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The Different Meanings of Discrimination from a Czech Perspective
| 347–356

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The Different Meanings of Discrimination from a Czech Perspective

1 Introduction

It was a pleasure to read Fernando Muñoz's excellent paper[1] on the constitutional history of the concept of discrimination in Chile. In this comment, I offer a comparison with the development in a Central European country, Czechia, which also experienced an authoritarian period in the 20th century, albeit of the ideologically opposite type, state socialism. Most of my work has so far focused on sex/gender equality and so it is largely on this topic that my analytical points are presented here. In section 2, I provide relevant quotes from all the Czech 20th-century constitutions with brief commentary. This is followed by two analytical sections which, drawing on the Czech experience, suggest lenses possibly helpful for wider analysis of equality and anti-discrimination law. Section 3 presents the – very different – trajectory that equality and anti-discrimination law has had in Czechia, where a substantive, transformative equality project centred around class preceded the introduction of individual anti-discrimination protections. This has led to certain legacies that are less at the surface level of regulation and more in the underpinning ideas and concepts, which have weakened the new anti-discrimination guarantees. Section 4 presents the distinction between what I have termed elsewhere[2] the general principle of equality, which is often complemented by a prohibition of *discrimination simplex* (no-ground discrimination), on one hand, and anti-discrimination law relating to grounds such as race or sex on the other. I note that the former is the pre-eminent concept, more frequently and readily used by applicants and applied by the courts. The protection from specific, ground-related discrimination, by comparison, has been flagging. This is perhaps because a genuine understanding of the normative reasons for the singling out of these grounds is missing.

1 In this volume.
2 Havelková (2020).

A short methodological note is called for. While my work has looked at past developments, it has always been with a view to understand the current situation of equality and anti-discrimination law in Czechia. It is therefore more 'genealogical' than 'historical'. Connectedly, rather than looking merely at how terms such as 'equality', 'discrimination' (or 'diversity') are used in primary sources, i. e. when referenced explicitly, in my work, I have aimed to understand the conceptual underpinnings of a wider range of legal regulation and case law, which can be understood as affecting the status of women and their equality in society (such as special treatment of women in labour law, prostitution, or abortion rights). This kind of hindsight (classifying an issue as an equality issue even when it might not have been seen as such historically) has advantages as well as disadvantages. The dangers are at least twofold: 1) it can be 'ahistorical', meaning that it does not correspond to past understandings, but rather imposes more current ones; and 2) it can be more removed from primary sources than the author's and many others' in this volume, as my analytical points are tied to my interpretation. The positives, on the other hand, could be 1) that it can identify 'silences' and gaps in the past; and 2) it may perhaps allow for a more critical rather than descriptive work, and so it is from this perspective that the following observations are written.

Finally, it is worth noting that the following comment is briefer than I had hoped. The deadline for the submission of the final draft coincided with the COVID-19 pandemic lockdown. For me, as for many primary carers – who are mostly women – this meant switching to full-time childcare in the home, alongside attempts to continue working in home-office conditions. It might be surprising that I raise this issue in my academic writing, but, since this is a symposium on equality and discrimination, I consider it highly relevant. By not being silent about the difficulties of reconciliation of family and work life during this time, which has led to a considerable drop-off in productivity especially among female academics, I hope to contribute to knowledge and the acknowledgment of this issue by the wider academic community.

2 Legal development

In this section, I provide the relevant equality and anti-discrimination provisions from the four Czech constitutions of the 20th century (1920,[3] 1948,[4] 1960,[5] and 1993[6]) with very brief commentary.

The 1920 Czech Constitutional Charter abolished male, occupational and aristocratic privileges. It also effectively prohibited discrimination (although the word is not used) based on certain characteristics: namely, origin, nationality, language, race, or religion (these, unsurprisingly, correlated to minorities, including the Germans in the Sudetenland, which formed part of the territory of the newly created country of Czechoslovakia):

> "Sec 106 (1): Privileges due to sex, birth or occupation shall not be recognized.
>
> (2) All persons residing in the Czechoslovak Republic shall enjoy within its territory in equality measure with the citizens of this Republic complete and absolute security of life and liberty without regard to origin, nationality, language, race or religion. Exceptions to this principle may be made only so far as is compatible with international law."[7]

Similar to many other countries, including Chile and Germany which are analysed here, this provision was viewed as compatible with a different status of men and women in the family.[8]

The equality guarantees were then affirmed and expanded by both state socialist constitutions in 1948 and 1960. The 1948 Constitution, in the very first paragraph of its section listing "Rights and Obligations of Citizens", stated that "[a]ll citizens are equal before the law."[9] This was immediately followed by a seemingly wide and profound guarantee of equality between the sexes:

3 Act No. 121/1920 Coll., Introducing the Constitutional Charter of the Czechoslovak Republic.
4 Constitutional Act No. 150/1948 Coll, hereafter 1948 Constitution.
5 Constitutional Act No. 100/1960 Coll, hereafter 1960 Constitution.
6 Act No. 2/1993 Coll., Charter of Fundamental Rights and Basic Freedoms.
7 I am using the translation available at: https://archive.org/details/cu31924014118222/page/n45/mode/2up.
8 Indeed, the 1920 Constitutional Charter itself contained a special provision on "Marriage and Family" which put "[w]edlock, family and motherhood" under "special protection of the law". (§ 126). For a discussion, see Feinberg (2006).
9 Sec 1 (1) 1948 Constitution.

> "Men and women have equal standing in family and in society and equal access to education and also to all occupations, offices and ranks."[10]

As I have argued elsewhere,[11] while family law was relatively quickly reformed to fulfil this promise, the family remained a place of de facto inequality throughout the state socialist period, often facilitated by provisions in other areas of law (any childcare leave from work was only available to women, for example).

The 1960 Constitution expanded the treatment of equality. In addition to a general provision guaranteeing "equal rights and equal obligations" to all citizens,[12] protecting them from nationality and race discrimination (again without using the word discrimination), it contained an explicit proclamation of the equal status of men and women, including in the family, as well as a positive obligation to create equal possibilities and equal opportunities in public life:

> "Art 20 (2) The equality of all citizens without regard to nationality and race shall be guaranteed.
>
> (3) Men and women shall have equal status in the family, at work and in public activity.
>
> (4) The society of the working people shall ensure the equality of all citizens by creating equal possibilities and equal opportunities in all fields of public life."[13]

This positive obligation was further emphasised in relation to women, as the 1960 Constitution went beyond a *de iure* guarantee of equality of the sexes. Not only did it address their special needs (which found expression in often quite limiting protective legislation), but it also mandated proactive measures to ensure women's participation.

> "Art. 27 The equal status of women in the family, at work and in public life shall be secured by special adjustment of working conditions and special health care during pregnancy and maternity, as well as by the *development of facilities and services which will enable women fully to participate in the life of society.*"[14]

10 Sec. 1 (2) 1948 Constitution. As before, the 1948 Constitution put "marriage, family and motherhood […] under the protection of the state." Sec. 10 (1) 1948 Constitution.

11 Havelková (2017) esp. 27–62.

12 Art 20 (1).

13 Art 20 (2). The following English translations of the 1960 Constitution are taken from: https://www.worldstatesmen.org/Czechoslovakia-Const1960.pdf.

14 Art. 27 Constitutional Act No 100/1960 Coll, emphasis mine.

In reality, the 1960s were a period in which these rights were challenged (partly because the previous collectivisation of child care had proved expensive), and during which the earlier emphasis on emancipation of women faded.

The post-state-socialist 1993 Charter of Fundamental Rights and Freedoms[15] comprises a general equality guarantee, as well as a specific provision which contains an extended list of specific grounds (again without the word discrimination).

> "Article 1 All people are free and equal in their dignity and rights. […]
>
> Article 3 (1) Everyone is guaranteed the enjoyment of his fundamental rights and basic freedoms without regard to gender, race, colour of skin, language, faith and religion, political or other conviction, national or social origin, membership in a national or ethnic minority, property, birth, or other status."

3 Trajectories

Like Chile and other Latin-American countries, Czechia, and other Central- and Eastern-European ('CEE') countries, experienced a radical transformation from an authoritarian to a democratic regime in the second half of the 20th century. The main difference is, of course, the type of regime from which these countries transitioned. In the case of Chile, it was from a right-wing dictatorship, and, in the case of Czechia, from a Communist-Party-led state socialist regime. This raises the question of what impact these histories have on these respective countries' understanding of equality and discrimination.

In Czechia, post-socialist legislators and judges have resisted equality and anti-discrimination law.[16] As I have argued elsewhere,[17] these negative attitudes can be in part explained by the specific trajectory that equality and anti-discrimination law has taken in CEE during (1948–1989) and after (1989–today) state socialism. This trajectory is different not just from Chile,

15 https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/Listina_English_version.pdf.

16 For an analysis, using the example of sex/gender, see Havelková (2017).

17 The following analysis is taken, in some cases verbatim, from Havelková (2016) 627. Considering this is a discussion comment rather than an independent paper, I allow myself this liberty.

but from the EU and other EU countries, as well as many common law countries (the originators of discrimination law, as the main paper in this section shows).

The development of sex equality and anti-discrimination law in the UK, for example, has been divided[18] into three phases: (1) the elimination of men's legal privilege, (2) the adoption of anti-discrimination legislation, and (3) the rise of substantive and transformative equality, such as affirmative action. The first stage was the same in the UK, in Czechia, as well as, it seems, in Chile, but the development between 'the West' and CEE then diverges from that point onward. In Czechia, the last two stages of equality happened in reverse.

There was first, under state socialism, a transformative project of socio-economic levelling aimed at substantive equality of results, whereas anti-discriminations rights were only introduced later. Because the transformative stage preceded an understanding of discrimination, its characteristics differ from the 'transformative equality' project elsewhere. During the state socialist period, the transformative public policy project did not require the creation of horizontal obligations partly because it happened under state socialism, when most of the types of private relations typically covered by anti-discrimination, such as employment, were effectively non-existent. Conceptually more importantly, it thus lacked an understanding and acceptance that law might need to interfere with deeply held prejudices, even among individuals (who, as employers or service providers, are duty-bearers under statutory anti-discrimination law).

As for the transformative project of the socialist state, its concern with equality was real, and yet the project was incomplete in several significant ways. It saw only socio-economic inequalities, but, with regard to specifically protected grounds including gender but also race, not socio-cultural ones (related to dignity, identity, or diversity). It was therefore transformative with regard to class, but not truly for other discrimination grounds. As mentioned above, while equality was a constitutionally enshrined principle,

18 I draw mainly on Hepple (2009) 129–164: Writing about labour 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. Fredman (2001) similarly identifies a "new generation" of equality rights, starting in the 2000s, which includes the positive duty to promote equality.

there was an absence of any corresponding enforceable anti-discrimination right. Moreover, for sex/gender specifically, the emphasis on the 'natural' differences between the sexes meant that sex/gender discrimination was not recognised as conflicting with women's constitutional equality guarantees.

While the use of 'nature' as a concept and a guarantee to deny women the full use of equality is echoed in the author's article, the Chilean trajectory is otherwise very different in phases 2) and 3). The neo-liberal use of equality – equality that effectively serves the already advantaged – is especially striking.

What legacies arise from these different trajectories? Of importance are both, the 'surface' level of legal regulation, as well as the underlying ideas and concepts.[19] At each level, there have been continuities and discontinuities, both often acting to the detriment of equality and anti-discrimination law. One crucial continuity is that of gaps. In post-socialist CEE, equality and anti-discrimination law has been weakened by the fact that anti-discrimination rights have no indigenous history to draw upon – state socialism knew neither enforceable individual rights, nor their horizontal enforcement. Substantive and transformative equality, therefore, does not have fertile domestic conceptual ground within which to grow in relation to any protected characteristics other than class or socio-economic status. A discontinuity is the widespread, strongly neo-liberal narrative, which connects any equality project with the state socialist past (often misunderstanding or misrepresenting the extent to which equality was both aimed for and actually achieved) and then rejects it, as it does other value-based projects.

Equality and anti-discrimination law thus appears to have been doubly disadvantaged in post-socialist CEE – both by mostly unconscious retention of gaps in regulation and understanding retained from state socialism, as well as by a reactive conscious rejection of certain aspects of the state socialist project. It seems that the historical Chilean understanding of equality, focused on protecting economic privileges, might also be a 'false friend' to the more current anti-discrimination law project. This brings me to the last point regarding specific grounds.

19 I have previously made similar points, and borrow some formulations from Havelková (2017) 304–307.

4 Grounds

The legal addition of specifically protected grounds, chosen because they identify deeply entrenched axes of disadvantage, is a recent phenomenon in both Czechia and Chile. Has their legal recognition brought about a genuine understanding of the normative reasons for such singling out? For Czechia, I would argue that such an understanding is still lacking.

In my recent paper on Czech equality and anti-discrimination law,[20] I explored a distinction which I suspect might be a useful lens through which to analyse the Chilean example as well, namely that of distinguishing the general principle of equality (and *discrimination simplex*) from ground-related anti-discrimination law. I argued that the general principle of equality is the pre-eminent doctrine in Czechia. There, as in many other civil law countries – and, as it seems to me, in Chile – the general principle of equality is older, more familiar. In Czechia, it is more often and more readily applied by courts and administrative bodies alike. Ground-related anti-discrimination law, on the other hand, is new, and was adopted for the external reason of securing EU membership. It has faced opposition in the Czech Parliament. It has also had a difficult time before the Czech courts, with many anti-discrimination law doctrines frequently misapplied, often in actual breach of EU law: ranging from the requirement of intent in direct discrimination cases to the misapplication of the shift of burden of proof, and an incorrect interpretation of indirect discrimination. This is paradoxical, given that anti-discrimination rights address a graver wrong: while the general principle of equality targets random arbitrariness, irrationality or unfairness, the prohibition of discrimination on specific grounds, focuses on decisions which track deep historical and/or current disadvantages and targets oft-repeated, systematic behaviour and practices.

In Czechia, arbitrary decision-making by the state, which is adjudicated on by the Constitutional Court, is understood as a problem, and the concern extends even to generally arbitrary and even unfair decision making in horizontal relations, mainly in the employment context. The same cannot be said for ground-related discrimination. Two phenomena reveal the pre-

20 The following analysis is taken, in some cases verbatim, from Havelková (2020). Considering this is a discussion comment rather than an independent paper, I allow myself this liberty.

eminence of the general principle of equality over the specific prohibition of discrimination on suspect grounds. First, the two concepts appear to be conflated. This can be seen in the not uniformly clear distinction between their respective standards of scrutiny by the Czech Constitutional Court, and the misapprehension under which the legislator appears to be acting when it comes to identifying specific grounds of prohibited discrimination in statutes (exemplified by the wide proliferation of protected grounds). Second, the general principle and the individualised instances of differential treatment not connected to a specifically protected ground (discrimination *simplex*) are more frequently and readily applied by the Constitutional Court, ordinary courts, and administrative bodies tasked with the public enforcement of the statutes containing anti-discrimination provisions.

This pre-eminence is striking because ground-related anti-discrimination rights are not a mere extension of general equality and discrimination *simplex*. They have different normative underpinnings and pose different adjudicative challenges, with consequent doctrinal differences (at least in EU law). Because these differences have not been recognised, key discrimination doctrines have been largely ignored or misapplied in Czech law. It thus appears that being treated as an extension is probably worse for ground-related anti-discrimination rights than if they had arisen independently (as in many common law countries). In the case of Czechia, the success of the general principle of equality and discrimination *simplex* therefore does not translate into robust ground-related anti-discrimination law; the latter perhaps even being held back because it has false friends that overshadow it.

This is connected with the fact that so few cases are brought by members of disadvantaged groups, which means that the prohibition of discrimination has so far mostly served the comparatively 'advantaged'. Some members of disadvantaged groups might be unaware of their rights, or even ignorant or too readily acceptant of patterns of inequality. Equally, it is likely – and probably more worrisome – that they do not believe that the system will do right by them (which is, sadly, confirmed by its operation so far). Members of the majority, on the other hand, have been using their right not to be discriminated against quite a bit by comparison, both by claiming discrimination *simplex*, and by using specific grounds: for example as far as sex discrimination is concerned, out of the five cases so far decided on their merits by the Constitutional Court, four were brought by men.

I wonder whether this analysis might be helpful in understanding the weakness and relative lack of success of ground-related anti-discrimination in Chile. For instance, has the specific understanding of the general constitutional guarantee of equality under the Pinochet regime hindered, rather than facilitated, the more recently adopted statutory ground-related guarantees? The history of protecting the already advantaged seems to run particularly strong in Chile. Is that perhaps also a factor in the difficulties that anti-discrimination law is facing more generally, and in the lack of recognition for LGBTQ+ disadvantage worthy of special protection?

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