

GENDER EQUALITY IN LAW: UNCOVERING THE LEGACIES OF CZECH STATE SOCIALISM by BARBARA HAVELKOVÁ
(Oxford: Hart, 2017, 368 pp., £70.00)

A feminist approach to a book review requires recognition that a book is embodied, in the sense that it is part of its author and has its own ‘story’. Taking up this task, I interviewed Havelková at Oxford University in the late Spring of 2018 to explore how *Gender Equality in Law* befits and ‘belongs’ to the woman who has written it.

Mindful of Czech accession to the EU in 2004, Havelková describes herself as a ‘first-generation’ law student for whom key topics at law school were EU membership and EU law. In this quietly ambitious monograph, her investigation is both rich and accessible. Havelková’s account provides the first socio-legal exploration of gender equality law in the post-socialist space and takes a long historical view to consider its legal functioning, underpinnings, and trajectory. The central question for investigation is why gender equality law has proven so ineffective in Czechia. This question is inspired by the hard fact that, fourteen years on from accession, the Czech higher courts have yet to uphold a single case of alleged sex discrimination by a female claimant, despite the uncomfortable similarity of facts contested with those recognized in other EU member states as incontrovertible breaches of EU law. Nevertheless, the Czech courts take the injustice of discrimination seriously indeed, finding discrimination almost exclusively where the perceived discrimination lacks any specific ‘equality’ grounds.

When Havelková began to formulate an explanation for the evident failures of equality law in Czechia, she found it fruitful to consider problematic perceptions about the impact of anti-discrimination law rather than the problems of anti-discrimination law itself. Accordingly, general understandings of the rule of law could impact on the gender discrimination project quite deeply. Judicial decision making in Czechia is structured by a legal formalism, inherited from its past. The mechanical task of textual interpretation is discordant with purposive interpretations of law but its application in the field of anti-discrimination is little different to judicial treatments of other areas. However, it hurts anti-discrimination decision making in specific ways because discrimination is an area of law that presupposes certain extra-legal understandings, for example, the need to understand the dimensions of inequality, to recognize that while the impact of gender bias can be devastating for an individual, it can be subtle in its operation at a societal level. As Havelková espouses:

As a judge, if you don’t have that [understanding], you are going to have an issue with interpreting anti-discrimination provisions. To understand anti-discrimination law it is helpful to have an awareness of the wider status of women and gender.

When I ask her about intellectual influences, Havelková immediately acknowledges a triumvirate, ‘my sociologist mother ... Catharine MacKinnon

and Sandra Fredman.’ Through her mothers’ influence, Havelková was accustomed to the language of gender from an early age and, as a student studying undergraduate law, the peculiarity of this became especially evident:

it cannot be overestimated just how sparse both the knowledge of and availability of feminist literature was to Eastern European law students of my generation. Just getting my hands on new things to read was a real challenge, because of the absence of a social constructivist approach to law [at law school]. I felt drawn to fill that gap in knowledge and literature . . . this book is part of that longstanding ambition and is sparked by my social science interest in gender.

Havelková spent a year in the United States shadowing Professor Catharine MacKinnon on a Fulbright Scholarship. MacKinnon opened up for her a new world of concepts about legal methodology and enabled Havelková to think about feminist legal scholarship as a style of legal writing that gave essential consideration to sociolegal perspectives. Under the supervision of Professor Sandra Fredman at Oxford, Havelková completed her doctorate. It was Fredman’s work and guidance that gave Havelková the tools with which to set feminist concepts in an EU context and to trace how they are embedded in different jurisdictions.

Talking about the book after its publication, Havelková draws on the story of Goldilocks (in which one bed is too narrow, one too wide and one just right) to explain her diagnosis of equality law decision making in Czechia. Taking a ‘too wide’ approach, the judiciary see equality as a like-for-like objective and draw on rule of law/public law understandings to take the constitutional requirement of equality as a demand for consistency in the private sphere of statutory protection. Under Czechia’s ‘too wide’ problem, says Havelková, ‘it is easier to say, this was unfair and discriminatory, rather than to say this was a discrimination of sex.’ Of the over a hundred cases heard in the Constitutional Court on questions of equality, only a handful rely on notions of equality as per the EU notion of protected characteristics (that is, sex, race, disability, and so on). Havelková notes judicial (and public) understanding of general inconsistency as a justice issue, alongside a narrower recognition of discrimination on specific grounds. She offers me the example of a man who applies for a job with a local authority transport system but is not selected because the employers say they have had a previous bad experience of him. When he claims discriminatory treatment, his complaint is taken more seriously in the courts than would a case in which a woman alleges discrimination on grounds of sex because she is paid half the wages of her male predecessor:

I looked at 17 cases that reached the Supreme Court level and none of them was fully won by the claimant, despite the fact that many of them are textbook examples of what is meant by discrimination . . . being fired the day before starting maternity leave, being demoted while pregnant, wage gaps on the same position between men and female predecessors or successors. Staggeringly, these are claims which are not won by the claimant.

Such cases show that judges in Czechia are not conceiving of discrimination claims as individualized instances that exemplify a wider problem. Rather, sex discrimination is judicially constructed as a misogynist excess. What remains unseen is how discrimination is perpetrated by ‘good’ people and how, as a matter of course, decision making in everyday situations is rooted in gender stereotyping and prejudice.

Havelková finds that the ‘too wide’ approach of the Constitutional Court also holds true at the level of administrative bodies. For example, the trade inspectorates in Czechia have been more successful in identifying discrimination based on general non-discrimination provisions than have the efforts of the labour inspectorates in making good their explicit task of addressing discrimination on specific grounds. Labour inspectors, like the judges of the constitutional court, have trouble assessing that something happened because of race or because of sex.

Meanwhile, according to the ‘too narrow’ problem, judicial understandings of discrimination on a specific ground such as sex are orientated around questions about fault and the issue of motive looms large. From the defendant, courts seek an admission of guilt. From the plaintiff, courts seek proof of discrimination on grounds of sex and will not infer it from surrounding evidence. On this ‘too narrow’ basis, the legal threshold in effect is a requirement to prove that an employer acted deliberately, with the intent to harm. This misapplies EU procedural requirements on shifting the burden of proof, and claims fail to operate on a no-fault basis. Hence, in action, Czech equality law does not capture the many cases in which unconscious bias leads employers to remunerate women less than men, or to fail to give them promotion or to demote them when pregnant.

The book is methodologically transparent, reflecting Havelková’s awareness that if others want to apply a categorical label to her approach they might find it sits distinctively between empirical socio-legal work and doctrinal legal history:

I wanted to look at the current state of play in equality law and realized it was helpful to begin in the past in order to trace continuities and disruptions. It became a project on legal history and legal development. I felt I would not be able to paint the right picture if I did not go in both to the legal history as well as to the law in context. The scope of the research, of the writing, of composing the book was a challenge. I needed to step outside of a positivist doctrinal methodology in order to give my best account of what is happening, why things are not working, why there is judicial hostility to gender equality and anti-discrimination law more generally.

Havelková’s organization of material divides the book across two time periods: 1948 to 1989 and 1989 to the current day. This is a ‘feminist legal genealogy’ which exemplifies her simultaneous interest in past, present, and future. Under conditions of state socialism, equality for a long time was exclusively about economic levelling and there was little discussion about symbolism and culture. Havelková observes that this history goes to the

heart of how the contemporary *#MeToo* debate about the everyday nature of sexual harassment in the workplace has been perceived in Czechia:

The dignity aspects of sex discrimination claims, frequently the essence of harassment or sex-based bullying claims, are not fully recognized because Czech society understands injury in socio-economic forms but does not really understand symbolic or cultural insults or offences to dignity. Czech society found it hard to recognize the harm of being a sexual object when you don't want to be.

A focus of EU law has been to develop legal tools in pursuit of equality but the goals of its anti-discrimination provisions have been very market-based and economically orientated. Although this EU approach is undoubtedly rooted in labour market concerns, Havelková highlights that EU membership brought to Czechia's post-socialist sphere a requirement that legal systems, judgments, and the administration of justice should demonstrate a beyond-market understanding,

The very idea of harassment, for example, it's about the power of disrespect and it recognizes the immaterial harms to human dignity and cultural aspects of equality that Czech society has lacked. EU equality norms have also pierced the biological essentialist understandings of gender; there are moments in EU law which, if applied correctly in Czechia, would produce a shift in understandings of gender.

Comparators in relation to maternity discrimination offer one such example. In EU law it becomes possible to compare a pregnant woman with a man, even though a man cannot become pregnant. In such circumstances, achieving equality lies in the upholding of non-discrimination principles and not on the patriarchal assumption that the law should be protecting women. Havelková asserts that for Czechia:

the EU's form of individualism is something new and quite needed . . . there is an important difference between thinking you have the right to be protected and thinking you have the right to be treated and regarded as equal.

When I ask about why Czech women appear to reject feminism as a basis of campaigns for women's rights, Havelková recalls the power of a dualistic, popular myth about feminism which both associates it with the policies of state socialism and asserts that the feminism of the West is aggressive. It is more than a little ironic that the policies of state socialism are now perceived as being feminist because, under state socialism as it actually existed, feminism was ridiculed as 'bourgeois'. Except for a brief period of gender progressive policies in the 1950s, Czech state socialism relied upon combining a rhetoric of the equal rights of women as workers with the implementation of highly gender-conservative policies affirming that women's essential value lay in motherhood. However, according to the revisionist myth, the 'feminist' socialist state had undermined the purportedly natural character of women. Both the myth of state-socialist feminism and the myth of aggressive Western feminism continue to hold popular appeal in suggesting that feminism was, and continues to represent, a distortion of

the true and correct way for society to function. Hence, Czech women in the 1990s did not turn to feminism in their rejection of state socialism. Instead, they turned to femininity as a way of asserting their individualism and the sexualization of women was considered healthy and natural. In the post-socialist 1990s, gender conservatism followed on from, and compounded, an already existing highly gender-differentiated culture:

Women saw they were exercising individual, liberated choices when they chose to enhance their breasts, wear a lot of make-up and high heels, or stay at home and out of the labour market for three years after a child was born. In other words, the only oppressive forms of power that people understood sufficiently well to feel able to reject was state power and under state socialism, the exercise of state power was obvious, it was harsh and its legacy has been to obscure softer forms of power associated with market liberalism, as well as patriarchy.

Given the scale of the problems she identifies with the pursuit of gender justice through the Czech courts, I am interested to know how Havelková squares the existence of a gender-blind judiciary with its female-dominated composition. It is a legacy of gender equality under state socialism that over of two-thirds of the judiciary in Czechia are women. Havelková recognizes that this troubles Western debates that assume that a resolution to the problem of a lack of women in the judiciary will be good for equality law. Czechia's feminized judiciary is not deciding cases in gender-sensitive ways. It provides a case-study example that, for reasons of culture and education, mere representation of individual women as judicial decision makers will not lead to the deciding of cases differently. Changes occurred in the composition of the judiciary under state socialism because the occupation was opened up to women, but insofar as judicial decision making is concerned, this has provided no substitute for greater awareness and gender sensitivity. 'What societies need', says Havelková, 'is feminist judges whether men or women, to inculcate a gender understanding among the judiciary.' Raising feminist concerns about the representation of women's interests in law does not depend upon an assessment as to whether women are deciding the cases 'like men' and vice versa but, rather, lies in asking if judges are deciding cases like gender-aware lawyers. To recognize that women's equality claims require better representation of feminists in the judiciary, rather than a better representation of women, is to appreciate law's social context. For example, in the United Kingdom, a woman who makes it to the top of the legal profession is likely, along the way, to have become aware of how bias, prejudice, and glass ceilings serve to impede equality, often in subtle ways and without intention to discriminate. Czech female judges often suppress their experiences of bias or they lack the conceptual tools to identify and interpret them as such.

A study of gender equality law Czechia could easily have adopted a standard EU *acquis*-implementation approach to foreground analysis of court cases. What Havelková sets in train, however, is a thorough engagement

with feminist legal materials to trouble conventional accounts of EU implementation in recent accession states. Her book is methodologically distinctive, offering a fluid blend of archival analysis, doctrinal excavation (both domestic and EU), and socio-political theory. Her resulting contribution to scholarly literature through this monograph is undoubtedly fascinating and remarkably broad.

First, Havelková adds to socio-legal methodological scholarship by setting fresh questions about the interplay of legal materials that question understandings of gender with those that explore legal histories. Consequently, this monograph challenges readers, and will inspire others, to ask how understandings of gender might usefully throw light into other dark corners of law. Secondly, by situating her critical analysis within the 'second-world' jurisdictional context of Czechia, she adds to scholarly understandings of gender equality and law in the 'first' and 'third' worlds. Thirdly, Havelková speaks to EU law scholars about the implementation of EU law, and she troubles a conventional account of the EU as a legal system by substantively demonstrating its domestic pliability and the failures of direct-effect doctrine and referral mechanisms. Fourthly, in relation to feminist literature, the monograph provides a reworked account of second-wave feminism by focusing on what has been overlooked or misunderstood in the context of the geographical, temporal, and social arena of the Czech Republic. Behind an iron curtain, second-wave feminism was completely missed while debates were being had in the West about gender as a social construct and primary organizing structure of society. Havelková draws attention to the legal consequences of Czechia's failure to internalize such new social understandings on account of having skipped the paradigm shift, and subsequently injects the political and legal project of feminism into the political and legal project of the widened EU. Finally, the work speaks to Czech society because many of the problems Havelková identifies in its administration of legal equality norms relate to its isolation from the historical trajectory of women's liberation which has informed and underpinned legal gender-equality conventions in the West.

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