

# The “Woman Question” in Post-Socialist Legal Education

*Isabel Marcus\**

## TABLE OF CONTENTS

I. Introduction .....	508
A. Raising the Question: A Professional/Personal Odyssey .....	511
B. Formulating an Answer .....	512
II. Grappling with the “Woman Question”: Ideology, Culture, and Politics	
A. Sex Equality and Socialist States .....	519
B. Post-Socialist Contestation Over Women’s Rights .....	524
1. Fraternal Patriarchy as an Ordering Principle in Post-Socialist States .....	524
2. Post-Socialist Retraditionalization and the Delegitimation of Women’s Rights .....	527
a. The Backlash Trinity: Conservatism, Religion, and Populist Nationalism .....	527
b. Neo-liberalism .....	531
III. Grappling with the “Woman Question”: Law, Legal Systems, and Women’s Rights	
A. Socialist Law and Legal Systems .....	533
B. Post-Socialist Law and Legal System Reform and Women’s Rights .....	537

---

\* *Isabel Marcus* teaches women’s human rights at SUNY Buffalo Law School and is a women’s rights advocate and activist. She also has taught extensively in post-socialist and Asian law faculties, worked closely with women’s rights NGOs, and is a co-founder of the Women’s Human Rights Training Institute (WHRTI) in Sofia, Bulgaria.

My deepest gratitude to an amazing collection of academic and legal professionals, both in Eastern Europe and the United States, who have read and contributed to this article. They include: Dianne Avery, Ana Covic, Janka Debrecenova, Rebecca French, Albena Koycheva, Martha McCluskey, Ivana Radacic, Sylwia Spurek, Genoveva Tisheva, Leah Wortham, and Christina Zampas. To Linda Kelly, my secretary/faculty assistant of twenty-eight years, I am permanently indebted for her sense of humor and commitment to timely completion of work.



1. Rewriting Laws and Reforming Official Practices .....	537
2. Anchoring Constitutionalism through Constitutional Courts.....	543
3. Legal Positivism, Feminist Legal Theory, and the Interpretation of Law .....	546
IV. Legal Education and the Inclusion of Women's Rights in the Curriculum.....	550
A. Socialist State-Controlled Legal Education.....	550
B. Legal Education in Post-Socialist States .....	553
1. Post-Socialist Teaching of Law .....	553
2. Stakeholders in Legal Education Reform.....	556
3. Curriculum Options for Women's Rights .....	560
V. Conclusion .....	564
Appendix A: Survey Results.....	566

## ABSTRACT

Sex equality—a significant contribution to the international human rights canon—was one of the legitimating principles of socialist states in Eastern Europe and, at least formally, of their post-socialist democratic successors. Why then has the subject been ignored or deeply marginalized in post-socialist legal education? Using socio-legal analysis to establish a legitimation or delegitimation dynamic regarding law in theory and practice in both eras, the author provides answers to this question and suggests various options for reforming post-socialist legal education to provide adequate training in the subject of women's rights consistent with states' international and regional human rights obligations.

## I. INTRODUCTION

The collapse of socialism in Central and Eastern Europe signaled the end of an almost fifty year Cold War pitting socialism's twentieth century rush to modernization<sup>1</sup> through the "victory of the proletariat" against capitalist liberal democracy. As socialism was being consigned to the trash heap of history in the region's<sup>2</sup> transition to liberal democracy,<sup>3</sup> there were optimistic expect-

1. IVAN T. BEREND, *DECADES OF CRISIS: CENTRAL AND EASTERN EUROPE BEFORE WORLD WAR II*, 1 (1998).
2. Albania, Armenia, Azerbaijan, Belarus, Bosnia, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Hungary, Latvia, Lithuania, Macedonia, Montenegro, Poland, Romania, Russia, Serbia, Slovakia, Slovenia, and Ukraine. See MARK MORJÉ HOWARD, *THE WEAKNESS OF CIVIL SOCIETY IN POST-COMMUNIST EUROPE* 147 (2003), for empirical analyses of "differences of degree" rather than "differences in kind."
3. Jacqui True, *Gendering Post-Socialist Transitions*, in *GENDER AND GLOBAL RESTRUCTURING: SIGHTINGS, SITES AND RESISTANCES* 74–75 (Marianne H. Marchand & Anne Sisson Runyan eds., 2000).



tations that imported Western values, norms, practices, and institutions—a market economy, a free democratic electoral system, constitutionalism, a civil law system encompassing an expanding European and international human rights canon, and a rule of law—would transform ex-socialist states. In that process, socialism’s authoritarian legacies would dissipate or be discarded.

But not all socialist ideals were consigned to that scrap heap. Sex equality—one of socialism’s signature ideological legitimating principles—was carried over in socialism’s market-oriented successors as a constitutional principle and fundamental guarantee of citizenship.<sup>4</sup> Yet for almost two and a half decades, the predominant political, legal, cultural, and educational responses of post-socialist states to sex equality issues—now part of the international human rights canon—have been marginalization, devaluation, resistance, or avoidance.

I start from the proposition that these patterns are neither idiosyncratic, nor a matter of casual neglect or mere oversight; they cannot be simply explained by a facile assertion that post-socialist states have had to deal with allegedly more important political and economic issues in the longer term wake of socialism’s collapse. Rather, they are evidence of what I characterize as legitimation/delegitimation contestations that usually pit NGOs—committed to the legitimation of women’s rights through state compliance with constitutional as well as regional and international human rights obligations—against powerful conservative and neo-liberal forces committed to the delegitimation of those rights.

This article addresses one largely overlooked arena of that legitimation/delegitimation contestation: legal education, largely in high status state-funded law faculties that dominate the field in each post-socialist country. Like other education, legal education is a “socially facilitated process of cultural transmission.”<sup>5</sup> More specifically, as the major first step in the professional socialization process of future lawyers and legal system officials, it is also a process of consciousness molding. Not only does it convey formal knowledge and a method of reasoning and analysis, it upholds a system of values through its choices of curriculum content, pedagogy, and structure. The inclusion or absence of a subject may be said to signify its importance or its lack thereof to the legal system, the larger society, and the state. In turn, this choice has longer term consequences for the practice of law and the operation of a legal system and, thus, contributes to the legitimation/delegitimation contestations I discuss in this article.

- 
4. “Citizenship can give rise to legal entitlements; it can serve as a source of security and stability and even a type of dignity . . . the recognition of a person’s capacity to be part of the public sphere and to take part in public discussions that shape the course of one’s life.” HELEN IRVING, *GENDER AND THE CONSTITUTION: EQUITY AND AGENCY IN COMPARATIVE CONSTITUTIONAL DESIGN* 90 (2008).
  5. PHILIP W. JACKSON, *WHAT IS EDUCATION?* 9 (2012) (emphasis removed).



The socio-legal context in which these contestations are occurring is crucial and, in important ways, distinguishes post-socialist states from their sister states to the West. Weakly legitimated post-socialist legal systems are still grappling with the longer term legacies of deeply delegitimated socialist law and legal systems. In the twenty-first century the difficulties created by those legacies are compounded by the complexities of an avalanche of law reforms driven by the European Union and pressures upon post-socialist states and legal systems both to comply with European principles of constitutionalism and to demonstrate that they have taken steps to anchor a rule of law consciousness in their respective states. Though women's rights are part of the human rights canon and, thus, a component of that rule of law, courts are unwilling to uphold them when the court's actions are interpreted as challenges to parliamentary-based popular sovereignty.

Some readers may object to my analysis being confined to states in one part of Europe—as if these states are singled out for hyper-critical scrutiny. However, there are significant differences within Europe in history, politics, and culture, as well as in the substance of law and the operation of legal systems and, for decades, the content and control over legal education. It would be rather sloppy scholarship to start from the proposition that if, in almost all Eastern European law faculties and in a number of Western ones as well, women's rights are marginalized or excluded, there simply is one general reductionist explanation—fraternal patriarchy.<sup>6</sup> Such flattening suffers from a lack of context. More specifically, it overlooks the fact that sex equality played a different role in a continent once divided by the Cold War and that the legacies of socialism are important for understanding legitimation/delegitimation struggles regarding women's rights in its post-Cold War eastern portion.

Other readers may be troubled by the scope of this article's analysis, which ignores each post-socialist country's uniqueness and, thus, the specificities of the context in which the contestations are embedded. Yet the consistency among states is so striking that it warrants an explanation.

Still others may claim that this analysis is premature—that the interval of almost two and a half decades since the collapse of socialism is a short one for reform in educational institutions. However, the extent and pace of law faculties' curricular responses to post-socialist market economy imperatives within the same interval suggests that the pace of reform can be—and has been—accelerated.

---

6. See generally SYLVIA WALBY, *THEORIZING PATRIARCHY* (1990). Unlike traditional patriarchy, a male dominated hierarchical arrangement within families, clans, and closely allied communities, fraternal patriarchy operates in larger social units in which men bond to maintain power and control over women without having close ties based on blood or marriage.



In this article, I discuss the reasons that the canon of women's rights, which directly concerns half of a state's population and has a profound impact on its other half, has been largely ignored in the law curriculum. I then identify the ways in which this deficiency can be remedied. It is my hope that the concerns I raise will become part of a professional discussion on the full inclusion of women's rights in the law faculty curriculum of post-socialist states.

### A. Raising the Question: A Professional/Personal Odyssey

In the early 1990s, as I began to have access to the region<sup>7</sup> as a legal academic, lawyer, and human rights activist, I became aware that nothing I had previously studied fully prepared me for the enormous changes generated by post-socialist modernization efforts oriented toward democratic European statehood and, in many ways, the early exhilaration generated by this prospect. That said, there were also developments that warranted apprehension: the lack of discussion concerning the longer term cultural engineering entailed in changing popular and official consciousness and practices regarding law and legal systems generated by socialism; the selective incorporation of certain human rights into post-socialist law and legal practice and the disregard of others; the failure of post-socialist governments, despite pressure from independent women's rights NGOs, to pay attention to women's rights; the resurgence of political and cultural forces that openly challenged the legitimacy of some important human rights principles, including women's rights; and what appeared to be a torpid pace of reform to a stultifying prior system of socialist legal education.

When I first raised the absence of women's rights in the law curriculum as a substantive issue with my mostly male legal academic colleagues in the region, they usually responded with a range of polite dismissals. Women were already men's equals. Women were already discussed unavoidably in certain subjects such as criminal or family law. Moreover, most women's issues were matters of culture and, thus, not of law.

Frequently, there were awkward moments when they embellished their comments with sexualized jokes and proverbs that invoked humiliating stereotypes of women, framed as timeless, self-evident, and culturally validated wisdom. I, not surprisingly, refused to be complicit in my own humiliation by performing the appropriate social response of laughing appreciatively or nodding knowingly. At the same time, I knew that a direct open challenge

---

7. I have taught in law, social work, journalism, and sociology faculties and worked with NGOs in Albania, Azerbaijan, Bulgaria, the Czech Republic, Georgia, Kosovo, Lithuania, Macedonia, Poland, Romania, Russia, Serbia, and Slovakia.



to their remarks on my part would only confirm prevailing demonizing caricatures of feminists, especially American ones.

In that first decade, most law students displayed degrees of wariness, skepticism, or polite disinterest when I raised issues of women's rights, perhaps because they took their cues from their teachers and peers. A few honest young women, however, confided that they were silenced, ridiculed, and humiliated by students and professors when they tried to raise such issues inside or outside the classroom.

As I continued to work in the region during the first decade of the twenty-first century, it was apparent that there was a lack of political will to follow up with necessary specific implementing legislation or the development of adequate monitoring mechanisms, despite post-socialist states' *de jure* commitments to sex equality, displayed by a constitutional provision or the enactment of an anti-discrimination law. Women's rights were not a concern of academic jurists. Among law students, however, I did find that a modest number, overwhelmingly female, were aware of domestic violence as a women's rights issue. That their consciousness was the result of NGO campaigns on the subject, rather than a product of their legal education, was clear—as students often displayed a telling lack of knowledge of the overarching women's rights jurisprudential framework in which the issue of violence against women is embedded.

Fast forward to the time of writing this article. Many law faculties now offer a general or European human rights course.<sup>8</sup> That said, based on my contacts and ongoing experience in the region as well as the data from four brief surveys I have conducted on the content of their legal education during the past eight years among more than eighty recently graduated lawyers from post-socialist states,<sup>9</sup> there is consistent evidence that women's rights are either not discussed or are mentioned only cursorily in any human rights course and very rarely, if ever, integrated or mainstreamed into more traditional law school subjects.

## B. Formulating an Answer

Several contemporary, scholarly, interdisciplinary approaches to law—law and culture studies, socio-legal analysis, and feminist legal theory and practice—inform my substantive development of a framework for this article: a three-pronged nexus consisting of culture, politics, law and the legal system,

---

8. I am indebted to my former research assistants Vera Cedano, Sara Korol, Amber Przybysz, and Stephanie Forman, for a review of law faculty web pages. (On file with the author.)

9. See Appendix A. These respondents participated in the pioneering program of the Women's Human Rights Training Institute in Sofia, Bulgaria.



and legal education. Section II is devoted to the first prong, and Sections III and IV are devoted to the second and third prongs. The advantage of this nexus is that it allows me to digest and synthesize relevant historical and contemporary information—admittedly a navigation between the Scylla of too much and the Charybdis of too little—that is essential to understanding the concerns raised in this article regarding the content of the law curriculum and its consequences.

Scholarly endeavors in the field of law and culture offer rich insights into the constitutive relationship between them. Culture is connected with the diverse ways in which social groups construct their lives ideologically, including what people think, value, believe, and hold as ideals. Culture plays an important role in the construction of identity.<sup>10</sup> Culture also contributes to the shaping of a legal system,<sup>11</sup> the substance of law, and the form and content of lawyers' and legal system officials' education. In turn, law, the legal system, and legal education influence the ongoing reshaping of a culture<sup>12</sup> by delineating hegemonic<sup>13</sup> social identity categories as legal classifications, including those based on sex and gender. Law assists in imposing and enforcing such social identity categories and, thereby, contributes to shaping an environment and a culture.<sup>14</sup>

Socio-legal analysis, the second approach, interprets law *systematically and empirically* as a *social* phenomenon.<sup>15</sup> It looks behind ideology, rhetoric, and formal approaches to the study of law, to the meaning of law in society as doctrine, interpretation, reason, and argument.<sup>16</sup> It also looks to the processes of legitimation<sup>17</sup> or delegitimation of law that support culture, as well as to the legal systems that enforce culture.

Contemporary socio-legal analysis distinguishes legitimation's normative justification of the authoritativeness of political and legal orders from its

- 
10. RIKKI HOLTMAAT & JONNEKE NABER, WOMEN'S HUMAN RIGHTS AND CULTURE: FROM DEADLOCK TO DIALOGUE 52–53 (2011).
  11. James L. Gibson & Gregory A. Caldeira, *The Legal Cultures of Europe*, 30 LAW & SOC'Y REV. 55, 57 (1996).
  12. Nancy Fraser, *Rethinking Recognition: Overcoming Displacement and Reification in Cultural Politics*, in RECOGNITION STRUGGLES AND SOCIAL MOVEMENTS: CONTESTED IDENTITIES, AGENCY AND POWER 21 (Barbara Hobson ed., 2003).
  13. Hegemony refers to power that naturalizes a social order, an institution, or even everyday practice so that how things are seems inevitable, and not the consequence of particular historical actors, classes, and events. Susan F. Hirsch & Mindie Lazarus-Black, *Introduction*, in CONTESTED STATES: LAW, HEGEMONY, AND RESISTANCE 7 (Mindie Lazarus-Black & Susan F. Hirsch eds., 1994).
  14. CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 5 (1973).
  15. Roger Cotterrell, *Why Must Legal Ideas Be Interpreted Sociologically?*, 25 J. L. & SOC'Y 171, 183 (1998).
  16. ROGER COTTERRELL, LAW, CULTURE AND SOCIETY: LEGAL IDEAS IN THE MIRROR OF SOCIAL THEORY 45–63 (2006).
  17. See generally RODNEY BARKER, LEGITIMATING IDENTITIES: THE SELF-PRESENTATIONS OF RULERS AND SUBJECTS (2001).





empirical aspects at three levels. Most abstract is polity legitimacy, consisting of the overall support and a sense of common attachment often expressed in historical narratives. It provides a legal system with normative coherence. Of greater importance for this article are the two other levels—regime legitimacy and output legitimacy. The former concerns issues of law and order; the latter focuses on a state's capacity to produce effective and efficient performance in accordance with criteria beyond purely economic considerations that are important to a particular political community.<sup>18</sup>

Feminist legal theory is the third approach addressed in this article's analysis. It underscores the significance and influence of sex and gender<sup>19</sup>—socially constructed categories underpinning sex/gender systems<sup>20</sup> and ideologies—which consist of roles, symbols, and meanings as well as rules, privileges, and punishments—that order behaviors, especially those connected with the exercise of power and sexuality.<sup>21</sup> One of its most significant contributions is the recognition that law, often relying on sex/gender stereotypes,<sup>22</sup> plays an important role as an enforcement mechanism in the acquisition, maintenance, and reproduction of sex and gender in both the public and private spheres<sup>23</sup> of a society and a state.

Feminist legal scholars rely both on theory and practice to chart the commonalities and variations in women's status in all contexts ranging from local norms and practices to the international political, legal, and economic system. They focus on the operation and impact of forces, institutions and practices in those contexts, which, as components of prevailing gender

- 
18. See generally LAW AND INFORMAL PRACTICES: THE POST-COMMUNIST EXPERIENCE (Denis Galligan & Marina Kurkchyan eds., 2003).
19. "Sexing draws attention to body and nature while gendering emphasizes mind and culture." In gendering, law plays a constitutive role in forming the 'naturally' sexed person based on culture specific oppositions, such as nature/culture and body/mind. HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 4 (2000). Gender, based on ideas of significant aspects of differences (identified as masculinity and femininity) between the sexes, including different degrees of difference, is constitutive of social relationships as an aspect of social differentiation, stratification, and power relations. It is not necessarily a static process. Joan W. Scott, *Gender: A Useful Category of Historical Analysis*, in WOMEN'S STUDIES INTERNATIONAL: NAIROBI AND BEYOND 26 (Aruna Rao ed., 1991).
20. GEERTZ, *supra* note 14, at 45.
21. Riki Wilchins, *A Continuous Nonverbal Communication*, in GENDERQUEER: VOICES FROM BEYOND THE SEXUAL BINARY 11, 14 (Joan Nestle et al. eds., 2002).
22. REBECCA J. COOK & SIMONE CUSACK, GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES 45 (2010).
23. The meaning and significance of the public/private distinction in law and culture depends upon the purpose for which, and the context in which, that distinction is employed. Karen Engle, *After the Collapse of the Public/Private Distinction: Strategizing Women's Rights*, in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 143 (Dorinda Dollmeyer ed., 1993). See SUSAN GAL & GAIL KLIGMAN, THE POLITICS OF GENDER AFTER SOCIALISM 37–62 (2000), for a reframing of the contents of public and private.





regimes<sup>24</sup> within overarching gender orders, disadvantage women and girls in sex/gender specific ways.<sup>25</sup> Their theoretical and empirical scholarly work identifies and documents the adaptability of the prevailing sex/gender order of fraternal patriarchy. That order relies in various ways on male control of modes of production in households and families as well as in governance, sexuality, cultural institutions, and paid labor. In that overarching order, men are the standard,<sup>26</sup> regardless of whether women are considered the "same" as men, thereby making women invisible, or "different" from men, thereby enabling claims of women's essential inferiority within a sex/gender hierarchy,<sup>27</sup> or are asymmetrically positioned as a group relative to men.<sup>28</sup>

Feminist scholars and lawyers have developed legal theories "to produce a reasoned critique of current legal arrangements and, in some versions, a vision of how law might be constructed in ways that move toward ideals of sex equality or gender justice."<sup>29</sup> Theirs is a rapidly expanding canon with a shared commitment to the equal worth of women and the universal applicability of women's rights as human rights.<sup>30</sup> That canon recognizes differences including vulnerabilities and disadvantages<sup>31</sup> among women and

- 
24. The patterning of gender relations within an institution is its gender regime. R. W. CONNELL, *THE MEN AND THE BOYS* 29 (2000). As a regime, gender also involves the way in which the state defines the role of women and men towards the fulfillment of the "common good" of a society in that institution. Enikő Magyari-Vincze, *Romanian Gender Regimes and Women's Citizenship*, in *WOMEN AND CITIZENSHIP IN CENTRAL AND EASTERN EUROPE* 21 (Jasmina Lukić et al. eds., 2006).
25. NIAMIH REILLY, *WOMEN'S HUMAN RIGHTS: SEEKING GENDER IN A GLOBALIZING AGE* 116–18 (2009).
26. Regardless of whether an individual man meets the patriarchal standard of a hegemonic, naturalized, normalized masculinity, all men, by virtue of being men in a fraternal patriarchal order, reap benefits through impersonal institutional supports in the state, the economy, and the prevailing culture. CONNELL, *supra* note 24, at 80–84. R.W. Connell & James Messerschmidt, *Hegemonic Masculinity: Rethinking the Concept*, 19 *GENDER & SOC'Y* 829 (2005).
- Hegemonic masculinities can be constructed that do not correspond closely to the lives of men . . . these models . . . express widespread ideals, fantasies and desires. They provide models of relations with women and solutions to problems of gender relations . . . and . . . ways of living in everyday local circumstances.
- Id.* at 838. "To sustain a given pattern of hegemony requires the policing of men as well as the exclusion or discrediting of women." *Id.* at 844.
27. See Ivana Radačić, *Feminism and Human Rights: The Inclusive Approach to Interpreting International Human Rights Law*, *UCLA JURIS. REV.* 238 (2008) (discussing the reconceptualization of the human rights subject by paying attention to sex/gender differences).
28. Radha Jhappan, *The Equality Pit or the Rehabilitation of Justice*, 10 *CANADIAN J. WOMEN & L.* 60, 74 (1998).
29. Nicola Lacey, *Feminist Perspectives on Ethical Positivism*, in *JUDICIAL POWER, DEMOCRACY, AND LEGAL POSITIVISM* 89, 111 (Tom Campbell & Jeffrey Goldsworthy eds., 2007).
30. This "universal mandate [] requires local interpretation to be culturally relevant and critically useful." Brooke A. Ackerly & Susan Moller Okin, *Feminist Social Criticism and the International Movement for Women's Rights as Human Rights*, in *DEMOCRACY'S EDGES* 134, 141 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999).
31. Martha Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 *YALE J. L. & FEMINISM* 1 (2008–2009).



acknowledges the range of their responses<sup>32</sup> to the many forms of discrimination and subordination they experience. It is also mindful of the danger of hierarchicalizing<sup>33</sup> those differences.

Section II is devoted to the first prong of the nexus—sex/gender ideology as a component of culture and politics. First, the section explores a shifting dynamic beginning with the legitimization of sex equality in the socialist era and then moves on to political and cultural struggles in the post-socialist era between supporters of sex equality in states purporting to be European liberal democracies and those forces seeking to delegitimize sex equality.

Section II(A) briefly discusses the principle of sex equality—the socialist answer in theory and practice to the ‘woman question’—implemented in the state’s organization of production, consumption, and social reproduction. In many ways, sex equality was one of socialism’s signature legitimating principles. That said, at different times in all socialist states, there were significant inconsistencies and contradictions in the prevailing state authored and disseminated sex/gender ideology, especially when it trumpeted essentialized sex/gender differences to accommodate shifts at times in public policies and institutional practices associated with economic development imperatives. In effect, notwithstanding socialist state achievements benefiting women—the provision of education, employment, and social welfare benefits—like their Western opponents in the Cold War, socialist states were still fraternal patriarchies. The claim in this section is that ideologically and, at times, in practice, socialist sex/gender ideology and practice is a complex legacy in the region.

Section II(B) addresses that complex legacy in the post-socialist order. It develops the argument that with the collapse of socialism, cultural and political contestations over the status of women surfaced openly as post-socialist states adjusted to imposition of market economies and to the operation of state institutions reformed to conform to liberal democratic norms and practices such as constitutionalism, a rule of law, inclusionary democratic institutions, and state accountability for its human rights obligations.

In those contestations, women’s rights NGOs of varying strengths and capacities worked to legitimate the internationally and regionally recognized modern women’s rights canon at the more concrete levels of regime and output legitimacy, rather than allowing it to languish at the abstract polity level of *de jure* commitment. That canon, emerging from arguments developed by activists, lawyers, and scholars from many countries, articulates an expansive vision of sex equality in practice.

---

32. Women’s agency is “the conscious capacity of individuals or groups to be autonomous and create a culture—often one of resistance.” KATALIN FÁBIÁN, *CONTEMPORARY WOMEN’S MOVEMENTS IN HUNGARY: GLOBALIZATION, DEMOCRACY AND GENDER EQUALITY* 12 (2009).

33. See *generally* MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* (2d ed. 2003).



Two sets of oppositional forces, operating in differing combinations with varying levels of strength depending on the country, have focused on challenging that canon. One set is what I have designated as a ‘backlash trinity’ consisting of conservatives, populist nationalists, and a significant portion of religious believers. They are prepared to use the state to achieve the reinstatement of a retraditionalized, fraternal patriarchal social order, thereby delegitimizing sex equality. They deny the political, cultural, and legal salience of the state’s contemporary women’s human rights obligations that may require state action to implement. The other set consists of neo-liberals committed to market-based policies regardless of their disparate gender-based impacts that create inequality by penalizing women. Neo-liberals oppose state intervention to reduce the harm of sex as well as class, race, ethnic, and sexual orientation based post-socialist inequalities—many of which have been generated or invigorated by the operation of an allegedly amoral and neutral market. For them, state protective and remedial special measures, identified with the human rights canon, interfere with a ‘natural’ social order based on individual rewards for successful risk taking.

Section III turns to law and legal systems—the second component of the nexus. Here, the argument is that a reversal of the sex equality legitimation/delegitimation process discussed in Section II, in which socialism legitimated sex equality and post-socialism is marked by concerted efforts to retraditionalize the sex/gender order, is at work. More specifically, as Section III(A) details, at the polity level, socialist law and socialist legal systems were formally legitimated as foundational components of the sovereign socialist state, at regime and output legitimation levels, they were delegitimated by their total subservience to and manipulation by the ruling party and their service largely as a repressive arm of the state. Notwithstanding rights provisions in socialist state constitutions, rights principles and legal action based therein were irrelevant.

As Section III(B) discusses, successor post-socialist states, committed to the implementation of liberal democratic principles in market-based economies upheld by rights-based legal systems and a rule of law, have grappled with this profound socialist legacy of a delegitimated legal sphere. At the same time, they have been confronted with an avalanche of new demands on their legal systems generated by reinstatement of a civil law system, the addition of constitutionalism as a jurisprudential principle, and legal requirements pertaining to EU accession. At regime and output legitimation levels, post-socialist legal systems have had, at best, limited success in deflecting or eliminating popular skepticism regarding law and legal systems as social goods—especially when the legal system is perceived to be susceptible to significant political and economic corruption. In effect, law and legal systems are weakly legitimated in the region.



Though women's rights NGOs engage in a range of activities beyond the legal sphere to expand public consciousness regarding sex/gender equality in practice, they also rely in part on the state's willingness and readiness to comply with and enforce its binding domestic, regional, and international human rights obligations. Consequently, they have a deep stake in a legal system's regime and output legitimation. In most instances, however, their legal systems have not been responsive to the allegations of women's rights violations for a variety of reasons also discussed in Section III(B).

Section IV is devoted to the third component of the nexus—largely state-funded legal education. Its legitimation *per se* is not at issue because it is the prerequisite for employment in the legal field. That said, I argue that it is also susceptible to the legitimation/delegitimation dynamic analyzed in Sections II(B) and III(B).

With some degrees of variation among socialist states, law faculties, like all other university departments, were subject to the ruling Communist party's intrusions and controls. The curriculum, discussed in Section IV(A), consisted of socialist law subjects that were unrecognized by prevailing civil and common law systems in the rest of the world, and, thus, constituted an isolated legal canon. Rights-based jurisprudence, associated with liberal democracy, was not relevant to a socialist legality focused on citizens' duties and obligations.

Like post-socialist law, post-socialist legal education—now scrubbed of its socialist content—faces paradigm shifts generated by liberal democratic theory and practice, including an expanded human rights canon. Given the post-socialist state's law and legal system reforms and the extent to which adherence to a rule of law that embodies democratic values is a vital component of those efforts, one might assume that legal education would also be affected. As Section IV(B)(1) documents, however, there is evidence that the legal academy has been very selective in its responses to the full range of substantive, as well as pedagogical, issues these reforms entail. This article argues that, in addition to the cultural, political, and legal system impediments to law curriculum reform and the modernization of legal education, there are subject-specific barriers to academic recognition of women's rights. That said, prompted by hope for change, Section IV(B)(2) develops suggestions for a possible expansion of stakeholder engagement in law curriculum reform, and Section IV(C) draws upon a wide range of contemporary academic options for including women's rights in an evolving modern law curriculum.



## II. GRAPPLING WITH “THE WOMAN QUESTION”: IDEOLOGY, CULTURE, AND POLITICS

### A. Sex Equality and Socialist States

For Europe, east and west, the pedigree of sex equality can be traced to wide-ranging discussions beginning in the mid-nineteenth century of the “woman question” encompassing the nature of women’s roles and the extent of their contributions to modern society.<sup>34</sup> In the pre-1917 political spectrum, women’s emancipation was touted as part of a proposed radical socialist and communist new and modern political, economic, cultural, and legal order. Women would be liberated from the dual oppression of existing patriarchal sex/gender systems<sup>35</sup> in which power and privilege on symbolic and material levels were distributed among and protected by men according to their socioeconomic class and, in some parts of existing empires, their privileged ethnicity. Women would enjoy full equality with men. For many socialist and communist women, “socialism was not just the only political stream that advocated women’s equality . . . they themselves were deeply convinced that the only way to social justice, including gender equality, was through socialism.”<sup>36</sup> Sex equality was, in effect, one of the signature principles for the legitimization of a new polity.

In the 1917 Bolshevik assumption of power in Russia, as well as in the post-World War II ascendancy of communist parties in Central and Eastern Europe, women were proclaimed equal citizens with men in a new socialist modernizing<sup>37</sup> order headed by a vanguard ruling party.<sup>38</sup> In this dramati-

- 
34. Francisca De Haan, *On Retrieving Women’s Cultural Heritage Especially the History of Women’s Movements in Central, Eastern and South Eastern Europe*, in *TRAVELING HERITAGES: NEW PERSPECTIVES ON COLLECTING, PRESERVING AND SHARING WOMEN’S HISTORY* 69 (Saskia E. Wieringa ed., 2008).
  35. Women were subordinated to men within their class because they were economically dependent on them; at the same time, women of the lower classes shared a subordinated position with men of their class in the larger economic, political, and legal order. *FREDERIC ENGELS, THE ORIGIN OF FAMILY, PRIVATE PROPERTY AND THE STATE* 192–201 (New York: Pathfinder Press, 1972).
  36. *A BIOGRAPHICAL DICTIONARY OF WOMEN’S MOVEMENTS AND FEMINISMS IN CENTRAL, EASTERN AND SOUTH-EASTERN EUROPE: 19TH AND 20TH CENTURIES* 8 (Francesca De Haan et al. eds., 2006).
  37. Gail Warshofsky Lapidus, *Sexual Equality in Soviet Policy: A Developmental Perspective*, in *WOMEN IN RUSSIA* 117–18 (Dorothy Atkinson et al. eds., 1977).
  38. The party possessed a monopoly over teleological knowledge and spoke, as well as acted, in the name of a collective common good “[to] redistribute the social product in the interests of the general welfare.” Katherine Verdery, *From Parent-state to Family Patriarchs: Gender and Nation in Contemporary Eastern Europe*, 8 *E. EUR. POL. & SOCIETIES* 225, 229 (1994).



cally changed organization of society, socialist consciousness regarding sex equality would have an impact on all aspects of life.<sup>39</sup>

A full discussion of socialist sex equality in ideology and practice as a legitimating principle is beyond the scope of this article. The abbreviated discussion in this section is designed to remind the reader of its significance as well as its limitations as part of the cultural and political legacy of post-socialist states.

Socialist state constitutions—polity legitimating documents—contained a sex equality provision that was showcased as a radical departure from the posture and practices of ‘hypocritical’ Western capitalist countries claiming to be committed to liberal democratic principles of equality and constitutionalism, but lacking such an important symbolic statement. Each socialist state also claimed that sex equality was more than a domestic *de jure* principle because it was implemented in state policies<sup>40</sup> and, after WWII, was strongly supported by the socialist bloc in the United Nations.<sup>41</sup>

Women were affirmatively recognized as a specific constituency<sup>42</sup> of the ruling party. Women’s interests, identified broadly with welfare, work, and housing,<sup>43</sup> were said to be represented organizationally either by the ruling party’s women’s section or a sole, officially recognized women’s organization and institutionally by a government department mandated to address women’s and children’s welfare.<sup>44</sup> At different times in different socialist countries, women also were assured representation in various state organs through a quota system<sup>45</sup>—a mechanism that was not available in Western democracies.

- 
39. Remaining traditional patriarchal practices and values were explained away in formulaic official assertions as residual. See, e.g., DOUGLAS NORTHRUP, *VEILED EMPIRE: GENDER AND POWER IN STALINIST CENTRAL ASIA* (2004).
40. In the 1950s, the Soviet government declared that gender equality had been achieved, and many other socialist countries followed suit. Sharon Wolchik, *Women and the State in Eastern Europe and the Soviet Union*, in *WOMEN, THE STATE AND DEVELOPMENT* 44, 45 (Sue Ellen Charlton et al. eds., 1989).
41. Socialist states were among the early ratifying parties of the major women’s rights international instrument. Convention on the Elimination of All Forms of Discrimination Against Women, adopted 18 Dec. 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., U.N. Doc. A/34/46 (1980), 1249 U.N.T.S. 13 (entered into force 3 Sept. 1981) [hereinafter CEDAW].
42. Women were related to the state not as individual citizens but as members of a politically constructed “corporate” (like working class or youth) group—women—which had specific tasks, characteristics, and opportunities. Éva Fodor, *Power, Patriarchy, and Paternalism: An Examination of the Nature of State Socialist Authority* 28 (Ph.D. diss., UCLA, 1997).
43. Group struggles around issues such as equal pay and the position of women in society were seen as superfluous in a political system formulated around ideological principles of egalitarianism in which most welfare and social care was, in fact, provided by the state. Barbara Einhorn & Charlotte Sever, *Gender and Civil Society in Central and Eastern Europe*, 5 INT’L FEMINIST J. POLITICS 163, 166 (2003).
44. Susan Gal, *Movements of Feminism: The Circulation of Discourses About Women*, in *RECOGNITION STRUGGLES*, *supra* note 12, at 100.
45. Suzanne Lafont, *One Step Forward, Two Steps Back: Women in the Post-Communist States*, 34 COMMUNIST & POST-COMMUNIST STUD. 203, 207 (2001). Also see Éva Fodor,





State propaganda highlighted these commitments and innovations as significant and positive benefits of the socialist system. However, there were no mechanisms outside the party or the state apparatus it controlled that were able to determine the accuracy of official sex equality claims.<sup>46</sup> The political reality was that “the positions [women] held in parliaments gave them little decision making power in a political system which formulated policy and legislation almost exclusively at the level of the Party’s Central Committees and Politburos in which women had diminishing or invisible levels of representation.”<sup>47</sup> Women’s participation in official organs and state controlled organizations meant that they, like their male counterparts, rubber-stamped decisions made by the upper echelons of each state’s ruling party—a powerful male dominated and controlled *nomenklatura* (ruling class)<sup>48</sup> linked in a Soviet-led fraternal socialist brotherhood.

That said, socialist state policies did provide women a range of tangible benefits identified with sex equality—“opportunities for their educational and occupational advancement, cultural and material enrichment, and social engagement . . . [as well as] new roles and identities . . . [and] a range of social benefits- from universal education and healthcare to state-subsidized vacations.”<sup>49</sup> Since a large, educated labor force was needed to transform society,<sup>50</sup> each socialist state recruited large numbers of women to work outside the home<sup>51</sup> in a greater variety of job classifications<sup>52</sup> than in Western economies. Although during the 1970s and 1980s in a number of socialist

---

*Smiling Women and Fighting Men: The Gender of the Communist Subject in State Socialist Hungary*, 16 GENDER & SOC’Y 240 (2002), for a discussion of the Hungarian 30 percent quota for women’s participation in the party, as well as for occupying positions of authority.

46. By their filing a reservation to CEDAW, *supra* note 41, art. 29(1), which specifies applicable procedures in case of a dispute regarding whether the state party has acted in compliance with the Convention, all socialist states protected themselves from serious external scrutiny regarding their implementation of Convention provisions. Monika Platek, *Hostages of Destiny: Gender Issues in Today’s Poland*, 76 FEMINIST REV. 5, 7 (2004).
47. Einhorn & Sever, *supra* note 43, at 168.
48. At the higher levels, occupied overwhelmingly by men, party membership increased “political capital” and, thus, the ability for attaining privileges more than extensive economic resources. Tanja van der Lippe & Éva Fodor, *Changes in Gender Inequality in Six Eastern European Countries*, 41 ACTA SOCIOLOGIA 131, 145–46 (1998).
49. Jill Massino & Shana Penn, *Introduction*, in GENDER POLITICS AND EVERYDAY LIFE IN STATE SOCIALIST EASTERN AND CENTRAL EUROPE 2 (Shana Penn & Jill Massino eds., 2009).
50. Wage labor also had a strong ideological pull—a means of undercutting female subordination, a central avenue for female self-realization, mitigation against the isolation of domestic drudgery, and a contribution to the building of socialism. LYNNE HANEY, INVENTING THE NEEDY: GENDER AND THE POLITICS OF WELFARE IN HUNGARY 34 (2002).
51. Zuzana Jezerska, *Gender Awareness and the National Machineries in the Countries of Central and Eastern Europe*, in MAINSTREAMING GENDER, DEMOCRATIZING THE STATE? INSTITUTIONAL MECHANISMS FOR THE ADVANCEMENT OF WOMEN 170 (Shirin M. Rai ed., 2003).
52. High-Level Regional Preparatory Meeting for the Fourth World Conference on Women, *The Role of Women in the Transition Process: Facing a Major Challenge*, 17–21 Oct. 1994, ¶10–13, U.N. Doc. E/ECE/RW/HLM/5 (5 Aug. 1994) [hereinafter *Role of Women*].





states, as birthrates fell and economic development faltered, labor policies premised on women working the double shift were challenged within ruling parties by proposals to remove women from the wage labor force. The state also ensured that women had far greater access to all levels of education than their Western counterparts. Since women were needed for both labor and reproduction, socialist states developed the world's most encompassing welfare systems, providing generous welfare benefits (child care, health care, social insurance, and maternity leave)<sup>53</sup> that were vital for women who, as discussed below, still remained responsible for the gendered tasks of family care.<sup>54</sup> Moreover, during most decades in most socialist countries, access to divorce and abortion—though not to reliable contraception—enabled women to exercise some measure of control over marriage and reproduction unavailable to their Western counterparts.

Each socialist state had a well-developed, party-authored and officially disseminated<sup>55</sup> sex/gender ideology anchored in the foundational legitimating principle of sex equality. During the early phase of Bolshevik consolidation of power, the emancipation of women briefly had androgynous aspects.<sup>56</sup> Subsequent versions of socialist sex/gender ideology, however, relied on the premise that men and women were both equal and “different.” The latter was attributable to men and women's sexed bodies, which generated essentialized complimentary natures of masculinity and femininity, expressed and confirmed in social practices.

Take, for example, the question of the strength needed for socialist labor-based modernization. Socialist sex/gender ideology posited that men possessed an essentialized strength endowing them with the capabilities for leadership in socialist political, economic, and cultural life. Not coincidentally, certain types of highly rewarded employment in the core sectors of socialism—the higher levels<sup>57</sup> of bureaucracy, heavy industry, the army, and the apparatus of repression—were almost wholly male and based on presumed masculine strengths, skills, or capacities as prerequisites. As sole employer, the state channeled women into sectors—healthcare, textiles, school teachers, office clerks, salespersons, and administrative workers—associated with female skills and caretaking capacities. These jobs had lower

53. Alena Heitlinger, *The Impact of the Transition from Communism on the Status of Women in the Czech and Slovak Republics*, in *GENDER POLITICS AND POST-COMMUNISM* 95 (Nanette Funk & Magda Mueller eds., 1993).

54. “State socialism ‘emancipated’ women not as equal citizens but as worker-mothers.” BARBARA EINHORN, *CINDERELLA GOES TO MARKET: CITIZENSHIP, GENDER AND WOMEN'S MOVEMENTS IN EAST CENTRAL EUROPE* 40 (1993).

55. See Janet Elise Johnson & Jean C. Robinson, *Living Gender*, in *LIVING GENDER AFTER COMMUNISM* 1 (Janet E. Johnson & Jean C. Robinson eds., 2007).

56. See Zuzana Kiczková & Etela Farkašová, *The Emancipation of Women: A Concept That Failed*, in *GENDER POLITICS AND POST-COMMUNISM*, *supra* note 53, at 84, 85.

57. Verdery, *supra* note 38, at 233.



wage scales than largely male sectors,<sup>58</sup> received less state investment, and were considered less prestigious because they were strategically less important. In effect, despite the sex equality principle, socialist labor forces were sex-stratified.

In the crucial sphere of biological and social reproduction, men's essentialized strength was acknowledged in family life by their status as head of household within the paternalist socialist state, though women continued to perform the overwhelming preponderance of family care work. Women's essentialized strength lay in socialist motherhood<sup>59</sup> and in maintaining appropriate female sexuality.<sup>60</sup> As child bearers, women were said to be suited for the domestic roles of manager and enabler of daily life and, thus, responsible for virtually all aspects of social reproduction<sup>61</sup>—the nurturing, caretaking, and supporting of all family members, as well as the provisioning of the household. Women's physical and psychological strengths were said to be naturally channeled into sacrificing and suffering for their family's welfare. Thus, reassuringly, according to ideology, strong women were not competitors with strong men.

Although, depending on the decade and country, certain state promulgated campaigns encouraged men to participate in some household activities, there were no major sustained efforts to reorganize gender-based responsibilities in home and family life in the name of sex equality.<sup>62</sup> In effect, no socialist country fully and consistently addressed "one of the most fundamental women's issues—the extent to which the entire economy . . . rested on women's unpaid and underpaid labor."<sup>63</sup>

Of course, the hegemonic sex/gender norms and role prescriptions, articulated by the state and party in official campaigns, were not adhered to by all citizens at all times in all socialist countries. Some "negotiated around or resisted gender . . . more evidently as coercion waned."<sup>64</sup> That said, in

58. Van der Lippe & Fodor, *supra* note 48, at 138.

59. With the exception of Romania, post-Stalinist societies equated proper femininity with "voluntary motherhood," Elena Zdravomyslova & Anna Temkina, *Gendered Citizenship in Soviet and Post-Soviet Societies*, in *NATION AND GENDER IN CONTEMPORARY EUROPE* 107 (Vera Tolz & Stephenie Booth eds., 2005), though in practice, state policies buttressed by propaganda campaigns manipulated women's choices.

60. Lynne Attwood, *Young People, Sex and Sexual Identity*, in *GENDER, GENERATION AND IDENTITY IN CONTEMPORARY RUSSIA* 96 (Hilary Pilkington ed., 1996).

61. In 1987, Gorbachev admitted that mistakes in misinterpreting the role of women lie in the fact that "women no longer [had] enough time to perform their everyday duties at home" and that many problems (in behavior, morals, culture, and production) were partially "caused by the weakening of family ties and slack attitude to family responsibilities." He characterized this situation as a "paradoxical result of our sincere and politically justified desire to make women equal with men in everything" and suggested "women return to their purely womanly mission." Lafont, *supra* note 45, at 207.

62. Zillah Eisenstein, *Eastern European Male Democracies: A Problem of Unequal Equality*, in *GENDER POLITICS AND POST-COMMUNISM*, *supra* note 53, at 303, 308.

63. BARBARA ALPERN ENGEL, *WOMEN IN RUSSIA 1700–2000*, at 232 (2004).

64. Johnson & Robinson, *supra* note 55, at 6.



the context of a totalizing party/state system, that controlled resources as well as orchestrated and reinforced sex/gender ideology,<sup>65</sup> there was limited personal agency to do so and the repertoire was limited.<sup>66</sup>

## B. Post-Socialist Contestation over Women's Rights

### 1. Fraternal Patriarchy as an Ordering Principle in Post-Socialist States

As signs of socialism's collapse accelerated during the late 1980's, negotiations for a transition to a new democratic order commenced in several states. But even in those states that had well-developed dissident movements<sup>67</sup>—aided by transnational human rights networks<sup>68</sup> supporting Western liberal democratic values—in which women were actively involved,<sup>69</sup> very few women participated in those crucial negotiations.<sup>70</sup> Notwithstanding the prospect that a version of inclusionary liberal democracy would replace socialism, women were invisible in the foundational first steps away from the authoritarian past.

With the advantage of hindsight, the reasons for these developments are clear. First, the naturalized cultural understanding that politics is still a masculine prerogative, especially at the higher levels, was carried over from socialist fraternal patriarchy to newly organized political parties whose top

65. Nanette Funk, *Introduction*, in *GENDER POLITICS AND POST-COMMUNISM*, *supra* note 53, at 1, 4.

66. Massino & Penn, *supra* note 49, at 8–9.

67. In most countries, there were not many lawyers among dissidents. Dimitrina Petrova, *Political and Legal Obstacles to the Development of Public Interest Law*, 5 *E. EUR. CONST. REV.* 62, 70 (1996). Thus, when socialist systems began to wane, the organized bar in most countries was ill prepared to assume a leadership role. William D. Meyer, *Facing the Post-Communist Reality: Lawyers in Private Practice in Central and Eastern Europe and the Republics of the Former Soviet Union*, 26 *LAW & POL'Y INT'L BUS.* 1019, 1038 (1994–1995).

68. Daniel C. Thomas, *The Helsinki Accords and Political Change in Eastern Europe*, in *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* 205 (Thomas Risse, Stephen C. Ropp & Kathryn Sikkink eds., 1999).

69. See SHANA PENN, *SOLIDARITY'S SECRET: THE WOMEN WHO DEFEATED COMMUNISM IN POLAND* (2006); Yvonne Galligan, *Enlargement, Gender and Governance: The Civil and Political Participation and Representation of Women in Central and Eastern Europe, Final Report to European Commission*, Contract No. HPSE-CT2002-000115, at 51–53 (2006), for a discussion of women's contribution to democratization movements in Poland and Czechoslovakia. Also see Einhorn & Sever, *supra* note 43, at 169, for women's participation in the Dialogue Group and the Danube Circle in Hungary.

70. See Sylwia Chutnik, *Transformers or the Changes in Poland after 1989 as Seen by a 30-Year-old*, in *WOMEN IN TIMES OF CHANGE 1989–2009*, at 41 (Agnieszka Grzybek ed., 2009), available at [http://www.boell.pl/downloads/Women\\_in\\_Times\\_of\\_Change\\_WWW.pdf](http://www.boell.pl/downloads/Women_in_Times_of_Change_WWW.pdf). See also Elzbieta Matyña, *Provincializing Global Feminism: The Polish Case*, 70 *SOC. RES.* 518 (Summer 2003).



echelons continued to be dominated by men.<sup>71</sup> Prevailing political rhetoric emphasized new opportunities as well as a return to a “natural” order disrupted and distorted by socialism—to Europe, to the nation, to the reinstatement of private property, and even to the prospect of a retraditionalization of the sex/gender order. In most states, parliamentary quotas for women were eliminated on the grounds that they were an undemocratic practice,<sup>72</sup> and a precipitous drop in the number of women elected to national parliaments followed.<sup>73</sup> Second, there were high stakes in the transition era of political and economic dismantling or reforming of state institutions, the re-distribution of political and economic resources, the selective protection of human rights such as speech in an independent media, the reform of state police powers focusing on domestic targets, as well as on prisons or other closed institutions like mental hospitals, and the rights of co-ethnics, designated as minorities, in adjacent states.<sup>74</sup> By retaining a sex equality provision<sup>75</sup> in their post-socialist constitutions, assuming their predecessors’ international human rights obligations, and ratifying the European Convention for the Protection of Human Rights and Fundamental Freedoms, post-socialist governments could proffer lip service to formal (*de jure*) sex equality. Third, the sex/gender based disparate economic impact of early neo-liberal structural adjustment policies, which produced market-driven social re-stratification and began the process of undermining state guaranteed economic and social rights,<sup>76</sup>

- 
71. JACQUI TRUE, GENDER, GLOBALIZATION, AND POSTSOCIALISM: THE CZECH REPUBLIC AFTER COMMUNISM 29 (2003).
  72. Galligan, *supra* note 69, at 58–60.
  73. Maria Todorova, *The Bulgarian Case: Women’s Issues or Feminist Issues?*, in GENDER POLITICS AND POST-COMMUNISM, *supra* note 53, at 30, points out that some women considered politics in the new order as equally unsavory and corrupt as in the prior one and, thus, best left to men. Other women may have bought into the illusion that once democracy was achieved, women would automatically benefit. See also Galligan, *supra* note 69, at 64–85, for an analysis of barriers to women’s political representation.
  74. Edwin Rekosh, *Constructing Public Interest Law: Transnational Collaboration and Exchange in Central and Eastern Europe*, 13 UCLA J. INT’L L. & FOREIGN AFF. 66 (2008).
  75. KONSTITUTSIJA ROSSIJSKOJ FEDERATSII [CONST. OF THE RUSSIAN FEDERATION] 25 Dec. 1993, art. 19; KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIE [CONST. OF THE REPUBLIC OF POLAND] 2 Apr. 1997, art. 33; A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONST. OF HUNGARY] 20 Aug. 1949, art. 66; CONSTITUTIA ROMANIEI [CONST. OF ROMANIA] 8 Dec. 1991, art 4; КОНСТИТУЦІЯ УКРАЇНИ [CONST. OF UKRAINE] 28 Jun. 1996, art. 24; SAKARTVELOS K’ONSTITUTSIA [CONST. OF GEORGIA] 24 Aug. 1995, art. 14; LIETUVOS RESPUBLIKOS KONSTITUCIJA [CONST. OF LITHUANIA] 24 Oct. 1992, art. 29; KONSTITUTSIYA NA REPUBLIKA BALGARIYA [CONST. OF BULGARIA] 13 Jul. 1991, art. 6; ÚSTAVA ČESKOSLOVENSKE SOCIALISTICKE REPUBLIKY [CONST. OF CZECHOSLOVAKIA] 11 Jul. 1960, art. 20.
  76. Kornelia Slavova, *Looking at Western Feminisms Through the Double Lens of Eastern Europe and the Third World*, in WOMEN AND CITIZENSHIP IN CENTRAL AND EASTERN EUROPE 252 (Jasmina Lukic, Joanna Regulska & Darja Zavirsek eds., 2006), identifies this process as “the intersection of class, nation, ethnicity, religion, gender and sexual orientation that had been suppressed and masked before as ‘sameness’ and ‘equality’ . . . exploded (or imploded rather).” True argues, “questions of equality—for instance between the new rich and poor or between men and women—were discredited and could only be addressed in the language of capitalism and freedom.” TRUE, GENDER, GLOBALIZATION, AND POST-SOCIALISM, *supra* note 71, at 11.



placed wealth in men's hands.<sup>77</sup> Over time, most women experienced a declining economic status at a faster rate than men.<sup>78</sup> Arguably, women's preoccupation with immediate economic concerns and family responsibilities may have further constrained any wide-spread enthusiasm on their part for involvement in unwelcoming male dominated political activity.

There were, of course, women who were undeterred by these daunting developments. These women turned to a newly developing sphere<sup>79</sup> in the region—civil society<sup>80</sup>—situated between the state and the citizenry and populated by new organizational entities designated as NGOs.<sup>81</sup> As NGOs developed expertise on specific women's rights issues such as reproductive rights or violence against women, they became attractive project partners for democratic, change-oriented European and North American governmental and private funders. In turn, external funders were attractive sources of support for NGOs who lacked reliable parliamentary allies and who experienced, at best, short-lived state recognition and very modest support for projects in the wake of the 1995 UN Conference on the Status of Women in Beijing.<sup>82</sup>

Over time, a number of NGOs in each post-socialist state developed the skill and capacity to participate in political and legal fora at multiple

- 
77. Privatization, which soon involved austerity programs, produced corruption, asset stripping, and "get rich quick" deals reminiscent of "stealing from the state" in socialist times at a far more extensive level. *Id.* at 14.
78. The immediate, palpable consequence of the collapse and rapid implementation of neoliberal economic policies, dismantling state-owned enterprises, was economic dislocation—more specifically, unemployment (unknown under full-employment socialism) and drastic reductions in social insurance benefits. Sex-neutral on their face, in fact, both developments had a disparate impact on women who were more likely to be unemployed and whose economic hardships were exacerbated by the curtailment of social insurance benefits. *Role of Women*, *supra* note 52, ¶19, notes this trend began in the 1980s.
79. Under socialism, power at the center came from incapacitating actual or potential loci of organization—ensuring that no one else could get things done or associate for purposes other than those of the center. As a result, the intermediate space between state and households was cleansed of all independent organizations. "[A]ll manner of associations were either attached to the state, locked in a struggle of cooperation with it, or placed under severe pressure from it." Katherine Verdery, *Ethnic Relations, Economies of Shortage, and The Transition in Eastern Europe*, in *SOCIALISM: IDEALS, IDEOLOGIES, AND LOCAL PRACTICE* 173, 183 (C. M. Hann ed., 1993).
80. "Civil society represented values and virtues such as individual freedom, co-operation, spontaneity, solidarity, public initiative, protest, intellectual critique, recognized political dissent and many other aspects of communal life destroyed by the Communists." Jiří Příbáň, *Reconstituting Paradise Lost: Temporality, Civility, and Ethnicity in Post-Communist Constitution Making*, 38 *L. & Soc'y Rev.* 407, 413 (2004). But see MORIÉ HOWARD, *THE WEAKNESS OF CIVIL SOCIETY IN POST-COMMUNIST EUROPE* (2003), for a discussion of the limitations of these groups.
81. Amanda Sloat, *The Rebirth of Civil Society: The Growth of Women's NGOs in Central and Eastern Europe*, 12 *EUR. J. WOMEN'S STUD.* 437 (2005). In the voluminous literature on NGOs, they are not without their critics.
82. See Jezerska, *supra* note 51, at 173–75, for a discussion of the follow-up 1996 Bucharest Conference on the Implementation of the Beijing Platform for Action in Central and Eastern Europe, which defined eleven priority objectives relevant to women's status in the region.



levels—domestic, regional, and international. They collected data, spoke truth to power, and conducted consciousness-raising campaigns, relied on political and legal strategies of naming and shaming, and filed complaints and lawsuits. NGOs provided concrete evidence that their state’s reliance on *pro forma* gestures or a superficial formal equality approach to women’s rights issues, was and continues to be an inadequate substitute for the implementation of substantive sex equality reforms. As NGOs continue to challenge post-socialist states’ claims to being liberal democracies, they send a clear message: Post-socialist “democracy” is a male-dominated system<sup>83</sup> that is yet another iteration of highly adaptable fraternal patriarchy.

## 2. Post-Socialist Retraditionalization and the Delegitimation of Women’s Rights

Two distinctive types of coalitions in the region actively seek to undermine and delegitimize sex/gender equality principles and the implementation of women’s rights as obliged under regional and international human rights jurisprudence as part of their political, cultural, and legal agendas. One coalition consists of conservatives, populist nationalists, and Catholic or Orthodox Christian clergy and their followers, all of whom are allies in what this article characterizes as a “backlash trinity.” The other consists of relative newcomers to politics and culture in the region—supporters of neo-liberalism developed in western economies. While a full discussion of both coalitions is beyond the scope of this article, Sections 2(a) and (b) identify each coalition’s major sex/gender ideology themes, as well as their positions on both the role and rule of law, which have implications for the state’s commitment to implementing its women’s rights obligations.

### a. The Backlash Trinity: Conservatism, Religion, and Populist Nationalism

Backlash trinity allies—conservative, religious, or populist nationalist—rely on a shared historical narrative to support their fraternal patriarchal vision of the appropriate social order. Once upon a time, in a romanticized and ideal pre-socialist world, the norms and practices of a “natural” patriarchal sex/gender order were observed, reinforced, and reproduced in political, legal, and cultural arrangements.<sup>84</sup> Regardless of prevailing class stratification, men—by virtue of their bravery and sense of duty—were charged with defending the honor of their women, families, communities, nations, and

83. See Zillah Eisenstein, *Writing Bodies on the Nation for the Globe*, in *WOMEN, STATES, AND NATIONALISM: AT HOME IN THE NATION?* 35 (Sita Ranchod-Nilsson & Mary Ann Tetreault eds., 2000).

84. Andjelka Milič, *Nationalism and Sexism: Eastern Europe in Transition*, in *EUROPE’S NEW NATIONALISM* 169 (Richard Caplan & John Feffer ed., 1996).





religious faith.<sup>85</sup> Men's masculinity was privileged and rewarded in law and in practice; they were the naturally ordained heads and protectors of families; they were endowed with and exercised familial entitlements. Women's identity, including their cabined sexuality,<sup>86</sup> was derived from and dependent upon their connections to men. They performed traditional essentialized biological and social reproductive tasks identified with femininity—mother, homemaker, and transmitter of the nation's language and culture to their children—in service to the patriarchal family, nation, and church. In that service, they displayed iconic capacities for sacrifice, forgiveness, and suffering.<sup>87</sup>

Enter socialism with its party-authored and state-imposed disruptive 'unnatural' sex equality principles implemented in state policies. Since women, like men, relied on the state for employment and welfare services, they were no longer dependent on their male providers and protectors. Enter socialism with its hostility to and repression of patriarchal religion that accompanied and justified the pre-socialist sex/gender order. Enter socialism, which, depending on the country and time period, relied instrumentally on shifting strategies of mobilizing<sup>88</sup> or repressing nationalism which supported an undisguised patriarchal sex/gender ideology.

Now, fast forward to the post-socialist era. In the wake of socialism's collapse and the ensuing economic insecurity, post-socialist states jettisoned one of socialism's foundational polity legitimation claims—the vindication of an ethnically undifferentiated working class freed from capitalist servitude and traditional religion—and replaced it with historically and culturally shared sentiments of community, national identity, and ethnic unity. Post-socialist state constitutions and declarations of sovereignty proclaimed that the "state is the realization of the nation's will to statehood."<sup>89</sup> In some states, that identity was connected to a traditional Christian church,<sup>90</sup> which, regardless of whether it cooperated with the socialist state during the godless

85. See Joane Nagel, *Masculinity and Nationalism: Gender and Sexuality in the Making of Nations*, 21 *ETHNIC & RACIAL STUD.* 242 (2001).

86. Nationalism involves the "sexualization of ethnicity . . . an omnipresent feature of interethnic relations that dramatically enhances loyalty and raises the emotional stakes of the community defined by this criterion." FÁBIÁN, *supra* note 32, at 132.

87. "[Mary] has been and still is a symbol of all those qualities that men want women to possess: she is saintly, virginal and full of maternal forbearance and devotion." Platek, *supra* note 46, at 13. The strength of the cult of Mary may vary among countries, but both Catholic and Orthodox churches rely on Mary as an iconic figure for women.

88. See Příbáň, *supra* note 80, at 420, for a discussion of nationalist communism in the late 1950s and early 1960s.

89. Philip G. Roeder, *National Self-Determination and Post-communist Popular Sovereignty*, in *NATIONALISM AFTER COMMUNISM, LESSONS LEARNED* 204 (Alina Mungiu-Pippidi & Ivan Krastev eds., 2004).

90. Religion played a significant role in nineteenth and twentieth century nation building in Central and Eastern Europe. Religious affiliation helped create ethnic identity, whereas in the West national identity emerged as a replacement for the older "religious myth" of identity. BEREND, *supra* note 1, at 188. Churches in the region functioned as secular and temporal entities as well. Often the church was the sole institution in a community under foreign rule and served as an organ of self-government and defense. *Id.* at 189.





socialist era of spiritual decline,<sup>91</sup> claimed to be the courageous repository and protector of the organic entity of the nation and its traditional moral values, culture, and unique heritage.<sup>92</sup> An essential component of that allegedly inseparable mix of culture and religion was and is a divinely ordained patriarchal sex/gender order.

These hitherto suppressed forces—the backlash trinity of conservatives, populist nationalists, and devout confessional believers committed to retraditionalization,<sup>93</sup> including refeminization and remasculinization<sup>94</sup> in the social, cultural, political, and legal order—surfaced in every post-socialist state. In the name of the collective good, traditional gender roles were reinstated and reinforced through politics, culture, and law. Women would be “good”/docile girls; men would no longer be “emasculated”<sup>95</sup> as they were under socialism. This calculated choice of rhetoric, evoking the specter of mass masculine gender trauma, was fraught with powerful political, psychological, and cultural consequences for both sexes. While men were identified as victims, despite the fact that they were privileged within the socialist fraternal patriarchy, socialism played upon status anxieties concerning their performance of masculinity, which identified with potency and control. For women, it served notice that they participated in undermining their own men and were accomplices to, if not instigators of, alleged “pathologies” generated in socialist family life with destructive carryovers in post-socialist society.

Initially, the backlash trinity accused women’s rights advocates of being lineal descendants of each socialist state’s official women’s organization.<sup>96</sup> Now, the trinity relies on such updated labels as “liberal humanist” or “radical feminist.”<sup>97</sup> But then, as now, such women are said to be unful-

- 
91. See Joanna Z. Mishtal, *How the Church Became the State: The Catholic Regime and Reproductive Rights in State Socialist Poland*, in *GENDER POLITICS AND EVERYDAY LIFE*, *supra* note 49, at 133.
  92. The context of the claim is of crucial importance. “In the context of the early eighties the claim that Poland is a Catholic country was a challenge thrown at the oppressive system. In a liberal democracy, however, the same words have an entirely different meaning: they are a denial of democratic pluralism made from a neo-nationalist position.” Agnieszka Graff, *The Quagmire Effect: On the Special Role of the Catholic Church in Poland* (2009), available at [http://www.pl.boell.org/downloads/A\\_Graff\\_About\\_the\\_Polish\\_catholic\\_church.pdf](http://www.pl.boell.org/downloads/A_Graff_About_the_Polish_catholic_church.pdf).
  93. Agnieszka Graff, *Lost Between the Waves? The Paradoxes of Feminist Chronology and Activism in Contemporary Poland*, 4 J. INT’L WOMEN’S STUD. 100, 108 (2003).
  94. Johnson & Robinson, *supra* note 55, at 5.
  95. See Joanna Goven, *Gender Politics in Hungary: Autonomy and Antifeminism*, in *GENDER POLITICS AND POST-COMMUNISM*, *supra* note 53, at 224, 226–27, for a discussion of the anti-feminist rhetoric employed in Hungary.
  96. Kathleen A. Montgomery & Gabriella Ilonszki, *Weak Mobilization, Hidden Majoritarianism, and Resurgence of the Right: A Recipe for Female Under-Representation in Hungary*, in *WOMEN’S ACCESS TO POWER IN POST-COMMUNIST EUROPE* (Richard E. Matland & Kathleen A. Montgomery eds., 2003).
  97. In the socialist era, feminism was considered redundant because it was associated with bourgeois ideology and divided the proletariat; in the post-socialist era, it is associated with leftist collectivist ideology. Slavova, *supra* note 76, at 258.



filled—they are sexualized bearers of a foreign ideology<sup>98</sup> and betrayers of the community, the nation, and its confessional institutions. These women's demands for equal rights with men are designed to decouple women from their essentialized femininity by encouraging selfishness with purportedly destructive societal consequences including, but not limited to, high divorce and low birth rates.

Each trinity ally challenges the substance of at least some major liberal democratic principles of law, especially human rights, and the role and rule of law in a modern state. Each ally claims that law, in order to be normatively and empirically legitimate, must be organically connected to the prevailing distinctive culture of nation, community, or church from which it derives its meaning rather than imported and superimposed by regional or international entities.

Conservatives and religious authorities, while not encouraging hostility to the entire human rights canon, are likely to be highly selective in their choice of human rights they are prepared to support. Conservatives focus on property rights and ignore or decry more inclusionary social and economic rights. Confessional authorities, especially in countries where the church enjoys a state-recognized privileged position,<sup>99</sup> may seek to impose their narrower vision of human rights protections in the name of religious freedom buttressed by the claim that those portions of the human rights canon that they oppose, such as women's rights and sexual orientation rights, are alien to the nation and faith that they embody and protect.

In the populist nationalist canon,<sup>100</sup> the nation is a reassuring haven from the destructive forces of modernity.<sup>101</sup> For them, the modern liberal democratic

98. Michaela Frunza & Theodore-Eliza Vacarescu, *Introduction, in GENDER AND THE (POST) "EAST"/"WEST" DIVIDE 7* (Mihaela Frunză & Theodora-Eliza Vacarescu eds., 2004).

99. See Alenka Kuhelj, *A Socio-Legal View on the Multiculturalism and Religious Changes in Post-Communist EU States*, 1 COLUM. J. E. EUR. L. 114 (2007) (discussing three models of church-state relations: secularist, positive neutrality, and neutrality).

100. Přibáň, *supra* note 80, at 407–31. Tismaneanu identifies the “ideological chaos created by the collapse of state socialism, leaving populism as the most convenient and frequently the most appealing ersatz ideology. Uprootedness, status loss, and uncertainties about identity provide fertile ground for paranoid visions of conspiracy and treason; hence the widespread attraction of nationalist salvationism.” Vladimir Tismaneanu, *Leninist Legacies, Pluralist Dilemmas*, 18 J. DEMOC. 35, 36 (2007).

101. András Sajó, *Becoming “Europeans”: The Impact of EU “Constitutionalism” on Post-Communist Pre-Modernity*, in SPREADING DEMOCRACY AND THE RULE OF LAW? 175–76 (Wojciech Sadurski, Adam Czarnota, & Martin Krygier eds., 2006). Sajó argues that “East European nationalism is . . . embedded in a value system that is (at best) indifferent to modernity as it grounds itself in past (ascribed and mystical) national glory . . . [a] belief [that] does not generate much interest in the ethics of modernity put forward in the rule of law (rational accountability for one's acts, transparency, and predictability through formalism, etc.).” See Tismaneanu, *supra* note 100, at 35–36, for a discussion of radical authoritarian trends marked by “intolerance, exclusiveness, rejection of all compromise, extreme personalization of political discourse and the search for charismatic leadership” in the region.



legal canon, which includes a rule of law consciousness and practices that are neutral among groups living in a territory,<sup>102</sup> as well as broad protection of human rights, is illegitimate because it fails to accord proper recognition and pre-eminence to the dominant nation. Instead, it relegates the nation to becoming the victimized majority.<sup>103</sup> Requirements of state compliance, especially with regional and international sex/gender equality obligations, are reinscribed as punitive actions visited upon the nation—antithetical to its interests and culture, its majoritarian collective group rights, and, even more apocalyptically, its survival.

Interestingly, though the backlash trinity virulently denounces the collectivist principles of socialism, it also identifies the desirable political, legal, social, and cultural order as one in which collective duties to the traditional patriarchal hierarchies of family, community, church, and nation—are privileged over individual-oriented, identity-based rights claims associated with law in liberal democracies. Like socialism, the trinity, too, is prepared to implement its vision by using the power of the state apparatus to undermine a broad democratic rule of law system in which sex/gender equality is a foundational component.

#### b. Neo-liberalism

Neo-liberalism, the post-socialist replacement for socialist state-driven collectivism, was introduced by Western aid donors and foreign economic advisors to newly elected post-socialist governments<sup>104</sup> charged with dismantling socialist command/control economies. It was presented as foundational to any transition into democratic European statehood.<sup>105</sup>

Neo-liberals claim that their political, economic, and legal agenda is based on a set of modern scientific principles regarding the market as the efficient rational mechanism for ordering economic arrangements and institutions in order to maximize aggregate gain through exchange.<sup>106</sup> That market fosters winners and losers<sup>107</sup> among corporations that happen to be

102. Příbáň, *supra* note 80, at 418.

103. Aurel Braun, *The Incomplete Revolutions: The Rise of Extremism in East-Central Europe and the Former Soviet Union*, in *THE EXTREME RIGHT: FREEDOM AND SECURITY AT RISK* 146, 150 (Aurel Braun & Stephen Scheinberg eds., 1997).

104. "Post-socialist ruling classes lost one ideology and needed another. Neo-liberalism with its focus on the market panacea suits their purposes well, silently reproducing their domination while denying responsibility for economic failures and injustice." Michael Burawoy, *Grounding Globalization*, in *GLOBAL ETHNOGRAPHY, FORCES, CONNECTIONS AND IMAGINATIONS IN A POSTMODERN WORLD* 342 (Michael Burawoy et al. eds., 2000).

105. See generally TADEUSZ KOWALIK, *FROM SOLIDARITY TO SELLOUT: THE RESTORATION OF CAPITALISM IN POLAND* (Eliza Lewandowska trans., 2011).

106. Martha T. McCluskey, *The Politics of Economics in Welfare Reform*, in *FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW AND SOCIETY* 193, 194 (Martha Albertson Fineman & Terence Dougherty eds., 2005).

107. Noémi Kakucs & Andrea Petó, *The Impact of EU Accession on Gender Equality in Hungary* in *GENDER, POLITICS AND THE EXPANDING EU, MOBILIZATION, INCLUSION, EXCLUSION* 174,187 (Silke Roth ed., 2008).



male-controlled,<sup>108</sup> which compete—and cooperate, when necessary—to leverage their power in domestic and globalized markets.

By making informed individual choices, exercising privatized agency and volition, and managing their personal affairs, each individual is accountable for their own life. Economic criteria and expectations are an individual's guide for social and ethical life.<sup>109</sup> Money and material gain are the concrete output measures of the successful exercise of this self-interested, self-realizing fundamental political value of freedom.<sup>110</sup> From this standpoint, "government's role, then, is limited to the protection of the entrepreneurial and competitive behavior of economically rational individuals . . . [who] provide for their own needs and service their own ambitions."<sup>111</sup> It follows that law, a tool of the state, should be used sparingly to promote that freedom.<sup>112</sup>

Unlike the backlash trinity's open identification with patriarchal sex/gender system norms and prescriptions, neo-liberalism is facially sex/gender neutral.<sup>113</sup> Its supporters claim that neo-liberal-based policies are primarily a "matter of neutral, technical expertise . . . separate from *politics* and *culture*, and not properly subject to specifically political authority or cultural critique."<sup>114</sup> In fact, this dissociation of policy from its larger context is misleading. "Neo-liberal policies have been implemented in and through culture and politics."<sup>115</sup> Denial of this reality, however, serves a strategic purpose; it enables neo-liberals to sidestep responsibility for significant *de facto* patterns of discrimination or subordination resulting from their policies. So, for example, though there is persuasive evidence that gender has been a fault line distinguishing winners and losers<sup>116</sup> in the post-socialist, neo-liberal economic restructuring process with longer term consequences,<sup>117</sup>

108. CONNELL, THE MEN AND THE BOYS, *supra* note 24, at 51–52.

109. JODI DEAN, DEMOCRACY AND OTHER NEO-LIBERAL FANTASIES: COMMUNICATIVE CAPITALISM AND LEFT POLITICS 51 (2009).

110. Margaret Thornton, *Neoliberal Melancholia: The Case of Feminist Legal Scholarship*, 20 AUST. FEMINIST L. J. 16 (2004).

111. JOHN L. COMAROFF & JEAN COMAROFF, ETHNICITY, INC. 50 (2009).

112. Martha T. McCluskey, *Razing the Citizen: Economic Inequality, Gender, and Marriage Tax Reform*, in GENDER EQUALITY, DIMENSIONS OF WOMEN'S EQUAL CITIZENSHIP (Linda McClain & Joanna Grossman eds., 2009).

113. See Isabella Bakker, *Identity, Interests and Ideology: The Gendered Terrain of Global Restructuring*, in GLOBALIZATION, DEMOCRATIZATION, AND MULTILATERALISM 127 (Stephen Gill ed., 1997).

114. LISA DUGGAN, THE TWILIGHT OF EQUALITY? NEOLIBERALISM, CULTURAL POLITICS, AND THE ATTACK ON DEMOCRACY, at xiv, 6 (2003).

115. *Id.*

116. Neoliberalism individualizes poverty and fails to acknowledge that it is structurally distinct for each sex because women's assumption of the overwhelming preponderance of the burdens of social reproduction and of time-consuming non-market based labor in the private sphere of the family, which increases the likelihood of their impoverishment is considered voluntary, if not natural. True, *Transitions*, *supra* note 3, at 84.

117. TRUE, GENDER, GLOBALIZATION, AND POST-SOCIALISM, *supra* note 71, at 22.



neo-liberals classify this concern as cultural<sup>118</sup>; so classified, it neither warrants state remediation nor, for purposes of this article, inclusion in the law faculty curriculum.

Claiming to be a force for modernization, neo-liberalism does not reject the entire human rights canon. Instead, it selectively endorses for state implementation those portions of rights discourse consistent with its ideological agenda. It supports a hierarchical rule of law that privileges protection of private property rights over other human rights. State interventions for the protection of identity-based human rights, such as women’s rights, that are identified as moral imperatives connected to a broader common or collective good<sup>119</sup> are inappropriate, misguided, and detrimental to the natural order. To the extent that oppression and exploitation exist, such forces are reduced to privatized individual characteristics, experiences, and choices.

Neo-liberal adherence to anti-statist principles, policies, and practices may not mesh completely with the backlash trinity’s support for state intervention designed to engineer a return to a neo-traditional sex/gender order. However, neo-liberalism’s well-developed theoretical anti-statist position, distinguished from the actual use of state supports for economic elites in public policies,<sup>120</sup> enables its supporters to mask their usually socially conservative beliefs and values that marginalize, if not ignore, women’s rights.<sup>121</sup> Thus, it can be an instrumentally attractive ally for the backlash trinity’s women’s rights delegitimation agenda.

### III. GRAPPLING WITH THE “WOMAN QUESTION”: LAW, LEGAL SYSTEMS, AND WOMEN’S RIGHTS

#### A. Socialist Law and Legal Systems

In the wake of the WWI destruction of the region’s Tsarist, Ottoman, Hapsburg, and Prussian Empires with their differing legal systems, mostly new sovereign states were created. These new sovereign states faced the important

118. Delegitimizing women’s rights as components of international and constitutional human rights law by assigning them *only* to the sphere of culture (usually considered as tradition) is distinguishable from a clash between religious or cultural autonomy and gender equality arising in connection with claims of immunity from gender equality provisions on the grounds of cultural or religious freedom. Frances Raday, *Culture, Religion, and Gender*, 1 INT’L J. CONST. L. 663 (2003).

119. Jill Blackmore, *Feminist Strategic Rethinking of Human Rights Discourses in Education*, in JUST ADVOCACY? WOMEN’S HUMAN RIGHTS, TRANSNATIONAL FEMINISMS, AND THE POLITICS OF REPRESENTATION 246–47 (Wendy S. Hesford & Wendy Kozol eds., 2005).

120. I am indebted to my colleague, Professor Martha T. McCluskey, for this comment.

121. Margaret Thornton, *The Demise of Diversity in Legal Education: Globalisation and the New Knowledge Economy*, 8 INT’L J. LEGAL PROF. 48 (2001).



polity legitimation tasks of writing new national law codes and creating their own civil law-based legal institutions.<sup>122</sup> The October Revolution in Russia, however, produced even more dramatic developments. Summarily eliminating Tsarist imperial law and shutting down the Tsarist legal system,<sup>123</sup> the Bolsheviks initially relied on revolutionary law and people's tribunals. By the end of the tumultuous first post-revolutionary decade, a new system of socialist law<sup>124</sup> and legal institutions were developed, which relied on "socialist legality"<sup>125</sup> to enforce socialist morality and order<sup>126</sup> in the service of the political and economic objectives of the collectivist USSR.

Thirty years later, as Soviet-backed post-WWII regimes consolidated control in Central and Eastern Europe, Soviet-inspired socialist law and legal system institutions were largely imposed.<sup>127</sup> Depending on the period and country, there were some allowable differences among fraternal socialist legal systems.<sup>128</sup> Every socialist state had "a collective interest-oriented system that constitutionally emphasized the reciprocity of rights and obligations, especially citizens' duties, whose failure to be fulfilled produced sanctions from state or party authorities who were the source of rights."<sup>129</sup>

Socialist state constitutions contained a far more extensive list of human rights guarantees than Western ones for polity legitimation purposes. However, since socialist legal systems did not follow principles of constitutionalism, which would have limited state authority,<sup>130</sup> these provisions

- 
122. Generally speaking the civil law tradition is characterized by reliance on law codes, large judiciaries, investigative procedures controlled by the judge, a denial of judicial law making, and the historical prestige of law professors. See H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* 136 (3d ed. 2007).
123. John N. Hazard, *The Lawyer Under Socialism*, WIS. L. REV. 90, 92–93 (1946) (stating the first official decree of the new Bolshevik government closed down the Tsarist legal system).
124. In a state owned and planned economy, private law is absorbed by public law, removing socialist law from the civil law orbit. JOHN N. HAZARD, *COMMUNISTS AND THEIR LAW: A SEARCH FOR THE COMMON CORE OF THE MARXIAN SOCIALIST STATES* (1969).
125. Jiří Přibáň, *Dissidents of Law: On the 1989 Velvet Revolutions, Legitimations, Fictions of Legality, and Contemporary Version of the Social Contract* 62 (2002), identifies socialist legality as an example of transforming legal legitimacy into an empty automatism of general language using some constitutive formal features of modern rational legality whilst actually dismantling the whole system of the rule of law and the proceduralist concept of legal legitimacy.
126. So, for example, there were crime-free streets, but citizens were not safe from arbitrary arrest. Braun, *supra* note 103, at 146.
127. Zdeněk Kühn, *The Democratization and Modernization of Post-communist Judiciaries*, in *CENTRAL AND EASTERN EUROPE AFTER TRANSITION 197–98* (Alberto Febbrajo & Wojciech Sadurski eds., 2010).
128. Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 AM. J. COMP. L. 99–102 (1995).
129. András Sajó & Vera Losonci, *Rule by Law in East Central Europe: Is The Emperor's New Suit a Straitjacket?*, in *CONSTITUTIONALISM AND DEMOCRACY, TRANSITIONS IN THE CONTEMPORARY WORLD* 324 (Douglas Greenberg et al. eds., 1993).
130. Petrova, *supra* note 67, at 68.





were not invoked or directly applied by courts to any legal issue. Nor were acts of party-controlled parliaments subject to meaningful judicial review.<sup>131</sup> “[B]ecause all actions had to emanate from the state and, therefore, have some appearance of legality . . . law was bureaucratic and purposive; it denied individual rights, as rights might have resulted in independent social action.”<sup>132</sup> Moreover, since party control and monopolization over the expression and defense of the public interest conflated public and state interest,<sup>133</sup> neither group nor individual legal challenges to the state were possible.

At the more concrete levels of regime and output legitimation, however, socialist law and legal systems were largely delegitimated in every socialist state. Socialist law, much of it declaratory in character, was of poor quality, with rampant inconsistencies and contradictions.<sup>134</sup> Prevailing legal norms did not necessarily conform to the general principles/higher legal rules of the constitution.<sup>135</sup> “The wide gap left to administrative discretion was filled by secret regulations granting privileges to the state and the members of the nomenklatura.”<sup>136</sup> “[O]ften unwritten extra-legal political rules of behavior and instructions from unchallengeable administrative or political authorities, especially the Central Committee of each state’s ruling party, could have greater force than legal norms.”<sup>137</sup>

Clientelism, favoritism, and a lack of transparency and accountability tainted the operation of socialist legal systems.<sup>138</sup> Prosecutors,<sup>139</sup> tasked with the administration of justice, the maintenance of socialist order, the protection of the socialist state, and the insurance of respect for the law,<sup>140</sup> were the most powerful legal system officials and were required to be party

131. Zdeněk Kühn, *Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement*, 52 AM. J. COMP. L. 547–48 (2004).

The will of the legislators does not allow . . . that the substance of the legal rules be changed under the pretext of interpretation. . . . In bourgeois laws the judge has become the pivot of the legal system. Socialist evolution has not made this error. Any remedial “interpretation” is contrary to the principles of Marxism-Leninism.

132. Sajó & Losonci, *supra* note 129, at 325.

133. Petrova, *supra* note 67, at 67.

134. Kathryn Hendley, *Rewriting the Rules of the Game in Russia: The Neglected Issue of the Demand for Law*, 8 E. EUR. CONST. L. REV. 89 (1999).

135. Bruno Schönfelder, *Judicial Independence in Bulgaria: A Tale of Splendour and Misery*, 57 EUR.-ASIA STUD. 61 (2005).

136. Sajó & Losonci, *supra* note 129, at 325.

137. Dencho Georgiev, *The Collapse of Totalitarian Regimes in Eastern Europe and the International Rule of Law*, in *THE RULE OF LAW AFTER COMMUNISM, PROBLEMS AND PROSPECTS IN EAST CENTRAL EUROPE* 331 (Martin Krygier & Adam Czarnota eds., 1999).

138. BOGUSIA PUCHALSKA, *LIMITS TO DEMOCRATIC CONSTITUTIONALISM IN CENTRAL AND EASTERN EUROPE* 6 (2011).

139. Prosecutors participated in two parallel legal systems—an administrative justice system, consisting of summary *in camera* measures to discipline and control citizens without their being legally represented and a formal court system in which lawyers participated.

140. OTTO ULČ, *THE JUDGE IN A COMMUNIST STATE: A VIEW FROM WITHIN* 91–94 (1972).





members working closely with its hierarchy. With the exception of the high court, the judiciary, whose professional educational preparation was often problematic,<sup>141</sup> was predominantly a poorly paid, relatively low status, female dominated profession.<sup>142</sup> “[J]udges . . . acted as bureaucrats and fulfilled the expectation that they would promote centrally determined public interests.”<sup>143</sup> In cases that might have political significance—especially those where party members were involved—judges, mindful of future performance evaluations, were known to rely on an informal consultative practice of “telephone justice” to check with the local party apparatus prior to handing down a decision. In the professional world of lawyers employed by the state,<sup>144</sup> political reliability and adherence to party orthodoxy were important for bar admission; meaningful self-governance was largely a fiction.<sup>145</sup>

In sum, socialist laws and the socialist legal systems interpreting and enforcing them lacked an independent existence, though socialist scholars and judges

claimed that, *unlike* their common law counterparts, they were operating within a system of written law emphasiz[ing] their affiliation with the Continental system while condemning what they believed was the primitive and reactionary nature of law in the much more dangerous “imperialists” nations, such as the United States and Great Britain.<sup>146</sup>

The ruling party “might happily use law . . . [but] ultimately was not subordinate to it.”<sup>147</sup> Since the socialist state was not bound by its own laws,

---

141. “The judges were ordered to follow the ‘Marxist-Leninist World View’ and to fight bourgeois remnants in human thinking.” Kühn, *Worlds Apart*, *supra* note 131, at 539.

142. “The percentage of women on the bench was in direct reverse proportion to the general level of prestige enjoyed by the profession.” Kühn, *Worlds Apart*, *supra* note 131, at 550.

143. Sajó & Losonci, *supra* note 129, at 324. Though there was some independent thinking both in legal reasoning (legal dogmatics) and in substantive terms of rights in Eastern Europe, “(I)t would be an error, however, to overestimate the importance of these features especially if one takes into consideration the amount of discretionary power built into the flexible texts of the laws and lack of sufficient and independent judicial review.” *Id.* But, Smilov argues that reliance on strict positivism or formalism during the socialist era must be contextualized—meaning that, depending on the era and the country, rejection of or significant limitations on judicial discretion served various functions including efforts to limit the state’s arbitrary authority. Daniel Smilov, *Constitutional Culture and the Theory of Adjudication: Ulysses as a Constitutional Justice*, in CENTRAL AND EASTERN EUROPE AFTER TRANSITION: TOWARDS A NEW SOCIO-LEGAL SEMANTICS 120 (Alberto Febbrajo & Wojciech Sadurski eds., 2010).

144. KATHRYN HENDLEY, TRYING TO MAKE LAW MATTER: LEGAL REFORM AND LABOR LAW IN THE SOVIET UNION 134 (1996).

145. Meyer, *supra* note 67, at 1036.

146. Kühn, *Worlds Apart*, *supra* note 131, at 545–46 (emphasis added).

147. Martin Krygier & Adam Czarnota, *The Rule of Law After Communism: An Introduction*, in THE RULE OF LAW AFTER COMMUNISM: PROBLEMS AND PROSPECTS IN EAST-CENTRAL EUROPE 1 (Martin Krygier & Adam Czarnota eds., 1999).



state and party officials could act with a measure of impunity;<sup>148</sup> legal system officials could not challenge them.<sup>149</sup> Citizens could not be protected from their rulers, who relied on large networks of informers.

That said, there were adaptive behaviors of resistance to the repressive socialist legal order. Citizens tried to live a “double life,”<sup>150</sup> based on a division between formal public life<sup>151</sup> and informal private life,<sup>152</sup> which included avoiding the socialist legal system whenever possible. Involvement with the law drew official attention to oneself and opened up or facilitated further state/party penetration of private relationships with unpredictable and, possibly, undesirable outcomes.<sup>153</sup>

## B. Post-Socialist Law and Legal System Reform and Women’s Rights

### 1. Rewriting Laws and Reforming Official Practices

Post-socialism involved reform on a grand scale. Aspects of the past would be differentiated from the present and the future.<sup>154</sup> For law and legal sys-

- 
148. “The legal system was obscure and discretionary enough to allow for the protection of the privileges of the nomenklatura.” Sajó & Losonci, *supra* note 129, at 326.
149. HENDLEY, TRYING TO MAKE LAW MATTER, *supra* note 144, at 138.
150. See Mark Morjé Howard, *The Leninist Legacy Revisited*, in WORLD ORDER AFTER LENINISM 36–38 (Vladimir Tismaneanu et al. eds., 2006), for a discussion of the distinction between public and private. Also see Jiřina Šiklová, *Courage, Heroism and the Postmodern Paradox*, 71 SOC. RES. 135 (2004), for a thought provoking account of the double life.
151. Formal life was held together by the official ideology’s compulsory language, constituting a veritable linguistic subversion of reality in many instances, as citizens tried to create the impression of political loyalty at work and in their dealings with state and party in relationships often characterized by amorality and distrust. Martin Krygier, *The Quality of Civility: Post-Anti-Communist thoughts on Civil Society and the Rule of Law*, in OUT OF AND INTO AUTHORITARIAN LAW 236 (András Sajó ed., 2003).
152. In the authentic private informal life of family and friends dissociated from politics and the legal system, relationships were uncoerced and largely based on honesty and trust. Family and kin relationships were conceived as a source of mutual resistance to power rather than a site of gender oppression. TRUE, GENDER, GLOBALIZATION, AND POST-SOCIALISM, *supra* note 71, at 49–52. See Graff, *supra* note 93 (discussing the building secure and deeply conservative family structures as a defense against an intrusive totalitarian state). But see Marina Kurkchyan, *The Illegitimacy of Law in Post-Soviet Societies*, in LAW AND INFORMAL PRACTICES, *supra* note 18, at 37, for a discussion of instrumental considerations and calculations (extra-legal access to goods or services in socialist economies punctuated by scarcity) in the connections established in the informal life.
153. See Martin Krygier, *Virtuous Circles: Antipodean Reflections on Power, Institutions, and Civil Society*, 11 E. EUR. POL. & SOCIETIES 36 (1996), for a discussion of socialism’s classic powerful model of social relationships to the state—a close combination of dependency with distrust given the pervasiveness of the state and that never-quite-known but known-to-be-great number of those who served it.
154. Ruti Teitel, *Transitional Rule of Law*, in RETHINKING THE RULE OF LAW AFTER COMMUNISM 279 (Adam Czarnota, Martin Krygier & Wojciech Sadurski eds., 2005).



tems, there was a delicate balance between continuity and discontinuity.<sup>155</sup> Popularly elected parliaments were tasked with resurrecting portions of pre-socialist civil law codes, writing new laws<sup>156</sup> guided by the principles, norms, and practices associated with a liberal democratic state and a neo-liberal market-based economy,<sup>157</sup> revising or eliminating practices associated with socialist legality,<sup>158</sup> beginning the process of anchoring constitutionalism as a guiding principle in the legal system, and developing and fostering rule of law consciousness, norms, and practices.<sup>159</sup>

One might assume that this extensive roster of tasks would require fledgling post-socialist parliaments to thoughtfully confront “deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in society and the polity, about the proper organization and operation of

- 
155. Adam Czarnota, *Between Nemesis and Justitia: Dealing with the Past as a Constitutional Process*, in *RETHINKING THE RULE OF LAW AFTER COMMUNISM*, *supra* note 154, at 123, 125.
156. “In Hungary in the first fifteen months after the formation of the new parliament in 1990 ‘one hundred and eleven laws were passed, and most dealt with such central issues as the structure of the ministerial system, the legal position of the deputies, the creation of a system of local justice.’” Zoltan Barany, *The Regional Perspective*, in *DILEMMAS OF TRANSITION: THE HUNGARIAN EXPERIENCE* 105 (Aurel Braun & Zoltan Barany eds., 1999). Between 1990 and mid 1992, the National Assembly in Czechoslovakia passed more than 500 laws. DANIELA PIANA, *JUDICIAL ACCOUNTABILITIES IN NEW EUROPE: FROM RULE OF LAW TO QUALITY OF JUSTICE* 90 (2010).
157. Neoliberal economists stressed the need to develop a market economy without significant corresponding legal regulation of new economic entities. Kühn, *Post-Communist Judiciaries*, *supra* note 127, at 178. Moreover, they and their supporters’ beliefs that free market economic reforms would lead to democracy obscured the need for intensive support of fledgling democratic institutions. Consequently, elite male hierarchies of patronage and personal connections were strengthened. PUCHALSKA, *supra* note 138, at 105–06.
158. Relying in part on European and international human rights norms and US legal models to legitimate their work product, parliaments decriminalized selected acts, such as those associated with socialist repression. Kyriaki Topidi & Alexander H.E. Morawa, *Prologue: Constitutional Transition in Central and Eastern Europe*, in *CONSTITUTIONAL EVOLUTION IN CENTRAL AND EASTERN EUROPE, EXPANSION AND INTEGRATION IN THE EU* 4 (2010). Jacques DeLisle, *Lex Americana? United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 *UNIV. PENN. J. INT’L ECON. L.* (1999) (restrictions on free speech and on freedom of association, and restraints on leaving one’s country).
159. Discussions regarding the appropriate focus for analyzing the extent to which a rule of law exists usually divide along institutionalist/culturalist lines. Institutionalists focus on laws, institutions and the role of lawyers; they are aware of the weakness of public institutions after state collapse and identify failures of rights protection and enforcement as indicia of state incapacity. Culturalists claim that inhospitable cultural and other legacies are crucial factors—that post-socialist societies *lack* important cultural prerequisites enabling citizens to care about what law says that exist in societies identified as liberal democracies and instead *possess* cultural legacies incompatible with such ambition. Martin Krygier, *Institutional Optimism, Cultural Pessimism and the Rule of Law*, in *THE RULE OF LAW AFTER COMMUNISM: PROBLEMS AND PROSPECTS IN EAST-CENTRAL EUROPE* 77, 84–88 (Martin Krygier & Adam Czarnota eds., 1999). For a combined institutionalist/culturalist approach to rule of law concerns, see András Sajó, *Corruption, Clientelism and the Future of the Constitutional State in Eastern Europe*, 7 *EAST EUR. CONS. REV.* 37 (1998).



a legal system and about the way law is or should be made, applied, studied, perfected, and taught.”<sup>160</sup> Instead, in a number of countries, foreign laws were translated word for word, at times incorrectly or carelessly and without proper comparative analysis, and then immediately enacted—suggesting a legal instrumentalism that promotes the idea that law does or should work.<sup>161</sup>

The early avalanche of new laws generated a host of demands and pressures on legal systems staffed by professionals trained in the socialist era whose carryover into the new order was unavoidable and whose re-education was limited. Since the machinery for maintaining party discipline was dismantled,<sup>162</sup> the state possessed limited capacity to monitor their performance, which, in turn, reinforced popular skepticism regarding the likely effectiveness of post-socialist law and legal system reforms in holding the state accountable for its actions or failures to act.<sup>163</sup> Over time, it became clear that popular expectations regarding the capacity of the post-socialist state, under sustained neo-liberal pressure to resolve daily life issues and alleviate social risk, would be largely unmet,<sup>164</sup> and that the post-socialist order did not create the conditions for an outpouring of citizen involvement in public life.<sup>165</sup>

In the late nineties, as post-socialist states sought to affirm their “return” to Europe, overwhelmed parliaments and unprepared judiciaries faced another round of legal reform and modernization associated with EU accession. This also had an impact on the already problematic legal system regime and output legitimation. In order to secure a place in the highly prized<sup>166</sup> EU accession queue, post-socialist states had to meet EU standards of conditionality.<sup>167</sup> Each Brussels-anointed candidate state<sup>168</sup> was required

- 
160. JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 2 (3d ed. 2007).
161. Zdeněk Kühn, *Development of Comparative Law in Central and Eastern Europe*, in *OXFORD HANDBOOK OF COMPARATIVE LAW* 228–29 (Mathias Reimann & Reinhard Zimmermann eds., 2008); see also David Nelken, *Comparativists and Transferability*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITION* 459 (Pierre Legrand & Roderick Munday eds., 2003).
162. Venelin I. Ganev, *The Rule of Law as an Institutionalized Wager: Constitutions, Courts and Transformative Social Dynamics in Eastern Europe*, 1 *HAGUE J. RULE OF L.* 263, 278–80 (2009).
163. See *INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS: INCORPORATION, TRANSFORMATION, AND PERSUASION* 259, 468, 517, 526, 555 (Dinah Shelton ed., 2011), for essays on Hungary, Poland, Russia, Serbia, and Slovakia.
164. NICOLAI GENOV, *GLOBAL TRENDS IN EASTERN EUROPE* 33–35 (2010).
165. Petrova, *supra* note 67, at 69–72.
166. The European Union had great symbolic significance as a return to Europe, as well as practical input, since membership in the EU was a powerful priority of the foreign policy of virtually all post-socialist states, as well as a strategic goal for a better future. Georgiev, *supra* note 137, at 330.
167. See DIMITRY KOCHENOV, *EUROPEAN ENLARGEMENT AND THE FAILURE OF CONDITIONALITY* (2008), for a critical analysis of pre-accession conditionality in the fields of democracy and the rule of law.
168. The first round of post-socialist candidates consisted of Estonia, Latvia, Lithuania, Poland, the Czech Republic, Slovakia, and Hungary. The second round included Bulgaria and Romania.



to demonstrate the harmonization of its laws with economically oriented EU laws and regulations—a standardization of law on a gigantic scale<sup>169</sup> involving the adoption of enormous amounts of transplanted legal concepts, rules, and regulatory models. Each candidate state also had to demonstrate that it had established an independent judiciary<sup>170</sup> and adopted the European human rights framework.<sup>171</sup> In addition, each candidate state had to provide evidence of its commitment to a rule of law and progress toward anchoring it.<sup>172</sup> This condition was met, in large part, by showing the extent to which its legal system personnel were trained<sup>173</sup> in the new legal discourse.

The accession process explicitly addressed women's rights by deeming the "full realization" of democracy contingent on gender equality.<sup>174</sup> Consequently, in their accession submissions, candidate states burnished their profiles of compliance and harmonization with EU laws and directives

- 
169. While the European Union's white paper on Eastern enlargement generated a list of 1,000 directives to be transposed, the entire *acquis* consisted of closer to 10,000 directives. Wade Jacoby, *Priest and Penitent: The European Union as a Force in the Domestic Politics of Eastern Europe*, 8 EAST EUR. CONST. REV. 65 (1999).
170. See Daniel Smilov, *EU Enlargement and the Constitutional Principle of Judicial Independence*, in SPREADING DEMOCRACY, *supra* note 101, at 316–17, for an extensive list of common standards and rules concerning the independence of the judiciary. See also FLORENCE BENOÎT-ROHMER & HEINRICH KLEBES, COUNCIL OF EUROPE: TOWARDS A PAN-EUROPEAN LEGAL AREA (2005).
171. See Copenhagen Criteria, *adopted June 1993*, available at [http://europa.eu/legislation\\_summaries/glossary/accession\\_criteria\\_copenhagen\\_en.htm](http://europa.eu/legislation_summaries/glossary/accession_criteria_copenhagen_en.htm), for the EU's pre-accession process. See also The Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, art. 6(1), 1997 O.J. (C 340) 1 (21 Oct. 1997), available at <http://www.eurotreaties.com/amsterdamtreaty.pdf>.
172. The World Justice Project identifies rule of law as consisting of the adherence to the following principles: government and its officials and agents are accountable under the law; the laws are clear, publicized, stable, fair, and protect fundamental rights, including the security of persons and property; the process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient; and the laws are upheld, and access to justice is provided, by competent, independent, and ethical law enforcement officials, attorneys or representatives, and judges who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve. See THE WORLD JUSTICE PROJECT, RULE OF LAW INDEX, available at <http://www.worldjusticeproject.org/rule-of-law-index/>. But see Thomas Carothers, *Promoting the Rule of Law Abroad: The Problem of Knowledge*, Working Papers, 34 (Democracy and Rule of Law Project, Carnegie Endowment for International Peace 2003), available at <http://carnegieendowment.org/files/wp34.pdf>, for a challenge to the notion that primary emphasis on the judiciary and judicial reform—as the nerve center of the rule of law—is appropriate while not addressing the perceived fairness of laws.
173. See DIMITRY KOCHENOV, *supra* note 167, at 243–52 (2008), for the European Commission's pre-accession assessments of candidate countries' weaknesses in their judiciaries and the overwhelming scale of reforms required, which was noted in Commission reports during the accession process. See also Ganev, *supra* note 162, for a discussion of the serious deficiencies of ex-socialist state judiciaries as erratic, sanctimonious, institutionally insulated, chronically dysfunctional, and strikingly inefficient.
174. See Elaine Weiner, *Eastern Houses, Western Bricks? (Re)Constructing Gender Sensibilities in the European Union's Eastward Enlargement*, 16 Soc. POL. 303, 303–04 (2009).

regarding sex equality by including a constitutional sex equality provision and any domestic anti-discrimination laws (often recently enacted in anticipation of accession,<sup>175</sup> either without any implementation provisions or with provisions which were not activated). Some states reported that they had established a gender unit<sup>176</sup> to represent women's interests in the state bureaucracy, to serve as a conduit for women's rights NGOs to government agencies at different levels,<sup>177</sup> and to promote women's rights through a newly popular strategy of "gender mainstreaming."<sup>178</sup>

However, given the EU priority of candidate states' conformity with the rules of a free market-based order, there were mixed signals regarding the *de facto* importance of sex equality in the accession package. Since the European Commission reviewers of the accession submissions did not consult with NGOs,<sup>179</sup> which arguably could have provided information regarding the states' actual practices, candidate states were free to rely on Potemkin-like strategic calculations to demonstrate their meeting EU conditionality: changes in formal law; bureaucratic expansion to include gender which, in most states, was window dressing developed by cynical bureaucrats and politicians;<sup>180</sup> and reliance on gender mainstreaming rhetoric. That EU

175. Galligan, *supra* note 69, at 137.

176. "Parliamentary debates regarding the transposition of EU equality legislation were conducted in the context of a tradition of law where the notion of gender-based discrimination is non-existent." The Council of Europe (2001) defines gender machineries as "an institutional governmental and, in some cases, parliamentary structure set up to promote women's advancement and to ensure the full enjoyment by women of their human rights." *Id.* at 44.

177. In practice, gender units reproduced bureaucratic norms and practices and rarely included women's rights organizations in their work; NGO participation was reduced to formal consultative exercises; their opinions rarely fed even into the processes of policy formation. *Id.*, at 148.

178. Commission on the Status of Women, *Follow-Up to the Fourth World Conference on Women: Review of Mainstreaming in the Organizations of the United Nations System*, U.N. Doc. E/CN.6/1997/2 (7 Feb. 1997), available at <http://www.un.org/womenwatch/daw/csw/critical.htm>.

Gender mainstreaming is a policy process involving an assessment of the implications for women and men of any planned governmental action: legislation, policies and programmes in all areas and at all levels and, ultimately, for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programs in all political, economic and social spheres, so that inequality is not perpetuated.

Critics claim that gender mainstreaming deploys the idea of gender in a very limited way and has allowed the mainstream to tame and deradicalize claims to gender equality. Hilary Charlesworth, *Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations*, 18 HARV. HUM. RTS. J. 1 (2005).

179. See Bozena Choluj & Claudia Neuess, *EU Enlargement in 2004: East-West Priorities and Perspectives from Women Inside and Outside the EU*, Discussion Paper, United Nations Development Fund for Women 4 (2004), available at <http://www.claudia-neuess.com/uploads/Neuess-Choluj-UNIFEM-neuPaper.pdf>, for a discussion of Eastern European women's rights NGOs' perspectives on EU accession.

180. In most accession states, the gender unit was short-lived as the political will in the national parliament to support them was undercut by coalitions of backlash forces challenging





member states were willing to be flexible meant—in practice, depending on the candidate country—that selective formal compliance could suffice<sup>181</sup> and that the European Union's available leverage for promoting change at the accession stage was dissipated.

In sum, in the more than two decades since these post-socialist states emerged, enthusiasm for law and legal system reform appears to have eroded and has been replaced by skepticism, legal nihilism, or legal instrumentalism.<sup>182</sup> Most post-socialist states still do not possess the capacity to compete with prevailing informal social norms,<sup>183</sup> which are inconsistent with beliefs, attitudes, and actions essential to anchoring a rule of law culture.<sup>184</sup> Public opinion in most post-socialist countries does not discern “connections . . . between the normativity of law and morality. . . . The normativity of law is perceived as a sort of convention covering at most a political game, hence, the attitude . . . that legal regulations entail dishonest intentions.”<sup>185</sup> Moreover, endemic corruption in most post-socialist legal systems<sup>186</sup> fuels popular perception that the purported fairness of the legal system is yet another instance of official hypocrisy,<sup>187</sup> now aided by lawyers in private practice in conjunction with the state. When legal system regime and output legitimation are severely compromised, there is little incentive to affirmatively

---

women's rights as a key political agenda issue openly and in coded terms as well. As funding was cut and projects terminated, the vicious cycle of lackluster performance justifying further dismantling was accelerated. Galligan, *supra* note 69, at 148.

181. MILADA ANNA VACHUDOVA, *EUROPE UNDIVIDED: DEMOCRACY, LEVERAGE, AND INTEGRATION AFTER COMMUNISM* 144 (2005). The proffered rationale was that, while not all Western European members of the EU initially had met the high standards associated with a liberal democratic order and European norms and principles, just as Western European states had moved along the spectrum towards greater if not full compliance by integrating them into domestic law, so too could and would post-socialist newcomers. Steven Greer & Andrew Williams, *Human Rights in the Council of Europe and the EU: Towards “Individual,” “Constitutional” or “Institutional” Justice?* 15 *EUR. L. J.* 468 (2009).
182. Marek Zirk-Sadowski, *Transformation and Integration of Legal Cultures and Discourses—Poland*, in *SPREADING DEMOCRACY*, *supra* note 101, at 307.
183. Denis Galligan, *Legal Failure: Law and Social Norms in Post-Communist Europe*, in *LAW AND INFORMAL PRACTICES: THE POST-COMMUNIST EXPERIENCE* 2–4 (Denis J. Galligan & Marina Kurkchyan eds., 2003).
184. See, e.g., Ausra Raulickyte, *Lithuania's Courts and the Rule of Law*, 2 *J. BALTIC STUD.* 182 (2001). Despite court reforms, societal attitudes towards courts and judges remain quite negative (citing survey results)—a residue of the Soviet past. *Id.* at 186–87.
185. Zirk-Sadowski, *supra* note 182, at 307.
186. Clientelistic networks, the pattern of opportunities in the region, and the growing normalization of corruption involving a network of social relations where personal loyalty to the patron prevails against market relations, democratic decision making and professionalism in public bureaucracies, go hand in hand. Sajó, *Corruption, Clientelism*, *supra* note 159, at 37–46. Also see Ivan Krastev, *Corruption, Anti-Corruption Sentiments and the Rule of Law*, in *RETHINKING THE RULE OF LAW AFTER COMMUNISM*, *supra* note 154, at 323, for the claim that corruption has replaced repression as the main obstacle to the rule of law in the region.
187. Tismaneanu, *supra* note 100, at 38.





protect citizens from violations of their rights, especially controversial ones, notwithstanding a state’s obligation to do so.

One reasonable response to the pessimistic assessment outlined above is that, given the powerful legacies of socialism, slightly more than two decades is an inadequate interval in which to achieve the deep changes necessary to generate law and legal system legitimation at regime and output levels. Each sovereign post-socialist state still lacks resources and a sufficiently large pool of legal system personnel able to implement new laws and develop appropriate legal practices.<sup>188</sup> NGO lawyers with whom I have worked report that judges, as well as lawyers, tend to have limited training in regional and international jurisprudence and lack access to sites that could assist them. Judges may simply apply the text of national law because it is the only thing they know with certainty.

As I have been told on numerous occasions, several more generations must retire or die off before significant changes can be fully and effectively implemented. What is often ignored or unrecognized in such conversations is the conterminous pressing need for the reform of legal education (discussed in IV(B) below) in order to begin to produce lawyers, legal system personnel, and academics who are equipped to address existing and anticipatable twenty-first century human rights issues including women’s rights at domestic, regional, and international levels. Mere generational turnover in the legal system or the academy will not suffice if newcomers merely reproduce past attitudes and behaviors.

## 2. Anchoring Constitutionalism through Constitutional Courts

At the apex of a state’s legal system, the constitutional court, a relative newcomer to European civil law countries,<sup>189</sup> is a crucial institution for the normative building of a democratic, law-based state.<sup>190</sup> Charged with interpreting

188. See, e.g., MILIEU LTD., COMPARATIVE STUDY ON ACCESS TO JUSTICE IN GENERAL EQUALITY AND ANTI-DISCRIMINATION LAW (2011), available at [http://ec.europa.eu/justice/gender-equality/files/conference\\_sept\\_2011/final\\_report\\_access\\_to\\_justice\\_final\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/conference_sept_2011/final_report_access_to_justice_final_en.pdf), an extensive report that includes, among its best practices recommendations, prioritizing the training and education of relevant professionals. *Id.* at 64–66. The report recommends that the Commission continue to finance the training for judges, legal practitioners, and academics. *Id.* at 66 (emphasis added).

189. The first Constitutional Courts were created in 1920 in Austria and Czechoslovakia, and disbanded in 1938. The Austrian Court was re-established in 1945. The German Court was established in 1951; the French Constitutional Council was formed in 1958. During socialist times, only Poland had a constitutional tribunal (established in 1986) with authority to review legal acts for conformity with its constitution.

190. Constitutional courts defy the principle that statutory law is the only and ultimate sources of law. They have developed a system of constitutional law using precedents as a source of law and with constitutional rules that may determine the normative framework of the law-based state. PŘIBÁŇ, DISSIDENTS OF LAW, *supra* note 125, at 97.



the state constitution by providing an independent<sup>191</sup> review of legislation and official practices, this court has a vital role in each post-socialist state's law and legal system legitimation efforts.<sup>192</sup> Unlike post-WWII Western European constitutional courts, which were symbols of legal continuity, constitutional courts in post-socialist states have not only had to legitimate their own existence, they also have had to address a panoply of new tasks: the annihilation of the old socialist legal paradigm,<sup>193</sup> the creation of a new tradition and the cultivation of faith in the new normative order,<sup>194</sup> and the resolution of tension between a legal order and a dramatically changing political order in which the impulse for sweeping change has to be constitutionalized.<sup>195</sup>

The almost two decade record of constitutional courts in the region suggests that many of them have not been able to fulfill the expectations placed on them.<sup>196</sup> There are, of course, some country specific reasons for this situation. However, there is also an overarching reason posing an apparent institutional dilemma that is connected more generally to the legitimation of post-socialist legal systems. An assertive constitutional court that, following a rule of law, declares laws enacted by parliament unconstitutional opens itself to a politically potent accusation of countermanding prevailing popular political beliefs. These include: a strong central government limited by "parliamentary checks, the protection of rights principally or solely through positive legislation, and a more modest political and social role for lawyers."<sup>197</sup> If the constitutional court appears either to be overriding the popular will expressed by a democratically elected parliament or protecting rights without specific positive legislation,<sup>198</sup> it can be labeled a counter-majoritarian, and, thus, an anti-democratic institution.<sup>199</sup> It then risks one of several high

191. See Smilov, *EU Enlargement*, *supra* note 170, at 313, for a discussion of different East European models for the implementation of the principle of judicial independence.

192. See RETHINKING THE RULE OF LAW AFTER COMMUNISM, *supra* note 154, at 297–303, for extensive discussions of constitutionalism in Central and Eastern Europe.

193. Kühn, *Post-Communist Judiciaries*, *supra* note 127, at 194.

194. Venelin I. Ganey, *Foxes, Hedgehogs, and Learning: Notes on the Past and Future Dilemmas of Postcommunist Constitutionalism*, in RETHINKING THE RULE OF LAW AFTER COMMUNISM, *supra* note 154, at 75.

195. *Id.*

196. See PUCHALSKA, *supra* note 138, at 125–45, for a critical analysis of the record of constitutional courts—more specifically—the Polish Constitutional Court in the constitutionalism-democracy balance of the post-socialist state. But see Sergio Bartole, *Conclusions: Legitimacy of Constitutional Courts: Between Policy Making and Legal Science*, in CONSTITUTIONAL JUSTICE, EAST AND WEST 426 (Wojciech Sadurski ed., 2002), for examples of Polish, Czech, and Slovenian constitutional courts going beyond a formalistic exegesis of the legal texts.

197. DeLisle, *supra* note 158, at 290.

198. See Wojciech Sadurski, *Constitutional Courts and Constitutional Cultures in Central and Eastern European Countries*, in CENTRAL AND EASTERN EUROPE AFTER TRANSITION, *supra* note 143, at 99, for a discussion of the impact of constitutional courts upon constitutional culture in their relationship with other branches of government—particularly legislatures.

199. See Sarah Wright Sheive, *Central and Eastern Europe Constitutional Courts and the Anti-majoritarian Objection to Judicial Review*, 26 LAW & POL'Y INT'L BUS. 1201, 1218–24 (1995), for a discussion of strategies to minimize the anti-majoritarian objection in Central and Eastern Europe.



stakes parliamentary responses—approval of the unconstitutional law, refusal to comply with the court’s decision, or revision of the constitution. Each of these options has a potential impact on the legitimation of the constitutional court and, ultimately, on the legitimation of an admittedly weakly legitimated post-socialist legal system.

Consequently, in states with relatively fresh memories of decades of totalitarian rule and the legacy of a compromised delegitimated socialist legal system, a judicious constitutional court, rather than moving forward to declare a law unconstitutional, may prefer to wait for parliament to interpret a constitutional provision and then itself become a parliamentary rubber stamp. This suggests that a constitutional court may be less valued if, after due deliberation, it comes to its own opposite conclusion. Admittedly, there is more than a whiff of irony in this proposition. The lack of legal system independence is again rationalized<sup>200</sup>—albeit, now, in a post-socialist democratic context, rather than a socialist one.

This outcome has implications for the European jurisprudential proposition of subsidiarity—that domestic courts should be the lynchpins of the European human rights system charged with protecting the European Convention’s rights and freedoms,<sup>201</sup> and that decisions involving European rights issues are best made at the lower levels of state government rather than at a supranational level. To the extent that there are major internal political, legal, and cultural incentives for a domestic legal system to avoid addressing certain human rights issues, such as women’s rights—even though most post-socialist legal systems are based on monist assimilation models<sup>202</sup> incorporating a state’s international and regional human rights obligations including women’s rights into domestic law—the depth of a state’s commitment to a rule of law within the multi-layered European human rights system is open to question. State resistance can be compounded by the fact that a judgment by the European Court of Human Rights in Strasbourg does not nullify state legislation or practices, but rather identifies the grounds for concluding that the state has violated its obligations under the European Convention. A petitioner’s victory at the supranational regional level does not preclude a state’s failure to execute the judgment. In fact, a state’s waiting

---

200. See Michal Bobek, *The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries*, 14 EUR. PUB. L. 99 (2008).

201. European Convention on Human Rights, *opened for signature* 4 Nov. 1950, 213 U.N.T.S. 221, Eur. T.S. No. 5 (*entered into force* 3 Sept. 1953).

202. Kühn, *Worlds Apart*, *supra* note 131, at 562. Other options for connecting international human rights law to domestic law are supplementation—by explicit or implicit constitutional directive—or adaptation—blending or hybridizing of international with domestic law through the process of interpretation. Ruth Rubio-Marin & Martha I. Morgan, *Constitutional Domestication of International Gender Norms: Categorizations, Illustrations, and Reflections from the Nearside of the Bridge*, in GENDER AND HUMAN RIGHTS 115 (Karen Knop ed., 2004).



game may be a good domestic political move<sup>203</sup>—leaving the prevailing party to have to turn for possible redress to a hitherto inattentive political entity, the Council of Ministers of the Council of Europe,<sup>204</sup> whose failure to act can be said to perpetuate rights violations.

In sum, women's rights—like other identity-based rights considered controversial by powerful domestic political, cultural, and legal forces discussed in Section II(B)—are a lightning rod that test a state's commitment to constitutionalism, a rule of law, and its regional and international human rights obligations. In theory, fulfilling these three commitments should assist in the legitimation of its legal system at regime and output levels; paradoxically, however, such diligent efforts may backfire.

### 3. *Legal Positivism, Feminist Legal Theory, and the Interpretation of Law*

The preceding two sections (III(B)(1) and (2)), which focus on the two key features contributing to post-socialist role of law and rule of law developments with mixed consequences for legal system regime and output legitimation, do not exhaust the explanation of contestations over the legitimacy of women's rights in a reformed post-socialist legal order. Of equal importance, though admittedly less likely to be acknowledged, is the extent to which the prevailing philosophical approach to the interpretation of law in post-socialist legal systems assists in the delegitimation of existing women's rights jurisprudence.

No longer bound and isolated by socialist law and legality,<sup>205</sup> post-socialist legal systems rely on legal positivism, the prevailing jurisprudential philosophy of European civil law systems, in their interpretation and application of law. Not surprisingly, law faculties teach law from a positivist perspective (discussed further in Section IV(B)(1) below).

203. See Kanstantsin Dzehtsiarou & Alan Green, *Legitimacy and the Future of the European Court of Human Rights: Critical Perspectives from Academia and Practitioners*, 12 GERMAN L. J. 1707 (2011).

204. See Marinella Marmo, *The Execution of Judgments of the European Court of Human Rights – A Political Battle*, 15 MAASTRICHT J. EUR. & COMP. L. 235 (2008), for a discussion of states failing to comply with the Court's judgments within the required three-month period and a discussion of the principle of solidarity aiming to enlarge the effect of the court's rulings to all member states. If a case is heard by the Court of Justice of the EU in Luxembourg, the remedy for state non-compliance with a judgment is not more effective. Also see INTERNATIONAL INFLUENCE BEYOND CONDITIONALITY: POST-COMMUNIST EUROPE AFTER EU ENLARGEMENT (Rachel A. Epstein & Ulrich Sedelmeier eds., 2009), for a discussion of political conditionality (democratic principles, human rights, and minority rights), in which EU institutions do not have any sanctioning power, except in extreme cases of a "serious and persistent breach" of democracy and fundamental rights. Under Article 7 of the EU treaty, certain membership rights then can be suspended.

205. Socialism could enforce its own interests freely with brutal force through unlawful interference or even through silencing the law. Kühn, *Worlds Apart*, *supra* note 131, at 5–10.



One of legal positivism’s basic premises is that law is a science—a highly developed form of rationality. It is analytically reducible to a logically coherent autonomous system of more or less deterministic rules that are independent of moral, economic, and political theory; these rules are used to control society.<sup>206</sup> Consistent with notions of law as a science, these rules are abstracted from the particularities of their socio historical context. In effect, “law is a self-referential system which obtains its authority from itself.”<sup>207</sup> Law sets up standards, said to be applied in a neutral manner to formally equal parties. It maintains its neutrality and objectivity by its enunciation of legal truths.<sup>208</sup>

Enacted by the sovereign—the parliament in modern democracies—, laws are presumed to be clear, complete, and coherent—meaning that there is a mutual relationship between legal rules.<sup>209</sup> To a significant degree, the presumption of the legal text’s linguistic correctness guarantees its judicial reading in accordance with the legislators’ intent.<sup>210</sup>

Courts adhering to a positivist approach based on explicit rules are likely to rely on technical modes of legal reasoning by directly applying a formally valid code provision as the binding objective source of law to produce a narrow, literal judicial interpretation of law. “[I]n hard cases, where an easy logical syllogism cannot be applied . . . judges do not need to listen to precedents, legal writings, the intention of the legislature, [or] the rationally reconstructed purposes of the law.”<sup>211</sup> They also can rely on the unwritten principle “when in doubt do nothing.”<sup>212</sup>

Of course, legal positivism, like other philosophies of jurisprudence, is not monolithic. Among its adherents, there is contestation<sup>213</sup> regarding the relative merits and failings of a hard-traditional or exclusive-positivism, a soft-inclusive-positivism,<sup>214</sup> or critical legal positivism.<sup>215</sup> The latter two ap-

206. See Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054 (1995), for a discussion of the assumption that positivism is inherently conservative.

207. Margaret Thornton, *Among the Ruins: Law in the Neo-Liberal Academy*, 20 WINDSOR Y.B. ACCESS JUST. 3 (2001).

208. PŘIBÁŇ, DISSIDENTS OF LAW, *supra* note 125, at 64–75.

209. KAARLO TUORI, CRITICAL LEGAL POSITIVISM 7 (2002).

210. Zirk-Sadowski, *supra* note 182, at 310.

211. Kühn, *Worlds Apart*, *supra* note 131, at 558.

212. PUCHALSKA, *supra* note 138, at 137.

213. PŘIBÁŇ, DISSIDENTS OF LAW, *supra* note 125, at 69–75. Also see Tom Campbell, *Democratic Aspects of Ethical Positivism, in JUDICIAL POWER*, *supra* note 29, at 3, for a discussion of the intellectual and empirical problems of legal positivism.

214. See Matthew Grellette, *Legal Positivism and the Separation of Existence and Validity*, 23 RATIO JURIS 622 (2010), for a discussion of “inclusive legal positivism,” which claims that standards of political morality are included in attempts to determine the existence, content, and meaning of valid laws without collapsing into a version of natural-law theory, rather than assuming connections between law and morality are only contingent.

215. See TUORI, *supra* note 209. See also Helen Stacy, *Positivism and Difference, in JUDICIAL POWER*, *supra* note 29, at 139; Lacey, *supra* note 29, at 94–99.



proaches seek to remedy the failings of the hard version, which does not recognize the cultural and communicative character of law and its actual impact.

Here, post-socialist legal systems appear to be caught in a dilemma. On the one hand, given the socialist legacy of deeply compromised and delegitimated law and legal systems, contemporary judicial reliance on hard legal positivism, which allows legal institutions to function under conditions of very limited discretion, may be reassuring. State commitments to judicial independence can be said to be honored when judges decide cases *only* according to law. But this claim is misleading, as law always involves interpretation of text, even if one claims law's alleged clarity and certainty and disregards contradictions and indeterminacy in legal doctrines.<sup>216</sup> Moreover, there are costs to reliance on hard positivism's formalist approach. Formal legality risks degeneration into excessive formalism and textualism,<sup>217</sup> which hampers the capacity of the legal system either to take new interests or circumstances into account or to remedy the *de facto* effects of social inequality. Arguably, then, post-socialist progress toward enhanced legitimation of law and the legal system at regime and output levels may be hindered by a traditionally oriented legal system's failure to recognize issues and provide meaningful redress, for example, for rights violations.

How do women's rights fare in post-socialist legal systems relying on prevailing legal positivist approaches to the interpretation of law? In all likelihood, they fare poorly in courts and, as discussed in Section IV(B), in law faculties as well. In a sex/gender discrimination case, a court that is committed to hard positivism can invoke a state constitution's sex equality provision to find no discrimination. If a general sex equality law, even one lacking any implementation provisions, is found to be consistent with that constitutional provision, a court may find no discrimination. Even if that state's constitution also contains a monist provision that incorporates binding regional and international obligations into state law, a court may ignore it. If a court concludes that a specific law is *de jure* facially consistent with a constitutional sex equality provision or general sex equality law and fails to consider allegations of its *de facto* disparate and, arguably, discriminatory impact, it may well find no discrimination. In any of these situations, the court is ignoring the close connections among power relations generated by sex and gender,<sup>218</sup> often combined with other variables such as race,

216. Lacey, *supra* note 29.

217. Kühn, *Worlds Apart*, *supra* note 131, at 532.

218. "The goal of the substantive equality is to transform social patterns of discrimination, partly by uncovering the inequalities in gender neutral laws and partly by challenging schemes that differentiate women by offering . . . only paternalistic benefits." Beverly Baines & Ruth Rubio-Marín, *Introduction: Toward a Feminist Constitutional Agenda*, in *THE GENDER OF CONSTITUTIONAL JURISPRUDENCE* 14 (Beverly Baines & Ruth Rubio-Marín eds., 2005).





ethnicity, class, or sexual orientation, that produce discrimination. To further complicate matters, if layers of law are involved, a hard positivist approach may be inadequate.<sup>219</sup> For example, a court may be tasked with reconciling an anti-discrimination law with a gender-neutral provision in another law or regulation while also trying to take into consideration EU, regional, or international jurisprudence about which it has little or no knowledge and training.

Feminist legal theory, associated with critical legal theory, provides a sharp contrast and an alternative to most prevailing versions of legal positivism—though one may be correct in assuming that judges are unaware of its existence. Feminist legal theory questions and renders problematic what is conventionally designated as the objective, the neutral, and the normal. By claiming that knowledge regarding the sexes is always socially situated,<sup>220</sup> it challenges positivism's foundational claim of law's objectivity and neutrality as an autonomous system and recognizes that "[l]egal texts are almost always written in an objective and discursive style from a position of a legal authority or expert that masks their discursive and constructive nature."<sup>221</sup> In a sexually patterned world, women and men are not formal legal subjects; they are not abstracted from social context, as legal positivism would have it. Sex/gender ideologies, whose hegemonic standards of naturalized and normalized masculinity and femininity are incorporated into law, are interpreted and enforced by law.<sup>222</sup>

Like other schools of socio legal analysis, feminist legal theory's criticisms of analytical (positivist) jurisprudence demystify legal doctrine, legal discourse, and law's understanding of itself.<sup>223</sup> Like other critical legal theorists, feminist legal theorists maintain that law does not transcend its location. Rather, law is a mechanism likely to reflect, reproduce, express, construct, and reinforce prevailing sexually patterned power relations in the world wide system of fraternal patriarchy that privileges or accommodates the needs of men.<sup>224</sup> Consequently, a *de jure* approach in a sex discrimination case will simply reproduce that power disparity. In contrast, a *de facto* contextualized determination of the actual harmful impact of a law recognizes those whose lives are concretely affected by it.

219. Oral Communication from Janka Debrecienova, a women's rights lawyer from Bratislava, Slovakia.

220. V. SPIKE PETERSON & ANNE SISSON RUNYAN, *GLOBAL GENDER ISSUES* 24 (1999).

221. Johanna Niemi-Kiesiläinen, Päivi Honkatukia & Minna Ruuskanen, *Legal Texts as Discourses*, in *EXPLOITING THE LIMITS OF LAW: SWEDISH FEMINISM AND THE CHALLENGE TO PESSIMISM* 69, 81 (Åsa Gunnarsson et al. eds., 2007).

222. Lacey, *supra* note 29, at 108.

223. PRIBAŇ, *DISSIDENTS OF LAW*, *supra* note 125, at 80–81.

224. Joanne Conaghan, *Reassessing the Feminist Theoretical Perspective in Law*, 27 *J.L. & Soc'y* 351 (2000).



#### IV. LEGAL EDUCATION AND THE INCLUSION OF WOMEN'S RIGHTS IN THE CURRICULUM

##### A. Socialist State-Controlled Legal Education

In their first edict after assuming power, the Bolsheviks abolished the entire pre-revolutionary legal system, including the bar.<sup>225</sup> Law faculties were closed for two years; social science faculties were charged with educating whatever legal professionals were needed;<sup>226</sup> the practice of law was opened to “all honest persons of either sex who enjoy civil rights.”<sup>227</sup> When a limited number of law faculties did reopen, they were subject to tight state control—a familiar pattern from the Tsarist past.

By the second decade of the socialist era, as socialist laws and the concept of socialist legality were more fully developed in the Soviet Union, references to European civil law systems were eliminated from the law curriculum. Compulsory ideological education—the History of the Communist Party, Political Economy, Marxist-Leninist Philosophy, and Scientific Communism<sup>228</sup> and participation in the Komsomol–Communist party youth organization—were added as requirements.

In post-WWII socialist countries, the existing civil law system was replaced by a socialist one; many of its principles and norms were imported from the USSR.<sup>229</sup> A purge of each national bar commenced, and the number of lawyers was radically reduced.<sup>230</sup> State controlled law faculties were

225. See JOHN N. HAZARD, *SETTLING DISPUTES IN SOVIET SOCIETY: THE FORMATIVE YEARS OF LEGAL INSTITUTIONS 1–9* (1960), for a discussion of the dismantling of Tsarist legal structures. According to Marxist theory, law is part of the superstructure of society; its content and purposes are determined by a society's economic base. Law, thus, is a tool for the reinforcement of ruling class dominance. In a utopian, classless, communist society, Marx proclaimed, law and the legal system would be unnecessary and would wither away as would legal education. G. M. Razi, *Legal Education and the Role of the Lawyer in the Soviet Union and the Countries of Eastern Europe*, 48 CALIF. L. REV. 776, 784 (1960).

226. See Razi, *supra* note 225, at 783, for a brief discussion of the period 1917–1921, when the Revolutionary Tribunals and Cheka were the dominant organs for the administration of justice and operated according to principles of “the revolutionary conscience and the revolutionary concept of justice”—thus limiting the need for legal education.

227. Meyer, *supra* note 67, at 1023. Initially, admission of children of the former bourgeoisie and the intelligentsia to institutions of higher learning was terminated, though this ban was later rescinded.

228. Anna Smolentseva, *Challenges to the Russian Academic Profession*, 45 HIGHER ED. 391, 393 (2003). Compulsory courses in scientific communism created problems of ideologization of the higher education process. *Id.* at 395.

229. Conflict between the party system and the Romanist-oriented members of the legal profession in parts of East Central Europe existed. HAZARD, *COMMUNISTS AND THEIR LAW*, *supra* note 124, at 118–26.

230. Meyer, *supra* note 67, at 1028. See also Razi, *supra* note 225, at 799, n.80.



required to adopt an ideologically vetted, Soviet inspired law curriculum,<sup>231</sup> as well as to institute class-based<sup>232</sup> or party-based<sup>233</sup> admission quotas. New socialist law texts were written in national languages; Soviet law texts often were used as supplements or references.<sup>234</sup> That socialist law and the socialist legal system were superior to common or civil law states, whose legal systems hypocritically espoused liberal democratic principles while being subservient to capitalist interests, was an ideological given.

Socialist legal education produced cadres of jurists—officials and professors at the highest level who prepared laws—and rank and file legal workers—judges, prosecutors, and lawyers. Like all education, it was connected to the state’s employment system, which usually assigned jobs to graduating law students.<sup>235</sup>

Like other university faculties, law faculties experienced varying degrees of party/state organized repression, depending on external political developments.<sup>236</sup> That said, even when, in post-Stalinist times, a few East Central European jurists developed rejuvenated concepts of justice within socialist legality,<sup>237</sup> in most socialist countries, the space for intellectual inquiry in law faculties remained extremely limited.<sup>238</sup> Citizens’ obligations to the state and society were emphasized rather than their rights.

231. Razi, *supra* note 225, at 789–90.

232. Fodor, *Power, Patriarchy, and Paternalism*, *supra* note 42, at 53–54. In Hungary, for example, the quota—originally 50 percent for children of the working class—was later reduced to 30 percent.

233. In the Soviet Union, in addition to a high score on entrance examinations, a recommendation from the Communist Youth Organization was required. For the prestigious faculties at Moscow and Leningrad, strong Community party connections were officially required. Lisa A. Granik, *Legal Education in Post-Soviet Russia and Ukraine*, 73 *OR. L. REV.* 963, 964 n.3 (1993).

234. Schönfelder, *supra* note 135, at 77–81. Law texts referred to “the teachers of the official philosophy of the Soviet state as often as possible to prove that they expound[ed] the subject matter according to the Orthodox views of Marxism-Leninism and that reality fits into theory, so as to obtain the imprimatur of the authorities.” Razi, *supra* note 225, at 782. It was not unusual to see treatises dedicated to the reviewers from the Ministry of Education who “perfected the scientific accuracy of the work.” *Id.* at 783.

235. In some states, they might be able to express employment preferences, but in most states, they had to work at an assigned position for a period of time before seeking positions elsewhere. Granik, *supra* note 233, at 972.

236. See PIANA, *supra* note 156156, at 106–09, for a discussion of the extent to which Polish legal education maintained a greater degree of intellectual integrity than Czechoslovak and Hungarian legal education. Also see Edi Spaho, *Dire Straits: Albanian Legal Education*, 9 *E. EUR. CONST. REV.* 90 (2000), for a discussion of the extreme repression in Albania.

237. MIECZYSLAW MANELI, *JURIDICAL POSITIVISM AND HUMAN RIGHTS* 128–64 (1981).

238. Higher education in the region generally was marked by a “passive nature and subordination to the functions of official ideology and a centrally planned economy . . . guaranteeing a minimal set of social benefits and a stable and predictable (life).” Igor V. Kitaev, *Russian Education in Transition: Transformation of Labour Market, Attitudes of Youth and Changes in Management of Higher and Lifelong Education*, 20 *OXFORD REV. EDUC.* 111,113 (1994).



Law professors taught from legal texts without providing any critical analysis.<sup>239</sup> Precedent was rejected as antithetical to the principle of democratic centralism;<sup>240</sup> other considerations, such as the efficacy of rules, their impact, the policy surrounding them, judicial decisions, customary practices, or established conventions, were disregarded.<sup>241</sup> Statutory interpretation was not a subject of study.<sup>242</sup> Since law was presented as a simple cognitive operation, discussions of legal methodology were rare.<sup>243</sup>

Pedagogical methods in law faculties reproduced the authoritarian and culturally endorsed pattern of a strong hierarchical relationship between faculty as experts and students as disciples. Professors relied on an *ex cathedra* pedagogy consisting of lectures on the texts and the memorization of codes; exams, oral or written, were based on memorization of legal theories, history, and specific code provisions.

Libraries, a potential source for critical thinking, usually were not directly accessible to students. Foreign book collections were skimpy and, depending on the country and period, these books might not be available for circulation. Moreover, since students and faculty were fluent in their national language and in Russian (a compulsory subject), they were less likely to be able to read foreign materials that offered a different perspective on law and legal systems and that, lacking official approval, were not translated into their mother tongue or Russian.

In most socialist states, legal education did not have the status associated with other disciplines, which trained workers to make concrete contributions to the further development of socialism.<sup>244</sup> Consequently, the legal profession was not widely represented in the higher echelons of the party or the state apparatus in many socialist states. The legal profession “had a marginalized role in social affairs and development . . . reduced to solving petty civil matters and dealing with criminality issues.”<sup>245</sup>

---

239. Textual and positivist analysis of legal texts were the only way to evade the omnipresent ideology of scarcely readable works relying on political propaganda to demonstrate the superiority of socialist law. Kühn, *Comparative Law*, *supra* note 161, at 227.

240. Kühn, *Worlds Apart*, *supra* note 131, at 542.

241. *Id.* at 540.

242. *Id.* at 542.

243. *Id.* at 543.

244. It is estimated that, in some countries, only six to ten percent of all law graduates became advocates. Others entered the state apparatus directly or became juriconsults. Meyer, *supra* note 67, at 1035.

245. Mariana Berbec-Rostas, Arkady Gutnikov & Barbara Namyslowska-Gabrysiak, *Clinical Legal Education in Central and Eastern Europe: Selected Case Studies*, in *THE GLOBAL CLINICAL MOVEMENT: EDUCATING LAWYERS FOR SOCIAL JUSTICE* 53–54 (Frank S. Bloch ed., 2001). Criminal defense counsel operated under state-imposed constraints designed to undercut the delivery of an effective representation of their clients. ROBERT RAND, *COMRADE LAWYER* 33 (1991).



## B. Legal Education in Post-Socialist States

### 1. Post-Socialist Teaching of Law

With the collapse of socialism, universities in the region were freed from intrusive state control. Their governance and institutional operations would be guided by liberal democratic principles—academic freedom, autonomy, self-governance, and respect for human rights.<sup>246</sup> In law faculties, the most immediate curriculum reform entailed substantive shifts as civil law subjects replaced socialist law ones and new subjects relating to the introduction of market economies and, later, to the European Union were added.

Despite the relatively weak legitimation of law and legal systems at regime and output levels (discussed in Section III(B)), there now appears to be an increased interest in the study of law and a higher status attached to lawyers than in the socialist past. This shift may be based on the prospect of expanded opportunities and attractive salaries for some lawyers, especially multi-lingual ones, in commercial and corporate law practices—at times connected with Western European or North American law firms.<sup>247</sup> For those hoping to enter the state bureaucracy, law training provides economic security in perilous times.<sup>248</sup>

- 
246. Helle Blomquist, *Legal Education, Profession, and Society Transition: Reform of Lithuanian Legal Education*, 29 REV. CENT. & E. EUR. L.35, 44 (2004). See Olga Bain, *Education After the Fall of the Berlin Wall: The End of History or the Beginning of Histories*, in POST-SOCIALISM IS NOT DEAD: (RE)READING THE GLOBAL IN COMPARATIVE EDUCATION 27, 28 (Iveta Slivova ed., 2010), for a discussion of the goals of deideologization, depoliticization, destatization, and decentralization as official educational reform objectives or—phrased as a constructive agenda—diversification, differentiation, humanization, and humanitarianization. Educators in post-socialist countries participated in the Bologna Process, which envisioned the creation of a European Higher Education Area in undergraduate and graduate education by 2010 through coordination of their higher education policies based on principles of autonomy and diversity. There was not much discussion about substantive curriculum reform. See Lusine Hovhannisian, *Clinical Legal Education and the Bologna Process*, PUBLIC INTEREST LAW INITIATIVE PAPERS, NO. 2 (2006), available at [http://www.pilnet.org/component/docman/doc\\_download/25-clinical-legal-education-and-the-bologna-process.html](http://www.pilnet.org/component/docman/doc_download/25-clinical-legal-education-and-the-bologna-process.html). Unfortunately, a number of expectations, generated in the early years of the process, have not been met.
247. See Stephan Heidenhain, *The Legal Profession in the Czech Republic* (2008), available at <http://www.osce.org/odihr/36296>; Márta Pardavi, *The Legal Professional in Hungary* (2008), available at <http://www.osce.org/odihr/36305>; Adam Bodnar & Dominika Bychawska, *The Legal Profession in Poland* (2009), available at <http://www.osce.org/odihr/36308>; Dmitry Shabelnikov, *The Legal Profession in the Russian Federation* (2008), available at <http://www.osce.org/odihr/36312>; Vasili Kukharchyk & Maryana Kulya, *The Legal Profession in Ukraine* (2008), available at <http://www.osce.org/odihr/3631>, for a discussion of the country-specific organization of legal practice..
248. For example, as in the socialist era, the majority of contemporary lower court judges are women. In many countries, the judiciary remains largely a low paying, secure bureaucratic career option. Galligan, *supra* note 69, at 44. However, depending on the country, the salary may be quite high when compared to other income levels.



State university law faculties continue to provide free or low cost education for the overwhelming majority of future legal professionals. Based on their access to the best and brightest students selected through a competitive state exam,<sup>249</sup> these faculties enjoy intellectual preeminence in the transmission of legal elite culture.<sup>250</sup> However, in the region's neo-liberal market oriented economies, they have been beggared by a lack of public financial resources<sup>251</sup> or foreign assistance.<sup>252</sup>

To meet the increased demand for legal education, private (proprietary) law schools have been established.<sup>253</sup> An undetermined percentage of them are considered "degree mills"—offering a degree for a price to intellectually unqualified or less qualified students.<sup>254</sup> At this point, they do not appear to be serious competitors to prestigious state university faculties.

Generally speaking, in the region, law remains a deeply conservative academic discipline.<sup>255</sup> Law is taught from a legal positivist standpoint, which does not encourage or reward challenges or critiques of existing legal authority or texts.<sup>256</sup> "Available textbooks summarize codes and avoid issues of interpretation and construction. . . . Critical reviews of judicial opinions are much less frequently found than in West European civil law countries."<sup>257</sup> In the wake of neo-liberalism and globalization in the region,

- 
249. The Ministry of Education in each country sets the number of entering students. Peter J. Sahlas & Carl Chastenay, *Russian Legal Education: Post-Communist Stagnation or Revival?* 48 J. LEGAL EDUC. 194, 213 (1998).
250. TUORI, *supra* note 209, at 166.
251. To diversify and increase their revenue stream, some state university law faculties have been permitted to admit an additional number of fee-paying students with lower exam scores. Snejana Slantcheva, *The Bulgarian Academic Profession in Transition*, 45 HIGHER EDUC. 425, 427 (2003).
252. Although the US government has supported "rule of law" projects as part of earlier law and development initiatives in other parts of the world and integrated legal education reform into overall legal reform initiatives, in Eastern Europe and the former Soviet Union, legal education reform has been at most a tangential part of ongoing United States-funded legal reform projects though it is fundamental to promoting the rule of law. Mark K. Dietrich & Nicolas Mansfield, *Lessons Spurred: Legal Education in the Age of Democracy Promotion 1–2* (2006), available at <http://ewmi.org/sites/ewmi.org/files/files/EVWMILegalEducationReform.pdf>.
253. It is estimated that 271 law schools were operating in Russia in 2004; only 108 were accredited. In 1986, there were only 100 state-run law schools. WILLIAM BURNHAM, PETER B. MAGGS & GENNADY M. DANILENKO, *LAW AND THE LEGAL SYSTEM OF THE RUSSIAN FEDERATION* 133–34 (3d ed. 2004).
254. Private law schools usually rely on underpaid state university law professors who supplement their low incomes by giving lectures to private law faculty students. See, e.g., Sahlas & Chastenay, *supra* note 249, at 202.
255. Parochial, outmoded positivist simple textual approaches continue to exist in academia. Kühn, *Post-Communist Judiciaries*, *supra* note 127, at 198.
256. There are crippling effects if, as happens, the professor has drafted the law code and will be offended if the student says anything other than repeating the content of the class lecture. Blomquist, *supra* note 246, at 72.
257. Schönfelder, *supra* note 135, at 84–85.





legal education is valued for facilitating the operation of the market as the quintessential sphere of freedom and economic well-being.<sup>258</sup> That law can work toward the promotion of change consistent with human rights principles such as equality, democracy, diversity, and social justice does not appear as a prominent theme or incentive.

Despite growing demands on the legal profession, the quality of legal education does not appear to have improved substantially. In state and most private law school faculties, classes are large. Many professors still rely on an *ex cathedra* (lecture) format,<sup>259</sup> which tends to reproduce the *status quo* as authoritative knowledge.<sup>260</sup> Students still transcribe and memorize the information conveyed by professors in their lectures for final exams.<sup>261</sup>

Some lecture courses may have large discussion sections labeled as seminars. These seminars are conducted by overburdened young assistants serving as legal academic apprentices.<sup>262</sup> Usually, there is very limited opportunity for in-depth critical discussion. Free standing seminars that require original research or extensive supplemental reading are rather rare.

Opportunities for legal, practice-oriented educational experiences are not only limited by a lack of resources, but also by prevailing pedagogical

258. Thornton, *The Demise of Diversity in Legal Education*, *supra* note 121, at 38.

259. Pedagogy in the region is influenced by German traditions. Defenders of this format claim that the civil law system is more coherent and organized than the common law system, "allowing students to master positive law and understand the internal logic of the legal system rather than taking a chaotic overview of the resolution of particular problems" as justifications for lectures rather than interactive and creative teaching methods. Sahlas & Chastenay, *supra* note 249, at 209.

260. "[T]he dialogic act of learning by rediscovering existing knowledge is not the same as the one-way transference of knowledge that takes place in traditional education. [Like the creation of new knowledge, it, too] must be predicated on critical reflection, curiosity, problematisation, uncertainty and creativity." Dianne Otto, *Handmaidens, Hierarchies and Crossing the Public-Private Divide in the Teaching of International Law*, 1 MELB. J. INT'L L. 35, 41 (2000).

261. "The best students [are] those who remember the maximum amount of formalized information . . . (though) they might not understand very well how it applies to practical situations." Daniil E. Fedorchuk, *Fighting Dragons of the Past: The Internationalization of Legal Education at Donetsk National University*, in *THE EXPORT OF LEGAL EDUCATION: ITS PROMISE AND IMPACT IN TRANSITION COUNTRIES* 45, 48 (Ronald A. Brand & D. Wes Rist eds., 2009).

[T]he educator's responsibility is to prepare an outline of core materials (especially, the main rules of relevant statutes) in condensed form in the lecture. . . . If case law is mentioned, usually only a short overview is provided without any recourse to the facts or factors which influenced the judgment or comparison to other judgments involving similar circumstances.

(The exception is Court of Justice of the EU and ECtHR cases.) *Id.* at 49. "Students normally are discouraged from going beyond the outline." *Id.* at 50. Extra information is not required to pass the exam, "and teachers themselves are often unaware of such information." *Id.*

262. Assistants are vulnerable to discrimination and to mobbing by professors. Ana Covic, who works in the Office of the Ombudsperson in Novi Sad, Serbia, provided this information.



assumptions that law professors disseminate theory to students and that law faculties should not be tasked with preparing future lawyers for practical work.<sup>263</sup> Consequently, clinical legal education, which focuses on skills, is uncommon in the law curriculum in most countries.<sup>264</sup> If internships are available, they usually consist of students' passive observation of court sessions or a law practice.

## 2. Stakeholders in Legal Education Reform

The discussion in this section is grounded on the reasonable assumption that, in the near future, law faculties are likely to face greater pressures to modernize by undertaking more expansive reforms, especially as socialist trained generations of faculty and administrators retire. This article begins with a more general analysis of faculty participation in a broad reform process. It is followed by an exploration of the possibilities of expanding the categories of stakeholders to others who might be consulted—law students, legal professionals, legal system officials, and NGOs. Finally, it addresses the subject specific barriers to the inclusion of women's rights in the law curriculum that each category of stakeholder may raise.

Law faculty members, the obvious main actors in legal education reform, may not be inclined to involve themselves for a variety of reasons. Regardless of rank, law faculty tend to be woefully underpaid,<sup>265</sup> have heavy teaching loads, and often supplement their income by teaching at private law faculties, tutoring private students for state law faculty entrance exams,<sup>266</sup> or work in legal practice as barristers, legal advisers, or judges. Arguably, such time consuming work in legal practice could help create connections between theory and practice in the curriculum and enrich teaching; it is not clear that such connections have been created. Rather, faculty may have limited time and energy to become involved in labor-intensive law reform projects.

Different generational cohorts of legal academics may display different levels of responsiveness to legal education reform that encompasses the development of new conceptual frameworks, subjects, and pedagogies, as

---

263. See Berbec-Rostas et al., *supra* note 245, at 55. See also Maria Slazak, *Legal Education and Training in Poland*, 4 EUR. J. LEGAL ED. 217–20 (2007), for a discussion of the lack of preparedness of students entering the legal profession. In some countries, legal studies are not sufficient for practicing law. After graduation from a law faculty, individuals must be hired as helpers to practicing attorneys before they are allowed to sit for the bar exam.

264. But see the development of legal clinics in law faculties in Poland: THE LEGAL CLINIC: THE IDEA, ORGANIZATION, METHODOLOGY (Dariusz Łomowski ed., 2005), available at [http://www.fupp.org.pl/down/legal\\_clinic.pdf](http://www.fupp.org.pl/down/legal_clinic.pdf).

265. Smolentseva, *supra* note 228, at 410–11.

266. In Poland, part-time employment is more common than full-time employment in the higher education private sector. Berbec-Rostas et al., *supra* note 245, at 63–64.



well as institutional reorganization. Two decades after the collapse of socialism, there has not yet been a full generational turnover in academic or legal system personnel—meaning that most professors, academic administrators, and legal system officials were educated and began their careers in socialist times or in the immediate post-socialist years when the penumbra of socialist-style education still loomed large.<sup>267</sup> These senior colleagues may be less open to proposals that substantively challenge their often entrenched professional beliefs, practices, and expertise.

Young faculty, many of whom have done part or all of their graduate legal studies (LL.M. or Ph.D.) outside their own country<sup>268</sup> and, in all likelihood, speak and write one or more foreign languages other than Russian, are sources of new knowledge and pedagogies and are therefore ideal contributors to a legal education reform process. However, as apprentices in the academy, often waiting for older professors to retire or die, young faculty is also the most vulnerable cohort in the law faculty hierarchy. Powerful senior colleagues may not appreciate young faculty’s innovativeness and creativity. Moreover, young faculty is also likely to be burdened with heavy teaching loads; in some instances, they may be teaching new subjects for which they also may be writing the first textbooks in the national language.

Although law curriculum reform is generally understood to be the turf of faculty as experts, there are other possible contributors who could provide different perspectives that might expand substantive and pedagogical reform options, although the inclusion of such individuals might require a paradigm shift in the region’s legal academic culture.

As part of the academic community and as future professionals, law students are stakeholders in the legal education reform process. At the time of this writing, law students are part of the first generation born after the collapse of socialism; they bring a different generationally based perspective to their education. At a minimum, their input can be encouraged by a system of student evaluations of faculty and courses,<sup>269</sup> as well as possible follow-

267. Since 1989 in Bulgaria, “academicians who gained their privileges under the Party quickly abandoned Marxist doctrine but not their positions of power . . . they feared serious reform would leave them behind.” Petrova, *supra* note 67, at 70. There is more than a hint of irony in the prospect that law professors with outdated knowledge, who are not part of the ongoing law reform process and are out of touch with new legal thinking and, thus, not able to enter international academic relations, would “hold power in the learning structure” and be protected by “new regulations securing academic freedom.” Blomquist, *supra* note 256, at 89.

268. Two examples are the EU Daphne Initiative and the Open Society Institute (OSI) Higher Education Support Program (HESP), which send younger legal scholars to Western European or U.S. law faculties for doctoral work.

269. See Izabela Kraśnicka, *Polish Legal Education in the Light of the Recent Higher Education Reform*, 2012 MICH. ST. L.REV. 691, 709 (2012), for a discussion of the inclusion of student evaluations in the evaluation of faculty teaching every two years in Poland.



up interviews with recent graduates working in the state apparatus, private practice, or social justice NGOs. That said, students spend a relatively brief period of time (three to five years) studying at a law faculty. Students' critical abilities can be discounted or challenged by those who believe either that younger persons ought to display deference toward their elders, especially those in official positions of formal authority, or that they are unseasoned and, thus, unqualified to make such evaluations.

Lawyers and legal system officials also have a stake in the modernization of legal education. They are concerned about the educational preparation of their future employees and colleagues. That said, given the relatively recent introduction of the norm of academic freedom in university governance and curriculum development, the extent of their involvement in legal education reform can become a delicate issue; their role would have to be clearly defined.

NGOs working in public interest are yet another identifiable category of possible stakeholders in the reform of legal education. A number of NGOs have legal staff with broad ranging expertise in environmental, labor, disability, prison, women's, and sexual orientation rights. That said, highly credentialed academics may dismiss non-academic legal professionals in NGOs as lesser colleagues or even trespassers on sacred academic turf.

Clearly, these more general considerations regarding the possible scope of consultation in curriculum reform efforts are relevant to the specific issue of the inclusion of women's rights in the law curriculum. Even if the range of stakeholders is expanded, there might also be subject-specific obstacles to its inclusion.

As Section II(B) points out, the subject evokes historical associations with a repudiated past and its accompanying liabilities. Legal academics, who are supporters of contemporary backlash trinity forces or of neo-liberalism, may minimize the importance of the subject, argue against its inclusion, or dismiss it. As Section III(B) details, to the extent women's rights raises the reform stakes in the curriculum by its openly critical recognition of the law/culture nexus, it offers coherent, far-reaching, destabilizing challenges to post-socialist fraternal patriarchies that claim to be liberal democracies bound by European human rights norms replicated in law faculties. Older faculty may be less welcoming of new, nontraditional subjects—especially if the subject challenges their reliance on hard legal positivism or has the potential to divert students away from the subjects they teach.<sup>270</sup> Some faculty are likely to marginalize the importance of women's rights, especially those who are unfamiliar with the significant contributions women's rights

---

270. In a private communication to the author, Janka Debreceniova, a Slovak lawyer specializing in women's rights, makes this argument.



scholars have made to many legal issues, or who are unaware of the field's well-developed intellectual pedigree<sup>271</sup> and intellectually vibrant, creative, and expansive contributions to the human rights canon, and to the reconceptualization of the role and rule of law.

In most countries, the absence of national language textbooks on women's rights<sup>272</sup> and the limited number of scholarly articles on its many concerns can further marginalize the subject. This article characterizes such a situation as a negative cycle of diminishing significance. By way of explanation, there may be little incentive for faculty to develop a textbook or write scholarly articles on a subject that is considered to be controversial or less valued by the higher echelons of each law faculty and that is, thus, less likely to be taught. In turn, the absence of texts or important scholarly works in the national language becomes an acceptable reason for continuing to assign a low priority to the inclusion of a subject in the curriculum. That low priority, then, is a further disincentive to undertaking scholarly work in the field.<sup>273</sup>

To the extent that female faculty are more likely to be drawn to the subject and advocate for it, there is reason to believe that the chances of its inclusion may be diminished. In law faculty hierarchies, women are less likely than men to be high ranking and influential full professors or chairs of cathedras; women who are identified as feminists risk being even more marginalized by their colleagues.

That said, in a very limited number of law faculties in the region, there are small numbers of courageous law faculty members who are committed to including women's rights in their teaching. They display laudable intellectual fortitude by bringing the contributions of feminist legal theory to the legal academy, but at present, it does not appear that a supportive dean and/or a critical mass of informed colleagues, prepared to engage in the systemic reform that feminist legal theory calls for, exist in the overwhelming preponderance of law faculties in the region.

As other possible stakeholders, lawyers and legal system officials also may not support the inclusion of women's rights in the curriculum. They share a basic intellectual socialization having been trained in more traditional positivist-oriented legal educational environments; in all likelihood, they have little knowledge of the subject<sup>274</sup> and may rely on stereotypes as

271. Publishers' lists, admittedly mostly in Western Europe, North America, Australia, and India, offer new texts and a plethora of books (both scholarly and popular); journal articles abound; voluminous well-researched reports are generated by international and regional governmental organizations charged with a human rights mandate, as well as by national or international coalitions of NGOs. See Conaghan, *supra* note 224, at 352.

272. Dr. Ivana Radačić, a Croatian legal scholar, has written a reader in feminist legal theory used in Croatia and Serbia. (Personal communication with the author.)

273. In a private communication to the author, Dr. Radačić also notes the extremely limited amount of feminist legal theorizing by scholars in the region.

274. See Magda Krzyżanowska-Mierzevska, *The Reception Process in Poland and Slovakia, in A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS* 531 (Helen Keller & Alec Stone Sweet eds., 2008), for a discussion of the impact of the ECHR in Poland



evidence to justify its marginalization or relegation to culture and, thus, designation as falling outside the purview of law. Consequently, though the legal system presumably stands to benefit from better trained future lawyers and officials, incumbents may have little incentive to actively support more extensive education in women's rights. Moreover, if legal system officials perceive that its inclusion will lead to an increase in caseloads which, in the region's underfunded and strained legal systems, can be understood as a mere diversion of precious, limited institutional resources rather than an essential component of a democratic legal system, they may be unsupportive. Finally, though some lawyers might find the prospect of a new field such as women's rights, spanning both private practice and public interest law, attractive, the harsh reality is that likely clients will have limited, if any, financial resources to fund litigation.

### 3. Curriculum Options for Women's Rights

There are numerous options for the substantive inclusion of women's rights in the post-socialist law curriculum. In the best of all worlds, these options are not mutually exclusive, and all of them would be available to students during the course of their legal studies.

The most immediately obvious options exist in the human rights or international/regional law department or cathedra of the faculty. A women's human rights course or seminar<sup>275</sup> exposes students to the work of legal scholars, lawyers, and judges from different countries<sup>276</sup> in a wide variety of fora.<sup>277</sup> The range of possible topics is enormous: gender-based violence ranging from intimate relationships to trafficking; war and post-conflict situations; regulation of reproduction, marriage, family life, and sexuality; and discrimination in employment, property law, criminal law, prisons, housing, social insurance, political life, education, economic development, children's rights, migration, and dress codes. Seminars provide opportunities for intensive and extensive discussions, role-plays, supplementary films, and external speakers (either live or via electronic hookup) or group projects as well as individual research.

Here, a cautionary word regarding the selection of syllabus topics is warranted. One must be mindful not to focus largely on "exotic" violations

---

and Slovakia; See Angelika Nußberger, *The Reception Process in Russia and Ukraine*, *id.* at 603, for a discussion of the impact of the ECHR in Russia and Ukraine.

275. See Blackmore, *supra* note 119, at 261.

276. Allaine Cerwonka, *Traveling Feminist Thought: Difference and Transculturation in Central and Eastern European Feminism*, 33 *SIGNS: J. WOMEN CULTURE & SOC'Y* 809 (2008) (discussing the ethnographic concept of transculturation—the ways in which ideas enter societies, the circumstances under which they circulate, and how they have been creatively transformed—applied to feminist East-West contact and relationships).

277. I am indebted to Ms. Dubravka Simonovic, the former representative from Croatia to the CEDAW Committee, for this contribution.





of women’s rights, such as female genital cutting, honor killing, and dowry deaths, associated with a distant “other”—meaning non-European/non-White women in European or non-European societies. Usually, it produces a racialized double othering—meaning that women become other in societies already considered as other<sup>278</sup> from a Western perspective. That othering can distract attention and analysis, thereby downplaying women’s rights violations in one’s own “modern” state.

An alternative is a course or seminar on Contemporary Issues in Anti-Discrimination Law. Its obvious focus—law bolstered discrimination against women and men based on sex and gender as well as other intersectional factors such as ethnic or racial minority, disability, sexual orientation, or immigrant/refugee status, and the remedies available to address these violations—can provide students with opportunities to explore cutting edge sex/gender human rights issues.

Substantive curriculum reform efforts anchoring women’s rights in the law curriculum cannot, however, be limited to specific women’s rights or anti-discrimination offerings. The scholarly work of feminist legal theorists, in combination with the careful presentation of legal arguments by women’s rights litigators in domestic, regional, and international fora, provide convincing evidence for the proposition that law reproduces, regulates, and enforces sex/gender systems that discriminate against or subordinate women in a variety of settings. It follows from this recognition and understanding that the content of a wide range of conventional/traditional courses<sup>279</sup>—jurisprudence, constitutional law, labor law, criminal law, social insurance law, family law, and health law, as well as newer arrivals such as national security, immigration, and environmental law—must be reviewed and appropriately revised to include gender. This process is known as gender mainstreaming.<sup>280</sup> It challenges existing knowledge that is taken for granted<sup>281</sup> and normalizes

- 
278. Historian Gerda Lerner, commenting on the connectedness of “difference” turning into “dominance,” notes that “[b]y looking at how the other is created, why it is created, and what function this creation serves, we gain insight into the actual workings of state societies. . . . [This] creation . . . is an essential aspect of hierarchical states, which depend on it to form their identity, to cohere, and to keep their system of dominance intact.” GERDA LERNER, *LIVING WITH HISTORY / MAKING SOCIAL CHANGE* 115 (2009). This insight clearly can be applied to the international system as well.
279. In 1999, for example, Sweden made it compulsory to include gender-related knowledge in legal education. See Eva-Maria Svensson, *Boundary-Work in Legal Scholarship*, in *EXPLOITING THE LIMITS OF LAW*, *supra* note 221 at 17, 33.
280. Gender mainstreaming appears throughout the Beijing Platform for Action in critical areas of concern: education, health, victims of violence, armed conflict, the economy, decision making, and human rights. An analysis of the effects of policies on women and men has an apparent concreteness and offers clear, relatively measurable direction to international policy makers. Charlesworth, *supra* note 178, at 3.
281. *Id.* at 77–78. See Helen Ward, “The Adequacy of their Attention”: *Gender-Bias and the Incorporation of Feminist Perspectives in the Australian Introductory Law Subject*, 11 *LEGAL EDUC. REV.* 1 (2000), for an extended discussion of the treatment of women in the Introductory subject (basic overview of the legal system including legal and constitutional history, legal reasoning, dispute resolution, and professional legal issues) in Australian law schools.



sex/gender issues as essential considerations. It underscores the need for critical examination of the extent to which gender stereotyping for women and men constructs legal identities. It uncovers and deinstitutionalizes<sup>282</sup> laws that support a state's fraternal patriarchal order as it encourages the interrogation of domestic laws in a particular subject for state compliance with its regional and international sex/gender human rights obligations.

Of course, mainstreaming women's rights is also an appropriate strategy in a more general international or regional human rights course. In an International Human Rights course, women's rights should not be limited to a lecture on the UN Convention on the Elimination of Discrimination Against Women (CEDAW). Rather, the status and treatment of women should be discussed as part of an understanding of each international human rights instrument. In a European Human Rights or a European Union law course, mainstreaming women's rights would expose students to increasingly expansive regional sex/gender equality jurisprudence in the decisions of the Court of Human Rights at Strasbourg<sup>283</sup> and, to a lesser extent, in the European Court of Justice in Luxembourg.

However, gender mainstreaming does have pitfalls<sup>284</sup> that must be addressed. If it "does not capture the relational nature of gender, the role of power relations, [and] the way that structures of subordination are reproduced,"<sup>285</sup> it can obscure the way gender shapes our understanding of the world. In other words, if mainstreaming leaves male gender identities unexamined in domestic, regional, or international law courses, it permits them to be considered natural and immutable.<sup>286</sup> In addition, if gender mainstreaming fails to include issues of intersectionality—including, but not limited to, race, ethnicity, class, age, disability, and sexual orientation<sup>287</sup>—in-

282. Shirin Rai, *Conclusions: Looking Forward*, in MAINSTREAMING GENDER, *supra* note 51, at 271.

283. With the entry into force of Protocol No. 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (establishing a free-standing non-discrimination guarantee and, thereby, expanding significantly the protection afforded by Article 14 which prohibits discrimination only in the enjoyment of other Convention rights), there are new opportunities to bring sex discrimination cases to the European Court of Human Rights in Strasbourg. Protocol 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* 4 Nov. 2000, Eur. T.S. 177, (2005) (*entered into force* 1 April 2005).

284. Sari Kouvou, *The United Nations and Gender Mainstreaming: Limits and Possibilities*, in INTERNATIONAL LAW: MODERN FEMINIST APPROACHES 237 (Doris Buss & Ambreena Manji eds., 2005).

285. Charlesworth, *supra* note 178, at 18.

286. For a discussion of mainstreaming and gender analysis deflecting attention away from women and issues of power central to women's subordination, see Sally Baden & Anne Marie Goetz, *Who Needs [Sex] When You Can Have [Gender]? Conflicting Discourses on Gender at Beijing*, 56 FEMINIST REV. 3 (1997).

287. See, e.g., Fiona Williams, *Contesting "Race" and Gender in the European Union: A Multilayered Recognition Struggle for Voice and Visibility*, in RECOGNITION STRUGGLES, *supra* note 12, at 299.



volved in producing sex/gender discrimination and subordination, its analysis is incomplete, inadequate, and inconsistent with the inclusionary thrust of feminist legal theory and practice.

Legal clinics, a new approach to legal education in the region, provide another opportunity for the inclusion of women’s rights in the curriculum. Clinicians around the world share goals of increased access to justice for previously unrepresented groups and to the development of public interest legal issues; they also are committed to a system of legal education that ensures future lawyers have the knowledge, skills, and values needed to help solve the world’s complex problems.<sup>288</sup>

Clinical legal education is an attractive antidote to the largely passive nature of the prevailing traditional approach to legal education, which—as Section IV(B)(1) details—emphasizes formal legal theory and the memorization of codes. Clinics provide opportunities for students to learn about case development in a problem-solving environment, to practice legal skills, and to address issues of professional responsibility by “allowing students to ‘complement classroom material with experiential learning’ through contact with real clients; and . . . [by] provid[ing] legal services to poor and under-represented people.”<sup>289</sup> Clinics teach students to develop critical perspectives on legal systems and public policies that may have a ripple effect—meaning that students trained to work on live cases in underserved populations can increase the number of committed practicing social justice-oriented lawyers upon completion of their education and their meeting of other professional requirements.

Women’s rights can be integrated into the broader mandate of a public interest law clinic, or they can be addressed in a subject-specific clinic. The latter avoids the possibility that women’s issues may be given a lower priority or bypassed in clinics with a more general public interest focus. In either instance, however, the clinic needs students who are intellectually prepared with foundational knowledge from courses or seminars on the subjects they will be addressing in their clinic cases or other activities.

The development and maintenance of a clinic<sup>290</sup> is a complex professional task. It requires a low faculty-student ratio to provide quality clinical training.<sup>291</sup> Qualified clinic supervisors with appropriate legal practice experience may be difficult to find.<sup>292</sup> In a clinic with actual clients, faculty

288. Margaret (Peggy) Maisel, *Setting an Agenda for the Global Clinical Movement*, in *THE GLOBAL CLINICAL MOVEMENT*, *supra* note 245, at 335–36.

289. Mart Skrodzka et al., *The Next Step Forward: The Development of Clinical Legal Education in Poland Through a Clinical Pilot Program in Bialystok*, 2 *COLUM. J. E. EUR. L.* 56, 59 (2008).

290. See Rekosh, *supra* note 74, at 86–89, for a discussion of the difficulties attendant upon efforts to “export” legal clinics and clinical legal education to Central and Eastern Europe, and to incorporate them into the curriculum.

291. Dietrich & Mansfield, *supra* note 252, at 7.

292. See Skrodzka et al., *supra* note 289, at 60, for a discussion of shortcomings of clinical legal education in Poland.



members must be available for clients as they would be in a law office. The clinic supervisor's workload may be even more labor intensive<sup>293</sup> because law students in the region are undergraduates and, in many instances, are likely to have limited life experience to bring to their work when they engage with clients.

Internships for supervised work, especially with a women's rights NGO, for a longer duration than the brief internship opportunity that law faculties in the region usually offer, are another curriculum option. Like clinics, internships can help ground students' understanding of the complexities of legal practice in concrete experience.

Law pedagogy is clearly a formative force in law students' understanding of the role of law and their future approaches to legal practice. If legal studies retain their traditional learning hierarchical format—meaning that knowledge is transferred as truth and certainty to passive recipients—students are likely to reproduce that hierarchy when they become lawyers or legal system officials.<sup>294</sup> Consequently, there is a strong argument to be made that as curriculum is reformed, so should the prevailing pedagogy as institutional practice in the legal academy.

Here, too, the field of women's rights has a contribution to make. Existing ex-cathedra pedagogy (discussed in Section IV(B)(1)) sends clear cultural, legal, and political messages to students that the skills associated with critical inquiry are not an important part of their education. This devaluation is antithetical to the values and methods in women's rights jurisprudence and legal practice that, through critical inquiry, identifies many forms of sex/gender based domination, subordination, inequality, and marginalization upheld in law and pays attention to voices that have hitherto been silenced or ignored. While a more expansive review of contemporary hierarchy-reducing pedagogies for law faculties is beyond the scope of this article, no discussion of legal academy educational reform is complete without rethinking that pedagogy is a part of curriculum reform.

## V. CONCLUSION

"Why are women's rights absent or marginalized in post-socialist legal education?" I answer my question by analyzing the processes of legitimation and delegitimation of women's rights in culture, politics, law, and legal institutions in the region. I argue that these spheres are connected to, and have an impact on, legal education and, more specifically, the contents of the law school curriculum and its pedagogy.

---

293. *Id.* at 67–68. In Poland, the clinic only provides written legal opinions. Clients are never represented in court.

294. Otto, *supra* note 260, at 40.



Unlike other subjects, such as commercial, criminal, administrative, or constitutional law, whose legitimacy for the modern state is not contested *per se*, women’s rights pose deep and destabilizing challenges to the law, culture, and politics of existing post-socialist fraternal patriarchal systems claiming to be liberal democracies. The women’s rights canon asks how gender works in law and how law works to produce gender.<sup>295</sup> In so doing, it identifies law as a “gendering strategy,”<sup>296</sup> helping to maintain social control. It exposes the maintenance of that control as resting, at least in part, on silencing or ignoring or victim blaming analyses and stereotypes.<sup>297</sup> It fully disputes the claim that women’s rights concerns are not legal issues and should thus be relegated to the realm of culture outside critical legal scrutiny.

At the time of this writing, the number of law faculties in the region offering a basic course in human rights or a European human rights course has increased from the nineties. Perhaps one or two class sessions are devoted to women’s rights. In subjects where explicit mentioning of women is unavoidable—family law and criminal law, for example—the contributions of women’s rights jurisprudence to crucial issues in these subjects are likely ignored or dismissed. Very few law faculties have developed women’s rights courses, seminars, or clinics, and to the best of my knowledge, none have paid serious attention to the intellectually challenging curriculum reform issue of gender mainstreaming, which recognizes the sex/gender impacts of law on both women and men and the power relationships that law and the legal practice construct and uphold. More likely, despite the passage of almost two and a half decades, the subject still is taught in externally funded trainings and seminars<sup>298</sup> open to lawyers or legal system officials, but not to students. By no means do I dispute the need for such continuing professional education. I suggest, however, that given the passage of time and the ongoing failure of law faculties, considered as part of the legal system elite, to remedy the curriculum deficiencies generated by the absence of women’s rights as an informing principle, as well as a substantive area of law, one might conclude that law faculties prefer to shift the intellectual burden by derailing its academic institutional recognition.

Clearly, the inclusion of women’s rights in the law curriculum is not a panacea. It is not a substitute for political will on the part of the state to actually implement and enforce its women’s rights obligations. Nor should it

295. Gender resists visibility and critique due to its pervasiveness and our personal investments. V. Spike Peterson, *Whose Crisis? Early and Post-Modern Masculinism*, in *INNOVATION AND TRANSFORMATION IN INTERNATIONAL STUDIES* 185 (Stephen Gill & James Mittelman eds., 1997).

296. Carol Smart, *The Woman of Legal Discourse*, 1 *SOC. & LEGAL STUD.* 29, 30 (1992).

297. See RIKKI HOLTMAAT & JONNEKE NABER, *WOMEN’S RIGHTS AND CULTURE, FROM DEADLOCK TO DIALOGUE* (2011), for a discussion of stereotyping.

298. The most extensive and vigorous one, the Women’s Human Rights Training Institute (WHRTI) in Sofia, teaches feminist legal theory and relevant legal skills for bringing cases in domestic, regional, and international fora. It has trained more than eighty lawyers in the region.



displace broad NGO consciousness raising campaigns and projects breaking the silence that envelops controversial issues.

That said, however, if one considers the legal academy as a forum for communication and dialogue, a site of a powerful socialization process for future legal professionals imbuing them with a commitment to a democratic, inclusionary rule of law, and a potential contributor to the legitimation of law and the legal systems at regime and output levels, then the almost complete absence of women's rights in the curriculum is deeply troubling and inconsistent with its mission to prepare lawyers and legal system personnel for their work in the twenty-first century. It is concrete evidence for the claim that law still is male-oriented in its references and its basic assumptions and is a *de facto* endorsement of different valuations<sup>299</sup> of women's and men's status and lived experience as legal subjects. It constitutes acknowledgement that legal education naturalizes a range of discriminatory harms identified in regional and international human rights canons and contributes to the compromised quality of citizenship for women.<sup>300</sup> To the extent that legal education actively supports or passively encourages the relegation of women's rights to the realm of culture instead of acknowledging it as a major concern of democracy and a rule of law, it serves the agenda of contemporary fraternal patriarchy in its neoliberal or backlash trinity iterations.

## APPENDIX A

### Survey Results

The surveys were conducted in May 2008 (end of the second cycle), November 2009 (beginning of the third cycle), and November 2011 (beginning of the fourth cycle) among participants in the Women's Human Rights Training Institute (WHRTI).<sup>301</sup> Eight questions with sub-sections were

299. "[G]ender equality cannot be equated with the right to work . . . [and] individual freedom [cannot] be sufficient when women and men's contributions are not similarly valued to begin with." Eisenstein, *Eastern European Male Democracies*, *supra* note 62, at 305.

300. Defined by law, citizenship "plays a role in the construction of gender differences as well as boundaries that are then created between individuals (and) the ways in which the state ascribes certain duties to women and men through cultural, economic and political means . . . and, generally speaking, on women's positions and gender relations within a particular society." Magyari-Vincze, *supra* note 24. See also RIAN VOET, *FEMINISM AND CITIZENSHIP* (1998); Zdravomyslova & Temkina, *supra* note 59, at 97.

301. The Institute, whose headquarters are in Sofia, Bulgaria, provides at least some of the legal education in women's rights lacking in the law faculty curriculum in the region. It trains Eastern European lawyers to develop and argue women's rights cases in domestic, regional, and international fora. It was founded in 2005 by an NGO partnership consisting of the Bulgarian Gender Research Foundation in Sofia, the Network of East-West Women in Gdansk, and the Center for Reproductive Rights in New York, and is funded by the Open Society Institute and other foundations.





asked; first, whether a human rights course was offered in their law faculty, whether they enrolled, whether women's rights were discussed, and how many classes were devoted to the subject. Then, the same sequence was asked for a European Human Rights course (added in the third survey) and a women's rights seminar. Next, whether women's rights were raised in other law faculty courses, and if so, which ones. What aspects of women's rights were covered and how much time. The last series of questions asked whether they had experienced sexist attitudes in their legal education and, if so, an elaboration. How much time was devoted to women's rights issues in those courses?

In 2008, sixteen lawyers (from Albania, Armenia, Bulgaria, Croatia, Cyprus, Hungary, Georgia, Latvia, Poland, Romania, Russia, Slovakia, and Turkey) participated in the survey. All but one were female. All but one studied law between 2000 and 2007.

Respondents from twelve of the thirteen countries stated that there was an elective human rights course at their law faculty consisting of formal lectures on legal texts with virtually no discussion. Less than one third recalled that, at best, one lecture was devoted to women's human rights consisting of a cursory formal review of the provisions of the UN Convention on the Elimination of Discrimination Against Women (CEDAW). Eight respondents noted that women's rights were briefly mentioned in at least one law school subject (four in family law; two in labor law; and two in an EU law course). All others stated that there was no discussion of women's rights in any law courses. One respondent reported that a women's rights course was available to LL.M. students and that her faculty's public interest law clinic, in principle, could handle women's rights cases, but that she did not remember any such cases. Eight respondents discussed the question about faculty and student attitudes toward women's rights. They recalled a dismissive attitude in some classes on the part of faculty and students toward women - however large their numbers in the lecture hall. Several considered the law faculty environment an intellectually unsafe one for raising women's rights legal issues. Six interviewees volunteered crude jokes about women by male law faculty in lectures. Each of the eight recalled feeling embarrassed and awkward when their classmates responded with laughter; several reported being angry, though they acknowledged that they did not dare challenge the professor or argue with their peers.

In 2009, for the third round of the Institute, twenty-two lawyers (from Albania, Armenia, Azerbaijan, Bosnia, Bulgaria, Czech Republic, Latvia, Macedonia, Moldova, Poland, Serbia, Slovakia, Tajikistan, Ukraine, and Uzbekistan and observers from Ireland and Spain) participated. All but two were female. Nine studied law during the late 1990s; thirteen studied law after 2000. Eleven respondents reported that there was a course on international human rights in their law faculty; fourteen stated that there was no course. Only two of the eleven reported that women's rights were discussed; one of



the two noted that CEDAW was only mentioned in passing. Six respondents stated that a separate course on European Human Rights was offered; one reported that this subject was added after she finished law school. Two of the six reported that women's rights were mentioned very briefly; one reported that since she was teaching the course, more time was devoted to women's right issues. All respondents reported that there was no women's rights course or seminar during their law studies. Eight respondents noted that women were briefly mentioned in at least one law school subject (family law (8); criminal law or labor law (4); constitutional law (3); international public law (1), and international humanitarian law (1)). Six interviewees responded to the question on faculty and student attitudes toward women's rights, noting that they felt uncomfortable raising women's rights issues. One reported that she and her classmates were not aware of the subject; another commented that there was no opportunity to discuss the issue; another stated that there was no qualified professor; yet another remarked that no one would listen or know the answers. One respondent was told to "stop her feminist tricks."

In 2011, twenty-four lawyers from Albania, Armenia, Azerbaijan, Bosnia, Bulgaria, Lithuania, Poland, Romania, Russia, Slovakia, Tajikistan, Ukraine, and an observer from Spain participated in the Institute. All but three are female. The majority (13) had their legal education since 2000; four had their legal education "on the cusp" (spanning time late nineties and early twenty-first century); five had their legal education in the mid to late nineties.

Eight respondents stated that a Human Rights course or seminar was offered in their faculties; one reported that it was offered as an option but not enough students signed up. Another reported that human rights were briefly discussed in the international and constitutional law classes. Six of the eight took a Human Rights course. Only two respondents indicated that women's rights were discussed at all—and, then very briefly. Eight respondents indicated that a European Human Rights course was offered; six took the class. Only one respondent indicated that women's rights were discussed at all and, then, only "partially." Two respondents from the same law faculty stated that a women's rights seminar was offered; one of them took the seminar. Another took a seminar on Islam and Law in which women's rights were discussed. The majority of respondents (12) stated that women's rights were not discussed in any other law school courses; those who reported, that there were discussions and specified the subject—family law (4), labor law—pregnant workers (2), and criminal law (2)—stated that, at most, two hours or one class was devoted to the subject, except for one respondent who stated that because the professor is a feminist, twenty percent of the criminal classes included women's rights. Eight respondents reported sexist attitudes from faculty or students regarding rape (2), abortion (1), and election quotas (1). Three reported faculty comments that women are less intelligent or are not as good as male lawyers, and one reported incidents of sexual harassment.

*Keri Ellis* is an attorney qualified in the United States. She received her J.D. from the John Marshall Law School and her LL.M. in Human Rights Law from the University of Cape Town. Ellis clerked for the Honorable Charles P. Kocoras on the U.S. District Court for the Northern District of Illinois and served as a volunteer instructor in international humanitarian law with the American Red Cross. Her current work focuses on the right to water and the right to sanitation in the Western Cape Province of South Africa. Email: [keri.ellis.94.01.12@gmail.com](mailto:keri.ellis.94.01.12@gmail.com).

*Loretta Feris* is a Professor of Law in the Institute of Marine and Environmental Law at the University of Cape Town and teaches natural resources law, pollution law, and international environmental law. She holds a BA(law), LL.B. and LL.D. from the University of Stellenbosch and an LL.M. from Georgetown University. Previously she was associate professor of law at the University of Pretoria, where she was also a research associate at the Centre for Human Rights. Feris is an NRF-rated researcher; her research interests include environmental rights and trade and environment. She is a Law Commissioner of the World Conservation Union (IUCN) and a member of the IUCN Academy of Environmental Law. She consults in the area of environmental law and trade and environment.

*Isabel Marcus* teaches women's human rights at SUNY Buffalo Law School and is a women's rights advocate and activist. She also has taught extensively in post-socialist and Asian law faculties, worked closely with women's rights NGOs, and is a co-founder of the Women's Human Rights Training Institute (WHRTI) in Sofia, Bulgaria.

*Emma Mawdsley* is a Senior Lecturer in the Geography Department, University of Cambridge. In addition to her research on Indian environmental and regional politics, she has worked on many aspects of international development. Her recent research concerns the "emerging powers" as development actors, and she is the author of *FROM RECIPIENTS TO DONORS: EMERGING POWERS AND THE CHANGING DEVELOPMENT LANDSCAPE* (Zed, 2012).

*Teresa Godwin Phelps* is Professor of Law and Director of the Legal Rhetoric Program at American University's Washington College of Law. She has been involved in teaching legal writing and developing legal writing programs for the past thirty years, both at WCL and at the University of Notre Dame Law School. In 1986, she wrote a seminal article, "The New Legal Rhetoric," that has had lasting influence on the way that legal writing is taught. She is a member of the Editorial Board of *Legal Rhetoric & Communication* and is on the Board of Directors of the Association of Legal Writing Directors. In addition to her expertise in legal rhetoric, her scholarship focuses on the intersection of law and narrative; she has written about the power of legal narratives in areas as diverse as domestic violence and transitional democracy. She has published numerous articles and three books on legal writing, on women and the law, and on transitional democracy and truth commissions. Her book, *Shattered Voices: Language, Violence, and the Work of Truth Commissions* (University of Pennsylvania Press, 2004), analyzes and evaluates truth commissions through the lens of narrative theory. Her more recent work focuses on the relationship between storytelling and building a human rights culture and on post-conflict remedies for



Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.