

Croatian Jurisprudence and Repopulation: Parents Educators v. the City of Zagreb

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The practical problem of this study is the adverse impact of the jurisprudence of the Higher Administrative Court (HAC) and the Constitutional Court of the Republic of Croatia (CCRC) on the termination of social benefits for parents educators, i.e., parents rearing several children, by the City of Zagreb. The study identifies the constitutional and/or *jus cogens* provisions in accord with the postulated values; describes the decisions on parents educators and appraises the decisions as tending towards, against, or past the constitutional and/or *jus cogens* principles; explains the decisions; forecasts probable future decisions, and proposes alternative decisions that are more in conformity with the constitutional and/or *jus cogens* principles.

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1. Introduction

1.1. Problems

The practical problem of this study is the adverse impact of Croatian jurisprudence on population retention in Croatia, which is critical to the very existence of the Croatian society. Croatian jurisprudence – or the jurisprudence – is a term of convenience denoting the judicial decisions rendered in 2021–2023 by the Administrative Court in Zagreb (ACZ), Higher Administrative Court of the Republic of Croatia (HAC), and the Constitutional Court of the Republic of Croatia (CCRC) on the City of Zagreb’s termination of social benefits for parents educators, i.e., parents rearing several children. The term “Croatian laws” denotes both Croatian jurisprudence and the Croatian decisions the jurisprudence has reviewed. The jurisprudence, and the decisions it has upheld, violates not only the Constitution of the Republic of Croatia (CRC) and its laws and by-laws but also international human rights and thus creates a legal and political situation detrimental to population retention in Croatia. The problem was not analysed by legal scholarship, let alone by policy-oriented jurisprudence. The remaining lines of this introduction indicate the underlying facts of the problem of inquiry.

Depopulation is a reduction in the number of people living in a place. A renowned economist wrote recently: “Global depopulation is the looming existential threat that no one is talking about” (Cowen, 2021). At the time this study was being completed, the European Commission (EC) recognised by its communication on demographic change in Europe that the shrinking and continued ageing of the EU population risks negatively impacting the EU’s long-term competitiveness. The EU’s working-age population is projected to decline (by 57.4 million until 2100), and the old-age dependency ratio to increase (from 33% to 60% by 2100). As a result of these trends, the EU’s share in the world’s population will continue to fall (from 6% today to below 4% in 2075) (European Commission, 2023).

According to the census of 2021, Croatia had 3,871,833 inhabitants, as against 4,284,889 in 2011, 4,784,265 in 1991, and 3,936,022 in 1953.

While in 2013 there were 39,566 live births and 50,839 deaths, i.e., a decrease of 11,273, in 2023 there were 32,170 live births and 51,275 deaths, i.e., a decrease of 19,105. 4.27% and 22.45% of the population is in the age group 0–14 and over 65, respectively. The average age of the population was: in 1961: 31.9; 1971: 34.0; 1981: 35.5; 1991: 37.1; 2001: 39.3 2011: 41.7; 2021: 44.3.¹

Croatian population has been changing due to migrations for centuries (Gregurović & Klempić, 2023). In the 20th century, Croatia lost ca. 2.3 million inhabitants, due to emigration (63.3%), war (32.7%), and epidemics (4%). Had it not been for emigration, the population in 2001 would count ca. 6.2 million (Nejašmić, 2014). The tendency continued in the 21st century, especially after the Croatian accession to the EU in 2013, which prompted ca. 242,000 people to emigrate till 2017 (Jerić, 2019, p. 26).

The total number of persons in employment in Croatia in April 2024 was 1,646,276, including 753,561 women, while registered unemployment was 6.2%, for women 7.65%. The national retirement insurance in April 2024 had 1,724,665 contributors and 1,228,501 recipients at the ratio of 1.4:1, the average net monthly pension (without international agreements) being EUR 627.92, i.e., 47.5% of the average wage (HZMO). The total number of workers from abroad, primarily from Nepal, India, and the Philippines, was 143,000 in the summer of 2024 (Miletić, 2024). In November 2024, the number of persons registered as unemployed is 89,082, while the number of registered job vacancies is 16,801 (RH HZZ). 78,000 persons (13% of the total, as against 11% in the EU as a whole) within the 19–29 age group are neither gainfully employed nor enrolled in schools (Mihanović, 2024).

Time and again, the Government of Croatia has made demographic revitalisation and the betterment of family its prime concerns (e.g., the 2024 Demographic Revitalisation Strategy until 2033; the 2006 National Population Policy; Malnar & Malnar, 2019). The leading Croatian demographer, who, together with his colleagues, has pleaded with the authorities for decades to recognise depopulation and undertake measures to alleviate it, recently said: “What is at work is astounding incomprehension of the consequences of demographic collapse” (Erceg, 2024).

¹ All population trends and figures in the paper are retrieved from the webpage of the Croatian Bureau of Statistics – <https://dzs.gov.hr>.

1.2. Tasks

This study is structured within policy-oriented jurisprudence (POJ) as developed initially by Lasswell and McDougal (1992), and adjusted to Continental (Civil Law) scholarship. The first part is the framework of inquiry, which, in addition to stating the problems (1.1), outlines tasks (1.2), including theoretical constructs, repopulation as a set of supra-positive values (which are postulated to avoid infinite regress (Lasswell & McDougal, 1992), and states hypotheses of the inquiry (1.3).

The second part (2) is the policy analysis proper. It performs the following five tasks: 1) identification of the constitutional and/or *jus cogens* principles in accord with the postulated values and serviceable as grounds for the appraisal of the Croatian decisions described in the performance of the next task (2.1); 2) description of the Croatian decisions on parents educators, and appraisal of the decisions as tending towards, against, or past the constitutional and/or *jus cogens* principles (2.2). The description, which presupposes the results of task 2.1, is close to descriptive legal science in Kelsen's sense (Kelsen, 1945). The appraisal, which presupposes description, is close to legal dogmatics (e.g., Herberger, 1981); 3) explanation of the decisions, which presupposes the results of task 2.2., is methodically close to legal history (e.g., Duve, 2021; Berman, 1994) broadened by historical sociology (e.g., Tilly, 2007), which has been assimilated by POJ (Morrison, 1962) (2.3); 4) the forecast of probable future decisions extrapolates the tendency of the decisions described in 2.2 and explained in 2.3, and indicates its span of variation in changing circumstances (2.4); 5) a proposal of alternative decisions that are more in conformity with the constitutional and/or *jus cogens* principles. The proposal is *de lege ferenda*. It is constrained by deliberations in 2.1–2.4.

Constructs. The assumptions of integral legal scholarship that are relevant here are as follows: since every single human act, i.e., an action and/or its effect, is singular, i.e., unique and un-repeatable, it can be recognised/identified by traductive reasoning, i.e., *a simile*, *a contrario*, and *a fortiori*, to the extent the act is similar to, or different from, an act that is already known (Valkman & Dembovskyy, 2008). The distinction between description and prescription is context bound and often a matter of degree (e.g., inexistant in custom, Kelsen, 1952), even if it can be analysed out in *usus* and *opinio* (as by D'Amato, 1971); since traductive reasoning cannot provide certainty, a general intellectual construct (a concept, a proposition, a system of propositions) about interactions of humans is an ideal type. The application of an ideal type (e.g., law, in the sense of a

legal order) to an object (e.g., Croatian law) includes a conceptualisation of the object, which may be largely empirical (e.g., Croatian law on 9 May 1945) or largely ideal typical (e.g., the concept of Croatia from 9 May 1945 onwards). While all the basic concepts of this inquiry (law, population, family, constitution, jurisprudence, etc.) are ideal types, they differ in the degree of abstractness and idealisation.

Explanations of the decisions are ideal types of development (Weber, 1968). An explanation in the weak sense ascribes a decision to an action-guiding reason that renders it acceptable (instrumentally and/or practically), and thus makes it probable. Such a reason is typically a moral, political, or legal rule, value, principle, etc. An explanation in the strong sense finds a decision to be prompted by a motive, e.g., an interest (i.e., expected advantage), that the decision-maker need not be aware of. An explanation in the strong sense describes a causal sequence by stating “what only approximately or partly happens in a number of cases, and, therefore, cannot be given the status of a causal law of nature” (Burger, 1976, p. 33). Such a motive is typically an ideological belief, which is itself prompted by relations of economic might and political power.

Repopulation. The complexities of de- and re-population are illustrated by a recent media report, stating *inter alia*: “South Korea’s fertility rate – already the lowest in the world – has fallen yet again, amid fears of ‘national extinction’. In neighbouring China and Japan, fertility rates hit record lows of 1.09 and 1.26, respectively, in 2022” (Aljazeera).

In view of the complexities indicated above, it may be preposterous to formulate repopulation policy even by multidisciplinary research let alone a legal inquiry. Law cannot be more than an instrument of social, health, economic, educational, and other policies, which is comparable to accounting. Nonetheless, repopulation, especially if carried out within a liberal democracy constituted as a social state with the rule of law, must meet certain obvious requirements, whereas law, as any other instrument, cannot be used to achieve any goals. Hence, the following is possible: to rule out the *prima facie* non-starters; to identify specific supra-positive values of repopulation, especially the ones of constitutional force; and to indicate the precondition of their acceptance by relevant actors.

Repopulation is necessary, if for no other reason, to provide for the elderly, irrespective of whether they are taken care of by family members or by the social (welfare) state. Both ways operate according to the pay-as-you-go (PAYG) principle, which requires the ones who can to take care of the ones who cannot. Already in the early stages of the depopulation of

developed countries, neoliberals forecast a collapse of social security due to inevitable ageing and advocated a switch to privately funded pension plans (e.g., Feldstein & Siebert, 2002, p. 9). While such plans are beneficial to the minority who can afford them, the “funded plans face many of the same problems as PAYG systems; some of their claimed advantages are more myth than fact” (Barr, 2001). Hence the first non-starter: timely private investment can solve the problem of ageing. Complexities of de- and re-population suggest the second obvious non-starter: fully-fledged repopulation. Population retention should do. It is not reasonable to expect that the present population of Croatia (or of any other known country) is willing to be replaced by foreigners. Hence the third non-starter: population retention by immigration. Increase of the fertility rate is also required. If even retention is no longer possible, the fertility rate should be kept high enough to ease the integration of immigrants into the Croatian society.

The specific supra-positive values (SSPVs, marked below by an ordinal number in front of the SSPV) are as follows.

Replacement level fertility, which requires an average > 2.1 children per woman, can be achieved in a liberal society, where no woman can be legally required to produce and/or raise children, only if the women who do have > 2 children, and their offspring and partners, are entitled to public support (1st SSPV).

Direct public support to parenthood, esp. motherhood, includes several of the following: medical coverage of parents and parenting (maternal and paternal), extended parental (maternal and/or paternal) leave, retraining after parental leave, bridging the parental (esp. maternal, i.e., female) pay gap, child benefits, all-day childcare, all-day stay of pupils at school, housing, vehicles, transportation, vacations, etc. (2nd SSPV).

Indirect public support to parenthood includes at least some of the following: responsible education so that the young can develop their potential with minimum attrition and repay the education, health, and other social and public (safety, utilities, environment, transportation, etc.) services received from the government by contributions to national funds of education and social security while working in Croatia; later retirement and employment of retirees, *inter alia* in childcare (3rd SSPV).

Public support to children and parenthood is the highest constitutional social and economic value (4th SSPV).

Since public support according to the 1st–4th SSPV is necessary for population retention and/or maintaining the minimal fertility rate, neither those

who provide support nor those who receive it can have a legitimate claim of being discriminated (5th SSPV).

Public support can be efficacious only if it is long-term and stable (6th SSPV).

Public support can be long-term and stable only if it is adopted by a wide consensus embodied in a constitutional instrument (7th SSPV).

The precondition of a consensus is the acceptance of the SSPV as the means of achieving a common goal necessary for survival. If any of the SSPVs, or all of them together, is/are considered by a significant minority to be detrimental to non-discrimination of women, the youth, or the elderly, or to one's philosophical conviction, political stance, economic survival, etc., consensus is not possible.

1.3. Hypotheses

1. Identification of the practical problem in 1.1. It is rendered plausible by the description and appraisal of the decisions in 2.2. on the basis of the principles in 2.1.
2. The ascription of Croatian decisions to EU policies, and the explanation of both the decisions and the policies by left liberalism, in 2.3.
3. *Ceteris paribus* in the next 5–10 years, Croatian law is going to be affected adversely by the rise of both the liberal left and the extreme right, in 2.4.
4. Croatian law can be more in accord with the principles in 2.1. provided it is in accord with the 4th–7th SSVP in 2.5.

2. Policy Analysis

2.1. Principles

If a constitutional and/or *jus cogens* principle of an instrument is, for the purposes of this inquiry, similar sufficiently to a principle of another instrument, they are considered to be identical. Whenever practicable, a principle is abbreviated or mentioned by a key word. A principle is accompanied by a reference to its sources, listing the primary source first and indicating articles and sections by numbers only (e.g., UDHR 2; ICCPR 2-1, 26).

International Human Rights. The following international instruments include the constitutional and/or *jus cogens* principles that are grounds for identification and appraisal of the decisions in section 2.2.: Universal Declaration on Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social, and Cultural Rights (ICESCR), Convention on the Rights of a Child (CRAC), European Convention on Human Rights (ECHR), Charter of Fundamental Rights of the European Union (CFREU). These instruments incorporate the following important principles: “human dignity” (UDHR, Art. 1; CFREU, Art. 1); “equality”, “non-discrimination” (UDHR Art. 2; ICCPR Art. 2/1, Art. 26; ICESCR Art. 2/2; ECHR, Protocol 12; CFREU, Art. 20–21); “freedom of thought, conscience, and religion” (UDHR Art. 18/1; ICCPR, Art. 18/1; ECHR, Art. 9; CFREU, Art. 10); “Parents have a prior right to choose the kind of education that shall be given to their children in accordance with their religious and other views” (UDHR Art. 26; ICCPR Art. 18/4; ICESCR, Art. 13/3; ECHR, Protocol 1–2; CFREU Art. 14/3; CRAC Art. 14/2, Art. 18).

Constitution of the Republic of Croatia (CRC). The CRC includes *inter alia* the following provisions relevant to the identification and appraisal of the claims and decisions in section 2.2.: *The rule of law* is one of the highest values of the constitutional order of the Republic of Croatia (Art. 3); In the Republic of Croatia government shall be organised on the principle of separation of powers into the legislative, executive, and judicial branches, but also limited by the constitutionally guaranteed right to local and regional self-government (Art. 4/1); *All persons* in the Republic of Croatia shall enjoy rights and freedoms, regardless of race, colour, sex, language, religion, political or other conviction, national or social origin, property, birth, education, social status, or other characteristics (Art 14/1); All persons shall be equal before the law (Art 14/2); Freedom of conscience and religion and freedom to manifest religious or other convictions shall be guaranteed (Art 40); The family shall enjoy special protection of the state (Art 61/1); The state shall protect maternity, children and youth, and shall create social, cultural, educational, material and other conditions promoting the achievement of the right to a suitable life (Art 62); Parents shall bear responsibility for the upbringing, welfare, and education of their children, and they shall have the right and freedom to make independent decisions concerning the upbringing of their children (Art 63/1).

2.2. Parents Educators

Decisions. Since its independence in 1991, Croatia has been ruled mostly by coalition governments led by the Croatian Democratic Union (*Hrvatska demokratska zajednica – HDZ*), in power in 1990–2000, 2004–2011, 2016–, and the Social Democratic Party of Croatia (*Socijaldemokratska partija Hrvatske – SDP*), in power in 2000–2003, 2011–2015. With Homeland Movement (*Domovinski pokret – DP*), a far-right party, as a junior partner, HDZ formed the new government of Croatia in 2024.

Introduction. The City of Zagreb, the capital of Croatia, had 767,131 inhabitants in 2021. The City of Zagreb Assembly, in accord with the demographic and pro-natalist policy of the then mayor and its allies, adopted the Decision on financial assistance to the mother educator in 2016. To qualify for assistance, a person had to be a female or male or adoptive parent or guardian who cared for at least three children, the youngest one being of pre-school age, provided the person was unemployed and their children did not attend kindergarten. The assistance was paid monthly in the amount equal to 65% of the average monthly gross earning in Croatia. The right to assistance expired when the beneficiary entered into employment and/or her/his child enrolled in a kindergarten and/or the youngest child of the beneficiary reached fifteen years of age. The decision was replaced by a more restrictive decision in 2018 (e.g., a person who received maternity benefit or unemployment benefit was not eligible as a beneficiary; in addition, the term mother educator was changed to parent educator).

Termination. The party *Možemo!* (We Can!), after winning the 2021 local elections in the City of Zagreb, made a draft proposal to amend the Decision of 2018. (City of Zagreb, 2021a) The rationale of the draft claimed the following: the measure parent educator had not defined properly measurable outcomes of the impact on demographics and beneficiaries; the actual impact on demographics in 2016–2020 was insignificant; the number of the third- and more-born children increased by 236, the total number of live births was 255, while the population of Zagreb increased by 18,768 in 2011–2020, the increase being a result of immigration; children of the beneficiaries in the early and pre-school age did not attend public kindergarten, which provides affordable and quality institutional education and thus reduces social inequality and the risk of poverty; the measure hampered women, its primary beneficiaries, when it came to re-integrating in the labour market; the measure also adversely affected their future income and retirement benefits, increasing their risk of poverty;

the amount of HRK 1.8 billion (ca. EUR 238 million) spent to finance the measure in 2016–2021, equalled the amount required to build 27 new kindergartens; the amount could have been spent more equitably to enable the children of both less and more numerous families to attend kindergartens (City of Zagreb, 2021b) .

Numerous interested parties took part in the online public consultations on the proposal. The Catholic Church in Croatia was (and has remained since) the most vocal critic of the cancellation or weakening of the parent educator measure (Glas Koncila, 2024).

In 2021, the City of Zagreb Assembly adopted the Decision to amend the Decision on financial assistance to the parent educator of 2018, whereby the parent educator measure was effectively terminated even for persons who had already been receiving financial assistance as parents educators. The Decision of 2021 ruled that financial assistance was going to be paid to parents educators monthly in the amount equal to 65% of the average monthly gross earning in Zagreb only till 30 April 2022, and after that date in the amount of HRK 1,000.00 (ca. EUR 131); and was not going to be paid for a child who has reached seven years of age.

Many of the beneficiaries of the Decision of 2018 submitted a notification to the HAC to review the legality of the Decision of 2021. Their principal complaint was that the Decision of 2021 annulled retroactively the rights to financial assistance granted by final individual administrative acts. The argument was that the Decision of 2021 curtailed these rights without meeting standard legal requirements. First, while there was no apparent public interest in the Decision of 2021, there was a manifest public interest in retaining the Decision of 2018, since the number of the third born, fourth born, and other later born children in 2016–2019 increased. Secondly, the intended aim of the Decision of 2021 was not proportional to the annulment of the already granted rights to financial assistance. The Decision of 2021 forced parents educators to seek employment in a loose labour market before their children could find placement in public kindergartens. (HAC, *Usoz-8/22-68*, p. 5) The Decision of 2021 affected adversely ca. 20,000 children, including 6,000 children of kindergarten age.

In its response, the City of Zagreb added a new argument to the report on the consultations on amending the Decision of 2018. The argument was that the parent educator measure could not be considered efficient in the overall pronatalist policy in the wider sense since the measure was “focused on a ‘minority type’ of family”.

The HAC suspended on 25 April 2021 the implementation of the Decision of 2021 (Usoz-8/22-55), and on 5 July 2021 rendered a judgment on the merits. Its major findings are as follows: the Decision of 2021 is quasi-retroactive, i.e., “it applies to an act or transaction in the process of completion”, unlike a truly retroactive decision, i.e., “the application of a new rule of law to an act or transaction which was completed before the rule was promulgated”, as stated by the CCRC (U-I-4455/2015, p. 15), with a reference to Hartley (Hartley, 2003, p. 129), Croatian translation (Hartley, 2004, pp. 148–150) (HAC, Usoz-8/22-68, pp. 104–124); the Decision of 2021 does have a legitimate aim in public interest (for reasons stated in the rationale of the draft of 2021); the beneficiaries have neither a right to nor a legitimate interest in financial assistance on the basis of the Decision of 2018, since the public power has the right to both grant and withhold such assistance; nonetheless, the notification is right that the City of Zagreb in adopting the Decision of 2021 failed to strike a balance between public interest and the protection of legitimate expectations of the addressees of the Decision; the parents educators who decide to stop receiving financial assistance and enter the labour market must, in the period of four months and sixteen days, find a job and daycare for the children of pre-school age (the HAC noted that in 2022 there were 3,537 children of parents educators, while on 22 May 2022 there were 252 free places in public kindergartens and 91 free places in religious kindergartens, and the City of Zagreb planned to accommodate additional 650 children in public kindergartens till the end of 2022, and 2,000 children till the end of 2023–2024).

Finalisation. The City of Zagreb Assembly adopted in 2022 the Decision to amend and supplement the Decision on financial assistance to the parent educator of 2018. The gist of the Decision of 2022 was the provision that the monthly financial assistance was going to be paid to parents educators till 31 March 2022 in April–June 2022 in the amount equal to 65% of the average monthly gross earning in Zagreb in January–August 2022, and after that date in the amount equal to 50% of the average wage in the current year in Croatia. The Decision of 2022 was accompanied by several compensatory measures to facilitate the employment, self-employment, and entrepreneurship of parents educators (e.g., City of Zagreb, 2022).

Again, several beneficiaries of the Decision of 2018 submitted a notification to the HAC to review the legality of the Decision of 2022. They claimed *inter alia* that the City of Zagreb had never appraised the effects of the Decisions of 2016 and 2018, and ignored Professor Nenad Pokos’ appraisal, which demonstrated that the Decisions of 2016 and 2018 had achieved their demographic objective (HAC, Usoz-143/22-91).

The HAC rejected the notification by its judgment of 27 March 2023 on the ground that the Decision of 2022 did strike a balance between public interest and legitimate expectations of parents educators by providing adequate compensatory measures, the most important being the opening of new places in public kindergartens.

Several hundred persons who had been beneficiaries of the Decision of 2018 submitted a constitutional complaint to the CCRC. They added to the claims they made to the HAC the argument that the HAC ignored the family educational impact on a child, although such impact cannot be made up for by other educational environments and institutions (CCRC, U-III-1744/2023). The CCRC dismissed the constitutional complaints that the Decision of 2022 violated the law, legitimate expectations, and the prohibition of retroactivity. The CCRC backed the HAC's appraisal that the Decision of 2022 was quasi-retroactive by the distinction between the two categories of constitutional provisions regulating social rights. The first institute explicitly the rights of citizens to certain kinds of social protection. The category includes the rights to: employment remuneration that ensures a free and suitable life (CRC, Art. 55); social security and social insurance regulated by law and collective agreements (CRC, Art. 56/1); assistance for weak, infirm or other persons unable to meet their basic subsistence needs (CRC, Art. 57/1); protection of persons with disabilities (CRC, Art. 57/2); special care, education, and welfare of physically and mentally disabled and socially neglected children (CRC, Art. 63/3); health care in conformity with the law (CRC, Art. 58). The first category also includes "the constitutionally guaranteed rights of children in the provisions of Art. 63–65 of the Constitution". The social rights of the first category require predictability and stability. Hence, "(t)he legislator has the constitutional obligation to establish conditions for the realisation of these constitutional rights of citizens by concretising, on the one hand, the substantive content and prerequisites and, on the other, the institutional system of financing and implementing these rights". The second category of constitutional provisions "gives the state the responsibility for the realisation of a certain kind of social protection, but in a manner that allows the state a wider margin of appreciation with regard to the choice of approach and specific measures of realisation". CRC Articles 61/1 and 62, on the protection of family and maternity, belong to the second category. So does the parent educator measure. The CCRC, based on CRC, Art. 4/1, denied the power of the City of Zagreb to enact measures that are not based on law (i.e., a statute, adopted by the Croatian Parliament) and are not fiscally sustainable. The CCRC reiterated

the view adopted by the HAC that “the parent educator measure has had socially negative effects ensuing from disabling the children of parents educators from attending kindergarten and disabling parents educators from entering the labour market”. The CCRC agreed with the HAC’s appraisal that compensatory measures of the Decision of 2022 did strike a required balance, and dismissed objections to the HAC procedure.

Dissent. Judge Miroslav Šumanović rendered a dissenting opinion disagreeing with the CCRC majority opinion on the Decision of 2022. Šumanović’s principal point was that the CCRC decision violated the vested legal rights of the beneficiaries rendered to them by final individual administrative acts based on the Decision of 2018. “(A)n administrative act rendered in the administrative procedure that is legally final cannot be categorised, by a criterion of legal nature and force, into ‘a stronger act’ and ‘a weaker act’, the latter being legally inferior in the sense of not creating ‘rights in the classical sense’”. “I believe that such argumentative *sfumat-ura* (derisively derived from the Italian *sfumato* – author’s remark) is not appropriate to this level of decision-making” (CCRC, U-III-1744/2023, pp. 96–99).

The majority opinion justifies its use of quasi-retroactivity by invoking its decision U-I-4455/2015. According to Judge Šumanović, reliance on that decision is unfounded since U-I-4455/2015 deals with the legislative intervention into consumer credits rather than final administrative acts. Unfounded is also the reliance of the majority opinion on the EU Court decisions C-210/87 Padovani, and C-496/18 and C497/18 Hungeod et al., and on the German Supreme Court decision 2 BvR 988/16 of 7 December 2022, since none of these decisions deal with interventions into final administrative acts either (CCRC, U-III-1744/2023, pp. 100–101).

Although the Decision of 2022 fails the test of legal validity, it is important to point out the argumentation of the majority opinion concerning the legitimate aim of the Decision of 2022. “It is obvious that the disputed Decision of 2022 has no other legitimate aim than the cancellation of the ‘parent educator’ measure as ‘socially negative’ according to the political judgment of the new political option of the local government in Zagreb ... The question of the socio-political evaluation of the upbringing of children by parents or government institutions is not of constitutional legal nature. The Constitution does not answer the question whether it is better that children internalise values and standards of their parents or of governmental educational institutions. It is a question of worldview, in which the Constitutional Court should not get involved ...” By not

only involving itself with the question but also taking sides in the dispute, the majority opinion accepted tacitly the assumption of the new political option in Zagreb that “women are exposed to discrimination already by playing the role of a mother”. “The finding that the parent educator measure was ‘demographically inefficient’ is highly bewildering in view of the professional expertise given by the specialist demographer Prof. Nenad Pokos, PhD, and enclosed with the administrative court records” (CCRC, U-III-1744/2023, pp. 101–103).

Appraisal. Judge Šumanović has made three legally valid points. The final individual administrative acts whereby certain persons were recognised as parents educators on the basis of the Decisions of 2016 and 2018 created for those persons legally perfect legal rights. Hence, they were not cancelled or altered but violated by the Decisions of 2021 and 2022. For the same reason, the CCRC majority opinion that the Decisions of 2021 and 2022 were quasi-retroactive is legally wrong. The Decisions of 2021 and 2022, even if they were not unduly retroactive, would not be valid due to the failure to consider the findings of the expert witness Nenad Pokos. The Decisions of 2021 and 2022 are based on political judgment of the new political option in Zagreb.

Šumanović’s appraisal can be completed by the following considerations.

The distinction that the HAC and the CCRC have made between two kinds of social rights guaranteed by the CRC has no support in and as such is contrary to the CRC, starting with the rule of law (CRC, Art. 3). The relegation of CRC Articles 61/1 and 62, on the protection of family and maternity, to the second, i.e., less guaranteed category, given the rampant depopulation of Croatia, is contrary not only to the CRC but also detrimental to the existence of Croatia as a society that is legally ordered as a state.

A repeatedly declared goal of the Decisions of 2021 and 2022 is to include parent educators, primarily mothers, in the labour force. It does not take an expert opinion to realise that the goal is incompatible with the policy. The reason is that the maintenance of population size requires a fertile woman to have more than two children, which is a burden that a working woman can hardly endure unless she is relieved not only by kindergartens but also by domestic assistance. Such assistance is scarce and increasingly expensive in Croatia, where there is a shortage of workers and retirees are too old for part-time work. The incompatibility of the goal as a means with repopulation as the end indicates that the Decisions of 2021 and 2022 serve, intentionally or not, the interest of those whose

primary concern is immediate profit, no matter what. For that reason, they disregard both their own other goals and fundamental concerns of others. Thus, the Decisions of 2021 and 2022 do not only ignore Pokos' finding, but also pass over in silence the available evidence that supports the claim of "the new political option" that kindergarten at an early age may be the most effective means of bridging the educational gap between the children of less educated and the children of better educated parents, especially if the latter are also economically disadvantaged (UNESCO, 2024). In addition, the Decisions of 2021 and 2022 do not weigh the institution of parent educator against the following obvious and relevant alternatives: depopulation; import of labour force; upbringing in a family with more siblings, which has educational benefits unattainable by kindergartens (by the very fact that children in a family are of different ages, with different rights, duties, responsibilities, authorities, loyalties, etc.). Finally, the Decisions of 2021 and 2022 do not support the parents' prior right to choose the kind of education that shall be given to their children (UDHR, Art. 26; ICESCR, Art. 13/3; CRAC, Art. 14/2, 18), CRC, Art. 4/1), including the freedom of thought, conscience, and religion (UDHR, Art. 18/1; ICCPR Art. 18/1; ECHR, Art. 9; CRC, Art. 40).

By the Decisions of 2021 and 2022 and the cancellation of final administrative acts, all with the assent of the HAC and the CCRC, the City of Zagreb usurped legislative powers of the Republic of Croatia and thereby, to put it mildly, did injustice to the sovereignty of the Republic (CRC, Art. 1, 1/1, 2/1), the rule of law (CRC, Art. 3), and the power of local government to limit rather than override the government of the RC (CRC, Art. 4/1). More importantly at this juncture, the City of Zagreb thereby institutionalised the *Možemo!* convictions, which have a moral content, not only in social law of the City of Zagreb but also, by using social law as a vehicle, in the state law of the RC.

The ideological bent of the Decisions of 2021 and 2022 is also revealed by the argument that the decisions of 2016 and 2018 favoured a "minority type" of family. The argument demonstrates that the "new political option" is not concerned with the rights of vulnerable minorities as such but with the advancement of the majority type of family, although the majority type fails, virtually by definition, to repopulate Croatia, and only the minority type which has more than two children, can and does contribute to population retention. Hence, the Decisions of 2021 and 2022, and the decisions of the HAC and the CCRC that upheld the Decisions, are not in accord with the constitutional principles and/or *jus cogens* on the right to equality and the prohibition of discrimination (UDHR, Art. 2;

ICCPR, Art. 2/1, 26; ICESCR, Art. 2/2; ECHR, Protocol 12; CFREU, Art. 20-21; CRC, Art. 4, 14) and the supra-positive values of this inquiry.

2.3. Conditions

The decisions adopted by the City of Zagreb, described and appraised in 2.2, are ascribed to EU policies. Both the decisions and policies are explained by the ideology of contemporary Western capitalism.

EU Policies. A repeatedly declared goal of the Decisions of 2021 and 2022 to include parent educators, primarily mothers, in the labour force is too similar to EU policies to be considered a Croatian peculiarity. It is reminiscent *inter alia* of the statement of the European Commission in 2018 that: “The availability, accessibility and affordability of high-quality childcare facilities are crucial for enabling women, and men, with caring responsibilities, to participate in the labour market” (European Commission, 2018, referring to the Commission’s Strategic Engagement for Gender Equality 2016–2019). The EC Communication on demographic change in Europe (European Commission, 2023) follows suit. The Communication advocates the following national policies, which can *prima facie* foster repopulation:

- i. better reconciling family aspirations and paid work, notably by ensuring access to quality childcare and work-life balance, with a view to fostering gender equality;
- ii. supporting and empowering younger generations to thrive, develop their skills, facilitate their access to the labour market and to affordable housing;
- iii. empowering older generations and sustaining their welfare, through reforms combined with appropriate labour market and workplace policies;
- iv. where necessary, helping to fill labour shortages through ... managed legal migration.

Furthermore, the 2023 Communication recognises “a growing trend of young people to postpone the decision to start a family or limit its size. Yet, when asked, many of them, particularly highly educated women, indicate they would want to have more children than they actually do” (EC, 2023, p. 6). Nonetheless, the Communication points out that: “To achieve the EU’s employment rate target for 2030, we must strive to at least halve the gender employment gap compared to 2019. Increasing

women's labour participation could be one of the most effective remedies to the negative consequences of population ageing" (p. 7).

Thus, the EC Communication avoids to recognise the incompatibility, first, between the principle that "everyone should be supported to be able to choose both a career and a family" (EC, 2023, p. 6) and the reality that the parents who choose both a career and a family do not have and are not likely to achieve in the foreseeable future the replacement level fertility of 2.1 children per couple, which is necessary for population retention; and, secondly, between the increase of labour force to maintain competitiveness of the EU in the world economy and the repopulation of the EU, which cannot be achieved without the abstention of a significant number of parents from the labour force.

Indicative of the European failure to even recognise the complexity of de- and re-population is the misreading of the EC Communication by its supposedly astute readers. A case in point is the editorial of the principal paper of the Catholic Church in Croatia. It finds the EC Communication to be surprising in that it does not strategically count on those who in previous years have pushed gender ideology, and, unlike other EC documents, mentions family several times in a positive light (Stanić, 2023).

Ideology. Ideology is an account, which is partly distorted by dominant economic and political interests, of the functioning and legitimacy of modern, i.e., capitalist, society (Marx & Engels, 1962-1; Marx, 1962-2; Seliger, 1977).

Contemporary capitalism, which has in the past half a century been financial (e.g., Palley, 2009) and more recently global (e.g., Peterson, 2022), even in the attempted decoupling from China (Freund, 2023) – which is only considered in the EU (European Union, 2024), has interest in investing in the countries where labour force is cheaper than in the West (including the EU), letting that force work in the West for wages lower than the ones paid to citizens of the West, and minimising social benefits for the latter, especially in the EU, which has invented the social state and provides better social services (health, retirement, disability, education, etc.) than virtually any other state. Hence, global financial capitalism, even in the EU, does not have an interest in the repopulation or even population retention of the EU.

There is more than one way of accounting ideologically for financial global capitalism.

The simplest is the doctrine that by increasing the wealth of the rich, they will spend more money, which would trickle down throughout society,

leading to more wealth for all (Finance Monthly, 2023). The doctrine hardly had much appeal in the EU even before the financial crisis of 2007. Capitalism can profit more by grafting its ideology on a philosophical conviction that, like a religion, promises to meet the aspirations that are not merely higher than but different in kind from wealth acquisition. Such a widespread conviction is left liberalism, whose prominent part is identity politics. While the term is inevitably fluid (e.g., Kalanj, 2010), it has come to signify certain vulnerable social groups, which are minorities if not by the number of adherents, then by social power. They include most notably women, racial minorities and persons identifying as LGTBQIA+ (e.g., Heyes, 2020; Edgar & Sedgewick, 1999).

Left liberalism is neither liberal nor left. Left liberal bans of any expression that is detrimental to social groups (religious, ethnic, race, gender, etc.) as hate speech are likely to be not only illiberal but counterproductive. I.e., they “can destroy the moral justification of enforcing laws against sexual orientation discrimination against religious dissenters” (Weinstein, 2017, p. 527). The goals of left liberalism are not socialist, i.e., developing productive forces and restraining (or even overcoming) the capitalist system. This is not surprising in view of the fact that socialist democracy in Europe abandoned such goals decades ago, remaining focused on reproductive rights of women (Goes, 2024), i.e., a goal that is liberal or, if linked to the ban of hate speech, illiberal. The social content of left liberalism is revealed by what it abstains to even mention, namely, global financial capitalism and its consequences. It is revealed also by the concern with minority rights, which are deeply ingrained in the constitutional protection of the rich minority against the majority without substantial property in the United States (Allott, 2003). Left liberalism is characterised more vividly by a book on the subject written by a German socialist (rather than liberal) leftist. A chapter in the book is entitled “The Leftliberalism – Maggy Thatcher’s Greatest Success”. It opens with the section “Privileged Victims – the Identity Politics” (Wagenknecht, 2021, p. 98 ff).

The *Možemo!* in power in the City of Zagreb Assembly that adopted the Decisions of 2021 and 2022, displayed by its programmes of 2020 and 2024 its affinity to identity politics and/or left liberalism (Možemo!, 2020; Možemo!, 2024). The programmes do not even mention the fact that, largely due to the loss of public control of financial industry, Croatian inhabitants keep their money in saving accounts with minuscule yields and have invested in 600,000 empty flats (Cvetko, 2023).

Left liberalism is obviously a contributing factor of the Croatian jurisprudence on the Decisions of 2021 and 2022. But it can be explained more

fully by capitalist institutions. They include the invasion of Anglo-American Common Law into Continental European Civil Law; democratic deficit accompanied by judicial hyper-activism; and the separation of law and rights (as if a right is not implied by law and *vice versa*).

2.4. Forecast

Ceteris paribus in the next 5–10 years, Croatian law is going to be affected adversely by the rise of both the liberal left and the far right. The national government and regional governments are likely to enact a number of laws and regulations on direct support to parenthood, esp. motherhood, along the lines of the 2nd SSVP. Due to the political split, a wide consensus, which is according to the 7th SSVP a prerequisite of any sensible policy of repopulation, is not to be expected. Hence, direct support is going to miscarry within the following range: not even direct support is going to be recognised as a highest constitutional social and economic value, which is required by the 4th SSVP; those who do not receive the support are going to object to it as being discriminatory, contrary to the 5th SSVP; without stability the support is not going to be efficacious, contrary to the 6th SSVP. While one cannot expect even a debate on the introduction of responsible education in accordance with the 3rd SSVP, which may reduce student attrition and brain drain, one should be ready to face the “left liberal” pressure to grant full political rights to minors of 16 years of age.

2.5. Alternative

Croatian law can be more in accord with the constitutional and/or *jus cogens* principles in 2.1, in a variety of ways, provided they are in accord with the 4th–7th SSVP in 1.2.2. To that end, Croatian political parties and major civic associations should form a national council to initiate and conduct public dialogue with a view to building national consensus on population retention. Only a comprehensive reform of legal education, with a view to strengthening the study of law in the context of social sciences, can generate judges more sensitive to both social and economic issues and the rule of law. What may help in the short run is continuous university education of administrative judges and the election of a more professional – and less partisan – Constitutional Court.

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CROATIAN JURISPRUDENCE AND REPOPULATION: PARENTS EDUCATORS V. THE CITY OF ZAGREB

Summary

Croatian jurisprudence on the City of Zagreb's termination of social benefits for parents educators: failed to consider relevant evidence; qualified inappropriately the decisions terminating the social benefits as quasi-retroactive; cancelled without a valid reason perfect legal rights of parents educators; distinguished inappropriately between two kinds of social rights and relegated the protection of family and maternity to the second, i.e., less guaranteed category, to the detriment of any sensible and efficient population policy; condoned the City of Zagreb's usurpation of legislative powers of the Republic of Croatia; and institutionalised convictions of a political party as social law. Thus, the jurisprudence did injustice to the constitutional power of local government to limit but not to override the government of the Republic of Croatia, the rule of law, the sovereignty of the Republic of Croatia, and also to the parents' prior right to choose the kind of education that shall be given to their children, including the freedom of thought, conscience, and religion. Croatian jurisprudence and the decisions it reviewed are ascribed to EU policies. They are explained by left liberalism as a prominent ideology of contemporary Western capitalism. If one extrapolates the tendency of the decisions as explained, Croatian law is going to be affected adversely by the rise of both the liberal left and the extreme right. What is required is a wide consensus on population retention embodied in a constitutional instrument.

Keywords: constitutional social rights, repopulation, parents educators, administrative review, constitutional review, the City of Zagreb, policy-oriented jurisprudence

HRVATSKA SUDSKA PRAKSA I REPOPULACIJA: RODITELJI ODGOJITELJI PROTIV GRADA ZAGREBA

Sažetak

Hrvatska sudska praksa u ukidanju socijalnih potpora roditeljima odgojiteljima ne uzima u obzir važne dokaze: neispravno ocjenjuje propise koji okončavaju socijalne potpore kao kvaziretroaktivne; bez valjanih razloga ukida pravomoćna prava roditelja odgojitelja; neispravno razlikuje dvije vrste ustavnih socijalnih prava te svrstava pravo na zaštitu obitelji i materinstva u drugu manje zajamčenu vrstu na štetu bilo kakve smislene i učinkovite populacijske politike; ne sankcionira uzurpaciju zakonodavne vlasti Republike Hrvatske koju čini Grad Zagreb; ustanovljuje uvjerenja političke stranke kao socijalno pravo. Time sudska praksa pravno vrijeđa ustavnu vlast lokalne samouprave da ograničava – ali ne i nadvladava – organe Republike Hrvatske, vladavinu prava i suverenost Republike Hrvatske, a vrijeđa također prvenstvo prava roditelja da izaberu odgoj i obrazovanja svoje djece, uključujući slobodu misli, savjesti i religije. Hrvatska sudska praksa i odluke koje je ocijenila izdanak su politika Europske unije. Objašnjive su lijevim liberalizmom kao istaknutom ideologijom suvremenoga zapadnog kapitalizma. Ako se ekstrapoliraju tendencije odluka tako kako su objašnjene, na hrvatsko pravo negativno će utjecati uspon kako lijevog liberalizma tako i krajnje desnice. Potrebno je stvoriti široku suglasnost o održanju stanovništva i ugraditi je u ustavni akt.

Ključne riječi: ustavna socijalna prava, repopulacija, roditelji odgojitelji, upravni nadzor, ustavno preispitivanje, Grad Zagreb, policy orijentirana sudska praksa