Chapter 18

Unequal Czech Old Age Pensions for Men and Women in the ECtHR's Case Law with Special Regard to *Andrle v. the Czech Republic**

Martin Stefko

Abstract

The purpose of this article is to provide an overview of the Czech pension policy in the light of Mr Andrle's case and to present the underlying argumentation. How is it possible that Mr Andrle did not win the case, although he had suffered discrimination to the extent that he was obliged to collect additional 4 years and 20 months of insured periods? As a woman, no such additional period would have been required. Despite the obvious gender-based discrimination, neither the Constitutional Court of the Czech Republic nor the ECtHR dared to declare this to be a discrimination. The former supported the explanation with the reasoning that there was nothing to do as the advantageous pension insurance status of women could only be abolished but not replicated to the status of men and that everything was covered by the people's power. The ECtHR argued that this practice was to be stopped, was going to be stopped by the policymakers, but Czechs simply needed more time. Czechs have had more time, but the will of the people remained more or less the same.

Keywords: pension insurance, old age, caretakers

* Acknowledgment: this article has been written and published thanks to the financial support of the grant project COOPERATIO/LAW.

Martin Stefko (2025) 'Unequal Czech Old Age Pensions for Men and Women in the ECtHR's Case Law with Special Regard to Andrle v. the Czech Republic'. In: Nóra Béres – Renáta Hrecska-Kovács (eds.) *The ECHR at 70: The Central European Narrative*, pp. 419–433. Miskolc–Budapest, Central European Academic Publishing.

https://doi.org/10.54237/profnet.2025.nbrhkechr_18

1. Introduction

Retirement ages[1] have come to be important milestones in people's working lives. People not only hope or dream about a long and happy retirement, but also they have to adjust their lives to be prepared to support themselves during this period of life. Mr Andrle took care of his two children.[2] He claimed the advantageous lowered retirement age reserved to women but was refused by the Czech Social Security Administration on the basis of his gender. The lowered retirement age was available only to women. Czech courts upheld the negative decision issued by the Czech Social Security Administration and so did the European Court of Human Rights (hereinafter 'ECtHR'). As a result, Mr Andrle did not retire at 57 but had to work almost until the age of 62.

The relevant Czech regulations and case law were found to be in line with the Convention on Human Rights and Fundamental Freedoms, in particular with Article 14 thereof. In this particular case (hereinafter referred to as the '*Andrle* case'), the ECtHR pointed out that: "*In the light of the specific circumstances of the case, this approach continues to be reasonably and objectively justified on this ground until social and economic changes remove the need for special treatment for women.*"

The ECtHR reaffirmed that gender equality allows for taking special measures that compensate for factual inequalities between men and women. It motivated such discrimination along three main considerations:

- 'specific historical circumstances',
- difficulties to pinpoint any particular moment when the unfairness to men begins to outweigh the need to correct the disadvantaged position of women using affirmative action and
- move towards equalisation of the retirement age.

What was formerly the twilight phase of a worker's life is now, some 126 years later, equal to the length of a person's youth. People are getting older and older, which means they can work for longer periods but are unwilling to do so. In this article, we will analyse the relevant case law of the ECtHR to place the *Andrle* case into a broader international context (section 2). The subsequent section will consider the historical circumstances that led to the establishment of a lowered age for women in the 50s of the previous century in the totalitarian satellite State of the Soviet Union. The fourth section will compare the legal opinion expressed by the ECtHR to subsequent Czech legislative developments (section 4) because, in the aftermath, the Czech legislature did several things. It abolished the lowered age for women.

1 The retirement age is legal shorthand for an age that has to be reached in order to be eligible for the benefit provided by national laws, in case of living beyond a prescribed age.

2 Mr Andrle is a citizen of the Czech Republic. He was married from 1971 until 1998 when his marriage was dissolved. Based on an application, his two minor children were entrusted to his care by decision of 16 July 1998 of the District Court in Ústí nad Orlicí. Case of *Andrle v. the Czech Republic*, Application no. 6268/08.

However, it also continued in the old ways and developed an additional increase in pensions for women only once again.[3]

2. International and European Union Standards

The 1948 Universal Declaration of Human Rights, the founding human rights instrument of contemporary international human rights law, included the first reference to retirement age. This reference can be found in Article 25 I, which states that everyone has the right to security in their old age. Beyond dispute, the International Labour Organisation ("ILO") has the most important role in setting development standards that affect retirement ages. The ILO has developed standards for the statutory age, expressed in Convention No. 102: the retirement age shall be not more than 65 years, unless a higher age is fixed by a competent authority, with due regard to the working ability of elderly persons in the country concerned.[4] ILO Convention No. 142 indicates that career guidance and vocational training should be provided without discrimination based on age.[5] Similarly, Recommendation No. 162 of 1980, on older workers, states that, wherever possible, retirement should be voluntary and take place in a framework allowing for a gradual transition from working life to free activity.[6] According to Section 21 (b) of the Recommendation, the entitlement age for an old-age pension should be flexible.[7]

The only right of the International Covenant on Economic, Social, and Cultural Rights that gives rise to any explicit protection for elderly persons in this regard is the right to social security under Article 9. The Committee on Economic, Social and Cultural Rights has emphasised that States should establish flexible retirement ages, depending on the occupation performed and the working ability of elderly persons. This flexibility should also reflect demographic, economic, and social factors.[8]

Within the unique control system developed based on the European Convention for the Protection of Human Rights and Fundamental Freedoms, the ECHR had to challenge the issue of discrimination on grounds of age, with the applicants arguing that earlier generations of pensioners received considerably higher pensions than the

3 The author is the father of two children and acknowledges that it was his wife who had always taken care of them. Nothing in this article is to be interpreted to the detriment of mothers. However, there are also men who do not have any female support and take care of their common children alone.

4 C102 - Social Security (Minimum Standards) Convention, 1952 (No. 102)

5 Cf. also Articles 1 and 5 of ILO Convention on Discrimination (Employment and Occupation), 1958 (No. 111).

6 Adopted in Geneva at the 66th ILC session, on 23 June 1980.

7 Servais, 2014, p. 77

8 International Covenant on Civil and Political Rights, 19 Dec. 1966, 999 U.N.T.S. 171, paragraph 28. Cf. Rodríguez-Pinzón and Martin, 2003, p. 958.

applicants would receive on reaching retirement age. However, the Court ruled in this Ackermann case that the applicants had not established that their situation was comparable to that of earlier pensioners and found that their scheme was reflective of socioeconomic circumstances.[9]

The European Union has never successfully established a common pension insurance scheme or even come close to this aim. The CJEU has confirmed several times that EU law permits the existence of different national social security schemes.[10] *Substantive and procedural differences between the pension insurance systems of individual Member States remain possible*[11] *unless there are different retirement ages and the criterion applied is sex.*[12] *Even so,* Directive 2006/54/EC does not preclude an employer from granting a pension supplement to persons who have already reached the occupational pension retirement age, but who have not yet reached retirement age for the statutory retirement pension, until the persons benefiting from the supplement reach the statutory retirement age.[13] *If Member States had efficiently overcome national differences, as t*he Convention concluded between Germany and Denmark on 14 August 1953, even regarding various retirement ages, *EU law precludes the loss of social security advantages for the workers concerned that would result from the inapplicability of such an international treaty, following the entry into force of EU coordination regulations.*[14]

2.1. The ECtHR

Pension insurance is not excluded from Article 14 of the European Convention on Human Rights and Fundamental Freedoms (hereinafter the 'Convention') as the

9 See *Ackermann v. Germany*, Application no. 71477/01, Judgment of 8 September 2005. The provision of different levels of support based on age has been also upheld by the UK House of Lords in a case brought under the European Convention on Human Rights, and by the Supreme Court of Canada under the Canadian Charter of Rights. *R. v. Secretary of State for Work and Pensions Ex Parte Reynolds* [2005], *UKHL 37. Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC); *Gosselin v. Attorney General of Québec*, 2002 SCC 84. See Kim and Piper, 2003.

10 See CJEU *judgment of 5 July 1988 in Case 21/87 Borowitz v Bundesversicherungsanstalt fuer Angestellte [1988] ECR 3715, paragraph 23.*

11 See Article 9 I (f) of the Directive 2006/54/EC. Cf. CJEU *judgment of 15 January 1986 in Case 41/84 Pinna v Caisse d' allocations familiales [1986] ECR 1, paragraph 20.*

12 CJEU judgment of 22 December 1993, Case C-262/88 Barber - Case C-152/91 and to measures intended to provide equal treatment for men and women in the past as well as for the future. Case C-408/92: Smith and Others v. Advel Systems and the Second Defrenne judgment, File No. 43/75. Cf. also Article 2 ofCouncil Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

13 The aim of this measure is to equalise, or make more equivalent, the overall amount of benefit paid to these persons in relation to the amount paid to persons of the other sex who are in the same situation and who have already reached the statutory retirement age.

14 See CJEU Case 227/89, [1991] ECR I-323, paragraph 27. To the contrary, in the *Walder* judgment of 7 June 1973 (Case 32/72, [1973] ECR 599, paragraphs 6 and 7) the CJEU ruled that it was clear from those Articles that the replacement by the regulation of the provisions of social security conventions between Member States was mandatory in nature and did not allow exceptions, save for the cases expressly set out in the regulation.

ECtHR concluded in several cases before the *Andrle* case. Because pension insurance requires stability and reliability, to allow for lifelong family and career planning, any adjustments to the pension schemes must be carried out in a gradual, cautious and measured manner. Any other approach could endanger social peace, foreseeability of the pension system and legal certainty, as pointed out in *Willis v. the United Kingdom*.[15] More or less along the same line, the ECtHR stated that calculation methods in disability insurance must consider gender equality in *di Trizio v. Switzerland*.[16]

The ECtHR stated that the *Andrle* case must be distinguished from the issue of discrimination in the field of parental leave,[17] because

- the amendments of the parental leave system referred to in the case of *Konstantin Markin* do not involve changes to the subtle balance of the pension system,[18]
- do not have serious financial ramifications and
- do not alter long-term planning, as might be the case with the pension system, which forms a part of national economic and social strategies.

To the contrary, less persuasive seems the conclusion of the *Andrle* case to be compared with the conclusion of the *Van Raalte* case,[19] in which the ECtHR stated that treating unmarried childless men differently than unmarried childless women is a violation of the Convention unless there are "*very weighty reasons*" for such a policy tax regiment on behalf State family support. The State cannot base the differential treatment on the assumption of men's respective biological possibilities to procreate. Even less understandable is the *Andrle* case compared to the *Willis* case, in which the ECtHR argued that the Applicant had paid full social security contributions, gave up work to take care of his sick wife and children, and that it was uneconomical for him to return to work on a part-time basis following his wife's death.[20]

3. The Czech context

Since 1948[21], the Czech system of protection against ageing, the death of a 'breadwinner', and employment disability was not constructed based on the premium principle. Although employees paid taxes that were used to finance social security, the

15 Case of *Willis v. the United Kingdom*, Application no. 36042/97.
16 Complaint no. 7186/09, Judgment of 2 February 2016.
17 Case of *Konstantin Markin v. Russia* (Application no. 30078/06)
18 Case of *Konstantin Markin v. Russia* (Application no. 30078/06).
19 *Van Raalte v. the Netherlands*, (Application no. 20060/92).
20 *Willis v. the United Kingdom* (Application no. 36042/97).
21 Cf., Section 5 of the Social Security Act No. 101/1964 Sb., Sec. 12 of the Social Security Act No. 121/1975 Sb., and Sec. 14 of the Social Security Act No. 100/1988 Coll.

benefits systems had no pure connection between inputs (premiums) and outputs (payments). The classical 'proportion principle' (the proportion between several earnings and an amount of pension) was used, but it was affected by the obligatory categorisation of jobs. This compulsory classification is the most representative and important example of certain advantageous provisions that were laid down during the era of communism.[22]

Shortly after the fall of communism, the leading political parties decided to abolish the system of compulsory employment categorizstion; however, the process of removal was slow and it is still unfinished. The categorisation of employment therefore even has some influence today, 34 years after the revolution. In the first stage of abolition, the Parliament approved the Act on the Abolition of Employment Categories (No. 235/1992 Sb., hereinafter the 'Abolition Act'). The Abolition Act sets forth that the lists of first and second employment categories were abolished on 1 June 1992, and that the classification of employment laid down in the Social Security Act of 1988 (No. 100/1988 Sb.) was to be in force until 31 December 1992. For the classification of the first and second employment categories, the lists outlined in tertiary legislation were to be used until 30 May 1992. Consequently, all jobs performed since 1 January 1993 are deemed to be classified in the same third employment category.

3.1. Employment Categories

According to the Social Security Act[23], each type of employment had to be classified into the first, second or third category[24]. Consequently, the category influenced both the retirement age and the final amount of the pension.[25] For example, under Section 22 (1) of the Social Security Act of 1988, the amount of an old-age pension is comprised of 60% of an individual's average monthly earnings if he or she reached 20 years in the first employment category, 55% of an individual's average monthly earnings if he or she reached 20 years in the second employment category or 50% of an individual's average monthly earnings in other cases. According to Section 22 (2) of the Social Security Act of 1988, the basic amount of old-age pension was increased by exactly 2% of an individual's average monthly earnings for each year of employment, if he or she continued to work beyond the 26th year of employment (if an individual worked 20 years in the first or second employment category, then the limit was decreased from the 21st year) and was employed in the first employment category; the basic amount was increased about 1.5%, in the second employment

22 Cf. Section 5 of Social Security Act No. 101/1964 Coll.

23 Cf. Social Security Act No. 99/1948 Sb., Social Security Act No. 55/1956 Sb., Social Security Act No. 101/1964 Sb., Social Security Act No. 121/1975 Sb. and Social Security Act No. 100/1988 Coll.

24 The principle was simple: the higher the employment category, the lower the retirement age and the higher the pension.

25 See Social Security, 1964, pp. 23–24.

category and 1% in all other cases. The particular effect of the employment category on the retirement age was regulated in Section 21 of the Social Security Act of 1988.

Though the type of employment category was extremely important, the list of first and second category employment was only partially outlined in the Act. The central State agencies were entitled to develop the core of the employment categories in tertiary legislation.[26] For example, miners, plane or ship cabin crew, and some officials in the military, police forces, or Communist Party were classified in the first employment category.[27]

3.2. The Abolition of Employment Categories

The old regulation (from the Communist era) contained in Section 21 of the Social Security Act of 1988, laid down the retirement age, depending on the number of years worked in the first or second employment category. If the standard method of computing retirement age was not advantageous to a woman, then her retirement age was determined depending on the number of children she raised. For example, the retirement age for a man employed as a miner for 15 years was at the age of 55. The retirement age for a man who did not work in the first or second employment category was 60. A woman who satisfied the same conditions as such a man, and who did not raise any children, had a retirement age of 57.

The legislation since 1989 has aimed to increase the retirement age. The first step was taken in 1995. The Pension Insurance Act stipulated an increased retirement age for insured persons, but only for those who reached the retirement age after 31 December 2012. The retirement age for a man is 63, and for a woman, it is dependent on the number of children she has raised.[28]

The Pension Insurance Act, which replaced the old regulation contained in the Social Security Act of 1988 (No. 100/1988 Sb.), sets forth additional transitional measures governing the importance of employment categories for determining benefits accrued since 1 January 1995. Under Section 71 of the Pension Insurance Act, acquired rights are protected. The amount of old-age pension, full invalidity pension or partial invalidity pension obtained under the Pension Insurance Act shall not be

26 The term 'tertiary legislation' means legislative measures of the State that have less power than primary or secondary legislation. Primary legislation means laws, and secondary legislation means Government Decrees or ministerial notes. In the end, the list of employment categories was defined in agreements between State agencies. See the Decision of 29 June 1961 of the Regional Court in Prague.

27 Cf. CSSZ, 1995, p. 46.

28 The retirement age is 59 years, if she raised at least five children, 60 if she raised three or four children, 61 if she raised two children, 62 if she raised one child, or 63 in all other cases.

lower than the number of benefits granted by provisions valid until 31 December 1995.[29]

All remaining insured persons, who either had already reached the retirement age before the Pension Insurance Act came into force (31 December 1995) or who reached the retirement age before 1 January 2013, are divided into two groups. Under Section 32 of the Pension Insurance Act, provided that an insured person reached the age before 31 December 1995 (the day before the Act came into force), the retirement age is 60 years for a man and 53 for a woman, if she raised at least five children, 54 if she raised three or four children, 55 if she raised two children, 56 if she raised one child or 57 in all other cases. If the insured person reaches the aforementioned age limits laid down in Section 32, between 1 January 1996 and 31 December 2012, the actual retirement age is determined by adding to the calendar month in which the person reaches the set age limit, 2 calendar months for a man and 4 calendar months for a woman, per each year commenced between 31 December 1995 and the date when the person reaches the set age limits.[30]

From 2010 onwards, within the so-called parametrical changes, the 'required insurance period' is being gradually extended, namely from a base of twenty-five years to a final thirty-five years. In determining the 'required period of insurance' for an individual, only the calendar year when he/she reaches retirement age is decisive. As regards the 'retirement age', this is also being increased gradually. Moreover, it is still differentiated according to the year of birth, gender, and number of children raised (by women). Until 31 December 1995, the required retirement age was 60 years for men and 53 to 57 years for women (57, if they did not raise any children, 56 in the case of one, 55 in the case of two, 54 in the case of three or four, and 53 in the case of five or more children raised). These age limits are still valid for people born before 1936. The precise retirement age of individuals born between 1936 and 1977 is outlined in an Appendix to the Pension Insurance Act. For persons born after 1977 (later changed to 1971), the number of calendar months that equals twice the difference between the year of birth and 1971 is added to the age of 67 years (later diminished to 65).

29 Pursuant to Section 71 (2) of the Pension Insurance Act, the principle of acquired rights is valid for an individual, provided he or she acquired at least one year of employment in the first or second employment category and the entitlement to benefits has arisen or will arise in the period from 1 January 1996 to 31 December 2018. If the entitlement arose after 31 December 2005, the insurance carrier is obliged to respect the principle of acquired rights only upon request from the entitled person. However, there is a rule set forth in Section 71 (4) of the Pension Insurance Act that excludes the application of certain provisions contained in the Social Security Act of 1988. The list in Section 71 (4) of the Social Security Act of 1988 refers to the possibility of increasing a benefit that is the only source of income, or to the provision that enables the application of acts valid before 1 October 1988.

30 In 2003, the legislator decided (Act No. 425/2003 Coll.) to continue this increase at the same rate up to 63 years of age (born in 1948-1953) for men and the target age of 59 to 63 for women.

3.3. Constitutional Protection

The social and cultural values acknowledged by Czech society have been reconsidered since the end of the Communist regime in 1989 and are outlined in the Charter of Fundamental Rights and Freedoms (hereinafter 'the Charter').[31] Article 30 of the Charter provides for social welfare rights; however, under this Article, an individual is not entitled to derive his or her rights to a specific retirement age directly from the Charter. This Article of the Charter represents rather the constitutional basis of the Czech pension insurance system and constitutes therefore the limits for ordinary statutes. According to Articles 4 and 41 (1) of the Charter, three conditions must be fulfilled in the statutory social regulations. First, in order to comply with the Charter and therefore to be valid, social regulations must be explicitly outlined in primary law, not in secondary legal measures, such as measures issued by the Government, Ministries, or other competent State or public agencies. Additionally, social regulations must secure the core and sense of social rights,[32] shall not be misused, and must be applied equally to all cases fulfilling the same conditions.[33]

The Czech Constitutional Court decided that no natural person may enter into a contract with the State which would guarantee a definite amount of benefits within the mandatory Czech social security system. Furthermore, the Constitutional Court declared that even in cases of a relationship between individuals and private insurance carriers, which are based on a contract governed primarily by private contract law, there is no right to obtain a definite amount of benefits from the carrier, because an individual is not entitled to assert vested rights. [34]

In the subsequent decision, the Constitutional Court reiterated that equality is a relative category that requires the elimination of unjustified differences. Legal distinctions in access to certain rights must not be arbitrary, but the principle of equality does not imply that everyone must be granted any right. Differential treatment is

31 The Charter of Fundamental Rights and Freedoms was adopted as an Appendix to Act No. 23/1991 Coll. Regarding the extraordinary situation in 1992, when the predecessor of the Charter in the Czech and Slovak Federal Republic was abolished, the Charter was declared again on 16 December 1992 as a component of the Czech constitutional order (Constitutional Act No. 2/1993 Sb.). The Charter was amended by Act No. 162/1998 Sb.

32 The State is obliged to act; omissions could be contrary the core of certain social rights. See the Constitutional Court's Decision File No. II. ÚS 2623/09)

33 Cf. the Constitutional Court's Decision of 6 June 2006, File No. Pl. ÚS 42/04 or the Constitutional Court's Decision of 5 May 1999, File No. Pl. ÚS 23/98.

34 See the Constitutional Court's Decision of 12 April 1995, File No. Pl. ÚS 12/94. Similarly, the Polish Constitution does not contain any specific provision about an exact retirement age. Although the Constitution guarantees the right to social security connected with retirement, Polish legislators reserve the right to increase the retirement age, should the condition of the retirement system so require. It was also confirmed by the Polish Constitutional Court, which left the legislature broad room for manoeuvre to take the necessary corrective actions. In the Court's opinion, increasing and equalising retirement age does not infringe the constitutional principles of acquired rights, or the citizens' trust in the State and its laws. On the other hand, the Constitutional Court ruled that the 'partial old-age pension' infringed the Constitution by ensuring different rights to women and men.

therefore permissible in principle if there are objective and reasonable grounds for the difference. In the field of economic, social, cultural and minority rights, the legislator has much more scope to apply its idea of the permissible limits of de facto inequality within it. "According to the Constitutional Court, if the contested provision were to be repealed, it would merely deprive women, mothers of a certain advantage, without giving men, fathers the same advantage as women, mothers in the context of 'equalisation". The Constitutional Court found the preferential treatment of women who had raised children to be based on objective and reasonable grounds, referring to the arguments in the parties' submissions and the requested opinions. Nor did the Constitutional Court find that the legislator had acted arbitrarily in adopting the contested provision, since a solution to the unequal position of men and women in the pension insurance system could not be found without a comprehensive and wisely timed adjustment of the entire pension insurance system, finding socially acceptable and economically acceptable aspects, which should rather be determined within the framework of the overall reform of the pension system."[35]

It follows that the Constitutional Court was ultimately persuaded by the tradition and study of the Ministry of Labour and Social Affairs. However, it is necessary to mention the relevant assessment of Judge Wagnerová who adds: "The actual, unusually contentious reasoning of the award, contained only in paragraphs 33 to part of paragraph 36, when the remainder of this paragraph contains a remarkable obiter dictum, builds on tradition, although it does not explicitly mention it, and on the contrary takes refuge in what I believe to be a problematically interpreted comparative study provided by the Ministry of Labour and Social Affairs."[36]

3.4. The Gradually Increasing Standard Retirement Age

As part of its austerity measures, the Government decided to change the current regulation of the statutory retirement age. The Act on Pension Insurance set forth an unlimited increase in the retirement age, which constituted a real nightmare for young generations. In addition to increasing the statutory retirement age, there was also a gradual unification of the statutory retirement age for men and women (since the 1950s, there have been separate retirement ages for the sexes). The Government aimed to slow down the pace of increase gradually. It might come into balance in the future, with the expected trends in average life expectancy.

Some experts stated that it can be expected that future developments will not entirely match current demographic forecasts. Even though current demographic forecasts did not support the Government's intention to change the pace of raising the statutory retirement age, the Ministry of Labour and Social Affairs, in cooperation with the Ministry of Finance, prepared a discussion document based on a proposal to create and enact a regular mechanism/process to review the pace of increase of

35 See the Constitutional Court's Decision of 16 October 2007, File No. Pl. ÚS 53/04.
36 Dissent votum by judge Wagnerová was published with the judgment.

the statutory retirement age, so that there are no significant changes in the average time spent in retirement for each generation. The period of entitlement to old age pension should stabilise at an average of about 20 years. It was apparent that the debate must continue.[37]

4. Not the second time

The Czech pensionable age under the Pension Insurance Act has increased since 1996, subject to various modifications. A major revision approved in 2017 (in force since 2018) concerned the envisaged unlimited growth in retirement age, setting the maximum at 65 years to be reached in the 2030s. This retirement age applies to persons born after 1971 and is the same for both men and women. Thus, the number of children raised is not taken into account by anybody.

As far as persons born before 1971 are concerned, the law is different. Retirement age is still differentiated depending on the year of birth, and the number of children raised is also taken into account for women.

Subsequently, the legislator enacted another change in favour of women and that happened while the indexation of pensions ought to be cut because of the financial instability of the whole pension insurance scheme.[38] From 1 January 2023, insured persons can once again apply for an increase in old-age pension for bringing up a child or children. This is a fixed amount, which will be CZK 500 in 2023. In the case of raising more children, this amount is multiplied by the number of children, i.e. for 3 children, CZK 1,500 will be due, by which the percentage of the old-age pension, regular or early, will be permanently increased. The amount due to pensions granted in 2024 and later will be gradually indexed in the same way as the pension percentages. The upbringing of the same child cannot be credited to more than one person simultaneously for the increase received for the child raised; if more than one person raised the child, the upbringing of the child shall be taken into account only for the person who personally cared for the child to the greatest extent.

The conditions for recognizing a child as having been brought up are the same as those that apply to reducing the retirement age of women. Thus, it is required that

37 Cf. the similar approach of the Slovak legislature, which has already started the phase of unifying the retirement age (a specific time is added to the lower retirement age of women, which is proportional to the number of raised children; 1–5 is taken into consideration). From 2017, a 'floating' retirement age limit, based on an increase in the average middle lifespan (of men and women) in a monitored reference period will be applied. Lacko, 2014, p. 42.

38 Act 323/2021 Coll. amending Act No 155/1995 Coll., on pension insurance, as amended, and Act No 582/1991 Coll., on the organisation and implementation of social security, as amended (in Czech "kterým se mění zákon č. 155/1995 Sb., o důchodovém pojištění, ve znění pozdějších předpisů, a zákon č. 582/1991 Sb., o organizaci a provádění sociálního zabezpečení, ve znění pozdějších").

the person has personally cared for the child up to the age of majority for at least ten years before the date of entitlement to the old-age pension, provided that if he/she has taken up the care of the child after the child has reached the age of eight, it will be sufficient if he/she has cared for the child for at least five years and has not ceased to care for the child before the child reaches the age of majority.

The increase for a child brought-up is not payable if the insured person committed against the child, as perpetrator, accomplice or participant, a deliberate offence against life and health, against freedom and personality protection rights, against human dignity in sexual context, or against the family and children under the Criminal Code or similar deliberate offences under previously applicable legislation.

Although the Government's interpretations of the new regulation appear to be gender-neutral at first sight, this is not true in practice. Only the woman's upbringing is automatically taken into account as this new law applies to each insured and pensioner. The practice of the Czech Social Security Administration for women already granted old age pensions is that the woman who gave birth to the child is eligible for the new upbringing allowance. The claim is deemed to be proved by the children's birth certificates as lodged to the authority by the matter of the children in question. The authority presupposes that the person who gave birth to a child was the main or sole upbringing parent regardless of other circumstances of the case. Therefore, the pension insurance authority does not conduct any procedure to examine whether the woman has cared for the child or not.

Only those parents who are to apply for an old age pension must agree upon the beneficiary for the upbringing allowance. If such an agreement cannot be concluded it is upon the authority to start a formal administrative proceeding todetermine the beneficiary.

As in the *Andrle* case, there are a few pending cases, when children were brought up by their father or a foster parent and those persons do not receive any upbringing allowance as they did not give birth to those children. None of those has been adjudicated and the respective decision published so far. But it is sure that the given upbringing allowances are adjudicated and paid to the respective mothers of those children.

However, this is not the second time. Because this time the primary reason is not outlined in the relevant legislation but is embedded in the relevant practice of a State authority. The relevant Czech regulations outlined in Section 34a of the Act on Pension Insurance are neutral.[39] It is the Czech Social Security Administration that simplifies procedures by having recourse to the stereotype that mothers bring up their offspring and their father, as men are to work and women to stay behind.

Those still rare cases when the stereotype was not true and fathers were the main upbringing persons are to be solved by competent Czech judges who, as we think, will quash the relevant decisions issued by the Czech Social Security Administration

39 Act No. 155/1995 Coll.on Pension insurance as amended.

and order proper evidence hearing to take place. If nothing of this will take place, which seems rather improbable, higher courts will be involved by the Constitutional Court as well.

5. Conclusions

As this article has shown, the Czech legislator tends to set forth advantageous provisions in codified universal public insurance for women as those are to raise their children almost exclusively. It is an important social role and must be supported. However, speaking about premium rates for the pension insurance scheme, it is the same percentage for all insured persons, including all men who had to take care of their children alone. Of course, those are small numbers compared to women, because Czech society still lives according to the old model of women caring for their children.

The ECtHR acknowledged in *Andrle* that, given the complex political negotiations, changes to the pension system in the Czech Republic are limited because of the fact that the measure in question was applied in the legal order for 45 years, and given demographic changes and changes in the perception of gender roles, the timing of the adjustment of the pension system needed to be right. Accordingly, in the Court's view, the State cannot be blamed for changing the pension system gradually and for failing to bring about full equality more quickly. The reform of the pension scheme must be set in the wider context of demographic changes, such as population ageing or migration, while at the same time maintaining the predictability of the scheme for those affected by it and obliged to contribute to it.

All of that might have been true upon the emergence of the *Andrle* case, as the proverb says: every cloud has a silver lining. We must hear the whole story that came after this. After social reforms, the Czech mandatory pension insurance remained to be flawed in terms of retirement age, and this will continue for decades. Women's lowered retirement ages do not apply to men, even when men have raised their children alone.[40] The retirement age will be equal for men and women from 2036 onwards when insured persons born in 1971 are to reach the age of 65, but always allowing for the possibility that the pension reform of 2022 prolonged advantageous provisions for women only. For the first few years by the letter of law, for the rest because of the actual practice of public authorities, which prefer women.

Hence, we can conclude that the Czech practice, partially approved by the Constitutional Court, has not been changed, despite enormous efforts and contrary

40 Cf. Koldinska, 2011, pp. 14–20.

decisions, both by the ECHR in Andrle[41] and the CJEU in *Soukupová*. [42] Should the case be brought one day in front of the ECtHR, the Czech Government will not be able to defend its position by having recourse to a specific history as the upbringing allowance came into force this year? The upbringing allowance was proclaimed to be one of the reform attempts launched by the Government to improve intergenerational justice within the pension insurance scheme. Its goal is to reward parents for the hardship of upbringing children. Albeit the rewarded insured might be a woman, the goal or desire of the legislature to prefer one sex over another can be seen in connection with actual retirement ages and the practice of the respective authorities. Therefore, we must understand that the presented measures still aim to compensate women only. Now we do not speak about measures rooted in these specific historical circumstances. The gradual reform is in place and shall be applied during the whole century as much as we can anticipate as of today. This scheme is to be applied not to the elderly, but to everyone even to those who were not even born.

Would the ECtHR find this practice reasonably and objectively justified when its main goal remains unchanged? The Czech people's power wants to compensate women for their role in family life and household duties even in the future.

The new reasoning is based on bad demographic expectations, together with the underlying trends of greater life expectancy and low birth rates. Seen specifically from the Czech perspective, despite corrective actions in recent years, pension insurance payments have been exceeding the dedicated social premium revenues on a regular basis. The Czech Republic, like other European countries (despite local variations), has both an ageing population and a shrinking working-age population. As a result of this projected deficit, pension insurance has become a "lightning rod" for far-reaching reform proposals. Therefore, the Czech Republic needs to act to ensure that the pension system retains an adequate and sustainable basis. The action is the incentive for women not to be afraid to have children and to raise them. However, it is a generally acknowledged fact that the ECtHR quite clearly refuses to recognise the legitimacy of the family law regulation at issue by pointing to tradition and, on the contrary, shows the dynamism in the concept of rights and relations related to the family.[43]

41 *Andrle v. the Czech Republic*, 2011, Application No. 6268/08.

42 Case C-401/11 *Blanka Soukupová v. Ministerstvo zemědělství.*

43 See the decision of 22 February 1994 in *Burghartz v. Switzerland* or the decision of 16 November 2004 in *Ünal Tekeli v. Turkey*)

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