

The struggle for social constructivism in post-socialist Central and Eastern Europe

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The paper argues that some of the difficulties gender equality is facing in post-socialist Central and Eastern Europe can be explained by a missing paradigmatic shift to a constructivist understanding of gender. Arguably the most explicit rejection of a constructivist gender perspective was recently served by the Bulgarian Constitutional Court's judgment, closely analysed in the paper, which found certain provisions of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) incompatible with the Bulgarian Constitution. A constructivist analysis of gender-based violence is capable of offering a range of important contextual insights into gender-based violence, whereas those who only have biology in their analytical arsenal are more limited (for example sexual predation is thus either an "innate" male sexual drive or psychologically certifiable deviance). The Bulgarian Constitutional Court, as the paper shows, does not even get as far as debating the insights gender analysis offers, but rather rejects them wholesale merely because the term "gender" is used. While a constructivist, critical (feminist) understanding of gender is under attack globally, this paper shows that the assault is particularly grave in at least certain post-socialist CEE countries, where it is not a mere backlash against a reasonably well-established viewpoint, but a fierce ex ante rejection of a concept not yet understood or debated.

The paper argues that some of the difficulties gender equality is facing in post-socialist Central and Eastern Europe ("CEE"), including before constitutional courts, can be explained by a missing paradigmatic shift to a constructivist understanding of gender. Arguably the most explicit rejection of a constructivist gender perspective was recently served by a judgment of the Bulgarian Constitutional Court which found certain provisions of the Council of Europe Convention on preventing and combating violence against women and domestic violence ("Istanbul Convention" or "IC") incompatible with the Bulgarian Constitution ("BC"). For reasons of space, this decision, and gender-based violence, will be the focus of this paper. Much of the wider analysis is based on the author's previous work on Czechia.¹

The paper is divided into three parts. The first briefly discusses why social constructivism is important in law. The second part substantiates² the claim that this perspective is missing or severely marginalized in CEE. The final part explores the reasons for this, highlighting in particular post-socialist legacies.

What is social constructivism and why is it important in law³

Social constructivism is the insight that what we take to be "reality" is, at least partially, if not completely, socially situated. For gender specifically,⁴ this means accepting that characteristics, preferences or roles of men and women are not necessarily in-born and

¹ Esp BARBARA HAVELKOVÁ, GENDER EQUALITY IN LAW: UNCOVERING THE LEGACIES OF CZECH STATE SOCIALISM (Hart/Bloomsbury 2017).

² For reasons of space, the paper illustrated this on the single case Bulgarian Constitutional Court, Decision No 13, Sofia 27 July 2018; [Решение № 13, София, 27 юли 2018 г. \(обн., ДВ, бр. 65 от 07.08.2018 г.\)](#).

³ For reasons of space, this section is written summarily and in author's own words. A full presentation and references to the rich existing, mostly Anglo-American, literature are not provided, as the reader will be familiar with them. Rather, I use the space available to reference CEE developments and analysis.

⁴ The following analysis is mine and draws heavily on second wave radical feminism. I, of course, acknowledge that there are some disagreements about this among feminists.

therefore inevitable. Importantly, constructivism does not make ontological claims but epistemological ones. The question is not how much of the perceived differences between men and women are due to nature or nurture respectively. Rather, it focuses on how our ideas of “men” and “women”, or masculinity and femininity, come about, how we are socialized into them, and, of particular import for law, how they are hierarchically organized in ways that lead to injustice. The opposite of social constructivism is biological determinism, which sees everything as predetermined by nature, and essentialism, which, as a consequence, believes in inevitable essential characteristics of men and women.

Two things follow from this approach. First, by highlighting the constructed nature of our understanding of men’s and women’s characteristics, roles, preferences, etcetera, it also challenges the idea that the current set-up is neutral. This applies to culture and society, and includes the law. Second, there is a structural element. If we acknowledge the socially constructed nature of gender, we are saying that there is environmental socio-cultural conditioning, and so what we think of ourselves and others is not as much up to us as we might think. Like a constructivist understanding of gender, these two propositions are also resisted in the legal communities of CEE. The first because of the dominance of a specific brand of legal positivism,⁵ and the second due to a particular brand of neo-liberalism, which does not see beyond the individual.⁶

A constructivist gender analysis is important to legal scholarship as well as legal practice, and for public and private law alike. Looking specifically at gender-based violence,⁷ a constructivist gender analysis allows us to see not only that women are the typical or overwhelming “victims”⁸ of certain types of violence or abuse (intimate partner violence, sexual violence, stalking, non-consensual distribution of intimate images, etc), but also that they are the targets because they are women.⁹ The constructivist approach takes the gendered social context into account. In the words of the Preamble to the Istanbul Convention:

“Recognising that violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women;

Recognising the structural nature of violence against women as gender-based violence, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men;[...]”

Without a gender analysis, wolf-whistles or sexualized commentary on the street, at work, or on the internet can be seen as harmless flirting or compliments, as they indeed often are seen in CEE.¹⁰ A gender analysis provides the insight that the (male) self-understanding of entitlement to evaluate women on the basis of their looks is part of a wider patriarchal subordination mechanism, which bases the value of women primarily on their external

⁵ See e.g. ZDENĚK KÜHN, *THE JUDICIARY IN CENTRAL AND EASTERN EUROPE: MECHANICAL JURISPRUDENCE IN TRANSFORMATION?* (Martinus Nijhoff 2011) and Isabel Marcus, *The "Woman Question" in Post-Socialist Legal Education*, 36 HUMAN RIGHTS QUARTERLY 207 (2014).

⁶ Havelková, *supra* note 1, at 199-205, 277.

⁷ I made the following points previously in Barbara Havelková, *Feminismus, gender a právo (Feminism, Gender, and the Law)* in MUŽSKÉ PRÁVO. JSOU PRÁVNÍ PRAVIDLA NEUTRÁLNÍ? (MEN'S LAWS. ARE LEGAL RULES NEUTRAL?) (Kateřina Šimáčková et al. eds., Forthcoming).

⁸ I acknowledge the critique of this term, but use it as a legal term (as used in the Istanbul Convention).

⁹ Both these elements of the definition have been contained already in Committee on the Elimination of Discrimination Against Women, Gen. Recommendation No. 19, U.N. Doc. A/47/38 (Jan. 29, 1992).

¹⁰ Barbara Havelková & Zuzana Andreska, *Much Backlash Against Nothing: #MeToo in Czechia*, in THE GLOBAL #METOO MOVEMENT (Anne Noel & David Oppenheimer eds., Forthcoming).

attractiveness to men rather than their internal qualities as human beings. It is not an accident that many sexual predators in Czechia have denied their behavior, using the “unattractiveness” of their “victims” as proof.¹¹ A similar entitlement to control applies to the enforcing the traditional gender binary, which explains why those who transgress it (LGBT+) are particular targets of violence and abuse. A gender analysis also helps us understand that this type of harassment is based on the belief that public spaces (be they real or virtual) belong to men who have to right to “police” them. These insights allow a better understanding of why harassment often dramatically escalates when women or LGBT+ do not “play along”. When women and LGBT+ reject harassment in no uncertain terms, they are refusing to submit not only to the concrete perpetrator, but they undermine several more general patriarchal imperatives.

To those who only have biology in their analytical arsenal, the explanation of sexual predation can be either “innate”¹² male sexual drive or psychologically certifiable deviance. This narrative, which survives in Czechia even in “expert” writing,¹³ makes most of sexual violence and abuse excusable because it is said to be biologically determined and thus natural. It is submitted that it is impossible to fully address the problem of gender-based violence, for example to realize that even its “lighter” forms such as street or online harassment feed into its more “serious” forms such as rape, unless one accepts the social constructivist insights into its causes. Namely, that much violence is perpetrated against women and LGBT+ because it is socially possible or even encouraged and that it serves to uphold certain tenets of the patriarchal gender order. Interestingly, however, as the following analysis of the Bulgarian decision shows, at least in one CEE country, we do not even get as far as debating these insights. They are being rejected before having been truly understood and considered, merely because the term “gender” is used.

2. The lack of social constructivism – the Istanbul Convention before the Bulgarian Constitutional Court

A striking rejection of gender, as an analytical (and) legal concept, came in July 2018 from the Bulgarian Constitutional Court.¹⁴ The case was brought by a group of 75 MPs who claimed that provisions of the Istanbul Convention defining gender in constructivist terms¹⁵ and creating obligations to change socio-cultural patterns¹⁶ including via education,¹⁷ were incompatible with the Bulgarian Constitution,¹⁸ especially its definition of matrimony as a “free¹⁹ union between a man and a woman”.²⁰ Several interveners on the side of the MPs raised other aspects of the Istanbul Convention, notably the fact that it contains “gender identity” among protected grounds of discrimination.²¹ The interveners also suggested further provisions

¹¹ Id.

¹² Havelková, *supra* note 1, at 120-1.

¹³ See references in id. at 180-8.

¹⁴ For more background on the issue, as well as discussion of the judgment, see Ruzha Smilova, “Promoting ‘Gender Ideology’: Constitutional Court of Bulgaria Declares Istanbul Convention Unconstitutional”, Oxford Human Rights Hub (22 August 2018) at <https://ohrh.law.ox.ac.uk/promoting-gender-ideology-constitutional-court-of-bulgaria-declares-istanbul-convention-unconstitutional/> and Radosveta Vassileva, “Bulgaria’s Constitutional Troubles with the Istanbul Convention”, *Verfassungsblog* (2 August 2018) at <https://verfassungsblog.de/bulgarias-constitutional-troubles-with-the-istanbul-convention/>. My own analysis is based on a translation of the judgment into Czech, provided to me by the Czech Constitutional Court judge, Kateřina Šimáčková.

¹⁵ Art 3(c) IC.

¹⁶ Art 12(1) IC.

¹⁷ Art 14(1) IC.

¹⁸ I am working with the English version available at: <https://www.parliament.bg/en/const>.

¹⁹ It is my understanding that a better translation from Bulgarian might be “voluntary”.

²⁰ Art 46(1) BC.

²¹ Art 4(3) IC.

of the Bulgarian Constitution were being violated, including the equality provision,²² the right to privacy,²³ as well as parents' rights to raising and upbringing of children,²⁴ and the guarantee of special protection to mothers in health care, work and social assistance.²⁵ The Court found the Istanbul Convention incompatible with the Bulgarian Constitution in a 8-4 decision in which all five women judges joined the majority.

The Court, in its decisions, shared the claimants' and supporting interveners' twofold worries about gender. First, and this was a politically particularly salient fear in Bulgaria at the time,²⁶ that it would grant further²⁷ LGBT+ rights. Second, that it would destabilize the gender binary as it applies to men and women. The Court went to considerable lengths to substantiate these fears, including by setting out outright straw-women.

First, in relation to LGBT+ rights, the Court posited that the inclusion of "gender identity" among protected grounds of discrimination²⁸ would "require the Bulgarian Republic to introduce processes that would allow for the legal recognition of sex, different from the biological". This requirement is patently not part of the Convention, as it clearly goes beyond its scope.

Second, as for the gender binary, in order to substantiate the clash between the "social sex" and "biological sex", the majority felt the need to define the meaning of sex in the Bulgarian Constitution. It did so in clearly biological determinist, essentialist terms:

"The Constitution and the whole of Bulgarian legislation is based on a binary understanding of the existence of the human species. [...] The social dimension of sex is unambiguously perceived in interaction with the biological one (Art 47(2) BC [on special protection to mothers]). In that constitutional provision, the biological sex of 'a woman' is connected with her social role – 'mother,' 'giving birth,' and 'obstetric care'. In short, the term 'sex' is used by the constitution-maker as a unity of the biologically determined and the socially constructed."

Underlying these was a hostile take on the concept of gender, which the Court did not dignify with fair treatment. For example, it used a wider definition of gender than that provided in the Istanbul Convention:²⁹ "a social construct, determined by *subjective perceptions and views* of the individual and society on the role of men and women."³⁰ The emphasis on subjectivity then allowed the majority to construct an argument about how this leads to "lack of clarity" and "ambiguity", in breach of rule of law: "the requirements of the rule of law does not allow the existence of two parallel and mutually contradictory meaning of the term 'sex'."³¹ The trouble-maker is "gender ideology",³² a term the majority used as a straightforward, unproblematic description of a constructivist understanding of gender:

²² Art 6(2) BC.

²³ Art 32(1) BC.

²⁴ Art 47(1) BC.

²⁵ Art 47(2) BC.

²⁶ Smilova, *supra* note 15; Vassileva, *supra* note 15.

²⁷ Beyond non-discrimination rights, mandated by EU directives.

²⁸ Art 4(3) IC.

²⁹ See also Smilova, *supra* 15.

³⁰ I am using Ruzha Smilova's translation into English here, *supra* 15.

³¹ It is true that the situation is muddled by a poor translation of the Istanbul Convention into Bulgarian (which does not use the term gender at all, and translates it inconsistently either as just 'sex' or 'social sex'). But this could have been easily remedied by looking at the binding French or English versions.

³² The term is used in parentheses in the judgment, but not problematized.

“‘gender ideology’ – a collection of thoughts, beliefs and understandings that biologically determined characteristics of sex are *irrelevant*, and the only relevant thing is *self-identification*. The absence of a uniform understanding of the term ‘gender’ are illustrated by active social and political debates on the ‘*for*’ or ‘*against*’ *gender ideology*”³³, which has been happening for more than two decades in tens of countries.”³⁴

Not only does this statement not capture the current state of art of gender scholarship and activism,³⁵ it also makes clear that the majority believe the current gender set-up to be neutral and normal. Patriarchy is not “gender ideology”, whereas a constructivist, critical understanding of gender is.

3. The lack of social constructivism as a historical legacy?

The hostility to gender can be surprising to some in “the West”, who assumed that a high level of equality between men and women was achieved in CEE already under state socialism. As I have shown elsewhere on the example of Czechia,³⁶ while this was true to considerable extent in the socio-economic sense (general measures levelling both wealth and income helped), it was true to a very minimal extent in socio-cultural terms. A limited shift in understanding of the public role of women happened (they entered politics and workplace) but a traditional gender division of roles persisted in the private sphere. Women faced the triple burden of (mostly full-time) work, care of children, and care of home and husband. This in turn meant that women’s public role was seen as secondary to their private role, and secondary to men. A vertical and horizontal segregation and considerable gender wage gap thus persisted during the entire period.

An equally important point is chronological. The most gender-revolutionary period came early after the Communist take-over in 1948 but regressed from 1960s onwards. There was first equality, then difference. The divergence of development from 1960s or 1970s onwards between “the West” and “the East” is of particular salience. From this point onwards, “an epistemological turn happened in Western social sciences and humanities (constructivism, the linguistic turn, the ethnological turn with an emphasis on qualitative research, post-structuralism)”,³⁷ supported by feminism, which brought the “analytical concepts of ‘gender’ and the ‘gender order’”.³⁸ Due to its almost complete intellectual isolation, this paradigmatic shift – to social constructivism, to a scepticism of objectivity or neutrality of existing narratives, and to structuralism – never happened in the state socialist space, nor was caught up with since the fall of the regimes.

Conclusion

A constructivist, critical (feminist) understanding of gender is under attack globally. This paper showed that it is particularly grave in at least certain post-socialist CEE countries, where it is not a mere backlash against a reasonably well-established viewpoint, but an *ex ante* rejection of a concept not yet understood or debated.

³³ This time without parentheses.

³⁴ Emphasis mine.

³⁵ As I discuss above, few would make the ontological claim that biology is irrelevant.

³⁶ See esp HAVELKOVÁ, *supra* 1, at 27-63.

³⁷ Hana Havelková, *(De)centralizovaná genderová politika: role Státní populační komise ((De)Centralized Gender Politics: the Role of the State Population Committee)*, in *PROMĚNY GENDEROVÉ KULTURY ČESKÉ SPOLEČNOSTI 1948–1989 (THE METAMORPHOSES OF GENDER CULTURE IN CZECH SOCIETY 1948-1989)* (Hana Havelková & Libora Oates-Indruchová eds., 2015) at 145.

³⁸ *Id.* at 145.