimination based on sexual orientation in the labour market?

The 2009 Report of the Agency for Fundamental Rights suggests that LGBT people in the labour markets of the then 27 states were mostly subtle in statistics,<sup>79</sup> while the implementation of the Employment Equality Directive<sup>80</sup> differed between Member States.<sup>81</sup> Fear of dismissal and a feeling of insecurity prevent LGBT people from disclosing their sexual orientation in the workplace, and thus they remain “invisible”. Consequently, this results in a relatively small number of cases and prevents the determination of the true extent of homophobia, transphobia and discrimination. At the level of the working environment, the role of management, as well as the presence or lack of equality policies and diversity management significantly influence the sense of security and protection at the workplace.<sup>82</sup> However, according to the EU LGBT Survey 2013, Lithuania and Croatia are at the forefront of countries in which respondents felt discriminated against based on their sexual orientation, with a rate of 61% and 60%, respectively.<sup>83</sup> As the youngest EU Member State, Croatia generally does not have any problems with the legislative framework because, as part of its pre-accession commitments and harmonisation of national legislation, it transposed *mutatis*

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<sup>76</sup> *Važnija im je bila moja seksualnost nego umjetnost*, author Maja Pejković Kačanski o raspravama splitskih vijećnika o imenovanju v.d. intendanta, Večernji list daily newspaper, Saturday, 28 June 2014, p. 8.

<sup>77</sup> *Odbili Bogdanića za intendanta zbog seksualne orijentacije, Skandal u Splitu, žestoka rasprava u Gradskom vijeću*, author Maja Pejković Kačanski, Večernji list daily newspaper, Tuesday, 25 June 2014, p. 5.

<sup>78</sup> Wojciech Sadurski, *Scrutinizing Discrimination: a Conceptual and Normative Analysis of Legal Equality*, *EUI WORKING PAPERS*, Law No 2005/19, European University Institute, Department of Law, 2005, p. 8.

<sup>79</sup> *Homophobia and Discrimination on Ground of Sexual Orientation and Gender Identity in the EU Member States, Part II – The Social Situation*, p. 56.

<sup>80</sup> Council Directive 2000/78/EC.

<sup>81</sup> *Homophobia and Discrimination on Ground of Sexual Orientation and Gender Identity in the EU Member States, Part II – The Social Situation*, p. 58.

<sup>82</sup> *Ibid.*, p.69.

<sup>83</sup> EU LGBT Survey, European Union lesbian, gay, bisexual and transgender survey, Results at glance, FRA, 2013, p. 15. Available at: [http://fra.europa.eu/sites/default/files/eu-lgbt-survey-results-at-a-glance\\_en.pdf](http://fra.europa.eu/sites/default/files/eu-lgbt-survey-results-at-a-glance_en.pdf) (last visited 5 October 2014)

*mutandis* the relevant acquis, in particular the Employment Equality Directive and the Gender Equality Directive (recast)<sup>84</sup> into its national legal corpus. The real problem lies in the daily practice and experienced forms of harassment, discrimination, or fear as a consequence of established stereotypes, intolerance and inability to accept the difference. It seems that we are facing the (in)capacity to put the existing legal framework in the function of institutional protection and a lack of preparedness of judges in terms of the scope and the interpretive potential of jurisprudence of the Human Rights Court and the Court of Justice of the European Union. In this regard, education and training of judges at the national level is extremely important, particularly in terms of raising awareness about “different communities”<sup>85</sup> because if the Europeanisation of European anti-discrimination law is indeed just a “ground floor” for further development of LGBT rights Holz hacker is talking about,<sup>86</sup> I’m afraid that national courts will not be able to respond to this challenge appropriately. Moreover, the struggle for the realisation of these rights will be significantly hampered. Therefore, I doubt that the national courts are able to identify problems and independently solve a case as it was done by e.g. the Court of Justice of the European Union in the case of Maruko.<sup>87</sup>

## **6. Concluding remarks**

Croatian society, similarly to those societies in a number of EU Member States, is characterised by a disparity between the guaranteed legal framework for the protection of LGBT people in the labour market and everyday practice. Because of fear, a lack of trust in institutions and the functioning of the system of protection, those persons usually hide their sexual orientation and gender identity, so we cannot escape the subjective impression that the society is willing to “tolerate” them as long as their strictly private and personal characteristics are not made “visible”. However, such approach seriously violates and endangers fundamental human rights of LGBT persons, or actually the same rights guaranteed to heterosexual persons in the predominantly heterosexual society. Moreover, it leads to self-isolation and social exclusion.

The national regulatory framework was significantly improved in 2008, at a time when in the EU legal system discrimination based on sexual orientation and gender identity was explicitly given a place in the founding treaties, by the adoption of the Anti-Discrimination Act and finally, by the adoption of the Same-Sex Civil Partnership Act in 2014. But, this is only the first and essential stage in the fight against prejudice and for the recognition of the fundamental legal standard and the constitutional principle of “equality” as the origin of social dogma and the point in the national

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<sup>84</sup> Directive 2006/54/EC.

<sup>85</sup> Geoffrey Kamil, The role of the judge in a diverse community, ERA Forum, 10, 2009, pp. 125-137.

<sup>86</sup> Ronald Holz hacker, Transnational Strategies of Civil Society Organizations Striving for Equality and Nondiscrimination: Exchanging Information on New EU Directives, Coalition Strategies and Strategic Litigation in: Laszlo Bruszt, Ronald Holz hacker (eds.) *The Transnationalization of Economies, States, and Civil Society: New Challenges for Governance in Europe*, Springer, 2009, p. 235.

<sup>87</sup> C-267/06 Maruko [2008] ECR I-1757.

(re)interpretation of human rights as achievements of civilisation and the modern democratic society. However, the next phase - the phase of advocacy for the rights of LGBT people in the labour market - implies the ability of social perception and acceptance of differences, as well as the consistent application of standards of equivalence and the legal protection of all members of society. I'm afraid the aforementioned will not be possible without greater social accountability and readiness of conservative political structures and religious communities to support the concept of diversity and equality of every individual in the predominantly traditional society. Understanding of discrimination must necessarily abstract the premise of "immutable characteristics", because discrimination based on sexual orientation is "intentional evil, not a mistake".<sup>88</sup>

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<sup>88</sup> Sadurski, 2005, pp. 32-37.