

# Contents

<i>Acknowledgements</i> .....	vii
<i>Table of Cases</i> .....	xv
<i>Table of Statutes</i> .....	xix
<i>Table of Parliamentary Debates</i> .....	xxv
<i>List of Abbreviations</i> .....	xxvii

<b>1. Introduction</b> .....	1
I. Main Argument.....	4
A. Women and Gender.....	5
B. Equality and Anti-Discrimination.....	6
C. The Role of Law and Rights.....	6
II. Book Structure and Chapter Summaries .....	7
III. Feminist Legal Genealogy—The Methodology .....	11
A. The Feminist Framework .....	12
i. Feminist Questions and Theoretical Concepts .....	12
ii. The Gender-Progressive Standard .....	15
iii. Why Use Equality? .....	16
B. Scope of the Book .....	17
i. Thematic Scope of the Enquiry .....	17
ii. Territorial Scope—A Single-Country Case-Study.....	18
iii. Territorial and Temporal Scope—Pre-Communist Legacies and the Germanic Space .....	20
C. A ‘Law in Context’ Approach—Sources and Method .....	21
i. Primary Sources and the Difference between the Periods .....	21
ii. A Mixed Inductive and Deductive Analysis .....	23

## Part I: State Socialism

<b>2. The Three Stages of Regulation of Women and Gender</b> .....	27
I. Equalisation (1948–62) .....	29
A. Pre-Communist Foundations.....	29
B. Stalinism .....	30
C. Equality Rights of the Sexes as a Constitutional Principle.....	33

D.	Equality in the Family .....	33
i.	New Family?.....	36
E.	Reproduction—Protecting the Health of Women .....	37
F.	Work and Welfare .....	38
i.	Equal Access to Paid Work for Women—a Right or an Obligation? .....	38
ii.	Protective Provisions and Welfare .....	40
II.	Reflection (1962–68) .....	41
A.	The Period of Reform.....	41
B.	Family—Between Equality and Tradition .....	44
i.	The Triple Burden.....	46
C.	Reproduction in the Time of the 'Population Crisis' .....	48
D.	A Turn from Equality in Paid Work to Care.....	49
i.	Protecting Motherhood.....	49
ii.	Bans on Work .....	51
E.	'Freedom' .....	52
III.	The Era of the Family (1969–89).....	53
A.	Normalisation .....	53
B.	A Retreat into the Private Sphere .....	56
i.	The 'Wrongly Understood Emancipation' .....	57
C.	Reproduction—Assuring the 'Quantity' and 'Quality' of the Population.....	59
D.	Pro-Population Policies .....	61
IV.	Conclusions.....	62
3.	<b>State-Socialist Law and Rights</b> .....	64
I.	From Activism to Formalism .....	65
A.	Early Activism (1948–53).....	65
B.	Stabilisation (1954–68) .....	67
C.	Normalisation (1969–89).....	68
II.	Characteristics of State-Socialist Law .....	70
A.	Law as a Tool of Social Change.....	70
B.	The Decline of Private Law and the Rise of Public Law .....	71
C.	Dubious Normativity and Disregard for Law.....	74
III.	Rights.....	76
A.	The Primacy of Social Rights and the Socialist Understanding of Rights.....	76
B.	Collective Interest.....	78
C.	Absence of Avenues for Rights Enforcement.....	80
IV.	Conclusions.....	82
4.	<b>Equality as Socio-Economic Levelling</b> .....	83
I.	Equality Trajectories.....	84

A.	Formal and Substantive Equality .....	85
B.	Three Phases of Equality and Anti-Discrimination Law .....	86
II.	Legal Guarantees—Equality as a Right? .....	89
A.	Sex Equality as a Proclamation but Not an Anti-Discrimination Right .....	90
III.	Substantive Equality along the Axis of Class .....	92
IV.	Emphasis on Difference .....	94
A.	Special Treatment of Women .....	95
B.	Different and Worse Treatment—Inequality Not Identified as Sex Discrimination .....	97
V.	Beyond Equality? .....	99
VI.	Conclusions .....	103
5.	<b>Blindness to Gender and Patriarchy</b> .....	105
I.	Aspirations versus Reality .....	109
A.	The ‘Woman Question’ in Marxism-Leninism and State-Socialist Aspirations .....	109
B.	(In)Equality in Reality .....	111
II.	Grappling with Explanations of Inequality .....	113
A.	Denials of Inequality .....	114
B.	Denials of Injustice .....	114
C.	Denials of Responsibility .....	115
D.	Seeing Gendered Causes? .....	116
III.	Intellectual Roots of the Limitations .....	117
A.	Capitalism, not Patriarchy .....	117
B.	The ‘Natural’ Difference of Women .....	119
C.	Production versus Reproduction .....	123
D.	Materialism and Culture .....	126
IV.	Feminism? .....	128
A.	The Prevented Bottom-Up Critique and the ‘Threefold Expropriation’ .....	129
B.	Women as ‘Communist Subjects’ and their ‘Liberation’ from the Public Sphere .....	130
C.	What Happened to Men? .....	132
D.	Residual and Reactive Turn to Traditional Gender .....	134
E.	The Regime as the Perceived Source of Oppression .....	135
V.	Conclusions .....	137

## Part II: Post-Socialism

6.	<b>Women and Gender After 1989</b> .....	141
I.	A Quarter Century of Post-Socialism .....	142
A.	Changes and Legacies .....	142
B.	The ‘Star Pupil’ (1989–97) .....	146

C.	Sobering Up and Trudging Along (1997–2006).....	149
D.	Cuts and a Conservative Turn (2006–14).....	151
E.	Arrival of the New Left? (2014 Onward).....	152
II.	The Model Family—Complete, Married, Heterosexual and with a Traditional Division of Labour .....	158
A.	The Rise of a ‘New’ Family? Same-Sex and Unmarried Partners .....	158
B.	Supporting a Traditional Division of Labour.....	162
C.	Bias towards Complete Families, Against Single Parenthood .....	163
D.	Women’s Reproductive and Health Autonomy? .....	166
III.	From Motherhood to Parenthood? The Question of Childcare.....	169
A.	Protecting Motherhood and Parenthood in Labour Law .....	170
B.	Protecting all Women as Mothers? .....	172
C.	Bringing Fathers into Care?.....	175
D.	Work or Care? A Closer Look at the Parental Benefit .....	177
IV.	Addressing Gender-Based Violence without Seeing Gender.....	180
A.	Positive Developments in Substantive Criminal Law and Beyond.....	180
B.	Refusal to See Gender .....	183
C.	Criminalising and Blaming the ‘Victim’ .....	184
V.	Conclusions.....	188
7.	<b>Post-Socialist Law and Rights</b> .....	190
I.	Transforming State-Socialist Law .....	192
II.	Law—Legacies of State Socialism .....	193
A.	Continued Disregard for the Law.....	193
B.	Legal Formalism.....	194
III.	Rights—Legacies of State Socialism.....	196
A.	Primacy of Socio-Economic Rights and a Parental Conception of Rights? .....	196
B.	‘Collective Interest’ or Anti-Majoritarianism? .....	197
IV.	A New Understanding of Law and Rights .....	198
A.	Neoliberalism.....	199
B.	The Anti-Regulation Narrative and Its Selectiveness .....	200
C.	Manners or Morals, not Law .....	202
D.	Conflating Economic and Social Notions of Privacy .....	203
E.	Rights as Freedoms for Some .....	205

F.	Fears of Abuse of Legal Provisions .....	207
G.	Lack of Critical Reflection.....	209
V.	Conclusions.....	210
8.	<b>Equality and Anti-Discrimination after 1989: Resisting the Ideas and the Legal Concepts.....</b>	<b>212</b>
I.	Constitutional Law and the Right to Equality and Non-Discrimination.....	213
A.	Sex Equality for Men?.....	216
i.	The Early Cases—Addressing Protection and Preferential Treatment of Women .....	217
ii.	Newer Cases.....	222
iii.	What Can Cases Brought by Men Tell Us about Gender Equality? .....	223
II.	Statutory Law and the EU as a Driver of Legal Change.....	225
A.	The EU Equality <i>Acquis</i> and its Rationales .....	226
B.	The EU as a Driver for Change .....	227
C.	Anti-Discrimination Law Merely a Membership Obligation .....	229
D.	A Reluctant Transposition of Anti-Discrimination Law.....	230
i.	Before the ADA .....	231
ii.	The ADA—as Little and as Late as Possible.....	232
E.	Giving Full Effect?.....	235
F.	Sex Discrimination Litigation before Ordinary Courts.....	238
III.	Anti-Discrimination Law before the Courts.....	243
A.	Avoiding Anti-Discrimination Adjudication .....	244
i.	Concentrating on Formal Questions .....	245
ii.	Shrinking the Scope of Reviewable Acts .....	247
iii.	Redirecting Applicants to Other Claims .....	250
B.	Greater Protection for Enumerated Grounds? .....	251
C.	How Do We Know the Ground Was Sex? Motive and Proof.....	256
i.	Looking for Fault .....	257
ii.	Burden of Proof .....	259
iii.	Interventions by the Constitutional Court .....	262
D.	Indirect Discrimination—Blindness to Structural Biases.....	263
IV.	Understanding Equality and Anti-Discrimination after 1989.....	268
A.	At Most Formal, Certainly Not Substantive Equality.....	268

B.	Women Too Different to be Discriminated Against? .....	271
C.	The Individualisation of Discrimination .....	272
V.	Conclusions.....	273
9.	<b>Wanted: Gender and Feminism</b> .....	276
I.	Aspirations Lost .....	277
A.	Socialist Residue, Conservative Resurgence and the Neoliberal Rise.....	277
B.	Political Aspirations? .....	278
II.	Denials of Gender Inequality .....	282
A.	Denials of the Existence of Inequality .....	282
B.	Denials of Injustice.....	283
C.	Denials of Responsibility.....	285
D.	Blindness to the Gendered Structure of Society .....	285
III.	Missing Feminism .....	288
A.	Why the Rejection of Feminism? .....	289
B.	The Presence of Undermining and Absence of Supporting Perspectives .....	291
C.	The Need for Second-Wave Radical Feminism .....	292
D.	The Need for Feminist Legal Scholarship .....	295
IV.	Conclusions.....	298
10.	<b>Conclusions</b> .....	300
I.	Women and Gender.....	300
II.	Equality and Anti-Discrimination.....	302
III.	Law and Rights .....	303
IV.	Continuity and Discontinuity .....	304
	<i>Bibliography</i> .....	308
	<i>Index</i> .....	333