

# CURRENT REFLECTIONS ON EU GENDER EQUALITY LAW EQUAL PAY

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## Current Reflections on EU Gender Equality Law Equal Pay

Today's discussion will be structured as follows:

- ▶ Terminology and historical background of equal pay and pay equity
- ▶ EU law regarding the principle of equal pay
- ▶ EU member state approaches:
  - ▶ Iceland (ISO certification)
  - ▶ France (Positive measures – action plans with sanctions)
  - ▶ Poland (Government app)
  - ▶ Italy (Agency cooperation)
  - ▶ UK (Public disclosure)

Complications of pay equity - transparency as the way forward?

## Terminology

- ▶ Equal pay – equal pay for equal work (liberal, individual form justice)
- ▶ Pay equity – equal pay for comparable work/work of equal value (collective, substantive justice)
- ▶ Direct pay discrimination is where one person is being paid less because of their sex;
- ▶ Indirect pay discrimination is where an apparently neutral provision, criterion or practice puts people of one sex at a particular disadvantage. For instance, if an employer pays 10% less per hour to part-time workers than to full-time workers, where the greatest part of part-time workers are women.

## History of equal pay and pay equity internationally

- ▶ Equal pay issues raised often as a result of men going to war (US Civil War 1870 Congressional Appropriations Act with respect to federal clerks)
- ▶ WWI – Equal pay addressed with respect to women and African Americans
- ▶ The 1919 Treaty of Versailles, creating the International Labour Organization (ILO), whose General Principles stated that certain issues were deemed of special and urgent importance, including a living wage, limitations as to working times, a right to rest, and the principle that men and women should receive equal remuneration for work of equal value.

## WWII and equal pay (not simply gender)

- ▶ 1948 UN Universal Declaration of Human Rights (UNDHR), stating that “[e]veryone, without any discrimination, has the right to equal pay for equal work.” This protection was not limited to sex, but rather under its Article 14, the signatories committed to that “[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”
- ▶ ILO Convention No. 100 on the Equal Remuneration for Men and Women Workers for Work of Equal Value of 1951 was drafted the next year.

## EU and international law regarding equal pay

- ▶ Article 119 of the 1957 Treaty of Rome (Art 157 TFEU) specifically addressed equal pay between women and men for equal work or work of equal value, an issue of social dumping. Article 119 was to be implemented by the Member States by 1961.
- ▶ Article 4 of the 1961 European Social Charter (retained in the 1996 version) espouses the “right of men and women workers to equal pay for work of equal value.”
- ▶ 1961 Iceland passes an equal pay act between men and women for work of equal value
- ▶ 1963 US federal Equal Pay Act
- ▶ The 1965 UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) provides for the protection of equal pay regardless of race, colour, descent, or national or ethnic origin for equal work.
- ▶ Article 7(d) of the 1966 UN International Covenant on Economic, Social and Cultural Rights (ICESCR), arguable for everyone as the language is “[f]air wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.”
- ▶ The UN 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) protects in its Article 11(d) the “right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work.”

## Equal pay and the CJEU

- ▶ Court of Justice began early to address the gap in its case law:
- ▶ 1976: "The principle that men and women should receive equal pay, which is laid down by Article 119, is one of the foundations of the community. It may be relied on before the national courts. These courts have a duty to ensure the protection of the rights which that provision vests in individuals..." Judgment of the Court of 8 April 1976, Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena, Case 43-75, ECLI:EU:C:1976:56
- ▶ 1989: "Finally, it should be noted that under Article 6 of the Equal Pay Directive Member States must, in accordance with their national circumstances and legal systems, take the measures necessary to ensure that the principle of equal pay is applied and that effective means are available to ensure that it is observed. The concern for effectiveness which thus underlies the directive means that it must be interpreted as implying adjustments to national rules on the burden of proof in special cases where such adjustments are necessary for the effective implementation of the principle of equality." Judgment of the Court of 17 October 1989, Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss, Case 109/88, ECLI identifier: ECLI:EU:C:1989:383

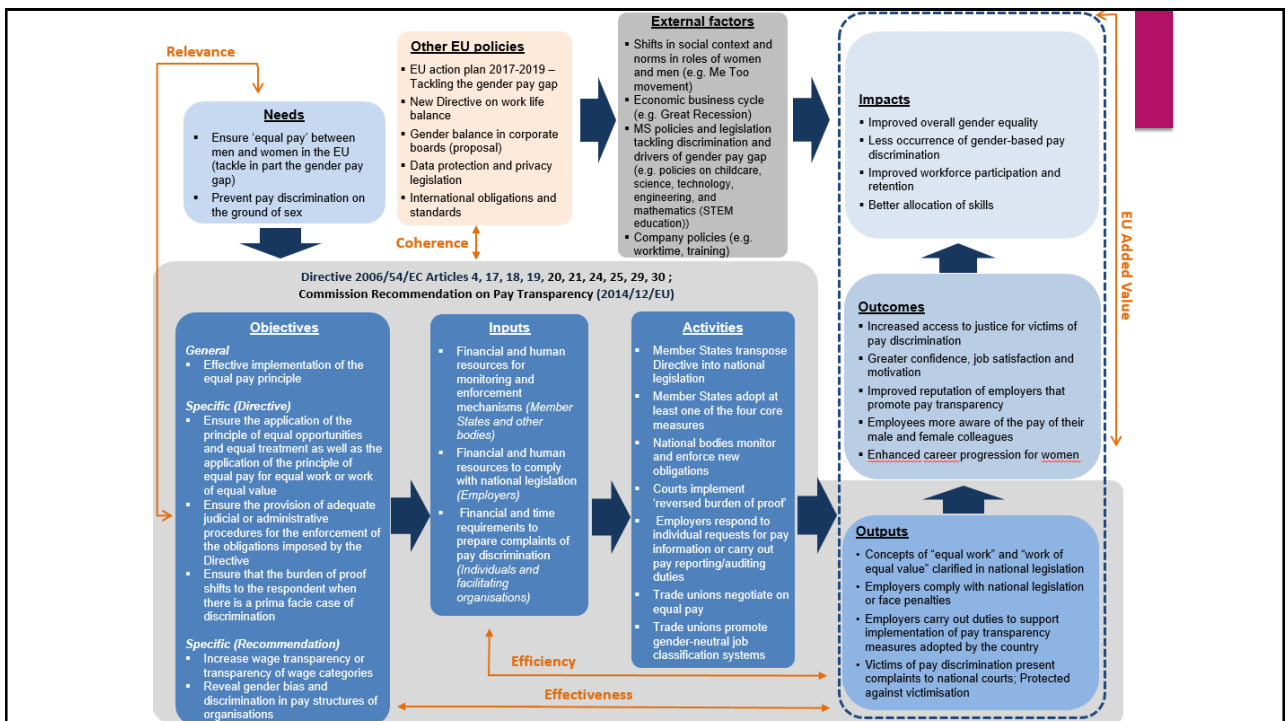
## CJEU jurisprudence

- ▶ CJEU has concluded that the work of equal value does not necessarily imply doing the exact same job. Different jobs can be of equal value when the educational, professional and training requirements, skills, effort and responsibility, work undertaken and the nature of tasks involved are in reality equivalent (assessments similar to the US EPA).
- ▶ All forms of pay are covered by equal pay right, including salary, overtime pay, bonuses, any other benefits in cash or kind which the worker receives directly or indirectly, in respect of his/her employment from his/her employer.

For a complete listing of the Court's jurisprudence on equal pay, see appendix 2 of the report by the European Network of legal experts in gender equality and non-discrimination, National cases and good practices on equal pay (European Commission 2019), available at <https://www.equalitylaw.eu/downloads/5002-national-cases-and-good-practices-on-equal-pay>.

# EU action law and equal pay

- ▶ Art. 157 TFEU
- ▶ 4.8 of the Recast Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation: 'For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated. In particular, where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.'
- ▶ Commission Recommendation of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency. OJ L 69/112, 8.3.2014. Four main measures: right to information on pay levels, pay reporting, pay audits and collective bargaining on equal pay including audits
- ▶ A 2013 report on implementing the Directive 13 and a 2017 report on implementing the Recommendation 14 highlight persistent problems with the practical enforcement and legal interpretation of the principle of equal pay for equal work or work of equal value.



# Intervention of the EU Action for equal pay

Annex 4 of the COMMISSION STAFF WORKING DOCUMENT  
EVALUATION of the relevant provisions in the Directive 2006/54/EC  
implementing the Treaty principle on 'equal pay for equal work or  
work of equal value' SWD(2020) 51 final

## Impacts

- ▶ Improved overall gender equality
- ▶ Less gender-based pay discrimination
- ▶ Improved workforce participation
- ▶ Better allocation of skills

## Outcomes

- ▶ Increased access to justice for victims of pay discrimination
- ▶ Greater confidence, job satisfaction and motivation
- ▶ Improved reputation of employers that promote pay transparency
- ▶ Employees more aware of colleagues pay (men and women)
- ▶ Enhanced career progression for women

## Outputs

- ▶ Concepts of "equal work" and "work of equal value" clarified in national legislation
- ▶ Employers comply with national legislation or face penalties
- ▶ Employers carry out duties to support implementation of pay transparency measures adopted by the country
- ▶ Victims of pay discrimination present complaints to national courts. Protected against victimization.

# EU Policy as to the Gender Pay Gap

- ▶ One of the five main priorities of the 2016-2019 strategic engagement for gender equality is to reduce pay, earnings and pension gaps between women and men, thereby addressing higher risk of poverty among women.
- ▶ The gender pay gap in unadjusted form is also one of the three indicators for gender equality included in the social scoreboard<sup>6</sup> that the Commission uses to monitor the implementation of the European Pillar of Social Rights.
- ▶ Gender equality has also been a prominent topic within the European Semester with the gender pay gap addressed in the Country Specific Recommendations for a number of countries as recitals and specific recommendations.
- ▶ The Commission's action plan for 2017-2019 provides that the Commission will assess the opportunity for targeted amendments to the Directive with the aim, in particular, of improving pay transparency.

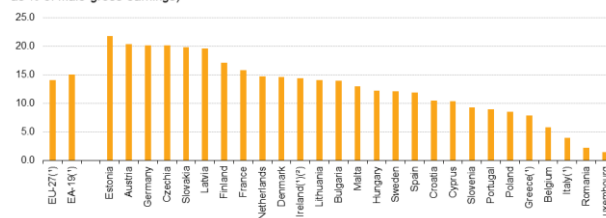
# Gender pay gap (pay equity) in the EU

- ▶ The EU gender employment gap stood at 11.7% in 2019, with 67.3 % of women across the EU being employed compared to 79% of men (EU27 data).
- ▶ The EU gender pay gap stands at 14.1% and has only changed minimally over the last decade. In essence, women work for free 2 months compared to men.
- ▶ Women in the EU even earned 39.6% less than men overall in 2014. Reasons include
  - ▶ Part-time v. full-time: 8% of men in the EU in 2019 worked in part-time, almost a third of women across the EU (30.7 %) did so.
  - ▶ Taking career breaks to care for others
  - ▶ Sectoral (occupational) segregation (private v. public, etc.). Also reflected in collective agreements
  - ▶ Lack of women in power (work-life balance, women on boards)
  - ▶ Discrimination

Source: [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/equal-pay/gender-pay-gap-situation-eu\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/equal-pay/gender-pay-gap-situation-eu_en)

# Eurostat

**The unadjusted gender pay gap, 2018**  
(difference between average gross hourly earnings of male and female employees as % of male gross earnings)



Note: For all the countries except Czechia: data for enterprises employing 10 or more employees, NACE Rev. 2 B to S (-O);  
Czechia: data for enterprises employing 1 or more employees, NACE Rev. 2 B to S  
(\*) Provisional data.  
(\*\*) 2017 data.

eurostat

## EU focus on pay transparency

The effective enforcement of the right to equal pay for the same work and work of equal value for women and men remains a major challenge, partly because of a lack of information on pay. Difficulties in general with access to justice (BOP, recordkeeping by employers, limited discover, short prescription periods, allocation of attorney fees, size of damages).

### Myths

- Pay transparency is costly (EU Commission Impact Assessment 50 cents emp)
- Employees do not want to disclose salaries (2/3 in favor of publishing average)
- Jobs are not comparable (pay equity can be assessed)
- Few court cases so no problem (access to justice)

## Effective and Dissuasive Remedies as a Component of Access to Justice in Discrimination Cases

- ▶ The EU treaties, legislation and jurisprudence have created an access to justice platform in which effective, proportionate and dissuasive remedies are in integral component with respect to equal pay.
- ▶ FRA – Access to justice in Europe (FRA Handbook 2016)
  - ▶ Fair and Public Hearing before an Independent and Impartial Tribunal
  - ▶ Legal costs and legal aid, the right to be advised, defended and represented
  - ▶ Right to an effective remedy
  - ▶ Procedural limitations barring access to justice: Court fees, formalism, evidence barriers, limitation periods, immunities, standing, length of proceedings, class actions, equitable remedies



# Proposal for EU Directive on Pay Transparency

- ▶ In the process of preparation, has gone through the roadmap and public consultation stage in the spring of 2020, now at the Commission adoption stage planned for the 4<sup>th</sup> quarter 2020.
- ▶ Key factors seen as requiring EU action:
  - ▶ Lack of transparency in pay systems
  - ▶ Remaining barriers to access to justice (low awareness, BOP, defence of rights, victim support, limitation periods, effective compensation, retaliation, costs of proceedings, with legal aid only available to (very) low income earners; in some countries (e.g. AT, BG95, SE) the losing party also bears the costs of the winning party, making the stakes of pursuing litigation very high; lack of courts' expertise on the legal framework for gender pay discrimination; low social awareness among victims of pay discrimination and lack of pay transparency; length and complexity of the proceedings linked to difficulties in proving discrimination and in finding the required comparator.
  - ▶ Limited mandates of national bodies to enforce equal pay measures

# Lessons that have emerged from the evaluation of the EU action

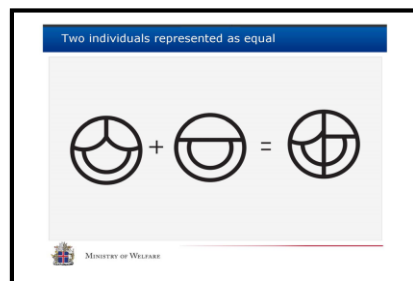
1. The need to clarify how to apply and use some existing legal concepts: Existing legal concepts such as 'pay', 'equal/same work', 'work of equal value' are not defined uniformly across national legislation and require facts to be assessed which can be complex. It is not always easy to determine what counts as equal work or work of equal value. This deters victims of pay discrimination from bringing claims and makes running a claim more complex for litigants and courts. Therefore, stronger clarity on how to interpret and apply the existing concepts could be helpful.
2. The need to better define a mandate and increase resources of monitoring bodies (e.g. equality bodies and labour inspectorates) in terms of their formal role in enforcing equal pay provisions — to enable them to issue an opinion or to take a decision on a case or to bring a case to court.
3. The need for a minimum level of fines and compensation in cases of gender-based pay discrimination.
4. The need to promote awareness of rights to redress which would increase the incentive for victims to seek access to justice.
5. The need to improve the practical application of the reversed burden of proof. This can be improved by clarifying the level of evidence required to reach the threshold of presumption of discrimination or by strengthening of the Directive's provisions on the burden of proof; pay transparency measures can also potentially support the implementation of the reversed burden of proof by enabling workers to provide evidence from which discrimination can be presumed.
6. The need to promote the use of gender-neutral job classifications/evaluations in Member States, in addition to requiring equal treatment of women and men where a job classification system is in place.
7. The need to ensure gender neutrality in terms of the actuarial factors used to calculate contributions and benefits in occupational social security schemes.
8. The need to promote training and the exchange of good practices on building gender-based pay discrimination cases; this could promote access to justice, and could build on existing examples such as the handbook developed by the European Network of Equality Bodies (Equinet) that provides concrete insights into how to build a case on equal pay<sup>217</sup>.
9. The need to ensure pay transparency measures are better implemented across the EU, which would spur more widespread action and higher compliance.
10. The need to promote data collection and research on the impacts of policies that promote the application of the equal pay principle, in particular counterfactual impact evaluation studies that assess the higher-level impacts.

## Different approaches in the EU member states

- Iceland (ISO certification)
- France (Positive measure – action plan with sanctions)
- Poland (Government app)
- Italy (Agency cooperation)
- UK (Public Disclosure)

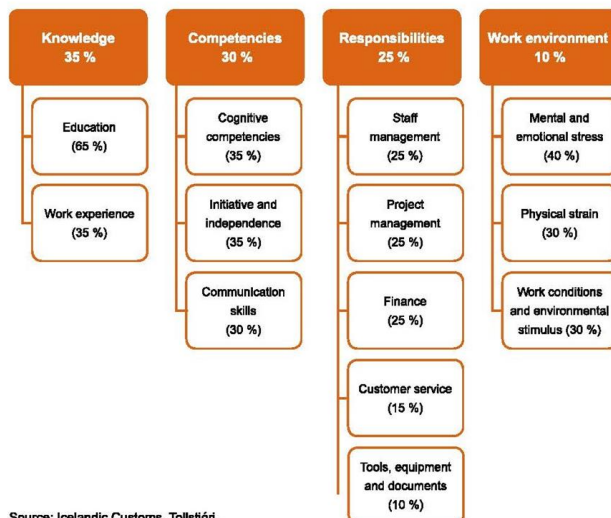
## Iceland (ISO certification)

Amendments to Article 19 of the Gender Equality Act No. 10/2008 on equal pay requires all companies with more than 25 employees to annually certify that they offer equal pay for work of equal value regardless of gender. The assessment is to be done according to Equal Pay Standard IST 85:2012 based on ISO 14001. If the company passes, it can use this mark.



**Figure 6. Example of a job classification scheme from Icelandic Customs.**

Job assessment



Source: Icelandic Customs, Tólstjórn.

## France – Positive measures with sanctions

The 2018 Act for the freedom to choose one's future occupation, effective 2019, addresses the gender wage gap. A flagship measure of the objective, equal pay between women and men in companies will no longer be subject to just an input-based obligation by employers, but to an output-based obligation comprising four stages:

- 1 • Measurement: the gender equality index with 5 indicators
- 2 • Transparency: each company will publish its results on its website
- 3 • Five corrective measures: each company will have 3 years in which to close the pay gap
- 4 • Audit : companies that have not closed the pay gap within 3 years could be fined up to 1% of their wage bill

The law requires companies with more than 50 employees to calculate their Gender Equality Index. The index can reach max. 100 points. If companies fail to reach 75 points, fines of up to one per cent of their expenditures on wages can apply. The law has a three-year period to enter into full effect. Companies have three years to reach more than 75 points and to monitor their activities at regular basis.

The index encompasses:

1. Gender pay gap, max 40 points
2. Difference in the rate of individual increases (excluding promotions) between women and men, max. 20 points
3. Difference in promotion rates between women and men, max. 15 points
4. Percentage of employees who returned from maternity leave during the reference year and who received an increase on their return during this same period, if increases occurred during the duration of their leave, max. 15 points
5. Number of employees of the sex underrepresented among the ten employees who received the highest remuneration, max. 10 points

## Poland – Government App

The Polish Ministry of Family, Labour and Social Policy suggests that employers estimate a “adjusted pay gap”, under which the salaries of employees are compared, taking into account the characteristics such as: gender, age, education, position held, working time and length of service.

To make it easier for the interested employers to verify whether they pay their employees the same money for the same work, the Ministry has created a computer application “Equal salaries” to provide an easy way to estimate the differences in the salaries of employees, taking into account their gender, age, education and other selected characteristics. The application is available free of charge to help all employers in developing a pay policy that is informed and non-discriminatory on the grounds of gender.

## Italy – Coordinating agencies

A 2018 Agreement between the National Labour Inspectorate and the National Equality Adviser committed the parties to increasing their cooperation in fighting gender discrimination by:

- ▶ The prompt examination of cases reported by Equality Advisers;
- ▶ The exchange of statistical data;
- ▶ The joint examination of the biannual report on the working conditions distinguished by gender in enterprises employing more than 100 workers provided by Article 46 of the Code for Equal Opportunities;
- ▶ The exchange of good practices and measures to fight discrimination and the monitoring of the results;
- ▶ The organisation of professional training on gender equality for both local equality advisers and labour inspectors;
- ▶ The promotion of meeting, at national or local level, to examine specific cases to remove discrimination or remarkable situations of inequality in the participation of workers, unions, employers' representatives, and the Minister of Labour.

Both parties committed to disseminate the agreement and to invite local equality advisers and local labour inspectorates to sign agreements which take the local situation into consideration.

# UK – Public disclosure

First Equal Pay Act 1970. The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 (SI 2017/172) and the Equality Act 2010 (Specific Duties and Public Authorities) Regulations 2017 (SI 2017/353) including the public sector's equality duty.

A relevant private employer must publish, for 2017 and each subsequent year, the following information—

- (a) the difference between the mean hourly rate of pay of male full-pay relevant employees and that of female full-pay relevant employees;
- (b) the difference between the median hourly rate of pay of male full-pay relevant employees and that of female full-pay relevant employees;
- (c) the difference between the mean bonus pay paid to male relevant employees and that paid to female relevant employees;
- (d) the difference between the median bonus pay paid to male relevant employees and that paid to female relevant employees;
- (e) the proportions of male and female relevant employees who were paid bonus pay; and
- (f) the proportions of male and female full-pay relevant employees in the lower, lower middle, upper middle and upper quartile pay bands.

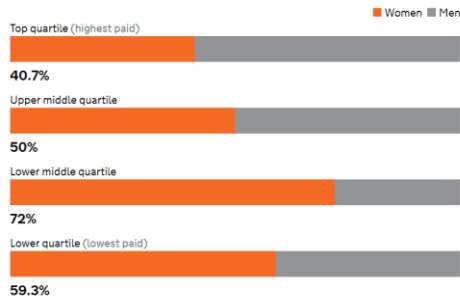
Gov.uk

The screenshot shows the 'Gender pay gap service' on the Gov.uk website. At the top, there is a 'GOV.UK' logo and the title 'Gender pay gap service'. A blue banner contains the text 'BETA This is a new service - your feedback will help us to improve it.' Below this is a section titled 'Search gender pay gap data' with a sub-heading 'Employers with 250 or more employees must publish figures comparing men and women's average pay across the organisation.' A search input field is provided with the placeholder text 'You can search by employer name or nature of business.' Below the search field are two links: 'Filter by nature of business or employer size' and 'Download all gender pay gap data'. At the bottom of the page, there are three columns of links: 'Gender pay gap explained' (Gender pay gap regulations and equal pay), 'Actions to close the gap' (Recommended actions for employers that make a difference), and 'Gender pay gap reporting' (For employers to report an organisation's gender pay gap data).

# UK gov. responds A & L Restaurants report

## Proportion of women in each pay quartile

▶ [About quartiles](#)



Laura Carlson, Juridicum SU

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## Future issues

- ▶ A proposed EU directive as to pay transparency that addresses the lessons learned from EU action as to equal pay
- ▶ Balancing the different approaches taken by the EU member states
- ▶ Insuring access to justice
- ▶ Addressing the imbalance between paid and unpaid work (care)
- ▶ Reconciling private and public sector wage differences
- ▶ Facilitating more women in positions of power