GENDER IN LAW UNDER AND AFTER STATE SOCIALISM: THE EXAMPLE OF THE CZECH REPUBLIC

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The thesis examines the expressions and origins of negative attitudes to gender equality in the Czech Republic, which have been noticeable especially in the process of implementation of the EU sex equality *acquis.* It asks whether and how they can be explained with reference to socio-legal developments that started during Czechoslovakia's State Socialist past, but are still relevant today. In order to answer these research questions, the thesis examines how gender equality has been regulated through law and how it has been understood by law-makers, judges and legal scholars in Czechoslovakia and the Czech Republic during State Socialism (1948-1989) and Transition (1989-today).

The thesis examines legal developments in gender-relevant areas, most importantly in antidiscrimination law. It also excavates the underlying, sometimes hidden, but crucial understandings of key concepts such as 'women', 'gender', 'equality', 'discrimination' and 'rights'. The thesis argues that while formal legal guarantees for women have largely been satisfactory in the Czech Republic by international standards, the way these formal legal guarantees are understood, interpreted and applied has not been gender-progressive.

It argues that the reasons for this are: (i) entrenched patriarchal ideas about women's appropriate role both in private and public life; (ii) a failure to understand gender as a social construct and to recognize gender order as a pervasive social structure; (iii) an inadequate conceptualization of equality and a refusal to combat sex discrimination; and (iv) a limited understanding of the role of law and of rights in the shaping of social relations. It argues that these understandings have been considerably path-dependent on State Socialism, be it through a rejection of anything perceived as State Socialist (which has harmed redistributive policies), as well as through the mostly unconscious retention of ideas or their absence (which has led to a blindness to the cultural aspects of patriarchy).

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PART I STATE SOCIALISM

PART II. TRANSITION

List of abbreviations and short terms

1949 Convention	Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 2, 1949, 96 U.N.T.S. 271, 282.
ADA	Act No 198/2009 Coll., Antidiscrimination Act (*antidiskriminační zákon*)
Amending Directive	Directive 2002/73/EC amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, L 269/15, 5/10/2002, 15-20
Beijing Platform	Fourth World Conference on Women, 'Beijing Declaration and Platform for Action' A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995)
CCC	Czech Constitutional Court
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 14.
CERD	International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Dec. 21, 1965, 660 U.N.T.S. 195
CEU	Central European University
Charter	Act No 2/1993 Coll., Charter of Fundamental Rights and Freedoms
CJEU	Court of Justice of the European Union
CP	Communist Party
CSO	Czech Statistical Office
CUP	Cambridge University Press
CZ	Czech or Czechoslovak
EC	European Communities
EEC	European Economic Community
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1
Equal Treatment Directive	Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L039, 14/02/1976, 40-42
Equal Pay Directive	Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, O.J. L045, 19/02/1975, 19-20
FF UK	Faculty of Arts, Charles University in Prague
Framework Directive	Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, O.J. L 303, 2/12/2000, 16
ICCPR	International Covenant on Civil and Political Rights, 999 U.N.T.S. 171
ICESCR	International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3
KomPrávo	Bobek M, Molek P and Šimíček V (eds), *Komunistické právo v Československu. Kapitoly z dějin bezpráví. (Communist Law in*

	Czechoslovakia. Chapters from the History of Unlawfulness) (Mezinárodní politologický ústav Masarykovy univerzity 2009)
MoI	Ministry of Interior
OED	Oxford English Dictionary; available at www.oed.com
OUP	Oxford University Press
Palermo Protocol	Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the U.N. Convention Against Transnational Organized Crime, G.A. Res. 55/25, 55 U.N. GAOR Supp. (No. 49), U.N. Doc. A/45/49 (Vol. I) (2001).
Parental Leave Directive	Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ L 145, 19/6/1996, 4–9
Pregnancy Directive	Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, O.J. L 348, 28/11/1992, 1-8
Race Directive or Directive 2000/43/EC	Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, O.J. L 180, 19/7/2000, 22
Recast Directive or Directive 2006/54/EC	Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26/07/2006, 23-36
SAC	Supreme Administrative Court
SC	Supreme Court of the Czech Republic
TEU	Treaty on European Union, O.J. C 83, 30/3/2010, p. 13
TFEU	Treaty on the Functioning of the European Union, O.J. C 83, 30/3/2010, 47
UN	United Nations
U.N.H.C.H.R.	United Nations' Office of the High Commissioner for Human Rights
VAT	Value added tax
VAW	Violence against Women
WesternRights	Sajó A (ed) *Western rights? Post-communist application* (Kluwer Law International 1996)

Table of statutes

Table of cases

Table of parliamentary debates

(all transcripts are available at www.psp.cz or www.senate.cz)

Date	Chamber	Print No.	Bill debated	Reference (fn.)
19/12/1956	National Assembly	N/A	Amendments to the Criminal Code	226
Domestic violence				
19/9/2002 17/4/2003	Senate	337 (2002)	The proposal to amend the Criminal Code by inserting a provision on domestic violence (adopted as Act No. 91/2004 Coll.)	6
25/6/2003	House	298 (2003)	The proposal to amend the Criminal Code by inserting a provision on domestic violence (adopted as Act No. 91/2004 Coll.)	1055, 1070, 1072, 1289, 1309
16/6/2005	House	828 (2004)	The accompanying bill on domestic violence, containing non-criminal provisions (adopted as Act No. 135/2006 Coll.)	1073, 1290, 1321
26/1/2006	Senate	197 (2006)	Connected bill on domestic violence, containing non-criminal provisions (adopted as Act No. 135/2006 Coll.)	1256
Labour and antidiscrimination				
10/12/2003	Senate	119 (2003)	An amendment to the Labour Code defining sexual harassment (adopted as Act No. 46/2004 Coll.)	5, 1078, 1284, 1291, 1302
10/2/2005	House	866 (2005)	The proposal of the first Antidiscrimination Act (not adopted)	1269
26/1/2006	Senate	201 (2006)	The proposal of the first Antidiscrimination Act (not adopted)	933
Registered partnership				
24/6/2005	House	969 (2005)	Proposal of the Act on Registered Partnership (adopted as No. 115/2006 Coll.)	1310
State advances on child support payments				
10/4/2004	House	848 (2001)	Proposal of an act on state advances on child support payments 2001 (not adopted)	1311
24/6/2005	House	964 (2005)	Proposal of an act on state advances on child support payments 2005 (not adopted)	1310, 1314
24/10/2007	House	132 (2007)	Proposal of an act on state advances on child support payments 2007 (not adopted)	1313
27/1/2010	House	849 (2009)	Proposal of an act on state advances on child support payments 2009 (not adopted)	1312

INTRODUCTION

In the run up to, as well as after, its accession to the EU,[1] the Czech Republic has adopted a range of new legislation in the area of gender equality. The overall record of implementation[2] of EU equality law in the Czech Republic, however, has been unsatisfactory.[3] Legislators as well as judges have expressed hostility and shown a lack of understanding of key ideas underpinning EU equality law, as the following examples illustrate. The first concerns the amendment to the Labour Code which prohibited harassment and sexual harassment, as required in order to fulfil the EU accession requirement to harmonize national law with the *acquis.* Senator Jaroslav Kubera[4] explained his refusal to vote for the amendment by pointing out that 'normal' women enjoy attention and men should be allowed to give it, and tried to delegitimize any female supporter of the bill as a bitter feminist:

> To begin with, I need to say I'm not a sexist,... [But] I cannot support our paternalistic protection or the desires of never gratified feminists, who are in no danger of harassment. This is the shocking and peculiar thing. I cannot name them, because I would do something I don't want to do, but you can look at them on the internet – the women involved, who are

[1] The Czech Republic acceded to the EU on 1st May 2004.

[2] The implementation requirement included transposition, application and enforcement. Delays and improper implementation can be identified with regards to all. I discuss this in more detail in chapters 5 and 7.

[3] For example the Antidiscrimination Act, which should have been in place at the time of accession in 2004, has only been adopted and entered into force in 2009. I have examined this in more detail in Barbara Havelková, 'Challenges to the effective implementation of EC gender equality law in the Czech Republic – an early analysis' in Kathrin Arioli and others (eds), *Wandel der Geschlechterverhältnisse durch Recht?* (DIKE 2008).

[4] From the right-wing Civic Democratic Party ('ODS').

> active this way, nothing will happen to them, no one would ever harass them.[5]

That this is not an uncommon position among law-makers was made clear by a declaration, adopted by the Senate when passing the Antidiscrimination Act:

> The Senate considers the ADA a tool for implementation of the requirements of EU law, the non-realization of which would lead to sanctions. It does not, however, identify with the character of the norm, which artificially interferes with the natural evolution of society, does not respect cultural differences among the Member states and elevates the demand of equality above the principle of freedom of choice. The Senate urges the government not to consent to adoption of further antidiscrimination measures at the EU level.[6]

A suspicion toward antidiscrimination rights has also been apparent in adjudication. There have been few antidiscrimination cases before the courts, most unsuccessful for the plaintiff. Many courts have expressed unwillingness to assess discrimination and award compensation. A district court in Prague in 2005[7] dismissed a case of discrimination in employment promotion. The following *obiter* passage shows the court's conviction that employers have an unlimited freedom in selecting and promoting their staff and that this managerial prerogative should by no means be judicially reviewed:

> [The] court found substantial differences in the appraisal of the candidates by the members of the [selection] board, however, since this evaluation was not based on objective measurement of knowledge but on subjective perception of the personalities of the candidates, these differences are natural. Moreover, […] the court did not consider the 'quality' of the candidates, i.e. their expertise, experience, etc., as a decisive element in the legal evaluation, as the law addresses only the difference in treatment

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[5] Senate, 10/12/2003, Print No 119 (2003). All translations are mine unless otherwise indicated. The language and syntax of this particular quote is peculiar in Czech, so I tried to translate as closely as possible. Emphasis mine.

[6] Senate, *Resolution no. 377 of 2008* (23 April 2008), emphasis mine.

[7] Judgment of District Court for Prague 1, *V.S. proti SPGroup* 23 C 11/2003-70.

> of candidates and distinctions made on the basis of sex, as regards the opportunity to obtain the position to be filled. [E]very person is an unrepeatable individual […] and it is therefore impossible to find that someone is better for a position than the other.[8]

The thesis asks whether these negative attitudes to antidiscrimination law go beyond the observable opposition to the implementation of the relevant EU *acquis*, and run deeper. It asks whether and how the reluctance to take the EU gender equality *acquis* on board can be explained with reference to socio-legal developments that started in the State Socialist past and are still relevant today. Is there an entrenched position against gender equality in the Czech Republic and is this an enduring legacy of the State Socialist past?

In order to answer these research questions, the thesis examines how has gender equality been regulated[9] through law and understood by law-makers, judges and legal scholars[10] in Czechoslovakia[11] and the Czech Republic during the periods of State Socialism[12] (1948-1989) and Transition[13] (1989-today). The thesis explores

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[8] Ibid, emphasis mine.

[9] I understand the term 'regulates' formally – as what formal legal rules are on the statute books. See also fn. 95.

[10] I am interested in the attitudes and conceptualizations among actors who create, apply and authoritatively interpret law: law-makers (this includes politicians when participating in parliamentary debates and officials responsible for the drafting of legal proposals), judges and legal scholars. The primary materials analysed are the output of these actors. I sometimes refer to all these actors together as 'legal community'.

[11] Czechoslovakia was established in 1918 and dissolved on 31th December 1992. There were periods when Czech law differed from Slovak law (in the first half of the 20th century as a result of reception of different norms – Austrian in the Czech lands and Hungarian in Slovakia -; and later due to federalization in 1968). In the period 1948-1992, the development in the Czech part of Czechoslovakia will be examined.

[12] 'State Socialism' is the term commonly used in literature to describe the period of communist rule in the CEE countries that belonged to the 'Soviet bloc' after WWII. The terms 'real socialism' (preferred for example by Gordon Skilling) and 'real existing socialism' (for example by Jacques Hersh and Dragsbaek Schmidt Johannes, *The aftermath of 'real existing socialism' in Eastern Europe* (Macmillan Press; St. Martin's Press 1996) are sometimes used as synonyms. Kaplan argues that the power or

what continuities and discontinuities exist between these periods, with regard to both, the legal regulation of women and gender, as well as the way law-makers, judges and legal scholars have thought about 'gender equality'.

In the foreground, the thesis examines legal developments in gender-relevant areas,[14] most importantly in antidiscrimination law. The thesis analyses the adoption of constitutional, statutory and secondary law provisions, including the use of such legal provisions for the implementation of EU law. But the thesis has also a socio-legal dimension - it excavates the underlying, sometimes hidden, but crucial understandings of key concepts such as 'women', 'gender', 'equality', 'discrimination' and 'rights'. As the thesis shows these understandings significantly determine whether the legal provisions adopted by the legislature or the executive, and the interpretation given them by the courts, will be gender-progressive,[15] i.e. counteracting patriarchy rather than entrenching it, or not.

The thesis is thus, firstly, a modern legal history of the treatment of women and gender in Czech law. It will be the first critical 'Women and the Law' 'book'

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regime can be described as 'communist' (due to the rule by Communist Parties), but that the society should be described as 'socialist'. Karel Kaplan, *Kořeny československé reformy 1968)*(Doplněk 2000).

[13] Transition is the term commonly used in literature, as a preference to Transformation, which is more frequent in Czech common usage but has a more close-ended meaning. See eg Elaine Weiner, 'Market dreams: gender, class, and capitalism in the Czech Republic' (*University of Michigan Press*, 2007). However, even the term Transition has been criticized as 'assum[ing] evolutionary progress', 'continu[ing] the Cold War morality tale' and 'homogenizing capitalism' (Susan Gal and Gail Kligman, *The politics of gender after Socialism: a comparative-historical essay* (Princeton University Press 2000), 10). I use the term Transition to describe a process of a shift *away* from State Socialism, but indeterminate with regards to the final aim (other than democracy and the rule of law).

[14] Cf. section 1.3.

[15] Cf. section 1.1 and 1.2.

available for Czechoslovakia and the Czech Republic.[16] Secondly, it offers a critical feminist analysis of the Czech legal discourse[17] on gender equality. The thesis looks at gender equality law in context,[18] and it takes a feminist perspective. Its method is mostly inductive – the thesis analysis is grounded in primary source material -, but it also uses feminist theoretical frameworks.[19] In the following sections, I elaborate on my methodology. I discuss, firstly, my commitment to feminist theories (section 1) and then in more detail my sources and how I analysed them (section 2), before presenting my main arguments and the structure of the thesis (section 3).

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[16] The only previous analysis of the legal situation of women was written in Czech in 1971. As well as being dated from today's perspective, it was tributary to the regime and therefore not critical. Senta Radvanová, *Žena a právo* (Orbis 1971). There is, moreover, no analysis available in English.

[17] The term 'discourse' and even 'legal discourse' are well-established philosophical and legal-philosophical categories often concerned with institutional and procedural aspects of communication and argumentation (Michel Foucalt being concerned with discourse as a technique of power; Michel Foucalt, 'The Order of Discourse' in Robert Young (ed), *Untying the text: A post-structuralist reader* (Routledge 1981), 52; and Jürgen Habermas with procedural aspects, Jürgen Habermas, *Theorie und Praxis. Sozialphilosophishe Studien* (Suhrkamp 1971); Jürgen Habermas, *Faktizität und Geltung* (Suhrkamp 1992)). The concept emphasises inter-subjectivity. The Habermasian understanding of discourse is important as it shows that the ruling of one judge (for example in an antidiscrimination case) will be influenced by the legal discourse in which they operate. As this observation would be denied by many in the Czech Republic (I discuss the ideas of neutrality and objectivity of law and lawyers in chapter 8 below), it is a particularly pertinent way of looking at the production of the 'impartiality of the judge' and the perceived independence of subjective thought. However, methodologically, I am not employing discourse analysis, as I elaborate in section 2.3 below.

[18] The term 'law in context' is used to emphasize the exploration of law in its social setting. For example the manifesto of the 'Law in Context' series by CUP states that it aims to 'treat law and legal phenomena critically in their social, political and economic contexts from a variety of perspectives. A contextual approach involves treating legal subjects broadly, using materials from other social sciences, and from any other discipline that helps to explain the operation in practice of the subject under discussion.'

[19] This thesis combines the use of 'sensitising categories' drawn from Western feminist theory with an analysis grounded in the Czech material. I elaborate this in section 2.3.

1 A feminist thesis - the theoretical framework

The thesis contributes to the field of gender legal studies.[20] It is situated within a feminist framework because of 1) the questions it asks and the theoretical framework it employs to answer them; 2) the standard it uses, i.e. what it considers gender-progressive or gender-conservative; 3) and the concrete issues and areas of law it examines. I discuss these in turn.

As no indigenous feminist legal scholarship has developed in the Czech Republic,[21] I draw on 'Western' academic writings. I use the term 'West' to refer to Western Europe and North America. The feminist theory as well as the legal development in the 'West' is a useful foil against which to explore the Czech development and identify its peculiarities. The 'East-West' dichotomy is therefore functional, albeit somewhat homogenizing.[22] To avoid this, where possible, I try to be specific and refer to a particular country or a group of countries when referring to the 'West' - of particular interest for the thesis are the law and scholarship from common law countries (UK, US and Canada), with their strong antidiscrimination tradition; as is the coming together of Western European laws and values that is the European Union.

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[20] Cf. section 1.1 and chapter 8(4.3.4).

[21] Cf. chapter 8(4).

[22] I do acknowledging the existing critiques that neither 'East' nor 'West' are homogeneous (For a discussion see Frances Elisabeth Olsen, 'Feminism in Central and Eastern Europe: Risks and Possibilities of American Engagement' (1997) 106 The Yale Law Journal 2215). However, these cautions were raised especially when the intellectually hegemonic 'West' has defined itself against the 'East' – it was a caution against homogenization, oversimplification and 'orientalism' in relation to a little known region. I do not believe that corresponding worries exist with regards to my treatment of Western Europe and North America.

1.1 Feminist questions and theoretical concepts

First, the thesis asks how has the status of women been regulated by Czech law and understood by the Czech legal community, for example with regards to their position in the marriage family, and the workplace. The category of 'women' has been challenged in more recent Western scholarship as essentialist and homogenizing.[23] I recognize that women are not a unitary category, and that other axes of disadvantage in society, apart from gender, such as race, ethnicity, class, immigration status, sexual orientation, disability or age, shape women's life experiences. I acknowledge that each situation is unique, and that the fact that one is a woman might not be the only reason for disadvantage, or not even the primary one.[24]

While I acknowledge that the category of 'women' is socially constructed,[25] I also consider that women have, although to differing degrees, a shared historical and current experience[26] of oppression and disadvantage,[27] both material and symbolic.[28]

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[23] The universal category of 'women' has been challenged as not corresponding to the variety of women's experiences. For example Kimberle Crenshaw has pointed out the underlying assumption of 'whiteness'. See eg Kimberle Crenshaw, 'Demarginalizing the intersection of race and sex: A Black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics' [1989] University of Chicago Legal Forum 139. Darren Rosenblum has argued, in the context of CEDAW, for abandoning the category of women and sex altogether; Darren Rosenblum, 'Unsex CEDAW, or what's wrong with women's rights' (2011) 20 Columbia Journal of Gender and Law 98.

[24] I do, indeed, consider that the project would benefit from an intersectional analysis, i.e. from looking at other axes of disadvantage which intersect with the category of 'women', but for reasons of space, such an analysis would go beyond the scope of the current thesis. For the advantages and difficulties of 'intersectional analysis', see eg Joanne Conaghan, 'Intersectionality and the feminist project in law' in Emily Grabham and others (eds), *Law, Power and the Politics of Location* (Routledge-Cavendish 2008).

[25] Eg Rosenblum notes that its meaning varies country to country; Rosenblum, 'Unsex'.

[26] Women are disadvantaged according to a variety of indicators, as summarized for example by Martha Nussbaum, *Women and Human Development* (CUP 2000), 1-4. For a more recent account, see The World Bank, 'Gender Equality and Development' (*http://econ.worldbank.org/*, 2012) accessed 1 Jan 2013.

This oppression has been perpetuated by law and law itself has employed and constructed the category of 'women'. For these reasons, I continue to use 'women' as a critical tool category of legal analysis.[29]

Such analysis is particularly useful in the post-communist context - while the mapping and scrutiny of the development of the legal treatment of women in the West is a project largely done,[30] it is still missing in post-communist Central Europe. The thesis offers it for the first time, using the example of the Czech Republic.

Incorporating the conceptual developments in the West, the thesis does, however, go beyond studying the legal treatment of 'women'. It also uses 'gender'[31] as an analytical tool, understood here, with Joan Scott, as 'a social category imposed on a sexed body'.[32] The concept of 'gender' draws attention to the culturally constructed meaning of womanhood and the nature of social norms regarding relations between the sexes and the roles of the sexes.[33] Doing 'gender' analysis is

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[27] A good overview of the situation around the world (with an emphasis on 'justice' and law) is provided in UN Women, 'Progress of the World's Women. In Pursuit of Justice' (*http://progress.unwomen.org/*, 2011) accessed 1 January 2013.

[28] I discuss the distinction between material (socio-economic) and symbolic (cultural) aspects in section 1.1, when presenting Nancy Fraser's theory of justice as redistribution and recognition.

[29] While I work with the observation that women are similar by having similar conditions thrust upon them in patriarchal societies and the experience this generates, I do not accept that there is something socially inherently different about being a woman – my position is non-essentialist.

[30] In the UK context, see eg Sandra Fredman, *Women and the law* (Clarendon 1997); in the US context, see the works contained and referenced in Tracy Thomas and Tracey Boisseau (eds), *Feminist Legal History: Essays on Women and Law* (NYU Press 2011).

[31] The distinction between the biological sex and socially constructed gender is attributed to the anthropologist Margaret Mead, *Sex and Temperament in Three Primitive Societies* (Routledge 1935). It has been subsequently challenged, epistemologically and ontologically. It is beyond the scope of the thesis to engage more deeply with this debate.

[32] Joan W. Scott, 'Gender: A Useful Category of Historical Analysis' (1986) 91 The American Historical Review 1053, 1056.

[33] Both are identified as cornerstones of the gender historical analysis in ibid, 1056.

also particularly important in the post-communist context, because, as I argue below,[34] the Czech Republic missed the 'second wave' of feminism[35] and with it the 'construction' of the analytical category of gender. Arguably, gender bias in law persists in 'the West', as well as in the East, but, as I argue, the particular post-communist problem is that an awareness and reflection of gender bias has been missing from law-making, judicial decision-making and legal scholarship, under State Socialism but also during Transition, including in areas such as gender-based violence[36] and antidiscrimination law.[37]

The study of 'gender' has included, alongside 'women', also the study of 'men' as well as lesbians, gays, bisexuals and trans-genders ('LGBT').[38] For reasons of space, neither is explored in greater depth and separately from the central issue of 'women', although I discuss the notable absence of attention the law has paid to men in the regulation of parenthood and childcare,[39] and occasionally draw on examples regarding LGBT rights when they illustrate a traditional gender (hetero)normativity, for example in the area of family law.[40]

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[34] Chapter 8(4).

[35] The struggle to achieve basic political rights during the period from the mid-19th century to early 20th century is often termed the 'first wave' of feminism. In the late 1960's and early 1970's in the US, a 'second wave' of feminists started addressing continued inequality in a wider range of areas of life - in education, the workplace, and at home. Cf. chapter 8(4.3.3).

[36] Chapter 6(3).

[37] Chapters 3 and 7.

[38] The letter Q is sometimes added to cover queer/questioning (sexual identity), and the letter I to cover intersex.

[39] Chapters 2 and 6.

[40] Chapter 6.

The concept of gender and related analytical categories, developed by feminist scholarship, are central to the theoretical framework of the thesis. Feminists point out that one of the organizing principles of our society is gender, and that the 'gender systems'[41] of our societies set normative expectations about 'gender roles',[42] the gendered division of labour,[43] and sexuality,[44] among others. Moreover, the 'gender order'[45] contains widespread patterns of power relations between masculinity and femininity, and these patterns are hierarchical. The particular type of gender order we live in, both in the West and in the East, is 'patriarchy'.[46]

Law is one of the social institutions of patriarchy.[47] The way in which law has been both a product and a tool of patriarchy has been the subject of extensive feminist

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[41] The term is often used by sociologists to emphasize the systematic and structural nature of the normative prescriptions about gender and the fact that the system is perpetuated by social institutions. See eg Cecilia L. Ridgeway and Shelley J. Correll, 'Unpacking the Gender System: A Theoretical Perspective on Gender Beliefs and Social Relations' (1994) 18 Gender and Society 510.

[42] A culturally constructed set of social and behavioural norms that are generally considered appropriate for either a man or a woman.

[43] The idea that women have expressive (caring) roles and men have instrumental (breadwinner) roles in the family, originally presented in Talcott Parsons and Robert Bales, *Family, socialization and interaction process* (Routledge 1956), has been heavily criticized by feminists as biologically deterministic.

[44] These three are identified as the cross-cultural mainstays of the gender system in Claire Renzetti, Daniel Curran and Shana Maier, *Women, Men, and Society* (Pearson 2012).

[45] The term is associated with Raewyn Connell, *Gender and power: society, the person, and sexual politics* (Polity Press 1987). The term 'gender regime' is often used to describe the configuration of gender relations within a particular setting (workplace, family, neighbourhood, etc.).

[46] Understood here as a social system which entails male dominance and female subordination, characterized by the male being central to positions of power, leadership, moral authority and control of property.

[47] On the relationship between law and patriarchy, see eg Janet Rifkin, 'Toward a Theory of Law and Patriarchy' (1980) 3 Harvard Women's Law Journal 83; for a Marxist feminist analysis, see Diane Polan, 'Toward a Theory of Law and Patriarchy' in David Kairys (ed), *The Politics of Law: A Progressive Critique* (Pantheon Books 1982). The inevitable historical contingence of law is also discussed in Herta Nagl-Docekal, *Feminist Philosophy* (Westview Press 2004).

scholarship.[48] Law, a prime normative and regulatory system in society, has been called on to govern issues related to family, work, political participation, inter-personal violence, among others. Because these areas are gendered in reality, law has not[49] been able to 'stay out of gender'. In terms of its relationship to the existing gender order and patriarchy, law can either draw on the existing structures and cement them - which has overwhelmingly been the case historically -, or - which has more rarely been the case - it can transform them.[50] Legal provisions regulating gender-relevant phenomena can thus be either gender-conservative (patriarchal) or gender-progressive (anti-patriarchal[51]), but not gender-indifferent. This thesis looks at whether Czech law has been gender-conservative or gender-progressive during State Socialism and in Transition, and how it has either affirmed or undermined patriarchal power-relations.

The law can be patriarchal, or gender-biased or gender-conservative,[52] in different ways; the literature speaks for example about discrimination, androcentrism, sexism or misogyny.[53]A particular difficulty is that both seemingly gender neutral as

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[48] See eg Catharine A. MacKinnon, *Toward a feminist theory of the state* (Harvard University Press 1989); Carol Smart, *Feminism and the power of law* (Routledge 1989); Fredman, *Women*.

[49] Whether it hypothetically can be entirely gender neutral or silent on gender is an interesting theoretical question, which I do not explore here. For the sake of my argument, it is sufficient to observe that law, like other social institutions, has shaped gender, gender roles and gender relations.

[50] See eg Tracy Thomas and Tracey Boisseau, 'Introduction: Law, History and Feminism' in Tracy Thomas and Tracey Boisseau (eds), *Feminist Legal History: Essays on Women and Law* (NYU Press 2011), 1.

[51] An in-depth elaboration of how to understand the requirements on anti-patriarchal law for example in the context of domestic violence, has been persuasively presented in Michelle Madden Dempsey, *Prosecuting Domestic Violence: A Philosophical Analysis* (OUP 2009); chapter 7.

[52] I use these terms synonymously.

[53] The use of these terms varies greatly among authors. The term 'discrimination' is often used as an umbrella term to cover both androcentrism and misogyny, for example by Nagl-Docekal, *Feminist*

well as gender specific laws can be patriarchal. With neutral laws,[54] the gender disadvantaging mechanism is 'androcentrism' – the basing of legal regulation on the seemingly neutral norm of the man. An example is the building of labour protection and benefits on the assumptions of full-time employed workers with indeterminate contracts who remain with one employer for extended periods, in stable (manufacturing) industries with trade-union protections. This model does not cover precarious work, in which women are disproportionately represented.[55]

But gender specific provisions too can be patriarchal, as they can codify traditional gender stereotypes,[56] roles and division of labour. For example, I argue in

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Philosophy, but is given a narrower meaning by Madden Dempsey, which defines it as acts which frustrate an individual's capacity to lead a successful life, based in 'misconception[s] about women's attributes, needs or interests'. She distinguishes 1) 'discrimination' from 2) 'sexism' - the 'failure to value women qua women' -, and from 3) 'misogyny', which is a 'malicious securing of disregard (evil) for women'. Madden Dempsey, *Prosecuting Domestic Violence: A Philosophical Analysis*, 139-147.

[54] As I explain in more detail below, my research concentrates on legal provisions which address phenomena clearly gendered in social reality. Beside these areas obviously affecting women and regulating and constructing gender, law is androcentric and many seemingly neutral legal norms addressing general issues contain a strong male or patriarchal bias. An example here can be the concept of excessive violence in criminal law which disallows the use of self-defence as a defence. The legal norm is constructed to reflect skirmishes and fights men engage in, but not the situation of battered wife who – after years of domestic abuse – kills her aggressor. See eg Holly Maguigan, 'Battered women and self defense: Myths and misconceptions in current reform proposals' (1991) 140 U Pa L Rev 379, 397. Similarly, some doctrinal constructions in tort law have been shown to perpetuate patterns of disparate recovery based on race and gender. Martha Chamallas and Jennifer B. Wriggins, *The measure of injury. Race, gender and tort law* (New York University Press 2010).

The analysis of how this bias in relation to such seemingly gender neutral provisions changed in a 'classless' society of State Socialism and its transformation in Transition would be an interesting and important endeavour. For example, an important strand of Western feminist jurisprudence analyses the way that legal regulation of private property affected women. See eg Fredman, *Women*, 40-58. It would be interesting to explore how this has played out in a socialist society without private property, whether the bias disappeared or whether it was merely replaced by a concern for state/socialist property. Such an analysis, however, for reasons of space, goes beyond the scope of this thesis.

[55] As elaborated in Judy Fudge and Rosemary Owens (eds), *Precarious Work, Women, and the New Economy* (Hart 2006).

[56] 'Gender stereotypes', are understood as 'personal beliefs… largely attributable to socialization', or 'standardized representations within a culture' which 'polarize differences between the sexes, notably in their physical appearance, traits, behaviours, and occupations'. Daniel Chandler and Rod Munday, *A Dictionary of Media and Communication* (OUP Oxford Reference (http://www.oxfordreference.com) 2012). They often lead to a denial of opportunities a particular individual might strive for and is thus closely linked to the concept of discrimination.

chapters 2 and 6, that Czech law has both directly[57] and indirectly[58] stereotypically constructed and regulated women as mothers and men as breadwinners.

The fact that men and women are both the same and different – 'same' in their humanity, but different in biology as well as their typical social situation –, has been a challenge for feminists[59] as well as for the practice of equality and antidiscrimination law.[60] The concept of disadvantage[61] has been a helpful tool to overcome the sameness-difference dichotomy. I use Nancy Fraser's analytical unfurling of disadvantage and social injustice, especially[62] her distinction between redistributive and recognition harms.[63] The historically older[64] emphasis on redistribution has been

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[57] Cf. chapter 2.

[58] Cf. chapter 6.

[59] Liberal feminists have used the argument of sameness to access rights already available to men. 'Difference feminists' (such as Carol Gilligan) argued that both, biological differences, such as pregnancy, or those that are socially constructed, such as primary child-care responsibilities, need to be legally recognized. Radical feminists, especially MacKinnon, have criticized the sameness-difference paradigm as obscuring the fact that the unchallenged norm, the standard of comparison, is male. For a summary of the debates, see Thomas and Boisseau, 'Introduction', 18-22 or Martha Chamallas, *Introduction to feminist legal theory* (Aspen Law & Business 1999), 31-128.

[60] The formal and substantive equality paradigms are used and discussed in chapters 3 and 7.

[61] MacKinnon stressed that 'the opposite of equality is hierarchy, not difference' and that therefore, the aim of equality law should be limiting disadvantage, not just eliminating any difference in treatment (Catharine A. MacKinnon, *Sex equality* (2nd edn, Foundation Press; Thomson/West 2007), 26). Cf. chapters 3 and 7.

[62] In her more recent writing, Fraser has added a third dimension to her theory of justice, that of 'representation'. Representation means both, 'ensuring [an] equal political voice for women in already constituted political communities', but also the 'reframing [of] disputes about justice that cannot be properly contained within established polities' (she points to a 'misframing' in the globalized world, 'when the state-territorial frame is imposed on transnational sources of injustice'). Nancy Fraser, 'Mapping the Feminist Imagination: From Redistribution to Recognition to Representation' (2005) 12 Constellations 295, 305. As these political questions to large extent 'precede' law (it is prior to questions of how law addresses inequality), and are largely outside the realm of national laws, I do not employ the category of 'representation' in the thesis. For a discussion of the specific role of 'participation', see Kevin Olson (ed) *Adding Insult to Injury - Nancy Fraser debates her critics* (Verso 2008), part III.

[63] Nancy Fraser, *Justice interruptus: critical reflections on the "postsocialist" condition* (Routlege 1997); Nancy Fraser and Axel Honneth, *Redistribution or Recognition* (Verso 2003); Olson, *Adding*.

concerned with economic inequality and injury in the material sphere. Some feminists[65] have, however, considered the redistribution paradigm insufficient to capture gendered injustice, especially its cultural disrespect toward 'the other' and the symbolic construction of patriarchy.[66] Fraser has argued that the dichotomy needs to be overcome, that both are necessary aspects of justice, and that the struggle needs to be for 'socialism in the economy' with reference to gender injustice as well as 'deconstruction in the culture'. I argue[67] that concern for both - redistribution and recognition – is missing in the Czech Republic today. Due to the experience of forty years of redistributive efforts by the socialist state, 'class' and redistribution is understood, but rejected as tainted by 'Communism'.[68] At the same time, a bottom-up identity building and understanding of cultural harms and 'status' has not yet emerged, so recognition is neither demanded nor given.

1.2 The standard of gender equality

These concepts developed by feminist theorists serve as preliminary content categories for my critical analysis of the Czech material.[69] The aim of the thesis is, however, not only descriptive and analytical in mapping this previously unchartered

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[64] Connected to both Marxist and social-democratic traditions.

[65] Especially cultural feminists, as well as other 'progressive social movements', such as multiculturalists and 'queer'. Kevin Olson, 'Introduction' in Kevin Olson (ed), *Adding Insult to Injury Nancy Fraser debates her critics* (Verso 2008), 2.

[66] Ibid, 3.

[67] Chapter 4(1.3) and 7(3.3.1).

[68] Cf. n.12.

[69] On method, see section 2 below.

material, but also explanatory.[70] I consider some legal developments positive and some negative in terms of whether they promote gender equality. I evaluate them as either gender-conservative or gender-progressive. The thesis thus develops evaluations of specific legal provisions with reference to the criteria of 'gender progressive' or 'gender conservative'. It does not, however, seek to develop an overarching vision for law reform in relation to the problems of gender conservatism identified in this thesis – the thesis thus has normative assumptions, but is not normative.

Many propositions have been put forward as to what sex or gender equality or justice entails, some legal,[71] some theoretical.[72] For the purposes of this thesis, I do not think the adoption of any one particular full account or program for gender equality is necessary. But in order to present the reader with a general idea of what I understand under my commitment to gender equality,[73] I borrow the gender equality project of the Beijing Platform of Action.[74] It strives to empower women through

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[70] A theory which offers a coherent set of true, general, and salient propositions about a phenomenon is an explanatory theory, in that it explains the essence or nature of that phenomenon. Julie Dickson, *Evaluation and Legal Theory* (Hart 2001), chapter 1. I am using the term 'explanatory' as well as 'descriptive' to highlight that my explanation involves evaluation based on normative standard, as I discuss below. I am indebted to Tarunabh Khaitan for bringing my attention to this distinction.

[71] In international law, notably Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 14.

[72] Nussbaum, *Women and Human Development*; Iris Marion Young, *Justice and the politics of difference* (Princeton University Press 1990); Fraser and Honneth, *Redistribution or Recognition*; among others. Alison Jaggar has offered a basic definition of gender equality as consisting of the requirement that 'those of one sex, in virtue of their sex, should not be in a socially advantageous position vis-à-vis those of the other sex'. Alison Jaggar, 'On Sexual Equality' (1974) 84 Ethics 275, 275; see similarly Nagl-Docekal, *Feminist Philosophy*.

[73] The platform itself speaks of empowerment rather than equality.

[74] Fourth World Conference on Women, 'Beijing Declaration and Platform for Action' A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995)

> removing all the obstacles to women's active participation in all spheres of public and private life through a full and equal share in economic, social, cultural and political decision-making… and the eradication of all forms of discrimination on the grounds of sex.[75]

The Beijing Platform has also identified the following 12 critical areas of concern, including the persistent and increasing burden of poverty on women; inequalities and inadequacies in and unequal access to education and training, health care, economic structures and productive resources, power and decision-making, the management of natural resources and the safeguarding of the environment, and communication systems, especially in the media violence against women; lack of respect for and inadequate promotion and protection of the human rights of women; and stereotyping of women.[76]

For reasons of space, the thesis cannot explore the full scope of the areas for action identified in the Beijing platform. The substantive areas of law which are explored have to be limited. I explain my choice of issues and areas examined in the following section.

1.3 The scope of the thesis

In order to answer the questions about underlying understandings of 'women', 'gender', 'equality', 'discrimination', and 'rights', the thesis analyses three sets of areas. First, its primary in-depth case-study is the development of gender equality and antidiscrimination law. Second, it looks at the regulation of family, work and welfare, as these were the areas self-defined by the socialist state as comprising the 'woman

[75] Ibid, paras 1 and 10.

[76] Ibid, para 44.

question'. Third, I supplement these topics by looking at some aspects of regulation of reproduction, sexuality, sexual orientation and gender-based violence – issues identified as central by many feminists, but neglected in the Czech Republic under State Socialism and absent from the EU *acquis*.

First, the thesis presents an in-depth study of equality and antidiscrimination law, both constitutional as well as statutory.[77] This particular case-study has been chosen, as the concepts and rights to equality and non-discrimination[78] have long been central to the feminist project. Indeed, the term 'sex equality' or 'gender equality' is often taken to encompass all feminist demands.[79] In the writing of feminist lawyers and legal scholars, this reflects the fact that 'equality' and 'non-discrimination' are the terms used in law, which have been then employed by feminist advocates to claim rights for women.[80]

Second, the thesis also looks in greater detail at areas which have been considered central to the question of equality of sexes in the Czech context. Under State Socialism, the question of 'equal rights between the sexes',[81] or the 'woman

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[77] Chapters 3 and 7.

[78] 'Equality' and 'antidiscrimination' are used practically interchangeably by many, for example by Sandra Fredman, *Discrimination law* (Oxford University Press 2011). If a difference were to be drawn, equality could be understood as a broader, a redistributive principle (Joseph Raz, *The Morality of Freedom* (OUP 1988) and antidiscrimination as a right and a more concrete prohibition of acts which are unjustly based on an irrelevant characteristic. A more detailed discussion of the differences would go beyond the scope of this thesis.

[79] Catharine A. MacKinnon, *Sex equality* (Foundation Press 2001).

[80] Of course, that these rights be enshrined has itself been a demand of the feminist movement. My point here is that the legally guaranteed rights to equality and non-discrimination have subsequently been used to address a wide range of issues concerning women, where the originally underlying maxim – that likes be treated alike – has not been obvious. This was for example the case with the argument for sexual harassment to be covered by statutory provisions prohibiting discrimination in the US. Carrie Baker, 'Sexual Harassment' in Tracy Thomas and Tracey Boisseau (eds), *Feminist Legal History: Essays on Women and Law* (NYU Press 2011).

[81] This term is found in State Socialist law and legal scholarship.

question',[82] was limited to[83] family, work, social welfare[84] and public life.[85] I argue that in Transition, notwithstanding some changes in legal provisions,[86] this narrow indigenous understanding has not been enlarged.[87]

Finally, Western feminist scholarship, as well as the already mentioned Beijing Platform, have identified a much wider range of areas necessary for the achievement of gender equality.[88] Issues such as reproduction, sexuality, sexual orientation and identity, or gender-based violence, raised by the 'second wave' of feminism, have been so far neglected in the Czech Republic. Including these issues in my analysis allows for a more comprehensive picture of the regulation of gender in law. Thus, I draw on my more detailed previous research into the issues of

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[82] Used in Marxist writings.

[83] This book title neatly summarizes the topics addressed by State Socialist authors: Jaroslava Bauerová and Eva Bártová, *Proměny ženy v rodině,práci a ve veřejném životě (Transformations of women in the family, work and public life)* (Nakladatelství svoboda 1987). Issues of sexuality or gender-based violence were outside its scope. Cf. chapter 4(1.4).

[84] The complexity and scope of social welfare systems mean that only very basic overviews of the gender-relevant issues are discussed.

[85] As political representation of women is rarely legally regulated (once voting rights are granted and unless quota are legally enacted), the topic is discussed minimally and more by way of illustration of the social position of women.

[86] These were often externally driven, in particular by the EU, as I discuss in chapter 5.

[87] And with regards to redistribution, it even became more limited. See chapters 5, 6 and 8.

[88] Individual authors covering the legal situation of women comprehensively offer varying emphases:

Martha Chamallas summarizes the issues as pertaining to 'money, sex and family' (Chamallas, *Introduction to feminist legal theory*, 6 and 171), Sandra Fredman speaks of marriage and property (including reproductive control), suffrage, employment, and welfare legislation (Fredman, *Women*, 39 – 177); Catharine MacKinnon speaks of family, sexual subordination, lesbian and gay rights, reproductive control, trafficking in women (meaning prostitution and pornography) (MacKinnon, *Sex equality*); Bartlett and Rhode discuss employment law, affirmative action, sexual harassment, family, reproductive rights, sexuality, LGBT issues, domestic violence, rape, pornography, international women's rights, global trafficking, women's health, education, and poverty and race (Katharine T. Bartlett and Deborah L. Rhode, *Gender and law: theory, doctrine, commentary* (5th edn, Aspen Publishers 2009)). The issues relevant to women and gender equality are also often identified in international documents, such as CEDAW or the Beijing Declaration. CEDAW; Fourth World Conference on Women, 'Beijing Declaration and Platform for Action'.

prostitution,[89] rape,[90] sexual harassment,[91] and domestic violence.[92] I also researched reproductive rights and LGBT rights specifically for this thesis. For reasons of scope, these areas are not presented and discussed in full extent and depth, but examples and illustrations are drawn from them.

2 A 'law in context' approach - materials examined and the method of analysis

As mentioned earlier, the thesis looks at law in context.[93] It doctrinally analyses legal sources, but goes beyond this 'internal'[94] approach to the study of law, both in terms of sources and method. The thesis draws on both legal and non-legal primary sources, as well as on secondary literature. I discuss the sources (2.1) in the two periods (2.2), the method for their analysis (2.2), and their role in my thesis (2.3), in turn.

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[89] Barbara Havelková, 'European gender equality under and after State Socialism: legal treatment of prostitution in the Czech Republic (MSt. thesis; Faculty of Law; University of Oxford)' (http://ora.ouls.ox.ac.uk/objects/uuid%3Aad0b1fa1-28ca-4400-908b-4b34e08ca064 2010).

[90] Barbara Havelková, 'Znásilnění - několik úvah nad právní úpravou' in Kristýna Ciprová (ed), *Pod hladinou: fakta a mýty o znásilnění* (Gender Studies 2010).

[91] Barbara Havelková, 'Právní úprava obtěžování z důvodu pohlaví a sexuálního obtěžování (Legal regulation of harassment on grounds of sex and sexual harassment)' in A. Křížková, H. Maříková and Z. Uhde (eds), *Sexualizovaná realita pracovních vztahů Analýza sexuálního obtěžování v České republice (Sexualised reality of labour relations An analysis of sexual harassment in the Czech Republic)* (Sociologický ústav AV ČR 2006)

[92] Barbara Havelková, *Feasibility study on national legislation on gender violence and violence against children - European Commission JLS/2009/D4/018 - National report for the Czech Republic* (unpublished, 2010).

[93] N.18.

[94] C McCrudden, 'Legal Research and the Social Sciences' (2006) 122 Law Quarterly Review 632, 633-634.

2.1 Primary sources

The thesis starts with an 'internal' or doctrinal approach to the study of law – it looks at legal rules and principles from the perspective of an insider in the system. The thesis, to answer questions about regulation of women and gender in law,[95] examines the following legal sources: constitutional, statutory and derivative acts, local ordinances, and, where relevant, internal administrative guidelines.

But the thesis also examines the conceptual understanding of law, among law-makers, judges and legal scholars. It is thus interested in the creation of law (especially through the parliamentary process) and its application and authoritative interpretation (by the courts and in legal academic literature). It therefore draws on 'external'[96] sources: documents relating to the law's creation - parliamentary debates, government reports, governmental policy papers, and explanatory memoranda to proposals of bills; and documents relating to the law's application and interpretation - the case law of the Constitutional Court, of ordinary courts,[97] and academic literature. All these sources are only available in Czech. For the first time, the thesis makes this

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[95] I use the term 'law', in the received Czech understanding as 'objective law' or '*de lege lata*' – i.e. norms for behaviour found in formal legal sources, which are binding and whose observation is enforced by public power (I am paraphrasing from Aleš Gerloch, Jiří Boguzsak and Jiří Čapek, *Teorie práva* (ASPI 2004)). I realize the limits of this definition of law, especially as offered by socio-legal scholars and legal sociology. However, for my purposes, it is useful to adopt this narrower approach. It is truer to the continental Germanic tradition where judge-made law is not considered a formal source of law, and where therefore legal norms as written in formal sources of law are seen as separate from the interpretation and application of these legal norms by the courts.

[96] To McCrudden, an external approach to law is the study 'of the law in practice, of legal institutions at work in society rather than legal rules existing in a social, economic, and political vacuum.' McCrudden, 'Legal Research and the Social Sciences', 633-634; in fine citing D. Ibbetson, 'Historical Research in Law' in P. Cane and M. Tushnet (eds), *Oxford Handbook of Legal Studies* (OUP 2003), 864.

[97] In the context of a civil law system, where court decisions do not have precedential quality, it is more appropriate not to consider them to be formal sources on par with legislation. Cf. n.95.

material available to a Western reader. All the translations from Czech are mine, unless otherwise indicated.

2.2 Difference between the periods

In order to offer comparable insights into the regulation of gender during State Socialism and Transition, I mirror the structure and analysis in the two chronologically divided parts of the thesis – Part I is dedicated to a law in context analysis of the regulation of gender during State Socialism and Part II to Transition. The legal provisions are the cornerstone of my analysis in both periods. The emphasis on statutory law might be surprising to a common lawyer, but it is congruous with the civil law system, in which 'law' is considered to be found first and foremost in the statutes.

While the 'internal' sources remain largely the same in both periods, the same cannot be said of 'external' sources. The political and institutional differences between these two time periods have been reflected in the varying availability and usefulness of the 'external', i.e. non-legal, primary sources.

For the period of State Socialism, there are no constitutional cases to be analysed as a Constitutional Court was never established. A limited number of cases before ordinary courts[98] raised issues of equality of the sexes,[99] but the official collections do not contain a single antidiscrimination case. As free political expression

[98] As available in the official ections *Sbírka rozhodnutí československých soudů* 1949-1960 (The ection of Decisions of Czechoslovak Courts) and *Sbírka rozhodnutí a sdělení soudů ČSSR* 1961-1969 (The ection of Decisions and Communications of the courts of the Czechoslovak Socialist Republic) and *Sbírka soudních rozhodnutí a stanovisek* 1949-today (The ection of Court Decisions and Opinions).

[99] Discussed in chapters 2(1.1) and 3(1).

was dampened by the single-party rule,[100] the parliamentary debates did not contain any substantive policy contestation. As a result, I concentrate on government reports, policy papers,[101] explanatory memoranda and academic literature[102] in my analysis in Part I. My aim is to present general conclusions about the State Socialist ideology and policy in relation to gender-relevant laws. In order to do so, I rely on authoritative sources - the main generalist[103] academic law journals *Právník* and *Socialistická zákonnost* and the official collections of judgments.

During Transition, the fall of Communist Party hegemony and the end of the single State Socialist project has led to a much greater contestation of policy. I therefore pay greater attention to political parties[104] and to parliamentary debates. For example the EU membership obligation to transpose the antidiscrimination *acquis,* as well as other gender-relevant legal proposals, generated many heated debates in the House of Representatives as well as in the Senate.[105] Transition also brought institutional changes - the newly established Constitutional Court has dealt with three sex equality cases.[106] And finally, as the Czech Republic adopted new antidiscrimination norms to fulfil its EU membership obligations, discrimination

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[100] The Communist Party had de facto control of the legislation and executive, as well as, arguably, the judiciary, but other parties existed and were represented in the Parliament, to give the system an appearance of democratic legitimacy and pluralism. Cf. chapter 1(1; 2).

[101] Especially the periodic Reports of the State Population Committee, published under the auspices of the Ministry of Labour and Social Affairs.

[102] *Právník* (Lawyer) and *Socialistická zákonnost* (Socialist Legality).

[103] Both accepted contributions from all areas of law.

[104] I discuss their positions on gender in chapter 5(3.2).

[105] See table of parliamentary debates above.

[106] The searchable database NALUS (www.concourt.cz) was used to identify the cases, using the terms 'equality', 'discrimination' and 'sex'.

claims have started to be heard before ordinary courts.[107] Thus, parliamentary debates and court decisions are key sources for uncovering the understanding of the legal concept of gender equality among law-makers and judges and are my primary sources of analysis in Transition.[108]

2.3 A mixed inductive and deductive approach to the analysis of primary sources

As I stated above, my analysis is both inductive and deductive - my research is grounded in Czech legal and policy materials but framed by Western feminist theoretical concepts. This is, first, the logical result of my positionality. I am Czech and obtained my legal education in the Czech Republic, in a system in which no legal feminist analysis was known, taught or applied. I became acquainted with Western feminist legal scholarship mostly[109] through my studies abroad and found it to be extremely useful for understanding gender in the Czech Republic. The chosen method thus corresponds to my Czech legal background and familiarity with Czech law and

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[107] Cf. chapter 7(2). For most of Transition, decisions of lower instance ordinary courts were inaccessible, although in theory public. I have relied on my contacts with attorneys and NGOs, representing plaintiffs in equality and antidiscrimination cases, to gain access to judgments of first and second instance courts. In 2011, the Ministry of Justice launched a searchable online database of selected lower court judgements (www.justice.cz). The decisions of the Supreme Court (www.nsoud.cz) and Supreme Administrative Court (www.nssoud.cz) are also available. These databases have been searched using the terms 'equality', 'discrimination' and 'sex'.

[108] In contrast to State Socialism, I no longer draw on academic literature as a primary source. Legal scholarship before 1989 was overwhelmingly subservient to the Communist regime and either formulated or expressed the policy of the socialist state. On the prominent role of experts in the formulation of the State Socialist policy, see Hana Havelková, 'Dreifache Enteignung und eine unterbrochene Chance: Der „Prager Frühling" und die Frauen- und Geschlechterdiskussion in der Tschechoslowakei' (2009) 20 L'Homme 31. It can therefore be taken as an illustration of the understanding of gender equality among the legal community. The freedom of expression and ideological pluralism in Transition means that the content of academic writing diversified to an extent that makes a general conclusion impossible.

[109] I do, however, owe a huge debt to my mother Hana Havelková, who originally introduced me to gender and feminism.

its legal community, combined with the Western intellectual frameworks which introduced me to gender. But it is also functional, as it allows me to identify the distinctiveness of the Czech case against the foil of 'Western' legal and intellectual developments.

This interaction between the theoretical framework and the primary material creates tension – will the *a priori* theoretical concepts informed by the culture of 'Western' societies truly capture the content of the material?[110] In order to address this tension between theory and material, Herbert Blumer[111] proposed to use 'sensitising concepts' which provide a 'general sense of reference and guidance in approaching empirical instances' , but 'retain close contact with the complexity of social reality, rather than trying to bolt it on to fixed, pre-formulated images'.[112] The concepts developed by Western feminist legal scholarship, which I presented in section 1.1 above, serve as my 'sensitising concepts' for the analysis of the Czech source material. I use them, as well as new categories which emerge from the primary sources. Both are then refined again using the Czech material.[113]

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[110] Any social science analysis of sources poses the question to what extent are *a priori* categories used (theory) and to which extent can a researcher be fully led by the material (pure induction from the material). Alan Bryman, *Quantity and quality in social research* (Routledge 2004), 60-70.

[111] Herbert Blumer, 'What is wrong with social theory?' (1954) 19 American Sociological Review 3.

[112] Summary of Blumer's method in Bryman, *Quantity and quality in social research*, 68.

[113] This does not quite correspond to either of the most current ways of addressing the problem of 'theory and research' identified by ibid, 79-87, as 'analytic induction' and 'grounded theory', but is somewhere in between. In social science or socio-legal terminology, my method would correspond to textual qualitative (content) analysis.

2.4 Secondary literature

I already mentioned that the thesis looks at 'law in context' – it examines the underlying understandings of gender equality and the ideological context, in which Czech constitutional, statutory and regulatory law has been created, interpreted and applied. This is the subject of my original research for which I draw on the primary materials described in section 2.1 above. But in order to paint a fuller picture of the development for the reader, it is helpful to take account of the historical, political, economic and social context, including data on women's lives. I rely on existing secondary literature to do so. General historical and political science scholarship is used for a presentation of the historical and political development in Czechoslovakia and the Czech Republic in the past sixty years.[114] I also draw on specific gender scholarship in the social sciences and humanities[115] for facts as well as theorizations. I also draw on existing critical legal scholarship analysing law during the two periods in Central and Eastern Europe ('CEE'),[116] and the process of accession of post-communist states to the EU.[117]

In terms of the scholarship on gender in Czechoslovakia and the Czech Republic, one has to distinguish between the writing which took place inside State Socialist Czechoslovakia, and other commentary. The former, due to the un-free nature of the State Socialist period, cannot be considered intellectually independent

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[114] For example by Karel Kaplan, Michal Pullman, Jakub Rákosník or Sharon Wolchik.

[115] Eg Melissa Feinberg, Radka Dudová, Věra Sokolová, Barbara Einhorn, Susan Gal, Gail Kligman, Nanette Funk, Steve Saxonberg, Hana Havelková, Alena Köhler-Wagnerová, Alena Heitlinger, Jacqui True, Hana Maříková, Hana Hašková, Zuzana Uhde, among others.

[116] For example by George Bermann, Inga Markovits, András Sajó, Kathryn Hendley, Martin Krygier, Adam Czarnota, Catherine Dupré, Zdeněk Kühn. I draw on it especially in chapters 1 and 5.

[117] Eg Csilla Kollonay Lehoczky, Charlotte Bretherton, Amanda Sloat.

and critical, and is therefore analysed as a primary source.[118] Western commentary[119] and writings by Czech women after the fall of State Socialism,[120] on the other hand, are treated as secondary literature.

It is these literatures that the thesis aims to contribute to: the social science literature on gender under State Socialism and in Transition in CEE; the legal scholarship on the specifics and specificities of the State Socialist and Transitional development; the legal scholarship on the implementation of EU law in the post-communist Member States; and the international feminist legal scholarship, with regards to the question of what does the 'Second World' experience means for its claims and frameworks.

3 Main arguments and structure of the thesis

3.1 Main argument

The thesis argues that while formal legal guarantees for women have in general acceptable in the Czech Republic, measured for example by the requirements of CEDAW or the Beijing Platform, the way they are understood, interpreted and applied has not been gender-progressive. It is argued that the reasons for this are underlying patriarchal ideas about women, a lack of understanding of gender as a social construct and of gender order as an important and pervasive social structure, a

[118] This is the case for example with Bauerová and Bártová, *Proměny ženy* or Radvanová, *Žena a právo*.

[119] Eg Alena Köhler-Wagnerová and Alena Heitlinger (Czech émigrées), Hilda Scott, Sharon Wolchik, Barbara Jancar, Barbara Einhorn, or Nanette Funk.

[120] Notably Hana Havelková, Jiřina Šmejkalová, Alena Köhler-Wagnerová, Gerlinda Šmausová, or Libora Oates-Indruchová.

rejection of the concepts of equality and of the need to combat discrimination, and a refusal to use law and rights to further gender equality. It argues that these underlying understandings are path-dependent on State Socialism. In the following, I briefly summarize the thesis' arguments about the concepts of 'women', 'gender', 'equality', 'discrimination', 'role of law' and 'rights', before proceeding to present the structure of the thesis in section 3.2.

3.1.1 Women and gender

I argue that women and their 'problems' have not been ignored in Czechoslovakia and the Czech Republic, but have been identified with certain 'roles', especially motherhood within marriage, and supported only when they conform to them. Men are the norm in the public life and largely absent from private life. The androcentric nature of the public set-up, and the gender-role-conserving nature of the private set-up, has not been perceived.

Gender, as a social construct, an organizing social principle and an axis of disadvantage has not been seen and acknowledged. Under State Socialism, it was doubly obscured – the socialist state only saw 'class', while the population identified the 'regime' as the source of oppression. In Transition, the market-liberal narrative of choice and individualism has obscured any structural causes of inequality, including patriarchy. A bottom-up women's awareness raising and feminist movement has been missing during both periods. Under State Socialism it was suppressed as any other civic movements. In Transition, feminism is seen as either unhelpful or harmful, largely by being associated with the socialist state, which appropriated the language of women's 'emancipation' but did not truly liberate women.

3.1.2 Equality and antidiscrimination

Equality was a central concern of the socialist state. The project was context-conscious and aimed at socio-economic levelling, but it was not particularly concerned with special characteristics, such as gender, and their intersection with questions of socio-economic equality. Moreover, it did not contain an individual antidiscrimination right - the conceptual step that the law should interfere with discriminatory acts or entrenched social structures of disadvantage, the cornerstone of the understanding of antidiscrimination law in 'the West', was not made. While the lack of legal antidiscrimination guarantees was remedied during Transition, thanks to the requirements of the EU membership, the underlying understandings have not shifted.

3.1.3 The role of law and rights

The socialist state saw the law as a tool for social change, but this 'social engineering' has been rejected in Transition. It is asserted that the law should not interfere with the 'natural' order of things; and law itself is seen as neutral, while calls for gender-progressive legislation are seen as biased. Gender equality is also hurt by a particular post-communist understanding of rights. Under State Socialism, rights were a mirage - legal guarantees were not enforceable individual entitlements but were often mere policy pronouncements. Any 'rights' were conditional on political reliability of the individual and had to correspond to collective interest. The understanding of rights as connected to 'desert' and to the support of the majority has continued into Transition, and it has weakened antidiscrimination and equality rights claims.

A ‘new’ understanding of rights as freedoms has also emerged in Transition, connected to market liberalism and the idea of a strong independent individual. It is a Darwinian understanding of freedom for the strong; any request for rights and empowerment from disadvantaged groups, including women, is seen as ‘request for protection’ and rejected.

3.2 Structure of the thesis

The thesis is organized chronologically, with Part I discussing the period of State Socialism and Part II the period of Transition. The internal organization of the two parts is the same – the individual chapters mirror each other. Chapters 1 and 5 are introductory. Drawing largely on secondary literature, they present the historical and political contexts in which the legal regulation of gender equality occurred, the internal periodizations of the eras, the main characteristics of the law and contemporary ideological frameworks. Chapters 2 and 6 discuss the development of the legal regulation of women in the marriage, family and the workplace in each of the periods, and critically assess the conceptions of women and gender underlying the law. Chapters 3 and 7 look in greater detail at the concepts and legal guarantees of equality and antidiscrimination. And chapters 4 and 8 look at how political aspirations with regards to gender equality were formulated in each period, how and why they were limited, and what underlying conceptual understandings have impeded their implementation in reality. The reasons for and the effects of the missing feminist analysis are also discussed. Finally, the Conclusions emphasise the continuities and discontinuities between the periods and tentatively suggest lessons for international feminist scholarship and for EU gender equality law and policy.

Part I, which looks at the period of State Socialism, argues that while much was done for women in terms of formal equality in law and empowerment in the public sphere, there was a marked lack of empowerment of women in the family and an absence of involvement of men in care. The Communist regime promoted 'public equality' but accepted 'private difference'.

In chapter 2, I set out and discuss this divide, drawing attention to how it changed over time. The period of State Socialism was not homogenous. The early activist period of the 1950s brought formal legal equalization (for example of spouses in family law) and the granting of access to the public sphere (to education, work and politics). But in the 1960s, these policies were challenged and eventually outweighed by pro-maternity and pro-family policies aiming at population growth in the 1970s and the 1980s. The diachronic analysis thus reveals that there was 'first equality, then difference'.

The co-existence of the 'same' as well as 'different' treatment of men and women raises the question of what were the contemporary legal provisions for, and the understandings of, equality and antidiscrimination. That is the subject of Chapter 3, which contrasts the development in the Czech Republic with that of Western European equality and antidiscrimination law. The Western development can be divided into three phases: 1) the elimination of men's legal privilege – formal equality before law; 2) the adoption of antidiscrimination legislation; 3) the rise of substantive and transformative equality. Chapter 3 argues that while the development was similar in the first phase (the already mentioned 'equalization' stage in the 1950s), phases two and three have basically run in opposite order in Czechoslovakia. The Czech Republic is therefore 'out of sync' with the West.

Equality was understood ‘substantively’ under State Socialism – it was context-based and strived for real-life equality. And it was also ‘transformative’ in the socio-economic sense – it aimed at redistribution, eradication of poverty and economic levelling. There were four important caveats, however. These policies were redistributive only – they were not concerned with respect for cultural harms, identity or diversity. They were also overwhelmingly collective – individual empowerment, autonomy and choice were not an issue. They were substantive and transformative with regards to class, but not other discrimination grounds, especially not gender; and because of a blindness to patriarchy, no understanding of structural gender disadvantage existed. Finally, an enforceable antidiscrimination right was missing.

Chapter 4 notes that the roots of these inadequacies and gaps in gender equality in law can be traced back to the limits of the State Socialist ideology as regards the ‘woman question’. And it observes that the limits of these aspirations were not transcended to include a more critical gendered analysis, because of the general impossibility of bottom-up opposition and critique, which meant that women’s voices were largely silenced and no indigenous feminist movement developed. I then examine how gender was ‘lived’ under State Socialism and whether the ideology, the policy and the legal advances, limited thought they were, did affect a socio-cultural change. I argue that due to the dislike of the regime, especially in the 1970s and 1980s, gender and patriarchy were doubly obscured - the socialist state’s official ideology and policy saw only class while the people only saw ‘the regime’.

Part II discusses the developments of gender equality in law after the fall of the State Socialist regime in 1989. This period of Transition saw the introduction of many previously missing legal guarantees (such as an enforceable constitutional and statutory antidiscrimination right) and the addressing of previously neglected issues

(such as domestic violence). It is argued, however, that there has been considerable path-dependence on the previous period with regards to conceptual categories and understandings.

Chapter 5 starts out Part II by observing that many of the positive legislative changes were introduced during Transition for reasons of external pressure – the membership in the EU. This meant that the process of adoption did not generate much needed genuine substantive debate about the legal provisions and they are thus seen by law-makers and judges as addressing problems which do not exist in the Czech Republic.

Chapter 6 examines in detail the development of legal regulation of women and gender in Transition. It picks up where chapter 2 left off regarding the topics of family and work and looks at what has become of 'public equality and private difference' in Transition. It observes that despite apparent changes – such as the gender-neutralization of provisions on care to include fathers, and the legal recognition of same-sex partnerships – various legal provisions as well as positions of law-makers expressed in the parliamentary debates continue to be gender-conservative. There is a bias towards complete heterosexual families with a traditional division of labour and towards mothers as carers. A similar trend is observed in the area of gender-based violence – despite positive legal development in Transition (such as the criminalization of domestic violence or stalking), the gender dimension of the issue continues to be denied and the law persists in taking a 'male' perspective.

Chapter 7 deepens the analysis into equality and antidiscrimination law, drawing especially on decisions in antidiscrimination cases before the Constitutional Court, as well as ordinary courts. It observes that the lack of legal guarantees, pointed out in chapter 3, has been remedied, but the understanding of equality and

antidiscrimination rights continues to be limited in Transition. The conceptual step that the law should interfere with discriminatory acts or entrenched social structures of disadvantage, an aim of antidiscrimination law in 'the West', has not been made.

Different treatment has been accepted in relation to protection of the traditional gender role of motherhood. It is, however, not accepted in relation to different treatment which is positive (such as affirmative action) and which would enable or empower women and counter existing gender bias. The constitutional right to equality, rarely applied to specifically protected grounds such as sex, has mostly been understood to prevent arbitrary or unjustified legislative distinctions. Equality law thus has not been accepted as aiming at the elimination of existing social disadvantage of women. The statutory right to non-discrimination is basically rejected as an unacceptable interference with private property and autonomy of private actors, especially employers. The current situation shows a complete lack of understanding of how cultural gender bias works to disadvantage women in social relations, in the labour market in particular. I argue that this is a lasting legacy of State Socialism - antidiscrimination law has no antecedents in the Czech law to draw on and substantive equality is seen as tainted by the communist project and discredited.

Chapter 8 notes that while the State Socialist ideological aspirations for gender equality were limited (to socio-economic aspects along the axis of class), in Transition, gender equality aspirations at the level of government practically disappeared. The chapter offers explanations for this; in particular, it points out that a continued rejection of feminism and of gender sensitive approaches in politics and the study of law has meant that a crucial source for contestation of patriarchal laws and policies has been missing.

In Conclusion, I return to the continuities and discontinuities between the periods of State Socialism and Transition. I argue that there has been great intellectual path-dependence on State Socialism which has shaped the understanding of gender equality in Transition. The path-dependence has taken two forms: an unreflective and mostly unconscious retention of ideas developed during the State Socialist period, as well as a reactive conscious rejection of anything perceived as State Socialist. Both have been detrimental to gender equality.

I then tentatively discuss the possible lessons which the specific trajectory of equality and antidiscrimination law in the CEE has for the EU. I argue in particular that a strong antidiscrimination rights-based approach, contained in binding legal instruments, is still necessary. Finally, I look at the possible lessons of my findings for international feminism. I argue that the 'Second World' is in a different position to both 'First World' and 'Third World'. Not having gone through a 'second wave' of feminist activism and thought, it cannot just join the current international 'third wave'. Also, having a strong history of redistributive policies, the Czech Republic is 'out-of-sync' with much of current feminist scholarship which emphasises the fight against gendered poverty. Instead, it needs awareness-raising with regards to cultural aspects of patriarchy, such as gender-based disrespect and immaterial harm.

PART I

STATE SOCIALISM

CHAPTER 1

POLITICS, LAW AND THE 'WOMAN QUESTION' UNDER THE RED STAR

The aim of this chapter is present to the unfamiliar reader the historical, legal and ideological context in which the legal regulation of gender, which I present in later chapters, was being created. In section 1, I briefly introduce the political, economic and legal history of the State Socialist era, identifying three distinct periods within it: Stalinism, Reform and Normalization. In section 2, I present the main traits of 'communist' law. I observe that the law was seen as one of the tools of social change. In order to fulfil the aims of the socialist state, public law was used both coercively and educationally, while the use of private law declined. The employment of law for the collective good left little space for individual 'rights' – many far-reaching rights guarantees were a mere 'mirage' under State Socialism. In section 3, I discuss the ideological framework for gender in law under State Socialism - the Marxist-Leninist understanding of the 'woman question'. I point out that its preoccupation with class meant that little attention was paid to other axes of disadvantage, including gender; its biological determinism prevented a critique of 'women's role' in the family; and its understanding of housework and childcare as unproductive contributed to an inability to truly value work traditionally done by women.

1 Political and legal history: Stalinism – Reform - Normalization

1.1 The pre-communist period

Czechoslovakia was formed from the dismantled Austro-Hungarian Empire in 1918. It was an economically developed, prosperous country with strong democratic credentials.[121] Wolchik points out that during the period of the 'First Republic' (1918-1938), Czechoslovakia was more advanced than other CEE countries as far as economic organization, literacy rates, political organization and political culture, as well as women's opportunities were concerned.[122]

The prosperous inter-bellum period ended in 1938, when the Czech[123] border areas were annexed to Germany. After the brief 'un-free period' of the 'Second Republic',[124] the remaining territory was occupied by Germany in 1939 and became a Protectorate. Most of Czechoslovakia was liberated by the Red Army in 1945. The influence of the Communist Party ('CP') rose after the end of World War II ('WWII') and culminated in the Communist take-over of the government in February 1948. The period between 1945 and 1948, the 'Third Republic', was in many ways 'proto-communist' – it saw the rising dominance of the CP, the weakening of democratic

[121] Sharon L. Wolchik, 'The Precommunist Legacy, Economic Development, Social Transformation, and Women's Roles in Eastern Europe' in Sharon L. and Alfred G. Meyer Wolchik (ed), *Women, State, and Party in Eastern Europe* (Duke UP 1985), 34-35; for a detailed account on Czechoslovakia, see Sharon L. Wolchik, *Czechoslovakia in transition: politics, economics and society* (Pinter 1991), 1-59; Alena Heitlinger, *Women and State Socialism: Sex Inequality in the Soviet Union and Czechoslovakia* (Macmillan 1979), 135 ff.

[122] Wolchik, 'The Precommunist Legacy', 34-35.

[123] Slovakia separated from Bohemia and Moravia to become an independent state in March 1939.

[124] 1938-1939.

opposition,[125] and the expulsion of the Germans. It also brought far-reaching changes to the economic system, such as land confiscations and the nationalisation of entire industries, so that already in 1945, 60 % of workers were employed by the state.[126] Many social provisions, often seen as State Socialist achievements, were enacted during this period[127] (such as child benefits or a guarantee of equal pay[128]).

With regards to law, after the dissolution of the Austro-Hungarian Empire in 1918, the Czech lands continued using Austrian law.[129] This was a well-developed system of Germanic 'civil law'.[130] Most of the originally Austrian law survived[131] the 'First Republic', the un-free period of 'Second Republic', as well as the Protectorate,[132] and was only changed with the State Socialist codification drive of 1948-1950.

As far as the legal treatment of women is concerned, the situation of Czech women before 1948 was marked by two tendencies: 1) formal equalization and 2)

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[125] Wolchik describes this period as 'modified pluralism [leading to] the institution of communist dominance'. Wolchik, *Czechoslovakia*, 17.

[126] L. Kalinová, 'Mythos und Realität des „Arbeiterstaates" in der Tschechoslowakei' in P. Hübner, C. Kleßmann and K. Tenfelde (eds), *Arbeiter im Staatssozialismus Ideologischer Anspruch und soziale Wirklichkeit* (Böhlau Verlag 2005), 90.

[127] The considerable continuity between the periods is well documented in Jakub Rákosník, *Sovětizace sociálního státu: lidově demokratický režim a sociální práva občanů v Československu 1945–1960 (The Sovetization of the social state)* (FF UK 2010).

[128] Cf. chapter 2(1).

[129] Cf. n. 11.

[130] I use the 'legal family' classification available in Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (OUP 1998), 132-167.

[131] Eg the 1811 Austrian General Civil Code (which is in amended form still valid in Austria) was only abrogated in 1950. For a discussion of the failed recodification of the civil code during the First Republic, see Melissa Feinberg, *Elusive Equality. Gender, Citizenship, and the Limits of Democracy in Czechoslovakia, 1918-1950.* (University of Pittsburgh Press 2006).

[132] 1939-1945. The law of the Protectorate was disregarded after the war by the Constitutional Presidential Decree from 3rd August 1944, No 11.

increase of protection in labour relations. These corresponded to the campaigns of the first wave feminist activists and of the socialist movement before WWII respectively. The equalization began in the 19th century, with women being able to access university education in 1897.[133] Equality between the sexes was an explicit program of the newly established Czechoslovak Republic. In 1918, the Declaration of Independence proclaimed that 'Women will have equal standing to men; politically, socially and culturally'.[134] This promise was codified in the 1920 Constitutional Charter: 'Privileges of sex, birth and profession are rejected.'[135] Women's suffrage was also incorporated.[136] In terms of protective legislation, gradual improvements of women's working conditions started in the 19th century. For example night-work was prohibited[137] and an 8-hour working day set in 1918.[138]

The era of Communist rule that started in 1948 was not homogenous and is often broken up into several periods.[139] In the following, I divide it into three phases: Stalinism (1948-1962), Reform (1962-1968), and Normalization (1969-1989).

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[133] Ministerial Decree of 23rd March 1897. The first woman was admitted to the Philosophical Faculty of Charles University the same year. The Faculty of Medicine followed in 1900. The Law Faculty only admitted the first woman in 1919. Milena Lenderová, *K hříchu i k modlitbě. Žena v minulém století.* (Mladá fronta 1999).

[134] Declaration of Independence of the Czechoslovak Republic from 18th October 1918 (Washington Declaration).

[135] Art. 106 of the 121/1920 , Introducing the Constitutional Charter of the Czechoslovak Republic.

[136] Art. 9 ibid.

[137] I discuss the negative consequences of bans of work for women in chapters 2(2.3.2) and 7(1.3).

[138] 91/1918.

[139] The details of this periodization vary by author, cf. Wolchik, *Czechoslovakia*, 20-59 an Otto Ulc, 'Czechoslovakia' in Teresa Rakowska-Harmstone (ed), *Communism in Eastern Europe* (2nd ed edn, Manchester University Press 1984).

1.2 Stalinism (1948-1962)

The period of Stalinism was marked by the attempt to radically transform politics, economy and society. In terms of politics and public life, pluralism was eliminated. While 'formal government structure remained relatively unchanged',[140] it became effectively subjected to the CP control. Associational life was simplified, centralized and equally subordinated to the CP.[141] Political purges were commonplace; show trials lead to executions of opposition politicians[142] as well as top Party officials.[143]

Economic measures during the period of Stalinism included further nationalization of industry and industrialization that required large-scale mobilization of labour, forced collectivization of agriculture, currency reform, severe restrictions on private inheritance and the introduction of a central planning mechanism.[144] The aims of these reforms were to take away economic power from non-communist elites[145] and to subject all economic activity to state and CP control. In terms of industrialization, the emphasis was on heavy industry. The state, however, 'neglected the development and technological improvement of the consumer industries, such as housing, convenience foods, artificial textile fibres, modern household gadgets and

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[140] Wolchik, *Czechoslovakia*, 22.

[141] Ibid, 22.

[142] Eg the women's rights activist and MP Milada Horaková.

[143] Eg the then Secretary-General of the CP Rudolf Slánský.

[144] Wolchik, *Czechoslovakia*, 20-26.

[145] Josef Korbel, *Twentieth-century Czechoslovakia: the meanings of its history* (Columbia University Press 1977), 260-268.

the whole tertiary sector of trade and services.'[146] This had important repercussions for women, whose work in these light industries and services was valued less, leading to a considerable gender wage gap.[147] It also meant that basic consumer goods were often unavailable, and the compensation of these shortages fell largely to women (such as sewing, vegetable growing, cooking, etc.).[148]

Stalinism in Czechoslovakia was 'particularly durable and virulent'.[149] Unlike in Hungary and Poland, which saw dramatic challenges to the system[150] after Khrushchev's denunciation of Stalin in 1956, Czechoslovakia did not de-Stalinize until the 1960s. One of the reasons cited by Wolchik is that the Czechoslovak economy was still performing well, thanks to the solid pre-communist base, so that the economic discontent, an important reason for mass pressure for change in the neighbouring countries, was not as pervasive in Czechoslovakia.[151]

As far as the legal development is concerned, the early Stalinist period was a time of ambitious legal reform. Following the adoption of a new Constitution in 1948,[152] most legal areas were recodified.[153] The period between 1948 and 1950[154] is often referred to as the 'legal two-year plan'. A new Act on Family Law was adopted

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[146] Heitlinger, *Women*, 138.

[147] Cf. section 3.3 and chapter 3(2; 3).

[148] Cf. chapter 2.

[149] Ulc, 'Czechoslovakia', 118.

[150] Wolchik, *Czechoslovakia*, 25

[151] Ibid, 25.

[152] Constitutional 150/1948.

[153] The term 'code' describes a statute (an act of parliament) which comprehensively regulates an area of law.

[154] Labour law was an exception which only saw codification in 1965.

in 1949,[155] and civil and criminal codes as well as codes of civil and criminal procedure were adopted in 1950.[156] These developments had elements of continuity with the pre-socialist legal system and to some extent followed the continental civil law tradition, but they were also meant to reflect the victory of the proletariat and corresponded to the Marxist-Leninist ideology. [157] This was true for the family code, which aimed to construct a 'democratic family', as I discuss in the following chapter. In the civil code, the ideological changes included the primacy of collective over individual interest, especially the preference for socialist forms of property.[158] New criminal law provisions on offences against the republic[159] and the economic constitution[160] were created and used repressively against the dissenters in the new socialist state.

The early Stalinist period (up to 1953)[161] has been described by Zdeněk Kühn, who analysed judicial decision-making in State Socialist Czechoslovakia, as 'activist and anti-formalist'.[162] It was characterized by a strong ideological charge. According

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[155] 265/1949.

[156] 141/1950 ; 86/1950 ; 142/1950 ;

[157] Bělovský points to the huge difference between the (socialist) rhetoric of the preamble and the (traditional) structure, terminology and content of the Civil Code itself. Petr Bělovský, 'Občanské právo (Civil law)' in KomPrávo, 434.

[158] Ibid, 434.

[159] Such as for example 'behaviour unfriendly to the republic' or 'abuse of religious function'. Tomáš Gřivna, 'Trestní právo hmotné (Substantive Criminal Law)' in KomPrávo, 563 ff.

[160] 'Machinations again nationalisation', 'endangering of creation and fulfilment of the economic plan', among others. Ibid.

[161] Zdeněk Kühn, *Aplikace práva soudcem v éře středoevropského komunismu a transformace* (C.H.Beck 2005), 53.

[162] Based on an analysis of judicial decision-making, he distinguishes between two periods within Czechoslovak State Socialist law: an activist and anti-formalist phase during Stalinism and the 'new socialist normativism' of the Normalization period. Zdeněk Kühn, 'Worlds Apart: Western and Central

to the then Prime Minister, judgments were meant to 'popularize the decisions of the [Communist] party'.[163] The political activism was especially apparent in criminal judgments. 'Class origin' was taken into account and harsher sanctions were given to 'anti-state perpetrators'.[164] Law was used instrumentally to transform society – outcomes were determined by the collective interests of socialist society, class, workers, etc.[165] Law was identified with (socialist) morality to the point where courts created legal obligations out of perceived moral duties.[166]

Kühn considers this period a dramatic departure from the continental traditions of formalism and positivism in judicial decision-making and speaks about an 'unbound application of law'.[167] He notes that part of this anti-formalism and activism was connected to the necessity to disapply inherited (capitalist) law. Once the new (socialist) codifications were adopted, however, the demand on judges' activism declined, and the importance of formalism, stability, positivism and textual interpretation rose again.

European Judicial Culture at the Onset of the European Enlargement' (2004) 52 American Journal of Comparative Law 531; Kühn, *Aplikace*.

[163] Fierlinger in 1952, cited in Kühn, *Aplikace*, 40. In East Germany 'a blind following of party guidelines' was required. Inga Markovits, 'Justice in Luritz' (2002) 50 American Journal of Comparative Law 819, 845.

[164] Kühn, *Aplikace*, 50-52. Ibid, 50-52.

[165] Principles applied by judges or academics in 1950s. Ibid, 45-50.

[166] Kühn cites the example of a decion of the Polish Supreme Court which derived from the moral duty to work overtime a legal one. Ibid, 44.

[167] As opposed to the traditional continental 'bound judicial decision-making', based on formalism and positivism. Kühn, 'Worlds Apart', 534 ff.

The impression of the late 1940s and 1950s arising so far is that of a totalitarian[168] and oppressive state, law and society. This is correct, but, paradoxically, as I show in more detail in chapter 2, it was also a transformative period which considerably advanced gender equality. The two pre-1948 developments - of equalization and the guarantee of special rights - continued and were enhanced after 1948.[169] This period saw the elimination of the legal privilege of men in family law,[170] as well as guarantees of equal access into the public sphere of work, education and politics.

Towards the end of the Stalinist period, a new wave of socialist recodifications took place. It started with a new Constitution of 1960.[171] A new family code,[172] new civil and criminal codes,[173] codes of civil and criminal procedure,[174] and a brand new labour code[175] were adopted in the early 1960s. These codifications were officially meant to improve the quality of the legal order. Tomáš Gřivna notes that this was to some extent achieved in criminal law, where some ideological but doctrinally

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[168] The concept of totalitarianism has been problematized for homogenizing a very context-specific phenomenon. However, if any period of Czech history was 'totalitarian', it was the early Stalinist period. See Special Issue, 'Existoval v českých dějinách totalitarismus?' (2009) 4 Soudobé dějiny.

[169] Cf. chapter 2(1).

[170] Bělovský comes to a similar conclusion regarding the transformative nature of the period. Bělovský, 'Rodinné', 463.

[171] Constitutional 100/1960.

[172] 94/1963.

[173] 40/1964 ; 140/1961.

[174] 99/1963 ; 141/1961.

[175] This dualism was abolished by the adoption of 65/1965.

awkward provisions were changed.[176] Also, some softening – such as the abolition of the death penalty – occurred.[177] Petr Bělovský notes, however, that this was not the case in civil law. In order to conform to the alleged 'progressive development of economic and political relations of a developed socialist society'[178] and to prepare for the ultimate arrival of communism, the new code radically departed from the continental civil law tradition and abolished many basic civil and legal institutions such as possession, usucaption, servitudes, tenancy, etc.[179] In its belief that socialist relationships were transformed and no longer needed civil law regulation, the code defied the reality of Czechoslovak economic relations at the time, which in turn contributed to the rise of a 'grey economy'.[180]

The remainder of the State Socialist period saw amendments to these codes but no recodification on a greater scale. Strikingly, with the exception of the labour code, all of these codifications are – in amended form – still in force today.[181]

1.3 Reform (1963-1969)

I observed that the Czechoslovak economy was performing well until the late 1950s. This changed in early 1960s: the rate of production growth slowed and prices

[176] Gřivna notes changes to 'preparation' and 'attempt' of a crime, for example. Gřivna, 'Trestní právo hmotné', 570.

[177] Ibid, 569.

[178] Bělovský, 'Občanské', 436.

[179] Ibid, 437.

[180] Cf. n.263. On disregard for law, cf. section 2.4.

[181] A new Civil Code has now been adopted and will enter into force on 1 January 2014.

rose. In 1963, Czechoslovakia's growth rate became negative.[182] The CP realized that the Czechoslovak economy needed restructuring to become more flexible, productive and efficient. A 'new system of direction' (*nová soustava řízení*), moving away from rigid central planning, was thus proposed. Alongside economists, others started to criticise the socialist system: creative artists, students, different mass organizations (including women's), but also members of the Communist party, even at its highest level. The country started to discuss 'socialism with a human face'.[183] Aside from economic reform, issues of Slovak autonomy, greater freedom of expression and civil liberties as well as greater political pluralism[184] were discussed; the political trials of 1950's were being re-examined.[185]

With regards to gender, the budding political pluralism meant that the formerly (relatively) unified official front on the 'equal rights of men and women' became diversified. On the one hand, the Czechoslovak Union of Women began to challenge the assertions that equality between men and women had already been realised,[186] but, on the other, the thawing brought about a challenge to the goal of sex equality by economists who pointed out the inefficiency of women's work when the state was paying for collective childcare, as well as by psychologists who claimed that collective care of children caused deprivation.[187] As a consequence, although the

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[182] Wolchik, *Czechoslovakia*, 27; Ulc, 'Czechoslovakia', 121.

[183] Wolchik, *Czechoslovakia*, 31-33.

[184] The proposals entertained by the CP however never included the abandoning of the one-party rule.

[185] Wolchik, *Czechoslovakia*, 31-33.

[186] Ibid, 29; Hilda Scott, *Does socialism liberate women? Experiences from Eastern Europe* (Beacon Press 1974), 109 ff; Heitlinger, *Women*, 65 ff.

[187] Cf. chapter 2(2).

period is generally viewed positively by historians, it had an ambivalent impact on gender equality.

The democratic reform process of the 1960s ultimately triggered fears in Moscow that the Czechoslovak CP was losing control. The 'Prague spring'[188] was thus cut short by the Warsaw Pact[189] military invasion of Czechoslovakia on 21 August 1968.[190]

1.4 Normalization (1969-1989)

'Normalization', which began in 1969, meant the 'annulment of the innovations of 1968'[191] – 'rehabilitated victims of Stalinism were "de-rehabilitated", economic reforms were blocked [and] censorship reinstated'.[192] The CP was massively purged, in many cases of committed Communists.[193] An estimated 280,000 people lost their jobs for political reasons which, among others, led to a decimation of entire academic disciplines, such as history.[194] Many were assigned to manual labour; some 150,000 went into exile.[195]

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[188] A term used to describe the culmination of the reform process in Spring 1968. Wolchik, *Czechoslovakia*, 34.

[189] Soviet, East German, Hungarian, Bulgarian and Polish troops participated.

[190] For a discussion of the entire reform period and invasion in English, see also Galia Golan, *Reform rule in Czechoslovakia: the Dubček era, 1968-1969* (Cambridge University Press 1973).

[191] Ulc, 'Czechoslovakia', 125. The exception was the acceptance of Slovak demands for greater autonomy. Czechoslovakia became a federation in 1968.

[192] Ibid, 125.

[193] Including reform leaders such as Alexander Dubček. A full one-third of the total 1,500,000 CP membership was removed from the ranks. Ibid, 126.

[194] Ibid, 128.

[195] Ibid, 128.

The period also included a change in the 'political formula'. The normalization leadership

> repudiated the earlier attempt to foster legitimacy and create genuine citizen support […]. Instead, it reverted to the strategy […] of gaining compliance through a combination of material rewards and coercion.[196]

Václav Havel described this 'post-totalitarian period' in his essay *The Power of the Powerless.*[197] He observed that the belief in Marxism had vanished from most spheres of society including the CP and its leadership, and Czechoslovaks were 'living a life in lie'. It was not important to believe the ruling ideology, but rather to perform its rituals.[198] Slavoj Žižek points to the fact that 'late socialism' was held together not by shared belief but by shared guilt.[199] The pointing out of this lie was an important aspect of the dissident movement – for example, the human rights initiative 'Charter 77' was demanding that the regime conform to human rights standards it itself signed up for internationally[200] or promised domestically.

Economically, the leadership tried to placate the population with a better standard of living, which included somewhat improved availability of consumer goods and social welfare benefits.[201] In terms of gender, this was a period of generous benefits, but ones oriented toward motherhood and family. It was overall a period of

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[196] Wolchik, *Czechoslovakia*, 37.

[197] First published illegally in 1979. Václav Havel, *Moc bezmocných* (Londýnské listy 1979).

[198] For English translation see Václav Havel, John Keane and Steven Lukes, *The power of the powerless: citizens against the state in central-eastern Europe* (Hutchinson 1985).

[199] Slavoj Žižek, *Did somebody say totalitarianism?: five interventions in the (mis)use of a notion* (Verso 2001), 91.

[200] In the 1966 ICCPR and ICESCR.

[201] Wolchik, *Czechoslovakia*, 37.

'stagnation and resignation' with regard to an aspiration to achieve greater equality between the sexes, as I discuss in chapter 2.

While the first half of the 1970s was 'economically the most successful in the history of socialist Czechoslovakia,'[202] the rest of the period was marked by a slow decline. Beginning in 1975,[203] the combination of 'waste in manpower allocation', 'irrational investment' particularly into heavy industry, 'industrial obsolescence' especially 'outdated factory equipment and technological procedures' led to a loss of competitiveness internationally which worsened the already unfavourable trade balance.[204] By the 1980s, 'the failure of government to live up to its part of the social contract has become all too evident'.[205] The average living standard dropped to the levels of the early 1960s.[206] In order to remain in power, the CP resorted to 'intensified ideological fire'.[207] This might be the reason why the Gorbachev-led changes to the Soviet system in the second half of the 1980s, *perestroika*[208] and *glasnost*,[209] did not resonate in Czechoslovakia.[210] Changes were only planned in 1987 and were restricted to the economic sphere; in any event, few were implemented

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[202] Ulc, 'Czechoslovakia', 131.

[203] Externally, the oil crisis of 1973 was a contributing factor.

[204] Ulc, 'Czechoslovakia', 132.

[205] Ibid, 133.

[206] Ibid, 133.

[207] Ibid, 134.

[208] Means 'restructuring'; refers to the restructuring of the Soviet political and economic system.

[209] Means 'openness'; describes an attempt of Soviet leadership to increase transparency in government in order to lessen corruption accompanied by a gradual decrease in censorship.

[210] Wolchik, *Czechoslovakia*, 39 ff.

prior to the end of the regime.[211] Even though anti-regime political activism increased in 1988 and 1989, the 'Velvet Revolution' which started on 17 November 1989 still somewhat came as a surprise and was precipitated as much by the collapse of communist regimes abroad as is it did from the inside.[212]

In terms of law, as I mentioned, the period of Normalization brought only minor adjustments to the early 1960s codifications. In terms of judicial decision-making, Kühn has described the 1970s and 1980s as a 'new socialist normativism'.[213] It fell to the legislator (or even the executive)[214] to sufficiently clearly express the will of the working people.[215] If judges were revolutionaries in 1950s, they became bureaucrats during Normalization, in a new period of 'bound judicial decision-making'.[216] Kühn notes that while the rhetoric was still ideological and anti-formalistic, the reality was that of formalism and textual interpretation, especially in the 'neutral areas of mass application of law' (the highly political cases against the regime's opponents remained an exception).[217] Marxist phrases overwhelmingly became pure rhetoric without any practical significance. In short, 'new socialist positivism was a mix of some selected Marxist clichés, intellectual impotency and

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[211] Ibid, 40-41. The reform aimed to decrease the element of central planning and increase the managerial independence of enterprises.

[212] Ibid, 41-49. For more on the period of *perestroika* and the fall of Communism, see respectively Michal Pullman, *Konec experimentu (The end of an experiment)* (Scriptorium 2011), and Beata Blehova, *Der Fall des Kommunismus in der Tschechoslowakei* (LIT Verlag 2006).

[213] Kühn, 'Worlds Apart', 534 ff.

[214] Although both the legislature and the executive nominally contained representatives of other parties, the government was de facto under the control of the CP.

[215] Kühn, *Aplikace*, 55.

[216] Kühn, 'Worlds Apart', 538.

[217] Kühn, *Aplikace*, 58.

ideological emphasis on centralized law-making authority'.[218] The prestige of the legal profession declined;[219] the role of the judges was seen to be the mere mechanical application of statutes.

The period was also characterized by a disregard for legal hierarchy – secondary law, adopted by the executive, became the *de facto* main source of law.[220] In order to make law 'understandable to broad working masses',[221] the law became simplified to the point of being unusable (such was the case with the already mentioned 1964 Civil Code).[222] The importance of law diminished and rates of litigation dropped.[223] A 'concept of 'limited law' took hold, in which statutes and other written law were considered the only formal sources of law. Neither legal scholarship nor judges distinguished between norms and the text of a statute or a regulation, thus making any interpretation of law other than linguistic and logical impossible.[224] Teleological methods of interpretation in particular, were missing. It is worth foreshadowing that this understanding of law has continued into Transition, and, as I argue in chapter 7, has been a major obstacle for the correct application of antidiscrimination law.

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[218] Kühn, 'Worlds Apart', 540.

[219] Kühn, *Aplikace*, 71 ff.

[220] Ibid, 62-65.

[221] Kühn citing contemporary sources in ibid, 65.

[222] Ibid, 67.

[223] I discuss both phenomena below as characteristics of 'communist' law.

[224] Kühn, *Aplikace*, 82-92.

2 Characteristics of State Socialist law

In order to understand State Socialist law, one has to be aware of some of its specific traits. In the following, I first look at the role of law in State Socialist Czechoslovakia. I note that the law was seen as a legitimate instrument of change (2.1), driven by Marxist-Leninist ideology and under the control of the CP (2.2). Due to the role of 'law as command', rather than law as a facilitator of private transactions, the importance of public law rose and the importance of private law declined (2.3). But notwithstanding the coercive character of much of public law, the normativity of State Socialist law was problematic – the law often commanded what could not be done and then made statements about performance which were at odds with reality. As a consequence, it ceased to be taken quite seriously, and a wide-spread disregard for law could be observed (2.4).

I then analyse the contemporary understanding of rights, arguing that legal rights were a mirage. Law was not meant to be used by individuals as a constraint on official power (as it was understood 'as command'), and many apparent guarantees were merely educational statements (i.e. their normativity was limited). Neither the (barely tolerated) civil and political 'rights', nor the (preferred) socio-economic 'rights' were enforceable individual entitlements in the Western sense – they were at most policy statements and aspirational instructions to the legislature (2.5). The 'individual' aspect of 'rights' was further weakened by the State Socialist emphasis on 'collective interests' (2.6). And their enforceability was made practically impossible by missing institutions (such as a constitutional court), the lack of independence of the judiciary, and its weakness vis-à-vis the legislature and the executive (2.7).

2.1 Law as a tool of social change

The early Stalinist socialist state in the 1950s evinced 'social change optimism'. To use the example of prostitution, Marxism saw it driven by women's poverty and therefore believed that the abolition of private property would eliminate it, together with all other inequalities in society. The early Socialist State expected it to disappear, but it did not. Prostitution was thus recriminalized as 'parasitism' in 1956,[225] together with other anti-socialist acts, such as speculation, sabotage and pilferage of socialist property. This marked a shift away from the 'social change optimism' to 'legislative optimism'. It was believed that these 'capitalist anachronisms in the popular consciousness'[226] could be suppressed and the connected behaviours changed through law. The explanatory memorandum to the 1956 amendment of the 1950 Criminal Code clarified that

> such actions [such as prostitution], resulting from relics of the past, are a heritage of crude societal morals and customs and they need to be fought against [by criminal law].[227]

The emphasis on 'social change' through law was later somewhat weakened because of the 'formalist' turn in the 1970s and 1980s,[228]

The use of law to affect social change, although often used repressively, was overall not necessarily bad for gender equality. As I discuss in the next chapter,

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[225] A provision criminalizing those who 'make a living unfairly and avoid honest work' was inserted by 63/1956.

[226] Deputy Šebík, National Assembly, 19/12/1956.

[227] Government of the Czech Republic, 'Explanatory Memorandum to the Governmental Proposal of an Act Amending the 1950 Criminal Code' (*http://www.psp.cz/eknih/1954ns/tisky/t0094_03.htm*, 1956) accessed 1st July 2009.

[228] Kühn, *Aplikace*.

especially in the activist 1950s, it justified state intervention in traditional institutions, such as the family. And when the 'social change' zeal diminished in the more formalist 1970s and 1980s, so did the efforts to achieve equality of the sexes.

Although the State Socialist use of law as a tool of 'social change' declined during Normalization, the memory of it, however, did not fade. In Transition, the image of law as a tool for 'social engineering'[229] has been retained and has often been used as an argument against legal guarantees of gender equality.[230]

2.2 The importance of Marxist-Leninist ideology and the influence of the CP

Marxism has been likened to a 'secular religion'[231] whose application in the socialist states had a quasi-religious character.[232] Especially during the Stalinist period, the interpretation of Marxism-Leninism by the State Socialist legal scholars and the Party was followed like a religion, with its own dogma, 'clergy' (in the form of revolutionary leaders and later party officials) and punishment of heretics.[233] Law was used to bring about various tenets of Marxism-Leninism, including its response to the 'woman question', as I show below.

It is important to note that both the creation and the application of law was not only framed by Marxism, but also directly affected by the decisions of the CP. Rado

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[229] Eg Miroslav Škaloud, 'Antidiskriminační zákon - více škody nežli užitku (Anti-Discrimination Law - More Harm Than Good)' (*www.skaloud.net*, 2006) accessed 2008 (previously available; on file with the author).

[230] Cf. chapters 7(3) and 8(3).

[231] Simone Weil, *Oppression and liberty* (Routledge and Paul 1958); Jiří Přibáň, 'Na stráži jednoty světa: Marxismus a právní teorie' in KomPrávo, 41, 45.

[232] Kühn, *Aplikace*, 37; Markovits, 'Justice', 845.

[233] Přibáň, 'Na stráži', 48-49.

Procházka gives ample examples of the 'direct transmission of decisions of the organs of the [Communist] party into the exercise of substantive competence of state institutions, including the parliament'.[234] Especially during Stalinism, the judges were seen as the 'missionaries of socialism'[235] and a Czechoslovak legal scholar in 1953 chastised judges for 'underestimating the importance of editorials and essential articles of the Red right (*Rudé právo*) [a propagandistic Czech daily]'.[236]

2.3 The decline of private law and the rise of public law

The importance of private law under State Socialism was low, compared to both, the previous period and the capitalist West.[237] Markovits observed, that '[l]aw needs self-determination, egotism, conflict, competition, choice bargaining, and the universal usefulness of money if it is to flourish.'[238] She observed very low litigation levels in the East and argued that the reason for this was the missing prerequisites for invoking the courts which existed in the West: 1) social disconnect between applicants; 2) translatability of claims into money; and 3) a wish to change status quo. In the East: 1) people could not sever legal or factual ties (workers could not be

[234] R Procházka, 'Všetkým telám rovnako' in KomPrávo, 96.

[235] Markovits, 'Justice', 842; Přibáň, 'Na stráži'.

[236] J. Kokeš, 'Za lepší rozhodování našich soudů' [1953] Socialistická zákonnost 11, cited in Kühn, *Aplikace*, 40.

[237] Markovits, 'Justice'; Kühn, *Aplikace*.

[238] Markovits, 'Justice', 870.

sacked, tenants not evicted, etc.); 2) money was not worth litigating for; and 3) nobody could change the status quo.[239]

Although litigation dropped in civil and commercial law, it rose dramatically in family law. In East Germany 51 % of civil courts' agenda consisted of family feuds, in Hungary it was 54 %[240] and 'over 50 %' in Czechoslovakia.[241] This was arguably because personal property and personal relations were the two things people could still 'own'.[242]

The diminished importance of private law was accompanied by the increased importance of public law. Public law expanded to previously private law doctrines.[243] Labour law, for example, became heavily publicized under State Socialism.[244] Public law also became very widely used to control and coerce. Criminal law flourished.[245] Especially during the Stalinist period, it was used to create a new socialist human being – various breaches of socialist morality became punishable as crimes or administrative offences. Examples of new socialist crimes ranged from 'the negligent

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[239] Inga Markovits, 'Pursuing One's Rights Under Socialism' (1986-1986) 38 Stanford law Review 689, 751.

[240] Kühn, 'Worlds Apart', 544.

[241] Jaroslav Bičovský, 'Problematika při sporech o otcovství' [1963] Socialistická zákonnost 474, 474.

[242] Ownership is used both literally and metaphorically.

[243] This was unproblematic to State Socialist legal scholars, as the distinction between private and public law itself was considered bourgeois – based on the institution of private property, and therefore suspicious. Bělovský, 'Občanské', 426-427.

[244] Considering that only 'socialist employers' (emanations of state) existed, the autonomy to negotiate a contract of employment was severely limited. This was not only true at individual level, but at ective level as well. A labour law textbook from 1955 states that 'the people's democratic state entrusts the trade unions with certain tasks previously discharged by the state administration; for example inspections of health and safety and compliance with health insurance rules'. Trade Unions were more tools of governance rather than independent representatives of workers. Karel Witz and Jiří Hromada, *Československé pracovní právo* (Státní pedagogické nakladatelství 1955), 74.

[245] Markovits, 'Justice', 841; Kühn, *Aplikace*, 54.

endangering of the common economic plan' to 'unauthorized leaving of national territory'.[246] They were often used to suppress opposition.[247] Hendley conceptualizes this trend as the prevalence of coercive law (emphasis on law's capacity to impose a basic social order) over reciprocal law (law as a constraint on official power, a tool of vindicating citizens' grievances and the facilitation of private transactions).[248] Markovits speaks about the prevalence of vertical law (law as command) over horizontal law (the coordination of purposes and balancing of interests):[249]

> [t]he socialist legal system seem[ed] to suffer from the same problems that plague[d] the socialist economic system: too much emphasis on command, an unwillingness to respect individual autonomy, [and] insufficient incentives.[250]

2.4 Dubious normativity and disregard for law

One of the ways social change was to be achieved was through educational legislation. State socialist legal theory explicitly accepted that socialist law was different from bourgeois law – the latter only worked through sanctions whereas the former through 'education and persuasion'.[251] Socialist law 'gave normative acts a

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[246] 231/1948.

[247] Kühn, *Aplikace*, 59-60.

[248] She points out that the defining elements necessary for the rule of law, which we know from the West, were missing or damaged in the Soviet Union: 1) law as reciprocal process (in which state and society participate); 2) procedural regularity; 3) substantive legitimacy; 4) efficacy and 5) accessibility. Kathryn Hendley, *Trying to make law matter: legal reform and labor law in the Soviet Union* (University of Michigan Press 1996), 3. See also Berman on 'parental law'; George A. Bermann, *Justice in Russia* (Harvard University Press 1950), 288.

[249] Inga Markovits, 'Socialist vs. Bourgeois Rights - An East-West German Comparison' (1977-1978) 45 University of Chicago Law Review 612, 626.

[250] Ibid, 631.

[251] Marie Kalenská, 'Vztah norem socialistické morálky k pracovnímu právu' [1962] Právník 837, 847.

deeper possibility of educational effects'[252] through adoption of 'proclamations, appeals and wishes' or 'norms with only a morally-political sanction'.[253] The existence of such *leges imperfectae*[254] is important for my assessment of 'human rights' under State Socialism, including equality guarantees - what appeared to be legal guarantees of rights were often only aspirational statements.[255]

Another aspect of these norms was their dubious normativity. Law was not only used to express aspiration but also to persuade about achievements, and describe a socialist heaven. For example the 1960s Constitution claimed that 'Socialism, in our country, has won!'[256] As Kathryn Hendley, writing on labour litigation in the Soviet Union, noted, the law often commanded what could not be done (in annual and five-year plans) and then lied about performance. Often, Czech legal scholars concluded reality from a legal norm which stipulated it. The realization of equality of sexes was deduced from a de jure legal change. For example a 1969 article criticized alimony for divorced (female) spouses as no longer necessary considering the evolved situation of women:

> from 1st January 1950 [when the new Act on family law entered into force] women became not only legally, but also an economically equal partner of the man in marriage.[257]

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[252] Ibid, 846.

[253] Ibid, 845.

[254] Sanction-less norms.

[255] Cf. section 2.5 and chapter 3.

[256] Art. I 1960 Constitution.

[257] Ota Rais, 'Jiný pohled na výživné rozvedené manželky' [1969] Právník 556, 557.

This shows that the distinction between description and prescription was fraught in state socialist law and legal scholarship and one has to be especially careful in interpreting guarantees, an issue I return to in chapter 3.

Moreover, the fact that the law so often demanded or stated the impossible meant that – in cases - it ceased to be taken quite seriously.[258] Indeed, several authors[259] have observed a widespread disregard for law. Inga Markovits, who has examined law and justice in East Germany, observed that:

> the public behaviour of many socialist citizens at times borders on anarchy[;…] tenants do not pay their rent; consumers do not settle their utility bills; passengers on buses or tramways jump the fare; […] they remodel homes or build weekend houses without permits, cheat about statutory limitations on the size of buildings, and obtain materials on the black market and labour from moonlighters […] GDR workers are thus not embarrassed to come late to work, drink on the job, go shopping during hours, take home provisions or tools, and generally behave as if they own[260] the place.[261]

The disregard for law has also been an important legacy of State Socialism in Transition. Especially the new antidiscrimination provisions, seen merely as an 'offering' to the EU,[262] have been disregarded, as I document in chapter 7 on a series of court cases.

How does the observation about disregard for law square with the previously mentioned coercive character of law? One has to distinguish between private and public law. In private law, suitable and well-crafted rules were not available to

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[258] Hendley, *Trying*, 28.

[259] Prominently Markovits, 'Pursuing'.

[260] Arguably, due to the concept of socialist property, they did.

[261] Markovits, 'Pursuing', 753.

[262] Cf. chapter 5(4).

facilitate civil or commercial transactions. Private law was thus not useful and a lot of important deals happened in the grey or black economies[263] - law was not called upon to act.[264] As far as public law is concerned, some of it was not truly normative and was easily disregarded, while its controlling and coercive aspects were considered oppressive and therefore to be avoided, if possible. Its role was also not seen as legitimate, and so it did not command regard. Public law did not provide any constraints on official power and tools for vindicating citizens' grievances – it did not empower individuals through rights. It is the 'mirage' of rights under State Socialism to which I now turn.

2.5 The primacy of social rights and the socialist understanding of rights

The preference for socio-economic rights in the socialist East, and for civil and political rights in the West is well-known. It was famously exemplified by the bifurcation of human rights in the two 1966 International Covenants.[265] Markovits points out that civil and political rights, grudgingly accepted by the East, were 'limited, conditioned, or dependent upon the fulfilment of duties and in this fashion

[263] Gregory Grossman coined the term 'second economy' – the 'unofficial, unplanned, illegal economy, operated privately for individual gain'. Gregory Grossman, 'The "Second Economy" of the USSR' (1977) Problems of Communism. See also Markovits on a connected 'second legality'. Inga Markovits, 'Law or Order - Constitutionalism and Legality in Eastern Europe' (1981-1982) 34 Stanford law Review 513, 597.

[264] Markovits, 'Justice', 848 ff; Kühn, *Aplikace*, 70.

[265] Stark summarizes that during the drafting of the covenants, '[t]he United States, a capitalist democracy, was deeply suspicious of economic, social and cultural rights, which it viewed as incompatible with capitalism and free enterprise. The Soviet Union, in contrast, distrusted civil and political rights, which it viewed as threats to the State.' Barbara J. Stark, 'The International Covenant on Economic, Social, and Cultural Rights and Monitoring' [2009] Hofstra University School of Law Legal Studies Research Paper Series; Research Paper No 08-18, 9.

clearly linked to the interests of state'.[266] Socio-economic rights, she observes, we considered 'more important than the traditional political freedoms, and [were] therefore give[n] precedence in the [socialist] constitutions'.[267] But even social rights, although preferred, were collective 'material guarantees... not rights in our [Western] sense at all.'[268]

The difference between the West and East was thus deeper, not only in emphasis but in conceptualization. Markovits summarizes:

> Bourgeois law sees rights as individual entitlements, focuses on the end result of a right's realization (if necessary in court), insists on exact definitions (in order to know how much a right-holder is entitled to), and basically perceives the realization of a right as a private affair. Socialist law sees rights primarily as policy pronouncements; focuses on the process of realizing the policy more than on the eventual realization of the right itself; is interested in ambiguity (which facilitates the manipulation of a right for policy purposes); and basically perceives the realization of a right as a social affair.[269]

Similarly, George Bermann has observed that in the Soviet Union, a 'right' [was…] understood to be a particular kind of benefit'[270] and what appeared to be constitutional rights were at most 'directives to legislatures'.[271] The state as sovereign could at any given moment change its mind – the concept of the 'rule of law' was vacant,[272] and so

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[266] Markovits, 'Law', 519. Similarly, on the example of freedom of association in Czechoslovakia, Rado Procházka, 'Všetkým telám rovnako' in KomPrávo, 111.

[267] Markovits, 'Law', 519.

[268] Ibid, 520. She flippantly illustrates: '"Material guarantees" protect no more "rights" than a mother's announcement to her children that she will cook spaghetti for supper.'

[269] Markovits, 'Socialist', 625.

[270] George A. Bermann, 'The struggle for law in post-Soviet Russia' in WesternRights, 41.

[271] Ibid, 54.

[272] Bermann points out that in the USSR, 'rule of law' only started to be discussed under Gorbachev. Ibid, 41. I found no mention of the 'rule of law' in the Czechoslovak legal journals studied either.

the state did not feel bound by rights. The content of the 'rights' in State Socialist Czechoslovakia, including 'the equal rights of the sexes', was not determined at the constitutional level, but through legislation. Rights were connected to duties,[273] both expressly in the legal texts as well as in legal scholarship.[274] And in practice, the availability and access to 'rights', even socio-economic rights, was often conditional[275] on political loyalty.[276]

This is an important framework in which to understand equality guarantees under State Socialism – they were not rights in the Western sense; a subject to which I return in chapter 3. But this understanding also left a legacy for Transition, where a continued perception that rights should be 'deserved' prevails, as I discuss in chapter 5.

2.6 Collective interest and an instrumental understanding of the individual

The concept of 'rights' was further weakened by the dominance of collective over individual interest. The collective interests - 'societal interest', class interest, interest of workers, 'what benefits working people, people's democracy and the camp of peace'[277] - were important principles applied especially by the early Stalinist

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[273] Markovits, 'Law', 519.

[274] On the obligation to work, see chapter 2(1.4).

[275] Some Czech women who were active in political dissent look back at equality of the sexes during State Socialism as a mere front, a charade, which did not exist in reality. This is too strong an analysis of the situation, but it is correct to say that access to many advantages of the system were conditional on the 'political reliability' of an individual (personal accounts of contemporaries in conversations with the author). Cf. chapter 4(2.6).

[276] See also Martin Krygier and Adam Czarnota, 'Rights, civil society, and post-communist society' in WesternRights, 141.

[277] Examples of principles applied by judges or academics in 1950s. Kühn, *Aplikace*, 45-50.

courts. Contemporary legal scholars were unambiguous as to the subordination of individual interest: 'the freedom of an individual is derivative of the freedom of society and is conditional on it'.[278] There was a presumption of a lack of conflict between individual and collective interest,[279] so claiming otherwise was particularly transgressive. Indeed, individuals who were perceived to put their interest above the interest of the collective were chastised by legal scholars.[280]

For example, with regards to the freedom of association, the only permissible purpose of associating was 'the realization of the democratic right of the people *to strengthen the peoples' democracy* and *to support the building of socialism*.'[281] This meant that a very basic political right was only available when pursuing a state-defined purpose. Markovits gives another example, from among socio-economic rights:

> [T]he constitutional "right to work" does not entitle a citizen to sue the state for employment, but it does – as a policy pronouncement – find reflection in court decisions that protect employment and people who work or in decisions that discriminate against people who do not work.[282]

An example of the use of the 'right to work' against those who do not work, in the Czechoslovak equality context, was a court decision to keep children in the custody and care of a divorced working mother rather than the new wife of the husband who

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[278] Viktor Knapp, 'O spravedlnosti' [1966] Právník 310, 320.

[279] Ibid, 320.

[280] Kalenská, 'Vztah', 842.

[281] Sec. 1 of 68/1951 , cited in Procházka, 'Všetkým', 112.

[282] Markovits, 'Socialist', 616.

was a homemaker.[283] Although in this particular case the preferential treatment of workers led to a gender-progressive outcome, the fact that the law's content was not to be determined dialectically, including through a clashing of state and individual interest, was problematic. This *a priori* preference for the collective interest in determining content of rights found its procedural equivalent in a lack of enforcement mechanisms.

2.7 Absence of avenues of enforcement

The procedures for challenges to state behaviour (which due to the public nature of employers included labour relations) on the basis of individual rights were either not there at all or not truly available in practice. For constitutional rights, there was no way to bring individual applications.[284] During the entire period of State Socialism, no judicial body had jurisdiction to review individual complaints of infringements of fundamental rights as guaranteed by the Constitution. For most of the time there was no provision for a Constitutional Court, and when its creation was finally foreseen by law,[285] it was not established. Administrative judicial review was equally non-existent - only informal complaints to the administration were acceptable.[286]

Before ordinary courts, litigation was dampened by the fact that courts were not impartial arbiters but merely another controlling arm of the socialist state. The

[283] Judgment of a Regional Court in Olomouc from 13th February 1950, RII 35/50; cited in Kühn, *Aplikace*, 48.

[284] Parties could argue before ordinary courts that statutory or regulatory law should be interpreted or even disapplied according to the constitution and its principles.

[285] Constitutional 43/1968.

[286] Markovits, 'Justice', 848 ff. See also Kühn, *Aplikace*, 70.

lack of independence of the judiciary is well documented.[287] The unity of the state went further, however. For example in labour relations, not only the courts but also employers and trade unions were all emanations of the state practically controlled by the Communist Party. Thus, an aggrieved employee, for example a woman asserting a discriminatory wage, would have to stand against her employer - a socialist organisation,[288] structurally charged with seeing to the collective wellbeing of the workers. She would do so before an arbitration committee organized by the Revolutionary Trade Union.[289] As the trade unions were seen as 'the connectors between the masses and the vanguard of the working class', the 'platform through which the Communist Party can best and most effectively influence the masses',[290] it could hardly be expected that such an arbitration was independent and impartial. A claim could only be taken to court after arbitration failed.

The decline in the role of courts is symptomatic of a weak judiciary. The courts were weakened in the earlier period by a preference of outcome over process,[291] and in the later period by a lack of separation of powers and a complete domination of the legislature and executive over the judiciary.[292] Especially in the later period, of 1970s and 1980s, when old pre-communist statutes were mostly

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[287] Otakar Motejl, 'Soudnictví a jeho správa' in KomPrávo

[288] No private employment existed.

[289] Jakub Rákosník, 'Pracovní právo v letech 1948-1960' in Jan Kuklík (ed), *Vývoj československého práva 1945-1989* (Linde 2008), 231.

[290] Witz and Hromada, *Československé*, 75.

[291] Markovits, 'Socialist', 626.

[292] A.K.R. Kiralfy, 'The Rule of Law in Communist Europe' (1959) 8 The International and Comparative Law Quaterly 465, 468.

replaced by law created by socialist legislatures, law was equated with written law and courts became mere textual interpreters and mechanical applicants of statutes.[293]

But it was not only the legislature, but also the bureaucracy which could do more for citizens than courts. Aggrieved citizens often sought non-legal, informal avenues, which were often more efficient as well as quicker: a complaint could be brought against administrative decisions to an administrative body, general complaints could be brought to the local CP committee (their 'street committee'), the 'procurator',[294] they could write into a 'complaint book' in shops and restaurants, etc.[295]

The lack of sanctions and judicial mechanisms for enforcement did not only impact the use of 'rights' by individuals, but also the rights' content. Individuals could not fight for their understanding of what the constitutional, statutory or regulatory provisions guaranteed them. Whereas in the West the interpretation of a right's content would often happen through self-interested litigation, in the East, this particular legal dialectic was missing.[296] As a result, I document in the following chapters of Part I, legal rights and guarantees of equality of the sexes under State Socialism did not necessarily serve those whose interested they were ostensibly protecting - women.

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[293] Kühn, 'Worlds Apart', 540-549.

[294] The 'procurator' was a specific State Socialist institution, which combined the functions of public prosecution in criminal law with extensive powers of oversight over the 'legality' of activities of public institutions, from central ministries and regional bodies, to courts (in criminal, as well as civil and administrative jurisdictions) and 'institutions which limit personal freedom' such as prisons. Jan Lata, 'Prokuratura (Public Prosecutors)' in KomPrávo, 878.

[295] Kühn, *Aplikace*, 70. Markovits, 'Pursuing', 732 ff.

[296] Markovits, 'Pursuing', 751.

3 The 'woman question' in Marxism

Because of the importance of Marxism-Leninism in socialist states, both in political and scientific terms, a brief discussion of its understanding of the 'woman question' is indispensable. Two caveats are necessary: 1) regarding the fluidity of theoretical canon; and 2) concerning the question of reception of Marxism in State Socialist Czechoslovakia. First, any analysis of Marxism will much depend on the authors one studies. If one only looks at Marx and Engels,[297] there is little to go on. Their writings are arguably very opaque on the 'woman question' as it is rarely at the centre of their argument, and comments which are scattered through several works do not create a consistent whole. But when one includes works of August Bebel,[298] who dedicated an entire book - *Woman under Socialism* - to the woman question, or those of later Russian revolutionaries Alexandra Kollontai[299] and even V. I. Lenin,[300] the 'Marxist' understanding of the 'woman question' arguably changes. Bebel, for example, whose book was widely read in Czechoslovakia,[301] addressed a much broader range of issues than either Marx or Engels, including prostitution, and was in favour of rights otherwise considered bourgeois, such as suffrage. In this section, I

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[297] As Alison Jaggar does.

[298] 1840-1913. A German Social Democratic politician and writer (). His book 'Woman under Socialism' first appeared in 1879, and saw further fifty editions during the author's life alone.

[299] 1872 –1952. A Russian Menshevik and later Bolshevik revolutionary; Europe's first female government minister (1919) and the world's first female ambassador (1923) (). She famously criticized the institution of family, calling for sexual and economic freedom of women as well as communal life.

[300] Clara Zetkin, 'Lenin on the Women's Question' http://wwwmarxistsorg/archive/zetkin/1920/lenin/zetkin1htm accessed 10 March 2010.

[301] Bebel's Woman under Socialism had particular impact on the thinking in the Czech Republic. Gustav Bareš, the author of its first translation into Czech in 1962, recalls in his introduction to the book how widely read the book was among socialists and communists in the first half of the 20th century. Scott, *Does socialism*, 57.

draw on these primary 'Marxist-Leninist'[302] texts, acknowledging, however, that these sources are diverse, their interpretations vary greatly and are disputed – unfortunately a more in-depth analysis of the development of the theoretical Marxist debates is outside the scope of my thesis. I also draw on secondary feminist analysis of Marxism,[303] which helps me identify key points in the theory.

Second, the Marxist-Leninist theory was differently interpreted in different countries of the Eastern bloc, during different periods. In this section, I discuss the Marxist-Leninist theory. In the following chapters of Part I, I am more interested in the particular Czechoslovak brand or interpretation of this canon – I discuss the Czechoslovak State Socialist ideology and policy aspirations with regards to the 'woman question' and the 'equality of the sexes', as formulated in political documents and legal scholarship. I am also interested in whether and how this political project was translated into legal reality.

This distinction between the three layers – 1) Marxist-Leninist theory; 2) State Socialist project; and 3) legal reality – allows for a more precise ascription of failures or obstacles to gender equality. Some drawbacks to female emancipation and gender equality under State Socialism can be, first, directly traced to the limits of the Marxist-Leninist ideology, such as seeing childcare as biologically determined or the ignorance of gender-based violence and issues of sexual identity and orientation. Second, some are the result of a particular twist given to classical Marxism-Leninism

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[302] Marxism-Leninism, which incorporated late 19th and early 20th century developments - especially Lenin's work-, was the preferred term used during State Socialism in the Eastern bloc countries. As it was used to describe the official ideology of several different socialist states, societies and decades, it was also far from homogeneous.

[303] Alison M. Jaggar, *Feminist politics and human nature* (Rowman & Allanheld 1983); MacKinnon, *Toward*; Scott, *Does socialism*; Heitlinger, *Women*; Alena Heitlinger, 'Marxism, Feminism, and Sex Equality' in Tova Yedlin (ed), *Women in Eastern Europe and Soviet Union* (Praeger 1980), among others.

by State Socialist ideologues, for example the gender wage gap between heavy industry on one hand and light and service industries on the other was connected to an interpretation of the Marxist distinction between production and reproduction. Finally, even where the classics of Marxism-Leninism got it right and the socialist state agreed, the equality project was harmed by other obstacles, for example the promise to bring domestic labour and childcare into the public sphere was never fully realized because it would have been too costly.

In the following, I discuss three features of the Marxist-Leninist theory which are of particular salience to gender equality: 1) the centrality of class and the neglect of other axes of inequality, including sex/gender; 2) the biological determinism, especially with regard to gender roles of women in the family; and 3) a particular understanding of productive work which devalued reproduction and therefore work in the home and childcare.

3.1 Solving the 'woman question' – the centrality of 'class'

Arguably the underlying problem with Marxism, in terms of women's rights and gender equality, was that it had never considered inequality between the sexes as a separate form of inequality or patriarchy as an independent system of oppression. The most influential Marxist theorist on the 'woman question', Friedrich Engels,[304] identified the organization of the family under capitalism as the origin of women's oppression. The requirement of inter-generational passing of private property in the

[304] Friedrich Engels, 'The origin of the family, private property, and the state' (*http://www.marxists.org/archive/marx/works/download/Engels_The_Origin_of_the_Family_Private_Property_and_the_Stat.pdf*, 2000) accessed 25th July 2009. First published in 1884.

male line required children of undisputed paternity[305] which were guaranteed by the institution of monogamous marriage, an institution in which women were enslaved. Engels believed that the abolition of private property and of capitalism would automatically lead to a change in relations between the sexes. This analysis was astute, as, historically,[306] the lack of property rights of women, especially within marriage, has been identified as a crucial element of patriarchal oppression. And the abolition of private property by the socialist state was a very radical way of addressing this socio-economic inequality; one which did have an equalizing effect on women and a 'minimizing' effect on men, as it stripped them of their previous sources of dominance - private property and enterprise.[307]

But was the abolition of private property sufficient? Engels himself identified three further necessary steps: 1) formal equalization of the legal position of men and women, 2) inclusion of women in employment, and 3) the collectivization of household duties:

> And in the same way, the peculiar character of the supremacy of the husband over the wife in the modern family, the necessity of creating real social equality between them, and the way to do it, will only be seen in the clear light of day when both possess legally complete equality of rights. Then it will be plain that the first condition for the liberation of the wife is to bring the whole female sex back into public industry, and that this in turn demands the abolition of the monogamous family as the economic unit of society.[308]

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[305] Ibid, 40.

[306] Certainly at the time of Engels' writing. See Fredman, *Women*, 44-49.

[307] Ivan Vodochodský, 'Patriarchát na socialistický způsob: k genderovému řádu státního socialismu (Socialist-wise Patriarchy: on Gender Order of State Socialism)' (2007) 8 Gender, rovné příležitosti, výzkum 34, 41. Cf. chapter 4(2.3).

[308] Engels, 'Origin'.

The fact that Marxism saw the emancipation of women as a necessary part of the project of human emancipation,[309] as well as the three-fold plan can be seen as positive. However, the primary emphasis on private property and class remained problematic. In her criticism of Marxism, radical feminist Catherine MacKinnon pointed out that

> a theory that exempts a favoured male group [the workers] from the problem of male dominance necessarily evades confronting male power over women as a distinctive form of power, interrelated with the class structure but neither derivative from nor a side effect of it.[310]

Similarly, socialist feminist Alison Jaggar notes that Marxism was capable of showing how the sexual division of labour benefited capital, but failed to look at how it benefited men:[311]

> From the point of view of Marxist political economy, men have no special privileges and there are no special needs and interests that are shared by women and which are in opposition to the interests of men.[312]

Arguably, this blinded the Marxist-Leninists as well as State Socialist ideologues to specifically gendered forms of oppression. By reducing all inequality and oppression to class and economics, they were unable to explain why women were more liable to be subjected to rape, to physical abuse, to sexual objectification and

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[309] This is a position taken by for example Alena Köhler-Wagnerová, *Die Frau im Sozialismus, Beispiel ČSSR* (Hoffmann und Campe 1974), 13.

[310] MacKinnon, *Toward*, 34.

[311] Jaggar, *Feminist*.

[312] Ibid, 78.

harassment,[313] as well as to see cultural gender biases and the harm they caused women in both the public and private sphere.

3.2 Biology vs society

The revolutionary character of Marxism was to a large extent premised on the realization that 'class' was a social construct, that it was contingent on external conditions; that it was therefore not inevitable and was changeable. This realization did not extend to gender. Alison Jaggar has observed that the Marxist understanding of women's nature was very ambiguous. On the one hand, Marxists 'emphasise[d] that women's subordination result[ed] not from biology, but from the social phenomenon of class.'[314] They imagined that through the abolition of sexual distinction in the market, an 'androgynous future'[315] was possible. On the other, it saw 'human nature as being biologically sexed', believed in 'the division of labour in the sexual act',[316] understood sexuality in a gendered way,[317] and believed that women's

[313] Ibid, 77. Cf. chapter 4(1.4).

[314] Ibid, 67.

[315] Ibid, 67.

[316] Ibid, 67-68.

[317] Both Marx and Engels took for granted that men's sexual drive was biologically stronger. Engels, according to Jaggar, for example assumed that 'women had to overcome men's resistance in order to secure the restrictions of sexual relations to a single partner.' Engels in *Origin*, summarized by ibid, 82. This can be contrasted with Bebel who saw both sexes as equal in their sexuality, and thought that both should be treated as such as regards the 'gratification of the identical natural impulse'. August Bebel and Daniel De Leon, *Woman under socialism* (Labor News Co. 1904), 146. For example his account of prostitution was thus constructivist – it saw prostitution as tied to particular historical forces, rather than to men's or women's inherent, essential biology or nature.

role in the home and with children was 'natural' and - in Marx's words - 'based on a purely physiological foundation'.[318]

As a result, Marxism-Leninism united the treatment of some phenomena as biological (roles of men and women in the home) and others as socially constructed (roles of classes). It also united an assertion of sameness (men and women are the same human beings for the purposes of paid work) with an insistence on difference (biological difference which determines roles in the home). This 'uniting' of dichotomies was not done reflectively or critically, and not in a gender-progressive way. Jaggar summarises:

> By obscuring women's oppression, Marxist theory provides a rationale for its perpetuation. The biologistic conception of procreation legitimates women's continuing responsibility for procreative labour. This responsibility, in turn, hinders women's full participation in non-procreative labour and legitimates sex-segregation in that sphere. At the same time, the biologistic conception of procreation leads to the devaluation of procreative labour: women's work may be socially necessary, but it is not fully historical and hence not fully human work. Similarly, the biologistic assumption of heterosexuality, together with the view that men's sex drive is biologically determined to be stronger than that of women, legitimates sexual harassment and rape.[319]

In Czechoslovak State Socialist policy, the collapsing of constructivism and essentialism as well as of sameness and difference was revealed in the policy of 'public equality' complemented by 'private difference'. Although women were pulled into the public sphere of work and politics, 'the biologistic conception of procreation legitim[ized] women's continuing responsibility for procreative labour'.[320] As I discuss in chapter 2 below, this manifested itself in pro-family policies which enabled

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[318] From Capital, cited in Jaggar, *Feminist*, 68.

[319] Ibid, 78.

[320] Ibid, 78.

motherhood but completely ignored fatherhood.[321] And biologistic assumptions about sexuality contributed to the inability of the socialist state to address issues of gender-based violence in a gender-progressive way.

3.3 Production vs reproduction

Finally, an important tenet of Marxist-Leninist economic theory which had repercussions for State Socialist policies toward women was the distinction between production and reproduction.[322] In Marxist theory, productive labour could be sold on the market. It was seen to have exchange-value and as such was a source of surplus-value.[323] Reproduction of labour power, consisting of the daily maintenance of labour power, such as being taken care of in the home, and of the biological reproduction and socialization of the future labour force,[324] were not seen as productive.[325] Jaggar has shown that for example housework was considered not only as 'being outside the market, but as being outside of production altogether'.[326] Heitlinger notes that while there were some Soviet theorists who argued for the conceptual inclusion of housework into production,[327] in practice, only 'labour that [wa]s eventually

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[321] Cf. chapters 2 and 4(1.2).

[322] Jaggar, *Feminist*, 76-77; Heitlinger, *Women*, 24 ff.

[323] Heitlinger, *Women*, 24.

[324] Ibid, 24.

[325] Marxist theory distinguished between value for use (the utility of consuming a good) and value for exchange (when a commodity is traded on a market). While production for use was typical for pre-capitalist societies, Marxism analyzed most production under capitalism as production for exchange, basically ignoring housework and other non-industrial production, such as the labour of the self-employed such as peasants.

[326] Jaggar, *Feminist*, 75.

[327] Eg S. G. Strumilin. Heitlinger, *Women*, 25.

embodied in a material product'[328] was counted by the Soviet Union as productive. As a result,

> labour involved in administration and public services (the latter including institutionalized forms of social reproduction of labour power) came to be regarded as socially necessary, but unproductive. Family-based housework was not even considered.[329]

Before I elaborate on the practical negative consequences of the distinction for women, a comment should be made on how the original Marxist-Leninist critique of capitalism turned into prescription for socialism. Much of Marxists-Leninist writing was dedicated to the analysis of capitalism, much less to what socialism or communism would look like. As a result, I believe, socialist states often actually ended up replicating what Marxism saw and criticised under capitalism. The critical description of production and reproduction under capitalism – for lack of presented alternatives – became also the framework for assessing labour and its worth under State Socialism. This assessment was quite obviously androcentric – valuing traditionally male work in society over traditionally women's work. But this gender bias, in reality and in its own theoretical assumptions, remained unseen by Marxist-Leninists and the socialist states.

As could be expected, the material consequences of this distinction between production and reproduction were gendered too – the centrally-distributed resources were 'allocated to the sphere of the economy defined as the most productive – heavy industry'.[330] This meant that neither public services (laundries, cookeries,

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[328] Ibid, 25.

[329] Ibid.

[330] Ibid. On valuation of women's work, see chapter 3(3; 4).

childcare…) nor the development and production of domestic appliances that could ease the burden of housework for women were properly funded.[331] I argue below in chapter 3 that this different understanding of production and reproduction had repercussions for the gender wage gap too – the wage sex segregation of the market (higher wages in men-dominated heavy industry and much lower wages in women-dominated light and service industry) was justified on the theoretical level and therefore unimpeachable.

[331] In a capitalist system, where supply is dictated by demand, the question of availability (and cost) is determined by whether and how much are individuals willing to pay. Under a State Socialist system of central-planning, the question was how much was the state willing to invest into the production of a particular good or the availability of a particular service. The fact that women would have bought certain products or used certain services did in itself nothing for their availability.

CHAPTER 2

THE THREE STAGES OF REGULATION OF GENDER

The question as to whether State Socialism 'liberated' women or equalized the relationship of the sexes, is often answered by commentators with a 'yes, but'.[332] The 'yes' refers to the empowerment of women in the public sphere, especially in access to education, work and politics. Possibly the most obvious 'but' is that there was a marked lack of empowerment of women in the family - traditional gender roles were retained in the home and women suffered from a triple burden of full-time work, housework and childcare.[333] I document and discuss this development in this chapter.

But the picture is more complex - the period of State Socialism was not homogeneous and different emphases can be identified during the different 'stages' of development. In this chapter, which is organized chronologically, I argue that an original revolutionary zeal of the Stalinist period of the 1950s, which modernized, emancipated and equalized, began to be challenged during the 'political thawing' of

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[332] Scott frames this question in terms of 'liberation'; Scott, *Does socialism*. See also Hana Havelková, 'Women In and After a „Classless" Society' in Christine Zmroczek and Pat Mahony (eds), *Women and Social Class - International Feminist Perspectives* (Taylor and Francis/UCL 1999); Vodochodský, 'Patriarchát', 38, among others.

[333] Sharon L. Wolchik, 'Introduction' in Sharon L. Wolchik and Alfred G. Meyer (eds), *Women, state, and party in Eastern Europe* (Duke University Press 1985), 7-8. See also Suzanne LaFont, 'One step forward, two steps back: women in the post-communist states' (2001) 34 Communist and Post-Communist Studies 203.

the 1960s and became eventually hollowed and outweighed by pro-maternity and pro-family policies aiming at population growth during the Normalization of the 1970s and the 1980s. I distinguish three different stages of gender equality under State Socialism: a period of Equalization during Stalinism (section 1); a period of Reflection during Reform (section 2); and an era of the Family during Normalization (section 3).[334] The chapter looks mainly at the areas identified as comprising the 'woman question' by the socialist state:[335] family and work.[336]

This chapter offers two main observations about the development of legal regulation of women and gender. First, there was a regression in the modernization of women's status and equality during the later stages of the State Socialist period. Second, the period of 'political thawing' in the 1960s was distinct – and needs to be assessed separately -, and its role with regards to gender was problematic. In this period, the emergent political pluralism brought challenges to official narratives of 'equality achieved' from women (organized and individual), but it also brought challenges by experts to the concept and policy of equality of the sexes.

Both of my observations allow for a more nuanced analysis of the continuities and discontinuities in conceptualisations of gender equality between State Socialism

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[334] Existing literature usually discerns two periods: 1) an emancipatory, equalizing, revolutionary and activist stage of the late 1940s and 1950s; and 2) a family-oriented, conservative and stability-centred one in the 1970s and 1980s. Vodochodský, 'Patriarchát', 38. See also Alena Wagnerová, 'Laudatio Linda Šmausová – žena – človek – vědkyně – přítelkyně: curiculum velice osobní' in Libora Oates-Indruchová (ed), *Tvrdošíjnost myšlenky Od feministické kriminologie k teorii genderu* (SLON 2011), 15; Scott, *Does socialism*, 1; Wolchik, 'The Precommunist Legacy', 42. A more differentiated periodization is offered by Sharon L. Wolchik, 'Elite Strategy Toward Women in Czechoslovaia: Liberation or Mobilization' (1981) 14 Studies in Comparative Communism 123; or Hana Hašková and Zuzana Uhde (eds), *Women and social citizenship in Czech society: continuity and change* (SOÚ 2009).

[335] Bauerová and Bártová, *Proměny ženy*; Radvanová, *Žena a právo*.

[336] This results in an important limitation - the official silence surrounding issues ignored by the state policy, such as gender-based violence or LGBT rights, is not remedied here. I discuss it in in chapter 4(1).

and Transition. The legal framework inherited in Transition came from the late period of Normalization, which supported and entrenched difference between the sexes, especially in the family. A woman was no longer characterized as the worker and active citizen as she had been in the 1950s; she was characterized as the wife who cared for her marriage and the mother who cared for her family. When claiming, in the 1990s, that gender equality needed no further attention as it had been addressed and achieved under State Socialism,[337] many Czechs did not realize that what was in fact inherited was pro-family and pro-motherhood, but not necessarily pro-gender-equality policies. At the same time, what became the scarecrow in the 1990s was the earlier model of equality, exemplified by a female tractor driver of the 1950s. The Transition-period rhetoric against 'state feminism' and forcible emancipation was thus distancing itself from policies that had not been current for about three decades.

The 1960s also played a particular role in Transition. The period of political thawing and pluralism, which emphasised greater economic freedoms, prepared the ground for Transition's liberalism. The challenges to the efficiency of women's work, full equality and collective childcare as well as the narrative of freedom and choice which became prominent in Transition, were in some cases a reoccurrence, in some a continuation, of the debates which led to the Prague Spring.[338]

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[337] For examples of this position among MPs, see chapter 7(3.4).

[338] This has been also noted by Alena Heitlinger, 'The Impact of the Transition from Communism on the Status of Women in the Czech and Slovak Republics' in Nanette Funk and Magda Mueller (eds), *Gender Politics and Post-Communism* (Routledge 1993), 97.

1 Equalization (1948-1962)

I noted in chapter 1 that two trends characterized the pre-1948 period with regards to the legal treatment of women and the relationship of the sexes: 1) equalization of the legal status of men and women, and 2) the increase in the social protection of women. Both continued and were enhanced after 1948. After the Communist take-over, the 'equal rights of men and women' were earnestly pursued as a policy goal. The period of late the 1940s and 1950s was characterized by an emphasis on women's access into the public sphere of work, education and politics. The legal situation of women improved in terms of equalization of legal status of men and women (especially family law), and loosening of some conservative restrictions on women (legalization of abortion and liberalization of divorce). During this period, some of the limits of the interwar period, which embraced women's public equality but shied away from interfering with the family,[339] were overcome. Stalinist legislation was not to be entirely kept out of the family.

The 1950s was the period when the East did overtake the West with regards to equality of the sexes. The relative backwardness of the West was noted by Prague Spring émigrés. Wagnerová, who left Czechoslovakia in 1969 for West Germany, remembers:

> As far as equal standing of women was concerned, we felt [in West Germany] as in the developing world; as if someone brought us back twenty years, to the times of our mothers and grandmothers. Like them, women [in Western Germany] left their work with the birth of the first child, or even already upon marriage [....,] there were no crèches and most kindergartens were open from 9 am till noon only. For the first time in our lives we experienced what it meant not to have one's own status and to be

[339] Feinberg, *Elusive Equality*, 99 and 128.

> defined through the status of one's husband [...]. It was an unpleasant surprise; a step back.[340]

1.1 Gender equality as a constitutional principle

Equality of men and women was affirmed in both[341] socialist Constitutions. The constitutional principle of equal rights of men and women was applied by activist Stalinist courts,[342] to the point of disapplying conflicting statutory provisions. So, for instance, a Regional Court in 1949 refused to grant a husband the exclusive right to decide over the couple's domicile, based on the equality provision of the Constitution. The fact that the wife refused to live with the husband's parents was not considered a ground for divorce, notwithstanding the fact that the then still valid General Civil Code[343] stipulated to the contrary.[344] Another Regional Court in the same year disapplied the criminal provision of the 1852 Criminal Code[345] on wife abduction (criminalizing marital infidelity), stating that it aimed at protecting only the husband's interests, which was incompatible with the constitutional equality guarantee.[346] This gender-progressive judicial activism and pro-equality engagement died out during the second half of 1950s and was not to be repeated.[347]

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[340] Wagnerová, 'Laudatio', 15.

[341] The 1948 and 1960 Constitutions, cf. chapter 3(1).

[342] The 1950s was a period of judicial activism. Kühn, 'Worlds Apart'; Kühn, *Aplikace*, passim.

[343] The Austrian Allgemeines Bürgerliches Gesetzbuch is in amended form still valid law in Austria.

[344] Judgment of the Regional Court of Košice Co 153/1949.

[345] Sec. 96 of the 117/1852 Imperial Criminal Code.

[346] Judgment of the Regional Court in Brno To VI 37/49.

[347] Kühn, 'Worlds Apart'; Kühn, *Aplikace*, passim.

1.2 Equality in the family

The 1948 Constitution put 'marriage, family and motherhood […] under the protection of the state'.[348] The new Act on Family Law of 1949 modernized family relationships and brought about de jure equality between husband and wife. The reform caught the imagination of the legal community – in the first few years of State Socialism, it was one of the most discussed topics of legal scholarship in the two studied periodicals, *Právník* and *Socialistická zákonnost*.

The new Act abandoned the legal institution of 'head of household' (*hlava rodiny*) which stipulated that the husband led the household, decided the place of residence, and was owed help and obedience of his instructions by his wife.[349] The previously separate roles of husbands (to see to the financial support and maintenance of the children) and wives (to care of their physical education and health) were eliminated[350] - the new Act stipulated equality of spouses in the marriage. 'Domestic chastisement' was no longer permitted by criminal law.[351] The new Act also abolished a previously existing right of annulment for a husband who found out his wife was already pregnant upon marriage.[352]

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[348] Sec. 10(1) 1948 Constitution.

[349] Sec. 91 and 92 946/1811.

[350] Sec. 141 ibid.

[351] Imperial Criminal Code as valid in 1950 counted with chastisement of spouse and children and only addressed excesses.

[352] Previously Sec. 58 of 946/1811.

The spouses also became equal in relation to their children[353] - the provision on 'paternal power' (*moc otcovská*), which gave the father the sole right to decide over his children's choice of occupation and property, was abolished.[354] This was thus a shift away not only from patriarchy in the sense of gender power of men over women, but also a termination of the power of *pater familias*, in the Roman Law sense, over his family.[355]

Economic relationships between the spouses were also equalized. The default option of communal property of the spouses did not exist under the pre-Communist regime.[356] If not otherwise contracted, the property was retained individually; in case of doubt, it was presumed the husband was the owner.[357] Similarly, unless challenged by the wife, it was presumed that the wife gave the husband rights of management of her property.[358] The new Act on Family created in 1949 a statutory community of marital property (*zákonné společenství majetkové*),[359] which made all acquired property co-owned by both spouses, and the management of this property belonged to both spouses equally.[360]

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[353] Sec. 15, 16 and 55 265/1949.

[354] Sec. 147 946/1811, in its last valid version.

[355] For the distinction of these two meanings of patriarchy, see eg Gerda Lerner, *The creation of patriarchy* (Oxford University Press 1986), 239.

[356] Sec. 1233 of 946/1811; according to it, a communal property could be established contractually.

[357] Sec. 1237 ibid.

[358] Sec. 1238 ibid.

[359] Sec. 22 265/1949; this was a dispositive provision – the spouses count contract otherwise.

[360] Sec. 23 ibid.

The Socialist State also put great emphasis on child maintenance, both during and after marriage.[361] The constitutional equalization of 'legitimate' and 'illegitimate' children[362] was accompanied by obligations on fathers towards children of unmarried mothers.[363] The enforceability of child maintenance after divorce was improved through the docking of wages by the socialist employer.[364] A system of state involvement in cases of non-payments of child support[365] was instituted in 1948.[366] All of these measures had an important gender dimension, as custody of children tended to be awarded to the mother and the high costs of childrearing and insufficient financial support childcare after divorce were a common cause of destitution for divorcees.

Divorce laws were also gradually liberalized. Admittedly, the pre-1948 General Civil Code[367] did not distinguish between men and women in access to divorce, but divorce was very limited in cases lacking the consent of both parties. The new Act broadened access to divorce, even though the spouse who caused the breakdown could not be granted divorce without the consent of the other spouse (who

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[361] Sec. 72 ibid.

[362] Sec. 11(2) 1948 Constitution. Previously, their position was not equal, but limited maintenance obligations of the father existed. Sec. 155-171 of 946/1811.

[363] Sec. 76 265/1949.

[364] While the 'docking of wages' existed previously (Sec. 532 142/1950), the mechanism was gradually modified to be more effective. So for example in 1955, the Statutory measure No. 57/1955 increased obligatory communications between the court and the employer, and made an executive title for docking of child alimony applicable to all future employers. See also Jan Gemrich, 'Nová úprava vymáhání pohledávek na úhradu osobních potřeb nezletilých dětí (New provisions on execution of outstanding receivables for allowance needs of minor children)' [1955] Socialistická zákonnost 605.

[365] These provisions were discontinued in Transition; I discuss the issues in greater detail in chapter 6(1; 2).

[366] 57/1948.

[367] In its last valid version.

was not at fault).[368] The requirement of proof of fault was alleviated in 1955[369] and finally abolished by the new Family Code in 1963.[370]

It is worth noting that the Communist Party was not the first to propose such changes. A reform of family law (and the civil code more generally) had been debated but never passed during the entire period of the First Republic. A version of an Act on Family Law was drafted by non-communist lawyers and politicians.[371] Unlike during the First Republic, when, as Feinberg noted, '[w]omen might have [had] an equal say in the voting booth, but inside their homes they remained subject to their husband's authority',[372] the Communist government was committed to formal equality in the family. The notion of equality went so far, that the maintenance of a divorced spouse, a provision which traditionally protects economically inactive wives from economic decline after divorce, was abolished. This development, founded on the presumption of full employment of women and their economic independence, however, outstripped the actual development of women's status, and the provision was reintroduced in 1963 in a gender neutral form.[373]

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[368] Sec 30(2) 265/1949.

[369] The new provision allowed for divorce without mutual consent if spouses were not cohabiting for a period of time. Sec. 30(4) ibid as amended by 61/1955.

[370] 94/1963.

[371] Feinberg, *Elusive Equality*, 41-72.

[372] Ibid, 99, 128.

[373] Sec. 92 94/1963

1.2.1 New family?

Conceptually, many of these provisions can be seen as a part of a revolutionary program of weakening the family. Dana Hamplová, a historian writing during Transition, observes that in the 1950s, this was an explicit aim found in the propaganda as well as practical policies.[374] She notes that

> Family is dangerous to revolutions, not only because it competes [with the revolution] for loyalty, but also because within it, existing values and norms are perpetuated and passed on.[375]

This analysis is correct when one looks at the legal provisions, but might be too strong when legal academic commentary is taken into account. Although law made the dissolution of families easier and the outright discrimination toward children of unwed parents was abolished, legal scholarship contained a strong marital normativity: children of unmarried mothers were still considered a social evil (and a capitalist hang-over),[376] marriages were lauded as a sure sign of 'good economic and political circumstances'[377] and the courts were instructed to prevent 'impetuous and frivolous divorces'.[378]

What did happen during the Stalinist period, however, was an increase in the public involvement of state and law in the family. Many issues previously considered a private matter became a public concern. The state became involved both by enacting

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[374] Dana Hamplová, 'Stručné poznámky o ideových přístupech k rodině v období socialismu' Cahier du CEFRES <http://www.cefres.cz/pdf/c22/hamplova_2001_ideove_pristupy_rodina_socialismus.pdf> accessed March 2011.

[375] Ibid, 2.

[376] Zdeňka Patschová, 'Tři roky boje za novou rodinu' [1953] Socialistická zákonnost 14, 15.

[377] Ibid, 18.

[378] Ibid, 18.

legislation which ran contrary to some traditional practices – with relation to the roles of the spouses in the family or the right to divorce. But it also assumed an active role through its institutions. For example the child support obligation of fathers towards their children was considered 'an obligation of an individual toward society'[379] and its enforcement was fully in the hands of society – the state as employer[380] docked the liable parent's wages. The non-payment of alimony was a criminal offence.[381] And the public 'procurator'[382] was given competence to initiate proceedings in matters of paternity *ex officio,* to establish who was liable for child support.[383] The fact that the state had no qualms about interfering in issues previously considered private, was positive during the early Stalinist period when the aims of the interference were still gender-progressive. As I discuss below, however, the socialist state gradually abandoned its revolutionary zeal, and other issues, often in conflict with gender equality, gained importance.

In the international context, a noteworthy feature of the Eastern push for equality of the sexes was the early and broad legalization of abortion, to which I now turn.

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[379] Ibid, 21.

[380] Nominally, the employers were 'socialist organizations'. But due to high levels of central planning, the freedom and discretion to make managerial decisions of these units was very low.

[381] Sec. 210 86/1950 and Sec. 213 140/1961.

[382] N.294.

[383] Josef Glos and Arnošt Kafka, 'Prokurátorská žaloba o popření otcovství' [1953] Socialistická zákonnost 92

1.3 Reproduction – protecting the health of women

The socialist state legalized abortion in 1957 by adopting the Act on the Artificial Interruption of Pregnancy.[384] The use of the term 'interruption of pregnancy' was significant – it centred on pregnancy, and whether the woman would continue or interrupt it, and not the foetus, and whether it would stay or be aborted.

The Act stipulated that abortions could be performed for health as well as other important reasons. The latter included the age of the woman, her number of children, the loss of husband or his invalidity, breakdown of the family, the prevalent financial responsibility the woman would have for the family or the child, a difficulty connected to the pregnancy of an unmarried woman, and a circumstance which indicated that the pregnancy was caused by rape or another crime.[385] Permission of an abortion committee was required. The Act also abolished criminal liability of the woman and of the medical personnel legally performing an abortion.[386]

The legislation was part of a broader policy in socialist countries[387] and was very progressive for its time, compared to the West. Unlike later pro-choice policy shifts in the West, however, the concern was arguably not in guaranteeing women's individual reproductive autonomy, but with public health problems caused by illegal abortions. In the words of the socialist legislator, the Act was adopted:

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[384] 68/1957.

[385] Sec. 2(2) Ordinance No 249/1957 of the Ministry of Health.

[386] Former Sec. 218 86/1950. A criminal provision, however, punished the performance of abortions done outside the scope of the Act.

[387] East Germany liberalized abortion in 1947. The Soviet Union, which had legalized abortion after the 1917 Revolution, but re-criminalized in 1937, legalized it again in 1955. Bulgaria, Romania, Poland, Hungary and Czechoslovakia followed. Scott, *Does socialism*, 104.

> In order to further care for a healthy development of the family, endangered by damage caused to health and life of women by interruptions done by unconscientious persons outside of health establishments.[388]

More problematically, the availability of the 'interruption' was not accompanied by full availability of contraceptives[389] – abortion became seen as the main way to prevent unwanted pregnancies,[390] which further problematizes abortion as a 'right'.

Aside from formal equality in law, the other two parts of Engels' three-pronged plan to address the 'woman question' were to bring women into the sphere of paid labour and to liberate them from 'household drudgery'.[391] It is to work and care-related welfare that I now turn.

1.4 Work and Welfare

1.4.1 Equal access to paid work for women – a right or an obligation?

Women's access to the labour market, education and politics[392] were the main achievements of the 1950s.[393] In terms of access to paid labour, the 1948 Constitution

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[388] Sec. 1 68/1957.

[389] Scott, *Does socialism*, 150-153.

[390] Alena Heitlinger, 'Passage to Motherhood: Personal and Social 'Management' of Reproduction in Czechoslovakia in the 1980s' in Sharon L. and Alfred G. Meyer Wolchik (ed), *Women, State, and Party in Eastern Europe* (Duke UP 1985); Květa Jechová, 'Matky a děti, chtěné i nechtěné. Mateřství v reálném socialismu' in *Opozice a společnost po roce 1948* (pg 10-73, Ústav pro soudobé dějiny 2009).

[391] Zetkin, 'Lenin'.

[392] The latter through party quota. I supply the data for all three in chapter 3(2).

[393] For a comparative study, which shows how the East overtook the West during this period, see Sharon L. Wolchik, 'The Status of Women in a Socialist Order: Czechoslovakia, 1948-1978' (1979) 38 Slavic Review 583.

guaranteed a right to work,[394] but it also stipulated an obligation to work.[395] The policy had an important ideological foundation – Marxism-Leninism disdained parasitism of the propertied classes and considered work essential for the creation of socialism and the socialist human being.[396] But there was also the important practical reason of economic necessity – the mobilization was needed to fill post-war shortages of labour supply in agriculture and industry.[397] When the drive to equalize family law is read in this light, it can be interpreted as mainly instrumental to the liberation of the female workforce. Indeed, a 1953 legal article entitled 'Three years of our fight for a new family', stated:

> The mobilizing character of our new family law consists in it helping to destroy capitalist anachronisms in thinking as far as old ideas and opinions are concerned, and *actively helps to develop a productive labour force*, with its new understanding of today's woman's tasks in society and *the necessity of her reinsertion into socially important work*.[398]

The obligation to work was explicitly specified in some statutes,[399] and was enforced through a web of administrative obligations and administrative and criminal offences. For example the provision on 'parasitism' criminalized 'make a living

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[394] Art. III(3), Sec. 26 1948 Constitution.

[395] Art. III(1) ibid.

[396] As previously elaborated on in Barbara Havelková, 'Pracovní právo' in KomPrávo, 494-499. A more sinister aspect of the obligation to work was its use against political opponents. Those who avoided work, endangered the government of people's democracy or its economic life were sent to forced labour camps (eg Sec. 12 88/1950 ; Sec. 2(1)a 247/1948).

[397] As a matter of fact, the obligation to work started before the Communist takeover. It existed in Nazi occupied Protectorate Bohemia and Moravia (for discussion, see J. W. Bruegel and 'Social Policy in Occupied Czechoslovakia, 1938-1944' (1945) 52 International Labour Review 154). A presidential decree created a general obligation already in 1945 (Presidential Decree 88/1945). The decree was abolished in 1958 (70/1958.), but, according to contemporary labour law scholars, was used rarely in the 1950s (Witz and Hromada, *Československé*, 40).

[398] Patschová, 'Tři roky', 15, emphasis mine.

[399] 88/1945; Government ordinance No 40/1953.

unfairly and avoid honest work',[400] and was used against prostitutes, among others.[401] The legal institution of 'obligation to work', however, was never absolute, and different groups of women were either exempt (pregnant women) or were lower on the list of groups to be 'mobilized' (married women).[402]

The right to work was considered positive by state socialist commentators,[403] and would also be seen as positive from a perspective of Western middle-class women who, during this same period, had to fight for access to education, work and public life.[404] Working women, whether working-class women who had historically always worked out of necessity,[405] or most Czechoslovak women who were in 1950s made to work (overwhelmingly full-time), ended up seeing things differently. Indeed when the right to work, and in the case of State Socialist Czechoslovakia the expectation and even the legal obligation to work was not accompanied by a change in the division of household labour and childcare, it lead to a triple burden for women. By the early 1960s, women were calling for the option to stay home with their children, a discussion I return to in section 2 below. Finally, while the 1948 Constitution

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[400] The provision was inserted into criminal law in 1956 by 63/1956 A similar offences existed in administrative law: offence of work avoidance in Sec.72 88/1950; Sec.19(c) 38/1961 , on local people's courts; 58/1965 ; Sec. 10 150/1969.

[401] I discussed this in greater detail in Havelková, 'MSt. thesis'.

[402] Eg the 88/1945 stipulated that, if urgently necessary in public interest, men aged 16-45 and women aged 18-45 could be allocated to work. Some groups, however, were exempt (among them soldiers, students and pregnant women), and a progression was set (unmarried before married persons, etc).

[403] Bauerová and Bártová, *Proměny ženy*, 188.

[404] The 'frustrated housewife' was represented for example by Betty Friedan, *The Feminine Mystique* (Dell 1974).

[405] Fredman points out that seeing work outside of home as liberating is a typically middle-class perspective. Fredman, *Women*, 101-103 and 105-106.

guaranteed equal access to all occupations[406] as well as fair[407] pay[408] and proclamations on equality were scattered throughout the legal system, women were concentrated in low-paying industries and positions,[409] and a gender wage gap persisted during the entire period of State Socialism. I present the data and discuss the causes of this persisting inequality in chapter 3 below.

1.4.2 Protective provisions and welfare

Alongside equal access measures, new protective provisions were enacted. In labour law, maternity leave of 18 weeks was introduced in 1950.[410] Individual protective measures, especially in the area of health and safety, were being adopted throughout the 1950s. This happened in an uncoordinated, sector-specific manner, however; so that in 1963, they were described by a labour law scholar, as 'imperfect, outdated and often practically impossible to find'.[411] It was not until the Labour Code of 1965 that these provisions were unified.

In social security law, birth grants (*porodné*) and a financial maternity help for up to 18 weeks (*peněžitá pomoc v mateřství*) were enacted in 1948.[412] Legislation on sickness insurance guaranteed women full free medical and birthing care, whether in

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[406] Sec. 1(2) 1948 Constitution.

[407] Equal pay for men and women was stipulated already Ordinance No 74/1945. However, it only stipulated equal wage for equal work, not for work of equal value.

[408] Sec. 27(4) 1948 Constitution.

[409] I discuss horizontal and vertical segregation in more detail in chapter 3(2).

[410] Sec. 13 66/1950.

[411] Jan Polášek, 'O zvláštní úpravě pracovních podmínek žen a mladistvých podle návrhu zásad zákoníku práce' [1963] Socialistická zákonnost 183, 184.

[412] Sec. 44 99/1948.

hospitals or at home and provided free layettes.[413] Social security legislation further benefited women - the periods of childcare by women were counted toward pension benefits as equivalent to periods of employment.[414] Attention was also paid to collectivization of childcare and housework. The number of crèches and kindergartens rose from a total of 2,500 in 1936 to 67,000 in 1967.[415] Many laundries and cafeterias in schools and in the workplace were created and a specialized co-operative chain offering household services, called 'The Liberated Household', was established.[416]

In the collectivization of childcare and housework, the socialist state was trying to make good on its promise of liberating women from 'household drudgery'. The measures, however, were never comprehensive enough, and, more importantly, without a change in the role of men in the family, the triple burden of women was not truly eliminated. As I discuss in section 2 below, from the 1960s onwards, the emphasis on bringing childcare and housework into the public sphere was replaced by supporting the woman to stay at home.

2 Reflection (1962-1968)

In the 1960s, the budding political pluralism meant that the formerly (relatively) unified official front on gender equality became diversified. On the one hand, women's organizations brought challenges to official narratives of 'equality

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[413] Sec. 32 ibid. Layette is a ection of clothing for a newborn child.

[414] Sec. 6 55/1956.

[415] Scott, *Does socialism*, 92; Milan Kučera, 'Rodinná politika a její demografické důsledky v socialistickém Československu' <http://www.cefres.cz/pdf/c22/kucera_2001_rodinna_politika_demografie_cssr.pdf> accessed March 2011, 11.

[416] Scott, *Does socialism*, 94 ff.

achieved'.[417] For Scott, this was a period of 'awakening'.[418] A 1968 statement by the Czechoslovak Union of Women[419] documents the discontent with existing policies:

> […] we are expressing our dissatisfaction with the fact that now, as in the past, the state and the party bodies do not take into account the complex and difficult situation in which Czechoslovak women are living… It is no longer possible to contemplate in silence discrimination against women in the matter of financial reward, particularly in the shifts towards the lower limits of wage categories and in the current tax system. The condition of women is further aggravated by the low standard of services and trade. Only a few women occupy leading positions, even in such obviously feminized sectors as the educational system, health service, textile and food industries, from factories to ministries […].[420]

On the other hand, political thawing and more open policy debates brought challenges to the goal of equality between the sexes itself. Although the 1960 Constitution contained even greater guarantees of equality of the sexes,[421] it ushered in a period when these rights were challenged and the emphasis on emancipation of women faded.[422]

Economists challenged the efficiency of gender equality policies, especially of women's work and of collective childcare.[423] The challenges to women's work were

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[417] Heitlinger, *Women*, 65-76.

[418] Scott, *Does socialism*.

[419] The CUW was a new women's organization created in 1967. Previously, a centralized and CP-dependent Central Committee of Women existed. Heitlinger, *Women*, 68-69.

[420] Published in *Vlasta*, No 17, 24th April 1968; cited from ibid, 70.

[421] Cf. chapter 3(1).

[422] According to Šimáčková, however, this fact was not restricted to equality of the sexes - each Czechoslovak socialist constitution 'opened a period which contradicted it, or rather headed somewhere else than the adopted and proclaimed constitution indicated'. Kateřina Šimáčková, 'Fiktivní nebo reálná ústava' in KomPrávo, 124.

[423] These debates did not appear in the legal periodicals but elsewhere. Květa Jechová, 'Cesta k emancipaci. Postavení ženy v české společnosti 20. století. Pokus o vymezení problému. (Path to emancipation. The position of women in Czech society in 20th century. An attempt to delimit the question)' in *Pět studií k dějinám české společnosti* (23-41, Ústav pro soudobé dějiny AV ČR 2008).

connected to claims of 'over-employment'.[424] As post-war reconstruction came to an end, the economy's need of labour supply lowered and productivity dropped. The female workforce – which was instrumentally pulled into paid labour at the time of need – was now being pushed out. Moreover, it was pointed out that collective childcare was expensive and that lower-earning women's contribution did not cover it.[425] Heitlinger perceptively commented that

> [t]o Lenin, analysing the question in somewhat abstract terms, the savings in labour time resulting from socialising housework would substantially cheapen the process. This impression was mistaken, for savings in time represent only one outcome of socialisation. Another arises when previously unpaid domestic labour becomes wage work and it commands payment in accordance with what is generally expected in the labour market, thus actually becoming more expensive. As a result, *very* great savings in labour time are necessary for the socialisation of domestic labour to become a viable economic proposition.[426]

The socialist state started to realize in the 1960s that it was too costly to provide childcare and housework services collectively, when women did it for free. These arguments against collective childcare were supported by psychologists, who stressed the importance of individual care[427] and argued that collectively raised children might suffer from deprivation.[428] Finally, the period was marked by a fear of a 'population crisis'[429] - overworked women were less and less keen to have many children and the

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[424] Scott, *Does socialism*, 126-133.

[425] Ibid, 126-133.

[426] Heitlinger, *Women*, 18.

[427] Hamplová, 'Stručné poznámky', 3.

[428] Josef Langmeier and Zdeněk Matějček, *Psychická deprivace v dětství* (SZdN 1963); Radvanová, *Žena a právo*, 98. See also Kučera, 'Rodinná politika'.

[429] Senta Radvanová, 'Zamyšlení nad připravovaným zákonem o poskytování příspěvku matkám malých dětí' [1969] Socialistická zákonnost 508, 509.

birth-rate considerably declined at the end of 1950s.[430] In expert debates as well as public opinion,[431] this led to a resurfacing of the notion of natural division of labour between men and women,[432] support for traditional individual child-raising in the family, and an emphasis on motherhood (2.1). The fight against the 'population crisis' included restrictions of the previously liberal abortion laws (2.2), as well as the introduction of generous maternity provisions (2.3.1). The fight against over-employment arguably encompassed a ban of certain types of work for all women, which – although apparently pro-women – pushed some women out of work (2.3.2).

2.1 Family – between equality and tradition

The question of family was revisited in the run-up to the adoption of a new family code in 1963. The importance of marriage and family was re-emphasised, in contrast to the Marxist expectation that its importance would lessen after the abolition of capitalism. A 1962 legal article stated that the 'questions of marriage and family as well as child-raising are continually at the centre of attention of socialist society'[433] and supported this claim by citing a speech by Nikita Khrushchev, then First Secretary of the CP of the Soviet Union, at the Party's XXII Congress:

> Those who say that the importance of family in the transition to communism decreases and eventually disappears are not right at all. In reality, the family under communism strengthens, family relationship are

[430] Scott, *Does socialism*, 104.

[431] Jechová, 'Cesta k emancipaci'.

[432] Ibid, 11.

[433] Milan Schiller, 'K návrhu osnovy zákona o právu rodinném' [1962] Socialistická zákonnost 168, 168.

> definitely cleaned of economic speculation and will reach highest levels of purity and strength.[434]

The socialist state was not consistent, however. Competing and contradictory policies and provisions co-existed in the family policy from 1960s onwards.[435] Equalizing and liberalizing projects continued alongside measures that strengthened the traditional traits in the institution of family. Two examples are discussed in more detail: 1) divorce - the abandonment of fault-testing liberalized marriage while the introduction of obligatory court reconciliation of spouses filing for divorce strengthened it; and 2) roles within the family - formally, the roles were further gender-neutralized, but the mother grew as the figure responsible for marriage, child-raising and house-making.

First, as far as divorce is concerned, the socialist state rejected the notion of the economic purpose of marriage and of it being a 'providing mechanism for a married woman'.[436] Thus, establishing fault, which was previously used to determine property settlements and alimony[437]and was a moral incentive for wives to lead impeccable lives and not file for divorce if they wanted to be economically secure, was no longer necessary. The testing of fault by the court in divorce proceedings was eliminated in 1963.[438] This arguably weakened marriage as it made divorces more accessible to spouses.

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[434] Ibid, 168.

[435] See also Gal and Kligman, *The politics*, 5.

[436] Milan Schiller and Vladimír Flégl, 'Několik poznámek k zákonu o právu rodinném' [1961] Socialistická zákonnost 177, 181. See also Zdeněk Číhal, 'O přípravách nového zákona o rodině' [1962] Socialistická zákonnost 597, 601.

[437] Schiller and Flégl, 'Několik poznámek'.

[438] 94/1963.

On the other hand, it was important to keep families together for the purposes of child-raising. The family, as imagined and reformed by the socialist state in the 1950s, no longer had a religious or an economic purpose, as it did pre-1948. Instead, it had an important 'social function […] of creating a favourable environment for the raising of children'[439] and was 'a tool to form the character of our youth'.[440] A new legal institution was thus introduced into the 1963 Code of Civil Procedure – an obligatory attempt by the court to reconcile spouses who applied for divorce (*řízení o smíření manželů*).[441] This made divorce proceedings more lengthy and onerous.[442]

Second, as far as roles in the family were concerned, throughout the State Socialist period, there was a strong express emphasis on the 'democratic family'. The importance of equality of the spouses continued to be affirmed.[443] This guaranteed women formal equality with men, but had also some negative consequences for women – the presumption of equality of women meant that post-divorce alimony[444] was limited to circumstances of qualified need and limited to five years after divorce.[445] Interestingly, the democratic character of the family applied to children as

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[439] Schiller and Flégl, 'Několik poznámek', 180.

[440] Schiller, 'K návrhu', 168.

[441] 99/1963. See also Miroslav Černý, 'Řízení o smíření manželů' [1965] Socialistická zákonnost 49; Jaroslav Radimský, 'Zkušenosti s řízením o smíření manželů' [1965] Socialistická zákonnost 24.

[442] The problems of the obligatory court reconciliation were noted by legal scholars relatively quickly after its adoption. Milan Schiller, 'Řízení o smíření manželů' [1965] Socialistická zákonnost 24. The legal Action program of 1968 considered its abolition. Vilém Másilko, 'Rozvod dohodou u bezdětných manželů' [1968] Socialistická zákonnost 680, 683.

[443] Eg Schiller and Flégl, 'Několik poznámek', 177 and 178.

[444] Post-divorce alimony was made available again in 1963. Sec. 92 94/1963

[445] The original proposal foresaw three years. Milan Černohubý, 'Příspěvek na výživu rozvedeného manžela' [1964] Socialistická zákonnost 38. The shorter time period was much preferred by legal academics.

well. The 'power-hierarchical position of parents' over children was criticized and eliminated - the legal institution of 'parental power' was abolished and changed into 'parental care'.[446]

But again, these ideas about new democratic socialist family and the formal legal equalization of roles of the spouses coexisted with other legal provisions which cemented the gender roles of spouses as 'fathers' and 'mothers'. All provisions regarding care of children – from maternity leave to connected benefits – were available only to women as I discuss in section 2.3.1 below. Men remained the 'breadwinners', for example for the purposes of discount on income tax for minor children.[447] I argue that these provisions portray more accurately the (lack of) aspirations of the Socialist State to reform the family than the formal legal equality expressed in the Family Code.

2.1.1 The triple burden

Thus, despite formal legal equality, women retained their traditional child-rearing and home-making duties. The practical consequence of full-time paid work[448] and the continued responsibility for children and home led to a triple[449] burden on women.[450] A Czechoslovak survey from the beginning of the 1960s showed that a woman with two children spent daily, on average, nine hours at work and commuting,

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[446] Schiller, 'K návrhu', 170.

[447] 76/1952 , and especially Sec. 16 Ordinance of the Ministry of Finance No 24/1967.

[448] Jiřina Šiklová, 'Are Women in Central and Eastern Europe Conservative?' in Nanette Funk and Magda Mueller (eds), *Gender Politics and Post-Communism: Reflections from Eastern Europe and the Former Soviet Union* (Routledge 1993), 75; Havelková, 'Women In and After', 78.

[449] If one counts paid work, childcare and housework separately.

[450] On the question of triple burden, see eg Wolchik, 'The Precommunist Legacy', 40.

five and a half hours shopping and taking care of the home, an hour and a half on children, an hour and 40 minutes on herself, and six hours sleeping. Her husband had four hours a day more free time than her.[451] Scott summarizes:

> Just when the American woman was starting to look around her and discover that her next-door neighbour felt as frustrated and unfulfilled as she did, the Czechoslovak woman was beginning to realize that the woman next door felt as overworked and exhausted as she did.[452]

Firestone's observation about Russia, that 'the roles of women were enlarged rather than redefined'[453] applies here as well.

This led to calls for greater protection and help for mothers and an emphasis on family and motherhood. As I said above, these calls came from experts who denounced the ineffectiveness of women's labour, censured women for 'deprivation' caused by collective care, and raised the alarm about the 'population crisis'. But these demands came from women as well. In 1968, the Czechoslovak Union of Women called for the option to stay home with their children.[454] The 'new system of direction' (*nová soustava řízení*), brought a liberal programme for the economy (and society) which supplied a narrative of choice. In 1969, a female legal scholar specializing in the position of women, criticized the previous (Equalization) period as

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[451] Cited in Scott, *Does socialism*, 106. For comparison within CEE and with the West, see Sharon L. Wolchik, 'Ideology and Equality' (1981) 13 Comparative Political Studies 445, 463.

[452] Scott, *Does socialism*, 109.

[453] Shulamith Firestone, *The Dialectic of Sex: The Case for Feminist Revolution* (London Cape 1971), 248.

[454] Action Program of the Czechoslovak Union of Women of 17th June 1968; cited in Radvanová, 'Zamyšlení', 509.

being too directive with the principle of equality of sexes when it 'coerced many, especially young mothers, into hasty return to their job':[455]

> A mechanical understanding of the equal standing of a woman in society has become antiquated. It came to the fore that even this idea [of equal rights] was a certain *expression of administrative manipulation with a person*, an *a priori* limitation of choice, where society – even for its own benefit – should enable such choice.[456]

Ironically, while the socialist state's push for equality became interpreted as pressure on women to work, the emphasis on freedom created the opposite pressure on women to stay home as mothers. While the idea of giving women more choice was laudable, the practice was culturally conservative. The late 1960s saw the introduction of many gender-specific pro-maternity provisions in the area of labour law and social policy which targeted women and cemented their role as mothers and housewives.

Two important things were missing from this policy. First, men were completely left out of the picture, i.e. they were workers and never carers. Second, women were asked to be both, workers and carers. In the 1950s the expectation was that they would be both at the same time. From the 1960s onwards, they were to be sometimes primarily workers (before having children or when the children were grown), sometimes primarily carers (while on maternity leave). What was not strived for was a true reconciliation of professional and private life, which would ideally encompass both men and women.

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[455] Ibid, 509.

[456] Ibid, 509; emphasis mine.

2.2 Reproduction in the times of the 'population crisis'

The Act on the artificial interruption of pregnancy and the ordinances implementing it were amended often during the period of State Socialism.[457] Several pro-population changes happened in the 1960s, which limited the accessibility of abortion. A 1961 Ordinance of the Ministry of Health included the possibility of inviting the responsible man (the would-be-father) or the parents of minor girls, thus inhibiting the freedom and limiting the privacy of the woman's request.[458] It also allowed the abortion committees to recommend to 'women (especially unwed mothers)' to give birth and then temporarily place their child in institutional state care, until they will be able to take care of the child themselves,[459] thus arguably valuing the existence of life over both, reproductive autonomy of the woman and the quality of life of the woman and child. In 1962, the obligation to appear before an abortion committee in the place of residence was stipulated. This arguably increased the anxiety connected with abortion as women might have feared that the abortion might become locally known[460] and made women's accounts of their circumstances more easily verifiable. It also had the effect of limiting the number of abortions for one woman, as women previously often 'shopped' around different districts to circumvent

[457] Between 1957 and the year 1980, nine ordinances or their amendments were passed. Scott, *Does socialism*

[458] Sec. 6 (1) Ordinance 104/1961.

[459] Sec. 6 (2) ibid.

[460] Notwithstanding the confidentiality obligations included in the Ordinances.

the cap of one abortion in 6 months.[461] After a period of free abortion, payments for abortions were reinstated in 1963[462] and increased again in 1964.[463] Gradually, the number of medical personnel on the interruption committee decreased and political and bureaucratic membership increased,[464] including members of the 'district population committee'.[465]

The latter change is an explicit reminder that the 'population-crisis' motivated many of these changes.[466] A 1965 law journal article asks 'to what extent is the possibility of legal interruption of pregnancy reconcilable with the current pro-natality population policy of our state'?[467] Some years later, this concern became legally expressed, when the opening provision of an implementing ordinance explicitly mentioned both, the health of the woman and the population growth, as important considerations.[468] The availability of contraception did not improve in this period.[469]

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[461] According to the demographer Fialová, as interviewed by and cited in Radka Dudová, 'Interrupce v socialistickém Československu z foucaultovské perspektivy' (2009) 10 Gender, rovné příležitosti, výzkum 25, 30.

[462] Sec. 11 Ordinance 126/1962.

[463] Sec. 11 ibid as amended by Ordinance of the Ministry of Health No 95/1964.

[464] In both Ordinance 104/1961 and Ordinance 126/1962.

[465] Sec. 2(b) Ordinance 126/1962.

[466] Scott, *Does socialism*, 104-107 and 138-164; see also Dudová, 'Interrupce'.

[467] Jiří Prokopec, 'K některým aspektům umělého přerušení těhotenství' [1965] Socialistická zákonnost 41, 41.

[468] Sec. 1 Ordinance of the Ministry of Health No 71/1973.

[469] For example, Scott notes that a Czechoslovak pill started to be produced in 1965, but the production was disrupted in 1969, so that the little success brought about by the availability of an oral contraceptive in shifting away from abortion as a primary tool of birth control form, was set back again. Scott, *Does socialism*, 150-153.

2.3 A turn from equality in paid work to care

As I foreshadowed in the Introduction, it is a great challenge for law to choose when to treat men and women the same, and when to treat them differently. Women are the same as men in their humanity and their potential, and with regards to these qualities, should be treated equally. But women are also different. Those who become mothers face disadvantage, both for the vulnerability connected to the physical aspects of pregnancy, birth and early motherhood, but also due to the vulnerabilities attached to the interdependent relationship between them and their children. Moreover, all women, whether mothers or not, face material and symbolic disadvantage connected to the gender-hierarchical organization of patriarchal societies.

I mentioned in section 1 that the socialist state put emphasis on equality between the sexes – it was enshrined in both socialist constitutions and the new Labour Code of 1965 proclaimed equal 'rights' for men and women as one of its basic principles.[470] However, as I argue in greater detail in chapter 3, these guarantees were not fully fledged equality rights, and, more importantly, did not contain an antidiscrimination guarantee. Moreover, from 1960s onwards, the law increasingly concentrated on treating women differently and on the protection and support of their motherhood.

[470] Art. VII. 65/1965.

2.3.1 Protecting motherhood

The problem with regulating motherhood is that not all women are mother and carers[471] and not all carers are inevitably women. The (descriptive) observation that most carers are women should thus not translate into a (prescriptive) framework which facilitates and cements motherhood but does not enable parenthood or other forms of childcare. Moreover, the protection should not go beyond what is necessary. When it does, it can - instead of protecting vulnerability and enabling reconciliation of work and family life – turn women into unviable workers and entrench traditional gender roles. I argue that the State Socialist law, since 1960s, often got the balance wrong – it overprotected women which hurt their position in the labour market, and kept men out of childcare, which contributed to a cementing of traditional gender roles in the family.[472]

The new Labour Code dedicated a special chapter to the 'Working conditions of women and minors'.[473] It urged employers to create employment opportunities for women,[474] and tasked 'national committees' (*národní výbory*) with creation and upkeep of crèches, kindergartens and other childcare facilities.[475] It contained positive guarantees for pregnant women and mothers,[476] such as breastfeeding breaks,[477]

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[471] In the biological and social sense respectively.

[472] I return to this issue, and its relationship to the legal concept of equality, in chapter 3(4.2).

[473] Sec. 149-169 65/1965.

[474] Sec. 149(1) ibid.

[475] Sec. 149(2) ibid.

[476] The rights were available based on the age of the child; to single parents, protection was available for longer.

[477] Sec. 161 65/1965.

preferential treatment with regards to over-time and working time in general[478] prohibition of work-related travel,[479] and protection from dismissal.[480] Maternity leave of 18 weeks, which was introduced in 1950, was lengthened several times in the 1960s, up to 26 weeks in 1968.[481] Also introduced in 1968 were 'further maternity leave' of one year,[482] lengthened to two years in 1969.[483]

These (labour law) provisions were accompanied by social security measures. 'Financial help in motherhood' (*peněžitá pomoc v mateřství*)[484] was paid out during maternity leave. A 'motherhood supplement' was paid out during further leave (*mateřský příspěvek*).[485] A one-off 'birth support' payment was also given.[486] Motherhood was reflected in the pension system – periods of childcare by women were counted toward pension benefits, and mothers were granted earlier retirement,

[478] Sec. 156 ibid.

[479] The prohibition was absolute for mothers of children up to one year of age; up to eight years, the consent of the working mother was required. Sec. 154 ibid.

[480] Sec. 155 ibid.

[481] Sec. 1 88/1968.

[482] Ibid.

[483] 153/1969.

[484] Sec 2(b) 88/1968.

[485] 154/1969.

[486] Sec. 13 88/1968.

based on the number of children.[487] Families were also entitled[488] to 'child-raising supplements' (*přídavky na děti*).[489]

These measures were valuable in recognising the social value of childbirth and care. As I discuss in the following chapter, some contemporary Czech authors were even suggesting that social security payment should be regarded as 'remuneration for caring work'[490] or that it should at least be considered a 'socially important activity'[491] and financially supported according to need. Their progressiveness also comes to relief in international comparison - what was achieved in the 1960s in Czechoslovakia was still a struggle for women in the UK in the 1970s and 1980s,[492] it was only achieved at EU level in the 1990s,[493] and is yet to be guaranteed in the US.[494]

Nonetheless, two aspects detract somewhat from this positive evaluation. First, these measures were adopted 'in the interest of improving the population development',[495] as was often explicitly mentioned in the statutes. Thus, although presented as pro-women, they had at their basis the collective interest in increasing

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[487] Sec. 11 101/1964.

[488] The 'child-raising supplements' were available since 1945 but the regulation was scattered in various sectoral legislation and not unified. Radvanová, *Žena a právo*, 212.

[489] Sec. 14 ff 88/1968.

[490] Radvanová, *Žena a právo*, 223; emphasis mine.

[491] Josef Mazanec, 'Význam péče ženy o dítě v důchodovém zabezpečení' [1975] Socialistická zákonnost 348, 350.

[492] Fredman, *Women*, 203-205.

[493] Pregnancy Directive.

[494] The US protects the parents from losing their job for a period of 24 weeks, but there is no statutorily guaranteed paid parental leave. Rebecca Ray, Janet C. Gornick and John Schmitt, *Parental Leave Policies in 21 Countries. Assessing Generosity and Gender Equality* (Center for Economic and Policy Research, 2008).

[495] Sec. 1 154/1969.

the rate of childbirth. Second, for the entirety of the State Socialist period, they only allowed mothers and not fathers to be carers, and consequently cemented the women's roles as mothers and carers in the family. It was only relatively late in Transition that a 'levelling up' occurred, which gave father's equivalent rights, as I discuss in chapter 6 below.

2.3.2 Bans on work for women

Another set of ostensibly protective but ultimately limiting measures were bans on work for women. The new Labour Code introduced a prohibition of night work[496] as well as a prohibition of certain types of work for all women.[497] The delegated legislation protected women from different kinds of physical, biological and chemical agents, processes and working conditions.[498] Scott, writing in 1971,[499] argued that while officially aiming at the protection of the weak female worker, these provisions in practice banned women from the best paid jobs in heavy industry. She pointed to three paradoxes of this legislation. First, it was enacted only in 1965 when working conditions finally started to improve. Women who, for their entire lives, worked in unsatisfactory conditions suddenly found themselves without work. Second, where a female workforce was necessary for the smooth running of factories or services (such as in the health sector), branch exceptions were passed – women thus could continue working in objectionable conditions if the socialist economy

[496] Sec. 152 65/1965.

[497] Sec. 150(2) ibid.

[498] Government Resolution No 32/1967.

[499] Scott, *Does socialism*.

required it. Third, analyses of female health in 1960s showed that the greatest problems facing women overall (migraines, neuroses, etc.) were caused by fatigue and sleep deprivation resulting from their triple burden and not from working conditions.[500] Admittedly, this development was not unique to State Socialist Czechoslovakia, but happened in Western Europe too. It was only from 1990s onwards that the CJEU considered these bans a violation of gender equality.[501] In both situations, however, it shows a paternalistic attitude to and a clearly gendered view of the female workforce.

2.4 'Freedom'

The political thawing and pluralism in the 1960s brought with it some freedom-related developments. On the one hand, increased freedom of speech brought the opening of hither-to unmentioned (and possibly unmentionable) topics such as prostitution[502] or pornography.[503] On the other, the emerging notion of freedom had some paradoxical consequences for women and gender equality. First, the narrative of freedom and choice was used to 'enable' women to stay home longer with children, which – while alleviating their triple burden – was a step back for their equality both

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[500] Ibid, 19-23.

[501] A blanket ban on night work and on work underground for women were considered incompatible with EU equality law by the CJEU in C-345/89 *Criminal proceedings against Alfred Stoeckel*, 25 July 1991, ECR [1991] I-04047 and C-203/03 *Commission against Austria*, 1 February 2005, ECR [2005] I-935 respectively. Cf. chapter 6(2) below.

[502] The legal debates about prostitution appeared in the 1960s; Havelková, 'MSt. thesis', 66-76.

[503] Discussions of pornography or striptease did not reach the legal periodicals but made their way into other publications. Several chapters of the book 'Sex - Love? Marriage? Family? Children?' were dedicated to this: 'The night shadow of sex flies through the republic'; 'Sex, art, and trade'; 'Excursion into the red-light district in Hamburg'; 'Pornography instead of butter?' in Ladislav Svoboda (ed) *Sex - Láska? Manželství? Rodina? Děti?* (Polygrafia 1969).

in the labour market (they became seen as the less reliable workers) as well as in the family (they now had the official hallmark of child-carers and home-makers). Second, the increased freedom of movement brought reports from the West about striptease, prostitution and pornography. Possibly as a reaction to the 'de-eroticization'[504] in the 1950s, those who experienced open and available sexuality abroad were deemed 'lucky', and for its lack of striptease bars, Czechoslovakia was considered to be in a 'stone age',[505] suffering from a 'backwardness of many years'. [506] Both these constructions – that women should have the 'choice' to be mothers and that men's access to sex and sexual entertainment is equal to 'progress'[507] - reappear strongly during Transition; with regard to prostitution amplified to mean a right of access to it for men.[508]

3 The era of the family (1968-1989)

The period of Normalization, which followed the 1968 Soviet-led military invasion of Czechoslovakia, has been characterized as 'a combination of material rewards and coercion.'[509] It was also a period of resignation and stagnation in terms of the State Socialist aspiration about social change in the area of equality of the sexes. The old emancipatory rhetoric, as well as the legal gains of 1950s, largely persisted,

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[504] Vladimír Macura, *Stastny vek. Symboly, emblemy a myty 1948-89 (The Happy Age. Symbols, Emblems and Myths 1948-89)* (Pražská imaginace 1992) cited in Havelková, 'Women In and After'.

[505] Bořivoj Vaníček, 'Noční motýl sexu letí republikou' in Svoboda, *Sex*, 69.

[506] Ibid, 69.

[507] Ibid, 68.

[508] Havelková, 'MSt. thesis', 96-97.

[509] Wolchik, *Czechoslovakia*, 37.

but alongside it, a gender-conservative regulation and understanding gained more and more ground. While policies in the 1950s saw women as citizens and workers, the 1970s and 1980s equated them with motherhood and family.[510] A 1973 Slovak sociological article stated that

> in real life, as a rule, popular opinion connects the rearing of younger children, roughly up to the *age of fifteen* [sic!], primarily with the woman and also with her maximum physical presence in the family.[511]

The relative decline of the ideal of equality of sexes is well illustrated by Scott's anecdote:

> By 1972 the image of the beautiful tractor driver as heroine had receded so far into the distant past that a top [Communist Party] official […] on a visit to a cooperative farm at harvest time […inquired of the husbands in] a husband-and-wife combine-operator teams: "And you let them drive?"[512]

I noted above that the East was ahead of the West at the end of 1950s or even the 1960s. But by the end of 1980s, the East had noticeably fallen behind. The émigré Wagnerová, who returned to Czechoslovakia from West Germany after the 1989 Velvet Revolution, observed:

> As if we somersaulted again back to the GDR, when we went there in late 1960s. Our [comparative] advance, that we were so proud of, ceased to exist.[513]

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[510] This shift has been noted by authors writing about other CEE countries. For Russia see eg Natalia Vinokurova, 'Reprivatising Women's Lives: from Khrushchev to Brezhnev' in Rebecca Kay (ed), *Gender, Equality and Difference During and After State Socialism* (Palgrave Macmillan 2007); for Hungary see Ildikó Asztalos Morell, 'How to Combine Motherhood and Wage Labour: Hungarian Expert Perspectives During the 1960s' in ibid.

[511] Jolana Jančovičová, 'Increasing Participation of Women in the Direction of Society' (1973) 5 Sociológia, 211-212 cited in Scott, *Does socialism*, 17, emphasis mine.

[512] Scott, *Does socialism*, 1.

[513] Wagnerová, 'Laudatio', 18-19.

The West experienced modernization and emancipation from 1960s onwards, mostly thanks to the rise of the 'second wave' of the feminist movement.[514] The bottom-up character of this development was important – gender inequality was fought against by activists and it was debated in the open in the pluralist and liberal democratic societies in the West. The understanding and consequent rejection of gender inequality became to a considerable extent internalized in the Western societies. The East missed this development. While in terms of material provisions for women, the East was still comparable to the West in 1989, it was in terms of a challenge to patriarchy and a shift in cultural paradigm, in which it fell behind; a topic to which I return in chapter 4.

In the following, I discuss the re-traditionalization of the law and legal discourse on family (3.1), present the wide-ranging pro-population policies, which had women at their centre (3.2), and assess the developments in the area of reproduction, including the policy of sterilization of Roma women (3.3). It is important to note that women were the main focus of all this regulation. All that was marriage, family, housework, reproduction and children was equated with women and regulated through them. This was true for all the responsibilities - men were out of the picture. But also the protective and supportive measures were not all they seemed – they entrenched and exploited rather than alleviated the responsibilities of women as mothers, wives and home-makers.

[514] For a discussion, see Rosemarie Tong, *Feminist Thought* (Westview 2009) and Arvonne S. Fraser, 'Becoming Human: The Origins and Development of Women's Human Rights ' (1999) 21 Human Rights Quarterly 853

3.1 A retreat into the private sphere

The strengthening of the family, both in terms of official policy and as a reaction of the population to the discredited regime's public space, defined the period of Normalization. For Ivan Vodochodský, the metamorphoses of the public and private spheres were essential to the understanding of the 'real socialism' of the 1970s and 1980s:

> The previously prestigious public sphere of work, and political and civil engagement, which used to be the male domain, became uninteresting, unpleasant and sometimes dangerous. By contrast the private sphere (sometimes spoken of as household, sometimes as family), previously viewed for routine and drudging "female work" became the main shelter from the traps of the outside world and a place where real feelings and opinions could be vented.[515]

Family became the locus of freedom, moral and civic education, and creativity.[516] It also – due to the dysfunctions of the economy – became a place where material shortages were compensated for.[517] Its function as an economic unit was not negligible, despite the earlier proclamations that under State Socialism it would not need to be. The family adopted an almost 'pre-capitalist role'[518] as a site where basic goods were produced:

> According to empirical research from the end of the 1970s, 57 % of women sewed or repaired clothes, and 25 % of the population produced or reconstructed furniture. Research among Prague workers showed that 37

[515] Vodochodský, 'Patriarchát', 38.

[516] Hana Havelková, ''Patriarchy' in Czech Society' (1993) 8 Hypatia 89, 92.

[517] Ibid, 92.

[518] Havelková even uses the word 'feudal'. Havelková, 'Women In and After', 77.

> % of eggs, 22 % of meat, and 73 % of fruit and vegetables were home-produced (from their or their relatives' gardens).[519]

While this economic reality might have provided good practical reasons for couples not to split, the law and the legal community reinforced it by adopting an uncompromising marital normativism – couples should marry and stay together.

3.1.1 The 'wrongly understood emancipation'

The 1971 book *Woman and the Law* observed that that 'the legal status [of co-habiting unmarried partners] is entirely deliberately not regulated in our law'[520] in order to make such an arrangement undesirable. 'The breakdown of marriage' was described as an unambiguously 'socially negative phenomenon'.[521] An aim – carried over from the 1960s – of preventing marriage breakdowns gained new momentum with the establishment of marriage counselling centres.[522] These were statutorily tasked with collaborating with courts.[523] Courts often referred couples seeking divorce for counselling first.[524]

The guidelines and legal academic articles on marriage counselling set marriage as the absolute norm. Moreover, it was the task and responsibility of women

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[519] Hamplová, 'Stručné poznámky', 6.

[520] Radvanová, *Žena a právo*, 76

[521] Ibid, 80.

[522] Originally founded in 1969; Jiří Haderka, 'Manželské poradny – jako partner soudů v úsilí za vytvoření a zachování trvalých manželských svazků' [1976] Socialistická zákonnost 294). Later elevated to the position of a social service (Sec. 2 and 80(3) and (4) 121/1975).

[523] Sec. 79 Ordinance No 130/1975.

[524] Karel Novák, 'Ze zkušeností manželské a předmanželské poradny v Jičíně' [1979] Socialistická zákonnost 226; Věra Capponi and Tomáš Novák, 'Spolupráce manželských a předmanželských poraden se soudy v Jihomoravském kraji v prevenci rozvodovosti' [1981] Socialistická zákonnost 229.

to hold marriages together. Under the label 'wrongly understood emancipation',[525] the equality between the sexes was *de facto* recanted in a 1979 law journal article:

> According to our experience, many women interpret emancipation as a mechanical half-and-half division of housework and do not see the necessity to help each other and come up with a form of collaboration and organization of the running of the household such as to have it *running in an undisturbed, smooth way*. We cannot do without specialization, the use of *natural abilities of each spouse to certain tasks*, nor without respect for the fact that one partner [man] has more work and out-of-work obligations. With mechanical half-and-half division, one partner [man] feels overburdened, *unjustly nagged*, which leads to reactions of protest and to conflicts.[526]

Even the advances of women which had already been achieved (in this case their high educational level) were criticized when leading to marital discord:

> [I]n so called young marriages, women have higher education than men. This non-traditional fact encounters lack of preparedness to accept this from their [male] partners. In our counselling centre we often attempt to address the consequences of the *un-understandable superiority of young women*, who – in a marriage with a less educated partner – take a position which makes the marital relationship *unequal* at least. Often, they [women] try to unload most of the household obligations on the other [male] spouse […claiming] that their work is more socially beneficial and important, and therefore more time-demanding than that of the [male] partner, who should understand this and take the burden of family obligations upon themselves.[527]

These excerpts show that while the formal equality of spouses guaranteed in family law remained the same, the understanding and interpretation of marriage among the legal community became openly based on a traditional understanding of the gender roles and considered the woman responsible for marital harmony. The condemnation of women who wanted equal sharing of household duties is a long way

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[525] Novák, 'Ze zkušeností', 229.

[526] Ibid, 229; emphasis mine.

[527] Ibid, 229; emphasis mine.

away from the Marxist and early Socialist promise of *de facto* equality and the liberation from household drudgery. By 1989, the traditional woman's role was so commonplace, that the then Prime Minister Adamec stated the woman's situation was 'not yet ideal because of "the lack of *free time* for fulfilment of *their duties* in the family"'.[528]

When discussing the 1950s, I mentioned the positive aspects of the public involvement in the family – the strengthening of equality between the spouses and the state's involvement in securing child support, among others. During Normalization, the state's interference, no longer driven by the aim of 'equality between the sexes' but by ensuring the rearing of children in 'unbroken' families, became gender-conservative. This is where the problematic nature of 'collective good' comes to the fore. As many of the guarantees were not aimed at enhancing individuals' (women's) autonomy, but rather at furthering collective interests or increasing the state's control over matters in the collective interest, their outcomes were not in the hands of those they were ostensibly protecting - women. The nature of the public involvement was thus double-edged. On one hand, the state could – and often did – further women's status by regulating and interfering in areas traditionally controlled by men.[529] On the other, the state was primarily interested in what it identified as collective interest and not in the will and choices of individuals. As a result, it often did not give women meaningful choices and even used them instrumentally.

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[528] Libora Oates-Indruchová, 'Where Have all the Tractor Drives Gone? Cultural Representations of Gender in Late State-Socialism' in Hana Havelková and Libora Oates-Indruchová (eds), *The Politics of Gender Culture under State Socialism: An Expropriated Voice* (Rouledge IN PRINT), emphasis added by Oates-Indruchová.

[529] This resonates with many writers' description of the state as 'paternalistic'; Padraic Kenney, 'The Gender of Resistance in Communist Poland' (1999) 104 The American Historical Review 399, 405, and the references therein. Cf. chapter 4(2.3).

3.2 Reproduction – assuring the 'quantity' and 'quality' of the population

Notwithstanding calls for greater privacy for women, for simplification of the committee process and greater speed throughout the period,[530] the abolition of abortion committees, which made abortion more accessible, only happened in 1986.[531] This did not mean, however, that the state relinquished its role as the guardian of health, social progress and population growth during the 1970s and 1980s. Part of its plan to improve the 'quality'[532] of the population included the policy of sterilizations of women from 'socially weak'[533] backgrounds. While the 1972 Sterilization guideline[534] was not ethno-specific, it led in practice[535] to forced[536] sterilizations, especially of Roma women.[537] A monetary incentive was enacted in

[530] The lengthy process prevented the use of new, less intrusive technologies, such as early pregnancy 'mini-interruptions'. Dudová, 'Interrupce'.

[531] 66/1986.

[532] Věra Sokolová, 'Planned parenthood behind the Curtain: Population policy and sterilization of Romani Women in Communist Czechoslovakia, 1972-1989' (2005) 23 The Anthropology of East Europe Review 79, 82.

[533] Czech Ombudsman, *Závěrečné stanovisko veřejného ochránce práv ve věci sterilizací prováděných v rozporu s právem a návrhy opatření k nápravě* (No: 3099/2004/VOP/PM a násl, 2004), 69.

[534] Guideline of the Ministry of Health of the CSR No 1/1972 Bulletin reg. in issue 5/1972.

[535] Sokolová, 'Planned parenthood', 80-81.

[536] The term 'forced' is used even though some situations are better described as lack of circumstances allowing for informed consent with the procedure.

[537] While non-Roma women were sterilized as well, Sokolová points out that 'several estimates claim that anywhere from 21.2 to 36.6 % of all sterilized women were Romani, while the Roma constituted less than 2 % of the overall Czechoslovak population.' Sokolová, 'Planned parenthood', 79. In other State Socialist countries, the ethnic character of state population policy was also pronounced. Bulgaria, while restricting abortions among ethnic Bulgarians, allowed them for Turkish and Roma minorities. Gal and Kligman, *The politics*, 16.

1973[538] and remained in place until the Velvet Revolution.[539] A 1989 health journal article supported the policy targeting the Roma thus:

> […]these are citizens who in high numbers demonstrate negative attitude toward work and education, have high crime rates, tendency toward alcoholism and promiscuity among women, and last but not least show retardation with regard to cultural and social development compared to other population groups.[540]

The number of sterilizations culminated at the very end of the communist era.[541] Shockingly, this policy continued in Transition and well into the first decade of the new millennium.[542]

I believe that this disregard for Roma women's reproductive rights must be borne in mind when assessing the reproductive policy of Socialist Czechoslovakia in general. Certainly during Normalization, the reproductive policy was strongly instrumental. Both abortions as well as sterilizations were seen as methods of (central) planning of parenthood and population control. In the context of Normalization Czechoslovakia, it is difficult to see them as 'rights' of women. Rather, they were instruments for higher state policies on health, population growth and assimilation of ethnic groups.

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[538] Internal act of the Ministry of Labour and Social Affairs of the CSR from 1973, IV/1-8750-13.9.1973/7; later regulated by various social security instruments. Czech Ombudsman, *Závěrečné stanovisko*, 30.

[539] Sec. 35 Ordinance of the Ministry of Health and Social Affairs of the CSR No 152/1988.

[540] E. Posluchová and J. Posluch, 'Problemy plánovaného rodičovstva u cigánskych spoluobčanov vo Východoslovenskom kraji' (1989) Zdravotnícka pracovníčka, 220 – 223, cited in Czech Ombudsman, *Závěrečné stanovisko*.

[541] R. Pellar and Z. Andrš, *Zpráva o výzkumu problematiky sexuální sterilizace Romů v Československu* (unpublished, 1989), cited in Czech Ombudsman, *Závěrečné stanovisko*.

[542] The Czech courts eventually started to compensate the victims in 2005. Czech Ombudsman, *Závěrečné stanovisko*.

The treatment of Roma women also gives an indication of a gendered approach to sexuality. While the lack of striptease bars for men was considered an indicator of 'social backwardness';[543] arguably similar sexually liberal behaviour among Roma women was termed 'promiscuity' and considered 'socially retarded'.[544]

3.3 Pro-population policies

Measures, targeting population growth,[545] which started in 1960s, were enhanced during Normalization. Indeed by the mid-1970s, the 'Czechoslovak population policy […] became, according to some Western demographers, "the best, most comprehensive pro-natalist population policy in the developed world"'.[546] Heitlinger notes that by the late 1970s,

> the Czechoslovak government was spending almost 4 % of its annual budget for direct cash benefits (family allowances, birth grants, paid maternity leaves, and allowances) and an additional 7 % on services and subsidies in kind (subsidized day care, kindergartens, school meals, afterschool care, children's goods, tax and rent reductions based on number of children). These levels exceeded comparable expenditures in any other major developed country.[547]

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[543] Vaníček, 'Noční motýl', 69.

[544] Posluchová and Posluch, 'Problemy', 220 – 223, cited in Czech Ombudsman, *Závěrečné stanovisko*.

[545] Many statutes stated so explicitly. Eg Sec. 1 107/1971.

[546] Sokolová, 'Planned parenthood', 81; citing John Besemeres, *Socialist Population Policy: The Political Implications of Demographic Trends in the USSR and Eastern Europe* (M.E. Sharpe 1980), 263.

[547] Heitlinger, 'The Impact', 98.

The maternity benefit was lengthened from one year in 1970, to two years in 1971 to three in 1988 (if the woman was caring of older children at the same time[548]); maternity leave in labour law was adjusted accordingly.[549] Families with children were preferred in the granting of 'newly-weds loans' which were meant to help with the purchase of a flat or a house.[550] Pro-natality pricing and tax policies were implemented.[551] Labour and social security protection and support for motherhood was boosted – for example the motherhood supplement created in 1968[552] was augmented in 1971[553] and 'child-raising supplements' (*přídavky na děti*) gradually increased.[554]

These provisions, although generous, were gender-conservative. They worked with the assumption that mothers were the (indispensable) caring parent – men and fathers continued to be absent. Moreover, it was the individual care in the home which was supported - the 1950s emphasis on collective child-care was challenged in the 1960s and slowly abandoned in the 1970s and the 1980s. The norm became the family, and the mother for childrearing.[555]

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[548] It motivated women to have two children shortly after each other. Radka Dudová, 'Promarněná šance na změnu: zhodnocení reformy rodičovského příspěvku' in Alena Křížková and others (eds), *Práce a péče* (SLON 2008), 31.

[549] From two to three years by 188/1988.

[550] 14/1973.

[551] Kučera, 'Rodinná politika', 5.

[552] 154/1969.

[553] 107/1971.

[554] 99/1972.

[555] Similarly, Hamplová, 'Stručné poznámky', 4.

Ostensibly, the state was paying extraordinary attention to the well-being of women, but it was often in a technocratic pursuit of 'collective interest'. This trend – of other aims of the socialist state 'behind' the seemingly pro-women measures[556] can be documented throughout the period: the push for access to employment overlapped with work-force mobilization to sustain industrialization in 1950s; the ban on women's work 1965 'coincided' with 'overemployment' worries; and the restrictions on abortion in late 1960s and early 1970s matched a 'population crisis'. In the 1980s, it consisted in allegedly 'pro-women' policies, which however were mainly aimed at the preservation of heterosexual families and population growth. This pernicious link between family and women, the illusion that pro-family policies are invariably pro-women,[557] continued well into Transition, as I discuss in chapter 6 below.

4 Conclusions

In this chapter, I observed that the Socialist State did a lot for women. Compared to the West, women accessed the public spheres of education, work and politics earlier and in greater numbers, during the Equality period on 1950s; and were then more generously and comprehensively supported as mothers, in the later Era of the family in 1970s and 1980s. This has been described as 'public equality and private difference', but the picture is more complex. First, it changed over time – it emphasised 'first equality, then difference'. Second, de jure equality was guaranteed not only in the public but also in the private sphere; the problem was arguably rather the easy acceptance of de facto inequality, seen as justified by the natural difference

[556] Similarly, Wolchik, 'Ideology and Equality', 445.

[557] Similarly, Jechová, 'Matky a děti'.

between men and women – it ‘relative de jure equality combined with de facto inequality’.

The underlying assumptions about men and women were very gender conservative, increasingly so towards the end of the period – women’s role as wives was to hold marriages together, and women’s role as mothers made them the exclusive carers for children in the home. How was the co-existence of the equal and the different legal treatment of men and women justified? And how were the ideas of ‘sameness’ and ‘difference’ of men and women reconciled? I turn to these questions in the following chapter.

CHAPTER 3

THE LEGAL CONCEPT OF EQUALITY: SOCIO-ECONOMIC LEVELLING

When speaking about women's rights and well-being, and about gender justice, many use the language of equality. But there is no uniform understanding[558] of the concept. Clear-cut classifications of equality and antidiscrimination law are difficult – Chris McCrudden, in his study of equality in English public law,[559] observes that it is 'essentially pluralistic in its sources, in its origins, in its meaning, in its application, and in its functions.'[560] Nevertheless, some categorization and terminology has to be used. I employ the concepts used in European and common law literature, acknowledging two challenges. First, that the meanings are neither settled nor uncontested. I address this by explicitly presenting my use of the terms in the following. Second, the Czech development was different, so the Western concepts[561] do not always map well onto it. I take care to clearly tease out these differences, as

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[558] Fredman points out that its precise meaning has been much contested between neo-liberals, modified liberals and critical theorists, including feminists. Sandra Fredman, 'Discrimination' in Peter Cane and Mark Tushnet (eds), *Oxford Handbook of Legal Studies* (OUP 2003).

[559] Christopher McCrudden, 'Equality and Non-Discrimination' in David Feldman (ed), *English Public Law* (OUP 2009).

[560] Ibid.

[561] Using indigenous terminology and categorization is not really possible – under State Socialism, there was a limited concept of equality derived from Marxism, in Transition, there has been none.

they help me answer my research question about the peculiarity of the Czech development.[562]

A distinction is often made between formal and substantive equality. Formal equality demands impartiality[563] and consistency,[564] basically asks for decisions to be made 'without regard to sex'[565] and is expressed by the equal treatment principle. Substantive equality, in realization that equal treatment of people unequally situated can lead to injustice, goes beyond the formal requirement of equal treatment and aims at equality of opportunity, resources or results.[566] The two concepts are thus identifying different problems and targeting different wrongs: formal equality is concerned with tackling arbitrariness, prejudice, bias or unjustified difference of treatment; substantive equality wants to eliminate hierarchy or dominance,[567] disadvantage,[568] or social exclusion.[569] While the concerns of formal equality are to a

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[562] I treat Western feminist concepts similarly, as I discussed in the Introduction (2.3).

[563] Hugh Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66 Modern Law Review 16. 16.

[564] Fredman, *Discrimination law*, 2.

[565] Collins, 'Discrimination', passim.

[566] Ibid, passim; Fredman, *Discrimination law*, 14-19. Fredman points out four dimensions of substantive equality: 1) it aims at breaking the cycle of disadvantage (redistributive dimension), 2) it requires respect and dignity (the recognition dimension), 3) it accommodates difference and demands structural change (the transformative dimension), and 4) it calls for social inclusion and political voice (the participative dimension). Ibid, 25-33.

[567] Catharine A. MacKinnon, *Feminism unmodified: discourses on life and law* (Harvard University Press 1987), 32-46.

[568] Disadvantage has been emphasized by courts, for example by the US Supreme Court in *Brown v. Board of Education* Supreme Court of the United States, 347 US 483 (1957), 495, as well as by academics. For Denise Réaume, 'substantive' understanding of equality is characterized by being sensitive to the 'actual conditions of life of members of disadvantaged groups' (Denise Réaume, 'Discrimination and Dignity' (2003) 63 Louisiana Law Review 1). MacKinnon stresses that 'the opposite of equality is hierarchy, not difference' and that therefore, the aim of equality law should be limiting disadvantage, not just eliminating any difference in treatment (MacKinnon, *Sex equality*, 26).

large extent addressed by a prohibition of direct discrimination and individualized enforcement, the substantive understanding of equality calls for a wider range of measures: which target group disadvantage and systematic harm, such as the prohibition of indirect discrimination; which counters pervasive exclusion, such as affirmative action; and which aim at changing the male bias or 'male norm'[570] and promote diversity, such as gender mainstreaming,[571] reasonable accommodation[572] and positive duties.[573]

In the West, the substantive equality approach arose out of a critique of formal equality and was based on the evolving social realities and understandings of inequality. Different authors[574] offer different periodizations of equality law. For my analysis, it is useful to divide the Western development into three phases: 1) elimination of legal privileges – formal equality before law; 2) adoption of antidiscrimination legislation; and 3) the rise of substantive and transformative equality.

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[569] For a more comprehensive list and analysis of wrongs of direct and indirect discrimination, see Andrew Altman, 'Discrimination' Stanford Encyclopedia of Philosophy http://platostanfordedu/entries/discrimination/ accessed 1 July 2012.

[570] Fredman, *Discrimination law*, 11.

[571] Eg. Jo Shaw, 'Mainstreaming Equality and Diversity in the European Union' (2005) 58 Current Legal Problems 255.

[572] This term is legally applied to disability only, but can be in a broader sense understood to include accommodation of family life in the workplace.

[573] Sandra Fredman, 'Breaking the Mold: Equality as a Proactive Duty ' (2012) 60 American Journal of Comparative Law 265.

[574] Eg Bob Hepple, writing about labour law in Western Europe, speaks about three phases of equality: 1) formal (1957-1975); 2) substantive (1976-1999); 3) comprehensive or transformative (2000-2004). Bob Hepple, 'Equality at Work' in Bob Hepple and Bruno Veneziani (eds), *The Transformations of Labour Law in Europe* (Hart 2009), 134-160.

The first phase has its origins in 18th and 19th century, in the liberal[575] calls for truly universal application of laws. Its aim was the elimination of legal privileges of men and the removal of formal legal impediments to women's self-realization. The demand for equal legal status[576] was the centrepiece of the feminist 'first wave'. Formal equality was, to large extent, achieved in the first half of 20th century.

As I have shown in chapter 1, formal equal treatment of men and women by the law was also a basic tenet of the 'woman question' in Marxism. In chapter 2, I have shown that the socialist state took care to institute formal equality in the family and in access to education, work and public life. The legal requirement of 'equal rights of men and women' (*rovnoprávnost mužů a žen*) was taken seriously by the socialist state, especially in the early period. Thus, up until 1960s, State Socialist Czechoslovakia did not differ much from the West, except that – as I argued in chapter 2 – the legal change actually happened faster. But the development diverged in the next phase.

In the West, beginning in the mid-1960s, the requirement of formal equality was expanded to include a right to non-discrimination – it was understood that not only law, but also discriminatory acts could be an obstacle to equality.[577] This phase started with statutory guarantees,[578] notably the US Civil Rights Act 1964 and the UK

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[575] Mary Wollstonecraft would be a prominent proponent. Mary Wollstonecraft, *A Vindication of the Rights of Woman* (Thomas and Andrews 1792).

[576] For an overview of the development, see eg Fraser, 'Becoming Human: The Origins and Development of Women's Human Rights '; or Nicola Lacey, 'Feminist Legal Theory and the Rights of Women' in Karen Knopp (ed), *Gender and Human Rights* (OUP 2004), 13-14.

[577] Eg Paul Brest, 'In Defence of the Anti-discrimination Principle' (1976) 90 Harvard Law Review 1.

[578] As Hepple points out, the international and constitutional law guarantees were often adopted immediately after WWII; the statutory guarantees, however, were only adopted beginning in the 1960s. Hepple, 'Equality at Work', 131-146.

Race Relations Act 1965. In Western Europe, it gathered momentum in 1970s with the adoption of the EEC directives on equal pay for men and women[579] and equal treatment of men and women.[580] In this chapter, I argue that Czechoslovakia missed this development – the principle of equality, although legally enshrined, was not understood to contain a prohibition of discrimination. It was only in the context of EU obligations in late 1990s that antidiscrimination provisions were inserted into statutory law. In chapter 7, I show how problematic the interpretation and enforcement has been in Transition.

Some Western scholars have challenged the usefulness of 'rights' in general for women[581] and have criticized antidiscrimination rights in particular, as too individualistic and therefore not affecting a structural change.[582] The Czech example, I believe, shows that although 'antidiscrimination rights' might not alone be sufficient to tackle gender disadvantage, they might still be necessary. Although litigation is an individualized tool, its effects arguably reach beyond decisions and awards in individual cases. It is hoped that employers would try to prevent litigation by adopting meritocratic and non-biased methods of assessment with regards to selection criteria, career advancement, remuneration, etc. The prohibition of discrimination highlights that gender bias exists in society, at the level of individuals and institutions, and it has to be consciously tackled. As I show in the following, it is exactly in the area of

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[579] Equal Pay Directive.

[580] Equal Treatment Directive.

[581] Eg Smart, *Feminism*.

[582] Eg Fredman, *Women*, 251-253.

understanding gender-based disadvantage and socio-cultural bias that the legal understanding of equality in the Czech Republic has been lacking.

The third phase, in the West, has involved the increasing incorporation of the substantive understanding of equality. Some signs of it appeared concurrently with the previous formal antidiscrimination phase – 'affirmative action' for race was enabled in the 1960s in the US[583] and 'positive action' for women in 1976 in the EEC.[584] The doctrine of 'disparate impact' was developed by the US Supreme Court in 1971[585] and the corresponding concept of 'indirect discrimination' in 1981 in the EEC.[586] In the EC/EU, substantive equality has been gathering particular momentum and 'widened and deepened'[587] since the 1990s. Equality law has become more 'comprehensive'[588] with regards to the inclusion of grounds and the protection of intersectional discrimination, and more 'transformative,'[589] aiming at the 'dismantling of systemic inequalities and the eradication of poverty and disadvantage'.[590] It has been becoming

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[583] Ruth Bader Ginsburg and Deborah Jones Merritt, 'Affirmative Action: An International Human Rights Dialogue' (1999) 21 Cardozo Law Review 253.

[584] Art. 2(4) Directive 76/207/EEC.

[585] *Griggs v Duke Power Co* 40 US 424 (1971).

[586] 96/80 *Jenkins v Kinsgate* [1981] ECR 911.

[587] Mark Bell, 'The Principle of Equal Treatment: Widening and Deepening' in Paul Craig and Grainne De Burca (eds), *The Evolution of EU Law* (OUP 2011).

[588] Hepple, 'Equality at Work', 154-160.

[589] The term transformative is often used to highlight a socio-economic dimension. See Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) and Hepple, 'Equality at Work', 155.

[590] Hepple, 'Equality at Work', 155.

more concerned with 'anti-subordination' than with 'anti-classification'.[591] Some authors categorize this approach, based on a positive duty to promote equality, as a separate, 'fourth generation'[592] of equality law.

I do not want to be ahistorical and hold the State Socialist period to today's 21st century Western standard of equality and antidiscrimination law. The historical excursion is important, however, because I argue that the development in Czechoslovakia and the Czech Republic was in many ways opposite to the West – starting with a particular brand of the socio-economically transformative agenda during State Socialism, and ending with today a limited formal understanding. I show in more detail below that already early in the State Socialist period, equality was understood 'substantively'– it was context-based and strove for real-life equality. And it was also 'transformative' in the socio-economic sense – it aimed at redistribution, the eradication of poverty and pursued economic egalitarianism and levelling.

There were four important caveats, however. These policies were redistributive only – they were not concerned with respect for different identities or diversity. They were also overwhelmingly collective – individual empowerment, autonomy and choice were not an issue. They were substantive and transformative with regards to class, but not to other discrimination grounds, especially not gender; and because of a blindness to patriarchy, no understanding of structural gender disadvantage existed. Finally, an enforceable antidiscrimination right was missing.

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[591] Owen M. Fiss, 'Groups and the Equal Protection Clause' (1976) 5 Philosophy and public affairs 107; Jack M. Balkin and Reva B. Siegel, 'The American Civil Rights Tradition: Anticlassification or Antisubordination?' (2003) 58 U Miami L Rev 9.

[592] Sandra Fredman, 'Equality: A New Generation?' (2001) 30 Industrial Law Journal 163. A different classification of the more recent US development is offered by Chamallas – arguably concentrating more on cultural than socio-economic aspects. She separates an equality stage in 1970s, a difference stage in 1980s and a diversity stage in the 1990s; Chamallas, *Introduction to feminist legal theory*.

The chapter starts by presenting the legal guarantees of equality under State Socialism and elaborates the argument that equality, although an important political principle, could not be truly understood as a right, and certainly not a right to non-discrimination on the basis of sex (section 1). I then give a brief overview of the reality of women's lives, pointing out that while access of women to education, the labour market and the public sphere was considerably improved, a substantial gender wage gap and horizontal and vertical segregation persisted (section 2). In section 3, I argue that State Socialist legal academics were unable to explain this persistent inequality because of their blindness to gender and patriarchy. Section 4 shows that although the understanding of equality had 'substantive' hallmarks, its aim to affect real change was directed to class and economic levelling and not gender, and its ready acceptance of different treatment led to the engendering of traditional gender roles and oblivion to discrimination, both individual and structural.

1 Legal guarantees – equality as a right?

Both State Socialist Constitutions guaranteed equality of men and women. The 1948 Constitution stipulated that

> The state guarantees to all its citizens, men and women, the freedom of person and its expression and it fosters *equal possibilities and opportunities* for all.[593]
>
> Men and women have equal standing in the family and in society and equal access to education and also to all occupations, offices and ranks.[594]

Similarly, the 1960 Constitution stated that

[593] Art. III (2) 1948 Constitution., emphasis mine.

[594] Sec. 1 (2) ibid.

> Men and women have equal standing in the family and at work and in public activity.[595]
>
> Equal engagement of women in family, work and public activity is secured through *special provision* for working conditions and special health care during pregnancy and maternity, as well as through the *development of institutions and services allowing women to use all their abilities to participate in the life of society*.[596]

The constitutional equality guarantees were complemented by statutory law. For example the 1965 Labour Code stated among its basic principles that

> Women have the right to equal standing with men at work. Women are guaranteed working conditions which enable them to work not only taking into account their physiological conditions but also and especially taking into account their *social function as mothers* and their role in raising and caring for children.[597]

Two aspects of these provisions are worth noting here. These statements are declarations of principle but do not truly create an individual right to equal treatment and non-discrimination. I turn to this point immediately in the following. They also show the hallmarks of a substantive understanding of equality and prominently feature special treatment. I return to these points in section 4 below.

I argue that the equality guarantee is expressed as a 'policy statement' rather than a right. In order to substantiate this argument, I use the five standard 'methods of interpretation' for legal norms, used by Central European legal theory: textual, logical, systematic, historical and teleological interpretation.[598]

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[595] Art. 20 (3) 1960 Constitution.

[596] Art. 27 ibid.

[597] Art. VII 65/1965, original version.

[598] As summarized for example in Gerloch, Boguzsak and Čapek, *Teorie práva*, 149-157.

With regards to language, the word 'right' was not used in the constitutions. The Labour Code speaks of a 'right' but only in its introductory provisions on principles - it was not repeated in the actual binding body of the code, where the only provisions addressing women set up their special treatment. The term discrimination was not mentioned at all. It is also significant that the constitutional language was that of 'is' rather than 'ought' – the declarations about equality are descriptive rather than prescriptive. In chapter 1, I noted that State Socialist law often expressed wishful thinking (both prescriptively and descriptively) rather than creating enforceable, sanctioned norms. A statement such as 'men and women *have* equal standing' might imply that equality has been achieved and it would be inappropriate to claim otherwise, rather than creating an individual right. Indeed, it is not clear which behaviour was prohibited if any; discrimination was certainly not it.

As far as systematic interpretation is concerned, the first question one has to ask is what normative power the constitutional provisions had over statutes and other acts of the government. Formally, both constitutions contained provisions which required all hierarchically subordinate norms to conform to the constitutions.[599] However, the legal scholarship assumed a lack of conflict between statutory and constitutional law and implied that constitutional provisions were given content through statutory law:

[599] The provision was weaker in the 1948 Constitution (Sec. 172 (3)), which only required that 'interpretation and use of all other legal acts be in harmony with the Constitution'. The 1960 Constitution (Art. 111 (2)) was more categorical in stating that 'statutes or other legal acts must not contravene the Constitution'. Some constitutions, for example the European Charter of Fundamental Rights (Art. 52 (5)) or the current Czech Charter (Art. 41 (1)), have a general provision which limits the effect of some rights or principles (often socio-economic) to the extent guaranteed by statute. This was not the case in the state socialist constitutions.

> Czechoslovak *laws actualize the principle* of 'equal standing' of men and women in a way that creates legal distinctions between them, for example when this is justified by "biological difference of the female organism".[600]

As I pointed out in chapter 1, in reality, constitutional 'rights' were only available insofar as contained in statutory or even regulatory acts, and it was the legislature and the executive that gave them content.

Furthermore, a systematic analysis of procedural mechanisms shows that avenues for redress and remedies were missing. As I observed in chapter 1, constitutional review was entirely unavailable, but even individual equality claims before ordinary courts, especially in the labour area, were practically unthinkable. It therefore comes as no surprise that the official 'Collections of judgments', reviewed for this thesis, contained not a single discrimination claim, nor was any mentioned in the literature.[601]

But the most persuasive demonstration of the non-right character of the equality guarantee is drawn from the contemporary construction of the 'human rights' norms and their aims (the teleological and historical interpretation). As I discussed in chapter 1, neither constitutional nor statutory provisions were constructed and understood as true rights – they were at most 'policy pronouncements'.[602] And the possibility of asserting rights was considerably weakened by the priority of collective over individual interest.[603]

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[600] Vladimír Mikule and Marie Kalenská, 'K otázce rovnosti před zákonem' [1968] Právník 511

[601] The guarantees were used in interpretation by ordinary courts in the 1950s, but there were no claims on the basis of individual equality or antidiscrimination rights.

[602] Markovits, 'Socialist', 625.

[603] As I have mentioned previously, the West has struggled with exactly the opposite problem – that antidiscrimination law was too individualized and therefore had limited impact on structural disadvantage. See Fredman, *Discrimination law*, 4.

In sum, an individual, thinking of challenging a discriminatory act, would have to contend with the lack of any clearly normatively expressed legal guarantee, a missing individual antidiscrimination right, an absence of procedural guarantees, and a theoretical conceptualization of 'rights' as mere 'policy pronouncement'. Moreover, she would also have to contend with the fact that the assertion that equality *has not* been achieved would be considered subversive and that asserting individual interest against the collective interest was not an appropriate and acceptable behaviour for a socialist worker and citizen.

2 Was equality achieved?

But there was an equality policy and it did care about access of women to the public sphere. State Socialism dramatically improved women's access to and participation in education, paid labour and politics.[604] While women made up only 18.5 % of full-time students in higher education in 1945, their portion had risen to 37.1 % by 1960.[605] The percentage of women among university graduates rose from 20 % in 1950 to 34 % in 1960 and to 44 % in 1987.[606] The percentage of women in the workforce rose from 37 % in 1948 to 43 % in 1960 and to 46 % in 1984.[607] The

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[604] For a comparative study including CZ, see Wolchik, 'The Status of Women in a Socialist Order: Czechoslovakia, 1948-1978'.

[605] Ibid, 584.

[606] Wolchik, 'Ideology and Equality', 449; Bauerová and Bártová, *Proměny ženy*, 159. For a more detailed breakdown and information about primary and secondary education, see Köhler-Wagnerová, *Die Frau*, 41-47.

[607] The number may appear low, but as it includes women of all age groups, it indicates, in fact, a very high level of female workforce participation. Comparable numbers in the West were lower throughout the period - 43.7 % in the US and 38.7 % in neighbouring Austria in 1978. Wolchik, 'Ideology and Equality', 452. See also Bauerová and Bártová, *Proměny ženy*, 188. See also Köhler-Wagnerová, *Die Frau*, 34.

share of employed women in the economically active population rose from 53.7 % in 1948 to 87 % in 1989.[608]

Similarly to education and work, the State Socialist regime successfully pushed for an increase in women's access to and participation in political decision-making. Notwithstanding the equal guarantee of passive and active voting rights in 1920,[609] the proportion of women in representative bodies did not exceed 5 % during the interwar period. After WWII these numbers rose slightly, up to 12 %.[610] The representation of women during State Socialism was much higher than that. The average proportion of women in the National Assembly was 23 %. At the communal level, representative bodies consisted on average of 30 % women.[611]

But the access and high levels of participation in the 'public' spheres of education, work and politics, was marred by inequality. Horizontal[612] segregation prevailed. In education, girls made up the majority of apprentices in the fields of textile and dress-making; health; and economics, organization, trade and services.[613]

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[608] Hana Hašková and Marta Vohlídalová, 'The Labour Market and Work-Life Balance in the Czech Republic in Historical Perspective' in Hana Hašková and Zuzana Uhde (eds), *Women and social citizenship in Czech society: continuity and change* (SOÚ 2009), 40.

[609] Sec. 9 of 121/1920 , Introducing the Constitutional Charter of the Czechoslovak Republic.

[610] The Constitutional Assembly had 8 % and the National Assembly of 1948-1954 had 12 % women. Bauerová and Bártová, *Proměny ženy*, 234-235.

[611] Ibid, 234-235. These high numbers have to be interpreted cautiously, however. Hana Havelková argues that 'the number of women deputies in parliament had in fact almost no impact, for women as well as men were not able to act as political agents but only as puppets [-] every law was approved by 100 per cent of parliament and [deputies] were nominated and then permanently manipulated by the Communist Party.' Havelková, 'Women In and After', 75.

[612] The term 'horizontal segregation' is used to describe concentration of workers of one sex (or other characteristic, such as race) in one segment on the labour market (for example men in the car industry and women in the textile industry).

[613] In 1980s, 98 %, 85.6 %, and 85.1 % respectively. Bauerová and Bártová, *Proměny ženy*, 152. The situation was similar in secondary vocational education, the following fields were dominated by women: health (97.3 %), pedagogics (96.7 %), librarian (89.7 %) and economics (87.2 %). From a

A similar trend could be seen in university education, in particular in technical fields and engineering, where the percentages of women remained in single digits.[614] This horizontal segregation in education was mirrored in segregation in the workplace.[615] As we already mentioned, women were concentrated in light industries and services, which were an afterthought in state socialist economic planning. In politics too, segregation persisted – women were present in the legislative bodies but practically entirely absent from the executive - both in terms of formal government[616] and the *de facto* government, the Central Committee of the CP.[617]

Vertical segregation[618] was also rampant. Scott, writing in 1970's, observes that only 4-5 % of decision-making posts and responsible government jobs were occupied by women.[619]

> It is known that in agriculture, where 52 per cent of all workers are women, only 20 of the country's 5,800 farm cooperatives are headed by women. There are no women ministers or vice ministers or ambassadors or member of the Presidium of the Central Committee of the CP. […] There are no women members of the Academy of Sciences and only two corresponding members. Only two of the more than three hundred district

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1970/1971 statistic, Köhler-Wagnerová, *Die Frau* 45. See also Bauerová and Bártová, *Proměny ženy*, 157.

[614] Köhler-Wagnerová, *Die Frau*, 45 and 48.

[615] Ibid, 36.

[616] During the entire period, only three women were either state or federal ministers. Hana Havelková, 'Jako v loterii: politická reprezentace žen v ČR po roce 1989' in H. Hašková, A. Křížková and M. Linková (eds), *Mnohohlasem* (Sociologický ústav AV ČR 2006), 30.

[617] Scott, *Does socialism*, 14.

[618] The term 'vertical segregation' is used to describe the concentration of workers of one sex (or other characteristic, such as race) at a certain career level (for example female workers and male managers). Vertical segregation is often perpetuated by the 'glass ceiling'.

[619] Scott, *Does socialism*, 14.

> national health centres are directed by women, in spite of the "feminization" of medicine.[620]

A corollary of horizontal and vertical segregation was a persistent gender wage gap. In 1962, a woman on average earned 64 % of men's wage, in 1988, the proportion rose only to 71 %.[621] The lack of equality in remuneration is particularly disheartening, as the socialist state (being *de facto* the only employer in the economy[622]) had a historically unique chance to completely disregard the costs of men's and women's pay on the labour market (the often cited cause of wage differentials in capitalist Western societies[623]) and remunerate jobs on the basis of their inherent value. Why did the gender wage gap, as well as other inequalities, persist?

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[620] Ibid, 14.

[621] Hašková and Vohlídalová, 'The Labour Market', 46.

[622] The state was 'responsible' for the structural differences in pay even legally - the wage policy was subject to central planning. The exact institutional set-up varied slightly over time. For a period, the setting of wages was under the control of the Ministry of social care (Sec. 1 244/1948), from 1951, it was under the control of the State Wage Commission (Government ordinance 27/1951). Organs of the state issued very detailed directives – it was observed in 1990 that pay was governed by roughly 800 separate legal norms published in the ection of Statutes (M. Trstenský, 'Market Economy and Labor Law: Czechoslovak Report' in M. Bogdan (ed), *Legal Aspects of Market Economy Reports from a Czechoslovak-Swedish Symposium* (Acta Societatis Juridicae Lundensis 1990), 40)**.**

[623] Eg Evelyn Ellis, *EU Anti-discrimination Law* (OUP 2005), 158.

3 Why was equality not achieved?

3.1 Grappling with explanations of inequality

In a – not uncommon – logical fallacy of inferring 'is' from 'ought', some authors bluntly denied the existence of the wage gap, at a time when women earned 66 % of men's wages:[624]

> The remuneration for work ceased to be the price of labour power, which is determined by the economic laws of supply and demand, but became a share of the worker on the national income. The amount of remuneration is set based on amount, quality and the social importance of work done. Work (and not sex or race) became the measure[…]. This basic change *guaranteed women actual real equal wages for equal work with men*.[625]

Others, such as Senta Radvanová, in her 1971 monograph *Woman and the Law*, acknowledged it:

> It is true that women participate in the productive social process *en masse*, but the internal, qualitative comparison of this participation comes out disproportionately adversely for women… their average earnings are lower.[626]

She identified several reasons for this. First, she observed women's lower qualifications.[627] This might have been true in the 1950s and 1960s,[628] but the persistence of the gap, into late the 1980s and beyond, shows that even when younger generations of women – whose education and qualifications were equal to men – joined the workforce, the gap remained.

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[624] Hašková and Vohlídalová, 'The Labour Market', 46.

[625] Jiří Jirásek, 'Některé otázky postavení žen v pracovněprávních vztazích' [1964] Právník 177, 178.

[626] Radvanová, *Žena a právo*, 16.

[627] Ibid, 16, 277.

[628] This explanation was also given in 1974 by Köhler-Wagnerová, *Die Frau*, 57.

A second reason she mentioned was that women's position in the labour market was impacted by the 'burden of the[ir] "second shift"'.[629]

> The core of the problem is that it is the *woman's role to be a mother*, not only in the biological sense (give birth to a child after a preceding pregnancy), but also in the broader social sense, i.e. to provide it with the necessary maternal care needed for its development and its socialisation as a human individual. A woman, however, alongside [being a mother] fulfils her role (mostly in parallel) in the work process and in other public activity.[630]

I made the observation about women's triple burden and the retention of traditional division of labour in the family in the previous chapter; and it would be a very important analytical point[631] in Radvanová's account, had she been critical of the 'roles' of the sexes and the domestic division of labour. Yet, her analysis oscillates between decrying the disadvantage women face and uncritically using the term 'role'. She recognized that 'the biological-social role of the woman-mother' was connected to the 'survival of various traditional opinions, or prejudices and anachronisms',[632] but at the same time unreflectively used it.[633] This striking cognitive dissonance can be traced back to, I would argue, the lack of theoretical category of gender and the missing understanding of how gender roles were culturally constructed. Even when 'prejudices' were identified, the analysis did not go further - the possibility of redefinition of the woman's role was not explored, nor was the 'role' of men remotely reconsidered.

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[629] Radvanová, *Žena a právo*, 19.

[630] Ibid, 19, emphasis mine.

[631] For an analysis of how patriarchal division of labour impacts segregation, see Heidi Hartmann, 'Capitalism, Patriarchy, and Job Segregation by Sex' (1976) 1 Signs 137.

[632] Radvanová, *Žena a právo*, 19.

[633] Ibid, 6, 32, 33, 207.

Third, Radvanová blamed mostly 'anachronistic individuals' and the prejudice of managers:

> It cannot be ignored that men often get work which is better paid than women.[…] Sometimes the position gets redefined to a lower pay grade when a woman is about to take it up. In the subconscious of many managers, women are still considered an auxiliary source of labour power.[634]

Another author critically highlighted the fact that 'men often get better paid positions because a woman's wage is still considered a supplement to a man's wage [by the management].'[635] But, similarly to the internal contradictions regarding whether a mother's triple burden was a 'role' or a 'prejudice', the authors also struggled with the analysis of whether the causes of inequality were structural or due to individual discriminatory behaviour.

Since we do not have records of individual discrimination complaints or claims, it is hard to assess how much of the wage gap can be attributed to individual acts of discrimination. Educated guesses of external commentators however attributed most of the gender wage gap to structural causes: 'the entire [state socialist] concept of economy[…] and the preferred branches therein'.[636] The undervaluation of work typically done by women can be traced back to the Marxist-Leninst understanding of production and reproduction and the particularly high estimate of certain types of production (especially heavy industry) over others (especially light industry and services), which I discussed in chapter 1. The State Socialist scholarship considered work typically done by men as more valuable than work typically done by women:

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[634] Ibid, 149.

[635] Marie Kalenská, 'K postavení žen v pracovněprávních vztazích v ČSSR' [1976] Socialistická zákonnost 18, 25.

[636] Köhler-Wagnerová, *Die Frau*, 57.

> The social importance of work which is *physically more demanding and difficult*, done mostly by men, is valued higher than other work.[637]

Most authors were uncritical about how the value of work was determined:

> [Gender wage gap] is not due to discrimination or exploitation. It is based on the different structure of men's and women's work and *on the fact* that difficult, physically and health-wise demanding, and consequently wage-preferred jobs *can only be done by men*.[638]

Radvanová was more reflective of the fact that the mere presence of women sometimes determined that work was valued less:

> It cannot be ignored that the feminization of some industries led to a lesser valuation of the social importance of these professions (for example education).[639]

She always stopped short, however, of a structural analysis which would see the impact of the gender order.

In reality, the gender wage gap most likely had both individual and structural causes, but it is not my aim here to give a final empirical answer. I am interested in the fact that the ability to explain the gender wage gap was diminished on the one hand by the inability to see gender and the gender order and on the other by a very limited equality guarantee. The authors failed to see that the individual behaviour of employers as well that of central planners determining wages was tapping into a wider societal gender bias about women's difference (in ability and preference), the lower importance of their wage for the family, their role in the family, the value of 'caring' work, etc. At the same time, neither different treatment by employers nor different

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[637] Radvanová, *Žena a právo*, 149.

[638] Bauerová and Bártová, *Proměny ženy*, 210.

[639] Radvanová, *Žena a právo*, 149.

impact of wage norms on the sexes was considered suspicious, discriminatory, and in breach of the equality guarantee.

3.2 Did social security compensate women for the gender wage gap and pay for caring?

With regard to equal pay, I want to explore another possible explanation of the gender wage gap, namely that 'women's pay' consisted not only of their wages but also of other benefits the state made available to women, especially mothers. Did the income from benefits compensate for the gender wage gap? And were the social benefits targeting women actually meant to remunerate their work in the home? Answers to both questions are theoretically important. An answer to the former might suggest that generous social security benefits were able to compensate for discrimination in the work-place. It might thus be an argument that an individual antidiscrimination right was not, actually, necessary. The latter answer would be particularly interesting for feminists, as many in the West have long criticized the fact that the work in the home is unpaid[640] and have called for its economic recognition.[641] If the Social State was willing to abandon the male-centred understanding of paid labour, it would mean an important paradigmatic shift. In the following, however, I show that neither argument can be made.

The compensatory role of social security benefits was suggested by Radvanová:

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[640] Eg Fredman, *Women*, 98-101.

[641] The Western feminist 'wages for housework' position is summarized in MacKinnon, *Toward*, 64.

> Women's wages are on average a third lower than those of men. The negative consequences of this are being compensated for through social security.[642]

She also considered, that 'wage has reached its zenith as means to interest people in societal development' and argued that the state money, which would have otherwise gone toward wages, was better spent 'liquidating the causes of social frustration', i.e. to social benefits.[643] Examples of these benefits include the 'material provision for transferred [female] employees' which was available to women who lost their job or position due to the ban on certain types of work contained in the 1965 Labour Code,[644] the previously mentioned counting of the periods of childcare toward pension benefits as equivalent to periods of employment,[645] or even child benefits.[646] About maternity benefit (*mateřský příspěvek*),[647] Radvanová even stated:

> this social provision does not have to have the form of compensation of pay, but rather the form of *remuneration for caring work* of children in the society's interest.[648]

Another author urged to

> consider the period of maternity leave as socially needed and necessary work, which *should be made equal to an employment relationship* [and remunerated at levels] comparable to wages.[649]

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[642] Radvanová, *Žena a právo*, 277.

[643] Ibid, 233. The context of these statements needs to be borne in mind: there was no private sector and both wages and social security was paid out of the state's budget – the clear distinction between wages and social security which exists in the West, did not exist.

[644] Ordinance No 74/1970. The provision included compensation for wages lost due to the transfer.

[645] Sec. 6 55/1956.

[646] She observes that they were instituted in 1945 as a 'form of pay' meant to 'increase the income of large families'. Radvanová, *Žena a právo*, 212.

[647] Introduced in 1969.

[648] Radvanová, *Žena a právo*, 223; emphasis mine.

The idea that these social benefits for women were truly understood as compensation for the gender wage gap can be challenged on two accounts, however. First, these benefits, as supplements to family income, indirectly benefited men in families. Second, they only benefited mothers and not women who were childless. Moreover, the idea is expressed by two academics in clearly aspirational language – these theses were suggestions, not a widely accepted understanding or justification of the pro-women or pro-family provisions.

Nonetheless, the fact that the conceptualization of care-work as work was put forward is very important at a theoretical level. The existence of this approach suggests that not only was the social provision for motherhood considered instrumentally necessary for population growth (as I have argued in the previous chapter), but that at least one segment of the state socialist experts and decision-makers[650] was willing to abandon the understanding of work exclusively as industrial male labour and recognize work in the home and children as equal to it. It also shows that there were true ideological and political aspirations about improving the position of women under State Socialism and there was a belief that the socialist project was meant to be socially transformative with regards to women's socio-economic well-being.

Are there other possible interpretations of the generosity of the socialist state in the area of social benefits for women? A sceptical interpretation would be to point out that in practice, it might have been aiming at the reduction of the likelihood of

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[649] Jirásek, 'Některé otázky', 185, emphasis mine. A similar debate was had in the UK, see Fredman, *Women*, 91-92.

[650] 'Experts' should not be equated with the 'state', but it has been argued that their opinions had considerable policy-influencing power. Havelková, 'Dreifache Enteignung'.

political discontent. But there is another explanation, with a solid theoretical basis. Namely, that the state was distributing 'according to need'. Marxist-Leninist theory foresaw two ways of distributing goods and services: under socialism, 'from each according to his ability, to each according to his work', and under communism, 'from each according to his ability, to each according to his need'.[651] Many authors commented that while in labour relations workers were still paid according to their work, social security was allocated 'according to needs':[652]

> Aside the [principle of remuneration based on work], distribution is increasingly being done based on a socially recognized need. It comes to play in cases where the society has a special interest in a certain activity (for example the care of children), where [awards] cannot be based exclusively on the workers' participation in social [paid] work.[653]

This understanding was truer to the Marxist-Leninist ideal of the division of everything 'according to needs' and probably closer to the prevailing State Socialist understanding. This interpretation is, however, less progressive from a gender perspective, because caring for home and children would no longer be seen as 'work', but merely as other 'socially important activity'.[654]

While under State Socialism the distinction, between the care-as-work approach and the benefits-according-to-need approach, might not have been crucial, it played a huge role in Transition. Had home-caring and child-raising truly become

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[651] The latter principle was first expressed by Marx in the *Critique of the Gotha Program*. Both principles were enshrined in the 1960 Constitution. Art. II stated that the socialist principle ('according to his work') was reality and Art. III promised that the communist principle ('according to his needs') was soon to be achieved.

[652] Mazanec, 'Význam', 350. The need-based understanding of social security is common in capitalist countries as well, so this conceptualization is not too surprising.

[653] Ibid, 349.

[654] Ibid, 350.

widely understood as work, continuing generous social payments to women and mothers might have been sustainable. But since it was more widely perceived as payment based on needs, and need became seen as anti-liberal after 1989, the support was rhetorically discredited and often diminished in Transition.[655]

4 The legal concept: substantive equality where difference prevails

4.1 Substantive equality

The State Socialist Constitutions, as well as the Labour Code, did not merely declare formal equality between the sexes, but stressed equality of opportunity and positive measures to allow women to 'use all their abilities'. To a Western reader, this might suggest a 'substantive understanding' of equality, an approach currently often considered more progressive in the West, as I have shown above. This substantive emphasis on context and real-life situation was part of a broader understanding of socioeconomic rights as primary, which I discussed in chapter 1. In a marked contrast to the capitalist West at the time, the socialist state considered positive rights a precondition for negative freedoms[656] - civil and political rights were seen as only possible if socio-economic rights enabled them. The same was true of equality – substantive equality was primary, formal equality had a limited role. Viktor Knapp, a leading Czechoslovak legal theorist, stated:

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[655] This debate has clear parallels in the West, for UK, see Fredman, *Women*, 91-91, 150-151.

[656] Jiří Boguszak, 'K sociální podstatě práva' [1967] Právník 297, 300.

> The basis is equality in substance, not just form.[657]

> Both Marx and Lenin see the basis of justice in equality; not in a quantitative legal equality ("law – the same standard for different people"), although even this [standard] is not without meaning for justice, but the equality of people, that is an equality which considers their inequality and their difference.[658]

Thus, while there was a commitment to achieving real substantive equality,[659] an individual antidiscrimination component was missing. This is also what made the situation in Czechoslovakia so different from the West. When one speaks about 'substantive equality', 'positive duties', 'pro-activity', etc. in the West, one assumes that an individual entitlement to assert discriminatory behaviour exists, and that all other measures go beyond it and complement it. In the State Socialist understanding, the 'substantive' measures were not only the basis, but they were all there was. The suspicion of Western equality and antidiscrimination law against the difference of treatment and impact was missing. The intellectual step that the law should interfere with bias, whether expressed by individual discriminatory acts or in discriminatory structures, was never made.

The fact that there was no understanding of antidiscrimination in State Socialist Czechoslovakia, brings into relief the difference between Western antidiscrimination law and Eastern equality law. In the West, the concepts of equality and antidiscrimination bring to mind protected grounds such as race/ethnicity or

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[657] Knapp, 'O spravedlnosti', 312.

[658] Ibid, 311.

[659] See also Josef Blahož, 'K otázce svobody o rovnosti v kapitalistických státech' [1980] Právník 517, 523.

sex/gender; in the East, the issue was economic equality.[660] In Knapp's words, the concern was 'an equality stemming from a particular division of means of production'.[661] During State Socialism, equality was first and foremost concerned with socio-economic levelling. Economic equality was to large extent considered already achieved through the socialist ownership of means of production. It was also actively pursued through wage policies, so that Walter Connor has observed that levelling and homogenization was even greater in Czechoslovakia than anywhere else in the Eastern bloc.[662] That this equality did not extend to groups defined by race or gender was not a pressing concern – indeed, much of the legal scholarly writing on equality was congratulatory.[663]

The potential of equality guarantees was further diminished by a ready acceptance of different treatment. This led to 'special' treatment which benefited women (4.2), but was also a ready justification for acceptance of segregation and discrimination (4.3).

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[660] On the primacy of class in Marxist-Leninist theory, cf. chapter 1(3).

[661] Knapp, 'O spravedlnosti', 311.

[662] Connor argues that this levelling was partly because Czechoslovakia – thanks to its pre-WWII economic advancement – had a sufficient resource of literate and qualified labour force. The general levelling of wages was also meant to compensate for the general lack of freedom in society: 'The Czech working class, as the [Czech] economists (probably rightly) saw it, was reasonably happy with economic policies that, if they could not guarantee a worker much, did guarantee that others would not do much better.' Walter D. Connor, *Socialism, Politics, and Equality. Hierarchy and Change in Eastern Europe and the USSR.* (Columbia University Press 1979), 217 and 23.

[663] Jirásek, 'Některé otázky', 178.

4.2 Different and 'special'

It is noticeable from the legal provisions that equality was inseparable from 'special' treatment. This is not in itself and inevitably problematic.[664] If one takes man as the comparator,[665] women are at once the same and different as men – same in their humanity, and different in their biology and the lives they typically lead in a patriarchal world. I consider that equality law needs to recognize this and accept both equal and different treatment as congruent with the principle of equality. But determining how much and what type of special treatment is necessary and suitable, is difficult.[666] I identify three challenges. First, the provisions can either draw on and contribute to an essentialist understanding of gender, or they can actively counteract it. Second, a balance needs to be struck between protecting the existing vulnerabilities of women on one hand and making sure that they have a full range of options and choices on the other. Third, the over-emphasis on difference can ultimately lead to an acceptance of different treatment which is not 'special' or beneficial, but worse. I argue that none of the three challenges was tackled well under State Socialism.

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[664] This is enshrined for example in the EU's recognition that 'provisions concerning the protection of women, particularly as regards pregnancy and maternity' do not constitute a breach of the 'principle of equal treatment'. Art. 2(3) Directive 76/207/EEC. Special treatment still has opponents, however. As Fredman points out, 'different' treatment has been opposed by liberals, who argue that equality should be symmetrical, as well as by neo-liberals, who reject interference with the 'free' market. Fredman, *Women*, 305.

[665] MacKinnon, for example, has criticized the sameness-difference paradigm as obscuring the fact that the unchallenged norm, the standard of comparison, is male. MacKinnon, *Feminism unmodified*, 32-46.

[666] On debates in the West, see Fredman, *Women*, 304-8.

4.2.1 'Natural' difference

Some Western authors reflecting the State Socialist gender policy have understood the State Socialist gender policy as emphasising sameness.[667] I believe that this was not so – while the language was that of equality or 'equal rights' (*rovnoprávnost*), many of the policies were based on a perceived difference between the sexes, increasingly more so towards the end of the State Socialist period.

There was a strong perception of inborn differences between the sexes which was perceived to lead to real difference in ability as well as preference. The canon was a biological determinism and essentialism, especially with regard to the role of women in the family:

> Woman, while of equal rights in society, is different from a man through her *social-biological function* with regard to the sustenance of human kind, which leads to a range of differences in anatomy, physiology, *in social roles*, especially in relationship to offspring, etc.[668]

Importantly, not only biological difference, but also social difference was taken as natural and unchangeable. There was no understanding that entrenching gender roles in law decreases women's (and men's) autonomy, in both family and the public sphere.

4.2.2 Special treatment based on difference, not disadvantage

As I pointed out above, special treatment was an accepted exception from the principle of equality. The principle that unlikes should be treated unalike was actually

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[667] For example Nanette Funk states that it 'failed to acknowledge' the 'difference [between men and women]' in Nanette Funk, 'Introduction: Women and Post-Communism' in Nanette Funk and Magda Mueller (eds), *Gender Politics and Post-Communism* (Routledge 1993), 6.

[668] Radvanová, *Žena a právo*, 6, emphasis mine.

more prominent that the imperative of treating likes alike. For example Radvanová explicitly defended special medical procedures for women – the screening for uterine cancer – as compatible with the principle of equality:

> [T]hese special procedures do not mean a breach of equality between citizens in access to health care. This is because the right to health care means care which is adequate and needed based on a particular health condition or the potential danger of disease.[669]

In many instances, the differential treatment was aiming to treat women better. There were measures which catered to women special needs resulting from their 'different' biology, such as breastfeeding breaks, or cervical cancer scans. There were measures which reflected the 'different' social reality of women's lives - such as the protection from dismissal during pregnancy and maternity in labour law, and maternity benefits in social security. There were even measures which could be understood as positive action – there was for example a legal requirement for employers to adopt binding 'plans to increase labour participation of women'[670] and there were the Communist Party quota for women.

Overall, materially, these provisions were good for women – they made sure that women's specific biology was reflected in policy, they protected women from the ramifications their motherhood would otherwise have on their economic situation, and they to some extent redressed the disadvantage women face more generally under patriarchy. But the problem was the underlying understanding. The conceptual distinction between the biological and the social was never made, and most special

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[669] Ibid, 191-192.

[670] Eg Sec. 8(1) 70/1958., and Sec. 20 Government ordinance No 92/1958.

treatment was deemed to protect and support the 'role' of women as mothers.[671] These essentialist references to 'functions' and 'roles' of women and mothers both drew on and entrenched a specific, narrow conception of what it meant to be a 'man' or a 'woman'. They cemented existing gender roles and the gender order. Because they were based on stereotypical ideas about roles, the provisions were inappropriately tailored, for example in that they completely excluded men from the possibility of caring.[672] In many instances, they went beyond what was necessary, as I have shown on the example of ban of certain types of work, which limited women's opportunities in the labour market.[673] The extent of some provisions, such as the length of maternity leave, although optional, made female workers less desirable to employers, and could stifle women's careers. More importantly, difference was not accommodated but treated separately. There was never any consideration of changing the male-based norm. During certain periods of their lives, women were predominantly workers, in others, they were mothers – symptomatic of this was a very low availability of part-time work.[674] No true provision was made for reconciliation of work and family life for either men or women. I would argue that the underlying reason for these problems was that the rationale of different treatment was not real material and symbolic *disadvantage* of women, but merely their *difference*.

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[671] Ibid.

[672] While I would advocate gender-neutralization of parenting, i.e. parental leave and parental benefits, there is a case to be made for special protection during pregnancy, breastfeeding and shortly after birth. The EU legislation has approached the issue in this fashion; see Pregnancy Directive and Parental Leave Directive.

[673] Cf. chapter 2(2).

[674] Part-time work has not been without its problems in the West, where it is more wide-spread – part-time workers have been the target of indirect discrimination, as many European cases demonstrate. Eg C-170/1984 *Bilka-Kaufhaus* [1986] ECR 1607.

4.3 Different and worse - Inequality not identified as discrimination

The difference narrative led to an understanding of the sexes as in many ways incomparable. This enabled both, a different-better treatment, which I just discussed, as well different-worse treatment. Neither unequal treatment nor unequal results along the sex/gender axis triggered suspicion, neither individual acts nor structural set-up which disadvantaged women were considered discrimination; after all, neither direct nor indirect discrimination as legal concepts existed.

The example of segregation can serve to illustrate that an awareness of how gender disadvantage works was missing at two steps. First, because difference between the sexes was seen as natural, segregation in the family and in the sphere of work between male and female jobs was understood as natural too.[675] This was not seen as any inequality, it was perpetuated in legal regulation and defended by legal academics:

> The fact that it is first and foremost the woman who is called to care for a child at young age, cannot be seen as some inequality. The equality of a man and a woman does not mean a mechanical division of life functions and societal work. Motherhood is an exclusive fate of the woman.[676]

The fact that women were different and had a second shift at home was accepted as an explanation for inequality and a justification for discrimination.

Second, since there was no awareness of patriarchy, and the hierarchy it entails, the fact that this segregation was 'separate but unequal'[677] and worked with a

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[675] For parallels in the West, see Fredman, *Women*, 74-5, 1-4-113, 122-125, 133-137.

[676] Radvanová, *Žena a právo*, 30.

[677] The term 'separate but equal' was used to justify discrimination of African Americans through segregation before the ruling *Brown v. Board of Education*. It is doubtful that a separation or segregation of two groups, based on a protected characteristic such as sex or race, can ever be equal.

hierarchy between the male and the female, with the female being inferior, was not problematized. The women were 'helpers', they were 'auxiliary',[678] especially in the public world of work and politics. Their income was seen by employers as secondary to men's in the family and therefore lower.[679] And in (local) politics, women's involvement meant their relegation to segregated tasks such as inspecting caring work, child care and social welfare.[680] As I have shown above, the fact that their work was valued less was considered to be based on obvious, objective criteria. Without seeing gender as constructed and changeable and without seeing patriarchy and the hierarchy and bias it creates in society, none of these inequalities could have been tackled. Symbolic disadvantage could not be fought, because stereotypes were not identified as harmful. Material disadvantage could not be fought, because it was considered a natural consequence of difference.

5 Conclusions

Equality was an important principle under State Socialism. The socialist state strived and overwhelmingly managed to eliminate traditional legal privilege of men and it guaranteed access of women into hitherto restricted arenas of education, work and politics. But looking beyond these two tenets, equality was limited. It did not contain a legal right to non-discrimination that would protect both from individual

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[678] Alfred G. Meyer, 'Feminism, Socialism, and Nationalism in Eastern Europe' in Sharon L. Wolchik and Alfred G. Meyer (eds), *Women, State, and Party in Eastern Europe* (Duke UP 1985).

[679] The man was not the sole breadwinner, like he was in the West, but still the main breadwinner in the family. Šiklová, 'Are Women', 75. See also fn. 635.

[680] Fodor observes that 'not surprisingly, the functions women were supposed to fill were not only different but also inferior to those carried out by men'. Eva Fodor, 'Smiling Women and Fighting Men: The Gender of the Communist Subject in State Socialist Hungary' (2002) 16 Gender & Society 240, 258.

prejudice or structural disadvantage. The concern of equality policy was overwhelmingly that of economic levelling – the axis of disadvantage tackled was class, not gender or other characteristics often protected in the West. And although the understanding of equality was substantive, in that it recognized differences between men and women, the 'special' treatment of this difference often meant overprotection that limited women's (and men's) choices and autonomy, and entrenched gender roles. The ready acceptance of difference also justified individual acts and structural mechanisms of discrimination. Finally, even though the State Socialist equality policy had 'transformative' hallmarks, it only applied to the socio-economic sphere – it cared about redistributive but not cultural transformation. The male norm was never questioned or redefined. Much of these limitations were connected to the ideological confines of the socialist state, in particular the absence of gender analysis – I turn to this debate in greater detail in the following chapter.

What happened to equality and discrimination law in Transition? I show below in chapter 8 that it has not fared much better. New guarantees, including the prohibition of direct and indirect discrimination have been transposed into Czech law because of EU membership obligations, but the lack of understanding of gender, patriarchy and the disadvantage it creates, inherited from State Socialism, persists. Equality law has suffered a double disadvantage since 1989 - in reaction to the previous period the socio-economic, substantive and transformative approach to equality has been discredited as 'communist', while the gap in understanding the cultural devaluation of the feminine and the symbolic harms women face under patriarchy has not been filled.

CHAPTER 4

IDEOLOGICAL ASPIRATIONS AND REALITY: MISSING GENDER

When discussing gender under State Socialism with Czechs, some of my interlocutors assume that gender equality was a fig-leaf and that the state was merely paying lip-service to it but in reality used women instrumentally. When discussing gender under State Socialist with my colleagues in the West, many assume that State Socialism liberated women in a way which has yet to be fully achieved in the West. The truth lies somewhere in the middle. I observed previously that both Marxist-Leninist theory and State Socialist ideology were concerned with class as an axis of disadvantage, first and foremost. On the other hand, there were aspirations specifically about women. The three-pronged plan included 'complete [legal] equality of rights', 'bring[ing] the whole female sex back into public industry' and 'the abolition of the monogamous family as the economic unit of society'.[681] These gender-progressive aspirations of the socialist state were to a large extent fulfilled, as I observed in chapter 2. But there were also some problems with the implementation of these aspirations. For example rather than liberating women from 'household drudgery' through collectivization as promised, the socialist state instead supported them as the exclusive individual carers in the home.

[681] Engels, 'Origin', Chapter IV(2), 46-47.

In section 1 of this chapter, I return to discussing the aspirations of the socialist state in greater detail and their considerable limitations. The State Socialist project was never about gender – there was no awareness of the culturally constructed gender roles and gender stereotypes, or the hierarchical social structures which constitute patriarchy. The inability to see gender and gender inequality led to three important gaps in the socialist state's sex equality project, which I discuss in greater detail: the fact that men were entirely missing from it (section 1.1); the concern with material aspects of life, which led to an absence of any aspiration to transform culture (section 1.2); and a connected inability to understand certain gendered phenomena, such as gender-based violence (section 1.3).

In the previous three chapters of Part I of the thesis, I have discussed 'the socialist state', under which I subsumed the analysis of law-makers, judges and legal experts, because their perspectives and positions evinced considerable uniformity.[682] This homogeneity did not continue into Transition, however. When 'the socialist state' fell in 1989, a broader and more diversified spectrum of actors joined in the public debate. In order to identify the continuities and discontinuities in the understanding of gender equality as I move into the period of Transition, I have to look beyond the state. In section 2 of this chapter, drawing mostly on secondary social-science literature, I consider the impact that over 40 years of State Socialist ideology have wrought on Czech culture and society with regards to gender equality.

First, I ask why the State Socialist sex equality project did not evolve and why the gaps in the existing aspirations were not filled. I argue that the State Socialist authoritarianism - characterized by a combination of single state ideology and a

[682] On the control exercised by the CP, see chapter 1(2.2).

curbed freedom of speech, assembly and association - prevented ideological self-healing as it suppressed the development of 'emancipatory consciousness' among women and genuine bottom-up critique (section 2.1).

I then examine how gender was 'lived' under State Socialism and whether the ideology, the policy and the legal advances that were made did affect a socio-cultural change. In section 2.2, I observe that State Socialist aspirations met with resistance from the population. This meant that even had the aspirations gone further, they might not have effected a far-reaching cultural change. In section 2.3, I note that the paternalism of the socialist state meant that the state assumed some traditionally male functions. This diminished the status of men, but did not enhance the status of women. On the contrary, men's 'weakness' arguably added yet another task to women – that of supporting their men. In section 2.4, I observe that although this paternalism might have increased the solidarity between the sexes, it did not increase equality in relationships and did nothing to decrease cultural devaluation of women. In section 2.5, I show that women were seen as less dependable 'communist subjects' than men, as pregnancies and child-bearing were seen to impair their political devotion and reliability. This was, paradoxically, viewed as liberating by women as it allowed them to avoid the oppressive and tainted public sphere of career and Communist politics. In Transition, however, this continued scepticism of political action has inhibited women's and feminist movements; a topic to which I return in chapter 8.

Finally, in section 2.6, I discuss the importance of political affiliation for one's life under State Socialism. The population perceived the divide between 'haves' and 'have nots' as largely between the 'regime and its supporters' and 'the rest'. This had two important repercussions for gender. First, it created a peculiar public/private divide, different from the West - there was little that was desirable about the public

sphere; women's retreat into the family was seen as liberating and cherished. In Transition, this meant that some Western feminist demands or slogans, such as 'personal is political', have met with misunderstanding and distrust among the Czechs. Second, the fact that many among the population saw 'political affiliation' as the main axis of oppression impeded the emergence of any awareness of gender inequality and a consciousness about patriarchy. Indeed, gender and patriarchy was doubly obscured - the socialist state's official ideology and policy saw only class, and, in reaction to the oppressive regime, the structure the people saw was 'the regime'.

1 Missing gender-progressive aspirations

I chapter 2, I showed the limits of the socialist state agenda with regards to gender; in chapter 3, I observed the limits of the equality guarantees. In the following, I return to the question of whether gender-relevant Socialist laws were gender-progressive or gender-conservative and summarize the State Socialist understanding of gender (or rather the complete lack of it) (1.1). I then return in depth to two issues foreshadowed in the previous chapters: the role of men (1.2), the emphasis on the 'material' (redistribution) and the neglect of the 'cultural' (recognition) (1.3). Finally, I argue that the inability to see gender and gendered cultural patterns meant that certain areas – such as sexuality or gender-based violence - were particularly mishandled or neglected (section 1.3).

1.1 Blindness to gender and the gender-conservatism of the State Socialist agenda

I have observed that although the socialist state cared about 'women' and even 'equality between the sexes', it was unable to see gender as a social construct which hierarchically organizes society.[683] It did not identify it in social reality, nor, consequently, in its own assumptions and starting-points. And yet both Marxist theory as well as State Socialist ideology were gendered; directly, in being biologically deterministic about the nature and role of women and men, as well as indirectly, for example in its analysis of production and reproduction, which considered work typically done by women as less valuable.[684] This bias was entirely unreflective.

What did the missing gender analysis and the gender-conservatism entail? I observed that differences between men and women had been perceived as natural and biological. This assumption of different roles for men and women had repercussions for both the private and the public sphere. In the private sphere of the family, women's roles were perceived as inherently different – the allocation of the responsibility of housework and childcare to them was therefore considered inevitable and normal.

But even in the public sphere, for example the world of paid labour, this led to inequality. In terms of access, men and women were seen as sufficiently similar. But when it came to their exact place or position and evaluation, the assumption of difference led to an acceptance of segregation and discrimination. Here, the inability to see how cultural bias translated into individual discriminatory acts, as well as structural mechanisms which disadvantaged women, meant that widespread gender inequality could not be challenged.

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[683] Cf. chapter 1(3.1).

[684] Cf. chapter 1(3.3).

1.2 Missing men

Gender did not exist as a meaningful category, and whether the term 'woman question' or 'equality of the sexes' was used, the 'problem' and the target of the regulation were women. As I argued in chapter 2, marriage, family, housework, reproduction and children was equated with women and regulated through them. A woman was 'not only a citizen of the socialist state, but also a worker, wife, a mother or a widow'.[685] First, it is telling that single or divorced women were not worth mentioning – women were appreciated only within certain defined categories and roles. The second omission is that of men. Men did not have 'roles', they were men.[686] Their social or legal status was not to be altered – the equality of sexes was not about them.

This explains why even those State Socialist commentators, who acknowledged the problem of the 'double burden', such as Radvanová, struggled to propose of solution to it. Because the problem could not be analysed through the gender perspective, it was blamed on 'the lack of help from the society'.[687] This was an important and valid point of Radvanová's – the author bravely criticized the socialist state for not fulfilling one of its promises, namely that of the abolition of the monogamous family as the economic unit of society[688] and the 'freedom [of women] from household drudgery'.[689] However, because she did not identify gender roles in

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[685] Radvanová, *Žena a právo*, 6.

[686] Similarly, Heitlinger, 'The Impact'.

[687] Radvanová, *Žena a právo*, 24.

[688] Engels, 'Origin'.

[689] Zetkin, 'Lenin'.

the family as the core of the problem, she turned to a material solution of improving the state's contribution to childcare and housework. She concluded that the problem of the 'double-burden' would be

> solved by [improved] services, technical advancement, [the righting of] management wrongs, and better productivity of the national economy…[as well as] the little mechanisation of the household and collective catering for children and collective childcare.[690]

She was right that better material provision would help; indeed, Heitlinger has observed that:

> [I]t is ironic that advanced capitalism has produced more significant changes in the nature of domestic labour than state-socialism [with capitalism's] semi-processed foods, expanded and rationalized shopping facilities, dry-cleaning and laundering services, […and] household appliances.[691]

Radvanová's suggestion regarding state involvement in the alleviation of women's workload with regard to children and the household is laudable – such measures should be a part of any gender equality policy. However, it cannot be the only element. At a theoretical level, Radvanová's ability to identify of the problem and the solution was inherently limited. A redefinition of the 'male norm' was necessary, both in terms of redefining the 'male' role from worker only, to a worker and a carer; but also in terms of redefining the idea of 'worker' away from androcentric assumptions based on traditionally male needs and experience, to accommodate typical women's experiences – need for flexibility, part-time, interruptions in career, etc.

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[690] Radvanová, *Žena a právo*, 27.

[691] Heitlinger, *Women*, 26.

1.3 Materialism and culture

Marxist-Leninist theory and State Socialism ideology were concerned with economics and material aspects of life, not culture.[692] This was expressed in the Marxist 'material conception of history'.[693] But the materialism of Marxism-Leninism and State Socialism was more general - an understanding that humans were beings whose needs were primarily determined by their physical integrity and material well-being.[694] This materialism very concretely impacted legal institutions. For example in the area of compensation for personal bodily injury, only 'pain', but no subjective 'suffering',[695] could be compensated.[696] Similarly, in the area of protection of personality (*ochrana osobnosti*), injury to personal dignity was not covered,[697] only damage to public reputation, which de-subjectified the protection and the understanding of harm.[698]

I argued in chapter 3 that this materialism had consequences for the concept of equality – the preoccupation with the material sphere and with class, as an axis of inequality, led to attention being paid to socio-economic levelling and the eradication

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[692] Scott observed that the Marxist movement has always 'put heavy emphasis on the tangible, material, economic, and political at the expense of the more ephemeral personal and psychological' Scott, *Does socialism*, xii.

[693] According to it, the mode of production of material life conditions the general character of its social and spiritual processes.

[694] Procházka, 'Všetkým', 98.

[695] Suffering, understood as an individualized emotional reaction to the event, was not compensable. Ibid, 101.

[696] No immaterial harm could be compensated which did not contain an element of physical bodily harm (such as for example emotional suffering caused by justified fear of bodily harm or the death of a family member).

[697] Procházka, 'Všetkým', 101.

[698] Ibid, 107-108.

of poverty, but not at all to symbolic harms resultant from the undervaluation of women and the 'feminine' in society. This, in turn, had repercussions for the ability to see discrimination. While in the West, the early 'formal' stage of antidiscrimination law was concerned with eliminating bias in decision-making, the importance of this was not realized in the East. This synergized with materialism in law: when the only inequality seen is material and the legal tradition does not recognize and compensate immaterial injury, some harms suffered traditionally by women are made invisible and marginalized.

Nancy Fraser's analytical unfurling of disadvantage and social injustice is useful here. She distinguishes between redistributive and recognition harms.[699] The emphasis on redistribution, concerned with economic inequality and injury in the material sphere, was what we find during State Socialism in Czechoslovakia.[700] In the West, however, since the 1970s onwards, feminists[701] have argued that the redistribution paradigm was insufficient to capture gendered injustice, especially its cultural disrespect toward 'the other' and the symbolic construction of patriarchy:

> More concerned with *insults* than *injuries* […their aim was] to combat the depreciation of their identities, ways of life, and social contributions.[702]

While Marxist theory and State Socialist ideology were aware of redistributive wrongs,[703] and tried to remedy them, they lacked an understanding of cultural,

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[699] Fraser, *Justice interruptus: critical reflections on the "postsocialist" condition*; Fraser and Honneth, *Redistribution or Recognition*; Olson, *Adding*.

[700] In the West, too, this is a particular concern of Marxists and Social-Democrats.

[701] Especially cultural feminists, as well as other 'progressive social movements', such as multiculturalists a 'queer'. Olson, 'Introduction', 2.

[702] Ibid, 3, emphasis mine.

recognition wrongs. Stereotyping, bias, cultural and social devaluation of women, gender-conservative notions of 'role' or 'sexuality' were not merely ignored, they were not cognizable under the State Socialist framework. Allowing or facilitating women to live lives not defined by their traditional gender roles, or redefining the male norm were unthinkable as policy and legal agendas of the socialist state.

This is also why for example questions of sexual identity were understood as medical problems. As the strict division between the sexes, with their ascribed gender roles and heterosexuality,[704] were the unchallenged norm, different gender identity was incomprehensible. Trans-sexuality was thus seen as a medical-psychological problem[705] and while operative sex change was available, it was dealt with under the rubric of 'treatment of serious sexual disorders', together with operations on intersex individuals (hermaphrodites) and deviants (sadists, paedophiles, etc.).[706] A legal change of name and sex (in birth records) was made possible in 1980. But only if one conformed to the gender-appropriate behaviour of their new sex - post-operative trans-sexual had to have a 'sufficiently persuasive appearance as a person of the opposite sex'[707] their 'reproductive function' was 'disabled'.[708]

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[703] They were arguably also aware of 'representative' wrongs, hence the informal party quota for women. Cf. n.62 on why I do not discuss representation in greater detail.

[704] Marxism itself was unambiguously heteronormative. Jaggar, *Feminist*, 69.

[705] Jiří Haderka, 'Jaký právní přístup k otázkám transsexualismu? (What legal approach to transsexualism?)' [1986] Právník 213, 213.

[706] Communication of the Czech Ministry of Health No. LP-267-16.9.1970.

[707] Internal instruction of the Czech Ministry of Health, No. 114-270-27.12.1979.

[708] Ibid.

Finally, the inability to see the cultural aspects of patriarchy, such as the objectification of women, also contributed to the fact that the gendered nature of certain types of violence was not recognized. I discuss this in the following.

1.4 Gender-based violence

I noted in chapter 1 that Marxist theory was unable to recognize and explain why women were particularly liable to be subjected to rape, to physical abuse, to sexual objectification and harassment.[709] Consequently, the socialist state failed to see, understand and adequately address gender-based violence, defined by CEDAW's General Recommendation 19[710] as 'violence that is directed against a woman because she is a woman or that affects women disproportionately'.[711] The fact that inter-personal violence, from rape to domestic violence to sexual harassment, has these gendered aspects was ignored in State Socialist Czechoslovakia. The concept of 'gender-based violence' did not exist and the existence of it went largely unacknowledged. Not a single article in *Právník* or *Socialistická zákonnost*, the two legal journal studied, was dedicated to any aspect of it, and none of the publications dedicated to women[712] addressed it. For example with regards to domestic violence, the author of *Woman and the Law*, after having dealt with alcoholism on several pages, comments in one paragraph that 'bad behaviour' and 'inordinate lifestyle' also

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[709] Jaggar, *Feminist*, 77.

[710] Committee on the Elimination of Discrimination Against Women, Gen. Recommendation No. 19, U.N. Doc. A/47/38 (Jan. 29, 1992).

[711] Art. 6 ibid.

[712] Radvanová, *Žena a právo*; Miroslava Šolcová, *Postavení ženy v socialistické společnosti* (Horizont 1984); Bauerová and Bártová, *Proměny ženy*.

happen in marriages and that some husbands are 'bullies and brutes',[713] without discussing or analysing this fact any further. Nor do legal journal articles dedicated to the questions of marriage, divorce and family, which mostly discuss ways of keeping marriages together, mention the possibility of spousal abuse.[714]

It could be counter-argued that there was recognition that certain types of crimes were more often perpetrated against women, as for example the crimes of rape and trafficking[715] were gender specific during the entirety of the State Socialist period, i.e. they could only be perpetrated against women.[716] But this did not imply any more sophisticated understanding of the social construction of male sexuality in society or the embeddedness of male-on-female violence in gender power relations. It can rather be traced back to very crude ideas about sexual instincts, as exemplified by a 1981 legal article about sexual crimes:

> All human behaviour in the area of sexuality is determined by sexual instinct. This sexual instinct, *libido sexualis*, is made up of unconditioned reflexes, which are, as is well-known, innate. They are the force driving the interests and behaviour of humans in their sexual life.[717]

The fact that it was considered 'innate' means that it was taken to be unchangeable. Sexual violence was thus reduced to being about sex, or even more reduced to being about sexual deviation. The only harm perceived was that of

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[713] Radvanová, *Žena a právo*, 83.

[714] The exception was Schiller who points out that the obligatory reconciliation of spouses is absurd in situations of 'physical attacks'. His commentary was gender neutral, however, and was not elaborated on. Schiller, 'Řízení', 25.

[715] Sec. 238 and 243 86/1950;. Sec. 241 and 246 of 140/1961.

[716] Other gender-based violence, such as domestic violence or harassment, was not specifically regulated and would have been punishable only in advanced stages, when serious bodily harm was inflicted or murder perpetrated.

[717] Miroslav Mitlöhner, 'K některým příčinám sexuálních trestných činů' [1981] Socialistická zákonnost 602, 602.

violence; there was no concept of it as an 'insult' – as an expression of symbolic meaning. There was a lack of perception that gender-based violence might be an extreme expression of the devaluation of women, which is every day manifested in casual objectification and sexism. Furthermore, from the context of the quote, it is clear that the sexual instinct referred to by the legal scholar was male – sexual violence is explained, and seemingly excused, by the male sexual instinct; women's sexuality and more importantly their sexual autonomy is in no way considered. I argue in chapter 6 below that the reluctance to acknowledge the existence of gender-based violence and the lack of understanding of it in the context of power relations between the sexes persisted well into Transition, and that the law and the legal actors have continued to take a 'male perspective' to the issue.

Having discussed the limits of the aspirations of the socialist state, I now examine whether the existing ideological aspirations and policies had any real socio-cultural effect. Did State Socialism change Czech culture and society with regards to its understandings and practice of gender?

2 The reality – did State Socialism change culture and society?

2.1 State Socialist authoritarianism and the silenced bottom-up critique

When looking at the limits and gaps of the aspirations of the socialist state in the area of 'equality of men and women', one might ask why the project did not evolve to transcend the limits and fill the gaps over the 40 years of State Socialism. The authoritarian nature of the state with its single and unimpeachable ideology, combined with curbs on freedom of speech, assembly and association were important contributing factors. There was a very limited space for a bottom-up critique. Thus, a

paradox existed of 'totalitarian practices [which] both enabled radical processes aimed at social equality [from the state]… and on the other hand they blocked it'.[718] Hana Havelková has argued that any 'spontaneous development' among women

> was halted both directly and indirectly. Directly, as women's movement was stopped … Indirectly, any activity from below was paralysed because women were [officially] strongly supported and protected by the state so, theoretically, they had no reason to complain.[719]

This situation has been described as modernization without liberation.[720] The modernization was top-down and paternalistic, and because of the authoritarian character of the system it was not accompanied by the liberation and empowerment of women. Alternative voices were silenced, including those of women.[721] A 'threefold misappropriation'[722] of the feminist agenda took place under State Socialism, in that none of the relevant actors - the regime, the social scientists writing on women's issues from the position of expertise, nor the dissident movement – felt or remedied the absence of an independent women's movement. On the contrary, these actors themselves often acted in anti-feminist ways.[723]

Probably to a large extent due to the suppression of alternative voices, there was a conspicuous absence of 'emancipatory consciousness',[724] especially compared

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[718] Havelková, 'Women In and After', 70.

[719] Ibid, 70.

[720] Ibid.

[721] Ibid.

[722] Havelková, 'Dreifache Enteignung'.

[723] Ibid.

[724] Gerlinda Šmausová, 'Emancipace, socialismus a feminismus' Kontext: časopis pro gender a vědění <http://www.zenyaveda.cz/html/index.php?s1=1&s2=3&s3=16&s4=3&id=48> accessed 20 March 2009.

to the West;[725] a trend which has continued into Transition, as I discuss in chapter 8 below. And paradoxically, during the critical period of the 1960s, when women's voices were briefly heard, their calls were for greater support of women's childcare obligations. This brings me to a question whether the revolutionary 1950s caused a backlash against emancipation.

2.2 Resistance to change

I have noted above that anti-traditional and gender-progressive aspirations and policies of the socialist state were limited. Interestingly, where the socialist state did try to change social structures, a part of the population pushed against it. A return to the 'traditional' was arguably a subversive tactic or a resistance[726] strategy of the population, especially later in the State Socialist period. Libora Oates-Indruchová has observed about a 1988 novel[727] that

> textually mediated femininity linked to the bourgeois/middle class may appear as subversive of the state-socialist ideology of classlessness. […F]emininity cast in that context not only subverts the image of the state-socialist superwoman (that self-effacing helpmate of the public sphere and "angel" of the private sphere), but also endows that superwoman with an empowering corona of individuality, ambition, self-fulfilment and achievement in the men's world precisely by drawing on the repository of the residual patriarchal discourse.[728]

Similarly, Kateřina Zábrodská, who has explored the negotiation of identity of the 'Czech socialist woman' through discourse analysis of interviews with Czech women,

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[725] Wolchik, 'Introduction', 8.

[726] Havelková, 'Women In and After', 73.

[727] *Z neznámých důvodů* by Zdena Frýbová.

[728] Oates-Indruchová, 'Where'.

has noted that women[729] 'articulate[d] their desire to accentuate gender differences wiped away by state socialism and to occupy the position of a 'woman' again'.[730]

These observations are important as they show that there was resistance to some aspects of the emancipation project. While I argued that the socialist state's program of change to traditional gender roles was limited, it is important to realize that no matter what its attempt, it might have struggled and failed in the face of the preference for a traditional gender order among the population in general and women in particular.

2.3 State socialist paternalism – what happened to men?

The State Socialist period has often been described as 'paternalistic', to denote the 'replacement of traditional forms of paternalist authority by a similar authority embodied in the state'.[731] Kenney observes that the term 'depict[s] the state acting as the head of a family, providing protection and stability in return for obedience'.[732] What was the impact of this state paternalism on men? Did it minimise their status?[733]

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[729] Her research is based on interviews with Czech women on their experiences in the State Socialist period. Kateřina Zábrodská, 'Between Femininity and Feminism: Constructions of a "Czech Post-Communist Woman" in Biographical Interviews' in Hana Havelková and Libora Oates-Indruchová (eds), *The Politics of Gender Culture under State Socialism: An Expropriated Voice* (Rouledge IN PRINT).

[730] She refers to this as the 'lost chivalry' repertoire. Ibid.

[731] Kenney, 'The Gender of Resistance in Communist Poland', 405, cf. references there.

[732] Ibid, 405.

[733] Zábrodská, 'Between'.

Ivan Vodochodský[734] has identified two disparate interpretations in the literature of what state paternalism meant for men and patriarchy. One considers the communist power male and its construction of the 'communist subject'[735] strongly gendered to the benefit of men and detriment of women. The other position notes that men were actually 'weak' and did not participate in communist power. Vodochodský himself leans toward this 'strong party - weak men' paradigm. He observes that even though most communist functionaries were men, they were not a positive example for other men.[736] According to him, the party functionaries came across as 'gender-less individuals or an animal species, with which it is impossible to identify, humanly, let alone gender-wise'.[737] If the communist functionaries had power but lacked authority and no one really wanted to be like them, what about ordinary men?

Vodochodský states that men were seen as 'weak, insecure and impractical'.[738] Due to nationalization, they lost the previous sources of their dominance - private property and enterprise.[739] Similarly Wagnerová has observed that

> Nationalization not only hit capitalists and small and large landowners as such but also men, striking at the core of their identity and self-awareness, since in taking away their property it also deprived them of an important attribute of their social dominance.[740]

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[734] Vodochodský, 'Patriarchát', 40.

[735] Fodor, 'Smiling'.

[736] Vodochodský, 'Patriarchát', 40; See also similarly Alena Wagnerová, 'Emancipace a vlastnictví.' (1995) 31 Sociologický časopis/Czech Sociological Review 77, 82.

[737] Vodochodský, 'Patriarchát', 40.

[738] Ibid, 41.

[739] Ibid, 41; see also Wagnerová, 'Emancipace a vlastnictví', 85.

[740] Alena Wagnerová, 'Emancipation and ownership' (1996) 4 Czech Sociological Review 101, 104.

In the public sphere, men were subject to persecution and blackmail,[741] which earned them sympathy and support within the family. The wife had to be a 'superwoman' (managing paid work, housework and childcare), the man was a 'big child'.[742] Zábrodská confirms these observations - she identified an interpretative repertoire in the narratives of women, which 'construct[s] men as lacking responsibilities and, in consequence, as incompetent and morally weak.'[743] Vodochodský observes a paradox:

> [We have here a society] in which, on one hand, most power is in the hands of men and where women hold only segregated and inferior positions. On the other hand a society, in which the majority of men are weakened in their traditional roles and dependent on the support from women to whom they are close.[744]

These debates are important for the status of women, as one could assume that a decrease in men's status meant an improvement of women's status. Gender relations, however, are not a zero sum game.[745] It can be argued that men's 'weakness' added yet another task to women – that of supporting their men, discounting their laziness, tolerating their 'aggression, alcoholism, womanizing and absenteeism'.[746] One could also hypothesize that the diminished power of men in the public sphere led to a reassertion of their power in the home, for example through domestic violence. For women, to denounce this to the oppressive state would be seen

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[741] Vodochodský, 'Patriarchát', 41.

[742] Gal and Kligman, *The politics*, 54.

[743] She identified this as a 'men are no heroes' repertoire. The other repertoires are 'equality impossible', 'lost chivalry' and 'loyal masculinity'. Zábrodská, 'Between'.

[744] Vodochodský, 'Patriarchát', 42.

[745] Wagnerová has described this as a 'negative "redistribution"', 'during which men lost but women did not gain' Wagnerová, 'Emancipation', 104.

[746] Gal and Kligman, *The politics*, 54.

as unacceptable breach of solidarity. While I have not found any data or research to support this argument with regard to Czechoslovakia under State Socialism, a similar mechanism is well documented in racialized societies, where women are torn between their loyalty to themselves and other women on the one hand, and their loyalty to their racial or ethnic group and their community on the other.[747]

The argument that there was great solidarity between the sexes under State Socialism has often been made, albeit not in the context of domestic violence. Did this solidarity imply a meaningful change in gender relations?

2.4 Solidarity between the sexes?

The literature has argued that there was greater harmony and solidarity among the sexes,[748] often seeing this as a consequence of the socialist state's paternalism. Vodochodský observes that State Socialist society was not divided between the worlds of women and worlds of men, but between those who ruled and those who were ruled.[749] As a consequence, men and women formed an alliance against a common enemy – the party and its representatives. Similarly, Gerlinda Šmausová argues that the 'non-meritocratic political rule flattened the vertical structure' of power hierarchies and that the 'equal political and economic deprivation of men and women' led to their solidarity.[750] Zábrodská confirms this observation to the extent

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[747] See eg Evan Stark, 'Race, Gender and Woman Battering' in Darnell F. Hawkins (ed), *Violent Crime Assessing Race and Ethnic Differences* (171-198, Cambridge University Press 2003), 194. More generally on the divided loyalties, see Crenshaw, 'Demarginalizing the intersection of race and sex: A Black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics', 161-162.

[748] Šmausová, 'Emancipace'.

[749] Vodochodský, 'Patriarchát', 39. Similarly Wagnerová, 'Emancipace a vlastnictví', 83.

[750] Šmausová, 'Emancipace'.

that women point to more solidarity with men than with other women. The 'loyal masculinity' repertoire portrays men as 'sympathetic, supportive and loyal', whereas attributes of '"envy", "jealousy", and "rivalry"' are given to other women.[751] Hana Havelková states:

> Many women agree that they themselves deliberately encouraged the patriarchal manners of their husbands so as to boost their husband's self-confidence, which the latter had difficulty maintaining in the public and work spheres.[752]

She also notes, however, that the solidarity between the sexes is a myth, 'from the cultural point of view'.[753] The solidarity did not eliminate gendered division of roles in the family, nor did it counter sexism - 'sexist anti-woman jokes never ceased to be liked by men'.[754] This resonates with my earlier observation about a lack of change in recognition and respect at the cultural level. Moreover, the solidarity was defined 'against' a 'common enemy'; once that enemy disappeared in Transition, arguably any solidarity dissolved.

I mentioned previously that men were subject to persecution and blackmail in the public sphere. Could and did women avoid this fate by retreating into the private sphere?

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[751] Zábrodská, 'Between'.

[752] Hana Havelková, 'A Few Prefeminist Thoughts' in Nanette Funk and Magda Mueller (eds), *Gender Politics and Post-Communism* (Routledge 1993), 69.

[753] Havelková, 'Women In and After', 77.

[754] Ibid, 77.

2.5 Women as a 'communist subject' and their liberation from the public sphere

Women were politically considered an inferior 'communist subject', but this might paradoxically have been ultimately liberating, as it enabled them to avoid the corrupt world of politics and public engagement. Eva Fodor, writing about Hungary, has argued[755] that Eastern women were seen as different and inferior in the East, but differently from the West. She observes that whereas Western liberal political philosophy works with the concept of a rational individual, the Eastern communist political ideology was based on the idea of a 'communist subject'. She argues that both of these concepts are gendered but in a different way:

> While on the surface genderless, the ideal communist subject had distinctly masculine features, and women could never completely satisfy the requirements. In particular, because of their reproductive duties, which were left unchallenged by state socialist policy makers, women could never be considered as reliable and as devoted to the communist cause as men were. Hence, their enforced participation in the world of work and politics could only be segregated and inferior.[756]

> [W]hile in liberal political ideology, pregnancy and child-bearing were seen to damage women's rationality and individuality, in [State Socialist] Hungary, these were considered to impair women's political devotion and reliability […women were] people less able to devote themselves to the communist cause, given that their primary allegiance went to their offspring.[757]

Especially during Normalization when the regime and politics were discredited in the eyes of a large part of the population and the desirability of engagement in the public sphere decreased, this expectation of women as less devoted

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[755] Fodor, 'Smiling'

[756] Ibid, 241.

[757] Ibid, 244.

was to a large extent liberating. While women could choose to participate in political power in the 1950s (when the communist ideal was still believable), and could choose to participate in the reform attempts in 1960s, they could also choose *not* to participate in the 1970s and 1980s, when Marxist-Leninist rhetoric and socialist ideals became a camouflage for naked power over the population. Women's ability to avoid work and political careers could have been perceived as freeing. It has been noted that 'women often used their maternal duties as an excuse to avoid party membership, a strategy not available to men'.[758] Women were thus able to avoid the moral corruption of the regime in a way men could not. This gives the previously mentioned fact of the low numbers of women in high government executive position and organs of the Party a different interpretation. It also means that the private sphere of family in the East was not the same 'velvet prison' as it was often portrayed by feminists in the West.[759]

Notwithstanding the fact that women's ability to avoid politics might have been seen as liberating, political affiliation was the crucial axis dividing society. In the following, I argue that this had repercussions for the ability of Czechs to see other structures of oppression, including gender.

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[758] Havelková, 'Patriarchy'.

[759] Eg Friedan, *The Feminine Mystique*.

2.6 The centrality of political affiliation

It is important to bear in mind that what divided the 'haves' from the 'have-nots' under State Socialism was not social status[760] or gender,[761] but political affiliation and Party membership. It was crucial for career advancement, pay rises,[762] a job itself,[763] housing,[764] and one's children's education.[765] It was also essential for access to goods and services, which were always in short supply. Dana Hamplová describes how distribution networks worked under State Socialism:

> members of the *nomenklatura*[766] had first right of choice; the left-overs then entered the official distribution, but the employees of storehouses, warehouses and supermarkets would first supply themselves, their relatives and their networks; only then would the left-overs enter the freely accessible "market".[767]

The access to all these goods and benefits was used as an enticement or a pressure tool to make people enter the Communist Party.

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[760] I originally used the term 'class' here but that is not accurate. Although the state socialist society was officially 'class-less', class origin played a very important role in people's lives. Especially during the Stalinist period, 'class origin' was used as a criterion for sentencing by the activist Stalinist courts, against previously propertied individuals.

[761] Race and ethnicity still arguably played an important role. The socialist state applied forceful assimilation policy to Roma, as I discussed in chapter 2(3.3), and was arguably anti-Semitic at its basis, which came through during the political processes on the 1950s.

[762] Recounted from personal experience by Havelková, 'Women In and After', 81-82.

[763] Recounted from personal experience by for example Heda Kovály, *Under a cruel star: a life in Prague 1941-1968* (Plunkett Lake Press 1986).

[764] Ibid.

[765] From personal accounts of contemporaries in conversations with the author.

[766] The term *nomenkatura* describes CP members in positions of power in the government, industry, agriculture, etc., i.e. the ruling communist elite in the Eastern bloc during State Socialism.

[767] Hamplová, 'Stručné poznámky', 6.

This had two important repercussions for gender. First, the 'us' and 'them' division created a different, peculiar public/private divide.[768] Access to and success in the public sphere, although desirable for material reasons, implied moral corruption and collaboration with a hated regime; family, on the other hand, was seen as shelter. This reverence of family continued into Transition and meant that some Western feminist demands or slogans, such as 'personal is political', were met with misunderstanding and distrust among the Czechs.

Second, the fact that the primary axis of oppression was perceived to be Party membership or political affiliation obscured the pervasive nature of gender as an organizing structure. Ivo Možný distinguished between two types of patriarchy women were aware of under State Socialism: 'structural patriarchy' and 'familial patriarchy'.[769] Under the former, the responsibility for a woman's (unsatisfactory and unequal) position, such as the triple burden, was ascribed to the regime; under the latter it was attributed to the concrete man in her family. Možný argues that women oscillated between the two but eventually tended to adopt the former.[770] Women thus saw the State Socialist regime to be at fault - the structure they saw and blamed was the regime and not patriarchy. This meant a double defeat for gender - the socialist state's official ideology and policy saw only class, and, in reaction to the oppressive regime, the structure that people saw, was 'the regime'.

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[768] Gal and Kligman, *The politics*, 50.

[769] Ivo Možný, *Moderní rodina* (BLOK 1990).

[770] Ibid, 123-125. Cited in Vodochodský, 'Patriarchát', 39.

3 Conclusions

It has to be recognized that affecting social change through law is always a difficult project. In this chapter, I argued, that although the socialist state had far-reaching transformative aspirations with regards to class and even to some extent women; by not 'seeing' gender, its aspirations with regards to gender equality were inherently limited. It did not even try to change the position of men, the androcentric nature of the state and law, the cultural devaluation of women and the symbolic harms under patriarchy. However, notwithstanding my critical analysis of the existing and missing aspirations, the bigger picture of gender in law under State Socialism is still relatively positive. There were genuine aspirations with regards to the improvement of women's status and equality of the sexes during the State Socialist period. Equality, especially in the socio-economic sense, was seen as a desirable and worthy aim. In Part II of my thesis, I show that this has no longer been the case in Transition.

In section 2 of this chapter, I discussed the understanding of gender in the Czech State Socialist society. I noted that the socialist state's concentration on class as an axis of inequality and not gender was not healed by any other segment of the society. Instead, the main axis of oppression perceived by the population was that of the 'regime' and of political affiliation – gender was thus obscured to both. In terms of gaps in the ideological and policy aspirations, I noted that women were prevented from correcting them, as bottom-up activism was repressed. But I also observed that the state socialist 'emancipation' project was arguably being rejected by women, especially during Normalization when women retreated from the public sphere into the shelter of their families. This meant that there was little subsoil for a bottom-up

women's or feminist movement. The lack of women's and feminist movement is another legacy of State Socialism, one to which I return in chapter 8.

PART II

TRANSITION

CHAPTER 5

POLITICAL AND LEGAL TRANSFORMATIONS UNDER EUROPEAN STARS

The Velvet Revolution of 1989 brought about a time of change. The state, law, economy and society were being transformed through processes of democratization, marketization and globalization.[771] 'Globalization', or rather the end of international isolation, rhetorically supported by the slogan of a 'return to Europe' and to 'normality',[772] framed these changes. Much of the pressure for political, economic and legal change came from the outside, from the IMF, World bank, the EU[773] and the Council of Europe.[774] This has also been largely true for gender equality reforms – the

[771] I offer only a very brief discussion of the development. For a more detailed account, see Steven Saxonberg, *The Czech Republic before the New Millenium: politics, parties and gender* (East European Monographs, Boulder 2003), 1-103; Weiner, 'Market dreams', 41-69; Jacqui True, *Gender, globalization, and postsocialism: the Czech Republic after communism* (Columbia University Press 2003), 10-27; Hašková and Uhde, *Women*.

[772] András Sajó, 'Rights in post-communism' in WesternRights, 142.

[773] The membership in the EU in particular has been seen as a guarantee that the process of democracy will be entrenched, strong and resilient to crises – a 'civilisational' step. Wojciech Sadurski, 'Accession's Democracy Dividend: The Impact of the EU Enlargement upon Democracy in the New Member States of Central and Eastern Europe' (2004) 10 European Law Journal 371.

[774] For a discussion of the role of these institutions, as well as that of individual Western states and experts, for the 'importation' of law in CEE, see Catherine Dupré, *Importing the law in post-communist transitions: the Hungarian Constitutional Court and the right to human dignity* (Hart 2003), 10, 49.

EU especially[775] has been a prominent driver for the adoption of new legislation, as I show in section 3 below.

With regards to democratization, the Czech Republic was deemed to fulfil the EU's accession requirements of 'liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law'.[776] But much still remains to be done; less with regard to a system of free competition between political parties, which has been established, and more with regards to the rule of law: corruption has been rampant and demoralizing, and human rights, especially with regards to the Roma minority, often disregarded.[777] The democratization brought about a rise of civil society, including women's and human rights NGOs, which slowly started to bring feminist and gender-relevant issues to the table and campaign for legal and policy reform. They have been critical for example for the adoption of the law on registered partnership and the provisions on domestic violence, discussed in chapter 6 below. Political pluralism also meant a diversification of the political spectrum. Partly in reaction to the previous period, partly due to the prevailing international political climate which in the early 1990s saw market liberalism and 'democratic capitalism'[778] as triumphant, right wing politics gained a lot of ground. Neo-liberals have challenged the ideas of

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[775] The Fourth World Conference on Women, 'Beijing Declaration and Platform for Action' has also been a significant impetus and yardstick. See for example Petra Kubálková and Tereza Wennerholm Čáslavská (eds), *Ženy a česká společnost. Hodnocení implementace Pekingské akční platformy v národních a mezinárodních politikách ČR (Peking +15)* (Otevřená společnost 2010).

[776] Art. 6 and 49 TEU. The process of checking the fulfilment of these criteria has been subject to criticism. See for example Dimitri Kochenov, *EU Enlargement and the Failure of Conditionality* (Kluwer Law International 2008).

[777] Both, corruption and the treatment of Roma, remained a concern during the entire process of pre-accession reporting and assessment by the European Commission; Geoffrey Pridham, 'Democractic consolidation in the Czech Republic: Comparative perspectives after twenty years of political change (Paper for conference 20 years of Czech Democracy)' ispofssmunicz accessed 1 August 2012.

[778] True, *Gender*, 11.

redistribution and equality, and social conservatives have attacked some long-established policies, such as the broad availability of abortion.[779]

The economic aspect of the transition to a 'capitalist democracy'[780] was marketization or market liberalization.[781] This included the influx of foreign capital, privatisation of large segments of the economy, a massive reduction of heavy industry and creation of small and mid-size enterprises. The connected[782] rise of unemployment[783] and various reforms of the social welfare system, adopted to cut state spending, have had a gendered impact.

These reforms brought about a change in the material and socio-economic situation of women. Thanks to the political freedoms, Transition also opened up new spaces for constructions and negotiations of gender, for 'gender multiplication' in the sense of the possibility for 'more and more various forms of gender',[784] and the potential for cultural change. Was the change for the better or worse in terms of gender? This is to large extent an impossible question, as the gain of political freedoms on one hand and the loss of some social securities on the other are

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[779] In the case of abortion, they were unsuccessful. Radka Dudová, *Interrupce v České republice: zápas o ženská těla* (SOÚ AV ČR 2012).

[780] True, *Gender*, 11.

[781] The marketization was supported by Western institutions – a 'functioning market economy' was part of the EU's Copenhagen criteria. According to Weiner, the process required economic stabilization, liberalization, privatization and deregulation. Weiner, 'Market dreams', 41-45.

[782] The rise of unemployment was in part the result of the economic changes, but also legal ones – pre-1989, due to the formal obligation to work, much employment was merely formal. Moreover, as unemployment was officially non-existent, pre-1989, it is hard to make statistical comparisons between the periods.

[783] Hašková and Vohlídalová, 'The Labour Market', 49.

[784] Johnson and Robinson speak about 'an opportunity for gender to multiply'; Janet Elise Johnson and Jean C. Robinson, 'Living Gender' in Janet Elise Johnson and Jean C. Robinson (eds), *Living Gender after Communism* (Indiana University Press 2007), 1-2.

ultimately incomparable. But it is worth noting that many feminist commentators have been critical of Transition,[785] possibly in an attempt to curb the general 'market triumphalism'[786] and enthusiasm about the 'end of history'[787] with 'democratic capitalism'[788] victorious. It is not the aim of the thesis to give a detailed and comprehensive empirical answer to the question whether 'women' have been winners or losers in Transition;[789] but Part II of the thesis aims to answer whether and how gender equality has been considered and addressed in legal regulation and the legal discourse, and assess whether these developments have been gender-progressive[790] or not.

I have so far mentioned change, but the period of Transition has also built on the previous system – there was continuity of law,[791] many legal professionals including judges[792] stayed in previously held positions, and there was an intellectual continuity, with regards to certain concepts or their absence. The continuities and discontinuities with the previous period are the red thread that informs the discussions

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[785] Gal and Kligman, *The politics*, 3; Olsen, 'Feminism', 2217; LaFont, 'One step forward, two steps back: women in the post-communist states'.

[786] Weiner, 'Market dreams', 43. For a description of the apparently limited options of the 'postsocialist condition', see Fraser, *Justice interruptus: critical reflections on the "postsocialist" condition*, 1-3.

[787] Defined by Fukuyama as the exhaustion of reasonable systematic alternatives to economic and political liberalism. Francis Fukuyama, *The end of history and the last man* (Maxwell Macmillan 1992), 235.

[788] True, *Gender*, 11.

[789] For an empirical analysis, see ibid, or Hašková and Uhde, *Women*.

[790] Cf. Introduction (1.1).

[791] Some individual provisions were abolished or amended, but the legal system as a whole was retained.

[792] The process of 'lustrations' (vetting) prevented people who were in positions of power before 1989 from holding position of power in the newly democratic state, especially in administration and the police. The lustration rules were not applied to judges. For a summary of the features of the act, see David Kosař, 'Lustration and Lapse of Time' (2008) 4 European Constitutional Law Review 460.

in Part II. I argue that there has been considerable intellectual and conceptual 'path dependence'.[793] Even what appears to be dramatic change, such as the market liberal rhetoric which uses freedom in opposition to equality, is often merely a reaction to the previous period, and is to large extent determined by it.

This chapter presents the political, economic, legal and ideological development over the 23 years since the Velvet revolution. Section 1, which draws mainly on existing secondary literature, notes that economically and politically, the Czech Republic went from being a 'star pupil' of Transition in the early 1990s, to being an ordinary one. The temporal analysis shows that the gender equality law and policy continued to be social-democratic, despite the prevalence of market liberal rhetoric in politics, well into the 2000s, but that the situation might now be changing, due to budget cuts implemented and proposed since the start of the financial crisis. It also highlights that membership of the EU has been a defining driver of legal change, especially in the 2000s. In section 2, I discuss what characterized law in Transition. I note important continuities with the previous period, especially a continued disregard for law, formalism in judicial decision-making and a weak concept of individual rights. Section 3 discusses the ideological framework and programmes of political parties. I observe the prominence of market liberalism, which has seen the idea of gender equality in direct contradiction to freedom. And I note that gender equality has not been present as either a value or policy in the programmes of any parliamentary political party. Sections 2 and 3 draw on secondary literature as well as my own analysis of Czech primary sources. Finally, section 4, based on my analysis of primary materials, especially parliamentary debates, argues that the EU has been the

[793] The idea that 'what a society is, does depends crucially on what it was, had and did'. Krygier and Czarnota, 'Rights', 106.

primary driver of any gender-relevant legal change in Transition but that it has not resulted in a corresponding mentality shift.

1 The 23 years of post-socialism – from 'star' to 'ordinary pupil'

1.1 First half of 1990s – The 'star pupil'

The 'Velvet Revolution' saw the peaceful fall of the authoritarian CP rule within the scope of few months – starting with the student protests on 17 November 1989 and ending with the election of Václav Havel as the new president on 29 December 1989.[794] This was followed by a 'Velvet Divorce' of the Czech Republic and Slovakia in 1993.

The Czech Republic was in a good position for economic reform in 1989, compared to some of its neighbours[795] and its early economic reform was deemed a 'story of success' up until 1996.[796] The 'anti-inflationary program of financial stabilization, price liberalization, and privatization'[797] launched in January 1991, was complemented by 'a package of welfare policies crafted to cushion the worst consequences of the liberalization of the economy and to ensure public support for the reform'.[798] Thus, interestingly, although the narrative was strongly anti-socialist and

[794] The first free parliamentary elections were held six months later.

[795] True, *Gender*, 11.

[796] Weiner, 'Market dreams', 53.

[797] True, *Gender*, 11.

[798] Ibid, 12.

neo-liberal, rejecting 'third ways'[799] and proposing a 'market without adjectives',[800] the policy reality continued to be 'social' or 'social-democratic', considering the overall measure of general welfare and relatively low levels of social inequality.[801] This 'disjuncture between discourses and practices'[802] has been identified as a more general feature of post-communist transitions.

But the economic transformation still had a negative impact on women. Women's unemployment rose and has remained about one-third higher than men's ever since the early 1990s.[803] The state also encouraged older workers to retire, an option many women availed themselves of. However, a mass exit of women from the labour market into the home, predicted by some, did not materialize,[804] as women both needed to work, since the generally low wage levels meant that families needed two incomes, and wanted to work, for reasons of status and personal satisfaction.[805] A

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[799] Weiner, 'Market dreams', 55. This rhetoric has been largely connected with the then Finance Minister (1989-1992), later Prime Minister (1992-1997) turned President (2003-today), Václav Klaus.

[800] Ibid, 58.

[801] The rise of social inequality after 1989 was dramatic, as the starting point of State Socialism was egalitarian. True, *Gender*, 19. However, Hamplová, analysing the first 14 years of Transition, argues that according to measures of general welfare and relatively low levels of social inequality, the Czech Republic's policies are best described as 'social-democratic'. Dana Hamplová, 'Women in the labour market in the Czech Republic: transition from a socialist to a social-democratic regime?' in Hans-Peter Blossfeld and Heather Hofmeister (eds), *Globalization, Uncertainty and Women's Careers: An International Comparison* (Elgar 2007). Others speak about a compromise between social-democratic and liberal concepts. Martin Potůček and Iveta Radičová (eds), *Sociální politika v Čechách a na Slovensku po roce 1989* (Karolinum 1998), 17.

[802] Gal and Kligman, *The politics*, 113 ff.

[803] Hašková and Vohlídalová, 'The Labour Market', 50.

[804] 'In the 1990s, women accounted for more than 44 % of all employees, and since then the figure has never fallen below 43 %.' ibid, 49-50.

[805] Charlotte Bretherton, 'Gender mainstreaming and EU enlargement: Swimming against the tide?' (2001) 8 Journal of European Public Policy 60, 61 and references cited therein.

rise in gender-conservative[806] rhetoric,[807] combined with a need to cut public spending, led to a decline in the provision of collective childcare.[808] There was a marked drop in the number of available childcare facilities; a trend which has not reversed until today. The decrease has been noticeable especially with regards to care of very young children – the number of public nurseries decreased from 1043 in 1991 to 54 in 2007.[809] Similarly, the public subsidies for child-care services were cut, so that already in 1990 'fees for day care increased by 36,5 % and fees for kindergartens by 86,3 %'.[810] Some gendered decrease of social protection can be seen in other areas as well, for example maternity benefits were lowered from 90 % to 69 % of wages in 1993[811] and never substantially increased again.

The rise of new political parties without internal quotas for women[812] brought a sharp decrease in their participation in politics. The proportion of women in the House of Deputies has hovered around 15 % throughout the 1990s and 2000s; in 2010, the percentage increased somewhat, to 22 %.[813] A masculinization of the formal

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[806] Cf. Introduction (1.1).

[807] Hašková, Maříková and Uhde, 'Leaves', 102.

[808] True, *Gender*, 24.

[809] The drop in the number of kindergartens was less dramatic. Hašková, Maříková and Uhde, 'Leaves', 105. See also Michaela Marksová - Tominová, *Gender assessment of the impact of EU accession on the status of women and the labour market in CEE (Czech Republic)* (Karat, 2003), 60-63.

[810] Heitlinger, 'The Impact', 99.

[811] 308/1993**.**

[812] The CP has had women's quotas throughout the State Socialist period as well as in Transition. Some parties instituted quota later, as I discuss in section 3.1.

[813] Fórum 50 %, 'Vývoj zastoupení žen v PSP ČR (1996-2010)' (*http://padesatprocent.cz/cz/zeny-v-politce/poslanecka-snemovna/vyvoj-zastoupeni-zen-v-psp-cr-1996-2010*, 2012) accessed 1 February 2013; see also Petra Rakušanová, 'Česká politika: Ženy v labyrintu mužů?' (*http://padesatprocent.cz/docs/zeny-labyrint-muzu.pdf*, 2006) accessed 1 February 2013.

democratic processes and a feminization of the civic sphere (NGOs) has been noted by commentators.[814]

Notwithstanding the gendered impact of the early transformations, a discussion of Transition's effect on women was absent during this period:

> [S]ociety was absorbed by […] major and fundamental themes [such] as the new constitution, charter of human rights, nationalism, privatisation, Czecho-Slovak relations, rehabilitation, the general moral atmosphere of society, return to Europe and so forth. The only voices raised on gender issues were from the Christian side, on the themes of abortion and motherhood… Politics and economics …were regarded as entirely gender-neutral.[815]

1.2 Second half of 1990s - Sobering

Economically, the period beginning in 1997 has been described as a 'fall from grace'.[816] It saw a macroeconomic crisis marked by the slowing of capital and labour productivity, caused largely by inadequate legislative and institutional restructuring of the banking and industrial sector.[817] An increase in unemployment,[818] a 'slew of bank failures' and corruption scandals connected to privatisation[819] brought about a dramatic decrease of confidence in market reform[820] and, after eight years of right-

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[814] True, *Gender*, 137-162; Gal and Kligman, *The politics*, 92-98.

[815] Hana Havelková, 'The Political Representations of Women in Mass Media Discourse in the Czech Republic 1990-1998' (1999) 7 Czech Sociological Review 145, 150. In this, the Czech Republic differed from other CEE countries – the issue of abortion became quickly prominent in Romania and Poland, in East Germany it was women's skyrocketing unemployment. Hana Havelková, 'Transitory and Persistent Differences: Feminism East and West' in Joan W. Scott, Cora Kaplan, Debra Keates (ed), *Transitions, Environments, Translations: Feminism in International Politics* (Routledge 1997).

[816] Weiner, 'Market dreams', 63.

[817] Ibid, 63-65.

[818] Ibid, 63-65

[819] True, *Gender*, 14.

[820] Ibid, 14.

wing government dominated by the Civic Democratic Party (ODS), led to an electoral victory by the Social Democrats (ČSSD). The Social Democrats, however, entered into a coalition with the ODS; this 'opposition agreement' led to a disillusionment about the democratic institutions among the electorate.[821]

With regards to gender, the political underrepresentation of women became an issue in the media. [822] The Beijing Platform of Action of 1995 led government to start tentative discussions about gender equality.[823] Women's activism rose slowly throughout the 1990s, for example on issues of discrimination in the labour market and domestic violence.[824] However, the overall public attitude to feminism during the entirety of 1990s was extremely hostile.[825]

1.3 First half of the 2000s – Trudging along

Much political effort in the first half of 2000s was directed towards EU membership. Notwithstanding the Czech Republic's success in fulfilling EU criteria, and its accession to the EU in 2004, the 2000s made apparent that the process of transition was not over. Further cracks appeared in what previously appeared to be the successes of the economic transformation. For example, many previously state-owned companies which were voucher-privatized in early 1990s – i.e. through a system of giving citizens books of vouchers that represented potential company shares -

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[821] Ibid, 15.

[822] Havelková, 'The Political'.

[823] Kristýna Ciprová and Linda Sokačová, 'Neziskové organizace (NGOs)' in Linda Sokačová (ed), *Gender a demokracie: 1989-2009 (Gender and democracy: 1989-2009)* (Gender Studies 2009), 94.

[824] Ibid.

[825] Cf. chapter 8.

experienced governance problems and had to be renationalized before ultimately being sold to foreign investors.[826] And while basic democratic structures had been put into place, the Czech democracy has yet to consolidate, especially in the sense of the internalization of rules and procedures and a true remaking of political culture based on democratic values.[827] Corruption scandals repeatedly erupted throughout the 2000s, some involving political party interference with the justice system, some inappropriate entwining of business and politics.

1.4 Second half of the 2000s - Budget cuts and a conservative turn

Although the result of the 2006 election was tied for the big parties, ODS and ČSSD, it ushered in a right-wing government. The government promised a balancing of public finances, which included tax reforms and budget cuts. The gender dimension was ignored although these reforms have had a considerable negative impact on women. For example, the increase in the basic rate of VAT from 5 % to 10 % has disproportionately affected the poor, who are disproportionately women. [828]

The financial crisis, which started in 2007, has not hit the Czech Republic as hard as it has other CEEs.[829] But the fear of 'becoming Greece' has galvanized fiscal conservatives, and the 2010 parliamentary elections were won by right-wing parties promising belt-tightening and further fiscal consolidation. The government has been

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[826] Gerald McDermott, *Embedded Politics: Industrial Networks and Institution Building in Post-Communism* (University of Michigan Press 2002).

[827] 'Democratic consolidation' is understood as stabilization, routinization, institutionalization and legitimation of patterns of politically relevant behaviour. Pridham, 'Democractic consolidation', 3.

[828] For a discussion see Petr Pavlík and Irena Smetáčková, 'Dopady vládní reformy na rovnost mužů a žen' in Petr Pavlík (ed), *Stínová zpráva v oblasti rovného zacházení a rovných příležitostí žen a mužů* (Open Society Fund 2008).

[829] Pridham, 'Democractic consolidation', 18.

criticized from the left side of the political spectrum for not having a plan for economic growth and drastically cutting social spending under the guise of 'social reform'.[830] Although a full time-comparison is not yet available, it might be that the 'social democratic' welfare provision which persisted long after the fall of communism is 'finally' being dismantled. The support of motherhood and family has certainly decreased – the government for example scrapped a social supplement for low income families, of particular import to single mothers,[831] and made birth grants means-tested.[832]

Although authors have spoken about a 'conservative turn' in relation to the entirety of Transition,[833] social conservatism became a perceptible part of high level political mainstream in the 2010 government. The Education Minister, for example, has launched a campaign to replace sex education with abstinence education.[834]

Notwithstanding the undercutting of material welfare as well as cultural hostility to gender on the side of the government, civil society, especially the NGO sector, has strengthened during the 2000s.[835] Equality in the labour market has

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[830] Social Watch, *Česká republika se řítí do smrtící spirály. Národní zpráva české koalice Social Watch za rok 2011* (http://wwwsocialwatchorg/node/15271, 2012).

[831] The provision was originally abolished by 347/2010. This Act was, however, declared unconstitutional for procedural reasons in Pl ÚS 55/10. The provision was then revoked by 366/2011.

[832] Sec 44 117/1995 , current version.

[833] Funk, 'Feminism East and West', 328; Linda Sokačová, 'Genderové změny po roce 1989 v České republice' in Linda Sokačová (ed), *Gender a demokracie: 1989-2009 (Gender and democracy: 1989-2009)* (Gender Studies 2009), 9.

[834] Lucie Jarkovská and Kateřina Lišková, 'Je to k nevíře aneb Obrat k prudérii v české sexuální výchově?' Sborník z kongresu Pardubice 2011 (http://wwwplanovanirodinycz/viewphp?cisloclanku=2011092602) accessed 1 February 2013.

[835] For example *Czech Women's Lobby*, a member of the European Women's Lobby, was founded in 2004 and has 23 members today. Women's NGOs have grown and professionalized; Ciprová and Sokačová, 'Neziskové organizace (NGOs)', 94.

remained the main issue, both in academic research as well as in NGO activities, largely due to the EU funding this issue attracts.[836] It has been noted that the public as well as employers have become more open and supportive of the topic of equal opportunities for women.[837] The question of political representation has also been re-gaining ground.[838] And the subjects of activism and study have diversified in 2000s. The emphasis has grown for example on LGBT rights, reproductive rights and inter-sectionality (Roma women, older women, migrants, single mothers, etc.) and gender-based violence has been increasingly addressed as a gender issue.[839]

2 Law in Transition

In chapter 1, I discussed several traits of State Socialist law and the contemporary understanding of rights, which framed my analysis of the limits that characterized legal guarantees of equality under State Socialism. Some of these traits have disappeared in Transition: the underlying Marxist ideology and the influence of the CP understandably vanished; the emphasis on 'coercive', 'vertical' and public law diminished as 'reciprocal' and private law gained importance under market conditions; and the importance of due process and individual enforcement replaced the State Socialist concern with 'correct outcomes' and 'collective interest'. But I argue that there are some characteristics which Transition has in common with State

[836] Ibid, 96-97.

[837] Sokačová, 'Genderové změny', 9.

[838] Largely thanks to the activities of the NGO 'Fórum 50 %' founded in 2004.

[839] See for example Kristýna Ciprová (ed) *Pod hladinou: fakta a mýty o znásilnění* (Gender Studies 2010).

Socialism.[840] First, a disregard for law has continued, which has, I believe, desensitized individuals as well as judges to breaches of law and to breaches of individual rights and has contributed to the low success rates of discrimination claims (2.2). Second, legal formalism has prevailed in judicial decision-making, which has meant that courts refused to engage with teleological interpretation of norms and a substantive engagement with the social realities of gender inequality (2.3). Third, the understanding and practice of 'rights' is still peculiar – rights continue to be perceived to be connected to obligations on the part of the rights-bearer, and to notions of desert and conditionality, which make creation and enforcement of unpopular rights (such as against sexual harassment) or by unpopular groups (the Roma), very difficult. At the same time, a new market-liberal understanding of rights as unbounded freedoms has enhanced the positions of the 'strong' (employers) against the 'weak' (employees) (2.4). Before examining these three traits of law in Transition in greater detail, I briefly present the legal reforms which have taken place in Transition (2.1).

2.1 Transforming 'communist' law

Notwithstanding the fact that the entirety of the State Socialist legal system was retained in Transition, legal reforms were necessary. Most branches of law required modification and amendments – for example civil law required a re-creation of 'private property' and the law of contract,[841] and constitutional law needed to create democratic institutions, establish the rule of law and guarantee enforceable

[840] Markovits problematizes the assumption that the traits 'remained' or were 'holdovers' – she notes that some were reinstituted based on a variety of influences. In particular she points out that 'Western' law has itself become more 'parental' and educational and therefore closer to 'socialist law'. Inga Markovits, 'The Death of Socialist Law?' [2007] 3 Annual Review of Law and Social Science 233

[841] For a discussion, see ibid, 239-240.

human rights. And entire branches of law had to be created anew - commercial, financial, intellectual property or competition law were all practically non-existent under State Socialism. It was also necessary to weed out State Socialist relics – crimes connected to the pre-1989 ideology, such as 'desertion of the republic',[842] which was used to sentence émigrés *in absentia*, or parasitism, which was used against prostitutes, among others, were abolished in 1990.[843]

New legal provisions were also necessary to address areas previously ignored and to bring Czech law more in line with developments in other Western European countries and the EU. This included many gender-relevant provisions; for example statutory antidiscrimination rights or new provisions targeting gender-based violence. I discuss these in greater detail in the following chapter. Institutional reform took place as well. Although the system of ordinary courts was kept without change, new courts were created. Most notably, the Czech Constitutional Court which was established in 1993, and the Supreme Administrative Court in 2003.

2.2 A continued disregard for law

A disregard for law, which I have observed under State Socialism, has continued in Transition. It has been apparent on the part of both public entities and private individuals, as most people living in the Czech Republic, as well as academic observers,[844] would attest to, and yet it is hard to prove or quantify. Necessary legal frameworks were sometimes not created – law was suppressed in the process of

[842] Sec 190 of 140/1961, pre-1990.

[843] 175/1990.

[844] Olsen, 'Feminism', 2235; Sajó, 'Rights', 149.

economic Transition,[845] and was considered a harmful retardant especially by then prime-minister, now President, Václav Klaus.[846] Existing regulation, especially in labour law, has also been widely disregarded, notwithstanding the continued existence of labour inspectorates.[847] The Labour Code's – arguably quite rigid[848] - protective provisions for employees have been widely circumvented. Companies would contract workers as self-employed persons with a trade licence, under a commercial law regime, rather than employing them under the regime of labour law. This so-called '*Švarc systém*'[849] has been illegal since 1992, but remained common practice well into the 2000s.[850] Systematic breaches of labour rights and wide-spread discrimination against the Roma and women have been documented, for example in the context of retail chains.[851] Olsen notes similar occurrences in other post-communist countries; in East Germany women would show employers certificates testifying to their

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[845] 'Poor capital market regulation and weak rule enforcement' in the 'voucher privatization' has been noted for example by The World Bank, *Transition. The first ten years.* (The World Bank, 2002), 71.

[846] Michal Mejstřík, 'Privatization in the Czech Republic and Russia: The Voucher Model' in H. Giersch (ed), *Privatization at the End of the Century* (Springer Verlag 1997).

[847] There is no specialized labour judiciary in the Czech Republic – labour disputes are adjudicated by ordinary courts.

[848] Many provisions, such as governing dismissal, were retained from State Socialism times and were arguably unsuited to more flexible needs of the new economy.

[849] Named after a businessman who only contracted workers with trade licences and was prosecuted by the authorities in the early 1990s.

[850] In mid-2000s, a mandatory minimal rate of tax for self-employed was meant to discourage this practice. I discussed this previously in Barbara Havelková, 'Effectiveness of the transposed EU equality law in the Czech Republic' (2006) 2 Croatian Yearbook of European Law and Policy 299, 309.

[851] Jana Koukalová, *Diskriminace a porušování práv zaměstnanců obchodními řetězci v České republice* (Ekologický právní servis 2008).

sterilization to get work, and in Slovenia, women had been required to sign undated letters of resignation, so they could be fired if pregnant.[852]

The general disregard for law is worth bearing in mind, as I believe it desensitizes individuals as well as judges to breaches of law and of individual rights. This contributes to the low levels of litigation and the lack of success of antidiscrimination litigation by women in the Czech Republic which I discuss in chapter 7 below.

2.3 Legal formalism

Analyses showing post-communist legal cultures in CEE as 'authoritarian', 'positivistic', 'dogmatic', and 'formalistic' have abounded in recent times.[853] Kühn has observed that the formalistic paradigm of 'new socialist normativism',[854] prevalent in the 1970s and 1980s, survived in Transition. Post-communist judges have been described as 'enslaved by textual positivism',[855] as judicial formalists who embrace arguments based on a literal reading of the statutory text and disregard other arguments.[856] I argue below in chapter 7 that this has had damaging effects on adjudicating equality and antidiscrimination law, as these types of cases require a

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[852] Olsen, 'Feminism', 2235.

[853] See, for example, S. Rodin, 'Discourse and Authority in European and Post-Communist Legal Culture' (2005) 1 Croatian Yearbook on European Law and Policy 1; Zdeněk Kühn, 'The authoritarian legal culture at work: The passivity of parties and the interpretational statements of Supreme Courts' (2006) 2 Croatian Yearbook on European Law and Policy 19; Kühn, 'Worlds Apart'.

[854] Cf. chapter 1.

[855] Kühn, 'Worlds Apart', 549.

[856] Kühn, *Aplikace*, passim. Zdeněk Kühn, 'The Application of European Law in the New Member States: Several (Early) Predictions' (2005) 6 German Law Journal 563, passim.

teleological interpretation of norms and a substantive engagement with the social realities of inequality.

Kühn observes that one of the reasons why judges adhere to judicial formalism is that textual positivism is more easily applicable than sophisticated concepts that developed in the West.[857] It is actually doubtful that these concepts are even available to Czech judges - Czech legal scholarship missed over 40 years of theoretical development in the West, including much critical legal scholarship, from legal realism, socio-legal studies, critical legal studies and critical race theory to gender legal studies and feminist jurisprudence. Although these bodies of scholarship have not necessarily been central to judicial practice in the 'West', they have had a significant presence in academic critique and engagement with judicial application of law. This has not been the case in the Czech Republic for most of Transition.[858] The negative synergy between missing critical theories of law and feminism has made any debate about the non-objective nature of the law and legal scholarship, and its andro-centric gender-bias, particularly difficult, as I discuss in chapter 8 below.

2.4 The old and the new understandings of rights

I noted that the State Socialist period was characterized by the primacy of socio-economic rights, and that 'rights' were policy pronouncements rather than enforceable individual entitlements. Both traits have to some extent continued in Transition. First, and somewhat surprisingly, the emphasis on socio-economic rights

[857] Kühn, *Aplikace*, 119.

[858] Critical voices have recently risen from a generation of young academics, among them Zdeněk Kühn, Michal Bobek, Vojtěch Šimíček, among others.

has continued, both in constitutions[859] and in their judicial application.[860] Welfare rights and 'the concept of an interdependence of rights and duties made their way into the new rule-of-law constitutions of Eastern Europe'.[861] The Czech Charter thus still contains a right 'to acquire the means livelihood by work'[862] as well as for example the quite rare guarantee of free healthcare.[863]

This continuity has been largely positive for socio-economic aspects of gender equality, but it has also created the problem of the assumption of satisfactory levels of rights.[864] The existing provisions are considered generous enough, and going beyond them has been hard to justify. The apparently generous continuity of existing social protection and rights could and has been used to argue against instituting new pro-equality and gender-progressive provisions – this has been the case with antidiscrimination legislation, as I show in chapter 7 below.

Second, the continuation of emphasis on socio-economic guarantees has been connected to a continued conception of rights as 'social entitlements against the state'[865] or as 'particular kind[s] of benefit',[866] as opposed to individual, enforceable entitlements, as they are perceived in the West. Markovits has observed that the

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[859] Markovits, 'The Death', 243-250.

[860] Sajó has criticized the Hungarian Constitutional Court for being 'communist' when it struck down a series of austerity cuts to pension and welfare benefits. Andras Sajó, 'How the rule of law killed Hungarian welfare reform' [1996] East European Constitutional Review 31.

[861] Markovits, 'The Death', 248.

[862] Art. 26(3) 2/1993., Charter of Fundamental Rights and Basic Freedoms.

[863] Art. 31 ibid.

[864] Although I observed in chapter 4 that the State Socialist political programme of gender equality was both incomplete and often inadequately translated into law.

[865] Sajó, 'Rights', 150.

[866] Bermann, 'Western rights?', 41.

drafters of post-socialist constitutions 'still seem to view the state not as an opponent but as a collective of which all are part',[867] and that law continues to be 'parental'. This is connected to an emphasis on 'general observance of legality'[868] rather than on the pursuit of individual rights through litigation. Sajó, writing about Hungary, has noted a 'culture of complaint'[869] rather than individual challenges before courts. Turbine, looking at Russia, has noted that the language of 'problem solving' is used rather than the language of 'rights' and informal networks are still seen as the way to solve problems.[870] In chapter 7, I observe the relatively low levels of antidiscrimination litigation – the weak status of rights might be a contributing factor to it. More importantly, the continued perception of rights as connected to obligations on the part of the rights-bearer weakens rights claims by unpopular groups, such as the Roma, or unpopular claims by anyone, such as for rights against sexual harassment.

Another continuation is the emphasis on collective interest. There is a limited understanding of human right's anti-majoritarian role - that they might be needed to protect individuals especially in situations where the majority is unsupportive or hostile. In the Czech Republic, there continues a perception that rights of particular groups should not be protected if the majority disagrees. The argument of 'many people' or 'general attitude' has been used to deny equality and antidiscrimination

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[867] Markovits, 'The Death', 242.

[868] She notes that many would rather 'complain' to the authorities than go to court and notes similarities in the institution of the ombudsperson and that of State Socialist 'procurator'. Ibid, 241, 248.

[869] Sajó, 'Rights', 153.

[870] Turbine connects these perceptions of rights-based approaches to existing negative perceptions of the legal system as a whole. Vikki Turbine, 'Russian women's perceptions of human rights and rights-based approaches in everyday life' in Rebecca Kay (ed), *Gender, Equality and Difference During and After State Socialism* (Palgrave Macmillan 2007), 177.

rights; shockingly often by institutions tasked with their protection. The Czech Ombudsman, Pavel Varvařovský, who denounced the ADA as useless in a newspaper interview and was then challenged on this by the Czech Helsinki Committee, responded to their critique by pointing out that he is not alone in his aversion:

> The reactions of many readers [below the original article] show, that they appreciate that the Czech Ombudsman has his own common sense and is not buffeted by the winds of current fads [of antidiscrimination law].[871]

The low levels of litigation could also be attributed to institutional factors. The gaps in and limits of available judicial review which I noted for the period of State Socialism were remedied in Transition – a Constitutional Court was created and courts have become independent. But other problems of enforcement exist. Tens of thousands of cases are pending in the system and proceedings in relatively simple cases can last for years,[872] the system of legal aid is insufficient and lacks transparency ,[873] and the remedies available – especially in cases of discrimination – are insufficient and in breach of EU law requirements, as I discuss in chapter 7 below.

The continuity of seeing rights as benefits or entitlement is not the whole picture, however. Alongside it and in contradiction to it, a new rights rhetoric has

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[871] Pavel Varvařovský, *Letter in response to a Czech Helsinki Committee communication (22/2/2011)* (On file with the author, 2011).

[872] In 2007, there were around 70,000 pending cases stretching back more than three years. Kristina Koldinská, 'Gender Equality: Before and After the Enlargement of EU: The Case of the Czech Republic' (2007) 13 European Law Journal 238, 251. In 2011, for example the average length of a pay discrimination claim was 4,5 years. Ministry of Justice, 'Average length of proceedings' (*http://cslav.justice.cz/InfoData/servlet/FileServlet?tabulka=ccav_dokument_sestavy&sloupec=obsah_dokumentu_html&where=id_dokumentu=453744&typSloupce=html&fileName=null*, 2012) accessed 1 February 2013.

[873] Legal aid is not uniformly and clearly regulated:; it is largely provided and the financial burden carried by the Czech Bar Association, and assessment of need is not uniform. The system has been widely criticized and a new act is being discussed. See for example http://www.bezplatnapravnipomoc.cz/.

emerged, supported by the narrative of market liberalism – that of rights as freedoms. This freedom is understood as the freedom to do what one wants, if one can, without interference. But there is no notion that the freedom of the weak and vulnerable needs to be enabled. It is a Darwinian understanding of freedom for the strong, used to deny rights to the weak. It is connected to a particular understanding of liberty and liberalism. I argue in chapter 7 below that this understanding shines through in the sympathy with an unbounded freedom of employers to choose their employees expressed in court decisions and that it has thus had a very negative impact on equality and antidiscrimination rights of individuals.

3 The ideological framework and political programmes

With regards to 'ideology',[874] as a democratic and pluralistic society, the Czech Republic after 1989 cannot be truly compared to State Socialism with its hegemony of Marxism, an ideology with an all-embracing explanatory ambition and a singular programme for the 'woman question'. In terms of political ideology, 'market liberalism' appears prominent. I argue that this has consisted of a selective use of liberal slogans rather than a consistent dedication to an ideal of autonomy (3.1). I then turn to political parties and observe that no party has a well formulated coherent policy with regards to gender equality (3.2). Thus, I argue, if one wanted to find the main framework and principal driver of gender-relevant legal change in Transition, one would have to look toward the EU (section 4).

[874] Understood as a 'systematic scheme of ideas, usually relating to politics, economics, or society and forming the basis of action or policy' (OED).

3.1 Market-liberalism

Liberalism is a contested category, but for the purposes of this discussion, I'm using Krygier and Czarnota's understanding of 'liberal commitments' as being 'to privacy, freedom, rights, civil society, markets and the rule of law'.[875] I believe that the liberalism of many in the Czech Republic has been selective. Three types of 'liberalism' have to be distinguished. There are political commitments of liberal democracies, among them the rule of law, rights and civil society.[876] There is an economic liberalism tied to capitalism, with an emphasis on the free market. And there is 'social' liberalism, understood in opposition to 'social conservatism' with its support for traditional social structures, values and gender roles.[877] In the Czech Republic, the dissent during the State Socialist period, especially the 1970s and the 1980s, was characterized by 'anti-communist liberalism'. This humanist reaction to the communist assault on rights and civil society[878] was 'political liberalism',[879] and can be seen as embodied by the first Czech President, Václav Havel. I would argue that, however, in Transition, market liberalism prevailed.[880] It has been embodied by the second President, Václav Klaus, who is well-known for his hostility to law as well

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[875] Krygier and Czarnota, 'Rights', 103.

[876] Ibid, 101-137.

[877] This 'social conservatism' is particularly well represented in the US and is often taken to define the political right. There are of course several varieties of conservatism in America (classical conservatives, libertarians, and neoconservatives), but their shared moral underpinnings, based on Christian values, tend to result in opposition to gay rights and abortion, and support for traditional family and distinct gender roles. For a summary see Peter Berkowitz, 'Introduction' in Peter Berkowitz (ed), *Varieties of Conservatism in America* (Hoover Press 2004).

[878] See also Krygier and Czarnota, 'Rights', 106.

[879] Ibid, 105.

[880] For Poland, see ibid, passim.

as the judiciary. For example in 1999 he stated that 'It is not necessary to adopt statutes. Small shareholders will be governed by the invisible hand of the market.'[881] This market liberal approach has been concerned with unbounded freedom of markets and individual entrepreneurs, but has been very hostile to civil society and rights[882] as well as the rule of law, and often went hand in hand with socially conservative attitudes.

Another way of looking at the characteristics of 'liberalism' in Transition is to ask how exactly 'liberty' and 'freedom' are understood – as a freedom from coercion where the actual ability to exercise the freedom is irrelevant[883] or as a context-conscious emphasis on autonomy with an understanding that choice and freedom has to be enabled?[884] Sandra Fredman distinguishes between 'market liberalism' which combines liberal political theory with neo-liberal economic analysis[885] (which corresponds to the former), and 'modified liberalism',[886] which has 'develop[ed] the tenets of liberalism in the direction of social justice' (which corresponds to the latter). Using this terminology, the Czech discourse has overwhelmingly been dominated by 'market liberals'.

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[881] Václav Klaus (Lidové noviny, 18 June 1999). *Centrum pro ekonomiku a politiku*, a liberal think-thank he founded in 1998, has also repeatedly challenged the legitimacy of the courts and warns of 'judicio-cracy'. Marek Loužek (ed) *Soudcokracie v ČR. Fikce nebo realita?* (Centrum pro ekonomiku a politiku 2006).

[882] Jiří Pehe speaks about Democracy without democrats. Jiří Pehe, 'Life Beyond Communism: Democracies Without Democrats' Transitions Online: wwwceeolcom accessed 1 August 2012.

[883] This understanding is best represented by Friedrich Hayek, a favourite of many proponents of Czech liberalism.

[884] This understanding, represented for example by Joseph Raz, is very little known in the Czech Republic.

[885] Fredman, 'OHLS', 206.

[886] Among legal philosophers, for example Ronald Dworkin or Joseph Raz.

But throughout this chapter, I have also observed that many legal guarantees of socio-economic rights were kept and the social welfare remained 'social-democratic'. On the one hand, the constitutional guarantees would imply that 'one wants capitalism only in its socially and morally impeccable form'[887] but on the other hand this 'contrast[s] sharply with the economic and social reality in these [post-socialist] countries: it is a very tough and Darwinistic 19th century capitalism in which greed for money and wealth not social consideration, are the preferred attitudes of the economic actors'.[888] The social rights and protections, continued from State Socialism do indeed seem to coexist with a new 'anarcho-capitalist'[889] understanding of economic freedom and market liberal narrative. This is an important frame for my analysis of Transition, as it allows for selectiveness in legal regulation of gender – the inherited pro-family and pro-maternity provisions have been allowed to largely continue, but any new gender-progressive measures face fierce opposition as new entitlements irreconcilable with freedom, the market and a small state.

How does the social concern on one hand and the pro-market liberalism on the other map onto the political parties? And what does this mean for their political programmes and the rights of women and the regulation of gender? I turn to these questions now.

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[887] Alexander Blankenagel, 'New rights and old rights, new symbols and old meanings: re-designing liberties and freedoms in post-socialist and post-soviet constitutions' in WesternRights, 67.

[888] Ibid, 67.

[889] A term used by to describe post-communist Russia in John Gray, *False Dawn: The Delusions of Global Capitalism* (The New Press 2000).

3.2 Political parties - a lack of concern for gender equality

The post-1989 democracy brought multi-party politics[890] and a diversified field of political programmes. In reaction and in opposition to State Socialism, right-wing[891] parties dominated politics in the 1990s. The consistently strongest party has been the Civic Democratic Party ('ODS'),[892] previously led and still heavily influenced by Václav Klaus. The party has been a beacon of market-liberalism, and most of its members have been very hostile to equality and antidiscrimination law, as I demonstrate in chapter 7. Václav Klaus himself vetoed the second Antidiscrimination Bill, as well as the Act on Registered Partnership.[893]

The right and centre-right side of the political spectrum has seen the most fluctuation – emergence and fall of smaller parties.[894] The 1990s and 2000s Parliament and Cabinet fixture[895] has been the socially conservative Christian-Democratic Party ('KDU-ČSL'). A recent newcomer is the socially conservative TOP 09, now a member of coalition government. Finally, the centrist and socially liberal Green Party entered into the House of Deputies in 2006 was in the coalition

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[890] In the following, I discuss only parties which have been elected to the Parliament (the threshold is 5 % of vote in proportional electoral system) and among them especially those which have done so in two consecutive terms or have joined the government.

[891] In the Czech context economically liberal and socially conservative. The extreme-right 'Republican Party' was prominent in 1990s but is now marginal. For an analysis see Hana Havelková, 'Tschechien: Die Republikanische Partei der Tschechoslowakei' in Helga Amesberger and Brigitte Halbmayr (eds), *Rechtsextreme Parteien - eine mögliche Heimat für Frauen?* (Leske+Budrich 2002).

[892] The ODS has been in the government – either alone or in coalition – from 1992 till 2002 and then again from 2006 till today.

[893] 115/2006.

[894] Among them the Civic Democratic Alliance ('ODA'), the Freedom Union, and more recently Public Affairs ('VV').

[895] The Christian Democrats have been part of a coalition government before as well as during State Socialism as well as for large part of Transition. They were in the Parliament until 2010.

government between 2007 and 2009. The Greens have repeatedly[896] been evaluated as the 'Party most open to women'.[897]

Left-wing politics have had two mainstays: the Social Democrats ('ČSSD') and the Communists ('KSČM'). Surprisingly, neither can be said to be a consistent proponent and defender of gender equality. In terms of political programme, the Social Democrats have been concerned with a high standard of social welfare and labour rights, but have not been raising issues of social inclusion or pursuing equality politics for minorities and marginalized groups.[898] At the level of participation of women, ČSSD has soft quotas but has been repeatedly in breach of them.[899] The Communists, although they put forward high percentages of women in elections,[900] do not identify gender equality as a policy aim.[901] Arguably their understanding of it has not advanced beyond the 'woman question' and pragmatism. For example with regards to the Antidiscrimination Bills, they made their support conditional on repeal of the 'lustration laws',[902] which prevented people who were in positions of power before 1989 – such as high ranking members of the CP, members of the 'Peoples'

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[896] Between 2006 and 2010. The Greens were ousted in 2011 by the Communists, but the reason was that only parliamentary parties were evaluated and the Greens were no longer present.

[897] The NGO Fórum 50 % annually awards 'Party most open to women' based on the content of their programme and the push for equal participation of women in the party. Fórum 50 %, '5. ročník soutěže Strana otevřená ženám zná vítěze: levice je letos ženám nejotevřenější' (*http://padesatprocent.cz/cz/nase-aktivity/strana-otevrena-zenam/5-rocnik-souteze-strana-otevrena-zenam-zna-viteze*, 11 December 2011) accessed 10 August 2012.

[898] There are several notable individual exceptions to this trend, for example Senator Alena Gajdůšková or former Deputy Anna Čurdová, who was expelled from ČSSD in 2011.

[899] Jaroslava Mildorfová, 'Politické strany jako bariéra vstupu žen do vysoké politiky' (Master Thesis, FHS UK 2010).

[900] Fórum 50 %, '5. ročník'.

[901] Mildorfová, 'Politické strany', 48.

[902] See fn. 792 above.

Militia', or officers and informers of the State Security Police – from holding position of power in the newly democratic state, especially in the administration and the police. As the lustration laws remained in place, the Communists ended up voting against the Antidiscrimination Bill.

It has to be said that although the parties are rhetorically ideological, pragmatism and even populism are often the guiding principles. 'Freedom', 'liberalism', and 'free market' have been used by ODS in early 1990s as rhetorical devices and incantations, while relatively generous social welfare policies continued. Similarly, the ČSSD, once in power, while rhetorically 'protectionist',[903] enacted some liberal economic reforms, such as privatisation of banks. The main problem for gender equality, I believe, is that none of the parties, with the possible exception of the Greens, has truly adopted gender equality either as a value or as a policy program. And there is no considerable pressure on them to do so, for gender equality is not popular in the Czech Republic – the reasons for this unpopularity, among them its association with the State Socialist past and missing feminism, are discussed below in chapters 7 and 8 respectively . The only pressure has been external – coming from the EU. It is the EU membership obligations and its impact to which I now turn.

4 The EU – a driver of legal change but not of a mentality shift

I consider the EU to have been the principal driver guiding policy and law reform with regards to gender, especially in the 2000s. With regards to the importance of its role, the EU in Transition can be likened to Marxism-Leninism during State

[903] Both in terms of economic nationalism and in social terms.

Socialism. Both influenced legislative development[904] and guided judicial decision-making.[905] But this comparison is of course limited, both in terms of content of the aims and with regards to the level of internalization. First, the content of the ideologies is very different – the EU's overall aim has arguably been to support economic growth through market integration complemented only by a small and selective set of social rights,[906] not overturning the private ownership of the means of production. Their cultural and ideological impact has also been distinct. Marxism-Leninism was a comprehensive political ideology internalized by the state and the legal community which largely enjoyed intellectual hegemony. The EU is a supranational organization creating legal obligations, and its ideology[907] has been open to contestation, especially at the national level. The EU's ideas and aims regarding equality and antidiscrimination in particular have been challenged and never internalized either by the law-makers or judges. The black letter law provisions have thus been inserted into the legal system reluctantly and then largely ignored and unenforced, as I sketch below and analyse in detail in chapter 7. While the Czech Republic has largely transposed the EU gender equality *acquis,* it has done so without subscribing to and understanding its rationales.

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[904] Marxism by being incorporated in the CP policy programs; the EU by the legal obligation of transposition of directives.

[905] The principles of Marxist ideology were applied as interpretive principles by the courts. Similarly, the EU expects national courts to interpret national law harmoniously with the aims of its *acquis;* and the requirement of teleological interpretation makes the EU's equality law's aims and rationales highly relevant.

[906] For a retrospective analysis, see for example Simon Deakin, 'The Lisbon Treaty, the Viking and Laval Judgments, and the financial crisis: in search of new foundations for Europe's "social market economy"' in Niklas Bruun, Klaus Lörcher and Isabelle Schömann (eds), *The Lisbon Treaty and Social Europe* (Hart 2011).

[907] Cf. n. 906.

In the following, I first briefly introduce the extent of the obligations (4.1) and discuss what EU's harmonization obligation has meant for Czech law (4.2). I then present the reluctance to fully implement (4.3).[908] I show that the EU's role has been paradoxical – without it, the provisions would not have been adopted, but with it, the debate surrounding the adoption of legislation, especially the Antidiscrimination Act, has concentrated on EU membership obligations only and not on the real importance and substance of the law (4.4).

4.1 The implementation obligation and rationales

Between 1957, when the equal pay principle was incorporated as Article 119 of the Treaty Establishing the EEC,[909] and the beginning of the new millenium, the EC adopted several[910] directives implementing the principle of equality between men and women in the areas of employment, work and social security. A new legal basis for equality legislation,[911] was created in 1999 by the Treaty of Amsterdam. Since then, the EU's equality *acquis* has been expanded both in terms of grounds – racial or ethnic origin, religion or belief, disability, age and sexual orientation[912] have been

[908] The substantive flaws in the adoption and application of antidiscrimination law are discussed in greater detail in chapter 7.

[909] Now Art. 157 TFEU.

[910] The full list is available on the European Commission website: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/426.

[911] Now Art. 19 TFEU.

[912] Race Directive; Framework Directive.

added to sex –, as well as scope – discrimination has been prohibited beyond the workplace in access to goods and services.[913]

Equality and antidiscrimination law began with market-making aims (to level the playing field for France),[914] but its social aims were recognized in the mid-1970s,[915] and are currently largely considered primary.[916] Equality and non-discrimination have become one of EU's core policies[917] and acquired the status of fundamental rights.[918] The EU's equality law and policy has arguably evolved to promote substantive equality.[919] The EU thus not only requires the Member States to prohibit direct discrimination, but strives to address existing inequalities and hierarchies through a prohibition of indirect discrimination, acceptance of positive action, requirement of a reasonable accommodation for the disabled, a shift of the

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[913] See Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, O.J. L 373, 21/12/2004, p. 37; Race Directive.

[914] Catherine Barnard, 'The Economic Objectives of Article 119' in Tamara Hervey and David O'Keeffe (eds), *Sex Equality Law in the European Union* (Wiley 1996), 321-334; Gillian More, 'The Principle of Equal Treatment: from Market Unifier to Fundamental Right' in Paul Craig and Grainne de Burca (eds), *The Evolution of EU Law* (OUP 1999).

[915] Case 43/75 *Defrenne* II ECR [1976] 455.

[916] Case 50/96 *Deutsche Telekom AG v Schröder* [2000] ECR I-00743, para. 57. The aims of EU equality law are not undisputed, however. Cf. chapter 3 and Christopher McCrudden, 'Theorising European Equality Law' in Eilis Barry and Cathryn Costello (eds), *Equality in Diversity: The New Equality Directives* (ICEL Dublin 2003).

[917] Expressed in Art. 3 TEU and Art. 8, 10 (gender mainstreaming) and Art. 19 (competence) TFEU.

[918] Case 149/77 *Defrenne III* [1978] ECR 1365, para. 26. This was confirmed by the insertion of Art. 23 into the European Charter. See also Catherine Barnard, 'Gender Equality in the EU: A balance sheet' in Philip Alston (ed), *The EU and Human Rights* (OUP 1999).

[919] Cf. chapter 3.

burden of proof in discrimination cases, etc. Arguably, it is concerned with disadvantage rather than merely with difference.[920]

4.2 A driver for change

Although the actual harmonization of Czech law with EU antidiscrimination *acquis* only started toward the end of the 1990s,[921] the EU gender framework was already on the radar in early 1990s.[922] It was, for example, expressly mentioned as an important consideration for relaxing the prohibition of night work for women by the Czech Constitutional Court in 1994.[923] The EU as a driver of change was effective both before accession as well as after the Czech Republic became a member in 2004, when the threat of infringement proceedings meant that an effort was made to transpose the EU *acquis* into Czech law.

As I discuss in chapter 6 below, Czech law has been – in continuity with the State Socialist period – generous towards pregnant workers and working mothers. The EU's minimum requirements in these areas, as contained especially in the Pregnancy Directive and the Parental Leave Directive, have been met and exceeded. EU has thus contributed not in the area of protection or special care, but in the area of equality. I argue that without it, provisions of care would not have been gender-neutralized to include fathers, reconciliation of work and family life would not be an issue, and there

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[920] Cf. chapter 3.

[921] The prohibition of discrimination was inserted into the Act on Employment in 1999 (167/1999.). The first "Euro-amendment" to the Labour Code was passed in 2000 (155/2000).

[922] Funk, 'Introduction', 14; also Heitlinger, 'The Impact', 101.

[923] Pl ÚS 13/94.

would be no prohibition of discrimination in Czech statutory law, labour law in particular.

Aside from having been an important impetus for change in labour and antidiscrimination law,[924] market-related areas where it has well-established competence, the EU has, more surprisingly, influenced gender-relevant provisions in criminal law. For example measures adopted under Justice and Home Affairs powers[925] led to improvements in the protection of victims of crime and the definition of trafficking.[926]

This influence of the EU has to be seen as positive. First, because where the EU has not provided guidance, the Czech government's gender policies have been marked by lack of direction, as I discuss in more detail in chapter 8 below. Thus, second, without the legal obligation to implement, many of these provisions would not have been adopted, and without them being on the statute books, women could not make use of them. The process of implementation has, however, mobilized opposition

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[924] I have previously explored the role of the EU in the development of Czech equality and antidiscrimination law in Havelková, 'Effectiveness'; Barbara Havelková, 'Burden of proof and positive action in decisions of the Czech and the Slovak Constitutional Courts - milestones or mill-stones for implementation of EC equality law?' (2007) 32 European Law Review 686; Havelková, 'Challenges'; and Barbara Havelková, 'The legal notion of gender equality in the Czech Republic' (2010) 33 Women's Studies International Forum 21

[925] Council Framework Decision 2002/629/JHA on Combating Trafficking in Human Beings, 2002 O.J. (L 203) 1; currently Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

[926] The new definition of trafficking, which included a broader range of forms of exploitation beyond sexual exploitation and no longer required a trans-border element, was driven by EU law. Government of the Czech Republic, 'Explanatory Memorandum to the Governmental Proposal of an Act Amending the 1961 Criminal Code' (*http://www.psp.cz/sqw/text/tiskt.sqw?o=4&ct=514&ct1=0*, 2003) accessed 1st July 2009; Government of the Czech Republic, 'Explanatory Memorandum to the Governmental Proposal of a Criminal Code' (*http://www.psp.cz/sqw/text/tiskt.sqw?O=5&CT=410&CT1=0*, 2008) accessed 1st July 2009.

to equality law, and its impact has been diminished by the very fact that the impetus for change has been external.

4.3 The reluctance to transpose and the refusal to apply

The entire process of EU harmonization in the area of antidiscrimination law has met with resistance.[927] This has been true as far as transposition is concerned - the Czech legislator adopted as little and as late as possible. For example in 2005, a year after Accession, the Czech Republic was the single most non-compliant Member State in the antidiscrimination area.[928] The comprehensive Antidiscrimination Law, which is meant to cover a range of areas and discrimination grounds, had to be proposed twice and was only adopted in 2009.[929] The courts too have been extremely averse to finding discrimination - out of the nine antidiscrimination cases I examine in chapter 7, only one was partly successful. Although the absence of legal guarantees, which characterized the State Socialist period, has been remedied, equality and antidiscrimination rights remain a 'mirage'. The courts refer to equality as 'relative', which makes it easy for equality to be outweighed by other considerations, such as freedom. Both constitutional and ordinary judges have little understanding of structural disadvantage, which makes them blind to indirect discrimination. Ordinary judges have moreover not grasped the basic tenets of direct discrimination, especially

[927] Cf. chapter 7(2.1).

[928] Of the ten directives addressing equal treatment mentioned in the Annual Report, infringement proceedings against the Czech Republic were initiated in the case of nine of those directives. European Commission, *23rd Annual Report and its Statistical Annex* (2005), 181 – 195.

[929] 198/2009.

that no proof of fault is required and that this is reflected in the procedural provision that shifts the burden of proof to the defendant.

The lack of understanding of antidiscrimination law is not accidental, but has deeper roots. In chapter 7, I analyse the ideological and conceptual path-dependence on State Socialism; in the following, I discuss the possible aspects of this reluctance which have to do with the EU itself.[930] In particular, I argue that equality law has suffered from the fact that any substantive debate about the need for antidiscrimination legislation has been avoided as the provisions have been presented merely as an obligation of EU membership.

4.4 Antidiscrimination law merely a membership obligation

The legislation proposed to harmonize with EU antidiscrimination law has not been seriously debated and explained, as reference has almost exclusively been made to the EU membership requirement.[931] Both of the antidiscrimination bills were presented by the government[932] as an implementation obligation - the government was not concerned with equality, but with accession. This can be illustrated by the appeal made by the then Vice Prime Minister and Minister of Justice Pavel Němec during parliamentary discussion about the first antidiscrimination bill:

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[930] This 'compliance gap' has been observed not just in the Czech Republic, but across the post-communist CEE. See for example Csilla Kollonay Lehoczky, 'The Significance of Existing EU Sex Equality Law for Women in the New Member States. The Case of Hungary' (2005) 12 Maastricht Journal of European and Comparative Law 467; Kristen Ghodsee, Lavinia Stan and Elaine Weiner, 'Introduction' (2010) 33 Women's Studies International Forum 1.

[931] This trend of implementation being instrumental to EU accession has been noted in other CEE states, see Barbara Einhorn, *Citizenship in an Enlarging Europe: From Dream to Awakening* (Palgrave Macmillan 2006), xviii.

[932] The first time by a coalition led by the ČSSD, the second time by ODS.

> I would like to remind you what this law is about. This law actually deals with implementing the Czech Republic's international obligations, which are binding on the Czech Republic, and introducing them into its legal order.[933]

The prevalence of this view is demonstrated by the declaration adopted by the Senate when finally adopting the ADA in 2008:

> The Senate considers the ADA a tool for implementation of the requirements of EU law, the non-realization of which would lead to sanctions. It does not, however, identify with the character of the norm, which *artificially* interferes with the *natural* evolution of society, does *not respect cultural differences* among the Member states and elevates the demand of equality above the principle of *freedom of choice*. The Senate urges the government not to consent to adoption of further antidiscrimination measures at the EU level.[934]

The fact that the proposal was passed merely to comply with EU law had impact on its actual provisions as well. When the first draft of an Anti-discrimination Act was presented by the Government Council of Human Rights to the Cabinet in 2004, the Cabinet deleted the provisions explicitly guaranteeing the right to equal treatment,[935] thus basically stripping the bill of its normative effect and making it into a list of definitions.[936] Possibly aware of the drawbacks that deletion entailed, the Cabinet amended the wording of the first Section of the proposal, replacing the phrase 'this statute regulates, in harmony with European Community law, the right to equal

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[933] House, 15/3/2006, 866 (2005). An exception to the overwhelming trend of presenting the bill as an EU membership obligation was the intervention of Alena Gajdůšková, a Social Democratic Senator: 'The law is not necessary because we committed ourselves to its adoption in the Accession agreement, but because discrimination is not an individual problem of the discriminated, but because it always is a problem of the society, not only a moral, ethical one, but economic too.' Senate, 26/1/2006, 201 (2006).

[934] Senate, *Resolution no. 377 of 2008*.

[935] The draft Sec. 1(2) and (3) read: 'Everyone has a right to equal treatment and protection from discrimination' and 'Natural and legal persons have an obligation to guarantee equal treatment […].'

[936] For a more detailed discussion, see Havelková, 'Challenges', 104.

treatment […]' with 'This statute *transposes* relevant norms of the European Community […]'. In order to fulfil EU membership obligations the Cabinet probably considered lip service all the more necessary the less the proposal in substance was a true transposition of EU equality law.[937]

Thus, while the importance of its adoption for the EU membership was stressed, no separate substantive case for equality legislation was made. No political party explained why freedom from discrimination is important for social, economic and political participation and the well-being of individuals, nor were possible benefits for society as a whole shown.

The lack of regard for the actual aims of antidiscrimination law within the legislature could have been remedied in the process of judicial decision-making. In theory, the national law should be disapplied when in conflict with a directive in vertical relations (direct effect). Furthermore, the doctrine of indirect effect should oblige 'the national courts to […] interpret national law, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive'.[938] In cases where the interpretation of an EU directive would be in doubt, the preliminary reference procedure has been available to national courts. Czech courts have, however, not used[939] the doctrine of direct effect to disapply an indirectly discriminatory tax provision, even when specifically (and correctly) requested by the claimant.[940] They have not considered the aims of the

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[937] Eventually, a normative prohibition was included in the new ADA; cf. chapter 7(2.1).

[938] Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I 8835, para 113.

[939] Cf. chapter 7(2.2).

[940] Judgment of Regional Court in Prague, *Whelan and Whelanová*, 11Ca 161/2007-39; cf. chapter 7.

antidiscrimination directives, as interpreted by the CJEU,[941] to give them indirect effect, notwithstanding the fact that this would have been appropriate, in particularly with regard to remedies, where the transposition has been too close-fisted to claimants. Nor have preliminary questions been referred to the CJEU for the clarification of antidiscrimination law.

This disregard for EU law constitutes a breach of the doctrines of supremacy and direct and indirect effect and thus EU law obligation, but, importantly for Czech victims of discrimination, it has further contributed to the low success rate of antidiscrimination claims before the Czech courts, as I show in chapter 7.

[941] Case 14/83 *Von Colson and Kamann* [1984] ECR 1891.

CHAPTER 6

THE REGULATION OF GENDER IN TRANSITION

Chapter 2, which analysed the development of the legal situation of women under State Socialism, looked primarily at family and work, as they were the two legal platforms on which the 'woman question' played out. The current chapter looks at what happened to them after 1989. It notes that the model State Socialist family – heterosexual, un-divorced, with two children, and a traditional division of labour – has persisted despite its apparent 'loosening', for example through the legal recognition of same-sex partnership (section 1). It then turns to the question of work and care. Under State Socialism, childcare was exclusively and directly regulated through women as mothers. This has changed in Transition – with gender-neutralization of many provisions of labour and social security law and the formal enabling of men to be carers - but it is argued that this development too is only superficial. There is a bias toward a particular type of family and a particular type of motherhood (married rather than divorced or single), and a particular type of care – individual, in the home and largely by the mother. There is continuity with State Socialism in the fact that assumptions, norms and preferences with which the law works show a gender bias, but the law-makers remain entirely unreflective of it (section 2).

While the 'woman question' under State Socialism consisted largely of issues of family and work, in Transition, the legal platforms on which gender equality has played out multiplied and diversified. Previously neglected issues, such as same-sex partnerships, discrimination,[942] political quotas for women,[943] domestic violence, sexual harassment, stalking, or prostitution, have started to be discussed and addressed. In section 3, I draw on the examples of prostitution, rape, domestic violence and sexual harassment to assess the regulation and understanding of gender-based violence in Transition. I argue that notwithstanding some positive legislative developments, there has been little shift in seeing and understanding the specific vulnerabilities of the victims, the power dynamic in gender-based inter-personal violence, and gender bias in enforcement of the law. The law and the legal community have often cared more for the aggressor or the client of prostitution than for the victims and as such - a 'male perspective' continues to be taken.

1 The model family – complete, heterosexual and with a traditional division of labour

In chapter 2, I observed that towards the end of State Socialism there was a regression in gender equality. While equality in the family and the modernization of women's status was the policy in the 1950s, by the 1970s and 1980s, complete heterosexual marriage with children became the norm and legal scholarship urged

[942] Chapter 7.

[943] Cf. chapter 5. The topic of quotas has been debated, but never reached a stage of concrete legal proposal and are therefore not discussed in greater detail here.

women to shoulder the burden of housework and childcare in order to preserve harmony in marriages. In the following, I argue that this strong marital normativism has continued in Transition. First, the preference for heterosexual relationships continues. Notwithstanding the adoption of the Act on Registered Partnership, the legal recognition of same-sex relationships falls short of its acceptance as a family form, especially since adoption is prohibited (1.1). It therefore should be seen as a mere exception to the rule of support for traditional families, observable in legal regulation as well as policy debates. Second, there is a bias toward complete families with a gendered division of labour, observable especially in the use of common taxation of spouses and the 'wife discount' which advantages traditional families with one breadwinner and one homemaker (1.2). Finally, there has been a strong preference for complete families. Single parents – in reality overwhelmingly mothers – are considered undesirable, and have been disadvantaged in legal regulation and rebuked in parliamentary debates. I illustrate this by reference to the debates surrounding the possibility of state involvement in the enforcement of child support in families with separated parents (1.3).

1.1 Registered partnership – a rise of a 'new' family?

While a deeper discussion of the regulation of same-sex partnerships is outside of the scope of this thesis, it is worth analyzing whether the adoption of the Act on Registered Partnership is a sign of an acceptance of a 'new' family and a development away from the traditional heterosexual family model. Proposals for some legal

recognition of gay partnerships have been on the table since mid-1990s,[944] mostly thanks to the lobbying efforts of LGBT rights NGOs. A total of six proposals were unsuccessful.[945] The seventh proposal was vetoed by President Klaus, but the veto was overturned in Parliament, and the Act came into force in 2006.[946] The law enacted was based in many respects on the Act on Family and thus on marriage, with regards to conditions of eligibility, the procedure for establishment and dissolution, inheritance and legal status as 'close persons'.[947] However, the law did not provide an equivalent of joint marital property or common taxation of spouses, immigration rights, or survivor's pensions. Furthermore the possibility of adopting children was explicitly prohibited.[948]

The majority of MPs eventually supported the bill,[949] but mostly based on the pragmatic argument that the law should recognize the reality of these partnerships.[950] There was no consideration of opening marriage itself to gay and lesbian couples and the possibility of adoption has been met with an almost unanimous rejection. This shows that same-sex partnerships could be tolerated, but they have not been seen as

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[944] The first addressed only inheritance and tenancy rights.

[945] Four (1995, 1997, 1999, 2004) were prepared by individual MPs, and two (2000, 2003) were prepared by the Ministry of Justice.

[946] 115/2006.

[947] This is a term used throughout the legal system, and gives for example the right of refusal to testify in criminal proceedings.

[948] Sec. 13(2) 115/2006.

[949] The majority of the population was behind this bill throughout (over 50% supported it between 1990 and 2003). Věra Sokolová, 'Koncepční pohled na sexuální menšiny aneb vše je jen otázka správné orientace' in H. Hašková, A. Křížková and M. Linková (eds), *Mnohohlasem* (253-266, Sociologický ústav AV ČR 2006), 259.

[950] The selection of rights guaranteed and not guaranteed does not appear to have any clear explanation. Each subsequent proposal had less legal guarantees. One could speculate that that the proposal was eventually accepted as minimal enough and different from marriage enough to be acceptable to more conservative MPs.

equal to marriage, nor as deserving of the full range of rights and options that heterosexual marriages have. This chimes well with Sokolová's observation that:

> On one hand, the Czech society likes to define itself as tolerant, but it can be argued that this tolerance is an expression of passivity rather than active understanding and respect.[951]

The Christian Democratic MPs were especially vocal in suggesting that a marriage-like registered partnership would undermine the institution of the family.[952] Indeed, the issues were explicitly connected in the debates:

> I have to say that we have to insist on conservative values. Just some minutes ago, we were discussing problems of [child] support in broken families. I believe that the only thing that can help our society is to adhere to conservative values.[953]

1.2 Supporting a traditional division of labour

This adherence to 'conservative values' and the preference for complete heterosexual families with a specialized division of labour have been apparent in tax rules. The common taxation of spouses and the 'wife discount' have both worked on the premise of a traditional family, in contrast to the trend of individualization of tax provisions, which much of Western Europe adopted in the 1980s.[954]

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[951] Sokolová, 'Koncepční pohled', 255.

[952] The arguments connecting LGBT rights and erosion of heterosexual marriage are familiar from the West, for example the American right.

[953] Cyril Svoboda (KDU-ČSL), House, 24/6/2005, 969 (2005).

[954] Chiara Saraceno, 'Means-testing family benefits in Europe: Explicit and Implicit Goals and contemporary trends' in Peter Herrmann (ed), *Human Beings--Between the Individual and the Social* (Nova 2006), 84.

The common taxation of spouses[955] was adopted in 2004 and was available to spouses during the fiscal years 2005-2007. It aggregated the married couple's income and then divided it by two, thus giving the advantage of a lower tax rate to families with one breadwinner and one homemaker, and comparatively disadvantaging non-heterosexual families, unmarried couples, families with two higher earners, and single households.[956] Considering the gender-wage gap,[957] which means that man's income is more likely to be higher than that of the woman, as well as the fact that the overwhelming majority of women take maternity leave and then continue on parental leave,[958] the likely family model these tax rules were indirectly supporting was one with a male breadwinner and a female homemaker.

The provision was abolished in 2007, not for gender equality reasons, but out of budgetary concerns, and was replaced, in 2008,[959] with a 'wife discount'. The provision[960] lowers the tax rate of a husband, if the wife's annual income is below 68.000 CZK (roughly three average monthly wages). This advantage in unavailable if the wife earns more than that.

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955 Section 13a 586/1992., as amended by 669/2004.

956 The provision was optional – i.e. low earner two-income families could opt for separate taxation.

957 The gender wage gap has hovered around 25 % since mid-1990s; in 2010, it was 24,9 % CSO, 'Zaostřeno na ženy a muže 2011' (*http://www.czso.cz/csu/2011edicniplan.nsf/publ/1413-11-r_2011*, 2011) accessed 10 October 2012.

958 Cf. n. 1026.

959 482/2008.

960 Sec. 35ba 586/1992, current version.

Both laws are most favourable[961] to a model where one spouse earns very little (typically the female) and one spouse is the breadwinner (typically the male) and are therefore indirectly gendered. But strikingly, the 'wife discount' provision is also expressly and directly gender specific. Although the Czech law normally uses generic masculine nouns and pronouns, the formulation here speaks of a discount for a 'wife'. 'Husband' is only mentioned in brackets. The gender-stereotyping character of the provision was never raised in the parliamentary debates.

1.3 A bias toward complete families and against single parenthood

The preference for complete families was also apparent in the debates surrounding the proposals for greater state involvement in the enforcement of child support payments.[962] The Czech Republic faces a serious problem of enforcement of child support payments once the parents' relationship breaks down. The divorce rate is high,[963] there is a high default rate on child support payments,[964] and a slow and ineffective system of enforcement through courts.[965] As the caring parents, who

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[961] The provisions do not directly penalize other family models, but by not offering the same benefit of lower taxation, they do comparatively disadvantage them. And while the material impact might be small (if the wife earns a full salary, the family would be overall better off than if she stayed at home), symbolically, the model shows preference for a certain organization of labour in the family.

[962] The following analysis is taken from Barbara Havelková and Kateřina Cidlinská, 'Genderové aspekty neúspěchu českých návrhů zákonů upravujících náhradní výživné na dítě' (2010) 11 Gender, rovné příležitosti, výzkum 60.

[963] In 2011, there were 45,137 weddings and 28,100 divorces. CSO, 'Zaostřeno na ženy a muže 2012' (*http://www.czso.cz/csu/2012edicniplan.nsf/kapitola/1413-12-r_2012-10,* 2012) accessed 1 February 2013.

[964] In 2011, 15,301 parents were prosecuted for non-payment of alimony (Sec. 213 40/2009); 9,140 of them repeat offenders. Police Presidium, 'Statistické přehledy kriminality za rok 2011' (*http://www.policie.cz/clanek/statisticke-prehledy-kriminality-za-rok-2011.aspx,* 2011) accessed 1 February 2013.

[965] Havelková and Cidlinská, 'Genderové aspekty'.

depend on child support from the non-resident parents, are overwhelmingly women,[966] the problem is a gendered one. As I mentioned in chapter 2, the state guaranteed child support throughout the State Socialist period, but the system was gradually eliminated in Transition. Children are only guaranteed social security payments when their actual income falls below the existential minimum[967] - the level of court-awarded child support is irrelevant and the policy thus addresses only the problem of absolute child poverty rather than assuring healthy and full child development.

To remedy this situation, a system of 'state advances' was proposed, in which the state would temporarily financially support the caring parent and child and then collect the amount due from the non-resident parent. This builds on the practice of many European states, which, urged by a Council of Europe Recommendation,[968] have adopted systems where the state temporarily steps in and provides payments when they are discontinued by the non-resident parent.[969] Four proposals were presented to Parliament between 2001 and 2009, all by female MPs, all unsuccessful. The debates surrounding the proposals showed a strong bias against divorced and single parents, exemplified here by a statement by the then Deputy, now Prime Minister, Petr Nečas (ODS):

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[966] Out of the approximately half a million 'lone parent families' in the Czech Republic in 2012, 75 % were headed by women. CSO, 'Zaostřeno 2012', table 1.20.

[967] See for detail Havelková and Cidlinská, 'Genderové aspekty'.

[968] Council of Europe Recommendation 869/1979 on payment by the state of advances on child maintenance.

[969] See for example Anne Corden, 'Comparing child maintenance systems: conceptual and methodological issues' (2001) [4] Int J Social Research Methodology 287; Celia Winkler, 'Sweden's Child Support Guarantee and Women's Economic Independence' (2001) 5 Journal of Poverty.

> The proposal is socially unjust […] because in certain circumstances a whole low-income family will have less money for their child than a broken family. This turns the whole social system, not only its motivational elements, *on its head*. It is *against common sense*.[970]

In the debates, the following four strategies were offered to single mothers to solve their financial difficulties: a) stay with the father; b) find a new provider; c) enforce the child support order themselves through the courts; or d) take on enough work to support a single-parent family.[971] These strategies illustrate well the 'marriage' between social conservatism and market liberalism which has characterized the Transition period, as I discussed in the previous chapter. On one hand, a socially conservative position is present - women are urged to accept the traditional gender role of a dependant – a wife to the father or a new man. On the other hand, a market-liberal position is also apparent – it considers that women should be responsible for their choices and there is nothing hindering them from taking care of themselves like anyone else. The fact that the 'motherhood penalty'[972] might need to be alleviated and mothers empowered was not considered.

Throughout the legal system, there are further examples of provisions which advantage couples over single parents. For example the current form of parental benefit[973] - a financial contribution to childcare paid out of the social security system - allows for the benefit to be counted based on the income of the higher earner in the couple. This might seem like a good idea, as it allows the carers – who are

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[970] House, 27/1/2010, 849 (2009).

[971] Havelková and Cidlinská, 'Genderové aspekty'.

[972] M. J. Budig and P. England, 'The Wage Penalty for Motherhood' (2001) 66 American Sociological Review. For an analysis of the Czech situation, see Alena Křížková and Marta Vohlídalová, 'Rodiče na trhu práce: mezi prací a péčí' (2009) 45 Sociologický časopis/Czech Sociological Review 31.

[973] Cf. section 2.4.

overwhelmingly women – to benefit from the higher income of their husband or partner. But it also means that women without a man, i.e. single or divorced mothers who are already on average in economically more dire situation,[974] are further comparatively disadvantaged.

Linda Gordon, writing about the US, has analysed the peculiar position of 'single mothers' in welfare: 'pitied but not entitled'.[975] She notes that the category 'single mother' has several subcategories: widowed, divorced, separated or abandoned, and never married. Each of these comes with their own moral judgements and social policy solutions, with widows generally the most, and unmarried single mothers the least 'deserving'. A similar hierarchy can be seen as emerging from the parliamentary debates on state advances of child support - divorced mothers were blamed for leaving their socially acceptable dependence on the man and becoming unacceptably dependent on the state, and single mothers were treated as calculating 'free riders' and their support is considered 'against common sense'.

It should be mentioned that although motherhood within marriage is preferred to divorced and single motherhood, fatherhood fares even worse, especially when one looks at decisions regarding custody of children after divorce. Although slight increases of shared and alternating custody can be discerned, the overwhelming majority of children are still given into the custody of the mother.[976] These

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[974] In 2010, gross income per person in two-parent nuclear families was on average 164,046 CZK; in a single parent household, it was only 119,688 CZK; i.e. only 72 %. CSO, 'Zaostřeno 2011'.

[975] Linda Gordon, *Pitied But Not Entitled: Single Mothers and the History of Welfare.* (Free Press 1994). For a discussion of the 'desert of 'single mothers' in the Swedish context, see Winkler, 'Sweden'.

[976] In the last 15 years, over 90 % have been put into the sole custody of the mother. In 2010, 20,059 children were given into the sole custody of the mother, 1,507 to the father, and 867 into shared or

preferences, of legislature and courts, show a gender bias – the former is illustrative of a traditional marital normativity, the latter of a traditional idea of the gender role of the mother as the natural carer.

2 From motherhood to parenthood? The question of child-care

As I noted in chapter 2, legislating on motherhood and care is difficult. The law needs to recognize, on the one hand, that many women are mothers and that it is overwhelmingly women who are carers. But it must not overprotect women to an extent that it limits their choices and weakens their position in the labour market, nor should it cement their 'social role' as the caring parent. Gender-progressive regulation would instead encourage fathers to participate in childcare and make sure that a meaningful reconciliation of private and work-life is available to both. Under State Socialism, in the 1950s, law saw women primarily as workers. This early model was based on the norm of a full-time working mother, supported (at least in theory) by collectivized childcare and housework. The collectivization, however, was insufficient and since there was no change of the division of labour in the family, women ended up with a triple burden and exhausted. This period subsequently became viewed as emancipation gone wrong. The 1960s saw calls for greater protection and support of motherhood, and in the 1970s and 1980s women were indeed primarily legally treated as mothers and mothers, in turn, as the only caring parent. The regulation from the Normalization period inherited in Transition thus had women at the centre of pro-natal and pro-family policies.

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alternating custody. Ministry of Justice, 'Statistics' (*http://cslav.justice.cz/InfoData/statisticke-rocenky.html;jsessionid=32b49471d1375d9d60d5a52d6b8a*, 2012) accessed 1 February 2013.

In the following, I look at legal regulation of motherhood and parenthood in labour and social security law. I argue that labour law as it is today is well suited to address the special needs of workers vulnerable for reasons of motherhood or parenthood (2.1). It is neither over- nor under-protective, and it limits its protection of women to issues connected with biological aspects of motherhood (pregnancy, childbirth and breastfeeding), while protecting both men and women as parents. I point out, however, that until late in Transition, the law continued to treat all women as potential mothers (through bans on work), and that this over-protection was not eliminated because of any changing understanding of the issue, but for reasons of EU membership (2.2). The inclusion of fathers in protection and support of parents was also EU-driven. Furthermore, the opening of parenthood to fathers was not done comprehensively and with a view to truly facilitate caring by fathers, so considerable gaps have remained (2.3). Finally, I look more closely at the parental benefit. I assess whether it facilitates the reconciliation of family and professional life or rather keeps the caring parents – overwhelmingly the mothers – in the home. I argue that while some positive changes have been made – such as the option to receive the total amount of the benefit over shorter periods which allows for an earlier return to the labour market, or the allowing of child-care by another person without the loss of the benefit – the 'norm' is still individualized care of several years in length (2.4).

Thus, overall, while there have been changes which can be seen as a 'loosening' of the role of the mother – the gender neutralization of provisions on parental leave and benefits or the allowing of child-care by a non-parent – the emphasis continues to be on private personal care in the home. This care continues to be overwhelmingly that of the mother; fathers are not fully and actively enabled and encouraged to participate.

2.1 Labour law – protecting motherhood and parenthood

The protection of pregnant women and mothers as vulnerable workers in labour law, inherited from State Socialism as gender-specific, was largely kept in Transition. On the other hand, provisions on care not connected to the biological aspects of motherhood have been gender-neutralized to include the fathers. The Labour Code, which regulates the employment relationship, now protects pregnant women, mothers on maternity leave and either parent – mother or father - on parental leave from dismissal.[977] The provisions often go beyond the minimum standards required by EU law. For example while the Pregnancy Directive requires protection from dismissal from the moment a pregnant worker informs her employer, Czech law protects her from the moment of conception of her child - informing the employer is not a prerequisite.[978] Similarly, in guaranteeing maternity leave of 28 weeks,[979] Czech law goes beyond the Pregnancy Directive's minimum required length of 14 weeks.[980] The leave is mandatory for 14 weeks in the Czech Republic,[981] but only for two under the directive.[982] Czech law also guarantees new mothers breast-feeding breaks, a measure being only debated at the EU level today. Czech mothers are entitled to two

[977] Sec. 53(1)d, 54 (b,c,d), 55(2) 262/2006. The exception are situations of dissolution of the employer and gross misconduct. Even then, the dismissal cannot be effective immediately (*okamžité zrušení*), but with delayed effect (*výpověď*).

[978] Art. 2(a) Pregnancy Directive.

[979] Sec 195. It is also available in cases of adoption to either parent - Sec. 197 262/2006.

[980] Art. 8(1) Pregnancy Directive.

[981] Sec. 195(5) 262/2006.

[982] Art. 8(2) Pregnancy Directive.

half hour breaks for children under one and one break a day for further three months after that. These breastfeeding breaks count towards working time and pay.[983]

But the protection of pregnant women and new mothers does not end here. If a pregnant woman is doing unsuitable work, the employer is obliged to reassign her, if possible to a position with equal remuneration. Should her pay be lower than her previous wage, a benefit under the 'sickness insurance' scheme tops up her income.[984] For pregnant women or caring parents,[985] there are also limitations on obligatory night work,[986] over-time,[987] change of work-place and work-travel.[988] The employer is generally required to consider pregnant women or caring parents when assigning work-shifts[989] and, unless there are serious operational reasons against it, must agree to a conversion to part-time.[990]

With regards to care, the already mentioned maternity leave provisions in labour law are complemented by financial provisions in social security - a maternity allowance is available, paid for through 'sickness insurance' and not the employer, and counted as a percentage of previously earned salary. The mother has a right to return to the same position, and, as required by EU law,[991] is newly protected from

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[983] Sec. 242 262/2006.

[984] Sec. 42-44 187/2006.

[985] Employees are protected when they have children up to 8 or even 15 years old.

[986] Sec. 239 (1) 262/2006.

[987] Sec. 241(3) ibid.

[988] Sec. 240(1) ibid.

[989] Sec. 241(1,2) ibid.

[990] Sec. 241(2) ibid.

[991] Art. 2(2)(c) Recast Directive.

discrimination.[992] Parental leave, which follows maternal leave, is available for 3 years[993] accompanied by a parental allowance, a small monthly sum[994] paid out of the social security system. The time spent caring for a child still counts as an equivalent of work for the purposes of pensions.[995]

These provisions address the particular vulnerability of pregnant women, mothers immediately after giving birth and carers on the labour market, and recognize their contribution to society. As they are today, the provisions both fulfil and go beyond the minimum requirements of EU law in the area of employment and are quite generous compared to other EU systems.[996] In chapter 2, I observed that the law had often gone beyond what was necessary and limited women's options and choices; is this still true in Transition?

2.2 Protecting all women as mothers?

As I observed in chapter 2, the State Socialist law contained wide-raging protections of women and limitations on work by women. Particularly the period of Normalization was characterized by a strong pro-maternity policy targeting population growth. This policy sat well with many women who retreated into the

[992] Sec. 2(4) ADA.

[993] Sec. 196 262/2006.

[994] The calculation of the benefit changed from a flat-rate sum in Sec. 7 382/1990 , to a set amount counted on the basis of the national social security 'personal need figure' in Sec. 32 117/1995. Parental allowance was increased in 2004 (Act. No 237/2003.) and again, considerably, increased in 2006 112/2006. But this change just before the 2006 elections, was arguably adopted for populist reasons (Dudová, 'Promarněná', 29). As of 2008 (based on 261/2007.), the amount depended on the length of time the caring parent chose to stay at home.

[995] Sec 5(1)(r,s) 155/1995.

[996] See for example European Commission, 'Legal Approaches to Some Aspects of the Reconciliation of Work, Private and Family Life in Thirty European Countries ' (*http://ec.europa.eu/justice/gender-equality/files/reconciliationfinal28aug2008_en.pdf*, 2008) accessed 1 February 2013.

private world of motherhood and family to escape the 'living of a lie' in the public sphere. A strong understanding of women's role as mother existed under State Socialism and was carried over into Transition. Throughout the 1990s, public opinion surveys have shown a continuing perception of motherhood as the most fundamental female role.[997] Not only was this perception, but also (over)protective legal provisions, carried over into Transition.

Until the mid-2000s, the Labour Code continued to speak about the 'maternal role' - it prohibited 'all inadequate or harmful work, especially work which endangers women's *maternal role*'.[998] The provision worked with the assumption that all women were actually or potentially mothers, whether or not that was the path they chose.[999] The formulation was amended in 2004[1000] to ban employment of women in works endangering motherhood, thus tailoring the protection more narrowly to only women who actually are mothers. Similarly, an Ordinance of the Ministry of Health[1001] which forbade certain works and working conditions to *all women* was abolished and substituted in 2003 by an Ordinance[1002] which only restricts the employment of pregnant and breastfeeding women and mothers till the end of the ninth month after giving birth, in accordance with the Pregnancy Directive.

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[997] Havelková, 'The Political', 157.

[998] Sec. 150 65/1965, as valid before 2005. Emphasis mine.

[999] On the issue of whether greater protection of women, and especially their reproductive capacity, is justified, see Fredman, *Women*, 306-308.

[1000] 436/2004.

[1001] Ordinance of the Ministry of Health No 261/1997.

[1002] Ordinance of Ministry of Health No 288/2003.

Further examples of (over)protective legislation have been bans of certain types of work for all women. Historically, these bans were considered necessary to prevent the exploitation of women. This was reflected in the adoption of international instruments in the first half of the 20th century.[1003] With time, the bans came to be seen more as a patronizing limitation, based on stereotypical ideas about women's physiological weaknesses and their role as mothers.[1004] As a limitation of women's autonomy in the labour market and ultimately a breach of equality, bans on night work[1005] and work underground[1006] were considered in breach of EU law by the CJEU.

In the Czech Republic, the question of the desirability – and constitutionality – of the ban on night work was resolved relatively early. A challenge[1007] was brought to the Constitutional Court in 1994. The CCC, looking toward a new ILO Convention and the EU law for guidance, considered the ban incompatible with gender equality.[1008] The current provision on night work is gender neutral.[1009] The elimination of the prohibition of work underground to all women was longer in

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[1003] For example the ILO Convention concerning the Employment of Women on Underground Work in Mines of all Kinds No. 45 from 1935; or ILO Convention concerning Night Work of Women Employed in Industry No. 89 from 1948.

[1004] For a discussion, see Fredman, *Women*, 304-308.

[1005] *Stoeckel*.

[1006] C-203/03.

[1007] Sec. 152 65/1965, version before 1994.

[1008] Cf. chapter 7(1.3).

[1009] Sec. 94 262/2006. Night work is in principle allowed to all, but subject to limitations, especially with regards to working time.

coming. The provision, originally contained in the 1965 Labour Code,[1010] was carried into the new 2006 Labour Code.[1011] The Czech provision was adopted and kept to comply with a 1935 ILO Convention,[1012] and was only abolished in 2012.[1013]

The fact that the changes to 'maternal role' as well as bans happened relatively late in Transition and only due to requirements of EU equality law means that this change in the legislative framework does not necessarily imply or show any substantive shift in understanding. It cannot be taken as an indicator that it is now understood that the over-emphasis of women's biological differences and the equation of all women with motherhood can be gender-cementing and limiting of women's choice.

It also highlights the contours of EU's role in the legal development in Transition. The Czech law has gone beyond EU law requirements where older, mainly originally State Socialist, protective provisions on motherhood have existed and been kept. On the other hand anything that has to do with reconciliation of work and professional life, the involvement of men in caring, or discrimination of women and mothers (as I discuss in the following chapter), has been long in coming and fulfils only the minimum requirements of EU law.

[1010] Previously, Sec. 150 65/1965.

[1011] Sec. 238(1) 262/2006. The reason was that the Czech Republic missed several occasions to withdraw from the 1935 ILO Convention.

[1012] ILO 45/1935.

[1013] 365/2011. amending 262/2006.

2.3 Gender neutralization – bringing fathers to care?

As I already mentioned, many provisions originally working with the assumption that only women were child-carers, were gender-neutralized in Transition. The system inherited from State Socialism consisted of maternity leave accompanied by maternity benefits, followed by 'further maternity leave', available for up to three years,[1014] accompanied by a motherhood allowance for further leave. In labour law, women were protected from dismissal during periods of maternity and further maternity leave; and various other special provisions were connected with pregnancy, motherhood and womanhood (most of which I described above). In Transition, these provisions were slowly gender-neutralized to include fathers – i.e. were levelled up to include men.

As early as 1990, the child-care benefit, 'motherhood allowance for further leave', was changed to a parental allowance (*rodičovský příspěvek*).[1015] Inclusion of child-care periods in determining pensions was extended to men in 1995.[1016] In labour law, 'further maternity leave' changed into 'parental leave' in 2000.[1017] Special treatment with regards to care which was available to women only until 2005,[1018] such as adjustments of working time and schedule, protection from dismissal, limitations of change of work place and work travel, was made available to caring fathers in the new 2006 Labour Code. The change of heading from 'Working conditions of women and

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[1014] Sec. 157 65/1965 as amended by 188/1988.

[1015] 382/1990.

[1016] 155/1995.

[1017] 155/2000.

[1018] Sec. 154-156 65/1965, last version.

minors'[1019] to 'Special working conditions of certain employees'[1020] in 2006 is illustrative.

But the inclusion of fathers had been patchy. For example, as far as parental allowance was concerned, it was made available to caring fathers in 1990, as I mentioned.[1021] In reality, however, this gender neutralization was notional as the Labour Code only recognized 'parental leave' in 2000.[1022] Thus, for a decade, a father could receive the benefit, but had no guarantee of a workplace and protection from dismissal during the period of care.

The pension system also retained different provisions for women and men as regards retirement age.[1023] Women's already lower retirement ages benefited from further lowering based on the number of children; no comparable provision existed for fathers. Furthermore, men but not women were required to inform the social security administration of caring periods, for the purposes of inclusion of these caring-periods into pension calculations.[1024] Both provisions were subject to constitutional review for breach of the right to equality of the sexes. The Constitutional Court declared the administrative obligation of men to inform the administration about periods of care unconstitutional in 2006, but upheld the different retirement ages in 2007. I discuss the way the CCC applied the constitutional sex equality guarantee in these cases in more detail in the following chapter.

[1019] Head VII ibid.

[1020] Part X, head IV 262/2006.

[1021] 382/1990.

[1022] 155/2000.

[1023] Sec. 32 155/1995.

[1024] Sec. 5 (3) 2nd and 3rd sentence ibid; and Sec. 6 (4) a) point 11 582/1991.

What is of interest in this section, however, is the question whether these changes in the law can be taken to signify a real and earnest attempt to draw men into parenting. I believe they do not. Notwithstanding the gender neutralization of the parental leave and allowance provisions, there has been little real change in the numbers of men caring for young children. It is still overwhelmingly women who are carers – in 2010 while 15 % of women were economically inactive due to care; only 0.2 % of men were;[1025] and women constituted 98 % of the recipients of the parental allowance, the benefit available to caring mothers and fathers out of the system of social security.[1026] The option of a specific 'father's leave' although occasionally discussed by politicians,[1027] never reached a stage of a legislative proposal. The contemporaneous receipt of maternity and parental allowance is not available – i.e. mothers and fathers cannot care at the same time. And switching between carers, while available, is in no way actively encouraged through the regulation,[1028] as it is for example in Sweden.[1029] Fathers have thus been allowed to care for children, but their participation has not been fully and actively enabled or encouraged.

Provisions for parenting, both in labour law and in social security, although they no longer directly and explicitly regulate motherhood, thus continue to do so

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[1025] Based on data from 2010. CSO, 'Zaostřeno 2011', table 4.3.

[1026] CSO, 'Ženy a muži v datech 2011' (*http://www.czso.cz/csu/2011edicniplan.nsf/publ/1417-11-n_2011*, 2011) accessed 10 October 2012, Graph 16.

[1027] A one-week long 'father's leave' was meant to be a part of a 'pro-family package' in 2008, but was eventually scrapped for budgetary reasons.

[1028] As it is for example in the Nordic countries. European Commission, 'Legal Approaches'.

[1029] Ibid.

indirectly.[1030] In the following, I look in more detail at the institution of parental benefit, and analyse how it indirectly regulates and constructs motherhood; in particular whether it aims to facilitate the reconciliation of private and professional lives of women or whether it encourages and supports private individual child-care by women in the home.

2.4 Work or care – a closer look at the parental benefit

The way that parental leave and benefit is set up influences women's decisions and ability to reintegrate into the labour market as well as their ability to care for young children. Two questions are particularly pertinent: 1) how long is the parental leave/benefits, and 2) does it compensate the costs of care without regard to who performs it, or does it advantage a particular form of care (by the mother, in the home)?

As for the length of the leave and benefit, arguably, a very short leave keeps the caring parent well integrated in the labour market, but might not allow for sufficient personal care of a new-born child. On the other hand, a longer period of care might be counterproductive with regards to labour market participation, as young mothers – and women more generally – become perceived by employers as workers with complications. The Czech state has been generous in terms of length of maternity[1031] and parental leave. The period of absence from the workplace when

[1030] Using the term 'indirect' in the sense it has in antidiscrimination law – apparently neutral provision which impacts significantly more persons of one sex.

[1031] Men can avail themselves of maternity leave and benefits only exceptionally in the case of adoption. Cf. n.1026.

dismissal is illegal and the length of benefit payments are three[1032] and four years[1033] respectively. The 'generousness' has, however, created problems for mothers as well as women more generally in the labour market. Young women – in expectation that they will soon become pregnant - are often employed on fixed term contracts,[1034] when they are employed at all. Questions about labour rights of women on maternity and parental leave and those returning to work dominate legal clinics and counselling centres for women,[1035] and discrimination on the basis of pregnancy and motherhood appears to be rampant.[1036]

While one might have expected a decrease in length of the leave and benefit in Transition, this has not been the case. The motherhood allowance was available for up to three years for second and further children until 1989; the new parental allowance became available for three years unconditionally (for every child) in 1990.[1037] In 1995, the provision of the parental allowance was lengthened to four years.[1038] 'Further maternity leave' was not extended in labour law, however, which meant that women who availed themselves of the full four year length of the social benefit had

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[1032] N.977.

[1033] Sec. 30(1) 117/1995.

[1034] Based on informal conversations with Czech women. I was unable to locate quantitative data supporting this statement.

[1035] In the legal clinic of the NGO Gender Studies, maternity and parental leave constitute the majority of questions. For example in August and September 2012, two thirds of all queries were on the subject (based on my research of publically available list of questions and answers on the website http://www.rovneprilezitosti.cz/cz2/archiv-dotazu (accessed 10th October 2012). This finding has been confirmed in personal conversations with female lawyers - I have been repeatedly asked why I cared about antidiscrimination law, when the biggest problems faced by Czech women were connected to motherhood.

[1036] See n.1034.

[1037] 382/1990.

[1038] Sec. 30-32 117/1995.

no right to return to their original workplace. Overall, these policies encouraged women to stay home longer with children, and the sharp decline in nursery places[1039] basically precluded alternative arrangements – while during State Socialism a woman stayed home on average for 2 years per child, this rose to three years between 1987 and 2009.[1040]

An apparent positive development has been the 'flexibilization' of the system. A 'three-speed parental leave'[1041] was introduced in 2008. It has allowed the child-caring parent the choice to receive a higher allowance for shorter periods of time.[1042] As the previous length of the parental leave has been making the return to the labour market more difficult for carers,[1043] the availability of a well-paid short-term parental leave is welcome – it gives the caring parent a good income for the initial period of care and then motivates her to return quicker to the labour market.

The system, as originally adopted, had been criticized by feminist commentators.[1044] Many of the identified deficiencies were remedied in 2011. For example, while originally the length of the benefit receipt had to be chosen a priori and the decision could not be changed,[1045] a change of length during the period of

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[1039] Cf. text to n.809.

[1040] The values are median. Hašková, Maříková and Uhde, 'Leaves', 104.

[1041] 261/2007.

[1042] Originally, the options were two, three or four years - the shorter the time, the higher the monthly allowance. The idea was the over the whole period, the total amounts paid out would be equal. Currently, the parent can go for as long as (s)he wishes; the only limitation is the monthly maximum of 11.500 CZK and the total maximum of 220.000 CZK.

[1043] Cf. n.1034.

[1044] Hašková, Maříková and Uhde, 'Leaves'; Dudová, 'Promarněná'.

[1045] Sec 30(2) 117/1995 as amended by 261/2007.

receipt is now available.[1046] Another point of criticism, the fact that the system disadvantaged the unemployed, as it was conditional on the previous receipt of the maternity benefit which is in principle only available to employed women, has been changed too.[1047] The critique which can still be made, however, is that the system disadvantages the poor. The level of the monthly benefit is dependent on the average earnings of parents. The highest monthly amount - and the logical corollary, the shortest leave - would thus be available only to high-earners. This in practice means that the carers in low-income couples would receive lower income for longer periods – there remains little incentive to return earlier to the labour market. Furthermore, the possibility of counting the amount based on the partner's earnings, while positive for couples with one higher earner (due to the gender wage gap, usually the man), further comparatively disadvantages single parents (in reality, mothers). This shows that the default option is still implicitly a longer period of care – the new system merely allows a specific group of parents to 'opt up' to a shorter and better paid parental leave.

As for whether the system financially compensates the costs that families incur in connection with care for children, or whether it expresses a preference and advantages a particular form of care, the latter seems to have been the case. For most of Transition, the system has encouraged private individual care in the home. Minor changes occurred since mid-2000s. First, from 2004 onwards,[1048] the recipient-parent could have unlimited income while still drawing benefit. Dudová argues that the

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[1046] Sec. 30(7) 117/1995 as amended by 366/2011.

[1047] It is now based on the income of either parent, not the actual recipient parent. Sec. 30(3,4,5) 117/1995 as amended by 366/2011.

[1048] 453/2003.

allowance could thus be interpreted no longer as a substitution for lost pay, but as a contribution toward caring.[1049] The system also saw some loosening of the 'personal care' prerequisite for eligibility. Since 2007, the person caring does not have to be the parent; it could be a nanny.[1050] However, the child cannot be put into collective care for any considerable time, without the benefit being lost. This continues to be a disincentive for parents to put children into crèches and kindergartens, and while it somewhat loosens the idea that child-care has to be done by the mother, it is both based on and contributes to an understanding that care is best done privately and individually.[1051]

3 Addressing gender-based violence without seeing gender

I argued in chapter 4 that the socialist state failed to see, understand and adequately address gender-based violence.[1052] In the following, I observe that these limits in understanding persisted in Transition, despite considerable improvements in gender-based violence legislation[1053] in the 2000s. A wider range of harmful behaviour is now covered thanks to changes in the substantive criminal law (section 3.1). But the unreflective bias about women, sex, sexuality, and sexual and intimate relationships perseveres (3.2). Law-makers and judges continue to have trouble

[1049] Dudová, 'Promarněná', 32.

[1050] Sec. 31(2) 117/1995; Sec. 31(3) after 261/2007.

[1051] Before 2012, the maximum was 5 days a month, it was increased to a maximum 46 hours a month in 2012 (Sec. 31(3)a 117/1995 current version).

[1052] For a definition, see chapter 4(1.4).

[1053] I draw on the research done and national report submitted for Havelková, *Feasibility study on national legislation on gender violence and violence against children - European Commission JLS/2009/D4/018 - National report for the Czech Republic*.

understanding and addressing the specific vulnerability of victims of gender-based violence. On the contrary, I show – using the examples of prostitution, rape and sexual harassment - that victims are often the targets of repression, primary scrutiny and blame (3.3). Unaware and unreflective of any gender bias in life and law that needs to be consciously fought, the Czech law, law-makers and judges continue to take a 'male perspective'.[1054]

3.1 Positive developments in substantive criminal law and beyond

As I noted in chapter 2, gender-based violence was not specifically addressed under State Socialism. The level and duration of oblivion and denial is striking - in the parliamentary debate about specific criminalization of domestic violence in 2003, a Communist Party MP still insisted that domestic violence did not even exist under State Socialism and only occurred post-1989:

> The Communist Party in Parliament will support the proposal, aware of the fact that *various negatives were brought into our society after 1989*; and one of these negatives is the rise of domestic violence.[1055]

Domestic violence, defined as 'maltreatment of a person living in a jointly occupied flat or house', was criminalized in 2004[1056] after several unsuccessful attempts. The new 2010 Criminal Code took over[1057] the provision.[1058] The definition

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[1054] Catharine A. MacKinnon, 'Reflections on Law in the Everyday Life of Women' in Austin Sarat and Thomas Kearns (eds), *Law in Everyday Life* (University of Michigan Press 1994).

[1055] Ladislav Mlčák (KSČM), House, 25/6/2003, 298 (2003). Emphasis mine.

[1056] Sec. 215a 140/1961, as amended by 91/2004.

[1057] The new provision increased the minimum sentence of the basic offence to six month and the maximum sentence from three to four years

[1058] Sec. 199 40/2009.

now covers opposite-sex as well as same-sex partners and does not specify any regularity of the relationship (marriage or registered partnership), but it is limited only to situations of cohabitation and thus does not cover all instances of intimate partner abuse.

The new 2010 Criminal Code, aside from incorporating the domestic violence provision,[1059] newly criminalised stalking.[1060] Besides, it introduced a more comprehensive definition of trafficking,[1061] driven by EU law[1062] and very close to the formulations of the Palermo Protocol.[1063] The definitions of sexual offences were broadened as well, to cover a wider range of behaviour. Rape[1064] is now defined not only as 'intercourse comparable to genital intercourse', but also any other sexual intercourse – action by which the perpetrator achieves sexual gratification using the body of another person (groping of genitals, breasts, etc.). A new offence of 'sexual coercion'[1065] was also inserted, which covers also coercion to 'self-gratification, denudation or similar behaviour'.

[1059] Sec. 199 ibid.

[1060] Sec. 354 ibid, entitled 'dangerous pursuit'.

[1061] Sec. 168 ibid. The definition of trafficking evolved gradually. In 2002, the provision 'trafficking in women for the purpose of sexual intercourse' was gender-neutralized (Sec. 246 140/1961 as amended by 134/2002), and in 2004 'trafficking of human beings', originally addressing only sexual exploitation, was amended to cover also other forms of exploitation such as forced labour (Sec. 232a 140/1961 as amended by 537/2004.).

[1062] The explanatory memorandum informs that the changes are meant to implement 2002 Framework Decision.

[1063] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the U.N. Convention Against Transnational Organized Crime, G.A. Res. 55/25, 55 U.N. GAOR Supp. (No. 49), U.N. Doc. A/45/49 (Vol. I) (2001).

[1064] Sec. 185 40/2009.

[1065] Sec. 186 ibid.

Gender-based violence has been addressed beyond criminal law. In 2006, the Protection against Domestic Violence Act[1066] was adopted which aimed specifically at improving the situation of victims. It enabled the police to temporarily evict the aggressor from the shared dwelling, provided for a court-ordered civil law territorial and personal injunction against the aggressor and set up a system of social help through intervention centres.[1067] Protection from harassment and sexual harassment on the basis of sex, sexual orientation and other protected grounds is now guaranteed by the ADA.[1068]

Notwithstanding the fact that most development in substantive law has been positive, some changes have been for the worse. In particular where there has not been an unambiguous external guidance, from international law or the EU, such as in the area of prostitution, the legislator has had trouble identifying vulnerability and has targeted and repressed the weaker side – the prostitute, as I discuss below.

3.2 A refusal to see gender

The fact that violence against women is a gendered phenomenon has been ignored or denied in the Czech Republic. In debating an amendment to the Criminal

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[1066] 135/2006.

[1067] Jiřina Voňková and Ivana Spoustová, *Domácí násilí v českém právu z pohledu žen* (ProFem 2008), 219.

[1068] The provision on sexual harassment was part of EU implementation obligations, specifically Art. 2(2) Equal Treatment Directive as amended by the Amending Directive; now Art. Art. 2(1)c,d and 2(2)a Recast Directive. The original transposing provision in the Labour Code (Sec. 7(2)), enacted in 2000, covered only quid pro quo sexual harassment and was not compliant with EU definition. A new definition was introduced in 2004, to comply with the Amending Directive. With the adoption of a new Labour Code (262/2006) which counted on the contemporaneous adoption of the first proposed Antidiscrimination Act, the protection disappeared. This situation was only remedied in 2009 when the second proposal of an Antidiscrimination Act was passed and entered into force (Sec. 2(2), 4(1,2) ADA).

Code to insert a provision specifically addressing domestic violence as well the connected bill containing policing, civil and social provisions,[1069] the majority of the MPs speaking were adamant as to the gender neutrality of the proposal. A female Cabinet minister thus stated: 'I will deliberately not speak about violence against women, but about domestic violence, because the violence in families can go both ways'.[1070] A Deputy, speaking about the problems of a civil injunction, used the example of 'a janitor beating his wife or a janitor beating her husband'.[1071] Typically, all other causes are identified, but not the gendered power relations under patriarchy, a particular conception of masculinity, and the subordination of women:

> [V]iolence is often generated by something, it is not like the perpetrator was born a violent. It is often so that he becomes an alcoholic […] drug user, or it is because he cannot get employment for extended periods of time, he fails his social function and solves this in a way by discharging this situation on the members of his own family.[1072]

This refusal[1073] means that there has been virtually no engagement with gender or feminist analyses in Czech policy debates, and yet there are many reasons why both are useful. By taking the perspective of the (overwhelmingly female) victims, feminists[1074] have able to show that a range of harmful acts overwhelmingly

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[1069] The bill eventually entered into force as 135/2006.

[1070] Petra Buzková (ČSSD), House, 22/10/2003, 298 (2003).

[1071] Jan Kasal (KDU-ČSL), House, 16/6/2005, 828 (2004).

[1072] Josef Janeček (KDU-ČSL), House, 22/2003, 298 (2003).

[1073] Similarly, a recent NGO Shadow Report pointed out that '[domestic violence is] conceived as a gender neutral phenomenon, which means that the government policy adopts a criminological approach. As a consequence, gender-oriented NGOs are excluded from active participation in formulating policy'. Marie Lienau and Ivana Spoustová, 'Domácí násilí na ženách' in Petr Pavlík (ed), *Stínová zpráva* (Nadace Open Society Fund 2008).

[1074] For example MacKinnon, *Toward*.

perpetrated against women were being ignored, misrepresented and legitimized[1075] and how. They identified the gender biases, about women, sex, sexuality and intimate relationships, which underlie legal rules and their application and which have often worked to the detriment and disadvantage of victims. Radical feminists[1076] have observed the structural aspects of gender-based violence – that it is not accidental that predominantly the aggressors are male and the victims are female, that it is not 'anomalous but paradigmatic – that it enacts and reinforces, rather than contradicting, widely shared cultural views about gender and sexuality'.[1077] Among the dynamics of patriarchy are its assumptions about normal or desirable sexual or intimate behaviour of men, women and couples. There are assumptions about 'normal' women's behaviour. These allow the non-conforming woman to be the subject of scrutiny, repression and blame. This has been very much the case in the Czech Republic, as I show in the following.

3.3 Criminalizing and blaming the victim

Women have often been at the centre of scrutiny and blame in the area of gender-based violence. I believe that this is connected to a perception that women do not really mind certain types of 'attention', or that violence does not happen to 'normal' women and thus when it does, they must have been somehow at fault.

[1075] I borrow this formulation from Rebecca Whisnant, 'Feminist Perspectives on Rape' (*The Stanford Encyclopedia of Philosophy (http://plato.stanford.edu/archives/spr2011/entries/feminism-rape/)*, 2011) accessed 10 December 2012.

[1076] For example Susan Brownmiller, *Against our will: men, women, and rape* (Simon and Schuster 1975); Andrea Dworkin, *Our Blood: Prophecies and DIscourses on Sexual Politics* (Perigee Books 1976); MacKinnon, *Feminism unmodified*.

[1077] Whisnant, 'Feminist Perspectives'.

The first dynamic was apparent in parliamentary debates on the prohibition of sexual harassment. A view that 'normal' women do not need or want a provision on sexual harassment, that they enjoy the attention, and that those who do have a chip on their shoulder was apparent, among other, from the following statement:

> [the women] want to hear they have a beautiful haircut, beautiful skirt or pants – low cut, so they will destroy their kidneys, but they will sacrifice everything, just to appeal to us. This is why I cannot support our paternalistic protection or the desires of never gratified feminists, who are in no danger of harassment.[1078]

The second dynamic is more insidious. Since the feminist insight that gender-based violence might be both a product and an instrument of patriarchy is missing, gender-based violence is seen as exceptional and deviant. There is an assumption that it does not happen to 'normal' women and if it does, the woman must have chosen or contributed to it. This can be through an activity she chose, such as prostitution, or her behaviour, through which she invited sexual harassment or even rape.

With regards to prostitution, women in it have long been seen as a legitimate primary target of restriction and regulation.[1079] Prostitution, which was criminalized during State Socialism as an act of work-avoidance under the provision on 'parasitism', was decriminalized in 1990,[1080] but a repressive administrative framework has continued to target the persons in prostitution rather than the clients. This culminated in 2010 when the new Criminal Code introduced the offence of 'prostitution endangering the moral development of children'.[1081] It criminalizes

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[1078] Jaroslav Kubera (ODS), Senate, 10/12/2003, 119 (2003).

[1079] Havelková, 'MSt. thesis', 76-108.

[1080] 175/1990.

[1081] Sec. 190 40/2009. A definition of what constitutes prostitution is not given.

'practicing prostitution'[1082] and 'organizing, guarding or catering prostitution in the vicinity of a school or a similar establishment or a place assigned to stay or visit of children'.[1083] The provision thus criminalizes the prostitute and the pimp, while completely ignoring the client. Not all feminists conceptualize prostitution as gender-based violence, but they are generally in agreement that targeting and criminalizing only prostitutes violates gender equality.[1084]

The condemnation and targeting of the prostitutes' behaviour is, moreover, in stark contrast to the perspective and treatment of the client, whose 'need' for prostitution is recognized and thus normalized and legitimized by law. The law, indeed, defines prostitution as 'the offering or provision of services aiming directly at *satisfying sexual needs*'.[1085] That these 'sexual needs' are the needs of the male clients and not of the women in prostitution, is obvious. A (male) legal academic, wrote in support of legalization of prostitution:

> After the November revolution [1989], one of the first demands of our citizens was the reopening of brothels. The *Czech citizen was demanding that paid sex be accessible to him*, not just to foreigners providing strong currencies.[1086]

That the 'Czech citizen' is a male potential client of prostitution is clear; and yet the one-sidedness of such a perspective is ignored.

[1082] Sec.190(1) ibid.

[1083] Sec.190(2) ibid.

[1084] Barbara Havelková, 'Using Gender Equality Analysis to Improve the Well-being of Prostitutes' (2011) 18 Cardozo Journal of Law and Gender 53.

[1085] The law does not say what prostitution is, but the Act of Trades explicitly excludes it from being a trade in Sec.3(3)(p) 455/1990., as amended. Emphasis mine.

[1086] Roman Bláha, *Trestněprávní aspekty prostituce v České republice* (LexisNexis 2008), 22.

The fact that it is the victim's and not the perpetrator's behaviour that requires scrutiny, is also apparent from court decisions on harassment in the workplace. Among the discrimination cases which have reached ordinary courts, and which I discuss further in the following chapter,[1087] were two cases against workplace harassment, understood as

> 'unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment'.[1088]

One was brought by a female diplomat against the Czech Ministry of Foreign Affairs (the *A.B.* case[1089]), another by a service-woman against a local Fire Department (the *P.S.* case[1090]). The judgments too, illustrate a tendency to blame the victim. It has to be said that both cases are hard to assess, as the courts did not take care to fully establish what happened between the claimants and their superiors.[1091] However, even just based on the meagre established facts recited by the courts, female employees were being mistreated by superiors. In the *A.B.* case,[1092] the court considered as established fact that the superior made 'spiteful and ridiculing comments' about the

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[1087] Harassment is considered discrimination (eg Catharine A. MacKinnon, *Sexual harassment of working women: a case of sex discrimination* (Yale University Press 1979) or Art. 2(1)(c) Recast Directive), but it also constitutes gender-based violence. I therefore discuss it in both places.

[1088] Art. 2(1)(c) Recast Directive. This classification is mine, as the courts did not explicitly identify the behaviours as harassment. This is in part due to the fact that the definition of harassment changed several times between 2000 and 2012, and the behaviours fell under two different legal regimes.

[1089] Judgment of the District Court for Prague 1, *A.B. proti Ministerstvu zahraničních věcí* 27C 90/2004-123.

[1090] Judgment of the District Court in Pardubice, *P.S. proti Hasičskému záchrannému sboru* BC 373/2006-107.

[1091] In *A.B.* - District Court judgment, the court did not closer examine the claims that she has been called a 'whore' who has 'sexual relations with Libyans' and was 'going to the beach with browns'.

[1092] Ibid.

claimant, but dismissed these as mere 'personal antipathy'.[1093] Similarly, in the *P.S.* case, notwithstanding witness and expert evidence about unusual behaviour of the superior towards the claimant,[1094] the court merely concluded that they had 'problems of communication'.[1095]

In both cases, the court went out of its way to assess the personality of the claimant and show that she might have been 'arrogant'[1096] or had 'communication problems'.[1097] No such examination of the person of the harasser was undertaken. In establishing the facts in the *A.B.* case, credence was given to a male colleague as a witness who otherwise stated that 'staffing a diplomatic position in an Arab country with a female is not the ideal solution'.[1098] The court did not stop to ponder whether witnesses with such attitudes can be sensitive to notice and correctly assess harassing behaviour.

An unreflective blaming of the victims of gender-based violence has also been prevalent in the public discourse on rape.[1099] This includes statements made by law enforcement officers. The criminologist and policeman Luboš Valerián, in his recent contribution to a leading monograph on sexual violence, commented:

[1093] Ibid. The reason why the court did not investigate harassment more thoroughly was that it – erroneously – believed that harassment did not constitute discrimination and that therefore there was no remedy under labour law.

[1094] Best described as the creation of hostile environment.

[1095] *P.S.* - District Court judgment.

[1096] Ibid.

[1097] Ibid.

[1098] *A.B.* - District Court judgment.

[1099] I have documented this on media excerpts in Barbara Havelková, 'Znásilnění – několik úvah nad právní úpravou a její aplikací' (*http://jinepravo.blogspot.com/2009/06/barbara-havelkova-znasilneni-nekolik.html*, 2009) accessed 1 February 2013

> If the victim of vice crime is a woman, we often find *her contribution* to the causes of the commission of the crime; for example garish or provocative dress, flirting, teasing behaviour, etc.[1100]

These wide-spread cognitive stereotypes about sexual violence, or 'rape myths',[1101] that persists even among the expert community hardly contribute to the respect of dignity and protection of the victims and aid proper assessment in sexual violence cases. The statistics,[1102] indeed, show that the chances of punishment are minimal. Of the 500-600 annually notified rapes, only in about 150 cases is the perpetrator sentenced. In a full third of the cases, the perpetrators are sentenced to imprisonment on probation – i.e. they do not spend a day in prison.[1103]

To summarize, Czech law thus - at least - does not take account of women's experiences as victims of inter-personal gender-based violence; and - at worst - appears to take a 'male perspective'. This bias underlies the concept of 'sexual needs' of clients of prostitutes and the criminalization of prostitutes and not clients, the idea that women trigger harassment in the workplace, or 'contribute' to rapes. The insufficient recognition of the need to consider gender-based violence from women's perspective and the ignorance of or refusal to apply gender analysis is connected to anti-feminist attitudes prevalent in the Czech Republic. I return to the conceptual deficiencies connected to the lack of gender analysis and missing feminism in Transition in chapter 8 below.

[1100] Luboš Valerián, 'Mravnostní kriminalita z pohledu Policie ČR' in Petr Kovář (ed), *Sexuální agrese: znásilnění z pohledu medicíny a práva* (Maxdorf Jessenius 2008), 156.

[1101] For a list and analysis, see for example Morrison Torrey, 'When will we be believed? Rape myths and the idea of a fair trial in rape prosecutions' (1991) 24 UC Davis Law Review 1013.

[1102] Police Presidium, 'Statistický výkaz kriminality' (*http://www.policie.cz/statistiky-kriminalita.aspx*, 2006, 2007, 2008, 2009, 2010, 2011).

[1103] Havelková, 'Znásilnění 2009'.

4 Conclusions

This chapter has shown that in Transition, despite some gender-progressive developments in family, labour, social security and criminal law, there has been very little shift in understanding of gender inequality, in reality and in law. In the area of gender-based violence, in continuity with the previous period, the fact that it is both enabled by and contributes to a specific socio-cultural gender order, has yet to be acknowledged; and a shift to incorporating the 'victim's' perspective has yet to take place. In the area of work and family, there continues to be an emphasis on and support of (certain types of) family and motherhood, inherited from the State Socialist Normalization period. This protection of mothers and carers in labour and social security law can be seen as positive – materially, it means relative well-being; symbolically, it shows that care is valued. But women continue to be primary carers of homes and children, despite the fact men are no longer missing de jure from care.

Women's difference continues to be highlighted, decreasingly directly through law, but still strongly in public perception, as I demonstrated by examples from parliamentary debates. Due to this, women continue to be seen as different. Their difference is then used as an explanation for the inequality and discrimination they experience in the labour market and in politics. Have the new equality and antidiscrimination law provisions, introduced thanks to EU law membership, helped in this regard? It is this question to which I now turn.

CHAPTER 7

EQUALITY AND ANTIDISCRIMINATION IN TRANSITION: RESISTING THE IDEAS AND THE LEGAL CONCEPTS

In chapter 3, I argued that while the socialist state had a political project of equality which was socio-economically substantive and transformative, an individual antidiscrimination right did not exist. This was remedied in Transition with the adoption of constitutional and statutory guarantees. But the reality of the interpretation, application and enforcement of the equality and antidiscrimination rights has been problematic. Due to a strong resistance in Parliament, antidiscrimination guarantees were adopted as little and as late as possible, and a woman has yet to fully win a sex discrimination case before the courts. Equality and antidiscrimination rights continue to be a mirage.

Section 1 explores the constitutional guarantees of equality (1.1). It observes that the Czech Constitutional Court ('CCC') has difficulty discerning the aims of equality law, beyond the elimination of disparate treatment. In particular, there is little understanding of disadvantage. The CCC does not distinguish between suspect and non-suspect grounds and has no concept of indirect discrimination (1.2). An analysis of the three sex discrimination cases decided so far shows above all a lack of consistency and depth of reasoning (1.3).

Section 2 looks at statutory guarantees and litigation before ordinary courts. The Czech state was obliged to protect individuals in horizontal relations under EU law, but the transposition of the EU equality *acquis* happened as late and as little as possible (2.1). Full implementation, especially application and enforcement by courts, has been inadequate. Litigation has been scarce and claimants' chances of winning have been minuscule. Out of the nine antidiscrimination cases I examine in more detail, only one was partly successful. Sometimes this is due to badly drafted norms and the courts' unwillingness to correct them through teleological interpretation and indirect effect.[1104] In particular, the threshold for compensation of immaterial harm is too high and based on the wrong criteria – the diminution of standing in society. But even when the norms themselves are unproblematic, courts misapply basic concepts. With regards to direct discrimination, for example, the courts look for 'motivation' or 'motive' to establish that discrimination happened on the basis of sex, which - without fully shifting the burden of proof – makes cases extremely hard to win. Similarly to the CCC, the fact that the prohibition of indirect discrimination is targeting systemic prejudice and harms is not understood by the ordinary courts at all (2.2).

Finally, in section 3, I explore the underlying understandings of equality and discrimination which make the enacted rights a mere mirage. I argue that one aspect of the problem is formalism. The courts are formalistic in three ways: in interpretation, in the way they deal with cases, and in their understanding of equality - teleological interpretation and considerations of context are missing (3.1). The courts have also found ways to minimize the role of equality. The rhetorical devices of the 'relative' nature of equality and its conflict with freedom and liberty weaken equality

[1104] Cf. chapter 5(4.3).

and the legitimacy and impact of antidiscrimination rights (3.2). There is also a limited understanding of what discrimination might look like in reality – the courts, as well as the public in general expect to see evil intent. The fact that unconscious biases are often the cause is not realized which is connected to blindness to the cultural aspects of patriarchy (3.3). Finally, I argue that these obstacles to gender equality are path-dependent on State Socialism. Two mechanisms can be identified - a vocal reactive rejection of the previous period's perceived egalitarianism, and unrealized ideological and conceptual continuities. Although seemingly contradictory, they both harm gender equality (3.4).

1 Constitutional law and the right to equality and non-discrimination

The Velvet revolution in 1989 brought substantive, institutional and procedural changes to the constitutional guarantees of equality. The Charter of Fundamental Rights and Freedoms was adopted and the Constitutional Court[1105] established in 1993. Procedurally, the CCC was empowered to review alleged breaches of fundamental rights both on the basis of individual complaints (concrete control of constitutionality) as well as in challenges to statutory law (abstract control of constitutionality).[1106] The Charter contains new formulations of the equality guarantee.[1107] Art. 1 states:

[1105] The CCC was established in 1993; between 1991 and 1992, a federal Czechoslovak Constitutional Court existed.

[1106] Art. 87 Czech Charter.

[1107] Aside from these general guarantees of equality, the Art. 4(3) requires that 'Any statutory limitation upon the fundamental rights and freedoms must apply in the same way to all cases which meet the

> *All people* are free and *equal* in their dignity and rights. Their fundamental rights and freedoms are inherent, inalienable, non-prescriptible, and irrepealable.[1108]

Upon a first reading, it does not seem to express a right to equality or a prohibition of discrimination and the term 'equal' appears only to require a generality of application.[1109] Article 3(1) then elaborates:

> Article 3(1) Everyone is guaranteed the enjoyment of her fundamental rights and basic freedoms *without regard* to gender, race, colour of skin, language, faith and religion, political or other conviction, national or social origin, membership in a national or ethnic minority, property, birth, *or other status*.[1110]

Art. 3(1) guarantees equal enjoyment of fundamental rights. The wording would suggest that the right is not an independent right to equality, but is an accessory[1111] to other fundamental rights (similarly to the character of Art. 14 of the European Charter of Fundamental Rights[1112]). It is also conspicuous that 'discrimination' is not

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specified conditions'. There are also special guarantees: Art. 37(3) and 97 (equality of the parties under due process), Art. 11(1) (equality in property rights) and Art. 24 (a prohibition of discrimination on the basis of membership of national or ethnic minority). See also Adéla Ščotková, 'Rovnost a zákaz diskriminace v judikatuře Ústavního soudu ČR (The prohibition of discrimination in the case-law of the CCC)' in Michal Bobek, Pavla Boučková and Zdeněk Kühn (eds), *Rovnost a diskriminace* (C.H.Beck 2007), 177-178.

[1108] Official translation; available at www.concourt.cz.

[1109] Some authors consider formal promises of 'general application' not to be true egalitarian principles. Raz, *The Morality of Freedom*, 220-222.

[1110] See n.1108, emphasis mine. The pronoun 'her' is not a true translation of the Czech version which uses generic masculine. The word 'pohlaví' in the list of grounds would be more accurately translated as 'sex' rather than 'gender'.

[1111] I am using the direct translation from Czech, 'accessory' and 'accessority', to describe that the equality right could only be invoked in connection to other substantive rights guaranteed in the Charter, much as is the case with Art. 14 of the ECHR. The exact meaning that the CCC accords to the term – whether a breach is required or an ambit test applies (see n.1112) is, however, unclear. It is, moreover, immaterial, because the CCC has treated the right to equality as largely independent, as I explain below.

[1112] While earlier case-law of the ECtHR required an actual breach of another substantive Convention right (*Belgian linguistic case (No 2)* (Application No: 1474/62 and others) (1968) 1 EHRR 252), the Court currently only requires that the discrimination fall under 'the ambit' or 'general scope' of one of

mentioned, which raises questions as to whether both direct and indirect discrimination are covered.

1.1 An independent right to non-discrimination under the Charter

Before discussing the exact content and extent of the equality right, it bears pointing out that CCC has been quite inconsistent in its case law, thus making definite answers difficult. Michal Bobek, in a recent commentary on Art 3(1), states:

> To infer a uniform test for breaches of the prohibition of discrimination from the existing case-law of the Czech courts, especially the Constitutional Court, is difficult to impossible. The case-law repeats several formulae […but] instead of creating a clear test of review, [the decisions] accumulate these statements, without truly considering their actual usefulness. It is not [CCC's] custom to move beyond the framework of repeating prefabricated paragraphs, to recast the categories into an intelligible test, and to apply it [to the case].[1113]

Notwithstanding this critique, it can be induced from the case-law that the CCC treats Art. 1 and Art. 3(1)[1114] as a right to equality and non-discrimination (although originally as direct discrimination only, as I show below). And notwithstanding its wording, it also treats a right to equality as an independent right, i.e. the issue does not have to fall within the ambit of other substantive rights

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the substantive rights guaranteed by the Convention. See for example *E.B. v. France* (Application No 43546/02) (2008).

[1113] Eliška Wagnerová and others, *Listina základních práv a svobod. Komentář* (Wolters Kluwer 2012), 98. For a critique of the CCC's test, see also Jan Wintr, 'Jak zacházet s ústavním principem rovnosti?' [2007] Jurisprudence 44.

[1114] It sometimes applies Art. 1 as a guarantee of equality, but it mostly reads Art. 1 in conjunction with Art. 3(1) as an equality and antidiscrimination right. See also Wagnerová and others, *Listina*, 99.

guaranteed by the Charter.[1115] This might suggest a generous, substantive approach to equality, but a closer analysis of the cases tells a different story.

1.2 Not understanding disadvantage

There are important limits in the CCC's understanding of the rights to equality and non-discrimination, notably the lack of understanding of real-life disadvantage. This has been observable in particular in its treatment of 'special grounds' and of indirect discrimination. I discuss these in turn.

1.2.1 No greater suspicion for typically specially protected grounds

One tenet of substantive equality, which has been gaining ground in Western equality and antidiscrimination law, is an understanding that measures which target an already disadvantaged group are more invidious than others.[1116] Some groups – defined by race, ethnicity, sex, gender, disability, nationality, immigration status, etc. - have been traditionally disadvantaged and marginalized, by both law and society. From the perspective of constitutional law, it is the use of these characteristics in law which is of concern. Historically, the state used the membership in these groups to discriminate, for example by upholding racial segregation or denying property rights to women. When these 'suspect grounds'[1117] are used today, they continue to trigger suspicion. Many Western systems recognize this and award special protection to

[1115] It does not require a substantive right to be breached, or even for the situation to fall within an ambit of a guaranteed substantive right. Ibid, 100. See also Ščotková, 'Rovnost', 182-185.

[1116] See for example the ECtHR decision in *Kiyutin v. Russia* (Application no 2700/10) (2011); *Andrews v Law Society of British Columbia* [1989] 1 SCR143 Supreme Court of Canada.

[1117] This terminology is found in ECtHR case-law.

certain grounds, such as race or sex. This elevation sometimes happens through an enacted closed list of grounds,[1118] a non-exhaustive list of grounds,[1119] or is judge-made.[1120] And these distinctions are usually subjected to stricter judicial scrutiny.[1121]

The Czech Charter does not explicitly distinguish between suspect and other characteristics – all are protected together under Art. 3(1), which contains a non-exhaustive list of grounds. This is not uncommon in comparison with other legal system.[1122] The absolute majority of cases dealing with equality have come under the catch-all category of 'other status' - the Court has for example reviewed the difference between a cooperative or personal ownership of a flat for tax purposes[1123] or between small and larger municipalities for budget distribution purposes.[1124] The cases that have come under the listed protected grounds, such as age, race and sex, have been very few. This is itself not a problem. What is questionable, however, is the fact that

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[1118] A closed list is contained for example in Art. 21 of the EU Charter (Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1), in Art. 3(3) of the German Basic Law (Grundgesetz für die Bundesrepublik Deutschland Vom 23.05.1949 (BGBl. I S. 1)).

[1119] A non-exhaustive list can be found for example in Art. 15(1) of the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B of the Canada Act, 1982 (U.K.), 1982, c. 11.

[1120] This is the case for example in the US in interpreting the XIVth Amendment. The same distinction can be found in the case-law of the ECtHR (Wagnerová and others, *Listina*, 104-105). For a similar typology, see Fredman, *Discrimination law* and Sandra Fredman, *Comparative study of anti-discrimination and equality laws of the US, Canada, South Africa and India* (European Commission Report, 2012), 32.

[1121] For example in the US, the level of scrutiny varies from strict scrutiny for race (*Korematsu v United States* US Supreme Court 323 US 214 (1944)) to intermediate scrutiny for sex (*United States v. Virginia* US Supreme Court 518 US 616 (1996)) to rational scrutiny for other grounds.

[1122] Fredman, *Comparative study*, 32-35.

[1123] Pl ÚS 29/08.

[1124] Pl ÚS 50/06. For more examples and a similar conclusion, see Wagnerová and others, *Listina*, 105-106 and Ščotková, 'Rovnost', 194.

the CCC has not been recognizably differentiating[1125] between its judicial review of the suspect grounds and other legislative distinctions. I would argue that this is not accidental, but illustrative of a lack of any concept of disadvantage or vulnerability. The Court's interpretation and application of equality and antidiscrimination law does not come from a deeper understanding of what belonging to a particular group can mean for one's position in society – it is ignorant of existing hierarchies, disadvantages[1126] and the pervasiveness of stereotyping and prejudice.

1.2.2 Indirect discrimination

The wording of the Charter does not indicate whether indirect discrimination is covered. Claims of indirect discrimination have not really come before the CCC (and certainly not in the sex equality context). The one notable exception is the - now famous - case on the segregation of Roma children in 'special' schools, which became high-profile when it was brought to the ECtHR as *D.H. v. Czech Republic*.[1127] The case was dismissed by the CCC in 1999 as manifestly unfounded.[1128] It has to be pointed out that, at that stage, the Czech Republic was not a member of the EU,[1129]

[1125] Some cases seem to suggest that a weaker test – a mere prohibition of arbitrariness – should be applied to alleged breaches of Art. 1. See Ščotková, 'Rovnost', 184-185. But as breaches of Art. 1 and 3(1) are mostly alleged and discussed together, this ultimately plays a minimal role. The Court has also in the past applied a stricter proportionality test to breaches of civil and political rights than social and economic rights. Pl ÚS 83/06. Wagnerová and others, *Listina*, 109.

[11261126] Cf. n.568.

[1127] *D.H. and other v. Czech Republic* (Application no 57325/00) (2006) ECtHR Chamber; *D.H. and other v. Czech Republic* (Application no 57325/00) (2007) ECtHR Grand Chamber.

[1128] I ÚS 297/99. The application was dismissed in part and in part the CCC found a lack of competence to review.

[1129] The EU at that stage had a case-law based prohibition of indirect discrimination on the basis of sex (*Jenkins*). A new legislative definition was adopted in Art. 2(2) Council Directive 97/80/EC on the

and the ECtHR at the time did not have a well-developed concept of indirect discrimination.[1130] The CCC could have, however, used the CERD notion of 'discrimination in effect'[1131] to interpret the provision as prohibiting indirect discrimination.

When the case was brought before the ECtHR, at the Chamber level, no violation was found.[1132] The case then went on appeal to the Grand Chamber,[1133] which found that the systematic segregation of Roma children was indirectly discriminatory and therefore in breach of the ECHR. The puzzlement of post-communist judges at indirect discrimination made itself obvious in the proceedings – most of the judges behind the majority Chamber judgment which found no violation came from post-communist countries;[1134] and most of the dissenters from the Grand Chamber decision, who still insisted on no violation, came from post-communist countries as well.[1135] The CEE judges' position showed disbelief that structures (such as psychological tests) might not be 'objective' but could contain a bias, and a basic

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burden of proof in cases of discrimination based on sex, O.J. L 14, 20/1/98, p.6-8. Race only became covered with the entry into force of the Race Directive.

[1130] Christa Tobler points out that 'for a long time, the attitude of the ECtHR to indirect discrimination was rather hesitant even though the reference to an effect-based approach to discrimination could be found early on in its case law'. As a matter of fact, it was only in 2005 in *Hoogendijk v The Netherlands* (App no 58461/000 and in *D.H.* itself that the Court explicitly referred to it. Christa Tobler, *Limits and potential of the concept of indirect discrimination* (European Commission Report, 2008), 14.

[1131] Art. 1(1) CERD.

[1132] *D.H. Chamber*

[1133] *D.H. Grand Chamber*.

[1134] The Czech, Hungarian, Lithuanian and Ukrainian judge were joined in the majority by a San Marino judge. The French president of the Chamber concurred; the Portuguese judge dissented.

[1135] The authors of the dissent were Jungwiert (Czech), Župančič (Slovenia), Šikuta (Slovak), Borrego Borrega (Spain).

puzzlement that seemingly neutral practices can be deemed discriminatory if in effect they harm an already disadvantaged group.[1136]

Arguably, the logical continuation of the prohibition of indirect discrimination is positive action – the conscious effort to counter the bias by paying particular attention to underrepresented candidates. Here too, it is clear that the CCC does not understand the rationale behind positive action – it has made statements to the effect that it would not evaluate positive action towards a disadvantaged group differently than any other legislative distinction.[1137]

The CCC's treatment of specific grounds and indirect discrimination shows that there is a very limited understanding of the relationship between the individual discriminatory act and structural disadvantage on one hand, and socio-cultural bias on the other. What has this meant for gender equality?

1.3 The oscillating sex equality case law

Only three cases concerning discrimination on the basis of sex have been adjudicated by the CCC on their merit so far.[1138] The first case, decided in 1994,[1139] concerned night work by women. The challenged provision was an amendment to the Labour Code which eliminated the previously existing ban of all night work for women and only kept some (gender neutral) limits to night work. A group of

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[1136] See for example the dissenting opinion of the Slovak Judge Šikuta in *D.H. Grand Chamber*.

[1137] Pl ÚS 8/07, para. 83, obiter. For a similar, and more strongly expressed position, see the Decision of the Slovak Constitutional Court Pl ÚS 8/04-202; for commentary Havelková, 'Burden'.

[1138] Ie not dismissed as manifestly unfounded.

[1139] Pl. ÚS 13/94.

Deputies[1140] claimed its incompatibility with ILO Convention No. 89 (1948)[1141] and thus its unconstitutionality. The government defended the decision by pointing to EU law[1142] and a new ILO Convention[1143] (unratified by the Czech Republic). It stated that there had been a change of perception in both bodies about the need to prohibit night work for women; in the words of the CJEU: that 'the concern for protection which originally inspired [instruments banning night work] is no longer well founded'.[1144]

The Court recognized this shift in stating that 'the ban [on night work for women], although until now presented as a sign of care for women, was in practice felt as a discrimination of women.'[1145] The decision, however, actually turned on the technical question of whether ILO Conventions on night work were to be counted as 'international agreements about human rights'[1146] the breach of which would mean unconstitutionality (a breach of other agreements would not). The CCC did not consider the 1948 ILO Convention to be a 'human rights' agreement and upheld the gender neutralizing amendment. Thus, while the case can be considered a victory

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[1140] A group of Deputies is entitled to submit statutory provisions to abstract constitutional review. As a matter of fact, all three cases were brought by an institutional actor suggesting the unconstitutionality of a statutory provision, i.e. the cases were not claims by individual applicants. However, the two later cases had individual applicants in ordinary courts.

[1141] ILO 89/1948.

[1142] *Stoeckel*.

[1143] ILO Convention concerning Night Work No. 171 from 1990.

[1144] This passage was not cited in the CCC judgment. *Stoeckel*, para. 11.

[1145] Pl. ÚS 13/94, paragraphs unnumbered.

[1146] The CCC could review state action against the fundamental rights standard as contained in the Charter or 'international agreements on human rights' under Art. 10 of the Constitutional 1/1993., the Constitution of the Czech Republic. The current wording of Art. 10 covers all international agreements and the distinction between agreements on human rights and other agreement has arguably lost its importance.

under a concept of gender equality which emphasises women's choice,[1147] it was an overall loss for the protection of socio-economic rights in relegating them to a non-human rights status. Even on gender equality, however, the decision should not be regarded as too indicative nor momentous - the pivotal issue was not substantive and the Court did little by way of a gender equality analysis - it relied entirely on an external assessment of what gender equality meant, provided by the EU and ILO.

The second ruling on sex equality came in 2006.[1148] Provisions governing pension insurance were under review.[1149] They stipulated that fathers, in order to receive pension benefits for the period of child-care, had to register the time they spent caring for a child within a period of two years after they ceased to be the main carer. Mothers, on the other hand, were not restricted by any deadline and could inform the authorities years later when actually claiming their pension benefit. The CCC declared this provision unconstitutional. It was not persuaded by the government's argument of administrative and fiscal effectiveness and 'procedure by presumption' based on the overwhelming reality of carers being mothers. Materially, this outcome might be welcome[1150] - some feminists[1151] would approve a decision to gender-neutralize and to include fathers in the legal regulation as full parents with

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[1147] This is the current interpretation of equal treatment of women in the EU, expressed in *Stoeckel* as regards night work, and in C-203/03, para. 45, as regards underground work.

[1148] Pl ÚS 42/04. The following description and an earlier version of the analysis has been previously in Havelková, 'Legal notion'.

[1149] ibid. Relevant provision: Sec. 5 (3) 2nd and 3rd sentence of 155/1995; and Sec. 6(4)(a)(point 11) of 582/1991

[1150] The government, in reaction to the judgment, eliminated the time-limited administrative obligation for men – in the future, both women and men would have to prove child-care when claiming the pension benefit. Sec. 6(4)(a) (11) 582/1991.

[1151] This is often a liberal feminist position. For a summary see Tong, *Feminist Thought*, 32. But see also a general argument for the 'primary nurturer' criterion in child custody in Smart, *Feminism*, 158.

equal rights.[1152] Disappointingly, the CCC did not address the question of how should the law respond to the disparate realities of men's and women's lives with regard to caring. The CCC saw two groups treated differently and without any gender conscious-argumentation or a consideration that equality might in some cases require different treatment, came to its conclusion.[1153] The language of the decision was overwhelmingly that of formal equality and mirrored a belief that gender-neutral legislation is what gender equality means.

The third case,[1154] decided in 2007, also dealt with pensions. It was a challenge to a rule which set pension ages immovably for men, but flexibly and lower for women, depending on the number of children. The CCC in this case came to the opposite conclusion to that in the previous case. It upheld the law, notwithstanding the fact that the ingression into child-caring men's lives was greater here (the existence of a right was at stake and the presumption of a female carer was irrefutable) than in the previous case (the presumption was refutable by the act of informing the social security administration). The extremely brief reasoning left many questions open but the deference to the executive and the legislature in the area of setting pension ages and pension systems can be identified as the main reason for upholding the rule.

[1152] For a discussion and a critique of the equality-difference dichotomy, see Sandra Fredman, 'A Difference with Distinction: Pregnancy and Parenting Rights reassessed' (1994) 110 Law Quarterly Review 106.

[1153] The task of drawing a line between special treatment of motherhood and general treatment of parenting is a difficult one and requires a thorough assessment of factual circumstances and purpose of the rules. For a well-reasoned and conscientious judgment, see C-476/99 *Lommers*, 19 March 2002, ECR [2002] I-02891, in which the CJEU reviewed a scheme set up by a Minister giving subsidised nursery places only to female officials and male officials only in cases of emergency. The CJEU considered this, partly for the 'safety valve' provision for emergencies, as compatible with the principle of equal treatment.

[1154] Pl ÚS 53/04. The relevant provision was Sec. 32 of 155/1995.

It has to be said that none of these cases were 'easy'.[1155] They concerned questions which have caused difficulty for many courts and feminists in the West, as I explored in chapters 2 and 6. Is protective legislation, which bans women from certain types of work, necessary to prevent their exploitation or is it a patronising limitation, based on stereotypical ideas about women's physiological weaknesses and their role as mothers? Should women be specifically protected as mothers, or should law recognize parenthood only?

One of the great challenges for equality law, to my mind, is that its aim – the elimination of inequality, understood as hierarchy and disadvantage[1156] – requires sometimes the same and sometimes different treatment. To facilitate women's equal access and rights in the labour market and men's access and rights with regards to childcare, one needs antidiscrimination provisions and gender-neutralization. But women's particular vulnerability during pregnancy and early motherhood might need special protection in labour relations and support through social security, and the systemic bias that women face sometimes needs to be overcome with preferential treatment in the form of temporary positive measures. One challenge is thus to choose 'correctly' where to treat situations the same and where to differentiate.

Another is to do so for the right reasons – ones which do not unreflectively draw on and reproduce existing gender hierarchies and disadvantages. In finding disparate treatment unconstitutional, a court might be aiming to overcome stereotypical ideas about women's abilities and roles, in full realization that protective legislation might lead to a limitation of women's choices, and that what appears to be

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[1155] In the Dworkinian sense that these were cases in which the rules could not be mechanically applied. Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977), 81 ff.

[1156] Cf. n.567.

'special' treatment can in reality be gender-cementing and materially and symbolically oppressing and disadvantaging. Or the court might be merely expressing a very formal and limited idea of what the equality law is – the elimination of difference. Similarly, in finding disparate treatment constitutional, a court might be recognizing vulnerabilities caused by biological differences or social disadvantage.[1157] Or it could be merely basing itself on essentialist assumptions about roles or characteristics of men and women.[1158]

The critique I raise against the three CCC decisions it not so much about the results of the cases, but its reasoning. There are three approaches to equality present in the cases: a) a residual protective pro-maternity understanding of women's rights, inherited from State Socialism;[1159] b) a formal understanding of what equality and antidiscrimination provisions mean;[1160] c) and a more sophisticated understanding of gender equality which is gaining ground in much academic writing in the West now[1161] and enters the Czech legal system via EU or international law. The CCC is truly committed to neither, although I would argue that the court tends toward the second, formal, understanding.

First, the cases all address carry-overs of State Socialist women-oriented protectionism, whether in terms of black-letter provisions originating in the State Socialist era (ban on night work) or ideology (the pension provisions – while having

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[1157] The EU limits the biology-based protection to vulnerability during pregnancy and early motherhood - see Art. 28 Recast Directive; the social role of parenting is treated gender-neutrally. The social disadvantage women face is addressed, among other, through positive action Art. 3 ibid.

[1158] On essentialism, see Tong, *Feminist Thought*, 90-91.

[1159] See chapters 2 and 3 for detail.

[1160] Cf. chapter 3(4).

[1161] Cf. chapter 3(1).

State Socialist antecedents - were actually both adopted in the 1990s). The CCC accepted this type of provision in the third case, not because of a substantive reason, but because it felt the need to exercise extremely light judicial review in the face of the possibility of upsetting the pension system. In my analysis of the State Socialist period in chapter 3, I noted that the special provisions were often expressions of essentialist ideas about the sexes. There are hints of biological determinism in a dissenting opinion to the second case,[1162] but the Court has been overall careful to speak about the realities of lives rather than 'roles' of the sexes,[1163] and has in that sense broken with the State Socialist essentialism. In its reasoning, however, the Court does seem quite sympathetic to different treatment in connection to motherhood.

Second, a formal assessment of equality was the basis of the second decision. This decision is longest and the reasoning most thorough; I would argue that this formal understanding of equality is where the Court feels most comfortable. The second case, as well as third, were both brought by men[1164] challenging provisions privileging or specifically protecting women.[1165] Such challenges were common for example in US in the early days after adoptions of antidiscrimination guarantees and the courts often responded by abolishing the difference of treatment, often 'levelled

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[1162] Prominently in a dissent by Stanislav Balík to the second decision.

[1163] Pl. ÚS 53/04.

[1164] Cf. n.1140.

[1165] Carol Smart describes this as a 'counter-use of law'. She points out that the recourse to law by women can create a backlash effect for the groups which it is meant to protect, and consequently warns of unbounded optimism with regards to what the law can do for women's rights. Smart, *Feminism*, 138.

down' for women.[1166] It might be that the CCC is finding its feet with the concept of equal treatment, much as some Western courts were in 'early days' of antidiscrimination law.

Finally, the CCC has also been exposed to a more current substantive understanding of equality, coming from EU and international law – this is what guided the decision in the first case. There are two problems with using an external standard and analysis, however. First, the Court is not learning to exercise and refine its own reasoning and is not internalizing the insights of the external standard. Second, the outcome very much depends on the court's willingness to give effect to the external understanding. The CCC has so far been relatively good in giving effect to EU equality law,[1167] unlike other CEE courts.[1168] It has, however, also been recalcitrant on occasion, most notably in a recent decision concerning Slovak pensions,[1169] in which it disobeyed a previous CJEU decision and thus the EU doctrine of supremacy.[1170] This makes outcomes in sex equality somewhat unpredictable.

[1166] For example the US Supreme Court decisions *Califano v Goldfarb* 430 US 199 (1977) struck down means-testing for widower-pensions, because women's widow pension were awarded automatically. The Supreme Court *Califano v. Webster* 430 US 313 (1977) struck down a provision allowing women to discount their three lowest earning years for the purposes of pension calculations.

[1167] The CCC for example upheld as constitutional the EU law mandated shift of burden of proof provision of the Code of Civil Procedure in a case which concerned race discrimination. Pl ÚS 37/04.

[1168] When the EU obligation is weaker, CEE judges have resorted to a completely formal assessment of equality. The Slovak Constitution Court for example struck down a provision enabling affirmative action as violating the Slovak constitutional equality guarantee (EU law in this case allowed for positive action but did not require it). SCC Pl. ÚS 8/04-202. For a discussion see Havelková, 'Burden'.

[1169] Pl ÚS 5/12.

[1170] For a discussion, see Jan Komárek, 'Playing With Matches: The Czech Constitutional Court's Ultra Vires Revolution' (*http://ukconstitutionallaw.org/2012/02/22/jan-komarek-playing-with-matches-the-czech-constitutional-courts-ultra-vires-revolution/*, 22 February 2012) accessed 5 July 2012.

2 Antidiscrimination guarantees in private relations

2.1 The reluctant transposition into statutory law

As the Charter only guarantees equality in vertical relations (against the state), in order to protect individuals from discrimination in horizontal relations (between individuals), it was necessary to enact statutory provisions. Incorporating equality and antidiscrimination provisions into Czech law – a condition of and an obligation under EU membership - has been a difficult process.[1171] I first look at the development before the enactment of the ADA and then at the ADA itself.

2.1.1 Before the ADA

Beginning in 1999, antidiscrimination provisions were introduced into much legislation governing labour relations[1172] and the shift of burden of proof was inserted into the Code of Civil Procedure.[1173] Until the Antidiscrimination Act (ADA) came into effect in 2009, the protection was unsatisfactory, however. Many provisions took years to become effective; the coverage has been patchy; and the level of guarantees occasionally dropped when new legislation was enacted.

[1171] For detail, see Havelková, 'Challenges' and Havelková, 'Effectiveness'.

[1172] 167/1999., amending the Act on Employment; 155/2000., amending the Labour Code; laws on wages in both the private and the public sector were amended by 217/2000.; antidiscrimination provisions were added to the State Service Act - 218/2002. and to the Act on Service in the Armed Forces - 361/2003.; a new Euro-compliant Act on Employment was adopted - 435/2004; and a new amendment to the Labour Code - 46/2004. - harmonized it with Amending Directive.

[1173] 30/2000.

First, some transpositions, while enacted, took years to become effective – for example the new Act on Service in the Armed Forces[1174] and the State Service Act[1175] were to enter into force in 2005, but their effectiveness had been postponed several times due to financial problems, and they only became effective in 2007 and 2012 respectively.

Second, the protection had been fragmented and heterogeneous – the definitions varied across different acts, some areas (such as self-employment) were not covered at all, and definitions were not always normatively connected to prohibitions and remedies. For example while the definition of sexual harassment was inserted into the Labour Code in 2000, it was not explicitly deemed to constitute discrimination and it was thus unclear whether any remedy was available. In a case brought by a female diplomat against the Czech Ministry of Foreign Affairs – for harassing behaviour by a superior at the Czech Embassy in Tripoli – the court did not examine the claim closely, merely stating that the 'spiteful and ridiculing comments' made about the claimant 'did not constitute unequal treatment of men and women'.[1176]

Third, the delayed adoption of the ADA led to an actual reduction in the existing level of protection when the new Labour Code entered into force in 2007.[1177] It was drafted on the assumption that the Antidiscrimination Act would become law and accordingly contained only a very general obligation of equal treatment and

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[1174] 361/2003., the act regulates employment relationships for police officers, firefighters, customs officers, prison guards, and members of the intelligence services.

[1175] 218/2002 Coll.

[1176] *A.B.* - District Court judgment.

[1177] 262/2006.

prohibition on discrimination.[1178] It neither defined the basic terms nor listed available remedies. Instead, it cross-referred to the (non-existent) Antidiscrimination Act.[1179] As a result, the level of protection in labour relations was actually reduced and already guaranteed rights abrogated between 2007 and 2009.

2.1.2 The ADA – as little and as late as possible

During most of the 2000s, the adoption of the Antidiscrimination Act was meeting with fierce resistance. Work on the bill started in the fall of 2001,[1180] with the first proposal presented to Parliament in January 2005. The bill was passed in the House of Deputies but was rejected by the Senate. Upon return to the House of Deputies, it failed to secure the absolute majority needed to override the Senate. A second proposal was presented to Parliament in July 2007. Both chambers passed the bill, but it was then vetoed by the President Václav Klaus. The House of Deputies overrode the presidential veto in June 2009, and the Antidiscrimination Act[1181] entered into force on 1 September 2009.[1182]

Not only was the ADA adopted as late as possible, subsequent drafts of the law also decreased in generosity of protection. For example while the original draft, prepared by the Government Council of Human Rights in 2004, contained a

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[1178] Sec.13(2)(b) and (c) ibid.

[1179] Sec. 16 (2) and Sec. 17 ibid.

[1180] Czech Government, *Resolution No. 170 of 20 February 2002 approving „Zpráva o možnostech opatření k odstranění diskriminace"* (2002).

[1181] 198/2009.

[1182] The act implements the new millennium EU directives and covers employment and social areas, and guarantees equality in access to goods and services on the following grounds: race or ethnic origin, nationality, sex, sexual orientation, age, disability, religious belief, religion and world view.

mediation competence for the equality body and an independent right for NGOs to bring cases where an indeterminate number of individuals were victims of an act of discrimination, the final ADA contained no such provisions. Institutionally, while the original proposal contained an option to create a truly independent equality body, the agenda went to the Ombudsperson in the end. This alternative was cheaper and also unfortunately far less appropriate in terms of the overall coherence of the system, as the Ombudsperson is charged with investigation of complaints of maladministration concerning public authorities but has no expertise in handling private disputes. As the directives are relatively open-ended as to the characteristics of the body and are minimalist as to the powers it should have, these regresses were not strictly speaking in breach of the directives.

But there are other aspects of the law which can be said to constitute insufficient transposition. The most problematic is the provision on remedies. The EU Recast Directive[1183] requires that 'real and effective compensation or reparation' be available, which is 'dissuasive and proportionate to the damage suffered'.[1184] I do not believe the Czech provisions fulfil these requirements. The ADA does not explicitly provide for compensation of material harm – that would have to be claimed under other statutes, such as the Labour Code or the Civil Code, which might not, however, offer the full protection in areas covered by the ADA. Even more problematic is the provision on immaterial harm. According to the Czech ADA,[1185] a victim of

[1183] The Recast Directive incorporated previous directives implementing the principle of equal treatment between men and women, their amendments and their interpretation by the CJEU. Its implementation period expired on 15 August 2008.

[1184] Art. 18 Recast Directive; see also *Von Colson*.

[1185] Sec. 10(1) and (2) 198/2009.

discrimination can claim cessation of discriminatory behaviour, elimination of consequences[1186] and satisfaction in the form of an apology. Only if these should prove insufficient, especially because of a diminution of 'the reputation or dignity of the person or her standing in society', can a financial compensation of immaterial harm be claimed.[1187] The provision for a remedy of immaterial harm is thus only subsidiary and available in exceptional circumstances. Furthermore, the criteria for the award are the external effects of the discrimination on a person's reputation and standing and not the full satisfaction, sanction and prevention, as EU law requires. Although the wording of the provision could be overcome by 'indirect effect' under EU law, the Czech courts have so far never interpreted the provisions harmoniously with the directives.

The formulation of the Czech ADA provision was copied from the 'personality protection' clauses of the Civil Code.[1188] The aims of 'personality protection' and discrimination law are different, however – the former is concerned with reputation and privacy, the latter with equality. Especially the role of dignity in both is different – in the former, dignity is an external quality of a person's reputation and standing, in the latter, arguably, it is virtually always harmed when one is discriminated against on the basis of characteristic such as race or sex. Among the nine cases on sex discrimination I have available,[1189] not a single one was successful

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[1186] The 'elimination of consequences' is not an equivalent of either 'restitution' or 'compensation' under common law. It is doubtful that the courts would be willing to, for example, order an employer to employ an applicant who was not hired due to a discriminatory practice.

[1187] Sec. 10(2) 198/2009.

[1188] Sec. 13 40/1964.

[1189] Cf. section 2.2.1.

with regard to compensation of immaterial harm.[1190] Very often, the reason for the denial is quite explicitly the lack of damage to reputation in the workplace. For example in a case brought by a flight attendant against the Czech Airlines[1191] for wage and promotion discrimination, the court said that an apology was sufficient, as some witnesses stated that they respected the claimant very much. This presents an insurmountable obstacle to the claimants - in order to prove that the claimant was good enough (i.e. deserving appointment, promotion, pay, etc.), she has to have the support of her colleagues as witnesses. But if she does have support of colleagues who attest to her qualities, the courts take this as a sign of a lack of reputation damage and deny pecuniary compensation.

But even where the legal provisions themselves are unproblematic, the courts have been extremely reluctant to rule for the claimants. I discuss this in the following.

2.2 Discrimination before ordinary courts

I have noted that the CCC has often struggled with constructing thorough arguments, being explicit about its reasoning with regards to purposes of legal norms and applying law to facts; the situation in ordinary courts is considerably worse than that at the Constitutional Court.[1192] The CCC has not shown an understanding of indirect discrimination, but has at least largely grasped the concept of direct

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[1190] In a set of 'test cases' of discrimination of Roma, the awards for immaterial harm were very low. In two cases in which restaurateurs denied access and refused to serve, the awards were 20.000 CZK (600 GBP) and 50.000 CZK (1.500 GBP). Judgment of a Regional Court in Hradec Králové, 16C 79/2002-109 and Judgment of a Regional Court in Ostrava 23C 96/2001-188, respectively.

[1191] Judgment of the Regional court in Prague, *A.L. proti ČSA* 21 Co 190/2008-199. From the summary available in Judgment of the Supreme Court, *A.L. proti ČSA* 21 Cdo 1743/2009.

[1192] Kühn, *Aplikace*, chapter 5, passim.

discrimination. This has not been the case with ordinary courts, who have demonstrated little understanding of the most basic tenets of direct discrimination.

In the following, I first present the sample of analysed cases (2.2.1). I then show that ordinary court have refused substantive review (2.2.2.) and looked for fault in antidiscrimination cases (2.2.3), thus making success for claimants virtually impossible. Similarly to the CCC, moreover, they have not shown any comprehension of the social mechanisms the prohibition of indirect discrimination is aiming to capture (2.2.4).

2.2.1 Antidiscrimination litigation and the sample cases

Litigation rates in antidiscrimination cases have been very low. A recent survey[1193] of discrimination litigation, looking at cases since the effectiveness of the ADA in 2009,[1194] found that out of the 86 first instance District courts, only 16 have encountered antidiscrimination claims (a total of 28 cases).[1195] Most of these cases were pending (15); and none has been won by the claimant.[1196] Similarly, a search in the online database of judicial decisions,[1197] recently launched by the Ministry of Justice, shows no result under the category 'discrimination'.

[1193] Czech Helsinki Committee, *Antidiskriminační zákon po dvou a půl letech jeho účinnosti – je v praxi opravdu účinný?* (http://diskriminacehelcomcz/2012/03/antidiskriminacni-zakon-po-dvou-a-pul-letech-jeho-ucinnosti-%E2%80%93-je-v-praxi-opravdu-ucinny/, 2012).

[1194] September 2009 – January 2012.

[1195] The question posed was whether there were claim based on the ADA. The data has to be considered proximate only – the courts do not keep records of the cases based on the statute breached, so their answers were based on different methods of finding out, including 'asking judges'.

[1196] A settlement was reached in one case.

[1197] The database only contains regional and superior courts' decisions; district court, where many discrimination claims would be heard in first instance, are not included; http://www.nsoud.cz/Judikaturans_new/judikatura_vks.nsf/uvod.

Any researcher who wants to substantively analyse the Czech antidiscrimination case-law is faced with the problem that decisions of district courts are not publicly available, and the decisions of regional and superior courts have only been available since the launch of the database[1198] in 2011. I have at my disposal nine cases, acquired through contacts with NGOs who aid victims of discrimination, and through research of the Supreme Court ('SC') database.[1199] These nine cases range from wage[1200] or promotion discrimination, to harassment[1201] claims, to a challenge to indirectly discriminatory rules of the tax code.[1202] Interestingly, most have been brought against public employers or institutions: the Police, the Fire department, the Ministry of Culture, the Ministry of Foreign Affairs, the Ministry of Justice and the Tax Authorities. In the remaining three cases, big corporations were sued: the Czech Airlines (where the Czech state is majority shareholder), SPGroup (an investment company) and Pražská Teplárenská (a heat utility giant). Within all these employers, one might have expected and hoped for a greater awareness of antidiscrimination obligations, due to their size and overwhelmingly public character. But this has not been the case.

Most of the nine cases have gone through three judicial instances[1203] - seven have reached the SC,[1204] one has reached the Supreme Administrative Court ('SAC').

[1198] ibid.

[1199] This has existed for over a decade.

[1200] *V.S.* - District Court judgment.

[1201] The behaviours described would fulfil the definition; the claimants however do not use the term 'harassment'. *P.S.* - District Court judgment; and *A.B.* - District Court judgment.

[1202] *Whelan and Whelanová* - Regional Court judgment.

[1203] The facts of most predate the entry into force of the ADA.

Unfortunately, there does not seem to be any more sympathy for antidiscrimination claims at any particular level of the judicial hierarchy. While most cases were unsuccessful at first instance, where the claimant exceptionally won,[1205] the case was then lost on appeal (*odvolání*)[1206] or extraordinary appeal (*dovolání*).[1207] And, even more disturbingly, when the Supreme Court quashed and returned a lower court decision,[1208] the lower courts still refused to find discrimination.[1209] Only one case out of nine, *A.L. against the Czech Airlines*, was successful, and only partially[1210] – the SC quashed lower instance decisions which found wage discrimination but did not award monetary compensation; the SC argued that when a court establishes that a discriminatory act has taken place and caused damage, there is an obligation to compensate.[1211] Although the nine cases are not representative of all of Czech Republic at the trial level (due to unavailability of the decision of first instance courts), it is representative of cases which reached the Supreme Court, as I analyse

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[1204] The cases reach the SC exceptionally - an extraordinary appeal can be brought on important questions of law. The cases have mostly been dismissed for not being of sufficient legal import.

[1205] *A.B.* - District Court judgment; and Judgment of District Court Prague-West, *B.V. proti Ministerstvu spravedlnosti* 10 C 5088/2004-96 confirmed on appeal Judgment of Regional Court in Prague, *B.V. proti Ministerstvu spravedlnosti* 23 Co 331, 332/2005-142.

[1206] Judgment of the Regional Court for Prague, *A.B. proti Ministerstvu zahraničních věcí* 14 Co 90/2008-148. The decision was confirmed by the Supreme Court.

[1207] Judgment of the Supreme Court, *B.V. proti Ministerstvu spravedlnosti* 21 Cdo 3819/2008.

[1208] Judgment of the Supreme Court, *Čaušević proti Pražské teplárenské* 21 Cdo 246/2008.

[1209] Judgment of the District Court for Prague 7, *Čaušević proti Pražské teplárenské* 26 C 25/2006-372.

[1210] It might be worth noting that the European Commission's systematic monitoring of implementation does not extend to judicial application.

[1211] *A.L.* - SC Judgment. In *Whelan and Whelanová*, a case which concerned taxation rules for spouses, the SAC quashed previous unfavourable decisions, but it did not do it expressly on the basis of their indirect discrimination claim (Judgment of Supreme Administrative Court, *Whelan and Whelanová* 7 Afs 103/2008-71). As a result, in a subsequent decision concerning another tax year, the court of first instance decided again against the claimants (Judgment of the Regional court in Prague, *Whelan and Whelanová II*, 5Ca 336/2008-29).

them all. The low rate of success of these cases thus gives an accurate image of the situation of antidiscrimination litigation in the Czech Republic. It is hard not to get the impression that courts go out of their way to avoid finding for the claimants. It might be worth noting that this cannot be attributed to the gender composition of the courts, as two thirds of judges in the Czech Republic are women,[1212] but rather to a lack of awareness of gender equality issues among all judges.

In the following, for reasons of space, I do not discuss all the individual cases separately,[1213] but concentrate on the reasons why these antidiscrimination cases fail. I believe that this is due to the incorrect interpretation of the legal concepts, substantive and procedural: direct and indirect discrimination and a shift in the burden of proof. These lead to inadequacies in assessment of the facts of the cases, as well as legal qualification of the facts. They are ultimately rooted in a lack of understanding of the aims of equality law and the reality of discrimination.

2.2.2 Direct discrimination – refusing substantive review

Most of the cases analysed concerned direct discrimination, although the courts themselves do not always identify what type of discrimination they are assessing. The classification is thus mine, based on the following definition of direct discrimination as where 'one person is treated less favourably on grounds of sex than

[1212] In 2012, women constitute 64 % of judges at district courts, 58 % at regional courts, 46 % at high courts, 30 % at the SC and SAC and 31 % at the Constitutional Court. E-mail communication with Libor Fůs; Press Department of the Ministry of Justice on 2 August 2012; the CCC percentage was counted based on the list of judges available at www.concourt.cz.

[1213] For more detail see Havelková, 'Legal notion'.

another is, has been or would be treated in a comparable situation.'[1214] The courts have had a problem with the most basic tenets of the concept. In the following, I first discuss the perfunctory interpretation of 'different treatment' which shows how inadequately the courts understand what behaviour antidiscrimination law is trying to eradicate. Second, I analyse the obvious difficulty courts have in finding that discrimination happened 'on the ground of sex' – I look at the substantive question of 'ground' as well as the closely connected procedural question of 'proof'.

A good example of the limited interpretation of 'different treatment' is a recent case of hiring discrimination. The claimant, Ms. Čaušević,[1215] argued that the selection process for a management position was tainted by sex discrimination, arguing that although she was the best qualified candidate, she had not been promoted to that position. The company ran two rounds of selection – in the first, Ms. Čaušević was evaluated as the best candidate but was not offered the job. In the second round – to which she was not invited - a younger male candidate was evaluated as the best candidate and hired. The court of first instance formalistically separated the two rounds, considering them incomparable, and therefore found no discrimination. *Obiter dictum*, the court made some worrying statements about its understanding of antidiscrimination law:

> […] the court found substantial differences in the appraisal of the candidates by the members of the board, however, since this evaluation was not based on objective measurement of knowledge but on subjective perception of the personalities of the candidates, these differences are natural. Moreover, […] the court did not consider the 'quality' of the candidates, i.e. their expertise, experience, etc., as a decisive element in

[1214] As defined today in Art. 2(1)(a) Recast Directive.

[1215] Judgment of the District Court for Prague 7, *Čaušević proti Pražské teplárenské*, 26 C 25/2006; Judgment of the Regional Court Prague, *Čaušević proti Pražské teplárenské* 54 Co 127/2007; *Čaušević* - SC judgment; *Čaušević* - District court judgment II.

> the legal evaluation, as the law addresses only the *difference in treatment* of candidates and distinctions made on the basis of sex, as regards *the opportunity to obtain the position* to be filled.[1216]

The court interpreted the right to equal treatment as applying only in respect of the *conditions* during the examination part of the selection process and not in respect of the evaluation and the ultimate selection of candidates. The court examined whether the set of questions was the same for all candidates and whether Ms. Čaušević possibly had less time to answer them. The court clearly did not understand that the 'different treatment' here was the fact that a man was hired and woman was not. As a consequence, the court did not consider it necessary to engage in any substantive review of the decision, stating that 'every person is an unrepeatable individual […] and it is therefore impossible to find that someone is better for a position than the other.'[1217] One can sympathize that the court finds it hard to re-assess who the best candidate was. But that is what, had the burden of proof been applied correctly, should have been for the employer to prove – that there were objective reasons for the selection of the man over the woman.

The appellate court confirmed this decision,[1218] but the Supreme Court overturned it and returned[1219] the case to the lower courts. The SC, however, only overturned the formal separation of the assessment of the two rounds of selection and while pointing out the need to apply the burden of proof correctly, it did not comment on the limited understanding of what 'different treatment' means. As a result, the

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[1216] *Čaušević* - District court judgment, 17.

[1217] Ibid.

[1218] *Čaušević* - Regional Court judgment.

[1219] *Čaušević* - SC judgment.

District court re-deciding the case insisted again that no discrimination had taken place.[1220] This understanding of what constitutes discriminatory behaviour, namely looking only for obviously different conditions of selection, makes success in discrimination cases all but impossible. It also shows considerable deference to managerial prerogative – employer's freedom to decide is valued over the applicant's freedom from discrimination. I return to the selective use of freedom below in section 3.2.2 and again in chapter 8.

2.2.3 Looking for 'fault'

Another problem highlighted by this case, but apparent in many others, was that the courts look for motive (*pohnutka*)[1221] or motivation (*motivace*)[1222] of discriminatory behaviour. The Czech courts do not seem to have an understanding that discrimination is often neither evil nor intentional, but that it is habitually just a result of unmindful processes and decisions which replicate existing societal biases. The courts do not realize that they should not be expecting to find proof of a conscious effort to discriminate but rather they need to assess whether the decision in question was made for objective reasons other than sex.[1223] This is expressed in the procedural requirement on the shift of the burden of proof,[1224] which instructs the court not to ask the claimant to prove discrimination on the basis of sex, but rather to

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[1220] *Čaušević* - District court judgment II.

[1221] Judgment of the Supreme Court, *H.P. proti Ministerstvu kultury* 21 Cdo 4586/2010.

[1222] *Čaušević* - District court judgment.

[1223] Ultimately, in my understanding, antidiscrimination law wants to affect a structural change – motivate employers to make a conscious effort *not* to discriminate.

[1224] Art. 19 Recast Directive.

look to the defendant to prove that a decision was made on another – objective – basis.[1225] The shift of the burden of proof doctrine is mentioned often in the case law, but it amounts to a mere mechanistic repetition of a formula. The courts do not really apply it to the cases before them and do not actually require the defendants to explain themselves.

Four particular problems can be identified with regards to finding *proof* of discrimination on the *grounds* of sex: 1) The understanding of motive is akin to fault; 2) The courts uncritically adopt gender stereotypical representations submitted by the employer, thus obscuring sex as a ground; 3) The courts basically look for an expression of the grounds for discrimination, and if an admission is not forthcoming, they have difficulty assessing it themselves; 4) They are insufficiently suspicious of irregularities in the employers' behaviour.

First, the liability under both in EU and Czech antidiscrimination law is objective, i.e. it does not require the subjective element of fault. Nonetheless, the Czech courts look for intent. For example in the *Čaušević* case, the District Court stated that 'it cannot be concluded from the established facts that the difference in time available for solving the case-study was *intentional, let alone* that it was *led by the motivation* to disadvantage one group, on the ground that there were women in it'.[1226] Here, the 'motivation' seems to be given an even higher threshold than intent.[1227]

[1225] Obviously the defendant can also claim that there was no 'different treatment' or detriment. In direct discrimination cases, justification is not permissible.

[1226] *Čaušević* - District court judgment II.

[1227] The CJEU has admittedly required a finding of 'responsibility' in employer in C-320/00 *Lawrence*, from 17 September 2002, ECR [2002] I-07325. I would argue, however, that the question there was

Second, the courts are unable to identify bias and they often uncritically adopt stereotypical assumptions presented by the defendants. This occurred in the *V.S.* case[1228] concerning wage discrimination. A female economist challenged the decrease in salary as discriminatory on the grounds that her male predecessor in the same position had earned on average some 6,400 euro annually more than she did. She argued that she was better qualified for the job and that she performed a wider range of tasks. The employer responded by claiming that as a consequence of the sale of some funds, the plaintiff was performing fewer transactions and had taken over only some of the tasks of her predecessor. Without hearing adequate evidence on their respective qualifications or on the number and content of tasks performed, the court reached the conclusion that 'the workload of both workers was quantitatively and qualitatively different'.[1229] Again, without any evidentiary support for this finding, the court accepted the employer's claim that '[the plaintiff] carried out operative tasks whereas […her predecessor] executed strategic operations'.[1230] It is hard not to see this as a negligent adoption of a gender stereotype from the court about women working in more mundane and less complicated ways ('operative' compared to 'strategic'), especially since the facts of the case did not support that conclusion.

Third, the courts look for an express communication of the *ground* of sex. In the *E.K.* case,[1231] a female Police officer claimed that her demotion during pregnancy

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where the behaviour was attributable to one subject – whether a comparison of the work performed for different employers could be made. 'Fault' was not required in *Lawrence.*

[1228] *V.S.* - District Court judgment.

[1229] The only witness heard on that point indicated that he was unaware of the scope of the tasks which the plaintiff took over from her predecessor.

[1230] *V.S.* - District Court judgment.

[1231] Judgment of the Regional Court in Pilsen, *E.K. proti Řediteli Policie* 30Ca 44/2007-49.

was discriminatory. The record clearly stated that the superior officer referenced scheduling and replacement problems connected to her expected absences as the reasons for the demotion. When asked whether the reason was pregnancy, however, he denied this. Both the Police president handling the internal appeal as well as the reviewing court took this denial as fact. Were they actually expecting the superior to expressly admit that he acted because of the claimant's pregnancy and therefore her sex? It seems so; unfortunately, such approach makes the possibility of success of antidiscrimination claim practically zero – no employer is senseless enough to openly and expressly admit to discrimination because of sex.

Fourth, the courts often find employers' behaviour 'irregular' or 'non-standard', but tolerate and excuse it. To me, the purpose of antidiscrimination law is not only to remedy excesses through individual litigation, but to affect a more general change – to incentivize employers to make decisions transparently, correctly and fairly, as well as to take active steps to provide an environment which is free of discrimination and harassment. This goes hand in hand with the shift of the burden of proof in antidiscrimination cases – the doctrine rests on the realization that if the employer's decision-making is not transparent, incomprehensible and non-standard, it would be difficult for the claimant to show the grounds on which a decision was taken.[1232] Antidiscrimination law should push workplaces and other institutions toward good practices of prevention, investigation and remedy. None of this seems to be a consideration for the Czech courts, however. For example in a case where invitations for interview were sent less than 24 hours in advance, thus not reaching the claimant mother of young children on time, the SC came to the conclusion that 'not

[1232] See CJEU's reasoning in 109/88 *Danfoss* 17 October 1989, ECR [1989] 03199.

every lapse of the defendant, or his 'non-standard' practice, has discrimination as a result'.[1233] It is certainly true that not every irregularity amounts to discrimination, indirect discrimination in this particular case, but the courts should at least press the defendants to justify such non-standard processes. Similarly, in neither of the two analysed harassment cases[1234] did the courts comment on the fact that all the victims' complaints were dismissed by the management and that absolutely no structures were in place to prevent, investigate, put an end to and punish such behaviour.

2.2.4 Indirect discrimination – blindness to structure

Only one of the cases examined concerned indirect discrimination, understood here as a situation

> where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.[1235]

The case was exceptional in other ways too – it did not concern labour relations and discrimination by an employer, but rather challenged statutory tax rules, using the argument of direct effect of EU law.[1236] The plaintiffs, Mr Whelan and Mrs Whelanová, challenged a rule which did not make the common taxation of spouses available in cases where one of the spouses was self-employed, cared for children, but was not officially the recipient of parental benefits. The tax code required such self-

[1233] *H.P.* - SC judgment.

[1234] *P.S.* - District Court judgment; *A.B.* - District Court judgment.

[1235] Current definition in Art. 2(1)(b) Recast Directive.

[1236] The case was brought by a couple; the wife is a prominent antidiscrimination law expert and co-author of the book Pavla Boučková and others, *Antidiskriminační zákon. Komentář.* (C.H.Beck 2010).

employed persons to pay an obligatory minimal rate of tax, thus precluding the couple from using the more favourable regime. The couple claimed that the tax code was indirectly discriminatory against women, as most part-time working carers were women.[1237]

The Regional Court[1238] reviewing the decision of the tax authorities formalistically concluded that the law did not recognize the fact of caring as a reason for exemption from minimal tax, but only the fact of being the recipient of the parental benefit. The Supreme Administrative Court,[1239] in a well-argued, substantive and teleologically sound judgment overturned and returned the case to the lower court. It might be worth noting that the SAC is a new court, only founded in 2003 which is known for recruiting on the basis of merit and from among younger, Western-educated, lawyers. Its teleological approach thus fits with the institution's adjudication in general, although it is exceptional in the context of the Czech judiciary.

Although the result of the case is to be welcome, the SAC decided it on a technicality – it pointed out to the fact, that the there was a difference between who was entitled and who was the recipient. The husband would have been entitled to the parental benefit, as the primary carer, and the fact that he was formally not the recipient did not matter. Consequently, he should have been exempt from the minimal rate of tax. Unfortunately for the claimants, the SAC did not elaborate on the indirect

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[1237] In their case, however, the husband was the self-employed carer; a fact which the court also considered a separate reason for the failure of the claim (the court did not seem to understand that when a provision of national law is indirectly discriminatory, in has to be disapplied under the 'direct effect' doctrine, no matter who the claimant is).

[1238] *Whelan and Whelanová* - Regional court judgment.

[1239] *Whelan and Whelanová* - SAC judgment.

discrimination aspects of the case. This enabled the Regional Court,[1240] in a subsequent decision concerning a new tax year,[1241] to again deny the couple the benefit of the common taxation.

It is the analysis of indirect discrimination which is of interest here. The Regional court observed that women are indeed overwhelmingly the carers and that this might lead to lowered incomes, but that

> The fact that the child-carer – the claimant – reached such low level of income that he was subject to obligatory minimal tax was *not a systemic but rather a random matter*. Undoubtedly even parents who care for children over four years of age *can* reach higher incomes and therefore evade the minimum tax obligation.[1242]

The excerpt shows the lack of appreciation of systemic disadvantage, which is the very thing indirect discrimination tries to challenge. The court does not understand that pointing out that indirect discrimination *can* be overcome on individual basis is not an exonerating argument. Indirect discrimination challenges systemic rules or mechanisms that have statistically significant disparate impact, whether or not an exceptional individual can strive and succeed in overcoming it.

3 The mirage of equality and antidiscrimination rights

I consider that the defects in antidiscrimination adjudication are not accidental, but are connected to a very limited understanding of equality and antidiscrimination law, and that these limits are path-dependent on the State Socialist past. I discuss the

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[1240] *Whelan and Whelanová II.*

[1241] The issue was arguably slightly different – the children were now over 4 years of age, and therefore parental benefit became unavailable entirely. The question thus was whether the tying of the beneficial tax regime to parental leave was acceptable.

[1242] *Whelan and Whelanová II.*, page 7.

court's formalism (3.1), the way equality has been minimized by treating equality as relative and in conflict with freedom (3.2), the limited understanding of mechanisms of discrimination in real-life, especially cultural ones (3.3), and the path dependence on State Socialism (3.4), in turn.

3.1 Formalism

The judicial decision-making is characterized by three types of formalism 1) an excessively 'formalistic' way of adjudication, centred on a textual interpretation, 2) a technique of avoiding substantive issues by concentrating on formal ones, and 3) a 'formal' understanding of equality.[1243] First, as far as formalistic adjudication is concerned, I observed in chapter 5 that post-communist judges tend to be judicial formalists who embrace arguments based on literal readings of the legal text and disregard other arguments.[1244] Teleological interpretation of norms is mostly absent from judicial reasoning. This disinterest in teleological reasoning has been apparent in the CCC's minimal assessment of the context of care in the two pension cases concerning rights of fathers. It has also characterized the decisions of ordinary courts, especially in the *Whelan and Whelanová* cases on indirect discrimination in taxation. And yet, teleological reasoning is crucial, as antidiscrimination law can be interpreted and applied properly, only when its aims are understood.

Second, ordinary courts are also formalist in how they deal with cases. They tend to concentrate on highly technical issues of law[1245] and fact[1246] to avoid having to

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[1243] Cf. chapter 3(1).

[1244] Kühn, *Aplikace*, passim. Kühn, 'The Application of European Law', passim.

[1245] *A.B.* - District Court judgment.

substantively engage in an analysis of discrimination. In the *A.B.* case, the court, citing different legal provisions applicable during different periods, refused to treat harassment as discrimination, and thus avoided having to assess that part of the plaintiff's claims.[1247] In *Čaušević,* the courts concentrated on whether the two rounds of the hiring assessment should be treated as one rather than on assessing whether the result was discriminatory or not.[1248] Thus, much space and effort is spent discussing aspects of the cases which are very remote from the question whether someone actually was discriminated. The courts seem to avoid the substantive questions at all costs.[1249]

Finally, there is a formal understanding of equality. While the CCC has in general been able to identify disparate legal treatment and assess the justifications and proportionality of measures, it has struggled with understanding real life disadvantage. This is exemplified by its lack of special attention to special discrimination grounds, such as race or gender, which hierarchically organize society, and are a source of stereotype and prejudice. It has also led all courts to deny review and remedy in cases of indirect discrimination and made the CCC sceptical to affirmative action. It has also made the courts blind to recognition harms, which I discuss in greater detail in section 3.3.1 below.

[1246] *Čaušević* - District court judgment; *Čaušević* - Regional Court judgment.

[1247] *A.B.* - District Court judgment.

[1248] *Čaušević* - District court judgment; *Čaušević* - Regional Court judgment.

[1249] Similarly Kühn, 'Worlds Apart', 551.

3.2 Minimizing equality

The concept and the right to equality are further weakened by two mechanisms. One is the emphasis on equality being 'relative'. The other is counter-posing equality against freedom.

3.2.1 Equality as 'relative'

The non-absolute nature of equality is emphasized throughout the case-law. The CCC has often mentioned that 'equality is a relative category'.[1250] Doctrinally, it is unclear what role this statement plays - does 'relativity' point to the need for a comparator or *'tercium comparationis'*;[1251] does it mean equality is accessorial to other fundamental rights; or that it can be justified (i.e. that not all distinctions are discrimination)? The Court's answer is unclear.[1252] It is, however, worth noting, that although arguably most fundamental rights and freedoms are to some extent non-absolute,[1253] the CCC chooses to repeatedly highlight it in relation to equality only.[1254]

The ordinary courts too mention it. For example in *Whelan and Whelanová* the court hedges its denial to find indirect discrimination by saying that one cannot

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[1250] Eg Pl. ÚS 53/04, para. 28.

[1251] 'Criterion of comparison' is the quality that two things which are being compared have in common.

[1252] Similarly Wagnerová and others, *Listina*, 100.

[1253] For example in the context of the ECHR, most rights are subject to limitations that are 'necessary in a democratic society'. Only genocide, crimes against humanity, slavery, and torture are ever regarded as absolute, i.e. subject to no limitations, exceptions, qualifications, or balancing against other rights. A summary of the consensus in the literature is available in Andrew Clapham, *Human Rights. A very short introduction* (OUP 2007).

[1254] Based on a search of the CCC database NALUS with the terms 'absolute' and 'relative'.

conclude from the EU directives 'some "absolute tax equality" of taxpayers'.[1255] I believe that rather than being a reference to a doctrinal principle, the mention of the non-absolute nature of equality is on one hand an expression of scepticism of equality and antidiscrimination rights and on the other a rhetorical device which enables the courts to proceed to deny the claimants' cases.

3.2.2 Equality as a threat to liberty

The negative attitude to equality is often expressed as a fear that equality will compromise liberty, freedom of choice, and meritocracy. A Senator stated:

> It cannot be doubted that it is correct to forbid, not only in the public but also the private sphere, any demonstrations of hatred or instigations of attacks against others, which can be seen as discrimination. This problem however should be resolved and is resolved in criminal law. All other discriminations in private relations are part of human freedom – the freedom to distinguish. […] It is the fundament of the private sphere, the decision-making –whom will I associate with and with whom not, with whom do I socialize and with whom not, with whom do I close a contract and with whom not.[1256]

Interestingly, this position rejects not only substantive equality but formal equality too – it is set against prohibition of discrimination and the individual's right to rise against it.

The courts too have expressed bemusement that antidiscrimination law might require them to interfere with the freedom of employers to decide whom to hire, how much to remunerate and how to treat their employees. The *Čaušević* case shows a court outright refusing to substantively review the employer's hiring decisions.

[1255] *Whelan and Whelanová II.*

[1256] Škaloud, 'Antidiskriminační'; similar statements were made by him in the Senate: Miroslav Škaloud (ODS), 26/1/ 2006, 201 (2006).

Managerial prerogative was unequivocally placed above equality. The fact that the freedom from discrimination is also a freedom, is not realized – there is great selectiveness about what type of liberty and whose liberty the law should protect and facilitate; an issue to which I return in chapter 8.

3.3 Not seeing discrimination

There is a limited understanding of what constitutes discrimination in the Czech Republic. Hana Havelková has observed that the understanding of discrimination is:

> narrower [in CZ] than the meaning current in western countries. In Czech society only direct, explicit and deliberate discrimination is recognized as such. According to a STEM agency survey, "the majority of women do not regard the fact that they are so little represented in political and public life as a discriminatory act."[1257]

This is true among judges as well. I have illustrated this on the insistence on fault or motive in decisions of ordinary courts. There seems to be an expectation that individual acts of discrimination would be explicitly motivated by hatred or intent to harm on the basis of sex, race, disability, etc. In reality, however, discriminatory acts are often unconscious and casual expressions of an ingrained wide-spread bias and prejudice about ability, preference, loyalty, commitment, etc.

It is also worth noting that two out of the three sex discrimination cases before the CCC concerned the rights of men. The CCC obviously cannot be blamed for not deciding cases which have not been brought before it, but this lack of litigation is symptomatic. Women's disadvantage is often subtle and harder to identify - it can be

[1257] Havelková, 'The Political', 158. A similar observation has been made about Russia by the American Bar Association. ABA CEDAW Report cited in Turbine, 'Gender, Equality', 172.

in norms expressed in gender neutral ways, the product of androcentrism and not necessarily misogyny. But it would seem that women's disadvantage has been the norm for too long, that there is little sense of entitlement among women in the Czech Republic that it should be overcome, little awareness among institutions that it should be remedied and little consciousness that disadvantage is what antidiscrimination is about.

3.3.1 Not understanding the cultural dimension

A particular problem for antidiscrimination is the oblivion to the cultural aspects of patriarchy and the considerable immaterial harm they cause. I noted that immaterial harm is an afterthought of the existing system of remedies in the ADA. A lack of understanding of symbolic harm has been also apparent in the judicial decisions. Although a claim that 'something is not there' is difficult to substantiate, I consider the lack of analysis on the cultural dimension of discrimination conspicuous.

The CCC has rarely spoken about stereotype or prejudice; and when it has, it was often just in recapitulation of party or institutional submissions and not in its own reasoning.[1258] While dignity is expressly mentioned in Art. 1 of the Charter, and the concept could arguably be useful to elaborate an understanding of stereotype, prejudice, stigma or disrespect,[1259] the CCC has used it very rarely and not in a

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[1258] For example in the case of different pensions ages, the word 'stereotype' appears once, only in a quotation from the submissions of the Governmental Committee for Human Rights. *Pl. ÚS 53/04*, para 9. In the case regarding racial segregation in education, the word 'prejudice' appears only in the recapitulation of the applicants' claims (I ÚS 297/99 from 20 October 1999, unpublished).

[1259] The concept has been used in Canada or South Africa; see Réaume, 'Discrimination and Dignity' and Bonthuys Elsje, 'Institutional Openness and Resistance to Feminist Arguments: The Example of the South African Constitutional Court' (2008) 20 Canadian Journal of Women and the Law 1. Its use has not been unproblematic, however, as it can often support both sides of an issue – for the discussion

coherent and consistent way.[1260] Nor have ordinary courts addressed dignity and respect in their decisions.

The lack of attention to immaterial aspects of discrimination considerably weakens antidiscrimination law. First, because the symbolic order, and its biases and prejudices, are the reason why people discriminate; and especially why they do so often, casually, unawares and without evil intent. Second, while discrimination often causes harm in the material sphere – women are not given jobs, are passed over for promotions, and are not paid fairly and equally; discrimination is also a terrible insult – one is not being assessed as a unique human being and on one's merit, but rather merely as a member of a particular group. Not caring about immaterial harm of discrimination means that both, its deeper causes as well as an important part of its harm, remain obscured and unaddressed.

3.4 Path-dependence on State Socialism

I argue that these shortcomings and limitations are largely path-dependent on State Socialism. There is a vocal reactive rejection of the previous period's perceived egalitarianism, but there are also largely unrealized considerable ideological and conceptual continuities.

In terms of rejection, the idea of equality is often linked to 'Communism'. In the public discourse, in the following exemplified by parliamentary debates, this link is used to discredit equality and antidiscrimination law. During the debates over the

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regarding abortion, see Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 The European Journal of International Law 655, 698.

[1260] The use of dignity in the CCC case-law would certainly deserve a more systematic analysis, but none is available at this moment.

first ADA bill, Deputy Marek Benda (ODS) ridiculed what he perceived as a class-based protective legislation:

> [there are] the radical movements which, in Marxist spirit, divide society into groups and classes. This time it's the classes of men and women, then of different colour of skin, then different religion, sometimes of something else.[1261]

During the same debate, Deputy Josef Janeček (KDU-ČSL) commented that

> The idea to force everyone under current conditions to have the same career, to have the same work is a nice idea. We heard these ideas before 1989 and they were also put to practice.[1262]

Equality is used as a socialist scarecrow, incorrectly so. Incorrectly, because, first, as I have shown in chapter 2, the push for formal legal equality and equality of access that dominated the 1950s fizzled out later in the State Socialist period. The 'women' policies actually inherited from State Socialism were pro-maternity and pro-family ones – policies of difference rather than equality. Second, as I have shown in chapter 3, equality was never a legal right, and certainly not one available to protect individuals from discrimination on the basis of characteristics such as sex or race.

On the contrary, it is exactly the missing understanding of disadvantage and discrimination which is the real 'heritage' of State Socialism. So is the continued emphasis on material disadvantage and oblivion to gender bias and immaterial harms, as well as the belief that law and society are objective and neutral. Similarly, the insistence that equality is a 'relative' right has roots in the statements of State Socialist legal scholars about the 'non-absolute nature' of equality, which was then

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[1261] House, 10/2/2005; 866 (2005).

[1262] Ibid.

used to highlight the fact that different treatment was acceptable.[1263] Finally, the emphasis on difference itself, and its use as an explanation and justification for different (discriminatory) treatment, is a State Socialist legacy.

4 Conclusions

In Transition, notwithstanding the adoption of new legal provisions, equality and antidiscrimination rights continue to be a mirage. The constitutional right to equality, rarely applied to specifically protected grounds such as sex, has mostly been understood to prevent arbitrary or unjustified legislative distinctions. Ordinary courts largely refuse to review discriminatory behaviour and provide remedy, even in cases of direct discrimination. Equality law has not been understood as a legitimate tool aiming at the elimination of existing social disadvantage of women. In continuity with State Socialism, different treatment is accepted in relation to protection of the traditional gender role of motherhood, as I have shown in chapter 6. But preferential treatment which would enable or empower women beyond the family, in the form of positive action, is anathema. So are measures that enable pro-active countering of structural bias, such as indirect discrimination and the shift of the burden of proof. There is thus a rather formal understanding of equality, combined with tolerance of different (protective) treatment when it applies to the 'different' situation of women, but not to (positive) measures that take on disadvantage. Disadvantage is either not seen, is seen but denied, or is considered to be an individual problem and not an issue for the state or even less so private actors, and is at any rate seen as unworthy of a

[1263] Mikule and Kalenská, 'K otázce'

legislative response. I return to these mechanisms of denial in greater detail in the following chapter.

In chapter 3, I observed that post-communist Czech Republic is out-of-sync with Western Europe. While Western Europe has gone from a liberal 'equal treatment' phase which emphasised antidiscrimination rights to a more substantive and transformative understanding which increasingly ties equality law to social policy, the Czech development was inverted. The State Socialist period had a substantive understanding of equality and was socio-economically transformative, while the antidiscrimination right only came afterward, in Transition.

Considering this socio-economically generous past, is the right to non-discrimination still necessary? I believe it is. It gives wronged individuals a claim and a remedy. But this 'individualized' character of antidiscrimination rights, and their enforcement in the adversarial process before the courts, has been criticized in the West as not affecting wider change.[1264] In socio-economic terms, this might be right, although one would hope that the threat of litigation does alter decision-making processes of employers and others obliged to equal treatment. I would argue, however, that the existence of antidiscrimination rights has considerable impact in cultural terms. It identifies the wrong of discrimination, and uncovers how it comes about and what its roots are – gender bias, especially in the case of direct discrimination, and androcentrism, in the case of indirect discrimination. And it points to a specific type of harm, caused by discrimination – the immaterial harm of disrespect and insult. Antidiscrimination law thus has important work to do in post-communist CEE.

[1264] Fredman, *Women*, 368-379.

This specific experience of post-communist countries, and their continued need for an antidiscrimination-rights-based equality policy, should be borne in mind at the EU level too. I return to the lessons for EU law in Conclusions.

CHAPTER 8

ASPIRATIONS LOST: MISSING GENDER AND FEMINISM

In chapter 4, I argued that although the State Socialist project with regards to 'equality of the sexes' was limited, the socialist state had genuine aspirations to affect social change and improve the lives of women. In this chapter I argue that these aspirations disappeared in Transition. Aside from the change driven by the EU and some contestation of gender-relevant policies by the NGOs, I argue in section 1, that there has been at least a lack of attention and at worse a rejection of gender equality among law-makers and judges.

Section 2 then explores why gender inequality continues not to be considered a problem in the Czech Republic today. Using Deborah Rhode's[1265] theoretical framework, I highlight three mechanisms prominent in parliamentary debates as well as court decisions: denial of inequality, denial of injustice and denial of responsibility. In section 3, I then identify further law related factors that help to explain the lack of aspirations to gender equality: denial of the need of a legal remedy and fears of abuse of rights and the legal system. I observe that legal principles such as 'freedom' and 'privacy' are used selectively by law-makers and judges, often to perpetuate patriarchal institutions and discredit calls for gender-progressive legislation. Law is

[1265] Deborah Rhode, *Speaking of Sex: Denial of Gender Inequality* (Harvard University Press 1997).

seen by judges and law-makers as neutral, while calls for gender-progressive legislation are seen as biased, and - as such - are rejected. In section 4, I argue that this myth of the gender neutrality of law can also be maintained because there legal and socio-legal gender scholarship is missing. The blindness to gender in social reality and the law is perpetuated by a rejection of feminism – as a social movement, perspective and academic field of study.

1 Aspirations lost

While the socialist state had a project with regard to equality of men and women, which I discussed in Part I, the period of Transition has been characterized by a lack of direction and aspirations in relation to gender equality. As I discussed in chapters 6 and 7, the Transition legal framework has consisted of 1) carry-overs from the State Socialist period, mostly with regard to protective legislation and social security; 2) new provisions which were externally mandated by EU law, especially equality and antidiscrimination provisions and gender-neutralizing amendments to provisions on child-care; 3) and some new provisions lobbied for by NGOs, such as the provisions on domestic violence or registered partnership. When one takes the EU and the NGO activity out, one does not find any formulated program or policy project on gender equality, similar to the one which existed under State Socialism.

It could be argued that this is an inevitable consequence of democratization and pluralism – in free societies, different ideas about what to do with social issues coexist and compete in the public sphere. But I am not merely pointing out a shift from a 'single idea' – a homogenous and hegemonic project of equality between men and women of the socialist state – to a pluralistic range of ideas in Transition. Rather, I argue that there exists an intellectual and legal conceptual vacuum as to what gender

(in)equality is and what gender equality policy should be, and a lack of interest on the part of law-makers and the legal community in exploring and debating it and that even an outright rejection of the concept of equality and gender are common. The absence of conceptualizing equality in a substantive way, discussed in the previous chapter, and the refusal to consider gender a significant social organizing principle and an axis of disadvantage during Transition is not just a reflection of a 'normal' pluralist democratic process, but reflects a more fundamental lack of engagement with basic elements of gender studies and feminist theory and practice, as I argue below.

The fact that many gender-progressive legislative proposals did not come from the government is illustrative. The proposals to legally recognize same-sex partnerships, to involve the state in cases of non-payment of child support, to specifically criminalize domestic violence[1266] and stalking[1267] were all private members' bills, brought by small groups of Deputies or Senators. And most of the positive[1268] changes actually proposed by the government were externally driven – EU law obligations were crucial in the adoption of the proposals of the ADA and the redefinition of trafficking.

When I discussed the aspirations of the socialist state in chapter 4, I pointed out that the aspirations were limited, but they were there - the concern with the 'woman question' and the project of 'equality of men and women' was genuine. In Transition, these aspirations disappear. In this chapter, I therefore explore the refusal to engage with and the rejection of gender equality, and the possible reasons for them.

[1266] The 2004 proposal was brought by a group of Senators.

[1267] The provision was originally not part of the Criminal Code as proposed by the government, but was inserted by the Constitutional Committee of the Chamber of Deputies.

[1268] Cf. Introduction (1.1).

2 (In)equality – the denials

Adopting gender-progressive legislation in Transition has been difficult. For example the ADA had to be proposed twice and was eventually adopted only over a Presidential veto. It took seven proposals and an over-riding of the Presidential veto to legally recognize same-sex partnership. And four proposals for the state advances of child support have been presented to parliament, so far without success. Applying gender-progressive has also been a challenge - I have noted the inability of courts to apply the basic tenets of antidiscrimination law in the previous chapter.

Why do gender equality issues face opposition among many law-makers and judges and why are gender-progressive legislative proposals so hard to push through and to apply? Deborah Rhode has described the failure to recognize the seriousness of gender inequality in the West as the '"no problem" problem'.[1269] She notices three patterns: 1) the denial of gender inequality; 2) the denial of injustice; and 3) the denial of responsibility. I have found all of these mechanisms very prominent in the Czech Republic as well, which confirms her observations as cross-culturally valid aspects of patriarchy. I discuss their Czech manifestations is the following section.

2.1 Denials of inequality

Rhode argues that the first dynamic concerns the denial of the very existence or the dimensions of the problem. The denial of the existence of the problem is very widespread in the Czech public discourse. For example the current Ombudsman, Pavel Varvařovský, who is tasked with the promotion of equality and

[1269] Rhode, *Speaking*.

antidiscrimination under the EU Directives,[1270] considers the Antidiscrimination Act a 'useless norm' and has expressed doubts that discrimination exists in the Czech Republic: 'The fact that something gets talked about – in this case the allegedly omnipresent discrimination – does not mean it is actually widespread'.[1271] A disbelief that any discrimination exists was also one of the reasons for President Klaus' veto of the Antidiscrimination Act: 'The Czech Republic does not discriminate against anyone.'[1272]

Similar denials have been common with regards to discrimination on other grounds, such as race and sexual orientation. A Deputy, after he first *ad hominem* attacked his predecessor and proposer of the Registered Partnership Bill, ridiculing her femininity and occupation, denied any LGBT disadvantage:

> Táňa Fischerová, as an actress, speaks very emotively and has a beautiful deep-felt presentation, but I hope she did not think that a certain sexual minority is somehow discriminated or that it does not have equal rights. If that is what she meant, I would ask her to recant, because it is not true.[1273]

These statements also show a very limited understanding of what inequality and discrimination are. As I argued in chapter 7, only formal legal difference of treatment would be considered discriminatory; real life discrimination, be it direct or indirect, does not appear to be an issue.

Rhode points out that one of the dynamics of the denial of the existence of gender inequality is to paint it as a problem of a distant past. In the Czech Republic,

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[1270] The directives require the establishment of 'equality bodies' for the promotion, analysis, monitoring and support of equal treatment of all persons without discrimination on the protected grounds. For sex, see Art. 20 Recast Directive.

[1271] Varvařovský, *Letter*.

[1272] Václav Klaus, *Letter explaining the veto of ADA (16/5/2008)* (2008).

[1273] Petr Pleva (ODS), House, 24/6/2005, 969 (2005).

this has been true of equality and antidiscrimination law, as I have shown in chapter 7 - 'equal rights of men and women', perceived as the cornerstone of the State Socialist regime, are either considered sufficiently achieved, or a suspicious 'communist' project which must not be repeated. Gender inequality is also considered a foreign problem. The external EU origin of antidiscrimination provisions fosters a perception that gender inequality is not a problem in the Czech Republic.

2.2 Denials of injustice

'A second way of denying inequality', according to Rhode, 'is to deny that gender disparities reflect social injustice'.[1274] Rhode points out that as most people want to 'believe in a just world', they often blame women's individualized conduct, capabilities or their choices for gender inequality.[1275] In the Czech debates, two main ways can be identified in which the injustice of inequality is denied. One is to highlight that women chose their situation or contributed to it. As I explored in chapter 6, women are seen as 'contributing' to sexual assault in academic literature on rape, courts looked for 'problems' in the behaviour of victims of sexual harassment, and divorced mothers were blamed for leaving their socially acceptable dependence on the man and becoming unacceptably dependent on the state in the parliamentary debates on state advances of child support.[1276]

[1274] Rhode, *Speaking*, 9.

[1275] Ibid, 9-10.

[1276] Cf. chapter 6(1; 2).

The other way of denying inequality as injustice is to highlight that inequality is the natural state of society. The 'naturalness' of inequality was underlined for example by President Klaus is his explanation of his veto of the ADA:

> The philosophy of the Act denies the fact that every person is a completely unique set of inborn and taught abilities, characteristics and qualifications. It denies that we have to expect different success, work ethic, effectiveness, as well as behaviour from everyone. The Act tries to eliminate inequality, which is, however, *a natural phenomenon*.[1277]

Assuming that 'sex-based disparities reflect sex-based differences that we cannot or should not alter',[1278] the idea that the differences are natural, was prominent under State Socialism and persists in Transition. When confronted with data showing the disparity and inequality between men and women, it is often argued that women 'naturally' choose not to pursue careers, not ask for higher wages, etc. This essentialism is based on an understanding that women wish to be mothers first and foremost.[1279] This has obvious inhibiting consequences for any challenge to the existing gender order through law.

2.3 Denials of responsibility

The final way in which confronting gender inequality is avoided, writes Rhode is that we 'relocate responsibility for finding solutions' from the public sphere by individualizing the issues.[1280] 'Whatever the cause, […] we make individual women

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[1277] Klaus, *Letter ADA*; emphasis mine.

[1278] Rhode, *Speaking*, 18.

[1279] Cf. chapter 6.

[1280] Rhode, *Speaking*, 13.

responsible for the remedy.'[1281] This mechanism has been apparent for example in the emphasis on private individual care in the family, which I discussed in chapter 6. Comparatively, the Czech state arguably still does a lot for families – for example maternity benefits are paid out from the sickness insurance scheme rather than left to employers[1282] and the periods of maternity and parental leave are counted toward pension benefits.[1283] But this shows that the Czech law and policy continues to be pro-family – law-makers do not refuse to be involved in supporting the family and women as mother. There is, however, great reluctance to support women's autonomy in ways which do not relate to the family.

Beyond Rhode's framework, I identify two further mechanisms in the Czech context which impede the fight against gender inequality: the need for a legal response and remedy is denied, and a strong fear of abuse of any new gender-progressive provisions exists. I turn to these now.

3 No role for law in gender equality

3.1 Denials of the need for a legal remedy

In addition to Rhode's framework, another obstacle to political and legal action against gender inequality that has been prominent in the Czech context – not considering gender inequality as a legal but only as a moral issue. The view that law is not the proper means for addressing gender inequality was recurrent in the

[1281] Ibid, 13.

[1282] For example in the US, not only are the no benefits provided by the state, the state does not even require the employer to pay. Cf. n.494.

[1283] This is not the case in all European countries. European Commission, 'Legal Approaches'.

parliamentary debates surrounding the transposition of EU antidiscrimination law. A Senator opined, in the debate on sexual harassment, that

> There is something like public morality, a certain state of society that should be improved by moral means; and what is a moral issue, should not be a matter for the law.[1284]

Similarly, President Klaus, in explaining his ADA veto, stated:

> The Act gives citizens the right to equal treatment in private relations which is by definition impossible. It interferes – in a considerable way – with an area, which has for centuries in Europe been formed by customary principles and ethical standards. With this Act, the state tries to "legislate good behaviour" and tells us, that the law should primarily lead us to good behaviour, and not education in the family, generally accepted and unwritten patterns of behaviour typical of our society, *natural* models, conventions, etc. *It is yet another attempt to regulate human life through law*.[1285]

Even the current Ombudsman, who is tasked with the promotion of equality, observed about the ADA that

> To regulate decent behaviour and reciprocal respect and tolerance among people is impossible, or, rather, it can be done but will have no effect whatsoever. Other instruments are better suited to serve the equal (but not egalitarian) treatment of a fellow man – education in the family, natural examples and patterns of behaviour, which are passed from generation to generation.[1286]

The reluctance to provide a legal remedy has tangible consequences for victims of discrimination. As I have shown in the previous chapter, limited statutory rights for compensation are provided in the ADA and a reluctance to award compensation in cases of breach of equality rights by the Czech courts has been wide-spread and persistent.

[1284] Daniel Kroupa (KDU-ČSL), Senate, 10/12/2003, 119 (2003).

[1285] Klaus, *Letter ADA*.

[1286] Varvařovský, *Letter*.

3.2 Fear of abuse of provisions

Another recurring theme has been the fear of abuse of the legal provisions by women. The fear of free-riding and abuse of financial help has been prominent in the debates surrounding the possible provision of state advances on child maintenance payments. Fears were expressed that the system would be perceived as 'easy money' by divorced or separated mothers. One Deputy expressed a worry that 'certain social groups' would make the state advances into a 'tendentious living',[1287] as it would discourage divorced or separated mothers from staying in or looking for work.[1288] The fears that socially weak groups would abuse the 'generousness' of the state are a fixture of market-liberal rhetoric and are not limited to women.

A more obviously gendered strand of this abuse-of-rights anxiety is the fear that the newly entitled women will use it to 'retaliate', which has been expressed in connection to regulation of various forms of gender-based violence. When the criminalization of domestic violence was discussed, the dangers of sentencing an innocent man were stressed, notwithstanding the fact that all regular safeguards of the criminal justice system apply in these cases.[1289] On the accompanying law, which gave the Police a right to temporarily evict an aggressor, MPs voiced fears that the law could be abused for 'settling family or property disputes or some love triangles with the involvement of a police officer'.[1290] Comparable worries were raised with respect to provisions on sexual harassment. A Senator pointed out the ease with which

[1287] Michal Doktor (then ODS), House, 24/6/2005, 964 (2005).

[1288] Then Deputy, now Prime Minister, Petr Nečas (ODS) was particularly worried about abuse by single mothers. House, 27/1/2010, 849 (2009).

[1289] Radim Chytka (ODS), House, 25/6/2003, 298 (2003).

[1290] Marek Benda (ODS), House, 16/6/2005, 828 (2004).

one can be accused of it and stated that 'every day brings a thousand chances […] to unleash this absurd farce'.[1291] Another Senator feared that 'the courts will end up doing nothing else'.[1292]

The fear expressed in these debates is that of a potentially accused party, that of a potential perpetrator. It is overwhelmingly the perspective of a man and the view of the law is that of an institution meant to support and defend the status quo. It assumes that the existing legal and social situation is desirable and justified. Indeed, Senator Kubera, in the debate on the prohibition of sexual harassment, explicitly stated that he did not intend to alter his harassing behaviour: 'what I do until now, I will do forever, on top of everything else, because of my age, I do not have another option.'[1293]

Both, the denial of a need for a legal remedy and the fear of abuse of gender-progressive legal provisions, are ways to prevent the law from serving a 'new' constituency – women. The arguments used against gender-progressive legislation often contain the following three ingredients: 1) an argument about freedom from state intervention; 2) especially in the private sphere; 3) supported by an argument that gender-progressive legislation is biased while existing laws are neutral, and that it is not law's role to 'regulate human life'. All these arguments are bent to fit the protection of existing patriarchal privileges in law and in society. The argument of freedom is used very selectively to combat gender-progressive legislation (3.3). The interpretation of 'privacy' collapses the economic and social understandings of

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[1291] František Mezihorák (ČSSD), Senate, 10/12/2003, 119 (2003).

[1292] Přemysl Sobotka (ODS), ibid.

[1293] Ibid.

family, and has been used selectively, to deny criminalization of domestic violence, to refuse legal recognition to same-sex partnerships, and to support a specific type of family (3.4). The critique of 'attempt[s] to regulate human life through law'[1294] completely ignores the fact that law already regulates human behaviour - it is indeed its primary purpose - as well as the fact that the way law currently does so is neither gender neutral nor objective (3.5).

3.3 The selective use of 'freedom'

The market-liberal[1295] narrative of freedom and choice has been very prominent in Transition, but it has been used selectively, to argue against legal intervention aiming to promote gender equality. It is understood as the freedom of some *to* do as they have always done and as they wish to do, and the freedom *from* being in any way obstructed, limited and regulated. Thus, the legal treatment of prostitution rests of the assumption that men should be free to avail themselves of prostitution[1296] and managerial prerogatives of the employer are granted strong protection in antidiscrimination law suits.[1297]

When the freedoms of the strong, propertied, male, 'Czech' majority and the potential curbing of them are at stake, freedom is invoked to protect these rights and privileges. When a request for freedom *from* limiting regulation or practice is raised by women, however, it is often rejected. A recent discussion about home births is a

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[1294] Klaus, *Letter ADA*.

[1295] Cf. chapter 5(3.1).

[1296] Cf. chapter 6(3).

[1297] Cf. chapter 7(2.2).

good illustration. Here, women's request[1298] to be able to choose to give birth with a mid-wife and to be able to do so outside of a hospital was dismissed and women continue to be 'protected' against their will. An even starker example has been the practice of forced sterilizations which started under State Socialism and continued into Transition,[1299] the existence of which was denied until 2004,[1300] and the compensation for which has been denied until 2012.[1301] The protection of women's reproductive freedom and autonomy was in this case very low on the governments and courts' agenda.

On the other hand, the specific request from women and other disadvantaged groups to be given rights and freedoms has been rejected as asking for help. The request for freedom from harassment was interpreted as a request for 'paternalistic protection' in the parliamentary debates.[1302] The request to be free from gender-based discrimination has been pitted against 'freedom' rather than interpreted as its expression, as I showed in chapter 7. The request for legal recognition of same-sex

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[1298] The request has been formulated by several NGOs promoting women's reproductive well-being and choice, such as 'Aperio' or 'Liga lidských prav'. It has also been raised by an – unsuccessful - applicant in a recent constitutional case; Pl ÚS 26/11 from 28th February 2012.

[1299] Cf. chapter 2(3.3).

[1300] A fully-fledged critical report was only published in 2004 by the Ombudsman, Otakar Motejl. Czech Ombudsman, *Závěrečné stanovisko*.

[1301] Following a decision by the ECtHR (*RK v The Czech Republic* (App No 7883/08) from 27 November 2012), the Czech government reportedly settled with one victim (Kateřina Červená, 'Vláda přiznala pochybení za nezákonnou sterilizaci, ženu odškodní 10 000 eury' (*http://llp.cz/2012/12/vlada-priznala-pochybeni-za-nezakonnou-sterilizaci-zenu-odskodni-10-000-eury/*, 11 December 2012) accessed 15 December 2012).

[1302] Jaroslav Kubera, Senate, 10/12/2003, 119 (2003).

partnerships has been described as an 'exploitation of the state to further the demands and claims of certain groups' by the President.[1303]

Furthermore, there is little acknowledgement that the freedom of the weak and vulnerable needs to be enabled – this narrative is rejected as illiberal and communist. There is an assumption that everyone knows what they want and is able to get it. There is no awareness that people will not necessarily know what they want because they already have adapted their preferences to the limited options available to them.[1304] There is no understanding that people will not always ask what they want, because they realize the futility of asking in the face of pervasive societal discrimination. There is no regard given to the fact that people might have different wishes at the same time and that the society and law can either enable them or render them irreconcilable – this is especially true of the fact that women's lives tend to have elements of independence as well as interdependence and that the reconciliation of professional and family lives might need active facilitation by the state. Finally, the narrative emerges in Transition that everyone is responsible for their choices.[1305] As pregnancy and motherhood is increasingly redefined in the terms of choice, it is considered up to the woman to bear the consequences of it.

In sum, the choice and freedom, with which the legal promotion of gender equality is seen as being in conflict, is a man's choice and freedom. There has been little appreciation that some people's choice might need enabling, facilitation and protection exactly through equality and antidiscrimination law. This gendered market-

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[1303] Václav Klaus, *Letter explaining the veto of the Act on Registered Partnership (16/2/2006)* (2006).

[1304] See Nussbaum's theory of 'adaptive preferences'. Nussbaum, *Women and Human Development*, 111-161.

[1305] Cf. chapter 6(1.3).

liberal use of the concept of freedom has been closely connected with the narrative of protection of privacy and the private sphere.

3.4 Manipulating the notion of privacy

I have noted previously[1306] that family became a sanctuary from the corruption and 'lies' of public life during the State Socialist period of Normalization. The 'private sphere' has since been seen as a refuge[1307] to be protected from interference.[1308] In reaction to the expansion of the 'public' sphere under State Socialism, the necessity to protect the 'private' sphere from state intervention has been emphasized in Transition.

This argument has been used against several pieces of gender-progressive legislation. It was one of the reasons why the specific criminalization of domestic violence was so long in coming,[1309] but in other areas the opposition to the involvement of the state and 'public law' in private relations remains. A Christian-Democratic Deputy argued against legal intervention in gay and lesbian partnerships:

> The relations between partners are not dependent on their sexual orientation and can be sorted through private law means. I *do not need a public law institution* for that; I do not need public law regulation, because it is about the relationship between two people.[1310]

[1306] Chapter 2.

[1307] Havelková, 'A Few Prefeminist Thoughts'; Gal and Kligman, *The politics*, passim.

[1308] Cf. section 4.

[1309] In 2004, the privacy concerns seemed to have been finally outweighed by the need to protect the 'life of the dependent persons' and domestic violence was specifically criminalized. The exceptionality of breaching the requirement of non-interference in the family was, however, highlighted in the parliamentary debates. Jitka Seitlová (unaffiliated), Senate, 25/6/2003, 298 (2003).

[1310] Cyril Svoboda (KDU-ČSL), House, 24/6/2005, 969 (2005), emphasis mine.

The refusal to involve the state in private family matters was also crucial in the refusal to guarantee state advances for child support. A female Deputy argued:

> The state justifies its expanding social paternalism through the interest in a proper and materially sound child development. Will the state resist the temptation to take over parental rights, after it took over parental obligations?[1311]

Then MP, now Prime Minister, Petr Nečas (ODS) compared state advances to 'making a "daddy" out of the state'.[1312] State's interference with the 'private' sphere was seen as an opening of a 'Pandora's box',[1313] seeing the intervention in the family as a dangerous precedent which could lead to state intervention in other 'private' areas:

> [State advances] could lead to extreme demands in other areas. Such as: someone is not getting wages, and the state steps in. Or [a private company could demand help]; how do you then get to be a careful entrepreneur[?].[1314]

It is the last point that uncovers the underlying manipulation of the concept of the private sphere. Namely, two different meanings of 'private' and 'public' are collapsed here – one market-liberal economic and the other social. The market liberal understanding identifies the private sphere with private property, enterprise and markets; the social understanding with the intimate sphere of the family. After the ineffectiveness of State Socialist central-planning, the market-liberal emphasis on private property and free markets as a guarantee of creation of wealth, access to goods, etc., has been very popular in Transition. This doctrine, of protecting the

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[1311] Lucie Talmanová (ODS), House, 10/4/2004, 848 (2001).

[1312] House, 27/1/2010, 849 (2009).

[1313] Jiří Pospíšil (Minister of Justice), 24/10/2007, 132 (2007).

[1314] Ladislav Šustr (KDU-ČSL), House, 24/6/2005, 964 (2005).

'private' sphere in the economic sense, has been used to criticize interference by the state with the 'private' sphere in the social sense. This rhetoric very instrumentally taps into the post-communist glorification of 'freedom' and rejection of pre-1989 statism and paternalism.[1315] It is, however, disingenuous, as legislating against domestic violence, status recognition for gay and lesbian couples, or granting antidiscrimination rights, has little to do with a 'big state' in the economic sense.

3.5 Seeing law as neutral and the rejection of law as an instrument of social change

Above, I have cited President Klaus' disgust at 'attempts to regulate human life through law'.[1316] It is, however, only new or proposed gender-progressive laws which are recognized as having this trait – they are considered 'merely *the exploitation of the state* to further the demands and claims of certain groups'.[1317] The fact that existing legal frameworks or their absence equally regulate human life, and can do so in ways which form and cement gender inequality, is not recognized. It is not recognized that a lack of regulation, for example of registered partnership, is a regulatory choice too; that the lack of legal recognition of same-sex partnerships is as much legal intervention in 'human life' as its regulation. Nor is there awareness that the way that law currently regulates family or gender-based violence shapes lives toward the preferred types of family, motherhood or parenthood, and encourages or

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[1315] The pre-1948 Czechoslovakia saw similar argumentation against state interference in the family (Feinberg, *Elusive Equality*). It is interesting that, in Transition, a return to 'normality' is that of return to the 'First Republic' and not necessarily through adopting modern 21st century solutions.

[1316] Klaus, *Letter ADA*.

[1317] Klaus, *Letter on Registered Partnership*.

discourages particular types of sexual behaviour. I have shown in detail in chapter 6 above that these choices are gendered in that they are based on normative assumptions about gender roles and gender relations. The blindness to gender bias in law and life reinforce each other. It is not understood that if reality is gendered and the law unreflectively follows its structures, it become complicit in the maintenance of the existing gender order or patriarchy.

I consider this blindness path-dependent on the State Socialist past - the missing recognition of the non-objectivity and non-neutrality of the law, as well the blindness to the gendered nature of disadvantage, are due to the fact that the Czech Republic was isolated from intellectual development in the West, and has not internalized insights from critical social and legal theories, notably feminism and feminist/gender legal studies. I return to the causes contributing to and to the repercussions of missing feminism below in section 4.

Another path-dependence is the particularly negative reaction to the State Socialist idea that law should affect social change, which I discussed in chapter 1. In Transition, the use of law for 'social engineering'[1318] has been discredited by association with State Socialism. Attempts at social change are considered either naïve, as has been the case with prostitution,[1319] or harmful, as has been the case with antidiscrimination law.[1320] In reaction to State Socialism, laws which are seen to be

[1318] This expression is used frequently, in the context of the fight against antidiscrimination rights for example by Senator Miroslav Škaloud. Škaloud, 'Antidiskriminační'.

[1319] As I have argued in my MSt thesis, in Transition, prostitution has become seen as pathological but inevitable and most debates about its legal regulation aim at suppressing its visibility rather than decreasing or eliminating the demand. Havelková, 'MSt. thesis', 95-106.

[1320] Deputy Janeček, cf. n.1262.

'educational' or have socially transformative aims have been treated with great suspicion by law-makers.

4 Missing gender; missing feminism

There is a strong dislike of feminism in the Czech society, to the point where when legislation on domestic violence was being debated in Parliament, it was felt that a distancing from the feminist movement was necessary to gain support for it:

> There was an objection that this proposal is an exudation of some feminist amateur activists. I would like to say that on the preparation of this bill, a broad spectrum of experts from the judiciary, prosecution, law and other things participated[...].[1321]

This is ironic, because the origins of the battle against inter-personal violence in the home can be firmly located within the feminist second wave.[1322] But it would not be strategic to point this out in the Czech context. Even when NGOs are involved, their rhetoric has rarely been explicitly feminist and gender-based. For example in the process of adoption of domestic violence legislation, the most influential NGOS, Bílý Kruh Bezpečí, presented the phenomenon as gender neutral.

Similarly, when legislating on sexual harassment, several MPs voiced fears about the disruption of gender relations and a female Senator felt it necessary to point out that Czech women need neither provisions banning sexual harassment, nor the feminist movement:

[1321] Jan Kasal (KDU-ČSL), House, 16/6/2005, 828 (2004).

[1322] The beginnings of the movement against domestic violence are often located with US women's awareness-raising groups in 1970s. Margi Laird McCue, *Domestic Violence: a reference handbook* (ABC-CLIO 2008), 5.

> You might have noticed that Czech society never was a feminist society. […] The reasons are various. I interpret it so, that in the Czech lands, smart, intelligent women always existed, who knew for certain that they will get to their 'place in the sun' with methods much more subtle and effective than is the feminist movement.[1323]

Both statements illustrate a common position, that feminism is at least useless and at worst harmful. And yet, the understanding of the real material and symbolic disadvantage women face would be greatly helped by a gender/feminist analysis. The absence of gender analysis and feminism are obviously related, and the problem is circular: a dislike of feminism makes the introduction of certain concepts more difficult, and, at the same time, a dislike of certain concepts leads to a distrust of feminism.

In the following, I first look at the different reasons for the strong dislike of feminism in the Czech society, mostly as identified in secondary literature, and the ways in which this is a legacy of State Socialism (4.1). I then observe that other perspectives or movements - such Marxism, psychoanalysis and post-structuralism - which in the West have synergies with feminism, are missing or discredited in the Czech Republic, which makes the presentation and mainstreaming of feminism even harder (4.2). I then look at which 'waves' and strands of feminism are particularly pertinent in the Czech Republic (4.3). I argue that the Czech Republic needs to catch up with the intellectual development and activist strategies of the 'second wave' of feminism, as it is a foundational 'step' which cannot be skipped, but that it can also benefit from more current 'third wave' insights.

[1323] Soňa Paukrtová (unaffiliated), Senate, 10/12/2003; 119 (2003).

4.1 Why a rejection of feminism?

The strong antipathy to feminism in the post-socialist Czech Republic has been observed by many commentators, both Czech[1324] and Western.[1325] Rebecca Nash observed 'an almost physical repulsion and disinterest in feminism'.[1326] Nanette Funk spoke about 'an antifeminism preceding feminism'[1327] Many identify as the reason the State Socialist past,[1328] or the impression that feminism is an unnecessary 'foreign import'.[1329] Several reasons for the difficulties Czechs have with feminism have been suggested in the literature.

First, the Czechs 'associate concepts such as "women's emancipation" and "women's movement" with the policies of the discredited communist regime'.[1330] This is in part due to the fact that various demands of Western feminism have been achieved early and taken for granted since,[1331] so there is a feeling that feminism has nothing more to offer. But at the same time, in the minds of Czech women, these measures were disproved as a way to achieve true gender equality,[1332] which also weakens feminism's appeal. '[O]wing to a significant gap between what was offered

[1324] Alena Heitlinger, 'Framing Feminism in Post-Communist Czech Republic' (1996) 29 Communist and Post-Communist Studies 77, 78;

[1325] Eg. Olsen, 'Feminism', 2247; or Barbara Einhorn, *Cinderella Goes to Market: Citizenship, Gender and Women's Movements in East Central Europe* (Verso 1993), 11 and 182-216.

[1326] Rebecca Nash, 'Exhaustion from Explanation: Reading Czech Gender Studies in the 1990s' (2002) 9 European Journal of Women's Studies 291, 294.

[1327] Funk, 'Introduction', 2.

[1328] Olsen, 'Feminism', 2248; Heitlinger, 'Framing', 78, and the Czech sources cited therein.

[1329] Gal and Kligman, *The politics*, 107.

[1330] Heitlinger, 'Framing', 81.

[1331] Ibid, 81.

[1332] Ibid, 83.

to women by the paternalistic communist party-state and how the official commitment to women's emancipation and equality was experienced',[1333] concepts such as emancipation and equality have acquired a pejorative meaning. Gal and Kligman argue that 'the assertion of women's advantageous position in communism continues as an aspect of public discourse, one that […] serves to delegitimate women's political activity in post-communism'.[1334]

Second, there is a mistrust of utopian and emancipatory ideologies in the post-socialist Czech Republic. Nanette Funk summarises:

> because philosophy and ideology played such central roles in state socialism and were used to deny social realities, there exists a deep suspicion of any organized body of belief, including feminism.[1335]

Although Czech women are arguably relatively emancipated and 'strong',[1336] and can be seen to engage in some aspects of the social practice of feminism, they have generally been lacking feminist consciousness, terminology and concepts, and there has been little awareness of a shared experience which has structural causes under patriarchy.

Third, Czech women have been 'disinclined to engage in collective action'.[1337] Under State Socialism, any public participation was seen as 'motivated by the desire to curry favour with the communist regime'.[1338] In Transition, women have thus felt

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[1333] Ibid, 82.

[1334] Gal and Kligman, *The politics*, 8.

[1335] Funk, 'Introduction', 6. See also Einhorn, *Cinderella*, 188-189.

[1336] Heitlinger, 'Framing', 77.

[1337] Ibid, 81.

[1338] Ibid, 83.

‘“liberated” from the obligation to participate in elections, demonstrations, and meetings’.[1339] This observation, made in the 1990s, might no longer be so pertinent in 2013. A rise in women’s NGOs and their activities[1340] in the 2000s indicate an increasing acceptance of the necessity of collective action at least in a part of the civil society.

Fourth, the negative reaction to feminism is connected to either a misrepresentation of Western feminism or the selection of its elements which are most incompatible with the post-communist condition and therefore easiest to dismiss. For example, many Czechs perceive feminism to be anti-male.[1341] Feminism is also perceived as emphasising women’s victimhood. This suggestion is resented, as Czech women ‘regard themselves as strong women rather than as victims’.[1342] Feminism, like State Socialism, is seen to want to eliminate ‘natural’ differences between the sexes, which clashes with the prevailing essentialist understanding of genders.

Finally, during the difficult period of Transition, there has been an ethos of a ‘community of suffering’- ‘in countries where everyone is suffering a lot, it feels churlish, selfish, even vulgar to mention that women’s suffering has its own particular qualities and forms’.[1343] Thus, ‘gender issues [have been] designated as a political

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[1339] Ibid, 84.

[1340] Cf. chapter 5(1.4).

[1341] Heitlinger, ‘Framing’, 77.

[1342] Ibid, 77.

[1343] Ann Snitow, ‘Feminist Futures in the Former East Bloc’ (1993) 7 Peace & Democracy News 1, 41.

luxury which the new democracies can ill afford to address'[1344] and 'women's interests [have been] sacrificed to the transformation'.[1345]

4.2 The absence of supporting perspectives and the rejection of Marxism

The inability to conceptualize gender and patriarchy, as well as the difficulties Western feminists have had in communicating with Eastern men and women, are, according to Jiřina Šmejkalová 'conceptual troubles',[1346] which 'are not exclusively connected to the absence of feminist theoretical and political debates'.[1347] She notes, 'a broken psychoanalytic tradition',[1348] a 'lack of poststructuralist approaches in the local intellectual context'[1349] and a 'deformed Marxist tradition'. The post-1989 rejection of Marxism is of particular salience. It means that its tools for social critique are not truly available to support a gender equality discourse in Transition. So while in the West some analytical concepts of Marxism are understood as aids to radical social change, to post-socialist Czechs, Marxist ideals are 'tools of conserving a

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[1344] Einhorn, *Cinderella*, 9.

[1345] Funk, 'Introduction', 2.

[1346] Jiřina Šmejkalová-Strickland, 'Do Czech women need feminism? Perspectives of feminist theories and practices in Czechoslovakia' (1994) 17 Women's Studies International Forum 277, 277.

[1347] Ibid, 277.

[1348] Psychoanalysis 'helped Western feminists to ask how deeply patriarchal identities go [and] how female and male identity can be represented in language and cultural stereotypes'. Its absence in the East meant that there is no 'space within the public consciousness for the articulation of the notion of gender or for confronting the problems of identity, self-knowledge, and self-expression'. Ibid, 278.

[1349] She argues that 'much of the theoretical work challenging fixed meanings and breaking stereotypes has been done by [Western] feminists inspired by poststructuralist theories and deconstruction'. This insistence on challenging the 'normal' and established meanings in general is missing in the Czech context. Ibid, 277.

frozen social order'.[1350] The rejection of Marxism also disarms from inception any arguments about socio-economic (or 'class') inequality. This has been particularly detrimental in Transition when this axis of disadvantage has become prominent with increasingly negative consequences for women, through their higher representation among the poor. The rejection of Marxism then reflects back on feminism. The 'left-wing orientation of much of western feminism', [1351] as well as its use of Marxist theory,[1352] has contributed to suspicion against feminism in general among the Czechs.[1353]

A similar problem, of lack of supporting perspectives, can be observed in the area of legal scholarship. There has not been a prominent[1354] critical movement of law yet. Feminism thus cannot draw on and synergize with the critique of law of legal realism, socio-legal studies, and critical legal theory.

4.3 The need for gender analysis and feminism in the Czech Republic

I showed in chapter 2 that State Socialism brought about early and relatively far-reaching equalization and advances to women's legal position – from access to education, work and politics to liberalization of divorce and a legalization of abortion. With respect to socio-economic equality and elimination of poverty, the 'East' arguably overtook the development in the 'West'. Some demands of Western

[1350] Ibid, 279.

[1351] Heitlinger, 'Framing', 81.

[1352] See also Šmejkalová-Strickland, 'Do Czech women?', 278.

[1353] Heitlinger, 'Framing', 81.

[1354] Individual authors, such as Zdeněk Kühn, have been introducing Western theoretical and critical approaches to Czech audiences, but the impact on the legal community, especially practitioners, has been arguably minimal.

feminists, more specifically 'second wave'[1355] feminists, have thus been fulfilled in the Czech Republic.

There are also parts of the Western feminist project which are arguably unsuited to the specifics of the Czech context, or mottos which might not be strategic. For example, the slogan 'personal is political' is probably unfitting, as the public and private spheres have been configured very differently in Czechoslovakia and the Czech Republic than in the West.[1356] As I observed, the public sphere, of both politics and work, were both corrupt and perceived as dangerous under State Socialism. The private sphere was perceived as a protected place free of the intrusions and stresses of public life. Women's position in the family, as child-carers and home-carers, allowed them an escape and created a strong and particular attachment to motherhood and family, which has persisted in Transition, and which does not quite have a parallel in the West.[1357]

There are, however, aside from demands which have been achieved and demands which do not fit the Czech context, some feminist ideas and agendas which would be very useful in the Czech Republic too. Western feminists have used the analytical categories of women, gender, gender order, patriarchy,[1358] sexuality, intimacy and identity. They have documented and analysed women's material and cultural disadvantage under patriarchy. They have uncovered sexism and misogyny, as well as androcentrism, in law and society. None of these have become part of the

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[1355] Cf. n.35.

[1356] Similarly Gal and Kligman, *The politics*, 101.

[1357] Similarly Heitlinger, 'Framing', 85.

[1358] Cf. n.46.

intellectual landscape in the Czech Republic, especially among law-makers, judges and legal scholars.[1359] In the following, I assess why gender remains invisible in the Czech Republic, pointing out the prevalence of other narratives about society, which have either attributed inequality to different causes (under State Socialism) or denied inequality as a structural phenomenon (in Transition) (4.3.1). I observe a continued materialism, which no longer leads to support of redistribution, but continues to constitute an obstacle to recognition and valuation of different identities and diversity (4.3.2). I then discuss which aspects of Western feminism I consider particularly pertinent for the Czech situation. I argue that although the developments of the Western 'third wave' have to be taken into account, post-communist CEE still needs to catch up with many of the 'second wave' insights and programmes (4.3.3). Finally, I point out that gender/feminist legal studies are much needed, for a critique of concrete provisions and implementation, but also to point out that the law, legal theory and legal education are not neutral and objective, but suffer from gender bias (4.3.4).

4.3.1 Why is gender invisible?

I suggest that the reason why gender has become obscured in scholarship and citizens' consciousness has been the preponderance of other narratives about society. As I noted in Part I, the official State Socialist analysis only saw class, while the population saw 'the regime' as determining disadvantage. In Transition, the market-liberal narrative of choice and individualism became internalized and obscured any

[1359] Cf. chapters 5, 6 and 7.

systemic forces which might impede and limit it – post-communist Czechs have difficulty seeing market-coercion[1360] as well as patriarchy.

Some aspects of the gender order are more obscured than others. In the following, I argue that the intellectual tradition of materialism survives, and while it no longer leads to an unambiguous support of redistributive policies, it continues to lead to an ignorance of cultural aspects of patriarchy. In particular, there is an unreflective presumption of 'normality' and a dismissal of diversity as a value.

4.3.2 Materialism, culture and identity

I noted that the State Socialist period was characterized by materialism - in its interpretation of history and understanding of society, which had repercussions for law and for gender equality. In law, the primary concentration on material harm has persisted into Transition. Until recently, only compensation for material harm caused by gender-based violence had been available to victims in criminal law.[1361] In the Antidiscrimination Act, an apology is considered the primary remedy for the immaterial harm suffered by the victim of discrimination and the courts have ignored symbolic harms in judicial decisions on equality and antidiscrimination, as I showed in previous chapter. Immaterial harm caused by sexual harassment in the form of a hostile environment has been derided in the parliamentary debates. Bias and prejudice, and the symbolic harm to dignity, respect and identity they cause continue to be neither seen and nor understood.

[1360] Speaking for CEE more generally, Gal and Kligman, *The politics*, 76.

[1361] Czech criminal courts can award compensation to the victim, to be paid for by the perpetrator, in the so-called 'adhesion procedure'.

But unlike in the State Socialist period, where the emphasis on materialism translated into attention to redistributive policies, concern with 'class' or 'socio-economic' equality are marginalized today. As I noted in chapter 5, many socio-economically generous provisions inherited from State Socialism were retained in Transition, in the 1990s and 2000s. But, at the level of discourse and policy, redistributive policies are seen as tainted by the State Socialist past. Consequently, once this generosity is discontinued, as seems to have increasingly been the case in the last few years, it is relatively hard to re-instate it, and, any new gender-progressive socio-economic measures, which lack State Socialist antecedents, are also unlikely to succeed. At most, one can hope for the conservation of existing benefits and provisions.

As I observed, there are instances when benefits have been discontinued more directly along the gender axis, such as the scrapping of the social supplement for low income families, which was of particular import to single mothers. But more importantly, women, who are overrepresented among the poor, are hit indirectly by almost all budget cuts. The phenomenon of the feminisation of poverty[1362] is well-known in the West, but the Czech Republic has little awareness and experience of it, due to its State Socialist, 'class-less' past. Today, as well as in the future, the redistributive aspects of gender inequality, after decades of relative well-being, will need increasing attention.

[1362] The coining of the term is attributed to Diane Pearce, 'The Feminization of Poverty: Women, Work, and Welfare' (1978) 11 Urban and Social Change Review 28; and has since been documented globally; see Sylvia Chant, 'Feminization of Poverty' in *The Wiley-Blackwell Encyclopedia of Globalization* (Blackwell Publishing Ltd 2012) <http://dx.doi.org/10.1002/9780470670590.wbeog202>.

Along with the renewed necessity to address redistribution, there continues to be a need for recognition, in the sense understood by Fraser. I believe a particular challenge here are the embedded ideas of objectivity, neutrality and normality (both with regards to social and legal norms). Consequently, there is limited acceptance of difference and diversity. Difference is accepted in connection to motherhood, but in a very limited, traditional, patriarchal way. Most difference is disliked. The recognition and respect of 'other' identities is low. This has to do with the relative homogeneity[1363] of the Czech society, which has been both a blessing and a curse.

It has been a blessing since the Czech Republic in Transition did not have to deal with ethnic tensions, violent nationalisms, and civil wars, unlike the more heterogeneous former Yugoslav states and societies.[1364] But it has been a curse, because it meant there was no pressing need to self-interrogate on questions of ethnicity, nationalism, and identity. As I already mentioned, this has particularly dire consequences for the Roma in the Czech Republic.[1365] The idea of equality and antidiscrimination rights for the Roma faces even stronger opposition than gender equality.[1366] This has repercussions for gender equality. Arguably, guaranteeing equality on one ground (such as race and ethnic origin), and establishing a consciousness of inequality and disadvantage, is often helpful to support a fight

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[1363] Pridham, 'Democractic consolidation'.

[1364] The role of nationalism has been prominent in the gender analysis of other post-communist CEE countries; cf. Gal and Kligman, *The politics*, passim.

[1365] The segregation of Roma into 'special schools' continues to be a problem despite the ECHR decision in *D.H. Grand Chamber*; see Czech Government, 'Zpráva o stavu romské menšiny v České republice za rok 2011 (2011 Report on the situation of the Roma minority in the Czech Republic)' (*http://www.vlada.cz/cz/ppov/zalezitosti-romske-komunity/aktuality/zprava-o-stavu-romske-mensiny-v-cr-za-rok-2011-100979/*, 2012) accessed 1 February 2013.

[1366] Violence and wide-spread protests against the Roma rocked the Czech Republic in 2011. Czech Government, 'Roma Report 2011'.

against discrimination of another (such as sex and gender). For example in the US, the concepts, arguments and strategies of the Civil Rights movement and the feminist movement reinforced each other and help the LGBT movement today.[1367] Such a situation does not exist in the Czech Republic – gender equality gets no conceptual support from a fight against inequality on other grounds. Indeed, the unpopularity of other groups and identities has been mentioned as one of the reasons why women do not engage in collective political action. Ann Snitow has argued that the lack of identity politics in CEE has to do with the fact that women do not want to be constituted as a special group, a 'minority', as it is perceived that '[t]o mention the group "women" is to demote individual women to a subset of society, with a stigmatized status like Slovaks or gypsies or Jews.'[1368] Unity is highly regarded, but it is 'not a unity of diversity, difference, and heterogeneity, but rather one of homogeneity, of an undifferentiated mass'.[1369] This understanding of normality, and unity in homogeneity, needs to be overcome for identity politics and diversity to thrive and for cultural aspects of patriarchy to stand a chance of being interrogated and challenged.

I have been arguing for attention to redistribution and recognition, and that the introduction of feminist concepts would help the project of gender equality in the Czech Republic. Are some 'waves' and strands of feminism more pertinent than others?

[1367] Currently, the US LGBT movement is trying to use the Supreme Court ruling in *Loving v Virginia*, 388 US 1 (1967), which struck down a law prohibiting interracial marriage, to argue for legality of gay marriage. See for example Andrew Koppelman, 'Same-Sex Marriage and Public Policy: The Miscegenation Precedents' (1996-1997) 16 QLR 105.

[1368] Snitow, 'Feminist', 42.

[1369] Zuzana Kiczková and Etela Farkašová, 'The Emancipation of Women: A Concept That Failed' in Nanette Funk and Magda Mueller (eds), *Gender Politics and Post-Communism* (Routledge 1993), 86.

4.3.3 What feminism?

As I mentioned, the Czech Republic, due to its intellectual isolation under State Socialism, missed the 'second wave'[1370] of feminism and never caught up with its project during Transition. I believe that the insights of the 'second wave' of feminism are very much needed. But some distinction between the different 'second wave' feminisms is necessary, as the positions were not unified, but, more importantly, some strands of 'second wave' feminism are further from the Czech understanding and needs than others.

Arguably, the Czech understanding of women's nature and the relationship between the sexes is closest to 'difference feminism',[1371] with its emphasis on cherishing and supporting motherhood and childcare. It is, however, not truly feminist – it does not argue for a true re-evaluation of caring and a full recognition of the 'ethic of care'.[1372] More importantly, it sees care as the natural preserve of the woman, and is thus essentialist. As far as liberal feminism[1373] is concerned, although the liberal emphasis on freedom and autonomy has been prominent in the general discourse in Transition, it has not been connected to gender equality. On the contrary, the calls for equality and antidiscrimination rights are seen as the antithesis of liberalism.

[1370] The notion of 'waves' has often been criticized for ignoring important progress within 'waves', and also for being West-centric. I agree with these points. But the periodization is useful to highlight the specific development in the East, so I use it as a short-hand, acknowledging its somewhat reductive character. Shira Tarrant, *When Sex Became Gender* (Routledge 2006), 222.

[1371] Often identified with Carol Gilligan, *In a different voice: psychological theory and women's development* (Harvard University Press 1982).

[1372] The exception are some women NGOs, such as 'Mateřská centra'.

[1373] Tong, *Feminist Thought*, 11-45.

As far as Marxist/socialist feminism[1374] are concerned, I would argue that it has never truly been present. The State Socialist project cannot be viewed as feminist, as I have argued in chapter 4, because, unlike Marxist and socialist feminism, it never recognized gender as a specific axis of social disadvantage. In Transition, Marxist and socialist feminist insights and arguments are the most discredited because of its roots in Marxism.

At least some of Marxism's analysis of redistributive inequality is known, even if largely rejected; this has not been the case with radical feminism's insights. Indeed, radical feminism is the strand by which the Czech discourse remains the most untouched. Most of the radical feminist critique of the cultural aspects of patriarchy, the centrality of gender or the insights into sexuality and violence, have not been introduced and grasped at all.

In the 'West', the debate has moved on; a 'third wave' of feminism is often identified.[1375] African-American, Third World and queer scholars and activists have since the 1990s challenged the universalism, generality and homogenization of women allegedly present in the analyses of 'second wave' feminists. 'Third wave' feminists have emphasised women's heterogeneity, inter-sectionality, the importance of individual narratives, and relativism, among others.[1376] I believe there is much that 'third wave' feminism can contribute in the Czech context as well – the expansion of gender analysis to queer issues, the critique of ideas of 'objectivity' and 'universality', which enables the appreciation of individual narratives and personal experience. But I

[1374] Jaggar, *Feminist*, passim.

[1375] Tong, *Feminist Thought*, 270-290.

[1376] Ibid.

believe that the Czech Republic needs first to catch up with the relevant aspects of the 'second wave'. Both in terms of intellectual development and activist strategies, it is a foundational 'step' which cannot be skipped.

4.3.4 Missing feminist legal scholarship

A gap particularly pertinent to this thesis is the lack of gender and feminist analysis in legal scholarship. In the following, I discuss four important functions that gender/feminist legal studies perform in critiquing law, legal scholarship and legal education, which are missing in the Czech Republic. But before I do that, a distinction needs to be made between equality scholarship and gender/feminist scholarship. In recent years, some legal academics, overwhelmingly young and Western-educated,[1377] have attempted to present and defend equality and antidiscrimination law to the Czech audiences. Often using Western theories and comparative law,[1378] they try to justify its importance and usefulness to law-makers, judges and lawyers. This effort has been reflected neither in the process of law-making as exemplified in the parliamentary debates, nor in the everyday realities of interpretation, application and (lack of) enforcement by the courts. But it does exist. The same cannot so far be said about gender/feminist legal scholarship. Equality is not popular, but gender and feminism are even less so.

[1377] Notably Zdeněk Kühn, Michal Bobek, Pavla Boučková, Markéta Whelanová, Kristina Koldinská, Martin Štefko, among others. I count myself among them; see for example Barbara Havelková, 'Diskriminace na základě pohlaví' in Michal Bobek, Pavla Boučková and Zdeněk Kühn (eds), *Rovnost a diskriminace (Equality and discrimination)* (C.H.Beck 2007); Barbara Havelková, *Rovnost v odměňování žen a mužů* (Auditorium 2007); or my co-authorship of Boučková and others, *Antidiskriminační zákon*.

[1378] See for example Michal Bobek, Pavla Boučková and Zdeněk Kühn, *Rovnost a diskriminace* (C.H.Beck 2007); Boučková and others, *Antidiskriminační zákon*.

In the West, gender/feminist legal studies have fulfilled four functions, all of which yet need to be performed in the Czech Republic. First, at the level of specific laws or provisions, they identify existing ones which are gender-conservative and should be eliminated, as well as missing gender-progressive ones, which should be adopted. Examples of provisions in conflict with the requirement of gender equality include the criminalization of abortion, prohibition of divorce or a particular construction of the law on rape which is suspicious of the victim's behaviour. Examples of provisions which should exist to address a real-life gender equality issue, but are often missing, include the specific criminalization of stalking or domestic violence, prohibition of harassment, etc.[1379]

A second project, done mostly by socio-legal feminist scholars, has been to uncover the reasons why even gender-progressive legal provisions do not have desired effects. Here, for example the gender bias within the criminal justice system has been the object of much study and criticism in the West.[1380] Third, feminist legal scholars have critiqued the law as such. This, according to Nicola Lacey, is the true 'feminist *legal theory*'[1381] which 'suggests that there is something not merely about particular laws or sets of laws, but rather, and more generally, about the structure of method of modern law, which is hierarchically gendered'.[1382] Finally, at a meta-level and together with other 'critical' movements, feminism has presented a critique of the

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[1379] Nicola Lacey refers to this project as 'feminist criticism of particular laws' and distinguishes it from 'feminist legal theory'. Nicola Lacey, *Unspeakable subjects* (Hart Publishing 1998), 2.

[1380] Eg Renée Römkens, 'Law as a Trojan Horse: Unintended Consequences of Rights-Based Interventions to Support Battered Women' (2001) 13 Yale Journal of Law and Feminism 265.

[1381] Lacey, *Unspeakable*, 2; others speak of 'feminist jurisprudence', see for example Robin West, 'Jurisprudence and Gender' (1988) 55 The University of Chicago Law Review 1.

[1382] Lacey, *Unspeakable*, 2.

mainstream legal scholarship and legal education.[1383] The uncovering of an androcentric bias in law, legal scholarship and education has been particularly important. Legal feminist scholars have shown that there is neither neutrality nor objectivity, from the choice of topic and question, to methods, to conclusions.

Neither of these levels of critique has been present in the Czech legal discourse. And while external drivers, such as the EU, have contributed to some changes to concrete laws and provisions (the first level), it is especially at the level of implementation, adjudication, legal scholarship and legal education (levels two, three and four) where an awareness of the existing gender bias is missing and where a paradigmatic shift has yet to occur.

5 Conclusions

In the Czech Republic, among both male and female law-makers, judges and legal scholars, gender continues to be ignored as a social construct which hierarchically organizes society. The existence of gender inequality is widely doubted, the injustice it constitutes is denied, and it is at any rate considered an individual problem and not worthy of a legislative response. Law and legal scholarship are seen as neutral, thus not needing a gender-based critique; and law is also rejected as a tool to combat gender inequality. In the West, these issues have been raised by feminists; in the Czech Republic, feminism is absent, and its absence is felt.

Given these 'denials', it is not surprising that the Transition period has not had any real policy aspirations with regards to gender equality. Although women like

[1383] Eg Duncan Kennedy, 'How the Law School Fails: A Polemic' (1970) 1 Yale Review of Law & Social Action 71.

everyone else have benefited from a fall of an un-free political regime, it is doubtful that they are ‘better-off’ in Transition than they were under State Socialism. As citizens, they have gained political freedom, but their participation in politics has dropped dramatically. As consumers, they have access to a greater supply of goods and services, but due to their overrepresentation among the poor, they might not be able to afford them. As workers, they continue to be discriminated against and not seen as fully equal. As wives and mothers, they continue to be materially supported, but in certain family and care constellations more than in others, and culturally, while valued, their contribution is not valued or seen as equal to ‘men’s’ work in the public sphere.

CONCLUSIONS

Feminist analyses of the law have generally focused on Western legal systems. This included most Western Marxist feminists, who have tended to use Marxism as a critique of Western systems rather than of the State Socialist systems. And the Czechoslovak State Socialist legal scholars' critique of their own country was very limited due to the un-free nature of the political regime. As a result, there has been no critical analysis of how State Socialism in reality addressed the 'woman question' through law and whether and how the legal community understood gender (in)equality. Yet the study of the State Socialist period is crucial for the understanding why has gender equality, as a legal concept and as a policy agenda to be implemented by law, been unpopular in Transition, including why have there been considerable difficulties with the implementation of the EU sex equality *acquis* in the new post-communist Member States.

This thesis is the first to address these questions. The thesis examined the legal regulation and the understanding of gender equality among the legal community in Czechoslovakia and the Czech Republic under State Socialism and in Transition – its first contribution is its close and critical analysis of the materials in the Czech language which have not been analysed in this way before.

The thesis argued that while formal legal guarantees for women have largely been satisfactory in the Czech Republic, for example as assessed with reference to the requirements of CEDAW or the Beijing Platform, especially with regards to socio-economic guarantees, connected to motherhood and parenthood in particular, the way these formal legal guarantees have been understood, interpreted and applied by the

law-makers, judges and legal scholars has not been gender-progressive. The thesis argued that the reasons for this can be found in: (i) the entrenched patriarchal ideas about women's appropriate role both in private and public life; (ii) a failure to understand gender as a social construct, to recognize gender order as a pervasive social structure, and to perceive the cultural aspects of patriarchy; (iii) an inadequate conceptualization of equality and a refusal to combat sex discrimination; and (iv) a limited understanding of the role of law and of rights in the shaping of social relations. In the following, I discuss these concepts individually in detail in the following: women and gender in section 1, equality and antidiscrimination in section 2, and law and rights in section 3.

The thesis further argued that the hostility to gender equality among law-makers, judges and legal scholars is specifically post-communist, i.e. that the legal approach to women and gender equality in Transition has been considerably path-dependent on the State Socialist past. In section 4, I return to the continuities and discontinuities of the legal regulation and understanding of gender equality between the periods of State Socialism and Transition. I elaborate on how the path-dependence on the State Socialist past exists on the surface - with regards to legal regulation -, but more importantly underneath – with regards to ideas and concepts underpinning the law. This intellectual path-dependence, which has shaped the understanding of gender equality in Transition, has taken two forms: an unreflective and mostly unconscious retention of ideas developed during the State Socialist period, as well as a reactive conscious rejection of anything perceived as State Socialist. Both have been detrimental to gender equality.

In the last part of the Conclusions, I discuss the contribution of the thesis to two more general bodies of literature: concerning EU gender equality law and policy,

and international feminist legal theory. In section 5, I discuss the possible lessons which the specific trajectory of gender equality and antidiscrimination law in the CEE has for the EU. I argue in particular that a strong antidiscrimination rights-based approach, contained in binding legal instruments, is still necessary. Finally, in section 6, I look at the possible lessons for international feminism. I argue that the 'Second World' is in a different position to both 'First World' and 'Third World' with regards to feminism. Not having gone through a 'second wave' of feminist activism and thought, it cannot just join the 'third wave'. The Czech Republic, having a history of redistributive policies, needs especially awareness-raising with regards to cultural aspects of patriarchy, such as gender-based disrespect and the immaterial harm it causes. The 'Second world' is thus 'out-of-sync' with the arguably poverty-oriented perspective of many 'First world' and 'Third world' feminists today – this different emphasis can contribute to a re-examination of crucial 'second wave' debates and the radical feminist project, from a fresh perspective.

1 Women and gender

State Socialism in Czechoslovakia did a lot for women – it equalized their legal status with men, facilitated their access to the public sphere of education, paid work and politics, and eliminated various legal limitations, for example in access to abortion or divorce. The socialist state's general emphasis on socio-economic well-being for all also benefited women, and women were, moreover, specifically supported and protected as mothers, through provisions of labour and social security law in particular, as I discussed in chapters 2 and 3. The legal gains of State Socialism have been largely retained in Transition, notwithstanding some decrease in the

generousness of social protection and social welfare, for example in the financing of childcare facilities.

The problem was that the 'woman question' under State Socialist was, first, about women fulfilling certain set roles (workers, mothers), and second, as the term suggests, it was exclusively about women and not men. The socialist state's policy neither considered that the male-based norm in the public spheres of politics and paid work might need redefining to accommodate the different experiences of women and carers, nor did it consider a redefinition of men's role in the home. Men were out of the picture. The fact that the division of labour and ideas about roles of men and women were socially constructed was neither seen nor challenged. There was no awareness of gender as a specific axis of disadvantage. The material disadvantage women face under patriarchy was partly addressed through the elimination of private property, which levelled men down, and a generous social security system, which was to some extent seen as compensation for women's motherhood penalty on the labour market and thus levelled women up. But while the political and legal systems were to some extent capable of addressing economic gender-related injustices, they completely lacked a conceptual apparatus to address the cultural roots of gender inequality and the symbolic harms of patriarchy. This intellectual gap has been largely retained in Transition.

Why was gender not 'seen'? I argued in chapter 4, that the socialist state's preoccupation with the abolition of private property and class led to an underestimation of the role of other axes of disadvantage, including gender. This blindness of the officialdom was not remedied in other segments of the State Socialist society – the population perceived political affiliation and Communist Party membership as the main axis dividing the 'haves' from 'have nots'. When women

identified oppression in State Socialist Czechoslovakia, it tended to be ascribed to the 'regime' rather than patriarchy. A bottom-up women's – let alone feminist – movement, which would have raised consciousness about gender and patriarchy, never materialized, partly due to the lack of freedom of speech and association, partly because the regime 'expropriated'[1384] the terminology of women's oppression and emancipation for its own political purposes.

In Transition, the blindness to gender and patriarchy has persisted. The existence and extent of gender inequality has been denied. When it has been acknowledged, it has not been considered as injustice, but as a natural consequence of women's choices. And even when the injustice of gender inequality has been acknowledged, responsibility by the state has been denied – the burden of change has been placed with women, and not with men, employers, the state, or the law. Gender and patriarchy continue to be ignored as meaningful categories to capture present day living conditions. An uncompromising market-liberal narrative of choice and individualism has been internalized and has obscured any recognition of systemic social forces which might impede and limit gender equality.

The missing awareness of gender inequality and patriarchy has not been remedied by a rise of feminism as a social movement and academic project in the Czech Republic. In the minds of Czech women, the idea of emancipation is still largely connected with the 'defeminizing' period of the 1950s and the iconic image of a female tractor driver – State Socialism not only seemed to have shown that 'emancipation' does not truly work for women in practice, but it also discredited attempts to open the debate about gender equality again in Transition.

[1384] Havelková, 'Dreifache Enteignung'.

2 Equality and antidiscrimination

Equality was a central concern of the socialist state. The equality project, aimed at the eradication of poverty and socio-economic levelling, was transformative. It was also substantive – it was understood that different real-life situation might require different treatment. Since women were considered different because of their 'role' as mothers, it often led to their special preferential treatment, in labour and social security law. Much of these provisions, however, were about protection rather than facilitation and empowerment – for example individual care of children in the home was supported, especially in the 1970s and 1980s - but there was no support for a true reconciliation of private and professional life.

Moreover, the perceived difference between the sexes also led to an acceptance of worse treatment for women in comparison to men. Neither structural inequalities, such as wide-spread segregation of men and women into different sectors of the economy (men in the well-paid heavy industry and women in the underpaid light industry and service sectors) and the related gender wage gap, nor individual acts of discrimination were actually identified and labelled as discriminatory. The State Socialist understanding of equality between the sexes was based on an assumption of natural difference between men and women. It did not acknowledge existing socio-economic and especially cultural disadvantage along the axis of gender which I argue needs to be recognized and tackled.

The lack of an antidiscrimination guarantee in law under State Socialism was symptomatic of this - the conceptual step that the law should interfere with discriminatory acts, the cornerstone of the understanding of antidiscrimination law in 'the West', was not made. In Transition, the absence of a legal guarantee of

antidiscrimination rights was remedied, to comply with EU membership requirements. However, on a fundamental ideological level the concepts of gender equality and non-discrimination continue to be rejected by law-makers and judges. My analysis of decisions of ordinary courts in chapter 7 revealed that judges continue to look for motive or intent before imposing liability – discrimination is understood very narrowly, as misogyny. The fact that much discrimination is merely an expression of an unconscious gender bias, is not realized in the Czech context.

3 Law and Rights

The socialist state saw law as a tool for social change. This had negative consequences – criminal law was used for political repression and for the suppression of phenomena such as prostitution - but it also meant advances in practice for gender equality – the socialist state was for example unafraid to interfere with and modernize the family. In Transition, this perceived 'social engineering' of the previous period has been rejected. Law-makers have repeatedly expressed the view that law is not the proper means for social change, and especially to address gender inequality. It is believed that the law should not interfere with the 'natural' order of things. This obviously hurts gender equality law and especially antidiscrimination law, as the notion that law might need to be used to counter gender based bias, prejudice and discrimination, is rejected.

Law is seen as neutral, while calls for gender-progressive legislation are seen as biased. There is no awareness of the patriarchal bias that exists among the law-makers and judges and in the law itself. MPs have, for example, expressed a fear that new gender-progressive legal provisions – for example on sexual harassment or

domestic violence – would be abused by women. There is, however, no recognition that this is actually a one-sided, 'male' perspective.

The concepts of 'privacy' and 'freedom' have been used selectively and have been manipulated, to undermine attempts to introduce gender-progressive legislation. Privacy has been used to deny reject suggestions that gender-based violence in the home and the workplace should be fought by law. And the concept 'freedom' has been employed to defend existing male privilege and to perpetuate patriarchal institutions.

The concept of 'freedom', central in Transition, has also been connected to a specific post-communist understanding of rights. Under State Socialism, rights were a mirage. Legal guarantees were not rights in the Western sense. They were not conceptualized as enforceable individual entitlements but were often mere policy pronouncements - possibly because of the emphasis on socio-economic rights and the suppression of civil and political rights. They were defined by collective interest, were connected to duties, and a sense of 'desert'. The period of Transition has, on the one hand, seen considerable continuity with this past, especially concerning the idea that rights are connected to obligations on the part of the rights-bearer and the idea that individual rights have to be justified through some kind of collective interest. Both have considerably weakened rights claims by unpopular groups, such as the Roma, or unpopular claims, such as for rights against sexual harassment by women. On the other hand, there is a 'new' understanding of rights as freedoms, connected to market liberalism. This freedom is understood as the freedom to do what one wants, if one can, without interference. But there is no notion that the freedom of the weak and vulnerable, and those who have been discriminated against, needs to be enabled. It is a Darwinian understanding of freedom for the strong; any request for rights and

empowerment from disadvantaged groups is seen as a 'request for protection' and discredited as 'communist'.

4 Continuity and discontinuity

Considering the important political, economic and ideological differences between the periods of State Socialism and Transition, the question arises whether the approach to gender equality of the period of State Socialism remains fairly unchanged during Transition, or whether it has been swept away. I have argued throughout the thesis that the period of Transition has been very much path-dependent on the State Socialist past, not only on the surface – with regards to actual legal regulation -, but even more importantly also 'underneath' – with regards to the ideas and concepts circulating in the public sphere and underpinning legal regulation.

At the 'surface' level of legal regulation, the Transition period has seen both continuity as well as change.[1385] Both dynamics have had positive but also negative consequences for gender equality. The continuity has been obvious, as the socialist legal order was carried forward after the Velvet Revolution. Much of the State Socialist regulation regarding women was kept in Transition. For instance, the generous labour protection and social security benefits of mothers largely continued, and long-standing provisions such as the legality of abortion were retained. But this continuity had negative elements as well, especially in the form of retention of provisions limiting women's choice, such as the bans of certain types of work, which lasted long into Transition.

[1385] The distinction of 'change' and 'continuity' has been problematized by Gal and Kligman, who argue the process is better understood as 'shifting interpretive frameworks'. Gal and Kligman, *The politics*, 109 ff.

In terms of change, many gender related issues which previously received little attention have been addressed by law since 1989. For examples same sex partnerships were legally recognized and domestic violence specifically criminalized. I have pointed out in chapters 5, 6 and 7, that much of this change has been externally driven by EU membership obligations – from antidiscrimination rights to opening parenthood and child-care to fathers. These new provisions have been gender-progressive and are examples of positive change. There have been negative changes too, however. Notably, social welfare provision has decreased somewhat. This decrease has in some instances been obviously gendered, for example in the scrapping of a social supplement for low income families, or the decrease of funding for collective childcare. But even general policies, such as an increase in the basic rate of VAT from 5 % to 10 %, have had a gendered impact due to the gendered nature of poverty. New gender-conservative or repressive provisions were also enacted, such the common taxation of spouses and the 'wife discount', and the criminalization and administrative repression of persons in prostitution, respectively.

I argue, however, that looking at the legal developments only scratches the surface. It is the examination of the intellectual path-dependence that sheds light on the roots of the hostility to gender equality during Transition. When one looks at the understandings and conceptualizations underlying the legal development, one realizes that some positive provisions, such as antidiscrimination rights, have been adopted *despite* a particular understanding of gender equality, rather than thanks to it. The wilful blindness to gender and the refusal to acknowledge that gender inequality exists, has furthermore prevented the adoption of full guarantees of gender-progressive provisions, for example effective remedies, such as compensation for immaterial harm arising out of discrimination. And this refusal has frustrated proper

interpretation, application and enforcement of the enacted provisions, for example when victims of direct and indirect discrimination have brought their claims to the courts. These understandings come most clearly to the surface in the above mentioned negative legal developments which took place in Transition – the traditional ideas about families shine through the tax provision of 'wife discount', for example.

I suggest that the intellectual path-dependence outlined above has taken two forms – there has been an unreflective and mostly unconscious retention of ideas developed during the State Socialist period, as well as a reactive conscious rejection to anything perceived as State Socialist. I believe both have been detrimental for gender equality. The conceptual continuities include the blindness to gender and patriarchy, in social reality and in law, especially its cultural aspects, bias, prejudice and symbolic harms. They include the belief in the objectivity and neutrality of social structures and the law. Another continuity has been the unreflective taking of the 'male' norm as the basis for legal regulation (in labour law), the taking of the 'male' perspective (in the regulation of prostitution and enforcement of rape law) or the ignoring of the male (in the family and in relation to child-care). In terms of equality law, there has been continuity in the limited understanding of discrimination merely as misogyny, and the ready acceptance of 'difference' of women as an explanation and justification for wide-spread inequality. Equality and antidiscrimination law's role in combating real-life disadvantage continues to be rejected.

Moreover, old categories have been filled with new meanings. For example, although coming from opposite ideological directions, Marxism and market liberalism both offer economic solutions to social problems. The abolition of private property in Marxism and the 'invisible hand' of the market forces in market liberalism are seen as sufficient for an automatic and correct resolution of most problems pertaining to

socio-economic well-being (in the language of Marxism) or wealth (in the language of market liberalism). Neither paradigm thus sees the need to address gender inequalities specifically.

The more obvious dynamic in Transition has, however, been the rejection of the previous ideology and concepts of the State Socialist period. This has been apparent with regards to the ideas of equality and women's emancipation. The rejection of the use of law as an instrument of social-change and the involvement of the state in the market and society has been a reaction the perceived 'social engineering' of the past. The new emphasis on 'neutrality', the individual, freedom and privacy, has been an attempt to distinguish Transition from the tyranny of the State Socialist understandings of collective good.

But these apparent rejections require three qualifications. First, the discontinuity is often merely apparent. For example feminism is rejected in part because the State Socialist period is often identified as having been feminist. But I have shown that this was not the case - Marxism condemned feminism as a bourgeois past-time. The socialist state did appropriate the rhetoric of 'women's emancipation', but was completely blind to gender and its analysis and the project with regards to the 'woman question' was limited and never truly feminist. In other words, State Socialism did not see gender as an axis of disadvantage, let alone as a crucial or the primary one. The rejection of feminism in Transition, although apparently an instance of discontinuity and rejection, is thus more in keeping with State Socialist attitudes than many in the Czech Republic realize. Second, much of the rejection happens at the level of rhetoric, and is very selective. The rhetoric has not been strong enough to annihilate all or even most of the inherited socio-economic provisions, but it has been used to prevent new gender-progressive legislation, most notably antidiscrimination

law, from being adopted and implemented effectively. Finally, the objections to and rejections of the previous period's ideas are not carefully, dispassionately and rationally formulated, but are perfunctory, casual and rather thoughtless reactions. The accusation of being 'communist' is used to disarm *ab initio* – this has made debates on the actual merits of gender equality policies very difficult.

To summarize, the Czech Republic has not yet shaken off the legacy of State Socialism. The path-dependencies not only at the very visible level of legal regulation, but also and especially at the underlying level of understanding and conceptualization, have been determinative for the existence, the quality and the application of legal provisions on gender equality. Moreover, gender equality has had the worst of both worlds of path-dependence. There has been continuity with the intellectual limitations of the State Socialist project as well considerable discontinuity with the achievements: on one hand the law makers, judges and legal community have yet to come to understand and apply concepts such as gender, cultural bias and discrimination, on the other the budget cuts of the late 2000s and early 2010s have begun to erode the generous social provision inherited from State Socialism.

5 Lessons for the EU – the need to sustain antidiscrimination rights

I have argued that new, post-communist, central European Member States, the Czech Republic among them, have had a different trajectory with regards to gender equality and antidiscrimination law than their Western counterparts. Arguably, the understanding of antidiscrimination law in Western Europe, especially in academic writing, moved from an emphasis on non-discrimination and the formal aim of

elimination of ‘different treatment’, to increasing incorporation of ‘positive duties’ and a ‘substantive’ and ‘transformative’ understanding of equality. I have shown in chapters 2 and 7 that the development in the CEE states was in many ways opposite. In the State Socialist Czechoslovakia, equality was understood ‘substantively’– it was context-based and strived for real-life equality. And it was also ‘transformative’ in the socio-economic sense – it aimed at redistribution, eradication of poverty and economic levelling. But it was not concerned with characteristics such as sex/gender, which are typically considered specifically protected grounds in the West, nor was there an enforceable antidiscrimination right. The legal antidiscrimination guarantees have only been adopted later, in Transition, thus making the development in the East ‘out of sync’ with the West.

I argued that in Transition, notwithstanding the adoption of new legal guarantees, antidiscrimination rights continue to be a mirage in the Czech Republic. Only weak remedies exist, and, more importantly, antidiscrimination law has not been properly implemented, especially by the courts. I argued that that the role of the EU in this development has been crucial but paradoxical. It was crucial for adopting antidiscrimination legislation and for gender-neutralization of provisions on child-care which guaranteed fathers equal rights with mothers. I observed that it has even influenced new provisions on gender-based violence, specifically trafficking. For the sake of completeness, it should be said that the EU was not crucial in other areas. For example, it was not needed to push for provisions on pregnancy or maternity, in labour and social security law, as generous measures protecting pregnant women and mothers, originating in the State Socialist period, had already been long in place, and had gone, and largely still go, beyond the requirements of EU law.

But even where the role of the EU has been crucial, such as in antidiscrimination law, it has been paradoxical, because the argument for adoption of new gender-progressive provisions was EU membership and not the actual benefits of the legal provisions for women and gender equality. There has been no substantive debate about the real-life need for antidiscrimination rights, and the understandings of gender (in)equality have not shifted or evolved.

I observed that the EU equality *acquis* was only reluctantly transposed and is not being effectively implemented - ordinary courts have been reluctant to decide for claimants and have not applied doctrines of direct and indirect effect, where it would have been appropriate. This constitutes a breach of EU law obligations, but has not had consequences for the Czech Republic, due to a limited infringement monitoring by the Commission. This brings me to the question of what lessons can be learnt from the specifics of the CEE experience for the current and future development of EU equality and antidiscrimination law. In these conclusions, I offer tentative arguments only, mainly to highlight issues which the thesis raises and which will provide the basis for a future inquiry.

The first question, which I have just foreshadowed, is how compliance can be better monitored. The requirements of EU membership are in practice limited to what the European Commission effectively understands as non-compliance and breach of the obligations under the Treaty and will pursue under Art. 258 TFEU. Overwhelmingly, and certainly in the antidiscrimination area, although tasked with assessing implementation, the Commission has largely only monitored transposition

of EU directives, not their application and enforcement.[1386] Reporting on implementation in the individual Member States has been an important tool for uncovering deficiencies,[1387] but should the compliance assessment under Art. 258 TFEU be strengthened too? This is a delicate question. It is already perceived in the Czech Republic that antidiscrimination guarantees were 'forced' on the country, and so greater 'interference' from the EU might be counterproductive.

The same is probably true for a second possible lesson for the EU – that the CEE Member States respond to hard-law and mandatory obligations, but less so to soft-law.[1388] One could argue that hard-law measures continue to be needed from the EU,[1389] even if they contain relatively mild obligations, as is currently the case with the proposed directive on improving the gender balance among non-executive directors of companies.[1390] But the hostility to gender equality in the Czech Republic is such that any hard-law measure will first be opposed by the Czech government at

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[1386] The cases where a Member State's executive or administrative practice has been the subject of infringement proceedings are extremely rare and usually brought only in cases of widespread and serious breach. See Case C-365/97 *Commission v Italian Republic* [1999] ECR I-7773. For a more detailed discussion, see Havelková, 'Challenges', 98.

[1387] Annual progress reports are available at http://ec.europa.eu/justice/gender-equality/document/index_en.htm.

[1388] This was especially apparent in the Slovak Constitution Court decision, where a provision on positive action, contained in the new Slovak Antidiscrimination Act was struck down as unconstitutional. *SCC Pl. ÚS 8/04-202*, cf. n.1168. I have argued previously that this stemmed from a formal understanding of equality, but was enabled by the fact that the provision of the EU directive was not mandatory. See Havelková, 'Burden', 688 ff.

[1389] This has, admittedly, been the case so far in the areas of antidiscrimination law.

[1390] European Commission, 'Proposal for a Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures ' (*http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0614:FIN:en:PDF*, 14 November 2012) accessed 20 February 2013

the EU level,[1391] and if adopted, would meet with serious backlash at the national level.

I believe the more useful lessons for EU law are thus at the level of realizing and understanding the different development that the CEE countries had. Some in the Western Europe are arguing[1392] for a redefinition of antidiscrimination law as part of a broader social policy, away from the liberal individualized approach. While this might be a logical step in a traditionally rights-based system of some member states, it might further weaken the position of antidiscrimination rights in the CEE countries, where equality has traditionally been a part of social policy, but where the emphasis on individual antidiscrimination rights has been missing. Similarly, there has been a move towards gender mainstreaming – the incorporation of gender equality considerations into the social mainstream, and considering it at every step of policy, from design to implementation, monitoring and evaluation.[1393] Gender mainstreaming is an important step to achieving gender equality, but can only be effective in situations where both the concepts of gender and (in)equality are actually understood. I have shown that this is not the case in the Czech Republic. For post-communist CEE countries, it is the specific measures addressing material and cultural gender inequalities which still need to be kept.

[1391] The current government already intimated that it will vote against it in the Council. Zuzana Kleknerová, 'Kvóty pro ženy nebudou. V EU je zablokuje i Česko' (*http://aktualne.centrum.cz/zahranici/evropska-unie/clanek.phtml?id=756518*, 6 September 2012) accessed 20 February 2013.

[1392] For example Daniel Cuypers at a recent workshop on 'EU non-discrimination law and policy – a future mandate?' in Leeds (5 December 2012).

[1393] Paraphrased from European Commission, 'Guide on Gender Mainstreaming' (*http://ec.europa.eu/employment_social/equal/data/document/gendermain_en.pdf*, 2004) accessed 20 February 2013.

6 Lessons for international feminism

I observed that due to its intellectual isolation during State Socialism, the Czech Republic has missed the 'second wave' of Western feminism and its insights into gender inequality, especially into the cultural and symbolic aspects of patriarchy, into sexuality and gender-based violence. And I have argued that it needs to incorporate them in order to be able to understand and tackle gender inequality, and adopt and correctly apply gender-progressive laws. Does the different history of gender and feminism in the CEE have any lessons for international feminism? I believe it does. My preliminary[1394] analysis is that the 'Second World'[1395] is in a different position to both 'First World' and 'Third World' with regards to feminism.

When some 'Third World' feminists criticize 'second wave' 'First World' feminism and especially radical feminists, they do so because they have been experiencing insufficient redistributive policies and consequently, for many of them, development and redistribution are considered the more crucial aspect of gender inequality today.[1396] If poverty is the primary concern, then issues of culture, identity, sexuality, etc. can be seen as less important or artificial.[1397]

[1394] As with the lessons for the EU, I consider this a topic which deserves more attention and will turn to it as a follow-up project to the thesis.

[1395] The term was used in the Cold War era to describe the socialist Eastern bloc as distinct from the developed capitalist countries, mostly of North America and Western Europe ('First World'), and from the non-aligned developing countries, mostly in Africa, South America and South-East Asia ('Third World').

[1396] In the context of prostitution, this shines through for example in Rosaan Kruger, 'Sex Work from a Feminist Perspective: A Visit to the Jordan Case' (2004) 20 South African Journal on Human Rights 138.

[1397] The reassertion of 'redistribution' policies after a period of emphasis on 'recognition' is apparent also in Fraser's writings. See especially Part I of Olson, *Adding*.

The ‘Second world’, on the other hand, has experienced forty years of redistributive policies under State Socialism. What it continues to need is greater awareness of cultural harms. In the legal sphere, this would include for example accepting that compensation for immaterial harms caused by discrimination and by gender-based violence needs to be available to victims, developing an understanding of an androcentric bias in law, and accepting the need to redefine the male-based ‘norm’. The different experience form the ‘Second World’, makes Eastern feminists, like myself, to some extent ‘out-of-sync’ with both ‘First World’ Western feminist, as well as many of their critics, especially in the ‘Third World’. Our different experience and standpoint might be beneficial to international feminism, as it might lead to the revisiting of some ‘second wave’ debates and of the radical feminist project, from a fresh perspective.

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