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A CRITICAL LEGAL PERSPECTIVE ON THE RECENT CZECH TRANSGENDER CASE (Pl. ÚS 2/20) / Nikolas Sabján

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Abstract: *The purpose of this short commentary is to present a critical legal analysis of the recent Czech Constitutional Court's judgment on trans rights. The paper puts forward an external legal perspective characteristic for critical jurisprudence and it aims to show the presence of antagonistic interests and the extra-legal (ideological) factors that permeates and influences the judicial decision-making. It outlines some of the theoretical assumptions of critical jurisprudence which are, subsequently, applied to the Court's judgment. More specifically, it follows the theoretical project of agonistic jurisprudence and attempts to show how it could be utilised in the context of judicial decision-making.*

Key words: *Transgender rights; PL. ÚS 2/20; Ideological critique of law; Critical legal theory*

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1. INTRODUCTION

Transgender rights, and more generally, issues surrounding trans people have become the object of fierce debate in recent years. Heated, though interesting and complex debates are underway in Anglophone countries (mainly in the UK and US; see e.g., Pape, 2022; Sharpe, 2020; Asteriti and Bull, 2020), in continental Europe (see e.g., Continental Europe Enters the Gender Wars, 2021; Europa-Kolleg Hamburg, Institute for European Integration, 2019), as well as in jurisdictions beyond the West (Jain and DasGupta, 2021).

Similarly, Central Europe (the context from which the author is writing) is also "catching up" and the topic is becoming part of public and academic discourse (see for instance Batka, 2021; Meteňkanyč, 2021). On the one hand, this development is welcomed. Simultaneously, however, it is unfortunate that the debates are oftentimes rather uneducated (particularly in the context of public/political discourse), full of prejudices and stereotypes. In some cases, there is an outright dismissal of the legitimate concerns of trans people as these are perceived as "subversive", "unconventional" or "unnatural". In particular, the topic itself has triggered a strong reaction from conservative groups and political subjects. For instance, the call for the protection of gender, gender identity or gender expression under human rights norms is decried by the usage of

derogatory terms such as "gender ideology" (UN Human Rights Council, 2021a). The "gender ideology" narrative is sometimes even framed as a global conspiracy with the aim to destroy political and social orders (UN Human Rights Council, 2021a). More generally, the debate concerning trans rights is part of what is sometimes referred to as "culture wars" (Barša, Hesová and Slačálek, 2021).

Against this background, the recent trans case decided by the Czech Constitutional Court (PL ÚS 2/20) can be perceived as emboldening the above-mentioned conservative forces and amplifying the emerging "gender wars" in the Czech Republic.[1] Arguably, the most controversial part of it concerned the Court's reasoning with respect to Section 29 of the Civil Code, which imposes mandatory sterilization for gender reassignment and which was ignored and thereby implicitly upheld as constitutional (I will come back to this later). Thus, it is hardly surprising that the judgment was characterized by Zuzana Vikarska and Sarah Ouředníčková as "*evasive, insensitive, ignorant and political*" (2022).[2] Their analysis, together with the dissenting opinion of judge Šimáčková provides, in my view, compelling arguments against the Court's conclusions. However, these analyses could be described as *internal legal perspectives*. These are valuable and I do concur with them. But my aim in this paper is to present, in the tradition of critical legal theory, an *external legal perspective* that is needed to complement the internal perspectives.[3] Thus, my aim is to situate the Court's decision in a more broad (critical) theoretical perspective to show how the Court's reasoning is influenced by ideological presuppositions, which remain hidden or are obscured by the supposedly rational, logical and *apolitical* character of its reasoning.

Taking into account the aforementioned, the paper is structured as follows: first, I will lay out and explain what I consider to be the core theoretical assumptions of critical legal tradition. This includes, in my view the political nature of the social world, hermeneutics of suspicion and the emancipatory ideal. More generally, my theoretical inspiration comes from Rafał Mańko's project of agonistic jurisprudence (2021, pp. 175-194) which, to my mind, represents an effective and theoretically sound framework for critically analysing judicial decision-making. The present paper adopts the essential attributes of this theoretical and intellectual project.

Subsequently, the second part will focus more closely on the Court's judgment by applying the critical-legal theoretical framework. First, I will briefly describe the facts of the case. Secondly, the emphasis will be put on the main legal arguments of the Court's decision. Even though I am primarily concerned in this paper with the *external* legal perspectives, it should be pointed out that reference will be made, naturally, to *internal* perspectives too. Or, to put it differently, every critical legal analysis should consist of a combination of internal and external perspectives, stressing how they are dialectically interconnected. Finally, I will conclude with a few comments regarding the topics discussed.

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[1] There is also an ongoing debate in Slovak Republic about a new technical guidance published by the Ministry of Health, which no longer prescribes sterilization in cases of gender reassignment. However, there has been a backlash from conservative members of the parliament.

[2] Though there are other reasons for it as I explain below.

[3] Internal legal perspectives are characteristic for traditional, positivist legal approaches where law is separated from social, political, economic, or ideological aspects and the main emphasis is put upon strictly legal arguments from within. External perspectives are more concerned with these extra-legal factors and their aim is to situate the process of legal argumentation, reasoning and decision-making in the broader socio-political and ideological context. I would like to primarily focus on this latter, external perspective. For a more detailed discussion see: Douzinas and Gearey (2005, pp. 16-17).

2. THEORETICAL BACKGROUND

As mentioned above, I will try to briefly outline the core theoretical assumptions of critical legal theory, albeit it is not possible to give a fully detailed account of all the theoretical assumptions due to limited space.[4]

2.1 *The Political Nature of the Social World*

Many of the recently published work on critical legal theory emphasizes the political[5] nature of the social world, i.e. the inherently antagonistic nature of the social. These antagonisms are in some sense universal and ineradicable. Critical legal theorists (e.g., Rafal Mańko) invoke the work of Chantal Mouffe and her notion of agonistic democracy (Mouffe, 2013), emphasizing the conflictual nature of the whole democratic project (Mańko, 2021, p. 178). This aspect represents also the dividing line between Marxist and post-Marxist theories – the former, at least in their orthodox versions, assume the possibility of eradicating social antagonisms whereas the latter disagrees with this conclusion. However, it should be clarified that conflict (in the post-Marxist sense) does not have a pejorative connotation. For Mouffe, conflicts form an important and productive part of democratic politics and she is critical towards the possibility of rationally reaching consensus. In other words, she does not have much patience with the liberal understanding of politics as a means to rationally resolve conflicts by the activity of experts, tinkering with technicalities where ideological and value-driven questions are apparently absent. At the same time, Mouffe is clear about the need to maintain the institutional and rules-based order – these are the "background requirements" to prevent the destruction of democratic system. To put it more precisely: "*conflict, in order to be accepted as legitimate, needs to take a form that does not destroy the political association*" (Mańko, 2021, p. 178).

Now, we cannot identify a closed list of antagonism(s). These are, rather, relative to the specific socio-economic and historical context in which they occur and play out. In spite of this, it is possible to identify, quite schematically, two different categories: economic and socio-cultural antagonisms. The former includes, for instance, conflicts between employers/employees, consumers/traders, tenants/landlords and so on. The latter category is more relevant for our analysis: these include antagonisms in the context of reproductive rights, discrimination based on race, ethnicity, sex or *gender*. The conflicts are taking place, by and large, between liberals/socialists and conservatives (or more generally, between traditionalists and progressives).[6]

Critical legal theorists aim to extend this theoretical framework to the legal sphere as well (i.e. to the so-called *juridical*) (Mańko, 2021, pp. 179-181). As Mańko explains: "*in my theoretical project the judge, as decision-maker, will be portrayed as someone arbitrating between conflicting (antagonistic) interests – in every single case that is adjudicated – on the assumption that political conflicts do not come to an end when legislation is enacted, but they continue in the courtroom*" (2021, p. 176). He then proceeds by stating that judgments, "*cloaked in legal form* (…) *decide on individual instances of on-going collective conflicts, opposing* [for instance] *moral progressives to traditionalists,*

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[4] Nevertheless, many of the theoretical and methodological issues have been covered elsewhere. See for instance: Hunt (1987, pp. 5-19); Mańko (2018, pp. 24-37); Mańko and Łakomy (2018, pp. 469-486).
[5] The concept of political is understood here as a "*space of power, conflict and antagonism*." Mańko (2021, p. 177).
[6] Although there are disagreements within the liberal/left ideological "camp" when it comes to trans rights (see for example: Zanghellini, 2020, pp. 1-14).

minorities to majorities and so forth" (2021, p. 176). It is important to note that these antagonisms decided in the courtroom are not *only* the result of rational and logical methods, relying merely on law but are permeated by ideological considerations. The ideological aspects of judicial decision-making are also an essential assumption of critical jurisprudence to which we now turn.

2.2 *Hermeneutics of Suspicion/Ideological Critique of Law*

The most succinct definition of the hermeneutics of suspicion in the legal field[7] is put forward by Duncan Kennedy, who points out that "*contemporary elite jurists pursue, vis-à-vis one another, a 'hermeneutic of suspicion', meaning that they work to uncover hidden ideological motives behind the 'wrong' legal arguments of their opponents, while affirming their own right answer allegedly innocent of ideology*" (2015, p. 91). More broadly, it is a practice, which aims to uncover hidden interests and meanings in the legal field. Even though there is much to be said about this form of hermeneutics, we shall stick to this short description by Kennedy and flesh out two further issues implicitly connected to this practice: first, the ideological critique of law; and secondly, the well-known argument of critical legal scholars concerning the indeterminacy of law. These are structurally interconnected.

Starting with the relation of ideology and law – much ink has been spilled over this issue and it is not possible to rehearse these debates in more detail here. I shall make only a few comments regarding this complex issue. First, we should distinguish between, on the one hand, *legal ideology* (or synonymously, ideology of law) which is understood here as a mechanism which contributes to the legitimacy of the legal system and more broadly, to the existing socio-economic order. It achieves this mainly by the processes of legitimization, naturalization, and universalization.[8] In other words, legal ideology maintains and reproduces, on the *structural* level, the existing order.

By contrast, *ideology in law* refers to specific ideologies penetrating and influencing legal actors and law as such (e.g., judicial decision-making, legislation, doctrine and so forth). Here we can return to Kennedy's claim above. Essentially, Kennedy argues that judicial decision-making is an ideological struggle and he distinguishes between "activist judges", "difference-splitting judges", "bipolar judges" or simply "centrists" (Mańko, 2021, p. 182). The ideological struggle applies, presumably, to lawyers, academics and other legal actors alike (Kennedy, 2007). Simply put, Kennedy is pointing to the ideologically motivated legal practice (and theory too) since, as he puts it, "*judges who claim they are ideology free are either acting in bad faith, or simply in denial in the psychoanalytical sense*" (Mańko, 2021, p. 184). Although Kennedy is working in a different legal context (common law system) and mostly focusing on appellate courts, his view is, I believe, correct. This description is especially accurate when it comes to, for instance, human rights/constitutional law (our case) or public international law.

One further aspect shall be mentioned with regards to the concept of ideology. It is not uncommon to invoke it as a phenomenon in connection to issues of truth/falsity or reality/fiction. This is how Marx and Engels' work is sometimes interpreted through their notion of false consciousness.[9] Now, there are more refined interpretations of Marx's and Engels' work which show that they did not use the concept of ideology only with this meaning. However, we shall skip this debate for it is not directly relevant for our purposes.

[7] For a different view see Leiter (2004, pp. 74-105).
[8] For a more in-depth analysis of these terms, see Marks (2001, p. 112) or Eagleton (2007, chapter 1).
[9] Marx never actually used this term. It was Engels, who used it in his correspondence with Franz Mehring. See: Marx-Engels Correspondence (1893).

What is more important is that in our usage ideology does not deal with questions of truth or falsity, i.e. it is not concerned with epistemic questions. Rather, ideology is understood as functional "*with regard to some relation of social domination ('power', 'exploitation') in an inherently non-transparent way: the very logic of legitimizing the relation of domination must remain concealed if it is to be effective*" (Žižek, 2012, p. 8). Thus, according to Žižek, ideology critique starts with the assumption that "*it is easily possible to lie in the guise of truth*" (2012, p. 8). In other words, ideology critique discerns how the content of certain statement or text (e.g. a legal text) even if factually correct, might legitimize a relation of domination.

Let us now turn to the second issue that is the indeterminacy of law. We turn again to Kennedy who presents what may be called a relative indeterminacy of law and puts forward a leftist phenomenological theory of interpretation (2008, pp. 154-173). Kennedy's theory can be summed up in the following way: legal materials do not determine *per se* the result of an interpretation, though they constrain the legal actor. In his view, legal actors interpreting texts are driven by as strategic (ideological) aims. However, achieving a preferred (ideological) result is "*a function of time, strategy, skill and the 'intrinsic' or 'objective' or 'real' attributes of the rule one is trying to change*" (2008, p. 160). Accordingly, it is in my view acceptable to characterise his theory as a relative indeterminacy of law – far from being an "anything goes" ethos, Kennedy recognizes the limiting nature of legal texts. However, the acceptable and dominant interpretation of a legal problem is determined also by other factors (as mentioned above). In addition, a crucial limiting factor in legal interpretation is the prevalent, i.e., *hegemonic* ideology. As Mańko points out, citing another Polish legal scholar Lakomy: "*if certain legal interpretations are more prevalent and treated as 'objective' by a give legal community, this is because of a shared cognitive structure of the members of a give interpretive community*" (2021, p. 183). In other words, this hegemonic ideology plays a crucial role in maintaining a specific solution to a legal problem and this is then perceived as the "correct" interpretation of law. A consensus emerges in the legal community and this interpretation is treated almost as if it was "natural" until a *counter-hegemonic* ideology emerges and questions the existing hegemonic view (including the existing "solution" to a specific legal problem).

Now, I want to add to the analysis that it is paramount to avoid an "universalising" approach which tries to present a one-size-fits-all conclusion. Nevertheless, I want to insist upon this feature of a struggle between hegemonic/counter-hegemonic ideologies permeating the legal domain and playing an essential role in the context of legal interpretation. But the point is that this struggle is different in each legal field. For instance, since human rights norms are much more abstractly formulated and normally actors in this field are more "progressive" (or one shall say less conservative) than in other fields, so it is more prone to reinterpretation and change. Nevertheless, taking the example of rights further, I think Kennedy correctly argues that rights are neither progressive or regressive *per se*; it is simply a medium through which individuals/group express their subjective preferences (2002, pp. 178-229). Additionally, the interpretation of these rights is heavily influenced by the existing hegemonic/counter-hegemonic ideological forces.

2.3 *Emancipation*

The last theoretical assumption that I would like to briefly mention is the emancipatory ideal of critical jurisprudence. The basic idea comes from Max Horkheimer (and other theorists from the Frankfurt school) who argued that the main distinguishing

criterion between traditional and critical theory is emancipation (Horkheimer, 1972, pp. 188-244). Critical theories aim to extend the freedom of individual as much as possible and simultaneously eradicate all forms of domination in social relations (Bohman, 2016).

This emancipatory goal is present also in the work of critical legal theorists whereby the importance of connecting theory to practice is underlined. Legal theories and philosophical work should not be produced for its own sake, but the objective is to directly address and affect the "outside world". Thus, it is not incorrect to describe the work of critical legal theorists as "engaged" and concerned with practical ends. This involves, for instance, analyses of how this or that decision of a court, legislation or legal interpretation affects different individuals and groups, whether it further entrenches relations of domination or sustains and helps to reproduce exploitative relations and so forth.

2.4 *Critical Analysis of Judicial Decision-Making*

Rafal Mańko concludes his latest article with specific suggestions for critical case-law analysis. It goes something like this: first, we need to identify the social antagonism(s) present in a specific case. Secondly, legal materials that the court could apply shall be identified. Thirdly, all the interpretative possibilities of a given legal material should be laid out. Fourthly, the decision itself is analysed with the aim to determine which of the antagonistic interests it favours. Fifthly, the emphasis should be put upon the ideological presuppositions of the chosen interpretation by the court. Ultimately, the analysis should indicate alternative (strictly) legal interpretations that will lead to results more in line with the emancipatory goal, thus in favour of, for example, minorities (Mańko, 2021, pp. 187-189).

3. CZECH CONSTITUTIONAL COURT ON TRANS RIGHTS

3.1 *Facts of the Case*

The facts of the case are relatively straightforward. The complainant (T.H.) is a non-binary person who was born as a man. T. H. does not identify as a man, nor a woman but if they had to choose, they would prefer to be considered as a woman. The complainant have undertaken hormonal therapy and certain aesthetic changes but have not undergone any surgical operations since they do not deem that necessary and which is quite common among trans people.

T. H. submitted a request to the Czech administrative authorities whereby they wanted to change the birth number from male to either a neutral or a female form. However, the authorities refused this request since T. H. had not fulfilled the conditions enshrined in Section 29 of the Civil Code, i.e., sterilization.

They initiated proceedings against this decision with the aim to question the constitutionality of three norms related to the process of gender reassignment: first, Section 29 of the Civil Code, which stipulates that gender reassignment occurs "*through surgery with the simultaneous disabling of the reproductive functions and the transformation of sexual organs*"; secondly, Section 21(1) of the 2012 Act on Specific Health Services concerning surgical intervention; thirdly, Section 13(3) of the 2000 Act on Registration of Population and Birth Certificate Numbers which prescribes the method of determining birth numbers which contains information about the sex and age of a person.

3.2 *Decision of the Court*

The Court upheld (implicitly) the constitutionality of the first two norms – implicitly because the Court did not carry out the constitutional review as it concluded that T. H. did not aim to undergo, in line with Section 29 of the Civil Code, sterilization. Consequently, the first two norms were, in the opinion of the Court, irrelevant. As stated by the Court: "*the complainant did not fulfil the condition for a change of his birth number before submitting the request, irrespective of Section 29 of the Civil code*" (Vikarská and Ouředníčková, 2022).[10] Concomitantly, the Court stated that T.H. "*identifies as a neutral person without an assigned sex.*" Thus, according to the Court, the mandatory sterilization for gender reassignment stipulated in the aforementioned Section 29 is not decisive since "*in the Czech legal order, gender reassignment means a transformation from a man to woman or from a woman to man*" but T. H. identifies as a non-binary person. And, as the Court stated, rather oddly, "*in the Czech Republic, people are divided into women and men.*" Based on this, the Court refused to rule on the constitutionality of Section 29 of Civil Code and therefore, it did not address the core issue of sterilization in the context of gender reassignment.

With respect to the issue of birth numbers, the Court stated the following: it accepts the possibility of self-identification with a different gender. However, this is irrelevant for birth numbers – their purpose is to register sex assigned at birth. In this regard, the Court opines that only the information about biological sex registered by the state is "useful"; by contrast, gender identity "*does not have any objective, meaningful use for the state and remains outside the state's reach or record, because there is no reason for this record*" (Vikarská and Ouředníčková, 2022). The Court continues in its reasoning, which seems to suggest that biological sex is "real" and gender identity is merely a "fiction". In relation to right of self-determination as part of right to privacy, the Court concluded that everyone has the right to "*perceive themselves however they wish*" but this should not be confused with the "*right for reality to be different than it is, i.e. with the right to some kind of a fiction*" (Vikarská and Ouředníčková, 2022).

I shall mention two further comments made by the Court and then move to the next part, which will critically scrutinize the Court's conclusions. First, the Court, without giving any explanation whatsoever, ignored the case-law of the European Court of Human rights[11] as it has "*considerable doubts about the transferability of some of the conclusions of the ECtHR to the environment of the Czech legal system.*" This was strongly criticized by the dissenting judges. Secondly, the Court concluded the judgment in its very last paragraph by stating that questions regarding persons as biological species, their lives and relationships should be dealt with and resolved in the Czech parliament. Otherwise, the "*judicialization of these issues may lead to the politicization of the Constitutional Court and thus to the weakening of its position as an impartial and independent judicial body protecting the constitutional order*" (Vikarská and Ouředníčková, 2022).

3.3 *Critical Notes*

After this brief outline of the facts of the case and the decision of the Court, I shall turn to the final part of this paper. Generally speaking, my purpose is to undertake an

[10] I am relying in my text on the translation found in the cited text.
[11] See the references to the ECtHR case in the dissenting opinion of Kateřina Šimáčkova. For a further analysis of case-law on this issue see Arnauld, von der Decken and Susi (2020, pp. 193-207); Bassetti (2020); or Horvat (2021).

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ideological critique of this decision in the light of the above-mentioned theoretical framework.

The first step should involve the identification of conflict(s)/social antagonism(s) of the case at hand. By and large, the antagonism here is between two competing ideologies – traditionalism and progressivism or more precisely, left/liberal interpretation on the one hand (the complainant) and the interpretation of the Court in line with conservative ideology.[12] The antagonistic interests in this context can be subsumed under the group of socio-cultural antagonisms (see above) which involve, more broadly, two contradictory interests – the interests of trans people as a minority group and the majority (which was clearly favoured by the Court in this case). At the same time, a more specific antagonism would be that of gender non-conforming (those who reject the male/female binary)[13] persons against the cisnormative (privileged) group trying to maintain the existing order of things and prefers the existing gender norms. The latter group was favoured by the Court. This can be demonstrated by the reasoning of the Court where the implicit message is that T. H. as a non-binary person does not fit within the male/female binary and "*in the Czech legal order, gender reassignment means a transformation from a man to woman or from a woman to man*."[14] As I explained above, this is the reason why the Court refused to consider the constitutionality of Section 29 of the Civil Code, which requires mandatory sterilization in the case of gender reassignment.[15]

Secondly, the determination concerning the legal materials that a court could find appropriate to decide the case is necessary. Even though in the case at hand the Court refused to deal with the constitutionality of two norms (concerning sterilization and surgical intervention) - and the decision in this respect was hardly convincing - these should have been applied. In fact, the majority of judges supported this view – sterilization as a condition enshrined in Section 29 of the Civil Code was the core issue and should have been considered. That is also why the decision was characterised by legal scholars as *evasive*.[16]

Had the Court applied these norms, the third step would have focused on the different possible interpretations of these relevant legal materials. Here, we shall reaffirm the hermeneutics of suspicion which directs us to the conclusion that "*no legal norm, be it a constitutional principle, a legislative rule or a precedent, may be simply 'applied' to a given set of facts without its interpretation*" (Mańko, 2021, p. 188). That would disregard the "*true stakes behind a given interpretation*" (Mańko, 2021, p. 188). Here, even the decision *not to* apply the earlier mentioned legal material is, of course, an interpretative act. And an ideological one, for that matter. If it had applied these norms (especially Section 29 of Civil Code), it would have been much more difficult for the Court to disregard conflicting, progressive interpretations (mandatory sterilization as a violation of right to privacy, as accepted by the ECtHR and other international quasi-judicial organs, such as the Human Rights Committee, or even in contravention of prohibition to be subjected to torture or to cruel, inhuman or degrading treatment or punishment).

[12] That is why it was welcomed by some conservative groups in Czech Republic, e.g. the Aliance pro rodinu (Alliance for family). Its statement can be found here: https://alipro.cz/2022/04/03/tz-rozhodnuti-ustavniho-soudu-chrani-deti-i-materstvi-a-otcovstvi-ktere-nelze-libovolne-menit/.

[13] Analyses of these terms can be found in Haefele-Thomas (2019, chapter 1); or Duffy (2021).

[14] Or as the Court stated "*in the Czech Republic, people are divided into women and men*."

[15] Of course, this argument is rather dubious, if not simply wrong, since T. H. also claimed that if they had to choose, they would prefer to be considered as a woman (e. g. in the context of birth number change). The Court ignored this fact as it was pointed out by Šimáčková in her dissenting opinion and this interpretation was also criticized by Vikarská and Ouředníčková (2022).

[16] See above.

Now, with respect to the third question (the birth number issue), it is also possible to imagine other interpretations which would be more in favour of the complainant (i.e. recognition of a third gender category). Such interpretation was reached by the Federal Constitutional Court in Germany (UN Human Rights Council, 2018, p. 18) or in other jurisdictions (Jain and DasGupta, 2021). The context, to be fair, was different. But the point is that alternative interpretations are conceivable.

Under the fourth step, Mańko proposes to order the results of an interpretation "*on an axis extended from the maximization of interests of group A to the interests of group B*" (2021, p. 188). (Un)surprisingly, the Court's interpretation maximizes the interests of the majority (and it is in line with the traditional/conservative ideologies). I do concur with Mańko that "*there can be no 'neutral' position on the axis, no 'perfect compromise' but that always the position between two poles benefits more to one or to the other side*" (2021, p. 188). Usually, the liberal counterargument invokes the methods of balancing or proportionality tests. I find this argument problematic and unconvincing because it merely shifts the issue onto a different level as balancing or proportionality tests are even more open to outside, ideological/political forces (see e.g., Koskenniemi, 2010, pp. 47-58). Thus, we cannot avoid these outside influences. Moreover, we cannot identify a "perfect compromise" in cases like the one, which is being discussed simply because there is always one side whose interests and values are upheld or supported.

The fifth step includes the analysis of Court's interpretation from the perspective of different ideologies. I already hinted at this before – the two antagonistic interests framed according to two clashing ideological positions. I would add to this that it was clearly the hegemonic ideology (the traditionalist/conservative) which guided the Court's interpretation. First, the Court conveniently evaded the problem of sterilization required in for gender reassignment, thus supporting its ideological presuppositions (i.e. *status quo*). Secondly, without elaborating on this further, the Court dismissed the existing case-law of the European Court of Human Rights. As we can see here, an emerging counter-hegemonic ideology is present on the supranational, but also international level (again, conveniently ignored by the Court) (UN Human Rights Council, 2021b). Third, it is symptomatic that the Court invoked a sort of "*ultima ratio"* argument that if it had dealt with these questions, it would have led to *politicization* of the judiciary. In my view, it is precisely the function of constitutional courts to decide these pressing questions and provide protection to the minority groups against the possible "tyranny of majority". But what's more important is the assumption of this last argument: it is that non-decision in these cases is somehow *apolitical* or non-ideological whereas the opposite would constitute a politicization. This conclusion is fundamentally flawed as non-decision in this case is in itself an *ideological* position, meaning that it maintains and reproduces the existing injustices and relations of domination (trans people subjected to inhumane practices, perpetuating symbolic and material harms, etc.) and the conclusion is consistent with the hegemonic (conservative) ideology. In other words, there was no *apolitical* or *non-ideological* position in the context of this case.

In the sixth step, an alternative legal interpretation more favourable to the opposing antagonistic interests backed by strictly legal arguments (linguistic, systemic, teleological and so forth) should be presented. As we referred to these above, it is not required to rehearse them again.

4. CONCLUSION

I have tried to show, in line with the theoretical assumptions of critical jurisprudence, the antagonistic interests present in the context of the recent trans case

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decided by the Czech Constitutional Court, as well as the influence of ideologies (either hegemonic or counter-hegemonic) which guided the Court. Critical legal approaches, as opposed to traditional theories, bring out to the fore these conflicts and ideological presuppositions and it was precisely this aspect that guided our analysis of the Constitutional Court's decision.

The fundamental assumption of this approach is that *things could have been different*. Although legal materials, together with other factors such as the hegemonic ideology, constrains the interpretations and decisions of courts, we can always find equally acceptable and sound interpretations (though these are also influenced by ideologies) which are more inclined towards the emancipatory goals of critical jurisprudence.

However, we should not succumb to the commonly held view that critical legal theory is nothing more but a nihilistic attitude where "anything goes". Additionally, as Karl Klare correctly argues, the fact "*that the legal and moral/ideological cannot be disentangled does not imply that there are no different between them or that these differences are unimportant*" (2015, p. 11). The law does constrain and there are good/convincing and bad/unconvincing legal arguments (though these are not static and change over time). However, we should recognize the extra-legal factors being at work in the legal field.

In addition, the fact that hegemonic and contra-hegemonic ideologies are always present in the legal field (e.g. in the context of judicial decision-making as argued earlier) does not mean that everything is ideological, and thus, any decision is qualitatively the same. As we tried to show above, it should be always determined which interests are maximized by a decision and which group is favoured/disadvantaged by it. Furthermore, the analysis should focus on how a certain interpretation/decision perpetuates relations of domination and social stratification. The purpose of this paper was precisely to focus on these aspects.

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