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Positive Action in the EU Gender Equality Law: Potential and Challenges in the Czech Republic

Pozitivní akce v genderové legislativě v EU:

potenciál a výzvy v České republice

Disertační práce

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Abbreviations

AA	Anti-Discrimination Act
ACHR	American Convention on Human Rights
ACHPR	African Commission on Human and Peoples' Rights
CCC	Czech Constitutional Court
CCPR	The International Covenant on Civil and Political Rights
CDE	Convention against Discrimination in Education
CDU	Christian Democratic Union of Germany
CEDAW	Convention on the Elimination of Discrimination against Women
CEE	Central and Eastern Europe
CEO	Chief executive officer
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CETS	Council of Europe Treaty Series
CFO	Chief financial officer
CFREU	Charter of Fundamental Rights of the European Union
CFRF	Charter of Fundamental Rights
CJEU	Court of Justice of the European Union (previously European Court of Justice)
COE	Council of Europe
CM	Council of Minister of Council of Europe
CMW	Committee on Migrant Workers
CR	Czech Republic
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CSFR	Czech and Slovak Federative Republic
CSO	Czech Statistical Office
CSSD	Czech Social Democratic Party
CSW	Commission on the Status of Women
CZK	Czech crowns
CWS	Commission on the Status of Women
DAW	Division for the Advancement of Women
EC	European Commission
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECOSOC	Economic and Social Council
ECT	Treaty establishing the European Economic Community (Treaty of Rome)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECRI	European Commission against racism and intolerance
ECSR	European Committee on Social Rights
EEC	European Economic Community
EHS	Environmental health and safety
EIGE	European Institute for Gender Equality
EQUINET	European Network of Equality Bodies
ERRC	European Roma Rights Centre
ESC	European Social Charter

ESCR	Economic, social and cultural rights
ETS	European Treaty Series
ETUC	European Confederation of Trade Unions
ETUI	European Trade Union Institute
EU	European Union
EUI	European University Institute
EWL	European Women's Lobby
EWOB	European Women on Boards
FRA	European Union Agency for Fundamental Rights
GDP	Gross domestic product
GEC	Gender Equality Commission
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICESR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICPJ	Interfaith Council for Peace & Justice
ILO	International Labour Organization
INSTRAW	International Research and Training Institute for the Advancement of Women
IRLR	Industrial Relations Law Reports
MPs	Members of Parliament
NGO	Non-Governmental Organisation
ODS	Civic Democratic Party
OECD	Organisation for Economic Co-operation and Development
OP	Operational program
OPZ	Operational employment program
OSAGI	Office of the Special Adviser on Gender Issues and Advancement of Women
PNAS	Proceedings of the National Academy of Sciences of the United States of America
RDC	Resource and Documentation Centre
SC	Supreme Court
SPDP	Documents and Publications Production Department
TACR	Technological Agency of the Czech Republic
TEC	Treaty Establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNIFEM	UN Development Fund for Women
US	United States
USA	United States of America
UNHRC	United Nations Human Rights Council
UWE	University Women of Europe
WHO	World Health Organization

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Introduction

Despite the fact that formal gender acquis is codified in the CR and the Czech women represent the majority of university graduates and almost half of the country's workforce, they only make up for about 25% of parliamentary representatives and an even smaller fraction of approximately 17% in decision-making organs in the corporate field.[1] In the last few decades, various types of positive action have been increasingly used world-wide in order to improve female representation in the political and economic field. Nevertheless, the theoretical work lags behind and there are not many studies which analyse formal regulation as well as practical application of such measures in a complex way. Several sectoral analyses were done in particular in Nordic countries which have the longest experience with positive actions; but there are not many studies covering the central European region, which is apparently very reluctant to use.

The purpose of this work is to contribute to the research in this field and to analyse codification, interpretation and the use of positive actions within major international organisations and selected national states with the aim to assess their possible applications in the Czech Republic (CR). This work is divided into three interrelated parts 1) theoretical and conceptual clarification of the principles of equality, positive actions, and gender equality; 2) comparative analysis of the codification and the use of positive actions in three major international organisations - the UN, the COE, and the EU; and 3) codification and possibility of use of positive actions, more concretely quotas, in the fields of political and economic representation in the CR; based on the best practices in other European states. Then the first added value of the research resides in a comprehensive and up-to-date overview of codification and interpretation of positive actions by the major international organisations. Next the second contribution resides in analysis and evaluation of the use of positive actions in selected states and assessment of their possible application in the specific context of the CR, as one of the Central European states that witnesses a long term political resistance to such measures.

This presented research is based on the intra-disciplinary legal, sociological, and political science approach. Mainly, the reason for the combined approach stems from the need to analyse not only technical legal formulation and interpretation of positive actions and related laws; but also political and social context which is determinant for their adoption and effective use. In other words a technical legal analysis alone does not clarify processes leading to formulation, and subsequent adoption or rejection of positive actions, which is done through political negotiation and is reflective of diverse historical and social development in different countries. Similarly, a legal analysis will not be able to discover and to evaluate overall effects of already applied positive actions in different fields and countries, which is done through sociological quantitative and qualitative research.

1 European Institute for Gender Equality (EIGE). *Gender Equality Index 2020: Czechia*. (2020). EIGE. https://bit.ly/2SZbXf4.

This work is thus based on the primary and secondary national and international legislation, theoretical work in the field of anti-discrimination, as well as sociological studies, opinions and views of norm-makers in this field as extracted through the minutes of meetings, interviews, and articles published in the media. This work used methods of description and compilation while analysing basic legal concepts; and method of comparative analysis when assessing codification and use of positive actions in selected organizations and states. Furthermore, a content analysis was applied in order to analyse related public debate, speeches and interviews. As far as the data is concerned, the research worked with legal acquis available at website of the concerned international organisations as well as publically available decisions of the Czech Constitutional Court, the Supreme Court, and the Supreme Administrative Court as well as the Public Defender of Rights. Some main sources of statistical data comprised databases of the EIGE, Eurostat, OECD, WEF and the Czech Statistical Office. Partial findings will be summarized throughout the work in the form of tables and short sum-ups in order to keep a consistent and clear direction of reasoning.

1. Theoretical and conceptual basis

1.1. Principle of equality and non-discrimination

1.1.1. Equality and non-discrimination

The main problem raised in connection with positive actions is their compatibility with the principle of equality and non-discrimination; as positive actions may result in direct or indirect forms of discrimination if not designed and used properly. In order to discuss this problematics, it is necessary to outline the principles of equality and non-discrimination; as well as the concept of positive actions in order to assess their compatibility. Like many other legal institutes, equality is not a priori a legal concept.[2] In general, equality always signifies a relationship between different objects, persons, processes or circumstances that have the same qualities regarding one specific feature, with differences in other features.[3] Thus, equality is not absolute but has to be measured in certain respects - biological, physiological, social, cultural or political. There is therefore no universal definition and 'equality' remains a contested concept which raises different questions, according to the field of analysis.[4] For the purposes of this research, the notion of equality (before the law and the by the law) and principle of non-discrimination will be used as they are codified by international human rights law and interpreted by the international monitoring organs.

The principle of equality and non-discrimination is a cornerstone of international human rights law and it constitutes a general principle of law binding on all States. It is codified in all major human rights treaties and most national laws; and serves as a basic interpretative mean of human rights. Nevertheless, it has taken some time until these principles got accepted at international level - they were not adopted by the League of Nation and were only codified after the Second World War in the UN Charter and ensuing treaties.[5]

The main reference to equality and non-discrimination is to be found in the UN Charter (Article 1) which states that one of the main principles of the UN is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples" and to promote "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".[6] The UDHR further proclaims that "all human beings are born

2 Bobek, M., Boučková, B., Kühn (2007). Z. *Rovnost a diskriminace (Equality and discrimination)*. Prague: C.H. Beck, 4.

3 Equality therefore needs to be distinguished from 'identity' or ´similarity´. Stanford Encyclopaedia of Philosophy. Available at https://stanford.io/2XaNRg9.

4 While sociological and economic analyses mainly pose the questions of how inequalities can be determined and measured and what their causes and effects are; social and political philosophy is rather concerned with the question of what kind of equality, if any, should be offered, and to whom and when? Ibid.

5 Lauren, P.G (2019). *Power and Prejudice – The Politics and Diplomacy of Racial Discrimination,* 2nd edn. New York: Routledge, 99-10.

6 These principles are further reiterated in Article 13(1)(b),55(c) and 76(c) of the Charter.

free and equal in dignity and rights" (Article 1); they should be treated without distinction of any kind (Article 2); and they are "equal before the law and are entitled without any discrimination to equal protection of the law" (Article 7). A general non-discrimination clause has subsequently been included into all major human rights treaties[7] and it is often enhanced by provisions prohibiting discrimination on explicit grounds such sex and age especially in family matters, education and employment.[8] These two treaties further explicitly prohibit discrimination based on race (CERD) and gender (CEDAW); and both ICESCR and ICCPR (Article 3) stress the principle of equality between men and women.

Both principles of "equality" and "non-discrimination" are typically codified in one of the first articles of human rights treaties, and they are often used interchangeably.[9] Despite being closely intertwined, they make up for two distinct rights, whereby the right to non-discrimination is narrower and makes a part of the right to equality as central and essential element. In legal texts equality (including non-discrimination) can be codified as a general principle (Preamble of the UDHR), an autonomous right (Article 7 UDHR), or an accessory right (Article 2 UDHR). Furthermore, as technical formulation suggest, non-discrimination[10] is a negative duty which obliges states not to treat people differently based on certain grounds (characteristics) and in certain situations. It does not, however, mean that by simply non-discriminating the equality of people will be achieved, i.e. for its attainment a more positive engagement on the side of states is implied. Moreover, both concepts suggest a different level of activity and duties on the side of the state.

The principles of non-discrimination prohibits different treatment of a person or group of persons based on certain status such as race, colour, sex, language, religion, opinion, national or social origin, property, birth, age, ethnicity, disability, marital, refugee or migrant status, and or any other grounds. It is usually codified in an accessory form, in which it can only be claimed in the enjoyment of substantive rights listed in a given instrument. Only a few instruments provide a

7 Article 2 and 26 ICCPR, Article 2(2) ICESCR, Article 2 CRC, Article 7 CMW and Article 5 CRPD, Article 2 American Declaration, Article 24 ACHR and Article 2 and 3 ACHPR.

8 E.g. ICESCR – Article 7(a)(i) on equal working conditions and remuneration for men and women; Article 7(c) on equal opportunity for all to be promoted; Article 10(3) on equal assistance for all children and young persons; and Article 13(2)(c) on equal accessibility in higher education. ICCPR – Article 23(4) on equality concerning marriage; Article 24 on non-discrimination of children. Article 20 and Article E of the revised ESC – on equality between men and women in matters of employment and occupation.

9 E.g. even though Article 14 of the ECHR codifies 'the principle of non-discrimination', the ECtHR also uses terms 'the principle of equality' or 'equal treatment' in its rulings. E.g. ECtHR. Case "relating to certain aspects of the laws on the use of languages in education in Belgium" (Merits), judgment of 23 July 1968, Series A, No. 6, para 34 (hereinafter Belgian Linguistic Case)

10 In common use, the word 'discrimination' indicates difference; and in law it generally refers to the different treatment resulting in a disadvantage. Nevertheless, from the etymological perspective, the word 'discriminate' means to note or observe a difference, to distinguish accurately (from Latin *discriminatus* "to divide, separate"), while 'equality' suggests a state of being equal (from Latin *aequalitas* "similarity, likeness"). It means that the sense of those words is contradictory; and moreover a negative form of discrimination i.e. non-discrimination/not making a difference does not automatically amount to equality.

definition of discrimination,[11] as “exclusion or preference” made on prohibited ground which has the effect of nullifying or impairing equality of opportunity or treatment. There are in general two main forms of discrimination: a) direct discrimination, which occurs when for a reason related to one or more prohibited grounds a person is treated less favourably than another person in a comparable situation; and b) indirect discrimination, occurs when an apparently neutral legislation or practice results in a disproportionate disadvantage for a particular group without reasonable justification.

1.1.2. Formal equality

Despite numerous theoretical attempts, there is no widely recognized comprehensive equality model used in law. There are, however, two distinct concepts of formal and material equality that are clearly traceable in international, regional and national laws. The principle of equality has been traditionally understood as ‘formal equality’ based on liberal and symmetrical approach, merit principle and individual justice; which does not take into consideration individual, social, historical background, and circumstances.[12] Formal equality advocates for the ‘sameness’ of applicable rules and requires equal situations to be treated equally; thus, it guarantees equality in front of law de jure but does not explore its de facto impact.[13]

Wording of the UDHR (Article 2) and of French version of the ECHR (Article 14) may actually support this interpretation as it prohibits “distinction of any kind”. Nevertheless, based on the ECtHR ruling in spite of the very general wording of the French version (“sans distinction aucune”), Article 14 does not forbid every difference in the exercise of the rights, and it must be read in the light of the English version (“without discrimination”).[14] As the Court stated, one would reach absurd results, guaranteeing such wide interpretation.[15] Similarly, other international monitoring bodies adopted such interpretation while arguing that not every distinction or difference in treatment amounts to discrimination.

Nevertheless, historic (but even some present) laws and practices aiming to treat the same people in the same way and different once differently; enabled to grant fewer rights to women, people of African descent, Jews, or just any other distinct groups.[16] In order to prevent such discriminatory treatment, international judicial and quasi-judicial organs have developed a set of criteria under which a different treatment (both negative such as limitation of certain rights and positive such as special treatment of pregnant women or children): [17]

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11 Article 1(1) CERD, Article 1 CEDAW, Article 2 CRPD, Article 1(1) ILO 111 and Article 1(1) Convention against Discrimination in Education.

12 Freedman, S. (1998). *After Kalanke and Marshall: Affirming Affirmative Action*. Cambridge: Y.E.L.S., 200.

13 Protocol No. 12 to the ECHR (ETS No. 177), Explanatory Report, para. 14.

14 Mowbray, A. (2012*). Cases*, *Materials, and Commentary on the European Convention on Human Rights* (3rd ed.). Oxford: Oxford University Press, 816, para 10.

15 Belgian Linguistic Case, para. 10.

16 More in Fredman, S. (2011). *Discrimination Law*, 2nd. Oxford: Oxford University Press.

17 E.g. ECtHR (*Marckx v. Belgium,* Abdulaziz, Cabales and Balkandali v. the United Kingdom), the Inter-American Court (*Advisory Opinion No. 4*, para. 57), and the HRC (General Comment 18, para. 13 and *Jacobs v. Belgium*).

1. It pursues a legitimate aim which has ‘has objective and reasonable justification’;
2. It is based on reasonable and objective criteria;
3. It includes reasonable proportionality between the aim sought and the means employed.

Original interpretations only considered similar persons in similar situations, and the discrimination was found if they were treated differently without objective and justified purpose. Nevertheless, more recent rulings and interpretation broadened this scope and stated that in some circumstances, the failure to treat differently persons whose situations are significantly different may also be contrary to the principle of non-discrimination.[18] Formal equality is thus fulfilled in both cases, when the similar subjects are treated similarly and different ones differently.

Consideration of what difference is reasonable, objective and proportionate may differ according to the culture and history of each jurisdiction.[19] This problem thus often arises while deciding on a suitable comparator to establish discrimination. International and national judicial organs generally require proof that different rules were applied to comparable situations or that the same rule was applied to different situations. In each case however a comparison has to be undertaken. In some situations, there can be more available comparators and in others none (e.g. pregnant women who constitute a separate category on its own).[20] Assessment of equality is conducted through a commonly shared attribute (a comparator, variable, or index) that needs to be specified in each particular case.[21] Furthermore, defining such variable is very important for both descriptive and prescriptive assertions of the concept of equality;[22] e.g. when assessing the qualities of two people and when prescribing how they ought to be treated in certain situations.

1.1.3. Material equality

Material equality on the other hand is based on substantive, material, factual, asymmetrical approach, with outcome oriented group justice which considers individual social and historical background and justifies a use of positive action.[23] Material equality recognizes that, due to historical discrimination, some social groups have distinctly lower starting position need balancing measures to attain equal opportunities (a comparable starting line).

The concept of ‘equality of opportunity’ thus goes beyond original notion of formal equality and it is partially based on a redistributive justice model aiming to remedy past discrimination (concerning mostly racial, ethnic minorities, handicapped and women) while at the same time

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18 Thlimmenos v. Greece, judgment (Grand Chamber) of 6 April 2000, Application No. 34369/97, para. 44 (hereinafter Thlimmenos v. Greece),

19 For example the Czech Constitutional Court set proportionality criteria which include criterion of suitability, necessity and comparison of binding nature of two conflicting basic rights.

20 Bobek et al. (2007), 12-14.

21 Westen, P. (1990). *Speaking of Equality: An Analysis of the Rhetorical Force of `Equality' in Moral and Legal Discourse*. Princeton, New Jersey: Princeton University Press, 10.

22 Oppenheim, F. (1970). Egalitarianism as a Descriptive Concept. *American Philosophical Quarterly, 7*(2), 143-152. Available at https://bit.ly/2EFSp7I.

23 Alexy, R. A. (2002). *Theory of Constitutional Rights*. Oxford: Oxford University Press, 276 on.

limiting a full redistributive justice.[24] Equality of opportunity is therefore a subgroup of material equality which presupposes an active approach of the state in detecting and correcting pre-existing inequalities through different measures (such as courses to increase qualifications for long-term unemployed, special educational programs for socially disadvantaged children etc.).

The notion of 'equality of outcomes' adds a "more interventionist substance to the concept of equality, by seeking to inject certain moral perception; namely, the desirability of equal distribution of certain public goods".[25] Equality of outcome alone, however, does not oblige a state to take the action - it only directs the focus to the result and the positive actions can but do not have to be a next politically decided step.[26] When trying to reach equality of outcome an argumentation through statistics often takes place and analysis of equality of opportunities is not even necessary – e.g. it is not important how many participants from preferentially treated groups took part in the selection process. What is important is how many will be represented in decision-making.[27]

Shift towards material equality

Over last decades there has been a shift towards the codification and interpretation of equality principle in its material understanding (which includes the use of positive actions); and which is manifested by several tendencies: extension of prohibited grounds and fields, shift from accessory to free-standing non-discrimination clause, extension of the state responsibility to private sphere, and a shift to equality as a free standing right.

Extension of prohibited grounds and fields

While non-discrimination article in older treaties included typically race, colour, sex, language, religion, political or other opinion, national or social origin, property, and birth; newer treaties add further prohibited grounds including age, gender, disability, nationality, sexual orientation, and gender identity. Selection and order of the grounds also often reflect different regional context. While Inter-American treaties (Article 2 ADHR and Article 1(1) ACHR) prohibit discrimination, among others based on 'economic status' and 'any other social conditions'; the European level (Article 14 ECHR) includes 'association with national minority'. On the other hand, the EU (and the European Communities as its predecessors) has been long regulating non-discrimination on the basis of sex or nationality only; but later extended the scope of protection to racial and ethnic origin, religion or belief, age, disability and sexual orientation.[28] Similarly, the

24 Equal Rights Trust (2007). *The Ideas of Equality and Non-Discrimination: Formal and Substantive Equality*, 3. Available at https://bit.ly/33pw6xq.

25 Ibid.

26 Bobek et al. (2007), 20.

27 Ibid, 21.

28 E.g. Directive 2006/54/EC 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 (hereinafter Gender Recast Directive). Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (hereinafter Racial Equality Directive). Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, concerning discrimination

sectoral scope of protection spilled from the field of employment to the welfare system and supply of goods. Similar trends are present in case of the European Social Charter (ESC) – while its original version (1961) states that the enjoyment of social rights 'should be' ensured without discrimination; its revised version (1996) changed the wording to 'shall be' secured without discrimination thus embracing equality principle also in the field of social rights.[29] This progressive nature of the Charter has also been confirmed by the ESC Committee which maintains that the Charter is a living instrument which needs to be interpreted in the context of new emerging issues and situations.[30]

Shift from accessory to free-standing non-discrimination clause

Another trend is the change towards free standing non-discrimination clauses which extend protection beyond the rights set forth in given legal instruments (e.g. Article 3 ACHPR, Article 24 ACHR and Protocol No. 12 ECHR). For example, Article 14 of the ECHR (1950) prohibits discrimination only in connection with the 'enjoyment of the rights and freedoms' codified in the Convention; while its Protocol No. 12 (2000)[31] sets out a free standing right to equality (Article 1) and increases the scope of protection to any right, which is granted under national law and can be derived from an obligation of a public authority.[32] It must be noted though, that the Protocol has not been ratified by all COE members[33] for various reasons including: sufficiency of protection provided by the EU or national anti-discrimination legislation; uncertainty about the future ECtHR interpretations and its workload; and a fear of a very general scope covering all acts of any public authority.[34] However, according to the Protocol supporters, such fears are not substantiated as the ECtHR case law has been very cautious so far and most of the cases have been dismissed. Furthermore, interpretation of the scope of obligations will be brought into line with Article 14 of the Convention, and the formal criteria of 'objective and reasonable justification' to assess discrimination will remain the same.[35]

Extension of the state responsibility to private sphere

While the original state duties that are stemming from non-discrimination articles covered mostly the public sphere, this scope of responsibility has gradually extended to include the private sector.

based on religion or belief, age, disability and sexual orientation.

29 Nevertheless, it has to be pointed out that the application of the Charter is not backed by binding decisions and sanction mechanism; and not all member states have ratified its revised version including: Austria, Azerbaijan, Belgium, Bulgaria, CR, Denmark, France, Lithuania, Monaco, Poland, Sweden, the UK, Lichtenstein and Switzerland did not sign it. Available at https://bit.ly/2W7Pp9Z.

30 LGA v. Czech Republic decision on the merits of 15 May 2018, para. 75.

31 The Protocol aims in particular at strengthening gender and racial equality.

32 So far the ECtHR has found a violation of this article only in case Sejdić and Finci v. Bosnia and Herzegovina; and it maintained that analysis of such cases would be identical to those considered under Article 14 of the Convention.

33 The Protocol has been ratified by 20 out of 47 COE member states so far. 18 states including the CR have signed but not ratified it; and 9 states have not signed it: Bulgaria, Denmark, France, Lithuania, Monaco, Poland, Sweden, Switzerland and the UK. Available at https://bit.ly/3egiYws.

34 COE (2005). *Non-discrimination: a human right – Proceedings of the seminar marking the entry into force of Protocol No. 12 to the ECHR*, Strasbourg: COE Publishing, 93.

35 Ibid.

The EU protection against discrimination applies both to public and private parties, and the CJEU confirmed vertical as well as horizontal direct effect of the anti-discrimination acquis in several cases.[36] Similarly, the UNHRC stated that Article 26 ICCPR prohibits discrimination in law or in fact "by public and private agencies in all fields".[37] This principle has been established also by the Inter-American Court of Human Rights with respect to health care and private health care institutions.[38] Even though it is not clear whether the COE's Protocol 11 has also a "horizontal" effect, the ECtHR has previously held that states are responsibility for any breach of the Convention in cases where private organizations perform its essential public functions.[39] Furthermore, the Explanatory Report to Protocol 11 states that "the prime objective of the article is to embody a negative obligation for the Parties" but that a horizontal effect cannot be excluded altogether.[40] Furthermore, there has been an increasing request for active approach demanded from states in general in respect to the data collection and evaluation as well, diffusion of information and preventive actions, or establishment of special anti-discrimination organs.

Shift to equality as a free-standing right?

The document Declaration of the Principles on Equality created by international experts in 2008 and endorsed by the Resolution and a Recommendation of the Standing Committee of the Parliamentary Assembly of the COE (PACE) can be seen as certain culmination of these tendencies.[41] The aim of the initiative is to launch a new paradigm on equality and to establish the general legal equality principle as a basic human right; i.e. as legally enforceable entitlement, not just a benefit.[42] This Declaration defines equality as a free-standing right, extending its application to all areas regulated by law and to all legal persons as well as individuals and groups. Inspired by the EU anti-discrimination directives, the declaration includes definitions of multiple discrimination, reasonable accommodation, victimisations, reversed evidence of proof, remedies and sanctions, specialized bodies, and the duty to gather and publish information and statistics in order to enable enforcement of the right to equality. Importantly, positive action measures are

36 Principle of direct effect enables individuals to immediately invoke an EU law provision provided that it is sufficiently clear and precise; unconditional, and not dependent on any other legal provision.

37 UNHRC (2000). *General Comment No. 28: Equality of Rights between Men and Women (Article 3)*, Sixty-eighth session, para 31.; UNHRC (2004). *General Comment No. 31*: *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, Eightieth session, para 8.

38 Ximenes-Lopes v. Brazil (2006) IACHR.

39 Van der Mussele v Belgium (1984) 6 EHRR 163; Costello-Roberts v UK (1995) 19 EHRR 112.

40 COE Committee of Ministers (2000). *Explanatory Report to the Protocol No. 12 to the ECHR.* (CETS - No. 177), June 26, 2000, para. 24.

41 The document was formulated through a two-year-long consultative process and signed by several hundreds of academics including Thomas Hammarberg (former COE Commissioner for Human Rights), legal practitioners and human rights activists. Available at https://bit.ly/2CuKOHX. Subsequent Resolution and Recommendation were proposed by the Committee on Legal Affairs and supported by the Committee on Equal Opportunities for Women and Men of the COE. REC 1986 (2011) 25/11/2011 https://bit.ly/2DzWDxj

42 Petrova, D. (2008). *The Declaration of Principles on Equality: A Contribution to International Human Rights*. London: Equal Rights Trust, 29. Available at https://bit.ly/3i2fHTC.

defined as part of equality implementation (and not as its exception), thus going beyond the scope of international and regional human rights instruments.[43]

It is important to stress though that both formal and material approaches include certain deficiencies and risks. Bobek et al. maintain that despite that formal equality looks like a 'bastion of objectivity and rationality' at the first sight; it is not free from value judgements, which can be included in seemingly objective provisions. Such bias may take place in law making as well as in its application. Linking equality to dignity, on the other hand, is a tempting argument which is, however, connected with linear increase of protection. Furthermore, it is necessary to bear in mind that the best attained legal regime should not be decreased and it has to be provided to everybody.[44] This substantive approach thus involves the risk of interchanging quality for quantity enabling an individual inequality as a side-effect. Equality, thus, can become a substitutive argument for redistribution.

Law and its practice under different international organizations show that both concepts are being currently used. Formal approaches are clearly present in formulation of major treaties. While older treaties rarely include provisions on positive actions, many recent legal sources already differentiate between formal and substantial equality and expressly allow for the use of positive action. Conditions of its application have been subsequently developed by main international judicial, quasi-judicial and political organs in their decisions, opinions and recommendations.

1.2. Positive actions and gender equality

1.2.1. Gender equality

Codification of gender equality and positive action

All major organizations view achievement of gender equality as one of their fundamental aims and codify principle of equality between women and men in their human rights treaties.[45] As early as in 1918, the Washington Declaration introduced a principle that women will be politically, socially and culturally equated with men. CEDAW, as the main document encompassing civil, political, economic, social and cultural rights of women, includes a free standing article on equality (Article 2) as well as definition of discrimination (Article 1).[46]

> Article 1. Discrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

43 E.g. Article 1(4) ICERD; Article 4 (1) CEDAW.

44 Bobek et al. (2007), 28.

45 Article 2 UDHR, Article 2(1) ICCPR, Article 2 ICESCR, and Article 14 ECHR.

46 CEDAW obliges states to ensure respect and application of these rights not only by state organs and entities but also by private persons. CEDAW is also the only treaty to include a free standing gender equality provision.

Even though this wording indicates no possibility of "distinction", CEDAW does enable for two types of different treatment – a) special measures of permanent character aimed at protecting maternity; and b) temporary special measures (positive actions) aimed at accelerating de facto equality between men and women. The need to implement positive actions and to move beyond formal substantive equality in order to achieve de facto gender equality has been frequently confirmed also by the UN, COE, and the EU supervisory organs.[47]

> Substantive equality for men and women will not be achieved simply through the enactment of laws or the adoption of policies that are, prima facie, gender-neutral. In implementing international treaties, States parties should take into account that such laws, policies and practice can fail to address or even perpetuate inequality between men and women because they do not take account of existing economic, social and cultural inequalities, particularly those experienced by women.[48]

The UN Platform for Action agreed in Beijing in 1995 addresses more direct equality in decision-making stating that it should better reflect the composition of society in order to strengthen democracy.[49] Similarly, the COE Council of Ministers directly connects equality between women and men with democracy as its fundamental criterion.[50] This Council also further asserts that it is no longer possible to understand human rights in absolutely neutral terms; and that positive actions should be employed in order to overcome obstacles to gender equality stemming from history, culture and social circumstances.[51]

Gender equality developments

The aim of positive actions in the gender context is to redress persisting legal, economic and cultural inequalities of women; which may, however, differ significantly at the regional and state level.[52] Many Muslim countries still allow for direct discrimination which denies women the right to possess or dispose with their property, the right to inherit equally to men, the right to work and travel without guardian's permission (e.g. Saudi Arabia's guardianship laws). On the other hand, many developing countries, especially in Africa, constitutionally guarantee gender equality but persistent customs exclude women from the exercise of certain rights, typically property rights to land (e.g Ethiopia). In most African and Asian countries, women still have limited access to education, basic health care, they are frequently forced into marriages (often as child brides), and to FGM and/or virginity tests. Women are also more susceptible to violence including rape, mutilation, forced labour and prostitution. Latin American countries for example suffer from the

47 As well as a number of other organisations such as the UN Women, the International Labour Organization (ILO), the UN Development Programme, the World Economic Forum (WEF), the World Bank and the OECD.

48 UN CESCR (2005). *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Article 3 of the Covenant),* 11 August 2005, E/C.12/2005/4, para. 7-9.

49 United Nations (1995). *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women*, 27 October 1995, Article 183.

50 This link had been also endorsed in The Declaration on Equality between Women and Men adopted by the 4th European Ministerial Conference on Equality between Women and Men (Istanbul, 1997).

51 COE Committee of Ministers (2007). *Recommendation CM/Rec (2007) 17 to member states on gender equality standards and mechanisms*, 16 May 2007, *CM/Rec(2007)17,* para. 8-10.

52 More in UN, Office of the High Commissioner for Human Rights (2014). *Women's Rights Are Human Rights*. New York, Geneva : UN. Available at: https://bit.ly/2T7bUOk.

highest rates of femicide. Many of those countries are in multi-ethnic regions where women often suffer from intersectional discrimination based on their race, origin and gender. Gender equality in labour is generally persisting problem, as over one hundred of world economies still prevent women from working in certain jobs.[53]

Such inequalities were present in Western countries only until recently and unequal position of women, i.e. their direct discrimination was legally codified. Still, in the nineteenth century, European women could not own property and write their own will,[54] marry freely,[55] study in universities,[56] patriciate in public sport events,[57] or work without the consent of their husbands;[58] while men enjoyed a legally recognized higher status and decision-making roles in public as well as private spheres.[59] Even when women have increasingly entered the labour market during the last century, their access to many professions were denied or restricted.[60] Women's suffrage was not allowed in some European countries until the end of the last century,[61] and they have been only slowly joining the legislative, judicial and executive branches.

One of the main conceptual roots of this unequal treatment of women dates back to the works of Jean-Jacques Rousseau,[62] who promoted institutionalized and segregated sex roles according to which women were confined to a private sphere with no direct access to power; while men were trained to judge independently, to express their thoughts, and to participate in decision-making.[63] The notion clearly inspired the Declaration of the Rights of Man and of the Citizen (1789) which declared “men to be born and to remain free and equal in rights”; but those equal men with full rights were French propertied male only; while women, slaves, children, and foreigners were dispensed as passive citizens with need of protection (due to illiteracy, lack of legal knowledge,

53 Iqbal, S (2018). *Women, Business and the Law 2018*. Washington, D.C.: World Bank Group, 2018. Available at: https://bit.ly/3kgdy99.

54 English women obtained the right to decide on their property in 1873.

55 Swedish women over 25 were allowed to marry without parental permission in 1872.

56 E.g. Cambridge had her first female graduate (British Queen today's queen-mother) only in 1945. Women’s application for scholarships and qualified jobs were often turned down based on gender bias (e.g. Gertrude T.B. Elion). Female scientist and writers were not allowed to publish and had to use male pseudonyms or publish in the name of their male colleagues.

57 E.g. First female Boston marathon runner was attacked for participating along with men in 1967.

58 E.g. Germany repealed the right of husbands to decide on the employment of their wives as late as 1977.

59 E.g. In 1811, the Austrian Civil Code from (ABGB para. 91) codified the role of man as the ‘head’ of the family. As late as in 2013, the UK repealed the law favouring royal sons in the right to throne before the daughters.

60 E.g. In many western countries women could not marry if they wished to become diplomats or teachers.

61 E.g. The right to vote was provided to women in 1971 in Switzerland, in 1976 in Portugal, and in 1984 in Lichtenstein.

62 Rousseau, J.J. (1762). *Émile, ou de l’éducation (Emile, or on Education),* Paris. A complex analysis of the work of Rousseau and his legacy is provided in Havelková, H. (2020). Kořeny právních nerovností v modernitě (The Roots of Legal Inequalities). In: Šimáčková, K., Havelková, B., Špondrová, P. *Mužské právo. Jsou právní pravidla neutrální?(Men's law. Are the legal rules neutral?).* Prague: Wolters Kluwer, 59-84.

63 Penny A. Weiss, P.A. (1987). Rousseau, Antifeminism, and Woman's Nature. *Political Theory*. Vol. 15 (1), 81-98. Available at https://bit.ly/3k8kHId.

and unemployment).[64] When, as a reaction to this deficit, Olympe de Gouges drafted Declaration of the Rights of Women and the Female Citizens (1791) stating that a "woman is born free and remains equal to man in rights"; she was accused of treason (as a person longing for state power and neglecting the virtues belonging to her gender) and executed in 1793.[65] At the end of French revolution, a decree was issued prohibiting women from participation in any political movement and no more than five women were allowed to gather on the streets.[66]

The purpose of this historical excuse was to demonstrate inequality of legal status of women who were deprived of their own legal personality and confined into a private sphere. This public/private concept with complementary gender roles of the male breadwinner and the female fulltime caretaker used to be a dominant social model in Western societies. Nevertheless, this traditional model has begun to change with the greater involvement of women in the labour market during the 1960s and 70s, when women became financially independent co-breadwinners alongside men.[67] Social statuses of women and men have continuously equalized and most formal discriminatory provisions were repealed, but there are still many persisting de facto inequalities, such as pay gap, under-representation of women in decision-making positions and fair share of carrying duties which would enable a better reconciliation of family and professional life. Furthermore, negative public discourse, stereotypes and prejudices that are still persistent prevent women from achieving a full de facto equality.[68] Despite the fact that numerous studies confirm that women in public offices perform well and they are re-elected more often than men in same positions,[69] they are still largely absent from the political and economic leadership. Women make up only 25% of the world's parliamentarians; 6% of the heads of states (10 out 152) and prime ministers (12 out of 193); and only 30 states reached gender equality (of at least 40%) of female

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64 Censer, J., Hunt, L. (2001). *Liberty, Equality, Fraternity: Exploring the French Revolution*. University Park: Pennsylvania State University Press, 55.

65 De Gouges also reformulated Rousseau's Social Contract including equality in marriage and dismantled the gendered concept of a citizen. Von Guttner, D. (2015). *The French Revolution*. South Melbourne: Nelson Cengage, 34-35.

66 More in Hufton, O. (1999). *Women and the Limits of Citizenship in the French Revolution (2nd ed..).* Toronto: University of Toronto Press; or Melzer, S. E, Rabine, L.W. (1992). *Rebel Daughters: Women and the French Revolution.* Oxford: Oxford University Press.

67 Havelková, H (1995). Dimenze „gender“ ve vztahu soukromé a veřejné sféry (The "gender" dimension in the relationship between the private and public spheres). *Sociologický časopis* 31(1) , 25-38.

68 E.g. In 1989, the US firm Price Waterhouse rejected promotion of her employee based on her "lack of femininity". In 2009, the Czech Prime Minister Topolanek maintained, in a public speech, that women should not compare themselves to men but rather take the role of mothers to which they were created by nature. In 2020, President Trump suggested that male employees form his cabinet should be doing more important political tasks and leave washing dishes to their wives.

69 E.g. Black, J.H., Erickson, L. (2003). Women candidates and voter bias: Do women politicians need to be better? March 2003. *Electoral Studies 22(1)*, 81-100.

representatives among ministers.[70] Women are equally absent from the economic decision making up only 16% of board members in the top 500 companies.[71]

Positive actions in the field of gender equality

Since the scope and extent of past and current gender inequalities varies in different fields and regions, possible positive actions to eradicate them differ accordingly. There are three main types of fields where positive actions are applied most frequently: political field (parliament, government, and judiciary), economic field (access to work and to decision-making organs) and education (access to education as well as to higher academic and decision-making positions). The second distinction is done according to the beneficiaries – a group of citizens who are not represented in given spheres – into gender, ethnic, religious positive actions. There is, however, a significant difference between women who form about half of each society and all other minority groups. While men and women form about 50% in each society (i.e. they are in parity); members of various minorities fall almost equally under each of these main groups and their overall size is different in each country.[72] Conceptually, it is therefore important to distinguish between diversity and gender equality policies.

Furthermore, it is important to distinguish between the quotas in education, in the labour market, and in politics; as they have different legal bases and can influence not only the public, but also a private sphere. In the sphere of education, there can be quotas for certain groups of students (regulating their access to education), or teachers (regarding their hiring and promotion). Unlike in the USA, most European universities are public and they are widely accessible by both sexes as well as minority students. Structural conditions, such as poverty or discrimination, often practically exclude certain groups such as Roma or immigrants. Hence, quotas in some regions for certain groups might be justified.[73] As far as gender ratio is concerned, European women now form a larger part of the university graduates but they are still under-represented in certain, mainly technical or scientific, fields. Concerning the teachers, women are over-represented in elementary and secondary education but their share is lower in universities and they only form about 25% of professors and associate professors. There are no EU regulations in this sphere and individual schools in different countries may set preferential treatment for certain groups of teachers. Several cases of preferential treatment from academic fields were already treated by the

70 The highest percentage of female parliamentarians is in Nordic countries (44%), followed by the Americas (31%), Europe (29%), sub-Saharan Africa (24%), Asia (20%), Middle East and North Africa (18%), and Pacific (16%). Nevertheless, there are currently 14 states (led by Spain and Finland) in which women surpassed the 50% majority in the cabinets. UN Women (2020). *Women in Politics: 2020*. Available at: https://bit.ly/3iH76rn.

71 OECD (2020). *What Big Data Can Tell Us About Women On Boards*. Available at: https://bit.ly/39LWxPG.

72 Under normal circumstances, there is a comparable number of men and women of one religion, racial or sexual background. Exceptions can be detected in the post-conflict zones (e.g. after genocide when habitually more men than women of certain race are murdered) or in societies with higher incidents of femmicides (including in embryonic stage).

73 E.g. Quotas for 'les banlieue' students (disadvantaged students, often second or third generation of immigrant families) from poorer satellites in France or quotas for Roma students in the CEE region.

CJEU, with the result that preferential treatment is only allowed when candidates have comparable qualification.[74]

As far as the workplace is concerned, women mostly face discrimination in the access and in the promotion at workplace due to stereotypes connected with their family duties since the main work archetype is still a male with no child-carrying burdens. While European women are strongly represented in the labour market, they are still missing from the economic decision-making. Women are also weakly represented among entrepreneurs but there are already examples of good practices in different EU countries, such as provision of subsidies, loans, tax breaks, tax exemptions, reductions in social security contributions, educational programs, and mentoring or counselling for women entrepreneurs.[75] It is important to note that quotas at the workplace are not a new phenomenon, but they are habitually used in many countries to secure employment to socially disadvantaged groups of citizens'; e.g. disabled workers.[76]

Despite the fact that the women represented in the labour market as well as in political parties in almost equal numbers, their representation decreases vertically towards top positions of decision-making. This pattern identified by Robert D. Putnam as the law of increasing disproportion discloses that the percentage of women declines as the importance and power of positions increases.[77] Besides, a pattern of horizontal segregation has been also detected as women are frequently assigned to 'soft' portfolios connected with lesser power and prestige, such as social affairs, culture, education and church; while men assert areas of finance, defence and foreign relations.[78] Women are also frequently assigned to the offices and portfolios of declining importance which is a phenomenon analysed by the theory of shrinking institutions.[79] Furthermore, numerous studies prove the theory of the glass ceiling implying that disadvantages caused by gender or other) grounds are stronger at the top of the hierarchy and they worsen with

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74 See chapter covering the EU.

75 Estonia, Croatia, Italy, Macedonia, Spain and Turkey are particularly active in this regard.

76 Spanish law, for example, provides for employment quotas for disabled workers (2% of posts in enterprises with more than 50 employees), workers in rural areas (50-70% in work covered by the Rural Employment Plan) and unemployed people in general (50-75% in employment schemes funded by INEM).

77 Putman, R. D. (1976). *The Comparative Study of Political Elites.* Englewood Cliffs: Prentice-Hall. Nevertheless, some researchers proved that this phenomenon is not absolute or invariable and that there are exceptions to the pattern (e.g. Dahlerup and Haavio-Mannila).

78 Such patterns have been identified in the parliaments, governments as well as in diplomacy. There is an ongoing academic debate whether this feature mirrors relative powerlessness of women (Skard, Haavio-Mannila), or rather women's genuine interests (Dahlerup) and their ability to acquire portfolios with significant financial impact and of strategic importance to them (Skjeie). As a matter of fact, this could well be the choice of women which is however socially and structurally determined as women still are the main care-takers in most societies.

79 The theory was first formulated by the Norwegian researcher Henriette Holter in 1976.

age.[80] Besides that another pattern referred to as "the glass cliff" was identified, according to which women are appointed to the leading positions in the time of crises.[81]

Time-lag theory, on the other hand, regards the current situation with more optimism and maintains that the increasing female representation is generally an irreversible phenomenon; which increases with the socio-economic development of the country/region.[82] Nevertheless, this theory is challenged by the recent development as female representation in western countries develops rather slowly or even stagnates in comparison with many developing countries, which have opted for the fast track of quota measures.[83] For example, Danish women's political representation has stagnated over recent years and even fallen in international rating. This suggests certain gender equality paradoxes - an inconsistency between discourse and practice, and between political goals and adopted laws.[84] The theory of saturation without parity tries to explain this paradox while maintaining that a new formative moment of 'de-gendering' takes place when satisfying level of gender equality has been reached.[85] Nevertheless, such saturation has not taken place in other Nordic countries that have higher proportions of female parliamentarians and politicians in general.[86]

Having all these disproportions in mind, it is possible to make distinction between six types of male dominance in politics: a) numerical over-representation; b) male-coded norms and practices at the workplace; c) vertical sex segregation (overrepresentation in decision-making); d) horizontal sex segregation (control over power portfolios and committees); e) discourses and framing (including stereotyping and/or sexism); and f) public policy (without concern for gender equality).[87] Women, despite their education, have difficulties to overcome such dominance, given numerous barriers such as a high degree of visibility, stereotyping, role conflicts, and exclusion from networks and lack of allies.[88] While some Nordic researches claim that there has been a shift

80 Cotter, D. A., Hermsen, J., Ovadia, S., Vanneman, R. (2001). The glass ceiling effect. *Social Forces*, 80, 655-681. The glass ceiling was equally identified in the economic decision-making see e.g. Alessio, J. C., & Andrzejewski, J. (2000). Unveiling the hidden glass ceiling: An analysis of the cohort effect claim. *American Sociological Review*, 65, 311-315, or Bailyn, L. (1993). *Breaking the Mold: Women, Men, and Time in the New Corporate World*. New York: Free Press.

81 Ryan, M., Haslam, A. (2007). The Glass Cliff. Exploring the Dynamics Surrounding the Appointments of Women to Precarious Leadership Positions. *Academy of Management Review*, 2007/32/2, 594-872.

82 Karvonen, L., Selle, P. (eds.). (1995). *Women in Nordic Politics: Closing the gap.* Aldershot: Dartmouth.

83 Dahlerup, D., Freidenvall, L. (2005). Quotas as a Fast Track to Equal Representation for Women: Why Scandinavia Is No Longer the Model. March 2005, International Feminist Journal of Politics 7(1), 26-48.

84 Borchorst, A. Dahlerup,D., Andersen, J.G., Rolandsen, L. Agustín (2014).*The Danish Political Gender Equality Regime – Continuity and Change.* Velux Foundations: The Grip Project. Available at: https://bit.ly/3iypFO3.

85 Kjaer, U. (1999): Saturation Without Parity: The Stagnating Number of Female Councillors in Denmark, in: Beukel, Erik, Klausen, Kurt Klaudi & Mouritzen, Poul Erik (eds.), *Elites, Parties and Democracy - Festschrift for Professor Mogens N. Pedersen*. Odense: University of Southern Denmark Press, 149-168.

86 Borchorst, A. Dahlerup,D., Andersen, J.G., Rolandsen, L. Agustín (2014).

87 Dahlerup, D., Leyenaar, M. (eds.) (2013). *Breaking Male Dominance in Old Democracies*. Oxford: Oxford University Press; Norris, P. Inglehart, R. (2001). Cultural Obstacles to Equal Representation. *Journal of Democracy, 12*, 126–140.

88 Dahlerup, D. (1988). From a Small to a Large Minority Women in Scandinavian Politics. *Scandinavian Political Studies*, *4,* 279.

from open resistance and ridicule towards female politicians to more indirect and unconscious discrimination; this is not true for all countries.[89] One of the latest comparative studies of the Inter-Parliamentary Union (IPU) and the Parliamentary Assembly of the Council Europe (PACE) from 45 European countries shows that up to 85% of women deputies and parliamentary employees have faced violence in work. On top of this, almost 70% of women faced comments about their appearance or gender stereotypes; 50% were threatened with death, rape or physical violence; 25% were victims of sexual violence; and 15% suffered physical violence. Despite these problems, most parliaments do not have any internal complaint and control mechanisms.[90]

Based on the research, women and minority groups need to reach certain level of representation - a 'critical mass'- in order to change their position and to gain influence within given institutions.[91] Early research on the Critical Mass Theory was delivered by Rosabeth M. Kanter who studied gender and ethnic relations in industrial corporations and defined 4 types of groups based on dynamics of their interactions: 1) uniform groups (with men or women only); 2) skewed groups (with less than 15% of one sex); 3) titled groups or larger minority (between 15-40%); and 4) balanced groups (with at least 40% of each sex).[92] Based on her research, Kanter found out that proportions of socially and culturally different groups are critical in shaping interaction dynamics whereby numerical 'dominants' take control over 'tokens'. Kanter observed that skewed female groups below 15% are socially isolated, subjected to stereotyped gender roles, and consequently more willing to conform to the majoritarian male dominated culture; and ace difficulties to create alliances as result.[93] Based on these findings, Kanter identified three main phenomena: a) visibility (tokens tend to be more visible), b) polarization (differences between the two groups are exaggerated), and assimilation (tokens adapt to dominants).[94] Hence, the consequence of higher gender misbalance is submission to the dominant norms which preserves its maintenance.[95] According to Kanter, a minority group will be able to install a better inner cooperation, common strategies and actions resulting in cultural changes, once it grows over 15% (to the titled group).

Kanter's theory was later applied to the research of female political representation by Drude Dahlerup,[96] who suggested a 4-stage model: 1) male monopoly with less than 10% female participation (with obligatory token women); 2) small minority of 10-25% (with women accepted

89 E.g. Refsgaard, E. (1990). "Kvindernes placering i folketingets arbejds-og magtdelig 1965-1990", in Drude Dahlerup og Kristian Hvidt (ed.). *Kvinder pa tinge.* Kobenhavn: Rosinantel Munksgard, 106-139.

90 Council of Europe (2018). *Sexism, harassment and violence against women in parliaments in Europe*. Available at: https://bit.ly/2ph1IDJ

91 Childs, S., Krook, M.L. (2008). Critical Mass Theory and Women's Political Representation. *Political Studies 5,* 725-736.

92 Kanter, R. M. (1977). *Men and Women of the Corporation.* New York: Basic Books.

93 Broome, L., Lamkin, J., Conley, M., Krawiec, K.D. (2011). Does Critical Mass Matter? Views from the Boardroom. *Seattle University Law Review 34*, 1049-1080, 1053; Childs, S., Krook, M. L. (2008), 727.

94 Kanter, R. (1977). Some Effects of Proportion on Group Life: Skewed Sex Rations and Responses to Token Women. *American Journal of Sociology 82(5),* 965-990.

95 Childs, S. Krook, M., L. (2008), 727.

96 Dahlerup (1988), 275-297.

in the social policy field); 3) large minority or take-off stage of 25-40% (with active measures to recruit women); and 4) gender balance of 40-60 % (with institutionalized parity or gender neutrality).[97] Dahlerup assumed that the critical mass (when substantive changes will start taking place) will be attained, when women form at least 30% of given institution. From that level on, Dahlerup expected a continuous growth of female representation as well as better cross-party female cooperation, and their ability to affect political culture, norms and policy outcomes.[98] Such anticipated cultural changes could include: improved social relations, political discourse and attitude towards female politicians (reduction of the stereotyping and of open resistance); greater influence of female politicians; changes in policy outcomes; as well as overall social and political female empowerment.[99]

The classic Critical Mass Theory has been criticized for omitting other factors that could be equally important as reaching the critical threshold.[100] Nevertheless, Dahlerup also emphasized significance of critical actors and critical acts (such as formation of female coalitions, and introduction of gender quotas, equality legislation or institutions); which can be more important than the critical mass alone.[101] Childs and Krook further elaborated on the concept of critical actors - concrete female or male politicians who lead female-friendly campaigns and initiate specific policy proposals in favour of women.[102]

To conclude, the Critical Mass Theory has been widely recognized, and it serves as one of the main arguments for increased female political representation as well as for introduction of gender electoral quotas.[103] This requirement of 30% has become an “acceptable minimum” for female representation in national as well as international legislative bodies, even though their individual goals could differ.[104] While the generally accepted numerical target in the UN is 30%, the EU and the IPU have initiated an increasing number of national states to focus on gender parity, which is considered to be reached with 40% representation. Gender parity should, however, not be confused with gender equality. While gender parity is a statistical measure of female-to-male ratio under specific indicators, gender equality is about “a substantive shift not only in the

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97 Dahlerup, D., Leyenaar, M. (2013).

98 Lovenduski, J., Norris, P. (2003). Westminster Women: the Politics of Presence. *Political Studies 51*, 84-102, 88; Raaum, N. C. (2005). Gender Equality and Political Representation: A Nordic Comparison. *West European Politics* 28 (4), 872-897, 876.

99 Dahlerup (1988), 283-284. Nevertheless, some researchers maintain that these hypotheses have not been thoroughly tested empirically.

100 Raaum, N. C. (2005), 882, 893.

101 Childs, S., Krook, M. L. (2008), 731.

102 Ibid, 734.

103 Broome, L., Lamkin, J., Conley, M., Krawiec, K.D. (2011), 1053.

104 Division for the Advancement of Women (2005). *Equal participation of women and men in decision-making processes, with particular emphasis on political participation and leadership*. Expert Group Meeting organized by: UN Department of Economic and Social Affairs (DESA), Addis Ababa, Ethiopia, 24 to 27 October 2005. Available at: https://bit.ly/39QIzMr.

proportion of men and women, but in the deeper dimensions of societal norms and sense of identities – to be valued and respected equally, regardless of gender".[105]

1.2.2. Codification, concept and types of positive actions

As already discussed, positive actions might be needed in order to reduce or eliminate conditions that cause and preserve discrimination. Such actions have generally two aims directed towards – a) redistribution (in economic sense), and b) recognition (in cultural sense).[106] In practice, those can be various legislative, executive, or administrative measures - in a softer form (such as support and training programmes, educational activities and campaigns); or in a harder form of 'preferential treatment' (such as targeted recruitment, hiring and promotion, targeted financing, and quota systems).[107]

Number of international instruments encourages, or even obliges, states to take these specific measures in order to promote equality of a certain de facto disadvantaged groups, especially racial and ethnic minorities,[108] and women[109]. Such an obligation was confirmed also by several supervisory organs. For example, since the, The ECtHR, for example, has used the concept of 'positive obligations' in its ruling Nachova and Others v. Bulgaria (2005), where it confirmed that that states have to take "legislative, regulatory, or other" measures aiming at the more effective equality.[110] Similarly, the UN HRC refers to such obligation in its General Comment 18; and the Committee on Economic, Social and Cultural Rights also often mentions duty to take affirmative action in its observations.

However, terminology in this field is not unified and different instruments and organs use different terms. While the UN Committees codifies 'temporary special measures'; the ECtHR refers to 'positive differential treatment'; and the EU coins 'specific measures'.[111] Latest documents and research use the term 'positive action', which is also used as a general term in presented research. As it is evident from the terminology, there is still no universal definition of positive actions and there are ongoing disagreements concerning the scope and application of such measures.

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105 Manlosa, A., Matias, D.M. (2018). *From gender parity to gender equality: changing women's lived realities.* Bonn: German Development Institute. Deutsches Institut für Entwicklungspolitik (DIE). Available at: https://bit.ly/3o4IoSz.

106 Axel Honneth conceives recognition as the fundamental, moral category, potentially encompassing redistribution, Nancy Fraser on the other hand argues that the two categories are both fundamental and mutually interconnected. Fraser, N., Axel Honneth, A. (2003). *Redistribution or Recognition? : A Political-philosophical Exchange*. London: Verso.

107 COE, Res MEG 7 (2010) on bridging the gap between de jure and de facto equality to achieve real gender equality, para 189, 190.

108 E.g. Article 1(4) and 2(2) ICERD; Article 4(2) and 4(3) Framework Convention for the Protection of National Minorities.

109 Article 4(1) CEDAW.

110 Nachova and Others v. Bulgaria, judgment (Grand Chamber) of 6 July 2005, Application No. 43577/98.

111 Racial Equality Directive 2000/43, General Framework Directive 2000/78, Gender Goods and Services Directives 2004/113.

The Council of Europe's Group of Specialists on Positive Action came to the conclusion that the concepts of positive action and anti-discrimination are closely inter-related and have to be understood within the context in which they are used. While anti-discrimination asserts equal rights and treatment of all categories in general; positive actions are aimed at favouring of certain groups.[112] There is no common agreement whether positive action should be gender neutral (including men in categories where they are under-represented) or only aimed at women. According to the experience of different states, neutral provisions can be contradictory, as they often preserve existing gender stereotypes. On the other hand, codification of positive actions in gender neutral form might better reflect certain existing disparities and further development.

Overall there are two approaches to understanding of positive actions – as derogation/exception from the principle of equality (and de facto discrimination of not supported groups of population);[113] or as a necessary part of implementation of the principle of equality which strengthens and supports overall equality. The international law tries to address this dilemma by setting the time limits; e.g. both CERD and CEDAW in their Article 4(1) codify that the temporary special measures "shall be discontinued when the objectives of equality of opportunity and treatment have been achieved".[114] Besides the time limit, there are further conditions detailed through the interpretation of the supervisory organs such as a justified and legitimate purpose and proportionality (ECtHR, CJEU).

Many legal experts maintain that the fact that positive actions are defined as 'temporary' suggests their derogative character. Nevertheless, temporary measures can be regarded as a permanent 'stand-by tool' of the equality which is activated always when necessary (i.e. it is not employed permanently but it is a permanent and accepted option) as duration of the measure does not necessarily express its relation to equality. In practice, it is difficult to imagine a situation in which all groups of population would have the same level of opportunities. This seems to be rather more probable that there will always be a certain segment of the socially disadvantaged population, which will need supportive measures of at least soft nature; e.g. training and requalification of long-term unemployed.

Types of positive measures

Starting off, it is important to make distinction between the category of positive measures and the categories of genuine occupational qualifications and protective measures which provide a special treatment for women but which are not directly aimed at elimination of inequality or discrimination and do not contravene equality principle. Protective measures provide special conditions for women in certain objective circumstances, typically connected with pregnancy,

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112 Council of Europe (2000). *Positive action* in the field of equality between women and men: *Final Report of Activities of the Group of Specialists on Positive Action in the field of Equality between Women and Men (EG-S-PA)*, 26. Available at: https://bit.ly/3iyIZJJ

113 Childs, S., Krook, M. L et al. (2007), 23.

114 Permanent positive actions, on the other hand, are codified in Indian Constitution which guarantees reserved places for the most disadvantaged social castes in education and public sphere. More in Boučková, P. (2009), *Rovnost a sociální práva (Equality and Social Rights).* Prague Auditorium, 45 on.

breastfeeding, and motherhood in general. Protective measures are well established in all major international human rights treaties, as well as national laws.[115] They guarantee a minimum maternity leave (12-14 weeks with payment or allowance), protection from licensing during maternity leave, and other protective treatment. Genuine occupational qualifications constitute a legitimate demand for concrete sex of the worker in case of certain occupations with regard to their nature or the context in which they are carried out.[116] Such regulations are found in international as well as national legislation.[117]

There are a few existing concepts of categorization of positive actions. Generally, two main groups of positive actions could be recognised.[118]

1. Wider concept includes all – hard as well as soft measures. This group covers all measures which go beyond simple negative prohibition of discrimination including hard as well as soft - seemingly neutral measures which are open to all but contribute mostly to integration and advancement of some groups such as awareness-raising campaigns, specialized educational and training courses, childcare facilities, pregnancy and parental rights and benefits, part-time work, home office, flexible working time (e.g. pre-school education that helps mainly Roma, or migrant children, social or cultural centres opened in the areas with a higher concentration of minority population, etc.). However, a weak preference gives similar weight to all criteria and sex is treated only as one of them.
2. Narrow concept consists of hard preferential measures. This second group is narrower and includes preferential benefits or treatment such as sex-based preferences or quotas accelerating de facto gender equality. Such measures are not considered discriminatory as long as they do not entail as a consequence the maintenance of unequal or separate standards, and they are discontinued when their objectives have been achieved (CEDAW Article 4). Several types of preferences are used in practice:[119]
    a. An absolute preference grants some benefits only for members of the underrepresented sex.
    b. A strong preference reserves some benefits to members of the underrepresented sex who satisfy certain minimal eligibility criteria.

115 E.g. the ILO Convention No. 103 concerning Maternity Protection (Revised 1952), the European Social Charter (Article 8) or the EU Council Directive (92/85/EEC) 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.

116 E.g. Preference for female cleaning lady in the female sport club.

117 E.g. ILO Convention 111, article 2; Equal Treatment Directive 76/207 article 2(2).

118 The question is whether actions preventing and erasing direct discrimination such as codification of sufficiently deterrent sanctions should be counted as positive action as suggested by Bobek et al. (2007), et al inspired by McCrudden. While such actions certainly presuppose an active approach on the side of state, they should be rather counted as a state norm-making obligation stemming as basic requirement of international anti-discrimination legislation which does not favour any particular group but serves as basic rule for all and mostly for an effective implementation of law.

119 This categorization is used by Selenec, Senden, and de Vos; while the CoE expert group on positive actions came up with another type of categorization. Council of Europe (2000).

c. A tie-break preference reserves some benefits to members of the underrepresented sex who are equally qualified or who equally merit such benefits.
d. Flexible preference permits another socially significant reason (such as health reasons, single parenthood, long-term unemployment) to supersede sex-based preferences.

Both strong and tie-break preferences can be formulated as flexible preferences. National EU reports show that states mostly opt for tie-break preferences, which according to the CJEU case law, have to be designed in flexible form i.e. the candidates have to be equally qualified and consideration to individual social background of all candidates must be considered and can override the gender preference.[120]

Importantly, it must be stressed that the 'quota' does not equal any of those categories but can be attached to them. The quota is merely a numerical goal that is supposed to be reached but it does not have to be applied i.e. it is possible to have absolute as well as flexible measures without quota. There is no universal definition of quotas, as it depends on the sector in which they are used. One of the most debated characteristics of the quota is whether it should be understood as a minimal or maximal requirement.[121] While in economy an import or production quotas is normally understood as an official maximum allowed,[122] most gender scholars understand quota as a minimum amount which should subsequently lead to equality.[123] The quota is frequently used to support different regional, ethnic, linguistic, or religious minorities and it can be introduced in democracies as well as in authoritarian systems. Such criteria are already reflected in electoral policies as nearly all states use some type of geographical quota to enable proportional regional and group representation.[124] Quotas are clearly the most contested forms of positive actions, and their possible impact and arguments for and against their use are analysed in further chapters.

1.2.3. Gender quotas in politics

Political resources and the gatekeeping problem

One of the main arguments for the female underrepresentation in politics refers to the lack of interest on the side of women, or to the preferences on this side of the electorate. Not much of a public discourse questions an internal party selection process, which seems to be a crucial stage. As Pippa Noris points out, there are three main hurdles in the election process as an individual

120 Selanec, G., Senden, L. (2012). *Positive Action Measure to Ensure Full Equality in Practice between Men and Women, including on Company Boards*. Brussels: European Commission Unit JUST/D1, 4-6.

121 Krook, M., L. (2014). Electoral gender quotas: A conceptual analysis. *Comparative Political Studies 47, no. 9*: 1268-1293, 4.

122 Import quota is the amount of goods that a country allows to be imported during a particular period of time. *The Cambridge Dictionary.*

123 Dubrow, J. K., Zabrzewska, A. (2020). An Introduction to Gender Quotas in Europe. In Dubrow, J. K., Zabrzewska, A. *Gender Quotas in the Post-Communist World. Voice of the Parliamentarian*, 19-33. Warsaw: IFIS PAN Publishers.

124 Dahlerup, D. (2007). Electoral Gender Quotas: Between Equality of Opportunity and Equality of Result. *Representation, 43:2, 73-92*, 79.

must be elected three times: 1) by himself/herself; 2) by the party; 3) and finally by voters.[125] But is it really the voters who decide? Or the party leaders who construct the candidate list? As far as the electorate is concerned, the western research indicates that most candidates choose their representatives based on their party affiliation and their policy positions; the sex of the candidate seems to be secondary.[126] Furthermore, the voters can only vote for those who are offered on the list - if women are not sufficiently represented on the list then they will not be elected. Apparently, the will of the voters is not as decisive and the most problematic phase seems to appear within the first two stages – the "self-election" and the "gatekeeping".[127] So the questions that are inquiring who selects the candidates, and on what criteria, are valid questions of public interest; as the parties receive the public financing and decide on norms that are binding for the whole society.

The first step – "self-election" - involves the transfer from the eligible to the aspirant, which is dependent on an individual's ambition and its political resources.[128] This means that the aspirants need to have personal but also structural predispositions to participate in the election. As already mentioned, most European women supersede men in education and work full time similarly to men, but they are still unequally represented in the legislative and executive branches. As indicated by the research, women do not aspire for public involvement and political careers mainly due to caring duties, existing stereotypes and hostile party environment;[129] an aspirant pool is therefore heavily skewed towards men. Furthermore, most parties do very little to encourage female participation, on the contrary, they often even restrict the realistic chances of women by placing them at the bottom of candidate lists. Party gatekeepers are thus even more influential than electoral systems,[130] as they ultimately decide on runners and they know which seats are 'safe'. Nominations are often done at their headquarters in complete secrecy; and are based on non-transparent criteria and relations.[131] Gender quotas' main aim in politics is precisely

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125 Norris, P. (1996). Legislative Recruitment. In LeDuc, L., Richard Niemi. R., Norris, P. (eds.). *Comparing Democracies: Elections and Voting in Global Perspective*. London: Sage.

126 Matland, R. (2005). The Norwegian Experience with Gender Quotas. In Ballington*, J.,* Binda, F. (eds.) (2005). *The Implementation of Quotas: European Experiences*, 64-71, 65. Stockholm: Idea. Available at: https://bit.ly/3mNOuWS. Nevertheless, these research results reflect the social status of mostly western countries, while research from Balkan countries, with more traditional gender division and stereotypes, indicate that voters tend to give preference to known male candidates before new female candidates.

127 Ibid, 19.

128 Ibid, 64.

129 Dahlerup, D. (1988), Council of Europe (2018).

130 Ilonszki, G., Siemienska, R., Havelková, H. (2001). In Jalušič, V. and Antić, M.G. 2001. Women – Politics – Equal Opportunities, Prospects For Gender Equality Politics in Central and Eastern Europe. Ljubljana: Peace Institute.

131 Siemienska, R. (2000). Political Representation of Women and Mechanisms of its Creation in Poland, In *Perspectives for Gender Equality Politics in Central and Eastern Europe*. Ljubljana: The Peace Institute; Ilonszki, G. (2000). Gloomy Present, Bright Future? A Gender Perspective for Party Politics in Hungary. In *Perspectives for Gender Equality Politics in Central and Eastern Europe*. Ljubljana: The Peace Institute.

to break through such structured differences in access to political decision-making and decision-makers - by the creation of new, favourable circumstances.[132]

Quotas Classification[133]

There are several types of quotas which can be distinguished based on different criteria.[134]
Based on the decision-maker, who mandates the quota; there are three main forms of quotas.

a) Voluntary or informal quota with different numerical goals and designs formulated in the political party statutes that are not externally controlled or sanctioned by the state. This is an older type of quotas currently used in 56 countries including Norway, Sweden, UK, Netherlands, Germany, Austria, Spain, Cyprus, Iceland, Luxembourg, Romania, Slovakia, and Slovenia.[135] There has been a certain domino pattern detected since adoption of quota by one or more parties in a country impacts an overall rate of female representation and motivates other parties to keep up with the set standards (e.g. Norway, Spain, and South Africa).[136]
b) Legislative (statutory) or formal quotas set uniform numerical goals to be reached either by the constitution,[137] or by the electoral law (most Latin American and European states). As of 2020, 57 countries use legislative quotas and they reach on average 27% share of women in their parliaments. There are already 17 European states which implemented legislative quotas in the EU (Belgium, France, Croatia, Greece, Ireland, Italy, Poland, Portugal, Slovenia, and Spain); in the Balkans (Albania, Bosnia and Herzegovina, Montenegro, North Macedonia, Serbia); and in the ex-USSR space (Armenia, Moldova).[138] In 2019, also two German Landers Brandenburg and Thuringia adopted a 50% quota with an alteration request.
c) Reserved seats can be set by the law or voluntary, agreed by political parties e.g. Morocco. This measure aims at the equality of results by requesting a certain number of 'guaranteed seats'. Popularity of the reserved seats is on rise and they are currently used in 25 countries,

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132 Dubrow, J. K. (2015). The Concept and Study of Political Inequality. In Dubrow, J. K. (eds.). *Political Inequality in an Age of Democracy: Cross-national Perspectives.* London: Routledge, 9-27.

133 The main databases on quotas are: longitudinal dataset *Quota Adoption and Reform Over Time* (QAROT) for 1947-2015; *The Global Gender Quotas Database* mapping current situation in 90 nations by International Institute for Democracy and Electoral Assistance (IDEA); the Inter-Parliamentary Union Women in Parliaments *Statistical Archive for 2004-2018*; and World Bank. *Proportion of Seats Held By Women In National Parliaments*.

134 This main typology has been drafted by Dahlerup, D. (2006). *Women, Quotas and Politics*. London: Routledge, 19-21. For more information on quotas see also IDEA https://bit.ly/34uQU5K. Further analyses are available in Krook, M. L. (2014). Electoral gender quotas: A conceptual analysis. *Comparative Political Studies, 9*, 1268-1293; Hughes, M. M. , Paxton, P. , Clayton, A. P. , & Zetterberg, P. (2019). Global gender quota adoption, implementation, and reform. *Comparative Politics* , *51* (2), 219–238.

135 E.g. in the Americas (Canada, Costa Rica, Chile, Paraguay, Nicaragua), Africa (Botswana, Kenya, Malawi, Zimbabwe), Middle East (Israel), Oceania (New Zealand, Philippines). In all these countries, the voluntary quotas are applied at least by two or more parties. The full list is available at: https://bit.ly/38TIua4.

136 The first parties in Norway that used the voluntary quotas were the Socialist Left and the Liberal Party in 1975, followed by the ruling Labour Party in 1983 and other parties in the 1990s. Even though Conservative Party rejected quotas based on the arguments of the best candidate and the arbitrariness of rules, it has (under the peer pressure) gradually increased female representation to a 30% range. In Germany, quotas are applied not only by the Social Democrats SPD (40%) but also by the Christian Democratic Union CDU (30%).

137 E.g. Burkina Faso, Nepal, the Philippines, Uganda.

138 The full list is available at: https://bit.ly/37SKzDR.

reaching on average almost 27% of female parliamentary representation.[139] Reserved seats for women might be combined with reserved seats for other groups e.g. India uses reserved seats for the disadvantaged castes at local level or Poland has two seats reserved for the German minority.[140]

The quotas can be further categorized based on the stage of selection in which they are applied to:

a) Aspirant quotas – setting a number of aspirants willing to take part in the selection process through the primaries or through the nomination committees or other party organs. This measure is used mainly in countries with plurality-majority electoral systems, even though it must be noted that it is not easy to create a quota fitting such a system.[141]
b) Candidate quota – setting a number of candidates to be placed on the ballot by the party (ranging usually from 20 to 50%). Many states opt for a gender-neutral formulation stating that no sex should have less than e.g. 40% and no more than 60%.
c) Elected persons in case of reserved seats; whereby women are increasingly elected rather than appointed in such systems (e.g. Jordan, Uganda and Rwanda).

Designing quota policy

There are several important factors that need to be taken into account when designing a concrete quota policy.

The type of electoral system largely influences numeric gains.[142] Based on experience, the quotas are the best applicable and the most efficient in the proportional representative systems and the most problematic in the plurality-majority systems. Canada, for example, has a single-member plurality system, and leader-driven campaigns where the success or failure of competitive political parties rest mainly on the party leader; Canadian parties, therefore, might be less willing to 'experiment' by selecting women as their leaders.[143]

Quota threshold secures a certain number of places on the candidate lists (or directly in the representative body), most often by setting a concrete percentage to be reached from 20-50%. Nevertheless, in most cases, the number of elected women is much lower than aims set in quota policies.[144] The research results vary on this point. Some researchers maintain that the number of

139 E.g. Afghanistan, China, Iraq, Jordan, Kosovo, Niger, Pakistan, Rwanda, Saudi Arabia, UAEThe full list is available at: https://bit.ly/3pygzTI.

140 Dahlerup, D., Gaber M. A. (2017). The legitimacy and effectiveness of gender quotas in politics in CE Europe. Teorija in Praksa 54 (2), 307-316, 310. Available at: https://bit.ly/3bZ6Bra.

141 The controversial all-women shortlists were used for elections by the British Labour Party in the past. Nevertheless, some countries used this quota successfully e.g. India and Bangladesh at the local level and Scotland in the parliamentary elections.

142 Paxton et al. (2007). Gender in Politics. *Annual Review of Sociology 33(1)*, 263-284.

143 O'Neill, B., Stewart, D. K. (2009). Gender and Political Party Leadership in Canada. *Party Politics (15),* 737-757.

144 Krook, M. L. (2016). Contesting gender quotas: dynamics of resistance. Politics, Groups, and Identities 2, 268-283, 268.

candidates has the biggest effect on the number of electors. This being independent of placement mandates and enforcement mechanisms, even though they amplify that effect.[145] Others, on the contrary, allege that a higher quota threshold does not automatically increase the number of elected women, and it can even split the votes and work to their disadvantage. Hence, they regard geographical nomination and ranking orders as more significant.[146] Nevertheless, the practice proves that many countries which started off with 20 or 30% quota have gradually increased this ration to vertical parity - a 50% gender zipper system (e.g. Belgium[147] and most South American countries[148]).

Formulation of the quota threshold is another important factor. There are two ways of formulating the threshold: a) in a gender specific way as a number reserved for one sex only (most often from 20-40% to be reserved for women); or b) in gender neutral formulation for "under-represented gender". A number of states and parties command a gender parity of 50-50% representation. Notably, it is important to note that such formulation sets a maximum for the representation of women, which a minimum female requirement does not.[149] Some quota systems define a maximum for both sexes e.g. neither gender should occupy more than 60% and no less than 40% of the seats which in practice is a 40% female quota (e.g. Spain). Mexico, for example, has also started out its quota policy with 60-40 gender split in nominations; but based on a constitutional reform in 2013 requires a 50-50 balance in all congressional candidacies.

Constitutional codification of quotas is not deemed to be more efficient in increasing the female representation than other quota measures, but they may prove to be more stable as they can only be repealed or amended by the qualified majority. At the same time, a requirement of constitutional change can be a logistical obstacle depending on the political composition of the parliament. Currently 36 states use constitutional quota codification, including Croatia, France, Greece, Italy, Kosovo and Serbia in Europe.[150] In 2009, Bolivia and Ecuador reformed their constitutions to mandate 50% gender parity for all government branches.[151] Mexico went even further with constitutional changes in 2019: to require gender parity for the executive, judiciary, and all state organs.[152]

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145 E.g. Schwindt-Bayer, L.A. (2009). Making Quotas Work: The Effect of Gender Quota Laws on the Election of Women. *Legislative Studies Quarterly 34 (1)*, 5-28.

146 E.g. Milthers and Dahl; and Wamberg.

147 First Belgic quota law from 1994, for example, introduced a 30% quota for underrepresented sex without the placement mandate, and it later amended to increase the quota to 50% along with placement requests. While the first law increased the female parliamentary representation from 16% to 25% in 1999, its amendment further improved it to the current 40%.

148 E.g. in Argentina, Bolivia, Costa Rica, Ecuador, Honduras, Mexico, Nicaragua, Panama, and Peru.

149 Dahlerup, D. (2005). No Quota Fever in Europe? In Ballington, J., Binda F. (eds.). *The Implementation of Quotas: European Experiences Quota Report Series.* Stockholm: IDEA, 21. Available at: https://bit.ly/3sOz8pa.

150 The full list is available at: https://bit.ly/2L99slU.

151 Piscopo, J. (2020). When do Quotas in Politics Work? Latin Amerika Offers Lessons. *Americas Quarterly*. October, 22, 2020.

152 Ibid.

Size of the constituencies also matters as research studies have shown that bigger constituencies are more favourable for female candidates. Once the parties are able to win more seats, they are 'willing' to list more women. Sweden, for example, proved this pattern when it merged its constituencies into larger ones in 2002.

Similarly, relative closeness of the list also proved to favour female candidates (e.g. Spanish system where voters can only vote for a political party as a whole). When preferential votes are possible, men may climb the list to the detriment of women. Electoral preferences differ regionally e.g. the CEE countries with greater legacy of collectivism and family orientation, indicate voters' inclination towards known male candidates.[153] In Macedonia, first "quota elections" took place in 2002; but due to open lists, which favoured branded male politicians, the number of women decreased.[154] In Poland, analyses indicate voters' support for list leaders and incumbent deputies.[155] Nevertheless, research indicates that there are great variations among parties according to the level of their active promotion of women; proving that institutions and preferences of political parties are important and they can make quotas both effective as well ineffective.[156] On the other hand, Nordic countries report a lack of gender bias on the side of the voters.

As far as duration of the policy is concerned, quotas can be designed as open-ended or temporary measure. In the case that these quotas are set as temporary, they need to be disconnected once a required mass is achieved. Nevertheless, most countries that use political gender quotas have not limited their use in time. This is a different approach from the economic gender quota where all European states have set an exact deadline by which the quota needs to be reached.

Placement mandates (the ranking order) of the candidates on the lists or also called double quota (required gender proportion on the list as well as in their ranking) is one of the most important features. Findings from research show that in cases when the order of the candidates on the lists is not regulated, women are usually placed at the bottom (e.g. Argentina or Belgium, Poland).[157] This placement mandate can be framed in several forms e.g. through the zipper system – alternation throughout the list which guarantees parity (typical for the Green parties, most parties

153 Nacevska, E., & Lokar, S. (2017). The Effectiveness of Gender Quotas in Macedonia, Serbia and Croatia. *Teorija in Praksa, 54 (2),* 394-412.

154 Despite these difficulties, the quota policies have finally settled and female candidates receive the electorate support and their reelection is greater than that of men.

155 Millard, F. (2014). Not much happened: The impact of gender quotas in Poland. *Communist and Post-Communist Studies*, 47 (1), 1–11. Available at https://bit.ly/30690tH.

156 Gwiazda, A. (2017). Women in Parliament: Assessing the Effectiveness of Gender Quotas in Poland. *The Journal of Legislative Studies*, 23:3, 326-347. Available at: https://bit.ly/2P1cmI6.

157 Poland, for example, approved legislative quotas in 2011 but due to absence of the ranking requirement, it did not achieve expected results - the participation of women in the Polish Parliament has increased since the approval of quota but still remains at 28%. More on the topic can be found in work of Millard and Gwiazda, Gendźwiłł and Żółtak, Górecki and Kukołowicz, Jankowski and Marcinkiewicz.

in Sweden, and newly Costa Rica). There can be other special requirements e.g. a) that top two candidates are of different sex (Belgium); b) that there are female candidates within the first 5-10 positions; c) that there is at least one female applicant among each three or four candidates (e.g. East Timor); d) that women represent half of all party lists (so called "horizontal parity" used in Costa Rica). This mandate can be formulated also as gender neutral requirement requesting certain amount of places for underrepresented sex (e.g. 40% in Spain).[158] Many countries which introduced the quota without placement mandate have later amended their laws in order to include it; even though such amendments often meet with a greater political opposition (e.g. Macedonia, Belgium).[159] In Latin America, the courts were often crucial in forcing political parties to use a placement mandate. The Constitutional Court in Costa Rica, for instance, has held that women have to be placed in positions with a realistic chance of election in order to reach the requested 40% quota provision as the parties tended to place women to 'losing districts'.[160] Mexico's first quota law, from 2002, did not apply to parties selecting candidates via internal primaries and it was amended a decade later after a judicial process.[161]

Monitoring and dissuasive sanctions for non-compliance are also one of the most decisive instruments for effective implementation of quotas, as the practice has proven that quotas without monitoring and sanctions do not have an intended effect.[162] This monitoring is usually done by electoral authorities; which ensure not only that parties meet the quota goals, but that they also comply with the ranking order and district assignment rules. The most common sanctions are rejection of the candidate list (Costa Rica, Spain, Slovenia, East Timor, France at the local level) and financial penalty (France at the national level, Portugal). There are numerous strategies of bypassing the quotas. In Bosnia and Herzegovina, several parties tried to manipulate the candidate lists by replacing strong female politicians by inexperienced women or relatives of male party politicians until the OSCE-led Provisional Election Commission reacted with sanctions.[163] In 2018, Mexican parties in the state of Oaxaca used the quota to list high number of illegible transgender candidates.[164]

158 Spanish law mandates a 40% - 60% gender proportion which has to be respected within every five positions.

159 Macedonian amendment of electoral law met with far greater opposition and the party split, and it was finally approved just by one vote majority. Ballington, J., Binda, F. (eds.) (2005), 33.

160 Ballington, J., Binda F. (2005), 35.

161 Piscopo, J. (2020).

162 Ukrainian had 10 legislative attempts before their approved 30% gender quota which was approved after Euromaidani 2015. Nevertheless, the law proved to be inefficient due to lack of enforcement mechanism and it was therefore amended in 2019. Dean, L. A., Dos Santos, P. A. G. (2017). The Implications of Gender Quotas In Ukraine: A Case Study of Legislated Candidate Quotas in Eastern Europe's Most Precarious Democracy." *Teorija in PraksaJ*; No. 2. 335.

163 Boric, B. (2005). Application of Quotas: Legal Reforms and Implementation in Bosnia and Herzegovina . In Ballington, J., Binda, F. (eds.) (2005), 39.

164 The local indigenous Zapotec community has long recognized transgender people known as *muxes* – born male who identify as neither male nor female. Electoral rules in Oaxaca allow muxes to occupy candidacies designated for women. In this case however, the electoral tribunal disqualified 15 candidates who claimed to be *muxes* but never demonstrated this gender choice before the candidate registration period. (No spot designated for men was filled by a transgender person). Two others candidates who had consistently identified themselves as transgender were qualified as eligible. The tribunal ordered the candidacies vacated by the disqualified candidates be filled by women. Among

Last but not least, the binding nature of the policy and accompanying measures also matter. A 'hard quota' that includes specific numbers, implementation, and enforcement details proves to be more efficient than a 'soft quota', referring to general targets in the form of recommendations. Nevertheless, different accompanying soft measures such as capacity building programs for the candidates and elected women but also for party leaders and decision makers, proved to be also very helpful.

Regional differences and quota regimes[165]

The 4th United Nations World Conference on Women in 1995 set the goal to increase the global share of female parliamentarians from 11% to 25%, and it took 25 years to reach it. Both legislative and voluntary quotas have contributed to this result, as most of the countries which have introduced both types of quotas have already reached 30% female parliamentary representation, while other countries have on average only 15% share. Three waves of quotas can be identified so far.[166]

First wave countries to adopt gender quotas were ex state-socialist countries and Pakistan (1956), Bangladesh (1972), and Egypt (1979-1984).[167] Nordic countries introduced voluntary quotas since the 1970s and they still constitute the only sub-region with the highest - over 40% - female parliamentary representation. The second wave was opened by Argentina, which introduced legislative quotas in 1991, and became a model for the whole region. Nowadays, all Latin American countries except Guatemala and Venezuela use quotas; thanks to which, the Americas as the first continent exceeded 30% of female parliamentary representation.[168] Finally, the third revision wave consists of more than 30 countries which revised their original quota laws, mostly by increasing the threshold, adding ranking mandates, and sanctions. During the same period, however, there has also been an increasing number of new countries (in Africa, Middle East and Balkans) which have newly adopted quota laws. Most of these countries adopted quotas as a part of the democratization and reconciliation process after the conflict period (e.g. Rwanda or Balkan countries) or after the fall of totalitarian regimes (e.g. Arab countries after the Arab Spring).[169]

others the tribunal ruled that "the manifestation of belonging to a gender is sufficient to justify the self-registration of a person;" nevertheless it also added that "the transgender identity should not be utilized in a deceptive way to comply with the constitutional principle of equity." Available at: https://bit.ly/3pYXLgP.

165 Since 2003, IDEA has developed a Global Database on Electoral Quotas for Women (www.quotaproject.org) that was supplemented through a series of qualitative regional workshops - in Asia, Europe, Latin America and Africa in 2002-2005.

166 Dahlerup, D., Gaber M. A. (2017), 307.

167 Apparently, quotas as instruments mandated from above, were not popular in any of those countries.

168 Women played an important role in the pro-democracy movement; nevertheless they were marginalized in the democratization process in single countries in the 1980s and acquired only some 5% of parliamentary seats.

169 The Middle East currently stands at almost 17% after allowing women to vote and to stand for elections, and introduction of quotas. Similar share has been reached by North African countries where quotas were introduced as part of political reforms after the Arab Spring. Asia recorded the slowest growth rate and the Pacific region still has the last three countries with no female MPs (Federated States of Micronesia, Papua New Guinea and Vanuatu). Among the countries with the worst records with 5% or fewer women MPs are Yemen, Oman, Haiti, Kuwait, Lebanon and Thailand.

Paxton and Hughes maintain that the proliferation of quotas has led to the greater proliferation of quotas.[170] Similarly, Dahlerup coins the term "quota fever" that spread in different regions; nevertheless, she cautions, that it impacted North America[171] and Europe only partially.[172] Adoption of legislative gender quotas in Europe has been rather slow and until 2005 only Belgium, France and several Balkan countries introduced this measure. This list was enlarged only later to include Italy, Ireland, Spain, Greece and Poland. Nordic countries, former quota pioneers, have already been overtaken by Rwanda,[173] Cuba, Bolivia, and United Arab Emirates which have already reached 50% female parliamentary representation (all except for Cuba using legislative quotas).

There are two distinct paths of development of female parliamentary representation that are categorized as slow and fast track.[174] Slow track model is typical for Scandinavian countries and it is characterized by the gradual increase of women's education, their labour market participation and civil society activism.[175] This development contradicts a widespread myth about quotas being the primary reason for the high female representation in Nordic countries.[176] Firstly, the Nordic countries never used legislative but only voluntary party quotas; and secondly, the quota was introduced only when female parliamentary representation reached 25%,[177] i.e. the quota was used to consolidate not to introduce the position of women in decision-making. Finally, not all the parties use voluntary quotas - in Norway, for example, those are especially centre and left wing parties which opt for quotas and Danish parties abolished quotas only after a few years of the use.[178]

Dahlerup maintains that the Scandinavian conditions are distinct and not easily transferable to other countries with the same effect.[179] These specific and favourable regional structural conditions included: 1) secularization, 2) the strength of social-democratic parties, 3) an extended welfare state, 4) women's educational boom and increased labour market entrance (since 1960s), 5) proportional representation electoral system based on principles of social and geographical

170 Paxton and Hughes (2015).

171 The number of women running for public office in the US has doubled in the last few years, but women still represent only 20% of the House of Representatives' members.

172 Ballington, J., Binda, F. (eds.) (2005), 14.

173 After the 1994 genocide (similarly to the WWII aftermath), women in Rwanda took active place in the rebuilding process and they have acquired 30% of parliamentary seats a decade later in 2003.

174 The main reasons were outlined by Dahlerup in Ballington, J. & Binda, F. (eds.) (2005), 14.

175 Dahlerup & Freidenvall (2005).

176 Ibid, 20.

177 The largest Norwegian party, the Labour Party, adopted a quota when female parliamentary representation reached 25% already. Similarly, the Swedish Labour Party adopted this instrument at the time of 33% women's parliamentary presence. This similar development was experienced in Spain where left wing parties have continuously increased the proportion of their female representatives (based on voluntary quota) to 36% in 2007 when they pushed for adoption of legislative quota.

178 Denmark has had a slower development than other Nordic countries. One of the reasons could be an absence of women's party organizations and channelling of female agenda through other arenas than the political parties. More in analyses of Lise Togeby.

179 Ibid, 64.

representation, 6) the high level of activism and different strategies of civil society, and 7) early enactment of equality laws; e.g. equal pay and equal treatment were regulated in the 70ies already.[180] Dahlerup notes that it took almost one century (80 years) for Nordic women to reach an equal representation in the parliaments, and they still did not reach 50%; which is a long way for other countries in existence.[181] Nevertheless, she cautions that there is no one size solution for all countries; and that concrete quota regimes must be individually designed according to the electoral system and other local factors.[182]

Fast track, on the other hand, is characterized by historical jumps in female parliamentary representation in a short period of time brought by quota, which represents a break with the widespread gradualism of equality policies; e.g. Argentina, Costa Rica, South Africa, Rwanda, Balkans.[183] Many of the fast track countries included gender quotas in their reform package introduced within the democratization process after the fall of totalitarian regimes or after the war conflict; this was the case of most of the Balkan countries and several ex-Soviet and the CEE states (Albania, Armenia, Bosnia and Herzegovina, Croatia, FYR Macedonia, Kosovo, Kyrgyzstan, Moldova, Montenegro, Poland, Serbia, Slovenia, Ukraine, and Uzbekistan).[184] The main impetus for these electoral reforms came from the international organizations counting not only the EU, but also the UN and the OSCE which were active in stabilization of the region, especially in the Balkans after the conflicts in 1990s.[185] Given the great extant of violence including rape, the local women NGOs has also received significant international support, especially from the OSCE, US AID the US Agency for Developmental Aid (e.g. Bosnia and Herzegovina).[186]

180 These conditions were analysed by a number of researchers including Sainsbury, Freidenvall, Niskanen and Nyberg, and Dahlerup.

181 Three periods of development were identified in Norway. In the first 50 years (1909-53) there were hardly any women representatives and the emphasis was on occupational and social representation without any gender perspective. In the next 20 years (1957-73) a proportion of female MPS increased to some 16%, nevertheless almost all counties elected one woman only. Finally, in the next 10 years (1977-81), the critical mass of 30% was achieved; and all left and center liberal parties adopted voluntary quotas while the right wing party followed suit Ballington, J., Binda, F. (eds.) (2005), 46-47.

182 Dahlerup (2007) suggests the term ‘quota regimes’ as a combination of the type of quota and the electoral system in which the quota operates.

183 Ballington, J., Binda, F. (eds.) (2005), 20; Dahlerup & Freidenvall (2005).

184 In many remaining ex-socialist countries there have already been attempts to introduce quotas (including Hungary and the CR) and there is at least one, usually left wing party, which practices some kind of voluntary quota. Slovenia, Croatia, Serbia and Kosovo introduced constitutional quota provisions and Bosnia and Herzegovina inserted the CEDAW provision granting women equal social, political and economic rights directly into its Constitution. Dubrow, J. K., Zabrzewska, A. (eds) (2020).

185 Unlike 10 central and northern ex state-socialist, Balkan states (with exception of Slovenia and Croatia) are still waiting for the EU membership; i.e. they are a lot more motivated to adopt all EU measures and recommendations including the gender equality policies. Slovenia was the only Balkan country which suffered a shorter 10 days conflict and joined the EU during the 2004 ‘big-bang’ accession. This was also the only candidate country which managed to adopt the Equal Opportunities Act for Men and Women and approved constitutional changes in favor of quotas as well as 40% gender quota for the EP elections before its EU entry.

186 Women NGOs usually formed a broad coalition. In Slovenia and Macedonia, for example, NGOs prepared the lists of female aspirants, educational material, and obtained support of local academics and media, which urged politicians to sign declarations of support of quota mechanism.

Another particular feature is the multi-ethnic character of this region,[187] where gender quota served as a stabilization factor to improve the situation of women as well as ethnic minorities. For example, in Serbia the quota was first introduced in three Albanian majority municipalities in 2002 local elections with the political stability motivation rather than gender one. Consequently, a national 30% legislative gender quota for local and parliamentary elections was adopted after the 2003 election when 90% male Serbs were elected to parliament. Similarly in Macedonia, the quotas helped to elect historically the first ethnic Albanian woman to the parliament. Thus, in post-conflict regions, the quota policy is not an independent political question; but it is linked to issues of peace, security, and minority representation as well.[188]

Existing research indicates that there might be a certain pattern of how gender quota works in different contexts (West/Eastern Europe; stable democracies/post-conflict contexts, etc.); given a combination of several factors that influence its introduction and implementation.[189] As discussed, the quota design, especially the quota threshold, ranking mandate and sanctions are crucial for the successful quota regime. Nevertheless, no matter how well the quota is designed, it will only be accepted in the favourable political and social context, which can be top-down (elite driven), bottom-up (mass or interest group driven), or both (sandwich support). There are a number of important international as well as national actors which can become crucial for the quota policies. Significant top down/elite driven support is provided especially by international state organisations such as the EU, the COE, the UN, and the OSCE that play an important role in the norm diffusion among their members. The UN technical and electoral assistance programs and international conventions (especially CEDAW) are vital, especially in countries transitioning to democracy. While donors play an important role in providing impetus, the local ownership and the regional peer pressure is significant, especially in cases of the retreat of the organizations from the region (e.g. Balkans or North African countries after Arab spring). International non-state organizations and academia also play a very significant role in terms of research and best practices exchanges.

At the national level, activity of national non-governmental actors, especially women's activist organizations,[190] have played crucial role in a number of countries (e.g. Poland, Slovenia, Macedonia, and South American states,[191] notably Chile or Mexico). Female factions within

187 On the contrary, the Central and northern ex-communist states are rather homogenous and ethnic quotas have never been a question of a deeper public discussion (despite the existing German minority in Poland; Hungarian and Roma minority in Slovakia; and Russian minority in Baltic states). Slovenia might have escaped more intensive war conflicts namely because of its relative homogeneity as well.

188 Ballington*,* J.*,* Binda, F. (eds.) (2005), 34.

189 Number of these factors have been previously researched by Krook, Krook and O'Brien, Bush, Hughes, Dahlerup and Gaber, and Rosen.

190 More in Krook, M. L. (2007). Candidate gender quotas: A framework for analysis. *European Journal of Political Research 46 (3),* 367-394.

191 Despite the fact that women played an important part of the social movement ending dictatorships in the 1980s, they were not taken into account in the subsequent democratization process in the 1990s and were logistically almost excluded from the election process. Thanks to their intensified activities, they managed to include quota policies in more recent legal reforms e.g. in Chile or Mexico).

political parties are equally significant as they can significantly influence party's decision-making, and it is therefore strategically important for them to be institutionally represented in the highest party levels (e.g. Spain).[192] The absence of such factions, on the other hand, can have adverse impact on the adoption and implementation of the women's agenda and policies (e.g. Denmark). Political support is the most important factor. One of the main logistical problems of the introduction of the quota policy is that it has to be passed by the male dominated parliaments and parties which usually have a negative attitude towards such measures.[193] Here, female coalitions across the spectrum may play a critical role (e.g. in Italy), as well as support of male role models.

Support from the government as well as the head of the state can be also significant. In Argentina, for example, the last minute support of the president was crucial for quota adoption in 1991. Research results prove that leftist parties have a greater tendency to support quota adoption,[194] and once in office, attempt to legislate them into existence (e.g. in Norway, Belgium, Spain).[195] In the 50ies already, Maurice Duverger coined the term a "contagion from the left", which can be well applied to the present situation - when smaller left parties demonstrate that there are no losses in supporting women, larger parties (especially ideological neighbours) feel pressured to follow suit out of fear of losing voters.[196] Nevertheless, most conservative, nationalist, and populist parties have rather reserved or openly negative attitudes towards quotas; and if they opt for these measures, it is usually on the voluntary party basis (e.g. in Germany, Serbia).

Unlike in western countries, many CEE centre and right wing parties are as inclusive towards the women, even without the quotas, nevertheless, they are more reluctant to appoint them to leading positions.[197] Internalization of quota at the party level can also influence their sustainability and effectiveness. For example, in Belgium, introduction of legislative quota served as a minimal requirement and some parties even increased their measures in order to profile themselves as

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192 Women's committees are habitually created at the top party level, and they cooperate with the party organs that elaborate electoral lists.

193 Krook, M. L. (2016). Contesting gender quotas: dynamics of resistance. *Politics, Groups, and Identities 4 (2*), 268-283. Dahlerup, D., Freidenvall, L. (2010). Judging gender quotas: predictions and results. *Policy & Politics 38 (3),* 407-425.

194 Survey among EU/EEA countries Paraquata 2008 showed that most of the left parties consider quotas to be "a fair method"; most centre parties see them as "necessary evil", and most right wing parties condemn them as "unacceptable". Dahlerup, D., Freidenvall, L. (2008), *Electoral Gender Quota Systems and Their Implementation In Europe*. Brussels: European Parliament. Available at: https://bit.ly/2Nu1vZQ.

195 The steady increase of Spanish female MPs since the late 1980s and the introduction of the mandatory 40% women's quota in 2007 (under the centre-left PSOE), took place thanks to the left-wing parties adopting women's quotas voluntarily. For instance, the PSOE adopted a 25% women's quota in 1988, later raised it to 40% in 1997, and submitted a bill to reform the Electoral Act in 2001. Also in Belgium a first quota law from 1994 was amended in 2002 when after 40 years of CD government, Liberals, SD and Green coalition embraced further changes. EIGE. *Electoral Quotas that Work*. Available at: https://bit.ly/3xyI4kx.

196 Duverger was referring to the situation when the right parties in self-defence and with the purpose to retain influence were forced to mirror actions of the left parties. Duverger, M. (1951). *Les partis politiques*, Paris: A. Colin.

197 Rashkova, E. R., Zankina. E. (2017). Women's Representation in Politics in South Eastern Europe: Quotas and the Importance of Party Differences. *Teorija in Praksa (2),* 376-393.

gender friendly.[198] Similarly, in Macedonia, parties that implemented internal party quotas achieved greater female representation than those using only the legislative quota.[199] On the other hand, in Bosnia and Herzegovina, no party nominated more women than mandated by law. Germany was an early adopter of voluntary quotas for women in political parties and in public administration in the 1980s and early 1990s; nevertheless, researchers point out to a culture of minimalist compliance residing in more passive resistance than vocal opposition.[200] The judicialisation of gender quotas can have an important impact (both positive and negative) on the shape and use of particular quota policy. In Argentina, Costa Rica, and Mexico; for example, the courts forced parties to apply placement mandates and to allocate women to competitive constituencies.

Ethnic composition of population needs to be also taken into account with regard to gender/ethnic intersectionality and "nested quotas" (seeking gender quotas within ethnic quotas) can be explored.[201] In order to combine both requests, parties seeking diversity in their candidate lists, may select ethnic minority women.[202] This type of the quota can also influence intersectionality, research proves that voluntary party quotas are more likely to help ethnic majority women than ethnic minority women/or men;[203] whereas legislated quotas support both ethnic majority and minority women.[204] Nevertheless, it has been also observed that quotas created in support of one minority group are often used in detriment of other groups, rather than majoritarian men.

Public opinion can be very influential, especially in regard to pressure from social media; but a more reliable source is provided by the regular polls. Based on surveys, most Europeans approve quotas; even though there are significant differences between men and women, whereas female approval is substantially higher, oscillating at about 70%.[205] Overall structural context can also increase or decrease effectiveness of quotas. Quotas alone are not fully effective without accompanying structural measures on the side of the party, e.g. open recruitment process, clear rules for selection reducing nepotism, work/family balance organizational measures, and training of female candidates; as well as on the side of the society as whole (such as fairer division of care including family and paternal leave policies, fight against gender-based harassment and violence, and collection of sex-desegregated data).

Above mentioned conditions and actors could culminate in formative moments - specific periods which lead to lasting changes of previous positions and discourses of gender equality. Hughes

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198 Ballington, J., Binda, F. (eds.) (2005), 35.

199 Ibid.

200 Lang, S. (2015). Thirty years of gender quotas in Germany: policy adoption between mainstreaming and minimal compliance, *EUI Law, 2015/21*, 8. Available at: https://bit.ly/39S8ZNI.

201 Hughes (2011); Celis et al. (2014). Quotas and Intersectionality: Ethnicity and Gender in Candidate Selection. *International Political Science Review*. vol. 35, no.1, 41–54. Available at: https://bit.ly/3qKxRyS.

202 Celis et al. (2014).

203 Hughes (2011)

204 Hughes (2011), 616.

205 Dahlerup, D., Freidenvall, L. (2008),

and Paxton define formative periods as balance between forces of resistance and forces of change,[206] while they focus on macro factors, such as democratization or revolution. Dahlerup et al. add further events such as mobilisation, or demobilisation, of actors, the establishment of new alliances, or by national events that are results of economic crisis or changes in the interaction between the national and supranational level.[207]

Effectiveness

One of the main research challenges resides in the measurement of the quota effectiveness, where two main effects are being investigated.[208] First category represents descriptive results, i.e. seat gains for female representatives. It is important to note that the positive results in this category are by far not self-evident as usually a lower number of women are elected as their target by the quotas, mostly due to the poor ranking on the candidate lists. This, however, can be changed through the double quota system, training of the candidates as well as through the party support. In any case, it has been indicated that it may take up to three elections to implement a quota; as the parties are not prepared to throw incumbent male parliamentarians in order to include women.[209] Studies have shown that descriptive representation may increase quickly and steeply in first years followed by some periods of stagnation or even set-backs, and that the concerned organs often use different deviation practices;[210] which shows the need to provide more detailed instructions, monitoring and follow-up mechanisms. Overall, the findings indicate that full compliance is possible, but to a great extent it is dependent on structural and cultural factors. Existing research did not prove automatic spill-over effect on women's descriptive representation in the top party representation, in the local councils, nor among mayors or top administrators; and there was no consistent evidence for shifts in public policies.[211]

The second type of research focuses on substantive results, researching qualitative effects of the increased female decision-making representation on legislation, negotiation and decision-making (i.e. on institutional or cultural changes in the parliament). Studies in this field indicate that the ‘quota women’ are no different from other parliamentarians in their performance,[212] and they participate in a wide range of party activities including the pursuit of nominations.[213] Moreover, it is not even necessarily an intended impact of quotas to require certain types of output from

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206 Hughes and Paxton (2008), 251.

207 Borchorst, A. Dahlerup,D., Andersen, J.G., Rolandsen, L. Agustín (2014).

208 According to Dahlerup, the quota research can be generally divided into three main phases – 1) decision/making process; 2) implementation process; and 3) effects of quotas. Dahlerup, D., Freidenvall, L. (2010). Judging gender quotas: predictions and results. *Policy & Politics 38 (3),* 407-425.

209 Dahlerup, D. (2005). No Quota Fewer in Europe? In Ballington*,* J.*,* Binda, F. (eds.) (2005), 21.

210 Holli, A. M. (2011). Transforming local politics? The impact of gender quotas in Finland.” In Pini, Barbara (ed.): *Women and Representation in Local Government. International Case Studies*. London and York: Routledge, 142-158.

211 Geys, B, Sørensen, R. J. (2019). The Impact of Women above the Political Glass Ceiling: Evidence from a Norwegian Executive Gender Quota Reform, *Electoral Studies 60 (2)*. Available at https://bit.ly/39Awydd.

212 E.g. Case studies of Italy by Baltrunaite, Sweden by Besley et al., and Germany by Xydias.

213 Young, L., Cross, W. (2003). Women’s Involvement in Canadian Political Parties, in Tremblay, M., Trimble, L. (eds). *Women and Electoral Politics in Canada.* Don Mills: Oxford University Press.

elected female representatives, but rather to open the political gate for them. As Dahlerup argues, "The main effect of properly implemented quota systems is that they make the political parties start recruiting women in a serious way."[214] Quota proposals have a noteworthy effect in awareness-raising and peer-pressure, even in cases when they get rejected. For example, Scandinavian conservative parties improved recruitment of women in order to demonstrate that quotas were not needed.[215] Overall, political gender quotas give basis for a greater acceptance of women in politics and other occupations and leadership positions;[216] as they may expand from politics to business life.[217]

1.2.4. Gender quotas in business

While many researchers suggest that a possible quota spill-over from political to economic field, this process is neither self-evident nor automatic. As pointed out by Hege Skjeie, not even egalitarian Nordic culture in itself is sufficient and women have been much less successful in gaining access to prominent business positions in comparison with politics in Scandinavian countries.[218] Hence, the use of some sort of positive measures seems to be necessary in order to decrease gender imbalance in decision-making in this sphere. Although, it is possible to distinguish between three categories of state practices in this context: 1) use of statutory gender quotas; 2) use of voluntary diversity recommendations; and 3) or no actions.[219]

Mandatory business quota

Countries with statutory gender quotas reach the highest female representation approximately 38%. Currently 10 European states have already introduced quotas including Norway, Belgium, France, Italy, Germany, Austria, Portugal, Spain, Iceland, Netherlands, and Switzerland.[220] In most of these states, compliance is monitored and strengthened by the sanction mechanism such as dissolution of the company, financial penalties, or 'comply or explain' mechanisms. Unlike political quotas all of these measures are set to reach the goals within specified time limit, from 1-7 years.[221]

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214 Dahlerup (2007), 88.

215 Similarly, France moved from being strongly against gender quotas, to reluctantly passing a gender quota electoral law, and finally rapidly expanding toward gender quotas in other occupations – all within just two decades. Lépinard, E. (2016). From breaking the rule to making the rules: the adoption, entrenchment, and diffusion of gender quotas in France, *Politics, Groups, and Identities*, 2016/4, 231–245.

216 O'Brien and Rickne (2016).

217 Hughes et al. (2017); Meier, P (2013) Quotas, Quotas Everywhere: From Party Regulations to Gender Quotas for Corporate Management Boards. Another Case of Contagion. *Representation* 49: 453–466.

218 Skjeie, H. (1991). The Rhetoric of Difference: On Women's Inclusion into Political Elites. *Politics and Society 19. 233–263*. Interestingly, Skjeie herself became the first female professor of political science in Norway in 2000.

219 The focus of the analysis is on European states but the business quotas have been applied in the USA. In 2018 California, for example, passed the bill requiring all public companies to include at least one female director within one year, backed by financial sections. Hawaii, New Jersey and Washington aim for quotas as well, while Illinois and New York have opted for diversity disclosure rules. Available at: https://bloom.bg/2XmmCi9.

220 These countries also saw the highest increase in women's representation by 28% since 2010. Austria and Portugal have adopted binding quotas relatively recently, so their impact cannot yet be measured. EU Gender Equality Report (2019), 29-30.

In 2003, Norway, as the first European country, introduced a legislative gender quota requiring all publicly traded and state companies to reserve 40% of board seats for women.[222] One noncompliant body is not allowed to register, and after repeated warnings, the company faces compulsory liquidation.[223] Interestingly, the law was proposed by the centre-right government and had a large support of the parliament despite the worries of business representatives who were alleging a lack of qualified women. Spain, Iceland, Belgium, France, Italy, Netherlands, Germany, Austria and Portugal have followed this trend in recent years.

Germany, as the largest EU economy, has had a very low female representation in top economic positions for a long time;[224] but it firmly opposed quotas under heavy influence of major car producers.[225] Nevertheless, after a political compromise of Christian and Social Democrats, a new Law on Equality for Women and Men in Managerial Positions was approved in 2015, based on which all publicly traded companies have to allocate available supervisory board seats to women until the 30% quota will be reached. In addition, a further 30% mandatory quota for women in management boards of state companies was approved in 2020, since a system of voluntary commitments in this field was insufficient.[226]

In 2011, France introduced a mandatory 40% of women on the boards of directors of listed companies with more than 500 employees and companies with an annual profit of more than EUR 50 million. The goal was to be achieved by January 2017. France requires firms to define such goals in their action plans which are monitored by the State Services. The fulfilment is backed by sanctions - individualised financial sanctions, board members are not paid remuneration related to the performance of their duties, and annulation of the appointment of new board members. France is currently the only EU state which has reached its 40% goal.

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221 There is a difference between the countries which have one tier system (only one governing executive organ) such as Spain and Belgium; and two tier systems consisting of executive management board and non-executive supervisory organ such as Germany, Austria, and the Netherlands. The problem in the dualist system is that the quota is usually mandated for the supervisory organ only and thus does not affect the share of women in the executive domain.

222 A 2003 law required 40% female representation in board members of state-owned enterprises by 2006 and the joint stock companies by 2008 under threat of sanctions.

223 Storvik, A., Teigen, M. (2010). Women on board. The Norwegian Experience. *International Policy Analysis.* Berlin: Friedrich-Ebert-Stiftung.

224 In the 200 top-earning companies in Germany, only 27% of supervisory board members and 9% of executive board members are women. Holst, E., Wrohlich, K., (2019). Increasing Number of Women on Supervisory Boards of Major Companies in Germany: Executive Boards Still Dominated by Men. *DIW Weekly Report 3,* 19–34.

225 Daimler appointed its first ever woman on board in 2011. Volkswagen, BMW, Daimler and Opel threatened to move production out of Germany if they are forced to use quotas. Available at: https://bit.ly/2EfS3V7.

226 In Germany there are currently only 5 DAX companies with more than one woman on the management board, while 97% of large American and 87% of large French companies have several female executives. A female quota will also be introduced for public German bodies such as health, pension and accident insurance funds, and the Federal Labour Office, where women make up about 14% of the senior leadership positions. Available at: https://bit.ly/2UF3dex.

In Switzerland there is a new requirement of 30% gender diversity for the supervisory boards and 20% for the management boards from 2021, done on a comply-or-explain basis with a five years period to comply for supervisory boards and up to ten years for the executive committee.[227]

Based on the law from 2011, public and listed companies in Italy had to include 33% share of women by 2015 under the fine of up to EUR 1 million and the dissolution of the Board of Directors. [228] Similarly to France, Italy has a supervisory authority monitoring quota compliance.

Also Belgium has introduced a special law in 2011 setting the goal of 30% female representation on the boards of directors of public enterprises (by 2012), listed companies (by 2018) and small listed companies (by 2020), under sanctions of annulment of all newly appointed board members and the loss of benefits and compensations of current board members.

Germany and Austria use the sanction of the "empty chair", and Portugal considers unlawful mandates as temporary. No sanctions are applied in Spain, Netherlands, or Iceland.[229] Iceland is the only country which made significant changes without the sanctions, most probably as result of a loss of confidence in the private sector management after 2008 global financial crisis that led to the change in corporate culture.[230]

Voluntary diversity recommendations

Countries with voluntary gender diversity recommendations reach on average 26% and there are 11 states that use them - Sweden, Finland, Luxemburg, Slovenia, Denmark, UK, Greece, Turkey, Poland, Romania, and Ireland. Rules on recommendations are typically codified in Corporate Governance Codes and they are backed by a soft 'comply or explain' sanction mechanism i.e. if the company does not comply with law; it needs to explain why the goals have not been met. In a number of these countries, there has been opposition to the stricter form of positive actions suggested by the EU. Major criticism has been voiced by the British conservatives (mainly UKIP) who agree with the use of positive actions but only as a non-binding social norm. Even though UK's Sex Discrimination Act allows for positive actions,[231] and the UK has actually managed to reach 30% female representation thanks to increased efforts; it remained largely opposed to mandatory EU quotas until its exit from the EU.[232]

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227 Ibid.

228 Rigolini, A., Huse, M. (2017). Women on Board in Italy: The Pressure of Public Policies. In Seierstad, C., Gabaldon, P., Mensi- Klarbach, H. (eds). *Gender Diversity in the Boardroom (1),* 125–154.

229 In the Netherlands, for example, public-listed companies with more than 250 employees will be required to draw up plans with "appropriate and ambitious targets" for the number of female executives and senior managers and to inform the Social and Economic Council on their progress annually. Available at: https://bit.ly/2UF3dex.

230 Iceland set an ambitious target of 50% representation of women on the boards of public and municipality companies as early as 2006. In 2010, an adopted amendment also required a minimum of 40% female representation of women on the boards of joint stock companies with more than 50 employees by 2013. In the three years after the introduction of the quota, the number of women on business boards has risen from 16 to 48%.

231 E.g., training of underrepresented gender in the workplace, and limited quota for women in trade union elections.

232 According to the British Government spokesman "it is more appropriate to deal with this issue at the national, not EU, level; in part because of the different business structures and cultures." Available at https://bit.ly/3f1Uese.

No actions

Finally there is a group of states which do not use any measures and their share of female representation in decision-making is the lowest approximately 14% e.g. Bulgaria, CR, Estonia, Croatia, Cyprus, Lithuania, Malta, Slovakia, Latvia.

Effectiveness

It needs to be noted that most of the progress has taken place after introduction of the legislative action by the European Commission in 2010 in this field. Even though the suggested Board of Directors Directive setting a target to reach 40 % women on boards has not been adopted, it has majorly impacted development in single EU states.[233] Over the last decade, the proportion of women on the boards of the largest listed companies across the EU has more than doubled from 12 % in 2010 to 28 % in 2019.[234] This progress has been driven mostly by the countries which introduced legislative quotas; nevertheless soft positive actions have also proven effective in some states.

These comparative analyses show that the higher representation of women on boards of directors has been reached in the countries which use some type of positive measures.[235] Similarly, as in case of political quotas, statutory gender quotas in business are considerably more effective than recommendations, especially when they are backed with dissuasive sanctions such as fines or liquidation in case of noncompliance.[236]

Most studies evaluating effects of the quotas come from Norway which has the longest experience with its application including in political parties, municipalities and both private and public companies. Some major learnings from Norway indicate that the quota was indeed effective in development of descriptive representation, as it quickly and substantially increased female representation in public decision making organs in only a few years e.g. on boards of public limited companies (PLC) from 6% in 2002 to 40% in 2009. Initial concern of the business leaders not to find competent women thus proved to be unsubstantiated and companies did not report such problems.

Nevertheless, the overall share of women on boards has not risen above the mandated quota; most boards are still chaired by men; and there has also been a very small increase among the female CEOs from 4.5% to only 8% in 2006 – 2016; which are facts suggesting the existence of

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233 European Commission, Proposal for a Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures (Brussels: COM(2012) 614 final. (Board of Directors Directive) 2012/0299 COD),

234 EIGE. Gender Statistics Database. Legislative quotas can be strong drivers for gender balance in boardrooms. Available at: https://bit.ly/3dcITr4.

235 The main database on women in business decision-making has been maintained by the European Institute for Gender Equality (EIGE). Available at: https://bit.ly/358jCuh. The European Commission has published data on female representation in different sectors via Women and Men in Decision Making Database since 2003.

236 This should be considered when planning quotas for other areas such as politics, science, or the media. Arndt, P., Wrohlich, K. (2019) : Gender Quotas in a European Comparison: Tough Sanctions Most Effective, *DIW Weekly Report (9) 38*, 337-344. Available at: https://bit.ly/38XovHL.

possible further ceilings.[237] This spill-over effect did not take place also internally on the lower positions within the companies or in a share of female enrolment in business programs, despite the fact that younger women are more positive about their career outlooks.[238] Finally, the gender wage gap did decrease but not significantly.[239]

One of the main learnings is that the sanctions were decisive in quota application in business areas as many firms were not complying with the requirement until facing sanctions.[240] Furthermore many PLCs changed their status to private limited companies (LTDs)[241] to avoid quota duties, thus implying that such measures should be applied evenly to all companies.[242] On the positive note, the studies showed cultural changes as quotas activated unused networks of top business women and broke the "old boys' networks" in board appointments.[243] Overall, no negative social or economic results stemming from quotas were indicated. One of the biggest general effects is that the gender quotas have become a natural part of debate and accepted gender equality practise.[244]

1.2.5. Main arguments concerning positive actions

There are two levels of debates arising around the formulation and the use of positive actions: the public and expert one. The public debate is to great extent influenced by two main misunderstanding concerning positive actions, which are the first is that positive actions equal quotas (as there is very little awareness of other measures and the scope and modalities of positive actions); and the second is that the quotas allow less qualified candidates to be hired, or promoted, at the cost of better ones. This expert debate, on the other hand, is more concerned with public interest, proportionality and effectiveness of harder forms of preferential treatment. Thus, it focuses more on conceptual and technical issues concerning the scope, duration and justification of concrete types of positive actions. Following, main types of arguments against and in favour of positive measures will be introduced.

Qualification and the merit principle

The main reproach towards positive actions concerns criterion of qualification. Many critics maintain that in cases of harder forms of positive actions, especially in cases of competitions and elections, worse candidates might be selected. Such selection will then have negative economic as well as social impact, as less qualified candidates will not be able to compete with others in a

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237 Aagoth, S., Teigen, M. (2010).

238 Bertrand, M., Black, S.,E., Jensen, S., Lleras-Muney, A. (2014). Breaking the Glass Ceiling? *The Effect of Board Quotas on Female Labor Market Outcomes in Norway.* Norwegian School of Economics (NHH). Available at https://bit.ly/2BDzJV2.

239 Ibid.

240 Aagoth, S., Teigen, M. (2010).

241 The number of PLCs dropped from 650 to 200 in 2002-2016.

242 Seierstad, C., Huse, M. (2017). *Gender Quotas on Corporate Boards in Norway: Ten Years Later and Lessons Learned" in Gender Diversity in the BoardRoom.* Palgrave Macmillan. Available at https://bit.ly/333VRmN

243 Bertrand, M. et. al. (2014).

244 Seierstad, C., Huse, M.,

long term, they will be stigmatized as inferior, and they will not be motivated to reach results on their own. Hence, supporter of merit principle advocate for softer forms of positive actions such as targeted advertisements, awareness campaigns, and special training. Most of all, as already mentioned the EU case law only allows equally qualified candidates to benefit from preferential treatment, the fact that largely dismisses above mentioned arguments of inferiority, unsustainability, or lack of personal effects. Furthermore, numerous studies of quota effectiveness in political as well as business field have not proved adverse economic and social impact. Another question is however, how different political parties and business firms define the qualifications and merit. This is a very problematic and potentially discriminatory grey area as most selection processes are either not transparent or they are based on work-related seniority which indirectly disadvantages most of women who have spent some time on maternity leave and possible part-time arrangements due to carrying responsibilities. The CJEU case law already dealt with such problem leaving a definition of qualification up to concrete employers but requiring clear and transparent criteria of selection process.

Free will and free competition

Another liberal argument against positive actions is that positive actions contradict the notion of free will of individuals and free competition.[245] The essence of the reproach is that equality of results does not differentiate among reasons of inequality, and some of them might have been caused by individuals themselves, e.g. not studying hard enough. Moreover, many argue that firms and institutions often prefer to formally comply with the quotas then restructuring methods and the system of the work (especially in the work-life balance area). In order to address these objections, suggestions were made that only inequalities that are out of control of individuals should be considered and each individual should bear responsibility for the rest.[246] Furthermore, even supporters of quota acknowledge that it is incorrect to aim for result without exploring the reasons; as a quota is not an all saving tool and other accompanying soft measures need to be undertaken to secure a long term sustainable structural change.

State neutrality and non-interference with the social structure

Yet another liberal argument maintains that the state should not leave position of neutral guardian and interfere with a social set-up and individual competitions.[247] Based on these views, the market economic rationality is more effective than positive measures; and a certain level of social inequality is natural and it should not be regulated artificially. Nevertheless, a state has never been impartial and it historically disadvantaged women as well as racial, ethnic and other minorities, through restriction of their legal personality and access to political representation, education, certain types of employment and positions. Furthermore, many of these barriers have been eradicated only during the last century; these being inequality in suffrage and racial

245 Sadrusji, W. (2005). *Majority Rule, Legitimacy and Political Equality*. EUI Working paper Law No. 2005/21, Firenze: European University Institute, 20-30.

246 Roemer, J. E. (1995). *Equality and Responsibility*. Boston: Boston Review, 20.

247 F. A. Hayek (1978). *Law, Legislation and Liberty*, *Volume 1: Rules and Order.* Chicago: University of Chicago Press. Available at https://bit.ly/3j9QEzo.

segregation, and some persist even in today's world. A liberal laissez-faire approach thus only reinforces such a situation since it leaves a free arena for an already dominant economic group to further profit from pre-existing inequalities. Moreover, a state is not neutral even at present times, as it is involved in social redistribution of public finances, which could be through taxes and allowances; which is, at least in Europe, one of its main functions. On the contrary, in states where such redistribution does not take place (e.g. USA), the reported level of discrimination due to great social differences and poverty is even higher.[248] Therefore, the state is involved in the social redistribution of its wealth, the only question is how and with what limits such redistribution should take place.

Imputed responsibility for the past wrongdoings

Continuing to the next argument, which is that current generation is not responsible for past inequalities and should not be disadvantage for something it did not cause, i.e. that it is not suitable to eradicate past discrimination though the new forms of discrimination. This counter-argument points out to the fact that the past and long-term privileged positions helped the ruling decision-making groups to acquire material resources, knowledge and skills which were passed to their descendants. In this way, following generations benefit from optimal starting position, with materially and socially unrestricted access to all estates including education, labor market, higher management positions and public offices. All of the current members of disadvantaged groups, on the other hand, often need to overcome even the most basic poverty lines and economic struggles to access such a starting line. Even if they manage to get through the educational system, the lack of social contacts and backing, as well as prejudice, is likely to hamper their further careers.

Limitation of opportunities for majoritarian groups

One of the underlying fears is that promotion of women and members of minorities will automatically diminish opportunities for men from the majoritarian social group within a given society. Nevertheless, the only measures with greater negative impact on the selection process are absolute and permanent preferences, which are unacceptable based on established EU case law. In their flexible form, the preferential measures do not exclude anyone from e.g. taking part in the competitions and their individual social background is taken into account. This fact that an over-represented group will have lower chances to succeed due to a fewer 'available seats', is in line with proportionality and legitimacy principles; as decision-making in the public sphere should reflect the composition of the society. Besides that disadvantaged group in question does not have to be women or minorities only, there are several areas where men were treated unequally in the past and have only recently been granted the benefits provided to women. For example, all EU countries are now obliged to grant fathers the right to: a parental leave and parental allowances on equal footing with mothers; flexible work arrangements, in order to better balance their work and family life; and a shared child custody in cases of divorces. Men are also increasingly supported in the female dominated work segments. Norway, for example, issued a Special

248 Bobek et al. (2007), 20.

Management Act in 1998 to support men in sectors where they are under-represented, e.g. in education and childcare.

Problem of the 'cream' and deepening social differences

Many critics point out that positive actions often result in deepening social differences within the group which benefit from positive actions. This reproach is based on the fact that a competition is created within the groups where only those who are already in advanced social positions receive benefits which they actually do not even need, i.e. that benefits within a given group are distributed unevenly.[249] Nevertheless, the technical structure of concrete actions could be designed in a way that only individuals with proven limited income could apply for a benefit, while more affluent ones will be excluded from the competition, e.g. so called 'income test' used in India.[250] It remains questionable though, whether certain level of income automatically opens the door for people from disadvantaged group into certain jobs and positions as much of discrimination is based on stereotypes and prejudice. Thus, even more affluent members of disadvantaged groups can still have problems reaching higher working and public positions; and in that case, they should also be allowed to benefit from the preferential treatment, which depends on the content and scope of the treatment. Finally, regardless of income level, beneficiaries do have to prove needed qualification and if this is only the 'cream' of the group at the time of application of positive action, then they are likely to be the first beneficiaries, who can become the role models and support their communities and their interests.[251]

On the other hand there is a range of arguments in favour of the use of positive actions, which are also frequently used in political and expert discourse as well as the court proceedings. Practitioners as well as theorists use different scales of classifications, but in general they all could be fitted within for main fields: remediation, economics, diversity, and social justice.[252]

Historical discrimination

One of the most cited argument for the use of positive actions is the aim to redress previous discrimination and historical injustices which have resulted in factual unequal position of certain groups within society. Indeed women and various minorities (e.g. African Americans and Native Americans in the USA, black population in South-Africa, Aborigines in Australia, or Roma in Europe), have been denied access to education, labour market and decision-making for centuries and even though their formal equal rights are now guaranteed, their overall social status and material opportunities to compete with majoritarian society are not sufficient. Even though the argument of historical discrimination is expressly mentioned in international law (notably CEDAW), it is not always well received by national courts. For example, based on the US case-

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249 Holmes, S.A., Winter, G. (2003). Fixing the Race Gap in 25 Years or Less. *New York Times*, 29.6.2003, 1.

250 Indira Sawhney v Union of India A.I.R.1993 SC 477, 86.

251 Bossuyt, M. (2002). *Prevention of Discrimination: The Concept and Practice of Affirmative Action*. UN: Economic and Social Council, 6. Available at: https://bit.ly/2SC2FBC.

252 Moses, M. (2010). Moral and Instrumental Rationales for Affirmative Action in Five National Contexts. *Educational Researcher, 39*(3), 211-228.

law, this argument is no longer deemed as relevant and it has been increasingly replaced by the diversity argument.

Diversity argument

Generally, one of the main utility arguments frequently used to support the use of positive actions is that of diversity, social cohesion and reconciliation eliminating social tensions. According to the diversity argument, the creation of a diverse and/or proportional group representation at schools, in the workplace and in public decision-making has a series of positive effects. Firstly, it reflects the composition of society, which is deemed to be an essential part of a just society.[253] It also contributes to a better integration and cohesion of different groups which helps to reduce stigma, prejudice, social tensions, and crimes within society.[254] Finally, it contributes to the creation of cultural, intellectual and knowledge diversity of individual institutions themselves. Number of scholars see this social dimension as one of the strongest arguments. Michele S. Moses, for example, argues that the social justice rationale should be invoked more centrally, as it underscores positive actions' role in fostering a democratic society.[255] This diversity argument is largely accepted in the court proceedings, and in the USA for example, it was even recognized as the 'state's compelling interest' providing for a more creative, profitable and sustainable environment and better use of labour and social potential.[256]

The argument of experience, interest groups and legitimacy

Different social groups may have distinct social and cultural norms and experience, and thus different perspectives on various social, economic and cultural issues (the argument of experience). Even more, this is valid for women, who due to existing biological and social differences, may also have different interests and needs; especially in the fields of family policy, health, employment, care for children and other dependents, public administration, etc. It is therefore efficient and legitimate to have representatives of these groups directly represented in the decision-making; as they have authentic knowledge and experience which can be in conflict with majoritarian representation and therefore not defended properly (argument of legitimacy).[257] It is important for the proper and fair functioning of society as a whole that there is no absence of male, female or minorities' role models in education as well as in work place and politics. Examples of successful members from different social groups can motivate and inspire others, especially if they can identify themselves with them (argument of positive patterns).[258]

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253 Bossuyt, M. (2002), 8.

254 Moses, M. (2010)

255 Ibid.

256 University of California v. Bakke, 438 U.S. 265 (1978), Grutter v. Bollinger, 539 U.S. 306 (2003).

257 One could question for example the legitimacy of laws passed by a male dominated parliament regarding questions of reproductive and health issues concerning women, without appropriate female representation in such an organ. Empirical research proves that women only start to advocate openly for their interests when they reach at least 30% representation (generally termed as a 'critical mass'); with lower representation, they rather 'compete' and assimilate with the masculine institutional culture. Dahlerup, D, (2006), The Story of the Theory of Critical Mass. *Politics and Gender*, Volume 2, December 2006, 511-522.

258 Even though, of course, it does not always have to be the case. A notable example is the one of an Afro-American Supreme Court judge Clarence Thomas, who does not support positive actions, even though he personally

Economic arguments

These studies prove that ethnically and gender balanced mixed teams have positive impacts on efficiency, decision making and performance; as they allow for differentiated views and a wider range of talents and life experiences.[259] Higher participation of women and members of disadvantaged minorities in the labor market has also positive effects on the state budget (and the GDP)[260] in the form of income tax, social and health insurance, and value added tax connected with higher rates of consumption and further creation of jobs. Moreover, empowerment of socially disadvantaged groups aims to improve their overall status and thus decrease their dependency on state budget (allowances), and to lower overall poverty and inequality in society.

The argument of demographic challenges

One of the myths about gender equality is that it results in decreased birth rate as women start focusing on their work and careers. Interestingly, this has proven to be mistaken as over 70% of European women work regardless of number of children and the highest birth rates are reached by the countries with the highest gender equality index. For example, Scandinavia and France approach self-preservation levels (over 2 children per couple), while in the CR, despite long maternity leave and existing allowances, the birth rate has been growing only very slowly over the last decades (around 1.5-1.7 children per couple). Experts agree that the main problem resides in the lack of appropriate housing, nurseries, flexible work arrangements and flexible options of parental leave and allowances, as well as persisting double burden of house work.[261] Shortly said, well designed gender equality laws and policies can better motivate women and men to parenthood.

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benefited from them.

259 E.g. Sandern, H., Oosterbeek, H., Praag, M. (2013). The Impact of Gender Diversity on the Performance of Business Teams: Evidence from a field experience. Management Science 59(7), 1514-1528.

260 The OECD study (2012) estimates that if the gap in the participation of women and men in the labor market in the CR was reduced to half of the current level by 2030, average annual GDP growth would increase by 0.4 percentage point (from the predicted growth of 2 , 4% per annum to 2.8%). Similar estimates have been published by the International Labor Organization, which estimates a 0.4 percentage point increase in GDP growth. OECD (2012). *Closing the Gender Gap: Act Now*. OECD Publishing. More information in: Office of the Government of the CR (2016). *Akční plán pro vyrovnané zastoupení žen a mužů v rozhodovacích pozicích na léta 2016-2018*. *(Action plan for balanced representation of women and men in decision-making positions for the years 2016-2018),* 10-13. Available at: https://bit.ly/3diUTWX.

261 A very controversial plan was introduced by Prime Minister Andrej Babiš in 2019, who proposed the provision of a state allowance in the form of a car to each family with three or more children. This proposal was largely criticized as unsystematic due to inappropriate choice of target group and means. Economists and sociologists suggest rather concentration on housing and the possibility of reconciling work and family. From an interview with economist Lukáš Kovanda, chief economist of the Czech Fund and lecturer at the University of Economics and the CEVRO Institute, available from https://bit.ly/2muA84n; and from the discussion of experts at the Government Council for Gender Equality in Prague on 31 October 2019 and their resolution, available at: https://bit.ly/2JDUeBV.

2. Positive actions at international level

2.1. Positive action in the United Nations (UN)

2.1.1. UN treaties

Equal rights of men and women and non–discrimination based on sex is one of the UN fundamental values and as such it is codified in the UN Charter (Preamble and Article 1)[262], as well as in the UDHR (Article 1, 2).[263] Furthermore, both Covenants (ICCPR Articles 2 and 26 and ICESR Article 2) include non-discrimination articles (Articles 2) as well as a guarantee of equal rights of men and women (Article 3) and stress equality in marriage and equal working conditions for men and women. Both documents further stress that states have to take all appropriate measures to give effects to the rights in the Covenants (Article 2(2) ICCPR, Article 2(1) ICESCR), which leaves some room for the use of positive actions, at least in their soft form. These positive actions in the form of preferential treatment are, however, not codified in any of these documents.

Not surprisingly, CEDAW is the most progressive of the UN treaties in the field of gender equality, calling upon the State Parties to pursue without delay policies aimed at eliminating of discrimination against women (Article 2) and achieving a full realization of gender equality (Article 24). The CEDAW is the first UN treaty specifically allowing for temporary special measures aimed at accelerating de facto equality between men and women (Article 4).

> Article 4 (1). Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.
> Article 4 (2). Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

Based on this article, positive actions are not considered as discriminatory provided that they: a) aim to accelerate de facto equality between men and women; b) will not result in the maintenance of unequal or separate standards; and c) are temporary i.e. their effects and progress should be evaluated and they need to be disconnected once their objectives are achieved. Besides that CEDAW allows use of permanent protective measures in case of maternity. All treaties allow submission of individual complaints and require states to take actions to prevent and combat discrimination committed by third persons. E.g. Article 2(e) CEDAW which requires states 'to

262 Article 13 (1)(b), 55(c), 76(c) of the Charter reaffirm Article 1(3).

263 While the UN Charter non-discrimination article is free standing and includes four main prohibited grounds - race, sex, language, or religion; the UDHR's formulation is accessory and adds other six grounds - colour, political or other opinion, national or social origin, property, birth or other status. The UDHR accessory formulation of non-discrimination article has been used also in the ICCPR and ICESCR (Article 2), furthermore the ICPR also includes a free–standing non-discrimination article (Article 26) which requires states to guarantee equal and effective protection to all persons.

take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise'.

2.1.2. Approach of the UN bodies

HRC: General Comment No. 28 (2000) and Jacobs v. Belgium (2000)

All UN Committees approve the use of positive action in the field of gender equality with almost identical reasoning for their application.[264] In the general comments, the HRC repeatedly urges state parties to use, and to report on the use of positive actions.[265] In General Comment No. 28 (2000), the HRC stresses even a duty of State parties to adopt positive actions in order to achieve effective empowerment of women and their participation in public affairs and office; and stretches the state duty to prevent discrimination also to private sector.[266]

This use of positive action was also approved by the HRC in case Jacobs v. Belgium (2000),[267] in which the claimant challenged a fixed quota for the appointment of an adequate number of elected candidates of each sex for the High Council of Justice in Belgium.[268] Jacobs claimed that fixed quotas violated his civil and political rights and decided to challenge the system after a second round of appointment was called when an insufficient number of women applied for the positions. The HRC held that a quota system in this case was acceptable as it was based on objective and reasonable grounds and it was proportional. Furthermore, it also stressed the importance of a gender perspective in judicial bodies.

ICESCR: General Observation no. 16

Similarly, in its General Observation no. 16, the ICESCR Committee warns against possible negative effects of apparently gender-neutral laws and policies, which may fail to secure equality since they do not consider existing economic, social and cultural inequalities experienced by women.[269] This committee maintains that 'temporary special measures' in favour of women might be necessary in order to achieve not only de jure/formal but also de facto/substantive gender equality. Nevertheless, the Committee refers to number of conditions which positive actions should fulfil: a) they have to aim at accelerating de facto equality between men and women (CEDAW); b) they will not result in the maintenance of unequal or separate standards (CEDAW); c) they have to be temporary – i.e. their effects and progress should be evaluated and they need to

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264 Their formulations are however inconsistent as they interchangeably refer to 'all steps necessary', 'effective and positive measures' or 'appropriate affirmative action'.

265 UN HRC (1996). *CPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*. 12 July 1996, CCPR/C/21/Rev.1/Add.7, para. 24.

266 UN HRC (2000). *CCPR General Comment No. 28: Article 3 (The Equality of Rights between Men and Women)*. 29 March 2000, CCPR/C/21/Rev.1/Add.10, para. 3, 4, 29.

267 Guido Jacobs v. Belgium, Communication No. 943/2000, CCPR/C/81/D/943/2000, para. 9, 10.

268 A provision required at least 4 men and women to be appointed as non-justices in a government institution.

269 UN Committee on ECSCR (2005). *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Article 3 of the Covenant).* 11 August 2005, E/C.12/2005/4, Ibid 84, para. 7-9, 18.

be disconnected once their objectives are achieved (CEDAW); d) they need to be specific - their nature, duration and application is issue and context specific; e) they have to be flexible - adjusted when circumstances require; and finally f) they have to be objective, proportional and based on reasonable grounds.[270]

CEDAW: General Recommendation No. 5 - Temporary Special Measures (1988)

The CEDAW Committee has recommended the use of positive action in a number of its recommendations, in particular in General Recommendation No. 5 on Temporary Special Measures (1988), it encourages States Parties to make more use of temporary special measures such as positive action, preferential treatment or quota systems to advance women's integration into education, the economy, politics and employment.[271] The Committee was even more progressive and specific in its Recommendation No. 23 on Political and Public Life (1997), in which it states that removal of de jure barriers is necessary but not sufficient. According to the Committee, "a failure to achieve full and equal participation of women can be unintentional and the result of outmoded practices and procedures which inadvertently promote men".[272] In order "to overcome centuries of male domination of the public sphere", it encourages the use of temporary special measures including recruiting, financially assisting and training women candidates, amending electoral procedures, developing campaigns directed at equal participation, setting numerical goals and quotas and targeting women for appointment to public positions such as the judiciary or other professional groups.[273]

UN Women and Strategic Plan (2018-21)

The UN has intensified its work in the field of gender equality in recent decades. In 2010, the UN General Assembly created UN Women as the main UN Entity for Gender Equality and the Empowerment of Women. UN Women builds up on work of several UN organs[274] and its mission is to support UN Member States and civil society in design of laws, policies, and programs in five priority areas: 1) increasing women's leadership and participation (important for our context); 2) ending violence against women; 3) engaging women in all aspects of peace and security processes; 4) enhancing women's economic empowerment; and 5) making gender equality central to national development planning and budgeting.[275] The UN Women's Strategic Plan 2018–2021 focuses predominantly on normative and legal frameworks, including elimination and amendment of discriminatory laws. Even though it stresses a number of progressive initiatives

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270 Ibid, para. 15

271 CEDAW Committee (1988). *General Recommendation No. 5: Temporary Special Measures*, 1. As it is clear from the wording, there is no clarification of the concept as the Committee lists quota systems apart from preferential treatment.

272 CEDAW Committee (1997). *General Recommendation No. 23: Political and Public Life*, A/52/38, para. 15.

273 Ibid.

274 UN Women merged several UN organs engaged with gender issues: Division for the Advancement of Women (DAW); International Research and Training Institute for the Advancement of Women (INSTRAW); Office of the Special Adviser on Gender Issues and Advancement of Women (OSAGI) and UN Development Fund for Women (UNIFEM).

275 UN Women. *About UN Women: Work and Priorities*. Available at https://bit.ly/30Avpyi.

such as gender mainstreaming and data collection; it does not include provisions on positive actions.[276]

CEDAW Committee's recommendation to the CR

In its last recommendations Concluding Observation on the sixth periodic report of the CR from 2016, the CEDAW Committee points to the fact that the Anti-Discrimination Act (2009) does not explicitly does not explicitly cover political participation and notes with regret that the state party did not adopt the law on temporary special measures requiring a minimum quota for the representation of women on electoral lists of political parties. The committee was also concerned about the lack of specific goals, targets and time frames in the +1 Strategy to accelerate the achievement of substantive equality of women in political and public life, especially in legislative assemblies, public and private companies, the Government and the public administration, in particular at the senior levels.[277] The committee reiterated its recommendation that the State party strengthen the use of temporary special measures in all areas under the Convention in which women are underrepresented or disadvantaged. It recommends that the State party develop specific goals, targets and time frames for the implementation of the +1 Strategy on equality of women and men and that it consider amending the Anti-Discrimination Act and other relevant legislation to include temporary special measures to accelerate the achievement of substantive equality of women and men in political and public life. The committee also recommends that the State party raise awareness among parliamentarians, government officials, employers and the general public about the necessity and time-bound nature of temporary special measures.[278]

2.1.3. UN Summary

All major UN treaties include general formal equality article prohibiting discrimination on any ground including sex. CEDAW expressly allows for the use of 'temporary special measures' and it sets conditions for their use. Hence, the CEDAW goes far beyond the mere obligation to ensure equality; and it was the first treaty to establish an explicitly asymmetric approach to equality rights.[279]

All the UN treaty-based committees have approved the use of positive actions in their recommendations and stress that protection from discrimination has to be effective. They distinguish between formal and material equality and emphasize that formal equality residing in prohibition of discrimination proves to be insufficient for effective application of equality

276 The Plan also emphasis a need of better coordination of activities between various UN organs such as the Commission on the Status of Women, CWS (https://bit.ly/39ednWH); the Special Rapporteur on violence against women (https://bit.ly/3fRyiBh); and the Working Group (https://bit.ly/2Bk2jL9); and other international organizations.

277 CEDAW Committee (2016). Concluding observations on the sixth periodic report of the Czech Republic. CEDAW/C/CZE/CO/6, para 14. Available at: https://bit.ly/3dcjI8k.

278 Ibid, para 15 and 23

279 Schiek, D. (2014). Article 23: Equality between women and men. In S. Peers, T. Hervey, J. Kenner, & A. Ward (eds.), *The EU Charter of Fundamental Rights: A Commentary* (633-660). Belfast: Hart Publishing, 9. Available at: https://bit.ly/3qiLuFy.

principle. Therefore, they all recommend the use of positive measures in order to suppress de facto discrimination and to eliminate historic and persisting disadvantages. They stress the state parties' duty to guarantee observance of equality also by the private sector and encourage them to gather statistics and to report on the use and results of positive actions. The CEDAW Committee has specifically and repeatedly urged the CR to set a gender quota in the election law and to use positive action in all fields where women are underrepresented.

It needs to be noted that the UN has, overall, the most progressive attitude to gender positive actions in their codification as well as in the assessment by the single Committees. Unlike the COE and the EU, the UN committees consider positive actions as a precondition to achieve equality, rather than as an exception from this principle.[280] The CEDAW Committee actively promotes accelerating de facto equality of women through the temporary measures and makes all efforts to adapt positive measures to the specific context and aims.[281]

280 More in Waddington, L., Visser, L. (2012). Temporary Special Measures under the Women's Convention and Positive Action under EU Law: Mutually Compatible or Irreconcilable?, In *The Women's Convention Turned 50*, ed. by Westendorp, I. Cambridge: Intersentia, 33-63.

281 Schiek, D. (2014). 26.

2.2. Positive actions in the Council of Europe (COE)

2.2.1. COE treaties

ECHR (1950)

The European Charter of Human Rights (ECHR) contains a general non-discrimination clause (Article 14) which introduces the same prohibited grounds as the UDHR and the UN Covenants and remarkably lists sex as the first prohibited ground before race and colour suggesting that gender quality in the regional context might have been more pertinent issues for Europeans.[282] This non-discrimination article is, however, formulated in an accessory form and it has to be pleaded in relation with some other substantive right guaranteed by the Convention. This convention does not include any provision on positive action which is probably not surprising taking into account the age of the convention which was elaborated and signed after World War II.[283] Subsequently, more progressive innovations have been added to the COE acquis through the protocols to the ECHR and additional binding and non-binding acts.

Protocol No. 12 to ECHR (2000)

One free-standing non-discrimination article was added to the ECHR via Protocol No. 12; which extended protection against discrimination covering any rights regulated by the national laws.[284] This protocol does not include any provisions concerning positive actions but does not exclude them either. According to the Explanatory Report to the Protocol, positive actions are not barred but the prime objective of the ECHR resides in negative obligation of the State Parties to refrain from discrimination against individuals.[285] The report maintains that there should be no positive obligation imposed on State parties with regard to positive actions as they would sit ill with the whole nature of the Convention which is based on collective guarantee of sufficiently specific and justiciable individuals. This stance is in stark contrast with the CEDAW position. Nevertheless, the report sets several conditions on possible application of positive actions which should be justified (addressing de facto inequalities or persons who are disadvantaged), proportional and sufficiently specific.

> The fact that there are certain groups or categories of persons who are disadvantaged, or the existence of de facto inequalities, may constitute justifications for adopting measures providing for specific advantages in order to promote equality, provided that the proportionality principle is respected. Indeed, there are several international instruments obliging or encouraging states to adopt positive measures ...However, the present Protocol does not impose any obligation to adopt such measures. Such a programmatic obligation would sit ill with the whole nature of the Convention and its control system which are based on the

282 Probably, taking into account the need of the post-World War II reconstruction of Europe and equal work conditions for women.

283 It needs to be noted that there is almost 20 years of difference between ECHR signed in 1950 and the first international documents introducing positive actions , notably CEDAW signed in 1979 and the EU Gender Equality Directive signed

284 Protocol No. 12 to the ECHR (CETS No. 177). The Protocol entered into force in 2005 and it has been ratified by 20 States by 2021. The CR has signed the protocol in 2000 but has not ratified it.

285 Explanatory Report to the Protocol No. 12 to the ECHR (CETS No. 177). Available at https://bit.ly/3eUB739.

> collective guarantee of individual rights which are formulated in terms sufficiently specific to be justiciable.[286]

European Social Charter (1961)

While the convention imposes essentially negative duties on states not interfering in enjoyment of guaranteed rights, the European Social Charter (ESC) requires positive involvement of states in provisions for a number of specific social and economic rights. The ESC requires that parties pursue, by all appropriate means, the attainment of conditions in which the rights and principles of the Charter may be effectively realized.[287] Among others, these rights include: the right to a special protection for employed women in case of maternity (Article 8) and the right for persons with family responsibilities to work without discrimination and without conflict between their employment and family responsibilities (Article 27). This revision of the ESC in 1996 introduced more specific articles on equality between women and men in the field of education, work, and family life which includes new rights to protection against harassment in the workplace. One of the most important, in our context, is the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex (Article 20); which according to the Additional Protocol to the ESC[288] (Article 1(3)) this provision "shall not prevent the adoption of specific measures aimed at removing de facto inequalities".[289]

According to the Explanatory Report, this article takes into account the need to accelerate the elimination of continuing de facto inequalities generally affecting women. According to this article, the specific measures shall be transitional and repealed gradually once equality has been achieved.[290] Importantly, the ECSR concludes that this provision upholds the very purpose of Article 20 (non-discrimination in the working field) and interprets it as a positive obligation on the side of the state parties which are required to take specific steps aimed at removing de facto inequalities.[291] Such actions affecting women's training or employment opportunities include for example introduction of national action plans for employment and equal opportunities; equality issues in company plans and collective agreements; gender perspective in all labour market policies; etc.[292]

Treaties including positive actions

There are two COE treaties that include articles on positive actions. One of these being exemplified in the Istanbul Convention, which includes, with the exception of a general non-

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286 Ibid., para 16.

287 European Social Charter Revised (CETS No.163).

288 Additional Protocol to the ESC (CETS No. 128).

289 The Charter also provides for an option to adopt „special measures " for the retraining and reintegration of the long-term unemployed if necessary (Article 10). It also obliges State Parties to adopt „positive measures" for people with disabilities (Article 15).

290 Explanatory report to the 1988 Additional Protocol, para. 26. Available at https://bit.ly/2ZU7ieR.

291 Conclusions 2002, Romania.

292 Conclusions XVII-2, Greece.

discrimination article (Article 4 (3)), an obligation of the state parties to take without delay the necessary legislative and other measures to promote and protect the right for everyone, particularly women, to live free from violence in both the public and the private sphere (Article 4); and obligation to observe equality is further stretched to cover non-state actors (Article 5 (2)) and any natural or legal person (Article 12(2)).[293] The state parties also have an obligation of gender mainstreaming (Article 6) and data collection (Article 11). Most importantly, there is a general provision allowing positive actions as well as further specific measures for protection of victims which should reflect their special needs (Article 56). The Framework Convention for the Protection of National Minorities (1994) states in its preamble that state parties should create appropriate conditions enabling national minorities to express, preserve, and develop their identity, and provides provision allowing adoption of adequate measures in order to promote effective equality.

2.2.2. Approach of the COE bodies

ECtHR

The ECtHR case law has predominantly dealt with cases concerning prohibition of negative discrimination and there are not many examples which go beyond formal equality. Nevertheless, based on the ECtHR case-law not all differences in legal treatment are discriminatory as long as they are not offensive to human dignity. As the court stated in its landmark *Belgian Linguistic Case*, certain legal inequalities tend to correct factual inequalities, and difference in treatment is not discriminatory if it has objective and reasonable justifications, a legitimate aim, and there is a reasonable relationship of proportionality between the means employed and the aim sought to be realized.[294] These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind.[295]

The court has further developed and refined its notion of different treatment in another landmark decision Thlimmenos vs. Greece. Mr. Thlimmenos, a Jehovah's Witness, was refused appointment to a post of accountant because of his previous criminal conviction for disobeying an order to wear the military uniform. The court held that the right not to be discriminated against based on Article 14 is also violated when a state without an objective and reasonable justification fails to treat differently persons whose situations are significantly different.[296] According to the court, Greece discriminated "by failing to introduce appropriate exceptions to the rule",[297] considering religious motives of the crime and the fact that the applicant has already been punished for his previous conviction. The court therefore held that further sanctions were disproportionate to the crime. In this landmark case, the ECtHR for the first time recognized

293 Convention on preventing and combating violence against women and domestic violence (CETS No. 210).

294 Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium, Application n. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, para 10.

295 Ibid, para. 57.

296 *Thlimmenos c. Grèce*, Application no. 34369/97, para 44.

297 Ibid, para. 48.

indirect discrimination and held that states have a duty to "introduce appropriate exceptions" and "treat differently persons whose situations are significantly different". This ruling leaves an open room for reasoning that gender positive actions, i.e. a different treatment of persons whose situations are significantly different, is allowed if there are objective and justifiable reasons. Such a hypothesis was confirmed by the European Commission of Human Rights which held that tax advantages to married women are objectively and reasonably justified as they encourage married women to engage themselves in a professional life.[298]

European Committee on Social Rights (ESCR)

Similarly, the European Committee on Social Rights (ECSR) emphasizes a need to address indirect discrimination which may arise from the situation when states fail to take due and positive account of all differences.[299] In its case law, the ECSR has also repeatedly stressed a need for states to take positive actions in order to guarantee the ECS rights.[300] For example, in connection with the right to fair remuneration Article 4(3), the ESCR maintains that State Parties must promote positive measures to narrow the pay gap, including measures to improve the wage statistics and national action plans for employment.[301]

The ECSR has addressed the question of positive action more specifically while giving interpretation concerning gender equality in employment and occupation (Article 20). In connection with this article, the Committee not only allows for positive action but sets it as a positive obligation for state parties. The ECRS also gives a very progressive interpretation of the parental leave (Article 27(2)) stating that domestic law should entitle men and women to an individual right to parental leave on a non-transferable basis, and to encourage the use of parental leave by either parent, while providing an adequate compensation for the loss of earnings.[302] Moreover, a part-time work option should be provided to the workers with family responsibilities and unemployment periods should be accounted in the assessment of pension rights and calculation of pensions. Concerning the provisions on violence against women (Article 16, 17), the ECSR implies positive obligations of the state parties[303] to ensure an adequate protection with respect to women, both in law[304] and in practice.[305] Similarly to CEDAW interpretation, the ECSR makes a distinction between positive measures and particular rights applying exclusively to

298 Lindsay v. United Kingdom, no. 11089/84, ECHR (Plenary), Decision of 11.11.1986, D.R. 49, 181.

299 Autism Europe v. France, 4.11.2003, § 52; ERRC v. Italy, 7.12.2005, § 20; ERRC v. Bulgaria, 18.10.2006, para 26.

300 Especially, with regard to integration of persons with disabilities.

301 Conclusions XVII-2 (2005), Czech Republic, para. 113-114; For more information see ECSR (2008). *Digest of the Case Law of the ECSR*, 46. Available at https://bit.ly/30BcnrL.

302 Conclusions 2015, Statement of interpretation on Article 27 para. 2.

303 In line with CM Rec (2002)5 on the protection of women against violence and PA Rec 1681 (2004) on a campaign to combat domestic violence against women in Europe.

304 E.g. providing for restraining orders and punishments, fair compensation for damages, special arrangements for the examination of victims in courts, etc.

305 E.g. data collection, training (in particular of police officers), and support and rehabilitation for victims, etc.

women which are not deemed to be discrimination (Article 8, 20 (1)), such as pregnancy, childbirth, breast-feeding, etc.[306]

ESCR decision on gender misbalance in business decision-making in the CR

In 2019, the ESCR Committee gave its decision on a collective complaint filed against the CR by the University Women of Europe (UWE)[307] for violation of the European Social Charter.[308] The UWE complaint concerned notably a high rate of gender pay gap; and the low representation of women in economic decision-making. The ESCR Committee found a violation of Article 1(c) and (d) of the 1988 Additional Protocol[309] by the CR in three areas due to insufficient progress in ensuring a balanced representation of women in decision-making bodies within private companies; and insufficient measurable progress in promoting equal opportunities between women and men in respect of equal pay.[310] The ESCR Committee noted that, based on the EIGE statistics, women on boards of largest listed Czech companies made up for 12.2% in 2010 while the EU average was 23%; and despite certain development it still lags behind with 18.5% to 27.8% EU average in 2019. The ESCR Committee therefore considered that already implemented measures have not been sufficient. Overall, the recommended quota of 40% was only reached in Sweden and Norway. Nevertheless, most of other states proved their efforts to enhance equal gender representation based on the statistical data from 2010 to 2019.[311] Thus, the ESCR Committee assessed the gradual progress rather than ultimate 40% threshold; while relying on statistical data as indicators of the existence of inequality in pay and opportunity in the workplace on the basis of gender. This approach underlines importance of official statistical data in the examination of discrimination cases and the need of their segregation and collection.

For the purposes of our analysis, it is interesting to note some of the arguments brought by the Czech Government during the proceedings. One of the technical arguments was pointing out to the fact that there is no genuine equivalent of the CEO in the CR and the comparable position would be the one of 'director general'; "which is, however, impossible to monitor statistically" as

306 At the same time the ECSCR maintained that prohibition of night work or underground mining only in case of women amounts to discrimination as night work is also harmful to men.

307 The UWE (a regional group of Graduate Women International) is a network of associations and federations from 16 countries which cooperates with the CoE and the European Women's Lobby on women's issues in the EU. More information available at: https://bit.ly/3bcNtVD.

308 The UWE logged a collective complaint against 15 states including Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, The Netherlands, Norway, Portugal, Slovenia and Sweden on August 24, 2016. Observations to these cases were submitted also by the European Confederation of Trade Unions (ETUC); the European Network of Equality Bodies (EQUINET), and the EU. Available at and https://bit.ly/2kis8T8. UWE (2016). Complaint of a Violation of the Revised European Social Charter. Available at: https://bit.ly/2kn70eF.

309 Article 1 (d) of the 1988 Additional Protocol: Right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex.

Part I: "All workers have the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex."

Part II: "With a view to ensuring the effective exercise of the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex, the parties undertake to recognize that right and to take appropriate measures to ensure or promote its application in the following fields: (…) (d) career development, including promotion."

310 Decision of the ECSR of 5 December 2019, No. 128/2016 (University Women of Europe [UWE] v. Czech Republic). Available at https://bit.ly/3f4aeKd.

311 The Committee did not state violations in states where statistical trends have been satisfactory e.g. in Belgium, Finland, France, Italy, the Netherlands, Portugal and Slovenia.

the information on director generals is not included in the Czech Commercial Register. The government argued that the UWE thus failed to prove its allegation. Hereby the government pointed out one of the main obstacles to improvement of gender equality in the country – namely to the lack of gendered data in general;[312] despite the fact that collection, classification and publishing of gendered data is encouraged by all human rights organisations.[313] Nevertheless, the government was not able to provide data proving gender equality in this field and merely pointed out to an existence of the Gender Equality Strategy and the Action Plan which include a 40% female representation target in both, public and private sector. Despite the fact that the targets of these strategic documents have not been reached, the government maintained that central governmental authorities "have been more or less working towards fulfilling this target". Some authorities have reportedly provided data on balanced gender representation within their management;[314] and all other authorities have been using at least some measures to fulfil this initiative. Nevertheless, as it was pointed out in the previous section the Action Plan has been rather unsuccessful and revealed, for a great part, reluctance of the state organs to take measures in this field.

One of the main conceptual problems however resides in the Government's reluctance to regulate the private sector in this field, and its arguments very much resemble the stance of the Senate towards the 'Women on Boards Directive'.

> The State as the duty bearer under international human rights law cannot require interference with the private sector that would go beyond the legitimate legal framework and be contrary to the principles of a liberal democratic state governed by the rule of law. The underrepresentation of women in decision-making positions in private companies cannot be, for example, assimilated to the State's failure in its duty to inspect the private sector or practices that are unlawful at national level or prima facie in contravention of the international obligations of the State.[315]

The ESCR Committee, on the other hand, considered that Additional Protocol and the Revised Charter[316] impose positive obligations on States to tackle vertical as well as horizontal segregation in the labour market through promotion of advancement of women in decision-making positions in private companies (possibly including quotas to the management boards of companies). The ESCR Committee maintained that designed measures must include promotion of effective gender parity in decision-making positions in both, public and private sector.[317] According to the Committee, these measures may include a 30 or 40% quota for underrepresented sex backed by 'comply or explain' mechanism. Finally, the ESCR Committee recalled that the state must take measures that enable achievement of the Charter objectives within reasonable time, with measurable progress and to an extent consistent with the maximum

312 'Not collecting data' is a frequently used state strategy common in other fields as well as in other countries; and it is based on fairly simple logic - if there is no data, there is no problem and there is no reason for change.

313 Makkonen, T. European Commission (2016). *European handbook on equality data, eds.* Luxembourg: Publication Office of the EU. Available at: https://bit.ly/3whLk3p.

314 E.g. Czech Telecommunication Office, Council for Radio and Television Broadcasting, Industrial Property Office, State Administration of Land Surveying and Cadaster, and State Office for Nuclear Safety.

315 Decision of the ECSR of 5 December 2019, No. 128/2016 (University Women of Europe (UWE) v. Czech Republic), Para. 226.

316 Article 1 (d) of the 1988 Additional Protocol as Article 20 (d) of the Revised Charter.

317 Conclusions 2016, Article 20, Portugal.

use of available resources. The CR is currently required to notify the COE Committee of Ministers about planned measures which will help to comply with its international legal commitments. Although the ESCR decisions are not binding and the COE enforcement mechanism is not particularly strong, it could influence further changes in the area

Committee of Ministers

While the ECtHR is rather reserved as far as positive action is concerned, the Committee of Ministers (CM) has been very progressive and concrete in its recommendations concerning gender equality in numerous fields including education, health, political and public decision making, media, sports, etc.[318] In its Recommendation on Legal Protection Against Sex Discrimination (1985), the CM encouraged the use of special temporary measures, to accelerate the achievement of de facto equality between men and women in the field of work and employment, social security and pensions, taxation, civil law, family law.[319]

Another landmark Recommendation on Balanced Participation of Women and Men in Political and Public Decision (2003) set a 40% threshold for female representation in the public decision-making which will provide them with tangible influence in decision-making.[320] This recommendation also invited the state parties to reflect on legal changes, including positive actions, which could improve gender balance in public decision-making.

Recommendation on Gender Equality Standards and Mechanisms (2007) held that the state parties are obliged to implement complementary strategies in their commitment to gender equality.[321] The CM recommended a dual approach to these strategies including specific actions (comprising temporary special measures) and gender-mainstreaming applicable to all policy areas and processes.

Finally, in the Resolution on Bridging the Gap between De Jure and De Facto Equality to Achieve Real Gender Equality (2010), the ministers recommended adoption of gender equality measures (including temporary special measures) in order eradicate discrimination and to promote gender balanced decision-making.[322]

318 Rec (2015)2 on gender mainstreaming in sport; Rec (2013)1 on gender equality and media; Rec (2012)6 on the protection and promotion of the rights of women and girls with disabilities; Res MEG 7 (2010) 1 on bridging the gap between de jure and de facto equality to achieve real gender equality; Rec (2010)10 on the role of women and men in conflict prevention and resolution and in peace building; Rec (2008)1 on the inclusion of gender differences in health policies; Rec (2007)17 on gender equality standards and mechanisms; Rec (2007)13 on gender mainstreaming in education; Rec (2003)3 on balanced participation of women and men in political and public decision making; Rec (2002)5 on the protection of women against violence; Rec (98)14 on gender mainstreaming; Rec (96)51 on reconciling work and family life; Rec (90)4 on the elimination of sexism from language; Rec (85) 2 on legal protection against sex discrimination; Rec (79)10 concerning women migrants.

319 Rec (85) 2 on legal protection against sex discrimination, Article III.

320 Rec(2003) 3 of the Committee of Ministers to Member States on Balanced Participation of Women and Men in Political and Public Decision Making. This recommended 40% goal has been subsequently adopted by many State parties and organizations.

321 Rec (2007)17.

322 Res MEG 7 (2010) on bridging the gap between de jure and de facto equality to achieve real gender equality, paras. 20 and 26.

This use of positive actions is also supported through the Parliamentary Assembly, which endorsed the Declaration of the Principles on Equality through its Resolution and a Recommendation and addressed it to the COE's Committee of Ministers and its member states for consideration.[323]

Gender Equality Commission

In 2012, the COE established the Gender Equality Commission in order to help to ensure the mainstreaming of gender equality into all policies.[324] The COE has pledged itself to achieve effective realization of gender equality and set up six main objectives in its current Gender Equality Strategy 2018-2023: 1) to prevent and combat violence against women and domestic violence; 2) to ensure the equal access of women to justice; 3) to achieve balanced participation of women and men in political and public decision-making; 4) to protect the rights of migrant, refugee and asylum-seeking women and girls;[325] and 5) to achieve gender mainstreaming in all policies and measures.[326]

In comparison with the UN gender equality strategy, there is a shift from economic empowerment, women in peace, security process towards gender mainstreaming, combating stereotypes, and sexism i.e. the strategy reflects the status quo and problems pertaining to Europe. Nevertheless, in both programs there is a call for balanced participation of women in political and public decision-making and prevention of violence against women. This strategy retakes CM recommendation on gender equality standards and commitment to de facto equality and recommends a dual-track approach to gender equality which should include specific policies and actions, including positive actions as well as gender mainstreaming. Furthermore, the strategy stresses that moving towards substantive gender equality requires a change of gender roles, including equal sharing of household and care responsibilities.

2.2.3. COE Summary

Both, the ECHR and its Protocol No.12 include a general non-discrimination clause but none of them explicitly provides for positive actions. Explanatory Report to Protocol No. 12 holds that the positive action is allowed but there is no positive obligation for states to take it in order to achieve a full and effective equality. There are following conditions for the use of positive action apparent from the Commentary - such actions should be justified, proportional, and sufficiently specific. The European Social Charter is more progressive and includes number of provisions for protection of women, especially in regard to work and employment, and its

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323 The Resolution and Recommendation were proposed by the Committee on Legal Affairs and supported by the Committee on Equal Opportunities for Women and Men of the COE. REC 1986 (2011) 25/11/2011. Available at https://bit.ly/2DzWDxj.

324 GEC members are appointed by States Parties and provide support to other COE bodies and to its members. The GEC cooperates on regular bases with other gender equality bodies and institutions including: a network of National Focal Points in each member state; Gender equality rapporteurs within the COE steering committees; COE - Inter Secretariat Gender Mainstreaming Team; EU – EIGE. Available at https://bit.ly/3eO1KXr.

325 This is a newly added aim which was not present in a previous program 2014-2017.

326 COE (2018). *Gender Equality Strategy 2018-2023*. Strasbourg: SPDP COE. Available at https://bit.ly/3frCAhG.

Additional Protocol (Article 1.3) allows states parties to take specific actions aimed at removing de facto inequalities affecting women's training or employment opportunities. This provision is interpreted by the ECSR as a positive obligation to take such actions on the side of a state.

In its landmark ruling in the Belgian Linguistic Case, the ECtHR held that it is impossible to treat everyone exactly in the same manner without exceptions, which in practise could lead to disadvantage of the most vulnerable groups of individuals, and it sets the conditions for the margin of different treatment which is acceptable as long as it has objective and reasonable justification, legitimate aim and is proportional. In the case of Thilmmenos vs Greece, the ECtHR added that the principle of equality is also violated when a state without an objective and reasonable justification fails to treat differently persons whose situations are significantly different. Based on this ruling, one could argue that positive action allowing differential treatment of persons, whose situations significantly differ, will be legal as long as there is an objective and reasonable justification for such action.

While the ECtHR seems to be rather conservative as far as the positive actions are concerned, the rest of the COE institutions are rather progressive. The Parliamentary Assembly directly calls for the use of positive actions in its Resolution and Recommendation of the Declaration of Equality Principles.[327] Likewise, the Council of Ministers issued numerous recommendations concerning gender equality in education, health, political and public decision making, media, and sports. Notably, in 2003, the Council of Minister officially recommended reaching a minimum threshold of 40% for the participation of women in political and public decisions and to this end recommended the use of positive action measures.[328]

Similarly, the ECSR has also repeatedly stressed a need for states to take positive actions in order to remove de facto inequalities and to achieve an effective equality. For example, in order to narrow the pay gap, the committee recommends adoption of measures to improve the quality and coverage of wage statistics. The ECSR has addressed positive actions more specifically while giving interpretation on equal treatment in matters of employment and occupation stating that it is a positive obligation for State parties to take positive actions to secure equality. Following the logic of the CEDAW Convention, the ECSR makes distinction between positive measures and particular rights applying exclusively to women (e.g. pregnancy, childbirth, breast-feeding, etc.).

In 2020, the ESCR issued a decision concerning unequal representation of women in the economic decision-making in the CR. The ESCR found violation of the 1988 Additional Protocol to ESC due to insufficient progress in a female representation in decision-making bodies of private companies; and insufficient measurable progress in promoting equal opportunities between women and men in respect of equal pay. The ESCR Committee urged the CR to take

327 The Resolution and Recommendation were proposed by the Committee on Legal Affairs and supported by the Committee on Equal Opportunities for Women and Men of the COE. REC 1986 (2011) 25/11/2011.

328 Council of Europe Committee of Ministers. (2003). *Recommendation Rec(2003) 3 of the Committee of Ministers to Member States on Balanced Participation of Women and Men in Political and Public Decision Making*. Council of Europe.

effective measures to promote gender equality in decision-making positions in both, public and private sector, including potentially quota mechanism.

Despite rather conservative treaty provisions, the COE has greatly increased its activities in the field of gender equality over the last decade. Numerous recent COE presidencies included gender equality as a priority in their programs and a system of new gender equality organs have been created including the Gender Equality Commission.

2.3. Positive actions in the European Union (EU)

2.3.1. The EU legislation

Although equality is one of the fundamental principles of the EU, its development has been rather slow and predominantly focused on gender and nationality in the occupational area. As far as gender equality is concerned, the European acquis has gradually advanced from equal pay and individual rights in the 1970s; to general equality and positive actions in the 1980s; and to gender mainstreaming in the 90s.[329] Since the 1990s, the European Commission (EC) has further elaborated series of gender positive actions beyond the workplace, including child care, leadership, and violence against women. Hence, the focus has gradually transferred from equal treatment, i.e. a mere non-discrimination towards substantial equality.[330] Many of gender laws concern equal pay and access to financial services, maternity leave, or sexual harassment have been adopted first by European institutions; at the same time, the principle of gender equality has been gradually strengthened though the EU legislation by obliging Member States to ensure equal treatment and to combat discrimination on the grounds of gender.[331]

It is important to highlight that individuals may invoke directives directly in case of their incompatibility with national law;[332] since the ECtHR has granted direct and indirect effect (EuroConform interpretation) regarding numerous antidiscrimination provisions already; and obliges competent national institutions, in particular the courts, to interpret national law in accordance with Union law.[333] Moreover, the ECtHR maintains that the national sanctions have to be proportional but also sufficiently deterrent and effective, and cannot be weaker than the

329 Based on this historical development, scientists distinguish different phases of the EU gender equality progress. Teresa Rees introduces three EU approaches towards the gender equality: 1) equal treatment (or tinkering approach) to include women into existing models in the 1970s; 2) positive actions (tailoring approach) to combat historical forms of inequality in the 1980s; 3) transformative approach based on the gender mainstreaming since the 1990s. Rees, T. (2005). Reflections on the uneven development of gender mainstreaming in Europe, International Feminist Journal of Politics, 7 (4), 555-574. Jacquot (2015) on the other hand, distinguishes between 1) exception model - from equal pay in the Treaty of Rome to the late 1980s, focusing on women's access to the labour market and historical inequalities; 2) anti-discrimination model - from Maastricht (1997) to Lisbon Treaty (2007) focusing on gender mainstreaming; and 3) rights-based model - ongoing post-Lisbon Treaty period. Jacquot, S. (2015). *Transformations in EU Gender Equality. From Emergence to Dismantling*. London: Palgrave Macmillan.

330 E.g. 1976 stressed that its purpose was to "put into effect the principle of equal treatment" (Article 1 (1) Directive 1976/207).

331 More in Hervey, T. (2005). Thirty Years of EU Sex Equality Law: Looking Backwards, Looking Forwards, *Maastricht Journal of European and Comparative Law*, 12/2005, 307-25.

332 Based on conditions set by the ECtHR the provisions have to be precise, clear, unconditional and not requiring additional national or European measures (case Van Gend en Loos); and apparently many provisions of anti-discrimination directives fulfil such criteria. Bobek 141

333 The ECtHR confirmed a direct horizontal and vertical effect of Article 141 TEC in case Defrenne v Sabena (1976) C-43/75 and direct vertical effect of Article 5 of Directive 76/207 EHS in the case Marshal (1993) C-271/91 or Johnston v Chief Constable of the Royal Ulster Constabulary (1986) C-222/84. Von Colson v Land Nordrhein-Westfalen (1984) C-14/83.

sanctions provided by national law in comparable cases.[334] This means that EU anti-discrimination laws can be an efficient tool for individual protection against discrimination in given fields, if properly implemented at national level.

Treaty of Rome (1957)

It is important to note that the only treaty provision specifically addressing equal gender treatment during the first decades was only one article regulating equal pay for equal work between men and women in the Treaty of Rome (1957) (Article 157 (1) TFEU).[335] Even though this article has been originally included for economic reasons in order to prevent social dumping and to secure the same conditions among member states, the CJEU also confirmed its social dimension.[336] In 1976, the Court of Justice of the European Union (CJEU) held that besides economic aim, the Article 119 EEC had also a social purpose thus expanding equality principle from 'equal pay for equal work' to 'equal treatment'.[337] Nonetheless, the fact that the EU principle of equality has been originally based on market rationalities has remained symptomatic for its further development and limited its scope and use. Such an approach of tying gender equality to the common market and economic gain has also been criticized for commodification of equality by numerous scholars and grass-root organisations.[338] The first codification of the positive action did not take through the primary law, but via Gender Equality Directive from 1976.[339]

> Article 2 of 76/207/EEC: (1) The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security. This principle is hereinafter referred to as "the principle of equal treatment."
> (4) This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1 (1).

If we compare it with later article 157 (4) of the Amsterdam Treaty, it is obvious that the wording is more passive "measures to promote equal opportunity for men and women, in particular by removing existing inequalities" as oppose to "measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers". Moreover, actions taken based on those articles might be essentially the same and in both cases, the legislator recognizes existing structural barriers which should be addressed. Further regulation took place through the Council

334 Ibid.

335 Original Article 119 (1) of the TEEC, former Article 141 of the TEC, now Article 157 (1) of the TFEU.

336 The main purpose of the equal pay article was to protect states (notably France which at that time had an equal pay rule codified) from migrating cheaper female labour. Nevertheless, in practice, Member States were hesitant to transpose the equal-pay provision and the progress took place only after agreement on a social programme in 1974 and adoption of the Equal Pay Directive (75/117).

337 Defrenne cases (Case 80/70; Case 43/75; Case 149/77). This decision has been followed by numerous cases.

338 Jacquot, S. (2015), 20.

339 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

regulation from 1984 which specifically encouraged the use of positive actions in both, public and private sector.[340]

Treaty of Amsterdam (1997)

With the entry into force of the Treaty of Amsterdam promotion of equality between men and women became one of the essential tasks of the Community (Article 3(3) TEU)[341] and the overall principle of equality has been strengthened. In addition, the Amsterdam Treaty has provided an EU as organisation with legal basis to take appropriate action to combat discrimination on a wide range of grounds, including sex outside employment (Article 19(1) TFEU);[342] which led to development of new equality directives.

> Article 19 TFEU: (1) Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
> (2) By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.

Most importantly, in our context, this treaty marked an important shift from mere equal pay and treatment to a more active approach in the area of equal opportunities (even though still in the area of work only) as it gave options, both to the EU and the member states, to take positive actions in this field. More concretely, the treaty enabled the EU to act in the wider area of equal treatment and opportunities in employment matters (Article 153 TFEU) and authorized positive action to empower women within this framework (Article 157 TFEU).[343]

> Article 157 TFEU: (3) 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.
> (4) With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

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340 84/635/EEC: Council recommendation of 13 December 1984 on the promotion of positive action for women

341 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts; *OJ C 340, 10.11.1997, 1–144.*

342 To these grounds belongs sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Previously, an EU action was based either on the internal market provision (today Article 114 or 115 TFEU) or the subsidiary powers provision (Article 352 TFEU). This Article has also provided a legal basis for the Directive on the principle of equal treatment between men and women in access to and the supply of goods and services (Directive 2004/113/EC).

343 The equal pay article (157) has been has been reframed to adapt codification of the principle of equality as it had been widened through secondary legislation and after the first positive measure Kalanke ruling (CJEU C-450/93 Kalanke[1995] ECR I-3051).

There are a few important elements to be noted. Firstly, the gender equality as formulated in the EU acquis is understood as a binary concept of equality between women and men and gender balancing measures generally concern these two sexes.[344] Secondly, the applicable positive measures only concern equality in working life. Thirdly, even though the Article 157 (4) speaks about the full gender equality in practise in the field of working life, which suggests substantive/material equality; CJEU case law on positive measures aiming at the result are not acceptable. Finally, the formulation differs from the CEDAW codification. This framework does not stress the temporary character of positive measures (as in case of CEDAW), nevertheless such limitation is implied. Even though the article refers to the compensatory character of positive actions, it does not mention its historical roots (as in case of CEDAW). As far as terminology is concerned, while CEDAW speaks of affirmative actions, the EU uses only the term 'measure providing for specific advantages'. Also in contrast to CEDAW, the formulation of positive actions is objective as it concerns under-represented sex; i.e. it does not refer to women only and can be applied to the fields where under-represented group consist of men.

It needs to be noted though, that these articles are not directly effective, and do not establish enforceable rights, but they symbolize a high-level political commitment to gender mainstreaming.[345] Numerous scholars point out that the Treaty of Amsterdam changed the course of original understanding of gender equality[346] and shifted from market-based frameworks to fundamental rights framework. Nevertheless, as Jacquot notes, there is a tension between these two coexisting main frameworks as they both use different approaches to equality and different types of positive action.[347]

Lisbon Treaty (2007)

The Lisbon Treaty marked a new development when equality and non-discrimination, equality between men and women in particular, were made one of the fundamental values of the EU (Article 2 TFEU).[348] The Lisbon Treaty (Article 8 TFEU) has further strengthened the commitment to gender mainstreaming in all its policies through several articles.[349] The purpose of gender mainstreaming is to induce, both, the EU and its member states to take into account

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344 This formulation is characteristic for the EU law where most equality acquis refers to equality between men and women. Remarkably, while the Rome Treaty (1957), Amsterdam Treaty (1997) and CFREU (2000) still use order men – women in their gender equality provisions; the Lisbon treaty (2007) reorders the wording to women and men when formulating gender equality as one of the main EU values.

345 Pollack, M.A., Hafner-Burton, E. (2000). Mainstreaming Gender in the European Union. *Harvard Jean Monnet Working Paper 2/00.* Cambridge: Harvard Law School, 10. Available at: https://bit.ly/3cUCukt.

346 E.g. Pollack, M.A. and Hafner-Burton, E.; Rees, T.; Guerrina, R.

347 Jacquot, S. (2015). *Transformation in EU Gender Equality: From Emergence to Dismantling*. London: Palgrave Macmillan, 97.

348 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007*, OJ C 306, 17.12.2007, 1–271.*

349 The mainstreaming as a new method was introduced by a coalition of female activists, academics and politicians in Beijing 1995. More in Woodward, A. (2001). Gender mainstreaming in European policy: Innovation or Deception?, *WZB Discussion Paper*, No. FS I 01-103, Berlin: Wissenschaftszentrum Berlin für Sozialforschung (WZB). Available at: https://bit.ly/3xuytuD.

objective of gender equality in formulation and implementation of all laws, policies and activities.

> Article 8 TFEU: In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.' Article 10 TFEU contains a similar obligation for all the discrimination grounds mentioned in Article 19 TFEU, including sex: 'In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

CFREU (2007)

The Charter of Fundamental Rights of the EU (CFREU) has for the first time included an open ended and free standing principle of non-discrimination on any ground (Article 21) and codified equality between women and men in all areas, including employment, work and pay.[350] The CFREU has also added an article on work-family reconciliation which includes protection from dismissal, right to paid maternity leave, and to parental leave (Article 33). Importantly, the CFREU has further enlarged the scope of gender positive actions and allowed for the use of gender positive actions in all areas, whereby work and pay is only one of the options (Article 23).[351]

> Article 23 CFREU: Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

Apparently, the main development (in comparison to the Amsterdam Treaty) resides in the enlargement of the scope of gender equality as well as positive actions to "all areas". Hence, the article goes beyond an obligation to refrain from discrimination (Article 21 CFREU) as well as a duty to respect diversity (Article 22 CFREU) which is much larger scope then it was granted to any other inequality.[352] Furthermore the wording is quite strong including a duty (a "must") to insure such all-encompassing equality, while the addressee is not indicated. Based on the article 51(1) CFREU, the Charter rights and principles are addressed to the EU institutions and to the Member States (only when they are implementing the EU law) and the provisions must be exercised under the conditions and within the limits defined by those EU treaties. This does not clarify; however, to what extent the single provisions are justiciable or interpretative in nature.[353] Based on thorough analysis, Dagmar Schiek concludes that Article 23 includes both, rights and principles which are judicially cognisable in some aspects, while their main significance lies in

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350 The CFREU combined and reaffirmed the rights and principles that already existed in EU law. The CFREU, drafted in 2000, has become binding since the entry of the Lisbon Treaty into force in 2009. Based on the Article 6(1) TEU, the Charter has the same legal status as the EU Treaties. Charter of Fundamental Rights of the European Union, *OJ C 326, 26.10.2012, 391–407.*

351 The first paragraph is based on: Article 3 TEU; Article 8 and Article 157(1) (3) TFEU; Article 20 of the revised ESC; Article 2(4) of the Council Directive 76/207/EEC. The second paragraph is grounded on Article 157(4) TFEU. Article 23 does not amend Article 157(4) (based on Article 52(2)). Explanations (*) Relating to the Charter of Fundamental Rights, (2007) OJ 303/17, 32.

352 Schiek, D. (2014), 11, 16.

353 The CFREU differentiates between principles and rights - while rights may be directly enforceable, principles can only be used to interpret the EU legislation (Article 52(5) CFREU). Explanations (*) Relating to the Charter of Fundamental Rights, (2007) OJ 303/17, 32.

interpretation of other CFREU and the EU law provisions as well as in programming politics.[354] According to Schiek this article opens the floor for "a wider range of positive action measures than merit-focused tie break rules for promoting public servants" and indicates that the member states should strive for de-facto equality rather than only supporting formal approaches to equal treatment; which is however contrary to the restrictive CJEU positive action case law.[355] Nevertheless, Schiek concludes that "the new provision should be read in a holistic way and taken as a starting point for developing a wider arsenal of temporary special measures to achieve de-facto equality of women and men".[356]

Overall, it can be concluded that both, the Amsterdam and Lisbon Treaty, have gradually strengthened codification of positive actions and gender mainstreaming in the EU primary law and shifted gender equality from reactionary concept to pro-active one. During the subsequent post-Lisbon era, there have been further attempts to transfer equality towards the more rights–based approach.[357] Nevertheless, this shift has destabilized the existing system which fuelled the EU gender acquis; since the key actors (especially the EC) had become very proficient at promoting equality via economic arguments such as adverse impact of inequality on demographics and public costs, which worked well in case of equal employment rights.[358] Overall, the social justice argument seems to be more difficult to disseminate, especially in regard to hostile position of the CCE and Eastern European member states.[359]

Gender equality directives (1975 - presence)

Much of development regarding the anti-discrimination acquis including positive actions took place through directives. Following an essentially neo-functionalist path, between 1975 and 2020 over dozen of anti-discrimination directives gradually spilled over form equal pay and employment - to cover welfare system and provision of goods and services, and balancing work and family life, which includes care for dependent persons, part time work, etc.[360] The scope of directives expanded beyond working life notably after 2000 with the Goods and Services

354 Schiek, D. (2014), 6.

355 Article 23 (1) demands mainstreaming the obligation to ensure equality applies to all areas, while employment, work and pay are the ones stressed explicitly. The latter is in line with the origins of the EU's gender equality policies. Schiek, D. (2014), 26.

356 Ibid.

357 Guerinna, R. observes that institutionally for example, the gender agenda has been transferred from EC DG EMPL to the DG for Justice and Consumers. Guerrina, R. (2020). From Amsterdam to Lisbon and beyond: reflections on twenty years of gender mainstreaming in the EU. In *Social policy in the European Union 1999-2019: the long and winding road.* European Trade Union Institute (ETUI). Available at: https://bit.ly/3xUOqKK.

358 Woodward A. (2015), 5-18.

359 Guerrina, R. (2020).

360 Directive on equal pay for men and women (75/117/EEC), the Directive on equal treatment of men and women in employment (76/207/EEC, amended by Directive 2002/73/EC) (both replaced by Recast Directive), the Directive on equal treatment of men and women in statutory schemes of social security (79/7/EEC), the Directive on equal treatment of men and women in occupational social security schemes (86/378/EEC, amended by Directive 96/97/EC and replaced by Recast Directive), the Directive on equal treatment of men and women engaged in an activity, including agriculture, in a self-employed capacity (86/613/EEC, replaced by Directive 2010/41/EU), the Pregnant Workers' Directive (92/85/EEC), the Parental Leave Directive (96/34/EEC, replaced by Directive 2010/18/EU), the

Directive (2004). An important revision of the gender acquis took place by Recast Directive (2006) which was supposed to make the EU acquis more accessible and put it in line with the CJEU decisions.[361] Nevertheless, those directives have been limited by the number of compromises and they are often criticized for not emphasising equality as a social justice issue but promoting policies which keep women as a reserve labour army;[362] while sifting from 'equality within the market' to 'equality for the market'.[363] The gender equality impetus was supposed to be renewed in the post-Lisbon period with a series of new directives and initiatives. Nevertheless, due to economic crisis they seem to reflect more of the employers' interests instead of the rights-based agenda.[364]

Positive actions are expressly allowed in Gender Equal Treatment (1976, 2002), Goods and Services (2004) and Recast Directives (2006) based on sex; and in Equal Treatment in Employment (2000) and Race Equality Directive (2000) based on racial and ethnic background and religion or belief, disability, age or sexual orientation.[365]

2002	Amendment of the Gender Equal Treatment Directive 2002/73/EC
Article 14	Member States may, under Article 141(4) (present Article 157 (4)) of the Treaty, maintain or adopt measures providing for specific advantages, in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.
Article 15	The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of one sex. Such measures permit organisations of persons of one sex where their main object is the promotion of the special needs of those persons and the promotion of equality between women and men.
2004	Goods and Services Directive 2004/113
Article 6	With a view to ensuring full equality in practice between men and women, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to sex.
2006	Recast Directive 2006/54/EC
Article 3	Positive actions Member States may adopt measures with a view to ensuring full equality in practice between men and women in working life.
Article 21	The prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of

Directive amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (2002/73/EC), the Directive on equal treatment of men and women in the access to and the supply of goods and services (2004/113/EC) and the aforementioned so-called Recast Directive on sex equality in employment and occupation (2006/54/EC), the Work-Life Balance Directive (2019/1158/EU) which will repeal Directive 2010/18/EU with effect from 2022. European Commission (2011). *Gender Equality in the EU.* Luxembourg: Publications Office of the EU, 6.

361 Masselot A. (2007). The State of Gender Equality Law in the EU. *European Law Journal*, 13 (2), 153-168.

362 Guerrina R. (2008).

363 Jacquot, S. (2015), 135.

364 Jacquot S. (2017), 27-48.

365 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

	one sex. Such measures permit organisations of persons of one sex where their main object is the promotion of the special needs of those persons and the promotion of equality between men and women.
Article 22	In accordance with Article 141(4) of the Treaty, with a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment does not prevent Member States from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers. Given the current situation and bearing in mind Declaration No 28 to the Amsterdam Treaty, Member States should, in the first instance, aim at improving the situation of women in working life.

Even though other directives might not mention positive actions directly; they all, in general, commit states to proactive positive behaviour regarding promotion of equality and eradication of legal and factual barriers averting equality including fairer share of carrying activities.[366] All directives set minimal conditions i.e. single member states may decide for more favourable provisions but cannot decrease the already achieved national level of protection.

Scope of positive actions and terminology

Similarly as in the UN and COE legislation, there are two separate cases which do not fall under positive actions in a stricter sense. First category includes provisions allowing different treatment in connection with maternity, as the unique statehood of women.[367] This second category makes provisions allowing for different treatment in situations where the nature or context of particular work or activity constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.[368]

366 Pregnancy Directive (1992) provided for fourteen weeks of maternity leave and protection against dismissal due to pregnancy and maternity. The Employment Equality Directive (2000) introduced concepts of direct, indirect discrimination, harassment, instruction to discriminate; reverse burden of proof. Goods & Services Directive (2004) prohibited discrimination in the access to and supply of goods and services both in public and private sphere and allowed for positive actions. Recast Directive - Gender Equality in the Labour Market (2006) prohibited discrimination in employment and occupation; allowed for positive actions; defined direct and indirect sex discrimination, harassment and sexual harassment, equality in employment and occupational social security schemes, reverse burden of proof; set requirement for national gender equality bodies and gender mainstreaming, etc. Parental Leave Directive (2010) granted a minimum of 4 months of non-transferrable parental leave for both men and women; and leave on the ground of force majeure (sickness or accident); and introduced special provisions for children with disabilities and long term sick persons. Work Life Balance Directive (2019) introduced ten days of paternity leave after the birth of a child, at least four months of flexible parental leave for both parents (with two non-transferable months) and five days of caring leave for seriously ill family members per year; protection against dismissal during the leave, and the right to receive an income corresponding to at least sickness benefits; right to return to the same or an equivalent place upon return and request flexible working hours, etc.

367 Paradoxically, however, such provisions have been often used in detriment of women while excluding them from certain types of work, in particular, in the police or army. The CJEU therefore gave a more restrictive interpretation of this article stating that provided protection needs to be directly tied to pregnancy, breastfeeding or the period after birth; and not generically to certain types of work. E.g. Sirdar v The Army Board (1999) C-273/97, Kreil v. Germany (2000) C-285/98.

368 E.g. a requirement to employ a female to conduct personal security check-ups for women; a man to become a singer in a male chorus; or a black person to play a role of Nelson Mandela, etc. Genuine and determining occupational requirements - Article 4 Directive 2000/43/EC, or Article 1.6 Directive 2002/73/ES.

Interestingly, while older gender equality acquis only refer to terms indicating 'measures providing for specific advantages' and 'measures promoting equality' or 'measures with a view to ensuring full equality in practice'; after 2000, the term positive actions have been expressly used in Race, Work Equality, and Recast Directives to refer to 'specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin'.

Board of Directors Directive (2012)

One of the most controversial directives including gender positive action, so called Board of Directors Directive, has been proposed by the Commission in 2012.[369] For the first time, this Directive has included a concrete numerical target of 40% participation of women in boards of publicly listed companies by 2020.[370] This Proposal was based on the Article 157(3) TFEU which provides the EU with an option to "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".[371] This main rationale used by the EC was economic one pointing to greater efficiency in the use of human resources (talent, knowledge and ideas), improved corporate governance, and increased financial performance and profitability. The EC has also used the cross-border reasoning advocating for a greater harmonization in the area, which would reduce undesirable competition among member states (so-called race to the bottom).[372]

This proposal was endorsed by the European Parliament in 2014 but national parliaments from several states used their right to oppose the proposed directive based on the early warning mechanism under the Subsidiarity Protocol.[373] Most objections were raised towards subsidiarity and proportionality principle as well as limiting individual rights of company owners.[374] Nevertheless, as pointed out by Barbara Havelková, there was a substantial difference between

369 European Commission, Proposal for a Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures (Brussels: COM(2012) 614 final. (Board of Directors Directive).
2012/0299 COD), Available at https://bit.ly/2CCKA2g.

370 The proposal does not concern small and medium-sized enterprises with fewer than 250 employees. There are 7,500 publicly registered companies in the EU and about 1/3 of them are small and medium-sized enterprises, so the proposal will affect a total of 5,000 companies; including 20 companies registered in the CR.

371 Besides, other provisions of the EU law are also concerned, notably on equality between women and men as one of the EU's founding values and (Articles 2 and 3(3) TEU); the EU responsibility to eliminate inequalities and to promote equality between men and women in all its activities (Article 8 TFEU); equality between women and men in all areas and option to take positive measures in this field (Article 23 CFREU); freedom to choose an occupation (Article15 CFREU); freedom to conduct business (Article16 CFREU); and the right to property (Article17 CFREU).

372 Sdělení COM(2012) 615, str. 15. Furthermore Article 19 TFEU and Article 352 TFEU could have also served as legal basis.

373 The Lisbon Treaty strengthened the role of the national parliaments in the EU legislative process by introducing an early warning mechanism which enables them to raise objections of proportionality and subsidiarity within 8 weeks from the receipt of the legislative proposal. Proposals can be blocked by consensus or majority of chambers; nevertheless, the final decision rests with the European Parliament and the Council.

374 Overall 19% of total votes (11 out 56) were raised against the proposal (there are 2 votes per country to reflect unicameral as well as bicameral parliaments). The reasoned opinions were submitted by the Czech Chamber of Deputies (1), Denmark (2), Poland (2), Netherlands (2), Sweden (2), UK (2) and the comments were forwarded by the Czech Senate (1), Estonia (1), France (2), and the Romanian Chamber of Deputies (1). Available at: https://bit.ly/3aZJSud.

reproaches of old and new CEE member states.[375] While old member states confronted mainly the principle of subsidiarity and certain technical aspects of the selection process, the CEE member states argued the very fundamental principles of gender equality maintaining that there are not enough qualified women and it is natural for women to focus on family. Moreover, they automatically assumed that the selection will not be based on merit (i.e. that female candidates will be not as qualified as men); and that their appointment will lead to uncompetitiveness. As argued by Havelková, the CEE states omit gender bias in leadership selection and perceive existing imbalances as natural or justified facts that should not be changed; let alone by law.[376] On the other hand, old member states did not question the need for gender equality in decision-making or women's abilities but rather maintained that the process should be realized at the state level.

Argumentation of the Commission to these reproaches is traceable in the Commentary to the Directive as well as in bilateral official discussions with given member states. The EC basically maintained that directive is to support gender equality in decision-making after decades in which the state self-regulation did not bring any substantial results. The EC further backed its legitimacy by the support of the European parliament and numerous stakeholders, notably trade unions, women organisations and a number of regional and municipal authorities which took part in a public consultation.[377] The EC further argued that the average annual improvement since 2003 was only 0.6% which meant that gender balance would be achieved in more than 40 years. Besides, the Directive impacts members of supervisory boards who are not involved in daily operations, yet they are important players. This clearly indicates the EC's attempt to compromise between the freedom to conduct business and the mandate for gender equality. Interestingly, several chambers, including the Czech ones, pointed out that such scope is limited and will not impact an overall gender equality in business. Such a statement alone confirms that proposed regulation is not disproportionate, but on the other that it is probably even too mild. Nevertheless, I argue that it needs to be kept in mind that this directive is only meant to support one concrete and specific segment of gender equality – equal representation on boards and not in the whole society. Among other things, it would be impossible to design one directive capable of reaching

375 Havelková, B. (2019). Women on Company Boards: Equality Meets Subsidiarity. *Cambridge Yearbook of European Legal Studies, 21*, 187-216. Available at: https://bit.ly/3h4MRDp.

376 Havelková argued that post-socialist member states have never truly experienced a bottom-up debate about the need of anti-discrimination law and transposed the EU acquis only very reluctantly while remaining to be dismissive of existing asymmetry of social reality (e.g. Slovak Constitutional Court ruling on positive action). Ibid,16.

377 The European Community has dealt with women's participation in decision-making since the beginning of the 1980s and this issue was identified as one of its priorities in the Strategy for Equality between Women and Men in 2010. In 2011, the EC launched the "Europe's Commitment - Women in Leadership" initiative, which called on listed companies to make a voluntary commitment to increase the presence of women in their governing bodies to 30% by 2015 and 40% by 2020. The same goal has been also endorsed by the European Parliament in its resolution of 6 July 2011 on women and corporate governance. In 2012, the EC organised a public consultation on the issue, in which trade unions, women organisations and a number of regional and municipal authorities favoured binding objectives. Business stakeholders, on the other hand, preffered continued self-regulation. Directive, 7. The European Parliament endorsed Directive by a substantial majority, at its first reading in 2013.

such a complex goal. So within the scope of its aim, the directive chose proportional measure in a stricter sense, taking into account the interests of employers.

This proposal of the directive therefore sets a minimum objective of a 40% presence of the under-represented sex among the non-executive directors in large companies listed on stock exchanges.[378]

> Article 4(1) Member States shall ensure that listed companies in whose boards members of the under-represented sex hold less than 40 per cent of the non-executive director positions make the appointments to those positions on the basis of a comparative analysis of the qualifications of each candidate, by applying pre-established, clear, neutrally formulated and unambiguous criteria, in order to attain the said percentage at the latest by 1 January 2020 or at the latest by 1 January 2018 in case of listed companies which are public undertakings.

According to the EC and numerous scholars, the proposed numerical quota is rather aspirational than binding as it is not backed by the sanction which should be decided and applied by the member states. Article 6 of the directive requires member states to adopt effective, proportionate and dissuasive sanctions and contains an illustrative list of possible sanctions such as administrative fines, or judicial annulment of the election of non-executive directors made contrary to this directive. Rather than on quota, the EC places the main emphasis on clear, neutrally formulated selection criteria. This proposal thus requires equality in opportunity (obligation concerning the means), rather than equality of result (an obligation of outcome). Among others, such intent is also included in the Article 157(3) that serves as the legal basis of the proposal. The main rationale behind this focus is that non-transparent selection processes are among the biggest barriers to the further female advancement at the workplace. In order to prevent the promotion of unsuitable candidates and positive discrimination, the directive includes an imperative of equal qualification. Furthermore, unsuccessful candidates may request the companies to disclose information about criteria and factors determining the selection.

> Article 4(3) In order to attain the objective laid down in paragraph 1, Member States shall ensure that, in the selection of non-executive directors, priority shall be given to the candidate of the under-represented sex if that candidate is equally qualified as a candidate of the other sex in terms of suitability, competence and professional performance, unless an objective assessment taking account of all criteria specific to the individual candidates tilts the balance in favour of the candidate of the other sex.

> Article 4(4) Member States shall ensure that listed companies are obliged to disclose, on the request of an unsuccessful candidate, the qualification criteria upon which the selection was based, the objective comparative assessment of those criteria and, where relevant, the considerations tilting the balance in favour of a candidate of the other sex.

Furthermore, any positive action, whether taken at EU or national level, must also respect the limits set by the CJEU: 1) they must address sectors in which women are under-represented; 2) they may favour only women who are equally qualified as male candidates; and 3) they must also include a "safeguard clause" which take into consideration personal situation of each individual

378 Apart from small or medium size companies.

candidate and provides the possibility of allowing exceptions from preferential treatment in justified cases.[379]

Another debate has arisen around the choice of appropriate rationales which falls within previously mentioned dichotomy of economic and rights-based approach. According to Havelková's internal market rationales, concentrating on cross-border impact and financial performance is problematic, since the whole project will be questioned if anticipated performance will not be delivered. According to her, the proposal should have been value-based and principled, focusing on increasing women's participation in economic decision-making and gender equality per se. She further argues that in connection with this goal an Article 19 TFEU should have been used as legal basis since it allows the EU to counter discrimination beyond the ground of sex and beyond employment and occupation; moreover, it is possible that the restrictive case-law on the CJEU on positive action, developed in the area of employment, would not be necessarily applicable when using a non-employment justification.[380] Havelková further points out that the preamble of the directive speaks about improvements in female representation, while the text codifies a symmetrical measure – the 'under-represented sex'. She sees this as unfortunate choice as the criterion of sex creates systematic asymmetry; which predominantly negatively affects women more than men, especially in access to power and decision-making. That is why, according to her, the text should have been cantered on the concept of gender and the fight against gender stereotypes.

Julie Suk puts forward a slightly different reasoning cantered on democratic argument while maintaining that the greater democratic legitimacy of big European corporations would promote greater democratic legitimacy of the whole EU, considering corporations' position as the EU social partners.[381] Suk also points out to the fact that such a stance was also taken by the European Parliament which shifted the focus from economic gains to existing democratic deficit and a 'comprehensive vision of gender equality'.

I agree with both argumentation lines, and above all with the stance that it is ill-suited to base gender equality acquis on economic rationales in general. Nevertheless, a democratic argument seems to be stronger in this case and would be likely more easily accepted among the member states, notably the CEE ones. Several arguments speak for such choice: the CEE states do not recognise asymmetrical discriminatory impact of present work-place practices based on gender stereotypes (as Havelková points out), as a matter of fact they even object the term "gender" as

379 Board of Directors Directive.

380 As Havelková points out, the Commission's action has been most probably pragmatic since Article 19 requires unanimity, while Article157 only requires qualified majority approval in the Council. Havelková, B. (2019), 22. In this respect, the EC had hardly any choice, as unanimity would be almost impossible to reach. Hence, rather than risking a total refusal, the EC has taken the safer path of economic reasoning. Alternatively, the EC could have tempted Article 19 as legal basis, and to reformulate it subsequently in case of possible rejection. This would have, nevertheless, prolonged, the whole process.

381 Suk, J. (2014). *Democratic Deficits and Gender Quotas: The Evolution of the Proposed EU Directive on Gender Balance on Corporate Boards. Oxford:* The Foundation for Law, Justice and Society, 5-8. Available at: https://bit.ly/3qtXGTJ.

such, and they demonstrated these stances by refusal of this directive as well as other international gender acquis, such as Istanbul Convention. It is therefore highly unlikely that they would agree to a more gender based argumentation. This democratic legitimacy argument in the private sector is also objected by the CEE states; nevertheless, there is an existing EU and other international and national anti-discrimination acquis which private firms have to follow including the duty of fair treatment and provision of equal opportunity; hence this argumentation seems to be better grounded. In my view, the same reasoning applies to the choice of the beneficiaries i.e. whether or not these should be women or under-represented sex. With regard to the above mentioned negative stance of the CEE legislators; as well as the fact that the EU most national laws formulate positive actions, and especially quotas, in neutral form; it seems to be effective to keep this format also in case of presented directive.

There is currently no qualified majority in the council in favour of the proposal, even after several adjustments increasing flexibility of its conditions; and there is no harmonized approach established in this field in the EU.[382] Nevertheless, an increased activity has been marked at the national level and the proportion of women on the boards of the largest listed companies has more than doubled from 12 % in 2010 to 28 % in 2019 thanks to the states which adopted some type of positive measures in this field.[383] Apparently, there is a great difference in results among

382 A qualified majority in the Council requires support of 55% of member states (16 out of 28) representing at least 65% of the total EU population. A blocking minority must include at least four Council members representing more than 35% of the EU population. Croatia, Denmark, Estonia, Germany, Hungary, Slovakia, the Netherlands and the United Kingdom formed a blocking minority against the given proposal.

383 EIGE. Gender Statistics Database. Legislative quotas can be strong drivers for gender balance in boardrooms. Available at: https://bit.ly/3dcITr4.

six countries with binding quotas which currently have 35 % women on boards (France, Germany, Italy, Belgium, Spain and Netherlands); countries using soft measures with 27 % women on boards; and no-action member states with around 15 % women on boards.[384] Reportedly 18 countries currently support the proposal and the changes may occur with the French EU presidency and possible shift of German position which would allow Council to reach a qualified majority for common approach.[385]

2.3.2. Approach of the EU bodies

CJEU

The CJEU has played a crucial role in clarifying and refining the character and the scope of positive actions. Despite the fact that gender positive actions are not frequently used at national EU states, there have been numerous cases dealt by the CJEU in this field already.[386] Interestingly, all early landmark cases have been brought up by men who felt discriminated by positive actions favouring women.[387] Nevertheless, the number of women bringing their cases to the CEJU has increased over the last decades.[388]

There is no comprehensive definition of positive action provided by CJEU, apart from the Opinion of Advocate that General Saggio delivered in case Badeck, where it has been defined as "any action, legislative or administrative, that provides instruments to secure equal social opportunities for a specific, naturally or historically disadvantaged group", which in in the area of equal opportunities in working life generally consists of programmes to encourage the

384 France remains the only EU state with 40 % of female board representation following the adoption of a 40 % quota in 2011 (applicable to all companies with more than 500 employees or revenues over € 50 million). Women account for at least 30% of board members in Sweden, Italy, Finland, Belgium and Germany; while in Cyprus, Greece, Malta and Estonia they make up 10% or less. Nevertheless, the progress at board level is not replicated at the executive level, where women account for just 18 % of senior executives compared to 30 % of non-executives; reflecting the fact that quotas tend to apply only to supervisory boards composed primarily of non-executives. Ibid.

385 European Parliament (2023. *Gender Balance on Boards*. Available at: https://bit.ly/3gS0cQH.

386 Case 312/86 Commission v France [1988] ECR 6315; C-450/93Eckhard Kalanke v FreieHansestadt BremenECR [1995] I-03051; C-409/95 Hellmut Marschall v Land Nordrhein-Westfalen ECR [1997] I-06363; C-158/97 Georg Badeck and Others ECR [2000] I-01875; C-79/99 Julia Schnorbus v Land Hessen [2000] ECR I-10997; C-407/98 Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist ECR [2000] I-05539; Joseph Griesmar v Ministre de l'Economie, des Finances et de l'Industrie et Ministre de la Fonction publique, de la Réforme de l'Etat et de la Décentralisation [2001] ECR I-09383; C-476/99 H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij ECR [2002] I-02891; C-319/03 Serge Briheche v Ministre de l'Intérieur, Ministre de l'Éducation nationale and Ministre de la Justice [2004] ECR I-08807.

387 In fact, positive actions which are supposed to help women are very much a male dependent construct in general. They have been introduced by male into the EU law (80-90% representatives in all EU organs have always been male). They are approved by men in national parliaments (where they form 70% majority on average) and at the same time they are opposed mainly by male dominated organizations (typically representatives of the biggest industries e.g. automobile producers in Germany). Furthermore, cases are more often initiated by male complainants and then decided mostly by male in the highest national courts and as well as in the CJEU which again is a male dominated organ (currently there are only 7 female judges out of 28 in the CJEU).

388 Cichowski, R. (2004). Women's Rights, the European Court, and Supranational Constitutionalism, *Law & Society Review. Vol. 38,* No. 3, 507-508.

appointment and promotion of women.[389] Clearer conditions concerning the use of positive actions have been successively developed in a number of CJEU landmark decisions which are introduced below. The cases provide contextual information which can serve as examples of possible practices.

Commission v. France (1988) - balancing de-facto inequalities

Even though most analysis of positive actions begin with the Kalanke case, the first case in this field, Commission v. France took place almost a decade earlier.[390] In this case, the CJEU took a rather favourable stance confirming "the exception provided for in Article 2(4) [of Directive 76/207/EEC] is specifically and exclusively designed to allow measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life."[391] Hence, the Court confirmed the existence of social inequalities and approved the aim to balance such inequalities as legitimate, thus pointing towards material equality. Nevertheless, the ruling was rather general and did not provide any further insights on conditions of application of positive actions.

Kalanke (1995) – prohibition of automatic preferences

The first landmark case concerning positive actions was Kalanke vs. Freie Hansestadt Bremen (Germany) which introduced a doctrine of prohibition of automatic and unconditional preferential treatment.[392] Mr. Kalanke and his female colleague were both candidates for promotion to a management position in the city's parks department in Bremen which resulted in giving the selection priority to the female candidate in accordance with the Bremen Law on Equal Treatment for Men and Women in the Public Service. Furthermore, it provides that equally qualified female candidates are to be prioritised in sectors where they are under-represented.[393] Mr. Kalanke's appeals reached the Federal Labour Court which confirmed that the Bremen Law was compatible with German constitutional law but had doubts on its compatibility with Equal Treatment Directive 76/207/EC Article 2(1) and 2(4)[394] and seeked a preliminary ruling from the CJEU.

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389 Opinion of Advocate General Saggio delivered on 10 June 1999. Georg Badeck and Others, Reference for a preliminary ruling: Staatsgerichtshof des Landes Hessen- Germany. C-158/97, para 20.

390 Case 312/86 Commission v France [1988] ECR 6315.

391 Para 15.

392 Eckhard Kalanke v. Freie Hansestadt Bremen, C-450/93 [1995], ECR 1-3051.

393 More specifically in sectors where women do not make up at least 50% of the staff in the individual pay, remuneration and salary brackets in the relevant personnel group within a department. The German constitution (Article 33 (2)) includes a specific equality clause which imposes the merit principle to guide any decision on employment or promotion of public employers. Accordingly, the person who is best qualified under a predefined set of qualifications, as assessed by public examinations or by in-post assessment following strictly formal rules, must always prevail. Nevertheless, due to the type of selection criteria, male remain dominant in senior positions. This has led to codification of the "tie break rule" according to which, women could be preferred over equally qualified male competitors in employment and promotion until there were as many women as men in the relevant pay bracket. Schiek, D. (2014), 21.

394 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

> Article 2 of 76/207/EC: (1) For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.
> (4) This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities.

Dagmar Schiek however points out to the fact that the main problem did not lie in the conditions of given German law but in the selection criteria which indirectly disadvantaged women.[395] Apparently, promotion decisions are often made based on "auxiliary criteria" comprising above all seniority and number of dependents.[396] According to her, men are better positioned in both categories, as they typically work without parental leave interruptions and list children and less earning wives as dependents, while women would have to be childless (in order not to interrupt their careers) and have less earning husbands to have more dependents than men. Furthermore, such evaluations are often done by the peers from the same units instead of external independent experts. Since in given case Mr. Kalanke had more dependants and was more senior, it was ruled that his individual situation was not taken into account. Nevertheless, as Schiek points out, such ruling has not challenged structural flaws of the selection process itself. She argues that instead of the codification of the tie break rule personal managers should have been made to abstain from structural discrimination.[397] Accordingly, the CJEU should have scrutinized the discriminatory policies which were replaced by the "tie break rule"; based on simple logic that if there were no discriminatory practices, there would be likely no need for the tie break rule.[398]

Another problem of the case was pointed out by Selanec and Senden, who argue that the case was somewhat problematic in that Mr. Kalanke was actually worse qualified for the job and recalled the tie break based on his social situation. This suggests that the tie break based on sex is only one among possible criteria that can be taken into account;[399] while the Equal Treatment Directive allows only a very limited scope of sex-based preferences such as those aiming to compensate for past discrimination.[400]

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395 Schiek, D. (2014), 21.

396 Ibid.

397 Ibid.

398 Schiek, D. (2014), 21-22.

399 This seems to be in line with Justice Powell's opinion in the US Supreme Court's decision regents of the University of California v. Bakke, 438 U.S.265 (1978).

400 Selanec, G and Senden, L. (2013). *Positive Action Measures to Ensure Full Equality in Practice between Men and Women, including on Company Board.* Luxembourg: Publication office of the EU, 9. Available at: https://bit.ly/3zRc2C1. As pointed out by Havelková, this is also one of the main problems of the judicial revision of ant-discrimination cases in the CR, where national courts apparently do not give more weight and caution to all discrimination bases on prohibited grounds, but treat them in the same manner and even more strictly than any other cases of discrimination. Havelková, B. (2019). Diskriminace z důvodu pohlaví před českými soudy – typologie případů, únikové strategie a strach z chráněných důvodů (Gender Discrimination before the Czech Courts - Typology of Cases, Evasion Strategies and Fear of Protected Reasons). *Jurisprudence 2/2019*. Prague: Law Faculty of Charles University.

The CJEU held that Article 2(4) must be read restrictively and national measures which guarantee women absolute and unconditional preference for appointment or promotions involve discrimination based on sex and are not in accordance with the scope of the Directive. The CJEU aligned its stance with the argument of Advocate General Tesauro, who considered both models of equality – formal and substantive, one argued that equality of opportunities must not be confused with equality in results, which according to him was the case. The ECJ inclined to the formal understanding of equality (equal treatment irrespective of the gender) and strictly refused measures ensuring equality in results. This narrow understanding of equality as equality of opportunities has been one of the most criticised aspects. Overall, the CJEU ruled out absolute and unconditional preferences but did not offer any definition of 'equality of opportunity' or guidelines to the assessment of 'proportionality' of a sex-related preferences.

Marschall (1997) – saving clause

This second landmark case, Marschall v Land Nordrhein-Westfalen, also stems from Germany.[401] Similarly as in Kalanke case, Mr. Marschall a teacher in North Rhine-Westphalia was denied promotion in favour of his female colleague; based on law giving a preference to female candidates if equally qualified and underrepresented in the career bracket, unless specific reasons tilt the balance in favour of male candidates. This last 'savings clause' (Öffnungsklausel) offering margin of flexibility and individual assessment constitutes a major difference between Kalanke and Marschall cases.

In principle, such a 'saving clause' allows the employer to supersede a granted preference given to female candidates based on some other social reasons such as health reasons, carrying duties, or time spent in army duty. Nevertheless, the CJEU did not give any own examples of such important social criteria and left this decision upon national states, with one expressed limit that such reasons must not be directly or indirectly discriminatory against female candidates.

> A national rule which (…) contains a saving clause does not exceed those limits if, in each individual case, it provides for male candidates who are equally as qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the individual candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate. In this respect, however, it should be remembered that those criteria must not be such as to discriminate against female candidates.[402]

Another novelty of this ruling is that the CJEU has expressly recognized possible bias in selection processes stating that even when both "male and female candidates are equally qualified, male candidates tend to be promoted (…) in particularly because of prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently," especially due to pregnancy, childbirth and breastfeeding, as well as further household and family duties.[403] The court further added that a

401 Marschall v Land Nordrhein- Westfalen, C-409/95 [1997] ECR I-6363.

402 Para 33.

403 Para 29-30.

mere fact that “candidates are equally qualified does not mean that they have the same chances”.[404]

Despite explicit recognition of such existing structural problems, similarly as in the Kalanke case, the court insisted on the notion of equality of opportunity instead of equality of results. This question has been largely debated during the proceeding, where numerous actors took part. While the EC, Austria, Finland, Norway, Spain and Sweden supported the German argument that the given measure aimed at equality of chances; France and the UK have considered that its aim was directed at the results, regardless of the savings clause.[405] This innovation of the ruling is though, that the court not only made distinction between the measures supporting ‘equality of opportunity’ and ‘equality of results’ but suggested that the level of the its scrutiny would not be the same in cases of positive actions increasing women’s capacity to compete for employment and those involving distribution of actual employment positions.[406]

Overall, the CJEU held that positive action in this case was in line with the Equal Treatment Directive 76/207/EC Article 2(1) and 2(4), since the employer provided for a 'saving clause'. allowing consideration of objective factors in individual cases. The CJEU confirmed that measures containing saving clauses are not absolute and unconditional providing that they do not discriminate against women.

Besides, the CJEU also provided clearer cumulative conditions under which positive actions are compatible with the European Law. According to the ruling, such actions must a) concern sectors where women are underrepresented; b) concern candidates who are equally qualified; c) consider each candidate individually and objectively; d) supersede granted preference to female candidates if another important social reason tilts the balance in benefit of male candidates; e) not be discriminatory against women; f) aim at eradication of gender role prejudice and at equal opportunities (not results).[407]

Badeck (2000) - balancing quotas

The case Badeck's Application is the third German case, in which Mr. Badeck (CDU member and the First Minister and Attorney General of Hesse) challenged five provisions of the Hesse Antidiscrimination Act allowing different types of gender positive actions, which in his view violated German Constitution and the Equal Treatment Directive 76/207/EC Article 2(1) and 2(4).[408] The law aimed at empowering women in different sectors where they were underrepresented with different types of actions.

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404 Para 31.

405 Para 18-20. Finish government further claimed that mere provision of targeted training and coaching has not been a sufficient tool to change existing misbalance. Para 14-16.

406 Selanec, G and Senden, L. (2013), 11-12.

407 Pare 31-35.

408 Georg *Badeck* and others, Case C-158/97 [2000] ECR I-1875.

First positive action allowed for a tie break preferential treatment for female candidates in the public service sectors where women were under-represented in order to fulfil binding goals. This law granted preferential treatment only for equally qualified female candidates with special consideration of social and personal factors of each candidate including experience which had been acquired by looking after children and family work, time spent in the army service, invalidity, and long term unemployment. On the other hand age, seniority, last promotion, family and marital status, partner's income, part-time work, care-related leaves was not taken into account. The CJEU observed that given conditions, even though neutrally formulated, are rather beneficial to women and aim to compensate for existing inequalities pointing towards material equality.[409] Nevertheless, the CJEU held that such 'flexible result quota' (flexible Ergebnisquote) which gives preference to equally qualified female candidates with individual consideration of all candidates was not unconditional or automatic, and thus compatible with the EU law.

Second action included binding targets for academic university positions (PhD and Habilitation) where women were supposed to be represented at the same percentage as they were represented among the graduates in the relevant disciplines. In this case, the CJEU maintained that fulfilment of binding goals are pre-conditioned by the regulated selection process which has to be in line with the EU acquis (i.e. to fulfil criteria of under-representation, equal qualification, flexible clause, etc.). Hence if such selection is lawful then the result of selecting female candidates and thus fulfilling the quota is equally lawful.[410]

Third action mandated the allocation of at least 50% of the employment training places in the public sector to women with the goal to diminish gender misbalance (unless despite efforts there are not enough female applicants). The CJEU maintained in this case that the given quota is not aimed at employment but merely at the preparation for an employment which has to be followed by the selection process in line with the EU acquis. Thus, given treatment is aimed at balancing structural barriers and providing equality of opportunities. Moreover, men are not excluded from such training – they have actually also 50% of reserved places and they can acquire more if the places are not taken up by women after all efforts. In these provisions, the CJEU sees the flexibility of a given quota.

Fourth action consisted of an invitation for the interview for all equally qualified female candidates in sectors in which they are under-represented. Similarly to previous cases of the training places, the CJEU considered an invitation to the interviews as a chance to succeed not as a guarantee of selection.

Finally, the fifth action set a non-binding 50% quota for female representation in employees' representative, administrative and supervisory (nominated not elected) organs. Selanec and Senden maintain that the Court de facto avoided the question by arguing that the measure was not mandatory since in some cases its implementation would require 'amendment of the relevant

409 Para 30-32.
410 Para 39-44.

law'.[411] This assumption allowed the Court to anticipate that other criteria can be taken into account and to conclude that the measure was acceptable. Selanec and Senden reasoned that the Court was probably not sure if it was prudent to apply the approach for conventional employment to decision-making bodies of commercial companies; which, according to them, casts a shadow of doubt on the Board of Directors Directive.[412]

Overall, the CJEU has approved positive actions in all five cases and concluded that the Hesse women's advancement provisions including the saving clause were lawful, restating its position in the Marschall and Kalanke case. At the same time, the Court did not accept the argument of the Advocate General Saggio who recognized both conceptions of equality as complementary and compatible with the EC law. A great additional benefit of this case is its focus not only on hiring and promotion but also training and interviews.

Abrahamsson - qualification criteria

This Abrahamsson dispute was caused by the positive action policy favouring female candidates in one of the Swedish universities.[413] Mr. Anderson and his three female colleagues applied for the post of Professor at the University of Göteborg and despite the fact that Mr. Anderson was slightly better qualified, the position was offered to a female candidate, based on the university appointments system. This university policy allowed a 'sufficiently qualified' candidate from an under-represented sex to be granted a preference, unless the difference between the qualifications was so great that there would be a breach of objectivity in appointing the woman. The selection benchmarks were based on 'merits' which were assessed by seniority and 'abilities' revealing potential of the candidates.

It needs to be noted that the Court did not object to qualification based on other than purely 'traditional' professional criteria, as it has previously done in the Badeck case. Furthermore, the court acknowledged that 'traditional' assessment criteria often form systematic gender barriers and that it is possible to formulate selection criteria in a gender neutral way which favour women but are still capable of benefiting men as well. Hence, women candidates could be considered 'equally qualified' based on their potential, even if they do not have 'traditional' professional record.

Nevertheless, such positive action must have transparent selection criteria in order to avoid arbitrary misuse and to allow for a proper judicial assessment. Overall, the CJEU held that this Swedish rule is unlawful due to lack of proportionality; but it failed to execute the proportionality test. Furthermore, the CJEU did not elaborate on the question of qualification, its scope, and the methods or criteria of assessment.

411 Selanec, G and Senden, L. (2013), 13.

412 Ibid.

413 Abrahamsson and Anderson v Fogelqvist, Case C-407/98 [2000] IRLR 732 CJEU.

Lommers (2002) – proportionality test

In the case of Lommers, the Ministry of Agriculture of the Netherlands introduced a program to encourage the presence of women within its ranks.[414] This program included partially subsidized nursery places available only to female employees. Mr. Lommers, an employee of the ministry, applied for a nursery place but his application was denied. Mr. Lommers held that the refusal was discrimination based on sex and contrary to Equal Treatment Directive 76/207/EC Art 2(1) and 2(4). In its opinion, the CJEU continued to mark division between formal and substantive equality and held that the plan aiming to achieve substantive equality by reserving spaces in subsidized nursery facilities did not violate the EU law.

Among others, the CJEU emphasised horizontal as well as vertical female underrepresentation and stressed de-facto barriers in form of care leaves in case of women. The court also emphasised that given action did not reserve places of employment but of some work-related conditions which were supposed to eliminate the causes of women's reduced career opportunities.

According to the CJEU, the program was consistent with Article 2(4) given a significant female under-representation in the Ministry and insufficiency of suitable nursery facilities which could discourage female employees.[415] In other words, the court offered a proportionality test suggesting that the preferences in this case were appropriate and necessary as insufficient supply was proved by e.g. waiting lists with female applicants. Moreover, it pointed out the existence of a saving clause which allowed male employees to benefit from the program in individual urgent cases such as single parenthood.

Other EU institutions

Gender equality including the positive actions is promoted especially by the European Commission, backed by the European Parliament, the European Women's Lobby (EWL) as well as national NGOs.[416] Since 2005, the Commission has intensified gender agenda and began a regular monitoring process of gender acquis application in single member states through the network of national legal experts and their regular annual and thematic country reports. The Commission further publishes a regular overview of the European Gender Law;[417] prepares strategic documents such as the Women Charter and controls use of funds from various financial

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414 Lommers v Minister Van Landbouw, Natuurbeheer en Visserij, Case C-476/99 [2002] IRLR 430 CJEU.

415 More on gender and the EU see Guerrina, R. (2010). *Mothering the Union: Gender Politics in the EU*. Manchester: University Press.

416 There is also a range of influential institutions and organs which participate in the preparation and oversight of the EU gender acquis: High-Level Group on Gender Mainstreaming; Group of Commissioners on Fundamental Rights, Non-Discrimination and Equal Opportunities; Inter-service Group on Gender Equality; Network of Experts on Gender Equality; European Network of Women in Decision-Making in Politics and the Economy; Governmental Expert Group in the Field of Non-Discrimination and the Promotion of Equality; Network of Socio-economic Experts; Network of Legal Experts in the Field of Non-Discrimination; European Network of Equality Bodies (EQUINET); Council of Europe Steering Committee for Equality between Women and Men; EU Agency for Fundamental Rights (FRA).

417 European Equality Law Review. Available at https://bit.ly/39Uy2z8.

programs.[418] Furthermore, an autonomous EU body - the European Institute for Gender Equality (EIGE) – was established in 2010 (Vilnius, Lithuania) with the aim to carry out gender studies, to compile gender equality statistics and to monitor implementation of gender equality commitments.[419]

Despite these efforts, the gender equality progress in the EU is rather slow. Based on the latest Gender Equality Index[420] (a tool published by the EIGE) the major gap persists in the domain of power and women's access to the labour market, reflecting the disproportionate weight of care duties borne by mothers.[421] Based on this data and in line with corresponding international legal and strategic instruments, the EC has prepared a new Gender Equality Strategy 2020-2025[422] with the following priority areas: 1) combating gender-based violence and challenging gender stereotypes; 2) boosting women's economic empowerment and ensuring equal opportunities in the labour market, including equal pay; and importantly in our context 3) enhancing equality in decision making in public life.

2.3.3. EU summary

In order to enhance gender equality, the EU has introduced a possibility to use positive actions within the EU as well as national law. First provisions on positive actions concerned only gender equality in working life and they were first introduced by the Equal Treatment Directive in 1976.[423] Treaty provisions were added by the Amsterdam Treaty and they were further strengthened by the Goods and Services and the Recast Directive. The Lisbon Treaty via CFREU extended the possibility to apply positive actions to improve gender equality to all areas.

In comparison to with CEDAW, the EU does not stress past inequalities or temporary character of the measures and its formulation is gender neutral referring to an under-represented sex. This codification also refers to a full equality in practice which suggests material equality and potential equality in results; nevertheless, the CJEU approach systematically allows equality of opportunities only. The use of positive actions at national level is voluntary; and there is no prescription regarding the extent and the kind of positive action that are applied. Similarly, it is

418 Including European Social Fund, European Regional Fund, Progress Program and Daphne Program.

419 In a few years, the Institute has managed to create a comprehensive Resource and Documentation Centre (RDC) enabling access to more than 500,000 resources on gender equality in the EU-28 including policy documents, books, articles, studies and specialised databases. It has realised a number of its own research projects and issued publicly available data. Available at http://eige.europa.eu/

420 Sweden is the best performing country with 83.6 points, followed by Denmark with 77.5. Greece and Hungary have the lowest scores of less than 52 points. EIGE (2019). *Gender Equality Index 2019: Still far from the finish line*. Available at https://bit.ly/2BAmzs2.

421 Among others, the Index shows that 31% of women (against only 8% of men) are working part-time, pointing to their carrying activities.

422 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://bit.ly/3g6yYms.

423 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

up to the states to decide whether and what kind of sanctions they wish to attach to introduced positive actions in order to enhance their effectiveness. Nevertheless, national positive actions need to follow some fundamental limits set by the CJEU case law.

Based on the CJEU case law, it is clear that the Court has been taking a very cautious towards gender positive actions. There are several principles that stem from its ruling so far. Firstly, positive actions might be applied only in sectors with imbalanced gender representations and can support only equally qualified candidates. Secondly, positive actions cannot be unconditional and automatic and must include a savings clause which grants objective evaluation of the individual situation of each candidate. Such a clause allows the employer to override a preference granted to female candidates for some other social reasons such as disability, single parenthood, or time spent in army duty.[424] However, the CJEU has never clarified the list of such overriding issues, and set the only condition that such additional tie breaks cannot be directly or indirectly discriminatory against women. Such a requirement might surely be misused, but if used properly it can be a very useful support to the argument that positive action is a socially balanced and fair policy of promoting equality.[425]

The most problematic and potentially the most restrictive feature of the Court's positive action doctrine seems to be qualification.[426] The CJEU has been consistently confirming that the candidates need to be equally qualified but the criteria of qualification are to be set by the national law-makers and concrete employers. In order to avoid indirect discrimination of women, there has been a shift from the 'traditional' qualification criteria such as seniority, age, date of last promotion to complex individual evaluation including one's ability and potential. Furthermore, potentially discriminatory factors such as family status, partner's income, part-time work, leaves related to childcare or parents-care, marital status are not be taken into account. On the contrary, experience acquired by looking after children and family work, time spent in the army service, or invalidity should be taking into consideration. On the other hand, the CJEU has gradually elaborated on the conditions of the use of positive actions and based on its case law, measures which are proportional, appropriate and necessary, and include saving clauses are in line with the EU laws.

Finally, it is important to evaluate an overall conceptual position of the CEJU to anti-discrimination agenda and positive actions. The main aim of the positive action is to redress asymmetric power relations and as such positive actions cannot possibly be formally symmetric as they would not change the situation. Hence, the positive actions always aim at unequal redistribution of common goods. The question is whether such actions should be understood as a tool to attain equality or as an exception from the guaranteed equality. The CJEU has inclined towards more restrictive understanding and sees positive actions as an exception to equality.

424 Selanec, G and Senden, L. (2013), 12.
425 Ibid.
426 Ibid.

Accordingly, it insists that such actions can only support equality of chances, especially with regard to improvement of formal competitive capacities (e.g. places in training programs or invitation for interviews) for which it applies an intermediate scrutiny comparable to rationality test. In this case it explores the existence of reasonable barriers and reasonable effectiveness of the selected actions. The Court seems to be much more receptive even towards harder forms of positive measures including quotas in this field with argumentation that such measures are always followed by the selection process which needs to be in line with EU law. Nevertheless, in case where positive actions aim towards equality in results (or reserved places) which redistribute certain goods and power more extensively, the CJEU applies stricter proportionality test where existing barrier to equality has to be clearly identified. The Court explores social importance of the distributed good and insists on individual approach, meritocracy, and narrowly tailored action while requiring proof of necessity and effectiveness (e.g. Lommers case).

As far as quotas are concerned, the CJEU distinguishes between the unconditional and automatic 'fixed quotas' and 'flexible quotas' which include saving clause and reflect individual context of the sector (e.g. number of Phd positions depends on the number students - Badeck case). In any case other principles including the underrepresentation of women in a given sector and equal qualification requirements must be fulfilled.

3. Gender equality in the CR

3.1. Gender equality and political and economic decision-making

According to all international reports, the CR lags behind in gender equality in several areas. The World Economic Forum ranked the CR 78th out of 153 countries.[427] Similarly, according to the latest EU Gender Equality Index, the CR ranks 23rd out of 28 countries and it progresses slower than other member states.[428] Related, the EC Report on the Equality between Women and Men in the EU further outlines the most problematic areas in in the CR namely - gender deficit in decision-making posts and very low political leadership in the Czech political parties by women.[429] CR still experiences gender pay gap, and segregation in the labour market or in education, which is accompanied by lower wages for entire feminized sectors such as education, and health care. Additionally, Czech women are not represented in the field of technology; and in this category the CR shows one of the worst results in the EU and in the sphere of power has one of the lowest scores whereas since 2010 experienced even worsened situation.[430]

Furthermore, the report indicates decrease in the employment rate of women with children to 33%[431] compared to women without children; while the European average is only 14%.[432] This data confirms existing structural deficiencies which complicate access of women with young children to the labour market.[433] As part of the European Semester, the CR has repeatedly been advised to make better use of the potential of women with young children in the labour market, in particular by ensuring the availability of quality and locally available care services about children. At the same time, the Czechs have one of the largest identified pay gaps, reaching 19%, caused, among others by lacking legislation concerning the wage transparency.[434] Developments in this area are hindered in particular by the confidentiality clauses in employment contracts, the absence of transparent salary ranges for specific positions,[435] as well as the absence of litigation,

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427 World Economic Forum (2019). *The Global Gender Gap Report 2018*. Available at https://bit.ly/2R53jZa.

428 The CR reached 56 points out of 100; while Sweden has the best rating with 83 points, followed by France, Britain and the Netherlands. Greece finished last with 51.2 points. Since 2005 the CR has improved only by 2 points. EIGE (2020). Gender Equality Index for 2019. Available at https://bit.ly/2qOGpdj.

429 European Commission (2021). *EU Gender Equality Report 2021.* Brussels: European Commission. Available at https://bit.ly/3qlPkgW.

430 European Institute for Gender Equality (EIGE). *Gender Equality Index 2020: Czechia*. (2020). EIGE. https://bit.ly/2SZbXf4.

431 Ibid.

432 EU Gender Equality Report 2021. European Commission. Available at https://bit.ly/3qlPkgW

433 Such as a lack of flexible forms of work including, part-time work, shared work, flexible working time, home office; availability of kindergartens and nurseries, as well as incentives for a fair division of parental leave.

434 The only EU country with a higher pay gap than the CR is Estonia (21.7%), while the best results range between 3-5%. Eurostat (2017). *The Gender Pay Gap Statistics*. Available at https://bit.ly/1Bf20GV. World Economic Forum (2019). *The Global Gender Gap Report 2020*. Available at https://bit.ly/3gZqkYJ.

and trade union actions.[436] The report also draws attention to the generally very low level of case law regarding gender equality, caused, among others, by insufficient sanctions awarded in legal disputes.

Most importantly, Czech women do not participate in decision-making. Despite egalitarian rhetoric, there were hardly any women in political representation under the state socialism. The situation has been slowly improving since the 90s of last century but it is still far from reaching equality. Although women make up half of the Czech population and more than 60% of all university graduates, they represent only about 25% of state officials, 20% of Supreme Court judges, 13% of Constitutional Court judges,[437] 16% of board members,[438] 15% of professors and 25% associate professors.[439] There are currently four female ministers in a fifteen-member Government;[440] and women are also underrepresented in the Chamber of Deputies (20%), in the Senate (22%) and their individual parliamentary organs;[441] as well as in the representation of regional councils (28%) and among mayors.[442] Overall, such data prove the notion 'the higher – the fewer' indicating existence of the glass ceilings.

Development of women's representation in the Chamber of Deputies and the Regional Councils - the ratio between the nominees and the elected

Election year	**1996**	**1998**	**2000**	**2002**	**2004**	**2006**	**2008**	**2010**	**2012**	**2013**	**2106**	**2017**	**2020**
Nominated to Parliament	20,2	20,8		26,3		27,7		27,2		26,9		28,6	
Elected MPs	**15,0**	**15,0**		**17,0**		**15,5**		**22,0**		**19,5**		**22,0**	
Nominated to regional Councils			21,8		26,0		29,2		27,6		30,1		27,6

Above introduced table reveals a few important facts. Firstly, there is rather significant difference between nominated and elected number of women. Based on the research learnings presented in

435 From an interview with Pavlína Kalousová, President of Business for Society, Available from https://bit.ly/2NjTDWP. For more recommendations on wage transparency see: *EC Rec of 7 March 2014 on strengthening the principle of equal pay for men and women through transparency*. Available at https://bit.ly/2oBsINM.

436 In the CR, as well as in other former socialist states, the social partners and collective bargaining do not play a significant role in the field of gender equality.

437 Only two out of fifteen judges of the Czech Constitutional Court are female and no woman has chaired this institution so far. Status as of 1.10.2019. Available at https://bit.ly/2D8VjBo.

438 EIGE (2017). *Largest Listed Companies: Presidents, Board Members and Employee Representatives*. Available at https://bit.ly/2tfIH40.

439 Czech Statistical Office (2017). *Employees by Professional Classification in Public Universities for Natural Persons.* Available at https://bit.ly/2o1I79E. NKC Gender and Science (2019). T*he position of women in science in the EU: Improvement, but slow*. Available at https://bit.ly/2mssQyu.

440 It must be pointed out though that this situation has improved in comparison with previous years and unlike in the past women currently lead some of the power ministries including finance and justice. Status as of 1.8.2020. Government of the CR. Members of the Government. Available at https://bit.ly/39uuGmt.

441 Forum 50%. Representation of Women and Men in Politics. Status as of 1.8.2020. Available at https://bit.ly/2WuAcz7.

442 More in Maškarinec, P., Klimovský, D, Danišová, S. (2018). Politická reprezentace žen na pozicích starostek v Česku a na Slovensku v letech 2006-2014. Srovnávací analýza faktorů úspěšnosti. (*Political representation of women in the positions of mayors in the Czech Republic and Slovakia in the years 2006-2014. Comparative Analysis of Success Factors).* Sociological Journal, 2018/54/4, 529-560.

the situation is typically caused by low placement of women on candidate lists and insufficient financial and political party support. This also confirms the learnings from different countries which use quotas that it is important to set about 10% higher level of quota for nominees then is targeted result i.e. if the aim is to reach 30% female representation, 40% quota for female nominees is required. Secondly, there is no linear and automatic increase of female representation (except of the regional councils) and there are even setbacks in 2006 and 2013. The sociologists researching this area have not identified any systematic pattern for such development; which remains unpredictable and can be worsened at any future point.[443]

The situation in political parties is similar. On average, there are about 35% of female members in political parties and 21% in their leadership;[444] and historically only two women led political parties.[445] So far, no woman has ever served as president or prime minister in the CR.[446] Voluntary quotas are applied only by the Green Party,[447] which is the only party to achieve gender equality with about 40% representation of women. The Communist Party does not have the binding quotas but it uses so called ´binding recommendations´. The CSSD used voluntary 40% quota for five years,[448] but it was cancelled in 2019 due to reported problem 'to fill it'.[449] Most of parties claim to be able to achieve gender equality without the statutory regulation; however, in two decades, none of the party has reached even 30% (with notable exception of the Green Party). According to statistical forecasts, the general target of 40% representation of women in decision-making positions, which is set as a goal in the Government Strategy for Equality between Women and Men for 2014–2020, will only be achieved in 40 years without supporting measures.[450]

The female representation deficit is even greater in the business sector as only around 16% of women are members of decision-making bodies in Czech companies, which is one of the worst

443 Havelková, H. (2006). Jako v loterii – politická reprezentace žen v ČR po roce 1989. (As in the Lottery - Political Representation of Women in the Czech Republic after 1989). In: Hašková, H. Křížková, A., Linková, M. (eds.). *Mnohohlasem. Vyjednávání ženských prostorů po roce 1989. (Polyphonic. Negotiations of Women's Spaces after 1989).* Prague: Sociological Institute of Academy of Science, 25-42.

444 Šprincová, V. (2015). *15 Tips on How to Support Women within Political Parties.* Prague: Government Office of the CR, 6. Available at https://bit.ly/2MhoSCN.

445 Markéta Pekarová Adamová was elected to lead TOP 09 in 2019, and Hana Kordová Marvanová was the chairwoman of the US-DEU for a year from 2001 to 2002. Interestingly, both parties are liberal right-wing oriented.

446 In contrast, women have already served as presidents or prime ministers in a number of the CEE countries, including Bulgaria, Georgia, Croatia, Kosovo, Latvia, Lithuania, Macedonia, Moldova, Poland, Romania, Slovakia, Slovenia, Serbia and Ukraine. The female presidents and prime ministers even formed their own Council of Women World Leaders. Available at https://bit.ly/2Nh8stm.

447 Nevertheless, the Green Party is currently a non-parliamentary party.

448 The statutes of the CSSD contained a provision according to which at least 40% of all candidates for the Chamber of Deputies and regional councils must be women.

449 According to the chairman Jan Hamáček, "it was difficult to find women to participate in conventions where there had to be a quarter of them" and the party will be "able to deal with gender equality even without quotas". Available at https://bit.ly/2osnUur.

450 This forecast was prepared by the Office of the Government of the CR via the FORECAST.ETS function. Available at https://bit.ly/2WkvT99. According to the EU general regulation, the existence of a national strategic framework for equality between women and men is one of the basic conditions for drawing of the EU funds. Strategy 8, https://bit.ly/3sPcNrq.

ratios in the EU that has been growing only very slowly over last decades.[451] Positive measures in the field of women's entrepreneurship are in generally very little used in the CR, although there are already examples of good practices in this area in other EU countries; such as provision of subsidies, loans, tax breaks, and tax exemptions, reductions in social security contributions, educational programs, mentoring and counselling for women entrepreneurs.[452]

Female share of seats on boards of the largest publicly listed companies and share of female managers

	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
CR - female share on boards	12.2	15.9	16.4	11.3	3.5	10.4	10.1	14.5	13.8	18.5	17.2
CR - female share of managers	27.7	25.8	26.2	27.2	27.9	29.5	25.4	24.6	26.8	26.8	-

Source: OECD[453]

The UN Committee on the Elimination of Discrimination against Women and the UN Human Rights Council has repeatedly called for the CR to step up its efforts to address gender inequalities. Similarly the COE has criticized the CR, in particular for existing gender pay gap and the low representation of women in the management of companies, and its Committee for Social Rights (ECSR) has issued a decision in 2020 stating that the CR violated the European Social Charter in these fields.[454]

3.2. Czech anti-discrimination legislation

3.2.1. Principle of equality and antidiscrimination provisions

Equality principle belongs to the main constitutional principles and it is generally understood as the sum of equal rights and obligations, including equality before the law in the absence of any formal privileges.[455] Equal treatment and non-discrimination provisions are codified within Article 1 and 3(1) of the Charter of Fundamental Rights (CFRF),[456] as well as in several articles concerning fundamental rights.[457] Further provisions are included in the Anti-Discrimination Act (Article 2), and other laws, notably in the Labour, School, and Consumer

451 According to the results of the Deloitte report, which maps the situation in 64 countries around the world, the CR lags behind not only the European but also the global average. Deloitte (2017). *Women in the boardroom - a global perspective.* 5th ed. New York: Global Centre for Corporate Governance. Available at https://bit.ly/2Nk14gN.

452 Estonia, Croatia, Italy, Macedonia, Spain and Turkey are particularly active in this regard.

453 Available at https://bit.ly/3c2iniO. More information can be found also at the EWOB. Country Report: Czechia. https://bit.ly/3efRlXQ

454 More information on the ESCR decision is available in the part 1.2.2.1.

455 Pavlíček, V. et al. (2015). Ústavní právo a státověda II. díl - 2. vydání Ústavní právo České republiky (*Constitutional Law and Political Science II. part - 2nd ed. Constitutional Law of the Czech Republic*). Prague: Leges. The first national provisions on equality were codified in the 1920 Czechoslovak Constitution and contained the principle of equality of citizens, political equality, prohibition of racial discrimination, and protection of national, religious and racial minorities. Equality in dignity began to emerge after World War II as an attempt to reconcile differences between people resulting mainly from the advantaged position of aristocracy.

456 Charter of Fundamental Rights, Constitutional Act No. 2/1993 Coll. as amended by Constitutional Act No. 162/1998 Coll. (hereinafter CFRF).

457 Equal right to ownership and its protection (Article 11), equal right to vote and equality of conditions for citizens in access to elect and other public functions (Article 21), equality regardless of nationality and ethnic background (Article 24), equality of parties in judicial proceedings (Article 37(3)), and equality of married and unmarried children (Article 32).

Protection Act.[458] The prohibition of discrimination is also codified in all major international treaties, which are binding upon the CR pursuant to Article 10 of the Constitution. Nevertheless, equality provisions in these sources differ in the scope of protected grounds, protected fields, addressees, and available remedies.[459] As a result potential plaintiffs have certain discretion to choose a legal basis for their complaints and the courts may consider interpretation and review of different articles with diverse intensity.[460]

The main equality provision included in Article 1 of the Charter does not indicate any concrete grounds and it is considered as self-standing provision which may extend prohibition of discrimination beyond fundamental rights to any field regulated by law.[461] The Charter further contains an equal treatment provision in the Article 3(1) with an open-ended list of protected grounds including sex, as well as other thirteen grounds and other status.[462] Unlike the first article, Article 3(1) of the CFRF is interpreted as an 'accessory' right which might be claimed only in combination with other fundamental rights or freedoms,[463] such as right to property (Article 11), right to vote and run for public office (Article 21). Interestingly, sex is listed as the first protected ground but otherwise there are no explicit provisions on equality between men and women. Nevertheless the Charter includes a 'protective' clause which enables special conditions for women at work (Article 29 (1)).

The Anti-Discrimination Act (AA) includes an equality treatment clause in Article 2(3) with a closed list of protected grounds comprising race, ethnic origin, nationality, sexual orientation, age, disability, religion, belief, or opinions. Apparently, selection and order of the grounds differs from the Charter and newly includes sexual orientation, age and disability. The term 'gender' or 'gender identity' are not included in the list, and they are not defined in the Czech legislation;[464]

458 Act No. 262/2006 Coll., Labour Code; Act No. 561/2004 Coll., Schools Act; Act No. 634/1992 Coll., the Consumer Protection Act; Act No. 435/2004 Coll., on Employment; Act No. 99/1963 Coll., Code of Civil Procedure; Act No. 234/2014 Coll., on the Civil Service; Act No. 361/2003 Coll., on the Civil Service Members of the Security Forces; No. 221/1999 Coll., Professional Soldiers Act; Act No. 349/1999 Coll., on the Public Defender of Rights.

459 As far as the protected grounds are concerned, all mentioned sources include a different provision codified either as article with demonstrative list (Article 3(1) of the CFRF, Article 16(2) of the Labour Code, Article 2(1) of the Schools Act); or as closed list (Article 2(3) of the AA); or as general article without an expressly stated grounds (Article 1 of the CFRF, Article 6 of the Consumer Protection Act No. 634/1992).

460 This fragmentation problem was partially (but not ideally) addressed by the resolution of the Supreme Court which held that the AA provisions will be applicable wherever there is no special regulation, which would take precedence. Resolution No. 21 Cdo 5948/2017 Coll. and Decision No. 21 Cdo 2550/2018 Coll.

461 This provision corresponds with Article 1 of the Protocol No. 12 to the ECHR on general prohibition of discrimination, nevertheless the CR has not ratified the protocol so far.

462 Sex, race, colour of skin, language, faith and religion, political or other conviction, national or social origin, membership of a national or ethnic minority, property, birth, or other status.

463 This provision corresponds with Article 14 of the ECHR on prohibition of discrimination.

464 Nevertheless, the term 'gender' was used in a several newer cases usually connected to the asylum requests based on persecution due to sexual orientation (e.g. decisions 6 Azs 36/2010 – 274, 4 Azs 114/2015 – 27, NSS 4 Azs 35/2019 – 69). The texts generally refer briefly to international treaties and documents without further analysis or comments (e.g. UN Convention relating to the Status of Refugees or the UNHCR directive HCR/GIP/02/01). Exceptions can be found only in a few decisions, such as the CCC decision in case of forced marriage and violence against a female Kyrgyz asylum seeker which cites the Special CEDAW Delegation report concerning gender stereotypes, violence against women, abductions and forced marriages in Kyrgyzstan. There are also two newer cases concerning Czech nationals – a case of transgender person requiring the change of the birth number (9 As 61/2018 – 64) and a case of gay parents requiring recognition of the parenthood of a child of two persons of the same sex (CCC 3226/16).

nevertheless, discrimination based on the ground of ‘gender identification’ is considered as discrimination based on sex and it is also prohibited by the AA Section 2(4).[465] Unlike in the Charter, the AA list is exhaustive and does not provide protection for other grounds.[466] Furthermore, special laws can enlarge the scope of grounds, such as the Labour Code Article 2(3) which codifies over two dozens of different grounds.

In general, it is thus possible to allege discrimination based on several provisions:

1. On the grounds of one of the explicitly protected reasons, such as gender or race.
4. On the grounds of 'other status' based on Article 3 (1) of the Charter; which is related to a personal trait or personal choices such as religion or political opinion.
5. On all other grounds of possible differentiation, according to the Article 1 of the Charter.

This classification has been offered by the recent Czech Constitutional Court (CCC) case law,[467] in which the Court also indicated different intensity of judicial review of given categories suggesting that only arbitrary and extreme cases of inequality are usually considered under the first Article. As Barabara Havelková points out, the CCC did not elaborate though on the scrutiny level regarding the protected grounds and other status; and it is generally unclear whether it follows such differentiation in its judgements.[468] Havelková further observes that an extensive list and different sources of codification of protected grounds can paradoxically lower the level of protection against structural discrimination as importance and context of the most pertinent grounds erodes.

As result, the courts often do not seem to recognize the difference between different categories and the fact that discrimination based on explicitly protected grounds (unlike cases of general discrimination) is usually related to historic legal and social disadvantages. Such historical drawbacks result in structural, not only in one-off or transitory problems; and they should be therefore treated with more caution. On the contrary, the courts seem to scrutinise cases of general discrimination with equal intensity if not more cautiously, whereas they restrict the recognition of gender and race based discrimination to extreme and conscious cases.[469] Similarly, Jan Wintr warns that too wide interpretation of ‘other status’ and overuse of the general close Article 1 of the Charter may result in the lack of clarity of the constitutional review criteria where the only guideline becomes the CCC’s own feeling of justice.[470]

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465 Czech law uses the term ‘gender identification’ as gender identity. Koldinská, K. (2019).

466 Such a restrictive approach is in line with the EU approach, which includes the closed list of protected grounds in the primary law (Article 19 TFEU). ECHR codification on the other hand is open and the ECtHR has already admitted other than enlisted grounds such as sexual orientation. Boučková, P., Havelková, B., Koldinská, K., Kuhn, Z., Whelanová, M. (2016). Antidiscriminační zákon komentář (Anti-Discrimination Act Commentary), 2nd ed. Prague: C.H. Beck. 172, 178.

467 Resolution of the I CCC 3271/13 of 6 February 2014; and Decision of the CCC 18/15 of 28 June 2016, published as No. 105/2016 Coll.

468 Havelková, B. (2019). Diskriminace z důvodu pohlaví před českými soudy – typologie případů, únikové strategie a strach z chráněných důvodů (Gender Discrimination before the Czech Courts - Typology of Cases, Evasion Strategies and Fear of Protected Reasons). Jurisprudence 2/2019. Prague: Law Faculty of Charles University.

469 Ibid, 10.

470 Wintr, J. Rovnost a zákaz diskriminace v judikatuře ústavního soudu desátých let – kritický rozbor (Equality and the prohibition of discrimination in the case law of the Constitutional Court of the 1990s - a critical analysis). In Šmíd (2020), 164. According to Wintr, the problem of extension of the scope of matters protected under non-

The principle of equality, as one of principles of fundamental rights and freedoms, can be invoked in vertical as well as in horizontal relations in the sense that a party to a case can use fundamental rights as a legal argument.[471] Nevertheless, fundamental rights as they are codified in the Charter generally apply to the vertical state/person relationship and they are addressed to public authorities who are obliged not to discriminate in the drafting and application of legislation i.e. to refrain from different treatment of persons without legitimate reason. Nevertheless, the CCC interprets such obligation in accordance with the German concept of indirect effect of fundamental rights on third persons ("unmittelbare Drittwirking").[472] Based on this concept judicial organs may consider fundamental rights in horizontal/private law relations through unspecific legal terms (such as 'good morals', 'protection of privacy', 'human dignity') that make an entrance point for constitutional rights and values into private sphere.[473] Nevertheless, indirect horizontal application of anti-discrimination does not guarantee adherence to this principle in private relations but only influences its interpretation in judicial proceedings.[474] This is where the AA along with provisions of different acts strengthened direct observance of equality principle in horizontal relations. Such observance is important especially in the field of work, education, and services which could effectively exclude certain groups of population from practical economic and social life without imperative of non-discrimination.

The EU Anti-Discrimination Acquis also introduced transfer of the burden of proof (codified based on Article 133(a) of the Civil Procedure Code) which could be understood as positive action supporting the party who allege discrimination. Nevertheless, the CCC did not fully accept such interpretation and found that the actual transfer of burden of proof would be contrary to the right to equality of the participants in the proceedings.[475] Based on its interpretation the burden of proof is shared, whereas the plaintiff must "not only assert but also prove that he/she was not treated in the usual, i.e. disadvantageous, manner".[476] In its later decision, the CCC pointed out that the position of an employee is usually considerably weaker at the work-place and that "it is therefore not appropriate to require from an employee to submit such evidence to which he or she cannot have access or which he or she cannot dispose of."[477] Nevertheless, such a stance is not generally shared in practice and the courts often require inadequate evidence in form of the hard evidence from the claimant, especially in the area of employment. Observance of non-

accessory Article 1 of the CFRF resides in the fact that the review of 'arbitrariness' does not have any reasonable criteria and it is on its own a subject to a rather arbitrary consideration of the CCC. Wintr gives an example of differentiation between low-income and high-income retirees in connection to the right to property (Decision of the CCC 8/07, published as No. 135/2010 Coll.). According to the CCC, such differentiation does fall under 'other statute' based on Article 3(1) of the Charter; nevertheless, the CCC continued with the test of non-accessory equality under Article 1 CFRF and considered the 'hopping' tax construction a manifestation of arbitrariness.

471 Koldinská, K. (2019). How Are EU Rules Transposed into National Law? Country Report. Gender Equality. Czech Republic. Luxembourg: Publication Office of the EU, 7. Available at https://bit.ly/3hA6B0g.

472 However, according to the CCC private parties can also exceptionally become addresses of such rights within horizontal relations. Decision of the CCC 38/06 of 6 February 2007, published as No. 84/2007 Coll.

473 Boučková et al. (2016), 24-25.

474 Ibid.

475 Decision of the CCC 37/04 of 26 April 2006, published as No. 419/2006 Coll. on the burden of proof in discriminatory disputes.

476 The plaintiff is supposed present the facts from which it can be concluded that there has been direct or indirect discrimination on the part of the, while the defendant is obliged to prove that the principle of equal treatment has not been violated. However, this rule only applies to the reasons and areas explicitly mentioned in Article 133(a) of the Civil Procedure Code. Koldinská, K. (2019).

477 Decision of the CCC III 880/15 of 8 October 2015, published as No 182/79, 59 Coll.

discrimination principle can be legally secured either through the private method of regulation (such as an apology, compensation for damages or non-pecuniary damages which are included especially in the AA) or public sanctions (such as fines or prohibition of activity; e.g. in Labour or Consumer Protection Act where discrimination is considered a tort).[478]

One of the main problems is a low level of litigation and the use of AA resides in recognition of non-sufficient remedies by the courts which rarely include financial compensation for non-pecuniary damages and thus effectively dissuade potential complainants.[479] This practice is also contrary to the principle of the effectiveness of the European law, according to which, an imposed sanctions should be effective, proportionate and dissuasive; and victims should be granted adequate compensation. In this respect, the problem is partly caused by the wording of the AA (Article 10), which stipulates that a discriminated person has the right to monetary compensation for non-material damage, only if redress of the abandonment of discrimination and the provision of non-monetary satisfaction are considered to be insufficient.

3.2.2. Codification of positive actions

Similarly to the term ´gender´, the term ´positive measure´ (or its equivalent such as affirmative or balancing measure) is not used in current Czech legislation. There are several provisions in the AA and the Labour Code, which could be considered positive measures, even though their scope, protected grounds and conditions vary significantly. In order to ease comparison of different elements of these provisions a table break-down into basic categories is introduced bellow.

Source	Type of measure/field	Protected grounds	Obliged subject	Conditions
5 (2) AA	- Provision for equal treatment shall mean the adoption of **measures that are a precondition for effective protection** against discrimination - and that can be required, taking into consideration good morals, and given the circumstances and personal situation of the party which is to provide for equal treatment; - **provision for equal opportunities** shall also be considered as provision for equal treatment.	- unspecified	-unspecified	- good **morals** **- circumstances** **- personal situation**
5 (3) AA	In matters of the **rights and access to employment** and access to an occupation, business, or other self-employment, working activities and other paid employment, including remuneration, **employers shall be obliged to provide for equal treatment** under paragraph 2 above.	- unspecified	**- employers**	- good **morals** **- circumstances** **- personal situation**
7 (1) AA	**- Difference of treatment** on grounds of **sex, sexual orientation, age, disability, religion, beliefs, or opinions** - in the matters specified in Section **1 (1) (f) to (j)** (social security, healthcare, education and training, and access to	**- sex, sexual orientation, age, disability, religion, beliefs, or opinions**	- unspecified	**- objective justification by** **- legitimate aim** **- appropriate &**

478 Gerloch, A. (2013). Teorie práva (Theory of Law), 6th ed. Pilsner: Aleš Čeněk, 116–118.

479 The research carried out by the Public Defender of Rights in 2015 showed that the average amount of required compensation for non-pecuniary damage was approximately CZK 260,000, while the highest awarded amount was only CZK 51,000. Šabatová, A., Polák, P., Šamánek, J. et al. (2015). *Diskriminace v ČR: oběť diskriminace a její překážky v přístupu ke spravedlnosti: Závěrečná zpráva z výzkumu veřejné ochránkyně práv* (*Discrimination in the Czech Republic: Victims of Discrimination and Its Barriers to Access to Justice: Final Report of the Ombudsman's Research).* Brno: Office of the Public Defender of Rights, 93-96.

	public goods and services) -shall not constitute discrimination, if the difference of treatment is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.	- in social security, healthcare, education and training, and access to public goods and service		**necessary** means
7 (2) AA	- Measures aimed at **preventing or compensating for disadvantages** resulting from a person's **membership of a group of persons** defined by any of the grounds specified in Section 2 (3) - and **ensuring equal treatment and equal opportunities** for that person shall not be considered as discrimination.	- race, ethnic origin, nationality, sex, sexual orientation, age, disability, religion, belief or opinions and, EU regulations on freedom of movement for workers, & nationality	- unspecified	- unspecified
7 (3) AA	- In matters of access to **employment or an occupation**, the measures under paragraph 2 above may not result in the favouring of a person whose qualities for the performance of employment or an occupation are not higher than those of other persons assessed at the same time.	- race, ethnic origin, nationality, sex, sexual orientation, age, disability, religion, belief or opinions and, EU regulations on freedom of movement for workers, & nationality	- unspecified	**-comparable qualities**
16 (4) Labor Code	- **Different treatment** shall not be considered discrimination if the **nature of the work activities** implies that such difference in treatment is an **essential requirement necessary for the performance** of the work; the purpose pursued by such an exception must be justified and the requirement proportionate.	- unspecified	**- employers**	**-justified purpose** **-proportionate requirement**
	- **Measures** the purpose of which is to justify the **prevention or compensation of disadvantage**s resulting from the membership of a natural **person in a group defined by one of the reasons** stated in the AA shall also not be considered discrimination.	- race, ethnic origin, nationality, sex, sexual orientation, age, disability, religion, beliefs, or opinions; and, EU regulations on freedom of movement for workers,nationality	**- employers**	-unspecified

If we compare given categories, it is clear that the 'preventive' measures included in Article 5 would fall under gender neutral category of positive actions in a 'broader sense' or under 'soft measures', as they do not provide for different treatment of any specific group, but may contribute to an increased gender equality in a given organisation/institution in general.[480] Such actions could possibly include the provision of internal complaint mechanism and mediation, internal guidelines, gender audits and plans, work-family balancing measures, etc.[481] The formulation of this article is rather progressive - it actually indicates that positive measures, in a broader sense, function as a 'pre-condition' of effective protection against discrimination and explicitly states that the provision of equal opportunities are part of equal treatment. It is clear from the formulation that the measure should be proportional to individual resources of the duty bearer, even though a duty bearer and more detailed conditions are not clearly defined.[482] Following paragraph (3) is more specific as it obliges employers to take such measures in matters of employment, including access to employment. Despite the vagueness of these provisions,

480 This article complies with the Article 157(4) TFEU: "With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting 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."

481 Boučková et al. (2016), 266-267.

482 Ibid, 269.

gender positive actions could possibly be part of such measures, as long as they aim at securing equal chances and do not result in excessive burden. Their further conditions could be interpreted in conjunction with other AA provisions, especially Section 7(2), (3), and the Labour and Employment Act; which also regulate the duties of employers to secure fair treatment at work.

Article 7, on the contrary, expressly enables different treatment of certain groups based on their common characteristics (sex, sexual orientation, age, disability, religion, belief, or opinions) in the field of social security, healthcare, education and training, and access to public goods and services.[483] Thinkable examples could include social advantages for disabled or retired people, special healthcare, wellness or fitness centres for women, senior clubs, religious schools, etc. Nevertheless, such exceptions are only allowed if they are proportional and objectively justified.

Finally, article 7(2) and (3) represent a positive measure in a stricter sense or a 'hard measure' as its aim is to prevent or to compensate for disadvantages resulting from a person's membership in a group of persons in order to ensure their equal treatment and equal opportunities. This formulation is the closest to the compensatory and preventive character of positive actions as they are defined by the CEDAW (Article 4) and CERD (Article 2), with the difference that the temporary character of the measures is not expressly stipulated; but which should be respected as both treaties are binding upon the CR. Unlike in the UN and EU Acquis relating to positive measures, the AA scope of protected grounds is rather extensive covering all eleven grounds granted by the AA (Section 3[2]), even though not all named groups have experienced historical and structural disadvantages in the Czech context.

Furthermore, both articles are formulated negatively as an exception from the protection of basic human rights and as such need to be interpreted narrowly. Such formulation is in line with the restrictive CJEU case law which is partially reflected in the Article 7(3) stating that preferential measures "may not result in the favouring of a person whose qualities for the performance of employment or an occupation are not higher than those of other persons assessed at the same time". Even though the formulation seems to point to the EU case law, the wording is rather unusual as it suggests that the person who is to receive a preferential treatment has to have 'higher' qualifications than other candidates. Such a requirement does not seem to be in line neither with the formulations and interpretation of international law nor with the aim of the positive action itself. The situation in which a person from a disadvantaged group with higher qualification then other competitors is not selected for the position, would point to direct discrimination. On the other hand, if such a person is selected then the selection is based on his/her higher qualifications; and no preferential treatment will be needed in such case. Based on the CJEU case law, positive actions serve as decisive 'plus point' in support of individuals from disadvantaged groups in case of selection among 'equally qualified' candidates. So, the formulation of the Section 7(3) should rather be:

> In matters of access to employment or occupation, the measures under paragraph 2 above may not result in the favouring of a person whose qualities for the performance of employment or an occupation are lower than those of other persons assessed at the same time.[484]

483 In compliance with Article 5 of Directive 2000/43; Article 7 of Directive 2000/78; Article 6 of Directive 2004/113; and Article 3 of Directive 2006/56.

484 Such interpretation is in line with the Ombudsman's conclusion in case of different treatment that will be discussed in the next chapter.

Overall underlying purpose of such measures is to consider specific needs based on protected grounds and/or to empower disadvantaged groups. Hence, 'different' treatment in this context cannot reside in a worse treatment as this would practically point out to the discrimination according to the Section 2(3) of the AA. Despite the fact that the codification of conditions in provisions of such treatment is not consistent, it is expected that adopted measures will be in line with the UN, the COE, and the EU interpretation; as well as the doctrine developed by the CCC.

It is important to note that there is no common approach in terms of terminology. The Anti-Discrimination Act does not explicitly use the term 'positive action' but it refers to two types of 'measures' a) "that are a precondition for effective protection against discrimination" in general (5(2) AA); or b) "that are aimed at preventing or compensating for disadvantages from a person's membership of a group of persons"[485] (7 (1) AA).

Czech legal experts mostly refer to the term 'positive measure' which is generally understood as "any form of proactive measure designed to benefit members of a disadvantaged group";[486] while the Ombudsman uses the term 'affirmative action' in his/her reports,[487] and the governmental legal proposals refer to 'balancing measures'[488]. The Czech Constitutional Court (CCC) uses the term 'preferential treatment'[489] when it refers to positive actions in favour of a certain group (e.g. miners). On the contrary it uses the term 'positive action' when repealing individual legal provisions which should be replaced by the activity (positive action) of the legislator in order to eliminate unconstitutional gaps in the law.[490] Other courts also frequently use the term 'positive measure' in connection with the state obligation to ensure an effective exercise of the guaranteed rights.[491]

The term 'quotas' have been so far used only in connection with economic cases such as for example landmark milk or sugar quota cases.[492] The quota system has been also used by the legislator in the Employment Act (para. 81); according to which employers with more than 25 employees are obliged to hire persons with disabilities in proportion of 4% against other employees. This mandate presents a quota in practise, even though the legislator has not used the term itself in the law.

Overall, there is obviously no common approach to the terminology used and it is therefore important to analyse the terms according to their aims and context. Interestingly, the Czech

485 On grounds of race, ethnic origin, nationality, sex, sexual orientation, age, disability, religion, belief or opinions and, in legal relationships governed by the directly applicable regulation of the European Union on freedom of movement for workers, also on grounds of nationality.

486 Kvasnicová, J., Šamánek, J. et al. (2015). *Antidiskriminační zákon. Komentář. (The Anti Discrimination Act. Commentary)*. Prague: Wolters Kluwer, 248.

487 E.g.

488 E.g. The Governmental Resolution No.1056/2014 from 15 December 2014.

489 Decision of the CCC 15/02 of 21 January 2003, published as No. 40/2003 Coll.on estate disability and pensions (benefits for mining professions).

490 Decision of the CCC 83/06 of 12 March, 2008, published as No. 116/2008 Coll. on constitutional compatibility of the Labour Code, Pl.ÚS 15/04

491 I. ÚS 2315/15 IV.ÚS 2538/11, II.ÚS 405/12

492 Decision of the CCC 5/01 of 16 October 2001, published as No. 410/2001 Coll. (Milk Quota); Decision of the CCC 45/2000 of 14 February 200, published as No. 96/2001 Coll. (Sugar quotas I); Decision of the CCC 39/01 of 30 October 2002, published as No. 135/25 Coll. (Sugar Quota II), Decision of the CCC 50/04 of 8 March 2006, published as 154/2006 Coll. (Sugar quotas III).

Chamber of Deputies (which has so far been negative on the use of gender positive actions initiatives including quotas) provided one of few examples of conscious reflection regarding the terminology and tried to clarify the term ´positive measure´ in a comparative perspective in its resolution from 2012.

> Positive measures (affirmative action or positive action in English), sometimes translated into Czech as negative discrimination compared to the original sense, include a wide range of measures by which the state seeks to improve the position of de facto disadvantaged groups who are in an unequal position compared to others groups. Positive actions are thus mainly related to material equality; which is applied if the means of formal equality do not lead to the desired objective. Positive action are used by the legal systems of many states; especially those in which some demographics faced racial or caste discrimination, such as in the USA and India and in South Africa.[493]

Given formulation also reveals an attempt to connect the term ´positive action´ with material equality; even though fulfilment of formal equality likewise requires an active approach on the side of legislators and employers. Another tendency is to connect the use of positive actions with ´other´ fields such as race and caste and 'other' countries such as USA or South Africa i.e. to point out to the racial and caste segregation problems that are not very common in our society (apart of Roma population), in so called 'othering strategy'. No example of gender positive actions have been given despite the fact that gender positive measures in politics, business and other fields have already been widely used in Europe as well as in other regions at the time of issuance of this resolution.

This resolution also pointed out to the quite common problem connected with translation of international legal documents where even the slight differences in translation of the key terms could result in different connotation. The resolution points out to an improper use of the term 'positive discrimination' in the Czech translation of the draft directive COM (2012) 614,[494] while pointing out that the conceptual feature of discrimination is disadvantage; on the contrary, the conceptual feature of "positive measure" is the benefit provided to groups that are still disadvantaged.[495] To conclude a more conscious alignment regarding the use of technical terminology in this field would certainly be beneficial for an enhanced legal certainty.

3.2.3. Problems with application of anti-discrimination acquis

It is generally recognised that development of the Czech Anti-Discrimination and gender legislation was determinedly influenced by gradual implementation of the EU Acquis, especially during the accession period. Nevertheless, the process of transposition was rather incoherent and fragmented EU provisions into various legal regulations. The transposition was supposed to be unified by the Anti-discrimination Act (AA) which aimed to comprehensively incorporate existing anti-discrimination acquis, nevertheless its approval has been the subject of almost a decade of negotiations due to negative stance of the Senate and president Vaclav Klaus. The AA was finally approved in 2009, when the Czech government was already threatened with sanctions by the EU. The AA introduced all main requirements of the EU Anti-Discrimination Acquis while

493 Czech Chamber of Deputies (2012). *274. Resolution of Committee on European Affairs of the 39th meeting on 6 December 2012. Prague: Czech Parliament*, Prague: Czech Parliament, 1-2. Available at: https://bit.ly/3gP8WXU.

494 Contrary to the terms introduced in the literature and in official translation of this term in English, Italian, French and Spanish versions of draft directive.

495 Bobek M., Boučková P., Kühn Z. (2007), 22. On the topic, see also e.g. Havelková B. (2007). *Equality in the Remuneration of Women and Men*. Prague: Auditorium.

providing for definitions of direct and indirect discrimination, harassment, and sexual harassment, as well as positive measures.

As far as sectors are concerned, the AA prohibited discrimination in a number of areas including employment, access to employment, health and education, social security and social benefits and services. The oversight of the anti-discrimination agenda has been entrusted as an additional task to already existing institution of the Ombudsman and the relevant provisions were added to other national acts. Presently, it is possible to conclude that the CR has formally transposed most of the European gender equality acquis. Nonetheless, potential of the AA and the EU gender acquis is not used in the CR due to a number of reasons.

One of the problems is on the side of the victims who are reluctant to report discrimination and to initiate judicial proceedings mainly due to lack of information and resources, mistrust in justice system and fear of retaliation and social exclusion.[496] Yet, numerous barriers lie on the judicial branch which apparently avoids applying the AA and anti-discrimination law based on protected grounds. Instead, the courts focus rather on formal questions in order to avoid deciding on merits and they are reluctant to award financial compensation. According to Zdeněk Kühn, this behaviour is determined by several factors: the historical development of continental law, a small number of anti-discrimination lawsuits, insufficient knowledge of Anti-Discrimination Law amongst lawyers and judges, social conservatism, and lack of public debate.[497]

One of the main problems seems to be that the judges are still not entirely familiar with the concepts of the EU Anti-Discrimination Law as they are embodied in the AA and they have a tendency towards exceeding formalism, including literal interpretation, and mechanical application of the law; which is very problematic.[498] According to Barbara Havelková, such formal approach is sufficient in cases of the simplest anti-discrimination principles, such as application of imperative to treat the same persons/situations in the same way, which can be applied mechanically. Nevertheless, more complicated concepts such as indirect discrimination and revers burden of proof are often misapplied in detriment of complainants.[499]

Another reason might be the fact that the AA refers to more serious cases of discrimination and/or structural social problems and the courts probably do not wish to point out to such malfunctions.[500] The courts thus rather rely on the tested sources such as anti-discrimination provisions of the constitutional order and international treaties (CFRF Article 1 and 3, ICCPR Article 26, and ECHR Article 14) or special laws such as Labour Law; and they are more open to find breaches of the general principle of equality.[501] As result, application of the AA in decisions

496 Fellegi (2020). Rovnost žen a mužů v České republice – jak dospět od formální úpravy k praktické aplikaci (Equality between Women and Men in the Czech Republic - How to Move from Formal Regulation to Practical Application). In Šmíd, M. (eds.): *Právo na rovné zacházení: Deset let antidiskriminačního zákona (Right to Equal Treatment. Ten Years of Anti-Discrimination Law),* 66-105. Prague: Wolters Kluwer. Available at: https://bit.ly/3oMIjDZ.

497 Ibid.

498 Havelková, B. (2019), 45. Havelková points out to three types of formalism which serve as a tool to avoid decisions on the merits in anti-discrimination disputes and which are to some extent the legacy of socialism: (a) overly "formalistic" decision-making based on strict linguistic interpretation; (b) avoiding material issues by emphasizing formal matters; (c) a "formal" understanding of equality.

499 Ibid.

500 Ibid.

of the Czech courts is minimal; some 70 cases were indexed so far by the highest courts;[502] and even less cases concern discrimination on the basis of gender (only about 15 cases).[503]

Overall, it seems that that anti-discrimination agenda is largely understood as mere protection against arbitrariness on the part of public authorities in constitutional or administrative decision-making and as a general requirement for fairness and consistency of decision-making in private law relations. Nevertheless, the judicial outcomes fail to show understanding that one of the main aims of the anti-discrimination law is an increased supervision in cases of suspected grounds such gender or race, typically associated with de facto structural disadvantages.[504] On the contrary, discrimination on the protected grounds is interpreted and applied far more strictly and the Czech courts rule on it principally only in cases of the most flagrant direct and intentional discrimination while omitting indirect and unintentional discrimination, contrary to the objective of international anti-discrimination acquis.

Hence, most cases concerning gender discrimination did not succeed in the first instance already. Furthermore, in a few cases were discrimination was confirmed, only an apology without compensation for non-pecuniary damage has been awarded (which does not cover even the high costs of proceedings). Such outcomes result in a wishes circle as they dissuade victims from complaining. It is important to keep these problems in mind as such overall negative political and judicial attitude towards anti-discrimination acquis can have decisive influence on potential use of positive actions. Employment of positive measures namely presupposes a) recognition of historical and structural discrimination; and b) willingness to adjust it on a political, judicial and social level.

As far as the position of the CCC is concerned, it seemed to be generally rather Euro-friendly upon the EU accession. The CCC, unlike many other regional constitutional courts which would be including the German, Polish or Slovak ones, mostly upheld the EU laws and the CJEU interpretation. The CCC for example upheld compatibility of the codification of the reversed burden of proof[505] (which could be considered as a positive action in a broader sense); approved the supremacy and direct effect of the EU laws in the "sugar quota case;"[506] indorsed a general admissibility of producers' quota in the "milk quota case";[507] and declared domestic application

501 For example, in case K. G. v. Charles University, the Supreme Court expressly instructed the applicant to file her objection of invalidity of termination of employment within the framework of labour law instead of anti-discrimination law. Judgment of the Supreme Court of 16 January 2015, No. 21 Cdo 1165/2013.

502 By the end of 2019, the CCC indexed the AA in 20 decisions, the Highest Administrative Court in 3 decisions, and the Supreme Court in 48 decisions (the SC interprets the AA more often due to its focus on civil and labor law agenda). Pospíšil, I. (2019). Deset let Antidiskriminačního zákona v judikatuře českých vrcholných soudů (*Ten Years of the Anti-Discrimination Act in the Case Law of the Czech Supreme Courts).* Presentation wihtin the Conference Anti-Discrimination Law 2009-2019 - 10 Years to Fairness organised by the Office of the Ombudsman on 3 October 2019. Prague: Senate of the CR. Conference material is available at: https://bit.ly/3sWU6Ry.

503 Havelková, B. (2019), 2.

504 Ibid, 44.

505 Decision of the CCC Pl. ÚS 37/04 of 26 April 2006, Coll. No. 419/2006 Coll. on burden of proof in discriminatory disputes - application for annulment of Section 133a (2) of the Code of Civil Procedure.

506 Decision of the CCC Pl. ÚS 50/04 of 8 March 2006, published as No. 154/2006 Coll. on sugar quotas III - "So far, if".

507 Decision of the CCC of the CR Pl. ÚS 5/01 of 16 October 2001, published as No. 410/2001 Coll. on milk quotas.

of the European Arrest Warrant as compatible with the Czech Constitution.[508] Nevertheless, such attitude does not seem to concern gender discrimination cases. Thus two paradigms of behaviour are present in the CCC and Czech courts' approach in general. Firstly, there is a 'binding v. non-binding dichotomy' typical for post-socialist judicial formalism and textual positivism, when the EU law is likely to be upheld only when in binding form. Secondly, even in cases when the EU law is expressly upheld, the courts (consciously or unconsciously) manage to avoid an application of some fundamental anti-discrimination rules.

3.3. Approach of the Czech courts and the Public Defender of Rights to gender equality and positive actions

Next, the attitude of different state branches including judicial, legislative and executive will be analysed in order to detect position and argumentation connected with positive actions which could enable or hinder their application.

3.3.1. Approach of the Czech courts

As positive actions, especially in their harder form, are barely used in the CR, following a broader equality case law of the Czech Constitutional Court (CCC), the Supreme Administrative Court and Ombudsman will be introduced in order to track some basic tendencies of the Czech state organs' approach to the principle of equality and to the use of positive actions. Some of the most important CCC cases, in which it developed the main postulates regarding the principle of equality concern interpretation of the Articles 1 and 3 the CFRF but also other CFRF's rights and freedoms, most often in connection with other ordinary Czech laws. The cases will be introduced chronologically in order to indicate development of the courts' attitude in the given field.[509] The aim of this analysis is to examine the approach of the Czech courts to anti-discrimination law and discrimination as widely as possible, including marginal statements (obiter dicta) and the form in which the facts of cases are ascertained, evaluated and presented.

Pension I – retirement pensions and tax increase (1992)

The first case pension i – retirement pensions and tax increase (1992)[510] does not concern gender, it is however one of the earliest post state-socialist decisions of the Constitutional Court of the Czech and Slovak Federative Republic, in which the Court came up with the crucial equality doctrines. The case was initiated by a group of deputies who argued that the adoption of the State Budget Act in 1992 and the amendment of some other related laws which increased taxes on recipients of retirement pensions. According to them such act constitutes a breach of several articles of the CFRF as well as the international treaties binding on the CR. In its decision, the CCC specified that equality is a relative principle which is "not understood as an abstract category, but it is always attributed to a certain legal norm, conceived in the mutual relationship of different subjects". Thus, the state does not guarantee absolute equality in each aspect; and

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508 Decision of the CCC Pl. ÚS 66/04 of 3 May 2006, published as No. 434/2006 Coll. on European arrest warrant (Euro Arrest Warrant).

509 The order is based on the date of the decision of the Court in the last instance.

510 Decision of the Czech-Slovak Constitutional Court 22/92 of 8 October 1992, published 22/92 of 8 October 1992as No. 11/1994 Coll.

equality, as conceived by modern constitutions, requires elimination of only unjustified differences.

According to the Court, the application of equality principle can be limited but not arbitrarily, i.e. it has to be justified by rational and objective reasons and with the reference to public interest: "If the law determines the benefit of one group and at the same time imposes disproportionate obligations on another group, it can only happen with reference to public values (...)." The CCC stipulated that in principle, it cannot be ruled out that the legislator sets higher taxes for more resourceful subjects; it cannot, however, place a greater burden on economically and socially weaker subjects. It means that possible gender positive action would be acceptable if it aimed to eliminate unjustified differences and would be backed by rational and objective reasons with the reference to public interest; while not affecting economically and socially weaker subjects.

Compensation for victims of Nazi prosecution (1995)

The second case regarding compensation for victims of Nazi prosecution (1995) concerns indirect discrimination in which the complainant (a widow after the direct victim) sought the payment of one-time remedy for direct and indirect victims. [511] The compensation was denied due to non-fulfilment of the condition of being married to a directly affected person at the time of prosecution. According to the Parliament of the CR, this criterion has been approved due to financial reasons in order to remedy only 'the most affected' persons. The plaintiff alleged that the requirement of the existence of marriage contradicts with the principle of equality guaranteed in the CFRF. She argued that this condition could not be met due to strict Germanization and existing laws; while adding that she married her partner as soon as the laws enabled it and lived with him until his death. The plaintiff also referred to the previous CCC judgment in which the condition of permanent residence required for entitlement to out-of-court rehabilitation was deemed unjustified.[512] In this case, the CCC held that a permanent residence should be used primarily for the record keeping purposes in the field of public law, while it considered rehabilitation as a private law regulation. Although the right to freedom of movement guaranteed by Article 14 (1) of the CFRF was not challenged, the CCC concluded its violation. Furthermore, the CCC held that the condition of permanent residence established inequality between persons, who were to acquire ownership, without objective or rational reasons.

Remarkably in the present decision, the CCC alleged that the contested provision did not infringe equality, as it laid down the same conditions for all subjects and did not require any special conditions on particular individuals or groups of subjects. Furthermore, the CCC held that the requirement of duration of marriage was a part of 'definition of entitled persons' and not just an 'additional category' as in case of permanent address. In conclusion, the CCC admitted the hardness of the law in the case, but did not find any breach of equality. This is a rather surprising normative condition as well as judicial conclusion, as it basically approves direct discrimination between indirect victims and imposes condition of conventional marriage to prove existence of the partnership. Apparently, those who lived and suffered along with direct victims but were not fulfilling the cultural norm of being formally married, were excluded from the scope of entitled persons. Assuming that most of the direct victims were men, such conditions could, gender-wise,

511 Decision of the CCC Pl. ÚS Pl. ÚS 47/95 of 2 April 1996, published as No. 122/1996 Coll. on the issue of equality - conditions for compensation to victims of Nazi persecution.

512 Decision of the CCC Pl. ÚS 3/94 of 12 July 1994, published as No. 164/1994 Coll. on restitution - abolition of the condition of permanent residence to determine the entitlement.

indirectly affect the whole group of not only unmarried female, but also male partners. While at the time of prosecution, there were probably not too many partners living out of the wedlock, to impose such a condition in present and to interpret as ‘a part of definition of entitled person’ points out to a great conservative cultural bias of both norm-makers as well as judges. While it is clear that the condition of marriage is the easiest and the most common proof of direct link between the victims and their partners, a proportionality test has not been performed to verify whether other evidence, besides marriage, could have been considered as an alternative.[513] Thus, a special treatment has been accorded for the group of victims of past inequalities but only those who fulfilled the condition of the traditional cultural norms.

Milk and sugar quota cases (2001-2006)

One of the few examples where a quota system was a subject of judicial review is in the economic field, notably in landmark milk and sugar quota cases.[514] In these quota cases, production limits were found legitimate with regard to the need to comply with the EU regulations and the need to stabilize production and prices on the market. Based on the regulation, support programs were also introduced for ‘non-productive’ functions of agriculture aiming at the protection of the environment. Even though it might not be apparent at the first sight, there are a few parallels with the use of gender positive actions. Firstly, it is clear that the Czech legislators as well as judicial bodies have already dealt with quantitative prescriptions in the form of quota and accepted it for the sake of compliance with the EU laws. Furthermore, the supportive environmental programs have been approved in this case despite apparent ‘non-profitable’ nature. Analogically, much of the reasoning could be used in the case of application of gender positive actions including quotas.

Pension II – estate pensioners (miners’ disability pension) (2002)

The second pension case pension II – estate pensioners (miners’ disability pension) (2002) does not concern gender but it is an interesting decision in the field of positive measures.[515] The plaintiff (Regional Court in Brno) aimed to annul the Pension Insurance Act’s provisions allowing mineworkers to claim disability (and accompanying allowances), while being involved in a regular gainful activity; an option which was not offered to other insured persons.[516] Apparently, alleged intention of the legislator was to take into account the difficult employability of the miners upon retirement. According to the plaintiff, such advantage was disproportioned and unjustified in comparison with some other groups, notable physically or mentally handicapped persons who faced even bigger problems on the labour market. The CCC concluded that such preferential treatment is not contrary to the principle of equality since “not every unequal treatment of different subjects can be qualified as a violation of the principle of equality, i.e. as unlawful discrimination of one subject in comparison with other subjects.” The CCC took

513 E.g. proof of the same registered address, common children, common bills, estate, firms, or testimony of witnesses.

514 Decision of the CCC 5/01 of 16 October 2001, published as No. 410/2001 Coll. (Milk Quota); Decision of the CCC 45/2000 of 14 February 200, published as No. 96/2001 Coll. (Sugar quotas I); Decision of the CCC 39/01 of 30 October 2002, published as No. 135/25 Coll. (Sugar Quota II), Decision of the CCC 50/04 of 8 March 2006, published as 154/2006 Coll. (Sugar quotas III).

515 Decision of the CCC Pl. ÚS 15 / 02 of 21 January 2003, published as No. 40/2003 Coll. on professional disability and pensions (benefits for mining professions).

516 Provisions of Section 78 of the Act No. 155/1995 Coll., on pension insurance, as amended by Act No. 24/2006 Coll. [hereafter Pension Insurance Act].

into consideration particularly the exceptionally strenuous, physical, and mental demanding natures of the work.

There are two interesting points in this case. Firstly, the CCC confirmed the possibility of employment of positive action in the form of preferential treatment of certain groups of people. Secondly, the CCC confirmed existing cultural norms, which evaluate physical work as more demanding than other types of work and confirmed assistance to retired miners to be more justifiable then to other disadvantaged groups. There was no evidence provided that the nature of mining work is harder and their employability more difficult than that of other insured groups. Neither was it explored whether other forms of support (which could be opened also for other groups) such as requalification courses would be sufficient. The CCC basically confirmed a historical social redistribution of state resources based on the cultural perception of the value of physical work performed by men; who are rewarded for past work while such benefits are denied to those who are deemed to contribute less to the system such as handicapped.

Pension III - mandatory application for pension insurance of male carers (2006)

The third pension case mandatory application for pension insurance of male carers (2006)[517] concerned the legal provisions according to which male child-carers had to submit a special application to participate in the insurance within two years after the end of childcare, while no such rule applied to women. According to the legislator, the public interest of these provisions was efficient management of public funds. The plaintiff, the Supreme Administrative Court, alternatively held that such provision discriminates against male carers and pursued its annulment.[518] The CCC confirmed that this contested provision disadvantaged one subject in a comparable situation without sufficient grounds and led to discrimination in relation to adequate material security in old age under Article 30 (1) of the CFRF. The CCC argued that despite having a legitimate aim to manage public funds, the means used to achieve it (i.e. unequal treatment of men and women) were disproportionate. The novelty of this case is that the CCC used the proportionality test to assess the fundamental right and the public good in the conflict.

> A fundamental right or freedom can be restricted only in the event of exceptionally strong and proper justified public interest in a careful examination of the substance and meaning of the restricted fundamental right. The first condition is therefore mutual commissioning between a fundamental right and the public interest that are in conflict (so-called false conflict - as opposed to a conflict between two fundamental rights); the second requirement is to investigate the essence and meaning of a restricted fundamental right.

This step has been criticized by some legal experts, who argued that the proportionality test can only apply to two fundamental rights that can be restricted only on the basis of law.[519] Be that as it may, the merit of the decision was generally found acceptable. Most criticism was voiced due to lack of reasoning, excessive generality, and uncertainty; as well as the failure to undertake a more profound proportionality test which would evaluate other alternative solutions.[520]

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517 Decision of the CCC 42/04 of 6 June 2006, published as No. 405/2006 Coll. (institute of compulsory insurance application for male carers).

518 The plaintiff sought hereby the annulment of the provisions of Article 5 para. 3, sent. 2 and 3 of the Pension Insurance Act.

519 Wintr, J. (2007). Jak zacházet s ústavním principem rovnosti? (How to deal with the constitutional principle of equality?). *Jurisprudence*, 2007/16/1, 47.

520 Havelková, B. (2008). Několik poznámek k rozhodování českých soudů v případech diskriminace z důvodu pohlaví I. (Some remarks on the decision-making of Czech courts in cases of discrimination on the grounds of sex I.). *Jiné právo*, 13.5.2008. Available at: https://bit.ly/34eBceZ.

Pension IV - early retirement of female carers (2007)

The fourth pension case early retirement of female carers (2007)[521] concerned legal provisions providing for an earlier retirement for female child-carers while such option has not been granted for male carers. According to the Ministry of Labour and Social Affairs, lowering the retirement age for men would lead to a significant increase in pension entitlements.[522] The plaintiff (the Supreme Administrative Court) held this provision to be contrary to the principle of equality and strived for its annulment. Unlike in the case of mandatory application for pension insurance, the CCC considered that different treatment in this case is justified without providing any substantial reasoning.[523] The CCC could have elaborated on issues of pregnancy and childbirth, and reason via biological differences; or it could have pointed out to the fact that women are primary carers in the CR, even though even such argument would not justify discrimination.[524]

The Court's reasoning remained very general and centred on four main arguments. Firstly, the Court held that annulment of the contested provisions would deprive women of their existing benefits but would not add any profits to men. Secondly, the Court recalled historical, sociological, and comparative European context, according to which a lower retirement age has always been favoured in the case of women. Thirdly, the Court argued that a repeal of such entitlement would weaken citizens' confidence and violate the principle of legitimate expectations. And finally, the Court stressed importance of minimal interference as the solution to gender inequality in pension insurance has to be done in "comprehensive and wisely timed adjustment of the entire pension insurance system."

None of these reasons though provided convincing grounds regarding necessity, rationality, or objectivity. Firstly, while it is true that men would not benefit from the increased retirement age of women, they do lose in comparison to women even if they fulfil the same conditions, i.e. they are directly discriminated against in a comparable situation. Even though men do not have to submit a special application for pension insurance anymore (based on the CCC's previously introduced decision); they still receive it later than women. Secondly, while it is valuable to look at historical context, the past does not automatically justify present legal regulation. The social context develops and more men are getting involved in caretaking activities. Moreover, other European states are already ceding from such practice and support gender balanced caretaking. Even the principle of legal certainty is questionable in this case, as it could justify just about any non-action and disable any needed reforms. The only seemingly rational reason is the explanation

521 Decision of the CCC Pl ÚS 53/04 of 16 October 2007, published as No. 341/2007 Coll.

522 The Ministry, however, did not support this claim with concrete statistics which seem to be exaggerated given the fact that men make up a small percentage of the child-carers.

523 Kühn, Z., Bobek, M. (2007). Odůvodňovat? K čemu? Nesnesitelná lehkost antidiskriminační judikatury Ústavního soudu. (Justify? For what? The unbearable lightness of the anti-discrimination case law of the Constitutional Court). *Jiné právo,* 2.12.2007. Available at: https://bit.ly/3l3oQwH.

524 Nevertheless, the pension system was eventually amended and the same retirement age is now set for all insured persons born after 1977, regardless of gender and the number of children raised.

that the CCC wanted to minimize its interference and to leave it up to the legislator to undertake a complex pension reform; even though even this argument does not provide for sufficient justification. To conclude, a preferential treatment of women in this case has been found legitimate but it strengthens the traditional position of women as sole carers, resides in past-dependency and does not reflect evolving social context.

Part-time work for female carers (2007)

Another important example concerning gender positive actions was the case of the part-time work for female carers (2007).[525] The plaintiff, a judge of the district court, sued the CR for discrimination based on sex since she was denied opportunity to serve as a part-time judge due to operational reasons, more concretely 'lack of judges'. The plaintiff pointed out to the fact that another female judge, in the same situation, was granted a part-time work and two male judges of the same court were released for a long internship in higher courts. Hence, given case includes direct discrimination since part-time work was denied to the plaintiff while it was allowed in case of her colleagues; this indirect discrimination since this case is indicative of a structural problem within the whole judiciary system, where failure to allow part-time work disadvantages mainly women as the main childcares.[526] The courts of first and second instance ruled in the plaintiff's favour, nevertheless the Supreme Court sided with the state and did not consider denial of part-time work to be discriminatory, while stressing that both, male and female, had the right to apply for it. Furthermore, the Supreme Court held that the shift of the burden of proof was not applicable since any discrimination stemmed from the case. The Court apparently confused between direct and indirect discrimination and misinterpreted the concept of the shift of the burden. As pointed out by Michal Bobek, a denial of a part-time work to a female employee to take care of children (while allowing male employees to do so due to work internship), is a backward step in the effort to eliminate discrimination against women and to promote the reconciliation of family and working life; which among others, shows the Court's insensitive approach to anti-discrimination issues.[527]

Discrimination in remuneration (2005)

Next case does not concern preferential treatment, but direct discrimination in remuneration (2005);[528] which is one of the main structural problems in the CR that could be addressed through positive measures. The female plaintiff, an employed economist at a brokerage firm, found out that her predecessor in the same position received a disproportionately higher salary and filed complaint based on pay discrimination. The courts of first and second instance ruled against the applicant, based on the argument that the plaintiff and her predecessor did not perform comparable work - a claim which was brought by the employer but was not sufficiently proven. The courts failed to separate objective factors such as qualification, abilities and job position from subjective ones such as personality and concluded that each employee performed work differently.[529]

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525 Decision of the Czech Supreme Court of 5 June 2007, No. 21 Cdo 612/2006.

526 Bobek, M. (2007). Poloviční soudkyně (A Half Judge?). *Jiné právo*. Available at: https://bit.ly/33ePCfL.

527 Ibid.

528 Decision of the District Court for Prague 1, No. 23 C 11/2003; Decision of the Municipal Court for Prague of 1 March 2006, No. 13 Co. 399/2005-101; Decision of the Czech Supreme Court of 11 June 2007, No. 21 Cdo 3069/2006.

529 Bobek, M. (2007).

Thus, the courts did not follow established case law of the CJEU, according to which there should be no subjective element of evaluation when comparing the same work with the aim to determine possible pay discrimination.[530] Among others, as in a number of other cases, the shift of burden of proof was not applied correctly. The case was finally dismissed by the Supreme Court which held that the judgment on the merits was not legally significant. This case points out the common problem of lack of transparent and objective evaluation criteria used in hiring, pay and promotion; which is often one of the main reasons of conscious or unconscious gender discrimination.

Discrimination in access to employment (2006)

Another similar case concerned discrimination in access to employment; more specifically, to a higher management position.[531] The female plaintiff, who in 2006 succeeded in the first round of the competition for the position of economic director (CFO) of the major Czech heating plant, was not invited to the second round of the competition. This company, without explanation, opted for a less qualified male candidate who did not succeed in the competition and was not recommended by consultants.[532] The plaintiff sued the company for discrimination based on sex and lost the dispute in the first and second instance. The courts focused primarily on formal procedural conditions of interviews but not on assessment of the quality of candidates (including their education and experience) despite some considerable inconsistencies in the assessment of individual candidates by the selection board. The courts maintained that such decision is based on a subjective evaluation and it is not appropriate for the court's examination. However, as Barbara Havelková argues, this is precisely the most problematic part as subjective evaluations of single candidates during the hiring process are the most susceptible opportunities for discrimination.[533] Furthermore, as in previous cases, the shift of the burden of proof was applied incorrectly as it was up to the employer to prove that the selection of the male candidate was done on the grounds other than sex. The Supreme Court, which considered the appeal, held that the plaintiff was considerably disadvantaged and returned the case to a new proceeding.[534] The plaintiff finally won the dispute in 2018, after 13 years of costly proceedings, when the court confirmed discrimination and ordered an apology and reimbursement of the proceedings without awarding financial compensation.

Student tax advantage (2008)

Several interesting insights were provided in the case of positive action in support of students, in which the plaintiff alleged a discriminatory nature of the age limit of 26 years for the provision of a student tax advantage.[535] The Supreme Administrative Court recalled the CCC doctrine on the relative character of equality principle and repeated that the law may favour one group or category of persons based on objective and reasonable grounds and with respect to

530 Bobek, M., Boučková, P., Kühn, Z. (2007). *Rovnost a diskriminace (Equality and Discrimination).* Prague: C.H. Beck, 382.

531 Decision of the District Court for Prague 7 of 25 September 2006, No. 26 C 25/2006-190; Decision of the Municipal Court for Prague of 23 May 2007, No. 54 Co 127/2007-258; Decision of the Czech Supreme Court of 11 November 2009, No. 21 Cdo 246/2008.

532 Pražská teplárenská (The Prague Heating Plant) is one of the largest heating companies in the CR which covers almost 25% of the thermal energy market and operates mainly in the area of Prague.

533 Havelková, B. (2019), 7.

534 Decision of the Czech Supreme Court of 11 November 2009, No. 21 Cdo 246/2008.

535 Decision of the Czech Supreme Administrative Court of 6 August 2008, No. 9 Afs 206/2007 – 44.

proportionality. Also, the CCC stressed that in the area of civil and political rights and freedoms there is a minimal floor for preferential (active) treatment of certain subjects. In contrast, in the field of economic, social, cultural, and minority rights; the state is often obliged to take active action to eliminate the inequality between different groups. Legislators, therefore, more often opt for preferential treatment in this field.

The courts which assessed the case provided rather controversial reasoning. While regional court held that the tax benefits are meant for students "who study properly and do not abuse them"; the SAC maintained that this financial interest is protected by the Higher Education Act which regulates the length, content, and as well as the fees. The main intention of the Income Tax Act, on the contrary, is "to avoid a greater restriction of the group of fully productive entities, more precisely their income, than the state could finance"; it "enshrines the benefits of taxpayers who prepare for future professions and at the same time, it sets an age limit after which the state already has an interest in the productivity of citizens than in supporting their further education."

Nevertheless, this state interest in presented case has a rather androcentric character as it assumes an uninterrupted course of university education and sees exceptions to this period as improper or even 'abusive'. It does not reflect the fact that the majority of university students are women who are likely to become mothers during their studies. Moreover, at the same time, the government incites young women to give births before the age of thirty, i.e. such measures then tend to be contradictory and may indirectly discourage women to engage in further studies. So even if there are positive actions for young people connected with education, they might be less accessible to female rather than male students.

Change of the birth number (2018)

Finally, one of the recent gender cases does not directly concern positive actions but it provides several important insights. The case in question concerned a transgender person who required a change of the birth number from male to neutral or female form without chirurgical gender reassignment.[536] The Supreme Administrative Court concluded that the Czech law only allows male or female form of birth number and its change is conditioned by the sterilization and genital transformation. The Court held that its task is to review the legality of public administration and it cannot decide beyond the scope of the law. Furthermore, it reasoned that the overwhelming majority of public opinion does not support the change of present practice and "considers as appropriate and good to maintain existence of match between external gender appearance and individual declaration of one's sex;" other perception is "generally considered an anomaly that is not meant to be the norm and is not desirable." Nevertheless, the CCC did not provide any evidence for such strong majoritarian opinion; and did not further elaborate on how developments of such social demand and society-wide debate could be measured and evaluated. Without further proofs, the CCC decided on alleged premise of conservative state of the Czech society and did not reflect the fact that the forced medical intervention has been denounced by the international organisations and the practise in the EU. The ECtHR, the UN Committee against Torture as well as the WHO denounce such practices with reference to human dignity, rights to bodily integrity, self-determination, and most EU states do not require medical intervention for gender reassignment. Such reasoning remains fundamentally flawed not only because it does not refer to any research data; but more importantly because it makes protection of individual fundamental

536 Decision of Municipal Court in Prague of 14 May 2018, No. 3 A 153/2017 – 35; Decision of the Czech Supreme Administrative Court of 30 April 2019, No. 2 As 199/2018 – 37.

rights dependent on the alleged view of the ‘society’. In principal, however, protection of fundamental human rights cannot be based on current majoritarian views but it needs to be guaranteed for each individual, even if it was a single case in society.[537] Such an attitude could indicate that judicial interpretation of positive measures might be equally conservative; even though there is existing quantitative and qualitative research data including polls which indicate majoritarian approval for gender positive actions including quota, so similar arguments would be harder to use.

3.3.2. Approach of the Public Defenders of Rights (Ombudsman)

Positive measure for women in a climbing centre (2011)

Overall, there are two opinions concerning positive actions for women; out of which only one was deemed to be in compliance with the AA. In 2011, the Ombudsman dealt with the case in which women in the climbing centre were entitled to a special discount as less represented customers.[538] Based on the Ombudsman’s opinion, “the price differentiation is in principle permitted, but it must not interfere with the dignity of individuals; therefore, any price differentiation, if it is to be lawful, must be reasonably justified”. The Ombudsman came to the conclusion that the application of different prices is legitimate, as the operator of the centre responded to the different demand of men and women and the number of female consumers has increased as a result of special gender discounts. Despite the fact that this is the only case confirming legality of the use of gender positive action, it received critique of legal experts for the failure to include a more detailed interpretation of all conditions set in the Section 7(2) AA which would have been a helpful guide for similar cases.[539] It is noteworthy that different treatment was justified by the ‘entrepreneurial profit’; which is consistent with the habitual position of courts that generally deem financial profit and economies as a reasonable justification.

‘Positive measure’ for female carers in a court (2014)

A more elaborate opinion was issued in 2014 in case of alleged use of positive action in favour of female employees with children, in which a state employer, a Court X, laid off two female judicial officers, who were collecting old age pension, for reasons of redundancy.[540] Based on the reasoning of the Court’s President, the complainants received at least some income (old age pension) while other employees under consideration would have been women with minor children whose position on the labour market is more difficult.[541] As indicated by the

537 From the interview with Andrea Baršová, Director of the Department for Human Rights and the Protection of Minorities in the Office of the Czech Government, in Prague, January 5, 2021.

538 Report of the Public Defender of Rights of 28 May 2012 on the inquiry the Price Differentiation Based on Sex in Provision of Services in the Climbing Centre, file mark 244/2011/DIS.

539 Boučková et al. (2016), 322.

540 Report of the Public Defender of Rights of 26 January 2016 on inquiry in a case of Discrimination on Grounds of Age upon Termination of Employment by Notice, file mark 8024/2014/VOP. Available at: https://bit.ly/36WOoHA.

541 Complainants were allegedly informed by their superior that the Court did not receive enough funds for remunerations and was instructed to lay off all working pensioners. Furthermore, the complainants were the only employees not awarded an extraordinary yearly bonus (without any reasons), once they refused to terminate their employment. Among others, the President of the Court has considered the issuance of the Ombudsman’s opinion to be superfluous and redundant, which is a rather disrespectful but quite common position among judges and parliamentarians.

Ombudsman, the CJEU case law allows the Member States to provide for different treatment based on age provided that it is objectively and reasonably justified[542] and it stays within the limits imposed by national legislation (Section 6 (1) and (3) AA), which must be interpreted narrowly.[543]

As stated in the opinion, it is difficult to imagine any material professional requirement regarding the work of a judicial officer that would justify different treatment based on higher age. According to the Ombudsman, the employer's action cannot be reasonably justified either by the Governmental Strategy for Gender Equality in the CR for 2014-2020 since it is a strategic framework document which does not stipulate any binding obligations of preferential treatment of one vulnerable group over another. On the contrary, the document points out to the fact that these groups, older female employees as well as young mothers, often face discrimination in the labour market. "Termination of employment on the grounds of age thus cannot be justified as affirmative actions with respect to younger female employees with minor children".

Unlike in previous cases Ombudsman further elaborates on positive actions which may "include efforts to meet certain quotas, whereas this goal can be attained in several ways e.g. by actively seeking employees or by providing certain advantages to a defined group of people".[544] The opinion further distinguishes between the positive actions taken by the State that are subject to the requirement of constitutionality, while private entities must meet the statutory requirements.[545]

There are two striking circumstances in this case. Firstly, it is quite ill-fated that 'not firing' of one group of women at expense of another is considered as positive action in support of women by such important state employers as the court. Secondly, the only group under the 'layoff consideration' was a group of women with small children, while men as a group were not mentioned at all based on the report. This points out to two structural problems – vertical segregation at the workplace where lower-valued administrative and assistance tasks are performed by women; as well as the fact that women in general are among the most vulnerable persons in the labour market. Finally, the whole strategy refers back to neo-liberal approach where it is more profitable to keep male workers without carrying duties rather than carrying mothers or pensioners.[546] Last but not least there is a notable shift in terms of a more profound reasoning which could be attributed to the expert critique of the previous opinion from 2011 and/or to the change of the person of the Ombudsman.[547]

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542 CEJU Judgement of 5 March 2009, The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform, C-388/07, para 65.

543 Kvasnicová, J., Šamánek, J. et al. (2015). *Antidiskriminační zákon (Anti-Discrimination Act). Commentary*. Prague: Wolters Kluwer.

544 Under condition of Article 7 (3) AA stipulating that it is not possible to favour a person whose qualities in terms of discharge of the job or occupation do not exceed the qualities of the other simultaneously assessed persons.

545 Kvasnicová, J., Šamánek, J. et al. (2015).

546 Altogether thirty-eight people were dismissed from work or left the Court upon agreement during one year. It would be interesting to find out the age and gender of other employees in order to confirm or to refute the existence of a structural problem.

547 While former Ombudsman Pavel Varvařovský (former judge of the Supreme and Constitutional Court) stated that discrimination is not a big problem in the CR and there is no need for a special anti-discrimination law; his successor Anna Šabatová criticized his position and called for expansion of powers and ranks of the Ombudsman's Office. Available at https://bit.ly/32shGZw.

Discrimination of Roma in housing (2015)

The Ombudsman has already considered several cases of different treatment including the use of positive actions based on the diverse grounds comprising sex.[548] The most common cases of different treatment are based on ethnic background and include direct or indirect discrimination of Roma in access to education, housing, and labour market. In 2015, the Ombudsman gave an opinion on a case in which members of Roma minority were discriminated against in the access to municipal housing i.e. different treatment in this case was not used to their benefit but to their detriment. The Ombudsman held that special measures adopted to equalize the opportunities according to the Section 7(2) AA "must never consist in provision of a lower standard than the general standard".[549]

Discrimination of Roma in education (2018)

Similarly, in the latter case from 2018, the Ombudsman held that segregated classes/schools for Roma equal to their direct discrimination according to the Section 2 (3) AA.[550] Special classes for Roma could have legitimate aims only if they seek to balance the initial disadvantaged position of some Roma pupils, who should subsequently join the regular classes. Such measures, according to the Ombudsman, must be exceptional since the legitimate goal should be attainable also in regular classes with the help of positive measures.

To this end, the Ombudsman has suggested ten positive measures (based on Section 7 (2) AA) which can only be effective if they are used in complex application: 1) pre-school education, 2) sensitive division of school districts, 3) transport assistance, 4) school educational programs, 5) teacher training and innovation, 6) teaching and school assistants, social pedagogues, and mediators, 7) work with families, 8) tutoring and mentoring, 9) prevention of bullying, and 10) assistance with financial costs.[551] Despite the fact that this opinion does not concern sex as discrimination ground, there are many similar features that can be applied to the gendered segregation of the public and private sphere and to the obstacles that women face in getting access to decision-making position in politics and business life. Similar positive measures are being suggested by the researchers and policy makers also in this field e.g. prevention of intimidation, help with the carrying activities, special training programs, tutoring and mentoring and provision of necessary financial costs.

Positive measures for young scientists (2019)

Another parallel with gender problems could be detected in the case of positive measures for young scientists, in which the Ombudsman held that the definition of 'young researchers' as persons under the age of thirty-five and the measures taken in their support are not discriminatory

548 There has been an ongoing expert discussion about the gender-correct version of the term Ombudsman which has its origin in Swedish where its meaning is gender neutral. Many allege that its English version of the term might involve a gender bias and the use of the term varies in different states and organisations. The UN Multilingual Terminology Database, for example, suggests that the term 'Ombudsman' is rendered gender neutral by use of either 'Ombudsperson', 'Ombuds' or 'Ombud'. Alternatively, a female Ombudsman might prefer the term 'Ombudswoman'. The EU as well as International Ombudsman Association uses the term 'Ombudsman', while the Journal of International Ombudsman Association and many expert documents refer to 'Ombudsperson'.

549 Report of the Public Defender of Rights from 15.4.2015 on the inquiry into the Discrimination of Roma in the Access to Municipal Housing, file mark 107/2013/DIS.

550 Report of the Public Defender of Rights from 12.12.2018 on the inquiry into the Inclusive Education of Roma and non-Roma Children, file mark 86/2017/DIS. Available at: https://bit.ly/3qcNY7z.

551 The Ombudsman refers to positive measures in this context as to 'desegregation measures'.

in accordance with the AA.[552] Based on this opinion, the young scientists usually do not have appropriate research experience; experience in working with the business community; published research results; and a partners' network to commercialize research results as their older colleagues.[553] Young university graduates not only face financial problems, but as well as decision-making problems regarding their career and family plans. Ombudsman therefore concluded that "without positive measure" the scientific career of young scientists would be very difficult and they would not be able to gradually integrate into their professional lives".[554] Such action is therefore "an appropriate response to existential insecurities and a lack of professional experience" that "responds to the structural disadvantages of young scientists and aims to redress existing inequalities". Existing structural disadvantages in form of carrying duties, lack of opportunities, previous experience, and missing network can be as well cited in case of female aspirants for political and business roles; and it could be therefore analogically reasoned that positive actions in their case could be equally acceptable.

3.4. Approach of the Czech Government and the Parliament to gender equality and positive actions

3.4.1. Approach of the Czech Government

The Czech Government has started focusing on gender equality agenda under the influence of international organisations, mostly within the process of the EU accession and implementation of its acquis. During the period of pre-accession activism in 1998–2002, three important human rights bodies were established under the social-democratic (ČSSD) government - Commissioner for Human Rights, Minister for Human Rights and the Governmental Council for Equality of Women and Men. Nevertheless, both commissioner and ministerial posts have proved to be politically unstable and their terms of office do not exceed three years on average, or they are left unoccupied. The main problem is thus lack of continuity of the agenda and commitment, which depends on the preferences of each governing coalition.[555] The Governmental Council for Equality between Women and Men established in 2001, thus emerged as the most stable organ; nonetheless, it has only an advisory function.[556] In the absence of an independent human rights ministry, the gender agenda is maintained by the Department for Equality between Women and Men of the Office of the Government.[557]

552 Report of the Public Defender of Rights from 19 August 2019 on the inquiry Age Limits for Young Scientists in the Zeta Program of The Technological Agency of the Czech Republic (TACR), file mark 5971/2018/VOP.

553 These barriers are recognized by the research and were also confirmed by the written statement of the Chairman of the TACR.

554 The terms affirmative and positive actions are used interchangeably in the Ombudsman's documents, even though the term 'affirmative action' is not used in the Czech law.

555 More in Fellegi, Z. (2020). Rovnost žen a mužů v České republice – jak dospět od formální úpravy k praktické aplikaci (*Equality between Women and Men in the Czech Republic - How To Advance from Formal Adjustments to Practical Application). In Šmíd, M. (eds.):* Právo na rovné zacházení. Deset let antidiskriminačního zákona (*Right to Equal Treatment. Ten Years of Anti-Discrimination Law*), pp. 66-105. Prague: Wolters Kluwer. Available at: https://bit.ly/3a9MGF9.

556 The Council´s website is available at https://bit.ly/3npBrgt.

557 This department was created in 2017 under social-democratic Government; an agenda was previously maintained by the Human Rights Section of the Office of the Government. The department's website is available at: https://bit.ly/3gMtxMP.

Gender Equality Strategy 2014-20 and 2021-30

The gender equality agenda has been covered by the strategic governmental documents that are monitored and adapted annually since 1998. In 2014, the ČSSD led government adopted the first long-term Governmental Strategy for Equality between Women and Men in the CR for 2014-2020, which has been renewed for the years 2021-2030 (Gender Equality Strategy).[558] This strategy serves as the main basis for legal and policy actions in crucial gender fields including gender balanced representation in public decision-making. Institutionally, the strategy sets specific binding objectives for the central state administrative bodies but its impact is twofold – it influences gender equality within the state organs in their internal context; as well as in their external output concerning legal and policy proposals which influence society at large (including political and business sphere).[559] Hence, the strategy covers three main sectors of decision-making – a) state organs and organisations, b) public political sector, and c) public and private business sector.

Action Plan for Gender Balanced Representation in Decision-Making 2016-18

Based on the first strategy from 2014 to 2020, the Czech Government adopted the Action Plan for Balanced Representation of Women and Men in Decision-Making Positions for the Years 2016 – 2018 (Action Plan) which included concrete measures supporting gender equality in ministries and state institutions as well as in state companies.[560] Both, the strategy and the Action Plan, are important tools as they represent a range of soft measures that can be applied as an alternative or supplement to the quotas. From the technical point of view, it is vital to analyse results of the measures used within these programs in order to assess necessity of the use of quota in this field, more concretely a 'necessity criterion' of the proportionality test. A moderate success has been reached regarding the gender audits,[561] pilot testing of LOGIB system,[562] training of managers, and use of gender neutral advertisements. Another positive development was approval of two legislative measures in support of men's participation in childcare, notably the paternity postnatal care benefit[563] and adjustment of possibilities to draw parental allowance.[564] Overall, however, the Action Plan was evaluated as successful as only one third of tasks were fulfilled while the rest was only fulfilled partially or not at all.[565]

'No problem' problem and shortage of finances

558 Office of the Government of the CR (2021). *Strategy of Equality between Women and Men in the CR for the Years 2021 – 2030.* Prague: Office of the Government. Available at: https://bit.ly/3sVZyV2.

559 The chapter has been observed by the Committee for Balanced Representation of Women and Men in Politics and Decision-Making Positions which contributes to the preparation of all strategic documents including proposals of legislative quota. More information available at: https://bit.ly/3dKrKWx.

560 Office of the Government (2018). *Akční plán pro vyrovnané zastoupení žen a mužů v rozhodovacích pozicích na léta 2016 - 2018* (*Action plan for Balanced Representation of Women and Men in Decision-Making Positions for the Years 2016 – 2018)*. Prague: Office of the Government. Available at: https://bit.ly/3xBNrjl.

561 Most ministries realized gender audits but there have been different evasion strategies reported, such as watering down of the content, non-inclusion of unfavourable information, non-publication of the results, interference with the work of auditors, realization of second audits (e.g. in case when the first one was too critical), preference of internal to external auditors, etc. From interviews with gender coordinators, trade union representatives and employees of different ministries realized in 2016-2019.

562 The LOGIB analytics tool allows both private and public sector employers to self-test the level of equal and fair pay within their organizations. It is a recommended tool for all state organs in order to align and compare the wage transparency practices. More information is available at: https://bit.ly/3u5Lqd4.

563 As part of the amendment to Act No. 187/2006 Coll., on sickness insurance.

564 Up to the amount of 70% of the daily assessment basis.

The main problem seems to reside in the reserved approach of most ministries - as many did not show much effort in adopting voluntary measures and often only formally reported to 'adhere to principles of gender equality' and/or 'not to have any gender problems'.[566] Based on ministries' reports, three main problematic areas can be identified; a number of ministries reported problems with shortage of finances and personnel, despite the fact that most actions can be financed through the EU structural funds.[567] It is not clear to what extent this is an evasion strategy or lack of knowledge and effort to gain needed funds; but it certainly is an area that can be further improved. Ministries and organisations which managed to finance extra personnel for gender issues through various projects and/or have cooperated with external expert gender bodies have reached better results.[568]

Alleged lack of competence

The second area which seems to be very problematic is the work within the larger sphere of influence beyond the institution itself. The Ministry of Culture, for example, refused to carry out a survey of gender stereotypes, sexism, and application of gender mainstreaming in public media, with the explanation that such activity is outside its legal scope.[569] Similarly, it declined to create and disseminate a manual for the public media that would include practical tips for a gender balanced representation, reconciliation of work and family life, respect for the dignity of employees and support for gender mainstreaming.[570] The Committee for Balanced Representation of Women and Men in Politics and Decision-Making Positions (as monitoring organ) alleged, on the other hand, the elaboration of analyses, surveys, and reports are within the competence of individual ministries pursuant to the Act on the Establishment of Ministries and Other Central Bodies (Article 8).[571] Based on this act, the Ministry of Culture is the central state administrative body for matters of the press (including non-periodical press, radio and television broadcasting) (Article 8); and as such it should examine the social issues in the area of its competence, analyse the achieved results and take measures to address current issues (Article 22).

Resistance towards Strategy +1

Thirdly, a considerable resistance was documented also towards the proposed *Strategy +1* which suggested a 40% female representation in decision-making organs to be reached through gradual

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565 Office of the Government (2019). Zpráva za rok 2018 o naplňování Akčního plánu pro vyrovnané zastoupení žen a mužů v rozhodovacích pozicích naléta 2016 –2018. (*Report for 2018 on the Implementation of the Action Plan for the Balanced Representation of Women and Men in Decision-Making Positions 2016-2018)*, 26. Prague: Office of the Government, Available at: https://bit.ly/3t3Bpf9.

566 On the contrary, the ministries which undertook deeper analysis identified some problems and particularities to be addressed. E.g. The Ministry of Culture reported that the lower salary level in contributory organizations negatively affects men's interest in decision-making positions in these organizations. Office of the Government (2019), 11.

567 Operational program (OP) Research, Development and Education; OP Employment, Integrated Regional Operational Program; Rural Development Program; Transnational Cooperation Program Central Europe 2020; OP Enterprise and Innovation for Competitiveness.

568 E.g. The Ministry of Education cooperated with the department Gender and Science of the Czech Academy of Science on analysis of barriers and strategies to promote equal opportunities in science.

569 Office of the Government (2019), 16.

570 Ibid, 22.

571 The Act No. 2/1969 Coll., on the establishment of ministries and other central bodies of the state administration of the Czech Socialist Republic, as amended.

inclusion of one female representative to existing organs.[572] The proposal included suggestions of best practices and an aspirational quota without sanctions and the ministries were requested to report on their advancement in this field, within their resorts as well as within companies with state ownership in their respective sectors.[573] Most ministries only formally confirmed to adhere to the standards but did not refer to any concrete steps in their resorts.[574] The situation was even more problematic in related companies, where many resorts reported inaction due to various reasons e.g. lack of capacities (Ministry of Finance) or competence (Ministry of Industry and Commerce).[575] On the other hand, the Czech Post Office (as a state organization under the Ministry of Interior) managed to undertake the gender audit, proving that such actions are possible.

Despite the fact that most of the tasks were not fulfilled and the gender indicators have not improved much; furthermore, the Action Plan has not been renewed due to political unwillingness. Nevertheless, many continuing tasks are included in the new strategy for 2021-30 which serves as the basis for further actions.[576] It needs to be pointed out that the position of single ministries is very much dependent on the political leadership and it changes over time. At the same time it is one of the most crucial gates for changes not only in the state administration but in political and business decision-making.

Political gender quota proposals

The Czech government has dealt with four legislative proposals of 'hard' positive actions in the field of gender equality so far - once with economic gender quota and three times with the political gender quotas. Negotiations about both types of quotas have been mostly influenced by international actors, namely the UN and the Council of Europe in the field of political representation and the EU in the field of business decision-making.

Proposal 2003

Compatibility of the gender political quota with the Czech legal order has been assessed by the Legislative Council of the Czech Government as early as in 2001. The Legislative Council came

572 The Governmental Council for Equality between Women and Men (2016). Doporučení Rady vlády pro rovnost žen a mužů směřující k odstraňování překážek a k vytváření podmínek pro vyrovnané zastoupení žen a mužů v rozhodovacích pozicích (Podnět k uplatňování Strategie „+1“) (*Recommendation of the Government Council for Equality Between Women and Men aimed at removing obstacles and creating conditions for balanced representation of women and men in decision-making positions (Initiative to implement the "+1" Strategy)).* Prague: Office of the Government. Available at: https://bit.ly/3xLhdCy.

573 E.g. to properly publish all competitions, including the selection criteria; to use gender-correct language in job advertisements; to emphasize promotion of a balanced gender representation in the vacancies (e. g. by stating "The Service promotes gender equality and diversity in decision-making positions); to set up gender balanced selection boards; to search for suitable candidates, both within and outside the organization; to provide for flexible forms of work and favourable working hours (e.g. to set rules on the latest possible meetings, to provide for a company or kindergarten groups); to establish a mentoring system within the organization, etc. Ibid, 7.

574 The Ministry of Regional Development even maintained that the strategy was not implemented in its resort so far as "there was no reason to do so". Office of the Government (2019), 16.

575 Ibid, 22.

576 The +1 strategy was approved by Government Resolution No. 466 of 23 May 2016, which is still a valid document. The Equality Department of the Office of the Government therefore plans to continue working with the +1 Strategy in connection with some measures in the Gender Equality Strategy 2021 – 2030 (chapter decision making, measure 1.3.1 and 1.3.2.). An implementation methodology for the +1 Strategy is currently being developed. From the written communication with the Gender Equality Department, May, 11, 2021.

to the conclusion that such positive actions are acceptable as long as they will not exceed the framework of the international agreement accepted by the CR, the Czech Constitution, and the Charter of the Fundamental Rights and Freedoms (CFRF).[577] The first attempt to revise national electoral laws with the aim to introduce a gender quota, increasing female political representation came as a reaction to the CEDAW recommendation on equal gender political representation.[578] Based on the *Governmental Resolution from 2003,* the Ministry of Interior prepared and consulted an amendment proposing a zipper system of 50% quota, according to which each political party was supposed to alternate both sexes in the whole candidate list and non-compliance, was sanctioned by the refusal of registration.[579] The proposal was not submitted to the Government due to lack of consent among coalition parties; and electoral laws have been amended without any gender perspective.[580]

Proposal 2009

The second *Governmental Resolution from 2009* set a goal to elaborate an amendment of the electoral laws including a 30% gender neutral quota.[581] The proposal was prepared by the Minister for Human Rights and the quota was to be applied in election to the Chamber of Deputies and to the Regional Councils.[582] The proposal included the placement order requiring both sexes to be placed in first two positions; and, as in the first case, non-compliance was backed by the refusal of the candidate list.[583] This time, the proposal was not submitted to governmental approval due to the change of the government.[584]

Proposal 2014

Third attempts took place based on the *Governmental Resolution from 2014* and the elaboration was entrusted to the Minister of Interior in cooperation with the Minister for Human Rights and Minorities.[585] The threshold of quota was increased to 40% and there was also change regarding the placement order and sanction. The newly suggested placement order required that in case of

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577 Minister of the Human Rights and Minorities (2009). *Důvodová zpráva k novele zákona č. 247/1995 Sb. o volbách do Parlamentu České republiky (Explanatory memorandum to the amendment of the law No. 247/1995 Coll. on elections to the Parliament of the CR).* Prague: Office of the Government of the CR, 5. (Hereinafter Explanatory Memorandum 2009).

578 Act No. 424/1991 Coll. on Associations in Political Parties and Movements; Act No. 247/1995 Coll. on Elections to the Parliament of the Czech Republic; Act No. 130/2000 Coll. on Elections to Regional Councils.

579 Governmental Resolution No. 478/2003 from May 19, 2003.

580 Leading party of Social Democrats (CSSD) failed to convince its right wing coalition partners (Christian Democrats/KDU-CSL and the liberal party Freedom Union).

581 The Governmental Resolution No. 964/2009 from 20 July, 2009. The Resolution entrusted elaboration of the proposal to the Minister of Interior but the task was later transferred to the Minister of Human Rights.

582 Election to the Senate is not included as it is based on a majority system and parties nominate only one candidate per constituency. Elections to the European Parliament and to the municipal offices were not included, even though they are also based on representative systems. Based on the reasoning provided in the legal proposal, the range of candidates at the municipal level is rather limited and the EP election concerns a supra-national rather than national representation. This is rather different from the development in Slovenia, for example, where the EP gender quota has been approved as first and the national one followed later.

583 Non-complying parties were supposed to submit a new list that would have to be re-examined in a new round. Consequently, the proposal also included the change of deadlines for submission of candidate lists.

584 This proposal was initiated by the former Minister for Human Rights and Minorities Michael Kocáb (Green Party), but the provisional/interim government was replaced by the right wing coalition (ODS, TOP 09 a Věci Veřejné) which was not favorable to the proposal.

two candidates, both sexes must be included on the list and in case of more candidates there must be at least one candidate of opposite sex among each three. Unlike in the previous case, the proposed sanction was a financial one and consisted of a 30% reduction of the state contribution per mandate. As in previous cases the proposal was not approved, this time due to coalition disagreements, which came about despite the fact that the 40% representation target was previously approved in the Governmental Gender Strategy 2014-2020. [586]

Finally, the newly approved Governmental Gender Strategy 2021 – 2030 includes the task assigned to the Minister of Interior in cooperation with the Office of the Government to "submit a proposal for the most appropriate support measures for balanced representation of women and men on candidate lists in the relevant elections, which will emerge from the impact assessment regulation" by the end of 2022.[587] Despite the fact that the last legislative proposal is technically ready, the Ministry of Interior insisted on including a zero/non-legislative option which confirmed persisting political resistance towards quota that may change, however, depending on personal and political composition of the government.[588]

Legal proposals introducing gender political quotas in the CR.

Year	Act	Proponent	Drafter	Quota	Placement order	Sanctions
2003	478/2003	ČSSD	Minister of Interior	50%	Zipper system - alternation of sexes in the whole list	Non-registration
2009	964/2009	Interim Gov.	Minister for Human Rights and Minorities	30%	1 person of opposite sex in first two positions	Non-registration
2014	1056/2014	ČSSD	Minister of Interior and Minister for Human Rights and Minorities	40%	1 person of opposite sex per 2 or 3 candidates	Reduction of financial contribution per mandate
2021	Strategy 2021-2030	ANO	Minister of Interior and Office of the Government	tba	tba	tba

To conclude, there have been three attempts to introduce a political gender quota in the last twenty years, appearing in about six year intervals under the lead of social democrats. None of them has ever passed through the government due to disagreements with the right wing coalition partners or due to change of the government. The technical side of the legal proposals has developed significantly during this period. While an ambitious first proposal included the zipper system i.e. 50% quota and the hardest sanction of refusal of registration; the last proposal changed to the 40% quota with much milder financial sanction and a placement order. Such a 'water down' design corresponds with the quota systems used in most countries; nevertheless, its approval depends on political will. Since none of these proposals have reached the Parliament

585 The Governmental Resolution No.1056/2014 from 15 December 2014. The task was entrusted to the Minister of Human Rights and Minorities Jiří Dienstbier, ČSSD.

586 Despite strong support of women's NGOs, the law was not adopted due to rejection by coalition parties (ANO and KDU-ČSL).

587 In order to reach wider consensus, a special working group consisting of experts in the field and politicians will be created. Office of the Government of the CR (2021). Příloha č. 1: Úkolová část Strategie rovnosti žen a mužů na léta 2021 – 2030 *(Annex No. 1: Task Section of the Strategy for Equality Between Women and Men for the Years 2021 – 2030*), Prague: Office of the Government, 21.

588 From interviews with the governmental officials and members of the Committee conducted in spring 2021.

there is no formal parliamentary stance recorded and further development in the field very much depends on political constellation after post-covid elections in 2021.

Economic gender quota proposal

There have been two levels of initiatives towards gender balance in business decision-making – a) in public companies with the state ownership; and b) in private companies, more concretely the biggest companies quoted on the stock exchange. Both spheres have different modalities and motors of change. Gender equality in the biggest private companies has been supported by international organisations, both private and public ones. Western private multinational companies usually have strong internal diversity requirements and codes of conduct that are applied in their national branches, including in the CR. Czech private companies are also influenced by international ant-discrimination law, notably the EU one, as well as by various 'soft' initiatives such as the Diversity Charter.[589] As result, there is internal as well as external international 'sandwich effect' influencing the biggest private companies.

The state companies, on the other hand, are only influenced externally through the soft measures financed mostly by the EU funds and miss internal dynamic factors. Contrarily, the post-socialist state institutions and organisations tend to be rather strongly hierarchically built and resistant towards internal changes, even though as legal and policy setters, they should be the ones to adopt equality values in the first place. This has resulted in the private sector currently having more experience with different measures and more impulses for change even though the main decisions in case of legislative actions rest in hands of the state organs.

Companies with the state ownership

As far as the state companies are concerned, the first Governmental Gender Strategy 2014-20 and the Action Plan 2016-18 already included the whole range of soft tools that were supposed to lead to 40% female representation on the supervisory boards and boards of directors in companies with state ownership. Such tools included the publication of competitions with transparent selection criteria, gender sensitive advertisements and gender balanced selection committees. The Action Plan has also included an aspiration to define the *Standard of Company Open to Equal Opportunities for Women and Men* which would include realization of gender audits, female empowerment action plans, and equal pay measures.[590] All proposed soft measure of the standards would support increased female representation in decision-making. Nevertheless, the

589 The Czech Diversity Charter was launched in 2014 by Michaela Marksová, the Minister of Labour and Social Affairs and it is run by Business for Society (Byznys pro společnost) - the national association for corporate responsibility and sustainability. The Charter has currently more than 80 signatories from different segments and includes some of the biggest multinational organisations e.g. Dentons, IKEA, ČSOB, MONETA Money Bank, Velux, Thermo Fisher Scientific, ŠKODA AUTO, Microsoft Czech Republic, ING Bank, Vodafone, Komerční banka. The signatories commit to maintaining a workplace environment open to all, irrespective of their gender, race, skin colour, nationality, ethnic origin, religion, world views, disability, age or sexual orientation. Available at: https://bit.ly/3nAJgQr.

590 Further measures have been suggested by NGOs working in this field such as to introduce specific calls on awareness-raising campaigns from the European Social Fund; to create national database of women with qualifications for management positions (similar to the Kvinnedagen.no 9 database set up in Norway before introduction of quota); to make achievement of the Standard one of the criteria for assessing the project application for the EU funds; to define a transparent advantage for companies meeting the Standard, etc. Otevřená společnost (2016). Vyrovnané zastoupení žen a mužů ve vedení veřejných firem a firem kótovaných na burze (*Balanced Representation of Women and Men in the Management of Public Companies and Companies Listed on the Stock Exchange)*, 8. Prague: Open Society. Available at: https://bit.ly/3aNSuTZ.

standard has not been adopted so far and the presence of women in management of publicly owned companies is the worst out of all companies with a 0.16% gender index.[591]

Private companies quoted on the stock market

Presence of women in management and on boards of private companies is somewhat better but it still does not reach 20% and it is well below the EU average. Discussions about this deficit intensified after introduction of the so called EU *Women in Boards Directive* (2012) which originally aimed to attain a 40% participation of women among non-executive directors of companies of publicly listed companies by 2020.[592] Based on the proposal, the directive would be binding upon companies traded in the EU market but would not apply to small and medium-sized enterprises with less than 250 employees and an annual turnover of less than 50 million euros. In the CR, this measure would apply to only a few companies, many of which have no women in the statutory bodies.[593] In addition, the directive gave the Member States the option to exclude companies with less than 10% of female (or male) employees from its effectiveness. The Czech government's approach to this draft has been contradictory since its inception - negative under the conservative government (ODS) and positive under the social democratic government (CSSD). At the time of the proposal submission in 2013, the right wing government expressed a fundamental disagreement with the draft due to conflict with the principle of subsidiarity and proportionality, choice of legal basis, as well as the content itself. On the contrary, the social democratic government expressed a positive opinion about the proposed directive in 2015 but had to drop the numerical target from the proposal under pressure from its coalition partners who articulated their substantial reservations.[594]

The new Gender Equality Strategy 2021-2030 includes the task of preparation of an additional amendment to the Nomination Act[595] and to the Act on Commercial Law Corporations[596] that would introduce provisions supportive of gender balanced representation in management and control organs of corporations, potentially including quotas.[597] The draft proposal should be prepared by the Office of the Government and the Ministry of Justice by the end of 2023; and the Office of the Government has already initiated creation of a special working group comprising governmental officials, experts from different fields and political representatives for that purpose.[598] Among others, this strategy includes range of soft measures such as preparation of

591 In 534 state companies there are currently 540 women in comparison to 2800 men in management; and many of these firms have no women in management at all. Otevřená společnost (2020). *Genderová mapa. Firmy ve veřejném vlastnictví. (Firms in the State Ownership. Gender Map)*. Available at: https://www.genderovamapa.cz/.

592 European Commission, Proposal for a Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures (Brussels: COM(2012) 614 final. 2012/0299 COD), Available at https://bit.ly/2CCKA2g.

593 E.g. ČEZ, Telefonika ČR, Unipetrol, Komerční banka, Pivovarů Lobkowicz and Philip Morris.

594 Similarly, as in the case of the political quota proposal, the objections came from the coalition parties (ANO and KDU-ČSL).

595 Act No. 353/2019 Coll., on the selection of persons to the management and supervisory bodies of legal entities with state ownership.

596 Act No. 90/2012 Coll., on business companies and cooperatives.

597 Office of the Government of the CR (2021). *Annex No. 1*, 18.

598 The initiative came from the Committee for Balanced Representation of Women and Men in Politics and Decision-Making Positions and the proposal will be discussed at the meeting of the Government Council for Gender Equality after the elections to the Chamber of Deputies. In the meantime the Gender Equality Department has prepared the proposal for legislative changes to the Nomination Act which will be proposed to the government after

events and methodological manuals to share best practices; and provision for specific calls improving diversity and female representation in business firms within the EU funded operational employment program (OPZ).[599] Given that such measures have already been promoted by the last Strategy and Action Plan without any greater response in application, it is questionable whether activities of concerned resorts will be sufficient without binding results in the form of quota.

Year	Act	Proponent	Measure
2012	Women in Boards Directive COM(2012) 614 final. 2012/0299 COD	EU - European Commission	Draft proposal for 40% female presence among *non-executive directors* of publicly listed companies by 2020
2012	274th Resolution of Committee on European Affairs	Chamber of Deputies	Disagreement due to proportionality and subsidiarity deficit
2013	163rd Resolution of the Senate	Senate	Disagreement due to proportionality and subsidiarity deficit
2013	Governmental framework position on the Women in Boards Directive	ODS led Government	Disagreement due to proportionality and subsidiarity deficit
2015	Governmental framework position on the Women in Boards Directive	CSSD led Government	Agreement under condition of omission of quota
2019	ECSR Decision No. 128/2016 (UWE v. CR)	COE - ECSR	Violation of the ECHR 1988 Protocol due to insufficient progress in gender balanced decision-making in equal pay
2023	Nomination Act No. 353/2019 Act on Commercial Law corporations No. 90/2012	Office of the Government and Ministry of Justice	Amendment proposal adding provisions to support gender equality in management and control organs of commercial corporations

3.4.2. Approach of the Czech Parliament

While political quota proposals initiated at national level never passed the governmental level; both chambers of the Parliament used their chance to express themselves to the EU proposed business quota in early warning mechanism procedure in 2013. With slightly different reasoning, they both called upon the Government to not consent to the proposed directive at the meeting of the EU Council.

Chamber of Deputies

Overall, the Chamber of Deputies' reasoned opinion on the Women on Board Directive showed a good level of awareness but very little sensitivity about the gender positive actions.[600] Technically, the opinion expressed several concerns regarding the legal basis, subsidiarity, and proportionality principle. The main underlying problem, however, seems to be an ideological one

elections in fall 2021. Based on the proposal, the companies with state ownership will be requested to take into account a gender balanced representation in management and supervisory boards without numerical goals.

599 More information available at: https://bit.ly/3vxJVF3.

600 Czech Chamber of Deputies (2012). *274. Resolution of Committee on European Affairs of the 39th meeting on 6 December 2012. Prague: Chamber of Deputies*. Available at: https://bit.ly/3gP8WXU.

since the opinion points out to certain unwillingness to accept women in leading positions. While opinion starts with acknowledgment of the long-term gender imbalance in the field, at no point it suggests that it should or could be changed, on the contrary, all selected arguments and examples point out to disadvantages of having women in decision making and none is mentioned in their favour.

In its introduction, the opinion refers to four areas of justification of positive measures as they are classified in the expert literature: 1) redress of previous wrong-doings; 2) redistribution of goods; 3) greater representation of minority groups; and 4) greater social cohesion reducing social tensions. Rather surprisingly, the opinion places women into the category of "greater representation of minority groups", without making any distinction or point about the fact that women are not a minority but one half of the population which surpasses minorities; since women as a superset includes all minorities. The approach of reducing women to a 'minority' seems to be the main conceptual problem which is reproduced in institutions as well as in the part of expert literature in the CR.[601] Nevertheless, under-representation of women applies to all indicated categories: it exists due to past wrong-doings (long-term legal and social exclusion of women from the public sphere); it is needed in order to redistribute the goods (to equalize access to economic decision-making); and it will contribute to a greater social cohesion (support access of women and their equal treatment of women at work-place, and their economic empowerment). So instead of the 'minoritising' approach, there is a need for a holistic approach.

The main argument concerning subsidiarity and proportionality pointed out to the fact that the EU voluntary initiative "Europe's Commitment - Women in Leadership" was launched only in 2011 and national states did not have enough time to reach results on their own. According to the Chamber of Deputies "the legally binding quota should be "an exceptional and last solution (…) approached only if all other voluntary measures failed."[602] On the other hand, the European Commission (EC) argued that the draft proposal reacted to decades of 'self-regulation' when national states did not take any voluntary measures in the field and the growth of female business representation was very slow. The EC argument has been proven correct over the subsequent time, as the states which have not adopted any type of quota (such as CR) have not advanced much in this field until today. Moreover, the Chamber suggested that more time was needed in order to assess the impact of quotas in other states. This points to another common EU problem, namely 'free-riding' indicating practice in which certain states refuse to participate in common projects and prefer 'to wait and see' results of other member states which try new approaches. Such behaviour is not in line with the notion of the EU solidarity would hardly bring any innovation in the EU in any field and either.

The Chamber of Deputies stressed that there is "virtually non-existent experience" to prove 'effectiveness' of this measure. It should be pointed out that at the time of drafting this opinion, Norway had already almost ten years' experience with the use of strict business quota accompanied by abundant research which, for the most part, showed positive or neutral impact.[603]

601 Not surprisingly, this copies the situation in the Chamber of Deputies itself, where women issues are treated within the Standing Committee on the Family, Equal Opportunities and National Minorities. Available at: https://bit.ly/3xdwLOc.

602 Such as coordination mechanisms, knowledge improvement, information and best practices exchange, support for innovative approaches, etc. (according to the Article 153 paragraph 2(a) TFEU).

603 See previous chapters.

Nevertheless, the Chamber made its arguments based on only two studies[604] which both referred to negative aspects - a) the 'golden skirts' - women who accumulate more functions and are too overworked to perform well;[605] and b) the 'young managers' – who are too inexperienced to make good decisions.[606] These examples were topped by the information that the plan to introduce positive action in Norway caused a significant fall in the share price in the "companies that were 'forced to' increase the number of women in their bodies".[607]

Herewith, the drafter demonstrated precisely the main problems which the proposed directive tried to solve. Firstly, the problem is connected with the selection process - namely who and on what criteria appoints non-executive members of boards. This drafter points out to the alleged problem of golden skirts and young managers but omits to mention information on selectors and the selection process. Even though the popular line (coming also from the Czech parliament) is that 'there are not enough qualified women', this could hardly be true given a long-term and high level of education and labour market participation of European women. On the contrary, the main problem often lies on selectors and the obscurity of the selection process. As it was pointed out in previous chapter on political parties, selection committees consist mostly of men and have no transparent selection criteria, which often result in a strategy to appoint either a) less experienced and less known candidates are not significant competitors and/or innovators; or b) women from family or friend nets who are loyal to the gatekeepers.

This indicates that it is precisely the selection process that needs to be improved and turned to be more objective and transparent. Nevertheless, this is the point which deputies apparently do not want to accept, maintaining that *"*private companies, which are exposed to competition from other competitors in the market, in principle reduce the selection criteria for candidates to such intellectual and personal qualities that will enable them to succeed best in the competition." Since the EU acquis requires selection only among 'equally qualified candidates', it is hard to say what kind of other 'intellectual and personal qualities' deputies see in men that women do not possess. The wording of the opinion suggests that there are more capabilities beyond the formal education and experience which women seemingly do not have. Such attitude points to the second major problem – namely prejudice and stereotyping based on the male cultural norm; which was also confirmed by the Norwegian price-fall example. The fact that a mere announcement of a plan to add women to decision-making resulted in a fall of share price of concerned companies in Norway confirms an existing wide-spread prejudice towards women in leadership. It also proves that the price of share itself is to a great extent a social construction which may reflect prejudice of share owners. It also proves that a harmonised and common EU approach in this field is beneficial in order not to discriminate against the companies which take such steps.

Finally, the Chamber stated that "from an absolute point of view, many women who do not belong to this exclusive group of golden skirts will not be able to break the 'glass ceiling' of

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604 Interestingly, the Chamber reproaches the Commission that it based its positive expectations only on a few studies, especially Credit Suisse, Research Institute (August 2012) "Gender diversity and corporate performance" and Deutsche Bank's research work (2010) towards gender-balanced leadership"; while it has based its own opinion equally only on two studies in the field, both with negative outcomes.

605 Lansing, P., Sitara, Ch. (2012). Quota Systems as a Means to Promote Women into Corporate Boardrooms. Employee Relations Law Journal. Vol. 38.N.3., 5.

606 Ahern, K. R., Dittmar, A. R. (2010). The Changing of the Boards: The Value Effect of a Massive Exogenous Shock. Michigan: University of Michigan. Available at: https://bit.ly/32Ssrqy.

607 Czech Chamber of Deputies (2012), 4.

discrimination". Surely, fixing the boards alone will not remove the problem of the labour market discrimination. This is the reason why the Women on Boards Directive is not the only initiative in the field, but only one of possible tools to reach gender equality. In other words, there is no single solution to this structural problem which can only be reached through a complex approach of different bottom up as well as top-down approaches. The proposed directive represents a top down approach which aims at the highest level of decision-making as no bigger gender friendly changes are possible without approval of company leaders (which should itself be gender balanced in the first place). Remarkably, the deputies maintained that "the proposed amendment will have a very limited socio-economic impact".[608] At the same time, however, they feared that this measure "may be a prelude to intensified EU legislative action on equal representation of women and men in all labour law with a wide impact on Member States ("open door policy")". So on one hand, the deputies reproached that the draft directive only affects a limited number of women; while on the other hand, they indicated unwillingness to accept other measures which would affect all women. In sum, it is safe to conclude that based on this opinion, the deputies did not wish for any change and did not provide for alternative solutions either.

Czech Senate

To begin with it is noteworthy to indicate that the Senate's historical attitude towards the EU anti-discrimination acquis is rather negative. Among others, this fact is documented in a 2008 statement in which the Senate implied that it "does identify itself with the nature of a norm that artificially interferes with the natural development of society, does not respect cultural differences of member states and ultimately places the demand for equality above the principle of freedom of choice". Further in its statement, the Senate called for the government "not to agree to the adoption of further anti-discrimination legislation at the EU level".[609] The former president Václav Klaus expressed a similar attitude when they vetoed the law stating that "the CR does not discriminate against anyone" and the law is therefore "unnecessary and counterproductive" and its effects problematic, given that it is "contrary to our country, but also by European legal principles and traditions which can bring new wrongs and injustices".[610] Inclusion of these statements is done purposely as it demonstrates the type of reproaches which still persist among numerous Czech norm-makers and significantly limit further expansion and application of gender equality laws.

The opinion of the Senate to the proposed Women in Board Directive was much shorter; nevertheless, it included the same objections as the lower chamber's one.[611] Similarly as the Chamber of Deputies, the Senate began their opinion with acknowledgement of long-term significant gender imbalances in senior positions. Unlike the Chamber of Deputies though, the Senate clarifies and acknowledges the roots of imbalance stating that "women face far greater

608 The Chamber alone indicated that the proposed directive would only impact 10-20 companies listed in the CR i.e. only the limited number of positions in the supervisory bodies.

609 Senate of the CR (2008). *Resolution of the Senate of the 13th meeting on 23 April 2008.* Prague: Senate of the CR. Available at https://bit.ly/2krsreC.

610 The former president referred mainly to the newly introduced principle of reversed burden of proof from the plaintiff to the defendant. Klaus, V. (2008). *Letter to the Speaker of the Chamber of Deputies Miloslav Vlček dated 16 May 2008.* Available at https://bit.ly/2mnmnEx.

611 Senate of the CR (2013). 163rd Resolution delivered on the 6th session held on 22nd March 2013 on the Proposal for a directive of the European parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, Senate Press no. N 006/09. Prague: Senate of the CR. Available at: https://bit.ly/300Hqgs.

discrimination in matters of motherhood, as a consequence of inability to effectively reconcile family and professional life, starting from a certain age". Henceforth, as a consequence, the EU, according to the opinion should therefore "focus on removing barriers that prevent women from reaching their full potential in our society, such as removing discrimination in maternity and parental leave, gender pay gap, and gender stereotypes".[612] In a few sentences, the senators managed to shift responsibility of current gender imbalance to women 'who are not being able to effectively reconcile family and professional life'; and to the EU which should remove indicated obstacles. There is no acknowledgement of the fact that all these areas are regulated by national law and given obstacles could and should be removed by the Parliament itself. This attitude has obviously not changed over the last years, as there were numerous attempts to amend the laws concerning the child care facilities, maternity leave and other relevant issues which were not adopted by the Parliament and/or Government. Furthermore, the Senate omits to recognize and to include that the non-transparency of the appointment process is also one of such barriers which is being addressed by the draft directive.[613]

The Senate (again similarly to the Chamber of Deputies) pointed out the problem of 'young managers' while maintaining that "imbalance may be caused by other factors, such as relatively high age of supervisory board members (58 years on average) and the absence of women in those segments of senior management of companies". This is a rather surprising argument given the fact that numbers of women university graduates in our region surpassed the 40 % mark in the 1980s already.[614] More importantly, through this statement the Senate pointed out to both, to the structural and intersectional character of gender discrimination, in this case. Firstly, there is an absence of women in advisory boards and in senior management of the companies which confirms the structural pyramid problem 'the higher – the fewer'. Secondly, it also confirms an intersectional character of the problem as it concerns women (based on sex) but also young women (based on age) who are not deemed wise enough to serve on boards. Such assessment refers back to the existing cultural norms since there are no legal rules requiring certain age for the membership in supervisory boards and there is no evidence that appropriate wisdom comes after age of fifty-eight. On the contrary, most of the recent successful entrepreneurs (male and female) are young people in their thirties who manage well all types of the newest technologies, social media marketing and sales; and it therefore seems sensible to have this segment of new generation front-runners represented in the leadership. One could speculate that the Senate's attitude in this respect might be caused by the character of the Senate itself, which consists of 85% of men who are fifty-four on average.[615]

Similarly to the Chamber of Deputies, the Senators maintained that effectiveness and real impact of the proposed directive might be limited as it only concerned members of supervisory boards. Interestingly, both parliamentary chambers thus address the proportionality principle but not for being disproportionately strong but for being too weak. At the same time, it does not mean that the Senate would agree with more efficient measures. On the contrary, it dismissed the idea of

612 Ibid.

613 Wolchik, S. L. (1981), 445, 449; Havelková, B. (2018), 9.

614 Havelková, B. (2018), 9.

615 Act 247/1995 Coll. Elections to the Parliament of the Czech Republic and on Amendments to Certain Other Acts sets the minimum age requirement for eligibility to both chambers in the CR – 21 for Chamber of Deputies (Article 25) and 40 for the Senate (Article 57). Periodical statistics regarding the age average in the Parliament are available at Czech Statistical Office. Forum 50%. *Development of nominations and representation of women in the Senate* of the CR. Available at: https://bit.ly/2OguMHJ.

legal regulation in the private sector altogether (due to clash with the ownership rights) and maintained that such initiatives should focus on the public sector including political institutions, public authorities and companies. It is hard to say whether the Senate would be more willing to accept political quota as a political institution and a public law body itself. In order to conclude both opinions, not only have a plentiful amount of examples of barriers that women have to face in access to economic leadership have been provided, but they themselves represent one such important legal barrier: the basis of prejudice and stereotypes.

3.5. Constitutional compatibility of gender quotas

3.5.1. Rationality v. proportionality

Main reproaches towards quotas could be demonstrated on comments raised by institutions in the process of assessment of legislative quota proposals at governmental level.[616] Key criticisms included allegations of non-constitutionality, inefficiency, redundancy (which is due to existing codification of formal equality), disproportionality, and unlimited duration. Since similar reproaches are also frequently raised by the part of the expert community and the public, it is important to scrutinize constitutional compatibility of the proposed positive measures.

Competence to adopt quotas

Firstly, it is necessary to assess whether the government and the parliament have competence to propose and adopt legislative quota at all. The Czech Constitution and the CFRF already include authorisation to regulate elections through the special laws and their amendments. As far as the positive measures are concerned, an option to use them is included in the UN treaties (notably CEDAW) as well as in the EU treaties, which are binding for the CR and form a part of the Czech constitutional law.[617] Already in 2001, the Legislative Council of the Czech Government confirmed that the constitutional changes are not necessary to introduce quotas, since such measures are expressly allowed by binding international law.[618] Hence, the objections of unconstitutionality of positive actions, including quotas, are unfounded. Nevertheless, there is an option to carry out declaratory constitutional changes in order to amplify equality among men and women;[619] and several European countries have opted for such amendments strengthening the mandate for the use of quota.[620] Nevertheless, such changes would require a qualified majority for parliamentary approval, which is habitually hard to meet. Finally, an option to adopt positive measures is expressly codified in the AA as well as in the Labour Code; and it has been also confirmed by the CCC which stated that, "the legislator has some room to consider whether such

616 E.g. Ministry of Defence, Ministry of Finance, Deputy Prime Minister for Science, Research and Innovation and several regions.

617 Furthermore, the business gender quota suggested by the EC Women on Boards directive would be also binding for the member states, once approved.

618 Office of the Government of the CR (2009), 5.

619 Such an amendment could have the following wording e.g. *"Following the principle of equality between women and men, an adoption of special positive measures is allowed"*. Špondrová, P. (2020). *Legalita (soulad s právem) legislativních kvantitativních opatření (kvót) na podporu rovnosti žen a mužů v politice. (Legality of legal legislative measures (quotas) to promote gender equality in politics.). Upcoming publication.*

620 E.g. France, Austria, Slovenia. On the other hand Spain, Poland and Ireland did not opt for constitutional changes.

treatment will be codified".[621] The question, therefore, is - not whether positive actions can be adopted - but under which conditions.

Notion of relative equality

The main conceptual basis for the use of positive actions including quotas resides in the notion of relative nature of equality. Already in 1992, the Constitutional Court of the ČSFR has specified that equality is a relative principle which is "not to be understood as an abstract category, but it is always attributed to a certain legal norm, conceived in the mutual relationship of different subjects".[622] Furthermore, the CC has ascertained that the state does not guarantee absolute equality in each aspect and it may grant more or fewer benefits to certain groups.

> It is up to the state to decide in order to secure its functions that it will provide fewer benefits to a certain group than others. However, even here it must not proceed completely arbitrarily. The Constitutional Court of the Czechoslovak Socialist Republic thus rejected the absolute understanding of the principle of equality and comprehended equality as a relative category, which requires in particular the elimination of unjustified differences and the exclusion of arbitrariness, but it does not however lead to the categorical conclusion that everyone must be granted any right.[623]

Proportionality test

Hence the CC CSFR has opened an option for preferential treatment of certain groups of population. At the same time, however, the Court emphasized that application of the equality principle cannot be limited arbitrarily and possible modifications need to have legitimate aim; i.e. they must be justified by public interest or by objective and rational reasons, and they have to be proportional.[624] One overall aim of the proportionality principle is to restrict authorities in the exercise of their powers by requiring them to strike a balance between an intended aim and the means used.[625] In the context of quotas, it means that advantages brought by this tool should not be outweighed by its disadvantages.[626] This proportionality principle is thus used in cases of conflict of two or more fundamental rights or the fundamental right and the public good.[627]

The CCC provided an extensive interpretation of the proportionality principle in numerous cases.[628] Based on its decisions, a fundamental right may be restricted or may have priority over another fundamental right provided that following criteria are fulfilled:

> 1) criterion of suitability (selected measure is capable of reaching a given goal);
> 2) criterion of necessity (in comparison with other options, selected measure is the least invasive towards other basic rights and liberties); and

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622 Decision of the CC CSFR 22/92 of 8 October 1992, published as No. 1/1992 Coll.

623 Ibid.

624 The criterion of objective and reasonable justification represents further elaboration of the category of public interest. Both, public interest and objective and reasonable justification can be understood as a subgroup of the broader concept of legitimate aim. Bobek et al. (2007), 187.

625 Principle of proportionality has been recognised as general legal principle in the UN, CoE as well as the EU legislation.

626 Design of the measure and accompanying safeguards are also taken into account as they can support its justification.

627 Bartoň, M. et al. (2016). *Základní práva (Fundamental Rights).* Prague: Leges, 95.

628 E.g. Decisions of the CCC US 4/94, 15/96, 16/98, 30/2.

3) criterion of comparison of the binding nature of two conflicting basic rights (damage to another fundamental right must not be disproportionate to the benefit brought by the adopted measure).

Rationality test

It is important to note that the CCC applied a universal proportionality test of the same intensity in the 1990s but it has eventually loosened the strict form and only assessed an extreme disproportionality in some cases.[629] In 2004, the CCC expressly refused to apply a strict proportionality test and formulated a notion of rationality test; which according to the regulation, is constitutional as long as it "establishes the pursuit of a legitimate aim in a way which can be imagined as a reasonable means of achieving it. Even if it is not necessarily the best, most appropriate, most effective, or wisest means".[630] This criteria of rationality test have been subsequently formulated by the CCC in its decision from 2008 and they include:

1. Definition of the meaning and essence of the adopted measure.
2. Assessment whether the adopted measure does not affect the very existence of the fundamental right or its actual implementation (essential content), if so, the regulation is assessed by the proportionality test.
3. Assessment whether the adopted measure pursues a legitimate aim.
4. Assessment whether the measure used to achieve a given legitimate aim is reasonable (rational), though not necessarily the best, most appropriate, most effective, or wisest.[631]

Different tests for different categories of human rights?

Provisions, typically related to the rationality test, comprise economic, social and cultural rights identified in the Article 41 (1) CFRF, including the right to freely choose a profession, as well as the right to conduct business (Article 26). This would potentially cover possible interference with the rights of other candidates for advisory board positions and rights to conduct business. Nevertheless, it remains questionable how to assess possible effects on political parties and election candidates.

In this context, it needs to be noted that the CCC differentiates between the field of civil and political rights and economic, social, and cultural rights. Hence, a possible application of positive actions in these fields may differ. While the CCC generally sees only minimal space for preferential treatment in the area of civil and political rights, it justifies a more active approach in the field of economic, social, and cultural rights.[632] According to the arguments of the drafter, the latest political quota proposal fits within the scope of the civil and political rights, as guaranteed by the CEDAW, and it is in line with the CFRF provisions on active and passive voting rights (Article 21 CFRF).[633] One woman on Board Directive Proposal, contrastingly, fit the

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629 More in Kosař, D., Antoš, M., Kühn, Z., Vyhnánek, L. (2014). *Ústavní Právo. Casebook (Constitutional Law. Casebook).* Prague: Wolters Kluwer.

630 Decision of the CCC 61/04 of 5 October 2006, published as No. 181/43 Coll. 57 on a strike in collective bargaining, para. 41.

631 Decision of the CCC 1/08 of 20 May 2008, published as No. 251/2008 on regulatory fees in healthcare.

632 Decision of the CCC 5/01 of 16 October 2001, published as No. 410/2001 Coll. (Milk Quota), VI, 8.

633 Minister of Interior (2014). Důvodová zpráva k novele zákona č. 247/1995 Sb. o volbách do Parlamentu České republiky (*Explanatory memorandum to the amendment of the law No.* 247/1995 Coll. on elections to the

category of economic, social and cultural rights. Nevertheless, it is important to note that representation in political life is tightly connected with social, economic, and cultural rights. If certain groups, in this case women, do not have access to political decision-making, they are not able to directly influence their vital social and economic rights. This means that a gender balanced representation should be analysed and argued in a holistic manner – conceptually as well as practically. Nevertheless, the question remains which constitutional scrutiny would be possible applied to political and economic gender quota proposals.

Significantly, a number of lawyers, including Kateřína Šimáčková, Veronika Bílková and Jan Wintr, consider that the execution of the proportionality test is likely unnecessary if the legitimate aim of the proposed quota is well-established.[634] According to Wintr, this regulation is easier in public sphere than in private one; but in case of well-argued public interesuch as gender equality at workplace and well-reasoned proposal, a rationality test will be sufficient in both, political and private sphere. At the same time, Wintr cautions that the quota is in its nature a restrictive tool and as such it should be temporary with the main aim to break stereotypes. On the other hand, Kateřina Šimáčková and Veronika Bílková accentuate a balancing effect of the quota that addresses existing social inequalities. Nonetheless, it seems that the rationality tests would be overall a sufficient check in case of possible constitutional scrutiny of the proposed quotas.

Yet, considering an interrelated nature of human rights and manifold effects of quotas, a practical application of the rationality test might be problematic. As it was pointed out, the difference between the basic rights, political rights and economic and social rights might be often very thin.[635] Besides, the political and economic gender quotas may have multiple effects on different categories of rights. Hence, it is not clear which constitutional test would be applied in case of possible proceedings. Taking all mentioned reasons into consideration, following a proportionality test will be performed separately for both, political and economic gender quota proposals in order to assess whether they are able to pass even the strictest constitutional scrutiny.

3.5.2. Legitimate aim

There are numerous justifications that could be used to fulfil an imperative of legitimate aim for the use of gender quota. One of the most important arguments include the objective to balance de-facto inequalities, to strengthen representative democracy, to provide compensation for past injustices, to secure public interest, notably state economic interests, and to align national practices with growing international consent will be analysed.

Balancing de-facto inequalities

Most scholars rank a balanced representation as the first legitimate aim of implementation of quotas. Nevertheless, Kateřina Šimáčková returns to the general aim of creation of quotas and sees their main benefit in correction of de-facto inequalities which help to realize material equality in opportunities.[636] She points out to the fact that the Czech norms and the case law recognize and support de-facto equality through empowerment of socially disadvantaged groups. In this context, she gives examples of numerous legal provisions and decisions which support

Parliament of the CR). Prague: Ministry of Interior, 14. (Explanatory Memorandum 2014).

634 From the online interviews conducted in May 2021.

635 This problem has been highlighted by Eliška Wagnerová, in her dissenting opinion to the above mentioned decision of the CCC 1/08.

636 From the online interviews conducted in May 2021.

factual equality, e.g. cases of tenants, pensioners, mothers or consumers.[637] Based on the CCC settled case law, the positive actions in this context, "are not contrary to the legal principles of equality and the prohibition of discrimination, if their application is aimed at eliminating de facto discrimination between entities".[638]

> From another point of view, the basic constitutional principle of equality can be conceived on two levels - as formal equality and also as factual equality. There is no doubt that the role of the legislator is to ensure formal equality in the drafting of the legal order, but in view of the fact that there is de facto inequality in the real world of nature and society for a number of reasons, the legislator must consider in justified cases, normative entrenchment of inequality, which, for example, will remove de facto inequality or other handicap.[639]

As it has been pointed out in part 1.1, women as a group face numerous social disadvantages including disproportional caring duties, lower pay and pensions, insecure work arrangements, prejudice and violence, etc.; which largely puts women at a disadvantage in advancing in the public sphere. Hence, the quota could serve as an optional tool to secure de-facto opportunity for their participation in decision-making.

As far as the possible argumentation from the side of the government is concerned, Šimáčková believes that the argument of, "balancing de-facto inequalities" would be the strongest and the most acceptable one since it is a well-established and accepted approach used in the Czech norm-making. Similarly, Veronika Bílková emphasizes the importance of social balancing and she points out that, contrary to popular discourse, a social regulation does not indicate communism but merely a welfare state (such most European states including the CR are).[640] These are indeed very important points since gender quotas in the CR are erroneously perceived as the tool securing results, while all suggested Czech quota models have aimed at balancing opportunities. Both gender political and economic quota proposals have targeted a balanced female representation among candidates without further guarantee of their success.

Representative democracy

The ultimate practical objective of the gender quota is to secure a fair participation of women in decision-making, both in politics and business. The main argument is that the leaders in the public sphere should reflect the composition of its population, which is even more important in the case of women who make up half of society and have specific experience, needs and perspective. There is often debate whether to use democratic or economic arguments in balance representation debates. I argue that the democratic interest is the strongest and superior one and it should not be substituted but only supported by other e.g. economic arguments. Women, as one half of the whole population (equally capable and educated), have the right to participate in decision-making based on their existence, size and social role and do need to justify their

637 E.g. Decision of the CCC 42/03 of 28 March 2006, published as No. 280/2006 Coll. on protection of tenants, Decision of the I. CCC 3512/11 of 11 November 2013, published as No. 183/71 Coll. 201, Decision of the I. CCC 863/16 of 10 August 2016, published as No. 152/82 Coll. 415, Decision I. CCC 3308/16 of 19 January 2017, published as No. 74/67 Coll. 115, Decision of the I. CCC 1844/17 of 27 November 2017, published as No. 218/87 Coll. 505.

638 Decision of the CCC 15/02 of 21 January 2003, published as No. 40/2003 Coll.on estate disability and pensions (benefits for mining professions).

639 Decision of the CCC 42/03 of 28 March, 2006, published as No. 280/2006 Coll. on protection of tenants, para. 58

640 From the online interviews conducted in May 2021.

presence by economic gains. In order to do it, however, they need to obtain realistic structural enabling conditions. In one of its decisions, the CCC maintained that the democratic state governed by the rule of law provides for such an environment .

> Unlike a totalitarian state, a democratic state governed by the rule of law provides space for the formation of various interest groups, which later, as individual political parties or movements, seek to enforce their ideas by gaining power in free competition of political forces respecting basic democratic principles (Article 5 of the Constitution). If this or that concept wins, the result should be fundamentally and usually legitimate, even if it is accepted despite the resistance of certain social groups.[641]

In this case, the CCC has pointed out to the core of the problem that the quota tries to address. Women are structurally disadvantaged through bearing almost exclusive responsibility for house and child care which is subsequently reflected in unfavourable work contracts with lower remuneration, career possibilities, and biases based on stereotypes. Hence, they hardly have the necessary time and resources to participate in such a process of "formation of various interest groups" and "individual political parties seeking to enforce their ideas by gaining power". This historical structural disadvantage prevents women from the full participation in the public leadership; and their absence creates a democratic deficit that should be addressed. While the quota system is not the only measure, it is one of the most efficient and internationally widely tested methods to do it.

Compensation of past injustices

Another relevant aim of the gender quota is to remedy past injustices since the past legal and de-facto seclusion of women from the public sphere is one of the main reasons of their present disadvantaged social position and their absence from public decision-making. The CCC has dealt with a number of cases in which it ruled that a different treatment can be justified based on historical inequalities.

For example, in 1994, the CCC approved mandatory employment of university teachers and researchers for a fixed period (as an exception from standard work contracts for indefinite period) in order "to remove the remnants of the past (state-communist) when filling the posts of university teachers and researchers and thus to ensure the real objectivity of teaching".[642] Analogical reasoning could be applied in case of political or economic quota. Women have been systematically excluded from the public sphere in the past and their participation is necessary for objectivity and legitimacy of political and economic decision-making. One could allege that MPs are only elected for a limited period of time, nevertheless, a lesson from the post-communist universities has shown that due to established connections, most of professors and scientists from the communist regime have been able to keep their positions, and that previous networks have been hardly ever disconnected. In this context, the quota could serve as a tool to break such persisting informal nets.

Similar reasoning was provided by the CCC in the case of retirement allowance for soldiers of former (communist) counterintelligence, in which the CCC recalled public values such as 'democracy and protection of democracy' and maintained that the treatment concerns "certain privileges of the group of people, who are resp. were favoured over other citizens". Again, this

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641 Decision of the CCC 83/06 of 12 March, 2008, published as No. 116/2008 Coll. on constitutional compatibility of the Labour Code, para. 180.

642 Decision of the CCC 36/93 of 18 May, 1994, published as No. 132/1994 Coll.

very much resembles the situation when men have been legally privileged through their exclusive right to vote and to be elected (with over a hundred years of lead); as well as through other norms regulating access to education, work, and division of child carrying activities. [643] The question therefore is whether inequalities stemming from the patriarchal system should not be remedied similarly to the ones stemming from the communist regime. Especially with regard to the fact, that the past injustices are still reflected in existing structural and social barriers which hamper women's access to decision-making.

Economic interests

One of the most cited public interests in judicial decisions is the economic one, such as contribution to the state budget or creation of new jobs.[644] As indicated by the research, increased presence of women in political and economic leadership supports innovative and balanced decision-making and adoption of gender balanced labour market policies.[645] Women have different life experiences and perspectives and a number of issues may be disregarded or undervalued when their presence in decision-making is missing, especially in the social sphere. It is also expected that increased presence of women in decision-making will have a double spill-over effect – it will help to improve conditions for their work (institutional as well as social); and it will lead to a further increase of females in the labour market. European as well as Czech women outnumber men in university education and their absence in public decision-making represents loss of talent and potential in an economic sense. Having said all that, the economic interest should only be secondary (if relevant at all), as the primary justification is democratic representation of women as half of population and as such this participation does not need to be justified by economic gains.

As far as direct economic impact on the state finances is concerned, the last political quota proposal bears no financial burdens; especially when compared with other measures such as subsidies or other forms of financial assistance provided by the state under various programs. As stated in the CCC decision on milk quotas, if the introduction of quotas were to be seen as a violation of equality, such programs would necessarily be unconstitutional as well.[646] On the contrary - the state would even save finances in cases of non-compliance with gender political quota as its financial contribution per mandate would decrease. What is noteworthy is that the drafter had such economic context in mind by choosing reduction of the state contribution over motivation in form of bonus which would be connected with the state budget costs.

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643 In the 19th century, elections in the area of CR were organized according to five electoral curies based on the property of citizens; whereas votes from the first/large-estate curia had higher weight. Women, members of the armed forces and workers were excluded from the right to vote. Exceptions were made for women from the first curia who owned the manor but elections had to take place through a proxy. Universal, direct, equal and secret suffrage was enshrined in the 1920 Czechoslovak Constitution. More in Malý, K. et al. (2011). *Dějiny českého a československého práva do roku 1945 (History of the Czech and Czechoslovak Legal Order until 1945).* Prague: Linde.

644 E.g. Decision of the CCC 22/92 of 8 October 1992, published as No. 11/1994 Coll.

645 Hong, L., Page, E., S. (2004). Groups of Divers Problem Solvers Can Outperform Groups of High-Ability Problem Solvers. *PNAS*, 101 (46) 16385-16389. Available at: https://bit.ly/3umyMXY.

646 This argument was used by the Ministry of Agriculture, Decision of the CCC 5/01 of 16 October 2001, published as No. 410/2001 Coll. (Milk Quota), II, 3.

Compliance with international law

Compliance with international law, most of all with the binding EU law, has also been recognised as one of the legitimate aims (considering the fact that ratified international treaties form part of the constitutional system and have higher legal force than ordinary laws).[647] Application of the gender quota has not been codified as an obligatory supranational norm so far, but it is included as an option for achievement of substantive equality in the UN, the COE, and in the EU treaties; as well as in recommendations of their supervisory and deliberative organs.[648] Equality between women and men is codified in the UN Charter as well as in CEDAW which expressly provide for the use of positive actions and their use is also recommended by the CEDAW Committee. The Beijing Declaration and Platform for Action from 1995 as a global agenda for gender equality also includes two strategic objectives aiming to ensure women's full participation in decision-making and their capacity to participate in leadership.[649] Equality between women and men is also codified as one of the main EU principles; and the Union as a whole strives to eliminate gender inequality and support equal treatment between men and women in all its activities. Among others, through the codification of the possibility to use positive measures.

Acceptability of preferential treatment was confirmed by the CCC in several cases in which it expressly recalls compliance with international law. In case of estate retirees (miners), the CCC justifies preferential measures with references to the Framework Convention for the Protection of National Minorities (Art. 4), ICPR General Comment No. 18, as well as the ECtHR decision on Belgian language case.[650] In another decision concerning protection of tenants, the CCC held that the restriction of property rights have a legitimate aim, as it contributes to the realization of the right to an adequate standard of living in the sense of Article 11 of the ICESCR, the family's right to social, legal, and economic protection in the sense of Article 16 of the ESC, resp. within the meaning of Article 4 (2) (a) of the Additional Protocol to the ESC.[651] In the landmark Sugar Quota II decision, the CCC stresses that another system of regulation (different from quotas) would be in conflict with the model applied in the EU and the CR would not comply with the approximation obligation towards the EU.

> The radical intervention of the Constitutional Court against the systems of production quotas would be a step towards such a conception of nationally guaranteed fundamental rights, which would not stand after the planned accession of the Czech Republic to the European Union.[652]

Analogically, the preferential treatment of women could be equally accepted with the reference to above mentioned relevant international law.

Changing conditions and emerging international consent

Reference to practise in other states and comparative research also plays an important part in the CCC reasoning which stresses „necessity to take into account the changing conditions in the contracting states and to respond to any emerging consent regarding the standards to be

647 E.g. Decision of the CCC 37/04 of 26 April 2006, published as No. 419/2006 Coll. on the burden of proof in discriminatory disputes.

648 Analysis of relevant acquis of each organization is included in previous chapters.

649 This platform also forms the basis for the Czech gender equality national action plan.

650 Decision of the CCC 15/02 of 21 January 2003, published as No. 40/2003 Coll.on estate disability and pensions (benefits for mining professions).

651 Decision of the CCC 42/03 of 28 March 2006, published as No. 280/2006 Coll. on protection of tenants.

652 Decision of the CCC 39/01 of 30 October 2002, published as No. 135/25 Coll. (Sugar Quota II), VI., 11.

achieved."[653] In its decisions, the CCC frequently refers to the practise in other EU countries or the USA, especially when dealing with production quotas or proportionality principle.[654] The fact that most of the world's states use some types of voluntary and/or legislative political quota, and the majority of the European states also use economic quotas with the view to achieve gender equality in decision-making; thus, speaking in favour of such measures.[655]

The comparative analyses show that the highest representation of women both, in parliaments and on boards of directors is in countries which use some type of quotas. States with political quotas exceeded 30% female representation and many of them have already reached gender parity of 40% to 50%. Similarly, countries with binding economic quotas, such as France, Italy, Belgium, Germany, Austria and Portugal, have already reached 38% of female business representation.[656] On the contrary, in countries with no supporting measures (including the CR), this share is around 14% and its progress over the last decade has been minimal (1.5%).[657] Moreover, the CR underscores international comparisons in both fields. The CR currently ranks between Lesotho and Equatorial Guinea at the 94th of the global index of female parliamentary representation;[658] well below the global percentage of female MPs (25,5%).[659] Similarly, CR underscores in the field of female business representation with 18%, while European average is about 28%.[660] It is therefore possible to conclude that there is an emerging global consensus to improve female representation in decision-making through the use of quotas, and moreover, this measure also proves to be efficient in, at least, reaching descriptive equality.

Compensation for the social contribution

Finally, there is a certain political tendency (approved by the courts) to acknowledge a preferential treatment as a certain reward for demanding work and social contribution; e.g. in cases of preferential treatment of miners and mothers in pension insurance. Even though women seem to be compensated for their social contribution, there are two problems connected with such a measure. Firstly, it singles out mothers and disregards women who perform carrying activities towards other family members, notably handicapped and elderly. Secondly, it encourages traditional exclusive female carer roles, which has been recognized as the main barrier for female participation in decision-making. In general, if women can be granted preferential treatment in the form of early pensions, they could also receive preferential treatment in other forms such as quota in political or business decision-making. Interestingly, while early pensions have an

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653 Decision of the CCC 37/04 of 26 April 2006, published as No. 419/2006 Coll. on the burden of proof in discriminatory disputes, para 71.

654 One of the arguments used by the CCC in the Sugar Quota II case was that Poland as the EU candidate country is also in the process of introducing production quotas in agriculture. In that context it is noteworthy to mention that Poland has also adopted a legislative gender quota in 2011. When exploring the principle of proportionality, the CCC referred to the practice of other constitutional courts, especially in Germany and the USA.

655 Elections in more than 130 countries today are governed by some type of quota policy introduced at the state- or party-levels. Inter-Parliamentary Union (2019), Women in parliament in 2018: The year in review, 10. Available at: https://bit.ly/3seZ6kU.

656 Countries that have adopted soft measures reached an average of 26% e.g. Denmark, Ireland, Greece, Spain, Luxembourg, the Netherlands, Poland, Slovenia, Finland, Sweden and the United Kingdom. Ibid.

657 Bulgaria, CR, Estonia, Croatia, Cyprus, Latvia, Lithuania, Hungary, Malta, Romania and Slovakia. Ibid.

658 Inter-parliamentary Union. Ranking of women in national parliaments. Available at: https://bit.ly/3qGU7ZR.

659 Inter-parliamentary Union. Gender equal parliaments. Available at: https://bit.ly/2OXtQse.

660 EIGE (2021). Gender Statistics Database. Largest listed companies: presidents, board members and employee representatives. Available at: https://bit.ly/3zoe0JT.

automatic and direct negative impact on the state budget, a higher representation of women in decision-making does not. So from the economic perspective, gender quota seems to be even more acceptable. Overall, from this point of view a gender quota could be regarded as objective and reasonable ground for introduction of preferential compensating treatment, going beyond early retirements.

3.5.3. Proportionality test

Proportionality principle is to be assessed once the legitimate goal has been identified. Following, a proportionality test of political and business quotas as they have been proposed in the CR will be assessed based on criteria of suitability, necessity and comparison of binding nature of two conflicting rights.

Criterion of suitability

Firstly, it is necessary to explore whether the quota is a suitable measure to reach a given aim - to increase the female representation in decision-making. Effectiveness of a quota measure depends on the field of its application (political, business, education, science, etc.) as well as regional specification; therefore, each type of a quota measure needs to be designed individually.

As far as the political quota is concerned, a long term experience from different countries prove that this measure is the most efficient under following conditions a) in representative electoral systems, and b) when it includes high numerical threshold, strict placement mandate, and it is backed by dissuasive sanctions.[661] The latest political quota proposal submitted in 2014 in the CR (with representative electoral system in place) aimed at a 40% quota for underrepresented gender, included gender placement as well as sanctions. Suggested design seems to be sufficiently efficient, yet not exceedingly strict. Based on experience from different countries, 40% has been proved as sufficient threshold for the promotion of the interests of a certain social group, considering that the number of elected persons from underrepresented groups is always lower than the quota for their inclusion on the candidate lists. Among others, the 40% target is also included in the COE Recommendation.[662] It is important to stress that some countries mandate strict parity of 50% (e.g. France, Belgium) and eliminate non-complying parties from the elections, while the Czech sanction proposal suggested reduction of the state financial contribution.[663] From that perspective, the drafter successfully tried to balance between efficiency and overall acceptability of political quota in the country.

Similarly 40% threshold for female representation was suggested for the boards of biggest companies. Both, deputies and senators used proportionality arguments in two ways: outwards in relation to the EU and inwards in relation to its effectiveness in local context. Firstly, both chambers argued that the EU principle of proportionality had been breached as there was no sufficient time to take voluntary measures at the state level. Secondly, they argued that the measure itself is disproportional; particularly, as far as its suitability is concerned, since it targets only supervisory and non-executive board members of listed companies. According to both chambers, this would limit its real impact on equal opportunities for women in general. As it has been previously pointed out, this measure was proposed by the EC after some decades of inaction

661 More information is available in chapter 2.2.2 Codification, concepts and types of positive measures.

662 Council of Europe (2003). Recommendation Rec (2003)3 of the Committee of Ministers to member states on balanced participation of women and men in political and public decision making.

663 Minister of Interior (2014), 11.

at national level. Even after almost a decade of this proposal, there have hardly been any measures taken in the CR and a slow growth of women in business decision-making is the proof of it.

As far as the suitability of the measure is concerned, the main objective of the proposed directive was to improve gender balance of the supervisory boards in particular; and any other positive spill-over effects are secondary and complementary to this main aim. As the Senate correctly noted, more measures are needed to ensure equal treatment of women at work-place; e.g. eradication of pay gap, equal share of carrying activities, and fight against stereotypes and prejudice. The EU and other organisations have been actively supporting legal and practical steps in these fields and many of them have already been proposed and approved in the CR. However, it is impossible to target all partial aims that lead to general gender equality by one norm, and the proposed directive is just one of them. As far as intended aim, results from states which implemented voluntary or mandatory business quotas prove that the business gender quota has been able to reach its goal, namely to improve gender balance on company boards.

Criterion of necessity

Secondly, the question is whether the quota is a 'necessary measure' or if there is some other, less intrusive regulation which could be used in order to reach a given goal. Generally, there certainly are other softer alternatives to gender quotas such as support of women's networking, training, mentoring, and medialization, creation of internal female platforms, gender audits and inclusion of gender perspectives in statuses and action plans; as well as provision for children facilities. Unfortunately, most parties do not support such activities, and currently none of the parties uses a voluntary quota. The situation is comparable in the business firms.[664] Apparently, neither an employment of softer measures nor 'natural development' has resulted in an increased presence of women in decision-making in the CR. In the last 30 years, female parliamentary representation has improved by about 10%; and progress of female economic representation has been even slower.

As far as the proposed EU business quota is concerned, both parliamentary chambers recognized that there is "a clear and long-lasting gender disparity" among board members. They also confirmed that the proposed measure would have "a very limited socio-economic impact in the CR"; given limited number of positions in the supervisory bodies and number of companies registered in the CR and listed on the Czech stock exchange.[665] Despite that, both chambers claimed that the Women on Boards Directive proposal is disproportionate and alleged that the Commission should have tried soft-law measures first.

Based on the EU Explanatory Memorandum, however, out of all possible options: 1) no action, 2) recommendation, 3) directive on non-executive boards, 4) directive with flexible objectives for non-executive and executive boards, 5) directive with binding objectives for non-executive and executive boards; the Commission chose one of the mildest options.[666] The Commission further maintained that no significant development has been made in previous decades based on

664 Notable exceptions are local branches of large multinational firms, especially American ones, which have internal regulations providing for certain diversity elements. Nevertheless, women's issues are included in the overall 'diversity' package and often do not advance sufficiently.

665 "Socio-economic development and the specifics of the legal environment in the Czech Republic have led to the fact that the number of companies having their registered office in the Czech Republic and listed on the national stock exchange is relatively limited in comparison with other countries." Chamber of Deputies (2012), 7.

voluntary national initiatives. This is also the case of the CR where no significant development was marked in 30 years of a free market experience when all types of voluntary measures could have been applied. Moreover, the situation has not improved even during the last ten years after introduction of the Commission's proposal. So even though the less invasive measures are possible, they have not been used, and the quota thus seems to be a necessary measure.

Moreover, both political and business quota proposals include a gender neutral formulation of the quota. Even if it may sound unrealistic in the present time, men might need quotas in future as well. Number of countries have already reached parity in the legislative organs and in a few countries, women outnumbered men in the parliament as well as in the government.[667] Men have already surpassed women in European universities and in certain sectors. Suggested measures thus provide for the long-term gender balance beneficial for all.

It is important to stress that the drafter also opted for the least invasive type of sanctions. Earlier Czech proposals of political gender quotas included the sanction of non-registration of the candidate lists in case of non-compliance. In this respect, a financial sanction, which still allows a non-complying party to submit its candidate list, is far less hostile. Said drafter expressly stated that earlier sanction of non-registration might have been considered disproportional and that the main intention is to motivate rather than to exclude parties from elections.[668] Furthermore, the conditions are set equally for all parties and only those which a) do not comply and b) succeed in elections would be financially sanctioned, while they could still participate in elections. Similarly, in case of business quota proposals, the European Commission left the choice of sanction mechanism up to the member states, and the states often choose the mildest 'fail or complain mechanism' at national levels.

Another frequent reproach concerns an open-ended duration of the proposed quota measure. The CEDAW (Art. 4(1) specifies that a positive measure should be temporary; however, it does not impose that such a condition has to be literally stipulated in legal regulation itself. As far as international practice is concerned, there are different standards used for political and economic quotas. Moreover, the vast majority of states using political quotas have not codified any time limitation of the measure as opposed to the economic quota where such time limitation is usually indicated.[669] It needs to be noted though, that the time limit in these cases is not formulated as a definite period after which the quota will no longer be imposed regardless of results but as the time limit during which companies have to comply with the set quota backed by sanction.

As far as the Czech political quota is concerned, the latest proposal from 2014 indicated that it is an intention of the drafter to continuously survey and to evaluate development of female political representation as it takes several election periods to reach the results and it is hard to forecast when sustainable gender balance will be attained. Considering the complexity and length of the legislative process, it seems indeed to be more rational to disconnect gender quota when the balance is reached rather than disconnecting and renewing it after several years. Furthermore,

666 European Commission (2011). Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures /* COM/2012/0614 final - 2012/0299 (COD) */

667 E.g. Women have outnumbered men in the governments of Spain and Finland.

668 Minister of Interior (2014), 11.

669 The quota system might be disconnected either when the numerical goal is reached or when the specified time elapses.

there are examples of the use of unlimited quotas in the CR, namely the milk and sugar quota, which were codified and found constitutional despite their invasive character and unlimited duration.

Criterion of comparison of the binding nature of two conflicting basic rights

Positive actions supporting female access to political and economic decision-making could potentially affect fundamental rights of other subjects including male candidates, voters, political parties and company owners. Following a binding nature of two potentially conflicting basic rights will be compared to find out whether damage to other fundamental rights is not be disproportionate to the benefit brought by positive actions.

Candidates

One of the most frequent objections concerns equal treatment of candidates, more concretely infringement of the passive voting right based on the Constitution (Article 19) and the CFRF (Article 21). In case of political quota proposal, the bill drafter argues that equality of men is not concerned as suggested quota is designed in gender neutral way; i.e. the rules are same for men as well as for women.[670] Furthermore, the proposed measure only makes part of equality of chances, and there is no guarantee that a suggested male or female candidate will be elected. The situation would be different in case of reserved seats (equality of results); which however is not the measure suggested in the CR. The drafter also argues that the quota and possible sanctions is applied to the political party as a juridical person, and therefore, does not concern candidates as physical persons and their fundamental rights.[671] Indirect discrimination of male candidates in case of underrepresentation of women could be possibly alleged but situation may change in a future and the tool will simply protect an underrepresented sex.

Furthermore, as it was previously ascertained, the CCC confirmed a relative understanding of the principle of equality in its case law,[672] and maintained that the legislator has the room to codify unequal treatment to eliminate de facto inequality, which in the present case would be de facto inequality in access to decision-making.[673] Thus, the Court approved constitutional acceptability of distinction between different subjects and rights; and stressed the principle of equality does not imply that everyone must be granted any right. In given case, the situation is even more acceptable as the quota is not designed for preferential treatment of one sex but of an unrepresented group which can be interchangeable.

Furthermore, an overrepresented group does not bear any disproportionate obligations, as matter of fact, any obligations at all. Obviously, new candidates from the overrepresented group will have a lesser chance to succeed but such legal limitations exist already. The CR as a state already regulates the candidate lists to the Chamber of Deputies since it secures a certain number of representatives for each region, which can be considered as a type of regional quota. It means that prospective candidates are already influenced by existing regulations; consequently, they may encounter different numbers and quality of competitors and have different chances to succeed depending on region. Similarly, in the case of milk or sugar quotas, new producers were

670 Minister of Human Rights and Minorities (2009), 7.

671 Minister of Interior (2014), 10.

672 Decision of the CSFR CC 22/62 of 8 October, 1992, published as No. 11/1992 Coll. Decision of the CCC 33/96 of 4 June, 2006, published as No. 185/1997 Coll.

673 E.g. Decision of the CCC 42/03 of 28 March, 2006, published as No. 280/2006 Coll. on protection of tenants.

disadvantaged in their access to the free market and the CCC not only found such limitations acceptable but actually desirable which could be well applied to the present gender quota case.

> The creation of a system of milk production quotas must somewhat "discourage" the entry of new operators into the sector; the aim of production quotas is to stabilize production to a certain maximum amount, which in the current situation actually means a certain reduction. Unrestricted access to the sector could undermine any effect of production quotas. The purpose of limiting the amount of production is therefore to discourage entry into the sector as well as from future investment where there is a public interest in reducing it. One certain disadvantage of potential future producers over current producers is a natural and irreversible feature of any restriction on the amount of production and cannot be seen as a violation of the constitutionally guaranteed principle of equality, because - as has already been said - equality in modern constitutional systems cannot be understood as an absolute category.[674]

Moreover, based on the Czech law and the CCC case law, certain modifications in this field are possible. Pursuant to the Article 41 (1) CFRF, economic and social rights (including the choice and preparation for a profession, as well as the right to conduct business and other economic activities) may be claimed only within the limits of the laws implementing those provisions; and the legislature disposes of a large margin of appreciation in this field.[675] Furthermore, as it was indicated earlier in the text, such legislation does not have to be strictly proportional and can be deemed reasonable even if it is not the best, most appropriate, most effective or wisest mean.[676] The CCC further maintains that the measures in this field would be deemed unconstitutional only in case of complete ignorance and negation on the side of the legislator.

> Social and economic rights (…) differ from classical fundamental rights in that they are not a priori unrestricted fundamental rights (…), but on contrary, the legislator gives them appropriate content and scope. In the case of economic and social rights, therefore, constitutional guarantees establish protection of institutions (employment, wages, social security, family, parenthood, etc.), not protection of specific public subjective rights. They can therefore serve as criteria for constitutional review only where the legislator would completely ignore or negate the constitutional protection of these institutions.[677]

One general objection of quota critics, especially in the business field, is negation of the meritocratic principle as the basic criterion for selection of the most suitable candidates for the supervisory position. Similarly, as in case of political quota, it is important to note that no candidate for a position in supervisory board has a legal guarantee of the outcome; but only an equal treatment in opportunities where his or her qualification and individual situation will be assessed based on transparent and clear criteria. Transparent and impartial selection is one of the main goals to be reached as most selections are done based on internal (mostly non-transparent) rules which reveal very little about the qualification criteria and selection process.

Based on established CJEU case law several criteria for application of positive actions at work-place have to be observed: (1) the measures must concern sectors in which one gender is under-represented; (2) the measure may give priority only to an equally qualified candidate from under-represented group; (3) the measure must not take precedence automatically and unconditionally, but must include a ‘safeguard clause’ which allows the personal situation of each candidate to be

674 Decision of the CCC 5/01 of 16 October 2001, published as No. 410/2001 Coll. (Milk Quota), VII, 11.

675 The rights set out in Articles 26, 27 (4), 28 to 31, 32 (1) and (3), 33 and 35 of the Charter.

676 Decision of the CCC 83/06 of 12 March, 2008, published as No. 116/2008 Coll. on constitutional compatibility of the Labour Code, para. 50, 185.

677 Decision of the CCC 20/09 of 15 November 2011, published as No. 36/2012 Coll. on service income of members of the security forces in the case of overtime.

taken into account.[678] Overall, there are a number of safeguards that prevent abusive application of quotas and selection of a less qualified candidate. Finally, in case of individual problems, a concrete candidate can always turn to the courts with claims of unequal treatment.[679]

Political parties

A frequently raised objection concerns a free competition of political parties as it is guaranteed by the Constitution (Article 5) and the CFRF (Article 22). Based on the latest political quota proposal, the free political competition is preserved as the rules are the same for all parties and none of them receives preferential treatment in detriment of others. Moreover, the parties fulfil an important state-normative function and receive public funds; it is therefore acceptable that the state imposes certain regulations for the elections.[680] Furthermore, the freedom of political parties in drawing up candidate lists is relative, as it is already restricted by different regulations e.g. existence of electoral counties and of 5% closing clause.[681] On the contrary, the introduction of a quota could be understood as the tool to achieve one of the goals of the equality as one constitutional values and fundamental human right.[682]

Voters

It is also often alleged that active voting rights based on the Constitution (Article 16) and the CFRF (Article 21) is restricted as voters' choice is limited through the quota. The argument of the drafter is that the voters will actually have a wider choice, as both sexes will be present among candidates in a more balanced manner.[683] Periodic public surveys also confirm that a gender balanced choice is in line with the voters´ opinion, which support inclusion of women in politics (82%) as well as positive measures including quotas in this field (75%).[684]

There is an often used argument that the voters can 'circle up' their favourite candidates, including women. This has proved to be a functioning method, since the voters showed their support for women via the 'circling' on various occasions already and lifted them from lower places to the frontrunners.[685] Nevertheless, it has been proven that women are placed in lower positions systematically which points out to the de facto inequality and a structural problem which needs to be addressed methodically by the state, and not accidentally by the voters.

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678 Kalanke C-450/93, Marschall C-409/95, Badeck C-158/97, Abrahamsson C-407/98, Lommers C-476/99 and others. For more information regarding the CJEU case law on positive action, see the Explanatory Memorandum to the proposal is available at https://bit.ly/36gAWeD.

679 Špondrová, P. (2020).

680 Minister of the Human Rights and Minorities (2009), 8.

681 Decision of the CCC 25/96 of 2 April 1997, published as No. 88/1997 Coll. on Principles of the Czech electoral system - the constitutionality of the so-called five percent clause in elections to the Chamber of Deputies.

682 Špondrová, P. (2020).

683 Minister of Interior (2014), 7.

684 Vohlídalová, M. (2015). Výzkumná zpráva z dotazníkového šetření ženy a muži v rovnováze (Research Report from a Questionnaire Survey of Women and Men in Balance). Prague: Sociological Institute of the Academy of Science. Available at: https://bit.ly/2NJtHb9.

685 E.g. In 2010, the voters circled up a record number of 14 women from the lower positions. Nevertheless, it is not possible to rely on preferential votes systematically. The 2010 election following global recession was rather an exceptional situation when voters in the so-called 'ring revolution' lifted the whole ¼ of the candidates in reaction to the dissatisfaction with existing representatives. More in Kos-Mottlová, M., Slačálek, O. (2020). Poloviční politika (Half Politics), In Šimáčková, K., Havelková, B., Špondrová, P. (eds.).: *Mužské právo. Jsou právní pravidla neutrální? (Men´s Law. Are the Legal Rules Neutral?),* Prague: Wolters Kluwer, 457.

Company owners

One of the main objections raised by the Parliament is freedom of entrepreneurs to decide about the composition of senior management in their companies and based on given opinions "the efforts for a political solution of the issue of gender imbalance should primarily focus on the question of equal representation in the political sphere".[686]

Accordingly, there are a few issues to be analysed: 1) whether the private sphere falls under legal obligations of gender equality; 2) if is so, whether the freedom to conduct business might be limited; and 3) if so, which circumstances legalize such limitation.

Obligation to secure equality and non-discrimination at work-place

First of all, as proved by statistics, the workplace (in private as well as public sector) is one of the areas where the most discrimination takes place in practice.[687] Hence, all employers have a significant social responsibility to provide for fair treatment and non-discriminatory environment. Such duty has been also confirmed by the UN and EU acquis and theirs organs including the UN Committees, ECSR, as well as the CJEU.[688] The UN Committee on Economic, Social and Cultural Rights stresses that numerous national laws protect specific economic, social, and cultural rights in relation to business entities, notably in the area of health-care, education, environment, employment relations, and consumer safety.[689] Such laws may impose negative obligations to abstain from specific conducts or positive duties to implement measures to enable practical application of these rights in the corporate sector.

National law further regulates such obligations and provides for non-discrimination and equal treatment in constitutions, anti-discrimination acts, labour codes and other national acts. Equal treatment at the work-place thus has to be secured based on international as well as Czech laws (notably the AA and the Labour Code); and the private sector falls under the legal obligations of providing for equal treatment, including the equal treatment based on gender. Furthermore, as it has been previously analysed, both international as well as national law expressly allows for the use of gender positive actions both, in public sphere as well as in private firms.

Equality vs freedom to conduct business and right to property

Secondly, it is important to clarify the status of freedom to conduct business; its relation to right to non-discrimination and equal treatment; and possibility of its limitation. Non-discrimination and equal treatment are one of the main principles of not only international, but as well as Czech laws, and they form basis of all other fundamental rights. The freedom to conduct business, on the other hand, has a much weaker standing. Right to work is codified in a number of international documents such as ILO Declaration of Philadelphia, UDHR, ICESCR and ESC but the freedom to conduct business is expressly included only in the EU legislation.

COE provisions

686 Czech Senate (2013), para. 8.

687 E.g. Šabatová, A., Polák, P., Šamánek, J. et al. (2015)., Havelková (2019).

688 See part 1.1.3. Extension of the state responsibility to the private sphere.

689 UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, 10 August 2017, E/C.12/GC/24. Available at: https://bit.ly/35e8Li9.

Nevertheless, the freedom to conduct business is tightly connected with contractual freedom and the right to property; which is guaranteed by Article 1 of Protocol No. 1 to the ECHR.[690] Based on this article, the ECtHR uses so called 'three rules' approach to assesses a possible state interference;[691] more concretely whether there was: a) interference with the principle of the peaceful enjoyment of property; b) deprivation of possessions or its subjection to certain conditions; or c) control of the use of property in accordance with the public interest[692]. Generally, the less intrusive the measure, the more it fits the first general principle rather than the category of control of use.[693] The ECtHR maintains that the notion of 'public interest' is extensive[694] and it has approved the restriction of property in numerous cases.[695] In principle, the ECtHR respects the national legislature's judgment concerning 'its public interest' unless it manifestly lacks reasonable foundation.[696] National authorities enjoy a wide margin of appreciation, especially in the field of social and economic policies. The CJEU has for example approved restrictions in the context of a change of political and economic regime;[697] or in cases of social protection in the housing sector.[698]

Even though states have a wide discretion to define its national interest, they are still obliged to undertake the proportionality analysis as such failure can result in a breach of Protocol No. 1.[699] Based on the ECtHR case law, the state interference must be a) provided for by law and by the general principles of international law; b) done in the public interest; and c) reasonably proportionate; i.e. to demonstrate a 'fair balance' between the person's right and the public

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690 Article 1 of Protocol No. 1 to the ECHR: (1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. (2) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

691 The interference is typically induced by lawmakers, senior officials and courts, but also customs and revenue officers, licensing authorities, rent control officers or other public officials. Council of Europe (2021). *Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights. Protection of property.* Strasbourg: CoE. Available at: https://bit.ly/3gkhiGD.

692 E.g. confiscation of assets or revenues; requirements to use property in a particular way (such as planning or rent controls); revocation or change of conditions of the business licenses; loss of certain exclusive rights over land; imposition of positive obligations on land owners (such as obligatory reforestation). Ibid.

693 The three rules are connected as the second and third rules represent particular instances of interference with the right to the peaceful enjoyment of property. In cases when deprivation or control of use of property are not applicable, the measure should be explored in the light of the general principle of respect for the peaceful enjoyment of possessions; whereas possessions include shares, patents, licenses, leases and welfare benefits. Ibid.

694 Vistiņš and Perepjolkins v.Latvia[GC], §106; R.Sz. v.Hungary, §44; Grudić v.Serbia, §75. Ibid.

695 E.g. elimination of social injustice in the housing sector; nationalization of specific industries; implementation of land and city development plans; prevention of tax evasion; measures against drug trafficking and smuggling; protection of the victims of the crime; restriction of alcohol consumption; protection of morals; transition from a socialist to a free-market economy; the smooth operation of the justice system; protection of environment; correction of errors committed by the State; abolishment of pension advantages; rent control or protected tenancies; conservation of the cultural heritage. Ibid.

696 Béláné Nagy v.Hungary[GC], §113. Ibid.

697 Valkov and Others v.Bulgaria, §91; Lekić v.Slovenia[GC], §§103 and 105. Ibid.

698 Anthony Aquilina v.Malta, §57; Velosa Barreto v.Portugal, §25; Hutten-Czapska v.Poland[GC], §178; Amato Gauci v.Malta, §55;Kasmi v.Albania, § 76. Ibid.

699 Paulet v.the United Kingdom, §§ 68-69. Ibid.

interest.[700] Fair balance test typically includes an assessment of the choice of measure (necessity); procedural factors; substantive issues; issues relevant to the applicant; and compensation[701].

According to the ECtHR, the fair balance test is not complied with if an individual (or company) has to bear an excessive or disproportionate burden.[702] The ECtHR also examines whether other, less intrusive measures were available in the pursuance of the public interest. Nevertheless, the possible existence of less intrusive measures is not a decisive factor, as long as the legislature acts within its margin of appreciation.[703] In certain cases, the ECtHR analysed whether the circumstances of the case were sufficiently considered by the State, especially with regard to the value of property.[704] Nonetheless, compensation is normally provided only in cases of property expropriation and even in such cases a wide margin of appreciation is applicable to the determination of the amount of compensation.[705] Specifically in the context of economic and democratic reforms or measures designed to achieve greater social justice;[706] where a measure controlling the use of property is in issue, the lack of compensation is considered in a fair balance test. Nevertheless, it does not itself constitute a violation of Article 1 of Protocol No. 1.[707]

EU provisions

Freedom to conduct business is expressly included in the CFREU (Article 16) as the right recognised in accordance with the Community and national laws.[708] The right to property included in the CFREU (Article 17) also stipulates that its use may be regulated by law in so far as is necessary for the general interest.[709] This article is based on Article 1 of the Protocol to the ECHR and even though the wording is somewhat different from the ECHR, the meaning and scope of the right as well as possible limits are the same (as stipulated by Article 52(3) CFREU).[710]

According to the settled CJEU law case, right to property, as well as the freedom to conduct a business or profession, are not guaranteed absolutely but always in connection with a certain

700 Beyeler v.Italy [GC], §§ 108-114. Ibid.

701 Expropriation without reasonable compensation normally constitutes disproportionate interference. A total lack of compensation can be considered justifiable only in exceptional circumstances. Ibid.

702 E.g. A rent-control scheme in force for eleven was considered as a severe restriction on private landlords (Hutten-Czapska v.Poland). Ibid.

703 James and Others v.United Kingdom, §51; Koufaki and Adedy v.Greece (dec.), §48. Ibid.

704 Azas v.Greece, §§51-53; Interoliva ABEE v.Greece, §§31-33, Ouzounoglou v.Greece, §30; Bistrović v.Croatia, §§42-44. Ibid.

705 Ibid.

706 Former King of Greece and Others v. Greece[GC], § 87; Kopecký v. Slovakia[GC], § 35; Broniowski v. Poland[GC], § 182. Ibid.

707 Anonymos Touristiki Etairia Xenodocheia Kritis v. Greece, §§ 44 and 45. Ibid.

708 This Article is based on CJEU case-law which has recognised freedom to exercise an economic or commercial activity (cases Nold and SpA Eridiana) and freedom of contract (cases Sukkerfabriken Nykøbing and Spain v.Commission); and on Article 119(1) and (3) of the TFEU, which recognize free competition.

709 Article 17 CFREU: (1) Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

710 The right to property is a fundamental right common to all national constitutions. It has been recognized on numerous occasions by the CJEU case; initially in the Hauer judgment (13 December 1979, ECR [1979] 3727).

social function. According to the CEJU, these rights might be limited provided that intended restrictions are consistent with Community objectives; they are proportional to the aim to be reached; and do not impair the substance of those rights.[711]

The concept of proportionality has been recognised and progressively elaborated by the CJEU as one of the general principles of the EU since the 1950s,[712] and it entails 3-levels verifying a) whether the measure is suitable to achieve a legitimate aim; b) whether the measure is necessary to achieve that aim or there are less restrictive means available; and c) whether the measure does not have disproportionate effect on the applicant's interests.[713] The CJEU, thus, reviews both legality and to certain extent also the merit of legislative and administrative measures which allows a rather extensive judicial review. Due to revisions of merits, some decisions may involve questions of political nature.[714]

There are two decisions relevant for the purposes of present analysis, which were also referred to in the CCC case law. In the judgment Metallurgiki Halyps against the Commission, the CJEU emphasized that Community restrictions on steel production in the public interest do not constitute an infringement of the right to ownership even if they can jeopardize the viability of the business.[715] In another case Hauer, the CJEU pointed out that the right to property does not preclude the right of a State to apply measures that are considered necessary to regulate the use of property in accordance with general interest.[716] In this case the general interest pursued by the European Community was to reduce production surpluses and to restructure the European wine industry. The CJEU thus approved the decision of the German authorities to restrict winegrowers from planting vines on their land due to Community production restrictions.

Czech constitutional provisions and case law

The freedom to conduct business and other economic activities along with the right to free choice of profession is codified in the Article 26 (1) of the Czech CFRF, and similarly to international provisions, it can be restricted by the law (Article 26 (2) CFRF). [717] Moreover, the CCC clearly

711 Lithgow and Others v. the United Kingdom, §§9 and 109; Deutsches Weintor eG v. Land Rheinland-Pfalz §54; Lidl GmbH & Co. KG v Freistaat Sachsen.

712 The proportionality principle was first assessed by the ECJ in case Federation Charbonniere de Belgique v.High Authority [1954] ECR 245 Case C8/55. The principle of proportionality is also recognized in Article 5 of the ECT, maintaining that "any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty".

713 Among others, the CJEU stated that in case of a choice between several appropriate measures the least onerous one should be adopted, and possible disadvantages must be proportionate to the pursued aims. R v.Minister of Agriculture, Fisheries and Food ex parte Fedesa [1990] ECR 1–4023 Case C-331/88.

714 The CJEU previously ruled that in matters where the Community legislature has a discretionary power which corresponds to the political responsibilities (based on Articles 40 and 43 of the Treaty), "the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective". The Queen v. Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others. Case C-331/88.

715 Judgment of the Court (Second Chamber) of 9 December 1982. Metallurgiki Halyps A.E. v Commission of the European Communities. Production quotas for rolled products. Case 258/81.

716 Judgment of the Court of 13 December 1979. Liselotte Hauer v Land Rheinland-Pfalz. Reference for a preliminary ruling: Verwaltungsgericht Neustadt an der Weinstraße - Germany. Prohibition on new planting of vines. Case 44/79.

717 Article 26 (1) Everybody has the right to the free choice of her profession and the training for that profession, as well as the right to engage in enterprise and pursue other economic activity. (2) Conditions and limitations may be

stated that categories of economic, social and cultural rights, including freedom to conduct business, can only be claimed within the limits of the law, which defines them (based on Article 41 CFRF).[718]

The CCC has taken rather restrictive approach to the right to conduct business in its case law and basis its arguments in a following manner: a) international regulation of the right to conduct is very weak and current foreign models confirm a limited concept of freedom to conduct business; b) legislator may restrict the freedom to conduct business relatively broadly; c) derivation of the freedom to conduct business from the property rights and personal freedom is unreasonably broad.

> Global international human rights pacts are silent on freedom of enterprise as a fundamental right. Even the European post-war standard of the ECHR and the Additional Protocols does not know it. Its derivation from the guarantee of property rights and personal freedom is an unreasonably broad interpretation, which finds no support in the case law of the ECHR (…). Only the CFREU recognizes the freedom of enterprise (economic activity), but provides for its restrictions by European and national law (…). Thus, only the Constitutional Court is called upon to define the concept of the Czech guarantee of freedom to conduct business under Article 26 of the Charter (CFRF). At the same time, current foreign models rather confirm the limited concept of freedom to conduct business held by the Constitutional Court as a right, which the legislator may restrict relatively broadly.[719]

Hence, even though the freedom to conduct business is connected with the right to property and contractual freedom CFRF (Article 11), the CCC interprets such relation rather restrictively.[720] Furthermore, even these rights can be restricted in the public interest, on the basis of law, and for compensation.[721] Overall, the CCC has approved limitations of freedom to conduct business and the right to property in numerous cases; concerning mainly price or quantitative regulation.

> The legislator may (within the limits set by the constitutionally guaranteed fundamental principles, human rights and freedoms) introduce price or quantitative regulation at its discretion in a particular sector of the economy, to define or influence a species and the number of entities operating in it or restrict contractual freedom (…).[722]

At the same time, however, the CCC stressed that respect for the autonomous sphere of an individual is a general condition for the functioning of the rule of law.[723] Accordingly, the state power is obliged to recognize autonomous manifestation of the will of individuals; and when

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set by law upon the right to engage in certain professions or activities.

718 Decision of the CCC 5/01 of 16 October 2001, published as No. 410/2001 Coll. (Milk Quota), VI., 8.

719 Decision of the CCC 39/01 of 30 October 2002, published as No. 135/25 Coll. (Sugar Quota II), V, 9.

720 According to the CCC, the contractual freedom is "a derivative of the constitutional protection of property rights under the Article 11 (1) of the Charter (the basic component of which is ius disponendi)". Based on Article 1 of the Constitution and Article 2 (3) of the CFRF; Decision of the CCC 24/99 of 23 May 2000, published as No. 167/2000 Coll., Decision of the CCC 5/01 of 16 October 2001, published as No. 410/2001 Coll. (Milk Quota), VI.

721 Article 11(3) Ownership entails obligations. This may not be misused to the detriment of the rights of others or in conflict with legally protected public interests. This may not be exercised so as to harm human health, nature, or the environment beyond the limits laid down by law. (4) Expropriation or some other mandatory limitation upon property rights is permitted in the public interest, on the basis of law, and for compensation.

Based on Article 1 of the Constitution and Article 2 (3) of the CFRF; Decision of the CCC 24/99 of 23 May 2000, published as No. 167/2000 Coll., Decision of the CCC 5/01 of 16 October 2001, published as No. 410/2001 Coll. (Milk Quota), VI., 8.

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723 Decision of the CCC 113/04 of 4 May 2004, 129.

such conduct does not interfere with the rights of third parties, the state power may only respect or approve them. Interference with the freedom of the individual may be invoked only in cases justified by a particular public interest, if such interference is proportionate to the objectives to be achieved. The CCC arguments can be best traced in landmark cases concerning regulation of the flat rents and milk and sugar quotas, in which it deemed protection of tenants and stabilization of milk and sugar prices as legitimate public interest.[724] With regard to the proportionality, the Court maintained, the

> State intervention must respect an appropriate (fair) balance between the general interest of society and the protection of the fundamental rights of the individual. This means that there must be a reasonable relationship of proportionality between the means employed and the objectives pursued.[725]

Proportionality vs rationality testing

It is noteworthy that the CCC used both COE and EU terminology elements in its definition; nevertheless, the proportionality test seemed to be a problematic part of those decisions, in particular the quota ones. As pointed out by dissenting opinions of judges Holländer and Procházka, the CCC did explore the question of necessity in case of protection of tenants but it failed to do so in later cases of milk and sugar quotas; even though such failure could have significantly influence an overall outcome of the case.[726] In case of protection of tenants, however, the CCC analysed the First Republic Legislation which allowed an increase in rent due to reimbursement of costs made for occasional or extraordinary necessary repairs and renovations of the house.[727] Furthermore, the CCC added a criterion for assessing the constitutionality of price regulation, while stating that the price regulation should not reduce the price to the point where it does not guarantee at least the return of necessarily incurred costs. Such regulation, according to the CCC, "would actually imply a denial of the purpose and all functions of ownership". Based on these arguments, the Court found violation of the CFRF (Article 4 (3) and (4) in conjunction with Article 11 (1)).

In the milk quota case, the CCC recalled that the system of production quotas represents 'a form of control over the use of property' that is introduced in public interest; and in several instances of concerned decisions asserted that the restrictive measures have to be proportional to the aim. Nevertheless, the CCC did not execute the full proportionality test and referred the question of necessity to the Parliament.[728] In connection with these considerations, the CCC pointed to the doctrinal continuity of its case law stressing that it is entitled to assess only the constitutionality

724 There are several factors that the CCC took into consideration including existing EU regulations which the CR as a candidate state needed to conform to as well as the fact that existing milk and sugar overproduction is exportable only with the state export subsidies financed from the public funds. Decision of the CCC 5/01 of 16 October 2001, published as No. 410/2001 Coll. (Milk Quota), VI., 8.

725 Decision of the CCC 5/01 of 16 October 2001, published as No. 410/2001 Coll. (Milk Quota), VII.

726 Decision of the CCC 3/2000 of 21 June 2000, published as No. 231/2000 Coll.

727 Provision of § 9 par. 4 of Act No. 32/1934 Coll.

728 The CCC "treats only the constitutional aspects of the challenged provisions, and does not comment on their suitability and effectiveness, e.g. in terms of the existence of a free market and the like; it is not called upon to assess the economic aspects of the necessity of, for example, various adjustments relating to business with regard to the need to secure individual, often juxtaposed or even conflicting (alleged) public interests. Choice of restrictive control instruments and the degree of their application is primarily the task of the legislator." Decision of the CCC 5/01 of 16 October 2001, published as No. 410/2001 Coll. (Milk Quota), VI.

(or legality) of the challenged legal regulation and not its suitability or effectiveness.[729] The CCC went even further in the Sugar Quota II case, where it added the notion of the 'rational basis test'.

> When evaluating the legal regulation, the so-called rational basis test will suffice; i.e. a brief verification of whether the implemented measures can lead to the objective pursued. A tendency to strictly evaluate all solutions adopted in the field of labour law would force the Constitutional Court to examine the necessity and usefulness of the chosen state policy and to lean towards some economic-political doctrine; however, this does not belong to the role of the Constitutional Court - as already mentioned - nor does it correspond to the relative political neutrality of the Charter and the Constitution of the Czech Republic.[730]

The main problem is that the 'rational basis test' as defined above does not involve all elements of the proportionality tests as defined by the CCC itself in its previous decisions, or as assessed by the ECtHR and the CJEU. According to this definition of rational basis test "a brief verification of whether the implemented measures can lead to the pursued objective" will suffice; based on proportionality test, this is just the first phase of 'suitability', while second and third phase analysing 'necessity' and 'comparing concerned public interest and restricted rights' should be equally analysed.[731]

Acceptable intensity of interference with property rights

The CCC, however, expressed itself on the question of the character and intensity of interference. In case of protection of tenants, the CCC did not accept the argument of loss of price, or inability to invest in repairs in case of rental prices and concluded that invocation of constitutional and international guarantees of ownership in those cases would be considered unjustified.[732] In case of milk and sugar quotas, the CCC admitted that the quantitative limitation of production of any product naturally constitutes a restriction of its use. Nonetheless, it reasoned that such restriction does not result in expropriation, since the owners may - to a limited extent - continue to dispose of the products.[733]

Based on the CCC argumentation the over-production is not explicitly prohibited but it is 'disadvantaged' in order to discourage production. The Court compared the penalty levy to taxes

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729 Decision of the CCC 5/01 of 16 October 2001, published as No. 410/2001 Coll. (Milk Quota), Decision of the CCC 39/01 of 30 October 2002, published as No. 135/25 Coll. (Sugar Quota II), 1667/15.

730 Decision of the CCC 39/01 of 30 October 2002, published as No. 135/25 Coll. (Sugar Quota II), VIII., 14. Decision of the CCC 83/06 of 12 March, 2008, published as No. 116/2008 Coll. on constitutional compatibility of the Labour Code.

The CCC herby endorsed the approach of the US Supreme Court since it stopped considering legislation of an economic and social nature incompatible with absolutized contractual freedom and the right to property, and acknowledged that the economic policy is primarily a matter for the political decision-making (see the context of the Roosevelt's New Deal). The Court explicitly refers to the American theory of the 'rational-basis test', according to which a norm will be valid whenever it is reasonably related to a public goal and is not result of arbitrary discrimination. This reasoning was used in case Wickard v. Filburn (317 U.S 111(1942)), in which the US Supreme Court referred to the responsibility of political authorities to make decisions concerning introduction of production quotas for wheat production. This represents an example of judicial restraint of the US Supreme Court.

731 This has also been one of the reproaches of dissenting opinions of constitutional judges Holländer and Procházka who maintained that given measure should be assessed based on safeguards of the right to property pursuant to Article 11(3) and (4) of the Charter and Article 1(2) of Protocol No. 1 to the ECHR.

732 In case of protection of rents, the complainants claimed that, due to lower rents, apartment owners will have difficulty to finance maintenance of their real estate which diminishes the value of their property.

733 Decision of the CCC 5/01 of 16 October 2001, published as No. 410/2001 Coll. (Milk Quota), VII., 9-10, Decision of the CCC 39/01 of 30 October 2002, published as No. 135/25 Coll. (Sugar Quota II), VI., 10.

and charges, the purpose of which is to increase the price of a particular good or service and reduce their consumption (similarly to excise duties on alcoholic beverages, cigarettes or hydrocarbon fuels or operating fees slot machines). The CCC maintained that disadvantage to a particular activity is a common legal instrument, especially when a direct ban or administrative or criminal sanctions would be disproportionate.[734] According to the CCC, the quota system is, on the contrary, a protective measure, which helps ensure sales and income for existing manufacturers.[735]

> It is therefore clear that the quota system does not constitute a fundamental and unjustified restriction on the right to property, but it is, in essence, a purposefully protective measure. To a certain extent, it may be subjectively perceived as a restriction on the property rights of milk producers; however, it cannot be overlooked that such measure - in its final effect under clearly defined and predetermined conditions - objectively protects and develops producers' property rights. The purpose of the quota system is to create the conditions for each producer to have an outlet and to receive a corresponding minimum price. However, the answer to the question of whether the measure is optimal and economically most advantageous clearly cannot be given by the Constitutional Court.[736]

Remarkably, while in case of gender business quota both chambers of the Parliament alleged interference with the free market and the right to property; in case of milk and sugar quota (where state interference reached much higher intensity and was backed by financial sanctions), their official attitude was favourable. According to the Chamber of Deputies, the claim of breach of equality principle was "unfounded, as everyone has the opportunity to freely decide whether and under what conditions it will do business in a certain area. The Chamber recalled that "even in the EU, the regulation of agriculture is not understood as a breach of the freedom to conduct business. The legislator therefore may, within the limits set by the guaranteed fundamental rights, define or affect the type and number of entities operating in a given sector or somewhat restricts the contractual freedom to place production on the market." Furthermore, based on the Senate's position, accompanying sanctions were not discriminatory.

Market economy, free from state intervention is not a human right

Most importantly, the CCC finalizes its argument with the statement that "the right to obtain a certain price on the market is not part of the fundamental right to property" and that a clean market economy, free from state intervention, is not a part of national human standard demands.[737] On the contrary it added that "limited application of production quota systems in particular in agriculture is common in the EU and in some other developed countries with a social market economy".[738] The CCC however did not consider whether other less invasive measures

734 Decision of the CCC 39/01 of 30 October 2002, published as No. 135/25 Coll. (Sugar Quota II), V., 10.

735 Interestingly, the CCC does not consider such measures to be similar to 'central socialist economic planning', even though, in case of revision of the Labour Code, it expressly recalled negative experience with 'social engineering' including the state-socialist labour practices such as codification of the duty to work, introduction of labour camps for the maladapted, and punishment of so-called parasitism. Decision of the CCC 83/06 of 12 March, 2008, published as No. 116/2008 Coll. on constitutional compatibility of the Labour Code, para. 48, 178. Since the argument of so-called 'social engineering' is one of the most popular in political discourse concerning gender quota, it should be pointed out that the effects of gender quota certainly do not compare to the examples recalled by the CCC in this case.

736 Decision of the CCC 5/01 of 16 October 2001, published as No. 410/2001 Coll. (Milk Quota), VII.

737 Decision of the CCC 5/01 of 16 October 2001, published as No. 410/2001 Coll. (Milk Quota), VI., Decision of the CCC 39/01 of 30 October 2002, published as No. 135/25 Coll. (Sugar Quota II), V., 9.

738 Decision of the CCC 39/01 of 30 October 2002, published as No. 135/25 Coll. (Sugar Quota II), VI.

could have been used and did not reflect upon possible individual economic losses caused by the quotas. Nevertheless, the Court weighed freedom to conduct business and the public interest, while stressing the social function of business activities.

> In its case law, the Constitutional Court refuses to separate fundamental principles of the rule of law, such as equality (Article 1 of the Charter) and the adequacy/suitability of legal regulation (Article 4 of the Charter) from individual human rights and freedoms, such as fundamental right to property (Article 11 of the Charter) and freedom to conduct business (Article 26 of the Charter) (…). Although the fundamental rights in question are included in the Charter and perceived as rights of different categories (the first as basic versus the second as economic and social), yet are closely linked. Freedom to conduct business is even referred to as freedom derived from property rights. This view can only be accepted partly. Business and other economic activity certainly represents in particular activities aimed at creating property values needed to meet living needs. Their everyday result is property (money in the modern economy) that is protected through the fundamental right to ownership at constitutional and international European level. Ownership of property (capital) is furthermore a precondition for the start-up and continuation of business. At the same time however, entrepreneurship represents the way of personal and group self-realization. Even property rights, if not to be conceived as self-serving, this itself mediates the use of other basic ones and other rights.[739]

Similar arguments were used by the he Bohemian-Moravian Confederation of Trade Unions in case of revision of Labour Code,[740] which stressed that the classical "free contract" from the times of economic liberalism was overcome and stressed the social function of property ("property is binding"). The Confederation further pointed out that protection of work, as well as the environment and other values, is unthinkable without limiting the disposition of ownership when private interest conflict with the superior general interest; and brought up an example of the EU which seeks to organically link both of them.

Gender quota implications

In light of these decisions, a possible gender quota for supervisory company boards seems to be a measure which should be able to pass even the strictest proportionality grid. Long-term gender imbalance in business decision-making is evident and officially acknowledged by both chambers of the Czech Parliament. Based on experience from other European countries, transparent selection criteria in combination with binding or aspirational quota have proved to be an efficient measure able to decrease such imbalance i.e. to be the measure suitable to reach the aimed goal.

Since no other efficient voluntary undertakings have been evidenced in the field over the last 30 years of existence of market economy (before or after the EU business gender quota proposal), such a measure seems to be necessary. Even though the House of Czech Deputies tried to suggest possible negative economic impacts of such measures (based on two studies); general long-term experience from other countries have not proved such adverse consequences. Even if this was the case, the CCC has previously stated that the freedom to conduct business has an important social impact and function and there is no right to obtain a certain economic profit and a market economy, free from state intervention, is not a part of national human standard demands.

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739 Decision of the CCC 39/01 of 30 October 2002, published as No. 135/25 Coll. (Sugar Quota II), IV, 8.

740 Decision of the CCC 83/06 of 12 March, 2008, published as No. 116/2008 Coll. on constitutional compatibility of the Labour Code, para. 22, 74.

As far as intensity of measure is concerned, it needs to be recalled that the main objective of the proposed directive was to secure fairness and transparency of selection process i.e. equality of chances where underrepresented gender can be preferred only among equally qualified candidates. Employers themselves decide on the criteria and final selection.[741] Furthermore, there were no sanctions included in the original proposal but it was left up to the states to secure compliance with stated requirements; with one of the options being 'complain or explain' mechanism. This requirement clearly does not impair the very existence of entrepreneurial freedom and does not lead to bankruptcy or inability to conduct the business. Such limitation is far less invasive than production quotas which have been deemed constitutional by the CCC or tax imposition which are generally recognized as acceptable and legitimate.[742]

3.6. CR Summary

Despite the fact that Czech women represent the majority of university graduates as well as almost half of the country's workforce, they only make up for about 25% of parliamentary representatives and even smaller percentage among board members of business companies.[743] Besides this horizontal segregation, there is also an existing vertical segregation according to different fields of studies and professions and political portfolios.[744] The CR has one of the highest pay gaps in the EU (reaching 19%) and one of the highest numbers of women dropping out of the labour market due to long parental leaves and caretaking.[745] Such a situation is largely structurally determined via several factors including lack of: 1) nurseries under age of three; 2) flexible work opportunities; 3) fairer share of parental care and 4) fairer share of general carrying activities; and 5) gender neutral institutional culture and practices.

This imbalance is also caused by the low level of practical application of anti-discrimination acquis and a very low number of anti-discrimination complaints and litigation caused by

741 According to the Commission's response to the Czech Senate, "the proposed directive does not unduly interfere with the property rights and obligations of shareholders… as it does not impose any specific obligation regarding the decision on appointment to these positions…"; and it solely ensures that "candidates have an equal chance of being appointed by introducing fairer and more transparent appointment procedures based strictly on the qualifications set by the companies themselves and by applying the rule, according to which the under-represented gender is preferred only among two equally qualified candidates" https://bit.ly/2OY4meC.

742 For example, based on the CCC case law, the Supreme Administrative Court held that a tax liability is constitutional, provided that it does not have confiscatory effects and leads to the legitimate goal. Decision of the Czech Supreme Administrative Court of 9 October 2008, No. 2 Afs 178/2006 – 46, para.15. Proposal submitted pursuant to Article 95 para. 2 of the Constitution of the Czech Republic to declare the provisions of § 8, § 9, § 10 and § 15 of Act No. 357/1992 Coll., On inheritance tax, gift tax and real estate transfer tax unconstitutional claims that the provisions of Section 15 of Act No. 357/1992 Coll., on Inheritance Tax, Gift Tax and Real Estate Transfer Tax, contradict the constitutionally guaranteed right to property enshrined in Article 11 of the Charter of Fundamental Rights and Freedoms and also in Article 1 of the Additional Protocol to Article 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as the statutory tax rate is disproportionately high and therefore "strangling".

743 European Institute for Gender Equality (EIGE). *Gender Equality Index 2020: Czechia*. (2020). EIGE. https://bit.ly/2SZbXf4.

744 European Commission (2021). *EU Gender Equality Report 2021.* Brussels: European Commission. Available at https://bit.ly/3qlPkgW.

745 Eurostat (2017). *The Gender Pay Gap Statistics*. Available at https://bit.ly/1Bf20GV. World Economic Forum (2019). *The Global Gender Gap Report 2020*. Available at https://bit.ly/3gZqkYJ.

excessive length and expenses of the proceedings and insufficient remedies. Moreover, most judges do not treat discrimination based on sex with more caution as it is intended by international law. On the contrary, the courts generally omit to recognize cases of structural gender discrimination and tend to condemn only the most flagrant intentional direct discrimination and often disregard cases of indirect and unintentional discrimination.[746] Most cases concerning discrimination based on gender thus do not succeed in the first instance. In a few cases where discrimination was confirmed, only an apology without compensation for non-pecuniary damage has been awarded which does not cover high costs of proceedings. This results in a wish circle as it dissuades victims from complaining. Hence, the minimal outlook of success, lack of compensation along with the social stigmatization of the complainants and their fear of retaliation almost completely eliminate discrimination disputes.

The CCC came up with the main postulates concerning the principle of equality in the early 1990's after the fall of the communist regime. According to its fundamental doctrine, equality is a relative principle which is always attributed to a certain legal norm and can be further modified by the norm-maker in different fields. The CCC confirmed that it is possible to treat one group of subjects differently (in positive or negative sense) but such an act must always be justified with regard to rational and objective criteria and the public interest. Generally, it is clear from the CCC case law that it distinguishes between formal and substantial equality and uses both approaches.[747] The CCC accepts the notion of substantial equality and allows for advantageous treatment especially of those who are socially disadvantaged and economically weaker; and who play a special role within society such as miners and female carers. Such preferential treatment has been enacted during state-socialism already and it is still acceptable and upheld, both by the legislator as well as the CCC. At the same time, it is important to point out that those preferences are typically based on traditional essentialist assumptions which presume that physical male work is harder than other types of work, and that women are the main (or even sole) child carer in the society. Nevertheless, one has to note that not all legislators and judges hold such views. In case of minors, it was the Regional Court in Brno, which pursued annulment of provisions favouring this particular group and in case of mandatory application for male carers and early retirement of female carers it was the Supreme Administrative Court which brought in the case.

746 Havelková, B. (2019). Diskriminace z důvodu pohlaví před českými soudy – typologie případů, únikové strategie a strach z chráněných důvodů (Gender Discrimination before the Czech Courts - Typology of Cases, Evasion Strategies and Fear of Protected Reasons). Jurisprudence 2/2019. Prague: Law Faculty of Charles University, 44.

747 Formal equality approach was used, for example, in the landmark gender equality case Pension III - mandatory application for male carers (Decision of the CCC Pl. ÚS 42/04 of 6 June 2006, published as No. 405/2006 Coll). Substantial equality approach was recognized in case of protection of lessees (Decision of the CCC Pl. ÚS 42/03 of 28 March 2006, published as No. 280/2006 Coll.), or in cases concerning proportionality of an imposed fine (Decision of the CCC Pl. ÚS 3/02 of 13 August 2002, published as No. 405/2002 Coll.) and examination of financial circumstances of the offender (Decision of the CCC Pl. ÚS 38/02 of 9 March 2004, published as No. 299/2004 Coll.).

Even though the CCC approach seems to be beneficial to women at first sight; in practice, it reinforces a traditional and stereotypical gendered division of work and a double burden for women since it indirectly discourages men to get more engaged in carrying activities. Seemingly, the main rationale for such a position is economic one to keep men as working force, not as carers, while treating women in exactly the opposite way. The state apparently opts to keep women on minimal allowances on maternity leave and early pensions in order to take care of children, sick and elderly; which is the task that would otherwise have to be secured by the government (e.g. nursing, preschool care and old people care). While both legislators and courts are generally much supportive of female carers; there is minimal support for female workers. Such a stance is revealed by numerous discrimination cases concerning the part-time work, remuneration and hiring, in which the court opts not to intervene in discretionary decisions of private employers. Hence, based on existing case-law, the outlook for the Czech courts' support of the use of positive actions in favour of women is rather sceptical. Nevertheless, the CCC repeatedly confirmed support for different treatment of economically and socially weaker subjects hereby demonstrating its responsiveness towards substantial equality which is crucial for application of positive actions.
The positive actions are expressly allowed via provisions of Anti-Discrimination Act as well as the Labour Code. Nonetheless, they are hardly used in practice, and if so their use is usually limited to the softest form open for all possible beneficiaries (such as provision of some forms of flexible working arrangements or institutional child care or training). This use of positive actions in a stricter sense which would target women in specific is rather rare in the CR. One of the most notable resistances among the political and corporate elites is present towards the use of quotas in order to redress gender imbalance in public decision-making. This quota measure is currently practiced only by the Green Party in the political sphere; and no examples are known in the business sphere. There have been three governmental proposals aiming to introduce legislative political quotas so far, but none of them has been approved by governing coalitions due to lack of political consensus. The business quota has been proposed via the EU Board of Directors Directive. Nevertheless, this proposal has been criticised by both chambers of the Parliament due inconsistencies with the principle of proportionality and subsidiarity and interference with the freedom to conduct business. Currently, this Directive is on hold due to blocking a minority formed in the Council of the EU, but possible changes might take place with the upcoming EU French presidency. The changes at the local Czech level could, however, take place as result of the pressure made by the ECSCR which has recently published its decision concerning the gender imbalance in the economic decision-making in the CR.

Since the Czech Parliament and several ministries have expressed numerous reproaches and concerns about constitutionality of proposed business and political quota; their constitutional compliance has been analysed in the study. Even though there is a possibility that the economic quota would be only assessed based on the rationality test, a full proportionality test has been executed for both types of quotas with regard to their manifold impact on different actors and type of rights. Hence legitimate aim as well as criterion of suitability, necessity, and comparison

of the binding nature of concerned conflicting basic rights has been assessed for both types of quota separately.

As far as the legitimate aim is concerned, there are numerous public interests that could be applicable including an objective to balance de facto inequalities; to strengthen representative democracy; to provide compensation for past injustices; to secure state economic interests; and to align national law with international acquis and growing international consensus. Concerning suitability, a long term experience from different countries prove that political quota is the most efficient in proportional representation electoral systems; and when it includes high numerical threshold, strict placement mandate and it is backed by dissuasive sanctions. The latest political quota proposal submitted in 2014 in the CR includes all given attributes and it can therefore be concluded that is a suitable measure to reach changes in descriptive representation. Similarly, based on experience from other European countries, transparent selection criteria in combination with binding or aspirational quota have proved to be an efficient measure able to decrease existing imbalance i.e. to be the measure suitable to reach the aimed goal. In terms of necessity, it seems that both types of quotas are necessary as 'natural development' has not led to any changes. Likewise, since no efficient voluntary undertakings have been evidenced in the political or economic field over the last 30 years in the CR (before or after the EU business gender quota proposal), such a measure seems to be necessary. Moreover, it needs to be noted that in case of business quota, proposed directive sets flexible objectives for non-executive boards without sanctions attached; whereas hard quota for both executive and non-executive boards backed by sanctions was one of additional choices.

Finally, impact on other physical and juridical entities including voters, other competing candidates, political parties and business firms have been evaluated. In the case of a political quota proposal, it needs to be noted that equality of men is not concerned as the suggested quota is designed in a gender neutral way; i.e. the rules are the same for men as well as for women. Furthermore, the proposed measure only makes part of equality of chances, and there is no guarantee that a suggested male or female candidate will be elected or hired. This situation would be different in case of reserved seats (equality of results); however, this is not the measure suggested in the CR. Furthermore, the CCC confirmed a relative understanding of the principle of equality in its case law, and maintained that the legislator has the room to codify unequal treatment to eliminate de facto inequality, which in the present case would be de facto inequality in access to decision-making. In given case, the situation is even more acceptable as the quota is not designed for preferential treatment of one sex but of an unrepresented group which can be interchangeable. Finally, based on established CJEU case law several criteria for application of positive actions have to be observed: (1) the measures must concern sectors in which one gender is under-represented; (2) the measure may give priority only to an equally qualified candidate from under-represented group; (3) the measure must not take precedence automatically and unconditionally, but must include a 'safeguard clause' which allows the personal situation of each candidate to be taken into account.

Regarding political parties, the presented quota is applicable to all and none of them receives preferential treatment in detriment of others. Furthermore, the freedom of political parties in drawing up candidate lists is relative; and it is already restricted by different regulations e.g. existence of electoral counties and of 5% closing clause. Therefore, if such regulation is not contrary to the constitution, then gender regulation should also be acceptable. On the contrary, the introduction of a quota could be understood as the tool to achieve one of the goals of the equality as one constitutional values and fundamental human right. Moreover, the parties fulfil an important state-normative function and receive public funds; it is therefore acceptable that the state imposes certain regulations for the elections.

It is often alleged that the voters' choice will be restricted. Here, it can be argued that on the contrary, the voters will have a wider choice, as both sexes will be present among candidates in a more balanced manner. Periodic public surveys confirm that a gender balanced choice is in line with the voters´ opinion, which support inclusion of women in politics (82%) as well as positive measures including quotas in this field (75%).

One of the main frequently raised objections concerns freedom of entrepreneurs to decide about the composition of their senior management. In this context it is important to note, that based on the international acquis ratified by the CR, Constitution, Labour Code and other laws, the Czech employers are already bound by imperative of equal treatment and non-discrimination and elimination of barriers leading to equality. Furthermore, both, international as well as national law expressly allows for the use of gender positive actions in public sphere as well as in private firms. While non-discrimination and equal treatment form basis of all other fundamental rights and they are one of the main principles of international as well as Czech laws; the freedom to conduct business has a much weaker standing and it is expressly codified only in the EU law. The freedom to conduct business could be connected with the right to property or contractual freedom, but it is to be noted that all three rights/freedoms can be restricted based on the international as well as Czech law. The CCC confirmed in its case law that the legislator may restrict the freedom to conduct business relatively broadly and that derivation of the freedom to conduct business from the property rights and personal freedom is unreasonably broad.[748] Overall, the CCC has approved limitations of freedom to conduct business and the right to property in numerous cases; concerning mainly price or quantitative regulation. Even though many critics, including the Chamber of Czech Deputies, suggest possible negative economic impacts of gender quotas; a general long-term experience from other countries has not proved such adverse consequences. Even if this was the case, the CCC has previously stated that the freedom to conduct business has an important social impact and function and there is no right to obtain a certain economic profit and a market economy, free from state intervention, is not a part of national human standard demands.

748 Decision of the CCC 39/01 of 30 October 2002, published as No. 135/25 Coll. (Sugar Quota II), V, 9.

As far as intensity of measure is concerned, it needs to be recalled that the main objective of the proposed directive was to secure fairness and transparency of selection process i.e. equality of chances where underrepresented gender can be preferred only among equally qualified candidates. Employers themselves decide on the criteria and final selection. Furthermore, there were no sanctions included in the original proposal but it was left up to the states to secure compliance with stated requirements; with one of the options being 'complain or explain' mechanism. This requirement clearly does not impair the very existence of entrepreneurial freedom and does not lead to bankruptcy or inability to conduct the business. Such limitations are far less invasive than production quotas which have been deemed constitutional by the CCC or tax imposition which are generally recognized as acceptable and legitimate.

Conclusions

The main purpose of this presented research was to analyse the current status of codification and the use of positive actions as a tool to reach effective gender equality in public decision-making; and to subsequently assess its potential application in the CR. There are several key findings stemming from the research.

Firstly, the formal codification at international level directly or indirectly allows for use of positive actions. All main international human rights treaties codify principle of equality and non-discrimination as a fundamental part of all their provisions and oblige states to take all necessary steps to their effective realisations. Furthermore, their supervisory organs do not interpret equal treatment as absolute mandate but expressly allow for different treatment if such is necessary, objective, and proportional. Besides, most treaties expressly allow for preferential treatment (positive actions) in order to reach de facto equality of historically and socially disadvantaged groups of population, notably women and racial minorities. The main decision concerning personal and material scope of such measures (in other words who should be preferentially treated, in which fields and with what intensity) remains in discretion of national states. Nevertheless, the main aim of the positive action is to redress asymmetric power relations and as such positive actions cannot possibly be formally symmetric as they would not change the situation. Hence, the positive actions tend to aim at unequal redistribution of common goods. The question is whether such actions should be understood as a tool to attain equality or as an exception from the guaranteed principle of equality. In order to avoid the clash with principle of equality, several conditions (specified either directly in international law or in related case law) prevent misuse and adverse effects of gender positive actions.

Firstly, the CEDAW clearly stipulate that such measures have to be temporary and disconnected once their aim is reached. The CJEU has further added that such actions must a) concern sectors where women are underrepresented; b) concern candidates who are equally qualified; c) consider each candidate individually and objectively; d) override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of male candidates; e) must not discriminate against women; and f) must aim at balancing gender role prejudice and to provide for equal opportunities (not results).

The CJEU thus inclines towards more restrictive approach and towards equality of chances, especially with regard to improvement of material competitive capacities (e.g. places in training programs or invitation for interviews) for which it applies an intermediate scrutiny comparable to rationality test. In such cases, the CJEU explores the existence of reasonable barriers and reasonable effectiveness of the selected actions. However, the CJEU seems to be receptive even towards harder forms of positive measures including quotas, with argumentation that such measures have to always be followed by the selection process which in line with EU law. Nevertheless, in cases where positive actions aim towards equality in results (or reserved places)

which redistribute certain goods and power more extensively; the CJEU applies stricter proportionality test where existing barrier to equality has to be clearly identified. The Court explores social relevance of the distributed good and insists on individual/meritocracy safeguards and narrowly tailored actions while requiring proof of necessity and effectiveness. In this context, the CJEU distinguishes between the unconditional and automatic 'fixed quotas' and 'flexible quotas' which include saving clause and reflect individual context. Nevertheless, the selection process and qualification/merit criteria remain to be very problematic and potentially discriminatory grey areas. A persisting problem is that most of selections are either non-transparent or they are based on work-related seniority which indirectly disadvantages most women due to maternity leaves and possible part-time arrangements. The CJEU case law already dealt with such a problem, leaving a definition of qualification up to concrete employers but requiring clear and transparent criteria of the selection process. Overall, it seems to be safe to conclude that positive actions are allowed based on international law and their use is sufficiently specified by international monitoring organs to be in line with the principle of equality.

There has been increasing use of different types of quota in Europe over the last decades, especially in the field of gender equality aiming to reach a balanced representation of women in public decision-making. While softer forms of positive actions are largely accepted, harder forms of preferential treatment, especially quotas, are still contradictory, especially in the corporate sector. Nevertheless, conducted analysis of existing quantitative and qualitative studies reveals a swift increase in terms of female descriptive representation while not reporting any major adverse effects. Hence, two main worries used against quotas, namely the one of not finding sufficient numbers of qualified women and of worse economic outcomes have not been proved true. On the other hand, the use of quota has not automatically spilled over into lower levels of business firms or public organs, or into related areas such as pay gap. Furthermore, no major turn at the practical level concerning different policies have been marked. These outcomes could point to several explanations. Firstly, it might be still too soon for descriptive improvements to bring some substantive results, as existing policies are path-dependent i.e. they are very difficult to change. Second possible explanation is that women have still not formed large enough group in decision-making organs to influence substantive issues. Finally, it is likely that representatives from the same background, education and training will align around the party ideology regardless of their gender. One thing that women have in common, though, is experience with motherhood and problems to accommodate family and work - the field in which they can bring needed social changes beneficial for the whole society. Regardless of this field though, the main benefit is the one of having an appropriate proportional gender representation in place which is one of the prerogatives of democratic and legitimate decision-making in a contemporary modern state.

As far as the CR is concerned, the positive actions are expressly allowed through provisions of Anti-Discrimination Act as well as the Labour Code. Nonetheless, they are hardly used in practice, and if so their use is usually limited to the softest form open to all possible beneficiaries. The political quota is currently practiced only by the Green Party; and no examples are known in

the business sphere. There have been three governmental proposals aiming to introduce legislative political quotas so far, but none of them has been approved by governing coalitions due to lack of political consensus. The business quota has been proposed through the EU Board of Directors Directive. Nevertheless, this proposal has been criticised by both chambers of the Parliament due inconsistencies with the principle of proportionality and subsidiarity, and interference with the freedom to conduct business.

Since the Czech Parliament and several ministries have expressed numerous reproaches and concerns about constitutionality of proposed business and political quota; their constitutional compliance has been analysed in the study. From the legal point of view, both quotas should be able to pass the proportionality test as established by the Czech Constitutional Court. The legitimate aim of balancing de facto inequalities and strengthening representative democracy and gender equality seems to be strong enough. Slow development and lack of effective soft measures in given fields also speaks in favour of necessity. Furthermore, fast changes in descriptive female representation, proven by international comparative analysis, also confirm criterion of suitability. Finally, basic rights of other subjects are not likely to be affected to the point of questioning their substance or nullifying their enjoyment. Hence, both measures seem to be acceptable from the legal point of view. The polls also indicate popular approval of such measures, and they are also recommended by expert governmental bodies. Nevertheless, the attitude of Czech politicians and judiciary does not seem to be favourable of such actions. Hence, current status quo indicates the need for more public discussions regarding the contemporary role of women and men, as well as the role of state in modern democratic society, in order to build a reasonable consensus for further legal and social developments.

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Abstrakt

Předložená studie poskytuje výsledky výzkumu týkajícího se kodifikace, interpretace a využití pozitivních akcí na podporu rovnosti žen a mužů v politickém a ekonomickém rozhodování v rámci hlavních mezinárodních organizací a vybraných národních států, s cílem posoudit možnosti jejich aplikace v České republice (ČR). Práce je rozdělena do tří propojených částí: 1) teoretické a koncepční objasnění principů rovnosti žen a mužů, antidiskriminačních opatření a pozitivních akcí; 2) komparativní analýza kodifikace, interpretace a využití pozitivních akcí ve třech hlavních mezinárodních organizacích – v OSN, v Radě Evropy a v Evropské Unii; a 3) kodifikace a možnost využití genderových pozitivních akcí (konkrétněji kvót) v oblasti politického a ekonomického rozhodování v ČR a posouzení jejich ústavní slučitelnosti.

Prezentovaný výzkum je založen na intra-disciplinárním právním, sociologickém a politologickém přístupu. Tato studie se tedy opírá o primární a sekundární národní a mezinárodní legislativu; teoretické práce v oblasti antidiskriminační a genderové literatury; a názory normo-tvůrců v této oblasti, získaných prostřednictvím výstupů z vládních rozhodovacích a poradních orgánů, rozhovorů a článků publikovaných v médiích. Práce využívá metody popisu a kompilace při analýze základních právních pojmů; metodu srovnávací analýzy při hodnocení kodifikace, interpretace a využití pozitivních akcí ve vybraných organizacích a státech. Dále byla aplikována obsahová analýza za účelem rozboru související veřejné debaty, projevů a rozhovorů. Přidaná hodnota výzkumu spočívá v komplexním a aktuálním přehledu kodifikace a interpretace pozitivních akcí v rámci hlavních mezinárodních organizací. Studie dále poskytuje analýzu využití pozitivních akcí ve vybraných státech a posouzení jejich možného uplatnění v konkrétním kontextu ČR, jako jednoho ze středoevropských států, které vůči analyzovaným opatřením zajímají dlouhodobě spíše negativně postoj.

Klíčová slova: rovnost žen a mužů v rozhodování, pozitivní akce, kvóty

Abstract

This presented study provides results of an extensive research regarding the codification, interpretation and the use of positive actions within major international organisations and selected national states with aim to assess their possible applications in the Czech Republic (CR). This work is divided into three interrelated parts comprising 1) theoretical and conceptual clarification of the principles of gender equality, anti-discrimination, and positive actions; 2) comparative analysis of the codification and the use of positive actions in three major international organisations - the UN, the COE, and the EU; and 3) codification and possibility of use of positive actions (more concretely quotas) in the fields of political and economic representation in the CR and assessment of their constitutional compatibility.

This presented research is based on the intra-disciplinary legal, sociological, and political science approach. This work thus relies on the primary and secondary national and international legislation; theoretical work in the field of anti-discrimination, as well as women in leadership literature; and opinions and views of norm-makers in this field as extracted through the minutes of meetings, interviews, and articles published in the media. This work used methods of description and compilation while analysing basic legal concepts; and method of comparative analysis when assessing codification and use of positive actions in selected organizations and states. Furthermore a content analysis was applied in order to analyse related public debate, speeches and interviews. The added value of the research resides in a comprehensive and up-to-date overview of codification and interpretation of positive actions by the major international organisations. Secondly, the study provides an analysis and evaluation of the use of positive actions in selected states and assessment of their possible application in the specific context of the CR, as one of the Central European states that has witnessed a long term political resistance to such measures.

Key words: gender equality in decision-making, positive actions, quotas