

# Gender Equality in Law

Uncovering the Legacies of  
Czech State Socialism

Barbara Havelková



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# 1

## *Introduction*

**G**ENDER EQUALITY LAW is not doing well in Czechia.<sup>1</sup> When obliged to adopt, interpret and apply statutory anti-discrimination provisions as a condition of membership in the European Union, legislators as well as judges have repeatedly expressed hostility and demonstrated a fundamental lack of understanding of key ideas underpinning them.<sup>2</sup> For example, when the Czech Senate passed the Anti-Discrimination Act (ADA) in 2008, it adopted a resolution—a rarely used declarative instrument—to express its opposition to the statute:

The Senate considers the Anti-Discrimination Act to be a tool for implementation of the requirements of EU law, the non-realisation 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 the adoption of further anti-discrimination measures at the EU level.<sup>3</sup>

Scepticism toward equality and anti-discrimination rights<sup>4</sup> is also common among the judiciary. For example, the Constitutional Court judge, Vojtěch Šimíček, writing extra-judicially in 2015, stated that one of the pitfalls facing human rights was

the current *anti-discrimination hysteria* [original emphasis]. The originally praiseworthy movement, which has achieved notable results, has long surpassed the borders of the reasonable. It has started to ignore that our whole life is based on *our mutual difference*, and our life is beautiful and noteworthy because each of us

<sup>1</sup> The name Czechia is new, approved by the Czech Cabinet as the official short name of the Czech Republic in the first half of 2016. I use the name Czechia to describe the Czech Republic (1993–today) and the Czech part of Czechoslovakia (1918–93). Slovak law was different for at least part of the period discussed. Whereas Czechia followed Austrian law when Czechoslovakia was established in 1918, Slovakia had Hungarian law and retained elements of it until the 1950s. After the federalisation of Czechoslovakia in 1968, the laws of the two countries once again diverged somewhat.

<sup>2</sup> I document this in detail in Ch 8.

<sup>3</sup> Senate, Resolution no 377 of 2008 (23 April 2008, on file with the author) (emphasis added). All translations are mine unless indicated otherwise.

<sup>4</sup> I discuss the possible difference between equality and anti-discrimination in section III.A.iii below, fn 72.

## 2 Introduction

is different. ... It is undoubtedly the law's task to eliminate unjustified differences. It *ought not, however, have the ambition to interfere with private relations*: to decide whom I should employ and in what position, ... with whom I can contract a rental agreement, how a candidate list [of a political party] should be constituted ... This tendency inevitably leads to two consequences. First, the limitation of the *freedom and free will* of individuals and, at the same time, the evasion of the rules. As much as a river eventually finds its way to its own river bed, so does *real life reject regulations* which are not *natural*.<sup>5</sup>

The resistance to anti-discrimination rights among Czech judges has meant that, more than a decade after Czechia's accession to the EU,<sup>6</sup> a woman has yet to be wholly successful when bringing a case of sex discrimination before the Czech courts.

The negative attitudes are not limited to Czechia; they are common among the formerly state-socialist countries of Central and Eastern Europe (CEE).<sup>7</sup> And they go beyond the observable opposition to the implementation of the EU anti-discrimination *acquis*.<sup>8</sup> A 'gender curtain' seems to hang between the 'West' and the 'East'<sup>9</sup> more generally with regards to gender equality

<sup>5</sup> V Šimíček, 'Lidská práva na rozcestí [Human Rights at the Crossroads]' in J Příbání *et al* (eds), *Lidská práva. (Ne)smysl české politiky? [Human Rights. The (Non)Sense of Czech Politics?]* (SLON, 2015) 149–50, emphasis added.

<sup>6</sup> Czechia acceded to the EU on 1 May 2004. From this moment on, the rights contained in the EU anti-discrimination *acquis* became directly effective against the state and indirectly effective in horizontal relations. See Ch 8.

<sup>7</sup> I use the term 'Central and Eastern Europe' (or CEE) to describe the former 'Eastern bloc' countries that did not become members of the Commonwealth of Independent States, the successor to the Soviet Union (ie countries that were Soviet satellites plus the Baltic states). My analysis is particularly applicable to post-socialist countries that have joined the EU (some in 2004, others in 2007 and 2013). These are the jurisdictions typically represented in the CEE literature, which contains a large body of work that deals with the deficiencies and difficulties of implementing EU anti-discrimination law. See, eg, C 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; M Zysk, 'Age Discrimination Law in a Country with a Communist History: The Example of Poland' (2006) 12 *European Law Journal* 371; C Chiva, 'The Limits of Europeanization: EU Accession and Gender Equality in Bulgaria and Romania' (2009) 10 *Perspectives on European Politics and Society* 195; U Sedelmeier, 'Post-Accession Compliance with EU Gender Equality Legislation in Post-Communist New Member States' (2009) 13 *European Integration Online Papers* 1; A Gerber, 'The Letter Versus the Spirit: Barriers to Meaningful Implementation of Gender Equality Policy in Poland' (2010) 33 *Women's Studies International Forum* 30; G Selanec, 'A Betrayed Ideal: The Problem of Enforcement of EU Sex Equality Guarantees in the CEE Post-socialist Legal Systems' (SJD thesis, University of Michigan Law School, 2012).

<sup>8</sup> The EU *acquis* 'is the body of common rights and obligations that are binding on all EU countries, as EU Members'. Aside from the legislation and the case law of the Court of Justice of the EU (CJEU), it is understood also to comprise 'principles and political objectives of the Treaties'. EU, 'Glossary', available at <http://eur-lex.europa.eu/summary/glossary/acquis.html>. I use the term *acquis*, as it helps highlight that adopting the EU *acquis* goes beyond a mere transposition of norms into the national legal system. For a more detailed discussion, see Selanec, 'A Betrayed Ideal' (2012), 148 ff.

<sup>9</sup> The labels 'West' and 'East' provide a useful shorthand for distinguishing between former socialist countries and the 'developed' capitalist countries, but they are of course both imprecise and somewhat homogenising. When I refer to the West, I understand it to include Western

law. For example, protective labour legislation that distinguishes between men and women with regard to the maximum weight they are allowed to lift has persisted in the CEE, but has largely been abandoned in the West.<sup>10</sup> The option of giving birth outside hospital is either illegal or made exceedingly difficult in many CEE countries, while it is both legal and common in the West.<sup>11</sup> Paternity leave has been introduced in half of the EU's old Member States and in only two post-socialist ones.<sup>12</sup> When the Czech Cabinet discussed the signing of the Council of Europe's Convention on Preventing and Combating Violence against Women and Domestic Violence (the so-called 'Istanbul Convention') in early 2016,<sup>13</sup> it was one of the last three EU Member countries to sign, alongside Bulgaria and Lithuania.<sup>14</sup>

This book explores this scepticism as regards gender equality, and asks how it can be explained with reference to legal and socio-legal developments that started in the state-socialist<sup>15</sup> past and which are still relevant today. It answers these questions by looking at how gender equality has been regulated in law and understood by lawmakers, judges and legal scholars in Czechia during the period between 1948 and today.<sup>16</sup> Thus, in the foreground, the book examines legal developments in gender-relevant areas,<sup>17</sup>

Europe and North America. When I make a specific point about Western Europe (typically in relation to the EU), about the common law legal family (typically in discussions of certain aspects of anti-discrimination law doctrine) or about Anglo-American space (typically in discussing feminist theories), I so specify in the text. This addresses to some extent the question of imprecision. As for homogenisation, I acknowledge the existing critiques that neither 'East' nor 'West' is homogeneous; see, eg, FE 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' defined itself as against the 'East'—it was a warning against homogenisation, oversimplification and 'orientalism' in relation to a little-known region. I do not believe that corresponding worries exist with regard to my treatment of the intellectually dominant Western Europe and North America.

<sup>10</sup> See Ch 6, p 173 below.

<sup>11</sup> See Ch 6, p 166–169 below.

<sup>12</sup> European Commission, *Maternity, Paternity and Parental Leave: Data Related to Duration and Compensation Rates in the European Union* (European Parliament, 2015), available at [www.europarl.europa.eu/RegData/etudes/STUD/2015/509999/IPOL\\_STU\(2015\)509999\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509999/IPOL_STU(2015)509999_EN.pdf); see Ch 6, p 176 below.

<sup>13</sup> See Ch 6, p 155 and 280 below.

<sup>14</sup> Ministry of Justice, *Předkládací zpráva pro vládu ČR k Istanbulské úmluvě* [*Supporting Report for the Cabinet on the Istanbul Convention*] (Ref No 9641/2015-LO-SP/18—on file with the author, 2015).

<sup>15</sup> 'State socialism' is a term commonly used in the literature to describe the period of rule of Communist Parties in CEE countries after World War II. Some authors use different terms, such as 'real socialism' (eg Gordon Skilling) and 'real existing socialism' (eg J Hersh and D Schmidt Johannes, *The Aftermath of 'Real Existing Socialism' in Eastern Europe* (Macmillan Press/St Martin's Press, 1996). While in common Czech parlance the term 'Communism' is used, it is not accurate. Kaplan argues that the power or regime can be described as 'communist' (due to the rule of Communist Parties), but that the society should be described as 'socialist': K Kaplan, *Kořeny československé reformy 1968* [*The Roots of Czechoslovak Reform 1968*] (Doplněk, 2000).

<sup>16</sup> The book describes the situation as of August 2016.

<sup>17</sup> See section III.B.i below.

## 4 Introduction

most importantly in equality and anti-discrimination law. But it also excavates the underlying, sometimes hidden, yet crucial understandings of key concepts such as women, gender, equality, discrimination, rights and the role of law in society. As the book shows, these understandings significantly determine whether the legal provisions, and the interpretation given to them by the courts, will be gender-progressive<sup>18</sup> or not. The quotations set out above give an indication of some of the intellectual and conceptual difficulties facing gender equality in Czechia today: an essentialist understanding of differences between men and women being natural, a notion that equality is incompatible with freedom, an assumption that Czechia is unique and not faced with a problem of gender inequality known to other countries, and a perception that existing laws are objective and neutral, while any new gender-progressive regulation of social relations is an unacceptable interference with the natural social order.

In the following, I briefly present the book's main argument (section I) and its structure (section II). I then elaborate on its methodology (section III).

### I. MAIN ARGUMENT

Gender-progressive legislation has faced difficulties every step of the way: in the process of adoption by lawmakers, interpretation and application by the courts, and conceptualisation by legal scholars. This book argues that these difficulties are deep-seated in underlying ideas about women, lack of understanding of gender as a social construct<sup>19</sup> and of gender order as an important and pervasive social structure, an extremely narrow understanding of what constitutes discrimination, and a refusal—or at best reluctance—to use law and rights to combat discrimination and to further gender equality. It also argues that these underlying understandings are path-dependent<sup>20</sup> on state socialism. Blindness to gender and the gender order among Czech lawmakers, judges and legal scholars has been at the root of the problem. It is impossible to get gender equality right unless the socially constructed nature of gender is acknowledged. This is particularly important for drawing the line correctly between when to treat women the same, and facilitate equal treatment, and when to acknowledge and facilitate or protect their difference.<sup>21</sup> Moreover, for anti-discrimination law to work, the structural nature of inequality needs to be acknowledged. It is especially important to

<sup>18</sup> See section III.A.ii below.

<sup>19</sup> See section III.A.i below.

<sup>20</sup> The idea that 'what a society is, has and does depends crucially on what it was, had and did'. M Krygier and A Czarnota, 'Rights, Civil Society, and Post-Communist Society' in A Sajó (ed), *Western Rights? Post-Communist Application* (Kluwer Law International, 1996) 106.

<sup>21</sup> See p 49 and 220 below.

recognise that the existing setup, societal and legal, is neither natural nor neutral. Without it, it is hard to comprehend, for example, how pay structures might be based on a socio-cultural undervaluation of work *typically done* by women or work *when* done by women.<sup>22</sup> Without a recognition that institutions might be biased along axes such as sex/gender,<sup>23</sup> it is difficult for acts that have disparate impact on women to trigger suspicion in judges.<sup>24</sup>

## A. Women and Gender

Women and their concerns have not been entirely ignored or disregarded by law and policy in Czechia. Rather, they have been identified with certain ‘roles’, especially motherhood, and supported only when they conform to them. Women’s ‘difference’, mostly understood as biologically determined, has often been used to dismiss inequality as natural. Men have been the norm in the public life, and have largely been absent from private life. The androcentric nature of the setup in the public sphere of work and politics, and the gender role-conserving nature of the setup in the private sphere of the family, and the role law plays in sustaining them, have not been subjected to reflection and critique.

Gender, as a social construct, an organising social principle and an axis of disadvantage, has not been seen and acknowledged by lawmakers, judges and legal scholars. Under state socialism, it was obscured: the socialist state was ideologically conditioned to see only ‘class’, while the population tended to identify the ‘regime’ as the source of its oppression. After 1989, it was the market-liberal narrative of choice and individualism that further hid any structural causes of inequality, including patriarchy. A bottom-up women’s awareness-raising and feminist movement was entirely missing during state socialism, and is only slowly constituting itself in Czechia today. Under state socialism, it was suppressed, just like all other civic movements, and while the language of women’s emancipation was ‘expropriated’<sup>25</sup> by the

<sup>22</sup> See esp p 271.

<sup>23</sup> 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 both widely used as well as challenged, epistemologically and ontologically. See, eg, J Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, 1990). There is, however, a difference between problematising a distinction that has been intellectually, and arguably even politically, well established and internalised in the West on the one hand, and not having arrived at the distinction at all in the East. It is hard to deconstruct without having constructed. The distinction thus has a role to play in an analysis of state-socialist and post-socialist CEE.

<sup>24</sup> See Ch 8 section III for detail.

<sup>25</sup> H Havelková, ‘Dreifache Enteignung und eine unterbrochene Chance: Der „Prager Frühling“ und die Frauen- und Geschlechterdiskussion in der Tschechoslowakei’ (2009)

## 6 Introduction

socialist state, its project did not truly liberate women. Since 1989, feminism has been considered either unhelpful or harmful, due to its—incorrect—association with the socialist past.

### B. Equality and Anti-Discrimination

Equality was a central concern of the socialist state. However, its equality project aimed at socio-economic levelling, and was not particularly concerned with special characteristics such as sex/gender. Moreover, it did not contain an individual anti-discrimination right, therefore the conceptual step that the law should interfere with discriminatory acts or entrenched social structures of disadvantage along axes such as sex/gender, the cornerstone of a progressive understanding of anti-discrimination law in many Western jurisdictions today,<sup>26</sup> was not made. While the lack of legal anti-discrimination guarantees was remedied in the post-socialist period thanks to the requirements of EU membership, the underlying understandings have not shifted. A legal harmonisation took place without a socio-cultural one. Importantly, women's difference continues to be seen as an explanation and justification for inequality and discrimination.

### C. The Role of Law and Rights

The socialist state saw the law as a tool for social change, but this 'social engineering'<sup>27</sup> was rejected after 1989. On the contrary, as the above-cited excerpt from the Senate resolution exemplifies, it is now asserted in policy and legal debates that the law should not interfere with the 'natural' order of things. Furthermore, law itself is seen as neutral and objective, while calls for gender-progressive legislation are seen as biased.

Gender equality is also hurt by a particular post-socialist understanding of rights. Under state socialism, rights were a mirage: legal guarantees were not enforceable individual entitlements but often mere policy pronouncements. 'Rights' had to correspond to a 'collective interest', and many were connected to obligations. The understanding of rights as connected to 'desert' and to the support of the majority was carried over into the post-socialist period, and has weakened anti-discrimination and equality rights claims, as well as other claims by women.

20 *L'Homme* 31; H Havelková and L Oates-Indruchová, 'Expropriated Voice' in Havelková and Oates-Indruchová (eds), *The Politics of Gender Culture under State Socialism: An Expropriated Voice* (Routledge, 2014) 10–11.

<sup>26</sup> Among common law countries, notably Canada and South Africa; beyond common law countries, in the EU and under the ECHR. See p 251 and 256.

<sup>27</sup> See Ch 3 section II.A.

A ‘new’ understanding of rights as freedoms also emerged after 1989, connected to market liberalism and the idea of a strong independent individual. It supports freedoms for the strong, but any request for rights and empowerment from disadvantaged groups, including women, is seen as ‘request for protection’ and thus rejected.

## II. BOOK STRUCTURE AND CHAPTER SUMMARIES

The book is organised chronologically. Part I (Chapters 2 to 5) discusses gender equality law during the period of state socialism (1948–89), while Part II (Chapters 6 to 9) looks at the post-socialist period (1989–today). The two parts mirror one another in terms of content: Chapters 2 and 6 discuss the development of the legal regulation of women and gender; Chapters 3 and 7 look at the characteristics of law and rights; Chapters 4 and 8 examine the legal concepts and the legal guarantees of equality and non-discrimination; and Chapters 5 and 9 analyse the underlying understandings of gender, the gender order and gender inequality.

Chapter 2 examines legal regulation in areas that were seen as answering the ‘woman question’ (*ženská otázka*)<sup>28</sup> under state socialism:<sup>29</sup> family and work. I observe that while much was done for women in terms of formal equality in law in the public sphere, there was a marked lack of empowerment of women in the family and an absence of involvement of men in it. The socialist state thus at least to some extent promoted ‘public equality’<sup>30</sup> but accepted ‘private difference’. The project of equality also changed over time: The early activist period of the 1950s delivered positive legal changes, but these policies were challenged and eventually outweighed by pro-maternity and pro-family policies aiming at population growth from the 1960s onwards. The diachronic analysis thus reveals that there was ‘first equality, then difference’.

Chapter 3 observes that law under state socialism, public law in particular, was seen as a legitimate tool for social change. This was good for gender equality in the activist and progressive 1950s, but became more problematic later. Moreover, the memory of this ‘social engineering’ persisted after 1989, when it got exaggerated, discredited and used against the introduction of regulatory public law instruments in private law. As for rights, they were also understood differently in the state-socialist East than they were in the West. They were not seen as individual entitlements but as mere policy proclamations, which made guarantees of rights, including equality, a mirage.

<sup>28</sup> The term used by Marxist-Leninist theorists and in state-socialist official writings.

<sup>29</sup> See fn 81 below.

<sup>30</sup> This had its limits too—segregation and a considerable wage gap persisted throughout the period. See p 113.

## 8 Introduction

Moreover, ‘rights’ had to correspond to collective interest and were often connected to obligations. Both traits were to some extent carried over into the post-socialist era.

Chapter 4 argues that the state-socialist equality project was limited. There was socio-economic levelling, but no anti-discrimination rights. The attention to specifically protected grounds, such as sex/gender, and to individual autonomy, as we know it from Western anti-discrimination law and scholarship,<sup>31</sup> was missing. Indeed, I suggest that the East and West have gone through very different developments with regard to equality and anti-discrimination law. Broadly speaking, the Western European development can be divided into three phases: the elimination of men’s legal privilege and guarantee of formal equality before law; the adoption of anti-discrimination legislation; and the rise of substantive and transformative equality. I argue that while the development was similar in the East during the first phase, phases two and three basically occurred in the opposite order in Czechia. There was first a substantive and transformative understanding of equality centred on class, and only later were anti-discrimination guarantees introduced. This was an important legacy for the post-socialist period, because it meant that the intellectual step that law ought to interfere with discrimination was not made, nor was any ground prepared for it.

Chapter 5 shows that these inadequacies and gaps in gender equality law were underpinned by blindness to gender and the gender order, as well as denials of the existence of inequality, denials of the injustice of it and denials of responsibility for it.<sup>32</sup> The roots of this blindness and denials were partly ideological, stemming from the Marxist-Leninist understanding of the natural difference of women, as well as its focus on class and capitalism to the exclusion of a recognition of other axes of disadvantage or systems of oppression. The regime’s expropriation of the language and agenda of equality meant that gender inequality was also obscured politically: women would have identified the regime as its source rather than patriarchy. Finally, gender was obscured epistemologically: the challenge to the perception that legal and social structures are natural, neutral and just, which happened in the West from 1970s onwards, did not occur in Czechoslovakia. Due to its isolation, Czechoslovakia missed the paradigmatic shift brought about by feminism, and Czechia has yet to experience it.

Part II turns to developments after the fall of the state-socialist regime in 1989. Chapter 6 documents that while many previously missing legal guarantees, such as enforceable constitutional and statutory anti-discrimination rights, were adopted, and previously neglected issues, such

<sup>31</sup> See discussion on p 206.

<sup>32</sup> I use Deborah Rhode’s framework, which—although created for the Anglo-American space—is apt for CEE as well. D Rhode, *Speaking of Sex: Denial of Gender Inequality* (Harvard University Press, 1997).

as gender-based violence, increasingly addressed, there has not been a genuine gender-progressive shift with regard to the underlying categories and understandings. I observe that the regulation of family and work, which was characterised by a combination of ‘public equality and private difference’ during state socialism, persisted in post-socialism. Despite apparent changes, such as the gender-neutralisation of regulation of 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 can be observed with regard to gender-based violence: despite positive legal developments in the post-socialist period, such as the criminalisation of domestic violence or stalking, the gender dimension of these issues continues to be denied and the law is written from a male perspective.

Chapter 7 observes that law and rights experienced continuity as well as change<sup>33</sup> in the years following the Velvet Revolution. I note that legal formalism, dominant among Czech lawyers during the 1970s and 1980s, survived the fall of state socialism. This has particularly harmed those areas of law that require purposive interpretation, such as equality and anti-discrimination law. The state-socialist understanding of rights as connected to desert, as conditional and as relativised by majority interest, has not waned either. Moreover, these inherited obstacles to gender equality have been joined by new challenges. A virulent market-liberal narrative rejected almost any legal regulation as an unacceptable social engineering, relegating most aspects of gender equality to manners or morals, not law. It also brought an understanding of rights as negative liberties. Supported by a resurgent social conservatism, this highly, albeit unwittingly, gendered account has defended negative freedoms for those who traditionally have them, but spurned new rights claims. Arguments drawing on economic liberalism and social conservatism, often together, have been raised by law-makers against new gender-progressive legislation and rights, as well as by judges in interpreting and applying the laws that have been adopted.

Chapter 8 provides an analysis of sex/gender equality and anti-discrimination law, and how it has been interpreted and applied by the Czech Constitutional Court (CCC) as well as by ordinary courts. In terms of the constitutional doctrine of sex/gender equality, it is currently difficult to

<sup>33</sup> The distinction between ‘change’ and ‘continuity’ has been problematised by Gal and Kligman, who argue that the process is better understood as ‘shifting interpretive frameworks’. S Gal and G Kligman, *The Politics of Gender after Socialism: A Comparative-Historical Essay* (Princeton University Press, 2000) 109 ff. I acknowledge this critique, and despite using the terms throughout the book, I offer a more nuanced assessment of these dynamics in the Conclusions in Ch 10.

assess, as all the five cases that have come before the CCC have been brought by men. The CCC appears capable of declaring unconstitutional expressly stated disparate treatment on the basis of sex, but its sensitivity to structural bias and ability to understand substantive equality have yet to be seen. At the statutory level, anti-discrimination guarantees were strongly and persistently resisted in Parliament, and were only finally adopted for reasons of EU membership. I show that courts rely on various strategies in their reasoning to avoid deciding on the merits, which inevitably means a loss for the claimants. When they do address the merits, they generally set a very high threshold for what constitutes discrimination, they incorrectly look for fault or intent, are very reluctant to shift the burden of proof to defendants, and refuse to see the possibility that general structures can be biased and constitute indirect discrimination. I argue that these flaws are connected to the underlying ‘few bad apples’ understanding of anti-discrimination law. ‘Bad’ because only express, intentional, hateful acts are seen as discriminatory, and ‘few’ because discriminatory acts are seen as unconnected excesses, rare and individualised. While this understanding harms anti-discrimination law in general, sex/gender discrimination is further hampered by the continued emphasis on the difference between the sexes, and an inability to see men and women as truly comparable.

Chapter 9 notes that while the state-socialist ideological aspirations for gender equality were limited, they practically disappeared at the level of government after 1989. Gender equality is at best ignored, at worst rejected as a project. The blindness to gender, gender order and gender inequality has persisted. A particularly strong dislike of feminism prevents any positive development. Feminist agenda suffers from the absence of a supporting perspective, such as Marxism, and a presence of undermining perspectives, such as structural functionalism. I discuss that although not all aspects of Western feminism are applicable to the Czech context, second-wave radical feminism,<sup>34</sup> as corrected by third-wave critiques,<sup>35</sup> in particular has important insights to offer. I note that legal scholarship has suffered from the absence of feminism too: positivist ideas about law as an autonomous, neutral and just system prevail.

<sup>34</sup> The struggle to achieve basic political rights during the period from the mid-19th century to the early 20th century is often termed the ‘first wave’ of feminism. In the late 1960s and early 1970s in the US, a ‘second wave’ of feminists started addressing continued inequality in a wider range of areas of life, such as education, the workplace, the intimacy of the home and sexual matters. Feminists of the ‘second wave’ concentrated on identifying and understanding patriarchy and the way it impacts women as a group. Radical feminism identifies gender as the main axis of the ordering of society and calls for its overthrow. I return to this discussion in detail in Ch 9, section III.C.

<sup>35</sup> Since the 1990s the universalism, generality and homogenisation of women allegedly present in the analyses of second-wave feminists has been challenged. Third-wave feminists have emphasised women’s heterogeneity, inter-sectionality, the importance of individual narratives and relativism. I return to this discussion in detail in Ch 9, section III.C.

In Chapter 10, I summarise the continuities and discontinuities between the two periods. I argue that there has been great intellectual path-dependence on state socialism, which has shaped the understanding of gender equality in post-socialism. 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 law.

### III. FEMINIST LEGAL GENEALOGY—THE METHODOLOGY

This book is multifaceted: it looks at legal and extra-legal sources, it performs a doctrinal legal analysis but goes beyond it, it looks at the law today but also at its historical development, it looks at the law but also at its intellectual underpinnings. It is possible that this book will represent different things to different readers. It can be seen as a standard doctrinal legal analysis and critique of anti-discrimination law in Czechia today,<sup>36</sup> as a legal history of the regulation of women,<sup>37</sup> as an intellectual history<sup>38</sup> of the concept of gender equality or an exploration of the legal discourse<sup>39</sup> about gender, amongst other things. These are all plausible understandings, and I believe the book can be read as such. I myself see it as a feminist legal genealogy<sup>40</sup> of gender equality in law, and in the following I elaborate on how I understand this methodology.

<sup>36</sup> Contained especially in Ch 8.

<sup>37</sup> Contained especially in Chs 2 and 6.

<sup>38</sup> On intellectual history and its relationship to legal history, see, eg, WW Fisher, 'Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History' (1997) 49 *Stanford Law Review* 1065.

<sup>39</sup> The terms 'discourse' and even 'legal discourse' are well-established philosophical and legal-philosophical categories, often concerned with institutional and procedural aspects of communication and argumentation. For example, Michel Foucault has been concerned with discourse as a technique of power (M Foucault, 'The Order of Discourse' in R Young (ed), *Untying the Text: A Post-Structuralist Reader* (Routledge, 1981) 52) and Jürgen Habermas with procedural aspects (J Habermas, *Theorie und Praxis. Sozialphilosophische Studien* (Suhrkamp 1971); J Habermas, *Faktizität und Geltung* (Suhrkamp, 1992)). The concept emphasises intersubjectivity. The Habermasian understanding of discourse is important, as it shows that the ruling of one judge (eg in an anti-discrimination case) will be influenced by the legal discourse in which he or she operates. As this observation would be denied by many in Czechia (I discuss the ideas of neutrality and objectivity of law and lawyers in Chs 7 and 9), it is a particularly pertinent way of looking at the production of the 'impartiality of the judge' and the perceived independence of subjective thought.

<sup>40</sup> I use the term 'genealogy' instead of 'history' to highlight the fact that the enquiry is driven by an interest in the present and looks at the past primarily through that lens. The term is thus used in a rather general sense rather than being fully compliant with, eg, the specific Foucauldian approach.

## A. The Feminist Framework

This book uses a gender analysis of law and is situated within a feminist framework, for the questions it asks and the theoretical framework it employs to answer them, the standard it uses and the issues it examines.

### *i. Feminist Questions and Theoretical Concepts*

First, this book asks how the status of women has been regulated by Czech law and understood by Czech lawmakers, judges and legal scholars. The category of women has been challenged in more recent Western<sup>41</sup> scholarship as essentialist and homogenising.<sup>42</sup> I recognise that women are not a unitary category, and that there are other axes of disadvantage in society, such as race, ethnicity, class, immigration status, sexual orientation, disability or age, that 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.<sup>43</sup> While I acknowledge that the category of women is socially constructed,<sup>44</sup> I also consider that women have, although to differing degrees, a shared historical and current experience of disadvantage,<sup>45</sup> both material and

<sup>41</sup> Since no indigenous feminist legal scholarship has developed in Czechia, as I show in Ch 9 section III, I draw on Western academic writings. The feminist theory, as well as the legal development in the West, identified here with Western Europe and North America, is a useful foil against which to explore the Czech development and identify its peculiarities. The East–West dichotomy is therefore functional, albeit somewhat imprecise and homogenising, as I have discussed above in fn 9.

<sup>42</sup> The universal category of women has been challenged as not corresponding to the variety of women's experiences. Eg, Kimberle Crenshaw has pointed out the underlying assumption of 'whiteness': see K 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: D Rosenblum, 'Unsex CEDAW, or What's Wrong with Women's Rights' (2011) 20 *Columbia Journal of Gender and Law* 98.

<sup>43</sup> I do, indeed, consider that the project would benefit from an intersectional analysis, ie from looking at other axes of disadvantage that intersect with the category of women, but such an analysis would go beyond the scope of the current book. For the advantages and difficulties of intersectional analysis, see, eg, J Conaghan, 'Intersectionality and the Feminist Project in Law' in E Grabham *et al* (eds), *Law, Power and the Politics of Location* (Routledge-Cavendish, 2008).

<sup>44</sup> Eg, Rosenblum notes that its meaning varies from country to country; Rosenblum, 'Unsex CEDAW' (2011).

<sup>45</sup> A good overview of the situation around the world is provided in UN Women, 'Progress of the World's Women 2015. Transforming Economies, Realizing Rights' (UN Women, 2016), available at <http://progress.unwomen.org/en/2015/>; and The World Bank Group, 'The Little Data Book on Gender 2016' (International Bank for Reconstruction and Development/The World Bank, 2016), available at <https://openknowledge.worldbank.org/bitstream/handle/10986/23436/9781464805561.pdf>. For a theoretical account, see, eg, M Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press, 2000) 1–4.

symbolic.<sup>46</sup> This disadvantage 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 category of legal analysis.<sup>47</sup> Such an analysis is particularly useful in the post-socialist context: while the mapping and scrutiny of the development of the legal treatment of women in the West is a project largely done,<sup>48</sup> it is still missing in the post-socialist CEE context. This book offers it comprehensively for the first time, using the example of Czechia.

Incorporating the conceptual developments in the West, the book goes beyond studying the legal treatment of women and uses gender as an analytical tool as well. I understand gender, with Joan Scott, as ‘a social category imposed on a sexed body’.<sup>49</sup> 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.<sup>50</sup> Doing gender analysis is also particularly important in the post-socialist context, because Czechia missed the ‘second wave’ of feminism, 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. I argue, however, that awareness and reflection of gender bias has been entirely missing from law-making, judicial decision-making and legal scholarship in Czechia, both during the period of state socialism and also since, even in such obviously gender-sensitive areas as anti-discrimination law<sup>51</sup> and gender-based violence.<sup>52</sup>

Internationally, the study of gender now includes, alongside women, the study of men as well as of LGBTQ.<sup>53</sup> 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,<sup>54</sup> and occasionally draw on

<sup>46</sup> See, eg, IM Young, *Justice and the Politics of Difference* (Princeton University Press, 1990); or N Fraser and A Honneth, *Redistribution or Recognition* (Verso, 2003) amongst others. I discuss the distinction between material (socio-economic) and symbolic (cultural) aspects of gender in equality in Ch 5 section III.D.

<sup>47</sup> 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.

<sup>48</sup> In the UK context, see, eg, S Fredman, *Women and the Law* (Oxford University Press, 1997); in the US context, see, eg, the works contained and referenced in T Thomas and T Boisseau (eds), *Feminist Legal History: Essays on Women and Law* (NYU Press, 2011).

<sup>49</sup> JW Scott, ‘Gender: A Useful Category of Historical Analysis’ (1986) 91 *The American Historical Review* 1053, 1056.

<sup>50</sup> Both are identified as cornerstones of the gender historical analysis in *ibid*, 1056.

<sup>51</sup> See Chs 4 and 8.

<sup>52</sup> See esp Ch 6 section IV.

<sup>53</sup> The abbreviation LGBTQ stands for lesbians, gays, bisexuals and trans-gender and queer people.

<sup>54</sup> Chs 2 and 6 section III.

examples regarding LGBTQ rights when they illustrate a traditional gender (hetero)normativity, for example in the area of family law.<sup>55</sup>

The concept of gender and related analytical categories, developed by feminist scholarship, are central to the theoretical framework of this book. Feminists point out that a central organising principle of our society is gender, and that the ‘gender systems’<sup>56</sup> of our societies set normative expectations about ‘gender roles’,<sup>57</sup> the gendered division of labour<sup>58</sup> and sexuality,<sup>59</sup> amongst others. Moreover, the ‘gender order’<sup>60</sup> contains widespread patterns of power relations between masculinity and femininity, and these patterns are hierarchical. The type of gender order in which we live, both in the West and in the East, is often referred to as a ‘patriarchy’.<sup>61</sup> It is understood here as a social system that entails male dominance and female subordination, characterised by men’s being central to positions of power, leadership, moral authority and control of property. The male is also the norm on which legal regulation is based.

Law is thus an important social institution of patriarchy.<sup>62</sup> The way in which law has been both a product and a tool of patriarchy has been the subject of extensive feminist scholarship.<sup>63</sup> Law, a prime normative and regulatory system in society, has been called on to govern issues relating to family, work, political participation and inter-personal violence, amongst others. Because these areas are gendered in reality, law has not been able to ‘stay out of gender’. In terms of its relationship to patriarchy, law can either

<sup>55</sup> Ch 6 section II.

<sup>56</sup> The term is often used by sociologists to emphasise the systematic and structural nature of the normative prescriptions about gender and the fact that the system is perpetuated by social institutions. See, eg, CL Ridgeway and SJ Correll, ‘Unpacking the Gender System: A Theoretical Perspective on Gender Beliefs and Social Relations’ (1994) 18 *Gender and Society* 510.

<sup>57</sup> A culturally constructed set of social and behavioural norms generally considered appropriate for either a man or a woman.

<sup>58</sup> The idea that women have expressive (caring) roles and men have instrumental (breadwinner) roles in the family, originally presented in T Parsons and R Bales, *Family, Socialization and Interaction Process* (Routledge, 1956), has been heavily criticised by feminists as biologically deterministic.

<sup>59</sup> These three are identified as the cross-cultural mainstays of the gender system in C Renzetti, D Curran and S Maier, *Women, Men, and Society* (Pearson, 2012).

<sup>60</sup> The term is associated with R 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).

<sup>61</sup> For definition and history, see, eg, G Lerner, *The Creation of Patriarchy* (Oxford University Press, 1986).

<sup>62</sup> On the relationship between law and patriarchy, see, eg, J Rifkin, ‘Toward a Theory of Law and Patriarchy’ (1980) 3 *Harvard Women’s Law Journal* 83; for a Marxist feminist analysis, see D Polan, ‘Toward a Theory of Law and Patriarchy’ in D Kairys (ed), *The Politics of Law: A Progressive Critique* (Pantheon Books, 1982). The inevitable historical contingency of law is also discussed in H Nagl-Docekal, *Feminist Philosophy* (Westview Press, 2004).

<sup>63</sup> See eg CA MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989); C Smart, *Feminism and the Power of Law* (Routledge, 1989); Fredman, *Women and the Law* (1997); J Conaghan, *Law and Gender* (Oxford University Press, 2013).

draw on the existing structures and cement them, which has overwhelmingly been the case historically, or it can transform them,<sup>64</sup> which has more rarely been the case. Legal provisions regulating gender-relevant phenomena can thus be either gender-conservative (patriarchal) or gender-progressive (anti-patriarchal),<sup>65</sup> but not gender-indifferent. This book looks at whether Czech law has been gender-conservative or gender-progressive during state socialism and in the post-socialist period, and how it has either affirmed or undermined patriarchal power relations.<sup>66</sup>

Law is shaped by its social environment and shapes it in return. This book explores the first part of this cycle, by looking at the understandings that underpin law. Addressing the second part would require a different methodology, and although I draw on secondary literature<sup>67</sup> to present the reader with the wider context and give basic information on the realities of Czech women's lives, it is not the focus of this book. Aside from exploring the gendered intellectual underpinnings of law and the gendered nature of the resulting regulation and judicial decision-making, I also examine whether there is any reflection among lawmakers, judges or legal scholars that these are indeed gendered.

## *ii. The Gender-Progressive Standard*

This book, as is the case more generally with feminist scholarship, is not neutral in its assessment of the legal regulation and the legal discourse. I consider some legal developments negative and some positive in terms of whether they promote gender equality. I evaluate them as either gender-conservative or gender-progressive. The book thus has normative assumptions, but is not normative in a sense of developing an overarching vision for law reform in relation to the problems of gender conservatism identified in this book. Nor do I think that the adoption of any one particular full account or programme for gender progressiveness is necessary. In order to present the reader with a general idea of how I understand this commitment,

<sup>64</sup> See, eg, T Thomas and T Boisseau, 'Introduction: Law, History and Feminism' in Thomas and Boisseau (eds), *Feminist Legal History*, 1.

<sup>65</sup> An in-depth elaboration of how to understand the requirements on anti-patriarchal law, eg in the context of domestic violence, has been persuasively presented in M Madden Dempsey, *Prosecuting Domestic Violence: A Philosophical Analysis* (Oxford University Press, 2009) Ch 7.

<sup>66</sup> I fully acknowledge that the development is not always linear and that there can be reversals and backlashes.

<sup>67</sup> In order to provide a wider historical, political, economic and social context for my findings, I rely on secondary literature. In particular, I have drawn on history and political science relating to the historical and political development in Czechia over the past 70 years, gender scholarship in the social sciences and humanities for facts about women's lives as well as theorisations, and existing critical legal scholarship analysing law during the two periods in CEE.

I borrow from the Beijing Platform of Action.<sup>68</sup> It strives to empower women through ‘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’.<sup>69</sup> I discuss my understandings of which policies and legal approaches are gender-progressive and which gender-conservative in detail in the individual chapters, noting points of disagreement among feminist legal scholars, where relevant.

### *iii. Why Use Equality?*

Sex equality or gender equality<sup>70</sup> is often the standard used in the literature to assess the situation of women.<sup>71</sup> The concepts and rights to equality and non-discrimination<sup>72</sup> have been particularly popular with feminist legal scholars.<sup>73</sup> This reflects the fact that they are both terms used in law, and they have been employed, often strategically, by feminist advocates to claim rights for women.<sup>74</sup> The concept of equality and its usefulness has also been challenged, however. Feminist scholars have pointed out that it maintains the man as the measure of things and the norm,<sup>75</sup> and feminist legal scholars

<sup>68</sup> Fourth World Conference on Women, ‘Beijing Declaration and Platform for Action’ A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995).

<sup>69</sup> *ibid*, paras 1 and 10.

<sup>70</sup> Many definitions of equality are available. Alison Jaggar, *eg*, defines it as a 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’: A Jaggar, ‘On Sexual Equality’ (1974) 84 *Ethics* 275, 275.

<sup>71</sup> See, *eg*, *ibid*; Nagl-Docekal, *Feminist Philosophy* (2004). Other terms have been used, however, *eg* ‘justice’ by Nussbaum, *Women and Human Development* (2000); Young, *Justice and the Politics of Difference* (1990); Fraser and Honneth, *Redistribution or Recognition* (2003), amongst others.

<sup>72</sup> Equality and anti-discrimination are used practically interchangeably by many, *eg* by S Fredman, *Discrimination Law* (Oxford University Press, 2011). If a difference were to be drawn, equality could be understood as a broader principle, one that answers the question of general distribution of goods and can be legally expressed by a general prohibition of arbitrariness in law. Anti-discrimination law could be seen as containing a more concrete prohibition of acts that are unjustly based on an irrelevant characteristic. *Eg*, Joseph Raz helpfully draws a distinction between general equality, on the one hand, and strict or paradigmatic egalitarian principles (corresponding to anti-discrimination guarantees), which aim at an equal distribution of a certain good, on grounds generated by existing inequalities in the distribution of that good, on the other: J Raz, *The Morality of Freedom* (Oxford University Press, 1988).

<sup>73</sup> A helpful summary is provided in R Hunter, ‘Introduction: Feminism and Equality’ in R Hunter (ed), *Rethinking Equality Projects in Law* (Hart Publishing, 2008) 1–3.

<sup>74</sup> Of course, that these rights should 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 the case, *eg*, with the argument for sexual harassment to be covered by statutory provisions prohibiting discrimination in the US. See C Baker, ‘Sexual Harassment’ in T Thomas and T Boisseau (eds), *Feminist Legal History: Essays on Women and Law* (NYU Press, 2011).

<sup>75</sup> MacKinnon, *Toward a Feminist Theory* (1989), 215–34.

have shown the consequent doctrinal difficulties of finding a comparator, for example, for pregnant women.<sup>76</sup> This is, however, arguably not a problem of equality as such, but of a narrow formal understanding of equality, which cares about consistency above all in a decontextualised way.<sup>77</sup> While acknowledging this critique as important, and including its cautions in my analysis in the following chapters, I use the concept and the right to equality as my standard in this book. In part, because the concept of equality has a particular history in CEE, in the form of socio-economic egalitarianism based on Marxist-Leninist ideology, followed by a reactive aversion and rejection of equality thereafter, which differs from the Western trajectory.<sup>78</sup>

## B. Scope of the Book

The book's analysis is circumscribed thematically, territorially and temporally. All require brief explanations.

### *i. Thematic Scope of the Enquiry*

In order to answer the questions about underlying understandings of women, gender, equality, discrimination, law and rights, this book analyses three sets of areas. First, it presents an in-depth study of equality and anti-discrimination law, both constitutional as well as statutory.<sup>79</sup> Secondly, the book also looks in greater detail at areas that have been considered central to the question of the equality of the sexes in the Czech context. Under state socialism, the question of 'equal rights between women and men' (*rovnoprávnost žen a mužů*),<sup>80</sup> or the 'woman question', was limited to family, work, social welfare and public life.<sup>81</sup> I argue that after 1989, notwithstanding some changes in legal provisions, this narrow indigent understanding has not been enlarged.<sup>82</sup> Thirdly, Western feminist

<sup>76</sup> See eg Fredman, *Women and the Law* (1997), 182–192.

<sup>77</sup> Ch 4, section I.A.

<sup>78</sup> Ch 4, section I.B.

<sup>79</sup> Ch 3 and 7.

<sup>80</sup> This term is found in state-socialist law and legal scholarship, Ch 2.

<sup>81</sup> The 1987 book by Bauerová and Bártová neatly summarises the topics that were typically addressed: J Bauerová and E 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. As political representation of women is rarely specifically legally regulated (once voting rights are granted and unless quotas are legally enacted), the topic is discussed minimally and more by way of illustration of the social position of women.

<sup>82</sup> And with regard to redistribution and the material well-being of women, it even became more limited. See Ch 6 section I.

scholarship,<sup>83</sup> as well as the Beijing Platform<sup>84</sup> or CEDAW,<sup>85</sup> has identified a much wider range of areas necessary for the achievement of gender equality. Issues such as reproduction, sexuality, sexual orientation and identity, or gender-based violence, raised by the second wave of feminism, have so far been largely neglected in the Czech Republic. Including at least some of these issues in my analysis allows for a more comprehensive picture of the regulation of gender in law. Thus, aside from presenting the findings of my original research in the two aforementioned areas, I also draw on the findings of my previous enquiries into the issues of prostitution,<sup>86</sup> rape,<sup>87</sup> sexual harassment,<sup>88</sup> domestic violence,<sup>89</sup> transgender rights<sup>90</sup> and reproductive rights. For reasons of scope, these areas are not presented and discussed in full and in depth, but examples and illustrations are drawn from them.

## *ii. Territorial Scope—A Single-Country Case-Study*

This book's aim is to offer insights into post-socialist legacies in CEE with regard to gender equality law. It does so by looking in detail at one of the

<sup>83</sup> Individual authors covering the legal situation of women comprehensively offer varying emphases: Martha Chamallas speaks about 'money, sex and family' (M Chamallas, *Introduction to Feminist Legal Theory* (Aspen Law & Business, 1999) 6 and 171); Sandra Fredman speaks of marriage and property (including reproductive control), suffrage, employment and welfare legislation (Fredman, *Women and the Law* (1997), 39–177); Catharine MacKinnon speaks of family, sexual subordination, lesbian and gay rights, reproductive control and trafficking in women, understood as meaning prostitution and pornography (CA MacKinnon, *Sex Equality* (Foundation Press; Thomson/West 2007)); 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 (KT Bartlett and DL Rhode, *Gender and Law: Theory, Doctrine, Commentary* (5th edn, Aspen Publishers, 2009)).

<sup>84</sup> Fourth World Conference on Women, 'Beijing Declaration and Platform for Action' (15 September 1995).

<sup>85</sup> Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 18 December 1979, 1249 UNTS 14.

<sup>86</sup> B Havelková, 'Právní úprava prostituce v ČR (Legal Regulation of Prostitution in the Czech Republic)' in B Havelková and B Hančilová (eds), *Co s prostitutí? Veřejné politiky a práva osob v prostituci (What to do with Prostitution? Public Policy and Rights of People in Prostitution)* (SLON, 2014); B Havelková, 'Blaming all Women: On Regulation of Prostitution in State Socialist Czechoslovakia' (2016) 36 *Oxford Journal of Legal Studies* 165.

<sup>87</sup> B Havelková, 'Znásilnění—několik úvah nad právní úpravou [On the Legal Provisions Concerning Rape]' in K Ciprová (ed), *Pod bladinou: fakta a mýty o znásilnění [Below the Surface: Facts and Myths on Rape]* (Gender Studies, 2010).

<sup>88</sup> B Havelková, 'Právní úprava obtěžování z důvodu pohlaví a sexuálního obtěžování [Legal Regulation of Harassment on the Grounds of Sex and of 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]* (SOÚ AV ČR, 2006).

<sup>89</sup> B 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).

<sup>90</sup> B Havelková, 'The Legal Status of Transsexual and Transgender Persons in the Czech Republic' in J Scherpe (ed), *The Legal Status of Transsexual and Transgender Persons* (Intersentia, 2015).

countries, Czechia. There are advantages to a single-country case-study. It allows for greater depth and richness of analysis, concentrated on one legal context; an analysis that can be supported by more comprehensive source material. Czechia, moreover, is a good choice as an example of the region, as it lacks some complexities present in other CEE jurisdictions, such as the pervasive influence of religion and the Church, which is prominent in countries such as Poland or Slovakia; and it has not experienced powerful nationalism and ethnic strife, as have countries in the Western Balkans.

The question that can be raised with single-country case-studies is as regards their generalisability. Does the book offer a commentary on the state-socialist and post-socialist condition of gender equality law in CEE more generally? I believe so. While not being factually generalisable, the study lends itself to being analytically generalisable.<sup>91</sup> I do not, however, offer the assessment as to the applicability of the book's conclusions to other jurisdictions here. It is for others to assess the explanatory power of the book's conclusions in relation to the reality of other countries. It might, nonetheless, be useful for me tentatively to highlight both the idiosyncrasies of the Czech case, as well as commonalities or areas where wider applicability could be expected.

One Czech specificity is the singular virulence of the neoliberal<sup>92</sup> economic discourse, especially in the 1990s, which was partly due to personalities such as Václav Klaus.<sup>93</sup> Another is the periodisation of the state-socialist period. My analysis<sup>94</sup> is most likely limited to Czechia, since other CEE countries' periods of 'thawing' and repression occurred at different moments of their state-socialist journey.<sup>95</sup> The same is true of my post-socialist periodisation,<sup>96</sup> since the countries' anti-communist revolutions happened at different moments and their trajectories varied after the fall of their respective regimes.

There are many commonalities too, however. The trajectory of equality and anti-discrimination law, while different from that in the West, has arguably been common to the region, as has been an emphasis on the natural difference of the sexes, which has made gender-progressive regulation of the family and care, as well as the effective implementation of sex/gender

<sup>91</sup> See, eg, RK Yin, *Case Study Research. Design and Methods* (Sage, 2003) 10.

<sup>92</sup> For definition and discussion, see Ch 7 section IV.A and 9 section I.A.

<sup>93</sup> He was Finance Minister (1989–92), later Prime Minister (1992–98) and eventually President (2003–13), and the long-term Chairman of the right-wing Civil Democratic Party (ODS). For detail, see p 200–204, 232, 279, 282–283.

<sup>94</sup> Ch 2.

<sup>95</sup> Eg, the Hungarian Uprising of 1956 happened more than 10 years earlier than the Prague Spring of 1968. This timing had consequences for where the countries stood in the late 1980s before the fall of state socialism: while Hungary, like Russia, was experiencing a thaw, Czechoslovakia was still mired in repressive policies that followed the 1968 invasion. Ch 2, section III.

<sup>96</sup> Ch 6, section I.

anti-discrimination rights, difficult. Similarly, the retreat into the private sphere of family during particularly politically oppressive periods of the past seems to have been a common strategy, one which has led to important reconfigurations of understandings of the public and the private, which are considerably different from those in the West.<sup>97</sup>

*iii. Territorial and Temporal Scope—Pre-Communist Legacies and the Germanic Space*

Readers in common law jurisdictions might be interested to learn more about those aspects of the scepticism regarding gender equality and law that are *not* unique to the post-socialist legal system but common to civil law jurisdictions,<sup>98</sup> especially given that gender equality law and anti-discrimination law have not enjoyed much success in countries such as Germany either.<sup>99</sup> This suggests that beyond being rooted in the state-socialist past, these negative Czech attitudes might be shared with other Continental, especially Germanic, countries. The scepticism might thus be connected to Central European social conservatism,<sup>100</sup> or to the Germanic legal system and legal culture,<sup>101</sup> not just to the post-socialist condition. In the Czech context, the Germanic influence can be expressed in temporal terms as well, as deeper pre-communist legacies.

<sup>97</sup> Some of the commonalities are summarised in Gal and Kligman, *The Politics of Gender* (2000).

<sup>98</sup> I am well aware of the heterogeneity of the civil law jurisdictions of Western Europe. A closer elaboration of them and their differences goes beyond the scope of this book, but a brief analysis may be found, eg, in C O’Cinneide, ‘The Uncertain Foundations of Contemporary Anti-discrimination Law’ (2011) 11 *International Journal of Discrimination and the Law* 7.

<sup>99</sup> Akin to Czechia, in Germany the Anti-Discrimination Act would not have been adopted had it not been for EU law. S Baer, ‘The Basic Law at 60—Equality and Difference: A Proposal for the Guest List to the Birthday Party’ (2010) 11 *German Law Journal* 67, 82. Moreover, as late as 1997, German Constitutional Court judge Udo Di Fabio considered gender equality to be a ‘foreign body in the system of fundamental rights’: *ibid*, 84.

<sup>100</sup> Eg, in Germany, the particular emphasis on heterosexual marriage as a basis of the family (Grundgesetz für die Bundesrepublik Deutschland Vom 23.05.1949 (BGBl. I S. 1), art 6) has been used to delay the recognition of women’s rights in relation to abortion and divorce, as well as the equal rights of LGBTQs. See *ibid*, *passim*; M Wrase, ‘Gleichheit unter dem Grundgesetz und Antidiskriminierungsrecht’ in L Foljanty and U Lembke (eds), *Feministische Rechtswissenschaft* (Nomos, 2006), 88.

<sup>101</sup> German scholars have particularly high regard for the principles of freedom of contract and private autonomy (I thank Michael Wrase for this insight). Eg, Karl-Heinz Ladeur, a prominent public law professor, described the German Anti-Discrimination Act as ‘unconstitutional and incompatible with both common sense and the requirements of the rule of law’, seeing it, amongst other things, as an unacceptable ‘control of motives’ incompatible with freedom of contract. See K-H Ladeur, ‘The German Proposal of an “Anti-Discrimination” Law: Anticonstitutional and Anti-Common Sense. A Response to N Vennemann’ (2002) 3 *German Law Journal* 3. The constitutionally embedded right to enterprise or freedom to conduct a business (*Geschäftsfreiheit*), which is unfamiliar in common law, has in my opinion guided the more protective attitude to managerial prerogative in Germanic jurisdictions (Grundgesetz für die Bundesrepublik Deutschland Vom 23.05.1949 (BGBl. I S. 1), art 6; this right is also recognised in the Charter of Fundamental Rights of the European Union, [2000] OJ C364/1, art 16).

I acknowledge these as possibly important and relevant explanations for the prevalent scepticism and resistance to gender equality law and anti-discrimination law in Central Europe,<sup>102</sup> but for reasons of space, while I occasionally point to them in the text, I leave their thorough analysis for another project.

### C. A ‘Law in Context’ Approach—Sources and Method

The book looks at law in context.<sup>103</sup> It analyses both legal and extra-legal sources, and employs but goes beyond the ‘internal’<sup>104</sup> doctrinal approach to the study of law.<sup>105</sup>

#### *i. Primary Sources and the Difference between the Periods*

This book examines legal sources: constitutional, statutory and derivative acts, local ordinances and, where relevant, internal administrative guidelines. It also looks at documents relating to the process of the creation of law by lawmakers: parliamentary debates, government reports, governmental policy papers and explanatory memoranda to proposals of bills. And it looks at sources that capture the interpretation and application of the law by the courts and reflections by legal scholars: the case law of the Constitutional Court and of ordinary courts,<sup>106</sup> and academic literature. All these sources are only available in Czech and, for the first time in most cases, this book makes their analysis available to a Western reader.

Legal sources 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 statutes. While the legal sources remain largely the same in both periods, because of the political and institutional differences

<sup>102</sup> In this geographical term, I include Germany and Austria along with Czechia.

<sup>103</sup> The term ‘law in context’ is used to emphasise the exploration of law critically, in its social, political and economic context.

<sup>104</sup> The approach taken by insiders in the system. C McCrudden, ‘Legal Research and the Social Sciences’ (2006) 122 *Law Quarterly Review* 632, 633–34.

<sup>105</sup> I use the term ‘law’ in the received Czech understanding as ‘objective law’ or ‘*de lege lata*’—ie, norms for behaviour found in formal legal sources, which are binding and whose observation is enforced by public power (I am paraphrasing from the leading introduction to the theory of law; A Gerloch, J Boguzsak and J Čapek, *Teorie práva [Theory of Law]* (ASPI, 2004)). I realise 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 more true to the Continental Germanic tradition, where judge-made law is not considered a formal source of law and where legal norms as written in formal sources of law are therefore seen as separate from the interpretation and application of these legal norms by the courts.

<sup>106</sup> 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 a par with legislation.

between state socialism and post-socialism, the same cannot be said of the other material. The availability and usefulness of the extra-legal sources varies somewhat in relation to the two periods studied.

During the period of state socialism, as free political expression was dampened by the single-party rule,<sup>107</sup> parliamentary debates did not contain any substantive policy contestation. There was no constitutional adjudication, as a Constitutional Court was never established. Only a very limited number of cases before ordinary courts, reported in the Official Collections of Judgments,<sup>108</sup> raised issues of equality of the sexes.<sup>109</sup> The more fruitful sources have thus been government reports, explanatory memoranda to bills, policy papers<sup>110</sup> and academic legal literature, as contained especially in the main generalist<sup>111</sup> academic law journals, *Právník (Lawyer)* and *Socialistická zákonost (Socialist Legality)*. All their volumes and issues, together with the entirety of the Official Collections of Judgments, have been perused for the project. The government-produced documents are helpful in identifying and assessing the state-socialist ideology and official policy in relation to gender-relevant laws. The policy papers and legal academic literature, on the other hand, while being subject to some political oversight,<sup>112</sup> occasionally offer a more open discussion of law, policy and society.

The fall of the Communist Party's political and ideological hegemony opened a period of political pluralism, with a much greater contestation of policy and a wider range of perspectives on law and society. For the post-socialist period, I therefore pay greater attention to parliamentary debates on gender-relevant bills, such as the proposal of the ADA. These have generated many heated debates in both chambers of the Parliament. The Velvet Revolution of 1989 also brought institutional changes. The newly established Constitutional Court has dealt with five sex equality cases, and discrimination claims have started to be heard before the ordinary courts.<sup>113</sup> The databases of the Constitutional Court, the Supreme Court and Supreme Administrative Court, and the newly established online database of ordinary courts' decisions, have been searched to identify relevant decisions. Thus, for the post-socialist era, parliamentary debates and court decisions

<sup>107</sup> 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.

<sup>108</sup> As available in the official collections *Sbírka rozhodnutí československých soudů 1949–1960* (The Collection of Decisions of Czechoslovak Courts) and *Sbírka rozhodnutí a sdělení soudů ČSSR 1961–1969* (The Collection of Decisions and Communications of the courts of the Czechoslovak Socialist Republic) and *Sbírka soudních rozhodnutí a stanovisek 1949–today* (The Collection of Court Decisions and Opinions).

<sup>109</sup> See ch 2 section I.C.

<sup>110</sup> Especially the periodic Reports of the State Population Committee, published under the auspices of the Ministry of Labour and Social Affairs.

<sup>111</sup> Both accepted contributions from all areas of law.

<sup>112</sup> See eg the discussions on causes of the gender wage gap, Ch 5 section II.

<sup>113</sup> Ch 8 sections I.A and II.F.

are the key sources for uncovering the understanding of gender equality among lawmakers and judges.<sup>114</sup>

*ii. A Mixed Inductive and Deductive Analysis*

This book's method is mostly inductive, with my research grounded in Czech legal and extra-legal materials. But it is informed and often framed by theories and concepts developed by Western feminist legal scholars. The interaction between the theoretical framework and the source material creates tension—will the *a priori* theoretical concepts informed by the culture of Western societies truly capture the content of the material?<sup>115</sup> I have used the concepts developed in the West as 'sensitising concepts' that 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'.<sup>116</sup> These, together with the new categories that have emerged from the primary sources, have been continuously refined using the Czech material.<sup>117</sup>

Increasingly, there is also secondary literature available on aspects of my research, notably social science and humanities literature on gender in CEE<sup>118</sup> and legal scholarship on law and rights in CEE.<sup>119</sup> The fact that I work at the intersection of these literatures<sup>120</sup> allows me to triangulate what is distinctively Eastern, against the foil of Western legal and intellectual developments, as well as what are the specificities of equality or anti-discrimination law, and even more specifically sex/gender, and what are the more general problems of law and rights in post-socialist CEE.

<sup>114</sup> In contrast to the period of state socialism, I no longer draw on academic literature as a primary source. The freedom of expression and ideological pluralism after 1989 means that the content of academic writing diversified to an extent that makes a general conclusion impossible.

<sup>115</sup> Any social science analysis of sources poses the question of the extent to which *a priori* categories are used (theory) and to what extent a researcher can be fully led by the material (pure induction from the material). A Bryman, *Quantity and Quality in Social Research* (Routledge, 2004) 60–70.

<sup>116</sup> Summary of Blumer's method in *ibid.*, 68; H Blumer, 'What is Wrong with Social Theory?' (1954) 19 *American Sociological Review* 3.

<sup>117</sup> This does not quite correspond to either of the most current ways of addressing the problem of 'theory and research' identified by Bryman, *Quantity and Quality in Social Research* (2004), 79–87, as 'analytic induction' and 'grounded theory', but is somewhere in between. In social science or socio-legal terminology, my method would correspond most closely to textual qualitative content analysis.

<sup>118</sup> Represented here, eg, by 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, Libora Oates-Indruchová, amongst others.

<sup>119</sup> Eg Inga Markovits, András Sajó, Kathryn Hendley, Martin Krygier, Adam Czarnota, Catherine Dupré, Zdeněk Kühn, amongst others.

<sup>120</sup> Others have done work at this intersection as well, see fn 7 above.