Gender Perspectives in Law 2

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Gender Competent Public Law and Policies

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Gender Perspectives in Law

Volume 2

Series Editors

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The series ‘Gender Perspectives in Law’ discusses all-encompassing gender-competent legal questions. Having a gender-competent approach is required when considering the highest values and normative standards of modern international, European, and national law. Raising awareness about gender equality issues means investing in the creation, interpretation, and implementation of legislation that is more fair, just, and equitable and will also contribute to a comprehensive understanding of social reality, as well as to gender-competent political, legal and economic decision-making and public policies.

The series accepts monographs focusing on a specific topic, as well as edited collections of articles covering a specific theme or collections of articles.

Marko Davinić • Svetislav Kostić
Editors

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Preface

The book series *Gender Perspectives in Law* is a systemic attempt to provide all-encompassing gender-competent legal knowledge. The term gender-competent legal knowledge is used to accentuate the reconsideration of different fields of legal knowledge from the point of gender equality approach and with offering relevant and convincing arguments in that regard. This term is sometimes replaced with the term "gender-sensitive," which also refers to awareness about the importance of gender equality approach and to its implementing in theoretical and scientific knowledge production. Having a gender-competent approach in legal education is required when considering the highest values and normative standards of modern international, European, and national law. Raising awareness about gender equality issues among researchers and academic scholars in the field of law and other multidisciplinary fields relevant for legal theory and practice, educating in a gender-sensitive manner law students (future lawyers, judges, prosecutors, public officials, members of parliament, and governmental bodies), as well as students of humanities-social sciences, means investing in the creation, interpretation, and implementation of legislation that is more fair, just, and equitable. Prosecutors and judges in particular, but also other legal professionals in all fields of legal practice, public administration, and policy decision-making need to be trained and sensitized in order to encourage a gender-sensitive approach. This will contribute to a more rich and comprehensive understanding of social reality, as well as to gender-competent political, legal, and economic decision-making and public policies. In other words, it means investing into the future based on more gender justice and more social justice and human rights protection in general. In the end, it will help fulfill the essence of contemporary law—equal respect and protection for all individuals, which leads to their equal opportunities and diminishes the possibility of gender discrimination.

This book series, *Gender Perspectives in Law*, attempts to cover all relevant subjects of legal knowledge from a gender equality perspective. The plural designation is entitled because there is a plurality of feminist understanding of gender equality issues generally speaking and insofar also within the law. The call for papers was open for professionals in legal, political, sociological, and historical

fields of interest with an attempt to cover, as much as possible, specific relevant topics, in order to provide an overview of the gender competent deconstructing and reconsidering the way they are articulated in the dominant thought, i.e. the mainstream within the law. The authors in the series' volumes try to establish a gender equality approach to different fields of law while taking into consideration specific issues of their interest and attempting to consider chosen different aspects of legal knowledge and practice in a paradigmatic gender-competent manner. They attempt to critically reconsider the dominant molds of legal knowledge and present innovative gender-sensitive and gender-competent insights relating to different issues within all fields of law, in order to introduce new research topics relevant for gender equality in law, as well as to stimulate the development of a legal and institutional framework for achieving gender equality in real life. The degree to which mainstream knowledge has been reconsidered from a gender equality perspective differs between contributors. Moreover, a variety of relevant legal subjects and other closely related subject matters are covered in varying degrees by the selected texts.

The book series *Gender Perspectives in Law* encouraged scholars and experts from different fields of law and humanities-social sciences to reconstruct their legal and multidisciplinary knowledge from the standpoint of gender equality. This book series should inspire further attempts of this kind, as a reconsideration of legal and multidisciplinary knowledge from a gender perspective has become an axiomatic task. If contemporary law is defined primarily from the human rights point of view, then it is necessary to take a gender equality perspective; the human rights foundation of law cannot be regarded as the civilizational standard without also incorporating women's rights and gender equality approach in general, articulating them in the mainstream legal and political thought, and eliminating gender-based biases and discrimination within the dominant legal systems. The book series Gender perspectives in Law represents the added value to the project Erasmus+ Strategic partnership in Higher Education, called "New Quality in Education for gender equality - Strategic Partnership for the development of Master's Study program LAW AND GENDER - LAWGEM".

The second book in the series *Gender Perspectives in Law*, which is titled *Gender Competent Public Law and Policies*, offers a new perspective on public law and public policies. The collection of papers begins with a very sophisticated discussion on gender perspectives in constitutional law, which can support gender justice, but also perpetuate patriarchal norms. The book covers an analysis of the role of the European Ombudsman in the area of gender discrimination. Particular attention is given to the importance of mainstreaming gender into public policies. Thus, the legal and institutional frameworks of Spain and Serbia are presented, which can be an inspiration to some other countries. Another important aspect covered in the book is an analysis of systemic differences between the average wages of women and men in the six Western Balkans countries. The book offers a discussion on female genital mutilation as a highly gendered crime based on extreme versions of the rigid patriarchal ethnic and religious norms and customs. It is analyzed through the lenses of the Istanbul Convention, as a tool to tackle violence against women. Particular attention is given to the femicide, its definitions, forms, and phenomenological

characteristics. Femicide has been acknowledged recently and is still facing inadequate judicial response in many countries. A special focus is given to German and Serbian experiences in acknowledging femicide and combating it through different measures. Finally, the importance of stalking laws has been presented, as stalking is a highly gendered crime and many states fail to combat it adequately. The collection of essays offered in this book will be of interest to all those working in the field of public law, and policymakers, as well as to students and academics who can broaden and deepen their research on different legal issues of public law and policies from gender perspectives.

The papers deal with very different topics related to the field of public law. The converging aim and axis is gender equality—its clarification, articulation, and promotion within public law theory and practice. Interesting and indicative enough is the fact that there are authors from different countries and continents. The global relevance of the gender equality perspective in legal education, legislation, and legal professions has been expressed and confirmed in the content and authorship of this book.

This book includes papers written by Susanne Baer, Marko Davinić, Branko Radulović and Vanesa Hervías-Parejo, Nikola Ilić, Ivana Marković, Aleida Luján Pinelo, Kosana Beker and Vida Vilić, and Susanne Strand and Ramunė Jakštienė.

Susanne Baer considers constitutional law or constitutionalism in terms of its twofold role: it can help achieve gender justice, but it can also perpetuate patriarchal norms. Constitutionalism has been faced with tremendous developments in international law regarding women's rights, and it can either use these changes for gender equality purposes or abuse them as decorum. According to the author, the controversies discussed in the paper affect both fundamental rights and the foundational structures of constitutionalism. She states that taking gender into account requires an understanding of constitutional law's gendered elements, grounded in the diverse and changing realities in which people live. This includes women disadvantaged by heteronormative stereotypes, as well as men defined by hegemonic masculinity, people labeled as sexual minorities because they deviate from a gendered norm, as well as transsexual and intersexual people who challenge the notion of natural sexual difference, which informs much of sex discrimination. The author critically remarks that gender has rarely been systematically studied in constitutional law, at least not in mainstream legal studies. She also assumes that feminist legal gender studies and similar critical work expose the nature of sex inequality in theories of the state and in the design of constitutions, and thus stimulate discussing gender as a concern in constitution drafting as well as in constitutional law as practiced today. The author admits that feminist critical reconsideration of constitutional law allows us to better understand what constitutional law does to perpetuate sex inequality, and what constitutional law can do to end it, thereby strengthening gender justice. The author addresses the legal subject and citizenship, the meaning of equality, intersectional inequalities, and diversity in law; she also considers issues of violence and the oppressive ideas of the private realm of marriage and the family, as well as participation and representation in public matters. In addition, she addresses the structural aspects of constitutionalism, namely democracy, the rule of law, the

welfare state, and, from more recently also actual aspects—sustainability and the environment we live in. Considering constitutionalism in context leads Baer to raise issues of legitimacy, the public-private distinction, post-national constitutionalism, and the challenge of merely decorative constitutional law. The fundamental rights discussion has extended from the legal subject to the relationship between dignity, liberty, and equality, and the understanding of equality and diversity. The author also raises the question of the future of constitutionalism.

Marko Davinić analyzes the role and contribution of the European Ombudsman in the area of gender discrimination. His analysis is mainly based on case studies, as well as on the European Ombudsman's strategic initiative in this area. The author reminds readers that European Union citizens who consider being victims of gender discrimination at the EU level can address the Court of Justice of the EU (CJEU), as the main authority regarding the interpretation and proper implementation of EU law. However, they also have the opportunity to address the European Ombudsman regarding gender discrimination committed by EU institutions, bodies, offices, and agencies. The author analyzes the topic within three main parts: the first part outlines EU legislation on gender equality; the second part is dedicated to the origin and development of the European Ombudsman and its basic competencies; finally, in the third, main part, the most important cases from European Ombudsman's practice regarding gender equality and protection against gender discrimination are analyzed. The author points out that unlike most of the national ombudsmen who represent only an additional means of control in relation to the judicial authorities (due to the provisions on exhaustion of all legal remedies), this is not the case at the EU level. The recourse to the CJEU (which is in progress or completed) precludes subsequent activities of the European Ombudsman in the same case. This means that citizens and organizations need to choose between addressing the CJEU and the European Ombudsman, considering the basic features and procedures of both these institutions. Notwithstanding the small number of cases the European Ombudsman has dealt with in the area of gender discrimination since its foundation, this institution has managed to open many important questions and to improve the practice of EU institutions, bodies, offices, and agencies regarding gender equality within the European Union. In this way, Davinić concludes that it has become a significant complementary tool in the protection of gender equality and the elimination of gender discrimination at the supranational level.

Branko Radulovic and Vanesa Hervias contributed with a text on mainstreaming gender into public policies from the perspective of Spain and Serbia. The authors aim to highlight aspects of the Spanish system on gender mainstreaming that can be successfully transferred to Serbia and similar countries. The comparison between these two countries is based on the fact that Spain ranks among the top European countries according to the Gender Equality Index, while Serbia lags under the EU average in overall gender equality. Furthermore, while Spain has developed methods to strengthen the integration of the gender perspective in all government programs and policies, Serbia still does not have a systemic approach to introducing gender-related aspects in public policies. The authors first present the historical background and key obstacles to gender mainstreaming in both countries. They then present a

legal and institutional framework for gender equality and gender mainstreaming in their countries. The main part deals with Spanish gender mainstreaming tools and policymaking measures. The following best practices are presented: strategic plans, equality plans in companies, corporate equality awards and corporate social responsibility policies, equality plans in companies, business award in equality, gender mainstreaming programs, education laws that mention the fulfillment of effective gender equality and equality of results, urgent measures in the labor against the glass ceiling, gender impact reports, gender-responsive budgeting, and gender quotas. The authors highlight these measures as those that had a substantial effect and enabled effective gender mainstreaming in public policymaking in Spain. Finally, the authors assess lessons from the Spanish experience that are relevant for Serbia to implement gender-competent public policies. Some existing policies in Serbia are reviewed, such as annual work gender equality plans or programs, gender equality risk management plans, balanced gender representation requirements in the management and supervisory boards, gender (equality) impact assessment, and the tool related to the collection and dissemination of relevant data disaggregated by gender.

Nikola Ilić analyzes the underlying causes of the gender pay gap in WB6 countries. The author assumes that in gender economics, there are three root causes of the gender pay gap: human capital, compensating differentials, and discrimination. On average, men can earn more than women due to their knowledge and skills, but also due to the discrimination against women in the labor market and working place. A closer analysis of relevant similarities and dissimilarities between WB6 countries, and their social and legal norms, combined with the gender economics approach, provides a plausible answer to the question of underlying causes. Similarities in the gender pay gap are a result of the shared history of gender discrimination due to patriarchal heredity, shared political culture, shared economic culture, and human capital or quality tied to individual productivity capacity. The author considers a few possible influencing factors regarding gender pay gap. Today, women are more likely to attend and graduate from university than men, meaning that the existing gender pay gap cannot be explained by the education level. On the other side, on-the-job training and work experience can explain the gender pay gap to a certain extent, as men are more likely to receive on-the-job training than women. Moreover, men are more likely to have continuity at the same job and thus get more training and experience than women, as a result of pregnancy and maternity leave. In that circumstance, men are able to increase their human capital and be more productive than women. However, this temporary and relatively small inequality in human capital cannot explain why women consistently earn less than men in WB6 countries, even before taking pregnancy and maternity leave. The author thus considers other possible causes of the gender pay gap, such as compensating differentials and discrimination. Discrimination against women undoubtedly exists in those countries, and it seems as one of the possible underlying causes for the considerable gender pay gap. The main cause is discrimination based on the shared history of patriarchy and gender segregation, which is a consequence of the mentioned historical circumstances and unwritten rules in politics and economics. These rules were socially acceptable and tolerated for such a long time that even today,

many employers do not recognize discrimination against women in labor markets. In this regard, the first step (and policy recommendation) for all WB6 countries would be to start collecting data on the gender pay gap and discrimination against women in labor markets.

Ivana Marković considers female genital mutilation (FGM) as a highly gendered crime based on extreme versions of the rigid patriarchal ethnic and religious norms and customs. The focus of her research is the Istanbul Convention, which clearly defines all forms of FMG wherever conducted as criminal acts. Committing FGM is not confined only to countries of its heredity but has been spreading across the globe in modern times, due to decades of migrations of families from Africa and the Middle East (especially from countries and regions where FGM has been the socially acceptable practice) to Western countries. FGM is thusly a living reality in the European continent as well, with France, the United Kingdom, Italy, Germany, the Netherlands, and Spain as the most affected European countries. This means that the spatial and temporal dimensions of this crime overcome the framework of its original roots. The author points out the contradictions between the legitimization of FGM and the persistence with which mothers and families practice it as a result of long-lasting traditions, on the one hand, and its delegitimization in moral and legal terms, i.e., criminalization based on international human rights law, on the other. The author concludes that the regulation of female genital mutilation in the Istanbul Convention provides a coherent framework for the criminalization of female genital mutilation in respective national legislations, in a sense that there are no justification grounds applicable to FGM. The author also concludes that in terms of the dogmatic of criminal law, the Istanbul Convention is enlarging its area of influence through the personality principle (principle of extraterritoriality).

Aleida Luján Pinelo combines, in a fruitful manner, her studying of gender issues and femi(ni)cide in a few European countries with her Mexican life experience and insights about femi(ni)cide in a way that allows her to recognize this phenomenon in Germany as well. She focused the research interest on the fact that this phenomenon, although existent, was not acknowledged in Germany until recently, neither by official statistics and policies nor by the media. Furthermore, femi(ni)cide research conducted at German universities was not tied to its occurrence in Germany but to its occurrence in Latin America. The author emphasizes that Germany started to acknowledge feminicide within its borders in 2018, when this country signed the Istanbul Convention. An additional factor that contributed to this was activist pressure. She applies feminist epistemologies from the global South, because femi (ni)cide is a feminist concept, and because they offer ways to question the colonial narratives that continue to be imposed in the discourses on femi(ni)cide. In other words, she deliberately overcomes the Western biased top-down approach in considering feminicide like something related to postcolonialism, decoloniality, and anticoloniality, with no relation to Western Europe what so ever. Separation-related homicides conducted by Western Christian German perpetrators are usually explained based on individual motivation rather than based on the cultural patriarchal heredity. Cultural background motivations are only used to explain actions of perpetrators coming from other cultures. In short, the author deconstructs double

standards when it comes to femi(ni)cide, and thus contributes to enriching the insights about the need for extending the intersectional approach to issues of gender equality, while adding the complexity related to the global North and South and another lens for overcoming Western-centrism.

Kosana Beker and Vida Ilić deal with inadequate judicial responses to femicide in Serbia. The authors first provide definitions, forms, and phenomenological characteristics of femicide. Beker and Vilić also cover basic concepts related to femicide as a criminal act with a visible gender dimension and emphasize that this aspect is very important, bearing in mind that the criminal legislation in many countries does not recognize femicide as a criminal act. Femicide is labeled as the most extreme manifestation of violence against women committed by men, but despite this, there is still no single accepted definition of the term. The authors criticize the existence of different definitions and elaborate that this leads to the nonexistence of comprehensive analyses and effective strategies to prevent femicide. However, they refer to feminist theory, which defines femicide as gender-based violence, and murder of a woman because she is a woman. Special attention is given to the analysis of the situation in Serbia, but the authors note that it is not possible to statistically monitor and quantitatively and qualitatively analyze femicide in Serbia, as there is a lack of official and publicly available data. Therefore, they analyze the research "Social and institutional response to femicide," which covers final court proceedings of femicide and attempted femicide from 24 higher courts in Serbia during the period from 2015 to 2019. The authors identify the research's greatest challenges, such as the anonymization of data in the court judgments, and qualification of the criminal act of murder and certain forms of aggravated murder. Among other things, they also noticed that the victims' gender was not considered, that the establishment of facts needs to go beyond the basic facts of the case, and that the entire criminal procedure is focused on the perpetrator. Beker and Vilić provide a list of recommendations for preventing and combating homicide: advocating for coordinated and timely action of all relevant state institutions, careful analyzing of each case of femicide, introducing a single definition of femicide, and creating official statistical records of femicide cases. They also believe that it is important to fully align the incriminations of gender-based violence with relevant international law, and to incriminate femicide as a separate criminal offense (gender-motivated murder of women), or to criminalize gender-motivated murder of women as a special form of aggravated murder of women committed by men in the context of gender-based violence. Finally, the authors claim that special protocols and multisectoral cooperation need to be improved, as well as social workers' and police officers' capacities, and the femicide Watch to be established.

Susanne Strand and Ramunė Jakštienė prepared a contribution on specific stalking laws. The authors explain that stalking is a phenomenon that includes multiple unwanted communications intruding on someone's life and causing fear for one's safety. This is a highly gendered crime, with certain statistics showing that one in five women is a victim of stalking. States, therefore, must combat this unwanted behavior, but to do this successfully, they need to invest resources into the police, social services, health care facilities, and criminal justice. The authors

argue that in most countries stalking is prosecuted as a single offense in accordance with laws regulating domestic violence, or as harassment, whether it is considered a criminal act or misdemeanor. Nevertheless, the authors argue that stalking should be treated as a separate act, given its detrimental effects, obsession with the victim, and repetition, which can sometimes lead to the most severe forms of violence, including homicide. They argue that each country needs to adopt a separate stalking law and rely on Article 34 of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention). The ratification of this instrument by different EU States prompted the adoption of criminal anti-stalking legislation. However, the authors argue that criminal legislation is just a part of combined measures that are necessary to combat stalking, such as prevention, civil actions, effective victims' protection, support, etc. The second part of the paper is dedicated to a comparison between the legal framework and stalking practice of two European countries, Sweden and Lithuania. The authors conclude that despite some positive trends, criminalization of stalking in both countries is still very limited as it covers only the most severe cases.

The editors of the book series *Gender Perspectives in Law* are grateful to the authors of this volume for offering relevant insights related to very different fields of public law, starting from constitutional law theoretical and practical issues up to the paradigmatic particular phenomena and legislations. They owe them appreciation for demonstrating a strong motivation and devotion to outlining, clarifying, and affirming the gender equality perspective in different fields of public law and through various issues of interest.

The series editors owe a great debt of gratitude and appreciation to the editors of this second volume *Gender Competent Public Law and Policies*, for their enthusiasm and great contributions. They are also grateful to the publisher, who believed in and supported this pioneering attempt to collect gender-competent and gender-sensitive legal and multidisciplinary analyses. Finally, they believe that the synergy and successful cooperation between authors, reviewers, editors, and the publisher contributed to the quality of all papers in this book and the book series as a whole.

Belgrade, Serbia

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Constitutional Law and Gender

Susanne Baer

Contents

Abstract Modern constitutional law is not innocent when it comes to gendered inequalities. A gender analysis that takes sex, sexualities and intersectional inequalities into account reveals the challenges, as well as the options to contribute to a more just society. From this point of view, constitutionalism is, or has been, a contract in front of a sexual contract that privileged public—male—politics over private—female—matters. Also, regarding women's rights, it has seen tremendous changes embedded in international law, yet risks to be abused as *decorum*, in need of defence. This affects both fundamental rights and the foundational structures of

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constitutionalism: as much as constitutional law may help to achieve gender justice, it may also perpetuate patriarchal norms. In many contexts, women fought for recognition as equals, at least on paper. Yet it takes time and effort to implement this fundamental right. Basically, taking gender into account then requires constitutional law to understand its gendered elements, grounded in the diverse and changing realities in which people live. This includes women disadvantaged by heteronormative stereotype, as well as men defined according to hegemonic masculinity, and people labelled as sexual minorities because they deviate from a gendered norm, as well as trans-sexuals and intersexual people who challenge a notion of natural sexual difference, which informs much sex discrimination.

1 Introduction

Where do we find gender in constitutional law, if you start looking for it? Sure, there are often men and almost never women in the texts of constitutional law.[1] But does gender matter? And what does this mean, exactly: "gender"? Or, legally speaking: Are women human, as in human rights (MacKinnon)[2]? Is, then, constitutional law a neutral device to organize politics, or is it inherently gendered itself? Does gender affect constitutional law, and if so, where and how exactly, with what kind of effects on whom? If you were to draft a constitution, what could you do to achieve, or hinder, gender justice[3]? If you were a lawyer, which case would you litigate, and how? If you were a justice of a constitutional court, how would you decide cases brought to you ranging from abortion to rape, sexist harassment to heteronormative families, patriarchal taxing to unequal pay? And if you are a scholar and educator, what is your analysis of constitutional law, regarding gender?

Obviously, there is a lot to consider. However, and as irrational as unsurprising in light of lasting gender inequalities and bias, gender in constitutional law has often not been systematically studied, at least not in mainstream studies of the law. Yet foundational questions have been addressed in feminist legal gender studies and similar critical work. This work exposes the nature of sex inequality in theories of the state[4] and in the design of constitutions,[5] discusses gender as a concern when

[1] Depending on linguistics, some constitutions are more "neutral" than others. In South Africa, "technical refinement" is mandatory to make legal texts readable and inclusive.

[2] MacKinnon (2007a).

[3] Irving (2008a, b), p. 1; Rubio-Marín and Irving (2019). On India Dhingra (2021), on South Africa Mabandla (2018), comparing the two Rubio-Marín and Irving (2019), on Tunisia de Silva de Alwis et al. (2017), on Romania Brodeală (2017), on Iceland and inclusive constitution making Landemore (2015). See also Irving (2017).

[4] MacKinnon (1987a).

[5] Ritter (2006).

drafting a constitution and in constitutional law as practiced today.[6] Some have developed a "feminist constitutional agenda",[7] and scholars, lawyers and activists have worked on in-depth analyses of seminal questions in constitutional law from a feminist perspective, whether or not labelled as such. They allow us to better understand what constitutional law does to perpetuate sex inequality, and what constitutional law can do to end it, thus strengthening gender justice.

There is much to be discovered, and this essay is an overview of the field, to allow for deeper enquiries.

I will address the legal subject and citizenship, the meaning of equality, intersectional inequalities and diversity in law, to move to issues of violence and oppressive ideas of the private realm of marriage and the family, and to participation and representation in public matters. In addition, the search for gender in constitutional law must address the structural aspects of constitutionalism, namely democracy, the rule of law, the welfare state, and, more recently, sustainability and the environment we live in. The first section situates constitutionalism in context, raising questions of legitimacy, the public-private distinction, post-national constitutionalism, and the challenge of merely decorative constitutional law. The second section addresses fundamental rights, from the legal subject to the relationship between dignity, liberty and equality, the understanding of equality and diversity. The third section is dedicated to the foundational structures. And the last one raises the question of the future of constitutionalism, because the concept is under pressure, gender equality included.

2 Constitutionalism in Context

Constitutional law is meant to be the highest law of the land, defining the way "we the people" want to live together and handle public matters, or "res publica". The idea is, with significant variations across time and space,[8] a fair legal—and thus necessarily secular—order of power, to legitimize and limit state action, to enable and protect individuals, and specifically those not in power, even from majority decisions. In addition, constitutional law evolved in nation states, but is now a concept for a world inextricably interrelated. And not least, constitutional law is the result of struggles. This includes struggles of women ("Rechtskämpfe"[9]) and others "othered" in gendered and sexualized ways.

[6] Irving (2008a, b), p. 3, referring to a study by Vivien Hart for the US Institute of Peace in 2004. See also Mohanan (2021) and MacKinnon (2012).

[7] Baines and Rubio-Marin (2005) and Baines and Daphne Barak-Erez (2012).

[8] A comparative collection has been edited by Williams (2009). For comparative material on equality, dignity and liberty, including abortion, gay marriage, transsexual rights, see MacKinnon (2016) and chapters in Dorsen et al. (2022); on Europe Abou-Chadi and Finnigan (2019).

[9] For the history of women fighting for equal rights in Germany, see Gerhard (2001).

However, the struggles are not yet always part of the stories told. Yet legal gender studies, as well as related critical studies of racism, colonialism, ableism and structurally similar inequalities offer fundamental insights that allow us to do better than before. If the simple fact is that, generally speaking, constitutional law has promised liberty and participation in politics, as well as an end of arbitrary power, and equal opportunities in fairness, but has not eliminated sex inequality, that provokes at least the following questions. First, to start with a prime concern of constitutional law, how do theories of legitimation deal with gender? Second, how are we to understand, and maybe reconfigure the distinction between a public and a private sphere that informs liberal constitutionalism and theories of the state? Third, is the more recent development of multi-level or post-national constitutionalism, as controversial as it is, an opportunity for sex equality?

2.1 From the Sexual Contract to Common Ground

Constitutional law organizes power, traditionally in the state, and eventually among states, in a "constitutional" regional or global order. However, constitutional law is based on an idea of legitimation. It informs rules for the creation and powers of government and parliament, including transnational cooperation and international treaty powers, as well as the creation and powers of courts. This legitimacy must, basically, derive from the "will of the people". Often, constitutional law is thus understood as a social or political contract that legitimizes the state, as in political theories of Locke, Hobbes, or Rousseau, depending.[10]

Whose contract is it? At first sight, and in reality and theory, there are men only. The "we" that preambles of constitutions refer to has been and someplace still is a categorically limited collective, from Greek and Roman philosophy to "modern" political theory, from Western European nation states to North, South and Central American, Asian and African as well as Eastern and Central European waves of constitutionalism. All men are created equal, and it is meant that way. Eventually, feminist political theorist Carole Pateman uncovered the "sexual contract" below the socio-political one, in that states rely on women's "private" service and support but do not allow them to participate in public matters.[11] It may be called "state patriarchy". Where can it be found today?

Historically and someplace still, women are excluded from constitution-making. Yet absence does not mean silence.[12] Looked at more closely, there are women in constitutional history. In France, Olympe de Gouge rewrote the famous "Déclaration des Droits de l'Homme et du Citoyen" for women, the "citoyenne", in 1791. In

[10] There are many studies, cf. in English Brown (1992); in German Sauer (2001); Ludwig et al. (2009).

[11] Pateman (1988).

[12] Irving (2008a, b), p. 4.

England, Mary Wollstonecraft drafted a Vindication of women's rights in 1792, to be published in North America the same year. In 1848, Elizabeth Cady Stanton issued a Declaration of Sentiments for North America, discussed in a women's movement meeting at Seneca Falls. Similar interventions are known in Australia and Canada, throughout Europe after 1989, in Colombia[13] and South Africa,[14] Nigeria 1999, Rwanda 2001, and Kenya 2002, as well as in Iraq 2005, Burma 2006 ("Constituting our Rights"), or Chile 2021. In all these contexts, women raised their voices, as did others not yet counting as citizens, calling for recognition, and eventually, agency, and equality in the end.

The call for recognition is an ongoing struggle. In 1979, feminist activists working for governments, the United Nations, in the academy or in NGO's, or active in parliaments and society at large, achieved a global commitment to women's rights, in the "women's rights convention" CEDAW of the United Nations. In 2011, a strong stance against violence against women was added to the fundamental promises of states in the Council of Europe, when activists and committed state actors succeeded in having the Istanbul Convention pass.[15] Also, younger human rights instruments tend to address specific vulnerabilities of girls and women, as in the Preamble and Articles 3 and 6 of the Disability Rights Convention.[16] These texts are important additions to a constitutionalism that is truly dedicated to sex equality. However, law dedicated to this cause is also less accepted than other such instruments, with "reservations" to limit reach and impact, rendering it a shallow frame. By now, countries like Russia or Turkey even formally quit the scene, and the standing of sex equality is weak as long as that does not result in any sanctions.

Thus, if constitutional law shall really serve as the framework of legitimate power in a given society, there are still steps to make. Regarding gender, we have to revisit our normative foundations, as in theories of contract, public discourse and deliberation, or fairness principles, and may start looking for better ones, in search for common ground.

2.2 Public Politics and Private Matters

The historical move from a limited "we" in constitutional matters to a common ground, where women and others have a say as well, is of utmost importance. Yet when we study interventions to achieve gender equality by means of law, another element surfaces: the public-private-divide. For constitutional law, the division between public matters, for politics, and eventually, the state, and private concerns, protected as individual rights shielded from state action, is foundational. For some,

[13] Morgan and Alzate (1992).

[14] Liebenberg (1995).

[15] Kriszan and Roggeband (2021).

[16] Degener (2016).

the contract between state and citizens rests on the promise that the private is left alone, and for others, the realm of law must be separated from morals. Yet the idea of a public-private—divide is gendered, and notably male, in a paradigmatic sense. It informs a "right to privacy", which shields a home and marriage from criminalizing sexual violence, and it informs the institutions of marriage and the family as "basic units" of society, with women's care not considered as work, and duties of procreation.

A gender analysis thus changes the scene. While liberal political theory and constitutional thought have ignored the private and prioritized the public,[17] feminist studies are interested in the home, not least the place where citizens grow up. Then, care work matters, as does the patriarchal order in many other regimes, in which p*ater familias* governs, thus represents, or even legally "owns" "his wife" and "his" children, albeit only those born out of marriage, and in which his power extends to "domestics", which adds race and class to gender. A sound analysis of the "home" illustrates that inequalities are gendered, all being "intersectional" in that sex, race, class et al. intersect. This is in fact quite complicated, with the wife subordinated to "her" man, but herself in power over "domestics", who are, especially if not legal residents, totally dependent, extremely vulnerable, and exploited. The less biologically fixed our understanding of sex inequality is, and the more attuned to power and hierarchy, the more we are able to understand these problems.

Most importantly, in the "private" sphere, such power is deemed unlimited in patriarchal regimes of marriage and family law, and in criminal law that exempts rape in marriage, or in social security and tax law that treat the man as the head of the unit, or in labor law when soft skills are valued and paid if men are assumed to have them, but neither valued nor paid if women "behave just naturally", to fit traditional stereotypes of masculinity and femininity. As long as gender stereotypes secretly inform a distinction between the public and the private in constitutional law, such hierarchies remain untouched. In short, the more domestic the less protection. In many legal systems, much has been changed. Yet the foundational notion must be overcome to consistently implement gender equality.

2.3 Constitutionalism Beyond the Nation-State

Eventually, constitutional law addresses women as participating agents, too, and recognizes issues formerly tabooed as private, like sexuality, or marriage, or care for children and elderly, to be matters of public concern. To achieve this, there have been many feminist interventions in constitutional moments, that is when societies, or at least some members of these, convene to discuss who "we" are, and how we want to organize our lives. Note that throughout history, these debates took comparative knowledge into account, profiting from women's movements beyond

[17] For the theoretical foundations, see Moller Okin (1989), Gavison (1992), and Olsen (1993).

national borders, and it is an international debate today.[18] Then, a critical lens on gender is imported into constitutionalism from other places, sometimes denounced as "the West", which ignores feminist traditions in the "East", both rather problematic labels, while it is international norms on gender equality that seem to travel best. We do not know all the stories, but there are many instances in which feminists organized internationally, rallying for political participation, against wars, for equality, against patriarchy, for gender mainstreaming, against male privilege. For these efforts, constitutional moments are windows of opportunity that result in, usually, a text, and a shared understanding of basic rights and structures that form a nation state, in which women and all others formerly excluded or degraded may be integrated eventually. Examples include international pacifist leagues, fighting war with early visions of a united nations, or suffrage movements to gain the vote as a building block of citizenship, or struggles for access to education, against violence against women and gender crimes, the right to independent mobility, and the like.

In addition, gender equality got recognized in international law. Sometimes, this happened earlier and often more explicit than in nation-states. Still, it is worth comparing the promises of equal human rights, as in the United Nations, the European, American, Asian and African human rights systems, or in the EU,[19] to the national state of the art, and consider when international guarantees are used to back up national or local demands. Legally, much depends on the formal status of international and regional law in a given country. But politically, international networks like the "velvet triangle" of European feminists for gender mainstreaming[20] and many more are important drivers of gender and constitutional law.

2.4 *Decorum, Abuse, Distress*

A constitution is a framework, not a manifesto, nor poetry.[21] After 1945, constitutions served as a never again to the Holocaust, while in other contexts, they are the never again to colonialism, a strong no to military regimes or other dictatorships. Also, in the 1980s and 1990s, constitutions marked and organized transitions from communist regimes to democracy, or from religious to more or less secular regimes, in the form of liberal constitutionalism.[22] Yet in the twenty-first century, democratic and liberal constitutionalism is under stress, even in places where it seemed promising.[23] The "new constitutionalism" that spread in the twentieth century, with courts

[18] Rubenstein and Young (2018).

[19] Lombardo and Forest (2012).

[20] Woodward (2003).

[21] Irving (2008a, b), pp. 23, 25.

[22] On the Arab spring Porras-Gómez (2021).

[23] With further references Baer (2018, 2020) and Sajó (2021).

to deliver the grand promises of constitutional law, is confronted with harsh reactions, by autocrats but also in established constitutional democracies. The end of WWII and the horror of the Holocaust, the formal end of colonialism, the fall of the Iron Curtain in Europe—liberalism seemed to be on the winning side. But more recently, and across the globe, with striking force and speed in Eastern and Central Europe, constitutional law is uncoupled from democracy and liberalism. Last not least, this affects gender justice, in that equality is at stake.

Contexts certainly differ. In some instances, a constitution has been or has become merely decorative, which means that legal guarantees of human rights and democratic politics are empty promises. Sometimes, such decorative constitutionalism is practiced to join an international entity that requires a constitutional commitment, as in the case of the EU acquis or the rule of law standards of the Council of Europe, in World Trade Organizations, or the UN, or in trade agreements. Yet such attempts to be members of markets, with funding and trade privileges, are not based on a practice of democracy, the rule of law, with independent courts and the power of judicial review, nor on equal rights. Similarly, there is abusive legalism, as in self-declared "illiberal"[24] and thus non-democratic, only formally legal regimes. The point is that when gender is taken into account, these are not neutral political developments. Quite to the contrary. Gender inequality—patriarchy, heteronormativity, homo- and transphobia—is a prominent item on the agenda of those who abuse or destroy constitutionalism,[25] couched in diffuse rhetoric of "decadence" and "national identity", "history" or "tradition".[26] In the twenty-first century, it seems that gendered inequalities are in fact a marker of such developments. Namely, constitutionalism dies when domestic violence against women and children is decriminalized, if it was ever sanctioned at all, or when homosexuals—or those denounced as gay—are subjected, by the state itself or tolerated, to social exclusion, forced "therapy", violence including "corrective rape" of women, persecution, jail, etc., or when trans- and intersexuals are labelled "sick", with medical operations forced on them, or when women are legally forced to carry every pregnancy to terms, even if it is a consequence of rape, or endangers their lives, and doctors willing to perform an abortion are severely criminalized. In such instances, sexist ideologies of heteronormative patriarchy replace constitutional cornerstones of dignity, autonomy and equality. Mostly, equality remains on the books, formally but the practice is, specifically regarding gender, inherently unequal. A gender perspective in constitutional law then asks who suffers, and who profits, from such changes in politics, and law.[27]

[24] For in depth analysis, see Scheppele (2018) and Sajó (2021); for comparative material, see Dorsen et al. (2022), Ch. 2.

[25] See, in English, Korolczuk (2014); Behrensen et al 2019; Kovats and Poim (2015); Kuhar and Paternotte (2017); Roggeband and Krizsán (2018); in German Hark and Villa (2015).

[26] Scheele et al. (2022).

[27] For more, see Baer (2021).

3 Fundamental Rights

By now, it should be clear that theories and concepts that inform constitutional law, and the commitment to constitutionalism itself, have a gender dimension. Now what about fundamental rights?

While some old constitutions do not feature a *magna charta* of fundamental rights, drafters in the twentieth and twenty-first century have included a human rights catalogue as an important promise. In some constitutions, it is the first chapter, while in others, it comes later or last. The texts name "man" or "men", or more neutrally "persons" or "everyone", "the people". Thus, a gender analysis starts, first, with the question of who that is, the basic legal subjectivity—is it a "man" in "human"? Whoever is constituted as a subject is also recognized as bearing rights, and this subject enjoys agency and participation.

Second, while liberal constitutionalism predominantly features and mostly focusses on liberty—*in dubio pro libertate*—the search for gender in constitutional law must address dignity and equality as well. There, the meaning of equality is, third, as important as it is controversial regarding sex equality in constitutional law. And fourth, constitutional law must properly handle the fact that sex/gender is but one inequality, intersecting with others, to eventually respect the diverse social settings we live in today.

3.1 From Man to Human: The Legal Subject

The "we" in drafting constitutions, as well as the "we" referred to as the source of legitimacy of state power, were male, historically and in the narrower sense of men drafting, passing and governing these laws. However, in the history of constitutional law, yet based on limited knowledge, women have always fought for recognition—in France led by de Gouges, for America in Seneca Falls, and in many other places some of which we have not yet heard about. Eventually, such efforts of ending the exclusive notion of "man" in "human rights" were and are often also needed to have courts, politics and scholars acknowledge that the bearer of fundamental rights may be a woman, too.[28] As such, constitutions design "civic membership".[29]

Regarding the subject that bears fundamental rights, catalogues of constitutional rights are often phrased in neutral language, often with an emphatic reference to human beings, persons, all and everyone. And even when rights explicitly address male subjects only, there are claims that women "are meant as well", in attempts to defend such obvious privilege. The question is, however, whether all people are in

[28] Sundstrom et al. (2019) studied why sex equality cases are (not) brought in various contexts: Mobilizing for sex equality needs feminist lawyers and data, at least.

[29] Ritter (2006).

fact equally recognized and protected by fundamental rights, and whether "equal" is substantially meaningful.

The public-private-problem already mentioned creates a problem here, too. In many legal systems and prominently in the common law of England, marriage has dissolved or still dissolves, in a binary heterosexual format, the woman into a—constitutionally protected—unit represented by the husband alone, as "his" wife. This is one crucial instance of the male norm, with man present, and woman on the back stage. It is the paradigmatic patriarchal notion, which has effects throughout legal systems. It has women loose her name, nationality, religion, property, and inheritance right towards her children, spend hours in unpaid care, and work for unequal pay, which results in dependent social security, "female" age poverty, etc.

As a binary norm, such an understanding of the constitutional subject as either man or woman also disregards "third options". This excludes intersexuals from legal subjectivity, i.e. persons physically neither clearly male nor female (according to contingent definitions that are still deemed natural). In fact, it harms people, when children are operated on without consent to construct a "proper" sex, or mistreated by ignoring their health needs, or pressed into behaviour according to a binary gender norm, including legally either m or f, not x. Yet, as the German Federal Constitutional Court held in 2017, such a binary order is not a constitutional requirement, but a violation of individual rights to recognition and respect.[30]

Different from intersexuals, transsexuals also challenge constitutional law, i.e. people born male who identify as women, or people born female who identify as men. Based on long fights for legal recognition, they won the fundamental right to be who they are, to themselves, albeit often with strict requirements of medical approval. Courts acknowledged a sex-change, as long as it is based on the binary norm man/woman, and ordered authorities to overcome biological essentialism. As such, individuals who transition from one sex to the other do still move in the binary scheme, yet claim that biological sex is not sexualized subjectivity, and gender, and that sex is not destiny, but a socio-cultural practice and choice.[31]

An additional challenge to the binary and heteronormative traditions in constitutional law is, then, the recognition of people who do not fit that scheme, but identify as homosexuals.[32] Again, constitutionalism has not yet delivered equal recognition and respect in many contexts. However, "gay rights" has become a cornerstone of the (in-) tolerance that informs a heated controversy around liberal constitutionalism nonetheless. While many courts and legislators have moved to recognize lesbians and gay men as legal subjects, and even equal, others denounce such developments as "decadent", "sick" and "unnatural", "destroying the family", sometimes coded as a threat to and defense of more or less national, religious or racialized "tradition" and

[30] See GFCC, Decision of the First Senate, 10 October 2017—1 BvR 2019/16 (available on the Court's website in German and English).

[31] ECHR, B.v. France, 13343/87 (1992); for an analysis of German jurisprudence (in German) Adamietz (2011); comparative material with leading cases in Dorsen et al. (2022), Ch. 8 Sec. D.

[32] Sperti (2017) analyzes constitutional litigation and courts responding to such claims.

"identity". As such, it is a constitutional classic: a clash between a hegemonic stance of the "majority", albeit often a powerful small group, and the fundamental rights of minoritized individuals. Then, claims to respect one's chosen intimacy (consensual, not harmful) and of one's "non-traditional" family, including children, challenge the notion of patriarchy. Again, gender in constitutional law rests on the notion that much is not destiny, but choice. For lesbian women, the right of equal recognition may thus ask for respect for the decision not to bear and raise children, while inclusive notions of the family offer rights to anyone, to freely choose a partner and the responsibility of parenting.

Finally, such struggles for fundamental rights related to gender including sexualities should extend to bisexuals. However, there is then no claim to one choice or identity, but to changing ways. This may be an additional challenge to constitutionalism, and asks for an understanding of even more liberal and non-discriminatory rights—post-gender, non-binary, post sexual identity, "post-categorical" (Baer[33]), eventually.

3.2 Agency and Participation

Based on fundamental rights, gender also informs those rights that form the source of legitimation of state power. In the history of constitutional and international law, political rights were often even fought for first, based on the "radical" idea that participation in politics would be the lever to eventually change all the rest. Yet women had to wait until the early twentieth century in much of Europe and the Americas, and are still waiting, and fighting, in some Arabic countries to get the right to vote and to stand for elections.[34] However, taking gender seriously and for real, representation is more than a formal option but has substantive value.[35] Political rights are, then, not merely numeric, but eventually transformative. Regarding gender, this moves beyond a bio-body-presence of so many men and so few women in parliament or government or courts. To be truly inclusive, we seem to need a change of the culture and agenda of politics. Here, constitutions often guarantee for equality in voting. Digging deeper, a gender analysis seeks to understand that this is more than getting the form for a ballot.

Taking gender into account, political rights start with formal equality but need to move towards substantive recognition. As instruments, this may require quotas for lists of candidates, on the level of political parties or for elections, or it may call for

[33] In German, Baer (2010, 2022).

[34] There are many studies, including Thames and Williams (2015), and updated annual data on women in politics provided by UN Women and the Inter-Parliamentary Union (www.unwomen.org).

[35] Pitkin (1967) and Kantola et al. (2013). On political rights, see Franceschet et al. (2019).

reserved seats in parliaments, or other types of "positive" or "affirmative" action.[36] Then, political equality may be based on empowerment of women and other (political) minorities.[37] By whatever means, the goal is to make sure "the people", to legitimize "the state", are really "we". For constitutional law, the point is to rethink what has been accepted as legitimate, representative, democracy as such, and how to be more inclusive.

Beyond political agency and participation, additional features of constitutional law deserve attention.[38] Do versions of federalism, or of subsidiarity that favor localities over centralized units, foster sex equality, while centralized forms of government hinder the participation and recognition of those who are not seen as naturally in power already?[39] Do constitutional arrangements of democracy, which include law-making procedures, political parties, rights of and in parliament, form and function of the executive, or the role of "experts" in politics, allow for gender justice? It has been and in some places still is a long road to truly equal suffrage, and there is an ongoing struggle for meaningful equality in politics, and thus the constitutional law that frames it, today.

3.3 From Pyramid to Triangle: Dignity—Liberty—Equality

Next to political rights, liberties are a cornerstone of constitutional law. As such, post WWII, postcolonial a well as post-communist constitutionalism is unthinkable without such fundamental rights. Indeed, many constitutions start with a list of rights that protect interests precious enough to be named. Some offer a long list of political, civil and eventually also social and economic guarantees, others refer to human rights catalogues. Yet sometimes, a unified state or a federation comes first, or the organization of government and other powers, or democracy and the rule of law. Note that constitutional architecture varies, depending on the agenda of the drafters in charge passing and amending constitutions.

In the list of rights, the architecture, and thus the attention paid to various interests, varies, too. In particular, it matters how fundamental rights are configurated in relation to each other. In some instances, dignity comes first, as in the EU Charter, while in others, like the U.S., freedom of speech is the first amendment. Similarly, human rights may be sorted in "generations", with civil and political rights first, then social rights, then group rights, and eventually, rights of future generations and post-human rights of nature. When and where is this a gendered choice, and how does it affect the meaning and status of equality?

[36] For Europe, see Ahrens et al. (2020). For the Pacific region, and a refined definition of success, Baker (2019).

[37] For data, see Krook and Zetterberg (2015). For the backlash, Berry et al. (2021), on Kenya.

[38] See Irving (2008a, b), pp. 57 et seq.

[39] Sullivan (2006); also discussed by Irving (2008a, b).

Again, there are many questions to ask: Is gender justice—or injustice—inscribed in a constitution when government institutions come first, and sex equality is not expressly guaranteed? Does the scheme with dignity on top, and liberty in all details to follow, while equality is a special concern on the side, grant rights equally to all, or is this a problematic hierarchy? Does dignity invite a notion of the noble, and liberty invoke an independent autonomy, both ingredients of hegemonic masculinity, or are both more refined? What does it do to constitutional law if much text, jurisprudence and scholarship is dedicated to freedoms, while equality is seen as a "complicated topic", reduced to the prohibition of arbitrariness and a right to formal equal treatment? Should it inform our understanding that human rights have been fought for not only with rallying calls for liberation, but also with demands for equality and respect, to make sure others matter? Is a triangle of fundamental rights an alternative, in which dignity, liberty and equality inform each other, a foundational notion of equal freedom with respect for all?[40]

3.4 From Formal to Substantive: Equality Revisited

To date, much work in litigation and legislation and legal gender studies to achieve gender justice has focused on equality. Indeed, both as a notion and a right, equality is a fundamental concern of constitutional and human rights law, and features prominently in most texts. However, an explicit commitment to sex equality, or to equality at least of women and men, or to non-discrimination regarding sex, or even gender, is not to be taken for granted, but fought for continuously.[41] Once accepted, the very understanding of equality matters tremendously, to properly address gendered inequalities. And this is where feminist legal theory may have contributed most significantly to constitutional law.[42]

In constitutional law, equality is often understood as a basic right to fairness, to prohibit arbitrary irrationality. With references to Aristotle, equality is, then, a formal guarantee of treating likes alike and unlikes unalike. The focus is on who is similarly situated, and who is different. But as a result, this version of equality protects the *status quo*: The more different you are socially, the more the law can treat you differently, and the more you resemble, to name three factors, white and able-bodied men, the more you participate in privilege.[43] Or, based on so many inherently

[40] Baer (2009).

[41] In the U.S., proposals for Equal Rights Amendment keep failing as long as too few states endorse it. For a recent—intersectional—draft see MacKinnon and Crenshaw (2019).

[42] Foundational is the work of MacKinnon, collected in a comparative casebook "Sex equality" (1991).

[43] For an analysis in relation to Marxist theory see MacKinnon (1987a). On substantive equality, MacKinnon (1991). For a similar dominance approach in German constitutional law, Sacksofsky (1996), and a "hierarchy" approach, Baer (1995).

unequal theories of democracy, law, society, and property not least,[44] as long as you are a wife, or otherwise not an owner of property, but owned up to slavery, you are not a citizen, never equal, never similarly situated.

For sex equality, this formal version of equality allows the status quo to remain patriarchal, and legally legitimate, untouched. An "equal" right to treat all breadwinners the same keeps women in "their place", channelled into "female professions", challenged with work-life-(im-)balance, and paid much less than men, thus not winning the bread, and send to the back stage. Similarly, an "equal vote" based on ownership (again of property or people, be it "their" women, children, "domestics", etc.) preserves an unequal status quo. Also, since pregnancy is so different, mothers may be "rationally" disadvantaged, too. As long as equality is defined as a formal guarantee of rational distinctions, it thus easily serves to legitimize unequal treatment of all those who are in fact unequal, for real.

In fact, sexism as well as apartheid as one version of legalized racism is based on this idea of formal equality: separate but equal. Yet this is also why the Canadian Supreme Court emphatically rejected this notion in 1989, to not side with the cruel histories of German Nazis using Aristotle to legitimize the murder of Jewish people, and to not endorse U.S. racism in law.[45] But what is equality, then?

Radical feminist and anti-racist lawyering, informed by a material—or "realist"—understanding of the law as such, define equality as "substantive", not just formal, and some constitutional courts interpret the clause that way too, more or less. Equality is, then, the right to undo social inequalities. It does not start with the formal promise of the law, and does not assume people are the same, but starts with the social reality of life, to address where people are unequal. In a way, it flips the law from head to feet. Based on a substantive notion of equality, the issue is not difference, but dominance.[46] Then, difference is acknowledged as diversity, while dominance is rejected as hierarchy[47] without a base.

To understand equality as substantive does indeed transform many constitutional problems. Regarding the classics, rights to marry and rights in marriage and in the family do, then, not protect patriarchy, but must be understood as rights to fight unequal arrangements. Then, equality in marriage and family law is a fundamental right to justice in the private sphere, to independent social security, equal parenting rights and obligations, etc. Then, equality in employment and labor law does not anymore protect male preferences and capabilities, but is applied to things people do, towards equal opportunities, equal pay for work of equal value, not based on stereotypical notions of male and female.

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[44] Williams (1991).

[45] Andrews v. Law Society of British Columbia, [1989] 1 SCR 143. For in depth discussion, see MacKinnon (1991, 2007b).

[46] MacKinnon (1987b).

[47] Details differ: equality directed against dominance (Sacksofsky), subordination (MacKinnon), hierarchization (Baer). A substantive interpretation has been accepted, in some cases, by the Canadian Supreme Court, the South African Constitutional Court, the Indian Supreme Court, the European Court of Human Rights or the German Federal Constitutional Court.

Such a substantive understanding of equality also transforms the law of violence, or crime. Often, this is not even on the constitutional agenda. But based on the realities of gender crimes, the fundamental right to substantive equality must apply. Then, sexual harassment, rape, and other forms of sexual violence, are not an excess and a violation of physical integrity, but also an inequality and a violation of equal rights. This implies a lot: a redefinition of the public/private divide, an experience-informed concept of gender-based violence, a refined notion of state responsibility, including the obligation to protect women from domestic assault. To import gender into constitutional law is to apply a fundamental right to equality to substantive inequalities, including violence.

3.5 From Essentialism to Intersectional Diversity

Thus, gender studies of constitutional law reveal the inequalities covered by the very promise of equal liberties for all. Feminist movements and theories challenge in fact every essentialism regarding sex and sexuality, in that they move beyond biology as destiny, and a prison of stereotypes. Then, fundamental rights are really designed to deliver the promise of justice to everyone. And again, who is that? The struggle to move from man to human is not yet over. Instead, it gets more challenging taking diversity into account.

There are at least two aspects to that challenge. First, the criticism of individual "men's" or "male" rights implies that adding "women's" rights does not get very far. It does not leave the binary scheme nor does it abandon essentialism. While a demand for women's rights remains crucial, a gender perspective in constitutional law introduces a broader notion of rights against intersectional inequalities. Therefore, second, a call for "women's rights" only must make sure it is not essentialist in invoking a homogenous group that does not exist, because women (and men) are not more similar to each other than to anyone else, socially, culturally, economically, politically, and even biologically. Therefore, a pressing question in constitutional law, taking gender into account, is how to properly address such "intersectionalities", as the varieties of mixed inequalities, all gendered, as well as racialized,[48] and informed by other notions of what is "normal", each and every time in context. Again, constitutional law then profits from gender studies to conceptualize rights and principles that account for the social diversity we live in, and with. An unbiased analysis of our world requires us to move from an idea of autonomous subjects and of normally similarly situated beings to a realistic account of experience as intersectional, as diverse. Grown in antiracist and feminist struggles in the U.S., and now a travelling concept, intersectionality conceptualizes inequalities at a crossroads of discrimination.[49]

[48] Combahee River Collective (1997); the foundational text is Crenshaw (1989).

[49] Crenshaw (1991) and Hornscheidt and Baer (2011).

For sure, there are many questions to ask and answer here as well. Intersectional equality takes identity seriously, but does not engage in identity essentialism, nor in a competition as "oppression olympics". It would also be dangerous to sort people into artificial groups, but remains important to insist on "women's rights", to name injustice as real. Since gendered inequalities are largely based on stereotypical assumptions of "the women" and "the men", group rights are helpful for minority concerns but come with the risk of "legal groupism",[50] resulting in hierarchical levels (which are in fact closed boxes) of "scrutiny" (in U.S. equality doctrine), or in ideas of "reverse discrimination" to counter affirmative action.

Also, there is no use in moving from the male to the female subject, in an emphasis of difference, as long as both are informed by problematic notions of autonomy, the public/private divide etc. Instead, how can we capture individuals as socially embedded, sharing a social space, always also part of collectivities, and diverse in many ways? Regarding concepts and doctrine, a gender perspective in constitutional law helps to address these challenges.

4 Foundational Structures

Obviously, gender informs constitutional law in the realm of fundamental rights, most prominently regarding equality. In addition, a gender analysis must be applied to the structural guarantees of constitutionalism, and move "beyond individual flashpoint issues".[51] There, constitutional law organizes politics as democratic, protected by the rule of law. Also, more or less explicitly, constitutions address "the social question", or distributive justice, in more or less committed welfare states, and must take its gendered inequalities into account. In addition, constitutional law is called upon to address the environment we live in, in favor of future generations, to organize a sustainable living on earth. Where and how does gender matter?

4.1 The Political Dimension: Democracy

Most prominently, constitutional law organizes politics as democratic, thus, an "opportunity structure"[52] more or less ex- or inclusive, including democracies embedded in international arrangements. As mentioned, constitutionalism, informed by a gender analysis, does not separate politics from the private in a seemingly, but

[50] "Groupism" is a sociological concept from J. Brubaker, used in law by Baer (2011). For more, see Baer (2013).

[51] Baines and Rubio-Marin (2005), p. 1.

[52] Irving (2008a, b), p. 32.

ideologically, neat line. Also, fundamental political rights address, at best, substantively, equal representation and agency. Is there, e.g., gender inequality in rules of party financing[53]? In addition, constitutional law must take intersectional diversity into account, which may also inform updated concepts of democracy. Thus, the constitutional framing of democratic politics profits from a gender perspective in various ways.

4.2 The Legal Dimension: Rule of Law

Furthermore, constitutional law safeguards the rule of law, or the principle of the "Rechtsstaat" or "l'état de droit", all distinctly meaningful, in context of place and time, including the now necessary conversation between national, trans- and international courts. In fact, constitutional law is the very embodiment of the rule of law itself, as long as it is more than a hymn and flag or *credo* or *decorum* (*supra* Sect. 2.4), but real law, and thus enforceable. And more to the point, and this is controversial, demanding, and surprising, constitutional law is the commitment even of democratically elected majorities to follow democratic procedures to organize power, and limit their power to respect rights. Therefore, judicial review of legislation is an indispensable ingredient of the project. To prevent decorative and abusive constitutionalism, courts empowered with judicial review must then be truly independent, and rules as well as political practice must ensure that decisions are implemented. And again, this is not a neutral point of view, from the perspective of gender. Indeed, as long as women's or "female" concerns are not recognized as equally important, and as long as gendered inequalities are an inherent aspect of the law itself as in marriage and family law, tax law and social security, employment and labor law, criminal law etc., the rule of law is tasked to ensure that such "minor" concerns are not overlooked. Here, the often controversial power of judicial review must be revisited and may gain, inequalities in mind, new meaning.

4.3 The Social Dimension: Welfare State

Next to democracy and the rule of law, constitutional law is also confronted with the question of social justice. In liberal traditions, this is not the first item on the agenda, and thus not the first generation of human rights. But it is an element of constitutionalism around the globe. Texts differ, being silent on or with social rights or principles of social justice, individually enforceable or to be considered by the state. However, the ability of constitutional law to address social realities matters.[54] And

[53] Muriaas et al. (2019).

[54] See also Goldblatt (2017).

again, it specifically matters regarding gender, since welfare is specifically gendered. A gender analysis of constitutional law then asks for unequal social effects of seemingly neutral regulation, and of regulatory schemes that perpetuate, or undo gendered injustice, and thus allow the law to find more nuanced answers to pressing questions.

4.4 The Material Dimension: Sustainability and the Environment

Recently, young people, and many of them women, and people from the Global South, added another item to the list of fundamental principles in constitutional law: sustainability, the environment, the climate. Beyond the actors who mobilize the law in formerly unknown settings, is there a gender dimension? Does the climate crisis affect men and women differently? As in all other fields of constitutional law, taking "gender" into account means to pose more nuanced questions.[55]

5 The Future: Constitutionalism Taking Gender into Account

Looked at without bias and closely, gender clearly informs constitutional law, including gendered inequalities at the intersections, and constitutionalism also clearly informs gender. Constitutional law has sometimes embraced and often perpetuated sexism, yet it has also been of help to struggles undoing gendered inequalities. One prominent strategy to do so is "gender mainstreaming,"[56] one instrument is affirmation action, a key tool is anti-discrimination law, and underlying must be a gender competent analysis of law, to achieve "gender justice", or "sex equality", in a broad sense. To take gender into account is not an abstract call, but a realistic and substantive way of doing justice to the world. This allows violence against women, patriarchal marriage and family law, pay discrimination, etc. to come into focus. Constitutional law is one field in which our very foundational commitments are negotiated. Taking gender into account thus matters.

[55] UN Secretary-General Antonio Guterres explained in a virtual town hall with women representing a range of civil society organizations during the 66th session of the Commission on the Status of Women (CSW66) that the climate crisis has a gender dimension in that women and girls are "bearing the brunt". See https://www.unwomen.org/en/news-stories/news/2022/03/the-climate-crisis-is-a-human-rights-crisis-and-a-womens-rights-crisis-un-chief-says.

[56] Gender Mainstreaming is a strategy to be non-discriminatory, and more equal, in all areas of policy making, in the UN, EU, and many other settings. See Jamil et al. (2020).

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The Role of the European Ombudsman in Strengthening Gender Equality Within the EU

Marko Davinić

Contents

Abstract The European Ombudsman investigates complaints about maladministration in the activities of the EU institutions, bodies, offices, or agencies. The main goal of this paper is to analyze the role and contribution of the European Ombudsman in the area of gender discrimination. The analysis is primarily based on case studies (cases brought by complainants) and the EO's strategic initiative in this area. The author argues that despite limited jurisdiction, the European Ombudsman has managed to raise many important questions and improve the practice of EU institutions, bodies, offices, and agencies regarding gender equality within the EU. In this way, it has become an important complementary tool in protecting gender equality and eliminating gender discrimination at the supranational level.

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> So many women continue to bear their gender as a handicap, to navigate the world as a potentially dangerous place, never to feel that ease and freedom in the world that is gifted to men as a birthright.[1]—Emily O'Reilly, the European Ombudsman

1 Introduction

For years, the EU and its Member States have been global leaders in gender equality. However, no Member State has achieved full equality between men and women. While the gender gap in education has been closed, the gender gaps in other areas (e.g., employment, pay, care, power and pensions) are still present.[2] Citizens of the EU who consider themselves victims of gender discrimination at the national level have the opportunity to address the national equality bodies,[3] national courts, and the European Court of Human Rights after exhausting all legal remedies available in their countries. Furthermore, suppose an individual considers that a national authority has failed to fulfill an obligation under the Treaties. In that case, he/she can complain to the Commission, which has the power to start an infringement procedure against the Member State and bring the matter before the Court of Justice of the European Union (CJEU).[4]

On the other hand, citizens of the EU who consider themselves victims of gender discrimination at the EU level can address the CJEU as the primary authority regarding the interpretation and proper implementation of EU law. In this regard, the essential procedures available to citizens are those for annulment of an illegal act

[1] *Speech by European Ombudsman Emily O'Reilly at the metooEP event* "Time's Up on sexual abuse and harassment in institutions and society" (Brussels, 6 February 2019): https://www.ombudsman.europa.eu/en/speech/en/109651.

[2] Communication from the Commission to the European Parliament, the Council, the European Economic, and Social Committee, and the Committee of the Regions—A Union Of Equality: *Gender Equality Strategy 2020-2025*, COM/2020/152 final, 1–2: https://op.europa.eu/en/publication-detail/-/publication/4ed128c0-5ec5-11ea-b735-01aa75ed71a1/language-en; As an illustration for gender gaps in the EU, we will mention few examples: the difference between the employment rate of women and men is 11.6%; gender pay gap is 15.7%, and gender pension gap is 30, 1%; women are only 32.2% of members of national parliaments, 7.5% of board chairs and 7.7% of CEOs in the largest companies. The gender gap has only been closed in education since more university graduates in Europe are women than men. See: *Gender Equality Strategy 2020-2025*, 8–10, 13; See also the Gender Equality Index as a tool to measure the progress of gender equality in the EU developed by the European Institute for Gender Equality: https://eige.europa.eu/gender-equality-index/about.

[3] See the list of national equality bodies within European Network of Equality Bodies (Equinet): https://equineteurope.org/what-are-equality-bodies/european-directory-of-equality-bodies; In addition, the European Institute for Gender Equality (EIGE), as an autonomous body of the EU, supports the EU and its Member States in the promotion of gender equality, and the fight against discrimination based on sex. See: https://eige.europa.eu/about.

[4] The European e-Justice Portal, *National courts and other non-judicial bodies*: https://e-justice.europa.eu/content_fundamental_rights-176-en.do; Article 258 of the TFEU.

of the EU institutions, for their inaction, and compensation for damage caused by their work.[5] Finally, many cases before CJEU are referred by courts and tribunals of a Member State regarding the interpretation of the Treaties and the validity and interpretation of acts of the institutions, bodies, offices, or agencies of the EU (so-called preliminary rulings).[6]

Nevertheless, citizens of the EU also have the opportunity to address the European Ombudsman (EO) regarding, among other things, gender discrimination committed by EU institutions, bodies, offices, and agencies. Therefore, the main goal of this paper is to analyze gender-related cases before the EO and evaluate the importance and achievements of the EO in strengthening the principle of gender equality within the EU. While there is a wealth of literature on the CJEU and its role in protecting gender equality rights,[7] this is not the case with the EO. That was the critical reason we conducted this research, primarily based on the analysis of the EO's case studies (cases brought by complainants) and on the EO's strategic initiative in this area.

The paper is divided into three parts: in the first part, EU legislation on gender equality is outlined; the second part is dedicated to the origin and development of the EO and its main competencies; finally, in the third—central part, the most important cases from EO practice regarding gender equality and protection against gender discrimination are analyzed.

2 Guarantees of Equality Between Women and Men in EU Legislation

The issue of gender equality and the elimination of discrimination on any grounds is deeply embedded in the foundations of the EU. Many provisions of the EU's founding Treaties are dedicated to this goal.

The Treaty on European Union (TEU) recognizes in the introductory provisions that the Union is founded on the fundamental values such as respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights and that "these values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."[8] Therefore, among other things, the European Union is

[5] See: Articles 263–265, 268 of the TFEU.

[6] Article 267 of the TFEU.

[7] See, for example: Guth and Elfving (2019); European Commission (2010); The Court of Justice of the European Union, *The Court of Justice and Equal Treatment*: https://curia.europa.eu/jcms/jcms/p1_3287489/en/; Brzezińska (2009).

[8] Article 2 of the TEU.

dedicated to combating social exclusion and discrimination and promoting equality between women and men.[9]

In a similar way, the Treaty on the Functioning of the European Union (TFEU) emphasizes that in "all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women."[10] To achieve the fundamental social rights, the EU shall support and complement the activities of the Member States, among others, in the labor market and treatment at work.[11] In addition, the EU promotes substantive equality by permitting the Member States to adopt "measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers".[12] The main objective of this norm is to ensure "full equality in practice between men and women in working life".[13] In that way, preferential treatment in equality between women and men in the labor market is guaranteed. Furthermore, the principle of equality in this area is further supported by a norm that prescribes that "each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied".[14]

The Charter of Fundamental Rights of the European Union (CFREU) has a particular part (Title III) dedicated to the question of equality. Among other things, it provides that "everyone is equal before the law",[15] and that any discrimination based on any ground, including sex, shall be prohibited.[16] A separate article is dedicated solely to the issue of equality between women and men. It is stipulated that this form of equality "must be ensured in all areas, including employment, work and pay".[17] At the same time it is provided that "the principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex."[18] In that way, affirmative action is ensured not just in the labor market, like in TFEU, but in all areas. The CFREU became legally binding in 2009 with the entry into force of the Treaty of Lisbon and

[9] Article 3, para. 3, subpara. 2 of the TEU.

[10] Article 8 of the TFEU.

[11] Article 153, para. 1 (i) of the TFEU.

[12] Article 157, para. 4 of the TFEU.

[13] Article 157, para. 4 of the TFEU.

[14] Article 157. para. 1 of the TFEU; 3. The equality of men and women in labour market is not just the responsibility of Member states, but also of EU institutions. Thus, it is prescribed that "the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value". Article 157, para. 3 of the TFEU.

[15] Article 20 of the CFREU.

[16] Article 21, para. 1. of the CFREU.

[17] Article 23, para. 1. of the CFREU.

[18] Article 23, para. 2. of the CFREU.

recognized, among others, the right to good administration and gender equality as fundamental rights of European citizens.[19]

Gender equality is guaranteed not just in primary law but also in secondary legislation of the EU. Thus, no less than six Directives are dedicated to the issues of equality between women and men: in the workplace,[20] in self-employment,[21] in access to goods and services,[22] in social security,[23] in pregnancy and maternity leave[24] and flexible working arrangements for parents and carers.[25] The principle of equality has been further strengthened by numerous cases brought to the CJEU which delivered justice for victims of discrimination.[26]

3 The Institution of the European Ombudsman

The institution of the ombudsman, in its basic form, is a person elected by the parliament, which controls the activity of the public administration on a national or regional level. Although it had only existed in the Scandinavian countries for a long time, this institution experienced expansion during the second half of the twentieth century, which cannot be compared to any other public body or institution. While many institutions have some of its characteristics, none of them has a specific

[19] *New statute: Ombudsman welcomes legal strengthening of her Office*: https://www.ombudsman.europa.eu/en/press-release/en/142792.

[20] 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): https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006L0054.

[21] 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: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32010L0041&rid=8.

[22] 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: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004L0113.

[23] 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: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A31979L0007.

[24] 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: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31992L0085.

[25] 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: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2019.188.01.0079.01.ENG.

[26] Gender Equality Strategy 2020–2025, 1, 5.

combination of prerogatives, which makes the ombudsman original and an indispensable element of a democratic society.[27]

The idea of establishing the Ombudsman within the European Community emerged in the mid-seventies. However, favorable conditions for introducing the EO had been created over time, primarily due to the general trend of protection of fundamental rights and freedoms in the world. No less critical was the need of political elites to bring the project of the EU closer to the citizens of this organization, as many had felt isolated from the process of European integration. All of this had contributed to a Danish proposal to be accepted and become part of the EC Treaty, which was signed in 1992. Several acts govern the status and operation of the EO. The legal basis of its operation is defined by the Treaty on the Functioning of the EU (Article 228). It is elaborated in detail in the Statute and Implementing provisions of the EO.[28] Although established by the Maastricht Treaty in 1992, the office started to work with the election of the first EO in 1995.[29]

Unlike most of the national ombudsmen, who represent only an additional means of control complementary to the judicial authorities (due to the provisions on exhaustion of all legal remedies), this is not the case at the EU level. The recourse to the CJEU (which is in progress or completed) precludes subsequent activities of the EO in the same case.[30] On the other hand, the lodging of complaints to the EO does not preclude later proceedings before the CJEU, but it is often impossible due to very short deadlines for filing lawsuits. This means that citizens and organizations must choose between addressing the CJEU and the EO, considering the basic features and procedures before these institutions. Nevertheless, the EO can also be an additional means of control for the courts when they cannot resolve an issue (for example, because it is not legal). Furthermore, in contrast to the national level, where ombudsman review is limited to the public administration authorities, the EO oversees all EU institutions, bodies, offices, and agencies, including the CJEU and the European Parliament, concerning their administrative activities. Therefore, it is clear that these institutions' judicial, legislative, and political activities are exempt from its jurisdiction.[31]

The EO can initiate a procedure based on authorized subjects' complaints or on its own initiative. In the first case, the role of the EO is predominantly passive because it

[27] Davinić (2013), pp. 381–382.

[28] Davinić (2013), pp. 386–387; See: *Statute of the EO*: https://www.ombudsman.europa.eu/en/legal-basis/statute/en; *Decision of the EO adopting Implementing Provisions*: https://www.ombudsman.europa.eu/en/legal-basis/implementing-provisions/en.

[29] The first EO was former Finish Ombudsman Jacob Söderman. He was succeeded in 2003 by Professor Nikiforos Diamandouros, and the current Ombudsman, Emily O'Reilly, was elected in 2013. The next election of a European Ombudsman will take place in 2024. The office of the European Ombudsman had 73 positions in 2021 in two units in Brussels and Strasbourg. See: https://www.ombudsman.europa.eu/en/history; https://www.ombudsman.europa.eu/en/press-release/en/142792.

[30] Davinić (2013), p. 388.

[31] Davinić (2013), p. 388.

responds to complaints referred to it by citizens and organizations. In the second case, the EO takes the initiative in areas and situations where he or she deems it necessary. In most cases, the EO initiates proceedings based on complaints while taking the initiative only in exceptional cases.[32]

Cases that the EO has dealt with over the years were related to various subject matters, especially access to information and documents, actions of the Commission in connection with Article 258 TFEU (its role as a guardian of the Treaties),[33] awards of tenders and grants, execution of contracts, competition and selection procedures within the EU institutions, etc. The importance of the EO is particularly evident concerning those irregularities that cannot be sanctioned by the CJEU (e.g., unfairness, avoidable delay, negligence). Complaints in this area are not based only on legal arguments but also on the general standard of good administrative behavior and universal principles of natural law and justice.[34]

4 Gender Equality Cases in the European Ombudsman's Practice

4.1 Sexual and Psychological Harassment

Harassment is often described as a series of sexual and psychological attacks on a person's dignity that can seriously damage the victim's health. Consequently, victims feel anxiety and low self-esteem. As a result, they are insecure about their abilities, more frequently absent from work, and may even be unable to fulfill usual work assignments.[35]

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[32] Davinić (2013), p. 389.

[33] See, for example case 230/2011/EIS which concerns the European Commission's handling of infringement complaint against Finland, regarding an allegation of discrimination against men in pension schemes: https://www.ombudsman.europa.eu/en/decision/en/12037.

[34] Davinić (2013), pp. 391–392; About the institution of the EO, see: Vogiatzis (2018); Craig (with Tsadiras) (2012), pp. 739–762; The European Ombudsman (2005); Heede (2000).

[35] See: Eurofound, *Violence and harassment in European workplaces: Extent, impacts and policies*: https://www.eurofound.europa.eu/publications/report/2015/violence-and-harassment-in-european-workplaces-extent-impacts-and-policies; In the EU secondary legislation harassment is defined in the following way: "where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment". In the same document the sexual harassment is defined as follows: "where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment". See: Article 2, para. 1 lit. c and d of 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); Despite the established opinions, gender-based violence is very present in the EU countries. For example, 33% of women in the EU have

The EU institutions and agencies generally have high standards, but they are not immune to workplace harassment. That was why the EO launched a strategic initiative in 2018, as a more informal tool than an ordinary inquiry, with the primary intention to identify and share best practices across the EU civil service. The initiative's focus was not only on the main EU institutions but also on no less than 26 EU institutions and agencies. All of them were asked about their anti-harassment policies, the number of reported cases of harassment, and their outcomes.[36] The EO emphasized that the goal of this initiative was not the investigation of harassment in substance but to examine the appropriateness and effectiveness of procedures preventing and dealing with harassment cases.[37]

As a result of this initiative, the EO identified a series of best practices that she strongly encouraged all EU institutions, agencies, and bodies to adopt. The EO divided these practices into two main categories: prevention of harassment and dealing with harassment.[38]

4.1.1 Prevention of Harassment

Awareness-raising is a crucial component of preventing harassment as the practice shows that less harassment will occur when employees consider that their employer deals effectively with conflicts. Furthermore, civil servants should know what constitutes both sexual and psychological harassment and how they can prevent it and report it if it happens. Best practices in this area include publishing anti-harassment policies on the institution's website, distributing brochures to employees, displaying contact details of confidential counselors, and organizing information sessions for staff members. A prerequisite for this is an anti-harassment policy that is clear and effective with regular evaluation, monitoring, and improvement.[39]

The anti-harassment training should be compulsory for all staff members, including managers, civil servants, and especially newcomers. It is emphasized that it should be organized regularly and up to date with the latest developments and forms of harassment.[40] Primarily, EU institutions and agencies should provide adequate guidelines for their staff on how to interact on social media and what to do in the case

experienced physical and/or sexual violence, while not less than 55% of women have been sexually harassed. See: *Gender Equality Strategy 2020-2025*, 3.

[36] Report of the EO on dignity at work in the EU institutions and agencies, SI/2/2018/AMF, para. 3–4: https://www.ombudsman.europa.eu/en/doc/inspection-report/en/107799.

[37] *Speech by EO Emily O'Reilly at the metooEP event* "Time's Up on sexual abuse and harassment in institutions and society".

[38] Report of the EO on dignity at work in the EU institutions and agencies, SI/2/2018/AMF, para. 5.

[39] Report of the EO on dignity at work in the EU institutions and agencies, SI/2/2018/AMF, para. 6–8.

[40] Report of the EO on dignity at work in the EU institutions and agencies, SI/2/2018/AMF, para. 9.

of cyberbullying, which may imply inappropriate, misogynistic, and hate speech and abusive online messages ranging from mild insults to death threats.[41]

Furthermore, research has shown that severe working conditions, such as a heavy workload and job demand that lack clear guidance, may increase the likelihood of harassment at work.[42] Therefore, regular assessment of psychosocial risks at work is the responsibility of the EU institutions and agencies.[43] Finally, the EO emphasized the importance of gender balance in management positions. The Council of Europe has defined "de facto equality" in public decision-making bodies as a "*minimum 40% representation of each gender*",[44] and the EO has encouraged the institutions to be ambitious in this respect.[45]

4.1.2 Dealing with Harassment

When harassment has already occurred, both the informal and formal procedures are essential for its elimination. As the EO pointed out, "people who have been harassed need support, need safe avenues through which they can navigate their complaints and the task of the institutions is to create those safe avenues."[46]

The informal procedure usually involves consulting confidential counselors or external mediators. The EO has emphasized that early intervention is vital in this process. Thus, she pointed out that civil servants should be encouraged to raise harassment issues as early as possible and "the role of confidential counsellors should be to help staff members to define, understand and assess the situation. Confidential counsellors should inform staff members about the procedures they can use and provide guidance in an impartial and objective manner".[47] Furthermore, the EO has encouraged the cooperation between confidential counselors from

[41] Report of the EO on dignity at work in the EU institutions and agencies, SI/2/2018/AMF, para. 15.

[42] Eurofound's report on "*Violence and harassment in European workplaces: Extent, impacts and policies", in* Report of the European Ombudsman on dignity at work in the EU institutions and agencies, SI/2/2018/AMF.

[43] Report of the EO on dignity at work in the EU institutions and agencies, SI/2/2018/AMF, para. 12–14.

[44] See *Council of Europe's Recommendation on balanced participation of women and men in political and public decision making*. Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e0848 *in* Report of the European Ombudsman on dignity at work in the EU institutions and agencies, SI/2/2018/AMF.

[45] Report of the EO on dignity at work in the EU institutions and agencies, SI/2/2018/AMF, para. 16.

[46] *Speech by EO Emily O'Reilly at the metooEP event* "Time's Up on sexual abuse and harassment in institutions and society".

[47] Report of the EO on dignity at work in the EU institutions and agencies, SI/2/2018/AMF, para. 23.

different institutions, which implies the organization of joint training and the exchange of best practices.[48]

On the other hand, the EO pointed out that most of the EU institutions and agencies in the survey had already established a formal procedure in harassment cases with clear rules and deadlines in the investigation process. This procedure should result in effective measures if it is proven that harassment has occurred. Successful formal procedures depend on impartial and independent investigators, no matter whether they are of an internal or external character. However, it is sometimes difficult to form special internal units for investigations, especially in small institutions and agencies, which is why the EO has supported and welcomed the creation of a pool (network) of independent investigators from different institutions.[49]

Special attention in the EO's report is dedicated to the question of harassment complaints against high-ranking personnel since staff members are particularly vulnerable in these situations. This problem was separately discussed in the European Parliament in October 2017 in the wake of the Harvey Weinstein scandal and press allegations regarding incidents in the Parliament.[50] During this plenary session, a Resolution was adopted in which it is emphasized that the European Parliament "strongly condemns all forms of sexual violence and physical or psychological harassment and deplores the fact that these acts are too easily tolerated, whereas in fact they constitute a systemic violation of fundamental rights and a serious crime that must be punished as such." [51] In its reply to the EO, Parliament emphasized that cases of sexual harassment committed by Members of the European Parliament (MEPs) are significantly underreported, especially in the case of parliamentary assistants, which are dependent and directed towards them. That was one of the reasons why the Parliament in 2018 adopted new rules for dealing with harassment complaints against MEPs and introduced more serious financial consequences if harassment has been proven.[52]

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[48] Report of the EO on dignity at work in the EU institutions and agencies, SI/2/2018/AMF, para. 24.

[49] Report of the EO on dignity at work in the EU institutions and agencies, SI/2/2018/AMF, para. 28–32.

[50] *Sexual harassment: MEPs debate situation in the EU in plenary*: https://www.europarl.europa.eu/news/en/headlines/society/20171023STO86603/sexual-harassment-meps-debate-situation-in-the-eu-in-plenary.

[51] *European Parliament resolution of 26 October 2017 on combating sexual harassment and abuse in the EU (2017/2897(RSP))*: https://www.europarl.europa.eu/doceo/document/TA-8-2017-0417_EN.html.

[52] Report of the EO on dignity at work in the EU institutions and agencies, SI/2/2018/AMF, para. 35–37; In one of her speeches, the EO addressed this problem: "Underreporting suggests that the 'old' culture of silence still lingers. There is not yet a fully shared acceptance of what constitutes harassment and consequently no shared outrage when it happens. At worst, the victim can be deemed part of the problem. The low number of cases being reported is a pity but hardly surprising. Harassment is not like having your handbag stolen. It isn't neatly defined, it encourages others to evaluate you as a likely or unlikely victim of harassment, it risks further sexualising you in cases of sexual abuse, and there is the risk of being branded as trouble, as difficult, with the inevitable

The EO attached great importance to the issue of rehabilitation measures and recommended that all EU institutions and agencies provide appropriate mechanisms intended to support and help victims of harassment. The primary goal of these measures is to ensure that their professional career and advancement are not hindered and limited.[53]

4.2 Pregnant Candidate Case

In case 3278/2004/ELB, the complainant applied for an internal competition organized by the European Parliament and mentioned that she was pregnant and due to give birth in mid-June 2004. On 4 June 2004, the Selection Board invited her to take tests on 2 July 2004. On 1 July 2004, she gave birth and informed Parliament that she would not be able to attend the tests the day after and requested to take them later. Parliament replied negatively to her request, and she appealed against Parliament's decision, arguing that this institution had discriminated against her based on sex and that "it is impossible for a woman, one day after having given birth, to take part in a competition, whereas it is possible for a man who has recently become a father."[54]

Parliament rejected her appeal, on the ground "that, according to the case-law of the Community Courts, tests should take place on the same date for all candidates. As regards the argument that tests could be organized at different times, Parliament noted that, as soon as candidates read the tests, secrecy is no longer maintained. Moreover, the rule of anonymity would be breached. It also stated that a competition cannot be challenged because one candidate is absent, be it for medical, practical or other reasons".[55]

The complainant then filed a complaint to the EO, maintaining the arguments submitted in her appeal. After assessing the Parliament's opinion and the complainant's observations, Mr. Diamandouros, the EO at the time, found an instance of maladministration in the Parliament's actions. He considered that the Parliament had failed to give any weight to the principle of equality regarding pregnant women's specific situation.[56] The EO pointed out that the principle of non-discrimination requires that different situations must not be treated in the same way unless such treatment is objectively justified. "The refusal to organize a new series of tests on a different date for candidates who failed to appear at the exams on the date the

consequence for one's career." *Speech by European Ombudsman Emily O'Reilly at the metooEP event* "Time's Up on sexual abuse and harassment in institutions and society".

[53] Report of the EO on dignity at work in the EU institutions and agencies, SI/2/2018/AMF, para. 39.

[54] Draft recommendation to the European Parliament in complaint 3278/2004/ELB: https://www.ombudsman.europa.eu/en/recommendation/en/501.

[55] Draft recommendation to the European Parliament in complaint 3278/2004/ELB.

[56] Draft recommendation to the European Parliament in complaint 3278/2004/ELB.

competition took place, because of their physical condition due to their giving birth to a child, can affect only members of the female sex", he concluded.[57] In his draft recommendation, he underlined that Parliament's refusal, in this case, was not well-founded and constituted *de facto* gender discrimination. In its reply, the Parliament showed commitment to revise the conditions for participation in future competitions for women who have recently given birth and its policy on setting the date of tests for pregnant candidates. Accordingly, the EO decided not to pursue the matter further and closed the case.[58]

4.3 Gender Discrimination in Management Positions

In case 366/2017/AMF, the complainant was a staff member of the European Investment Bank (EIB) who lost her management position in the department's reorganization. She then participated in a selection procedure for a new management post within the same department but was not selected. The complainant argued "that she and the other female managers in the department had been unfairly demoted from their management roles and that, in general, women in the EIB do not have the same opportunities as men to access management posts".[59] She made these claims to the EIB following its whistleblowing policy and reported on gender discrimination concerning various positions, arguing that only 20% of managers, in sharp contrast to 89% of the administrative support posts in this bank, were occupied by women in 2015. Since the EIB did not react to her report, she filed the complaint to the EO in March 2017, who opened an inquiry.[60] It took the EIB more than 8 months to reply to the complainant's report. Therefore, the EO suggested that the institution set deadlines for handling reports under its whistleblowing policy, which EIB accepted. Furthermore, the EIB failed to give a clear answer on the issue of alleged gender discrimination as a potential systemic problem within the Bank. In this context, the EO recommended that the EIB should comprehensively reply to the complainant, clearly indicating the actions it had been taking and intended to take to achieve gender balance.[61] In its response, the EIB provided the complainant with a detailed reply, including an assessment of gender balance. It also provided the complainant and the Ombudsman with a copy of its Diversity and Inclusion Strategy. The EIB set

[57] Draft recommendation to the European Parliament in complaint 3278/2004/ELB.

[58] Decision of the European Ombudsman on complaint 3278/2004/ELB against the European Parliament: https://www.ombudsman.europa.eu/en/decision/en/2322.

[59] Decision in case 366/2017/AMF on how the European Investment Bank handled concerns about gender discrimination and equal opportunities for its staff, para. 1: https://www.ombudsman.europa.eu/en/decision/en/105387.

[60] Decision in case 366/2017/AMF on how the European Investment Bank handled concerns about gender discrimination and equal opportunities for its staff, para. 1, 3–4.

[61] Decision in case 366/2017/AMF on how the European Investment Bank handled concerns about gender discrimination and equal opportunities for its staff, para. 5–6, 9–10.

a target to increase the percentage of women managers to 33% and male support staff to 21% in 2021. Since the EIB accepted her suggestion for improvement and recommendations, the EO decided to close the case. However, the EO made an additional suggestion for improvement regarding a balanced representation of both genders: "The EIB should try harder to achieve a balanced representation of both men and women in its management positions, aiming higher than the target of 33% women in management positions by 2021".[62]

4.4 Part-Time Work for National Experts

In case 242/2000/GG, the complainant was a UK civil servant who applied for a post as a national expert at the European Commission (seconded national expert—SNE). She wanted to work on a part-time basis in order to be able to take care of her 11-month-old son at the time. However, she was informed that the only option for national experts was to work full-time throughout the detachment, and the complainant reluctantly had to withdraw her application. She then filed the complaint to the EO, arguing that the relevant rule "was discriminatory on the grounds of sex since it was likely to affect a greater proportion of women than men as women generally have more childcare commitments than men".[63] The Commission replied that the decision was not discriminatory since it was based on the objective needs of the institution, which, however, was looking for the option of future part-time work for SNEs where it is possible.[64]

The EO of the time, Jacob Söderman, considered that around 82% of Commission's officials working part-time were women, which implied that the impossibility of part-time work for SNEs was probably to inflict more damage to women than to men. The EO, therefore, made the following draft recommendation to the Commission in May 2001: "The European Commission should abolish its rule prohibiting national experts on secondment to the Commission from working part-time by 30 September 2001 at the latest".[65] In response, the Commission sent its detailed opinion in July 2001, which again failed to provide a definite date by which the discriminatory measure should finally be abolished. Thus, it did not comply fully with the EO's draft recommendation. According to EO's opinion, since this case was of significant public interest, he submitted a special report to the European

[62] Decision in case 366/2017/AMF on how the European Investment Bank handled concerns about gender discrimination and equal opportunities for its staff, para. 15, 19, 21, 31; See also case 184/2005/GG where the EO found no evidence of gender discrimination during selection procedure: https://www.ombudsman.europa.eu/en/decision/en/2452.

[63] Draft recommendation to the European Commission in complaint 242/2000/GG: https://www.ombudsman.europa.eu/en/recommendation/en/437.

[64] Draft recommendation to the European Commission in complaint 242/2000/GG.

[65] Draft recommendation to the European Commission in complaint 242/2000/GG.

Parliament in November 2001.[66] In this report, the EO repeated a recommendation to the Commission, but instead of proposing a concrete date for the abolition of the disputable rule, he used the phrase "as quickly as possible".[67] As a result, the European Commission adopted Rules applicable to National Experts on Secondment to the Commission in April 2002, which prescribed the possibility of part-time work by SNEs in justified cases.[68]

4.5 Paternity Leave

In case 2501/2009/(MF)RT, the complainant was a European Parliament official who became the father of twins in 2008. The internal rules prescribed 10 days' special leave for fathers following the birth of a child. Taking that into account, as well as the practice of some other institutions (e.g., the Court of Justice of the EU) that grant their male staff 20 days' special leave in the case of multiple births, the complainant considered that he was entitled to the same amount of time. However, the Parliament gave him only 12 days (20% more than regular). The complainant was not satisfied, and after exhausting internal protection mechanisms, he filed the complaint to the EO, arguing "that Parliament's decision to grant him only two days' special leave for the birth of his second son, a twin, was unfair," and that it creates "de facto discrimination against the second twin."[69]

In its reply, Parliament specified that its internal rules do not regulate special leave for fathers in the event of multiple births. Therefore, it used an analogy with the provisions governing maternity leave (extension from 20 to 24 weeks in these cases) and thus extended the 'paternity' leave by the same percentage—20%.[70] Mr. Diamandouros, the EO of the time, considered this practice unjustified since

[66] Special Report from the European Ombudsman to the European Parliament following the draft recommendation to the European Commission in complaint 242/2000/GG: https://www.ombudsman.europa.eu/en/special-report/en/381.

[67] Special Report from the European Ombudsman to the European Parliament following the draft recommendation to the European Commission in complaint 242/2000/GG.

[68] See: Article 12 of the Rules applicable to National Experts on Secondment to the Commission, European Commission, Brussels, 30 April 2002, C (2002) 1559; This option has been reaffirmed in the subsequent rules on SNEs. See: Art. 12 of the Commission decision laying down rules on the secondment of national experts to the Commission, European Commission, Brussels, 1/6/2006, C (2006)2033: https://www.ab.gov.tr/files/Duyurular/sne.pdf; Article 12 of the Commission decision of 12.11.2008 laying down rules on the secondment to the Commission of national experts and national experts in professional training, European Commission, Brussels, 12.11.2008, C(2008) 6866 final: https://www.eea.europa.eu/about-us/jobs/commission-decision-laying-down-rules.

[69] Decision of the European Ombudsman closing his inquiry into complaint 2501/2009/(MF)RT against the European Parliament, para. 1–7, 48: https://www.ombudsman.europa.eu/en/decision/en/11324.

[70] Decision of the European Ombudsman closing his inquiry into complaint 2501/2009/(MF)RT against the European Parliament, paras. 15, 17.

maternity and 'paternity' leave served different purposes. According to him, "maternity leave is designed only for female officials who have given, or who are going to give, birth and allows mothers to take care of their children during the first four months of life. The special leave is intended to allow an official who becomes a father to assist the mother of his newborn child/children during the mother's maternity leave".[71] Furthermore, the EO reminded Parliament that some national legislation (e.g., Swedish) multiplies the number of days according to the number of children born. In light of the above, the EO considered that principle of good administration would require Parliament to adopt a more generous approach, which would imply 10 extra days of special leave. Nevertheless, Parliament rejected the EO's proposal for a friendly solution and decided to maintain its challenged practice.[72] The EO characterized Parliament's refusal as an instance of maladministration, and made the draft recommendation, which Parliament also rejected. However, the EO did not consider it valuable and expedient to submit a special report to Parliament against its own administration, so he closed the case with a critical remark.[73]

5 Conclusion

Over the years, the EO has been accepted as a substantial body for the protection of the rights of citizens and legal persons in the EU. Nevertheless, its importance should not be overestimated, as it performs an important but limited function in the EU. The EO is only one tool in a wide range of institutions that ensure the quality and proper actions of the EU institutions. Only their coordinated activities can contribute to achieving the ideal of good administration, which would enable prescribed rights to be put into practice. Moreover, the success and effectiveness of the EO are determined by extensive cooperation with other EU institutions, foremost with the European Parliament, the European Commission, and the CJEU. The great advantage of the EO in comparison to other authorities is that he or she exercises "soft" control, relying on persuasion and personal authority. In this way, the EO directs more than restricts authorities, leaving them enough space in their activities.[74]

The EO's function is primarily limited by its jurisdiction, which is tied to the control of the EU institutions, thereby excluding national and local authorities when they implement EU law. Since a minimal number of EU citizens has direct contact

[71] Decision of the European Ombudsman closing his inquiry into complaint 2501/2009/(MF)RT against the European Parliament, summary.

[72] Decision of the European Ombudsman closing his inquiry into complaint 2501/2009/(MF)RT against the European Parliament, para. 24–25, 29–30, 35.

[73] Decision of the European Ombudsman closing his inquiry into complaint 2501/2009/(MF)RT against the European Parliament, para. 54.

[74] Davinić (2013), pp. 382, 392–393.

with EU institutions, the circle of potential complainants is significantly reduced. Notwithstanding the small number of cases the EO has dealt with in gender discrimination, this institution has raised many important questions and improved the practice of EU institutions, bodies, offices, and agencies regarding gender equality within the EU. Each successfully solved case has had a significant preventative effect on future practice. Furthermore, in a symbolic sense, it is very important that the function of the EO, after two men, has been performed by a woman in the last 8 years. At the same time, the fact that she comes from Ireland, which is known for its traditional and conservative beliefs and values, has enabled her to understand better and identify the problems that women continue to face at all levels of government in EU countries. There is no doubt that Ms. O'Reilly, together with her predecessors Mr. Söderman and Mr. Diamandouros, has managed to bring the EO institution closer to the EU citizens and establish it as a powerful complementary tool in protecting their rights.

Despite everything that has been accomplished in this area, all institutions at the national and supranational levels have a long way to go to achieve full gender equality and eliminate all forms of gender discrimination. Given that non-reporting of sexual harassment and gender discrimination cases is one of the main problems in this area, we believe a particular unit should be established within the EO's office to deal with these cases. Several employees of both sexes should be involved in its work, but with a larger number of women, since they are the most frequent victims in such situations. Furthermore, the EO should make additional efforts to inform citizens of the EU about the existence of such a unit, and that cases of sexual harassment and gender discrimination fall within its competence, especially in situations where EU institutions do not have transparent and effective internal protection mechanisms. Finally, we believe that the strategic initiative conducted by the EO, which had dealt with the issue of harassment, could be periodic (every 3 or 4 years) and include not only the institutions and agencies that participated in the first initiative, but also many others. Moreover, it should not be limited to the harassment but should cover other possible aspects of gender discrimination. In this way, the EO office could follow the trends (progress and setbacks) and consequently give recommendations to the EU institutions. All of this would contribute to strengthening the principle of gender equality, more robust protection of possible complainants, and greater recognition of the role and importance of the EO institution in this area.

Legal Documents, Internet Resources, and Cases

Commission decision laying down rules on the secondment of national experts to the Commission, European Commission, Brussels, 1/6/2006, C (2006)2033: https://www.ab.gov.tr/files/Duyurular/sne.pdf.

Commission decision of 12.11.2008 laying down rules on the secondment to the Commission of national experts and national experts in professional training,

European Commission, Brussels, 12.11.2008, C(2008) 6866 final: https://www.eea.europa.eu/about-us/jobs/commission-decision-laying-down-rules.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions—A Union Of Equality: *Gender Equality Strategy 2020-2025*, COM/2020/152 final: https://op.europa.eu/en/publication-detail/-/publication/4ed128c0-5ec5-11ea-b735-01aa75ed71a1/language-en.

Consolidated version of the Treaty on European Union (TEU): https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT.

Consolidated version of the Treaty on the Functioning of the European Union (TFEU): https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT.

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: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004L0113.

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: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A31979L0007.

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: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31992L0085.

Council of Europe's Recommendation on balanced participation of women and men in political and public decision making: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e0848.

Decision in case 366/2017/AMF on how the European Investment Bank handled concerns about gender discrimination and equal opportunities for its staff: https://www.ombudsman.europa.eu/en/decision/en/105387.

Decision of the EO adopting Implementing Provisions: https://www.ombudsman.europa.eu/en/legal-basis/implementing-provisions/en.

Decision of the European Ombudsman closing his inquiry into complaint 230/2011/(TS)EIS against the European Commission: https://www.ombudsman.europa.eu/en/decision/en/12037.

Decision of the European Ombudsman closing his inquiry into complaint 2501/2009/(MF)RT against the European Parliament: https://www.ombudsman.europa.eu/en/decision/en/11324.

Decision of the European Ombudsman on complaint 184/2005/GG against the European Commission: https://www.ombudsman.europa.eu/en/decision/en/2452.

Decision of the European Ombudsman on complaint 3278/2004/ELB against the European Parliament: https://www.ombudsman.europa.eu/en/decision/en/2322.

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

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Mainstreaming Gender into Public Policies: A Tale of Two Countries

Branko Radulović and Vanesa Hervías-Parejo

Contents

Abstract The primary purpose of this paper is not to offer a single universally transferable model but rather to compare and highlight aspects of the Spanish system that can be successfully transferred to Serbia and similar countries taking the first steps of gender mainstreaming. According to the Gender Equality Index, Spain is among the top European countries, while Serbia lags behind the EU average in overall gender equality. On the one side, Spain has a proven track record and developed methods to strengthen the integration of the gender perspective in all government programs and policies. On the other side, Serbia has yet to more systematically introduce gender-related aspects in public policies. After providing the context, the paper provides historical background and key impediments to gender mainstreaming in both countries. This is followed with the brief description of legal

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and institutional framework. Next, the current situation and gender mainstreaming tools are analyzed. Finally, the authors assess lessons from Spanish experience that may be relevant for Serbia to implement gender competent public policies.

1 Introduction

Gender equality policies materialize the institutional effort to address inequalities between women and men. In this regard, at the European level and particularly during the last four decades, we have witnessed a remarkable development of strategies, tools and regulations to make such equality effective. Today, however, public authorities and public opinion, in general, continue to debate the social impact, effectiveness and efficiency of the policies implemented.[1] In this regard, the Fourth World Conference on Women, held in Beijing in 1995, marked a turning point by highlighting the need to involve society as a whole in achieving gender equality. For the first time, this Conference also pointed-out that the promotion of equality cannot be dealt solely by sector and through equality policies but must be integrated into public policies as a whole. Thus, from 1995 to the present day, gender mainstreaming has been viewed as the most effective strategy for achieving the equality between women and men that has emerged as an approach relevant to all states and public institutions.[2] However, the policies sometimes fail to materialize in actions and measures that boost the fight against persistent inequalities.[3] The literature often perceived gender mainstreaming as a potentially having radical influence on gender related public policies, but the approach has also been profoundly criticized.[4] The founding documents of gender mainstreaming in Europe define it as the incorporation of the gender perspective in a transversal manner in all public policies.[5]

The implementation of gender mainstreaming depends on the specific country setting and respective social context. Although in different degrees, limitations to the implementation of gender mainstreaming can be observed, for example, in countries such as Spain and Serbia. Cross-cultural research shows that countries may substantially differ with respect to beliefs and traditional expectations about the gender roles, that is, whether women and men should have distinctive or overlapping roles.[6] In that respect, a useful comparison between these two countries could be provided

[1] Alfama i Guillen (2017), p. 41.

[2] Grañeras Pastrana et al. (2015), p. 218; Hafner-Burton and Pollack (2002), pp. 341–350.

[3] Gómez Villalta (2017), p. 24.

[4] Caglar (2013); Walby (2005), p. 338.

[5] Council of Europe (1999). Instigated by the adoption of gender mainstreaming perspective in 1996 the process has evolved considerably over the last decades. For an overview see Lomazzi and Crespi (2019).

[6] Crespi (2009), p. 174.

through the lens of dimensions of national culture. Namely, Hofstede et al. (2010) distinguished several dimensions in which national cultures differ—power distance, uncertainty avoidance, individualism-collectivism, masculinity-femininity, and long-term-short-term orientation.[7]

While there are differences between Spain and Serbia with respect to power distance (the extent to which the less powerful members accept hierarchical order and expect that power is distributed unequally), both countries in comparison with the other European countries are relatively hierarchical societies. Similarly, both countries score low on the masculinity-femininity dimension (distribution of roles between the genders) meaning that the dominant values in societies are caring for others and quality of life and not achievement and success. [8] These findings suggest that gender mainstreaming in Spain and Serbia may face comparable path dependency and similar impediments and limitations regarding expectations and beliefs about the gender roles. This is relevant for Serbia, as in terms of development and values, Spain is much closer compared to the Scandinavian countries that are usually seen as forerunners and role models regarding gender equality policies. Hence, these similarities may be important in terms of the implementation of gender mainstreaming policies, especially considering the difference between the current stage of implementation of gender mainstreaming and diverse approaches taken by policymakers.

On the one hand, Spain is in seventh place in the ranking of European countries in the development of equality policies.[9] One of the aspects in which Spain has improved the most is equal access to positions of power and responsibility. Thus, over the last decade, the number of women managers in Spanish companies has risen from 10% to 27%. In this regard, the number of female managers at the Bank of Spain is particularly noteworthy, in only 10 years has risen from 23% to 60%.[10] Another example to highlight is the female representation in the Congress of Deputies, that has risen from 34% to 42%.[11] In addition, Spain has a 14.3% gender inequality rate which places it among the 11 lowest countries that make up the OECD.[12] However, a wage gap of 17% persists, and the risk of poverty for women continues to be higher (21%) than for men (20%).[13] In addition to the above, women continue to be concentrated in certain production sectors where they also have fewer

[7] Hofstede et al. (2010), p. 29.

[8] For a detailed interpretation see https://www.hofstede-insights.com/country-comparison/serbia,spain/.

[9] EIGE (2020). The Gender Equality Index has six components work, money, knowledge, time, power and health. With 70.1 points out of 100, Spain is 2.7 points above the EU average (67.4) and behind Sweden (83.6), Denmark (77.5), France (74.6), the United Kingdom (72.2), Finland (73.4), the Netherlands (72.1), Ireland (71.3) and Belgium (71.1). In addition, the European report highlights that the index for Spain has grown at a faster rate than that of the surrounding countries.

[10] CEOE (2019).

[11] EUROSTAT (2017).

[12] SIGI (2019).

[13] EIGE (2020).

possibilities for professional promotion.[14] To a greater extent, women are also subjected to part-time work and double and triple shifts, which are developed between the paid economy, the household economy and the care of family members and dependents.[15] Likewise, the figures for gender violence, far from decreasing, have continued to increase. Thus, in 2003–2021 period, 1113 fatal victims of gender violence have been recorded in Spain.[16] From 2019 onwards, it is possible to observe an advance in the diversification of the institutionally recognised forms of violence. Thus, the Spanish Government's Delegation for Gender Violence considers situations that are also gender violence and that had been excluded from this concept until now. This is the case of non-partner violence, sexual harassment, sexist (or gender-based) harassment and stalking (or repeated harassment).[17]

Meanwhile, in Serbia, studies generally show that women are often discriminated against, and that in terms of power and responsibilities, they are in a relatively worse position than men.[18] Several issues related to gender inequality in Serbia are particularly noteworthy. Generally, women are less employed despite being more educated, they work in jobs that pay less, they are burdened more with household work and childcare than men and take less part in decision making. The gender pay gap in Serbia is substantial and persistent.[19] Women earn on average approximately 90% of the average wage of men. As in Spain, the at-risk-of-poverty rate, in Serbia is higher for women (23.6%).[20] Women are also frequently exposed to discriminatory sex and gender stereotypes and harassment. Violence against women is especially pronounced. For example, OSCE survey on violence against women found that approximately a fifth of women in Serbia aged 15 and over have experienced physical and/or sexual violence either by partners or other persons.[21] The incidence of violence has been constantly rising during the past 10 years, and in the majority of cases the victims are women.

The Gender Equality Index for Serbia (for 2018) has a score of 58.[22] Serbia observed constant, but a sluggish improvement compared to 2014 when the index

[14] González and Mateos (2020), p. 4.

[15] World Economic Forum (2020).

[16] Government Delegation for Gender Violence (2021). For more information, you can consult the documentary Mil mujeres asesinadas de Radio y Televisión Española: https://lab.rtve.es/mil-mujeres-asesinadas and the page of the Government Delegation against gender violence: https://violenciagenero.igualdad.gob.es/violenciaEnCifras/victimasMortales/fichaMujeres/home.htm.

[17] Marín Zurita et al. (2021).

[18] SIPRA (2021). For an overview visit https://socijalnoukljucivanje.gov.rs/wp-content/uploads/2021/11/Status_of_vulnerable_groups_in_the_process_of_the_accession_of_the_Republic_of_Serbia_to_the_European_Union-Status_of_women_and_gender_equality.pdf

[19] Anić and Krstić (2019), p. 156.

[20] For an overview of the at-risk-of-poverty rate in Serbia visit https://www.stat.gov.rs/en-us/oblasti/potrosnja-prihodi-i-uslovi-zivota/prihodi-i-uslovi-zivota/.

[21] OSCE (2019). For a detailed results visit https://www.osce.org/files/f/documents/e/4/419750_1.pdf.

[22] Babovic and Petrovic (2021), p. 18.

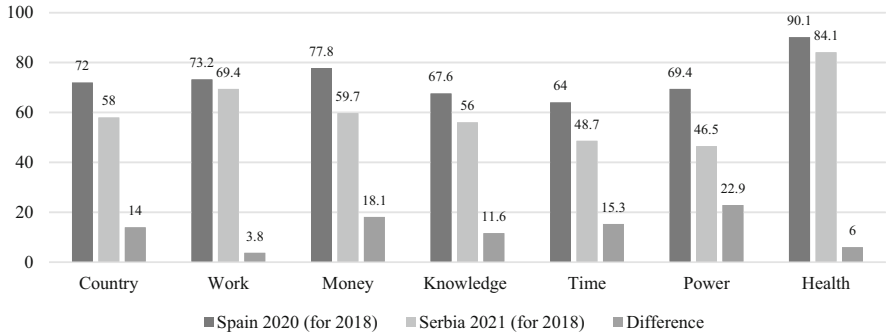

Fig. 1 Gender equality index—comparison of Spain and Serbia [Source: Authors based on EIGE and Babovic and Petrovic (2021)]

was calculated for the first time (a cumulative increase by 5.6 points). However, Serbia still lags behind the European Union (EU) average (67.4) in all aspects of the gender equality index.[23] Compared with the other countries' results, this score would place Serbia in front of nine member states (Fig. 1).

Serbia is also below Spain's average in each component of the gender equality index (Fig. 1). In both countries', health, work and money components of the index are those with the highest scores. Despite recent rapid improvement, the power component for Serbia is still the one with the worst score and simultaneously with the biggest difference between two countries. Hence, for Serbia, Spain as a country with much faster pace of GEI improvement and especially in the area of position of power and responsibility may be a useful role model.[24] On the positive note, Serbia is among one of the handful of countries that has introduced gender responsive budgeting and half of the current government ministers are women. In addition, women are relatively more educated, as in 2018 women comprise 57% of graduate students, compared to 43% of men.[25]

To understand the current results, next section provides a brief historical overview of gender mainstreaming in Spain and Serbia. Section 3 reviews legislative and institutional frameworks for gender equality and gender mainstreaming. Section 4 reviews gender mainstreaming tools and oversight. Section 5 concludes.

[23] Serbia is the first country outside of the EU to adopt the Gender Equality Index in 2016. For comparison purposes we used EIGE index from 2020 which mostly uses 2018 member states data. Data available at https://eige.europa.eu/gender-equality-index/2020.

[24] However, the difference between these two countries is not as prominent in the SDG gender index. Namely, in 2019, score for Serbia was 74.9 and places it at 34 out of 129 countries, while Spain was 23rd with score 79.7.

[25] For more data on tertiary education statistics see https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Tertiary_education_statistics#Graduates.

2 Gender Mainstreaming in Spain and Serbia: History and Current Challenges

2.1 Spain

Hand in the hand with the feminist movement, the first equality policies in Spain took place with the first government of democracy, under the presidency of Adolfo Suárez González, in the period 1976–1981. These policies focused on making women visible and trying to correct gender inequalities, built during the almost 40 years of Spanish dictatorship, where women were excluded from public, paid and socially prestigious spaces.[26] From the 1980s onwards, and especially during the government of Felipe González Márquez (1982–1996), specific policies began to be implemented. Political strategies consisted of implementing affirmative action measures aimed at balancing opportunities for women and men in the public sphere. Moreover, at that time, it was already understood that the pretension of achieving equal treatment was not a guarantee for the materialisation of a factual situation of equal opportunities.[27] Gender equality policies were formulated and implemented only in a sectoral manner and through sectoral tools such as equality plans and only through specific institutions such as women's institutes.[28] Over the years, we have seen that the sectoral approach is insufficient, as patriarchy is a structural and multidimensional problem that is also adaptive and takes various forms to survive over time.[29] Based on the above a consensus was reached in Spain on the adoption of a dual strategy that materialised in the period 2004–2008 under the presidency of José Luis Rodríguez Zapatero. During this period, on the one hand, the aim was to maintain diversify gender equality policies and, on the other, to detect and correct existing biases in public policies as a whole through their evaluation and reformulation from a gender perspective. To a large extent, both aims were truncated by the dismantling of equality policies in Spain during the Great Recession of 2008–2016 and the lack of institutional commitment to combat these inequalities from the root.[30] The above was reflected in the lack or scarcity of resources allocated to address gender issues in a cross-cutting manner and in the lack of prior knowledge, and lack of interest on the part of political leaders of the rest of the departments and ministries during that period.[31] Since June 2018, under the government of Pedro Sánchez Pérez, there has been a solid return to gender mainstreaming in public policies, which is making it possible to focus attention on persistent inequalities and design strategies in a transversal manner.

[26] Bustelo (2016), p. 30.

[27] Quiles Bailén and Téllez Infantes (2016), p. 81.

[28] Fraser (2015).

[29] Bermúdez Figueroa and Hervías Parejo (2021), p. 51.

[30] Alonso and Paleo (2014), p. 44.

[31] Diz and Lois (2011), p. 146.

In terms of the current challenges to gender mainstreaming, three main limitations have been identified. The first of these limitations is that the public policies implemented often reproduce the gender biases inherent to patriarchal societies, which, instead of combating inequalities, contribute to their perpetuation over time.[32] An example of this can be seen in employment, where there is still little development of gender mainstreaming, especially in Spanish municipalities. Furthermore, the actions implemented in the field of employment continue to be aligned with European political priorities. Thus, for the most part, they are aimed at improving the employability and labour insertion of women, with a significant focus on social vulnerability; and through paid employment or entrepreneurship, while the plans designed at the autonomous and local levels identify a wider range of desirable actions.[33] Secondly, other limitations of equality policies, in terms of employment, are that they are not providing effective responses to the wage gap, the glass ceiling, as women's lack of access to highly masculinised professions or the absence of citizen participation in the design of strategies.[34] The third of the limitations lies in the challenge of giving real and effective compliance to the laws and public strategies designed.[35] In this sense, to combat gender violence, the State Pact[36] against gender violence 2017 has managed to bring all political parties to agree to vote, in consensus, 292 measures structured in 10 axes of action. This Pact involves influencing all areas of society and the involvement of society as a whole and the public authorities at different administrative levels. However, to date, the measures approved have not been implemented in more than 70% of cases.[37] For example, law enforcement agencies and judges involved in separation proceedings due to gender-based violence do not have the necessary specific training. Thus, the interventions of these professionals, in some cases, reproduce gender stereotypes about caring responsibilities and what is expected of a good wife and mother/father. The fourth of the limitations lies in the need to consolidate the structures that promote equality and in their budget allocation to comply with the measures designed and their maintenance over time.[38]

An example of this can be seen in education, where the figure responsible for contributing to the integration of the gender perspective in school councils and

[32] Antón (2017), p. 276.

[33] Otero-Hermida and Bouzas Lorenzo (2018), p. 194.

[34] Calvo (2017), p. 9.

[35] Salazar (2018), p. 18.

[36] The State Pact is the name given in political practice to political pacts between political parties of opposing tendencies to frame the State's action in the long term on matters of importance, regardless of which party is in government at any given time.

[37] Rosa San Segundo, director of the Institute of Gender Studies at the University Carlos III of Madrid and president of the University Platform for Feminist and Gender Studies, recalls that "The development of the Pact of State has not materialized in more than 70% of the measures" (Radio Televisión Española, 2020), https://www.rtve.es/noticias/20200307/datos-igualdad-espana-buena-nota-pero-pocos-avances-dos-anos-despues-primera-huelga-feminista/2004950.shtml.

[38] Lombardo and León (2015), pp. 30–33.

educational centres has not been assigned his or her functions in a specific way, nor the requirements that this position entails.[39] In Spanish universities, although they have the support of the current government teams, the structures guaranteeing equality, such as equality units and university ombudspersons, are not sufficiently consolidated. Thus, for example, they do not have permanent staff, and the budget allocations dedicated to integrating the gender perspective in the actions implemented are modest and insufficient.[40] Fourthly, other limitations are the lack of measures that promote a genuine reconciliation of family and professional life[41] and the scarcity of incentives that promote more generalised access of women to decision-making and positions of power.[42] To vindicate persistent inequalities, Spain has experienced the first major feminist strike, on the 8th of March, 2018, where almost six million people, according to data from trade unions, participated in the stoppages of economic activity, and around 370,000 took to the streets in Madrid and Barcelona only. A year later, on the 8th of March 2019, the official figures, provided by Madrid and Barcelona, had grown to over half a million people who took to the streets to form what has come to be called the violet tide. The violet tide is claiming to rebuild the values and thoughts of Spanish citizenship from gender equality and banish machismo in all areas of society.[43] Along with the above, in 2020, the Ministry of Equality, which was already in force in 2008–2010, has been reinstated. This Ministry is committed to the necessary change in values, customs, roles and stereotypes, sexist and patriarchal, reproduced inside and outside public administrations.

2.2 Serbia

Throughout the socialist era, the right to equal opportunities for women was a part of the official ideology and political agenda.[44] In addition, there was a substantial rise of women in the workforce. While some policies had long-lasting effects, practice often departed from formal policies. Gender roles remained persistent, and men were still traditionally seen as providers for their families, while women had to stay at home or balance domestic and work responsibilities.

[39] Organic Law 3/2020, of 29 December, which amends Organic Law 2/2006, of 3 May, on Education, in article 126.2: "Once the School Council of the centre has been constituted, it shall designate a person to promote educational measures that foster real and effective equality between men and women".

[40] Hervías Parejo (2019), p. 89.

[41] Campillo Poza (2013), p. 173.

[42] Fernández de Castro (2014), p. 145.

[43] Minici (2018).

[44] Ignjatović and Bošković (2017), p. 199.

Concentrated efforts to institutionalize gender equality and gender mainstreaming[45] begin after 2000 with the head start of Serbia's democratic transition. Ever since the gender mainstreaming is mainly driven by the process of accession to the EU and by a committed 'gender policy elite'.[46] The process emphasizes issues such as violence against women and harassment in general, political participation, gender pay gap and preventing and protection against discrimination. Throughout this period, Serbia has developed and adopted several strategic documents with the aim to improve gender equality. The first document the National Strategy for Improving the Status of Women and Promoting Gender Equality covered the period from 2009 through 2015. The initial strategy had a substantial impact on the legal framework (mostly in the field of equal participation in political life, but also introduced several measures that advanced gender sensitive statistics and improved institutional set-up). A political commitment for gender equality in Serbia is shown in terms of adoption new strategic documents containing policy measures aimed to reduce gender inequality. Namely, the second Strategy was adopted for 2016–2020 period, and the current one for 2021–2030 period.

Like Spain, Serbia is facing similar, but somewhat more complex challenges. The first of the limitations relates to ineffectiveness of policy measures. This can be mainly attributed to the lack of strong supportive institutional mechanisms and lack of financial resources. In practice, lack or delay in adopting laws, weak law enforcement coupled with the lack of a monitoring mechanisms and difficulties in data collection prevents an adequate assessment of the state of gender equality. Serbia has still a rather dysfunctional system of free legal aid with barriers and restrictions in exercising access to justice, especially for women from vulnerable groups. These impediments together with the insufficient capacities and knowledge of employees in public authorities for gender responsible policy planning, are also acknowledged in existing policy documents. Second, as gender bias is still prevalent mirroring traditional values and the place of gender equality on political agenda of Serbian citizens was moving slowly. Also, there are different attitudes regarding specific policy measures. For example, research revealed that Serbian citizens provided support for gender related social policy but were not in favour of quotas 'for women'.[47] Third, part of the agenda is largely driven by the EU accession process and related pressures. The results of such pressure are mixed. For example, there is a criticism that due to political issues and other interests the EU has been inconsistent in its commitments to LGBT rights throughout the accession process that resulted in more symbolic rather than substantive changes.[48] Finally, while there is a thriving civil society sector that puts a continuous pressure and keeps gender equality relatively high on political agenda, most research in Serbia is related to

[45] In Serbian literature gender mainstreaming is usually translated as "urodnjavanje". See Antonijević (2018), p. 300 for discussion.

[46] Ignjatović and Bošković (2013), p. 436.

[47] Ignjatović and Bošković (2013), pp. 436–437.

[48] Slootmaeckers (2021), p. 387.

non-academic context.[49] There is abundance of assessments and guidelines related to the implementation of the gender related public policy documents and measures and specific projects, research about gender mainstreaming in Serbia is still relatively scarce.

3 Legislative and Institutional Frameworks for Gender Equality and Gender Mainstreaming

3.1 Spain

As for the Spanish institutional and legislative framework, to understand the current situation, it is necessary to look back more than 50 years to the end of the dictatorial period. This period was characterised by the absence of fundamental citizenship rights especially in case of women, with rules that forced them under permanent legal guardianship.[50] The supreme law that initiated democracy is the Spanish Constitution of 1978, which in Article 14 proclaimed that Spaniards are equal before the law, without any discrimination on the grounds of birth, race, sex, religion, opinion or any other personal or social condition or circumstance. Article 9.2 of the Constitution also states that the public authorities shall assume responsibility for removing the obstacles for achieving real and substantial equality between women and men.

In 1983, the Women's Institute was created as an autonomous body to fight inequalities between men and women. The creation of the Institute led to the implementation of plans for equality and positive action measures. Since its creation, the Institute has had its own budget and is promoting recognition of Spain's progress in equality at the international level. In 1985 the Penal Code was reformed to allow for the voluntary termination of pregnancy, and in 1989 the extension of paternity or maternity leave to 16 weeks was approved. In 1988 a quota participation system was adopted, which guaranteed that women would occupy at least 25% of the positions of organic representation. Also, in the same year, Act No. 34/1988 of the 11th of November 1988 on advertising was published, under which advertising that uses the image of women in a vexatious or discriminatory manner shall be considered unlawful. The following year, Law 39/1999, of the 5th of November, on the reconciliation of work and family life, was published. With this law, the need to establish certain leaves of absence (Articles 19 and 20), and other flexibility measures to achieve a genuine reconciliation between women's public and private life

[49] Antonijević (2018), p. 305.

[50] The period of dictatorship in Spain lasted almost 40 years. Examples of laws during this period are the Fuero de los Españoles of 1945, which established the rights and duties of Spaniards, and the Ley de principios del movimiento nacional of 1958, which established the guiding principles of Franco's Legal System.

began to be considered. For its part, Law 30/2003, of the 13th of October, on measures to incorporate gender impact assessment in government regulations, in its Articles 1 and 2, establishes the obligation to prepare gender impact reports on all State regulations. This has resulted in the preparation of diagnoses, reports, and other instruments for evaluating public policies by the administrations and other public entities such as autonomous bodies and universities.

Another significant advance in the area of equality has been the publication of the Organic Law 1/2004 of the 28th of December, on comprehensive protection measures against gender violence. The Law aims to fight violence against women by those who are, or have been, their spouses or partners, even if they do not live together. In 2007, the Organic Law 3/2007 for the effective equality between women and men introduces in Article 14, the general criteria for action by public administrations and provides the framework for the integration of the principle of equal treatment and opportunities and collaboration between public bodies to foster equality.[51] The Law also establishes the criteria for action by public administrations in application of the principle of equality between women and men, covering, among others, the duties of removing the obstacles that imply the persistence of any type of discrimination in order to offer conditions of effective equality between women and men in access to public employment and in the development of professional careers. Likewise, the public authorities shall promote the balanced presence of women and men in public employment and in the development of professional careers. In addition to the above, the public authorities shall also promote the balanced presence of women and men in the selection and assessment bodies so that the number of persons of each sex does not exceed 60% (never less than 40%). Public authorities shall also establish effective measures against sexual harassment and harassment based on sex and shall establish effective measures to eliminate any direct or indirect discrimination in remuneration based on sex. Finally, the public authorities will be responsible for periodically evaluating of equality in their respective areas of action.

Other key bodies in the drive towards equality and against violence have been the Government Delegation for Violence against Women and the State Observatory on Violence against Women. During the past year, the Ministry of Equality has also been set up by Royal Decree 455/2020 of the 10th of March, which develops its organisational structure and the State Secretariat for Equality and against Gender Violence (SEIVG). This Secretariat is responsible for promoting and developing the cross-cutting application of the principles of equal treatment and opportunities between women and men through cross-cutting actions by the public authorities. The purpose of the SEIVG is to ensure equal treatment and opportunities, promote women's social, political and economic participation, and prevent and eradicate all forms of violence against women.

[51] Several other criteria should be highlighted: maternity protection, by creating a new benefit of 42 days' duration for female workers who do not have sufficient contributions, and the recognition of paternity leave and the establishment of measures to ensure the reconciliation of work and personal and family life for women and men and the promotion of co-responsibility in housework and family care.

3.2 Serbia

The Serbian Constitution guarantees equality of women and men and requires the state to pursue a policy of equal opportunities (Article 15). It also prohibits direct and indirect discrimination on any grounds or personal characteristics, including sex and prescribes the possibility of special measures to achieve full equality of persons or groups of persons who are in an unequal position with other citizens (Article 21).

Serbia has rather developed legislative framework related to gender equality. Generally, relevant laws could be arranged in two groups. First, legislative framework that is directly related to issues of gender equality and the laws that regulate the competencies of institutions related to gender equality at different levels of government. Most important laws in the first group are the Law on Gender Equality,[52] Law on Prohibition of Discrimination;[53] Law on Prevention of Domestic Violence[54] as well as the Law on Planning System of the Republic of Serbia[55] which provides framework for the systematic introduction of gender mainstreaming tools. Serbia, like Spain also ratified the Convention on the Elimination of all Forms of Discrimination against Women.[56] The second part of the legislative framework are laws and regulations related to various aspects relevant to gender equality and empowerment of women and girls.

The most significant and long-awaited law was the Law on Gender Equality (LGE). The LGE was adopted in May 2021. With the entry into force of the LGE, previous Law on Equality of Sexes ceased to produce legal effects.[57] In general, the previous law has provided improved settings based on the clauses of the Serbian constitution and specified the meaning of indirect and direct gender based discrimination as well as measures for combating discrimination (Vujadinović 2015). The Law on Equality of Sexes also specified women's right to work, and equal pay for equal work, and demanded equal opportunities in education, sports, culture, political and public life. However, the focus of the 2009 Law was mainly on discrimination aspects. It did not provide adequate foundation for the institutional framework and failed to introduce a number of specific tools that could substantially improve gender equality in Serbia.

The new LGE aims to fulfil the gap by establishing the institutional framework and introducing various measures to promote equal possibilities for participation and equal treatment of men and women in all aspects of social life. It also enhances the framework to combat and prevent all forms of gender related violence, violence against women and domestic violence. On the one hand, the LGE operationalizes public policy documents as it stipulates measures that ensure equal participation in

[52] Official Gazette of the Republic of Serbia No. 52/2021.

[53] Official Gazette of the Republic of Serbia No. 22/2009 and 52/2021.

[54] Official Gazette of the Republic of Serbia No. 94/2016.

[55] Official Gazette of the Republic of Serbia No. 30/2018.

[56] Official Gazette of the Republic of SFR Yugoslavia—International Contracts No. 11/1981.

[57] Official Gazette of the Republic of Serbia No. 104/2009.

all phases of planning, preparation, making and implementation of gender related decisions. On the other hand, it also establishes new structure of gender related public policy documents and provides legal foundation for the current National GE Strategy. Namely, besides abovementioned National GE strategy that is accompanied with the relevant Action plan, it requires other levels of government (local self-governments and autonomous provinces) to adopt action plans, while other public authorities and employers have an obligation to introduce gender equality in relevant plans or programmes. Finally, it also introduces risk management plans that should reduce deviations from the principle of gender equality. Most importantly, the LGE makes a distinction between general and specific measures. General measures are measures prescribed by the law which, in the relevant area, prohibit discrimination based on gender, or require undertaking of certain actions in order to achieve gender equality. Specific measures are activities, and practices aimed to ensure equal participation and representation determined and implemented by the public authority and the employer.[58] Article 16 of the LGE requires that public authorities and the employers who employ more than 50 employees need to determine and implement special measures and incorporate GE principles in their annual plans and programs.

In Serbia, the creation, implementation, monitoring and improvement of policies for achieving gender equality are performed by the Government; ministries and other state administration bodies responsible for special fields and respective measures for achieving and promoting gender equality; Coordination Body for Gender Equality; bodies of the autonomous provinces, bodies of the local self-government units; other public authorities, organizations and institutions that are involved in the prevention of gender based discrimination and violence. From public policy perspective, the most relevant institution is the Coordination Body for Gender Equality (CBGE). After dissolution of the Gender Equality Directorate, in 2014, Serbian government has established the CBGE. The CBGE coordinates the work of state administration bodies and other institutions in order to improve gender equality. The Body also initiates and monitors the implementation of strategic documents, laws and other regulations in the field of gender equality, provide expert opinions and manage the work of state bodies in tasks which exert a direct or indirect influence on gender equality and coordinate state administration bodies in the field of gender equality. Hence, Serbian CBGE could be seen as a counterpart to the Spanish Institute for Women and Equal Opportunities, that was subsequently transformed. Both bodies drafting gender equality policy documents, initiate and review legislative changes

[58]The LGE enlists specific measures (tools): (1) the right to information and equal access to policies, programs and services; (2) application of gender mainstreaming and gender responsive budgeting in the process of planning, managing and implementing plans, projects and policies; (3) promoting equal opportunities in human resource management and the labour market; (4) balanced gender representation in administrative and supervisory bodies and positions; (5) balanced gender representation in each phase of formulating and implementing gender equality policies; (6) the use of gender-sensitive language in order to influence the removal of gender stereotypes in the exercise of the rights and obligations of women and men; (7) collecting and disseminating relevant data disaggregated by gender.

promote gender equality and coordinate gender mainstreaming processes, research on gender equality issues; EU and international affairs; and information, publishing and training. Finally, both provide feedback to other governmental departments on new policies. However, despite these similarities, the role and the position of these two bodies are substantially different. First, the allocated resources are substantially different. Second, the position of Coordination Body is substantially weaker and faces several impediments with respect to its negotiating power with other governmental organisations.

The second institution is the recently established Ministry of human and minority rights and social dialog.[59] Among other responsibilities of the Ministry are related to gender equality and its promotion and anti-discrimination policy. The Ministry is obliged on annual basis to submit a report on the state of protection and promotion of gender equality to the Government and the competent committee of the National Assembly. Within the Ministry, activities related to the gender equality are under the Sector for Anti-Discrimination Policy and Promotion of Gender Equality. The Sector was part of the Ministry of Labour, Employment, Veterans' Affairs and Social Affairs from July 2017 to October 2020. Within the Sector, the Group for the Promotion of Gender Equality performs activities related to the promotion of gender equality, monitoring the implementation of the recommendations of the CEDAW Committee and other international organizations relevant to gender equality, cooperation with civil sector associations dealing with the promotion and advancement of gender equality. Despite its status, the Ministry seems to be a junior partner of the CBGE with respect to public policies on gender equality. The Minister is Deputy Chairmen of the CBGE, and it appoints proportionately smaller number of members to the Committee. Also, the future status of the Ministry is not clear, and whether it will be re-established once the new government is formed remains to be seen.

4 Gender Mainstreaming Tools and Oversight

4.1 Spain

In Spain, the tools to promote equality between women and men have been diverse. Thus, among others, the plans and programmes that protect and guarantee the principle of equality, positive actions, equality units and certain specific actions such as transversal training, business incentives, gender reports, impact assessments and budgets with a gender perspective stand out. All these instruments have promoted progress towards more effective equality and have ensured that the gender perspective is being incorporated transversally into some organisations and enti-

[59] See art. 12 the Law on Ministries, Official Gazette of the Republic of Serbia No. 128/2020.

ties.[60] Equal opportunity Plans in Spain (PIOM in its Spanish acronym) arise from the creation of the Women's Institute and the beginning of an institutional policy for equal opportunities. These PIOMs were aimed at eliminating gender differences and ensuring that women were not discriminated against through public actions such as affirmative action measures. [61] The PIOMs implemented in Spain have been as follows: I Plan for Equal Opportunities for Women 1988–1990, [62] II Plan for Equal Opportunities for Women 1993–1995, [63] III Plan for Equal Opportunities for Women 1997–2000[64] and IV Plan for Equal Opportunities for Women 2003–2006.[65] These plans also required follow-up reports, which made it possible to conduct impact evaluations of the actions implemented.

The strategic plans for equal opportunities arise in compliance with Article 17 of Organic Law 3/2007, of the 22nd of March, for the effective equality of women and men. Unlike the plans described above, the strategic plans aim to achieve equality through cross-cutting actions. The following have been implemented: the Strategic Plan for Equal Opportunities, 2008–2011,[66] the Strategic Plan for Equal Opportunities, 2014–2016[67] and the Strategic Plan for Equal Opportunities 2018–2021.[68]

Equality plans in companies, corporate equality awards and corporate social responsibility policies have arisen from the articles of the Organic Law for the effective equality of women and men. Positive actions, the third tool, consist of specific measures favouring women adopted by the public authorities to make the constitutional right to equality effective. These actions are used to correct manifest situations of inequality of rights of women. the equality plans in companies are defined as an ordered set of measures agreed, in light of the diagnosis of the situation, to achieve equal treatment and opportunities for women and men in companies and to eliminate discrimination on the grounds of se The business

[60] Camas García (2014), p. 167; Martín Bardera (2016), pp. 302–303.

[61] For more information about the Plans for equal opportunities you can visit the link of the Instituto de la Mujer at: https://www.inmujeres.gob.es/elInstituto/historia/home.htm.

[62] You can consult the document I Plan for Equal Opportunities for Women 1988–1990 at: https://sede.educacion.gob.es/publiventa/plan-para-la-igualdad-de-oportunidades-de-las-mujeres-1988-1990/mujer-igualdad/21189.

[63] You can consult the document II Plan for Equal Opportunities for Women 1993–1995 in the following link: https://rieoei.org/RIE/article/view/1213.

[64] You can consult the document III Plan for Equal Opportunities for Women 1997–2000 at: https://www.juntadeandalucia.es/institutodelamujer/ugen/system/files/documentos/10.pdf+&cd=1&hl=en&ct=clnk&gl=en.

[65] You can consult the document IV Plan for Equal Opportunities for Women 2003–2006 at: https://www.mscbs.gob.es/organizacion/sns/planCalidadSNS/pdf/equidad/IV_Plan_Igualdad_Hombre_Mujeres_2003-2006.pdf.

[66] You can consult the document Strategic Plan for Equal Opportunities, 2008–2011 at the following link: https://www.mites.gob.es/ficheros/ministerio/igualdad/Plan_estrategico_final.pdf.

[67] You can consult the Strategic Plan for Equal Opportunities, 2014–2016 in the link below: https://www.inmujeres.gob.es/actualidad/PEIO/docs/PEIO2014-2016.pdf.

[68] You can consult the Equal Opportunities Strategic Plan, 2018–2021 at the following link: http://cadenaser00.epimg.net/descargables/2018/02/28/55434a755de875a6500561a7567456a0.pdf.

award in equality is a mark of excellence that is obtained in annual calls for applications and is a recognition of profit-making entities that stand out in the development of policies of equality between women and men in the workplace. This distinction is valid for 3 years. However, the distinguished entities have to submit an annual monitoring report, which allows verifying that they maintain excellence in *equality*. Corporate social responsibility policies aim to improve the internal organisation of the administrations themselves, for example, through the development of contracts with gender clauses and the inclusion of such clauses in the conclusion of subsidies and public agreements.

The Gender Mainstreaming Programmes are co-financed by the European Social Fund, and their main objective is to incorporate gender mainstreaming in the different areas of intervention of public policies, in particular through advice to the management centres of the General State Administration, the Managing Authority of the European Social Fund and other types of bodies such as transnational networks and the Autonomous Communities. Other tool for integrating the gender perspective in the public policies formulated in Spain has been achieved through Spain's membership of the Network of Equality Policies between women and men of the Community Funds. This Network is a forum for debate and analysis to improve the real and effective integration of the gender perspective in the public strategies co-financed by the Community Funds and applicable to the different member states of the European Union. These Plans are regulated in Article 3 of the Law against Gender Violence in Spain. They are responsible for introducing into society, from a gender perspective, values based on respect for fundamental rights and freedoms and equality between men and women, as well as the exercise of tolerance and freedom within the democratic principles of coexistence. For combating violence is the approval by the Council of Ministers of the draft Organic Act on Comprehensive Guarantees of Sexual Freedom. This bill aims to eliminate the distinction between abuse and aggression and opt for a positive consent model, of only yes is yes, inspired by the Istanbul Convention. This law will punish the most severe cases of rape with up to 15 years in prison and introduce the crime of street harassment.

In the field of education, Spain is characterized by the active promotion of gender equality. This means that in addition to applying specific provisions in the education sector, it conceives gender equality as one of the intrinsic objectives of the education system itself.[69] In such a model, gender equality is not only understood as equality of treatment and opportunities, but education laws mention the achievement of effective gender equality and equality of results. Among the actions that the education system undertakes, the following stand out: transversal training, virtual spaces, celebrations of anniversaries, awards for teacher and student research to prevent gender violence, equality agents in schools, equality units in universities, plans for equality between women and men in education and the review of legislation and other strategies from a gender perspective.

[69] Mínguez Blasco (2021), p. 151.

On the labour field, equality policies continue to focus on the fight against the glass ceiling and combat women's poverty. The Royal Decree-Law 6/2019, of the 1st of March, on urgent measures to guarantee equal treatment and opportunities between women and men in employment and occupation aims to remove the glass ceiling. Also, the Royal Decree-Law 14/2021, of the 6th of July, on urgent measures to reduce the temporary nature of public employment aims fight temporality in employment. Other actions in the same area are committed to: (1) the management of working hours through flexible working hours and teleworking, (2) public financing of childcare for children up to the age of three, and (3) the revaluation of Social Security System pensions, pensions of the Passive Class and other public social benefits for the year 2021 (Royal Decree 46/2021, of the 26th of January). In addition, the following tools have been implemented for the professional promotion of women: the More Women, Better Companies Initiative, the Professional Development and Leadership Programme for Women Managers: Talentia 360, Women Managers, the professional development and leadership project: Promociona and the Women, Talent and Leadership Network, to give visibility to high potential women managers who are qualified and capable of occupying positions at the highest level in companies and organisations. In addition, for women's entrepreneurship, the following have been launched: the Business Support Programme for Women (PAEM), the Rural Women's Challenge Programme and financial aid to create a company or consolidate one that has already been created. It has also promoted: the DIE Network, which is an initiative of the Women's Institute for the exchange of good practices and experiences in equal opportunities between women and men in the workplace, and the DIE Network's Guide to good practices in reconciliation and co-responsibility in companies with the Equality in the Company label. Also, in the workplace and to prevent violence situations the Reference Manual for the development of procedures for action and prevention of sexual harassment and harassment based on sex in the workplace. Finally, with regard to evaluations, which consists of assessing the effectiveness and efficiency of the equality policies implemented, it is important to point out the need for public authorities to ensure that statistics and studies always include the sex variable and gender indicators following the Article 20 of Organic Law 3/2007 on Effective Equality between Women and Men. The gender impact reports, which are documents that accompany the draft bills and proposed regulations, which are prepared by the competent department before the approval of the regulatory proposal and which contain a prior assessment of the results and effects of the regulatory provisions on women and men separately and the evaluation of these results, about equal opportunities between women and men. For the preparation of these reports, the Practical Application Guide for the preparation of gender impact reports on regulatory provisions prepared by the government following Law 30/2003 of 2007 has been made available. Among the most relevant are the gender impact reports of the general state budgets, which are published annually. Finally, it is worth mentioning gender budgeting, which is a strategy for integrating the gender perspective into general policies through the public budget, as a complementary and necessary way to specific equality policies. The budget has become the fundamental instrument for

the application of gender mainstreaming. This implies reorganising the administrations' procedures in all phases, at all levels and by the people who typically carry them out, to include gender equality objectives in all areas of action.

4.2 Serbia

In Serbia, as in Spain, various though not that much diverse tools have been used to promote gender equality. The key public policy documents with the aim of promoting gender equality are National Strategies for Gender Equality. Serbia has adopted several subsequent strategies. The current strategic public policy document is Gender Equality Strategy for 2021–2030 period. The Strategy introduces several novelties. First, it aims to integrate policies and include policies not yet targeted (development, green and circular economy, environmental protection, climate change, access to energy and energy efficiency, access to property, financial markets, digital technologies etc.). Second, it incorporates intersectionality and aims to systematically include all vulnerable groups. Finally, based on the experience with COVID-19 pandemic it aims to properly integrate gender equality issues into public policies (laws, planning documents) related to emergencies. Priorities of the previous, 2016–2020 Gender Equality Strategy were to (1) change gender patterns and improve culture of gender equality; and (2) improve gender equality measured by gender equality index and (3) introduce gender perspective in the adoption, implementation and monitoring of public policies. The strategy was quite comprehensive incorporating more than 50 measures (for the first two years of the implementation). However, the draft 2018–2020 Action Plan was not approved but instead the measures and activities envisaged by the previous plan continued to be implemented.

Ex post evaluation of the 2016–2020 Strategy shows that strategy triggered several important processes to advance gender equality issues, but that the results achieved are quite uneven between different policy areas.[70] The 2016–2020 Strategy had several issues. Action plan for implementation covered only first two years, participatory process was somewhat limited, and monitoring faced several challenges as some values were not properly set. Still, several positive results are evident. Serbia has implemented more systematic introduction of a gender perspective in the adoption, implementation and monitoring of public policies, programs and budgets. Serbia has adopted several laws, hence, substantially improving the legislative framework for the promotion of gender equality and protection of women's rights. Political participation of women in government and in political life and institutions and decision-making in public affairs increased. Finally, gender responsive budgeting also started to be gradually implemented. It has been described as a

[70]Evaluation is available at https://www.rodnaravnopravnost.gov.rs/sites/default/files/2021-09/Evaluacija%20Strategije%20za%20RR.pdf.

strategy for implementing national gender equality policy into all public arenas, and the implementation has targeted both the national and the local level of politics.

In December 2015, amendments to the Law on Budget System introduced the obligation of gender-responsive budgeting.[71] The law (Art. 2) defines Gender Responsible Budgeting (GRB) as "the introduction of the principle of gender equality in the budget process, which includes gender budget analysis and revenue restructuring to improve gender equality." Hence, improving gender equality has become an expected outcome of budgeting process in Serbia. In 2016, additional amendments introduced gender responsive budgeting as a requirement in the planning and execution of budgets. Article 79 specifies that the Annual Budget Report contains reporting on impact of the budget programmes on improvement of gender equality, with additional remarks, explanations, and explanations. Furthermore, information on gender responsive objectives and indicators became integral part of programme information (Article 28). A pilot round of budget reporting occurred in 2017 with a gradual introduction of GRB across budget users who are mandated to apply its principles. Further positioning of GRB as one of pillars of gender mainstreaming in Serbia was recognized in the 2016–2020 Gender Equality Strategy where was a specific objective under the Strategic Goal 3. In practice, in 2021 around 50 organizations at the national level are gradually introducing gender responsive budgeting.

Similarly, to Spain, increasing women's political representation was one of the highest priorities in Serbia. Gender quotas were the primary mechanism to address the under-representation of women in political decision-making in Serbia. For example, only 1.7% of women were elected in the first elections for the Serbian Parliament, after dissolution of Yugoslavia in 1992, and during Milosevic's rule, the proportion of women in parliament was never above 6%.[72] Quotas were initially introduced in the law on local elections of 2002 requiring that a minimum of 30% of the less-represented gender on all local election candidates' lists. The same quota approach was translated into national elections related legislation. General quota system was subsequently adopted through the 2009 Law on Gender Equality.[73] Namely, the GE Law required that public authorities apply affirmative action in case that the underrepresented gender in each organizational unit, in managerial positions and in bodies management and supervision is below 30%. The law that regulates the election of members of national parliament introduced 30% requirement, that is at least that share of candidates from the submitted election lists should belong to less represented sex. Subsequently, both laws increased threshold to the current 40% level. Indeed, such policy provided immediate results. Compared to 12.5% of female

[71] Serbia has moved from so called line budgeting to programme budget only in 2014. Programme budget helps achieve performance evaluation, that in turn enabled smoother introduction of the gender mainstreaming of the budget process.

[72] Mrsevic (2005).

[73] However, quotas were widely used to ensure political participation of women in former regime.

representatives in the National Assembly, the share rose to 34% in 2014,[74] to exactly 40% in 2021.[75]

Quotas will not remove all the barriers to representation of women in Serbia due to traditional gender division and patriarchal social structures.[76] However, the introduction of a gender quotas in the context of Serbia, can be considered an important quality change. First, gender quotas focusing on quantitative aspect once adopted were easy to implement enabling swift and substantial increase in female representation, especially in least developed and patriarchal parts of the country. Second, in case of Serbia, similar to some other countries,[77] they also enabled easier introduction of gender issues into the mainstream political agenda. Third, thresholds translated also at the level of executive branch of government, where women compared to only rather small minority 15 years ago, are having almost half of the seats including Prime Minister and two Deputy Prime Ministers substantially increasing the degree of female empowerment in Serbian Government. Most probably, trend related to threshold increase will continue as the new Law on Gender Equality defines balanced gender representation when the share of one sex is between 40% and 50% in relation to the other sex, and significantly unbalanced gender representation exists when the representation of one is lower than 40% in relation to the other. The question whether quotas will break the glass ceiling for women in Serbian political framework remains to be answered. Spanish experience may provide some guidance. In Spain, where quotas at the local level were introduced in 2007, research found no significant variation related to the probability that women will reach influential positions such as party leader or mayor, or introduce economically significant changes in public expenditures, revenues, or budget composition.[78] The translation of results at the local level in Serbia is also missing as there is still a small share of women among municipal heads and city mayors. However, research has shown that quotas and rising female representation may induce changes in parliamentary deliberations and specific policy choices having long-run effects "that go beyond immediate symbolic effects of representation or substantive effects on policies in the short run".[79]

Again, similarly to Spain, Serbia has introduced annual equality plans. Namely, the LGE introduced the requirement for public authorities and employers who have more than 50 employees to determine and implement special measures within the annual work gender equality plans or programs that are related to the realization and promotion of gender equality. The plan or program contains a brief assessment of the situation, gender sensitive data, a list of specific measures, reasons for setting

[74] Ignjatović and Bošković (2013, 2017).

[75] Data available at http://www.parlament.gov.rs/national-assembly/national-assembly-in-numbers/gender-structure.1745.html.

[76] Vujadinović (2015), p. 66.

[77] Meier and Lombardo (2013), p. 53.

[78] Bagues and Campa (2021).

[79] Hessami and da Fonseca (2020), p. 2.

specific measures and GE goals. The report should also provide the results of implemented activities according to indicators with initial and target value, data on spent funds and recommendations on improving gender equality. This tool is recently introduced, so it is not yet possible to assess the effects. Coverage of companies in Serbia is still lower, as recent Decrees in Spain (901/2020 and 902/2020) that regulate gender equality plans and their recording in a public register and enforce equal pay between women and men affect companies of all sizes. Taking into account the number of women working in SMEs in Serbia current law, while reducing administrative burden for companies leaves out substantial share of women participating in the labor market.

Another tool recently introduced by the LGE are Gender Equality Risk Management Plans. The GE Risk Management Plans should ensure that gender perspective and gender mainstreaming are incorporated in the actions of public authorities. Risk management plan enlists areas and activities performed by the relevant public authority that are particularly risky for violating the principle of gender equality. Plans should assess risks and elaborate preventive measures to eliminate risks. However, the bylaw that provides specific manner on the development and implementation of a risk management plan, as well as the content of the report on the implementation, is yet to be published.

Serbia has introduced several tools in the labour field as well as those aimed to remove the glass ceiling and combat women's poverty. The LGE stipulates the prohibition of termination of the employment by the employer or by public authority, as well as determination of an employee as redundant on the basis of gender, pregnancy, maternity leave, childcare leave or leave for special care of a child, as well as due to the initiated procedure for protection of discrimination, harassment, sexual harassment and sexual blackmailing. To combat glass ceiling, the LGE introduced balanced gender representation requirement in the management and supervisory boards. Namely, Article 30 of the LGE stipulates the employer's obligation to ensure balanced representation in accordance to the abovementioned thresholds (whereby significantly unbalanced gender representation exists when the representation of one gender is lower than 40% compared to the other gender).

While, Spain has a tool specifically related to the education sector, Serbian approach to gender equality may be even more comprehensive than the one in Spain. Similar, interventions besides labor market and education are envisaged in other fields. Namely the LGE makes distinction between 16 fields. Besides abovementioned labor field and management and supervisory bodies, other fields include social and health care, education, upbringing, science and technological development, ICT and information society, defense and security, traffic, energy, environmental protection, culture, public information, sports management and supervisory bodies, political action and public affairs political parties, trade unions, associations, sexual and reproductive health, and access to goods and services.

As described, the Spanish central government introduced various tools to implement gender mainstreaming. Besides *ex ante* gender impact assessment, the government performs ex post gender budget analysis, gender-related budget incidence

analysis, and *ex post* gender impact analysis.[80] Serbia is about to introduce gender (equality) impact assessment of policies (measures) and regulations as a tool for ensuring that a gender perspective is incorporated in every policy proposal and regulation. Namely, Law on Planning System and accompanying bylaws require from the proponent of the legislation or policy document to consider impacts on gender and gender equality. The legal framework requires GEIA if a proposal for example relates to daily life of a population with existing gender differences. Gender inequalities, their causes and effects are not always obvious, but they can create serious problems if they are not given the necessary attention. The detail of the gender equality impact assessment is determined based on the results of the gender equality test. Policymakers are required to assess whether the draft law has any direct or indirect impact on the men and women, both individuals and/or businesses. If the answer is positive, policy makers have to prepare a detailed GEIA. All relevant options considered for achieving the objectives of the regulations are analyzed through a gender equality test. Based on the conducted gender equality test, the proposer considers the potential effects and assesses whether it is necessary to conduct a detailed analysis of the effects of regulations regarding gender equality. The proposer submits the completed Gender Equality Test form for the selected option to the Republic Secretariat for Public Policies together with the Report on the conducted analysis of the effects of regulations, as part of the material submitted. The opinion assesses whether the regulation requires a more detailed analysis of the effects on gender equality.

Finally, Serbia, has also introduced tool related to collection and dissemination of relevant data disaggregated by gender. Namely, there is an obligation for public authorities to ensure that statistics make relevant gender distinction following the Article 12 of LGE. Besides, the Law also requires gathering and dissemination of data on unpaid domestic work, that is especially relevant in terms of gender equality.

5 Instead of Conclusions: Lessons Learned

This paper reviews historical context and provides recent developments with respect to gender equality in Serbia and Spain. Indeed, there is a "common core" to gender mainstreaming in both countries. While there are a number of similarities, differences exist in terms of coverage, supervision and monitoring and institutional structure. Serbia still must take actions to establish sustainable and adequately resourced institutional set up. It was also shown that similarities exist regarding gender mainstreaming tools. For example, in both countries gender quotas were the primary mechanism to address the under-representation of women in political decision-making process. As expected, both countries achieved positive results, though they are mainly related to the central level, while it will take time to translate

[80] OECD (2018); De Villota (2016), p. 71; Jubeto et al. (2018).

these results to the local level. With respect to budgeting there are certain improvements that both countries could pursue. For example, neither Spain nor Serbia provide financial incentives to encourage and promote gender equality in political parties.

Some of tools applied in Spain could be used in Serbia to promote gender equality more effectively. Lessons from Spain could be especially important with respect to several gender mainstreaming tools that Serbia recently introduced tools such as annual plans, or tools that are about to be introduced like Gender Impact Assessment. These tools may help Serbia to catch-up and implement gender mainstreaming more systematically and less formalistic. Furthermore, experience with the tools such as Spanish Gender Mainstreaming Programmes may be quite useful in Serbia as they could provide insights and aid smooth introduction of gender mainstreaming in the different areas. The implementation of these tools for example in the education sector could promote gender equality as one of the intrinsic objectives of the education system itself.

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Gender Pay Gap in the Western Balkans: Why Do Women Earn Less Than Men?

Nikola Ilić

Contents

Abstract This paper analyses systemic differences between average wages of women and men (raw or unadjusted gender pay gap) in the six Western Balkans countries. The findings in this paper suggest that in these countries, during 2015–2019, women earned, on average, up to 16% less than men. The reason behind such a considerable gender pay gap could be in shared history, i.e. shared political and economic culture in the Western Balkans, rooted gender segregation, and discrimination against women. The findings in this paper also suggest that such a

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gender pay gap might have adverse economic consequences, such as a decrease in employment rate and economic activity and, consequently, a significant decrease in GDP per capita. Based on these findings, several policy proposals are put forward aiming to reduce the current gender pay gap and mitigate the adverse economic consequences.

1 Introduction

In economics, the gender pay gap (or the wage gap) is a systemic difference between the average wages of women and men.[1] For a more detailed picture of the systemic difference between the average wages, the raw gender pay gap could be adjusted for employees' personal characteristics and working hours of women and men.[2] However, in a case when that additional information is not available, one could calculate the raw or unadjusted gender pay gap, based solely on the data on average wages, by using the following formula:

$$[(\mathrm{HEm} - \mathrm{HEw})/\mathrm{HEm}] \times 100 = \mathrm{GPG}$$

In this formula, "*HEm*" represents the hourly earnings of men, "*HEw*" represents hourly earnings of women, and "*GPG*" is the gender pay gap (expressed as a percentage of male gross earnings) for a given society. Using this formula, one may calculate, i.e. show in numbers systemic differences between the average wages of men and women and compare the state of play in different countries worldwide. Even though the gender pay gap appears to be a simple matter of statistics, it is becoming a highly relevant issue in contemporary economics due to the recent findings that revealed a significant causal link between the gender pay gap, women empowerment, and entrepreneurship.[3] Moreover, many studies suggest that closing the gender pay gap is positively correlated with an increase in GDP per capita,[4] and some even indicate that closing the gender pay gap could reduce severe social problems, such as uneven bargaining power in the household and a high risk of domestic violence.[5]

To this date, researchers have successfully identified and analysed the gender pay gap in many developed countries, including the United States[6] and the EU member

[1] See Whitehouse and Smith (2020), pp. 519–532; Gould et al. (2016).

[2] See, for instance, Leythienne and Ronkowski (2018), pp. 137–169; Antić and Krstić (2019), pp. 137–169.

[3] See: RCC (2021) and WEF (2021).

[4] See, for instance, EIGE (2019), ILO (2020), and PWC (2021).

[5] Petreski and Mojsoska Blazevski (2015).

[6] Meara et al. (2019), pp. 271–305; PayScale (2021).

states.[7] They also explained in detail what could be the cause for the gender pay gap in these countries and the possible economic consequences. However, a comprehensive analysis of the gender pay gap in the Western Balkans is still missing.[8]

Thus, this paper aims to provide the missing puzzle, i.e. to assess and compare gender pay gaps in the six Western Balkans countries—Albania, Bosnia and Hercegovina, Croatia, Montenegro, North Macedonia, and Serbia (WB6). Furthermore, by comparing the national gender pay gaps and scrutinizing relevant social and legal norms, this paper aims to offer comprehensive alternative explanations for the gender pay gap in this region and put forward regional-specific policy recommendations.

The structure of this paper is consistent with its aim. Following the introduction, the first section assesses the raw gender pay gap in the WB6 countries by using the available data, while the second section of the paper offers possible explanations or the underlying causes for the obtained results. Based on these findings, the third section of the paper further analyses the adverse economic consequences of the gender pay gap in these countries and formulates the regional-specific policy recommendations. Finally, concluding remarks will follow.

2 Assessing the Gender Pay Gap in the Western Balkans

All the countries in the Western Balkans have shared and still share to a large extent, the same communist past, culture, and social as well as legal norms. Excluding Albania, all the WB6 countries were former Yugoslavia's federal units for more than 40 years and had enforced common federal laws and policies. Moreover, in the late 1990s, all the countries simultaneously passed through privatization, started to open their markets for domestic and foreign investors, and were eventually overwhelmingly oriented to the free-market economy. These and other similarities justify and enable economic analysis and various comparisons of the gender pay gaps in the WB6 countries. Finally, a series of "Women and Men" surveys conducted and published by the national statistics authorities during 2015–2020, enables a comprehensive analysis and comparisons. Based on these surveys, i.e. the data collected and processed by using the same or similar methodology and other data provided by the national statistics authorities, the unadjusted pay gap may be finally accurately assessed and compared in Albania, Croatia, and Serbia. Unfortunately, the same sources do not contain the data for BiH, North Macedonia, and Montenegro. However, some data in recently conducted studies and scientific publications[9] could indicate the size of the unadjusted gender pay gap in these three countries.

[7] Boll and Lagemann (2019), pp. 101–105; EU Commission (2021).

[8] That is also one of the findings in the FREN - Foundation for the Advancement of Economics (2020).

[9] See, for instance, Avlijas et al. (2013), Miteva (2019), and RCC (2021).

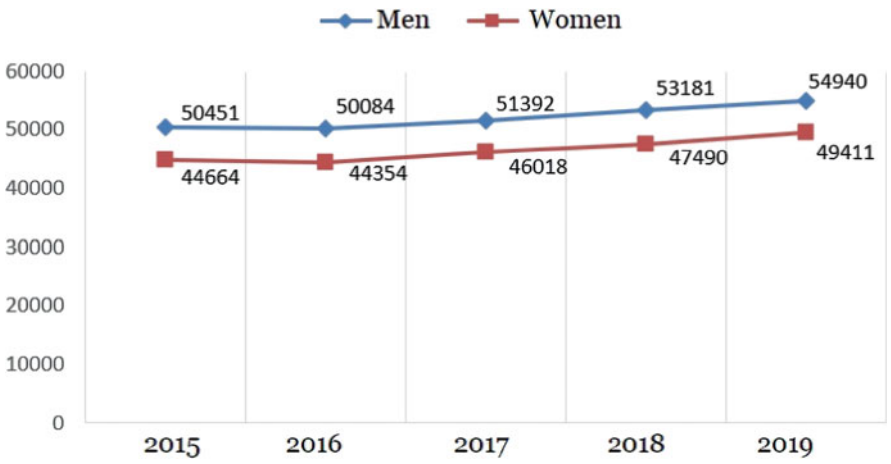

Fig. 1 Average monthly wages for employees by sex in ALL (2015–2019) (Source: *Women and Men in Albania*, INSTAT 2020)

Therefore, the unadjusted gender pay gap in the WB6 countries could be assessed and analysed in detail to explain the underlying cause and economic consequences of systemic differences between the average wages of men and women in this region.

2.1 Albania

The gender pay gap in Albania during the 2015–2019 period is more than evident due to the national statistics authority[10] differentiating earnings of women and men.[11] For instance, only in 2015, women in Albania earned monthly, on average, 44.664 ALL (roughly 367.87 EUR), while men earned 50.451 ALL (roughly 415.53 EUR). If calculated by the provided formula, the earning gap in 2015 exceeds 11%. Figures 1 and 2 shows average monthly wages and the unadjusted wage gap in Albania for the observed period.

Based on the available data, it seems the gender pay gap in Albania is below the EU average for the same period, which is approximately 14%.[12] However, the calculated indicator for Albania is unadjusted, meaning it gives an overall picture of the gender pay gap without restrictions for age and working hours. That indicates the gender pay gap could be somewhat larger in reality. Besides, there is a significant

[10] INSTAT (2020).

[11] These earnings are calculated based on the enterprises' payrolls declared to the General Directorate of Taxation for contributions on social security, health, and tax on income from employment (INSTAT 2020).

[12] EU Commission (2021).

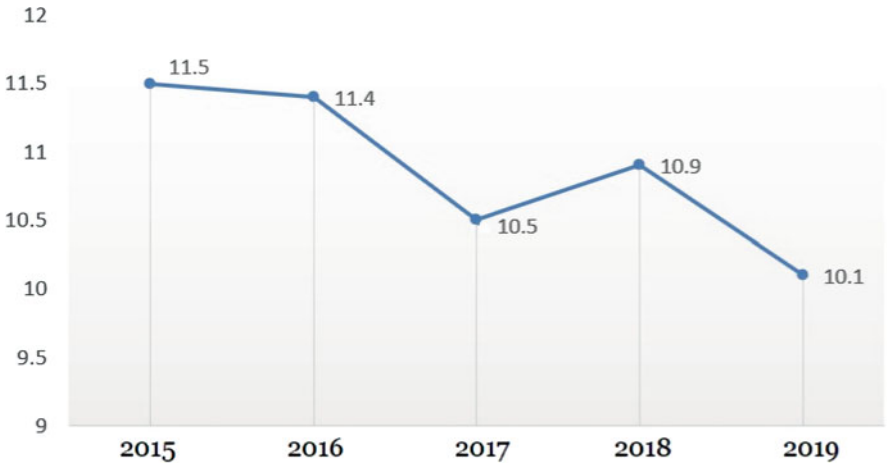

Fig. 2 The gender pay gap in Albania in % (2015–2019) (Source: Calculation of the author, based on INSTAT 2020)

difference between various professions when it comes to the gender pay gap in Albania, starting from the armed forces (3%) and skilled agricultural workers (7%) to machine operators (24%).[13] This inequitable distribution of the gender pay gap could cause additional problems, such as decreased economic efficiency and productivity on the level of professions, especially in the private sector. However, before analyzing possible causes and economic consequences of the gender pay gap in the WB6 countries, it is necessary to identify whether there is a gender pay gap in the whole region in the first place and, if there is, what is the magnitude of the pay gap on the level of WB6.

2.2 Croatia

Unlike other WB6 countries, Croatia is the EU member state, and the data relevant for the gender pay gap identification are available within the Eurostat databases. In addition, the Croatian Bureau of Statistics (CBS) collects and publishes data regarding the average wages within the "Women and Men" series.[14] According to this publication, women in Croatia in 2015, on average, earned 7471 HRK (roughly 994 EUR), while men during the same year earned 8422 HRK (roughly 1121 EUR).[15] Consequently, the unadjusted gender pay gap in 2015 exceeded 11%.

[13] INSTAT (2020).

[14] This paper primarily relies on CBS's data due to the similar data collecting and processing methods compared to the other national statistics authorities in the Western Balkans.

[15] CBS (2016).

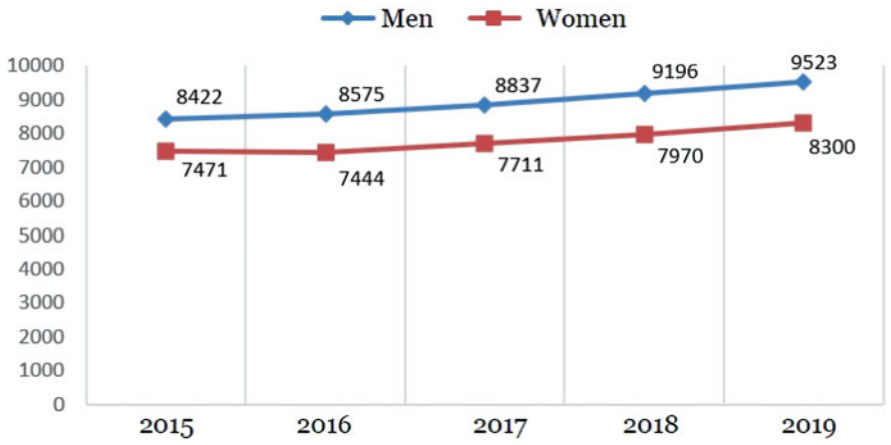

Fig. 3 Average monthly wages for employees by sex in HRK (2015–2019) (Source: *Women and Men in Croatia*, CBS Publications 2017–2021)

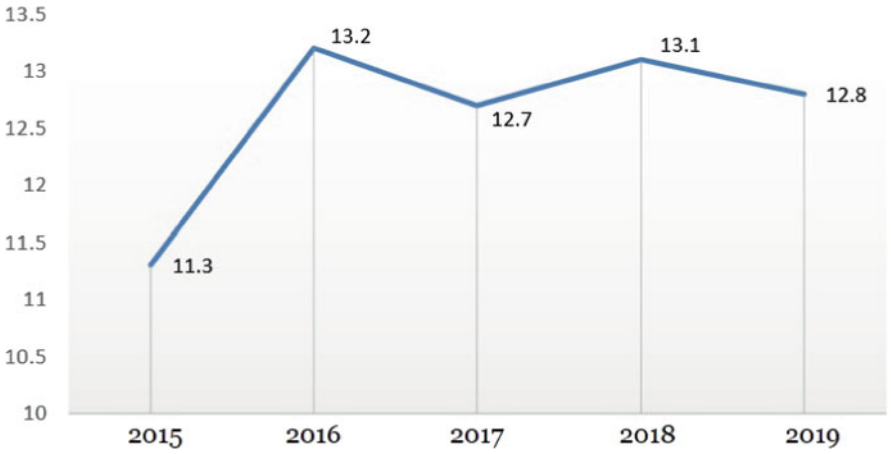

Fig. 4 The gender pay gap in Croatia in % (2015–2019) (Source: Calculation of the author, based on CBS Publications 2017–2021)

Figure 3 shows the CBS data on the average wages in Croatia during 2015–2019, and based on these data, Fig. 4 shows the gender pay gap for the same period.

Compared to Albania, it seems Croatia has a slightly wider and more stable gender pay gap. However, it is still below the European average of 14%.[16] When analyzing particular professions, it seems women in Croatia face similar problems as in Albania, but the variability of the pay gap is slightly lower. In other words, the gender pay gap across different professions is more evenly distributed, without huge

[16] EU Commission (2021).

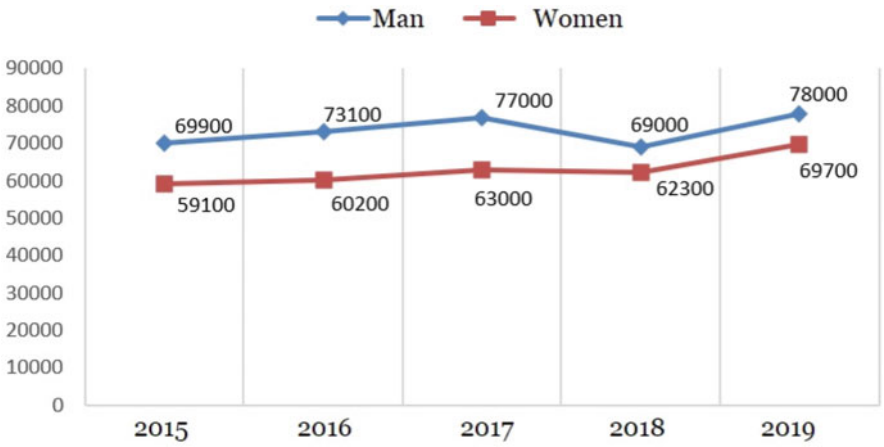

Fig. 5 Average monthly wages for employees by sex in RSD (2015–2019) (Source: *Women and Men in Serbia*, RZS 2020)

earrings disparities in favour of men. For instance, in transportation and storage services, administrative and support services, men earn up to 10% more per hour than women, while in some professions, like mining and quarrying, men earn up to 2% less.[17] However, the widest gender pay gap is within the private sector, in providing financial and insurance services, where men get almost 28% higher salaries than women.[18] Even with few exceptions, such as financial services, it seems the gender pay gap in Croatia is relatively evenly distributed. That could enable a slightly better overall economic performance compared to Albania and some other WB6 countries.

2.3 Serbia

Currently, Serbia is a country candidate for the EU membership, but Eurostat still does not possess relevant data that could enable the raw gender pay gap screening in Serbia. The only available source of information is the national statistics authority (RZS), regularly publishing the "Women and Men" series. According to these publications, women in Serbia in 2015, on average, earned 59,100 RSD (roughly 502 EUR), while the men earned 69,900 RSD (approximately 594 EUR).[19] If the same formula applies, as in the case of Albania and Croatia, it means that the gender pay gap in 2015 exceeded 15%. Figures 5 and 6 show the average wages by sex and the unadjusted gender pay gap in Serbia during the 2015–2019 period.

[17] CBS (2020).
[18] CBS (2017–2021).
[19] RZS (2020).

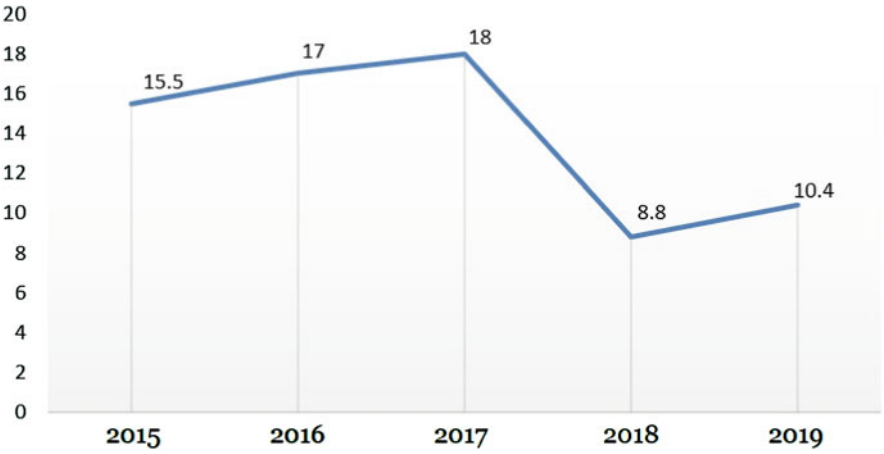

Fig. 6 The gender pay gap in Serbia (2015–2019) (Source: Calculation of the author, based on RZS 2020)

At first glance, it seems that Serbia had a relatively more progressive gender pay gap during the first 3 years of the observed period, compared to Albania and Croatia. Yet, one should not jump to conclusions because there is a reasonable explanation for the wage gap in Serbia for the said period. Namely, during that period, wages were calculated based on data obtained from the records of the tax administration and included wages of employees in legal entities. Since 2018, the data refer to the wages and salaries of all employees.[20] In other words, the representative sample is larger since 2018, and the results are more credible. Therefore, it seems that the gender pay gap in Serbia is slightly below the EU average for the same period.[21] When it comes to the comparisons with the other countries in the region, Serbia is somewhere in the middle, between Croatia and Albania. However, it is necessary to assess the raw "national" gender pay gaps in the whole region to see a broader picture and all the relevant details.

2.4 Bosnia and Herzegovina

So far, the Agency for Statistics of Bosnia and Herzegovina (ASBH) did not provide data regarding (un)employment rate and wages by sex on a regular basis. Therefore,

[20] RZS (2020).

[21] It should be noted that the gender pay gap in the EU member states and Serbia are not compatible due to the different methods of collecting data and calculating by Eurostat in the EU and RZS in Serbia. Namely, the EU calculates the adjusted gender pay gap that includes data on employees' personal characteristics and working hours, i.e. data not collected or provided in Serbia and the majority of other countries in the region.

it is hard to accurately assess or determine the unadjusted gender pay gap for BiH and compare it with the other WB6 countries. However, some reports and scientific publications could provide a valuable clue or reliable indication of gender inequality and the gender pay gap in BiH.

For instance, the World Bank report,[22] published in cooperation with the ASBH, states that "there is a visible gender difference in the hourly wages in favour of men that is persistent across all levels of education, age groups, occupations and industries". In the same report, the WB roughly estimates that women, on average, earn 3.5 KM (1.8 EUR), while men 3.9 KM (2 EUR) per hour. Based on these findings, using the same formula as in the case of other countries in the region, one may conclude that the gender pay gap in BiH in 2015 was approximately 10%.[23] Of course, this result is not comparable with the gender pay gaps in other WB6 countries due to the specific data collection methods and estimations. However, this result could be a significant part of a broader picture of the gender pay gap in the Western Balkans.

The other recent studies acknowledge the gender pay gap data is not available for BiH[24] but points that, according to the available data, the employment rate among the population aged from 20 to 64 is significantly higher for men than women. For instance, in 2019, 61% of men and only 38% of women were employed. That also may indicate a wide gender pay gap in BiH since relatively lower demand for women's labour force could cause a relatively low earnings per hour compared to men. In addition, that is in line with the findings from the WB report,[25] stressing that "social values in BiH remain conservative with most men and women expressing traditional perceptions of gender roles" and indicating the law demand for women's labour.

2.5 North Macedonia

As in the case of BiH, the statistics authority of North Macedonia (SSORM) does not possess relevant data on earnings per hour for women and men. Therefore, it is not feasible to assess the exact scope of the unadjusted gender pay gap and trends over the years. However, there are some reports and studies that could provide a broader picture of gender inequality.

Petreski and Mojsoska Blazevski, in the ILO working paper,[26] analyse the gender pay gap in North Macedonia based on the methodology developed by Grimshaw and

[22] WB (2015).

[23] The same report states that the gender pay gap is largely explained by unobserved factors, indicating that the main source of the gender pay gap in BiH could be discrimination.

[24] RCC (2021).

[25] WB (2015).

[26] Petreski and Mojsoska Blazevski (2015).

Rubery,[27] and estimate that women in that country on average earn 18% less per hour than men. Similarly, Nikoloski[28] estimates that the adjusted gender pay gap in North Macedonia in 2015 was approximately 17% and concludes that the gender pay gap is relatively lower among low-paid workers than highly-paid workers.[29] Based on those findings, it seems that the gender pay gap in North Macedonia is above the European average of 14%, and significantly higher compared to other WB6 countries. Consistently with that conclusion, in the global gender gap report,[30] North Macedonia is ranked lower (73) than other countries from the region (Serbia 19, Albania 25, Croatia 45, Montenegro 48), excluding Bosnia and Herzegovina three places behind (76).

2.6 Montenegro

Similar to BiH and North Macedonia, Montenegro's statistics authority (MONISTAT) does not possess relevant data for determining the raw gender pay gap. In other words, it is unknown whether there is a systemic difference between the average wages of men and women and what could be the magnitude of the pay gap. However, some institutions and authors are trying to estimate the gender pay gap based on the available data or indicators.

According to the FREN Policy Brief,[31] the gender pay gap in Montenegro, for the period 2008–2010, was slightly lower than in North Macedonia and hardly exceeded 16%, which is higher than the regional and European average. Based on those estimations, the ILO Report also states there is a significant difference between wages earned by women and men in Montenegro, consequently making the unadjusted gender pay gap exceeds 16%.[32] Inconsistently with these findings, the Montenegro's Government, in the official Plan of Activities for Achieving Gender Equality,[33] estimates that the gender pay gap is 13.9%, and as an underlining cause of the gender pay gap cites discrimination against women. Moreover, the Government did not specify whether that is an adjusted or unadjusted gender pay gap, nor it has presented any data based on which the gender pay gap may be estimated or calculated. Finally, even if the Government's findings are correct, that would mean Montenegro has the highest gender pay gap in the region besides North Macedonia.

[27] Grimshaw and Rubery (2015).

[28] Nikoloski (2019).

[29] Also, the FREN Policy Brief (2020), based on the data from 2008 to 2010, estimates that the adjusted gender pay gap in North Macedonia is 17.9%, which is similar to the cited most recent findings.

[30] WEF (2021).

[31] FREN Report (2020).

[32] ILO (2019).

[33] The Government of Montenegro (2017).

3 Possible Explanations of Gender Pay Gap

Based on available data, one may conclude that women in WB6 countries, on average, earn significantly less than men do. This conclusion is inevitable in the case of Albania, Croatia, and Serbia, where national statistics authorities possess and regularly publish relevant data on wages by sex. In the case of BiH, North Macedonia, and Montenegro, the overall picture is not that clear due to the lack of relevant data. However, there are strong indications that these three countries also have a significant unadjusted gender pay gap, higher than the EU average. Finally, after answering the question of whether there is a gender pay gap in the WB6 countries, the new question arises—What are the underlying causes of the gender pay gap in this region? So far, in gender economics, three root causes of the gender pay gap are analyzed and explained in detail: human capital, compensating differentials, and discrimination.[34] In other words, on average, men can earn more than women do due to the knowledge and skills they possess, but also due to the discrimination against women in the labour market or working place. In this paper, these three and other region-specific raw gender pay gap causes will be analyzed, in a broader context of similarities between the WB6 countries. A closer analysis of relevant similarities and dissimilarities between those countries, and their social and legal norms, combined with the gender economics approach, might provide a plausible answer to the raised question. Moreover, after revealing the underlying causes, one can more precisely explain and predict the adverse economic consequences of the gender pay gap in the WB6 countries.

3.1 Shared History and Gender Segregation

As mentioned before, all the WB6 countries share, to a large extent, common social values and legal norms due to the shared history. That could be one of the triggers for the gender pay gap. Namely, the WB6 countries were under autocracy, where gender segregation in the workplace was socially acceptable and, in some cases even directly promoted by the government. Ex Yugoslavia's Communist Party, and other communist parties in the region, had copied the Communist Party of the Soviet Union for a long time,[35] and the Soviets did not seriously consider women's emancipation but rather emancipation of the "working class". Therefore, during the communist era, women were mainly blue-collar workers, while men overtook the vast majority of the key occupations in the economy.[36] Indeed, that happened more than 50 years ago in the Western Balkans. However, the communist regime maintained these social values for such a long time that those social values became a

[34] Jacobsen (2007).
[35] Jorgić (2018), pp. 4–5.
[36] Harsch (2014), pp. 1–20.

significant part of political and economic culture in the region and remained a long time after the dissolution of the communist political system.

3.2 Shared Political Culture

During the communist era in the Balkans (1945–1990), women's political and social rights were significantly expanded (Vujadinović and Stanimirović 2019, p. 173). However, the unwritten rule stated that all political representatives should be men. For instance, the remains of the said rule were visible during the first multi-party elections in Serbia in 1990. Out of 250 members of the parliament, 3 were women. That unwritten rule is gradually fading, but its consequences are present even today. Since women were (almost) entirely excluded from the political life in the WB6 countries for such a long time, they did not have significant political power. Naturally, the lack of effective political power further leads to gender segregation and marginalization of women. Because of these historical circumstances, policymakers in the WB6 countries face the difficult task of changing public opinion toward women's political participation. According to Fernández and Valiente,[37] the gender quota could be a proper initial policy tool in that area.[38]

3.3 Shared Economic Culture

The centralized economies during the communist era relied upon social companies, i.e. companies that were controlled and governed by the government. The CEO-s and managers in these companies were overwhelmingly men, while women were engaging with production or, in the best-case scenario, administration. In this way, by suppressing private entrepreneurs and promoting male-governed social entrepreneurship, the communist regime created an economic environment with severely limited access for women to the core economic activities. Similarly to the said unwritten rule in politics, the communists effectively formed the unwritten rule in economics—women are not competent for highly ranked positions in (social) companies nor sufficiently skilled for private entrepreneurship. That rule has become a part of the regional economic culture and remained in power a long time after the dissolution of Yugoslavia and the communist regime in Albania. A piece of evidence supporting that conclusion (besides the fact that women did not run key companies

[37] Fernández and Valiente (2021), pp. 351–370.

[38] For instance, Serbian Law on Gender Equality (Official Gazette RS, 104/2009) has introduced the rule that at least 30% of all members of the Parliament have to be women. Other WB6 countries have introduced similar legislation, and it seems that it has had a positive impact on women's empowerment and political participation in the region.

controlled by the governments) could be a relatively low female labour force participation rate in WB6 countries compared to the EU.[39]

3.4 Human Capital

Human capital, in general, is an intangible asset or ability or quality linked to individual productivity capacity.[40] In other words, an individual might have relatively high productivity at work due to her human capital, which could be embodied in education, on-the-job training, work experience, or some other form of intangible asset. In that sense, systematic differences in human capital by sex could explain, to a certain extent, the systematic differences in average wages by sex or the raw gender pay gap in WB6 countries.[41]

Differences in education have narrowed over time in the WB6 countries to the point where women are more likely to attend and graduate from university than men.[42] Thus, the level of education by sex cannot explain the existing gender pay gap in the BW6. However, it seems that on-the-job training and work experience can explain the gender pay gap to a certain extent. Several studies have found that men are more likely to receive on-the-job training than women.[43] Moreover, men are more likely to have continuity at the same job[44] and thus get more training and experience due to pregnancy and maternity leave women might have. In that case, man could increase their human capital and be more productive than women. However, that temporary and relatively small inequality in human capital cannot explain why women constantly earn less than men in WB6 countries, even before they get pregnancy and maternity leave. Therefore, other possible causes of the gender pay gap have to be considered, such as compensating differentials and discrimination.

3.5 Compensating Differentials

Women and men in WB6 labour markets may perform different jobs within different industries and sectors, from physical work in the mining industry to highly sophisticated jobs in the IT sector. Some of these jobs are undesirable, and some are highly

[39] Atoyan and Rahman (2017).

[40] Jacobsen (2007).

[41] That is why education is one of the crucial characteristics within the Blinder-Oaxaca method for calculating the gender pay gap in its adjusted form. See Leythienne and Ronkowski (2018).

[42] WEF (2021).

[43] See, for instance, Lynch (1992), pp. 299–312; Beeson Royalty (1996), pp. 506–521.

[44] Jacobsen (2007).

desirable. That variety of jobs could be a significant independent variable in the gender pay gap analysis. In other words, men could hold more undesirable positions in the economy and thus get higher compensation, which could partially explain the existing gender pay gap. However, whether some working position is pleasant and desirable or not depends on individual preferences. In other words, the same job, at the same time, could be desirable and pleasant for one person and highly undesirable for the other, regardless of their sex. Therefore, compensating differentials could be considered a cause of the gender pay gap only when some occupations, in general, are more desirable for men than for women and vice versa. Even in those cases, the desirability and prestige of a working position are not necessarily correlated with compensation. For instance, Bose have found that accountants could be ranked lower in desirability but higher in remuneration than librarians.[45] For all those reasons, it seems that compensating differentials cannot explain the current gender pay gap to the full extent, even if one had all the relevant data for the WB6 countries.

3.6 Discrimination

The last two considered potential causes for the gender pay gap referred to the supply-side of a labour market. In other words, women and men might earn different wages due to different productivity, specific human capital, or specific working conditions and preferences. However, some of the major causes of the gender pay gap might occur on the demand side. In case when two persons have equal human capital and other productivity factors, but they are members of the two different groups, end receive different outcomes in the workplace in terms of wages, benefits or access to the job, workplace discrimination occurs.[46]

Many studies indicate considerable gender discrimination in the WB6 countries.[47] That may be a consequence of the mentioned historical circumstances and the unwritten rules in politics and economics. Those rules were socially acceptable and tolerated for such a long time that even today, some employers do not recognize discrimination against women in labour markets. Besides mentioned sources, one may find plenty of anecdotal evidence for discrimination against women in WB6 countries, in the local press,[48] academic papers,[49] and even legal testimonies.[50] It is not unusual for employers in WB6 countries to state for the records, during the trials, they are not aware of discrimination against women or that men are much more capable of performing a particular job than women. In some other cases, employers

[45] Bose (1985).

[46] See Jacobsen (2007); Bobbitt-Zeher (2011), pp. 764–786.

[47] See, for instance, CSF (2018), EPRS (2018), and RCC (2021).

[48] RSE (2019) and RTV (2019).

[49] Antić and Krstić (2019), pp. 137–169.

[50] Serbian Supreme Court, judgement in the case Rev2 2461/2015.

even explicitly admit that they are aware of discrimination and still decide to pay lower wages to a woman returning from maternity leave, as recently discovered in an anonymous survey conducted in Montenegro.[51] Of course, because all the mentioned shreds of evidence are not systematized, it is hard to determine the magnitude of discrimination against women in the WB6 and the causal relationship between discrimination and the gender pay gap magnitude. In any event, discrimination against women undoubtedly exists in those countries, and it seems it could be one of the underlying causes for the considerable gender pay gap. In this regard, the first step (and policy recommendation) for all WB6 countries would be to start collecting data on the gender pay gap and discrimination against women in labour markets. The second step could be ensuring that laws and regulations in WB6 effectively protect the standard of equal pay for work of equal value and incentivizing employers to ensure payment transparency.[52]

4 Adverse Economic Consequences and Policy Proposals

An analysis of the economic consequences of the gender pay gap may answer why WB6 countries should start to collect the data on the systematic differences in earnings of men and women and why they should try to eliminate those differences and discrimination in favour of men. Namely, the issues of the gender pay gap and discrimination against women are not only a matter of human rights and equality. As already demonstrated in many studies,[53] those issues are also highly relevant for the overall economic performance. Among the other economic consequences, a relatively wide gender pay gap, such as in WB6, may significantly affect the employment rate and the activity of women in labour markets and thus further affect the GDP per capita.

4.1 Decrease in Employment and Economic Activity

Discrimination against women and the wide gender pay gap negatively affects women's activity and participation in labour markets. According to a most recent study,[54] by closing the current activity rate gap,[55] an increase of 3.5 to 6 million jobs

[51] RSE (2019).

[52] All WB6 countries currently have laws and regulations forbidding gender-based discrimination. However, they did not explicitly legally protect the standard of equal pay for work of equal value nor introduced mandatory payment transparency for the employers, which could help in reducing the gender pay gap.

[53] See, for instance, EIGE (2019).

[54] EIGE (2019).

[55] The activity rate gap refers to the percentage of people who are either working or looking for work.

in 2050 on the EU level could be expected. Proportionally to their population, WB6 countries may expect an even more significant increase in employment due to the relatively wider current activity rate gap than in the EU.[56] Based on these estimations and counterfactual analysis, one could conclude that the gender pay gap currently decreases employment in WB6 countries by up to 3%. Additionally, a decrease in the employment rate is not the only consequence of the wide gender pay gap. Due to the relatively low wages compared to men, employed women cannot contribute to pension funds as much as men, thus indirectly creating the gender pension gap[57] and increasing the future poverty rate and economic inequality index. Finally, the lower the employment rate and the economic activity in WB6 countries are, the gender pay gap could leave a more significant mark on their GDP per capita.

4.2 Decrease in GDP per Capita

According to the recent estimates,[58] increasing women's employment rates across the OECD (to match those of Sweden—a consistent top performer) could increase GDP by US$ 6 trillion annually, while closing the gender pay gap could increase female earnings across the OECD by US$ 2 trillion annually. Similarly, the EIGE estimates that closing the activity rate gap in the EU could generate an increase in GDP per capita of 3.2–5.5% in 2050 while eliminating the gender pay gap could lead to a 0.2% increase in GDP per capita over the 2030–2050 period.[59] Those studies and estimates prove the significant causal link between the gender pay gap and GDP per capita, i.e. the wide gender pay gap leads to an decrease in GDP per capita and *vice versa*. In that sense, it seems WB6 countries have even more considerable potential for increasing the GDP per capita than the EU member states due to the relatively wider average gender pay gap.

The Cambridge Econometrics calculations (RCC 2021) additionally (indirectly) confirm the causal relationship between the gender pay gap and the GDP per capita. According to those findings, the women empowerment index[60] significantly correlates to the GDP per capita in the WB6 countries. Figure 7 shows the results for WB6 countries, and the EU member states.

Figure 7 suggest that measures that economically empower women (among the others, reducing the gender pay gap) might go hand-in-hand with higher GDP per

[56] RCC (2021).

[57] See Halvorsen and West Pedersen (2018), pp. 130–143.

[58] PWC (2021).

[59] EIGE (2019).

[60] The women empowerment index examines the gender gap in five areas—labour force participation, education, decision making, health and political participation. All the fundamental elements of the women empowerment index are closely correlated with and could affect the gender pay gap.

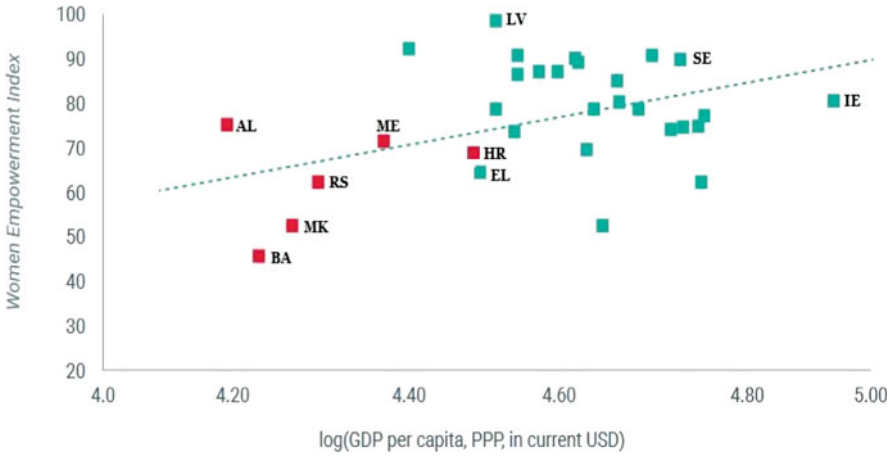

Fig. 7 Relationship between the WEI and GDP per capita. Note: Red dots are WB6 economies, while teal dots are the EU economies [Source: Calculations of the Regional Cooperation Council (RCC), based on the Cambridge Econometrics calculations and World Bank data, RCC 2021]

capita. However, as Latvia shows, the GDP per capita is not necessarily associated with the women empowerment index. Ireland and Sweden have higher GDP per capita but do not outperform Latvia on the index. Still, that finding does not undermine the main conclusion that reducing the gender pay gap is correlated with the GDP per capita increase due to the two main reasons. The first reason refers to the complexity of the women empowerment index, and the second reason refers to the exogeneity of the economic growth. Namely, the women empowerment index is based on the gender gaps in different fields, including labour force participation, education, decision making, health and political participation. The optimal method to analyse the causal link between the gender pay gap and GDP per capita would be to use GDP per capita as a dependent variable and the systematic difference in earnings of men and women as an independent variable in a regression. Yet, as already stated, such an approach temporary is not possible due to the lack of data on the gender pay gap in WB6 countries. Furthermore, even if WB6 countries had the data on the gender pay gap, many other factors could correlate with the GDP per capita as well, i.e. some other independent variables may be a part of the equation. However, as already stated, those obstacles do not diminish firm indications that the increase in the gender pay gap causes a decrease in GDP per capita. Because of those adverse economic consequences and significant potential for further economic growth, WB6 countries should have a more cautious approach to the gender pay gap issue.

4.3 Policy Proposals

Based on the findings in this paper, the fundamental policy proposal for WB6 countries is to adopt measures that will enable collecting and processing data necessary for the gender pay gap assessment and analysis. Once the adjusted gender pay gap is precisely determined, it will be easier to design and implement all other policies and measures to reduce the gender pay gap and improve economic performance. In that sense, it would be recommendable for all WB6 countries to follow Eurostat's approach and methodology. In that way, WB6 countries could precisely determine the gender pay gap and adequately compare their results and policies with all other European countries.

Additionally, since the gender pay gap reflects the broader socio-economic relations within a society by showing what access women have to economic opportunities,[61] it would be recommendable for WB6 countries to implement the women empowerment measures, such as (1) designating a stakeholder to coordinate the diverse public and private programmes to support women's employment and entrepreneurship, (2) implementing scale-up programmes dedicated to women's entrepreneurship, providing entrepreneurship training, differentiated by the socio-economic status, local and regional context, and (3) supporting companies recently founded by women.[62] In this way, women would be strongly encouraged to participate in various economic activities and contribute to further economic development. Moreover, WB6 countries should ensure that their laws protect the standard of equal pay for work of equal value and incentivize employers to ensure payment transparency.

These and similar measures should empower women in the Western Balkans to take a larger share in economic activities and reduce the gender pay gap in the long run. Moreover, WB6 countries should more persistently address the underlying cause of the gender pay gap in the region, i.e. discrimination against women. Among the other measures, that implies raising public awareness about different forms of gender discrimination and transparency, especially about the discrimination linked to access to employment and discrimination in the workplace.[63] In particular, WB6 countries should work on transparency concerning employers' internal legal regulation promoting gender equality (including pay transparency) and sentencing employers who discriminate in the process of or during employment. These measures could significantly improve the protection and enforcement of women's rights and, at the same time, the economic performance and living standard in the region. That is the main reason why the policy proposals and measures for the gender pay gap reduction, from the economics point of view, should be significant for both women and men in the Western Balkans.

[61] Petreski and Mojsoska Blazevski (2015).

[62] RCC (2021).

[63] RCC proposes similar measures in, 'Economic benefits of gender equality and women empowerment in the western Balkans six', 2021.

5 Concluding Remarks

Historically, due to traditional patriarchal values, institutions, and political culture, the Western Balkans was a fertile ground for discrimination, which could be the main reason or the underlining cause for the gender pay gap. During the era of communism in WB6, women were systematically discriminated against in politics and sometimes hidden behind the socially accepted role of housewife in economics. Later on, following Yugoslavia's dissolution and the civil wars in the Balkans, women found themselves in an even worse position. A vast majority of them were marginalized and forced to fight for fundamental human rights (except, in some cases, women entrepreneurs, members of political and economic elites, who have entered the social strata of the winners of transition into the neoliberal economy). All these historical circumstances left a considerable mark on the current status of women in the WB6 countries and their role in the economy.

Based on the available data and conducted assessments, it seems that the WB6 countries have a considerable amount of human capital. A relatively high percentage of women and men are highly educated and possess the necessary skills to work in a digital environment. Women and men have equal chances to receive education in the WB6 countries, and on average, women are even more educated than men. However, it seems that investments in the human capital of women and men are not equally profitable in WB6, primarily due to the discrimination in the labour markets, i.e. systemic differences between the average wages of women and men. A considerable gender pay gap further disincentivizes women to participate in labour markets and, among others, to become entrepreneurs. More importantly, this relatively wide gender pay gap could lead to a relatively low GDP per capita in WB6 countries. That is an additional validation, from the economics standpoint, that the issue of the gender pay gap is relevant for both women and men living in Western Balkans. In other words, the economies in the WB6 countries will lag behind the EU, as long as they have a relatively wider gender pay gap.

Therefore, women, men, and, in particular, policy-makers in the WB6 countries should be highly concerned with discrimination against women and the gender pay gap. They might solve this problem only by working together on women's empowerment and their full inclusion in the national labour markets (not only formally by implementing laws and regulations, but substantially). That will be a long journey with many obstacles, but every journey starts with a single step. In this case, that step is collecting and further analyzing data on the gender pay gap and discrimination against women in the WB6 countries. The second step could be ensuring that laws and regulations in WB6 effectively protect the standard of equal pay for work of equal value and incentivize employers to ensure payment transparency.

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Female Genital Mutilation as a Criminal Offence According to the Istanbul Convention

Ivana Marković

Contents

Abstract The paper examines the provisions on female genital mutilation (FGM) from the Istanbul Convention. They stipulate that the State Parties shall take the necessary legislative or other measures to ensure that certain intentional conducts are criminalized. These conducts are mutilation (expressed in various acts) of the genitals of women and girls, as well as coercion, procurement, and incitement to undergo any of these acts. The aim of the paper is to answer the following questions: What doctrinal aspects do the Articles 38, 41, 42, and 44–46 of the Convention entail, and to what extent are they specified? What about the controversial issue of consent? Are there particularities regarding the spatial and temporal dimensions of the crime? The answers to these questions reflect the nature of FGM as a highly gendered crime.

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1 Introduction

Poverty, domestic violence, sexual violence and human trafficking are all problems that for decades harm primarily women and girls, despite not always being recognized and named as such. They are accompanied by an old, lesser known tradition that is inseparably connected to being female, that is still topical, and is getting even more present in some parts of the world. This tradition—female genital mutilation (FGM), practiced in certain communities is, speaking in today's terms, a highly concerning human rights violation and public health issue.[1] The Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) from 2011, although being an important regional instrument, has become an epitome of fighting violence against women by means of law.

Its focus is, of course, on the respective European States. A look at the prevalence rates worldwide may present the inclusion of female genital mutilation in the sections of substantial criminal law of European societies[2] at first glance as far-fetched and irrelevant. Countries with the highest FGM prevalence rates are all outside of Europe, namely Somalia (98%), Guinea (96%), Djibouti (93%), Egypt (91%), Eritrea (89%), Mali (89%), Sierra Leone (88%) and Sudan (88%).[3] However, FGM is a living reality here, on our continent, too.[4] This has intensified since Europe, particularly the European Union is experiencing an ongoing high immigration influx of people from Africa and the Middle East; and there again from countries and regions with medium to very high FGM prevalence rates. According to the relevant national sources, the most affected European countries are France,[5] the United Kingdom,[6] Italy,[7] Germany,[8] the Netherlands[9] and Spain.[10]

[1] Lepcha and Paul (2021), p. 291.

[2] For more on that see Acale et al. (2022).

[3] Filho et al. (2021), p. 270.

[4] Göttsche (2020), p. 1.

[5] 125,000 subjected and 44,106 at risk in 2019. For an overview and interactive map see: End FGM European Network, https://www.endfgm.eu/female-genital-mutilation/fgm-in-europe/.

[6] 137,000 subjected and 67,300 at risk in 2015. End FGM European Network.

[7] 87,600 subjected and 4900 at risk in 2019. End FGM European Network

[8] For example, in Germany the number of genitally mutilated girls/women rose from 35,715 in February 2015 to 64,812 in December 2017. Awo et al. (2018), p. 7. The most current available data from Germany are from 2020: around 74,899 women and girls were subjected to FGM. Terre des Femmes (2020), https://www.frauenrechte.de/images/downloads/fgm/TDF_Dunkelzifferstatistik-2020-mit-Bundeslaender.pdf. From 2015 to 2017, the number of girls/women at risk rose there from 5956 to 15,540. Awo et al. (2018), p. 7. In 2020, the number was 20,182. Terre des Femmes (2020).

[9] 41,000 subjected and 4200 at risk in 2019. End FGM European Network, https://www.endfgm.eu/female-genital-mutilation/fgm-in-europe/.

[10] 15,907 subjected and 3652 at risk in 2020. End FGM European Network.

As Sotiriadis remarks, a regional phenomenon is crossing the borders and is becoming an issue for the host societies as well.[11] It would therefore be utterly short-sighted and oversimplified to label female genital mutilation as an only or foremost African problem. From this perspective, the inclusion of FGM in the text of the Istanbul Convention was a visionary decision. The universal reason to do so is the intrinsic gender-based violence of female genital mutilation, which is the central topic of this paper.

2 Female Genital Mutilation (FGM) in General: Definition and Classification

The World Health Organization (WHO) defines female genital mutilations as "all procedures that involve partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical purposes".[12] The UN uses the same definition,[13] and so do basically all other international organizations, scholars, and practitioners.[14]

The globally recognized[15] and most commonly used[16] classification of FGM stemming from the WHO consists of four major types, depending on the degree to which the external genitalia are affected.[17] Type I (*Clitoridectomy*) is the partial or total removal of the clitoris (small, sensitive and erectile part of the female genitals) and, in very rare cases, only the prepuce, i.e. the fold of skin surrounding the clitoris. Type II (*Excision*) involves the partial or total removal of the clitoris and the *labia minora*, with or without excision of the *labia majora*. Type I and type II are the most common forms of FGM worldwide with approximately 80%.[18] Type III (*Infibulation*) is the most severe form of FGM. It is the narrowing of the vaginal opening through the creation of a covering seal. The seal is formed by cutting and repositioning the inner or outer labia, with or without removal of the clitoris.[19] The repositioning of the wound edges is done by stitching or holding the cut areas together for a certain period, to create the covering seal, very often by bounding the

[11] Sotiriadis (2014), p. 321.

[12] WHO, Female genital mutilation, https://www.who.int/health-topics/female-genital-mutilation#tab=tab_1.

[13] For example: UNICEF, Female genital mutilation, https://www.unicef.org/protection/female-genital-mutilation.

[14] Braun and Böse (2020), p. 567; Diouf and Nour (2020), pp. 194–199; Awo et al. (2018), p. 8; Reisel and Creighton (2015), p. 49; Strunz and von Fritschen (2020), pp. 37–39.

[15] Lovel (2017), p. 17.

[16] Diouf and Nour (2020), p. 194.

[17] Ofor and Ofole (2015), p. 112.

[18] Strunz and von Fritschen (2020), p. 37.

[19] Ofor and Ofole (2015), pp. 112, 113.

girls' legs together for up to 40 days.[20] Only a small opening is left for urine and menstrual blood to flow out. Approximately 15% of all mutilations belong to this type. However, there are countries (Somalia, Eritrea, Djibouti) where practically all women and girls have been subjected to this form of FGM.[21] Type IV (*Others*) are all other harmful procedures to the female genitalia for non-medical purposes, e.g. pricking, piercing, incising, scraping and cauterizing the genital area.[22]

The Istanbul Convention entails in Article 38 forms of FGM that are to be criminalized. These conducts are based on the WHO classification yet are slightly abbreviated compared to the categorization of the WHO.

3 The Istanbul Convention and FGM: Relevant Provisions

3.1 Substantial Criminal Law

The Istanbul Convention encompasses in Article 5 obligations for the State Parties and due diligence, by stipulating that they "shall refrain from engaging in any act of violence against women and ensure that State authorities, officials, agents, institutions and other actors acting on behalf of the State act in conformity with this obligation"[23] and that they should further "take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors".[24]

This serves the purposes of the Convention according to Article 1, para. 1, namely to "protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence"[25] and to "contribute to the elimination of all forms of discrimination against women and promote substantive equality between women and men".[26] The concrete obligations have been stipulated further in the text in the form of particular conducts that are to be criminalized.[27]

One of those conducts is female genital mutilation (Article 38), where certain intentional conducts are to be criminalized through legislative or other measures.

[20] European Network End FGM, https://www.endfgm.eu/female-genital-mutilation/what-is-fgm/; Klein et al. (2018), p. 2.

[21] Strunz and von Fritschen (2020), p. 39.

[22] Ofor and Ofole (2015), p. 113.

[23] Article 5 (1) of the Convention.

[24] Article 5 (2) of the Convention.

[25] Article 1 (1) (a) of the Convention.

[26] Article 1 (1) (b) of the Convention.

[27] Beside female genital mutilation (Article 38), those conducts are: psychological violence (Article 33), stalking (Article 34), physical violence (Article 35), sexual violence, including rape (Article 36), forced marriage (Article 37), forced abortion and forced sterilization (Article 39) and sexual harassment (Article 40).

These conducts are "excising, infibulating or performing any other mutilation to the whole or any part of a woman's *labia majora*, *labia minora* or *clitoris*". Here, excising refers to the total or partial removal of the clitoris and the labia majora, while infibulating means the closure of the labia majora by partially sewing together the outer lips of the vulva to narrow the vaginal opening.[28] All other physical alterations of the female genitals are covered by the term performing any other mutilation.[29] Compared to the definition of the WHO, clitoridectomy (type I) is attributed to excising (type II). Performing any other mutilation is a very broadly formulated conduct—a "catchall element" that catches acts that fall through the cracks of the other specifically named variations of the conduct. The abbreviated Article 38, para. 1 of the Convention, compared to the underlining WHO classification, explicitly mentions three types of FGM and does not contain their particular definitions. This concise formulation resonates with the legislative logic of criminal law provisions which usually should not be overburdened with definitions.

In addition, the Explanatory Report explicitly relates to the WHO World Health Assembly Resolution 61.16 from 2008 on accelerating actions to eliminate female genital mutilation when it underlines that the acts are covered by Article 38, including when performed by medical professionals.[30] This is necessary to emphasize for two reasons. The first reason for enclosing professional medical staff is more of a dogmatic nature, to prevent misinterpretation of medical interventions[31] within the broader context of consent as justification grounds,[32] which will be discussed later in Sect. 4.

The second reason is the specific context of this phenomenon where "FGM is practiced by any category of the trained healthcare personnel, whether in a public or private clinic, at home or elsewhere".[33] The main arguments in favor of the medicalization of FGM are that it reduces complications and that it is an interim step toward the abandonment of this custom.[34] However, both arguments have turned out to be problematic. The amount of complications has not been lowered.[35] The harm inflicted has not been reduced; especially the long-term psychological and physical damages for the girl/woman remain lifelong and irreversible.[36] There is also no

[28] Council of Europe Explanatory Report. 2011, 34.

[29] Council of Europe Explanatory Report. 2011, 34.

[30] Council of Europe Explanatory Report. 2011, 34; WHO, Sixty-first World Health Assembly WHA 61.16, "Female genital mutilation", 24 May 2008, 22.

[31] See Sect. 3.

[32] Marković (2012), pp. 306–324; Marković (2011), pp. 282–296.

[33] WHO 2010, 2. As a guiding principle, the WHO highlights that "medicalization of FGM is never acceptable because this violates medical ethics since (i) FGM is a harmful practice; (ii) medicalization perpetuates FGM; and (iii) the risks of the procedure outweigh any perceived benefit". WHO (2016, ix).

[34] Kimani and Shell-Duncan (2018), p. 29.

[35] Serour mentions the example of Egypt, where after reported deaths of girls who were cut in hospitals, the ban on FGM in public hospitals was renewed. Serour (2013), p. 147.

[36] Council of Europe. Explanatory Report 2011, para. 198.

proven impact on the decrease of the overall prevalence of FGM.[37] In addition, medical ethics are violated. How can the doctor fulfill his Hippocratic Oath not to harm (non-maleficence) while performing an unnecessary cutting of healthy organs, a bodily mutilation? FGM remains harmful to girls and women even when it's carried out by physicians.

Complicity is addressed as well in Article 38, in the form of coercing or procuring a woman to undergo any of the listed acts[38] and in the form of inciting, coercing, or procuring a girl to undergo any of the listed acts.[39] The fragile position of the girl is acknowledged by one additional form of complicity (incitement), as well as various applicable aggravating circumstances (Article 46). If they are not already constituent elements of the offence, then the circumstances that the offence was committed by a member of the family,[40] that the offence was committed by two or more people acting together[41] and, most importantly, that the offence was committed against a child[42] may be considered as an aggravating circumstance in the process of determination of the sentence. Female genital mutilation is deeply rooted in cultural and religious traditions and customs, and a sense or understanding of wrongdoing is often absent. Therefore, it is probable that the persons who commit FGM would reoffend, especially if they do the cutting "professionally". For this reason, another appropriate aggravating circumstance would be when the perpetrator had previously been convicted of offences of a similar nature.[43] By adding the conducts from Article 38 (a) to the Article on aiding and abetting (Article 41), the remaining forms of participation have been covered as well.

Of course, this inclusion of complicity/participation in the Articles 38 and 41, and with it the rightful widening of the criminal zone beyond the main perpetrator is another difference compared to the medical WHO definition. Also, by naming particular forms of participation, the Istanbul Convention made a whole range of relevant old/new actors legally visible.

The strong rootedness in cultural/religious/traditional (mis)beliefs, not only of female genital mutilation, but of other offences as well, is reflected in Article 42 (*Unacceptable justifications for crimes, including crimes committed in the name of so-called honour*). This provision of the Convention excludes the possibility to regard certain ideas as justification grounds of crime. For acts of violence that are covered by the Convention, culture, custom, religion, tradition or so-called honour

[37] As Kimani and Shell-Duncan point out, a statistical overview of data from 25 countries showed no association between medicalized FGM among daughters and rates of decline in prevalence. Even more, in the two countries with the highest rates of medicalized FGM (Egypt and Sudan), the rates of FGM remain constantly high. Kimani and Shell-Duncan (2018), p. 29.

[38] Article 38 (b) of the Convention.

[39] Article 38 (c) of the Convention.

[40] Article 46 (a) of the Convention.

[41] Article 46 (e) of the Convention.

[42] Article 46 (d) of the Convention.

[43] Article 46 (i) of the Convention.

shall not be regarded as justifications. Claims that the victim has "transgressed cultural, religious, social or traditional norms or customs of appropriate behavior" are particularly included.[44] The belief in these ideas is usually combined with its clandestine performance in jurisdictions where it is forbidden, which means that the parents are aware of its illegality, hence excluding the invocation of mistake of law.[45] In their understanding and actions, customary law gained priority over written law of the respective country.

The absence of any sense of wrongdoing, insight and remorse raised concerns of the court in an Irish case from 2020, the very first of its kind in this country. The parents, pleading not guilty, claimed that their 1-year-old daughter fell on a toy and injured herself. Medical examinations showed that the injuries were not accidental and that the head and glans of the victim's clitoris had been completely removed. The judge viewed this act as being carried out in a premeditated and planned manner and described it as "the most egregious breach of trust".[46]

In a similar case from the United Kingdom (London) from 2019, the Ugandan mother of a 3-year-old mutilated girl used the same argumentation, claiming that her daughter fell on metal and ripped her private parts. The girl was coached to lie to the police about that. The woman was eventually convicted and has become the first person in the UK to be found guilty of FGM;[47] decades after the practice has become illegal in England and Wales by the Prohibition of Female Circumcision Act in 1985.

3.2 Sanctions

Unlike national criminal provisions with their numerically framed stipulation (shall be sentenced "from...to..."; "at least"; "up to..."), usually at the end of each paragraph of the respective crime, the Istanbul Convention expects the sanctions for the offences established in accordance with the Convention to be effective, proportionate and dissuasive, taking into account the seriousness of the offences.[48] This applies to all types of sanctions, whether they are criminal or not.[49] The triad effective—proportionate—dissuasive is closely linked to the various offences from the Articles 33–41, including FGM, which as such should be made punishable under

[44] Article 42 (1) of the Convention.

[45] See also Sect. 5.

[46] Parents jailed over the female genital mutilation of daughter. 27 January 2020. *The Irish Times*. https://www.irishtimes.com/news/crime-and-law/courts/circuit-court/parents-jailed-over-female-genital-mutilation-of-daughter-1.4152765. Riordan, Alison. Father convicted of female genital mutilation of daughter, aged 1, to appeal conviction and sentence. 26 May 2020. *Irish Examiner*. https://www.irishexaminer.com/news/arid-31001777.html.

[47] FGM: Mother guilty of genital mutilation of daughter. 1 February 2019. https://www.bbc.com/news/uk-england-47094707.

[48] Article 45 (1) of the Convention.

[49] Explanatory Report, para. 232.

penal law.[50] Of course, these sanctions can be imposed only when the crime was committed or attempted. In a case from Norway, the West African mother showed interest and became active (contacted a nurse) to get her newborn baby girl mutilated. Yet, her actions did not amount up to punishable attempt. The only available measure was the withdrawal of the travel documents by the police to avert.[51]

Regarding an inherent foreign dimension of criminal genital mutilation,[52] the clarification that these sanctions shall include, where appropriate, "sentences involving the deprivation of liberty which can give rise to extradition"[53] is of additional importance, as the offence often has a cross-border (foreign) dimension. According to Article 2 of the European Convention on Extradition, extraditable offences are offences punishable by deprivation of liberty or under a detention order for a maximum period of at least 1 year or by a more severe sanction.[54] The transnational momentum is important, as many foreign nationals cross the border to subdue their daughters to mutilations in their countries of origin where FGM is not prohibited or is rarely prosecuted. Facilitating extradition enhances the deterrent effect of sanctions for this crime. In a recent case, a Somali woman was convicted for having her two daughters of 6 and 7 years at that time subdued to FGM in Somalia and Ethiopia before coming to Switzerland where she was convicted.[55] Or to mention an example from Africa, with people from Burkina Faso, where the practice is banned, crossing the border to have FGM performed in neighbouring countries where FGM is not criminalized (Mali) or inviting cutters from there.[56] Girls are particularly vulnerable (i.e. by the aforementioned "holiday circumcisions";[57] FGM at young age[58]) and have fewer options to seek help and support. In order to ensure the best interest of the child, including safety, sanctions may include withdrawal of parental rights if those interests cannot be guaranteed in any other way.[59] However, in practice it may be carried out differently. In a Portuguese case from 2021, the Court of Appeals suspended the sentence of previously 3 years prison for a convicted mother, arguing that taking the mother away from the victim would be a second punishment for the daughter.[60]

[50] Explanatory Report, para. 232.

[51] Lien (2017), pp. 201, 202.

[52] See Sect. 4 of this paper.

[53] Article 45, para. 1 of the Convention.

[54] Explanatory Report, para. 232.

[55] Johnsdotter and Mestre i Mestre (2015), p. 19.

[56] UNFPA (2018), p. 63.

[57] See Sect. 5 of this paper.

[58] Serour (2013), p. 147.

[59] Article 45, para. 2 of the Convention.

[60] Amora, Natacha. Female Genital Mutilation in Portugal: collateral effects of its criminalisation. https://www.theiwi.org/gpr-reports/female-genital-mutilation-in-portugal.

3.3 Jurisdiction

Lastly, jurisdiction also plays a role in the context of FGM. Either because of migrations and/or because of performing the intervention in the country of origin or other country where FGM can be performed, the crime has a transnational dimension[61] and depends on effective cross-border cooperation. Particularly two provisions from Article 44 are relevant in this regard. The first one is the establishment of jurisdiction not only based on the territorial principle,[62] but also based of the active and passive personality principle.[63] The second provision that ensures the prosecution of FGM is the lifting of the rule of dual criminality for particular offenses (FGM included) from the third paragraph. This means that the State Parties shall assume jurisdiction if the crime is committed in a third country (by or against their nationals or residents) even if this offense is not a criminal offense in that country.

In a case from 2015, the Supreme Court of Spain declared the country's jurisdiction over FGM, along with the international responsibility to prosecute it and regardless of a law that limited the scope of extraterritorial jurisdiction of the country.[64] The fact that Spain has signed the Istanbul Convention which obligates member states to prosecute FGM, regardless of the place of the commission of the crime was the basis for this judgment. The case was about a family from Africa with their eldest daughter having come to Spain already mutilated. The defendants admitted having undergone her FGM the same year she was born, in Gambia where it is allowed as a traditional and customary practice. Beside the outcome, what is often quoted is the remark of the defendants that this practice is comparable with "the mistreatment – torture of animals (bullfights), wondering about the legitimacy of other jurisdictions to sanction it."[65]

Regarding the nature of the crime from Article 38, it has to be seen in the context of (gender-based) violence. The Istanbul Convention defines violence against women as "a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life". The notion of gender-based violence

[61] In one case from Denmark, a girl of the age of 4 years from Eritrea underwent FGM in Sudan. Both parents were brought before court. The mother was sentenced to 2 years of prison, only 6 months unconditional. The father was acquitted presumably because FGM has been performed without his knowledge. Decision of the Frederiksberg Court, 23rd of January 2009. Johnsdotter and Mestre i Mestre (2015), p. 19.

[62] Article 44, para. 1 (a) (b) (c) of the Convention.

[63] If the offence is committed by or against one of their nationals or by or against a person who has her or his habitual residence in their territory. Article 44, paras. 1 and 2 of the Convention.

[64] Sentencia del Tribunal Supremo (2015), STS 2750 from May 26, 2015.

[65] Hermida del Llano (2017), p. 59.

is understood as "violence that is directed against a woman because she is a woman or that affects women disproportionately"[66] and runs like a thread through the very nature of female genital mutilation.

The drafters of the Convention agreed upon and expressed it in the Explanatory Report that all criminal law provisions should be formulated in a gender-neutral manner, meaning that the sex of the victim or the perpetrator should not be a constitutive element of the crime.[67] However, this is valid only in principle and is not preventing Parties to introduce gender-specific provisions.[68] When it comes to FGM, though, the Convention itself breaks with the principle of gender neutrality, due to the nature of female genital mutilation.[69] The name and the content of the offence define that the victims of this crime are necessarily women or girls. Gender-based asylum claims[70] are also explicitly connected to FGM; female genital mutilation and forced marriage are mentioned first when it comes to gender-related persecutions of asylum seekers.[71]

4 Justification Grounds? Medical Interventions and the Issue of Consent

Consent is usually one of the major preconditions for excluding unlawfulness of medical interventions, while they as such represent (grievous/dangerous) bodily harm and are dogmatically speaking punishable. Therefore, a special justification ground was developed to remove medical procedures out of the zone of criminal liability, or to be more precise, to exclude unlawfulness as an element of crime.

FGM is an invasive intervention on the body of girls/women, in one of the most sensitive areas, performed in a traditional/cultural/religious spirit, dominated by multiple medical consequences that occur immediately and in the aftermath of the surgery. If we consider the amateurish procedure in which FGM usually takes place as a medical intervention in a broader sense, the question arises whether it meets the cumulative conditions of the eponymous justification ground. Those conditions are: (1) medical indication, (2) performing the intervention *lege artis* (according to professional standards), (3) consent or presumed consent and (4) purpose of healing (cure/recovery).[72]

At first glance, we can infer that three out of four prerequisites are not fulfilled. There is no medical necessity to cut a healthy girl/woman, especially when she is at a

[66] Article 3 (d) of the Convention.

[67] Council of Europe Explanatory Report (2011), para. 153.

[68] Council of Europe Explanatory Report (2011), para. 153.

[69] Council of Europe Explanatory Report (2011), para. 198.

[70] Article 60 of the Convention.

[71] Council of Europe Explanatory Report (2011), para. 313.

[72] For more details on the particular requirements in general see Marković (2012), pp. 312–315.

young age and hence in a growth phase. The only reasons to nevertheless do so are of a traditional/cultural/religious nature and are not backed by medical needs. This goes together with the absence of the fourth requirement. If there is no medical indication to perform an intervention, then there is consequently also no pre-existing purpose for healing. One cannot cure someone who was already healthy/uninjured. In fact, the drafters of the Istanbul Convention had this in mind when they stated in the Explanatory Report that "other legally justifiable acts, for example, acts committed in self-defense, defense of property, or for necessary medical procedures, would not give rise to criminal sanctions under this Convention."[73] In other words, if there is no medical necessity, then the act cannot be legally justified.

Lastly, the profiles of the unskilled persons who usually perform the act, exclude the second requirement (*lege artis*). FGM is usually executed by elderly, esteemed individuals from the community, almost exclusively women,[74] but also barbers and herbalists,[75] without anesthesia and under unsanitary conditions, thus even creating further risks of complications. The absence of only one requirement suffices to negate the applicability of medical interventions as justification grounds, let alone the missing of altogether at least three preconditions. Furthermore, an appeal from the WHO that "urges all Member States to enact and enforce legislation to protect girls and women from all forms of violence, particularly female genital mutilation, and ensure implementation of law prohibiting female genital mutilation by any person, including medical professionals",[76] raises the question if the requirement for the conduct to be *lege artis* is actually a requirement at all (pre-supposing that they always apply professional standards), at least in the eyes of WHO. As on organization that monitors FGM very closely and provides guidelines, this appeal is directed to countries beyond the Council of Europe, and by this also beyond the Istanbul Convention.

What remains to be analyzed from the aforementioned conditions for medical interventions is the controversial issue of consent. The drafters had it also in mind when they stated that "in conformity with general principles of criminal law, a legally valid consent may lift criminal liability."[77] The consent, to legitimize otherwise criminal behavior, has to be legally valid. Legal validity is defined by the legislation, theory, and judicial practice of the respective country. Having in mind that the drafters also mentioned medical necessity as a requirement to lift criminal liability, this has to be taken into account as well. Consequently, FGM could not be

[73] Council of Europe. Explanatory Report (2011), para. 156.

[74] Small et al. (2020), p. 469.

[75] World Health Organization. 1997. https://www.unfpa.org/resources/female-genital-mutilation-fgm-frequently-asked-questions#who_performs.

[76] World Health Organization, Sixty-first World Health Assembly WHA 61.16, Female genital mutilation, 24 May 2008, https://apps.who.int/gb/ebwha/pdf_files/WHA61-REC1/A61_REC1-en.pdf, 22.

[77] Council of Europe. Explanatory Report (2011), para. 156.

justified. The existence of only consent could not legitimize FGM in the eyes of criminal law, it would not suffice.[78] Nonetheless, let's look at this element, as it initiates the procedure of female genital mutilation (although *request* instead of consent would be the proper term in this case) and is in the eye of its proponents sufficient, regardless of the other three missing elements.

In order to become relevant as a criminal category, consent has to have a certain quality. To be potentially effective as a justification ground, consent has to consist of: (a) the entitlement to dispose of the respective legal good; (b) statement of consent; (c) the ability to consent, without defect of consent and (d) prior informing of the patient ("informed consent").[79]

Analyzing the (again cumulative) requirements for consent one by one, we come to a similar conclusion as before. Informing the patient means explaining the necessity, the procedure, and the expected outcome of the intervention (the pros and cons). Having in mind that the majority of females are cut at a very young age, also as babies, not only is there no information, but there is also not even simple understanding or consciousness of what follows. This negates the ability to consent.[80] In the case when the intended procedure was explained or indicated to the girl/woman and she raises concerns or even refuses to participate, psychological and physical pressure is to be expected. Apart from this situation, the use of force by holding down the girl/woman is part of the painful intervention, even if the girl/woman agrees with it. Statement of consent, if existent, is given orally, which later complicates the gathering of evidence. In one case from France, police officers found material evidence in the form of "a bloody kitchen roll holding pieces of genital flesh". Regardless of their denial, both parents were convicted for assistance to crime, because the act of FGM was carried out in their home and they thus ought to have known and given their consent to the intervention.[81]

Lastly, the entitlement to dispose ("rule") over one's own physical integrity and other legal goods cannot abolish the criminal liability of the perpetrator. The significance and multitude of the affected (highest!) legal goods would not enable this. Legal goods that are violated by FGM, no matter how their infringement may be systematized or named in the respective legal system (i.e. as dangerous/grievous bodily harm, as physical violence, as female genital mutilation), include some of the most relevant human rights: the right to life (when the procedure resulted in death); the right to physical integrity; sexual and genital autonomy; the principles of equality and non-discrimination on the basis of sex; and the right to freedom from torture and cruel, inhuman, or degrading treatment or punishment.

[78] The German Criminal Code has made the decision easier by introducing the legal standard of "good morals" (*Gute Sitten*) in Article 228 that counteracts an otherwise valid consent.

[79] Marković (2012), p. 315.

[80] Serour (2013), p. 147.

[81] Johnsdotter and Mestre i Mestre (2015), p. 18.

5 Spatial and Temporal Dimensions: Foreign Element and the Limitation Period

The spatial dimension of FGM is twofold. When performed in the country of origin, it is usually done in isolated and hidden locations, under unsanitary conditions.[82] Compared to the circumcision of boys, medical personnel is involved to a much lesser extent. FGM is perceived and passed on as an extremely intimate matter that needs to be "resolved" for the girls/women to be able to enter the community in a new role, with many new marital, parental, and other obligations.

The second spatial dimension is known as holiday mutilations.[83] Parents go with their daughter to their country of origin, disguised as vacation, and let the intervention be performed there. In a Swedish case, a girl from Somali-born parents confessed to her welfare officer that she was subjected to FGM at the age of 11 during a visit in Somalia and that her mother carried out several genital examinations on her to make sure that she is still a virgin.[84]

In another case from 2018 from Switzerland, again a Somali woman was convicted for having her two daughters of 6 and 7 years subdued to FGM in Somalia and Ethiopia a few years before they came to Switzerland. Her defense challenged the application of Swiss law here because the woman was not a Swiss resident at the time of the offence, while the extraterritorial application of Swiss law is intended to criminalize and prevent "FGM tourism" of Swiss residents sending their daughters abroad to undergo the mutilation. The defendant, on other side, came to Switzerland only after the procedure. This interpretation was declined by the Court referring to the principle of universality.[85]

The girl often does not know what is going to happen, let alone that she's been asked for consent. In addition, while being abroad on holidays, allegedly visiting the extended family, the girl is also at risk of being subjected to child/forced marriage.[86] The exclusion from the decision-making process applies also to mutilated adult women.[87] The reason not to arrange FGM in their habitual residence can be either the intention to embed the rite in an authentic traditional/cultural/religious surrounding. Or, and this is more likely, the parents (legal guardians) are very well aware of the fact that FGM is a crime in their country of residence (which excludes the invocation of mistake of law). Therefore, holiday mutilations (during fictional or real holidays, or other made-up travels to relatives when female genital mutilation is

[82] Kimani and Shell-Duncan (2018), p. 30.

[83] Braun and Böse (2020), p. 571.

[84] Decision of the Mölndal District Penal Court, 2 Oct 2006. Johnsdotter and Mestre i Mestre (2015), p. 19.

[85] Human Rights. *Erste Anwendung der Strafnorm gegen Genitalverstümmelung*. https://www.humanrights.ch/de/ipf/menschenrechte/folterverbot/genitalverstuemmelung-uebersicht-vernehmlassung.

[86] Acale et al. (2022).

[87] Serour (2013), p. 147.

being done) are a welcome opportunity to circumvent the punishability of FGM. The irrelevance of mistake of law was confirmed and illustrated in one of the first Spanish cases to be prosecuted. Despite regular medical examinations of their two daughters, explanations about the applicable law in Spain as their country of residence that forbids FGM, and their agreement not to carry out the practice, the Gambian parents had their children undergo female genital mutilation and were convicted each to 12 years of imprisonment. Their defense that they were unaware that FGM is a crime in Spain, supported by the claim of the mother that she was illiterate and that she did not know if she had been submitted to FGM in her childhood herself, was dismissed. The mother later admitted that she was in favor of female genital mutilation.[88]

This phenomenon was observed and tried to be counteracted. In this regard, the Istanbul Convention entails a provision on the important question of jurisdiction, where State Parties should establish their jurisdiction in cases where female genital mutilation is committed abroad to a girl/woman who has her habitual residence on their territory.[89] Hereinafter, families of these girls/women could be prevented to briefly return to their country of origin to commission holiday circumcisions there.[90]

Special measures that include the foreign element of committing the crime abroad are, next to various non-legal options (counseling, code signaling when a girl is at risk, etc.), also provided by national laws.[91]

The temporal dimension takes into consideration the fact that the girls are often subjected to FGM at a very young age, even as babies. Undergoing female genital mutilation in such early stages of life naturally means no understanding, no information, and consequently no option to refuse the extensive and irreversible genital alteration on the part of the victims, which is the reason why it is performed so early. A practical solution for this would be to postpone the beginning of the limitation period for the respective FGM crime, to give the victims enough time to realize and fully grasp what they were subdued to and then to come forward and report it. In Germany, for example, for certain crimes (FGM included), the limitation period starts when the victim has turned 30 years old; until then, the limitation period is stayed (Article 78b, para. 1). A similar regulation exists in the Austrian Criminal Code, where the limitation period starts after the victim turns 28 years old (Article 58, para. 3 (3)). This gives the mutilated woman enough time to understand FGM beyond the social surrounding she was raised in, and to decide to report the crime.

[88] Carranco. Gambian parents each given 12 years jail in genital mutilation case. 26 May 2013. *El País*. https://english.elpais.com/elpais/2013/05/26/inenglish/1369577191_732099.html.

[89] Article 44 of the Convention.

[90] Acale et al. (2022).

[91] In the German Criminal Code (Article 5 [9], lit. a, b), for example, female genital mutilation from Article 226a counts as an offence for which, if committed abroad with specific domestic connection, German criminal law applies, regardless of the applicable law at the place where the offence was committed.

6 Conclusion

When speaking about the regulation of female genital mutilation in the Istanbul Convention, the following points from the previous discussion can be highlighted.

The relevant provisions provide a coherent framework for the criminalization of female genital mutilation in the respective national legislations. Although the naming may be slightly different, Convention[92] practically covers all four types of FGM. It is laudable that complicity/participation[93] is also explicitly covered by the Convention, taking account of the hidden, yet familial/socially pushed conduct upon young women, girls, and even babies. The Article on aggravating circumstances[94] complements this.

It is also important to underline that there are no justification grounds applicable to FGM. Arguments stemming from cultural relativism cannot legitimize punishable behavior. The Article on 'Unacceptable justification for crimes, including crimes committed in the name of so-called "honour"'[95] of the Istanbul Convention reaffirms that. Moreover, the inapplicability of any justification ground includes the absence of legally valid consent, whether from the victim herself, or from her parents/legal guardians. Sanctions should include deprivation of liberty that can lead to extradition, and measures might include withdrawal of parental rights.[96]

Due to a higher number of FGM-affected girls/women in Europe and in conjunction with its provisions on jurisdiction, the scope and importance of the Istanbul Convention with regard to FGM is expanding as well. Its significance did not rise by accessions of further countries,[97] but by the extended pool of persons connected (subjected) to FGM that live on the soils of the Parties to the Convention. Speaking in terms of the dogmatic of criminal law, the Istanbul Convention is enlarging its area of influence by the personality principle (principle of extraterritoriality). Another conclusion is that the national jurisdiction of the State Parties is very often established in cases with a foreign element. The respective provision of the Convention extensively refers to that.[98] The practice and the occurring holiday circumcisions confirm the need for this kind of regulation.

A further particularity of the criminal offense of female genital mutilation is its gender-centrism. The victim is *per se* female (girl/woman), while the perpetrator is very often also a woman.[99] The exclusiveness regarding the sex of the victim makes it an even more gendered crime than forced marriage (boys/men can be forced into

[92] Article 38 of the Convention.

[93] Articles 38 and 41 of the Convention.

[94] Article 46 of the Convention.

[95] Article 42 of the Convention.

[96] Article 45 of the Convention.

[97] The withdrawal of Turkey from the Istanbul Convention, its first signatory and name giver, in July 2021 points out a counter-development.

[98] Article 44 of the Convention.

[99] Serour (2013), p. 147.

marriage, too). The only criminal offense from the Istanbul Convention that is similar in its gender uniqueness is forced abortion.[100]

FGM is violence against the genital and sexual autonomy, against physical and mental integrity of girls and women, and should be treated accordingly. The Istanbul Convention provides a useful concept for that. It has reflected upon and integrated many of the problems linked to FGM, using categories from Criminal Law. The Convention has made the issue of FGM visible, has given guidelines on how to legally respond through criminalization and confirmed its characterization as a regional instrument of law with an international outreach.

Criminal Law remains, of course, a last resort that (re)acts only *ex post* and hence has limited impact. But it is definitely necessary at the end of the road to confront FGM. At the beginning should stand applicable preventive measures that eliminate taboos and false beliefs. Those measures include the unification, systematization, and centralization of relevant data, raising awareness of the health hazards of the practice, further education, communication, and economic support.[101] The answer to the question of whether female genital mutilation, a medically not indicated, irreparable, irreversible surgery with no benefits whatsoever[102] really stands "between tradition and torture", will then cease to be a dilemma.

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[100] See Article 39 of the Convention.

[101] For example, the WHO emphasizes that their efforts concentrate on strengthening the health sector response to provide medical care and counselling to affected women and girls; building evidence by generating knowledge about the reasons, consequences and costs of FGM; and increasing advocacy to end FGM by estimating the health burden and the potential public health benefits and cost savings of preventing FGM. WHO 2020, Female genital mutilation. https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation. When it comes to concrete programs, the European Institute for Gender Equality (EIGE) has selected as examples of good practices the *Chain Approach* (Ketenaanpak) from the Netherlands and *the Catalan protocol for the prevention of FGM* from Spain. The evaluation criteria were "works well", transferability and learning. European Institute for Gender Equality (2013), pp. 4–9.

[102] Serour (2013), p. 148.

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On Extreme Forms of Violence Against Women in Europe: Does Femi(ni)cide Exist in Germany?

Aleida Luján Pinelo

Contents

Abstract In this paper the author analyzes how femi(ni)cide is framed and defined in European policy and domestic policy, and to what extent the concept of femi(ni)cide could improve the functioning of policies on violence against women in this region. This article is situated within the debates on the implementation and ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention). The author focuses her analysis on Germany, working with three types of sources: reports to the Group of Experts on Action against Violence Against Women and Domestic Violence (GREVIO); minor interpellations; and parliamentary motions. The paper is informed by feminist theories and so-called epistemologies of the South. The author argues that the discourses on femi(ni)cide in Germany illustrate how modern modes of thought limit the ability to address femi(ni)cide in its complexity and evidence a continuum of colonial structures of thought.

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1 Introduction

In the last few years, European governments have more intensely developed strategies to fight violence against women (VAW) in their own territories, evidenced by the implementation of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention). This legally binding instrument obligates governments of contracting countries to adopt concrete and comprehensive plans to combat, protect women against, and ultimately eliminate all forms of gender violence. The plans are meant to include: necessary modifications to law codes; development of data collection and comprehensive policies; the establishment of strategies of prevention through education, awareness, and training programs; development of protection and support tools; and international cooperation and monitoring mechanisms.[1] This Convention, however, does not explicitly acknowledge femi(ni)cide[2] as part of its definition of VAW.[3] Femi (ni)cide is a feminist concept that applies to certain killings of women or feminized subjects—those which occur within the patriarchal apparatus or power hierarchies of sex/gender.[4] Femi(ni)cide ranges a variety of non-discrete types such as serial, rape, lesbophobic, prostituted woman, intimate, child and racist.[5] For many years, femi (ni)cide was an issue treated by European countries mainly as a development cooperation issue, a problem in countries of the global South,[6] particularly in Latin America.[7] Only recently has femi(ni)cide in the context of Europe gained ground in feminist scholarship and domestic political agendas.[8] While there has been research on VAW and female homicide in the context of Europe, the problem of femi (ni)cide was generally framed as such only outside of Europe. I argue that a deep structure of colonial thought is partly responsible for the assumption for many years that femi(ni)cide did not occur in Europe. In Latin America, on the other hand, femi (ni)cide has been addressed since the late '90s, with vast knowledge produced in academic, legal and activist spheres.[9]

The focus of my paper is Germany, a choice based on personal experience. While I was living in Berlin, two stories came to my attention: the case of Julissa J. (from

[1] Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, Istanbul (CETS No. 210, 2011).

[2] I use "femi(ni)cide" as an abbreviation of "feminicide/femicide".

[3] See further Daza Bonachela (2017).

[4] The definition offered here should not be taken as official or definitive, as the concept itself continues to evolve and be refined; see further Luján Pinelo (2018).

[5] For femi(ni)cide types see, e.g., Russell (2001); Atencio and Laporta (2012).

[6] Global South is used here to refer broadly to those countries that historically have experienced "the human suffering caused by capitalism and colonialism on the global level, as well as for the resistance to overcoming or minimising such suffering." Santos (2016), p. 18.

[7] For critiques of the use of the term "Latin America" see, e.g., Mignolo (2005); Gargallo (2014).

[8] See, e.g., Weil et al. (2018).

[9] See further Fregoso and Bejarano (2010); Laporta (2015a).

Colombia), killed by her German ex-partner in Berlin in 2011, and that of Semanur S. (from Turkey), killed by her Turkish partner in Berlin in 2012. I saw dissimilarities in the media coverage of each case, as well as the respective discourses about violence. The perpetrator's nationality made a difference: the case of Semanur S. received far more media coverage, and the perpetrator's motives were explained in relation to his "cultural background". In Mexico, the subject of femi(ni)cide has been well-known since the beginning of the millennium; to my understanding, as a Mexican, these cases in Germany were femi(ni)cides. I did some brief research into femi(ni)cides in the German context, and to my surprise I found no information. It caught my attention, though, that several students in German universities were doing research on femi(ni)cide in Latin America. The situation reminded me of the earliest anthropological studies, in which exotic "others" were the ones studied. Why didn't German authorities and media call these crimes femi(ni)cides? Why was there no research on this subject in the context of Germany? Why was there no available data on these crimes? Some years after these initial questions, a second turning point was Germany's statement to the United Nations Office on Drugs and Crime (UNODC) denying the existence of femi(ni)cides in its territory: "Femicide (understood as the killing of women simply because of their gender and to which there is little or no state reaction) is not a phenomenon which can be found in Germany".[10]

The reluctance of the global North, and particularly Germany, to address the phenomenon of femi(ni)cide in its own territories has slowly started to change in recent years. In Germany, one can see this shift begin around 2018, which might be partly explained by the conjunction of activism and the ratification of the Istanbul Convention. In what follows, I will analyze how femi(ni)cide is being defined and framed in the political arena in Germany. I will focus on three types of documents: reports, minor interpellations, and motions. These documents are relevant for several reasons, the most important one being that they shape the discussion of femi(ni)cide and potentially influence the design of strategies and laws which, ultimately, affect the lives of people. My analysis is informed by feminist theories and epistemologies of the South;[11] I use these approaches because femi(ni)cide is a feminist concept, and because they offer ways to question the colonial narratives that continue to be imposed in the discourses on femi(ni)cide.

[10] United Nations Office on Drugs and Crime, *Statement by Germany on the investigation and prosecution of gender-related killings of women and girls*, annex (2014), https://www.unodc.org/documents/justice-and-prison-reform/IEGM_GRK_BKK/Germany_Annex.pdf.

[11] I borrow the term "epistemologies of the South" from Boaventura de Sousa (2016) to cover a variety of epistemologies originating in the global South, such as postcolonialism, decoloniality and anticoloniality. For an overview see Mendoza (2016).

2 International Legislation and Femi(ni)cide

There are two main international conventions that bind European countries with respect to VAW: The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Istanbul Convention (IC).[12] In this section, I briefly introduce how these conventions frame femi(ni)cide. This is important because they inform political discussions within Germany and the government's liability in relation to femi(ni)cide - Germany ratified CEDAW in 1985 and the IC in 2018.

When CEDAW was adopted in 1979, its language did not speak of violence but of discrimination. Diana Russell, who originally theorized "femicide", had not yet formulated this feminist concept.[13] To date, CEDAW Committee has elaborated 38 recommendations, and it is from recommendation no. 12 (1989) onwards that language regarding violence as a form of discrimination is introduced. The wording "all kinds of violence" is commonly used in subsequent recommendations, aiming to cover a diverse spectrum of forms of violence. Sometimes certain forms of violence are described more specifically e.g., "dowry deaths", "violence that puts life at risk", "maternal mortality", "honour killings", and "infanticide". Recommendation no. 35 (2017) is the only one that explicitly uses the terms "femicide" and "feminicide", which are both implied to mean *gender-based killings of women*.[14] It recommends the inclusion of femi(ni)cide in data collection, analysis, and publications on "all forms of gender-based violence against women".

When the IC was adopted in 2011, the paradigm of femi(ni)cide was significantly developed, to the point that in some countries (mostly in Latin America) it had entered the legal sphere.[15] Still, the subject of femi(ni)cide, or any explicit language concerning death, is not included in the IC. However, the Explanatory Report of the IC takes a strong political stand against all forms of violence. It mentions that during the preparation of the IC at least two reports on "feminicide" were taken into consideration: Recommendation 1861/2009 on Feminicides, and Resolution 1654/2009 on Feminicides.[16] A broad interpretation of the IC and its Explanatory Report could suggest that femi(ni)cide is implied within the overall picture of VAW. But the fact that femi(ni)cide is not explicitly named and defined in international and European legislation leaves open the possibility for states to interpret the

[12] A deep analysis of these international documents in relation to femi(ni)cide is worthwhile, but goes beyond the scope of this paper.

[13] Russell used "femicide" in the International Tribunal on Crimes against Women in 1974, but without defining it. In 1990 she and Jane Caputi offered a first definition.

[14] UN Committee for the Elimination of All Forms of Discrimination against Women, *General Recommendation 35*, CEDAW/C/GC/35 (2017), 34b.

[15] See further Laporta (2015b).

[16] Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, Istanbul, 11 May 2011, paras. 16 and 23.

conventions more narrowly, and to avoid addressing the problem of femi(ni)cide while still complying with international and European law.

3 Does Femi(ni)cide Exist in Germany?

Germany's 2014 statement to the UNODC has already been challenged by political actors such as activists[17] and party members. The question now is, how is femi (ni)cide being defined and framed in current political discussions? And why does this matter? To address these questions, I first focus on the State Baseline Report (SBR) to the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) and its eight corresponding shadow reports. After that, I examine 10 minor interpellations regarding femi(ni)cide. I conclude with the analysis of two motions on femi(ni)cide. I argue that these documents show the different official positions of the various political parties in government regarding femi(ni)cide and reveal tendencies that are liable to inform possible approaches to the problem.

3.1 State Baseline Report

Germany delivered its first SBR to GREVIO as required by article 68 of the IC on September 2020. This report is meant to show how the State plans to implement the IC, and was prepared based on a questionnaire formulated by GREVIO, which requests, among other things, information on deaths of women, attempted murders of women, and deaths of children of women victims.[18] The SBR confirms that VAW and domestic violence are violations of human rights, particularly the right to equality among men and women, and reaffirms Germany's commitment against such violations.

Neither the questionnaire nor the SBR use the term "femi(ni)cide"; still, it is possible to extrapolate to a certain extent how the phenomenon of femi(ni)cide is being framed. In the section on substantive law, the SBR addresses the subject of the killing of women and explains that all homicides are processed by the German

[17] See Dyroff et al. (2020).

[18] The Group of Experts on Action against Violence Against Women and Domestic Violence, *Questionnaire on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention)*, GREVIO/Inf(2016)1, at V:O.

Criminal Code (StGB): Section 211 (Murder under specific aggravating circumstances),[19] Section 212 (Murder),[20] Section 227 (Bodily harm resulting in death),[21] and Section 231 (Taking part in brawl resulting in death).[22] In particular it specifies, "If the killing is intended to express hatred or contempt for women in general on grounds of their sex, the murder characteristics of 'base motives' (Section 211 (2) StGB) may apply".[23] StGB Section 178 includes criminalization of rape resulting in death (within the paradigm of femi(ni)cide some of these cases might fall under the type of "rape femi(ni)cide"),[24] and StGB Section 176b penalizes sexual abuse of children resulting in death (within the paradigm of femi(ni)cide some of these cases might fall under the type of "child femi(ni)cide").[25] Although the term "femi(ni)-cide" is not used, the State seems to insist that existing law already addresses the problem of femi(ni)cide and thus there is no need for further action. The justificatory reasoning suggests that femi(ni)cide is already included in these laws due to their "generality" and "universality". According to the SBR, German law takes femi (ni)cide seriously, but women and feminist groups in Germany claim otherwise: e.g., there are complaints about a lack of data on these crimes.[26]

The report also mentions the Act on Compensation for Victims of Violent Crimes (OEG), which allows victims or surviving dependents to receive compensation in situations in which the State was unable to provide effective protection against "a wilful act of violence".[27] This Act suggests that the State recognizes the existence of situations in which it fails to prevent crimes potentially including femi(ni)cides. This interpretation aligns with the part of Marcela Lagarde's definition of "feminicide" in which she points out that: the State not only has the legal responsibility to punish all homicides but also the legal and social responsibility to prevent those crimes.[28] As the report clarifies, there is no information on the number of applications under the OEG, leaving the real picture regarding collateral victims of femi(ni)cide (including children and adults) unknown. It is evident that the SBR's failure to speak of femi

[19] Penalty: imprisonment for life.

[20] Penalty: at least 5 years imprisonment, in some cases imprisonment for life.

[21] Penalty: at least 3 years imprisonment.

[22] Penalty: 3 years maximum imprisonment or fine.

[23] Germany, *GREVIO First State Report Germany*, State Report (2020), p. 43. "Motives are considered 'base' if they are at the lowest moral level and are therefore much more despicable than in the case of manslaughter" German Women Lawyers Association (DJB) (2021), p. 40.

[24] Penalty: at least 10 years imprisonment or imprisonment for life.

[25] Penalty: at least 10 years imprisonment or imprisonment for life.

[26] See Dyroff et al. (2020).

[27] State Report, at V:D.

[28] As Lagarde explains, her definition is framed as a human rights violation that includes the *tolerance of society* towards these crimes and the *responsibility of the State* to work on guaranteeing the lives of its citizens and the enforcement of justice (2008: 216-7).

(ni)cide does not allow for a clear panorama of these crimes in Germany, or of how State programs are helping to address this problem.

3.2 *Shadow Reports*

Following the SBR, eight shadow reports have been submitted to GREVIO.[29] Shadow reports are critical documents produced by civil society in response to official reports, whose aim is to point out shortcomings in the government's strategies.[30] Unlike the SBR, some of the shadow reports use the term "femi(ni)cide" and explicitly highlight the need to address the problem of femi(ni)cide in State strategies. In this section, I will focus on the shadow reports that explicitly mention femi (ni)cide, and I will analyze how it is defined and framed.

The report by the German Women Lawyers Association (DJB) embraces the language of "femicide";[31] however, it mostly refers to intimate femi(ni)cide, and in fact "separation-related homicides" is more frequently used. The report criticizes current legal frameworks that emphasize "cultures of gender-based violence" such as female genital mutilation (FGM), forced marriages and honour killings. Only in a footnote does the text criticize the courts for not naming "femicide as an expression of patriarchal structures and convictions".[32] The report states that, although "honour killing" is not a criminal category, research has shown that perpetrators considered to belong to cultures of "honour killings" are often sentenced taking their "cultural background" into consideration, whereas perpetrators of separation-related homicides who are identified as belonging to the Western-Christian-German culture are sentenced for their individual acts and motivations.[33] The patriarchal or sex/gender system behind these violent expressions of masculinity is erased.

The report includes a section on prosecution of "femicide" in the form of "separation-related homicides", a term which the report offers as the representative form of homicide of women in the context of intimate relationships in Germany. The report states that "separation-related homicides are classified as femicides, i.e.,

[29] This information was valid at least until August 18, 2021. The RIGG-Intervention-Union RLP (September 2020); Solidarity with women in distress, SOLWODI (2020); Lebkom e. V., Lessan, Terre des Femmes and End FGM European Network joint report (2020); DaMigra (December 2020); German Women Lawyers Association (February 2021); The German Istanbul Convention Alliance (February 2021); The Alliance Nordic Modell (July 2021); and Johanna Elle/Andrea Kothen (July 2021).

[30] UNWOMEN, *Alternative and shadow reporting as a campaign element* (January 3, 2012), https://www.endvawnow.org/en/articles/1302-alternative-and-shadow-reporting-as-a-campaign-element.html.

[31] DJB (2021).

[32] DJB (2021), p. 36.

[33] DJB (2021), p. 40.

killings of women based on their gender",[34] but this does not mean that the term "femicide" is used in German law; the drafters might be referring to how international organisms such as the World Health Organization (WHO) and European Institute for Gender Equality (EIGE) categorize these crimes. The DJB warns that an intimate relationship between victim and perpetrator should not be used as a mitigating factor. On the contrary, "gender-based motives" should be considered "for the penalty in Section 46(2) of the German Criminal Code in order to sensitize prosecutors and judges for dealing with the sentencing of such offences".[35] Such motives, according to the DJB, should be considered when, for example, the crime is perpetrated against a woman just because she is a woman or when gender prejudices are evident. The report suggests that the ascription of base motives should be informed by the definitions of gender-based violence in Article 3 (a, d) of the IC.

I would warn that this suggestion can be a limitation if the interpretation of the article is limited, as the documents analyzed in sections 4 and 5 will show. Furthermore, DJB's use of "femicide" to refer to "separation-related homicides" alone can lead to a misperception of the larger phenomenon of femi(ni)cide, potentially causing other types of femi(ni)cide to be left out when policies and strategies are developed. The report does not make clear why the DJB is hesitant to speak of femi(ni)cide in all its forms and in its full complexity as a framework.

The German Istanbul Convention Alliance (BIK) report engages more broadly with the subject of "femicide",[36] and several definitions are found throughout the report. But, in general, "femicide" is defined as having "gender-based causal connections",[37] and as occurring when a woman "is murdered because of the fact she is a woman".[38] The drafters also consider transmen* and transwomen* as potentially falling under this definition.[39] The report points out that the government has failed to address the problem of femicide in Germany for several reasons: e.g., the information collected is limited, what is available only covers intimate femi(ni)cide,[40] and there is a lack of coordination between institutions.

[34] DJB (2021), p. 40.

[35] DJB (2021), p. 44.

[36] German Istanbul Alliance (BIK) (2021). The alliance was established in 2018. The DJB is part of this alliance too.

[37] BIK (2021), p. 30.

[38] BIK (2021), p. 138.

[39] Some countries such as Puerto Rico and Argentina differentiate femi(ni)cide from transfemi(ni)cide. For others, femi(ni)cide is an umbrella term that includes transfemi(ni)cide as a type. In the German context, "*" has been used as a sign of inclusion and visibility, referring to any person that identifies with the given gender identity preceding the asterisk. This, however, has started to be questioned: see, e.g., Yaghoobifarahicht (2018).

[40] The report is referring here to the Federal Criminal Police Office annual reports on intimate partner violence.

The report argues that the German media plays a role in how the problem is portrayed and perceived in society: the lack of a critical perspective and a racist use of language tend to "culturalize" or "ethnicize" some cases.[41] Legally, it explains, a similar dynamic reigns: a perpetrator of intimate femi(ni)cide belonging to the Christian-German group usually gets away with a sentence of "manslaughter", whereas a perpetrator from, e.g., Turkish or Arab cultures (framed as cultures of "honour killing") usually receives a sentence of murder with base motives, implying harsher sentences.[42] The report claims that the problem with respect to femi(ni)cide is not the lack of a legal category as such but the interpretation and application of the current law. For example, "separation killings" are usually treated leniently on the grounds that "the perpetrator would be in a vulnerable emotional state".[43]

Some of BIK's recommendations are "to promote setting up national and international databases to collect detailed information on femicides in order to acquire information that could be used to prevent crimes in the future";[44] securing funding; promoting research; naming "femicides";[45] and avoiding the use of culturalized or stigmatizing terms such as "honour killings", "family drama", and "bloody deed".[46] Even when the BIK report embraces the paradigm and concept of femi(ni)cide in a more extensive way compared to other shadow reports, the term is not used consistently, and in some sections the critiques contradict each other: e.g., whereas the report recommends using the term "femicide", "separation killings" is more frequently used in some of its sections. I suggest that, to avoid reductively speaking of intimate femi(ni)cide alone, it is necessary to identify femi(ni)cide types or clarify how the term is being used.

The Alliance Nordic Model report also refers to femi(ni)cide, but its focus is on women in prostitution. The report's understanding of femi(ni)cide is not totally clear, but one can deduce that it is related to the killing of women because of their gender, given the statement that "[n]ot all homicides in prostitution are related to gender".[47] The report makes evident that comprehensive data on women in prostitution in Germany is lacking, including data on femi(ni)cide per prostitution, and recommends gathering this data. Julia Monárrez, in her database, included "prostitution-related femi(ni)cide" within "feminicide by stigmatized occupation": "women [who] are murdered because of the nature of the work they perform. Under this

[41] BIK (2021), p. 139. For a detailed analysis of this point see Beeck (2021).

[42] BIK (2021), p. 138.

[43] BIK (2021), p. 138.

[44] BIK (2021), p. 28.

[45] BIK (2021), pp. 28–30.

[46] BIK (2021), p. 139.

[47] Alliance Nordic Model, *Shadow report Council of Europe convention on preventing and combating violence against women and domestic violence* (2021), p. 39, https://rm.coe.int/2021-07-09-alliance-nordic-model-shadow-report/1680a33a24.

Table 1 Minor interpellations, elaborated by the author

Date	Document number	Submitted by	Used term
2018-August	19/3763 19/4059	Die Linke	Femicide
2018-November	21/14972	Die Linke	Feminicide
2019-February	7/3138	Freie Wähler/BMV	Femicide
2019-April	19/9695 19/10062	Die Linke	Femicide
2019-November	21/18951	Die Linke	Femicide/Feminicide
2020-February	18/5809 18/6142	Die Grünen	Femicide
2020-April	22/132	Die Linke	Femicide
2020-August	17/107111	SPD	Femicide
2020-September	7/3707 7/4588	Die Linke	Feminicide
2020-December	19/25512 19/25876	Die Grünen	Femicide

criterion we find those women who work in bars and nightclubs. They are the dancers, servers, and prostitutes".[48]

These shadow reports evidence that, though the IC does not explicitly include the term "femi(ni)cide", it has served as a platform for activists and other social actors to bring the subject to the table—similar to the way activist and academic spheres have been key to making femi(ni)cide visible in other regions. Yet in most of these reports the focus is still marginal. Still missing is the demand to make femi(ni)cide an explicit part of the definition of VAW.

4 Minor Interpellations

Since August 2018, 10 minor interpellations using the paradigm of femi(ni)cide have been presented to the German government. In Germany, minor interpellations are questions that any member of the parliament (in conjunction with the parliamentary party) asks to the government (either at the state or federal parliament level), which in turn (through the ministries) has the duty to answer them in writing and in a timely manner (Table 1).[49]

Tracking the use of femi(ni)cide by representatives of political parties obliges us to introduce two other important definitions which they draw from. The WHO states that "[f]emicide is generally understood to involve *intentional* murder of women because they are women, but broader definitions include any killings of women or

[48] Atencio (2017), p. 22.

[49] To collect the interpellations, I used the now-expired project https://kleineanfragen.de/ and the Federal Parliament webpage. For a comprehensive explanation of how the German government works, see, e.g., https://www.bpb.de/.

girls" (emphasis mine).[50] EIGE offers a general definition of "femicide" that covers different types: "killing of women and girls because of their gender". A second definition offered by EIGE for statistical purposes covers only "intimate femicide": "the killing of a woman by an intimate partner and death of a woman as a result of a practice that is harmful to women."[51] As an additional note, EIGE implies that the term "feminicide" is only used to describe situations in which there is insufficient response from the State.

Many interpellations do not offer a definition of femi(ni)cide, so I will focus on those in which definitions can be found or deduced. Furthermore, my analysis will be organized by political party; usually parties interpret feminist wordings such as "gender", "gender-based violence", "woman", and "patriarchy" according to their ideology. In particular, the German word *Geschlecht* can refer to both sex or gender; its translation depends on the context and on the person speaking. In what follows, I translate this term as "sex/gender".

Die Linke[52] is the party that has presented the greatest number of interpellations at the Federal and state level (6 out of 10); it has also done the most to elaborate its use of the term "femi(ni)cide". The party's interpellations ask two main types of questions to the government in relation to the definition of femi(ni)cide: whether the state shares the definitions offered by international organisms such as the WHO, and what the government understands femi(ni)cide to mean. Most of Die Linke's interpellations use similar definitions, which can be summarized as: sex/gender-specific killing of women and girls that is motivated by hierarchical sex/gender relations and closely linked to discriminatory social structures. It is clear that "femi(ni)cide" is used to mean more than intimate femi(ni)cide. In some cases, Die Linke's interpellations use the framing "woman*", which aims to highlight the diversity of women, and note that the killing targets their "ascribed" sex/gender.[53] Moreover, a complex and intersectional perspective can be found: for example, the parliament members request information about "sex workers", women with "migrant background", women with "disabilities", and trans and intersex people.[54] This suggests that these actors work with femi(ni)cide types such as "transphobic" and "prostitution-related" femi(ni)cide, and that they recognize that, e.g., migrant women or women with disabilities might face different challenges.

Die Grünen[55] is the party that has presented the second-largest number of interpellations, at both the Federal and the state levels. In its interpellation to the Federal level, the party does not offer a definition but rather asks if the government uses the term. The state interpellation argues for following EIGE's definition and

[50] World Health Organization, *Understanding and addressing violence against women* WHO/RHR/12.38 (2012).

[51] European Institute for Gender Equality. *Femicide*. https://eige.europa.eu/thesaurus/terms/1128.

[52] "The Left" (Left).

[53] Hamburger Senat, *Antwort des Senats auf die Kleine Anfrage der Fraktion Die Linke*, Doc. 21/18951 (2019).

[54] E.g., Hamburger Senat, *Antwort des Senats auf die Kleine Anfrage der Fraktion Die Linke*, Doc. 21/14972 (2018).

[55] "The Greens" (Centre-left).

defines "femicide" as "the killing of women and girls because of their gender, whether committed or tolerated by private and public actors. The term covers, *inter alia*, the murder or manslaughter of a woman in the context of a partnership".[56] Despite this broad understanding of femicide, almost all questions in the interpellation request information about women killed in the context of a relationship, so-called intimate femicide.

Turning to the responses from the federal and state governments, the answers from the federal government show that it knows about the subject of femi(ni)cide and seems to accept the WHO's definition. However, it explains that it does not use the concept as a framework because: (1) the concept is open to many interpretations; (2) the concept subsumes other forms of killing, such as honour killings. Moreover, the federal government argues that the issue is addressed under existing criminal laws.[57] The state responses, although aligned with the Federal government, show subtle differences: for example, one state argues that since femi(ni)cide does not exist in German (criminal) law, it cannot give an account of the phenomenon,[58] while another state responds that it is possible to offer an answer based on a general understanding of the term as covering all VAW resulting in death, regardless of motivation.[59] The first of these two statements, in addition to arguing that the legal category does not exist, also takes WHO's definition of femi(ni)cide, in which *intentionality* is a key element, and goes on to argue that it is not possible to offer information on femi(ni)cides because German criminal statistics do not record motivations in the first place. The second answer uses femi(ni)cide as a paradigm for analysis but risks turning "femi(ni)cide" into the term for any killing of women. Other state responses mention that the states are bound to the IC and therefore "the definitions of sex/gender-based violence fixed there are decisive for [their] work".[60]

This statement shows the importance of definitions and what is or is not included within them; for example, one can read "all forms of violence" in the IC as comprehensively as possible, which would include femi(ni)cide, or one can make a narrow interpretation that femi(ni)cide is not fixed and defined in the IC, therefore the states are not bound to specifically address femi(ni)cide. Meanwhile, governments, at both the federal and state levels, are unable to answer the various questions posed by the political representatives, partly because they are not obliged by a binding acceptance of femi(ni)cide to gather the necessary information. Some answers from federal and state governments stress the focus on motivation in the definition of femi(ni)cide—"*because* she is a woman"—yet they offer no argument that justifies the lack of documentation of motives. In fact, I question whether the

[56] Niedersächsischer Landtag, *Antwort der Landesregierung auf die Kleine Anfrage der Fraktion Die Grünen*, Doc. 18/6142 (2020). All translations into English are my own.

[57] Bundesregierung, *Antwort der Bundesregierung auf die Kleine Anfrage der Fraktion Die Linke*, Doc. 19/4059 (2018).

[58] Sächsischer Landtag, *Antwort der Landesregierung auf die Kleine Anfrage der Fraktion Die Linke*, 7/3707 (2020).

[59] Landtag Mecklenburg-Vorpommern, *Antwort der Landesregierung auf die Kleine Anfrage der Fraktion Die Freie Wähler/BMV*, Doc. 7/3138 (2019).

[60] Hamburger Senat (2018).

focus in tackling femi(ni)cide should be individual motivation alone, which could overshadow the complex context in which most of these murders occur.

As far as data collection and research are concerned—addressed in articles 10 and 11 of the IC—answers to the interpellations clearly state that due to the lack of a criminal definition, no data collection, evaluation, and publications on the subject are foreseen. In other answers, it is argued that these articles of the IC do not request criminal statistics but rather direct governments to "collect disaggregated relevant statistical data at regular intervals on cases of all forms of violence covered by the scope of this Convention".[61] Here we see that it not only matters which of "all forms of violence" are named but also what type of data. In addition, a state-level answer claims that femi(ni)cide cannot be made a criminal category because this might be unconstitutional and discriminatory.[62] It would be supposedly discriminatory because treats women differently from men, and unconstitutional because the constitution should treat people equally—an argument built on the grounds of the supposed "neutrality" and "equality" of law. The question, then, is why some gender-specific forms of crimes such as FGM are in the criminal code while others are not.

A recurrent question in the interpellations is whether femi(ni)cide can be framed as a hate crime.[63] The government often recalls that from 2020 on, police statistics include, in the section on hate crimes, information on "sex/gender", "sexual identity", and "sexual orientation". This aligns with, e.g., one of Russell's definitions of "femicide": "a hate killing perpetrated by men against females".[64] The idea of framing femi(ni)cide as a hate crime does not come from the government alone. Some lawyers have suggested it as well—for example, Leonie Steinl proposes that gender-based violence against women can fall under the category of hate crime in current German law if a criminal offense is committed and a gender-related prejudice motive is identified.[65] Paying attention to the precise definition of hate crimes would be crucial, though, if we are to avoid limiting the concept of femi(ni)cide, since not all femi(ni)cides are motivated by clear hate and prejudices.

These answers from different levels of government to minor interpellations suggest that, if language relating to femi(ni)cide or murder (besides the culturalized violence of honour killing) is not explicitly used in international conventions and laws, it is unlikely that policies will fight against the phenomenon these words speak to, or that state institutions will address the problem in any depth. It is evident that the discussion around criminalizing femi(ni)cide needs to be continued, but is it really necessary for femi(ni)cide to become a criminal category in order for Germany

[61] Bundesregierung, *Antwort der Bundesregierung auf die Kleine Anfrage der Fraktion Die Linke*, Doc. 19/10062 (2019).

[62] Niedersächsischer Landtag (2020).

[63] E.g., Hamburger Senat (2019).

[64] "The Origin & Importance of the Term Femicide," on Diana E. H. Russell's official website, https://www.dianarussell.com/origin_of_femicide.html.

[65] Steinl (2018), p. 202.

to address it in policy making and data collection? For example, "hate crime" as such is not a criminal category in the German criminal code, but it has become a legal category and therefore data is being collected by corresponding institutions.[66]

5 Motions

Motions are draft bills that parliamentary groups present to the state or Federal parliaments to be discussed in a plenary session.[67] So far, three motions have been presented on the subject of femi(ni)cide, all by the parliamentary group of Die Linke. I will focus on the two in particular which were discussed in plenary sessions.[68]

The first motion was presented to the legislative assembly of Hessen in March 2020.[69] Its subject is the prevention of and fight against "femicide" in the region of Hessen, and it takes as referent the IC and activism in Latin America. In this motion, femicide is defined as "the killing of women due to their sex/gender or because they are women",[70] and it is framed as a structural and systemic problem in a patriarchal society. The motion lists a series of 15 actions, including: to work towards a national reform of criminal law aligned with the IC; to classify "femicide" as a hate crime; to include "femicide" in crime statistics; and to register hate crimes against trans and intersex people. The motion aligns with the idea that without appropriate data very little research on the subject is possible.[71]

The plenary discussion starts with a speech by the representative of Die Linke; interestingly, she ends her participation with the phrase "not one less", a motto that has been used widely in feminist activism in Latin America against femi(ni)cide.[72] The SPD[73] speaker describes an eight-stage prototype pattern, developed by criminologist Jane Monckton Smith, to show that many cases of femicide - intimate femi

[66] Bundestag, Gesetzes zur Bekämpfung des Rechtsextremismus und der Hasskriminalität, BGBI. I 2021, Nr. 13, 441–447 (March 30, 2021).

[67] Bundeszentrale für politische Bildung, *Der Deutsche Bundestag und seine Akteure* (December 13, 2019), https://www.bpb.de/izpb/301690/der-deutsche-bundestag-und-seine-akteure.

[68] It seems that there was no parliamentary debate on the motion Sächsischer Landtag, *Antwort der Landesregierung auf den Antrag der Fraktion Die Linke*, 7/3817 (2020).

[69] Governed by the CDU ("Christian Democratic Union of Germany", Center right) and Die Grünen.

[70] Hessischer Landtag, *Antrag der Fraktion Die Linke*, Doc. 20/2570 (2020).

[71] 17 femi(ni)cides were documented in this region during 2018 (AK Feministische Geographien 2021, Femi(ni)zide in Hessen 2018, https://storymaps.arcgis.com/stories/d5f0ca7d7436478a8883a00993b183e2#ref-n-a7L06R.

[72] Hessischer Landtag, *Prävention und Bekämpfung von Frauenmorden*, Plenary session 46, 20/46 (2020), at 3552. The original slogan, belonging to the Mexican poet and activist Susana Chávez Castillo, is "Ni una menos, ni una muerta más" (Not one less, not one more woman dead). Minutouno (2015).

[73] "Social Democratic Party" (Centre-left).

(ni)cide—do not happen out of the blue, aiming to illustrate that femi(ni)cide is not just an isolated event but the result of a continuum of violence which the state should work to prevent and protect women from. The representative of the FDP[74] mentions that many tend to think that "femicide" is only a problem in Latin America, and stresses that although the phenomenon is widespread in that region, it occurs in Germany too.[75] However, one of this representative's criticisms of the motion is that criminalizing "femicide" (which would imply harsher penalties) will not solve the problem.[76] The speaker holds that these crimes can be addressed with existing criminal law but recognizes the problem related to "base motives"—as highlighted by the DJB shadow report. The representative of the CDU, self-identified as a man, points out that the debate on VAW should address men as well as women, because such violence starts with them and their masculinity. Still, he rejects the framing of the motion, which suggests that Germany is a patriarchal society. This line of thought, in my view, coincides with that expressed by the AfD[77] speaker, who differentiates between "honour killings" and "separation killings", applying the term "patriarchal cultures" to the former, referring to migrant communities alone. Still, the AfD speaker seems to agree that either case should receive an equally heavy sentence. The same speaker argues that the right name for femi(ni)cides is "killing of women" or "women killings".[78]

The final document I will analyse is the motion on "femicide" presented to the German Federal Parliament in November 2020. Femicide is framed in it as the killing of women (including girls) due to their sex/gender in light of hierarchical sex/gender power relations.[79] The motion uses a broad definition of femicide and a deeper understanding of the phenomenon: femicidal violence targets subjects whom the perpetrator identifies as women (even when the victim does not necessarily identify as such), and it can happen in a relationship setting, in a family setting, in a public setting, or due to hate. The motion stresses and questions the Federal government's refusal to use the definition of femicide provided by the WHO. It contains 7 actions, including suggestions to: recognize femicide as the killing of

[74] "Free Democratic Party" (Center to center-right).

[75] Hessischer Landtag (2020), at 3554.

[76] The failure to decrease the number of femi(ni)cides in countries that have criminalized femi(ni)cide in their penal code seems to support the argument that criminalizing is not the solution. Although this argument is partially true, it does not take into consideration the level of impunity in the judicial system in most of the countries referred to, which makes it more difficult to effectively implement these penalties. Furthermore, it shadows the symbolic aspect that many feminists in Latin America have mentioned regarding the value of the legal category of femi(ni)cide. Feminists in Latin America are not so naïve as to believe that criminalization of femi(ni)cide alone will solve the problem.

[77] "Alternative for Germany" (Right-nationalist).

[78] Hessischer Landtag (2020), at 3560-1. The Social and Integration Policy Committee recommended that the motion be dismissed by the Assembly in August 2020.

[79] Die Linke, *Antrag: Femizide in Deutschland untersuchen, benennen und verhindern*, Doc. 19/23999 (2020).

women and girls due to hierarchical sex/gender relationships; establish an independent femicide watch for Germany; broaden the yearly police report on intimate violence to VAW in general; and provide training to the police and the judiciary.

In the plenary discussion, Die Linke's representative states that the party is not proposing to create a new criminal category of femicide but rather to add a consideration of sex/gender relations in the existing law.[80] The representative implies that making femicide a criminal category is not a prerequisite for establishing independent monitoring that collects data on these crimes and does research on risk, so as to design suitable prevention strategies. The next speaker, from the CDU/CSU,[81] argues the following: that some of the actions listed in the motion were already implemented long ago; that her party's central concern is the victim herself regardless of sex/gender (suggesting that naming "femicide" is to privilege certain victims over others); that hate crimes against women are already considered in the criminal statistics in the form of sexual orientation and sexual identity (as stated in the previous section); that overall, more men are killed than women; and that men too are killed in the context of (ex-)relationships, but there is no claim that such killings happen because they are men.

In response to this speaker's arguments, I might make the following observations. The narrative of neutrality and equality of state institutions, to which the speaker appeals, is a commonplace that tends to blind us to the material reality we live in, in which, e.g., skin color, sex/gender, and nationality have effects on our material circumstances. Police and other members of the justice system should treat all perpetrators equally; however, extensive literature shows that white and racialized perpetrators are not treated "neutrally" or "equally".[82] As for the argument that more men than women are killed, it is another commonplace and omits questions such as, who kills men and who kills women? In contexts of intimate relationships, when women are perpetrators, what are their motivations? Research has shown that men are mostly killed by other men; women are mostly killed by men. In the context of relationships, women mostly kill men due to a long history of abuse, to protect children or to protect themselves; however, sentences given to women perpetrators tend to be harsher.[83] Furthermore, to work with the paradigm of femi(ni)cide does not imply obscuring, denying, or avoiding the study of cases of male victims of violence as well.

The AfD representative heats up the debate and at the same time makes it richer for analysis with the claim: "Now there are societies in which women are valued.

[80] Deutscher Bundestag, *Femizide in Deutschland untersuchen, benennen und verhindern*, Plenary session, 19/192 (2020), at 24298.

[81] "Christian Social Union in Bavaria" (Centre-right).

[82] See e.g., Lembke and Frommel (2009). "Racialization" refers here to the processes by which racial meanings are attributed to social problems and are used as key factors to define and understand such problems. See further Murji and Solomos (2005).

[83] For research backing up these assertions, see e.g., Radford and Russell (1992), pp. 10–11.

Germany was once such a society".[84] This affirmation invokes an idyllic period in Germany's history in which women were appreciated and did not experience violence, suggesting this is no longer the case. The idea is not that Germans have become violent, but that violent men, the "others" from "macho cultures", have spread widely and established themselves in German society due to migration. As the speaker states, "there are societies where women are treated like dirt (...) [These societies] can be found in North Africa and the Middle East. Germany is well on the way to becoming such a society".[85] The speaker portrays these diverse regions as cultures of forced marriage, women treated as slaves, and honour killings. I see a principal element to criticize in this speaker's discourse: the dualist narrative of "us", the civilized and good, versus the barbaric and violent "others"—an approach that, in addition to being openly racist and xenophobic, is problematic in its very structure. Dualistic mindsets - good vs. bad, us vs. other, West vs. East, civilized vs. barbarian - have already been criticized by currents of thought such as postmodernism and new materialism.[86] Societies are too complex to be reduced to dualisms of this kind; furthermore, postcolonial and decolonial studies have exposed the colonial and hegemonic roots of these dyads and their political purpose.[87] The AfD is not neglecting "femicide" here; it is, however, othering and culturalizing it.[88]

Most of the strategies in Germany to fight against domestic violence, and later "all" forms of VAW, started to develop in the 1990s. Many of the representatives involved in the debates on the two motions just discussed say that the measures taken to fight VAW are vast and provide a list of the programs currently operating at state or federal level. However, the paradigm of femi(ni)cide shows us that these measures need to be reviewed because numbers of such killings are still high. Furthermore, as the SPD speaker points out, although the "standard" type of "femicide" in Germany is intimate femi(ni)cide, there are other types too, and we do not have the necessary data to give an account of them. In these motions, the focus is often placed on intimate femi(ni)cides, and other types such as prostitution-related, trans-phobic, lesbophobic, child and non-intimate femi(ni)cides are not addressed at length.

6 Conclusion

The focus of this article has been an analysis of how femi(ni)cide has been defined and framed in the political arena in Germany, with an eye toward shedding light on trends in addressing the problem and possible future lines of work and action.

[84] Deutscher Bundestag (2020), at 24300.

[85] Deutscher Bundestag (2020), at 24300.

[86] See, e.g., Dolphijn and van der Tuin (2012).

[87] See e.g., Mignolo (2005); Mendoza (2016); Santos (2016).

[88] The motion was dismissed in June 2021 (Deutscher Bundestag, *Beschlussempfehlung und Bericht*, Doc. 19/30480, 2021).

It is evident that, for the State, what is not named does not exist; in this regard, the act of naming matters, since it can affect the lives of real people. This is an example of how theory and concepts come to matter and have concrete effects on the "real world". In the case of femi(ni)cide, when the problem is not named, it is not visible, and no political interventions are taken against these crimes. It is evident that the IC has been a driving force for countries to take up the theme of femi(ni)cide, but one of its limitations is its lack of explicit language referring to death or femi(ni)cide. In CEDAW, femi(ni)cide is not included in the definition of VAW, gender-based violence, or gender-based violence against women. This lack reinforces the continued rejection of the term "femi(ni)cide" by states such as Germany; interestingly, in German discussions, CEDAW recommendation no. 35, on data collection on femi(ni)cide, is never referred to.

Unlike some countries in Latin America, which have legally recognized femi(ni)cide, Germany is reluctant to take a similar stance. In the analyzed documents, at least two fallacious logics can be observed. The first is evident when it is stated that there is no data on femi(ni)cide because no legal category exists, and that no legal category exists because the problem is already addressed in the constitution—this would logically seem to mean that because the crime is addressed in the constitution, no data can be collected on it. The second is evident when it is stated that there is no data on femi(ni)cide because no legal category exists, but that making femi(ni)cide a criminal offense is unconstitutional—in this case, the logical extrapolation is that there is no constitutionally sound way to approve data collection. Much of the discussion focuses on femi(ni)cide as a criminal category; however, that is not the only path that Germany can take to justify data collection, policy, and research. To give a parallel example, hate crimes are not a criminal category, yet they are recognized by the law, and data has been collected since 2021.[89]

In the texts I analyzed, two main recurring problems with regard to how they address femi(ni)cide are what I identify as "universalism" and "dualism". These modes of thinking correspond to a modernist ontology—an ontology that has been questioned by, for example, postmodernism, new materialism and epistemologies of the South. Such thinking not only fails to grasp the complexity of reality, but can also entail autocratic practices.[90] I argue that, in order to address the phenomenon of femi(ni)cide in its complexity, it is necessary to identify these modes of thought, dismantle them, and "traverse" them.[91] For example, most of the debates analyzed in this paper assume the premise of the *de facto* "universality", "neutrality" and "equality" of law, and this turns out to be problematic when applied to problems such as femi(ni)cide. When the crime is subsumed under the "universal" term of

[89] Bundestag (2021).

[90] The list of criticisms of modern thought is extensive. See, e.g., Dolphijn and van der Tuin (2012); Mendoza (2016), Santos (2016).

[91] A similar critical approach is followed by Verdu in this volume. "Working through", "traversing", or "pushing dualism to an extreme" is a methodology developed by new materialism whose purpose is to find a way to move beyond the dualisms from modernity; see further Dolphijn and van der Tuin (2012).

"homicide", the nuances and differences in motivations and contexts in which men and women are killed are erased (the same is true for diversity among women and men). Appealing to a belief in "neutrality" and "equality", politicians argue that all perpetrators are treated according to these premises, while experts have shown otherwise, as evidenced in the reports by the DJB and BIK.[92] The science of law (broadly understood) needs to think through these generalizations, otherwise it will not be able to address the realities that demand its action.

There is also a tendency, in the texts analyzed here, towards a dualistic approach that ends up "othering" or "culturalizing" violence (a mechanism used by Western countries in which cultural elements from non-Western countries are magnified to explain violence).[93] In the case of femi(ni)cide, this includes the creation of dichotomies between "we" and the "others" (the non-violent Christian-Germans versus the violent non-Christian-Germans, or the non-violent Europeans versus the violent outsiders). FGM and honour killings (which are largely associated with non-European cultures) are well accepted in the law, whereas most political actors are still reluctant to recognize femi(ni)cide.[94]

I see a positive sign in the fact that Die Linke, the major political party lobbying on the subject, has generated discussion about it, taking a critical approach to the subject and taking into account contributions from the global South such as intersectionality, the questioning of dualisms, the quest for the legal recognition of femi(ni)cide and data collection, the emphasis on the responsibility of the State, and the need to study femi(ni)cide as a complex phenomenon. It is understandable that Die Linke, for the most part, has presented the interpellations and motions, given that its policies tend to question traditional and patriarchal values. Nor is the AfD's reaction surprising, since its agenda is openly anti-immigrant (particularly anti-Muslim) and promotes traditional (patriarchal) Christian values.[95] Given this circumstance, there is a danger that the issue of femi(ni)cide will become politicized despite the fact that, as stated by one of the political representatives cited above, VAW is a problem that should concern all parliamentarians regardless of which party they belong to.[96]

The German State no longer denies the existence of femi(ni)cide in its territory, as it did in 2014. Now, cases such as those of Julissa and Semanur can be framed as femi(ni)cide in German media,[97] research on Germany using the framework of femi(ni)cide has started to increase, and activist data collection projects have also

[92] See Lembke and Frommel (2009); DJB (2021); BIK (2021).

[93] See Montoya and Rolandsen Agustín (2013).

[94] Lembke and Frommel (2009) analyze this phenomenon in the law, although they do not use the concept of femi(ni)cide. Femi(ni)cide, as I have addressed in this paper, is not legally recognized in Germany, so there are no sentences for femi(ni)cides in the country.

[95] For a broader description between Die Linke and the AfD see Olsen (2018).

[96] Hessischer Landtag (2020), at 3551.

[97] For a study on German media framing of femi(ni)cide, see Beeck (2021).

emerged.[98] However, after the analysis of these documents, it is evident that femi (ni)cide as a concept, and in its complexity, has not yet been fully embraced in policy making, and there is a real danger of continuing to perpetuate detrimental stereotypes and inequalities in policy and politics.

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[98] See Dyroff et al. (2020).

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Femicide in Serbia: Inadequate Judicial Response

Kosana Beker and Vida Vilić

Contents

Abstract Violence against women is a global phenomenon that affects the lives of women and girls around the world. The ultimate and most extreme form of violence against women is femicide—the murder of a woman because she is a woman. In Serbia, femicide is not incriminated as a separate crime, although there are many characteristics that can distinguish femicide from the neutral form of murder (homicide), it has a strong gender dimension, and it is a form of hate crime. The roots of femicide lie in a culture dominated by patriarchal structure, gender discrimination, and unequal power relations based on male domination and control. It is the most serious consequence of violence against women, especially domestic and intimate partner violence. Despite the adoption of the legislation on the prevention of violence against women in Serbia, the state and its institutions have not been able to provide adequate prevention and protection from femicide. Although it is necessary to take measures at the level of the entire society to eradicate violence against women, the focus of this paper is a judicial response to femicide. The authors argue

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that the analysis of the case law shows it is unsatisfactory and inadequate.

1 Introduction

Violence against women is a global phenomenon that affects the lives of women and girls around the world. The ultimate and most extreme form of violence against women is femicide—the murder of women because they are women.

This paper includes definitions, forms and phenomenological characteristics of femicide, as well as basic concepts related to femicide as a criminal act with a visible gender dimension. This is very important because there is no unique definition of femicide, and the criminal legislation in the vast majority of countries does not recognize femicide as a criminal act. The aim of this paper is to provide basic information on this phenomenon in order that professionals in state institutions responsible for the prevention, control, and prosecution of femicide better understand the gender characteristics of femicide. We have also summarized elementary classifications of femicide, made according to the relationship of murderers and victims, the criteria of immediate causes that lead to femicide and the classification on direct and indirect killings of women. This paper presents the current legal and factual situation of femicide in Serbia. In addition, it includes key findings from the research conducted within the project "Eradication and prevention of femicide in Serbia", aimed at assessing relevant actors capacity in understanding the dynamics, nature and forms of femicide and at contributing to improvement of risk assessment and effective intervention in the prevention of femicide. Research results were published in "Social and institutional response to femicide in Serbia",[1] the first interdisciplinary research on femicide in Serbia, which included analysis of current court practice in processing femicide cases from 2015 to 2019.

2 Definition and Classification of Femicide

A large number of crimes are committed using violence or by threating with violence. However, violence as such is not incriminated as a separate crime in criminal law; rather there are many criminal acts in which violence is an element of the criminal act, either as *modus operandi* or manner of committing the criminal act (e.g. rape, physical assault, aggravated bodily harm). Culturological conceptions of violence link 'masculinity' with violence, as a result of discrimination (structural inequalities and prejudices which rationalize the attitude of inferiority of women

[1] The results of this research are published in: Konstantinović Vilić et al. (2019); Petrušić et al. (2019); Konstantinović Vilić and Petrušić (2021).

and/or members of certain ethnic, religious and other groups, with the legitimization of violence against them) and widely spread patriarchal concepts and values (male violence against women, as a common way of control and demonstration of power.[2] Numerous criminological researches of violent crimes, both in Serbia and worldwide, among other things, revealed that the perpetrators of violent crimes are predominantly males, younger and middle-aged up to 45 years of age.[3] Statistics and previous research show that the vast majority of murderers are male (approx. 90%), therefore Kaiser claims that murder is a man's crime,[4] while Richard Collier stated that the "most crimes would remain unimaginable without the presence of men".[5]

Femicide stands out as the most extreme manifestation of violence against women committed by men. However, both theory and practice still lack a single (unified) definition of femicide. The existence of different definitions is one of the key reasons why it is difficult to determine the prevalence of femicide, which makes it challenging to comprehensively analyze and create effective strategies to prevent femicide. Having in mind that femicide, as the most extreme manifestation of violence against women, has its roots in a culture dominated by gender discrimination, patriarchal structure, and unequal power relations, it is very important to separate femicide from other forms of murder and to prevent it with special measures and strategies. The term 'femicide' was first used in Britain in 1801, in the *Satirical Review of London* at the Commencement of the Nineteenth Century, defined as the killing of women, as well as in 1848 *Wharton's Law Dictionary*, which defines femicide as a criminal act.[6] The current use of the term dates back to 1970, owing to feminists and feminist movements, especially Carol Orlock, who is highly regarded today for launching an initiative to use the term in this context, in her unpublished anthology of femicides.[7]

One of the first definitions of femicide was given by Diana Russel[8] as killing of a woman by a man because of her gender, killing of females by males because they are females, misogynistic killing of females perpetrated by males motivated by hatred of women, contempt for women, pleasure, sense of ownership and superiority over women).[9] In addition, she emphasized that this term should not be used for gender-irrelevant murders, such as accidental killings of women by men unknown to them or killings of women committed by women. Later, Karen Stout explained 'intimate

[2] Simeunović Patić (2003), p. 35.

[3] Carrabine et al. (2004); Walker and Maddan (2013); Rowe et al. (1995); Konstantinović Vilić et al. (2019).

[4] Keiser et al. (1993), p. 173.

[5] Collier (1998).

[6] Caputi and Russell (1990), p. 34.

[7] Kaye (2007).

[8] Diana Russell used the term femicide when testifying about murders of women at the International Tribunal on Crimes against Women in Brussels in 1976.

[9] Radford and Russell (1992).

femicide' as "killing of women by male partners", while Myrna Dawson and Rosemary Gartner expanded this definition to include "current or former legal spouses, common-law partners or boyfriends".[10] The more recent definition of femicide in the *2012 Geneva Declaration on Armed Violence and Development* did not have a strictly feminist component () because it assumes that femicide is any killing of a female person.[11] In the latest global report on homicide, the term 'femicide' is used for gender-related killings of women, but only if a woman is killed by an intimate partner or family member, acknowledging the fact that some gender-related killing would not be accounted for due to the definition.[12]

In the feminist theory, femicide is gender-based violence i.e. violence directed against women on the basis of their gender, gender roles and unequal power relations in the society. It is a murder of a woman because she is a woman, misogynistic killing of women by men, motivated by hatred of women, contempt or desire for domination and taking control of her life.[13] It covers all misogynistic and sexist murders of females regardless of age, including torture, burning of widows at the husband's stake or dowry, homicides for "insulting family honor", deaths from female genital mutilation, as a result of rape, domestic violence killings, the killing of newborn female children to give preference to male children, etc.[14]

Research on gender-based violence has been conducted worldwide, most of it in Europe[15] and the US,[16] but there is a lack of research focused specifically on femicide. In recent years, a number of murdered women in gender-related killings is available at the global level,[17] but there are not many in-depth studies on femicides, there are only the mere numbers.[18] However, femicide is widespread in the world and it still has a tendency to grow. For example, a UNODC study from 2019 shows that 87,000 women and girls were intentionally killed globally in 2017, which is a decrease from 2012. The share of women killed by intimate partners or other family members, however, rose from 47 percent of all female homicide victims

[10] Gartner et al. (2017)

[11] Femicide: A Global Problem (2012).

[12] United Nations Office on Drugs and Crime (2019), p. 21.

[13] Radford and Russell (1992); Konstantinović Vilić et al. (2019), p. 67.

[14] Caputi and Russell (1990), p. 15 in Radford and Russell (1992).

[15] See, for example: OSCE-led Survey on Violence against Women (2019); *Violence against Women, an EU wide Survey: Main Report* (2015).

[16] See, for example, Tjaden and Thoennes (2000).

[17] See, for example *Global study on homicide*, United Nations Office on Drugs and Crime (2019).

[18] On example, could be the case of France. In a report by the judiciary published in 2019 reviewed 88 criminal proceedings of femicide cases and identified several patterns: prior episodes of violence in two thirds of cases, substance abuse, and unemployment of the victim or the perpetrator. Most of the femicides took place when victims separated from the perpetrator or announced their intention to do so. The report made 24 recommendations to improve the criminal justice response to these cases.See Šimonović (2021), para 62.

in 2012 to 58 percent in 2017. The overall number who lost their lives to this type of homicide rose from 48,000 victims in 2012 to 50,000 in 2017.[19]

It is evident that there is a need to clearly define and recognize the phenomenon of gender-based killing of women as a *femicide*, in order to make a distinction in relation to the gender-neutral term *homicide*, not only to understand the scale of this social problem, but also to assess the state institutions' reactions to femicide. In the situation of silence and non-reaction of the state, femicide can also be defined as a crime that states commit as accomplices against women.[20]

As for the classification of femicide, there are several different classifications. One of the elementary classifications of femicide was made according to the relationship of murderers and victims: intimate partner femicide (perpetrators: husbands/former husbands, lovers/sexual partners, former lovers/sexual partners, boyfriends/former boyfriends), family femicide (perpetrators: fathers/stepfathers, brothers, half-brothers, uncles, grandfathers, fathers-in-law, brothers-in-law), femicide committed by other perpetrators known to the victim (family friends, male authority figures e.g. teachers, priests, colleagues from work), femicide committed by males unknown to the victim while committing some other criminal offence (robberies, compound larcenies where death was caused, in armed conflicts).[21] Based on the analysis of femicides committed in Latin America, the cases of this phenomenon are divided by immediate causes that lead to femicide: femicide in an intimate relationship, femicide in a non-intimate relationship, femicide of girls under 14, femicide in family, femicide due to intimacy/attachment, systemic sexual femicide (unorganized and organized), femicide due to prostitution or "stigmatized" occupations, femicide due to human trafficking, femicide due to smuggling, transphobic femicide, lesbophobic femicide, racist killings of women, and femicide as a consequence of genital mutilation.[22] Finally, the Special Rapporteur on violence against women, it causes and consequences Rashida Manjoo, formulated the femicide classification in her 2012 thematic report[23] to direct and indirect killings of women. Direct killings of women include: killings of women as a result of intimate partner violence; killings of women accused of witchcraft/sorcery; "honor" killings of women and girls; killings of women in the armed conflict contexts; dowry killings; killings of Aboriginal and Indigenous women; extreme forms of violent killings of women; killings related to sexual orientation and gender identity, and other forms of gender-based killings of women and girls.[24]

[19] United Nations Office on Drugs and Crime (2019), p. 14.

[20] Lubura (2017), p. 119.

[21] Russell (2008), p. 22 in Konstantinović Vilić (2019), p. 78.

[22] Lacmanović (2015), pp. 71–72.

[23] Manjoo (2012), para 16.

[24] On the other hand, indirect killings include deaths due to poorly conducted or clandestine abortions; maternal mortality; deaths from harmful practices; deaths linked to human trafficking, drug dealing, organized crime and gang related activities; the death of girls or women from simple neglect, through starvation or illtreatment; and deliberate acts or omissions by the State. Manjoo (2012), para 16.

We propose the definition of femicide as defined by the UN Special Rapporteur on violence against women and its causes and consequences as the killing of women because of their sex and/or gender (gender-related killing of women).[25] Also, Special Rapporteur recommended that states should collect data on femicides under three broad categories: intimate-partner femicide and family-related femicide, based on the relationship between the victim and the perpetrator, and other femicides, according to the local context. Hence, this classification could be a good starting point in order to obtain comparable data worldwide.

3 Situation in Serbia

In the period 2010–2021, almost 400 women were killed by a partner or family member.[26] Until 2017, every third woman was killed with a firearm, usually a gun, and in almost every third case the violence was reported to one of the competent institutions before the femicide. In following years (2018–2021), the majority of women were killed by knife, every sixth with a gun; every sixth woman reported the perpetrator to one of the competent institutions, almost every fourth perpetrator committed suicide after the femicide, while every seventh tried to commit suicide.[27]

Regardless of the huge social danger and the prevalence of femicide in recent years, it is not possible to statistically monitor and quantitatively and qualitatively analyze femicide in Serbia, due to the lack of official and publicly available data. Although the obligation to establish central national database on cases of domestic and gender-based violence is prescribed by the law,[28] this database has not been established yet. Judicial statistics on criminal offenses (including murder), published annually by the Republic Statistical Office, do not contain data on number of violent deaths of women committed by men (i.e. femicides), nor it contain the motives of criminal acts.[29]

The Serbian Criminal Code[30] criminalizes murder (Article 113), several types of aggravated murder (Art. 114), and murders with a lower degree of social danger (Article 115–118). Femicide is not incriminated as a separate criminal act. The criminal act of murder is defined as the intentional unlawful deprivation of another person's life, with prescribed punishment of imprisonment from 5 to 15 years.

[25] Šimonović (2016, 2021), para 25, 18.

[26] According to the data annually collected by Mreža Žene protiv nasilja (Women Network Against Violence), based on the media reporting. Annual reports available at: https://www.zeneprotivnasilja.net/femicid-u-srbiji.

[27] Mreža Žene protiv nasilja (2010–2021).

[28] Zakon o sprečavanju nasilja u porodici *[Law on Prevention of Domestic Violence]* (2016).

[29] See, for example: *Judicial Statistics,* Republic Institut for Statistics, Belgrade, available at: https://www.stat.gov.rs/sr-Latn/oblasti/pravosudje.

[30] Krivični zakonik Republike Srbije *[Criminal Code of Serbia]* (2005).

Qualified (aggravated) murders exist when premeditated murder is committed in such a manner and under such circumstances that give it a higher degree of social danger, which leads to more severe punishment. According to different criteria, these murders are classified into several types: manner of committing an act;[31] motives of the perpetrator;[32] circumstances of committing an act and consequences,[33] and characteristics of the victim.[34]

Even though femicide is not incriminated separately, it may be qualified as simple murder, as a form of aggravated murder (Article 114)—murder committed from other base motives (point 5), causing the death of a pregnant woman (point 9), causing the death of a family member who was previously abused (point 10), or as a special aggravated form of the criminal offense of domestic violence where the death of a family member was caused (Article 194, para 4). Also, the court should consider as a special aggravating circumstance in sentencing the circumstance that the crime was committed out of hatred (Article 54a). Thus, the court may treat hatred based on misogynistic and sexist motives as one of the base motives, and punish a perpetrator with longer imprisonment.

Having in mind the prevalence of femicide in Serbia, at least according to the data from women's NGOs monitoring,[35] in addition to the legal framework that does not recognize femicide specifically, incriminating femicide as a separate criminal offense in Serbian criminal law seems to be quite justified and necessary. This would enable proper qualification of all cases of femicide, which undoubtedly would reduce possible errors in the qualification of criminal offenses and punishment of perpetrators. Additionally, incrimination of femicide would enable the state, as well as other interested organizations and individuals to statistically monitor the number of reported, accused and convicted persons for femicide.

Comparative criminal law response to femicide differs from country to country, but three basic systems can be recognized.[36] In some countries, femicide is

[31] Murder in a cruel manner, murder in an insidious manner.

[32] Murder out of selfishness, murder for the purpose of committing or concealing another criminal offense, out of callous revenge or other base motives.

[33] Murder by callous violent behaviour, murder during commission of robbery or compound larceny, premeditated murder by endangering the life of another person and murder of several persons, if it is not a manslaughter, murder of a child at birth or deprivation of life out of compassion.

[34] Official or serviceman during discharge or related to discharge of their duty; Judge, Public Prosecutor, Deputy public Prosecutor or police officer related to discharge of their duty; person who perform duty in public interest related to discharge of their duty; a child or pregnant woman; previously abused family member.

[35] For more information, see Mreža Žene protiv nasilja, https://www.zeneprotivnasilja.net/o-nama and Udruženje građanki "FemPlatz" Pančevo, https://www.femplatz.org/index.php.

[36] Expert group on gender related killing of women and girls (2014). In 2014, UNODC convened an intergovernmental expert group meeting on gender-related killing of women and girls, which discussed United Nations reports and information provided by Member States and civil society organizations, and made a number of recommendations, notably on data collection and analysis. The recommendations envisage practical measures to be undertaken by Member States in order to

criminalized as a separate criminal offence, most often in the countries of South and Central America. Several states explicitly envisage the perpetrator to be a man, and most definitions imply the existence of some specific circumstances concerning the relationship between victim and perpetrator, previous violence by the perpetrator, act of killing per se, circumstances concerning the victim's characteristics, and other circumstances, while in some states misogyny, hatred or contempt for the victim because she is a woman, as well as other circumstances related to unequal power relations are prescribed. In all jurisdictions punishments are more severe than for the simple forms of homicide.[37] Further, in second system, gender-related or gender-based elements or circumstances are included in definitions of aggravated murder, most often, for example, the killing of a pregnant woman, and newer forms include killings of women committed by men in the context of gender-based violence and murder of a woman because she is a woman regardless of the sex of the perpetrator.[38] This group also includes criminal law jurisdictions where gender-related elements are inserted in the definitions of aggravated murder in a way that does not apply exclusively to women, such as hate crimes, the killing of a previously abused family member, "honor" killings, and so on.[39] Finally, the third system is gender-neutral, such is the case in Serbia. Many states have provisions on aggravating circumstances which may apply to all criminal offence, including murder, in smaller number of countries, aggravating circumstances are prescribed to be specific to women, while in most criminal law jurisdictions aggravating circumstances are formulated in a gender-neutral way (hatred because of gender, sex, gender identity or sexual orientation; marital/partner relationship between the victim and the perpetrator, murder in the presence of children, and so on).[40]

Like some other authors in Serbia[41] and numerous women's organizations,[42] especially having in mind the local social context,[43] we advocate for the incrimination of femicide, as separate criminal offence against woman's life and body in the Criminal Code of Serbia. The definition of femicide should include any

improve the prevention, investigation, prosecution and punishment of gender-related killing. More information: *Global study on homicide*, United Nations Office on Drugs and Crime (2019), p. 28.

[37] Expert group on gender related killing of women and girls (2014), paras. 7–22.

[38] Expert group on gender related killing of women and girls (2014), para. 24.

[39] Expert group on gender related killing of women and girls (2014), para. 25.

[40] Expert group on gender related killing of women and girls (2014), para. 31–36.

[41] Batrićević (2016), p. 440; Konstantinović Vilić et al. (2019); Petrušić et al. (2019); Konstantinović Vilić and Petrušić (2021).

[42] Udruženje građanki "FemPlatz" (*Women's Rights Association FemPlatz)* Pančevo, Ženski istraživački centar za edukaciju i komunikaciju (*Women's Research Center for Education and Communication*) Niš, Kuća rodnih znanja (*Gender Knowlegde Hub*) Novi Sad, Mreža Žene protiv nasilja (*Network Women against Violence*), etc.

[43] As for the local social context in Serbia, it is marked with re-traditionalisation of the society, highly influential Serbian Orthodox Church and acceptance of their values, strengthening of rights wing parties, deteorization of women's rights, high rates of violence against women, including femicides, etc.

gender-motivated deprivation of a woman's life, whether intentionally committed, or the woman's death involved in the perpetrator's negligence, if it has occurred as a result of gender-motivated violence.[44] In that case, the object of protection would be a woman's life, and the object of the act or the object of assault would be a woman, including trans* women. Committing the act would be the same as in the criminal offence of murder, expanding it also to psychological abuse (creating agitation, fear, dead) resulting in death. Finally, the criminal offence of femicide should include hatred towards women on the part of the perpetrator as a gender-based motive (e.g. misogyny, discrimination and disrespect for a woman's life and bodily integrity).[45]

3.1 Research on Social and Institutional Response to Femicide in Serbia

The research "Social and institutional response to femicide"[46] included all final court proceedings of femicide and attempted femicide from 24 higher courts in Serbia during the period from 2015 to 2019. In that period, there were 124 final cases – 30 attempted femicide cases (attempted murder and aggravated attempted murder) and 94 cases of femicide (murder, aggravated murder, manslaughter in a heat of passion, domestic violence resulting in death of a family member). As mentioned previously, femicide is not incriminated as a separate criminal offence in Serbia, thus those cases were classified in court judgments as: murder (45%), various forms of aggravated murder (47%), manslaughter in a heat of passion (2%), serious bodily harm resulting in death (3%), and domestic violence resulting in death (3%). The largest number of criminal offences committed was aggravated murders, followed by the simple murder, independently or concurrently with other criminal offences. It should be noted that in several criminal proceedings, there was a modification of the legal classification of the crime at different stages of the proceedings, i.e. differences in legal classifications between indictment and judgment, and also differences in legal classifications between the first instance courts judgments and courts of appeal. This modification of legal classification of committed crime were changes to a less grave criminal offence (e.g. aggravated murder was reclassified as murder, murder was reclassified into manslaughter in a heat of passion, and aggravated murder was reclassified into domestic violence resulting in death of a family member), which led to milder punishment of the perpetrator.

[44] Batrićević (2016), p. 446.

[45] Batrićević (2016), p. 446.

[46] Data presented under this title originated from following researches: Konstantinović Vilić et al. (2019); Petrušić et al. (2019); Konstantinović Vilić and Petrušić (2021). The authors of this article abridged and adapted it from the original publications.

One of the most significant challenges of the research was the anonymization of data in the court judgments. Even though this topic is regulated by the law and internal court regulation,[47] there were numerous cases in which data was over-anonymized, i.e., not only perpetrators' and victims' personal data (names, addresses), but also information on the place of murder, educational level of actors, data on employment, number of children, etc. According to available data, the majority of femicides occurred in urban areas (54%), in most cases in the joint flat (house, yard) of the victim and the perpetrator (38.2%) and the flat (house, yard) of the victim (31.9%). The research results, similarly as previous researches on violence against women, confirm that the least safe and most hazardous place for a woman to stay is her home.[48]

The most common relationships between the perpetrator and the victim in cases of both femicide and attempted femicide were an intimate partnership and family relationship. In 48.8% of the femicides, perpetrator and victim were in an intimate partnership (existing or former marital, common law, or emotional union), while this number is even higher in cases of attempted femicides (69.7%). It is important to note that in addition to intimate partner femicides, there was a high percentage of femicides committed by sons against mothers (18.3%).[49] These results conclusively established that the greatest risk of femicide exists when the perpetrator and the victim are married, living together in common law marriage, or in an intimate partnership. In addition, these findings indicate an extremely high social danger of femicide because, as we conclude, it most often occurs in those relationships where trust, affection, sincerity and love should prevail.

Data on the nature of the relationship between victim and perpetrator before the crime are very scarce. The existence of a history of violence in the relationship points at the dynamics of violence and its frequency, indicating the need to investigate the institutional response in cases where the murder was preceded by violence. However, the court does not consider the history of the violent relationship between the perpetrator and the victim, in cases when the perpetrator has not been previously convicted of acts of violence against that victim. Also, the data on family circumstances, personality characteristics, and behavior of perpetrators before the murder are either not available at all or there is very little information in the case file. This shows that it is very rare in court proceedings unless a psychological or psychiatric expert testimony was ordered, to find out the facts related to the perpetrator's family life and behavior before committing the crime, as well as to his personality traits.

[47] Pravilnik o zameni ili izostavljanju (pseudonimizaciji i anonimizaciji) podataka u sudskim odlukama [*Rulebook on replacement or omission (pseudonymization and anonymization) of data in court decisions*] (2006).

[48] See, for example: *Global study on homicide*, UNODC (2019), p. 14; Dimushevska (2021), p. 20; OSCE-led Survey on Violence against Women (2019).

[49] Sons who kill their mothers are often described as immature, passive and dependent, with common schizophrenia, mostly are single and living with mother with absent father. The criminal act involve excessive used force in their own home, and the motive are often delusional beliefs, altruism, threat of separation or an argument. See more in West and Feldsher (2010), p. 21.

Therefore, it was not possible to conclude the influence of primary family relations on the perpetrator's criminal behavior. On the other hand, scarce data show that the relationship between the perpetrators and the victims before the crime had been mostly bad, the relations were disturbed, femicide was preceded by fights and arguments, with or without physical violence. In most cases, victims had not turned to the competent state authorities and institutions for support and protection against violence that was present in their relationship before femicide. Only a small number of victims had reported violence, but the way the state institutions responded in these cases testifies to their inefficiency and is an indicator of the ineffectiveness of the system for protecting women against violence.

The predominant sanction for perpetrators of femicide was imprisonment, and it was pronounced in 84.8% of the cases, alone or with imposed security measures (i.e. compulsory psychiatric treatment and confinement in a medical institution, confiscation of weapons, compulsory drug addiction treatment). A security measure as only sanction was imposed to 15.04% of the perpetrators who had a "mental illness" at the time of committing the criminal offense and therefore lacked mental capacity. The lengths of imprisonment sentences imposed were different, depending on the type of criminal offense committed and on the extenuating and aggravating circumstances. The sentences ranged from three to 40 years in prison. Imprisonment for 40 years and imprisonment for 15 years was imposed in the largest number of cases (15.4% each), followed by imprisonment for 20 years (14.08%). As for the sentences imposed for attempted femicide, 78.8% of prison sentences were imposed, either as a stand-alone imprisonment sentence or imprisonment along with security measures and fines. The mildest sentence was three years in prison, while only in one case the sentence imposed was 20 years imprisonment with two security measures (confiscation of objects and compulsory treatment for alcoholism). The largest number of sentences was for five years (19.2%), four years (15.4%), and three years (11.5%) in prison.

3.2 Inadequate Judicial Response in Cases of Femicide in Serbia

The research results clearly showed that judicial response to femicide in Serbia was inadequate; there are a lot of challenges and also a lot of space for improvement. It was noticed that in qualifying the criminal act of murder and certain forms of aggravated murder, victims' gender is not taken into account, hence ignoring the fact that femicide is gender motivated criminal offence. When gathering facts and presenting evidence, courts should keep in mind that femicide is not an isolated event. Femicide is gender based crime, so it is necessary to consider the specificity of the context in which femicide occurred and the history of prior gender-based violence. This implies that the establishment of facts should go beyond the basic facts related to the place, manner and used weapon, considering the importance of

the physical superiority of the perpetrator over the victim and the existence of inequality of power, detailed examination of previous life and relations between perpetrators and victims, the perpetrator's personality, his misogynistic attitudes, etc. Also, research showed that in Serbian criminal code, the entire criminal procedure is focused on the perpetrator; therefore victims are overlooked and there is almost no information on victims in the court case files. Having in mind that research on the case law on femicide is very scarce, it is indicative that research conducted in Bosnia and Herzegovina on femicides, showed very similar results, i.e. that the whole proceedings is focused on the perpetrator.[50] In the past few decades, the high prevalence of violence against women and its consequences to both victims and society have been recognized by international and national authorities.[51] Criminal justice responses have included the development and enforcement of laws that prohibit all forms of violence against women, laws that eliminate discrimination against women, the implementation of relevant policies, and strengthening the capacities of institutions.[52]

Researches conducted in Serbia has shown that gender stereotypes exist also in the court judgments, as it is a case in many other countries,[53] which contribute to perpetuation and reinforcement of gender stereotypes in the society.[54] Existence of gender stereotypes is evident in case-law on femicide. Not only sanctions for femicides are very lenient, but also judges do not understand gender component of murder as an aggravated circumstance, which results in improper criminal qualification.[55]

3.2.1 Cruelty and Insidiousness

One form of an aggravated murder is a "murder in a cruel or insidious manner" (Art.114 para.1 item 1). This form exists when the perpetrator inflicts excessive physical and mental pain on the victim. The criminal law literature points out that this type of murder has objective and subjective elements.[56] Although every murder is in a way cruel and insidious, this type of qualified murder is objectively

[50] Konstantinović Vilić and Petrušić in Beker ed. (2022).

[51] García-Moreno et al. (2015) in Global study on homicide - Gender-related killing of women and girls, United Nations Office on Drugs and Crime, Vienna, https://www.unodc.org/documents/data-and-analysis/gsh/Booklet_5.pdf.

[52] See Global study on homicide - Gender-related killing of women and girls (2019), United Nations Office on Drugs and Crime, Vienna.

[53] See, for example, CEDAW General Recommendation No. 33 on Women's Access to Justice, (CEDAW/C/GC/33) 2015; Halilović et al. (2017); Halilović and Huhtanen (2014).

[54] Konstantinović Vilić and Petrušić (2021), pp. 221–222; Konstantinović Vilić and Petrušić in Beker ed. (2021).

[55] In the Serbian Criminal Code, for qualified forms of murder harsher punishment is envisaged—a prison sentence of at least 10 years or a prison sentence of 30 to 40 years.

[56] Jovašević (2017), p. 22.

characterized by a particularly pronounced cruelty, harshness and severity, because the victims are inflicted with such physical and mental torment, suffering and pain that exceeds the intensity of pain that usually occurs during the deprivation of life. The court in each case, based on the findings and opinion of forensic experts, determines the intensity of pain that victim suffered, i.e. whether the pain and suffering inflicted on the victim is cruel, above average, excessive, intense, for a longer or shorter period of time, which all could indicate a degree of cruelty in depriving the victim of life. In practice, several issues regarding the objective element of this form of aggravated murder are disputable: whether the number and type of injuries indicate the existence of cruelty (for example, the number of stab wounds); how long should the victim suffer great pain before she dies in order for cruelty to be determined as qualifying circumstance; whether cruelty is manifested when injuries are inflicted to conscious or unconscious victim, and whether the subjective experience of victim's pain is important, concerning all elements of a criminal act. Furthermore, subjective element of the murder in a cruel manner refers to the attitude of the perpetrator towards the victim. For subjective element to exist, it is necessary that victim suffers great pain and fear, and that perpetrator is aware of his actions, but he is insensitive and cold-blooded towards her torments[57] and he willingly undertakes acts of execution aware of their cruelty. In practice, the existence of subjective element is determined by the court, based on findings and opinion of a forensic psychiatrist, who determines the characteristics of the perpetrator's personality. It is a matter of free judge's belief whether they will determine the existence of subjective element in each specific case and would consider cruelty as a part of perpetrators' personality (Jovašević 2017, p. 24). The jurisprudence insists on the subjective element of cruelty, if the perpetrator had a subjective element that manifested itself in the conscious, desired infliction of severe pain and suffering on the victim, or in the feeling of satisfaction in the suffering of the victim. Otherwise, according to the generally accepted opinion of the courts, there is not enough reason for the criminal act to be qualified as aggravated murder in a cruel way.

Research shows that in practice, particularly great challenges exist in determining the existence of objective and subjective elements necessary for the qualification of the criminal act of murder in a cruel or insidious manner in situations when forensic experts cannot determine with certainty whether the victim was conscious at the time of the injury and suffered pain or has lost consciousness and stopped feeling pain, at what exact moment she was fatally injured, and whether the perpetrator was satisfied or enjoyed in the victim's suffering and pain. We argue that the perpetrator's very knowledge that his actions are cruel and that the victim feels pain of high intensity, or excessive suffering and torture, should be sufficient for the existence of a strong subjective element. As for the objective elements of cruelty, the number and type of injuries inflicted should be assessed, because it indicates the existence of cruelty, such as inflicting excessive physical pain and mental suffering, which are above

[57] Radovanović and Đorđević (1973), p. 59.

average intensity in relation to the pain and suffering that accompanies any murder. We argue that victim's subjective experience of fear, pain and suffering should not be treated as crucial for the criminal qualification of aggravated murder, especially because the victim is dead and cannot testify and describe those sufferings. In our opinion, aggravated murder in cruel manner exists also when the victim has already lost her consciousness, as well as when the victim has already been killed.[58] The impossibility to determine by experts the exact moment the victim lost consciousness, which is often the case in practice, should not affect the qualification of the crime, if the number and type of injuries objectively indicate cruelty. We argue that the subjective element of cruelty derives from the objective element, as some other authors.[59] When murder was committed in a cruel manner, that inflicts excessive and severe pain and suffering, it should be assumed that the perpetrator is aware of the fact that this act is cruel and inflicts pain of severe intensity, excessive suffering and torture to the victim.

3.2.2 Jealousy as a Base Motive

Another issue regarding the qualification of murder is jealousy. We argue that jealousy should be treated as a base motive, having in mind that jealousy is an expression of egoism, the perpetrator's possessive attitude towards the victim, who considers a woman as 'his property' and values his emotions more than another person's life. As a manifestation of power and possessiveness, the jealousy of the perpetrator is a base motive, so the murder of a woman motivated by the jealousy should be qualified as aggravated murder committed from base motives. In case law, there are different understandings of whether jealousy itself is a qualifying circumstance. According to one point of view, murder committed out of jealousy cannot be qualified as murder from base motives, because for such qualification the jealousy must be recognized as pathological, insane, unusual, with no reasonable grounds from real life and to result in other base motives, such as hatred, envy, malice, rage, or from the perpetrator's obsession when his love has not been returned.[60] However, there are also perceptions that jealousy is a base motive because it is selfish, based on one's own emotions, which are valued more than the life of another person.[61] In theory, there is an understanding that jealousy, itself, is not a qualifying circumstance, so that murder motivated by jealousy is almost always caused by the behavior of a partner. Therefore, the murder of a woman by her partner committed out of

[58] Some theories assume that if the victim is already killed, and the perpetrator severely desecrates the corpse, "this act causes increased horror and disgust, regardless of the fact that the victim did not feel suffering and torment." See Čejović (1986), p. 290.

[59] Konstantinović Vilić et al. (2019); Petrušić et al. (2019); Konstantinović Vilić and Petrušić (2021).

[60] Judgment of the Supreme Court of Serbia, Kž.I 982/70.

[61] Judgment of the Supreme Court Kzz 314/2014.

jealousy, is not considered aggravated murder, because it is 'his wife/partner', meaning she is his property. In a patriarchal culture, such as in Serbian society, adultery or suspicion of female adultery by a man is perceived as usurpation that requires punishment and reparation.[62] We argue that jealousy is a base motive itself because it is based on the desire to possess a woman, dominate over her, and control her sexual behavior.

3.2.3 Previous Abuse

In addition, when qualifying the criminal offense of "murder of a family member who was previously abused by the perpetrator", it is necessary for courts to consider the dynamics of violence that the perpetrator previously committed against the victim in the context of family life and partnership relation. The term 'previous abuse' should be interpreted to include not only abuse immediately before the murder, but also in an earlier period, bearing in mind that intimate partner violence is a specific process in which violence escalates. Furthermore, the term 'abuse' should be interpreted to include all forms of physical and psychological violence against the victim before femicide. The murder of a family member who was previously abused happens when the perpetrator takes the life of a member of his family after physical or mental abuse that lasted for a shorter or longer period of time. It is a two-act criminal offense, because the perpetrator undertakes two activities that are necessarily related: physical or psychological violence and deprivation of life of a family member. It is necessary that the act was committed against the same subject and that the perpetrator acted with intent in relation to the fatal consequence.[63] This criminal offense differs from the criminal offense of domestic violence, because the consequence of violence is the death of a family member in this case, no matter whether the perpetrator acted negligently. However, in court practice, the question arose whether the term 'abuse' has the same meaning as the term 'domestic violence'. Some of the judges have opinion, which we fully accept, that in essence, these terms have the same meaning. This opinion is confirmed by international documents regulating domestic violence, in which this form of violence is called abuse.[64] One of the contentious issues regarding the qualification of this criminal act is the question of whether the abuse preceding the murder should be carried out systematically and continuously or whether 'one-time abuse' is sufficient. In theory, it is considered that for this criminal offense 'the existence of one-time abuse it is not enough, rather it should be continuous and systematic abuse'.[65] A similar view is expressed in case law. We believe that the existence of continuity of abuse and the duration of the abuse over a longer period of time may be an

[62] Simeunović Patić (2002), p. 3.
[63] Jovašević (2017), p. 58.
[64] Kiurski (2019), p. 23.
[65] Stojanović (2018), p. 443; Konstantinović Vilić et al. (2019), p. 32.

aggravating circumstance, but not a condition for the act to be qualified as aggravated murder. The main argument is that 'abuse'does not differ from 'domestic violence', thus as domestic violence exists when one act of violence is committed, criminal act of murder of a family member who has previously been abused also exists if one-time act of physical and/or psychological violence against a family member occurred before femicide. At the same time, it is not important whether the perpetrator was convicted for domestic violence before committing the murder, but it is important that the perpetrator's treatment of the victim has elements of the criminal offence of domestic violence.

Also, it is disputable whether for the murder of a family member who was previously abused the very existence of abuse which precede the murder is sufficient or whether it is necessary that the murder was committed during or immediately after the abuse.[66] On this issue, the opinions of legal theorists and practitioners (including judges, lawyers, etc.) are divided, which is a consequence of insufficiently precise legal formulations. One opinion is that this form of murder requires that the murder is committed during the abuse of a family member or in continuity with the abuse or immediately after the abuse in the same place and on the same occasion. We believe that this opinion is not well founded, and that for the existence of this criminal offence is necessary to determine the existence of the abuse of a family member before committing the criminal act of murder. We argue, similar to other authors[67] that this form of aggravated murder exists both when the abuse preceded the murder and when the murder was committed during the abuse.

4 Instead of a Conclusion: Recommendations for Prevention and Suppression of Femicide

Femicide, as the most severe form of violence against women, can be prevented by the coordinated and timely action of all relevant state institutions, in order to eliminate the root causes of femicide, such as: economic and social marginalization of women, discrimination against women, the existence of gender stereotypes and prejudices, patriarchal gender patterns, the existence of previous violence and security risks, untimely reaction of institutions to the reported violence, impunity of previous perpetrators' violence, failure to provide support and assistance to the victim of violence, etc.

It is also very important to perform a careful analysis of each case of femicide, to determine endogenous criminogenic or personality factors of the perpetrators of femicide, but also the methods on how women cope with intimate partner violence, including the level of abuse to which a woman is accustomed and consider 'allegedly acceptable' in intimate partner relationships. Previous research on violence against

[66] Delić (2012), p. 122.

[67] Kiurski (2019), p. 23.

women has shown that femicide is predictable in intimate partner relationships, because it occurs after many years of unreported and unprocessed violence and unrecognized cyclical manifestations of violence. Lowering the threshold of sensitivity of women to violence perpetrated by an intimate partner or male family members is a precondition for women to detect signs of abuse early, to recognize danger, and reject the patriarchal attitude that she caused violence, that she is guilty, and that she should endure and suffer.[68]

In order to monitor all cases of femicide at the national level, it is necessary to establish a single definition of femicide and official statistical records of cases of femicide, including cases of femicide followed by suicide, so the extent of these phenomena could be monitored. It is also important to fully align the incriminations of gender-based violence with the definitions contained in the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, and to incriminate femicide as a separate criminal offence (gender-motivated murder of women) or to criminalize gender motivated murder of women as a special form of aggravated murder of women committed by men in the context of gender-based violence. Multisectoral cooperation in the field of preventing and combating all forms of gender-based violence against women and providing services to victims, including specialized services provided by civil society organizations, needs to be improved. It is necessary to improve the capacity of employees in social welfare institutions, the police, in order to identify and to assess specific risks of femicide[69] as well as courts and the prosecutor's office, in order to properly qualify the criminal act.

In addition to changes in criminal legislation, special protocols should be adopted for defining the actions of competent bodies and institutions in cases of femicide, while in prosecuting cases of femicide it is very important to examine in detail the history of violence, the perpetrator's life, perpetrator's relationship with the victim, misogynistic attitudes of the perpetrator, etc. During the criminal proceedings, it is necessary to determine whether there were gender-based motives for femicide: physical superiority of the perpetrator over the victim, inequality of power, hatred and jealousy due to leaving the partner, revenge due to establishing a new partnership, etc. It is very important to pay attention to those cases of femicide when firearms were used and to provide a legal ban on issuing a permit for acquiring, holding, and carrying firearms in cases of previously reported violence against women. During criminal proceedings, it is important to improve the position of victims by cooperating more with indirect victims—family members, providing adequate protection to child witnesses by developing specialized psychological assistance services, adapted to the age and needs of children, in order to avoid their additional traumatization. During the penal treatment of perpetrators of femicide, existing methods and forms of treatment should be improved, including

[68] Pavićević et al. (2016), p. 468.

[69] Konstantinović Vilić et al. (2019), p. 357.

the development of new programs aimed at changes in behavior and attitudes towards women and violence against women.

All of the mentioned recommendations are applicable not only to Serbia, but also to the wider region. We can say that there are still no precise information and data on femicide in Europe, and existing researches on this phenomenon are uncoordinated. In order to eradicate femicide in Europe, the first step is to establish official statistics on femicide for all European countries in order to adopt appropriate measures, strategies and policies, which will be able to effectively deal with the prevention of murders of women. It is also necessary to develop comprehensive and coherent strategies, which will link all the different actions that have been carried out so far, including the issue of femicide, in order to make measurable progress. At least, the first step for all countries should be establishment of the Femicide Watch (observatories for monitoring femicides), as recommended by the Special Rapporteur on violence against women, its causes and consequences.

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The Importance of Having a Specific Stalking Law

Susanne Strand and Ramunė Jakštienė

Contents

Abstract Stalking has been recognized as a phenomenon of multiple unwanted communications intruding on an individual's life, causing fear for his or her safety. It is a pervasive societal problem, where one in five women in Europe has experienced such violence. Also, stalking is a highly gendered crime where eight of ten stalkers are men stalking women. The high prevalence rate indicates that society must invest many resources in terms of police, social services, health care facilities, and criminal justice legal work to combat stalking. Due to a variety of difficulties with the stalking legislation, stalking is most often prosecuted as a single offense within the domestic violence legislation or as a crime of harassment. It can also be defined as a misdemeanor. However, stalking is a form of repeated offense and needs to be dealt with as such. Therefore, this chapter aims to discuss the importance of having specific stalking laws and compare the interpretation and implementation of the

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stalking legal framework in two European countries, Sweden and Lithuania.

1 Introduction

Stalking is a type of behavior that consists of repeated and unwanted behavior. It can be defined as "unwanted and repeated communication, contact or other behavior with the intention, or without any concern of, cause fear for the victims, or those who are close to them, safety".[1] Lifetime prevalence shows that more than one in ten, i.e., 10% to 20%, in English-speaking countries has experienced being stalked, where stalkers equally consist of ex-partners, acquaintances, and strangers, including public figures.[2] Moreover, stalking is associated with high rates of violence, where 20–30% of victims are assaulted, and more than 50% are directly threatened.[3] Further, recidivism rates vary up to 56% between empirical studies.[4]

A stalker's motivation is characterized by an obsession for the victim where the cause for the obsession is one of the most important things for the stalker. In some cases, the cause is the only thing that matters in the stalkers life. Some stalkers feel a strong sense of entitlement, and they justify their actions as they believe that they have the "right" to pursue their cause.[5] This leads to stalkers intruding upon the victim, where the stalker rationalize this as something they have the right to do. For the stalker, they, i.e., their cause, are more important than the victim.[6]

Stalkers have a behavior pattern that includes repeated attempts to contact victims and are thereby "serial criminals", i.e., as defined by committing several crimes repeatedly towards the same victim. Common stalking behaviors can be categorized out from how the stalking behavior escalates. Most stalkers start to use some form of unwanted communication, which they use throughout the stalking episode, including texting, phone calls, mailing, and various types of social media.[7] Also, writing notes, letters, and sending unsolicited objects or gifts are different kinds of unwanted communication. When the stalking escalates, stalkers start to use approaching behaviors, such as waiting outside the victim's home, work, school, spying, or following the victim.[8] The most severe forms of stalking includes violence in all forms, ranging from pushing, grabbing, and assault to homicide. As a consequence

[1] Kropp et al. (2008), p. 3; Logan and Walker (2017), pp. 200–222.

[2] ABS (2016); BRÅ (2006). Stalking in Sweden (2006), p. 3; Dressing et al. (2005), pp. 168–172; Stieger et al. (2008), pp. 235–241; Tjaden and Thoennes (1998).

[3] Logan (2020), pp. 13–28; McEwan et al. (2009), pp. 1469–1478.

[4] Bendlin et al. (2020), pp. 1–23.; Eke et al. (2011), pp. 271–283; Strand (2018).

[5] Mullen et al. (2009).

[6] Mullen et al. (2009).

[7] Mullen et al. (2009).

[8] Mullen et al. (2009).

of these behaviors stalking causes a significant strain on both victims and society. Being a victim of stalking negatively impacts the quality of life, where mental health problems, such as stress and depression, are common.[9]

Stalking is a highly gendered crime as most stalkers are men, and most victims are women, where approximately eight of ten stalkers are men, and almost nine of ten victims are women;[10] and one in five women in Europe has experienced being stalked.[11] Although, empirical evidence shows that male and female stalkers are equally violent, and stalking causes psychological and social harm to victims regardless of victim gender and whether or not it involves violence.[12]

The high rates of stalking indicate that society must invest many resources in terms of policy, social services, health care facilities, protective actions, and criminal justice legal work to combat such violence. However, the criminal law response to stalking has serious shortcomings. Stalking is often prosecuted as other types of crime, such as harassments, threats, violation of restriction orders, violation of the inviolability of housing, assaults, *etc.*[13] But generic provisions do not cover stalking in its entirety, therefore, they are not efficient in combating it. Moreover, few stalking victims report the crimes to the police, and about 15–20% of stalkers who are reported to the police will be charged and prosecuted. Even less of them are convicted and sentenced, and only few are imprisoned.[14]

Criminal legal protection can be limited to some groups of victims only (e. g., in cases of domestic violence, human trafficking), which precludes other persons from benefits of victim protection.[15] Stalking is a form of repeated offense that is not dependent on limited types of stalker-victim relationship and needs to be dealt with accordingly. Therefore, stalking laws is important, specifically due to that they most often work as an umbrella charge, i.e., they cover all pattern of stalking behaviours instead of discrete generic crimes, are essential to pursue the offense correctly through the criminal justice system.[16] Inadequate legal response to victims' experiences subserves underreporting and escalating of stalking.[17]

Stalking is specified in Article 34 in Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No.210), the

[9] Diette et al. (2014); Korkodeilou (2017); Sheridan and Scott (2010); Davis et al. (2002); Kamphuis et al. (2003); Purcell et al. (2005); McEwan et al. (2009); Strand and McEwan (2012).

[10] ABS (2016); BRÅ (2006). Stalking in Sweden (2006), p. 3; Dressing et al. (2005), pp. 168–172; Stieger et al. (2008), pp. 235–241; Tjaden and Thoennes (1998).

[11] Eige (2021).

[12] Strand and McEwan (2011), pp. 202–219. Strand and McEwan (2012), pp. 545–556; Purcell et al. (2005), pp. 416–420; Weller et al. (2013), pp. 320–339.

[13] Logan and Walker (2010), pp. 440–455.

[14] BRÅ (2014), p. 8; BRÅ (2015), p. 2; BRÅ (2021). Cirme statistics; Logan and Walker (2017), pp. 200–222.

[15] Van Der Aa and Römkens (2013), pp. 232–256.

[16] Council of Europe, 11.V.2011, CETS 210, para. 185.

[17] Bouffard et al. (2021).

"Istanbul Convention".[18] It is defined as "the intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety." This legal definition is close to those referred to in the social science literature that describe stalking as a social phenomenon. On the other hand, stalking laws are more stringent in their design and scope, thereby not all stalking behaviors are criminalized. For example, it is not a crime to wait for someone outside their work, although the behavior could be part of stalking. Further, if the stalker approaches the victims and harass them, then it becomes a crime. Because of this, it is difficult for victims to prove stalking since some stalking situations are criminalized per se, but many are not.

In this chapter we compare the interpretation and implementation of the stalking legal framework in two European countries, Sweden and Lithuania, aiming for the identification how to make specific stalking laws work effectively. Before exploring the stalking legislation of Sweden and Lithuania and comparing them, the legal regulation of stalking in Europe and the phenomenon of stalking will be additionally discussed.

2 Stalking Laws

The EU parliament has recognized the importance of combatting stalking.[19] Even if stalking laws in Europe have been enacted since the mid-1990s, starting in the UK and continuing throughout Europe, with most laws enacted from 2000 to 2011, several countries have no specific stalking statutes.[20] Most countries include stalking in other laws that include criminal offences such as harassment, assaults, or threats but mainly within the legislation on domestic violence. For those who are being stalked by an ex-intimate partner this works well but for victims being stalked by an acquaintance or a stranger it is not applicable at all. Therefore, in order to be able to prosecute all stalkers a specific stalking law is essential.

Having a stalking law is also vital due to the crime, by definition, [21] being a series of crimes committed towards the victim. For the judicial process to pinpoint stalking, it is important that the law is constructed in such a way that it will guide and help to combine many behaviors into several crimes that can be charged as one crime, stalking. The legislation can also add that a stalking crime has an increased punishment than a single crime. However, stalking behavior includes actions that are difficult to prove as crimes, specifically the different types of psychological violence.[22] Another critical aspect of the stalking law is that stalking is not only a crime

[18] CETS No. 210.

[19] Wurm (2013).

[20] See the inventory that is subject to revision in Van Der Aa (2018).

[21] Kropp et al. (2008); Logan and Walker (2017), pp. 200–222.

[22] Mullen et al. (2009).

of domestic violence. About one-third of stalkers in the community are targeting an ex-partner.[23] Although, nearly three of four stalking cases reported to the police are ex-partner stalking.[24] This is partly due to the lack of stalking laws where stalking behaviors thereby are dealt with within the domestic violence jurisdiction and, therefore, adding to the misperception of stalking in the community mainly being part of domestic violence. Stalking laws targeting all forms of stalking and not only domestic violence will increase awareness of stalking as a crime and might hopefully lead to more victims reporting stalking offenses.

Further, only victims who have reported offenses will be eligible for risk assessment and risk management provided by the criminal justice system, such as restraining orders. Therefore, stalking laws are essential opening up for all victims to report the stalking to the police. Otherwise, if not reporting it will be difficult to get help and support and the stalking most likely will continue.

Special legal regulation on stalking in criminal terms is a clear trend in the EU as many states have passed criminal anti-stalking legislation.[25] Ratification of the Istanbul Convention was a clear incentive.[26] However, there are examples of opposite directions, e. g., the Danish case of turning to indirect criminalization, i.e., criminal prosecution only in cases of violation of restraining orders.[27] Ratifying the Istanbul Convention, Denmark made a reservation of the right to provide for non-criminal sanctions, instead of criminal sanctions, for stalking behaviors.[28] The legal definitions in different countries vary considerably in terms of the scope of illegal behaviors and sentences.[29] But the question remains: does it really work? Is stalking really criminalized? Do special provisions ensure substantive but not formal criminal law response to victims‘ experiences? More evaluations of stalking laws are needed to answer the question.

The authors do not question the benefits of the criminalization of stalking. On the contrary, we support the need for a criminal law response as part of combined measures combating stalking, along with prevention, civil actions, effective victims' protection, support, *etc.*. The following two sections aim to assess the national mechanisms in Sweden and Lithuania on prosecuting this type of violence.

[23] ABS (2016); BRÅ (2006), p. 3; Dressing et al. (2005), pp. 168–172; Stieger et al. (2008), pp. 235–241; Tjaden and Thoennes (1998).

[24] Belfrage and Strand (2009), pp. 67–76.; Maran and Varetto (2017), pp. 507–524.

[25] Van Der Aa (2018).

[26] In the case of Greece see https://www.ohchr.org/Documents/Issues/DigitalAge/ReportPrivacyinDigitalAge/Greece2.pdf (Criminal Code of Greece, Article 333); for more examples see Van Der Aa (2018).

[27] Van Der Aa (2018).

[28] CETS No. 210.

[29] Legal Definitions in the EU Member States. https://eige.europa.eu/gender-based-violence/regulatory-and-legal-framework/legal-definitions-in-the-eu; Van Der Aa (2018).

2.1 The Stalking Law in Sweden

Before the criminal law was enacted into the Swedish Criminal code victims reported stalkers for crimes such as violence, threats, property damage, and harassment. These behaviors are not stalking *per se* but can be part of the stalking behavior. Even when stalkers were prosecuted for multiple single events as specific crimes, it was still challenging to get stalkers convicted for crimes as part of the stalking behavior. Further, ex-intimate partner stalking was reported as a crime within a unique part of the legislation in the criminal code under the Chapter 4, Section 4a of offenses against liberty, the law of "Gross violation of a woman's integrity" (Law 2013:367) aiming towards combatting men's repeated violence towards women. It was enacted in 1998 and revised several times. The crime is committed when a male partner of a female victim repeatedly and systematically abuses her in a current or former relationship aiming at damaging her integrity and self-esteem.

The Swedish stalking law is called "Unlawful harassment" (Law 2022:1043) and was enacted on October 1st, 2011. It has thereafter been revised. It is part of the Criminal Code, Chapter 4, Section 4b. The Swedish provision outlines a checklist consisting of 14 illegal behaviors. All of them constitute individual crimes, *e. g.*, assault (Chapter 3, Article 5), unlawful coercion (Chapter 4, Article 4), threat (Chapter 4, Article 5), violation of privacy (Chapter 4, Article 6c), molestation/harassment (Chapter 4, Article 7), defamation, which was recently added to the list, Chapter 5, Article 1, *etc*. The penalty for stalking is imprisonment for a maximum of 4 years. The idea with the offense is that the sentence should be more stringent than if the stalker had been convicted of each of the separate offenses that made up the overarching charge.

No restrictions are placed on the type or number of offenses that must have occurred. However, case law suggests that at least three crimes with relatively high intensity will be necessary for a conviction. It is more common that stalkers will be sentenced for any of the individual offenses instead of the overarching offense. [30] It is an offense of public prosecution, meaning that anyone can report it to the police, although the victim mainly reports it since it is very difficult to prosecute if the victim doesn't cooperate in the investigation. The police can then investigate, and prosecutors can lay charges with or without the victim's cooperation. Although, the prosecutor has no case without the victim's cooperation due to difficulties in hard proof evidence, it is necessary to support victims to continue their cooperation with the investigation. For severe cases of domestic violence, it was 6.1 times more likely to get a conviction for the crime "Gross violation of a woman's integrity" if the victim cooperated in the investigation.[31]

A follow-up study was done for the first years following the law enforcement. During the first two years of the law about 1700 stalking cases were reported in

[30] BRÅ (2015), p. 2.

[31] Strand et al. (2021), pp. 220–233

Sweden, of which 16 percent were prosecuted, and seven percent were convicted,[32] indicating that only a few cases of the total amount of stalking conducted in society could be recognized by the judicial system. Most crimes prosecuted within the stalking law were harassment, breaching a restraining order, and unlawful threats. The most common legal consequences for stalking were imprisonment (50%), probation (25%), and forensic psychiatric care (14%).[33] More recent crime statistics for the last 5 years 2016–2021 show that about 500–600 stalking crimes are reported annually, and about 100 are sentenced according to the stalking law.[34]

2.2 *The Stalking Law in Lithuania*

Lithuanian legislation on stalking is particularly relevant as an example of the most recent criminal law development. At the end of October 2021, a new provision in the Criminal Code of the Republic of Lithuania was introduced to criminalize stalking specifically (Art. 148^1).[35] To the author's knowledge, several pre-trial investigations were already opened under this article during the first month after the enforcement.

It does not mean that stalking was not criminalized at all until now in Lithuania. But the prosecution was limited only to the most severe cases of stalking. Usually, violent behavior was not even considered stalking, and some other generic norms were applied, e. g., those were establishing criminal liability for discrete acts of stalking tactics like a violation of private life (Criminal code Art. 165–168) and destruction of property (Art. 187). But the, most non-physical violence cases were prosecuted under Art. 145.2 as threatening or terrorizing a person.[36] Therefore, the expectations for the new legal norm were to expand the criminalization of stalking, covering a more comprehensive range of dangerous acts that did not fall within the scope of previous practice.

2.3 *Scope of Criminalized Behaviors: Comparison of Lithuanian and Swedish Stalking Law*

Like most EU countries,[37] the Lithuanian legislator has opted for an inclusive concept and sets a wide margin of appreciation of what behaviors constitute stalking.

[32] BRÅ (2015), p. 2.

[33] BRÅ (2015), p. 2.

[34] Crime Statistics BRÅ (2022). www.bra.se.

[35] Lietuvos Respublikos baudžiamasis kodeksas [Criminal Code of the Republic of Lithuania]. *Valstybės žinios*, 2000-10-25, Nr. 89-2741.

[36] https://ird.lt/lt/reports/defaultAction?year=2021&period=1-12&group=162.

[37] Van Der Aa (2018).

This strategy is disputed as regards to principle of *lex certa* and *ultima ratio.*[38] It is more challenging for law enforcement but is obviously more favorable than an exhaustive list of illegal actions for victims. As empirical research on stalking behavior shows,[39] a finite catalog of stalking tactics is hardly possible. Concerning this, the Swedish provision is to be criticized as it outlines a checklist consisting of 14 illegal behaviors that fall under unlawful harassment. Therefore, it is unclear what delimitates harassment from analogical individual crimes as it is not constructed to be their cumulative version. The only clearly identified element is being "part of a repeated violation of the person's integrity." Inconsistent categorization reinforces the ambiguities: harassment is incorporated into Chapter 4 in the criminal code of Sweden specifying offenses against liberty, but the list of illegal behaviors consists of parallel crimes that come from Chapter 3 (i.e., offenses against life and health), 5 (defamation), 6 (sexual offenses), or 12 (damage to property offenses). Seeking to adhere to the strategy of accurately determining stalking behaviors and improving the response to victims' experience in conjunction, one example of German regulation could be followed here, where the special provision enumerates a non-exhaustive list of illegal acts (Article 238).[40]

The criminalization of harassment can also be interpreted to cover (but not to replace) stalking.[41] But due to the elaboration of social science knowledge, law enforcement's demand for clear regulation, and victims' needs of adequate response to their experiences, specification of the legislature is preferred. For example, the UK enacted discrete offenses of harassment (section 2) as well as stalking (section 2A) and even went further specifying stalking involving fear of violence or stalking involving serious alarm or distress (section 4A);[42] then introducing offense of coercive control (section 76)[43] and civil stalking protection orders.[44]

2.4 *Sanctions: Comparison of Lithuanian and Swedish Stalking Law*

New Lithuanian legislation categorizes stalking as a misdemeanor, not a crime. Accordingly, no custodial sentence can be imposed. And this is contrary to Art. 145.2 that determines terrorizing as a crime and provides for imprisonment for a term of up to four years without any alternative sentences. The exact same penalty is

[38] Van Der Aa (2018).

[39] Mullen et al. (2009).

[40] German Criminal Code (Strafgesetzbuch; StGB). https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1986.

[41] Van Der Aa (2018).

[42] The Protection from Harassment Act 1997.

[43] Serious Crime Act 2015.

[44] Stalking Protection Act 2019.

imposed under the provision of the Criminal code of Sweden in Section 4b, additionally establishing aggravated sentence in case of domestic violence—no less than a year and six years at most in Section 4a. Keeping in mind that most criminal cases of stalking, i.e., 42%, in Lithuania are closed suspending sentence enforcement, this new regulation does not help ensure a more effective sentencing system. This statement is reinforced by the number of cases under Art. 145 that sharply decreased over the past several years: it makes only approximately 10% of all registered reports on domestic violence in 2018, 7.6% in 2019, and 4.5% in 2020.[45] The statistical data regarding the end of criminal proceedings in domestic violence cases are even more disturbing: only approximately 12% of all reports proceed as pre-trial investigations; most of them are terminated, mainly on the ground of reconciliation between victim and perpetrator.[46]

Systematic allocation of sentences looks ungrounded as well. Stalking is the only offense against human liberty that is classified as a misdemeanor in Chapter XX of criminal code in Lithuania. Moreover, other illegal behaviors that are typical stalking tactics are also ranked as crimes: e.g., label (Art. 154); violation of a person's dwelling (Art. 165) or correspondence (Art. 166); collection, disclosure, or use of information about a person's private life (Art. 167, 168), etc. On the one hand, the hierarchy of values raises some doubt: is privacy worth more than liberty? On the other hand, under this framework, even a single act against dignity and honor or private life imposes stricter punishment than stalking, usually involving various forms of continuous violence. This contradicts the main idea of criminalization of stalking as a pattern of violent behaviors, not discrete acts that breach the same values as crimes against privacy and honor. And here is another drawback leading to competition among articles of criminal code in Lithuania as now all perpetrators will seek to be prosecuted under the new provision. Labeling the amendments of criminal code in Lithuania as an enhancement of victim protection, the legislator produced the opposite result—the new regulation will have more lenient legal effects on the perpetrator. Therefore, it is merely a political compromise rather than an efficient response to victims' needs. In the light of the activism to criminalize stalking and the efforts made to that end, it is a disappointment. This regulation sends an inadequate message that is inconsistent with the stalking doctrine. Some means of stalking are less punished, and single violent acts are considered more dangerous than the whole complex of multidimensional, systemic violent behaviors. We realize that severe sentences do not prevent violence *per se,* but the existing legal structure is not sufficiently deterrent. The Istanbul Convention obliges states to ensure that the offenses are punishable by effective, proportionate, and dissuasive sanctions.[47] But

[45] https://ird.lt/lt/reports/view_item_datasource?id=8916&datasource=55190.

[46] https://osp.stat.gov.lt; Policijos departamento prie Lietuvos Respublikos Vidaus reikalų ministerijos Pažyma dėl policijos veiklos. 2018-01-19, Nr. 5-IL-545, 7.

[47] Lithuania has signed but not ratified the convention yet.

the overview of the research shows that worldwide, victims perceive sanctions against stalkers as inadequate.[48]

On the contrary, the criminal code of Sweden imposes aggravated sanctions for stalking compared to discrete analogical crimes such as assault, violation of privacy, harassment, *etc*. In this regard, it seems more reasonable than Lithuanian legislation.

2.5 *Diversification of Criminal Liability: Comparison of Lithuanian and Swedish Stalking Law*

The scope of both Lithuanian and Swedish regulation regarding the victim-perpetrator relationship is broad, covering but not limited to stalking of an intimate partner. This course is more favorable as it grants prosecution of other types of interpersonal violence or when victims do not meet the eligibility criteria to qualify for a crime in a close environment (e. g., intimate relationship, family member, *etc.*). However, due to the progress in victim protection, there is a trend in the EU to diversify the level of criminal liability. In cases of stalking against vulnerable groups, e. g., minors, domestic violence victims, etc., either qualified victims and aggravated penalties are determined or/and prosecution can be initiated *ex officio*.[49] Provision of the Criminal code of Sweden implements the first alternative: crime against a person in a close relationship or a female spouse is rated as a gross violation subject to aggravated sentencing. Lithuanian provision takes a procedural approach limiting prosecution *ex officio* only in domestic violence cases. The state's initiative in opening criminal proceedings to protect victims of domestic violence is in conformity with the European Court of Human Rights case law.[50] According to the Lithuanian provision, all victims are granted the same protection. Aggravated sentences can be imposed only if generic aggravated circumstances were established, e.g., an offense against a minor, pregnant woman, *etc.*, but they do not specifically refer to domestic violence, see criminal code of Lithuania Art. 60. This is why Lithuania's legislator should consider enacting procedural and substantive measures and institute aggravating punishment for stalking in an intimate relationship. This is not an uncommon practice in Lithuanian criminal law as some provisions regarding physical violence establish qualified crimes against a family member or close relative, e. g., Art. 140.2; 129.2(3); 135.2(3); 138.2(3). Reliance on both substantive and procedural criminal law can enhance the effect of state protection and is functional, e.g., German or Croatian provisions, qualified crimes in

[48] Backes et al. (2020); Korkodeilou (2014).

[49] Van Der Aa (2018).

[50] *Valiulienė v. Lithuania.* Application no. 33234/07. 26 March 2013, §85; *Opuz v. Turkey.* Application no. 33401/02. 9 June 2009, paras.168–171; *Bevacqua ir S. prieš Bulgariją.* Application no. 71127/01. 12 June 2008, paras. 83, 65.

close environment and prosecution *ex officio* regarding determined groups of vulnerable victims.[51]

3 Evidencing

Providing evidence of stalking is very difficult, and the criminal legal systems worldwide struggle with this.[52] It is one of the most latent and underrepresented offenses in the criminal law system, even in the post-reform period.[53] The scope of illegal behaviors is not always clear. This is the case in both Sweden and Lithuania, although it is much more difficult in Lithuania due to its legislation that requires the victim to act in a certain way.

The new Lithuanian provision complicates this by determining constituent elements of violation and constructing it as an offense. The wording of an article requires establishing the expressed will of a victim not to be contacted. On the one hand, this is an additional factor to prove. And this is the wrong approach as it shifts the responsibility, the burden of proof and the guilt to the victim: despite the fact that victims have already suffered, they are required to act in a determined way. This requirement does not respond to the specifics of stalking as not all victims choose an active coping strategy. Some of them try to avoid physical contact with the offender or remain passive.[54] The recent research in Lithuania shows that the most usual security strategies used by the victim are ending the relationship with the perpetrator, distancing, and limiting accessibility. Moreover, according to the research, active denial of communication with the perpetrator does not deter one. It might even be a trigger to escalate the violence or change stalking tactics.[55] However, blaming stalking victims is not an unusual criminal law reaction[56] even after legislative reforms resulting in the criminalization of stalking.[57]

According to Lithuanian regulation, illegal behavior can qualify as stalking only if it adversely affects the victim's social life or emotional state. These outcomes are not unreasonable as research shows that stalking usually negatively affects victims' physical and mental health, daily and personal life, and relationships with other people.[58] But research indicates that stalking can affect a person diversely depending

[51] Criminal Code of Croatia [*Kazneni zakon], Narodne Novine* [Official Gazette of the Republic of Croatia] Nos 125/11, 144/12, 56/15, 61/15, 101/17 and 126/19, Article 140.

[52] Jordan et al. (2021), pp. 31–42; Backes et al. (2020), pp. 665–678; Villacampa and Salat (2019).

[53] Bouffard et al. (2021); Brady and Nobles (2017), pp. 3149–3173.

[54] Podaná and Imríšková (2016), pp. 792–809.

[55] Quinn-Evans et al. (2021), pp. 6979–6997.

[56] Gavin and Scott (2016), pp. 716–732.

[57] Taylor-Dunn et al. (2021), pp. 5965–5992.

[58] Korkodeilou (2017), pp. 17–32.

on the victim's gender, the form, and duration of exposure to violent behavior.[59] Consequence-specific provisions on stalking are not unusual EU-wide[60] and on a broader scale.[61] But this strategy leads to difficulties establishing them, e. g., the case of the Czech Republic.[62] Substantiating precisely defined consequences in each case can be excessive. Besides that, specification of impact on victim impedes the procedure of evidencing and sends a message that stalking is unlawful not *per se* but only if it has definite effects. This is not the case in Sweden where each stalking act needs to be a crime according to the 14 different criminal acts that constitutes the overarching stalking crime. However, there are still many problems gathering evidence since it relies heavily upon the victims documentation.

The Lithuanian provision baselessly excludes cases from prosecution where the victim felt alternative consequences or reported to the police before changing something in one's life or opted not to do that for some reason, e.g., a person likes one's job or one does not have resources or it is one's last year at this university, *etc*. This is a person's right; one does not have to conform due to somebody's controlling behavior. Subordination and obedience are the aims of an abuser. The problem is that the new article of the criminal code of Lithuania focuses on victims' activities but not stalkers. This is a wrong approach that may amount to secondary victimization. The wide-scale research shows that the success of criminal proceedings often depends on active victims' participation, e.g., collecting the evidence,[63] as is the case in Sweden. However, this is not aspiration in Lithuania as victims are not supposed to do the law enforcement's job. Difficulties will also arise establishing *mens rea* and the causal link between stalking and negative effects, e.g., that a victim changed one's place of residence just because of stalking.

The Swedish legislation on stalking can be difficult to interpret as well. Mainly due to the overall difficulty to prove that stalking behaviors are criminal acts. As stated before many of the stalking behaviors are not criminal acts per se and it is up to the prosecutor to gather evidence for those acts that are criminal acts according to any of the 14 crimes that constitutes the overarching stalking law. Since it is not enough with one crime to be sentenced for stalking, prosecutors can choose to prosecute for the single criminal acts instead in order to get a conviction. On one hand that is good since the stalker then might be sentenced for at least some of the stalking behaviors, on the other hand the sentence will be less stringent than it would have been if the stalker would have been convicted for stalking.

Regarding these arguments, specific negative consequences to the victim should be waived for the Lithuanian criminal justice. Suppose they still want to relate prosecution with this element. In that case, a better alternative is to construct an article as a suitability crime, according to, e.g., Germany's experience, and apply the

[59] Villacampa and Salat (2019); Podaná and Imríšková (2016), pp. 792–809.

[60] Van Der Aa (2018).

[61] Branscum et al. (2021), pp. 261–282.

[62] Horakova (2012), *In* Pavelkova, Strouhal, Pasekova, 171–177.

[63] Backes et al. (2020), pp. 665–678.

standard of a reasonable person. This structure could build on previous practice under Art. 145 of the criminal code of Lithuania that is also a suitability crime. As the Swedish section on harassment does not require specific effects this is already in place in Sweden. Another alternative to expanding victim protection when stalking has not resulted in a straightforward way is taken by Portugal, where even attempted stalking is criminalized.[64]

Many EU countries have amended their previously established anti-stalking laws.[65] This indication upholds the perception that the criminalization of stalking and its implementation is challenging. This is true even in the cases of the latest national legislation, e.g., Lithuanian, that can build on the experience of the pioneers.

4 Conclusion

Stalking has been recognized in several jurisdictions in Europe during the last two decades, and both Swedish and Lithuanian criminal legal regulations on stalking align with the identified trends. However, along with the developments, their shortcomings came as well.

Strict adherence to the *lex certa* and *ultima ratio* principles in Sweden led to the limited scope of criminalized behaviors. Further, categorizing the offenses and the existing legal system of sanctions in Lithuania is inconsistent and does not sufficiently deter stalking. Therefore, the prohibition of a wide range of stalking tactics and specification of legislation is preferred to ensure an adequate criminal law response to victims‘ experiences.

Evidencing stalking in Lithuania and Sweden is focused on the perpetrator’s behavior and not the victim. However, victims are the primary source of information, and thereby the key witness to the offense, their documentation of the stalking is essential for the case. This makes stalking offenses very difficult to prove, relying on a few pieces of evidence, and a huge strain is put on the victim to be responsible for collecting evidence as a victim of an offense. Criminal liability is limited to construing constituent elements of the offense. This seems to be the wrong approach, potentially leading to secondary victimization.

Stalking, as recognized within the judicial system due to reporting rates, is most prevalent in ex-intimate relationships; therefore, criminal law response in Lithuania should be stronger, establishing aggravated sentences in cases of domestic violence. In Sweden, two different but very similar laws are already in place to target both domestic violence and stalking. Also, with the stalking law, non-ex-intimate partner stalking, conducted by acquaintances and strangers, will be recognized to a larger extent and thereby all victims of stalking can be allegeable to risk management strategies from the criminal justice system.

[64] Ferreira et al. (2018), pp. 335–344.

[65] Van Der Aa (2018).

Despite the latest amendments of criminal codes criminalization of stalking in both Lithuania and Sweden is still relatively limited, covering only the most severe cases. Therefore, more research and evaluating of stalking laws is necessary in order to investigate the effect of the law.

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