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Editorial

Dear readers,

In front of you is a special issue of the Journal of Law entitled "EU of Gender Equality", which, through six published studies, analyzes the challenges of achieving various aspects of gender equality at the EU level and the level of individual EU member states or candidate countries.

These articles are the result of the International Scientific Conference "EU of Gender Equality", held at the Faculty of Law in Osijek on September 24, 2026. The Conference marked the final activity of the Jean Monnet Module "European Union and Gender Equality – EUGEquality". This project was approved and funded by the European Union through the European Education and Culture Executive Agency (EACEA) under the Erasmus+ programme. The project spanned three years, running from November 1, 2023, to October 31, 2026. The purpose of the Conference was to present the results and findings of the Jean Monnet Module, and to provide a platform for stimulating discussion on key issues affecting gender equality policy in the EU and its Member States.

The first paper examines the influence of the growth of (right wing) populism on women's rights in Central and Eastern Europe, with emphasis on the constitutional dimension of this relationship, i.e. exploring different constitutional strategies used by anti-gender actors in synergy with populist parties in Croatia. Authors Anita Blagojević, Ivana Tucak and Ivica Pavić analyze three basic constitutional strategies: regressive constitutional erosion, constitutional entrenchment, and constitutional pre-emption, and the implementation of these strategies on practical examples: the regulation and interpretation of the right to abortion, the constitutional referendum on marriage, and the ratification of the Istanbul Convention. The second paper deals with the principle of equality in criminal procedure. Authors Igor Milinković and Milijana Buha address the challenges posed by the introduction of AI-based tools in criminal procedure and examine whether and to what extent the use of AI-based tools is appropriate in cases involving gender-based violence. The paper of the author Nina Gumzej draws on a doctrinal analysis of the AI Act, including deployer Fundamental Rights Impact Assessments, powers of fundamental rights authorities and the right to explanation, in light of the EU Charter, EU equality law, and CEDAW. On that basis, it examines how the EU AI governance can better address gender equality. Author Matija Miloš explores how the intersection of law and political participation is framed in the European law of political participation, with a view of its implications for gender. Focusing on three themes of the European law of political presentation, i.e. on representation, deliberation, and contestation, the author argues for a decentred role of the law, more focused on depicting and advancing experiences of gender. Author Lucie Přenosilová addresses the interpretation of Article 5(2) and Article 8(3) of the Work-life Balance Directive (WLBD) and their interrelationship, posing the main question: what does "facilitating take-up of parental leave" mean in EU Law. Using doctrinal analysis grounded in textual, contextual and purposive interpretation, the paper considers the Directive's recitals and CJEU case-law. The question of the existence of the concept of the glass ceiling in sport is the main preoccupation of the authors Marija Karadža and Dragana Bjelić Gaćeša. Focusing

on the analysis of the representation of women in managerial positions in sport organizations and on comparing the situation in Croatia and the EU, the paper tries to contribute to a better understanding of the issue of gender equality in the context of leadership positions in sports organizations and provide recommendations for overcoming the challenges faced by women.

We would like to thank all the authors for their outstanding contributions to achieving the project's intended goals. We are confident that the articles in this special issue will stimulate further discussion on both longstanding and emerging challenges in the field of gender (in) equality.

Anita Blagojević, PhD and Ivana Tucak, PhD

Guest-editors of the Special Issue

*Anita Blagojević**
*Ivana Tucak***
*Ivica Pavić****

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THE RISE OF POPULISM AND THE RIGHTS OF WOMEN IN CROATIA: SOME CONSTITUTIONAL CONSIDERATIONS****

Summary: *Over the past thirty years, the countries of Central and Eastern Europe have been undergoing transition, including democratic transition, which was marked primarily by adopting the EU acquis, including that on gender equality and women's rights. These processes have not been welcome everywhere and by all political actors. As a result, in the conditions of polarization of society between the progressive liberal left and the conservative and populist right, which is gaining more and more momentum, a democratic crisis widely regarded as democratic regression and illiberalism has emerged. The aforementioned populist movement processes often put in the political foreground, often as the basic or unifying idea (opportunistic synergy) of the right-wing political spectrum, certain democratic achievements of women's rights and gender equality, such as the right to abortion or the Istanbul Convention, but only with the aim of protecting so-called traditional values, the traditional family and protecting national identity in the context of the relationship between national and European norms from "dangerous" "gender politics" and "gender ideology" imposed by the corrupt EU political elite. The strengthening of these processes was also influenced by some other socio-political, economic and technical circumstances, such as the migrant and health crises, economic crisis, but also the development of technology and social media, which enabled the global networking of anti-gender actors. Anti-gender movements*

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and strategies are not unknown even in the sphere of constitutional law, and, according to an interesting classification by Rubio-Marin, there are three basic strategies recognized to have been used by the aforementioned anti-gender actors, which are: regressive constitutional erosion, constitutional entrenchment and constitutional preemption. The described processes and movements did not bypass Croatia either, for which the paper follows the implementation of the described strategies on practical examples: the regulation and interpretation of the right to abortion, the constitutional referendum on marriage and the ratification of the Istanbul Convention.

Keywords: *democratic backsliding, gender equality, women's rights, anti-gender, constitutional strategies, Croatia*

1. INTRODUCTION

A lot has been written on the crisis on democracy and the rule of law in Europe, the crisis of constitutional democracy, democratic backsliding and illiberalism,[1] whereby the crucial challenges addressed were in connection with the guarantees of judicial independence, the independence of constitutional courts, the undermining of supervisory institutions and the overall crisis of institutional trust in the climate of substantial polarization of society. Likewise, many authors, starting from the 1980s, which were marked by the surge of populist political parties,[2] devoted their research to the populist phenomenon[3] as well to the relation between democratic backsliding and conservative populist projects.[4]

However, the topic of the relation between the crisis of democracy and the growth of populism directed at the rights of women, i.e. the topic of gender aspect of populism and the gendered nature of democratic backsliding,[5] is relatively new and, although not completely ne-

1 Select papers include: Adam Przeworski, *Crisis of Democracy* (Cambridge University Press 2019); Biljana Kostadinov, 'Vladavina prava – backsliding ili globalni kraj liberalne demokracije' in *Ustavne promjene i političke nagodbe. Republika Hrvatska između ustavne demokracije i populizma* (HAZU 2021) 365–379; Martin Loughlin, 'The Contemporary Crisis of Constitutional Democracy' (2019) 39(2) OJLS 435–454; Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85(2) U Chi L Rev 545–583; Tímea Drinóczi, 'The Unfolding Illiberalism in Hungary' (2021) 46(3-4) RCEEL 352–380; Kim Lane Scheppele, 'The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work' (2013) 26(4) Governance 559–562; Branko Smerdel, 'Kognitivna disonanca ili promjena paradigme: Kriza ili propast ustavne demokracije: što nakon populističke kontrarevolucije?' in *Ustavne promjene i političke nagodbe. Republika Hrvatska između ustavne demokracije i populizma* (HAZU 2021) 51–71.

2 Cas Mudde, 'The Populist Zeitgeist' (2004) 39(4) Govt & Oppos 541.

3 Among different authors writing about populism we highlight: Cas Mudde, 'The Populist Zeitgeist' (2004) 39(4) Government and Opposition 541–563; Cristóbal Rovira Kaltwasser, *Populism vs. Constitutionalism? Comparative Perspectives on Contemporary Western Europe, Latin America, and the United States* (Policy Brief, The Foundation for Law, Justice and Society 2013) <https://ora.ox.ac.uk/objects/uuid:0b3a92d0-401b-4af8-a4bd-89afb98e7454/files/m9aa11e2c361d04b11b64a57564b66b30> accessed 21 October 2026; Mark Tushnet and Bojan Bugarič, 'Populism and Constitutionalism: An Essay on Definitions and Their Implications' (2021) 42(6) Cardozo Law Review; Berto Šalaj, 'Što je populizam?' (2012) 3(11) Političke analize 55–61.

4 See, e. g.: Paul Blokker, 'Populist Understandings of the Law: A Conservative Backlash?' (2021) 14(1) PACO <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3784236> accessed 21 October 2026; Anne Pintsch, Daniel Hammerschmidt and Carl Meyer, 'Introduction: the decline and rise of populism in Europe and their effect on democracy promotion' (2022) 35(4) CRIA 405–423; Yann Algan and others, 'The European Trust Crisis and the Rise of Populism' 2017 BPEA 309–382.

5 Silvia Suteu, 'The Rule of Law Crisis Was Always Gendered: The Anti-Gender Playbook in Europe' (2025) 21(1) EuConst 58, 59.

glected, especially by political scientists, sociologists, and a select few constitutional scholars,[6] there is still plenty of room for improvements in research, primarily concerning the countries in Central and Eastern Europe, and in particular in Croatia, where this topic has mostly been neglected.

The countries of Central and Eastern Europe share a common socialistic tradition and have gone through similar, albeit not equally as peaceful,[7] democratic transition in the 90s. On the constitutional plan, the wave of new democratic constitutions brought upon a thorough change of the systems of government (constitutional revolution),[8] and the devotion of constitution makers of new democracies to the field of human rights has been clearly visible, qualitatively and quantitatively. All countries in said region established their constitutional courts and have gradually been integrated into the United Nations and the Council of Europe. Most of them also ratified the majority of international human rights protection documents of those organizations, including those regarding women's rights. They have also gradually, but not with the same dynamic, become European Union (hereinafter: EU) members who have harmonized their legislations with EU gender equality *acquis*. Accepting EU gender equality directives and anti-discrimination legislation has led to the understanding of EU as the major driver of progress on gender-related issues.[9] Naturally, the actual implementation of gender equality acquis is an entirely different matter, but the fact is, the supranational nature of EU membership overall was not met with open arms everywhere, mostly due to the principle of supremacy of EU law.[10] The growing Euroscepticism and the rise of illiberal governments in Hungary (starting from 2010) and Poland (starting from 2015) are the best indicators of the described "welcome" status, not to mention the massive expansion in the number of proceedings before the Court of Justice of the EU, mostly concerning judicial reforms, but also partly regarding the rights of women and gender equality.[11] On the other hand, some countries from the region, such as Slovenia, have been rather friendly towards accepting and implementing the aforementioned EU standards.[12]

This paper aims at exploring the influence of the growth of (right wing) populism on women's rights in Central and Eastern Europe, with emphasis on the constitutional dimension of this relationship, i.e. exploring different constitutional strategies used by anti-gender actors in synergy with populist parties in Croatia. In that context, in the second section of the paper we continue by discussing the specifics of anti-gender movement mobilization and the growth of right-wing populism in the last two to three decades in Central and Eastern Europe with specific reference to the networking and opportunistic synergy of the two against the so-called

6 Valuable contributions in this sense were made by, e.g.: Agnieszka Graff and Elżbieta Korolczuk, *Anti-Gender Politics in the Populist Era* (Routledge 2021); Silvia Suteu, 'The Rule of Law Crisis Was Always Gendered: The Anti-Gender Playbook in Europe' (2025) 21(1) EuConst 58–89; Martin Loughlin, 'The Contemporary Crisis of Constitutional Democracy' (2019) 39(2) OJLS 435–454.

7 Some countries had largely peaceful transitions, such as Hungary, Poland, Czechoslovakia, while others, like Croati and Romania, were not as fortunate in that regard.

8 Branko Smerdel and Smiljko Sokol, *Ustavno pravo* (Narodne novine 2009) 79.

9 Barbara Havelková, Mathias Möschel and Anna Śledzińska-Simon, 'Women, gender, and constitutionalism in Central and Eastern Europe: Introduction to the symposium' (2025) 23(2) I-CON 486, 492.

10 *Ibid.*

11 *Ibid.*

12 *Ibid.*, 493.

"gender ideology". The focus of the third section of the paper is on defining and explaining the means and aims of said strategies. The overall aim of the paper is to reach conclusions on whether those strategies have become a staple in the Croatian anti-gender arena and how much they, together with the lack of care by the government, have negatively impacted the rights of women in Croatia.

2. THE GROWTH OF POPULISM AND WOMEN'S RIGHTS: "OPPORTUNISTIC SYNERGY" (RIGHT-WING) POPULISM AND ANTI-GENDER ACTORS

The wave of anti-gender politics in Central and Eastern Europe grew simultaneously with the growth of illiberalism and anti-EU rhetoric. It started in Poland (2012/13 onwards), then continued in Slovakia (2014/15 onwards), Hungary (2017 onwards),[13] and it has certainly not bypassed Croatia either (2013 onwards). The current wave of conservative anti-gender movements in Central and Eastern Europe is part of the global anti-gender movement based on the anti-liberal idea of gender and family.[14] We could say that the anti-gender movement phenomenon is not particularly new since it has existed for a couple of decades already, becoming especially apparent during multiple countries' conservative actors' responses to the decision of World Conferences of Women in Cairo and Beijing in 1994 and 1995,[15] though it should be noted that the initial leading role in the "resistance" to the introduction of the term "gender" was played by the Vatican, as well as other religion organizations.[16] It could also be said that the dynamic and adaptability of its growth was quite intensive, particularly in the past two decades, marked by strong anti-gender mobilization and global networking of various anti-gender scenes, mostly ultraconservative religious and right-wing populist political actors. This sort of networking should not come as a surprised, as the right-wing populism has served as a fertile ground for promoting political goals and visions of society under patriarchal control. Lastly, this wave should definitely not be considered solely as something accidental or an incidental part of democratic backsliding, but as its core, a common meeting ground for most right-wing based movements.[17] The main preoccupation of those movements are women – specifically, women's sexual and reproductive rights, including the right to abortion, actions against the so-called gender ideology, sexual education, gender studies and opposing the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (hereinafter: Istanbul Convention). What differs those movement from their previous more or less similar iterations is the intensity, complexity, networking – which became much more pronounced with the rise of the Internet and various social media, and its

13 Eszter Kováts, 'Anti-gender politics in East-Central Europe: Right-wing defiance to West-Eurocentrism' (2021) 13(1) Gender – Zeitschrift für Geschlecht, Kultur und Gesellschaft 76, 78.

14 Suteu (n 5) 59.

15 Nur Sinem Kourou, *Right-Wing Populism and Anti-gender Movements: The Same Coin with Different Faces* (GPoT Policy Brief No 68, 2020) <https://www.iku.edu.tr/gpot/policy-brief-nur-sinem-kourou-right-wing-populism-and-anti-gender-movements-same-coin-different> accessed 21 June 2026.

16 Graff and Korolczuk (n 6) 38.

17 Kováts (n 14) 87.

proximity with right-wing populism.[18] This should not come as a surprise seeing as the current anti-gender discourse is structured as entirely populistic in nature, opposing the "pure, innocent gender-conservatives" and the "corrupt, immoral elites" spreading "gender ideology".[19] The differentiation between "us" and the "dangerous them" is the very core of populism, which is also apparent in other segments of populism opposition, such as anti-elitism, anti-pluralism, nationalism and anti-gender positions in general. As Dietze and Roth rightly observe, "the specter of right-wing populism is haunting Europe",[20] a "specter obsessed with gender and sexuality".[21] Even though the anti-gender attitude of populist parties is often not immediately apparent and recognizable ("blurred and incoherent"),[22] it is impossible to properly analyse it without involving the gender dimension. Moreover, we can agree with Mostov's take on populism as being "always gendered and dangerous to women and democracy".[23] Although gender is not usually perceived to be in connection with nationalistic ideologies, due to the particularly emotional response to gender politics, gender has indeed arisen as the ideal ideological catalyst for right-wing populist scene and an extremely important instrument of realizing different populist goals,[24] i.e. as a "meta language" and an "effective bridge".[25] Therefore, we can view the relation anti-gender movements and right-wing populism through the lens of "opportunistic synergy" in which both actors reap their own benefits: while populists accept anti-gender rhetoric to "increase moral legitimacy in the eyes of traditional values",[26] anti-gender actors seek to not only participate in all stages of legislative procedures,[27] but also to put forward proposals for constitutional review and/or to organize petitions and protests.

To answer how, so to say, a theological movement body grew political limbs, it is necessary to explain different, concurrent or preceding, socio-political, economic and technological circumstances over the past two to three decades made this transformation possible.[28] Notably, different crises that disproportionally affected women, such as the great financial crisis of 2008 and the 2019 pandemic, which redefined political goals of ultraconservative actors who are, under the disguise of "crisis of family", trying to pass on the goals of preserving the "natural family" and "family values". This was further emphasized in Central and Eastern Europe by the rise to power of right-wing populists with the migrant crisis in 2015/16, who tried to represent immigrants – mostly people of other religions – as a "threat to Europe and to Europeans" (e.g. Law and Justice in Poland, Lega in Italy, AfD in Germany), bringing together

18 Graff and Korolczuk (n 6) 7.

19 *Ibid.*

20 Gabriele Dietze and Julia Roth, 'Right-Wing Populism and Gender: A Preliminary Cartography of an Emergent Field of Research' in Gabriele Dietze and Julia Roth (eds), *Right-Wing Populism and Gender: European Perspectives and Beyond* (Transcript 2020) 7.

21 *Ibid.*

22 Ronald Car, 'Gender Equality: A Task for Militant Democracy, Not for Culture Wars?' in Martin Mejstřík and Vladimír Handl (eds), *Current Populism in Europe: Gender-Backlash and Counter-strategies* (Heinrich-Böll-Stiftung 2021) 15.

23 Julie Mostov, 'Populism is Always Gendered and Dangerous' (2021) 5 Frontiers in Sociology 1.

24 Mara Malagodi and Elettra Stradella, 'Conceptualising the Link between Constitutional Degradation and Gender Populism' (2025) 21(1) EuConst 8, 12.

25 Dietze and Roth (n 20) 16.

26 Graff and Korolczuk (n 6) 24.

27 *Ibid.*

28 *Ibid.*, 42.

"gender ideology" and "islamophobia".[29] Finally, the previously unprecedented spread of conservative and anti-gender agendas, due to the global connection of relevant networks and actors, has been fueled by technological advancements, including social networks and platforms for online petitions, etc.[30] The cooperation of other ultraconservative and political actors is facilitated and promoted by various transnational organizations, such as the global *pro-family*, but actually *anti-choice* and *anti-LGBT*, network, the World Congress of Families, renamed in 2016 to the International Organization for the Family.[31]

The opportunistic synergy of anti-gender actors and right-wing populists has found its ideal niche in Central and Eastern Europe. In this context, Graff and Korolczuk explain that, unlike in the 1990s, when the role of the West was to help the East in the establishment of liberal democracy, today the roles have been reversed and the role of the East is to help the West and save it from "rampant individualism and secularization".[32] In these countries, resistance to Western "gender ideology" routinely involves presenting gender as "the Ebola from Brussels",[33] where the emphasis is on the (undemocratic) way in which the policy of sexual and reproductive rights was introduced,[34] i.e. on presenting the resistance to the gender equality *acquis* as "the mark of national sovereignty and a chance to reclaim its rightful place in the moral geography of Europe."[35]

Although right-wing populism is not a new phenomenon in Central and Eastern Europe, what has specifically characterized it in the last few decades, besides its networking with anti-gender actors, is its exceptional ability to adapt the concrete goals of the struggle to specific local conditions: somewhere it is the right to abortion, elsewhere the Istanbul Convention, same-sex marriage, or the introduction of sex education. Of course, migrations of potential "targets" in the geographical and temporal dimension are a frequent occurrence, but, in general, it can be concluded that in most former socialist countries the focus is on the following three areas: the alleged threat to the "traditional family", opposition to the Istanbul Convention, and the right to abortion.[36] In all three of those narratives, the networking of anti-gender movements with populist parties and politicians is present. Malagodi and Stradella state that the current right-wing populism should be referred to as "gender populism", since it properly accepts anti-gender ideology, and often even represents the institutional and political version of that ideology – i.e., it identifies with a set of discourses about sex, gender and sexuality.[37]

29 *Ibid.*, 43.

30 *Ibid.*

31 *Ibid.*, 47.

32 *Ibid.*, 54.

33 *Ibid.*, 92.

34 *Ibid.*, 18.

35 *Ibid.*, 27.

36 Suteu (n 5) 60.

37 Malagodi and Stradella (n 24) 9.

3. THE GROWTH OF POPULISM AND WOMEN'S RIGHTS IN CROATIA: SOME CONSTITUTIONAL CONSIDERATIONS

The rhetoric and legal engagements of networked anti-gender actors, with a special role of populists, in reducing the achieved level of women's rights also have their significant constitutional dimension. The relation between populism and constitutionalism is generally quite complex.[38] One of the main characteristics of this relationship is the selective and partial acceptance of the determinants of constitutionalism by populists, or acceptance of only those that suit them to achieve their desired goals. In addition, the constitutional arena that is available to various anti-gender actors to achieve their intended goals is rich with constitutional strategies. In fact, they are not only quite diverse, but are such that they undoubtedly contribute to constitutional erosion, or the so-called "abusive constitutionalism",[39] especially in countries in which democratic and rule of law backsliding are present.

Rubio-Marin distinguishes between three constitutional strategies commonly used by anti-gender actors: 1. the strategy of regressive constitutional erosion, 2. the strategy of constitutional entrenchment, and 3. the strategy of constitutional preemption.[40]

The first tactic refers to constitutional litigation, which aims to nullify or (seriously) limit the previously guaranteed level of women's rights, either through legislation or case law, especially in countries where (constitutional) courts are "politically packed".[41] The above is best supported by the dynamics of the erosion of the right to abortion in the USA (*Dobbs v Jackson Women's Health Organization*, 2022) and Poland (Decision of the Constitutional Tribunal from 2020). The Polish example shows how the right-wing collation in power from 2015-2023, combined with the unlawful appointment of the members of the Constitutional Tribunal, contributed to the erosion of democratic norms,[42] erosion of democratic legitimacy of institutions,[43] and, ultimately, the erosion of women's rights. In Hungary, the proposal of a "heartbeat law" in 2022 came from a right-wing party (Jobbik, in 2016.)[44]

The second strategy involves the (mis)use of constitutional amendments to strengthen the "traditional gender order".[45] It is especially promising in countries where the procedure for amending the constitution in a parliament with a sufficiently strong parliamentary majority is not "overly burdensome",[46] i.e. in countries with poorly regulated referendum institutions, especially in relation to popular initiative referendums. Recently, the tactic of constitutional reform in Central and Eastern European countries has been used in the fight against same-sex marriage, i.e. in favour of the constitutional definition of marriage as a life union between a

38 *Ibid.*, 19.

39 Ruth Rubio-Marín, 'Anti-Gender Constitutionalism' (2025) 21(1) EuConst 32, 37.

40 *Ibid.*, 39.

41 *Ibid.*

42 Suteu (n 5) 73.

43 Rubio-Marin (n 39) 40.

44 Suteu (n 5) 71.

45 *Ibid.*

46 *Ibid.*, 45.

man and a woman. For example, the Hungarian Fundamental Law from 2011 defined marriage not only as a life union between a man and a woman, but also as the basis for the survival of the nation.[47] Attempts to amend the constitution by introducing the definition of marriage as a heterosexual institution through popular initiative referendums were recorded in several former socialist countries, some of which were successful (Croatia, 2013), while others failed due to an insufficient number of collected signatures (Slovakia 2014, Romania 2018).[48]

Finally, the third tactic refers to presenting the protection of the "traditional family" as a sign of constitutional sovereignty, which is conveyed through the prism of national identity.[49] and the relation between supranational norms and the national constitution, and is especially present in constitutional debates surrounding the constitutionality of the Istanbul Convention. The mobilization against the so-called "gender ideology" of the Istanbul Convention opened numerous constitutional debates in several countries of Central and Eastern Europe, whose constitutional courts had the opportunity to decide on the compatibility of the provisions of the Istanbul Convention with national constitutions that "articulate a binary and biological understanding of sex."[50] The constitutionality of the Istanbul Convention was questioned before the constitutional courts of Bulgaria (2018), Latvia (2021), Moldova (2022) and Lithuania (2024).[51] Only the Bulgarian Constitutional Court found that the Convention was in violation of the Constitution, since the Convention "was incompatible with the binary biological conception of sex enshrined in the Constitution."[52] While in some countries (like Croatia) the ratification of the Istanbul Convention, due to pressure from conservative anti-gender actors, was accompanied by a political "interpretative declaration" about not accepting the obligation to introduce "gender ideology", in other countries the constitutional controversies appeared after the ratification of the Convention. Poland ratified the Convention in 2015, but when the Law and Justice (Prawo and Sprawiedliwośc, PiS) came into force, an evaluation of the Convention's constitutionality was requested (2020), which was officially withdrawn four years later when the new establishment took over.[53]

The following section paper will show how all three constitutional strategies are a part of the repertoire of anti-gender actors in Croatia as well. However, not all strategies were successful nor did they lead to constitutional erosion, or to an erosion of the rights of women.

As one of the former socialist states that proclaimed its democratic Constitution on December 22, 1990, Croatia has, over time, and intensively from 2000 onwards, managed to build a fairly good legal and institutional framework regarding women's rights, gender equality and non-discrimination.[54] The construction of this framework was strongly influenced by

47 Malagodi and Stradella (n 24) 40.

48 Rubio-Marin (n 39) 48.

49 *Ibid*., 39.

50 *Ibid*., 50.

51 Dovilė Pūraitė-Andrikienė, 'Conclusion on the Constitutionality of the Istanbul Convention of the Lithuanian Constitutional Court: Context, Reasoning, and Legal Consequences' (2025) 8(1) Access to Justice in Eastern Europe 322 <https://ajee-journal.com/upload/attaches/att_1734361289.pdf>.

52 Rubio-Marin (n 39) 52.

53 *Ibid*.

54 For an overview of legal and institutional framework see, e.g.: Anita Blagojević, 'Gender Equality in the Republic of Croatia. Two Steps Forward, One Step Back' in Irene Spigno, Valentina Rita Scotti and Juliano Luccas Pereira Da Silva (eds), *The Rights of*

the process of Europeanization. However, simultaneously with this process, with the growth of Euroscepticism as a response to the acceptance and implementation of EU standards in the field of gender equality, there was a growth of anti-gender movements in Croatia, which intensively linked their legal mobilization with populist politicians and parties. At the same time, it should be emphasized that this mobilization of conservative organizations is part of a transnational conservative movement, that is, these organizations do not have an indigenous dimension, but are often branches of transnational conservative organizations.[55] The key actors of the Croatian anti-gender scene were (and still are) various institutions (including religious), conservative civil society organizations, and conservative and far-right populist parties and politicians who actively support policies directed against gender equality and women's rights.[56] The growth of the anti-gender scene, from the first phase in 2006, marked by the mobilization against sex education, through the second phase in 2013, marked by successful lobbying for the marriage referendum, to the phase of entering the political scene from 2014 onwards,[57] is proof of the exceptional continuity, capacity and organization of these networked actors. The opportune synergistic networking with the political scene involves two groups of main actors: on the one hand, there are numerous conservative organizations (such as Vigilare and Voice of Parents for Children (Glas roditelja za djecu – GROZD) and popular initiatives (such as In the Name of the Family (U ime obitelji)), and on the other hand, there are anti-gender and populist political parties, from the first anti-gender party, Croatian Growth – HRAST, to the electoral victory of the Homeland Coalition in the 2016 parliamentary elections, and then the winning of parliamentary seats by far-right populist parties in the 2020 and 2024 elections (Bridge Party, Homeland Movement and Croatian Sovereigns). Moreover, the Homeland Movement, a right-wing populist political party with a pronounced anti-gender discourse, focused specifically on opposing "gender ideology" and the Istanbul Convention, and is currently part of the ruling coalition.

The networking of anti-gender actors with populist parties occurred at an "ideal moment" marked by a crisis of democracy and the rule of law, a pronounced distrust of citizens in all government institutions, and the growing of division in society. All these circumstances present fertile ground for populist actors, especially in countries that have extremely poor legal regulation of referendums, a parliament that ignores the constant warnings of the profession about the necessity of reforming that legislation, as well as the decisions of the Constitutional Court, for example one related to the necessity of passing a new "Abortion Law", but the Constitutional Court that is also unwilling to engage more actively in solving the accumulated problems.

Women in Comparative Constitutional Law (Routledge 2023) 17–34.

55 E.g. The Vigilare Association is a branch of the conservative organization Tradition, Family and Property and closely cooperates with the members of said association in Poland, Antonija Petričušić and Diandra Delić, 'Osporavanja reproduktivnih prava žena pravnom mobilizacijom antirodnog pokreta u Republici Hrvatskoj' (2024) 54(1) Revija za sociologiju 33, 46.

56 *Ibid*., 44.

57 Tanja Vučković Juroš and Maja Gergorić, 'Mobilizing the Womb: Anti-Abortion Activism and the Institutionalization of the Anti-Gender Movement in Croatia' in Roman Kuhar and Adriana Zaharijević (eds), *Anti-Gender Mobilizations in the Post-Yugoslav Space: Hidden Connection* (Palgrave Macmillan 2026) 38–40.

3.1. STRATEGY OF THE REGRESSIVE CONSTITUTIONAL EROSION: THE RIGHT TO ABORTION

The liberal 1978 Act on Health Measures for the Exercise of the Right to Free Decision-Making on Childbearing (hereinafter: the Abortion Act), which regulated the right to abortion, is one of Croatia's longest-standing legislative acts.[58] It is directly grounded in the 1974 Constitution of the Socialist Federal Republic of Yugoslavia, which was the first constitution in the world to explicitly guarantee the right "to free decision-making on childbearing" (Art. 191 of the SFRY Constitution). This provision was not included in the new Constitution of the democratic and sovereign Republic of Croatia. Under the aforementioned Abortion Act, abortion is legally permitted in the Republic of Croatia upon the pregnant woman's request up to ten weeks from conception.

The greatest challenge to this Act in its nearly half-century existence was the constitutional review before the Croatian Constitutional Court. It took the Constitutional Court of the Republic of Croatia 26 years from the initial proposal to reach a decision.[59] Although it rejected arguments regarding the unconstitutionality of the right to abortion, the Constitutional Court ordered the Croatian Parliament in its ruling to enact a new abortion law within two years. However, this still has not happened to this day.

The abortion law has been challenged by numerous petitioners, including the Croatian Movement for Life and Family, the Croatian Catholic Association "WE" and the Association "In the Name of the Family".[60] In its petition, the Croatian Movement for Life and Family argued that the right to abortion conflicts with the constitutional provision guaranteeing every human being the right to life (Article 21 of the Constitution of the Republic of Croatia), citing "scientific facts" that confirm a conceived, unborn child is a person.[61] Consequently, this petitioner viewed abortion as a denial of the right (to life) rather than as a right itself.[62] The Association "In the Name of the Family" also identified the unconstitutionality of the abortion law in its disregard for fathers, given that the procedure is performed at the request of the pregnant woman.[63] The Association believed this undermined the equality of both parents in relation to the child.[64]

In its ruling, the Constitutional Court noted that international law does not provide an answer to the question of when human life begins and that its protection in international human rights instruments is of a general nature. That means that the interpretation of the beginning

58 Ivana Tucak, Josip Berdica and Laura Seleš, 'Future of the Abortion in Croatia' in Ivan Pavić, Nikša Alfirević and Suzana Vuletić (eds), *Bioethics and Social Ethics in The Modern World: The Environmental and Social Sustainability Context(s)* (Palgrave Macmillan 2025) 71, 80.

59 *Ibid*,. 80.

60 *Ibid*., 82.

61 U-I-60/1991 et al. Ustavni sud [Constitutional Court] February 21, 2017, *Narodne novine [Official Gazette]* 25/2017, para. 4.1; *ibid.*, 82.

62 U-I-60/1991 *et al*. Ustavni sud [Constitutional Court] February 21, 2017, *Narodne novine [Official Gazette]* 25/2017, para. 4.1 and 4.1.1; *ibid*., 82.

63 Abortion Act, Art. 18.

64 U-I-60/1991 et al. Ustavni sud [Constitutional Court] February 21, 2017, *Narodne novine [Official Gazette]* 25/2017, para. 4.6, Tucak, Berdica and Seleš (n 58) 83.

of human life falls within the purview of individual states.[65] Although a woman's right to freely decide on childbearing is not explicitly guaranteed by the new Croatian Constitution, it is protected by the right to privacy under Article 35 of the Constitution – as interpreted by the Croatian Constitutional Court – which guarantees a woman the right to make autonomous decisions regarding conception and pregnancy. This right is not absolute; however, when restricting it, the legislature must strike a balance with the state's legitimate interest in protecting the unborn.[66]

Although the Croatian Constitutional Court has thus afforded constitutional protection to the right to abortion, the situation in practice is far from ideal. Croatia ranks low in the "Contraception Policy Atlas Europe 2025" published by the European Parliamentary Forum on Sexual and Reproductive Rights.[67] The issue of abortion is largely linked to the strong influence of the Catholic Church in Croatian society, a fact supported by data showing that 78.97% of Croatia's inhabitants identify as Catholic.[68] Timely access to abortion is hindered by the high proportion of doctors and other healthcare professionals who refuse to participate in performing abortions. While the lack of official records makes it impossible to determine the exact number, data collected by the Ombudsperson for Gender Equality in 2019 indicated that nearly 60% of healthcare professionals (specifically 58.8%) held this stance.[69] Furthermore, significant public attention is drawn to initiatives advocating for the protection of life from conception, such as the "March for Life" (which has organized public gatherings and national marches for the protection of life from conception since 2016)[70] and the public prayers held by the "Knights of the Immaculate Heart of Mary".[71] Paradoxically, however, although the majority of Croatian citizens identify as Catholic, this does not dictate their stance on abortion; all studies show that most citizens believe women should have the right to choose whether to give birth. A recent survey revealed that 75% of Croatian citizens hold this view, while 70% do not support the public prayers organized by the aforementioned Knights.[72]

Although seven years have passed since the deadline set for the Croatian Parliament to enact a new abortion law, the majority of parliamentary parties do not question the Constitutional Court's ruling regarding the constitutional right to privacy, which protects a woman's right to abortion. The only significant exception is the Homeland Movement, a party that is

65 U-I-60/1991 *et al*. Ustavni sud [Constitutional Court] February 21, 2017, *Narodne novine [Official Gazette]* 25/2017, para. 26, *ibid*., 86.

66 U-I-60/1991 et al. Ustavni sud [Constitutional Court] February 21, 2017, *Narodne novine [Official Gazette]* 25/2017, para. 44.1, *ibid*., 86–87.

67 CONTRACEPTION POLICY ATLAS EUROPE, Tracking government policies on access to contraceptive supplies, family planning counselling and the provision of online information on contraception, European Parliamentary Forum for Sexual & Reproductive Rights, 2025 <https://www.epfweb.org/sites/default/files/2025-02/CCInfoEU_A3_EN_2025_FEB14%20BIS.pdf> accessed 1 June 2026.

68 Rezultati Popisa stanovništva 2021. [The Croatian Bureau of Statistics 2021 Census] <https://dzs.gov.hr/vijesti/ objavljeni-konacni-rezultati-popisa-2021/1270> accessed 1 May 2026.

69 Izvješće Pravobraniteljice za ravnopravnost spolova za 2018. godinu [Croatian Ombudsman for Gender Equality, 2018 Report] <https://www.prs.hr/application/uploads/IZVJE%C5%A0%C4% 86A/Izvje%C5%A1% C4%87e_o_radu_Pravobraniteljice%20za%202018%20godinu.pdf> 315, accessed 2 June 2026, see also Antonija Petričušić, Reproduktivna prava kao ljudska prava <https://informator.hr/strucni-clanci/reproduktivna-prava-kao-ljudska-prava#footnote-2581-8> accessed 2 June 2026.

70 March for Life website <https://hodzazivot.hr/o-nama/> accessed 2 June 2026.

71 Knights of the Immaculate Heart of Mary website <https://vitezovi-bsm.hr/hr/3/Tko+smo+mi> accessed 2 June 2026.

72 A 2024 research showed that 75% of female citizens in Croatia supported the woman's right to abortion <https://voxfeminae.net/vijesti/novo-istrazivanje-75-gradanki_a-rh-podrzava-pravo-na-pobacaj/> accessed 2 June 2026.

part of the current ruling coalition. Their political platform emphasizes the need to protect life from conception to natural death.[73] As already noted, the issue of abortion is largely linked to the strong influence of the Catholic Church in Croatian society, and not so to the influence of anti-gender and populist actors. As shown, the constitutional review process demonstrates that the attempt to repeal existing abortion regulations was unsuccessful. Therefore, the first selected case can be viewed through the prism of the attempt of regressive constitutional erosion.

3.2. STRATEGY OF CONSTITUTIONAL ENTRENCHMENT: CONSTITUTIONAL DEFINITION OF MARRIAGE

Another common constitutional strategy used by anti-gender actors is constitutional entrenchment, which, as previously stated, represents the misuse of constitutional changes with the aim of strengthening the traditional gender order.

The process of anti-gender politics penetrating into constitutional matters in reached its culmination on December 1, 2013, when, based on 683,948 signatures collected as part of the popular initiative "In the name of the family", received by the Croatian Parliament on June 14, 2013, and in accordance with the decision of the Croatian Parliament of November 8, 2013,[74] a referendum was held on the proposal to amend the Constitution of the Republic of Croatia, which proposed that Art. 62 of the Constitution be amended with a new provision according to which marriage would be defined as the life union of a woman and a man. Despite the fact that the earlier constitutional amendment of 2010 removed from the Constitution the provision on the majority of voters required to participate in a referendum to pass a referendum decision,[75] 37.9 percent of voters participated in the referendum, and as many as 65.87 percent of voters were in favor of the proposal.[76]

During the 2013 campaign, which we can basically regard as political because it very quickly took precedence over the usual issues of governance in Croatia, Željka Markić, the campaign leader from the civil association "In the Name of the Family" (which later gave rise to the popular initiative with the same name), appeared on nearly all relevant political radio and television shows in Croatia. However, the organizers of the referendum initiative constantly

73 Politički program Domovinskog pokreta [Homeland Movement Political Agenda] 10 <https://dp.hr/wp-content/uploads/2024/03/Politicki-pogram-Domovinskog-pokreta.pdf> accessed 2 June 2026.

74 *Narodne novine [Official Gazette]* 134/2013. The decision to call the referendum passed with 104 out of 151 M.P. votes, even though the Constitution does not explicitly stipulate the majority required for such a decision, so it could have been passed by a simple majority.

75 In political terms, the purpose of the constitutional amendment was to ensure that the EU accession referendum, which occurred in January 2012, did not fail due to low turnout. For the Parliament decision to call the referendum on the accession of the Republic of Croatia to the European Union, see *Narodne novine [Official Gazette]* 151/2011.

76 Izvješće Državnog izbornog povjerenstva Republike Hrvatske o državnom referendumu održanom 1. prosinca 2013. [State Electoral Commission Report on the State Referendum held on December 1, 2013] para. 3–4, <https://www.izbori.hr/arhiva-izbora/data/referendum/2013/izabrani/i_81_000_0000.pdf> accessed 21 May 2026.
For comparison, a total of 56.29 percent of voters took part in the 2011 parliamentary elections, see Konačni službeni rezultati izbora [2011 Parliamentary Elections Results], <https://www.izbori.hr/site/UserDocsImages /Izbori_izvjesca/konacni_sluzbeni_rezultati_2011.pdf> accessed 21 May 2026.

emphasized that their access to the media was limited and that they were victims of hate speech from "LGBT portals", such as Crol.hr and VoxFeminae.[77]

At one point, even the Croatian Government joined the campaign. A video clip was recorded showing representatives of the ruling "Kukuriku" coalition, calling on citizens to vote "against" in the upcoming referendum. The clip was ultimately not released under the sponsorship of the Government, but was, nevertheless, posted on the Kukuriku Coalition's YouTube channel.[78] Croatian Radio and Television Network (HRT), the provider of public broadcasting service in Croatia owned by the Republic of Croatia, adopted a decision at the Programme Council meeting on November 20, 2013, prohibiting the expression of personal views related to the upcoming marriage referendum, even on the employees' social media profiles.[79]

Publications by reputable international news portals before and after the referendum regularly wrote about the strengthening of right-wing and conservative forces in the midst of the economic crisis and high unemployment and deep social and political divisions that the initiative led to, as well as the strong involvement of the Croatian Catholic Church in the campaign.[80]

Croatia was also called out during the debate on the Proposal for the Annual Report on Human Rights and Democracy in the World for 2013 and the European Union's policy in that area.[81]

The importance of this topic for Croatian society and state was further supported by 11 public university professors of constitutional law who signed and published a joint statement in June 2013, warning about the problems and potential political implications of the shortcomings of Croatian referendum legislation.[82]

A documentary film titled "Referendum" was released in 2013 on the impact of the described popular initiative and the divisions it caused in Croatia.[83]

77 „Dr. Markić: 90% medija bilo je PROTIV referenduma o braku, a 70 % birača ZA, to krivotvorenje stvarnosti nastavlja se" <https://narod.hr/hrvatska/dr-markic-90-medija-bilo-je-protiv-referenduma-obraku-a-70-biraca-za-to-krivotvorenje-stvarnosti-se-nastavlja> accessed 21 May 2026.

78 „Video: članovi Vlade pozvali građane da glasaju 'protiv': ministri nisu odustali od spota" <https://www.jutarnji.hr/vijesti/hrvatska/video-clanovi-vlade-pozvali-gradane-da-glasaju-protiv-ministri-nisu-odustali-od-spota-923558> accessed 21 May 2026.

79 „Zabrana izražavanja stavova o referendumu za djelatnike HRT-a je kršenje temeljnih ljudskih prava!" <https://www.index.hr/vijesti/clanak/Zabrana-izrazavanja-stavova-o-referendumu-za-djelatnike-HRT-a-je-krsenje-temeljnih-ljudskih-prava!/712630.aspx> accessed 21 May 2026.

80 „Svijet: Konzervativna Hrvatska zabranila istospolne brakove" <https://www.crol.hr/portal/vijesti/svijet2/5171-svijet-konzervativna-hrvatska-zabranila-istospolne-brakove.html> accessed 21 May 2026.

81 Available at: <https://www.eeas.europa.eu/sites/default/files/documents/2013_human-rights-annual_report_ en.pdf>. The report proposal was also supported by one Croatian M.E.P. from the Croatian People's Party, <https://narod.hr/eu-svijet/eu/uropski-parlament-hns-ov-eurozastupnik-rados-glasao-za-izvjesce-protiv-hrvatske> accessed 21 May 2026.
The controversial parts of the Report proposal that were highlighted by our representatives, as well as the petition on the CitizenGO platform that collected over 150,000 signatures, resulted in the removal of the controversial parts regarding Croatia from the final version of the Report. <https://narod.hr/eu/uspjeh-u-bruxellesu-iz-izvjesca-izbrisano-vrijedanje-hrvatske-i-referenduma-o-braku> accessed 21 May 2026.

82 „Apel 11 profesora radi sprečavanja ustavne krize" <https://www.vecernji.hr/vijesti/apel-11-profesora-radi-sprecavanja-ustavne-krize-567551> accessed 21 May 2026.

83 Željka Markić, Dražen Ilinčić i Ljiljana Bunjevac Filipović: „Referendum" (Dokumentarni film) <https://www.youtube.com/watch?v=JjnE22QNYUQ> accessed 21 May 2026.

In December 2023, organized by the Croatian M. P. Nino Raspudić, a round table was held at the Parliament titled "10 years since the national referendum on marriage: a look back at the past and lessons for the future".[84]

After the proposal for the decision to call the referendum had been put forward by a Parliament committee, the Constitutional Court addressed the referendum issue on three separate occasions – first, with a warning (before the referendum was called), then, with a statement (after the referendum was called, but before it was held) and, finally, with a decision (after the referendum was held).

In Warning U-VIIR-5292/2013 issued on October 28, 2013,[85] The Court warned that the procedure must be approached carefully, given that it was the first referendum of its nature since the establishment of independent and sovereign Republic of Croatia. Therefore, it was necessary to ensure that the decision to call and the procedure that would ensue were within the framework of the Constitution, especially in the situation where the rules on the procedure and the method of implementation of the popular initiative in Croatia have not been precise enough to not require any clarification regarding content and form of the referendum proposal.[86] The wording of certain parts of the proposed referendum calling decision was criticized, for example – that the actual subject of the referendum decision was to forward a proposal to the Parliament instead of adopting the amendment at the referendum itself, which would imply that the amending decision lay with the Parliament.[87] The Court did not in any way express its opinion on the constitutionality of the referendum question itself, considering that such an action outside the procedure initiated by the Parliament would be an act of "impermissible voluntarism".

Before voting on the proposal for a decision to call the referendum, the Parliament rejected another proposal to submit the referendum proposal and question for constitutional review in accordance with Art. 95 of the Constitutional Act on the Constitutional Court, which the Court, in November 14, 2013 Statement[88] saw as an expression of political and legal will by the Parliament to deem the referendum proposal and question constitutional.

However, the Court continued the Statement by saying that the fact that the Parliament did not request constitutional review did not mean that the Court ceased to have a general supervisory power over the constitutionality of the whole referendum process, as this power stems from Art. 125, paragraph 9 of the Constitution. It added that said power may, however, only be used exceptionally, when such an unconstitutionality of the referendum question or such a serious procedural error existed that would threaten to undermine the structural characteristics of the constitutional state, its constitutional identity, including the highest values of the constitutional order of the Republic of Croatia.[89] Because of this, it offered its interpretation of legal implications of passing the referendum in proposed form.

84 „Okrugli stol u organizaciji zastupnika Nine Raspudića" <https://sabor.hr/hr/press/okrugli-stol-u-organizaciji-zastupnika-nine-raspudica> accessed 3 June 2026.

85 U-VIIR-5292/2013 Ustavni sud [Constitutional Court] October 24, 2013, *Narodne novine [Official Gazette]* 131/2013.

86 *Ibid*., para. 7.

87 *Ibid*., para. 5.

88 Sus-1/2013 Ustavni sud [Constitutional Court] November 14, 2013, *Narodne novine [Official Gazette]* 138/2013.

89 *Ibid*., para. 5.

The Court cited Art. 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe and Art. 9. of the Charter of Fundamental Rights of the EU (as well as the Official Explanation of the Charter),[90] as well as examples of relevant case law, pointing out that marriage and family life – protection to which persons in same-sex unions who do not have the right to marry are also entitled – are not synonymous or identical legal institutes. It pointed out that the case law showed the mentioned provisions neither prohibit nor prescribe marriage between persons of the same sex, but that the European Court of Human Rights has, regardless, closed the door to a rigid interpretation of marriage under Art. 12 of the Convention exclusively as a union of persons of the opposite sex. The regulation of access to marriage, however, remained a matter of national legislation.[91] The Court also emphasized that the referendum on the constitutional definition of marriage is not a referendum on the right to respect for family life, as it is a permanent value of the Croatian constitutional state and is guaranteed to all persons, regardless of their sex and gender. A positive referendum outcome should not affect further development of legal framework of institutes of extramarital and same-sex unions in accordance with the constitutional requirement that everyone in Croatia has the right to respect and legal protection of their personal and family life and human dignity. The incorporation of proposed provision in the Constitution would not prevent further development of legislation regarding the exercise of the right to family life through the institutes of extramarital and same-sex unions, not would it prejudicate current or future possible similarities or differences in people's rights between those two institutes.[92]

The referendum proposal was, in terms of its content, a copy of existing legal provision of the Family Act, meaning the Court, had it found the referendum proposal question unconstitutional, would have indirectly also found the provision of Art. 5 of the Family Act unconstitutional. At the end of the Statement, the Court commented on the potential argument according to which the proposed amendment would bring a novelty to the Croatian legal system by giving constitutional character to an existing statutory norm, and found that such a thing should be done only exceptionally and would, by no means, be acceptable as a rule, referring to an opinion by the Venice Commission.[93] These exceptions could only be justified with deep-rooted social and cultural characteristics of society.[94]

Finally, in the Statement the Court repeated its earlier warnings about inadequate legislative framework for referendums and popular initiatives of the current Referendum Act (which, with minimal amendments in 2016 and 2017, is still in force today) stated in October 20, 2010 Decision U-VIIR-4696/2010[95] and added that more than three years after entry into force of the Constitutional Act for the Implementation of the Constitution (adopted after the

90 Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/21. From relevant parts of the Explanations that refer to Art. 9 of the Charter, it is visible that the wording of the Article has been consciously modernized to cover cases in which national legislation recognized arrangements other than marriage (*arrangements other than marriage*) for founding a family.

91 *Ibid*., para. 6.3.

92 *Ibid*., para. 7.2, 12.

93 *Ibid*., para. 9.1, see European Commission for Democracy through Law (Venice Commission), *Opinion on the Fourth Amendment to the Fundamental Law of Hungary* (CDL-AD(2013)012, 2013) <https://www.coe.int/en/web/venice-commission/-/opinion-on-the-fourth-amendment-to-the-fundamental-law-of-hungary-adopted-by-the-venice-commission-at-its-95th-plenary-session-venice-14-15-june-2013-1> accessed 21 October 2026.

94 *Ibid.*

95 *Narodne novine [Official Gazette]* 119/2010 .

constitutional amendment in 2010), the Parliament had not fulfilled its obligation, for which it was given only six months. Unfortunately, this obligation has still not been fulfilled in mid-2026. The lack of political will by the Parliament keeps forcing the State Electoral Commission, in cooperation with other state bodies, to fill the legislative gaps with *ad hoc* instructions.

From the perspective of the current topic, the least interesting was the third act by the Court, which was the January 14, 2014 Decision on the completion of the supervisory review on the constitutionality and legality of the referendum procedure, in which Art. 62 of the Constitution was amended with a new paragraph.[96] However, the Court did emphasize that regulatory deficiencies also existed regarding rules on the competent body for drafting the normative text of constitutional amendments, or for controlling it when it is proposed by voters, as well as regarding rules on the procedure and manner in which constitutional amendments would be published.[97]

Although the selected case generally has no implications for the rights of women, as it primarily concerns same-sex couples, the inclusion of the traditional definition of marriage in the Constitution has contributed to the spread of political and symbolic debates directed against gender equality. The 2013 Marriage Referendum was a turning point for anti-gender mobilization in Croatia,[98] showing how anti-gender actors "successfully reframed LGTB rights and emerged as influential political actors."[99] The referendum was followed by other anti-gender activities that expanded to the area of public and political life, such as a campaign against the ratification of the Istanbul Convention.

96 SuP-O-1/2014 Ustavni sud [Constitutional Court] January 14, 2014, *Narodne novine [Official Gazette]* 5/2014

97 *Ibid*., para. 8. The Constitutional Court pointed out that the Parliament is authorized to draft a new, consolidated text of the Constitution, which has also not been done to date. Other shortcomings of the referendum regulation, as well as the interpretations offered by the Constitutional Court, were written about by, e.g., Horvat Vuković, see Ana Horvat Vuković, 'Ustavni sud Republike Hrvatske i referendumi narodne inicijative 2013.–2015.: analiza i prijedlozi' (2016) 37(2) Zbornik Pravnog fakulteta Sveučilišta u Rijeci 805–835; *cf* Anita Blagojević and Ana Sesvečan, 'Ustavnopravni okvir referenduma u Republici Hrvatskoj: trenutno stanje i budući izazovi' (2019) 56(4) Zbornik radova Pravnog fakulteta u Splitu 835–876. Smerdel also warned about many other shortcomings since the introduction of popular referendum initiative, see Branko Smerdel, *Ustavno uređenje europske Hrvatske* (Narodne novine 2020) 423–432; Branko Smerdel, 'Neposredno odlučivanje i njegove ustavne granice' (2010) 10(11) Hrvatska pravna revija 1–9; Branko Smerdel and Robert Podolnjak, 'O referendumu narodne inicijative u Hrvatskoj i Sloveniji' in Branko Smerdel and Robert Podolnjak (eds), *Referendum narodne inicijative u Hrvatskoj i Sloveniji: ustavnopravno uređenje, iskustva i perspektive* (Hrvatska udruga za ustavno pravo 2014) 1–13; Branko Smerdel, 'Ustav, populizam i kraj liberalne demokracije – „referendumanija" ugrožava temelje ustavnog poretka' (2019) 56(4) Zbornik radova Pravnog fakulteta u Splitu 761–784.
The GONG association (civil organization focused on monitoring elections and encouraging active and responsible participation of citizens in political processes) offered its view of the shortcomings of the legislative framework on referendums and popular initiatives in the form of recommendations published in 2012 in a document titled "Analiza referenduma u Hrvatskoj u odnosu na europske standarde" [„Analysis of referendums in Croatia in relation to European standards"] <https://www.gong.hr/media/uploads/dokumenti/Analiza referendumauHrvatskojuodnosunaeuropskestandarde2.pdf> accessed 21 October 2026. The Ombudsman also warned about said shortcomings <https://www.ombudsman.hr/hr/analiza-regulacija-referenduma-ne-odgovara-demokratskim-standardima/> accessed 21 October 2026.

98 Tanja Vučković Juroš, Ivana Dobrotić and Siniša Flego, 'The Rise of the Anti-Gender Movement in Croatia and the 2013 Marriage Referendum' (2020) 72(9) Europe-Asia Studies 1523, 1524.

99 *Ibid*., 1523.

3.3. STRATEGY OF CONSTITUTIONAL PREEMPTION: THE ISTANBUL CONVENTION

The third strategy commonly used by anti-gender actors, according to Rubio-Marin, is constitutional preemption, i.e. presenting the protection of "traditional family" as an expression of constitutional sovereignty through the lenses of national identity and the relation between supranational norms and the norms of the national constitution.

In Croatia, this strategy materialized during the ratification process of the Istanbul Convention.

The Convention was signed in mid-2011 and came into force in August 2014. Croatia signed the Convention in early 2013, but the ratification was delayed for years and only took place in April 2018, accompanied by an interpretative statement by the Government, which contained the following positions of the Croatian Government: 1. the aim of the Convention is exclusively to protect women from all forms of violence and to prevent, prosecute and eliminate violence against women, 2. Croatia believes that the provisions of the Convention do not contain an obligation to introduce gender ideology into the Croatian legal and educational system or an obligation to change the constitutional definition of marriage, and 3. the Convention is in accordance with the Constitution and will be applied taking into account its values, principles and provisions.[100]

The Government, aware of the sensitive sociological and political circumstances at the time regarding the concept of gender and its embodiment in constitutional and legal norms, and having learned from the experience of the recently held state referendum on marriage in 2013, decided to approach the ratification process slowly and cautiously, officially justifying delays with reasons like substantial costs and complexity of preparing the implementation of Convention principles into national legislation.[101] The process was so slow that the opposing political parties rightly questioned whether it was even underway and, finally, in 2017, they submitted their own proposal of ratification act for the Convention.[102] Only after this proposal did the Government submit its own draft proposal of the ratification act for mandatory public consultation. However, even after the consultation was concluded, the proposal was nowhere to be seen. Under increasing political pressure, which even resulted in opposition party interpellation on the work of the Government regarding the ratification of the Convention in March 2018.,[103] seeking to pressure the Government into formally submitting their proposal

100 Informativna brošura o Istanbulskoj konvenciji, Vlada Republike Hrvatske [Informative broshure on the Istanbul Convention, Government of the Republic of Croatia] <https://vlada.gov.hr/UserDocsImages/Vijesti/ 2018/03%20o%C5%BEujak/27%20o%C5%BEujka/Istanbulska_letak_FINAL.pdf> accessed 28 May 2026.

101 See Informative broshure (n 82); even then it was obvious that, even within the ruling political party, there was no consensus regarding the ratification of the Convention.

102 Prijedlog Zakona o potvrđivanju Konvencije Vijeća Europe o sprječavanju i borbi protiv nasilja nad ženama i nasilja u obitelji, s Konačnim prijedlogom zakona <https://edoc.sabor.hr/DocumentView.aspx?entid=2004139> accessed 29 May 2026.

103 Interpelacija o radu Vlade Republike Hrvatske po pitanju ratifikacije Konvencije Vijeća Europe o sprječavanju i borbi protiv nasilja nad ženama i nasilja u obitelji <https://edoc.sabor.hr/DocumentView.aspx?entid=2007971> accessed 29 May 2026.

of the ratification act to the Parliament within 30 days, the Government finally submitted its proposal of the ratification act to the Parliament in April 2018.[104]

Unlike any other political decision of the Parliament in recent history, the issue of ratification of the Istanbul Convention led to divisions inside governing political parties, especially on the political right, as is evident from the fact that the ratification decision was not supported by fourteen representatives of the ruling party of the Coalition.

Outside the sphere of state political institutions, the campaign against ratification was led by the popular initiative "The Truth about Istanbul", supported by the European Christian Political Movement,[105] but one should not neglect the influence of the Croatian Bishops' Conference, which openly spoke out against ratification in the April 2018 Statement.[106] In May 2018 the initiative also collected signatures for calling the referendum on cancellation of the Convention. It insisted that the Convention introduced gender ideology and the concept of gender identity in the Croatian legal system, even though the term "gender identity" has existed in the Anti-Discrimination Act since its adoption in 2008.[107] The concept of gender and its use in the Convention was also considered controversial by members of the Croatian Academy of Sciences and Arts (HAZU), who voiced their opinion in a statement by the Scientific Council for Education and Schooling in December 2017.[108] After the statement was heavily criticized, HAZU distanced itself from it, stating that it did not represent the position of the organization.[109] The referendum initiative ultimately proved unsuccessful, given that, although more

104 It is also worth noting that very important amendments to the Standing Orders of the Parliament were adopted at the end of 2018, which enabled an item on the agenda to be discussed in the following working week by 30 or more M.P. signatures, instead of it, as was often the case, remaining in the "drawer" of the Speaker of the Parliament, being formally included in the agenda, but not discussed or voted on until there was political will by the ruling majority, see Poslovnik o izmjenama i dopunama Poslovnika Hrvatskog sabora [Amending Act on the Standing Orders of the Croatian Parliament], Art. 17, *Narodne novine [Official Gazette]* 29/2018.

105 „Istina o Istanbulskoj" Civil Initiative Website <https://istinaoistanbulskoj.info/gradanska-inicijativa> accessed 29 May 2026.

106 Izjava Hrvatske biskupske konferencije o ratifikaciji Istanbulske konvencije [Statement by the Croatian Bishops' Conference on the ratification of the "Istanbul Convention"] <https://hbk.hr/dokumenti-hbk/izjava-hbk-o-ratifikaciji-ratifikaciji-istanbulske-konvencije/> accessed 29 May 2026.

107 Zakon o suzbijanju diskriminacije [The Anti-discrimination Act], *Narodne novine [Official Gazette]* 85/2008. It should be pointed out that the unofficial translation of the Act on the Croatian Ombudsman website gives an inaccurate translation of certain terms, e.g. the term *gender identity* in Article 1 is referred to as "native identity", <https://www.ombudsman.hr/wp-content/uploads/2020/06/Anti-discrimination-Act.pdf> accessed 2 June 2026.

108 Izjava znanstvenog vijeća za obrazovanje i školstvo Hrvatske akademije znanosti i umjetnosti <https://narod.hr/wp-content/uploads/2017/12/Izjava_ZVOS_Istanbulska_konvencija.pdf> accessed 30 May 2026. The statement, among other things, contains the following: *The Istanbul Convention would impose a "gender-neutral" upbringing on children and young people, which is completely unacceptable from the point of view of freedom of education because the concept of gender in the Istanbul Convention is defined exclusively by "behavior, activities, roles"... Violence is defined exclusively as "gender-based" with the implication that only men are perpetrators and women are victims... so it is obvious that the Istanbul Convention seeks to promote scientifically unproven theses about the gender and sexual structure of humans. ... school education about the positions of women and men in society must not be aimed at denying male-female sexual and all other consequential differences because they are biologically, evolutionary, anatomically and functionally given. ... education ... must not serve as a basis for social discrimination. This cannot be achieved by violently denying and tabooing differences, but by raising awareness of the value of the human person, both female and male. ... Gender ideology ... poses a danger to the healthy and natural development of children and young people due to the unforeseeable consequences that may arise from its implementation in school curricula."*

109 „Na Izjavu Znanstvenog vijeća HAZU-a uslijedile brojne reakcije" <https://web.archive.org/web/2017122917 4317/> <http://vijesti.hrt.hr/422635/na-izjavu-znanstvenog-vijeca-hazu-a-uslijedile-brojne-reakcije> accessed 30 May 2026.

than 370,000 valid signatures were collected, it was not enough to force the Parliament to call referendum and so the proposal did not get to reach the stage of constitutional review.[110]

Despite everything described above, many positive effects of implementation of the Istanbul Convention in Croatia were shown in the GREVIO Report for the Republic of Croatia from May 2023, proving that irrational fears by the political right have not materialized.[111]

Although an interpretative statement in itself lacks a distinct legal dimension, given that it does not exempt a state from the obligation to implement the international document, its political dimension cannot be overlooked. Therefore, it can be viewed as a kind of concession made to reach a compromise with conservative and anti-gender actors in order to ratify the Convention, rather than the means of restricting rights of women.

4. INSTEAD OF A CONCLUSION: THE RIGHTS OF WOMEN IN CROATIA IN THE WEB OF POPULISM AND LACK OF CARE BY THE GOVERNMENT

As shown in the paper, the indicated phenomena of the crisis of constitutional democracy, democratic regression and illiberalism, which were partly caused and partly led to the polarization of society and the rise of populist parties, which were initially a characteristic of democratic transition countries, and today are increasingly widespread in Western countries, did not bypass Croatia either. Furthermore, we can conclude that their appearance and development has closely followed other countries in our surrounding, which should not be surprising in today's highly technological and globalized world of communications.

Although right-wing populism is not a new phenomenon in Central and Eastern Europe, what has specifically characterized it over the last few decades – beyond its interconnectedness with anti-gender actors – is its remarkable ability to adapt its goals to specific local conditions. While the shifting of potential "targets" across geographical and temporal dimensions is a common occurrence, one can generally conclude that in most former socialist countries, the focus lies on these three areas: the alleged threat to the "traditional family", opposition to the Istanbul Convention, and the right to abortion.

The rhetoric and legal activities of interconnected anti-gender actors – with populists playing a very particular role aimed at curtailing the established level of women's rights – also possess a strong constitutional dimension. The constitutional arena available to various anti-gender actors for achieving their envisioned goals is rich in constitutional strategies. Indeed, these strategies are not only quite diverse, but also undeniably contribute to constitutional

110 Many constitutional law experts have spoken out in the media stating that such a referendum would not be permitted even if enough signatures had been collected, i.e. that, even if the issue were not deemed unconstitutional, the referendum decision could not have the direct effect of terminating the Convention, see, for example, Đorđe Gardašević <https://faktograf.hr/2018/04/10/referendum-istanbulska-konvencija-ustavni-sud/> accessed 29 May 2026; Mato Palić <https://www.tportal.hr/vijesti/clanak/sprema-nam-se-referendum-o-istanbulskoj-ustavni-strucnjak-to-je-vratolomija-pucanj-u-prazno-foto-20180410/print> accessed 29 May 2026.

111 Baseline evaluation report: Croatia, GREVIO, May 2023 <https://rm.coe.int/baseline-evaluation-report-on-croatia/1680ac76c9> accessed 29 May 2026.

erosion. Following Rubio-Marín's classification, we conclude that the three common strategies employed by anti-gender actors within the sphere of constitutional law are: 1. regressive constitutional erosion – achieved by influencing constitutional court jurisprudence or legislation aimed at annulling or severely limiting the guaranteed level of women's rights; 2. constitutional entrenchment – the misuse of constitutional amendment processes – particularly prevalent in countries where anti-gender actors perceive that amending the constitution is not overly difficult (as has been observed in Croatia regarding the popular initiative referendum, despite its numerous legislative shortcomings and the apparent difficulty of amending the constitution through this mechanism); 3. the so-called constitutional preemption, which entails framing the protection of the "traditional family" as a mark of constitutional sovereignty – viewed through the prism of national identity and the relationship between supranational norms and the national constitution – while simultaneously opposing the spread of so-called "immoral Western ideas" propagated by "radically liberal" political elites. The analysis demonstrates that all three constitutional strategies formed a regular part of the repertoire of anti-gender actors in Croatia. all three constitutional strategies are a part of the repertoire of anti-gender actors in Croatia as well. However, not all strategies were successful nor did they lead to constitutional erosion, or to an erosion of the rights of women. The cases analyzed demonstrate different forms of political and legal mobilizations through various constitutional strategies. While the first case, the Marriage Referendum, was successful and resulted in a Revision of the Constitution, the other two cases were unsuccessful. The constitutional review proceedings concerning the law regulating abortion did nor result in the repeal of the statutory right to abortion, and the Istanbul Convention was ratified despite the opposition from conservative and anti-gender actors. Although all three strategies demonstrate the systematic efforts of anti-gender actors to challenge gender equality, their impact to the rights of women has been limited, due to the employed institutional responses, ranging from the Constitutional Court's upholding of the constitutionality of the right to abortion, to the Government's willingness to make what was considered necessary for the ratification of the Istanbul Convention.

Croatia is a country that, generally speaking, has worked towards a solid legal and institutional framework on women's rights, gender equality and non-discrimination, with a noticeably strong influence Europeanization. However, at the same time, there was also a strong growth of euroscepticism towards the implementation of EU gender equality standards, clearly recognized as part of the transnational conservative movement, and politically expressed through the activities of populist parties, some of which are not only politically active today, but also part of the political power, which speaks in support of the conclusion about the danger of Euroscepticism rooting itself deeper in Croatian society and politics. Religious organizations and various civil society organizations, though often gathered around individual conservative viewpoints, significantly contributed to the emergence and spread of populist parties, which reached their peak in the previous decade through activities aimed at shaping specific results in forms of constitutional definition of marriage, the non/ratification of the Istanbul Convention, and the (lack of) activity and decision willpower by institutions such as the Constitutional Court and the Croatian Parliament regarding the formulation of new regulation of the right to abortion.

The influence of populist parties in Croatian politics has, objectively, still remained at a low level, largely confined to sporadic activity from the political opposition. It seems that the current example of political coalition involving one such party is only a byproduct of opportunistic behaviour rather than an indicator of their factual political growth.

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RAST POPULIZMA I PRAVA ŽENA U HRVATSKOJ – ODABRANI USTAVNOPRAVNI ASPEKTI

Sažetak

Tijekom posljednjih trideset godina zemlje srednje i istočne Europe prolazile su kroz tranziciju, uključujući demokratsku tranziciju, koju je ponajprije obilježilo prihvaćanje pravne stečevine EU-a, među ostalim, i onu koja se odnosi na rodnu ravnpravnost i prava žena. Ti procesi nisu svugdje i kod svih političkih aktera naišli na odobravanje. Kao rezultat toga, u uvjetima polarizacije društva između progresivne liberalne ljevice te konzervativne i populističke desnice, koja sve više dobiva na zamahu, pojavila se demokratska kriza koju se opravdano opisuje kao demokratsku regresiju i neliberalizam. Spomenuti populistički pokreti politički u prvi plan često stavljaju – ili kao temeljnu ili kao ujedinjujuću ideju (oportunistička sinergija) desnog političkog spektra – određena demokratska postignuća vezana uz prava žena i ravnopravnost spolova, poput prava na pobačaj ili Istanbulske konvencije, ali isključivo s ciljem zaštite takozvanih tradicionalnih vrijednosti, tradicionalne obitelji i nacionalnog identiteta (u kontekstu odnosa nacionalnih i europskih normi) od „opasne" „rodne politike" i „rodne ideologije" koje nameće tzv. korumpirana politička elita EU-a. Na jačanje tih procesa utjecale su i druge društveno-političke, gospodarske i tehničke okolnosti, poput migrantske i zdravstvene krize te gospodarske krize, ali i razvoj tehnologije i društvenih mreža, što je omogućilo globalno umrežavanje aktera koji se protive rodnoj ravnopravnosti (antirodni akteri). Antirodni pokreti i strategije nisu nepoznanica ni u sferi ustavnog prava. Prema zanimljivoj klasifikaciji Rubio-Marina, prepoznate su tri osnovne strategije kojima se koriste spomenuti akteri: regresivna ustavna regresija, ustavno učvršćivanje i ustavna preempcija. Opisani procesi i pokreti nisu zaobišli ni Hrvatsku. Stoga se u radu prati provedba opisanih strategija na praktičnim primjerima: regulaciji i tumačenju prava na pobačaj, ustavnom referendumu o braku te ratifikaciji Istanbulske konvencije.

Ključne riječi: *demokratska regresija, rodna ravnopravnost, prava žena, antirodni pokreti, ustavne strategije, Hrvatska*

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THE PRINCIPLE OF EQUALITY IN CRIMINAL PROCEDURE: GENDER PERSPECTIVES, ETHICAL STANDARDS, AND THE CHALLENGES OF AI

Summary: *The principle of equality before the courts is firmly established in international and regional human rights instruments and constitutes a fundamental principle of judicial ethics. In criminal proceedings, it encompasses several closely related yet conceptually distinct guarantees. While equality of arms, as an essential component of the right to a fair trial, seeks to ensure a fair procedural balance between the prosecution and the defence, the broader principles of equality and non-discrimination require equal and impartial treatment of all participants, regardless of their personal characteristics. The effective realization of these guarantees continues to be challenged by structural inequalities, implicit biases, and gender-based stereotypes. The increasing use of artificial intelligence (AI) in criminal justice raises additional concerns regarding discriminatory outcomes, unequal access to technological resources, transparency, accountability, and potential imbalances in procedural rights and opportunities. In the first part, the paper examines the relationship between the general principle of equality, the right to fair trial, and equality of arms in criminal proceedings. Through an analysis of international human rights standards and criminal procedure legislation in Bosnia and Herzegovina and selected countries from the region, it assesses the legal mechanisms designed to ensure procedural fairness and the effective protection of individual rights. Particular attention is given to the procedural position of injured parties, examined within the broader framework of equality, non-discrimination, and access to judicial protection. The analysis also considers the extent to which existing procedural safeguards protect against gender-based discrimination and stereotyping, particularly in proceedings involving gender-based violence.*

In the second part, the paper examines the implications of the growing use of AI in criminal proceedings for both equality of arms and the broader principle of non-discrimination. While AI may contribute to greater efficiency and consistency in

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criminal justice, unequal access to technological resources and limited opportunities to scrutinise AI-generated evidence may create new forms of procedural imbalance. At the same time, AI systems may reproduce or amplify existing gender biases reflected in training data and institutional practices. Particular attention is devoted to the risks associated with the use of AI in cases involving gender-based violence, including discriminatory outcomes and hermeneutical injustice. The paper argues that safeguarding equality in AI-assisted criminal proceedings requires transparency, effective procedural safeguards, and substantive human oversight.

Keywords: *Principle of equality, Criminal procedure, Gender equality, Artificial intelligence, Algorithmic bias*

1. INTRODUCTION: THE PRINCIPLE OF EQUALITY BEFORE COURTS

The aim of the paper is to examine the different dimensions of equality in criminal proceedings, with particular emphasis on the relationship between equality of arms, the prohibition of discrimination, and the effective protection of procedural rights. The analysis explores how these guarantees interact in criminal proceedings, assesses the extent to which the existing legal framework in Bosnia and Herzegovina (BiH) ensures their effective implementation, particularly regarding the procedural position of injured parties and gender equality, and considers the implications of the increasing use of artificial intelligence for procedural fairness and non-discrimination. The research employs doctrinal and comparative legal analysis, drawing on relevant international human rights standards, the case law of the ECtHR, and criminal procedure legislation in BiH and selected countries from the region.

The paper focuses on equality of arms in the prosecution–defence relationship and the distinct procedural safeguards afforded to injured parties. Within this framework, gender-based discrimination and the increasing use of artificial intelligence are examined as challenges to the effective exercise of procedural rights and the broader principle of equality in criminal proceedings.

1.1. EQUALITY BEFORE THE COURTS, THE RIGHT TO A FAIR TRIAL, AND EQUALITY OF ARMS: INTERNATIONAL AND EUROPEAN LEGAL FRAMEWORK

The principle of equality before the courts is firmly embedded in international human rights instruments. Article 14(1) of the International Covenant on Civil and Political Rights[1] provides that all persons shall be equal before the courts and tribunals. This provision should be interpreted in conjunction with Article 2(1) of the Covenant, which requires States Parties

1 United Nations: International Covenant on Civil and Political Rights <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> accessed 12 February 2026.

to respect and ensure the rights recognized therein to all individuals within their territory and subject to their jurisdiction, without discrimination of any kind. Such prohibited grounds of discrimination include race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or any other status. Accordingly, the principle of equality before the courts constitutes not only a procedural guarantee of equal treatment in judicial proceedings but also reflects the broader principle of equality and non-discrimination that underlies the international system of human rights protection.[2] The Human Rights Committee (HRC) has emphasized that the right to equality before courts and tribunals inherently encompasses the principle of equality of arms. This principle requires that all parties to judicial proceedings be afforded equal procedural opportunities, except where distinctions are prescribed by law and justified on objective and reasonable grounds. Any differential treatment must not place one party at a substantive disadvantage or otherwise undermine the fairness of the proceedings. Thus, equality of arms would be violated if, for example, the prosecution were granted a right of appeal against a particular judicial decision while the defendant were denied an equivalent procedural opportunity.[3]

At the regional level, although the European Convention on Human Rights (ECHR) does not explicitly guarantee equality before the courts as a separate right, the principle constitutes an essential element of the right to a fair trial guaranteed by Article 6. The case-law of the European Court of Human Rights (ECtHR) has consistently regarded equality of arms as one of the essential components of a fair trial, requiring that each party be afforded a reasonable opportunity to present its case under conditions that do not place it at a substantial disadvantage *vis-à-vis* its opponent.[4] Article 14 of the ECHR protects a broader dimension of equality by prohibiting discrimination in the enjoyment of Convention rights. Unlike equality of arms, which concerns procedural balance, it addresses unjustified differential treatment based on personal characteristics, as well as failures to treat significantly different situations differently. Although Article 14 is not a free-standing provision, its application does not require a violation of another Convention right, provided that the circumstances fall within its ambit.[5] Article 1 of Protocol no. 12 to the ECHR complements Article 14 by establishing a general prohibition of discrimination extending beyond the rights guaranteed by the Convention. Although it does not establish specific procedural guarantees in criminal proceedings, it may be relevant where discriminatory treatment arises in the enjoyment of rights provided by domestic law or in the exercise of powers by competent public authorities, including on grounds of sex or gender.[6]

2 UN Human Rights Committee, General Comment No. 32: art 14 /Right to Equality Before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32 (2007); UN Human Rights Committee, General Comment No. 18: Non-Discrimination, HRI/GEN/1/Rev.9 (Vol. I) (1989).

3 Joseph Sarah, Castan Melissa, *The international covenant on civil and political rights: cases, materials, and commentary* (Oxford University Press 2013), 440.

4 *Zhuk v Ukraine* App no 45783/05 (ECtHR, 21 October 2010) para 25, quoted in Mrčela Marin, 'Adversarial Principle, the Equality of Arms and Con Frontational Righ – European Court of Human Rights Recent Jusrisprudence', (2017) 1 EU and comparative law issues and challenges series (ECLIC), 17 n12. See also: Burlacu Ivan, Rusnac Constantin, 'The Right to Defense and Equality of Arms in Criminal Proceedings', (2025) 9(5) ACROSS Journal of Interdisciplinary Cross-border Studies, 145–161.

5 Radačić Ivana, 'Gender Equality Jurisprudence of the European Court of Human Rights' (2008) 19(4) European Journal of International Law, 842.

6 Protocol no. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 2000). See also Explanatory Report to Protocol No. 12, §§ 21–23.

Comparable guarantees may be found in other regional human rights instruments. Article 8 of the American Convention on Human Rights[7] recognizes the right to a hearing with due guarantees by a competent, independent, and impartial tribunal, while Articles 1 and 24 establish the principles of equality and non-discrimination. Likewise, Article 7 of the African Charter on Human and Peoples' Rights[8] guarantees the right to have one's cause heard, and Article 3 affirms that every individual is equal before the law and entitled to equal protection of the law. Consequently, equality before the courts has evolved into a universally recognized requirement of contemporary human rights law, closely linked to the broader principles of equality, non-discrimination, and effective judicial protection.

Although closely related, equality before the courts, the right to a fair trial, and equality of arms are conceptually distinct. Equality before the courts reflects the broader requirement of equal and non-discriminatory treatment in the administration of justice, while the right to a fair trial encompasses a range of procedural guarantees. As one of these guarantees, equality of arms is primarily procedural in nature, requiring a fair balance between the prosecution and the defence, particularly regarding opportunities to present their cases and challenge evidence.[9]

The principle of equality also constitutes one of the fundamental standards of judicial ethics. The Bangalore Principles of Judicial Conduct[10] emphasize that ensuring equal treatment of all persons before the courts is essential to the proper discharge of judicial responsibilities. Accordingly, judges are expected to be aware of and adequately understand the diversity that characterizes the societies in which they perform their judicial functions, including, but not limited to, race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes (Principle 5.1). Proper adherence to the principles of equality and impartiality does not require judges to disregard social, cultural, or economic differences among those appearing before the court; rather, it requires them to recognize and understand the ways in which such circumstances may shape the conduct, motivations, and experiences of parties and other participants in legal proceedings. At the same time, awareness of diversity must never serve as a basis for differential or discriminatory treatment; rather, it should enable judges to ensure that all individuals are treated with equal respect and dignity and are afforded a genuinely equal opportunity to participate effectively in judicial proceedings.[11]

7 American Convention on Human Rights (1969) <https://treaties.un.org/doc/publication/unts/volume%201144/ volume-1144-i-17955-english.pdf> accessed 12 March 2026.

8 African Charter on Human and Peoples' Rights (1981) <https://treaties.un.org/doc/Publication/ UNTS/Volume%201520/ volume-1520-I-26363-English.pdf> accessed 12 March 2026.

9 Some authors have sought to identify the specific procedural guarantees encompassed by the principle of equality of arms. Akther and Nordin, for example, include the right to be present at trial, access to legal counsel, the right to defend oneself in person or through legal assistance, the right to free legal aid, and the right to examine or have witnesses examined. See: Akther Shajeda and Nordin Rohaida Binti, 'Equality of Arms: A Fundamental Principle of Fair Trial Guarantee Developed by International and Regional Human Rights Instruments' (2014) 1 LNS(A) lii, *Legal Network Series*, 5–6.

10 The Bangalore Principles of Judicial Conduct are an influential international soft law instrument on judicial ethics, developed by the Judicial Group on Strengthening Judicial Integrity in 2001 and adopted in their final form in The Hague on 25–26 November 2002. Widely recognised as a global reference for judicial ethics, they have significantly influenced the development of national standards of judicial conduct <https://www.unodc.org/documents/ji/ training/bangaloreprinciples.pdf> accessed 11 April 2026.

11 These considerations raise an important question in the context of the growing use of artificial intelligence (AI) in judicial decision-making: can AI systems adequately replicate the contextual understanding required by the principles of equality and impartiality, or might they, under certain conditions, provide a more consistent and objective means of securing equal

Contemporary theories of equality have increasingly moved beyond the traditional notion of formal equality, recognizing that the mere allocation of identical rights and procedural guarantees does not necessarily ensure genuine equality in practice. As Fredman has argued, substantive equality requires attention not only to disadvantage, but also to stereotyping, exclusion, and structural barriers that may impair the effective exercise of rights. In the context of criminal proceedings, this means that equality before the courts cannot be reduced to the formal requirement of equal treatment; it also requires that all participants be afforded a genuinely equal opportunity to exercise their procedural rights and participate effectively in the administration of justice.[12]

1.2. GENDER EQUALITY IN CRIMINAL PROCEEDINGS

One of the fundamental dimensions of the principle of equality in criminal proceedings concerns the prevention of gender discrimination and the guarantee of equal treatment for all participants in the administration of justice. Although gender equality within the legal profession is today regarded as an essential component of democratic governance and the rule of law, women were historically excluded from judicial office and many other legal professions. The case of Myra Bradwell provides a well-known illustration of such barriers. In 1873, the United States Supreme Court upheld the refusal to admit Bradwell to the bar, while Justice Bradley's concurring opinion justified this exclusion on the ground that a woman's primary destiny and mission were those of wife and mother. The case illustrates the deeply rooted institutional and cultural assumptions that long restricted women's access to legal careers and participation in the administration of justice.[13] While explicit legal barriers have largely disappeared, formal equality has not entirely eliminated gender-based stereotypes and discriminatory practices within criminal justice systems. Such bias may affect not only judges and legal professionals but also defendants, victims, witnesses, expert witnesses, prosecutors, defence counsel, and other participants in criminal proceedings. Instances of sexist conduct within courtrooms demonstrate the persistence of these challenges. Judicial disciplinary proceedings against Judge Arthur Cieslik in 1987, following derogatory comments directed at female attorneys, together with other documented examples of gender-based disparagement tolerated during judicial proceedings, underscore the continuing relevance of gender equality concerns within the justice system.[14]

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treatment? Human judges may draw upon experience, empathy, and an appreciation of the social realities that shape legal disputes, yet they remain susceptible to conscious and unconscious biases. AI systems, by contrast, may offer greater consistency and a degree of resistance to certain forms of human subjectivity and prejudice, although, as will be discussed below, they are by no means immune from bias themselves. At the same time, they often lack the capacity to fully comprehend the social, cultural, and individual circumstances that may be relevant to the fair adjudication of a case. The central challenge, therefore, is whether algorithmic decision-making can genuinely promote equality before the courts or whether the ethical demands of equality and impartiality ultimately depend upon forms of contextual and moral judgment that current AI systems are unable to replicate.

12 Fredman Sandra, 'Substantive equality revisited', (2016) 14(3) International journal of constitutional law.

13 Igor Milinković, *Ogledi iz pravne etike I: Sudijska etika (Essays on Legal Ethics I: Judicial Ethics)* (Faculty of Law of the University of Banja Luka 2021), 168–169.

14 *Ibid.*, 169.

The principle of gender equality extends beyond the rights of parties to criminal proceedings and encompasses all participants in the administration of justice, including judges, prosecutors, defence counsel, witnesses, court personnel, and other actors involved in the judicial process. Contemporary standards of judicial ethics require not only that judges refrain from discriminatory conduct, but also that they actively prevent and address discriminatory behaviour by those operating within the judicial environment. The Bangalore Principles of Judicial Conduct emphasize that judges must not permit distinctions to be made on the basis of irrelevant characteristics, including gender, and should require lawyers and court personnel to maintain the same standard of conduct.[15] Failure to respond to sexist remarks or discriminatory treatment may create the appearance of judicial endorsement, thereby undermining confidence in judicial impartiality and compromising the perception of fairness that lies at the heart of the right to a fair trial.

These concerns have acquired additional significance in the era of artificial intelligence. As AI systems are increasingly integrated into criminal justice processes, there is a growing risk that algorithmic tools may perpetuate existing inequalities or produce discriminatory outcomes, including those based on gender. Algorithmic bias may be understood as a systematic and repeatable error in a computational system that generates unfair outcomes by disproportionately privileging or disadvantaging particular individuals or groups. Gender bias represents a specific manifestation of algorithmic bias in which one gender is subjected to less favourable treatment than another.[16] Such outcomes may result from historical prejudices embedded in training datasets, institutional practices reflected in past decision-making patterns, or characteristics of the algorithmic models themselves. Some scholars have also linked the persistence of gender bias in AI systems to the underrepresentation of women in the design and development of artificial intelligence technologies. Ensuring equality before the law therefore requires not only vigilance against traditional forms of discrimination but also the development of legal and ethical safeguards capable of addressing the challenges posed by AI-assisted decision-making.

Scholars have identified several distinct sources of algorithmic bias. Tanna and Dunning distinguish between four principal categories of AI bias. The first is bias introduced by data, which occurs when AI systems learn from data that reflect existing patterns of prejudice, discrimination, or structural inequality. The second is bias introduced by developers, arising from the conscious or unconscious assumptions and value judgments of programmers and system designers. A third form, commonly referred to as stability bias, reflects the tendency of AI systems to preserve existing patterns and decision-making practices, thereby limiting opportunities to correct historical disparities. Finally, AI bias in the strict sense may emerge from the operation of the algorithm itself, generating outcomes that cannot be explained solely by either the training data or the choices of developers.[17] Gender bias may arise through any of these mechanisms, either individually or in combination, illustrating the complex ways in which AI systems can reproduce or amplify existing inequalities. These risks demonstrate that

15 Principles 5.4 and 5.5.

16 Juliana Castaneda *et al.*, 'Dealing with gender bias issues in data-algorithmic processes: a social-statistical perspective', (2022) 15(9) Algorithms 1.

17 Minesh Tanna, William Dunning, 'Bias and discrimination', in Charles Kerrigan (ed.), *Artificial Intelligence: Law and Regulation* (Edward Elgar Publishing, 2022), 422–441.

AI cannot, at least in its current state of development, be regarded as a fully neutral or value-free decision-making tool. Accordingly, the deployment of AI within criminal justice systems must remain subject to meaningful human oversight, transparency and explainability requirements, and robust legal and ethical safeguards designed to uphold the principles of equality, fairness, and non-discrimination.

2. THE PRINCIPLE OF EQUALITY IN CRIMINAL PROCEEDINGS

The principle of equality in criminal proceedings is closely related to the maxim *audi alteram partem* (or *audiatur et altera pars*), which embodies the right to be heard and requires that each party be afforded a meaningful opportunity to present its case and respond to the arguments and evidence submitted by the opposing party. The principle of equality of arms first emerged in the decisions of the former European Commission of Human Rights, notably in Ofner and Hopfinger v. Austria and Pataki and Dunshirn v. Austria.[18] Its subsequent development in the case law of the European Court of Human Rights began with Neumeister v. Austria (1968), which recognised its connection to the right to a fair trial. In Delcourt v. Belgium (1970), the Court further clarified that equality of arms constitutes one aspect of the broader guarantee of a fair trial under Article 6(1) of the ECHR.[19]

The principle of equality of parties in criminal proceedings implies the possibility of impartial determination of facts and the right of the accused to be heard by an independent body. However, in judicial proceedings aimed at the objective establishment of facts, it is also necessary to ensure that other participants in criminal proceedings who are not formal parties to the proceedings are given the opportunity to present facts relevant to the subject matter of the criminal case. It is also interesting to note that in legal theory one encounters the view that the principle of equality means equal punishment regardless of social status, race, or any other individual characteristics. People should be judged based on what they have done, rather than on who they are. Accordingly, equality in criminal law may be defined as the requirement that all citizens face the same threat of investigation and criminal prosecution for the commission of a criminal offence.[20] Equal treatment of parties in criminal proceedings cannot be ensured if it depends on the financial resources of the accused.[21] In this regard, the right of the suspect or accused to free legal aid in criminal proceedings also serves the principle of equality of parties.

18 *Ofner and Hopfinger v Austria* App nos 524/59 and 617/59 (European Commission of Human Rights, 23 November 1962), Commission Report of 23 November 1962, § 46; *Pataki and Dunshirn v Austria* App nos 596/59 and 789/60 (European Commission of Human Rights, 28 March 1963), Commission Report of 28 March 1963, § 36. See also: Masha Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings* (Intersentia 2012), 1–3, 30–31.

19 *Neumeister v Austria* App no 1936/63 (ECtHR, 27 June 1968), para 22; *Delcourt v Belgium* App no 2689/65 (ECtHR, 17 January 1970), para 28.

20 James Q Whitman, 'Equality in Criminal Law: The Two Divergent Western Roads', (2009) 1(1) Journal of Legal Analysis, 120–121.

21 'Simplicity as Equality in Criminal Procedure', (2007) Vol. 120 Harvard Law Review <https://harvardlawreview. org/wp-content/uploads/2007/03/simplicity_as_equality.pdf> accessed 24 February 2026.

Equality of parties in criminal proceedings is also achieved through the adversarial principle.[22] Equality of arms constitutes a fundamental element of the right to a fair trial.[23] The dispute between the parties in criminal proceedings, who defend opposing theses, represents the most effective method for discovering the truth.[24] The principle of equality in criminal proceedings therefore contributes to the establishment of the truth in the criminal process. The principle of equality is closely linked to the right of the parties in criminal proceedings to act on an equal footing, to examine witnesses against them, to be present during the examination of witnesses, and to examine witnesses (both for and against them) under the same conditions.[25]

The principle of equality in criminal proceedings implies that the parties are equal before the court regardless of gender and that they are guaranteed equal procedural rights and opportunities. The principle of equality derives from the constitutional principle of the prohibition of discrimination and means that the law is applied equally to everyone, regardless of sex, origin, property status, social position, or any other personal characteristic. Equality implies that the parties in criminal proceedings enjoy equal procedural rights, while the prohibition of discrimination means that parties in criminal proceedings must be able to exercise the procedural rights provided by law regardless of their gender, language, culture, or other personal characteristics.

3. THE PRINCIPLE OF EQUALITY IN CRIMINAL PROCEEDINGS IN BOSNIA AND HERZEGOVINA AND SELECTED COUNTRIES FROM THE REGION

3.1. BOSNIA AND HERZEGOVINA

The principle of equality in criminal proceedings in BiH[26] requires the court to ensure equal treatment of the parties and defence counsel, particularly regarding access to evidence and its presentation at the main hearing. The court, the prosecutor, and other competent authorities, are required to examine and establish both incriminating and exculpatory facts with equal

22 Ivana Miljuš, *Načelo jednakosti „oružja" u krivičnom postupku* (doktorska disertacija, Pravni fakultet Univerziteta u Beogradu 2021).48–50.

23 Elizabeta Ivičević Karas, 'Načelo jednakosti oružja kao konstitutivni element prava na pravični kazneni postupak iz članka 6. Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda', (2007) 57(4–5) Zbornik PFZ, 761–788.

24 Dragoljub Dimitrijević, *Krivično procesno pravo* (Savremena administracija 1967), 114.

25 Mrčela (n 4) 15–31.

26 Zakon o krivičnom postupku Republike Srpske (Official Gazette 53/2012, 91/2017, 66/2018 and 15/2021) art 14 (hereinafter 'ZKP RS'); Zakon o krivičnom postupku Bosne i Hercegovine (Official Gazette 3/2003, 32/2003 (corrigendum), 36/2003, 26/2004, 63/2004, 13/2005, 48/2005, 46/2006, 29/2007, 53/2007, 58/2008, 12/2009, 16/2009, 53/2009 (other law), 93/2009, 72/2013 and 65/2018) art 14 (hereinafter 'ZKP BiH'); Zakon o krivičnom postupku Federacije Bosne i Hercegovine (Official Gazette 35/2003, 56/2003 (corrigendum), 78/2004, 28/2005, 55/2006, 27/2007, 53/2007, 9/2009, 12/2010, 8/2013, 59/2014 and 74/2020) art 15 (hereinafter 'ZKP FBiH').

diligence. The Criminal Procedure Act of the Brčko District (BD) links equality in proceedings directly to the right to a fair trial.[27]

In BiH, the principle of equality in criminal proceedings requires that procedural activities be conducted in a manner that facilitates the objective determination of all relevant facts, whether incriminating or exculpatory in relation to the suspect or accused. The principle further demands that the parties be given an effective opportunity to examine and contest the evidence on which the proceedings are based, while the court must reach its decision solely on the basis of lawfully established facts. Where reasonable doubt remains regarding facts relevant to criminal responsibility, such doubt must be interpreted in favour of the accused, consistent with the principles of *in dubio pro reo* and the presumption of innocence.

The principle of equality in criminal proceedings primarily concerns the parties right of access to evidence and its presentation at the main hearing. Accordingly, it is the duty of the judge, or the presiding member of the panel, to ensure a comprehensive examination of the case and to eliminate anything that unnecessarily delays the proceedings without contributing to clarifying the matter. The court's obligation to prevent delays while ensuring a thorough examination of the case derives from the right to a trial without undue delay. It may be argued that in BiH the principle of equality in criminal proceedings is largely limited to the main hearing and entails the court's obligation to provide the parties with equal procedural rights in presenting evidence and establishing facts relevant to the case, in accordance with the principles of fairness and truth, as facts are determined both to the detriment and in favor of the suspect or accused. Unfortunately, the fact that the principle of equality is limited to only one stage of the criminal procedure is also confirmed by the rule prescribed by law that during the investigation, the defense attorney and the suspect have the right to review the files and examine the cases "in favor of the suspect".[28] Furthermore, the defence has the right to access evidence necessary for challenging the lawfulness of detention, as well as the right to propose the collection and presentation of evidence during the investigation that may support the position of the suspect or accused. Similarly, the parties and defense counsel have the right to propose judicial securing of evidence. So that the suspect and his counsel have the right to access evidence relevant to assessing the lawfulness of detention, as well as the right to propose the presentation of evidence during the investigation in favor of the suspect.

The procedural rights of the suspect during the investigation are limited, as there is no obligation for the prosecutor to inform the suspect about the issuance of orders to conduct investigative actions, since the investigation is generally conducted in secret. The law provides that, in the event of the termination of an investigation, the prosecutor must notify the victim in writing of the termination and the reasons for it. The victim then has the right to file a complaint within eight days to the Chief District Prosecutor. The suspect, if examined, as well as the person who reported the criminal offense, must also be informed of the termination.[29] The fact that a suspect may be unaware that an investigation is being conducted against them, and that the investigative stage is generally confidential in nature, is further evidenced by the

27 Zakon o krivičnom postupku Brčko distrikta Bosne i Hercegovine (Official Gazette 34/2013 (consolidated text), 27/2014, 3/2019 and 16/2020) art 14 (hereinafter 'ZKP Bd').

28 ZKP RS, art 55(1); ZKP BiH, art 47(1); ZKP FBiH, art 61(1); ZKP Bd, art 47(1).

29 ZKP RS, arts 232(2) and 224(5); ZKP BiH, arts 224(2) and 216(4); ZKP FBiH, arts 239(2) and 231(4); ZKP Bd, arts 224(2) and 216(4).

legal provision requiring notification of the termination of an investigation only where the suspect has previously been examined. The court is obliged to ensure that the parties in the proceedings enjoy equal rights; however, this duty of the court is impossible to fulfil during the investigation phase, as the court does not have the authority to review the prosecutor's decision not to conduct an investigation, nor the decision to carry out investigative actions. During the investigation, the role of the court, i.e., the preliminary hearing judge, is limited to approving or rejecting the prosecutor's proposal for the conduct of evidentiary actions that may affect the suspect's right to privacy and other personal rights.

3.2. CROATIA

In criminal proceedings in Croatia, the principle of equality is not limited solely to the main hearing, as the court and other competent state authorities involved in the proceedings examine facts that both incriminate and favor the accused with equal diligence. By requiring these authorities to consider information relevant to both the guilt and innocence of the accused with equal care, the legislature underscores the close connection between the principle of equality in criminal proceedings and the presumption of innocence.[30] That the principle of equality is not disregarded during the investigation phase in Croatian criminal proceedings is also indicated by the legal provision granting the accused the right to appeal a decision to conduct an investigation. The merits of the appeal are examined by the investigating judge.[31] To ensure a trial within a reasonable time, the Croatian Criminal Procedure Act provides that if the state prosecutor has examined the accused prior to issuing a decision to conduct an investigation, they are obliged to decide on the initiation of the investigation within 48 hours of the examination.[32] That the accused and the state prosecutor have equal procedural rights in terms of evidence collection during the investigation is further confirmed by the legal provision granting the accused the right to propose to the state prosecutor the collection of evidence. If the state prosecutor rejects the accused's proposal to conduct an evidentiary measure, the proposal must be referred to the investigating judge, who may order the prosecutor to carry out the proposed measure.[33] During the trial phase in Croatian criminal proceedings, the parties have an equal right to propose the presentation of evidence. The court also has the right to propose the presentation of evidence that the parties have not requested, and it may require the presentation of evidence that the parties and the defense counsel have waived.[34] Under Croatian law, the injured party may assume criminal prosecution as a subsidiary prosecutor where the state prosecutor decides not to initiate or to discontinue prosecution, subject to the conditions prescribed by law. This possibility does not presuppose an unlawful prose-

30 Zakon o kaznenom postupku Republike Hrvatske (Official Gazette 152/2008, 80/2011, 121/2011, 91/2012, 143/2012, 152/2014, 70/2017, 126/2019, 130/2020, 80/2022, 36/2024, 72/2025 and 13/2026) art 9(1)–(2).

31 Zakon o kaznenom postupku Republike Hrvatske, art 218(1)–(2).

32 Zakon o kaznenom postupku Republike Hrvatske, art 216(4).

33 Zakon o kaznenom postupku Republike Hrvatske, art 234(2).

34 Elizabeta Ivičević Karas, 'Neka pitanja uređenja rasprave u hrvatskom kaznenom postupku – normativni okvir i praksa', in Stanko Bejatović, Ivan Jovanović (eds), *Glavni pretres i suđenje u razumnom roku regionalna krivičnoprocesna zakonodavstva i iskustva u primeni* (Beograd 2015), 100.

cutorial decision but allows the injured party to pursue prosecution despite the prosecutor's assessment that the necessary grounds, particularly reasonable suspicion, are lacking. Where the injured party requests an investigation, the investigating judge determines whether the statutory requirements for its initiation have been met.[35] The 2026 amendments to the Croatian Criminal Procedure Act are also relevant to the participation of injured parties. Under Articles 345(5) and 346(5), as amended, the injured party is notified of the indictment and the relevant procedural rights and may, within the prescribed period, substantiate a civil claim in writing, draw attention to evidence concerning the accused's guilt, and propose interim measures to secure that claim. These rights strengthen opportunities for participation without placing the injured party in the same procedural position as the prosecution.

3.3. SERBIA

The principle of equality in criminal proceedings in Serbia is defined within the framework of the legality of criminal prosecution, according to which the public prosecutor and the police are obliged to impartially clarify any suspicion of a criminal offense in relation to which they are conducting official actions, and to examine with equal diligence both the facts incriminating the accused and those that may be favorable to them.[36] The principle of equality of parties in criminal proceedings in Serbia is linked to the principle of the evaluation of evidence and the court's duty to assess the evidence presented impartially and, on that basis, to establish with equal diligence the facts that incriminate the accused as well as those that are in their favor.[37] In Serbia, the order to conduct an investigation is served on the suspect if their identity is known, as well as on their defense counsel, if they have one.[38] The suspect and their defense counsel enjoy significant procedural rights during the investigation phase in Serbian criminal proceedings, as they may independently collect evidence and materials in favor of the defense. Accordingly, the principle of equality of parties in procedural rights in Serbian criminal proceedings is not disregarded during the investigation. Furthermore, pursuant to Article 302 of the Criminal Procedure Code of Serbia, if the suspect and their defense counsel consider that a particular evidentiary action should be undertaken, they may propose to the public prosecutor that such action be carried out. If the public prosecutor does not accept the suspect's proposal for the collection of evidence, the preliminary proceedings judge may decide on the suspect's proposal for the gathering of evidence. In addition, in order to safeguard the right to defense, the public prosecutor is obliged to invite the suspect and their defense counsel to submit, within a specified time limit, proposals for the undertaking of certain evidentiary actions.[39] The parties in criminal proceedings in Serbia also enjoy equal procedural rights during the

35 Article 55 paragraphs 1–3 and article 225 paragraphs 1–3 Zakona o kaznenom postupku Republike Hrvatske. See also: Ante Novokmet, Dražen Tripalo, 'Oštećenik kao tužitelj u teoriji i praksi hrvatskog kaznenog postupka', (2025) 32(2) Hrvatski ljetopis za kaznene znanosti i praksu, 303–334.

36 Zakonik o krivičnom postupku Republike Srbije (Official Gazette 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021 (Constitutional Court decision) and 62/2021 (Constitutional Court decision)) art 6.

37 Zakonik o krivičnom postupku Republike Srbije, art 16(2).

38 Zakonik o krivičnom postupku Republike Srbije, art 297(1).

39 Zakonik o krivičnom postupku Republike Srbije, art 303(2).

main hearing. The law provides that the presiding judge shall invite the parties, the defense counsel, and the injured party to explain the evidence they propose to present at the main hearing. At the same time, they shall be warned that evidence which was known to them but was not proposed at the preparatory hearing without justified reason will not be admitted. For the purpose of establishing the facts objectively and impartially during the main hearing, the presiding judge may, even without a proposal from the parties, the defense counsel, or the injured party, order the obtaining of new evidence for the main hearing.[40] The principle of equality of "arms" implies a more active role for the injured party in the earlier stages of criminal proceedings, i.e., during the investigation. The realization of equality of arms in criminal proceedings presupposes access to legal assistance, as it is difficult to envisage genuine procedural equality where the accused is not represented by defence counsel.[41]

3.4. MONTENEGRO

The principle of equality in the Criminal Procedure Code of Montenegro is defined as a foundation of the principles of fairness and truth.[42] The court, the public prosecutor, and other state authorities participating in criminal proceedings are obliged to establish, truthfully and comprehensively, the facts relevant for issuing a lawful and fair decision, and to examine with equal diligence both the facts that incriminate the accused and those that are in their favor. Furthermore, the court is required to ensure that the parties and defence counsel enjoy equal procedural opportunities with respect to the submission, examination, and presentation of evidence. In fulfilling this role, the court serves as a guarantor of both equality of arms and the right to a fair trial. It must base its decisions exclusively on facts lawfully established during the proceedings and conduct the trial in a manner that ensures impartiality, fairness, and respect for the principle of non-discrimination. Accordingly, all participants in criminal proceedings must be treated equally, irrespective of race, colour, language, religion, political or other opinion, national or social origin, property, status, or any other personal characteristic or circumstance.

The comparative analysis reveals both common principles and differences among the examined legal systems. While all four jurisdictions require the impartial examination of incriminating and exculpatory facts, they differ in the procedural safeguards available during investigations and the opportunities afforded to injured parties. The legislation of Croatia and Serbia provides more clearly defined mechanisms for defence participation during investigations, whereas the BiH framework places greater emphasis on equality at the trial stage. These differences are relevant to the assessment of effective, rather than merely formal, equality.

40 Zakonik o krivičnom postupku Republike Srbije, art 350(2).

41 Milan Škulić, 'Kritička analiza nekih odredbi novog Zakonika o krivičnom postupku Srbije', in Milan Škulić, Goran Ilić (eds), *Novi Zakonik o krivičnom postupku Srbije: Kako je propala reforma, šta da se radi?* (Udruženje javnih tužilaca i zamenika javnih tužilaca Srbije 2012), 29.

42 Zakon o krivičnom postupku Crne Gore (Official Gazette 57/2009, 49/2010, 47/2014 (Constitutional Court decision), 2/2015 (Constitutional Court decision), 35/2015, 58/2015 (other law), 28/2018 (Constitutional Court decision) and 116/2020 (Constitutional Court decision)) art 16; Branko Vučković, Vesna Vučković, 'Princip jednakosti građana pred zakonom – krivičnopravna zaštita' <https://scindeks-clanci.ceon.rs/data/pdf/proc-0024/2024/proc-00242401443V.pdf> accessed 11 March 2026.

4. THE PRINCIPLE OF EQUALITY AND THE PROCEDURAL RIGHTS OF THE INJURED PARTY IN CRIMINAL PROCEEDINGS

The injured party does not have the status of a party in criminal proceedings, nor does he or she possess significant procedural rights during the investigation; their role is often merely informative or initiatory. The principle of equality of arms in criminal proceedings implies that all parties have the right to access evidence, present their views and submit motions, as well as the right to rely on the same procedural mechanisms and legal remedies. In criminal proceedings in BiH, the injured party does not have the status of a party to the proceedings and therefore does not enjoy equal procedural rights as the parties to the criminal proceedings, namely the suspect or the accused and the prosecutor. The principle of equality of arms primarily protects the procedural balance between the prosecution and the defence; it does not require injured parties to possess identical powers. Their position must instead be assessed in light of equality before the courts, non-discrimination and effective access to procedural protection, including information about decisions and available remedies.

The principle of equality in criminal proceedings entails the obligation for courts and prosecutors to act without prejudice and stereotypes, particularly in cases of sexual violence, domestic violence, and human trafficking. Gender stereotypes can lead to the secondary victimization of the injured party. In the criminal procedure laws of BiH, the principle of equality is defined by the court's duty to treat the parties and the defense counsel equally, providing each party with the same opportunities regarding access to evidence and its presentation at the main hearing. According to the statutory text on the equality of parties in criminal proceedings, it can be said that equal procedural rights are recognized only for the parties in the proceedings, but not for all participants, such as, for example, the injured party. In the criminal proceedings of the Republic of Srpska, the injured party has the same procedural rights (capabilities) as the public prosecutor only if they assume the criminal prosecution from the public prosecutor, and only on the condition that the public prosecutor withdraws from the prosecution after the indictment has been confirmed. Since the injured party assumes the prosecution after the indictment has been confirmed, this no longer constitutes a criminal prosecution per se, but rather representation of the confirmed indictment during the stage of the proceedings that follows its confirmation, namely the main hearing. Consequently, the injured party operates within the framework of evidentiary proposals made by the public prosecutor in the confirmed indictment.[43] In other criminal procedure laws in BiH (in the FBiH, the BD, as well as at the state level in the Criminal Procedure Code of BiH), the injured party remains a secondary participant in criminal proceedings, whose procedural rights are limited to filing a civil claim, which the court is not obliged to decide within the criminal proceedings. It is also worth noting that, in paragraph two of the same article defining the principle of equality in criminal proceedings, the legislator stipulates that the court, the prosecutor, and other authorities participating in the proceedings are obliged to examine and establish, with equal diligence, both the facts that incriminate the suspect or accused and those that are in their favor. The principle of equality of parties in criminal proceedings also relies on the prin-

43 Milijana Buha, '(Ne)dovoljna procesna prava oštećenog u krivičnim postupcima u BiH (ne)omogućavaju borbu protiv trgovine ljudima', (2025) 2 Glasnik Advokatske komore Vojvodine.

ciple of *in dubio pro reo* and the presumption of innocence, as well as on the obligation of the prosecutor and other state authorities in the proceedings to carry out evidentiary actions and collect not only the evidence that incriminates the suspect or accused, but also the evidence that is favorable to them.

Gender equality in criminal proceedings entails equal rights, responsibilities, and opportunities for women and men, as well as the absence of discrimination based on sex or gender. This issue is particularly significant in the context of criminal justice, especially in cases involving sexual violence, domestic violence, and human trafficking. Ensuring gender equality in criminal proceedings therefore requires particular attention to the procedural position of injured parties, whose effective participation and access to procedural safeguards are essential for the realization of both equality and fairness within the criminal justice system.

In *Fabbri and Others v. San Marino* (2024), the Grand Chamber of the ECtHR examined the right of victims of criminal offences to pursue civil claims within criminal proceedings that had been discontinued following the investigative authorities' inactivity and the expiry of statutory time limits.[44] The Court clarified that Article 6 of the ECHR does not require States to allow victims to pursue civil claims within criminal proceedings. However, where domestic law provides for this possibility, the civil aspect of Article 6 may apply, provided that the injured party pursues a recognised civil right in accordance with the applicable procedural requirements and that the criminal proceedings are decisive for its determination.[45] In the case at hand, the Court declared the applications of two applicants inadmissible because they had failed to formally request civil-party status, as required by domestic law. Regarding the third applicant, the Court found no violation of Article 6, despite acknowledging serious shortcomings in the investigation, since the applicant had not pursued his civil claim with sufficient diligence and had alternative avenues of judicial protection available.[46] The judgment thus confirms that the discontinuation of criminal proceedings does not automatically violate the injured party's right of access to a court, although the availability of alternative remedies must be assessed in light of the circumstances of the case, including the applicant's conduct and any serious dysfunction attributable to the authorities.[47]

These findings are particularly relevant to the procedural position of injured parties in Bosnia and Herzegovina, especially regarding their opportunities to participate effectively in criminal proceedings and pursue compensation. Although the judgment does not require injured parties to enjoy procedural rights equivalent to those of the prosecution or the defence, it underscores the importance of ensuring effective access to judicial protection, particularly where criminal proceedings are discontinued without a determination of their civil claims.

The injured party can undertake various procedural actions in criminal proceedings (such as submitting evidence, filing a civil claim, being heard as a witness, or lodging a complaint against a negative prosecutorial decision). However, the injured party does not have the authority to make prosecutorial decisions, issue orders to conduct an investigation, decide not

44 *Fabbri and Others v San Marino* App nos 6319/21, 6321/21 and 9227/21 (ECtHR, 24 September 2024), paras 1–25.

45 *Fabbri and Others v San Marino* App nos 6319/21, 6321/21 and 9227/21 (ECtHR, 24 September 2024), paras 84–93.

46 *Fabbri and Others v San Marino* App nos 6319/21, 6321/21 and 9227/21 (ECtHR, 24 September 2024), paras 141–152.

47 *Fabbri and Others v San Marino* App nos 6319/21, 6321/21 and 9227/21 (ECtHR, 24 September 2024), paras 137–140.

to conduct an investigation, or discontinue an investigation, as the investigation being guided by the principle of accusatorial procedure - is a prosecutorial decision.

To enable victims to understand and effectively exercise their rights in criminal proceedings, it is essential that they receive clear and timely information regarding the rights and procedural safeguards available to them. This is particularly important in cases of gender-based violence, where victims should be informed of their entitlement to free legal aid, the possibility of pursuing a civil claim within the criminal proceedings, and the availability of protective measures aimed at preventing secondary victimization. A significant European Union instrument addressing the prevention of gender-based violence, violence against women, and domestic violence is Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence.[48] The purpose of this directive is to provide a comprehensive framework for the effective prevention of, and fight against, violence against women and domestic violence, with the aim of protecting victims and ensuring the provision of support to them. The directive stipulates that victims should be provided with legal assistance, including free legal aid, when reporting criminal offences, where provided for under national law. An important provision of Directive (EU) 2024/1385 establishes that investigations or criminal prosecutions for rape should not depend on whether the victim or her representative reports such offences. Furthermore, criminal proceedings should continue even if the victim withdraws the complaint. However, the prosecution retains the right to discontinue the criminal proceedings for other reasons, for example, if it concludes that there is insufficient evidence to proceed.[49] In order to prevent gender-based violence and to protect the victim and her rights in criminal proceedings, it is essential that the criminal proceedings are not discontinued solely because the complaint has been withdrawn.

The injured party is not a party to the criminal proceedings but a subsidiary procedural participant whose procedural rights depend on the decisions of the public prosecutor, since the investigation is generally conducted and directed by the prosecutor. The subject of the criminal proceedings is not to determine the merits of the civil claim but to establish whether the suspect has committed the criminal offence with which they are charged and whether they are criminally responsible for the offence under investigation. Criminal procedural actions and evidentiary measures are aimed at determining whether a criminal offence has been committed and establishing the criminal liability of the perpetrator. The injured party does not possess the same procedural rights as the prosecutor in criminal proceedings, since they are not a party to the proceedings. Therefore, the principle of equality of arms primarily concerns the suspect's right to defense and the prosecutor's right to conduct the investigation and collect evidence for or against the suspect or the accused. From the perspective of the principle of equality in criminal proceedings, the injured party's right to request an examination of the prosecutor's reasoning behind a negative prosecutorial decision cannot be disregarded. However, the question remains whether it is sufficient, under the law of BiH, for complaints by the

48 Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence [2024] OJ L 2024/1385.

49 Directive (EU) 2024/1385 of the European Parliament and of the Council of 14 May 2024 on combating violence against women and domestic violence [2024] OJ L 2024/1385, recital 37.

injured party against a negative prosecutorial decision to be decided by the same authority or only by its immediate superior, or whether the matter should be entrusted to a court.

Victims play a significant role in the evidentiary process, as they can be examined and heard as witnesses in criminal proceedings, and court decisions may be based on their testimony if they are examined in accordance with the rules of direct and cross-examination. A common question in criminal practice is whether a court decision can be based on the testimony of witnesses who are unavailable to the court for justified reasons. In this regard, the Grand Chamber of the ECtHR has held in one case that there is no violation of the right to a fair trial if a judgment is based on statements from witnesses who could not be cross-examined in court.[50] Exceptions to the requirement of direct presentation of evidence are also possible in criminal proceedings in BiH, as the law provides that records of statements given during the investigation may, by decision of the judge or the panel, be read and used as evidence at the main trial only if the individuals examined have died or are permanently mentally incapacitated, cannot be located, their appearance in court is impossible or significantly impeded for important reasons, or if, without lawful justification, they refuse to give testimony at the main trial.

5. ARTIFICIAL INTELLIGENCE AND THE PRINCIPLE OF EQUALITY IN CRIMINAL PROCEEDINGS: GENDER PERSPECTIVES

The rapid development and growing use of artificial intelligence (AI) have significantly influenced contemporary criminal justice systems. AI-based tools are increasingly employed in activities ranging from predictive policing and criminal investigations to risk assessment, sentencing, and parole decisions. Although such technologies may improve the efficiency and consistency of decision-making, they also raise complex legal and ethical concerns relating to transparency, explainability, accountability, and equality. In particular, algorithmic systems, as pointedout above, may reproduce or amplify existing social inequalities when they rely on biased or incomplete data or when their outputs are applied without adequate scrutiny and human oversight. Such existing discriminatory practices may also encompass gender discrimination, thereby contributing to the persistence and reinforcement of inequalities affecting women and other vulnerable groups within the criminal justice system.

The widely discussed controversy concerning the COMPAS risk assessment instrument[51] demonstrates the potential of AI-assisted decision-making to perpetuate discriminatory outcomes. While the criticism directed at COMPAS primarily concerned racial disparities, the same mechanisms may give rise to gender-based discrimination where algorithmic systems rely on data that reflect historical biases and structural inequalities affecting women.

Gender bias may arise in risk assessment instruments, predictive policing systems, facial recognition technologies, and algorithmic tools used to support judicial decision-making. For

50 *Al-Khawaja and Tahery v United Kingdom* App nos 26766/05 and 22228/06 (ECtHR, 15 December 2011).

51 Igor Milinković, 'Vještačka inteligencija i sudska vlast: obećanja i rizici primjene', (2019) 41 Godišnjak Pravnog fakulteta Univerziteta u Banjoj Luci, 89.

example, studies have shown that facial recognition systems often exhibit significantly higher error rates when identifying women, particularly women belonging to racial minorities,[52] while risk assessment tools may rely on variables that indirectly reflect existing gender inequalities and caregiving patterns. Similar concerns have been raised in the context of domestic violence[53] and sexual offences, where algorithmic systems trained on historical data may underestimate risks faced by victims or reproduce institutional assumptions embedded in past decision-making practices. Consequently, AI systems may not only replicate existing forms of discrimination but also lend them an appearance of objectivity and neutrality, thereby making such biases more difficult to identify and challenge. In cases involving gender-based violence, a biased risk assessment may affect investigative priorities or decisions on protective measures. The procedural concern is therefore whether such an assessment can be reviewed in light of the individual circumstances and whether the resulting decisions remain accountable to human authorities.

In criminal proceedings, investigations are generally directed by the prosecution, while investigative actions are carried out by the police under the supervision of the prosecution, often using advanced artificial intelligence tools to analyze large volumes of data. The defense and the injured party usually do not have the same access to these technologies, nor the financial or technical capacity to use them. This can lead to procedural imbalance, as one party possesses significantly stronger analytical resources. It should also be noted that data obtained through artificial intelligence tools can be biased.

The use of artificial intelligence in judicial decision-making raises significant concerns from the perspective of legal certainty. As a fundamental element of the rule of law, legal certainty requires that individuals be able to foresee, to a reasonable degree, the legal consequences of their conduct and the manner in which legal rules will be applied. However, AI systems based on machine learning may generate outcomes that are difficult to predict, explain, or effectively scrutinize, particularly where their decision-making processes lack transparency. Consequently, reliance on such systems in judicial decision-making may undermine predictability, weaken legal certainty, and increase the risk of arbitrary or unjust outcomes. The increasing algorithmization of law may weaken the ability to challenge and contest decisions, a procedural safeguard widely regarded as an essential component of the rule of law. Furthermore, the epistemic opacity and "black-box" nature of certain AI systems, combined with their technical complexity and proprietary protections, may undermine transparency, restrict public oversight, and hinder effective legal scrutiny of algorithmically assisted decisions.[54]

Gender discrimination in criminal proceedings may also involve hermeneutical injustice, a concept developed by Miranda Fricker to describe situations in which structural deficiencies in shared interpretive resources prevent the experiences of marginalised individuals from be-

52 Joy Buolamwini, Timnit Gebru, 'Gender shades: Intersectional accuracy disparities in commercial gender classification', (2018) Conference on fairness, accountability and transparency, PMLR.

53 Ana Valdivia, Cari Hyde-Vaamonde, Julian García Marcos, 'Judging the algorithm: Algorithmic accountability on the risk assessment tool for intimate partner violence in the Basque Country', (2025) 40(4) AI & Society.

54 Igor Milinković, 'Pravo i vještačka inteligencija: etički i regulatorni izazovi', in Igor Milinković (ed.), *Pravni okvir primjene vještačke inteligencije (pomoćnih tehnologija) u rješavanju pravnih sporova u Bosni i Hercegovini* (Pravni fakultet Univerziteta u Banjoj Luci 2025), 7–8.

ing adequately understood.[55] In cases of gender-based violence, prevailing gender stereotypes may contribute to the misinterpretation or insufficient recognition of victims' experiences, undermining their effective participation in criminal proceedings. These difficulties may be further compounded by the use of opaque AI systems, which can limit individuals' ability to understand and challenge assessments affecting their rights.[56]

The use of AI in criminal proceedings has the potential both to enhance and to undermine the principle of equality of arms. On the one hand, AI-assisted tools may improve access to information and contribute to more efficient legal representation. However, the use of AI in criminal proceedings can undermine the principle of equality of arms if one party, most often the law enforcement or prosecutorial authorities, has access to more advanced technological means for collecting and analyzing evidence than the defense. A particular concern is the lack of transparency of algorithms and the difficulty of verifying them, which can limit the parties' ability to effectively challenge the evidence and arguments of the opposing side. To ensure equality of arms in criminal proceedings, the use of artificial intelligence must be accompanied by clear rules on transparency, confidentiality, and equal access to technology in order to maintain procedural balance between the parties. The use of evidence obtained through artificial intelligence tools poses a risk to the principle of equality of arms. If investigations rely on AI techniques, the accused should be able to understand how the evidence was collected, while "denial of disclosure regarding the program, code, or data used would constitute a clear violation of the principle of equality of arms."[57] AI-based tools have the potential to create significant inequalities between the parties in criminal proceedings, particularly where the accused lacks effective means to understand, verify, or challenge evidence generated through such technologies. AI applications operate by processing and storing biometric data, performing facial recognition, and monitoring human activities. AI-driven surveillance develops systems capable of capturing images (personal images), storing and processing personal biometric data, thereby compromising privacy, identity, and autonomy, and potentially creating a constantly monitored environment[58] without the knowledge of the individuals under surveillance. Such evidence is unlawful if it is obtained without a court order.

Evidence obtained through artificial intelligence tools can be used in criminal proceedings only if the opposing party has the opportunity to challenge the reliability of such AI-generated evidence. Decision in criminal proceedings cannot be based solely on automated data processing without first hearing the individuals to whom the collected data relate. Data obtained from existing databases may be unreliable and potentially discriminatory, for example, due to selective police surveillance of certain "high-risk" groups.

From a procedural perspective, these risks highlight the importance of ensuring that the defence has sufficient information to assess and challenge AI-assisted evidence, including its reliability and potential discriminatory effects. Where algorithmic assessments influence de-

55 Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford University Press 2007), 147–175.

56 Emilie van den Hoven, 'Hermeneutical Injustice and the Computational Turn in Law' (2021) 1(1) Journal of Cross-Disciplinary Research in Computational Law, 9–11.

57 Katalin Ligeti, 'AIDP-IAPL International Congress of Penal Law Artificial Intelligence and Criminal Justice', 11 <https://penal.org/> accessed 11 March 2026.

58 Carrão Maria do Céu Cunha. *Artificial Intelligence in Criminal Proceedings The admissibility of AI-generated evidence*. MS thesis (Universidade NOVA de Lisboa 2022).

cisions affecting injured parties, particularly in cases of gender-based violence, effective safeguards also require individualised assessment and substantive human review.

The EU Artificial Intelligence Act (Regulation (EU) 2024/1689) provides an important regulatory response to these concerns. Under Article 6(2), read together with Annex III, certain AI systems used in law enforcement, including the assessment of evidence and risks to victims, as well as systems assisting judicial authorities in interpreting facts and applying the law, are classified as high-risk, subject to the applicable classification rules. The Regulation establishes safeguards concerning data quality and the mitigation of discriminatory bias (Article 10), transparency enabling appropriate interpretation of AI outputs (Article 13), and effective human oversight (Article 14). Article 27 further requires certain deployers, including public authorities, to assess the potential impact of relevant high-risk AI systems on fundamental rights. These provisions are particularly relevant to procedural fairness and gender non-discrimination.[59]

The EU AI Act does not automatically apply as part of the domestic legal framework of BiH, which is not an EU Member State. Nevertheless, it provides a relevant regulatory framework for the alignment of BiH legislation with the EU acquis in the context of the country's accession process. Moreover, under Article 2, the Act may apply to certain providers and deployers established in third countries, including BiH, where the conditions for its territorial application are met.

6. CONCLUSION

The analysis undertaken in this paper highlights the fundamental importance of equality in criminal proceedings as an essential guarantee of procedural fairness and the rule of law. While recognising the close relationship between equality before the courts, the right to a fair trial, and equality of arms, the paper has also drawn attention to the distinctions between these concepts and their respective implications for criminal proceedings. Criminal procedure legislation in BiH recognises equality as a fundamental procedural principle, reflected in safeguards such as the right to legal assistance, adversarial proceedings, equal opportunities to present and challenge evidence, and protective measures for victims and witnesses. The obligation of courts to base their decisions on lawfully established facts and to ensure impartial and non-discriminatory treatment of all participants further reinforces the importance of equality in the administration of criminal justice. Nevertheless, the effective realisation of this principle requires more than the formal recognition of procedural rights; it also depends on ensuring that those rights can be meaningfully exercised in practice.

At the same time, equality in criminal proceedings cannot be reduced to the formal allocation of procedural rights. Judicial impartiality requires active resistance to stereotypes, prejudices, and discriminatory practices that may affect decision-making, particularly in cases involving sexual violence, domestic violence, and human trafficking. In this regard, con-

59 Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) [2024] OJ L 2024/1689, as amended; Article 6(2), Annex III, points 6(a), 6(c)–(e) and 8(a), and Articles 10, 13, 14 and 27.

temporary standards of judicial ethics impose not only a duty to refrain from discriminatory conduct, but also a responsibility to prevent and address discrimination within the judicial process. Particular importance must therefore be attached to measures that strengthen the procedural position and protection of victims, including safeguards against secondary victimization and mechanisms designed to ensure their effective participation in the proceedings.

The comparative analysis further indicates that certain aspects of the legal framework in Bosnia and Herzegovina continue to raise questions regarding the effective realization of equality, particularly during the investigative stage, where the procedural position of injured parties remains relatively limited. Strengthening procedural safeguards for victims, while preserving the rights of the defence and the accusatorial character of criminal proceedings, represents an important challenge for future legislative and institutional reforms.

Finally, the increasing use of AI introduces new challenges for the principle of equality. While AI-assisted tools may contribute to greater efficiency and consistency, they also create risks associated with algorithmic bias, lack of transparency, unequal access to technological resources, and the potential reproduction of existing social inequalities, including gender-based discrimination. These risks are particularly significant in proceedings involving vulnerable groups and underscore the need for strict legal regulation, transparency, accountability, and meaningful human oversight.

Accordingly, equality does not require identical procedural powers for every participant. It requires safeguards suited to their distinct procedural positions, including the ability to challenge evidence, effective protection of injured parties and scrutiny of possible discriminatory effects of AI-assisted decisions.

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NAČELO JEDNAKOSTI U KAZNENOM POSTUPKU: RODNE PERSPEKTIVE, ETIČKI STANDARDI I IZAZOVI UMJETNE INTELIGENCIJE

Sažetak

Načelo jednakosti pred sudovima čvrsto je utemeljeno u međunarodnim i regionalnim instrumentima za zaštitu ljudskih prava te predstavlja temeljno načelo sudačke etike. U kaznenom postupku ono obuhvaća nekoliko blisko povezanih, ali konceptualno različitih jamstava. Dok jednakost oružja, kao ključna sastavnica prava na pravično suđenje, nastoji osigurati pravičnu procesnu ravnotežu između optužbe i obrane, šira načela jednakosti i zabrane diskriminacije zahtijevaju jednak i nepristran tretman svih sudionika, neovisno o njihovim osobnim svojstvima. Učinkovito ostvarivanje ovih jamstava i dalje je suočeno s izazovima strukturalnih nejednakosti, implicitnih pristranosti i rodno uvjetovanih stereotipa. Sve veća primjena umjetne inteligencije (UI) u kaznenom pravosuđu otvara dodatna pitanja vezana uz diskriminatorne ishode, nejednak pristup tehnološkim resursima, transparentnost, odgovornost te potencijalnu neravnotežu u procesnim pravima i mogućnostima.

U prvom dijelu rada istražuje se odnos između općeg načela jednakosti, prava na pravično suđenje i jednakosti oružja u kaznenom postupku. Kroz analizu međunarodnih standarda ljudskih prava i kaznenog procesnog zakonodavstva u Bosni i Hercegovini te odabranim državama regije, procjenjuju se pravni mehanizmi namijenjeni osiguravanju procesne pravičnosti i učinkovite zaštite prava pojedinca. Posebna pozornost posvećena je procesnom položaju oštećenika, koji se promatra unutar šireg okvira jednakosti, zabrane diskriminacije i pristupa sudskoj zaštiti. Analizom se također razmatra u kojoj mjeri postojeća procesna jamstva štite od rodno uvjetovane diskriminacije, osobito u postupcima koji uključuju rodno uvjetovano nasilje.

U drugom dijelu rada ispituju se implikacije sve raširenije uporabe umjetne inteligencije u kaznenom postupku na jednakost oružja i šire načelo zabrane diskriminacije. Iako umjetna inteligencija može pridonijeti većoj učinkovitosti i dosljednosti u kaznenom pravosuđu, nejednak pristup tehnološkim resursima i ograničene mogućnosti preispitivanja dokaza generiranih s pomoću umjetne inteligencije mogu stvoriti nove oblike procesne neravnoteže. Istodobno, sustavi umjetne inteligencije mogu reproducirati ili pojačati postojeće rodne pristranosti koje se odražavaju u podacima za treniranje i institucionalnim praksama. Posebna pozornost posvećena je rizicima povezanima s primjenom umjetne inteligencije u predmetima koji uključuju rodno uvjetovano nasilje, uključujući diskriminatorne ishode i hermeneutičku nepravdu. U radu se zastupa stajalište da očuvanje jednakosti u kaznenim postupcima potpomognutima umjetnom inteligencijom zahtijeva transparentnost, učinkovita procesna jamstva i stvarni ljudski nadzor.

Ključne riječi: *načelo jednakosti, kazneni postupak, rodna ravnopravnost, umjetna inteligencija, algoritamska pristranost*

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GENDER EQUALITY AND EU ARTIFICIAL INTELLIGENCE GOVERNANCE: THE AI ACT IN LIGHT OF CEDAW AND EMERGING COUNCIL OF EUROPE NORMS

Summary: *Algorithmic discrimination can often arise before a final automated decision is made, through data, design, optimisation, deployment context and institutional practice. This article examines whether procedures under the EU Artificial Intelligence Act (AI Act) can make gendered and intersectional disadvantage in high-risk systems and selected deployments identifiable, documentable, subject to supervision and open to legal challenge. It develops a doctrinal account of the Act's equality-relevant procedures in relation to EU equality law, CEDAW and emerging Council of Europe AI norms. CEDAW, especially as elaborated in General Recommendations Nos 28, 33 and 40, supplies the substantive equality reference point for effects, indirect discrimination, intersectional discrimination, access to justice, evidence and AI-related gender bias. The Council of Europe Framework Convention on AI places those concerns within a lifecycle approach to AI governance. Council of Europe Recommendation CM/Rec(2026)1 identifies equality-sensitive implementation methods, including impact assessment, discrimination audits, public information, institutional oversight and remedial links. Council Decision (EU) 2025/2350 recognises the non-binding Recommendation's potential influence on AI Act implementation in relation to international standards and approaches, subject to consistency with the Act's harmonised obligations for providers and deployers. The article concludes that AI Act procedures can support scrutiny, supervision and legal contestation of gendered and intersectional algorithmic disadvantage where the information they produce is connected to substantive equality standards, competent institutions and remedial regimes.*

Keywords: *algorithmic discrimination, procedural equality, gender equality, EU AI Act, CEDAW, CM/Rec(2026)1*

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1. INTRODUCTION

AI systems are increasingly deployed in fields already marked by structural inequality, including employment, education, credit, welfare, healthcare, migration, public administration and justice. The EU Artificial Intelligence Act (AI Act) regulates many of these systems through a horizontal, risk-based structure.[1] For equality law, the central question is how the Act's procedures can make discriminatory risk visible, subject to institutional supervision and available for legal challenge, especially where AI systems operate in sectors already associated with discrimination and structural inequality.[2] The AI Act addresses equality-related risk mainly through risk management, data governance, documentation, bias detection, Fundamental Rights Impact Assessments in defined cases, access by designated fundamental-rights authorities, complaints and explanations.[3] These duties can generate information, structure responsibility and open institutional access. The Act's procedures do not, however, displace the substantive tests of discrimination under applicable equality law. This article examines the conditions under which AI Act duties may be interpreted through substantive equality standards and used to support scrutiny, supervision and contestation of gendered and intersectional algorithmic disadvantage.

The substantive equality perspective adopted in this article draws on the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[4] and its General Recommendations. General Recommendation No 28 confirms that CEDAW is a dynamic instrument and that discrimination includes direct and indirect discrimination, as well as intersecting forms of discrimination and their compounded effects.[5] General Recommendation No 33 situates equality within access to justice, evidentiary barriers, remedies and accountability[6], while General Recommendation No 40 addresses AI directly, including women's underrepresentation in AI development, gender bias in AI systems, continuous impact assessment and independent auditing of de-biasing.[7] These standards clarify what equality-sensitive AI governance must be capable of revealing where disadvantage arises through apparently neutral data, design, deployment or institutional practice.

The Council of Europe instruments address the implementation dimension of that inquiry. The Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law (Framework Convention) is the first international treaty to set out legally binding obligations in this area.[8] Its lifecycle approach places legal attention on the different stag-

1 Regulation (EU) 2024/1689 [2024] OJ L 2024/1689, arts 1, 5, 6 and 50–56.

2 AI Act, arts 6, 9, 10 and 27 and Annex III; Charter of Fundamental Rights of the European Union [2012] OJ C326/391, arts 20, 21 and 23; AI Act, recitals 1, 27, 48 and 56–58, 60.

3 AI Act, arts 9, 10, 11–13, 27, 77, 85 and 86.

4 Convention on the Elimination of All Forms of Discrimination against Women 1249 UNTS 13.

5 UN Committee on the Elimination of Discrimination against Women, General Recommendation No 28 (CEDAW/C/GC/28, 2010), paras 2, 8, 16 and 18.

6 UN Committee on the Elimination of Discrimination against Women, General Recommendation No 33 (CEDAW/C/GC/33, 2015), paras 1, 3, 8, 14–20 and 25(a)(vii).

7 UN Committee on the Elimination of Discrimination against Women, General Recommendation No 40 (CEDAW/C/GC/40, 2024), paras 2, 9 and 30–31, especially para 31(d).

8 Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law, CETS No 225, arts 1, 3, 10, 14–16 and 30(3). The EU ratified the Convention on 15 May 2026, but it had not entered into force by 25

es of an AI system's existence, from its initial design and development to deployment, use and eventual retirement. Recommendation CM/Rec(2026)1 on equality and artificial intelligence addresses the equality dimension of AI governance in more specific terms.[9] Although non-binding, it may influence AI Act implementation where Union law refers to international standards and approaches, provided that such use remains consistent with the AI Act's harmonised obligations for providers and deployers.[10]

CEDAW, the Framework Convention and CM/Rec(2026)1 perform distinct functions in the analysis. CEDAW supplies the substantive equality orientation for effects, indirect discrimination, intersectionality, evidentiary barriers and AI-related gender bias. The Framework Convention places those questions within a lifecycle approach to AI governance, in which equality risks may arise across design, development, deployment and use. CM/Rec(2026)1 identifies equality-oriented implementation methods that remain bounded in EU law by the AI Act's harmonised structure. This combination provides the basis for the article's analysis of how selected AI Act procedures may be given equality content and the conditions under which those procedures can support substantive and intersectional equality while preserving the Act's harmonised regulatory structure. The doctrinal analysis distinguishes applicable legal obligations, non-binding guidance and proposals for equality-sensitive implementation.

The structure of this paper is as follows. Section 2 examines algorithmic discrimination, gender and substantive equality, including CEDAW's relevance to indirect discrimination, intersectionality, access to justice and AI-related gender bias. Section 3 analyses the AI Act's procedural equality model and explains the analytical use of that expression by reference to the Act's institutional architecture and scholarship on fundamental-rights impact assessment, procedural justice and AI Act enforcement. Section 4 examines equality standards in the Council of Europe instruments, including the lifecycle approach of the Framework Convention and the relationship between CM/Rec(2026)1 and EU law. Section 5 applies CEDAW's substantive equality orientation and CM/Rec(2026)1's implementation methods to selected AI Act procedures. The conclusion draws these elements together around the evidential and institutional use of information produced through AI Act procedures.

2. ALGORITHMIC DISCRIMINATION, GENDER AND SUBSTANTIVE EQUALITY

Algorithmic discrimination need not depend on discriminatory intention. It may result from design choices, historical datasets, proxy variables, model optimisation, institutional context or weak oversight. Gerards and Xenidis distinguish planning, development and decision-mak-

October 2026: Council of Europe Treaty Office, 'Chart of signatures and ratifications of Treaty 225' <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=225> accessed 25 October 2026.

9 Recommendation CM/Rec(2026)1 on equality and artificial intelligence (Council of Europe, 4 March 2026), preamble and Appendix, paras 1–8.

10 Council Decision (EU) 2025/2350 on the position to be taken on behalf of the European Union on the Draft Recommendation on equality and artificial intelligence [2025] OJ L 2025/2350, art 1 and recitals 6–9.

ing or use as three stages in algorithmic decision-making. The distinction is legally important because different actors and equality risks appear at each stage. Decisions about whether to use an algorithm, which data to use, how variables are designed, how outputs are validated and how results are monitored may each introduce or preserve discriminatory effects.[11] Their account, together with the Council of Europe's 2023 Study on AI, equality and non-discrimination, shows that discriminatory effects should not be treated as exceptional malfunction. They may result from technical and institutional choices that embed existing inequality.[12]

This structural account is especially important for gender equality, because many AI systems are trained on data from sectors already marked by unequal labour, welfare, medical and financial conditions. Such systems may inherit assumptions and exclusions already present in those fields. For example, recruitment systems may learn from hiring patterns in male-dominated sectors, while credit tools may treat interrupted employment, part-time work, lower accumulated wealth or caring history as neutral risk indicators, although such factors reflect gendered labour-market structures.[13]

Current EU gender-equality policy confirms the same sectoral concern. The Gender Equality Strategy 2026–2030 links women's unequal position to health research, access to finance, pay, pensions, care, employment, public life, education and the digital economy.[14] These are also fields in which AI systems are deployed or likely to be deployed, with several covered by the AI Act's high-risk categories.[15] Legal assessment must therefore attend to the social field in which the system operates, including gendered data gaps, care-related labour-market disadvantage, unequal access to capital and occupational segregation.[16]

Once algorithmic disadvantage is understood in this contextual way, the next question is how EU equality law classifies it. The relevant EU equality directives distinguish direct and indirect discrimination, harassment and, in sex-equality law, sexual harassment; they also treat instructions to discriminate as discrimination and require protection against victimisation.[17] In AI contexts, explicit use of sex or another protected ground may be absent. Discrimination may arise through correlated variables such as postcode, educational path, employment history, language use, device data, consumption patterns or online behaviour. Many algorithmic cases therefore fit the structure of indirect discrimination: an apparently neutral provision, criterion or practice places persons with a protected characteristic at a particular disadvantage, unless the measure is objectively justified by a legitimate aim and proportionate means.[18]

11 Janneke Gerards and Raphaële Xenidis, *Algorithmic Discrimination in Europe: Challenges and opportunities for Gender Equality and Non-Discrimination Law – a special report* (Publications Office of the European Union 2021) 37–47 and 50–51.

12 Ivana Bartoletti and Raphaële Xenidis, *Study on the Impact of Artificial Intelligence Systems, Their Potential for Promoting Equality, Including Gender Equality, and the Risks They May Cause in Relation to Non-Discrimination* (Council of Europe 2023) 9–10, 15–30 and 67–72.

13 Gerards and Xenidis (n 11) 63–64; Bartoletti and Xenidis (n 12) 19–30.

14 European Commission, Gender Equality Strategy 2026–2030, COM(2026)113 final, Brussels, 5 March 2026, Introduction and Roadmap Principles 2–8.

15 AI Act, Annex III.

16 Bartoletti and Xenidis (n 12) 9–10, 15–30 and 67–72; Gerards and Xenidis (n 11) 40–47.

17 Directive 2006/54/EC [2006] OJ L204/23, arts 2 and 24; Council Directive 2004/113/EC [2004] OJ L373/37, arts 2, 4 and 10; Council Directive 2000/43/EC [2000] OJ L180/22, arts 2 and 9; Council Directive 2000/78/EC [2000] OJ L303/16, arts 2 and 11.

18 Directive 2006/54/EC, art 2(1)(b); Directive 2004/113/EC, art 2(b); Directive 2000/43/EC, art 2(2)(b); Directive 2000/78/EC, art 2(2)(b).

The doctrinal classification is nevertheless more complex than a simple movement from human discrimination to algorithmic discrimination. Direct discrimination remains relevant because discriminatory intent is not required and EU law recognises forms such as discrimination by association. Its application is less straightforward where disadvantage is mediated through proxies or inferred categories rather than an express protected ground. Indirect discrimination will often be the closer fit because it examines the disadvantageous effect of an apparently neutral provision, criterion or practice. That classification also creates a difficulty: routine reliance on indirect discrimination may expand the role of objective justification and reduce the practical force of equality protection. Proxy variables sharpen the problem because postcode, employment gaps, language, accent, device data or educational trajectory may track race, poverty, pregnancy, care responsibilities, disability, class or migration history without naming them. The affected person may not know which variables were used, how they interacted, or whether disadvantage arose only through their combined operation.[19]

The same difficulty becomes more acute where disadvantage is intersectional. AI systems classify people through many variables at once, and harm may fall on groups defined by the interaction of sex with race, age, disability, poverty, migration status, religion, sexual orientation or gender identity. EU gender policy addresses this intersectional dimension expressly, whereas EU equality law has not developed a uniform approach to discrimination based on combined grounds.[20] The Gender Equality Strategy's reference to women and men "in all their diversity"[21] together with General Recommendation No 40's treatment of digital spaces and AI, supports an intersectional approach to AI-related equality.[22]

CEDAW supplies the effects-based, institutional and structural understanding of equality needed for that analysis. Article 1 defines discrimination against women by reference not only to purpose, but also to effect. Article 2 requires States parties to eliminate discrimination through law, competent tribunals and public institutions, and to take appropriate measures to eliminate discrimination by persons, organisations and enterprises. Article 5 addresses the social and cultural patterns through which stereotypes and gendered roles are reproduced.[23] These provisions connect AI-related discrimination to effects, institutional responsibility and the reproduction of gendered stereotypes through apparently neutral systems.

General Recommendation No 28 develops a dynamic and intersectional interpretation of CEDAW. It confirms that the Convention anticipates new forms of discrimination and that discrimination against women may be direct or indirect. It also treats intersectionality as integral to States parties' obligations, requiring recognition of discrimination linked to sex and gender together with other factors such as race, ethnicity, religion or belief, health, age, class, caste, sexual orientation and gender identity.[24] That understanding is well suited to AI

19 Gerards and Xenidis (n 11) 63–76.

20 See eg Case C-443/15, David L. Parris v Trinity College Dublin and Others, EU:C:2016:897, paras 79–82; *cf* 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 [2023] OJ L 132/21, recital 25 and art 3(2)(e).

21 Gender Equality Strategy (n 14), introduction.

22 General Recommendation No 40 (n 7), paras 17 and 27–31.

23 CEDAW (n 4), arts 1, 2 and 5.

24 General Recommendation No 28 (n 5), paras 2, 8, 16 and 18.

systems, which classify persons through multiple variables and may produce disadvantage through their combined operation.

General Recommendation No 33 adds the access-to-justice dimension that becomes important once the analysis turns to AI Act mechanisms. It treats access to justice as including justiciability, availability, accessibility, good quality, remedies and accountability, and recognises that women's access to justice may be impeded by intersecting discrimination, stereotypes, discriminatory procedures and evidentiary rules.[25] In algorithmic contexts, those concerns arise where affected persons cannot identify the system used, obtain relevant evidence, understand how an output was produced or establish a prima facie case. That is why documentation, explanation, institutional access and audits matter for equality enforcement in AI contexts.[26]

General Recommendation No 40 brings the CEDAW analysis directly into the field of AI. It identifies technological developments, including AI, as affecting implementation of the Convention and records that AI systems may reflect and magnify gender bias. It also addresses women's underrepresentation in AI development and calls for gender-sensitive AI, correction of biased AI, continuous impact assessment and independent regulation mechanisms to audit de-biasing. For this analysis, General Recommendation No 40 connects substantive equality, women's participation in technological development and institutional oversight of AI systems.[27]

CEDAW therefore provides the substantive equality orientation for the analysis that follows. It supports an understanding of AI-related equality that extends beyond the removal of explicit sex variables and requires attention to the gendered and intersectional structures in which AI systems operate. The analysis now turns to whether AI Act procedures can make such disadvantage visible, subject to supervision and available for legal challenge.

3. THE AI ACT'S PROCEDURAL EQUALITY MODEL

The AI Act's capacity to make gendered and intersectional disadvantage identifiable, subject to supervision and open to challenge is most visible in the high-risk regime. Article 6 and Annex III classify systems as high risk where they are used in fields such as education and vocational training, employment, workers' management and access to self-employment, access to and enjoyment of essential private and public services, law enforcement, migration, asylum, border control and the administration of justice. These are fields in which gendered and intersectional disadvantage may affect work, income, residence, welfare, safety, education and legal protection. The high-risk regime thus places many equality-sensitive uses of AI within the Act's preventive procedural architecture. The practical reach of that preventive relevance depends on the scope of high-risk classification. Lütz shows that gender-equality protection under the Act depends substantially on whether a system falls within the high-risk regime.[28] Fieldwork by the EU Agency for Fundamental Rights (FRA) shows uncertainty among provid-

25 General Recommendation No 33 (n 6), paras 1, 3, 8 and 14–20.

26 General Recommendation No 33 (n 6), paras 15(g), 18(e) and 25(a)(vii).

27 General Recommendation No 40 (n 7), paras 2, 4, 9 and 30–31.

28 Fabian Lütz, 'The AI Act, gender equality and non-discrimination: what role for the AI office?' (2024) 25 ERA Forum 79, 81–83.

ers, deployers and experts about the scope of high-risk classification, including the effect of the Article 6(3) filter.[29] The filter may exclude certain Annex III systems from high-risk classification where they do not pose a significant risk of harm to health, safety or fundamental rights, although the exception does not apply where the system performs profiling of natural persons.[30] The practical reach of the Act's strongest procedural safeguards is thus shaped by interpretation of the high-risk category.

This is particularly evident in employment. The Gender Equality Strategy 2026–2030 identifies new risks to women caused by AI, including gender bias in recruitment, evaluation and algorithmic management.[31] Employment, workers' management and access to self-employment are high-risk areas under Annex III. In these settings, AI systems may reproduce occupational segregation, penalise career paths shaped by care responsibilities, undervalue feminised work or convert earlier discrimination into apparently neutral performance indicators. The overlap between high-risk classification and EU sex-equality law is thus one of the clearest examples of AI Act's equality relevance.[32] FRA's fieldwork also records gendered recommendation patterns and testing for gender and ethnicity bias in employment. Although not representative, this shows that some actors involved in potentially high-risk AI systems already treat gender and ethnicity bias as assessment issues.[33]

The category-based structure nevertheless has limits. Ebers argues that the AI Act is only partly risk-based, because it relies heavily on pre-defined categories, limited empirical justification and sharp boundaries between high-risk and lower-risk systems.[34] For equality analysis, the consequence is that discriminatory risk may depend less on the formal category of the system than on the context of use, affected groups and cumulative effects. Within those limits, much of the Act's equality relevance depends on procedural duties attached to high-risk classification.

The first of those duties is risk management under Article 9. Providers of high-risk AI systems must establish, implement, document and maintain a risk-management system throughout the system lifecycle. The system must identify and analyse known and reasonably foreseeable risks, estimate and evaluate risks that may emerge under intended use and reasonably foreseeable misuse, and adopt appropriate risk-management measures. In equality-sensitive settings, these requirements make the content of risk identification decisive. Where the social and sectoral context of design, deployment or use makes gendered or intersectional discrimination reasonably foreseeable, such risks should be assessed as risks to fundamental rights. The legal issue is therefore not only if a provider has a risk-management system, but if the system is capable of identifying discrimination risks in that context.

Article 10 makes that equality relevance more concrete via data governance. High-risk AI systems using data for training, validation or testing must comply with data-governance and

29 FRA, *Assessing High-Risk Artificial Intelligence: Fundamental Rights Risks* (Publications Office of the EU 2025) 8–9 and 23–28.

30 AI Act, art 6(3). For the application dates of Chapter III, Sections 1–3, except art 6(5), see AI Act, art 113(c): 2 December 2027 for systems under art 6(2) and Annex III, and 2 August 2028 for systems under art 6(1) and Annex I.

31 Gender Equality Strategy (n 14), Roadmap Principle 5.

32 Lütz (n 28) 81–83; Directive 2006/54/EC, arts 2 and 14.

33 FRA (n 29) 40–42 and 67–68.

34 Martin Ebers, 'Truly Risk-Based Regulation of Artificial Intelligence: How to Implement the EU's AI Act' (2025) 16 European Journal of Risk Regulation 684, 688–689 and 692–693.

data-management requirements. Training, validation and testing datasets must be relevant, sufficiently representative and, to the best extent possible, free of errors and complete in view of intended purpose. Providers must also examine possible biases that are likely to affect health and safety, have a negative impact on fundamental rights or lead to discrimination prohibited under EU law, especially where data outputs influence inputs for future operations.[35] Article 10 thus links bias detection to fundamental rights and non-discrimination law, not only to technical performance.

Article 4a is particularly important for equality analysis. It permits providers of high-risk AI systems, under strict conditions, to process special categories of personal data where strictly necessary for bias detection and correction. This permission also extends, under specified conditions, to deployers of high-risk systems and to providers and deployers of other AI systems and models. This addresses a practical legal problem: protected-characteristic data may be necessary to detect discrimination, although some such data fall within the special categories of personal data under the General Data Protection Regulation.[36] Without a lawful and safeguarded route for such processing, discriminatory effects may remain invisible, particularly where disadvantage is intersectional. Article 4a should therefore be understood as a limited legal mechanism via which data protection and equality enforcement can be reconciled under strict conditions. This interpretation is reinforced by the Gender Equality Strategy, which treats equality data, including sex-disaggregated data, as a condition for evidence-based gender equality policy and anticipates further work on equality data across discrimination grounds.[37] In the AI Act context, bias detection may require data on sex and other protected grounds, subject to necessity, proportionality and strict safeguards. Data protection and equality should therefore be read together: the law must protect persons against misuse of sensitive data without preventing accountable data use where such data are necessary to reveal and correct discrimination.

The equality-relevant inquiry is not limited to provider-side obligations. Article 27 of the AI Act also requires specified deployers of high-risk AI systems to carry out Fundamental Rights Impact Assessments (FRIAs). The duty applies to bodies governed by public law, private entities providing public services, and deployers of high-risk AI systems used for creditworthiness, credit scoring, and risk assessment or pricing in life and health insurance.[38] The assessment must describe the deployer's processes in which the high-risk AI system will be used, period and frequency of use, categories of natural persons and groups likely to be affected, specific risks of harm likely to affect them, human oversight measures and measures to be taken where those risks materialise. Where a data protection impact assessment under the GDPR or Directive 2016/680 already meets an obligation under Article 27, the deployer may include the relevant parts in the FRIA or cross-refer to them.[39]

35 AI Act, art 10(2)–(3), especially art 10(2)(f).

36 AI Act, art 4a(1)–(2), inserted by Regulation (EU) 2026/1744 of the European Parliament and of the Council of 8 July 2026 amending Regulations (EU) 2024/1689, (EU) 2018/1139 and (EU) 2023/1230 as regards the simplification of the implementation of harmonised rules on artificial intelligence (Digital Omnibus on AI) [2026] OJ L 2026/1744, art 1(6); GDPR, arts 6 and 9(1).

37 Gender Equality Strategy (n 14), Roadmap Principle 8.

38 AI Act, art 27(1); AI Act, Annex III, point 5(b)–(c).

39 AI Act, art 27(4); GDPR, art 35; Directive (EU) 2016/680 [2016] OJ L119/89, art 27.

Mantelero argues that FRIA under Article 27 should be understood as a prognostic, *ex ante* and iterative assessment.[40] Lasek-Markey and Hogan similarly treat the FRIA as a distinct feature of EU AI governance, while stressing that it draws on a wider tradition of impact assessment.[41] Article 27 should therefore shape deployment strategy and risk mitigation, rather than operate as a form completed after decisive design, procurement or implementation choices have already been made. While Article 27 can accommodate gender equality because deployers must identify affected groups and contextual risks, its equality value is nevertheless limited by scope and methodology. The limitation of scope is particularly evident in employment: private employers that do not provide public services generally have no FRIA duty for high-risk AI systems used for recruitment or worker management.[42] Even where the duty applies, the provision does not expressly require analysis of sex discrimination, intersectionality or care-based disadvantage. Without equality-specific guidance, FRIAs may therefore become narrow compliance documents rather than instruments capable of identifying gendered and intersectional disadvantage. FRA's 2025 fieldwork found that risks to fundamental rights beyond data protection were not generally assessed in a structured manner, and that existing practices focused mainly on data protection, technical issues and business or legal risk. These findings support guidance under Articles 9 and 27 that expressly addresses equality, non-discrimination and access to effective remedies.[43]

The limits of assessment then lead to institutional access and contestation. Article 77 connects the Act's procedural duties to institutional protection of fundamental rights: designated authorities and bodies may obtain, through the relevant market surveillance authority, information or documentation created or maintained under the Act where necessary for their tasks. This includes authorities that supervise or enforce EU equality and non-discrimination law, and allows eligible equality bodies to obtain information relevant to their mandates, even where they are not market surveillance authorities. Where the documentation is insufficient to ascertain whether obligations under Union law that protects fundamental rights have been infringed, those bodies may make a reasoned request to the market surveillance authority to organise technical tests of a high-risk AI system.[44] Articles 85 and 86 add complaint and explanation mechanisms, but they do not create a discrimination remedy, compensation or a full evidential regime. Their equality value depends on their connection with other legal regimes and institutions.

Taken together, these provisions support a limited account of the AI Act's procedural equality model. "Procedural equality" is used here only as an analytical description of the Act's fundamental-rights architecture, in which discriminatory risk is addressed via assessment, documentation, supervision, access to information and contestation. This understanding draws on Mantelero's account of fundamental-rights protection through assessment, docu-

40 Alessandro Mantelero, 'The Fundamental Rights Impact Assessment (FRIA) in the AI Act: Roots, legal obligations and key elements for a model template' (2024) 54 Computer Law & Security Review 106020, 4–5 and 8–10.

41 Marta Lasek-Markey and Linda Hogan, 'Delivering on the Promise of the Fundamental Rights Impact Assessments in the EU AI Act: Intersectionality and Vulnerability' (2025) 16(2) European Journal of Law and Technology 3–6.

42 AI Act, art 27(1) and Annex III, point 4.

43 FRA (n 29) 34–36 and 53–60.

44 AI Act, art 77(1), (1a) and (3); Fabian Lütz, 'Enforcing and reforming the AI Act: on the importance of gender equality and non-discrimination in AI regulation' (2026) ERA Forum <https://doi.org/10.1007/s12027-026-00885-9> accessed 15 June 2026, 3–8.

mentation, information flows and oversight,[45] Kinchin's emphasis on voice, information, contestability and meaningful review,[46] and Lütz's analysis of Article 77 bodies, technical testing, complaints, explanations and institutional co-operation.[47] The Act creates records, allocates responsibility, opens documentation to designated authorities and requires *ex ante* attention to fundamental rights in selected cases. Yet those procedures may produce information capable of supporting equality enforcement while leaving historic disadvantage unidentified. Aggregate accuracy may conceal group-specific error rates, and provider-side bias testing may leave deployment context outside the analysis. Karagianni's feminist reading of the Act reinforces this limit: the Act gives limited express attention to gender equality and tends to address bias through technical and procedural compliance rather than through a structural account of gendered and intersectional inequality.[48]

AI Act procedures can therefore make discriminatory risk visible, but the equality value of the information they produce depends on substantive equality standards, evidential rules, institutional powers and remedial settings outside the Act. The Council of Europe instruments examined next identify equality-oriented standards and implementation methods that can guide the use of those procedures within the Act's harmonised structure.

4. COUNCIL OF EUROPE EQUALITY STANDARDS AND AI ACT IMPLEMENTATION

The Council of Europe instruments examined in this section address the implementation problem identified above in complementary ways: the Framework Convention supplies a lifecycle frame for AI governance, while CM/Rec(2026)1 provides equality-specific guidance. This is relevant to the AI Act because the discriminatory risks identified in Sections 2 and 3 may arise before the final AI-assisted decision, through problem formulation, data selection, design, testing, deployment, monitoring or use.[49] The Framework Convention addresses that temporal and institutional dimension by defining its scope by reference to activities within the AI lifecycle.[50] Its equality and risk-management provisions place equality, including gender equality, within that lifecycle structure.[51]

45 Mantelero (n 40) 2–6.

46 Niamh Kinchin, '"Voiceless": the procedural gap in algorithmic justice' (2024) 32 International Journal of Law and Information Technology eaae024, 1–6 and 24–28.

47 Lütz (n 44) 3–8.

48 Anastasia Karagianni, 'Gender in a stereo-(gender)typical EU AI Law: A feminist reading of the AI act' (2025) 1 Cambridge Forum on AI: Law and Governance e25, 2–3 and 13–14.

49 Gerards and Xenidis (n 11) 37–47, 50–51, 55–58 and 63–64; Bartoletti and Xenidis (n 12) 15–30.

50 Framework Convention (n 8), arts 1 and 3; Explanatory Report to the Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law, Vilnius, 5 September 2024, paras 14–15. The AI lifecycle includes activities from design and data collection through development, verification, deployment and operation to retirement. These activities need not follow a fixed sequence and may recur after substantial changes to the system or its intended use.

51 Framework Convention (n 8), arts 10 and 16.

The Framework Convention does not, however, prescribe a detailed method for lifecycle assessment. The Council of Europe's HUDERIA Methodology and Model (HUDERIA) gives practical form to that assessment. HUDERIA is a non-binding framework for identifying, assessing, preventing and mitigating AI-related risks and impacts from the perspective of human rights, democracy and the rule of law. It supports lifecycle risk and impact assessment and may be used alongside risk management and FRIA under the AI Act.[52]

For this analysis, HUDERIA shows what lifecycle assessment may entail once AI systems are treated as socio-technical systems. It directs attention to application context, design and development context, deployment context, affected persons and groups, protected characteristics, vulnerability factors, stakeholder engagement, mitigation planning, access to remedies and iterative review. These elements explain how AI Act procedures may be applied to assess discriminatory risk in context, rather than as narrow formal compliance.

For EU AI law, the relationship between the Framework Convention and the AI Act is mediated by EU's harmonised regulatory structure. The two instruments differ in legal form and addressees. The Act is a detailed regulatory regime with operator duties and sanctions, while the Convention is a principle-based treaty addressed to Parties and formulated largely as obligations of result.[53] Council Decision (EU) 2026/1080 provides that the Convention is to be implemented in the Union exclusively via the AI Act and other relevant *acquis*, where applicable.[54] The Convention therefore operates, for EU law purposes, as a broader human-rights standard against which AI Act implementation may be assessed, rather than as a separate source of operator duties within the Union.

CM/Rec(2026)1 operates at a more specific level. It is an equality-specific Committee of Ministers recommendation developed to complement the Framework Convention in relation to equality and non-discrimination. It addresses equality across the AI lifecycle, from design, development and data use to deployment, monitoring and use.[55] It also refers to structural and systemic disadvantage, multiple and intersectional discrimination, meaningful participation, public consultation, awareness, training and data collection. [56] These elements have significance for AI Act implementation because they identify equality considerations that can guide the application of existing procedural duties.

CM/Rec(2026)1 is not legally binding for Council of Europe member States. In EU law, however, Council Decision (EU) 2025/2350 treats it as capable of producing legal effects in AI Act implementation, in the context of standardisation under Article 40(3) and codes of practice for general-purpose AI models under Article 56(1) of the AI Act. The Recommendation

52 Council of Europe, *HUDERIA Methodology and Model* (Council of Europe 2026) 7–11, 13–17, 19–23, 25–30 and 33–43.

53 Miguel Ángel Presno Linera and Anne Meuwese, 'Regulating AI from Europe: a joint analysis of the AI Act and the Framework Convention on AI' (2025) 13(3) The Theory and Practice of Legislation 292, 302–307.

54 Council Decision (EU) 2026/1080 of 21 April 2026 on the conclusion, on behalf of the European Union, of the Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law [2026] OJ L 2026/1080, art 3.

55 CM/Rec(2026)1 (n 9), preamble and Appendix, paras 1–8 and 13–20; Council Decision (EU) 2025/2350 (n 10), recital 2.

56 CM/Rec(2026)1 (n 9), Appendix, paras 2, 8, 13–39.

may guide the interpretation and application of AI Act procedures as a persuasive source, but it must remain consistent with the Act and cannot itself add duties for providers or deployers.[57]

For this analysis, the equality-sensitive provisions of CM/Rec(2026)1 are used to guide the application of AI Act procedures, especially in relation to human-rights risk and impact assessment, discrimination audits and audit standards, public information, institutional oversight and access to justice, including evidentiary rules, collective action and compensation. Together, these standards and mechanisms explain how information produced through AI Act procedures can support equality scrutiny, institutional supervision and remedial use.

5. SELECTED IMPLEMENTATION IMPLICATIONS: EQUALITY CONTENT IN AI ACT PROCEDURES

The analysis now applies CM/Rec(2026)1's equality-sensitive criteria, together with CEDAW, to selected AI Act procedures. This discussion is necessarily selective: FRIA, discrimination audits, data governance, public information, institutional access, standards and remedial connections could each sustain a more detailed analysis. The aim is to show how existing AI Act procedures may be given equality content through CEDAW's substantive equality orientation and CM/Rec(2026)1's implementation methods. The shared premise is that procedural duties acquire particular value for equality enforcement where the information they generate can be used to identify gendered, structural and intersectional disadvantage.

The analysis begins with FRIA. In equality-sensitive settings, FRIA should not be limited to a general description of affected groups or abstract fundamental-rights risk. Interpreted in light of General Recommendation No 40 and CM/Rec(2026)1, it should identify direct, indirect and intersectional discrimination risks; describe affected groups; examine sectoral context; identify relevant protected grounds and proxies; and set out mitigation, monitoring, complaint and review mechanisms. Such an approach develops the equality relevance of FRIA without converting it into a general equality assessment duty for all deployers.[58]

Discrimination audits raise the question of how technical testing can be connected to legal equality analysis. CM/Rec(2026)1 asks member States to initiate the development of standards for discrimination audits of AI systems and to strongly encourage providers and deployers to engage in such audits.[59] In the AI Act context, that connection requires audits not to be limited to aggregate accuracy. They should examine if outcomes differ across sex and other protected grounds, if proxy variables reproduce protected-ground disadvantage, if mitigation measures obscure intersectional harms, and if the system's operation changes after deploy-

57 Council Decision (EU) 2025/2350 (n 10), recitals 6–9 and art 1; AI Act, arts 40(3) and 56(1). The Decision rests on arts 114 and 218(9) TFEU and defines the Union's position on adoption; it does not incorporate the Recommendation into EU law. Recital 6 identifies potential legal effects by reference to international standards under art 40(3) of the AI Act and international approaches to codes of practice for general-purpose AI models under art 56(1) of the AI Act.

58 AI Act, art 27; General Recommendation No 40 (n 7), paras 9 and 30–31, especially para 31(d); CM/Rec(2026)1 (n 9), Appendix, paras 2, 8, 18 and 20.1.

59 CM/Rec(2026)1 (n 9), Appendix, para 20.3.

ment. Gerards and Xenidis's work on algorithmic discrimination supports this lifecycle approach, since bias may enter through design, development, use and later system adaptation.[60]

Data governance raises a related implementation issue. As Section 3 showed, Article 4a of the AI Act permits, under strict conditions, the processing of special categories of personal data where strictly necessary for bias detection and correction. The equality implication is that discrimination cannot always be assessed without information about affected groups. Equality-sensitive implementation must therefore preserve the safeguards of data protection law while allowing proportionate and accountable data use where such data are necessary to reveal discriminatory effects.[61]

Public information mechanisms are another part of equality-sensitive implementation. The AI Act creates registration duties and EU database for certain high-risk systems.[62] CM/Rec(2026)1 encourages Member States to contribute to, maintain or consider the creation of public registries for AI systems with a significant impact on the enjoyment of human rights, which may include information on risks to equality and non-discrimination.[63] Such mechanisms should not be treated as merely administrative. They can help affected persons know whether AI was used, assist equality and fundamental-rights bodies, and allow researchers and civil society to detect patterns that individual claimants may not see. Public information is thus part of the evidential infrastructure through which equality-related risks may become visible.

Institutional access is a further condition of equality-sensitive implementation. Article 77 access to information and documentation matters only if designated bodies have the capacity to use it. Capellà Ricart's analysis reinforces this institutional claim: equality bodies may be well placed to assist victims, access information, investigate collective and intersectional discrimination, participate in proceedings and act in the general interest, provided they have sufficient independence and technical, human and financial resources.[64] CM/Rec(2026)1 similarly supports independent oversight bodies with resources and powers to scrutinise discrimination linked to AI systems, including via inquiries.[65] The 2024 equality body directives provide the legal basis for equality bodies' independence, resources, assistance to victims, inquiries, opinions, litigation and, where provided under national law, public-interest action.[66] These sources should be connected in national implementation, including via effective co-operation between equality bodies, market surveillance authorities, data protection authorities and sector regulators.

60 Gerards and Xenidis (n 11) 40–47 and 148–150.

61 AI Act, art 4a(1)–(2); GDPR, art 9; Gender Equality Strategy (n 14), Roadmap Principle 8.

62 AI Act, arts 49 and 71.

63 CM/Rec(2026)1 (n 9), Appendix, para 16; Council of Europe, Committee of Ministers, 'Explanatory Memorandum to Recommendation CM/Rec(2026)1 of the Committee of Ministers on equality and artificial intelligence' CM(2025)180-add4final (4 March 2026), para 62.

64 Anna Capellà Ricart, 'The role of European equality bodies to address algorithmic discrimination' (2024) 24(3) International Journal of Discrimination and the Law 194, 194–195 and 201–211.

65 CM/Rec(2026)1 (n 9), Appendix, paras 33–37.

66 Council Directive (EU) 2024/1499 [2024] OJ L 2024/1499, arts 3, 4, 6, 8–10 and 14; Directive (EU) 2024/1500 [2024] OJ L 2024/1500, arts 3, 4, 6, 8–10 and 14.

Standards will also shape equality-sensitive implementation. Harmonised standards and common specifications can shape the practical application of AI Act requirements on risk management, data governance, accuracy, robustness and technical documentation.[67] If those standards define performance without attention to equality, the AI Act's procedural model will remain incomplete. CM/Rec(2026)1's call for discrimination-audit standards, the Gender Equality Strategy's commitment to inclusive standard-setting, and General Recommendation No 40's call for gender-sensitive AI converge on the need for equality expertise in standard-setting.[68] Standards should thus include methods for assessing discriminatory error rates, proxy discrimination and intersectional risks where feasible.

The final implication concerns remedial connection. The Act's complaint and explanation rights may help affected persons and public authorities identify non-compliance, but they do not provide a complete discrimination remedy.[69] Effective equality protection requires connections between AI Act procedure and equality law, data protection law, labour law, administrative law and other remedial regimes. CM/Rec(2026)1 recognises this need by addressing access to justice, evidentiary rules, collective avenues of action and compensation for discrimination linked to AI lifecycle activities.[70] General Recommendation No 33 similarly treats access to justice, evidence, remedies and accountability as components of effective equality.[71] Procedure has remedial significance only where it can generate evidence and institutional knowledge capable of supporting substantive legal claims.

These implementation implications are cumulative. FRIA, audits, data governance, public information, Article 77 access, standards and remedial links have limited equality value if they operate in isolation. Their legal value depends on an evidential and institutional sequence through which structural and intersectional disadvantage can be identified and challenged.

6. CONCLUSION

This article has examined how equality can be integrated into EU AI governance through the AI Act in light of emerging Council of Europe norms. The analysis has shown that the equality contribution of the AI Act provisions examined here is primarily procedural. Its high-risk regime, data-governance rules, documentation duties, Fundamental Rights Impact Assessments, standards architecture, Article 77 access, complaints and explanations create legal sites at which information about AI systems can be generated, preserved, accessed and used. Those procedures become equality-relevant where they are directed by substantive equality standards and connected to institutions capable of identifying gendered and intersectional disadvantage. This matters because algorithmic discrimination is often produced through the conditions of AI development and deployment, rather than only through the final decision. A

67 AI Act, arts 40–41 in connection with arts 9–11 and 15.

68 CM/Rec(2026)1 (n 9), Appendix, para 20.3; Gender Equality Strategy (n 14), Roadmap Principle 5; General Recommendation No 40 (n 7), paras 30–31, especially para 31 (d).

69 AI Act, arts 85–86.

70 CM/Rec(2026)1 (n 9), Appendix, paras 21, 23, 25 and 26.

71 General Recommendation No 33 (n 6), paras 1, 14–20 and 25(a)(vii).

focus on outputs alone gives too narrow an account of the harm and too weak a basis for legal contestation. Equality analysis in AI governance must therefore reach the lifecycle conditions through which disadvantage is generated or reproduced.

CEDAW supplies the substantive equality orientation for that inquiry. Its effects-based and intersectional understanding of discrimination directs attention to indirect harm, compounded disadvantage, stereotypes, evidentiary barriers, remedies and accountability. General Recommendation No 40 is particularly important as it addresses AI directly, linking gender-sensitive AI to women's participation in technological development, continuous impact assessment and independent auditing. These standards clarify what equality-sensitive AI governance must be capable of revealing.

The Council of Europe instruments add a lifecycle and implementation dimension. The Framework Convention places equality risks within AI-system activities across design, development, deployment and use. HUDERIA gives practical content to lifecycle assessment by directing attention to context, affected groups, mitigation, remedies and iterative review. CM/Rec(2026)1 identifies equality-sensitive implementation methods, including discrimination audits, public information, institutional oversight, evidentiary rules, collective action and compensation. In EU law, these methods may inform the interpretation and implementation of existing AI Act procedures within the limits of the Act's harmonised structure.

The article's main contribution is to connect these layers. CEDAW supplies the substantive equality orientation; the AI Act supplies the procedural infrastructure of EU AI governance, and the Council of Europe instruments provide lifecycle and implementation methods. The result is a legally bounded model of equality-sensitive AI Act implementation. Risk management, data governance, FRIA, documentation, Article 77 access, standards, complaints and explanations have limited equality value if they remain separate compliance exercises. They become legally useful where information produced through one mechanism can support scrutiny, supervision or legal contestation through another.

Equality in EU AI governance thus depends on the movement of information across procedures, institutions and remedial regimes. Information generated by providers and deployers must be capable of use by designated fundamental-rights authorities, equality bodies, market surveillance authorities, data protection authorities, courts and other remedial fora. Under that institutional sequence, the AI Act can support legal scrutiny of gendered and intersectional algorithmic disadvantage while remaining within its harmonised regulatory structure. Its contribution to substantive equality lies in making discriminatory risk visible, usable and contestable within EU AI governance.

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*Nina Gumzej**

RAVNOPRAVNOST SPOLOVA I UPRAVLJANJE UMJETNOM INTELIGENCIJOM U EUROPSKOJ UNIJI: AKT O UMJETNOJ INTELIGENCIJI U SVJETLU CEDAW-A I NOVIH NORMI VIJEĆA EUROPE

Sažetak

Algoritamska diskriminacija često može nastati prije donošenja konačne automatizirane odluke, kroz podatke, dizajn, optimizaciju, kontekst primjene i institucionalnu praksu. Ovaj članak ispituje mogu li postupci predviđeni Aktom o umjetnoj inteligenciji učiniti rodno uvjetovani i intersekcijski nepovoljan položaj u visokorizičnim sustavima i odabranim oblicima primjene prepoznatljivim, dokumentiranim, podložnim nadzoru i otvorenim za pravno osporavanje. Razvija se doktrinarna analiza postupaka iz akta relevantnih za jednakost u odnosu na pravo jednakosti Europske unije, CEDAW i nove norme Vijeća Europe o umjetnoj inteligenciji. CEDAW, osobito kako je razrađen u općim preporukama br. 28, 33 i 40, pruža sadržajni standard jednakosti za učinke, neizravnu diskriminaciju, intersekcijsku diskriminaciju, pristup pravosuđu, dokazivanje i rodnu pristranost povezanu s umjetnom inteligencijom. Okvirna konvencija Vijeća Europe o umjetnoj inteligenciji smješta ta pitanja u pristup upravljanju umjetnom inteligencijom koji se temelji na životnom ciklusu. Preporuka Vijeća Europe CM/Rec(2026)1 utvrđuje provedbene metode osjetljive na jednakost, uključujući procjenu učinka, revizije radi utvrđivanja diskriminacije, javno informiranje, institucionalni nadzor i poveznice s pravnim sredstvima. Odluka Vijeća (EU) 2025/2350 prepoznaje mogućnost utjecaja pravno neobvezujuće Preporuke na provedbu Akta o umjetnoj inteligenciji u vezi s međunarodnim normama i pristupima, uz uvjet sukladnosti s usklađenim obvezama koje taj Akt propisuje za dobavljače i subjekte koji uvode sustave. Članak zaključuje da postupci iz Akta o umjetnoj inteligenciji mogu poduprijeti provjeru, nadzor i pravno osporavanje rodno uvjetovanog i intersekcijskog algoritamskog nepovoljnog položaja kada su informacije koje ti postupci proizvode povezane sa sadržajnim standardima jednakosti, nadležnim institucijama i režimima pravne zaštite.

Ključne riječi: *algoritamska diskriminacija, postupovna jednakost, ravnopravnost spolova, Akt o umjetnoj inteligenciji, CEDAW, CM/Rec(2026)1*

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GENDER IN THE EUROPEAN LAW OF POLITICAL PARTICIPATION**

Summary: *The existing scholarship on gender and political participation in the European Union tends to explore formal sites, legislative representation in particular. In this paper, I take a broader, systemic perspective by paying attention to legal structures that enable political participation in the Union, both within formal sites and beyond them. I argue that the European law of political participation is formed through a joined dynamic of emulation and rupture, which affects how gender may be brought to bear in political activity. After illustrating the interplay of the law of political participation and gender by the case of the recent "My Voice, My Choice" European Citizens' Initiative, I argue that gendering the European law of political participation may challenge the boundary between formal and informal political participation. Such projects, however, remain under the sway of three sources: the image of the state, the Union's political economy, and the visibility of political autonomy.*

Keywords: *gender, European Union, representation, participation, European Citizens' Initiative*

1. INTRODUCTION

The political arena is among the key sites of struggle for gender equality. Scholars have already done much work on the role of gender in the formal, i.e. institutionalized sites of political participation, such as constitution-making and legislatures.[1] The boundary between

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1 Many contributions are from disciplines other than law, although constitution-making in particular was a fruitful topic for legal scholars. See, for instance, Tiffany D Barnes and Mirya R Holman, 'Gender Quotas, Women's Representation, and Legislative Diversity' (2020) 82 The Journal of Politics 1271; Hanna Bäck and Marc Debus, 'When Do Women Speak? A Comparative Analysis of the Role of Gender in Legislative Debates' (2019) 67 Political Studies 576; Leslie Schwindt-Bayer and Peverill Squire, 'Legislative Power and Women's Representation' (2014) 10 Politics & Gender 622; Silvia Suteu, 'Women and Participatory

such sites and more informal kinds of political participation has received less attention, particularly from legal scholars.[2] The informal sites and opportunities for politics matter since the figure of the representative, the core of formal participation, is a creation of political processes that may involve informal political activity of the represented.[3] What is more, in part as a consequence of the difference between "the public" and "the private" long critiqued by feminists, women tend to be more engaged through informal kinds of political participation that veers into social participation.[4] For instance, charity work is likely to be more feminised, seeing as it is often more compatible with prevalent gender norms than, say, membership in a political party.[5] Relegation to the sphere of the informal (and not necessarily private) may open different routes to participation. For one, it may be leveraged to subvert the formal limitations of politics, with excluded voices finding their place beyond the halls of state institutions.[6] Hence, an exploration of gender and political participation must pay attention to how the law constitutes the sites of formal and informal political activity, as well as the interface between them.

In this paper, I will look at how the boundary between the formal and informal sites of politics is drawn in the European Union's law of political participation. In doing so, I aim to build around the crucial issue of descriptive representation in legislatures. The latter tends to be more accessible to nonlegal disciplines and the relevant research has thus developed separately from more systemic feminist critiques of EU law.[7] Here I will bring the two together by looking at the law as a vehicle for delineating political participation from what is beyond it. As such, the law plays a crucial role in the construction of the "transmission belt" of democratic politics, including representation.[8] The aim here is to explore how the systemic features of EU law open or foreclose opportunities for gendering political participation broadly conceived.

In positing that there is a distinctly European law of political participation, I do not mean to recount the much broader and richer literature on the democratic deficit of the Union and

Constitution-Making' in Helen Irving (ed.), *Constitutions and Gender* (Edward Elgar Publishing 2017); Ruth Rubio-Marín, 'Women and Participatory Constitutionalism' (2020) 18 International Journal of Constitutional Law 233; Natalia Morales Cerda, 'Feminist Manifestos: Challenging the Limits of Performative Constituent Power through Political Representation' (2026) 15 Global Constitutionalism 420.

2 For a notable exception, see Morales Cerda (n 1).

3 See, in particular, Michael Saward, *The Representative Claim* (Oxford University Press 2010); Nadia Urbinati, *Representative Democracy. Principles & Genealogy* (The University of Chicago Press 2006) 37.

4 See, for instance, Vivien Lowndes, 'Getting on or Getting By? Women, Social Capital and Political Participation' (2004) 6 The British Journal of Politics and International Relations 45; Hilde Coffé and Catherine Bolzendahl, 'Same Game, Different Rules? Gender Differences in Political Participation' (2010) 62 Sex Roles 318.

5 Camila Páez-Bernal and Miki Caul Kittilson, 'Gender and Political Participation' in Marco Giugni and Maria Grasso (eds), *The Oxford Handbook of Political Participation* (Oxford University Press 2022) 570.

6 Maureen Hays-Mitchell, 'Voices and Visions from the Streets: Gender Interests and Political Participation among Women Informal Traders in Latin America' (1995) 13 Environment and Planning D: Society and Space 445; Bandana Purkayastha and Mangala Subramaniam, 'Introduction' in Bandana Purkayastha and Mangala Subramaniam (eds), *The Power of Women's Informal Networks. Lessons in Social Change from South Asia to West Africa* (Lexington Books 2004) 2.

7 Jo Shaw, 'Importing Gender: The Challenge of Feminism and the Analysis of the EU Legal Order' (2000) 7 Journal of European Public Policy 406, 421; Barbara Havelkova, 'Critical Legal Feminism in EU Law. A Post-State-Socialist Perspective' in Päivi Johanna Neuvonen and Paul Linden-Retek (eds), *Critical Theory and European Union Law. The Question of Postnational Emancipation* (Hart Publishing 2026) 159, 165.

8 Jo Shaw, 'Importing Gender: The Challenge of Feminism and the Analysis of the EU Legal Order' (2000) 7 Journal of European Public Policy 406.

the efforts to remedy it.[9] I also do not claim that the body of law interrelated with political participation in the Union is more than a protean creation. There is much to criticize about the Union's participatory structures (and lack thereof).[10] Nevertheless, recent scholarship has demonstrated that there are grounds for establishing a legal doctrine of political participation under EU law.[11] This paper builds on the insights from this research, all the while teasing out how the European law of political participation constitutes formal and informal sites of political participation.

In thinking about gender, political participation, and the European Union law, I ask how EU law of political participation enables (or frustrates) the deployment of gender as an instrument of reordering the formal and informal participatory sites. I draw inspiration from Rosi Braidotti's theory of nomadic citizenship.[12] The keyword I am adopting from her work is "rupture". Braidotti scrutinizes the European Union as a post-nationalist project, arguing that the Union's emergence offers a chance to construct identities as embodied practices that in turn lead to "flexible citizenship forms".[13] Braidotti's use of the term "citizenship" cannot be conflated with the reading of the concept as a shorthand for legal regimes. Braidotti rather insists on citizenship as a critical feminist practices of accountability and relationality, a politics of crafting one's identity and participating in the co-creation of common locations.[14] Instead of being an initial component of the project, the law is here introduced at a later stage, recognising the new flexible citizenships that do not hinge on it.[15] Braidotti's project of juxtaposing citizenship as practice and citizenship as a legal regime adds to similar efforts in critical theory.[16] Her work also resonates with the recent legal theorising on citizenship, namely the law's failure to acknowledge the lived citizenship of migrants.[17] In this paper, I follow Braidotti's research in imagining the Union as an opportunity for rupture with the status quo and explore how its law on political participation both frustrates and enables the role of gender in it.

Following this introduction, I explore the intersections between gender and political participation, outlining three areas of interest: the conceptual framework of political participation, formal sites of political participation, and their informal counterparts. Here I draw on

9 See, for example, David Beetham and Christopher Lord, *Legitimacy and the EU* (Routledge 1998); Andrew Moravcsik, 'Reassessing Legitimacy in the European Union' (2002) 40 JCMS: Journal of Common Market Studies 603; Jan Pieter Beetz and Enzo Rossi, 'The EU's Democratic Deficit in a Realist Key: Multilateral Governance, Popular Sovereignty and Critical Responsiveness' (2017) 8 Transnational Legal Theory 22.

10 See, for example, Alberto Alemanno, 'Europe's Democracy Challenge: Citizen Participation in and Beyond Elections' (2020) 21 German Law Journal 35, 35; Xenophon Contiades, 'The Democratic Principle as an Organisational Basis of the European Union' in Joseph Drew (ed.), *Redefining Europe* (Editions Rodopi B V 2005) 61; Jan-Hendrik Kamlage and Patrizia Nanz, 'Crisis and Participation in the European Union: Energy Policy as a Test Bed for a New Politics of Citizen Participation' (2017) 31 Global Society 65.

11 Gloria Golmohammadi, *The Principle of Participatory Democracy in the European Union* (Hart Publishing 2026).

12 Rosi Braidotti, 'Gender and Power in a Post-Nationalist European Union' (2004) 12 NORA - Nordic Journal of Feminist and Gender Research 130, 132.

13 *Ibid*., 137.

14 *Ibid*., 133, 137.

15 *Ibid*., 137.

16 For instance, Owen builds on Tully's work to contrast civil and civic democracy, the former constituted through law and the latter insisting on practices. David Owen, 'Democracy, Boundaries, and Respect' in James Tully and others (eds), *Democratic Multiplicity. Perceiving, Enacting, and Integrating Democratic Diversity* (Cambridge University Press 2002).

17 Most recently Sarah Ganty and Clíodhna Murphy, 'Integration Through Rights: Towards an Associational Paradigm' [2026] The Modern Law Review.

the feminist reading of the constituent power to argue that bringing gender to bear on the three components of political participation may help reconfigure the meanings and forms of political engagement. I then introduce the European law of political participation, briefly describing how it has developed through a dynamic of emulation of the state and its forms of political participation, punctured by episodes of rupture. The third substantive chapter brings together the underlying logic of the European law of political participation and the gendering of the difference between formal and informal political participation. The case of the "My Voice, My Choice" movement and the accompanying European Citizens' Initiative, advocating for a Europe-wide access to safe abortion, helps me isolate three factors that shape the interplay of gender and EU's law of political participation: the imaginaries of the state, the Union's political economy, and political autonomy's visibility.

2. GENDER AND POLITICAL PARTICIPATION: FORMAL, INFORMAL AND THE WORLDS IN-BETWEEN

Law and political participation are closely intertwined. Law is by and large adopted through the legislative process that normally forefronts elected elites. Constitutions themselves are produced by political action that often includes forms of elite and/or popular participation.[18] Once created, the law also frames politics, recognizing some of its manifestations as legitimate while refusing the same recognition to others. Take, for instance, civic disobedience or buycotts, a form of consumer activism. By treating some of these as illegal or classifying others as private – and presumably unpolitical – the law is more than a neutral backdrop. It is a way of making sense of political experiences. To think of it as a boundary, as in Sheldon Wolin's evocative description of the role the United States Constitution has for democracy, is only a part of its biography.[19] Boundaries must be drawn and their meaning as boundaries maintained in a project that does not end with adopting a legal form.[20]

That law is also about making sense of political experience is not always appreciated when political participation is concerned.[21] Instead, the law is identified with its form and the role it has in political participation is usually conceived as a matter of human rights protection and organization of power, two great themes of constitutional law.[22] Here the law frames po-

18 John Erik Fossum and Agustin Jose Menendez, 'The Constitution's Gift? A Deliberative Democratic Analysis of Constitution Making in the European Union1' (2005) 11 European Law Journal 380; Amal Sethi, 'Looking beyond the Constituent Power Theory: The Theory of Equitable Elite Bargaining' (2024) 13 Global Constitutionalism 126.

19 Sheldon S Wolin, 'Fugitive Democracy' in Seyla Benhabib (ed.), *Democracy and Difference. Contesting the Boundaries of the Political* (Princeton University Press 1996) 33.

20 Hans Lindahl, 'The Purposiveness of Law: Two Concepts of Representation in the European Union' (1998) 17 Law and Philosophy 481, 499.

21 See, however, Eoin Daly, 'Integration Referendums as Expressions of Constituent Power: Ireland as a Case Study' (2024) 86 The Review of Politics 218; Eoin Daly, 'Popular Sovereignty After Brexit' (2022) 23 German Law Journal 1; Leah Trueblood, *Referendums as Representative Democracy* (Hart Publishing 2024); Roberto Gargarella, *The Law as a Conversation Among Equals* (Cambridge University Press 2022).

22 Henry J Steiner, 'Political Participation as a Human Right' (1988) 1 Harvard Human Rights Yearbook 77; Zoltán Pozsár-Szentmiklósy, 'Direct Democracy and the Separation of Powers' in Antonia Baraggia, Cristina Fasone and Luca P Vanoni (eds), *New Challenges to the Separation of Powers* (Edward Elgar Publishing 2020); Dominik Steiger, 'A Constitutional Theory

litical action, processes, and actors. By regulating specific sites and times for politics, the law draws a line between more and less formal types of political participation, as well as between different legal forms. Legislatures are differentiated from protests, elections from referendums, political speech from a petition addressed to the parliament. In drawing these and other boundaries, the law may express particular values.[23] The law may also provide a framework open to an ideal, say that advocated by deliberative or republican theories of democracy.[24]

The obverse relation, in which political action makes sense of the law, is framed as a manifestation of the constituent power.[25] As is well known, the constituent power is "a theory of collective action" associated with the power to establish or change a constitutional order.[26] The "making sense" involved in such fundamental changes is conflated with producing a legal form, its radical reinterpretation, or crafting a narrative by which the citizenry endows the founding of the constitutional order with meaning.[27] In all cases, the power to (re)constitute form and its meaning occupies the theorist's imagination. Thus, the image of political participation in constitutional law is constructed by drawing upon a conceptual structure associated with political participation and situating it within or beyond particular formal institutions and processes.

Recent feminist theorizing on the constituent power demonstrates the relevance of gender to the outlined interplay of law and political participation. As constituent power is about effecting fundamental constitutional changes, it comes attached to arguably most significant forms of political participation in constitutional law.[28] These, whether embedded in a representative body, a referendum, a constituent assembly or some other procedure or institution, employ constitution-making to attempt "a turn for the better", an improvement.[29] From a feminist perspective, as Houghton and O'Donoghue argue, the attempts to take a turn for the better may also exclude, in several respects. By being imagined as exceptional, the con-

of Imperative Participation: Delegated Rulemaking, Citizens' Participation and the Separation of Powers Doctrine' (2015) 79 Albany Law Review 1; Henk Botha, 'Democratic Participation and the Separation of Powers' in Henk Botha, Nils Schaks and Dominik Steiger (eds), *Das Ende des repräsentativen Staates? Demokratie am Scheideweg. Eine Deutsch-Südafrikanische Perspektive* (Nomos Verlagsgesellschaft 2016).

23 As is the case with the contemporary regulation of protest in the UK. Richard Martin, 'Environmental Protest, Contention, and the Law: Conceptualizing the Public Order Act 2023' (2025) 52 Journal of Law and Society 363, 388.

24 See, for example, Stephen Tierney, *Constitutional Referendums. The Theory and Practice of Republican Deliberation* (Oxford University Press 2012); Claus Offe, 'Referendum vs. Institutionalized Deliberation: What Democratic Theorists Can Learn from the 2016 Brexit Decision' (2017) 146 Daedalus 14; Paul Blokker and Volkan Gül, 'Citizen Deliberation and Constitutional Change', *Deliberative Constitution-making* (Routledge 2023); Ron Levy and Graeme Orr, *The Law of Deliberative Democracy* (Routledge 2017).

25 Joel Colón-Ríos, *Constituent Power and the Law* (Oxford University Press 2020); Roberto Gargarella, 'On Constituent Power and the Law by Joel Colon-Ríos' (2021) XXIII Etica & Politica 217.

26 Hans Lindahl, 'The Paradox of Constituent Power. The Ambigious Self-Constitution of the European Union' (2007) 20 Ratio juris 485, 486.

27 The literature on the topic is vast, what follows is only a sampling. Joseph Francesco Cozza, 'Authorizing Revolutionary Constitutional Change: The Approximation Thesis' (2021) 7 Constitutional Studies 157; Ludvig Beckman, 'Democratic Legitimacy Does Not Require Constitutional Referendum. On "the Constitution" in Theories of Constituent Power' (2018) 14 European Constitutional Law Review 567; Gary Jeffrey Jacobsohn and Yaniv Roznai, *Constitutional Revolution* (Yale University Press 2020); Ming-Sung Kuo, 'Between Fact and Norm. Narrative and the Constitutionalisation of Founding Moments' in Richard Albert, Menaka Guruswamy and Nishchal Basnyat (eds), *Founding Moments in Constitutionalism* (Hart Publishing 2019).

28 Whether the concept of the 'constituent power' should be used to think about these forms of participation is a different issue. Sergio Verdugo, 'Is It Time to Abandon the Theory of Constituent Power?' (2023) 21 International Journal of Constitutional Law 14.

29 Zoran Oklopcic, *Beyond the People. Social Imaginary and Constituent Imagination* (Oxford University Press 2018) 123.

stituent power side-lines all those who were unable to participate in its rare exercise.[30] By being identified with an abstract actor who constitutes, regularly "the people", acts of the constituent power may paper over existing gendered relations that shape the process of constituting, and ignore the destructive capacities of the constituent power.[31] Furthermore, as Oklopčić argues, the image of the constitution itself, as the result of the constituent power, is used to push one's attention towards a singular understanding of establishing a constitutional order. By prompting us towards a specific vision of the constitution as a structure meant to endure stresses emerging from its context, imaginaries of a constitutional structure able to adapt and respond to varying demands gets pushed aside.[32] The constituent power thus does not only establish a particular constitutional order, but a particular perspective on itself and its outcome.

In scrutinizing political participation intertwined with constitution-making, Houghton, O'Donoghue, and Morales Cerda agree that taking gender into account challenges the erasures perpetuated by the dominant accounts of the constituent power.[33] To demonstrate this, they take up manifestos, and feminist manifestos in particular. Houghton and O'Donoghue argue that feminist manifestos are a claim to constituent power, one that brings to light marginalized voices, may serve to constitute "groups, organizations and spaces" all the while revealing the exclusions of both law and political processes.[34] Their account draws on the performative nature of the constituent power, that does not require a predefined subject of the power, i.e. "the people", but produces it and its creation, the constitutional order.[35] Once recast into feminist manifestos, the constituent power is also a collective project, one involving a multitude of members of a group struggling for recognition.[36] As such, manifestos are also not tied to a particular genre, say to the written form often associated with constitutions.

Houghton, O'Donoghue and Morales Cerda show how artistic performances and crafts, including singing, oral traditions, and knitwear, may form manifestos that articulate alternative constituent claims.[37] As such they are repeated performances and practices, rather than exceptional moments, bringing to life a different way of establishing a constitutional order. Nonetheless, Morales Cerda departs from Houghton and O'Donoghue in arguing that, while performances of a broad spectrum are of central importance to this feminist reading of the constituent power, the pathways by which they may be translated into institutional form remain unclear. Where Houghton's and O'Donoghue's path-breaking account of the constituent power insist on performativity, Morales Cerda argues that an account of representation is required to bridge the boundary between informal claims to power, such as manifestos, and

30 Ruth Houghton and Aoife O'Donoghue, 'Manifestos as Constituent Power: Performing a Feminist Revolution' (2023) 12 Global Constitutionalism 412, 413.

31 *Ibid*., 431.

32 Oklopcic (n 29) 128–129.

33 Houghton and O'Donoghue (n 30) 33; Morales Cerda (n 1) 425.

34 Houghton and O'Donoghue (n 30) 421.

35 For a broader account on performativity and the constituent power, see Mónica Brito Vieira, 'Representation and Constituent Power' in Peter Niesen, Markus Patberg and Lucia Rubinelli (eds), *The Oxford Handbook of Constituent Power* (Oxford University Press 2026).

36 Morales Cerda (n 1) 445.

37 Houghton and O'Donoghue (n 30) 434; Morales Cerda (n 1) 435.

their institutionalization.[38] The problem in both cases is the configuration of the boundary between informal and formal political participation.

That gendering the law of political participation involves reconsidering the interplay of formal and informal sites of political participation is a lesson that extends well beyond the constituent power. Take, for instance, gender quotas. They are often associated with legislative representation and elections.[39] By placing a formal requirement that a certain number of women be involved in decision-making, quotas grant access to "power, resource, and opportunities" effectively and relatively quickly, all the while representing to the broader public that women are capable of being active in politics.[40] And yet, to the extent quotas are imagined as a specific form of participation, they are open to the charge of essentialism. Essentialism presents certain features as so ingrained in a particular identity that only members of the group sharing that identity are considered its legitimate representatives. Although essentialism may be used in a political strategy that contests inequality, it has more often had deleterious impact on women.[41] In political participation in particular, the idea that any woman can represent all women creates both a simplistic and a potentially fixed image of womanhood. As Mansbridge argues, the resulting representation may "reinforce stereotypes", reduce the space individuals have to navigate and express their identities authentically and, on a group level, may both make certain groups more prominent and more separated from others.[42] Similarly to a dominant reading of the constituent power, quotas may end up levelling, rather than articulating difference.

In warning of gender essentialism that may accompany quotas, theorists advocate a reconsideration of the interplay between formal and informal political participation. Mansbridge forcefully argues that it is necessary to focus on "experiences rather than innateness", i.e. quotas should encourage more nuanced processes that give them meaning reflective of all the complexities of female lives.[43] For instance, if quotas are an object of deliberation in political parties rather than just a formal checkbox in parliamentary elections, they may not only undermine essentialist beliefs concerning women's inability to rule.[44] They may also avoid the essentialist trap of forgetting the heterogeneity of women, including in the scope of representation, for instance, queer or Roma women.

Beyond gender quotas and political practices they are meant to foster, finding spaces for informal political participation more broadly conceived may also work to counteract essentialism, since informality may directly involve female experience and push against innate-

38 Morales Cerda (n 1) 443.

39 Biljana Kotevska and Vera Pavlou, 'Promotion of Gender Balance in Political Decision-Making' (2023) 8 <https://www.equalitylaw.eu/downloads/5824-promotion-of-gender-balance-in-political-decision-making> accessed 13 November 2026.

40 Jane Mansbridge, 'Quota Problems: Combating the Dangers of Essentialism' (2005) 1 Politics & Gender; Lisa Baldez, 'The Pros and Cons of Gender Quota Laws: What Happens When You Kick Men Out and Let Women In?' (2006) 2 Politics & Gender.

41 Ann Heilmann, 'Gender and Essentialism: Feminist Debates in the Twenty-First Century' (2011) 53 Critical Quarterly 78, 78.

42 Mansbridge (n 40).

43 *Ibid*.

44 Medha Nanivadekar, 'Are Quotas a Good Idea? The Indian Experience with Reserved Seats for Women' (2006) 2 Politics & Gender 119; Mansbridge (n 40).

ness.[45] The possible role of feminist manifestos as a performance of alternative constitution-making is a case in point. Informal political participation, however, is not restricted to creating constitutions. In general, informal political participation can mean any voluntary activity performed by citizens and aimed at affecting a political outcome.[46] This is not to say that every action is always a form of political participation, a move that would make the concept unintelligible. The point is instead that citizens may turn their everyday actions into political statements, that everyday repeated actions, apparently mundane, can be important sites of resistance and may as such be framed to instantiate political change.[47] Domesticity, often identified with gender norms that keep women restricted to the constraints of the private sphere, may in this light emerge as a political instrument.[48] As Morales Cerda warns, however, much like formal participation requires the consideration of its informal counterparts, informal participation poses the problem of institutionalization. Informal practices may otherwise remain side-lined rather than challenging the dominant visions of gender. Braidotti's theory of nomadic citizenship faces the same predicament, as it is unclear how and when the law should acknowledge citizenships crafted through bottom-up practices.

If gendering political participation is about reimagining the feedback loop between the formal and the informal, the law must not be reduced to the formal side of the equation. Instead, its structures, processes and the vocabulary it provides should be scrutinised for how they enable the fostering of both formal and informal participatory forms, as well as how they facilitate or frustrate the interplay between the two. To gender the law of political participation is to explore its role as a world in-between permanence of form and fluidity of practice. It is to ask whether this body of law is in itself participatory enough. The participatory capacity of a legal regime is not only about the equal protection of rights but about its ability to address challenges to its dominant interpretation. The case of women's struggle for representation in the formal political arena is thus not only a fight for individual voting rights, but involves problematising the underlying "sexual contract".[49] The reimagining of the constituent power similarly requires us to think not only whether the law protects participation, but how its structures and contents may address the calls for its reimagining. I now turn to these issues in the context of the European law of political participation.

45 See, for instance, RP Carbine, 'Turning to Narrative: Toward a Feminist Theological Interpretation of Political Participation and Personhood' (2010) 78 Journal of the American Academy of Religion 375.

46 Marco Giugni and Maria Grasso, 'The Study of Political Participation Across Research Traditions' in Marco Giugni and Maria Grasso (eds), *The Oxford Handbook of Political Participation* (Oxford University Press 2022) 4.

47 Laurence Bherer, Pascale Dufour and Françoise Montambeault, 'What Is Informal Participation?' (2023) 36 International Journal of Politics, Culture, and Society 1, 4, 6.

48 Páez-Bernal and Caul Kittilson (n 6) 571; Amalia Morales-Villena, Paloma Martín-Martín and Joana María Mestre-Miquel, 'Community Work and Citizen Activism as a Response to the Crisis in Spain: Gender, Poverty and Social Exclusion' (2021) 24 European Journal of Social Work 951; Sandrine Bergès, 'Domesticity and Political Participation: At Home with the Jacobin Women' (2023) 76 Political Research Quarterly 213.

49 Stéphanie Hennette Vauchez and Ruth Rubio-Marin, 'The Political Subject' in Stéphanie Hennette Vauchez and Ruth Rubio-Marin (eds), *The Cambridge Companion to Gender and Law* (Cambridge University Press 2023) 339.

3. EMULATION AND RUPTURE: THE DYNAMICS OF THE EUROPEAN LAW OF POLITICAL PARTICIPATION

The European Union has made important inroads in furthering gender equality.[50] Its law helped safeguard women's rights, particularly in the field of anti-discrimination and in the economic sphere, with its interventions gradually expanding into related fields, as with gender-based violence.[51] On the international scene, the Union was an important global actor advocating for gender equality and has contributed to a broad adoption of gender quotas across the board.[52] Moreover, and since the Treaty of Amsterdam in particular, the Union has championed gender mainstreaming, the integration of gender perspectives into all stages of policy making and all fields of policy. The broad adoption of gender mainstreaming across the Union and its Member States has in itself opened new opportunities (and risks) for advocacy and political participation of NGOs in the field.[53] Indeed, some forms of political participation provided by the Union, such as the European Citizens' Initiative, may be a strategy for gender mainstreaming.[54] Hence, the Union has enabled a broad space for problematising gender, both through hard law and by platforming the issue through its more soft law initiatives.

While largely a success story of feminist governance, the Union's approach to gender equality has been under threat from a variety of fronts. Under the pressures of the financial crisis, the dominance of Member States in setting policy priorities through the European Council, the gendered nature of the democratic backsliding that has occurred in several Member States as well as an increasing technocratic and less activist understanding of gender equality, gains may yet become losses.[55] In this part of the paper we do not have to dwell on all of the problems afflicting feminist governance in the Union. Instead, I will argue that at least a part of the causes can be traced to the same dynamic that shapes the European law of political participation, that between emulation and rupture.

The precarious achievements of the Union's gender equality cannot be disassociated from an underlying legal structure of political participation. The latter was in principle geared towards more elite rather than popular forms of politics.[56] It is a well-known interpretation of the project that it is meant to check popular sovereignty, often imagined as the keystone of democratic governance in constitutional democracies.[57] Indeed, the story of Article 119, the

50 How more could and should be done is a more complicated matter. See, in particular, Havelkova (n 7).

51 Barbara Havelkova, 'The Protected Ground of Sex' in Colm O'Cinneide, Julie Ringelheim and Iyiola Solanke (eds), *Research handbook on European anti-discrimination law* (Edward Elgar Publishing 2025) 253; Sophie Jacquot, 'EU Gender Equality Policy and the Progressive Dismantling of Feminist Governance' in Marian Sawer and others (eds), *Handbook of Feminist Governance* (Edward Elgar Publishing 2023) 313.

52 Rubio-Marín (n 1) 324.

53 Sonia Mazey, 'Gender Mainstreaming Strategies in the E.U.: Delivering on an Agenda?' (2002) 10 Feminist Legal Studies 227.

54 Jo Shaw, 'Mainstreaming Equality and Diversity in European Union Law and Policy' (2005) 58 Current Legal Problems 255, 301.

55 Jacquot (n 51) 312, 317–319; Silvia Suteu, 'The Rule of Law Crisis Was Always Gendered: The Anti-Gender Playbook in Europe' (2025) 21 European Constitutional Law Review 58.

56 Kalypso Nicolaidis, 'The Peoples Imagined. Constituting a Demoicratic European Polity' in Jan Komárek (ed.), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press 2023) 236.

57 Bruno de Witte, 'Sovereignty and European Integration: The Weight of Legal Tradition' (1995) 2 Maastricht Journal of European and Comparative Law 145.

guarantee of equal pay for men and women originally embedded in the Treaty of Rome and the starting point of the Union's gender equality projects, attests to this. Originally, Article 119 was not a feminist creation but an instrument meant to counteract market disturbances that may emerge from industries where the workforce was dominantly female.[58] As the Union was from the start more geared towards a functional integration, one centred primarily on the economy, a feminist reading of the implications of an equal pay requirement developed only belatedly, supplemented by later legal developments and advocacy.[59] The more economy-based thrust of the Union meant that its institutional structures were from the start prone to elite political participation and more easily amenable to technocracy.

The market-based and elitist character of the Union's political structures maintains its power, particularly in times of crises.[60] Indeed, despite the apparent "de-coring" process, in which European Union's law is no longer centred only on matters associated with its single market,[61] the market still has a powerful hold when it comes to political participation. The most recent attempts of the Union to defend democracy through a battery of legislation still rely on legal structures geared towards regulating the internal market.[62] As the Union must act only within its competences and these are at their most powerful when it comes to the economy, the choice may seem obvious. After all, it does enable the Union's interventions into some of the challenges facing both the Union and Member States, such as the use of targeted political advertising.[63] However, as Feisel argues, the invocation of market-related competences also requires that particular structures of political participation be translated into those better suited to the Union's economic thrust.[64] By consequence, the law produced by the Union, in attempting to advance political participation, ends up emulating the market.[65] Gender equality falls under the sway of the economy as well, with scholars noting that the Union perpetuates the bond by "economising" its gender equality policies. For instance, knowledge produced by feminists has faced an uphill struggle towards informing the Union's response to the economic crisis.[66] In contrast to the apparently scientific nature of the market, feminist knowledge is side-lined as ideological.[67]

In addition to emulating the market, the Union's law of political participation emulates, to some extent at least, the political structures in common to state and federations. The emulation is evident from the Union's reliance on representation, originally one that citizens of the Union's Member States could have affected for the most part indirectly, through the domestic

58 Jacquot (n 51) 312.

59 *Ibid*.

60 Ignacio Sánchez-Cuenca, 'From a Deficit of Democracy to a Technocratic Order: The Postcrisis Debate on Europe' (2017) 20 Annual Review of Political Science 351.

61 Mark Dawson, 'The Changing Substance of European Law' (2024) 20 European Constitutional Law Review 451.

62 Franca Maria Feisel, 'The "Internal Market Detour" for Defending Democracy' (2026) 63 Common Market Law Review 1.

63 Max Zeno van Drunen, Natalie Helberger and Ronan Ó Fathaigh, 'The Beginning of EU Political Advertising Law: Unifying Democratic Visions through the Internal Market' (2022) 30 International Journal of Law and Information Technology 181.

64 Feisel (n 62).

65 Anna Elomäki, 'Challenges to Feminist Knowledge? The Economisation of EU Gender Equality Policy' in Marian Sawer and others (eds), *Handbook of Feminist Governance* (Edward Elgar Publishing 2023) 324.

66 *Ibid*., 331.

67 *Ibid*.

political elites. That the Treaty on the European Union eventually codified "representative democracy" as the basis of the Union's functioning comes at the cusp of a long process that need not be revisited here.[68] Suffice it to say that the significance of representative democracy has grown as the Union evolved from a trio of narrowly tailored supranational organizations to a broader institutional structure.[69] With a view to bringing the Union closer to citizens, the European Parliament was gradually converted into a directly elected body. It thus complemented the indirect representation provided by the executive organs of Member States participating in the European Council and the Council of Ministers.[70] Furthermore, in time and especially with the Lisbon Treaty, the Parliament's powers were augmented to the point that it truly approximates a national legislature.[71] The German Constitutional Court had recently confirmed as much in its ruling on the constitutionality of electoral thresholds for European elections.[72]

Emulation, however, is not the only feature of the European law of political participation. Rupture, correctly identified by Braidotti as the Union's departure from the nation-state model,[73] is the other. European integrations were jumpstarted by the limitations of the nation-state and its political structures. Within the Union, the attempts to respond to crises of democracy and the emulation of the state in uplifting the European Parliament to a directly elected institution are responses to specific subsequent ruptures, brought about by the limitations of the integration project. One of the most persistent ruptures is the perceived lacking legitimacy of the Union. In response to it, TEU sets down the provisions on democratic principles. Some scholars have argued that, with their coming into force, participation can no longer be justified as an instrumental exercise, geared towards efficiency of decision-making. Instead, participation gains an intrinsic value. It is not valued exclusively for the output it can produce, but for its ability to uphold democratic values, especially equality.[74] Despite the normative reorientation of participative pathways, however, they are reported to be obscure and underutilized.[75]

The most recent example of a rupture that has the potential to shape the European law of political participation is the finding of the European Court of Justice in *Commission v. Hungary*. The case revolved around the highest values of the European Union, which are as such also a part of the European law of political participation. Given that they bind both the institutions of the Union and the Member States, being a part of "the very identity of the Union as a common legal order",[76] it follows that they must also have implications for politi-

68 Christine Neuhold, 'Into the New Millenium: The Evolution of the European Parliament from Consultative Assembly to Co-Legislator' (2000) 1 Eipascope 1.

69 Stijn Smismans, 'The Constitutional Labelling of "The Democratic Life of the EU". Representative and Participatory Democracy' in Lynn Dobson and Andreas Follesdal (eds), *Political Theory and the European Constitution* (Routledge 2004).

70 *Ibid*.

71 Berthold Rittberger, 'The Creation and Empowerment of the European Parliament*' (2003) 41 JCMS: Journal of Common Market Studies 203.

72 2 BvE 6/23, 2 BvR 994/23, para bb) 1.

73 Braidotti (n 12).

74 Joana Mendes, 'Participation and the Role of Law after Lisbon: A Legal View on Article 11 TEU' (2011) 48 Common Market Law Review 1849.

75 Alberto Alemanno, 'Unboxing the Conference on the Future of Europe and Its Democratic Raison d'être' (2020) 26 European Law Journal 484, 492.

76 C-769/22 *Commission v Hungary* [2026], ECLI:EU:C:2026:326, para 549.

cal participation. The Court of the European Union moved along similar lines in finding that Hungarian anti-LGBTQIA+ legislation runs counter to the Union's highest values. The Court identified the violation in the legislation's capacity to further "hateful conduct" and "stigmatisation and marginalisation" of minorities.[77] Although the Court does not single out political participation, it stands to reason that the broad strokes of its argument not only encompass representation but apply to it with additional force. As representation is imminently tied to politics, speech and action encompassed by it must be all the more bound to values that are meant to ground the Union's political and legal order.

The Union's law of political participation is a complex creature. It is in part shaped by emulation and in part by rupture, with the resulting legal structures remaining somewhat opaque.[78] Mendes thus argues that the provisions on democratic principles do not specify "appropriate means" for participation, do not define the representativeness of associations that may enter into participative exercises, do not help strengthen individual citizens in participatory exercises, and may be too ambitious in their scope.[79] What interests us here is how do the dynamics of emulation and rupture that shape these legal structures intersect with gender and its capacity to scrutinize the boundary between formal and informal political participation.

4. GENDER IN THE DYNAMICS OF THE EUROPEAN LAW OF POLITICAL PARTICIPATION: THE CASE OF THE "MY VOICE, MY CHOICE"

,That the European law of political participation places gender between emulation and rupture, thus shaping the possibilities of scrutinising the boundaries between formal and informal political participation, may be explored through the case of the European Citizens' Initiative. The Initiative is only one of the instruments of participatory democracy inaugurated by TEU. However, it is best suited for the task at hand because it encompasses the different dynamics I have been discussing so far. The Initiative is a formal type of political participation, as it is a procedure laid out in the TEU, requiring at least a million citizens from at least seven Member States to suggest tabling new legislation to the Commission.[80] At the same time, the task of formulating a proposal, gathering signatures and pushing the Initiative through must emerge in a bottom-up process, which will require at least some informal engagement. More importantly, the subject matter of the Initiative may build upon an informal political practice, even an alternative understanding of citizenship.[81] As the Initiative is reminiscent of

77 *Ibid.*, para 554–555.

78 For an excellent reconstruction of their meaning, see Golmohammadi (n 11).

79 Joana Mendes, 'Participation and the Role of Law after Lisbon: A Legal View on Article 11 TEU' (2011) 48 Common Market Law Review 1849.

80 See Article 11(4) TEU. For a critical exploration of the instrument, see Erik Longo, 'The European Citizens' Initiative: Too Much Democracy for EU Polity?' (2019) 20 German Law Journal 181.

81 Some of the initiatives registered at the time of writing illustrate this well. Take, for instance, the *European Public Social Network* initiative, which calls upon the Commission to jumpstart a European social media platform that would foster forms of interaction free from corporate interest and manipulation. The initiative takes up online spaces as civic resources and attempts

citizen-initiated legislation that exists in some jurisdictions, it is an expression of the emulation impulse of the EU's law of political participation.[82] Since its introduction is a response to the ongoing crisis of the Union's legitimacy, it also holds a promise of rupture. In sum, as an instrument of participation, the Initiative is situated on the fault-lines relevant to gender and its positioning in relation to formal and informal political participation.

For the purposes of my argument, I will expand on a single case "My Voice, My Choice" movement that has successfully submitted an Initiative on the right to access to safe abortion.[83] The Movement and the Initiative, coordinated by Nika Kovač, a Slovenian scholar and activist, aim to respond to a heterogenous European terrain of abortion regimes. While the large majority of Member States allows the procedure, an abstract legal guarantee is often contrasted by more specific legal restrictions, such as waiting periods and mandatory counselling, an unequal distribution of facilities and resources, and entrenched gender norms.[84] In some cases, even an abstract guarantee of access to safe abortion was severely limited. The example of the 2020 landmark decision of the Polish Constitutional Tribunal is a case in point, one that is now being challenged following the fall of the previous regime.[85] Another example is Croatia, where abuse of conscientious objection disproportionately limits access to abortion.[86] Under the circumstances, to invoke access to safe abortion initiates a struggle over the image of a woman as is recognized in law, instead of being an enforcement of a well-entrenched right. By using the Initiative to bring the issue to the European level, the Movement bypassed the fragmented political arenas of the Member States, in some cases severely stacked against women's rights.

The Initiative sought a clear legal response from the Commission, one that would help suppress political efforts to reshape women's citizenship as if there is an abstract woman that can be essentialized and turned into an object of any political agenda. In being supported by a network of 300 CSOs advocating for the rights of women across the Union, the Initiative was able to articulate some of the complexities of women's lived realities. For instance, it highlighted the material inequalities that affect women's reproductive autonomy, the bond between failing healthcare systems and the right to abortion, and the stigmatisation of women seeking to

placing them under a different vision of social control. For more, see the website of the initiative <https://citizens-initiative.europa.eu/initiatives/details/2026/000004_en> accessed 14 November 2026.

82 For more on citizen-initiated legislation, see Stéphane Schott, *L'Initative Populaire Dans Les États Fédérés Allemands: Contribution á La Connaissance d'une Institution Démocratique* (LGDJ 2012); Francisco Soto Barrientos, 'La Democracia Como Forma De Estado : Análisis De Los Mecanismos De Partipación Directa En La Constitución Suiza' (2012) 10 Estudios Constitucionales 373.

83 More information on the Movement and the legislative initiative is available on the Movement's website, <https://www.myvoice-mychoice.org/our-demands> accessed 13 November 2026, and the website of the Initiative: <https://citizens-initiative.europa.eu/initiatives/details/2024/000004_en> accessed 13 November 2026.

84 Isabelle Schmitz, 'My Voice, My Choice: A Unique European Citizen's Initiative to Make Safe Abortion Accessible for All Women within the European Union' (2025) 1 ReproSex: International Journal on Sexual and Reproductive Health 244, 245.

85 Marta Bucholc, 'Abortion Law and Human Rights in Poland: The Closing of the Jurisprudential Horizon' (2022) 14 Hague Journal on the Rule of Law 73; Anna Śledzińska-Simon and Anna Wójcik, 'Taking Women's Rights Seriously: Women's Struggle for a New "Social Contract" in Poland' (2024) 15 Pravni zapisi 20.

86 Ana Horvat Vuković, 'Ustav Republike Hrvatske i priziv savjesti u pružanju zdravstvenih usluga' in Arsen Bačić (ed.), *Ustavne promjene i političke nagodbe. Republika Hrvatska između ustavne demokracije i populizma* (Hrvatska akademija znanosti i umjetnosti 2021) 453.

terminate a pregnancy.[87] The idea of the Initiative was to suggest a funding instrument that would ease women's access to abortion.

While the Commission ultimately did not propose a dedicated funding instrument, it noted that the European Social Fund Plus resources may be used to support access to safe abortion for all women across the Union.[88] The Initiative had thus achieved its aim to some extent. In addition to being able to present their case to the Parliament, which supported the Initiative,[89] and the Commission, the organizers managed to exhort a clear political message from the Commission. However, much will still depend on whether Member States will use the funds for their intended purpose.

The case of this particular initiative illustrates how the Union's law of political participation situates gender between emulation and rupture. In order for it to be successful, the organizers of the Initiative have had to adapt their vision to the institutional framework of the Union and its participatory channels. Their efforts to do so were praised in process of adopting the Commission's response to the Initiative.[90] Furthermore, the Executive Vice-President Minzatu argued that the protection of access to abortion matters "for women's participation in the labour market, for their careers and economic empowerment", with access to healthcare findings its spot at the end of the line of these priorities.[91] Gender had to be translated into terms that can be manipulated and regulated by the Union. Whether the advancement produced by the Initiative will also result in the strengthening of care and solidarity invoked by the Initiative remains an open issue.

That an innovation produced by the Initiative as a formal type of political participation must fit into its form is an unsurprising finding. It indicates how the European law of political participation, situated as it is between emulation and rupture, may best be conceived as a limited instrument, one suited to reframing a particular struggle rather than conclusively ending it. Its ability to acknowledge critical interpretations of gender and, indeed, forms of nomadic citizenship may well be limited. However, the success of the "My Voice, My Choice" initiative helps us hone in on three factors that shape the Union's law of political participation when the boundary between formal and informal political engagement is concerned: the image of the state, the Union's political economy, and the visibility of political autonomy.

As a rupture from the nation-state, even when its legal implications are unconclusive or limited, the Union allows a departure from the image of the state. As argued by Přibáň, constitutional imaginaries may be identified as social constructs, and those associated with the Union do not necessarily align with those of the nation-state.[92] In being imagined as something

87 Schmitz (n 84) 248.

88 European Commission – Speech: "My voice, my choice" press release: <https://ec.europa.eu/commission/ presscorner/api/files/ document/print/en/speech_26_492/SPEECH_26_492_EN.pdf> accessed 11 November 2026.

89 European Parliament's Resolution of 17 December 2025 on the Euorpean citizens' initiative entitled "My Voice, My Choice: For Safe and Accessible Abortion" (2025/3007(RSP)) <https://www.europarl.europa.eu/doceo/ document/TA-10-2025-0338_EN.html> accessed 11 November 2026.

90 https://ec.europa.eu/commission/presscorner/api/files/document/print/en/speech_26_492/SPEECH26_492EN. pdf (last accessed on 11 November 2026).

91 *Ibid*.

92 Jiří Přibáň, 'European Constitutional Imaginaries. On Pluralism, Calculemus, Imperium, and Communitas' in Jan Komárek (ed.), *European Constitutional Imaginaries* (Oxford University Press 2023) 22.

other than the state, the Union can serve as a critical space to reimagine political participation as well.[93] Hence, the recognition of nomadic citizenship invoked by Braidotti may find a waystation in the European law of political participation. While it in itself cannot challenge the primacy of the state as the site of politics, it can challenge the imaginary of the state. With "My Voice, My Choice", for instance, the Initiative built upon the idea of the Union as a federalist entity that facilitates movement within its boundaries.[94] As the Union can be conceived as a distinct federal entity,[95] the alternative imaginary may also reinterpret political processes, here those associated with abortion.

A more challenging case is the Union's political economy. As I had already noted, the emulation of the market is a strong structural force in EU law, which then affects the law of political participation as well. Ivana Isailović has already forcefully argued that EU law tends to efface gender inequalities, insisting more on facilitating capitalism than consistently enforcing gender equality.[96] Recognition of an alternative, less formal kind of political engagement may have to find a way to itself emulate, or at least dissimulate the market. In the case of the Citizens' Initiative covered in this section, it was the economic concerns that carried the day. Where political participation cannot find a market logic that supports it, the success of a form of political participation may be more precarious. This is a problem currently affecting some other forms of political participation in EU, such as mini-publics.[97]

The third relevant factor is the visibility of political autonomy. With the Union's law of political participation stretched between emulation and rupture, political autonomy itself becomes fragmented and opaque. It is in part expressed through institutionalized channels, namely elections for the European parliament and the Citizens' Initiative. In other respects, it may remain restricted to the informal sphere or rather be considered as apolitical. The formal channels of the Union, such as the Initiative, grant visibility to a proposal as political and relevant to the Union. However, the ability of alternative forms of political visibility may be curtailed, and not only by the limits of the Union's competences or its political economy. A more serious limitation emerges from the focus of the European law of political participation on servicing the Union's legitimacy concerns. It, in turn, may fail to register projects directed primarily towards the emancipation of the citizenry, including women.

5. CONCLUSION

In this paper, I have argued that, in addition to the distinction between public and private spheres, often used to disenfranchise women in fact or through law, the gendering of polit-

93 *Ibid*., 42.

94 For a critical exploration of the different human hierarchies involved in the project, see Ana Bobić, 'Legal Hierarchies in the European Union as a Social Pathology' (2026) 2026/20 <https://cadmus.eui.eu/server/api/ core/bitstreams/3028924e-c205-4920-9bb2-f2bf6bc78dc6/content> accessed 11 November 2026.

95 Signe Rehling Larsen, *The Constitutional Theory of the Federation and the European Union* (Oxford University Press 2021).

96 Ivana Isailović, 'Gender in Political Economy and EU Law' (2024) 15 Transnational Legal Theory 525.

97 Perle Petit and Alvaro Oleart, 'Citizenwashing EU Tech Policy: EU Deliberative Mini-Publics on Virtual Worlds and Artificial Intelligence' (2026) 14 Politics and Governance <https://www.cogitatiopress.com/politics andgovernance/article/view/10468> accessed 13 November 2026.

ical participation must also consider the relevance of the boundary between the formal and informal. My starting point was Rossi Braidotti's theory of nomadic citizenship. Against this background, I have explored the European law of political participation as an instrument for recasting the difference between the two spheres of political activity. Having identified emulation and rupture as two structural features of this body of law, I have explored their potential for problematizing the interplay of formal and informal types of political participation. In sum, the law of the Union works both as a constraint and an enabling factor. As a whole, it is unlikely to be open to any informal kind of political participation. Any nomadic citizenship, constructed from the bottom-up, will not find full acknowledgment in the Union's law. However, the case of the "My Voice, My Choice" initiative illustrates that it may help in opening settled forms of political participation to scrutiny. The key weakness of the project is the legal fragmentation that makes some forms of political activity more visible than others, as well as the powerful economic thrust of the European project.

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*Matija Miloš**

ROD U EUROPSKOM PRAVU POLITIČKE PARTICIPACIJE

Sažetak

Postojeća istraživanja roda i političke participacije u Europskoj uniji uglavnom su posvećena formalnim oblicima participacije, posebno predstavljenosti u zakonodavstvu. U ovom se radu zauzima širu, sistemsku perspektivu tako što se pozornost usmjerava na pravne strukture koje omogućuju političku participaciju u Uniji, kako unutar formalnih okvira tako i izvan njih. Pokazuje se kako se europsko pravo političke participacije oblikuje združenom dinamikom oponašanja i proboja, koja utječe na mogućnosti povezivanja roda i političkog djelovanja. Nakon prikazivanja ove dinamike na primjeru nedavne Europske građanske inicijative, „Moj glas, moj izbor", utvrđuje se da rodni pristup europskom pravu političke participacije može izazvati razgraničenje između formalne i neformalne političke participacije. Međutim, takvi su projekti pod utjecajem triju izvora: slike države, političke ekonomije Unije te vidljivosti političke autonomije.

Ključne riječi: rod, Europska unija, predstavljanje, participacija, Europska građanska inicijativa

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WHAT DOES "FACILITATING TAKE-UP OF PARENTAL LEAVE" MEAN IN EU LAW? INTERPRETING ARTICLE 8(3) OF THE WORK-LIFE BALANCE DIRECTIVE

Summary: *Since fathers remain underrepresented in caregiving across the EU, the work-life balance directive (WLBD) aims to encourage their engagement in childcare. Among the incentives introduced by the Directive is an allowance provided during the non-transferable part of parental leave under Article 8(3) WLBD. While the original proposal provided for a minimum amount of the allowance equivalent to sick pay, this requirement was removed during the legislative process. As a result, Article 8(3) WLBD obliges the Member States merely to provide for an allowance that "facilitates the take-up" of the non-transferable part of parental leave by both parents. The formulation remains ambiguous as to its substantive content. The paper addresses the interpretation of the provision through doctrinal analysis grounded in textual, contextual and purposive interpretation. It argues that the outcome-oriented facilitation requirement may paradoxically lead to the Member States facing more demanding obligations than under the proposal. The sufficiency of the amount may differ across the EU, as documented by examples from the Member States. The paper further analyses other features influencing the take-up of parental leave, focusing on the earmarking of the allowance and its conditionality on personal care. The paper concludes by examining how the satisfaction of the facilitation requirement should be assessed, since the non-use of the leave by fathers may also be attributed to causes not connected to the allowance. Therefore, the paper seeks to contribute to the understanding of what requirements must be met by the Member States to comply with Article 8(3) WLBD.*

Keywords: *parental allowance, parental leave, work-life balance directive, gender equality*

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1. INTRODUCTION

Equality between women and men is a long-standing commitment of the European Union ("EU"), enshrined both in primary[1] and secondary[2] law. Despite decades of efforts, the differences in employment rate (gender employment gap)[3] and pay levels (gender pay gap)[4] between men and women persist, leading further to the gender pension gap.[5] A significant part of these gaps may be explained by a disproportionate share of childcare responsibilities borne by women (gender care gap).[6] It has been increasingly recognised that closing the gaps requires redistributing caregiving responsibilities between parents.[7] Since 2019, this aim has been reflected in the work-life balance directive ("the Directive" or "WLBD"),[8] which *inter alia* modifies the right to parental leave that has already been enshrined in the Directive 2010/18/EU.[9] Under Article 5(2) WLBD ("Article 5(2)"), two months of the leave must be non-transferable between parents, which means that two months must be reserved for each of the parents respectively. Article 8(3) WLBD ("Article 8(3)") further requires that parents taking the non-transferable part of parental leave receive a payment or allowance.[10]

Nonetheless, the wording of Article 8(3) is rather vague as to its content. The provision states that the allowance "shall be set in such a way as to facilitate the take-up of parental

1 Article 3(3) of the Consolidated version of the Treaty on European Union [2016] OJ C 202, Articles 8 and 153 of the Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C 202 ("TFEU") and Article 23 of the Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

2 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) [2006] OJ L204/23 (and its predecessors), Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1979] OJ L 6/24, Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L 373/37, Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC [2010] OJ L 180/1, Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU [2019] OJ L 188/79, 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 [2022] OJ L315/44 and 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 [2023] OJ L 132/21.

3 Eurostat, 'Gender employment gap, by type of employment' <https://doi.org/10.2908/SDG_05_30> accessed 1 April 2026.

4 Eurostat, 'Gender pay gap in unadjusted form' <https://doi.org/10.2908/SDG_05_20> accessed 1 April 2026.

5 G Betti *et al*, Unequal Ageing in Europe: Women's Independence and Pensions (Palgrave Macmillan 2015) 65–66.

6 European Institute for Gender Equality, *Sharing care, closing gender gaps: CARE Survey 2024* (Publications Office of the European Union 2026) 19, 21 or European Commission: Directorate-General for Justice and Consumers, *2025 report on gender equality in the EU* (Publications Office of the European Union 2025) 24.

7 Principle 9, European Pillar of Social Rights [2017] OJ C 428/10, European Commission, *A Union of Equality: Gender Equality Strategy 2020–2025* (European Commission 2020) 8, European Commission, *Gender Equality Strategy 2026–2030* (European Commission 2026) 10.

8 Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU [2019] OJ L188/79.

9 Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC [2010] OJ L68.

10 Only the term "allowance" will be used for the sake of readability; the conclusions are however applicable both to payments and allowances.

leave by both parents" without clarifying what said facilitation means. Remarkably, under the proposal of the Directive ("the proposal"), the minimum allowance was to be set at the level of national sick pay,[11] and various percentages of gross wages have been further proposed by the members of the European Parliament.[12] All of these proposals were rejected during the legislative process, as the Member States feared the impact that a concrete indicator of the amount of the allowance could have on their social security systems.[13]

As a result, Article 8(3) contains a rather vague obligation whose content must be derived by interpretation. Concerns have been raised that the absence of a minimum amount will fail to ensure sufficient compensation for a loss of income in practice.[14] Yet case law of the Court of Justice of the European Union ("CJEU") indicates that a minimum amount can be derived by purposive interpretation.[15] Furthermore, the requirements of Article 8(3) likely extend to other features of the allowance that may influence the take-up of the leave. Since the provision is formulated in terms of an outcome, namely the take-up of parental leave by both parents, any feature of the allowance that determines whether both parents can and will use the leave may fall within the facilitation requirement. The paper therefore examines two such features in particular, the earmarking of the allowance for each parent and its conditionality on personal care of the child, and briefly considers others, such as flexibility and administrative barriers.

Indeed, the interpretation of Article 8(3) may have serious consequences for Member States when assessing their compliance with the Directive. While existing literature has addressed the transposition of the Directive across the Member States[16] and offered preliminary observations on the content of Article 8(3),[17] a systematic interpretive framework for assessing compliance with the facilitation requirement has not yet been developed. The aim of this paper is thus to provide interpretation of Article 8(3) grounded in doctrinal research, the central research question being what the facilitation requirement under said Article actually entails. Considering the amount of the allowance as well as other features that may affect the uptake of the leave, the paper seeks to contribute to the understanding of how Member States' national legislation may satisfy the requirements of Article 8(3).

11 European Commission, Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU. COM(2017) 253 final.

12 European Parliament, Amendments 263–598, Draft report, PE618.193v01-00 111–123.

13 Council of the EU, Proposal for a Directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU – Progress report, ST 14280 2017 INIT 6.

14 M Weldon-Johns, 'EU work-family policies revisited: Finally challenging caring roles?' (2021) 12(3) *European Labour Law Journal* 313, C de la Porte, Z J Im, B Pircher and D Szelewa, 'The EU's work-life balance directive: Institutional change of father-specific leave across member states' (2023) 57 *Social Policy & Administration* 551 or E Caracciolo di Torella, 'One more step along the way: the 2019 Work Life Balance Directive' (2020) (4) *Revue de droit comparé du travail et de la sécurité sociale* 77.

15 Case C-342/93 *Joan Gillespie and others v Northern Health and Social Services Boards, Department of Health and Social Services, Eastern Health and Social Services Board and Southern Health and Social Services Board* [1996] ECR I-00475 and case C-194/08 *Susanne Gassmayr v Bundesminister für Wissenschaft und Forschung* [2010] ECR I-06281. On the general tendency of the CJEU to employ purposive interpretation, K Lenaerts and J A Gutiérrez-Fons, *Les méthodes d'interprétation de la Cour de justice de l'Union européenne* (Bruylant 2020) 27 and 38.

16 M de la Corte-Rodríguez, *The transposition of the Work-Life Balance Directive in EU Member States (II): Considerable work still to be done* (European Commission 2023).

17 A Oliveira, M de la Corte-Rodríguez and F Lütz, 'The new Directive on Work-Life Balance: towards a new paradigm of family care and equality?' (2020) 45(3) *European Law Review* 295.

2. THE INTERRELATIONSHIP BETWEEN THE ALLOWANCE AND NON-TRANSFERABLE PART OF PARENTAL LEAVE

To fully understand the significance of the allowance under Article 8(3), it must be noted that the non-transferable part of parental leave under Article 5(2) and the allowance under Article 8(3) are interdependent. Article 5(2) requires two months of the leave to be non-transferable between parents, with the purpose of encouraging fathers to make use of their right.[18] Making a part of the leave non-transferable can indeed lead to an increased take-up of the leave by fathers, as documented in Sweden[19] and Poland.[20] However, non-transferability alone does not ensure that fathers will exercise the right. Such was the experience with the Directive 2010/18/EU that provided for one unpaid non-transferable month of the leave.[21] Consequently, the Directive made the allowance mandatory for the non-transferable part, acknowledging that an allowance allowing both parents (i.e. including first-earners) to take the leave is necessary to render Article 5(2) effective in practice.[22]

Some arrangements of the leave may, however, cause the allowance to compensate for the lack of non-transferability. Typically, parents share an entitlement of which a defined part is reserved for each parent and cannot be used by the other if one of the parents does not use it.[23] In some Member States, both parents each have non-transferable individual entitlements. Strikingly, in Czechia[24] and Slovakia[25] each parent holds an individual entitlement exercisable until the child reaches three years of age,[26] and both parents may take the leave simultaneously. As the entitlements are individual and identical in length, the entitlement cannot be transferred, as the other parent already holds an entitlement of the same duration.[27] Formally, the non-transferability under Article 5(2) is satisfied. Yet in practice, the mother typically takes the leave for the full period until the child is three, while the father takes none at all. Although the father's entitlement expires unused, this is not perceived as a loss, since the mother's own entitlement covers the same period. The system thus creates no pressure on fathers to partic-

18 Recital 20 WLBD.

19 S Fahlén and A Duvander, '*Fathers who do not use parental leave: A register-based analysis of Swedish fathers to children born between 1994 and 2017, Working Paper 2023:1*' (Swedish Social Insurance Inspectorate 2023) 6–7.

20 M Latos-Miłkowska, 'The missed opportunity of Poland's implementation of parental leave provisions' (2025) 16(1) *European Labour Law Journal* 144.

21 Recital 11 WLBD, M Karu and D-G Tremblay, 'Fathers on parental leave: an analysis of rights and take-up in 29 countries' (2018) 21(3) *Community, Work & Family* 356–357 or C Castro-García and M Pazos-Moran, 'Parental Leave Policy and Gender Equality in Europe' (2016) 22(3) *Feminist Economics* 65.

22 Recital 31 WLBD.

23 International Labour Organisation, *'Maternity and paternity at work: law and practice across the world*' (International Labour Office 2014) 62 or de la Corte-Rodríguez (n 16) 53–54.

24 J Kocourková, 'Country note: Czechia' in I Dobrotić, S Blum, G Kaufman, A Koslowski, P Moss and M Valentova (eds), *21st International Review of Leave Policies and Related Research 2025* (International Network on Leave Policies and Research 2025) 193–194.

25 Z Dančíková, 'Country note: Slovak Republic' in Dobrotić, Blum, Kaufman, Koslowski, Moss and Valentova (n 24) 483–484.

26 After this period, it is possible to request flexible working conditions: K Štěpánková, 'A brief overview of legal approaches towards work-life balance in the Czech Republic and in England' (2025) 2 *The Lawyer Quarterly* 203.

27 L Přenosilová, *Transpozice nepřenosné části rodičovské dovolené* [Transposition of non-transferable part of parental leave] (C. H. Beck 2024) 20.

ipate in childcare, as the mother loses nothing if the father does not take the leave, and the father loses only an entitlement he was unlikely to exercise in the first place.[28]

This outcome is clearly inconsistent with the objectives of the Directive, which expressly aims to promote a more equal distribution of caregiving responsibilities. Nevertheless, it is not contrary to the wording of Article 5(2) itself, which only requires that two months of the leave cannot be transferred. The Directive does not account for the model of individual entitlements of both parents covering the very same period of the child's age. In such cases, the interconnection between the leave and the allowance is particularly manifest, as the allowance becomes the primary instrument through which the Directive's objectives can be advanced. Should the allowance be designed so as to require its individual uptake by both parents, it could provide the pressure that the leave structure itself fails to create. What Article 8(3) demands in substantive terms is, however, far from being self-evident. The following chapter will therefore analyse the implications of the provision.

3. FACILITATING THE TAKE-UP OF PARENTAL LEAVE

The allowance provided during parental leave falls into the social security schemes.[29] The competence for the EU to legislate in matters of social security is granted under Article 153(1)(b) TFEU. Since such measures must be adopted unanimously,[30] much of the legislation in matters of social security is adopted on a different legal basis.[31] This was also the case of the allowance under Article 8(3). The Directive was adopted on the basis of Article 153(1)(i) TFEU, which provides for the competence of the EU to support equality between men and women as regards labour market opportunities and treatment at work. Yet, the measures adopted on the basis of Article 153 TFEU[32] must not significantly affect the Member States' social security systems' financial equilibrium.[33] This must be borne in mind when interpreting Article 8(3); its implementation may give rise to new permanent costs, especially if the parental leave was previously unpaid.

Does that mean that the amount of the allowance is entirely at the Member States' discretion? While the CJEU has not yet had the opportunity to express its stance on Article 8(3), its earlier case law concerning maternity allowance suggests that such a conclusion would be ill-considered. Admittedly, maternity leave serves a different objective than parental leave.[34] The significance of the case-law lies, however, in the approach taken by the CJEU.

28 *Ibid.*, 22.

29 Case C-275/96 *Anne Kuusijärvi v Riksförsäkringsverket* [1998] ECR I-03419.

30 Article 153(1) TFEU.

31 S Garben, 'Article 153 TFEU' in M Kellerbauer, M Klamert and J Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 1376.

32 *Ibid.*, 1386.

33 Article 153(4)(a) TFEU.

34 Case C-184/83 *Ulrich Hoffmann v Barmer Ersatzkasse* [1984] OJ C 207.

In *Gillespie*, the CJEU has emphasised that while the payment provided during maternity leave does not have to fully compensate for the loss of income, it must not be "set so low as to jeopardize the purpose of maternity leave." The CJEU has further listed several criteria for the assessment of the adequacy of the amount, such as the length of the leave or other forms of social protection provided for by national law.[35] Strikingly, the CJEU held this ruling only on the basis of the right to equal pay, since the Directive 92/85/EEC[36] did not apply to the case as to the temporal scope. There was therefore no minimum amount of the payment resulting from the secondary law.[37] Still, the CJEU was able to determine that an amount undermining the purpose of the leave would not be compliant with EU law. This suggests that the purpose of the facilitation requirement of Article 8(3) could be achieved even absent its explicit formulation. Should the amount of the payment undermine the objective of the non-transferable part of parental leave (which is, undoubtedly, to facilitate the take-up of the leave by both parents), the CJEU would be able to declare its insufficiency regardless of an explicit requirement for such facilitation.

The CJEU retained the emphasis on the effectiveness of the payment provided during maternity leave in its subsequent case law. This time, the Directive 92/85/EEC applied on the matter, providing for a minimum amount at least equivalent to sick pay.[38] There is no reason to assume that its stance on payments provided during maternity leave would be an exception that would not extend to the allowance provided during the non-transferable part of parental leave.[39]

It follows that when the Member States have replaced the minimum amount of the allowance by the vague facilitation requirement, they have not escaped the CJEU's scrutiny. Therefore, it must be assessed what amount facilitates the take-up of parental leave by both parents and is compliant with Article 8(3). This chapter first examines whether a universal benchmark for the adequate amount can be determined, or whether a case-by-case approach is required. It further considers whether the sick pay level originally proposed by the Commission remains relevant despite its rejection.

3.1. DETERMINING THE AMOUNT OF THE ALLOWANCE

Several guidelines are provided by the Directive itself. Recital 31 WLBD directs the Member States to set the allowance at a level allowing for a decent living standard, explaining that particular attention should be paid to first-earners. Recital 29 WLBD adds that the allowance must be adequate. The allowance thus must be sufficient to enable both parents to take leave without an income loss that would be incompatible with maintaining a decent living stand-

35 Case C-342/93 (n 15) para 20.

36 Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) [1992] OJ L348.

37 Case C-342/93 (n 15), para 19–20.

38 Case C-194/08 (n 15) para 8.

39 Oliveira, de la Corte-Rodríguez and Lütz (n 17) 306.

ard.[40] Yet it is questionable whether a universal benchmark for adequacy can be determined, or if a case-by-case approach is needed. The two possibilities will be discussed below.

3.1.1. A UNIVERSAL BENCHMARK FOR ADEQUACY

As a rule, the minimum amount providing a decent living standard is set as a percentage of the worker's previous earnings. That applies also to flat-rate systems, where the percentage tends to refer to average monthly wage in the State.[41] Flat-rate systems are not tailored to the workers' previous earnings, which might prove detrimental to workers with an income higher than the average salary. That said, allowances based on a percentage of previous wages are typically limited by ceilings;[42] these must not, however, render the allowance inadequate.[43]

A benchmark often referred to in the literature is 66% of the previous earnings, which corresponds to the minimum requirements for maternity benefits under Article 6(3) of the ILO Maternity Protection Convention,[44] under which the amount of such benefit "shall not be less than two-thirds of the woman's previous earnings." De la Corte-Rodríguez proposes this benchmark as a given also for the purposes of parental leave, stating that "the level will be considered 'adequate' if the percentage is 66% or more".[45] With this conclusion, he refers to the International Review of Leave Policies and Related Research of 2022, whose authors have long used it in their analyses of parental leave.[46] In the referenced source, the authors explain that this benchmark is used by the European Commission in monitoring the Member States' progress in meeting Employment Guidelines.[47] Yet a year later, they admit that "there is disagreement over what might constitute 'well paid' leave, with many arguing that this would be 100 per cent of wages." While the authors maintained the 66% benchmark to ensure consistency with other years of the review,[48] its adequacy is clearly not straightforward. Crucially, the allowance under Article 8(3) must not only allow families to maintain a decent living standard, but also genuinely facilitate the take-up of the leave by both parents.[49] An allowance that does not provide the incentive for first-earners to use the leave thus does not meet the aims of Article 8(3) regardless of whether it provides a decent living standard.

40 *Ibid.*, 305–306.

41 De la Corte-Rodríguez (n 16) 71.

42 A striking example is Denmark, which provides for a 100% allowance, but the ceiling reduces the replacement rate to 58%: de la Corte-Rodríguez (n 16) 72. Further examples are provided by J Javornik and A Kurowska, 'Work and Care Opportunities under Different Parental Leave Systems: Gender and Class Inequalities in Northern Europe' (2017) 51 *Social Policy & Administration* 630–631.

43 De la Corte-Rodríguez (n 16) 71.

44 International Labour Organization Maternity Protection Convention, 2000 [No. 183].

45 De la Corte-Rodríguez (n 16) 71.

46 The same benchmark is used to date: Dobrotić, Blum, Kaufman, Koslowski, Moss and Valentova (n 24) 22–23.

47 A Koslowski, S Blum, I Dobrotić, G Kaufman, and P Moss (eds), *18th International Review of Leave Policies and Related Research 2022* (International Network on Leave Policies and Research 2022) 35–36.

48 S Blum, I Dobrotić, G Kaufman, A Koslowski and P Moss (eds), *19th International Review of Leave Policies and Related Research 2023* (International Network on Leave Policies and Research 2023) 75.

49 Oliveira, de la Corte-Rodríguez and Lütz (n 17) 306.

Can a different universal benchmark be determined? The literature suggests that to attract a substantial majority of fathers, the allowance must compensate for 80% – 100% of previous income; a replacement rate of 67% is considered only a minimum enabling a modest take-up of the parental leave.[50] During the legislative process, replacement rates of 80%,[51] 85%[52] or 100% have been proposed.[53] Sociological surveys show that at low replacement rates, uptake by fathers is consistently low, as documented in Italy (30%),[54] France (25,8%)[55] and Germany (65%).[56] At higher replacement rates, the uptake increases. Iceland and Sweden, with replacement rates of 80% and 77,6% respectively, achieve high take-up rates for both parents.[57] Yet in Czechia and Slovakia[58] and Denmark, fathers often conditioned the use of the leave on full salary compensation. In Denmark, the statutory rate is considered too low, which leads to fathers using the leave only if collective agreements secure a better income replacement. Consequently, many fathers would not consider an allowance compensating only 66% of their income sufficient.[59]

Still, insisting on full income compensation would probably significantly affect the financial equilibrium of the Member States' social security systems, which would be contrary to Article 153(4)(a) TFEU. The allowance under Article 8(3) must be provided during two months of the non-transferable part of parental leave, which could prove costly for the Member States at a full income replacement rate. The length of the leave was indeed a reason why the minimum amount for the parental leave was rejected;[60] furthermore, *Gillespie* suggests that the length of the leave would be accounted for during the assessment.[61] Thus, a compromise between the parents' declared needs and the social security schemes' capacity will likely have to be made.

It is further suggested that the minimum amount may be linked to "concrete points of reference at national level" that aim to ensure a decent living standard, such as the minimum wage or benefits provided by the social security system;[62] the adequate amount would then vary across the Member States. An argument may thus be made for a case-by-case approach.[63]

50 Y T Yang, S F Wallington and S Morain, 'Paid Leave for Fathers: Policy, Practice, and Reform' (2022) 100 *Milbank Quarterly* 982.

51 Amendment 507, European Parliament (n 12).

52 *Ibid*., Amendment 513.

53 *Ibid*., Amendment 505, 508, 511, 512.

54 F Zambri and others, 'Paternity and parental leave in Italy: the parents' perspective' (2025) 61(3) *Ann Ist Super Sanità* 206.

55 De la Porte, Im, Pircher and Szelewa (n 14) 556.

56 M Rocha, 'Promoting gender equality through regulation: the case of parental leave' (2021) 9(1) *The Theory and Practice of Legislation* 41.

57 Oliveira, de la Corte-Rodríguez and Lütz (n 17) 316.

58 S Saxonberg and H Maříková, 'The central European world of fatherhood policies: how individual attitudes mediate the norm of threeness in the Czech Republic and Slovakia' (2023) 29(6) *Journal of Family Studies* 2513.

59 M T Krüger and C L Lindhardt, 'Fatherhood in transition: How extended parental leave shapes the quality of life for Danish fathers' (2026) 75(1) *Family Relations* 740.

60 Council of the EU (n 13) 6; De la Porte, Im, Pircher and Szelewa (n 14) 559.

61 Case C-342/93 (n 15) para 20.

62 Oliveira, de la Corte-Rodríguez and Lütz (n 17) 305–306.

63 De la Corte-Rodríguez (n 16) 69, 72.

3.1.2. CASE-BY-CASE APPROACH

There are several further reasons why the adequacy of the allowance should be assessed on a case-by-case basis. Firstly, the amount of the allowance cannot be assessed in isolation from other structural features of the parental leave. In particular, the flexibility of the take-up, such as the possibility to take the leave in alternating periods or on a part-time basis[64] may be relevant when determining the adequacy of the allowance, since it affects the length of the continuous period during which the parent is dependent on the allowance. A parent taking leave in shorter, interrupted periods faces a different financial burden than one taking the full non-transferable part continuously; accordingly, the sufficiency of the allowance may vary depending on the flexibility arrangements available under national law.

Secondly, the social reality can frustrate a seemingly adequate parental allowance. A noteworthy example is Czechia, which allows parents to choose the monthly amount of parental allowance up to a maximum that is virtually equivalent to the maternity and paternity allowance. Yet the allowance is constructed as a lump-sum from which the monthly allowance is deducted. Accordingly, the higher the amount deducted monthly from the lump sum, the shorter is the duration of the allowance.[65] A shortage of childcare facilities[66] then leads some parents to use the parental leave for the longest possible period and to opt for the lower amount of parental allowance so that it can be used throughout the whole period of the leave.

Lastly, the impact of a certain replacement rate on workers may differ. Notably, it is suggested that the Member States should consider particularly the situation of low-paid workers.[67] An allowance replacing only two thirds of their income might indeed render the take-up of the leave unaffordable for these workers. Still, the CJEU has indicated in Gillespie that other forms of social protection provided for by national law may be considered when assessing the adequacy of an allowance.[68] Therefore, other benefits provided by the Member States' social security system must be accounted for when determining if the allowance under Article 8(3) conforms to the facilitation requirement.

3.1.3. A RETURN OF SICK PAY LEVEL?

As discussed above, the minimum amount could be also linked to benefits provided by the national social security system.[69] It is thus pertinent to assess if the level of sick pay could still be relevant despite its rejection during the legislative process. The CJEU has repeatedly used *argumentum a contrario* when a proposal has been deliberately deviated from.[70] In other words, if the European legislator deliberately rejected a certain proposition, then it expressed

64 Article 5(6) and Recital 23 WLBD.

65 Přenosilová (n 27) 77.

66 O Nešporová, 'The Initial Years of Motherhood and Fatherhood as Perceived by Expectant Parents: The Division of Care and Paid Work' (2016) 4 *Social studies* 22.

67 Oliveira, de la Corte-Rodríguez and Lütz (n 17) 306.

68 Case C-342/93 (n 15) para 20.

69 Oliveira, de la Corte-Rodríguez and Lütz (n 17) 305–306.

70 Lenaerts and Gutiérrez-Fons (n 15) 52, and e.g. Case C509/11 *ÖBB-Personenverkehr AG* [2013] ECLI:EU:C:2013:613, para 44–45.

the will to not include the rejected provision in the Directive, and its intent was to regulate the matter differently. Regarding the parental allowance, the legislator rejected the proposal to regulate a minimum amount of the allowance corresponding to sick pay level. Since the rejection was motivated by the Member States' concerns about financial stability of their social security systems, it certainly was not intended to set a minimum level exceeding the level of sick pay. Indeed, the position of the Member States is evident from the travaux préparatoires that the CJEU increasingly uses in its case law.[71] Should the concerns of the Member States be considered, a higher standard than the original sick pay level would likely not apply, since the intention of the Member States was clearly to have a wider margin of discretion than under the proposal.

Still, the level of sick pay varies across the Member States and it is not self-evident that it always provides a decent living standard.[72] Indeed, even under the proposal, national regulation might be possibly considered contrary to the Directive on grounds of undermining the Directive's objectives if it was concluded that the allowance equivalent to sick pay did not provide a decent living standard. The *Gillespie* and *Gassmayr* cases suggest that the CJEU might be willing to review the national legislation in this regard. Yet such a ruling would be more difficult to justify, as the EU does not provide for a minimum amount of sick pay.[73] An attempt to set such amount through case law might be thus considered an undue interference with national social security systems. Linking the minimum amount of the allowance under Article 8(3) to sick pay levels would suggest that the legislator considered such a level adequate in the light of levels of social security benefits provided in the respective Member States. However, since the sick pay benchmark is no longer part of the Directive, there is room for a more open-ended interpretation.

The sufficiency of the allowance under Article 8(3) is not determined only by a decent living standard, but also by the facilitation of the take-up of parental leave. The sick pay provides workers with compensation for a loss of income during sickness;[74] its purpose is thus different to the facilitation requirement under Article 8(3). Admittedly, the amount of sick pay should ensure that workers are not forced to come in sick to work due to financial constraints,[75] and therefore should provide incentives for workers to take sick leave when needed. Still, it is not self-evident that the adequacy would be assessed equally for the sick pay and for the allowance under Article 8(3). This might lead to a rather paradoxical outcome under which the facilitation requirement would in fact lead to a stricter review, where an allowance equivalent to sick pay might be considered insufficient. An example may be drawn from the case of Czechia, where the sick pay level amounts to 60%, only after one month does it rise to 66% and after

71 Lenaerts and Gutiérrez-Fons (n 15) 49.

72 Caracciolo di Torella (n 14) 75; J Rajić Ćalić, Directive (EU) 2019/1158 on work-life balance for parents and carers – new era of reconciliation of family and professional life' (2025) (27) *Revija za evropsko pravo* 82.

73 S Spasova, D Bouget and B Vanhercke, *Sick pay and sickness benefit schemes in the European Union: Background report for the Social Protection Committee's In-Depth Review on sickness benefits* (European Union 2016) 8.

74 *Ibid.*

75 Still, workers may be induced to work despite the illness by other factors, such as the culture of presenteeism or pay setting: J Tomšej, 'Attendance bonus systems as indirect discrimination: A comparative analysis of the Czech Republic and Slovenia' (2026) 17(1) *European Labour Law Journal* 14–15.

two months it reaches 72%; furthermore, ceilings apply. The sick pay level would therefore be considered insufficient even under the benchmark of 66%.[76]

It has been shown that the interpretation of Article 8(3) can lead to multiple outcomes as to the amount of the allowance. Whether the CJEU will apply a universal benchmark, resort to national points of reference, or adopt a case-by-case approach is not entirely predictable. Nonetheless, the two-third benchmark does not provide a decent living standard for all workers. It is observed that fathers with lower salaries are less likely to take the parental leave.[77] A worker with minimum wage can hardly afford losing a fifth of his income (80% replacement rate), let alone two thirds (66% replacement rate). On the other hand, the replacement of full income is unlikely to be required, since the need for the preservation of sustainability of national social security systems will certainly be considered by the CJEU. Yet the rejection of the sick pay level may potentially expose Member States to a more demanding standard than required by the proposal.

3.2. FURTHER PARAMETERS OF THE ALLOWANCE

As argued above, the facilitation requirement under Article 8(3) is not necessarily limited to the amount of the allowance. Such conclusion results from *Gassmayr*, where the CJEU reaffirmed that "the choices" made by the provider of the allowance must not undermine effectiveness of the relevant Directive.[78] This principle is relevant not only to the level of financial support provided, but also to the conditions under which it is available. Even an adequate allowance may fail to facilitate the use of leave if its design or conditions discourage one or both parents from taking it. Accordingly, any feature of the allowance that affects whether both parents use the leave may fall within the scope of the facilitation requirement. This chapter focuses on two features: earmarking of the allowance for each parent, and its conditionality on personal care of the child. The chapter also briefly summarises other features that may be relevant for the take-up.

3.2.1. EARMARKING THE ALLOWANCE FOR BOTH PARENTS

Article 8(3) requires the allowance to facilitate the take-up of parental leave by both parents, implying that the allowance must be functional for parents as independent addressees. De la Corte-Rodríguez distinguishes between systems where the right to the allowance is at least partly constructed as an individual entitlement and those where it fully operates as a family entitlement.[79] Indeed, the latter approach is suspect as regards earmarking, since it leads to no part of the allowance being reserved for the respective parents. This was docu-

76 The Czech parental allowance is currently a flat-rate lump-sum and is also considered to be contrary to the facilitation requirement: De la Corte-Rodríguez (n 16) 71.

77 A-Z Duvander and S Fahlén, 'To Take Leave or Not to Take and How Long to Take? A Study on Swedish Fathers' Parental Leave Use' (2025) 46(6) *Journal of Family Issues* 1058.

78 Case C-194/08 (n 15) para 70.

79 De la Corte-Rodríguez (n 16) 69, 80.

mented in three Member States, while only one of them (Estonia) formally employs the family entitlement. The other two examples are Czechia and Slovakia, where the allowance is (just as the parental leave) formally individual. De la Corte-Rodríguez nevertheless concludes that it can be regarded as a family right, since the allowance cannot be received simultaneously by both parents and the total duration of the allowance covers the entire period during which it can be claimed. The allowance may therefore be fully used up by only one of the parents,[80] and it is not guaranteed that both parents will have the possibility to take the allowance in practice.

Indeed, Czechia and Slovakia employ lump sum systems, where the actual duration of the allowance is determined by the monthly amount chosen by the parents. If no part of the allowance is reserved for each of the parents, it may occur that a parent wanting to take the non-transferable part of parental leave may find that the other parent has already exhausted the full amount, and there is no allowance remaining.[81] Such a situation contradicts the requirements of Article 8(3), since, despite formally having the right to take the parental allowance, the parents have no guarantee that a sufficient allowance will be available when they decide to use the non-transferable part of parental leave. It is thus submitted that Article 8(3) requires a part of the allowance to be earmarked for each parent individually.

3.2.2. CONDITIONALITY ON PERSONAL CARE

A distinct parameter concerns whether the allowance is conditioned on the parent actually caring for the child. Such a requirement may be derived from Article 3(1)(b) WLBD, which defines parental leave as a leave from work provided to take care of a child. The allowance used during the non-transferable part of parental leave is thus intended to sustain parents taking a leave to take care of their child. Admittedly, Recital 23 WLBD explains that the take-up of parental leave may be stimulated by flexible forms of the leave such as part-time leave or leave taken in alternating periods. By contrast, an arrangement where the parent continues working full-time while receiving the full allowance would not meet the objectives of the allowance, as the allowance would not, in fact, facilitate the take-up of parental leave.

In several Member States, the allowance is fully or partially decoupled from actual caregiving. De la Corte-Rodríguez concludes that arrangements that allow parents to claim the full allowance during full-time work should be prohibited or extremely limited, as they are detrimental to the very aim of parental leave.[82] This is all the more pertinent since the possibility to work full-time is widely used by fathers, as documented in Slovakia,[83] Hungary,[84] Lithuania,[85] Estonia[86] and Czechia; in the latter country, fathers may ensure caregiving by

80 *Ibid.*, 69.

81 Přenosilová (n 27) 76 or Saxonberg and Mařík̆ová (n 58) 2513.

82 De la Corte-Rodríguez (n 16) 73.

83 Z Dančíková, 'Involved fatherhood in Slovakia? A multi-dimensional picture painted using multiple methods' (2026) (14) *Social Inclusion* 15.

84 J Galántai, 'Developments in Involved Fatherhood in Hungary: A Register Database Analysis' (2026) (14) *Social Inclusion* 6–7.

85 R Brazienė and S Vyšniauskienė, 'Paid Leave Policies and Parental Leave Choices in Lithuania' (2020) (14) *Tiltai* 38.

86 De la Corte-Rodríguez (n 16) 73.

another individual, including the mother, without restriction.[87] The increase in the take-up of the allowance does not therefore necessarily indicate a redistribution of caregiving responsibilities between parents that is sought by the Directive. Accordingly, Article 8(3) should be interpreted as requiring the allowance to be conditional on the actual take-up of parental leave by the respective parent.

Still, even the actual use of the leave does not always lead to an equal distribution of care. In Spain, the majority of fathers had taken parental leave simultaneously with mothers, assuming a helper role rather than the one of the primary carer.[88] While such arrangements do not fulfil the objectives of the Directive, it would be hardly defensible to consider it as contradicting Articles 5(2) and 8(3) as long as both parents actually make use of their individual entitlements to the leave; a simultaneous use of the leave is not prohibited by the Directive.

3.2.3. FURTHER FEATURES OF THE ALLOWANCE

Several other features may further influence the take-up of parental leave. Firstly, as shown in the previous chapter, the Directive aims to promote flexible forms of parental leave. While the particular patterns of that flexibility are at the Member States' discretion,[89] it is crucial that the flexibility extends to not only the leave, but also to the allowance. The case of Czechia can again be provided as an example of the issue. While the parental leave is arguably quite flexible, the amount of parental leave and its addressee may be changed only every three months. Thus, the allowance would correspond to a take-up of parental leave for three consecutive months, irrespective of the fact that the leave could be, in fact, used in even more flexible ways.[90]

Furthermore, allowance constructions favouring mothers' decisions were identified in several Member States as raising compatibility issues. In Austria, where the mother chooses a flat-rate variant of the allowance, the father is bound by that choice regardless of his own income. In Poland, the more favourable variant of the allowance is contingent on the mother's decisions.[91] In both cases, the father's access to an adequate allowance depends not on his own individual entitlement but on a choice made by the mother. The abolition of such practice may lead to an increased take-up of the allowance, as illustrated by Finland.[92]

Lastly, it has been documented that administrative barriers may deter the fathers from using parental leave.[93] Legislation that would make it unreasonably burdensome for parents to request the allowance might therefore be considered non-compliant with Article 8(3) WLBD.

87 Přenosilová (n 27) 75.

88 C Castellanos Serrano and A Recio Alcaide, *Use of Paid Parental Leave in Spain by Mothers and Fathers of Children Born in 2023: The Problem of Simultaneity in the Parental Leave System Design* (UNED 2025) <https://oai.e-spacio.uned.es/server/api/core/bitstreams/9e026628-14d6-4fb6-b73d-d422a83dbfb2/content> accessed 6 May 2026.

89 Article 5(4) and Recital 23 WLBD.

90 Přenosilová (n 27) 77.

91 De la Corte-Rodríguez (n 16) 70–71.

92 M Saarikallio-Torp and A Miettinen, 'Family leaves for fathers: Non-users as a test for parental leave reforms' (2021) 31(2) *Journal of European Social Policy* 172.

93 C de la Porte, Z Im, B Pircher, N Ramos Martin, D Szelewa 'An examination of 'instrumental resources' in earmarked parental leave: The case of the work–life balance directive' (2023) 33(5) *Journal of European Social Policy* 535.

4. ASSESSING COMPLIANCE WITH THE FACILITATION REQUIREMENT

In the previous chapters, it has been concluded that the vagueness of the facilitation requirement does not prevent the CJEU from assessing the Member States' compliance with Article 8(3), and that the scrutiny extends not only to the amount, but also to other features of the allowance. Drawing on the preceding analysis, several criteria may be proposed for assessing compliance with Article 8(3). First, the amount must enable first-earners to take the non-transferable part of parental leave without a loss of income that would be incompatible with a decent living standard of the family. Second, the allowance must be individually earmarked so that both parents are guaranteed access to an adequate amount when using their respective entitlements. Third, the allowance must be conditional on the actual take-up of parental leave by the parent receiving it, precluding the delegation of care to the other parent. Fourth, the structural features of the allowance (such as flexibility or administrative requirements) must not create barriers discouraging parents from using the leave.

Several possibilities were proposed as to the amount, ranging from the adherence to the sick pay levels envisaged by the proposal, through a benchmark of two thirds of workers' average monthly income, to a case-by-case assessment. Based on the CJEU's approach adopted in *Gillespie*, it is unlikely that the CJEU would provide a concrete minimum benchmark of the allowance. In case of a reference to a preliminary ruling, the CJEU would likely leave the assessment to the national court and provide guidance on whether in the particular case anything suggests that the allowance is not in conformity with the facilitation requirement.[94] Regarding an action for failure to act, the CJEU would likely decide on the sufficiency of the allowance of the Member State in question. Still, in the reasoning it would probably provide some broader guidance on assessing the compliance with the facilitation requirement, indicating if any of the approaches outlined above should be followed or if there is even another perspective to be considered.

It is perhaps easier to determine the (non)compliance of a national legislation with the facilitation requirement regarding the other features of the allowance. It has been shown that in some Member States, the lack of earmarking may enable only one parent to use up the whole allowance, leaving the other parent without any resources even if (s)he may still use parental leave. Regarding personal care, some Member States do not condition the use of the allowance by personal care of the child, allowing parents to use the allowance while working full-time. Both cases should be considered as in breach of Article 8(3), since the allowance then clearly does not facilitate the take-up of parental leave by both parents.

Yet numerous studies have pointed out that the take-up of the leave is strongly influenced by factors not connected to the allowance, of which the cultural norms[95] and workplace attitudes[96] are most cited. Since the facilitation requirement refers to the allowance, any reasons

94 Case C-342/93 (n 15) para 20.

95 Saxonberg and Maříková (n 58) 2520, A Švab and Ž Humer, 'Between Supportive and Involved Fatherhood in Slovenia' (2026) (14) *Social Inclusion* 17, M Latos-Miłkowska (n 20) 141.

96 Krüger and Lindhardt (n 59) 740; M Valentova, 'How do parents care together? Dyadic parental leave take-up strategies, wages and workplace characteristics' (2025) 39(1) *Work, Employment and Society* 109; M Valentova, A Amjahad and A-S Genevois,

for potential failure to implement Article 8(3) must be grounded in the features of the allowance. It is uncertain how exactly the CJEU will assess the compliance with the facilitation requirement if the non-use of the leave may be caused by factors unrelated to the allowance.

In many Member States, there is a deeply rooted perception that childcare is primarily the mothers' role. In the Czech and Slovak context, it was even observed that mothers themselves oppose the take-up of parental leave by fathers, fearing that fathers are not capable of providing appropriate care.[97] While the Member States should challenge these stereotypes in their policies, the non-use of the parental leave due to the cultural norms cannot alone lead to the breach of Article 8(3). The exception would be a situation where the features of the allowance would, in fact, reinforce these norms, such as the preference of mothers' choices when determining the form of the allowance, as described in the previous chapter.

The cultural norms are further reflected in workplace norms. It has been observed that the use of parental leave is rather normalized for mothers, but not for fathers.[98] Fathers also feel the need to adhere to the ideal worker norm and anticipate career penalties due to the use of parental leave. That results in self-restraint on their part, even if their fear does not prove to be true in reality.[99] Therefore, policies targeting the organisational culture of employers are called for.[100]

Interestingly, the organisational norms are not entirely outside the scope of the EU Directives, since Article 11 WLBD requires the Member States to take the necessary measures to prohibit less favourable treatment of workers on the grounds that they have applied for or have taken the parental leave. A breach of the national legislation implementing the Directive's provisions must be then sanctioned by penalties that are effective, proportionate and dissuasive. Yet it is not a rarity for such sanctions to be ineffective due to the inadequacy of non-pecuniary damages, procedural burdens or low use of administrative sanctions.[101] Accordingly, an insufficient protection could be in breach of the Directive, but not of Article 8(3). It was further documented that many of the fathers' concerns do not in fact materialize.[102] While it would certainly be beneficial to incentivize employers to actively promote the take-up of parental leave by fathers, these incentives would be out of the scope of Article 8(3). Therefore, a Member State that does little to shift the organisational norms cannot be penalized for a breach of that Article.

Since multiple factors simultaneously influence fathers' decisions, it is difficult to isolate the contribution of any single factor. Three questions may nevertheless guide the analysis: first, whether the allowance has led to any measurable increase in fathers' take-up following

'Parental Leave Take-up and its Intensity. Do Partners' Workplace Characteristics Matter?' (2024) 53(4) *Journal of Social Policy* 1170–1171; Švab and Humer (n 95) 18; J Atkinson, 'Reconciling the ideal worker norm and involved fatherhood: new fathers' experiences of requesting Shared Parental Leave in UK organisations' (2025) 28(3) *Community, Work & Family* 380–381.

97 Saxonberg and Maříková (n 58) 2513.

98 Valentova, Amjahad and Genevois (n 96) 1170–1171.

99 Atkinson (n 96) 380–381.

100 Valentova (n 96) 91, 109 or Švab and Humer (n 95) 18.

101 J Tomšej, 'Sanction systems in the light of EU Directives 2000/43/EC and 2000/78/EC: a comparative study of Slovakia, Czechia and Poland' (2020) 2 *European Equality Law Review* 59–61.

102 Atkinson (n 96) 380–381.

transposition; second, if the features of the allowance discussed above (such as amount, earmarking, conditionality on personal care or flexibility) are themselves capable of explaining the low take-up; and third, whether the persistence of a low take-up can be plausibly attributed to cultural or workplace factors independently of the allowance.

Statistics on the take-up of parental leave before and after the Directive's implementation could serve as a starting point;[103] an allowance that has led to no increase in the take-up of the leave would likely be considered insufficient. Nonetheless, it is virtually impossible to motivate all fathers to use the leave. This is not the case even in the Member States with high take-up of the leave by fathers.[104] There will likely always be fathers not willing to use the leave regardless of economic incentives.[105] Still, it is uncertain how the CJEU would assess situations where some increase in the fathers' use of parental leave has been documented, but the overall number of fathers using the leave remains low.[106]

5. CONCLUSION

More than four years have passed since the expiry of the deadline for transposition of the Directive. Both measures central to this paper - non-transferable part of parental leave under Article 5(2) and the allowance provided during its uptake under Article 8(3) – have been, more or less successfully, implemented into the Member States' national legislation. This paper has sought to point out the challenges arising from the wording of Article 8(3). It has demonstrated that in some Member States, the allowance is the principal measure to motivate fathers to use the parental leave, since national legislation provides for the non-transferability of the leave only formally. In such cases, the outcome represents a gap in the Directive rather than non-compliance with its wording, since Article 5(2) does not account for the model of identical individual entitlements. The allowance under Article 8(3) then becomes the primary instrument through which the Directive's objectives must be pursued.

As regards the amount, the paper has shown that the absence of a concrete benchmark in Article 8(3) does not place the matter beyond the scrutiny of the CJEU. Drawing on the approach adopted in *Gillespie* and *Gassmayr*, the CJEU is willing to assess the sufficiency of an allowance by reference to its purpose. That applies all the more to Article 8(3) where the purpose of the allowance is expressly stated. Yet determining a universal benchmark is problematic. The frequently cited threshold of 66% of previous income may prove insufficient to facilitate the take-up of parental leave. At the same time, full income replacement would probably significantly affect national social security systems and therefore cannot be demanded from the Member States. It is also possible that the sick pay benchmark, as included in the proposal, will be accounted for, since the intention of the Member States was clearly a less stringent outcome.

103 Oliveira, de la Corte-Rodríguez and Lütz (n 17) 306.

104 A-Z Duvander, K Halldén, A Koslowski and G Sjögren Lindquist, 'Income Loss and Leave Taking: Increased Financial Benefits and Fathers' Parental Leave Use in Sweden' (2024) 53(2) *Journal of Social Policy* 568.

105 Saarikallio-Torp and Miettinen (n 92) 172.

106 As observed e.g. in Poland: M Latos-Miłkowska (n 20) 144.

While the amount of the allowance was the main concern during the legislative process, the paper has explained that other features may prove decisive for the take-up of parental leave by both parents. Systems where the allowance operates as a family entitlement enable one parent to exhaust the full amount of the allowance before the other uses the non-transferable part of the parental leave. Accordingly, a part of the allowance should be earmarked for each parent individually to be compliant with Article 8(3). Furthermore, some Member States permit parents to claim the full allowance while continuing to work full time, with actual childcare provided by another person, including the other parent. The allowance should thus be conditional on the actual take-up of parental leave by both parents. Other features of the allowance might also prove detrimental to the use of the leave by both parents, such as insufficient flexibility of the take-up of the allowance or administrative barriers.

Finally, the paper has shown that a low take-up of the leave may not necessarily be attributed to the allowance, but rather to cultural norms or workplace attitudes. These norms fall outside the scope of Article 8(3), since a Member State cannot be found in breach of the facilitation requirement on the basis of factors unconnected to the allowance. When assessing the compliance with Article 8(3), it should be determined to what extent a low take-up is attributable to the allowance or to external factors. It should be considered if the allowance has led to any increase in fathers' take-up following the transposition, whether the low take-up is explained by the features of the allowance or if it can be plausibly attributed to cultural or workplace norms. A low or non-existent increase in the take-up of parental leave in a Member State may indicate that the facilitation requirement has not been fulfilled, but it cannot alone be conclusive.

Consequently, the vagueness of the facilitation requirement, while deliberately chosen by the Member States during the legislative process, does not afford them unlimited discretion. It is not unequivocal that the vagueness of the facilitation requirement will ultimately serve the Member States' interests. A provision whose content must be derived by interpretation, and whose purpose is expressly declared in its own text, may give rise to more demanding and less predictable obligations than those the Member States had sought to avoid.

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ŠTO ZNAČI „OLAKŠATI KORIŠTENJE RODITELJSKOG DOPUSTA" U PRAVU EUROPSKE UNIJE? TUMAČENJE ČLANKA 8. STAVKA 3. DIREKTIVE O RAVNOTEŽI IZMEĐU POSLOVNOG I PRIVATNOG ŽIVOTA

Summary

Budući da je sudjelovanje očeva u skrbi o djeci i dalje znatno manje od sudjelovanja majki diljem Europske unije, Direktivom o ravnoteži između poslovnog i privatnog života nastoji se potaknuti njihovo aktivnije uključivanje u skrb o djeci. Jedan od poticaja predviđenih Direktivom jest novčana naknada za vrijeme korištenja neprenosivog dijela roditeljskog dopusta, uređena člankom 8. stavkom 3. Direktive. Iako je prvotnim prijedlogom Direktive bilo predviđeno da iznos te naknade ne smije biti niži od naknade za vrijeme bolovanja, taj je zahtjev izostavljen tijekom zakonodavnog postupka. Slijedom toga, članak 8. stavak 3. Direktive obvezuje države članice tek na osiguravanje naknade koja „olakšava korištenje" neprenosivog dijela roditeljskog dopusta oboma roditeljima, pri čemu sadržaj te obveze ostaje nedovoljno određen.

U radu se razmatra tumačenje navedene odredbe primjenom dogmatske pravne analize, uz oslanjanje na jezično, sustavno i teleološko tumačenje. Polazi se od teze da zahtjev za olakšavanjem korištenja roditeljskog dopusta, usmjeren na postizanje određenog učinka, može paradoksalno dovesti do strožih obveza za države članice od onih koje su bile predviđene prvotnim prijedlogom Direktive. Na primjerima iz država članica pokazuje se da ocjena primjerenosti visine naknade može varirati unutar Europske unije. Nadalje, analiziraju se i druga obilježja naknade koja mogu utjecati na korištenje roditeljskog dopusta, osobito njezina namjenska vezanost uz pojedinog roditelja te uvjetovanje prava na naknadu osobnim pružanjem skrbi o djetetu. Naposljetku, razmatra se na koji način treba ocjenjivati ispunjenje zahtjeva za olakšavanjem korištenja roditeljskog dopusta, imajući u vidu da se razlozi zbog kojih očevi ne koriste roditeljski dopust ne moraju nužno odnositi na visinu ili druga obilježja naknade. Cilj je rada razjasniti obveze koje države članice moraju ispuniti kako bi postupale u skladu s člankom 8. stavkom 3. Direktive.

Ključne riječi: *naknada za roditeljski dopust, roditeljski dopust, Direktiva o ravnoteži između poslovnog i privatnog života, rodna ravnopravnost*

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THE GLASS CEILING IN SPORT: AN ANALYSIS OF WOMEN'S REPRESENTATION IN LEADERSHIP POSITIONS IN SPORTS ORGANISATIONS***

Summary: *This paper aims to analyze the representation of women in managerial positions within sports organizations and to compare the situation in the Republic of Croatia with that in the European Union. Specifically, the analysis covers two levels of managerial functions: presidents and vice-presidents of National Olympic Committees from 2021 to 2025. Special attention is devoted to identifying the share of women at the aforementioned levels of managerial functions and to examining differences between the Croatian and European contexts. The research is based on the analysis of secondary data, relevant documents from sports organizations, strategic and policy documents concerning gender equality, and a review of the relevant scientific literature. Furthermore, the paper employs a comparative method, justified by an analysis of the situation in the Croatian and European contexts, to identify similarities, differences, and patterns of gender representation across the observed levels of managerial functions in sports organizations.*

The results of the research showed that in the context of the observed functions, there are significant differences in the representation of women both at the level of EU member states and in Croatia. Namely, while the share of women in vice-presidential positions across EU member states during the observed period was between 28% and 31%, their share among presidents ranged between 15% and 19%. The above results indicate that the vice-president position is significantly more accessible to women than the president position.

The paper contributes to a better understanding of gender (in)equality in leadership positions within sports organizations and provides recommendations to overcome the challenges faced by women.

Keywords: *gender equality, glass ceiling, sports organizations, Republic of Croatia, European Union*

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1. INTRODUCTION

Achieving gender equality is one of the key goals of modern society. Although the Republic of Croatia and the European Union have developed normative and institutional frameworks to promote gender equality, practice shows that this goal has not yet been achieved, particularly in women's representation in management positions.

The position of women in sport throughout history has been determined by social and cultural norms that have long restricted their participation in organized sport. During the 19th century, women mainly engaged in activities considered appropriate to their social status, such as gymnastics, dance, ice skating and recreational tennis, while competitive sports were reserved primarily for men.[1] Such exclusion was also evident in the Olympic movement, as women were not allowed to participate in the first modern Olympic Games in 1896, and they did not compete until the 1900 Paris Olympics.[2] During the 20th century, the development of women's sport was linked to social changes, particularly the strengthening of the women's rights movement and demands for equal access to sport.[3] Feminist movements in the 1960s and 1970s contributed to the greater involvement of women in sporting activities and competitions, and to a gradual increase in their presence in sports organizations and in leadership positions.[4] Although the representation of women in sports management structures is higher today than before, it remains relatively low.[5]

The development of women's sports in Croatia followed European trends. The first organized forms of physical activity for women appeared in the late 19th and early 20th centuries through gymnastics and falconry societies.[6] After the Republic of Croatia's independence in 1991, Croatian women's sports continued to develop rapidly, with the successes of Croatian female athletes in major international competitions significantly contributing to the international affirmation of Croatian sport and increasing women's interest in sports.[7] At the same time, the greater visibility of women's sport and the growth in the number of successful female athletes contributed to raising awareness of the importance of equal participation of women across all segments of the sports system, including in the management of sports organizations. In recent decades, there has been a gradual increase in women's involvement in the management and leadership structures of sports organizations. However, their representation at the highest levels of decision-making still lags behind that of men.[8]

1 Carol A. Osborne and Fiona Skillen, "Women in Sports History: The More Things Change, the More They Stay the Same?", *Sport in History* 40, no. 4 (2020): 411–433.

2 Allen Guttmann, *Women's Sports: A History* (New York: Columbia University Press, 1991), 23.

3 Jennifer Hargreaves, *Sporting Females: Critical Issues in the History and Sociology of Women's Sports* (London: Routledge, 1994), 56.

4 Susan K. Cahn, *Coming on Strong: Gender and Sexuality in Women's Sport* (Cambridge, MA: Harvard University Press, 1994).

5 Adam B. Evans and Gertrud U. Pfister, "Women in Sports Leadership: A Systematic Narrative Review", *International Review for the Sociology of Sport* 56, no. 3 (2021): 317–342.

6 Sokol. *Croatian Encyclopedia, online edition.* Miroslav Krleža Lexicographic Institute, 2013–2026.

7 Croatian Olympic Committee (COC), Croatian Sports Almanac 2010/2011 (Zagreb: Ars Media / COC, 2012).

8 Adam B. Evans and Gertrud U. Pfister, "Women in Sports Leadership: A Systematic Narrative Review", *International Review for the Sociology of Sport* 56, no. 3 (2021): 317–342.

The paper aims to analyze the representation of women in management positions (president and vice president) in the national Olympic committees of the member states of the European Union and the Republic of Croatia, and to determine whether the available statistical data indicate the existence of the glass ceiling concept.

Given the purpose of the work defined in this way, two research questions stand out:

1. What is the proportion of women in management positions (president, vice-president) in the national Olympic committees of the member states of the European Union and the Republic of Croatia
2. Is the share of women in hierarchically lower management positions (vice president) higher than the share of women in hierarchically higher management positions (president)?

From the questions posed in this way, the following hypothesis was formed:

"The representation of women varies depending on the position in national Olympic committees (vice president, president), with women being less represented in presidential than in vice presidential positions."

The research is based on the analysis of secondary data, relevant documents from sports organizations, strategic and policy documents concerning gender equality, as well as a review of the relevant scientific literature. Furthermore, the paper employs a comparative method, justified by an analysis of the situation in the Croatian and European contexts, to identify similarities, differences, and patterns of gender representation across the observed levels of managerial functions in national Olympic committees. It is important to note that although the title of the paper refers to the representation of women in sports organizations in general, the research is focused on the national Olympic committees of the European Union member states and the Republic of Croatia as umbrella sports organizations due to the scope of the work and the availability of comparable data. Furthermore, the analysis is limited to two key managerial functions – president and vice-president, since the aforementioned positions represent the highest levels of management within the national Olympic committees.

Structurally, the paper has an introduction and conclusion and contains 3 chapters. The second chapter discusses the theoretical framework of the glass ceiling concept, while the third chapter examines sports organizations in general, with particular emphasis on national Olympic committees. The central part of the paper, namely the fourth chapter, is dedicated to analyzing statistical data on the representation of women in the aforementioned management positions within the national Olympic committees of the European Union member states and the Republic of Croatia, and to comparing their representation across these positions. The final part of the paper summaries the research results and, based on the findings, confirms or rejects the hypothesis.

2. THEORETICAL FRAMEWORK – THE GLASS CEILING CONCEPT

The term "glass ceiling" was coined in the 1970s in the United States to describe the invisible, artificial barriers created by attitudinal and organizational prejudices that block women

from senior executive positions.[9] From its creation to the present day, the aforementioned concept has attracted the attention of numerous authors who have defined it, identified its causes, and examined its consequences.

In the context of the conceptual definition of the glass ceiling, it should be highlighted that, according to the Federal Glass Ceiling Commission, the concept refers to "artificial barriers to the advancement of women and minorities." These barriers reflect "discrimination... a deep line of demarcation between those who prosper and those left behind."[10]

The European Institute for Gender Equality (hereinafter: EIGE) defines the glass ceiling as "Artificial impediments and invisible barriers that militate against women's access to top decision-making and managerial positions in an organization, whether public or private and in whatever domain",[11] and additionally clarifies that "the term 'glass' is used because these impediments are apparently invisible and are usually linked to the maintenance of the status quo in organizations, as opposed to transparent and equal career advancement opportunities for women and men within organizations."[12]

Tiwari and colleagues point out that "The glass ceiling makes it tough for women to move forward for superior positions and prevents them from entering into male-controlled or dominated occupations. Gender difference could be seen at every level in the form of lack of promotion opportunities, pay rate gap, underrepresentation of women at leading positions, lack of career progress, etc."[13] The same authors believe that: "Discrimination based on gender has an unfavorable effect on the organizational commitment of working women, which leads to an increase in their intentions to quit the organization. Further, it could also be seen as an adverse effect on employees' performance, which further led to a reduction in organizational performance."[14]

"The concept of glass ceiling refers to a set of impediments to career advancement for women. Organizational policies and practices that disproportionately and negatively impact women could create a hidden system of discrimination. The glass ceiling is a subtle, transparent barrier that prevents the advancement of women into the upper ranks of the job hierarchy."[15]

Glass ceiling refers to "discriminatory barriers that prevent women from rising to positions of power or responsibility and advancing to higher positions within an organization simply because they are women."[16]

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9 Linda Wirth, *Breaking Through the Glass Ceiling: Women in Management* (International Labor Office, Geneva 2001) 1 <https://www.ilo.org/public/libdoc/ilo/2001/101B09_102_engl.pdf> accessed 19 May 2026.

10 David A Cotter, Joan M Hermsen, Seth Ovadia and Reeve Vanneman, 'The Glass Ceiling Effect' (2001) 80(2) *Social Forces* 655, 656.

11 European Institute for Gender Equality, 'Glass Ceiling' <https://eige.europa.eu/publications-resources/thesaurus/terms/1099> accessed 20 May 2026.

12 *Ibid.*

13 Mansi Tiwari, Garima Mathur and Suvijna Awasthi, 'A Study on the Effects of Glass Ceiling and Organizational Commitment on Corporate Women's Turnover Intentions' (2019) 18(2) *Academy of Strategic Management Journal* 1.

14 *Ibid.*, 2.

15 Inter-American Development Bank, Institution for Development Sector, *Glass Ceiling in Research: Evidence from a National Program in Uruguay* (IDB Working Paper Series No IDB-WP-798, 2017) 2.

16 Ana Babić and Isabelle Hansez, 'The Glass Ceiling for Women Managers: Antecedents and Consequences for Work-Family Interface and Well-Being at Work' (2021) 12 *Frontiers in Psychology* 618250, 2, referring to Li and Leung (2001).

Coleman defines glass ceiling as "Artificial barriers based on attitudinal or organizational bias that prevent qualified individuals from advancing upward in organizations into management level positions."[17]

Cotter and colleagues state that "a glass ceiling inequality represents a gender or racial difference that is not explained by other job-relevant characteristics of the employee."[18] David Cotter and colleagues defined four distinctive characteristics that must be met to conclude that a glass ceiling exists. A glass ceiling inequality represents:

1. "A gender or racial difference that is not explained by other job-relevant characteristics of the employee."

2. "A gender or racial difference that is greater at higher levels of an outcome than at lower levels of an outcome."

3. "A gender or racial inequality in the chances of advancement into higher levels, not merely the proportions of each gender or race currently at those higher levels."

4. "A gender or racial inequality that increases over the course of a career."[19]

Regardless of whether the glass ceiling is in the workplace, politics, or sports organizations, it reflects social and economic gender inequality. At this point, it is important to examine the possible causes of the glass ceiling in sports organizations. Numerous studies to date have shown that the answer to the above question is not unambiguous but a combination of several factors: social, organizational, and institutional. Some authors cite discrimination, stereotypes and male-dominated power networks as[20] the main obstacles to women's advancement to leadership positions. Similarly, Burton points out that sport has historically been shaped as a distinctly male system in which, among other things, management styles are associated with men. Furthermore, informal relationships in sports organizations are also highlighted, in which key information often circulates through male networks. The lack of mentoring and sponsorship, as well as structural patterns of employment and promotion that systematically favour men, are also highlighted as important obstacles.[21] Furthermore, some authors explain the low representation of women in the aforementioned organizations through three groups of hypotheses. The first hypothesis states that women have less experience in management positions due to "pipeline" problems and limited access to education and career advancement. The second hypothesis states that some women have no interest or motivation in management positions due to family and private obligations traditionally associated with women, while the third hypothesis explains the low representation through social restrictions and

17 Jo Evans Coleman, 'Barriers to Career Mobility/Advancement by African-American and Caucasian Female Administrators in Minnesota Organizations: A Perception or Reality?' paper presented at the Annual Meeting of the American Educational Research Association, San Diego, CA, April 13–17, 1998, 4.

18 David A Cotter, Joan M Hermsen, Seth Ovadia and Reeve Vanneman, 'The Glass Ceiling Effect' (2001) 80(2) *Social Forces*, 657.

19 Farida Mohamed, Abdel Moniem MK Elsaid and Ghadeer Mohamed Badr ElDin Aboul Ela, 'The Glass Ceiling Phenomenon: A Review of Literature and a Theoretical Perspective' (2023) 14(2) *The Business and Management Review* 199.

20 Ana Babić and Isabelle Hansez, 'The Glass Ceiling for Women Managers: Antecedents and Consequences for Work-Family Interface and Well-Being at Work' (2021) 12 *Frontiers in Psychology* 618250. doi: 10.3389/fpsyg.2021.6182.
Javier Gallardo-Pérez, Ana González-Serrano, Javier García-Unanue and Carlos Burillo, 'The Glass Ceiling in the Sport Industry: Spanish Version of the Women as Managers Scale (WAMS)' (2021) 2(2) *Sexes* 163–173, 164 referring to Selva *et al.* (2011).

21 Laura J Burton, 'Underrepresentation of Women in Sport Leadership: A Review of Research' (2015) 18(2) *Sport Management Review* 155–165.

persistent differences in education and social expectations.[22] Just as the factors that lead to the glass ceiling differ, so do the consequences it generates. Taking the above into account, it is possible to conclude that the concept of the glass ceiling results in lower representation of women in leadership positions and decision-making processes. Conversely, women remain in "lower" hierarchical positions, which generates lower salaries and pensions and speaks in favour of maintaining gender inequality.

3. SPORTS ORGANIZATIONS

Sports organizations are the fundamental carriers of organized sport and play a key role in the development of sports activities, competitions and sports policies.[23] They encompass different levels of the sports system, including clubs, national and international federations and Olympic committees, which together form a hierarchically interconnected system of sports governance.[24] Their fundamental purpose is to enable organized participation in sports, the development of athletes and the implementation of competitions, where they mostly operate as non-profit, autonomous organizations based on democratic governance and the public interest.[25] The importance of good governance practices, which include transparency, accountability, ethics, and the limitation of the mandates of governing bodies, is emphasized in the modern sports system.[26] The autonomy of sports organizations is not absolute, but must be aligned with national legislation and international sports rules.[27] In recent decades, a trend towards the professionalization of sports governance and a transition from a volunteer model to strategic, professional governance has also been observed. Based on the objective and research questions, the hypothesis was put forward that the representation of women is uneven across management functions in national Olympic committees, with representation lower in hierarchically higher positions, especially in the position of president. The paper analyses the structure, roles, and functions of the President and Vice-President, including their responsibilities, terms of office, and election methods, within the framework of the provisions of the Olympic Charter and the literature on sports governance. National Olympic Committees (NOC) are the key national institutions of the Olympic Movement that represent countries within the Olympic system. Their status, organization and activities are regulated by the Olympic Charter of the International Olympic Committee, under which they operate as autonomous, non-profit organizations aligned with the principles of good governance.[28] According to the Olympic Charter, NOC must include the national sports federations of the Olympic sports,

22 Javier Gallardo-Pérez, Ana González-Serrano, Javier García-Unanue and Carlos Burillo, 'The Glass Ceiling in the Sport Industry: Spanish Version of the Women as Managers Scale (WAMS)' (2021) 2(2) *Sexes* 163–173, 164 referring to Selva *et al.* (2011).

23 Council of Europe, *European Sports Charter* (Strasbourg, 2021), art. 1–3.

24 Mato Bartoluci, *Economics and Management of Sports* (Zagreb: Faculty of Economics, University of Zagreb, 2003).

25 Council of Europe, *European Sports Charter* (Strasbourg, 2021), art. 1–3.

26 And International Partnership Against Corruption in Sport, *Good Governance in Sport Framework* (2023), 10–18.

27 European Olympic Committees EU Office, *SIGGS 3.0: Autonomy and Good Governance in Sport* (Brussels: EOC EU Office, 2024).

28 International Olympic Committee, *Olympic Charter* (Lausanne, 2026), Rules 27–28; International Olympic Committee, *Olympic Governance Principles* (Lausanne, 2024).

athlete representatives and members of the International Olympic Committee from the country concerned.[29]

Table 1. Composition of National Olympic Committees (NOC)

Ingredients	National Olympic Committees (NOC)	Competence	Mandate	Selection method
Management structure	Assembly, executive committee, president, vice-presidents, commissions	Adopting a strategy, choosing management, supervising the work of the organization	4 years (according to the Olympic Charter)	The president and the executive committee are elected by the members (national associations and other members) at the NOC assembly.
Operating system	Executive Head, administration, professional services	Operational management, implementation of decisions of management bodies	Professional/ contractual function (not a fixed mandate, depends on the statute)	Appointed by the Executive Board / NOC Assembly
Participants	National sports federations, athletes, athlete representatives, IOC members	Participation in decision-making and implementation of sports programs	Athlete representative term: 4 years or according to the statute	They are elected by national federations and the Athletes' Commission.
Sources of income	Olympic solidarity, sponsorships, public funds, own income	Funding of NOC programs and activities	ON	ON
Institutional environment	Olympic Charter, national laws, statutes, IOC rules	Regulating work and ensuring compliance with the Olympic system	ON	ON

Author's processing based on data from: International Olympic Committee, Olympic Charter (2026);
National Olympic Committees represent a key link between the International Olympic Movement and national sports systems. Their organization is based on autonomy, democratic governance, and a clear hierarchy of functions, with the President, Vice-Presidents, and Secretary General holding key management and operational roles.

The key principle is that the national federations of Olympic sports must hold a majority on the governing bodies, ensuring sports representativeness and the legitimacy of decision-making.[30] The NOC has exclusive jurisdiction over:

- organization and management of national Olympic delegations,
- selection and registration of athletes for the Olympic Games,
- the development of the Olympic movement in the country,
- cooperation with international sports federations,

29 International Olympic Committee, *Olympic Charter* (Lausanne, 2026), Rule 28(1).

30 Association of National Olympic Committees, Governance Report on National Olympic Committees, 2023.

- promoting Olympic values.[31]

In addition to sporting functions, the NOC has organizational and logistical responsibilities for delegations, including accommodation, transport and insurance for athletes.

The NOC electoral system is based on:

- democratic decision-making of the assembly,
- the national sports federations' representation,
- inclusion of athletes in management structures.

Modern standards emphasize transparency, term limits, and prevention of conflicts of interest as key elements of good governance in sport.[32]

The Croatian Olympic Committee (COC) is the national Olympic Committee of the Republic of Croatia and the central body of Croatian sport within the Olympic movement. It was founded in 1991 and was internationally recognized by the International Olympic Committee in 1992.[33] The COC operates as a non-profit sports association of special public interest and is obliged to apply the provisions of the Olympic Charter and the national Sports Act in its activities.[34]

The COC has exclusive jurisdiction in Croatia over the Olympic system, which includes:

- organization and leadership of the Croatian Olympic delegation,
- selection and registration of athletes for the Olympic Games,
- coordination of national sports federations,
- development of the Olympic movement and Olympic education,
- management of sports funding programs through public needs in sports.[35]

The Croatian Olympic Committee also represents Croatia in international Olympic institutions and coordinates the implementation of the International Olympic Committee's Olympic programs.[36] The composition of the Croatian Olympic Committee is based on the principles of representativeness of the sports system. Membership includes:

- national sports federations of Olympic sports,
- county sports communities,
- Athlete representatives (Athletes' Commission),
- Croatian Olympians Club,
- members of the International Olympic Committee from Croatia by function.[37]

31 International Olympic Committee, Olympic Solidarity Manual, 2024.

32 Association of National Olympic Committees, Governance Report on National Olympic Committees, 2023.

33 International Olympic Committee, Olympic Charter, in force 3 February 2026, Rule 28.

34 Sports Act, *Official Gazette No. 141/22 (2022).*

35 International Olympic Committee, *Olympic Solidarity Manual* (Lausanne: International Olympic Committee, 2024).

36 International Olympic Committee, Olympic Charter, Rule 27, 2026.

37 Croatian Olympic Committee, Statute of the Croatian Olympic Committee, Zagreb, 2024.

Table 2. Members of the Croatian Olympic Committee (COC)

Ingredients	Croatian Olympic Committee (COC)	Competence	Mandate	Selection method
Management structure	COC Assembly, COC Council, president, vice-presidents, commissions	Making strategic decisions, management and supervision of COC work	4 years (in line with the Olympic Charter and the Statute of the Croatian Olympic Committee)	The president, vice-presidents and members of the Council are elected at the COC Assembly
Operating system	Secretary General, professional service, administration	Implementation of Assembly and Council decisions, daily management	Contractual/ professional function (without limited mandate)	The Croatian Olympic Committee Council appoints him.
Participants	National sports federations, athletes, Athletes' Commission, Croatian Olympians' Club	Participation in the work and decision-making of the Croatian Olympic Committee	Athlete representative term: 4 years or according to the Statute	They are elected by sports federations and the Athletes' Commission.
Sources of income	State budget, Olympic solidarity, sponsorships, own revenues	Financing national sports programs	ON	ON
Institutional environment	Olympic Charter, Croatian Olympic Committee Statute, Sports Act	Legal regulation and system compliance	ON	ON

Author's processing based on data: Croatian Olympic Committee, *Croatian Olympic Committee Statute* (2024); Olympic Charter; Sports Act.

The COC analysis shows:

- a high level of compliance with the Olympic Charter in the structure,
- strong concentration of management power in the Council and the President,
- professionalization through the role of Secretary General,
- Long-term office as a stabilizing but also potentially centralizing factor.

The Croatian Olympic Committee formally operates as an autonomous sports organization, but is financially and institutionally connected to the state through:

- financing from public funds,
- cooperation with the Ministry of Tourism and Sports,
- implementation of national sports programs. This model creates a hybrid system of autonomy and public accountability, which is typical of European National Olympic Committees.[38] The Croatian Olympic Committee represents a typical example of the

38 Council of Europe, European Sports Governance Standards, 2022.

European model of NOC with pronounced autonomy, but also a strong connection to state funding and the public sector.[39]

4. ANALYSIS OF THE REPRESENTATION OF WOMEN IN MANAGEMENT POSITIONS IN SPORTS ORGANIZATIONS (NATIONAL OLYMPIC COMMITTEES) IN THE REPUBLIC OF CROATIA AND THE EUROPEAN UNION

It should be recalled that "gender equality is one of the fundamental values of the European Union and a fundamental principle of Olympism".[40] The European Union's Gender Equality Program is based on the fundamental treaties of the European Union and the Charter of Fundamental Rights of the European Union, which, among other things, emphasize that equality between women and men must be ensured in all areas.[41] The European Union has made significant progress in gender equality over the last few decades, but gender gaps persist. Of particular note is the overrepresentation of women in lower-paid sectors and their underrepresentation in decision-making positions.[42] Two strategies should certainly be mentioned here: the Gender Equality strategy for the period from 2020 to 2025 and the Gender Equality strategy for the period from 2025 to 2030. In 2020, the European Commission adopted the Gender Equality strategy for the period from 2020 to 2025, which sets out objectives and measures aimed at achieving progress towards a gender-equal Europe. The key objectives of this Strategy were to end gender-based violence, confront gender stereotypes, reduce gender gaps in the labour market and across sectors of the economy, achieve gender equality in pay and pensions, and achieve gender balance in decision-making and politics.[43] Furthermore, in March 2026, the European Commission adopted the Gender Equality Strategy for the period 2025–2030, which proposes concrete measures to advance gender equality across all areas of life, including leadership. This strategy ensures the consistent implementation of gender equality legislation, but also addresses new risks related to cyber violence and artificial intelligence that particularly affect women.[44] When looking at the issue of women in sports organizations, it should be noted that, despite the growing share of women in sport, their underrepresentation in decision-making bodies remains a particular concern. In 2025, the European

39 Croatian Olympic Committee, Election of the President of the Croatian Olympic Committee 2024–2028, official announcement, Croatian Olympic Committee, Zagreb, 3 October 2024 <https://www.hoo.hr> accessed 10 June 2026.

40 GAMES Consortium, GAMES Pool of Actions: Croatian Version (EOC EU Office, 2024) 7 <https://media-hoo.b-cdn.net/dokumenti/GAMES-Pool-of-Actions_Croatian-version.pdf> accessed 21 May 2026.

41 European Commission, 'Commission Presents Gender Equality Strategy 2026–2030 for a More Equal, Cohesive and Successful Europe' (Press release, IP/26/526, 5 March 2026) <https://ec.europa.eu/commission/ presscorner/detail/en/ip_26_526> accessed 15 May 2026.

42 European Commission, Gender Equality Strategy 2020–2025 <https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/gender-equality/gender-equality-strategy> accessed 16 April 2026.

43 European Commission, Gender Equality Strategy <https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/gender-equality/gender-equality-strategy_en> accessed 16 April 2026.

44 European Commission, Gender Equality Strategy (EU policy page) <https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/gender-equality/gender-equality-strategy_en#gender-equality-strategy-2026-2030> accessed 20 April 2026.

Parliament adopted a Resolution on the role of EU policies in shaping the European model of sport (2025/2035(INI)[45] which, among other things, encourages sports governing bodies to implement further measures for equality, diversity and inclusion, in particular to address the underrepresentation of women and minorities in leadership positions. It is important to emphasize that the aforementioned Resolution relies on the 2021 Resolution, specifically the Resolution on key features of the European model of sport (2021/C 501/01).[46] It is precisely in the context of gender equality in sport that Article 24 of the Resolution, which identifies gender equality as one of the fundamental values of the organization of sport in Europe, is of exceptional significance and by which the Council of the EU and representatives of the governments of the Member States call on the Member States to promote values in sport and sports organizations, which are governed in accordance with the principles of democracy, transparency, integrity, solidarity, gender equality, openness, accountability, accessibility, social responsibility and respect for fundamental and human rights, is of exceptional significance.

The European Commission cooperates with the member states of the European Union and national sports organizations to raise awareness of the importance of gender equality in sports, as it is considered one of the fundamental principles of good management in sports organizations.[47] On this track, it is important to point out that the European Commission has drawn up a proposal for strategic activities in the field of gender equality in sport for the period from 2014 to 2020,[48] which contains a recommendation to achieve the following goals by 2020: at least 40% of women and men in the executive boards and committees of national sports governing bodies and 30% in international sports organizations based in Europe, and at least 40% of women and men in the management of professional sports administrations and government bodies.[49] Furthermore, the European Commission follows the recommendations of the High Group for Gender Equality in Sport published in 2022. Specifically, it is an action plan and set of recommendations for the European Commission, EU member states, national and international sports bodies, and local organizations to achieve a fairer gender balance in sport. In the mentioned plan, among other measures to address the weaker representation of women in leadership, it is recommended to set a 50% representation quota for women in all decision-making bodies and to establish fixed-term limits.[50]

It is also worth mentioning the Erasmus+ Program, which is of exceptional importance for projects that promote, among other things, gender equality in sport. In this regard, the Erasmus + Sport 2021 program financed the GAMES project, under which the manual "GAMES

45 European Parliament, *European Parliament Resolution of 8 May 2025 on Women's Rights and Gender Equality in the EU (2024/2081(INI))* (P10_TA(2025)0212) <https://www.europarl.europa.eu/doceo/document/TA-10-2025-0212_HR.html> accessed 1 June 2026.

46 Council of the European Union, *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* (2021/C 501/01), Official Journal of the European Union, C 501, 13 December 2021 <https://eur-lex.europa.eu/legal-content/HR/TXT/HTML/?uri=CELEX:42021Y1213(01> accessed 1 June in 2026.

47 European Commission, *Gender Equality in Sport* <https://sport.ec.europa.eu/policies/sport-and-society/gender-equality> accessed 15 May 2026.

48 European Commission, *Gender Equality in Sport: Proposal for Strategic Actions 2014–2020* (2014) <https://op.europa.eu/en/publication-detail/-/publication/7e7a7ff2-5bff-42b4-90f9-8266b3ddc01c> accessed 17 May 2026.

49 *Ibid.*

50 European Commission, *Towards More Gender Equality in Sport: Factsheet* (2022) <https://sport.ec.europa.eu/sites/default/files/2022-03/Factsheet%20Gender%20Equality%20in%20Sport%202022.pdf> accessed 27 May 2026.

– Pool of Actions" was developed in February 2024.[51] This manual presents specific measures to promote gender equality in leadership positions within European National Olympic Committees.[52] The Croatian Olympic Committee also presented the manual on its official website, calling it a "great example of good governance".[53]

When discussing gender equality in the Republic of Croatia, it should be noted that, as in the European Union, there is a satisfactory normative and institutional framework for ensuring gender equality. Although the aforementioned framework is not the subject of this paper, it is necessary to recall that the Constitution of the Republic of Croatia considers gender equality one of the highest values of the constitutional order and the basis for interpreting the Constitution.[54] Furthermore, in accordance with the provisions of Article 12, paragraph 3 of the Gender Equality Act[55], a significant imbalance of one gender exists when its representation in political and public decision-making bodies is lower than 40%. Therefore, the aforementioned provision represents a standard for assessing gender balance in decision-making structures. At this point, we will also refer to the fundamental strategic document of the Republic of Croatia in the field of gender equality, namely the National Plan for Gender Equality for the period until 2027, which an Implementation Action Plan accompanies. This is a document adopted by the Government of the Republic of Croatia in 2023, whose fundamental goal is to create conditions for an "equal society by establishing equal opportunities for all citizens".[56] The aforementioned National Plan uses a dual approach to gender equality by defining targeted measures to eliminate existing gender inequalities and by integrating gender equality perspectives into public policies, projects and programs.[57] One of the strategic objectives is to increase the representation of women in political and public decision-making positions, emphasizing the need to eliminate gender discrimination in all areas of social life, thereby creating conditions for women's advancement (removing the so-called glass ceiling).[58] Furthermore, in the context of ensuring gender equality in sport, the Assembly of the Croatian Olympic Committee supported the European Commission's proposal for 40% representation of women in its leading body, i.e. the Council.[59] The provision on the aforementioned representation of women was

51 GAMES Consortium, *GAMES Pool of Actions: Croatian Version* (EOC EU Office, 2024) <https://media-hoo.b-cdn.net/dokumenti/GAMES-Pool-of-Actions_Croatian-version.pdf> accessed 21 May 2026.

52 *Ibid.*, 4.

53 Croatian Olympic Committee, *Gender Equality in Sport* <https://www.hoo.hr/page/69,%20Ravnopravnost%20 spolova%20u%20sportu> accessed 1 June 2026.

54 Constitution of the Republic of Croatia (Official Gazette 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 5/14), Art. 3.

55 Gender Equality Act (OG 82/08, 69/17).

56 Office for Gender Equality of the Government of the Republic of Croatia, *Development of the National Plan for Gender Equality for the period 2021 to 2027* (8 January 2021) <https://ravnopravnost.gov.hr/vijesti/izrada-nacionalnog-plana-za-ravnopravnost-spolova-za-razdoblje-od-2021-do-2027-godine/3429> accessed 1 June 2026.

57 *Ibid.*

58 Office for Gender Equality of the Government of the Republic of Croatia, *National Plan for Gender Equality for the Period until 2027* (2023) <https://ravnopravnost.gov.hr/UserDocsImages/dokumenti/NPRS%202027% 20APRS%202024/Nacionalni%20plan%20za%20ravnopravnost%20spolova,%20za%20razdoblje%20do%202027.pdf> accessed 1 June 2026.

59 Women and Media, 'The Croatian Olympic Committee Assembly supported the proposal for a 40 percent share of women in the "Olympic government"' (28 February 2023) <https://www.zeneimediji.hr/skupstina-hoo-a-podrzala-prijedlog-o-40-postotnom-udjelu-zena-u-olimpijskoj-vladi/> accessed 2 June 2026.

also implemented in the Statute of the Croatian Olympic Committee,[60] with a 2024 amendment made upon the recommendation of the International Olympic Committee. The Croatian Olympic Committee issued such a recommendation to its members, i.e., National Sports Federations, regarding the representation quota for the underrepresented gender.[61]

However, only 11.5% of national sports federations are led by women, and many do not have a single woman on their boards of directors.[62]

4.1. METHODOLOGY

This part of the research applied a quantitative analysis of the representation of women in management positions (president and vice president) in the National Olympic Committees of the Member States of the European Union and the Republic of Croatia. The analysis is based on secondary data from the European Institute for Gender Equality (EIGE) on gender representation in sports organizations from 2021 to 2025. The data were taken from the official website of EIGE, specifically the Gender Statistics Database, Browse Gender Statistics – Women and men in decision-making, and the area "sport" was selected from the drop-down menu, and within it, data for the national level (specifically data for National Olympic Committees) were selected.

The analysis used descriptive statistics to present the absolute numbers of women and men and the relative shares of women in the observed management functions. Absolute values indicate the actual number of women and men in individual functions, while the relative share represents the percentage share of women in the total number of function holders. This approach allows for a more precise comparison between countries and across different levels of management. Furthermore, a comparative analysis was conducted to examine data from the member states of the European Union and the Republic of Croatia to identify similarities, differences, and patterns in the representation of women in sports management. Special emphasis was placed on interpreting the results in the context of gender equality and the theoretical framework of the glass ceiling.

The analysis includes data for a five-year period (2021–2025), which was selected to ensure a sufficiently long time frame to reliably observe trends in the representation of women in the management structures of sports organizations, as well as the current level of gender equality in the National Olympic Committees of EU member states.

60 Croatian Olympic Committee, *Statute of the Croatian Olympic Committee (revised text, July 2024)* , art 59 <https://media-hoo.b-cdn.net/dokumenti/Statut-HOO-a_pro%C4%8Di%C5%A1%C4%87eni-tekst_srpanj-2024.pdf> accessed 2 June 2026.

61 Croatian Olympic Committee, *Strategic Plan of the Croatian Olympic Committee 2026–2032* (2026) 49 <https://media-hoo.b-cdn.net/dokumenti/Strateski-plan-HOO-a-2026.-2032.pdf> accessed 3 June 2026.

62 *Ibid.*

4.2. RESULTS AND DISCUSSION

This chapter presents and analyses the results of the research on women's representation in the management structures of National Olympic Committees in the Member States of the European Union and the Republic of Croatia during the period from 2021 to 2025. The research focuses on two management positions, president and vice-president of National Olympic Committees, providing insight into women's representation at different management levels and enabling the monitoring of changes throughout the five-year period. The results are presented in two tables showing the number of women (W) and men (M) holding these positions.

Table 3. Representation of women in the position of vice president of national Olympic committees in the period 2021–2025.

Country	**2021**	**2022**	**2023**	**2024**	**2025**
	W M	**W M**	**W M**	**W M**	**W M**
EU-27 countries	23 57	25 57	26 63	28 60	27 59
Belgium	1 1	1 1	1 1	1 1	2 0
Bulgaria	0 5	0 5	0 5	0 5	0 5
Czech Republic	0 5	0 5	0 5	0 5	0 4
Denmark	0 2	0 2	0 2	0 2	0 2
Germany	3 2	4 1	4 2	3 1	3 2
Estonia	0 4	0 4	0 4	0 4	0 2
Ireland	0 2	0 2	0 2	0 2	1 0
Italy	2 0	2 0	2 0	2 0	1 1
Greece	0 1	0 1	0 1	0 1	0 1
Spain	2 1	1 3	1 3	2 2	1 3
France	4 4	4 6	4 4	5 4	6 6
Croatia	2 2	3 1	3 1	3 1	2 2
Cyprus	0 1	0 1	0 1	0 1	0 1
Latvia	0 3	0 3	0 3	0 3	0 3
Lithuania	1 2	1 2	1 2	1 2	1 2
Luxembourg	1 1	1 1	1 1	1 1	1 1
Hungary	0 2	0 1	0 2	0 2	0 2
Malta	0 1	0 1	0 1	0 1	0 1
Netherlands	0 0	0 0	0 1	0 1	0 1
Austria	1 2	1 2	1 2	2 1	2 1
Poland	0 4	0 4	1 10	1 10	1 8
Portugal	1 4	1 4	1 4	1 3	0 3
Romania	2 1	2 1	2 0	2 1	2 1
Slovenia	0 3	0 3	1 3	1 3	1 3
Slovakia	0 3	1 2	1 2	1 2	1 2
Finland	2 0	2 0	1 0	1 0	1 1
Sweden	1 1	1 1	1 1	1 1	1 1
UK	1 0	1 0	1 0	1 0	- -

Source: Author's processing based on EIGE data

An analysis of the representation of women as vice-presidents of national Olympic committees from 2021 to 2025 shows a gradual increase in their presence among European Union Member States. The number of women who held the position of vice-president of national Olympic committees increased from 23 in 2021 to 27 in 2025. At the same time, the number of men in the same position remained significantly higher, ranging between 57 (2021) and 63 (2023). Therefore, although the above data indicate some progress in the inclusion of women in the management structures of sports organizations, specifically National Olympic Committees, gender balance has not yet been achieved.

Looking at the share of women at the European Union level, it is evident that in 2021, women held 28.8% of vice-presidential positions, rising to 31.4% in 2025. This is a positive development, but women still occupy less than one third of the mentioned positions. Such results indicate that, despite the gradual increase in their representation, women still do not have equal access to the position of vice-president of National Olympic Committees.

Analysis of data at the level of individual EU Member States shows significant differences in women's representation. In several Member States, women were not represented in the position of vice-president of the national Olympic committee throughout the period under review. This was the case in Bulgaria, the Czech Republic, Denmark, Cyprus, Greece, Latvia, Malta, Estonia and Hungary. These data show that progress in gender equality has not been achieved evenly across all EU Member States.

On the other hand, some Member States record relatively high representation of women. France stands out for having the highest number of women in the position of Vice-President, with the number increasing from four in 2021 to six in 2025. Germany shows a higher number of women than men in the said position throughout the period. At the same time, Italy, Finland and the UK are particularly interesting examples, as from 2021 to 2024 all Vice-Presidential positions were held by women.

The Republic of Croatia is among the countries with a relatively high representation of women in the position of vice president of the national Olympic committee. Throughout the observed period, of the four vice-president positions, women ranged from two to three, while men ranged from one to two. From 2022 to 2024, women even outnumbered men in this position. Such results set Croatia apart from the European Union average and indicate a more favorable position for women in the management structures of the national Olympic committee than in many other member states.

Despite positive trends, the results still indicate a gender gap in sports governance. At the European Union level, women remain significantly underrepresented among vice-presidents of national Olympic committees, while in some countries, they are absent. Such findings can be linked to the glass ceiling phenomenon, which refers to invisible barriers that make it difficult for women to access the most influential management positions. Although the vice-president position is clearly more accessible to women than the highest management positions, the data show that full gender equality in sports governance has not yet been achieved.

In conclusion, the analysis shows that during the observed period, some progress has been made in the representation of women as vice-presidents of national Olympic committees, both at the level of the European Union and in the Republic of Croatia. However, there are still significant differences among Member States and a pronounced underrepresentation of

women at the overall level, which confirms the need for further measures to strengthen gender equality in sports organizations.

Table 4. Representation of women in the position of president of national Olympic committees in the period 2021–2025.

Country	**2021**	**2022**	**2023**	**2024**	**2025**
	W M	**W M**	**W M**	**W M**	**W M**
EU-27 countries	5 22	5 22	4 23	4 23	5 22
Belgium	0 1	0 1	0 1	0 1	0 1
Bulgaria	1 0	1 0	1 0	1 0	1 0
Czech Republic	0 1	0 1	0 1	0 1	0 1
Denmark	0 1	0 1	0 1	0 1	0 1
Germany	0 1	0 1	0 1	0 1	0 1
Estonia	0 1	0 1	0 1	0 1	1 0
Ireland	1 0	1 0	1 0	1 0	0 1
Italy	0 1	0 1	0 1	0 1	0 1
Greece	0 1	0 1	0 1	0 1	0 1
Spain	0 1	0 1	0 1	0 1	0 1
France	1 0	1 0	0 1	0 1	1 0
Croatia	0 1	0 1	0 1	0 1	0 1
Cyprus	0 1	0 1	0 1	0 1	0 1
Latvia	0 1	0 1	0 1	0 1	0 1
Lithuania	1 0	1 0	1 0	1 0	1 0
Luxembourg	0 1	0 1	0 1	0 1	0 1
Hungary	0 1	0 1	0 1	0 1	0 1
Malta	0 1	0 1	0 1	0 1	0 1
Netherlands	1 0	1 0	1 0	1 0	1 0
Austria	0 1	0 1	0 1	0 1	0 1
Poland	0 1	0 1	0 1	0 1	0 1
Portugal	0 1	0 1	0 1	0 1	0 1
Romania	0 1	0 1	0 1	0 1	0 1
Slovenia	0 1	0 1	0 1	0 1	0 1
Slovakia	0 1	0 1	0 1	0 1	0 1
Finland	0 1	0 1	0 1	0 1	0 1
Sweden	0 1	0 1	0 1	0 1	0 1
UK	0 1	0 1	0 1	0 1	- -

Source: Author's processing based on EIGE data

An analysis of the representation of women as presidents of national Olympic committees from 2021 to 2025 shows an extremely low presence of women at the highest management level of sports organizations, specifically national Olympic committees. Among European Union member states, the number of women who held the position of president of a national Olympic committee ranged from 4 to 5, while the number of men was between 22 and 23.

Throughout the observed period, no significant progress was made in increasing the representation of women in this position, indicating a persistent male dominance at the highest levels of sports management.

The share of women among the presidents of national Olympic committees was 18.5% in 2021 and 2022, then decreased to 14.8% in 2023 and 2024, and increased again to 18.5% in 2025. The data shows that women lead less than one-fifth of the national Olympic committees in the European Union. Such representation significantly deviates from the principle of gender balance. It indicates a pronounced gender gap in the role of the president of the aforementioned organizations.

Looking at the situation in individual EU member states, the data show that the number of women in presidential positions is very limited. During the entire period under review, only Bulgaria, Lithuania and the Netherlands had female presidents of national Olympic committees. Furthermore, in some countries (Ireland and France), there were changes during the period under review, indicating that presidential positions are subject to personnel turnover and that the presence of women in these positions is often unstable. Most EU member states did not have a single woman serving as president of a national Olympic committee during the entire period under review.

It is important to note that the Republic of Croatia did not have a woman president of the national Olympic committee for the entire period under review. In all five years analyzed, the presidential position was held by a man. The Republic of Croatia is thus among the majority of European Union member states in which women have not reached the highest management position within the national Olympic committee. Therefore, the analysis of available data shows that the presidential positions in national Olympic committees are still predominantly held by men.

If we compare the two positions, namely the position of president with the position of vice-president of the national Olympic committees, it is clear that in the observed period, at the European Union level, women made up between 28% and 31% of vice-presidents, while their share among presidents ranged between 15% and 19%. The difference between these two levels of governance indicates that women reach lower hierarchical positions than higher ones in power and decision-making. The pattern just described represents one of the key characteristics of the glass ceiling phenomenon.

5. CONCLUSION

The results of the research confirm the hypothesis that the representation of women varies by the type of management function within national Olympic committees and that women are less represented in presidential than in vice-presidential positions. At the level of the European Union, women held between 28% and 31% of vice-presidential posts during the observed period, while their share among presidents was only between 15% and 19%. A similar pattern is evident in the Republic of Croatia, where women achieved significant representation in the vice-presidency. At the same time, they did not hold the presidency of the Croatian Olympic

Committee during the entire observed period. The results indicate that the representation of women decreases with increasing hierarchical level within the management function, which is consistent with the glass ceiling phenomenon.

The European Union has developed a series of strategic documents that set goals to combat gender-based violence, reduce gender stereotypes, reduce disparities in the labour market, and achieve balanced representation of women and men in decision-making processes, including leadership. In addition, strategic documents and recommendations of the European Commission in the field of sport, as well as resolutions of the European Parliament, emphasize the need to increase the representation of women in the management structures of sports organizations, with various action plans and recommendations encouraging the introduction of quotas and other measures to ensure gender balance. A similar approach is evident in the Republic of Croatia through the National Plan for Gender Equality by 2027, which envisages integrating a gender perspective into public policies and increasing women's participation in decision-making processes, including removing obstacles such as the so-called glass ceiling. However, despite the developed strategic frameworks at the European and national levels and numerous recommendations and programs aimed at strengthening gender equality in sport, the analyzed data show that gender inequalities still exist, especially in hierarchically higher positions in national Olympic committees, where the representation of women is still extremely low. The current situation can only be improved through the consistent implementation of European and national gender equality strategies and ongoing awareness-raising about the importance of gender equality across all areas of decision-making. An additional contribution can be made by applying the concept of diversity management, which involves the systematic and conscious inclusion of people with diverse characteristics in organizational processes to effectively leverage the potential of diversity. Such an approach can help create a more inclusive environment, reduce gender inequalities, and increase the success and quality of management in sports organizations.

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STAKLENI STROP U SPORTU: ANALIZA ZASTUPLJENOSTI ŽENA NA RUKOVODEĆIM POZICIJAMA U SPORTSKIM ORGANIZACIJAMA

Sažetak

Cilj je ovog rada analizirati zastupljenost žena na rukovodećim pozicijama u sportskim organizacijama i usporediti situaciju u Republici Hrvatskoj sa situacijom u Europskoj uniji. Konkretno, analiza obuhvaća dvije razine rukovodećih funkcija: predsjednice i potpredsjednice nacionalnih olimpijskih odbora od 2021. do 2025. godine. Posebna pozornost posvećena je utvrđivanju udjela žena na spomenutim razinama rukovodećih funkcija te ispitivanju razlika između hrvatskog i europskog konteksta. Istraživanje se temelji na analizi sekundarnih podataka, relevantnih dokumenata sportskih organizacija, strateških i političkih dokumenata koji se odnose na rodnu ravnopravnost te pregledu relevantne znanstvene literature. Nadalje, u radu se koristi komparativna metoda, opravdana analiza stanja u hrvatskom i europskom kontekstu, kako bi se utvrdile sličnosti, razlike i obrasci rodne zastupljenosti na promatranim razinama rukovodećih funkcija u sportskim organizacijama.

Rezultati istraživanja pokazali su da u kontekstu promatranih funkcija postoje znatne razlike u zastupljenosti žena i na razini država članica EU-a i u Hrvatskoj. Naime, dok je udio žena na potpredsjedničkim pozicijama u državama članicama EU-a tijekom promatranog razdoblja bio između 28 % i 31 %, njihov udio među predsjednicama kretao se između 15 % i 19 %. Navedeni rezultati ukazuju na to da je pozicija potpredsjednice znatno dostupnija ženama od pozicije predsjednice.

Rad doprinosi boljem razumijevanju rodne (ne)ravnopravnosti na vodećim pozicijama unutar sportskih organizacija i daje preporuke za prevladavanje izazova s kojima se suočavaju žene.

Ključne riječi: *rodna ravnopravnost, stakleni strop, sportske organizacije, Republika Hrvatska, Europska unija*

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