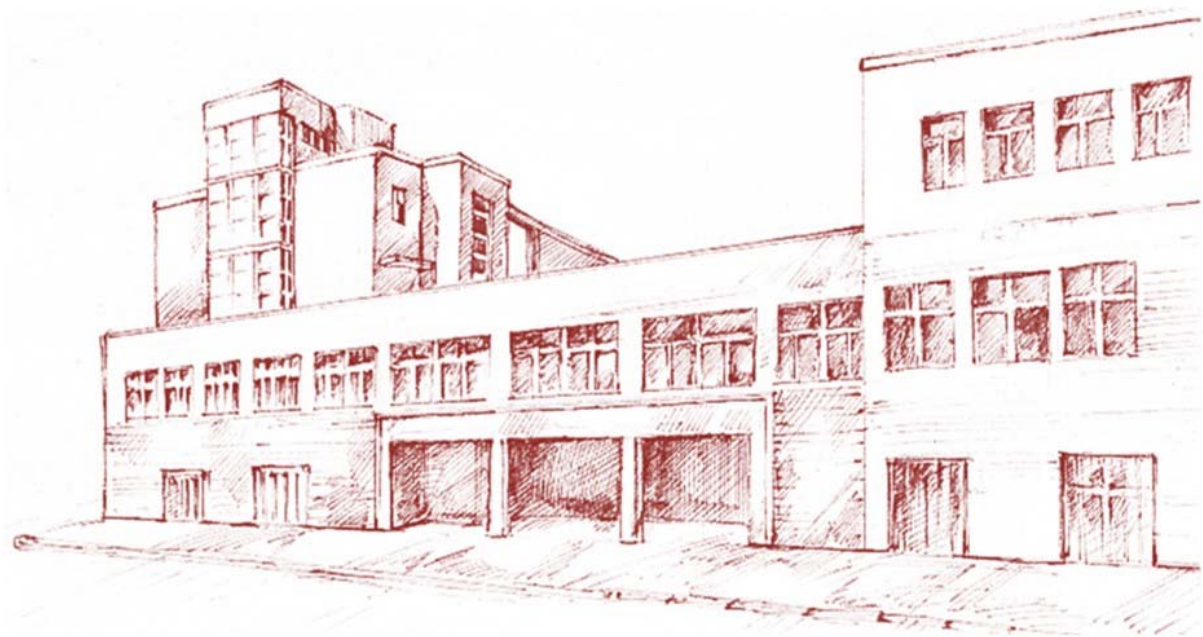




Gender Equality in Contemporary Legal Context(s)

Conference Proceedings of Students and Early-Career Researchers

Trnava 2026

Gender Equality in Contemporary Legal Context(s)

This volume of conference proceedings from the Conference of Students and Early-Career Researchers, held on 15 April 2026, has been published within the framework of the project co-funded by the European Union (Project No. 101238560 — HRPEU — ERASMUS-JMO-2025-HEI-TCH-RSCH). The conference itself was also organised within the framework of the HRPEU project.

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**Co-funded by
the European Union**

Tnava 2026

Recommended Citation:

MORAVCOVÁ, D., VUJOŠEVIĆ, T. (eds.). Gender Equality in Contemporary Legal Context(s) 2026: Conference Proceedings of Students and Early-Career Researchers 2026. 1st ed. Trnava: Trnava University in Trnava, Faculty of Law, 2026.

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Trnava, 2026

ISBN: 978-80-568-0975-4

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Preface

It is our great pleasure to present this volume of proceedings from the Conference of Students and Early-Career Researchers 2026, held on 15 April 2026 at the Faculty of Law, Trnava University in Trnava. The conference brought together students and early-career researchers from several countries, providing them with an opportunity to present their research, exchange ideas and engage in meaningful academic discussions across different legal traditions and perspectives. The diversity of topics and the international participation confirmed that legal scholarship knows no borders and that dialogue between young researchers is an essential element of contemporary academic life. Supporting young scholars and creating opportunities for their professional development has always been one of the core missions of our Faculty. Academic conferences such as this one allow participants to develop critical thinking, strengthen international cooperation and become part of the wider academic community. We are particularly grateful that this conference and the publication of these proceedings were made possible through the support of the European Union under the HRPEU – Jean Monnet project. This support enables us to create an international platform for discussion on issues of fundamental importance to European legal development and to encourage students and young researchers to actively engage with current legal challenges. Initiatives of this kind strengthen not only academic excellence but also a shared understanding of the values on which European cooperation is founded. We would like to express our sincere appreciation to all authors for their valuable contributions, to the reviewers for their careful and constructive work and to everyone who participated in the organisation of the conference. We hope that this publication will serve as an inspiration for further research, stimulate new academic discussions and contribute to the continued development of legal scholarship among the next generation of researchers.

Kristián Csach

FIFTY YEARS AFTER DEFRENNE: IS SLOVAKIA ENTERING A NEW ERA OF EQUAL PAY?

Dominika Moravcová¹

Gender equality has become one of the defining legal and societal issues of the twenty-first century. Despite being the subject of extensive academic debate, legislative activity and public discourse, it continues to raise significant practical and legal challenges. Although European countries generally provide a high level of protection of fundamental rights, grounded in the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union and extensive anti-discrimination legislation, important gender-related inequalities persist in practice. One of the most prominent examples is the persistent gender pay gap. According to research published in 2025, the gender pay gap in Slovakia amounts to 16.8%, while the gap between mothers and the rest of the workforce is even more pronounced, reaching 18.3%. The authors conclude that a substantial proportion of these differences remains unexplained, suggesting the influence of unobserved factors, including differences in individual choices, bargaining power, as well as systemic bias and discrimination.² These findings demonstrate that, despite decades of legislative development at both the European and national levels, achieving genuine equality in remuneration remains an ongoing challenge.

The year was 1976. More than fifty years before the publication of this article, the Court of Justice delivered one of the most influential judgments in the history of European equality law, *Defrenne II*³, decided on 8 April 1976. The judgment marked a turning point in the development of the principle of equal pay for men and women and has remained a cornerstone of the European Union's equality jurisprudence ever since. The first question referred to the Court under the preliminary ruling procedure concerned the direct effect of Article 119 of the EEC Treaty.⁴ More specifically, the referring court asked whether Article 119 introduced directly into

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² Gašpercová, P., Tóth, P. (2025). Analysis of wage differences bet. *Economic Review*, 54(3), 177 – 195. <https://doi.org/10.53465/ER.2644-7185.2025.3.177-195>

³ Judgment of the Court of 8 April 1976, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, case 43-75, EU:C:1976:56.

⁴ Art. 119 of the Treaty establishing the European Economic Community: „Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work . For the purpose of this Article , " pay " means 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 employment from his employer .

Equal pay without discrimination based on sex means :

the legal systems of the Member States the principle of equal pay for men and women performing equal work and, consequently, whether workers could rely on that provision before national courts independently of any implementing national legislation.

The doctrine of direct effect was first expressly recognised by the Court of Justice in its landmark judgment in *Van Gend en Loos*.⁵ In that case, the Court departed from the traditional understanding of direct effect in public international law and adopted a teleological and systematic interpretation of the EEC Treaty, placing particular emphasis on its objectives and underlying purpose. Examining the nature of the Treaty, the Court observed that its primary objective was the establishment of a common market whose functioning directly concerned both natural and legal persons within the Community. Accordingly, the Treaty could not be regarded merely as an international agreement creating reciprocal obligations between the contracting States. Rather, it established a new legal order of international law, within which not only the Member States but also their nationals became subjects of rights and obligations. Consequently, provisions of the Treaty were capable of conferring rights upon individuals which national courts were required to protect.⁶ As stated by M. Siman, the constitutional structure of the European Union, founded on the transfer of sovereign powers from the Member States to the Union, necessarily presupposes that individuals remain able to rely directly on rights conferred upon them by Union law. As the Court has consistently emphasised, the effectiveness of the EU legal order would be seriously undermined if individuals were deprived of the possibility of invoking those rights before national courts following the transfer of competences from the Member States to the Union.⁷

The pivotal finding of the Court in *Defrenne II* was the following:

„The principle that men and women should receive equal pay, which is laid down by Article 119, may be relied on before the national courts. These courts have a duty to ensure the protection of the rights which that provision vests in individuals, in particular in the case of those forms of discrimination which have their origin in legislative provisions or collective labour agreements, as well as where men and women receive

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement ;
(b) that pay for work at time rates shall be the same for the same job.“

⁵ Judgment of the Court of 5 February 1963, *Van Gend en Loos v Administratie der Belastingen*, C-26/62, EU:C:1963:1.

⁶ *Ibid.*

⁷ SIMAN, M., SLAŠŤAN, M. (2012) *Právo Európskej únie (inštitucionálny systém a právny poriadok Únie s judikaturou)* [The law of the European Union (institutional system and legal order of the Union with jurisprudence)]. Bratislava: Euroiuris, 2012.

unequal pay for equal work which is carried out in the same establishment or service, whether private or public.

*The application of Article 119 was to have been fully secured by the original Member States as from 1 January 1962, the beginning of the second stage of the transitional period, and by the new Member States as from 1 January 1973, the date of entry into force of the Accession Treaty. The first of these time-limits was not modified by the Resolution of the Member States of 30 December 1961.*⁸

More than fifty years after Defrenne II, an important question remains: why do significant disparities in the remuneration of men and women still persist across many European countries? Unfortunately, Slovakia is no exception and continues to face considerable challenges in achieving genuine pay equality in practice. At first sight, the existing legal framework appears to provide a sufficiently robust legal basis for the effective protection of the principle of equal pay. National courts may rely directly on the foundations established by EU law when adjudicating disputes concerning pay discrimination. As Vujošević rightly observes, comparative jurisprudence demonstrates that the requirements of individualised assessment, procedural fairness and proportionality constitute important safeguards against discriminatory outcomes.⁹

Recognising that the existence of legal rights alone is insufficient to eliminate persistent inequalities in practice, the European Union has sought to respond to contemporary challenges by adopting Directive to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms.¹⁰ The Directive establishes minimum requirements designed to reinforce the principle of equal pay and the prohibition of both direct and indirect discrimination on grounds of sex in matters of remuneration. Most importantly, it introduces a significantly enhanced framework for pay transparency, which is expected to improve the practical enforcement of equal pay rights throughout the European Union.¹¹

⁸ Judgment of the Court of 8 April 1976, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, case 43-75, EU:C:1976:56.

⁹ Vujošević, T. (2025). *Revocation of nationality on security grounds: Human rights standards and risks of statelessness*. In D. Lantajová & I. Vu Nhu (Eds.), *Case Law of International, European and National Judicial Authorities in the Field of Citizenship*, Trnava University, Faculty of Law, pp. 57-68.

¹⁰ Directive (EU) 2023/970 of the European Parliament and of the Council of 10 May 2023 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms (Text with EEA relevance) (*OJ L 132*, 17.5.2023, pp. 21–44).

¹¹ EUR-lex (2023) Equal pay for equal work or work of equal value between men and women – Rules on pay transparency. Available at: <https://eur-lex.europa.eu/legal-content/EN/LSU/?uri=CELEX:32023L0970>.

The Slovak Republic has implemented the Directive through the Act no. 76/2026 of 15 April 2026 on Equal Pay for Men and Women for Equal Work or Work of Equal Value and on Amendments to Certain Acts. The new legislation introduces a number of important rights for employees while, at the same time, imposing extensive obligations on employers, particularly in relation to pay transparency and information disclosure. Whether these legislative changes will bring about a genuine improvement in practice remains to be seen. The true impact of the new Act will ultimately depend not only on its wording, but also on its effective implementation by employers, its interpretation by courts and labour inspectorates, and the willingness of employees to exercise the rights it confers. Nevertheless, the adoption of the Act represents an important milestone in the development of Slovak labour law and demonstrates the continuing influence of European Union law on the protection of fundamental social rights. It is to be hoped that the new legal framework will contribute to reducing the gender pay gap in practice and enable Slovakia to improve its position among European countries in achieving pay equality between women and men. Fifty years after Defrenne II, the principle of equal pay remains not merely a legal aspiration but an ongoing challenge. If the new legislation succeeds in translating this principle into everyday workplace reality, it may well become the most fitting tribute to the fiftieth anniversary of one of the most influential judgments in the history of European equality law.

GENDER DISBALANCE IN POLITICAL REPRESENTATION: THE CASE OF MONTENEGRIN QUOTAS

Tereza Vujošević¹

Abstract

The democratic development of countries is still being evaluated through gender equality in political representation. Legal reforms introduced a quota system as a final resort for improving women's participation in politics at the highest level, but nevertheless, gender disparities continue to persist. This article examines gender disbalance in political representation in Montenegro, with particular attention to the introduction and impact of electoral gender quotas. Following longitudinal data on parliamentary representation from 1990 to 2024 some trends are evident. During the early post-socialist period, women's representation in the Montenegrin parliament remained below 7%. Montenegro introduced a 30% gender quota for electoral lists in 2011, followed by placement rules in 2014 to improve the effectiveness of the policy, which contributed to a gradual increase in the number of female members of Parliament. However, gender equality is not even close to being achieved. Women remain underrepresented in leadership positions, including party leadership, ministerial positions and local government offices. While gender quotas have improved representation, maybe only at a quantitative level, structural barriers within political parties, broader socio-cultural norms, hate speech and misogynist attacks in general continue to limit gender equality in all social structures, including political power.

Keywords

Gender equality, political representation, gender quotas, women in politics, political participation in Montenegro.

Introduction

Gender equality in political representation has become one of the central indicators of democratic development and inclusive governance. Over the past decades, scholars and international organizations have increasingly emphasized the importance of women's participation in political decision-making, while gender mainstreaming in the political arena is considered a central indicator of inclusiveness and democratic progress. Despite positive effects and changes, women remain underrepresented in political institutions in most countries. Montenegro, unfortunately, is not an exception. Gender stereotypes, institutional constraints, unequal access to political networks and many more (in)visible “enemies” limit women from

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participating in politics on equal terms with men. It was a continuous trend since women gained the right to vote in Yugoslavia after World War II (see Table 1.)

Reconfiguration of political institutions and party systems from the early 1990s did not result in equal political participation for men and women. In some national contexts, the opposite happened - traditional gender roles reemerged, marginalizing women in politics. Since the introduction of multi-party democracy in 1990, women have been consistently underrepresented in Montenegrin political institutions. During the first decade of democratic development, women did not exceed 7 % of parliamentary representation², which reflected the strong dominance of male political elites, as well as the limited access of women to political power. The persistent patriarchal social norms, male-dominated party structures and informal political networks altogether contributed to the systematic exclusion of women from decision-making processes at the highest levels.

Table 1. Women in the Parliament of Montenegro (1946–2016)³

Period	MPs total	Women MPs	% of Women MPs
1946-1950	107	3	2.80
1950-1953	161	6	3.72
1953-1958	122	5	4.09
1958-1963	150	7	4.66
1963-1969	254	37	14.56
1969-1974	254	9	3.54
1974-1978	135	15	11.11
1978-1982	165	16	9.69
1982-1986	165	22	13.33
1986-1989	165	20	12.12
1989-1990	165	20	12.12
1990-1992	126	6	4.80
1992-1996	85	6	7.06
1996-1998	71	5	7.04
1998-2001	78	4	5.12

² UNDP Montenegro, The struggle for women's human rights does not end; it only seeks new forms of organization, 2023, retrieved from: <https://www.undp.org/montenegro/press-releases/struggle-womens-human-rights-does-not-end-it-only-seeks-new-forms-organisation> , Accessed: 10th March 2026

³

2001-2002	77	8	10.39
2002-2004	75	8	10.67
2005 (no elections)	75	10	13.33
2006	81	8	9.88
2007 (no elections)	81	9	11.11
2009-2012	81	10	12.30
2012-2016	81	14	17.28

Following the restoration of independence in 2006, Montenegro intensified its efforts toward democratic consolidation and European integration. That brought attention to gender equality and women's political participation as highly important constituents of democratic society and democratic governance. Nevertheless, women's representation in parliament remained very low in the early post-independence period. In 2006, women were holding only 9.88%⁴ of seats in the Parliament, demonstrating the significant gender gap in political representation, positioning Montenegro below averages of women's representation in national parliaments.

The Law on Gender Equality⁵ and Law on Election of Councillors and Members of Parliament brought hope that the “dark” period is behind regarding the political representation, which is particularly significant in post-socialist democracies. Namely, in 2011, Montenegro adopted a legal provision requiring that at least 30 percent of candidates on electoral lists must belong to the underrepresented gender.⁶ The primary aim of this reform was to increase women's representation in the national parliament by ensuring that political parties nominate more female candidates. The legislation did not specify the placement of female candidates on electoral lists, which significantly undermined the effectiveness of the quota. Although the formal requirement of 30% representation was met, women were frequently positioned in the lower segments of party lists, where their chances of securing parliamentary seats were minimal.

Additional amendments introduced in 2014 corrected this mechanism by establishing placement rules designed to prevent political parties from placing female candidates in unelectable positions on electoral lists. It meant that electoral lists must be structured so that, within every sequence of four consecutive candidates (positions 1–4, 5–8, etc.), at least one

⁴

⁵ Zakon o rodnoj ravnopravnosti, Sl. list RCG, br. 46/07, 40/11 i 35/15

⁶ Bajić Slavica, *op. cit.*

candidate belongs to the underrepresented gender.⁷ This measure made a change and had a positive impact on the quantitative dimension (Table 2.). But the real struggle for power and equality was (is) not over yet.

Table 2. Women in the Parliament of Montenegro (2016-2026)⁸

Period	MPs Total	Women MPs	Women MPs (%)
2016 - 2020	81	24	29%
2020-2023	81	21	26%
2023-2026	81	22	27%

Beyond Representation: Structural Inequality and Misogyny in Montenegrin Political Life

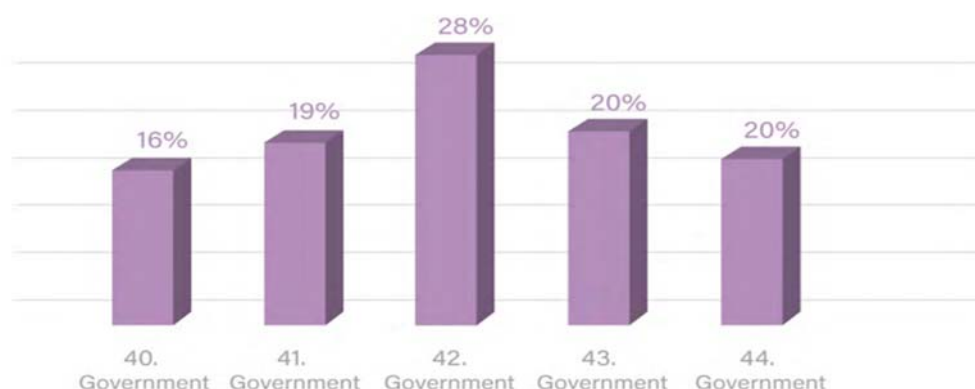
The introduction of gender quotas has contributed to a gradual increase in women's parliamentary representation (Tables 1 and 2). While gender quotas have contributed to an increase in quantitative representation, deeper structural barriers that limit women's political participation have not been fully addressed. Social expectations related to family responsibilities and traditional gender roles continue to influence women's willingness to pursue political careers.

Despite evident improvements, Montenegro has still not reached the legally prescribed quota of 30% representation. Women remain significantly underrepresented in political leadership positions, including party leadership, ministerial posts and local government institutions (Tables 3 and 4).

⁷ Article 39a, *Ibid.*

⁸ Gilić Teodora, Rovčanin Andrea, Report on Online Violence Against Women in Politics in Montenegro, CEMI,

Table 3. Women in the Government of Montenegro ⁹



The additional burden for women in politics represents hate speech and misogyny in public discourse. Women engaged in political life are frequently exposed to violence and hate speech in both offline and online environments, often as a direct consequence of their visibility as public figures.¹⁰ As Scharnagl emphasizes, misogyny is increasingly becoming embedded in social and political structures, influencing public debate, online spaces and institutional behavior, persisting despite formal advances in gender equality as democratic backslides.¹¹

The findings of the public opinion survey conducted in Montenegro indicate a concerning perception of the misogyny issue. Most respondents (62.4%) acknowledge the existence of violence against women in politics in Montenegro.¹² However, only 18.2% consider it a serious problem, while 44.2% view it as present but not particularly severe.¹³ At the same time, a notable share of respondents (22.2%) do not perceive violence against women in politics as a problem at all.¹⁴ Raščanin-Radičević, one of the women in politics, reports that the vast majority of female politicians face discrimination, with around nine in ten affected.¹⁵ Approximately

⁹ *Ibid.* p. 19

¹⁰ Westminster Foundation for Democracy, Violence against women in Montenegrin politics, retrieved from: <https://www.wfd.org/what-we-do/resources/violence-against-women-montenegrin-politics> , Accessed: 1st April 2026

¹¹ Scharnagl Annika, The Personal Is Still Political: Why the Rise of Misogyny Threatens Democracy, Austrian Institute for International Affairs, 2026, retrieved from: <https://www.oiip.ac.at/en/publications/the-personal-is-still-political-why-the-rise-of-misogyny-threatens-democracy/> , Accessed: 1st April 2026

¹² DeFacto Consultancy, Violence against women in Montenegrin politics, comprehensive study, 2024, p. 14.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Despotović Aleksandra, A woman in politics – a heroine or “the one who neglected her home, husband, and children for her career“, UNDP Montenegro Blog, 2024, retrieved from: <https://www.undp.org/montenegro/blog/woman-politics-heroine-or-one-who-neglected-her-home-husband-and-children-her-career> , Accessed: 1st April 2026

seven in ten have experienced some form of violence, and nearly all report biased or discriminatory treatment in media coverage and representation.¹⁶

In recent years, Montenegro has repeatedly experienced surges of misleading narratives and hostile rhetoric, particularly during periods of intensified social and political tensions.¹⁷ Additionally, online hate speech targeting women in politics is on the rise. Women are frequently subjected to sustained attacks, insults, threats, and degrading commentary as a result of their political engagement and public expression. Research conducted by CEMI (Centar za monitoring i istraživanje) shows that such practices not only restrict the ability of women to participate freely in public debate but also contribute to a climate of fear and hostility, which may deter other women from entering political life.¹⁸ Moreover, it is not limited to the national context but reflects wider global challenges related to gender equality and democratic development.

These findings indicate that, although gender quotas have led to visible increases in the number of women in parliament, they have not substantially altered the broader conditions under which political participation takes place in Montenegro. A corresponding redistribution of power has not matched the presence of women in political institutions, as significant barriers persist within party structures, access to leadership positions and social norms in general.

Table 4. Women's representation in politics and public administration ¹⁹

Proportion of seats held by women in single or lower houses of national parliaments (2025)	Women ministers or cabinet members (2025)	Women's representation in deliberative bodies of local government (2023)	Share of women in senior positions in public administration (2023)
28.4%	22.6%	32.7%	46.4%

At the same time, the widespread presence of misogyny, hate speech and various forms of violence continues to shape the experiences of women in politics, limiting their ability to

¹⁶ *Ibid.*

¹⁷ Radulović Đurđa, Monitoring report on hate speech in Montenegro, Centre for Investigative Journalism Montenegro and Media Diversity Institute Western Balkans, 2025, p. 5.

¹⁸ Gilić Teodora, Rovčanin Andrea, *op. cit.* p. 32.

¹⁹ Equal Future, Women's representation in politics and public administration, Montenegro, retrieved from: <https://www.equalfuture-eurasia.org/womens-representation-in-politics-and-public-administration/montenegro#:~:text=Women's%20representation%20in%20public%20administration,public%20administration%20field%20in%20Montenegro>. Accessed: 1st April 2026

participate on equal terms. The fact that a considerable share of the public does not perceive these issues as serious further underestimates the depth of the problem. These are just some of the reasons why the persistence of gender inequality in political life cannot be addressed through legal measures alone, but requires broader changes in political and institutional practices, as well as in individual attitudes and reactions.

Addressing Structural and Social Barriers to Women's Political Participation

The previously presented trend corresponds with findings of scholars who suggest that gender quotas do increase women's numerical presence in political institutions but often do not produce bigger structural change. What is also important are quota design, implementation and broader political context.²⁰ International reports highlight a persistent lack of investment in women's empowerment, reflected in their limited presence in leadership including political leadership, decision-making and higher-paying sectors, reinforcing deeply rooted gender roles that prioritize women's family responsibilities over public engagement.²¹

Górecki and Pierzgalski consider that quota systems primarily influence *descriptive representation*, but their effects on political influence and participation remain contingent on institutional and contextual factors.²² Other authors agree that quotas can have a positive effect on increasing the number of female politicians, but it does not ensure support for the reelection of women to the post.²³ That is why more transparent and merit-based candidate selection procedures, as well as support mechanisms such as training, mentoring and financial support, are necessary to enable women's progress within highly hierarchical party systems.

The Montenegrin case reflects this pattern. Although quotas have contributed to an increase in women's parliamentary presence, they have not substantially influenced the distribution of political power. Strengthening monitoring mechanisms and introducing clearer penalties for non-compliance could enhance the credibility and effectiveness of existing legislation.

²⁰ Merdanović, Ajla Van Heel, Delalić Selma, The Impact of Electoral Gender Quotas on Women's Political Participation in Bosnia and Herzegovina, *Politics in Central Europe*, vol. 19, no. 4, Metropolitan University Prague, 2023, p. 767

²¹ Vlada Crne Gore, Nacionalna strategija rodne ravnopravnosti 2021-2025. godine sa Akcionim planom 2021-2022. godine, p. 6

²² Górecki, Maciej. A., Pierzgalski, Michał. Legislated candidate quotas and women's descriptive representation in preferential voting systems. *European Journal of Political Research*, 61(1), 2022, p. 154

²³ Diana Z. O'Brien and Johanna Rickne, Gender Quotas and Women's Political Leadership, September 18, 2014). IFN Working Paper No. 1043, p. 1

As Clark and Kroska stated, women's representation and its increase is a matter of democratic quality, not only of fairness.²⁴ From this point of view, gender imbalance should be considered as part of a wider process of democratic consolidation, not only a narrowly defined equality issue. Quotas remain an important instrument for correcting historical inequities, but the power of transformation depends on formal rules, institutional support and society in general. Without synergy between all stakeholders, progress is likely to remain partial and without sustainability potential.

Conclusion

Quota mechanisms have contributed to a noticeable increase in the number of women in parliament, especially following the introduction of placement rules in 2014. In this sense, Montenegro reflects broader comparative trends identified in the literature, where quotas are effective instruments for improving descriptive representation.

However, the analysis also shows that these gains remain limited in scope. Despite gradual progress, the legally prescribed threshold of 30% representation has not been achieved and women continue to be underrepresented in key positions of political power, including party leadership, executive offices and local governance. This confirms arguments advanced by Górecki and Pierzgalski that the impact of quotas depends not only on their formal adoption but also on the institutional and political context in which they operate. In the Montenegrin case, party hierarchies, informal networks and gender norms continue to constrain women's access to decision-making positions.

Furthermore, this paper highlights the importance of examining the broader environment in which political participation takes place. The prevalence of misogyny, hate speech and various forms of violence, particularly in digital spaces, represents a significant barrier that extends beyond institutional design. As indicated by recent research and public opinion data, these practices not only affect individual political actors but also shape the overall climate of political engagement, potentially discouraging women from entering or remaining in political life. In this respect, the Montenegrin case illustrates how formal progress in gender equality can coexist with persistent informal practices that undermine its realization.

²⁴ Clark Rob, Kroska Amy, *Free to represent you and me: Gender attitudes and women's share of parliament, 1995–2021*, Social Science Research, Volume 122, 2024, p. 1.

The findings also support the view that gender equality in political representation should not be understood solely as a matter of numerical balance, but as a question of democratic quality. Higher levels of women's representation are closely linked to broader patterns of democratic development and inclusiveness. From this perspective, the persistence of gender inequality in Montenegro points to wider challenges in the process of democratic consolidation.

In conclusion, while gender quotas have played an important role in addressing historical imbalances, they have not been sufficient to produce substantive equality in political life. Achieving more meaningful and sustainable progress will require a broader approach that goes beyond formal legal mechanisms. This includes reforms within political parties, stronger institutional enforcement and efforts to challenge deeply rooted social norms and practices. Without such changes, improvements in representation are likely to remain partial, limiting the inclusiveness and the overall quality of democratic governance in Montenegro.

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Zakon o rodnoj ravnopravnosti ("Sl. list RCG", br. 46/07, 40/11 i 35/15)

GENDER EQUALITY IN DIVORCE PROCEEDINGS AND PROCEEDINGS TO DETERMINE PARENTAL RIGHTS AND OBLIGATIONS: BETWEEN THE LEGAL FRAMEWORK AND PRACTICAL APPLICATION

Andrea Mičudová¹

Abstract

This paper analyses the application of the principle of gender equality in divorce proceedings and subsequent proceedings concerning parental rights and responsibilities towards minor children. It argues that formal equality does not necessarily result in substantive equality in judicial practice and highlights the need for individualised, stereotype-free judicial reasoning.

Keywords

gender equality in family law, divorce and parental rights and responsibilities, best interests of the child, judicial decision-making, case law

Introduction

The principle of gender equality (*principium aequalitatis*) represents one of the fundamental constitutive elements of a modern constitutional state, and its significance is inextricably linked to the protection of human dignity and the fundamental rights of the individual. In the legal system of the Slovak Republic, this principle is enshrined not only at the constitutional level², but also in a number of international obligations that the state has undertaken in the context of human rights protection.³ Despite its normative enshrinement, however, the question of its actual application in individual branches of law remains a subject of expert debate.

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² Article 12(1) and (2) of Act No. 460/1992 Coll. Constitution of the Slovak Republic: “(1) People are free and equal in dignity and rights. Fundamental rights and freedoms are inalienable, non-transferable, imprescriptible and irrevocable. (2) Fundamental rights and freedoms are guaranteed to everyone within the territory of the Slovak Republic, regardless of sex, race, colour, language, faith or religion, political or other opinion, national or social origin, membership of a national or ethnic group, property, birth or other status. No one may be harmed, favoured or disadvantaged on these grounds.”

³ See the European Convention on Human Rights

A particularly sensitive area where the requirement for gender equality intersects with the practical application of the law is family law, specifically divorce proceedings and the closely related proceedings concerning the determination of parental rights and responsibilities towards minor children. These are proceedings that have not only a legal but also a significant social and psychological dimension, and the decisions made within them have a long-term impact on the lives of all those involved, particularly minor children.

Although family law is based on the principle of formal equality between parents, according to which both parents have the same rights and obligations in relation to their children⁴, the courts' application of the law may be influenced by the broader social context. The historically conditioned division of parental roles, in which the mother was traditionally perceived as the primary carer and the father as the family's breadwinner, may also be reflected in the courts' decision-making processes, often at the level of implicit, not always consciously reflected assumptions.

These facts raise the question of whether the principle of gender equality in family law proceedings is applied only at a formal level, or whether it is also genuinely reflected in specific court decisions. At the same time, it is necessary to examine the extent to which courts are able to eliminate stereotypical approaches when assessing parental competence and replace them with an individualised assessment based on the specific factual circumstances of the case.

An integral part of this issue is also the principle of the best interests of the child, which constitutes a key interpretative criterion in family law. This principle takes precedence over the rights of parents, and its application requires a comprehensive assessment of all relevant factors, including emotional bonds, the stability of the environment, and the parents' ability to ensure the proper upbringing of the child.⁵ It is precisely at this point that tensions may arise between the requirement for gender equality and the need to ensure optimal conditions for the development of a minor child.

The aim of this paper is to analyse the application of the principle of gender equality in divorce proceedings and in subsequent proceedings concerning the regulation of parental rights and obligations, particularly in relation to judicial decision-making practice. The paper focuses on

⁴ LAZAR, J. et al. *Substantive Civil Law 2*. Bratislava: IURA EDITION, 2010, p. 48

⁵ LÖWY A. et al. *The best interests of the child as a value criterion in decision-making in proceedings concerning the care of minors by the court*. Bratislava: C. H. Beck SK, 2022, p. 17

identifying potential manifestations of gender stereotypes in decision-making, as well as on assessing their compliance with the requirements arising from national and international law.

From a methodological perspective, the paper is based on an analysis of legislation, specialist literature and relevant case law of national courts, as well as the case law of the European Court of Human Rights. Particular attention is paid to decisions addressing the issue of equality between parents in the exercise of parental rights and responsibilities () and the interpretation of the principle of the best interests of the child.

The analysis should result in an assessment of the extent to which courts are able to ensure not only formal but also substantive equality between parents in divorce proceedings and proceedings concerning arrangements for minor children, as well as the formulation of conclusions aimed at strengthening the fairness and predictability of decision-making practice in this area.

1. The legal framework for gender equality in family law

The principle of gender equality is enshrined at the constitutional level, and its normative expression can be subsumed under the general principle of equality in rights.⁶ This principle is also reflected in the state's international legal obligations, such as in the Convention on the Elimination of All Forms of Discrimination against Women.⁷

In the context of family law, this principle is reflected in the equal legal status of parents in the exercise of parental rights and duties (*paritas parentum*). The legal framework is based on the premise that both parents have the same scope of rights and duties in relation to a minor child.⁸ However, the legal equalisation of parents in our country does not have a long history. The original legal provisions governing parental rights and duties towards a minor child were based on paternal authority (*patria potestas*), which had already taken shape in the era of Roman law. Under this system, the father of the family – the *pater familias* – held all authority over a legitimate child (whether born in wedlock or acknowledged as his own). Not only did he act as the child's sole legitimate representative, but he also held decision-making authority over matters concerning the child's personal and professional life (he decided on the child's education, managed their property, chose a husband for his daughter, and approved a wife for

⁶ Article 12(1) and (2) of Act No. 460/1992 Coll. Constitution of the Slovak Republic

⁷ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

⁸ Section 28 of Act No. 36/2005 Coll. on the Family

his son).⁹ The mother had exclusive authority only over illegitimate children (children from a previous marriage, or those born before the marriage and not subsequently recognised by the husband as his own).¹⁰ Over time, women came to be in a position where they could act as guardians of their children if the father was absent due to war or death.¹¹ The period of transition from people's democracy to socialism can be regarded as a turning point when mothers attained the same legal status as fathers in terms of rights and obligations towards their own minor children. The Constitution of 9 May is an important legal framework for the equalisation of the status of men and women¹² not only in the care of children. The original paternal authority was subsequently transformed into parental authority on the basis of the relevant provisions of Act No. 265/1949 Coll. on Family Law.¹³ Subsequent developments in family law have preserved (and continue to preserve) the equality of parents in their rights and obligations towards a minor child.

As regards court proceedings, in the event of divorce and the subsequent determination of the rights and obligations of parents towards minor children for the period following the divorce, the key interpretative criterion in the court's decision-making is the principle of the best interests of the minor child, which takes precedence.¹⁴ This principle constitutes the fundamental ratio decidendi of the courts' decision-making in this area.

It follows from the above that the legal system is constructed as gender-neutral. The question remains, however, to what extent this neutrality is maintained in practice.

⁹ LITEWSKI, W.: Roman Private Law, 5th revised edition, Warsaw: LexisNexis Legal Publishing House, 2003, p. 189

¹⁰ GARDNER, J. F. WOMEN IN ROMAN LAW & SOCIETY, London: Routledge 2009, pp. 96–101

¹¹ *Ibid.*, p. 120

¹² Section 1(2) of Constitutional Act No. 150/1948 Coll. Czechoslovak Constitution: "*Men and women have equal status in the family and in society and equal access to education and to all professions, offices and ranks.*"

¹³ Section 39(1) of Act No. 265/1949 Coll. on Family Law: "*Both parents are equally obliged to provide for the maintenance and upbringing of the child. The provision of funds for the maintenance and upbringing of the child may be offset, in whole or in part, by the personal provision of care for the child.*"

¹⁴ Article 3 of the Convention on the Rights of the Child: "(1) The best interests of the child shall be a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.

(2) States Parties to the Convention undertake to ensure such protection and care for the child as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians or other individuals legally responsible for them, and shall take all necessary legislative and administrative measures to this end.

(3) States Parties to the Convention shall ensure that institutions, services and facilities responsible for the care and protection of children meet the standards established by the competent authorities, in particular in the areas of safety and health, the number and suitability of their staff, and competent supervision. Available at: <https://www.employment.gov.sk/files/slovensky/ministerstvo/narodne-koordinacne-stredisko/dohovor-pravach-dietata.pdf>

2. Divorce and its legal consequences in the context of gender equality

Divorce is a legal event that fundamentally alters the personal and financial circumstances of the spouses, as well as their relationship with minor children. In divorce proceedings, the court does not merely decide on the dissolution of the marriage, but is also obliged to regulate the exercise of parental rights and responsibilities for the period following the divorce, in a manner consistent with the best interests of the child.¹⁵

In practice, when deciding on the custody of a minor child, there is often a tendency to award custody to the mother. Although this trend is not enshrined in law ¹⁶ , it may result from a combination of several factors, including the historical division of parental roles, but also the specific factual circumstances of the case, such as the extent to which each parent has been involved in the child's care to date.

The case law of the Supreme Court of the Slovak Republic has repeatedly emphasised that the decisive criterion is not the parent's gender, but their ability to provide proper care for a minor child and to create a stable and safe environment for them.¹⁷ This approach reflects a substantive understanding of equality that goes beyond the scope of formal legal status.

Divorce also has significant economic consequences, which are often unevenly distributed between former spouses. Household and childcare duties, traditionally performed predominantly by one parent, are not economically valued, which can lead to that parent being disadvantaged following divorce. This aspect highlights the need to view gender equality within a broader socio-economic context.

¹⁵ PAVELKOVÁ, B.: Family Law. Commentary, 3rd edition, Bratislava: C.H. Beck, 2019, p.107

¹⁶ Compare § 177 ABGB of 1811: *"If the spouses are divorced or completely separated and are not reunited, the court, having settled the dispute, ensure that male children are cared for and brought up by their mother until they reach the age of four, and female children until they reach the age of seven, unless compelling reasons, arising primarily from the grounds for divorce or separation, require a different arrangement. The costs of upbringing must be borne by the father."*

¹⁷ Decision of the Supreme Court of the Slovak Republic, ref. no. 3 Cdo 146/2011

3. JUDICIAL DECISION-MAKING AND GENDER STEREOTYPES

The decision-making of the courts does not take place in isolation from the social context, but is influenced by value-based and cultural factors. In this regard, the presence of implicit gender stereotypes can be identified, which may influence the assessment of parental competence.

Among the most common is the stereotype of the mother as the primary carer and the father as the family's breadwinner. Such perceptions may lead to an asymmetrical assessment of parents when deciding on the custody of a minor child.

3.1. Analysis of judicial practice in the Slovak Republic in proceedings concerning the regulation of parental rights and obligations (with case law)

The decision-making practice of the courts of the Slovak Republic in proceedings concerning divorce and the regulation of parental rights and obligations represents a key source of insight into the actual application of the principle of gender equality. Although the legal framework is based on the equality of parents, case law indicates that court decisions are primarily determined by the principle of the best interests of the child, which takes precedence in such proceedings.

The Supreme Court of the Slovak Republic has repeatedly emphasised in its case law that, when deciding on the placement of a minor child in personal care, it is not the parent's gender that is decisive, but their ability to provide proper care and a stable upbringing.¹⁸ This approach reflects a substantive understanding of equality that goes beyond the formal equality of the parties to the proceedings.

At the same time, however, a certain continuity can be identified in practice regarding the placement of minor children in the care of mothers, particularly in cases involving younger children. Although this trend is not explicitly enshrined in case law as a legal rule, its occurrence can be indirectly inferred from decisions that take into account the child's previous care and the continuity of the upbringing environment.¹⁹ In some cases, such an approach may lead to the reproduction of traditional gender roles if it is not sufficiently individualised.

A significant shift in judicial practice can be observed in connection with the increasing application of alternating personal care. The Supreme Court of the Slovak Republic has

¹⁸ Decision of the Supreme Court of the Slovak Republic, ref. no. 3 Cdo 96/2010

¹⁹ Decision of the Supreme Court of the Slovak Republic, ref. no. 4 Cdo 120/2011

emphasised that shared custody is a legitimate form of exercising parental rights, provided that the conditions for its implementation are met, in particular the parents' ability to communicate and cooperate.²⁰ At the same time, however, case law points out that this model cannot be applied automatically, but must always take into account the specific interests of the child.

The Constitutional Court of the Slovak Republic has repeatedly emphasised in its case law the importance of proper reasoning in decisions of the general courts in family law matters. Insufficient or formulaic reasoning may lead to a violation of the fundamental rights of the parties to the proceedings, in particular the right to a fair trial.²¹ From this perspective, the quality of the reasoning behind a decision is a key element in ensuring justice and, at the same time, a tool for eliminating gender stereotypes.

At the same time, judicial practice emphasises the need to maintain the child's contact with both parents as part of their right to family life. This principle is reflected in particular in decisions regarding contact arrangements, where courts emphasise the importance of regular and meaningful contact with both parents.²²

From the perspective of gender equality, it can be stated that judicial practice in the Slovak Republic formally adheres to the principle of neutrality with regard to the parents' gender; however, its application may in some cases be influenced by broader social factors. This is precisely why it is essential for courts to consistently apply an individualised approach and avoid stereotypical reasoning.

3.2. The relationship between the case law of the Slovak Republic and the European Court of Human Rights: a critical analysis

The decision-making practice of Slovak courts in proceedings concerning the regulation of parental rights and obligations formally reflects the principle of gender equality and consistently emphasises the primacy of the principle of the best interests of the child. This approach is consistent with the case law of the European Court of Human Rights, which has long regarded the protection of family life and the best interests of the child as key criteria when assessing interference with parental rights.²³

²⁰ Decision of the Supreme Court of the Slovak Republic, ref. no. 5 Cdo 120/2012

²¹ Ruling of the Constitutional Court of the Slovak Republic, ref. no. I. ÚS 76/2010

²² Decision of the Supreme Court of the Slovak Republic, ref. no. 6 Cdo 88/2013

²³ ECHR: *Neulinger and Shuruk v. Switzerland*, Grand Chamber judgment of 6 July 2010

At the level of declared principles, it can thus be stated that there is a high degree of consistency between domestic case law and the case law of the ECtHR. The Supreme Court of the Slovak Republic has repeatedly emphasised that a parent's gender is not a decisive criterion when placing a child in care and that decisions must be based on the individual circumstances of the case.²⁴ This approach is consistent with the case law of the ECtHR, in particular the judgment in the case of *Konstantin Markin v. Russia*, in which the Court rejected a stereotypical understanding of parental roles as a legitimate basis for differential treatment.²⁵

Despite this formal consistency, however, a closer look at judicial practice raises the question of whether these principles are consistently applied at the level of specific decisions. Although Slovak courts do not explicitly rely on gender stereotypes, their implicit presence may manifest itself in recurring decision-making patterns, particularly in the more frequent placement of children in the care of mothers. Whilst this phenomenon may be justified by specific factual circumstances, it also raises doubts as to whether it is always the result of a strictly individualised assessment.²⁶

From the perspective of ECtHR case law, what is decisive is not only what criteria are stated, but also how they are applied in practice. In the case of *Zaunegger v. Germany*, the Court emphasised that automatism or presumed preferences for one parent are inadmissible unless supported by the specific circumstances of the case.²⁷ This principle can also be applied to the Slovak context, where recurring outcomes of decisions should always be subjected to critical scrutiny in terms of their reasoning.

The quality of the reasoning in judicial decisions remains a particular point of concern. The Constitutional Court of the Slovak Republic has repeatedly pointed out that insufficient reasoning may lead to a violation of the fundamental rights of the parties to the proceedings.²⁸ This requirement is fully in line with the case law of the ECtHR, for example in the case of *Sommerfeld v. Germany*, where the Court criticised the domestic authorities for failing to examine the relevant factors sufficiently.²⁹ In this context, it can be stated that the quality of the

²⁴ Decision of the Supreme Court of the Slovak Republic, ref. no. 3 Cdo 96/2010

²⁵ ECHR: *Konstantin Markin v. Russia*, Grand Chamber judgment of 22 March 2012

²⁶ LÖWY A. et al. *The best interests of the child as a value criterion in decision-making in proceedings concerning the care of minors by the court*. Bratislava: C. H. Beck SK, 2022, p. 26

²⁷ ECHR: *Zaunegger v. Germany*, judgment of 3 December 2009

²⁸ Judgment of the Constitutional Court of the Slovak Republic, ref. no. I. ÚS 76/2010

²⁹ ECHR: *Sommerfeld v. Germany*, Grand Chamber judgment of 8 July 2003

reasoning constitutes a key tool for eliminating stereotypes, as it compels the court to explicitly formulate the grounds for its decision.

Another significant aspect is the development of the approach to shared custody. Slovak case law is gradually accepting this model as an equal alternative to sole custody, which can be seen as a shift towards a substantive understanding of gender equality.³⁰ This trend is in line with the case law of the ECtHR, which emphasises the importance of maintaining family ties with both parents, provided this is in the child's best interests.³¹ At the same time, however, the ECtHR points out that such solutions cannot be applied mechanically, but must always be based on a comprehensive assessment of the situation, as is evident, for example, from the judgment in *Neulinger and Shuruk v. Switzerland*.³²

From a critical perspective, it can be said that Slovak case law is currently in a transitional phase between a formal and a substantive understanding of gender equality. On the one hand, the courts are bound by a normative framework that explicitly prohibits discrimination and requires equality between parents; on the other hand, however, they face practical challenges associated with the application of 'vague legal concepts', such as the best interests of the child.³³

In this context, the case law of the ECtHR plays an important harmonising and corrective role. It provides interpretative guidance that emphasises the need for individualised decision-making, the rejection of stereotypes, and the thorough reasoning of decisions. Its significance lies not only in the protection of individual rights, but also in the systematic influence it exerts on the quality of domestic decision-making practice.

In conclusion, it can be stated that although Slovak case law formally respects the principles of gender equality and the best interests of the child, its application in practice requires further strengthening, particularly in the areas of transparency in decision-making and the elimination of implicit stereotypes. The effective realisation of gender equality in family law therefore depends not only on the existence of legal norms, but above all on the quality of their application in specific cases.

³⁰ Decision of the Supreme Court of the Slovak Republic, ref. no. 5 Cdo 120/2012

³¹ ECHR: *Sommerfeld v. Germany*, Grand Chamber judgment of 8 July 2003

³² ECHR: *Neulinger and Shuruk v. Switzerland*, Grand Chamber judgment of 6 July 2010

³³ FICOVÁ, S. et al. *Family Law. Commentary*. Bratislava: Wolters Kluwer, 2017, p. 210

4. THE BEST INTERESTS OF THE CHILD AS THE DECISIVE CRITERION

The principle of the best interests of the child constitutes the central pillar of family law and, at the same time, the most significant criterion for decision-making in proceedings concerning minor children. Its vague nature allows for the consideration of a wide range of factors that may influence the child's development and well-being; at the same time, however, it places high demands on the quality of judicial decision-making.³⁴

When assessing the best interests of the child, the court is obliged to take into account, in particular, the stability of the upbringing environment, the emotional bonds between the child and the parents, the parents' ability to meet the child's physical and psychological needs, as well as their willingness to cooperate in the exercise of parental rights and responsibilities. These criteria are not exhaustive and their significance may vary depending on the specific case.

The European Court of Human Rights emphasises in its case law that decisions in family law matters must be based on relevant and sufficient grounds and that courts are obliged to avoid stereotypical reasoning. This approach reinforces the requirement for transparency and persuasiveness in judicial decisions.

The tension between the principle of gender equality and the principle of the best interests of the child may arise particularly in situations where a strictly formal application of parental equality would not be in accordance with the child's needs. The solution to this tension is a substantive approach to equality, which allows for the individual circumstances of the case to be taken into account and ensures a fair outcome.

It follows from the above that the principle of the best interests of the child does not represent a contradiction to gender equality, but rather a corrective to it, ensuring that parental equality is applied in a manner consistent with the protection of the rights and interests of the minor child.

CONCLUSION

An analysis of the application of the principle of gender equality in divorce proceedings and in subsequent proceedings concerning the regulation of parental rights and obligations highlights the persistent tension between the normative framework and practical application. Although the

³⁴ LUPRICHOVÁ, P. The best interests of the child – an effective tool for the protection of minors? Bratislava Legal Forum, 2015, p. 164

legal system of the Slovak Republic unequivocally enshrines the equality of parents as a fundamental principle of family law, its practical implementation is conditioned by several factors that go beyond the purely legal framework.

The decision-making of the courts is inevitably influenced by the social context in which it takes place, and therefore it is impossible to completely disregard historically and culturally conditioned notions of parental roles. These notions may manifest themselves in the form of implicit stereotypes that influence the assessment of parental competence, despite the formal neutrality of the legal framework. From this perspective, it is clear that ensuring genuine, substantive equality requires more than just the existence of equal legal rules – it also requires their consistent and reflective application.

The key corrective in this area remains the principle of the best interests of the child, which constitutes the central criterion for decision-making in family law matters. Whilst its vague nature allows for a flexible response to the individual circumstances of each case, it simultaneously places increased demands on the quality of the reasoning behind judicial decisions. It is precisely thorough and transparent reasoning that serves as a tool through which the influence of stereotypical considerations can be minimised and it can be ensured that the decision is based on objective and legally relevant facts.

In this context, it can be stated that the tension between the principle of gender equality and the principle of the best interests of the child is not necessarily conflicting, but rather requires their mutual harmonisation through a substantive approach to equality. Such an approach presupposes that parental equality will not be understood as a rigid formal category, but as a dynamic principle applied with regard to the specific needs of the child and the individual capabilities of the parents.

From a comparative perspective, a trend can be observed towards strengthening the participation of both parents in the upbringing of the child, particularly through the institutions of joint or shared custody. However, this trend cannot be applied mechanically; it must always be subjected to the test of the child's best interests. There are no universal solutions in this area, and therefore the individualisation of decision-making remains a key prerequisite for a fair outcome.

On the basis of the above, it can be concluded that strengthening gender equality in family law proceedings requires a systematic approach that will encompass not only legislative reform but also improvements in the quality of decision-making practice. Case law from higher courts

plays an important role in this process, as it can provide methodological guidance for lower courts and contribute to the standardisation of decision-making.

At the same time, it is necessary to emphasise the importance of an interdisciplinary approach that takes into account not only the legal but also the sociological and psychological aspects of family relationships. Only in this way can court decisions not only comply with legal norms but also genuinely contribute to safeguarding the best interests of the child and ensuring a fair arrangement of relations between parents.

Ultimately, it can be concluded that gender equality in family law does not represent a static state, but a dynamic process, the quality of which is determined by the legal system's ability to reflect social changes and ensure that formal equality also acquires a substantive dimension in everyday decision-making practice.

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Decision of the Supreme Court of the Slovak Republic, ref. no. 6 Cdo 88/2013

GENDER PERSECUTION AND GENDER APARTHEID BEFORE THE INTERNATIONAL CRIMINAL COURT

Gabriel Kun¹

Abstract

The article deals with the prosecution of gender persecution before the International criminal court. Only recently the International criminal court started prosecuting acts of persecution done on the grounds of gender. With the recent landmark judgment in the Al Hassan case being a prime example of the applicability of gender persecution as distinct form of persecution. The article will firstly give out a basic description of the crime of persecution with its various corresponding elements. Followed by an extensive analysis on the applicability of gender persecution in the courts judgment in the Al Hassan case. And at the end of the article we would discuss the further protection of gender equality through the possibility of prosecuting gender apartheid by the international criminal court.

Keywords

Gender persecution, Gender apartheid, International criminal court, Al Hassan

Introduction

Gender equality can be violated by various discriminatory and oppressive acts. The most severe form of these violations necessitate the application of criminal law. In recent decades we witness great improvements in regards to development of new tools, methods, techniques and strategies in prosecuting various acts constituting a severe breach of gender equality such as domestic violence and sexual violence, gender based crimes in general.

Besides the realm of domestic legislation these serious acts violating gender equality are also present in international law with many of them being prosecutable offences under international criminal law. Of course violation of gender equality can be interpreted in international criminal law from different perspectives. For example, certain acts persecuted under international criminal law violates gender equality through the violation of bodily autonomy and personal dignity of the victim such as rape, forced prostitution or general sexual violence. Other acts violate gender equality through the violation of reproductive rights such as forced pregnancy or forced sterilization. There are also acts which violates gender equality through by causing specific gendered harm such as the crime of forced marriage.

In this article we would like to focus our attention on the violation of gender equality through gender discrimination which are prosecuted in international criminal law under the

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crime of persecution. In the beginning of the article we would like to give out a basic description of the crime of persecution with its various corresponding elements. Followed by an extensive analyses of the case law of the international criminal court (hereinafter as “ICC” or “court”) concerning gender based persecution. And finally we would also examine the potential further development of prosecution of discriminatory acts constituting a serious violation of gender equality in the international criminal law in prosecuting gender apartheid.

1. The crime of persecution under the Rome statute

The crime of persecution on political, racial and religious grounds was a recognized part of the international criminal law ever since modern inception in the aftermath of world war at International Military Tribunal in Nurnberg and International Military Tribunal for the Far East.² In recent decades it became the subject of great interest for the various ad hoc and mixed tribunals which sprung up at the final decade of the 20th century and at the beginning of the 21st century. This saw on the legislative level the expansion of discriminatory grounds as well as the development of legal theory through the extensive case law of the various tribunals. Particularly notable in regards to development of the crime of persecution is the extended jurisprudence of the International Criminal Tribunal for the former Yugoslavia with its landmark decisions in the Kupreškić et al or Tadić cases. This development had a large scale impact on the definition of the crime persecution in the Rome Statute of the International Criminal Court (1998) (hereinafter as “Rome statute” or “statute”). Subsequently the ICC also contributed to the further legal development of the crime of persecution in its own caselaw particularly in the Ntaganda case.

The Rome statute defines persecution as an: *“Intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”*³ In order for an act to be considered persecution under the provisions of the Rome statute it must be directed: *„against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, and in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.”*⁴

² GREY, R.: Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court. Cambridge: Cambridge University Press. 2019. 96 p.

³ Article 7 (2) g) Rome statute of the International criminal court (1998)

⁴ Article 7 (1) h) Rome statute of the International criminal court (1998)

From this short description alone we can infer that the crime of persecution has certain specific elements which make it distinct from other crimes against humanity and other criminal acts listed in the Rome statute.

The first of these distinct element is the severe deprivation of fundamental rights.⁵ These severe deprivation of fundamental rights can have physical character can also be of a normative character such as a discriminatory order, policy, decision or other form of regulation.⁶ Persecution can be carried out through a persecutory act or an omission.⁷ Lastly an act of persecution can be committed either as one act or in a series of acts.⁸ This means persecution can manifest itself in the form one serious violation of fundamental rights or it can also consist of a series of smaller violations which collective would amount to persecution. In the case of large number of smaller violations, the court would assess these individually and in relation to each other in order to determine the whether they constitute a crime of persecution.

When it comes to down to identifying which human rights constitute a fundamental right for the purposes of persecution is determined by the court through the application of various international human rights instruments such as the International Covenant on Civil and Political Rights (1966) or Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1985), as well as international customary law.⁹ In the established case law certain rights such as: the right to life, liberty and the security of person, the right not to be held in slavery or servitude, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment and the right not to be subjected to arbitrary arrest, detention or exile, are examples of fundamental rights whose violation by the perpetrators can fall under the heading of persecution.¹⁰

However as indicated by the use of the term „severely,“ not every deprivation of fundamental rights would constitute a form persecution.¹¹ The deprivation of fundamental rights needs to be severe enough to rise to the gravity of other acts enumerated as crimes against humanity. In this regard the court categorizes various acts prohibited by the Rome statute into two groups. Acts such as murder, torture, rape or sexual slavery done in a discriminatory manner will always amount to a serious violation of fundamental rights, thus a complex

⁵ Article Article 7 (1) (h) International Criminal Court: Elements of Crimes (2010).

⁶ ICTY, Prosecutor v. Blagoje Simic et al., Case No. IT-95-9-T, TC, Judgment (17 October 2003). para. 58.

⁷ ICTY, Prosecutor v. Dusko Tadic, Case No. IT-94-1-T, Trial Judgement (7 May 1997) paras 694, 714

⁸ ICTY, Prosecutor v. Kupreškić et al., Case No. IT-95-16-T, TC, Judgment (14 January 2000). para. 624.

⁹ LI, Y.: Persecution in International Criminal Law and International Refugee Law, In: Zeitschrift für Internationale Strafrechtsdogmatik, vol. 15, 2020, Iss. 6. ISSN 1863-6470, p. 303

¹⁰ ICTY, Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-T, Trial Judgement (3 March 2000), para. 220

¹¹ CASESSE, A.: International Criminal Law, First edition. New York: Oxford University Press Inc. 2003. p. 79

analyses is not needed.¹² In the case of other acts however the court cannot automatically assume that they constitute a severe deprivation of human rights, and the court must carry out a full assessment of these acts on a case-by-case basis by looking at them in their context and with consideration of their cumulative effect in order to determine whether they amount to a severe violation of fundamental rights.¹³

The second distinct element of the crime of persecution is the discriminatory intent.¹⁴ The Rome statute recognizes discriminatory intent on various discriminatory grounds such as political, racial, national, ethnic, cultural, religious or based on gender. An act of persecution can be carried on one of such grounds, but a combination of more than one may equally form the basis for the discrimination.¹⁵

The third distinct element of crime of persecution is the connection requirement.¹⁶ Only acts listed as criminal under the Rome statute can be considered to amount to the crime of persecution. The ICC considers acts such as murder, extermination, enslavement, torture, rape, sexual slavery done on discriminatory grounds to fall under the crime of persecution.¹⁷ This definition of what acts constitute the crime of persecution is stricter than the one articulated in the jurisprudence of the ad hoc tribunals¹⁸ and leaves the possibility of the persecuting hate speech as a form of persecution out of question.¹⁹ However due to the open ended nature of certain provisions of the Rome statute such as the other inhumane act clause,²⁰ the court can prosecute certain acts of similar gravity to other acts listed in the Rome statute, under the crime of persecution even though these acts are currently not listed under the Rome statute.²¹

Besides these specific elements pertaining to the crime of persecution as whole there is one specific element pertaining to gender persecution and that is the definition of gender in the Rome statute. Gender is defined in the Rome statute as: "*two sexes male and female as defined*

¹² ICC, Prosecutor v. Bosco Ntaganda, Case No.: ICC-01/04-02/06, Trial Judgement (8 July 2019). para. 994.

¹³ ICC, Prosecutor v. Bosco Ntaganda, Case No.: ICC-01/04-02/06, Trial Judgement (8 July 2019). para. 992.

¹⁴ Article Article 7 (1) (h) International Criminal Court: Elements of Crimes (2010).

¹⁵ ICC, Prosecutor v. Bosco Ntaganda, Case No.: ICC-01/04-02/06, Trial Judgement (8 July 2019). para. 1009.

¹⁶ Article Article 7 (1) (h) International Criminal Court: Elements of Crimes (2010).

¹⁷ KUMSKOVA, M.: Invisible Crimes Against Humanity of Gender Persecution: Taking a Feminist Lens to the ICC' Ntaganda and Ongwen Cases. In: Texas International Law Journal, vol. 57, 2022, iss. 2. ISSN 0163-7479, p. 247

¹⁸ ICTY, Prosecutor v. Popović et al., Case No. IT-05-88-A, Appeal Judgement (30 January 2015). para 738

¹⁹ ICTR, Prosecutor v. Georges Ruggiu, Case No. ICTR 97-32-I, Judgment and Sentence (1 June 2000) paras. 22 and 24

²⁰ They are similar open ended provision in the Rome statute which allow the prosecution of acts of similar gravity to acts already prosecuted under the statute but not explicitly enumerated, these include article 7 (1) g and article 8 (2) b xxii of the statute, both of whom allow the prosecution of other form sexual violence as crimes against humanity or war crimes.

²¹ KUMSKOVA, M.: Invisible Crimes Against Humanity of Gender Persecution: Taking a Feminist Lens to the ICC' Ntaganda and Ongwen Cases. In: Texas International Law Journal, vol. 57, 2022, iss. 2. ISSN 0163-7479, p. 247

within the context of society.”²² At first glance the mention of “*two sexes male and female*” could be interpreted by some, that the Rome statute define gender on biological bases. However the addendum “*within the context of society*” means that the Rome statute understands gender on socially constructed ground rather than a biological one.²³ Thus gender is defined by the collective and individual perception of members of society on what it means to be a male and female based on the roles, behaviours, activities and attributes that a given society considers appropriate for women and men.²⁴ This more open-ended definition is supported by both the ICC and Office of the prosecutor (hereinafter as “OTP”) as suggest by their collectively issued policy paper on the Crime of Gender Persecution, which means that the court allows the prosecution of gender persecution directed against Transgender or Intersex individuals or more broadly members of the LQBITQ+ community as whole.²⁵

Other than these specific elements the crime of persecution most also meet the chapeu element of crimes against humanity, which means that the crime of persecution most be committed as part of a widespread or systematic attack directed against a civilian population.²⁶

2. The case law of the ICC in regards to the crime of gender persecution.

2.1. An introduction to the case law of the ICC concerning gender persecution

Despite gender persecution being part of the Rome statute from the beginning, it took a while for the first charge of gender persecution to appear before the court. There were instances in the past where serious violation of fundamental rights was committed against members of one gender but these we usually prosecuted by the OTP and the court under crimes against humanity of rape or other form sexual violence or under the heading of persecution but based on other discriminatory grounds than gender.²⁷ Currently gender persecution specifically figured or figures in three distinct cases before the court. In Prosecutor v Al Hassan Ag Abdoul Aziz Ag

²² Article 7 (3) Rome Statute of the International Criminal Court (1998)

²³ GREY, R. - O'DONOHUE J. – ROSENTHAL I. – DAVIS, L. – LLANTA, D.: Gender-based Persecution as a Crime Against Humanity The Road Ahead. In: Journal of International Criminal Justice, vol. 17, 2019, iss. 5. ISSN 1478-1395, pp. 963 and 966

²⁴ GREY, R. - O'DONOHUE J. – ROSENTHAL I. – DAVIS, L. – LLANTA, D.: Gender-based Persecution as a Crime Against Humanity The Road Ahead. In: Journal of International Criminal Justice, vol. 17, 2019, iss. 5. ISSN 1478-1395, p. 966

²⁵ For example: Policy on the Crime of Gender Persecution, 2022, p. 7, GREY, R. - O'DONOHUE J. – ROSENTHAL I. – DAVIS, L. – LLANTA, D.: Gender-based Persecution as a Crime Against Humanity The Road Ahead. In: Journal of International Criminal Justice, vol. 17, 2019, iss. 5. ISSN 1478-1395, pp. 958 and 970 or GREY, R.: Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court. Cambridge: Cambridge University Press. 2019. 32 p.

²⁶ LI, Y.: Persecution in International Criminal Law and International Refugee Law, In: Zeitschrift für Internationale Strafrechtsdogmatik, vol. 15, 2020, Iss. 6. ISSN 1863-6470, p. 305

²⁷ GREY, R.: Prosecuting Sexual and Gender-Based Crimes at the International Criminal Court. Cambridge: Cambridge University Press. 2019. 278 – 279 pp.

Mohamed Ag Mahmoud (hereinafter as “Al Hassan case”) in regards to the situation in Mali, Prosecutor v Abd-Al-Rahman in regards to the situation in Sudan, and the case of Prosecutor v Mahamat Said Abdel Kani in regards to the situation in the Central African Republic II.²⁸ In the article we would focus our analyses of gender persecution present in the Al Hassan case. We justify our decision on the grounds that unlike in the Al Hassan case, in the other cases the court did not provide a substantial analyses of role of gender in its assessment of the crime of persecution. Secondly unlike the Al Hassan case which already came to its conclusion both the Al-Rahman and the Said cases are still not concluded. With the Said case still being in pre-trial phase and the Al-Rahman case being in the appeals process.

The facts of the Al Hassan case is as follows. In 2012 during the Malian civil war the members of the islamist insurgency groups Ansar Dine and Al-Qaeda in the Islamic Maghreb (hereinafter as “AQIM”) have jointly took over and occupied the city Timbuktu.²⁹ During the following months the occupying forces committed various criminal acts constituting serious violation of International humanitarian law.

Mr. Al Hassan as member of the Ansar Dine was the de facto leader of the religious police Hashab, and was indicted by the OTP among other international crimes for the crime of persecution on religious and gender grounds.³⁰ The OTP alleged that Ansar Dine and AQIM through the implementation of various policies had infringed a violated the fundamental rights of the citizen of Timbuktu and that these violations had amounted to a crime of persecution as defined under the Rome statute.³¹

Despite the courts verdict of not guilty for the charge of gender persecution, largely due to the disagreement between the judges on the guilt of Mr. Al Hassan,³² the decision of the ICC in the Al Hassan case cannot be considered a complete failure in regards to the prosecution of gender based persecution, since the decision had established a competent framework under which future prosecution of gender persecution can be carried out as well as it contributing greatly to the legal theory of the crime of persecution as whole and gender persecution in particular.

²⁸ RINGIN, A.: In conversation: the crime of gender persecution at the International Criminal Court, In: Australian Journal of Human Rights, vol. 29, 2023, Iss. 2. ISSN 2573-573X, p. 4

²⁹ ICC Press Release: 26 June 2024 Situation in Mali: Mr Al Hassan convicted of war crimes and crimes against humanity committed in Timbuktu. Available at: <https://www.icc-cpi.int/news/situation-mali-mr-al-hassan-convicted-war-crimes-and-crimes-against-humanity-committed> (accessed on 11.11.2025)

³⁰ ICC, The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Case No.: ICC-01/12-01/18, Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (27 March 2018) paras. 1 and 7

³¹ ICC, The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Case No.: ICC-01/12-01/18, Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (27 March 2018) para 6

³² ALEXANDER, A.: Prosecutor v Al Hassan: Governance and Gender In International Criminal Law, In: Melbourne Journal of International Law, roč. 26, 2026, č. 1. ISSN 1444-8610, p. 20

2.2 The development of legal theory of the crime of persecution in the Al Hassan decision

While the trial chamber mostly adhered in its characterization of the various elements of the crime of persecution to the established case law. They were some notable developments in the characterization of the crime of persecution by the court.

For example, the trial chamber has defined the connection requirement on a less strictly bases than it might appear on the first analyses of the relevant provisions of the Rome statute or in the Elements of Crimes. In the view of the court it is not necessary to examine whether the specific elements of other crimes listed in the Rome statute have been met in order to establish that the crime of persecution has taken place. In other words the crime of persecution is not an auxiliary offence which can be used as an additional charge or aggravating factor but a standalone crime of its own.³³ The court does not need to firstly examine whether the conduct of the perpetrator can be subsumed under the various crimes listed in the Rome statute, and then whether the conduct of the perpetrator has met the specific elements associated with these crimes. A more general connectivity is sufficient to establish that the persecution was carried out through the commission of one of the crimes listed in the Rome Statute.³⁴

Another interesting development has taken place in regards to the definition of the discriminated group. One of the objections of the defence in regards to the charge of persecution was with OTP identifying the persecuted group based geographical criteria.³⁵ The defence contested this definition as being too broad to substantiate the material element of persecution, and in violation of the provisions of Rome statute and the established case law which identify the discriminated group through protected characteristic such as a common political, racial, ethnic or religious identity.³⁶ The court had rejected the argument of the defence arguing that a protected group can be identified through objective characteristic such as geographical location or birth place.³⁷

The court came to this conclusion through a linguistic interpretation of the provision of the Rome statute defining the crime of persecution, which list the various characteristic such as

³³ ICC, The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Case No.: ICC-01/12-01/18, Trial Judgement (26 June 2024). para 1209

³⁴ ICC, The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Case No.: ICC-01/12-01/18, Trial Judgement (26 June 2024). para 1208

³⁵ ICC, The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Case No.: ICC-01/12-01/18, Final defence brief (4 August 2023). para 572

³⁶ ICC, The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Case No.: ICC-01/12-01/18, Final defence brief (4 August 2023). para 573

³⁷ ICC, The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Case No.: ICC-01/12-01/18, Trial Judgement (26 June 2024). para 1206

race, religion or ethnicity as grounds for discrimination rather than a quality which members of the persecuted group must fulfil.³⁸ Unlike genocide which requires that the identity of the target group to overlap with the discriminatory grounds, persecution does not require an existence of coherent group.³⁹ In other words it is not necessary for the identifiable target group or collectivity to be defined through their shared race, gender or ethnicity, it is only required that they be targeted on discriminatory grounds.⁴⁰ This is the reason why persecution can be carried against victims who are not part of the targeted group but are mere sympathisers, allies, or in any other way related to, the targeted group.⁴¹

Besides further developing the crime of persecution as a whole the Al Hassan judgment was also a landmark decision in regards to the development of legal theory of gender persecution. The defence argued that systematic discrimination of women was already embedded in Malian society and that the treatment of women by the occupying forces were no better or worse than what the female victims were used to.⁴² The trial chamber rejected this line of argumentation, arguing that persecution cannot be excused by the previous existence of discrimination.⁴³ The court thus embraced a more universalist conception of gender rights provided by the various universal and regional human rights instruments rather than, localized one based on traditional perception of gender rights and position of women in an affected society.

2.3. The development of specific methodology in analysing gender persecution in the Al Hassan cases

As suggested at beginning of this section the Al Hassan judgment was also a landmark decision because the courts innovative way it dealt with and analysed gender persecution in the particular context and facts of this case.

³⁸ ICC, The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Case No.: ICC-01/12-01/18, Trial Judgement (26 June 2024). para 1206

³⁹ For example. ICC, The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Case No.: ICC-01/12-01/18, Trial Judgement (26 June 2024). para 1206 or AMBOS, K.(ed): Rome Statute of the International Criminal Court, Article-by-Article Commentary, Fourth edition. Munchen: Verlag C.H.Beck Ohg. 2022. 225 and 226 pp.

⁴⁰ AMBOS, K.(ed): Rome Statute of the International Criminal Court, Article-by-Article Commentary, Fourth edition. Munchen: Verlag C.H.Beck Ohg. 2022. 226 p.226

⁴¹ ICC, Prosecutor v. Bosco Ntaganda, Case No.: ICC-01/04-02/06, Trial Judgement (8 July 2019). para. 1011.

⁴² ICC, The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Case No.: ICC-01/12-01/18, Final defence brief (4 August 2023). para 591

⁴³ ICC, The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Case No.: ICC-01/12-01/18, Trial Judgement (26 June 2024). para 1573

The trial chamber started its analyses of gender persecution by examining what fundamental rights were deprived from the female victims during the occupation of Timbuktu and in which way were these deprivation of fundamental rights were carried out. Right from the start of the occupation the new Islamic administration imposed various discriminatory and repressive policies aimed at the female population of the city. In particular the administration mandated strict dress codes for women who were forbidden from leaving their homes without wearing a veil and covering their body.⁴⁴ They were also prohibited from wearing clothing that showed the shape of the body or was see-through, using hair extensions or certain beauty products.⁴⁵ The violations of these rules were punished severely by the Islamic courts through public floggings and amputation of the limbs.⁴⁶

Besides the cruel punishments administered by the courts, the religious police Hesbah, also played a significant role in the enforcement of these discriminatory rules. They are countless witness testimonies from or about female victims who were beaten by the members of Hesbah, for the violation of dress codes or for acting immodestly in public.⁴⁷ Of arbitrary arrest and detention for even a minor infringement of the dress code. And of rapes and sexual abuse perpetrated on the female victims during their time of detention. Besides the physical and psychological damage suffered by the female victims of these violations, the cruel punishment and enforcement of the rules lead to a chilling effect among female population of the city, many of whom were afraid to go out alone in public or to participate in a public gatherings.⁴⁸

In the view of the trial chamber these various policies and enforcement mechanism lead to the severe deprivation of various fundamental rights of the female population of Timbuktu including but not limited to: The right to freedom of thought, conscience and religion,⁴⁹ the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment,⁵⁰

⁴⁴ ICC, The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Case No.: ICC-01/12-01/18, Trial Judgement (26 June 2024). para 1533

⁴⁵ Ibid

⁴⁶ ICC, The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Case No.: ICC-01/12-01/18, Trial Judgement (26 June 2024). para 1538

⁴⁷ ICC, The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Case No.: ICC-01/12-01/18, Trial Judgement (26 June 2024). paras 576, 1356,

⁴⁸ ICC, The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Case No.: ICC-01/12-01/18, Trial Judgement (26 June 2024). para 1570

⁴⁹ ICC, The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Case No.: ICC-01/12-01/18, Trial Judgement (26 June 2024). para 1544

⁵⁰ ICC, The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Case No.: ICC-01/12-01/18, Trial Judgement (26 June 2024). para 1550

the right to bodily integrity, the right not to be held in slavery or servitude,⁵¹ freedom of movement⁵² and last but not least to prohibition of discrimination on the basis of gender.⁵³

As this short description implies the court analysed the violation of fundamental rights from a gender specific perspective. Thus besides the presence of violation of basic fundamental rights such the right to life, freedom from torture and other inhumane treatment or freedom of religion, the court also established the violation of other more gender specific rights such as the right to bodily autonomy or the prohibition of discrimination on the basis of gender. Even in regards to the violation of basic fundamental rights, the court used a more gender specific analyses which acknowledged the specific gender and sexual harm which the victims had suffered through the violation of their basic rights.

After establishing what fundamental rights of the female population of Timbuktu were violated during the course of the occupation, the ICC continued with the analyses of the discriminatory intent. In its analyses the court had established the presence of discriminatory intent through the combination of three distinct group of evidence.

Firstly, the court took it into account the general derogatory attributed and behaviour of the perpetrators towards the population of Timbuktu communicated through various sermons and propaganda distributed and pronounced by the members of the Ansar dine and AQIM forces during their occupation of the city.⁵⁴ While derogatory behaviour or attitudes towards a particular group does not in on of itself constitute the fulfilment of discriminatory intent it is a strong indicator of its presence alongside other evidence.⁵⁵ The court used these attitudes and behaviour of the perpetrator in the present case, to argue that the violence and persecution directed against women was not accidental in character but was a result of longstanding hatred by the perpetrators even before the implementation of any discriminatory policy.

With the above mentioned argument used as a form of indirect evidence to support the presence of discriminatory intent, the court further argued for its presence through the argument of discriminatory legislation and its discriminatory application. Interestingly the court in its argumentation for the presence of gender discrimination used a comparatively method in which

⁵¹ ICC, The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Case No.: ICC-01/12-01/18, Trial Judgement (26 June 2024). para 1552

⁵² ICC, The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Case No.: ICC-01/12-01/18, Trial Judgement (26 June 2024). para 1554

⁵³ Ibid.

⁵⁴ ICC, The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Case No.: ICC-01/12-01/18, Trial Judgement (26 June 2024). paras 1562 and 1568

⁵⁵ ICTY, Prosecutor v. Popović et al., Case No. IT-05-88-A, Appeal Judgement (30 January 2015). para. 713

it compared formal and material effects of discriminatory policies on the female victims with the effects of these policies and the general standing of the male population in comparison.

In regards to the argument of discriminatory legislation the court have argued for the presence of discriminatory intent by pointing at the legislation adopted by the governing administration of the city which had certain legislative provisions that specifically applied to the female population while not applying to the male population of the city.⁵⁶ Such as a strict dress code tailored specify for the female members of the city , an obligation for woman not to leave their home without wearing a veil and covering their body in specific clothing, and a prohibition of going outside on their own after a certain time at night.⁵⁷

In regards to argument of discriminatory application of these legislative provisions the court acknowledged that similar policies on appearance pertaining the female victims were also present in regards to the male population of Timbuktu.⁵⁸ For example the male population also had to followed a strict dress code which mandated the length of trousers and the wearing of a beard.⁵⁹ However the discriminatory intent manifested itself in the sanctioning of the violations of these dress codes from the members of Anser dine and AQIM. Males who were in violation of the dress code were usually only verbally reprimanded with only one instance of a physical altercation.⁶⁰ Woman on the other hand were punished severely through physical violence, torture and detention even for seemingly minor violation of the imposed dress codes.⁶¹ Based on these findings the court had established that formal elements of persecution was present in regards to the female victims and that these underlying acts of persecution by the members of the Ansar dine and AQIM forces constituted acts prohibited and sanctioned by the Rome statute specifically the acts of torture and other inhumane acts.⁶²

⁵⁶ ICC, The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Case No.: ICC-01/12-01/18, Trial Judgement (26 June 2024). para 1568

⁵⁷ ICC, The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Case No.: ICC-01/12-01/18, Trial Judgement (26 June 2024). para 1569

⁵⁸ ICC, The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Case No.: ICC-01/12-01/18, Trial Judgement (26 June 2024). para 1571

⁵⁹ ICC, The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Case No.: ICC-01/12-01/18, Trial Judgement (26 June 2024). para 733

⁶⁰ ICC, The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Case No.: ICC-01/12-01/18, Trial Judgement (26 June 2024). para 1571

⁶¹ Ibid.

⁶² ICC, The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Case No.: ICC-01/12-01/18, Trial Judgement (26 June 2024). paras 1575 and 1578

3. Gender apartheid in international criminal law.

On 8 July 2025, in regards to the situation in Afghanistan the Pre-Trial Chamber II issued two arrest warrants for Mr Haibatullah Akhundzada and Mr Abdul Hakim Haqqani, two of the highest representative of current government of the Emirate of Afghanistan, for the charges of ordering, inducing or soliciting the crime against humanity of persecution on gender grounds against girls, women and other persons non-conforming with the Taliban's policy on gender, gender identity or expression.⁶³ This development came as result of lengthy investigation by the OTP which started back in 2017 and was seen generally positively by the members of the international community and by various international law scholars. Although they are certain legal scholars, international non-governmental organization⁶⁴ and even members and representative of various international governing bodies⁶⁵ who view the charge of gender persecution to not be sufficient to cover the extent and gravity of discrimination and inhumane treatment which the female victims face in Afghanistan.⁶⁶ In their view a more appropriate characterisation of the discriminatory regime enforced by the Taliban would be the charge of gender apartheid.

The crimes against humanity of persecution and apartheid has at first glance a lot in common. For example, both crimes have a connection requirement to other crimes listed in the Rome statute and both of them lead to severe deprivation of fundamental rights of the members of the targeted group. The key difference between them lies with mens rea and actus reus element of crime. Persecution entails the severe deprivation of fundamental rights (actus reus) based on a discriminatory intent of the perpetrator (mens rea). The deprivation of fundamental rights can be of systematic character, however, the systematic nature of deprivation is not part of the definition of the crime of persecution, and a persecution can be carried out in the form of

⁶³ Situation in Afghanistan: ICC Pre-Trial Chamber II issues arrest warrants for Haibatullah Akhundzada and Abdul Hakim Haqqani <https://www.icc-cpi.int/news/situation-afghanistan-icc-pre-trial-chamber-ii-issues-arrest-warrants-haibatullah-akhundzada>

⁶⁴ Amnesty International: 17 June 2024 Gender apartheid must be recognized as a crime under international law [viewed on 08.4.2026] available online at: <https://www.amnesty.org/en/latest/news/2024/06/gender-apartheid-must-be-recognized-international-law/>

⁶⁵ OHCHR Press Release: 19 June 2023 Taliban edicts suffocating women and girls in Afghanistan: UN experts, [viewed on 08.4.2026] available online at: <https://www.ohchr.org/en/press-releases/2023/06/taliban-edicts-suffocating-women-and-girls-afghanistan-un-experts>

⁶⁶ For example. BARR, H.: Gender Apartheid as an International Crime Taliban Oppression in Afghanistan Triggers Campaign. In: Georgetown Journal of International Affairs [online], 2025. [viewed on 08.4.2026] available online at: <https://gjia.georgetown.edu/human-rights-development/gender-apartheid-as-an-international-crime-taliban-oppression-in-afghanistan-triggers-campaign> or OHCHR Meeting summaries: 11 September 2023 Special Rapporteur to Human Rights Council: the Systematic and Institutionalised Discrimination that Seeks to Exclude Women from All Facets of Life in Afghanistan Necessitates an Examination of the Evolving Phenomenon of Gender Apartheid [viewed on 08.4.2026] available online at: <https://www.ohchr.org/en/meeting-summaries/2023/09/special-rapporteur-human-rights-council-systematic-and-institutionalised>

a single act of persecution rather than a complex system of intertwining acts. In the case of Apartheid the various inhumane acts of a character similar to those listed under the Rome, including the severe deprivation of fundamental rights, are committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups (actus reus), with the intent of the perpetrator to maintain such institutionalized regime of systematic oppression (mens rea).⁶⁷

The crime of apartheid was created as response to the regime of racial segregation present in South Africa from approximately 1948 to 1994, where the minority white population imposed a sophisticated system of discrimination aimed at maintaining political power in opposition to the majority black population.⁶⁸ This system of segregation made the black population into second class citizen, with many of their human rights and freedoms such as the freedom of movement, right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, right for education etc. being severely curtailed or not guaranteed at all.⁶⁹ The international community responded firstly by condemning the south African regime of segregation in the International Convention for the Elimination of All Forms of Racial Discrimination (1965) and then by criminalizing it as a crime against humanity in international law instruments such as the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968) or through the Convention on the Suppression and Punishment of the Crime of Apartheid (1973).⁷⁰

Gender apartheid in this regard can be defined similarly to racial apartheid as a “*system of governance, based on laws and/or policies, which imposes systematic segregation of women and men and may also systematically exclude women from public spaces and spheres.*” (Bennoune, 2024, p. 33)

Despite the extraordinary nature of this accusation, the charge of gender apartheid is more grounded than it seems. While it is true that the oppression of women and girls especially in islamic societies such as Afghanistan and Iran stems primarily from religious dogma. There is strong evidence to suggest that there is also a political motivation behind it.

⁶⁷ For example. Article 7 (2) h) Rome Statute of the International Criminal Court (1998), BALDWIN, C.: Apartheid and Persecution: The Forgotten Crimes Against Humanity. In: *Opinio Juris* [online], 2021. [viewed on 08.4.2026] available online at: <https://opiniojuris.org/2021/04/30/apartheid-and-persecution-the-forgotten-crimes-against-humanity> or LINGASS, C.: The Crime against Humanity of Apartheid in a Post-Apartheid World. In: *Oslo Law Review*, vol. 2, 2015, Iss. 2. ISSN 2387-3299 pp. 94 and 102.

⁶⁸ MAYNE, J. A.: *From Politics Past to Politics Future: An Integrated Analysis of Current and Emergent Paradigms*, Westport: Praeger. 1999. 52 p.

⁶⁹ SUGARMAN, J. G.: Universal Declaration of Human Rights and the Policy of Apartheid in the Republic of South Africa, In: *Journal of legislation*, vol. 17, 1991, iss. 1. ISSN 0146-9584, pp. 82, 90 and 96

⁷⁰ ROBINSON, D. – VASILIEV, S. – SLIEDREGT, E. – OOSTERVELD, V.: *An Introduction to International criminal Law*, Fifth edition. Cambridge: Cambridge University Press. 2024. 244 p.

The late 20th and early 21st century was a period of immense political turmoil in Afghanistan where it went through various political regimes including a constitutional monarchy, communist dictatorship, Islamic republic, finally settling into a theocratic Islamic state. During these various regimes the female population experienced a fluctuating level of freedom and oppression with particularly the communist regime followed by the Islamic republic being considered the periods of greatest freedom for the female population.⁷¹ When Taliban took over in 2021 the new regime went on a crusade against the various freedoms and rights enjoyed by the female population. Targeting firstly many of their political, economic and social rights by excluding woman from roles in government and restricting their right to work and right for education.⁷² Then moving further into the private sphere with imposition of strict dress codes, limitation of movement, and protection from domestic violence.⁷³

The gradual and calculated way that the regime went on their way of suppressing the fundamental rights of Afghan woman as well as the end result of this crusade which left the female population in the position of second class citizen essentially deprived of all their civil, social, political and economic rights,⁷⁴ can constitute the fulfilment of the systematic element of the crime apartheid.

Secondly the Taliban regime instituted a systematic form of oppression of the female population in order to eliminate the power of class of citizens who naturally harboured sympathies to the previous more tolerant regime and could endangered the standing of the current regime. For example, after the imposition of the first restrictive measures the Afghan women held a series of demonstrations demanding the respect and return of their various political and social rights.⁷⁵ These demonstrations were quickly and violently suppressed by the regime which imposed even further sanction and restriction on the Afghan women. The imposition of these new repressive policies were not motivated in this case by religion but were

⁷¹ NEHAN, N.: The Rise and Fall of Women Rights in Afghanistan, In: LSE Public Policy Review, vol. 2, 2022, iss. 3. ISSN 2633-4046, pp. 2 - 4

⁷² BENNOUNE, K.: The International Obligation to Counter Gender Apartheid in Afghanistan, In: Feminist Dissent, 2023, Iss. 7, ISSN 2398-4139 p. 42

⁷³ For example. HADID, D.: The Taliban orders women to wear head-to-toe clothing in public. In: NPR [online], 2022. [viewed on 08.4.2026] available online at: <https://www.npr.org/2022/05/07/1097382550/taliban-women-burqa-decree>, 4. United Nations: 11 August 2025 Four years on, here's what total exclusion of women in Afghanistan looks like, [viewed on 08.4.2026] available online at: <https://news.un.org/en/story/2025/08/1165622> or BENNOUNE, K.: The International Obligation to Counter Gender Apartheid in Afghanistan, In: Feminist Dissent, 2023, Iss. 7, ISSN 2398-4139 p. 43

⁷⁴ HAQPAL, N.: The Afghan women's movement and gender apartheid: shifting the trajectory of international human rights law. In: Central Asian Survey [online], 2025, p. 6 [viewed on 08.4.2026] available online at: <https://www.tandfonline.com/doi/epdf/10.1080/02634937.2025.2514553?needAccess=true>

⁷⁵ ABBASI, F.: Afghan Women Protest Against Taliban Restrictions. In: Human rights watch [online], 2021. [viewed on 08.4.2026] available online at: <https://www.hrw.org/news/2021/09/07/afghan-women-protest-against-taliban-restrictions>

a response against a perceived political threat, similar in character to thread represented by the black majority against the white minority rule in South Africa. Thus in our opinion the various element of crime of apartheid was fulfilled in this case because of the intent of the Taliban to keep woman subservient and disallow them to gain any political power under the new regime.

Of course there are various challenges to the practical application of the charge of gender apartheid before the ICC. For example, there are legislative issue present with its application since the Rome statute or more broadly international law only recognizes racial apartheid with no recognition of apartheid based on other inherent characteristic such as religion, gender or ethnicity.

Some scholars suggested that a creative reading of the provisions concerning apartheid through the article 21 of the Rome statute which instructs the court to read the text of the statute in harmony with the development of international human rights law, could lead to the expansion of the definition and scope of the crime apartheid on the grounds other than race.⁷⁶ However this extensive interpretation of the provisions Rome statute concerning the crime apartheid, may be well beyond the scope of article 21 of statute a could constitute a violation of the rules of treaty interpretation established in the Vienna Convention on the Law of Treaties (1969).⁷⁷

Some legal scholars theorized that crime of gender apartheid could be qualified as an another inhumane act similarly other gender based crimes such as forced marriage.⁷⁸ Although this characterization could constitute a violation of the legality principle.

Last but not least an amendment to the Rome statute which would expand its list of crimes with the crime of gender apartheid is one of the possible solutions to the qualification problem. This option is however highly unlikely since the last major amendment of this scope was approved more than fifteen years ago.⁷⁹

Besides legislative challenges there are also practical issues pertaining to the prosecution of gender apartheid. Unlike other crimes listed in the Rome statute, apartheid does not have an extended case law which can be used as guidance for prosecution. For a really long time apartheid remained a crime only on paper with no actual convictions or active prosecution.

⁷⁶ DAVIS, L. – ANWAR, K.: Three Definitions, One Choice: Defining Gender Apartheid in the Draft Crimes Against Humanity Treaty. In: *Opinio Juris* [online], 2025. [viewed on 08.4.2026] available online at: <https://opiniojuris.org/2025/12/02/three-definitions-one-choice-defining-gender-apartheid-in-the-draft-crimes-against-humanity-treaty/>

⁷⁷ Article 31 and 32 Vienna Convention on the Law of Treaties (1969)

⁷⁸ SATHY, L. A.: Is Gender Apartheid the New Forced Marriage?: An Analysis of Gender Apartheid as an 'Other Inhumane Act' before the ICC. In: *Völkerrechtsblog* [online], 2025 [viewed on 08.4.2026] available online at: <https://voelkerrechtsblog.org/24234-2/>

⁷⁹ These were the Kampala Amendments approved in 2010 which among other things had expanded the list of prosecutable crimes by the crime of aggression.

Only in recent years we witness its first practical application. For example, in April of 2025 in the Republic of South Africa, the Johannesburg High Court allowed the prosecution of two former members of security forces for a deadly bombing attack carried against four young activists from the Congress of South African Students, on the charges of murder and apartheid as a crime against humanity.⁸⁰ However, the case is still on going without a final verdict. This does not mean that apartheid cannot be tried before the ICC, however the lack of practical experience in prosecuting apartheid may discourage the OTP with prosecuting it before the court. Especially since apartheid is similar to the crime of persecution with which the court has a longer and more detailed experience and history.

Although gender apartheid today still remains only as theoretical concept. Its acknowledgment as distinct form of violation of international law by some legal scholars, international non-governmental organization and various international governing bodies gives us hope for its future inclusion in the current international criminal law framework.

Conclusion

Despite the ultimate acquittal of Mr. Al Hassan, the judgment in his case still represented a landmark decision due to the courts innovative methodology and findings which in our opinion set a precedent for all future prosecution of gender based persecution. Of course the fight against gender discrimination in the context of international criminal law is far from over. The new precedents and methodology established in the Al Hassan case is to face a serious challenge in the new Afghanistan case. In the meantime, there is consistent new development in furthering the protection of gender equality in international criminal law. As we have suggested in the article the case for prosecuting serious gender discrimination under the crime of apartheid is on the rise in recent years. With a high possibility of its future inclusion among the list of enumerated crimes in the Rome statute. We could only theorize what other developments in the prosecution of gender based discrimination has the future in store for us.

⁸⁰ VARNEY, H.: A Landmark Court Decision Opens New Avenues for Accountability for Apartheid-Era Crimes in South Africa. In: International Center for Transitional Justice [online], 2025. [viewed on 08.4.2026] available online at: <https://www.ictj.org/latest-news/landmark-court-decision-opens-new-avenues-accountability-apartheid-era-crimes-south>

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NEUTRAL LAW, HIDDEN (GENDER) INEQUALITY: A FEMINIST CRITIQUE OF LEGAL POSITIVISM

Malwina A. Tkacz¹

Abstract

This paper offers an introductory account of the tension between the formal neutrality of law and the persistence of structural inequalities by advancing a feminist critique of legal positivism. While positivism provides analytical clarity by separating law from morality and is primarily concerned with what the law is, it may obscure the ways in which legal frameworks reproduce power relations under the guise of neutrality. Feminist legal theory challenges this assumption, demonstrating that ostensibly abstract legal categories often reflect historically situated and socially contingent perspectives. As a result, rules that are formally equal may generate substantively unequal outcomes. The paper argues that law should be understood as a socially embedded practice rather than merely a system of rules, and calls for a more context-sensitive approach that complements positivist insights with sustained attention to structural inequality.

Keywords

legal positivism, feminist legal theory, neutrality, equality, gender

“Feminists will continue to find the pursuit of ‘justice’ (as the term is understood) within the parameters of legalism to be a chimera – always promised, yet never fully realized.”²

– Margot Stubbs

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² Stubbs, M. (1986). Feminism and legal positivism. *Austl. JL & Soc'y*, 3, p. 86.

1. Introduction

Modern legal systems often present themselves as neutral, objective, and universally applicable.³ This self-understanding is closely connected with the tradition of legal positivism⁴, most prominently associated with Hans Kelsen⁵, who, in the words of Edwin W. Patterson, “built and rebuilt a systematic philosophy of law and the state which has won him a place among the most distinguished legal-political philosophers,”⁶ and later H. L. A. Hart⁷, a proponent of methodological (descriptive-explanatory)⁸ legal positivism⁹. According to Kaarlo Tuori, Kelsen and Hart “were perhaps the most important representatives of 20th-century positivistic legal theory.”¹⁰ This tradition emphasizes the separation of law and morality¹¹ and conceives of legal validity as grounded in social facts rather than ethical content.¹²

The emphasis on generality and formal equality is closely tied to the ideal of the rule of law¹³, which seeks to ensure predictability, stability, and the avoidance of arbitrariness in legal decision-making.¹⁴ By abstracting from historical and social context, the law seeks to provide a uniform structure within which rights and obligations can be determined. However, this very abstraction also raises important questions about whether formally equal rules can adequately account for differences in social conditions, power relations, and lived experience.¹⁵

³ See Gardocki, L. The Principle of Universality. *Nordisk Tidsskrift for Kriminalvidenskab*, 76, pp. 57-69.

⁴ Legal positivism is a school of thought within the philosophy of law, often contrasted with natural law theory. Its central tenets include, above all, the thesis of the separation between law and morality and the reduction of law to a system of norms (rules). In striving for a strictly scientific and descriptive approach, legal positivism focuses on what the law *is*, deliberately setting aside questions of what it *ought to be*. Legal positivism maintains that law can be understood as a closed, logical system in which legally correct outcomes are derived through logical reasoning from established and pre-existing rules. Positive law is understood as law that has been posited – that is, enacted, recognized, or established through socially accepted procedures. Although it frequently takes the form of statutes issued by the state, it may also emerge from judicial decisions or established legal customs. Moreover, positive law is not confined to state authority alone; legal orders such as that of the European Union also generate binding norms that qualify as positive law despite not constituting a state.

⁵ Patterson, E. W. (1952). Hans Kelsen and his pure theory of law. *Calif. L. Rev.*, 40, pp. 5-11.

⁶ Ibidem. p. 5.

⁷ See Raz, J. (1984). Hart on moral rights and legal duties. *Oxford J. Legal Stud.*, 4, pp. 123-131.

⁸ Methodological legal positivism holds that legal theory is capable of (and ought to provide) a value-neutral account of law understood as a specific social phenomenon.

⁹ Perry, S. R. (1998). Hart's methodological positivism. *Legal Theory*, 4(4), p. 430.

¹⁰ Tuori, K. (2017). *Critical legal positivism*. Routledge. p. 7.

¹¹ See Marmor, A. (1999). The Separation Thesis and the Limits of Interpretation. *Canadian Journal of Law & Jurisprudence*, 12(1), p. 135.

¹² The critiques of this view argue that it is not possible to fully separate social facts from their ethical grounding.

¹³ See Grant, J. A. (2017). The ideals of the Rule of Law. *Oxford Journal of Legal Studies*, 37(2), pp. 383-405.

¹⁴ See Anghel, E. (2023). Predictability and Accessibility of the Law. *LESIJ-Lex ET Scientia International Journal*, 30(1), p. 73.

¹⁵ See Bunting, A. (1992). Feminism, Foucault, and law as power/knowledge. *Alta. L. Rev.*, 30, pp. 829-842.

Indeed, this formal neutrality has been the subject of sustained critique within feminist legal theory.¹⁶ Feminist scholars¹⁷ (e.g., Catharine A. MacKinnon¹⁸ and Patricia J. Williams¹⁹) have argued that the abstraction and generality characteristic of modern law may conceal rather than eliminate inequality.²⁰ What appears as neutral may in fact reflect historically dominant perspectives, thereby reproducing structural forms of disadvantage.

This paper examines and introduces the tension between abstract legal reasoning and lived social realities.²¹ It argues that legal positivism, while analytically powerful, risks obscuring the ways in which law contributes to hidden inequality.²² A feminist critique reveals that law is not merely a system of rules but a practice rooted in social relations and shaped by power²³, interpretation, and experience²⁴ – as articulated by Michel Foucault: “a form of knowledge that is both a product of politics and itself a political force which in turn generates other forms of knowledge.”²⁵

2. Legal Positivism and the Ideal of Neutrality

Legal positivism is grounded in the claim that the existence and validity of law depend on social facts rather than moral considerations.²⁶ According to H. L. A. Hart, law is identified through criteria accepted within a legal system, and its validity does not depend on its merit. This position allows for conceptual clarity and distinguishes legal analysis from moral evaluation. He claims that: “the analysis or study of the meanings of legal concepts is an important enterprise, to be distinguished from (though in no way hostile to) historical inquiries,

¹⁶ See Lacey, N. (1989). Feminist legal theory. *Oxford J. Legal Stud.*, 9, pp. 383-394.

¹⁷ West, R. (2018). Women in the legal academy: A brief history of feminist legal theory. *Fordham L. Rev.*, 87, pp. 977-1003.

¹⁸ See Rapaport, E. (2018). Generalizing gender: Reason and essence in the legal thought of Catharine MacKinnon. In *A mind of one's own* (pp. 254-272). Routledge.

¹⁹ See Harrell, H. C. (2025). From the shadows: An ode to Patricia J Williams's Alchemy of Race and Rights. *Feminist Theory*, 26(3), pp. 597-603.

²⁰ Littleton, C. A. (1986). Equality and feminist legal theory. *U. Pitt. L. Rev.*, 48, p. 1044.

²¹ See MacKinnon, C. A. (1987). *Feminism unmodified: Discourses on life and law*. Harvard university press.

²² See Ernst, S. (2022). Hidden gender orders: Socio-historical dynamics of power and inequality between the sexes. In *The Palgrave handbook of the history of human sciences* (pp. 749-773). Singapore: Springer Nature Singapore.

²³ See Oksala, J. (2017). Feminism and power. In *The Routledge companion to feminist philosophy* (pp. 678-688). Routledge.

²⁴ See Mulinari, D., & Sandell, K. (1999). Exploring the notion of experience in feminist thought. *Acta sociologica*, 42(4), pp. 287-297.

²⁵ West, R. (1989). Feminism, critical social theory and law. *U. Chi. Legal F.*, 59, p. 60.

²⁶ See Toh, K. (2008). An argument against the social fact thesis (and some additional preliminary steps towards a new conception of legal positivism). *Law and Philosophy*, 27(5), pp. 445-504.

sociological inquiries, and the critical appraisal of law in terms of morals, social aims, and functions.”²⁷

A key implication of this view is the ideal of neutrality. The principle of neutrality is typically associated with the principle of equality. General rules are designed to avoid arbitrariness and ensure predictability.²⁸ In this sense, legal positivism is often described as presenting a model of legal reasoning in which courts operate through rule-based deduction, and legal actors – particularly judges – are portrayed as applying law in a manner that is formally separate from political or moral considerations, thereby appearing intrinsically neutral or even “value-free.”²⁹ From this perspective, abstraction is not a flaw but a virtue: it enables law to transcend particular interests and provide a stable framework for social coordination.³⁰

Yet this commitment to neutrality implicitly presupposes that individuals are similarly situated with respect to the law. It assumes that general rules affect all subjects in comparable ways. This assumption becomes problematic when considered in light of structural and historically embedded social inequalities.³¹ As feminist legal theory has argued, “A feminist critique of law cannot be expressed within a framework that is predicated on the autonomy of the law – that is, one based on an understanding of law as a neutral and independent structure that is supposedly uninvolved as an institution in the repression of women.”³²

3. Feminist Critique of Legal Positivism

Feminist legal theory challenges the idea that law can be neutral in practice, questioning both whether it is currently neutral and whether genuine neutrality is conceptually possible at all. It argues that legal categories and standards are historically and socially situated, often reflecting male-dominated perspectives.³³ This critique extends in particular to the figure of the legal subject itself. The “abstract subject” of the law is often not a truly universal human being, but a figure shaped by specific social and historical assumptions. As feminist philosophy of law

²⁷ Breckenridge, G. (1964). Legal positivism and the natural law: the controversy between Professor Hart and Professor Fuller. *Vand. L. Rev.*, 18, p. 947.

²⁸ See Schauer, F. (2004). The generality of law. *W. Va. L. Rev.*, 107, pp. 217-234.

²⁹ Stubbs, M. (1986). Feminism and legal positivism. p. 65.

³⁰ Compare Finnis, J. M. (1989). Law as Co-ordination. *Ratio Juris*, 2(1), pp. 97-104.

³¹ See Bermúdez Figueroa, E., Dabetić, V., Yuste, R. P., & Saeidzadeh, Z. (2023). Gender and structural inequalities from a socio-legal perspective. In *Gender-competent legal education* (pp. 95-142). Cham: Springer International Publishing.

³² Stubbs, M. (1986). Feminism and legal positivism. p. 64.

³³ See Finley, L. M. (1989). Breaking women's silence in law: The dilemma of the gendered nature of legal reasoning. *Notre Dame L. Rev.*, 64, pp. 886-910.

emphasizes, legal systems are deeply shaped by sex and gender relations, gendered norms, sexism, misogyny, and patriarchal structures that permeate legal institutions, legal actors, and those subject to law.³⁴

Margot Stubbs argues that the conceptual structure of legal positivism – serving as a methodological foundation of Western legal discourse – has significantly constrained the development of a feminist critique of law, precisely because it presupposes law as a closed and autonomous system.³⁵ In this sense, positivism is criticized for its fundamental theoretical limitations, which remain problematic regardless of whether it is presented in simple or sophisticated forms.

Stubbs further contends that a feminist theory of law must necessarily move beyond positivism's claims to universality and historical neutrality, and instead expose its role in reproducing both gendered and class-based power relations.³⁶

From this perspective, legal positivism is not merely a neutral theory of law but is structurally aligned with liberal assumptions that conceptualize society as an aggregation of autonomous, contracting individuals. It thereby supports an understanding of law as a neutral, self-contained mechanism for resolving conflict. This view is closely linked to the ideal of the rule of law, understood as equality before the law and impartial adjudication. However, feminist critiques argue that such an ideal contributes to a reification of law, obscuring its role in maintaining and reproducing social hierarchies. Rather than functioning as a neutral safeguard of liberty, law is thus seen as central to the production and stabilization of social relations of domination.

Consequently, it is argued that legal positivism has not been subjected to a critique as thorough as that directed at liberalism, despite sharing its core assumptions about society and neutrality. In this sense, positivism may provide an artificially abstract account of how law operates as a closed system, detached from the structural conditions in which it functions.

The feminist critique operates on several levels. First, formal equality³⁷ – the principle that like cases should be treated alike – may fail to account for structural differences. Rules that are neutral on their face can produce unequal outcomes when applied to individuals in unequal

³⁴ Francis, L., "Feminist Philosophy of Law", *The Stanford Encyclopedia of Philosophy* (Spring 2026 Edition), Edward N. Zalta & Uri Nodelman (eds.), URL = <<https://plato.stanford.edu/archives/spr2026/entries/feminism-law/>>.

³⁵ Stubbs, M. (1986). Feminism and legal positivism. pp. 63-64.

³⁶ Ibidem.

³⁷ Compare Levit, N. (2000). A different kind of sameness: Beyond formal equality and antisubordination strategies in gay legal theory. *Ohio St. LJ*, 61, pp. 867-934.

conditions. For example, workplace norms that assume uninterrupted career trajectories may disadvantage those with caregiving responsibilities, disproportionately³⁸ affecting women.³⁹

Second, legal language and reasoning may encode implicit biases. Concepts such as “reasonableness” or “objectivity” are not entirely value-neutral but may be shaped by dominant social norms. As a result, the application of law may systematically privilege certain perspectives while marginalizing others. Roni Amit points to cases where landlords are exempted from responsibilities such as water supply, while tenants are stringently held to their contractual obligations without regard to circumstances potentially resulting from the landlord’s negligence (such as fire), all in the name of an ostensible reasonableness.⁴⁰ Not only does the concept of “reasonableness” here unjustly privilege property owners over lessees, but such situations also disproportionately affect women.⁴¹ Here we see how the detachment of positivistic conceptions of “reasonableness” from what the layperson would actually consider reasonable can perpetuate and even exacerbate inequalities. And this brings us to the third level, where the positivist separation of law and morality may limit the capacity of legal theory to address injustice.⁴²

From this perspective, feminist scholars argue that law should not be understood as an external or inert mechanism, but as an active social relation that plays a central role in structuring and reproducing gendered and class-based hierarchies. Rather than remaining at the margins of feminist inquiry, law must be brought into the core of critical analysis as a site of social struggle. This requires moving beyond the positivist framework and approaching law as a form of socially grounded practice that not only mediates but also sustains existing power relations, whether intentionally or as an adaptive feature of broader social dynamics.⁴³

³⁸ The ideal of equality itself may become problematic when it is understood as requiring identical treatment, irrespective of differing social and material conditions. Such a formal notion of symmetry can obscure structural inequalities and, in practice, produce asymmetrical and unjust outcomes. The appearance of neutrality or symmetry thus contributes to the persistence of these inequalities by rendering them less visible.

³⁹ See Croghan, R. (1991). First-time mothers' accounts of inequality in the division of labour. *Feminism & Psychology*, 1(2), pp. 221-246.

⁴⁰ Amit, R. (2024). Access to Injustice: How Legal Reforms Reinforce Marginalization. *CUNY L. Rev.*, 27, p. 15.

⁴¹ Ibidem. p. 31.

⁴² This very serious problem has already been noticed by, among others, Gustav Radbruch, a German legal philosopher who argued that positive law can give rise to norms that are not only unjust but also grossly unjust (*lex iniustissima*). Such norms were rejected by Radbruch, who maintained that a grossly unjust law is not law (*lex iniustissima non est lex*) and therefore is not binding (the so-called Radbruch Formula).

⁴³ Stubbs, M. (1986). Feminism and legal positivism. p. 86.

4. Hidden Inequality of Law

The concept of equality (and inequality) is a subject that has generated significant controversy. It is often linked to the celebrated slogan of the French Revolution – “Liberté, Égalité, Fraternité” – yet it also frequently leads to confusion and, at times, a sense of unease.⁴⁴

Equality can be considered in multiple contexts – including social equality, political equality, gender equality, equality in employment, education, and health care, as well as economic equality.⁴⁵

Social equality⁴⁶ – often taken as a general notion of equality – refers to a condition in which individuals within a society share the same status across as many dimensions as possible, including civil rights, freedom of expression, property rights, and access to goods and social services. As noted in the *Collins Dictionary of Philosophy*, equality in social theory denotes sameness in a specified respect, such as equality of opportunity, income, or entitlement.⁴⁷

The notion of “hidden inequality” captures the paradox that law can appear neutral while producing unequal effects.⁴⁸ This phenomenon is not necessarily the result of intentional discrimination but arises from the interaction between abstract (positive) norms and unequal social realities.

Law operates through generalization. It simplifies complexity in order to function. However, this simplification can obscure relevant differences. When the law fails to recognize structural inequalities, it may reinforce them by treating unequal situations as if they were equal.⁴⁹

Moreover, the institutional context of law – courts, procedures, and practices – plays a role in shaping outcomes. Access to legal resources, familiarity with legal language, and the capacity to navigate institutions are unevenly distributed.⁵⁰ These factors further complicate the assumption of neutrality.

⁴⁴ Bondü, R., & Inerle, S. (2020). Afraid of injustice? Justice sensitivity is linked to general anxiety and social phobia symptoms. *Journal of Affective Disorders*, 272, pp.198-206.

⁴⁵ We can also distinguish horizontal equality, vertical equality, and political equality.

⁴⁶ Fourie, C. (2012). What is social equality? An analysis of status equality as a strongly egalitarian ideal. *Res Publica*, 18(2), pp. 107-126.

⁴⁷ Vesey, G. and Foulkes, P. (1990). *Collins Dictionary of Philosophy*. London: Collins. p. 104.

⁴⁸ See Schlüter, L. (2022). Revealing invisible inequalities in egalitarian political theory. *Journal of global ethics*, 18(1), pp. 134-151.

⁴⁹ See MacKinnon, C. A. (1991). Reflections on sex equality under law. *Yale Law Journal*, pp. 1281-1328.

⁵⁰ See Minow, M. (2022). Access to justice. *American Journal of Law and Equality*, 2, pp. 293-311.

From this perspective, inequality, including gender inequality, is not external to law but is partly constituted through legal forms themselves. The very features that define modern law – generality, abstraction, and formalism – can contribute to the invisibility of injustice.

5. Beyond Legal Positivism: Toward a Context-Sensitive Approach

The feminist critique does not necessarily require the complete rejection of legal positivism. Its analytical tools remain valuable for understanding how legal systems function. However, it calls for a supplementation of positivism with a more context-sensitive and critical perspective.

Such an approach would recognize that law is situated within social relations, legal interpretation involves normative judgment, and that equality requires attention to substantive conditions, not only formal rules. This shift moves toward a conception of substantive equality⁵¹, which takes into account the actual effects of legal norms and seeks to address structural disadvantage.

Within this framework, feminist scholarship has suggested that a fully developed feminist theory of law would need to go beyond positivism's claims to trans-historical and universal validity and to reflect more explicitly on its possible role in the reproduction of sex- and class-based social relations in modern (particularly capitalist) societies.⁵²

This perspective also opens the possibility of integrating insights from other traditions, including critical legal studies and phenomenological approaches, which emphasize lived experience and the situated nature of legal subjects.

Conclusion

The ideal of abstract and neutral law remains a foundational element of modern legal thought. Yet, as feminist legal theory persuasively demonstrates, this ideal may conceal rather than eliminate structural inequalities embedded within social life. Legal positivism, particularly in the tradition of H. L. A. Hart, offers a compelling and analytically rigorous account of law's formal structure. However, its commitment to the separation of law and morality and its

⁵¹ MacKinnon, C. A. (2011). Substantive equality: A perspective. *Minn. L. Rev.*, 96, pp. 1-27.

⁵² Stubbs, M. (1986). Feminism and legal positivism. p. 63.

emphasis on formal neutrality limit its capacity to fully account for the ways in which law operates within unequal social contexts.

The analysis developed in this paper suggests that law (not only from the feminist perspective) cannot be adequately understood as a self-contained and value-neutral system. Rather, it must be seen as a social practice, shaped by historical conditions, power relations, and interpretive frameworks. From this perspective, the neutrality of law appears not as an empirical reality, but as a normative aspiration – one that requires critical scrutiny rather than unqualified acceptance.

Moving beyond a strictly positivist way of understanding law does not necessitate abandoning its conceptual tools. Instead, it calls for their supplementation with approaches that foreground context, lived experience, and structural inequality.

The challenge observed by the legal feminist scholars is not simply to critique the abstraction of law, but to reconfigure it. Law (and jurisprudence) must remain sufficiently general to ensure stability and predictability, yet sufficiently responsive to recognize and address inequality. Only by confronting the tension between abstraction and social reality can law begin to fulfill its promise – not merely as a system of rules, but as a practice oriented toward justice.

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HOW DO GENDER STEREOTYPES AFFECT CRIMINAL JUSTICE

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Abstract

This article examines the impact of gender stereotypes on the objectivity and impartiality of judicial decision-making in criminal proceedings. It argues that despite the formal existence of anti-discrimination norms, stereotypical perceptions - formed through cultural, social, and religious influences - continue to affect the administration of justice at both individual and institutional levels. The study explores the theoretical foundations of gender stereotypes and analyzes their manifestation in criminal law through sentencing disparities, evaluation of victim behavior, and judicial reasoning. Particular attention is given to real-life cases and statistical data demonstrating how stereotypes influence legal outcomes, including the concepts of the "ideal victim," chivalry, and paternalism. The research also highlights the role of media, religion, and legal traditions in reinforcing biased perceptions, as well as the existence of both negative and "protective" forms of discrimination. The findings confirm that gender stereotypes distort the interpretation of evidence, undermine equality before the law, and threaten the right to a fair trial. The article proposes the need for comprehensive reforms, including judicial training, gender-sensitive approaches, and alignment with international human rights standards, to eliminate bias and strengthen public trust in the justice system.

Keywords

gender inequality, differences in criminal sentences, judicial bias, gender stereotypes, criminal justice

Introduction

A judge, when examining an individual case, carries out a comprehensive assessment of the case materials, witness testimony, and the characteristics of both the offender and the victim. On the basis of an impartial, thorough, and objective consideration of the case, the judge renders a well-reasoned judgment, which must be fair, and the penalty imposed must be proportionate to the harm caused. At the same time, every judge, as a member of society, holds personal beliefs that may influence the decision-making process and its ultimate outcome. Despite the large amount of anti-discrimination law, there is often a certain lack of proportionality in the decisions made, most frequently resulting in discrimination against individuals on the basis of race or gender. Some narratives in society begin

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to be accepted by people as objective reality, so we often don't even notice when they turn into discrimination.

The purpose of this article is to examine the impact of stereotyping on the objectivity of judicial decisions, where certain stereotypes come from and how they have evolved into a basis for gender-based discrimination. In particular, it aims to analyze real-life examples of the influence of gender stereotypes on the formation of judgments in criminal proceedings; to study statistical indicators reflecting the formation and dissemination of stereotypical perceptions within society; and to explore judicial practice in cases involving the influence of gender stereotypes on the adjudication of criminal matters.

The study aims to analyze the relevant legal issues and to propose ways of addressing these gaps, which will contribute to increasing public trust in the judicial system and have a positive impact on the administration of justice.

In order to examine all of the above-mentioned issues, the research draws upon doctrinal studies by scholars, judicial decisions of national courts and the European Court of Human Rights, statistical data, and other academic literature.

1. Theoretical and legal nature of gender stereotypes

From childhood, people internalize patterns of behavior customary to a particular era of society's development, as well as for its geographical and sociocultural characteristics, are ingrained in the human mindset. This means that gender stereotypes may be rooted in traditional folk beliefs and established worldviews. For example, traditional behavioral models for women and men among African peoples may differ from European views on the same issues. In this context, questions arise about the impact of stereotyping on the legal system of every country, since every participant in the judicial process is part of a society that is used to providing stereotypical perceptions of the positive and negative actions of women and men. Special attention should be paid to the impact on the objectivity and impartiality of judicial decisions, how to address well-established stereotypes in practice, how to get rid of them, and what to do if you face injustice due to these narratives. When examining a narrower aspect of the issue of stereotypes in criminal law, it is worth analyzing how stereotypes can influence sentencing, the differentiation of sentences into less strict and more strict depending on gender, and the difference in society's perceptions of offenders based on their gender.

Gender stereotypes describe culturally established, simplified, permanent, and emotionally tinted images of behavior and personality features of men and women. Any stereotypes, including gender stereotypes, have a questionable influence on both collective and individual consciousness: on the one hand, they reflect the historical and cultural experience of many generations, simplifying the

processes of viewing the world, evaluating, and analyzing social reality; on the other hand, they oversimplify it and, at times, distort it.³ In other words, a stereotype is something that is often repeated and has become habitual and generally accepted. Understanding the specifics of legal cases, we are convinced that making generalizations is unacceptable and unprofessional in the work of any lawyer, as every situation is unique and demands detailed analysis. As a representative of justice and the will of the law, a judge must not use simplifying methods of cognition when deciding a case, because the fate of the defendant hinges on his or her shoulders. The scholar W. Lippmann, who first used the term stereotype, identified four characteristics of stereotypes:

Firstly, stereotypes are always simpler than reality;

Secondly, people obtain stereotypes from their social environment (friends, the media, etc.), rather than forming them themselves based on personal experience;

Thirdly, all stereotypes are false to a greater or lesser extent: they always attribute expectations to a specific person, according to which they must behave and act as a result of their membership in a particular group;

Finally, stereotypes are very persistent: even if people become convinced that a stereotype does not correspond to reality, they tend not to reject it, but rather to claim that the exception only proves the rule.⁴ Medias have a significant influence on the formation of certain opinions among the general public and tend to manipulate people's emotions in order to boost their ratings. For example, in 2020, a car accident occurred in Kharkiv(Ukraine) in which a driver killed four people on a pedestrian refuge island. Without waiting for official information, the media reported inaccurate details about the origin of the person responsible for the car accident and focussed on his status as a foreigner. Public statements by authorities, particularly regarding foreign students obtaining residence and study permits through corruption, together with media reports on the incident, led to the formation of a negative stereotype, showing them as people who are more likely to break the law.⁵

2. The influence of gender stereotypes on criminal law

Negative racial stereotypes, which have had a significant role in the criminal justice system since the very origins of the legal system, have led scholars to consider whether other stereotypes, particularly gender stereotypes, play a similar role. One of the most widely accepted arguments in

³ Надія Куравська. Гендерні стереотипи як джерело гендерної дискримінації та сексизму: *Збірник наукових праць: психологія*. Вип. 22, 2018, p. 59, doi: 10.15330/psp.22.

⁴ О. Химович. Стереотип: теоретико-методологічні підходи до інтерпретації: *Соціальні технології: актуальні проблеми теорії та практики*, вип. 59–60, 2013, p. 67

⁵ Барабаш Дар'я. Стереотип, його місце в злочинності та вплив на суддю під час розгляду кримінальних справ: *Conferinta stintifica internatională „OMUL, CRIMINOLOGIA, STINTA”, editia a II-a, 2023*, p. 761

criminology is that men commit crimes more often than women. Although women account for about 25% of those arrested, their share of the prison population is much lower. According to the U.S. Department of Justice, approximately 93% of individuals in state and federal prisons are men, and only 7% are women. Despite ongoing debates about changes in the gender gap in crime rates, differences in sentencing remain unchanged. Men receive stricter punishments than women. For example, a study by Franklin and Henry (2019) found that men are 1.4 times more likely to be sentenced to imprisonment and receive prison terms that are approximately 19% longer. These inequalities can be exacerbated by other non-legal factors, particularly the victim's gender. Although some studies have found no effect of this factor, more recent research shows that crimes against women are punished more strictly, especially when the offender is a man. At the same time, in cases involving domestic violence or sexual assault, the penalties are sometimes less strict or even do not lead to imprisonment.⁶

Korean society is an example of how stereotypes help create an environment that facilitates sexual violence. The more strongly a person believes in gender role stereotypes, the more tolerant they are towards sexual violence, which, in turn, increases the chances of it spreading. Gender stereotypes and myths about rape are deeply rooted in the Korean justice system. They hinder the proper prosecution of crimes involving sexual violence. A case in which a court acquitted a man accused of rape, relying on unreasonable assumptions about the woman's behavior, sparked significant public attention. The court highlighted certain actions of the woman, specifically: her desire for physical contact, even if not sexual; holding hands; her behavior toward the man during the date; and her inability to defend herself due to fear. The court concluded that the victim's fear was a result of her own anxiety, and that there was no use of force or threats enough to make self-defense hard. Later, this decision was canceled by the appellate court and the defendant was found guilty of rape. However, this case illustrates just how deeply ingrained myths about rape are - particularly regarding the "typical" behavior of victims.⁷

Another case also clearly illustrates the existence of myths about rape within the Korean justice system. In this case, a 13-year-old girl with an intellectual disability broke the screen of her cell phone and ran away from home because of the fear of punishment from her mother. Through a mobile chat app, the girl met a 25-year-old man who offered her a place to stay for the night and later committed sexual assault against her. Over the next five days, the girl had sexual contact with seven adult men.

⁶ Tri Keah S. Henry. Racial Stereotypes, Gendered Crimes, and Judicial Discretion: a Multi-Level Examination of the Effect of Race and Gender on Sentencing Disparities: *A Dissertation Presented to The Faculty of the Department Criminal Justice and Criminology Sam Houston State University*, 2020, p. 3

⁷ Sou Hee Yang. Criminal Law and Gender Stereotypes in the Prosecution of Cult-Based Sexual Violence in South Korea: *Gender stereotypes: Case Studies, Policies and Theoretical Approaches*, 2026, p. 341-342

She was found in a park suffering from mental distress and experiencing hallucinations. However, during the hearing of the case regarding compensation for medical expenses and emotional distress, the court concluded that since she had created the chat room herself and had been provided with accommodation at a motel, she had engaged in prostitution voluntarily. Although this decision was also overturned by the Court of Appeal, the case illustrates just how strongly myths about rape influence the judicial assessment of facts in sexual offense cases, showing how easily even young victims with intellectual disabilities can be accused of the sexual violence committed against them.⁸

Stereotypes also appear when judging the behavior of the accused. In 1999, in Finland, Sanna Sillanpää opened fire on five men, killing three and injuring a fourth, and was described as “sick,” “evil,” and a “ruthless killer.” In 2013, Jodi Arias was convicted of murdering her ex-partner, despite her claims of self-defense due to a “controlling, psychologically abusive relationship.” These examples highlight the fact that violence committed by women is often viewed in two ways: the women are regarded as either mentally ill, emotionally unstable, or cold-blooded, or as victims of circumstance acting in self-defense.⁹

In Indonesia, women involved in terrorist organizations are characterized as “immature,” “poor,” and “brainwashed.” Indonesian gender norms are shaped by unique religious, cultural, political, and historical factors that ignore the responsibility of female extremists, focusing instead on the protection of “women and children.” The “brainwashing” stereotype is one of the most common stereotypes regarding women's involvement in terrorist organizations. Women are often described as emotional, irrational, and more easily influenced. This reflects a gender-based assumption about their inability to think independently. This leads to men being regarded as criminals and women as victims, which sometimes allows women to avoid criminal responsibility. This stereotype also limits women's participation in security-related professions, particularly in intelligence operations, where they are considered more vulnerable to influence. Identifying women with children creates a stereotype of their “immaturity.” This is reflected in the “women and children” paradigm, which emphasizes their need for protection rather than recognizing them as active subjects. This stereotype leads to policy that is focused on protection rather than on recognizing women's agency. It also weakens the effectiveness of law enforcement, as women may avoid responsibility.¹⁰

⁸ *Ibid.*

⁹ Amber Phillips, Melissa S. de Roos. Gender Stereotypes and Perceptions of Stranger Violence: Attributions of Blame and Motivation: *International Journal of Offender Therapy and Comparative Criminology*. Vol. 69(1), 2025, p. 44

¹⁰ Nuri Widiastuti Veronika. Poor, brainwashed and immature: prevalent gender stereotypes in Indonesian preventing violent extremism (PVE) and counterterrorism (CT) efforts: *Critical Studies on Terrorism*. Vol. 18, no. 1, 2025, p. 91, 103-105

Women may have an advantage in court, especially if they can present themselves as “women” fulfilling other traditional roles (such as wives and mothers). One such example is Ukrainian criminal law, which, according to Article 79 of the Criminal Code of Ukraine, establishes that in the case of sentencing pregnant women or women with children under the age of seven to restricted liberty or imprisonment (except for those sentenced to imprisonment for a term of more than five years for serious and particularly serious crimes, as well as for corruption-related criminal offenses, criminal offenses related to corruption), the court has the right to release such convicted persons from serving both the principal and additional penalties, establishing a probationary period within the timeframe during which, under the law, a woman may be exempted from work due to pregnancy, childbirth, and until the child reaches the age of seven.¹¹ The court makes its decision based on the conviction that the woman is capable of fulfilling her maternal responsibilities and providing the full range of maternal care that is necessary for a child of that age. The Ukrainian Criminal Code is extremely tolerant, that is why there have been cases where a woman, taking advantage of the circumstances, successfully used her child to avoid punishment. However, it should be noted that the application of this type of exemption is a right, not an obligation, of the court. Therefore, for the court to resolve this case positively, it is necessary to establish reasonable grounds for such exemption.¹²

3. The impact of gender stereotypes on judges and court decisions

When we talk about justice and balance in a modern democratic society, it makes sense to bring up the right to an independent, objective, and impartial trial. This right forms the basis for a dignified existence in society, it belongs to the first generation of human rights as a fundamental protection of the individual. Foremost, this right protects individuals from state abuse and establishes the obligation to ensure a fair trial, the presumption of innocence, and the equality of the parties. This right is guaranteed by both national courts and, at the international level, by Article 6 of the European Convention on Human Rights. The Convention establishes that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.¹³ Furthermore, international standards of judicial ethics - the Bangalore Principles of Judicial Conduct of May 19, 2006, establish that a competent, independent and impartial judiciary is likewise essential if the courts

¹¹ Criminal Code of Ukraine: *Law of July 17, 2025*. URL: <https://zakon.rada.gov.ua/laws/show/2341-14#n2>

¹² URL: https://protocol.ua/ua/kriminalniy_kodeks_ukraini_stattva_79/#google_vignette

¹³ European Convention on Human Rights: *International Treaty from November 4, 1950*. URL: https://www.echr.coe.int/documents/d/echr/convention_ENG

are to fulfil their role in upholding constitutionalism and the rule of law.¹⁴ We have already noted that a stereotype is a kind of tool that simplifies our understanding of things by categorizing individuals according to certain social standards. However, it would not be an overstatement to say that this poses a serious risk to the fair trial of a case in court. The balance of justice shifts depending on the judge's personal convictions, which have been formed throughout his or her life experience. As a person who grew up among his or her own kind and was formed under the influence of social beliefs, a judge trusts his or her own judgment regarding a given situation. However, such a decision may not always be fair to the defendant or may not fully compensate the victim for the harm they have suffered. In the course of performing their professional duties, judges, guided by their own negative internal beliefs - which have been shaped by certain negative examples - reach more negative conclusions in advance, subconsciously limiting their search for additional evidence. As a result, the judge may form a certain negative impression of the accused, one that confirms stereotypes simply because the accused is charged with a crime that fits that stereotype. If a judge is influenced by any gender stereotype, he or she automatically ascribes certain established roles, characteristics, and features of a specific social group to an individual, which inevitably affects the judge's objective perception of information and the formation of subjective opinions and beliefs. Therefore, when a judge's mindset becomes stereotyped, he or she forms a personal opinion about an individual based on preconceived ideas about a particular social group, rather than on relevant facts, circumstances, or an actual investigation related to that individual. The main danger of stereotypes influencing a judge during the trial of criminal cases is the formation of an unjustified negative bias toward an individual, attributing to them general group characteristics without distinguishing the specific features unique to that individual. Such subconscious bias results in discrimination by the court during proceedings, which can influence the harshness of the sentence and violates the guaranteed right to a fair trial.¹⁵ The harshness of punishment is best understood through a combination of legal and non-legal variables. Legal variables include the seriousness of the offense, the type of crime committed, and prior criminal history, while non-legal variables include race, education, gender, and socioeconomic status. Non-legal factors have a significant impact on the outcome of sentencing, however, when determining sentences, these factors are more often used to the advantage of women than of men. Research shows that, in general, men face harsher treatment in court than women. One of the strongest arguments for explaining this phenomenon is the influence of negative gender stereotypes, as reflected in the concepts of chivalry and paternalism. Chivalry refers to a combination of a man's

¹⁴ The Bangalore Principles of Judicial Conduct: *an international document from 19 May 2006*. URL: <https://www.unodc.org/documents/ji/training/bangaloreprinciples.pdf>

¹⁵ Дар'я Барбаш. Стереотип як перешкода правосуддю та його вплив на суддю під час розгляду кримінального провадження: *Наукові нотатки*, 2023, с. 140-143, DOI: 10.32353/khrife.3.2023.08

unwillingness to harm a woman and the belief that a woman cannot be a criminal. It is noted that male law enforcement officers do not like to punish women, just as male police officers do not like to arrest them. Basically, chivalry holds that men do not like to punish or blame women for their offenses, regardless of whether they are guilty or not. Paternalism, on the other hand, views women as childlike, defenseless, and helpless beings who should be protected from harm rather than punished. In 1956–1957, an analysis of data in Philadelphia found that women accounted for only 6.3% of those accused. Based on other data, it was found that 61.5% of women were imprisoned, while 38.5% were not. In contrast, 79.6% of men were imprisoned, while 20.4% were not. It can be suggested that the judge and prosecutor treated the criminal offenses in which the woman was involved differently when sentencing her.¹⁶ However, women are more likely to face public and judicial criticism for using drugs than men. In cases of sexual violence, judges have often been influenced by the stereotype of the “ideal victim of sexual violence,” which invalidates a large number of reports of sexual assault.¹⁷ Many women who do not fit the stereotype have been put in vulnerable situations, such as a 17-year-old girl from Canada who was sexually harassed by her employer after a job interview. The court found that because of the girl’s prior sexual experience, the man did not take her refusal seriously, and therefore acquitted the accused on the grounds of “implied consent.” The court was convinced that such a refusal would have been taken seriously if it had been said by a girl of “good moral reputation. Eventually, the Supreme Court of Canada cancelled the lower courts’ rulings, pointing out that “the plaintiffs should be able to rely on a system free from such myths and stereotypes, and on a judicial system which is not biased by these unfair stereotypes. The court also criticized the inappropriate use of rape myths within the judicial system (in particular, the notion that women must use physical force in response to sexual violence) to establish the absence of agreement. The court examined Canada’s obligations to overcome gender stereotypes under international law, including the Convention on the Elimination of All Forms of Discrimination Against Women. This decision has become a guideline in similar cases and has been widely welcomed by the international community.¹⁸

Another important case for understanding how stereotypes affect court decisions is a CASE OF I.G. v. MOLDOVA (ECtHR).¹⁹ Although no discrimination was found in this case, the court’s approach to the case was based on certain stereotypes regarding the victim’s “proper” behavior. The

¹⁶ Spencer Hagenbuch. The Effects of Gender Stereotypes and Types of Crime on Perceptions of Responsibility, Sentencing Severity, and Likelihood of Recidivism: *Senior Thesis Spring, 2023*, pp. 3–6

¹⁷ Ibid. 15 p. 142

¹⁸ Supreme Court of Canada: *R. v. Ewanchuk*, application no.: 26493, judgement of 25 February, 1999. URL: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1684/index.do>

¹⁹ [https://hudoc.echr.coe.int/#%7B%22itemid%22:\[%22001-110904%22\]%7D](https://hudoc.echr.coe.int/#%7B%22itemid%22:[%22001-110904%22]%7D)

case involved a 14-year-old girl who had engaged in sexual intercourse against her will. Under pressure from her abuser, the girl consumed alcoholic beverages, after which she was unable to control herself properly or defend herself against her abuser's actions. After the incident, the man threatened her with violence if she disclosed the situation, which caused a delay in reporting the matter to law enforcement. As a result, the forensic medical examination was unable to provide a definitive answer regarding the presence of physical signs of sexual assault. Taking the circumstances of the case into account, the national courts did not consider the girl's state of intoxication to be such that it prevented her from resisting her abuser and charged the man only with sexual intercourse with a minor.

In this case, the ECHR found a violation of Article 3 of the Convention ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment.").²⁰ The Court emphasized that the state had failed to fulfill its positive obligation to ensure the effective investigation and proper prosecution of all forms of rape and sexual violence.

Importantly, this case revealed not only a lack of evidence but also the manner in which it was interpreted by national authorities, which indirectly reflected gender stereotypes regarding the victim's behavior. The assessment of the circumstances specifically the state of intoxication and the delay in reporting to the police effectively turned into a questioning of the veracity of the woman's testimony, rather than taking into account the context of coercion and psychological pressure. In this way, the focus of the criminal proceedings shifted from analyzing the perpetrator's actions to verifying the extent to which the victim's behavior aligns with notions of an "appropriate" response to sexual violence.

This point of view carries the risk of implicitly influencing stereotypes on the evaluation of evidence by prosecutors and judges, when lack of instant resistance, delay in applying or alcohol consumption may be subconsciously perceived as factors that reduce the credibility of a rape claim. That is why the European Court of Human Rights, in its decision, emphasized that the State had failed to fulfil the positive obligation to investigate sexual violence effectively, and the combination of procedural shortcomings had led to a violation of article 3 of the Convention.

4. Impact of religion on the formation of gender stereotypes. How such stereotypes affect criminal justice

²⁰ article 3 ECHR https://www.echr.coe.int/documents/d/echr/convention_ENG

Religious doctrines serve as a source of normative behavioral models, which over time evolve into entrenched gender stereotypes. In general, religion often exerts a significant influence on the formation of a country's legal system, a phenomenon particularly prevalent in the Islamic world.

In this context, perceptions of gender roles - shaped by religious norms and their traditional interpretations - play a crucial role. In particular, a model has become entrenched in many societies whereby men are viewed as the primary holders of power, protectors, and providers, while women are assigned a more limited, predominantly domestic role.

Criminal law in Muslim-majority countries often reflects the principles of Islamic governance, or *siyasa shar'iyah*, a framework that integrates Islamic principles, particularly sharia law, into legal and governmental systems. Sharia law, derived from the Quran and Hadith, provides ethical and legal guidelines for structuring societies, including the administration of criminal justice. However, the application of Sharia-based criminal law has become a subject of significant debate, particularly regarding its alignment with international human rights standards.²¹

This issue has indeed become problematic, as Islamic law is largely based on patriarchy, which leads to direct discrimination enshrined in law.

Let us consider the legal system of Iran as an example, since Islamic law plays a very important role in that country.

Under classical Islamic law, as under other pre-modern legal systems, the principle of legal equality of persons is not recognized. The Islamic Penal Code, which was enacted by the Iranian government soon after the 1979 Revolution, clearly follows the classical Islamic law doctrine and violates the principle of legal equality by provisions that discriminate, *inter alia*, on the basis of gender.²² Under the IRI's criminal law, men and women are treated differently with regard to the age of criminal responsibility, *diya* (blood money) and *qisas* (retaliation), evidence, etc.²²

As for the age of criminal responsibility, it is set at an earlier age for girls. According to the classical approach, the criterion for criminal responsibility is a person reaching the age of maturity, which, according to the Shiite school of Islam followed by the Islamic Republic of Iran, is 9 lunar years (8 years and 9 months) for girls and 15 lunar years (14 years and 7 months) for boys. The age of maturity in Islamic law is called "bulugh" - it is the attainment of sexual maturity by a person, which serves as the basis for acquiring full religious and legal responsibility.²³

The claim regarding the faster maturation of girls is partly biologically grounded but also carries a significant stereotypical dimension. At the level of physiological development, girls on average do

²¹ <https://ejournal.uinsaid.ac.id/shahih/article/view/10038/3504>

²² https://iranhrdc.org/wp-content/uploads/pdf_en/LegalCom/

²³

reach certain developmental stages earlier than boys, particularly due to the earlier onset of hormonal changes and accelerated physical maturation, although these processes vary significantly on an individual basis.

However, using this biological fact as a basis for attributing criminal responsibility at an earlier age for girls compared to boys may take on a discriminatory character, as it relies on a stereotypical assumption that girls also achieve social and psychological maturity earlier. Such an approach effectively transfers biological differences into the sphere of social and legal assessment, which is not always scientifically justified.

This approach to determining the age of criminal responsibility may conflict with international standards in the field of child rights protection and the principle of non-discrimination. According to the provisions of the Convention on the Rights of the Child, States Parties are obliged to ensure special legal protection for persons under the age of 18. In particular, Article 40 of the Convention provides that every child alleged as, accused of, or recognized as having infringed the penal law has the right to be treated in a manner consistent with the child's age, dignity, and worth, and that promotes the child's reintegration into society.²⁴

Moreover The UN Commission on Rights of a Child (UNCRC) in the General comment №10 explained that the minimum age of criminal responsibility should be on fairly high level to reflect the actual incidence of emotional, psychological, and intellectual maturity. Setting the age of criminal responsibility at 9 years is pedagogically and legally unfounded, as this age does not meet the criteria for full awareness of the consequences of one's actions, upon which modern international juvenile justice is based.²⁵

Returning to the issue of gender equality, the different ages of criminal responsibility for boys and girls constitute direct discrimination on the basis of sex. In accordance with Articles 2 and 26 of the International Covenant on Civil and Political Rights, everyone has the right to equal protection under the law without any exceptions.²⁶ This requirement to ensure equality is also enshrined in Article 2 of the Universal Declaration of Human Rights. Furthermore, such legislative practice violates the provisions of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). In particular, Articles 1 and 2 of this document oblige States Parties to actively eliminate any legal provisions that legitimize unequal treatment of women or girls within the justice system.²⁷

²⁴ <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>

²⁵ <https://www.refworld.org/legal/general/crc/2007/43085>

²⁶ <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>

²⁷ <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women>

Important to understand that these legislative differences usually based on obsoleted gender stereotypes such a «quick maturity» of females and not on the objective biological indicators. The persistence of such approaches in criminal proceedings undermines the fundamental principles of justice and equality, perpetuating biased attitudes rather than ensuring equal legal standards for all citizens regardless of their gender.

One of the most telling forms of gender discrimination in the criminal law of states where Islamic law has a significant influence is the institution of “diya” (payment of compensation for harm caused to a person’s life or health). This legal mechanism provides for the payment of monetary compensation to the victim’s family in cases of bodily injury or death.

In the Islamic Republic of Iran, the law establishes a direct link between the amount of compensation and the gender of the victim: the payment for the death of a woman is only half the amount set for the death of a man. Furthermore, the application of the “qisas” principle (“an eye for an eye”) deserves special attention. If a woman’s family insists on imposing a similar punishment on the perpetrator, they are required to pay the difference in the amount of “blood money.” This legal framework clearly demonstrates that, within this system, the legal valuation of human life is differentiated based on gender, which significantly limits women’s rights in the context of access to fair justice.²⁸

Specified legal mechanism is in direct contradiction to articles 3 and 7 of Universal Declaration of Human Rights, which ensure everyone right to life as well as right to be equal before law without any form of discrimination.

Furthermore establishing a different amount of compensation, which based on gender identity, contravenes the principles of Convention on the Elimination of All Forms of Discrimination namely above-mentioned articles 1 and 2.

Another significant issue regarding equality is the very imposition of punishment. In many cases, women may face harsher or more likely punishment for the same offenses, especially when it comes to offenses related to moral and ethical norms. This approach stems from deeply entrenched societal perceptions of women as the bearers of family honor, which leads to heightened expectations regarding their behavior and, consequently, a harsher state response to any violations thereof.

Significant restrictions are also evident in procedural terms, particularly within the framework of the rules of evidence. In certain legal systems, a woman’s testimony is given less legal weight than a man’s, or requires mandatory additional corroboration. This practice significantly limits women’s

²⁸ 21

ability to exercise their right to a defense, placing them at a deliberate disadvantage during criminal proceedings.

Such approaches directly contradict fundamental international standards of fair trial. In particular, Article 14 of the International Covenant on Civil and Political Rights guarantees the equality of all persons before the courts, while Article 26 of the same document enshrines the general principle of equality before the law and prohibits any discrimination. Furthermore, Article 10 of the Universal Declaration of Human Rights affirms the right of every person to a fair and public hearing by an independent and impartial tribunal, which excludes any bias based on gender.

Thus, the transfer of religiously motivated gender stereotypes into the legal sphere leads to a violation of the principles of equality and fair trial. Their impact on criminal proceedings is systemic in nature, which, as exemplified by Iran, manifests itself in the entrenchment of legal inequality for women. This is reflected in the differentiated age of criminal responsibility, the lower “value” of a woman’s life in the legal system, and procedural restrictions. Therefore, to ensure fundamental human rights and fair trial, it is necessary to distinguish between certain religious institutions and the legal system.

5. The absence of life imprisonment for women in post-Soviet countries and what is the impact of stereotypes on this issue? Pregnancy as circumstance that mitigates criminal liability

In many countries, life imprisonment replaced death penalty, which was the most severe form of punishment. However, its application is not gender-neutral, as certain legal systems preserve norms that reflect stable social views of women’s role. Also in most post-Soviet countries, life imprisonment can not be applied to women’s.

In Azerbaijan, Moldova, Kazakhstan, Kyrgyzstan, and other countries, this rule is justified by principle of humanism in criminal law. Such approach gave rise to numerous academic and legal debates as to whether this decision truly shows humanism or instead stereotypical and discriminatory.

In 2019, the issue of abolishing the usage of life imprisonment to women was also considered in Ukraine. A draft law No. 10392 “On Amendments to Certain Legislative Acts of Ukraine (regarding the abolition of life imprisonment for women)” was submitted to the Verkhovna Rada of Ukraine. The draft proposed a new wording of article 64 of the Criminal Code of Ukraine, according to which: “Life imprisonment shall not be applied to persons who committed crimes under the age of 18, to persons over the age of 65, and to women, as well as in cases provided in part four of article 68 of this Code.” The provisions of this draft law completely cancel the usage of life imprisonment to

women.²⁹ The opinions of legal scholars divided. The draft law provoked a controversial reaction between lawyers and the academic community, as most of them consider it unjustified to cancel life imprisonment for women who, during committing serious crimes, guided by similar intentions to men's. This position is fully justified, however, such women are minority, and modern domestic legislation must be improved according to European standards.³⁰

In support of this draft law T.V.Duyunova said that, according to anatomical and physiological features, woman is biologically weaker being and has certain limitations in her physical abilities. In this regard, some scholars justify the need for a differentiated approach to the criminal women's liability, referring to their increased vulnerability and socio-biological characteristics.³¹

It is also argued in academic literature that only woman who experienced violence is capable of committing a serious crime which life imprisonment may be imposed for. In this context, it is emphasized that women are more emotionally and socially vulnerable beings compared to men, and their igher sensitivity is sometimes justified as a factor that may indirectly influence criminal behavior.

In contrast, V.V.Hryshchenko emphasized that imposition of punishment cam not involve gender differences, except where it is provided by law, since such sanction as life imprisonment is used for comitting of serious crimes, and the act committed by the offender has significant negative consequences.³²

This draft law did't enter into force due to constitutional guarantees of equality, however, some advantages for women towards life imprisonment still remain in Ukraine. As it was already noted, article 64 of the Criminal Code of Ukraine excludes possibility of imposing life imprisonment for pregnant women.³³ In this sense, woman acts as a special subject of criminal law due to her physiological condition. According to general theoretical provisions of criminal law, a special subject of crime is a person who, has not only general characteristics of subject, but also possesses additional features that have criminal law significance and define possibility or limits of bringing such person to liability. In scientific researches, this approach is interpreted as a form of positive discrimination, which is understood as giving certain categories additional legal guarantees or preferences in order to achieve equality and protect their interests. In this context, the justification for positive discrimination is well-founded, as it is aimed not only to protect the health of the woman but, firstly,

²⁹ <https://molodyivchenyi.ua/index.php/journal/article/download/2089/2068>

³⁰ <https://pgp-journal.kiev.ua/archive/2020/12/35.pdf>

³¹ 29

³² 29

³³ Article 64 of Ukrainian Criminal Code

to protect the rights and interests of the unborn child, who is actually subject of criminal law measures without being a subject of crime.

Despite positive aspect of this approach, its application is accompanied by debates and raises concerns about the risk of overuse of relevant legal guarantees. In particular, the provision of article 64 of the Criminal Code of Ukraine also applies to situations where a woman was not pregnant at the time of committing the crime but acquired this status before sentencing. In such circumstances, there is a risk that pregnancy may be used as a basis for avoiding the appointment of the most severe punishment, women who have committed serious crimes may deliberately become pregnant in order to mitigate the severity of the sentence. Measures based on a humanistic approach must have an objective and reasonable justification. According to approaches of the United Nations (Human Rights Committee, General Comment No. 18),³⁴ differences in legal regulation are allowable only if they pursue a legitimate aim and are proportionate to it. In the case of prohibition on using life imprisonment on pregnant women, such aim is generally justified, however, the mechanism for realization this guarantee may raise doubts from the perspective of proportionality.

At the same time, modern European legal discourse emphasizes need to avoid fixing legal approaches based only on traditional perceptions of social roles of women and men. In particular, Council of Europe documents, such as the Gender Equality Strategy 2018–2023 and the Gender Equality Strategy 2024–2029, emphasise importance of ensuring equal division of family responsibilities and the increasing role of fathers in child rearing. This reflects the phased transformation of gender roles in society and need to take these changes into account when shaping legal norms. In this regard, question arises as to fairness of granting exclusive criminal law guarantees only to women, especially in cases where men may also perform childcare functions. So, although the prohibition on imposing life imprisonment on pregnant women has a justified aim, its realization must be carried out according to principles of proportionality, fairness, and gender equality to prevent potential abuse.

Conclusion

Gender stereotypes are often formed on the base of certain historical views about the social roles of women and men in society. Their formation has also been partly influenced by various religious beliefs. However, gender stereotypes are not only a problem of perception regarding women or men, but also a factor that significantly influences the legal system, especially criminal proceedings. The study identified a number of problem areas where gender stereotypes have the greatest impact on the

³⁴ <https://www.refworld.org/legal/general/hrc/1989/6268>

fair examination of cases and the making of decisions. These areas include the assessment of victims' behavior in sexual assault cases, the determination of sentencing in relation to the gender of the accused, and the formation of a judge's personal beliefs under the influence of social biases and their own life experiences. The analysis confirms that gender stereotypes have a complex impact on the criminal justice system. They operate both at the individual level - through the biases of judges, prosecutors, or investigators - and at the institutional level, becoming ingrained in legal norms or established judicial practice. This leads to a departure from the principles of objectivity and impartiality, which puts the right to a fair trial at risk.

Especially dangerous is the way stereotypes misrepresent the interpretation of evidence and the perception of the behavior of those involved in the proceedings. The study's findings confirm that the concept of the "ideal victim" is frequently applied in sexual assault trials. This often leads to the victim's testimony being called into question, while the defendant's actions are justified. At the same time, when a woman stands trial, her actions are judged through the prism of gender expectations: either as a sign of emotional instability or as a departure from "traditional" female behavior, which directly influences the harshness of the sentence. At the same time, an ambivalence regarding gender stereotypes in the judicial system has been identified. On the one hand, there is a bias against women who violate patriarchal norms (in particular, those accused of violent crimes). On the other hand, there is a mechanism of "affirmative action" in place, under which women may receive lenient punishments or procedural concessions based on paternalistic ideas about their vulnerability, motherhood, or the perception that they are less of a threat to society.

However, both of these approaches violate the principle of equality before the law, because instead of individual determination of liability, a generalized approach is applied that is based exclusively on the gender of the individual.

The influence of gender stereotypes, which have become ingrained in legal systems under the influence of religious or cultural factors, needs special attention. As has been established, in a number of countries such stereotypes acquire normative status, leading to direct discrimination regarding the age of criminal responsibility, the evaluation of evidence, or the sentencing of punishment. This demonstrates that the problem of gender stereotypes extends beyond individual perception, taking on a systemic character and influencing the very architecture of the criminal justice system.

It is important to realize that even in legal systems where equality is formally established, gender stereotypes often operate in a hidden way - through the subconscious beliefs and cognitive biases of those who apply the law. Such influence is not always noticeable, yet it has the power to fundamentally change the course of legal proceedings, particularly when assessing guilt, the reliability of evidence, or determining punishment. Therefore, achieving true gender equality in the

criminal justice system requires complex changes. This involves not only bringing legislation into line with international standards, but the development of a legal culture free from stereotypical thinking.

Key factors in this process include the professional training of judges and law enforcement officials, the integration of gender-sensitive practices into the judicial system, and the improvement of mechanisms for monitoring compliance with the principle of non-discrimination.

Therefore, the elimination of gender stereotypes is a necessary condition for the establishment of fair justice. Only by moving away from biased stereotypes and focusing on the unique circumstances of each case can we ensure equal protection of citizens' rights and the effective functioning of the criminal justice system in a democratic society.

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GENDER EQUALITY IN PROFESSIONAL SPORT UNDER EU LAW: THE LIMITS OF EQUAL PAY IN ADDRESSING STRUCTURAL ECONOMIC DISPARITIES

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Abstract

This article examines whether, and to what extent, the current EU legal framework is capable of addressing gender-based pay disparities in professional sport. The research problem arises from the persistent gap between the principle of equal pay under EU law and the economic realities of the sports sector. The analysis is based on a doctrinal legal method, including an examination of EU primary and secondary law, as well as relevant case law of the Court of Justice of the European Union.

The findings demonstrate that EU equal pay rules have limited effectiveness in sport due to structural and market-based factors. In particular, the distinction between workers and self-employed athletes, the requirement of comparability, and the “single source” criterion restrict the application of Article 157 TFEU. Moreover, key drivers of income in sport—such as sponsorships, media rights, and commercial value—largely fall outside the scope of EU regulation.

The article concludes that EU law, in its current form, is insufficient to ensure substantive pay equality in professional sport. While indirect measures may influence structural conditions over time, achieving genuine equality requires broader changes beyond the legal framework.

Keywords

gender equality, payment gap, sport, EU law

Introduction

Gender equality and equal rights between genders are fundamental principles in both EU law and international law. These principles are reflected, inter alia, in the Charter of Fundamental Rights of the European Union, where the promotion of equality is established as a central objective.² These principles are also applicable within the field of sport, which constitutes an important social and economic arena, and in which both public and private actors bear responsibility for addressing inequality.

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² See also among others: The universal declaration of human rights (UDHR) by the UN, and CEDAW

Over the past decades, there has been significant progress in relation to women's participation and rights in sport.³ Increased attention and political focus have contributed to improvements in several areas, including greater representation and more equal conditions of competition. An illustrative example is the Olympic Games in Paris 2024, where, for the first time, there was an equal distribution between female and male athletes.⁴ At the same time, the commercialisation of sport has also served highlight significant economic disparities between women's and men's sport.⁵

Despite this development, significant differences between women and men persist, particularly with regard to economic conditions and opportunities. Pay disparities in professional sport are reflected in differences in salaries, prize money, and commercial income, thereby affecting female athletes' ability to compete on equal terms.⁶ The issue is therefore not only whether such inequalities exist, but also the extent to which they can be justified, and whether the current legal framework is capable of addressing them.

This article examines whether, and to what extent, the EU legal framework is capable of addressing gender-based pay disparities in professional sport, with particular emphasis on salaries, prize money, and sponsorship income. The analysis is grounded in EU law and supplemented by selected national and international examples in order to illustrate broader structural patterns and comparative perspectives.

The article is based on a doctrinal analysis of EU primary and secondary legislation, as well as relevant case law of the Court of Justice of the European Union, supplemented by legal and academic literature.

The article proceeds as follows: it first sets out the EU legal framework governing gender equality and sport. It then analyses gender-based pay disparities and their underlying causes. The subsequent section examines the limitations of EU law in addressing such disparities, with

³ UN Women. "Five things to know about women and sport". [online]. Available at: <https://www.unwomen.org/en/articles/explainer/five-things-to-know-about-women-and-sport>

⁴ International Olympic Committee. "Gender equality through time". [online]. Available at: <https://www.olympics.com/ioc/gender-equality/gender-equality-through-time>

⁵ Council of Europe. ALL IN: Towards gender balance in sport – How to make an impact on gender equality in sport. [online]. Available at: <https://rm.coe.int/all-in-toolkit-how-to-make-an-impact-on-gender-equality-in-sport-all-y/1680989ab2>

⁶ *Ibid.*

particular focus on individual and team sports. Finally, the article discusses possible measures within the framework of EU law.

Legal framework

At the most fundamental level, the application of EU law to sport is governed by Article 165 TFEU (1), second paragraph. The provision codifies earlier case law of the Court of Justice of the European Union by establishing that sport falls within the scope of EU law, while at the same time requiring that due regard be given to its “specific nature”.⁷ However, this does not imply that all matters of a sporting nature may derogate from the core areas of EU law.⁸ On the contrary, the sports sector must, as a general rule, comply with EU law, unless deviations can be justified on the basis of legitimate and proportionate considerations linked to the specific characteristics of sport.⁹ The question of whether gender-based pay differences may be justified by reference to such specificities raises particularly complex issues, which will be examined further below.

A central issue in the application of the principle of equal pay under Article 157 TFEU is whether professional athletes are to be classified as “workers” or as “self-employed”. This classification is decisive for whether the provision applies at all. The case law of the Court of Justice demonstrates that athletes participating in team sports are, as a general rule, regarded as workers within the meaning of EU law.¹⁰ By contrast, the Court has held that individual athletes are to be regarded as “self-employed entrepreneurs”.¹¹ The consequence is that athletes in team sports fall within the scope of Article 157 TFEU, whereas individual athletes, in principle, fall outside the direct scope of the provision.

Even where professional athletes are classified as “workers”,¹² particular challenges arise with regard to the enforcement of the principle of equal pay. In *Tesco*, the Court of Justice clarified that the concept of “work of equal value” may apply even where work is carried out at different establishments, provided that the pay disparity can be attributed to a single source.¹³ This

⁷ See Judgment from the CJEU - Case C-415/93, *Union royale belge des sociétés de football association ASBL v Bosman* EU:C:1995:463. See also Case C-519/04 P, *Meca-Medina and Majcen v Commission* EU:C:2006:492. See also article 165 TFEU.

⁸ Judgment of the CJEU - C-680/21, *Royal Antwerp Football Club*.

⁹ Case C-519/04 P, *Meca-Medina and Majcen v Commission* EU:C:2006:492

¹⁰ GÁBRIŠ, Tomáš: Sports Law. s. 42. With further citation to *BOGAERT, Stefaan van den: Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman*. Hague: Kluwer Law International, 2005, p. 52-55.

¹¹ Ibid. page 42. See also Case C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, and Case 36/74 *Walrave and Koch* [1974] ECR 1405.

¹² Article 157 TFEU.

¹³ Case C-624/19 *Tesco Stores Ltd v USDAW and others* EU:C:2021:429.

requires the existence of an identifiable entity responsible for determining pay and capable of remedying any disparities. When transposed to the sporting context, however, this requirement has limited practical significance. Professional athletes are typically employed by different clubs, and men's and women's sport is often organised in separate leagues and competitive structures. As a result, the "single source" requirement will rarely be satisfied, which in practice limits the effectiveness of EU equal pay rules within the sporting sector.

The EU legal framework is further supplemented by secondary legislation and policy measures aimed at strengthening equality in the labour market, which, in principle, also apply to professional sport. Of particular importance is the Recast Directive, which establishes the principle of equal pay for work of equal value and prohibits both direct and indirect discrimination.¹⁴ The Directive will, in principle, be applicable to professional athletes who are classified as workers under EU law.¹⁵

Furthermore, the Work–Life Balance Directive, concerning the reconciliation of work and family life, may be of particular relevance for female athletes by establishing minimum rights relating, *inter alia*, to parental leave and flexible working arrangements.¹⁶ EU law is also complemented by policy initiatives emphasising that gender equality in sport forms part of the Union's broader social and economic objectives,¹⁷ which in turn may have implications for pay disparities.

The framework must also be viewed in light of international obligations, including Article 11 of the Convention on the Elimination of All Forms of Discrimination against Women and ILO Convention No. 100 on Equal Remuneration, as well as Article 14 of the European Convention

¹⁴ Directive 2006/54/EC of the European Parliament and of the Council of 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).

¹⁵ GÁBRIŠ, Tomáš: Sports Law. s. 42. Further citation BOGAERT, Stefaan van den: Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman. See also Case 66/85 Lawrie-Blum v Land Baden-Württemberg EU:C:1986:284

¹⁶ Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers, OJ 2019 L 188/79. See article 2.

¹⁷ See Resolution of the Council and of the representatives of the Governments of the Member States meeting within the Council on the key features of a European Sport Model, OJ 2021 C 501/01; Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, of 21 May 2014 on the European Union Work Plan for Sport (2014–2017), OJ 2014 C 183/12; European Commission, A Union of Equality: Gender Equality Strategy 2020–2025, Brussels, 2020; European Commission, Towards More Gender Equality in Sport: Recommendations and Action Plan, Brussels, 2022; European Union, European Pillar of Social Rights, 2017

on Human Rights and Protocol No. 12 on non-discrimination.¹⁸ At the same time, developments within sports governance demonstrate that certain measures may contribute to enhanced gender equality, such as the Union Cycliste Internationale's introduction of minimum salary provisions and maternity-related rights for female cyclists.¹⁹

The problem of gender-based pay disparities in sport

Gender-based pay disparities in professional sport are frequently justified by reference to market dynamics, including differences in revenue generation, audience demand, and commercial value. However, the existence of such justifications does not negate the broader legal and societal concerns raised by persistent inequalities in remuneration.

First, gender-based pay disparities challenge the EU's legal framework on equal pay, equality, and equal opportunities irrespective of sex. These principles are firmly established within EU law²⁰ and are also reflected in broader international commitments to gender equality.²¹ Even where such disparities are explained by reference to market-based factors, they may nonetheless conflict with the fundamental principles underlying EU equality law.²²

Beyond the strictly legal dimension, pay disparities in sport raise broader societal concerns. Sport occupies a uniquely visible and influential position, functioning not merely as an economic activity but also as a cultural and social institution.²³ Persistent inequalities in the remuneration of male and female athletes may therefore contribute to the reinforcement of gender stereotypes and the normalisation of unequal treatment.²⁴ In this sense, unequal pay in

¹⁸ United Nations, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979, Art. 11; International Labour Organization, Equal Remuneration Convention (No. 100), 1951; Council of Europe, European Convention on Human Rights, Art. 14 and Protocol No. 12.

¹⁹ Union Cycliste Internationale, "The UCI takes decisions in favour of the professionalisation of women's cycling, and commits to a fairer and safer sport", 2 August 2023. [online]. Available at: <https://www.uci.org/pressrelease/the-uci-takes-decisions-in-favour-of-the-professionalisation-of-womens/3v6b9Jot77gDWpCSaFqpd0>

²⁰ See Article 157 TFEU; Articles 21 and 23 of the Charter of Fundamental Rights of the European Union.

²¹ See as example CEDAW art 11; UDHR arts 2 and 23.

²² European Commission, Towards More Gender Equality in Sport: Recommendations and Action Plan (2022); OECD, Gender Equality in Sport: Governance, Investment and Media Coverage (2020).

²³ Council of Europe, ALL IN: Towards gender balance in sport – How to make an impact on gender equality in sport, Strasbourg: Council of Europe, 2019, Toolkit 2 (Chapter 2). [online]. Available at: <https://rm.coe.int/all-in-toolkit-how-to-make-an-impact-on-gender-equality-in-sport-all-y/1680989ab2>

²⁴ Cooky, Cheryl; Messner, Michael; Musto, Michela, "It's Dude Time! A Quarter Century of Excluding Women's Sports in Televised News and Highlight Shows", *Communication & Sport*, 2015, vol. 3, no. 3, pp. 261–287; and European Commission, Gender Equality in Sport: Proposal for Strategic Actions 2014–2020, Brussels, 2013. [online]. Available at: https://ec.europa.eu/assets/eac/sport/events/2013/documents/20131203-gender/final-proposal-1802_en.pdf

sport risks undermining the potential of sport as a vehicle for social progress and gender equality.

Moreover, disparities in pay can have tangible consequences for the development of women's sport. Lower levels of remuneration reduce the ability of female athletes to pursue professional careers on equal terms with their male counterparts, thereby limiting the pool of elite participants and affecting the overall competitiveness and visibility of women's sport.²⁵ This may in turn perpetuate a structural cycle of underinvestment, reduced media coverage, and continued disparities.

The limited availability of sustainable professional opportunities also affects the presence of visible role models. The existence of such role models has been identified as a key factor in promoting participation, especially among younger athletes, and in supporting the long-term development of sport.²⁶ Persistent pay disparities may therefore have effects that extend beyond the individual athlete, influencing participation patterns and the future trajectory of women's sport more broadly.

How the differences arise

The underlying causes of gender-based pay disparities in sport are complex and multifaceted. Broadly speaking, these explanations can broadly be understood as falling into three main categories: market-based factors, structural and organisational conditions, and more deeply rooted systemic and cultural mechanisms.

A central explanation is grounded in market dynamics. Pay disparities are often justified by reference to differences in market value between women's and men's sport, including variations in audience interest, commercial value, and revenue generation.²⁷ From this perspective, sponsorship investments are driven by expected returns, whether in the form of increased visibility, reputational benefits, or direct financial gain. In a market characterised by freedom of contract, actors are, in principle, free to determine whether, and on what terms, they wish to enter into sponsorship agreements. Lower demand for women's sport consequently leads to

²⁵ *Ibid.*

²⁶ UNESCO, Global report on women in sport, Paris: UNESCO, 2024. [online]. Available at: <https://unesdoc.unesco.org/ark:/48223/pf0000390527>

²⁷ Napoli, Julie; Nicholls, Montana; Ouschan, Robyn, "The paradox of challenging and reinforcing stereotypes in women's sport sponsor communication", *Journal of Marketing Management*, 2024, vol. 40, no. 1–2, pp. 72–101. [online]. Available at: <https://doi.org/10.1080/0267257X.2023.2273937>

reduced sponsorship revenues and a more limited financial basis for female athletes and teams.²⁸

A closely related factor is the level of media exposure afforded to women's sport. It is well documented that women's sport receives less media coverage than men's sport.²⁹ As visibility constitutes a key driver of commercial value, reduced media attention directly affects both sponsorship interest and overall revenue generation. At the same time, the scope for regulating such disparities is limited, inter alia due to considerations of editorial independence and freedom of expression.³⁰ These factors contribute to the persistence of existing inequalities.

The organisation of sport also plays a significant role in the emergence of pay disparities. As a general rule, men and women compete in separate leagues and tournaments. This often entails different revenue structures³¹, which are often invoked to justify differences in salaries and prize money. In light of the EU principle of equal pay, which largely presupposes comparability within the same employer or pay structure, this creates challenges for the application of the concepts of "the same work" or "work of equal value".³²

At the same time, it is important to qualify the significance of prize money as a source of income. Although equal prize money has been introduced in certain sports, it often constitutes only a limited portion of athletes' overall earnings, particularly at elite level.³³ In individual sports, a substantial share of athletes' income is typically derived from personal sponsorship agreements and, in some cases, appearance fees, which are more directly determined by market value.³⁴ This may contribute to the persistence of economic disparities between male and female athletes. In team sports, by contrast, pay disparities are more directly reflected in salaries determined by clubs.³⁵

²⁸ Abrams, Olivia, "Why Female Athletes Earn Less Than Men Across Most Sports", Forbes, 23 June 2019. [online]. Available at: <https://www.forbes.com/sites/oliviaabrams/2019/06/23/why-female-athletes-earn-less-than-men-across-most-sports/>; cited in Ramdat, Bryan, "The Gender Pay Gap, in Relation to Professional Sports", Journal of Race, Gender, and Ethnicity, 2021, vol. 10, pp. 45–65.

²⁹ European Commission, Towards more gender equality in sport, 2022.

³⁰ Charter of Fundamental Rights of the European Union, OJ 2012 C 326/391, Art. 11; Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on audiovisual media services (Audiovisual Media Services Directive), OJ 2010 L 95/1, as amended by Directive (EU) 2018/1808.

³¹ Parity, 2024 Fan Survey, 2024. [online]. Available at: https://paritynow.co/hubfs/2024%20Fan%20Survey_ParityxSurveyMonkey_FINAL-updated.pdf

³² Article 157 TFEU.

³³ Council of Europe, ALL IN: Towards gender balance in sport, 2019

³⁴ *Ibid.*

³⁵ FIFPRO, Working conditions in professional football, 2023. [online]. Available at: <https://media.fifpro.org/media/4eslemz2/working-conditions-in-professional-football.pdf>

In addition, pay disparities may be explained by underlying structural and cultural factors. Research has shown that leadership, competence, and performance in sport have historically been associated with masculinity, thereby contributing to a lower prioritization of female athletes.³⁶ This has led to lower prioritisation of measures aimed at improving the economic conditions of women's sport.

Taken together, gender-based pay disparities in sport may be understood as the result of an interaction between market dynamics, institutional structures, and historically embedded perceptions. These factors are mutually reinforcing lower visibility leads to reduced revenues, which in turn limits investment and further development. This contributes to the persistence of existing inequalities.

Structural limitations of EU law

EU equal pay regulation has, in principle, been developed for traditional employment relationships and therefore does not fully capture the specific conditions that characterise sport. Although the principle of equal pay is established in Article 157 TFEU, EU law allows for objectively justified differences in treatment.³⁷ In the context of sport, pay disparities are often justified by reference to the specific nature of sport, including the organisation of separate competitions and differing revenue structures.

Differences that would be considered problematic in other sectors may, to a greater extent, be accepted as legitimate in the context of sport. Furthermore, the enforcement of the principle of equal pay in sport is, in practice, limited. This is largely due to the difficulty of identifying clear violations of equal pay rules within the complex economic structures that characterise the sports sector.

Moreover, the regulation of equal pay is largely principle-based and not sufficiently adapted to the underlying causes of pay disparities in sport. Such disparities are significantly influenced by commercial factors, including sponsorship agreements, media and broadcasting rights, and competition structures.³⁸ These commercial elements are not directly addressed by EU equal pay regulation within labour law. As a result, a mismatch arises between the legal framework

³⁶ Owen, Anthony; Peter, Linda; Martins, Alice, "Gender Equality in the Sports Legal Framework: A Global Analysis of Challenges, Progress, and Future Directions", August 2025. [online]. Available at: https://www.researchgate.net/publication/394342001_Gender_Equality_in_the_Sports_Legal_Framework_A_Global_Analysis_of_Challenges_Progress_and_Future_Directions

³⁷ Article 165 TFEU.

³⁸ Fink, Janet S., "Hiding in plain sight: The embedded nature of sexism in sport", *Journal of Sport Management*, 2016, vol. 30, no. 1, pp. 1–7. [online]. Available at: <https://doi.org/10.1123/jsm.2015-0048>

and the actual drivers of pay disparities. Consequently, equal pay rules have limited practical effect, as they do not substantially engage with the underlying structures that sustain these inequalities.

Individual athletes

For individual athletes, a central challenge is that they are, in many cases, classified as self-employed and therefore fall outside the scope of Article 157 TFEU. As a result, the EU labour law on equal pay have limited applicability in this context.³⁹

Although equal prize money has been introduced in several international competitions, particularly in larger and more high-profile tournaments,⁴⁰ prize money often constitutes only a limited part of athletes' overall income.⁴¹ A substantial share of their income is derived from individual sponsorship agreements and commercial partnerships, which are largely determined by the athlete's market value.

Such sources of income largely fall outside the scope of EU law. The sponsorship market is largely based on private agreements and commercial considerations, and the EU has limited competence to intervene in such matters.⁴² Direct regulation of sponsorship income would also raise several legal concerns, including potential interference with contractual freedom and the "freedom to conduct a business".⁴³

Furthermore, it would be practically challenging to determine what constitutes "work of equal value" in a market where commercial value is influenced by a range of factors, such as visibility, performance, and audience interest. This makes it difficult to apply the principle of equal pay in a meaningful way in this context.

Team sport

³⁹ GÁBRIŠ, Tomáš: Sports Law.

⁴⁰ Falkingham, Katie; Oxley, Sonia; Thompson, Anna, "Women's football: The fight for equal pay", BBC Sport, 8 March 2021. [online]. Available at: <https://www.bbc.com/sport/56184881>

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ The EU-charter of fundamental rights article 16.

EU law also faces significant limitations in the context of team sports. Although athletes in team sports are more likely to be classified as “worker”,⁴⁴ challenges arise in the application of the principle of equal pay.

First, men and women generally compete in separate leagues and tournaments, resulting in distinct economic structures.⁴⁵ This provides a basis for arguing that there is no “same work” or “work of equal value”,⁴⁶ despite the fact that the athletes participate in the same sport.

Secondly, pay determination is, in practice, dispersed across multiple independent actors. Players are employed by different clubs, which operate within varying economic conditions and competitive structures.⁴⁷ Even within the same club, women’s and men’s teams often operate under different financial conditions in relation to remuneration.⁴⁸ These differing revenue bases are linked to media rights, sponsorship income, and audience interest.⁴⁹ As a result, a club’s overall revenue is often generated by the men’s team,⁵⁰ which in practice forms the basis for salary levels.

As a result, pay disparities between women’s and men’s teams may appear to be economically justified and thus objectively justified under EU law. Salaries are considered to reflect the economic value that players generate for the club, rather than constituting direct discrimination.⁵¹ At the same time, these income disparities are largely historically rooted and self-reinforcing, in that higher revenues enable greater investment and visibility, which in turn generate further revenue.

⁴⁴ GÁBRIŠ, Tomáš: Sports Law.

⁴⁵ Falkingham, Katie; Oxley, Sonia; Thompson, Anna, “Women’s football: The fight for equal pay”, BBC Sport, 8 March 2021. [online]. Available at: <https://www.bbc.com/sport/56184881>

⁴⁶ Article 157 TFEU.

⁴⁷ About Norwegian sport (EEA-member). - Landsorganisasjonen i Norge (LO), “Fortsatt lang vei til likestilling i idretten”, 2 September 2022 (updated 7 March 2023). [online]. Available at: <https://www.lo.no/hva-vi-mener/et-likestilt-arbeidsliv/nyheter-om-likestilling/fortsatt-lang-vei-til-likestilling-i-idretten/> ; Sporting Intelligence, Global Sports Salaries Survey 2017, 2017. [online]. Available at: <https://globalsportssalaries.com/GSSS%202017.pdf>

⁴⁸ Ernst, Martina; Puck, Jonas, “Gender pay gap on the soccer field – a sure case for a red card”, 17 May 2022. [online]. Available at: <https://executiveacademy.at/en/knowledge/career/gender-pay-gap-on-the-soccer-field-a-sure-case-for-a-red-card>

⁴⁹ Falkingham, Katie; Oxley, Sonia; Thompson, Anna, “Women’s football: The fight for equal pay”, BBC Sport, 8 March 2021. [online]. Available at: <https://www.bbc.com/sport/56184881>

⁵⁰ Deloitte, “Deloitte Football Money League – Women’s clubs”, 22 January 2026. [online]. Available at: <https://www.deloitte.com/uk/en/services/consulting-financial/analysis/deloitte-football-money-league-women.htm> ; compared to Deloitte, “Deloitte Football Money League – Women’s clubs”, 22 January 2026. [online]. Available at: <https://www.deloitte.com/uk/en/services/consulting-financial/analysis/deloitte-football-money-league-women.htm>

⁵¹ Falkingham, Katie; Oxley, Sonia; Thompson, Anna, “Women’s football: The fight for equal pay”, BBC Sport, 8 March 2021. [online]. Available at: <https://www.bbc.com/sport/56184881>

This makes it difficult to identify a single responsible actor for pay determination for the purposes of EU law. Consequently, the so-called “single source”-requirement will rarely be satisfied, which in practice limits the application of EU equal pay rules within team sports.⁵²

Overall, EU law is only to a limited extent suited to addressing pay disparities in sport. The legal framework is subject to structural limitations, both as a result of the specific nature of sport and the economic mechanisms underlying pay determination.

A fundamental issue is that responsibility for ensuring equal pay is distributed among multiple actors. Sports federations emphasise equality objectives, clubs point to economic constraints, and sponsors base their decisions on commercial considerations.⁵³ The absence of a clearly identifiable responsible actor contributes to slow progress, despite the existence of an overarching legal framework promoting gender equality.

Possible EU measures

The limited effectiveness of EU law to address pay disparities in sport raises the question of what measures may nevertheless be implemented within the limits of the Union’s competence. Although direct regulation of pay conditions in sport appears difficult to implement, a number of indirect measures may contribute to reducing these disparities.

One possible measure is to strengthen requirements relating to governance and accountability within sports organisations.⁵⁴ The EU has already taken steps to promote gender balance on corporate boards through the Directive on gender balance.⁵⁵ the Directive primarily applies to listed companies, it nevertheless illustrates the use of gender representation as a means of promoting equality. Similar requirements and regulatory approaches could be made relevant to sports organisations, either through soft law instruments or as conditions attached to public funding. Increased representation of women in sports governance may contribute to greater attention to pay disparities and the prioritisation of measures aimed at strengthening women’s sport.⁵⁶

⁵² Case C-624/19 *Tesco Stores Ltd v USDAW and others* EU:C:2021:429.

⁵³ Council of Europe. ALL IN: Towards gender balance in sport – How to make an impact on gender equality in sport. [online]. Available at: <https://rm.coe.int/all-in-toolkit-how-to-make-an-impact-on-gender-equality-in-sport-all-y/1680989ab2>

⁵⁴ See See Longa, *Gender Equality within the Sports Legal Framework* (2025).

⁵⁵ Directive (EU) 2022/2381 of the European Parliament and of the Council of 23 November 2022 on improving the gender balance among directors of listed companies and related measures, OJ 2022 L 315/44.

⁵⁶ Vaquero-Cristóbal, R.; Mateo-Orcajada, A.; Dağlı Ekmekçi, Y. A.; Pereira, A.; Amin, S.; Meroño, L.; González-Gálvez, N.; Ballı, Ö. M.; Mendes, F.; Mbah, O.; Abenza-Cano, L.; Leiva-Arcas, A.; Doğan, Y. İ.; Figueiredo, A.; Ponce-Ramírez, C. M.; Esparza-Ros, F.; Albaladejo-Saura, M., “Gender equity in sport from the perspective of

Indirect measures may also be employed to influence structural factors affecting market value in sport. A key factor in the context of equal pay in sport is media coverage. It is well documented that women's sport receives significantly less media attention than men's sport,⁵⁷ both in terms of quantity and in the way performances are portrayed.⁵⁸ This imbalance in media coverage contributes to lower visibility, which in turn leads to a lower commercial value for women's sport.

The EU's ability to directly regulate media content is rather limited. This is primarily due to considerations of freedom of expression and editorial independence.⁵⁹ Direct regulation or requirements mandating increased coverage of women's sport would therefore raise significant legal challenges. More realistic measures may include reporting obligations concerning gender balance in media coverage, financial incentives for the production and broadcasting of women's sport, or support schemes aimed at increasing visibility. Such measures would be compatible with the framework of EU law, but their impact is likely to be limited and dependent on changes in market behaviour and broader societal attitudes.

The EU also has limited capacity to regulate the sponsorship market in sport. Sponsorship income constitutes a significant part of the overall revenue structure in sport, and is particularly central to the economic situation of individual athletes. Nevertheless, the EU's regulatory tools in this area remain limited. Direct intervention in commercial agreements could conflict with principles of contractual freedom and the freedom to conduct a business,⁶⁰ and may also raise issues under EU competition law.⁶¹

However, the EU may still influence developments through measures aimed at increasing transparency and awareness, such as reporting requirements concerning the distribution of sponsorship income between genders or incentive schemes promoting investment in women's sport.

Overall, this demonstrates that the EU has limited ability to regulate the direct causes of pay disparities in sport, but may exert greater influence on the underlying structures through indirect measures. Such measures must, however, be carefully balanced against fundamental rights and

European women athletes and sport managers, physical education teachers and sport coaches", *Frontiers in Psychology*, 2024, vol. 15, article 1419578. [online]. Available at: <https://doi.org/10.3389/fpsyg.2024.1419578>

⁵⁷ Fink, Janet S., "Hiding in plain sight: The embedded nature of sexism in sport", *Journal of Sport Management*, 2016, vol. 30, no. 1, pp. 1–7. [online]. Available at: <https://doi.org/10.1123/jsm.2015-0048>

⁵⁸ *Ibid.*

⁵⁹ The EU-charter article 11.

⁶⁰ The EU-charter article 16

⁶¹ TFEU article 101 and 102

market considerations, and are therefore unlikely, on their own, to achieve substantive equal pay in sport.

Findings

This article shows that gender-based pay disparities in professional sport cannot be explained by reference to a single factor. Rather, these disparities arise from an interaction between market mechanisms, structural organisation, and historically unequal investment and attention. These factors are mutually reinforcing and contribute to maintaining a persistent economic imbalance between the genders.

Furthermore, the analysis demonstrates that EU equal pay rules have limited effectiveness within the sports sector. The legal framework has largely been developed in general terms and is primarily tailored to traditional employment relationships. In particular, the application of the principle of equal pay is constrained by the specific characteristics of sport, including the organisation of separate competitions and differing revenue structures.

The analysis also shows that the distinction between “workers” and “self-employed” persons is of decisive importance. Individual athletes largely fall outside the scope of EU equal pay rules, while in team sports these rules are weakened by requirements of comparability and the “single source” criterion. As a result, EU law primarily regulates only a limited part of the income structure in sport, whereas key factors such as sponsorship income and media rights have proven difficult to regulate without becoming disproportionately intrusive.

Finally, the analysis indicates that the EU is primarily limited to indirect measures, such as governance mechanisms, incentives, and visibility-enhancing initiatives. Although such measures may contribute to reducing disparities over time, their impact remains limited and is dependent on the response of the market and society.

Conclusion

This article has examined the extent to which EU law is capable of regulating gender-based pay disparities in professional sport. The analysis demonstrates a clear mismatch between the legal principles of equal pay and the economic realities of the sports sector.

The EU law establishes a principled foundation for equal pay, but is only to a limited extent adapted to the structural and market-based conditions that characterise sport. Requirements relating to worker status, comparability, and the “single source” criterion, as well as the need to

take account of the specific nature of sport, limit the application of the legal framework. At the same time, economic disparities are largely rooted in historical and structural factors, which means that pay differences often appear to be market-based and therefore legally justified.

On this basis, it may be concluded that EU law, as currently designed, is not sufficient to ensure substantive equal pay in professional sport. The legal framework primarily addresses formal equality within traditional employment relationships, while the key drivers of pay disparities remain largely unregulated.

This does not imply that EU law is without significance, but rather that its role is primarily indirect. Through measures aimed at enhancing visibility, transparency, and institutional accountability, the EU may contribute to influencing structural conditions over time. Nevertheless, achieving genuine pay equality will require an interplay between legal measures, market developments, and changes within the governance structures of sport.

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GENDER QUOTAS ON CORPORATE BOARDS: LESSONS FROM NORWAY AND IMPLICATIONS FOR EU LAW

Thomas Froholt¹

Abstract

The article examines the effectiveness of gender quotas for corporate boards, focusing on Norway and the EU's new legislation, which will go into effect from June 1st 2026. While the Norwegian model has successfully increased female board representation, its broader impact remains limited. The article assesses whether quotas are an effective policy tool and whether the EU's more flexible approach is likely to achieve similar results. The analysis draws on empirical findings from Norway and evaluates their implications for the design and effectiveness of the EU's regulation.

Keywords

Gender quotas, Board representation, Gender equality, Norway, European Union

1. Introduction

Gender equality in corporate leadership has in recent decades become a key concern in both national and European policy debates. Despite broader progress in labour market participation, women remain significantly underrepresented in decision-making positions within large companies.² In response to this imbalance, several jurisdictions have introduced regulatory measures aimed at increasing female representation on corporate boards, most notably through the use of mandatory gender quotas.³

Norway has been a regulatory pioneer, being among the first countries to adopt such measures, introducing binding quota requirements for public limited companies in the early 2000s.⁴ The regulations was a response to the systematic underrepresentation of women on corporate boards.⁵ More recently, the European Union has adopted Directive (EU) 2022/2381, which seeks to improve gender balance among directors of listed companies across Member States.

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² European Commission: *Commission welcomes political agreement on Gender Balance on Corporate Boards* [online]. Brussels: European Commission, 2022 [cit. 2026-04-04]. Available at <https://ec.europa.eu/>

³ See, for instance, French Law No. 2011-103 of 27 January 2011 (Copé-Zimmermann Law) and the German Act on Equal Participation of Women and Men in Leadership Positions (2015)

⁴ Act of 13 June 1997 No. 45 relating to public limited liability companies (Allmennaksjeloven) § 6-11a, as amended by Act of 19 December 2003 No. 120.

⁵ ECON Centre of Economic Analysis (2003), *Women and Men with board positions, as cited in Proposition no. 97 (2002-2003)*

While inspired in part by national experiences such as Norway's, the EU framework adopts a more flexible and less intrusive approach.⁶

This development raises important questions regarding both the effectiveness and desirability of quota-based regulation. Although the Norwegian model has succeeded in increasing female representation on corporate boards its broader impact on gender equality in corporate leadership remains contested.⁷ The central question of this article is therefore to what extent quota regulation in Norway have been effective, and if the experiences from Norway support the EU's regulatory approach as sound policy.

To examine this question, the article will proceed in four parts. First, it outlines the legal frameworks governing gender quotas in Norway and the European Union. Second, it examines empirical findings from Norway concerning the effects of quota regulation, with particular emphasis on both board representation and broader corporate outcomes. Third, it provides a critical assessment of quota-based regulation as a policy instrument. Finally, it evaluates the EU directive in light of the Norwegian experience; assessing whether the Union's more flexible approach is likely to achieve its intended objectives.

2. Legal framework

The following section outlines the legal frameworks governing gender quotas in Norway and the European Union. It focuses on the key rules, their scope, and enforcement mechanisms, in order to provide a basis for the subsequent analysis.

2.1 Norwegian law – quotas in public limited companies

In Norwegian law, gender quota requirements for corporate boards follow from the Public Limited Liability Companies Act (Allmennaksjeloven) § 6-11a. The provision establishes that each gender shall be represented by approximately 40 per cent of board members in public limited companies (ASA). The rules apply specifically to such companies, reflecting their public character and broader societal role.⁸

⁶ See Section 2.2 And 2.3 for a comparative analysis of the Norwegian and European Union frameworks.

⁷ See e.g. Prop.131LS (2022-2023) (amendments to company legislation concerning gender composition of boards and consent to participation in a decision of the EEA Joint Committee concerning the incorporation of Directive (EU) 2022/2381 into the EEA Agreement page 63-64.

⁸ *Ibid.* page 64, where it is emphasised that public limited companies are expected to act as role models and set standards for the wider business sector.

The legal consequences of non-compliance are significant. A board in non-compliance will not be lawfully constituted, and as such will lack the authority to represent the company or to enter into binding legal acts on its behalf.⁹ Continued non-compliance may also lead to compulsory dissolution of the company.¹⁰ The Norwegian model is therefore characterised by binding rules combined with strong enforcement mechanisms.

2.2 European law – Directive 2022/2381

At the European Union level, gender balance in corporate boards is regulated by Directive (EU) 2022/2381. The directive requires Member States to ensure that listed companies aim to achieve either at least 40 per cent representation of the underrepresented sex among non-executive directors, or 33 per cent among all directors.¹¹¹²

Unlike the Norwegian framework, the directive does not impose uniform and directly applicable sanctions. Instead, it requires Member States to introduce appropriate measures, including transparent selection procedures and effective, proportionate, and dissuasive sanctions. The directive thus leaves significant discretion to the national authorities in determining the legal consequences of non-compliance.¹³

2.3 Comparison – Norway vs. EU

Both frameworks aim to increase gender representation on corporate boards, but they differ in their regulatory structure. Norwegian law establishes a clear and binding rule with strict legal consequences, whereas the EU directive adopts a more flexible approach, relying on national implementation and procedural requirements. This distinction forms an important basis for assessing their respective effectiveness.

⁹ See Norwegian Supreme Court Judgement Rt-1993 p. 429 and Ot.prp.nr.97 (2002-2003) section 6.4.3, where it is assumed that failure to comply with statutory composition requirements renders the board unable to exercise its functions.

¹⁰ See Aarbakke et al: *Aksjeloven og Allmennaksjeloven, kommentarutgave*, 2nd edition, section 0.3.

¹¹ Directive (EU) 2022/2381, Article 5.

¹² The directive uses the terms “directors” and “non-executive directors” in order to accommodate different corporate governance systems across Member States. In the Norwegian context, this corresponds in practice to members of the board.

¹³ See the Directive Article 8

3. Empirical Findings from Norway

The Norwegian quota reform has been widely studied and provides a substantial empirical basis for assessing the effects of gender quota regulation. The findings can broadly be grouped into four categories: representation effects (3.1), economic and structural consequences (3.2), normative and societal impacts (3.3), as well as limitations and unintended effects (3.4).

3.1 Representation effects

Firstly, the reform has been clearly successful in achieving its primary objective of increasing female representation on corporate boards. From 2004 to 2009 Norway experienced an increase of more than 30 per cent from just under 10, to about 40 per cent representation for women in public limited companies.¹⁴ From 2009 to 2022 this upward trend continued, albeit at a slower pace, to 43 per cent.¹⁵

The impact however is not only limited to public limited companies. Data from the same time period show that female representation on corporate boards has also increased in private limited companies and cooperative enterprises, rising from approximately 15 to 20 per cent and from around 20 to 25 per cent, respectively, without being subject to the same statutory quota requirements.¹⁶

While the reform has been effective in achieving its primary objective, there has also been some development in leadership positions within companies. In particular the share of women serving as chief executive officers has increased over time. From 2004 to 2023 the share of female CEO's has increased from 5 to 11 per cent in public limited companies and from 13 to 17 per cent for private limited companies.¹⁷ For cooperatives, the share of female CEOs increased from approximately 22 to just over 30 per cent.¹⁸

Overall, the Norwegian experience demonstrates that quota regulation has been highly effective in increasing female representation at board level. Moreover, the data indicate some broader developments beyond the scope of the regulation, including modest increases in female representation in other company forms and in executive positions.

¹⁴ Statistics Norway (SSB): Styre og ledelse i aksjeselskaper [online]. Oslo: SSB, [2022] [cit. 2026-04-04]. Available at <https://www.ssb.no/>

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

3.2 Economic and structural consequences

While the representation effects on quota regulation are clear, its economic and structural consequences for the companies effected are more contested. The following section examines the imperial findings relating to these effects.

A central question in the literature is whether increased gender balance on corporate boards has any measurable impact on firm performance. Empirical studies generally find no consistent evidence that quota regulation has a negative effect on profitability. Rather, the results tend to be either neutral or slightly positive, depending on the methodology and performance indicators applied.¹⁹

These findings are further supported by recent comparative research. A meta-analysis covering multiple jurisdictions finds no consistent evidence that gender quotas negatively affect firm performance. Instead, effects are generally neutral or slightly positive, while also varying significantly depending on country context, methodology, and performance measures.²⁰

Beyond financial performance, several studies highlight structural effects on corporate governance. In particular, increased gender diversity has been associated with improved monitoring, greater board independence, and a heightened focus on compliance and regulatory adherence.²¹ Although such effects are not uniformly observed, they suggest that quota regulation may contribute to stronger governance practices.

Overall, the empirical findings suggest that quota regulation do not have a detrimental impact on firm performance. At the same time, the evidence points to certain structural improvements in corporate governance, particularly in terms of monitoring and compliance. This indicates that the effects of quota regulation may be more pronounced in relation to governance quality than financial outcomes.

3.3 Normative and societal impacts

Beyond their economic and structural consequences, gender quota regulations may also have broader normative and societal effects. In particular, such measures can be understood as interventions aimed at altering underlying patterns of recruitment and decision-making within corporate governance.

¹⁹ Teigen, M.: Kunnskapsoversikt om kjønnsbalanse i styre og ledelse [online]. Oslo: Institutt for samfunnsforskning, 2022 [cit. 2026-05-04] available at www.samfunnsforskning.no

²⁰ POST, C – BYRON, K. et al.: Gender quotas and firm performance: A meta-analysis. *Journal of Corporate Finance*, 2024

²¹ *Ibid.*

A key concept in this regard is that of homosocial reproduction, which refers to the tendency of decision-makers to select candidates who resemble themselves in terms of background, experience, and social characteristics.²² This mechanism has been identified as a contributing factor to the persistent underrepresentation of women in corporate boards, as existing board members, often male, tend to recruit within their own networks.

Against this background, quota regulation may function as a disruption of established selection patterns. By requiring a minimum level of gender representation, the rules effectively limit the scope for homosocial reproduction and compel organisations to expand their recruitment base. This is supported by empirical research. A study conducted in 2020 found that the introduction of quotas led organisations, headhunters and nomination committees to reassess prevailing notions of suitability for board membership.²³ In particular, the reform contributed to a broader recognition of previously undervalued forms of competence and experience, thereby challenging gendered assumptions about leadership and board qualifications.²⁴

These findings suggest that quota regulation may have effects that extend beyond formal representation, influencing how merit and competence are understood within corporate governance. In this sense, quotas may contribute not only to increased gender balance, but also to a broader and more inclusive conception of leadership and board suitability.

At a more general level, this indicates that quota regulation may function not only as a corrective mechanism, but also as a catalyst for gradual cultural and institutional change within corporate governance structures.

3.4 Limitations and unintended effects

While the Norwegian experience demonstrates several positive effects of quota regulation, the empirical findings also reveal certain limitations and unintended consequences.

A central observation is that the effects of the reform appear to be largely confined to board level representations.²⁵ As discussed above in section 3.1, the increase in female representation in executive positions has been more gradual and less pronounced, suggesting limited spillover effects beyond the institutional level at which the quotas are directly applied.

²² Prop. 131LS (2022-2023)

²³ Seierstad, et al. 2020 “Broadening of the field of corporate boards and legitimate capitals: An investigation of gender quotas in corporate boards in Norway”, Work, Employment And Society. Available online: <https://doi.org/10.1177/0950017019892835>

²⁴ *Ibid.*

²⁵ *Ibid.*

In addition, some studies indicate that companies have adapted strategically to the regulatory requirements. For example, firms have reduced the size of their boards in order to comply formally with quota rules while limiting the number of female board members in absolute terms.²⁶ Such adjustments raise questions about whether formal compliance necessarily leads to substantive change in corporate decision-making structures.

Relatedly, the phenomenon of so called “shadow boards” or informal governance structures has been highlighted in the literature.²⁷ In such cases, decision-making may shift away from the formal board to less regulated arenas, potentially undermining the intended effects of the quota regime. Consequently, female board members may become liable for decisions taken in these arenas, while they in reality have limited influence in the decision-making processes. There is, however, limited empirical evidence documenting the extent to which such structures are actually used in practice. The concern therefore remains partly hypothetical.

Together, these findings suggest that while quota regulation is effective in achieving formal representation targets, its broader impact may be more limited and context dependent. This highlights the importance of distinguishing between formal compliance and substantive change when assessing the overall effectiveness of quota-based regulation.

4. Analysis: Is quota regulation good policy?

The findings outlined above provide a basis for assessing whether quota regulation constitutes an effective and appropriate policy tool. While the Norwegian experience demonstrates that such regulation can be highly effective in increasing female representation on corporate boards, its broader effects are more nuanced and raise important questions. The following section examines these issues through a normative assessment of quota regulation, focusing on its effectiveness, justification, and broader implications. Gender equality constitutes a well-established objective in both Norwegian and European law. Its legitimacy as a policy goal is, for the purposes of this article, not in question.²⁸

²⁶ E24: Over 500 bedrifter omgår kvinnekrav ved å krympe styret [online]. Oslo: E24, 2024 [cit. 2026-05-04]. Available online: <https://e24.no/>

²⁷ Prop. 131LS (2022-2023), page 64

²⁸ Charter of the Fundamental Rights of the European Union, Art 23 and the Norwegian Equality and Anti-discrimination Act § 1

4.1 Effectiveness as a Policy Tool

The empirical findings show that quota regulation is highly effective in achieving its primary objective: increasing female representation on corporate boards. The Norwegian model demonstrates that mandatory quotas can produce rapid and substantial changes in board composition. This supports the use of quotas as a policy tool, particularly where the objective is clearly defined and measurable.

At the same time, the findings indicate that these effects are largely confined to board level representation. While some broader developments can be observed, including modest increases in other company forms and in executive positions, these changes are more limited and gradual. This suggests that quota regulation is effective in achieving targeted outcomes, but less effective in producing broader structural changes.

Overall, the findings strongly support quotas as an effective instrument for increasing board representation but indicate that their impact is more limited when the objective is extended beyond this level.

4.2 Means, Proportionality and Corporate Autonomy

As mentioned, gender equality is an accepted policy objective in both Norwegian and EU law. The question is therefore whether quota regulation is an appropriate and proportionate means of achieving that objective.

The findings suggest that quotas are effective in addressing structural barriers in recruitment processes. By limiting the discretion of existing decision-makers, quota rules force companies to look beyond established networks. This supports the use of quotas as a policy tool, as they directly target mechanisms such as homosocial recruitment.

At the same time, quota regulation represents a clear interference with corporate autonomy and the discretion of shareholders. This weighs against quotas, particularly from the perspective of private ordering and freedom of contract.

The empirical findings also show how the effects of quotas are largely limited to board-level representation. The lack of stronger spillover effects suggest that quotas primarily address the outcome of gender imbalance rather than its underlying causes. This weakens the case for quotas as a proportionate measure, especially if less intrusive alternatives could potentially achieve similar long-term results.

Overall, the findings support quotas as an effective corrective mechanism but raise concerns regarding proportionality and the extent of regulatory intervention.

4.3 Economic and Governance Considerations

The empirical findings show that quota regulation does not have a negative effect on firm performance. This weakens one of the main arguments against quotas, namely that they are economically harmful. In that sense the findings support the view that quota regulation is a defensible policy tool.

At the same time, the findings do not demonstrate clear positive effects on profitability. Increased gender representation on boards has not been shown to improve firm performance in a consistent or measurable way. This limits the extent to which quota regulation can be justified on economic grounds alone and therefore weighs against quotas as an efficiency-based policy. However, the findings point more consistently to improvements in corporate governance. Gender-diverse boards are associated with stronger monitoring, greater independence, and increased focus on compliance.²⁹ These effects suggest that quota regulation may improve the quality of corporate decision-making and oversight, which supports the case for quotas as a policy tool.

Overall, the economic findings are neutral, while the governance findings are moderately positive. Taken together this indicates that quota regulation is not economically harmful, and may contribute to better governance, but that its justification cannot primarily rest on economic efficiency.

4.4 Circumvention

Concerns have been raised that companies may circumvent quota requirements through strategic adaptations, such as reducing board size or shifting decision-making to informal structures. However, there is limited empirical evidence to suggest that such practices are widespread or have significantly undermined the functioning of quota regulation in practice. Nevertheless, available evidence indicates that such practices do occur in certain instances.³⁰

²⁹ Teigen, M.: Kunnskapsoversikt om kjønnsbalanse i styre og ledelse [online]. Oslo: Institutt for samfunnsforskning, 2022 [cit. 2026-05-04] available online: www.samfunnsforskning.no/

³⁰ Aftenposten (2025), “Gender Quotas: Male leaders need not be so afraid” opinion piece, 2025, [cit. 2026-14-04] available online: www.aftenposten.no/

Overall, the findings do not indicate that these concerns constitute a substantial problem. While such adaptations may occur in isolated cases, they do not appear to materially weaken the effectiveness of quota regulation as a policy tool.

4.5 Quotas as a Political “Quick Fix”

A further concern that has been raised in public debate is that quota regulation may function as a political “quick fix”.³¹ While quotas have been effective in increasing female representation on corporate boards, the share of women in executive positions has increased only modestly. This may create an impression of progress, while underlying structural barriers remain largely unchanged, and reduce the political incentive to pursue more comprehensive and long-term measures.

4.6 Overall Assessment and Implications for the EU

Taken together, the Norwegian experience suggests that quota regulation is an effective, but targeted policy instrument. It succeeds in achieving board-level gender balance and may contribute to improvements in governance and recruitment practices, but its broader impact on corporate leadership structures is more limited.

These findings are particularly relevant in assessing the European Union’s recent directive. Given that the EU framework adopts a more flexible and less intrusive approach, it is uncertain whether it will achieve effects comparable to those observed in Norway. While the directive may promote gradual improvements in gender balance, its weaker enforcement mechanism may result in a more limited overall impact.

Accordingly, the effectiveness of the EU model might depend on the extent to which Member States implement and enforce the directive in practice. The Norwegian experience indicates that strong and binding measures are particularly effective in achieving rapid change. Thus, more flexible approaches may risk producing slower and less pronounced results.

It should also be noted that Norway consistently ranks among the highest performing countries in terms of gender equality.³² This may have implications for the transferability of the findings. In particular, the effects observed in the Norwegian context may not necessarily be replicated

³¹ AFTENPOSTEN: *Regjeringens plan for kjønnskvotering er for inngripende* [online]. Oslo: Aftenposten, 2026 [cit-2026-14-04]. Available online: www.aftenposten.no

³² UNITED NATIONS DEVELOPMENT PROGRAMME: Human Development Report 2023/2024 [online]. New York: UNDP, 2024 [cit. 2026-05-04] available at: <https://hdr.undp.org/>

to the same extent in countries with different institutional or cultural frameworks. This might limit the extent to which the Norwegian experience can be generalised to other jurisdictions.³³

5. Conclusion

This article has examined the effectiveness of gender quota regulation in Norway and assessed whether the Norwegian experience supports the European Union's approach in regulating gender compositions of corporate boards in Public Limited Companies. The findings demonstrate that quota regulation is highly effective in achieving gender balance at board level, but that its broader impact on corporate leadership structures is more limited.

While quotas may contribute to improvements in corporate governance and to shifts in recruitment practices, they do not fully address the underlying causes of gender imbalance. The Norwegian experience therefore suggests that quota regulation is best understood as a targeted policy instrument rather than a comprehensive solution.

In light of this, the EU's more flexible approach may lead to more gradual and less pronounced results, particularly where enforcement mechanisms are weak. The overall effectiveness of the directive might therefore depend on its implementation at the national level and the extent to which Member States adopt robust enforcement measures.

³³ See for instance Ferri, G. – Ferrari, M.: Gender quota and corporate governance: a review. Corporate Governance, 2017, where they emphasize the findings heterogeneous and differ between countries, markets and institutional context.

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<https://hdr.undp.org/>

PATERNITY LEAVE AS A TOOL FOR GENDER EQUALITY: A COMPARATIVE ANALYSIS OF NORWEGIAN AND EU LAW

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Abstract

This paper compares the legal frameworks governing paternity leave in the European Union and Norway to evaluate lessons the EU can learn from Norway's system to facilitate gender equality. It analyzes the effectiveness of paternity leave in promoting gender equality. Gender equality in the labour market remains a persistent challenge in Europe, with women's workforce participation significantly affected by childcare responsibilities. The EU's Work-life Balance Directive (2019/1158) establishes minimum standards, while Norway has maintained a pioneering system since 1993 featuring earmarked, non-transferable father's quotas. This paper employs comparative legal analysis, examining legislative frameworks including the Work-life Balance Directive and National Insurance Act chapter 14. The analysis focuses on duration of leave, compensation levels, transferability of rights, and effectiveness in promoting gender equality using secondary sources.

Norway's 15 weeks of non-transferable paid leave at 80-100% earnings achieves over 90% uptake, contrasting with the EU's 10-day minimum. Norway's success is largely attributed to universal childcare expansion rather than leave policies alone. For the EU, enhancing effectiveness requires stronger minimum standards, childcare infrastructure investment, adequate pay, public financing, and cultural initiatives supporting father participation.

Keywords

Paternity leave, Gender equality, EU law, Norwegian law, Work-life Balance directive

1. INTRODUCTION

1.1 Background of the Problem

1.1.1 Historical and recent legislative developments in EU and Norway

As the years have gone by, gender equality has come more in focus in the European Union (EU). The EU has started to recognize that the askew distribution of childcare has big implications on women's representation in the labour market. The European Commission has estimated that the economic loss due to the gap in employment amounts to 370 million Euros a

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year.³ The exclusion of women in the labour market in the EU is partly due to biological reasons, such as breastfeeding the first months. However, despite being as qualified as men, a lot of women are withdrawing from the labour market due to difficulties in re-entering the labour market, as well as insufficient public childcare provisions.⁴ The Commissions main initiative was introducing the Work-Life Balance Directive. In the directive, a big initiative taken to even out the balance is by introducing 10 days of paid paternity leave.⁵

Norway has taken paternity leave further. The foundation was laid in 1993 with the introduction of a four-week father's quota, a legal and social mechanism that fundamentally redefined parental leave from a women's issue to a family and gender equality matter.⁶ This quota represented an explicit policy instrument designed to strengthen father-child relationships while promoting gender equality both in the workplace and domestic sphere. The "use it or lose it" principle embedded in the quota created a powerful legal incentive for paternal involvement in early childcare.⁷

The legal framework continued evolving, especially between 2005 and 2013, when the father's quota expanded from four to fourteen weeks, demonstrating Norway's sustained commitment to transforming gender roles through law. By 2015, the total parental leave reached 49 weeks at full compensation or 59 weeks at 80 percent compensation up to 6G, which refers to six times the National Insurance basic amount, an inflation adjusted calculation unit used to determine maximum benefit levels in the Norwegian social insurance system (totalling about 68 989 euro as of March 2026).⁸ Thus, fathers were entitled to ten weeks of non-transferable leave. Norway's model pioneered the concept of earmarked, non-transferable paternal rights as a tool for substantive gender equality.

1.1.2 How does the EU-Norway relationship work?

³ Arnalds, Asdis A., Ann-Zofie Duvander, Gudny Björk Eydal, and Ingolfur V. Gislason. 2021. "Constructing Parenthood in Times of Crisis." *Journal of Family Studies* 27 (3): 420–35. fetched from: https://www.researchgate.net/publication/373188824_Arranging_childcare_in_two_Nordic_countries_A_comparison_of_ECEC_start_in_Iceland_and_Sweden 17.03.2026.

⁴ The European Commission *Employment and social developments in Europe 2025*.

⁵ cf. the Work-life Balance Directive art. 4 (1).

⁶ LOV-1966-06-17-12..

⁷ Civita-notat nr. 7 / 2015.

⁸ Civita-notat nr. 7 / 2015 chapter 3.1.

Norway is not an EU member but is bound by EU law through the European Economic Area (EEA) Agreement as an EFTA state.⁹ This creates a unique legislative relationship where Norway must incorporate EU directives and regulations into national law to maintain single market access yet lacks voting rights in EU decision-making processes. Norway retains a theoretical veto right, though exercising it risks undermining the entire EEA framework.

Consequently, the Work-life Balance Directive and other EU directives and regulations in this area are binding for Norway through the EEA Agreement. However, these legal acts only become enforceable in member states and EEA countries after national implementation into domestic law.¹⁰ Norway currently has a considerable backlog of unimplemented EU directives, meaning that while legally obligated to incorporate these provisions, the actual domestic legal effect is delayed until the implementation process is completed.

1.1.3 Norway and the EU, two different entities.

An important thing to point out is that Norway and the EU are two different entities which considerably effects the lawmaking process. Norway is a state, and therefore, Norway can make laws specifically designed for the people of Norway and its culture. The EU on the other hand, is a multilateral organization with 27 member states. The legal acts which the EU passes naturally bears the effect of having to account for 27 different states. As a result, Norway has a greater opportunity to enact more specific laws compared to the EU. This fact must be recognized when analysing these two legal entities.

1.2 Main question:

The main question this paper will try to answer is:

How does Norway and the EU facilitate paternity leave, and should the European Union adopt key elements of the Norwegian model? How could such a framework be designed to accommodate the diverse economic capacities and social policy traditions of member states while maintaining meaningful minimum standards that effectively promote substantive gender equality?

⁹ European Parliament, *Briefing on EU-Norway relation*, (2015), Fetched 24.03.2026.

¹⁰ The European Commission, *Transposition of Single Market directive (2025)*, Fetched 24.03.2026.

1.3 Research Objectives

This paper pursues three interconnected research objectives that guide the comparative analysis of the regulation of paternity leave in the EU and in Norway, and how effective that regulation is at promoting gender equality:

First, to analyse and compare the legal frameworks for paternity leave in EU and Norwegian law by examining primary legislative sources, including the Work-life Balance Directive (2019/1158), its predecessor Directive 2010/18/EU, Folketrygdloven chapter 14 and Likestillings- og diskrimineringsloven. This objective involves identifying the key legal provisions, their scope, duration and compensation levels. This dual comparison, between the Norwegian legal framework and the EU legal framework provides deeper insight into how legal design choices affect outcomes.

Secondly, to evaluate the effectiveness of each system in promoting gender equality by assessing how legal design features, such as earmarked quotas, compensation levels, and transferability rules create incentives for paternal leave uptake and contribute to transforming gender norms around childcare and labour market participation.

third, to identify best practices and potential areas for improvement in both systems, drawing on the comparative analysis to offer evidence-based recommendations for policy development that could strengthen paternity leave as a tool for achieving substantive gender equality. To answer the question if the EU learn from Norway's model, and how it realistically, as a multi-national organization can implement some of the things that Norway has been doing for years.

1.4 Methodology

Comparative legal analysis forms the methodological foundation, examining the Norwegian and EU legal frameworks side-by-side to identify similarities, differences, and the implications of different legal design choices. This comparison operates at multiple levels: legislative structure, substantive provisions and other sources of law. The legal analysis will primarily cover the different legal provisions which regulates paternity leave in Norway and in the EU and explain what those differences are.

Secondary analyses utilizing data collected by others and reanalysing it to address the research question. In this part, articles by Norwegian experts, as well as ILOs article on paternity leave

are analysed to gauge the effectiveness of paternity leave policies. The findings of that analysis are used to answer the question of whether the EU should follow the Norwegian way of regulating paternity leave.

Limitations: The methodology acknowledges certain constraints, including the relatively recent implementation of the Work-life Balance Directive (2022 deadline)¹¹, which limits available case law and long-term outcome data. The analysis also recognizes that legal frameworks operate within specific cultural and institutional contexts that affect their practical implementation and effectiveness. This culture-aspect also applies when examining the effectiveness of paternity leave policies in Norway and in the EU.

2. ANALYSIS

2.1 The current EU Legal Framework on paternity leave and its historical development

2.1.1 Directive 2010/18/EU

In 2009 the first hint of EU regulation regarding the rights and freedoms of the father in relation to his parental responsibility of a child came in the form of the Parental Leave Directive 2010/18/EU. Although the Directive did not grant any specific rights to the father, it did grant, among other elements, both the mother *and* the father of a child the right to parental leave for a minimum period of 4 months for a child as long as the child is younger than eight years old.¹² This right awarded to both the mother and the father can be seen as an important stepping stone for the creation of the modern paternity rights in the EU regulatory framework.

However, because the Directive did not require member states to implement specific paternity leave regulation, it placed little *real* pressure on the member states in regard to the creation of legally binding national legislation.¹³ This is illustrated by the fact that in March 2017 – approximately 7 years after the Directive came into effect – 7 member states did not have

¹¹ cf. the Work-life Balance Directive art. 20 (1). Following art. 18 (1) a rapport covering the implementation of the Directive is to be drawn up after the 2nd of August 2027.

¹² cf. Directive 2010/18/EU art. 1 clause 2 of the Framework Agreement On Parental Leave.

¹³ Caroline de la Porte, Zhen Jie Im, Brigitte Pircher, Dorota Szelewa, *The EU's work-life balance directive: Institutional change of father-specific leave across member states* (05.05.2023), fetched from: <https://onlinelibrary.wiley.com/doi/10.1111/spol.12920>.

national legislation governing paternity leave (Austria, Croatia, Cyprus, the Czech Republic, Germany, Luxembourg, and Slovakia).¹⁴

2.1.2 Directive (EU) 2019/1158

Directive 2010/18/EU was in 2019 repealed by the Work-life Balance Directive (EU) 2019/1158 which entered in to force on the 1st of August 2019.¹⁵ The Work-life Balance Directive is the newest and current EU regulation governing paternity leave. The member states had until the 2nd of August 2022 to implement the articles of the Directive into national law^[08].

The most significant regulation, regarding paternity leave, of the Work-life Balance Directive is article 4 which is fittingly named “Paternity leave”. Article 4 (1) grants the father paternity leave of 10 working days on the birth of the worker’s child. The entire period of paternity leave of 10 working days is to be paid as mandated in article 8. If the father wishes to apply for the 10 days of paid paternity leave, he is also protected against dismissal by his employer as set forward in article 12. Article 4, article 8 and article 12 are the first and as of now only EU-regulation *specifically* governing the fathers right to paternity leave.

The father’s right to 2 weeks of paid paternity leave contrasts with the mother’s right to 14 weeks of paid maternity leave as set forward in Directive 92/85/EEC¹⁶ article 8.

In addition to the specific paternity leave regulation in the Work-life Balance Directive, the Directive also expands upon the parental leave regulation in the Parental Leave Directive (Directive 2010/18/EU). The Work-life Balance Directive continues the parental leave period of a minimum of 4 months, but in addition, 2 of the 4 months are non-transferable.¹⁷ This effectively means that the father has minimum of 2 months of parental leave which he cannot give away to the other parent, but the father is naturally not obligated to take any parental leave if he so chooses. This non-transferable 2-month period is to be paid as is mandated in article 8 (1). However, due to the relative passive wording of article 8 (1), it is effectively up to each member state to decide how much each parent is to be paid for the non-transferable 2-month period. Therefore, the level of pay might drastically vary depending on which EU member state the father is applying in.

¹⁴ Martina Prpic, *Maternity, paternity and parental leave in the EU* (march 2017), fetched from: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599323/EPRS_BRI\(2017\)599323_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599323/EPRS_BRI(2017)599323_EN.pdf)

¹⁵ cf. the Work-life Balance Directive art. 16 (2).

¹⁶ Directive 92/85/EEC is commonly referred to as the “Pregnant Workers Directive”.

¹⁷ cf. the Work-life Balance Directive art. 5 (2) and (1).

The Work-life Balance Directive marks a definitive and legally noticeable effort from the EU when it comes to equalizing the rights of the father in connection to the birth of a child. In the eyes of Oliveira, Corte-Rodriguez and Lütz, the Work life Balance Directive improves women's participation and situation in the labour market by expanding the upon "[...] the possibilities for men to take part in parental and caring responsibilities".¹⁸

2.1.3 Article 157 TFEU and Article 153 TFEU

Apart from specific Directives and Regulations, the TFEU also has an impact on the regulation of paternity leave in the EU. Although Article 157 TFEU and Article 153 TFEU doesn't directly address paternity leave, the articles constitute the highest legal basis for the regulation of paternity leave in the EU.

Article 153 TFEU mandates that men and women is to be treated equal in labour relations¹⁹, and the article also empowers the EU to adopt minimum requirements for the member states via Directives.²⁰ As made clear from the preamble of the Work-life Balance Directive, Article 153 TFEU was the primary legal basis for the adoption of the Directive. Therefore, Article 153 TFEU is and will continue to be an integral part of the legal pillar which the regulation of paternity leave is created upon.

Article 157 TFEU establishes the principle of equal pay for work – equal value between men and women.²¹ While Article 157 TFEU does not directly affect the regulation of paternity leave in the EU, the article is still important when it comes to minimizing the gender pay gap, which is in the core of Article 157 and which is also one of the desired outcomes regarding the effect of paternity leave.

2.1.4 Relevant CJEU-decisions

As of April 2026, there are no relevant CJEU decisions directly addressing the regulation of paternity leave in the Work-life Balance Directive. The reason for this lack of case law is primarily due to the fact that the Directive did come into effect for the member states before the 2nd August 2022 and because the regulation of paternity leave in the Directive is not well suited for the overruling of state practise as long as the requirement for 10 days paid paternity leave is in order.

¹⁸ Álvaro Oliveira, Miguel De la Corte-Rodríguez and Fabian Lütz, *The new Directive on Work-Life Balance: towards a new paradigm of family care and equality ?* (2019).

¹⁹ cf. art. 153 (1) (i) TFEU.

²⁰ cf. art. 153 (2) (b) TFEU.

²¹ cf. art. 157 (1) TFEU.

The lack of CJEU decisions addressing the regulatory status of paternity leave shows that the current EU legal framework on paternity leave, leaves much up to the member states to decide the level of protection granted.

However, in C-104/09 *Roca Alvarez*, the CJEU ruled that national law could not restrict the father's opportunity to take parental leave only to cases where the mother was employed as this constituted a form for indirect discrimination. Even though the ruling mainly covered parental leave, it is reasonable to assume that the outcome would be the same if the case was about paternity leave regulated in the Work-life Balance Directive. The reason for this is that the right to paternity leave regulated in article 4 applies to all fathers “irrespective of the worker's marital or family status, as defined by national law”.²²

2.1.5 The general overview of the regulation of paternity leave in the EU

The regulation of paternity leave in the EU is primarily grounded in the Work-life Balance Directive, which establishes minimum standards aimed at improving the reconciliation of work and family life. Under this Directive, the EU member states are required to provide at least 10 days of paid paternity leave upon the birth of a child. However, the Directive grants a wide margin of discretion to national authorities regarding the specific design and implementation of other rights.²³

As a result, the regulation of paternity leave varies considerably across the EU in terms of duration, level of payment, and eligibility conditions.²⁴ This reflects a clear minimum harmonization approach, whereby the EU sets baseline requirements while allowing member states to adopt more generous provisions in line with their domestic social and legal frameworks.²⁵

In addition to establishing minimum entitlements, EU regulation places strong emphasis on anti-discrimination and the protection of workers exercising their rights. Provisions such as

²² cf. the Work-life Balance Directive art. 4 (3).

²³ The European Commission, *EU legislation on family leaves and work-life balance*, (N.D)

²⁴ Ieva Zumbyte and Dorota Szelewa, *Assessing Compliance: Implementation of EU's Work-life Balance Directive in European Countries* (2024), fetched from: <https://transeuroworks.eu/wp-content/uploads/2024/10/Assessing-Compliance.-Implementation-of-EUs-Worklife-balance-directive.pdf>.

²⁵ The European Commission, *Harmonised Standards*, fetched from: https://single-market-economy.ec.europa.eu/single-market/goods/european-standards/harmonised-standards_en.

Articles 11 and 12 of the Directive ensure that individuals taking paternity leave are safeguarded against dismissal, unfavourable treatment, and loss of acquired rights.

Overall, the EU framework on paternity leave combines minimum harmonization with robust equality protections, leaving substantive variation to national systems while promoting common standards of worker protection across the Union.

2.2 The current Norwegian legal framework on paternity leave and its historical development

2.2.1 Folketrygdloven of 1993

The first formal regulation of paternity leave in Norway followed the 1993 reform of the National Insurance Act (Folketrygdloven).²⁶ The regulation of paternity leave was incorporated in chapter 3A of the Act, which governed cash benefits in connection with childbirth and adoption. Following § 3A-7 (5) the father had a right to 4 weeks (20 days) of paid paternity leave known as the “father’s quota” in the provision. Those 4 weeks were non-transferable and contingent upon certain conditions, including the mother’s engagement in work, education, or similar activities.²⁷ If the father did not utilize this portion, the entitlement lapsed.²⁸

The introduction of § 3A-7 in 1993 marked the first regulation of paternity leave in Europe.²⁹ This provision set in motion the development and expansion of paternity leave in Norway. Folketrygdloven of 1993 has since been repealed and modernized.

2.2.2 Folketrygdloven of 1997

In Norway, the father’s right to paternity leave is currently governed by Folketrygdloven of 1997 chapter 14.³⁰ The provisions in chapter 14 governs maternity leave, parental leave and paternity leave. Following § 14-12 (1), the father has a right to 75 days (15 weeks) of 100% paid paternity leave. This right is contingent on both the father and the mother qualifying for paid leave.³¹ For that to be the case, both the father and the mother would have to have been employed with a pension-qualifying income for at least six of the last the months before the

²⁶ LOV-1966-06-17-12 reformed 1993.

²⁷ LOV-1966-06-17-12 § 3A-7 (1) letters a-c and (5).

²⁸ LOV-1966-06-17-12 § 3A-7 (5).

²⁹ Nora Marie Haune Bornø, *Likestillingsrelaterte utviklingstrekk i foreldrepengerordningen - en rettighetsanalyse* (2018), fetched from:

https://www.jus.uio.no/ior/forskning/omrader/kvinnerett/publikasjoner/skriftserien/103_borno.pdf.

³⁰ LOV-1997-02-28-19 chapter 14. The provisions in chapter 14 has been changed several times since 1997.

³¹ cf. § 14-12 (1).

parent's parental benefit period begins.³² As stipulated in § 14-9 (5), the father's right to 15 weeks of paid paternity leave is non-transferable.

The calculation of how much money the father gets because of him taking paternity leave, depends upon the income of the father calculated in accordance with the rules for calculating sick leave.³³ Both the father's and the mother's right to paid leave in the case of the birth of a child must be utilized within 3 years of the birth.³⁴ Therefore, the right to paternity leave has a timer which gives the father an incentive to utilize it.

Where the father does not qualify for 75 days of paid paternity leave because the mother does not meet the requirement to occupational activity, the father still has a right to 50 (10 weeks) of paid paternity leave.³⁵ Furthermore, the father can choose to lower the level of payment granting the effect of expanding the period of paternity leave.³⁶ Additionally, the mother and the father have 80 days (16 weeks) of paid shareable parental leave.³⁷ This means that the total amount of paid benefits granted to both the mother and the father is near equally divided as 15 weeks are granted to the mother and father each, and the remaining 16 weeks are shareable.

2.2.3 Likestillings- og diskrimineringsloven of 2017

The protection against discrimination when the mother or father is taking leave from work because of the birth of a child is governed by Likestillings- og diskrimineringsloven.³⁸ Discrimination due to pregnancy, maternity or paternity leave, adoption leave and caregiving duties is illegal.³⁹ Following § 10 (1), such discrimination is only allowed if it is necessary to protect the women, foster or newborn, or when obvious reasons call for it. Discrimination in connection to hiring or dismissal due to pregnancy, maternity or paternity leave, adoption leave and caregiving duties, is never allowed.⁴⁰

2.2.4 The general overview of the regulation of paternity leave in Norway

In general, the Norwegian regulation of paternity leave places a strong emphasis on specifically earmarked benefits granted to the father. The 75 days of paid paternity leave granted to the father illustrates this emphasis. The high number of days of paternity leave granted to the father taken in combination with the 3-year application deadline, shows that Norwegian regulation is aimed at encouraging the father to utilize his right to paid paternity leave.

³² cf. § 14-13 cf. § 14-6 (1).

³³ cf. § 14-7 (1). This provision refers to chapter 8 of Folketrygdloven of 1997 which governs sickleave. The payment of paternity leave is capped at 6G cf. § 14-7 (1).

³⁴ cf. § 14-10 (3). This 3-year rule also applies in the case of a transfer of care.

³⁵ cf. § 14-14 (3).

³⁶ cf. § 14-9 (5).

³⁷ cf. Folketrygdloven § 14-9 (1) and (5).

³⁸ LOV-2017-06-16-51. Likestillings- og diskrimineringsloven translates to "the Equality and anti-discrimination act".

³⁹ cf. Likestillings- og diskrimineringsloven § 6 (1).

⁴⁰ cf. Likestillings- og diskrimineringsloven § 10 (3).

The emphasis in the Norwegian regulation to encourage the father to utilize his right to paternity leave is further made clear from the fact that the total amount of benefits granted to the mother and the father is almost equal.⁴¹

2.3 Comparative Analysis

The main purpose of this analysis is to evaluate whether the EU should expand upon its regulation of paternity leave in the same way Norway regulates paternity leave. When answering this question, the different legal regulation of paternity leave in the EU and in Norway must be assessed.

2.3.1 The comparative legal analysis

The main similarity between the Norwegian and the EU regulation of paternity leave is the anti-discrimination regulation. The Work-life Balance Directive and Likestillings- og diskrimineringsloven protects the father and the mother against unjust discrimination for taking paternity or maternity leave such as dismissal.⁴² Also, the method of calculating the level of pay granted to the father is similar in Norway and in the EU as both legal systems use the level of pay granted for sick leave as a standard.⁴³

The main difference between the Norwegian and the EU regulation of paternity leave is the length of paid paternity leave granted to the father and the length of paid paternal leave. In Norway, the father gets 75 days (15 weeks) of paid paternity leave, but in the EU, the minimum requirement is only 10 days (2 weeks) of paid paternity leave. That is a staggering difference of 65 days.

Another substantial difference between the regulation of paternity leave in the EU and in Norway is connected to the relationship between the distribution of the total amount of benefits granted to both the father and the mother. Whereas Norway grants the father and the mother the same amount of paid leave days (75 days), the EU grants the mother 12 *more* weeks of paid leave than what the father is afforded. This difference illustrates that Norway has taken a more

⁴¹ Out of the total 230 days of paid leave afforded to the father and mother, 75 days are granted to the mother and father each, while the remaining 80 days are sharable cf. Folketrygdloven § 14-9 (1) and (5). The relationship between the distribution of total amount of benefits is almost 1/3, 1/3 and 1/3.

⁴² cf. Likestillings- og diskrimineringsloven §§ 6 (1) and 10 (1) and (3) and the Work-life Balance Directive art. 11 and 12 (1).

⁴³ cf. Folketrygdloven § 14-6 (1) and the Work-life Balance Directive art. 8 (2).

gender-neutral approach to the regulation of paternity leave compared to EUs more gender-traditional approach.

Furthermore, the level of payment granted for the shareable paid parental leave in the EU and Norway are different. In Norway, the payment granted for the sharable period of 16 weeks is equal to the payment granted for paternity and maternity leave. Meanwhile in the EU, the level of payment can vary and therefore reducing the effect of using parental leave as tool for promoting gender equality.⁴⁴

2.3.2 Effectiveness for Gender Equality

To answer the question if the European Union should adopt key elements of the Norwegian parental model to further progress in gender equality, we must answer one important question: *Does the Norwegian model work to promote gender equality in the labour market?*

The Nordic Council of Ministers comprehensive analysis provides crucial evidence on this question⁴⁵, while recent Norwegian research nuances which policy elements drive the effect of different measures.⁴⁶

2.3.2.1 What makes fathers use their paternity leave?

The Norwegian model for paternity leave has proven popular among Norwegian fathers, after implementing the quota, and not a shared piece of the total, over 90 per cent of fathers take their earmarked quota.⁴⁷ This stands in contrast to voluntary systems, which have shown that only about 50 per cent of men in OECD countries, which mostly have voluntary systems, uses the opportunity to take paternity leave.⁴⁸

Also, Norway's 15-week non-transferable father's quota operates on the "use it or lose it" principle, meaning families forfeit these weeks entirely if the father does not take them, has created an economic incentive that has proven to change behaviour patterns, meaning more

⁴⁴ This is due to relative weak wording of the Work-life Balance Directive art. 8 (3), where it is up to the different member states to decide the level of pay granted.

⁴⁵ Elin Kvande & Brita Bungum, *Parental leave in Norway*, Nordic Council of Ministers (2025).

⁴⁶ Bakken (2022), *Arbeid og Velferd* 2022:1.

⁴⁷ Elin Kvande & Brita Bungum, *Parental leave in Norway*, Nordic Council of Ministers (2025)

⁴⁸ ILO (2025), *Closing the Gender Gap in Paid Parental Leaves*, page 11.

fathers using their quota.⁴⁹ The mechanism addresses what researchers identify as a coordination problem, individual fathers face less workplace stigma when leave-taking becomes normalized across society.

The system produces sustained effects beyond the immediate leave period. Fathers who take their quota remain more involved in childcare as children grow, contributing to more egalitarian household labour division. This aligns with the ILO finding that early paternal involvement correlates with long-term caregiving engagement.⁵⁰

2.3.2.2 Labour Market Effects

While the Norwegian experience shows positive impacts on women's labour force participation and earnings, recent research challenges the assumption that parental leave policies alone drive these outcomes. Bakken's analysis of Norwegian register data reveals that much of the improvement in employment discrimination against mothers and women's labour force participation in the early 2000s was not necessarily attributable to the father's quota, but rather to the expansion and development of childcare policy.⁵¹

Bakken demonstrates that the dramatic expansion of subsidized, high-quality childcare services in Norway, particularly the introduction of a legal right to childcare (*barnehagegaranti*) in 2009, and the massive expansion of coverage from approximately 54% of children aged 1-5 in 1997 to over 90% by 2011, coincided with and likely drove significant improvements in maternal employment outcomes.⁵² This suggests that while father's quotas contribute to cultural change and more equal care distribution within families, the main structural enabler of women's continuous labour force participation is accessible, affordable childcare.

The Nordic Council of Ministers acknowledges that when fathers take substantial leave and share ongoing childcare responsibilities, this reduces gender inequality in career interruptions.⁵³ However, Bakken's findings indicate that without adequate childcare infrastructure following the parental leave period, mothers face structural barriers to employment regardless of how equally parental leave is distributed.⁵⁴ Norwegian data demonstrates that mothers whose

⁴⁹ Elin Kvande & Brita Bungum, *Parental leave in Norway*, Nordic Council of Ministers (2025).

⁵⁰ ILO (2025), *Closing the Gender Gap in Paid Parental Leaves*.

⁵¹ Bakken, (2022).

⁵² Ibid.

⁵³ Elin Kvande & Brita Bungum (2025).

⁵⁴ Bakken (2022).

partners took the quota had higher earnings years later, but this effect appears amplified when combined with childcare availability that enables both parents to return to full-time work.⁵⁵

2.3.2.3 Paternity leave, a butterfly effect?

However, the quota system has contributed to constructing new forms of "caring masculinity" where active caregiving becomes integral to masculine identity rather than being viewed as feminine.⁵⁶ Some studies reveal generational shifts, with younger Norwegian fathers increasingly viewing caregiving as essential to being a good father.⁵⁷

Research indicates that children exposed to active paternal involvement develop more egalitarian attitudes about gender roles.⁵⁸ This suggests the Norwegian model produces cultural transformation that extends beyond the immediate policy targets, creating a self-reinforcing cycle toward greater equality.⁵⁹

2.3.2.4 The “child penalty”, does it remain?

Even in Norway, substantial child penalties for women persist in the labour market.⁶⁰ This aligns with cross-country research showing that parental leave alone cannot fully eliminate gender-based labour market inequalities without broader structural changes including workplace discrimination policies, occupational desegregation, and addressing the gender pay gap.⁶¹ Bakken's research reinforces this point, demonstrating that the reduction in employment discrimination against mothers in Norway correlated more strongly with childcare expansion than with parental leave reforms.⁶²

Further, Organizational norms and manager attitudes significantly affect whether Norwegian fathers feel able to take available leave.⁶³ In workplaces with ideal worker norms expecting continuous availability and long hours, fathers may face stigma or career penalties even when

⁵⁵ Elin Kvande & Brita Bungum (2025).

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ ILO (2025).

⁶² Bakken (2022).

⁶³ Elin Kvande & Brita Bungum (2025).

legally entitled to leave, highlighting the importance of complementary cultural and organizational change.⁶⁴

3. RESULTS

3.1 The comparative legal analysis

The comparative analysis reveals fundamental structural differences between the Norwegian and EU approaches to paternity leave regulation. Norway provides 15 weeks of earmarked, non-transferable paid paternity leave with compensation at 80-100% of previous earnings, making paternity grants and maternal grants very similar when combined with shared parental leave. In contrast, the EU Work-Life Balance Directive grants minimum standards of 10 working days of paid paternity leave plus two months of non-transferable parental leave, with member states retaining control over compensation levels. This reflects a minimum harmonization approach that permits substantial variation across member states, due to variations in economic prerequisites and cultural differences in the member states.

3.2 How effective is paternity leave for gender equality?

The research demonstrates that Norway's earmarked quota system achieves exceptionally high uptake rates, with over 90% of eligible fathers utilizing their non-transferable leave, compared to approximately 50% in voluntary systems. The "use it or lose it" mechanism creates economic incentives that normalize father involvement and reduce workplace stigma. However, Bakken's article reveals an important nuance: much of Norway's improvement in maternal employment outcomes and reduction in discrimination during the early 2000s correlates more strongly with childcare expansion than with paternity leave reforms. The introduction of universal childcare rights and expansion of coverage in childcare from 54% to over 90% of children aged 1-5 appears to have been the primary structural driver of women's continuous labour force participation.

⁶⁴ Elin Kvande & Brita Bungum (2025).

3.3 Cultural and Intergenerational Effects

Beyond immediate labor market outcomes, Norway's quota system has contributed to constructing new forms of "caring masculinity" and generational attitude shifts toward more egalitarian gender norms. Children exposed to active paternal involvement develop more egalitarian attitudes, suggesting the policy produces cultural transformation extending beyond its immediate targets. Yet substantial child penalties for women persist even in Norway, indicating that parental leave alone cannot eliminate gender-based labor market inequalities without complementary measures addressing workplace discrimination, occupational segregation, and the gender pay gap.

3.4 Policy Implications for EU Adoption

The findings suggest that while Norway's earmarked quota model effectively promotes father involvement and cultural change, its success in improving maternal employment outcomes depends critically on integration with comprehensive childcare infrastructure. For the EU, realistic adoption would require recognizing member state diversity in economic capacity, existing welfare structures, and cultural contexts. Rather than mandating uniform Norwegian-style quotas, a graduated harmonization approach could establish stronger minimum standards for earmarked paternity leave (beyond the current 10 days) while prioritizing parallel investment in affordable, accessible childcare services. The evidence indicates that EU member states seeking to reduce maternal employment penalties should prioritize childcare availability alongside or even before expanding paternity leave provisions. Effective implementation would require adequate income replacement (Norway's 80-100% vs. current EU flexibility), public financing through social insurance to avoid employer discrimination, and complementary workplace culture initiatives addressing "ideal worker" norms that discourage father uptake even when legal entitlements exist.

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