

*Aleksandar MIHAJLOVIĆ**
Institute of Comparative Law, Belgrade

APPLICATION OF ANTI-DISCRIMINATION LAW IN THE FIELD OF LABOR AND EMPLOYMENT IN THE REPUBLIC OF SERBIA: THE ECONOMIC ANALYSIS OF LAW APPROACH

The aim of this paper is to analyze the problem of labor market discrimination through the methodology of economic analysis of law, as a special discipline, as well as the doctrinal approach, focusing on the legislative framework in the concrete filed in the Republic of Serbia. The main research question is do we really need anti-discrimination law in the field of labor and employment, or we can use only free market mechanisms to eliminate employers who discriminate employees who are in the labor market and/or the labor force which pretend to enter the market. Economic analysis of law starts from the premise that employers are rational players at the market who want to maximize their profits, and the only important thing is the productivity of employees, not their personal characteristics which do not affect their labor performance (productivity). Although this reasoning sounds rational, we witness that discrimination in the labor market has been persisting and governments intervene with anti-discrimination legislation and public policies, as well as special institutional solutions, trying to suppress it and support economic development and social inclusion of marginalized social groups. The author's special attention in the paper is on the two economic models of discrimination, Becker's Taste for Discrimination and Statistical Discrimination Model, which will explain the necessity of anti-discrimination law in the field of labor and employment. Concurrently, the focus will be on the Serbian legal framework and the importance of the impact assessment, as a tool for improving the quality of legislation and policies in the concept of respect of the principle of equality and non-discrimination.

Keywords: Economic analysis of law, discrimination, labor market, impact assessment.

* LLM, Research Assistant, ORCID: 0000-0001-8309-7896, e-mail: a.mihajlovic@iup.rs

1. INTRODUCTION

The main research question of this paper is do we really need anti-discrimination legislation in the field of labor and employment or the labor market mechanism will be a regulator sufficient to solve this social problem. In this framework, the aim of this investigation is to analyze the problem of labor market discrimination through the methodology of economic analysis of law, as a special discipline, as well as the doctrinal approach, focusing on the legislative framework in this field in the Republic of Serbia.

In the simplest way we can explain the labor discrimination as an unequal treatment of equally productive workers, who possess equal qualifications, the consequence of which is a barrier to enter the labor market or wage disparities for the same jobs and same qualifications (when they enter the market). Economic analysis of law (hereinafter: EAL) uses the economic reasoning and tries to explain the complexity of legal problems and institutions and to provide the best solutions for their efficient solving. Employers have the aim of maximizing the profit and of being as much as possible competitive with other employers in the same field. This approach of rational employers is related to the concept called *homo economicus*, seen as a rational agent, who tends to maximize their benefits, both economical and non-economical (Mojašević, 2021, pp. 24-25). On this reasoning there is no space for discrimination towards employees based on their personal characteristics, because the fact that an employee is a woman, gay, Roma, black etc. is not important and does not affect their productivity. This ideal economic model of rational employers unfortunately does not work in practice, because we witness different forms of discrimination in the field of labor and employment. Governments all over the world introduce anti-discrimination legislation and public policies, trying to suppress discrimination in the labor market and support the inclusion of marginalized social groups and economic development. The intervention does not include only legislation, there are also different public policies, new institutional solutions, such as the establishment of independent human rights institutions, using the situation testing to prove discrimination in a concrete case or in an economic field towards the concrete social group(s), implementation of special rules for providing evidence in anti-discrimination litigations etc. The two economic models of discrimination, Becker's Taste for Discrimination and Statistical Discrimination Model, will also be the subject of this paper, and their explanation will justify the necessity of the anti-discrimination intervention, which comes as the lack of free market mechanisms to eliminate employers who discriminate. In an ideal economic model, an employer who discriminates, who has a "*taste for discrimination*", will be eliminated from the market because the cost of employing only selected workers is too high and the employer will lose the "battle" in the market for a long period of time. On the other side, a rational employer, who does not have discriminatory preferences, will employ people who are discriminated, and who will cost him/her less than when employing only selected groups which satisfy the employer's taste. This economic rationality will provide conditions for lower prices of products/services in comparison to the employer-discriminator who will use higher prices as a way to provide enough resources to cover all costs. Higher prices will

make him/her less competitive in the market, and the competitive pressure will squeeze him/her out from the market. The last part of the paper investigates the anti-discrimination legal framework in the field of labor and employment in Serbia, as well as the rules of conducting the impact assessment, focusing on the social impact and the principle of equality in the process of drafting legislation and public policy documents. Although there is an “umbrella” anti-discrimination act in Serbia called the Law on the Prohibition of Discrimination, there are other legal acts which norms also prohibit discrimination in the field of labor and employment. This kind of various norms in different legal acts can cause difficulties in their implementation, and problems with measuring their effectiveness and efficiency in practice.

2. ECONOMIC ANALYSIS OF LAW AND ITS APPLICATION TO LEGAL INSTITUTIONS

EAL represents a scientific field which combines the knowledge of economics and law, and tries to explain the legal institutes using the microeconomic tools and economic reasoning. Although there is still a strong resistance among some legal scholars to EAL and its incorporation to legal education, using the explanation that the economist’s objective of efficiency will minimize the importance of justice and fairness, it represents now an inevitable part of the legal education in Europe, the USA and worldwide (Spurr, 2015, pp. xv-xvii). Its approach is that the legal institutes are changeable over time, because people make different decisions (Mojašević, 2007, p. 90). The subject of modern EAL are not only legal fields which are traditionally connected with economics, such as torts, contracts, property rights, antitrust law, there are also some non-traditional disciplines and topics very popular among ELA scholars, such as family law¹, criminal law, corruption², marriage, family relations, domestic labor, rule of law³, drug addiction etc. (Vrban, 2006, p. 64).

There are four basic premises used in EAL due to its application to different legal issues: the first, *the methodological individualism*, which includes decisions made by an individual. Collective behavior has to be analyzed as a system of individual decisions which are based on different preferences. If we place this concept to the labor market discrimination in the context of economic theories of discrimination, a conclusion is that some employers discriminate because they have a preference for it (Becker’s Taste for Discrimination), in another case of Statistical Discrimination Model, they do it not because of the taste, but because due to the asymmetry of information in the labor market in the relationship between employer and employee, and it is easier to make a decision

¹ See more: Beuker, M. 2022. Benefits of a Legal-Economic Approach to Comparative Family Law. In: Boele-Woelki, K. (ed.), *Comparative Family Law Methodology*. Paris: International Academy of Comparative Law, pp. 99-127.

² See more: Begović, B. 2007. *Ekonomska analiza korupcije*. Beograd: Centar za liberalno-demokratske studije. Available at: <http://www.clds.rs/newsite/Boris-Begovic-Ekonomska-analiza-korupcije.pdf> (28. 8. 2023).

³ See more: Jovanović, A. 2019. Srbija i ekonomske implikacije vladavine prava. *Zbornik radova Pravnog fakulteta u Nišu*, 85(4), pp. 55-71.

based on the stereotypical attitudes which are commonly known. In this situation, an employer, who does not pretend to discriminate (does not have a taste for discrimination), can decide to employ a male worker instead of a female candidate, not because he/she has more preference to males, but because it is common (statistically proved) that female workers take parental leave more often than their male counterparts; the second, individuals are *rational decision makers* who want to *maximize their interest* (both material and non-material, for example, if someone wants to earn more money and travel to his/her favorite destination, the other one wants to have more free time for leisure activities). This kind of predictability of human behavior in the context of rational maximization is very important for the creation of legal rules and policies which should cause concrete changes although it is important to mention that behavioral sciences⁴ teach us that the human behavior is not always rational and is driven by biases; the third, *human preferences are stable* over a period of time although they are changeable throughout life, depending on individual characteristics as well as on different social factors; the fourth, *a human interaction tends to be in a balance* (Barković, 2009, pp. 120-121).

EAL puts in its heart the concept of efficiency which “[...] contains two values: a valuable goal and valuable means (inputs) with which that goal is achieved. Maximum efficiency consists of achieving a maximum value of output from a given value of inputs” (Stigler, 1992, p. 458). For some lawyers, like the judge Richard Posner, the common law system is more efficient than civil law, because judges, who make rules, are in a better position to create a norm which will figure out efficiently concrete circumstances (Garoupa, Ligüerre & Mélon, 2017, p. 14). On the other side, the opposition to the former view sees the law as a synonym of justice, derived from the natural law concept, where there is no place for quantification and qualification (Devlin, 2010, p. 170). Efficiency criteria is a part of welfare economics, where microeconomics, as a basic tool of EAL, deals with behavior of individuals and market effects, while welfare economics evaluates the effects of a concrete economic policy of regulation and will consider if such measures increase or decrease welfare (Mathis, 2008, p. 31). When we examine this theoretical concept in line with labor discrimination, the author’s aims are: to analyze labor discrimination through the behavior of individual employers who do have and do not have taste for discrimination (using the two economic models of discrimination), to consider why market mechanisms are not sufficient to resolve this problem, and to evaluate existing legislation which is used as a government’s intervention in the legal framework of the Republic of Serbia. EAL reasoning opens a space for a wider observation of labor discrimination, beyond just doctrinal approach, including a public policy approach which encompasses also administrative, social, economic and political side of a state intervention (Kreis & Christensen, 2013, p. 41).

⁴ Based on the approach that the human behavior is not always rational and is driven by biases, there is a development of a new scientific field called Behavioral Economic Analysis of Law or Behavioral Law and Economics. For more details, see: Jolls, C., Sunstein, R. C., & Thaler, R. 1998. A Behavioral Approach to Law and Economics. *Stanford Law Review*, 50(5), pp. 1471-1550; Sunstein, R. C. 1997. Behavioral Analysis of Law. *The University of Chicago Law Review*, 64, pp. 1175-1195 and Zamir, E. & Teichman, D. 2018. *Behavioral Law and Economics*. New York: Oxford University Press.

In the context of application of EAL to labor discrimination, it is inevitable to mention that all resources are limited, included also human resources in the market (Miller, 1985/86, p. 433). Every choice has its own cost which is borne by a decision maker. Making one decision means that we miss a chance to achieve another goal because of limited resources, while our wishes are unlimited (Jovanović, 2008, p. 22). Based on the economic language, all rare goods have a price, while goods which are unlimited are not in the interest of economists (for instance, this is a case with air, but not also with fresh air, which due to the global pollution, becomes a limited resource and a luxury) (Jovanović, 1998, p. 17). An employer who discriminates makes a risk to miss an opportunity to employ a genius who can increase his/her profit and make him/her more competitive, and there is an economic punishment in a format of a price which will be paid by a discriminator.

EAL distinguishes two types of analysis, the positive EAL and the normative EAL. The former is predictive, and its aim is to show how concrete legal rules work in practice (Dnes, 2018, p. 12), for instance, to what extent the anti-discrimination legislation will change the behavior of employers who discriminate employees who are members of concrete social groups, while the latter analysis aims to investigate if an existing mechanism or a norm is desirable (Begović, Jovanović & Radulović, p. 13), and it can involve suggestions or recommendations how the concrete system can be improved by a more desirable solution, for instance if a legal punishment for an employer-discriminator should be more rigorous or a concrete public policy should be replaced by a new, more efficient one.

3. LABOR MARKET IMPERFECTIONS AND THE NECESSITY FOR A STATE INTERVENTION

There are different definitions what the market is, and one explanation is that “A market is a mechanism through which sellers and buyers are connected for the exchange of goods and services.” (Nikolić & Mojašević, 2015, p. 131). Its basic assumptions are a division of labor and a specialized production of goods and services which are a subject of exchange in the market (Božić, 2009, p. 104). The forces of supply and demand are basics which shape the market activities and make allocation of resources to the economic activities where the demand is greater and where the production will be higher. The perfect labor market includes two components: the transaction cost of exchanging goods and services is zero, and qualitative information between producers and consumers; because based on precise information, both sides can make decisions which maximize their welfare.

There are four functions of the market: the first, *the selective function* which is related to the competitiveness of producers in the market, the more competitive the more successful they will be in the market. Less competitive producers will use higher prices for selling their goods and services, and they will be “punished” by consumers who will refuse to buy such goods and services. As a final result, this kind of producers will leave a market and the selection will be done; the second, *the informative function* which shares signals which goods and services consumers want to buy, and for producers which

amount of goods and services should be produced. Based on this information a price can be set; the third, *the allocative function* of available resources towards the most efficient outcomes; the fourth, *the distributive function* which means distribution of social product based on the factors of production (labor, land, capital) and their prices (Milošević, 2020, pp. 83-84).

When we come to the labor market, there are employers and employees. Their exchange in the labor market and cooperation have a final aim to maximize their welfare. Of course, we cannot miss consumers, who are also very important part of this chain, because their preferences provide signals which kind of services and goods should be produced. In this paper this part of the consumers' role will not be analyzed. It is important to be mentioned that in some cases consumers can have a taste for discrimination towards one group of people and this can provoke their boycott of buying services and goods produced by a concrete group of workers. In this case, an employer who does not have a taste for discrimination can start refusing to employ such group of workers who are not accepted by consumers because of economic reasons (for instance, consumers do not like to buy food produced by a black cook or guests in a night club do not like to be served by waitresses who are over 30 years old). In this situation, there are no legal mechanisms which can change the behavior of consumers, the solution is related to prices, when an employer starts to employ "desired" workers, he/she must increase prices of services and goods, as a way to cover higher costs which come as a consequence of discrimination of a concrete labor force. Higher prices can provoke changes of consumers' behavior.

Markets in general, as well as labor markets, are not perfect, they are usually imperfect, and a state intervention is inevitable. This comes because in some cases there is not a fair-play game in a market, and the second reason is the asymmetry of information or imperfect information among participants. In our explanation of labor market discrimination, we will start from the assumption that a labor market is competitive (this characteristic will be very important for understanding the two theories of discrimination), but there is asymmetry of information. In this condition an employer can make decisions towards employees based on stereotypes and some statistical generalization regarding some groups of people. Although we start this article with a presumption that employers are rational in making decisions and want to maximize their profit, discrimination in the labor market exists and consequences can be seen as different wages for the work of a same value or barriers to enter concrete markets or jobs. Some economists, such as Gary Becker, think labor market imperfections will be solved by a market itself and legislation can affect the efficiency of resource allocation⁵, but this explanation does not work in practice. Anti-discrimination legislation is an inevitable instrument, and there are two main reasons why it is necessary: the first, equality and human rights approaches which mean that all human beings are equal in their rights and dignity, and there is no reason that someone does not have equal opportunity in the labor market only because he/she has some personal characteristics which do not affect his/her productivity; the second,

⁵ See more: Epstein, A. R. 1995. The Status-Production Sideshow: Why the Antidiscrimination Laws Are Still a Mistake. *Harvard Law Review*, 108, pp. 1085-1109.

the efficiency of allocation of resources, including the human capital (Boeri & Ours, 2013, p. 117). There is also an approach of making the difference between imperfect and non-competitive labor markets and the role of anti-discrimination legislation. Based on this reasoning, in competitive labor markets employers will be punished by the market's power, and anti-discrimination legislation and policies are not necessary (the market is seen as a sufficient regulator), while in imperfect labor markets there are some other conditions which can affect the persistence of discrimination, and where the legislative intervention is inevitable (Boeri & Ours, 2013, p. 117).

4. TWO ECONOMIC MODELS OF DISCRIMINATION IN THE LABOR MARKET

Gary Becker was a pioneer among economists who developed the theory of discrimination in the neo-classical economic tradition and who introduced “non-pecuniary motives into economic theory” in the explanation of labor discrimination (Dex, 1979, p. 90). His approach is that some people have a preference to work with one group of workers instead with another group, and these people *are willing to pay for* this kind of their preference or taste (Stiglitz, 1973, p. 288). Social scientists have analyzed discrimination from different perspectives: sociologists have included a perspective of a social distance towards some groups of people or their disadvantaged socio-economic position in one society which both make them more vulnerable in the labor market; psychologists place their attention on different types of personalities; while economists, including Becker, have changed these perspectives and included *economic productivity* (Becker, 1971, p. 14). In that sense, discrimination is seen as “[...] a difference in pay between two workers of equal productivity”, and it is Becker's definition of understanding (Guryan & Charles, 2013, p. F420).

The taste for discrimination should be understood that some employers have a taste/preference not to employ workers who are members of concrete social groups, who have some personal characteristics which make them less attractive for employers. In some situations, Becker makes a distinction when an employer discriminates based *on prejudices* or based *on ignorance* of the efficiency of workers (for example, an employer does not like to employ black workers – a prejudice, or because he/she thinks that they are not very-well skilled and efficient in their performance – an ignorant approach; ignorance can be eliminated by a concrete action and making sure in practice that a candidate is efficient, while in a case of prejudices, this situation cannot be overcome very easily) (Becker, 1971, p. 16). In another cases, the taste-based discrimination comes as an effect of employees' or customers' taste (England & Lewin, 1989, p. 240). For instance, employees can pressure their employer not to hire black or female workers, and as a condition for working with them, employees can ask for higher salaries as a compensation if such workers would be employed. Customers can also have an influence to an employer to discriminate some groups of people if they do not like to buy products or use services provided by members of concrete communities.

Becker's idea is that in a competitive market a discriminator-employer will lose the competition battle and will leave the market. This will come as a price of discrimination, because this employer will have higher costs for salaries and production instead of an employer who does not discriminate. The demand for preferred workers will be higher in comparison to non-preferred workers, for whom demand will be lower, and the cost of their employment will be cheaper in comparison to the first group of workers (this means that the cost of production will be also cheaper and prices of these products/services more competitive in comparison to discriminator-employer). In this situation, a rational employer focused to maximize the profit will tend to employ workers who are discriminated. Such rational employer could sell his/her products and services at lower prices compared to an employer discriminator. In the longer market run, a discriminator loses this market game because the cost will be too much and he/she cannot cover it. The competition pressure will squeeze out him/her from the market (just to remind that the condition for this economic model is absolutely a free market and a fair-play game among competitors). In other words, Becker's model will work in practice if the supply of entrepreneurship is elastic enough with a zero price or if there is a majority of employers who will employ discriminated employees and make a stronger competition pressure towards discriminators (in this cited article the author focused on black workers as a discriminated group, because the model was created based on racial discrimination towards black workers, anyway, this logic can be applied in the context of every discriminated group in a labor market) (Heckman, 1998, p. 112).

Statistical discrimination can be explained as one group characteristics used for the estimation of productivity of an individual who is a member of this group (England & Lewin, 1989, p. 241). The reason why it happens is *the information cost* (Sunstein, 1991, pp. 26-27) to realize an individual's productivity and capability to complete labor tasks. An employer will always have less information regarding a candidate who will be at an advantage about information which will use to present himself/herself in the best possible way. There are also limitations based on different legal norms which protect privacy and do not allow employers to ask employees or job applicants concrete questions during their employment or a job interview. It is important to emphasize that in this model of discrimination an employer does not have a taste for discrimination although he/she can have it, but a decision regarding an individual is based on average and statistically based characteristics of members of one group of people. For instance, an employer can refuse to employ a woman because women take parental leave more often than men, or a Roma applicant will be refused because of statistic data that this population has lower levels of skill and education in general in comparison to the non-Roma population. In this example an employer has a too high cost due to the asymmetry of information to realize concrete characteristics of these applicants (a woman and a Roma applicant), and he/she will use average characteristics related to the members of these social groups (women and Roma people). This informative aspect of statistical discrimination can be summarized in the following way: "The more informative the signal of the individual applicant is – the more complete the information is – the greater the weight the employer places on that information; the less informative the signal is, the more weight

he places on the average productivity of other workers from the same group.” (Guryan & Charles, 2013, p. F418). There are some views from the economic perspective that statistical discrimination can increase the overall efficiency, but it has to be underlined that “[...] it uses average valuations, rather than marginal valuations which are necessary for efficient resource allocation” (Schwab, 2000, p. 8).

Both analyzed models of discrimination are forbidden from the legal perspective and the anti-discrimination legislation in the field of labor and employment does not allow them access to the labor market. This is in accordance with the stance that the act of discrimination can be done both when a discriminator has a taste for it, and when the subjective motive is dominant, as well as when it is not coming as a consequence of someone’s taste, but as an objective action which is based on an average conclusion about one group characteristics which are applied automatically to each of its members. In other words, this is in accordance with the anti-discrimination law which prohibits both direct and indirect discrimination, no matter if an employer wants to discriminate (when has a taste for it) or when he/she does it not knowing about the prohibition of such kind of behavior in general, and uses only general observations of some groups of people which are supported by statistics.

5. ANTI-DISCRIMINATION LEGISLATION IN THE FIELD OF LABOR AND EMPLOYMENT IN THE REPUBLIC OF SERBIA

In this part of the article the author’s focus will be on the norms which prohibit discrimination in the field of labor and employment based on the Law on the Prohibition of Discrimination⁶ (hereinafter: LPD), which represents an “umbrella” anti-discrimination law in the Republic of Serbia. The anti-discrimination provisions which are stipulated by the Labor Law are also part of the LPD, and will not be analyzed additionally. After this the focus is on the impact assessment of regulations⁷ and public policy documents which aim to improve their quality in the context of implementation of the principle of equality, focusing also on the field of labor and employment.

As we mentioned before, purposes of anti-discrimination law are to provide fairer allocation of resources, including this among the human capital and equal opportunities in accessing labor market, as well as to “[...] prevent employers from considering various personal characteristics in making employment decisions” (Donohue III, 1994, p. 2586). The LPD recognizes *an open clause* of personal characteristics and prohibits discrimination based on them. Some characteristics can be seen *prima facie*, for instance some forms of disability, worship of some religion if a person wears symbols, race, nationality, while others are not disclosed, e.g. sexual orientation (Reljanović, 2010, p. 75) or gender identity. Further, the LPD in Article 16 paragraph 1 stipulates that discrimination in the field of work is prohibited, including the violation of equal opportunities for establishing an employment relationship or the enjoyment under equal conditions of all rights in the field of work, such as the right to work, free choice of employment, promotion in the service,

⁶ Law on the Prohibition of Discrimination, *Official Gazette of the RS* no. 22/2009 and 52/2021.

⁷ In this context, regulations encompass both laws and by-laws.

professional training and professional rehabilitation, equal compensation for work of equal value, right to real and satisfactory working conditions, right to vacation, education and joining a trade union, as well as protection against unemployment. It is very important that the LPD recognizes implementation of *special (affirmative) measures* in Article 14 paragraph 1 which aim is achieving full equality, protection and advancement of persons, or groups of persons in an unequal position, and which do not constitute discrimination. This kind of unequal treatment will be tolerated under the legal framework, because its purpose is to alleviate existing inequalities among concrete social groups, e.g. affirmative measures for employment of Roma people or persons with disabilities.

In many situations it is not very easy to provide enough evidence to prove discrimination, because of the fear of victims that reporting such cases can reveal their identities and make them more vulnerable. For this purpose, the institute called *situation testing* can be used as a social experiment. This means that a potential discriminator will be put in a situation where his/her behavior will be tested. We can distinguish a potential discriminator, experimental groups whose members pose some grounds for discrimination, and a control group whose members are equal as members of an experimental group, except concrete personal characteristics (grounds for discrimination). For instance, Roma people, who pose all necessary qualifications for a concrete job, will apply and go through the interview, as well as their non-Roma counterparts, who form a control group. If all Roma candidates are refused and only non-Roma persons are employed, this can be a clear sign of discrimination of Roma people in a labor market. Situation testing is done in the partnership with the Commissioner for Protection of Equality, it is used as a valid proof in litigations or procedures before the Commissioner for the Protection of Equality, and based on the LPD Article 46 paragraph 4, the Commissioner has to be informed in a written format regarding the testing. Generally speaking, situation testing has two main purposes: to provide a proof of evidence of discrimination in a concrete case and to provide a wider picture to what extent discrimination exists in different fields of social life, e.g. labor market, medical and dental services etc. (Poverenik za zaštitu ravnopravnosti, 2018, p. 21).

The LPD stipulates also special provisions regarding evidence, which aim is to support victims of discrimination and provide incentives for reporting cases of discrimination. Based on the Article 46 paras 1-2, in a situation of direct discrimination, a defendant cannot be released from responsibility by proving that he/she is not responsible, while in a case when a plaintiff makes it probable that the defendant committed an act of discrimination, the burden of proving that as a result of that act there was no violation of the principle of equality, respectively the principle of equal rights and obligations, is borne by the defendant. These rules are applicable equally in court's proceedings or before the Commissioner for the Protection of Equality.

Beside the existing anti-discrimination legislation, it is very important when drafting laws, by-laws and public policy documents to assess their potential effects which they can have in practice during their implementation. This is related to protection of human rights and the principle of equality. In general, every decision by an individual, a family as a union, or a government has its own effects, both positive and negative. Good

planning and assessing different options are the best way to achieve goals with as little as possible negative consequences.

For the first time since 2018/2019, the Law on the Planning System of the Republic of Serbia⁸ (hereinafter: LPS RS) and an accompanying by-law called the Regulation on the Methodology of Public Policy Management, Impact Analysis of Public Policies and Regulations, and the Content of Individual Public Policy Documents⁹ (hereinafter: Regulation) regulate the planning system, including the impact assessment which is applicable equally to laws, by-laws and public policy documents.

Based on the LPS RS, the impact assessment is seen as a part of the public policy management system, and Article 2 paragraph 1 point 7 defines impact assessment as an analytical process conducted during public policy and legislation planning, formulation and adoption with a view to identifying change that should be achieved, their elements and cause and effect relationship, and the choice of optimal measures for achieving public policy goals (*ex-ante* impact assessment), during and after the implementation of adopted policies and regulations with a view to evaluating performance, and reviewing and improving the public policy and/or legislation (*ex-post* impact assessment). The implementation of the principles of equality and non-discrimination are among the priorities in the policy system management.

The Regulation in Article 9 paragraph 1 distinguishes the following steps in the process of conducting an *ex-ante* impact assessment, and they are: 1) the analysis of the existing situation and identifying the change to be achieved by implementing the public policy measure, conditions for implementing such a change and the causal relationships between such conditions; 2) establishing the goals and objectives of the public policy, and performance indicators to be used for measuring the achievement of objectives; 3) identifying options – potential measures, and/or groups of measures for achieving the objectives and resources for their implementation; 4) the analysis of the effects of options – potential measures and risks for implementing each of the options; 5) conducting the selection of the optimum option or optimum combination of the reviewed options; 6) determining the type of a public policy document, and/or regulation they will intervene with; 7) identifying the resources required for implementing and monitoring the implementation of public policies and establishing performance indicators at the level of measures.

There are six impact analyses and assessment of public policy options and solutions from regulations based on the Article 24 paragraph 1 of the Regulation: 1) analysis of financial impact; 2) analysis of economic impact; 3) analysis of social impact; 4) analysis of environmental impact; 5) analysis of governance impact; 6) risk analysis.

The analysis of *social impact* is very important in assessing potential positive and negative effects of public policy documents and regulations towards vulnerable social groups and *labor market*. The Appendix 7 of the Regulation contains a list of questions which answers should be used for this analysis, and the question number 4 is directly connected

⁸ Law on the Planning System of the Republic of Serbia, *Official Gazette of the RS* no. 30/2018.

⁹ Regulation on the Methodology of Public Policy Management, Impact Analysis of Public Policies and Regulations, and the Content of Individual Public Policy Documents, *Official Gazette of the RS* no. 8/2019.

to the labor market: *Would the selected option affect the labor market and employment, as well as the working conditions (e.g. changes in employment rates, dismissal of redundant workers, eliminated or newly-formed jobs, existing rights and obligations of workers, needs for requalification or additional training imposed by the labor market, gender equality, vulnerable groups and forms of their employment, etc.) and how?* Beside this question, other questions¹⁰ from this Appendix contribute to the implementation of the concept called human rights impact assessment which aim is to prevent violations of human rights which can come as a consequence of concrete government's measures and legislations.

The last amendments to the LPD from 2021 in Article 14 paragraph 4 stipulates an obligation not only for the central authorities, but also for the local authorities, that they should conduct an *ex-ante* impact assessment of regulations or public policy documents in the context of their compliance with *the principle of equality* in a case when a regulation or a public policy is important for the realization of the rights of socio-economically disadvantaged persons or groups of persons.¹¹ This article emphasizes also that vulnerable social groups in the labor market have to be in a special focus when an assessment is done. This novelty is important because the *ex-ante* impact assessment has been recognized as obligation for local authorities, and not only for central, the human rights impact assessment through the respect of the principle of equality has been recognized by the main anti-discrimination law in the Republic of Serbia, and the labor market context is in the focus.

The implementation of the human rights impact assessment by the Republic of Serbia authorities has been recognized as of a special importance by the UN Committee on Economic, Social and Cultural Rights which recommended to the Serbian authorities

¹⁰ The full list of key questions from the Appendix 7 of the Regulation which are used for the social impact assessment: 1) What costs and benefits (material and non-material) will the selected option cause for the citizens? 2) Will the effects of the implementation of the selected option have a harmful effect on a specific group of the population and will this negatively affect the successful implementation of this option, and what measures need to be undertaken to minimize such risk? 3) What social groups, particularly what vulnerable social groups would be affected by the measures of the selected option and what would this impact be reflected in (primarily persons in poverty and socially excluded individuals and groups, such as persons with disabilities, children, youth, women, persons aged 65 and over, members of the Roma national minority, undereducated persons, unemployed persons, refugees and internally displaced persons and the population of rural areas and other vulnerable social groups)? 4) Would the selected option affect the labor market and employment, as well as the working conditions (e.g. changes in employment rates, dismissal of redundant workers, eliminated or newly-formed jobs, existing rights and obligations of workers, needs for requalification or additional training imposed by the labor market, gender equality, vulnerable groups and forms of their employment, etc.) and how? 5) Do the selected options provide for an equal treatment, or lead to direct or indirect discrimination of various categories of persons (e.g. based on national affiliation, ethnic origin, language, sex, gender identity, disability, age, sexual orientation, marital status or other personal characteristics)? 6) Could the selected option affect the price of goods and services and the living standard of the population, how and to what extent? 7) Would the realization of the selected options positively affect changes in the social situation in a given region or county and how? 8) Would the realization of the selected option affect changes in the financing, quality or availability of the social welfare system, healthcare system, or educational system, particularly regarding equal access to services and rights of vulnerable groups and how?

¹¹ For more details about the application of this provision, see: Mihajlović, A. 2023. Application of the principle of equality in the process of impact assessment of regulations and public policy documents in the Republic of Serbia. In: Čelić, D. & Miljković, S. (eds.), *Law between the Ideal and the Reality*. Kosovska Mitrovica/Belgrade: University of Priština, Faculty of Law and Institute of Comparative Law, pp. 213-226.

the following: the Republic of Serbia has to systematize the application of impact assessment through the dimension of human rights in the process of preparing regulations and public policy documents in the field of economic, social and cultural rights¹² (economic rights are related to the labor rights and labor market); expression of concern about the lack of systematic collection and processing of desegregated data that would enable an accurate assessment of the fulfillment of economic, social and cultural rights in the Republic of Serbia, and recommends the use of appropriate indicators that can be used to monitor the level of enjoyment of economic, social and cultural rights.¹³ The UN Committee recommended the application of the methodology¹⁴ for the development of indicators, which was prepared by the Office of the United Nations High Commissioner for Human Rights.

6. CONCLUSION

Economic analysis of law approach was used in this paper to explain two models of discrimination in the labor market, Becker's Taste for Discrimination and Statistical Discrimination Model. Becker's Taste for Discrimination Model means that an employer has a taste to discriminate concrete groups of people in the labor market and is ready to pay a price for this kind of preference. Becker also explained that in the longer period of time, a discriminator will be eliminated from the market because the price of discrimination would be too high that he/she can cover such costs. The second model, Statistical Discrimination comes because an employer does not have always enough information about candidates in the labor market and his/her decision regarding one individual will be based on some statistical/average characteristics of a group whose member is an individual. In this model, an employer does not have a taste for discrimination although in some cases it can be a combination of a taste and not accurate information about concrete candidates.

Due to the market imperfections in general, including the labor market, it cannot be seen as a regulator which will eliminate employers-discriminators and establish a market equilibrium. The normative intervention in a format of anti-discrimination law is inevitable for two reasons: this is a question of respect of human rights and the principle of equality, as well as a mechanism which will allocate resources, including labor force as a human capital, where they are necessary and where their engagement will provide the highest level of utility. The Law on the Prohibition of Discrimination was in a focus in this paper as a main anti-discrimination legal act in the Republic of Serbia which prohibits different forms of discrimination in different fields, including a labor market, based on different grounds/

¹² Concluding observations on the third periodic report of Serbia, Committee on Economic, Social and Cultural Rights E/C.12/SRB/CO/3, 06/04/2022, paragraph 7.

¹³ Concluding observations on the second periodic report of Serbia, Committee on Economic, Social and Cultural Rights E/C.12/SRB/CO/2, 10/07/2014, paragraph 7.

¹⁴ United Nations Human Rights Office of the High Commissioner, 2012. *Human Rights Indicators – A Guide to Measurement and Implementation*. HR/PUB/12/5. New York/Geneva: United Nations Human Rights Office of the High Commissioner.

personal characteristics. A special attention was also on the impact assessment of regulations and public policy documents in a context of implementation of the principle of equality in the process of legislative drafting or formulation of public policy documents, and their potential implications to the labor market and employees. This has been regulated by the Law on the Planning System of the Republic of Serbia and the Regulation on the Methodology of Public Policy Management, Impact Analysis of Public Policies and Regulations, and the Content of Individual Public Policy Documents. The last amendments of the Law on the Prohibition of Discrimination have concretized the application of the principle of equality in the process of drafting legislation and public policy documents, especially in the field of labor. This novelty also recognized a wider circle of subjects who are responsible for their implementation, beside central authorities, there are also local authorities.

LIST OF REFERENCES

Monographs

- Becker, S. G. 1971. *The Economics of Discrimination*. 2nd ed. Chicago/London: The University of Chicago Press.
- Begović, B., Jovanović, A. & Radulović, B. 2019. *Ekonomska analiza prava*. 1. izdanje. Beograd: Pravni fakultet Univerziteta u Beogradu, Centar za izdavaštvo.
- Begović, B. 2007. *Ekonomska analiza korupcije*. Beograd: Centar za liberalno-demokratske studije. Available at: <http://www.clds.rs/newsite/Boris-Begovic-Ekonomska-analiza-korupcije.pdf> (28. 8. 2023).
- Beuker, M. 2022. Benefits of a Legal-Economic Approach to Comparative Family Law. In: Boele-Woelki, K. (ed.), *Comparative Family Law Methodology*. Paris: International Academy of Comparative Law, pp. 99-127.
- Boeri, T. & van Ours, J. 2013. *The Economics of Imperfect Labor Markets*. 2nd ed. Princeton/Woodstock: Princeton University Press. <https://doi.org/10.2307/j.ctt32bc18>
- Božić, M. 2009. *Ekonomska politika*. 5. izmenjeno izdanje. Niš: Pravni fakultet u Nišu, Centar za publikacije.
- Dnes, W. A. 2018. *Principles of Law and Economics*. 3rd ed. Cheltenham/Northampton: Edward Elgar Publishing.
- Garoupa, N., Ligüerre, G. C. & Mélon, L. 2017. *Legal Origins and the Efficiency Dilemma*. 1st ed. Abingdon/New York: Routledge. <https://doi.org/10.4324/9781315311210>
- Jovanović, A. 1998. *Uvod u ekonomsku analizu prava*. 1. izdanje. Beograd: Savet projekta Konstituisanje Srbije kao pravne države, Centar za publikacije Pravnog fakulteta Univerziteta u Beogradu.
- Jovanović, A. 2008. *Teorijske osnove ekonomske analize prava*. 1. izdanje. Beograd: Pravni fakultet Univerziteta u Beogradu, Izdavački centar.
- Mathis, K. 2008. *Efficiency Instead of Justice?* 1st ed. Berlin: Springer. https://doi.org/10.1007/978-1-4020-9798-0_1
- Mihajlović, A. 2023. Application of the Principle of Equality in the Process of Impact Assessment of Regulations and Public Policy Documents in the Republic of Serbia. In:

- Čelić, D. & Miljković, S. (eds.), *Law between the Ideal and the Reality*. Kosovska Mitro-
vica/Belgrade: University of Priština, Faculty of Law and Institute of Comparative Law,
pp. 213-226.
- Milošević, G. 2020. *Osnovi ekonomije*. 2. izdanje. Novi Sad: Pravni fakultet, Centar za
izdavačku delatnost.
- Mojašević, A. 2021. *Primena biheviorističkih nalaza u javnim politikama*. Beograd: Dosije
Studio, SeCons – grupa za razvojnu inicijativu; Niš: Univerzitet.
- Nikolić, Lj. & Mojašević, A. 2015. *Ekonomija za pravnike*. Niš: Medivest Niš.
- Poverenik za zaštitu ravnopravnosti. Brankica Janković (ur.). 2018. *Priručnik za situaciono
testiranje diskriminacije*. Beograd: Poverenik za zaštitu ravnopravnosti.
- Schwab, J. S. 2000. Employment discrimination. In: Bouckaert, B. & De Geest, G. (eds.),
Encyclopedia of Law and Economics. Aldershot: Edward Elgar, 3, pp. 1-22. Available at:
<https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1844&context=facpub>
(24. 6. 2023).
- Spurr, J. S. 2019. *Economic Foundations of Law*. 3rd ed. Oxon/New York: Routledge. [https://
doi.org/10.4324/9781351239783](https://doi.org/10.4324/9781351239783)
- United Nations Human Rights Office of the High Commissioner, 2012. *Human Rights
Indicators – A Guide to Measurement and Implementation*. HR/PUB/12/5. New York/
Geneva: United Nations Human Rights Office of the High Commissioner.
- Vrban, D. 2006. Ekonomska analiza prava. In: Vukadinović, D. & Odri-Kartag, A. (eds.),
Američka jurisprudencija XX veka. Novi Sad: Novosadska asocijacija za teoriju, etiku i
filozofiju prava, pp. 61-67.
- Zamir, E. & Teichman, D. 2018. Behavioral Law and Economics. New York: Oxford Univer-
sity Press. <https://doi.org/10.1093/oso/9780190901349.001.0001>

Scholarly Articles

- Barković, I. 2009. Ekonomska analiza prava: mogućnosti i ograničenja. *Pravni vijesnik*,
25(2), pp. 115-129.
- Devlin, A. 2010. Law and Economics. *Irish Jurist*, 45, pp. 165-197.
- Dex, S. 1979. Economists' Theories of the Economics of Discrimination. *Ethnic and Racial
Studies*, 2(1), pp. 90-108. <https://doi.org/10.1080/01419870.1979.9993254>
- Donohue III, J. J. 1994. Employment Discrimination Law in Perspective: Three Concepts
of Equality. *Michigan Law Review*, 92, pp. 2583-2612. <https://doi.org/10.2307/1290003>
- England, P. & Lewin, P. 1989. Economic and Sociological Views of Discrimination in Labor
Markets: Persistence or Demise? *Sociological Spectrum*, 9(3), pp. 239-257. [https://doi.org/
10.1080/02732173.1989.9981888](https://doi.org/10.1080/02732173.1989.9981888)
- Epstein, A. R. 1995. The Status-Production Sideshow: Why the Antidiscrimination Laws Are
Still a Mistake. *Harvard Law Review*, 108, pp. 1085-1109. <https://doi.org/10.2307/1341870>
- Guryan, J. & Charles, K. K. 2013. Taste-based or Statistical Discrimination: The Economics
of Discrimination Returns to Its Roots. *The Economic Journal*, 123(572), pp. F417-F432.
<https://doi.org/10.1111/ecoj.12080>

- Heckman, J. J. 1998. Detecting Discrimination. *Journal of Economic Perspectives*, 12(2), pp. 101-116. <https://doi.org/10.1257/jep.12.2.101>
- Jolls, C., Sunstein, R. C. & Thaler, R. 1998. A Behavioral Approach to Law and Economics. *Stanford Law Review*, 50(5), pp. 1471-1550. <https://doi.org/10.2307/1229304>
- Jovanović, A. 2019. Srbija i ekonomske implikacije vladavine prava. *Zbornik radova Pravnog fakulteta u Nišu*, 85(4), pp. 55-71.
- Kreis, M. A. & Christensen, K. R. 2013. Law and Public Policy. *Policy Studies Journal*, 41(S1), pp. 38-52. <https://doi.org/10.1111/psj.12011>
- Miller, M. J. 1985/86. Economic Analysis of Legal Method and Law: The Danger in Valueless Values. *Gonzaga Law Review*, 21, pp. 425-455.
- Mojašević, A. 2007. Pojam i značaj ekonomske analize prava. *Zbornik radova Pravnog fakulteta u Nišu*, 50, pp. 189-208.
- Reljanović, M. 2010. Iskustva država-članica Evropske unije u sprečavanju diskriminacije pri zapošljavanju. *Strani pravni život*, 54(3), pp. 65-84.
- Sunstein, R. C. 1991. Why Markets Don't Stop Discrimination? *Social Philosophy and Policy*, 8(2), pp. 22-37. <https://doi.org/10.1017/S0265052500001114>
- Sunstein, R. C. 1997. Behavioral Analysis of Law. *The University of Chicago Law Review*, 64, pp. 1175-1195. <https://doi.org/10.2307/1600213>
- Stigler, J. G. 1992. Law or Economics? *The Journal of Law & Economics*, 35(2), pp. 455-468. <https://doi.org/10.1086/467262>
- Stiglitz, E. J. 1973. Approaches to the Economics of Discrimination. *The American Economic Review*, 63(2), pp. 287-295.

Legal Sources

- Law on the Prohibition of Discrimination, *Official Gazette of the RS* no. 22/2009 and 52/2021.
- Law on the Planning System of the Republic of Serbia, *Official Gazette of the RS* no. 30/2018.
- Regulation on the Methodology of Public Policy Management, Impact Analysis of Public Policies and Regulations, and the Content of Individual Public Policy Documents *Official Gazette of the RS* no. 8/2019.
- Concluding observations on the third periodic report of Serbia, Committee on Economic, Social and Cultural Rights E/C.12/SRB/CO/3, 06/04/2022, <https://digitallibrary.un.org/record/3969915> (last visited June 27, 2023).
- Concluding observations on the second periodic report of Serbia, Committee on Economic, Social and Cultural Rights E/C.12/SRB/CO/2, 10/07/2014, <https://digitallibrary.un.org/record/782312> (last visited June 27, 2023).