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Women's Equality from a Legal Perspective – International and Transatlantic Overview[1]

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This paper serves as a continuation of a preliminary study of the author entitled "Gender Balance in Economic Decision-making – Legal Backgrounds in Europe and in Hungary", which presented a brief overview of the social and legal status of women both on national and international level – in the heart of Europe, in Hungary, and in the European Union as a framework for the member states in Europe.[2] *This paper aims to map the net of the most important institutional protection of women's rights under the aegis of the United Nations, and also gives an insight into the legal status of women in the United States, sketching an overview of the most significant legal provisions.*

Keywords: fundamental rights, equality rights, equality of law, gender equality, women's equality, women's rights.

A nők egyenlősége jogi szempontból – nemzetközi és tengeretúli áttekintés

Jelen cikk a szerző egy megelőző tanulmányának folytatásaként íródott, amely a "Gender Balance in Economic Decision-making – Legal Backgrounds in Europe and in Hungary" címmel angol nyelven jelent meg, és amely a nők szociális és jogi státusának egy elnagyolt összefoglaló áttekintéseként szolgál, mind hazai, mind nemzetközi szinten. A szerző célja ezúttal a nők

1 The work was created in commission of the National University of Public Service under the priority project PACSDOP -2.1.2- CCHOP -15-2016-00001 entitled "Public Service Development Establishing Good Governance" in the Egyed István Postdoctoral Program.

2 Borbás Beatrix: Felelős társaságirányítás és női participáció a gazdasági döntéshozatalban, Európában és Magyarországon, elméletben és gyakorlatban [Beatrix Borbas: Corporate Governance and Women's Participation in Economic Decision-making in Hungary and in Europe – theory and practice], *Opuscula Civilia*, 12/2016. The study elaborates on the significant legal provisions of Hungary and EU, and also informs about some results of the research made in eleven EU member countries, entitled European Women Shareholders Demand Gender Equality (see details: www.ewsdge.eu), organised by the European Women Lawyers Association (see details: www.ewla.org). The article is available in Hungarian at: https://akk.uni-nke.hu/document/akk-uni-nke-hu/Opuscula_Civilia_2016_Borbas_Beatrix.pdf

jogainak legfontosabb intézményi garanciáinak feltérképezése az ENSZ égisze alatt; másfelől a tanulmány a legfontosabb amerikai jogi szabályozás bemutatásával a nők USA-beli jogi státuszába is betekintést nyújt.

Kulcsszavak: alapvető jogok, egyenlőségi jogok, jogegyenlőség, társadalmi nemek egyenlősége, női egyenlőség, női jogok.

Introduction

In theory, I do share those doubts which concede that equality is at once the most appealing and the most threatening idea, as it means the promise of impartiality on the one hand – which is one of the highest moral achievements –, and on the other hand, a kind of threat as well: namely, that the principle "people should be treated the same way" may lead to the unwished-for result that some people will be treated wrongly.[3] Examining the equality of rights in general, one must bear in mind that anti-discrimination rights are not, as a conceptual matter, equal treatment norms: they do not require that all people (or people in a certain category) are treated the same way, but they allow for different treatment, while prohibiting different treatment only on some grounds.[4] The third main phenomenon, which can be significant from the perspective of changes in women's participation in public life, is the model of majoritarian system of government, which grants each individual an equal voice; this requirement was definitely not fulfilled at the time the constitutional structure was set up: at that time, women were denied equal rights. Furthermore, contemporary observers challenge the accuracy of the model's assumption today – it is a truism that political influence correlates with socio-economic status.[5]

These thoughts, compared to the consideration of the idea that decision-making procedures of any group of people, society, who deal with representative democracy must face social justice issues – like women's enforced participation in decision-making bodies –, raise interesting correlations.

However, first and foremost, there is a history of women's participation in public life, and it can be investigated in order to understand better the current situation, when these kinds of questions are waiting for answers. Furthermore, it is perhaps unnecessary to mention that related legal provision plays a role in social changes; however, in this article – and I hope that in the next few ones as well – I intend to get closer to the referred answers.

3 Peters 1997, 1211.
4 Holmes 2005, 175.
5 Denvir 1983, 1039.

Women's rights as human rights – international treaties globally

Development of women's participation in public spheres: social changes, followed by legal provisions

The power of knowledge must be considered as the basic foundation of intellectual and political decision-making, as well as the development of women's education who participate in it. If we concede that women's issues can be more effectively incorporated into decision-making if there are more women who participate in the bodies (which make the decisions in a given society), then – needless to say – the interests of half of the societies in general should be represented by women, but at least, women as well as men. Historically, during the 19th century, one of the most remarkable changes was the increase of literacy rates, therefore, women began to articulate their views of the world. The industrial revolution and the development of science and technology contributed immensely to women's emancipation. Beyond the fact that more women found employment outside the home, travel and communication became easier and cheaper. Beside these developments, there was another issue which proved significant from the perspective of women's participation in public life – and it was not the economic breakthrough, but the biological one, the development of safe and legal means of birth control.[6]

By the time the United Nations was formed in the middle of the 20th century, a critical mass of women had been educated and were employed outside home, and parallelly, they obtained legal and social freedom enough to participate in public life. Some of those women formed organisations, and after a few decades, there were numerous international women's organisations with serious professional experience behind them. These organisations had the power of lobbying. Owing to these activities of advocacy, as a result of several female representatives's support, the Universal Declaration of Human Rights used the term „everyone" rather than the personal pronoun „his" in most but not all of its articles.[7] After the social changes of the last century, the United Nations showed a significant interest in women's equality issues, due to the facts mentioned above, to the consequences of World War I and II on the workforce, and to the civil rights movements in general.

The codification of women's equality of rights has been completed as part of the declaration of human rights in the basic Treaties under the aegis of the United Nations. From the 1950s to the 1970s, numerous treaties have been accepted, as the Convention on the Political Rights of Women (1954) – which concerned the basic rights of political participation of women –, the Convention on the Nationality of Married women (1957), the Discrimination Convention of Employment and Occupation (1958), and three other special treaties: the Convention to the Consent of Marriage, Minimum Age of Marriage, and Registration of Marriages (1964),

6 Fraser 2006, 6.
7 Fraser 2006, 6–7.

the Convention against Discrimination in Education (1960), and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974).[8]

Under the aegis of the United Nations – CEDAW and the most significant women's advocacy organisations of the last century

Though in 1946, a request was submitted by the British Federation of Business and Professional Women to the UN General Assembly that a convention on sex discrimination would be in order, women still had to wait until 1963 when the general assembly called for the commission of the status of women to draft a declaration on eliminating discrimination, and invited member states and numerous NGOs to submit comments and proposals to it.[9] It was the CEDAW treaty (Convention on the Elimination of Discrimination against Women), which included special regulations and was ratified worldwide with real effect. It was accepted in 1979, entered into force two years later and was ratified by twenty countries. By 1990, the number of the participating parties almost reached one hundred.[10]

The CEDAW Convention was preceded by thirty years of work by the United Nations Commission on the Status of Women.[11] The trend of promoting women's rights seemed to go in the direction of bringing women into the focus of human rights concerns – so the fundamental human rights form the basis, and within that section, the principle of equal rights of women and men.

As for the content of the CEDAW document, it first and foremost laid down the legal definitions of the fundamental terms, as equality and equality of rights; furthermore, it served as an international bill of rights for women. Moreover, it contains several agenda for action to guarantee the enjoyment of the above enumerated rights. In the following fourteen articles, the Convention covers civil rights and the legal status of women, amongst other topics.[12] As for the civil rights of the equality of women, the Convention refers to the main previous treaties concerning human rights, like the Charter of the United Nations, and notes that the Universal Declaration of Human Rights states that "all human beings are born free and equal in dignity and rights" and that "everyone is entitled to all the rights and freedoms set forth" therein, without distinction of any kind, including distinction based on sex. Thirdly, it refers to the International Covenants on Human Rights, which have the obligation to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights.

8 After ratifying the most significant and broadest provisions, specific treaties followed – for instance, the Declaration on the Elimination of Violence against Women in 1994

9 Fraser 2006, 39–41.

10 Hungary ratified the CEDAW Treaty amongst the first countries, in 1982, with no preservation.

11 This body was established in 1946, under the presidency of John Fitzgerald Kennedy. The first president of the committee was Eleanor Roosevelt, the recent first lady of the United States.

12 As well as specified topics like human reproduction or impact of cultural factors on gender relations.

After these reaffirmations, one could doubt the necessity of the CEDAW Treaty. However, it provides the answer to the theoretical question immediately: it states that despite these various measures extensive discrimination against women continues to exist, which situation violates the principles of equality of rights and respect for human dignity. In addition, CEDAW also concerns the participation of women on equal terms with men, in political, social, economic and cultural life as a factor, which provides the growth of social prosperity, as well as highlighting the principle, that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields.[13]

However, CEDAW does not stop at definitions and clarification of activities: there are articles[14] which identify special – rather social than legal – measures, which shall be finished when the objectives of equality of opportunity and treatment have been achieved, and the second part of the Convention declares the basics about political and public life of women – as the requirement of taking all appropriate measures to eliminate discrimination against women in political and public life. In the section of public life, the representation of women is stated in the Convention,[15] according to which all appropriate measures shall be taken to ensure women, on equal terms with men and without any discrimination, the opportunity to represent their Governments on international level and to participate in the work of international organisations.[16] The Treaty demands that the participant states ensure the equality in several areas (like education, employment, health, economic and social benefits, rural women issues). These demands are given special emphasis regarding the situation of rural women and their particular struggles and vital economic contributions.[17]

International treaties are – due to their nature – beyond the participating countries' legal enforcement authority, they belong more to the field of intergovernmental diplomacy and international public policy. Since international treaties are hardly effective enough without special procedures and institutional background to enforce the provisions, CEDAW in its fifth part also establishes the Committee on the Elimination of Discrimination against Women, the system of National Reports, and elaborates on other procedures, as Committee meetings, reports and the role of

13 Beside the legal aspects and public policy issues, the introductory provisions also concern social issues, as the great contribution of women to the welfare of the family and to the development of society, as well as the social significance of maternity and the role of both parents in the family and in the upbringing of children. Moreover, it states that the role of women in procreation should not be a basis for discrimination; the upbringing of children requires a sharing of responsibility between men and women as well as society as a whole.

14 CEDAW, Article 3, 4, 5 and 6.

15 CEDAW, Article 8.

16 Although it seems unimportant, it is closely related to the public participation of women, that according to Article 9, *nationality of any women should not be changed* by the husband during marriage automatically, making them dependent on their husband's nationality rather than individuals in their own right.

17 CEDAW, Articles 10, 11, 13 and 14.

specialised agencies. As for the law enforcement of the Treaty, one of the obstacles were that the states are permitted to make reservations, provided that the reservations are not incompatible with the object and purpose of the Convention.[18] At 31 December 2010, 59 of the 186 States parties maintained reservations to the Convention or declarations, amongst them several reservations which may be described as political, and many of them root in different cultural and religious approaches to the role of women, frequently reflected in domestic laws in several areas of private law.[19] These reservations were handled very carefully by the other parties; however, all the states and the CEDAW Commission had the right to submit excuses against certain reservations.[20]

As for entering to force these results of legislative efforts, the United Nations has always played a significant role in struggling the challenges of gender equality. However, in general the legal provisions are not considered effective enough without monitoring the law enforcement and the related social changes. In 2010, the General Assembly of UN created UN Women, as an entity for gender equality and the empowerment of women. UN Women activities are focusing on several priority areas, like increasing women's leadership and participation in political decision-making; empowering them politically as well as economically; ending violence against women; engaging women in peace and security progress; and making gender equality central to national development planning and budgeting, concerning that women are under-represented in political and economic decision-making processes.

Under the aegis of UN, other entities were established as well – the Division for the Advancement of Women (DAW), the International Research and Training Institute for the Advancement of Women (INSTRAW), the Office of the Special Adviser on Gender Issues and Advancement of Women (OSAGI), and the United Nations Development Fund for Women (UNIFEM).[21]

The Commission on the Status of Women is solely dedicated to the promotion of gender equality and the empowerment of women. The Commission has a priority theme in each year – in 2018 these are the challenges and opportunities in achieving gender equality and the empowerment of rural women and girls, and the review theme from the last year is the participation in and access of women to the media, as well as information and communications technologies, furthermore, their impact and their use as an instrument for the advancement and empowerment of women. In 2019, the priority topic was the social protection systems, access to public services and sustainable infrastructure for gender equality and the empowerment of women and girls.[22]

18 Available: www.un.org/womenwatch/daw/cedaw/reservations.htm (accessed 09. 03. 2020).
19 Freeman–Chinkin–Rudolf 2012, 567–568.
20 Academic Lecture of Professor Vanda Lamm, April 20, 2018, Eötvös Loránd University, Faculty of Law and Political Sciences, Budapest, Hungary.
21 Available: www.unwomen.org/en/about-us/about-un-women (accessed 01. 01. 2020).
22 Available: www.unwomen.org/en/csw (accessed 12. 01. 2020).

Women's rights in the judicial system of the U.S.

The United States' legal path to gender equality is as different as it can be, compared to the European countries. In the continental legal systems, the national regulations generally declare the equality of women on international and national level as well, as referred in the prior chapter. Otherwise, in the USA, in the last century a number of significant legal provisions were passed by the Congress, developing time to time the legal and social status of women, following the above mentioned social changes, which were significant in the American society as well.

Equality of rights in the U.S. constitution – the Reconstruction Amendments

On a constitutional level, the equality of rights were incorporated as amendments to the U.S. Constitution after the Civil War: these amendments –the Thirteenth, Fourteenth, and Fifteenth Amendments – were intended to „cleanse the nation of its sins against humanity", and created a race-neutral standard of judicial review. The three amendments were designed to raise the recently freed men from the status of chattel slavery to that of free men and women, as equal participants of the white political community.[23]

The codification issues of total social equality became more important than those of racial equality in the United States after the American Civil War. The first step was the Thirteenth Amendment, which eliminated slavery; the process continued in 1868 with the Fourteenth Amendment, which stated racial equality; finally, the Fifteenth Amendment, assured the voting rights for African-American people. The codification's important requirements were the Civil Rights Act of 1866. This was a necessary act of legislation, because, although the Civil War ended in 1865, the Southern states responded to the Thirteenth Amendment by enacting „Black Codes", a broad series of legislative restrictions designed to keep newly freedmen in a condition functionally approaching slavery by denying them most of the rights associated with citizenship and full membership in the socio-community.[24] After the Congress accordingly adopted the Civil Rights Bill – which guaranteed equal rights for all citizens –, it immediately started the amendment process in order to assure the constitutional background for citizens against states and local governments.[25]

The meaning of these amendments for women is quite controversial, and depends on how one interprets the constitution; however, it is clear that in the Fourteenth Amendment, three clauses are important concerning women's equality. The first is the *Privileges and Immunities Clause:* „no state shall make or inforce any law which shall abridge the privileges or immunities of citizens of the United States".[26]

23 Hall 1988, 32–43.
24 Wasserman 2013, 2.
25 Available: www. history.house.gov (accessed 21. 02. 2020).
26 The Constitution of the United States, Article IV. Section 2, Clause 1.

Secondly, according to the *Due Process Clause*, „…nor shall any state deprive any person of life, liberty or property without due process of law".[27] Lastly, the *Equal Protection Clause* reads „…nor denie to any person within its jurisdiction the equal protection of the laws".[28] There can be no doubt that the Framers of this sentence were closely related to the antislavery movement and were influenced more or less by the same theories of natural rights, embodied in the clause „all men are created equal" in the Declaration of Independence; still, the Framers told to those who hoped that the emancipation of slaves would lead to the emancipation of women, that „this is the Negro's Hour".[29]

Nowadays, although there has been much debate over the meaning, intention and limitation of these amendments, there is no more debate over the fact that at the time the Reconstruction Amendments were formulated, the Framers limited the Thirteenth and Fifteenth Amendment based on race – the Thirteenth Amendment is literally limited, the Fifteenth Amendment is at least arguably limited –, but not the Fourteenth, even though it was written broadly, in the historical moment of freeing the former slaves. It is distinguishable from the latter two – it can be applied to other classifications, too, like age, education, and, of course, gender. And if one could examine the jurisprudence of the recent decades in the higher courts of the judicial system of the U.S., it would become very clear that the Equal Protection Clause is extended to women and to other groups as well, and those issues were taken seriously by the official interpretators of the Constitution.[30]

Civil society for women's equality and the path to public life participation

The rights of political participation – the right to vote, and the passive side of the same liberty, the freedom of being elected – are amongst the most significant civil political liberties in every and each democratic system, because they allow citizens to act together, to form groups to express shared economic and social interests and so increase political influence.[31] As the Court observed „…No right is more precious in a free country than that of having voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."[32]

Feminist movements rarely have common opinions in the issues of women's rights, except for two short periods: between 1912-1920, when they signed on to a campaign to have the Nineteenth Amendment passed, which gave the right to vote for women; and between 1970-1982, when they worked together for the Equal Rights Amendment

27 Fifth Amendment to the US Constitution, US Bill of Rights.
28 Fourteenth Amendment to the US Constitution, US Bill of Rights.
29 McBridge–Parry 2011, 20.
30 In-depth interview with Professor Mario Mainero, June 8., Chapman University, Dale E. Fowler School of Law, 2018, Orange, USA
31 Murphy–Flemming–Harris II. 1986, 23–26.
32 Supreme Court, 1964, in the case of Wesberry v. Sanders. Chemerinsky 2009, 1081.

campaign. However, the proposal itself immediately divided women activists to such an extent that they could not unite for other issues; some saw a constitutional standard of equality as the only way, while for others the ERA was too rigid to allow for the special needs of women as workers and mothers.[33]

Since the Seneca Falls Convention, when the movement for women's rights began to develop at a national level, the idea of voting rights for women was on the table, but with the onset of the Civil War the suffrage movement lost some momentum, moreover, after the war, women's suffrage endured another setback. In 1918, President Wilson „switched his stand on women's voting rights from objection to support, and tied the proposed suffrage amendment to America's involvement in World War I and the increased role women had played in the war efforts."[34] In 1919, the U.S. Senate passed the Nineteenth Amendment and by 1920, a total of 35 states had approved the amendment.

As we could see, the equality of rights of women started with the Civil Rights Movement, and its first goal was to gain women's suffrage. In the 1910s and 1920s, the Civil Rights Movement stood up for women who had no political power. This was the first non-violent movement, and finally it proved successful in the frameworks of the given historical circumstances. This was in line with President Wilson's intention to support women's suffrage, and after World War I, women had to enter the job market, and had to get employment, also to fill up the lost men's space.

As for the related public policy, there have been two major presidential commissions investigating the women's issues. The first took place during the presidency of John Fitzgerald Kennedy, the second belongs to the Nixon-era. The first was the 1963 report of the President's Commission on the Status of Women, which had been established a year before its first referred report, under the leadership of then ex-first lady, Ms. Elenor Roosevelt. The report reviewed education, workforce, and public policy-making, and did not forget about the family roles. The second report, made in 1970, is shorter and more specific; it is entitled „A Manner of Simple Justice: The Report of the President's Task Force on Women's Rights and responsibilities". Both reports have recommendations; the latter one includes recommended legislation as well, of course, endorsing ERA. President Kennedy's comission on the status of women proposed a compromise, agreeing that equality of rights under the law for all women and men is basic to democracy, but it maintained that the constitution already contained this principle in the fifth and fourteenth amendment, therefore there would be no need for ERA, but just „judicial clarification".[35] In the field of education, the next step was the so-called Title IX in 1972, a federal law, passed by the Congress, which prohibits discrimination on the basis of sex – in any federally financed education program or activity.

33 McBridge–Parry 2011, 18–19.

34 Available: www.history.com/topics/womens-history/19th-amendment/videos/19th-amendment (accessed 02. 02. 2020).

35 McBridge–Parry 2011, 20.

As for the procedure of joining the CEDAW, in 1980 President Carter signed the treaty and sent it to the Senate for ratification, but Carter, in the final year of his presidency, did not have the political leverage to get senators to act on the measure. Since then, the Senate Foreign Relations Committee – the committee charged with ratifying treaties and international agreements – has debated CEDAW five times, but it has not been ratified yet. Although there are many social organizations, NGOs and grassroots movements which support the ratification, CEDAW is unlikely to be ratified by the Senate anytime soon.[36] Some studies state that the strong equality guarantees of CEDAW stand in contrast to the definitions of equality employed by the Supreme Court, therefore, the ratification of CEDAW would have a radical impact on American women's right to equality.[37]

After these achievements and conflicts of women's movements, the referred facts of the controversial interpretation of the Fourteenth Amendment led to a new feminist movement, which considered ERA, the Equal Rights Amendment,[38] to be only a formal amendment to the Constitution, believing that the equal protection clause is hardly applied to women. In the 1970s, Americans anyway rang in the bicentennial with a decade of tense and gloomy events like Nixon's resignation, revelations of domestic spying, racial separatism, and fights over the Equal Rights Amendment.[39] After a brief debate, a number of organisations and political parties agreed that the enactment of the ERA would end special benefits for women, and equal rights would improve the status of all women so much that there would be no need for any special treatment anymore; therefore the majority of supporters of women suffrage opposed the ERA, considering it a threat to the interest of poor mothers and working women. In spite of the opinion of these small but loud groups, in 1944 both the democratic and republican parties endorsed the ERA in their party platforms, however, as support for the ERA grew, the opposition also became more active: this opened up class differences in the women's movement. The draft made more progress in 1945, it was passed by the senate by a majority, but was still short of the necessary two-thirds. After a short period of standstill, fifteen years later the ERA became a contentious issue during the 1960 democratic convention, and president Kennedy's new commission could not avoid to endorse the concept, but argued – as mentioned above – that these rights were already embodied in the constitution.[40]

36 Available: www.thoughtco.com/why-wont-u-s-ratify-cedaw-3533824 (accessed 02. 02. 2020).

37 Benshoof 2011, 105.

38 ERA's text: „Section 1. Equality if rights under the law shall not be denied or abridged by the Unites States or by any State on account of sex." (Available: www.equalrightsamendment.org/, accessed 02. 02. 2020)
Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
Section 3. This amendment shall take effect two years after the date of ratification."

39 Tartakovsky 2018, 201.

40 McBridge–Parry 2011, 24–25.

As for the failure of ERA, one needs to bear in mind, that under the very difficult and strict procedure of amending the U.S. Constitution (2/3 of each Houses and ¾ of the states must accept the amendment) the time limit for the acceptance is not a necessary requirement in every case – only in those, which the Framers decide to specify. However, in the case of ERA, the legislative branch decided to make a time limit, and although this was extended by the Congress to 1982, that deadline expired as well without the wished-for results.

Nowadays there might be a debate over the successful ratification of ERA in the current society and its representatives, since more than three decades passed, and the legal issues of ERA are still on the table. The shadows of the amendment are still a great subject to social and legal debates: for instance, in 2017, on the 45th anniversary of the day when the Congress passed ERA, Nevada became the 36th state to ratify it, Illinois was the 37th, and it has been only a few months[41] when Virginia state legislators decided to join the amendment's supporters by ratifying it as 38th.[42]

Barriers in the application of constitutional provisions – the state action requirement and the levels of scrutiny

The main question of the application of constitutional provisions is the correlation between the legal and social status of women in the United States. The equality / difference issue is the controversy over the meaning of the Constitution and its guarantees of equality, as they apply to gender and women's rights – in other words, the debate over what sort of foundation the Constitution provides for women's rights.

Most of the Bill of Rights is enforced against the states by incorporation through the Fourteenth Amendment Due Process Clause, and equal protection is enforced against the federal government by similar process through the Fifth Amendment's Due Process Clause. As a result, most of the rights of the people apply equally in cases involving both state and national government action.[43]

The state action requirement stems from the fact that the constitutional amendments which protect individual rights – especially the Bill of Rights and the Fourteenth Amendment – are mostly phrased as prohibitions against government action, therefore the constitutional provisions do not force the private parties; the provision begins with „No state shall…", so all lawsuits alleging constitutional violations of this type must show how the state or the federal government was responsible for the violation of their rights.[44]

Nowadays „state action" is a term used to refer to the basis for a legal claim for damages against a governmental body for a violation of a person's civil rights, and any

41 Exactly on January 27, 2020.
42 Available: www.equalrightsamendment.org (accessed 09. 03. 2020).
43 McAlinn–Rosen–Stern 2005, 105.
44 Available: www.law.cornell.edu/wex/state_action_requirement (accessed 09. 03. 2020).

activity by any subordination of the government of a state, so any of its branches or employees who use the „color of law" to violate an individual's civil rights.[45]

From the perspective of women's equality rights, the real issue is, that under the concept of state action, neither the Privileges and Immunities Clause, nor the Equal Protection Clause guarantees constitutional protection against private parties, therefore, for instance, where there is no state action, there is no constitutional equal protection claim. Therefore, in case of violation of equal rights of women, each plaintiff will need other laws, such as the Civil Rights Act, to challenge discrimination.[46]

Due to this constitutional interpretation, although American women enjoy strong legal protections against sex discrimination, these protections are largely created by federal statutory law rather than the U.S. Constitution, therefore women seek to invalidate sex discriminatory laws as unconstitutional by the Supreme Court or federal courts.[47]

The other significant issue of law enforcement – in particular in the area of judicial review – is the levels of scrutiny, used by the Supreme Court while interpreting the law. The Supreme Court regularly uses three levels of scrutiny while analysing the invalidity of laws on federal or state level, from the perspective of the Constitution – strict scrutiny, intermediate level scrutiny or low-level scrutiny. The level of scrutiny depends on how you define the government interest, therefore the strict scrutiny must be a compelling governmental interest, and there are only a few of them.[48]

The discriminative legislature's judgement – the authority responsible for striking down any discriminatory statutes as unconstitutional ones – highly depends on what the basis of discrimination is, and how significant the compelling governmental interest is.

Examples for three categories of the bases of the discrimination are the following: in cases of race-based discrimination, the Supreme Court almost automatically invalidates the statutory regulations by going under a strict-level scrutiny, however, gender-based discrimination only implies an intermediate level of scrutiny, and, for instance, the economic legislature is subject in general to low-level scrutiny.

This classification creates differences between the forms of discrimination – racial discrimination has a serious and long history, and there is, without any doubt, a compelling governmental interest and constitutional protection. As we could see, gender-based discrimination is at least controversial from the perspective of the constitutional protection, and the Supreme Court found that since economic regulation is generally based on rational foundations, those kind of regulations which separate the richer and poorer levels of society, generally go under low-level scrutiny.

45 Available: https://definitions.uslegal.com/s/state-action/ (accessed 09. 03. 2020).
46 Available: www.aclu.org/files/pdfs/about/rightsofwomen_chapter1.pdf (accessed 09. 03. 2020).
47 Benshoof 2011, 105.
48 In-depth interview with Professor Mario Mainero, June 8., Chapman University, Dale E. Fowler School of Law, 2018., Orange, USA.

Still, if one takes a look at the practice of the constitutional interpretation of gender-based discrimination, it is unnecessary to say that if the government law – even state or federal law – is under-inclusive or over-inclusive, that is going to be unconstitutional anyway, even under intermediate scrutiny – therefore it would be pretty difficult to uphold a gender discriminatory law.[49]

Final Thoughts

The twentieth century has witnessed political movements in favor of women's suffrage, civil rights, women's rights worldwide, and indeed, the system of continuous immigration guarantees that new ethnic groups change the ethnic landscape of America, reminding the country about its commitment to equality.[50] Debates over constitutional law and women's equality are usually more complex and politically relevant in the United States than in other countries, and one could wonder where the reasons of those controversies are stemming from. There are some differences, which come from the common law system itself, and there remain deep disagreements over the constitutional equality, but there are basic disagreements over the absolute equality of women and men as well.

During the campaign for ERA, the advocates pointed out that it occurs only in the US, the greatest democracy, that women do not have the guarantee of equality written into the constitution. Of course, one must bear in mind that although many countries have put guarantees of sex equality, or have ratified treaties, these provisions are only symbolic without institutional guarantees, and do not have much effect on policy debates and the drafting of laws and regulations – contrary to the system in the Unites States, where, although the constitutional language is only partly symbolic, it is fundamental in the society; similarly, it is instrumental and crucial to policy powers, that women and men must be treated equally.[51] Furthermore, in addition to the powers of the courts in judicial review, the federal courts – and not only the Supreme Court – have the authority to strike down laws that are unconstitutional. It is clear that this complex system is historically rooted in certain antecedents and as for the future jurisprudence, it is pretty much predictable and expectedly long-lasting, as part of an internal system of common law, assuring a kind of continuity of interpretations of law.

In my opinion these are the reasons why the system does not change fundamentally during different governmental programs and objectives, but operates effectively.

49 In-depth interview with Professor Mario Mainero, June 8., Chapman University, Dale E. Fowler School of Law, 2018., Orange, USA.

50 Clark 2001, 495.

51 McBridge–Parry 2011, 18–19.

Therefore, the United States still plays a leading role in the field of judging gender-based discrimination (is social terms) and granting the law enforcement of women's equality (in legal terms).

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