



# Gender Equality Aspects of Public Law

# 9

Marko Davinić, Eleonor Kristoffersson, and Tanasije Marinković

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Authors are listed in alphabetical order. The chapter is the result of the collective work of all three authors but that the Sects. 9.2 and 9.3 were written by Tanasije Marinković, Sect. 9.4 by Marko Davinić and Sects. 9.5 and 9.6 by Eleonor Kristoffersson.

M. Davinić (✉) · T. Marinković  
University of Belgrade, Faculty of Law, Belgrade, Serbia  
e-mail: [markod@ius.bg.ac.rs](mailto:markod@ius.bg.ac.rs); [tanasje.marinkovic@ius.bg.ac.rs](mailto:tanasje.marinkovic@ius.bg.ac.rs)

E. Kristoffersson  
Örebro University, School of Law, Psychology and Social Work, Örebro, Sweden  
e-mail: [eleonor.kristoffersson@oru.se](mailto:eleonor.kristoffersson@oru.se)

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**Abstract**

This chapter portrays the initial appearance of modern public law in late eighteenth-century Europe as homocentric, and its gradual profiling, in the centuries to follow, across the globe, as gender-balanced. It also addresses the reforming force of the international instruments in achieving gender-balanced public law on a national level, as well as the inherent limits of those instruments due to the inevitable pluralism of public law approaches to gender equality in areas of reasonable disagreement. Furthermore, authors will analyse structural, institutional, and cultural factors that play a part in the underrepresentation of women at all worldwide governmental levels. However, they emphasise that electing more women in state institutions is only the first step. What is necessary is to ensure that women have a tangible impact on public policies. Thus, they conclude that empowering women is a multi-layered process that is much more complex than choosing an equal number of women in state institutions. Public law aspects on gender-based violence as well as anti-discrimination measures are also included in this chapter.

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**9.1 Introduction**

This chapter deals with fundamental constitutional law and administrative law institutions and their re-evaluation based on the gender equality principle. Readers will be stimulated to better conceive the meaning and importance of the gender equality principle in the area of public law, but also the challenges to its effective implementation.

The second section portrays the development of the modern public law from the homocentric, through the gender-neutral to the gender-competent public law. It points out that the birth of modern public law is very much related to the rise of the secular and liberal state and its upshot: the clear delineation between public and private spheres. This divide contributed in its own way to the exclusion of women from the public realm and their subjection to male domination within the family for over one and a half centuries.

The third section addresses the structural processes on the international and national level bolstering the profiling of gender-competent public law. It emphasises the importance of universalism in public law approaches to gender equality, as embodied in the international instruments which provide focal points for local reforms. However, it also draws attention to the inevitability of pluralism in those approaches in areas of reasonable disagreement, as exemplified by the inherent tensions between freedom of religion and gender equality.

The fourth section deals with representation of women in all levels of government and political life. Subtopics, which will be addressed in this section, are obstacles

and of importance to women's political representation, international norms and standards in this area, the role and impact of the Inter-Parliamentary Union (IPU) in the political representation of woman, and the "Women's Power Index," as a new interactive tool.

The fifth section deals with public law and gender-based violence. Not only criminal law, but also public law may play an important role against gender-based violence. In this section, the role of, for example, education law and health care law is discussed.

In the sixth section public law aspects of anti-discrimination law are discussed. Whereas most countries in the world recognise the principle of non-discrimination, its enforcement and the effectiveness of the respective laws vary widely. Measures that are discussed in this section are discrimination ombudsmen, access to justice and information on the legal concept of discrimination.

### Learning Goals

- Readers should be able to grasp that gender-balanced public law is the result of a long historical process and that even nowadays there are parts of the world where it is not achieved. As well as this, there is a pluralism of understanding as to what the gender-balanced public law implies.
- Readers should be able to understand the obstacles and importance of women's political representation as well as international norms and standards in this area.
- Readers should be able to understand the relation between gender discrimination and gender-based violence.

## 9.2 From Homocentric to Gender-Competent Public Law

The struggle for a more gender-balanced public law is historically grounded in the rejection of the public privileges based on gender, and in the understanding that gender equality in the public realm needs to be not only formal but also substantive. This struggle unfolded in a dialectical process, comprising three different stages. In stage one, differences—whether real or constructed, between men and women provided grounds for treating women as inferiors.<sup>1</sup> It is within this homocentric context that the modern public law was born (Sect. 9.2.1). In stage two, women made claims to equality, by stressing similarities between themselves and men and downplaying differences.<sup>2</sup> As a result, public law became more gender-balanced, in fact gender-neutral (Sect. 9.2.2). In stage three, women pursued equality in a way that accounted for differences between genders, without disadvantaging

<sup>1</sup>Rosenfeld (2003), p. 620.

<sup>2</sup>*Ibid.*

themselves.<sup>3</sup> Consequently, gender-competent public law has been gaining momentum (Sect. 9.2.3).

### 9.2.1 The Birth of Modern (Homocentric) Public Law

Modern public law appeared as a consequence of the switch from both a religious to secular state and from an absolutist to liberal state, at the time of the Enlightenment in eighteenth-century Europe.<sup>4</sup> The replacement of the religious paradigm by secularism, relegated the religion (and education which was attached to it) to the private sphere; whereas the triumph of the liberal state reserved economic and social matters to the realm of free market and civil society. The end result was a clear delineation between public and private spheres, which proved to not only be important for the profiling of modern public law, but also for *homocentric* public law.

In ancient and medieval Europe, political power, law and religion were united.<sup>5</sup> Although the two authorities—religion and state—were distinct and occasionally in conflict, they generally cooperated and supported each other.<sup>6</sup> Nevertheless, the attempts of various popes to seize the worldly sword (political authority) in addition to their spiritual sword (religious authority) led to the resistance of princes, kings and emperors and their gradual independence from them. Hence, the emergence of absolutist monarchies, in which the king was the sovereign by the grace of God, but was separated from the church. This paved the way for political authority to become somewhat secularised.<sup>7</sup> With the bourgeois eighteenth-century revolutions, such as the American (1776) and French (1789), the process of gradual secularisation of the state was completed. Backed up ideologically by the liberally oriented social contract theories, the concept of a “popular sovereignty, was finally able to replace the concept of sovereignty of the king by the grace of God”.<sup>8</sup> Religion was relegated to the private sphere and public law became secular.

Limited government “by consent,” implied a fundamental transformation of the understanding of public law. Constitutional and administrative law regulated the public sphere of a liberal state, leaving the economy, religion and family matters to the private realm. Yet, that consent did not encompass women, who were considered to be inferior to men. In this first stage of the dialectical process, unfolding towards a more gender-balanced public law, the difference was correlated to inequality—those who were considered different were legitimately treated better or worse.<sup>9</sup>

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<sup>3</sup> *Ibid.*

<sup>4</sup> Cf. Raday (2003), p. 663.

<sup>5</sup> Fleiner and Fleiner (2009), p. 309.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*, p. 315.

<sup>8</sup> *Ibid.*, p. 316.

<sup>9</sup> Rosenfeld (2003), p. 620.

### Example

The fundamental constitutional document of that period, the French Declaration of the Rights of Man and of the Citizen, proclaimed “freedom and equality in rights of *man* at birth” (1789). This prompted Olympe de Gouges to draft the Declaration of the Rights of Woman and of the Female Citizen affirming that “*woman* is born free and remains equal to man in rights” (1791). ◀

Despite these efforts of early feminists, Napoleon’s legislation (1804) characterised women as “lifelong, irresponsible minors”.<sup>10</sup> Even a century later, public lawyers preached that constitutional equality not only allowed for differences of treatment, including between men and women, but that it ordained them when they derived from the nature of life and social reality.<sup>11</sup>

Democratic revolutionary struggles brought society to the realms of the Enlightenment, leaving nonetheless women in the obscurity of the medieval times. A negative conception of freedom, typical for the public law of the liberal state, cherished “the right to be left to do or be what [he] is able to do or be without interference from other persons, reinforces the status quo of women’s social subordination”, while concealing it simultaneously.<sup>12</sup> Furthermore, it allowed for domestic violence, which was neither gender-neutral nor random, to be viewed as something “personal”, “private” or a “family matter”. Hence it was not considered as a human rights violation, *per se*, or was even treated as justified.<sup>13</sup> The systematic exclusion of women from the public realm and their subjection to patriarchal authority within the private sphere of family continuously persisted (see Sects. 9.5 and 9.6 *infra*).

Therefore, the public/private dichotomy came under the attack of the feminist critique very early on (see Feminist Political Theories chapter). “Such a division of spheres, by ignoring the political character of power unequally distributed in family life, does not recognise the political nature of the so-called private life”.<sup>14</sup> However, “once we admit the idea that significant differences between men and women are created by the existing division of labo[u]r, within the family, it becomes increasingly obvious just how political of an institution the family is”.<sup>15</sup> Furthermore, feminist critique rightly contributed to the understanding of violence against women as a public crime in the sense that beatings “kept women from leaving, [and] kept them providing sexual, housework and child care services as male entitlements”.<sup>16</sup>

<sup>10</sup>Romany (1994), p. 95.

<sup>11</sup>Orban (1911), p. 117. Quoted in Renauld and Verdussen (2019), p. 150.

<sup>12</sup>Romany (1994), p. 93.

<sup>13</sup>Copelon (1994), pp. 116–117.

<sup>14</sup>Romany (1994), p. 94.

<sup>15</sup>Okin (1989), p. 115. Quoted in: Romany (1994), p. 94.

<sup>16</sup>Romany (1994), p. 95.

### 9.2.2 Gender-Neutral Public Law

It took more than a hundred years for Olympe de Gouges' fight to start bearing fruits. The gradual change of the *homocentric* paradigm towards more gender-balanced public law took place only in the twentieth century, as a result of various political movements. These movements claimed for the rights of women to be treated like men.<sup>17</sup> In this second stage of the dialectical process, feminist movements argued for political and civil equality by stressing similarities between the sexes and downplaying differences. Since these claims were made in a setting dominated by men, the identity that women had to embrace in their quest for equality was a male-oriented identity.<sup>18</sup>

The first steps to political equality for women were made at the turn of the twentieth century, with the consecration of female suffrage. But even then, women's political equality was understood to be compatible with their civil inequality.<sup>19</sup> "In western liberal democracies, it was not until 1945 and, as a rule, not before the 1960s and 1970s that marriage and family law, regarded as the paradigmatic realms of tradition, were systematically reformed to ensure women's full equality with men [. . .], a task undertaken by constitutional litigation and legal reform in Asia only in the late 1980s and 1990s".<sup>20</sup>

#### Example

In Germany, female suffrage was recognised in 1918. In the next step, the 1919 Weimar Constitution set forth that "men and women shall as a rule have the same civil rights and duties" (Article 109 (2)). The comprehensive formal equality of men and women was entrenched only in 1949, in the Basic Law (Article 3 (2)). Yet, it was not until the 1970s that gender equality was fully implemented in German family law.<sup>21</sup> ◀

### 9.2.3 Gender-Competent Public Law

Today, of the 194 constitutions in the world, almost two-thirds guarantee equality on the basis of sex. However, the question remains of how much actual change was made by the worldwide sweep of gender equality provisions.<sup>22</sup>

<sup>17</sup>Vujadinović (2019), pp. 99–107.

<sup>18</sup>Rosenfeld (2003), p. 620.

<sup>19</sup>Rubio-Marin and Chang (2013), p. 301.

<sup>20</sup>*Ibid.*

<sup>21</sup>Arnold (2019), pp. 98 and 100–101.

<sup>22</sup>Young (2016), pp. 1 and 3.

For this reason, the “second birth” of modern public law implies not only the embracement of equality for all: men, women, and since recently, non-binary gender (see example *infra*); but also, of substantial equality as opposed to formal equality. The increasing recognition of positive state duties to ensure that gender equality is effectively achieved also calls for the expansion of the reach of public law into what was once free market relations and private domains of marital and family relations.

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**Example**

The Constitution of Argentina empowers the Congress “to legislate and promote positive measures, guaranteeing true equal opportunities and treatment, the full benefit and exercise of the rights recognised by this Constitution and by the international treaties on human rights in force, particularly referring to children, *women*, the aged and disabled persons” (Section 75 (23) emphasis added). ◀

To achieve second stage “equality as identity,” (gender-neutral public law) women had to downplay their feminine specificities, which would be perceived as obstacles to access the world of men.<sup>23</sup> For example, the women’s right to political equality could only be conceived in the same terms as the free suffrage for men. However, in stage three, women pursued equality in a way that accounted for differences between the genders without disadvantaging themselves. For instance, they demanded gender quotas for electoral lists so that they could be effectively empowered, whilst not renouncing their marital, family and other life roles (see Sect. 9.4 *infra*).

The need to confront the social reality and fight effectively against gender inequalities has led to the internationalisation of fundamental rights (see Sect. 9.3 *infra*). This trend has imposed international obligations upon states, extending the domain of public law and of their responsibility. For example, the 2011 Council of Europe Convention on Combating Violence Against Women and Domestic Violence (Istanbul Convention) binds the states to “take 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 private sphere” (Article 4).

Furthermore, gender-sensitive public law goes beyond binary female-male understanding of gender equality.

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**Example**

Correlating difference to equality, the German Federal Constitutional Court found in 2017 that the German Civil Status Act violated the fundamental right to free development of personality by not allowing for the positive entry in the birth register of a non-binary legal gender option. The proceedings were brought by a complainant who had been assigned the female sex and who had been

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<sup>23</sup>Rosenfeld (2003), p. 620.

registered as a girl in the birth register; but who had an atypical set of chromosomes (so-called Turner syndrome), and permanently identified neither as female nor as male. The complainant filed an application for a positive entry as “inter/diverse” in the birth register. However, the registry office rejected the application, claiming that the Civil Status Act did not permit such an entry.<sup>24</sup> The Federal Constitutional Court held that the general right of free development of personality, protected under Article 2 (1) of the German Basic Law, included the protection of the gender identity “which is usually a constitutive aspect of an individual’s personality”.<sup>25</sup> More specifically, the Court reasoned that “the official assignment of sex is of paramount importance for one’s individual identity [. . .]: sex determines entitlements and obligations provided for by law; it also often forms the basis for identifying a person, and, beyond legal provisions, gender identity is also significant in everyday life”; and that “the gender identity of persons who can be assigned neither the male nor the female sex is protected as well”.<sup>26</sup> As a result, the Court considered that the Civil Status Act interfered “with the general right of personality in its manifestation as protection of one’s gender identity”.<sup>27</sup> For that purpose, the Court recalled that under civil status law, a person’s sex had to be documented in the birth register; that the only positive categories available for this were “female” and “male”; and, that there was no further category. Thus the Court concluded that if a child could not be assigned either the female or the male sex, no positive entry could be made in the birth register; and that the complainant had to tolerate an entry that did not correspond to their constitutionally protected gender identity.<sup>28</sup> ◀

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### 9.3 Universalism and Pluralism in the Public Law Approaches to Gender Equality

Whereas the previous chapter exposes the unfolding dialectical processes leading to the gender-competent public law, this chapter attempts to elucidate the structural developments on the international and national level buttressing these trends. In that respect, legal norms embodied in the international instruments such as the 1950 European Convention on Human Rights, the 1966 International Covenant on Civil and Political Rights, the 1979 Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), or the Istanbul Convention, and in the practice of their (quasi-)judicial institutions, provide focal points for local reforms

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<sup>24</sup> 1 BvR 2019/16 (10 October 2017) [English translation of the ruling provided by the Federal Constitutional Court], para. 1.

<sup>25</sup> *Ibid.*, paras. 38–39.

<sup>26</sup> *Ibid.*, paras. 39–40.

<sup>27</sup> *Ibid.*, para. 42.

<sup>28</sup> *Ibid.*



and fight against discriminatory cultural patterns. They symbolise the universalism in public law approaches to gender equality (Sect. 9.3.1).

Although gender-balanced public law is gaining momentum across the world, there are still numerous sub-groups and whole societies where patriarchy prevails. Stereotyping women exclusively as mothers and housewives, in a way that limits their opportunity to participate in public life, is widespread even nowadays: in Kuwait women were until recently (2005) ineligible for public posts.<sup>29</sup> Similarly, while Germany introduced the non-binary gender option for official records, in Benin, Senegal or the Ivory Coast, intersex is a social taboo.<sup>30</sup> It follows that public law responses to gender inequalities are very much culturally predetermined.

Hence, there is not merely one universal version of gender equality, just as there is more than one school of feminism. Accordingly, there will often be a wide range of public law issues that constitutional and administrative law aiming for gender equality should consider. A pluralism of legitimate approaches should address them, especially in areas of reasonable disagreement. These areas normally appear when the wide margin of appreciation is accorded to the Member States or when the (quasi-)judicial institutions, established by the international instruments, take divergent positions to the same set of legal issues (Sect. 9.3.2).

### 9.3.1 Universalism in Public Law Approaches to Gender Equality

Contemporary development of public law, in particular of constitutional law, is marked by the interplay between the international and national legal systems, leading to the internationalisation of constitutionally entrenched fundamental rights. The internationalisation of constitutional law took place through the vertical convergence of international law norms and constitutional texts, as well as of the case-law of the (quasi-)judicial bodies entrusted with their enforcement. Good domestic practices, which have been previously “upgraded” to international standards, serve both as principles governing the functioning of international institutions and as points of reference for the evaluation of national public law norms. The vertical convergence is manifested in the international law’s impact on the national constitution-making, public law reforms and judge-made law.<sup>31</sup>

#### Example

The Canadian Charter of Rights and Freedoms incorporates two international covenants—one on Civil and Political Rights and one on Economic, Social and Cultural Rights. Both covenants guarantee gender equality, while no fewer than

<sup>29</sup> Al Fili (2019), p. 371.

<sup>30</sup> Niassé (2019), p. 432.

<sup>31</sup> Peters and Preuss (2013), p. 34.

15 international human rights documents are annexed to the Constitution of Bosnia and Herzegovina, including the CEDAW. ◀

Rubio-Marín and Morgan categorised domestic public law incorporations of gender rights flowing from international legal instruments. Accordingly, there are three major forms of incorporation of international human rights law: assimilation, supplementation and adaptation. Assimilation takes place in the moments of constitution-making and constitution-amending, when international human rights law directly influences the drafting of fundamental domestic rights. Supplementation is manifested in the constitutionally mandated hierarchical ordering of international and national law in such a way that they become an integrated system of internally applicable law. Adaptation involves processes, be they constitutionally required or judicially constructed, through which the interpretation and application of the fundamental domestic rights is influenced by international law. These types of incorporations of international gender norms and jurisprudence have helped shape domestic public law, in a number of countries, either by expanding, complementing or concretising relevant constitutional provisions.<sup>32</sup>

CEDAW has been particularly praised for its accomplishment on behalf of gender equality. It has been argued that even when national governments have hypocritical commitment to women's equality, the activists are given a basis for action and for demanding more equality. Much of the CEDAW Committee's work, in reviewing country reports and identifying the next steps for countries seeking to achieve CEDAW's goals, has received the approval of professionals defending different strands of feminism.<sup>33</sup> Yet, the CEDAW Committee process has also raised concerns for being insufficiently sensitive to the pluralism of its state parties. Jackson draws attention to the impulse to standardise from the top down, under the CEDAW regime in areas of reasonable disagreement.<sup>34</sup> Relying on the arguments of feminist pluralism, constitutional diversity and epistemological humility, she claims that there may be benefits of a certain degree of "space" between international human rights treaties, as interpreted by their expert committees, and the regimes of national law.<sup>35</sup>

### 9.3.2 Pluralism in Public Law Approaches to Gender Equality

The dialectical march towards gender-competent public law did not end the dilemma as to the best way of achieving gender equality. As it was previously shown, universalism did provide for some guidance in that respect, but has also been criticised for its tendencies to impose too singular a vision. Also, there are areas in

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<sup>32</sup>Rubio-Marín and Morgan (2006), pp. 115 and 118–119.

<sup>33</sup>Jackson (2016), p. 449.

<sup>34</sup>*Ibid.*, p. 450.

<sup>35</sup>*Ibid.*, p. 462.

which international instruments purposefully accord a wide margin of appreciation to the Member States; or in which the (quasi-)judicial institutions, established by those instruments, take different or even opposing positions to the same set of legal issues.

Public law performs multiple functions. Other than also setting gender equality, it provides the frameworks for the protection of rights and liberties. In that sense, gender equality commitments may come into conflict with other rights-based commitments.<sup>36</sup> One of those rights, standing very high on the list of public law commitments, is the right to freedom of religion.

In the words of the ECtHR, freedom of religion is “one of the most vital elements that go to make up the identity of believers and their conception of life” and it entails “freedom to hold [...] religious beliefs and to practice [...] religion”.<sup>37</sup> The relegation of religion to the private sphere did make public law secular and free from religion (see Sect. 9.2 *supra*), but it did not free the state from the duty to secure the exercise of religious freedom through public law mechanisms. The ECtHR “has frequently emphasised the State’s role as the neutral and impartial organiser of the exercise of various religions,” as well as that the “State’s duty of neutrality and impartiality is incompatible with any power on the State’s part to assess [...] the ways in which those beliefs are exercised”.<sup>38</sup>

While religion is so highly valued, due to its importance for the identity of believers, many of the religious practices support patriarchal gender relations, specifically the subjection of women to male domination within the family.<sup>39</sup> One of those religious practices, with respect to which there is a reasonable disagreement across the globe, is the dress code for Muslim women in public spaces. Four types of female coverings have been the object of intensive legal debates for the past three decades: the hijab (a headscarf tied under the chin), the burka (a full-body covering including a mesh over the face), the niqab (a full-face veil leaving an opening only for the eyes) and the burkini (a full body swimsuit). The clash between cultural-religious and gender equality arguments “has risen as a constitutional issue in secular countries, where religious Muslim communities demand that their women and girls observe the dress code”.<sup>40</sup> In theocratic Islamic states, a woman’s dress code is mandatory and severely punishable for any breach.<sup>41</sup>

There has been a series of administrative and judicial cases on the wearing of the hijab in educational institutions and workplaces in France,<sup>42</sup> Switzerland,<sup>43</sup> and Turkey.

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<sup>36</sup> Cf. *Ibid.*, pp. 460–461.

<sup>37</sup> App. No. 44774/98, *Case of Leyla Sahin v. Turkey* [GC] (ECtHR, 10 November 2005), para. 104.

<sup>38</sup> *Ibid.*, para. 107.

<sup>39</sup> Raday (2003), p. 672.

<sup>40</sup> *Ibid.*, p. 690.

<sup>41</sup> *Ibid.*

<sup>42</sup> Roman (2019), pp. 285–286.

<sup>43</sup> Hottelier and Carron (2019), pp. 473–474.

### Example

The ECtHR considered that the ban on wearing the Islamic headscarf in institutions of higher education, in Turkey, did not constitute an unjustified interference with the right to freedom of religion as guaranteed by the European Convention on Human Rights. In reaching this ruling, the ECtHR pointed out the Member States' margin of appreciation and took into account, *inter alia*, the emphasis placed in the Turkish constitutional system on the protection of the rights of women and gender equality; as well as that the ban applied to universities in which the equality before the law of men and women was being taught and practiced.<sup>44</sup> ◀

The conflicts over wearing burkas and niqabs in public places have arisen as major political and even constitutional issues in France,<sup>45</sup> Belgium,<sup>46</sup> Italy,<sup>47</sup> Norway,<sup>48</sup> and Switzerland.<sup>49</sup>

### Example

When the question of prohibition, regarding the wearing of clothing, designed to conceal the face in public, came before the ECtHR, it held again that this measure was not an unjustified interference with the right to freedom of religion, as guaranteed by the Convention "having regard in particular to the breadth of the margin of appreciation afforded to the respondent State in the present case".<sup>50</sup> However, the ECtHR considered that such a measure could not have been justified "in the name of gender equality", but for the purpose of the constitutional concept of "living together".<sup>51</sup> In contrast, the United Nation's Human Rights Committee took the view that that same prohibition violated the freedom of religion and the prohibition of discrimination based on gender and religion, as guaranteed by articles 18 and 26 of the International Covenant on Civil and Political Rights.<sup>52</sup> The Committee observed, *inter alia*, that the concept of "living together" was very vague and abstract, and that the "State party has not identified any specific fundamental rights or freedoms of others that are affected by the fact

<sup>44</sup> App. No. 44774/98, *Case of Leyla Sahin v. Turkey* [GC], paras. 115–116.

<sup>45</sup> Roman (2019), pp. 286–287.

<sup>46</sup> Renauld and Verdussen (2019), pp. 172–173.

<sup>47</sup> Luciani (2019), pp. 346–347.

<sup>48</sup> Smith (2019), p. 378.

<sup>49</sup> Hottelier and Carron (2019), pp. 474–475.

<sup>50</sup> App. No. 43835/11, *Case of S. A. S. c. France* [GC] (ECtHR, 1 July 2014), paras. 129, 155 and 157.

<sup>51</sup> *Ibid.*, paras. 119 and 121–122.

<sup>52</sup> CCPR, C/123/D/2807/2016, *Case of Miriana Hebbadj v. France*, paras. 7.17 and 8; CCPR, C/123/D/2747/2016, *Case of Sonia Yaker v. France*, paras. 8.17 and 9.

that some people present in the public space have their face covered, including fully veiled women”.<sup>53</sup> ◀

Finally, even “Islam on the beach” had its administrative and judicial repercussions. In the summer of 2016, certain municipal authorities on the French Riviera banned the use of the full body swim-suits on their beaches, under the pretext that this type of clothing was contrary to the principle of secularism and/or that the ban was protecting the public order. On the one hand, the administrative judges did not accept the argument of secularism considering that it was a principle which imposed obligations upon the public authorities and not the individuals. On the other hand, the protection of public order was a legitimate aim for the limitation of an individual, since there were cases of violence between the Maghrebinian families, whose female members were wearing hijabs or burkas, and the locals.<sup>54</sup> However, it remained unclear how the wearing of these garments on the beach, such as the hijab or burka, could in itself disturb public order. The idea to ban the wearing of the burkini on the beach was also present at the time in Belgium.<sup>55</sup>

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## 9.4 Representation of Women in All Levels of Government and Political Life

### 9.4.1 Obstacles and Importance of Women’s Political Representation

Although women constitute approximately one half of the world population, they are underrepresented at all governmental levels around the world. Multiple structural, institutional and cultural factors play a part in the current situation, where women are politically underrepresented. Many studies show a direct correlation between the social and economic position of women in society and their participation in political life.<sup>56</sup> Thus, “socio-economic obstacles include poverty and unemployment, lack of adequate financial resources, illiteracy and limited access to education, choice of professions and the ‘dual burden’ of family and a full-time job. Women take on a disproportionate share of household tasks which makes a political career almost impossible.”<sup>57</sup> In addition, institutional barriers are usually an important reason for systematic differences in women’s representation between comparable societies. For

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<sup>53</sup> *Miriana Hebbadj v. France*, para. 7.10; *Sonia Yaker v. France*, para. 8.10.

<sup>54</sup> Hochmann, <https://verfassungsblog.de/islam-on-the-beach-the-burkini-ban-in-france/>, accessed October 17, 2021; Roman (2019), p. 286.

<sup>55</sup> Renauld and Verdussen (2019), p. 173.

<sup>56</sup> Delys (2014), p. 8.

<sup>57</sup> Bari, <https://www.un.org/womenwatch/daw/egm/enabling-environment2005/docs/EGM-WPD-EE-2005-EP.12%20%20draft%20F.pdf>, last accessed October 17, 2021; Quoted in: Delys (2014), p. 8.

example, difficulties in obtaining support from political parties and securing campaign funding. Moreover, “many studies showed that much more women are being elected under proportional party lists, in contrast to majoritarian single-member constituencies”.<sup>58</sup> In that sense, the proportional representation system “provides an incentive for parties to broaden their appeal by adding women to their party lists. The majoritarian single-member system, in contrast, usually only allows for one candidate per district to be chosen”.<sup>59</sup> Finally, the political culture is often based on traditional attitudes regarding women, emphasising women’s primary roles as mothers and housewives, not as decision-makers.<sup>60</sup>

### Example

The President of the European Commission Ursula von der Leyen expressed her feelings regarding a diplomatic protocol incident (“Sofagate”) that happened during her visit to Turkey in April 2021. Only two chairs were prepared for the three presidents in the room: “I am the first woman to be President of the European Commission. I am the President of the European Commission. And this is how I expected to be treated when visiting Turkey two weeks ago, like a Commission President, but I was not. I cannot find any justification for the way I was treated in the European Treaties. So, I have to conclude, it happened because I am a woman. Would this have happened if I had worn a suit and a tie? In the pictures of previous meetings, I did not see any shortage of chairs. But then again, I did not see any women in these pictures, either.”<sup>61</sup> ◀

There are different arguments which are brought forward when discussing the importance of women’s representation. “The justice argument claims that women have a right to half of the seats since they make up half of the population; the experience argument holds that women have different experiences, either biologically or socially constructed, that should be represented as well; the interest argument grants that women and men have conflicting interests and that these interests cannot be represented by men; the symbolic argument says that every female politician acts a role model for all women, regardless of political views or party membership and will attract other women to the political arena; the critical mass argument states that women are able to achieve solidarity of purpose to represent women’s interests when they achieve certain levels of representation; and the democracy argument asserts that the equal representation of women and men

<sup>58</sup>Norris (2000), pp. 348–351; Quoted in: Delys (2014), p. 9.

<sup>59</sup>*Ibid.*, p. 9.

<sup>60</sup>*Ibid.*, pp. 9–10.

<sup>61</sup>*Speech by President von der Leyen at the European Parliament Plenary on the conclusions of the European Council meeting of 25-26 March 2021 and the outcome of the high-level meeting between the EU and Turkey*, 26 April 2021: [https://ec.europa.eu/commission/presscorner/detail/en/speech\\_21\\_1965](https://ec.europa.eu/commission/presscorner/detail/en/speech_21_1965).

enhances the democratization of governance in both transitional and consolidated democracies.”<sup>62</sup>

Many authors emphasise the importance of ‘critical mass’ for women’s political representation, which means that only a considerable minority of women will be able to impose topics which are important for them and to encourage other females to enter the political arena.<sup>63</sup> Furthermore, Atkeson suggests that “viable women candidates lead women to feel more connected to and a part of the political system in a way that they do not when they look around and see only men”.<sup>64</sup>

### Example

**Upon** reflecting on her historic run for the US vice-presidency in 1984, as the first female vice-presidential nominee, representing a major American political party, Geraldine Ferraro stated that, “women across the country have told me what a huge personal impact my nomination had on their lives. Many took risks and tried new challenges, saying, ‘If you could do it, so could I.’ Others have thanked me for opening doors.”<sup>65</sup> ◀

Of course, it is not just about the sheer number of women in politics that is at stake, but also the quality of their activities and their sensitivity for gender equality approaches. This cultural (mindset) approach should not be overlooked when discussing women’s political representation.

## 9.4.2 International Norms and Standards in the Area of Political Participation of Women

A number of international norms and standards relate to women’s leadership and political participation. Among them the most prominent are:

- The 2011 UN General Assembly resolution on women’s political participation (A/RES/66/130)
- The 2003 UN General Assembly resolution on women’s political participation (A/RES/58/142)
- Council of Europe, Recommendation Rec (2003) 3 of the Committee of Ministers on balanced participation of women and men in political and public decision making
- The 1995 Beijing Declaration and Platform for Action
- The UN Economic and Social Council resolution 1990/15

<sup>62</sup>Dahlerup (1978), pp. 139–162; Quoted in: Delys (2014), pp. 7–8.

<sup>63</sup>Similar in: Delys (2014), p. 11.

<sup>64</sup>Atkeson (2003), p. 1043.

<sup>65</sup>*Ibid*, pp. 1043–1044.

- The 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>66</sup>

It is important to emphasise that some of the listed documents regulate solely on the area of political participation of women, while others have a broader scope, regulating political and other types of participation.

The 2011 UN General Assembly resolution on women's political participation (A/RES/66/130) highlighted that "the active participation of women, on equal terms with men, at all levels of decision-making is essential to the achievement of equality, sustainable development, peace and democracy", and that "women in every part of the world continue to be largely marginalised from the political sphere, often as a result of discriminatory laws, practices, attitudes and gender stereotypes, low levels of education, lack of access to health care and the disproportionate effect of poverty on women". The General Assembly "reaffirms its resolution 58/142 of 22 December 2003 on women and political participation, and calls upon all States to implement it fully". Furthermore, it "calls upon all States to eliminate laws, regulations and practices that, in a discriminatory manner, prevent or restrict women's participation in the political process". The General Assembly urged all States to take numerous actions to that end.<sup>67</sup>

The 2003 UN General Assembly resolution on women's political participation (A/RES/58/142) affirmed that "the empowerment and autonomy of women and the improvement of their political, social and economic status are essential to the achievement of representative, transparent and accountable government, democratic institutions and sustainable development in all areas of life". Furthermore, it recognised "that the active participation of women, on equal terms with men, at all levels of decision-making is essential to the achievement of equality, sustainable development, peace and democracy". However, this document expressed concerns that, "despite general acceptance of the need for gender balance in decision-making bodies at all levels, women are still largely underrepresented at most levels of government, especially in ministerial and other executive bodies, and in legislative bodies". Taking all that into account, the General Assembly urged states and invited the private sector, non-governmental organisations and other actors of civil society, to take appropriate measures to strengthen the process of political participation of women.<sup>68</sup>

Council of Europe, Recommendation Rec (2003) 3 of the Committee of Ministers on balanced participation of women and men in political and public decision-making, recommended that the governments of Member States, among

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<sup>66</sup>UN Women, *Global norms and standards: Leadership and political participation*: <https://www.unwomen.org/en/what-we-do/leadership-and-political-participation/global-norms-and-standards>.

<sup>67</sup>The 2011 UN General Assembly resolution on women's political participation (A/RES/66/130): [https://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/66/130](https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/66/130).

<sup>68</sup>The 2003 UN General Assembly resolution on women's political participation (A/RES/58/142): [https://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/58/142](https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/58/142).



other things, “commit themselves to promote balanced representation of women and men by recognising publicly that the equal sharing of decision-making power between women and men of different background and ages strengthens and enriches democracy”.<sup>69</sup>

### Example

“For the purpose of this recommendation, balanced participation of women and men is taken to mean that the representation of either women or men in any decision-making body in political or public life should not fall below 40%”.<sup>70</sup> ◀

The 1995 Beijing Declaration and Platform for Action was adopted by 189 UN Member States and is still considered to be the most ambitious and progressive document ever made for advancing women’s rights. It made comprehensive commitments under 12 critical areas of concern and has remained a powerful source of guidance and inspiration.<sup>71</sup> One of those areas is called “Women in power and decision-making” and it is acknowledged in the Declaration that “without the active participation of women and the incorporation of women’s perspective at all levels of decision-making, the goals of equality, development and peace cannot be achieved” (para. 181). It is also recognised that “despite the widespread movement towards democratisation in most countries, women are largely underrepresented at most levels of government, especially in ministerial and other executive bodies and have made little progress in attaining political power in legislative bodies” (para. 182). The Platform for Action envisages measures which should provide women’s equal access to and full participation in power structures and decision-making (Strategic objective G.1) and increase women’s capacity to participate in decision-making and leadership (Strategic objective G.2). Those actions are expected to be taken from different actors: the UN, governments, international organisations, national bodies, the private sector, political parties, trade unions, employers’ organisations, research and academic institutions, subregional and regional bodies, non-governmental and women’s organizations, and industrial and professional entities.<sup>72</sup>

The UN Economic and Social Council resolution 1990/15, among other actions, called on governments, political parties, trade unions, professional and other representative groups “to increase the proportion of women in leadership positions to at

<sup>69</sup>Council of Europe, 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, paragraph 1: <https://rm.coe.int/1680519084>.

<sup>70</sup>Appendix to Recommendation Rec (2003) 3.

<sup>71</sup>UN Women, *The Beijing Platform for Action: inspiration then and now*: <https://beijing20.unwomen.org/en/about>.

<sup>72</sup>Beijing Declaration and Platform for Action, Beijing+5 Political Declaration and Outcome, UN Women, United Nations 1995, reprinted by UN Women in 2014, pp. 119–126: [https://beijing20.unwomen.org/~media/headquarters/attachments/sections/csw/pfa\\_e\\_final\\_web.pdf#page=125](https://beijing20.unwomen.org/~media/headquarters/attachments/sections/csw/pfa_e_final_web.pdf#page=125).

least 30 percent by 1995. This was suggested in order to achieve equal representation between women and men by the year 2000". Further, to "institute recruitment and training programmes to prepare women for those positions".<sup>73</sup>

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted by the United Nations General Assembly in December 1979 and entered into force as an international treaty in September 1981.<sup>74</sup> Political participation is regulated in two articles in this document. In Article 7, it stipulates that states "shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right: (a) to vote in all elections and public referenda and to be eligible for election to all publicly elected bodies; (b) to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government; (c) to participate in non-governmental organisations and associations concerned with the public and political life of the country". Furthermore, Article 8 of the Convention regulates, that states "shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organisations".<sup>75</sup>

### **9.4.3 The Role of the Inter-Parliamentary Union (IPU) in the Political Representation of Women**

The Inter-Parliamentary Union (IPU) is one of the leading international organisations for the empowerment of women. Its work is directed towards three main objectives: "increasing the number of women in parliament through well-designed quotas and parliamentary caucuses, supporting women in parliament, and transforming parliaments into gender-sensitive institutions that deliver on women's rights".<sup>76</sup> Furthermore, the IPU has recognised gender equality as a key component of democracy in its documents. For example, in the 1997 Universal Declaration on Democracy, the IPU highlighted "the direct link between democracy and the balanced participation of men and women in politics, and in particular in parliament".<sup>77</sup>

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<sup>73</sup>The UN Economic and Social Council resolution 1990/15: [https://www.un.org/ga/search/view\\_doc.asp?symbol=E/1990/90](https://www.un.org/ga/search/view_doc.asp?symbol=E/1990/90).

<sup>74</sup>Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>.

<sup>75</sup>Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>.

<sup>76</sup>See: IPU, *Gender Equality*: <https://www.ipu.org/our-impact/gender-equality>.

<sup>77</sup>*Implementation of the IPU Strategy for 2012-2017, Gender Mainstreaming at IPU*, IPU Governing Council, Geneva, 9 October 2013, p. 1: <https://www.ipu.org/about-ipu/gender-equal-ipu>.

According to data from the Inter-Parliamentary Union (IPU), “with a global average of 25 per cent women, most parliaments remain male-dominated, and women MPs are often under-represented on decision-making bodies.”<sup>78</sup>

Regarding women’s participation in parliament, one can conclude from relevant data that constant progress has been evident in the previous years. However it is still insufficient and slow. It means that at the current rate, it would take “another 50 years before gender parity is achieved in parliaments worldwide”.<sup>79</sup>

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### Example

“The United States made history in 2020 with the election for the first time of a woman as Vice President. Vice President Kamala Harris also constitutionally becomes President of the Senate. With Nancy Pelosi as Speaker of the House of Representatives, both chambers of the US Congress are now presided over by women”.<sup>80</sup> ◀

As far as women ministers are concerned, they mainly cover areas of social and women’s affairs, gender equality, environment and energy. However, as of 1 January 2021, there are just 13 countries with women holding 50 per cent or more ministerial positions.<sup>81</sup>

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### Example

Countries with women holding one half or more ministerial positions are as follows: Nicaragua—58.82%, Austria—57.14%, Belgium—57.14%, Sweden—57.14%, Albania—56.25%, Rwanda—54.84%, Costa Rica—52.00%, Canada—51.43%, Andorra, Finland, France, Guinea-Bissau, Spain—50.00%.<sup>82</sup> ◀

Despite overall improvement across the globe, the number of countries with no women ministers as of 1 January 2021 increased to 12, compared to nine in the year before.<sup>83</sup>

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### Example

As of 1 January 2021, there are no women in the governments of Azerbaijan, Armenia, Brunei Darussalam, D.P.R. Korea, Papua New Guinea, Saint Vincent

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<sup>78</sup> IPU, *Gender Equality*: <https://www.ipu.org/our-impact/gender-equality>.

<sup>79</sup> *Proportion of women MPs inches up but gender parity still far off* (published on: 5. 3. 2021): <https://www.ipu.org/news/women-in-parliament-2020>.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Women in politics: new data shows growth but also setbacks*, (published on 10. 3. 2021): <https://www.ipu.org/news/women-in-politics-2021>.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

and the Grenadines, Saudi Arabia, Thailand, Tuvalu, Vanuatu, Vietnam and Yemen.<sup>84</sup> ◀

The IPU and the CEDAW Committee have urged parliaments and governments worldwide to adopt National Action Plans in order to reach the goal of gender parity in politics by 2030. The main measures to be taken to achieve this goal are as follows:

1. Reforming legal frameworks, which implies:
  - Adoption of electoral gender quotas (as reserved seats, legal candidate quotes or political party quotes);
  - Reformation and enactment of comprehensive legislation that guarantees gender equality in all areas of life;
  - Limitation on spending on electoral campaigns;
2. Making institutions gender-sensitive and gender-responsive, which implies:
  - Adopting the target of parity in all spheres of public life, at both the national and subnational levels;
  - Ensuring that internal rules and codes of ethics help prevent all forms of discrimination and gender-based violence against women
  - Establishing mechanisms for gender mainstreaming in state institutions.
3. Ensuring a conducive environment for gender equality, which implies:
  - Fighting against negative gender stereotypes;
  - Mobilising all media formats in order to implement information campaigns and raise awareness on the importance of this issue;
  - Reorganisation of political parties to be more favourable for women's participation;
  - Protecting and supporting women's human rights defenders and NGO representatives;
  - Promoting gender equality in educational curriculum.<sup>85</sup>

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### Example

“The Liberal Democrats in the UK wondered what it was that kept women out of politics and set up a campaign with the name “Cash, Confidence and Culture” which addresses the three main obstacles newcomers in politics face.”<sup>86</sup> ◀

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<sup>84</sup> *Ibid.*

<sup>85</sup> *Joint Call by IPU and CEDAW Committee on International Women's Day 2021*, (published on: 8. 3. 2021): <https://www.ipu.org/iwd-2021-statement>; About importance of gender quotas, see also: Giegerich (2021), [https://jean-monnet-saar.eu/wp-content/uploads/2021/05/Symposium-Gender-Parity\\_updated-version\\_II.pdf](https://jean-monnet-saar.eu/wp-content/uploads/2021/05/Symposium-Gender-Parity_updated-version_II.pdf).

<sup>86</sup> See: Delys (2014), p. 19.

Electoral gender quotas have appeared as one of the main instruments for tackling the underrepresentation of women around the world and have been introduced in more than 130 countries in the last few decades.<sup>87</sup> In general, there are three main types of electoral gender quotas:

1. Political party quotas (voluntary party quotas)
2. Candidate quotas
3. Reserved seats

Political party quotas are not regulated by law. Instead, they are introduced by the internal acts of the parties (they are voluntary, not mandatory for parties), and they usually determine the minimum number of seats that must belong to women on electoral lists (for example, 40%). On the other hand, candidate quotas and reserved seats are introduced by national legal acts (Constitution or election laws). The differences between them is that candidate quotas require the percentage of women on electoral lists of political parties (in this case, it is not voluntary), while reserved seats determine the percentage of women who must be elected (share of women in institutions after the elections).

Reserved seats provide more guarantees for the election of a woman than any other option. Thus, introducing candidate quotas requiring a certain minimum of each gender on an electoral list (for example, 40%) does not automatically result in women winning that percent of seats. Political parties may meet that requirement, but they can place women at the bottom of the lists, making their election much more difficult.<sup>88</sup>

Some may argue that “quotas imply that politicians are elected because of their gender, not because of their qualifications.” On the other hand, there is a counterargument that “women are just as qualified as men, but women’s qualifications are downgraded and minimised in a male-dominated political system”.<sup>89</sup>

However, setting quotas for women isn’t a silver bullet for achieving gender equity and well-being. Thus, it is emphasised that “one cannot deal with the problem of female representation by a quota system alone. Political parties, the educational system, NGOs, trade unions, churches—all must take responsibility within their own organisations to systematically promote women’s participation, from the bottom up [...]”.<sup>90</sup>

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<sup>87</sup> Krook and Zetterberg (2017), p. 1; See also the Global Database of Gender Quotas in parliaments worldwide, as a joint project of International IDEA, Inter-Parliamentary Union and Stockholm University: <https://www.idea.int/data-tools/data/gender-quotas/country-overview>.

<sup>88</sup> Dahlerup (2005), p. 150.

<sup>89</sup> *Ibid*, pp. 143–144.

<sup>90</sup> Dahl, former Speaker of Swedish Parliament, quoted in Dahlerup (2005), p. 143.

#### 9.4.4 The Women's Power Index

In 2020, the Women and Foreign Policy program launched the “Women’s Power Index” as a new interactive tool. It ranks 193 UN Member States according to their progress toward gender parity in political participation and analyses the proportion of women who serve as heads of state or government, in cabinets, national legislatures, as candidates for national legislatures, local government bodies, and visualises the gender gap in political representation.<sup>91</sup> The index points out that the number of female heads of states has increased over the last three decades. Nevertheless, women remain underrepresented at all levels of government.<sup>92</sup>

##### Example

As of March 29, 2021, out of 193 countries only 22 have a female head of state or government. Only 13 have at least 50 percent women in the national cabinet and only three have at least 50 percent women in the national legislature.<sup>93</sup> ◀

Vogelstein and Bro argue that political representation of women is important for a multitude of reasons. They summed up that , “increasing women’s political representation is not simply a matter of fairness -- it is also a strategic imperative”.<sup>94</sup> Firstly, women are more likely to cross party lines to find common ground. In that way, they manage to overcome the differences much easier than their male counterparts.<sup>95</sup> Furthermore, experience shows that female lawmakers are more likely to advocate for policies that support social welfare, health, education and gender equality, especially laws on parental leave and childcare, domestic violence, rape and sexual harassment.<sup>96</sup>

##### Example

“Research on *panchayats* (local councils) in India discovered that the number of drinking water projects in areas with women-led councils was 62 per cent higher than in those with men-led councils. In Norway, a direct causal relationship

<sup>91</sup> See: Vogelstein and Bro (2020), *Women's Power Index*: <https://www.cfr.org/article/womens-power-index>; See also: <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/women-in-politics-map-2020-en.pdf?la=en&vs=827>.

<sup>92</sup> Vogelstein and Bro (2020): <https://www.cfr.org/blog/womens-power-index-tracks-womens-political-representation>.

<sup>93</sup> Vogelstein and Bro (2020), *Women's Power Index*: <https://www.cfr.org/article/womens-power-index>.

<sup>94</sup> Vogelstein and Bro (2018), <https://edition.cnn.com/2018/11/09/opinions/year-of-woman-goes-global-bro-vogelstein/index.html>.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

between the presence of women in municipal councils and childcare coverage was found”.<sup>97</sup> ◀

Finally, women in politics promote stability of the country and reduce the possibility for state-perpetrated human rights abuses, such as political imprisonment, torture, disappearances, killings and even decrease the risk of international conflict.<sup>98</sup>

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### Example

One study found that, “as the percentage of women in the legislature increases by 5%, a state is nearly 5 times (4.86) less likely to use violence. At a normative level, this also suggests that the pursuit of gender equality in societies throughout the world may have positive effects for the lessening of violence at national, transnational, and international levels”.<sup>99</sup> ◀

Vogelstein and Bro point out that “electing women does not guarantee those outcomes. Holding political office is just the first step to wielding political power; in many countries, institutional structures and political systems still limit women’s ability to influence policy. Women are not a homogenous group, and not all female leaders will be cooperative, peaceful, or advocate for laws that strengthen gender equality [. . .]. Regardless of outcome, as the number of women leaders increases, more women will likely be inspired to become politically engaged.”<sup>100</sup>

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## 9.5 Public Law and Gender-Based Violence

Gender-based violence may be defined as “violence that reflects the existing asymmetry in the power relations between men and women and that perpetuates the subordination and devaluation of the female as opposed to the male”.<sup>101</sup> Gender-based violence is a health issue that threatens girls’ and women’s wellbeing, health, and overall life quality all over the world. Gender-based violence occurs both in peacetime and in war. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and any other form of sexual violence of comparable gravity are, under the Statute of Rome, considered as a crime against humanity when committed as a part of a widespread or systematic attack directed against any civilian

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<sup>97</sup> UN women: *Facts and figures: Leadership and political participation*: <https://www.unwomen.org/en/what-we-do/leadership-and-political-participation/facts-and-figures>.

<sup>98</sup> Vogelstein and Bro (2018), <https://edition.cnn.com/2018/11/09/opinions/year-of-woman-goes-global-bro-vogelstein/index.html>.

<sup>99</sup> Caprioli and Boyer (2001), p. 514.

<sup>100</sup> Vogelstein and Bro (2021), *Women’s Power Index*: <https://www.cfr.org/article/womens-power-index#chapter-title-0-2LC/>.

<sup>101</sup> Reed et al. (2010), p. 348.

population with knowledge of the attack.<sup>102</sup> According to the World Health Organisation (WHO), one third of the women in the world have experienced sexual and/or physically intimate partner violence.<sup>103</sup> Equally, almost one third (27%) of the women aged 15–49 years who have been in a relationship, report that they have been subjected to a form of physical and/or sexual violence from their partner.<sup>104</sup> Globally, 38% of all murders of women are committed by intimate partners.<sup>105</sup>

The WHO defines intimate partner violence as “a behaviour by an intimate partner or ex-partner that causes physical, sexual or psychological harm, including physical aggression, sexual coercion, psychological abuse and controlling behaviours. Sexual violence is any sexual act, attempt to obtain a sexual act, or other act directed against a person’s sexuality using coercion, by any person regardless of their relationship to the victim, in any setting”.<sup>106</sup> Sexual violence includes, according to the WHO, “rape, defined as the physically forced or otherwise coerced penetration of the vulva or anus with a penis, other body part or object, attempted rape, unwanted sexual touching and other non-contact forms”.<sup>107</sup>

The WHO reports demonstrate that gender-based violence is a huge world-wide health issue. Adding other aspects, such as race, social class and sexual orientation, is important to understand the issue in more detail.<sup>108</sup> Research shows that partner violence is not limited to men’s violence against women but that it may happen in all forms of partner constellations.<sup>109</sup> The complexity of the issue is not limited to gender, but the gender aspect is important to understand violence.

The public-private divide allows states to clean their hands of any responsibility for what happens in the private sphere and only take responsibility for the public sphere. What belongs to the private and to the public sphere differs over time and between regions and states. The definition of the public-private divide is thus of relevance of which responsibility the state has for gender-based violence, which happens between private individuals.

The WHO provides different explanations for gender-based violence. There are individual factors such as a history of exposure of child maltreatment, harmful use of alcohol, marital discord and dissatisfaction and difficulties to communicate between partners.<sup>110</sup> Applying the public-private divide, society has a role in protecting children from maltreatment and to offer treatment for alcoholism. Forcing

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<sup>102</sup> Article 7 of the Rome Statute of the International Criminal Court, <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>, accessed 26.04.2021.

<sup>103</sup> World Health Organisation (WHO), Violence against women, 21 March 2021, <https://www.who.int/news-room/fact-sheets/detail/violence-against-women>, accessed 27.04.2021.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

<sup>108</sup> See Kaladelfos and Featherstone (2014), p. 236.

<sup>109</sup> See Reed et al. (2010), p. 349 with references.

<sup>110</sup> Barr (2018).



grown-ups to treat their own alcoholism, would in most societies be considered a violation of the right to personal integrity. At the same time, having a system for voluntary treatment of alcoholism is an obvious part of public society.

Other explanations are lower levels of education, low levels of women's access to the labour market, weak legal sanctions for sexual violence and a low level of equality in forms of discrimination roles.<sup>111</sup> Here, the role of society is clearer for example, in giving access to education to everybody. The latter however, requires a well-functioning state apparatus, where the public sector has the financial resources to provide equal opportunities. In education, the state may be proactive in counteracting gender-based violence. In higher education in Sweden for example, knowledge about men's violence against women is a compulsory integral part of the education to become a lawyer, medical doctor, nurse, psychologist, social worker, physiotherapist and dentist.<sup>112</sup> Knowledge about such violence is considered crucial to save lives.<sup>113</sup> The aim is that students shall gain knowledge about how to both discover and prevent men's violence against women, may it be physical or other forms of violence.<sup>114</sup>

### Example

In the Syllabus for the first semester of the Swedish law programme at Örebro University, there is the following course aim:

“Be able to describe the basic features of the problem concerning men's violence against women and violence in close relationships and in this context describe in what way this is relevant to the legal profession.”

This is how it is reflected in the course content part of the syllabus:

“During the course, the issue of men's violence against women and violence in close relationships is introduced and discussed at an overall societal level but also from a gender perspective and what significance this has for the legal profession.”

Men's violence against women is also an examination:

“Introduction of men's violence against women and violence in close relationships - Seminar, 1.5 higher education credits (Exam code: A023)

Active participation in seminars and group assignments.”

The seminar is graded with “pass” or “fail”. Just to have pass or fail for this subject at the first semester is motivated by the fact that most students are complete beginners on discussing men's violence against women. ◀

<sup>111</sup> *Ibid.*

<sup>112</sup> Appendices to *Högskoleförordningen* (1993:100), the Higher Education Ordinance.

<sup>113</sup> Socialdepartementet, Kunskap om mäns våld mot kvinnor obligatoriskt i jurist- och läkarutbildningarna, 17 March 2017, <https://www.regeringen.se/pressmeddelanden/2017/03/kunskap-om-mans-vald-mot-kvinnor-obligatoriskt-i-jurist-och-lakarutbildningarna/>, accessed 27.04.2021.

<sup>114</sup> *Ibid.*

One field within public law that plays an important role is health care legislation. In article 20 of the 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention),<sup>115</sup> the contracting parties are obliged to “take the necessary legislative or other measures to ensure that victims have access to health care and social services. These services must be adequately resourced and professionals are trained to assist victims and refer them to the appropriate services”. Sweden has a long tradition of gender equality and this has a central position in Swedish policy.<sup>116</sup> Still, Swedish health care law has just recently started to expressively address men’s violence against women.<sup>117</sup> The first binding regulations on violence in close relations, which were applicable to both health care and social work, were enacted in 2014.<sup>118</sup> These regulations are however gender neutral. Men’s violence against women, which is addressed in public policy and regulations on higher education is not reflected in any binding norms in relation to health care. Furthermore, the legal obligations in the regulations are vaguely defined.<sup>119</sup> This vagueness in practice, leaves it to the discretion of the health care actors to decide on how to deal with victims of gender-based violence.

Public law measures against gender-based violence may also be found in police law. In Germany for instance, police law empowers the police to expel violent partners from the flat for up to ten days: “Expulsion from the flat: In order to avert a danger to the life, limb or freedom of a female or male fellow resident, the police may expel the person from whom the danger emanates from the flat and the immediately adjacent area and prohibit him or her from returning.”

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### Example

Another example is the obligation of State Parties to the Istanbul Convention to prevent violence against women and domestic violence by ordering a perpetrator to leave the victim’s residence, or prohibiting the perpetrator from entering the victim’s residence in situations of immediate danger (Art. 52). By allowing the victim to stay at the residence “it shifts th[e] burden to the perpetrator,”<sup>120</sup> who is required to leave the residence for a “sufficient time” instead of the victim. This emergency tool gives the victim the necessary time to seek long-term restraining or protection orders (as required under Art. 52 Istanbul Convention).

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<sup>115</sup><https://rm.coe.int/168008482e>, accessed 27.4.2021.

<sup>116</sup>See Öhman et al. (2020), p. 3.

<sup>117</sup>Öhman et al. (2020), p. 2.

<sup>118</sup>SOSFS 2014:4 Socialstyrelsens föreskrifter och allmänna råd om våld i nära relationer, <https://www.socialstyrelsen.se/regler-och-riktlinjer/foreskrifter-och-allmanna-rad/konsoliderade-foreskrifter/20144-om-vald-i-nara-relationer/>, accessed 27.4.2021.

<sup>119</sup>Öhman et al. (2020), p. 9.

<sup>120</sup>Council of Europe, ‘Emergency Barring Orders in Situations of Domestic Violence: Article 52 of the Istanbul Convention, A Collection of Papers on the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence’, June 2017.

In Germany, for example, such an emergency barring order (EBO) can be issued by the police for up to 14 days.<sup>121</sup> ◀

Since gender-based violence is just starting to become recognised in law, more sophisticated issues such as gender-based violence for transgender women, in relation to public law, is even more rare. There are however, studies on gender-based violence in health care, education and police encounters for transgender women in Latin America and the Caribbean.<sup>122</sup> In this research it was found that transgender women experienced gender-based violence when they obtained state-issued identity documents or when they used identity documents that conflicted with their gender identity.<sup>123</sup> Legislation that potentially could improve this situation are modernised gender identity laws and to give the right to self-determine the name and gender that appears on official documents.<sup>124</sup> Another conclusion that was drawn in regard to legislation, is that to achieve equality for trans people there is a need to design and implement public policies that reach beyond the elimination of discrimination and violence. Thus enabling conditions for all trans persons to live their lives to full potential.<sup>125</sup>

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## 9.6 Public Law Aspects of Antidiscrimination Law: Enforcement of Antidiscrimination Law by Public Law Mechanisms

Studies show that states that have ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>126</sup> thus, have anti-discrimination rules in their constitutions or elsewhere in their legislation, are more likely to adopt full legal protection against domestic violence. Anti-discrimination laws therefore, play an important role in changing prejudices, customs and traditions and other practices based on the idea of the inferiority of women. This section puts focus on public law mechanisms against discrimination and how those mechanisms may function as awareness raising in education and training of professionals.

Discrimination against women is defined in CEDAW as “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,

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<sup>121</sup> See e.g. § 29a General Law for the Protection of Public Safety and Order in Berlin, Germany.

<sup>122</sup> Lanham et al. (2019), p. 37.

<sup>123</sup> *Ibid.*, p. 43.

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*

<sup>126</sup> <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>, accessed 28.4.2021.

civil or any other field.”<sup>127</sup> The states that have ratified CEDAW have obliged themselves to condemn discrimination against women in any form. They have agreed to embody the principle of equality between men and women in their constitutions or other legislation and ensure the practical realisation of the principle (Article 2(a)). They should “prohibit discrimination by law and impose sanctions against discrimination, give access to justice in discrimination cases and refrain from engaging in any act of discrimination against women”. Furthermore, the contracting states should take measures to eliminate discrimination against women by any person, organisation or enterprise and abolish all laws, regulations, customs and practices that constitute discrimination against women, including penal provisions.<sup>128</sup>

Most countries in the world embrace the principle of equality and non-discrimination but in practice, the protection is broader in some and narrower in other countries.<sup>129</sup> Only Iran, Sudan and Somalia have taken no action to ratify CEDAW.<sup>130</sup> In Asian, European and South American laws, antidiscrimination is a constitutional principle. In Argentina, Brazil, the Czech Republic, Germany, India, Israel, Japan and Spain, it is a fundamental right. Antidiscrimination laws cover a wide range of activities, such as housing, employment, education, health, or access to public and private areas.<sup>131</sup>

To make discrimination laws more effective all over the world, the access to justice is crucial. If a court procedure is necessary and it is expensive and slow, the discrimination laws will not be effectively in practice.<sup>132</sup> A public law measure that may be a best practice, is a discrimination ombudsman, who may assist people who have been subject to discrimination. A discrimination ombudsman may work actively against discrimination, in relation to employers and other actors.<sup>133</sup> Furthermore, a discrimination ombudsman may supervise employers and other actors and make binding decisions on how the actor must act in the future to avoid discrimination.<sup>134</sup> Finally, a discrimination ombudsman may assist and represent persons in court proceedings. A practical issue in any court proceeding is the issue of proof. Where gender equality is weak in practice, it may be difficult for the victim to be believed.

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<sup>127</sup> Article 1 CEDAW.

<sup>128</sup> Article 2 CEDAW.

<sup>129</sup> Mercat-Bruns et al. (2018), p. 3.

<sup>130</sup> United Nations Human Rights. Office of The High Commissioner, Convention on the Elimination of All Forms of Discrimination Against Women, Last updated 20 June 2016, [https://www.ohchr.org/Documents/HRBodies/CEDAW/OHCHR\\_Map\\_CEDAW.pdf](https://www.ohchr.org/Documents/HRBodies/CEDAW/OHCHR_Map_CEDAW.pdf), accessed 28.4.2021.

<sup>131</sup> Mercat-Bruns et al. (2018), p. 5.

<sup>132</sup> *Ibid.*, p. 7.

<sup>133</sup> See Diskrimineringsombudsmannen, Vad gör DO, <https://www.do.se/om-do/vad-gor-do/>, accessed 27.4.2021.

<sup>134</sup> *Ibid.*

To pursue legal proceedings against somebody for discrimination may have a high price, especially if the proceedings are not successful. It is thus important, that discrimination laws contain a prohibition of reprisals for persons who reports or complain of discrimination or participates in an investigation into discrimination. Otherwise, it is likely that many cases are never reported. The limited amount of damages that victims of discrimination get, in the case that court proceedings are successful, may further discourage the victim from initiating a legal action.<sup>135</sup>

Effectiveness of anti-discrimination laws may be measured by the degree of compliance.<sup>136</sup> Anti-discrimination laws have a symbolic value and demonstrate that gender equality is an important issue, which in turn reduces gender-based and domestic violence. This is maybe the most important function of those laws. There are many ways to achieve compliance. One is awareness in public policy and to openly communicate that gender equality is an important issue. Another is to create gender awareness early in the education of children and young people . To respect and promote equality in education is a cornerstone in many educational systems.<sup>137</sup> To actively educate in gender equality and non-discrimination of women may be more controversial. Public law governing schools may have an important role to play in this respect. Also, the proactive role of a discrimination ombudsman, who works proactively in relation to employers and other stakeholders may increase the degree of compliance.

To make anti-discrimination laws effective in practice, it is important to efficiently communicate to the stakeholders what discrimination is. This is a matter for public law and a public authority such as a discrimination ombudsman. In Sweden for instance the discrimination ombudsman communicates with film material and in text form and explains what discrimination is. Besides Swedish, the communication is in Arabic, Bosnian, Croatian, Dari, English, Finnish (also the version spoken in Tornedalen), French, German, Persian, Polish, Romani (Ariil, Gurbet, Kaldaresh, Lovari and the Swedish version), Sami (North, South and from the Luleå region), Serbian, Somalian, Spanish, Tigrinya and Yiddish. It is also communicated in sign language and easy-to-read language and there is also the option to listen to the text.<sup>138</sup> Here is an example of how the Swedish discrimination ombudsman communicates discrimination:<sup>139</sup>

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<sup>135</sup>Mercat-Bruns et al. (2018), pp. 7–8.

<sup>136</sup>*Ibid*, p. 11.

<sup>137</sup>See e.g. Benjamin (2013), p. 197.

<sup>138</sup>Diskrimineringsombudsmannen, <https://www.do.se>, accessed 28.4.2021.

<sup>139</sup>Diskrimineringsombudsmannen, Disadvantaging a person on parental leave is prohibited, <https://www.do.se/other-languages/english/disadvantaging-a-person-on-parental-leave-is-prohibited/>, accessed 28.4.2021.

### Example

#### Pregnancy and parental leave

“The prohibition against disadvantaging a person taking parental leave covers in principle all situations that may arise between an employer and an employee or job-seeker. It makes no difference whether there is an intention to disadvantage or not. It is the effect or the result that determines whether it is a case of disadvantage. Examples of disadvantage include:

- Not being given a job or promotion
- Being transferred or relocated to less favourable duties or working conditions
- Lagging behind in salary
- A trial period of employment is terminated or does not result in permanent employment
- Being subjected to victimisation or other harassment by the employer that causes discomfort and suffering.”<sup>140</sup> ◀

As important as knowing what discrimination is, is to know what discrimination is not. Initiating a discrimination issue against an employer based on a misunderstanding on the concept of discrimination is not wise. Thus, the Swedish discrimination ombudsman gives examples on what discrimination is not, in the case of pregnancy and parental leave:<sup>141</sup>

### Example

“There are some situations where the prohibition of disadvantage to a person on parental leave does not apply. These are situations where certain conditions or treatment are a necessary consequence of the parental leave, such as:

- not paying salary to the person on parental leave (does not apply to agreed top-up salary during parental leave)
- not employing a jobseeker who intends to be on leave during a large part or the entire period of employment (applies to temporary employment)
- changing a person’s duties when he/she returns from parental leave if the previous duties no longer exist”<sup>142</sup> ◀

<sup>140</sup>Diskrimineringsombudsmannen, Disadvantaging a person on parental leave is prohibited, <https://www.do.se/other-languages/english/disadvantaging-a-person-on-parental-leave-is-prohibited/>, accessed 28.4.2021.

<sup>141</sup>*Ibid.*

<sup>142</sup>Diskrimineringsombudsmannen, Disadvantaging a person on parental leave is prohibited, <https://www.do.se/other-languages/english/disadvantaging-a-person-on-parental-leave-is-prohibited/> accessed 28.4.2021.

## 9.7 Conclusion

Modern public law appeared with the rise of the secular and liberal state at the time of the Enlightenment in eighteenth-century Europe. “Government by consent,” implied a fundamental change of the nature of constitutional and administrative law. Yet, women were not included in that consent. The systematic legal and factual domination of women by men, in the public and private spheres, continuously persisted. The gradual shift from a homocentric to a more gender-balanced public law took place only in the second half of the twentieth century, under the pressure of various political movements. The “second birth” of the modern public law signified not only the embracement of equality for both men and women, but also for the non-binary gender, as well as of substantial equality as opposed to formal equality. The increasing recognition of positive state duties to ensure gender equality in practice also meant the expansion of the reach of the public law. Public law used to be reserved for the free market relations and private domains of marital and family relations.

Although gender-balanced public law is gaining momentum across the world, there are still many sub-groups and whole societies in which patriarchy prevails. National public law responses to gender inequalities are very much culturally predetermined. In that respect, international legal norms embodied in the CEDAW, the International Covenant on Civil and Political Rights, the European Convention on Human Rights or the Istanbul Convention and in the practice of their (quasi-)judicial institutions provide focal points for local reforms and fight against discriminatory cultural patterns. However, there is not always one, universal version of gender equality, just as there is more than one school of feminism. Accordingly, there is a wide range of public law issues that constitutional and administrative law aiming for gender equality should consider and a pluralism of legitimate approaches addressing them. The pluralism of approaches particularly appears in areas in which international instruments accord a wide margin of appreciation to the Member States or in which the (quasi-)judicial institutions established by those instruments take divergent positions to the same set of legal issues.

Although women constitute approximately one-half of the world population, they are underrepresented at all governmental levels worldwide. Multiple structural, institutional and cultural factors play a part in this phenomenon. The situation is improving from year to year. However, this process is not fast and efficient enough, especially in developing countries. All international documents in this field emphasise the direct link between the equal representation of women in public life and the process of democracy. Sure, there is no doubt that democratic values cannot be achieved as long as women are underrepresented in public affairs. However, electing more women in state institutions is only the first step. What is necessary is to ensure that they have a tangible impact on public policies. They should not serve only as décor and reason for praise before foreign diplomats and international institutions. Thus, empowering women is a multi-layered process that is much more complex than choosing an equal number of women in state institutions. Consequently, this process requires the active involvement of all segments of the state and society.

Even though most countries in the world recognise principles of non-discrimination of women, every third woman in the world has been subject to a form of gender-based violence. Still, the existence of anti-discrimination laws in a country, plays a role in reducing gender-based violence. Anti-discrimination laws are however not alone the solution on either gender-based violence or discrimination of women.

People who meet persons who are subject to gender-based violence in their profession, such as lawyers, psychologists, medical staff and social workers, need education and knowledge about gender-based violence to see the signs, encounter the victims in the right way and to help them. Bringing gender-based violence as a subject into education laws is a public law measure that may be efficient. Binding regulations in relation to gender-based violence for health care is another important public law measure.

Anti-discrimination laws have an important signal value in recognising that women shall not be discriminated. Anti-discrimination laws as such, do not however abolish discrimination of women. Creating an anti-discrimination law that is effective in practice contains many challenges. For example, a female employee takes a risk when reporting her employer for discrimination in working life. A public law measure that may make this easier is a discrimination ombudsman, who can make binding decisions, but also inform employers, employees and other stakeholders on what discrimination is and what is not.

In discussions on equal representation, gender equality and discrimination of women, ethnicity, sexual orientation, societal class, and age need to be taken into consideration. There are cumulative disadvantages if many of these and other similar aspects are present. Furthermore, a wealthy, heterosexual, white women may be better-off regarding discrimination and other disadvantages than a poor, trans-sexual immigrant. Thus, when designing public law measures, they need to include more aspects than only gender, without missing out the gender issue.

### Questions

1. What were the historical and ideological preconditions for the profiling of modern public law and why it is considered as homocentric in its initial stage?
2. What is the rationale behind gender-neutral and gender-sensitive stages of development of modern public law?
3. Why is there pluralism in the public law approaches to gender equality and how do the tensions between some aspects of freedom of religion and gender equality exemplify it?
4. What are the main obstacles for political representation of women worldwide?
5. Explain the main arguments which are brought forward when discussing the importance of women's representation.

(continued)



6. Does only a larger number of women in state institutions guarantee their greater political influence?
7. What is the relevance for private-public divide in relation to gender-based violence?
8. Which public law measures may have an effect against gender-based violence? Mention some examples from the text and some examples from any other jurisdiction that you know.
9. Why is there still discrimination, even though most countries have discrimination laws in place?
10. If you compare discrimination of women with other discrimination grounds (race, sexual orientation, disability, age...), which public law measures should, according to your view, be the same for all kinds of discrimination, and in which regard are specific measures needed?

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