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GENDER MAINSTREAMING IN LAW AND LEGAL EDUCATION

Political revolutions of the 18th and 19th century engendered an idea of universal equality. However, the American Declaration of Independence and the French Declaration of the Rights of Man and of the Citizen have not been gender sensitive documents. Women had to struggle for a long time in order to achieve visibility in laws and they did gain an equal right to vote in the USA only 144 years later and in France only 160 years after the issuing of these documents. Contemporary international and national law has greatly advanced from a gender equality point of view. However, gender sensitive legislation and implementation of legal norms has been far from widely accepted. Gender sensitive legal education of (future) legislators, lawyers, judges, and prosecutors has thus been of the utmost importance.

First, the article offers theoretical clarifications and historical background analysis of a sense and purpose of gender mainstreaming. The achievements in international law and strategic documents concerning gender equality will be taken into consideration in the second chapter. The main focus will be on the meaning of and instruments for gender mainstreaming in legal education in Serbia as well as generally. Paradigmatic examples from judicial practice will also be presented.

Key words: *Gender mainstreaming. – Legal education. – Gender (in)sensitive case law.*

1. INTRODUCTION – THEORETICAL CLARIFICATIONS AND HISTORICAL BACKGROUND

“Gender” is a social category, that is, socially constructed sexual identity¹. Gender sensitivity is the phrase related to the mindset based on

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¹ See for example: Kate Millet, *Sexual Politics*, Garden City, NY 1970, 29; Judith Butler, *Gender Trouble: Feminism and Subversion of Identity*, Routledge, NY 1990 (1999), 6,7.

gender equality and applied in the approach to legal protection, power relations, cultural patterns, social roles, language, statistics, media cover, etc. “Gender mainstreaming”² is related to policy measures, which have been aimed at gender equality improvement and its full realization in a final instance; it implies an integration of a gender dimension into public life, according to which gender equality becomes a domain of public policies. Gender mainstreaming in the legal field means the promotion of an idea of universal human rights and women’s rights in formulation, interpretation and implementation of laws (including positive special measures, where necessary), with an aim to fulfill gender equality.

Gender equality and gender mainstreaming in family, society, and law has been the phenomenon of modern times. Modernity brought emancipation from a traditional patriarchal matrix of male domination in all spheres of life (which predominantly characterized all pre-modern societies).³ The industrial revolution of the 18th century enabled massive access of women into economic production; political revolutions of the 18th and 19th century brought an epochal idea of universal equality, which inspired feminist movements of 19th century to express women’s self-recognition as equal human beings and to struggle for women’s own political and legal visibility, e.g. for equal rights to vote, to education and private property. Women’s massive participation in patriotic fronts of the First and Second World Wars and their replacing male workers during those wars at work in industrial and military production,⁴ contributed also to the recognition of equal female right to vote. Thus women taking part in massive industrial production, as well as their inclusion into the massive education from the mid 20th century, contributed significantly to the gradual entry of women into public life.⁵ Feminist movements of the second half of the 20th century played a special role in the growth of wom-

² The notion of gender mainstreaming appeared in international documents for the first time at the UN Third World Conference on Women held in Nairobi in 1985, and afterwards was accepted in Beijing in 1995., <http://www.undp.org/women/mainstream>, last visited 20 November, 2015.

³ K. Millet, 23–59; Eva Figes, *Patriarchal Attitudes*, Virago, London 1970, 17–34, 152–167.

⁴ Karen Offen, “Feminism and the Republic”, *The French Republic – History, Values, Debates*, (eds. E. Berenson, V. Duclert, and C. Prochasson), Cornell University Press, Ithaca and London, 2011, 289–299; See also: Women in Wartime: The Rise of the Female Public Servants, Guardian Public Leaders Newsletter, <http://www.theguardian.com/public-leaders-network/2014/nov/08/world-war-women-workplace-public-services>, last visited 20 November, 2015.

⁵ Dragica Vujadinović, “Perespektive rodne ravnopravnosti u sferi prava – slučaj Srbije”, *Perspektive implementacije evropskih standarda u pravni sistem Srbije* (ed. S. Lilić), Pravni fakultet, Beograd 2012; Dragica Vujadinović, “Rod i pravna regulative”, *Perspektive implementacije evropskih standarda u pravni sistem Srbije* (ed. S. Lilić), Pravni fakultet, Beograd 2013.

en's self-awareness and in the public (legal, political, social) recognition of half the world's population as equal human beings.⁶ New feminist movements of the 1960s and 1970s and an explosion of feminist publications (starting in 1948 with Simone de Beauvoir's *Second Sex*⁷ and many others in the 1970s and later), together with an extraordinary development of international human rights law,⁸ did contribute to a dramatic change in a common mindset concerning gender emancipation. The Universal Declaration of Human Rights had its common foundation in the value of dignity of the human person. The very term "human" was used on Eleanor Roosevelt's insistence, aiming to avoid the "neutral" understanding of universal rights as "men's" rights.⁹

Throughout history, law was created by men, meaning that women and the female were not "visible" in legal documents¹⁰, not even in the French Declaration of the Rights of Man and of the Citizen and the American Declaration of Independence¹¹. For a long time, "Man" and "Citizen" simply meant "male". Women in France in 1789 and 1792 gained momentum and demanded representation in the assemblies, the right to vote, and the extension, that is, the full application of the Declaration of the Rights of Man and of the Citizen. They argued that citizenship should encompass both sexes.¹² Olympe de Gouges proposed the "Declaration of the Rights of Woman and the Female Citizen". However, women were not included among "active citizens" of the French Republic. This meant that at the time of the Declaration only male property owners held these rights. The revolutionaries and Jacobins did not match the ideas of self-

⁶ J. Mitchell, *Woman's Estate*, Penguin 1971, 60–75; Vicky Randall, *Women & Politics, An International Perspective*, MacMillan Education Ltd, London 1982, 262–315.

⁷ Simone de Beauvoir, *Second Sex*, 1949, in English – Penguin, London 1972.

⁸ Ari Kohen, *In Defense of Human Rights*, Routledge, London and NY 2007, 135–151.

⁹ See: "The American Experience, Eleanor Roosevelt", <http://www.pbs.org/wgbh/amex/eleanor/peoplevents/pande09.html>, last visited 20 November, 2015.

¹⁰ Zorica Mršević, *Ka demokratskom drustvu – Rodna ravnopravnost*, IDN, Beograd 2011, 23–33.

¹¹ Jack Balkin says: "The revolutionaries' demand for social equality was an ideal. It was not completely achieved in the years after the Revolution, nor did the revolutionary generation understand how great a social transformation true social equality would require. Few thought the idea of social equality should apply to women, or to slaves, and many did not even think it should apply to white men who lacked property." (J.M. Balkin, *Declaration and the Promise of Democratic Culture*, <http://www.yale.edu/lawweb/jbalkin/articles/declar1.htm>, 1999., last visited 20 November, 2015.)

¹² Sheila Rowbotham, *Svest žene – svet muškarca*, Radionica SIC, Beograd 1983, 3–22; K. Ofen, *Osporavanje muške aristokratije: Feminizam i Francuska revolucija, Ženske studije*, online publication, June 11, 2013, <http://www.zenskstudie.edu.rs/izdavanje/elektronska-izdanja/casopis-zenske-studije/zenske-studije-br-13/79-osporavanje-muske-aristokratije-feminizam-i-francuska-revolucija>, last visited 25 November, 2015.

aware women. De Gouges was beheaded, and female associating in public was banned in 1795.¹³

Women had to fight – together with men who were cognizant of the gender equality issue – for decades and even centuries for the “visibility” of being equally human and for recognition of female human rights.¹⁴

A long struggle was necessary through suffrage and feminist movements for achieving real legal and political equality in the USA, Great Britain, France, and other Western countries.¹⁵ In the USA, it took 144 for women to get the right to vote (from the American Declaration of Independence in 1776 to 1920). In Europe it took from 80 to 180 years: for example in France it took 160 years (from the French Declaration of Man and of the Citizen in 1789 to the universal right to vote in 1944).¹⁶

Women also had to struggle for the right to education. Female students did achieve the right to accede to higher education in 1863 at Zurich University, in 1870 at Cambridge, in 1878 at Oxford University, between 1870 and 1882 in the Scandinavian countries.¹⁷ These, however, were the exception until the second part of the 20th century when, especially from the 1970s, there was a massive, global expansion of education, in which women/girls have taken part at a rate twice that of men.¹⁸

The second part of the 20th century and beginning of the 21st century brought significant steps forward in legal recognition and protection of women’s rights in international and national law. After the Second World War universal right to vote was established in almost all countries, and women’s rights have garnered legal support, such as the right to decide on abortion, the right to equal pay for equal work, protection from family/domestic violence, protection in general from gender-based violence, raise the legal issue of sex-trafficking, etc.

¹³ See: K. Ofen, 2013.

¹⁴ Z. Mršević, 23–33; K. Ofen, 2013; D. Vujadinović, 2012; D. Vujadinović, 2013.

¹⁵ *Ibid.*

¹⁶ Dragana Obrenić, *Pravo glasa žena, Neko je rekao feminizam* (ed. A. Zaharijević), Artprint, Novi Sad 2008, 24–45; Women’s Suffrage, *Encyclopedia Britannica’s Guide to Women’s History*, <http://kids.britannica.com/women/article-216007>, last visited 25 November 2015.

¹⁷ P. Marks, *Femininity in the Classroom: An Account of Changing Attitudes, The Rights and Wrongs of Women* (eds. J. Mitchell and A. Oakley), Penguin Books 1976, 176–198; T. Blackstone, *The Education of Girls Today, The Rights and Wrongs of Women* (eds. J. Mitchell and A. Oakley), Penguin Books, 1976, 199–216; Tijana Krstec, “Pravo na obrazovanje”, *neko je rekao feminizam* (ed. A. Zaharijević), Novi Sad 2008, 57–69.

¹⁸ <http://www.coe.int/t/dghl/standardsetting/equality/05conferences/2014NFPHelsinki/Documents/Report%20Conference%20Helsinki.pdf>, last visited 25 November 2015.

The international legal¹⁹ framework of protection of women's rights was established in the late 20th century and the improvement has continued in the 21st. Policy is being rewritten from a feminist point of view, and gender mainstreaming, e.g. the so-called "state feminism"²⁰ has taken central stage.

2. INTERNATIONAL STANDARDS FOR GENDER MAINSTREAMING IN EDUCATION

In contemporary democratic societies education represents the main channel for promoting values of freedom, social justice and equality. These values include as their constituent part the value of gender equality, which means equal representation, power and participation of both genders in all spheres of public and private life, as well as their right to difference. Higher education especially, but also all educational spheres and levels represent a powerful mechanism for social change. Integrating a gender sensitive approach into higher education, as well as generally into educational fields, is of the utmost importance. In international documents dedicated to the advancement of gender equality, education has been recognized as one of crucial fields of action.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)²¹ was adopted in 1979 by the UN General Assembly. CEDAW is often described as an international bill of rights for women and it establishes international standards in this respect. States that have signed CEDAW, accepted an obligation to eliminate traditional understanding of gender roles in all forms of education, and for that purpose to initiate revising of textbooks, curricula and teaching methods. At the World Conference on Human Rights²², held in Vienna in 1993, the protocol for enhancing CEDAW was initiated as well.

The Beijing Declaration and Platform for Action, adopted at the Fourth World Conference on Women, held in Beijing in 1995,²³ established that gender discrimination in education remained very strong and that this must be overcome in order to cease further reproducing stereotypes and social inequalities.

¹⁹ Z. Mršević, 2011, 47–84.

²⁰ J. Outshorn and J. Kantala, *Changing State Feminism*, Palgrave MacMillan, London 2007, 1–20, 164–182.

²¹ <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>), last visited 15 November, 2015.

²² <http://www.ohchr.org/EN/ABOUTUS/Pages/ViennaWC.aspx>., last visited 15 November, 2015.

²³ http://www.unwomen.org/~media/headquarters/attachments/sections/csw/pfa_e_final_web.pdf, last visited 18 November, 2015

In 1995, the Council of Europe also considered the gender perspective of education issuing its Recommendation of the Parliamentary Assembly of the Council of Europe on Gender Equality in Education,²⁴ which insists on creating new policies aiming at gender mainstreaming.

In 1998, UNESCO adopted the World Declaration on Higher Education for the Twenty-First Century, Vision and Action, whose article 4 is devoted to “Enhancing participation and promoting the role of women”.²⁵ The Committee of Ministers of European Council Member States adopted its 2007 Recommendation CM/Rec (2007)13 on Gender Mainstreaming in Education, which offers basics for educational reforms in member states of Council of Europe, and which insists that states have to introduce gender sensitive approaches in textbooks and in teaching methods for purposes of educating young people in favor of a democratic citizenry.²⁶

In the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention), announced on May 11, 2011, article 14 (1), says that “(P)arties shall take, where appropriate, the necessary steps to include teaching material on issues such as equality between women and men, non-stereotyped gender roles, mutual respect, non-violent conflict resolution in interpersonal relationships, gender based violence against women and the rights to personal integrity, adapted to the evolving capacity of learners, in formal curricula and at all levels of education”.²⁷

The 2012 Gender Equality Transversal program, established by The Council of Europe, had the aim to organize meetings of experts around focal points. In October 2014, at the Helsinki conference, the focal point was to combat gender stereotypes in and through education. The conclusions of this Conference were that even seven years after the European Council’s Recommendations (CM/Rec (2007)13), gender equality in the EU has not been achieved; that the greatest obstacles in that respect are stereotyping and sexism; gender mainstreaming in schools throughout EU has not been established, although laws and policies with that aim have been adopted. The reason is, according to the conclusions, that education and schools have not been the target of policies and programs yet, although there are some good examples,²⁸ of course. The Conference also

²⁴ Recommendation of the Parliamentary Assembly of the Council of Europe on Gender Equality in Education, (<https://wcd.coe.int>), last visited 18 November, 2015.

²⁵ http://www.unesco.org/education/educprog/wche/declaration_eng.htm, last visited 16 November, 2015.

²⁶ <https://wcd.coe.int/ViewDoc.jsp?id=1194631&Site=CM>, last visited 16 November 2015.

²⁷ https://www.coe.int/t/DGHL/STANDARDSETTING/EQUALITY/03themes/violence-against-women/Conv_VAW_en.pdf, last visited 16 November, 2015.

²⁸ For good examples of training teachers, parents, promoting gender equality topics for academic research, see the European Council’s Report: Promoting Gender Mainstreaming in Schools, <http://www.coe.int/equality>, last visited 17 November, 2015.

concluded that the concept of gender mainstreaming is not fully understood by all the actors in educational process throughout European countries. Therefore, systemic recommendations for governments and regional and local authorities, schools, educational training providers, relevant NGOs, international organizations, were declared.²⁹

The EU has insisted in its primary law – foundational treaties, its secondary law – Directives (for example, Pregnant Workers directive, equal pay, equal treatment in occupational social security schemes directives, directives regarding the right to paid maternity leave, paternity leave, etc.), judgments/case law of the Court of Justice of the EU, and soft law (EU Road Map for Gender Equality, EU “Women’s Charter”, Strategy for Equality Between Women and Men 2010–2015, the European Gender Equality Pact for 2010–2020)³⁰ – on improving gender equality. The EU also required accession countries to establish the Anti-Discrimination Law and the Law of Gender Equality, as well as to improve their Labor Law, Criminal Law, Family Law and all fields and aspects of legislation that deal with protection from gender-based discrimination. Further, the European Institute for Gender Equality was established, with one of its activities being the assessment of impact of gender equality policies in the EU and the Member States. The Institute does this through the Gender Equality Index, which is built around six core domains: work, money, knowledge, time, power and health, plus violence against women and intersectional inequalities.³¹

Introducing a gender dimension into higher education represents an important factor in the process of establishing common European Higher Education Area (EHEA), which was defined by the Bologna Declaration.³²

3. GENDER MAINSTREAMING IN LEGAL EDUCATION

Due to the highest value standards of modern international and national law, which have been based on universal human rights and women’s rights, introducing a human rights sensitive approach and gender sensitive approach in legal education is quite necessary. Educating students of law – future lawyers, judges, prosecutors, administrative workers, mem-

²⁹ <http://www.coe.int/t/dghl/standardsetting/equality/05conferences/2014NFPHelsinki/Documents/Report%20Conference%20Helsinki.pdf>, last visited 17 November, 2015.

³⁰ http://ec.europa.eu/justice/gender-equality/law/index_en.htm, last visited 17 November 2015.

³¹ <http://eige.europa.eu/gender-statistics/gender-equality-index>, last visited November 2015.

³² <http://www.ehea.info/article-details.aspx?ArticleId=65>, last visited November 2015.

bers of parliamentary and governmental bodies – in a gender sensitive manner means a real investment into better legislation, more correct interpretation and implementation of laws. Sensitizing judges in particular, but also legal professionals in all fields of their legal practice serves the fulfillment of what the essence of contemporary law is – equal respect and protection for each individual.³³

The mainstreaming of gender equality in legal education requires manifold institutional, pedagogical, educational changes. It implies re-considering all textbooks from the point of gender sensitive language and content, overcoming gender stereotypes and prejudices in content articulations, explanations and language, developing a gender sensitive approach among professors and students concerning understanding and interpreting legislation and particular fields of law, concrete laws, case law, as well as concerning the pedagogical approach of professors. In addition, it requires the introduction of gender sensitive titles and positions, aiming at improving a gender balance of academic staff, and introducing gender sensitive statistics.

Gender-responsive budgeting initiatives are also important. They have to support manifold projects, consisting of issuance of guidelines, training activities (training of monitors, commissioners, trustees, representatives of all referential political, media, and educational bodies; training university professors, as well as primary school and high school teachers and lecturers); institutional empowerment and networking; building a monitoring infrastructure; developing and improving media coverage; conducting projects for empirical surveys of textbook, curriculum and syllabus content from the point of gender equality.

Systematic theoretical-methodological frameworks for reconsidering curricula and textbooks for higher education and legal studies do not exist either in the European Union or in Serbia. Gender mainstreaming in legal curricula should encompass, firstly, a reconsideration of legal courses and textbooks from the mentioned point of view, secondly, the introduction of particular courses of gender studies, and thirdly, the introduction of legal clinics for gender equality and anti-discrimination.

Gender equality aspects should be considered in all legal courses, especially in those which have been dealing with individual human rights, family and gender relations, individual and social welfare and security, protection of women and children in labor, power relations, participation in decision-making, etc. What should also be taken into account is how much presentation and interpretation of law-making and law implementation has been gender sensitive in its language, content, hidden stereotypes, implications for social roles.

³³ Dragica Vujadinović, Country Report on Legal Perspectives of Gender Equality in Serbia, in: *Legal Perspectives of Gender Equality in Southeast Europe*, SEELS, Skopje November 2012, 161–186.

For example, one of the introductory courses in legal studies, Introduction to Jurisprudence, is supposed to help students to understand how law has been made by men and how women were invisible until recently, i.e. to understand that behind gender neutral legal language and declarative universal legal norms lies a patriarchal matrix that hides gender inequalities. The course also attempts to familiarize students with formal and substantive equality and gender sensitive approaches in understanding the creation, interpretation and implementation of law. It should carefully introduce gender sensitive language. However, none of these textbooks in Serbia and elsewhere contains gender sensitive content. For example, in one recently published and otherwise good Serbian textbook, there is complete absence of gender sensitive content. Indeed, in expressing the plural of man and woman, the textbook employed once the old fashioned formulation people and women.

Sociology and/or Sociology of Law are also introductory courses that should consider family relations, genesis of the family, categories of sex and gender, family violence, parent-child relations, social roles, social and cultural factors from the point of the dialectic between patriarchy and anti/patriarchy. It should be obligatory to overcome traditional patriarchal stereotypes, and family relations and social roles must be treated differently than in the traditional matrix, especially in cases of rape, sex-trafficking, prostitution, child care, protection from family violence, etc. Sociology and sociology of law should include the feminist approach and its justifiability. Serbian textbooks for higher education and legal education in particular, have still not been articulated in a gender sensitive way.

Family Law is the field of civil law whose content (including its textbooks and syllabi) are most fit for explaining and interpreting social relations of the private sphere (marriage, family, parenting) from a proper gender equality perspective. For example, a gender sensitive approach is necessary to explain the prevalent practice of formally ascribing common property of a couple to the husband, despite the fact that the gender neutral norms regulate this issue on principles of equal rights to commonly acquired property. It is also necessary to explain to students the phenomenon of unpaid homework, and problems which emerge in the court concerning issues in evaluating such unpaid work when considering division of jointly acquired property. In the case of parenthood, impacts of gender stereotypes have to be considered as well as their influence on judicial decisions about who of the parents will get the right to care, custody and control of children in a divorce. However, some of the current textbooks still present approaches that openly support a patriarchal matrix, stereotypes and traditional social roles. The situation is similar in the case of Criminal Law. It is important to make students aware of the importance of sanctioning and systemic prevention of domestic violence. The text-

books and the teaching should have a gender sensitive approach when dealing with victims of rape, all too easily turned into perpetrators in the patriarchal matrix. What is sorely required is the study of necessary protocols of systemic coordinated police action, social service and the judiciary in the case of domestic violence.

Gender studies were first introduced in university curricula in the social sciences, coming later to legal studies. Under the influence of feminist movements, gender studies became a field of study in American and European universities in the 1970s. The first course of gender studies was introduced at Cornell University in 1969, and the first systemic gender study program was presented at San Diego University in 1970.³⁴

When gender studies and legal clinics are concerned, good practices in the EU are linked with an existence of well developed networks, such as the Women's International Studies Europe (WISE) (founded in 1990 on Cyprus), the *Advanced Thematic Network in Women's Studies in Europe* (ATHENA) (established in Holland in 1996), as well as the Association of Institutions for Feminist Education and Research in Europe (AOIFE). In 2009, all these institutions banded together to form the European Association for Gender Research, Education and Documentation (ATGENDER).³⁵

According to the recommendations outlined by the Council of Europe in 2007, one of the indicators of governments' will to overcome gender stereotypes and inequality in education is the "existence of gender/women's studies and research in universities and research institutions and their adequate support and financing".³⁶

Regarding the so-called Gender Studies in Serbia,³⁷ it is first important to mention that each faculty and university in Serbia is autonomous in establishing its curricula and syllabi.³⁸ The introduction of Gender Studies must be initiated by professors and approved by the faculty administration. There are only a few faculties of law and social science

³⁴ Ž. Papić, *Sociologija i feminizam*, IIC SSO, Belgrade 1989, 20.

³⁵ [www://atgender.eu/index.php/atgendermenu/mission](http://www.atgender.eu/index.php/atgendermenu/mission), last visited 18 November 2015.

³⁶ CM/Rec (2007)13, fn.26.

³⁷ N. Petrušić, S. Konstatinović Vilić, *Integrisanje studija roda u univerzitetski sistem obrazovanja*, Project of Ministry of Education of the R Serbia, No. 179046, 2013.

³⁸ For example, at the Law Faculty in Belgrade, the male and female professors initiated the course "Gender Studies" to be included in the curriculum of undergraduate studies and they have implemented an interdisciplinary approach (including a historical-political, social, cultural and legal dimension of the gender issue). A national, regional, European and international context of legal regulation and affirmation of gender equality is considered in this course. In its teaching, special attention is paid to protection against violence, human- and sex trafficking. Two debates pro and contra legalization of prostitution and right to abortion have also been included.

faculties in Serbia where this kind of syllabus has been introduced either at the undergraduate or graduate level of academic work.³⁹

Legal clinics for gender equality and/or against discrimination are a specific form of gender mainstreaming in the frame of legal education. Students get an opportunity at legal clinics to witness cases that deal directly with issues of gender based discrimination, domestic violence, case law, etc. Legal clinics inter-connect students' theoretical knowledge, personal insights and practical legal experience.⁴⁰

All the above mentioned forms and tracks of gender mainstreaming in Serbian legal education should become relevant standards and criteria for accreditation of a legal educational curriculum of faculties of law in Serbia.

4. LEGISLATION AND REFERENTIAL CASE LAW IN SERBIA

The Constitution of the Republic of Serbia (2006) does not fully comply with the EU Gender Equality Law. According to the Commentary on the Constitution,⁴¹ certain Constitutional provisions are contestable from the point of gender equality, whereas others are not. Article 15 generally proposes equality and equal opportunities for women and men (female and male). The Constitution stipulates prohibition of both direct and indirect discrimination on any grounds, including the one based on sex [article 21 (3)]. Prohibition of gender based discrimination is not mentioned as such, the notion “sex” is used instead of “gender”. Article 48, which is related to basic rights and recognition of differences, does not mention sex (gender), but only differences in ethnic, religious, linguistic and cultural identity. Article 49 speaks about forbidding religious, racial and ethnic hatred, but not based on sexual identity. Article 60 considers equal rights of women related to work, but does not specify necessity of equal pay for equal work, nor does it offer any solution for unpaid domestic labor. Article 62 (1) speaks in a contradictory way about the right to marriage and establishing a family. Article 63 speaks also in an unclear way about the right to give birth, whereas Family Law refers directly to women as possessors of this right.

The Law on Gender Equality⁴² was adopted and came into force in December 2009. It was written in compliance with the EU Gender Equal-

³⁹ See: N. Petrušić, S. Konstatinović Vilić, *Modeli rodne senzitivizacije obrazovanja*, in: *Prava djeteta i ravnopravnost polova – Između normativnog i stvarnog*, Banja Luka 2012.

⁴⁰ N. Petrušić, S. Konstatinović Vilić, 2013.

⁴¹ M. Pajvančić, *Komentar Ustava Republike Srbije*, http://www.kas.de/wf/doc/kas_22016-1522-14-30.pdf?110224181009, last visited 17 November 2015.

⁴² *Zakon o ravnopravnosti polova*, “Službeni glasnik RS”, br. 104/2009. The notion “sex” instead of “gender” is used in the title and vocabulary of this Law, although the

ity legislation. The clauses in the Serbian Constitution which had not been sufficiently clearly articulated from the gender perspective, are here better articulated. Article 3 of The Gender Equality Law specifies what equal opportunities refer specifically to the case of female individuals. Articles 4, 5 and 6 specify indirect and direct discrimination based on gender. Article 7 articulates special measures for combating discrimination. Articles 11 and 17 specify women's right to work, and equal pay for equal work. Articles 30, 31, 32, 33 and 36 demand equal opportunities in education, sports, culture, political and public life. Article 47 describes extreme urgency for proceedings initiated for the purpose of protection from gender-based discrimination; Articles 48, 49 further elaborate on criminal procedures related to gender based discrimination.

Government agencies are responsible for planning, organizing, implementing and financing the measures aimed at raising public awareness concerning the need to prevent domestic violence.

The Law on Gender Equality does not provide, however, special measures and programs for victims of domestic violence, envisaging provision for shelters, social, legal and other assistance, and a compensation to the victims of violence.

According to the commentary on the Law on Gender Equality,⁴³ special importance is given to the fact that this law secures judicial protection from gender based discrimination, and also secures misdemeanor sanctions in that respect. However, the relevant judicial practice based on this Law has not been collected yet.

The Law on Prohibition of Discrimination⁴⁴, which was also adopted in 2009, essentially complements and enhances the Law on Gender Equality. It establishes an independent, autonomous and specialized state authority – The Commissioner for Protection of Equality (article 1).

The quota system is introduced in the amended Law on Electing the Members of Parliament, which proposes that one third of the MPs must be female. However, the amendment according to which a female people's representative should replace each female resigning MP, once again failed to pass the Parliamentary procedure of adopting amendments to this law. This, of course, opens space for manipulation and getting around the rule that one third of MPs must be women.⁴⁵

difference between “sex” (as the biological characteristic) and “gender” (socially established roles) is mentioned in article 10.

⁴³ M. Pajvančić, N. Petrušić, S. Jašarević, *Komentar Zakona o ravnopravnosti polova*, Beograd, 2010. pp. 103–123.

⁴⁴ Zakon o zabrani diskriminacije, “Official Gazette of the Republic of Serbia”, 22/2009.

⁴⁵ Z. Mršević, 2011, 95.

In addition to the Law on Gender Equality and the Anti-Discrimination Law, positive steps in favor of female and child protection from violence have been taken in the amended Criminal Code from 2002; domestic violence was criminalized for the first time as a specific criminal act in Art. 118a of the Criminal Code⁴⁶. Failing to pay alimony, marital rape, incest, as well as sexual harassment and human trafficking have been sanctioned by the Code. A new Family Law from 2005⁴⁷, followed the same track concerning domestic violence. In cases of abuse, neglect or violence against children, there is a possibility of depriving the parent of his/her parental rights.

Labor law⁴⁸ differentiates direct and immediate gender-based discrimination. All forms of discrimination, including based on gender, are forbidden when it comes to preconditions of employment and choice of candidate, work conditions, education, professional promotion and job advancement, termination of contract, etc.

With an intention to point out the good practices that can serve as examples of proper implementation of existing legislation in Serbia, the following are two court decisions which protect women's rights (both verdicts passed before the adoption of the Law of Prevention of Abuse at Work and the Law on Gender Equality).⁴⁹

The Municipal Court in Užice ruled in a civil case on 9 October, 2006, on a class action of several women for compensation due to discrimination on a gender basis during dismissal and determination of retirement benefits. In its decision explanation, the Court called for the application of domestic legislation (art. 13 of the Constitution, art. 12. and 18. of the Labor Law), but also of international documents, which the country is obliged to respect and apply.⁵⁰

The Municipal Court in Jagodina passed a verdict on 3 September, 2008, in which it applied the existing legal provisions of criminal law to punish harassment of women in the workplace, specifically for mobbing. This was one of the first verdicts on mobbing in Serbia.⁵¹

The Commissioner for the Protection of Equality also confirmed the existence of indirect discrimination, not only towards specific women

⁴⁶ Criminal Code "Official Gazette of the Republic of Serbia", 2002, 26/77. http://www.cbs-css.org/files/publikacije/krivicni_zakon_rs.pdf, last visited 18. November 2015.

⁴⁷ Porodični zakon, "Official Gazette of the Republic of Serbia", br.18/2005.

⁴⁸ Zakon o radu, "Official Gazette of the Republic of Serbia", br. 24/2005, 61/2005, 54/2009, 32/2013 i 75/2014.

⁴⁹ B. Urdarević, Country Report on Legal Perspectives of Gender Equality in Serbia, in: *Legal Perspectives of Gender Equality in Southeast Europe*, SEELS, Skopje November 2012, 161–186.

⁵⁰ J. Lazić, N. Dičić, N. Petković, *Radna prava žena u Srbiji*, Bg Centar za ljudska prava, Beograd 2008, 32–36.

⁵¹ *Ibid*, 36–38.

who submitted a complaint of returning to a lower level of work after their maternity leave, but also in the case of more than 30 other women from the same company. Therefore, the Commissioner for Equality engaged in strategic litigation against this firm, with the case ongoing.⁵²

Cases of discrimination can also come onto the agenda according to a narrow interpretation of laws. The Administrative Secretariat of the City of Belgrade, municipal department Palilula, refused to give a certificate of single marital status to a person who announced plans to enter a same sex marriage abroad, with the explanation that the certificate cannot be given to persons who intend to commit the mentioned act in foreign countries, as long as same sex marriage is unconstitutional in Serbia. The Commissioner for Equality concluded that this administrative service is discriminating against persons on the basis of their sexual orientation.⁵³

The Commissioner for Equality also reported a case based on complaints against a university textbook in Criminology⁵⁴ that dealt in a contesting manner with issues of rape, women as victims and psychological profiling of women as witnesses. The Commissioner concluded that the author expressed clear gender stereotypes and derogated the dignity of women, especially those who are victims of violence. The Commissioner also pointed to the negative impacts of this textbook's stereotyping and regressive ideas for shaping the mindset of students – future lawyers, judges, prosecutors.

The most sound case of gender based discriminatory legislation can be seen in the recently enacted Law on Ways to Determine Maximum Number of Employees in the Public Sector, which implied that only women become surplus workers in the public sector at the age of sixty and six months. Namely, their previously achieved advantageous right to retire on the basis of age has been in this law transformed into discriminatory proposal for diminishing the number of employees in the public sector. The Constitutional Court of Serbia recently announced the temporary suspension of this discriminatory provision – while being opposed to constitutional guarantees against gender-based discrimination and constitutionally guaranteed equal access to workplaces – until the final decision on the constitutionality of this law.⁵⁵

⁵² 53 <http://www.ravnopravnost.gov.rs/sr/pol-rod/pritu%C5%BEba-i-s-protiv-a-a-d-o-o-zbog-diskriminacije-po-osnovu-pola-u-oblasti-rada-i-zapo%C5%A1ljavanja>, last visited 17. November 2015.

⁵³ Opinion No. 07-183/2013-02, August 28, 2013. <http://www.ravnopravnost.gov.rs/sr/seksualna-orijentacija/pritu%C5%BEba-o-z-l-lj-p-protiv-sekretarijata-za-upravu-gu-grada-beograda-zbog-diskriminacije-po-osnovu-seksualne-orijentacije-u-p>, last visited 17. November 2015.

⁵⁴ Opinion No. 07-00-185/2014/02, July 31, 2014. <http://www.ravnopravnost.gov.rs>

⁵⁵ Republic of Serbia, Constitutional Court, No. IY 3 244/2015, October 8, 2015.

The influence of the European Convention case-law on the Constitutional Court⁵⁶ of Serbian jurisprudence has been quite significant in the field of civil rights. The Constitutional Court has even tended to introduce some new rights, by relying on the well-established case-law of the Court. In particular, that was the case with the right to recognition of sex adjustment, which the legislation in force did not allow for, so the Constitutional Court had to fill in this normative gap.⁵⁷

The case originated with a constitutional complaint which was submitted by X, born in 1949, and diagnosed with the *pseudohermaphroditism*, i.e. physical characteristics of the female sex with the gender identity of the male sex. After receiving different therapies, X had sex reassignment surgery in Belgrade, in December 2010. In March 2011, he sought from the municipal authorities responsible for keeping the birth registry, the rectification of the data related to his sex. The request was denied. He filed a constitutional complaint, against the denial. The Constitutional Court decided in favor of the complainant and ordered the authorities to alter the data related to sex in the registry of birth.⁵⁸

The Constitutional Court referred to a number of the Court's judgments in which it found that there had been no administrative or judicial remedy at the applicant's disposal under domestic law.⁵⁹ It referred, in particular to: *Vernillo v. France* and *Lepojić v. Serbia*, for its holding that the remedy had to be sufficiently certain, not only in theory, but also in practice.⁶⁰ It made reference to *Chahal v. The United Kingdom*, in arguing that remedy should be of such a nature as to allow the competent authority both to deal with the substance of the relevant infringement and to grant appropriate relief.⁶¹ It referred to *Airey v. Ireland*, stating that when there were several remedies available it was up to the victim to choose the one it wanted to use;⁶² as well as to *Akdivar v. Turkey*, in its holding that the redress should have reasonable prospects of success.⁶³

⁵⁶ D. Popović, T. Marinković, "The emergence of the human rights protection in Serbia under the European Convention on Human Rights: The experience of the first ten years", in Iulia Motoc, Ineta Ziemele (eds.), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe – Judicial Perspectives*, Cambridge University Press, forthcoming (march 2016). Case-law and references from 48 to 62, are taken from D. Popović,

⁵⁷ D. Popović, T. Marinković, op.cit.

⁵⁸ Ruling of the Constitutional Court, no. Uz-3238/2011, 8 March 2012, Part III.

⁵⁹ *Ibid.*, Part V.

⁶⁰ *Vernillo v. France*, no. 11889/85, 20 February 1991, para. 27; *Lepojić v. Serbia*, no. 13909/05, 6 November 2007, para. 51.

⁶¹ *Chahal v. The United Kingdom*, no. 22414/93, 15 November 1996, para. 145.

⁶² *Airey v. Ireland*, no. 6289/73, 9. October 2010.

⁶³ *Akdivar v. Turkey*, no. 21893/93, 16. September 1996, para. 68.

Concerning the recognition of the right to have one's sex adapted to his/her gender identity, as an inherent element of the right to respect for private life, the Constitutional Court had to recognize the right to respect of private life, which was not as such enshrined in the 2006 Constitution.⁶⁴ The Constitutional Court construed this right from the constitutional guarantee of “dignity and free development of individuals”.⁶⁵ Supporting the inclusion of the right to respect of private life into the constitutional guarantee of dignity and free development of individuals, the Court resorted to the understanding of the notion of “respect of private life” in the Convention case-law. In particular, it quoted the Court's holding that the “respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings”.⁶⁶

The Constitutional Court also referred to the Convention case-law, for its notion of private life which implied “a physical and moral integrity of a person” together with “his or her sexual life”.⁶⁷ The Constitutional Court held that “the sphere of private life of a person undoubtedly includes, *inter alia*, its sexual identity, sexual orientation and sexual life, as a result of which a right to a private life presupposes a right to have the details of personal identity specified, and in that sense a right to have one's sex adapted to its gender identity”.⁶⁸ The Constitutional Court concluded that “although neither the Constitution nor the European Convention [on Human Rights] explicitly mention gender identity and the right to a change of sex, this sphere of a person's life undoubtedly belongs to a constitutionally guaranteed sphere of dignity and free development of individuals and conventionally guaranteed sphere of respect for private life”.⁶⁹

Consequently, after recognizing the right to have one's sex adapted to its gender identity, as a constitutionally entrenched right, the Constitutional Court introduced a positive obligation for the authorities to make necessary alterations in the birth registry.⁷⁰ Such a rectification should be allowed upon request of the person concerned, supported by the documentation provided by the medical institution, which effectuated the sex reassignment surgery.⁷¹ In extending the boundaries of individual rights,

⁶⁴ Ruling of the Constitutional Court, no. Uz-3238/2011, Part VI.

⁶⁵ Constitution of Serbia, Article 23 (1) and (2).

⁶⁶ *Niemietz v. Germany*, no. 13710/88, 16. December 1992, para. 29.

⁶⁷ *X and Y v. The Netherlands*, no. 8978/80, 26. March 1985, para. 22.

⁶⁸ Ruling of the Constitutional Court, no. Uz-3238/2011, Part VI.

⁶⁹ *Ibid.*, Part VII.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*, Part VIII.

the Constitutional Court found, once again, the necessary support in the Convention case-law, i.e. in the judgment given in *Goodwin v. The United Kingdom*.⁷²

5. CONCLUSION

The contemporary epoch has brought about the awareness of the need to overcome patriarchal subordination of the female gender and to implement in law and societal life an idea of universal equality among human beings, equal respect for each individual and protection of universal human rights. However, the existent emancipatory trends in social, cultural, economic, political, and legal life of modern states and societies are far from complete in removing patriarchal remnants and manifestations.

Patriarchy has been deeply rooted in cultural patterns, social roles and family relations, as well as in the cultural, social, economic, political life. Thus far we can speak about the dialectic between patriarchy and emancipation in modern times. The patriarchal matrix of hierarchical male/female, parent/child relations fits perfectly well with an authoritarian political and social order, and serves to reproduce power relations in public life. Elements of patriarchy, however, exist even in the most developed countries and under various circumstances; the dialectical opposition and crossing between patriarchy and emancipation in gender relations has been part of the agenda in the life of each individual, each family, each social and political unit in the world. In more developed post-traditional societies and more democratic states, the emancipatory elements have been proportionally more existent; in contradistinction – in more authoritarian regimes and more traditional societies, regions, local communities, groups and associations and families – patriarchal power relations still prevail. The struggle between patriarchy and trends of gender emancipation (anti-patriarchy) has been an ever present task.⁷³

Gender equality – as the aim of public policies – imposes a need for individual, social, political, cultural matrix change and thus a need to also introduce legal norms, mechanisms and policy measures for overcoming patriarchy.

⁷² *Christine Goodwin v. The United Kingdom*, no. 28957/95, 11 July 2002, para. 77.

⁷³ P. Ginsborg, “Uncharted Territories: Individuals, families, Civil Society and the Democratic State”, *The Golden Chain – Family, Civil Society, and the State*, (eds. J. Nautz, P. Ginsborg & T. Nijhuis), Berghahn, NY – Oxford, 2013, 17–42; Dragica Vujadinovic, “Family and Civil Society in Present-Day Serbia”, *The Golden Chain – Family, Civil Society, and the State*, (eds. J. Nautz, P. Ginsborg & T. Nijhuis), Berghahn, NY – Oxford, 2013, 260.

A legal framework for gender mainstreaming consists of international and national legislation based on principles of gender equality and protection of women's rights. It implies reconsidering different fields of legislation from the point of gender sensitivity, and enacting in each state the Anti-Discrimination Law and Law on Gender Equality. This legal framework should be supported by creating national policy frameworks on gender equality – establishing parliamentary and governmental bodies (on regional and municipality levels as well) for gender equality, establishing national strategies for promoting gender equality and action plans, introducing independent bodies such as the Ombudsperson and Deputy Ombudsperson for gender equality, as well as the Commissioner for Equality.

Concerning the stipulation of gender sensitive approaches in education, additional legal, political and institutional mechanisms at the state level, as well as the educational level are necessary.

Starting from kindergarten and including the university level, education plays an essential role in forming systems of values and engendering emancipatory social roles and power relations or, on the contrary, reproducing traditional gender social roles and stereotypes.

Higher education, including legal education, should provide an emancipatory mindset. It is necessary to introduce gender sensitive pedagogy and approaches in legal textbooks, as well as offer gender sensitive statistics. Sensitizing teachers is a crucial factor in this process. Without educating teachers in this respect, students will not receive a proper understanding of female (in)visibility in gender neutral legal norms, nor of social implications related to gender (in)sensitive interpretations and implementations of specific legal norms.

A gender sensitive approach in syllabi and pedagogy has been underdeveloped in higher education, not only in Serbia, but generally speaking. Though the EU has made the most significant steps forward in gender mainstreaming in its primary, secondary and soft law, as well as in its policy strategies, the European High Education Framework – in both its content and implementation – has also been lagging behind in this respect.

Therefore, the project of a “positive intervention from above” should be very useful, meaning introducing strategy-plans for training teachers and professors, reconsidering textbooks, curricula and syllabi from the point of gender sensitive language and content, monitoring the proportion of male and female academics and university administrators, introducing proper budgeting, and monitoring an all-encompassing process of gender mainstreaming.

Universal human rights as the civilization standard of modernity are not fulfilled in their meaning and mission unless they encompass gender equality. Gender mainstreaming has become a normative project and aim, marking an immense step forward in historical terms. However, the struggle for visibility of women (and all vulnerable groups) in legislation, legal education and jurisprudence has been consistently on the agenda both as the emerging practice and as the task to be fulfilled.