

## BOOK REVIEWS

BARBARA HAVELKOVÁ, *GENDER EQUALITY IN LAW: UNCOVERING THE LEGACIES OF CZECH STATE SOCIALISM* (HART PUBLISHING 2017)

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### I. DESCRIPTION OF THE BOOK

Critical Legal Studies and Feminist Jurisprudence, that were mainly developed in the West in the 1970s, are with some exceptions missing from post-Socialist Central and Eastern European ('CEE') scholarship. The formalist approach to law inherited from the State Socialist era and the so-called 'allergy to feminism'<sup>1</sup> blocked the application of these critical approaches to the study of CEE legal systems. This gap in the literature is partly addressed by Barbara Havelková's book *Gender Equality in Law. Uncovering the Legacies of Czech State Socialism*. This is the first book since 1989 to apply a feminist and critical studies methodology to the legal system of a CEE country. It is therefore indispensable to any scholar writing about gender and equality in CEE and a must-read for anyone with an interest in understanding the CEE legal culture(s) and societies.

The starting point of the book is the observation that 'gender equality law is not doing well in Czechia'.<sup>2</sup> The book then endeavours to explain why. Its overall argument is that the difficulties of gender equality law in Czechia are caused by four factors: (1) conservative assumptions about women's role in society, (2) a refusal to see gender as socially constructed and to acknowledge that it is an important axis ordering society, (3) a limited understanding of

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<sup>1</sup> This is the term used in Barbara Einhorn, *Cinderella Goes to Market: Citizenship, Gender, and Women's Movements in East Central Europe* (Verso 1993) 182–215.

<sup>2</sup> Barbara Havelková, *Gender Equality in Law: Uncovering the Legacies of Czech State Socialism* (Hart Publishing 2017) 1.

discrimination, and (4) a reticence to use legal means to fight discrimination and advance gender equality.<sup>3</sup>

Intrinsic to building the argument of the book is the historical analysis. By inquiring into the Socialist past of Czechia, the book sheds light on how current conceptualizations of women, gender, law, equality and rights are path-dependent on State Socialism. As the author masterfully shows, the legal situation of gender equality in Czechia (and CEE) today cannot be understood without engaging in an 'archaeological' study of the ideas underlying the current conceptions of gender and equality. This approach, in the words of the author, is best characterized as a 'feminist legal genealogy'.<sup>4</sup> Engaging in reconstructing such a genealogy makes Havelková's book extremely intellectually enriching. As the author explains, every reader can describe the book in different ways: as a doctrinal analysis that points to the flaws of anti-discrimination law, as an inquiry into Czech gender legal history, as an intellectual history of the conceptualization of gender and equality, or even as an analysis of the legal discourse around gender issues in Czechia.<sup>5</sup> In my view, all these descriptions are accurate and I found the idiom 'feminist legal genealogy' cleverly tailored and fit to label the methodology needed to understand the theoretical underpinnings of gender equality in law. Perhaps this idiom should become a more commonly used one for this type of legal analysis.

In terms of content, the book revolves around the central theme of anti-discrimination and equality law in Czechia. In addition to this, the book also touches upon the regulation of different domains relevant for gender equality, like gender-based violence, sexuality, reproductive politics and parental leaves, as well as upon more general aspects related to post-Socialist societies. These include issues such as the rejection of ideologies like feminism after the fall of State Socialism, or characteristics of post-Socialist legal cultures like the disrespect for legal norms imposed in a top-down fashion by external players such as the European Union.

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<sup>3</sup> Havelková (n 2) 4.

<sup>4</sup> Ibid 11.

<sup>5</sup> Ibid.

The book is divided into two parts. The first part is dedicated to the situation of gender and the law under State Socialism, while the second part tackles the development of gender equality in law during post-Socialism. Each part is divided into four chapters that mirror each other.<sup>6</sup> Such mirroring gives the readers the opportunity to fully appreciate the development of gender equality in law, both during State Socialism and post-Socialism. The chapters look at regulation of women and gender (chapter 2 during State Socialism and chapter 6 after State Socialism), at the conceptualization and use of law and rights (chapter 3 and chapter 7), at the conceptualization and use of equality and non-discrimination (chapter 4 and chapter 8) and, lastly, at the difficulty of conceptualizing gender, the gendered order of society and the inequality that derives from it (chapter 5 and chapter 9).<sup>7</sup>

## II. CONTRIBUTIONS AND DISCUSSION

In my opinion, the book makes three important contributions: first, to feminist social and legal reform in Czechia, second, to comparative (feminist) legal studies in CEE, and third, to international and transnational feminist (legal) scholarship.

### 1. *The Contribution to the Feminist Social and Legal Reform in Czechia*

By exposing the gender bias of the law in Czechia and by discussing the origins of the flaws of its equality and anti-discrimination laws, the book should raise awareness among legal practitioners, lawyers and judges regarding the way law perpetuates inequality. Furthermore, by pointing to the sources of gender inequality in the law, the book should also provide women's groups and those interested in promoting gender equality in Czechia with a basis for building a political agenda. Yet, when discussing the normative side of her study, Havelková argues that the book does not aim to build a project of legal reform. She explains that her book 'is not normative in the sense of developing an overarching vision for law reform in relation to the problems of gender conservatism [that were] identified'.<sup>8</sup> By making this statement, Havelková presumably aimed to be cautious not to mix her role as

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<sup>6</sup> Havelková (n 2) 7.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid 15.

a researcher with that of an activist. Personally, I do not think that such caution was necessary. Quite the contrary, in my view, the merit of the book lies precisely in its potential to trigger social and legal change. This even more considering that in other parts of the book, Havelková herself seems to advocate for reform. For example, in Chapter 9, which is suggestively called 'Wanted: Gender and Feminism', the author emphasizes the need for second-wave radical feminism approaches in Czechia<sup>9</sup> and calls for further developing feminist legal scholarship in the country.<sup>10</sup>

## 2. *A Stepping Stone for Comparative (Feminist) Legal Studies in CEE*

Being the first monograph to study the legal system of a Central and Eastern European country from a feminist perspective, the book stands as an example of how to use the feminist methodological toolkit to study the law of the countries in the region. It therefore contributes to the legal debates on gender equality in CEE and serves as a stepping stone for comparative feminist legal studies in the post-Socialist space and beyond. Of course, it would have been extremely interesting to prove empirically whether the analytical framework of this book can be applied to more CEE countries. Yet, the single case study was, in my view, a thoughtful choice. Gender equality law the former Socialist states is generally seriously under-researched<sup>11</sup> and the availability of sources is limited.<sup>12</sup> For this reason, to be able to do serious comparative work on gender equality law in CEE, the study of single cases is needed. As Havelková explains in her methodological part,

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<sup>9</sup> Havelková (n 2) 292–295.

<sup>10</sup> Ibid 295–298.

<sup>11</sup> There are of course articles on different topics pertaining to gender equality, but very few undertake a legal approach and further research is needed to fill the gap existent in the literature. For a comprehensive gender studies bibliography in CEE see Mary Zirin and others, *Women and Gender in Central and Eastern Europe, Russia, and Eurasia: A Comprehensive Bibliography* (Routledge 2007).

<sup>12</sup> For example, in the case of Czechia, the author explains the difficulties she had to deal with in accessing court cases on gender related matters Havelková (n 2) 238–239. The same is the case with Romania, the country I am currently researching, or with other countries in the region.

country case studies allow for a more complex analysis and leave space for bringing together a wider variety of sources.<sup>13</sup>

Although this book is a single–case study and does not provide factual information about other CEE countries, it nevertheless contributes to comparative law by offering an analytical framework to study other countries.<sup>14</sup> For example, some of its findings apply not only to Czechia, but also to neighbouring countries, and could thus provide a starting point for scholars working on similar topics in other CEE jurisdictions. Such findings include: rejecting equality legislation due to the so–called 'backlash' against Communism or preserving gender conservative measures inherited from the former regime;<sup>15</sup> the reluctance in adopting or applying the EU–imposed reversed burden of proof in anti–discrimination cases;<sup>16</sup> or the more general misapplication (or non–application) of gender equality legislation in CEE, as the adoption of such legislation did not result from genuine internal commitment to equality and women's rights, but rather from pressures linked to EU accession.<sup>17</sup>

Another important contribution is the book's ability to bring to the fore some of the characteristics of Czech and Central and Eastern European legal

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<sup>13</sup> Havelková (n 2) 19.

<sup>14</sup> Ibid

<sup>15</sup> The best case that exemplifies the 'backlash against Communism' manifested as a rejection of the equality measures promoted by the former regime is the case of rejecting the measures to promote women in politics adopted by the Communist regime see Drude Dahlerup and Milica Antic Gaber, 'The Legitimacy and Effectiveness of Gender Quotas in Politics in CE Europe' (2017) 54 *Teorija in Praksa* 307, 308.

<sup>16</sup> See for example the case of Romania in Raluca Maria Popa, '*Issue Histories Romania: Series of Timelines of Policy Debates*' (Institute for Human Sciences (IWM), Vienna 2007) 7; Reticence of the courts to applying the reverse burden of proof was also brought up into discussion in the case of Hungary. See Csilla Kollonay Lehoczky, 'The Significance of Existing EU Sex Equality Law for Women in the New Member States. The Case of Hungary' (2005) 12 *Maastricht Journal of European and Comparative Law* 467, 488.

<sup>17</sup> See Kristen Ghodsee, Lavinia Stan and Elaine Weiner, 'Compliance without Commitment? The EU's Gender Equality Agenda in the Central and East European States' (2010) 33 *Women's Studies International Forum* 1.

cultures such as formalism, disregard for the law<sup>18</sup> and scepticism around using law as a tool for social change.<sup>19</sup> Of course, assessing and describing legal culture generally raises difficult methodological problems. Yet, the book successfully provides legitimate sources and concrete examples to support claims regarding the CEE legal culture that for a non-CEE legally trained audience are not self-evident.

The book also does an excellent job at explaining how equality developed and how it was enshrined in the Eastern European legal landscape as compared to Western Europe. Havelková explains that in Western Europe there are generally 'three phases of equality and anti-discrimination law: [...] 1. The elimination of men's legal privileges; 2. The adoption of anti-discrimination legislation; and 3. The rise of substantive and transformative equality'.<sup>20</sup> Then, she explains that Czechia and the other post-Socialist states skipped the second phase. While Western European countries were introducing anti-discrimination guarantees, Socialist States were treating 'sex equality as a proclamation, but not an anti-discrimination right'.<sup>21</sup> In the particular case of Czechia, Havelková establishes that the word 'right' was used in a limited way in legislation, while the word 'discrimination' did not exist at all in legal texts.<sup>22</sup> Furthermore, no system for vindicating these rights existed<sup>23</sup> and equality was seen as a 'policy pronouncement' to be enforced by the state and not through individual claims before courts.<sup>24</sup> In this way, Socialist States turned to achieving substantive equality without resorting to non-discrimination rights. As Havelková shows, due to the Marxist-Leninist ideology that saw class as the main axis for oppression, substantive equality was limited to socio-economic levelling and was achieved through redistribution policies.<sup>25</sup> Thus, the Socialist States generally lacked politics of recognition to address 'stereotyping, gender bias, devaluation of women and

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<sup>18</sup> Havelková (n 2) 193–196.

<sup>19</sup> Ibid 70–71, 201.

<sup>20</sup> Ibid 86–87.

<sup>21</sup> Ibid 90.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid 91.

<sup>24</sup> Ibid 91–92.

<sup>25</sup> Ibid 92–94.

the feminine'.<sup>26</sup> This concrete finding points to Nancy Fraser's argument that achieving equality requires both politics of redistribution (i.e. socio-economic politics) and of recognition (i.e. socio-cultural politics),<sup>27</sup> and can be seen as one of the broader learnings from the State Socialist period.

### 3. 'Eastern' Perspectives on Feminist Legal Theory

This last observation leads us to the contribution of the book to feminist (legal) literature which is particularly developed in Anglo-Saxon academia. As already explained, the author borrows the feminist legal methods developed in the West and applies them to an Eastern European country. By exposing the tension between 'Western theories' and the 'Eastern reality',<sup>28</sup> Havelková challenges the universalism of Western theories and offers new perspectives. The example of Czechia shows how non-religious societies, or ideologies rejecting religion from the organization of societies such as State Socialism, can also give birth to patriarchal law and policies. The example furthermore shows that the feminist critique of the public/private divide cannot be applied in the East in the same way as in the West. State Socialism and its repressive measures led to a retreat of the citizens into the family. Thus, the family started to be conceptualized as a 'refuge', a place for peace and freedom where State intervention was not desirable. Moreover, during State Socialism women themselves appeared to prefer to withdraw into the private sphere of the family in order to avoid the repression taking place in the public sphere and the triple burden they had to perform: in the socialist field of production and at home by being in charge of household and childcare.<sup>29</sup> Therefore, as Havelková's book shows, the motto of the second-wave feminists that 'the personal is political' cannot be applied in the same way to post-Socialist countries.<sup>30</sup>

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<sup>26</sup> Havelková (n 2) 84.

<sup>27</sup> Nancy Fraser, 'From Redistribution to Recognition? Dilemmas of Justice in a 'Postsocialist' Age', in Nancy Fraser (ed), *Justice Interruptus: Critical Reflections on the 'Postsocialist' Condition* (Routledge 1997).

<sup>28</sup> Havelková (n 2) 23.

<sup>29</sup> *Ibid* 40, 56–57.

<sup>30</sup> *Ibid* 293.

However, even if the book correctly underlines that State Socialism did not disestablish the public/private divide, it misses to point to another particularity of the private sphere during that period, namely that the private sphere encompassed a replica of the public/private divide. In other words, the family in the State Socialist East was different not only because citizens, men and women, preferred it to the repressive public sphere, but also because it came to entail a public sphere where citizens could exercise their civil and political rights. I am referring here to the 'fractal theory' developed by Susan Gal in her essay 'A semiotics of the Public/Private Divide'.<sup>31</sup> Gal argues that during State Socialism, the family, which was previously seen as private, started to encompass the public/private divide as it became a space where citizens' freedoms, such as freedom of speech or assembly, were openly exercised. In this setting, as the public/private division was replicated in the private sphere, so was the gendered division of labour. Consequently, women had to take care of the household to support the public sphere division within the private.

Another interesting issue in this book that should spark debate for Western and Eastern readers alike, is the need for second-wave (radical) feminist approaches in Czechia<sup>32</sup> and in CEE more broadly. As the author shows, second-wave feminism that developed in the West around the 1970s, could not follow the same track in Socialist Central and Eastern Europe. The 'woman's question' tackled in an authoritarian fashion by the Socialist regime in Czechoslovakia, and perhaps more broadly in the Socialist space, referred only to issues related to family, labour and public life.<sup>33</sup> Second-wave feminist demands linked to issues such as 'reproduction, sexuality, sexual orientation and identity or gender based violence'<sup>34</sup> were generally disregarded before 1989. It is only after the fall of Socialism that second-wave feminism appeared in the region. Yet, at the same time, third-wave feminism was emerging in the West, emphasizing that the ideals of gender equality could not be reached without taking into account differences between women (e.g. ethnicity, sexual orientation, disability). In this context, while I agree with

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<sup>31</sup> Susan Gal, 'A Semiotics of the Public/Private Distinction' (2002) 13 *A Journal of Feminist Cultural Studies* 77.

<sup>32</sup> Havelková (n 2) 292–295.

<sup>33</sup> *Ibid* 17.

<sup>34</sup> *Ibid* 18.

the author that, as second-wave feminists have argued, we must become more aware of the gendered order of society before focusing on the identitarian demands brought up by third-wave feminism, I also think that this idea is open to debate. This is because of the different streams of feminism that contest radical feminism on ideological grounds, and the fact that second and third-wave feminism might already coexist in CEE. Against this background, research and reflections on the women's movement and demands in Czechia and CEE more broadly would nicely complement Havelková's book. More single country studies on gender and the law in CEE, or more in-depth legal studies of different dimensions of gender (in)equality such as gender-based violence, reproductive and sexual rights, political representation or labour market discrimination would also be a good supplement to the book. Given the excellent analytical framework offered by this pioneering study in the field of gender legal studies in CEE, I hope to be reading such studies soon.