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THE NEED FOR ENACTING POSITIVE DISCRIMINATION IN THE ORGANISATION AND FINANCING OF ACCESSIBILITY FOR THE INHABITANTS OF MOUNTAIN AND HILLY REGIONS IN THE AREA OF PUBLIC PASSENGER ROAD TRANSPORT

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THE NEED FOR ENACTING POSITIVE DISCRIMINATION IN THE ORGANISATION AND FINANCING OF ACCESSIBILITY FOR THE INHABITANTS OF MOUNTAIN AND HILLY REGIONS IN THE AREA OF PUBLIC PASSENGER ROAD TRANSPORT

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ABSTRACT

In this article the author discusses the right to freedom of movement as the fundamental human right that enables the exercising of numerous other human rights such as the right to freedom of work, the right to education, the right social security, the rights to accessibility of healthcare, the right to a healthy living environment, etc. The right to freedom of movement crucially depends on the establishment of public transport (PT), and securing that all citizens have access to these services under equal and fairness of conditions. On these grounds he presents the legal regulation of the public passenger transport in the Republic of Slovenia (hereinafter the RS) and legal bases for special regulation of access to these services for the inhabitants of mountainous and hilly regions. On the basis of the studies conducted, the comparisons made and the number of public bus lines a day among urban settlements and individual mountainous or hilly regions in the years 1995 and 2012 the author establishes that the standard of accessibility to public passenger transport services in the RS has been established on the conventional theory of social justice and on the basis of the human right to freedom of movement and the constitutional provision that imposes special concern for economic, cultural and social development on the state or local communities. He also confirms and proves the thesis in accordance with which the mentioned standard of

accessibility for the inhabitants of mountainous and hilly regions is adequate. On the grounds mentioned the author justifies the statement that the state or local communities should establish accessibility to inhabitants of these areas on the Rawls's theory of social justice or Kaufmann's theory of personal justice and positively discriminate them in the access so that it relinquishes the "cost benefit analysis" by way of which it regulates the accessibility of inhabitants of urban settlements and organises them adequate and adjusted possibilities of access to public passenger transport services. In order to be able to cover higher costs of financing of these services per inhabitant in comparison with the amount of funds provided for the access per inhabitant in urban settlements it should provide additional public funds.

Keywords: right to mobility, access to public transport services, positive discrimination, inhabitants of mountainous and hilly areas

I. BASIC PREMISES OF THE TOPIC

In this paper, the author verifies the thesis in accordance with which the standard of accessibility to public passenger services in the road transport in the RS established on the conventional theory of social justice is not adequate for inhabitants of mountainous and hilly areas.

In the second section the article is focused on the bases of international public law on the basis of which the RS as the signatory state of conventions with the social-market system¹ shall regulate the public passenger transport as a commercial public service (mixed goods) and provide its citizens and other inhabitants with access to these services under substantively equal conditions.

On the basis of benefits of individuals and the public interest he defines the reasons why public transport services have the character of mixed goods. Due to the goals pursued these shall be regulated in a differentiated manner.

In the third section the author studies the legal regulation of the field of public passenger transport in the legal order in the RS and interactions with the EU regulation of this field.

On the basis of the existing researches he establishes the status of the legal regulation in the field of organisation and performance of public passenger transport services and accessibility of the inhabitants of the RS to them. He finds out that the access has been provided in

¹ Korže B., Uloga tržišno-socijalne države u uspostavljanju slobodne konkurencije u uvjetima ekonomske globalizacije, *Pravo gospod.*, 2005, let. 44, No. 3, p. 123-138.

compliance with the conventional theory of distributive justice without considering the fact that the inhabitants of mountainous and hilly areas live in significantly different conditions and therefore the accessibility should be adjusted to these conditions for them. Based on the research and study of comparison of accessibility in the year 2012 the author proves that public passenger transport has decreased significantly since 1995. In this section he discusses the results of the study in which it is stated that the RS has not suitably regulated the organisation and performance of these services as it is required in the regulations and the EU policies. In accordance with them it should follow the rules of the competition while pursuing the special goals. He believes that the inhabitants of mountainous and hilly areas are in a completely different position when compared to the inhabitants of urban settlements and therefore access to public passenger transport services should be regulated in an appropriate and adjusted manner. The discussion is limited to public passenger transport that is the only choice for the inhabitants of mountainous and hilly areas.

In the fourth section the author studies accessibility of inhabitants of urban settlements and accessibility of inhabitants of mountainous and hilly areas on the basis of the existing studies. Contrary to the objectives of the programme documents of the EU and RS he establishes extremely negative trends of accessibility that are results of the prevailing economic criteria. If they are still acceptable for the accessibility of the inhabitants of urban settlements, they cannot be applied to the formulation of the standard of accessibility of inhabitants of mountainous and hilly areas.

In relation to the human right to freedom of movement and the provision of the RS constitution on special concern of the state or local communities for economic, cultural and social development and by way of Rawls's and Kaufmann's theories of justice he justifies the thesis that in the RS the access to public passenger transport services is not adequate for the inhabitants of mountainous and hilly areas and these inhabitants represent a special category of users that should enjoy positive privileges granted to them by the state or local communities by organising adequate and adjusted possibilities of access. Special public funds shall be provided for co-financing of these services when compared to the inhabitants of urban settlements.

In the conclusion, the author formulates proposals for possible solutions and methods of organisation of public passenger transport for the establishment of adequate accessibility for inhabitants of mountainous and hilly areas to public transport services so that they will be in a position comparable to the one of inhabitants of urban settlements.

II. HUMAN RIGHTS AND REGULATION OF THE PUBLIC PASSENGER TRANSPORT SERVICE IN THE SOCIAL-MARKET STATE

II.1. The Human Right to Freedom of Movement is the Principal Basis for Legal Regulation of Public Passenger Transport

The human right to freedom of movement also includes the right to mobility, which has a relatively independent significance, but is also of essential significance for the exercise of numerous other human rights: the right to work; right to education; rights to economic, cultural, and social development of individuals and the social community, etc. The General Assembly of the United Nations defined the right to freedom of movement as a civilization achievement in Article 13 of the Universal Declaration of Human Rights,² and the Council of Europe referring to this Declaration wrote it down as a general principle in Article 2 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention).³ By ratifying the Convention, the signatory states committed themselves to enact the right to mobility in their national legal systems, so that they can restrict its enactment only as an exception in cases when such a restriction is crucial to ensure state security or public safety, maintain and restore public order, prevent criminal activities, prevent the commission of offences, protect health or morals, or protect the rights and freedoms of other subjects. In accordance with the Convention and the deduction of the human right to freedom of action, the Republic of Slovenia regulated the right to freedom of movement, substantially identical to that defined in the mentioned instruments of international public law, in Article 32 of the Constitution of the Republic of Slovenia (hereinafter: the Constitution of the RS).

² Adopted and declared by the General Assembly of the United Nations on 10 December 1948 with Resolution No 217 A (III).

³ The Convention and the Protocols have been amended in accordance with the revisions of Protocol No 11, which was drawn up and presented for signature to the Council of Europe Member States in Strasbourg on 11 May 1994, and entered in force on 1 November 1998.

II.2. Efficient Public Passenger Transport is a Prerequisite for Enacting the Right to Mobility

Public passenger transport is of crucial significance for enactment of the right of citizens and other inhabitants to mobility, and therefore every social market state (welfare state) is obliged to provide the inhabitants with adequate access to public transport services. Mobility enables maintenance and sustainability of numerous private and public interests and therefore the state is obliged to define it as mixed goods, and to become actively involved in the organization and control over its implementation. In addition to direct exercising of human rights and in accordance with the macro development model, a suitable supply of this good is a condition for the growth of the private sector, while according to the micro-model it also directly affects economic conditions (supply and demand)⁴ and the promotion of demographic, ecological, welfare, and other social values. The contents of public interest in the provision of public passenger transport must therefore be defined by “cost-benefit analysis”,⁵ so that the promotion of public interest guarantees the attainment of all listed goals or externalities as intangible social benefits. Although the supply of these goods enables the exclusion of users this is not desirable since the marginal costs of an additional supply of public passenger transport services are as a rule zero or minimal (e.g., increase in the number of the means of transport as a result of the increased number of passengers). The present paper is focused on the study of the duties of the social market state in the field of access to public passenger services, but it can be ascertained that similar social goals related to the exercise of the right to movement or mobility while enforcing the principle of substantive equality are also pursued by other countries.⁶

When determining the volume and structure of public passenger services and the share of public funds to co-finance them, a welfare state must, on the one hand, start from a constitutionally defined system concept and from the contents of individual human political, economic and social rights and fundamental freedoms,⁷ and on the other hand, from its economic capabilities while taking into consideration the encouraging impact on economic

⁴ Bailey, S. J., *Public Sector Economics: Theory, Policy, and Practice*, 2nd ed., Palgrave Macmillan, 2001, p. 44.

⁵ Mutatis mutandis Musgrave/Musgrave, *Public Finance in Theory and Practice*, 5th ed., McGraw-Hill book Company, Singapore, 1989, p. 131.

⁶ Sarmistha R. Majumdar, *The Case for the Development of Public Transport in an Urban Boundary Rural Area*, *Review of Policy Research*, Volume 27, Number 6 (2010), Nos. 741 to 760.

⁷ Korže, B., *Sistemske podlage za opredelitev obsega javnih dobrin v tržno socialni državi /Systemic Foundations for Determining the Volume of Public Services in Market-Social State / – 19 Days of Slovenian Public Administration*, Ljubljana, 20-21 September 2012, p. 462.

growth and overall social development. The establishment of the convergence between the two sides is a prerequisite for achieving optimum social welfare in the field of public passenger transport services. Such an approach to the regulation of public passenger transport and its implementation is also imposed on the European Union Member States by Article 106 of the Treaty on the Functioning of the European Union⁸ providing that public passenger transport be organized as a (commercial) public service, and that in doing so the states are entitled to depart from the rules of competition⁹ if so required by the public interest established on a legitimate basis. In the organisation of public passenger transport the state is obliged to pursue various externalities and it is its task organise the accessibility for individual categories of users in a differential manner if needed and that it adequately modifies the “cost benefit analysis” in accordance with which the general standard of accessibility is formulated.

III. REGULATION OF PUBLIC PASSENGER TRANSPORT IN THE REPUBLIC OF SLOVENIA

III. 1. Legislative regulation of Public Passenger Transport

Pursuant to Article 50 of the Road Transport Act,¹⁰ the national public passenger transport services in the RS are commercial public services, which are provided in the public interest by the state or local community in the form of compulsory or (in case of above-standard) optional services. A significant part of public passenger transport is within the competence of the state, while local communities are responsible for independent regulation of regular urban road transport, inland navigation, and transport by taxi. At the national level the Ministry of Infrastructure and Spatial Planning is competent for the provision of public service. It performs the duties of commercial public service in regular domestic inter-urban

⁸The Court of Justice of the European Communities, decided in its opinion 1/94 (WTO Agreement: GATS and TRIPS), 1994 ECR I-5267 *inter alia*, “that transport services were to be regarded as not falling into the Common Commercial Policy and that they remained implied powers under the EC chapter on transport, and are thus shared between the EC and its Member states;” see Craig, P., De Burca, G., *EU Law: Text, Cases, and Materials*, 4th ed., Oxford University Press, 2008, on p. 185 et seq.

⁹ Consolidated Version of the Treaty on the Functioning of the European Union, Official Journal of the EU C 83 dated 30 March 2010.

¹⁰ Road Transport Act (*Official Gazette of the RS*, No 123/2008).

public road public passenger transport¹¹ (Slovenske železnice d.o.o. for railway transport).¹²

The concession areas, type and volume of transport, methods of transportation, conditions for the provision of transportation, accessibility standards, prices of transport, and the quality of transport services, as well as other components pursuant to the law are regulated by implementing regulations of the Government. Regular public transport is financed from the prices of services, public funds, and other sources whereby the amount of public funds is specified by the annual budget.

In their regulation and performance of the services of domestic road public passenger transport, RS as the state, local communities, and public service providers are also bound by the primary and secondary sources of European Union law and by the pursuit of objectives defined in the White¹³ and Green Papers.¹⁴ According to Article 106 (previously 86) of the Treaty on the Functioning of the European Union, RS as the Member State is obliged to organize the scope and structure of public passenger transport services in line with the rules of competition, providing that it may exclude only those services and at those locations where this would denote an obstruction to the performance of special duties aimed at the enforcement of public interest in the area of public passenger transport. When regulating public passenger transport, the Member State is obliged to act in conformity with Regulation No 1370/2007/EC¹⁵, repealing Council Regulations (EEC) Nos. 1191/69 and EEC 1893/91, and to bring national regulations in line with Directive No. 2004/17/EC.¹⁶ Such regulation is aimed at enforcing equality, transparency, access to information, provision of legal security, and applying the special characteristics of public passenger transport, increasing accessibility and consequently their use, and increasing quality.¹⁷

¹¹ Since 2004, regular public passenger transport has been carried out in the Republic of Slovenia as commercial public service. The Directorate of RS for Roads has signed 47 concession contracts with concessionaires. These concession contracts were signed in September 2004 directly with existing carriers which performed regular public transport services in 2003/2004. See Hočevar, 2007.

¹² Railway Transport Act (*Official Gazette of the RS* 44/2007).

¹³ See e.g. White Paper – European Transport Policy for 2010 – time to decide, COM (2001) 370, 12 September 2001.

¹⁴ Green Paper: Towards a new culture of urban mobility, 25 September 2007.

¹⁵ Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70. Date of entry into force: 3 December 2009.

¹⁶ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 on coordinating the procurement procedures of entities operating in the water, energy, transport and postal services.

¹⁷ See Commission of the European Communities, *Commission Staff Working Paper – Impact Assessment*, SEC (2007) 635/2.

III. 2. Implementation of the legal regulation of public passenger transport in the RS

In my opinion, the RS fails to respect the rules of competition according to the provision of Article 106 (previously 86) of the Treaty on the Functioning of the European Union to an adequate degree, which is among others the reason for not achieving the goals provided in the secondary sources of the EU law, and in the White and Green Papers, or those specified in its national programme documents. Neither the state nor local communities have so far managed to set up an efficient competitive system of allocating rights to public passenger transport providers. Likewise, they have failed to enable transparent public procedures in which the most favourable providers of such services would be selected and in which competitors from other EU Member States could also participate. In addition, the RS still fails to comply with the requirements specified in Article 93 (previously 73) of the Treaty on the Functioning of the European Union, according to which public financing of the coordination of transport or compensations for provision of certain services which are part of public services is lawful, if it is based on objective criteria and if it is stipulated on the basis of negotiations between competent authorities and providers. Article 93 of the Treaty on the Functioning of the European Union provides that the Member States with respect to public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided in Articles 101 to and including with 109 of the Treaty on the Functioning of the European Union.¹⁸ In order to provide for an efficient public passenger transport, the RS should follow the EU regulations and ensure their consistent implementation.

Studies¹⁹ have shown that inadequate implementation of provisions is the reason why public passenger transport is not provided under equal conditions²⁰ and the users are not provided with access to public passenger transport services under equal conditions (some are unduly privileged and other unduly discriminated). The non-uniform methods, conditions of

¹⁸ Treaty on European Union – Consolidated Version 6655/2/08 REV 2, Brussels, 28 May 2010.

¹⁹ Predovnik, T., Hočevar, M. et al., *Analiza stroškov in koristi uvedbe enotne vozovnice – integriran javni potniški promet /Cost and Benefits Analysis of Introducing Uniform Ticket – Integrated Public Transport/*, Agencija za Promet d.o.o., 2008.

²⁰ Bensa, B., *Strokovne podlage urejanja javnega prometa v regiji /Technical Bases for Transport Regulation in the Region/*, Omega Consult, 2009.

management and financing, and inadequate interconnectedness of individual types of public passenger transport are also the reason for inadequate efficiency which is reflected particularly in incessant reduction of the inhabitants' demand for public transport and constant increase of transport by personal vehicles. The study²¹ also shows that because of reduced demand the supply of public passenger transport services in peri-urban and inter-urban road transport, which still amounted to approximately 51.5 million km of transport in 2004, dropped to 49.5 million km in 2005, even lower to 48.3 million km in 2006,²² and continues to decrease. In 1985, the number of passengers transported in inter-urban public passenger road transport exceeded 300 million, in 1995 equalled approximately 120 million, in 2000 approximately 74 million, and in 2005 only approximately 40 million.²³ The consequences of this situation are reflected in the economic inefficiency of public passenger transport providers, high (non-transparent) subsidies from public funds and simultaneous constant increase of environmental pressures by exhaust gasses, traffic jams, and an increasingly declining supply of these services. The system of subsidies from public funds earmarked for the providers of public passenger transport is fragmented between the state and local communities, which results in further negative impacts on the effectiveness of the use of public funds and at the same time – in terms of prices – lack of competitiveness of the public transport providers.²⁴ Inadequate systemic regulation and unsuitable implementation of the existing regulation is also the reason for considerable differences in business operations of the providers of public passenger transport services, while in general it can be said that their inventiveness is inadequate, supply not comprehensive, and also the quality of their services is inadequate.²⁵ Individual providers have indeed low costs per kilometre of transport, but also below-average revenue.²⁶ On the other hand, there are providers with

²¹ Predovnik, T., Hočevar, M. et al., *Analiza stroškov in koristi uvedbe enotne vozovnice – integriran javni potniški promet /Cost and Benefits Analysis of Introducing Uniform Ticket – Integrated Public Transport/*, Agencija za Promet, 2008.

²² Id.

²³ Predovnik, T., Hočevar, M. et al., *Analiza stroškov in koristi uvedbe enotne vozovnice – integriran javni potniški promet /Cost and Benefits Analysis of Introducing Uniform Ticket – Integrated Public Transport/*, Agencija za Promet, 2008.

²⁴ See, Statistical Office of the Republic of Slovenia, 2007.

²⁵ See e.g. Kranjc R., *Kakovost Javnega Potniškega Prometa s tehniško – Tehnološkega Vidika /The quality of public passenger transport from technical-technological point of view/*, University of Maribor, 2009; Gulič A., Plevnik A., *Prometna infrastruktura in prostorski razvoj Slovenije: novejša analitična spoznanja /Traffic infrastructure and spatial development of Republic of Slovenia: recent analytical discoveries/*, IB Revija, Institute of Macroeconomic Analysis and Development, Ljubljana 2000.

²⁶ Id.

above-average revenue and above-average costs.²⁷ Otherwise, the present system of subsidizing the public passenger transport is based on a “gross” model, with incorporated elements of a “net” model- maximization of compensation.²⁸ Other features of the existing system are as follows: a) the state does not cover the entire difference between recognized costs and revenue earned, and therefore cannot “order” additional lines; b) all concessionaires have equal recognized costs per kilometre of transport (regardless of vehicles used); and c) there are considerable differences between carriers (concessionaires) regarding “profitable” and “non-profitable” lines.²⁹ Generally, it can be said that the system of co-financing of public passenger transport services is exceptionally rigid since it fails to take into consideration that the providers perform their services in unequal conditions.³⁰ In addition, another conclusion can be made: co-financing of the access to public transport services for inhabitants of mountainous and hilly regions in the RS is not regulated so that required additional funds for financing of adequately adjusted possibilities of access are provided from public sources. The system of financing greatly differs from local community to local community; the competence for the regulation of this field has been transferred on local communities and is based on the classical model of distributive justice. In accordance with this model the supply includes the majority of inhabitants of these areas, but neglects individuals who are excluded from the relative majority. The only exception is schoolchildren for whom local communities adequately provide transport services to school and back. Individual local communities join these routes also with transport of other inhabitants from mountainous and hilly areas, which does not meet their actual needs for public transport.

IV. REGULATION OF ACCESSIBILITY TO PUBLIC PASSENGER TRANSPORT SERVICES

²⁷ With decreasing number of passengers the public passenger transport system is becoming ever more expensive which means a reduction of revenue and need for greater subsidies. See Hočevar, 2007, p. 23 – 37; Hočevar, 2006, p. 89 - 103.

²⁸ Gabrovec, M., Lep, M., Kotar, M., Določitev koncesijskih območij, vrednotenje avtobusnih linij in oblikovanje paketov linij, ki bodo predmet gospodarske javne službe /Determination of concession areas, evaluation of bus lines and formation of line packages to be the subject of commercial public service/. The Report of the Ministry of Transport, Ljubljana, June 2003, p. 78 - 83.

²⁹ Some carriers (central – northern part of Slovenia) have relatively high revenues which are coming close to recognized costs, while others (eastern part of Slovenia) cover distinctly non-profitable lines. Because of the restricted payment of compensations the carriers (concessionaires) are in unequal position.

³⁰ Blaž J., Hočevar A., Spreminjanje Upravljanja Javnega Potniškega Prometa v Sloveniji na Podlagi Avstrijskih Izkušenj /Changing of public passenger transport management in Slovenia on the basis of Austrian experiences/, Uprava, Year 6, Volume 2, Ljubljana 2008, p. 105-121.

IV.1. Accessibility in the RS is regulated according to Conventional Theory of Distributive Justice

The empiric analysis from the year 2006 indicating the conditions of mobility of inhabitants and a study of accessibility to public passenger transport services³¹ conducted in conformity with the programme documents³² was conceived on the basis of the following criteria: 1. distance of the residence of public passenger transport users from stops; 2. frequency of journeys on working days during school days, on working days during school holidays, and on Sundays; 3. links between regions (inter-urban lines), links between municipal centres with the centres of administrative units (inter-municipal lines), and links between settlements within municipalities (municipal lines), 4. the number of inhabitants in individual settlements from which public passenger transport is organized, presuming that public passenger transport is used by one fifth of the inhabitants in relation to their total number.³³ Based on the criterion of the distance of users from public passenger transport stops, the study is conceived on the distance criteria of up to 0.5 km and up to 1 km, whereby the distance of up to 0.5 km is considered as adequate, and up to 1 km as satisfactory, while a suitable frequency is considered to be at least 23 pairs of transport means (buses) per day, and at least eight pairs as satisfactory (on Sundays at least eight pairs as adequate and four pairs as satisfactory). The links which fail to comply with these criteria are excluded from the study. According to the criterion of the number of inhabitants in a particular settlement, the settlements are classified into those with 1,000, 500, and 200 inhabitants, neglecting the settlements with less than 200 inhabitants.³⁴ The analysis establishes the demand for public passenger transport services according to the criterion of commuting active working population by the municipality of residence and municipality of work, and the number of commuting students, high-school students and pupils by the municipality of residence and municipality of schooling, and according to the criterion of the number of inhabitants, presuming that it is reasonable to organize public passenger transport in settlements having 200 or more inhabitants, 22% of the total population in a settlement are pupils and students,

³¹ Izdelava standardov dostopnosti do javnega potniškega prometa in splošnih prevoznih pogojev za avtobusne prevoznike /Drawing up of the standards of accessibility to public passenger transport and general transport conditions for bus transport operators/, Study of the Agencija za promet d.o.o., Ljubljana 2006, <http://www.agencija-promet.si/onas.html>.

³² Ordinance on Spatial Planning Strategy of Slovenia (*Official Gazette of the RS*, No 76/2004), Resolution on National Environmental Action Plan 2005-2012 (*Official Gazette of the RS*, No 2/06), The Transport Protocol of the Alpine Convention (*Official Gazette of the RS*, No 126/03).

³³ Gabrovec, M., Bole, D., Dostopnost do avtobusnih postajališč /Accessibility to bus stops/, *Gospodarski vestnik*, No 78-2, 2006, p. 39 to 51.

³⁴ Author's note: relatively low number of inhabitants is the consequence of sparse population!

and the share of active working population is 38% (that in the settlements without school and jobs approximately 60% of inhabitants on average commute to work and school), and that approximately one fifth of all inhabitants will commute by public means of transport (in 2002, only 9.8% of working commuters and 77.2% of students and pupils used public passenger transport services).

The analysis shows that the volume of public passenger transport services significantly decreased in the period from 1995 to 2006, particularly on working days during school holidays as well as on Sundays. In practice, the performance of public passenger transport services did not achieve the level of accessibility as it was defined in the programme documents, Resolution on transport policy in RS from 2006 and the Strategy of transport development of Slovenia from 2004. Contrary to these objectives the accessibility reduced due to the abolishment of non-profitable lines. In addition to this, the study establishes that accessibility to public services in road transport was regulated for the inhabitants of settlements with minimally 200 inhabitants. It also shows that the standard of accessibility was established on the conventional theory of distributive justice which includes the majority, but excludes inhabitants of small and remote settlements.

IV. 2. Conventional theory of distributive justice is an inadequate basis for the regulation of accessibility of inhabitants of mountainous and hilly regions

It derives from the study of accessibility establishing that inhabitants of settlements with less than 200 inhabitants and environmentally displaced persons are not included in the standard of accessibility and that the accessibility of inhabitants of mountainous and hilly regions in regulated in compliance with the conventional theory of distributive justice. The same applies to the inhabitants of other urban regions. The theory stated has been developed on the “cost benefit analysis” and the prevailing economic criteria, acceptable for the regulation of accessibility of inhabitants of urban regions, but the accessibility of inhabitants of mountainous and hilly regions should be regulated otherwise. When compared to the inhabitants of urban regions these inhabitants are in a significantly different position and therefore it is necessary to consider social values to a great extent when determining their standard, especially the values from the field of demography, ecology and social welfare, etc.

The study conducted in 2011 for the field of Ljubljana urban region shows similar results.³⁵ The authors establish that accessibility to public passenger services in road transport from mountainous and hilly areas is adequately regulated for schoolchildren and on some special lines for workers, but not for other categories of inhabitants from these regions. Public transport is insufficient on working days and there is none on Saturdays, Sundays, and holidays.

Accessibility of these inhabitants is reduced due to the abolishment of non-profitable lines. The reason for the extreme negative trend lies in the fact that RS does not implement the field of public passenger transport in compliance with the policy set and does not achieve the objectives for the efficient development of social community.³⁶

Table I³⁷ shows the results of the research of links to individual settlements in mountainous and hilly areas by public passenger road transport to large towns or community centres in 1995 and in 2012.

Table I – Links to individual settlements in mountainous and hilly areas by public passenger road transport to large towns or community centres in 1995 and in 2012.

ROUTE	REGIME 1995	REGIME 2012	No. of RIDES 1995	No. of RIDES 2012
KRANJ – JEZERSKO	EVERY DAY	EVERY WORKING DAY	11 TO 20 PAIRS	6 TO 10 PAIRS
TOLMIN – BOVEC	EVERY DAY	EVERY DAY	11 TO 20 PAIRS	6 TO 10 PAIRS
RAVNE NA KOROŠKEM – ČRNA	EVERY DAY	EVERY DAY	41 OR MORE PAIRS	21 TO 40 PAIRS

³⁵ Matej Gabrovec, Nika Razpotnik Visković, Ustreznost omrežja javnega potniškega prometa v Ljubljanski urbani regiji z vidika razpršenosti poselitve, Geografski vestnik 84-2, Ljubljana 2012, pp. 63 - 72

³⁶ Korže B., New Slovenian Public Passenger Transport Regulatory Reform - Towards an Inefficient System, 12th WCTR Conference, Lisbon 2010, <http://intranet.imet.gr/Portals/0/UsefulDocuments/documents/02449.pdf>.

³⁷ Table I shows a few selected inter-urban lines between regions (Kamnik – Gornji Grad, Nova gorica - Dobrovo), inter-urban lines within regions (Kranj – Jezersko, Ravne na Koroškem - Črna, Mozirje – Solčava, Bled – Rudno polje) and local links around individual regional centres (Solčava – Logarska Dolina, Jesenice – Planina pod Golico, Jesenice – Pristava pri Jesenicah, Tržič – Jelendol, Črna na Koroške – Sleme, Prevalje – Holmec, Tržič - Podljubelj).

The Need for Enacting Positive Discrimination in the Organisation and Financing of Accessibility for the
Inhabitants of Mountain and Hilly Regions in the Area of Public Passenger Road Transport

Korže, Branko

ŽELEZNIKI - SORIŠKA PLANINA	EVERY DAY	SCHOOL DAYS	6 TO 10 PAIRS	1 TO 5 PAIRS
BAČA – SORICA	WORKING DAY	SCHOOL DAYS	1 TO 5	1 TO 5 PAIRS
MOZIRJE – SOLČAVA	EVERY DAY	MONDAY- FRIDAY	11 TO 20 PAIRS	6 TO 10 PAIRS
ČRNA NA KOROŠKEM – SLEME	MONDAAY TO FRIDAY	-	1 TO 5 PAIRS	0
SOLČAVA - LOGARSKA DOLINA	SEASON	MONDAY TO FRIDAY SEASON	1 TO 5 PAIRS	1 TO 5 PAIRS
NOVA GORICA – DOBROVO	EVERY WORKING DAY	MONDAY TO FRIDAY	6 TO 10 PAIRS	1 TO 5 PAIRS
TRŽIČ – JELENDOL	EVERY WORKING DAY	MONDAY TO FRIDAY	1 TO 5 PAIRS	1 TO 5 PAIRS
TRŽIČ – PODLJUBELJ	EVERY WORKING DAY	MONDAY TO FRIDAY	6 TO 10 PAIRS	1 TO 5 PAIRS
JESENICE - PLANINA POD GOLICO	EVERY DAY	SCHOOL DAYS	1 TO 5 PAIRS	NO DATA
JESENICE – JAVORNIŠKI ROVT	EVERY WORKING DAY	SCHOOL DAYS	1 TO 5 PAIRS	
KAMNIK - GORNJI GRAD	EVERY DAY	EVERY DAY	6 TO 10 PAIRS	1 TO 5 PAIRS
PREVALJE – HOLMEC	EVERY DAY	SCHOOL DAYS	6 TO 10 PAIRS	1 TO 5 PAIRS

The sources of public transport data: data for 1995 were taken from the Geografski atlas Slovenije,³⁸ and data for 2012 from the existing timetables for individual settlements in the table.³⁹

A general finding deducted from this table is that public bus transport between small settlements in mountainous and hilly areas and regional administrative centres has significantly decreased. Between Kranj and Jezersko (Gorenjska region), for instance, there were 11 to 20 pairs of journeys (depending on the day) in 1995, and in 2012 only 6 to 10 pairs of journeys. The same applies to the Tolmin – Bovec route (Bovec region), Mozirje – Solčava route (Savinja region), etc. Furthermore, it can be ascertained that there is no public passenger transport or it significantly decreased between mountainous and hilly areas (villages) and individual regional centres.⁴⁰

IV. 3. The principle of equality and Rawls's theory of social justice and Kaufmann's theory of personal justice

Equality as a fundamental human right⁴¹ is established, on the one hand, in private, individual interest, and on the other, in integrated, collective social interest. This ambivalence is significant for understanding equality, either merely in the direction of providing equal freedom or in the direction of providing equal non-freedom or limitations of individuals which leads to an imbalance and is thus socially dysfunctional. From this viewpoint, equality must not be understood in the sense of quantitative symmetry, since qualitative value standards are decisive here as a rule. The dichotomy and the need for balance are important for understanding the legal principle of equality. In the Declaration of Human Rights, equality is conceived as a principle on the basis of which all other human rights are implemented, whereby it is necessary to note that there is no absolute equality, but the equality manifests itself in the prohibition of arbitrary distinction.⁴² Hence, in modern law or the rule of law,

³⁸ Geografski atlas Slovenije /Geographic Atlas of Slovenia/, DZS Ljubljana, year 1998, p. 234.

³⁹ <http://www.vozni.redi.si/postajalisce/>.

⁴⁰ When examining timetables for the displayed information of "no data" it can be understood that there is no bus connection. These are remote (mountainous, hilly) places which are not linked to the regional centre (Jesenice – Planina pod Golico, Jesenice – Pristava pri Jesenicah, Bled – Rudno polje, Črna na Koroškem – Sleme, Bača – Sorica, etc.).

⁴¹ The Universal Declaration of Human Rights stipulates in the first paragraph of the preamble that the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace.

⁴² Constitutional Court Decision U-I-92/07 dated 15-4-2010 (*Official Gazette of the RS*, No 46/2010) abandons this principle and permits exercising of the right to equality as an independent right.

equality denotes proportionally equal treatment of the addressees of the law. The notion of equality is closely related to the principle of justice (*iustitia*) as the essence of law, and the relationship represents the very principle of proportional equality which surpasses the dimension of law and reaches into the area of morals, customs, politics, religion, and other value standard domains. Justice as a criterion for regulating relations is an interpersonal category, from which correlative rights and duties of individuals derive, and which can be expressed in arithmetic equality and arithmetic inequality (*dissymmetry*), and therefore it is better to designate justice in association with the notion of fairness as proportionality than equality.⁴³ It follows from the so defined notion of justice that justice is always a guideline for a certain allocation of rights and duties, and consequently also positions or statuses of legal entities, and therefore the issue of legal inequality must also be defined from the aspect of justice. The reason for that is the fact that an equal treatment of legal entities which are in different actual positions, can lead to its opposite and be unjust for one of the entities under consideration. My basic premises in resolving the issues of the relationship between the principle of legal equality and justice in regulation of access of inhabitants of mountainous and hilly areas to public passenger transport services are therefore Rawls' theory of social justice and Kaufmann's personal theory,⁴⁴ which surpass the conventional theory of distributive justice. According to the conventional theory, justice should serve to satisfy the broadest possible circle of individuals while Rawls' theory also includes in the circle of beneficiaries those who – for subjective or objective reasons – are not covered by the majority. Kaufmann supplemented the latter by including concrete individuals among the beneficiaries. On the basis of these theories, the relative well-being of each member of the social community is founded on social collaboration, while the distribution of social benefits and burdens is based on fair or just equal opportunities in the interest of a fulfilled private and social life and development of each individual.⁴⁵ The establishment of a cooperative society will interconnect individuals as free, equal, truly equal, and the most creative beings to

⁴³ Cerar, M., Some (constitutionally) legal aspects of the principle of nondiscrimination, in the *Enakost in diskriminacija: Sodobni izzivi za pravosodje/Equality and Discrimination: Contemporary Challenges for the Judiciary/*, The Peace Institute, Ljubljana 2005, p. 25.

⁴⁴ Rawls, J.: *A Theory of Justice*, Oxford University Press, 1999: p. 20 et seq.

⁴⁵ Kaufmann, A., *Uvod v filozofijo prava /Introduction to the Philosophy of Law/*, Cankarjeva založba, Zbirka Pravna obzorja, Ljubljana, 1992, p. 190.

ensure their individualized development, integration into social life and participation in managing the affairs of general importance.⁴⁶

Rawls' theory of social justice upgraded with Kaufmann's personal theory was the basis for a legal principle which imposes on the legislator – when regulating legal relations – and on the implementer of abstract general norms – when making particular decisions by way of which it decides on the rights and obligations of legal entities – to regulate essentially equal states in the same way and different ones in different ways. The principle of equality in the sense of equality in law needs to be understood as a general prohibition of arbitrariness or prohibition of arbitrary, unequal, or equal legal treatment. The legislator is thus compelled to grant, pursuant to the principle of equality, legal entities in the same or identical or essentially similar position the same status, equal rights, and obligations (equal scope) and equal legal protection, and to grant legal addressees estimated to be in unequal or in an essentially different position a different status,⁴⁷ different rights, and obligations (different scope) and different legal protection, in proportion with their inequality or distinction.⁴⁸

A generally unequal treatment of legal entities is marked as discrimination while in an etymological sense discrimination is a neutral mark of distinguishing or of the process of creating differences or distinction between two or more subjects or objects.⁴⁹ Although it is thus a neutral notion as such, it can be positive in value (beneficial, good, just, etc.) in many a situation and a perspective. It can be used (at a certain time and place) to encourage individuality, originality, and competitiveness in the economic or political fields, the field of education, science, culture, etc.⁵⁰ However, in the search for or establishing of various forms of its implementation in the field of law (and also politics, economy, morals, customs, religion, and in other fields) it is one of the key mechanisms for defining and preventing unjust, or on the basis of other values unacceptable equality of people and/or other legal entities.

Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms distinguishes in the described sense a prohibitive aspect – prohibition of discrimination – and a dictating aspect – a quality before the law. Article 14 of the Constitution of the Republic of Slovenia expresses the principle of equality before the law which needs to be connected with

⁴⁶ According to Kaufmann, just law is founded on relative divisionary justice which is contrary the unification system according to the conventional theory of social justice. It is oriented towards man, so that it takes into consideration man's special interests, needs, etc.

⁴⁷ Smith N., Hirsch D., Davis A., Accessibility and Capability. The Minimum Transport Needs and Costs of Rural Households, *Journal of Transport Geography* 21(2012), p. 93-101.

⁴⁸ Šturm, L. (ed.) et al., *Komentar k Ustavi Republike Slovenije / Commentary to the Constitution of the Republic of Slovenia*, Graduate School of Government and European Studies, Ljubljana 2002, p. 184.

⁴⁹ Cerar, M., p. 21.

⁵⁰ Cerar, M., p. 23.

the principle of the rule of law (Article 2), and understands it in a broader context, i.e., also as the principle of equality in law. In this sense, equality or non-discrimination is described by the term of positive discrimination. In a broader sense, discrimination denotes the enforcement of special legal positions and/or special rights intended to prevent (replace) less favourable positions⁵¹ and promote or create equal opportunities of certain catalogues of persons (weaker, socially endangered, ethnic minorities, women, elderly, unemployed, inhabitants of urban settlements).⁵² Positive discrimination therefore serves to introduce measures to prevent economic, political, and social marginalization, and contributes to a better distribution of social goods and burdens among different categories of persons and/or various social groups, economic operators, regions, etc.⁵³ As a rule, they cannot provide for true (perfect) equality,⁵⁴ but they can contribute significantly to a higher degree of uniformity of beneficiaries in starting positions (substantive equality). A more equal, harmonic, efficient and just social order is established in individual fields by means of positive discrimination instruments (measures).⁵⁵

Standards of accessibility of public passenger services to all categories of inhabitants.⁵⁶ based on the conventional theory of social (distributive) equality pursuing the supply of the majority of population and excluding all those citizens and other inhabitants who are not included in the majority are not adequate. It is not acceptable in a modern systemic regulation founded on the rule of law, human rights, and fundamental freedoms to equally treat citizens and other inhabitants, regardless of the place of their residence. Inhabitants of mountainous and hilly areas live in essentially different (generally more difficult) living conditions and therefore they should be positively discriminated in the regulation of their accessibility when compared to the inhabitants of urban regions. The situation should be regulated according to the lines of the Rawls's theory of social justice and Kaufmann's theory of personal justice. Substantively equal starting living conditions in the area of access to public transport services should be provided to them. The regulated access will also

⁵¹ Lampe, R., *Pravo človekovih pravic /Law of Human Rights/, Založba Uradni list, year 2010, p. 472. Positive measures are intended to prevent less favourable position and denote compensation for less favourable position of individuals.*

⁵² Flander B. *Pozitivna diskriminacija /Positive discrimination/, Faculty of Social Sciences, monograph, Ljubljana, year 2004, p. 101.*

⁵³ *Legislators name them special measures, temporary measures and the like.*

⁵⁴ Gaspari, M., *O enakosti /About equality/, Pravniki, year 50, No 11/12, Ljubljana 1995 p. 583.*

⁵⁵ Flander B., p. 104.

⁵⁶ *Izdelava standardov dostopnosti do javnega potniškega prometa in splošnih prevoznih pogojev za avtobusne prevoznike / Drawing up of the standards of accessibility to public passenger transport and general transport conditions for bus transport operators/, Study of the Agencija za promet d.o.o., Ljubljana 2006, <http://www.agencija-promet.si/onas.html>.*

contribute to achieving other social goals such as demographic settlement of the countryside, provision of adequate social position of citizens who live in small and remote settlements,⁵⁷ or independent dwellings, and consequently goals which should prevail over economic goals (withdrawal from the cost benefit analysis on the basis of which the standard of accessibility of inhabitants of urban regions is established). The two theories mentioned are based on justice that is the essence of law and the rule of law (Article 2 of the Constitution of the RS). In this respect it should also be stressed that the minimum accessibility advocated by some authors,⁵⁸ is neither an adequate systemic or practical solution.

Special regulation of accessibility of inhabitants of these regions to public passenger services is an important part of special concern that is imposed to the state or local communities by Article 71, paragraph 3 of the Constitution of the RS. When searching for suitable solutions the legislator could follow the example of foreign experiences,⁵⁹ in such a way that some of their solutions would be suitably adapted to local circumstances and needs. In addition to various types of transport adjusted to concrete needs of these inhabitants, the state or local communities should provide special funds for co-financing of these specific needs. By the abolishment of numerous economically non-profitable lines of inhabitants of these regions the state acted in opposition to the system legal obligations imposed on it.

V. V. CONCLUSION AND PROPOSALS

In mountainous and hilly countries such as Slovenia, demographic reasons (e.g. population of countryside) impose on the state a special concern for the life of its citizens in these areas. This concerns life in special conditions that differ significantly from those of inhabitants who live closer to the economic, cultural, commercial and administrative centres, and therefore their economic, cultural, and social position is crucially endangered if the state fails to positively discriminate these inhabitants at the normative and implementing level by the supply of individual relevant public and mixed goods needed for life and development under special, usually more favourable conditions. It is of essential importance that large funds from

⁵⁷ Similarly Osti G., *Mobility Demands and Participation in Remote Rural Areas*, European Society for Rural Sociology, Published by Blackwell Publishing, Vol 50, 2010, p. 297 – 309.

⁵⁸ Zupančič P., *Javni potniški promet na ruralnih območjih Republike Slovenije v funkciji zadovoljevanja javnih potreb (magistrska naloga)*, Univerza v Ljubljani, Fakulteta za gradbeništvo in geodezijo, Ljubljana 2007, p. 173-174.

⁵⁹ Solomon J., Titheridge H., *Setting Accessibility Standard for Social Inclusion: Some Obstacles*, In: Paper presented at 41st annual Universities »transport study Group Conference 2009, UCL Centre for Transport Studies, London 2009, UK.

public sources are provided for the supply of these inhabitants in these regions with these goods. In such supply of these inhabitants the state should withdraw from the criterion of economical aspect so that regular and sufficient supply is provided to them. Only by positive discrimination, especially in financing from public sources, can the state provide these inhabitants with the same starting position in the area of accessibility to administrative, healthcare, cultural, educational, recreational services, as well as to workplaces and purchasing as other citizens or inhabitants of the state. Providing the inhabitants of these areas with accessibility to the public passenger transport services is one of significant prerequisites for preventing further migration of these inhabitants to urban areas and preventing further abandoning of agricultural activities in which the majority of these inhabitants is engaged. The equalization of basic living and working conditions of these inhabitants with those of the inhabitants of urban areas means at the same time the implementation of the constitutional principle of equality, justice and preservation of the settlement of countryside, and consequently prevention of further overgrowing of arable agricultural land with forests and bushland. The social benefits of the preservation and/or enhancement of settlement in mountainous and hilly areas result from positive discrimination in the field of organisation and co-financing of accessibility to public passenger transport services of the inhabitants of these areas.

Dispersed settlement of inhabitants in mountainous and hilly areas, their different actual positions and associated heterogeneity of their needs for accessibility to public passenger transport services require an individual approach to the determination of their needs. In order to be able to organize public passenger transport for these inhabitants in the most efficient way possible, their individual needs should be objectified by social interests. An adequate standard of accessibility should be determined for each individual. Determination of individualized standards would constitute the basis on which the state through its competent bodies or through local communities in individual areas would grant concessions or organize public passenger transport on another suitable basis. In addition to the integrated transportation of school children, and transportation of workers and somewhere also other users, which is the only efficiently functioning model in the RS, the state could follow the example of Ireland⁶⁰ and introduce in addition to regular lines also the model of prior

⁶⁰ For more about the study see: O'Shaughnessy M., Casey E., Enright P.: Rural transport in peripheral areas: The role of social enterprises in meeting the needs of rural citizens, *Social Enterprises Journal*, Vol. 7 Iss: 2, p 183 – 190.

announcement of the needs of users (advanced booking) “door-to-door,” which are organized by separately subsidized taxi services, or combine public transport with various types of commercial transportation provided by either forestry personnel or other companies whose activities involve constant transportation to individual mountainous or hilly areas.

In order to be able to attain the defined objectives, the Slovenian legislator should prepare corresponding legal bases, in the indicated direction, in the law concerning integrated public passenger transport, currently under preparation, on which the individual needs of the inhabitants of mountainous and hilly areas can be objectified by social goals and subordinately by economic capabilities, thus providing them with privileged conditions in comparison to the inhabitants of urban areas as regards accessibility to suitable public passenger transport services and assuring them sufficient public funds for co-financing. Mutual policy of populating and transport routes could contribute to the elimination of problems of accessibility to these services from the aspect of long-term solutions, but only to a minimal extent this can contribute to the actual improvement of the situation.

ABBREVIATIONS:

RS – Republic of Slovenia

EU – European Union

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