Articles

Resistance to Anti-Discrimination Law in Central and Eastern Europe–a Post-Communist Legacy?

By Barbara Havelková[*]

Abstract

Post-communist Central and Eastern European ('CEE') legislators and judges have been resistant to equality and anti-discrimination law. This Article argues that these negative attitudes can be explained in part by the specific trajectory that EAL has taken in CEE during and after state socialism, which has differed from Western Europe. In the UK/EU, the formal guarantees of equal treatment and prohibitions of discrimination of the 1960s and 1970s were complemented by a more substantive understanding of equality in the 1990s and 2000s. This development was reversed in CEE—substantive equality, of a certain kind, preceded rather than followed formal equality and anti-discrimination guarantees.

The State Socialist concern with equality was real, and yet the project was incomplete in several significant ways. It saw only socio-economic, but not socio-cultural inequalities (relating to dignity, identity or diversity). It was transformative with regards to class, but not other discrimination grounds, especially not gender. While equality was a constitutionally enshrined principle, there was an absence of any corresponding enforceable anti-discrimination right. Finally, the emphasis on the "natural" differences between the sexes

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meant that sex/gender discrimination was not recognized as conflicting with women's constitutional equality guarantees.

Today, the lack of anti-discrimination legal guarantees has been remedied. However, equality and anti-discrimination law has been weakened by the fact that anti-discrimination rights have no indigenous history to draw upon, nor has substantive and transformative equality any fertile domestic conceptual ground within which to grow in relation to any protected characteristics other than class or socio-economic status.

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A. Introduction: An "Artificial Interference with Society"

The EU anti-discrimination *acquis*, and equality and anti-discrimination law in general, is not doing very well in post-communist Central and Eastern Europe (CEE).[1] In the Czech Republic, the case study used in this Article, the transposition of the *acquis* happened as late[2] and as little as possible,[3] and its application and enforcement have been seriously unsatisfactory.[4] Czech legislators as well as judges have been resistant to its incorporation and enforcement and have demonstrated a lack of understanding of key concepts that underlie EU equality law. One illustration of their opposition to the *acquis* is the "declaration"—an instrument of commentary on legislation, very rarely used—adopted by the Czech Senate in 2008 when it passed the Anti-Discrimination Act:

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[1] *See, e.g.*, Csilla Kollonay Lehoczky, *The Significance of Existing EU Sex Equality Law for Women in the New Member States: The Case of Hungary*, 12 MAASTRICHT J. EUR. & COMP. L. 467 (2005); Malgorzata Zysk, *Age Discrimination Law in a Country with a Communist History: The Example of Poland*, 12 EUR. L.J. 371 (2006); Alexandra Gerber, *The Letter Versus the Spirit: Barriers to Meaningful Implementation of Gender Equality Policy in Poland*, 33 WOMEN'S STUD. INT'L F. 30 (2010); Kriszta Kovács, *Equality: The Missing Link*, *in* CONSTITUTION FOR A DISUNITED NATION. ON HUNGARY'S 2011 FUNDAMENTAL LAW 171 (Gábor Attila Tóth ed., 2012).

[2] For example, the Anti-Discrimination Act (ADA), which should have been in place at the time of accession by the Czech Republic to the EU in 2004, was only adopted and entered into force in 2009. *See* Barbara Havelková, *Challenges to the Effective Implementation of EC Gender Equality Law in the Czech Republic – An Early Analysis*, *in* WANDEL DER GESCHLECHTERVERHÄLTNISSE DURCH RECHT? 95 *passim* (Kathrin Arioli, et al. eds., 2008).

[3] Each subsequent draft of the ADA that was proposed decreased the generosity of protection that it offered. For example, while the original 2004 draft, prepared by the Government Council of Human Rights, contained a mediation competence for the equality body and an independent right for NGOs to bring cases where an indeterminate number of individuals were victims of an act of discrimination, the final ADA contained no such provisions. *Id.*

[4] Litigation has been scarce, and claimants' chances of winning have been minuscule. Barbara Havelková, Gender in Law Under and After State Socialism: The Example of the Czech Republic, 151–60 (2013) (unpublished D.Phil. thesis, University of Oxford). Sometimes, this has been due to badly drafted norms and the courts' unwillingness to correct them through teleological interpretation and indirect effect under EU law. In particular, the threshold for compensation of immaterial harm is too high and based on the wrong criteria, namely the diminution of standing in society. But even when the norms themselves are unproblematic, courts tend to misapply basic concepts. With regards to direct discrimination, for example, courts typically look for "motivation" or "motive" to establish that discrimination happened on the basis of sex, which, without fully shifting the burden of proof, makes cases extremely hard to win. Furthermore, the ordinary courts do not understand that the prohibition of indirect discrimination targets systemic prejudice and harms. I have discussed some examples of this previously. *See generally* Havelková *supra* note 2; *see* Barbara Havelková, *The Legal Notion of Gender Equality in the Czech Republic*, 33 WOMEN'S STUD. INT'L F. 21 (2010).

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> The Senate considers the Anti-Discrimination Act to be a tool for the implementation of the requirements of EU law, the non-realization of which would lead to sanctions. It does not, however, identify with the character of the norm, which artificially interferes with the natural evolution of society, does not respect cultural differences among the Member states and elevates the demand of equality above the principle of freedom of choice. The Senate urges the government not to consent to adoption of further antidiscrimination measures at the EU level.[5]

Adjudicators in the Czech Republic are also suspicious of anti-discrimination rights. Czech courts have heard few anti-discrimination cases, and most have ended with unsuccessful results for plaintiffs. Many courts have expressed an unwillingness to find discrimination and award compensation. For example, a district court in Prague in 2005 dismissed a sex discrimination case involving employee promotion.[6] In the following *obiter* passage from the ruling, the Court suggests employers must enjoy unlimited freedom to select and promote their staff:

> [The] court found substantial differences in the appraisal of the candidates by the members of the [selection] board, however, since this evaluation was not based on objective measurement of knowledge but on subjective perception of the personalities of the candidates, these differences are natural. Moreover, . . . the court did not consider the "quality" of the candidates, i.e. their expertise, experience, etc., as a decisive element in the legal evaluation, as the law addresses only the difference in treatment of candidates and distinctions made on the basis of sex, as regards the opportunity to obtain the position to be filled. [E]very person is an unrepeatable individual . . . and *it is therefore impossible*

[5] Czech Senate, Resolution no. 377 of 2008 (23 Apr. 2008), http://www.senat.cz/xqw/xervlet/pssenat/htmlhled?action=doc&value=46806 (emphasis added).

[6] Obvodní soud 14 Mar. 2005 [of District Court for Prague], 23 C 11/2003-70 publ. in: V.S. proti SPGroup (Czech).

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> *to find that someone is better* for a position than the other.[7]

Such a lack of understanding is not limited to issues of gender.[8] Applicants from CEE have brought many cases before the European Court of Human Rights (ECtHR), complaining of anti-Roma racial discrimination in education and racially motivated violence in post-communist CEE states.[9] These cases highlight the Roma minority's dire situation in CEE states as well as the courts' failure to provide a remedy at a national level. In addition, the cases suggest many CEE judges, including those elected to ECtHR, lack a basic fundamental understanding of the nature and origins of inequality and discrimination. This is especially true when unconscious and institutional bias[10] is a factor. Take, for example, *D.H. v. Czech Republic*, a case involving the segregation of Roma children in "special" schools in the Czech Republic.[11] While the ECtHR Chamber level failed to find any violation,[12] the plaintiffs won the appeal before the Grand Chamber, which found that the systematic segregation of Roma children was indirectly discriminatory, and therefore, in breach of the European Convention on Human Rights (ECHR).[13] Most of the judges behind the majority Chamber judgment who found no violation came from post-communist countries,[14] and most of the Grand Chamber decision dissenters who insisted there was no violation came from post-communist countries as well.[15] In their judgments, the judges from post-communist CEE countries expressed disbelief that certain procedures or structures, such as psychological testing, might not be "objective" and could suffer from institutional bias. They appear fundamentally

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[7] *Id.* (emphasis added). Elsewhere in the judgment, the court states that managerial prerogative should not be judicially reviewed.

[8] The Article addresses sex and gender as it applies to women. A look at LGBTQ issues is beyond its scope.

[9] *E.g.*, Nachova v. Bulgaria, 2005-VII Eur. Ct. H.R. 42 (2005).

[10] I use "bias" in the following not to imply a sentiment or inclination, but a trend or tendency that is not neutral.

[11] The Czech Constitutional Court heard this case in 1999. It was dismissed in part as manifestly unfounded and in part because the Court found a lack of competence to review. I. ÚS 297/99 from 20 Oct. 1999, unpublished.

[12] D.H. v. Czech Republic, App. No. 57325/00 Eur. Ct. H.R. (2006).

[13] D.H. v. Czech Republic, 2007-IV Eur. Ct. H.R. 43 (2007).

[14] The Czech, Hungarian, Lithuanian, and Ukrainian judges were joined in the majority by a judge from San Marino. The French president of the Chamber concurred; the Portuguese judge dissented.

[15] The authors of the dissent were Jungwiert (Czech Republic), Župančič (Slovenia), Šikuta (Slovakia), Borrego Borrega (Spain).

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bewildered that seemingly neutral practices could be discriminatory even if, in effect, they disproportionately harm an already disadvantaged group.[16]

It may seem strange that judges from post-communist countries might hold such negative attitudes towards equality and anti-discrimination law, especially if one recalls the egalitarian ideology of state socialism. At first glance, one might imagine that there is a strong tradition of equality in Central and Eastern Europe. But as this Article explains, a closer look reveals that while equality was a real concern for state socialist policy-makers, the equality project was limited in many important ways, and these limitations continue to impact equality and anti-discrimination laws in post-communist countries today.

In this Article, I argue that such negative attitudes can be explained in part by the specific trajectory that equality and anti-discrimination laws have taken in Central and Eastern Europe during and after state socialism,[17] which has differed from Western Europe. My examination of Western Europe in this Article is limited to legal developments in the EU and the UK.[18] The EU is significant, as it was the EU equality *acquis* that eventually led to the adoption of anti-discrimination legislation throughout post-communist CEE countries. The UK was chosen for its well-established tradition of equality and anti-discrimination law. The UK's anti-discrimination legislation preceded the EU *acquis*, which was not the case with continental jurisdictions, the judiciary has complemented it with a thorough and extensive interpretation, and much cutting-edge European theory and scholarship comes from the UK. For reasons of space, I avoid comparisons with other continental countries although such juxtapositions could be very fruitful for other research projects. As the primary aim of this Article is to discuss the developments in CEE, not in Western Europe, I describe the UK/EU developments in anti-discrimination law only to the extent that they form a useful foil for my analysis of Czech law. Accordingly, I present a somewhat stylized and simplified account of the Western European trajectory, without focusing on its divergences, or its flaws and inadequacies.[19]

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[16] D.H. v. Czech Republic, 2007-IV Eur. Ct. H.R. 43 (2007). (J. Šikuta, dissenting).

[17] Although the case study used here is Czechoslovakia and the Czech Republic only, and the region of Central and Eastern Europe was not homogenous in its treatment of women or the pursuit of equality, the description of the general trajectory provided here is applicable to most countries in the region.

[18] U.S. doctrine and even scholarship, which through its case law marks a return to a formal understanding of equality, is less and less useful for discussions about European developments.

[19] These could certainly be found. At the national level, even countries that are often perceived as being at the forefront of the gender equality project, such as Sweden, have been criticized for failing to adopt sufficient policies to close the gender wage gap and eliminate patterns of horizontal and vertical segregation. *See generally* LAURA CARLSON, SEARCHING FOR EQUALITY, SEX DISCRIMINATION, PARENTAL LEAVE AND THE SWEDISH MODEL WITH COMPARISONS TO EU, UK AND US 81–226 (2007). At the EU level, many gaps in protection remain, for example as regards protection from intersectional discrimination. *See* Dagmar Schiek, *From European Union Non-Discrimination Law Towards*

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The development of equality and anti-discrimination law in Western Europe can be divided into three phases: (1) the elimination of men's legal privilege,[20] (2) the adoption of anti-discrimination legislation, and (3) the rise of substantive and transformative equality, such as affirmative action. The Article argues that in the CEE states, the last two stages happened in reverse. There was first a transformative project of socio-economic leveling, aiming at substantive equality of results, and only later were anti-discrimination rights introduced (Section B).[21] Because the transformative stage preceded an understanding of discrimination, its characteristics differ from the current Western European equality project.

During state socialism, equality was understood substantively. It was context-based and strove for real-life equality. It was also transformative in the socio-economic sense because it purposefully aimed at redistribution, the eradication of poverty, and economic leveling. That said, it was also incomplete in several significant ways. For one, state socialist equality policies were redistributive only. Unsurprisingly, due to their Marxist origins these policies were concerned primarily with socio-economic inequalities and not with socio-cultural ones, such as symbolic harms,[22] nor with dignity, identity, or diversity.[23] For another, relatedly, although state socialist equality policies were substantive and transformative with regard to class, they did not target other discrimination grounds the same way, and especially not sex, let alone gender.

Multidimensional Equality Law for Europe, *in* NON-DISCRIMINATION LAW, COMPARATIVE PERSPECTIVES ON MULTIDIMENSIONAL EQUALITY LAW 77–89 (Dagmar Schiek & Victoria Chege eds., 2009).

[20] Although this Article uses the example of gender, the description of the trajectories applies to equality and antidiscrimination law more generally.

[21] This story might well apply to other parts of the world, especially to countries with a history of socialism. For a similar observation about an inverted equality trajectory in India, where statutory protections from discrimination are relatively new, see Tarunabh Khaitan, *Transcending Reservations: A Paradigm Shift in the Debate on Equality*, 20 ECON. & POL. WKLY. 8 (2008).

[22] "Symbolic" denotes non-material aspects of speech or acts which can be harmful. Some feminist scholars have used this concept for example to capture the devaluation of women in the context of pornography. *See generally* CATHARINE A. MACKINNON, ONLY WORDS (1994).

[23] I borrow the terms and concepts of recognition and redistribution from Nancy Fraser. *See generally* NANCY FRASER & AXEL HONNETH, REDISTRIBUTION OR RECOGNITION?: A POLITICAL-PHILOSOPHICAL EXCHANGE (2003). Exploring whether and how gender inequality and injustice are tied either to material (socio-economic, redistributive) aspects of inequality on the one hand, or symbolic (socio-cultural or recognition) aspects on the other would be an interesting and important endeavor, especially considering the Marxist underpinnings of the Czechoslovak state socialist ideology and policy. Due to space constraints, this is not addressed here.

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Equality and anti-discrimination law were limited in two further ways under state socialism (Section C). First, while equality was a respected and constitutionally enshrined principle, any corresponding enforceable right not to be discriminated against was absent. Second, sex/gender equality in the law encountered the added problem of difference in the sense that substantive emphasis focused on sex/gender difference rather than on disadvantages faced by women due to the gender power hierarchy in society. While on the one hand, this differentiation permitted the special treatment of women to protect their particular vulnerabilities, it also meant that in circumstances where such differential treatment left women worse off, it was not recognized as an issue in conflict with their constitutional equality guarantees.

B. Different Equality Trajectories

The concepts of equality and anti-discrimination are central to this Article, but there is no uniform understanding of them in legal scholarship.[24] Chris McCrudden, in his study of equality and anti-discrimination law in English public law, observes that this is because it is "essentially pluralistic in its sources, in its origins, in its meaning, in its application, and in its functions."[25] Notwithstanding this opacity, some categorization and terminology is nevertheless useful for our purposes here. The following Section introduces two principal conceptualizations: Formal and substantive equality. I then outline the trajectory that equality and anti-discrimination law took in the UK and the EU. Lastly, I discuss anti-discrimination grounds. These features and concepts of equality and anti-discrimination law in Western Europe are used as frameworks against which I highlight the peculiarities of the parallel development in Czechoslovakia and the Czech Republic both during and after state socialism.[26]

I. Formal and Substantive Equality

Scholars often distinguish between "formal" and "substantive" equality. Formal equality is expressed by the equal treatment principle. It demands impartiality[27] and consistency,[28] and

[24] Fredman points out that its precise meaning has been much contested between neo-liberals, modified liberals and critical theorists, including feminists. *See* Sandra Fredman, *Discrimination*, *in* OXFORD HANDBOOK OF LEGAL STUDIES 202 (Peter Cane & Mark Tushnet eds., 2003).

[25] Christopher McCrudden, *Equality and Non-Discrimination*, *in* ENGLISH PUBLIC LAW 581, 582 (David Feldman ed., 2004).

[26] Using indigenous terminology and categorization is not really possible. Under State Socialism, there was a limited concept of equality derived from Marxism; in the post-communist period, there has been none.

[27] *See* Hugh Collins, *Discrimination, Equality and Social Inclusion*, 66 MOD. L. REV. 16 (2003).

[28] *See* SANDRA FREDMAN, DISCRIMINATION LAW 2 (2011).

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asks that decisions be made "without regard to sex."[29] Substantive equality, on the other hand, recognizes that the equal treatment of people unequally situated can lead to injustice. It therefore goes beyond the formal requirement of equal treatment and aims at equality of opportunity, resources, or results.[30] These two concepts thus identify different problems and target different wrongs: Formal equality is concerned with tackling arbitrariness, prejudice, or the unjustified difference of treatment, whereas substantive equality aims at eliminating hierarchy or dominance,[31] disadvantage,[32] or social exclusion.[33] While the concerns of formal equality are to a large extent addressed by prohibitions of direct discrimination and individualized enforcement, a substantive understanding of equality calls for a wider range of remedial measures. Some of these measures, such as the prohibition against indirect discrimination, target group disadvantage and systematic harm, while others, such as affirmative action, counter pervasive exclusion. Yet other measures, such as gender mainstreaming, reasonable accommodation,[34] and positive duties,[35] seek to change the male bias or "male norm"[36] and promote diversity.[37] In Western Europe, the substantive

[29] Collins, *supra* note 27, *passim*.

[30] *Id.*; *see also* Fredman, *supra* note 28, at 14–19. Fredman points out four dimensions of substantive equality: (1) It aims at breaking the cycle of disadvantage, also called the redistributive dimension, (2) it requires respect and dignity, also called the recognition dimension, (3) it accommodates difference and demands structural change, also called the transformative dimension, and (4) it calls for social inclusion and political voice, also known as the participative dimension. *Id*. at 25–33.

[31] CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32–46 (1987).

[32] Disadvantage has been emphasized by courts, for example in Supreme Court of the United States in *Brown v. Board of Education*, 347 U.S. 483, 495 (1957), as well as by academics. For Denise Réaume, a "substantive" understanding of equality is characterized by being sensitive to the "actual conditions of life of members of disadvantaged groups." *See* Denise Réaume, *Discrimination and Dignity*, 63 LA. L. REV. 645, 648 (2003). MacKinnon stresses that "the opposite of equality is hierarchy, not difference," and that therefore, the aim of equality law should be limiting disadvantage, not just eliminating any difference in treatment. *See* CATHARINE A. MACKINNON, SEX EQUALITY 26 (2007).

[33] For a more comprehensive list and analysis of the wrongs of direct and indirect discrimination, see Andrew Altman, *Discrimination*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2015).

[34] This term is applied to disability only in EU law, but could be understood in a broader sense to include the accommodation of family life in the workplace.

[35] *See generally* Sandra Fredman, *Breaking the Mold: Equality as a Proactive Duty*, 60 AM. J. COMP. L. 265 (2012).

[36] FREDMAN, *supra*, note 28, at 11.

[37] *See, e.g.,* Jo Shaw, *Mainstreaming Equality and Diversity in the European Union*, 58 CURRENT LEGAL PROBS. 255 (2005). For an account of the difficulties gender mainstreaming has faced in the CEE, see Charlotte Bretherton, *Gender Mainstreaming and EU Enlargement: Swimming Against the Tide?*, 8 J. EUR. PUB. POL'Y 60 (2001).

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equality approach arose out of a critique of formal equality and was based on evolving social realities and understandings of inequality.[38]

State socialist equality law in Czechoslovakia had many hallmarks of the substantive understanding of equality. Relevant constitutional and statutory provisions did not merely declare that men and women were formally equal, but also stressed equality of opportunity and introduced positive measures to ensure laws allowed women to "use all their abilities."[39] This emphasis on context and real-life situations was part of a broader understanding that prioritized socio-economic rights. In marked contrast to the capitalist countries of 'the West' at the time, the socialist states considered positive rights to be a precondition for negative freedoms.[40] In other words, civil and political rights were seen as only possible if socio-economic rights enabled them. The same was true of equality. For this reason, substantive equality received primary consideration, while formal equality played a more limited role. Viktor Knapp, a leading Czechoslovak legal theorist, stated in 1966 that:

> The basis is equality in *substance*, *not just form* . . . . Both Marx and Lenin see the basis of justice in equality; not in a quantitative legal equality ("law – the same standard for different people"), although even this standard is not without meaning for justice, but the equality of people, that is an *equality that considers their inequality and their difference*.[41]

The socialist state's commitment to achieve real substantive equality cannot be doubted.[42] That said, its sole concern with class and its over-emphasis of gender difference with little basis in any understanding of discrimination, means this was a very different type of substantive equality from the kind that has emerged in Western Europe.

Since 1989, the more substantive a provision, the less acceptable it has been for post-communist legislators and judges. For example, the flawed application of the shifting of

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[38] If I were to map the concepts of formal and substantive equality on the characterization of Western European trajectories that I offer below, phases (1) and (2) could be considered as having adopted a formal understanding, while phase (3) adopted a substantive one.

[39] *See infra* notes 72–76.

[40] Jiří Boguszak, *K sociální podstatě práva (On the social basis of law)*, PRÁVNÍK 297, 300 (1967). *See also* Inga Markovits, *Socialist vs. Bourgeois Rights: An East-West German Comparison*, 45 U. CHI. L. REV. 612 (1978).

[41] Viktor Knapp, *O spravedlnosti (On Justice)*, PRÁVNÍK 310, 312 (1966) (emphasis added).

[42] *Id. See also* Josef Blahož, *K otázce svobody o rovnosti v kapitalistických státech (About freedom and equality in capitalist states)*, PRÁVNÍK 517, 523 (1980).

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burden of proof by Czech trial courts has required repeated intervention by the Czech Constitutional Court,[43] indirect discrimination has been adjudicated considerably more narrowly than EU and ECHR standards require,[44] and the Slovak Constitutional Court found a provision allowing for positive action to be a violation of the equality provisions of the Slovak Constitution.[45]

II. Three Phases of Equality and Anti-Discrimination Law

Although there are differences in accounts of how equality and anti-discrimination law developed in Western Europe, there are some recognizable general trends.[46] Three phases can be identified: (1) The elimination of legal privileges, (2) the adoption of anti-discrimination legislation, and (3) the rise of substantive and transformative equality. The following analysis focuses on gender.

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[43] Nález Ústavního soudu České republiky ze dne 26.04.2006 (ÚS) [Decision of the Czech Constitutional Court of Apr. 26, 2006] sp.zn Pl. ÚS 37/04, publ. in No. 419/2006 Coll.; Nález Ústavníhosoudu České republiky ze dne 12.08.2015 (ÚS) [Decision of the Czech Constitutional Court of Aug. 12, 2015] sp.zn III.ÚS 1136/13; Nález Ústavní soud České republiky ze dne 22.09.2015 (ÚS) [Decision of the Czech Constitutional Court of Sept. 22, 2015] sp.zn III.ÚS 1213/13; Nález Ústavní soud České republiky ze dne 08.10.2015 (ÚS) [Decision of the Czech Constitutional Court of Oct. 8, 2015] sp.zn Ref. No. III.ÚS 880/15.

[44] One case of indirect discrimination on the basis of sex concerned the common taxation of spouses. The tax regime offered a beneficial tax rate to employed couples, but not to self-employed couples. The courts did not accept the plaintiffs' claim that the tax code was indirectly discriminatory against women, as most part-time working carers were women. Rozsudek Nejvyššího správního soudu České republiky ze dne 21.05.2009 [Judgment of the Supreme Administrative Court of May 21, 2009] čj. 7 Afs 103/2008-71. In an case of indirect discrimination of Roma in education, the trial courts, as well as the Constitutional Court, emphasised the situation of the individual over the stark statistical disparities pointing to a structural problem, and found no discrimination. Nález Ústavní soud České republiky ze dne 12.08.2015 [Decision of the Czech Constitutional Court of Aug. 12, 2015] sp.zn III.ÚS 1136/13.

[45] The provision was contained in the new Antidiscrimination Act which implemented EU law. Because the provision on positive action in EU law was permissive rather than obligatory, the Court was able to strike the implementing Slovak provision down. Nález Ústavného súdu Slovenskej republiky *zo* dňa 18.10.2005 [Decision of the Constitutional Court of the Slovak Republic] sp. zn. Pl. ÚS 8/04-202, 18 Oct. 2005, publ. in No. 539/2005 Coll.

[46] I mostly draw on Bob Hepple's work. Writing about labor law in Western Europe, he describes three phases of equality: (1) Formal, in 1957–1975; (2) substantive, in 1976–1999; and (3) comprehensive or transformative, in 2000–2004. Bob Hepple, *Equality at Work*, *in* THE TRANSFORMATIONS OF LABOUR LAW IN EUROPE 129–64 (Bob Hepple & Bruno Veneziani eds., 2009). Sandra Fredman similarly identifies a "new generation" of equality rights, starting in the 2000s, which includes the positive duty to promote equality. *See* Sandra Fredman, *Equality: A New Generation?*, 30 INDUS. L.J. 163 (2001).

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The idea that legal privileges should be eliminated originated in the eighteenth and nineteenth centuries when liberals called for equal application of laws to men and women.[47] Their aim was the elimination of legal privileges for men and the removal of formal legal impediments to women's self-realization, with particular regard to voting and property rights. This demand for equal legal status was the centerpiece of the "first wave" of feminism.[48] As a result of this development, most European countries achieved near-complete formal legal equality in the first half of the twentieth century.

Formal legal equal treatment of men and women was also a basic tenet of Marxism's "woman question."[49] Friedrich Engels claimed the abolition of private property and capitalism would automatically lead to a change in relations between the sexes, but he also emphasized it was necessary to go beyond fundamental economic reforms and formally equalize the legal position of men and women.[50] The Czechoslovak socialist state took the "equal rights of men and women" project (*rovnoprávnost mužů a žen*) seriously, especially in the early period after the Communist take-over in 1948 when formal equality in the family and in access to education, work, and public life were instituted.[51] Thus, up until the 1960s, state socialist Czechoslovakia arguably differed little from Western Europe in terms of formal legal equality requirements, except that the legal change actually happened faster in Czechoslovakia.[52] But this similarity did not persist in subsequent phases of development when Czechoslovakia began to diverge from Western Europe.

From the mid-1960s onwards, many in the West came to understand that the mere absence of formal discrimination in law did little to address historical patterns of disadvantage and continued discrimination.[53] Discriminatory acts, whether made by public or private actors, could also be obstacles to equality. The legal equality requirement was therefore expanded

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[47] Mary Wollstonecraft was a prominent proponent. MARY WOLLSTONECRAFT, A VINDICATION OF THE RIGHTS OF WOMAN (1792).

[48] For an overview of this development, see, for example, Arvonne S. Fraser, *Becoming Human: The Origins and Development of Women's Human Rights*, 21 HUM. RTS. Q. 853 (1999); *see also* Nicola Lacey, *Feminist Legal Theory and the Rights of Women*, *in* GENDER AND HUMAN RIGHTS 13 (Karen Knopp ed., 2004).

[49] This is the term used in Marxist and state socialist writing.

[50] The other two tenets of Engels' program were the inclusion of women in employment and the collectivization of household duties.

[51] Barbara Havelková, *The Three Stages of Gender in Law*, *in* THE POLITICS OF GENDER CULTURE UNDER STATE SOCIALISM: AN EXPROPRIATED VOICE 31, 32–37 (Hana Havelková & Libora Oates-Indruchová eds., 2014).

[52] *Id.*

[53] This was not only the case in Western Europe, but also notably in North America, with the U.S. playing a leading role.

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to include a right to non-discrimination. This phase started with statutory "civil rights" guarantees,[54] such the UK Race Relations Act 1965.[55] In the EU, this phase gathered momentum in the 1970s with the adoption of EEC directives on equal pay[56] and equal treatment[57] of men and women. Like the first phase, which involved the elimination of legal privileges, this phase was largely concerned with formal equality and the equal treatment principle.

Czechoslovakia, along with the other socialist countries in CEE, however, missed this development. The principle of equality, although legally enshrined, was not understood to contain a prohibition of discrimination within it. It was only much later, at the turn of the new millennium, that anti-discrimination provisions were inserted into statutory law as part of the obligatory legal reforms required by accession to the EU. As I illustrated above, the interpretation and enforcement of these provisions has been extremely difficult in both the Czech Republic and post-communist CEE countries generally.

The third phase of development of equality and anti-discrimination law in Western Europe has involved an increased understanding of how seemingly neutral measures can, in effect, be biased in favor of an advantaged group. This new sensitivity has led to a shift towards a more substantive understanding of equality. Some signs of this shift appeared concurrently with the previous formal anti-discrimination phase. In 1976, the EEC equal treatment directive[58] enabled "positive action"[59] for women, and in 1981,[60] the Court of Justice of the

[54] As Hepple points out, the international and constitutional law guarantees were often adopted immediately after WWII; the statutory guarantees, however, were only adopted beginning in the 1960s. Hepple, *supra* note 46, at 129–64.

[55] The U.S. preceded this with the U.S. Civil Rights Act of 1964.

[56] EEC Directive on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women. Council Directive 75/117 of 10 Feb. 1975, O.J. (L 45) (EC).

[57] EEC Directive on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. Council Directive 76/207 of 14 Feb. 1976, O.J. (L 39) (EC).

[58] *Id*. at art. 2(4).

[59] Affirmative action for race was enabled in the 1960s in the U.S. *See, e.g.*, Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253 (1999).

[60] Case 96/80, Jenkins v. Kinsgate, 1981 E.C.R. 911.

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European Union (CJEU) developed the concept of "indirect discrimination."[61] From then onwards, substantive equality has gathered momentum in the EC/EU, and since the 1990s has "widened and deepened."[62] EU equality law has become more "comprehensive"[63] with regards to the inclusion of grounds protected against discrimination, such as sexual orientation. It has also become more "transformative,"[64] aiming at the "dismantling of systemic inequalities and the eradication of poverty and disadvantage."[65] It has become increasingly concerned with "anti-subordination" rather than with "anti-classification."[66]

III. Discrimination Grounds

Discrimination tends to be prohibited only on the basis of certain characteristics. The UK Equality Act 2010 explicitly recognizes age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.[67] The EU list is similar.[68] These characteristics are chosen because the stereotypes and prejudices surrounding them are often grounds of discrimination in real life. They are axes of societal disadvantage and bases of societal hierarchies.

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[61] The U.S. Supreme Court developed its doctrine of "disparate impact" in 1971. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[62] Mark Bell, *The Principle of Equal Treatment: Widening and Deepening*, *in* THE EVOLUTION OF EU LAW 611–40 (Paul Craig & Grainne De Burca eds., 2011).

[63] Hepple, *supra* note 43, at 154–60.

[64] The term "transformative" is often used to highlight a socio-economic dimension. *See* SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES (2008); *see also* Hepple, *supra* note 43, at 155.

[65] Hepple, *supra* note 46, at 155.

[66] Although developed in the context of the US, this characterization is applicable to the EU development. Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003). Some authors categorize this approach based on a positive duty to promote equality as constituting a separate, fourth generation of equality law; *see* Fredman, *supra* note 43, *passim*.

[67] Equality Act 2010, c. 15, § 4.

[68] The EU has the competence to combat discrimination on the basis of "sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation." Treaty on the Functioning of the European Union art. 19, Oct. 26, 2012, 2012 O.J. (C 326) 47. It has done so through a series of directives. The other grounds mentioned in the EU Equality Act 2010 were interpreted as covered by the ground of "sex" by the CJEU. The ECHR of 1950 prohibits discrimination on the basis of "sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." This is a wider list than the one contained in the EU and the UK legislation, but the duty is more limited. One could argue about anti-discrimination guarantees that the wider the group of duty-bearers and the more far-reaching the duties, the more limited the grounds.

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Much can be said on the subject of grounds,[69] but for the purposes of this Article, the inclusion or exclusion of class or socio-economic status is of particular interest. In the EU[70] and the UK, it is not included among the enumerated protected grounds.[71] In Czechoslovakia, on the other hand, concerns with class were fundamental. They drove the equality project, which the socialist state saw first and foremost as being about socio-economic inequality. In the words of Viktor Knapp, the concern was with inequality "stemming from a particular division of means of production."[72]

The socialist state's goal of socio-economic leveling was considered largely achieved with the expropriation of private property after the 1948 Communist takeover. It was also actively pursued through full employment and equalizing wage policies, where a conscious and concerted overcompensation of manual labor and undervaluing of non-manual work led to an unprecedented leveling and homogenization of income across society.[73] A generous social security system completed this effort. The state socialist project was very socio-economically transformative, both in its aims and its outcomes. But its concern with poverty, class, and socio-economic status was not accompanied by any concern for dismantling other axes of inequality, such as gender, race, and ethnic origin.[74]

The lack of attention paid to these other types of discrimination is worth noting, but it also tells us something about equality and anti-discrimination law. Wealth and income inequality can be addressed by a largely redistributive tool set, which might not need a statutory prohibition of discrimination in horizontal relations. This is perhaps why class or socio-

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[69] For a discussion of their role in anti-discrimination law, see TARUNABH KHAITAN, A THEORY OF DISCRIMINATION LAW 30–38 (2015).

[70] Convention for the Protection of Human Rights and Fundamental Freedoms art. 14, Nov. 4, 1950, 213 U.N.T.S. 221.

[71] The UK Equality Act 2010 speaks about socio-economic inequalities in relation to the public sector equality duty. Equality Act 2010, c. 15, § 1. But as this provision is very limited in its definition of duty-bearers, it has not been extended to private, horizontal relations, such as employment or access to goods and services. See my comment about the inverse relationship between the scope and grounds, *supra* note 68.

[72] Knapp, *supra* note 41, at 311.

[73] The general leveling of wages can be seen as a compensation for the general lack of freedom in society. *See, e.g.*, WALTER D. CONNOR, SOCIALISM, POLITICS AND EQUALITY: HIERARCHY AND CHANGE IN EASTERN EUROPE AND THE USSR 23, 217 (1979).

[74] Other grounds such as religion or belief, disability, age, or sexual orientation were not addressed either. As these have entered the anti-discrimination landscape more recently, and in the case of the EU only in this millennium, it is not surprising that these were not specifically addressed during the period of state socialism.

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economic status are often omitted as protected categories in Western jurisdictions. It also explains why state socialist Czechoslovakia, committed to achieving real substantive socio-economic equality, did not need an individual anti-discrimination component. This made the situation in Czechoslovakia different from the West. When one speaks about "substantive equality," "positive duties," "pro-activity," for example, in the West, one assumes that an individual entitlement to assert discriminatory behavior exists, and that all other measures go beyond and complement it. In the state socialist understanding, "substantive" measures were not only the basis, but they were all there was. The suspicion that difference of treatment and impact triggers in Western equality and antidiscrimination law was missing. The intellectual step that the law should interfere with behavior based on bias, whether expressed by individual discriminatory acts or in discriminatory structures, was never made.

C. Equality During State Socialism

Czechoslovakia had two constitutions under state socialism, one in 1948, and one in 1960, and both guaranteed equal rights for men and women. The 1948 Constitution stipulated that: "The state guarantees to all its citizens, men and women, the freedom of person and its expression and it fosters equal possibilities and opportunities for all"[75] and "[m]en and women have equal standing in the family and in society and equal access to education and also to all occupations, offices and ranks."[76] Similarly, the 1960 Constitution stated that: "Men and women have equal standing in the family and at work and in public activity."[77] In addition:

> Equal engagement of women in family, work and public activity is secured through special provision for working conditions and special health care during pregnancy and maternity, as well as through the development of institutions and services allowing women to use all their abilities to participate in the life of society.[78]

Statutory law complemented these constitutional equality guarantees. The 1965 Labor Code, for instance, stated among its basic principles that:

> Women have the right to equal standing with men at work. Women are guaranteed working conditions which

[75] Constitutional Act No. 150/1948 Coll. (1948), art. 3, § 2 (Czechoslovakia) (emphasis added).

[76] *Id.* § 1(2).

[77] Constitutional Act No. 100/1960 Coll. (1960), art. 20, § 3 (Czechoslovakia).

[78] *Id.* art. 27.

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> enable them to work not only taking into account their physiological conditions but also and especially taking into account their social function as mothers and their role in raising and caring for children.[79]

Two aspects of these legal provisions are worth noting and are discussed in greater detail below. First, there was no inclusion of any explicit right against discrimination on the basis of sex (or any other typically protected characteristic). Second, the statements on equality, especially in the 1960 Constitution and the 1965 Labor Code, went hand in hand with an emphasis on difference.

I. Sex Equality Proclamation but Not an Anti-Discrimination Right

It is important to understand that the equality guarantees expressed in both constitutions, as well as the Labor Code, were more akin to "policy statements" than enforceable individual rights. The five standard "methods of interpretation" for legal norms used in Central European legal theory[80]—textual, logical, systematic, historical, and teleological[81]—help illustrate this distinction.

With regards to language, Czechoslovakia's socialist constitutions did not use the word "right." The Labor Code spoke of a "right to equal standing," but it was mentioned only in its introductory provisions on principles, which were not binding. It is quite significant that the word was not repeated in the actual binding body of the Code. The only provisions that specifically addressed women in the normative part of the Code targeted them for special treatment because of their "physiological conditions" and their "social function as mothers." Discrimination was not mentioned at all.

As far as systematic interpretation is concerned, the first question to ask is: What normative power did the equality provisions in the constitutions have over statutes and other acts of the government? Formally, both constitutions contained provisions that required all hierarchically subordinate norms to conform to their provisions.[82] The legal scholarship at

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[79] Constitutional Act No. 65/1965 Coll. (1965), art. 7.

[80] These are not specifically state socialist but common to Germanic legal systems.

[81] *See generally* ALEŠ GERLOCH & JIŘÍ ČAPEK, TEORIE PRÁVA 149–57 (2003).

[82] The provision was weaker in the 1948 Constitution in that it only required that "interpretation and use of all other legal acts be in harmony with the Constitution." Constitutional Act No. 150/1948, § 172(3). The 1960 Constitution was more categorical in stating that "statutes or other legal acts must not contravene the Constitution." Constitutional Act No. 100/1960 art. 111, § 2. Some constitutions, such as the European Charter of Fundamental

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the time, however, assumed no conflict between statutory and constitutional law. They saw the constitutional provisions as being given their content through statutory law:

> Czechoslovak laws *actualize the principle* of "equal standing" of men and women in a way that creates legal distinctions between them, for example when this is justified by "biological difference of the female organism."[83]

Constitutional "rights" were only available insofar as they were recognized in statutes or regulations. As the excerpt above shows, this made it possible to convert the principle of "equal standing" identified in the constitutions into permitted differential treatment based on biological or other differences found in other legal instruments.

A systematic analysis of procedural mechanisms reveals that avenues for redress and remedies for discrimination or breaches of the equality guarantees were entirely missing from the legal framework. Procedures for challenging state behavior—including labor relations due to the public nature of employers—on the basis of individual rights either were not truly available in practice or did not even exist. An individual could not defend her constitutional "rights" through individual application.[84] Throughout the entire period of state socialism, no judicial body had jurisdiction to review individual complaints of infringements of fundamental rights guaranteed by the constitutions. For most of that era, no provision was made for a Constitutional Court to deal with these issues. When one was eventually conceived and finally foreseen by law,[85] it was never established. Furthermore, administrative judicial review was non-existent, and only informal complaints to the administration were considered acceptable.[86] The fact that courts were not impartial arbiters but rather a controlling arm of the socialist state dampened litigation in front of

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Rights, art. 52, § 5, or the current Czech Charter, art. 41, § 1, have a general provision that limits the effect of some rights or principles—often socio-economic—to the extent guaranteed by statute. This was not the case in the state socialist constitutions.

[83] Vladimír Mikule & Marie Kalenská, *K otázce rovnosti před zákonem* (On equality before the law), PRÁVNÍK 511 (1968) (emphasis added).

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

[85] Constitutional Act No. 43/1968 Coll. (1968).

[86] Inga Markovits, *Justice in Luritz*, 50 AM. J. COMP. L. 819, 848 (2002). *See also* ZDENĚK KÜHN, APLIKACE PRÁVA SOUDCEM V ÉŘE STŘEDOEVROPSKÉHO KOMUNISMU A TRANSFORMACE (THE JUDICIAL APPLICATION OF LAW DURING CENTRAL EUROPEAN COMMUNISM AND TRANSFORMATION) 70 (2005).

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ordinary courts.[87] It is therefore not surprising that the official "Collections of Judgments" did not contain a single discrimination claim throughout the entire state socialist period, nor were any mentioned in the scholarly literature of the time.[88]

Finally, it is helpful to examine the characteristics of these legal provisions in their historical context through historical and teleological interpretation. The relatively weak normativity of state socialist law and its particular understanding of "rights" are especially important. State socialist legal theorists explicitly accepted that socialist law was different from bourgeois law, claiming that the latter only worked through sanctions whereas the former worked through "education and persuasion."[89] They believed that state socialist law "gave normative acts a deeper possibility of educational effects"[90] through the adoption of "proclamations, appeals and wishes" or "norms with only a morally-political sanction."[91] The existence of such *leges imperfectae*, i.e. sanction-less norms, were often only aspirational statements, even though they might seem like legal guarantees of rights to Western lawyers. Thus, it is possible that their provisions did not aim to prohibit any behavior nor did they foresee consequences for breach at all.

The most persuasive demonstration of this non-right character of the equality guarantees in socialist constitutions comes from the contemporary construction of human rights norms and their aims. Inga Markovits has summarized the difference between Western and Eastern understanding of rights as follows:

> Bourgeois law sees rights as individual entitlements, focuses on the end result of a right's realization (if necessary in court), insists on exact definitions (in order to know how much a right-holder is entitled to), and basically perceives the realization of a right as a private affair. Socialist law sees rights primarily as policy

[87] The lack of independence of the state socialist judiciary is well documented. *See, e.g.*, Otakar Motejl, *Soudnictví a jeho správa* (Judiciary and its Control), *in* KOMUNISTICKÉ PRÁVO V ČESKOSLOVENSKU. KAPITOLY Z DĚJIN BEZPRÁVÍ (COMMUNIST LAW IN CZECHOSLOVAKIA. CHAPTERS FROM THE HISTORY OF UNLAWFULNESS) 813–21 (Michal Bobek et al. eds., 2009).

[88] The guarantees were used in interpretation by ordinary courts in the 1950s, but there is no record of any claims brought to court on the basis of individual equality or antidiscrimination rights.

[89] Marie Kalenská, *Vztah norem socialistické morálky k pracovnímu právu* (The relationship between socialist morality and labor law), PRÁVNÍK 837, 847 (1962).

[90] *Id.* at 846.

[91] *Id.* at 845.

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> pronouncements; focuses on the process of realizing the policy more than on the eventual realization of the right itself; is interested in ambiguity (which facilitates the manipulation of a right for policy purposes); and basically perceives the realization of a right as a social affair.[92]

Under state socialist law, therefore, neither constitutional nor statutory provisions were constructed and understood as legally enforceable "rights" of individuals. At most they were "policy pronouncements"[93] and "directives to legislatures."[94]

In sum, during the state socialist period, any individual wanting to challenge a discriminatory act would have had to contend with the following: An absence of any clear, normatively-expressed legal guarantee to be free from such an act; no recognized enforceable individual anti-discrimination right; no specific anti-discriminatory procedural guarantees; and a theoretical conceptualization of equality rights as being nothing more than "policy pronouncements."

A woman who wanted to claim sex/gender discrimination in particular would also have had to overcome an even more fundamental obstacle: The perception that natural differences between the sexes implicitly legitimized the differential treatment and status of women. This Article now turns to the particular challenges of sex/gender equality and anti-discrimination law.

II. The "Different" Treatment Trap for Women

The preceding discussion of the trajectory and characteristics of state socialist equality law, in principle, applies to all discrimination grounds, such as race or ethnic origin. In the following Section, this Article discusses sex/gender specifically. I am particularly interested in how perceptions of the natural difference between the sexes can weaken equality and anti-discrimination rights. Unlike race or ethnic origin, which one can argue would become irrelevant characteristics in an ideal, equal, post-racial society, the exclusive reproductive ability of women is the basis of real differences between the sexes that law and policy should not ignore. Even in an ideal, equal, post-patriarchal society, where social disadvantage would have perished, society would, I believe, still need to accommodate particular vulnerabilities

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[92] Markovits, *supra* note 40, at 625.

[93] *Id.* at 625.

[94] George A. Bermann, *The Struggle for Law in Post-Soviet Russia*, *in* WESTERN RIGHTS? POST-COMMUNIST APPLICATION 41, 54 (András Sajó ed., 1996).

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rooted in biology. Race can become irrelevant in a way that sex cannot. The questions of how to identify and delineate the relevant differences with regard to sex and how the law should treat them will never disappear.[95]

The constitutional and labor law provisions quoted earlier revealed that sex equality guarantees in state socialist Czechoslovakia were inseparable from the special treatment of women. This is not in and of itself automatically problematic.[96] If one takes men as the comparator, women are at once both the same as and different from men: They are the same in their humanity, but different in their biology and in the lives they typically lead in a patriarchal world. For equality law to be true to its name, it needs to recognize this and accept that both equal and different treatment on the basis of sex is congruent with the principle of equality.[97] That said, it is often difficult to determine how much, and what type, of special treatment is necessary and suitable.[98]

There are three particular challenges that arise with such determinations. First, it is easy to assume that all of the specifics of women's lives are rooted in their biology. Legal provisions can reflect and perpetuate such an essentialist understanding of gender; for example, they can see the mother as the only parent. Or, they can actively counteract it; for example, they can actively encourage fathers to become involved in child-care. Second, there must be a balance between protecting the existing vulnerabilities of women on the one hand and making sure that this protection does not stifle them or limit their range of options and choices on the other. Finally, over-emphasizing difference can ultimately lead to an acceptance of differential treatment that is neither "special" nor beneficial, but actually worse for women. This is how equality and anti-discrimination measures can fail women.

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[95] They have also been the subject of considerable attention, and some disagreement, from feminist legal scholars. For example, Alison Jaggar advocates for greater recognition of difference, and Martha Minow supports gender-neutrality. Alison M. Jaggar, *Sexual Difference and Sexual Equality*, *in* THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE (Deborah Rhode ed., 1990); Martha Minow, *Adjudicating Differences: Conflicts Among Feminist Lawyers in* CONFLICTS IN FEMINISM (Marianne Hirsch & Evelyn Fox Keller eds., 1990).

[96] This is enshrined, for example, in the EU's recognition that "provisions concerning the protection of women, particularly as regards pregnancy and maternity" do not constitute a breach of the principle of equal treatment. *See* Council Directive 2006/54, art. 28(1), 2006 O.J. (L 204) (EC). Special treatment still has opponents. As Fredman points out, "different" treatment has been opposed by liberals, who argue that equality should be symmetrical, as well as by neo-liberals, who reject interference with the "free" market. *See* SANDRA FREDMAN, WOMEN AND THE LAW 305 (1997).

[97] MacKinnon, for example, has criticized the sameness-difference paradigm as obscuring the fact that the unchallenged norm, the standard of comparison, is male. *See* MACKINNON, *supra* note 32, at 32–46.

[98] On the debates in the West, see FREDMAN, *supra* note 96, at 304–08.

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The following Section examines how state socialism did not tackle well—or at all—these three challenges.

With my following critique of Czechoslovak law I do not mean to say that the West has found the right formula either, certainly not during the relevant time period. The following Section does not aim to offer a comparison, but rather tries to show that the difference between the sexes has played a prominent role under state socialism, and continues to do so today, which has undermined equality and anti-discrimination law.

III. The "Natural" Difference of Women

Some Western scholars who have studied state socialist gender policies have understood state socialist law and policy as emphasizing the sameness of men and women.[99] The picture was more complicated. In Marxist theory, the understanding of women's nature was very ambivalent. Marxists "emphasize[d] that women's subordination result[ed] not from biology, but from the social phenomenon of class . . . ."[100] They imagined that through the abolition of sexual distinction in the market, an "androgynous future" was possible.[101] At the same time, they saw "human nature as being biologically sexed," believed in "the division of labor in the sexual act,"[102] were convinced that women's role in the home and with children was "natural," and believed the division was, in Marx's words, "based on a purely physiological foundation."[103] Marxism thus united an assertion of sameness, where men and women are the same human beings for the purposes of paid work, with an insistence on their difference—a biological difference that determined their respective roles in the home.

Importantly, neither Marxist nor state socialist theory understood gender as a social construct. While the revolutionary and transformative character of Marxism was to a large extent premised on "class" being a social construct, contingent on external conditions and therefore changeable, this analysis did not extend to gender. Although there was an acknowledgement of inequality between the sexes in society, the inequality was mostly understood to be a consequence of class inequalities under capitalism, or of the natural, biologically determined differences between men and women. Since canonical Marxist

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[99] For example, Nanette Funk states that state socialism "failed to acknowledge" the "difference [between men and women]." Nanette Funk, *Introduction: Women and Post-Communism*, *in* GENDER POLITICS AND POST-COMMUNISM 1, 6 (Nanette Funk & Magda Mueller eds., 1993).

[100] ALISON M. JAGGAR, FEMINIST POLITICS AND HUMAN NATURE 67 (1983).

[101] *Id.*

[102] *Id.* at 67–68.

[103] *Id.* at 68 (citing KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 178 (1967)).

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analysis of social inequality assumed that if the socio-economic conditions (the "base") were changed, society and culture, including gender inequality (the "superstructure"), would automatically change too. Accordingly, whatever inequality did not disappear was considered to stem from "natural differences." In this manner, any continuing gender inequality could be used to confirm the naturalness of differences between men and women.[104]

A perception of there being natural, inborn differences between the sexes enabled assumptions about corollary differences in ability and preference. Furthermore, women's social roles or functions, especially familial roles, were consequently seen as being biologically determined:

> A woman, while of equal rights in society, is different from a man through her *social-biological function* with regard to the sustenance of human kind, which leads to a range of differences in anatomy, physiology, *in social roles*, especially in relationship to offspring, etc.[105]

The socialist equality project, therefore, never intended to address gender. It did not include any critique of the relations between the sexes and their hierarchical nature—neither in socio-economic nor socio-cultural terms. Nor was it ever considered that the position of men might need to change to achieve equality—the term "woman question" is quite illustrative of this. In this sense, the state socialist sex equality policy was really a policy of "public equality and private difference."[106] The policy combined women's advancement in the public spheres of education, work, and politics with a continuation of traditional gender relations in the family. But, as this Article discusses below, women's different role in the family eventually seeped into their treatment as workers. A ready acceptance of biologically determined differences between the sexes enabled "special" treatment to benefit women, but it also provided a ready justification for their segregation and discrimination in the public sphere.

This kind of understanding of difference would have easily pre-empted any formal challenges against discriminatory behavior in the socialist era. Legal tests of discrimination, wherever enshrined, typically contain a checking of "comparability" between the claimant and a member of the privileged group. If one believes men and women are fundamentally

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[104] I thank Michael Wrase for helpful discussions on this point.

[105] SENTA RADVANOVÁ ET AL., ŽENA A PRÁVO (WOMAN AND THE LAW) 6 (1971) (emphasis added).

[106] Havelková, *supra* note 51, at 48.

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different, anti-discrimination law ceases to be useful.[107] Thus, even if an anti-discrimination right had been incorporated into state socialist law, its enforcement likely would have been undermined by the prevailing, underlying misunderstandings of inequality. These ideas about difference have yet to be challenged in the Czech Republic, and they have been central in preventing the successful implementation of anti-discrimination provisions with regards to sex/gender—even when they were finally adopted in 2000s by the Czech legislature.[108]

IV. The Special Treatment of Women

As I pointed out above, special treatment was incorporated directly into legal provisions guaranteeing equality between the sexes. With regard to women and sex/gender, the principle that "unlikes should be treated unalike" was actually more prominent than the axiom of "treating likes alike."[109] In many instances, the differential treatment was intended to benefit women. Measures were implemented that catered to women's special needs that resulted from their "different" biology, such as breastfeeding breaks at work,[110] or cervical cancer scans for women. Radvanová explicitly defended the latter as being compatible with the principle of equality:

> [T]hese special procedures do not mean a breach of equality between citizens in access to health care. This is because the right to health care means care which is *adequate and needed* based on a *particular* health condition or the potential danger of disease.[111]

Other measures reflected the "different" social reality of women's lives. They included their protection from dismissal during pregnancy, maternity leave under labor law,[112] and

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[107] For a similar point about the U.S., see CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 216–17 (1989).

[108] *See infra* note 136 and 137.

[109] This is the Aristotelean formulation of the equality principle. For a discussion and a feminist critique of this standard, see CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 225 (1989).

[110] Constitutional Act No. 65/1965 Coll. (1965), § 161 (Czechoslovakia).

[111] RADVANOVÁ, *supra* note 105101, at 191–92 (emphasis added).

[112] Maternity leave of eighteen weeks, which was introduced in 1950, was lengthened several times in the 1960s, up to twenty-six weeks in 1968. Constitutional Act No. 65/1965 Coll. (1965), § 155 (Czechoslovakia). Also introduced in 1968 was "further maternity leave" of one year, which was lengthened to two years in 1969. *See* Constitutional Act No. 153/1969 Coll. (1969) (Czechoslovakia).

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maternity benefits in social security.[113] Some measures even pushed for direct, positive actions, such as, for example, a legal requirement that employers adopt binding "plans to increase the labor participation of women,"[114] or even the Communist Party's quota for women.

Overall, in a material sense, these provisions were good for women. In fact, Czechoslovak women were probably better off socio-economically than many women in most Western European countries during the same time period.[115] The socialist state made sure that women's specific biology was reflected in policy. It protected women from the ramifications that their motherhood would have otherwise had on their economic situation. And to some extent, such measures even redressed the disadvantages women face more generally under patriarchy.

There was, however, the problem of an underlying misunderstanding of sex/gender. State policy never drew a conceptual distinction between the biological and the social,[116] so most special treatment was deemed to protect and support the role of women as mothers. These essentialist references to "functions" and "roles" of women and mothers both drew on and

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[113] These were especially generous from the 1960s onwards. "Financial help in motherhood" (*peněžitá pomoc v mateřství*) was paid during maternity leave. *See* Constitutional Act No. 88/1968 Coll. (1968), § 2(b) (Czechoslovakia). Furthermore, a "motherhood supplement" was paid during "further maternity leave" (*mateřský příspěvek*). *See* Constitutional Act No. 154/1969 Coll. (1969) (Czechoslovakia).

[114] *E.g.*, Constitutional Act No. 70/1958 Coll. (1958), § 8(1); Government Ordinance No. 92/1958 Coll., § 20.

[115] For a transnational comparison, see, e.g., Sharon L. Wolchik, *Ideology and Equality*, 13 COMPARATIVE POLITICAL STUDIES 445 (1981). The transformative zeal of the socialist state fizzled out considerably as time progressed. *See* Havelková, *supra* note 51, at 44-48. Many émigrés saw Western Europe as decidedly backward when they arrived after leaving Czechoslovakia after 1968. Alena Wagnerová observed that it was "as in the developing world; as if someone brought us back twenty years, to the times of our mothers and grandmothers." Alena Wagnerová, *Laudatio Linda Šmausová – žena – člověk – vědkyně – přítelkyně: curiculum velice osobní*, *in* TVRDOŠÍJNOST MYŠLENKY. OD FEMINISTICKÉ KRIMINOLOGIE K TEORII GENDERU 15 (Libora Oates-Indruchová ed., 2011). The reverse was true when they returned to Czechoslovakia after 1989: "As if we somersaulted again back to the GDR, when we went there in late 1960s. Our [Eastern comparative] advance, that we were so proud of, ceased to exist." *Id.* at 18–19.

[116] In the West, this distinction has, of course, been problematized and challenged, notably by Judith Butler. *See generally* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990). There is a difference between troubling a distinction–which has been intellectually, and arguably even politically, well-established and internalized in the West–and not having arrived at the distinction at all, as in the East. It is hard to deconstruct something that has not been constructed in the first place. Arguably, in many Western European countries, especially on the continent, it took a while for this intellectual shift to be judicially acknowledged as well. Susanne Baer notes that in Germany, "the interpretation of Article 3 [of the Basic Law] only moved away from simple biologism in the 1980s . . . ." Susanne Baer, *The Basic Law at 60 - Equality and Difference: A Proposal for the Guest List to the Birthday Party*, 11 GERMAN L.J. 67, 82 (2010).

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entrenched a specific, narrow conception of what it meant to be a "man" or a "woman." The policies cemented existing gender roles and the gender order. Because they were based on stereotypical ideas about roles, such provisions were tailored to reflect them. One example is that they completely excluded men from the possibility of being responsible for childcare.[117] In many instances the measures went beyond what was necessary, such as when the new 1965 Labor Code[118] banned a range of types of work for all women. The ban was intended as a protective measure for the benefit of women but, in effect, it seriously limited women's opportunities in the labor market.[119] Furthermore, the extent of some provisions, such as the length of "further maternity leave," although optional, could make female workers less desirable to employers and stifle women's careers. Nor was there any consideration of changing the male-based norms that pervaded law and society. In the context of work, for example, alternative measures that could have allowed for the reconciliation of family and work obligations, such as part-time work,[120] were never made a part of the equality project.[121]

One could conclude from this that women were mostly treated the same as men during the periods of their lives when they were seen as workers and different when they were seen as mothers. But women's perceived difference from men inevitably seeped into their lives as workers, and this difference was used to deny or justify discrimination.

The change to the legal provisions after 1989 was slow in coming. For example, the Labor Code continued to speak about the "maternal role" until mid-2000, and a protective provision prohibiting women to perform underground work[122] was abolished recently in

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[117] While I would advocate gender-neutralization of parenting in the form of parental leave and parental benefits for both men and women, there is a case to be made for special protection of women during pregnancy, and breastfeeding shortly after birth. EU legislation has approached the issue in such a fashion. *See* Council Directive 1992/85, 1992 O.J. (L 348) (EC); *see also* Council Directive 1996/34, 1996 O.J. (L 145) (EC).

[118] The Labor Code introduced a prohibition of night work, see Labor Code, No. 65/1965, § 152, as well as a prohibition of certain types of work for all women. *See also* Labor Code, No. 65/1965 § 150(2).

[119] Havelková, *supra* note 51, at 43.

[120] Part-time work was almost non-existent during the period.

[121] The generous provision of child-care, for instance, was clearly positive in helping mothers to work outside of home, and yet it did nothing to change the male-based employment model.

[122] Labour Code Act No. 262/2006 Coll., § 238(1).

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2012.[123] Child-care was only made available to fathers in 2000.[124] Because the majority of these changes were heavily influenced by EU law requirements, they cannot be taken to illustrate a mentality shift.

V. Different and Worse Treatment—Inequality Not Identified As Sex Discrimination

The narrative of natural difference between the sexes enabled an understanding of men and women as incomparable. This supported different-but-better treatment but also different-and-worse treatment.[125] Because difference between the sexes was seen as natural, the segregation of women into the realm of the family, housework, and childcare—as well as the separation of male and female jobs in the sphere of work—were also understood as natural.[126] Rather than being perceived as a manifestation of inequality, this was instead perpetuated through legal regulation and defended by legal academics:

> The fact that it is first and foremost the woman who is called to care for a child at young age, *cannot* be seen as some *inequality*. The equality of a man and a woman does not mean a mechanical division of life functions and societal work. Motherhood is an exclusive *fate* of the woman.[127]

But "separate" is rarely "equal."[128] Women were "helpers" and "auxiliary,"[129] especially in the public worlds of work and politics. Employers viewed women's income as secondary to

[123] Act No. 365/2011 Coll. amending 262/2006.

[124] In 1990, parental allowance was made available to caretaker fathers (Act No. 382/1990 Coll.), but the Labour Code only recognized parental leave in 2000 (Act No. 155/2000 Coll.). Thus, for a decade, a father could receive the benefit, but had no guarantee of workplace protection from dismissal during the period of care.

[125] This particular trap that respecting difference creates has not been unique to the East and has been noted by feminist scholars in the West. *See, e.g.*, Martha L. Minow, *Foreword: The Supreme Court, 1986 Term—Justice Engendered*, 110 HARV. L. REV. 10, 12–13 (1987); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, *passim* (1987).

[126] For parallels in the West, see, e.g., FREDMAN, *supra* note 96, at 74–75, 104–13, 122–25, 133–37.

[127] RADVANOVÁ, *supra* note 105, at 30 (emphasis added).

[128] The U.S. used the term "separate but equal" to justify discrimination of African Americans through segregation before the *Brown v. Board of Education* ruling. *See Brown*, 347 U.S. at 488.

[129] Alfred G. Meyer, *Feminism, Socialism, and Nationalism in Eastern Europe*, *in* WOMEN, STATE, AND PARTY IN EASTERN EUROPE 4, 23 (Sharon L. Wolchik & Alfred G. Meyer eds., 1985).

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men's and, as a result, women earned considerably less.[130] Women rarely reached higher managerial positions.[131] In local politics, women's involvement meant their relegation to segregated tasks such as inspecting quality of social care, childcare, and social welfare.[132] In national politics, while women were represented in the largely powerless state legislatures,[133] women rarely became members of the executive government or of the Central Committee of the Communist Party.[134]

Scholars and jurists at the time did not reflect on the possibility that this segregation and inequality might be unfair and discriminatory. Instead, they viewed such disparity as a consequence of natural differences in women's abilities or preferences. Challenging symbolic disadvantages, such as the undervaluing of work that was typically done by women, was not really possible because stereotypes were not identified as being harmful to women but rather reflections of biological reality. Similarly, challenging material disadvantages, such as lower rates of remuneration, was also difficult because they too were seen to be a natural consequence of difference. Neither unequal treatment nor unequal results along the sex/gender axis triggered the kind of suspicion that it would under UK/EU anti-discrimination

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[130] In 1962, women on average earned sixty-four percent of men's wages, and in 1988, the proportion rose only to seventy-one percent. *See* Hana Hašková & Marta Vohlídalová, *The Labour Market and Work-Life Balance in the Czech Republic in Historical Perspective*, *in* WOMEN AND SOCIAL CITIZENSHIP IN CZECH SOCIETY: CONTINUITY AND CHANGE 46 (Hana Hašková & Zuzana Uhde eds., 2009). Although the man was not the sole breadwinner as he was in the West, he was still the main breadwinner in the family. *See* Jiřina Šiklová, *Are Women in Central and Eastern Europe Conservative?*, *in* GENDER POLITICS AND POST-COMMUNISM: REFLECTIONS FROM EASTERN EUROPE AND THE FORMER SOVIET UNION 75 (Nanette Funk & Magda Mueller eds., 1993).

[131] Hilda Scott, writing in 1974, noted that "in agriculture, where 52 per cent of all workers are women, only 20 of the country's 5,800 farm cooperatives are headed by women," and "only two of the more than three hundred district national health centers are directed by women, in spite of the "feminization" of medicine." *See* HILDA SCOTT, DOES SOCIALISM LIBERATE WOMEN? EXPERIENCES FROM EASTERN EUROPE 14 (1974).

[132] Fodor observes, "[n]ot surprisingly, the functions women were supposed to fill were not only different but also inferior to those carried out by men." Eva Fodor, *Smiling Women and Fighting Men: The Gender of the Communist Subject in State Socialist Hungary*, 16 GENDER & SOCIETY 240, 258 (2002).

[133] The average proportion of women in the National Assembly was twenty-three percent—double the amount than before the Communists came to power. At the communal level, representative bodies consisted of an average of thirty percent women. *See* JAROSLAVA BAUEROVÁ & EVA BÁRTOVÁ, PROMĚNY ŽENY V RODINĚ, PRÁCI A VE VEŘEJNÉM ŽIVOTĚ (TRANSFORMATIONS OF WOMEN IN THE FAMILY, WORK AND PUBLIC LIFE) 234–35 (1987). On the limited role of the legislature in actual decision-making, see Hana Havelková, *Women In and After a "Classless" Society*, *in* WOMEN AND SOCIAL CLASS - INTERNATIONAL FEMINIST PERSPECTIVES 69, 75 (Christine Zmroczek & Pat Mahony eds., 1999).

[134] During the entire period of forty-one years, only three women were either state or federal ministers. *See* Hana Havelková, *Jako v loterii: politická reprezentace žen v ČR po roce 1989*, *in* MNOHOHLASEM 25, 30 (H. Hašková, et al. eds., 2006). *See also* SCOTT, *supra* note 131, at 14.

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law.[135] Without seeing gender characteristics and roles as constructed and changeable, and without seeing patriarchy and the socio-cultural and socio-economic hierarchy it creates in society, none of these inequalities could have been properly identified and tackled.

The easy acceptance of the difference between women and men as justifying discrimination did not disappear after 1989. For example, to this author's knowledge, no wage discrimination case has yet been won in the Czech Republic. Courts readily accept such employers' explanations as "the workload of both workers [male predecessor and female successor on the same position] was *quantitatively* and *qualitatively* different" and the woman "carried out *operative* tasks whereas […her male predecessor] executed *strategic* operations," without gathering sufficient evidence to substantiate such claims.[136] This illustrates the negligent adoption of gender stereotypes about women and their work, which is widespread among the courts.[137]

D. Conclusion

Equality was an important principle under state socialism. Class and socio-economic inequalities were comprehensively leveled through property redistribution, full employment policies, and generous social security. With regards to the equality of men and women, the socialist state strived—and mostly managed—to eliminate the traditional legal privilege of men, and it guaranteed women access to the hitherto restricted arenas of education, work, and politics. Beyond these tenets, equality was limited in state socialist Czechoslovakia. Its legal order did not provide any right to non-discrimination that would protect against individual prejudice or structural disadvantage. The primary transformative concern of state socialist equality policy was overwhelmingly that of economic leveling. The effect was that it focused exclusively on the class/socio-economic status axis of disadvantage, and not on sex/gender or any other specific characteristics typically protected by anti-discrimination law. Although the understanding of equality was substantive in the sense that it recognized differences between men and women, the "special" treatment that resulted from this perceived difference often led to the overprotection or entrenchment of gender roles that ultimately limited women's (and men's) choices and autonomy. Moreover, the ready acceptance that women were different in their roles, characters, abilities, and preferences

[135] The former should trigger suspicion of direct discrimination and the latter of indirect discrimination.

[136] Rozsudek Obvodního soudu pro Prahu 1 ze dne 14.03.2005 [Judgment of the District Court for Prague 1 of Mar. 3, 2005], sp.zn 23 C 11/2003-70 (emphasis added).

[137] Similarly to the previously mentioned decision, see also Rozsudek Okresního soudu v Blansku ze dne 30.06.2015 [Judgment of the District Court in Blansko of June 30, 2015], sp.zn 78EC 1342/2011 –279.

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made individual acts and structural mechanisms of sex/gender discrimination appear natural or justified.

These deficiencies carried over into the post-communist transition period and continue to prevail today. Although the lack of constitutional and statutory provisions on equality and anti-discrimination have been remedied, these rights have been weakened by the fact that anti-discrimination law has no indigenous history to draw upon, and nor has substantive and transformative equality law any fertile domestic conceptual ground within which to grow in relation to any protected characteristics other than class or socio-economic status. It is this tradition and its legacy that is behind the low success rate of claims of direct and indirect discrimination in Czech courts over the past decade and a half. Moreover, the equality project is largely seen as tainted by the State Socialist past—tried and failed.

This Article argued that the trajectory of equality and anti-discrimination law was different in CEE than it was in the UK/EU. In Czechoslovakia, substantive equality of a certain kind preceded rather than followed formal equality and the right not to be discriminated on the basis of certain protected characteristics. When one speaks about substantive or transformative equality, positive action, positive duties, or pro-activity in the UK/EU context, one assumes that an individual entitlement to challenge discriminatory behavior exists, and that all other measures go beyond it and complement it. In the state socialist understanding, however, substantive measures were not only the basis for equality, but they were all there was. The suspicion of different treatment and impact that typifies UK/EU equality and anti-discrimination law was missing. State socialism never took the intellectual step for the law to interfere with bias and its discriminatory manifestations, whether expressed by individual acts or in institutional structures.

When it comes to sex/gender, the perception that all differences between the sexes were rooted in biology, and therefore natural and unchangeable, has made any possibility of addressing discrimination even less likely. Special legal provisions might legitimately address some biological vulnerabilities and social disadvantages. The problem in Czechoslovakia and the Czech Republic has not been the emphasis on the difference between the sexes *per se*, but rather the incorrect delineation, flawed choices, and poor calibrations of the responses to this difference, as well as the fact that the difference between the sexes has and continues to also either obscure discrimination or to justify its perpetuation.

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