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ZYRA E KRYEMINISTRIT / OFFICE OF THE PRIME MINISTER / URED PREMIJERA

Agjencia për Barazi Gjinore / Agencija za Ravnopravnost Polova / Agency of Gender Equality

Haxhi Gashi

COMMENTARY THE LAW ON GENDER EQUALITY

Prishtina, May 2017

Prof. dr. iur. Haxhi Gashi



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Prishtina, May 2017

Author:

Haxhi Gashi

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The Republic of Kosovo now has a comprehensive and modern legal framework that guarantees the protection and promotion of gender equality and is in line with international conventions and standards. The Constitution of the Republic of Kosovo presents gender equality as a fundamental value of Kosovo society, stressing that "The Republic of Kosovo ensures gender equality as a fundamental value for the democratic development of the society, providing equal opportunities for both female and male participation in the political, economic, social, cultural and other areas of societal life (Constitution of Kosovo, Article 7, point 2).

The first law on gender equality was adopted in 2004, while in June 2015 the Kosovo Assembly adopted the new Law on Gender Equality (LGE). The new law provides changes and innovations in the spirit of clarifying concepts and not just there, focusing on the protection and promotion of equality as a fundamental value for the democratic development of society. Because of the rooted cultural norms that put women and girls in less favourable situations than men and boys, and this situation is evidenced by data on levels of representation in employment, education, doing business and in the field of heritage, this law requires equal representation and participation at the representation level of 50%. It also seeks to undertake specific measures such as the quota to achieve equal representation of women and men in the recruitment process, decision-making structures and processes, economic empowerment and resource allocation.

The law applies to men, women and persons who have a protected characteristic of gender identity or sex determination. The law guarantees equal opportunities and treatment in public and private spheres, including socio-economic spheres. It sets the standards for achieving gender equality at state and local levels as well as at systems and processes, including civil society.

This law foresees the implementation of gender responsive budgeting as a new concept and requires: "its inclusion in all areas, as a necessary tool to guarantee that the principle of gender equality is respected in collecting, distribution and allocation of resources" (LGE, Law No. 05/L-020). In addition, it specifically requires that all policies, documents and legislation shall integrate the gender perspective. It requires that all public policies aimed at promoting and achieving gender equality are in line with the e Kosovo Program on Gender Equality as the highest national platform for gender equality, while the Kosovo Government should report annually to the Assembly of Kosovo regarding the progress of such a program.

Compared to the 2004 law, the 2015 law significantly improves the definitions on sexual harassment and prohibits the victimization of persons who report on sexual harassment. Another innovation of this law is that it provides for punitive measures for gender-based criminal offense that attack the dignity of individuals. It also obliges institutions to collect and submit data divided by gender.

Law enforcement and the process of achieving gender equality through equal treatment of women and men as well as the provision of equal opportunities implies the inclusion of women's and men's development interests in education, employment, economic and social and cultural empowerment. Democratic governance obliges institutions to establish social justice and sustainable development and obviously this cannot be done by neglecting half of the population.

The Agency for Gender Equality took the initiative to compile this commentary in order to facilitate, clarify and accelerate the process of advancing and implementing justice, achieving gender equality, and making appropriate decisions by relevant institutions in the spirit of basic principles of human rights.

On behalf of the Agency for Gender Equality/Office of the Prime Minister, I thank the author Mr. Haxhi Gashi for his professional work, cooperative approach and commitment to fairly convey the spirit and values of this law by providing clarifications, comments and practice on implementation.

Special thanks go to the Swedish Government - Swedish International Development Cooperation Agency (SIDA) which provided assistance in drafting this commentary.

Hope this commentary will serve to us and to all institutions of Republic of Kosovo, colleagues as well as to local and international partners in our joint journey for achieving gender equality and building a society based on values and principles.

Thank you,

Edi Gusia

Chief Executive Officer – Agency for Gender Equality

Office of the Prime Minister



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First of all, I would like to thank the Agency for Gender Equality within the Office of the Prime Minister for the trust given to us in drafting the Commentary on the Law on Gender Equality with the aim of contributing to facilitating the implementation of this law in practice. Also, I would like to extend my gratitude to Mrs. Edi Gusia and Mrs. Leonora Selmani for comments and suggestions during the drafting of this Commentary. Also, I want to thank the Government of Sweden and Swedish International Development Agency- SIDA for the support to draft this Commentary.

We are grateful for the contribution provided by all judges, prosecutors, lawyers and officials dealing with gender equality that we had the opportunity to contact and received comments, documents, papers and other necessary materials from.

Special thanks go to Mr. Sc. Nur Ceku (PhD candidate) and Mr. Sc. Argzon Muqaj (PhD candidate) for collecting materials, suggestions, comments and recommendations during the commenting phase of this Commentary.

Author

Prishtina, 22 May 2017

PREFACE

Equal treatment of all persons before the law is a crucial issue of the rule of law. Equal treatment between genders is also to be viewed in this light, a matter that is highly debated at the present time as a result of unequal treatment between genders (women and men). When talking about the rule of law, as a fundamental priority of the functioning of a democratic society whose main focus is the respect for human rights, the rule of law cannot be considered successful unless effective gender equality before the law is achieved. Nevertheless, this does not seem to be an easy matter for transition societies, part of which is also Kosovo since 1999, respectively since after the war, where the habit of thinking and acting is not yet in line with the legal provisions in force. This is related to many causes: 1) lack of necessary knowledge for new laws: 2) lack of common practice for the same cases: 3) the impact of various economic, social and political factors on the establishment of norms and their implementation: 4) the impact of different societal views on gender, 5) lack of willingness to adequately apply the norms as a result of the impact of different interests of stakeholders groups: 6) different positions about law institutes and the way of interpretation, etc. All of these together form the corpus of the lack of rule of law. Such a significant lack of such proportions has also been observed in the implementation of the laws for protecting human rights and freedoms. Although there is progress in this regard, a law research indicates that there is much to be done. Such a category of rights is also the gender rights and the lack of equal treatment, various violations and abuses. Although all citizens enjoy the protection of rights guaranteed by positive laws, unequal treatment between the genders is pronounced, particularly when it comes to women's rights.

The state has a legal obligation to provide each individual with the fundamental freedoms and rights and guarantee them by the Constitution and laws, not only as legal recognition, but also their effective protection as required by international laws and standards. This protection also covers the protection from violation and infringement of these rights in practice. Bearing in mind that although the Constitution and the special laws, in principle, guarantee equal treatment between genders, there are significant shortcomings in the practical implementation of this equal treatment, and therefore the need for the adoption of a special law on gender equality emerged, to establish a special framework that facilitates the implementation of other laws.

Kosovo has made progress in applying international laws and standards in the field of human rights protection. In this regard, the way of treating and protecting and equal treatment between genders is also regulated by a different approach,

i.e. creating a special legal basis. The first law adopted is Law no. 2004/2 on Gender Equality, of the year 2004, and later, in 2015, a new law was adopted, Law no. 05/L-020 on Gender Equality, which is currently in force. With this, the lawmaker wanted to pay special attention to equal treatment between genders before the law, providing for special mechanisms for law implementation.

Despite the existence of many laws, including the special law on gender equality, there are various interpretations and understandings of law implementation as well as non-implementation of international standards in the field of human rights and equal treatment between genders, ascertained by many reports of the Agency for Gender Equality but also other organizations dealing with human rights.

The purpose of this commentary is to clarify the aforementioned dilemmas to the extent possible, given the fact that we are dealing with a new law, and there is no theory developed and sustainable practice established in Kosovo. However, this law has a peculiarity since it is related to a large number of special laws, so that during commenting, the interpretation in terms of the implementation of these laws was the main task herein.

The commentary is based on clarifying the meaning of the norm from its own content, in conjunction with the other norms of the law itself, in conjunction with other laws, particularly with the case law so far, giving a meaning to a particular Article on how it can be implemented in practice. The explanation is also based on literature and reports from local and international organizations. Particular attention has been given to commenting its relation to EU directives on human rights and equal treatment between genders, considering that they are part of this law. In addition, the commentary is based on international standards - conventions and other acts - as well as in the practices of European Court of Human Rights and the European Court of Justice.

We are aware that certain omissions are possible in such a work despite the great commitment on our part, for which we hope to have the readers understanding. We welcome any professional and purposeful suggestion that may contribute to improving future work.

Author

Prishtina, 22 May 2017

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ABBREVIATIONS

CEDAW	The Convention on the Elimination of all Forms of Discrimination Against Women (known as CEDAW)
UDHR	The Universal Declaration of Human Rights
EC	European Council
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ICCPR	The International Covenant on Civil and Political Rights
ECHR	European Convention on Human Rights
LGE	Law on Gender Equality
FLK	Family Law of Kosovo
LIK	Law on Inheritance in Kosovo
Par.	Paragraph

GUIDELINES ON COMMENTARY TECHNICAL DESIGN AND USE

The technical design of the Commentary maintains the order of the Chapters and Articles. The technical division of the Commentary is done according to the order of the Articles, where below each Article is comment section. Articles are in **bold**, whereas the Comments section is provided below Articles.

The comment section starts with the expression, for e.g. *Comment, Article 1; Comment, Article 20*; etc., to make clear to the reader where the comment starts to place the separating line with the Article. Each comment section starts with the number of the Article, e.g. Article 1, **Comment section starts with 1**. When the Article does not have a paragraph, comments are done without division of the matter and no number. If necessary, the division of the matter within an Article but with no paragraph is made as follows: **1.a), 1.b), 1.c), etc.** When the Article has several paragraphs, the Comment section is divided according to paragraphs and starts with the expression *Paragraph 1, Paragraph 2, Paragraph 3* etc. **and the Comment section text is divided as follows: 1.1, 1.2, 1.3 etc.**

When it is considered necessary that matter within a paragraph should be divided, or there are certain items, **the Comment section is divided as follows: 1.1.a), 1.1.b), 1.1.c), etc. 1.2.a), 1.2.b), 1.2.c), etc.** **The order was maintained when there were sub-paragraphs within Articles, such as Article 2.1.1, 2.1.2 etc.**

When within the matter of commentary the emphasis of the sentence or the problem falls on any **word, phrase or sentence, they are highlighted in *Italic*.**

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INTRODUCTION

1. General overview

The rule of law in terms of respecting and protecting human rights, in accordance with international standards and local laws is a preoccupation of all democratic societies. Even when the protection of human rights is achieved through legal infrastructure, implementation of laws is a problem in itself, especially when it comes to equal treatment between genders. This difficulty appears in Kosovo as well. In Kosovo there is a legal infrastructure for the protection of human rights and gender equality, which is in line with international standards, starting with the Constitution, as the highest legal act, which explicitly stipulates the implementation of international conventions on human rights¹, as well as the laws of certain fields. However, there is a lack of implementation of laws when it comes to equal treatment between genders, although the laws formally ensure this equality.

Gender equality and equal treatment between genders in terms of all spheres of life, is a requirement deriving from the Constitution, specific laws, but also from international standards in the field of human rights.² This, as part of equal treatment before the law, but it also contains special provisions for gender equality.³

Since 2004, the new legal basis has been established, namely the special law, Law no. 2004/2 on Gender Equality⁴, to regulate and strengthen the implementation of special laws in order to ensure equal treatment between genders. In 2015, it was issued a new law, Law no. 05/L-020 on Gender Equality⁵, to guarantee, protect and promote gender equality as a fundamental value of a democratic society. The purpose of legislator to enact a special law on gender equality derived as a

¹ See: The Constitution of the Republic of Kosovo, adopted on 9 April 2008, which entered into force on 15 June 2008, Chapter II stipulates the protection of the human rights and fundamental freedoms, in particular Article 22 stipulates the direct application of international standards (international agreements and instruments), accessible at the following link: <http://gzk.rks-gov.net/ActsByCategoryInst.aspx?Index=1&InstID=1&CatID=1>

² See some of the most important conventions and acts: the International Covenant on Civil and Political Rights was adopted by the United Nations General Assembly, also known as the World Parliament, by Resolution 2200A (XXI), the European Convention on Human Rights, signed on 4 November 1950, which entered into force on 3 September 1953 (in Kosovo, it is directly applicable under Article 22 of the Constitution), the 12th Protocol of the European Convention on Human Rights, adopted on 4 November in Rome, which entered into force on 1 April 2005, the UN Convention on the Elimination of All Forms of Discrimination Against Women, adopted by the Resolution 34/180 of the UN General Assembly, at its 34th session, on 18 December 1979, the UN Convention on the Elimination of Forms of Racial Discrimination, adopted by the General Assembly through Resolution 2106 of 21 December 1965.

³ See the Constitution of the Republic of Kosovo, Article 24, paragraph 2 ad specific laws, such as: Labour Law, Law on Higher Education, etc.

⁴ See Law no. 2004/2 on Gender Equality, Official Gazette of the Provisional Institutions of Self Government of Kosovo no. 14, dated 01 July 2007.

result of lack of implementation of international standards in cases where equal treatment between genders is needed, because the law itself contains conventions and directives of the European Union as reference points for implementation. In addition, the other purpose was to create a legal framework that would stipulate basic rules to ensure gender equality, measures to achieve this equality, implementation of other laws, and to establish enforcement mechanism.

2. International Standards on Human Rights and Gender Equality

In Kosovo international standards for the protection of human rights are directly applicable, whereby most important international acts are also included in the Constitution⁵. All provisions of international acts referring to equality before the law, in the contents of its Articles also include the gender equality.

It should be emphasized that unequal treatment before the law is a phenomenon mostly affecting women, respectively female gender. The State needs to ensure equal treatment and protection of all before the law. This is explicitly required by Article 7 of the UDHR, which states: “*All are equal before the law and are entitled without any discrimination to equal protection of the law*”.⁶ This should also be implied for gender equality in conjunction with Article 2 of the UDHR.

Equal treatment before the law is provided and guaranteed by the International Covenant on Civil and Political Rights (hereinafter “ICCPR”).⁷ The ICCPR explicitly obliges the States to respect and assure the rights of all individuals in their territory and who are under their authority without discrimination, by issuing even more appropriate acts for the protection of these rights.⁸

In terms of other international conventions and acts referring to human rights, any omission or lack of implementation of human rights protection regarding equal treatment before the law includes non-implementation of equal treatment between genders. Even the Law on Gender Equality itself provides the linkage and implementation of these international conventions and EU directives, by including them in its articles.⁹

Given that female gender has been subject to forms of discrimination in different times and spaces, and as a result of different circumstances, this has conditioned to have international acts protecting women (females) from different forms of

⁵ See Law no. 05 / L-020 on Gender Equality, Official Gazette of the Republic of Kosovo, no. 16, June 26, 2015.

⁶ See the Constitution of the Republic of Kosovo, Article 22.

⁷ Universal Declaration on Human Rights, UN General Assembly, 10 December 1948, 217 A (III), Article

⁸ The International Covenant on Civil and Political Rights, adopted and open for signature, ratification and accession by the General Assembly through its Resolution 2200 A (XXI) of 16 December 1966, entered into force in 1976; Article 26 protects the right to equal treatment before the law without any form of discrimination.

⁹ Gruda, Zejnullah, International Protection of Human Rights, Fifth edition, Prishtina 2010, p. 40.

discrimination.¹⁰ Therefore, as required by the Convention on the Elimination of All Forms of Discrimination against Women, account should be taken of the treatment of cases in the family, as well as in other public and private institutions and organizations from all bodies charged with this task, in order to avoid any form of discrimination.

At the European level, the European Convention on Human Rights (hereinafter “ECtHR”) should be considered as an act of special importance for the protection of human rights and family rights. This Convention protects human rights (right to life, the prohibition of torture and cruel, inhuman and degrading treatment, the right to liberty and personal security, the right to a fair and just trial, the right to respect the private and family life, the right to an effective remedy, the prohibition of discrimination), which are reflected in the gender equality for these rights¹¹.

¹². The rights guaranteed by the Convention are equally protected for all citizens without any form of discrimination, including gender¹³.

The European Court of Human Rights (hereinafter the “ECtHR”) has in many cases established practices and standards for the protection of human rights, including those relating to equal protection of genders. Also, in other countries, such as in the US, there are cases established by the US Supreme Court, through which was addressed the issue of equal treatment between genders, in terms of constitutional and legal rights, in particular the improvement of women’s position in all spheres of life.¹⁴

In addition, the EU has issued a large number of Directives referring to the equal treatment of genders, so that Member States take into account and incorporate t

¹⁰ See Article 1 of this Law.

¹¹ See the Convention on the Elimination of All Forms of Discrimination against Women, adopted and open for signature, ratification, and accession by the UN General Assembly with its Resolution 34/180 of 18 December 1979, entered into force on 3 September 1981. Article 1 of this Convention states: “For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

¹² See ECHR, Articles 2,3,5,6,8,13 and 14.

¹³ ECHR, Article 14 which states: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

¹⁴ Rogers. M. Smith, *Gender at the Margins of Contemporary Constitutional Citizenship*, in: *Gender Equality, Dimensions of Women’ Equal Citizenship*, Edited by Linda C. McClain and Joana, Cambridge 2009, p. 23-24.

hem into national legislation¹⁵. The lawmaker in Kosovo has acted in the same way, providing for some of them in Article 1¹⁶.

3. Legal Framework in Kosovo for the Protection of Human Rights and Gender Equality

Human Rights are guaranteed and protected by the highest legal act, the Constitution of the Republic of Kosovo. The Constitution, in Chapter II, Articles 21-56, guarantees human rights and fundamental freedoms.¹⁷ In these articles are summarized the fundamental human rights and freedoms and at the same time is ensured their guaranteeing and protection by law, but also by the competent state bodies. Also, as mentioned above, international standards referring to human rights are included in the Constitution of the Republic of Kosovo and they have direct application and have precedence over domestic law, where some of them are also listed by name in the Constitution.¹⁸ The fact itself that equality before the law belongs to all persons without distinction, including gender, implies that the provisions on human rights are also appropriately applied to the violation of equality before the law, if this is based on gender differences. In practice, in each case, nature of the difference before the law is evaluated and only after it is ascertained that this difference exists it is then assessed in accordance with the relevant legal provisions.¹⁹ In this sense, if this concerns gender differences, in these cases, the constitutional provisions on equality before the law also apply to cases of gender differences.

The Law on Gender Equality, as a special law (*lex speciale*), guarantees gender equality in all relationships, including constitutional rights, those of family relationships, hereditary, labour, property, education, goods and services, etc. Therefore, the violation of equal treatment between genders in all aspects of life constitutes a violation of the rights guaranteed by the Law on Gender Equality, but also of other national acts - specific laws and international laws that guarantee and protect gender equality.

¹⁵ See, among others: Council Directive no. 2000/78/EC, dated 27 November 2000, laying down a general framework for equal treatment in employment and occupation; Directive of the European Parliament and of the Council no. 2006/54/EC, dated 5 July 2003, on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation; European Council Directive no. 79/7/EEC, dated 19 December 1978, on the progressive implementation of the principle of equal treatment for men and women in matters of social security; Directive nr. 2004/113/EC, dated 13 December 2004, on the implementation of the principle of equal treatment between men and women in access to and supply of goods and services; Directive nr. Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the implementation of the principle of equal treatment between men and women engaged in self-employment, by which is amended the Council Directive 86/613/EEC.

¹⁶ See Article 1 and comment on this article.

¹⁷ For more, see the Constitution of the Republic of Kosovo, Chapter II, Freedoms and Fundamental Rights, Articles 21-56.

¹⁸ See the Constitution of the Republic of Kosovo, Article 22.

¹⁹ See the Decision of the Constitutional Court of the Republic of Kosovo for the Case KI 89/13, Ref. no. MM630 / 14, dated 13 May 2014, paragraph 51.

4. The legal nature of the Law on Gender Equality and its relation to other laws

The Law on Gender Equality is a special law (*lex specialis*), which aims to guarantee, protect and promote gender equality.²⁰ This law is a separate legal framework that has laid down some principle rules of equal treatment between genders, reference to international standards and local laws on equal treatment of genders,²¹ the prohibition of gender discrimination,²² protective measures,²³ enforcement mechanism,²⁴ measures of equal treatment in employment, education and social security²⁵, and sanctions for non-implementation of the law.²⁶ However, the LGE has a close connection with other laws regulating certain areas, as these laws also provide guaranteeing and protecting of equal treatment between genders in these areas.²⁷

Violations of human rights, but also rights regulated by specific laws on certain materials (material laws), constitute violation of this law. As an example, the Constitution, Law on Family, Law on Heritage, Law on Social and Family Services, Law on Health, Labour Law, Law on Education, Law on Social Scheme, the Criminal Code, etc., regulate certain aspects of Parties rights, which also include aspects of equality before the law, but also the specific rules of equal treatment between genders. Therefore, the LGE should not only be implemented as a separate law, but should be viewed and implemented in conjunction with other laws.

The Law on Gender Equality only sets out some basic rules, but specific rules are defined by specific laws. Equal treatment of genders is therefore required to be implemented within the framework of terms and conditions established by these laws. If specific laws did not foresee or regulate equal treatment of genders, then they should be amended and take into account the requirements arising from the

²⁰ See LGE, Article 1 and comment on this article.

²¹ See LGE, Articles 1 and 2, as well as comment for these articles.

²² See LGE, Article 4 and comment on this article.

²³ See LGE, Articles 5 and 6, as well as comment for these articles.

²⁴ See LGE, Articles 7 – 14 and comment for these articles.

²⁵ See LGE, Articles 15-20 and comment for these articles.

²⁶ See LGE, Article 23 and comment part.

²⁷ Among others, see Law no. 2004/32 on the Family of Kosovo, Official Gazette of the PISG, no. 4/2006, dated 1 September 2006, Article 3; Law no. 2004/26 on Kosovo's Legacy, Official Gazette of the PISG, no. 3/2006, dated 1 August 2006, Article 3; Labor Law no. 03 / L-212, Official Gazette of the Republic of Kosovo, no. 90, dated 01 December 2010, Law no. 03 / L-182 on Protection against Domestic Violence, Official Gazette of the Republic of Kosovo, 76/2010, dated 10 August 2010; Code no. 04 / L-082 of the Criminal Code of the Republic of Kosovo, Official Gazette of the Republic of Kosovo, no.19, dated 13 July 2012; Law no. 05 / L-021 on Protection from Discrimination, Official Gazette of the Republic of Kosovo, no. 16, dated 26 June 2015; Law no. 2003/15 on the Social Assistance Scheme in Kosovo, as amended and supplemented by Law no. 04 / L-096, Official Gazette of the Republic of Kosovo, no. 15, dated 13 June 2012; Law no. 04 / L-131 on State Pension Funds, Official Gazette of the Republic of Kosovo, no. 35, dated 05 June 2014; Law no. 04 / L-037 on Higher Education in the Republic of Kosovo, Official Gazette of the Republic of Kosovo, no. 14, dated 9 September 2011; Law no. 04 / L-125 on Health, Official Gazette of the Republic of Kosovo, no. 13, dated 07 May 2013.

LGE. The LGE also lays down the obligation to implement EU Directives in the field of gender equality, international conventions and the practice of ECtHR and ECJ. Thus, the LGE is presented as a primary law (framework) in relation to specific laws and creates the obligation to apply criteria and standards for equal treatment between genders. If there is a disagreement between the LGE and the specific laws, the LGE has priority in implementation.

COMMENTARY OF THE LAW ON GENDER EQUALITY

LAW No. 05/L-020 ON GENDER EQUALITY, Official Gazette of the Republic of Kosovo, no. 16, dated 26 June 2015.

CHAPTER I GENERAL PROVISIONS

Article 1

Purpose

1. **This Law shall guarantee, protect and promote equality between genders as a basic value of democratic development of society.**
2. **This Law determines the general and specific measures to ensure and protect the equal rights of men and women, and defines the Institutions responsible and their competencies.**
3. **This Law is in accordance with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Directive on establishing a general framework for 2 equal treatment in employment and occupation (Directive 2000/78/EC); Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Directive 2006/54/EC); The Directive on the progressive implementation of the principle of equal treatment for men and women on issues of social security (Council Directive 79/7/EEC, of 19 December 1978); Directive on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC (Directive 2010/41/EU, of 7 July 2010); Directive on the implementing the principle of equal treatment between men and women in the access to and supply of goods and services (Directive 2004/113/EC).**

Comment, Article 1

1. *General Review.* The Law on Gender Equality is a legal basis that aims to create legislative and institutional mechanisms to establish and regulate equal

treatment and protection of women's and men's rights (women and men, girls and boys) in all spheres of life. The law has used the expression "equal treatment of males and females (alb. "meshkujt dhe femrat") and we comply with this terminology, even though there are dilemmas regarding the expression, with opinions that the term "*women and men (alb. "gratë dhe burrat") should be used*".²⁸ It should be added that the term "sex differentiation" and "gender differentiation" are often used in literature, as well as in legislation. However, it must be underlined that, while the term "sex differentiation" is primarily used as a biological criterion to make distinction between man and woman, the term "gender" is much broader encompassing social differences between men and women, such as the relevant ideas for their role in family and society, namely a social category.²⁹ The issuance of such a law is conditioned by the lack of implementation of specific laws, when it comes to equal treatment of all citizens, taking here in consideration gender-based treatment. In other words, the legislator wanted to ensure equal treatment between the genders and to eliminate the possible forms of gender-based discrimination by a special law. If the question arises as to what situations the law is required to be applied, then we may say that the law should be applied in all areas. However, in particular, the law has also counted some areas that may be more specific for ensuring equal treatment and achieving effective equality between genders.

2. It should be noted that many reports and analysis of the situation in Kosovo have shown that the Law on Gender Equality is not properly implemented, because in many spheres of life there is a significant lack of female involvement in different institutions and organizations of the private and public sector. These data were also found in the Report of the Parliamentary Commission on Human Rights, Gender Equality, Missing Persons and Petitions, through which was conducted monitoring of the implementation of the Law on Gender Equality of Kosovo no. 2004/2.³⁰ Thus, although there are specific laws that provide for equal treatment between genders, through this report it was concluded that there is a negative relation in terms of involvement of female gender in different areas, such as in employment, education, health, property issues and other sectors.

²⁸ There are many debates with regards to the proper terminology in this law, as to whether the term "males and females" or "men and women", "girls and boys" should be used. However, for the purposes of this commentary and of law implementation, the terminology used in the law will be preserved - i.e. the expression "females and males".

²⁹ Susanne Burri and Sacha Prechal, EU Gender Equality Law, updated in 2013 at: European Commission, European Network of Legal Experts in the Field of Gender Equality, Directorate-General for Justice Unit JUST/D/1, January 2014, p. 1.

³⁰ See the Assembly of the Republic of Kosovo, IV-th Legislature, and Parliamentary Committee on Human Rights, Gender Equality, Missing Persons and Petitions, Monitoring Report on the Implementation of the Law on Gender Equality of Kosovo no.2004/2, July 2013. Also, see: research "Participation, the role and position of women in central, local institutions and political parties in Kosovo, carried out by AGE and in the Kosovo Assessment Program for Gender Equality 2008-2013.

Comment, Article 1, paragraph 1

1.1 In paragraph 1 of this Article, the purpose of the law is emphasized. This purpose is focused on guaranteeing, protecting and promoting gender equality. This paragraph contains three basic expressions “*guaranteeing*”, “*protecting*” and “*promoting*” gender equality, by setting the gender equality as a fundamental value for the democratic development of the society.

1.1. a) “*Guaranteeing*” equality between genders, as an expression, refers to some mechanisms which ensure equality between genders, because without guarantee, other actions will not be possible. Firstly, guaranteeing of equality is ensured by law, implying here the establishment of the necessary legal infrastructure in all segments of life, as a basis to achieve equality. If a right is not guaranteed by law, it cannot be required to be implemented; even law enforcement mechanisms may not succeed, if they are not based on legal grounds. The right of gender equality in Kosovo is guaranteed by the highest legal act of the country, the Constitution of the Republic of Kosovo. Article 3 guarantees equality before the law for all individuals, as well as respect for human rights, thus including equality between genders.³¹ Precisely and expressively, guaranteeing of gender equality is provided in Article 7, which refers to the fundamental values, contained in the Constitution. Paragraph 2 explicitly stipulates the equality between genders, as follows: “*The Republic of Kosovo ensures gender equality as a fundamental value for the democratic development of the society, providing equal opportunities for both female and male participation in the political, economic, social, cultural and other areas of societal life*”³²

1.1.b) With the Constitution of the Republic of Kosovo some of the most important international agreements and instruments are directly implemented in the field of guaranteeing human rights, some of which are listed in the Constitution, Article 22.³³ Among the instruments provided are the following: (1) *Universal Declaration of Human Rights*; (2) *European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols*; (3) *International Covenant on Civil and Political Rights and its Protocols*; (4) *Council of Europe Framework Convention for the Protection of National Minorities*; (5) *Convention on the Elimination of All Forms of*

³¹ The Constitution of the Republic of Kosovo, Article 3, stipulates: “1. The Republic of Kosovo is a multi-ethnic society consisting of Albanian and other Communities, governed democratically with full respect for the rule of law through its legislative, executive and judicial institutions. 2. The exercise of public authority in the Republic of Kosovo shall be based upon the principles of equality of all individuals **before the law and with full respect for internationally recognized fundamental human rights and freedoms**, as well as protection of the rights of and participation by all Communities and their members”.

³² The Constitution of the Republic of Kosovo, Article 7, paragraph 2

³³ The Constitution of the Republic of Kosovo, Article 22.

Racial Discrimination; (6) Convention on the Elimination of All Forms of Discrimination Against Women; (7) Convention on the Rights of the Child; (8) Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.

1.1.c) Each of the international conventions or instruments contains provisions guaranteeing human rights and freedoms, but some of them the equality between genders in particular. Universal Declaration of Human Rights (hereinafter UDHR), Article 2, par. 1 says: “*Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*”;³⁴ The European Convention on Human Rights, namely Article 14 which prohibits discrimination, stipulates: “*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*”³⁵; The International Covenant on Civil and Political Rights (ICCPR), in Article 2, paragraph 1, guarantees civil and political rights without discrimination, including non-discrimination on grounds of sex, as follows: “*1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*”.³⁶ Convention on the Elimination of All Forms of Discrimination against Women (known as CEDAW), in Article 1, has given importance to the regulation and guaranteeing of gender equality, eliminating any form of discrimination, including discrimination on grounds of gender (sex). Article 1 underlines: “*For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field*”. While in Article 2, in a more pronounced way is foreseen that states shall take all measures to condemn the discrimination of women.³⁷ Even in EU law, the Charter of Fundamental Rights, Article 6, sets out the

³⁴ See UDHR, Article 2.

³⁵ See ECHR, Article 14.

³⁶ See ICCPR, Article 2.

³⁷ For more, see CEDAW.

principle of non-discrimination and equal treatment. The Courts should assess situations and apply this principle in all cases.³⁸

1.1.ç) Also, the Constitution of the Republic of Kosovo has guaranteed equality between genders under Article 24, referring to equality before the law. Article 24, paragraph 1, stipulates: “All are equal before the law. Everyone enjoys the right to equal legal protection without discrimination”.³⁹ Non-discrimination and equal treatment before the law also includes equal treatment when it comes to equal rights between genders. However, Article 24, paragraph 2, specifically guarantees equal treatment before the law, including non-discrimination on grounds of race, colour, **gender** ... etc.⁴⁰ In this way, the Constitution has established fundamental principles, on the basis of which through specific laws, should be ensured equal treatment of all individuals regardless of differences, including equal treatment between genders, respectively sexes. The Constitution has left no room for any particular law to have more or fewer rights for a particular gender, in any area. The principle of equal treatment between genders falls within equal treatment before the law, as a general principle that is applied also in the EU law, which implies that there should be no lesser rights for one gender than the other.⁴¹ When reference is made to equal treatment before the law, this means that each law regulating certain social relations should also contain specific articles in the form of principles that will guarantee equal treatment before the law.

1.1.d) “*Protection*” of gender equality, as a special expression in paragraph 1 of Article 1, should refer to the application of legal norms, that is, what is guaranteed to be protected. It would be pointless that human rights and equal treatment between genders should only be foreseen by law, but have no mechanisms to protect these rights guaranteed by legal acts. Thus, the purpose of this law is to provide for law enforcement mechanisms, in particular to pay attention to the mechanisms that ensure the protection of equal treatment between genders. This includes administrative, judicial, prosecutorial and self-governing bodies in private institutions or private legal entities. This is also stated in paragraph 2 of Article 1, defining the mechanisms guaranteeing gender equality.

³⁸ Nuria Elena Ramos Martin, Positive Action in EU Gender Equality Law: Promotion of Women in Corporate Decision –Making Positions, Labour Law, Economic Changes and New Society, 2014, p. 20-33, p. 23.

³⁹ The Constitution of the Republic of Kosovo, Article 24.

⁴⁰ The Constitution of the Republic of Kosovo, Article 24, paragraph 2: “*No one shall be discriminated against on grounds of race, colour; gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status*”.

⁴¹ Christopher McCrudden and Sacha Prechal, The Concepts of Equality and Non-Discrimination in Europe: A practical Approach, European Network of Legal Experts in the Field of Gender Equality, European Commission Report, 2009, p. 4.

Paragraph 2

1.2 In paragraph 2 of this article it is explained that this law determines the general and specific measures to ensure and protect the equal rights of men and women. Also, this law defines the Institutions responsible and their competencies to ensure and protect the equal treatment between genders.

1.2. a) Article 5 of this law sets out general measures to ensure equality between women and men. In this regard, several general measures are listed, such as: analyzing the status of women and men in the respective organization and field; adoption of strategies and action plans for the promotion and establishment of gender equality in accordance with the Kosovo Program for Gender Equality; gender mainstreaming of all policies, documents and legislation, etc.⁴², while specific measures are foreseen in Article 6 of this Law.⁴³

1.2. b) Paragraph 2 of this article also defines the responsibilities of the institutions that should care for and ensure equal treatment between genders, respectively between males and females. This is the part that should be considered in connection with other relevant articles of this law, where the responsible institutions, in particular articles 7-11, which define the Agency of Gender Equality as the responsible institution, Article 12 for relevant officials in ministries and municipalities, Article 13 for the Ombudsman and Article 14 for political parties.⁴⁴

Paragraph 3

1.3 Paragraph 3 of Article 1 stipulates that this Law is consistent with a considerable number of international conventions and EU Directives for the protection of human rights, gender equality and non-discrimination. Not only is the law consistent, but the emphasis in this paragraph is determined by the fact that all that is set forth in this law must be interpreted in connection with these international standards and the practice created by the relevant bodies for the implementation of these acts.

1.3. a) The Convention on the Elimination of All Forms of Discrimination against Women (hereinafter “CEDAW”) is an international act that aims to oblige states to develop mechanisms that do not discriminate women, as the most discriminated category in many societies.⁴⁵ Article 1 of this

⁴² For more with regards to general measures, see Article 5 of this law and the commentary part on these measures.

⁴³ For more with regards to specific measures, see Article 6 of this law and the commentary part on these measures.

⁴⁴ Regarding the responsibilities of the responsible institutions, see Articles 7 to 14, as well as the commentary part on these articles.

⁴⁵ See the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), approved and open

convention stipulates: “*For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field*”.⁴⁶

1.3.b) In the abovementioned sense, all bodies/authorities while implementing specific laws should have regard to this convention and this law is also interpreted in conjunction with the articles of this convention. Article 2 of the convention also foresees the obligations of States to include in their legislation certain measures to prevent discrimination, such as: the inclusion of equality between men and women in their constitutions, to envisage legal measures and sanctions, to impose legal and judicial protective measures, to take measures to prevent discrimination against women in any organization and enterprise, to abolish any legal provision, including criminal offenses representing discrimination against women.⁴⁷ The Convention envisages not only the formal-legal aspect of the protection against discrimination, but also the *de facto* aspect, that is practical application of these standards laid down in the convention.⁴⁸

1.3. c) In the provision of Article 1, paragraph 3, it is envisaged the compliance of the law with the *Directive establishing a general framework for equal treatment in employment and occupation (Directive 2000/78/EC)* and the *Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Directive 2006/54/EC)*. In the sense of this norm, particular emphasis is set on the fact that the law itself should be in compliance with these directives. In fact, the law is in line with these directives, as far as it is written and harmonized by specific articles. However, the meaning of the norm should be expanded so that when interpreting the provisions of this law, but also other laws referring to the employment matters, they are consistent with these directives and to eliminate the forms of gender discrimination they should foresee equal treatment between men and women.

1.3.c) In the Council of Europe Directive, known as Directive 2000/78/EC ⁴⁹

for signature, ratification and accession by the General Assembly, through its Resolution 34/180, dated 18 December 1979, and which has entered into force on 3 September 1981.

⁴⁶ See CEDAW, Article 1.

⁴⁷ See CEDAW, Article 2.

⁴⁸ See CEDAW, Article 4.

⁴⁹ **Directive of the Council 2000/78/EC, dated 27 November 2000, on establishing a general framework for equal treatment in employment and occupation**, *Official Gazette L 303*, 02/12/2000 p. 0016 – 0022 accessible at: <http://>

establishing a general framework for equal treatment in employment and occupation, Article 1 also sets out the objective that States lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.⁵⁰ For the purposes of this Directive, “*equal treatment principle*” means that there will be no direct or indirect discrimination for any of the reasons mentioned in Article 1. For the purposes of paragraph 1, direct and indirect discrimination have been listed: a) *direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1*; b) *indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless: (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or (ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.*

1.3.d) In the content of Article 1 of the Directive is given the framework within which the states should create the conditions for equal treatment of all persons, genders, etc., with some reasonable exceptions, but which cannot be extended so as to pose a discrimination form.

1.3. dh) In addition, Directive 2006/54/EC **on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation**, which has amended the previous Directives with regards to this matter, has foreseen in Article 2: “Equality between men and women as a fundamental principle and the principle of Community law under Articles 2 and 3(2) of the Treaty and the jurisprudence of the Court of Justice. These provisions of the Treaty declare equality between men and women as a ‘*task*’ and a ‘*purpose*’ of the Community and impose a positive obligation to promote it in all its activities.”⁵¹ This Directive also provides in Article 3 that the Court of Justice has found that the basis of the principle of equal treatment for

eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML

⁵⁰ See Directive 2000/78/EC, Article 1.

⁵¹ Directive 2006/54/EC of the European Parliament and the Council, dated 5 July 2006, on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), Official Gazette of the European Union, L 204/24, 26.7.2006.

men and women may not be restricted to prohibiting discrimination based on the fact that a person is of another sex. In view of its purpose and the nature of the rights, it seeks to protect, it also applies to discrimination arising from a change of person's gender. In this sense, the directive has envisaged any form of discrimination in terms of gender differences, but also when it comes to gender changes, a well-known phenomenon.

1.3.e) The Law on Protection against Domestic Violence has strengthened the function of the law by linking it with the compliance with this directive, by interpreting the law with all forms of discrimination prohibition, when it comes to rights in employment and occupation. Thus, the standards envisaged by this Directive and those foreseen by the practice of the Court of Justice need to be applied even in the cases of the implementation of the LGE.

1.3.f) Paragraph 3 also provides the compatibility of the LGE with the Directive on the progressive implementation of the principle of equal treatment of men and women in social security matters (Directive of the Council (78/7/ECC), dated 19 December 1978). This directive refers to social security, and in Kosovo there are several laws governing different forms of insurance, such as the Law on Social Schemes, the Law on Safety and Health at Work, the Law on Pensions, etc.⁵² Also, Article 16 of this law determines the equal treatment between genders, in the sense of occupational social security schemes.⁵³

1.3.g) Paragraph 3 also provides the alignment of legislation with the Directive on the implementation of the principle of equal treatment between men and women engaged in self-employment activities and repeals the Council Directive 86/613/EEC (EU Directive 2010/41, dated 7 July 2010).⁵⁴ Therefore, during the implementation of the law, this Directive and the practice developed with regard to this Directive or other Council Directives should be taken into account if the existing Directive has been amended.

1.3.gj) Directive on implementing the principle of equal treatment between men and women in access to and supply of goods and services (Directive 2004/113 / EC).⁵⁵ This directive is also one of the Directives of the Council of Europe, which should be taken into account when implementing this law and other laws, when it comes to equal treatment of genders.

⁵² See the Labour Law no. 03/L-212, Official Gazette of the Republic of Kosovo, no. 90, 01 December 2010, accessible at: <https://gzk.rks-gov.net/ActDocumentDetail.aspx?ActID=2735>,

⁵³ For more, see Article 16 and comment part.

⁵⁴ Directive 2010/41/EU of the European Parliament and of the Council, dated 7 July 2010 on the implementation of the principle of equal treatment between men and women engaged in self-employment and repealing of Council Directive 86/613/EEC, accessible at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:180:0001:0006:en:PDF>

⁵⁵ Directive of the Council 2004/113/EC, dated 13 December 2004 on the implementation of the principle of equal treatment between men and women in access to and supply of goods and services, accessible at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32004L0113>

Article 2

Scope

- 1. This Law applies to men, women and persons who have a protected characteristic of gender identity or sex determination, and guarantees equal opportunity and treatment in public and private areas of social life, including political and public life, employment, education, health, economy, social benefits, sport and culture and other areas set out by the present or other law.**
- 2. The prohibition of discrimination based on gender and sex and obligations to promote equality of men and women in this Law shall mean the inclusion of equality and non-discrimination on the protected characteristic of gender identity.**
- 3. This Law ensures the institutional framework necessary for implementation**
- 4. Nothing in this Law shall be construed so as to restrict or diminish any existing rights provided for in other laws, or applicable international agreements and instruments.**

Comment, Article 2

2. The article defines the scope of application of this law by explicitly stating that the provisions of this law apply to men, women and persons having a protected characteristic of gender or sex identity.

Paragraph 1

- 2.1 Paragraph 1 of Article 2 sets out several legal requirements for equal treatment between the genders and sets out the scope of the law in this regard. These legal provisions guarantee equal treatment in the public and private sphere of social life, including political and public life, employment, education, health, economy, social benefits, sports, culture and other spheres defined by this or any other law.⁵⁶ The scope of this law undoubtedly derives from the Constitution of the Republic of Kosovo, which contains many provisions through which the principle of gender equality is guaranteed. Article 7, par. 2 of the Constitution provides that: “*The Republic of*

⁵⁶ In addition to the Law on Gender Equality, as *lex specialis*, there are some other laws that promote the concept of gender equality, e.g Law no. 03/L-149 on Civil Service, Law no. 05/L-021 on Protection from Discrimination, etc.

*Kosovo ensures gender equality as a fundamental value for the democratic development of society, equal opportunities for participation of women and men in political, economic, social, cultural and other areas of social life*⁵⁷, defining gender equality as a fundamental value of the constitutional order. However, the Constitution mentions the concept of gender equality in other provisions that regulate the construction and functional modelling of the most important public institutions.⁵⁸ Pursuant to constitutional order, the composition of the legislative, judiciary, Constitutional Court, Prosecutorial Council, Judicial Council, State Prosecutor and Civil Service must be organized by respecting and guaranteeing the principle of gender equality.⁵⁹ The Constitution provides sufficient safeguards for genders to be represented and participate in public life equally, the Court further considers that women of equal qualifications as men in Kosovo society have to be broader involved in public life and in the formation and functioning of the public bodies. This is to be achieved through the implementation of the constitutional principles, values and mechanisms.⁶⁰ It is in the mandate of the Government of Kosovo to implement the Law on Gender Equality and to ensure that the principle of equality not only remains *de jure* but also *de facto*. Of course, in the wider function of law enforcement and the elimination of various factors that hinder the implementation of the principle of gender equality in the country, the whole society needs to be engaged. Therefore, this law, in its light, has foreseen this legal regulation in order to create additional mechanisms for equal treatment between the genders in all spheres of social life, among others, in *political and public life, employment, education, health, economy, social benefits, sports, culture and other spheres defined by this or any other law*.

Paragraph 2

2.2 Implementation of the gender equality principle is undoubtedly closely related to implementation of the non-discrimination principle and paragraph 2 of this article refers precisely to prohibition of gender discrimination. Unequal treatment of an individual compared with treatment accorded to

⁵⁷ See the Constitution of the Republic of Kosovo, Article 7.2.

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⁵⁹ Constitution of the Republic of Kosovo, see Articles: 71 [Qualifications and Gender Equality]; 104 [Appointment and Removal of Judges]; 108 [Kosovo Judicial Council]; 109 [State Prosecutor], 110 [Kosovo Prosecutorial Council], and Article 101 [Civil Service],

⁶⁰ See: JUDGMENT OF THE CONSTITUTIONAL COURT OF KOSOVO, CASE NO. K013/15 Evaluation of an amendment to the Constitution of the Republic of Kosovo, proposed by fifty-five deputies of the Assembly of the Republic of Kosovo, and referred by the President of the Assembly of the Republic of Kosovo on 6 February 2015 with letter no. 05-259/DO-179

another person based on gender is considered gender discrimination. The prohibition of discrimination is regulated by many international documents and mechanisms, the most important being the International Covenant on Civil and Political Rights⁶¹ and the European Convention on Human Rights⁶² and Protocol no. 12⁶³. Other very important documents combating the most specific aspects of discrimination are the UN Convention on the Elimination of All Forms of Discrimination against Women⁶⁴, the UN Convention on the Elimination of All Forms of Racial Discrimination,⁶⁵ the UN Convention on the Rights of Persons with Disabilities⁶⁶ and Convention no. 111 of the International Labour Organization⁶⁷, which prohibits discrimination in the workplace.

Here are also many Council of Europe documents, amongst them, the 1996 European Charter on Social Rights, which includes the prohibition of discrimination in terms of work but also on the basis of differences in sexes.⁶⁸ With other articles, specific areas have been specified as to how gender equality can be protected.

Paragraph 3

2.3 Paragraph 3 of this Article shows that this law regulates the institutional framework that will ensure implementation of this law. In the law, in detail, the powers of the Agency for Gender Equality as well as other officials in institutions responsible for implementing the provisions of this law

⁶¹ The International Convention on Civil and Political Rights was adopted by the General Assembly of the United Nations, also known as the World Parliament, with Resolution 2200A (XXI). In Kosovo it is directly applicable under Article 22 of the Constitution.

⁶² The European Convention on Human Rights, signed on 4 November 1950, entered into force on 3 September 1953. In Kosovo it is directly applicable under Article 22 of the Constitution.

⁶³ The 12th Protocol to the European Convention on Human Rights, adopted on 4 November in Rome, entered into force on 1 April 2005. Case *Sejdc and Finci v. Bosnia and Herzegovina* is the first case in the jurisprudence of the European Court of Human Rights in which the Court found a violation of Article 1 of Protocol 12

⁶⁴ UN Convention on the Elimination of All Forms of Discrimination Against Women, adopted by Resolution 34/180 of the UN General Assembly, at its 34th Session on 18 December 1979. In Kosovo it is directly applicable under the article 22 of the Constitution.

⁶⁵ The UN Convention on the Elimination of All Forms of Racial Discrimination, adopted by the General Assembly, by Resolution 2106 of 21 December 1965. In Kosovo it is directly applicable under Article 22 of the Constitution.

⁶⁶ UN Convention on the Rights of Persons with Disabilities, adopted by the General Assembly, with Resolution A/RES/61/106. This Convention is not directly applicable in Kosovo

⁶⁷ Convention no. 111 of the International Labour Organization, approved by the General Assembly, the Convention adopted on 25 June 1958 by the General Conference of the International Labour Organization at its forty-second session. Entry into force: 15 June 1960, in accordance with Article 8.

⁶⁸ Council of Europe, European Union Agency for Fundamental Rights, Handbook on European non-discrimination law, 2010, p. 13; See also Article 20 and Article E in part v European Social Charter which states that: "With a view to ensuring the effective exercise of the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex, the Parties undertake to recognise that right and to take appropriate measures to ensure or promote its application in the following fields: a) access to employment, protection against dismissal and occupational reintegration; b) vocational guidance, training, retraining and rehabilitation; c) terms of employment and working conditions, including remuneration; d) career development, including promotion".

and other laws to ensure that gender equality are regulated.⁶⁹ Without an institutional framework that takes care of law implementation there would be no effective law implementation. Although, according to the law, each institution should ensure equal treatment between the sexes as well as legal protection, however, a special mechanism has been established by law - the Agency for Gender Equality - as a body whose primary duty is the implementation of this law and other laws when it comes to equal protection between genders.

Paragraph 4

- 1.3 Paragraph 4 of this law clarifies that the provisions of this law cannot be construed so as to diminish the rights that are guaranteed by domestic laws and other international acts. However, the provision is of such a nature that if gender equality is guaranteed by other acts, this means that this law cannot diminish these rights. However, while the law requires equal treatment between genders, consequently, according to the provisions of this law, the public bodies and institutions of Kosovo must change the legal provisions that have discriminatory character for any gender, or which diminish these rights.

Article 3

Definitions

1. Terms used in this Law shall have the following meaning:

- 1.1. **Gender Equality** - shall be the entire and equal exercise of women and men, of their human rights. It is the non-presence of gender based discrimination, in opportunities, sharing of resources or benefits, as well as access to services;

- 1.2. **Woman** - includes any person that considers itself as such, regardless of age or marital status;

- 1.3. **Man** - includes any person that considers itself as such, regardless of age or marital status;

- 1.4. **Equal treatment** - equal treatment with no direct or indirect discrimination based on gender and promotion of gender equality;

⁶⁹ See Articles 7, 8, 9 and part of commentary.

1.5. **Direct gender discrimination** - shall be considered when an individual is treated less favourably on grounds of gender, is treated, has been treated or would be treated an individual of the other gender in comparable situation;

1.6. **Indirect gender discrimination** - shall be considered when, a provision, criterion or impartial practice shall, have or will put person of other gender at an unequal position unless that such provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;

1.7. **Sex** - refers to the biological and physiological characteristics that define men and women;

1.8. **Gender** - is socially-constructed roles assigned to women and men, which is an acquired identity that is learned, changed over time, and varies widely within and across cultures

1.9. **Gender identity** - this protected characteristic covers the gender-related identity, appearance or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth;

1.10. **Equal opportunity** - ensuring full participation and equal to men and women in all areas of political, social, cultural, educational, economic and other areas established by the present or any other law;

1.11. **Harassment** - harassment is a situation where an unwanted conduct related to the gender, sex and gender identity, with the purpose or effect or violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment;

1.12. **Sexual harassment** - shall mean any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment;

1.13. **General measures** - are measures of a normative nature, with which it is achieved, protected gender equality and prevented gender discrimination by laws, which regulate specific areas, conducts in certain circumstances or the right approach for ensuring equal gender treatment;

1.14. **Special measures** - are temporary measures which aim to guarantee equal rights and promote gender equality in specific areas of social life;

1.15. **Unequal representation** - is when the participation or representation of one gender is less than fifty percent (50%) at any level of decision-making body in political and public life;

1.16. **Gender mainstreaming** - is the inclusion of a gender perspective into every stage of the process, planning, approval, implementation, monitoring and evaluation of legislation, policies or programs and budgets, in all political, economic and social areas, considering the promotion and advancement of equal opportunities between men and women;

1.17. **Gender responsive Budgeting** - is the implementation of Gender Mainstreaming in the budgetary process. This means the valorisation of budgets from the viewpoint of gender, in which case the gender question is taken into account at all levels of the budgetary process, and restructuring incomes and expenditures with the aim of promoting the equality of women and men;

1.18. **Violence on the grounds of gender** - shall mean all acts of violence that result in, or are likely to result in, physical, sexual, psychological, social or economic harm or suffering on the grounds of gender, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life;

1.19. **Victimization** - occur when a person suffers an adverse or negative consequences in response to a complaint (started procedures) or actions in order to apply the principle of equal treatment, as defined in Article 1 of this law, and/or when such person provides information, evidence or assistance in relation to the complaint procedure in case of discrimination;

1.20. **Pay** - the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his/ her employment from his/her employer;

1.21. **Occupational social security schemes** - on the progressive implementation of the principle of equal treatment for men and women in matters of social security whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social

security schemes or to replace them, whether membership of such schemes is compulsory or optional;

1.22. **Gender stereotypes** - are generalized views or preconceptions about attributes or characteristics that are ought to be possessed by, or the roles that are or should be performed by, men and women;

Comment, Article 3

3. Article 3 contains a number of definitions that clarify the terms used in this law, but also the very meaning of some categories of forms of discrimination. The definitions are of particular importance to the law because the provisions of the law should be reviewed and interpreted in conjunction with the definitions. However, some definitions are also related to the articles of law themselves, which also provide an explanation of the notion or type of discrimination. For example, the definitions “*direct gender discrimination*” and “*indirect gender discrimination*” are regulated by Article 4, paragraph 1. Therefore, even when interpreting, there should be a link between the definition and the norm itself provided for in Article 4.

Paragraph 1

- 3.1.1 With Article 3, “**Gender Equality**” is defined in this manner: *shall be the entire and equal exercise of women and men, of their human rights. It is the non-presence of gender based discrimination, in opportunities, sharing of resources or benefits, as well as access to services.* According to this definition, women and men not only have equal rights guaranteed by law in writing, but this also means achieving equality through the exercise of equal rights. Exercise of rights refers to all human rights, i.e. those guaranteed by domestic and international legal acts. Often, in practice, it is evident that the law has treated equally the rights between genders, but these are not achieved during the actual exercise of rights. So, *de jure*, the genders are equal in terms of human rights, but *de facto*, this aim of the legal norm is not achieved. Therefore, in the definition, it is emphasized that this gender equality is achieved even in the practical aspect. For example, property rights are guaranteed equally for both sexes, but in practice it is evident that the property is mostly registered in the name of the man, respectively male. Therefore, the law requires this practical approach be changed to achieve effective equality. Also, based on the Law on Inheritance, all heirs are equal regardless of gender,⁷⁰ but in practice, women renounce their inheritance

⁷⁰ . See Law no. 2004/26 on Inheritance in Kosovo, Official Gazette of PISG, no. 3/2006, 1 August 2006, Article 3.

to the benefit of men/brothers. The Law on Gender Equality requires this practice to be avoided and an effective exercise of equal rights for both sexes: women and men. This is also foreseen with the Kosovo Property Rights Strategy.⁷¹

3.1.2 Definition “**Woman**” includes “*any person that considers itself as such, regardless of age or marital status*”. With this definition, the law does not refer to biological aspect, but emphasized the fact that each person can determine his or her own gender. We consider that with this definition the phrase “*Woman*” is not sufficiently clarified because it is related to other laws that define gender and refer to biological aspects.⁷² However, the lawmaker has emphasized the fact that each person is entitled to choose his gender (sex) depending on his/her feelings, and implement this right with other relevant laws that also determine the manner of regulating the biological aspect of genders.

3.1.3 Definition “**Man**” includes “*any person that considers itself as such, regardless of age or marital status*”. The same thing was referred to female gender. The law allows the persons to decide about their gender and the way they feel in relation to it.

3.1.4 “**Equal treatment**” is considered “equal treatment with no direct or indirect discrimination based on gender and promotion of gender equality” and places emphasis on what is considered equal treatment. By this it is meant the elimination of any form of discrimination when it comes to genders, and by this definition it is specified that discrimination can be direct and indirect and should be eliminated during implementation of relevant laws. Moreover, the LGE itself through Article 4 prohibits direct and indirect gender discrimination.⁷³

3.1.5 “**Direct gender discrimination** shall be considered when an individual is treated less favourably on grounds of gender; is treated, has been treated or would be treated an individual of the other gender in comparable situation;”. With this definition, is foreseen elimination of forms of discrimination that can be directly manifested in a particular case by favouring one gender or by applying discriminatory measures, respectively, preventing another

⁷¹ See Kosovo Property Rights Strategy, Ministry of Justice, 2016, p. 12-13. Regarding access to property rights, see POLIS Organization, Women’s Property Rights, Practice Implementation Legislation, 2017, accessible to: <http://abgj.rks-gov.net/Portals/0/1.%20Raport%20hulumtues%20-%20Final.pdf>

⁷² See Law no. 02/L-76 on Reproductive Health, Official Gazette of the Republic of Kosovo, no. 24, May 2, 2008, Article 2 “Definitions” and Articles 7-9 clarify the meanings of the term “woman” in the biological sense as the child’s mother and her rights.

⁷³ See Article 4 of this law and the part of the commentary.

gender from realizing his/her rights. No gender should have more rights than the other, guaranteed by law or realized in practice.

In the case of ECtHR, **Markin vs. Russia**, *failure to issue permission to the father to exercise parental supervision by military authorities, with the justification that this right belongs only to the military personnel of the female gender, was considered by the Court as a violation of Articles 8 and 14 of the ECHR*.⁷⁴ Consequently, military authorities applied direct discriminatory measures by not recognizing the father's right to exercise parental rights. Thus, laws and conventions often do not specify exactly what discrimination is, but practice has to identify this and to clarify when there is discrimination.⁷⁵ The concept of direct discrimination is also recognized in the context of EU law, ECHR and directives, and it is more easily identifiable than indirect discrimination because it speaks of a comparable situation when a person is granted less rights or treated less than the other person in a similar situation. This concept includes less favourable treatment, the same, comparable situation and the same protection grounds⁷⁶. EU law speaks of cases where individuals of EU member states are treated less favourably, but analogously is also used for cases of gender discrimination.

3.1.6 “**Indirect gender discrimination**” *shall be considered when, a provision, criterion or impartial practice shall, have or will put person of other gender at an unequal position unless that such provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary*”. The emphasis of this definition also includes cases where state legislation can provide for different legal conditions for genders, giving more or diminishing one's gender rights in relation to the other. Also, this includes the possibility that a gender is treated more favourably when exercising rights in practice. Therefore, states should eliminate forms of legal discrimination but also enforcing laws and realizing rights in practice should be equal. In Kosovo laws, is mentioned the equal treatment of gender rights, but in practice, their realization is often more difficult for the female gender. *Example*: the Law on Inheritance, all generations, regardless of gender have equal rights to inheritance, but in

⁷⁴ ECHR, **Markin vs. Russia**, application no. 30078/06, the decision of 22 March 2012, p. 2 and part of decision/enacting clause, p. 44.

⁷⁵ Ivana Radacic, Critical Review of Jurisprudence: An Occasional Series, *Gender Equality Jurisprudence of the European Court of Human Rights, The European Journal of International Law Vol. 19 no. 4, EJIL 2008, fq. 841- 856, fq. 842.*

⁷⁶ Council of Europe, European Union Agency for Fundamental Rights, Handbook on European non-discrimination law, 2010, fq. 22-25.

practice, there are many cases where women give up the inheritance⁷⁷ in favour of men.⁷⁸ Even the ECHR and EU law, besides recognizing direct discrimination when two persons are treated differently for the same situation, they also recognize indirect discrimination when dealing with the same two persons for different situations. Thus, this discrimination means that there must exist: 1) neutral rules, criteria or practices of the same, 2) a significant negative effect on a protected group, 3) and a comparison of situations.⁷⁹

3.1.7 **“Sex”** *refers to the biological and physiological characteristics that define men and women*. As can be seen from the definitions, the Law on Gender Equality has not properly clarified the terms used *“Gender”* and *“Sex”*. If we look at the Kosovo Family Law, the definition or term *“Sex”* is used to distinguish man and woman in biological aspect.⁸⁰ While the meaning of the term *“Gender”* is used in a different sense, not for the distinction between men and women but to indicate the affinity of persons in the family, which is a barrier to marriage but also realizing family rights based on affinity.⁸¹ There are 3 types of genders in terms of family rights: 1) Consanguinity, 2) Adoption, 3) Affinity⁸². Therefore, based on LGE, it is difficult to understand when it is referring to sexes and when to gender.

3.1.8 **“Gender** *is socially-constructed roles assigned to women and men, which is an acquired identity that is learned, changed over time, and varies widely within and across cultures*; As it is seen in this definition, the law gives another dimension to the meaning of gender, which focuses not only on the distinction between man and woman sexes in the biological aspect, but also on the social phenomenon or attribute that this distinction has taken, namely, male and female gender. It should be added that in this law gender is not used as in the Law on Family but also as a distinction between men and women.

⁷⁷ Law no. 2004/26 on Inheritance of Kosovo, Official Gazette of PISG, no. 3/2006, 1 August 2006, Article 3 and Article 11.

⁷⁸ Kosovo Center for Gender Equality, Women’s Property Ownership in Kosovo, 2011, p. 9-11, accessible in: <http://www.kgscenter.net/wp-content/uploads/2015/05/EdrejtajeTrash%C3%ABgimise.pdf>; POLIS Organization, Women’s Property Rights, Legislation vs Practice Implementation, 2017, accessible to: <http://abgi.rks-gov.net/Portals/0/1.%20Raport%20hulumtues%20-%20Final.pdf>

⁷⁹ Council of Europe, European Union Agency for Fundamental Rights, Handbook on European non-discrimination law, 2010, fq. 29-31.

⁸⁰ See Law no. 2004/32 on the Family of Kosovo, Official Gazette of the PISG, No. 4/2006, 1 September 2006, Article 14.

⁸¹ LFK, Articles 21, 22, 23

⁸² Haxhi Gashi/Abdulla Aliu/Adem Vokshi, Commentary on the Law on Family, published by GIZ, 2012, p. 68-73, 103.

3.1.9 Definition of Gender identity states that “this protected characteristic covers the gender-related identity, appearance or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person’s designated sex at birth;”. The definition of gender identity defines a person’s identity in terms of gender based on appearance, but also based on subsequent changes that may be done with surgical interventions, which are legal. Thus, not only gender identity at the time of birth alone shall be taken into account, but also that it change with the person’s growth and depending on sexual orientation medical intervention may be done to determine the gender identity. Thus, the definition and interpretation in this law should be extended to subsequent gender changes, not just the gender originally listed in the birth register as the first gender-determining moment. Within the ECtHR case, in the case *Hämäläinen vs. Finland*, the applicant was born in 1963 and lives in Helsinki, Finland, The applicant was born male. She always felt that she was a female in a male body but decided to cope with the situation. In 1996 she married a woman and in 2002 they had a child. The applicant started feeling worse in 2004 and decided in 2005 to undergo gender reassignment surgery. ⁸³ However, the ECtHR ruled that in this case there was no violation of the Convention when the state authorities had rejected the request for the change of civil registry with new data based on subsequent changes. However, this article provides for understanding that these gender differences in terms of sex change can be made in the future and thus differ from the sex that a person has at the time of birth.

3.1.10 “**Equal opportunity** *ensuring full participation and equal to men and women in all areas of political, social, cultural, educational, economic and other areas established by the present or any other law*”. With this definition is clarified that the genders not only have equal rights but should also be given equal opportunities in all areas of social life, such areas were also mentioned and regulated with special articles⁸⁴. Thus, definition has clarified that opportunities should be created by laws, for all areas of social

⁸³ ECtHR, *Hämäläinen Vs. Finland*, application no. 37359/09, decision of 16 July 2014. In the aforementioned case, the Applicant was diagnosed as transsexual in 2006. On 7 June 2006 the applicant changed her first names and renewed her passport and driver’s licence but she could not have her identity number changed. The identity number still indicates that she is male, as does her passport. On 2007 the applicant requested the local Register Office to confirm her as being female and to change her male identity number to a female one as it no longer corresponded to reality. However, the local register office refused this request. Later on, the Applicant filed a claim with the Helsinki Administrative Court and the Supreme Court on Administrative Matters. Both claims were rejected by the abovementioned courts. The Applicant addressed the ECtHR with a claim that Finland violated her right to privacy and family life on the ground that is not entirely recognized her new gender with regards to transformation from marriage to civil-partnership. Thus, the Applicant alleged that Articles 8, 12 and 14 of the [European Convention on Human Rights](#) were violated. The European Court of Human Rights, by a majority of votes, ruled that the Convention was not violated and recognized the decisions of the Finland authorities.

⁸⁴ See LGE, Articles 5, 15-19 and commentary part for these Articles.

life, but also be accompanied by practical measures.

3.1.11 “**Harassment** is a situation where an unwanted conduct related to the gender, sex and gender identity, with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment;”. The law prohibits any form of harassment based on gender differences, eliminating any form of intimidation, hostile approach, and degradation, depravity through which one gender or another is placed in such situations. These situations should be observed at by the prism of human behaviour and such behaviours should be banned. Competent authorities should always be prepared to take precautionary measures for any such events or actions not to appear in open or closed environments. With this, not only are the rights in gender equality violated, but human rights are also violated, guaranteed by local and international legal acts⁸⁵. Harassment may also appear as a criminal offense within the meaning of the Criminal Code of Kosovo (hereinafter CCK or the Criminal Code).⁸⁶

3.1.12 “**Sexual harassment** shall mean any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment; The definition provides clarification that any form of sexual harassment is prohibited. The legal provision is clear and includes elements that are governed by other applicable laws, in particular the Criminal Code,⁸⁷ the Law on Protection against Domestic Violence,⁸⁸ the Law on Protection from Discrimination, etc.⁸⁹

3.1.13 “**General measures**” are measures of a normative nature, with which it is achieved, protected gender equality and prevented gender discrimination by laws, which regulate specific areas, conducts in certain circumstances or the right approach for ensuring equal gender treatment; With this definition is given the explanation that through legal acts must be undertaken general measures to ensure gender equality. The general measures are defined in Article 5 of this law. Therefore, the interpretation of this definition should be considered in the light of Article 5.⁹⁰

⁸⁵ Constitution of the Republic of Kosovo, Articles 22, 23 and 24;

⁸⁶ See Code no. 04/L-082 Criminal Code of the Republic of Kosovo, Official Gazette of the Republic of Kosovo, No. 19, July 13, 2012, Article 186.

⁸⁷ Criminal Code of Kosovo, Article 150, paragraph 2.3 and criminal acts against the human body, with particular emphasis on the offenses of rape, harassment and sexual abuse.

⁸⁸ See Law no. 03/L-182 on Protection against Domestic Violence, Official Gazette of Kosovo, 76/2010, of 10 August 2010

⁸⁹ Law no. 05/L-021 on Protection from Discrimination, Official Gazette of the Republic of Kosovo, no. June 16, 26, 2015.

⁹⁰ See LGE, Article 5 and the part of the commentary.

3.1.14 **“Special measures”** *are temporary measures which aim to guarantee equal rights and promote gender equality in specific areas of social life;* This definition clarifies the situations where special measures should be taken to ensure equal rights between the genders and the promotion of these rights in specific areas. For more information on the content of these measures, see article 6 of this law.⁹¹

3.1.15 **“Unequal representation”** *is when the participation or representation of one gender is less than fifty percent (50%) at any level of decision-making body in political and public life;* with this definition is established a standard/criterion for ensuring gender equality. Any representation lower than 50% for one or the other gender in all social spheres is considered as unequal representation. In Kosovo, according to population statistics, woman and man population share is roughly the same margins with the ratio 49-51% or 50-50% woman and man.⁹² This provision requires that equal representation be achieved and there should be mechanisms to ensure this percentage of representation.

3.1.16 **“Gender mainstreaming -** *is the inclusion of a gender perspective into every stage of the process, planning, approval, implementation, monitoring and evaluation of legislation, policies or programs and budgets, in all political, economic and social areas, considering the promotion and advancement of equal opportunities between men and women;* This definition places emphasis on the equal gender mainstreaming in any sphere, which are also named in the content of the provision. Therefore, this implies that realistic efforts need to be made for equal gender mainstreaming, and that in Kosovo, female gender is less represented, and therefore there are needed mechanisms to ensure this female gender mainstreaming. Consequently, the question arises as to how to deal with circumstances when professional criteria for integration into workplaces and other political and social spheres are required. The law always requires the creation of opportunities for professional achievement and through this equal gender mainstreaming. The question arises: can there be any priority rights for any gender in order to integrate them into the spheres of social life? It should be emphasized that the law does not require this to be done outside merit bases, but to create equal opportunities for integration. With Bremen’s law in Germany it was foreseen to be given the right of priority to female gender and to have so-called positive discrimination to promote women’s rights.⁹³ The same opinion was given by the Labour Court and the

⁹¹ See LGE, Article 6 and the part of the commentary.

⁹² See AGE Report, Women and Men in Kosovo, 2011.

⁹³ Bremen Law on Equal Treatment for Men and Women in Public Service) (“Bremen law”)

German Federal Labour Court⁹⁴ However, in the same case, the ECtHR concluded that implementation of the Bremen law by which a candidate was automatically granted priority based on gender, without the same qualification criteria, only because she was underrepresented, constitutes gender discrimination⁹⁵. However, in the decision of the ECJ in the case of *Kalanke vs. Bremen*, the court held that there could be given priority in employment in accordance with Directive 76/207/EEC in cases where women are less represented, provided they have the same professional conditions, i.e. not automatically, but implying the under-representation to mean less than half within an employee/institution group.⁹⁶

3.1.17 Gender responsive Budgeting - *is the implementation of Gender Mainstreaming in the budgetary process. This means the valorisation of budgets from the viewpoint of gender, in which case the gender question is taken into account at all levels of the budgetary process, and restructuring incomes and expenditures with the aim of promoting the equality of women and men;* With this definition, explanations are given that both budget aspects and the distribution of public money should be made in a way that supports gender equality in terms of budget at all levels. In Kosovo, there are many initiatives to involve women in budgetary quotas in order to support projects and activities that involve greater involvement of women. With this is foreseen larger female gender representation in social life, and this is facilitated through budget allocations that support women's activities for the purpose of their integration into social life, as noted in the preliminary definition of "gender mainstreaming".

3.1.18 "Violence on the grounds of gender shall mean all acts of violence that result in, or are likely to result in, physical, sexual, psychological, social or economic harm or suffering on the grounds of gender, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life"; Causing violence to any individual is a violation of human rights. These rights are guaranteed by the constitution and other legal acts. Violence against human beings, regardless of gender, constitutes criminal offense. The content of this definition is very broad and it contains some forms of violence, each of which can be presented as separate criminal offense.⁹⁷ However, emphasis is on the fact that this violence is caused

⁹⁴ Ann Donahue, *The Kalanke Ruling: Gender Equality in the European Labor Market*, *Northwestern Journal of International Law & Business*, Vol. 18, Issue 3, Spring 1998, fq. 734.

⁹⁵ GjED, *Kalanke vs. Bremen*, Decision C-450/93, 17 October 1995, I-3078.

⁹⁶ GJED, *Kalanke v Bremen*, **Decision** C-450/93, 17 October 1995, I-3079.

⁹⁷ See KPC, Article 14, in conjunction with articles 189, 194, 195, 196 and the criminal offenses of Chapter XX- of offenses against sexual integrity. Although in the Criminal Code there are definitions other than the terms used in this article, however, the content of the actions falls into the content of actions that present different types of offenses against the body and human freedom.

on the basis of gender differences, respectively taking into account that this occurred due to a person or group belonging to a particular gender. Therefore, violence is forbidden not only as a violation of human rights, but also because it violates gender equality and manifests itself as a form of gender discrimination.

3.1.19 “**Victimization** occur when a person suffers an adverse treatment or negative consequences in response to a complaint (started procedures) or actions in order to apply the principle of equal treatment, as defined in Article 1 of this law, and/or when such person provides information, evidence or assistance in relation to the complaint procedure in case of discrimination”. This definition aims to clarify cases of victimization towards a person as a result of circumstances when he has used legal procedures to ensure equal treatment before the law, as required by this law and other laws. As a result of this, he or she experiences adverse treatment. Here are also understood other circumstances when this adverse treatment or victimization comes also as a result when a person has provided information or has proven and helped to identify cases of unequal treatment between genders.

3.1.20 “**Payment**” is the “*the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his/her employment from his/her employer*”. This definition has clarified the forms of payments that a person may receive regarding employment. Forms of discrimination may also appear on wages, salaries and other forms of remunerations. Therefore, understanding these definitions is important because salary and payment are not the same as it is the case with salary and other remunerations as a result of additional work, damages or other forms or remuneration for merits at work.

3.1.21 “**Occupational Social Security Scheme** on the progressive implementation of the principle of equal treatment for men and women in matters of social security whose purpose is to provide workers, either employees or self-employed, in an undertaking or group of undertakings, the area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them whether the membership in such schemes is compulsory or optional”. The social security schemes and the requirement for these categories to also have equal treatment between genders have been clarified by this decision. There are several laws in Kosovo that regulate different aspects of security schemes and various professional categorizations on the basis of which social security schemes of employees, self-employed,

businesses etc. are also built.⁹⁸ More generally, this Law with Article 16 has dealt with social security schemes and the manner of ensuring equal treatment between the genders in these schemes.⁹⁹

3.1.22 “**Gender stereotypes** are *generalized views or preconceptions about attributes or characteristics that are ought to be possessed by, or the roles that are or should be performed by, men and women*”. Gender stereotypes are circumstances that appear in society and that relate to people’s views or prejudices about which work or activity should be performed by men and which by women. Thus, gender differences are created with such prejudices. Thus, there emerges gender inequality. For example if there is a preconception that only women can deal with some type of work, this creates unequal treatment of the genders. Therefore, the purpose of the law is to avoid these prejudices or views.

Article 4

Prohibition of gender discrimination

1. **The direct or indirect gender discrimination is prohibited, including less favourable treatment of women for reasons of pregnancy and maternity, marital status, nationality, race, disability, sexual orientation, social status, religion, belief, age or any other basis defined by law or agreement and international instruments into force.**
2. **Gender-based violence is a form of discrimination that seriously inhibits women’s and men’s ability to enjoy rights and freedom on a basis of equality and is prohibited.**
3. **Harassment and sexual harassment are prohibited. Refusal or surrender of a person against such behaviour shall not be used as a basis for a decision affecting that person.**
4. **In order to prevent gender discrimination in legislation, policies, programs and practice, the principle of gender equality and gender integration, including benefits following pregnancy and child birth,**

⁹⁸ See Law no. 2003/15 on the Social Assistance Scheme in Kosovo, Amended and supplemented by Law no.04/L-096, Official Gazette of the Republic of Kosovo, no.15, 13 June 2012; Law no. 04/L-131 on Pension Schemes Financed by the State, Official Gazette of the Republic of Kosovo, no.35, 05 June 2014.

⁹⁹ See Article 16 and the comment section.

shall be applied in all planning, budgeting and implementation of the above acts by public and private entities.

- 5. Instruction to direct or indirect discrimination on the ground of sex shall be deemed to be discrimination within the meaning of this Law.**
- 6. There will be no victimization of persons involved in filling or porcessioning of complaints of discrimination, harassment or sexual harassment filed based on this law.**

Comment, Article 4

4. Article 4 prohibits discrimination by focusing on two key points: direct and indirect discrimination. Discrimination is the distinction or exclusion that is made to a person or a group of persons in relation to others.

Paragraph 1

- 4.1 Article 4, paragraph 1, foresees the prohibition of direct or indirect gender discrimination, including the types of discrimination for which legal protection may be sought. These types of discrimination are of a different nature and are mainly related to the person's condition or rapport with the state, or with others. At the end of this paragraph the possibility to present other types of discrimination which are not defined in this paragraph, but are foreseen by any other ground established by law or international agreements and instruments is allowed. This means that these types or causes are not the only ones on the basis of which discrimination can be caused, but there may be other causes that may be dictated in practice, but should always be looked at by international law and international standards in Article 1.¹⁰⁰
- 4.1.a) The right to protection from discrimination is a universal right. The European Convention on Human Rights, which is also applicable in Kosovo, prohibits discrimination in Article 14.¹⁰¹ Article 14 of the ECHR has been used by EU countries and ECtHR jurisprudence to ensure equal treatment of genders and the prohibition of discrimination on grounds of gender or sex.¹⁰² It has been emphasized in ECtHR decisions that equal treatment

¹⁰⁰ Regarding international standards for the prevention of discrimination, see section 1 and the comment section.

¹⁰¹ Article 14 of the Convention provides for the prohibition of discrimination according to which: "The enjoyment of the rights and freedoms set forth in the European Convention on Human Rights and the Human Rights Act shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status", accessible on: http://www.echr.coe.int/documents/convention_sqi.pdf

¹⁰² Ivana Radacic, Critical Review of Jurisprudence: An Occasional Series *Gender - Equality Jurisprudence of the European Court of Human Rights, The European Journal of International Law Vol. 19 no. 4, EJIL 2008, p. 841- 856, p. 842-843.*

between the sexes is a fundamental requirement for Council of Europe member states.¹⁰³ ECtHR, in *Salgueiro Da Silva Mouta vs. Portugal* case, found gender discrimination with the decision of the Appellate Court in Lisbon, violating Article 8 in relation with Article 14 of the Convention. The Lisbon Court had entrusted the responsibility to care for the children to the mother and not to the father, based on the fact that the father was of the same sexual orientation (homosexual) because he lived with another man, and on this occasion, discrimination was based on sexual differences.¹⁰⁴ Private family rights and the right to a common life with children is guaranteed for each parent equally by Article 8 of the ECHR.¹⁰⁵ In addition, the European Union Charter of Fundamental Rights in paragraph 1 of Article 23 foresees equality between men and women, which should be ensured in all areas, including employment and wages.¹⁰⁶ Also, the Constitution of the Republic of Kosovo, has defined in detail the ways of discrimination in paragraph 2 of Article 24.¹⁰⁷

4.1.b) This article provides for the prohibition of direct or indirect gender discrimination. *Direct Discrimination* is the form of discrimination that occurs when a person or group of persons is treated less favourably than another person or group of other persons in a similar or same situation, based on any of the reasons stated in this section. Direct discrimination is considered when a person is treated less favourably than another person of the same category. Thus, it has been noted in some EU countries that they have fewer rights for one category of persons with their legislations. In some EU countries, the legislation provided the right to raise the child only to mothers, which is considered direct discrimination.¹⁰⁸ Direct discrimination exists when the law does not recognize or reduces the rights of a category of persons. In *Luczak vs. Polans* case, the ECtHR considered that there had been direct discrimination after a French farmer who had lived, worked as a farmer, had paid taxes and social security in Poland as was the case with Polish farmers, had not been given the opportunity to benefit from Special insurance for farmers, because the farmer in question was not a

¹⁰³ ECtHR, *Abdulaziz, Cabales and Balkandali vs. UK*, application no. 9214/80; [9474/81](#), the decision of 28 May 1985, par. 78.

¹⁰⁴ ECtHR, *Salgueiro Da Silva Mouta vs. Portugal*, application no.33290/96, the decision of 21 December 1999.

¹⁰⁵ Institute for Political and Legal Studies (IPLS), *The European Court and the right to private life*, Tirana, 2012, p.269.

¹⁰⁶ See Article 23 of the Charter of Fundamental Rights of the European Union: http://www.europarl.europa.eu/charter/pdf/text_en.pdf

¹⁰⁷ Paragraph 2 of the Article 24, of the Constitution of the Republic of Kosovo provides: “No one shall be discriminated against on grounds of race, color, gender, language, religion, political or other opinion, national or social origin, relation to any community, property, economic and social condition, sexual orientation, birth, disability or other personal status”, accessible on:

<https://gzk.rks-gov.net/ActsByCategoryInst.aspx?Index=1&InstID=1&CatID=1>

¹⁰⁸ Nik de Boer, Susanna Burri, Hélène Masse-Dessen, Simone van der Post, in: European Commission, *Legal Approaches to Some Aspects of the Reconciliation of Work, Private and Family Life in Thirty European Countries*, 2008, p.11.

Polish citizen.¹⁰⁹ *Indirect discrimination* is that form of discrimination that occurs when a legal provision, criterion or practice, seemingly impartial, places a person or group of persons in unfavourable conditions in relation to others, and when that measure, criterion or practice, is not objectively justified by a legitimate aim when the means of attaining that goal are either inadequate or are not necessary and proportionate to the condition that caused it. Indirect discrimination situations are understood to be those when the same rules create discrimination for different situations. The ECtHR in several cases has found that the same rules may discriminate on different situations, in particular discriminating against different groups. The CJEU, in *Schonheit* case, also found indirect discrimination in the case of smaller pension payments for part-time employees in relation to full-time workers. Although the legal rule was same for all, because full-time workers pay a higher rate of pension contributions and receive higher pensions than half-time employees due to the length of work, however, the ECtHR has ascertained that as 88% of the half-time employees were women; this represents discrimination in relation to the other male group.¹¹⁰ The same is the case when there are overtime payments for a category of workers who work daytime and use this right after hours or in the evening. However, for another category that have a shortened schedule, or work at night, there is no possibility of overtime, and practically indirect discrimination occurs due to the place and nature of the work.¹¹¹ Often in doctrine, this phenomenon is also recognized by the concept “gender pay gap”, where because of the nature of employment only one category has certain working conditions and jobs, and is afforded a payment other than the other category that does not get this opportunity.¹¹²

4.1.c) Paragraph 1 also provides for the prohibition of less favourable treatment of women due to pregnancy and maternity or marital status. The purpose of this paragraph is to prevent unequal treatment in pregnancy cases, especially in cases of employment relationship or employment application. Regarding this issue, the ECtHR in its judgment in *Mary Brown v Rentokil Limited*, concluded that when a woman was dismissed on grounds of her absence due to her inability to work as a result of her pregnancy, such dismissal

¹⁰⁹ ECtHR, *Luczak v. Poland*, application no. 77782/01, the decision of the date 02/06/2008, accessible on: <file:///C:/Users/HP/Downloads/001-83464.pdf>

¹¹⁰ CJEU, *Hilde Schonheit vs. Stadt Frankfurt am Main* and *Silvia Becker vs. Land Hessen*, common cases C-4/02 and C-5/02 [2003] ECR I-12575, 23 October 2003.

¹¹¹ Nik de Boer, Susanna Burri, Hélène Masse-Dessen, Simone van der Post, in: European Commission, *Legal Approaches to Some Aspects of the Reconciliation of Work, Private and Family Life in Thirty European Countries*, 2008, p. 12-13.

¹¹² European Commission, *Legal Aspects of the Gender Pay Gap*, Report prepared by experts Sacha Prechal, Susanne Burri, Irene van Seggelen and Gina de Graaff, Directorate-General for Employment, Social Affairs and Equal Opportunities, Unit EMPL/G/2, 2007, p. 6.

from the job constitutes direct discrimination because of gender.¹¹³ The abovementioned paragraph foresees the prohibition of discrimination even in cases of nationality. In this regard, equal treatment must be offered to all persons, irrespective of their nationality or ethnicity. Concerning this issue, the European Union Charter of Fundamental Rights, in paragraph 2 of Article 21, has laid down the prohibition of any discrimination on grounds of nationality.¹¹⁴

Paragraph 2

4.2 Paragraph 2 has determined gender-based violence as a form of discrimination, forbidding the prohibition of its use. Violence on a gender basis is considered violence against a person because of his/her gender. Gender Violence, as such, may occur in physical, sexual or psychological form and includes: sexual violence (rape, sexual assaults and harassment), slavery and harmful practices that may be forced marriages, female genital mutilation etc. Moreover, these actions are not only discriminatory on a gender basis, but also represent elements of various criminal offenses.¹¹⁵ However, this paragraph establishes the obligation of state bodies to undertake measures to ensure protection against gender-based violence for all persons without discrimination.

Paragraph 3

4.3 This paragraph provides for the prohibition of harassment and sexual harassment, defining two kinds of harassment, in accordance with the definitions set out in Article 3 of the Law. The purpose of this paragraph is to provide protection against persons who are exposed in cases of harassment and sexual harassment. Sexual harassment is also a criminal offense.¹¹⁶ Therefore, the refusal or surrender of a person cannot be used against him in the course of developing any legal proceedings because of the fact that the person has filed such submissions. The legal provision in this case speaks about the protective measures that should be undertaken to protect persons presenting such cases of discrimination but even if they have committed any such action under such circumstances should not be taken to constitute a burden on him or as an illegal act. With this, the provision speaks of cases

¹¹³ See ECtHR, *Mary Brown vs. Rentokil Limited, C-394/96 [1998]* accessible on: <http://www.equalrightstrust.org/ertdocumentbank/brown%20and%20rentokil%202.pdf>

¹¹⁴ According to paragraph 2 of Article 21 of the Charter of Fundamental Rights of the European Union is foreseen: “*Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.*” For more, see document on: http://www.europarl.europa.eu/charter/pdf/text_en.pdf

¹¹⁵ See KPC, Article 14, regarding articles, 189, 194, 195, 196 and criminal offenses of the Chapter XX- criminal offenses against sexual integrity.

¹¹⁶ See KPC, chapter XX, criminal offenses against sexual integrity.

where the person was obliged to act despite his/her will, but as a result of violent discriminatory acts.

Paragraph 4

4.4 This paragraph aims to create greater legal certainty regarding the principle of gender equality and gender mainstreaming, aiming for the principle of gender equality to be applied in all the planning, budgeting and implementation of the above acts by public and private entities. In this way, public institutions and private entities are obliged to plan their budget by providing financial support in cases of pregnancy and childbirth related to the creation of various legal reports. In Kosovo, the right to maternity leave is recognized and there is also financial support during this period, respectively a certain salary is paid for.¹¹⁷

Paragraph 5

4.5 According to this paragraph, anyone who instructs any person to engage in any discriminatory act on grounds of gender shall be deemed to have committed such discrimination. This has a significant effect on the prevention of gender discrimination due to the fact that in many cases discrimination can be made through various instructions. Therefore, a person who has instructed another person to engage in any discriminatory act will respond along the person who committed the discrimination.

Paragraph 6

4.6 This paragraph provides the guaranteeing of the rights of persons who may be involved as victims in any case of discrimination, harassment or sexual harassment. This means that judicial bodies, the prosecution and other state bodies must act in accordance with this paragraph, prohibiting the victimization of persons in the abovementioned cases in any form that these cases may arise.

¹¹⁷ See Law no. 03/L-212 on Labour, Official Gazette of the Republic of Kosovo, no. 90, 01December 2010, Article 12.1 and 49.

Article 5

General measures to prevent gender discrimination and ensure gender equality

- 1. In order to prevent and eliminate gender discrimination and achieve gender equality, Republic of Kosovo Institutions shall be responsible to implement legislative and other measures including:**
 - 1.1. analyzing the status of women and men in the respective organization and field;**
 - 1.2. adoption of strategies and action plans for the promotion and establishment of gender equality in accordance with the Kosovo Program for Gender Equality;**
 - 1.3. inclusion of gender mainstreaming in all policies, documents and legislation;**
 - 1.4. ensuring that the selection, recruitment and appointment processes, including for leading positions, are in line with the requirement for equal representation of women and men;**
 - 1.5. inclusion of gender budgeting in all areas, as necessary tool to guarantee that the principle of gender equality is respected in collecting, distribution and allocation of resources;**
 - 1.6. ensuring equal representation of women and men in all conferences, meetings, seminars and trainings inside and outside the country;**
 - 1.7. allocating adequate human and financial resources to programs, projects and initiatives for the achievement of gender equality and women's empowerment;**
 - 1.8. gender division of all data and collected statistical information shall be recorded, registered, processed and shall be obliged to submit these data to the Kosovo Agency of Statistics;**
 - 1.9. taking into account gender equality while naming institutions, schools and streets.**

2. **Any provision which is in contradiction to the principle of equal treatment under this Law shall be repealed.**
3. **Public contracts and any provisions contrary to the principle of equal treatment, which is included in contracts or in collective or individual agreements, are or may be declared non-valid or altered in accordance with the provisions of the Law on Protection against Discrimination.**

Comment, Article 5

5. Article 5 foresees some general measures that are obligatory to be undertaken by all institutions of the Republic of Kosovo to ensure equal treatment between the genders. In fact, some of the measures include special articles e.g. gender budgeting, gender mainstreaming in political structures, etc., however, this article has emphasized some of the points that will be explained below.

Paragraph 1

- 5.1 Paragraph 1 provides for legislative, judicial and administrative measures which should be undertaken to ensure gender equality.
 - 5.1.1 Sub-paragraph 1 of Paragraph 1, requires analysis of the status of women and men in relevant organizations and fields. This implies that it is necessary to look at what status or treatment the genders within the various organizations have, what is the participation of women and men, their placement in workplaces, etc. Analysis is thought to be multidimensional to achieve gender equality. The legal provision uses the term “status” so that the meaning of this expression should be extended to include all activities exercised in an organization to achieve gender equality. What is understood as discrimination in this respect is clear, i.e., if there is less favourable treatment for one gender in relation to the other gender.
 - 5.1.2 Adoption of strategies and action plans is needed in organizations and institutions for the promotion and establishment of gender equality in line with the Kosovo Program on Gender Equality.¹¹⁸ Therefore, it is required to develop strategies and action plans to achieve gender-balanced outcomes, in accordance with this program. Which plans or actions are required to be approved, this depends on the nature of the works of each institution or organization. Article 11 of this Law has also charged the Agency for Gender Equality to monitor these actions in order to be in line with the Kosovo Program for Gender Equality.¹¹⁹

¹¹⁸ See Kosovo Program for Gender Equality, Office of the Prime Minister, Agency for Gender Equality, accessible on: [http://abgj.rks-gov.net/Portals/0/ABGJ%20Programi%20i%20Kosoves%20per%20Barazi%20Gjinore%20\(2\).pdf](http://abgj.rks-gov.net/Portals/0/ABGJ%20Programi%20i%20Kosoves%20per%20Barazi%20Gjinore%20(2).pdf)

¹¹⁹ See Article 11, and the comment section for this Article.

5.1.3 This provision foresees *the inclusion of gender mainstreaming in all policies, documents and legislation*. Any document defining certain institutional and organizational policies, enterprises, etc., should contain provisions guaranteeing gender mainstreaming. *Example:* Employment policies should have provisions regulating how gender integrations will be ensured and gender equality in employment, education, health, etc. Also, here it mentions *all documents*, i.e. wanting to ensure gender equality in any document to avoid unequal treatment between genders. With laws, it is required to include provisions that ensure gender equality. But not only as a principle but also the main provisions of the Laws should contain criteria that ensure equal treatment between genders. Thus, as an example, Article 5 of the Law on Labour prohibits discrimination, but the expression discrimination must be interpreted by Article 1.17 of this law defining discrimination including gender discrimination¹²⁰, in Article 2.3 of the Law on Higher Education, discrimination is mentioned, but there must be special expression for gender discrimination¹²¹, discrimination is also prohibited in paragraph 1.2 of Article 5, of the Law on Health.¹²²

5.1.4 Paragraph 1, point 4, states that actions should be taken to *ensure that the selection, recruitment and appointment processes, including for leading positions, are in line with the requirement for equal representation of women and men*. This provision refers to employment cases and seeks to establish a secure process of equal treatment in employment among genders. This includes all stages from the selection, selection of job candidates to be based on equal treatment, employment and assignment. Article 15 regulates the prohibition of discrimination in employment relationships and this article should be interpreted in connection with Article 15.¹²³ This provision refers to all aspects of employment, procedures and appointments to work positions.

5.1.5 Another general measure to be taken by the institutions is the inclusion of gender budgeting in all fields as a necessary instrument to ensure that the principle of gender equality is respected in the collection, allocation and assignment of funding sources. Gender budgeting is a very controversial topic in Kosovo regarding how it should be understood and implemented in practice. This implies in the first instance the distribution of the Kosovo budget in a way that enables equal development of projects for women and men, the possibility of gender equality integration in all spheres of social

¹²⁰ Law no. 03/L-212 on Labour, Official Gazette of the Republic of Kosovo, no. 90, 01 December 2010

¹²¹ Law no. 04/L-037 on Higher Education in the Republic of Kosovo, Official Gazette of the Republic of Kosovo, no. 14, 9 September 2011

¹²² Law no. 04/L-125 on Health, Official Gazette of the Republic of Kosovo, no. 13, 07 May 2013.

¹²³ See Article 15 and the comment section.

life. For this, the Agency for Gender Equality and the Kosovo Women's Network Group have also produced many reports on gender budgeting and women's involvement in budget quotas in all sectors and about how much women and men benefit from budget allocation.¹²⁴ Responsible institutions, primarily AGE, should also take care of legislative measures and initiatives to facilitate gender budgeting.

5.1.6 Sub-paragraph 1.6 of this article, requires an equal representation of genders at conferences, meetings, seminars, and trainings abroad. With this legal provision it is clear that different institutions and organizations should also pay attention to the participation or representation of the genders even when it comes to conferences, seminars and trainings. Why is this important? Not only to ensure numerical representation, but equal gender integration, professional training that also enables the genders, especially the female gender, to prepare to compete and to be represented equally in all sectors is also ensured through these mechanisms. Employment or mainstreaming into certain sectors requires legal and professional conditions. This is achieved through the professional training of the less represented gender to reach the specified quota. So these are also concrete institutional actions that give results in equal gender mainstreaming.

5.1.7 Another general measure of ensuring gender equality is also the allocation of appropriate human and financial resources for programs, projects and initiatives to achieve gender equality and empower women. Appropriate human resources are considered identifying individuals with appropriate preparation for specific programs and a project so that representation is professional and gender equality is achieved. This also includes the identification of financial resources that enable the mainstreaming of women into specific projects and initiatives. Therefore, it is not enough for the institutions to only share and publish these programs, but attention should be paid to programs being adapted to human capacity (human resources) and suitable for the female gender to achieve participation in these projects or initiatives. Traditionally, men in Kosovo are more involved in different businesses and projects, so this provision places emphasis on finding a more suitable form for human and financial resources for women.

5.1.8 Sub-paragraph 1.8 sets out the general measure as a requirement for all institutions to have gender-specific data. These data should be sorted and systematized according to the needs, depending on the nature and organization of the work. Thus, these data should be systematized, such

¹²⁴ See the report of Kosovo Women's Network, Gender Responsive Budgeting - A practical user guide, accessible on: <http://www.womensnetwork.org/documents/20140610143939392.pdf>

as employees, decision-making, work-related benefits, etc., in education institutions, systematization of gender-based pupils, teachers/professors, administration, etc. After the systematization, the data should be submitted to the Kosovo Agency of Statistics in order to be collected and processed by this Agency. The role of the Agency with statistical reports is extremely important because development programs are compiled from these statistics. In this regard, gender inclusion in the sectors, as required by this law, can be reflected through statistical data.

Paragraph 2

5.2 In paragraph 2 it is made clear that all provisions of the applicable laws which are in contradiction to the principle of equal treatment under this law should be repealed. All member states of the European Community are obliged to repeal discriminatory provisions in their legislation, therefore this legal provision is to serve this function.¹²⁵ So if by any law that regulates certain fields, there are provisions that foresee less favourable conditions for any gender or foresee discriminatory measures, they should be repealed.¹²⁶ The obligation to repeal belongs to the institution that issued the law or other legal act. The institution that has issued legal provisions has an obligation under this law to reconsider and amend the legal provisions by repealing those that are discriminatory for any gender and that do not guarantee equal treatment. Every citizen whose rights been violated can initiate proceedings with the same institution but also with other institutions, e.g. the Ombudsperson to address any legal provision that is discriminatory or less favourable to one gender.

Paragraph 3

5.3 Paragraph 3 has also regulated another circumstance as a general measure to be taken to ensure gender equality. This also requires the cancellation of public contracts that are in contradiction to the principle of equal treatment of the genders. It also provides for the cancellation of any contractual provision in individual or collective contracts if they are of discriminatory nature. Cancellation or void publication may be made in accordance with the provisions of the Law on Protection from Discrimination.¹²⁷

¹²⁵ EU REPORT ON COLLECTIVE BARGAINING, By the Network of Legal expert on the application of Community law on equal treatment between women and men, June 2006, page 4, accessible on: http://ec.europa.eu/justice/gender-equality/files/2006collective_bargaining_report_final_en.pdf

¹²⁶ Based on this provision it is proposed to repeal the Law on Elections that foresees the quota for women's participation of 30%. According to this law, the representation quota should be increased.

¹²⁷ See Law no. 05/1 -021 on Protection against discrimination, Official Gazette of the Republic of Kosovo, no. 16, 26 June 2015.

- 5.3.1 The Law on Protection from Discrimination provides for having equal gender roles in all sectors. If this is not provided, the procedure for appealing or revoking legal provisions may be initiated under the Law on Protection from Discrimination.
- 5.3.2 The law has established as a general safeguard measure the annulment of discriminatory laws and contractual provisions to ensure equal treatment of the genders.

Article 6

Special measures

- 1. Public institutions shall take temporary special measures in order to accelerate the realization of actual equality between women and men in areas where inequities exist.**
- 2. Special measures could include:**
 - 2.1. quotas to achieve equal representation of women and men;**
 - 2.2. support programs to increase participation of less represented sex in decision making and public life;**
 - 2.3. economic empowerment and steps to improve the position of women or men in the field of labour improvement of equality in education, health, culture and allocation and/or reallocation of resources;**
 - 2.4. preferential treatment, recruitment, hiring and promotion, and other measures in each area where inequalities exist.**
- 3. The candidate of underrepresented gender must have the same qualifications against his/her candidate in terms of meeting conditions.**
- 4. The application of each candidate shall undergo an objective assessment which must take into account all the criteria that are typical to each individual candidate;**
- 5. Priority given to the candidate of underrepresented gender cannot be automatic and unconditional but, can be ignored if the specific reasons**

for an individual candidate may be in his / her favour.

- 6. Do not constitute gender discrimination when public institutions take special measures, including legal provisions, aimed at accelerating the deployment of actual equality between women and men. These measures should cease to exist once they achieve gender equality objectives, for which are created.**
- 7. Legislative, executive, judicial bodies at all levels and other public institutions shall be obliged to adopt and implement special measures to increase representation of underrepresented gender, until equal representation of women and men according to this Law is achieved.**
- 8. Equal gender representation in all legislative, executive and judiciary bodies and other public institutions is achieved when ensured a minimum representation of fifty percent (50%) for each gender, including their governing and decision-making bodies.**

Comment, Article 6

6. Article 6 provides for specific measures to be taken by the responsible institutions to ensure gender equality. These measures can be taken when, even though formally gender rights are equally regulated by law, however, in practice they are not realized or one of the genders realizes less rights set forth by law and international acts. Therefore, it is required the enforcement of certain measures to achieve in practise the purpose of equal treatment and fulfilment of gender rights.

Paragraph 1

- 6.1 Paragraph 1 sets out and lists some specific measures that public institutions should undertake in order to realize genuinely equal rights between genders, in cases where there is inequality or in other words the practical realization of these right is not achieved. There are many cases when the law foresees equal rights between genders but they are not realized in practise. As an example, we can mention property, inheritance, functional issues or high management positions, etc.¹²⁸ Therefore, by special measures is claimed to have an affirmative approach to gender rights, which are not realized in practice, and that in Kosovo are mainly related to the female gender.

¹²⁸ Law on Property and Real Rights, Article 2 provides equal rights for all citizens, emphasizing that any citizen may

Paragraph 2

6.2 Paragraph 2 explicitly lists the special measures that should be taken by public institutions.

6.2.1 In sub-paragraph 2.1 it is envisaged that a specific measure should be taken to set specific quotas to achieve equal representation of women and men. What does this mean as a measure? This implies that a number of places shall be reserved for less represented gender, which in most cases in Kosovo is women, in order to achieve equal representation. These quotas are foreseen in several functions. Thus, the Law on Political Parties foresees a 30% quota as compulsory for gender - gender quotas - the gender quota in case of Kosovo is practically for the women, as reserved seats. The same is foreseen for the representation of political parties or coalitions in parliament.¹²⁹ Likewise, many laws provide that in equal legal conditions for a job or other engagements, priority shall be given to women in order to have greater representation of women to achieve an equal representation in practice. This measure does not constitute a violation of rights of others or recognised otherwise as a positive discrimination, but it is *an affirmative measure* of rights of less represented gender and constitutes a constitutional and legal obligation. This affirmative approach has been confirmed by the ECtHR in the *Kalanke vs. Bremen* case, by a decision concluding that there might be affirmative measures for the gender that is less than half represented in an institution or organisation.¹³⁰

6.2.2 Subparagraph 2.2 provides for the development of various programs to include the less represented gender in public life. So, in conjunction with the first point, here is emphasised the development of programs that enable the less represented gender to prepare for public life and to take responsibility even in leading positions in public life. As is well known, in certain leading positions certain professional criteria are required. This is explicitly provided in point 3 of this paragraph that the both genders should have the same professional criteria. Therefore, in order to achieve professional qualification it is required the development of programs that will help, respectively enable, the less represented gender, that in the

acquire equal property rights. Nevertheless, in practice a property is registered in the name of man. Also, Law on Family, Articles 47 and 50, provides that joint property of spouses shall be registered in the name of both spouses. Hence, in practise, in most cases such property is registered in the name of the husband. Also, Law on inheritance envisages and provides equal property between women and men, but in practise, in most cases women waive from property rights to the benefit of man.

¹²⁹ See Law no. 03/1-073 on General Elections in the Republic of Kosovo, Official Gazette of the Republic of Kosovo, no. 31, 15 June 2008, Article 27.

¹³⁰ ECHR, *Kalanke vs. Bremen*, Decision C-450/93, 17 October 1995.

future when a job and public policy and decision-making is required, to be prepared to achieve equal representation between genders in practice. These programs can be training programs, specialisations etc.

6.2.3 Sub-paragraph 2.3 includes the economic empowerment between genders to improve the position of women or men in all areas of employment, education, health, culture and allocation or reallocation of resources. This legal provision clearly requires the undertaking of special measures to economically empower the less represented gender or the gender that realizes fewer rights in practice. EU authorities have also issued special acts to empower women by achieving special quotas in decision-making on company boards as well. This was done through specific European Commission programs and resolutions to empower and promote decision-making positions for women (females) in the company.¹³¹ In Kosovo there is constant talk about the economic empowerment of women as a guarantee that they will be more powerful and represented in the social life. In fact, the lack of property or wealth, employment, and wage income make them even less represented for the very fact that the realization of many rights, including education, cultural activities or self-employment, also requires material resources, respectively economic power. Therefore, in this item, the emphasis is put on economic empowerment because the lack of material / economic resources of one gender makes it dependent on the other gender, which in many causes leads to renunciation of realization and protection of rights as a result of inability to survive, in the absence of material means.

6.2.4 Subparagraph 2.4 provides for preferential measures as well as other recruitment/employment measures and promotion for the less represented gender or where there is gender inequality. However, it should be added that promotion or preferential measures cannot be made without professional criteria because they are specifically mentioned below in items 3, 4, 5. However, the emphasis of the provision is that public and private institutions should undertake a number of preferential measures when there are equal conditions for representing or appointing in the decision-making process the less represented gender. Also, it requires the recruitment of less represented gender. Even in EU law and ECJ judgments, preferential measures for the less represented gender (women) are envisaged to give priority to job recruitment and decision-making positions to reach the quota equal to the other gender (men).¹³² Recruitment also implies the support

¹³¹ Nuria Elena Ramos Martin, Positive Action in EU Gender Equality Law: Promoting Women in Corporate Decision –Making Positions, *Labour Law, Economic Changes and New Society*, 2014, p. 20-33, p. 29.

¹³² Nuria Elena Ramos Martin, Positive Action in EU Gender Equality Law: Promoting Women in Corporate Decision

with additional training and qualification measures to meet the professional criteria in order to represent the less represented gender. As it is seen in item 4 of this paragraph, it is permissible to avoid or disregard the recruitment of another gender that is more represented in those cases where the less represented gender has such criteria that the appointment at the workplace does not present any harm to the institution or organization, while on the other hand increases the gender representation quota for the less represented gender. Namely, when the circumstances of each case individually justify a disregard of the same professional criteria. This should be understood to give the opportunity to another gender which, by providing this opportunity and with training aids, achieves the same results at work as the other gender that is most represented.

Paragraph 3

- 6.3 In paragraph 3, it is clearly stated that when the less represented gender applies for jobs it should have the same professional criteria with the opposite gender or opposite gender candidate. This provision has sufficiently clarified the law that there cannot be such an automatic preference without meeting the professional criteria only because a person from less represented gender should be selected so as to achieve a certain quota. As stated above, in order to achieve equal representation, additional training measures or other recruitment engagement should be made to reach the professional criteria required to be achieved for the given workplace.

Paragraph 4

- 6.4 With paragraph 6.4, attention is also paid to the application of candidates. When there are candidate applications, including candidates of opposite gender, the provision implies that the evaluation should be objective and during this evaluation one shall take into account all the criteria that are characteristic of each candidate individually. The legal provision means that there should be an objective evaluation without giving advantage to any candidate but on the basis of professional criteria, as explained above in paragraph 6.3. But the last sentence extends the meaning of the legal provision in one aspect to take into account the criteria that are characteristic of each individual. By this it can be understood that not necessarily everybody should have the same criteria except those that are strictly necessary, but there may be some other features that one candidate may be given priority

–Making Positions, Labor Law, Economic Changes and New Society, 2014, p. 20-33, p. 30.

in the selection but this only when necessary to include less represented gender in certain sectors. So, it is thought that some criteria may help to select a less-represented gender candidate. Thus, the spirit of the law on the one hand protects and requires equal professional criteria, however, on the other hand, as it can be read and understood, and in correlation with other provisions, there is an affirmative approach to the less represented gender rights to be taken into account when examining applications of candidates. This provision should be interpreted in conjunction and in relation to paragraph 6.5 which foresees priority situations for a less-represented gender candidate.

Paragraph 5

6.5 In this provision it is clarified that the less-represented gender candidate cannot be given priority automatically only because it belongs to that gender, e.g. only due to the fact that the candidate is a female or male, but that a priority may be acceptable under reasonable circumstances. Here is used the expression “*ignored*”, stating that the less represented gender candidate has the personal and professional qualities that are justified and the circumstances of each case separately allow to understand that it will achieve at least the same results at work as the candidate belonging to the more represented gender. What are these circumstances is difficult to generalize, but should be assessed in each case separately, and always have to consider the professional criteria. As an *example* we can illustrate the case when 3 years of work experience are required for a job but the less represented gender candidate has less work experience e.g. 1 or 2 years but has superior qualified education that implies that with his or her skills it can easily show results at work for which less qualification is required. This could be a circumstance to consider. Work experience is not necessarily an indicator of quality work, but there may be other additional criteria as well. A higher degree of education or a specific supplementary education (specialization) that may be a supportive element for the less represented gender in order to achieve equal representation. This is also justified by the provision of item 6 of this paragraph which does not consider discrimination as a special measure to establish factual gender equality.

Paragraph 6

6.6 Paragraph 6 specifies that undertaking specific measures to promote the rights of a less-represented gender is not considered to constitute a discriminatory measure. Article 4 of this law foresees that genders should

be treated equally and there should be no discriminatory measures.¹³³ This legal provision provides for specific measures that are temporary only in order to achieve a factual equality. These measures must cease once the goal has been achieved, namely the achievement of factual equality. The nature of this provision is an exception to the general principles and of affirmative nature to give advantage to a gender only in order to achieve equal representation. While these measures cease to apply if they are discriminatory, namely, go beyond the equal representation.

Paragraph 7

- 6.7 Paragraph 7 foresees the obligation of all legislative, executive and judicial institutions and other institutions of all levels to undertake the above mentioned special measures to achieve factual representation and factual gender equality. These measures should continue until equal representation between men and women is achieved for all sectors as it is required under this law. Thus, this provision is of mandatory nature for the institutions to apply the special measures contained in this law. It should also be added that these are not the only measures mentioned, but also other additional measures that will help to achieve gender equality can be taken.¹³⁴

Paragraph 8

- 6.8 Paragraph 8 also specifies a 50% representation quota for each gender which is also considered as a gender equality criterion. Thus, here is required 50% representation for female gender and 50% representation for male gender. All the measures set forth in this law should be in the function of this provision to achieve equal representation between genders.

¹³³ See Article 4 and the comment on this Article.

¹³⁴ See as example, Administrative Instruction no. 03/2016 of the Government of Kosovo on Special measures for registration of joint immovable property in the name of both spouses, adopted by Decision no.07/75, dated 18.02.2016.

CHAPTER II

INSTITUTIONAL MECHANISMS FOR GENDER EQUALITY

Article 7

Agency for Gender Equality

Agency for Gender Equality is an Executive Agency (hereinafter the Agency, which acts within the Office of the Prime Minister (OPM).

Comment, Article 7

7. The second chapter of the law deals with the regulation of institutional mechanisms that have the mandate to apply not only the provisions of this law, but to take care to implement and promote the implementation of the principle of gender equality in the country. The chapter defines and counts the key institutions for this, which are: Agency of Gender Equality¹³⁵, central and local level institutions, Ombudsperson, and political parties. Also, this chapter sets out the obligations of the institutions to adopt the National Program on Gender Equality as a document that establishes a framework of actions in this framework, setting time priorities. Article 7 regulates the establishment of the Kosovo Agency for Gender Equality, which operates within the Office of the Prime Minister of Kosovo¹³⁶. Thus, this Article, apart from defining the establishment of this Agency, also defines its legal status by qualifying it as a key institution for law implementation.

Article 8

Functions and responsibilities

1. The Agency within its scope has the following responsibilities:

1.1. promotes, supports, coordinates and makes the implementation of

¹³⁵The Agency for Gender Equality was initially established by the Government of Kosovo with Decision no. 5/131 date 1 February 2005 as the Office for Gender Equality and as a separate body of the Government of Kosovo in compliance with Article 5.1 of UNMIK Regulation no. 2004/18, date 7 June 2004, on promulgation of the Law on Gender Equality adopted by the Assembly of Kosovo (Law no. 2004/2). With Government of Kosovo Decision no. 03/2006 of 12.07.06, the Office for Gender Equality, from 1 September 2006, is transformed into Agency for Gender Equality within the Office of the Prime Minister.

¹³⁶ The Office of the Prime Minister of Kosovo is a senior body of the State Administration of Kosovo. See: Law no. 03 / L-189 on State Administration of the Republic of Kosovo: Official Gazette of the Republic of Kosovo, YEAR V / no. 82/21, Prishtina. Regarding the competencies of the Office of the Prime Minister, see Government Regulation no. / 02 2011 on the Areas of Administrative Responsibility of the Office of the Prime Minister and Ministries, Article 6

the provisions of this law and sub-legal acts issued in accordance with this law;

1.2. proposes to the Government amendments/supplementations of laws and sub-legal acts, and the approval of other measures to implement this law, in accordance with applicable legal procedures;

1.3. identifies and/or drafts policies which promote gender equality and monitor their implementation;

1.4. participates in the preparation of laws, sub-legal acts, strategies, and programs to ensure gender mainstreaming and gender budgeting is applied;

1.5. shall lead the process and prepares reports for the implementation of the convention on the Elimination of All Forms of Discrimination against Women and contribute to reporting on the implementation of international obligations concerning gender equality;

1.6. cooperates with public institutions and relevant officials for gender equality in the ministries and municipalities to ensure implementation of the provisions of the present Law;

1.7. cooperates with civil society;

1.8. organizes training for the inclusion of gender mainstreaming and gender budgeting for institutions;

1.9. analyzes the status of gender equality in Kosovo, on the basis of reports, research and studies, and present the findings in annual reports, special reports, guidelines, codes of conduct, opinions and provides recommendations to relevant authorities and publishes these results;

1.10. shall take measures with the aim of raising awareness on gender equality;

1.11. takes adequate measures to promote equal gender treatment in cooperation with the social partners, through the development of social dialogue for employees and employers on issues of particular importance which relate to the realization of their rights arising from employment, social wellbeing and other professional issues;

1.12. Report to the Government on the implementation of the present law for the previous year, no later than the end of March, the report after

approval by the Government shall be published.

Comment, Article 8

8. Article 8 defines the specific scope of this Agency and responsibilities in the framework of the implementation of this law and the entire affirmative process of the implementation of the principle of gender equality in Kosovo.

Paragraph 1

- 8.1 Paragraph 1, with several sub-paragraphs (otherwise presented as items) has defined and counted the competencies of the Agency.

8.1.1 In subparagraph 1.1 this institution is entrusted with the competencies to promote, coordinate and implement the provisions of this law and other sub-legal acts issued for the implementation of this law and those to be issued in the future. The term *promotion* means that the Agency will undertake various activities that support or offer active encouragement to advance the principle of gender equality through various activities and programs.¹³⁷ In addition to promotion, the Agency also *coordinates* activities related to the implementation of this law, i.e., coordination of institutional, sectoral, civil society activities and so on. The Agency, as an institutional mechanism, has the mandate to implement this law and seen in a broader aspect, the law should be implemented by other institutions and not only by this Agency. In fact, in addition to the executive role, the Agency has the role of the “*guardian*” of the implementation of the provisions of this law by other actors and mechanisms.

8.1.2 In subparagraph 1.2 of this Article, the Agency is authorized and mandated with another responsibility, that of proposing the amendment and supplementation of the relevant legislation and adopting measures for the implementation of this law. So here we are dealing with two actions. First, during the implementation of this law, the Agency may propose to the Government to adopt laws, amendments to laws or sub-legal acts such as: instructions, ordinances or guidelines that are necessary for the practical application of the matter contained in the legal provisions. The second action relates to other measures that are not measures in the form of legal acts, but are intended to be in accordance with the law. By not specifying other measures it is left at the discretion of the Agency to propose the appropriate actions identified by it in the service of law implementation. Other measures may be: public awareness campaigns, roundtables, seminars, research,

¹³⁷ National Program for Gender Equality (2010) in its first Strategic Objectives outlines the following actions: Share of values and practises that promote gender equality, protection of rights and empowering of women, p. 28, available at www.ks-gov.net.

artistic actions, regional and international experience exchanges etc.

8.1.3 Subparagraph 1.3 can be interpreted in the sense of paragraph 1.1 of Article 8, as it also determines the role of the Agency to identify and draft policies promoting gender equality and to exercise monitoring of their implementation in practice. The three characteristics of this subparagraph are: *first*, it places the Agency in the role of the policy identifier and proposer promoting gender equality, which is surely to be preceded by a research and analytical process to identify the appropriate policy; *second*, builds the position of the Agency to adopt appropriate policies, and, *third*, the monitoring of the implementation of this policy in practice. Therefore, these are actually the parts of an action that are organically interconnected.

8.1.4 Subparagraph 1.4 builds role of the Agency in a specific and very significant area as well as its participation in the preparation of legislation, strategic documents and programs, ensuring the incorporation of gender budgeting and gender mainstreaming.¹³⁸ Thus, the Agency should play a decisive role and not just be a simple participant in discussions when drafting legislation or strategies related to gender budgeting, i.e. have an active role. In fact, the implementation of legislation and of these documents and programs requires financial means. Mainstreaming of gender budgeting under this provision implies that from the very start of the drafting of a policy, program or law, one should integrate gender budgeting which is in the function of greater efficiency of spending of financial means. Gender Budgeting is conceived as an instrument to mainstream gender perspective into economic planning and the government budget. It aims at adopting a perspective for improving women's and men's equality on the basis of a gender assessment at each stage of the planning, program and realization of government budgets.¹³⁹

8.1.5 Subparagraph 1.5 of Article 8, in continuation of counting of the Agency's duties, sets forth another competence of the Agency regarding the obligation to monitor the process of implementing the Convention on the Elimination of All Forms of Discrimination against Women, and reporting on implementation of international obligations regarding the gender equality process in Kosovo. The adoption of the Convention on the Elimination of All Forms of Discrimination Against Women by the United Nations General Assembly represents the culmination of international efforts to protect and promote women's rights worldwide and was the result

¹³⁸ Budgeting means the process of determining the financial resources needed to meet the costs of the objectives of a particular policy.

¹³⁹ See: Gender Responsive Gender Budgeting at the Central Level - Kosovo Budget, Practical Guidelines, published by Women's Caucasus, Prishtina 2014.

of the great work done by The Women's Status Committee, established in 1947 as a structure in the United Nations system in order to develop policies aimed at improving the status of women.¹⁴⁰ The Convention is also known today as the Women's Constitution due to its great importance for the protection and promotion of women's rights in all areas of life. Its preamble recalls that the elimination of discrimination against women and the promotion of equality between men and women are fundamental rights ascribed and mandated under the Charter of Human Rights. The preamble states that the full development of a country, issues that concern the world as a whole and peace issues, require maximum effort by both genders, both men and women. The Convention calls upon signatory States to ratify it to fulfil certain specific obligations to eliminate gender-based discrimination and the enjoyment and exercise of civil, political, economic, social and cultural rights equally between men and women. On October 6, 1999, the UN General Assembly, by a consensual, historic decision on women, adopted the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, with 21 articles, and called on all States parties to the Convention to become parties to this instrument as soon as possible. This Protocol provides the opportunity to address individual complaints to the Commission based on CEDAW. Being an institutional instrument, the Agency, as a specialized body in this case, will guide and coordinate the implementation of the principles and obligations envisaged by the Convention on the practical level in Kosovo. So this is an obligation of the Agency which is not disconnected from all the obligations that this mechanism has in the process of implementing gender equality. The Agency should, through reporting, research, analysis and monitoring processes, measure the level of implementation of this important instrument. This situation is also related to the general activities the Agency conducts in reporting on the implementation of international principles and standards in Kosovo regarding the principle of gender equality. Looking at the activity of this Agency, it is seen that it constantly intends that with its activities it fulfils this obligation.¹⁴¹

¹⁴⁰ Inequality in many areas of everyday life, then poverty among women and discrimination against girls were the circumstances that led the United Nations in the 1970s to decide on the launch of the **United Nations Decade on Women: Equality, Development and Peace**, from 1976 to 1985. In 1979, with the adoption of the Convention on the Elimination of All Forms of Discrimination Against Women (**CEDAW**), the Decade reached the culmination. This Convention is the most important instrument for the protection and promotion of women's rights. For the first time, CEDAW, which includes civil, political and economic, social and cultural rights, combining two categories of rights, which are otherwise divided into two categories, recognized women as full human beings. (<http://www.un.org/womenwatch/daw/cedaw/sigop.htm>).

¹⁴¹ See various reports of AGE, available at: <http://abgi.rks-gov.net/sq-al/publikimet.aspx>.

8.1.6 This sub-paragraph defines another task of the Agency, which for the purpose of implementing this law in the formal and material aspect, should cooperate with public institutions and gender equality officers within ministries and municipalities. The word “public institutions” includes a broad notion and implies all those institutions within the public administration, which actually include ministries and municipalities as well. However, the latter two, according to the Law on State Administration, are bodies of state administration. Nevertheless, public institutions are other organizations as well such as hospitals, schools, public universities, independent agencies, etc., i.e. all that are financed through Kosovo budget. The Offices for Gender Equality in the ministries of the Government of the Republic of Kosovo are special units that have the mandate to perform their duties from the aspect of gender equality within the competences of the ministries, based on the LGE and in cooperation with the Agency for Gender Equality. Apart from the central level, even in the sphere of local government, there are gender equality officers in all municipalities of the Republic of Kosovo. These officials promote and create equal opportunities, draft their policies based on gender equality, adopt measures and undertake activities necessary to create equal opportunities for women and men. Officials of these offices cooperate with the Agency for Gender Equality. The Inter-Ministerial Council on Gender Equality, whose members are the gender equality officers in the ministries, coordinates the work of the same and projects future tasks. Officials for Gender Equality in Ministries and Municipalities act under the authority and direct supervision of the highest administrative position of the relevant ministry or the mayor of the respective municipality.¹⁴²

8.1.7 Within the tasks of the Agency, one of the most important ones can be considered the cooperation with the civil society. Civil society organizations certainly have great experience in the various areas of opinion research, the preparation of analytical research as well as the regional and international experience regarding the various aspects of the implementation of the principle of gender equality. Therefore, the Agency’s cooperation with them is very important because it coordinates their work in the field of gender equality with governmental institutions as well as with other established institutions, respectively contributing to the implementation of the LGE.

8.1.8 Subparagraph 1.8 is related to the other sub-paragraphs of this Article and regulates another scope of the Agency, within its overall scope: that of training for gender mainstreaming and gender budgeting in institutions. This

¹⁴² See: Regulation no. 12/2016 on Duties and Responsibilities of Certain Officers in Ministries and Municipalities, approved by the Government decision no. 02/109 of the date 16.09.2016

provision places emphasis on the organization of trainings, but in the course of the trainings it can of course be possible to undertake different actions such as conferences, seminars, simulation sessions, legislation interpretations, reviews, analyzes etc., actions that build and create models for participants with regards to the implementation of the law. The lawmaker place their focuses on training in two specific areas: first, the gender mainstreaming, this can be understood as gender inclusion process in drafting state policies for all areas, taking into account their impact on women and men.¹⁴³ Since 1995, the EU has applied the principle of gender mainstreaming as a way of achieving equality between men and women. Gender mainstreaming is a complex process involving: organizing, improving, developing and evaluating political processes so that gender perspectives are integrated into all policies, levels and phases by actors normally involved in policy making. It is a strategy to voice the concerns of women and men and their experiences in an integral dimension in the design, implementation, monitoring and evaluation of policies and programs in the political, economic, social sphere, etc.

8.1.9 Subparagraph 1.9 of Article 8 in a way pretends to summarize the activities of this implementing mechanism also foreseen by other paragraphs of this Article. Looking at the activity of the Agency, it is seen that it continuously analyzes, investigates, monitors and gives recommendations and guidance to relevant authorities. To date, the Agency has issued many recommendations, brochures, reports, analyzes and action plans. One of the most important documents that undoubtedly emerged from the Agency's activity is the plan and report for monitoring the implementation of UN Security Council Resolution 1325 entitled "WOMEN, PEACE AND SECURITY" adopted in 2000.¹⁴⁴ This resolution refers to the participation of women in the peace consolidation, where Article 1 highlights states' obligations with regards to the women representation: "*Urges Member States to ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict*". For the purpose of implementing the obligations envisaged by this Resolution, the Government of Kosovo approved the "Action Plan for the implementation of Resolution 1325"

¹⁴³ To illustrate: The Agency for Gender Equality in cooperation with the European Institute for Gender Equality in Vilnius, Lithuania, supported by the European Commission Office in Kosovo, held a two-day workshop on 04 and 05 June 2015, with the topic "Gender Index as a mechanism for mainstreaming the gender perspective into public policy". This workshop aimed to analyze existing data collected by Kosovo institutions and to issue concrete recommendations for the preparation of a report for the Index of Gender Equality in Kosovo, which would be drafted based on a unified methodology and would provide results based on sustainable and standardized indicators. See AGE Information Newsletter 2015.

¹⁴⁴ This resolution is adopted by the Security Council at its 4213th meeting, on 31 October 2000.

Women, Peace and Security 2013-2015¹⁴⁵ and mandated the Agency as an institutional mechanism to monitor the implementation of this Action Plan.

- 1.1.10 The provision of sub-paragraph 10 of Article 8 lists another mandate (competence) of the Agency, that of taking measures in order to raise awareness on gender equality in Kosovo. Realistically, the whole activity of this mechanism refers to raising the awareness of institutions and citizens. In this provision, the legislator has not determined explicitly what measures should be taken, but that is left to the discretion of the Agency. These measures may be different, such as awareness raising campaigns for a particular issue, placement of banners, roundtables, seminars, flyers, various guidelines etc.¹⁴⁶
- 1.1.11 This legal provision refers to the Agency's activity regarding adequate measures to promote equal treatment between genders in the labour market among social partners. An important mechanism would be women's employment and equal opportunities for women and men in employment and job positions. Equal treatment with regard to access to employment, vocational training and promotion at work should also be an essential element in employment relationships. Similarly, the principle of equal time working hours and equal salary are important issues in this aspect of equal pay.¹⁴⁷
- 1.1.12 This provision lays down the obligation of the Agency to report to the Government on the implementation of this law every year, no later than 31 March. The report contains (summarizes) the activities of the Agency during the year and viewed from a broader perspective, reporting is not only about the law implementation frameworks but also the undertaking of concrete measures. Agency's Division for Reporting and Monitoring is responsible for reporting.¹⁴⁸

¹⁴⁵ On February 20, 2012, the Government of the Republic of Kosovo took the decision to draft an Action Plan implementing United Nations Security Council resolution 1325 "Women, Peace and Security". The decision obliged the Agency for Gender Equality within the Office of the Prime Minister to coordinate and lead the working group for drafting the Action Plan, consisting of representatives of institutions, civil society and international partners.

¹⁴⁶ As an illustration of the measures for the purpose of raising awareness of gender equality, refer to the Guideline of the Agency: *Kërko Mbrojtje Ligjore apo Kushtetuta ju Mbron*.

¹⁴⁷ Concerning gender-based discrimination in the field of employment, we mention a case from the jurisprudence of the Federal Constitutional Court of Germany, Decision no. BVergfGE 191 (1992). The case concerned that a supervisor (female) in a sweets factory was convicted for violating the law prohibiting women's employment as labour at night. Having used the usual remedies, the supervisor filed a constitutional complaint claiming that the law in question violated the equality provisions provided for in Article 3 of the German Basic Law. The Referral was accepted by the Constitutional Court, which in its decision stated that the provisions of the law prohibiting women's labour at night was discriminatory and was contrary to the Basic Law.

¹⁴⁸ See: Regulation no. 1/2007 on the Organization and Functioning of the Agency for Gender Equality, Article 6.

Article 9

Agency Organization

- 1. The Agency is led by Chief Executive who is responsible for the administration, operation and management of the Agency.**

- 2. The appointment, discharge, functions and responsibilities of the Chief Executive shall be accomplished in accordance with the relevant provisions in force the Republic of Kosovo.**

- 3. Organization, structuring and functioning of the Agency shall be regulated by sub-legal act proposed by the Agency and approved by the Government.**

Comment, Article 9

9. Article 9 regulates the internal organization of the Agency for Gender Equality. Paragraph 1 stipulates that this Agency is led by the Chief Executive Officer, who is the chief administrative officer in this Agency and the principal responsible for the functioning and implementation of the Agency's policies. Meanwhile, paragraph 2 of the same Article defines or better said, refers to the provisions of the applicable legislation regarding the appointment and dismissal and function of the CEO of the Agency. In this paragraph, the lawmaker has maintained a uniform level of organization of this agency with other government agencies, hence no new rules have been established. Whereas, paragraph 3 stipulates that the Government, by a sub-legal act, approves the internal organization of the Agency, because this Agency reports directly to and is under the umbrella of the Government. The initiating and proposing a sub-legal act is done by the Agency itself. Generally speaking, the organization of the Agency does not differ from the organization of other agencies at the Government level.

Article 10

Financing

- 1. Funds for operation of the Agency on Gender Equality shall be provided from the budget of the Republic of Kosovo.**

- 2. Agency on Gender Equality in order to implement its mandate that promote gender equality shall accept donations from local and international donors, if they do not affect financial independence of the Agency on Gender Equality or its rights from the Budget of the Republic of Kosovo and that are not in contradiction with the law. Donations received should be made public.**

Comment, Article 10

10. Article 10 of the Law regulates the way the Agency is financed. As is clearly defined in paragraph 1 of this Article, the Agency ensures the carrying out of its operations through the funds by the state budget, as any other institution in the Republic of Kosovo.

Paragraph 1

- 10.1 With paragraph 1, the way of funding is clearly regulated, so that AGE is funded by the state budget, respectively the budget of the Republic of Kosovo. Thus, this provision is quite clear and requires no comment. However, in order to achieve the function and purpose for which it is responsible, the AGE should have a sufficient budget, in accordance with the function it has been given, otherwise, many competences cannot be delivered in practice.

Paragraph 2

- 10.2 Paragraph 2 provides that AGE may also receive donations from local or foreign donors but these donations should not affect the budget independence of the Agency and all donations received should also be made public in order to directly affect the transparency of the allocation of these donations.

Article 11

Kosovo Program for Gender Equality

- 1. Agency on Gender Equality shall coordinate the preparation of the Kosovo Program on Gender Equality, monitor its implementation and report annually to the Government on its implementation.**
- 2. Government shall review and approve the Kosovo Program on Gender Equality and should report annually to the Assembly for its implementation.**

Comment, Article 11

11. Article 11 foresees that Kosovo has its own program for gender equality. This article defines the body that prepares the program and the body that reviews and approves it.

Paragraph 1

- 11.1 With paragraph 1, this article charges the Agency for Gender Equality for program preparation and monitoring and reporting to the Government. The Kosovo Program for Gender Equality (2008-2013) is a strategic program for the integration of gender equality in public policies and programs of the Government of the Republic of Kosovo¹⁴⁹. The program consists of 6 specific areas: 1. Integration of women into the economy; 2. Integration of women into the labour market and social care for categories affected by social problems; 3. Women in decision-making processes; 4. Health care and access of women and men to health services; 5. Education; 6. Representation and contribution to culture and media. The program should help Kosovo Government institutions in addressing issues of gender equality (historical, economic, social, cultural, political, etc.).¹⁵⁰

Paragraph 2

- 11.2 Paragraph 2 clarifies that the Government is the body that reviews and approves the gender equality program, thus raising to a high level the state's care for equal rights among genders. This article also requires the Government to report annually to the Assembly on the implementation of this program.

Article 12

Relevant officials for Gender Equality in Ministries and Municipalities

1. All Ministries and Municipalities shall be obliged to appoint the relevant officials for gender equality with sufficient professional capacity and allocate sufficient resources from the budget, to coordinate implementation of the provisions of this law.

¹⁴⁹ The National Program on Gender Equality (2010) as the first strategic objective mentions the following actions: Share of Values and Practices that Promote Gender Equality, Protection of Rights and Women Empowerment, p. 28, available at www.ks-gov.net.

¹⁵⁰ AGE is preparing a new program based on the requirements arising from this law. The current program was drafted on the basis of the Gender Equality Law 2004.

2. Duties and responsibilities of the relevant officials for gender equality should include:

- 2.1. coordination of the implementation of this law and of the Kosovo Program for Gender Equality;**
- 2.2. inclusion of gender mainstreaming and budgeting in drafting and implementation of policies;**
- 2.3. cooperation with the Agency for Gender Equality and other relevant actors in the field of gender equality;**
- 2.4. preparation of annual reports on implementation of the Kosovo Program for Gender Equality and other reports that are submitted to the Agency;**
- 2.5. implementation of other measures foreseen by this law.**

3. Relevant officials for gender equality shall exercise their duties and responsibilities in accordance with provisions determined by this Law and relevant sub-legal act which shall be approved by the Government, according to the proposal of the Agency.

Comment, Article 12

12. The provisions of Article 12 oblige all ministries and municipalities in Kosovo to designate appropriate officials for gender equality and also to allocate sufficient resources to fulfil their mandate. Paragraph 2 of this Article explicitly lists five duties and responsibilities that they should carry out, which include: Law Enforcement Coordination and Gender Equality Program; Budgeting and gender integration; Cooperation with gender equality agencies; Preparation of reports and the manner of reporting and implementation of legal policies in the field of gender equality. Paragraph 3 *ex officio* obliges officials in ministries and municipalities to perform their duties and responsibilities under this law and other legal acts deriving from this law and the legislation in force. With this provision, the legislator wanted the entire state apparatus to be aware of the importance of gender equality as an advanced standard, so that the protection and promotion of gender equality would not remain on the shoulders of the Agency alone.¹⁵¹

¹⁵¹ See Regulation no. 12/2016 on the Duties and Responsibilities of Relevant Officers for Gender Equality in the Min-

Article 13

Ombudsperson

Ombudsperson is an equality institution that handles cases related to gender discrimination, in accordance with procedures established by the Law on Ombudsperson.

Comment, Article 13

13. Article 13 highlights the importance of the Institution of the Ombudsperson regarding the gender discrimination. The Ombudsperson is an independent institution established based on the Constitution of the Republic of Kosovo¹⁵² and the Law on the Ombudsperson¹⁵³. The Ombudsperson is a mechanism of equality for promotion, monitoring and support of equal treatment without discrimination on the grounds protected by the Law on Gender Equality and the Law on Protection from Discrimination¹⁵⁴. This article mentions some notions, such as *gender equality and discrimination*, which are commented above¹⁵⁵. What is important in this article is to clarify what is the procedure developed by the Ombudsperson Office when dealing with cases related to gender discrimination. The Gender Equality Unit within the Ombudsperson office is engaged to implementing the LGE. It accepts complaints about gender-based discrimination in the areas of employment, education, ownership, domestic violence, victim and housing protection, and access to the judicial system. Cooperates with government bodies, civil society and international organizations and media. The People's Advocate Office develops procedures related to human rights violations, but with particular emphasis on cases referring to discrimination, including discrimination on a gender basis.

13.a) According to this Article, any person who claims to have been discriminated on a gender basis may submit a request to the institution of the Ombudsman for the initiation of a procedure, which shall in principle be submitted in writing, but also electronically and orally, in case it can not be made in

istries and the Municipalities, approved by the Government of Kosovo with Decision no. 02/109 of 16.09.2016.

¹⁵² Kosovo Constitution, Articles 132, 133, 134 and 135.

¹⁵³ Law no. 05 / L-019 on the Ombudsperson in Kosovo, Official Gazette of the Republic of Kosovo, no. 16, 26 June 2015.

¹⁵⁴ Article 1, Paragraph 2 of the Law on Ombudsperson, See also Law no. 05 / L -021 on Protection from Discrimination, Official Gazette of the Republic of Kosovo, no.16, 26 June 2015.

¹⁵⁵ See LGE, Articles 2 and 4 and the comment section.

writing.¹⁵⁶ After receiving the complaint, the Ombudsperson within ten (10) working days decides for the admissibility of the case as follows: 1. to review the case under accelerated procedure; 2. to start full investigation; 3. to reject the complaint; 4. to reject the complaint as groundless; 5. to terminate investigation when he/she ascertains that the case was resolved in another way in accordance with the request of the complainant.¹⁵⁷ In all above cases, Ombudsman shall notify the party in writing within thirty (30) days from the day of receipt of the complaint. Consequently, after development of the procedure, a final decision is made and the findings and recommendations are submitted to the complainant and the responsible public authorities.¹⁵⁸

13.b) With this Article, the focus has been placed on the mechanism for ensuring equal treatment of the sexes, and the Ombudsperson Institution has been separated as one of these institutions or mechanisms that ensure respect for human rights by the responsible institutions.

Article 14

Political parties

Political parties with their acts are obliged to implement measures to promote equal participation of men and women at authorities and bodies of the parties in accordance with provisions of Article 6 of this Law.

Comment, Article 14

14. Article 14 specifies the obligation of political parties to take measures to promote equal participation of men and women at authorities and bodies of political parties. Kosovo has the Law on Financing of Political Entities and two laws on amending and supplementing this law.¹⁵⁹ It is important to mention that the Law on Gender Equality uses the term *political party*, while the Law on Political Entity Financing uses the term *political subject* and sometimes the term *political party*. *Political entity means political*

¹⁵⁶ Article 20, Law on Ombudsperson.

¹⁵⁷ Article 21, Law on Ombudsperson.

¹⁵⁸ Article 27, Law on Ombudsperson.

¹⁵⁹ Law no. 03/174 on the Financing of Political Entities and the Law on Amending and Supplementing the Law no. 03/174 on the Financing of Political Entities, as amended and supplemented by Law no. 04/058.

*party, coalition, citizen initiative or an independent candidate.*¹⁶⁰ However, a political party means an organization of individuals who voluntarily join on the basis of common ideas, interests or views for the purpose of exercising the influence and election of their representatives in the public post unless otherwise defined by the legislation in force.¹⁶¹ Political parties in Kosovo in their statutes guarantee the membership and representation of all individuals regardless of gender. However, there is an unequal numerical proportion between men and women who are part of the political parties.

- 14.a) Given that there is no equal representation between sexes in political parties, women forums have been established in the main political parties in the country, so that more females (women) are part of the political parties, consequently of the political life.¹⁶² Also, a minimum quota of 30% of women representation in the Parliament of the Republic of Kosovo has been set up to promote female participation in political life. Each party or each coalition should have women representation of at least 30% as a separate quota.¹⁶³
- 14.b) For the purpose of representation of the female gender in the Parliament of the Republic of Kosovo, the quota of at least 30% of the female gender is foreseen. This is intended to promote women rights and achieve a representation regardless the number of votes won. This is an election system that promotes gender equality, envisioning the mechanism with a 30% quota as the minimum representation provided under the law.¹⁶⁴

¹⁶⁰ Law on Financing of Political Parties, Article 2, 1.10.

¹⁶¹ See Article 2 of Law no. 03 / L-072 on Local Elections in the Republic of Kosovo..

¹⁶² See the statutes of the main political parties in Kosovo: PDK, LDK, VV, AAK, Nisma, AKR, etc.

¹⁶³ Law no. 03 / L-073 on General Elections in the Republic of Kosovo, Official Gazette of the Republic of Kosovo, no. 31, 15 June 2008, Article 27.

¹⁶⁴ Law no. 03 / L-073 on General Elections in the Republic of Kosovo, Official Gazette of the Republic of Kosovo, no. 31, 15 June 2008.

CHAPTER III
EQUAL PROTECTION AND TREATMENT, ON THE BASIS OF
GENDER AFFILIATION, IN EMPLOYMENT RELATIONSHIPS

Article 15

Prohibition of gender discrimination in employment relationships

1. It is prohibited the direct or indirect discrimination on grounds of sex, marital or family status, pregnancy, birth, parenting and each custody form in the public or private sectors, in relation to:

1.1. conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including advancement;

1.2. access to all types and levels of vocational guidance, vocational training and advanced and requalification, including practical work experience;

1.3. employment and working conditions, including dismissals, as well as pay;

1.4. membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations;

1.5 Access to employment including the training leading thereto, a difference of treatment which is based on a characteristic related to gender shall not constitute discrimination where, by reason of the nature of the particular occupational activities or conditions in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate.

Comment, Article 15

15. Article 15 envisages prohibition of gender-based discrimination in the employment relationship, envisaging also cases where discrimination may

occur. Gender discrimination in the workplace means a visible behaviour by which people are treated differently and not favourably because of their marital or family status, pregnancy, childbirth, parental right and any form of guardianship. Gender discrimination in the workplace can be used as an accurate indicator of how gender equality is respected in one country.

- 15.a) International Labour Organization defines discrimination in relation to employment and occupation as any distinction, exclusion or preference based on race, colour, sex, language, religion, political opinions, national or social origin, and which intends or follows eliminating or impairing the equality of opportunity or treatment in employment or occupation. Also, the interpretation and implementation of this Article should be made in conjunction with Article 5 of the Labour Law no. 03 / L-212, which also envisages prohibition of all types of discrimination during the establishment of the labour relationship.¹⁶⁵
15. b) Prohibition of gender discrimination in labour relations, besides being regulated by local legislation is also regulated by a large number of international conventions. One of these conventions is the Convention on Elimination of All Forms of Discrimination Against Women, which in Article 11 specifies the obligations of States Parties in the field of employment, requiring States parties to take all measures to eliminate discrimination against women in the area of employment.¹⁶⁶ The Convention also provides the basis for achieving equality between women and men by ensuring equal access of women with equal opportunities to political and public life, including the right to vote and run in the elections, as well as education, health and employment. The abovementioned Convention, based on Article 22 of the Constitution of the Republic of Kosovo, is directly applicable in Kosovo.¹⁶⁷ Also, the Constitution of Kosovo in Article 49 regulates the right to work and the exercise of profession by guaranteeing the freedom of every person to choose his/her profession and occupation.¹⁶⁸

Paragraph 1

- 15.1 Paragraph 1 of this Article prohibits direct or indirect discrimination based on sex, marital or family status, pregnancy, childbirth, parenting and any form of custody in the public or private sector during the establishment of employment relationships and then in other sub-paragraphs mentions the cases when these kinds of discrimination can be carried out. Direct

¹⁶⁵ See Article 5 of the Law. 03/L-212 on Labour <http://www.kuvendikosoves.org/common/docs/ligjet/2010-212-alb.pdf>

¹⁶⁶ See Article 11 of the Convention on the Elimination of All Forms of Discrimination against Women <http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf>

¹⁶⁷ See the Constitution of the Republic of Kosovo, Article 22.

¹⁶⁸ See the Constitution of the Republic of Kosovo, Article 49.

gender discrimination in the workplace implies undertaking of policies and practices that openly deny equal individual opportunities of individuals on the basis of their gender. While, indirect discrimination can occur through practices and policies that appear to be neutral in respect of gender but always lead to denying the opportunities or privileges of one of the sexes. This can be illustrated by the fact that in many EU countries men have full-time employment, while women half-time or shortened.¹⁶⁹

15.1.a) The direct and indirect definition of discrimination is also envisaged by the European Council Directive no. 2000/78 /EC of 27 November 2000 on establishment of the general framework for equal treatment in employment and occupation. The purpose of this Directive is to establish a general framework to combat discrimination based on religion or belief, disability, age or sexual orientation in terms of employment and occupation, aiming at enforcing the principle of equal treatment in the member states.¹⁷⁰ The directive should also be extended in the sense of equal treatment and the prohibition of direct and indirect discrimination in the meaning of Article 14 of the ECHR as well, so that the directives should be interpreted in conjunction with the rights protected by the ECHR, including the prohibition of discrimination in gender-based employment relationships.¹⁷¹

15.1.b) Article 15 of the Law, in the subsequent subsections has determined cases when discrimination may occur, aiming to ensure the effective exercise of the rights and freedoms set forth in this Law and other international acts as defined in paragraph 3 of Article 1 of this law. Regarding the cases of discrimination in employment relationships, the ECtHR's ruling in the case of *Konstantin Markin vs. Russia* of 2010 is of great significance. The ECtHR found a violation of Article 14 in conjunction with Article 8 of the ECHR. The court held that the refusal of a member state (Russia) to give the male military staff a parental leave, unlike the female military staff, is discriminatory. Although Article 8 does not include the right to parental leave, the Court emphasized that if a country decides to establish a parental leave scheme, that State must do so in a non-discriminatory manner. The Court found that the advancement of equality between men and women today is a major objective of the Council of Europe member states and

¹⁶⁹ Sylvia Walby, *The European Union and Gender Equality: Emergent varieties of gender regime*, Paper presented to National feminisms in a Transnational Arena' conference, University of Wisconsin at Madison, 2003, fq. 2.

¹⁷⁰ See European Council Directive no. 2000/78 / EC dated November 27, 2000, article 1 defines a general framework for equal treatment in employment and occupation, available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML>

¹⁷¹ International Organization for Migration (IOM), *Handbook on European Non-discrimination Law and its Update including the Manual on the Anti-discrimination Legal, Framework and Referral Mechanism in Azerbaijan*, Baku, 2013, fq. 46-47.

that very strong reason must be introduced before a difference in treatment between sexes can be considered as in accordance with the Convention.¹⁷²

15.1.1 This sub-paragraph obliges public and private institutions to provide equal access and conditions for employment by ensuring the implementation of the principle of equal opportunities and equal treatment for men and women in employment and occupation matters. The implementation of recruitment conditions means the non-inclusion of gender-based discrimination elements when proclaiming a vacancy, providing equal opportunities for women and men in terms of applying to job vacancies. An extended interpretation of this sub-paragraph is also envisaged by Council Directive No. 2000/78/EC of 27 November 2000 on the establishment of a general framework for equal treatment in employment and occupation. This Directive applies to all persons in the public and private sectors regarding the conditions of access to employment, to self-employment or to the profession, including selection criteria and recruitment conditions at any branch and at all levels of the professional hierarchy.¹⁷³ Based on the fact that the law is fully in accordance with the aforementioned Directive, the competent institutions for the implementation of this subparagraph should take into account Article 10 of this Directive, under which Article, Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove (burden of proof) that there has been no breach of the principle of equal treatment.¹⁷⁴ The spirit of the directive is to provide equal employment opportunities for both sexes (men and women) for all countries, because, from numerous analyses made by the European Commission, it has resulted that in many countries male employment rates were higher than those for women.¹⁷⁵

15.1.2 Sub-paragraph 1.2 of Article 15 guarantees equal access to all types and levels of professional guidance, recognizing the right of access to all professional levels, both in the public and private sectors. In addition, this

¹⁷² See ECHR decision [http://hudoc.echr.coe.int/eng#{"dmdocnumber":\["904732"\],"itemid":\["001-109868"\]}](http://hudoc.echr.coe.int/eng#{).

¹⁷³ For more details, see Article 3, paragraph 1, point a) of Council Directive 2000/78/EC of 27 November 2000 on the establishment of a general framework for equal treatment in employment and occupation <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML>.

¹⁷⁴ See Article 10 of Council Directive 2000/78/EC of 27 November 2000 on the establishment of a general framework for equal treatment in employment and occupation, accessible at: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML>.

¹⁷⁵ Nik de Boer, Susanna Burri, Hélène Masse-Dessen, Simone van der Post, in: European Commission, *Legal Approaches to Some Aspects of the Reconciliation of Work, Private and Family Life in Thirty European Countries*, 2008, fq. 2-3.

subparagraph, in accordance with the Council Directive 2000/78/EC of 27 November 2000, also provides for the establishment of an approach to all types and levels of professional guidance, vocational training, advanced vocational training, and retraining, including practical work experience.¹⁷⁶ Professional training means the promotion and equal distribution of women and men to different types of jobs, providing equal distribution and opportunities through timely and fair information. Under this subparagraph, the employer can not use differentiated standards or procedures to the employees due to gender.

15.0.3 Subparagraph 1.3 of Article 15 guarantees equal employment and working conditions for women and men, including dismissal, payment, and equal treatment. Inequality between men and women is also due to the dominant position of men in the labour market or because of the ways of paying for full-time and part-time work, where women are more often employed with part-time jobs.¹⁷⁷ This subparagraph obliges employers to apply equal working conditions, starting from recruitment, performance, and dismissal, including equal pay for work of equal value. Regarding working conditions, Article 5 of Council Directive no. 2000/78/EC, of 27 November 2000, places special importance on occupational accommodation for persons with disabilities while guaranteeing respect for the principle of equal treatment. Under the aforementioned directive, employers will take appropriate measures, where needed in a particular case, to enable a person with disabilities to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.¹⁷⁸

15.1.4 Equal pay means equal pay between work performed by a female employee and a male employee. Equal pay for equal work of female and male workers is also foreseen by the Treaty on the Functioning of the European Union. According to Article 157 of this Treaty “*Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied*”.¹⁷⁹ As seen above, the treaty has also defined work of equal value. Regarding equal pay

¹⁷⁶ For more details, see Article 3, paragraph 1, point b) of Council Directive 2000/78 / EC of 27 November 2000 on the establishment of a general framework for equal treatment in employment and occupation, accessible at:

<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML>

¹⁷⁷ Mieke Verloo, Multiple Meanings of Gender Equality, A Critical Frame Analysis of Gender Policies in Europe, Central Europe University, Budapest 2007, fq. 28.

¹⁷⁸ For more details, see Article 5 of Council Directive no. 2000/78/EC of 27 November 2000 on the establishment of a general framework for equal treatment in employment and occupation, Official Journal L 303, 02/12/2000 P. 0016 - 0022, accessible at: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML>

¹⁷⁹ See Article 157 of the Treaty on the Functioning of the European Union, accessible at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>

between females and males, the ECJ, in its decision in the case of *Barber v Guardian Royal Exchange*, stressed the need for genuine transparency, allowing for effective scrutiny. According to the Court, this is achieved only if the principle of equal pay is respected in each of the elements of remuneration given to men and women.¹⁸⁰ In this respect, the Charter of Fundamental Rights of the European Union plays an important role, which in paragraph 1 of Article 23, foresees equality between men and women in all fields, including employment and wages.¹⁸¹ The International Labour Organization has paid special attention to equal pay, through its Convention no. 100 on equal remuneration for men and women workers for work of equal value, which has been ratified by most States Parties to the Convention on the Elimination of All Forms of Discrimination against Women. The abovementioned Convention recommends taking into account the study, development, and adoption of job evaluation systems based on gender-neutral criteria that would facilitate the comparison of the value of those jobs of different nature where women predominate, with jobs where men currently predominate.¹⁸²

15.1.5 This sub-paragraph guarantees the right of membership and involvement in a workers' or employers' organisation in order to protect their interests at work. For the purposes of this sub-paragraph, the term *workers' or employers' organisation* means those organizations that are established to serve the members that have created them, providing a range of services to improve efficiency and effectiveness for their members. One of the most basic services provided by these organizations is overseeing the implementation of legislation related to the rights of workers at work. The abovementioned subparagraph is in full compliance with paragraph 1, item d) of Article 3 of the Council Directive no. 2000/78/EC of 27 November 2000 on the establishment of a general framework for equal treatment in employment and occupation.¹⁸³ Under this subparagraph, the responsible institutions of the Labour Inspectorate should supervise and prosecute cases on the basis of which the rights of employees are violated as a result of membership

¹⁸⁰ For more details, see the decision of the ECJ at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX-%3A61988CJ0262>.

¹⁸¹ See paragraph 1 of Article 23 of the Charter of Fundamental Rights of the European Union which, with the Lisbon Treaty, is mandatory for the member states and which marks an important moment in the development of the right to gender equality in the EU. This Charter will, inter alia, prohibit discrimination on any grounds, including sex (Article 21); It recognizes the right to gender equality in all areas, not only in employment, and the need for positive action to promote it (Article 23). The card also guarantees "the right to paid maternity leave and parental leave" (Article 33). http://www.europarl.europa.eu/charter/pdf/text_en.pdf

¹⁸² For more details, see Convention No. 100. on Equal Remuneration for Men and Women Workers for Work of Equal Value of the International Labor Organization http://www.ilo.org/dyn/normlex/en/f?p=NORMLEX-PUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312245:NO

¹⁸³ For more details, see Article 3, paragraph 1, point d) of Council Directive no. 2000/78/EC of 27 November 2000. <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML>

in any organization intended to protect the rights of employees. In order for this sub-paragraph to be applicable, the institutions responsible for its implementation are encouraged to take into account paragraph 1 of Article 13 of the above-mentioned Directive, according to which, the Member States, in accordance with their practices and national traditions should take the appropriate measures to promote dialogue between social partners, with a view to promoting equal treatment, including monitoring of workplace practices, collective agreements, codes of conduct through research or exchanges of experience and Good Practices.¹⁸⁴

15.1.6 This sub-paragraph covers cases which do not constitute discrimination if a particular place of work requires special gender-specific characteristics, based on the special nature of the professional activities or the conditions under which they are carried out, if one such characteristic constitutes a determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate. The same approach as this sub-paragraph is also noted in the revised Directive no. 2006/54/EC of the European Parliament and of the Council of 5 July 2006, in paragraph 2 of Article 14.¹⁸⁵ According to this paragraph of the aforementioned Directive, Member States may provide, regarding the access to employment, including main training, that a change of treatment based on a sex-related characteristic shall not constitute discrimination, where due to the nature of the professional activities or context in which they are carried out, such a characteristic constitutes a genuine and determining professional requirement, provided that its objective is legitimate and the requirement is proportionate.¹⁸⁶

Article 16

The prohibition of gender discrimination in social security schemes at work

1. There shall be no direct or indirect discrimination on grounds of sex in all occupational social security schemes, in particular as regards:

¹⁸⁴ See paragraph 1 of Article 13 of Council Directive no. 2000/78 / EC of 27 November 2000. <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML>

¹⁸⁵ In 2006, the new EC Directive 2006/54/EC, which brings together the existing provisions of the various sex equality directives, including some cases from the ECHR case law, was adopted.

The purpose of this Directive is to clarify and merge into a single text the provisions on employment, including promotion and professional training, as well as working conditions, together with salaries and occupational social security schemes.

¹⁸⁶ See paragraph 2 of Article 14 of the abovementioned Directive:

<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1449588923123&uri=CELEX%3A32006L0054>

- 1.1. the scope of such schemes and the conditions of access to them;**
- 1.2. the obligation to contribute and the calculation of contributions;**
- 1.3. the calculation of benefits, including supplementary benefits due in respect of a spouse or dependants, and the conditions governing the duration and retention of entitlement to benefits.**

2. Provisions contrary to the principle of equal treatment shall include those based on sex, either directly or indirectly, for:

- 2.1. determining the persons who may participate in an occupational social security scheme;**
- 2.2. fixing the compulsory or optional nature of participation in an occupational social security scheme;**
- 2.3. laying down different rules as regards the age of entry into the scheme or the minimum period of employment or membership of the scheme required to obtain the benefits thereof;**
- 2.4. laying down different rules, except as provided for in subparagraphs 2.8 and 2.10 of this Article, for the reimbursement of contributions when a worker leaves a scheme without having fulfilled the conditions guaranteeing a deferred right to long-term benefits;**
- 2.5. setting different conditions for the granting of benefits or restricting such benefits to workers of one or other of the sexes;**
- 2.6. fixing different retirement ages;**
- 2.7. suspending the retention or acquisition of rights during periods of maternity leave or leave for family reasons which are granted by law or agreement and are paid by the employer;**
- 2.8. setting different levels of benefit, except in so far as may be necessary to take into account the actuarial calculation factors which differ according to sex in the case of defined contribution schemes; in the case of funded defined-benefit schemes, certain elements may be unequal where the inequality of the amounts results from the effects of the use of actuarial factors differing according to sex at the time when the funding of this program is implemented;**

2.9. setting different levels for workers' contributions;

2.10. setting different levels for employers' contributions, except:

2.10.1. in the case of defined-contribution schemes if the aim is to equalize the amount of the final benefits or to make them more nearly equal for both sexes;

2.10.2 in the case of funded defined-benefit schemes where the employer's contributions are intended to ensure the adequacy of the funds necessary to cover the cost of the benefits defined.

2.11. laying down other standards or standards applicable only to workers of a specified gender, except as provided for in subparagraphs 2.8 and 2.10 of this Article, as regards the guarantee or retention of entitlement to deferred benefits when a worker leaves a scheme.

3. Where the granting of benefits within the scope of this article is left to the discretion of the scheme's management bodies, the latter shall comply with the principle of equal treatment.

Comment, Article 16

16. Article 16 of the law prohibits direct or indirect discrimination on grounds of sex in all occupational social security schemes. With regard to direct and indirect discrimination, clarification is provided in the preceding paragraphs, but it is important to note that, in addition to direct and indirect discrimination, the doctrine of equality also recognizes formal and substantive discrimination in relation to labour relations. In the case *Thlimmenos vs. Greece*, the ECtHR has explicitly acknowledged that not only the formal discrimination that implies the unequal treatment of equal issues, but also the substantive discrimination that implies equal treatment of unequal issues, falls within the scope of Article 14 of the European Convention on Human Rights.¹⁸⁷ Therefore, it is important to consider these forms of discrimination in the implementation of this Law. According to this Article, occupational social security schemes means social security which compulsorily protects all citizens who are economically active but who are subject to reduced income as a result of birth, old age, invalidity

¹⁸⁷ See ECHR, *Thlimmenos v Greece* available at:

<http://www.equalrightstrust.org/ertdocumentbank/Microsoft%20Word%20Case%20of%20Thlimmenos%20v%20Greece%202.pdf>

or loss of the family provider. In addition, social security schemes provide compulsory protection to all persons employed in the event of a reduction in income as a consequence of temporary disability caused by illness, accident at work or unemployment. Concerning this Article, the Constitution of Kosovo in Article 51 provides for health and social security.¹⁸⁸ According to this Article, health care and social security and basic social security related to unemployment, illness, disability and old age are regulated by law.¹⁸⁹ As seen in the previous Article of the Constitution, the issue of social security schemes is foreseen to be regulated by relevant laws. Currently the legislation pertaining to this article includes the Law on the Social Assistance Scheme in Kosovo, the Law on Pension Funds in Kosovo and the Law on Health Insurance. Regarding social security schemes, the European Social Insurance Convention which, from the four main principles contained in it, sets the principle of equal treatment as the first principle with regard to the organization of social security schemes. The implementation of the principle of equal treatment in social schemes requires the inclusion of a broad spectrum of actors, not just the government, but also employers, trade unions and public sector representatives and there are often difficulties in finding social consensus.¹⁹⁰ The Convention applies to all legislation and regulates social security branches dealing with sickness and maternity benefits, disability benefits, old-age benefits, survivors' benefits, benefits in the case of death, benefits related to occupational diseases, unemployment benefits and family benefits.¹⁹¹ Also, the European Parliament and Council Directive of 5 July 2003, no. 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, in item c) of Article 1 provides for gender-equal treatment in relation to social security schemes.¹⁹²

¹⁸⁸ See Constitution of the Republic of Kosovo, Article 51. Regarding the content and meaning of this article see Enver Hasani, *Commentary of the Constitution of the Republic of Kosovo*, Published by GIZ GmbH, 2012, Pristina, Commentary on Article 51, pg. 191-196.

¹⁸⁹ See Article 51 of the Constitution of the Republic of Kosovo.

¹⁹⁰ See Anna Van Der Vleuten, *The Price of Gender Equality, Member States and Governance in the European Union*, Ashgate, England, 2007, np. 2.

¹⁹¹ See paragraph 1 of Article 2 of the European Convention on Social Security

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680074611>

Also, this Convention applies to all general social insurance schemes and special schemes, whether contributory or non-contributory, including employer liability schemes with respect to the benefits referred to in paragraph 1 of Article 2 thereof. According to the Convention, bilateral or multilateral agreements between two or more Contracting Parties shall, to the extent practicable, determine the conditions under which this Convention shall apply to the schemes laid down by collective agreements made binding by the decision of the public authorities.

¹⁹² See Directive of the European Parliament and of the Council of 5 July 2003, no. 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation

- 16.1.1 Under this subparagraph, no direct or indirect discrimination shall be allowed in the organization of social security schemes at work and regarding the conditions of access thereto. According to the Directive no. 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the application of social security schemes should apply the principle of equal treatment for men and women, excluding contributions paid by workers on a voluntary basis. Also, this Directive in Article 7 has laid down professional schemes for which risk protection may be required, including the risk of illness, invalidity, old age, including early retirement, industrial accidents, occupational diseases and unemployment.¹⁹³
- 16.1.2 This sub-paragraph prohibits discrimination or unequal treatment in any form as regards the obligation to contribute and the calculation of contributions. According to this Article there should be equal treatment for both men and women in the case of payment of contributions and their calculation regarding the compulsory social security. In order to apply the principle of equal treatment, special care should be devoted to the drafting of social security contracts because these contracts are often offered under different conditions for men and women, both in terms of premiums and benefits, especially in private schemes of pensions. These differences are usually based on the fact that, on average, women live longer than men and insurance companies as a consequence have a greater financial risk in providing insurance to women, compared to insurance provided to men. Regarding this issue, paragraph 1 of Article 5 of Directive no. 2004/113/EC of 13 December 2004 on the implementation of the principle of equal treatment between men and women in the access to and supply of goods and services obliges Member States to ensure that in all new insurance contracts, signed at least after 21 December 2007, the use of gender as a factor in the calculation of premiums and benefits for the purposes of insurance and related financial services, should not result in differences in the premiums and benefits of individuals. ¹⁹⁴ Regarding the obligation to pay contributions, the European Court of Human Rights in the case *Van Raalte v Netherlands*, (Application no. 20060/92) referring to Article 14 of the ECHR ascertained that differentiation in treatment is discriminatory. Regarding this case, the applicant was a citizen of the Netherlands, was not married and had no children. He paid contributions

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006L0054>

¹⁹³ See Directive no. 2006/54/EC of the European Parliament and of the Council of 5 July 2006, paragraph 1, item a) of Article 7, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1449588923123&uri=CELEX-%3A32006L0054>

¹⁹⁴ See Directive no. 2004/113/EC of 13 December 2004 on the implementation of the principle of equal treatment between men and women in access to and supply of goods and services, Article 5, paragraph 1, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32004L0113>

for the general care of children according to an act issued in 1962 which obliged any person under the age of 65 who earned a salary through a work contract. However, unmarried women over 45 years of age with a royal decree had been relieved of the obligation to pay contributions for this category, while the same age men were not excluded. The applicant alleged that the exclusion of women without children above the age of 45 is discrimination based on gender which is prohibited by Article 14 of the ECHR. Previously, the state of the Netherlands rejected such a request. The applicant's application was approved by the ECtHR which found that the presented facts fall within the scope of Article 14 of the ECHR and of Article 1 of Protocol no. 1 thereof. The Court held that for the purposes of Article 14, the difference in treatment is discriminatory if it does not have an objective and reasonable justification, if it does not pursue a legitimate aim or if the means are not in proportion to the purpose sought to be achieved. The Court acknowledged that States enjoy a freedom of assessment in different or similar situations justifying a different treatment, but it is considered that for a difference in treatment based exclusively on gender will not have to be a very weighty reason. On this basis, the Court considered that the justifications provided by the State were not sufficient and found unanimously that there had been a violation of Article 14 of the Convention, taken together with Article 1 of Protocol No. 1.¹⁹⁵

16.1.3 This sub-paragraph prohibits any discrimination in respect of the calculation of benefits in relation to women and men, including supplementary benefits in relation to spouses or dependants, as well as the conditions governing the duration and retention of entitlement to benefit. Regarding the calculation of benefits from social security schemes and supplementary benefits in relation to spouses, the Council Directive no. 79/7 / EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security such an issue is dealt with in paragraph 1 of Article 4 thereof. The directive in this paragraph states that the principle of equal treatment shall be applied, implying that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to the marital or family status, in particular as concerns: the scope of schemes and conditions of access thereto, the obligation to contribute and the calculation of contributions, as well as the calculation of benefits, including increases due in respect of a spouse and for dependants and the of conditions governing the duration

¹⁹⁵ See ECHR, *Van Raalte v Netherlands*, Application no. 20060/92, available: [http://hudoc.echr.coe.int/eng#{"dmdocnumber":\["695908"\],"itemid":\["001-58031"\]}](http://hudoc.echr.coe.int/eng#{)

and retention of entitlement to benefits.¹⁹⁶

Paragraph 2

16.2 This paragraph defines cases that are in conflict with the principle of equal treatment of sex, which may occur either directly or indirectly in the application of social security schemes. For the purposes of this paragraph, *the principle of equal treatment* implies the exclusion of direct and indirect discrimination, guaranteeing, by legal provisions, the application of this principle. At the same time, while enabling the full and equal participation of men and women in all aspects of social security at work defined by this law or by any other law. According to this paragraph, direct sex discrimination may occur when a person is treated less favourably in relation to another person because of his or her sex. While indirect discrimination refers to discrimination, which is the result of the application of the gender neutrality criterion, which disadvantages particularly persons belonging to one sex compared to persons of the opposite sex. This paragraph, in the subsequent subparagraphs, in the same way as the Directive of the European Parliament and of the Council of 5 July, with reference no. 2006/54 / EC on the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation has explicitly set out examples or cases of discrimination based on sex in social security schemes.¹⁹⁷ Also, with regard to the prohibition of discrimination in social security schemes, the European Council Directive no.2000/43/EC for implementing the principle of equal treatment between persons irrespective of racial or ethnic origin in point e) and f) of paragraph 1 of Article 3 provides for social protection, including social security, healthcare, and social advantages.

16.2.1 Under this subsection direct or indirect discrimination is considered the preliminary determination of persons who, because of their sex, participate in a social security scheme at work. Therefore, when implementing social schemes, special attention should be paid to the drafting of such provisions in order to comply with the principle of equal treatment. The other purpose of this sub-paragraph is to prevent the preliminary determination of persons who may participate in social security schemes by creating preferences or favours based on their sex. The paragraph also obliges the

¹⁹⁶ For more see paragraph 1 of Article 4 of the European Council Directive no. 79/7 / EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:31979L0007>

¹⁹⁷ See Directive of the European Parliament and of the Council no. 2006/54 / EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation of 5 July 2003, Article 9, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006L0054>

responsible institutions to eliminate any possibility through the drafting of legal acts in accordance with this law, which would prevent the possibility of determining persons who may participate in a work insurance scheme violating the principle of equal treatment, sex differences respectively.

- 16.2.2 Under this subparagraph, state institutions are obliged, by establishing a legal basis, to regulate the manner of the functioning of social security, including compulsory and voluntary insurance. Upon regulating these schemes, an equal treatment should be provided excluding any discrimination on grounds of sex. The other purpose of this sub-paragraph is to provide equal opportunities for participation in social security schemes. Therefore, when drafting such schemes, the principle of non-discrimination should be taken into account by providing equal access and opportunities.
- 16.2.3 This sub-paragraph provides for drafting of those rules relating to the prohibition of discrimination on grounds of sex, either directly or indirectly, in occupational social security schemes. Under this subparagraph, when drafting different rules regarding the age of entry into this scheme or the minimum period of employment or membership in this scheme, equal opportunities should be created eliminating any possibility of discrimination on grounds of sex. The subsection provides for the drafting of rules or provisions regarding the age of entry into this scheme, implying the obligation of the institutions to exclude any element which would be contrary to the principle of equal treatment. Based on this, the drafting of these provisions should provide equal opportunities regardless of the sex of any person. The sub-paragraph also addresses the minimum period of employment or membership in the scheme for the purpose of benefiting from it, implying the obligation to respect the principle of equal treatment both in the case of membership and respect for the minimum period of employment.
- 16.2.4 Under this sub-paragraph, it is prohibited to compile any rule which is contrary to the principle of equal treatment, including those on grounds of sex, which relate to the reimbursement of contributions when a worker leaves a scheme without having fulfilled the conditions guaranteeing the right to long-term benefits. The sub-paragraph also provides for the possibility of not fulfilling the conditions guaranteeing the right to long-term benefits while also guaranteeing in these cases the observance of the principles of equal treatment on the grounds of sex.

- 16.2.5 This sub-paragraph provides for the prohibition of gender discrimination in social security schemes by defining the obligation of the responsible institutions for the adoption of provisions which are not contrary to the principle of equal treatment on grounds of sex. These provisions should lay down equal conditions for the granting of benefits or restricting benefits to workers of one or other sex. Under this sub-paragraph, the preliminary determination of different conditions for the granting of benefits or restricting such benefits, through provisions which are contrary to the principle of equal treatment on grounds of sex, will constitute direct or indirect discrimination. This implies the obligation of responsible institutions, which have the responsibility, to ensure equal protection and treatment when defining these conditions.
- 16.2.6 This sub-paragraph provides for the prohibition of gender discrimination in occupational social security schemes through provisions that are contrary to the principle of equal treatment on the grounds of sex, either directly or indirectly, in the case of regulation of different retirement ages. For the purpose of this sub-paragraph, the term “*retirement*” shall mean the regular monthly payment to a person for a lifetime, ranging from retirement age, physical incapacity or death of a person. The purpose of this sub-paragraph is to establish a clear rule that should be applied to the retirement of persons irrespective of their age. In these cases, the principle of equal treatment between women and men must be applied by not recognizing any kind of direct or indirect discrimination. This subparagraph requires the responsible institutions to take into account the principle of equal treatment on the grounds of sex by eliminating any form of discrimination on the occasion of retirement age.
- 16.2.7 This sub-paragraph provides for the prohibition of gender discrimination in social security schemes by obliging the responsible institutions to take into account the principle of equal treatment when drafting the provisions by not allowing any kind of discrimination. Under this subparagraph, the principle of equal treatment shall apply in the case of suspension of retention or enjoyment of entitlement during periods of maternity leave or leave for family reasons, guaranteed by law or by agreement and paid by the employer. In these cases, there should be equal treatment between men and women, recognizing and enforcing all rights related to payments that are guaranteed by law or by agreement and paid by the employer. The purpose of this sub-paragraph is to ensure greater legal certainty which would lead to the elimination of any form of discrimination through oversight of the implementation of laws and agreements relating to such

cases. Similarly to this paragraph, such an issue is also provided for in point g) of Article 9 of the European Parliament and Council Directive of 5 July 2003, no. 2006/54 / EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.¹⁹⁸

16.2.8 This sub-paragraph establishes the prohibition of gender discrimination in social security schemes at work with regard to the determination of different levels of benefit, except in so far as may be necessary to take into account the actuarial calculation factors which differ according to sex in the case of defined contribution schemes, in the case of defined benefit financing schemes, certain elements may be unequal where the inequality of the amounts results from the effects of the use of insurance factors differing according to sex at the time when funding of this program is implemented. The purpose of this sub-paragraph is to create a freedom of action in relation to social security schemes, allowing in some cases concrete implementation of the principle of equal treatment. Such an issue is also permitted by European legislation. The same content as the present sub-paragraph is contained in the European Parliament and Council Directive of 5 July 2003, no. 2006/54 / EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation in item h) of Article 9.¹⁹⁹

16.2.9 This paragraph prohibits any kind of discrimination which is contrary to the principle of equal treatment, including those on grounds of sex, as a result of setting different levels of worker's contributions. In these cases, the responsible institutions are obliged to apply all the criteria eliminating any discrimination between men and women when defining levels for employee contributions. For the purposes of this sub-paragraph, *employee contributions* are the main source of social security funding. Contributions are paid to special funds, each of which is required to finance a certain social program (such as health insurance, pensions, or social security and unemployment). Contributions are paid by employers and employees (being deducted from their salary).

¹⁹⁸ For more see: point g) of Article 9 of the European Parliament and Council Directive of 5 July 2003, no. 2006/54 / EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006L0054>

¹⁹⁹ For more see: point h) of Article 9 of the European Parliament and Council Directive of 5 July 2003, no. 2006/54 / EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006L0054>

16.2.10 The previous subparagraph prohibited discrimination in terms of setting different levels of employee contributions, while this sub-paragraph is intended to prohibit discrimination when setting different levels for employer contributions. Also, in terms of what is meant by *employers' contributions*, it was explained in the previous paragraph. The purpose of this sub-paragraph is to prohibit any direct or indirect discrimination that may be committed on the grounds of sex, distinguishing between men and women when setting levels for employers' contributions. The subparagraph has the same content as point j) of Article 9 of the European Parliament and Council Directive of 5 July 2003, no. 2006/54 / EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.²⁰⁰

16.2.10.1 In the previous paragraph, the main purpose was to prohibit gender discrimination in social security schemes when setting different levels for employers' contributions, but this sub-paragraph is an exception to this determination. Under this subparagraph, when setting the levels for employers' contributions, the application of the principle of equal treatment is exempted only if the purpose is to equalize the amount of final benefits or to make them more nearly equal for both sexes. From the content of this subsection it emerges that the application of this principle is exempted only in this case, which implies that during the implementation of the provisions regarding the prohibition of gender discrimination in the occupational security schemes, special attention should be paid and to avoid exception to other cases during the implementation of this law. A similar content to this sub-paragraph is also provided by the European Parliament and Council Directive of 5 July 2003, no. 2006/54 / EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation in point (i) of Article 9.²⁰¹

16.2.10.2 This sub-paragraph also provides for an exception under sub-paragraph 2.10 with regard to setting of different levels for employer contributions, allowing the exclusion of the principle of equal treatment in the case of funded defined-benefit schemes where the employers' contributions are intended to ensure the adequacy of the funds necessary to cover the

²⁰⁰ For more see: point j) of Article 9 of the European Parliament and Council Directive of 5 July 2003, no. 2006/54 / EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation,

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006L0054>

²⁰¹ For more see: point i) of Article 9 of the European Parliament and Council Directive of 5 July 2003, no. 2006/54 / EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006L0054>

cost of the benefits defined. From the content of this sub-paragraph it emerges that in the cases of the organization of funded schemes in respect of employers' contributions, it is permissible to adopt provisions which are contrary to the principle of equal treatment, including those on grounds of sex for the purpose of ensuring funds needed to cover the cost of the defined benefits. The purpose of allowing this exemption is to ensure the provision of the necessary funds covering the defined benefit costs. The sub-paragraph expressly defines the case when such exemption is allowed, hence the responsible institutions must be very careful not to misuse the provision in other cases. Such an issue is also set out in point (ii) of Article 9 of the European Parliament and Council Directive of 5 July, 2006/54 / EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.²⁰²

- 1.1.11 This sub-paragraph is intended to prohibit the imposition of discriminatory standards which may be attained by violating the principle of equal treatment with regard to workers of a particular sex. Under this sub-paragraph, no gender-based discrimination in social security schemes is permitted by drafting provisions that may be favourable or less favourable to both men and women. The purpose of this subparagraph is to guarantee and ensure that the establishment of standards will be equal and will not allow any kind of discrimination on the grounds of sex, through provisions that are contrary to the principle of equal treatment.

Paragraph 3

- 1.2 Paragraph 3 of Article 16 regarding the prohibition of gender discrimination in social security schemes in cases where the granting of benefits within the scope of this Article is left to the discretion of the governing bodies of the scheme, obliges the scheme's governing bodies to apply the principle of equal treatment, offering equal opportunities for men as well as for women. According to this paragraph, the scheme's management bodies are required in all cases when the division of social security schemes is done, to observe this principle by ensuring full and equal participation. This paragraph is in full compliance with paragraph 2 of Article 9 of the European Parliament and Council Directive of 5 July, 2006/54 / EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, which has

²⁰² For more details, see point ii) of Article 9 of the European Parliament and Council Directive of 5 July, no. 2006/54 / EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation:

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006L0054>

the same content as this paragraph.²⁰³

Article 17

Obligations of employer in employment relationships

1. Employers in all sectors are obligated to:

1.1. refrain from including elements of gender discrimination in vacancy announcements;

1.2. in labor relations to promote gender equality before and during employment relationship;

1.3. ensure equal opportunities for women and men to apply for vacant positions;

1.4. When in a vacant position or for a certain category of work there is no gender equality, does not present discrimination if the advertisement encourages the underrepresented gender to apply with the aim to promote gender equality;

1.5. not disfavour a jobseeker by setting rules, criteria or procedural methods which tend to be neutral but in practice are less favorable for persons of a gender constituting indirect gender discrimination;

1.6. hire a person regardless gender for different types of vacant positions, in every level of professional hierarchy;

1.7. promote equal distribution between men and women in different positions of work and within different categories of employers through training and developing of professional abilities and other temporary measures;

²⁰³ See paragraph 2 of Article 9 of the Directive of the European Parliament and of the Council of 5 July 2003, no. 2006/54 / EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation,
<http://eur-lex.europa.eu/legal-content/EN/TEXT/?uri=CELEX%3A32006L0054>

1.8. ensure that men and women employees have equal opportunity to attend education and professional training and attend courses that aim to improve professional skills or prepare them for other professions;

1.9. to implement equal criteria in evaluating of working performance quality;

1.10. employer cannot implement one evaluating criterion, seeming neutral, but in practice is in disadvantage of persons of different sex;

1.11. in particular, where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of gender;

1.12. To offer equal payment for a work of equal value;

1.13. the employer is obliged to provide such a working environment in which none of the workers is subject to employer's, superior's or co-worker's undesired treatment of sexual nature, including undesired physical, verbal or nonverbal treatment or other sexually based behaviour which creates intimidating, hostile or humiliating relationships and environment at work and offends the dignity of men and women at work;

1.14. not to put in an unfavourable position or to take disciplinary measures towards an employee who objects or complains for discrimination, sexual harassment and discomfort, as well as employee who testifies for discriminating actions, sexual harassment and discomfort, made by employee or other employee;

1.15. employers are obliged to take all necessary measures to enable women and men to correspond to both their professional and family obligations;

1.16. The time schedule, in accordance with the needs of the employer and the family needs of the employee must be organized in such a way that male/female employees can return to their previous posts after maternity leave, parental leave, abortion leave, sick leave or after the time spent out of the place of work due to family emergencies or professional training.

2. Every person after parental leave shall be entitled, according to conditions which are no less favourable to her and to benefit from good working conditions to which she is entitled during her absence including possibilities of advancement.

Commentary, Article 17

17. Article 17 of the law sets out the employer's obligations with regard to employment relationships in all sectors, obliging them to take actions that exclude gender discrimination in the work place. This article obliges employers to take concrete actions from the moment of announcement of vacancy, establishment of the employment relationship, until the end of the employment relationship. Regarding the prohibition of discrimination and obligations of the employer on occasion of establishment of employment relationship Law on Labour no. 03/L-212 in paragraph 1 of Article 5 provides for the prohibition of discrimination in employment and occupation, related to recruitment in employment, training, promotion of employment, employment conditions, disciplinary measures, termination of employment contract or other issues deriving from the employment relationship that are regulated by this law and other applicable laws.²⁰⁴ Likewise, the abovementioned law in paragraph 4 of Article 5 provides for the employer's obligation that in case of employment of employees, for the same work place to set equal criteria and opportunities for both, women and men.²⁰⁵ Therefore, employers, when applying employment-related procedures, must respect the procedures and take concrete actions that exclude any discriminatory action in accordance with this article and with the Law on Labour. The implementation of these provisions should be done in conjunction with each-other, including the provisions of the Law on Protection from Discrimination, such an issue is also envisaged in paragraph 5 of Article 5 of the Law on Labour, according to which: "*Provisions of the Law on Protection from Discrimination, shall apply directly when it comes to the employment relationship established between the employee and the employer*".²⁰⁶

Paragraph 1

17.1 Paragraph 1 of Article 17 obliges all employers in all sectors, that when establishing an employment relationship, comply with the sub-paragraphs set out by this article, specifying also the cases when gender discrimination

²⁰⁴ See paragraph 1 of Article 5 of the Law no. 03/L-212 on Labour, available at : <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2735>.

²⁰⁵ See paragraph 4 of Article 5 of the Law no. 03/L-212 on Labour.

²⁰⁶ See paragraph 5 of Article 5 of the Law no. 03/L-212 on Labour.

can occur in the employment relationship. This paragraph aims to establish detailed rules that guarantee equal protection and treatment on the basis of gender in employment relationships, including conditions for access to employment, self-employment and employment in occupation, employment conditions, selection criteria, regardless of activity at all levels of the professional hierarchy, including the promotions. These rights are intended to ensure the application of the principle of equal treatment for men and women with regard to access to employment and working conditions.

17.1.1 Under this sub-paragraph, employers in all sectors are obliged to avoid and eliminate any gender-based discriminatory element, which may have a negative impact on establishment of the employment relationship, in violation of the principle of equal treatment. This sub-paragraph obliges employers that on the occasion of publication of vacancies, which aim to establish employment relationships, they not contain discriminatory elements on the basis of gender by creating advantages for one gender. Such an issue is also defined by the Law on Labour in paragraph 2 of Article 8, which provides that, the vacancy for establishment of employment relationship should be equal for all target candidates, without any kind of discrimination, as foreseen by this law and other applicable acts.²⁰⁷ Also, gender-based discrimination is prohibited on occasion of vacancy announcement regarding candidates selection, due to future pregnancy possibility, actual pregnancy, parental responsibility, civil status and family responsibilities. In the case of *Emrl Boyraz v. Turkey*, ECtHR found violation of Article 14 of the Convention in conjunction with Article 8, when the female candidate was dismissed from an energy public company because it was not male and had not performed the military service.²⁰⁸ Therefore, such a differentiation is a violation of this law and international human rights acts and constitutes discrimination on a gender basis. Regarding the conditions for access to employment, including also the vacancy announcement, selection criteria and recruitments conditions in any branch and at all levels of the professional hierarchy within the European Union, this matter is regulated by the European Parliament and Council Directive, of date 5 July, with no. 2006/54/EC on implementation of the principle of equal opportunities and equal treatment of men and women in issues of employment and occupation. This Directive, in Article 14 provides for the prohibition of direct or indirect discrimination on grounds of sex in the public or private sector, specifying in item a) of paragraph 1 of this Article also the cases on which discrimination may occur, including conditions for access to employment, for independent work or in the profession, including

²⁰⁷ See paragraph 2 of Article 8 of the Law no. 03/L-212 on Labor <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2735>

²⁰⁸ ECHR, *Emrl Boyraz v. Turkey*, application no. 61960/08, Decision of date 02/03/2015.

also the selection criteria and recruitment conditions, at any branch of activity and at all levels of professional hierarchy and in promotion cases.²⁰⁹

17.1.2 This sub-paragraph is intended to oblige employers to respect the principle of equal treatment, promoting gender equality before and after establishment of an employment relationship. Different institutions and organizations with internal acts should regulate the method of equal treatment of workers as human right, but also the gender equality.²¹⁰ Promotion means the obligation of any employer or individual acting on behalf of the employer to exclude any discriminatory element, including elements of the gender-based discrimination from the moment of vacancy announcement, in order to ensure equal opportunities for women and men. Promotion also means equal distribution of women and men to different types and categories, through the treatment and development of professional skills. The other aim of this sub-paragraph is the obligation of both public and private sector employers to undertake affirmative measures by notifying and publishing various documents or brochures through which employees are informed with their rights, in order to respect as much as possible principles of gender equality.

17.1.3 This sub-paragraph is intended to oblige employers in all sectors, to create and provide equal opportunities for women and men applying for job vacancies. When providing equal opportunities, employers must apply the principles of gender equality, respectively, the principle of equal gender treatment by eliminating any element of gender discrimination. In that case, respecting the principle of equal treatment means that there should not be direct or indirect discrimination on grounds of sex (gender), including the less favourable treatment of women for reasons of pregnancy and child delivery. Under this sub-paragraph, the employer must provide equal opportunities from the moment of vacancy announcement, through which the persons apply for the job. In these cases, vacancies cannot contain any differentiation in gender criteria, creating favours for one or the other gender. An unequal treatment with regard to employment had been reviewed by the ECJ. It is interesting to note the case of the *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV*. This is the case of potential employer who openly stated that he would not hire people of certain racial or ethnic origin. According to the ECJ, such a statement had a powerful and repressive affect to certain candidates to appear in the announcement of some of the positions, and thus they were prevented from accessing the labour market.²¹¹

²⁰⁹ See paragraph 1 of Article 14 of Directive no. 2006/54/EC of the European Parliament and Council, of date 5 July 2006 available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1449588923123&uri=CELEX%3A32006L0054>.

²¹⁰ See, among others, Ministry of FSK, Policy on human rights and gender equality in MKSF and in KSF, 2011.

²¹¹ For more, see the case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v Company Feryn NV*.

- 17.1.4 This sub-paragraph is intended to create additional opportunities in order to achieve gender equality in those cases or in those sectors where there is no gender equality. In these cases, under this sub-paragraph, employers are entitled to the right and are encouraged that through public calls to invite the underrepresented gender to apply in these concrete cases. Under this sub-paragraph, employers are obliged to undertake concrete actions through which gender equality promotion should be invoked, while inviting the underrepresented or less employed gender to apply, in order to achieve gender equality. The abovementioned sub-paragraph allows for the derogation or disregard from the recruitment of the other sex that is more represented, in those cases where the less represented gender has such criteria that the appointment in the work place does not result in any damage to the institution or organization, while on the other side increases the gender representation quota for the underrepresented gender. This should be understood in a positive way, giving the opportunity to another gender which, by giving of this opportunity and other training aids, achieves the same results at work, as the other gender that is more represented.
- 17.1.5 This sub-paragraph obliges employers to treat equally all job seekers, prohibiting any favouring by establishing rules or procedural criteria that are more favourable or unfavourable to one gender or another. Under this sub-paragraph, employers are obliged to establish rules and criteria that must be transparent, so that jobseekers can have equal access when applying for a job. Also, this sub-paragraph obliges the employers to establish rules that should be neutral even when implemented in practice, creating equal opportunities for both men and women. Another goal of this sub-paragraph is to prohibit any form of discrimination that may appear in hidden forms, which may result in more favourable conditions for persons of one gender. Likewise, this sub-paragraph, besides providing for the prohibition of measures which may be discriminatory in terms of gender during their realization in practice, in order to create greater security during the employment relationship, stipulates that in all these cases discrimination may be indirect.
- 17.1.6 This sub-paragraph is intended to oblige employers when creating the employment relationship in all sectors, to eliminate any form of gender discrimination in any position or vacancy, including all levels of professional hierarchy. Regarding this, according to sub-paragraph,

Vat: http://www.equalrightstrust.org/ertdocumentbank/Microsoft%20Word%20%20Centrum%20voor%20gelijkheid%20van%20kansen%20en%20voor%20racismebestrijding%20v%20Firma%20Feryn%20NV%20_final_.pdf

gender discrimination at work occurs when a person or group of persons is treated unequally in the context of work because of gender. Under this sub-paragraph, employers have a legal obligation from the moment of drafting the conditions required for a work place, including the announcement of vacancy until the candidate selection, to exclude gender differences and any type of discrimination, whether direct or indirect. The purpose of this sub-paragraph is the obligation of employers that on occasion of announcement of vacancies to guarantee and provide equal access without gender discrimination at all levels of the professional hierarchy.

- a) The same obligation as this sub-paragraph is foreseen by the Law on Labour in paragraph 4 of Article 5, according to which: “*The employer is obliged, in the case of employment of employees, for the same work place to determine equal criteria and opportunities to both women and men*”.²¹² Equally, EU legislation and jurisprudence prohibits direct and indirect discrimination between men and women in employment. This legislation requires that none of the laws, regulations and practices of member states regarding the labour market and social policies should contain any kind of discrimination. Gender discrimination at work has a negative effect on the labour market in general, because gender segregation at work causes lack of flexibility in the labour market and often causes employers to pursue employment policies that are based on gender stereotypes and prejudices instead of personal qualifications and qualities of the individual. Segregation in the labour market makes half of the workforce not to use their talents, leading to incomplete, inefficient and unstable development. Therefore, a greater institutional responsibility is required which would have a positive impact on the exclusion of gender discrimination in labour relations.
- b) One of the most common cases in practice where gender discrimination can occur is the case of female pregnancy. In these cases, employers use discriminatory criteria, excluding equal opportunities for women who are pregnant or are presumed to be pregnant. Regarding these cases, there are also views from ECJ jurisprudence. ECJ in the case of *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassene*, held that an employer is in direct contravention of the principle of equal treatment laid down in Article 2 point 1 and Article 3 point 1 of Council Directive 76/207/EEC if he refuses to enter into a contract of employment with a candidate, found by him to

²¹² See paragraph 4 of Article 5 of the Law on Labour no. 03/L-212, accessible on: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2735>.

be suitable, because of the adverse consequences for him which are to be anticipated owing to the fact that the candidate was pregnant when she applied for the post, in conjunction with rules concerning unfitness for work laid down by a public authority under which inability to work in connection with pregnancy and confinement is assimilated to inability to work on account of sickness. Further, the ECJ stated that the implementation of the Equal Treatment Directive would not change, where, in the circumstances described above, no male applied for a position. If a woman has been dismissed from employment because of issues related to her sex, for example pregnancy, it is always discriminating.²¹³

- 17.1.7 The purpose of this subparagraph is to oblige the employers to promote equal distribution between men and women in different positions of works and within different categories of employees through training and development of professional abilities and other temporary measures from the moment of establishment of working relationships in all sectors and until its completion. Promotion through equal information implies that employers are obliged to use fair and adequate information methods by notifying all workers fairly and at the same time. Likewise, promotion means giving equal opportunities between women and men regarding career advancements through career development opportunities. At the same time, various trade union organizations have important role in the promotion of workers' rights, which through various promotional and information activities can raise awareness of employers in undertaking measures that affect equal treatment of employees.
- 17.1.8 This sub-paragraph is intended to oblige employers to eliminate all forms of discrimination throughout the employment relationship which may affect workers' access to vocational training. Employers in all sectors are obliged to ensure equal treatment between women and men in terms of continuing vocational education and training and attending trainings that are held to increase professional skills or prepare for other professions. Under this subsection employers are obliged to create adequate promotion conditions, which must be equal for all employees, providing opportunities for vocational training through training that affects the acquisition of professional skills or the preparation of other professions.
- 17.1.9 The purpose of this sub-paragraph is to oblige employers to apply equal criteria for the quality of work when establishing a work relationship

²¹³ For more see ECJ decision, accessible in:
<http://www.equalrightstrust.org/ertdocumentbank/Dekker%20v%20Stichting.pdf>

in all sectors, whether public or private. Quality assessment at work is carried out in order to increase the success of the work and to ensure the gradual improvement of the professional ability and the quality of services provided by the employees. Almost every employer organization, at the end of each year, evaluates the results at work performed by the employee. The evaluation of the results at work is based on the verification of the realization of the objectives or tasks assigned at the beginning of the evaluation period by the employee. Therefore, in relation to the aforementioned, this subparagraph is intended to guarantee a realistic assessment by the employees, respecting the principle of equal treatment and applying all equal criteria that eliminate any kind of gender discrimination in the workplace.

17.1.10 This sub-paragraph is intended to guarantee a realistic assessment system, obliging employers to apply assessment criteria throughout the employment relationship when assessing employees, which are equal not only in the theoretical but also in the practical sense. Therefore, employers in all sectors are obliged to use equal criteria for both women and men the whole time, so that the assessment is fair and real. According to this sub-paragraph, it is considered that any action that creates disadvantages to other persons is discriminatory through the use of evaluation criteria which in themselves contain discriminatory elements.

17.1.11 This sub-paragraph foresees an additional obligation for employers in all sectors, whether public or private, regarding the job classification system. Under this subsection, employers are obliged that the job classification system used to determine the salary is based on the same criteria for men and women, thus avoiding discrimination on grounds of gender. The purpose of this sub-paragraph is to guarantee a fair classification of employees regarding their workplaces in those cases where this classification is used to determine the salary. Therefore, under this subsection, no discrimination is allowed in all sectors when classifying jobs in relation to salary determination.

17.1.12 This subparagraph is intended to exclude forms of discrimination related to employee salaries by requiring employers in all sectors to pay equal pay for equal work and work of equal value. Unequal treatment at the level of payment may occur in cases where a woman is paid less than one male for the same job, or vice versa, when a male is paid less than one female for the same job. Regarding the same wage for work, it is also commented on sub-paragraph 1.3 of Article 15 of this law. Equal pay for equal work for female and male workers is also foreseen in the Treaty on

the Functioning of the European Union. According to Article 157 of this treaty, “*Each Member State shall ensure the principle of equal pay for male and female workers for equal work or work of equal value*”.²¹⁴

17.1.13 This subparagraph addresses a broader aspect of employers’ obligations with regard to employment relationships in all sectors, including the provision of such a work environment in which none of the workers is subject to undesirable treatment of sexual nature by the employer, supervisor or colleagues, including unwanted physical, verbal, nonverbal treatment or other sexual behaviours that create relationships and an intimidating, hostile, or humiliating working environment that violates the dignity of women and men at work. Under this subsection, the employer is obliged to provide equal working conditions, including relationships with supervisors and work colleagues, eliminating any form of unwanted sexual treatment. Even within the European Union, directives on gender equality define sexual harassment as a special type of discrimination where unwanted “verbal, nonverbal or physical” behaviour is of a sexual nature. Council Directive no. 2004/113 / EC of 13 December 2004 concerning the *application of the principle of equal treatment between men and women in access to and supply of goods and services* in the third paragraph of Article 4 provides that sexual harassment and harassment within the meaning of this Directive Will be considered discrimination on the basis of gender and is therefore prohibited. Refuting a person or submitting to such conduct can not be used as a basis for a decision affecting that person.²¹⁵

17.1.14 This sub-paragraph is intended to provide legal protection for all employees in the public sector as well as in the private sector, against whom, in the case of an appeal or objection related to gender discrimination in the workplace, no discriminatory measures should be used but equal treatment by employers even in these cases. Likewise, this subparagraph prohibits employers from putting in unfavourable positions or undertaking disciplinary measures toward an employee who objects or complains for discrimination or sexual harassment as well as employee who testifies for discriminating actions or sexual harassment, made by employer or other employees.

²¹⁴ See Article 157 of the Treaty on the Functioning of the European Union
<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>

²¹⁵ See paragraph 3 of Article of the Directive no. 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and service
<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1429086989424&uri=CELEX:32004L0113>

17.1.15 This sub-paragraph is intended to oblige employers in all sectors to take the necessary measures to enable women and men the appropriate conditions for their professional and family obligations. In these cases, employers are obliged to create equal conditions for all employees, applying the principle of equal treatment and eliminating any element of gender discrimination. Under this subsection, employers are obliged to meet all the conditions in relation to employees regarding their rights in terms of professional promotion and maintenance of regular family reports. The purpose of this subsection is to respect the principle of equal treatment, i.e. that there will be no discrimination on grounds of sex, either directly or indirectly, with particular reference to marital or family status. In all of these cases, employers are obliged to exclude any element of direct or indirect discrimination, which concerns the ability of women and men to correspond to both their professional and family obligations.

17.1.16 This subparagraph is intended to provide additional rights to employees in certain situations which may arise during the performance of the employment relationship. Under this subsection, employers are obliged in all sectors that during labour relations, organization of work and timetable shall be made in accordance with labour market needs and family status of employees, in order to ensure return to the same place of work after maternity leave, parental leave, abortion leave, medical leave or after hours spent abroad for urgent family reasons, or vocational training. Under this subsection, employers are not allowed to use any discriminatory measures regarding the treatment of employees in cases related to termination of employment under this subsection.

Paragraph 2

17.2 Like paragraph 1, this paragraph is intended to oblige the employer to respect the rights of employees on the parental leave and their return to work after the break. This paragraph obliges employers to apply equal and no less favourable conditions for an employee or another. Also, the other purpose of this paragraph is the protection of employees during the holiday period, recognizing the right for advancement at work. This paragraph creates greater assurance for employees, obliging employers to apply equally for employees who, at certain times, have been disconnected from the employment relationship.

Article 18

Evaluation of unpaid work

1. Unpaid work of women and men is considered as a contribution to the development of the family and the society in cases of:

1.1. The care for family welfare;

1.2. The care for children;

1.3. The care for other members of the family;

1.4. Dealing with agriculture and family economy.

2. Subjects specified in paragraph 1 of this Article shall benefit from community services, labour policies and employment, and vocational training based on the legislation in force.

Comment, Article 18

18. Article 18 regulates the evaluation of unpaid work and thus requires equal treatment of the sexes. The emphasis in this legal provision is in the evaluation of the types of work that are not in cash, namely in the form of income, but the performance of certain jobs which if carried out by another employee would have a cost in terms of money.

Paragraph 1

18.1 Paragraph 1 of Article 18 foresees the evaluation of the unpaid work of women and men who have contributed to the development of family and society. This article aims to eliminate forms of discrimination especially for women who care for the family, the child and the agricultural affairs, but that this work does not turn into a form of cash income. However, this work has a certain value and as such should be evaluated because it benefits the child and the society as a whole. This is also foreseen in the Family Law, Art. 54, where it is foreseen the assessment of the joint property of the spouses, but also of the families of the spouses, as well as the affairs of the spouses providing each other with care for the family and the children.²¹⁶ Similarly, other work, such as agriculture and the like, which are not paid in cash, but should be accounted for as contributions of the family member

²¹⁶ See Family Law, Article 54; Also, see Haxhi Gashi/Abdulla Aliu/Adem Vokshi, Commentary on Family Law, pub-

because they affect family income. Therefore, the legal provision goes towards understanding in this respect and its implementation can be viewed in terms of the provisions of the Family Law for any other similar situation.

Paragraph 2

18.2 Paragraph 2 defines the right of the aforementioned subjects in paragraph 1 to benefit from community service, labour and employment policies as well as vocational training. The provision is not very clear and there is no logical link with paragraph 1. However, it should be understood in the sense that the unemployed should have community care, treated with priority in employment issues, namely finding a job, and professional training in order to prepare for the labour market.

Article 19

Prohibition of gender discrimination in access to and supply of goods and services

1. Discrimination based on sex in access to and supply of goods and services shall be prohibited.

2. This Law shall apply to all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life which is provided by public and private institutions.

3. This Law does not prejudice the individual's freedom to choose a contractual partner as long as an individual's choice of contractual partner is not based on that person's sex.

4. This Law does not prejudice the individual's freedom to choose a

lished by GIZ GmbH, Pristina 2012, p. 147-151.

contractual partner as long as an individual's choice of contractual partner is not based on that person's sex.

Comment, Article 19

19. Article 19 includes regulating the matter in regards to supply of goods and services for both sexes without distinction. This legal provision is influenced by the EU Directive, Directive no. 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.²¹⁷ This directive has obliged EU member states to create equal conditions for both genders and without discrimination when it comes to access to goods and services. So the meaning is in the sense that there should be no restrictions in terms of any contractual relationship for jobs/services but also for sales or other forms of supply of goods from the public and private sector. In EU law, especially in the EU treaties, there are many provisions that prohibit economic and social discrimination between citizens of EU member states.²¹⁸ These principles should also be applied when it comes to gender discrimination.

Paragraph 1

19.1 Paragraph 1 is quite clear that it prohibits gender-based discrimination regarding access to supply with goods and services. Thus, with this provision, if a provider of services or goods/company or any other natural person, or even public legal persons and institutions make gender-based restrictions, this is viewed as direct or indirect discrimination, depending on what actions are taken.

Paragraph 2

19.2 Paragraph 2 is almost identical to Article 3 of the EU Directive, Directive no. 2004/113 / EC of 13 December 2004. Article 3 of the Directive specifically provides for the prohibition of discrimination in access to goods and services, whether the provider is private or public, and whether this restriction is made on a gender basis.²¹⁹ The Directive on equal treatment in access to goods and services also refers to Article 57 of the Treaty on the Functioning

²¹⁷ See Directive no. 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, available at:

<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1429086989424&uri=CELEX:32004L0113>

²¹⁸ Christopher McCrudden and Sacha Prechal, *The Concepts of Equality and Non-Discrimination in Europe: A practical Approach*, European Network of Legal Experts in the Field of Gender Equality, European Commission Report, 2009, fq. 6.

²¹⁹ Council Directive no. 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, Article 3, *“Within the limits of the powers conferred*

of the European Union, which provides as follows: “*Services shall be considered to be ‘services’ within the meaning of the Treaties where they are normally provided for remuneration.* In particular “services” include: activities of an industrial character, activities of a commercial character, activities of craftsmen, and activities of the professions. Cases of gender or racial discrimination should be eliminated. In a case before the Swedish Court of Appeals, the Applicant had attempted to buy a pet (puppy). Once the seller had realized that the buyer was gay, he/she had refused to complete the sale because of the concern about the welfare of the dog due to the seller’s conviction regarding gay person behaviour. The Swedish Court of Appeals ruled that the refusal to sell the dog constituted direct discrimination in the context of goods and services, specifically concluding that it constituted harassment because of sexual orientation.²²⁰ Also, the ECtHR found discrimination in the case *Horváth and Kiss vs Hungary*. The Court assessed whether the placement of Roma children in a special school where children with mental disabilities attended school constituted indirect discrimination. The court found that student segregation had shown that the state had not respected the positive obligation. Additionally, the state had allowed access to education, which “had caused additional complications to their difficulties and threatened their further personal development, rather than assisting them in integrating into regular schools and developing skills that would ease their life with the rest of the population.”²²¹

Paragraph 3

19.3 Paragraph 3 aims to explain that the freedom of contracting is allowed between the parties and it should be respected, as long as a possible restriction on services and good supply contracts is not gender-based. If a prohibition or restriction to enter into a contractual relationship, e.g. with respect to a contract for the supply of goods, is based on the fact that one party is of another gender and for which the contractor does not enter into a contract, it shall be considered as discrimination. But, on the other hand, if the restriction to enter into a contractual relationship is aimed at market conditions rather than gender, then in such case this situation is

upon the Community, this Directive shall apply to all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context”.

²²⁰ *Ombudsman Against Discrimination on Grounds of Sexual Orientation v. A.S.*, Case no. T-3562-06, Swedish Court of Appeals, 11 February 2008). English summary available at the European Network of Legal Experts in the Field of Discrimination, 8 (July 2009) “European Legal Journals for Protection from Discrimination”, page. 69

²²¹ ECHR, *Horváth and Kiss vs Hungary*, application no. 11146/11, Judgement dated 29 January 2013, English version available at: [http://hudoc.echr.coe.int/eng#{"itemid":\["001-116124"\]}](http://hudoc.echr.coe.int/eng#{)

not considered discrimination. This provision is in compliance with EU Directive no. 2004/113 / EC, Article 5.²²²

Paragraph 4

- 1.4 In paragraph 4 there is an exception regarding the supply of goods and services even if it is based on one sex, but that this type of supply must have a legitimate aim and is achieved with adequate means. Here it is meant to imply when dealing with promotion and engaging affirmatively another gender because it is less represented.

²²² Directive no. 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, Article 3, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:373:0037:0043:en:PDF>

CHAPTER IV EQUAL TREATMENT AND PROTECTION AGAINST DIS- CRIMINATION ON THE BASIS OF GENDER IN THE EDUCA- TION FIELD

Article 20

Prohibition of Gender Discrimination and Unequal Treatment

1. Discrimination on the basis of sex within educational institutions at all levels is prohibited, including access to education, admission process, access to services, facilities and benefits such as, scholarships, evaluation results, obtaining scientific degrees and titles, access to vocational training, education, sports and other fields.

2. The following actions shall constitute discrimination based on sex:

2.1. any gender based restriction, or barriers in the creation of necessary facilities, to be educated in public or private institutions which offer education or other qualification and training services;

2.2. different opportunities for men and women in the selection of a special study, training or graduation, and with regards to duration of classes unless justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Comment, Article 20

20. Article 20 regulates gender-based discrimination in the field of education. Discrimination on other grounds, such as race, etc., are qualified as discrimination within the ECHR practice. Such one case regarding Roma community access to education is the case of *Lavida and others vs Greece*. The ECtHR found that the possibility for Roma children to enroll only in primary schools where only Roma children attend is discrimination in the field of education.²²³ This article explicitly refers to gender-based discrimination.

²²³ ECHRJ, *Lavida and others vs Greece*, application number 7973/10, Decision date 20 May 2013

Paragraph 1

20.1 Paragraph 1 provides for the prohibition of gender-based discrimination at all levels of education, including education, access to education, scholarships, sports services etc. Thus, this article requires equal treatment between the sexes in the field of education in all dimensions.

Paragraph 2

20.2 Paragraph 2 lists cases of discrimination based on sex. These provisions prohibit offers of different educational services for women and men in public and private institutions. Therefore, any distinction which focuses on the provision of specific services such as: education, qualification, as mentioned in paragraph 2, sub-paragraph 1, but that provision is made separately for the female gender and distinctly for the male gender (women and men), is of a discriminatory nature. The sub-paragraph 2 of paragraph 2 prohibits any discrimination on a gender basis, such as studies, training or graduation, duration of classes, etc. However, there is an exception here if the provision of specific services may be justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. The question arises what these aims may be? They should be justified separately for each particular case. For example, training courses only for women in order to encourage their involvement in certain occupations in which women are less represented. Women's courses for professional promotion to compete in jobs to increase quotas required by law etc.

Article 21

Education of Gender Equality

1. In schools and other educational institutions the teaching aids used shall be based on gender equality and gender equality education should be included in school curricula at all levels.

2. Preparation, adoption and implementation of educational programs - education, drafting materials, textbooks and reviewing existing materials and textbooks should be done by including gender perspectives and eliminate negative stereotypes, prejudices, traditional practices and other practices

that are contrary to the principle of gender equality.

3. Incorporation into school curricula education and training activities aimed at sensitizing young people about gender equality and preparing them for democratic citizenship.

4. There shall have equal inclusiveness of women and men in professional and non-professional education training and counselling for those professions which are traditionally considered only for women and only for men.

Comment, Article 21

21. Article 21 regulates education so it should be based on gender equality, including school curricula at all levels, and the preparation and approval of curricula, including textbooks. These programs should be made in the context of gender equality and the elimination of negative practices and other prejudices that are in conflict with the principles of gender equality. Paragraphs 3 and 4 of this Article also stipulate that the equal inclusion of both sexes in educational activities and professional and unprofessional training should be drafted in formal acts.

Paragraph 1

21.1 Paragraph 1 defines the obligation of all institutions for equal treatment of the sexes in education and curriculum development (programs). Education and schooling are considered to be among the fundamental social and economic rights because equal access to and equal opportunities in education for women and men enables them to raise their skills and prepare them for all spheres of life,²²⁴ so that equal integration is possible in all workplaces. The legal framework governing education issues also specifically refers to non-discrimination and the affirmative aspect of the principle of gender equality. The Law on Higher Education, as one of the fundamental principles, provides for the guarantee of equal opportunities for all students and staff in higher education institutions.²²⁵ Article 5.1 of the Law on Higher Education provides: *“In the higher education provided by licensed providers of higher education in Kosovo all persons shall have access within or outside the territory of Kosovo without any discrimination”*.²²⁶ But in the text of this law there are other provisions that foresee the principle of non-

²²⁴ Sheila Aikman and Elaine Unterhalter, *Practicing Gender Equality in Education*, Oxfam GB in 2007, p. 3-4.

²²⁵ See Law no. 04/L-037 on higher education in the Republic of Kosovo, Official Journal of the Republic of Kosovo, no. 14, September 9 2011, Prishtina.

²²⁶ See Law no. 04/L-037 on higher education, Article 5.1.

discrimination and the principle of gender equality. Article 22 sub-paragraph 3.2 that speaks of the terms of funding provides that *“it does not prejudice the duty of the holder to carry out his activity without discrimination on grounds of sex, race, sexual orientation, disability, marital status, colour, language, religion, political or other opinion, national, ethnic or social origin, affiliation to an ethnic community, property, birth or other state of affairs”*.²²⁷ There is no doubt that this law, in its spirit and letter, contains the affirmative approach of the principle of gender equality. The Law on Education in Municipalities of Kosovo, which aims to regulate the organization of public education institutions and the provision of public education in pre-primary, primary, lower secondary, upper secondary and higher education levels in the municipalities of the Republic of Kosovo, also expressly refers to the principle of non-discrimination and equality in Article 5.b when it is foreseen that in the case of student registration the principle of equality and non-discrimination shall apply.²²⁸ The Law on the Publishing of Textbooks, School Lectures, and Pedagogical Documentation also lays down the institutional obligation to prohibit textbooks where there is discrimination or violation of the principle of gender equality, stating: *“No textbooks, teaching aids, school textbooks and pedagogical documentation who propagate against Kosovo are allowed, which violate human rights and gender equality and which incite political, national and religious hatred”*.²²⁹

Paragraph 2

21.2 The provisions of this Article referring to gender equality education are certainly multi-institutional obligations that draft, design and implement specific programs, curricula, programs or take other educational measures. These actions, being legal categories, require special specification during their implementation on the practical level. Education is seen as one of the most proven measures for the emancipation of society or the implementation of affirmative measures in the area of respect for human rights or gender equality. The provisions of this Article are comprehensive regarding the obligation of institutional actions in the field of education and related to the above Articles of this Law it can be said that the Agency can provide a great

²²⁷ See Law no. 04/L-037 on higher education, Article 22, paragraph 3.2.

²²⁸ See Law no. 03/L-068 on education in the Municipalities in Kosovo, Official Journal of the Republic of Kosovo, Prishtina, Year III, no. 30, June 30 2008.

²²⁹ See Law no.02/L-67 on Publishing of Learning Resources, School Lectures and Pedagogical Documentation. The law was promulgated by the SRSG in UNMIK Regulation no. 2006/46 from 18.08.2006.

help in the training process, since from its activity it possesses specialized sample programs that can be included in training and education programs.

Paragraph 3

21.3 This paragraph provides equal treatment in education when dealing with professional, unprofessional training, counselling, even when they are traditionally considered to belong to one sex only. It is important to emphasize the fact that we as a society are not fully liberated from the old worldview, the stereotypes of women, the prejudices of the discriminating nuances that we have inherited from our past and the customary law, so undertaking concrete measures in the implementation of the principle of equality is very important. In spite of great advances, there are still prejudices that some work belongs to only men and some is for women. Fighting this prejudice certainly needs to be multi-dimensional, but above all is an educational measure. Women in decision-making, women in uniform, women who drive a cab and many other professions still appear to us as men's work. This has to change in the future, but along with these changes concrete actions need to be undertaken such as legislation. Women's access to education, health or public administration is among the main problems. It is more likely that women in Kosovo are unemployed and economically inactive (in terms of earning income) than men as a result of their inadequate education and gender discrimination. Many women lack basic skills, a large number of people are banned from participating in normal economic and social activities, leaving them vulnerable to exploitation. Women living in remote rural areas are a category that is particularly disadvantaged. Poverty seriously affects women in society and limits their opportunities and the cultural and public perception of women as expressed in the media and elsewhere is poor. This reality results in a drastic reduction in women's development opportunities, but also contributes to keeping the conservative structure of society, preventing inclusive change and economic development.

Article 22

Legal protection of the right to equal treatment of women and men

1. Persons who consider that the principle of equal treatment has not been implemented to them, may initiate procedures and shall submit evidences

to administrative authority or to competent court in accordance with the provisions of the Law on Protection from Discrimination.

2. Violations of the provisions of this law, in cases where a criminal offense, shall be punished according to the provisions of the Criminal Code of the Republic of Kosovo.

Comment, Article 22

22. Article 22 sets out the rules of providing legal protection and dealing with cases of discrimination in proceedings before the competent authorities. In this article are provided references that in the case of discrimination on a gender basis, the parties have the right to protection and this protection is done before the competent administrative and judicial bodies.

Paragraph 1

22.1 Paragraph 1 gives legal protection to persons who consider that their rights of equal treatment have been violated. This article instructs the parties (persons) who have been violated their rights to pursue the proceedings in administrative or judicial bodies under the Law on Protection from Discrimination.²³⁰ The state may also fail to protect human rights, especially when it comes to violations of women's rights that often appear as domestic violence but related to some kind of discrimination in providing effective protection.²³¹ In the case *M.G. vs. Turkey*, the ECtHR found violations of the ECHR because the state authorities were passive and failed to protect women from violence during marriage and after-divorce threats as well as other procedures.²³²

Paragraph 2

22.2. Violations of the provisions of this law in cases when they constitute a criminal offense are punishable under the provisions of the Criminal Code of the Republic of Kosovo. Paragraph 2 clarifies that some actions not only constitute discrimination on a gender basis, but the content of the actions may also constitute elements of criminal offences. Therefore, in cases where actions constitute elements of criminal offenses, they will be prosecuted and punished under the Criminal Code of the Republic of Kosovo.

²³⁰ For more, see Law no. 05/L-021 on Protection from Discrimination, Official Journal of the Republic of Kosovo, no. 16, June 26, 2015.

²³¹ Regarding protection from domestic violence, see Law no. 03/L-182 on Protection from Domestic Violence, Official Journal of the Republic of Kosovo, 76/2010, on August 10 2010. Also, see Haxhi Gashi/Ruzhdi Berisha, Commentary on the Law on Protection from Domestic Violence, published by the Agency for Gender Equality, Prishtina 2014.

²³² ECHR, *M.G. v. Turkey*, application no. 646/10, court decision available at: [http://hudoc.echr.coe.int/eng-press#{"cite mid":\["003-5332256-6646783"\]}](http://hudoc.echr.coe.int/eng-press#{)

Article 23

Punitive Provisions

- 1. For violation from Articles 2, 3, and 5 of this Law, the competent court shall develop a violation procedure and shall impose sanctions.**
- 2. Fine of three hundred (300) up to five hundred (500) Euros shall be imposed for offenses to person who has committed discrimination based on gender in the public or private sector, in the field of offense under article 2, paragraph 1 of this law.**
- 3. Fine of five hundred (500) up to seven hundred (700) Euros shall be imposed for offenses to person responsible or other person legal person, public authority or individual who according to registered profession performs certain activities, which based on gender would violate the certain person's dignity or creates certain environment, threatening, approach or practice, hostile, offensive or disturbing, Article 3, subparagraphs 1.1, 1.11, 1.12 of this Law.**
- 4. Fine of seven hundred (700) up to nine hundred (900) Euros shall be imposed to legal entity for violation under Article 3, subparagraph 1.4 of this Law.**
- 5. Fine of three hundred (300) to five hundred (500) Euros will be imposed for violation to the person responsible as per Article 5 subparagraph 1.8 of this Law, if not collected, recorded and processed statistical data divided by gender and do not submit to Kosovo Agency of Statistics.**
- 6. Funds received from these fines are delivered in Kosovo Budget.**

Comment, Article 23

23. Article 23 provides for minor offense provisions that govern the conduct of an offense procedure and the imposition of sanctions in case of non-implementation of certain provisions of this law. Offense, according to positive legislation, is defined as *“the behaviour by which there are violated or jeopardized the public order and peace as well as social values guaranteed by the Constitution of the Republic of Kosovo, the protection of which is impossible without minor offence sanctioning.”*²³³ In relation to

²³³ Article 2 of Law no. 05/L-087 on Minor Offenses, Official Journal of the Republic of Kosovo, no. 33, September 8, 2016.

this definition of offense, we see that an offense among other things (*inter alia*) occurs when different behaviours or actions from different subjects can violate or jeopardize the social values guaranteed by the Constitution of Kosovo. We have seen and addressed in the above articles that the principle of gender equality represents one of the fundamental values of society in Kosovo, a principle guaranteed by the constitution. Laws can also be defined as acts that further elaborate principles and constitutional provisions. Thus, here we see that the offense provisions of the Law on Gender Equality sanctioned in this article are in full compliance with the provisions of the special legislation governing the offense. This is due to the fact that the Law on Minor Offenses leaves to the discretion of the legislator through laws, or municipalities through their by-laws, to determine the imposition of minor offense sanctions.

Paragraph 1

23.1 Paragraph 1 of this Article regulates certain provisions for the non-implementation of which the procedure shall be conducted and sanctions shall be imposed as in some sub-paragraphs of Articles 2, 3 and 5 of this Law. *The lawmaker* with the listing of these articles has in fact evaluated that their implementation is essential to the achievement of the objectives defined by this law and, in the contrary, the offense sanction will be imposed. The procedure for imposing a misdemeanor sanction shall be made according to the provisions of the Law on Minor Offenses, whereas the competent court to develop this proceeding according to territorial jurisdiction is the Basic Court, namely the Minor Offense Division,²³⁴ which is established in every basic court of our country.

Paragraph 2

23.2 Paragraph 2 of this Article regulates the determination of the fine which may be from three hundred (300) to five hundred (500) Euros and which may be imposed for minor offenses against a person who has committed gender discrimination in the public or private sector, in the area of offense from Article 2 paragraph 1 of this law. Article 2 first paragraph regulates some of the fundamental issues regarding the principle of gender equality “and guarantees equal opportunities and treatment in the public and private spheres of social life, including political and public life, employment, education, health, economy, social benefits, sport, culture and other

²³⁴ The Minor Offense Division judges all misdemeanour offenses, functions within the General Department and acts at the headquarters of each basic court as well as court branches. In this department, all matters are judged at first instance, unless they are in the exclusive competence of another Department of the Basic Court. All cases filed with the General Department shall be tried by one (1) single judge, unless otherwise provided by law.

spheres defined by this or any other law “ . As a fundamental provision and guarantee for the implementation of gender equality, in order to emphasize their implementation, the lawmaker has regulated to impose fines in the event of failure in implementation.²³⁵

Paragraph 3

23.3 Paragraph 3 of Article 23 determines the amount of the fine which can range from five hundred (500) to seven hundred (700) Euros. In addition to the amount of the fine, this provision specifies the subjects to which this sanction may be imposed: the person in charge of the legal person, the body with public authorizations or the individual who in the form of a registered profession carries out a certain activity which violates on gender base the dignity of a particular person or creates threatening, hostile, offensive or disturbing environments, approaches or practices (Article 3, subparagraphs 1.1, 1.11, 1.12 of this law). In order to have a clearer picture of the issues that govern the relevant sub-paragraphs of Article 3, the interpretation of Article 3 above can be looked at. In fact, Article 3 regulates only definitions that do not contain normative matters but represent the spirit of the law and this spirit is integrated in all legal norms.

Paragraph 4

23.4 The fourth paragraph is related to the previous paragraph because it refers to a fine of between seven hundred (700) to nine hundred (900) Euros imposed on a legal person for minor offenses under Article 3, sub-paragraph 1.4 of this law. Thus, under this provision, a legal person may be fined if there is a violation of the principle of equal treatment regardless of whether he has the status of a legal person in the public or private sphere. This principle can be specifically expressed in the area of employment and advancement in career, education, participation, etc.

Paragraph 5

23.5 The fifth paragraph provides a fine in the amount of three hundred (300) to five hundred (500) Euros, which may be imposed as misdemeanour measure on the responsible person in the subjects referred to in Article 5, sub-paragraph 1.8 of this Law if they do not collect, record and process gender-disaggregated statistical data and do not submit them to the

²³⁵ According to Law no. 05 / L-087 on Minor Offenses “A fine shall be imposed as an offense sanction which may be foreseen on a defined or fixed amount.” (Article 29)

Kosovo Agency of Statistics.²³⁶ Collection, preservation and processing of gender-based statistical data is a very important mechanism for seeing the realization of different aspects of the law and the progress made, but also to build platforms or programs in the future in identified areas because only statistical data allow to see the real situation of the implementation of gender equality in the field of education, employment, participation in public life, decision making, various political and trade union organizations, non-governmental organizations, military life, etc. In a nutshell, the use of statistical data is an essential measuring instrument for the level of real implementation of the value of gender equality.

Paragraph 6

23.6 The sixth paragraph of this Article regulates a technical procedure according to which all the means that would be collected from the imposition of fines against different entities under this Article shall be deposited in the Kosovo budget. This norm is in accordance with the Law on Public Financial Management and Accountability,²³⁷ according to which any financial resources collected by public authorities are transferred to the Kosovo budget and Kosovo has a unique financial account. Then, the funds or financial resources, in accordance with the relevant legislation, are distributed according to the planning foreseen by the Law on Kosovo Budget.²³⁸

Article 24

Issuance of sub-legal acts

For the implementation of this Law, upon the proposal of the Agency on Gender Equality, the Government shall adopt sub-legal acts within six (6) months after the entry into force of this law.

²³⁶ The Kosovo Agency of Statistics is a professional institution that deals with the collection, processing and publication of official statistics data. The Kosovo Agency of Statistics acts under Law no. 04/L-036, which entered into force on 12.12.2011 (ask.rks-gov.net/).

²³⁷ See Law no. 03/L-048 on Public Financial Management and Accountability, Official Journal of the Republic of Kosovo, no. 27, June 03, 2008.

²³⁸ The Law on Budget is a separate one-year statutory term that approves the planning of revenues and expenditures of public money in Kosovo each year.

Comment, Article 24

Article 24 is in fact a transitional provision defining the obligation for the adoption of sub-legal acts for the implementation of this law, which will be proposed by the Agency and will be approved by the Government of Kosovo. Legal provisions do not apply automatically, and for their implementation it is necessary to issue subordinate legal acts that have a lower legal force than the law but assist in its implementation. This law specifies the issuance of the Regulation on the Organization and Functioning of the Agency and the Regulation on the Duties and Responsibilities of Officials for Gender Equality in the Ministry and the Municipality. These regulations are in force after being proposed by the Agency and approved by the Government of Kosovo.²³⁹

Article 25

Repeals

1. After entering into force, this law repeals:

- 1.1. Law no. 2004/2 on Gender Equality;**
- 1.2. UNMIK regulation no: 2004/18 on announcement of law on gender equality in Kosovo approved by Kosovo Assembly;**
- 1.3. UNMIK Administrative direction no.2007/03 for implementation of UNMIK regulation no: 2001/19 on executive branch of interim self-govern institutions;**
- 1.4. Regulation no.1/2006 on establishment, competences and assignments of the interministerial council for gender equality;**
- 1.5. Administrative Instruction MLGA No.2005/8 for determining the powers and duties of official/s job descriptions for gender equality in the municipality.**

²³⁹ These regulations can be downloaded on this email address: abgi.rks-gov.net .

Comment, Article 25

Article 25 regulates a new legal situation which is created after the entry into force of this law. This has to do with the fact that after the entry into force of this law, the previous law and its sub-legal acts are automatically abrogated. There are 5 legal acts that are abrogated because this matter is regulated by the new law. Repeal and promulgation of the new law was made with the purpose of enacting more advanced legislation and based on the constitutional principles of Kosovo, since the repealed acts were issued before the adoption of the Kosovo Constitution.

Article 26

Entry into Force

This Law shall enter into force fifteen (15) days after its publication in the Official Gazette of the Republic of Kosovo.

Comment, 26

The last article of this law defines the moment of entry into force of the law. In fact, this legal provision is also a constitutional provision,²⁴⁰ which foresees that laws approved by the Assembly enter into force 15 days after its publication in the Official Journal. This period has to do with the principle of legal certainty that various subjects, especially those for which the law is dedicated, are familiar with the content of the relevant norms. This principle is general for all laws, but there are specific cases when the law itself may foresee another date of entry into force.

²⁴⁰ See Constitution of the Republic of Kosovo, Article 80.6.

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