Post-Illiberal Women's Rights

Constitutional Negligence and Gender Constitutionalism

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17.06.2026 doi: 10.59704/0e28aa64fddb00b5

One of the major lessons of the rule of law backsliding is that the erosion of legal remedies (and capture of independent institutions) will, sooner or later, undermine effective fundamental rights protection. And even though women's rights are probably not the first thing that comes to mind when talking about the rule of law, they turned out to be the litmus test for harms caused by the rule of law backsliding.

That is why it is worth analysing the effectiveness of the post-2023 restoration of the rule of law in Poland, focusing specifically on what was visibly undermined by the populists: women's rights. We argue that the pre-populist negligence in recognising and interpreting the constitutional status of women's rights made it easier for populists to attack women's rights and replace them with an 'interest of the family'. As a result, in a post-populist context, repairing the harm done to women's rights seems to be avoided, because the same reasons that stood behind pre-2015 constitutional avoidance still apply today. It also seems that such negligence was a common feature in the region, identified also in the Hungarian context.

Constitutional Negligence

The constitutionalisation of fundamental rights in Central and Eastern Europe in the 1990s created numerous opportunities for effective protection of women's rights. Yet it was unclear how the new liberal order would affect the rights that women had already gained previously. During the communist era, women were present in the labour market, yet absent from political decision-making processes. Politics in the 1990s was predominantly male. As Drinoczi and Balogh found with respect to Hungary, after 1989, "women's issues were not put on the democratic opposition's agenda". Furthermore, they found that "democratic transition did not result in women having greater involvement in political decision-making; the formally recognised position of women did not translate into substantive participation".

In 1995, Kim Lane Scheppele listed numerous problems women's rights were facing in post-communist states. She found that "the most acute and highly politicised battle concerning women's issues is the struggle over abortion rights".[1] In Poland, limiting access to abortion was a result of a deal between the new political majority and the Catholic Church. The way access to abortion was analysed in 1997 by the Constitutional Tribunal showed that, despite having a liberal constitution, the practical meaning of the constitutional protection of women's rights (such as self-determination) had been drastically undermined. In 2015, the Constitutional Tribunal found that the regulation of the so-called 'conscience clause' (an obligation requiring doctors to refer patients to another provider where the medical procedure, such as abortion, could be performed) was unconstitutional – again, no indication of how the ruling would affect access to legal abortion. A similar pattern of constitutional negligence could be diagnosed in the 2010 judgement concerning differentiated retirement age for men and women. The Tribunal did not regard it as a violation of the Constitution and did not engage with analysing the practical consequences of such a provision for women or their pensions.

Similar patterns were present in Hungarian constitutional law: many of the equality cases involved men claiming discrimination, so they mostly involved the rights of men and financial matters. As a result,

[1] K.L. Scheppele, Women's Rights in Eastern Europe, East European Constitutional Review 1995, p. 66-69.

"constitutional interpretation of gender equality in Hungary has been predominantly male-centred". According to research by Balogh and Drinoczi, the Hungarian Constitutional Court (HCC) usually took a purely formalistic stand on equality without providing a broader context or facts that could present the consequences of the challenged norms for women. They found that the HCC tended to "advance the formal equality of men instead of the substantive equality of women". The HCC's approach towards women's status in society "has always been rather traditionalist, paternalistic, or even patriarchal", and "women have always been sidelined" by the HCC.

Illiberal Reading of Women's Rights

Democratic backsliding involves not only the capture of institutions but also the redefinition of women's place in the public sphere. In Poland, although women's rights were initially not at the centre of PiS's agenda, they gradually became a key element of its ideological project. This shift was reflected in legislation, the jurisprudence of the captured Constitutional Tribunal, and broader state practices shaping the role of women in society. The following examples illustrate how these developments reinforced narratives that gradually weakened women's position in the public sphere.

The most striking example is the abortion ruling of the captured Constitutional Tribunal of 2020, which declared the embryo-pathological ground for abortion as unconstitutional. Beyond its substantive impact, the judgement illustrates a profound shift in gender narratives within constitutional reasoning. Proportionality analysis was effectively hollowed out: the Tribunal reconstructed a constitutional protection of foetal life, while the rights of the pregnant woman were marginalised. The reasoning devoted to the "rights" of the embryo was disproportionate relative to the treatment of women's rights. This imbalance was also reflected at the linguistic level, where the reasoning increasingly framed women through the language of motherhood and reproductive roles, while questions concerning autonomy and self-determination remained marginal. The state's reaction to the subsequent protests further reinforced this approach. Women's protests were met with a markedly aggressive response from public authorities, despite a more tolerant approach to other large-scale public assemblies. This included the use of force against protesters, the use of pepper spray against (female) Members of Parliament, and the disclosure of personal data of one of the activists.

Similar tendencies concerning reproductive rights can also be observed in Hungary, where abortion remains legal but is burdened with paternalistic procedural restrictions intended to ensure that a woman is 'certain' in exercising her autonomy. A good example is the 2022 regulation requiring women seeking an abortion to listen to the foetal heartbeat before making a final decision. Much like the Polish abortion ruling, this places women not as autonomous individuals but primarily within their reproductive role, leaving their autonomy outside the pronatalist narratives promoted by the state.

In Poland, these narratives were consistent with a broader shift in approach already visible at the beginning of PiS's rule. During the constitutional crisis, this tendency only intensified. First, social policies directed at families were not linked to women's participation in the labour market. Programmes such as 500+ or the "Mama 4+" pension effectively reinforced the withdrawal of women from paid work in favour of caregiving roles. In Hungary, scholars have pointed out similar pronatalist policies, such as baby grants and tax breaks for families choosing to have three or more children. In practice, however, these policies often assumed that women would simultaneously engage in paid work and remain primarily responsible for childcare and reproductive labour, frequently working for "meagre wages in underpaid mommy-track jobs". While differing from the Polish model, this also limited women's ability to participate in public life on genuinely equal terms. Second, in both countries, international legal instruments such as the Istanbul Convention were framed as an attack on the family, contributing to the delegitimisation of gender equality norms. Hungary refused to ratify the Convention, whereas in Poland, the government sought to use the

captured Constitutional Tribunal to withdraw from the Convention by having the Istanbul Convention unconstitutional.

Transition to Gender Constitutionalism?

Following the 2023 elections in Poland, the process of democratic transition has not sufficiently addressed women's rights. First, women have remained underrepresented in the government, and where present, they have often been concentrated in portfolios traditionally associated with 'women's issues', such as family or education. This is not to deny that some important reforms concerning women's rights have been initiated, including changes to the definition of rape and measures aimed at strengthening gender equality in employment and corporate governance. However, those developments did not trigger broader *de facto* inclusion of women in decision-making processes, especially in politics. Second, recommendations issued by the Minister of Health and guidelines adopted by the Prosecutor General concerning abortions performed on mental health grounds have helped to prevent the most serious violations of patients' rights and contributed to an increase in the number of legal abortions. However, these measures fall short of the commitments made during the electoral campaign, as their implementation was ultimately hindered not by the President but by the governing coalition's inability to reach an agreement on legislative reform. Third, family policy has largely continued along previous lines, reinforcing women's withdrawal from the labour market through measures such as the expansion of child benefits and the introduction of care-oriented schemes like the so-called "grandmother's allowance".

While Poland has been restoring democracy for two and a half years, the lack of change in this rhetoric and in meaningful action to include women in the transition is striking. Although women play a significant role in public debate within civil society, this does not translate into decision-making power. This raises the question of how such a political 'window of opportunity', both in Poland and Hungary, could be used to improve the constitutional status of women's rights. Situating this discussion within Ruth Rubio-Marin's theory of 'gender' constitutionalism may help clarify the potential direction of change. She distinguishes between four types of constitutionalism: exclusionary, inclusive, participatory, and transformative.

Exclusionary constitutionalism rests on a traditional division between the public and private spheres, associating men with public life and women with care and reproductive functions in the private sphere. To a great extent, it characterises the illiberal, paternalistic, and pro-natalist policies and narratives both in Poland and Hungary, where demographic decline was frequently attributed to women's employment and reproductive autonomy, rather than to broader structural conditions.

Inclusive constitutionalism focuses on formal equality and the recognition of sex equality at the constitutional level. In our opinion, such a form was present in the early years of post-communist constitutionalism in Poland and Hungary, when the formal understanding of equality played the fundamental role in constitutional case-law (Hungary) and when the context involving the practical consequences for women's rights was absent from constitutional interpretation (Poland). That is why we perceive it as constitutional negligence. In times of rule of law backsliding, inclusive constitutionalism has been further instrumentalised, with formal equality between women and men invoked to suggest that no further action is needed, effectively closing the discussion on the need to ensure women's meaningful participation in the public sphere. While constitutional guarantees of equality formally remain in place in both Poland and Hungary, they have been surrounded by conservative interpretation in both countries and supplemented, in Hungary, by additional conservative constitutional provisions.

Rule of law backsliding makes it almost impossible to challenge such negligence and instrumentalisation before independent institutions. That is why reinstating the rule of law fundamentals should not only rebuild institutional safeguards (such as judicial independence) but also open the way to discuss two further types of constitutionalism. Participatory and transformative constitutionalism treat women's empowerment

as a condition of democratic legitimacy. According to Rubio-Marin, participatory constitutionalism emphasises substantive equality and women's equal participation in decision-making processes, including through mechanisms such as parity democracy. Transformative constitutionalism goes further by treating care and reproductive functions as matters of public concern and by seeking their more equal redistribution between women, men, and the state. Rebuilding the rule of law should ensure that women are part of this transition. On the one hand, it should require improvement of the legal framework (such as ratification of the Istanbul Convention and legalising access to safe abortion procedures). On the other hand, however, the transition to the rule of law should mean that women are actors in the democratic transition and not simply subjects of new legal or political models.

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SUGGESTED CITATION

Łakomiec, Katarzyna; Grabowska-Moroz, Barbara: Post-Illiberal Women's Rights: Constitutional Negligence and Gender Constitutionalism, Verfassungsblog, 17.06.2026, doi: 10.59704/0e28aa64fddb00b5.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20260617-190718-0.