"How fair is equal?" Some aspects of human rights discourse and the recontextualization of laws and policies

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Introduction

This aim of this paper is twofold - firstly, to analyse aspects of the human rights discourse as a language for phrasing issues of exclusion and pleas for inclusion, examining the features of the discourse that make it so pervasive, while taking its own exclusionary dimensions into account; and secondly, to focus on the issue of women's rights within this discourse, and to contextualize them using a Croatian example, with special regard to social and economic rights.

Croatia's status as a candidate country for accession to the EU implies a need for various institutional reforms and legal adjustments to be made in the near future. The final part of this paper explores the attitudes of Croatian citizens towards recent and forthcoming changes in the legal framework with regard to the position of the women in society, based on recent research by Čulig, Kufrin and Landripet (2007). Their findings indicate that a majority oppose the legal changes that diminish the rights of women, even if they contribute to promoting gender equality (e.g. enforcing laws that would enable women to work under all conditions or making the male and female retirement age equal).

The dual structure of this paper reflects the duality of the focus of this conference. The first part attempts to give insight into the wider problematic of *inclusion and exclusion*, within and across societies, in a general way; whereas the second part analyses a specific problem related to the focal issue of this year's conference, namely *Challenges of the New Europe*, by analysing an example of legal change related to the integration of an accession country to the European Union. This paper seeks to elucidate the relation between the inclusive potential and the exclusionary aspects of human rights, focusing on issues of recontextualization, referring both to what happens to people who become legal subjects of the discourse and to the transfer of the discourse into a new context.

I - Inclusive and exclusionary aspects of a human rights discourse

Without analysing the debate between the cultural relativists' position and their opponents, in relation to the universalism of human rights discourse, which has been in the focus of many authors (cf. Dembour, 1996 and 2001), I would instead like to draw attention to the potential of this discourse as a tool for inclusion and its ability to create a community of communication, giving voice to members of muted groups. I would also like to argue that human rights discourse, as a predominantly legal one, has some exclusionary features pertaining to it and explain their relation to inclusive aims of the idea of human rights. Furthermore, I would like to emphasize decontextualizing and recontextualizing processes taking place in relation to the human rights discourse.

The contemporary discourse of human rights has been described by many authors as being predominantly legal (Evans 2005; Hastrup 2001 and 2006) and as such having certain features pertaining to the language of law in general, as outlined by Bourdieu (1987: 820) – the neutralization effect (created by the use of passive and impersonal constructions), and the universalization effect (created by the use of indefinites and the intemporal present, fixed formulas and locutions, etc.). One of the most important paradoxes inherent in human rights discourse is that it is formulated to protect persons from the unrestrained power of the state, but is also used to express claims in relation to other individuals and groups and regulate relationships between them. Moreover, although the discourse of human rights emphasizes equality between humans, many people are *excluded* from the enjoyment of their basic human rights, as is the case with refugees, because it is so closely tied to the context of the nation state (Dembour 1996:25-29). These paradoxes can be translated into the question of the legality of human rights – in other words, human rights can be understood as legal and extralegal at the same time: legal in being formulated through declarations and conventions, often formulated in legal language, and in being tied to the context of the state; but at the same time being extralegal.

The issue underpinning the previous analysis can be phrased in the form of a question: how is it possible that people can claim their rights as human and be denied those rights as refugees *at the same time*? Part of the answer can perhaps be found in the work of Franz von Benda-Beckmann (cf. Colson 1970), who reminds us that "Human beings become citizens, strangers or indigenous peoples by cultural and legal constructions" (1997:3) and argues that in the same society there is likely to be a variety of different legal and normative orders operating simultaneously. Moreover, "within the same political organization there may be a number of normative constructions of the interrelationships between different normative orders" (ib:16), thus invoking a complex notion of *legal* and *normative pluralism*.

This also brings us to the matter of the construction of personhood in human rights discourse. It has often been argued that a legal language constructs the person as a responsible, accountable individual (La Fontaine 1986), and Merry shows the importance of conforming to the "image of responsible personhood: an autonomous choice-maker, rationally determining her best interests, self-governing and self-disciplining. This is the bourgeois legal subject[1], crafted at considerable cost from the sociocultural variability of the world during the Enlightenment in Europe and transplanted through colonial processes." (Merry 2002:341) Moreover, the human rights discourse operates with "a conditional definition of the legally protected self" which means that persons claiming rights are redefined within the discourse and in order to be able to enjoy their rights have to act like responsible, autonomous subjects - like 'good victims' (Merry, 2003).

This has led some authors, like O'Donovan, to examine the notion of the rights bearing subject, which is often characterised as being abstract because "he purports to be universal (…) [and at the same time he is] criticised for his lack of human embodiment, for his lack of diversity (…) It is said that in his abstraction and in his particular choices he excludes women, children, the oppressed and dispossessed" (1996:353). She concludes that although claiming rights might empower the new subjects and give them

[1] Collier et al. argue that the bourgeois law by claiming to treating everyone equally both ignores the differences and produces them, by constructing the realm outside the law where inequality flourishes (Collier et al. 2002:212).

responsibilities for resistance as opposed to the discourse which denies their identities, they also enter a particular kind of society (a sort of 'interpretive community') which is fragmented and exclusive (ib: 363). Nevertheless, actors are not confined to this new identity and they often move in and out of it (Merry 2003).

An interesting issue underlying those raised by many authors mentioned in this section is fundamentally the question about the nature of the human rights discourse as a legal one, a question also raised by Wilson in his chapter on representing human rights violations. In his analysis of human rights reports he points to the prevailing legal rhetoric and notes that a significant *decontextualization* occurs in the reports almost as a rule: "Documenting human rights violations is about reporting evidence, not creating a narrative, since it is incomplete and is abstracted from the motivation and intentionality of actors." (1997:145). In other words – social narrative is *skeletonised* by the law (cf. Geertz 1983). Moreover, the reports construct a specific kind of personhood, they "tend to bifurcate individuals into either victims or perpetrators, but these same individuals might wish to assert another alternative identity (e.g. survivors, freedom fighters)" (Wilson and Mitchell 2006:5). In her analysis of Wilson's observation, Marilyn Strathern agrees that descriptions of victims strip them of specific social circumstances, such as family and class background, but argues that what is taking place is "not so much detachment from social context as such, a logical impossibility, but the removal of an entity from one context into another. The victim is re-described in the kind of bare detail similar to presumption of (human) equality before the law, the new social context being the universe of others who have suffered human rights abuse." (2004:230)

The *recontextualization* mentioned here is occurring within a new context which is an abstract one, a kind of 'imagined community' (cf. Anderson 1983).

> The language of human rights reports mirrors the language of the modern nation-state, and the texts must engage in that discourse to influence state policy. Thus the effectiveness of human rights agencies' legalistic language lies in the fact that

> it speaks the language that state agents can understand. Were it to speak outside that discourse, then it presumably would have no effect. (Wilson 1997:154).

In this passage Wilson draws attention to the way in which the power of human rights discourse is somehow tied to its form, more precisely, the legality of its form and the emergent question: *whether the effectiveness of the discourse of human rights is inescapably tied to its legalism*? The instrumentalism of the legal language is a double edged sword, as has been argued above, creating particular conceptions of personhood, abstract and decontextualized and having the same kind of dehumanizing capacity as the "language of abusive forms of governance" (Wilson 1997:155) but at the same time creating 'interpretive communities' with a shared language and opening up spaces for the dispossessed and members of *muted groups* (cf. Ardener 1975:xii). A partial answer to this question is already implicitly given by Wilson when he argues that as reporting is not directed solely at governments and state institutions it would perhaps be more appropriate if the discourse would accommodate some less legalist (and perhaps more narrative) uses of language.

The issues of power in human rights discourse have been raised by Tony Evans, who argues that human rights are best understood as three different discourses that are overlapping each other: philosophical, political and legal, the last one being dominant. Evans examines what interest does the dominance of the legal discourse over the other two serve and asserts that it "acts to reify the freedoms necessary to legitimate market discipline by providing a framework that is promoted as immutable and binding" (2005:1062). The Foucauldian concept of discipline he invokes "refers to a mode of social organization that operates without the need for coercion" (ib:1054). Discipline is, thus, internalized and sustained through surveillance, in the case of *market discipline* through surveillance "undertaken by international and regional agencies – for example, the World Trade Organization (WTO), the World Bank, the European Union (EU), and the North American Free Trade Agreement (NAFTA)" (ib:1057). In his opinion the consequences of human rights discourse are obscured, because "while the discourse makes claims for the pursuit of human dignity and community, it also provides the

context of free will, equality within exchange relations, and property converge (??????) to create social relations characterized by selfishness, gain and private interests, rather than the pursuit of human dignity and community. Despite the mechanisms of self-discipline at the center of market discipline, there remains a need for authoritative expert pronouncements and idioms when norms are transgressed [which] … is the central role of international law.." (ib:1057). Thus, it can be concluded that this emancipatory discourse has some disciplining and hegemonic features.

The conclusion that can be made is that the legality of human rights discourse, on which its enforceability rests, is closely tied to the instrumentalist language, which is a particularly restrictive one, redefining persons as rights-bearing subjects and excluding some at the same time. Nevertheless, the human rights discourse has both legal and extralegal aspects, which leads to several paradoxes, especially in the context of the nation-state to which it is tied. The issues of exclusion are related to the wider problem perhaps inseparable from the origin of human rights as a tool for the protection of individuals and groups from the unrestrained rule of governments, within the nation-state framework.

I would now like to look at the relationship of the exclusionary features of the discourse to its inclusionary aims and pretensions. If the creation of human rights culture is understood as a symbolic construction of community, it can be expected that through the process of symbolic construction boundaries will be marked, thus leading to the exclusion of some groups and individuals. It has been noted that the human rights discourse has both of these features – it creates an 'interpretive community' as mentioned above, but although it asserts universal humanity, it is often exclusive in practice, perhaps due to the fact that in their legal aspect human rights are tied to the nation-state. The boundaries of political communities are in the focus of the work of Seyla Benhabib in which she examines the tension between the universality of human rights claims as opposed to the exclusivity of particular national identities, "between the expansive and inclusionary principles of moral and political universalism, as anchored in universal

human rights, and the particularistic and exclusionary conceptions of democratic closure" (2004:21).

Moreover, the democratic legitimacy of the state seems to be built on this very tension, nation-states granting rights within a particular (bounded) political community, but legitimized by conforming to the universal human rights principles (Benhabib 2004:44). This aspect of human rights discourse can be understood as basically ideological. This sort of ideology is invoked in the situation of a loss of orientation, as Clifford Geertz argues (1973:219), which can in turn be related to processes of globalization and rapid change in the contemporary world. Hastrup refers to this aspect of human rights discourse as *the glue of communities* (2001b:7).

Thus, it can be concluded that although inclusionary and exclusionary aspects of the human rights discourse seem to be at odds and even mutually exclusive, they are two facets of the same process. The discourse enables the creation of an interpretive community, a community of communication, within which muted groups are given a voice. On the other hand, as with any community making process (cf. Cohen 2004), it leads to the creation of symbolic boundaries and therefore excludes those who do not conform to the image of responsible, autonomous self-governing personhood, or 'a good victim', or those beyond the boundaries. Insofar as it is considered a community of communication, the human rights discourse can be compared to the European Union, which is often described as a 'unity of values', and human rights themselves are one of the central values constituting it:

> The EU is ultimately a union of values. The governments of the region must, and are also increasingly seen to, espouse these values – values related to democracy, the rule of law, respect for human rights, protection of minorities and a market economy (Commission of the European Communities, 2003).

II - 'How fair is equal?'

In the second part I would like to focus on the interpretation of one of the findings of a recently conducted research on the attitudes of Croatian citizens toward the legal changes surrounding the status of women, within the process of accession to the European Union. The legal changes taking place are related to the human rights paradigm and, in particular, to the notion of equality between men and women. The example analysed brings up a question of *fairness of equality*, as well as issues concerning the recontextualiztion of policies.

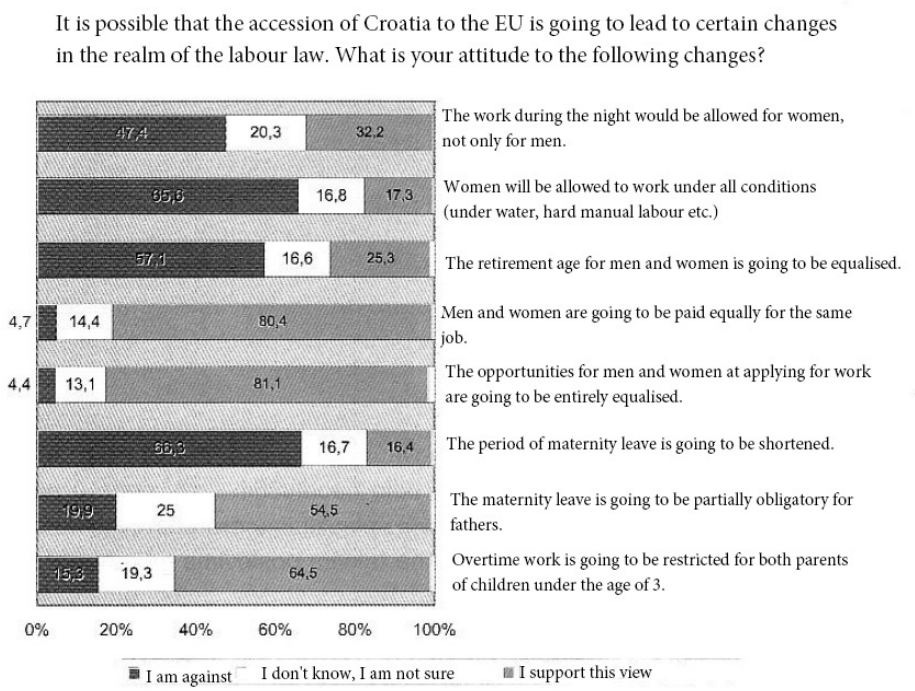
Firstly, it seems important to mention the context in which the gender equality discourse has emerged. As Tomaševski (1995) emphasized in the introduction of her book entitled *Women and Human Rights*, the title of the book reflects the fact that women indeed do not enjoy their freedoms and rights, sometimes even the basic ones, to which they are entitled by being human. For this reason, with an aim of changing this situation and emphasizing the rights that women have as humans, the Convention on the Elimination of all Forms of Discrimination against Women was adopted in 1979 by UN General Assembly. It is sometimes referred to as the Women's Convention, or the international bill of rights for women. But, this convention has met with a severe feminist critique:

> "In many ways, the creation of a specialised 'women's' branch of human rights law, of which the Women's Convention is the flagship, has allowed its marginalization. 'Mainstream' human rights institutions have tended to ignore the application of human rights norms to women." (Charlesworth and Chinkin 2000: 2018)

Nevertheless, it can be said that the rights of women and equality between women and men has become a major part of the human rights agenda from the time of the adoption of the Convention onwards. In the context of the European Union, human rights and equality between men and women are recognized as one of the fundamental values of the Union (see Article 23 of the Charter of Fundamental Rights of European Union, 2000).

Regarding the process of the enlargement of the EU, one of the most important requirements of the countries in the process of accession to the EU is the harmonisation of their national legislations with the laws of the Union. This situation applies to Croatia, as one of the accession countries. Therefore "[t]he article (141) of the Foundation Treaty mentioned is binding upon all member states of the EU and constitutes a law with which Croatian law will have to be harmonised. It is also the legal basis for the passing of the secondary legislation the reception of which is also part of the *acquis*, and hence a condition for approaching the EU." (Vasiljević 2004:278) Croatia has begun this process of legal harmonisation as a part of her integration to the EU, which has met with ambivalent responses and attitudes on the part of the wider public.

The attitudes of Croatian citizens toward the process of accession of Republic of Croatia to the EU have been the focus of recent research by Čulig, Kufrin and Landripet (2007). A part of their research refers to the attitudes toward the recent and future changes in the legislation related to the position of women, especially in the area of Labour Law. This has been investigated in a twofold way: by assessing the likelihood of certain changes and by assessing their acceptability.



Graph 1 (Source: Čulig, Kufrin and Landripet 2007:125)

Their findings indicate that citizens strongly support equalising men and women in the domain of job opportunities, and salaries (for the same job), which have already been enforced in the legislation. But, their findings also show that a majority oppose legal changes that diminish existing legal protections of women, even if they contribute to promoting gender equality (e.g. enforcing laws that would enable women to work under all conditions or making the male and female retirement age equal), as can be noticed in the Graph 1.

These findings seem to raise the question of 'how fair is equal', referring both to the position of women in society and to the monitoring of the level of implementation of this legal framework in the accession countries, as opposed to the member states of the EU. Firstly, they seem to be asking whether the 'equal opportunities' legal framework ensures the fair treatment of women and their position in society, compared to the socialist welfare state model. Secondly, the question refers to the fact that the level of enforcement of human rights in the member states of the EU is seriously limited (Novak 2007) - for example, Greece and Portugal seem not to have any special laws at all to regulate the ban on sexual harassment (Vasiljević 2004:281). Therefore, it is possible that the demand for higher criteria and a more strict level of enforcement in the new accession countries reflects the 'lessons learned' from the recent accessions. In some cases, the laissez-faire attitude did not bear fruit, and after a country becomes a member state, there are very few mechanisms for improving the legal framework and especially its enforcement (cf. Božić 2007). This second attitude can be understood in relation to the perspective of some analysts, noted by Stubbs and Zrinšćak, that "a neo-liberal, non-interventionist model of capitalist development remains the hegemonic discourse and practice within the EU" (2005).

The reluctance to accept the legal framework of the EU could partly be explained in terms of the position of 'euroscepticism', which can perhaps be linked to a difference in values between Croatia and the EU. Rimac and Štulhofer (2004) have investigated the level of trust of Croatian citizens in the EU and the 'distance' of Croatia from the EU in

terms of values. Their analysis shows that Croatia was mostly similar in the latter respect to the accession countries, which have in the meantime become new member states. These authors argue that the convergence in values is important, and propose certain measures for achieving it to a greater extent, but "[t]he point of such measures, of course, is not just to facilitate and speed up Croatian integration into the EU, but, primarily, to achieve a greater level of social trust, economic success and political stability." (ib. 322) This perspective clearly emphasizes the importance of values for the process of integration into the EU. It could therefore be possible to think of the difference in values as an important part of the explanation of the reluctance to change certain aspects of the existing legal framework for the protection of women's position in society, especially in the area of Labour law.

These changes should be understood in the larger context of social policy, and the post-socialist situation should be taken into account. Both aspects seem to have been rather neglected by the institutions and actors in the accession process. On the one hand "social policy concerns and social dialogue in Croatia have not been sufficiently developed or discussed in the context of EU accession" (Stubbs and Zrinšćak 2005:162), and as Noemi Lendvai argues, there is a consensus among scholars on that issue - the social aspects of the accession process have been rather weak in the past and presently:

> In the context of transitional, post-communist social policy, the EU is seen as a weak transnational actor not only during the transition period (Standing, 1996a; Deacon, 2000a), but also during the accession process, which failed to promote elements of the European Social Model to the candidate countries. (Lendvai 2004:322)

On the other hand, the post-socialist context and the specificity of the situation of the new accession countries have not been taken into account to a sufficient degree. This has been argued by Watson, who disagrees with the uniform approach, pointing out that transferring an equal opportunities framework to post-socialist contexts denies the social and political context, thus resulting in the ineffectiveness of the policies and the loss of credibility of the EU (Watson, 2000).

Although the last argument is strongly reminiscent of a relativist critique of human rights universalism, again I do not wish to pursue that line of argument. That debate has lost its momentum without reaching a definite conclusion, the most viable option being finding a balance between these two opposed positions, somewhat like 'a movement of the pendulum', a metaphor used by Marie-Benedicte Dembour (2001). Instead, I propose once more to look at the issue from the perspective of the decontextualization and recontextualization of a particular human rights policy, in this case the idea of equality between women and men. I think it is possible to look at the changes of legal framework and policy transfer in terms of recontextualization, the context in this case consisting of a special set of values held by the members of the society, to an extent related to a post-socialist social welfare situation.

This argument is in accordance to the approach proposed by Stubbs and Lendvai, in their article "Policies as Translation: situating trans-national social policies" (2007). These authors argue for a different approach in understanding the policy transfer, rooted in terms of meaning-making and translation. Similar to the human rights discourse, policies are usually phrased in a legal language, with an assumption of instrumentalism, but as these authors emphasize, the legality of language often obfuscates its political nature. The idea of policies as translation, in the view of Stubbs and Lendvai, is more than just a process of interpretation, it includes negotiations over the meanings, it "entails representing something in a new way and in a new place, inevitably changing what it means. It is a 'craft of compromise', an art not a science, and entails mediating between different claims" (ib. 8). Such a process of translation resembles and involves a process of recontextualization - it involves reinterpretation in a new context. Thus, not only actors and people subject to policy are recontextualized by taking part in it, or by being subjected to it, they also represent a new context for the policy which is transferred, negotiating its meanings.

In this part it can be concluded that the question that seems to be underlying the data about the attitudes of Croatian citizens toward the legal changes in the position of women and their protection in the society in the process of accession to EU, the question

‘how fair is equal’ has essentially two meanings, which are closely tied, through the idea of social values. The first question refers directly to the position of women in society and their legal protection, asking is the ‘equality between men and women’ and ‘equality of opportunities’ really fair, expressing a concern that such a legal framework might not ensure better protection of women’s rights. The second question relates to the wider social and political context of the changes, namely that of a post-socialist welfare state and its social policies, as a specific context within which the discourse itself is recontextualized. Moreover, it seems to reflect the scepticism stemming from the neglect of social policy issues in the processes of accession of Croatia to the EU.

Concluding Remarks

To sum up, it can be said that the human rights discourse, which is such a powerful tool for inclusion, has certain exclusionary aspects. It is an empowering discourse, which gives voice to muted groups and individuals, thus including them within a shared community, an 'interpretive community' or a 'community of communication'. Although the coexistence of the inclusive and exclusionary aspects of the discourse seems paradoxical and contradictory, the exclusionary aspect of the discourse is in fact the reverse, the flip side of its empowering aspect. The very community-making characteristic of the discourse implies the symbolic boundaries of the community, therefore excluding some from the very outset.

Furthermore, human rights discourse is largely a legal discourse, and as such it seems to decontextualize social actors, stripping them of their particular circumstances, at the same time giving them a voice and thus introducing them into an imagined 'community of communication', recontextualizing them. The discourse itself can be recontextualized, transposed to a new social setting, the process somewhat similar to the 'translation' of policies. The case analysed, related to the policy of equality between women and men applied to the Labour law in Croatia, should be understood as an example of this process of recontextualization in terms of policy translation. The concept of recontextualization emphasizes the specific institutional circumstances, instead of only focusing on the values held by individuals in a particular society, at the same time stressing the complexity of this two-way process.

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