A Betrayed Ideal: The Problem of Enforcement of EU Sex Equality Guarantees in the CEE Post-socialist Legal Systems

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S.J.D. Thesis:

A Betrayed Ideal:
The Problem of Enforcement of EU Sex Equality Guarantees in the CEE Post-socialist Legal Systems

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Introduction

The notion of equality between men and women has, for a long time, played a significant role in the societies of Central and Eastern Europe (CEE). The ideal was particularly important during the period of “real” or “really existing” socialism in CEE.¹ For the CEE socialist regimes, the ideal of equality was an ideological banner that supposedly demonstrated their moral superiority to the “West”. The ideal has gained new importance in recent years, when the CEE post-socialist states had to commit to the protection of the notion of equality between sexes as a condition of their membership in the European Union (EU).

This thesis will analyze the position of EU sex equality guarantees in the CEE post-socialist legal systems. More precisely, it will identify and explain key obstacles to enforcing the recently transposed EU sex equality law in the CEE post-socialist legal systems. In addition, it will provide a critical account of the model of harmonization of the CEE legal orders with the EU sex equality acquis that has been used during the process of accession negotiations between the EU and CEE states.

This thesis will demonstrate that the negotiation model of the pre-accession harmonization of the CEE post-socialist legal orders with the requirements of the EU sex equality acquis did not succeed in identifying the most important barriers to the legal enforcement of EU sex equality guarantees in the post-socialist legal orders. Consequently, we can find profound and disturbing differences in the enforcement of EU sex equality guarantees between the EU and CEE legal orders.

¹ The phrase “really existing” socialism is hardly grammatically elegant. However, it has become somewhat of an academic convention in this part of Europe.
In this respect I will show that the post-socialist legal systems still tend to perceive the notion of equality of the sexes in a way that was characteristic of their socialist predecessors. This lingering effect of the socialist legacy has profoundly limiting implications for the enforcement of EU sex equality guarantees in the CEE post-socialist legal orders.

The first chapter provides an account of the socialist normative understanding of equality between men and women. Socialist regimes used law to achieve specific normative and ideological goals concerning the ideal of equality between men and women. This can provide the origins of problems with the enforcement of EU sex equality law in the CEE post-socialist states today.

Chapter II explains the position and importance of sex equality guarantees in the legal order of the European Union, showing that EU sex equality guarantees are profoundly open-textured. As a consequence, European courts are entrusted with a sensitive responsibility to provide these guarantees with an appropriate normative content, which differs considerably from how post-socialist courts understand their role in enforcing the law.

Chapters III and IV deal with the process of accession negotiations during the so-called “2004 Eastern Enlargement”. The third chapter provides a brief overview of the structure of the enlargement negotiations. The fourth chapter describes the pre-accession harmonization efforts in the area of sex equality. I will show that both sides in the negotiation process failed to identify the key obstacles to enforcing EU sex equality guarantees in post-socialist legal systems. As a result, the CEE post-socialist states joined the European Union unprepared for the enforcement of its sex equality guarantees.
Chapters V and VI focus on the judicial enforcement of EU sex equality guarantees in the CEE post-socialist legal orders. Here, the socialist legacy demonstrably affected the judicial enforcement of EU sex equality guarantees negatively in the CEE post-socialist legal orders. Barriers to the enforcement of basic EU antidiscrimination provisions are identified and explained. Finally, Chapter VII focuses on indirect discrimination, in an attempt to explain the complete absence of indirect discrimination decisions in the CEE post-socialist countries.

This thesis is limited only to those areas of life that are within the regulatory competence of the EU. It does not aim to provide a complete account of the position of the ideal of sex equality in the CEE legal orders. Areas of life that are of great importance to the equality of women, such as family relations, sexual violence or reproductive rights, remain accordingly outside the scope of this thesis. Moreover, due to the size and complexity of its subject matter, the thesis will inevitably suffer from a degree of generalization, and many important differences between the various CEE legal systems will not be given the attention they deserve. The main goal is to identify those obstacles to the enforcement of EU sex equality provisions that originate from the CEE post-socialist states’ common experience of “really existing” socialism.
Chapter I

The Socialist Understanding of Sex Equality in Central and Eastern Europe

1.1. Introduction

The object of analysis in this chapter is vast and complex. Accordingly, many interesting features, details, and differences regarding the manner in which these legal systems approached and regulated the ideal of equality between men and women will be left out. Nevertheless, the chapter identifies those key aspects of the socialist approach that still affect the enforcement of equality provisions in the CEE legal systems.

However, I have to stress here, at the very beginning, that my intention is not to provide an account of the socialist conception of sex equality. Socialism has been a vast and complex political reality and concept. Accordingly, there is no one correct socialist conception of sex equality. This chapter will, in a more modest way, provide an account of the understanding of sex equality that was typical of a relatively limited part of Europe and a particular period of history, identifying those features characteristic of the CEE socialist regimes that are intimately related to the problems of enforcement of EU sex equality guarantees, being a part of the “socialist legacy” that still troubles these legal systems.²

Furthermore, the term conception may to some extent also be problematic. It usually entails that a wide range of participants in a particular legal culture ranging from political activists,

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² The thesis is primarily concerned with the post-socialist CEE countries that became EU member states (Bulgaria, Czech Republic, Hungary, Poland, Romania and Slovakia) or have a Candidate Status (Croatia).
legislators and the judiciary to academics have participated in its development. In real socialism, this was hardly the case. The conception of sex equality that was characteristic of these regimes was primarily the result of actions firmly controlled by the Communist Party. Its primary source was positive law, and not judicial decisions or academic writings. Some may thus object that the chapter deals more with a political ideology related to this ideal than its normative concept. This objection may not be far from the truth.

I will primarily focus on several issues.

First, the chapter will provide a brief account of the normative (and ideological) view of equality between men and women that was characteristic of the CEE regimes of the so-called “really existing socialism”, where there was a particular chasm between the normative ideals and ideological commitments on one hand and a lack of political will to fulfill these commitments on the other. As explained in more detail below, the CEE regimes of real socialism developed a conception that was, in many aspects, not unique or distinctive. What distinguished it was its capacity to justify effectively the efforts of these regimes to subordinate women’s individual autonomy to the existing needs of a socialist state.

Second, I will briefly discuss the socialist understanding of law, its function in the CEE socialist legal system and its relation to the normative conception of sex equality. Law played a profoundly important role in socialist regimes as one of the main tools of social engineering. Unfortunately, the perception of law and its function that was characteristic for the socialist period is still to some extent operational in the CEE post-socialist legal orders. These legal systems still perceive the law in a very formalistic manner that has proven to be one of the most important barriers to the enforcement of equality guarantees.
Third, this chapter provides an extensive analysis of the CEE socialist labor law provisions that regulated the socialist ideal of equality between men and women. It shows that socialists used, or more precisely, manipulated certain regulative strategies that are familiar to those who deal with the EU sex equality *acquis* at present time. In fact, for a significant number of the CEE socialist labor law equality provisions, we can find a corresponding provision in the EU *acquis*. However, as we will soon realize, these provisions served profoundly different normative goals in the regimes of “really existing” socialism.

To provide this account of the socialist approach to the ideal of equality between men and women, I have primarily focused on socialist statutory law and academic literature. The reason for the glaring absence of judicial decisions is simple. CEE socialist courts did not deal with sex equality disputes. At the beginning of the EU accession negotiations between the CEE post-socialist states and the European Union (EU), the European Commission was unpleasantly surprised with the following finding: “*after the meetings with the countries the Commission analyzed the state of legislation in the respective countries and came to the conclusion that in the field of equal opportunities the principle of non-discrimination on grounds of sex can be found in the constitutions of all the applicant countries. However, the representation of this principle in civil and labor codes is much more uneven. This raises many questions concerning the enforcement of equality provisions. The only case on gender discrimination ever ruled on in a central and eastern European country is a Hungarian case. The Hungarian Monor City Court considered that an advertisement in which a young man was sought was incompatible with Hungarian law.*”

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The absence of judicial decisions on equality was a direct consequence of the CEE socialist regulatory approach to the ideal of equality between men and women.

1.2. The Conception of Equality between Women and Men Characteristic of the CEE regimes of “Really Existing” Socialism

1.2.1. The Basic Framework of the Socialist Ideal of Equality

The ideal of equality has been the cornerstone of socialist political thought. The very purpose of socialism, especially “really existing” socialism, was to create a political system that would generate a society based on true equality. This concluding stage in social evolution was named communism. The notion of equality between men and women played a particularly important role in the socialist understanding of equality. It was also one of the most important ideological banners that the CEE regimes of the “really existing” socialism used to demonstrate their political and normative superiority to western liberal democracies.

Moreover, socialists perceived social subordination of women as an archetype of class exploitation. Since they believed that social subordination of women and class exploitation shared the same cause (private ownership over the means of social production), they were convinced that the resolution of class conflict inevitably led to the elimination of inequality.

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between men and women. Therefore, it is not surprising that the conception of sex equality characteristic of “really existing” socialism was in many ways an expansion of the socialist ideal of general equality. To grasp fully the understanding of sex equality characteristic of these regimes, it is useful to understand its relation to the socialist understanding of general equality.

The socialist conception of equality was essentially based on the widespread Aristotelian notion that likes ought to be treated alike and different differently. The “really existing” socialism rephrased the notion into meritocratic terms corresponding to the interests of a socialist state. The principle of socialist equality thus required “from each according to his abilities, to each according to their contribution.”

Being based on the Aristotelian notion the socialist understanding of equality was hardly unique. However, what distinguishes the socialist conception is an implicit duty of every individual to contribute (to the best of her abilities) to the wellbeing of the socialist society. The constitutions of the CEE regimes of “really existing” socialism explicitly recognized that duty.

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9 This has been the dominant conventional understanding of equality in western societies. Socialists were fully aware that the likes alike principle had been closely related to liberal political thought characteristic of western capitalist societies. However, they argued that the notion can achieve its full potential only in a society that abolished private ownership of social resources.

10 For one of the rare socialist academic accounts of the notion of socialist equality, see KNAPP VIKTOR, Filosofické problémy socialistického práva [Philosophical Problems of Socialist Law], (Academia, 1967).

11 See, for example, Article 14 of the 1949 Constitution of the Hungarian People’s Republic; Article 19 of the 1976 Constitution of the Polish People’s Republic.

12 For example, Art 13 of the 1968 Constitution of the Czechoslovak Republic provided that “Every organization and every citizen who is allotted any task connected with the fulfillment of the state plan for the development of the national economy shall exert every effort and show the utmost initiative to carry out this with the maximum success.” Art 90 of the 1976 Constitution of the Polish People’s Republic provided that “It shall be the duty of every citizen...to abide by the provisions of the Constitutions and laws, to maintain socialist work discipline, to respect the principles of community life and to do his duty toward the state conscientiously”.

10
As a formal matter, socialists believed that a socialist state existed only for one purpose – the creation of a communist society. Described crudely, socialists perceived communism as a period of unparalleled industrial and technological progress accompanied by unprecedented economic wealth that would enable a particular society to satisfy every need of its citizens. They were convinced that communism would grant ultimate freedom to its members, who would no longer be required to labor in order to satisfy their basic natural needs. On the contrary, their work would be a freely chosen response to the needs that humans have as creative beings. In Marx’s utopian words, “in communist society, where nobody has one exclusive sphere of activity but each can become accomplished in any branch he wishes, society regulates the general production and thus makes it possible for me to do one thing today and another tomorrow, to hunt in the morning, fish in the afternoon, rear cattle in the evening, criticize after dinner, just as I have a mind, without ever becoming hunter, fisherman, herdsman or critic.”

Communism would thus free the individual from the constraints of nature and allow her to explore her creative potential as an intellectual being. It would allow her genuine self-realization and self-fulfillment. Moreover, socialists believed that such ultimate freedom would be accompanied by ultimate social equality expressed in the principle “from each according to

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13 Szabo, *Fundamental questions concerning the theory and history of citizens' rights*, p. 54.
his abilities, to each according to his needs.” Consequently, socialists were convinced that communism was the concluding stage of social evolution.

The idea that the socialist state had one definitive purpose was clearly expressed in CEE socialist constitutions. For example, the Czechoslovakian Constitution provided that “In our country all the main tasks of the transition from capitalist to socialist society have already been solved... All our efforts are now directed at creating the material and moral conditions for the transition of our society to communism.”

However, this ultimate value of communism allowed the CEE socialist regimes to subordinate almost all individual interests to the interest of the socialist state. Socialists did not merely believe that it was possible to achieve communism. They were convinced of their ability to plan and control the construction of communist society. This confidence was also clearly reflected in CEE socialist constitutions. The Hungarian Constitution, for example, provided that “Economic life of the Hungarian People’s Republic is determined by the state’s national economic plans. Relying on the enterprises, the co-operatives and institutions in social ownership, the State directs and controls the national economy in order to develop the productive forces of the national economy, to extend social property, to improve systematically

16 The 1968 Czechoslovakian Constitution provided “We are already practicing the socialist principle “from each according to his ability, to each according to his work”... At a later stage, in which work becomes the primary necessity of life, it is our intention to expand the forces of production and multiply the wealth of our society to such a degree that it will be possible to provide for all the growing requirements of the society and for the full development of each of its members. It will then be possible to proceed to the realization of the highest principle of distribution – the principle of communism: ‘from each according to his ability, to each according to his needs.’”
17 Marx famously stated that “communism is the riddle of history solved, and it knows itself to be this solution.” See KARL MARX, Three Essays by Karl Marx Selected from the Economic Philosophical Manuscripts: Alienated Labor / Private Property and Communism / Critique of the Hegelian Dialectic, (1947).
18 Declaration of the Czechoslovakian Constitution. Similarly, in Art. 4 of the Constitution of the Polish People’s Republic, we can find that “it shall be the primary objective of the State activity to develop socialist society in all its aspects, to expend the creative forces of the Nation and of each person and meet the needs of citizens more and more adequately.”
the material and cultural standards of the citizens, and to strengthen the defensive forces of the country.\textsuperscript{20}

Accordingly, CEE socialist regimes placed all of their social resources, including the intellectual and labor potential of every citizen, under the control of the state governed by the Communist Party, which was considered the most progressive social force and representative of socialist citizens. The unfettered power of the socialist state to subordinate the interests of its citizens to its own priorities was of profound importance for the understanding of sex equality in the CEE regimes of “really existing” socialism.

1.2.2. The Fundamentals of the Conception of Sex Equality Characteristic of “Really Existing” Socialism

Similar to the understanding of general equality characteristic of CEE socialist regimes, their conception of equality between men and women was based on the well-known Aristotelian principle \textit{likes alike, different differently}. On a very basic normative level, CEE socialist regimes insisted on the inherent equal worth of every citizen of socialist society regardless of her or his sex. The assumption of inherent equality also entailed that men and women ought to be treated according to the same fundamental principle of socialist equality \textit{from each according to his/her abilities, to each according to his/her contributions}. However, CEE socialist regimes believed that this principle required different treatment of the sexes.\textsuperscript{21}

\textsuperscript{20} Article 7 of the Constitution of the Hungarian People’s Republic. See also Articles 11-14 of the 1952 Constitution of the Polish People’s Republic or Articles 7 and 14 of the 1968 Czechoslovakian Socialist Constitution.

\textsuperscript{21} This view found strong support in Marx’s writings. Marx argued that “\textit{the standardization of the working day must include the restriction of female labor, insofar as it relates to the duration, intermissions, etc., of the working day; otherwise, it could only mean the exclusion of female labor from branches of industry that are especially unhealthy for the female body, or are objectionable morally for the female sex}.” \textit{Karl Marx,} Critique of the Gotha
Real socialism insisted that certain differences between men and women were too obvious to be
denied and ignored. Differences in procreative function were considered particularly important.\textsuperscript{22} Accordingly, Central and Eastern European socialist regimes favored the notion that men and
women ought to be treated according to the same standards only to the extent they were in a
position to contribute to socialist welfare in the same manner.\textsuperscript{23} However, since they thought it
was rather obvious that various physiological differences prevented women from contributing to
the development of the socialist society in the same way as men, they believed they were
justified in treating the sexes differently.\textsuperscript{24}

This twofold approach to the notion of sex equality was clearly visible in socialist constitutions.
All CEE socialist constitutions guaranteed equal rights regardless of sex and equal rights for men
and women.\textsuperscript{25} At the same time, all of them also provided for special treatment of women. For
example, the Czechoslovakian Constitution held that “\textit{the equal status of women in the family, at
work and in public life shall be secured by special adjustment of working conditions and special
health care during pregnancy and maternity, as well as by the development of facilities and
services that will enable women to fully participate in the life of society}.”\textsuperscript{26}

\begin{flushleft}
\textsuperscript{22} HALASZ, \textit{Civic equality and equality before the law} p. 186.
\textsuperscript{23} See EINHORN, \textit{Cinderella goes to market: citizenship, gender, and women’s movements in East Central Europe}, pp. 23-4.
\textsuperscript{24} See SZABO, \textit{Fundamental questions concerning the theory and history of citizens' rights}, p. 75.
\textsuperscript{25} Article 62 of the Hungarian Constitution provided that “\textit{In the Hungarian People’s Republic, women enjoy equal
rights with men}”. Similarly, Art. 78 of the Polish Constitution provided that ”\textit{Women in the Polish People’s Republic
shall have equal rights with men in all fields of public, political, economic, social and cultural life}”, whereas Art. 20
of the Czechoslovakian Constitution used a slightly different phrasing: “\textit{Men and women shall have equal status in
the family, at work and in public activity}.”
\textsuperscript{26} Article 27 of the Czechoslovakian Constitution. Similarly, Article 78 of the Polish Constitution provided that “\textit{The
equality of rights of women shall be guaranteed by: 1) equal rights with men to work and pay according to the
principle of “equal pay for equal work”, the right to rest and leisure, to social insurance, to education, to honors
and decorations, to hold public offices; 2) mother-and-child care, protection of expectant mothers, paid leave before
and after the confinement, development of a network of maternity clinics, crèches and nursery schools, the extension
\end{flushleft}
Like any other approach based on the Aristotelian notion of equal treatment, the socialist conception of equality required some type of standard to define what constitutes likeness and what constitutes difference. Real socialist regimes found this standard in the notion of labor. They identified the notion of contribution, central to the idea of equality, primarily with participation in the process of economic production.\textsuperscript{27}

In the socialist hierarchy of values, human labor was without a doubt on the very top.\textsuperscript{28} Labor allowed people to subdue nature and reshape a material world surrounding them in accordance with their existential needs. It was therefore considered the key to economic development and social progress. Accordingly, socialist political theory considered that participation in the process of economic production was the most important contribution to the socialist society.\textsuperscript{29} The value of labor was clearly recognized by socialist laws providing that all citizens had a duty to work. The Polish Constitution, for example, explicitly provided that “work shall be the right, the duty, and the matter of honor for every citizen.”\textsuperscript{30} Moreover, in accordance with the principle of socialist equality, individuals were rewarded in accordance with their labor. Almost all social services and benefits offered by socialist societies were conditioned on employment participation.

\textit{of a network of services establishments, restaurants and canteens"}, whereas Art. 62 of the Hungarian Constitution held that “the equality of rights of women is served by the guarantee of opportunity for employment and conditions of employment in the appropriate manner; by paid leave in the event of pregnancy and childbirth, increased legal protection of maternity and children, and by a system of institutions for maternity and children’s welfare.”\textsuperscript{27} The Hungarian Constitution insisted that the labor is “the basis of the social order” and that, accordingly, “citizens serve the cause of socialist construction through their work, participation in work-competition, tightening of labor discipline, and improvement of working methods.” Similarly, Art. 19 of the Polish Constitution provided that “through their work, observance of work discipline, and competitive efforts in work and improving methods, the working people shall increase the power of the Country, raise the prosperity of the people and accelerate the full implementation of the socialist system.”\textsuperscript{28} MEYER, Feminism, Socialism and Nationalism in Eastern Europe, p. 14. \textsuperscript{29} SZABO, Fundamental questions concerning the theory and history of citizens’ rights, p. 59. \textsuperscript{30} Similarly, the Czechoslovakian Constitution stated that the “work in the interest of the community shall be the primary duty and the right to work the primary right of every citizen”, while the Hungarian Constitution held that “every citizen capable of work has the right and duty to work according to his abilities.”
However, Central and Eastern European socialists also believed that labor was extremely important for the personal autonomy of individuals. \(^{31}\) In their view, by using their personal labor to subordinate a surrounding material world to satisfy their immediate needs, individuals expanded their horizons and evolved their needs. \(^{32}\) In that sense, labor was, at least as a matter of official political theory, crucial for individual self-realization and self-development. \(^{33}\)

At the same time, Central and Eastern European socialists considered that biological differences between the sexes determined their different positions in relation to labor. One of the distinguishing features of the socialist understanding of sex equality was a firm conviction that equality between the sexes was possible only if women were fully incorporated into the process of economic production. \(^{34}\) The CEE socialist regimes grossly simplified this principle for ideological reasons. They frequently argued that the fact that the socialist state abolished private ownership of the means of production while the socialist economy required the participation of every citizen meant that real socialism eliminated all reasons for inequality between the sexes. \(^{35}\) Thus, full employment of women in a socialist economy demonstrated, in their view, full equality of the sexes. \(^{36}\)

\(^{31}\) See HALASZ, Equality of Citizens and Equality of Rights, p.189.

\(^{32}\) See NANCY HOLMSTROM, A Marxist theory of women's nature in Feminism & political theory (Cass R. Sunstein ed. 1990), p. 70-1.

\(^{33}\) For example, the Czechoslovakian Constitution provided that “in a society of working people, the individual can fully develop his capabilities and assert his full interests only by active participation in the development of society as a whole, and particularly by taking on an appropriate share of social work.” See also D. DOBROWOLSKA, The Value of Work for an individual in Poland, in Personal Activity in the Socialist Society (N. S. Mansurov ed. 1974), pp. 277-28.


\(^{35}\)MEYER, Feminism, Socialism and Nationalism in Eastern Europe, p. 17. See also MARY BUCKLY, Soviet Interpretations of Women’s Question, in Soviet sisterhood (Barbara Holland ed. 1985), p. 39; EINHORN, Cinderella goes to market: citizenship, gender, and women's movements in East Central Europe, pp. 19, 27.

\(^{36}\) EINHORN, Cinderella goes to market: citizenship, gender, and women's movements in East Central Europe, p. 32.
Although they insisted on full employment of women, socialists never considered that men and women could or should participate in the process of socialist production in the same manner and under the same terms. For example, Lenin explicitly argued that real socialism was not “of course speaking of making women the equal of men as far as productivity of labour, the quality of labour, the length of the working day, labour conditions, etc., are concerned.” 37 “Really existing” socialism considered it self-evident that different sex physiologies required a sex-based division of labor. In other words, men and women could not contribute to real socialism in the same manner.

Furthermore, accepting that the sexes ought to be treated the same regardless of their physical differences would violate the principle of socialist equality “from each according to their abilities”. 38 Consequently, the CEE regimes of real socialism perceived their labor law regulation prescribing strict conditions for female participation in economic production as an extension of their general equality. This perception was so well-established that all the CEE post-socialist states reluctantly abandoned these provisions only upon insistence by the EU.

At the same time, however, different participation in the process of production entailed different “rewards” for the sexes according to the principle “to each according to their contributions”. These regimes were not particularly concerned with labor segregation or worried about the fact that jobs in which women predominate were almost as a rule paid less than those dominated by men. 39 This was a direct consequence of the labor value-structure characteristic of the economic

37 Quote taken from SCOTT, Women and socialism: experiences from Eastern Europe, p. 140.
model preferred by real socialism. The Central and Eastern European regimes insisted on the economic model favoring labor-intensive massive industry since they believed that it was central to the rapid development of their industrially regressive societies. Consequently, almost all social resources were invested in construction and development of heavy industry. Accordingly, manual labor in industrial production was valued as the highest contribution to the welfare of socialist society. Since male physiognomy was on average better fitted for heavy manual labor preferred by the socialist economic model, women were placed at a systemic disadvantage from the very beginning.

Simultaneously, socialist regimes made a significant number of these manual labor-intensive jobs unavailable to women regardless of their personal interests. The CEE regimes believed that such sex-based segregation of labor was an unfortunate consequence of poor material conditions characteristic of their societies, but nevertheless necessary for the protection of women’s health. They optimistically insisted that segregation would progressively diminish and eventually completely disappear owing to the economic and technological progress of socialist production.

In addition to their strong value preference for intensive manual labor, socialists also developed a rather ambiguous view of labor that was traditionally considered “female”. For example, they often thought that replenishing and caring labor traditionally performed by women

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40 AFANASSIEVA & METCALFE, Gender, work, and equal opportunities in central and eastern Europe, p. 399.
41 EINHORN, Cinderella goes to market: citizenship, gender, and women’s movements in East Central Europe, p. 25.
43 KARL MARX, Captal § I, (Progress Publishers, 1970). However, see JAGGAR, Feminist politics and human nature, pp. 69, 75.
within a household had only a derivative value since it was not directly productive but merely supportive of truly productive labor.

However, alleged differences between the sexes in their physiological capacity to effectively participate in strenuous labor were not the primary reason for the different treatment of women. The CEE regimes frequently justified the restriction of women’s participation in socialist production by their concern for women’s health. They insisted that, due to their procreative capacity, women can, in addition to labor, also contribute to the welfare of a socialist society by assuming the role of motherhood. These regimes encouraged procreation for several reasons. The CEE socialist economic model was sustainable only if a society could ensure a constant influx of labor force. Their massive industry could simply not afford a low fertility rate. At the same time, the Second World War significantly reduced the population (mostly male) of the CEE societies, which raised serious concerns about natality. As a result, the CEE regimes developed a complex system of social measures encouraging women to assume responsibility for procreation and become mothers. More precisely, the purpose of these measures was to ensure that women would not abandon motherhood to achieve their professional goals. This was a clear retreat from the original socialist position that a socialist state would ensure all necessary services to allow women to fully participate in socialist economic production.

However, these regimes were not willing to afford a large network of state-financed institutions that would assume the primary responsibility for childcare and thus ensure a continuous

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44 JAGGAR, Feminist politics and human nature, pp. 73-9.
participation of women in employment. As a result, the understanding of women’s role in the
CEE socialist societies changed significantly and these regimes gradually retreated without much
argument towards the traditional distribution of social roles. Women always remained an
important part of the socialist labor force. However, the CEE socialist regimes also insisted that
women carry the responsibility for social procreation and childcare. Moreover, the role of
motherhood slowly took precedence over the participation in economic production.
Accordingly, socialists started “celebrating” women as working mothers without paying them for
their contribution through housework.

Consequently, the “really existing socialism” expected women to contribute to socialist progress
through labor and childcare. Moreover, as we will see soon, the CEE regimes developed
measures that strongly encouraged women to leave the labor force for a longer period of time in
order to provide for their children and families. They did expect mothers to eventually return to
employment, but, at the same time, failed to show almost any concern for the negative
implications that the primary responsibility for childcare had on their careers. This chasm
between the ideological commitment to equality of women and a lack of political will to ensure

47 EVA FODOR, Women at Work: the Status of Women in the Labour Markets of the Czech Republic, Hungary and
Poland, (The United Nations Research Institute for Social Development, 2005), p. 2; E. LEACOCK & H.I. SAFA,
48 FODOR, Women at Work: the Status of Women in the Labour Markets of the Czech Republic, Hungary and
Poland, p. 3. Also ELAINE WEINER, Assessing the implications of political and economic reform in the post-socialist
era: the case of Czech and Slovak women, 31 East European Quarterly (1998); For a somewhat less critical reading
of the socialist ideology and politics towards women, see KRISTINA KOLDINSKÁ, Gender Equality: Before and After
49 Moreover, the CEE regimes tied the procreative ability of women to the socialist notion of individual self-
fulfillment. See ATTWOOD, Soviet Studies: Gender, p. 14729; LYNNE A. HANEY, Inventing the needy: gender and
50 HANEY, Inventing the needy: gender and the politics of welfare in Hungary, p. 103.
51 For a typical example of this position, see GARANCSCY, The Status of Female Labour and the Law in Hungary,
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52 See EVA FODOR, et al., Family policies and gender in Hungary, Poland, and Romania, 35 Communist and Post-
the means required for the implementation of this ideal resulted in the socialist double burden for women.

1.2.3. The Importance of Law for the Socialist Conception of Equality between Men and Women

One of the most distinctive features of the conception of sex equality characteristic for real socialism, at least from the perspective of this thesis, was the manner in which these regimes used law to implement their normative notions and political goals.

The CEE legal regimes regulated the issue of equality between men and women in a truly extensive manner. As we will see soon, the CEE socialist regimes developed a whole system of rather detailed legal rules and social incentives aimed at implementing their understanding of equality between the sexes or more precisely their understanding of desirable social roles for women and men. Accordingly, law was the main source of knowledge regarding the socialist understanding of equality, especially since socialist academic writers rarely discussed the issue. Thus, to understand fully the conception of sex equality characteristic for CEE really existing socialism, it is useful to recognize certain basic features of the socialist understanding of law. This is all the more important since the manner in which these legal systems perceive law has become one of the most important obstacles to the enforcement of EU sex equality guarantees in the post-socialist Member States.

Socialists were convinced that a socialist state not only had a right but also a duty to plan and regulate every aspect of social life. This absolutist notion of legitimacy of state power was a direct consequence of the *reason d’être* of the socialist state. Due to the unconditional value that
the construction of communism had for socialist regimes, the socialist state was allowed to take almost all necessary measures that it believed would achieve that goal. Moreover, the CEE regimes of really existing socialism were convinced that communism can be achieved in an objective and scientific manner.\(^{53}\) In their view, socialist regulation was a result of scientific efforts and careful planning. To them, the primary function of law was to provide a clear direction to socialist citizens about how to contribute to the achievement of these goals. This “scientific” character of socialist legislation justified extensive regulation consisting of precise rule-like legal commands.\(^{54}\) To ensure this all-controlling function of law, the socialist ideology even developed its own version of the rule of law principle known as socialist legality.\(^{55}\)

The principle of socialist legality had several key features that are of interest for the later chapters of this thesis. First, socialist legality insisted on strict and faithful obedience of legal commands so that every citizen could “serve to the cause of the socialist construction.”\(^{56}\) The purpose of socialist law was not to protect individuals from undesirable state intrusions but to ensure full compliance.\(^{57}\)

Second, socialist legitimacy insisted on written law.\(^{58}\) The written law protected the interests of the central government since it ensured that anything that was not issued officially and centrally

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\(^{53}\) See GYULA ÉORSI, Comparative civil (private) law: law types, law groups, the roads of legal development, (Akadémiai Kiadó 1979), p. 547.


\(^{58}\) See, for example, IMRA SÁBO, A Szocialista Jog [Socialist Law], (Kozgazdasági és Jogi Konyvkiado, 1963), p. 221; JÍRÍ BOGUSZAK, Zaklady socialistické zakonnosti v ČSSR [The Foundations of Socialist Legality in the Czechoslovak Socialist Republic], (Československa akademie ved, 1963), p. 144.
stayed outside socialist law. Moreover, socialist legitimacy insisted on clear and precise commands. Accordingly, principle-like norms carried little weight in the legal regimes of the CEE “really existing” socialism. These regimes acknowledged only those principles that were explicitly recognized by positive black-letter law.

However, even positive principles had a rather limited function. These principles were not capable of providing concrete rights or duties. They were merely a declaratory expression of political normative values and goals that a particular socialist regime had hoped to realize in some foreseeable future. In fact, the CEE socialist regimes believed that these declaratory principles could acquire concrete meaning only through more precise statutory or executive rules.

In practical terms, this meant that all those provisions that hold great legal value for us today, such as conventional fundamental rights or principle-like equality guarantees, had merely a declaratory value in socialist legal regimes since they were not directly enforceable before competent enforcement bodies. This was particularly important in regard to the legal role of socialist constitutions. Although they were formally considered to be the highest legal act in the socialist legal system, their provisions were not directly enforceable. Provisions of socialist constitutions were above all an expression of political ideals of a socialist state whose concrete meaning was defined through an extensive web of positive statutory rules and executive

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60 See, for example, J. CAPEK, Interpretace socialistickeho prava [The Interpretation of Socialist Law], Acta Universitatis Carolinae Iuridica (1983), p. 29.
commands. For similar reasons, the legal regimes of really existing socialism denied any
legitimacy to normative considerations, established social practices, or judicial precedents.61

Third, the regulatory scope of the written law in the regimes of real socialism was exceptionally
extensive. The CEE socialist legal systems heavily relied on executive regulations and decrees. 62
These types of regulations allowed them to develop even more precise and detailed legal rules
and thus exercise more effectively their control over every aspect of social life. These regimes
insisted on the conventional legal hierarchy of their legal acts with the Constitution followed by
statutes and only then by executive regulation.63 However, socialist statutes often left a wide
margin of discretion to executive bodies, or directly delegated the general regulatory power to
the government.64 Consequently, if superordinate provisions of the CEE socialist legal orders
were not sufficiently precise, their executive bodies assumed the responsibility for making them
clear and precise.65 Consequently, executive regulation was often the most important source of
applicable law.

The implications of these features of socialist legality become particularly interesting in light of
the fact that most of the EU sex equality guarantees are given a principle-like form and require
elaboration through concrete judicial decisions.

The understanding of the rule of law characteristic of real socialism also had important
implications for adjudication in these legal regimes. The authoritarian purpose of socialist law

61 BOGUSZAK, Zaklady socialisticke zakonnosti v ČSSR [The Foundations of Socialist Legality in the Czechoslovak
Socialist Republic], p. 148.
62 SAJÓ, New Legalism in East Central Europe: Law as an Instrument of Social Transformation, p. 331.
63 WOJCIECH SADURSKI, Rights Before Courts A Study of Constitutional Courts in Postcommunist States of Central
64 SAJÓ, New Legalism in East Central Europe: Law as an Instrument of Social Transformation, p. 332.
65 See further KALMÁN KULCSÁR, The role of law-making in the modernization process, 25 Acta Juridica Hungarica
(1983).
required that socialist courts stay loyal to the will of the socialist government. Accordingly, the function of socialist courts was not dispute resolution facilitating some notion of fairness or socially desirable balance between all interests involved in the dispute.\textsuperscript{66} From the socialist perspective, insisting that only the legislative and executive branches of the government had the capacity and legitimacy to plan and control social relations, adjudication that allowed the courts interpretative discretion was unacceptable. Therefore, the CEE socialist regimes insisted that the only acceptable function of the courts was to enforce faithfully the legislator’s commands.\textsuperscript{67}

The function of courts in the CEE socialist regimes determined their style of adjudication. The socialist regimes fully embraced the legal fiction \textit{jura novit curia} and pushed it to its extreme. They did not only assume that their courts always knew the exact positive rule applicable to the facts of a particular case. More importantly, they believed that socialist courts always had the duty to determine \textit{the correct} meaning of the applicable rule.\textsuperscript{68} In that sense, the central task of socialist adjudication was to establish a correct applicable rule and determine its objectively accurate meaning.

Based on their role in the socialist legal order, socialist courts developed a style of adjudication favoring a narrow and simplistic understanding of positivist textualism. The key judicial task was to establish the meaning of particular words used by a particular provision in order to deduce the correct legal \textit{command} entailed by the rule. To achieve this task, courts primarily relied on the semantic interpretation and looked for the plain meaning of the text.\textsuperscript{69} If semantic interpretation

\textsuperscript{66} \textsc{Siniša Rodin}, \textit{Discourse and Authority in European and Post-Communist Legal Culture}, 1 Croatian Yearbook of European Law & Policy (2005), p. 8.

\textsuperscript{67} \textsc{Varga}, Transition to rule of law: on the democratic transformation in Hungary, p. 84.


\textsuperscript{69} Id., p. 543.
failed, courts used the systemic method of interpretation. They tried to clarify a vague term by looking for its clarification in other provisions of the same statute, or even in other positive legal acts. Socialist courts committed a serious breach of their role if they relied on any type of purposive interpretation and constructed the meaning of vague terms in light of normative considerations such as individual fairness, social justice, or utility.\textsuperscript{70} Similarly, they could not rely on principle-based provisions even though they were provided by statutory law. Moreover, they were not expected to interpret rules in light of what they thought was the legislator’s intent or underlying policy, because of the risk of undermining the authority of the central government.\textsuperscript{71}

CEE socialist regimes tried to justify this type of adjudication by insisting on \textit{legal logic}.\textsuperscript{72} They reduced judicial decision making to the process of logical deduction. They insisted that once a court had correctly established the facts of the dispute and determined the objective meaning of the applicable rule, it simply had to compare the factual predicate defined by the rule with the established facts and deduce the logical conclusion required by the command in the rule.

Extreme legal positivism favored by CEE regimes reflected their distrust towards judiciary. In many ways, socialist courts were disempowered. As one scholar perceptively noted, socialist courts simply did not decide on “hard” cases.\textsuperscript{73} For example, cases that involved the state as the defendant were in principle dealt with in the administrative complaint procedure.\textsuperscript{74} In the

\textsuperscript{70} See, for example, Jiří BOGUŠZAK, Právní záruky socialistické zákonnosti v Československé republice [Legal guarantees of the socialist legality in the Czechoslovak republic], 98 Právník 113 (1959), p. 125.


\textsuperscript{72} See CSABA VARGA, Lectures on the paradigms of legal thinking, (Akadémiai Kiadó, 1999), p. 159.

\textsuperscript{73} SAIÓ, New Legalism in East Central Europe; Law as an Instrument of Social Transformation, p. 294.

\textsuperscript{74} MARKOVITS, Pursuing One’s Rights under Socialism, pp. 697-8.
administrative procedure, citizens did not sue the state. Instead, they filed a complaint against a particular act of an administrative body of the socialist state. The complaint was basically filed to the same or superior administrative body. Decisions of the administrative bodies were final and were not subject to judicial control.

Furthermore, regular socialist courts did not have the competence to decide on economic disputes since all establishments in the socialist planned economy were state-owned. Economic disputes were therefore more likely to be resolved through centralized political intervention. Rare economic cases that had to be resolved legally were not assigned to regular civil courts, but to the specially designed Commercial court. In addition, socialist legal systems often developed a system of conciliatory mediation/arbitration whose purpose was to resolve disputes before they reach trial proceedings. Such proceedings were particularly popular in the context of employment and were conducted by lay arbitrators who were employees of a particular establishment. Their primary purpose was to teach a lesson and find some conciliatory solution of the problem; not to punish a person.

The limited role of socialist courts as well as their subordinate position in relation to the socialist legislature and executive bodies showed that the socialist regimes bureaucratized and proletarianized their judiciary. As a result of such devaluation of the judicial function, professional qualifications of socialist judges were almost reduced to clerical skills. The most valuable skill for a socialist judge (or a lawyer in general) was to know the socialist law, that is,

76 Id.
79 MARKOVITS, *Pursuing One’s Rights under Socialism*, p. 691.
to know which valid statute, decree or decision must be applied in a particular situation. Having in mind the size and volatility of the socialist regulatory system, this was certainly not an easy task.\textsuperscript{80}

However, once she established the relevant facts of a particular case and the applicable law, it was assumed that the socialist judge was left with an easy task. All she had to do was to compare the established facts with the factual predicate determined by the rule and deduce a simple logical conclusion. Since the courts were not allowed to consider any reasons outside the legal text or engage in any discussions of substantive issues, judicial decision-making was perceived as a thoroughly predetermined and logical process.\textsuperscript{81} Consequently, the reasoning in decisions of socialist courts was thoroughly controlled by “textual arguments” and socialist courts rarely bothered to explain the rationale behind the legal provisions they were applying. In this way, socialist adjudication came as close as possible to what one prominent CEE legal thinker and judge described as \textit{mechanical jurisprudence}.\textsuperscript{82}

Many of the described features of socialist law will become even more visible in the following analysis of the manner in which the CEE regimes of real socialism implemented their conception of equality between men and women through their labor law.

\section*{1.3. Equality between Men and Women in CEE Socialist Labor Codes}

The labor code was without a doubt one of the central pillars of socialist legal systems. This is hardly unexpected since the purpose of the socialist labor code was to extensively regulate all segments of workers’ participation in socialist production. A typical socialist labor code

\textsuperscript{80} See KULCSÁR, \textit{The role of law-making in the modernization process}.\
\textsuperscript{81} Cf. VARGA, Transition to rule of law: on the democratic transformation in Hungary, p. 84.\
consisted of several hundred articles. Each article consisted of several rather detailed rule-like provisions that were assumed to express the commanding will of the socialist government in a determinate and easily applicable manner.

In contrast to the constitution, the labor code had a much greater practical importance in the CEE socialist legal systems. Recall that, in the CEE socialist legal orders, the constitution was a normative blueprint of socialism in a particular country. It was a solemn political declaration of the most important values and principles of the socialist society. However, in accordance with the Marxist idea of historical materialism, socialists held that these provisions were not directly enforceable. Socialists believed that the practical meaning of socialist values and ideals could never be abstractly determined, since it depended on the constantly changing economic and technological basis of the socialist society. Consequently, socialist constitutions always required a more concrete elaboration through socialist statutes and secondary acts. The purpose of these acts was to provide the most effective way of achieving socialist goals and values guaranteed by the constitution that was viable in the light of the material basis of the society existing at a particular moment.

Accordingly, the task of the labor code was to provide concrete commands about the implementation of some of the most important socialist values and goals guaranteed by the constitution. This provided a rule-like quality to a great majority of labor code provisions, making them, unlike constitutional guarantees, directly enforceable by the socialist judiciary.

Due to the essential importance that human labor and participation in the process of economic production had for the socialist idea of equality, socialist labor codes were the most important equality acts in the socialist legal order. This was particularly the case in regard to the ideal of
equality between men and women. No other socialist statute, with the possible exception of a family code, paid that much amount of attention to women and their position as did a labor code. As we will see soon, socialist labor codes extensively regulated women’s status in socialist production. Taking into account the fundamental premise of the socialist conception of equality between men and women, according to which the equality of women is contingent on their participation in the process of production, this attention is not surprising.

At the same time, this degree of attention to the position of women also suggests that socialist labor codes offer a valuable insight into the understanding of equality between men and women characteristic for the CEE legal regimes. Indeed, as we will see, socialist labor codes developed a rather complex framework of detailed rule-like provisions whose purpose was to establish employment conditions that were responsive to the abilities and socially desirable roles of men and women, which would ensure their equality in the socialist society. Furthermore, socialist labor code provisions rather faithfully followed the fundamental premises of the socialist concept of equality between men and women, which provided them with a significant degree of coherency. Hence, despite their complexity, socialist labor law equality frameworks were not perplexing.

The close connection between socialist equality labor law provisions and their normative background is also interesting from another perspective. We will see that many socialist provisions seem rather familiar from the present-day EU perspective. However, the analysis in this section will show that these apparently similar socialist provisions served normative goals that were profoundly different from those underlying the EU sex equality provisions. In that sense, the analysis warns us that despite textual similarities it is rather risky to make any
assumptions about the meaning of these provisions without taking into account their unique normative framework. Unfortunately, as I will show in the latter chapters, this is a lesson that still has to be learned when it comes to the implementation of EU sex equality guarantees in the CEE post-socialist Member States.

The analysis of the way in which socialist labor codes regulated the issue of equality between men and women will be structured around its three important features. First, I will point out the importance of the difference approach for the equality of men and women in socialist production. Second, I will analyze more closely the central role of motherhood in the socialist understanding of equality of women. Third, I will point to the peripheral role that antidiscrimination guarantees played in socialist labor law equality frameworks.

1.3.1. Regulating Difference

One of the most striking features of socialist labor codes is the number of provisions providing for different treatment of women and men in relation to various employment conditions.

The CEE socialist labor codes thus included provisions that provided for different treatment of

- men and women in relation to employment at particular jobs
- women and men in relation to night-work
- women and men with children in relation to overtime and part-time work
- women and men with children in relation to employment at particular jobs
- women and men with children in relation to termination of employment
- women and men with children in relation to business trips or transfers to different place of work
• pregnant women in relation to employment
• pregnant women in relation to termination of employment
• women and men who desired to take birth-leave in order to spend time with their newborns
• women and men who desired to take childcare leave.

The list of sex-based different treatment rules seems particularly long from an EU perspective. The Community 76/207 Equal Treatment Directive provided only three exceptions from the equal treatment principle requiring that men and women be treated according to the same criteria in relation to all employment conditions. Women and men in the EU could thus be treated differently in employment only if this was required 1) by a specific nature of a particular job (bona fide qualification); 2) for the protection of women, particularly in regard to pregnancy and maternity; 3) for the promotion of actual equality of opportunity for men and women.

More importantly, the European Court of Justice (ECJ) has consistently held that the exceptions from the equal treatment guarantee had to be interpreted strictly. The Court has, for example, insisted that measures for the protection of women must be limited to health reasons closely related to the process of childbearing. Similarly, the European Commission has insisted that measures for the protection of women that are not related to pregnancy or maternity should be repealed or made to apply equally to both sexes.

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86 European Commission, Protective Legislation for Women in the Member States of the European Community COM(87)105.
What is clear from the list of sex-based different treatment provisions in the CEE socialist labor codes is that the protection of health as a reason for different treatment can explain only a limited number of socialist protectionist provisions. Clear examples of such concern are provisions protecting the health of pregnant women. Accordingly, all of the CEE socialist labor codes prohibited employment of pregnant women at jobs that were threatening to their pregnancy, and obliged employers to transfer pregnant workers to a job that did not entail a risk to their pregnancy.\(^{87}\) Similarly, they almost uniformly prohibited the dismissal of pregnant women.\(^{88}\) Moreover, many of them prescribed strict sanctions for violating this prohibition. For example, the Hungarian labor code provided that anyone "who refuses employment to expectant mothers or to a woman in the period of baby-nursing, on this account, or reduces the wages of such women, or dismisses such women from employment is liable for prosecution on the charge of a petty offence."\(^{89}\) Furthermore, the CEE socialist labor codes prevented employers from sending women on business trips or requiring them to work overtime.\(^{90}\)

However, beyond the provisions regulating employment conditions of pregnant women, the concern for women’s health seems hardly convincing as an explanation of the “special”

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\(^{87}\) For example, Art. 150/3 of the 1968 Czechoslovakian Labor Code provided that “a pregnant woman may not be employed at work which according to medical opinion endangers her pregnancy for reasons due to her specific health conditions. The same shall apply to a mother til the end of the nine month after accouchement.” Czechoslovakian Labor Code, Shirka Zakonu, 1968. Similarly, Art. 309 of the 1986 Bulgarian Labor Code provided that “pregnant or breastfeeding employee engaged in a job which does not suit her state shall be reassigned to another suitable job, or to the same job but with alleviated working conditions, should the medical authorities prescribe so. Until the enterprise puts this prescription into effect, the employee shall be relieved of her obligation to perform the job unsuitable to her state, and the enterprise shall pay her compensation to the amount of the gross labour remuneration received by her during the month preceding the date of issue of the prescription.” Bulgarian Labor Code, Durzaven vestnik, Nos. 26-27, 1986.


\(^{89}\) Art. 36 of the 1967 Hungarian Labor Code. See also Art. 271 of the 1968 Czechoslovakian Labor Code.

protection that we see in these codes. For example, socialist labor codes included a significant number of provisions that prohibited employment of women at particular jobs or under a particular set of employment conditions. They almost uniformly prohibited employment of women for physically strenuous jobs. A classic example is the prohibition of underground work for women. However, the list of “prohibited” jobs was much longer. For example, socialists “protected” women from work in any industry where they could be exposed to a harmful chemical substance, work requiring heavy lifting, operation of heavy machinery or even driving large transport vehicles.91

The CEE socialist regimes attempted to justify such special protection of women primarily by health concerns. The CEE socialist labor codes in principle contained only a general prohibition of employment of women in strenuous jobs. For example, the Hungarian Labor Code simply declared that “women and young persons shall not be employed in jobs which may have adverse consequences for them in view of their physique and stage of physical development”.92 However, due to its generality, the provision was not directly applicable per se and required further elaboration through executive decrees.93 Therefore, CEE socialist governments issued executive labor regulations with a precise list of occupations that were not open to women. Such executive decrees were in most cases issued by ministries of health and labor.94

92 Art. 20/2 of the 1967 Hungarian Labor Code.
93 The exceptions were the labor codes of the Yugoslav socialist republics. For example, Articles 58-9 of the Croatian Labor Code provided a list of more than 20 different types of work that were prohibited to women. Some of the more “interesting” examples are occupations including work with any type of pneumatic machines causing strong vibrations, jobs including carrying of weight uphill, jobs requiring contact with Simmens-Martin, electric or other types of furnaces for metal or jobs involving emptying septic holes.
94 For example, see Decision No.5 of the Committee on Labour and Social Affairs, Ministry of Public Health, and Central Council of Bulgarian Trade Unions on work appropriate for women, work that is prohibited for women, and work that is specifically women’s work, 30 April 1987, Durzaven
These labor law decrees prescribed lists that included tens of different occupations that were prohibited to women. For example, the Polish labor law decree from 1979 provided a list of over 90 occupations that were strictly prohibited to women in 18 different areas of the process of production. More recently, many of these executive labor law decrees authorized employers to demand from their female workers to take medical examinations that would establish whether they are capable of performing a particular job that was not listed as “prohibited” without a risk to their female physique.

Socialist regimes regularly justified such protective legislation by their concern for women’s health. However, these justifications were frequently inconsistent, if not completely dubious. In most cases, a health risk entailed by a particular type of work was the same for both male and female workers. Yet, access to that type of work was banned only to women. Moreover, only female workers could be asked to take a medical examination with the purpose of establishing a health risk for their “special” physique. Furthermore, many of the occupations were banned as harmful to women without any concrete medical evidence.

This type of protection becomes even more problematic when observed in the context of similar socialist labor provisions. In addition to women, adolescents were the only other social group

_Vestnik_, 12 June 1987 or, in the Hungarian case, _Ordinance No. 6 of the Minister of Health on the protection of the health and physical integrity of women and young persons_ published in Egeszsegugyij Kozlony, 23 July 1982, No. 14, pp. 304-309.

_Ordinance of the Council of Ministers providing a list of types of work in which women may not be employed_, published in Dziennik ustaw polskiej Rzeczypospolitej Ludowej, 27 February 1979, No.4, Serial No. 18, pp. 37-42. The decree covered the following areas of employment: Movement and transport of loads; Mining and quarrying; Foundries and metal-working; Manufacture of non-metallic mining products excluding coal; Chemical industry; Work with explosives; Dry distillation of coal, oil-refining and natural gas industries; Textile industry; Paper industry; Tanning industry; Food and tobacco industries; Printing trades; Building and road-making; Communications and transport; Health services and nuclear technology; Local government services; Agriculture; and Forestry.


that enjoyed a similar type of “health” protection in the CEE socialist regimes.\textsuperscript{98} In fact, the provisions protecting women and adolescents were regularly included in the same chapter of the CEE labor codes dedicated to the protection of “special” categories of workers.\textsuperscript{99} The rationale behind the extensive protection of adolescents is more or less clear. Adolescents are usually protected in a similar manner due to the social concern for their weaker bargaining position, which is tightly related to doubts regarding their ability to make informed rational decisions. Regardless of the prejudices towards women that were not rare in everyday life of the CEE socialist societies, the official socialist ideology certainly did not claim that women were irrational individuals incapable of making sound decisions. This similar treatment of two profoundly different groups highlights two implications of the socialist protectionist legislation.

First, socialist protectionist labor law provisions involved a significant restraint of individual autonomy for women. This becomes even more obvious if one takes into account that many occupations that were not available to women due to health reasons were equally harmful to men.\textsuperscript{100} Moreover, this does not mean that men were not protected from work that was harmful to their health. The CEE socialist labor codes protected male workers from harmful work if they provided medical proof that their health was at risk.\textsuperscript{101} However, the choice to use the available protection was left to individual men. In that respect, the character of the socialist protection of women’s health was paternalistic.\textsuperscript{102}

\begin{itemize}
\item \textsuperscript{98} 1987 Bulgarian Labor Code, 305; 1968 Czechoslovakian Labor Code, Art. 163-8; 1967 Hungarian Labor Code, Art. 22.
\item \textsuperscript{99} Ibid.
\item \textsuperscript{100} \textsc{Molyneux, Women in Socialist Societies: Problems in Theory and Practice}.
\item \textsuperscript{101} For example, Art. 371/a of the 1968 Czechoslovakian Labor Code; Art. 29 of the Croatian Labor Code; Art. 117-118 of the 1977 Slovenian Labor Code.
\item \textsuperscript{102} Some socialist labor law experts have complained that women showed certain resistance against protectionist legislation that is in their interest and found it necessary to stress that the government will nevertheless gradually
\end{itemize}
Second, the fact that the CEE socialist regimes rejected any idea of women as less rational individuals, but still insisted on such a strict level of protection of female workers, suggests that, apart from the concern for the health of female workers, there was some other “higher” social interest at stake. If protectionist measures were truly motivated only by health concerns, the CEE socialist regimes would have certainly extended the same level of protection to their male workers as well.

This protectionist legislation reveals the profoundly troubling character of the notion of equality between men and women characteristic for the CEE “really existing” socialism.\textsuperscript{103} It reveals the highly problematic manner in which these regimes defined the notion of difference.

As seen, the CEE socialist regimes justified their strict protectionist measures with their concerns for the “female physique”. The Hungarian Labor Code thus stated that women “shall not be employed in jobs which may have adverse consequences for them in terms of their physique,”\textsuperscript{104} while the Czechoslovakian Labor Code provided that women shall not be “employed at work which is physically inappropriate or harmful to their organism”.\textsuperscript{105} In other words, socialists tried to justify this type of protectionist different treatment with reasons that are biological, which implies that they are “natural” and “objective”.\textsuperscript{106}

Such a deterministic definition of the notion of difference had a far-reaching effect for the socialist notion of equality. It neutralized significant inequalities of women in socialist economic production.

\textsuperscript{103}Einhorn, Cinderella goes to market: citizenship, gender, and women's movements in East Central Europe, p. 26.

\textsuperscript{104}1968 Hungarian Labor Code.

\textsuperscript{105}1968 Czechoslovakian Labor Code.

\textsuperscript{106}See, for example, Garancs\textsuperscript{c}y, The Status of Female Labour and the Law in Hungary.
First, it justified the segregation of men and women in different areas of employment. As discussed below, socialist labor courts guaranteed equality of opportunity to men and women in those jobs that were not inaccessible to women due to health reasons. However, due to “natural” differences in male and female physiognomy, they considered it was “natural” that women and men tended to choose different professions that were more “appropriate” to their sex.107 Moreover, some of these systems even encouraged the employment of women in “appropriate” occupations. For example, the Bulgarian Labor Code provided that “women shall be hired to suitable jobs with priority, all other conditions being equal.”108 Not all of the CEE socialist regimes found such segregation to be necessarily desirable. However, they certainly rejected any suggestion that sex segregation in employment was a form of structural inequality of women.109

The second implication is equally important, if not more. The socialist perception of sex differences as “natural” justified a significant pay gap between men and women in CEE socialist economies.110 CEE socialist regimes did not find it discriminatory that those professions traditionally occupied by men, particularly those that were more “suitable” to male physiognomy because they required strenuous physical work, were better paid.111 In their view, the value of such labor was determined “objectively” in light of its importance for the development of

108 Art 306/1 of the 1987 Bulgarian Labor Code. The executive order of the Ministry of Health provided that work “appropriate” for women is work that they may in general accomplish on an equal footing with men, work listed in the appendix (List No.1), and any other non-specified work. Decision No.5 of the Committee on Labour and Social Affairs, Ministry of Public Health, and Central Council of Bulgarian Trade Unions on work appropriate for women, work that is prohibited for women, and work that is specifically women's work, Durzaven Vestnik, 12 June 1987.
socialist economy.\textsuperscript{112} For example, the Czechoslovakian Labor Code provided that “the wage shall be determined and paid to workers in accordance with the quantity, quality and social importance of their work, so that it effectively stimulates their material interest in achieving the best possible results of their work, in particular growing productivity and quality of products and services, as well as economy and efficiency, and so that it stimulates the interests of workers in improving their qualifications and their utilization. Organizations shall differentiate wages according to the complexity of the work involved and the conditions under which it is performed, the prerequisite for its performance, the personal ability of individual workers and their merit in the results of the working team and the organization.”

Accordingly, they considered that paying such strenuous labor equally to less demanding work contravened the principle of socialist equality from each according to his abilities, to each according to his contributions, that is, the principle of equal pay for equal work.\textsuperscript{113} In other words, they believed that paying “male” and “female” work equally led to an unfavorable treatment of male workers performing heavy labor because of women’s “natural” physical disadvantage.

Accordingly, CEE socialist regimes recognized the existence of a pay gap between men and women in their economies. However, they justified it by (again predetermined) inferior material and technological conditions of a socialist economy.\textsuperscript{114} In that sense, they argued that the pay gap would eventually “wither away” with the economic progress of their society. Moreover, they believed that women had the responsibility to facilitate this progress by improving their

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{112} V. Brajić, \textit{Equality in the Labor Law: Yugoslavia}, 14 Bulletin of Comparative Labour Relations (1985), p. 240. For similarities between this view and the reasoning of the ECJ in the Rummler dispute, see Chapter II.
\item \textsuperscript{114} Garancscy, \textit{The Status of Female Labour and the Law in Hungary}, .
\end{itemize}
\end{footnotesize}
education and developing their practical skills, which would allow them to acquire socially more valuable and better paid jobs.\footnote{Id., pp. 162-3.}

As explained later, in addition to the above arguments, the extensive “special” protection of women significantly narrowed the scope of the socialist prohibition of discrimination on the grounds of sex for similar reasons. This narrow understanding of discrimination remains one of the most important barriers to the enforcement of EU sex equality guarantees in the CEE post-socialist legal systems.

### 1.3.2. Protection of Motherhood

I have suggested in the previous section that socialist protectionist measures were not truly motivated by the concern for women’s health. More precisely, the socialist protection of women’s health was instrumental to achieving a “higher” interest of socialist society.

Indeed, even if we look at the socialist labor law measures that seemed to be truly concerned with the protection of health, such as the provisions concerning the protection of pregnant women, we can quickly conclude that they were not motivated exclusively by health concerns. In that sense, a significant number of measures protecting pregnant women could hardly be explained as necessary for the protection of their health. For example, all of the CEE socialist regimes strictly prohibited \textit{night work} for pregnant women regardless of any actual health risk.\footnote{Art 156/3 of the 1968 \textit{Czechoslovakian Labor Code}; Art 140 of the 1987 \textit{Bulgarian Labor Code}; Art 178/1 of the 1974 \textit{Polish Labor Code}; 37/3 of the 1967 \textit{Hungarian Labor Code}; Art. 68/1 of the 1978 \textit{Croatian Labor Code}; Art 126 of the 1977 \textit{Slovenian Labor Code}.}
Similarly, they did not allow *overtime* work for pregnant women.\textsuperscript{117} They also prohibited *transfer* of pregnant women to a different place of work.\textsuperscript{118} Furthermore, pregnant women who were transferred to another position due to a health threat to their pregnancy were sometimes not allowed to return to their old job for a certain period of time after they gave birth.\textsuperscript{119}

Even more telling is the fact that almost every benefit granted to pregnant women was simultaneously extended to *mothers* with small children, even though fathers can also provide childcare that is traditionally provided by mothers. For example, almost all of the CEE socialist regimes strictly prohibited the dismissal of mothers with small children.\textsuperscript{120} They forbade mothers with children under a certain age to go on business trips and allowed them to refuse such trips after the child reached that particular age.\textsuperscript{121} Furthermore, the CEE socialist labor codes almost uniformly prohibited night work and overtime work for women with small children.\textsuperscript{122} At the same time, any equivalent parental benefits were denied to fathers, except in limited circumstances involving men as single parents.

The described provisions show the true purpose of the CEE socialist labor law protection of women in employment. These measures served to encourage women to assume the traditional role of a mother and consequently keep them second class laborers in the socialist work force. In that regard, they facilitated the socialist ideology of motherhood that gradually became


\textsuperscript{119} Art of the 1968 Czechoslovakian Labor Code. See also Art 23(4) of the 1968 Hungarian Introductory Decree to the Labor Code.

\textsuperscript{120} Articles 47/2, 48/1d, 49/2-3, 155 of the 1968 Czechoslovakian Labor Code; Art. 313 of the 1986 Bulgarian Labor Code; Art. 177 of the 1974 Polish Labor Code; Art. 26 of the 1967 Hungarian Labor Code.

\textsuperscript{121} Art 154 of the 1968 Czechoslovakian Labor Code; Art 178/2 of the 1974 Polish Labor Code; Art 310 of the 1986 Bulgarian Labor Code.

\textsuperscript{122} Art 156/3 of the 1968 Czechoslovakian Labor Code; Art 178/2 of the 1974 Polish Labor Code; Articles 140/2, 147/2 of the 1986 Bulgarian Labor Code; Art 37/3 of the 1967 Hungarian Labor Code.
prominent in the CEE regimes of “really existing” socialism after the Second World War and

The CEE socialist labor code provisions concerning the protection of women in employment
demonstrate that these socialist regimes considered men and women to have distinctly different
social roles. Men were above all workers (and political decision makers, if they met the
ideological requirements). Their role as fathers was at best of secondary importance. Women
were both mothers and workers. However, they were mothers first. Their role of a socialist
worker came second to their responsibility for reproduction.\footnote{Fodor, et al., \textit{Family policies and gender in Hungary, Poland, and Romania}, p. 480.}

In fact, the CEE socialist labor codes were rather straightforward about the purpose of the labor
law protection of women. The Czechoslovakian Labor Code thus declared that “\textit{women have the
right to the same status at work as men. Women must be provided with working conditions enabling them to participate in work not only with regard to their physiological conditions but especially also with regard to their role in society as mothers, in raising children and in taking care of them.”}\footnote{Art VII of the 1968 Czechoslovakian Labor Code.} Accordingly, it stipulated that women shall not “\textit{be employed in any work that is physically inappropriate or harmful to their organism, in particular work which might endanger their mission as mothers.”}\footnote{Art 150/2 of the 1968 Czechoslovakian Labor Code.} Similarly, the Bulgarian Labor Code provided that “\textit{the performance by women shall be prohibited for jobs which are heavy or hazardous to their health and procreative function}”\footnote{Art 307 of the 1987 Bulgarian Labor Code.}, while the Slovenian Labor Code demanded from employers to
determine “\textit{those jobs which women cannot perform, especially during the period of pregnancy,}
due to the protection of motherhood.”

Some of the CEE socialist labor codes even listed the protectionist provisions under the special section of the code titled “the protection of motherhood”.

The socialist protection of motherhood came at a high cost. We have already seen that the CEE socialist regimes significantly restricted women’s personal autonomy in order to protect their procreative capacity. They were also more than willing to accept the traditional sex-based distribution of work within family and household, which placed the responsibility for childcare and nourishment of family members primarily, if not exclusively, on women’s shoulders.

Women’s labor within the family and household allowed these regimes to invest valuable resources into other “priorities” instead of developing a costly network of social institutions providing childcare and nourishment services.

At the same time, they could not afford to lose women’s labor in the process of economic production. Generous but still limited in scope and duration, protectionist measures show that socialists expected women to fully resume their role of workers after they fulfilled their “mission as mothers.”

Socialist mothers were expected to work, although not necessarily the same (i.e.

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128 Art 123 of the 1977 Slovenian Labor Code. Art 57 of the 1978 Croatian Labor Code provided that employers should determine “strenuous jobs and tasks harmful for health, which cannot be performed as harmful for the function of motherhood.” Art 189 of the 1976 Statute on Collective Work of the Federal Socialist Republic of Yugoslavia provided that employers had to secure “special protection of pregnant women against heavy labor and harmful effects of work, protection of overtime and night labor, maternity leave, flexible working hours after the confinement and during the period of care for a young child as well as any other rights which aim to secure the protection of the maternal function.”. Statute on Collective Work of the Federal Socialist Republic of Yugoslavia, Službeni List SFRJ, 53/76.

129 Such thematic sections could be found, for example, in the 1977 Slovenian Labor Code and the 1978 Croatian Labor Code.

130 E. LEACOCK & SAFA, Women's Work: Development and the Division of Labor by Gender, p. 256.

better paid) jobs as men. Mothers who refused to “contribute” to the socialist economy could expect significant social consequences.

For example, in one of the rare CEE judicial decisions (indirectly) involving the issue of equality between the sexes, the Czechoslovakian court suggested that divorced women could lose custody over their children if they did not work. In this case, the court dismissed the father’s request for custody that was based on the argument that the mother could not provide sufficient care for the children since she worked full time. The father claimed that the children would be given better care under his custody since his wife did not work in order to care for their two children.

The court rejected these arguments and found that a socialist economic order enabled a woman “to enter social production and thus ensured her the position that was given to a man.” Consequently, “women were enabled to participate through their work in the development of the entire nation and contribute to the welfare of their family.” The court concluded that “the fact that women participate successfully in the development of socialism denies any old-fashioned theories about their biological and social inferiority. Therefore, if the legal order of the people’s democracy guarantees women full participation in societal production, the defendant’s work as such cannot be the reason why she would not be able to care for her child.” However, the Court also found it necessary to stress that the mother’s employment was proof that she would raise her child “in accordance with the interest of the society. He will be at least equally secured as in his

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134 Decision of the Krajský soud v Olomouci [Regional Court in Olomouc] dated 13.2. 1950 reported in the Sbírka soudních rozhodnutí [Collection of judicial decisions], abr. Sb.s.r. 1950, 279.
father’s home, as there the child would be raised by his second wife, who – as the father himself remarked – is not employed.”

The fact that CEE socialist regimes expected women to assume their responsibility for social reproduction and equally participate in socialist production shows two features of the socialist understanding of equality between men and women. The CEE socialist equality not only perpetuated the traditional perception of women’s social roles and corresponding inferior abilities\(^{135}\), but also willingly placed women under a “double burden”.\(^{136}\)

To “encourage” women to take on this burden, CEE socialist regimes developed a particular model of childcare leave that became a trademark of the CEE socialist equality of women. The labor law provisions again played a key role.

The CEE socialist labor law model of childcare protection is a combination of two types of measures. On the one hand, the model provided strict protection of employment status for mothers who decided to give birth. On the other hand, the employment protection was further supported by a set of generous social benefits for mothers who decided to assume childcare responsibility during the early period of a child’s life. This last feature made the socialist model rather popular in the CEE societies.

At the same time, the model had a rather inflexible structure. Women were not in a position to balance their parental responsibilities and their professional interests in accordance with their personal interests. Instead, the inflexible structure allowed the socialist regimes to manipulate the


model of childcare protection in a manner that accommodated their competing economic interests – the need for a labor force and the need for reproductive services.\footnote{137 See GLASS & FODOR, From Public to Private Maternalism? Gender and Welfare in Poland and Hungary after 1989, p. 332; FODOR, Women at Work: the Status of Women in the Labour Markets of the Czech Republic, Hungary and Poland, p. 17.}

The CEE socialist model of childcare leave consisted of two tiers: 1) maternity leave, and 2) extended maternal leave. In relation to the first tier, socialist labor codes guaranteed women the right to a relatively long period of maternity leave.\footnote{138 In reality, a maternity leave was often longer than the period prescribed by statute. See GARANCSCY, The Status of Female Labour and the Law in Hungary.} An average length of a maternity leave varied between 6 – 9 months. The leave was mandatory. The time spent on a leave was included in a mother’s service record for the purposes of retirement.\footnote{139 SLOAT, Legislating for Equality: The Implementation of the EU Equality Acquis in Central and Eastern Europe, p. 12.} At the same time, the CEE socialist states generously (in principle fully) compensated mothers for the loss of their wages during the period of a maternity leave (see table below). The maternity allowance was, of course, available only to employed mothers.

Furthermore, as seen above, the CEE socialist labor codes strictly prohibited the dismissal of women on maternity leave.\footnote{140 Articles 47/2, 48/1/d, 49/2-3, 155 of the 1968 Czechoslovakian Labor Code; Art 313 of the 1986 Bulgarian Labor Code; Art 177 of the 1974 Polish Labor Code; Art 26 of the 1967 Hungarian Labor Code.} A dismissal was possible only in extraordinary circumstances that were explicitly prescribed by a labor law, such as the termination of an economic enterprise. However, even in such cases, socialist labor codes required employers to find a new job for a dismissed mother that corresponded to her qualifications.\footnote{141 Id.} After the end of a maternity leave, the employer was required to reassign a mother to her original work and workplace.\footnote{142 Art 147 of 1968 Czechoslovakian Labor Code; Art 313 of the 1986 Bulgarian Labor Code; Art 70 of the 1978 Croatian Labor Code.}
not possible, the employer was required to assign her to other work that corresponded to her qualifications and previous pay.

In contrast, the CEE socialist regimes did not provide the corresponding right to paternal leave to fathers who wanted to spend time with their partners and newborns during this period of significant importance for the formation of family relations. Some regimes allowed fathers to take a personal leave of absence in such situations. These leaves were usually rather short. Moreover, they were unpaid and not included in the service record for retirement purposes. In that sense, their structure clearly shows how the CEE socialist regimes perceived the distribution of family responsibilities.

The CEE socialist labor codes also provided women with the option to take extended maternal leave immediately following the maternity leave. These maternal leaves were usually granted until the child’s third birthday. They were optional and not fully compensated (see table below). However, women who stayed on extended maternity leave still enjoyed some financial support from the socialist state in a form of various family benefits. In all other aspects, mothers who assumed responsibility for childcare during the extended period were granted the same level of employment protection as they enjoyed during the period of maternity leave.

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144 Id.
146 See, for example, GARANCSCY, The Status of Female Labour and the Law in Hungary, pp. 172-3.
Table 1.

<table>
<thead>
<tr>
<th></th>
<th>Czechoslovakia(^{147})</th>
<th>Hungary(^{148})</th>
<th>Poland(^{149})</th>
<th>Bulgaria(^{150})</th>
<th>Croatia/Slovenia</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Maternity leave:</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>duration</strong></td>
<td>28 weeks (37 for single mothers or multiple births)</td>
<td>24 weeks</td>
<td>16 weeks for the first child and 26 for multiple births</td>
<td>10 months for the first child; 13 months for the second; 14 months for the third and fourth; 10 for subsequent children</td>
<td>6 months</td>
</tr>
<tr>
<td><strong>Maternity leave:</strong></td>
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</tr>
<tr>
<td><strong>compensation</strong></td>
<td>90% of gross salary</td>
<td>100%</td>
<td>100%</td>
<td>100% for 120 days for the first child; 150 for the second; 180 for the third and fourth; and 120 for subsequent births.</td>
<td>100%</td>
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<tr>
<td></td>
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<td></td>
<td>A minimum wage for the remainder of the leave - 6 months for the first child, 7 months for the second, 8 months for the third, and 6 months for subsequent children</td>
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<tr>
<td><strong>Maternal leave:</strong></td>
<td></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>duration</strong></td>
<td>Until a child's third year</td>
<td>Additional 1-1.5 years</td>
<td>Until a child's third year</td>
<td>Until a child's third year</td>
<td>Until a child's first year</td>
</tr>
<tr>
<td><strong>compensation</strong></td>
<td>Lump sum allowance</td>
<td>Two lump sum allowances</td>
<td>Lump sum allowance for 2 years</td>
<td>Lump sum allowance (one-tenth of minimum salary) until a child’s second year</td>
<td>Lump sum allowance</td>
</tr>
</tbody>
</table>

\(^{147}\) Data taken from SAXONBERG & SZELEWA, The Continuing Legacy of the Communist Legacy? The development of family policies in Poland and the Czech Republic.

\(^{148}\) Data taken from SLOAT, Legislating for Equality: The Implementation of the EU Equality Acquis in Central and Eastern Europe.

\(^{149}\) SAXONBERG & SZELEWA, The Continuing Legacy of the Communist Legacy? The development of family policies in Poland and the Czech Republic.


However, the optional character of the extended maternal leave was somewhat deceiving. In reality, most women had little choice but to use this option due to several reasons.

First, in contrast to the rather developed social network of childcare services for older children, the social system of childcare for children under 3 years of age was lacking both in size and quality in all the CEE socialist regimes. Hence, parents who could not rely on “granny services” often had no choice but to stay at home.

Second, the inflexible structure of the socialist childcare leave model induced women to take long maternity leaves. For example, the CEE labor codes frequently allowed mothers to use the extended maternal leave only immediately after the end of the maternity leave. Furthermore, women were not allowed to split maternal leave into several segments to use them at different times. At the same time, various types of financial childcare and family benefits often seemed sufficiently attractive to women whose average salary was frequently lower than men's.

To summarize, the CEE socialist regimes engaged in rather extensive gender engineering. The labor law provisions concerning the protection of women and childcare leave favored profoundly different gender roles for women and men in socialist society. More precisely, the primary purpose of these “equality” provisions was to encourage women to assume the traditional responsibility for “caring and rearing” of children during a considerable period of early childhood and keep mothers out of the labor market during that period. The CEE socialist

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152 See further BOGDAN MIECZKOWSKI, Social Services for Women and Childcare Facilities in Eastern Europe, in Women, state, and party in Eastern Europe (Sharon L. Wolchik & Alfred G. Meyer eds., 1985).
regimes were more than willing to accept the serious disadvantages that such a social sex-based
distribution of family responsibilities had for women. Consequently, the CEE socialist model of
women’s emancipation has been described as grossly inefficient, harsh and hypocritical.\footnote{MAXINE MOLYNEUX, Gendered Transition in Eastern Europe, 21 Feminist Studies (1995), p. 638.}

Moreover, they were more than willing to tolerate the disadvantaged position of women in
employment that was a consequence of their “special” protection. This argument is particularly
relevant for our purposes since it shows that the CEE socialist labor codes did not particularly
favor the idea of equality of opportunity in employment, which requires the state to ensure that
women can compete on equal footing with men for available career opportunities as individuals
or, more precisely, that their employment opportunities do not depend on the social conditions
ddictated by the (gender) roles that society assigns to their particular sex. In contrast, the
protectionist provisions of the CEE socialist labor codes show that these socialist regimes held
that men and women should have significantly different roles in socialist production and social
life in general. In that respect, from the CEE socialist perspective, the notion of equality of
opportunity - aimed at weakening the different social roles that men and women have in a
particular society - did not look particularly appealing. This will become more visible later in the
analysis of the role of antidiscrimination guarantees in the CEE socialist labor codes.

1.3.3. The Role of Antidiscrimination Guarantees

For socialists, the labor code was the central equality statute.\footnote{See, for example, ANDOR WELTNER, Fundamental Traits of Socialist Labor Law, (Akademiai Kiado, 1970).} In that regard, one feature of the
CEE socialist labor codes is particularly interesting. They all lacked strong antidiscrimination
guarantees.
In principle, the CEE socialist labor codes simply repeated or referred to their constitutional guarantees of equality of rights of women and men. Only a few of them actually contained a provision that explicitly prohibited discrimination on the grounds of sex.\textsuperscript{157} Similarly, in contrast to their strict protectionist provisions regulating the position of pregnant women in employment, the CEE socialist labor codes did not contain explicit provisions prohibiting discrimination on that particular ground.

Furthermore, the socialist labor codes did not distinguish between direct and indirect discrimination. More precisely, not a single CEE socialist labor code prohibited indirect discrimination. This does not mean that CEE socialist regimes were not aware of this particular notion of discrimination.\textsuperscript{158} After all, socialists insisted that the socialist notion of equality went beyond the formal understanding of this ideal that insisted on consistent application of the same criteria to men and women, regardless of their physical and social differences.\textsuperscript{159}

However, the absence of strong antidiscrimination guarantees from the CEE labor codes, including the prohibition of indirect discrimination, reflects the extent to which these regimes were willing to manipulate the notion of equality for their ideological interests.

\textit{1.3.3.1. Direct Discrimination}

In principle, the CEE socialist labor codes did not include a strong prohibition of direct discrimination. In fact, only a few of them had a provision that explicitly referred to discrimination on the grounds of sex. For example, the \textit{Bulgarian Labor Code} stipulated that “in

\textsuperscript{157} See Art 8/3 of the 1986 \textit{Bulgarian Labor Code} and Art 18/3 of the 1967 \textit{Hungarian Labor Code}.

\textsuperscript{158} See LASZLO, \textit{Equality in the Labor Law: Hungary}.

exercising labor rights and obligations, no discrimination or restriction of labor rights shall be allowed on the grounds of nationality, origin, religion, sex, race, social or material status.”\(^{160}\)

Similarly, the Hungarian Labor Code provided that “in establishing employment and defining the rights and obligations arising from employment, no discrimination shall be made between employees in terms of sex, age, nationality, race and social origin.”\(^{161}\)

In contrast, the Slovenian and Croatian labor codes did not contain any equality guarantees, while the Czechoslovakian Labor Code simply stated that “women are entitled to the same status at work as men. Women must be guaranteed working conditions that would enable them to participate in work not only with regard to their physiology but in particular with regard to their mission in society as mothers, raising children and attending to them.”\(^{162}\)

None of these socialist labor codes provided a definition of direct discrimination. Even those labor codes that explicitly prohibited discrimination on the grounds of sex did not elaborate the meaning of this concept.

Similarly, the CEE socialist labor codes did not explicitly prohibit pay discrimination between men and women. They did include a general guarantee of equal pay for equal work. For example, the Bulgarian Labor Code simply provided that “equal pay shall be due for equal work”\(^{163}\), while the Czechoslovakian Labor Code stated that “workers shall be entitled to wage for the work they have done.”\(^{164}\) However, the CEE socialist regimes never provided precise

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161 Art 18/3 of the 1967 Hungarian Labor Code.
164 Art 111 of the 1968 Czechoslovakian Labor Code.
criteria for evaluating the value of work. They simply stated that the value of a particular job would be determined by a decision of a responsible executive body.

The lack of concrete criteria for discrimination made these labor law provisions all but inapplicable in the socialist legal order. I have argued earlier that the CEE socialist courts were firmly committed to an extremely narrow notion of legal textualism that recognized only clear and precise rules as a legitimate source of judicially applicable law. From this perspective, labor code equality provisions were, similarly to constitutional provisions, merely normative principles of the socialist legal order. As such, these provisions required a more concrete elaboration through clear and precise labor law rights and obligations. In fact, labor law equality guarantees were in principle a part of an introductory chapter of the CEE socialist labor code that was usually titled “the fundamental principles”. The purpose of this particular section of a socialist labor code was to establish an ideological normative framework of the code and, as such, it did not contain directly enforceable guarantees.

The absence of a clear cut prohibition of discrimination on the grounds of sex is a consequence of a particular ideological character of the socialist understanding of equality between men and women. Socialists tied the emancipation of women to their participation in the social process of

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165 Art 111/2 of the 1968 Czechoslovakian Labor Code provided that “the wage shall be determined and paid to workers in accordance with the quantity, quality and social importance of their work, so that if effectively stimulates their material interest in achieving the best possible results of their work, in particular growing productivity and quality of products and services, as well as economy and efficiency, and so that it stimulates the interests of workers in improving their qualifications and their utilization. Organizations shall differentiate wage according to the complexity of the work involved and the conditions under which it is performed, the prerequisite for its performance, the personal ability of individual workers and their merit in the attended results of the working team and the organization.” Art 243 of the 1986 Bulgarian Labor Code provided in even more general terms that “work shall be considered equal whenever its results, complexity and the demands of the job and the conditions in which it is performed are equal.”

166 See also SŁOAT, Legislating for Equality: The Implementation of the EU Equality Acquis in Central and Eastern Europe, p. 8.
production. In their view, private control over the means of economic production was the key cause of arbitrary discrimination in a capitalist system. Accordingly, once they had transferred the means of production under the control of a socialist state and provided full employment, they declared that equality between men and women became a reality. Strong antidiscrimination guarantees would have been in conflict with this ideological position. Their existence would have implied that socialist regimes failed to protect women against sex-based discrimination. More importantly, they were in conflict with the character of a socialist economy. In a socialist planned economy, the state was always the employer. Hence, a labor law discrimination claim would have meant that the state violated one of its most prominent fundamental ideals. This would certainly not lie well with the claim that socialist regimes achieved true equality between men and women.

Another conceptual reason explaining the absence of a “cut and clear” prohibition of sex discrimination from the CEE socialist labor codes is the notion of equality itself. In the socialist conception of equality that was focused on biological and social differences between the sexes, the prohibition of direct discrimination was somewhat problematic. A definition of discrimination that identified equal treatment of men and women with strict application of the same criteria would clearly be in conflict with numerous sex-based labor law provisions.

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167 EINHORN, Cinderella goes to market: citizenship, gender, and women's movements in East Central Europe, p. 20.
168 In a decision from the early days of the Czechoslovakian socialist regime, a Czech court explained: “The economic order directing to socialism gave a woman a possibility to get rid of this dependence and get rid of the dominance of the husband. It enabled her to step into societal production and ensured her the position the man has. By transferring the means of production into the property of the society, private capitalist entrepreneurs were denied the possibility to decide who would be employed in their firms and under which conditions. Thus, any reasons for the discrimination against women in production were eliminated. Women were enabled to participate through their work for the development of the entire nation and also for the welfare of their family. By changing the economic foundation of the society, new relations were also created among the people, including genders as well.” Decision of the Krajský soud v Olomouci [Regional Court in Olomouc] dated 13.2. 1950 reported in the Sbírka soudních rozhodnutí [Collection of judicial decisions], abr. Sb.s.r. 1950, 279.
169 See, for example, GARANCSCY, The Status of Female Labour and the Law in Hungary.
Moreover, to the extent that such “liberal” understanding of discrimination implied a commitment to the normative ideal of personal autonomy of every individual, it was ideologically problematic. It would run directly against the socialist attempt to define equality through different socially engineered roles for women and men as social groups.

Consequently, from the CEE socialist perspective, it was extremely difficult to define discrimination in any clear cut manner, since such a definition assumed that a socialist legislator was capable of providing precise criteria that separated relevant from arbitrary biological and social differences between men and women.

These conceptual problems had one profound implication for the role of antidiscrimination provisions in the CEE socialist regimes that continued to pervade in these legal orders long after the fall of communism. The CEE socialist regimes developed a very narrow understanding of direct discrimination. As argued, due to ideological reasons, a definition of discrimination that entailed the responsibility of state controlled institutions for discrimination was unacceptable to the CEE socialist regimes. Consequently, they reduced the notion of discrimination to a conscious act of a concrete individual. Moreover, from the socialist perspective, a mere fact of different treatment on the grounds of sex did not *per se* constitute discrimination. There had to be something more: a prejudicial motivation. At the same time, the ideological importance of equality between men and women implied that sex discrimination was one of the most serious violations of the socialist legal order. From this perspective, a simple labor law prohibition of discrimination could not sufficiently reflect the importance of this ideal. Accordingly, the CEE socialist regimes tended to criminalize discrimination.
For example, the *Hungarian Labor Code* was one of the rare CEE socialist labor codes that explicitly prohibited discrimination on the grounds of sex.\(^{170}\) However, it also defined discrimination as a petty offence or even as a criminal act.\(^{171}\) Similarly, the Code also prohibited discrimination against pregnant women because of pregnancy.\(^{172}\) The pregnancy-based discrimination was not defined as a form of sex-based discrimination, which is not surprising since such discrimination did not necessarily entail a sex-based prejudice. However, the violation of the prohibition of unfavorable treatment on the grounds of pregnancy was defined as a petty offence as well. Since intent is an inherent element of a petty offence, the scope of this form of discrimination was also reduced to intentional unfavorable treatment.

The same narrow approach that reduced discrimination to intentional prejudicial treatment can be found in other legal systems of real socialism. Other CEE socialist regimes included direct discrimination in their criminal codes. For example, the Slovenian Criminal Law Code provided that “*anyone who prevents a person in exercising her rights granted by the Constitution, statutes or other positive regulations, including the regulation of self-governed economic organizations, because of her nationality, race, religion, ethnicity, sex, language, education or social status or anyone who gives a particular advantage to some person on the same grounds will be punished by six months to five years imprisonment.*”\(^{173}\) A similar solution can be found in the Croatian Criminal Code\(^ {174}\), while the Romanian Criminal Code provided that “*an act of a functionary limiting a citizen’s use or exercise of his rights, or creating a state of inferiority regarding that*

\(^{170}\) Art 18/3 of the 1967 *Hungarian Labor Code*.
\(^{171}\) WELTNER, *Fundamental Traits of Socialist Labor Law*, p. 111.
\(^{173}\) Art 60 of the 1977 *Slovenian Criminal Law Code* published in 12/77 *Uredni List Socialističke Republike Slovenije*.
\(^{174}\) Art 46 of the 1977 *Croatian Criminal Law Code* published in 25/77 *Narodne Novine Socijalističke Republike Hrvatske*. Art 70 also defined as a criminal act any violation of the “special” labor law rights provided to women.
citizen on the basis of his nationality, race, sex, or religion, is punishable by six months to five years imprisonment."

In contrast, the Polish Criminal Code opted for a somewhat different approach. The Code did not explicitly define discrimination as a criminal act. However, it provided that “whoever being responsible in a work establishment for matters connected with employment maliciously and persistently violates the rights of an employee arising from the employment relation or from the regulation concerning social insurance and thereby exposes an employee to serious damage shall be subject to penalty of the deprivation of liberty up to 3 years.” The result was essentially the same.

Chapter VI will show that such an ideological narrowing of direct discrimination to intentional prejudicial treatment has to this day had profound limiting effects for the judicial enforcement of antidiscrimination guarantees in the CEE legal systems.

1.3.3.1.1. Indirect discrimination

The notion of indirect discrimination also had a significantly different meaning in the CEE socialist regimes from the one that we apply today in the context of EU sex equality law.

Socialists were well aware of the concept of indirect discrimination. Moreover, the socialist conception of equality stressed the social unfairness of applying the same rules to social groups

who were differently situated. At the same time, not a single CEE socialist labor code defined and prohibited the notion of indirect discrimination. Nevertheless, they were convinced that a socialist society was capable of eliminating this problem.

CEE socialists perceived indirect discrimination in terms of an unfavorable impact of formally neutral rules of social distribution on certain social groups that were not capable of satisfying objective requirements entailed by the neutral rule as successfully as other groups. On this basic conceptual level, the socialist understanding of indirect discrimination was similar to the one we find in the EU equality discourse.

However, in contrast to the present-day understanding of indirect discrimination in the EU legal system, socialists did not question the social fairness and neutrality of their rules even though they put a particular group in a disadvantaged social position. Socialists were convinced that a disparate impact of their objective non-discriminatory rules of social distribution could have only two possible causes: it was either a result of inherited inferior social conditions or of "naturally" predetermined differences between groups.

Socialists thus perceived as indirectly discriminatory any rule that negatively affected a particular social group. For example, in their view, workers without proper qualifications were placed in an unfavorable position by employment rules that required proper education, because these rules limited their fundamental right to work. They believed that this type of indirect discrimination could be eliminated by structural measures aimed at creating free education for all citizens. Free education created an opportunity (and responsibility) for an individual to eliminate

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social insufficiencies that prevented her or him from satisfying an objective and neutral employment rule.

An example of "naturally" caused indirect discrimination was a physical condition such as weaker physiognomy or pregnancy. CEE socialists believed that a socialist society was capable of eliminating such natural “insufficiencies” of particular social groups by introducing “special” affirmative measures. A state had to provide these groups with "special" rights that would ensure their full equality with other citizens. In other words, full equality of these groups depended on the benevolent socialist state.

What makes this socialist understanding of indirect discrimination profoundly different from the one that can be found in the EU discourse is the distribution of responsibility for indirect discrimination. For socialists, existence of indirect discrimination was merely an unfortunate consequence of a combination of "natural" differences between individuals and inherited inferior economic conditions. Accordingly, from the socialist perspective, employers could never be held accountable for indirect discrimination. Even the socialist society as such was not responsible. At the same time, a socialist state had the obligation to eliminate this form of indirect discrimination. The obligation did not derive from the responsibility of a socialist society for past discrimination or systemic disadvantages of a particular group arising from unfavorable social circumstances. It originated from the ideal of communist society or, more precisely, from the duty of a socialist state to create a society where the principle "from each according to his or her abilities, to each according to her or his needs" would be a reality.
As such, this obligation was directly related to concrete economic conditions. From the socialist perspective, the obligation existed only if economic conditions of a particular society allowed a socialist state to "afford" such measures.

Accordingly, the CEE socialist regimes never explicitly prohibited indirect discrimination either in their constitutions or in their labor codes.

1.4. Conclusion

The first chapter has showed that socialism was a rather problematic platform for equality between women and men.

On the one hand, as their constitutions show, it cannot be denied that, following the Soviet example, the CEE socialist regimes were among the first to declare the unconditional equality of basic rights for women and men. Moreover, as demonstrated by their labor codes, these regimes were among the first that legally opened a significant number of professions that were traditionally closed for women. A great number of pregnancy and maternity rights discussed in this chapter that many Europeans still enjoy today were in a certain way pioneered by socialist regimes. Although this was not explicitly discussed in this chapter, it should be noted that these regimes were also the first to ensure full equality of women and men on all levels of education.

However, socialist equality came at a high cost for women. The CEE socialist regimes developed a concept of equality that insisted on the notion of inherent differences between men and women. As a result, they tended to confine women and men to different social roles that were constructed primarily to serve the “higher” interests of the socialist state.
To implement their normative understanding of equality, socialists developed a comprehensive system of detailed labor law provisions that regulated almost every aspect of women’s participation in socialist production. The main purpose of these “protectionist” provisions was to convince women to take on a double burden imposed on them by the socialist ideology of “motherhood”. What is interesting from the present-day European perspective is that a significant number of socialist equality provisions can be found in the EU sex equality law. However, these EU provisions serve profoundly different normative values and goals.
Chapter II
EU Sex Equality

2.1. Introduction

After the analysis of the equality framework characteristic of the CEE “really existing” socialist regimes, this chapter will provide the “other side of the story”: a brief description of the sex equality framework characteristic of the EU legal order. This will hardly be an exhaustive account of the EU sex equality conception. Instead, I will focus on those features of the EU sex equality law that stand in sharp contrast to the sex equality legal framework described in Chapter I. In that respect, this chapter will be primarily concerned with two features of the EU sex equality law. The first feature concerns the regulatory form of the EU sex equality law. I will point out that the EU legal order regulates the notion of sex equality by employing a very different legal style from the one used by the CEE socialist regimes. Thus I will show that these two regimes used different forms of legal regulation and distributed regulatory powers in a strikingly different manner. The second feature concerns the normative foundations of EU sex equality law. I will show that EU sex equality law serves values and policies that are strikingly different from those favored by the CEE regimes of “really existing” socialism.

Both of these points will be of crucial importance for the latter chapters. They will both help us identify and understand those features of the equality doctrine favored by CEE post-socialist courts that represent an obstacle to the enforcement of EU sex equality guarantees in their national legal systems.
I will first argue that the EU legal order has traditionally favored standard-like open-textured equality guarantees. This style of legal regulation stands in stark contrast to the one used by the CEE regimes, which insisted on clear-cut mechanically applicable legal rules providing members of protected social groups with rights and obligations tailored to their specific group needs and social roles. This disparity in legal forms of equality provisions reflects profound differences in distribution of powers and responsibilities between legal institutions responsible for the protection and promotion of equality between men and women (or other social groups).

I will further argue that the European Court of Justice used the open-textured character of EU sex equality guarantees to develop a rather pragmatic approach to sex discrimination claims that avoids rule-like answers to important substantive dilemmas and favors normative adjudication. One feature of this approach is of particular importance for this thesis. The approach places the key responsibility for important normative choices that have far-reaching social implications on national courts. As I will argue in Chapters VI and VII, this is not something which the post-socialist courts are accustomed to or equipped for and willing to do.

2.2. The Open-textured Character of EU Antidiscrimination Guarantees

The contrast between sex equality provisions favored by the CEE socialist regimes and those found in EU law is rather clear. The EU legal order has not insisted on clear-cut provisions. Rather, it has traditionally favored a more flexible form for its sex equality guarantees.

For example, the famous Art 119 of the Rome Treaty simply provided that “[e]ach Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work”. For more than two decades, it was
considered that such wording did not provide for an individual right to equal pay. Eventually, however, the ECJ “read” the provision in a strikingly different manner, arguing that it entailed a comprehensive framework of individual antidiscrimination guarantees.

The EU secondary sex equality legislation has not been much more specific than Art 119. The key sex equality directive – the 76/207 Equal Treatment Directive (the ETD) – in a circular fashion simply stated that “the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status”.180 The ETD did not explain what was meant by direct or indirect discrimination. From that perspective, the recent 2006/54 Equal Treatment and Opportunities Directive (the 2006/56 Recast Directive) seems more elaborate.181 In contrast to the ETD, it actually provides definitions of central antidiscrimination guarantees such as direct discrimination/equal pay, indirect discrimination, sexual harassment as well as the definition of the burden of proof.

On closer inspection, however, the Recast Directive does not seem to tell us much more about the meaning of these concepts than the ETD. For example, Art 2/1/a of the Recast Directive provides that direct discrimination occurs “where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation.” At the same time, the Directive does not propose how we ought to determine whether two situations are sufficiently similar to be considered comparable (the comparability test) or what precisely

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constitutes the term “on grounds of sex”. Yet, without these standards, the definition of direct discrimination is hardly operational.

Similarly, Art 2/1/b states that indirect discrimination occurs “where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.” However, the Directive does not explain at which point a disadvantage becomes “particular”. Does that depend on a specific number of affected individuals or on the specific importance that a particular interest entails for a member or members of a particular group? The notion of “objective justification” is equally open-textured. Does any goal that is not related to the fact that a person belongs to a particular sex immediately qualify as “legitimate” or should it hold some particular value for us? Furthermore, when is a measure “appropriate”? The term suggests that at the very least the measure must be capable of achieving its “legitimate goal”. However, the question remains at which degree and at what cost? Is a measure appropriate if we demonstrate that it is reasonable to assume that it will promote its “legitimate goal” to some extent, if not completely? What if a measure fully achieves its “legitimate goal”, but its negative implications for the members of a disadvantaged group still seem high? The described examples demonstrate a profound openness of the two basic EU antidiscrimination instruments. However, similar dilemmas accompany almost all other EU equality guarantees.

183 Id., p. 111.
These simple observations suggest that EU sex equality guarantees are open to different readings. Their meaning seems to depend on a particular value-based or policy driven outlook. In that regard, they bring to the surface an issue of legal indeterminacy.

To put it simply, the notion of legal (in)determinacy is concerned with the capacity of legal provisions to provide objective answers to legal disputes falling within the scope of their application.\textsuperscript{184} Objective answers are, in turn, conclusions about the correct way of action predetermined by the semantic content (wording) of an applicable legal provision. The claim of legal indeterminacy, in that respect, basically asserts that legal provisions do not “decide” concrete disputes. In other words, it denies that concrete decisions of enforcement bodies are predetermined by the semantic content of legal norms.\textsuperscript{185}

The indeterminacy claim has its soft and strong version.

The soft version is focused on limitations inherent in language as a social construct. It starts from the premise that, being a tool of human communication, language basically reflects social practices. Accordingly, its ability to provide guidance in all situations that can occur in real life is “incomplete”. Since legal provisions use language as a tool of communication, they will often remain open to different readings. However, proponents of this view insist that indeterminacy of legal provisions is only marginal.\textsuperscript{186} According to this view, a great majority of semantic terms have a clear “core” meaning precisely because language reflects real-life experiences that are known to us. Consequently, the law will rarely “run out”. However, they do admit that in those

\textsuperscript{186} I consider H.L. A. Hart as the most prominent proponent of this understanding of the indeterminacy claim. See H. L. A. HART, The Concept of Law, (Oxford University Press, 1961), especially pp. 119-20, 123-26, 128, 131, 135, 143, 150.
cases where the law “runs out”, the responsibility to choose the most desirable solution for a particular dispute lies with the courts. In such situations, courts are left with no choice but to rely on their normative convictions.

There are also some proponents of the soft claim who agree that a legal text may be indeterminate, but deny that the law “runs out” in such situations.\(^{187}\) In their opinion, courts are not allowed to rely on their normative convictions when semantically indeterminate legal provisions fail to provide them with a clear guidance. In such situations, they are required to invest their best “Herculean” effort and determine the correct solution of a particular dispute by using their best understanding of the political normative model on which their particular legal system is founded.

The implications of the strong claim are much more far-reaching. To put it simply, this claim denies that legal provisions have the capacity to provide objective ‘correct’ answers to concrete legal disputes. It rests on two lines of argument. The first one is focused on the pragmatic character of language. The proponents of the strong claim also stress that the meaning of legal text is always contextual.\(^{188}\) In simple terms, words reflect social practice. However, unlike the proponents of the soft claim, they draw different conclusions from that premise. According to the strong claim, words can have stable meanings only to the extent that the social practice they reflect is stable. At the same time, social practices are hardly stable. Since almost any society is simultaneously committed to an internally incoherent set of normative ideals and goals that are


\(^{188}\) Proponents of this line of the strong claim are Roberto Unger, Mark Tushnet and James Boyle. See ROBERTO MANGABEIRA UNGER, Knowledge & politics, (Free Press, 1976); JAMES BOYLE, The politics of reason: Critical Legal Theory and Local Social Thought U. Pa. L. Rev. (1985); TUSHNET, Defending the Indeterminacy Thesis.
mutually competing, social actions will always be pulled between several competing purposes. As a result, meanings of particular terms will be fluid.

This is not a nihilist claim. The proponents of the strong claim do not assert that it is not possible to understand how terms are supposed to affect our behavior.\textsuperscript{189} They do not even deny that a meaning of a particular term can be settled. Accordingly, they do accept that it is possible to predict outcomes of legal disputes with some acceptable probability. However, they do not accept that these outcomes are predetermined by the legal text. According to this view, an outcome of the application of law is always a normative choice. This follows from the pragmatic nature of language. Although the meaning of semantic terms can be settled, this is merely a result of a current social compromise concerning the normative function of a particular social action. Accordingly, to the extent that one manages to convince relevant social actors that a particular practice in question ought to serve a different normative purpose from the one it served so far, it will unsettle the existing compromises and consequently undermine the settled meaning of corresponding terms. Since people expect our social practices to serve more than one normative purpose, the process of unsettling is not particularly dramatic. On the contrary, it is always an available option. However, this also means that any interpretation necessarily entails a normative choice. In that regard, courts that decide to enforce the ‘core’ meaning of legal terms merely choose to promote a specific set of interests favored by a particular group of social actors who prevailed in the social process of constant competition to shape and reshape goals behind accepted social practices. From that perspective, language is not merely a neutral social instrument. It is an instrument of social control.

\textsuperscript{189} TUSHNET, \textit{Defending the Indeterminacy Thesis}, p. 350.
The second line of argumentation characteristic of the strong claim took a somewhat different approach. This line of argument stresses the “patchwork” character of systems of legal rules in western societies. According to this view, experience teaches us that the societies of a western-style democracy cannot commit to a coherent set of normative goals and policies. Therefore, it is only realistic to accept that these legal systems consist of conflicting and competing norms that pull in different directions in almost any situation and, thus, mutually undermine each other. Consequently, those who enforce legal provisions will always have a choice between contradictory solutions that find equal support in the existing legal norms. In that sense, the task of adjudication will always entail a value-based choice.

Standard-like norms have an important role in this line of argument. Their open-textured character reflects our reluctance to commit exclusively to a coherent set of normative goals. In that regard, they resemble an instrument of damage control. Since they can accommodate competing normative interpretations, they allow us to deviate, if we find that desirable, even from semantically most comprehensive rules by insisting on the desirability of competing normative reasons justifying such a deviation.

The strong claim has yet another important implication. It insists that any legal norm is merely a result of a provisional political compromise between competing and contradictory but equally legitimate political views. In that regard, it is highly skeptical, to say the least, towards the possibility of one overarching, unifying and comprehensive political theory that could explain and thus provide determinacy to otherwise mutually contradictory legal provisions.

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191 See MARK KELMAN, A guide to critical legal studies, (Harvard University Press, 1987), Chapter I.
One may reasonably wonder why the issues of legal form and legal determinacy are relevant for EU sex equality guarantees or this thesis in general. This is especially true since many pages have been written about the EU sex equality law and yet no one has questioned its legal form or character so far. I will point out several reasons why these two related issues are of central importance for EU sex equality law and, particularly, the enforcement of its provisions in the CEE post-socialist legal systems.

As I argued earlier, the majority of EU sex equality guarantees are put in a standard-like form that makes them open to different interpretations. Moreover, some of the arguments characteristic of the indeterminacy claim raise some interesting questions related to these provisions.

One of the key implications of the standard-like form is the distribution of lawmaking power. In order to be effective, standard-like provisions require courts to assume responsibility for interpretation grounded in value-based or policy driven choices. In that regard, such provisions basically provide courts with significant lawmaking powers. Of course, such a distribution of power entails a risk of arbitrary judicial enforcement. Hence, the important question is whether there are ways to limit the risk of judicial decision-making based on personal preferences. The indeterminacy claim suggests that judicial decision-making always entails normative choices. In some ways, this makes the ‘risk question’ somewhat misplaced since the risk is simply an inherent element of adjudication.

EU sex equality law offers significant support to the indeterminacy claim. In fact, some of the features of the indeterminacy claim are precisely what seems to make EU sex equality law so interesting. Furthermore, EU sex equality law gives credence to those who believe that the EU
legal order seems to have developed a model of adjudication that has so far managed to use the responsibility for sensitive normative choices in a rather progressive manner.

What is almost immediately noticeable about the EU sex equality guarantees is that it is hardly surprising that they were put in a standard-like form. The notion of equality has always been one of the most challenging normative social ideals. Many societies, especially those favoring pluralist democracy, have found it rather difficult to define legally the notion of equality. It seems that the more diverse a society, the more difficult it tends to be to find agreement about the meaning of this ideal. In a supranational political entity such as the EU, this has been a particular challenge. The EU legislative process is uniquely complex. It involves not only supranational actors such as the Commission, the Council or the Parliament, which all have their own agendas, but it also involves 27 national states with their particular cultures, political perspectives and legal traditions. Consequently, the EU finds it challenging to regulate even those issues that are much less complex than the notion of equality. In that respect, the art of political compromise is simply a way of functioning for the EU.

Moreover, in a complex political system such as the EU, certain diversity of different political understandings of the notion of equality is expected. For example, Professor McCrudden has identified at least five prominent conceptions of equality competing in the background of the EU equality law.193 As Professor McCrudden points out, each conception reflects a different political vision of a ‘just’ society with different and often conflicting clusters of normative values and interests. Similarly, Professor Fredman identified several competing approaches in EU equality provisions. Indeed, the structure of EU sex equality legislation has a “patchwork”

quality. For example, the ban on direct discrimination, arguably the central pillar of EU equality law, is grounded in the so-called formal notion of equality that insists on comparability (and consequently on the male standard of measurement) and consistency in treatment. At the same time, the very same article of the Recast Directive prohibits indirect discrimination, which favors a more substantive understanding of equality focused on the effects and favoring a certain degree of redistribution. Moreover, both the Treaty and the Recast Directive allow (and even encourage) so-called positive measures aiming to achieve true equality of sexes. A similar ‘patchwork’ character is typical of ‘auxiliary’ sex equality directives such as the Pregnant Workers Directive and the Parental Leave Directive (the PLD). While the PLD encourages the elimination of ‘motherhood stereotypes’ and promotes a redistribution of childcare responsibilities between the sexes, the PWD reflects the idea that women are still primary childcare providers.

However, due to profound differences in normative frameworks entailed by these competing notions of equality, these provisions tend to pull in different directions and consequently undermine each other. We will see this phenomenon once we switch our focus to the ECJ’s case-law.

The ‘patchwork’ character of EU sex equality legislation is not particularly surprising if we bear in mind the complexity and diversity of political views in the EU. In fact, the EU legal order has traditionally favored the standard-like form for its equality guarantees precisely because of its capacity to accommodate different readings and thus facilitate political compromise.

However, by insisting on the standard-like form for its sex equality guarantees, the EU has placed key responsibility for their concrete implications and real-life effectiveness in the hands
of its courts. This brings to the surface several questions concerning the role of judiciary, which are of close interest to the indeterminacy claim.

As I argued earlier, the soft version of the indeterminacy claim suggests that, although open-textured legal norms may be subject to competing normative interpretations, courts will eventually develop doctrinal rules that will make such norms determinate. The question remains whether the ECJ, being the ultimate interpretive authority in the EU legal order, has developed a similar sex equality doctrine. Moreover, some proponents of the soft claim argued that even when they are faced with the task of enforcing open-textured legal provisions, courts have a duty to find their truthful meaning by looking for an overarching political understanding capable of explaining their purpose. In that regard, the next question is whether the ECJ has ever engaged in such a “Herculean” task.

By the end of this chapter, I will answer both of these questions negatively. Moreover, I will argue that the Court developed an approach that gives support to certain arguments presented by the strong claim. I will show that the Court favors a pragmatic approach to sex equality disputes, which is based on a case-by-case value-based balancing. In that regard, its sex equality case-law is also more reminiscent of a ‘patchwork’ than a coherent whole.

The indeterminacy claim is interesting from the viewpoint of the enforcement of EU sex equality guarantees in the CEE post-socialist systems for several reasons. According to the proponents of this claim, indeterminate legal provisions require courts to assume responsibility for challenging normative choices. However, as seen in the previous chapter, CEE post-socialist courts have traditionally been firmly committed to an understanding of adjudication that is based on the premise of loyalty of the judiciary to the legislative and executive branch and that accordingly
insists on easily applicable clear-cut rules. Consequently, the CEE courts do not “believe” in the indeterminacy of legal provisions and are not likely to accept responsibility for challenging normative decisions.

However, as we shall see soon, the indeterminate character of sex equality guarantees has been of central importance to the development of the ECJ’s pragmatic approach to sex equality law. Moreover, the doctrinal framework developed by the Court so far actually demands from national courts to confront and assume responsibility for value-based choices required by the pursuit of real-life equality between the sexes. In that regard, the capacity of CEE post-socialist national courts to participate in value-based adjudication favored by the ECJ is of crucial importance for the enforcement of EU sex equality guarantees in these legal systems.

2.3. The ECJ’s Approach to sex equality guarantees

2.3.1. Introduction

The remainder of the chapter deals with sex equality case-law of the European Court of Justice. It shows that, three decades after the ECJ delivered its groundbreaking rulings in the Defrenne saga, we are still not in a position to provide clear answers to some of the most basic questions raised by the EU sex equality guarantees. At the same time, the Court has developed a particular, rather pragmatic, approach to the enforcement of sex equality law. The approach does not reflect some articulated coherent doctrine, nor does it provide any clear-cut answers. Consequently, even as interpreted by the ECJ, EU sex equality guarantees remain open-textured.

However, the approach allows the Court to tread carefully between diverse and complex considerations characteristic of complex systems such as the EU legal order, some of which at
first sight appear hardly related to the notion of sex equality. I will argue that the approach shows that the Court has come to embrace a style of adjudication that is based on careful weighing and balancing of diverse and competing interests, policy-goals and normative values that are particular to each individual case, as well as the political or social context of the case.

The distribution of responsibilities underpinning this approach is of special interest to us. The approach frequently puts the spotlight on national courts and places significant responsibility on them to make challenging normative choices. In principle, the Court often simply establishes an operational framework applicable to a particular situation but leaves the challenging choices to the referring national court. In that regard, the approach requires national courts to confront actively and challenge particular barriers to sex equality in their own backyard. So far, this pragmatic style of adjudication based on a careful distribution of interpretive responsibilities between the supranational and national level has, in principle, served the notion of real-life equality well and has improved the position of women on the EU labor market. This does not mean that there were no setbacks. There certainly were and some of them will be analyzed in this chapter.

This chapter does not cover the whole of the ECJ’s sex equality case law. Rather, it is focused on decisions concerning two central guarantees – the prohibition of direct and indirect discrimination. However, since these decisions cover over two thirds of the Court’s sex equality case law, they are more than capable of providing sufficient support to my arguments.

Furthermore, I will divide this section into several parts. Each part will provide a chronological overview of development, as well as critical analysis of the case-law related to one of the mentioned guarantees. The enforcement of each guarantee will be analyzed within a particular
context in which they played a significant role. In that regard, I will first focus on the manner in which the ECJ used the notion of direct discrimination in areas of equal pay, equal employment conditions and equal social security conditions. Subsequently, I will focus on the indirect discrimination guarantee and its different levels of scrutiny. Finally, I will analyze the role of direct discrimination in the context of protection of pregnant workers. In this way I hope to show the most significant features of the ECJ’s pragmatic approach to EU sex equality law.\textsuperscript{194}

\textbf{2.3.2. Analysis of the ECJ’s Sex Equality Case-law}

\textbf{2.3.2.1. Direct Discrimination – the Early Period}

The pragmatism of the ECJ’s approach to the notion of sex equality and its place within the EU legal order was one of the earliest features of the Court’s discrimination decisions. In fact, the celebrated \textit{Defrenne} trilogy was in many ways the result of that pragmatism.

Four decades ago, when the Court delivered its first sex equality ruling in the \textit{Defrenne} saga, it was far from clear whether the ideal of sex equality ought to have any role in the developing legal order of the European Economic Community (EEC).\textsuperscript{195} This was certainly not suggested by the founding Treaty.\textsuperscript{196} True, the Treaty did include Art. 119 stating that Member States shall guarantee equal pay for equal work.\textsuperscript{197} However, the underlying purpose of this provision was primarily economic and it was hardly related to the conventional understanding of sex equality.

\textsuperscript{194} I use the term pragmatic to describe the Court’s practice of using open-textured legal norms and principles to justify antidiscrimination rulings that are primarily the result of the Court’s practical and contextualized concerns.

\textsuperscript{195} Case 43/75, Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena [1976] ECR 455.

\textsuperscript{196} Treaty establishing the European Economic Community, Rome, 1957.

\textsuperscript{197} In its original version, Art 119 stated: “Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.”
ideal as a fundamental right. Moreover, it was cast as a classic international-treaty provision with states as its primary addressees. Therefore, judging by its wording, it was rather doubtful whether Art 119 could or should have any relevance before national courts of the Member States.

Nevertheless, the Defrenne Court found that Art 119 included the right to equal pay for men and women that was directly enforceable by national courts. Moreover, it was superior to any conflicting provision of national law. If analyzed carefully within its particular context, the reasoning that the Defrenne Court used to reach this conclusion reveals the pragmatic character of the Court’s approach to sex equality law that still remains a characteristic of its case-law today. The Defrenne Court in some respect used the notion of equality to provide support to the still feeble supremacy principle. Art 119 was the only provision in the founding Treaty that resembled a fundamental right guarantee or echoed a social policy concern. The fact that this provision offered the benefit of “social face” to the still relatively newly established EC law certainly did not harm the Court’s efforts to redraft this Treaty provision into a directly enforceable fundamental right and thus reaffirm the principle of supremacy of EU law. In fact, since Defrenne, the Court relied on the moral aura of sex-equality guarantees to strengthen the authority and extend the reach of the EU legal order in relation to national legal systems. Moreover, since Defrenne, the notion of sex equality became the cornerstone and driving force of development of EU social policy.

By insisting that national courts must enforce Art 119 as an individual right, the Court showed its commitment to improving the position of women in the labor market. However, there was another side to the *Defrenne* reasoning. A dogmatic approach to the notion of pay discrimination found in the *Defrenne* reasoning reflects to great extent the Court’s reluctance to jeopardize the economic ability of employers to function efficiently. In that regard, the Court’s very first decisions showed what is still very much valid today – the scope and meaning of sex equality guarantees are tightly related to the Court’s ability to trade between its commitment to improve women’s status and economic concerns.

The dogmatic manner in which the Court interpreted the equal pay principle further reveals the pragmatic character of the Court’s approach. In *Defrenne II*, the Court found that the remuneration practice explicitly providing different salaries for female and male flight attendance staff performing the same work constituted a clear violation of Art 119. However, the Court reached this conclusion in a rather dogmatic manner that placed significant importance on the value (or, more precisely, the appearance) of legal determinacy. First, the Court insisted that individuals can rely on Art 119 only in case of “direct and overt discrimination.” Second, such discrimination must be identified “solely with the aid of the criteria based on equal work and equal pay”, since Art 119 prohibited those forms of direct discrimination “which may be detected on the basis of a purely legal analysis of the situation.”

I will call this approach the sameness doctrine (approach) for practical purposes. I consider it to be dogmatic for several reasons explained below. However, I also believe that its dogmatic character was primarily a result of the pragmatic concerns that the Court faced four decades ago.

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201 Id., para. 18.
202 Id., para. 21.
203 See CATHARINE A. MACKINNON, Sex equality, (Foundation Press, 2nd ed, 2007).
primarily those regarding the effect of the Treaty provisions in national legal orders. First, the approach clearly favored simplicity. As stressed by the Defrenne reasoning, the right to equal pay for men and women is enforceable only on the basis of simply determinable factual predicate. In the Defrenne case, the factual predicate that concerned the Court was limited to the amount of pay and the type of work performed. Second, the approach insists on the appearance of neutrality and objectivity. Once the factual predicate was determined, the conclusion followed from a “purely legal analysis of the situation.” However, behind the “legal purity” was the classic Aristotelian idea that likes ought to be treated alike and those who are different differently. It was this formula that served to provide the Court’s decisions with the appearance of neutrality.

It is not surprising that the Court used the Aristotelian formula as a backbone of its approach. The Aristotelian notion has been a widely accepted expression of fairness and justice on the European Continent. After all, it was born there. It has held a particularly favorable place among courts (in Europe and overseas). What makes this notion particularly attractive to courts is its apparent promise of almost “arithmetic” rationality and objectivity. Many simply take it for granted that same situations ought to be treated in the same manner. It is not only that consistency entails the promise of predictability and the feeling of certainty. For many, it is also tightly related to the notion of inherent equal worth. The premise that a person cannot be subject to arbitrary will and that she ought to be treated differently from apparently similar others only for a valuable reason (legitimate goal) is, thus, considered to be an expression of the inherent right to basic due respect. This has been the principal source of its moral appeal. Moreover, the likes alike rationale can easily be connected to the notion of a simple consistent application of clear-cut legal rules, which has, especially at the time the Defrenne saga was taking place, been
the conventional understanding of the judicial function in most of the European legal systems. 

To the extent that the success of the Court’s efforts to establish a new legal order depended on the approval of national courts, it was prudent to make its decisions compatible with this understanding of adjudication.

Such a pragmatic appeal made it easy for the Court to ignore the profound drawbacks of the Aristotelian notion of equality. Above all, the notion is inoperable without a concrete standard of likeness. Yet, determining which similarities and differences among countless many are relevant is clearly a normative decision that requires us to give preference to one set of interests and values at the expense of others. Hence, its apparent neutrality and objectivity are mere abstractions. In reality, the notion has tended to favor interests of dominant social groups that usually control decision-making institutions in a particular society. In the context of sex equality, the Aristotelian formula has tended to favor a male standard of measurement.

Unfortunately, the Defrenne saga successfully concealed the indeterminate character of the Aristotelian formula. It certainly helped that the facts of the Defrenne case were rather simple: one worker performing exactly the same task was paid less than the other. It is important to notice that the Court actually never questioned the reason behind the disputed practice. The pay discrepancy between similarly situated workers of a different sex was sufficient for the Defrenne Court to conclude that the practice constituted discrimination between the sexes. This also reflected the pragmatism of the Court’s approach. By focusing primarily on the pay discrepancy, the Court basically piggybacked the notion of sex discrimination on the shoulders of the general principle of equal pay. The notion that all workers performing the same work

ought to be paid the same acquired the status of one of the most important requirements of social justice in Europe after the World War II. The principle of equal pay is, of course, strongly evocative of the normative idea that individuals ought to be treated the same unless there is a legitimate reason that can justify different treatment. The principle was particularly wide-spread during the 1970ies when Western Europe suffered through several waves of serious social turbulence.\textsuperscript{205} In that sense, tying the notion of sex discrimination to the already well-accepted social principle of equal pay seemed rather convenient.

However, this pragmatic move had its consequences. A sameness approach implied that employers can be held responsible for sex discrimination even if their decision to pay two similarly situated workers of a different sex differently was not necessarily related to the criterion of sex. The Court’s argument that Art 119 was directly applicable only to “\textit{direct and overt discrimination which may be identified solely with the aid of the criteria based on equal work and equal pay}” gave support to such an understanding, since it suggested that a mere inconsistency coupled with the fact that workers do not belong to the same sex sufficed to prove sex discrimination. If the Court had focused on the way in which the employer’s decision was related to the criterion of sex, the issue of consistent application of these criteria would be merely of secondary importance. In that case, an inconsistent application would only indicate a possibility that the employer treated the female worker unfavorably \textit{due to} her sex. In other words, inconsistent application of the criteria of equal work and equal pay would not be the only method capable of demonstrating the relatedness of the employer’s decision to the criterion of

\textsuperscript{205} This was also the time of the Equal Rights Movement in the United States, which was profoundly committed to the general awakening of the women’s movement on both sides of the Atlantic and more generally to the idea of social fairness.
sex. In that regard, it was not at all clear what actually constituted sex discrimination after Defrenne.

More importantly, the factual minimalism in Defrenne blurred the key problem of the sameness approach. The approach was based on the implicit assumption that the task of determining whether two individuals perform the same work is rather straightforward. This might have been the case in Defrenne since the employer failed to offer any plausible reason explaining why he was paying women less, except for the fact that this was an established practice. If the employer could have offered a plausible reason, this would have immediately raised the question whether positions in question were different after all. This simple fact reveals two points. First, the question of comparability and the question of relatedness are related. Second, the sameness approach seems straightforward only to the extent that the Court’s conclusion regarding the comparability of two jobs coincides with or enjoys a considerable support from a general opinion. We will see that, once this agreement is missing, the approach starts falling apart.

Finally, it is worth mentioning that there was a certain normative contradiction in the Defrenne reasoning. The Defrenne Court explicitly stated that it was not willing to scrutinize those pay differences that did not result from straightforward inconsistent application of the same pay criteria for the same jobs performed by men and women. This suggested that the Court was not willing to overly interfere with the decision-making autonomy of employers. At the same time, however, the sameness approach included the possibility of exactly the opposite. To the extent that the approach was capable of ignoring actual reasons behind the pay difference, it suggested that the Court was willing to hold employers responsible for pay differences even if they were

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206 As Prechal and Burrows put it, Art 119 is directly applicable where “[c]omplex judgments are not necessary”. PRECHAL & BURROWS, Gender discrimination law of the European Community, p. 28.
based on economically sound reasons that were unrelated to sex. The fact that the Court assumed
the role of deciding whether two jobs can be considered sufficiently similar from a supposedly
purely economic “objective” perspective certainly restrained the decision-making autonomy of
employers.

Is it possible to explain such a contradiction? I believe it is.

The sameness approach was not a result of some coherent set of normative convictions. On the
contrary, it resulted from pragmatic institutional considerations. What made the sameness
approach appealing to the Court was its apparent simplicity and the implicit promise that the
approach can provide an aura of objectivity and neutrality to judicial decisions. In other words,
the approach carried the promise that it can protect courts from challenging normative choices.
In that sense, the directly applicable sex discrimination guarantee based on the sameness
approach had a better chance of being accepted by national courts favoring such a style of
adjudication.

The sameness approach dominated the early-period case-law and can be found in early decisions
such as Macarthys\textsuperscript{207}, Worringham\textsuperscript{208}, Burton\textsuperscript{209} as well as some later ones such as Marshall\textsuperscript{210},
Vera Mia\textsuperscript{211}, Drake\textsuperscript{212}, Rummler\textsuperscript{213}, Cotter\textsuperscript{214}, Commission v. France\textsuperscript{215} and possibly even
Danfoss.\textsuperscript{216}

\textsuperscript{207} Case 129/79 Macarthys Ltd v Wendy Smith [1980] ECR 1275, para. 11.
\textsuperscript{208} Case 69/80 Susan Jane Worringham and Margaret Humphreys v Lloyds Bank Limited [1981] ECR 767, paras. 23, 27.
\textsuperscript{209} Case 19/81 Arthur Burton v British Railways Board [1982] ECR 554, para. 15.
\textsuperscript{210} Case 152/84 M. H. Marshall v Southampton and South-West Hampshire Area Health Authority [1986] ECR 723, para. 38.
\textsuperscript{212} Case 150/85 Jacqueline Drake v Chief Adjudication Officer [1986] ECR 1995, para. 34.
These decisions are based on the rule that identically situated men and women must be treated the same. However, the Court frequently avoided explaining the reasons underlying its conclusion of comparability between concrete individuals. Instead, it simply assumed that they are comparable or not. Once it established a valid comparative relation, the Court simply condemned different treatment as discriminatory. This one-dimensional reasoning was again enabled by factual minimalism. Almost all of these disputes concerned rather obvious cases of discrimination. Furthermore, most of them not only involved an intentional use of sex as the distribution criterion but, moreover, the intent was often the result of a sexist prejudice or stereotype. In that regard, the Court’s conclusions did not seem particularly controversial from the perspective of an average person.

However, the approach did not always leave the appearance of straightforwardness and objectivity as it promised in Defrenne. Its flaws quickly surfaced in disputes with a slightly more complicated factual predicate. Such cases effectively revealed the ability of the sameness approach to accommodate completely opposite results and thus exposed its indeterminate character. One such example is the Macarthys case, involving a claimant who was employed at the same position and performed the very same tasks as her male predecessor. The only difference was that they were employed at different time-periods. Yet, she was paid less. The claimant de facto relied on the logic of the sameness approach and claimed that she was

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217 It seems that the Court relied on the same style of reasoning in other areas of the Community law as well. See PRECHAL & BURROWS, Gender discrimination law of the European Community, p. 3.
218 The Court was relying on the same formalistic antidiscrimination reasoning in other areas of the Community law as well. Id., pp. 3-4.
discriminated against. The Court was faced with the question whether time can somehow turn two jobs that were identical in all other physical aspects into different ones. In reality, time was not an issue at all. What really mattered was whether market conditions are capable of justifying the pay difference for work that is physically identical. Once expressed in this fashion, the *Macarthys* dilemma clearly revealed that there was nothing easy about the question of comparability. It thus struck at the key attractions of the sameness approach – the promise of straightforwardness and objectivity.

The Court was perfectly aware of the threat. In its effort to minimize the damage, the Court insisted that the concept of equal pay “is entirely qualitative in character in that it is exclusively concerned with the nature of the services in question.”\(^{220}\) Moreover, the Court also rejected the suggestion that discrimination could be established through the use of a hypothetical comparator. It found such a method “overly complicated and speculative” and argued that a hypothetical comparator was not “confined to parallels which may be drawn on the basis of concrete appraisals of the work actually performed by employees of different sex within the same establishment or service”, but rather “implies comparative studies of entire branches of industry and therefore requires, as a prerequisite, the elaboration by the Community and national legislative bodies of criteria of assessment.”\(^{221}\)

These efforts to present discrimination scrutiny as a completely “objective” inquiry were not particularly successful, since the Court, almost in the same breath, acknowledged that there may be objective economic factors that could turn even the entirely same jobs into incomparable

\(^{220}\) *Macarthys*, para. 11.

\(^{221}\) *Macarthys*, para. 15. See PRECHAL & BURROWS, Gender discrimination law of the European Community, p. 80.
situations. The Court did not clearly identify such factors. However, the *Macarthys* reasoning seems to imply that the Court insisted on its capacity to assess in an “objective” manner which market-based factors determine the comparability of two job positions.

*Macarthys* attempted to portray the Court’s discrimination approach as being narrowly focused on the consistent treatment of supposedly objectively similar situations. In that regard, it implicitly rejected the approach that would be primarily concerned with the actual reasons behind the employer’s decision and their connection to a person’s sex. Accordingly, the Court rejected a hypothetical comparator. However, this was merely a spin. In reality, the Court’s ruling resulted precisely from such reasoning. The Court simply considered that the disputed pay differences were justified by alterations in the market value of a particular kind of work that occurred over time. There was nothing in the sameness approach that would have prevented the Court from focusing exclusively on the physical characteristics of the work in question and consequently reaching the exactly opposite ruling. However, this would have clearly threatened the ability of employers to react effectively to market changes and in that respect it would have clashed with the notion of market integration that was at the heart of the EC project.

So, why did the Court insist on the sameness approach notwithstanding its rather obvious drawbacks? The broader context may help us understand the reasons. First, there is no doubt that the Court was perfectly aware of the challenges entailed by a wider approach to discrimination. At the time when it delivered its early-period sex discrimination rulings, the Court was already dealing with notions such as distinctly applicable measures, covert discrimination, discriminatory

222 Id., para. 12.
effect or double burden in the context of free movement of workers and goods.\footnote{See Case 152/73 Giovanni Maria Sotgiu v Deutsche Bundespost [1974] 00153; Case 8/74 Procureur du Roi v Benoît and Gustave Dassonville ECR [1974] 00837; Case 120/78Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein ECR [1979] 649.} Hence, there is no doubt that the Court was perfectly aware that the sameness approach could not fully capture the problem of discrimination. Nevertheless, in the context of sex equality, it decided to limit antidiscrimination protection to this narrow approach. Such a decision most likely reflects the Court’s doubts about its own position. The authority of the Court was certainly stronger in the context of free market law due to the main purpose behind the EEC. However, the Court had to tread much more carefully in relation to those questions that were of relevance to social policy regulatory powers of the Member States. In this area, the Court probably did not feel ready to deal with the challenges brought by a wider antidiscrimination approach similar to those it faced in the free movement context.

Moreover, since its authority depended on the acceptance of national courts, the Court considered it more likely that in this area they would be more receptive towards the approach the requirements of which appeared to be simpler. An approach that focuses on a decision-making process and the reasons behind employers’ actions would have difficulties meeting this requirement. Such an approach would quickly lead to difficult questions concerning the duty of an employer to recognize the extent to which a person's sex influenced his decision (the question of relatedness). This is hardly an objective question. No doubt, the question of comparability is equally “value-laden”. This was well illustrated in \textit{Macarthys}, where the Court allowed two identical jobs to be considered different due to reasons whose “objectivity” was not at once obvious to an average person, which instantly brought into question the credibility of the sameness approach.
In fact, the question of comparability and the question of relatedness are in some way the same questions. However, due to the strength of the Aristotelian formula, the approach that insisted on a consistent treatment of those considered to be similar seemed more “rational”. As such, it offered an aura of objectivity and impartiality. This made the sameness approach appear uncontroversial. At the same time, its concealed open-ended character left the Court enough maneuvering space. More precisely, the sameness approach provided the Court with two options. On the one hand, it allowed the Court to justify almost any decision by adjusting the criteria of comparability. On the other hand, because the two approaches involved similar normative choices, the Court could always switch to the approach focused on the relatedness question without great difficulties if it considered that the switch would better serve its purpose.

The case in which the Court most vigorously insisted on the sameness approach is also the case in which its drawbacks became most visible. Rummler involved the claim that the practice of paying women the same salary for jobs involving heavy lifting regardless of the fact that such jobs required a greater physical effort from women than men constituted sex discrimination. The claimant basically argued that women had to be rewarded for their invested manual labor measured against their personal physical strength and not against some indistinctively applicable standard of heavy labor that reflected the interests of employers and which, on average, favored male employees. By appealing to the notion that every worker ought to be equally respected as a unique individual, the claimant revealed the flexibility of the sameness approach. The claimant’s arguments implied a radical restructuring of conventional pay practices. Yet, the sameness approach could easily accommodate her position and justify such a result.

Being aware of this, the Court used the rhetoric that insisted on the objective character of the sameness approach more firmly than ever. It argued that “equal pay requires essentially that the nature of the work to be carried out be considered objectively. Consequently, the same work or work to which equal value is attributed must be remunerated in the same manner whether it is carried out by a man or by a woman.” Accordingly, “it is consistent with the principle of non-discrimination to use a criterion based on the objectively measurable expenditure of effort necessary in carrying out the work or the degree to which, reviewed objectively, the work is physically heavy.”

These arguments suggest that it is always possible to find one correct and universally applicable standard of treatment whose consistent application would ensure fair results. Moreover, the consistent application of such a standard would ensure the objectivity and neutrality of judicial decisions. Notwithstanding this rhetoric, there was hardly anything objective and neutral behind such legalistic arguments. The argument that the expenditure of effort can be measured objectively may be an argument that is valid in an abstract world of natural sciences, which is focused exclusively on properties of a particular object. However, it is hardly “objective and neutral” when applied to the socially constructed world of actual human relations, where a value of a particular type of labor reflects a compromise between conflicting interests. The idea that 20 kilos of weight always demand an investment of the same physical effort regardless of the personal characteristics of those who are actually doing the heavy lifting simply conceals a normative choice to protect employers from costly restructuring of their conventional pay

225 Id., para. 13.
226 Id., para. 14.
practices and consequently preserve the existing structure of income distribution that favors those whose physiognomy is better fitted for heavy manual labor.

It is important to notice that the Court’s ruling was hardly the only possible conclusion. The sameness approach that the Court used to justify its decision could have accommodated several different outcomes. Nothing in this approach prevents the argument that labor should have been measured in accordance with the standard of personal capacity. Furthermore, one could have equally convincingly argued that labor should have been measured against the average strength of members of the female sex or some standard that combined the average strength of both sexes. However, the Court explicitly rejected such a possibility by arguing that, in such a case, the “work objectively requiring greater strength would be paid at the same rate as work requiring less strength.”228 This was a rather narrow-minded argument. It is one thing to say that the practice based on a consistent application of a facially neutral standard on men and women cannot constitute discrimination. It is a completely different thing to say that the application of a facially neutral standard that would not be based on the physiognomy of a stronger sex would lead to discrimination. Not only does this go beyond the requirements of the sameness approach, but, more importantly, it thwarts any effort to remove obstacles to real-life equality that are embedded in the very structure of social relations.

The Hofmann ruling reflects a similar reluctance towards the approach that would entail challenging choices involving the dismantling of structural barriers to equality.229 In Hofmann, the Court rejected the claim that men and women ought to have the same access to maternity leave and held that the national measure denying the right to men who were willing to care for

228 Id., para. 23.
their newborns did not constitute discrimination. To justify its decision, the Court “turned” the Aristotelian coin. It argued that the measure that restricted the maternity leave to mothers was justified by “objective” biological differences between mothers and fathers that placed women in a more difficult position in terms of their health. Moreover, the Court argued that men and women were different due to the special emotional relation between a woman and her child. Consequently, the measure in question “objectively” fell within the scope of the exception that allowed a different treatment for the protection of women.

Once again, the rhetoric of objectivity played an important role in the Court’s reasoning. However, the Hofmann ruling was hardly necessitated by the sameness approach on which the Court relied. A measure that would treat both parents the same and allow them both to spend some time with their newborn would protect the mother's health equally, if not more, effectively. Moreover, it would facilitate a more balanced distribution of childcare responsibilities and help eliminate the wide-spread stereotype about women as biologically predetermined for childcare. This would help eliminate serious implications that such a stereotype has for their competitive position on the labor market. Furthermore, it would help mitigate the existing pay gap between the sexes.

Of course, such a measure would not come without a cost. It would increase either the cost of labor for employers or public expenditures. Moreover, the opposite ruling that would have found the disputed measure discriminatory would have brought the Court into conflict with a powerful Member State over a charged question of regulatory competences in the social policy area of

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significant political importance for that state. These pragmatic considerations should certainly not be disregarded. The pragmatic character of the Court’s early-period approach is nicely illustrated by the important *Johnston* ruling.

In *Johnston*, the Court found that the measure that excluded women in police units operating in a violent environment from carrying weapons and in turn cost them their position, did not breach the equal treatment guarantee. The Court accepted the arguments presented by the national government that carrying weapons made women more exposed to enemy attacks, but also that it overtly conflicted with the public perception of their desirable role and, thus, further increased the public sense of insecurity. Consequently, the Court allowed that such a measure could be justified by the exception that allowed different treatment of the sexes due to the *bona fide* jobs requirements.

There is no doubt that *Johnston* has been one of the Court’s groundbreaking decisions. Most importantly, the *Johnston* Court insisted that a national legal system must provide individuals with an option to subject any decision affecting their rights granted by EU law to judicial scrutiny regardless of the identity of the decision maker or the sensitivity of the context in which the decision took place. Consequently, *Johnston* significantly improved the effectiveness of judicial protection of equal treatment. Furthermore, the Court established the principle that any exception from the right to equal treatment must be interpreted strictly. The requirement of strict interpretation basically meant that only those measures that were included within the scope of one of the three exceptions explicitly provided by the 76/207 Equal Treatment Directive and that satisfied the proportionality principle could justify different treatment of men and women.

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232 See also Case 163/82 Commission of the European Communities v Italian Republic ECR [1983] 3273.
234 *Johnston*, paras. 35-7.
However, the ease with which the Court accepted that the disputed measure fell within the scope of the *bona fide* exception is telling. The Court was fully aware of the fact that the government’s decision to exclude women from armed security forces stemmed directly from harmful stereotypes about women. Yet, it provided the national court with enough maneuvering space to justify it as a necessary requirement of the job in question. Such an interpretation of the equal treatment guarantee basically implied that sexist stereotypes can determine the scope of the *bona fide* exception as long as they are well-established in a particular community. This is hardly a “strict” interpretation of this exception.

In this regard, it is difficult to ignore the fact that the measure in question concerned the regulatory area that was of utmost political importance for the Member State in question and that it occurred in a highly sensitive context. If it had found the disputed measure discriminatory, this would have undoubtedly brought the Court into a highly charged clash with the national governments over their ability to autonomously regulate the area of national security. This pragmatic consideration explains a somewhat contradictory character of the *Johnston* reasoning better than any normative notion of equality. On the one hand, the Court’s firm decision that the Member States have an obligation to ensure access to judicial protection to victims of discrimination regardless of the interests at stake circumscribed their autonomy. On the other hand, the Court allowed for the possibility of justification of the disputed measure. True, the Court never explicitly said that the measure in question was actually justified. Rather, it left that sensitive question to the referring national court. However, this does not detract from the fact that the Court allowed as legitimate the interpretation of the ETD according to which, in circumstances where interests of national security are at stake, the scope of the *bona fide*

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235 I am grateful to Prof. C. McCrudden for this point.
exception may relate to the strength of sexist stereotypes. In this way, the Court implicitly reassured the Member States that their national interests are a part of the “equality equation” after all.

Moreover, the manner in which the Court distributed interpretative responsibilities between itself and national courts is particularly interesting for our purposes. The Johnston Court insisted that the disputed measure could survive scrutiny only if it satisfied the proportionality test. The Court also established the general framework of the proportionality principle. However, the task of determining what the framework actually required in practice was left to national courts. As I will elaborate later, this is a task that requires national courts to confront rather challenging normative choices. By delegating such decisions, the Court compelled national courts to share the responsibility for the development of EU sex equality law. At the same time, the Court retained for itself the position of the final arbiter that can always intervene if a national court failed to exercise its responsibilities in a manner that corresponds to goals favored by the Court.

As noted above, the sameness approach seemed to function when applied to cases with relatively simple facts, especially when the Court’s view regarding the comparability of the persons involved coincided with the prevailing opinion. In that respect, it is not surprising that the Court primarily used this approach in the equal pay context. However, in cases dealing with other employment conditions where the question of comparability involved a more complicated factual
The facts of the dispute are rather interesting. The case concerned the decision of an employer to dismiss all workers who were 55 years old or younger. The older workers were given a choice between compensated dismissal and early retirement. The plaintiff argued that such a scheme was discriminatory since it treated women such as herself, who were 10 years away from their statutory retirement age (60 years), less favorably than men in the same position (their retirement age was 65). In fact, she found support for her claim in the fact that the employer initially offered a choice between compensated dismissal and early retirement both to men and women who were 10 years (and less) away from their retirement. In that regard, two facts were rather clear. First, the employer actually considered that the plaintiff was similarly situated to workers who were given the benefit of choice. This is hardly surprising since the purpose of the disputed measure was to protect those workers who were exposed to the risk of long-term unemployment due to the fact that they were close to the statutory retirement age. Second, the employer changed the initial scheme only due to the organized pressure from male workers who demanded that male workers in the age group 50-55 should be given the same benefit as women of the same age. This only showed that the criterion of sex played a significant role in the employer’s decision.

Nevertheless, the Court found that the disputed scheme did not constitute sex discrimination.

The Court ignored the actual social purpose of the scheme and held that the plaintiff was treated similarly to her male colleagues of the same age employed in the same economically troubled

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237 Case 151/84 Joan Roberts v Tate & Lyle Industries Limited [1986] ECR 703.

238 See Roberts, para. 5.
enterprise. The Court narrowed the scope of relevant considerations to two facts. The first was that all workers were employed in the same economically troubled enterprise. The second was that all workers in the same age group were dismissed.\(^{239}\) The conclusion followed from the likes-alike formula. However, the same formula could have equally justified the opposite conclusion. Moreover, in contrast to its equal pay decisions, the Roberts facts, especially the fact that the employer initially considered that men and women of the same age are not in a similar economic position, show the complexity of the comparability question. Consequently, the sameness approach lost its appearance of objectivity and neutrality.

The Roberts case was merely a taste of what the Court was about to face. Ever since Defrenne the ECJ’s claim of commitment to the notion of sex equality provided the EU with a “social” face and thus increased both the legitimacy of the EU legal order and the Court itself. Over time, however, to prove that commitment, the Court had to deal with increasingly challenging questions of inequality of men and women on the labor market. It quickly became clear that the disparity of social circumstances faced by men and women required a more sophisticated response than sameness in treatment. Moreover, with greater challenges came greater expectations and criticism. Accordingly, the sameness approach gradually became a burden.

It is, therefore, not surprising that, as soon as it gained confidence in its authority and stabilized the supremacy of EU law over national legal systems, the Court started moving away from the sameness approach. Two lines of retreat are of special interest to us. The first line of retreat concerns the manner in which the Court developed protections against measures that appeared to be neutral but in reality disparately affected women. The second line concerns the manner in

\(^{239}\)For a similar critique of the Court’s approach to direct discrimination disputes, see More, “Equal treatment” of the sexes in European Community law: What does “equal” mean?, p. 61.
which the Court redrafted the notion of direct discrimination by refocusing its attention from the question of consistency to the question of relatedness.

2.3.2.2. Changing the Course: Indirect Discrimination

It took almost a decade from the Defrenne saga for the notion of indirect discrimination as directly effective individual right to become a part of EU sex equality law. In Defrenne II, the Court explicitly rejected the idea of indirect discrimination since it could not “be detected on the basis of a purely legal analysis of the situation”, but required “sociological” inquiries and political choices. Yet, with the growing importance of sex equality law for the EEC legal order, the Court became aware of an increasing need for an instrument that would compensate for the drawbacks of the sameness approach and help it address negative implications of those inequalities that are firmly woven into the structure of everyday social relations and that have profoundly detrimental consequences for the ability of women to compete with men for valuable employment opportunities.240 Moreover, less than a decade after the Defrenne saga, this type of discriminatory barrier became the target of an increasing number of challenges brought before the Court. Therefore, the issue of indirect discrimination quickly became of crucial importance for the ECJ’s image of a court committed to sex equality.241

As a response to those needs and challenges, the Court extended the scope of the equal treatment principle to include not only a careful examination of disparate treatment but also a concern about disparate impact of supposedly neutral measures. This approach was not unknown to the

240 FREDMAN, European Community discrimination law: A Critique , p. 121.
Court since it was at the very core of its free movement case law since the early 1970s.\textsuperscript{242} Yet, the proscription of indirect discrimination entered EU sex equality law only through the landmark decision of \textit{Bilka}.\textsuperscript{243} According to the \textit{Bilka} reasoning, indirect discrimination occurs if a particular measure that does not explicitly (i.e. on its face; in the wording) discriminate against men or women excludes from a certain benefit a significantly greater number of persons of one sex, unless such a measure is based on objectively justified factors unrelated to any discrimination on grounds of sex.\textsuperscript{244} Moreover, the condition of “objective justification” requires from an employer to demonstrate that a measure corresponds to a real need of an undertaking, that it is appropriate with a view to achieving the objectives pursued and that it is necessary to that end.\textsuperscript{245}

The indirect discrimination framework established in \textit{Bilka} has remained remarkably stable over time and it is still valid today. However, the ECJ’s commitment to this framework is closely related to the framework’s capacity to accommodate the Court’s practical concerns on a case-by-case basis. Accordingly, this doctrine does not provide national courts with concrete rule-like solutions for concrete situations. On the contrary, one of the most important features of the indirect discrimination framework is its dependence on the capacity of national courts to balance between different available options and assume responsibility for important value-based choices.

The \textit{Bilka} ruling was clearly a significant step forward in the evolution of the ECJ’s sex equality law. It compensated for the two shortfalls of the sameness approach. First, it eliminated the

\textsuperscript{242} See supra fn. 223.

\textsuperscript{243} Case 170/84 \textit{Bilka-Kaufhaus GmbH v Karin Weber von Hartz} [1986] ECR 1607. Regarding the role of indirect discrimination in other areas of the Community law, see CHRISTA TOBLER, Indirect discrimination: a case study into the development of the legal concept of indirect discrimination under EC law, (Intersentia, 2005).

\textsuperscript{244} Id., paras. 29 and 30.

\textsuperscript{245} Id., para. 36.
possibility of prejudicially motivated treatment.\textsuperscript{246} The sameness doctrine did not offer adequate protection to those plaintiffs who were unfavorably treated due to an employer’s prejudice, but could not identify an appropriate comparator, especially since the ECJ explicitly rejected the notion of a hypothetical comparator as overly speculative. Bilka remedied this insufficiency through the requirement that any measure producing a disparate impact be justified by objective factors “unrelated to any discrimination on grounds of sex”.

Second, indirect discrimination brought the notion of structural inequality into the spotlight. Since it is focused on the disparate impact of indistinctively applicable standards of treatment, it showed that equality goes beyond mere consistency. Moreover, indirect discrimination is underpinned by the assumption that apparently objective standards used to determine the comparability of two situations frequently reflect a viewpoint or standard of living that favors a particular (dominant) group and are, as such, not neutral.\textsuperscript{247} Accordingly, it redirects our attention to well-established although obscured systemic real-life inequalities that are the actual cause of the disparately unfavorable effect of an apparently neutral measure. This undermines the assumption that it is possible to resolve the question of comparability in an objective and neutral manner. By undercutting the idea that there is an objective standard of likeness, the notion of indirect discrimination destabilizes the conventional understanding of the Aristotelian formula.

The fact that indirect discrimination directs our attention to structural inequalities does not necessarily mean that it will be used as a means of dealing with the problem of systemic discrimination. Due to its open-ended character, the instrument can serve very different goals.

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{246} C\textsc{atherine} B\textsc{arnard} \& B\textsc{ob} H\textsc{epple}, \textit{Substantive Equality}, 59 The Cambridge Law Journal (2000), p. 568.
  \item \textsuperscript{247} F\textsc{redman}, Discrimination law, p. 111.
\end{itemize}
\end{footnotesize}
The flexibility of this instrument is tightly related to the component of “objective justification” and the goals behind it.

First, one could argue that both the notion of disparate impact and objective justification merely serve as instruments for flushing out concealed illicit motivation (prejudice or stereotype). In that regard, the disparate impact component of this instrument would serve as an indicator that a decision maker knowingly used a particular neutral standard to achieve the same result that would be achieved through explicit “facial” discrimination. The objective justification requirement would offer a chance for a decision maker to convince a court that his reasons were legitimate. In that respect, these two requirements are primarily the expression of low risk aversion towards the possibility that an employer is lying. This narrow understanding of indirect discrimination is not particularly concerned with the problem of structural discrimination.

Second, one could argue that indirect discrimination aims to ensure that an employer’s measure is truly rational. An employer would use the objective justification requirement primarily to convince a court that his measure served a purely rational business purpose that is important for the successful functioning of his enterprise. More precisely, an employer would have to demonstrate two things: first, that the measure is truly capable of achieving a real business goal, and second, that there was no other measure capable of achieving the same legitimate goal with

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249 It is worth noting that the Court rejected this narrow understanding of indirect discrimination in the context of free movement. See Case 120/78Rewe-Zentral AG v Bundesmonopolverwaltung für Bramntwein ECR [1979] 649.
less harmful implications for a disadvantaged group. This would show that a connection between
the disputed measure and a systemic disadvantage causing a disparate impact does not go beyond
what is really necessary for a successful functioning of a particular enterprise. As one
commentator noted, measures that failed on these two tests would not be acceptable in some
desired future society where men and women will be equal in real life and not merely in law.250

Third, one could argue that the prohibition of indirect discrimination aims to achieve a fairer
distribution of socially valuable benefits and opportunities between members of dominant and
disadvantaged groups. This would supposedly strengthen the social position of the latter and
eventually lead to the removal of systemic inequalities. According to this view, employers would
have to convince a court not only that a particular measure is rational but also that the goal a
measure is trying to achieve ought to, in that particular case, be given priority over the goal of
improving the subordinate social position of members belonging to a disadvantaged social group
in question.251 This would turn the objective justification test into a straightforward value-based
balancing exercise.

The preceding arguments suggest that the Bilka indirect discrimination framework can easily
serve very different policy goals and normative notions of equality while preserving its formal
structure intact. In the following paragraphs, I will argue that the indirect discrimination case-law
shows that the ECJ often used this flexibility. More precisely, by “adjusting” substantive
parameters of its fixed formal components, the Court used the indirect discrimination formula to
accommodate practical concerns specific to a particular case.

251 See SHELDON LEADER, Proportionality and the Justification of Discrimination, in Discrimination law: concepts,
The Bilka Court seemed to have used indirect discrimination to ensure that the disputed measure was “truly rational”. The Court thus did not merely require that the measure had to serve a real legitimate (business) aim, but rather insisted that it had to be capable of achieving its non-biased goal \textit{and}, most importantly, that it had to be \textit{necessary} for the realization of that goal. Had the Court perceived indirect discrimination as a tool of flushing out a biased intent, it would not have insisted on such a high level of scrutiny of disparate impact measures in which the necessity test clearly strikes even measures that are not biased and whose effects only unintentionally impair the interests of members of the disadvantaged group.

At the same time, the Bilka Court did not use indirect discrimination as a far-reaching redistributive instrument. The Court explicitly held that employers do not have an obligation to consider the effects that the position of women in family life has on their position in employment. Accordingly, if it met the necessity requirement, the legitimacy of an employer’s measure remained unaffected by the possibility that it perpetuated structural inequalities that caused the disparate impact in the first place. Consequently, some have criticized the Court for its reluctance to use indirect discrimination as an instrument of social engineering to achieve substantive equality.

However, it is easy to underestimate the redistributive potential of the Bilka indirect discrimination formula. Although the Court held that Bilka was not obliged to take into consideration structural inequalities such as the sex-biased distribution of family responsibilities, it will not be easy for employers to ignore this fact in real life. Any employer who wishes to

\begin{itemize}
\item \textbf{252} See also Id. at. p. 114.
\item \textbf{253} \textit{Bilka}, para. 43.
\item \textbf{255} BARNARD, \textit{The Economic Objectives of Article 119}, p. 330.
\end{itemize}
avoid potential indirect discrimination charges will seek to reform his practices in a manner that
will ensure a more balanced participation of female and male workers.\textsuperscript{256} Such restructuring is
hardly possible if an employer decides to ignore the actual cause of a disparate impact.
Moreover, due to the high level of scrutiny established by the \textit{Bilka} reasoning, employers will
find it useful to convince a court that they tried to adjust their measures to counterbalance the
negative effects of structural inequalities.\textsuperscript{257}

Most importantly, it has frequently been ignored that the \textit{Bilka} Court never defined the level of
scrutiny entailed by the legitimate aim requirement in a precise manner. It is easy to assume
simply that any goal that is not related (consciously or unconsciously) to the criterion of sex is
immediately legitimate. However, the \textit{Bilka} reasoning does not necessitate such a conclusion. It
is equally open to the argument that the condition of legitimacy allows a court to evaluate the
importance of a particular business goal in light of its negative implications on the position of a
disadvantaged group.\textsuperscript{258} In other words, it allows a court to demand from an employer to
demonstrate that his need \textit{outweighs} a disadvantage to the affected women. The Court, in fact, at
one point suggested rather frankly that it will evaluate whether the measure’s goal is worthy of
its effects. In the Court’s words, “\textit{it is also necessary to ascertain whether the pay practice in
question is necessary and in proportion to the objectives pursued by the employer.”}

That the \textit{Bilka} framework allowed different levels of scrutiny was illustrated by the very next
case following \textit{Bilka}. The \textit{Rinner-Kühn} dispute involved a provision of national legislation

\textsuperscript{256} See FREEMAN, \textit{Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of
Supreme Court Doctrine}, p. 1099.
\textsuperscript{258} See MICHAEL RUBENSTEIN, \textit{The Equal Treatment Directive and U.K. Law, in Women, Employment and
allowing employers to deny a sick-leave allowance to part-time workers. 259 According to the Member State involved, the provision served the social policy goal of an integrated labor force.260 The Court rejected this justification of the disparate impact and held that mere generalizations about certain categories of workers cannot satisfy the legitimate aim requirement.261 This suggested that the legitimate aim test entailed a potentially robust level of scrutiny. However, the Court simultaneously insisted that the disputed statutory measure had to be suitable and requisite for attaining the aim in question. Hence, it effectively lowered the Bilka standard of scrutiny required by the other two tests included in the Bilka objective justification requirement.262 What distinguished Rinner-Kühn from Bilka was the authorship of the disparate impact measure. Hence, the most plausible explanation of this reduction in the level of scrutiny is the Court’s reluctance to restrain the Member State’s regulatory autonomy in nationally sensitive policy areas.263 In that respect, Rinner-Kühn resembles the Hoffman and Johnston decisions.

This case-law further confirmed the ability of the Bilka framework to accommodate the Court’s pragmatic concerns. For example, in Nolte, the Court stated that the Member States can justify their statutory disparate impact measures if they demonstrate that they were “reasonably entitled to consider that the legislation in question was necessary in order to achieve” the aim of their national social policy “unrelated to any discrimination on grounds of sex.” 264 This apparently

262 ELLIS, Gender Discrimination Law in the European Community , p. 27.
263 See T. K. HERVEY, EC law on Justification for Sex Discrimination in Working Life, in Collective bargaining, discrimination, social security and European integration (Roger Blanpain ed. 2003), p. 129. According to Ellis, the Court lowered the level of scrutiny because “in social security cases, the balance has to be struck between the principle of equality of opportunity between the sexes and the relief of poverty, and the latter frequently seems to win.” ELLIS, Gender Discrimination Law in the European Community.
264 Case C-317/93 Inge Nolte v Landesversicherungsanstalt Hannover 1995 [ECR] I-04625, para. 34.
reduced the *Bilka* objective justification condition to a lukewarm reasonableness test.\(^{265}\) The Court justified such a reduction by openly admitting that the Member States must be allowed wide regulatory discretion in the area of social policy.\(^{266}\)

However, even this lukewarm formula can be easily used as a rather robust type of scrutiny. This has been demonstrated by the *Bötel* case where the Court dealt with a national measure of employment policy that compensated part-time and full-time workers differently for participation in staff council training courses.\(^{267}\) The measure aimed to compensate employees for those hours they could not work due to their training, since otherwise they would be reluctant to participate in training courses. Although this was certainly a *reasonable* argument, the Court rejected the measure arguing that it was “likely to deter” part-timers from acquiring the knowledge needed for serving on staff councils.\(^{268}\) This basically meant that the *Bötel* Court was not convinced that the measure was *capable* of achieving its goal. Without more convincing evidence of the measure’s capacity to achieve the goal, the government was not entitled to “reasonably consider” that the measure was necessary.

The Court further reaffirmed this message in *Seymour-Smith* where it held that the Member States can justify the disparate impact of their employment policy if they can “*provide evidence on the basis of which it could reasonably be considered that the means chosen were suitable for achieving that [legitimate] aim*”\(^{269}\) In that regard, by insisting on a strict application of the

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\(^{266}\) Nolte, para. 33.

\(^{267}\) Case C-360/90 *Arbeiterwohlfahrt der Stadt Berlin e.V. v Monika Bötel* [1992] ECR I-03589.

\(^{268}\) Bötel, paras. 24-5.

\(^{269}\) C-167/97 *R v Secretary of State for Employment ex parte Seymour-Smith and Perez* [1999] ECR I-623, para. 76.
capability test, the Court turned a mild Nolte reasonableness test into a more demanding type of scrutiny.

As a result, we can find three different levels of scrutiny in the indirect discrimination case law.\textsuperscript{270} The lowest Nolte level of scrutiny applies to the justification of statutory social security provisions. Next is the intermediate Bötel level of scrutiny applicable to statutory employment policy provisions.\textsuperscript{271} The highest Bilka level of scrutiny is applicable to the justification of an employer's practices.

However, it is important to note that the Bötel Court was not only concerned with the capacity of the disputed measure to achieve a proclaimed end. The disputed measure entailed a clear risk that women would continue to be underrepresented in business decision-making bodies since many more women than men worked part-time. Consequently, women’s ability to influence existing structural inequalities in the labor market would remain weak. It is unlikely that the Court overlooked this negative implication. Moreover, this might have been the reason why the Court turned away from the Nolte level of scrutiny and chose to insist on the strict application of the comparability test. In that regard, the Court primarily scrutinized the measure in light of its implications on the normative value of a more equal distribution of labor market opportunities between the sexes. The “technical” capacity test was thus merely a pretext for a value-driven decision.

The Court never explained why it developed three different levels of scrutiny of disparate impact measures.\textsuperscript{272} However, the line of cases dealing with national statutory measures illustrates

\textsuperscript{270} HERVEY, \textit{EC law on Justification for Sex Discrimination in Working Life}, pp. 122-3.
\textsuperscript{271} See also Case C-281/97 Andrea Kruger v. Kreiskrankenhaus Ebersberg [1999] ECR I-05127.
\textsuperscript{272} BARNARD \& HEPPLE, \textit{Indirect Discrimination: Interpreting Seymour-Smith}, p. 411.
clearly that the Court has been rather accommodating to what could be broadly described as social policy concerns. Moreover, it confirms the Court’s pragmatic reluctance to restrain the Member States’ national regulatory autonomy in those politically sensitive areas. Most importantly, it shows how simple it is for the Court to use the indirect discrimination framework that it established in *Bilka* to accommodate its practical concerns.

The capacity of the indirect discrimination framework to accommodate the Court’s practical concerns is also illustrated by the case-law concerning non-statutory disparate impact measures. For example, in *Danfoss*, the Court applied the *Bilka* framework in two rather different manners. The *Danfoss* Court scrutinized the pay policy consisting of several remuneration criteria that overall had a less favorable impact on the salaries of female employees. The Court tested each criterion separately. Thus, for example, in relation to the criterion of training as one of the pay policy criteria, the Court held that employers must show “*that such training is of importance for the performance of the specific tasks which are entrusted to the employee*”, which reaffirmed the *Bilka* level of scrutiny. Yet, in the very same decision, the Court stated that, notwithstanding its disparate impact on female salaries, the criterion of length of service immediately passed the *Bilka* “objective justification” requirement since it was understandable that the criterion served the employer’s needs as “*it goes hand in hand with experience*” which “*generally enables the employee to perform his duties better.*” The length of service by no means necessarily increases work efficiency. At best it can be reasonably assumed that it is likely that it will increase it in a significant number of cases. The fact that the Court accepted this rational stereotype without any substantive scrutiny indicated that in relation to this particular criterion the Court deflated the *Bilka* test to a light version of the reasonableness test.

273 *Danfoss*, para. 24.
This discrepancy can be explained as a pragmatic compromise between certain competing interests and values. On the one hand, the Danfoss Court was clearly concerned with the position of female employees, especially their ability to protect effectively their EU equal treatment rights. Accordingly, the Court insisted that, in principle, it is a responsibility of an employer to convince a court that his pay criteria can actually increase the effectiveness of production. On the other hand, the Court was also clearly concerned with the cost that the restructuring of conventional pay practices may have for employers. Accordingly, the Court insisted on the lower level of scrutiny for those practices that would be expensive to reform. In that regard, Danfoss suggested that the more important the disputed measure is for the efficient functioning of an enterprise, the less likely it is that the Court would require from an employer to help carry the cost of structural inequality. The same Bilka framework was able to accommodate all of these concerns and thus provide the Court’s ruling with an apparently “objective” and consistent justification.

The Danfoss Court’s position on the length of service criterion was subject to strong criticism for a long time. Eventually, the Court yielded. To move away from its Danfoss approach, the Court employed the Bötel strategy. Thus, in the Cadman decision, the Court held that the employer does not have to “establish specifically that recourse to the criterion of length of service is appropriate” to attain the legitimate objective of rewarding acquired experience which enables the worker to perform his duties better “unless the worker provides evidence capable of raising serious doubts in that regard.” By turning the spotlight on the burden of proof threshold, the Court de facto insisted on the stricter capability test. Consequently, it increased the level of

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276 ELLIS, Gender Discrimination Law in the European Community, p. 28.

277 C-17/05 B. F. Cadman v Health & Safety Executive ECR [2006] I-09583. See paras. 38, 40.
scrutiny demanded by the *Bilka* framework. However, unlike *Bötel*, the *Cadman* Court placed the main brunt of the burden of proof on the plaintiff.

The ability of the *Bilka* indirect discrimination framework to facilitate the ECJ’s efforts to find some satisfying balance between the value of greater equality of women in the labor market and the employers’ interest in cost-effective production is also illustrated by the *Enderby* ruling.\(^{278}\) In *Enderby*, the Court was faced with the question whether a disparate impact in terms of pay can be justified by the employer’s need to remain competitive in a race for well-qualified candidates. The dilemma was obvious. The employer tried to justify his discriminatory pay policy by arguing that he was forced to use such measures due to the already existing structural inequality in the labor market. The Court provided a rather Delphian answer stating that “*the state of the employment market, which may lead an employer to increase the pay of a particular job in order to attract candidates, may constitute an objectively justified economic ground within the meaning of the [indirect discrimination] case-law.*”\(^{279}\) This ruling has been widely read as if the Court accepted “the role of market forces” as a legitimate factor that can “objectively justify” disparate impact measures without any meaningful scrutiny. The only requirement which the Court *explicitly* insisted on was the proportional correlation between the size of pay difference and the strength of market pressure.\(^{280}\)

It is important to note that the ECJ’s indirect discrimination framework also allows a somewhat different reading of the *Enderby* ruling. More precisely, it allows several strategies of narrowing such a broad approval of the role of market forces. First, the Court never stated that the market

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\(^{278}\) Case C-127/92 *Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health* [1993] ECR I-05535.

\(^{279}\) *Enderby*, para. 26.

\(^{280}\) *Enderby*, para. 27.
forces in question could not be explained by factors that exclude any discrimination on grounds of sex. In other words, the Court can always find that those market forces that are (significantly) related to structural discriminatory barriers that put women in a disadvantaged position cannot satisfy the first step of the “objective justification” requirement - the legitimate aim test. Second, the Court never stated that the measure in question was actually capable of achieving its aim. In other words, it did not find that higher salaries attracted candidates that can successfully respond to the requirements of the job in question. Third, it never stated that there was no other measure that can attract well-trained candidates equally effectively without facilitating the pay inequality. In fact, a simple pay-raise for the female-dominated work of equal value could in many instances achieve precisely that.

What did the Court say? In a move that is of particular interest to us, the Court “delegated” the responsibility for these questions to the national court. The Court reminded the readers that it has “consistently held” since Bilka that “it is for the national court, which has sole jurisdiction to make findings of fact, to determine whether and to what extent the grounds put forward by an employer to explain the adoption of a pay practice which applies independently of a worker’s sex but in fact affects more women than men may be regarded as objectively justified economic grounds.” 281 Accordingly, although it found that the state of the employment market may qualify as an objective justification, “[h]ow it is to be applied in the circumstances of each case depends on the facts and so falls within the jurisdiction of the national court.” 282

Such delegation of responsibilities is a rather pragmatic move. If there is anything that national courts could have learned from the ECJ’s indirect discrimination case-law, it is that the

281 Enderby, para. 25.
application of this sex equality guarantee does not involve a mere question of facts and a
simplistic application of clear-cut rules. On the contrary, as I argued earlier, it involves a whole
set of challenging value-based choices that will determine its actual reach and effectiveness.
There are reasons that can explain why the Court placed the responsibility for these normative
decisions on national courts.

I doubt that the Court decided to place the responsibility for such important normative decisions
on national courts because it felt that it lacks appropriate authority to make these choices for the
whole Union. The Court has delivered many decisions the effects of which were equally or even
more far-reaching. It is more likely that the Court felt it lacked appropriate insight and
experience to make such normative choices at that particular moment. In that regard, it probably
wanted to use decisions of national courts as a source of valuable information. If nothing else, it
is certainly useful to see how much the national courts are willing to use the potential offered to
them by this guarantee in practice. The Court’s decision to delegate the responsibility for
challenging normative decisions entailed by sex equality guarantees to national courts also
corresponds to a particular style of adjudication that, according to some, has become
characteristic of the EU legal order. According to this view, the relation between the ECJ and the
national courts is more discursive than hierarchical. In that regard, by delegating certain
important normative decisions, the Court is encouraging national courts to engage in a type of
normative discourse with the ECJ regarding the appropriate scope and implications of these EU
guarantees. This increases both the quality and legitimacy of the Court’s case-law.

283 For the most famous expression of this view, see MIGUEL POJARES MADURO, We the court: the European Court
of Justice and the European Economic Constitution: a critical reading of Article 30 of the EC Treaty, (Hart
Whatever reasons actually stand behind the Court’s decision to delegate this responsibility to national courts, the fact remains that the ECJ’s indirect discrimination approach in the context of EU sex equality law compels national courts to engage in adjudication that requires them to assume responsibility for difficult value choices. To demonstrate this, I have focused my analysis on the ECJ’s indirect discrimination decisions that deal with the notion of “objective justification” of disparate impact measures. I have chosen this particular segment because I believe that it offers an effective illustration of the pragmatic character of the Court’s indirect discrimination approach. However, I could have also demonstrated the same point by analyzing the indirect discrimination decisions in which the Court struggled with the question of comparability of groups or the question about the appropriate size of a particular disparate impact. Although I will not deal with these issues in this chapter, I will return to them in Chapter VII, where I will analyze the manner in which CEE post-socialist courts deal with indirect discrimination.

In the next section, I will return to the ECJ’s direct discrimination case-law to show that the Court’s approach in this area has the very same pragmatic character and that it places national courts before the very same task of answering challenging normative dilemmas entailed by EU sex equality guarantees.

2.3.2.3. Direct discrimination: Constructing the New Approach

The indirect discrimination case-law clearly showed that the ECJ took EU sex equality law beyond equality as consistency in treatment. Once the Court introduced indirect discrimination guarantee in Bilka, it became clear that actual effects matter.

Another decision that genuinely affected EU sex equality law and signaled the end of the sameness approach that dominated the ECJ’s early-period case-law was Dekker. Dekker was the first ECJ’s case involving pregnancy-based discrimination. In that regard, it is not surprising that it was this case that dealt the final blow to the sameness approach. The cornerstone of the sameness approach was the comparability test. Women and men who were in comparable situations had to be treated the same. Moreover, as I argued earlier, the sameness approach appeared functional as long as the Court’s decision about the comparability of two individuals enjoyed support from the prevailing attitudes. The moment that support was lost, the appeal of the sameness approach vanished.

Therefore, it is clear that the issue of pregnancy presented a significant challenge to the sameness approach. What makes this issue so problematic for the sameness approach is the simple fact that no man can get pregnant. Consequently, for the conventional Aristotelian perception of equality, the notion of pregnancy represents a difficulty since there is nothing in that abstract formula that can tell us whether we should treat pregnant women as similar to or different from men. What is more, its abstract character allows it to accommodate both options. On the one hand, many have argued that pregnancy, being a medical condition, resembles illness, which allows us to compare pregnant women to ill men. This argument is especially popular in the context of participation of women and men in a labor market. Employers are hardly interested in medical differences between pregnancy and illness. All they care is whether a worker is capable of providing services at some acceptable cost. From their perspective pregnant women and ill men (and women) are similarly situated and out to be treated alike. On the other hand, many

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opponents of this market driven viewpoint have argued that pregnancy is a physical condition unique to female sex. From this perspective, comparing pregnancy with illness is unacceptable. It equates a socially desirable and one of the most profound events in a life of any human being with medical condition that has grave consequences for the unfortunate individual and society in general. Accordingly, since pregnant women cannot be compared to any men they ought not to be treated according to any “male” standard. The question of pregnancy, thus, not merely reveals the dubious utility of the Aristotelian formula, but, more importantly, also reveals the fact that the formula has conventionally perpetuated the male standard of measurement providing it with an aura of neutrality and objectivity. *Dekker* is a nice illustration of this conflict.

The *Dekker* Court held that the employer’s refusal to employ a pregnant woman because the national law did not grant him a reimbursement of expenses caused by her absence from work constituted discrimination on grounds of sex.287 Its reasoning is particularly interesting. The Court explicitly rejected the argument that there can be no discrimination without a comparator.288 According to the Court, whether the disputed measure constitutes direct discrimination “depends on whether the fundamental reason for the refusal of employment is one which applies without distinction to workers of either sex or, conversely, whether it applies exclusively to one sex.”289

Such reasoning was a significant blow to the sameness doctrine because it offered a different and equally viable approach to direct discrimination claims.290 The *Dekker* approach was, for all

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289 *Dekker*, para. 10.
practical purposes, not contingent on the existence of an actual male comparator. Above all, it showed that there are other ways to prove direct discrimination. Moreover, it showed that we do not need a comparator to know whether a particular treatment can be considered “unfavorable”. According to Dekker, direct discrimination primarily depends on the quality of reasons behind the disputed decision. The Court explicitly argued that any decision that was based on the decision-making criterion that was “directly linked to the sex of the candidate” constituted direct sex discrimination. In other words, the reason must not be related to the criterion of sex membership. However, according to Dekker, the relation between the reason that led the employer to make the disputed decision and one’s membership in a particular sex must be evaluated in the light of the actual effects of the disputed measure. The Court argued that the disputed decision was directly linked to the sex because of its effects. In Dekker, the effects appeared rather obvious since the employment practice under scrutiny negatively affected only women. In some way, it “punished” those women who exercised the procreative capacity that distinguished them from men. Since the Court was rather clear that it will not allow such measures, some have argued that the Dekker reasoning reflected an “essentially feminist principle”. However, it is worth noting that, on a conceptual level, the Aristotelian notion of equality was capable of accommodating the Dekker ruling. This notion entails that those who are different ought to be treated differently. In that respect, when it comes to pregnancy, women are in an incomparable situation to any man and cannot be treated alike. However, if they are different,
is there anything in the Aristotelian notion of equality that can tell us how precisely pregnant
women need to be treated except that they have to be treated differently? No. Not in the abstract
formula itself. However, the answer changes if we reintroduce the notion that women deserve
equal respect as compared to men, which is the premise that conventionally lies behind the
Aristotelian understanding of sex equality. We can thus argue that pregnant women cannot be
treated unfavorably because men are never treated unfavorably simply because they are
exercising a feature that is essential to their particular sex. From this perspective, Dekker simply
granted women something that men already had – the guarantee that they will not suffer negative
consequences simply because they are being typical members of their sex. Such a reading of
Dekker suggests that the male standard was alive and well after all. We will see later how easy it
is for the Court to reintroduce the male comparator into pregnancy related considerations.

In light of the preceding arguments, it should also be pointed out that, if the Dekker Court indeed
accepted the “essentially feminist principle”, it restricted it to a rather narrow area of pregnancy
discrimination and at a particular price.295 Dekker suggests that pregnant women are not like
men. It follows that women are “purely” women when they are pregnant. In that respect, Dekker
defines women through their procreative ability.296 However, a procreative ability is nothing
more than a simple biological fact. By defining women through their biology, Dekker implicitly
provided pregnancy with a much broader, socially constructed meaning with far-reaching
normative implications. Dekker relies on the assumption that reproduction is an inherent function
of the female sex and thus the primary feature of their gender. It is hardly a coincidence that this
assumption reflects the well-established belief that procreation, childcare or caretaking in general
are women’s primary responsibilities. In fact, this is something that the Court already suggested

295 See Dekker, para. 17.
in *Hoffmann*.\textsuperscript{297} It is far from certain that this can be considered an “essentially feminist principle”.

Regardless of such conceptual implications, the fact remains that, in practical terms, *Dekker* offered a new approach to direct discrimination that moved beyond consistency. The question whether (pregnant) women were sufficiently similar to men was not at the center of the Court’s scrutiny. Instead, the Court was concerned with the extent to which the reason behind the employer’s decision that was not instantly or obviously concerned with the plaintiff’s sex (i.e. pregnancy) was, when considered on the whole, related to the fact that the plaintiff belonged to a particular sex. Since this approach is focused on the strength of this connection, I will call it the relatedness approach.

In *Dekker*, the application of this approach seemed fairly simple. Women could not be treated unfavorably due to pregnancy because pregnancy is essentially related to the fact that they are women, which was illustrated by the sheer fact that *only* women can suffer negative implications of such treatment. However, the relatedness approach hardly offers straightforward answers to dilemmas entailed by the notion of direct discrimination. For one, if pushed to its logical end, the *Dekker* approach would have far-reaching practical implications. For example, the approach suggested that any reduction in pay due to a pregnancy leave or any unfavorable treatment due to a worker’s sex-specific illness constituted discrimination. It would also strike down any measure that is based on the retirement age determined specifically for each sex. In short, when taken to its extreme, the approach turns into the so-called “but for” test. We will see that the Court was

hardly ready to accept such consequences, which suggests that *Dekker* was above all a pragmatic answer to a challenging dilemma.

More importantly, the relatedness approach opens a new set of challenging dilemmas. The approach entails that a legitimacy of a particular practice depends on the quality of reasons behind it. Moreover, it ties the quality of reasons to the actual effects of the practice. In *Dekker*, pregnancy was found to be an illegitimate reason for decision-making because it negatively affected only women. Accordingly, the Court held that it was directly related to the criterion of sex. However, *Dekker* did not say whether a reason would still be sufficiently related to sex if a measure affected women primarily although not exclusively. Would an employer be responsible for direct discrimination if he used some indistinctly applicable standard only because he was aware that such practice will exclude many more women than men?

The same dilemma could be expressed in somewhat different terms. In *Dekker*, the defendant argued that he treated the plaintiff unfavorably not because of her sex, but due to the simple fact that she would be absent from work. In that respect, he treated her just as he treats any other absent worker. Moreover, the employer hired another woman in the plaintiff’s place, which shows that sex *per se* was not relevant for his decision. Yet, the *Dekker* Court did not accept this explanation. Its reasoning clearly suggests that the absence of prejudicial intent was irrelevant. What mattered was that the actual effect clearly showed that the reason behind the practice was directly related to the plaintiff’s sex. In that respect, the *Dekker* Court held the employer responsible because it considered that the employer could have been aware of the problematic nature of his practice due to its effects. However, the ECJ never defined at which point an
employer must become aware of the directly discriminatory nature of his practice. Which effects are sufficiently serious to merit such a legal response?

In addition, the Court never explained why it abandoned the sameness approach even though the Aristotelian formula could have accommodated the pregnancy dilemma in question. The Court simply assumed the position that pregnant women are incomparable to men. The simplest answer is that the relatedness approach seemed to have been more accommodating of the Court’s normative concerns in this particular case. In other words, the choice of approach was a pragmatic decision.²⁹⁸

The preceding arguments suggest that the sameness approach and the relatedness approach share something in common. They are both incapable of providing straightforward answers to serious dilemmas entailed by the notion of discrimination. They both require similar normative choices and cannot function without them. In fact, the question of comparability and the question of relatedness are in some way one and the same question. They cannot be answered “objectively”. Answers to both of these questions depend on a court’s view whether it is desirable to hold a defendant responsible for his actions due to effects that those actions have for the particular interests or values a court considers worthy of protection. The two approaches are, therefore, connected by their flexible, indeterminate and accommodating character. However, what the Court discovered was that the two approaches offered different “maneuvering” opportunities, allowing it to accommodate pragmatic concerns more effectively on a case-by-case basis. It is probably because of this that the Court never fully abandoned the sameness approach, nor fully

²⁹⁸ Ellis argued that the Dekker reasoning was a pragmatic solution that undermined the underlying principle of the equality law. Nevertheless, she welcomed it because it favored women. ELLIS, EC Sex Equality Law, p. 207.
embraced the relatedness approach. On the contrary, the Court eventually combined them into one approach, which provided a rather effective tool of judicial balancing.

The first post-Decker direct discrimination case confirmed that the Court had changed its course. In *Birds Eye*, the Court found that the bridging pension compensating for the difference between the amount of the regular pension and the amount of the illness-related early pension did not constitute direct discrimination, notwithstanding the fact that female employees in the age group 60-65 received a lower bridging pension compared to male employees of the same age and performing the same work.\(^{299}\) The purpose of this policy was to ease the unfortunate financial situation of early retirees for whom the reduced early pension was the only means of financial support. The measure took into account that women started receiving the state pension at the age of 60, while the early-retired men had to live without the state pension until they turned 65. The main cause of the difference in treatment was the fact that the bridging pension formula took into account the sex-based statutory retirement age that was different for men and women.

The Court did not apply the Decker logic. On the contrary, the Court argued that “the principle of equal treatment...like the general principle of non-discrimination which it embodies in a specific form, presupposes that the men and women to whom it applies are in identical situations” and thus seemingly relied on its sameness approach.\(^{300}\) Yet, the Court held that the disputed measure did not constitute discrimination. It justified its decision arguing that male and female workers of the same age who were employed by the same employer and had to retire early were not similarly situated. This position was in clear contradiction with the one that the Court assumed in the earlier *Roberts* dispute involving similar facts, which suggested that the

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\(^{300}\) *Birds Eye*, para. 17.
Court’s decision was not the result of the Aristotelian logic used by the Court as the justification of the *Birds Eye* ruling.\(^{301}\) In fact, the Court used the Aristotelian consistency formula in a manner that signaled a retreat from the sameness approach.

In the early-period case-law, the Court insisted on the “objectivity” of the comparability test. Accordingly, it never questioned the actual motives behind some unfavorable treatment. The *Birds Eye* reasoning is clearly different in that respect. In *Birds Eye*, the Court rather explicitly admitted that it was not sure whether it was possible to objectively answer the comparability question concerning the male and female workers who had to retire early. The Court started from the assumption that they did not “appear to be” equally situated.\(^ {302}\) However, to confirm this assumption, the Court looked at the structure of “the mechanism for calculating the bridging pension” and “the purpose of the bridging pension”.\(^ {303}\) It thus used the very purpose of the disputed measure as a standard of comparability. This *de facto* turned the comparability argument into an “addendum”. In fact, the *Birds Eye* dispute was never resolved by the Aristotelian consistency test. It was resolved at the very moment when the Court chose to accept the purpose of the employer’s measure as a *legitimate reason* for different treatment.\(^ {304}\) From that point onwards, the comparability scrutiny became a test of trustworthiness of the employer’s justification of unfavorable treatment of women of a particular age. The *Birds Eye* ruling rested on the approach similar to the one used in *Dekker*. The Court approved the disputed policy because it believed that, in the light of its effects, which it found socially desirable, the reason

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\(^{302}\) *Birds Eye*, para. 18.

\(^{303}\) *Birds Eye*, paras. 20-21.

behind it could not be considered sufficiently related to the plaintiff’s sex. Consequently, even the fact that the employer actually used the sex-based criterion did not suffice to turn the employer’s decision into direct discrimination.

The preceding analysis suggests that the Birds Eye ruling was primarily a result of the Court’s value-based judgment concerning the social effects of the disputed policy. In that respect, Birds Eye was a balancing exercise. However, this exercise has one rather important negative implication. When evaluating the effects of the disputed policy, the Court showed appreciation of the fact that the measure improved the financial condition of workers who were forced to retire early due to illness. However, it failed to acknowledge or take into account that the bridging pension perpetuated the existing pay gap between women and men and thus preserved the overall poverty of older women.

The implications of the Birds Eye reasoning became more explicit in the relatively recent Hlozek case where the Court dealt with the issue of bridging allowances once again. This time the employer decided to allow access to the bridging allowance to all women over 50 and all men over 55. The measure was a part of the employer’s social package aimed at alleviating the social consequences of the dismissal of a large number of employees caused by the restructuring of the enterprise. The employees received the bridging allowance until they reached the early retirement age provided by the State – 55 years of age for women and 60 for men. Those who were not granted the allowance were given a one-time compensation. The claim was brought by

305 In that respect, it is noteworthy that the Court insisted that the measure had a “neutral” real-life effect for men and women since men who turned 65 in principle received a lower bridging pension compared to women of the same age who received higher statutory pensions. In other words, the Court was suggesting that the bridging pension did not widen the existing pay gap. See Birds Eye, para. 22.


307 See the critique of the Birds Eye reasoning in FREDMAN, Women and the law, p. 356.

308 Case C-19/02 Viktor Hlozek v Roche Austria Gesellschaft mbH. [2004] ECR I-11491.
a 54 years' old male employee who believed that he was discriminated against since he would have been allowed access to the bridging pension if he was a woman.\textsuperscript{309} The Court stayed consistent to its \textit{Birds Eye} decision and found that the bridging allowance did not constitute direct discrimination justifying the decision by the different labor market position of male and female employees in the age group 50-55.\textsuperscript{310}

The \textit{Hlozek} Court explicitly recognized that the employer based the disputed decision on the retirement age criterion that was sex-biased.\textsuperscript{311} However, consistently with \textit{Birds Eye}, it held that this was not enough to establish discrimination since men and women were not similarly situated. The Court argued that men and women of that particular age group were not similarly situated \textit{because} they were not equally exposed to the risk of long-term unemployment. This justification is problematic for two reasons. First, the Court did not provide any concrete support for this assumption even though the assumption can certainly not be considered “common knowledge”. For example, it may had very well been the case that, in that particular profession or particular economic cycle, members of one sex who were five years away from their retirement were not exposed to some considerable risk of long-term unemployment. Moreover, the plaintiff argued that the right not to be discriminated against on the grounds of sex is an individual right that entails that individuals ought to be evaluated on the grounds of their individual circumstances and not some broad group-based assumptions. Second, and more importantly, the Court never explained why we should accept a consideration such as the risk of long-term unemployment as a relevant yardstick of comparability. Since the purpose of the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{309} \textit{Hlozek}, para. 23.
\item \textsuperscript{310} P. P. CRAIG \& DE BÚRCA G., EU law : text, cases, and materials, (Oxford University Press, 4th. ed, 2008), p. 896.
\item \textsuperscript{311} The Court found that “[i]n this case, it is common ground that the provisions of the social plan of 26 February 1998 provide for a difference in the treatment of workers based directly on their sex, because they fix the age giving entitlement to the bridging allowance at 55 for men and 50 for women.” \textit{Hlozek}, para. 45.
\end{itemize}
\end{footnotesize}
bridging allowance was to protect from financial hardship those workers who were close to their statutory retirement because the employer assumed that they were most exposed to the risk of long-term unemployment, the absence of any such explanation suggested that the Court reduced the supposedly objective comparability test to the simple test of the employer’s trustworthiness. However, this was not the case.

The described leap of faith can be explained by the fact that the question of comparability of female and male workers in question was not at the center of the Court’s interest. What really concerned the Court were the actual effects of the policy in question and the implications that the decision may have for the workers in similar economic positions. Hlozek was essentially decided on the basis of the Court’s view of the normative desirability of the measure in question. The Court evaluated the measure primarily in view of its social effects. It explicitly argued that the disputed bridging allowance was neutral because it “was not intended to give rise to discrimination against male workers of the undertaking and nor did it have that effect.” The fact that the Court used the language of intent does not mean that it suddenly switched to an intent-based approach. It merely indicated that it was not willing to hold the employer responsible for something that was the responsibility of national and supranational legislative bodies. The Court was aware that the employer’s policy relied on sex-based factors. However, in this case, sex was hardly an arbitrary criterion. If it wanted to provide workers of both sexes with equally effective protection from long-term unemployment, the employer was forced to take into account that the legislator tied their retirement age to the criterion of sex.

Moreover, to hold the employer responsible for basing the decision on the sex-based retirement age would have been a rather direct attack on this exception provided by the EU Directives. It is

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312 Hlozek, para. 48.
doubtful that the Court was ready to engage in this institutional conflict. However, by pointing out the lack of intent on the employer’s behalf, the Court clearly identified who is responsible for the discriminatory character of the measure.

As far as the employer’s responsibility was concerned, what truly mattered to the Court were the actual effects. Accordingly, the Court explicitly stressed the fact that the employer invested particular care to ensure that female employees enjoyed equally effective protection of its social measure.\(^{313}\) Moreover, it pointed out that the measure is unlikely to perpetuate the negative implications of sex discrimination in relation to the retirement age.\(^{314}\) Based on these considerations, the Court found that the policy in question was not related to the criterion of sex membership although it involved sex-based concerns.

Decisions such as *Hlozek* and *Birds Eye* show several characteristics of the ECJ’s approach to direct discrimination. First, the Court did not embrace the “but for” test lurking in *Dekker*.\(^{315}\) The “but for” test is rather straightforward in terms of its application and as such may be attractive to courts that favor “objective” adjudication not involving challenging value-based decisions. Hence, it is rather telling that the Court opted for a completely different approach.

Second, these decisions show that the relatedness approach is not completely incompatible with the key feature of the sameness approach.\(^{316}\) The comparability test can serve as a useful test of trustworthiness of reasons given by an employer. Nevertheless, this is merely a secondary role.

The key focus always remains on the manner in which the disputed decision relates to the

\(^{313}\) *Hlozek*, para. 48-9.

\(^{314}\) *Hlozek*, para. 50.

\(^{315}\) McColgan has recognized that the *Hlozek* reasoning effectively undermines the objective “but for” approach. AILEEN MCCOLGAN, Discrimination law: text, cases and materials, (Hart, 2nd ed, 2005), p. 52.

plaintiff’s membership in a particular sex. Yet, in both cases, the Court made sure to express its rulings through the Aristotelian formula. This suggests that the Court either still considers that the formula can provide its decisions with an appearance of “objectivity” and “neutrality”, or that it finds that the appearance of consistency with its earlier case-law is sufficiently important to justify the pretense.

Whatever the case, the fact is that the Court never entirely gave up the early-period sameness approach. The approach clearly played a dominant role in a number of post-Dekker cases. More specifically, the Court has tended to use the sameness approach in two types of situations. The first involves rather uncontroversial cases of direct discrimination where defendants treated plaintiffs unfavorably for no sound reason except their sex.317 In those decisions, the Court simply states, without any meaningful elaboration, that comparable individuals of a different sex have been treated differently and concludes that this constitutes direct sex discrimination. The second type is more interesting. In principle, it involves cases that protect some market-based interest at women’s disadvantage. In such cases, the Court tends to use the sameness approach primarily to obscure the controversial value-based character of its decisions, by providing them with a rather abstract and legalistic reasoning. Good examples of such cases are Lawrence318 and to a lesser extent Jonkman.319

Cases such as these suggest that the Aristotelian formula facilitates the Court’s maneuvering capacity, which is probably the main reason why the formula keeps reappearing even in those

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318 Case C-320/00 A. G. Lawrence and Others v Regent Office Care Ltd, Commercial Catering Group and Mitie Secure Services Ltd, ECR [2002] I-07325.

319 Joined cases C-231/06 to C-233/06 Office national des pensions v Emilienne Jonkman (C-231/06) and Hélène Vercheval (C-232/06) and Noëlle Permesaen v Office national des pensions (C-233/06) ECR [2007] I-05149.
cases where the Court is obviously concerned with the effects of the disputed practice and not its formal consistency. This point is illustrated particularly well by an important equal pay decision, *Brunnhofer*, which gave a new twist to the ECJ’s approach to direct discrimination.

The facts of the *Brunnhofer* case are rather complicated.\(^{320}\) In short, the main dispute concerned a pay practice according to which the female plaintiff received a lower monthly pay-supplement compared to her male colleague employed in a position that the applicable collective agreement classified as the same job category. The Court found that such a practice did not necessarily constitute direct discrimination. It justified its conclusion in Aristotelian terms by arguing that the equal pay principle is a “*particular expression of the general principle of equality which prohibits comparable situations from being treated differently unless the difference is objectively justified.*”\(^{321}\) Accordingly, the direct discrimination guarantee prohibits “*unequal pay as between men and women for the same job or work of equal value, whatever the mechanism which produces such inequality, unless the difference in pay is justified by objective factors unrelated to any discrimination linked to the difference in sex.*”\(^{322}\)

The *Brunnhofer* ruling is based on the approach that combines the features of the sameness approach and the relatedness approach. According to this combined approach, direct discrimination occurs if a difference in treatment between similarly situated individuals was somehow related to the plaintiff’s membership in a particular sex. In other words, to establish direct discrimination a court needs to establish two facts. The first is that a plaintiff was similarly situated to some comparator yet treated differently. The second is that the difference in treatment was related to the fact that the plaintiff belonged to a particular sex.

\(^{321}\) Brunnhofer, para. 28.
\(^{322}\) Brunnhofer, para. 30. See also paras. 39-40.
What did the Court gain by this combined approach? Would it not be simpler to say that any decision that was related to the fact that a plaintiff belonged to a particular sex constituted direct discrimination? It probably would. However, the combined approach provided the Court with a rather pragmatic balancing tool.

The comparability test provided the Court with several practical options. Often it is difficult to be sure whether a particular treatment ought to be considered “unfavorable”. This is particularly the case in the context of pay when it is hard to know what a “fair” compensation is for a particular type of work. In such cases, a comparator can provide some sense whether to consider a particular practice as unfavorable. The comparability test achieves this by tying the idea of fair treatment to the notion of arbitrariness. In that respect, the Nikoloudi ruling was particularly interesting since the Court explicitly held that the plaintiff can establish unfavorable treatment by identifying a comparator who is not of the opposite sex.\footnote{Case C-196/02 Vasiliki Nikoloudi v Organismos Tilepikoinonion Ellados AE ECR [2005] I-01789, paras 27, 30.} A simple fact that a plaintiff has been treated less favorably than similarly situated others for no viable reason entails that she was accorded less respect and consideration as an individual. However, arbitrary treatment is not illegal \textit{per se}. Hence, there is still a question of relatedness between the disputed treatment and the plaintiff’s sex.

The comparability test can also play a different role. By channeling our attention to careful scrutiny of similarities and differences between two situations, the test can help us realize a possible rationale behind a different treatment in question. This implies that the comparability test can serve as a burden of proof threshold. The Court can use the incomparability argument when it considers that a number of viable reasons that could explain different treatment are such that it is not worth investing additional resources into further scrutiny. In fact, the Brunnhofer
Court actually used the comparability test to distribute the burden of proof in the equal pay disputes. The Court argued that it is possible to determine equal work on the basis of objective criteria. However, the objective criteria such as “the nature of the work, the training requirements and the working conditions” are conventional criteria of job comparison that are widely accepted. Consequently, the Brunnhofer objective comparability test is primarily a test of reasonableness. All that a plaintiff has to do is to show that it is reasonable to assume on the basis of these criteria that two jobs are sufficiently similar to raise suspicion that sex might have affected an employer’s decision. At that point, the burden of proof would shift to a defendant.

However, the combined approach implies that the Court would not be willing to offer protection to those plaintiffs who failed to identify an appropriate comparator. I am convinced that this would not be the case since the existence of an actual comparator is not a constituent element of discrimination. Imagine a case where the plaintiff offered as a proof of discrimination an e-mail in which the defendant admitted that he used the plaintiff’s disadvantaged position in the labor market as a woman and “forced” her into a contract that pays her less than she actually deserves. The fact that the plaintiff could not identify an actual comparator would hardly change the fact that the employer’s decision was tightly related to the plaintiff’s sex. In any event, the Court could always use a hypothetical comparator.

The combined approach is thus ultimately concerned with the effects of the scrutinized practice. However, the manner in which the Brunnhofer Court evaluated those effects to examine the relation between the disputed practice and the plaintiff’s membership in a particular sex is rather telling. The Court insisted that any difference in pay between workers performing sufficiently

324 Brunnhofer, paras. 42-43.
325 Id.
comparable work must be “objectively justified”. This means that “the grounds put forward by the employer to explain the inequality must correspond to a real need of the undertaking, be appropriate to achieving the objectives pursued and necessary to that end.” In other words, the pay difference must pass the scrutiny of the same proportionality test that the Court uses in the context of indirect discrimination. This suggests that any pay difference between workers of a different sex performing similar work is immediately suspect as being related to the disadvantaged position of women in the labor market. Moreover, it is possible that the Court insisted on such a high level of scrutiny because it was aware that any such practice perpetuates the existing pay gap and as such is tightly related to sex inequality. Consequently, employers are required to convince courts that their apparently discriminatory pay practices are “truly economically rational” and, possibly, even sufficiently important to prevail over the interests of reducing the existing pay gap. Having in mind the earlier arguments related to the proportionality test in the context of indirect discrimination case-law, it is fair to say that the test provided the Court with a rather effective balancing tool.

There is another feature of the combined approach that is particularly interesting for this thesis. The approach places on national courts the responsibility for two most sensitive tasks. First, national courts are given the primary responsibility for determining whether two jobs are comparable for the purposes of a particular case. In Brunnhofer, that meant that the referring national court was left with the most challenging question, since it had to determine whether the criterion of the employer’s trust in a particular candidate can be a factor of relevance for the

326 Brunnhofer, para. 67.
327 Prechal argued that the Court introduced the “proportionality test in order to blur the line between direct and indirect discrimination and thus escape the strict constrains entailed by limited number of exceptions from direct discrimination. PRECHAL, Equality of treatment, non-discrimination and social policy: achievements in three themes, p. 545.
comparability test. Second, just as in indirect discrimination disputes, national courts must elaborate and apply the proportionality test in each particular case. Clearly, both of these decisions require national courts to assume responsibility for important normative choices. Of course, as the Brunnhofer Court noted, the ECJ can always step in and provide national courts with more specific guidance as regards any feature of the direct discrimination scrutiny if it considers that this is needed.  

2.3.2.4. **Direct discrimination – the limits of pregnancy**

If examined carefully, the Dekker reasoning implies that the meaning of the notion of sex is not fixed. Dekker’s key argument that pregnancy is directly linked to the sex criterion was easy to accept primarily because of the popular perception that pregnancy is inherent in what it means to be a woman. However, closer scrutiny quickly reveals that the relation between the condition of pregnancy and the notion of sex (membership) is not so obvious. In fact, the primary reason why the Dekker Court held that pregnancy falls within the scope of the suspect decision making criterion of sex was the conviction that women who chose to exercise their procreative capacity ought not to carry the cost that pregnancy entails for employers’ market-based interests. Such a normative choice shows that the notion of sex does not have some fixed, objectively (biologically) predetermined meaning. It is a social construct the meaning of which changes with social circumstances.

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328 Brunnhofer, para. 64-65.
329 For example, Julén argued that to describe an unfavorable treatment on the grounds of pregnancy as direct (instead of indirect) discrimination implies that pregnancy is not a social construct but a biological constant, which reinforces the traditional assumption about women and men’s roles within the family and in relation to childcare. JUÑÉN, *A Blessing or a Ban? About the Discrimination of Pregnant Job-Seekers*, p. 180.
330 In that sense, we should have in mind the ECJ’s Hofmann decision where the Court showed that it is willing to offer significant protection to new mothers due to their special importance for the emotional well-being of newborns. See McGlynn, *Ideologies of Motherhood in European Community Sex Equality Law*. 
If the meaning of the notion of sex is not fixed, as Dekker seems to suggests, neither is the notion of discrimination on the grounds of sex. The post-Dekker pregnancy case-law consistently confirmed this argument. The case-law concerning pregnancy-related illnesses illustrates this point particularly well.

The manner in which the ECJ abandoned its sameness approach the very first time it encountered a pregnancy discrimination case suggested that the new relatedness approach that was focused on the effects instead of consistency would dominate the area of pregnancy related discrimination. At the same time, the relatedness approach suggested that any time an employer harms a woman’s employment interests due to her pregnancy the Court would hold him responsible for sex discrimination. In that sense, the Dekker reasoning entailed a possibility of the “but for” test with some far-reaching implications for conventional business practices. Yet, as seen below, the Court made it clear rather early that it will not rely on the “but for” test in the context of pregnancy. However, the manner in which it chose to avoid it was somewhat surprising, although fully consistent with its demonstrated pragmatism.

If pushed to its extreme, the Dekker reasoning suggested that pregnancy allowances that are lower than regular salary constitute direct discrimination. The Court rejected this implication in Gillespie. It found that the equal pay principle did not require “that women should continue to receive full pay during maternity leave” since it “is well settled that discrimination involves the application of different rules to comparable situations or the application of the same rule to different situations.” and women on pregnancy/maternity leave were “in a special position

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which requires them to be afforded special protection, but which is not comparable either with that of a man or with that of a woman actually at work”. 333

This was clearly a turnabout from Dekker. The Court reintroduced the Aristotelian formula to escape the implications of its Dekker reasoning. However, the manner in which the Court used the formula fully reveals the pragmatic nature of this move. The Court held that pregnant workers could not argue that they were treated less favorably because they were incomparable to anyone else. Without a comparator, there was no way to determine whether the treatment was less favorable. However, the fact that there was no “less favorable” treatment does not necessarily entail that the disputed treatment did not constitute discrimination. Also, the fact that pregnant women were “incomparable” did not mean that they did not merit full pay. This is even more so since the Court itself held that the equal pay principle required that the amount of the pregnancy/maternity allowance must not “be so low as to undermine the purpose of maternity leave, namely the protection of women before and after giving birth.” 334 This meant that the principle of equal pay implied some standard of treatment for “incomparables” after all. 335

In fact, the whole point of the Dekker ruling was to establish that discrimination does not depend on consistency and comparability but rather on the quality of reasons behind the practice evaluated through its effects. The Gillespie Court bluntly ignored this point.

The Court reintroduced the sameness approach because it was easier to justify the Gillespie ruling through that approach. Of course, neither of these two approaches was responsible for the ruling. The ruling was the result of a value-driven choice not to overstrain employers with the

333 Id. para. 17.
334 Id. para. 20.
335 HERVEY, EC law on Justification for Sex Discrimination in Working Life, p. 114.
cost of improving women’s disadvantaged social position during the period of pregnancy. The sameness approach simply offered more maneuvering space in terms of justifying that choice. In fact, in that very same case, the Court switched back to the Dekker approach when it suited its needs and held that the denial of pay increases to a woman on pregnancy/maternity leave constituted sex discrimination “since, had she not been pregnant, she would have received the pay rise.”

The Abdoulaye ruling illustrates a similar pragmatism. In Abdoulaye, the Court found that the a lump-sum payment that the employer paid exclusively to female employees on maternity leave with the aim of offsetting “occupational disadvantages, inherent in maternity leave, which arise for female workers as a result of being away from work” did not constitute direct discrimination since women and men are in “different situations.” The Court failed to explain how women switched from being “incomparable” to being comparable but “differently situated” in relation to men. This point is relevant because, if the Gillespie Court accepted the argument that women on pregnancy/maternity leave suffer “occupational disadvantages” that entrench their disadvantaged social position, it would be more difficult for the Court to argue that the equal pay principle provided merely the right to minimal pregnancy allowance. In Abdoulaye, the Court adjusted its approach to accommodate the fact that it approved of the allowances in question since they were voluntary and as such were not a threat.

336 Id. para. 22.
Nowhere has the pragmatic character of the Court’s approach to discrimination been more obvious than in the context of pregnancy related illnesses. In the *Webb* decision, the Court held in an unusually strict manner that pregnant women cannot be compared to ill men since “pregnancy is not in any way comparable to a pathological condition”. However, if pregnancy is not a pathological condition while illness is, what is a pregnancy related illness? The Court greatly struggled with the question whether health complications caused by gestation constituted a regular part of pregnancy (and consequently fall within the scope of the notion of (female) sex) or they were just an illness. Initially, it held that a pregnancy related illness is like any other illness. Therefore, the employer’s requirements concerning absence from work due to health issues were equally applicable to men and women. Consequently, *the equal treatment principle* allowed the employer to take into account the absence from work during the pregnancy period that was caused by pregnancy related health complications when calculating the allowed sick leave days but not the period of absence during the maternity leave guaranteed by a national legislation since this would undermine its purpose.

The Court made a highly uncharacteristic move and explicitly overruled this position in the *Brown* decision. The Court argued that “although pregnancy is not in any way comparable to a pathological condition the fact remains that pregnancy is a period during which disorders and complications may arise which form part of the risks inherent in the condition of pregnancy and

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342 *Fotex* para. 24.
are thus a specific feature of that condition. Once it defined a pregnancy related illness as an inherent part of pregnancy, the Dekker approach kicked in. However, in the very same decision, the Court found that the same pregnancy related illness is no different from a regular illness if it occurs after the end of the maternity leave. Accordingly, at that point women were again comparable to ill men and the Court could switch back to the Aristotelian formula.

It has been argued that the equal treatment principle has proved to be a rather “unreliable legal tool” in the context of pregnancy due to its inherent openness to different interpretations. The reason for this may be that the equal treatment principle played only a secondary role in the pregnancy decisions. The real issue in the pregnancy cases was not the comparability or uniqueness of men and women. It was how to distribute the social cost of pregnancy between employers and pregnant women. This has been a constant effort of finding an acceptable balance between the interest of improving the position of women in the labor market and the interest of making sure that employers can function efficiently. Whether this pragmatic “win some, lose some” approach can be called an equality approach is a fair question. However, it is clear that, if the Court confronted these issues straightforwardly, its pregnancy case-law would not be half as confusing as it is.

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344 Brown, para. 22.
345 Brown, para. 24. For the right to take sick leave while on pregnancy leave, see Case C-411/96 Margaret Boyle [1998] ECR I-06401.
346 Brown, para. 26. See also a more recent decision in Case C-191/03 North Western Health Board v Margaret McKenna [2005] ECR I-000.
However, the case-law concerning pregnancy-related illnesses shows that the questions of comparability and relatedness are not the only open-ended features of the equal treatment guarantee. The term sex is equally open-textured. These decisions illustrate that, for practical purposes, a concrete meaning of the term is tightly related to the manner in which our societies regulate the social relation between men and women. How open-textured the Court’s approach to pregnancy disputes is can be seen in the *Mayr* decision that further extended the scope of the term “sex”. In *Mayr*, the Court held that a dismissal of a female worker who took leave in order to undergo *in vitro fertilization* constituted direct discrimination on grounds of sex.\(^{350}\) The Court argued that the ruling followed from the well-established case law according to which an unfavorable treatment on “the account of pregnancy, or for a reason essentially based on that state, affects only women and therefore constitutes direct discrimination on the grounds of sex.”\(^{351}\) Accordingly, since part of the *in vitro* treatment “directly affects only women [i]t follows that the dismissal of a female worker essentially because she is undergoing that important stage of *in vitro fertilisation treatment constitutes direct discrimination on grounds of sex.”\(^{352}\) It is doubtful that the Court reached this decision because it was faithful to the *Dekker* reasoning. Imagine if the situation involved a couple who had to be absent from work in order to use a defined window of opportunity to get pregnant. Clearly, in such a situation, “the account of pregnancy” as a reason for unfavorable treatment would affect both a man and a woman. Yet, it would hardly make sense to argue that this is the crucial difference that distinguishes this case from *Mayr*. The real question would not be whether the reason affects only members of one sex but rather whether there is some good policy-driven or value-based reason why we should not

\(^{350}\) Case C-506/06 *Sabine Mayr v Bäckerei und Konditorei Gerhard Flöckner OHG.* [2008] ECR I-01017.

\(^{351}\) *Mayr*, para 46.

\(^{352}\) *Mayr*, para. 50.
ask employers to tolerate the same cost in relation to those women who decided to exercise their procreative capacity but do not require this degree of medical support.

2.4. Conclusion

As can be seen from this chapter, the EU legal order favors sex equality guarantees of a very different character from those that could be found in the CEE regimes of the “really existing” socialism. While CEE regimes favored clear-cut “mechanically” enforceable rules dealing with very concrete situations, EU sex equality law consists primarily of standard-like, open-textured guarantees whose practical meaning depends on various normative considerations.

This chapter has also shown that the ECJ has in some way valued this character of sex equality guarantees. Although it clearly has the authority, the Court has not developed clear and precise legal propositions (rules) providing these guarantees with a sufficient degree of determinacy, so as to allow national courts to enforce these rules in a mechanical manner. The ECJ’s sex equality rulings may leave an impression of being “logical” and “objective” in the sense that they have somehow been predetermined by some inherent meaning of equality principles of a higher order. In that respect, the reasoning in the ECJ’s sex equality decisions frequently suggests that the notion of (sex) equality is reducible to the Aristotelian principle. Moreover, according to the case law, the principle apparently contains inflexible concepts that can be strictly distinguished from each other. Unfavorable treatment is either related to sex or it is not discriminatory at all. Discrimination is either direct or indirect. It is either justified or not. There is no middle ground.

I have tried to show, however, that the ECJ has favored such a formalist style for pragmatic reasons. In that regard, the formalism is merely a pretext for value-based adjudication. This
chapter has shown that, in most of the ECJ’s sex equality decisions, it is rather difficult to establish “the rule the case stands for” in some determinate fashion. Moreover, the ECJ developed several approaches to the same discrimination dilemmas and they all differ in their concrete implications. Furthermore, each could be read as being applicable to a wide range of cases or a small number of disputes with rather specific facts. For those reasons, the Court was always in a position to justify its holdings by using one or the other approach, depending on its specific pragmatic concerns related to a particular case. Consequently, the ECJ’s sex equality decisions make much more sense if they are read in light of the specific facts of a particular case and in light of the particular social, political and institutional context in which a case took place.

This style of adjudication reveals one important feature of EU sex equality law. An open-textured, standard-like character of EU sex equality guarantees, whether they are prescribed in legislative acts or established through case law, requires courts to confront and adjudicate a variety of value choices. Accordingly, the manner in which the ECJ interprets and applies sex equality guarantees is hardly “purely legal”, as the Court described its approach. When enforcing sex equality rights, the ECJ is constantly engaged in normative decision-making about the appropriate balance between competing policy considerations, values and private interests. Consequently, doctrinal propositions that we find in the Court’s case-law, such as the notion of proportionality, are primarily balancing tools. In principle, the ECJ’s sex equality rulings are a result of the Court’s effort to find an appropriate balance between two primary concerns. On the one hand, the ECJ’s sex equality case law shows a clear concern for the market-based interest of efficient economic production. On the other hand, the Court is clearly aware of the structure of distribution of power in the EU labor market, which is determined by the ability of employers to use women’s socially disadvantaged position in order to maximize their economic utility at their
comparative disadvantage. In that regard, the Court constantly uses the open-textured character of sex equality guarantees to (re)define the line between protecting employers from an overtly cumbersome cost entailed by discrimination challenges to conventional even if unequal employment practices and protecting women from disadvantaging implications that such practices have for their capacity to compete on an equal footing with men, or their ability to engage in fair bargaining with employers. Behind the formalist façade thus lies a normative struggle.

In the following chapters, I will show that this style of adjudication looks rather problematic from the perspective of CEE post-socialist courts. The ECJ has frequently required from national courts to assume the primary responsibility for normative choices entailed by EU sex equality guarantees. The most challenging questions such as the comparability test, the relatedness test, the question of disparate impact, objective justification requirement or the capability or necessity tests rest with national courts. None of these methods of scrutiny can be applied “mechanically”. All of them entail politically charged judgments that need to be decided on a case by case basis.

Such a distribution of adjudicating responsibilities has one important implication. EU sex equality guarantees and the manner of their enforcement have been primarily designed for adjudication systems that favor litigation based on value-based or policy-driven argumentation. They invite parties to convince courts that a particular interpretation of a particular guarantee is desirable as a matter of some normative policy. Courts are required to respond accordingly. It is reasonable to assume, then, that those legal systems that favor the so-called “mechanical jurisprudence” and discourage their courts from assuming responsibility for normative choices are more likely to encounter problems with the enforcement of EU sex equality guarantees.
This assumption will be the subject of scrutiny in the remainder of this thesis.
Chapter III
Negotiating Accession

3.1. Introduction

The purpose of the EU accession negotiation process in the area of sex equality was, in part, to prepare the Candidate States (CS) for the task of enforcement of EU antidiscrimination guarantees. The EU accession negotiations failed to achieve this purpose. Legal reforms did not have a clear strategy or precise goals. More importantly, the parties failed to understand the profound normative gaps between them. The negotiation process failed to fully take into account the manner in which the post-socialist legal systems perceive the process of judicial enforcement of the law. Moreover, the negotiation process ignored the extent to which the understanding of equality between men and women that the post-socialist systems inherited from their socialist past affected their capacity to enforce EU antidiscrimination guarantees.

This and the following chapter will show that the negotiation efforts were not merely insufficient to achieve their goals. Indeed, I will argue that the structure of the whole process was flawed. Because the negotiators ignored the profound normative gaps between them, the character of the negotiation process perpetuated certain obstacles to the enforcement of EU antidiscrimination guarantees in the post-socialist legal systems. This and the following chapter, therefore, argue against the perception that the accession negotiations ensured a successful transposition of the EU sex equality acquis into the CEE post-socialist legal systems. On the contrary, the process

353 See Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of The Regions - Report on equality between women and men, COM(2004) 115 final, Brussels, 19.2.2004, p. 7; Report from the Commission to the Council, the European Parliament, the Economic and
of the post-socialist transition in the area of sex equality is still very much a work in progress. Even the direction of this transition is still unknown.

3.2. Sex equality and EU Enlargement

The key driving force behind the legal reforms in the area of sex equality in the CEE post-socialist states has been the process of enlargement of the European Union. Consequently, it has been easy to assume that the process of legal transition has been deliberate and calculated. Moreover, judging on the basis of the available negotiation material, the official belief was that the post-socialist legal systems would accept the dominant understanding of sex equality in the European Community by the end of the negotiation period.354 Accordingly, it was assumed that at the end of the transition period the CEE legal systems would have a well-defined and coherent system of legal guarantees common to all other EU Member States, supported by effective institutional enforcement mechanisms.355

3.2.1. The ABC of the Enlargement

3.2.1.1. The Idea of Enlargement

The process of enlargement of the European Union has often been considered one of the most successful EU policies.

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The method of achieving this goal is controversial. In simple terms, enlargement requires assimilation of the Candidate States into the existing structure of the EU club in such a way that their assimilation would be without any detriment to the functioning of the club. The enlargement process was envisaged as a one-sided process of reformation where only those who were joining the club were required to convert, while the club purported to remain unchanged.\textsuperscript{356}

The model has for the most part been successful over the previous history of EU enlargement. Hence it is not particularly surprising that the EU applied the same approach to the so-called Eastern Enlargement.\textsuperscript{357} As a result, in order to be recognized as eligible partners in European integration, the CEE post-socialist states were required to adjust to the standards that were established by the existing EU members. This asymmetrical process strongly determined the structure of the accession negotiations for the Eastern Enlargement.

3.2.1.2. \textit{Preconditions for the Enlargement}

Before the accession of the 10 new post-socialist Members in May 2004, the Union had already acquired a significant enlargement experience. Nevertheless, there is no doubt that the Eastern Enlargement was in many ways significantly different from all other rounds of EU enlargement.\textsuperscript{358}

\textsuperscript{356} Id. at p. 6.

\textsuperscript{357} “The European Council meeting in Luxembourg on 12 and 13 December 1997 marks a moment of historic significance for the future of the Union and of Europe as a whole. With the launch of the enlargement process we see the dawn of a new era, finally putting an end to the divisions of the past. Extending the European integration model to encompass the whole of the continent is a pledge of future stability and prosperity.” EUROPEAN COUNCIL, \textit{The Presidency Conclusion of the Meeting of the European Council in Luxembourg}, 13 December 1997 available at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/032a0008.htm.

First of all, the 2004 enlargement was the largest in EU history. The negotiation process involved 12 Candidate States. This was an unprecedented challenge in a purely technical sense. More importantly, however, the CSs involved in the 2004 enlargement were rather different from those that joined the EU in the previous enlargement rounds. Except for Malta and Cyprus, all other CSs were post-socialist states that had embraced democracy and open market economy only a few years before their application for EU membership. There was no doubt that their political and economic, as well as legal systems were considerably different from those characteristic of the European Union. Therefore, it seemed more important than ever to insist that membership in the Union was contingent on the acceptance of the basic political and social values, principles and institutions considered common to the existing Member States. Only if they became sufficiently similar could the CSs function according to the already well-established rules accepted by the old Member States (MS).

This idea was clearly expressed at the 1993 European Council in Copenhagen. On that occasion, the EU Member States established that in order to become new members of the European Union, the CEE post-socialist states had to accept that:

“Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the
candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.”  

These basic standards became known as the Copenhagen Criteria. They were classified into three groups:

- Political criteria: stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
- Economic criteria: existence of a functioning market economy and the capacity to cope with competitive pressure and market forces within the Union;
- Criteria of acceptance of the Community acquis: ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.

These criteria were further strengthened by the Madrid European Council in 1995.

The Copenhagen Council described the acceptance of these criteria by the CEE post-socialist states not merely as a basic condition of accession but as the precondition for European peace and stability. The criteria consist of important political, economic and legal principles that any state wishing to accede to the European Union must satisfy. The Copenhagen criteria were something like a blueprint for the political, economic and legal reform of the aspiring candidates. At the same time, despite their importance, the Copenhagen criteria were never precisely

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360 Id., para. 7.A.iii.
362 “The European Council welcomed the courageous efforts undertaken by the associated countries to modernize their economies, which have been weakened by 40 years of central planning, and to ensure a rapid transition to a market economy. The Community and its Member States pledge their support to this reform process. Peace and security in Europe depend on the success of those efforts.” Id.
defined. This was particularly the case in relation to the political and economic criteria. This vagueness often allowed the EU to react to ad hoc political or economic developments that were not necessarily within the competence of the Union but which their MSs nevertheless considered inappropriate for an EU candidate.

The three Copenhagen criteria play different roles at different stages of the enlargement process. For example, the start of accession negotiations was contingent only on the full satisfaction of the political criterion. In many ways, this is a consequence of Art 49 of the Treaty on European Union (TEU). The economic criterion and the acquis capacity criterion have to be gradually fulfilled during the period of accession negotiations. In exceptional cases, a candidate state can be given additional time for the implementation of a particular requirement after accession.

The third Copenhagen criterion - the capacity to incorporate and implement Community law – played a key role in the context of negotiations regarding equality and non-discrimination.

3.2.1.3 The Acquis – the Key of the Enlargement

The Community “acquis” is a unique term. The literal translation of this French term is “legacy”. The term implies a certain kind of wisdom and knowledge on how to approach and handle issues important for the functioning of the European Community or the Union. This knowledge is

364 SMITH, The Evolution and Application of EU Membership Conditionality.
365 Art 49: Any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members. Treaty on the European Union, Official Journal of the European Communities C 325/11.
366 MAURER, Negotiations in Progress, p. 121.
primarily based on the practical experience deriving from the functioning of the EU political and legal system in the past. Accordingly, the purpose of the acquis is to facilitate effective functioning of the complex system.

The scope of the acquis is extensive and it is difficult to determine in any precise manner what is included.\textsuperscript{368} There is no fixed definition. The Commission describes it as “the body of common rights and obligations which bind all the Member States together within the European Union. It is constantly evolving and comprises:

- the content, principles and political objectives of the Treaties;
- the legislation adopted in application of the treaties and the case law of the Court of Justice;
- the declarations and resolutions adopted by the Union;
- measures relating to the common foreign and security policy;
- measures relating to justice and home affairs;
- international agreements concluded by the Community and those concluded by the Member States between themselves in the field of the Union’s activities.”\textsuperscript{369}

The acquis is not limited to the acts of the European Community but also includes the acts adopted under the second and third pillars of the European Union.

We can therefore distinguish between the “hard” and “soft” acquis.

\textsuperscript{368} Grabbe describes the term in the following way: “‘Acquis communautaire’ is the term used to refer to all the real and potential rights and obligations of the EU system and its institutional framework”. HEATHER GRABBE, A Partnership for Accession? The Implications of EU Conditionality for the Central and East European Applicants, EUI Working Paper RSC No. 99/12, European University Institute (1999).

In the “hard” sense, the *acquis* includes positive legal provisions. It primarily refers to the Union’s primary law such as the provisions of the Treaty on European Union or the European Community Treaty and the secondary Community law such as Community regulations, directives, and decisions. The “hard” *acquis* also includes the case law of the Community courts, which is often considered the very core of *acquis*.

However, the *acquis* also includes EU soft law instruments such as recommendations, declarations, resolutions or opinions of EU institutions. It also includes political objectives of the Union. In that sense, numerous famous EU policies from different areas of EU competence and their implementing measures are included in the “soft” *acquis*.

The “hard” *acquis* is binding. Its authority lies in its positive legal character and accompanying sanctions. The “soft” *acquis* is not legally binding. Its authority primarily depends on the persuasiveness of its goals and measures. The “persuasiveness” is often facilitated by the political peer pressure of other MSs or EU institutions. It is somewhat misleading to claim that the soft *acquis* instruments are less important due to their non-binding nature. These instruments are often more effective in realizing the Community goals. Also, they are often better in defining the purpose behind a particular area of the *acquis*.

There are at least two reasons why the effective functioning of the Union requires compliance of all Member States with the *acquis*, especially its “hard” part. First, EU policy goals could not be achieved if the Union accepted selective compliance. Second, selective compliance discourages the mutual trust and solidarity among Member States that is indispensable for the

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370 See further P. NICOLAIDES, Enlargement of the European Union and Effective Implementation of its Rules, (European Institute of Public Administration, 2000).
functioning of a supranational entity such as the Union. This idea reflects in some way the notion of equality among the members of the Union. Therefore, it is not surprising that the aspiring candidates are required to accept and implement the acquis in its entirety.

The idea of equality among the members of the Union is clearly reflected in the third Copenhagen criterion. The acquis capacity criterion requires full harmonization with all the parts of the Community acquis, regardless of its legal nature. Formally, the CSs were not only expected to transpose the positive law of the Community into their legal systems, but were also expected to harmonize their national policies with Community policies. In the 2004 enlargement process, for example, the CSs were thus required to fully commit to the aims of economic and monetary union.

However, the principle of full acceptance of the soft acquis was not equally respected regarding all parts of the acquis during the process of the 2004 accession negotiations. The Union was selective in insisting that the CSs demonstrate full compliance with the complete body of acquis before accession. The States were thus not expected to implement fully several policy goals before the accession or even immediately after the accession. For example, the CSs were not required to fully implement the cooperation measures in the area of internal affairs or to unconditionally subscribe to the Union’s foreign policy before the accession. Also, candidate states were not required to participate in all of the Community policies before the accession.

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374 SMITH, The Evolution and Application of EU Membership Conditionality, p.117.
Instead, they were asked to gradually harmonize their policy goals and build institutional capacity before the accession.\textsuperscript{376}

The principle of full acceptance was much more operative in relation to the “hard” \textit{acquis}. The CSs were required to incorporate the complete body of EU legal principles and positive norms into their national legal systems during the period of accession negotiations.\textsuperscript{377} This condition is known as the “transposition” requirement. In the 2004 accession negotiations, the CSs were expected to transpose approximately 85,000 pages of the EU “hard” \textit{acquis}. No exceptions were allowed.\textsuperscript{378} In that sense, the transposition requirement was not only the most concrete of the Copenhagen criteria, it was the \textit{core} condition of accession. However, the obligation to accept fully the “hard” \textit{acquis} was not exhausted by the transposition requirement. In the 2004 accession negotiations, the CSs were also formally expected to create the capacity to \textit{implement} (through further legal acts) and \textit{enforce} (through national administrative and judicial systems) the transposed EU legal norms.\textsuperscript{379}

These requirements of implementing and enforcing Community law were primarily focused on ensuring effective executive regulatory efforts. Administrative bodies of the CSs were expected to produce rules that elaborated those legal provisions of the \textit{acquis} that for some reason required further clarification. This clarification most often concerned those provisions of Community

\textsuperscript{377} See ADAM LAZOWSKI, \textit{Approximation of Laws, in} Handbook on European Enlargement (A. Ott & K. Inglis eds., 2002), p. 636. Lazowski argues that soft law instruments and the case-law of EU courts were not part of the harmonization requirement, but may have an important impact on the interpretation of the domestic legislation. This may be a fair description of the reality. However, it does not correspond to the EU official position.
\textsuperscript{378} See SMITH, \textit{The Evolution and Application of EU Membership Conditionality}, pp. 112-113.
secondary law that left some regulatory discretion to Member States. The requirement thus targeted primarily executive bodies with regulatory capacity such as ministries, regulatory agencies or other similar institutions.

The CSs were also expected to start enforcing those provisions of national law that resulted from the transposition of the EU acquis. As this requirement was primarily focused on national bodies responsible for the enforcement of such provisions, the focus was on the national judiciary as well as the system of specialized enforcement bodies such as ombudsman offices or special administrative agencies with enforcement powers. For the sake of simplicity, I will refer to both described requirements as the implementation requirement.

The implementation requirement presupposed an effective enforcement system of national institutions with the capacity to enforce national norms implementing the Community acquis. In that sense, the requirement was based on several further assumptions. First, it assumed the existence of a national system of enforcement institutions that had a sufficient number of people with sufficient resources needed for this task. Furthermore, the requirement implied the existence of a system of enforcement procedures and remedies that could ensure effective protection of rights granted to individuals by EU law. Most importantly, the requirement was based on the assumption that the Community provisions have a more or less determined meaning or one that could be properly discerned. Accordingly, it assumed that national enforcement institutions not

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380 For the meaning of the term “implementation” in the EU legal order, see LORENZO ALLIO & MARIE-HÉLÈNE FANDEL, Making Europe work: improving the transposition, implementation and enforcement of EU legislation, EPC WORKING PAPER (2006).
only ought to possess a considerable knowledge of the Community policies, but also have the
capacity to understand correctly the “proper” meaning of various Community provisions.

Due to the scope of the acquis, this requirement had far reaching implications for almost every
aspect of the state’s capacity for policy-making and policy-implementation.\footnote{HEATHER GRABBE, “How does Europanisation Affect CEE Governance? Conditionality Diffusion and Diversity”, 8 European Public Policy 4, pp. 1013-1031.} It therefore
required from national governments to provide those institutions responsible for implementation
and enforcement of transposed EU provisions with material resources and know-how, as well as

Thus it comes as no surprise that the third Copenhagen criterion of full acceptance of the acquis
not only required the CSs to harmonize their legal systems with the requirements of the EU
acquis through far-reaching legislative action, but also to reform those institutions responsible
for implementation and enforcement of transposed EU provisions in order to develop their
capacity to meet fully all requirements of EU law.\footnote{See MARESCAU, Pre-accession, p. 22.} This was particularly stressed by the
Commission at the beginning of the process of enlargement:

“The applicant countries’ administrative and judicial capacity is of crucial importance for the
adoption, implementation and enforcement of the acquis and for the efficient use of financial
support in particular from the structural funds. It is vital that Union legislation be transposed
into national law. But this is not sufficient to ensure its correct application. It is equally
important for the applicants’ administrations to be modernised so that they can implement and
enforce the acquis. This will often require new administrative structures as well as properly

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\footnote{HEATHER GRABBE, “How does Europanisation Affect CEE Governance? Conditionality Diffusion and Diversity”, 8 European Public Policy 4, pp. 1013-1031.}
\footnote{See MARESCAU, Pre-accession, p. 22.}
trained and remunerated administrators. The applicants’ judicial systems must be capable of ensuring that the law is enforced. This requires the retraining and in some cases, the replacement of judges, to ensure that courts are able to operate effectively in cases involving Community law. It is important that these countries’ courts should be able, from accession, to apply the principles of Community law, such as primacy over national law or the direct effect of some legislation. It is also essential for these courts to have a sufficient number of judges trained in Community law in order to make use of the preliminary ruling procedure in Article 177 and to ensure effective cooperation with the Court of Justice of the European Communities.\footnote{Agenda 2000, Vol. II: The challenge of enlargement, COM/97/2000 final - Vol. II.}

Since it required extensive legislative and institutional reform, the condition to accept fully the acquis was certainly the most comprehensive and concrete if not the most important Copenhagen criterion. However, the criterion also had a very practical function. It provided a framework for the accession negotiations.

\subsection*{3.2.1.4. The Basic Structure of Negotiations}

For the purposes of the 2004 accession negotiations, the acquis was divided into 31 specific chapters. Each chapter reflected one regulatory area within the Union’s competence.\footnote{See MARESCEAU, Pre-accession, p.11.} Most of the chapters were built around specific Community policies.\footnote{C. DELCOURT, The Acquis Communautaire: Has the Concept had its Day?, 38 Common Market Law Review (2001).} Each chapter identified the Community legislation from a specific regulatory area that had to be transposed and implemented into the national legal systems of the CSs. It also contained specific policy measures and actions in which the CSs were expected to gradually start participating. Each chapter also included requirements concerning the institutional capacity necessary for the
implementation and enforcement of both positive law and policy measures in the specific policy area. The negotiation chapters were, therefore, a catalog of positive provisions, policy measures and institutional improvements that the CSs had to incorporate, implement and introduce into their national legal systems. In short, they were both a catalog of required reforms and a standard of scrutiny.

Each chapter was negotiated independently from other chapters. The Union and the CSs had special negotiating teams responsible for specific chapters. Moreover, they often had special working teams responsible for a particular part of one chapter. The negotiations within a specific chapter were closed after the CSs completely transposed the Community legislation identified in the chapter and established a system of institutions capable of implementing and enforcing the transposed legislation.

3.2.1.5. The Enlargement Negotiations

The phrase “negotiation” is somewhat misleading in the context of EU enlargement. The purpose of the accession negotiations was not to determine conditions under which the aspiring candidates could join the Union. These conditions were established by the EU before the start of negotiations. The primary function of the accession negotiations was to facilitate the efforts of each CS to accept and implement predetermined membership obligations and prepare itself to function in accordance with the reestablished rules of the EU club. Consequently, it has frequently been argued that the EU accession negotiations are to a great extent structured as a one-way process in which one side determines the rules of the game and the other “harmonizes”

389 See MAURER, Negotiations in Progress.
390 According to Art 49 of the TEU, the Member States of the EU (and not the EU itself) are the negotiating party in the negotiation process regarding the accession to the EU.
accordingly.\textsuperscript{392} The CSs were aware of the nature of the accession process.\textsuperscript{393} They freely accepted this lack of balance when they freely applied for EU membership.\textsuperscript{394}

Notwithstanding the fact that the accession conditions were determined before the process even started, the accession negotiations still had to define several issues that were of great importance for the CSs. The primary objective of the negotiations was to determine the manner and time-framework for the fulfillment of the accession conditions. As discussed above, the enlargement process was based on the premise of full transposition of the EU \textit{acquis}. This meant that negotiations could not be closed before the CSs completely satisfied the accession conditions.\textsuperscript{395} Accordingly, the CSs could only delay fulfilling particular \textit{acquis} requirements after the end of the “transitional” period, and even then only exceptionally. In principle, a transitional period was agreed upon only if a CS convincingly established that the instantaneous fulfillment of a particular condition threatened to cause significant harm to its interests.\textsuperscript{396}

The process of Eastern Enlargement had several phases and a number of different instruments. The first phase in the enlargement process was the conclusion of the so-called Europe Association Agreement (EAA).\textsuperscript{397} At this point, an aspiring state was still not granted the status of EU candidate. This is a pre-negotiation phase. The EAA is an international treaty with the


\textsuperscript{395} COMMISSION, Agenda 2000 - Volume I - Communication: For a Stronger and Wider Union p. 60.


\textsuperscript{397} MARESCAUV, \textit{Pre-accession}, p. 14.
purpose of preparing a particular state for EU candidacy. The EAAs are mostly concerned with economic issues and are primarily focused on trade liberalization and market competition. However, the Agreements also contain the obligation of gradual harmonization with the Community *acquis*.

The next phase in the enlargement process is candidacy status. In principle, candidacy is still a pre-negotiation period. Candidacy can be granted to states that satisfy the requirements of Art 49 TEU. To be granted candidacy status, an aspiring state is above all required to satisfy the Copenhagen political criteria. It also needs to demonstrate its potential to fully satisfy the other two Copenhagen criteria before accession. Candidacy status is granted by a unanimous decision of the Council of Ministers after the positive opinion from the European Commission.

The Council’s decision marks a new phase in the enlargement process, the *acquis screening process*. The purpose of the screening process is to prepare the CSs for the bilateral phase of the negotiations. During the screening process, the CSs are provided with an overview of the legislation and policy obligations for each specific chapter. They are also asked to present an overview of their national regulation in the same area. The primary aim of this exercise is to

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400 INGLIS, *EU Enlargement: Membership Conditions*, p. 76.


“screen out” differences between the national and Community legislation in a particular area.\textsuperscript{403}

In principle, screening is still a pre-negotiation phase.

The screening process is organized around specific chapters of the \textit{acquis}. In the 2004 Enlargement, 29 chapters of the \textit{acquis} were subject to screening. The process is organized by the European Commission. During the screening, the Commission is represented by a team of experts dealing with each particular chapter. In principle, these experts are also members of the EU negotiating team for the particular chapter. The CSs are represented by delegates who are most likely members of the national negotiating team for the particular chapter.

The screening process basically consists of two stages.\textsuperscript{404} The first stage is explanatory and multilateral. Its aim is to familiarize the CSs with the \textit{acquis} and increase their understanding of the Community’s policies in a particular area.\textsuperscript{405} In practical terms, this means that the Commission provides the CSs with a list of legal provisions that have to be transposed and explains their purpose and effects. The CSs are thus introduced to the entire body of legal rules for a particular chapter including the case law of the European courts. Community policies, programs, and funding possibilities are also explained to the candidates. Ideally, the screening process should provide the CSs with an adequate understanding of the rationale behind the positive provisions they are required to transpose, implement, and enforce in their national legal systems.

\textsuperscript{403} See the official website of the Croatian Ministry for Foreign Affairs and European Integration regarding the Croatian enlargement negotiations at \url{http://www.eu-pregovori.hr/default.asp?ru=440&sid=&akcija=&jezik=2}.

\textsuperscript{404} M\textsc{aurer}, \textit{Negotiations in Progress}, p. 120.

\textsuperscript{405} C\textsc{ommision}, Composite Paper: Report on progress towards accession by each of the candidate countries 1998 pp. 25-6.
The second stage of the screening process is bilateral and inquisitorial. The purpose of this stage is an in-depth analysis of the correspondence of the national legislation, institutions and procedures of each candidate with the _acquis_ requirements of a particular chapter. The objective is to identify those areas of national legislation and institutional mechanisms that candidates need to reform in order to satisfy membership requirements. Accordingly, the CSs are thoroughly questioned by the Commission in this stage. The inquisitorial character of the screening process facilitates development of a detailed negotiating agenda for a particular chapter. It also helps reveal a possible need for a transitional period.

The next phase in the enlargement process is the accession negotiations. The negotiations are formally conducted as a part of an Intergovernmental Conference (IGC) between Member States and each candidate state. These negotiations may be opened before the screening process. However, since screening is crucial for determining the institutional capacity of a CS to implement the _acquis_, negotiations usually start after the screening phase. The primary purpose of the negotiations is to ensure full acceptance of the _acquis_. The accession negotiations therefore define detailed conditions of accession as well as any transitional periods if such are necessary.

Officially, the negotiations are conducted at the ministerial level. In reality, however, most of the work is done at the deputy level. At the deputy level, a CS is represented by the national negotiating team. The head of the team is the chief negotiator appointed by the national

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406 See the Commission’s answer to the Written Question E-3159/01 (OJ 160 E, 04/07/2002 P. 0061 – 0061).
407 MAURER, _Negotiations in Progress_, p. 120.
government. He or she is usually supported by different groups of experts specialized in specific chapters.\textsuperscript{409}

Enlargement basically entails a change of the founding Treaty on European Union. In that respect, only the Member States, as the founding parties to the Treaty, can be the parties in the accession negotiations. However, although the European Union is formally not a party to the accession negotiations, in reality, most of the work is done by the European Commission at the request of the Member States.\textsuperscript{410}

The accession negotiations start with the acceptance of the European Union Common Position (EUCP) by the Member States for each particular chapter. The EUCP identifies those issues that are considered of key importance for the negotiations. A draft of the Common Position (DEUCP) is proposed to the Member States by the Commission.\textsuperscript{411} The EUCP is adopted unanimously by the Member States acting through the Council of Ministers.

The EUCP examines the existing legislative compliance with the \textit{acquis} for each particular CS and its capacity to achieve further harmonization. It pays special attention to issues which the Member States find particularly problematic in relation to that Candidate. Accordingly, it identifies reforms of the national administrative and judicial systems that the Union considers necessary for the effective implementation of the \textit{acquis} and establishes a time framework for those reforms. Since it identifies issues that need to be resolved before the moment of accession, the EUCP is fundamental to the accession negotiations. The negotiations within a particular chapter are provisionally closed only after the Member States agree that all issues identified in

\textsuperscript{409} MAURER, \textit{Negotiations in Progress}, p. 1177.

\textsuperscript{410} Id. at, p. 118.

the EUCP are sufficiently attended to by the CS. At that moment, the EUCP is formally adopted at an accession conference organized at the ministerial level.

The formal acceptance of the EUCP does not necessarily mean that the negotiations within a particular chapter are completely over. In accordance with the EU position that “nothing is closed before everything is closed”, the whole process of accession negotiations is closed only after all acquis chapters have been provisionally closed. Accordingly, any chapter that has been provisionally closed can be reopened before the end of the complete negotiation process.

There are several instruments that play an important role in the accession negotiations phase:

- Accession Partnership (AP)
- Monitoring Instruments
  - Enlargement Strategy Paper
  - Annual Progress Report (Progress Report)
  - Monitoring Tables
- National Plan for the Adoption of the Acquis (NPAA)

Their purpose is to facilitate the full implementation of the EU acquis into the national legal system and thus ensure that a candidate state is ready to effectively enforce the acquis at the moment of accession. In other words, they are supposed to guarantee that the Union will enlarge without any larger disturbance in the functioning of its political and legal system.

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412 Maurer, Negotiations in Progress, p. 118.
The Accession Partnership has been identified as the key instrument of the pre-accession strategy.\textsuperscript{414} Its purpose is to guide and drive forward the work of a CS in the negotiation process. In accordance with this purpose, the AP defines the principles, priorities, intermediate objectives and conditions of the pre-accession actions that will ensure full readiness of a CS for membership.\textsuperscript{415} The AP also identifies EU policies and financial instruments aiming to assist the efforts of the CS to reach this goal. Due to the Union’s financial aid and other similar benefits, the AP has been an effective instrument.\textsuperscript{416}

The AP is accepted by the Council of Ministers and revised on an annual basis. Hence, it is formally binding only for the Member States. Nevertheless, the main intention of the AP is to determine specific objectives that have to be achieved by a Candidate.\textsuperscript{417} The AP is basically a more specific elaboration of the EUCP requirements. It usually requires specific legislative actions, improvements of specific implementation procedures, human resources reforms, or rearrangements of the institutional structure in a specific area of the\textit{acquis}.\textsuperscript{418} These requirements can be established as\textit{priority} goals that have to be implemented within one year, or as\textit{midterm} goals that have to be implemented within a maximum period of five years. EU assistance to a CS is usually programmed to facilitate the implementation of the AP objectives.

\textsuperscript{414} EUROPEAN COMMISSION, Report from the Commission to the Council on the implementation of Council recommendation 96/694/EC of 2nd December 1996 on the balanced participation of women and men in the decision-making process COM(2000) 120.
\textsuperscript{415} See COMMISSION, Composite Paper: Report on progress towards accession by each of the candidate countries 1999, p. 7.
\textsuperscript{418} See e.g. EUROPEAN COMMISSION, \textit{Making a success of enlargement - Strategy Paper and Report of the European Commission on the progress towards accession by each of the candidate countries}, COM/2001/0700 final, p. 17.
The *Annual Progress Report* is the most comprehensive monitoring instrument.\(^{419}\) It evaluates the progress of the accession negotiations. The reports are issued by the Commission for each candidate individually on an annual basis. The report examines whether and to what degree a candidate state has implemented reforms defined by the AP.\(^{420}\)

In practical terms, the report is an extensive chapter-by-chapter analysis of the progress made by a candidate country in meeting the accession criteria. Particular attention is paid to national legislative reforms in each of the 29 negotiating chapters. The report also analyses progress in a candidate’s capacity to adopt the *acquis* and the steps taken to strengthen administrative institutions.\(^{421}\)

The *monitoring tables* are a practical tool developed by the Commission to facilitate the negotiation process. They are prepared for each candidate state. They are the most frequent way of communication between the Commission and the national negotiating teams.\(^{422}\) Tables monitor the implementation of the commitments assumed by the CSs during various phases of the negotiations. Unlike the progress reports, the monitoring tables are not public documents. As such, they are accessible only to the negotiating parties. This makes it somewhat difficult to get a clear and complete overview about their structure and functioning. This is unfortunate since the monitoring tables are the most frequently used instrument in the actual negotiations.

Although there are several types of monitoring tables, they all have a similar structure. All tables consist of several subject columns. The first column concerns a particular commitment or more

\(^{419}\) *Maresceau, Pre-accession*, p. 32.
\(^{420}\) Leo Maurer *Maurer, Negotiations in Progress*, p. 122
\(^{421}\) See *COMMISSION, Composite Paper: Report on progress towards accession by each of the candidate countries 1999*, p. 33.
\(^{422}\) This communication is often done through the Technical Assistance and Information Exchange system of the Directorate-General Enlargement of the European Commission (TAIEX). See TAIEX website at [http://taiex.ec.europa.eu/](http://taiex.ec.europa.eu/).
precisely, the task or requirement assumed by a candidate state during the negotiations. In the next column, the table usually provides information regarding the completion of a particular requirement. This usually involves information about a particular law that has transposed a particular part of the *acquis*. Further columns usually concern information about the institution that is responsible for the completion of the task and its capacity to ensure effective implementation. Tables also require information about a completion deadline as well as an assessment of the degree to which a candidate has harmonized with the *acquis* concerning that particular obligation.

The most frequently used monitoring table is the so-called *concordance table*. Concordance tables are used for monitoring the degree of legislative harmonization with a particular Community directive.\(^{423}\)

The *Enlargement Strategy Paper* (ESP) is a general overview of the negotiation process issued annually by the Commission. The document has two descriptive parts. It describes the Commission’s view of the state of play in the enlargement process. It also sets out the pre-accession strategy. The ESP thus contains a synthesis of the analysis done by the Commission for each candidate state in the regular reports.\(^{424}\) The document also contains an analysis of common problems affecting all or several candidate countries. The ESP also provides a series of recommendations regarding the future course of the enlargement process.\(^{425}\) It sets out proposals for opening negotiations in particular chapters, the manner in which negotiations should be

\(^{423}\) For an example of a concordance table, see EUROPEAN COMMISSION, *Guide to the Approximation of European Union Environmental Legislation*, SEC (97) 1608, Annex 3.


conducted, and proposals concerning the time period during which the EU will be ready for the first accession(s). In that sense, the ESP is a type of enlargement road map.

The National Program for Adaptation of the Acquis (NPAA) provides a direct answer by a candidate state to the Accession Partnership and Progress Report. In the NPAA, a candidate state specifies which of the AP obligations have been completed. In that sense, the NPAA is a national annual report on the degree of harmonization achieved. The NPAA is at the same time a type of national roadmap for harmonization, since it also provides a national plan and timetable for achieving the remaining accession requirements.

It is not surprising that the NPAA often follows the structure of the monitoring instruments. The NPAA is thus divided up according to the negotiation chapters and follows the structure of the monitoring tables. It therefore provides chapter-by-chapter information on legislative reforms. It also provides information about structural and administrative reforms of the public administration or judiciary. In addition, it provides information about human and budgetary resources.

The phase of accession negotiations is technically over once the Council has accepted the final EUCP for each chapter. However, this does not mean that the monitoring process necessarily ends at this point. Those chapters that have been provisionally closed on the basis of the candidate’s commitment to complete particular obligations before the accession date will

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continue to be monitored by the Commission. The accession negotiation process formally ends with the conclusion of the accession treaty.

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Chapter IV - Negotiating Sex Equality

4.1. The Position of Sex Equality in the Negotiations

It is fair to say that equality between men and women has been one of the most prominent goals of the European Union. The importance of the principle of sex equality for the Union’s social policy is similar to the importance of the four economic freedoms for the Union’s market integration policy. Moreover, the principle of sex equality has been valuable in helping to provide legitimacy for the EU legal order. In that sense, sex equality has been an important part of the Union’s acquis. In accordance with this, it could be expected that the EU would invest considerable efforts to ensure that the CSs created an effective system of sex equality guarantees compatible with the requirements of the Community sex equality acquis. The Commission’s negotiating position that “there can be no membership without the guarantee of equal rights for women and men and the machinery to enforce these rights” certainly supported this view. Unfortunately, in reality, there was a significant gap between political (even ideological) statements and actual results.

Protection of equality between men and women played a multi-faceted role in the 2004 Eastern Enlargement. The principle of equality between men and women was simultaneously a part of

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two Copenhagen criteria: the political criterion, and the criterion of full acceptance of the
acquis.434

Within the context of the Copenhagen political criterion, the CSs were required to demonstrate
their capacity to combat grave violations of human rights that reflected inequality of women such
as the trafficking of women, or violence against women.435 The founding Treaties have not
conferred on the Union the competence to regulate these human rights violations. Consequently,
the CSs were not required to transpose any of Community legislation. However, they had to
show a clear political commitment to the goal of eradicating these evils and they were expected
to participate in common actions taken at the EU level.436 It was assumed that a state that did not
show such a commitment could not be granted candidacy status.

In accordance with its prominent position in the Community “hard” acquis, the principle of sex
equality received the highest attention in the context of the third Copenhagen criterion.437 Sex
equality was thus an important part of Chapter 13 (Social Policy and Employment) of the
accession negotiations. The Community acquis in that chapter included the minimum standards
in fields such as labor law, equal treatment of women and men in employment and social
security, and health and safety at work. Some of the Chapter 13 areas of concern, such as health
and safety at work, labor law and equality of treatment of women and men included the “hard”
acquis that had to be fully transposed and implemented into the national legal systems of the

434 ROSSITSA RANGELOVA, Gender Labor Relations and EU Enlargement, in European Union: challenges and
435 See DAGMAR LORENZ-MEYER, A Plea for Complexity in Addressing Dilemmas in EU Gender Equality Policies
436 See, for example, COMMISSION, Enlargement Strategy Paper 2000: Report on progress towards accession by each
of the candidate countries , p. 16.
437 Dagmar-Meyer calls this “the Commission’s tendency to compartmentalise ‘women’s concerns’ under issues of
employment and social policy as the only area where binding legislation exists.” LORENZ-MEYER, A Plea for
Complexity in Addressing Dilemmas in EU Gender Equality Policies in EU Enlargement, p. 10.
CSs. Other such areas required harmonization of national policies. The policy harmonization was a prerequisite for participation in the EU social structural funds and financial instruments.

4.2. **Sex Equality Acquis**

The sex equality *acquis* included the Community’s primary and secondary legislation, the substantial case-law of the European Court of Justice, and Community policy measures (soft-law).

Equality between men and women occupies a significant place in the Community’s primary legislation. Art 2 of the Treaty on the European Union (TEU) identifies equality between men and women as one of the Union’s fundamental values. Art 3(2) TEU requires the Union to combat discrimination and promote equality between men and women. Art 8 (formerly Art 3(2) of the Treaty on the European Community) of the Treaty on the Functioning of the European Union (TFEU) explicitly requires the Union to eliminate inequalities between men and women and promote their equality in all activities within its competence. Consequently, the policy of gender mainstreaming has become an obligation for Community institutions and for the Member States when they are acting as Community agents. Building on Articles 2 and 3, Art 13 TEC empowered the Community to take appropriate action to combat discrimination based on sex in any policy that is within the power of the Community.

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The key TEC provision is Art 157 TFEU (formerly Art 141 TEC). Art 157 established the principle of equal pay for men and women as one of the fundamental principles of the Community’s legal order.\textsuperscript{442} Furthermore, it obliged the Council to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. Moreover, Art 157 explicitly allows the Member States to adopt measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers with a view of ensuring full equality in practice between men and women in working life.

However, the sex equality \textit{acquis} mostly consists of secondary law. At the moment, the secondary sex equality law consists of six Directives. In the Eastern Enlargement negotiations, the sex equality \textit{acquis} included nine Directives that had to be transposed into the national legal systems of the candidate countries.\textsuperscript{443}


\begin{itemize}
  \item \textsuperscript{442} Case 43-75 Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena, [1976] ECR 455.
  \item \textsuperscript{443} See OPEN SOCIETY INSTITUTE, Monitoring the EU Accession Process: Equal Opportunities for Women and Men .
  \item \textsuperscript{444} Official Journal L 269 , 05/10/2002 P. 0015 – 0020.
  \item \textsuperscript{445} Official Journal L 039 14.02.76 p.40, Derogation in 194N, Incorporated by OJ L 001 03.01.94 p. 484.
\end{itemize}
- Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)\textsuperscript{450}
- Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time\textsuperscript{451}
- Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC\textsuperscript{452}

\textsuperscript{446} Official Journal L 045 19.02.75 p.19. Incorporated by OJ L 001 03.01.94 p. 484.
\textsuperscript{447} Official Journal L 006 10.01.79 p.24. Incorporated by OJ L 001 03.01.94 p. 484.
\textsuperscript{448} Official Journal L 225 12.08.86 p.40. Incorporated by OJ L 001 03.01.94 p.484. Amended by OJ L 046 17.02.97 p. 20.
\textsuperscript{449} Official Journal L 359 19.12.86 p.56. Incorporated by OJ L 001 03.01.94 p. 484.
\textsuperscript{450} Official Journal L 348 28.11.92 p. 1.
\textsuperscript{451} Official Journal L 307 , 13/12/1993 p. 0018 - 0024 , Amended by OJ L 195 01.08.00 p. 41.
• Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of
discrimination based on sex.\footnote{Official Journal L 014 20.01.98, p.6, Amended by OJ L 205 22.07.98 p. 66.}

on part-time work concluded by UNICE, CEEP and the ETUC - Annex : Framework
agreement on part-time work.\footnote{Official Journal L 014, 20/01/1998, p. 9-14.}

The Directives cover three key policy areas that configure the Community equal opportunity
policy: equal treatment in (self)employment, equal pay, equal treatment in relation to social
security and reconciliation of family and work. The ECJ case-law has always played a
particularly important part in the Community acquis. In the words of the Commission: “A
number of milestone cases have tested the legislation in practice and led the Court to consider its
boundaries – adding coherence and precision to the directives.”\footnote{EUROPEAN COMMISSION, Commission’s Manuscript: Equality between women and men in the European Union ; Equality between women and men in the European Union, 2005.} The Court has therefore been
a guarantee of the constant evolution of the Community sex equality acquis. Many of the
Community sex equality provisions are merely a compilation of the Court’s practice. Others have
been profoundly “elaborated” by the Court. In that sense, it would certainly not be far from the
truth to claim that the ECJ’s case-law has been the most significant part of the Community sex
equality acquis.

In addition to legislation, the Community has also developed other significant policy instruments
(soft-law) for the promotion of equality. Particular importance has been given to the Community
policy of gender mainstreaming. The policy of gender mainstreaming is a recognition that
policies of inclusion of women into existing structures, which is currently the dominant
approach, do not suffice.\textsuperscript{456} Community institutions and the Member States are expected to take systematically into account the differences between the conditions, situations and needs of women and men in all Community policies and actions.\textsuperscript{457} Gender Mainstreaming requires the reorganization, improvement, development and evaluation of policy processes in order to incorporate a gender equality perspective in all policies at all levels and at all stages, by the actors normally involved in policy-making.\textsuperscript{458} Thus, all institutions participating in Community policies are encouraged to develop specific instruments such as gender statistics, indicators and benchmarks.\textsuperscript{459} These instruments are considered as a tool for gender mainstreaming and are valuable in monitoring the progress in reaching greater gender balance in different policy fields. The key Community instrument in this policy is the Community framework strategy on gender equality.\textsuperscript{460}

The promotion of equal participation of women in decision making has been another important Community sex equality policy.\textsuperscript{461} The Member States are encouraged to adopt a comprehensive, integrated strategy designed to promote balanced participation of women and men in the decision-making process and to develop appropriate legislative, regulatory or incentive measures.\textsuperscript{462} The Community has considered balanced participation in the decision-making

\textsuperscript{456} “The promotion of equality must not be confused with the simple objective of balancing the statistics: it is a question of promoting long-lasting changes in parental roles, family structures, institutional practices, the organization of work and time.” EUROPEAN COMMISSION, Communication from the Commission: Incorporating equal opportunities for women and men into all Community policies and activities, COM (96) 67 final.

\textsuperscript{457} Id.

\textsuperscript{458} BEVERIDGE, Implementing Gender Equality and Mainstreaming in an Enlarged European Union: Prospects and Challenges .

\textsuperscript{459} LORENZ-MEYER, A Plea for Complexity in Addressing Dilemmas in EU Gender Equality Policies in EU Enlargement .


\textsuperscript{461} LORENZ-MEYER, A Plea for Complexity in Addressing Dilemmas in EU Gender Equality Policies in EU Enlargement, p. 5.

process to be an essential requirement of democracy and a positive step for society since such
decisions take into account the needs and interests of the population as a whole.\(^{463}\) In this sense,
balanced participation has also been one of the Copenhagen political criteria.\(^{464}\)

The Community has also taken some measures concerning balance between work and family
life. Such measures are considered to be of special importance not only for the quality of
personal life but even more for equality of opportunity of women in the labor market.\(^{465}\) The
Member States have agreed on the targets for the provision of childcare facilities under the
broader agenda for economic growth and jobs.\(^{466}\) They are also encouraged to facilitate men’s
possibilities to take up leave, by developing financial and other incentives.

These policies have primarily relied on soft-law measures such as Council resolutions and
recommendations; Commission strategies, papers and reports, or the Member States’
proclamations. Community funding has also played a crucial role in the promotion of these soft-
law policies. The Community has developed several funds that financially support measures
implementing sex equality policies. The Community has developed several significant financing
programs in order to better ensure the use of the Structural Funds for the promotion of gender
equality. Gender equality measures have thus been funded through instruments such as the
Gender Equality Programme, the EQUAL initiative, Interreg, Urban, Leader and Daphne
programmes.

\(^{463}\) EUROPEAN COMMISSION, Report from the Commission to the Council on the implementation of Council
recommendation 96/694/EC of 2nd December 1996 on the balanced participation of women and men in the
decision-making process.

\(^{464}\) See Recommendations from the Agenda Equality Conference for the Applicant Central and Eastern European
Countries, 8-10 October 1998, Bled, Slovenia.

\(^{465}\) Resolution of the Council and of the Ministers for Employment and Social Policy, meeting within the Council of

\(^{466}\) ALSO EUROPEAN COUNCIL, Recommendation 92/241/EEC O. J. L 123 (1992) and the COMMISSION, Report on the
implementation of the Council recommendation of 31 March 1992 on childcare C (98) 237 final.
4.3. **Structure of the Sex Equality Acquis Negotiations**

The structure of the sex equality *acquis* negotiations was based on two important principles:

- transposition of the Community *acquis* until accession date
- enforcement of the Community *acquis* upon accession.

Transposition of the sex equality *acquis* was formally one of the key prerequisites for the successful fulfillment of the accession requirements in the 2004 Enlargement. Without the full transposition of the sex equality *acquis* there would be no EU membership. Consequently, the primary focus of the negotiation process in the area of sex equality was on EU legislation. This is clearly visible from numerous enlargement documents that frequently described the *acquis* in the field of equal opportunities for men and women in terms of this legislation. Moreover, the focus was on secondary legislation. Case-law was conspicuously absent from accession documents.

The principle that the CSs must be ready fully to enforce the *acquis* immediately upon accession reflected the Union’s position that EU membership required more than the formal transposition of the *acquis*. The importance of effective implementation of the *acquis* was highlighted from the beginning of the enlargement process. *Agenda 2000* stressed that transposition is a necessary

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470 Id. EUROPEAN COMMISSION, Report from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Equal opportunities for women and men in the European Union 1999.
but not a sufficient condition to ensure the correct application of the acquis.\textsuperscript{471} Securing effective application of Community legislation through appropriate administrative and judicial structures was highlighted as “a central feature of the accession negotiations.”\textsuperscript{472} This position is in accordance with the fundamental principles of the uniform application of EU law across the Union, and effective protection of individual rights granted to individuals by the Community legal order.

However, the principle of full enforcement of the sex equality acquis had one important weakness. The Union did not insist on enforcement before the accession date. It only required that the CSs must be capable of enforcing sex equality law upon the accession. Actual enforcement was therefore not a condition for closing Chapter 13 negotiations.\textsuperscript{473}

The requirement of “full enforcement” therefore had a somewhat different content from the one suggested by its name. The 2004 Enlargement documents clearly show that the Union did not monitor the actual enforcement of transposed sex equality guarantees in order to evaluate consistency with the ECJ case-law. Instead, the Commission understood the requirement of full enforcement in terms of capacity building for national implementation and enforcement institutions.\textsuperscript{474}

The principal idea was to use the period of accession negotiations to prepare national institutions for the sensitive task of enforcing the sex equality acquis. The goal of institutional capacity

\textsuperscript{471} \textsc{European Commission}, Agenda 2000 - Volume I - Communication: For a Stronger and Wider Union, p. 62.
\textsuperscript{472} \textsc{European Commission}, Composite Paper: Report on progress towards accession by each of the candidate countries 1998, p. 16.
\textsuperscript{474} See, for example, \textsc{European Commission}, Enlargement Strategy Paper 2000: Report on progress towards accession by each of the candidate countries, pp. 21-2.
building was particularly concerned with several issues. First, enforcement institutions had to be properly equipped. They had to have sufficient financial, technical and human resources. Second, the CSs had to ensure effective procedural rules for the enforcement of sex equality guarantees. Most importantly, enforcement institutions had to be equipped with officials who had proper knowledge and training concerning the enforcement of the Community sex equality acquis.

The policy of institutional capacity building was certainly a sensible policy. However, it concealed the key problem of the accession harmonization in the area of sex equality. The fact that national institutions were well equipped both in terms of personnel and material resources did not necessarily mean that they were actually capable of enforcing the transposed guarantees. This was even more the case since, as we shall see, the Union could not guarantee the substantive capacity of these institutions. Consequently, since it abandoned any scrutiny of the actual application of the sex equality acquis during the negotiations, the Union was left without any credible indications of the CSs’ readiness for the sensitive task of enforcement. The structure of the negotiation process in the area of sex equality consequently left the negotiators with strong doubts concerning the ability of the CEE Member States to enforce the Community sex equality guarantees.

It was clear from the start of the negotiation process that the policy of institutional capacity building had two different dimensions: formal and substantive. Formal capacity building was

475 EUROPEAN COMMISSION, Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Annual Report on Equal Opportunities for Women and Men in the European Union 2002, p. 4; See also SMITH, The Evolution and Application of EU Membership Conditionality, p. 117.
477 See, for example, EUROPEAN COMMISSION, Making a success of enlargement - Strategy Paper and Report of the European Commission on the progress towards accession by each of the candidate countries, p. 24.
primarily concerned with *quantity*. Accordingly, it was measured in *numbers* of employees, financial and technical resources. Formal capacity was also concerned with the procedural rules that would ensure the effectiveness of enforcement. Substantive capacity building was primarily concerned with the ability of institutions to enforce the transposed guarantees in accordance with their normative goals and underlying values. As such, it could not be measured in numbers but only in terms of quality of the actual enforcement decisions.

The Union has identified the substantive dimension of capacity building as being of vital importance for the ability of the CSs to start enforcement of the transposed provisions immediately upon accession. However, this acknowledgment was not matched by its actions during the 2004 accession negotiations.

This acknowledgment had two important implications. First, it emphasized the importance of education and training for the officials of enforcement institutions in the CSs. Second, it raised the question of what should be the appropriate method of evaluation of the substantive capacity acquired by the relevant institutions during the process of negotiations. These concerns were of particular importance in the context of the CSs’ *judiciary* since judicial enforcement has always been a key mechanism of protection of sex equality rights in the Community legal order. The failure of the Eastern Enlargement negotiations to ensure effective implementation of the sex

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479 Commission’s Press Release IP/01/1566: “One key to meeting the objectives set at Gothenburg is that the candidate countries ensure the proper implementation and enforcement of the ‘acquis communautaire’ i.e. the whole set of existing EU rules, standards and legislation. This requires in particular further efforts to strengthen administrative structures and to reform judicial systems in these countries.” See also EUROPEAN COMMISSION, Agenda 2000 - Volume I - Communication: For a Stronger and Wider Union, p. 62.
equality *acquis* in new (post-socialist) Member States was directly related to the way in which the negotiating parties dealt with these two concerns.

In principle, although the Union recognized and stressed the vital importance of the actual capacity of the CSs' institutions to enforce the transposed provisions, its strong statements and declarations lacked concrete actions to support this.

The main characteristic of the Eastern Enlargement negotiation process was a classic disparity between *form* and *quality*. In order to conceal its lack of institutional capacity and the absence of political will to ensure the substantive competence of the relevant institutions in the CEE post-socialist legal systems to enforce the transposed provisions, the European Union overstressed improvement in the formal capacity of these institutions. Consequently, the basic structure of the Eastern Enlargement negotiation process in the area of sex equality rested on three features:

- it overemphasized the focus on the legal texts as the most important requirement for the effective protection of sex equality rights\(^{481}\)
- it insisted on the clarity and precision of the legal rules (in order to limit the risks of “improper” application inherent in the discretion of the enforcement institutions rather then ensure their substantive capacity)
- it focused on formal institutional capacity, such as the number of employees, equipment and financial resources

As a result, the transposition of the Community positive law into national legislation of the candidate states received the most attention in the sex equality negotiation process. Furthermore,

\(^{481}\) OPEN SOCIETY INSTITUTE, Monitoring the EU Accession Process: Equal Opportunities for Women and Men, p. 17.
the accession requirement of full acceptance of the *acquis* was set rather low. Three reasons help us understand this approach:

- absence of a developed strategy of enforcement capacity-building
- lack of attention to administrative and judicial enforcement capacity
- poor ability to monitor capacity-building reforms

### 4.4. Lack of Strategy

The Union’s strongly declared commitment to enforcement capacity stands in marked contrast with the absence of a convincing strategy for the capacity-building that would be necessary for the effective enforcement of Community sex equality guarantees.

The Union clearly identified poor enforcement of equality rights as a crucial threat to the effectiveness of the sex equality *acquis*. Moreover, it declared that enforcement capacity building was a key issue in its pre-accession strategy in the field of sex equality. The development of enforcement capacity was therefore established as one of the most important accession requirements in the field of sex equality. At the same time, however, the analysis of the enlargement documents reveals that the Union clearly lacked a coherent strategy regarding the capacity-building issue.

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For example, the Commission’s *Regular Reports* paid only marginal attention to the implementation of sex equality guarantees in the CSs.\(^{484}\) The reports usually simply listed the accession requirements in this area and even this was in rather general terms and without any qualitative evaluation of the related actions taken by a specific candidate state. The reports were almost exclusively focused on the transposition of positive law. The issue of institutional enforcement capacity appeared in the reports only after 2001.\(^{485}\) Even this was discussed only in very general terms. The reports basically expressed the need for more proactive and concrete measures in relation to the improvement of institutional capacity.\(^{486}\) They merely recorded basic developments in relation to the issue of institutional capacity without any elaborated analysis of the problems.\(^{487}\) They never suggested any concrete measures that might address these problems.

As one scholar argued, “a look at the Annual Progress Reports reveals that no systematic analysis of legal and de facto progress of candidate countries in the field of equal opportunities and treatment of women and men has taken place. Statements on the situation of women and on gender equality are scarce, remain very general, and do not allow for year-to-year or country-to-country comparisons of progress. Criteria and indicators for assessing progress are not explained. Moreover, information in the Annual Reports on gender inequality in candidate countries is frequently incomplete or obsolete.”\(^{488}\)

Notwithstanding the Commission’s clear discontent with their progress in this area, none of the CSs suffered any consequences. Such an approach to the implementation of the sex equality acquis during the negotiation period gave rise to the criticism that the Commission accepted as sufficient whatever action was taken by the CSs within the Chapter 13.\textsuperscript{489}

Although their purpose was to set short-term and mid-term goals for the CSs, the Accession Partnerships showed more or less the same level of generalization as the Regular Reports. The priorities set by the APs in the area of sex equality were too broad and simplistic. Just as with the progress reports, the APs were primarily concerned with the alignment of national statutory law with the Community’s sex equality Directives. In terms of institutional enforcement capacity, they hardly reflected any thoughtful or coherent policy of capacity building. The capacity building goals set in the APs were oblique and unsupported by any elaborated institutional preferences.\textsuperscript{490} Identified priorities such as “increased enforcement efforts”, strengthening of the “institutional structure, in particular of the labor inspectorates”, and so on, are better described as simplistic observations rather than any kind of serious requirements.\textsuperscript{491}

The answer of the Candidate States to the priorities set in the APs and Progress Reports was equally disappointing. Two national instruments provide some insight into the way in which the CSs treated the issue of sex equality. As we saw in the previous chapter, the main national instrument was a National Program for the Adaptation of the Acquis (NPAA) issued annually by every candidate state.\textsuperscript{492} The CSs used the NPAA to present the outcomes of the reforms taken

\textsuperscript{489} See ANNE SCHUTTPELZ, Policy Transfer and Pre-accession Europeanization of the Czech Employment Policy (Discussion Paper SP III 2004-201) (Wissenschaftszentrum Berlin für Sozialforschung 2004).
\textsuperscript{490} GRABBE, How Does Europeanisation affect CEE Governance? Conditionality, Diffusion and Diversity, p. 1021.
\textsuperscript{491} See EUROPEAN COUNCIL, Council Decision of 28 January 2002 on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with the Czech Republic, 2002/85/EC.
up in the light of the commitments they had assumed during the negotiations, or to outline their plan for completing commitments they had not succeeded in realizing.

In 2002, the Commission and CSs jointly developed another important monitoring instrument – an Action Plan to Strengthen Administrative and Judicial Capacity (the Action Plan). These Action Plans were supposed to establish a comprehensive, well-defined and enhanced institution building strategy to address identified weaknesses relating to a candidate’s administrative and judicial capacity. The Commission explained this negotiating instrument in the following manner:

“Jointly with each country, the Commission has made a detailed analysis of each country’s approach to implement the Accession Partnership priorities concerned, of its intentions to reinforce efforts for institution building, and of the concrete measures that remain to be taken to achieve adequate administrative capacity in each area. Any remaining gaps in terms of assistance and monitoring have also been identified. This process has resulted in comprehensive Action Plans by country that bring together for each priority:

493 EUROPEAN COMMISSION, Press Release IP/01/1566: “One key to meeting the objectives set at Gothenburg is that the candidate countries ensure the proper implementation and enforcement of the 'acquis communautaire' i.e. the whole set of existing EU rules, standards and legislation. This requires in particular further efforts to strengthen administrative structures and to reform judicial systems in these countries. To this end, the Commission proposes an “action plan” aiming to help candidate countries to further build their administrative capacity. This action plan will use established mechanisms (expert assistance, networking, training, investment plans) and mobilise a special financial EU assistance from the PHARE programme of up to €250 million in 2002. In addition to the €750 million already foreseen, the total effort of the EU to strengthen the administrative and judicial capacity of the candidate countries would thus amount to €1 billion in 2002. If needed, this effort could be repeated in 2003, for instance to assist for additional training. The Commission will also further monitor the state of preparation of each candidate country. The next ‘Regular Reports’ in 2002 will then examine whether the candidate countries will have, by accession, adequate capacity to implement and enforce the acquis properly.” at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/01/1566&format=HTML&aged=0&language=EN&guiLanguage=en.

494 The Commission argued in its 2002 Report on Czech Republic: “The purpose of the Action Plan is to identify jointly the next steps required for the Czech Republic to achieve an adequate level of administrative and judicial capacity by the time of accession, and ensure that all necessary measures in this regard are taken, providing the Czech Republic with targeted assistance in areas that are essential for the functioning of an enlarged Union.” EUROPEAN COMMISSION, 2002 Regular Report on Czech Republic’s Progress towards Accession, SEC(2002) 1402.
the relevant commitments made in the negotiations;

- implementing measures envisaged by each country as discussed with the Commission;

- the Community assistance that is already underway or planned to support the country in its efforts, and any supplementary assistance that will be provided for this purpose under the €250 mn supplementary institution building facility under the Phare Program

- the additional monitoring activities, including peer reviews, that are required to assess each country’s preparation, over and above the Regular Reports and the usual monitoring of the negotiations.”  

Unsurprisingly, the NPAAs differed from one candidate state to another in terms of their priorities. However, they all shared one feature. The priorities set by the NPAAs in the area of sex equality matched the level of simplification and obscurity found in the Commission’s Progress Reports and APs. Accordingly, the NPAAs were primarily focused on the transposition of positive Community law. They often merely list specific transposition requirements and set transposition deadlines. For example, the Polish NPAA merely lists the changes in the national legislation that were relevant for the implementation of the sex equality acquis explicitly stating that no institutional changes were required.


497 See Polish NPCC 2000 - Chapter 13, document approved by the Council of Ministers of the Republic of Poland on April 26, 2000, pp. 28-38.
If the NPAAs addressed the issue of institutional enforcement capacity at all, they addressed it in a very broad and superficial manner. Most of the time the NPAAs simply recognized a need for better training of national officials. At most, the approach adopted was to set a goal of establishing a national body for the promotion of sex equality, or some mechanism for monitoring the implementation of the *acquis*. They did not elaborate any substantive details regarding the competence, operational methods or evaluation of such institutions and mechanisms.

The Slovenian NPAA is a typical illustration of this obscure approach to enforcement capacity. In relation to the enforcement of transposed sex equality guarantees, the document simply stated that the Slovenian Government had concluded that “the appointment of a Human Rights Deputy Ombudsman authorised to cover equal opportunities” was the most appropriate solution. It also stated that the Equal Opportunities Act “envisaged the system for monitoring its implementation” and “provided for the extension of the Equal Opportunities Office competence so as to deal with discrimination cases and deliver opinions”. Similarly, the Slovak NPAA envisaged the creation of an ombudsman for equal treatment, and adopted as one of the tasks to be completed to “monitor practical application of equal opportunities and activities to promote the application of these principles”.

These documents never explained why the identified administrative solutions were the most appropriate ones. Accordingly, they failed to explain how specifically they would ensure the


enforcement of the sex equality acquis or what steps the Government would take to insure the enforcement capacity of these institutions.

In comparison with other negotiating instruments, the Action Plans were the most comprehensive documents when it came to the issue of the capacity of national institutions to enforce the sex equality acquis. The Action Plans contained specific references primarily focused on national institutions responsible for the implementation and enforcement of the acquis. In relation to the enforcement of the sex equality acquis, the CSs used this instrument to establish various capacity building measures. These measures most often concerned: the establishment or reinforcement of national institutions responsible for the protection of equality rights; budget and staff increases; the training of officials, experts and social partners; the upgrading of data-collection and IT systems; and the establishment of information centers and other awareness raising activities. However, a closer analysis of the Action Plans reveals that the CSs did not move much beyond the generality and obscurity found in other negotiating instruments.

The Action Plans used a specific tabular form. The first column of this table referred to requirements related to strengthening administrative and judicial capacity for a particular candidate state. The second column referred to the commitments assumed by the CS during the

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500 Implementing measures envisaged in Action Plans by each country may have included “depending on the nature of the priority in question, and the specific weaknesses that have been identified for each country: adopting missing legislation; designating, establishing, or reinforcing relevant management structures and authorities; creating or reinforcing command and co-ordination systems, as well as evaluation, monitoring and arbitration mechanisms; developing and implementing strategic and management plans; training officials, judges, prosecutors, and the business community; setting up public awareness campaigns; and developing or upgrading relevant IT systems and databases and their inter-connection with EC systems.” EUROPEAN COMMISSION, Communication from the Commission on the Action Plans for administrative and judicial capacity, and the monitoring of commitments made by the negotiating countries in the accession negotiations, COM (2002) 256.

501 Action Plan of the Czech Republic for 2003 – Chapter 13, materials acquired during the research visit to the Czech Ministry of Labor and Social Affairs, May 2005, Prague.
negotiation process and the concrete measures that the candidate had started implementing in order to fulfill the AP requirements. The third column referred to the assistance the Union provided to candidate states to help their capacity building efforts. The fourth column referred to the monitoring efforts regarding the implementation of the specified measures. Such a structure provided a clear overview of capacity building developments in a particular *acquis* chapter. An overview of the capacity building measures quickly reveals that the issue of equality between men and women had a rather obscure and oblique position in the part of the table concerning the *acquis* chapter on social policy and employment.

The following Slovak Action Plan is an illustration of this approach.
Table 2.

<table>
<thead>
<tr>
<th>AP Priorities related to strengthening administrative / judicial capacity</th>
<th>Implementation by X-land: commitments taken in negotiations / measures for implementation</th>
<th>Community Assistance: ongoing / planned in programming for 2002</th>
<th>Monitoring actions: ongoing / required</th>
</tr>
</thead>
<tbody>
<tr>
<td>3.13 Social policy and employment</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Priority 1:</strong> Ensure proper implementation of the social acquis, in particular in the field of health and safety at work, as well as equal treatment for women and men. Strengthen the related administrative and enforcement structures, including the labour inspectorates. Adopt legislation against discrimination and develop a timetable for its implementation.</td>
<td><strong>Commitments taken in negotiations:</strong> (CONF-SK 66/00) – establishment of the monitoring centre on racism and xenophobia during the pre-accession period (CONF-SK 20/01) – personnel enforcement at the labour inspectorates till the end of 2003 in further approximately 162 inspectors within limits of the state budget (since 1 January 2001 the number of systematized positions for labour inspectors increased by 38) <strong>Measures for implementation:</strong> <strong>Ongoing</strong> – increase in the number of labour inspectors (+27 staff in 2002) (approved in Budget 2002) Planned: NPPA 2001 establishment of a Centre for training and information on work protection to improve the quality of basic and further training of labour inspectors and staff at labour inspectorates (+ 20 staff in 2002–2004)</td>
<td><strong>Ongoing:</strong> SR 9913.04 – Improved Labour Protection System and Implementation of Labour Protection Management System in Enterprises in the Slovak Republic. Budget (twinning): 1,2 MEUR. SR0110 – Twinning light facility in order to strengthen the institutions and administrative capacity for the full application of the acquis communautaire. Budget: 0,8 MEUR.</td>
<td><strong>Ongoing:</strong> Evaluation of the Labour Inspectorate by the Senior Labour Inspectorates Committee (SLIC) planned for 2002. Additional monitoring required: Specific monitoring to assess the effectiveness of the enforcement system.</td>
</tr>
</tbody>
</table>
As can be seen from this example, the Action Plans referred to sex equality in very general terms, stressing mostly the legislative efforts required. The Slovenian Action Plan thus stated that one of the priorities in Chapter 13 is to “strengthen the administrative and enforcement structures, including the labour inspectorates, related to the EC legislation in the field of labour law and health and safety at work, adopt legislation against discrimination and develop a timetable for its implementation.” Similarly, the Romanian Action Plan stated that the priority in this field is to “strengthen the administrative and enforcement structures (related to EC legislation in the fields of labour law, equal treatment for women and men and health and safety at work), including the labour inspectorates.” Such obscurity is not surprising since the first column of the Action Plans merely reflected the AP priorities.

The second column dealing with commitments and implementation further confirmed the low importance of the issue of sex equality enforcement. The Action Plans thus show that the Candidate States most frequently used two capacity building measures. First, some of the Action Plans envisaged the establishment of some kind of public authority for monitoring and promoting equality between men and women. Second, most of them planned measures to reinforce labor inspection authorities. In both cases, the measures proposed were almost exclusively formal in nature. In other words, they were primarily focused on personnel increases, financial support, and technological development. One scholar described these measures as the

M&M (men and money) approach. More importantly, none of the Action Plans specified the competences of the equality bodies. Hence, their tasks and powers were virtually left unknown. Moreover, it is not at all clear whether the strengthening of labor inspectorates was in any way connected with sex equality enforcement efforts since they were defined in a very ambiguous way. Training of administrative staff, particularly of labor inspectorates, was envisaged by many candidate states. Here, most of the Action Plans relied on the so-called “twinning” projects. Some envisaged the establishment of centers for the training of administrative personnel. Others chose the production of practical manuals or the organization of specialized seminars for labor inspectors and other administrative personnel. However, the significance of all these measures for the improvement of the sex equality enforcement capacity was rather questionable since none of the Action Plans described either their goals or the methods of implementation and evaluation that would be adopted.

The negotiation instruments reveal one more important fact. During the period of accession negotiations, the Candidate States established equality bodies for the implementation and

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504 PHEDON NICOLAIDES, Preparing for accession to the European Union: how to establish capacity for effective and credible application of EU rules, in The Enlargement of the European Union (Marise Cremona ed. 2003), p. 44.

505 For example, the negotiating commitment in the Romanian Action Plan simply states that “Manuals for labour inspectors will be designed and 400 labour inspectors will be trained in order to apply new norms, methods and proceedings of inspection.”

506 The Commission defines the twinning as “one of the principal tools of institution building accession assistance. Twinning aims to help beneficiary countries in the development of modern and efficient administrations, with the structures, human resources and management skills needed to implement the acquis communautaire to the same standards as Member States. The key input from the Member State administration to effect longer-term change is in the core team of long-term seconded EU experts, practitioners in the implementation of the acquis, to the new Member State, acceding, candidate or potential candidate country. Each Twinning project has at least one Resident Twinning Adviser (RTA) and a Project leader. The RTA is seconded from a Member State administration or from another approved body in a Member State to work full time for a minimum of 12 months in the corresponding ministry in partner country to implement the project. The Project Leader is responsible for the overall thrust and coordination of the project. They are supplemented by carefully planned and timed missions of other specialists, training events, awareness raising visits, etc. to accompany the reform process towards the targeted result.” The Commission’s website “Pre-Accession Assistance for Institution Building – Twinning” at http://ec.europa.eu/enlargement/how-does-it-work/financial-assistance/institution_building/twinning_en.htm. For a critical view of twinning, see S. VELLUTI, EU gender equality policy and legislation in the 21st century: putting flesh on the principle of equal opportunities? (2009), p. 6.
enforcement of sex equality guarantees that differed considerably from one CS to another in their form and competences. A significant number of the CSs (the Czech Republic, Estonia, Lithuania, Romania, and Slovakia) decided to establish a sex equality body in the form of a department at the level of their ministries of labour. ⁵⁰⁷ Some countries such as Poland and the Czech Republic established the equality body in the form of a government advisory office. Lithuania established the Ombudsperson for Equal Opportunities. Slovenia established the Bureau for Equal Opportunities, which includes the Ombudsperson. Romania and Hungary established the National Agency for Equal Opportunities between Men and Women.

These equality bodies differed significantly in their structures, responsibilities and competences. This is not surprising since the enlargement documents in the area of sex equality never identified the institutional bodies that were necessary nor the specific enforcement procedures and instruments that the Union considered desirable. In fact, the Union only established some minimum requirements concerning the administrative enforcement of sex equality guarantees in the 2002 amendment to the Equal Treatment Directive, after the Chapter 13 negotiations were closed for all Candidate States. ⁵⁰⁸ The transposition deadline set for the 2002 amendment was October 2005, long after the May 2004 Enlargement.

The amended 2002/73 Equal Treatment Directive required that the Member States should establish an equality body with competences to:

- provide independent assistance to victims of discrimination in pursuing their complaints about discrimination;

⁵⁰⁷ OPEN SOCIETY INSTITUTE, Monitoring the EU Accession Process: Equal Opportunities for Women and Men , p. 20.
• conduct independent surveys concerning discrimination;
• publish independent reports and make recommendations on any issue relating to such discrimination.\textsuperscript{509}

Even though the Directive prescribed only weak organizational requirements for equality bodies, the Commission never insisted that the equality bodies established during the accession negotiations even have the competences prescribed by the Directive. Instead, the Commission merely required the CSs to \textit{commit} that they would establish a national equality body with appropriate competences by the end of the transposition period. Consequently, the equality bodies could be established in various forms. For example, they could be established as national councils, equality ombudspersons or special working groups consisting of social partners and NGOs or independent advisors.\textsuperscript{510} More importantly, in the Eastern Enlargement negotiations, the Commission did not insist that these equality bodies ought to have a particular set of competences before the expiration of the transposition deadline.

This negotiation position was certainly consistent with the Commission’s understanding of the discretion granted to the Member States in the amended 2002/73 Equal Treatment Directive. According to the Commission’s explanatory memorandum attached to the original proposal of the Directive, “\textit{[t]he proposed Directive establishes a number of minimum requirements for such independent bodies in the Member States. Member States are free to decide on the structure and functioning of such bodies in accordance with their legal traditions and policy choices. The

\textsuperscript{509} See EUROPEAN COMMISSION, \textit{Commission’s internal Guide to the Main Administrative Structures required for Implementing the Acquis} (2005); COMMISSION, Communication from the Commission: on the Action Plans for administrative and judicial capacity, and the monitoring of the commitments made by the negotiating countries in the accession negotiations.

independent bodies may be specialized agencies or may form part of wider bodies, whether pre-
existing or newly established. “This position had one practical implication. Once the CSs were left with full discretion in relation
to the newly established equality bodies, the Commission was in no position to insist on any
particular set of professional qualifications for their officials. Moreover, due to the transposition
deadline for Directive 2002/73 set for the end of 2005, it hardly seemed efficient to insist on
substantive capacity building of equality bodies during the accession negotiations.

The Eastern Enlargement negotiations in the area of sex equality, therefore, involved a paradox.
On the one hand, the negotiation instruments identified the establishment of national sex equality
bodies as one of the key guarantees of the CSs’ capacity to enforce the transposed sex equality
guarantees. On the other hand, the CSs were not required to satisfy any substantive requirements in
relation to the capacity of these bodies to actually ensure their enforcement. This paradox suggests
that substantive capacity building for the purpose of enforcing the transposed sex equality
guarantees was not particularly high on the list of priorities in the Eastern Enlargement
negotiations. “

Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as
regards access to employment, vocational training and promotion, and working conditions, COM(2000) 334 final.
512 This certainly does not correspond to the Union’s public commitment to the issue of substantive institutional
capacity. According to the Commission, “a core element in negotiating countries’ preparations for accession, and a
central factor for the success of this enlargement process, is the development of adequate administrative and
judicial capacity to implement and enforce the acquis as of accession. The European Council emphasised the
importance of this aspect at its meeting in Madrid in 1995 and on a number of subsequent occasions, most recently
at Laeken in December 2001. The Commission attaches the greatest importance to ensuring that the candidate
countries reach an adequate level of administrative and judicial capacity by the time of accession. Starting from its
1997 Opinions and subsequently in the Regular Reports, the Commission has carefully monitored the progress made
by each country in this area.” EUROPEAN COMMISSION, Communication from the Commission: on the Action Plans
for administrative and judicial capacity, and the monitoring of the commitments made by the negotiating countries
in the accession negotiations.
Therefore, all candidate states successfully closed the Chapter 13 negotiations, despite significant differences related to one of the chapter’s key requirements. Moreover, some candidate states provisionally closed Chapter 13 even before they established a central equality body. For example, Slovakia did not establish a sex equality body long after the accession.513

The situation relating to the establishment of sex equality bodies suggests that the Union lacked a coherent strategy of enforcement capacity building in the Candidate States.514 It confirms the earlier view that the issue of enforcement capacity building was not high on the Union’s list of priorities in the negotiation process. This claim is further supported by the fact that those capacity building measures that were identified as necessary in the negotiating documents in relation to Chapter 13 were in reality almost completely absent from the area of sex equality.

As seen above, both the Commission and the national negotiating instruments identified peer reviews515 and the so-called twinning programs as important instruments of enforcement capacity building. However, I am not aware of even one twinning project in the area of sex equality during the period of accession negotiations.516 For example, the Commission’s reports on the twinning efforts do not list a single program in the sex equality area for any of the 12 CSs during

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514 NICOLAIDES, Preparing for accession to the European Union: how to establish capacity for effective and credible application of EU rules, p. 46.

515 According to the Commission, peer reviews are “evaluation exercises in which experts from Member States and the Commission in charge of implementing and enforcing the acquis in a certain domain, evaluate the level of preparation of, and formulate advice for, their counterparts in the negotiating countries.” COMMISSION, Communication from the Commission: on the Action Plans for administrative and judicial capacity, and the monitoring of the commitments made by the negotiating countries in the accession negotiations, pp. 22-3.

the period of Eastern Enlargement negotiations. Similarly, twinning reports from Great Britain and Germany, which are the two greatest contributors to the Community’s twinning policy, equally show an absence of twinning in the area of sex equality.

The available data show that twinning programs in the area of sex equality only started taking place, and even then in a rather irregular manner, *after* the accession of the new Member States. This is consistent with the results of interviews with the Commission officials who participated in the negotiations in this area. According to the officials interviewed, the enforcement capacity building concerns had to be postponed for the post-accession period due to the limited resources available to the Commission’s negotiating team in this particular Chapter 13 area.

The situation is not so clear as regards peer reviews since the results of these efforts were not made public. Nevertheless, I am not aware that any peer reviewing took place in the area of sex equality during the accession negotiations and there was certainly no organized peer review policy in this area. Interviews conducted with the Commission officials in the Directorate General for Employment, Social Affairs and Equal Opportunities in December 2004 (seven months after the enlargement) confirmed the absence of a coherent strategy in this area. The officials who were involved in the Eastern Enlargement negotiating process in the area of sex equality spoke somewhat reluctantly about the issue of enforcement capacity in the new Member

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519 See supra text related to fn. 815.

520 The interviews were conducted in the period of December 6-10, 2004 as a part of the European Union Visitors Programme. In that period, I interviewed twelve officials of the European Commission from six Directorates-General, including the DG Employment, Social Affairs and Equal Opportunities and the DG Enlargement. Three of the interviewed officials were directly involved in the negotiation process in the area of sex equality. Interviews were given under the condition of anonymity. All of the interview notes and recordings are with the author.
States. In principle, they admitted that the issue of enforcement of sex equality guarantees might be a significant problem in the new MSs, especially those with a socialist past. They also recognized that more should have been done during the period of accession negotiations. However, almost all of the interviewed Commission officials constantly stressed that the issue of internal domestic administrative organization was not within the Union’s competences. In their view, the responsibility to ensure that their national institutions have the capacity to enforce sex equality guarantees effectively lies with the CSs, as in the case of the “old” MSs. They stressed that it was appropriate for the Union to insist on the establishment of an institutional framework, but that the Union did not have the power to insist on any precise content for that framework.

Moreover, some officials expressed the hope that the mere process of establishing such an institutional framework would have positive far-reaching implications. In their view, supported by the process of transposition of the sex equality acquis, the establishment of the institutional framework would inspire the type of public debate about the importance of equality between men and women that was lacking in the CEE post-socialist states. It would thus increase the awareness of the transposed sex equality rights and consequently lead to more effective enforcement. Of course, they emphasized that if the new Member States failed to ensure the effective enforcement of the transposed rights, the Union could always employ the well-established enforcement tools of infringement procedures, and political pressure, to remedy the problem.

522 See similar interview results in CHARLOTTE BREITHERTON, Gender Mainstreaming and Enlargement: the EU as Negligent Actor? (3-4 July, 2002).
Some of these arguments seem plausible. In the formal sense, the Union indeed does not have the competence to regulate the organization of national administrations. This area is left firmly within the scope of the national autonomy of the MSs. Accordingly, to insist that the CSs had to comply with the requirements concerning the organization of their administrative bodies during the negotiation process would entail that they are unequal in comparison to the MSs. But such a view, although actually plausible, is far removed from reality.

First, the argument that the Union could not insist on any particular institutional structure in order to ensure the substantive enforcement capacity of equality bodies in the CSs without breaching the principles of the separation of powers and equality between the states ignores those areas of the negotiation process where the Union insisted on the fulfillment of requirements that were already clearly outside its competence. The most obvious example was the Copenhagen political criterion that insisted on respect for human rights. Formally, the Union had no competence to regulate the human rights policy, which remained firmly within the national regulatory autonomy of the MS. Yet, the CSs could not join if they failed to secure the protection of fundamental rights. Furthermore, the CSs were expected to respect even those fundamental rights, such as the rights of minority groups, which were not even recognized in some “old” Member States, such as in France.

I certainly do not argue that the Union should have abandoned the first Copenhagen criterion. On the contrary, the Union has a legitimate interest in accepting only those new members that respect fundamental values and principles, not least because these facilitate the effective functioning of the Union’s complex supranational political and legal system. However, it is difficult to see why the same principled position could not have justified a more developed and
stricter position in relation to the organization of enforcement bodies, especially if these bodies were regarded as crucial for the effective protection of such fundamental principles as equality between men and women.\textsuperscript{523}

Second, the belief that the very effort to develop a national institutional framework for the protection of sex equality would increase the awareness and protection of the transposed sex equality guarantees was rather naïve. The Union was well aware that the problem of enforcement of the transposed sex equality guarantees continued regardless of the administrative reforms adopted during the negotiation process.\textsuperscript{524} Moreover, even today, years after the accession, awareness of sex equality rights in the CEE post-socialist states is low.\textsuperscript{525}

These inconsistencies suggest that the arguments about the Union’s lack of competence are an attempt to justify the simple fact that the Union failed to use the opportunity offered by its dominant position in the process of the accession negotiations to ensure a more effective system of enforcement of sex equality guarantees in the new MSs, even though it had the means to achieve this goal.\textsuperscript{526} Interviews with the Commission officials who participated in the negotiations in the area of sex equality revealed that the Commission was well aware of the

\textsuperscript{523} For a similar view, see NICOLAIDES, Preparing for Accession to the European Union: How to Establish Capacity for Effective and Credible Applications of EU Rules.


\textsuperscript{525} See ELAINE S. WEINER, The Gender Politics of the European Union’s Eastward Expansion: Equal Opportunity Policies in the Czech Republic (9/30-10/1/ 2005); VELLUTI, EU gender equality policy and legislation in the 21st century: putting flesh on the principle of equal opportunities?.

\textsuperscript{526} See NICOLAIDES, Enlargement of the European Union and Effective Implementation of its Rules.
problem of persistently poor enforcement capacity of the Candidate States despite the institutional reforms adopted. This awareness was also reflected in the negotiation documents.\textsuperscript{527}

Both the structure of the negotiation process in the area of sex equality and interviews with the Commission officials who participated in the negotiations demonstrate that enforcement capacity building was low on the list of priorities in the area of sex equality. The Union basically reduced the harmonization process to the transposition of the “hard” \textit{acquis}. The primary focus was on positive law. In that respect, it is noteworthy that many of the interviewed officials expressed the conviction that the key to effective enforcement was the correct transposition and implementation of the Community law. According to this view, the primary focus is on national regulatory bodies and not so much on administrative officials who are responsible for enforcement. National regulatory bodies are expected to implement obligations set out in Community Directives through clear, elaborated and coherent legal rules.\textsuperscript{528} Such rules should then be easy to apply by the administrative officials responsible for enforcement.

This “executive bias” is based on a particular understanding of the Community sex equality guarantees (and Community law in general). According to this view, sex equality provisions have more or less clear and precise meaning. Consequently, enforcement is perceived to be almost a mechanical task. Substantive enforcement capacity of equality bodies is of secondary importance. Since the rules have a determinate meaning that can be easily applied to concrete situations, the fact that the officials responsible for their enforcement are not fully familiar with the normative background of these rules does not seem to be of crucial concern.


\textsuperscript{528} This view has been described as the “executive bias”. See \textsc{Grabbe}, \textit{How Does Europeanisation affect CEE Governance? Conditionality, Diffusion and Diversity}. 

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Consciously or not, the structure of the accession negotiations in the area of sex equality reflected this executive bias and its assumptions about the Community sex equality guarantees. Two structural features of the accession negotiations are particularly relevant. First, the negotiation efforts were overwhelmingly focused on the “correct” transposition of the sex equality Directives. This is clearly visible in the negotiation documents. All of the negotiation documents give clear primacy to the legislative harmonization of national laws with the Community requirements over all other efforts.\textsuperscript{529} In many of these documents, transposition is the exclusive concern. Moreover, legislative results were the only concrete negotiation benchmarks in the area of sex equality. Even this concern about legislative harmonization, as we shall see, proved to be a rather flexible condition by the end of the process.

The negotiation instruments that were not public reveal even more clearly that the negotiation efforts in the area of sex equality were overwhelmingly, if not exclusively, focused on legislative harmonization. The key negotiation instrument in the area of sex equality, and a main method of communication between the negotiating teams, was the so-called table of concordance. As illustrated by the tables used in the Czech negotiations, the concordance table consisted of seven columns.\textsuperscript{530}

The first two columns were concerned with the requirements of the “narrow” sex equality acquis. The first column thus referred to the number of particular provisions of a particular Directive. The second column reproduced the precise text of this particular provision.

\textsuperscript{529} Id.
\textsuperscript{530} Srovnavaci Tabulka- Smernice Rady 76/207/EHS, Kandidatska zeme: Češka republika [Concordance Table – Community Directive 76/207/EC, Candidate country: Czech Republic], materials acquired during the research visit to the Czech Ministry of Labor and Social Affairs, May 2005, Prague.
The other five columns were concerned with the national response to these requirements. The third column concerned the name of the national legislation that transposed the relevant Community provision. The fourth column concerned the precise numbering of the transposed national provision. The fifth column required the precise text of the transposed national provision. The sixth column evaluated the conformity of the national provisions with the Community law. The table allowed for three evaluative grades: F for “full conformity”; P for “partial conformity” and N for “not in conformity”. The seventh column allowed for remarks. The remarks in this column usually expressed an estimated date for transposition.

Table 3. The concordance table for the Czech Republic
**SROVNÁVACÍ TABULKA**

Kandidátská země: Česká republika

<table>
<thead>
<tr>
<th>Článek</th>
<th>Text</th>
<th>Odkaz</th>
<th>Článek</th>
<th>Obsah</th>
<th>Soulad</th>
<th>Poznámky</th>
</tr>
</thead>
<tbody>
<tr>
<td>čl. 1</td>
<td>Lidé jsou svobodní a rovní v důstojnosti i v právech. Základní práva a svobody jsou nezadatelné, nezcizitelné, nepromlčitelné a nezrušitelné.</td>
<td>čl. 1</td>
<td>čl. 3 odst. 1 Obecná ustanovení 08.02.1991</td>
<td>Článek 2 odst. 1 Zásadou rovného zacházení ve smyslu následujících ustanovení se rozumí vyloučení jakékoliv diskriminace na základě pohlaví bud’ přímo, nebo nepřímo s ohledem zajímá na manželský nebo rodinný stav.</td>
<td>F</td>
<td></td>
</tr>
<tr>
<td>čl. 2 odst. 1 Zásadou rovného zacházení ve smyslu následujících ustanovení se rozumí vyloučení jakékoliv diskriminace na základě pohlaví bud’ přímo, nebo nepřímo s ohledem zajímá na manželský nebo rodinný stav.</td>
<td>Ustavní zákon č. 23/1991 Sb., kterým se uvozuje Listina základnic h práv a svobod</td>
<td>Článek</td>
<td>Článek</td>
<td>Článek</td>
<td>Článek</td>
<td>Článek</td>
</tr>
</tbody>
</table>

1 F = plná slučitelnost (full compatibility); P = částečná slučitelnost (partial compatibility); N = neslučitelné (incompatible)

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531 COMPARATIVE TABLE.
532 Candidate Country: the Czech Republic.
534 Legislation.
535 Article.
536 Text.
537 Reference.
538 Article, Title, effective date.
539 Content.
540 Consistency.
541 Comments.
542 Council acting on a proposal from the Commission the provisions defining its content, scope and details of its implementation.
543 Article 2, paragraph 1.
544 Art. 2, paragraph 1 For the purposes of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on the grounds of sex either directly or indirectly by reference in particular to marital or family status.
546 Art. 1, Art. 3 paragraph 1, General provisions 08/02/1991.
547 Art. 1 People are free and equal in dignity and in rights. Fundamental rights and freedoms are indefeasible, inalienable, imprescriptible and irrevocable. Art. 3 (1) Fundamental rights and freedoms are guaranteed to all without distinction of sex, race, color, language, faith and religion, political or other opinion, national or social origin, belonging to national or ethnic minority, property, birth or other status.
Both the Commission officials interviewed and the Czech officials who participated in the negotiations confirmed that the concordance tables were the cornerstone of the negotiation process in the area of sex equality.

Basically, the Commission would develop a concordance table concerning a particular sex equality Directive and ask a particular CS to identify the corresponding national legal provisions. The Commission relied entirely on national governments to supply this information. The governments had to identify what they considered to be the corresponding legal norms. They also had to provide a translation of the provisions and evaluate the degree of correspondence between the Community provision and the national provision. The national negotiating teams were asked to evaluate whether these provisions had the “correct” meaning and seek to achieve the goals regardless of whether the wording of the national legislation differed from the EC Directive. The Commission therefore assumed that the national negotiating teams fully understood the precise implications of the Community provisions.

Once the national team had identified and translated the corresponding national provisions, it delivered the concordance table to the Commission. In principle, the Commission did not question these submissions. In other words, the Commission did not conduct its own analysis of a national legal system in order to establish whether a particular CS “correctly” transposed a particular sex equality provision.

The negotiating teams met roughly twice a year. The information provided through the concordance tables was vital for the discussion at those meetings. In short, the tables were the main source of information for the Commission. It is no exaggeration to say that the concordance
tables were of key importance for the Commission’s evaluation of the progress of negotiations in the area of sex equality.

The described structure of the negotiation process in the area of sex equality strongly underlines the view that the legal text alone is sufficient to enable the enforcement of the Community sex equality rules. The same view is reflected in the fact that the enlargement documents favor formal capacity building measures. Centralization of enforcement efforts into one administrative body, personnel increases, production of manuals, and improvements of financial or technical support are measures primarily focused on the technical efficiency of the enforcement procedure and do not particularly contribute to the substantive capacity of enforcement institutions.

The structure of the accession negotiations in the area of sex equality is particularly problematic in the context of this thesis for several reasons. First, to the extent that they were based on an understanding that the Community sex equality guarantees have a more or less determinate meaning that can be applied rather mechanically in concrete situations, the accession negotiations promoted a view that did not correspond to reality. As shown in Chapter II, the Community antidiscrimination guarantees are profoundly open-textured. Consequently, their enforcement depends on sensitive and often difficult normative choices. Therefore, it seems rather unrealistic to expect that national officials who are not fully familiar with the multifaceted normative background of the Community sex equality guarantees, and especially with the complex case-law of the ECJ, would have sufficient capacity to enforce these guarantees.
regardless of how “correct” the process of transposition was.\(^\text{548}\) Thus, the lack of any meaningful effort to improve the substantive capacity of enforcement bodies was particularly problematic.

Second, because it was based on the view that adoption of the legal text of sex equality guarantees could ensure an effective enforcement of these guarantees in the CEE post-socialist legal systems, the negotiation process was not concerned with the profound differences in the way in which the post-socialist and Community legal orders understood the notion of equality between men and women. On the contrary, as will become clear in the last two chapters of the thesis, due to the overemphasis on the legal text and the conviction that the sex equality guarantees were determinate, the negotiation process perpetuated the narrow and formalistic understanding of the law and legal protection that is one of the crucial barriers to their enforcement in the post-socialist legal systems.

The structure of accession negotiations in the area of sex equality stressed the importance of the transposition requirement and ignored the need for substantive capacity building. This can be explained rather simply.

The Union was simply not well enough prepared for the substantial task of building enforcement capacity in the 12 Candidate States. The fact that the Union does not have the legal competence to regulate the organization of national administrative systems in the “old” Member States has been relevant in one particular regard. Since it lacks this power, the Union consequently “lack[ed] any formal rules on the meaning of the concept of effective implementation and/or enforcement”\(^\text{549}\), which could be applied to the future Member States. In addition, the need for


\(^{549}\) GRABBE, How Does Europeanisation affect CEE Governance? Conditionality, Diffusion and Diversity, p. 1018.
institutional reforms during the process of Eastern Enlargement was unprecedented in its size.\footnote{NICOLAIDES, \textit{Preparing for Accession to the European Union: How to Establish Capacity for Effective and Credible Applications of EU Rules}, p. 47.}

The majority of the 12 CSs inherited their problematic institutional frameworks from the socialist era. Taking these two factors into account, one could have hardly expected that the Commission would be in a position to effectively tackle this sensitive task.\footnote{PHEDON NICOLAIDES, \textit{Enlargement of the EU and Effective Implementation of Community Rules: An Integration-Based Approach}, EIPA Working Paper 99/W/04 (1999).}

\section*{4.5. \textbf{Poor Institutional Capacity}}

Another reason that can help explain the approach adopted in the Eastern Enlargement negotiations in the area of sex equality is the poor institutional capacity of the Commission’s working teams in this area.\footnote{Similarly GRABBE, \textit{How Does Europeanisation affect CEE Governance? Conditionality, Diffusion and Diversity}, p. 1023.}

Officially, the Directorate-General (DG) for Enlargement represented the Union and the Member States in the negotiations. All negotiating actions were formally conducted through this particular DG. However, the actual work was undertaken at the level of subcommittees to the numerous working teams responsible for particular issues.\footnote{See MAURER, \textit{Negotiations in Progress}, p. 118.} The Commission’s working team responsible for the negotiations in the area of equal opportunities for men and women primarily consisted of two units of Direction G of the Directorate-General for Employment, Social Affairs and Equal Opportunities. The two units were the Unit G/1 for Equality for Women and Men and the Unit G/2 for Enlargement and International Affairs. This working team in principle consisted of four to five people. For the sake of simplicity, I will call this working team the Commission’s negotiating team in the area of sex equality.
The team was responsible for negotiations with all 12 Candidate States. As the officials of the team stated in interviews, such limited capacity allowed them to focus primarily on monitoring only legislative harmonization.

Monitoring of legislative harmonization was itself an enormous task. In the pre-negotiation phase, it involved a screening process in which the members of the Commission’s negotiating team had to present and explain the Community sex equality *acquis* to all negotiating teams of the 12 Candidate States. It also involved an even more demanding analytical phase where the team was expected to identify discordances between Community law and national legislation in all 12 Candidate States.\(^{554}\) This task was not limited to statutory discrepancies. It also involved the monitoring of executive and administrative regulations.\(^ {555}\)

In the negotiation phase, the team was responsible for defining and “negotiating” concrete requirements in the area of sex equality for each of the 12 CSs. It was also responsible for monitoring their fulfillment. The sensitivity of some of the requirements, such as the introduction of a ban on sexual harassment, shifting the burden of proof, indirect discrimination, and compliance with the interpretation of the ECJ, did not make the negotiations or the harmonization process a simple one.\(^ {556}\)

Moreover, as stressed by some of the interviewed team members, the task of maintaining the momentum of the harmonization efforts in the national systems and the constant scrutiny of the

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\(^{556}\) See, for example, Bretherton, Gender Mainstreaming and Enlargement: the EU as Negligent Actor?, p. 10; Lorenz-Meyer, A Plea for Complexity in Addressing Dilemmas in EU Gender Equality Policies in EU Enlargement.
harmonization results often collided with the self-perception of the CSs as sovereign states. As the head desk officer in the team explained, progress of the negotiation process in the area of sex equality was dependent primarily if not exclusively on the “initiative and expertise” of the desk officers from the Units G/1 and G/2. Taking into account their limited resources, it is truly remarkable that a team of this size managed to handle such an overwhelming and sensitive task in such a relatively short period of time.

However, the interviews with the Commission’s officials participating in the negotiations revealed one important further implication of the limited institutional capacity of the Commission’s negotiating team. The limited capacity of the team was clearly responsible for focusing most of their efforts on the transposition requirement. The officials interviewed openly admitted that concerns regarding the capacity of the CSs to enforce the transposed guarantees had to be postponed until the post-accession period due to the team’s limited capacity. The limited efforts that they directed towards the issues of enforcement were primarily focused on monitoring the efforts to improve the formal capacity of the national institutions since they could be relatively simply reported and supervised. The team was not involved in the education or training of national officials responsible for the enforcement of the transposed sex equality legislation.

The limited capacity of its negotiating team also made the Commission overly dependent on the candidate states themselves in terms of providing relevant information. This explains the

557 See, for example, the transcripts of the parliamentary discussion in the Lower House (Poslanecka snemovna) of the Parliament of Czech Republic on April 11, 2003 and in the Senate of the Parliament of Czech Republic on December 10, 2003.
importance of the concordance tables. The interviewed officials frankly said that, in the area of sex equality, the national negotiating teams were the primary and often the only source of information needed for the evaluation of the progress of the CSs. In that context, it is interesting to note that, in some other negotiating areas, the Commission employed a somewhat different approach to the collection of information that was regarded as important for the evaluation of progress. For example, in the area of internal market, the Commission moved beyond monitoring the transposition and the M&M (men and money) capacity building measures. In contrast with the Commission’s approach in the sex equality area, it is particularly interesting to note the manner in which the Commission evaluated the enforcement capacity of the national institutions in the internal market area. For example, the Commission evaluated the extent to which the national rules seemed vague, overly complex, or difficult to understand. It also evaluated the degree of independence of the national body responsible for enforcement, as well as its competences. Moreover, it examined whether these institutions employed their powers in a proactive manner. Furthermore, it evaluated the openness, transparency and promptness in decision making of these bodies, as well as their coordination and communication with other relevant governmental and non-governmental actors. Moreover, the Commission did not limit itself to information received from the Member States. It conducted surveys of those who were

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560 In 2001, the Commission claimed that “monitoring actions are already underway. The Commission regularly provides the Council with detailed monitoring tables and reports that look at the way commitments undertaken in the framework of negotiations have been implemented. These also concern commitments on building up adequate administrative capacity. The Commission does not always have the relevant expertise to judge the readiness of the candidate countries’ administrations since implementation is largely up to Member States.” COMMISSION, Making a success of enlargement - Strategy Paper and Report of the European Commission on the progress towards accession by each of the candidate countries.

561 NICOLAIDES, Enlargement of the EU and Effective Implementation of Community Rules: An Integration-Based Approach, p. 56.

562 Nicolaides argues that the Commission’s findings suggest that some of these elements are generic to all enforcement institutions responsible for the enforcement of the acquis.
the supposed beneficiaries of the relevant Community provisions. The difference between the approach described in the negotiating area of internal market and the Commission’s approach in the area of sex equality described in the previous section is striking and there is hardly any doubt that it is related to the political importance accorded to these two concerns.

This difference is emphasized by two additional consequences of the limited capacity of the Commission’s negotiating team in the area of sex equality. First, the issue of sex equality was on the negotiating agenda for a rather short period of time.

The negotiations concerning Chapter 13 of the acquis were started in the first half of year 1998. The screening phase took place towards the end (October – December) of 1998. The negotiations were provisionally closed by the end of 2001. However, in the interviews, the head desk officer in the Commission’s team explained that “the real work” started sometimes during the year 2000 and was mostly over by the middle of 2001. In that sense, the negotiation process effectively lasted for approximately 12-14 months. The chapter remained closed until

564 See NICOLAIDES, Preparing for accession to the European Union: how to establish capacity for effective and credible application of EU rules, p. 55.
566 Ibid.
accession in May 2004, notwithstanding the Commission’s frequent critiques of the poor institutional capacity for enforcement in the candidate states.\textsuperscript{568}

Second, the limited institutional capacity of the Commission’s negotiating team in the area of sex equality produced the so-called commitment policy.\textsuperscript{569} One of the most striking findings resulting from the interviews of the Commission’s officials who participated in the negotiations is that the Commission provisionally closed the Chapter 13 negotiations notwithstanding the fact that the majority of the CEE post-socialist CSs did not fully transpose the EU sex equality acquis. The chapter was provisionally closed on the basis of their commitment that the EU sex equality provisions would be fully transposed by the date of accession. The commitment policy clearly supports those critics who argued that in terms of policy measures, especially in relation to the capacity building efforts, the Commission uncritically accepted whatever measure was taken or proposed by a CS. Moreover, the Commission was not aware to what extent the CSs had actually fulfilled their commitments even in December 2004 when the interviews took place. I was then told that the Commission was “preparing” to gather all national laws related to the sex equality Directives, translate them and analyze the degree of their compliance.

On the one hand, it would be somewhat simplistic to claim that the Union did not accord any true importance or that it accorded merely declaratory importance to the protection of equality between men and women. After all, the Union did insist that candidate states should introduce a significant number of important equality guarantees into their national legal systems without any


exceptions and develop institutional solutions for their enforcement.\textsuperscript{570} This is considerable progress for legal systems that ignored the problem of equality between women and men for decades.\textsuperscript{571} In that sense, the Commission officials who participated in the negotiations were right in their conviction that they are “making a difference” despite all the problems encountered in the process of harmonization.\textsuperscript{572}

4.6. Forgotten Judiciary

The most striking feature of the negotiation process (and the most relevant in the context of this thesis) was the fact that the process completely ignored the enforcement capacity of the judiciary in the CSs. On a very general declaratory level, the negotiation documents merely paid lip-service to the importance of competent judiciary. In the words of the Commission:

“To fully anchor law in society, it is indispensable to inform citizens about their rights and to encourage them to avail themselves of their rights in a culture of open discussion supported by the judicial capacity to deal with disputes efficiently.”\textsuperscript{573}

Moreover, one of the basic negotiation documents, Agenda 2000, states that

“the applicants’ judicial systems must be capable of ensuring that the law is enforced. This requires the retraining and in some cases, the replacement of judges, to ensure that courts are

\textsuperscript{570} See OPEN SOCIETY INSTITUTE, Monitoring the EU Accession Process: Equal Opportunities for Women and Men , pp. 16-20.
\textsuperscript{572} I have encountered a similar attitude from the Czech officials whom I interviewed during my research.
able to operate effectively in cases involving Community law”. Apart from these general statements, the negotiation documents hardly considered the enforcement capacity of the judiciary. In the area of sex equality, the issue of judicial enforcement of the transposed sex equality guarantees was almost completely absent.

The negotiation documents suggest a certain reluctance on the part of the Union to question the work of the judiciary in substantive terms. In that respect, the negotiation documents often emphasized that the quality of judicial enforcement was primarily a responsibility of the CSs themselves. This position was also reflected in the opinions of the Commission officials interviewed. These Commission officials within the DG Employment and Social Affairs unanimously stressed that they considered interference with the manner in which the national courts applied the law to be inappropriate. In their view, the requirement of a functioning judiciary was entailed in the criterion of full enforcement of the acquis, but this was within the responsibility of the CSs. They insisted that instances of ineffective judicial enforcement could be sufficiently dealt with through infringement procedures, or possibly by way of complaints based on the ECJ’s Kobler doctrine. Bearing in mind that the national courts of the CSs also assumed the role of “European” courts in proceedings where they were responsible for the enforcement of the Community law, such distancing of responsibility for the quality of judicial decision-making in these legal systems seems rather problematic.

Distancing from the issue of judicial enforcement in the Eastern Enlargement negotiations did not mean that the Union completely ignored the judiciary in the CSs. The negotiation documents

575 See EUROPEAN COMMISSION, Enlargement of the European Union Guide to the Negotiations - Chapter by Chapter.
576 Case C-224/01 Gerhard Köbler v Republik Österreich [2003] ECR I-10239.
do show that the Union invested some efforts to improve the capacity of national courts in the CSs. However, as with the Community’s efforts in relation to the reform of national administrations, the negotiation efforts targeted the capacity of the judiciary only in the *formal* sense.

Most of the twinning projects concerning the judiciary in the period of the negotiating process, for example, targeted institutional problems such as the independence of the judiciary or corruption.⁵⁷⁷ Similarly, most of the capacity building efforts consisted of M&M measures. Efforts to improve the substantive enforcement capacity of the national judiciary and ensure some minimal guarantee of the quality of their decisions in the proceedings where they were required to interpret and apply Community guarantees were almost completely absent. The most important measure was the Union’s support for the opening of the so-called Judicial Academies in the Candidate States.⁵⁷⁸ These institutions were formally established by the national governments. However, the Union as a rule provided substantial financial support and/or organizational know-how. The purpose of these institutions is to provide continuous education for national judges that would allow them to keep up with legal developments.⁵⁷⁹ In light of accession, education in EU law was one of their primary functions.

However, these national Judicial Academies were given full autonomy in the organization of their curricula. They decided which topics were taught in their programs and who would teach them. Since the education of national judges was primarily streamlined through these

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⁵⁷⁹ As an illustration of the activities of these institutions, see the overview of the activities of the Czech Judicial Academy at http://portal.justice.cz/soud/soubor.aspx?id=25450.
institutions, it is clear that the Union did not have a clear strategy of, or control over, the development of the substantive enforcement capacity of national judiciaries in the CSs. Consequently, the Commission has recently recognized the need for a more coherent European strategy of judicial training.580

Moreover, in some CSs, these institutions of judicial education started functioning only after the enlargement. In that sense, the education of the judiciary during the accession period in relation to EU law was primarily the result of voluntary individual efforts that were organized either by national government institutions, law schools or NGOs.581 Such unorganized efforts of enforcement capacity building of the judiciary during the accession period left the courts in the CSs apparently unprepared for the task of enforcement of EU law.582 For example, research on the extent to which the Czech courts were familiar with EU law showed that 89 out of 128 interviewed judges expressed the view that their colleagues had not acquired sufficient knowledge of EU law.583 One judge explained the insufficient familiarity of the Czech judges with EU law by saying that “most of the judges have never been informed or tried to be informed. Most seminars are organised only on general questions like what is the EU, its organs, where is its seat, or generally on the difference between primary and secondary law and the

581 A significant number of these projects were sponsored by the EU. Many of them relied on the experts provided through the Academy of European Law (ERA). ERA has started playing an increasingly important role in the education of judiciary in the post-socialist legal systems in the last few years. ERA organizes numerous seminars on different EU law topics at its center in Trier. However, it also helps in the organization of national EU law seminars in national legal systems by providing the valuable services of its lecturers. For ERA’s activities, see http://www.era.int
583 Questionnaire, “The diffusion of domestic and EU law through the court system”, the research project of the University of Aarhus, Denmark in cooperation with Zdeněk Kühn, January 2007. Results of the Questionnaire are with the author.
Another judge of the Supreme Administrative Court explained that “the awareness of EU law is high in general, but its knowledge is not very deep. Judges usually recognize if the case has any aspects linked to EU law and then study the relevant part. In practice, I don’t see any fundamental problems in application of the EU law.” Many of the interviewed judges stressed that judges belonging to younger generations are more familiar with EU law because they had an opportunity to learn something about it at universities.

The preceding arguments suggest that one should not be particularly optimistic with regard to the capacity of the courts in the new MSs to enforce Community sex equality guarantees. This argument will certainly find support in the following two chapters. At this point, it should be stressed that efforts that targeted the capacity of the judiciary in the CSs to enforce Community sex equality guarantees were almost completely absent from the accession negotiation process. Not a single negotiation document mentions that anything has been done during the negotiation period in that regard.

Those efforts that did exist were organized in a rather sporadic manner on a voluntary basis outside the control and influence of the Union. Most of these efforts were organized in the form of one or two-day seminars for very limited groups and as such could hardly had a serious impact. In that respect, it is worth stressing that the education of judges in relation to the EU sex equality acquis is not high on the list of priorities of the national Judicial Academies even today. For example, the Czech Judicial Academy, as one of the most prominent institutions of this type in the CEE, has not organized a single educational seminar on sex equality law since it started

584 Id.
585 Id.
586 The European Academy of Law has been the notable exception to this gloomy picture. The Academy developed a series of seminars concerning the EU sex equality law that are accessible to judges in the new MSs. See the ERA program “EC Legislation on Equal Treatment between Women and Men” at the website http://www.era.int.
functioning in 2003. The Slovak Judicial Academy offered a seminar called “Discrimination: psychological and legal aspects” twice a year in the period of 2004-2006. Since 2006, the issue of equality has not been included in its curriculum.

4.7. Conclusion

In the third and fourth chapters, I have argued that the model of harmonization of the CEE legal orders with the requirements of the EU acquis in the area of sex equality failed to identify and neutralize the key obstacles to the enforcement of EU sex equality guarantees in the CEE post-socialist systems.

In that sense, I have shown that the EU insisted on the model of harmonization in the area of sex equality acquis that overstressed the importance of the “correct” transposition of positive legal provisions at the expense of substantive capacity building that would prepare post-socialist courts for the challenging task of enforcement of the transposed guarantees. I have acknowledged that the Union invested significant resources into institutional capacity building. However, these efforts were primarily targeted to improve the “formal” capacity of post-socialist institutions responsible for implementation and enforcement of the EU acquis. In contrast, the Union invested significantly less effort into the improvement of their substantive capacity. Moreover, I have demonstrated that the available data suggest that not much of the invested resources targeted institutions responsible for the enforcement of sex equality acquis.

Moreover, I have demonstrated that the resources that the Union invested into its own institutional capacity for negotiations in the area of sex equality acquis were far from impressive.

On the contrary, they suggest a lack of political commitment to the importance of the ideal of sex equality in the accession negotiations.

As a result, the CEE post-socialist states joined the European Union unprepared for the complex task of enforcement of the transposed sex equality guarantees.
Chapter V

Lingering Legacy of the CEE “Really Existing” Socialism

5.1. Introduction

The fifth chapter will focus on the lingering effect of the legacy of real socialism on the perception of law, and more particularly, on the understanding of the appropriate function of adjudication in the CEE post-socialist legal systems.

In that regard, I will argue that the CEE post-socialist courts still perceive law in a formalistic manner. Similar to their socialist predecessors, the CEE post-socialist courts are still firmly committed to statutory law, or more precisely, to clear-cut written legal rules. Accordingly, these courts still perceive adjudication as a mechanical application of clear legal commands that is completely independent of normative considerations. Consequently, the CEE post-socialist courts, in principle, still demonstrate a clear aversion towards open-textured principle-like legal norms that require courts to assume responsibility for sensitive normative decisions.

5.2. The Challenge of Post-socialist Adjudication

One of the key barriers to the enforcement of EU sex equality guarantees in the CEE post-socialist legal systems is the inherited perception of the function of law and, more particularly, of adjudication. The manner in which post-socialist courts apply the law is the most significant threat to the enforcement of EU sex equality guarantees in post-socialist legal systems.
5.2.1. A Belief in Determinacy

The dominant perception of law and its function in the CEE post-socialist legal systems still strongly resembles the narrow positivism of the socialist period. Law is still perceived primarily as a system of more or less clear and precise statutory and executive rules. The system is not necessarily perceived as coherent but as determinate and cohesive. The key element of the legal system is a positive written rule. The key quality of the written rule is the ability to communicate in a sufficiently clear and precise manner a command of the legislative or executive authority. Accordingly, the post-socialist systems are committed to the notion that every written rule has a single correct meaning. The ideal-norm of this positivist understanding of law is a provision that defines the factual predicate in a precise manner and clearly states the consequences that follow if the actual facts correspond to the factual predicate.

Clearly, such positivism is not unique to the post-socialist legal systems. After all, they are a part of the family of legal systems with civil-law traditions that are all committed to positive understanding of law. However, what distinguishes the CEE post-socialist legal systems from their relatives is their stronger authoritarian character. This has been particularly visible in the high degree of judicial deference to the legislative and executive authority.
5.2.2. Rule-bound Adjudication

The post-socialist courts perceive their function through a very narrow notion of rule-boundness based on a firm faith in a determinate and correct meaning of statutory and executive rules and a strict distinction between lawmaking and the application of the law.\textsuperscript{589}

The majority of the CEE post-socialist courts are firmly committed to the notion of textual determinacy. According to this view, the meaning of the provision lies exclusively in the text. To deduce the correct meaning, the courts will use only the canons of linguistic interpretation. Accordingly, the meaning of the rule is not dependent on the intentions of its author. A written provision whose meaning cannot be deduced with certainty through careful reading of its text is regarded as flawed.

The function of adjudication is to deduce the correct meaning of a rule from its text and apply it to the circumstances of a particular dispute. The courts perceive this process as absolutely objective and neutral. First, to deduce the meaning of the text, they rely exclusively on the “correct” literal meaning of the words. Second, at the core of this process lies the process of deductive logic. The courts use this logic to construe the correct meaning of the whole provision from its single units. They also rely on syllogisms in order to deduce the final conclusion concerning the consequences of the behavior in question after they compared the factual predicate of the provision with the concrete facts of the dispute. Normative considerations that do not belong to the realm of logic but of subjective preferences are excluded from the process since the courts will not even consider the author’s intent.

\textsuperscript{589} \textsc{Jirzi Zemanek, The Emerging Czech Constitutional Doctrine of European Law, 3 European Constitutional Law Review (2007), pp.418-9.}
Due to this perception of law and their function, the post-socialist courts favor written rules that entail precise, easily understandable legal commands that are mechanically applicable to readily ascertainable facts. Their form is if facts AB then consequences XY. Such a command must be highly specific and general. On the one hand, it must be highly specific in terms of the details of a particular social situation they aim to regulate. On the other hand, it must be general in the sense that it applies to all individuals who may find themselves in that situation regardless of their specific circumstances. If individual circumstances matter, they must be explicitly specified in another rule-like legal provision.

This perception of law has had several practical implications. The CEE post-socialist courts are almost exclusively focused on statutory law and executive regulations. Accordingly, they tend to avoid significant parts of domestic positive law. Most strikingly, ordinary courts in the CEE post-socialist legal systems tend to ignore constitutional provisions in their decision-making. An ordinary court favoring clear and precise commands perceives the open-textured constitutional norms as vague political ideals that should be left within the subjective political discretion of the legislator and excluded from the objective logical process that is the judicial enforcement of the law.590

Consequently, the CEE post-socialist courts have frequently refused to use constitutional standard-like provisions as interpretative guides in their application of “regular” law. Moreover,

590 As a Romanian judge described: “in the absence of an express article allowing the rights provided for by the Constitution to be directly enforced, the Romanian courts are extremely reluctant to consider them as such and have always asked for ordinary laws to include and develop such provisions with procedural terms.” GABRIEL ANDREESCU, Right-Wing Extremism in Romania, (Cluj, 2003), p. 56. Halmai expressed a similar concern: “Even though the “new constitution” has been in effect for 11 years now, it is still the case that most ordinary judges see no relationship between the constitution and their everyday practice of deciding cases.” GABOR HALMAI, The Hungarian Approach to Constitutional Review: The End of Activism? The First Decade of The Hungarian Constitutional Court, in Constitutional justice, east and west: democratic legitimacy and constitutional courts in post-communist Europe in a comparative perspective (Wojciech Sadurski ed. 2002), p. 209.
they have assumed that their function does not allow them to question the constitutionality of positive law at all. The Hungarian courts have thus avoided exercising their power of judicial review in order to protect fundamental rights guaranteed by their Constitution. Their Croatian colleagues have completely ignored the constitutional requirement to stop their proceedings if they suspect that a particular legislative or executive act is in conflict with the Constitution and to refer the question of constitutionality to the Constitutional Court.

For the same reasons, many of the CEE post-socialist courts have denied that the decisions of their Constitutional Courts ought to serve as guidance in their application of the law and considered them relevant only for the specific case in which they were delivered. This position is illustrated by the reasoning of the Polish Supreme Court (the PSC) explicitly denying the binding character of the decisions of the Constitutional Court and arguing that the ordinary courts are bound only by the positive statutes. According to the PSC, “a decision of the Constitutional Court does not have any immediate effect, which would deprive the contested statute of its binding character and, moreover, excludes the possibility of negating such a statute (by other means e.g. within ordinary court’s adjudication) until the Parliament decides to amend or cancel the statute.” The Croatian Supreme Court (the CSC) has voiced a similar position.

591 Halmai, id.
592 In the period of 20 years of the existence of democratic legal order in Croatia, there have been less than 20 referrals to the Constitutional Court. See Rodin, Discourse and Authority in European and Post-Communist Legal Culture, p. 11.
593 See Kuhn, The Changing Face of Central European Judiciary, Part 5, Chapter IV.
595 Decision of the Croatian Supreme Court No. II K2-888/03-3 dated January 07, 2004.
The logic behind this denial of the interpretive guiding value of constitutional provisions is quite simple. If a particular statute is in accordance with the constitutional requirements, then it is for the ordinary courts to follow consistently the correct meaning of its provisions. In other words, the Constitutional Court can say whether the statutory provisions satisfy the constitutional requirements, but it cannot change their predetermined and fixed meaning.

Another striking example of the narrowing of positive law is a certain discomfort of the CEE courts regarding the application of international legal instruments, even though, in most of the CEE states, such instruments are an inherent part of the national legal system. A great majority of ordinary courts simply tend to ignore the relevant provisions of international law. On the rare occasions when they refer to them, they do so primarily to support their predetermined holdings with a brief reference to the text of these provisions.

For example, in one of the rare decisions mentioning the ECHR in the period before 2008, the Croatian Supreme Court argued that it is obvious from the text of the Convention that the

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596 In his study book used for teaching purposes at the Zagreb University Faculty of Law, Borkovic argued that a Constitution consists of a set of abstract principles that have to be given a concrete meaning through provisions of ordinary statutory and administrative acts. IVO BORKOVIĆ, Upravno pravo, (Informator, 1997), pp. 59, 90, 91.

597 Following this reasoning, the Czech ordinary courts rejected some of the decisions of their Constitutional Court as “incorrect” because they did not have sufficient support in the text of positive law. See KÜHN, The Changing Face of Central European Judiciary, pp. 222-3.

598 Id. at p.233. A research of the case-law of the Croatian Supreme Court conducted in January 2008 showed that the Court referred to international treaties in approximately 30 decisions. However, a great majority of those decisions dealt with specific bilateral treaties between the Republic of Croatia and its neighboring countries. The Court referred to multilateral international conventions only in 5 decisions (Gž-1/03-2; Revr 340/03-2; Kž-849/02-5; III Kr 647/02-3; I Kž-53/03-3). It mentioned the European Convention for Protection of Human Rights and Fundamental Freedoms only once (III Kr 647/02). These findings are based on the full text search offered at the official website of the Croatian Supreme Court: http://www.vsrh.hr.

The number of the SC decisions mentioning the ECHR increased significantly during 2008 and 2009 due to the reform of the Judiciary Act. The Act allowed individuals to file the so-called “reasonable period” complaint to a higher court even though the proceedings before the lower did not end. The “reasonable period” complaint was an attempt to ensure effective implementation of the ECHR Art. 6 right to a reasonable period trial. Since the reform of the Judiciary Act, the SC has delivered over 100 decisions referring to the ECHR. However, 99% of those decisions are the “reasonable period” decisions. Moreover, all of those decisions, regardless of their ruling, have the same paragraph simply stating that the decision is “in accordance with the case-law of the ECtHR” without ever mentioning a single decision of that Court.
The particular decision of the lower court did not violate the fundamental right in question. The Court did not bother to support its reading of the Convention with the case law of the ECtHR or substantively elaborate the reading in some other way. Instead, the Court simply held that there was no violation of the right to a fair trial due to the fact that the plaintiff was not awarded a translator although his first language was not Croatian since “the Convention mandates national courts to award a translator only if a plaintiff does not ‘understand or does not speak’ the language of the court.” According to the Court, “since the proceedings showed that the plaintiff obviously understood the language of the court and he did not personally request a translator”, there was no violation. The Court neither explained why it considered it “obvious” that the plaintiff had a sufficient knowledge of the language of the court nor referred to any decision of the ECtHR elaborating the standard of linguistic knowledge that enables plaintiffs to follow the proceedings in a foreign language.

The post-socialist courts have thus in principle been rather suspicious of the possibility of using international law as persuasive authority in the interpretation of their positive national legal provisions. Their reluctance has produced some interesting decisions during the period of the EU accession negotiations.

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Similarly, in one of the rare decisions of municipal courts mentioning the ECHR, the court simply used the Convention to support its finding without even looking at the text of the Convention. Decision K-102/02, Općinski sud u Osijeku [Municipality Court in Osijek]. The situation is not much better in other CEE legal systems. Kuhn’s research has shown that, among thousands of cases decided in the two year period (2000-2002), the Czech Supreme Court referred to the ECHR merely 4 times. In Slovakia, out of 120 officially reported decisions of the Supreme Court, only one mentioned the ECHR. KUHN, id, p. 234. One study of the decisions of the three highest courts in the Czech Republic shows that some of these courts referred to the ECtHR decisions but in a discriminatory way. They used them only when they supported their holdings while clearly ignoring them in the opposite situations. Z. KUHN, et al., Judikatura a právní argumentace; Teoretické a praktické aspekty práce s judikaturou [Case Law and Legal Reasoning; Theoretical and Practical Issues Relating to the Use of Case Law] (Auditorium 2006), pp. 78 – 96.
For example, the Slovak Supreme Court (the SSC) flatly refused to interpret a national legal provision in a way that would be “friendly” to the EU acquis explaining that the relevant EU provisions were not part of the domestic legal system, since Slovakia was not a member of the EU at that time.\textsuperscript{600} The Court refused to use EU law as an interpretative guide despite the fact that Art. 69 of the Slovak’s Europe Agreement provided that “[t]he Contracting parties recognize that the major precondition for the Slovak Republic’s economic integration into the Community is the approximation of the Slovak Republic’s existing and future legislation to that of the Community. The Slovak Republic shall endeavor to ensure that its legislation will be gradually made compatible with that of the Community.”\textsuperscript{601} By ignoring the interpretive possibility offered by this clause, the SSC held that, “considering the current stage of EU integration,” an argument based upon European law was of no concern to the Court.

A similar view has been expressed by the Czech Supreme Court (the CzSC) and the Croatian Supreme Administrative Court.\textsuperscript{602} The CzSC, for example, refused to use EU law as an interpretative tool in relation to some provisions of the Czech contract law finding that “legality of the contract concluded between the parties on 31 of August 1993 must be decided according to the law that was valid at the time, which was done by both lower courts. On the contrary, laws and directives valid in the countries of the European Community are not applicable, as the

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\textsuperscript{600} Decision No. 76 of the Slovak case reporter for 2000: Zbierka stanovísk Najvyššieho súdu a rozhodnutí súdov Slovenskej republiky [Collection of decisions of the Supreme Court and courts of the Slovak Republic] (Vol. No. 4/2000, p. 55).


\textsuperscript{602} Decision of the Administrative Court of the Republic of Croatia No. Us-5438/2003-7 delivered on 26.10.2006, Official Gazette no. 16/2007. The Administrative Court accepted that the guarantees provided by the Stabilization and Association Agreement (SAA) between Croatia and the European Union are part of the relevant law since the SAA had been properly incorporated into the national legal system. However, the Court argued that EU acquis criteria, practices and interpretative instruments related to those guarantees cannot be a legitimate source of law if they had not been explicitly incorporated into the text of the SAA or transposed through some other legal act. For a critical analysis of the Croatian Administrative Court and its capacity to enforce EU law, see ŠINIŠA RODIN, Divergencija javnoga diskursa u Hrvatskoj i Europskoj Uniji - uzroc i posljedice, Politička Misao (2007). The English version is available at http://bib.irb.hr/datoteka/311183.Rodin-TS-SR-TS2-final.doc.
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Czech Republic has not been a member of the Community, which is why the Czech Republic is not bound by these laws. The obligatory force of the provisions referred to by the plaintiff cannot be inferred from any of the provisions of the Europe Agreement between the Czech Republic and the European Community as was speculated by the court of appeal. The question of harmonization of the legal system of the Czech Republic with the legal system of the European Community is gaining in importance. However, this cannot change anything in the outcome of this case.”

The post-socialist courts even avoid some parts of national statutory law. Some statutes in the post-socialist systems use the first few provisions to state the normative goals and principles underlying a particular statute. Such provisions are of a very general and open-ended character. Since they are not expressed in a rule-like form with a clear definition of the factual predicate or the precise command, courts simply do not rely on them in their decisions. Just as they consider that the statutes are a proper elaboration of the open-ended constitutional provisions, they equally consider that the clearer and more precise statutory provisions are a concrete elaboration of the statute’s normative goals. Kühn captured this dogma arguing that many post-socialist judges believe that the applying general principle would be “duplicating” the law. As a result, it is very difficult to find any openly normative (value-based or policy driven) arguments in the decisions of the CEE ordinary courts.

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The strict narrowing of the law has often resulted in rather insensitive conflicts between the ordinary and Constitutional Courts in many of the CEE legal systems. These conflicts were particularly intensive during the pre-accession period due to possible negative implications that the narrow understanding of national positive law might have had on EU accession efforts. The Constitutional Courts purported to “educate” or even “discipline” the ordinary courts in order to facilitate the harmonization of national legal systems with the EU *acquis* and thus foster the accession process.

The decision of the Polish Constitutional Court is a good illustration of such efforts. The Court argued that EU law formally has no binding force in the national legal system. However, due to the harmonization clause in the Polish Association Agreement with the EU, Poland was still “obliged to use its best endeavors to ensure that future legislation is compatible with Community legislations”. Furthermore, it found “that the obligation to ensure compatibility of legislation (borne, above all, by the parliament and government) results also in the obligation to interpret the existing legislation in such a way as to ensure the greatest possible degree of such compatibility.”

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606 Probably the harshest criticism of this style of adjudication came from one of the most prominent political figures in the CEE and Europe in general. In one of his addresses to the Senate of the Czech Republic, Vaclav Havel, then president of the Czech Republic, argued that the dominant perception of law in the post-socialist period “is mechanical, I would like to say senseless, application of law, which almost becomes an object of some cult. It is an approach toward the application of law which does not permit any control by ordinary common sense; neither does it allow for any consideration of the law’s sense, meaning or circumstances, any consideration of the probable legislative intent or even the core of law’s value in a hard case. Although the law is a human product, it attains almost metaphysical authority.” Quoted in KUHN, *Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement*, p. 563.

Kühn argues that the Czech Constitutional Court took a somewhat different line of argumentation to reach the same result. In the *Skoda Auto* decision, the Court apparently argued that an interpretation of Czech antitrust law in accordance with the interpretation of EU antitrust law developed by EU bodies is valuable since “*both the Treaty of Rome and the EU Treaty derive from the same values and principles as Czech constitutional law.*”\(^{608}\)

The Croatian Constitutional Court continued such pre-accession “educational” efforts. The Court found that the criteria, practices and interpretative instruments arising from the EU *acquis* specifically referred to in the Stabilization and Association Agreement between Croatia and the European Union (SAA) are not applicable as the primary source of law but rather as an interpretative tool. The Court stressed that the administrative bodies are obliged to apply the law in the same manner in which similar provisions have been applied in the EU legal order. The Court stressed that the harmonized national law needed to be applied in accordance with the purpose and spirit of their corresponding EU legal provisions. The Court argued that this did not entail that Community law has formally acquired a binding status, but it did entail that the “*national legal provisions regulating market competition have to be applied and interpreted taking into account rules, criteria and principles of the [Community] competition law.*”\(^{609}\)

However, the question is to what extent these efforts of the Constitutional Courts actually had any significant effect on the ordinary courts. For example, the EU “educational” efforts of the Croatian Constitutional Court seem to have very little if any influence on the Croatian judiciary. Out of 80 judges from three different regions in Croatia who participated in the judicial training organized by the Government’s Office for Human Rights regarding the enforcement of EU


\(^{609}\) Decision of the Constitutional Court of the Republic of Croatia *U-III / 1410 / 2007*. 

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antidiscrimination law, not a single one was aware of the decision of the Constitutional Court, although it had been delivered more than a year ago at the time.\textsuperscript{610}

On the other hand, Bobek speculates that “the practice of voluntary harmony in interpretation has occurred in hundreds of cases before the courts” in the Czech Republic.\textsuperscript{611} He argues that the post-socialist courts have frequently used EU law after accession to clarify ambiguous national provisions in disputes that predated the accession.\textsuperscript{612} Such a practice was purely voluntary since the disputes occurred before the accession to the EU and as such were supposed to be decided on the basis of national law of that time. At the same time, however, he provides little concrete evidence of this practice.

Moreover, some of the reported decisions from the Czech Republic suggest that the post-socialist courts have tended to welcome EU law to the extent that it could have provided them with a more specific meaning and hence more easily applicable legal rules. For example, in what Bobek calls a “leading case” regarding the practice of voluntary harmony in interpretation, the Supreme Administrative Court found that, although the 1992 Czech VAT Act did not provide an explicit answer to the question of value added tax policy at hand, the Court could rely on the Sixth VAT Directive providing more precise rules for a specific situation.\textsuperscript{613} The Court never examined the desirability of direct enforcement of the EU Sixth VAT Directive in the Czech legal system. In

\textsuperscript{610} The argument is based on the personal experience of participating as a lecturer in the professional training of the Croatian judiciary. The seminar “The Implementation of the Suppression of Discrimination Act” for municipal and county court judges, April 16, 2009 at the County Court in Osijek organized by the Croatian Government’s Office for Human Rights in collaboration with the Judicial Academy of the Croatian Ministry of Justice. See the website of the Croatian Government’s Office for Human Rights related to elimination of discrimination http://www.suzbijanjediskriminacije.hr/index.php?option=com_content&view=frontpage&Itemid=1&lang=en

\textsuperscript{611} KUHN & BOBEK, What About That “Incoming Tide”? The Application of EU Law in the Czech Republic.

\textsuperscript{612} MICHAL BOBEK, A New Legal Order, or a Non-Existent One? Some (Early) Experiences in the Application of EU Law in Central Europe, 2 Croatian Yearbook of European Law & Policy (2006), pp. 10-11.

providing EU tax law with direct effectiveness in the domestic legal system before the moment of accession, the Court avoided analyzing the precise implications that such a decision could have for the interests of the parties or whether such an effect would be desirable from the viewpoint of the Czech VAT policy. Instead, the Court drew its conclusion from the mere fact that the provisions of the Czech VAT Act were modelled on the EC VAT legislation. According to the Court, “[i]t is therefore clear that in framing the draft of the Value Added Tax Act (the proposal was made 4. 11. 1992, the Act was adopted on 24. 11. 1992 and became effective 1. 1. 1993) the EC legislation …was the main source of inspiration for the legislature which clearly intended to adopt such legislation, the value added tax, which would be compatible at least with the basic features of the Sixth Directive…”

Interestingly, the Court found it necessary to justify its decision through its loyalty to the Czech legislator. The loyalty principle is further confirmed by the Court’s finding that domestic courts are allowed to interpret the Act differently from the Directive’s text only if the “Czech legislature deliberately chose a different wording” deviating from the European model.

Moreover, the Court argued that the key evidence that the Act followed the EU Directive could be found in the legal text. According to the Court, it was clear that the Act followed the Directive from “the fact that the text of the provisions of Art 2b, paragraph 3 of the Act is in many respects an exact transfer of the contents of certain parts of Article 9 of the Sixth Directive, which regulates the VAT place of supply of services. It is therefore obvious that in interpreting Art 2b, paragraph 3 of the Act one should essentially act in such a way that this interpretation confirms with the relevant provisions of the Sixth Directive, in particular with its Article 9…”
This example confirms the words of one prominent judge of the Polish Supreme Court who argued that the harmonious interpretation “has mostly been of ancillary or instrumental nature” and, in the majority of cases, the purpose of the reference to EU law “was to support the argumentation concerning an already formulated interpretation of Polish law.”

It is likely that a significant number of the cases in which the post-socialist courts relied on EU provisions featured this type of “harmonious interpretation”. In many of them, the post-socialist courts referred to EU provisions as a support for their holdings even though it was rather questionable whether the dispute was in any way related to the application of EU law.

The argument that the post-socialist courts welcome EU law to the extent that it provides them with clearer and textually more determinate rules corresponds to another important feature of the post-socialist jurisprudence. As critics have noted, similarly to their socialist predecessors, the post-socialist courts prefer executive regulations and decisions over more general statutory rules since they tend to be technical in character and mechanical in application. This preference for “executive” rules is a result of a particular understanding of their authority. Scholars have


615 In addition to Poland, Kühn and Bobek’s recent research suggests that this has also been the case in Slovakia. However, they are much less clear about the situation in their domestic legal systems (Czech Republic). ZDENĚK KUHN & M. BOBEK, Europe Yet to Come; the Application of EU Law in Slovakia, in The Application of EU Law in the New Member States - Brave New World (A. Lazowski ed. 2009) p. 12, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1442504.


suggested that their preference for such rules, even when it is not clear whether they are in agreement with the statutory provisions, demonstrates that the post-socialist courts do not respect the hierarchy of legal rules. However, as long as executive regulations satisfy the procedural requirements prescribed by the higher law, the post-socialist courts will avoid questioning their substantive compliance since they perceive it as a challenge to the authority they ought to respect.

The narrowing of positive law and the preference for “executive” rules are merely a futile attempt to facilitate a post-socialist understanding of adjudication. These courts strongly favor clear-cut rules that can be easily applied. They are also committed to the idea that a proper legal rule has a correct meaning, which further entails that any legal dispute must have a logically correct solution. In that sense, as Rodin has noted, when post-socialist judges talk about their task, they talk about the “application of the law” in a way that frequently confuses the method with the function of adjudication. As a rule, they give priority to the enforcement of the wording of legal rules, while they perceive the resolution of the dispute as the logically predetermined consequence of the rule enforcement. Clear, precise, and mechanically applicable rules are of vital importance to such an understanding of adjudication.

The same understanding is directly reflected in their style of judicial reasoning. Post-socialist courts will justify their holdings exclusively in terms of the positive text of the applied rule. Their decisions are “free” from any overt normative considerations based on legal principles, policy justifications, or value arguments. This is a direct consequence of the fact that post-

620 Id.
socialist judges as well as the post-socialist legal profession in general still perceive the law as strictly separated from justice (social justice or individual fairness). From the perspective of a post-socialist judge, the law consists purely of “positive rules as independent actors”. Normative considerations are left to the realm of political decision making.

The VAT decision of the CzSAC discussed above to a great extent illustrates this style of reasoning. As Bobek and Kühn argue, “the courts have accepted the new legal order even for the period and the cases they were technically not obliged to.” They relied on EU law to a great extent because their post-socialist legal system “suffered from great legislative instability”. However, as the reasoning of the CzSAC shows, they did not justify their decision to rely on EU law when faced with the textual indeterminacy of their national statutes in normative or policy-based terms. They did not even justify it in terms of some notion of improved legal certainty. They justified it as if they were “technically obliged” to interpret their national statutes in accordance with the rules provided by EU law.

Another important feature of the post-socialist style of adjudication is a certain aversion towards the notion of precedents and the relevance of case-law in general. The post-socialist courts are still convinced that the only way in which they make the law is “inter partes”. They accept that every legal rule requires its final concretization through a decision in a particular case. However,

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622 Varga calls this understanding of the law a “dull rule positivism” in which “the law (just) is merely composed of laws (lex).” VARGA, Transition to rule of law: on the democratic transformation in Hungary, p.142.
623 For example, one of the most prominent legal academics in Croatia claims that “[i]n modern states organized in accordance with the principle of the separation of powers, the judicial power does not, and cannot, have any sort of ‘policy’, nor may its function of applying the law be described in that way.” ŽELJKO HORVATIC, Problem odnosa u zakonu propisane i sudskim presudama primijenjene kaznenopravne represije prema počiniteljima kaznenih djela, 11 Hrvatski ljetopis za kazneno pravo i praksu (2004), p. 388. Quoted by ĆAPETA, Courts, Legal Culture and EU Enlargement, p. 33.
624 KÜHN & BOBEK, What About That “Incoming Tide”? The Application of EU Law in the Czech Republic.
625 Id.
the law they make in the form of a judicial ruling is valid only for the specific parties involved in the specific dispute and is predetermined by the plain meaning of the words in the rule they were applying. The idea of binding precedents that implies law-making based on normative choices therefore seems foreign to their understanding of the judicial function. Consequently, the post-socialist courts very rarely refer to the decisions of other courts, including the decisions of higher courts.

This does not mean that these courts consider case law completely irrelevant. The post-socialist courts will tend to welcome “precedents” of their highest courts if such decisions are presented as correct interpretations of a vague legal text. In reality, such “precedents” are primarily an effort of the post-socialist legal systems to ensure the determinacy of the legal text.

All post-socialist legal systems insist on the power of their judges to decide disputes in accordance with their independent understanding of the law while in the same breath they require from them to follow the so-called uniformity decisions of their Supreme Courts. For example, Art 3 of the Hungarian Judiciary Act provides that “[j]udges are independent; they shall render their decisions based on the law, in accordance with their convictions. Judges may not be influenced or instructed in relation to their activities in the administration of justice.” However, the Act also provides the Supreme Court with the power to establish a special judicial chamber whose goal is to consider divergences of doctrinal opinions in practice of the lower

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courts and deliver decisions that would make that practice uniform. The decision is delivered in the special abstracto proceedings and it does not apply to parties in any particular case. However, Art 25/c of the Act provides that “the Supreme Court shall adopt an obligatory uniformity decision applicable to the courts”.

The Croatian legal system developed an even more peculiar scheme of ensuring interpretative uniformity. The Croatian Judiciary Act provides that all appeal courts need to establish the so-called “Evidencija” department. Its purpose is to monitor the consistency of judicial practice within a particular court. If Evidencija considers that a particular decision of the judicial council departed from some other decision of the same court, it will block the delivery of the decision to the parties even after the decision was delivered in a chamber session open to the public.

Evidencija will inform the President of the Judicial Department of a particular court. The Judicial Department consists of all judicial councils of a particular court responsible for a particular area of law (civil law or criminal law). The President will then initiate a special session of the department that has the power to decide that the disputed decision must be revised. Again, these uniformity proceedings are held in abstracto and the decision is binding for the particular council that departed from the dominant interpretation of the law. In contrast to the Hungarian system, even the lower courts can deliver uniformity decisions which are then binding only for their

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631 Art. 32/6 of the Hungarian Act on the Organization and Administration of Courts.
judicial councils. The uniformity decisions of the Supreme Court are binding for the judicial councils of that Court as well as the second instance courts.634

Regardless of some differences between uniformity efforts favored by these various legal systems, their aim is the same. Doctrinal differences in the interpretation of the law are in conflict with the conviction that a proper legal rule requires a determinate correct meaning. Accordingly, the purpose of “uniformity precedents” is to eliminate differences in judicial interpretation and provide “the correct” reading of the law.

The preceding arguments show that the CEE post-socialist courts are rather anxious about textual inconclusiveness, vagueness or openness. Unfortunately for them, they had to live with this anxiety on an every-day basis in the last decade or so, especially during the accession period. On the one hand, the post-socialist courts had to deal with the legal provisions that were highly unstable due to the fast pace of transitional reforms. On the other hand, the post-socialist courts became exposed to a much wider range of disputes, many of which were far more challenging than anything that they had been expected to deal with in the socialist period.635 The post-socialist courts thus quickly realized that the positive law of the post-socialist transitional period did not offer bright-line solutions to many of these “hard cases”.

Their reaction has been interesting. Post-socialist judges have frequently expressed their skepticism about the ability of a national democratic legislature to ensure the quality of legal provisions. In their view, the reason why the legal system became increasingly inconclusive

634 The Czech Republic has a somewhat different system of ensuring doctrinal uniformity of judicial practice. See Art. 20 of the Zakon o soudech, soudech, předsedících a státní správě soudů a o změně některých dalších zákonů [Law on Courts and Judges], Official Gazette 6/2000 Sb.
during the period of transition was the failure of the legislative branch to ensure high-quality legal rules, and not because the hard cases could not be solved on the basis of the legal text. In all post-socialist legal systems, one can find frequent complaints about legislative chaos, a great deal of which was caused by the process of EU accession.  

Two fears have been frequently related to this chaos. First, it has been feared that the courts will not be able to follow the tempo of the “legislative stampede.” Second, there were frequent doubts that the legislators will not have the capacity to rise to the challenge of the task, which will result in a legal system full of ambiguities, conflicts, loopholes and lacunae.  

This reaction shows that, notwithstanding the transitional challenges, the post-socialist courts have not lost their faith in legal determinacy or denounced their narrow commitment to legal text. Accordingly, the post-socialist courts do not think that their function has changed. They have accepted that their function has become much more challenging since it is often not clear what the provision they are supposed to apply requires from them. However, at the same time, the uncertainty has reaffirmed their belief that their primary task is to enforce authoritative legislative commands embodied in the legal text of positive rules.  


See, for example, MAREK ZIRK-SADOWSKI, Transformation and Integration of Legal Cultures and Discourses - Poland, in Spreading Democracy and the Rule of Law? The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders (Wojciech Sadurski, et al. eds., 2006).  

See ĆAPETA, Courts, Legal Culture and EU Enlargement, p. 43.  

Discussing the independence of the post-socialist courts, Bobek rather critically argues that, in the post-Communist era, “judicial cadre is a class of subservient technocrats, who (still) seek refuge in mechanical and formalistic interpretation of the law.” BOBEK, A New Legal Order, or a Non-Existent One? Some (Early) Experiences in the Application of EU Law in Central Europe, p. 43.  

See WOLFGANG WEIl, East Enlargement and the Legal Discourse in the EU (2006), paper presented at the Cross-cutting workshop “Integration or Absorption? Legal discourses in the enlarged Union organized by the University of Hanover, Germany, September 28-30, 2006 available at http://www.mzes.uni-
socialist courts still share the same strong reluctance towards any type of normative decision making that was characteristic of their socialist predecessors. 641

5.2.3. Coping with Indeterminacy

Faced with this serious challenge to their conventional understanding of law and the judicial function, the post-socialist courts developed several ways of restoring the determinacy of legal systems tainted by the imperfect rules threatening to burden them with the responsibility for policy decisions or value-based choices.

One obvious strategy of restoration is the evasion of indeterminate rules. For example, many post-socialist systems have included some version of the prohibition of discrimination between men and women, if not since the socialist period then since the period of the EU accession negotiations. Unsurprisingly, these antidiscrimination provisions were open to different readings. That is why it seems rather unlikely that the striking absence of sex discrimination judgments in these legal systems is a coincidence. One possible explanation may be that acts of discrimination have so far been redefined into some more familiar and/or more determinate question of law. 642

Unfortunately, these legal systems still favor a culture of opaqueness in relation to making

mannheim.de/projekte/typo3/site/fileadmin/research%20groups/2/Hanover2006/Weiss%20Enlargement%20and%20Discourse%20Hanover06.pdf.

See, for example, ZIRK-SADOWSKI, The Judicature of Polish Administrative Courts after the Accession to the EU, p. 25 available at http://www.eif.oeaw.ac.at/downloads/workingpapers/wp15.pdf.

642 Being an active participant in several projects involving training of Croatian judges in antidiscrimination law and EU law in general, I have been told in private discussions with judges participating in the program that both judges as well as lawyers tend to deal with potential discrimination cases on the basis of other more determinate rules. One example of such strategy is deciding a potential discrimination case on the basis of the labor law guarantee requiring employers to justify their dismissal decisions by the reasons listed in the Labor Act. If a plaintiff proves that such reasons were absent, a court would find that the dismissal was unjustified without getting involved into a discussion of discrimination. Another interesting strategy that recently gained prominence in Croatia is to redefine discrimination into a violation of a worker’s personal dignity (popularly called mobbing). Under this strategy, a court can simply find that a person has been individually harassed at work, which was psychologically damaging for her, and decide that her personal dignity was violated without getting involved into a discussion of sex-based discrimination and sexual harassment.
judicial decisions available to the public, especially those at the lower levels where these disputes are being decided. Moreover, due to the obscure manner in which post-socialist courts justify their rulings, especially the higher courts that tend to publish their decisions, it is often difficult to fully determine the actual facts of a particular dispute. For these reasons, it is hard to establish the extent of this evasion strategy. However, statistical data concerning the number of proceedings before the Zagreb Municipality Civil Court (ZMCC) that are in some way related to the question of discrimination is indicative. Out of 89 proceedings, only 30 of them have been classified and argued as discrimination claims. The greatest majority of proceedings – 52 – have been classified as claims of violation of a worker’s personal dignity (popularly called mobbing). It is rather likely that many of these proceedings actually involve sexual or ethnic harassment, which the law explicitly defines as a form of direct discrimination. Data such as this offer strong support to the claim that the post-socialist courts tend to avoid engaging in discrimination adjudication. The other strategy is a version of “systemic” interpretation. If post-socialist courts cannot determine the meaning of a particular provision based on the literal meaning of its terms or at least by following the “logic” of the act containing the flawed provision (noscitur a sociis), they will turn to other parts of the legal system. There are two standard versions of this “systemic” interpretation.

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643 However, the post-socialist courts are not the only ones using this strategy of evasion. For a similar approach used by the French courts, see Ph. Martin, Droit social et discriminations sexuelles: a propos des discriminations generees par la loi, Droit Social (1996), p. 563.

644 The ZMCC is probably the largest court in CEE. It consists of over 300 judges and judicial advisors. On average, each judge decides between 100 and 200 disputes annually. The research I conducted for the purposes of this thesis covers the period of January 2005 – October 2010. The research was conducted during September –November 2010.

645 Out of 30 proceedings classified as discrimination claims, 24 involve a general claim of discrimination, which means that the parties did not specify a particular ground of discrimination but simply argued that they have been treated less favorably. Only 2 proceedings have explicitly involved the sex discrimination claim.

646 Out of 52 proceedings classified as violations of a worker’s personal dignity, 30 involve female claimants.
If indeterminacy results from a conflict between two provisions, the post-socialist courts will tend to rely on certain systemic precepts that facilitate the functioning of the legal system. Frequent examples of such precepts are *lex specials derogate legi generali* or *lex posterior derogate legi priori* or *specialibus non derogant*. These purport to draw their authority both from the very “logic” of the legal system and its traditional “classical Roman” roots. An example of this strategy can be found in the line of the recent Czech post-accession decisions concerning the application of the *Protocol on asylum for nationals of member states of the European Union* on Slovak asylum seekers most of whom were of Roma origin.\(^{647}\)

The case concerned the appeal against the administrative decision denying political asylum to a Slovak woman because she was a citizen of an EU Member State defined by the Protocol as a ‘secure State of origin’.\(^{648}\) Acting upon the appeal, the Municipal Court agreed with the administrative decision and dismissed the application without examining the actual circumstances of the concrete case. The problem was that the Czech Asylum Act allowed an examination of circumstances of a particular case that could dispute the presumption of the “safe state”. The EU Protocol was not as explicit but it did provide that a Member State could accept the application from a citizen of another EU state under certain conditions. The Prague Municipal Court acted as if the Protocol required an automatic denial of applications from EU Member States and thus denied the applicant the possibility of examining her special circumstances. At the same time, the municipal court did not find that the EU Protocol was in


conflict with national law based on the EU principle of supremacy. Instead, the court argued that the Protocol had a status of *lex specialis* in that particular case.\(^{649}\)

This indeed allowed the court to have its cake and eat it. The *lex specialis* argument allowed it to avoid the politically sensitive issue of a conflict between the EU and national law. At the same time, it allowed it to justify its preference for a mechanically more applicable rule. Most importantly, however, the court never considered the concrete consequences of such a clear-cut but strict position for the applicant nor did it evaluate the rule’s normative desirability, especially in light of the fact that Roma were often victims of racial discrimination in the CEE countries.\(^{650}\)

The Supreme Administrative Court affirmed the judgment.\(^{651}\)

The CzSAC was more concerned with the possibility of a conflict between EU and national law than with the implications of denying applicants the possibility of a review of their special circumstances. The Court held that it “*has no doubt that the provisions of the Protocol are directly effective Community law which national courts and authorities must apply directly…*”

However, at the same time, it found that “*that was not the reason to apply the principle of priority of application of Community law over national law to this situation, since the national legislation was not in conflict with Community law. Nothing prevented the defendant from enforcing the contents of the Protocol using the provisions of § 16 paragraph 1 point e) of the Asylum Act.*”

\(^{649}\) Id.


Based on this finding, the CzSAC confirmed the disputed practice of the Czech administrative authority that automatically rejected asylum applications from citizens of EU states without a possibility of examining their special circumstances. The CzSAC never engaged in any normative analysis of such “harmonized” enforcement of the Asylum Act.

The asylum decisions are an example of the manner in which the post-socialist courts tend to use the systemic principles such as *lex specialis*. As illustrated by the decision of the Prague Municipal Court, they do not treat them as principles inviting normative or policy arguments based on the desirability of concrete implications of their decisions but rather turn them into clear-cut rules. Consequently, it is again suggested that it is the legal text and logic that decide concrete disputes, and not judicial normative considerations.

The asylum reasoning of the CzSAC suggests that they may use the principle of the EU legal order in a similar fashion. As seen, the CzSAC justified its decision to deny the appeal using the EU principles of direct effect, supremacy, and national autonomy in procedural matters.\(^6\) It argued as if these principles required the national administrative authority to deny automatically the asylum applications ignoring the fact that they offered an equally plausible possibility of normative evaluation of asylum applications on a case-by-case basis.

We can find the same tendency even at the level of constitutional courts. For example, the Czech Constitutional Court held that ordinary courts have a duty to interpret national contract law passed six years before accession to the EU *fully* in accordance with the relevant EU law.

\(^6\) For similar examples of the “formalization” of EU law in one of the Baltic post-socialist legal systems, see YVONNE GOLDAMMER & ELŽE MATULIONYTĖ, *Towards an Improved Application of European Union Law in Lithuania*, 3 Croatian Yearbook of European Law & Policy (2007), pp. 316-317.
Directives. Having in mind the decisions of the CzCC discussed above, this would not be so unusual if the Court did not argue that its ruling followed from the EU principle of indirect effect as defined by the ECJ in the *Faccini Dori* and *Marleasing* decisions. However, the ECJ’s indirect effect doctrine does not require national courts to interpret their national provisions in compliance with the relevant EU Directives regardless of the circumstances but *only to the extent* that such interpretation is allowed by the text. In other words, national courts are invited to “stretch” their national provisions in order to accommodate a conflicting EU law in light of circumstances specific to a particular case. They are not only required to choose between two competing meanings of the same provision. They are also required to choose whether they will grant primacy to the EU legal order or stay loyal to their national legal order. By ignoring this characteristic of the principle of indirect effect, the CzCC disregarded its rather complex normative background and turned it into a mechanical rule.

A similar method that post-socialist courts frequently use to avoid deciding disputes on the basis of indeterminate provisions is to focus narrowly on and strictly enforce legal formalities. Kühn thus argues that “[w]hile many examples…indicate that post-Communist ordinary judges are strong adherents to the values of formalism and textual formalism, many other examples show that formalism and textual formalism might serve a quite different agenda. Too often it seems that post-Communist judges hesitate to go into merits of a case, preferring to dispose a case on

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653 See further BOBEK, *A New Legal Order, or a Non-Existent One? Some (Early) Experiences in the Application of EU Law in Central Europe*.


655 See, for example, Case C-212/04 *Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos (ELOG)* ECR [2006] I-06057, para. 111; Case C-555/07 *Seda Kucukdeveci v Swedex GmbH & Co. KG* ECR [2010] NYP, para. 48.
formal grounds. Formalism is a veil hiding the real reason for the decision – inability to decide a complex issue of a case or even hostility to the substantive outcome mandated by the law.”

The second version of post-socialist systemic interpretation is even more interesting. When faced with indeterminacy inherent in a particular provision, the CEE post-socialist courts will assume the position of absolute unity of legal text within the legal system. Hence, they will search for a definition of the problematic term in other statutes or executive acts even though it serves a very different purpose or notwithstanding the fact that the legislator would have been uncomfortable with the results produced by such application of the law.

Kühn’s extensive research of adjudication in the CEE post-socialist legal systems contains numerous examples of this version of systemic interpretation. However, by far the most vivid example is the decision of the Czech court regarding the compensation to relatives of the victims of Nazi concentration camps. Troubled by the term Nazi concentration camps, the court relied on the definition of prisoners of the Nazi regime in the socialist statute that was several decades old and unrelated to the purpose of the provision they were interpreting. The socialist statute defined prisoners of the Nazi regime as persons who were imprisoned before May 5, 1945. By insisting on this statutory definition, the courts denied the right to compensation to the relatives of those victims who died of consequences of Nazi torture after that date.

KÜHN, The Changing Face of Central European Judiciary, p. 190. Kühn argues that dismissing cases for trivial reasons is a favorite tool of post-socialist courts to lighten their increasing workload and create the appearance of higher efficiency. He provided an example in which the Czech court dismissed a claim after a four-year delay of the beginning of the proceedings because the plaintiff wrongly designated as the defendant the “municipal authority” instead of the “municipality that acts through its authority”. By the time the plaintiff amended his pleading, he realized that he had lost the right to file a new claim due to the four-year delay.

Id. at pp. 188-93.

Such a decision prompted an almost angry reaction from the Czech Constitutional Court, which is probably the most outspoken critic of the formalist adjudication practiced by the Czech ordinary courts. Id.
A decision of the Croatian Administrative Court is another telling example. Only two weeks after it denied any authority to EU law in the Croatian legal order, the Administrative Court commended the Agency for the Protection of Market Competition. The Agency had relied on the competition rules delivered by the European Commission in their decision making although these EU provisions were not published in any official gazette. Moreover, they had a retroactive effect. The Court argued that this practice facilitated regulatory determinacy since it compensated for certain gaps in statutory law.  

Several recent decisions indicate that many post-socialist courts quickly discovered the potential that the EU legal order offered for systemic interpretation. Accordingly, they have shown openness to EU provisions that offer more determined definitions of terms whose meaning was not clearly defined by national law, such as “public undertaking”, or that could make difficult issues such as asylum seem simpler than they actually are.

The third strategy is related to the role of Supreme Courts in the CEE post-socialist legal systems. Ironically, the dogmatic conviction that any dispute can be resolved exclusively on the basis of legal text accompanied by the consequent lack of interest in the practice of other courts has frequently resulted in significant discrepancies in the application of law by post-socialist courts. To limit these discrepancies, post-socialist legal systems vested in their Supreme Courts (SCs) the difficult task of securing the uniform application of legal rules throughout the whole legal system. Post-socialist SCs have thus become the final authorities that can determine the correct application of the law and thus ensure the equality of their citizens before the law.

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659 See text related to fn. 602.
660 See BOBEK, A New Legal Order, or a Non-Existen One? Some (Early) Experiences in the Application of EU Law in Central Europe, p. 9-11.
However, the manner in which the SCs in these systems perform this duty is rather particular. The SCs exercise their authority of unifying judicial practice in several ways. The conventional way is for SCs to establish the “correct” reading of a problematic rule in their regular decisions resulting either from an appeal in a concrete dispute or from an extraordinary revision of final decisions. As seen above, this is further strengthened by the so-called “uniformity proceedings” the purpose of which is to eliminate doctrinal differences within the same court. However, since these SCs decide thousands of cases every year, it is highly unlikely that their “correct” interpretations will reach lower courts, especially since they only recently made their decisions accessible to the public.

To deal with these problems and strengthen their interpretative position in the judicial system, some post-socialist SCs have developed a practice of issuing the so-called sententiae. These acts are basically an extremely compressed version of the SC decisions. They include the basic facts and legal rules that the SC applied in a particular case. However, the key part is the official holding of the SC in a particular decision. The holdings are expressed in a very rule-like form that makes them more easily applicable by ordinary courts in future cases when the court is confronted with similar circumstances.

However, the most important method through which the post-socialist SCs exercise their authority of determining the correct application of the law is their power to issue the so-called

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661 See supra text related to fns. 631-635.
663 Some examples of these judicial acts are: “damage sustained during a sport event organized by an employer is not sustained in the course of employment” or “there is no causal link between the damage of a motor vehicle sustained during transportation from the accident site and the accident for which the insurer is liable to compensate damages.” See RODIN, Functions of Judicial Opinions and the New Member States, p. 379.
legal understandings. Legal understandings are interpretative statements issued by the Supreme Court in abstracto, independent of any particular dispute. The purpose of such judicial declarations is to provide the correct reading of a particular statutory provision, which is why post-socialist courts do not perceive them as law-making. In the majority of post-socialist legal systems, these decisions are not formally binding for lower courts. However, legal understandings of the SCs are also expressed in a rule-like form that makes them far more similar to a positive command than to a judicial decision. Accordingly, since they facilitate mechanical application of the law, they have significant practical authority among the lower courts. What makes this instrument particularly problematic is that, in some post-socialist legal systems, executive bodies are allowed to ask the Supreme Court to provide a legal understanding of a particular provision within the framework of a proceeding before a lower court.

In addition to judicial instruments, some post-socialist systems provide another striking instrument for facilitating the determinacy of the legal system and securing a subordinate position for the judiciary. They have preserved the socialist instrument of “authentic

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665 However, see Art 35 of the Croatian Judiciary Act. Zakon o sudovima, Narodne Novine 150/05, 16/07, 113/08, 153/09 [Official Gazette No. 150/05, 16/07, 113/08, 153/09]. Articles 24-25 of the Hungarian Act on the Organization and Administration of the Courts suggest that they are also binding in Hungary.
666 In Croatia, the legal understandings of the Supreme Court have acquired an even greater relevance after the recent statutory reform of judicial decision-making. The recent amendment to the Act on Judiciary (Official Gazette no. 150/05) allowed the State Attorneys to submit to the Supreme Court the Request for the unified application of the law if they believe that the ordinary county courts do not have the same understanding of a particular positive law (Art 59(1)). On the basis of this request, the Supreme Court could stop all ongoing proceedings in the Republic dealing with a particular issue that was the subject of the Request until it delivered its legal understanding on the unified application of the law (Art 59/6). Such legal understandings were binding for all courts and, to some extent, could even have a retroactive effect (Art 59/7). We can find a similar solution in Serbia. In Poland, the legal understanding (the statement) of the Supreme Court can be requested by “the Spokesman for Citizens’ Rights, the Public Prosecutor General or, within his/her competence, by the Spokesman for the Insured.” (Art 60/2 of the Act on the Supreme Court. See http://www.sn.pl/english/sadnajw/index.html). Such statements have a status of “legal principles”. (Art 61(6)). In the Czech Republic (Act on the Judiciary, Articles 14/30 and 123/3. Official Gazette no. 6/2002) and Slovakia (Act on the Judiciary, Articles 21/3 and 21/23. Official Gazette no. 757/2004), the statements of legal understandings can be requested by the Minister of Justice.
interpretation” that allows the parliament to “clarify” the “correct” meaning of already existing statutes.668

668 The institute of authentic interpretation can be found in Croatia, Slovenia and the Czech Republic until recently. In Croatia, the Constitutional Court explicitly accepted such power as inherent in the legislative function of the parliament. Decision of the Constitutional Court of the Republic of Croatia No. U-II-1265/2000 dated 21. September 2004. More importantly, declarations of authentic interpretation are regularly submitted by ordinary courts regardless of the fact that they may have retroactive effects. See the decision of the Croatian Supreme Court Usp. Rješenje VSRH Broj: Rev-629/00-2.
Chapter VI

Post-socialist Formalism as a Barrier to Sex Equality

6.1. Introduction

Excessive judicial formalism, which has so far been characteristic of the CEE post-socialist adjudication, will continue to be one of the most important barriers to the enforcement of EU sex equality guarantees for quite some time.

The previous chapter has shown that the CEE post-socialist courts are rather hostile towards open-ended norms that invite courts to deal with challenging value-based questions. Yet, as shown in Chapter II, EU sex equality guarantees are profoundly open-textured. Moreover, due to a particular pragmatic approach to discrimination disputes favored by the ECJ, these guarantees require that national courts assume primary responsibility for challenging deep-rooted structural barriers to real-life equality between men and women. Consequently, it is fair to assume that these courts will not be particularly sympathetic to EU sex equality guarantees. Moreover, in light of their narrow rule-bound understanding of adjudication, we can expect that they will invest significant effort in avoiding responsibility for normative decisions implied by EU sex equality guarantees. This chapter will discuss several strategies of evasion and point out two ways in which the post-socialist style of adjudication is likely to impede the enforcement of equality rights in the CEE legal systems. First, in their attempt to escape the responsibility for normative choices, the CEE post-socialist courts will try to provide sex equality guarantees with a rule-like character. Accordingly, they will narrow their scope and make them as mechanically applicable as possible. Second, to ensure their applicability, the post-socialist courts are likely to
read the open-textured sex equality guarantees narrowly in accordance with the understanding of equality between men and women that they inherited from the era of the CEE “really existing” socialism.

6.2. Formalizing Equality

One of the most striking features of equality jurisprudence in the CEE post-socialist legal systems is the significant discrepancy between the number of decisions concerning sex and race discrimination. In the last decade, the number of race discrimination decisions increased significantly. Today we can talk about a rather extensive race equality case-law in the CEE legal systems. However, the structure of this case-law is rather monotone. Almost all of these decisions concern allegations of discrimination against Roma citizens and almost all of them concern rather overt expressions of discrimination.

At the same time, the number of sex equality decisions has consistently remained strikingly low.669 There are two key reasons that can help explain this discrepancy.

The first reason concerns the visibility of discrimination. There is hardly any doubt that the CEE societies have significant problems with racism of the most serious character when it comes to the position of the Roma minority in these societies. Racial discrimination against Roma has a long and bitter history in the CEE, which also includes the socialist era, and it is still firmly entrenched in every aspect of social life. Acts of discrimination against Roma are frequent and

669 However, the research of the Zagreb County Municipality Court antidiscrimination proceedings in the period of January 2005 – October 2010 showed that, out of 89 proceedings that were somehow related to the question of discrimination, only two were explicitly classified as sex discrimination. In contrast, 4 were classified as ethnic discrimination. However, 52 proceedings were classified as claims of violation of a worker’s personal dignity (so-called mobbing). Since in 30 proceedings the plaintiffs were female employees, it is reasonable to assume that a significant number of these proceedings actually involve sexual harassment.
frequently overt. In that sense, the growing number of cases in this area is not surprising. If anything, the number is still disproportionally small in relation to the widespread scope of the problem.

In contrast to such overt practice of social discrimination against Roma, the CEE post-socialist societies are still formally committed to the idea of equality between men and women. More precisely, they perceive sex equality in a way that was characteristic for the era of “really existing” socialism. In their view, equality between men and women is still based on the notion of inherent sex difference. Accordingly, men and women are frequently given different social roles, which are (often more formally than actually) considered equally valuable. Consequently, although these legal systems may be committed to the liberal ideals of individualism and personal freedom, when it comes to relations between the sexes, essentialism still tends to trump autonomy.

This particular understanding of gender equality has two broad social implications. On the one hand, pure prejudice has always been harshly condemned and as such is certainly not as frequent as in the context of race. On the other hand, these societies have a rather high level of tolerance for sex stereotypes that are related to conventional understandings of desirable social/gender roles for women and men. Consequently, sex discrimination is more sophisticated and difficult to detect.

671 Judges who participated in the research of antidiscrimination proceedings at the Zagreb Municipality County Court considered that a great majority of claimants cannot recognize discrimination. Although their description of facts often suggests that they were discriminated against, pleadings submitted by plaintiffs and their legal representatives rarely involve the claim of discrimination. Moreover, many of the complainants consider that any violation of their rights is immediately discrimination since they have been treated less favorably from those whose rights have not been violated. At the same time, most of them simply cannot recognize that the unfavorable practice
The second reason is of an institutional character. What certainly greatly contributed to the increase in race equality decisions is an admirably organized network of non-governmental organizations (NGOs) for the protection of the rights of Roma minorities. A great majority of the decisions are the result of their legal efforts and financial support to victims of discrimination. Unfortunately, NGOs for the protection of women's rights have not been so oriented towards legal processes and have mostly focused on the political arena. In the context of sex equality, litigation is still rather underdeveloped while the awareness and understanding of antidiscrimination law among the legal profession remains rather low. The poor culture of litigation, lack of financial support for legal efforts, and the length of judicial proceedings in the labor law context have certainly dampened enthusiasm regarding the possibility of judicial protection of the right to equal treatment. As it has been argued, “[a]s persons involved in gainful activities are almost always dependent on earnings from those activities, lengthy adjudications of disputes are a burden for them.”

The discrepancy between the number of gender discrimination and race discrimination cases has had one major practical consequence for this research. Due to the limited size of the sex equality jurisprudence, I have also significantly relied on race equality case-law. Sex and race discrimination are certainly two sociologically different phenomena. However, both the EU and CEE post-socialist legal systems use the same legal instruments to deal with these two problems.

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672 OPEN SOCIETY INSTITUTE, Monitoring the EU Accession Process: Equal Opportunities for Women and Men, p. 25.
673 KOLDINSKÁ, Gender Equality: Before and After the Enlargement of EU: The Case of the Czech Republic, p. 251.
Moreover, as we shall see, the way in which post-socialist courts perceive discrimination is independent of the specificities of these two phenomena. It is primarily determined by two things. On the one hand, it is determined by their perception of “good” law and their own function. On the other hand, it is equally determined by the conceptual doctrinal solution that they inherited from their socialist past.

Another notable feature of equality case-law is an almost complete absence of indirect discrimination decisions. Almost all of the equality decisions are constructed as concerning direct discrimination only. Since the following chapter deals with the relation between the post-socialist adjudication and indirect discrimination in more detail, suffice it to say here that the absence of indirect discrimination decisions seems to be the result of the aversion that post-socialist courts have towards complex legal instruments that entail sensitive value-based choices.

The same aversion is illustrated by the manner in which the post-socialist courts structure and apply the instrument of direct discrimination, which is the focus of this chapter. One of the key features of equality decisions is the “mechanization” of the antidiscrimination guarantee by the courts. Their decisions in the context of sex and race equality show that the post-socialist courts have tried to make direct discrimination guarantees more determinate. To achieve this goal, the post-socialist courts have reconstructed the prohibition of direct discrimination in a conventional formalist fashion characteristic of these legal systems and cast it as a strict rule that contains a rather clear factual predicate that can be applied in a relatively easy and “objective” manner.

Accordingly, to find that a particular action constituted direct discrimination, the court needs to establish the concrete perpetrator and his action, the concrete victim and her damage, and a clear causal link between the action and the damage. Most importantly, the causal link between the
action and the harm must be grounded in the perpetrator’s prejudice. As explained in the following section, it is this focus on prejudice that is the key characteristic of their approach to discrimination and the feature that distinguishes it from the approach favored by the ECJ. If any of the above elements cannot be established with a high degree of certainty, it is unlikely that a post-socialist court will be ready to assume responsibility and find that a particular employer or service provider committed direct discrimination.

Some of the decisions that have already been mentioned above are good examples of this narrow approach to discrimination that is reminiscent of criminal law adjudication. For example, in the Miskolc schools segregation case, the first instance court found that there was no discrimination because it assumed that the link between the harm (segregation in different schools) and the defendant’s action (the decision to merge local schools only in the administrative and financial sense while leaving them physically separated) can be established only in case of the defendant’s active conduct and not the defendant’s omission. According to the Court, “the wording of the law unequivocally established” that discrimination “can result only from active conduct (and not omission).” Accordingly, the court stressed that the plaintiffs failed to show that the discrimination resulted from the local council’s intentional action. The appeal court in principle confirmed this position but still overruled the decision of the lower court because, in that particular case, in the court’s view, the text of the positive statutory law explicitly allowed for the possibility that the harm can be caused by the omission to act.

676 Id.
The *Gypsy Street* decision of the Slovak district court is a rather interesting illustration of the narrow formalistic approach to direct discrimination.\(^678\) The case concerned the Slovak electricity supply company *Zapadnoslovenska Energetika* that regularly mailed invoices to customers in a predominantly Roma neighborhood that were addressed to “Gypsy Street” even though that was not the name of the street. The Roma residents argued that such treatment constituted violation of the equal treatment principle since the word “gypsy” has a particularly derogatory and insulting meaning in the Slovak language. The court rejected the claim.

According to the Court, there could be no discrimination because there was no *direct relation* between the defendant and the plaintiffs since the defendant could not have known the actual addressees of his action.\(^679\)

We can find a similar pattern of reasoning in the Czech *Baseball Bat Goddess* case.\(^680\) The case involved a bar that installed the statue of an ancient goddess holding a baseball bat with the inscription “go get the gypsies.” The plaintiff was a Roma customer who claimed that such action constituted racial harassment. He relied on the EU Racial Equality Directive that was at the time still not transposed into the national system. Nevertheless, he argued that the existing civil-law provision on the protection of personality had to be interpreted in a way that included racial harassment. The court rejected the harassment claim arguing that “… the above-mentioned inscription on the baseball bat was a general expression, without any reference to an actual individual; upon application of objective criteria, it could not infringe the petitioner’s personality. It is also not possible to identify it as an unlawful infringement of the personality...


rights of the petitioner; the subjective feeling of the petitioner that his personality rights had been violated...is not a fact of sufficient significance to qualify in legal terms for the application of objective criteria as required by Section 13 of the Civil Code...Thus, because an unlawful infringement of the petitioner’s personality rights was not proven, the fundamental basis for civil liability is lacking.”

Since the Czech law provided that the civil-law guarantee of the protection of personality included protection from direct discrimination, the court also de facto ruled that this type of harassment was not a form of direct discrimination.

Another common feature of the equality decisions of post-socialist courts is their narrow formalistic commitment to national statutory law. In short, the post-socialist courts are focused almost exclusively on the national statutory text, and the style of reasoning they use to justify their equality decisions eschews normative (value-based) argument. The *Baseball Bat Goddess* decision of the lower court, for instance, reasoned that the disputed act was not illegal harassment since it was not explicitly defined as such in the referred statutory law.

The lower courts very rarely refer to constitutional guarantees of equality or to the case-law of their Constitutional Court in their decisions. References to Supreme Court decisions are also rare, as are references to normative principles. The CEE post-socialist courts almost never justify their decisions as a contribution to the protection or promotion of some notion of equality, to principle of equal treatment, or to the effectiveness of antidiscrimination guarantees. Even the

681 Id.
682 The Supreme Court overruled the decision of the High Court and concluded that harassment falls within the scope of the protection of personhood guarantee since it violates one’s personal dignity. However, the court did not say that harassment is a form of direct discrimination. However, it did say that the situation in question could be described as an incitement to discrimination. Decision of the Czech Supreme Court no. 30 Cdo 1892/2004-203.
683 In fact, there are more examples of clear disobedience of the Supreme Court rulings than examples where ordinary post-socialist courts decided to rely on the reasoning of their Supreme Court. For some reason, when it comes to equality cases, the Czech and Hungarian courts seem particularly “disobedient”. See report concerning the Czech Republic in *3 European Antidiscrimination Law Review*, 2006, pp. 57-58 available at [http://www.migpolgroup.org/publications_detail.php?id=172](http://www.migpolgroup.org/publications_detail.php?id=172).
Aristotelian principle is rarely acknowledged as something that is of importance for their reasoning.

There are some interesting, if rare, exceptions from this absence of normative arguments, but they are mostly limited to the highest courts. Their decisions show that, even when they rely on normative principles and values in their reasoning, the post-socialist courts do not abandon their formalist style of adjudication. For example, when the Czech Supreme Court reversed the decision of the lower court in the *Baseball Bat Goddess* case, it found that the lower court had misread the relevant provision. The Court argued that the relevant provision protecting an individual’s personality contains an open list of rights protected as personality rights. It pointed to the text of the Constitution that guarantees the honor and reputation of every “man”. Based on this, the Court simply concluded that harassment must be included in the open list of personality rights since it causes similar humiliation to a person’s dignity. In that respect, the Court remained loyal to the legal text and its final conclusion was merely a result of its logical application. Consequently, the Court never *explained* the normative meaning or the scope of the notion of harassment or why it necessarily constitutes a violation of the personal sense of honor and dignity. On the contrary, the Court authoritatively argued that it is “*beyond any doubt that such cases of infringement of personality rights involve not only acts aimed at a specific individual, but also those acts expressed in general terms involving a whole group.*”

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685 Section 11 of the Civil Code provides that “*every natural person has the right to the protection of his or her personality, mainly of life, health, civil integrity and human dignity, his or her name and expression of personal character.*”
To the extent that the Supreme Court simply established a rule that harassment constitutes a violation of personality without investing any effort to explain why, the decision is nothing more than an attempt to increase the rule-like determinacy of the problematic provision.

There are other signs of “formalization” of equality law in the case-law of post-socialist courts. Thus, the language of equality decisions of post-socialist courts is very formal, if not formalistic. The appearance of logical coherence plays an important role. The justification of the ruling clearly aims to leave the reader with a feeling of objectivity and necessity.

The School Farewell Ceremony illustrates the formal character of the arguments and their appearance of objectivity. The case involved a decision of a Hungarian local school to organize separate farewell ceremonies for Roma pupils and other children. The school argued that the decision was a health measure due to the consistent hair-lice problem among Roma students. The Court found that the decision constituted discrimination. According to the Court, discrimination entails distinctions that are “unreasonable, cannot be justified in a satisfactory and objective manner, and the methods applied are not in proportion with the purpose. It is a prohibited distinction, i.e. discrimination if there is no reasonable proportional relationship between the purpose and the measure taken, and if the discrimination is done arbitrarily in the interest of an illegitimate purpose.” Following the “logic” of its argument, the Court found that the disputed decision constituted discrimination only because “as the case documents state, there could have been a solution to resolve this issue with appropriate public health measures.” In other words, the decision was discriminatory because it was not objectively necessary and not

687 Id., p. 265.
because it was related to the criterion of ethnicity or because it perpetuated existing racial prejudice and the socially disadvantaged position of Roma citizens in a particular community.

A similar attempt to justify their conclusions by objectivity and legal logic is further illustrated by the *Julia Central Disco* case, where the court rejected rather clear evidence of racial discrimination provided by several methods of proof including situation-testing. The Court found that Disco’s use of membership cards, which was a formal reason for the denial of entrance to Roma customers, “was obviously unreal, a pretence, but from this does not logically follow the fact established by the court of first instance that the cause of the denial of entry was Romani origin.”

Segregation cases across the CEE legal systems illustrate the way in which these courts seek “empirical” validation of their conclusions, which is an attempt to avoid dealing with charged normative questions. Thus the Croatian Constitutional Court justified its conclusion that the segregation of Roma and other children in different classes did not constitute discrimination because the class distribution was conducted in accordance with the “rules of the education profession” and with respect to “pedagogical standards”. The same line of argument was used by the Hungarian court in the *School Farewell Ceremony* decision to justify the segregation of children in different school buildings and by the Czech courts in the infamous *D.H. case* to

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689 Id.
justify segregation of Roma children in “special” schools for intellectually challenged children.\footnote{Decision of the Constitutional Court of the Czech Republic dated October 20, 1999, not reported.}

We can see a similar pretense of “objectivity” in sex equality decisions concerning the equal pay guarantee.\footnote{See supra text related to the fn.s. 790790-793793.}

The manner in which these decisions use international law is another common characteristic of equality decisions of the post-socialist courts illustrating their attempt to formalize equality law. Compared to other areas of adjudication, a significant number of equality decisions refer to some instrument of international law. These references are particularly common in the equality decisions of the highest courts. However, all of the post-socialist equality decisions use international law in the same limited way.

Almost all of them merely refer to a treaty in general terms, sometimes not even quoting a particular provision. They frequently use international guarantees as if their meaning is self-evident or, more precisely, as if the court’s reading of these provisions is self-evidently correct. More importantly, they refer to these provisions merely to support their preconceived rulings.

It is also interesting that these courts often refer to the international human rights instruments that were fairly prominent during the socialist era, such as the UN Charter and Covenants, but which do not have a complex and firmly binding jurisprudence behind them. When they invoke the European Human Rights Convention (ECHR), they refer almost exclusively to its positive norms and rarely refer to the accompanying case-law. Only the highest courts refer to the
decisions of the European Court for Human Rights and only as if they self-evidently support their rulings.\(^{694}\)

Probably the clearest example of this use of international law is the Decision of the Croatian Constitutional Court that dealt with the segregation of Roma and non-Roma children in the local primary schools.\(^{695}\) The Court claimed that it had consulted fourteen different international human rights legal instruments, including the EU Racial Equality Directive. However, it never explained how these fourteen instruments affected its decision. The Court only rather selectively relied on several sentences from a few equality decisions of the ECtHR that tended to support its conclusions, including the infamous decision *D.H. and others v Czech Republic* of the European Court of Human Rights\(^{696}\).

Most strikingly, although the majority of domestic equality decisions were directly related to the EU *acquis*, the post-socialist courts have very rarely referred to the relevant EU provisions and even more rarely to the ECJ case-law.

The decision of the Czech Constitutional Court dealing with the constitutionality of a statute that required only men taking care of their children to register their parental leave with the responsible administrative body was a noteworthy example.\(^{697}\) The Court held that such a requirement is constitutional and in accordance with the “international human rights treaties and

\(^{694}\) In contrast to the case law of the ECJ, the decisions of the ECtHR do not have a formally binding authority in their national legal systems. The ECtHR is a conventional international law court. Accordingly, its rulings are binding only for the member states participating in a particular dispute to the extent that this binding effect is determined by the relevant international treaty. In that respect, the ECtHR decisions are binding for national courts only if this is provided by the national legal order. Therefore, it is not surprising that the post-socialist national courts tend to ignore these decisions even though the provisions of the European Convention of Human Rights are directly applicable in their legal systems.

\(^{695}\) Decision of the Croatian Supreme Court *U-III/3138/2002* dated 07.02.2007.

\(^{696}\) Case of *D.H. and others v. the Czech Republic* [2006] ECHR 57325/00.

decisions of international bodies” without ever specifying the specific treaties and decisions. The Court never referred to EU law but it did argue that the disputed law was “common in many Member States of the EU.” However, the dissenting justice in the decision found that the only EU Member State with a similar law was Slovakia.

Similarly, in the Baseball Bat Goddess decision, the Czech Supreme Court explicitly referred to the UN Charter of Civil and Political Rights and the ECHR without any elaboration of the meaning of the provisions it was invoking. As regards EU law, it simply stated that its reasoning was in accordance with “international obligations of the Czech Republic towards the European Union.”

To these examples of selective and rather sketchy “exploitation” of non-national law, we can also add cases where the Slovak and Czech Constitutional Courts (mis)used EU equality law to justify their decisions in which they either struck down the possibility of positive action in the context of racial equality or redefined a provision that regulated a transfer of the burden of proof in discrimination proceedings in a way that was more favorable compared to what has been required by EU law.

In one of its most notable decisions, the Slovak Constitutional Court held that positive action in the context of racial equality was not allowed by the national constitution. According to the Court, positive measures in the context of race were not legitimate since the text of the

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Constitution did not explicitly allow such exceptions to the equal treatment guarantee.\(^{700}\) The Court explicitly stated that it would be willing to accept some type of positive measures favoring women since the text of the constitutional provision unambiguously states that “women, minors and disabled persons shall enjoy more extensive health protection at work and special working conditions”.\(^{701}\) However, since the text of the Constitution did not provide for a similar possibility concerning racial minorities, the Court simply concluded that the statutory provision allowing positive action in the context of race was unconstitutional.\(^{702}\)

Furthermore, the Court found support for its conclusion in the ECJ’s *Johnson*\(^{703}\) and *Kreil*\(^{704}\) rulings. However, both of these decisions provided that the exceptions from the equal treatment principle must be interpreted in accordance with the so-called proportionality principle. In that sense, neither of the two decisions prohibited positive measures. On the contrary, the ECJ

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\(^{700}\) Art. 12 of the Slovak Constitution stipulates that

1. *All human beings are free and equal in dignity and in rights. Their fundamental rights and freedoms are sanctioned, inalienable, imprescriptible and irreversible.*

2. *Fundamental rights shall be guaranteed in the Slovak Republic to everyone regardless of sex, race, colour, language, belief and religion, political affiliation or other conviction, national or social origin, nationality or ethnic origin, property, descent or any other status. No one shall be aggrieved, discriminated against or favoured on any of these grounds.*


\(^{701}\) Art. 38(1) of the Slovak Constitution. The Constitution also states that

1. *Matrimony, parenthood, and family shall be protected by the law. Special protection of children and minors shall be guaranteed.*

2. *A pregnant woman shall be guaranteed a special treatment, protection in employment, and adequate working conditions.*

\(^{702}\) It has been suggested that such a ruling was inconsistent with the Court’s previous decisions, which allowed special treatment of people with mental problems and minors in connection with their civil procedure guarantees. See Havelkova, *Burden Of Proof and Positive Action in the Czech and Slovak Constitutional Courts - Milestones or Millstones in Implementing EC Equality Law*, p. 697. However, it should be noted that disability and age are not explicitly listed in Art. 12 of the Slovak Constitution as “prohibited” grounds of different treatment. In that respect, one could argue that the Court was consistent in its narrow reliance on legal text. It should also be stressed that the Court’s reasoning left open the possibility of a different interpretation. Parallel to the argument about the required explicit constitutional legal basis for positive action, the Court strongly objected to the supposed ambiguity of the provision in question. It even objected to its openness to several “purposive interpretations”. In the Court’s view, the positive measure had to be clear and precise. This type of reasoning allows the Court to reconsider its strict position once the Slovak legislator develops more precise positive action rules.


\(^{704}\) Case C-285/98 Tanja Kreil v Bundesrepublik Deutschland [2000] ECR I-00069.
explicitly allowed positive measures under certain conditions.\textsuperscript{705} The Constitutional Court never consulted the ECJ’s positive action decisions that would be much more appropriate for its decision. In addition, neither Johnson nor Kreil (nor any of the ECJ’s positive action decisions for that matter) applied outside the employment context.

In other words, the Slovak Constitutional Court simply assumed a rather formalistic but easily applicable rule-like reading that positive measures are not allowed due to the text of the Constitution and, in addition, tried to (mis)use the ECJ’s case-law to conceal the real peremptory character of its decision.

A similar narrowing of EU guarantees can be found in the decision of the Czech Constitutional Court concerning the constitutionality of the provision of the Civil Procedure Code that transposed the EU requirement regarding the shifting of the burden of proof in discrimination disputes.\textsuperscript{706} The national provisions went significantly beyond the minimum requirements in the EU \textit{acquis}, placing the entire burden of proof on the defendant, and allowing the claimants merely to state that they had been discriminated against without any requirement to support their allegation.\textsuperscript{707} The Court found that the provision was in accordance with the Constitution but only after it profoundly reinterpreted its disputed meaning. The Court argued that the reallocation


\textsuperscript{707} The provision stated that “the court, in cases of provision of health or social service, access to education and professional training, access to public contracts, membership in organisations of employers or employees and the membership of professional or special-interest associations, the sale of goods or provision of services, may take as proven facts asserted by a plaintiff to show that he or she has been directly or indirectly discriminated against on the basis of sex, racial or ethnic origin, religion, belief or ideology, physical handicap, age, sexual orientation, unless the contrary has been established in the proceedings” Quoted in HAVELKOVÁ, Burden Of Proof and Positive Action in the Czech and Slovak Constitutional Courts - Milestones or Millstones in Implementing EC Equality Law, p. 700.
of the burden of proof in the national provision cannot be unconditional and that “the person, who claims to have been discriminated against, has to present facts sufficient for the conclusion that discrimination might have occurred, even though this does not sufficiently clearly follow from the provision.” 708 Moreover, it argued that such an interpretation of the transfer of the burden of proof was required by the EU equality *acquis* and the ECJ’s case law. 709

But, the ECJ’s decisions referred to by the Slovak Court were only remotely related to the issue of the burden of proof at best. More importantly, the EU equality *acquis* does not prohibit the Member States from going beyond the proscribed minimum. 710 On the contrary, the Race Equality Directive explicitly states that the definition of shifting the burden of proof “shall not prevent Member States from introducing rules of evidence which are more favorable to plaintiffs.” 711

However, the decisions by the Czech and Slovak Constitutional Courts are also somewhat of an exception. The majority of the post-socialist lower courts that dealt with the issue of discrimination avoided EU law. Several reasons may explain this evasion of the EU equality *acquis*. First, many of the cases discussed occurred before the accession of their countries to the

708 Quoted in id., p. 702.
710 However, Havelkova argues that “the Czech Constitutional Court went to some lengths to interpret the provision in conformity with the Race Directive. If [the provision of the Czech civil procedure code] was not the best example of a truthful transposition of EC law but the CCC clarified it in a way that satisfied both EC law and constitutional requirements.” Moreover, in her opinion, the Court was driven by the substantive understanding of equality. HAVELKOVA, Burden Of Proof and Positive Action in the Czech and Slovak Constitutional Courts - Milestones or Millstones in Implementing EC Equality Law, p. 703.
In that sense, the post-socialist courts may have intentionally ignored the EU *acquis* simply because it was not formally an integral part of their national legal system at the relevant time. This is a rather formalistic position, however, since many of these disputes were adjudicated on the basis of the national statutory provisions produced by the pre-accession harmonization process.

Second, and more to the point, it is likely that a majority of the CEE post-socialist courts have found it rather complicated to engage with EU law. Many of them are simply not aware of the relevant EU legislation in this area and they find the thorough exploration of the EU *acquis* intellectually challenging and time consuming. Most importantly, the post-socialist courts seem “instinctively” aware that a full engagement with the EU *acquis*, and particularly with the ECJ’s case law, will inevitably involve them in decision making that requires normative choices they have been trying to avoid. For example, in the context of sex equality, neither the Čauševičová nor the Forestry Project Manager courts consulted the EU sex equality *acquis* that would have required them to confront sensitive questions regarding the burden of proof and direct discrimination. In the context of race, in the well-known *Miskolc Segregation* case, the Hungarian courts ignored the *Race Equality Directive* and the ECJ’s case-law since it would

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713 It has been noticed that in great majority of judicial proceedings in which EU law played a role, the post-socialist courts took EU law into account (often rather reluctantly) only after the legal representatives of the parties insisted on EU law. BOBEK, *A New Legal Order, or a Non-Existent One? Some (Early) Experiences in the Application of EU Law in Central Europe*, p.284. In a discussion with one justice of the Czech Administrative Supreme Court, I was told that Czech judges almost never consult and refer to EU law on their own. Arguments based on EU law are always initiated by the legal representatives of the parties in dispute.

714 This was one of the key findings of the research done among Czech judges. The research project University of Aarhus, Denmark in cooperation with Kühn: “Research Questionnaire: The diffusion of domestic and EU law through the court system”, January 2007.

715 For Čauševičová decision, see supra text related to fn. 764. For the Forestry Project Manager, see supra text related to fn. 772.
place before them complex questions concerning indirect discrimination and the burden of proof.\footnote{Debrecen Appeals Court, Pf. I. 20. 683./2005/7. The English translation of the decision is available at http://www.cfcf.hu/?nelement_id=28&article_id=44.}

The ECJ’s equality decisions do not provide bright-line answers that the CEE post-socialist courts expect from higher courts (which they tend to regard as responsible for making sensitive choices). On the contrary, as seen in Chapter II, the ECJ's equality decisions are not easy to read and it is often challenging to discern what the Court aimed to achieve. Their reasoning often seems internally incoherent and it is frequently hard to reconcile fully several decisions that deal with the same issue. Moreover, the examples from Chapter II showed that the ECJ often purposefully “entrusts” national courts with challenging value-based choices that the post-socialist courts find inappropriate for the judicial function.\footnote{Cf. KÜHN, The Changing Face of Central European Judiciary, p. 267.} Accordingly, it is unlikely that the ECJ’s equality decisions will play any serious role in the decisions of the CEE post-socialist courts any time soon.

The third reason is somewhat ironic. The absence of EU references from the equality case-law of post-socialist courts may have been encouraged by the accession strategy of “copy and paste” transposition of the legal texts of EU positive law.\footnote{See OPEN SOCIETY INSTITUTE, Monitoring the EU Accession Process: Equal Opportunities for Women and Men (2005).} Consequently, while the post-socialist legal systems more or less faithfully transposed the legal text of EU equality Directives into their national statutes, they gave very little, if any, attention to the case-law of the ECJ. As seen earlier, the process of accession negotiations almost completely disregarded the issue of
normative and doctrinal harmonization. Accordingly, it is not surprising that a significant number of lawyers and judges dealing with equality disputes believe that the national legislation fully and faithfully incorporated EU antidiscrimination requirements, which, in turn, allows them to focus exclusively on national positive law.

The noteworthy exception from the preceding description of the post-socialist equality adjudication is the Polish Supreme Court. Its equality decisions are profoundly different in their style of reasoning and reflect a significantly different understanding of adjudication. For example, its recent equality decisions in the context of sex and age show that this Court is ready to accept the indeterminacy of the legal text and interpret it both in light of policy goals and normative values. Also, this Court has fully engaged with EU antidiscrimination law and carefully considered the arguments of the ECJ. Accordingly, it is fair to say that the Polish

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720 During the Seminar on the Racial Equality Directive: "Promoting awareness of Community rules against racial discrimination" organized by the EU Fundamental Rights Agency in Zagreb in June 2007, Eastern European legal experts and practitioners who have actively participated in race discrimination disputes before Slovakian and Hungarian courts argued that there is no room for the preliminary reference procedure in race discrimination disputes since the Slovak and Hungarian legal systems correctly implemented the Race Equality Directive. In their view, which is apparently widespread in these legal systems, the ECJ's preliminary reference procedure is relevant only if there is a clear conflict between the text of national law and the text of EU law and not if the national courts are “incorrectly” enforcing the national provision that correctly implemented the EU acquis. In that sense, it is worth pointing out Kuhn’s argument regarding the enforcement of EU law in the post-socialist legal systems according to which “deeply rooted legislative optimism has produced an atmosphere where ordinary judges and lawyers generally overemphasize the impact of legal transplants made by the legislature on the one hand, while they seriously understated their own role in that process. That is why one should not be surprised that legal transplants operate often in a very different way than they do in the donor countries. In systems where persuasive arguments are not recognized as relevant, a sensible harmonization is not likely to succeed.” KÜHN, The Application of European Law in the New Member States: Several (Early) Predictions, p. 568.
721 In a recent decision concerning the legality of dismissal on the ground of achieving retirement age, the Court thus argued that the achievement of the retirement age per se is not a sufficient reason for dismissal and that such a decision constitutes discrimination on the grounds of age, which would be contrary to EU antidiscrimination guarantees. However, the Court also found that the dismissal due to the fact that the employee acquired the right to a pension may be a sufficient reason for the dismissal in light of the current socio-economic situation when a significant number of people are unemployed and looking for work to support themselves and their families. The Court also found that, in light of the ECJ's case-law and contrary to the previous practice of the Court, dismissal of a female employee due to her earlier retirement age constitutes discrimination on the grounds of sex. Resolution of the Polish Supreme Court II POY 13/08 dated January 21, 2009. See also decision I PK 219/07 dated March, 19, 2008.
Supreme Court does not share the same narrow understanding of adjudication characteristic for other courts in CEE. It is not clear whether this is the case with other Polish courts.

Notwithstanding this noteworthy exception, I have tried to show in this section that the equality decisions of the post-socialist courts carry clear marks of the formalistic understanding of law and adjudication discussed in Chapter V. More precisely, I have tried to show that the post-socialist courts use different techniques to “formalize” equality guarantees and increase their mechanical applicability. In this way, they are allowed to avoid politically sensitive normative choices that equality guarantees inevitably place before courts. As explained below, I am not claiming that the post-socialist courts are not actually making such choices. To the contrary, the very decision to provide equality guarantees with a rather rigid rule-like form is essentially a normative choice. Instead, they are trying to avoid justifying their decisions through normative arguments and seek to conceal the fact that ultimately they do make sensitive normative choices concerning equality with far-reaching real-life consequences for members of disadvantaged social groups.

The following section will focus on the key features of this narrow formalist style of adjudicating equality disputes. I will argue that in order to provide the prohibition of direct discrimination as the basic equality guarantee with a rule-like character, these courts reduced discrimination to the notion of illicit motivation based on prejudice. Moreover, I will argue that this approach is tightly related to a particular normative understanding of equality that these legal systems inherited from the era of “really existing” socialism.
6.3. Narrowing Equality

I have argued in the previous section and in Chapter V that the CEE post-socialist courts have a strong aversion towards adjudication that entails sensitive value-based and/or policy choices. Accordingly, when faced with legal provisions that are not sufficiently clear and precise, they will attempt to interpret them “objectively” in a manner that will restore their determinacy.

In the previous section, I have argued that the equality decisions of the CEE post-socialist courts indicate a shared tendency to “formalize” equality guarantees, or more precisely, an attempt to construct the prohibition of discrimination in a more “mechanical” manner. I have argued that these courts tend to ignore the open-endedness of antidiscrimination guarantees and treat them as inflexible rule-like instruments that can be applied fairly easily. Accordingly, one striking feature of the post-socialist equality decisions is that they lack any substantive discussion about the meaning of discrimination.

Due to the process of EU accession, all of the CEE post-socialist legal systems provide similar statutory definitions of both direct and indirect discrimination that are valid for a significant number of important regulatory areas such as employment, social security, access to market services and education. Moreover, many of these legal systems have extended these definitions to other non-EU regulatory areas or even other non-EU grounds of discrimination.\(^{722}\) However, if we look at the equality decisions of the CEE post-socialist courts, these statutory definitions have not found a particularly important place in their reasoning. I am not arguing that they have been ignored by these courts. The post-socialist courts regularly refer to the relevant statutory

\(^{722}\) For example, the Croatian Suppression of Discrimination Act prohibits both direct and indirect discrimination on no less than 18 grounds. Zakon o suzbijanju diskriminacije, Narodne Novine 85/2008 [Official Gazette No. 85/2008].
provisions prohibiting discrimination in their decisions. But, the CEE post-socialist courts treat them as if their meaning is obvious. Consequently, their decisions are free from any substantive discussion concerning the meaning and goals of these provisions.

The following analysis of direct discrimination decisions will show that in order to provide standard-like antidiscrimination guarantees with easily applicable clear-cut meaning, the post-socialist courts have turned to the notions that are most familiar to them. Those notions were inherited from the period of “really existing” socialism and are not easily reconciled with the normative understanding favored by the ECJ.

The equality decisions show that the socialist heritage affected the application of antidiscrimination instruments in two particular ways.

First, the post-socialist courts favor a particular bi-polar understanding of equal treatment. On the one hand, they perceive the notion of equality in treatment in a rather egalitarian sense that prohibits any difference in treatment that cannot be justified by some socially legitimate reason. This egalitarian notion of equal treatment was characteristic of the socialist understanding of equality based on the notion of class-sameness that required that all workers be treated the same unless differences were favorable to the well-being of the socialist society.

On the other hand, and more importantly, they perceive sex and race discrimination in very limited terms as requiring prejudicial motivation. As I argue in more detail below, this construction corresponds to the conception of equality that was characteristic of the CEE regimes of “really existing” socialism. It suffices to say here that, in accordance with that particular understanding of equality, a mere difference in treatment based on the criterion of sex could not
constitute sex discrimination *per se*. As argued in Chapter I, in order to constitute sex (or race) discrimination, a difference in treatment related to the criterion of sex (or race) had to be malevolent and degrading. Moreover, the relevance of intent as an essential element of discrimination was further reinforced by the fact that discrimination was not regulated in civil-law statutes such as labor law statutes but it was cast as a criminal offence.

Second, the socialist heritage has influenced the manner in which the post-socialist courts deal with pregnancy-related unfavorable treatment of women in a way that fits this understanding of discrimination grounded in prejudice.

### 6.3.1. Discrimination as Prejudice

As noted above, one of the most noticeable features of post-socialist equality decisions is that they treat the term “discrimination” as if it has a self-evident meaning. In principle, the CEE post-socialist courts do not discuss the meaning of this instrument in their decisions but simply apply it as if it is common knowledge. However, the manner in which they apply the notion of discrimination shows that they favor a rather simplistic but stable meaning of discrimination that is constructed around the notion of prejudice. In that sense, the factual predicate of the post-socialist sex or race discrimination consists of a perpetrator, his action, a victim, her harm, and a causal link of a prejudicial character.

We have already seen examples of decisions in which the post-socialist courts rejected the claim of discrimination because there was no direct relation between the victim and the alleged perpetrator or because it was not clear whether there was harm. Post-socialist courts have also

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723 See supra text related to fnns. 675-682. The same feature can be found in a number of Bulgarian cases concerning segregation of Roma people in education. Case *Romani Baht Foundation and European Roma Rights Centre versus*
struggled with the element of the perpetrator. Some Hungarian courts, for example, were not clear whether discriminatory actions of employees can be ascribed to the employer. These cases involved situations where staff personnel denied access to a service establishment to a Roma customer. In their view, the uncertainty was legitimate since it was not clear that the prejudicial motivation behind such treatment was shared by the owner.

The understanding of the CEE post-socialist courts of particular elements of direct discrimination has been determined by their fixation on prejudice as a necessary element. For example, in the Gypsy Street case, the court argued that there was no discrimination since there was no direct connection between the perpetrator and harmed individuals because the defendant mailed the letter with the problematic address to every household in the street and not merely to Roma residents. This reasoning implicitly rests on the view of discrimination as intentionally harmful action motivated by prejudice against a particular individual or her group. The Baseball Bat Goddess reasoning of the lower court is similar in this respect.

Some post-socialist courts have rather clearly expressed their view that direct discrimination requires prejudice.

In the Miskolc Segregation case, the first instance court found that there was no discrimination because it considered that the link between the harm (being segregated in different schools) and the defendant’s action (the decision to merge local schools in administrative and financial sense...
only) can arise only in case of the defendant’s active conduct, and not his omission.\footnote{Decision of the Borsod-Abauj-Zemlen County Court No.13. P..21.660/2005/16. See also supra text related to the fns 675-677.} The court stressed that the plaintiffs failed to show that the discrimination was directly based on race and that it resulted from the local council's intentional action. The appeals court in principle confirmed this position, but it still overruled the decision of the lower court because, in that particular case, in the court’s view, the statutory text explicitly allowed for the possibility that the harm can be caused by an omission to act.\footnote{Decision of the Debrecen Appeals Court No. Pf. I. 20.683/2005/7. See also text relevant to the fns. 676-677.}

The Idea case is another telling example. This was the first case under the Slovak Antidiscrimination Act that implemented all the EU equality directives.\footnote{Decision of the Michalovce District Court No. 12C/139/2005 dated 31.08.2006. Reported in ZUZANA DLUGOSOVA, Report on the measures to Combat Discrimination: Directives 2000/43/EC and 2000/78/EC: Country Report - Slovak Republic p. 6 available at http://www.migpolgroup.org/publications_detail.php?id=223. Also see the case report in the 5 European Antidiscrimination Law Review, 2007, p. 95; case report by the Public interest Law Institute at http://www.pili.or/en/content/view/401/95/.} The case was a result of the use of “situation testing”. Several equal rights activists decided to “test” a popular bar that was famous for its mistreatment of Roma people. Upon their arrival at the bar, the Roma activists were indeed refused access. According to the bar management, they were refused access because they did not have a membership card. At the same time, their non-Roma colleagues entered without any questions asked. The court rejected the claim of the plaintiffs that they have been discriminated against. It accepted the credibility of the defendant’s argument that was supported by few witness statements that the bar regularly serves Roma people and concluded that “\textit{[t]he racial motive of the defendant’s behaviour towards the applicants on 14 April 2005 was not proved during the proceeding. The defendant proved by the testimony that he serves also Roma. It is clear from the testimony of the usher that he was not given by the defendant any
order for non admission of Roma to the restaurant. …. This means that direct discrimination has no racial ground.”

Similar examples can be found in the sex-equality context. Croatian courts have found that the decision of an employer to end a fixed-term contract of an employee who had just started her maternity leave did not constitute discrimination since the plaintiff did not show that the employer intentionally dismissed her because of the maternity leave. The courts accepted the employer’s justification that he terminated the contract because the doctor for whom the plaintiff was substituting had returned to work from his study leave. They ignored the fact that the same doctor resumed his study leave only after nine days after his return. According to the courts, the plaintiff failed to demonstrate discriminatory treatment since she did not prove that the defendant and the returning doctor collaborated to stage his return from the study leave with the purpose of terminating her employment.

The most explicit statements regarding the essential importance of prejudicial motivation, however, have come from the highest courts.

For example, in its decision about the constitutionality of the reversal of the burden of proof in anti-discrimination cases, the Czech Constitutional Court held that “[o]ne cannot conclude from the interpretation of § 133a par. 2 of the CPC that it is enough for a person who felt racially discriminated against when purchasing services to claim simply that discriminatory conduct occurred. That person must, in court proceedings, not only claim, but also prove, that he was not treated in the usual, non-disadvantaging manner. If he does not prove this claim, he cannot

730 Id.
succeed in the proceedings. He must also claim that the disadvantaged treatment was motivated by discrimination on the basis of racial or ethnic origin.”

Similarly, in its School Segregation (also known as Oršuš) decision, the Croatian Constitutional Court found that “the distribution of children in primary school classes is a result of the abilities and needs of every child individually.” It also stressed that this individualized approach to class distribution was conducted in accordance with “the rules of the education profession” and with respect to “pedagogical standards”. Accordingly, the Court found that “the approach according to which exclusively the competent experts are responsible for decisions about the allocation of a particular child to a particular class” is the correct approach. Since the court found no reason to question the opinions of the relevant school commissions consisting of competent experts (medical doctors, psychologists, pedagogues, teachers) responsible for the organization of school enrollment, the Court concluded that the policy of segregated classes did not constitute discrimination. The allocation of children to such classes was not “motivated or performed due to their racial or ethnic origin.”

Not all equality decisions were so explicit about the role of prejudicial motivation. However, the way in which the courts evaluated facts before them and justified their decisions shows that they operated with the question of prejudicial motivation in mind.

734 Id.
735 The Court also argued that the practice of establishing special classes served “a legitimate goal of necessary adjustment of the primary education to abilities and needs of the plaintiffs, where the determining factor has been their insufficient knowledge of the Croatian language in which the education takes place.” In that sense, the purpose of special classes was not racial segregation. Instead, the classes were a measure that “secured an intensified work with children with the purpose of their learning of Croatian language and the removal of the consequences of their earlier social deprivation.”
For example, in the Hungarian pre-harmonization *School Farewell* case, the court found that a segregated school farewell ceremony constituted direct discrimination because such a measure was not necessary for the protection of public health interests.\(^{736}\) Scholars have argued that this particular decision illustrates an objective approach to discrimination where the motive is not relevant.\(^{737}\) This is a rather generous reading of the court’s reasoning. In fact, the court did not argue that the farewell ceremony constituted racial discrimination at all. Instead, it switched to a more general and “simpler” notion of equal treatment that, as the court explained, requires “*that the difference in treatment must have a reasonable proportional relationship between the purpose and the measure taken.*” This allowed the court to avoid declaring that the school committed *racial* discrimination. The fact that prejudicial motivation played a crucial role is seen in the Court’s conclusion that the segregation of children in different school buildings did not constitute discrimination even though the criterion of race played a part in the school’s decision to separate children to different buildings. If the court followed the objective approach that is not concerned with the motive but merely with the use of a biased criterion, it would have found at least *prima facie* discrimination on the grounds of race. The reason why it did not is that the Court perceived racial discrimination not as a mere use of the criterion of race, but as an expression of racial prejudice.

This intent-based understanding of discrimination is tightly related to what I would call a quasi-egalitarianism that the CEE post-socialist societies inherited from the period of “really existing” socialism. As argued in Chapter I, the CEE socialist regimes frequently claimed that, in contrast to the western capitalist democracies, they succeeded in achieving real equality of their citizens.


\(^{737}\) SCHIEK, et al., Cases, materials and text on national, supranational and international non-discrimination law, p. 266.
This egalitarian claim was one of their most important ideological banners, particularly in the context of equality between men and women. The claim of ideological supremacy significantly affected the manner in which these legal systems legally regulated the question of equality.

Socialist egalitarianism primarily rested on the absolute regulatory power of the socialist state. The CEE regimes of “really existing” socialism argued that their unfettered class-based control of the state power allowed the socialist state to respond successfully to the needs of its citizens. Moreover, it allowed the state to achieve real equality in society. On the one hand, to the extent that citizens had similar interests and needs, the socialist state provided them with the same clear and precise statutory rights. On the other hand, the absolute regulatory power also allowed the socialist state to eliminate real-life inequality between social groups by providing them with equally clear and precise statutory rights tailored to their specific needs. The claim of the CEE socialist regimes that real equality was realized once the state provided different social groups with concrete rights tailored to their specific needs implicitly rested on the assumption that these rights would be faithfully and consistently enforced. Such confidence was the result of the unqualified power to control every aspect of social life, including the manner in which their courts enforced socialist law. Consequently, the CEE “really existing” socialism reduced equality to the simple enforcement of positive statutory rules.

This quasi-egalitarianism had profound implications. Since it reduced the notion of equality to the consistent enforcement of positive statutory rules, this quasi-egalitarianism could not easily accommodate a notion of “systemic” discrimination. In fact, the very moment that the CEE socialist regimes declared that they achieved real equality, any notion of discrimination going beyond prejudicial intent acquired a potential to undermine this claim. This is even more so
since, in these regimes, every social or economic entity was owned and controlled by the socialist state. Consequently, any notion of discrimination that was not highly personalized and reduced to individual prejudice necessarily entailed that the socialist state engaged in discrimination. This, of course, inevitably undermined the ideological claim that socialist societies had achieved real equality.

Moreover, the CEE socialist regimes could argue that violation of positive rights guaranteeing equality could never be systematic precisely because of the socialist state’s ability to control all aspects of social life. In that sense, discrimination could only be a sporadic incident in a socialist society. Since they insisted that discrimination could be only sporadic, the CEE regimes of “really existing” socialism assumed that it could not affect one social group more than another. Consequently, the CEE socialist regimes reduced discrimination to intentionally adverse unfavorable treatment that involved a denial of some specific statutory right. A denial of some statutory right that did not involve illicit motivation remained a “simple” breach of the law regardless of whom it involved and what its consequences were.

Although the CEE societies abandoned “really existing” socialism two decades ago, the quasi-egalitarianism inherited from that period still lingers on.

Notwithstanding the growing social differences, these societies still believe that there are no gross inequalities within them. They are particularly sensitive to the claim that they systematically keep certain social groups, especially women, in a disadvantaged social position. In their view, if there was anything valuable about their socialist past, it was the fact that socialism left all social groups in a more or less equal social position. In that sense, although in
post-socialist societies individuals could excel and distinguish themselves materially from others, social groups remained by and large equal.

This commitment to egalitarianism is clearly visible in the fact that these societies still favor a general prohibition of discrimination according to which any difference of treatment between citizens must be justified by some objective socially valid reason. For example, the Croatian Discrimination Suppression Act prohibits discrimination on no more or less than *eighteen* different grounds in *all* aspects of public or private life.\(^{738}\) According to this Act, a private employer would have serious difficulties justifying his decision to employ a candidate only because she belongs to the same alma mater if there is a better or even an equally qualified candidate. The Hungarian Act on Equal Treatment forbids discrimination on 20 different grounds.\(^{739}\) The same diluted understanding of equality is illustrated by the Hungarian *School Farewell* decision, where the court argued that *any* difference in treatment whatsoever that cannot be objectively justified constitutes discrimination.\(^{740}\)

At the same time, when it comes to the most notorious expressions of inequality such as unfavorable treatment on the grounds of sex or race that cannot be easily “objectively justified”, these legal systems tend to assume a rather “defensive” position. It seems that because they perceive themselves as being “egalitarian”, these legal systems have difficulties accepting that sexism or racism may be built into the structure of their everyday life. Accordingly, they still consider that this type of discrimination occurs sporadically and is not systemic. To be clear, the

\(^{738}\) [Zakon o suzbijanju dikriminacije, Narodne Novine 85/2008 [Suppression of Discrimination Act, Official Gazette No. 85/2008]].

\(^{739}\) Act CXXV on Equal Treatment and the Promotion of Equal Opportunities adopted by the Hungarian Parliament on December 22, 2003. The Bulgarian Act on Protection against Discrimination of January 1, 2004 prohibits discrimination on 17 different grounds. The Czech and Slovak legislators chose a different path and banned discrimination on the seven EU grounds.

\(^{740}\) See supra text related to fns. 686-692.
majority of people in the CEE post-socialist societies consider racism or sexism to be undesirable and even socially vulgar behavior. However, precisely because they attribute to it such a stigmatizing value, they have difficulty recognizing the possibility that discrimination is a systemic phenomenon involving society as a whole. Accordingly, it is hardly surprising that the CEE post-socialist courts still tend to insist on the intent-based notion of discrimination.

However, the quasi-egalitarian heritage can only partially explain the tendency of post-socialist courts to reduce discrimination to prejudice. As I argue in more detail later, the intent-based approach allows the CEE post-socialist courts to avoid decisions that entail politically sensitive normative choices. Having in mind Chapters I and V, it is clear that the CEE post-socialist courts can hardly be described as social reformists. On the contrary, the role of judiciary in these legal systems was limited for decades. Their primary purpose was a faithful enforcement of the (autocratic) will of the legislative/executive branch. They were never expected to be actors of change and any “activist” adjudication was strongly discouraged. Consequently, these courts are traditionally inculcated to conform and not to challenge the dominant view.

The narrow intent-based approach to discrimination merely reflects the conservative character of the CEE post-socialist courts. By reducing discrimination to prejudice, they have managed to avoid normative choices that would require them to confront dominant arrangements of distribution of power or valuable resources in their societies. For example, due to their intent-based notion of discrimination, the CEE post-socialist courts never have to struggle with the Hlozek-like dilemmas whether to hold employers responsible for sex-related decisions aiming to
protect older workers since such situations were never motivated by any kind of sexist prejudice.\footnote{Case C-19/02 Viktor Hlozek v Roche Austria Gesellschaft GmbH [2004] ECR I-11491. For a detailed analysis of this case, see Chapter II.}

To put it simply, the narrow intent-based approach allows the post-socialist courts to preserve the existing status quo and thus avoid confrontation with well-established dominant social groups. In that sense, the CEE post-socialist courts do not favor the narrow intent-based view of discrimination because they are somehow inherently incapable of making normative decisions entailed by a notion of discrimination that is primarily focused on the effects of unfavorable treatment instead of illicit motivation. They favor it because any other “systemic” notion of discrimination promotes interests that are different from those that the law they are used to serving usually favors.\footnote{I am indebted to Professor C.A. MacKinnon for this point.}

There may not be anything unique about this “built-in” aversion of the CEE post-socialist courts towards discrimination approaches that require from courts to confront the status quo. Perceptions and traditions they inherited from the era of “really existing” socialism, however, make this aversion particularly strong. The manner in which CEE post-socialist courts dismantled the burden of proof guarantee in order to avoid holding defendants responsible for sex or race discrimination nicely illustrates this aversion.
6.3.2. Dismantling the Relocation of the Burden of Proof

Due to their particular understanding of discrimination, the post-socialist courts developed a rather clear aversion towards the burden of proof that their legal systems acquired from the EU sex equality *acquis*.\(^{743}\)

EU equality law provides that the respondent bears the burden to prove there has been no breach of the principle of equal treatment after the plaintiff has presented the facts from which a court may presume that direct or indirect discrimination might have occurred. EU equality law does not require a complete reversal. The plaintiff cannot simply claim that she has been discriminated against, after which it would be on the defendant to provide convincing proof that his actions were either not unfavorable for the plaintiff or that they were not related to the criterion of sex. She must present evidence that allows the court to presume that discrimination might have occurred. After the plaintiff proved *prima facie* discrimination, the defendant must refute this assumption. In that sense, a reversal of the burden of proof as defined by EU law is in fact a standard of adequacy of proof for the defendant that he must satisfy after the plaintiff has proven a *prima facie* case to a certain standard.\(^{744}\) At the same time, however, the EU acquis certainly does not prohibit the complete reversal of the burden.

Although it does not insist on the complete reversal, it is difficult to ignore the far-reaching potential of this standard. Moreover, the standard has a status of *directly effective* EU right. Accordingly, individuals can ask their national courts to enforce this standard even if their national law insists on some less favorable standard of proof. Indeed, according to the text of the


\(^{744}\) I owe many thanks to Professor C. A. MacKinnon for the warning concerning this misnomer.
Recast Directive, the threshold for the transfer of the burden is rather low. The Directive allows national courts to shift the burden to the defendant at the moment when the plaintiff presents facts from which discrimination may be presumed. In that sense, any combination of facts allowing even a rather theoretical assumption is enough for the courts to shift the burden. For example, there is nothing in the text of the Directives that prevents national courts from shifting the burden after the plaintiff proves that her pay is lower than the average male salary for a particular type of work.

The far-reaching potential is further reinforced by the ECJ’s case-law. The ECJ has never precisely defined the threshold at which the burden shifts to the defendant. It left the responsibility for such “concrete details” to national courts. Instead, the ECJ has tended to define this instrument in terms of its normative goals. The Court developed the standard as a specific expression of the so-called principle of effective judicial protection. The principle of effective judicial protection requires national courts to ignore any national provision or practice that makes the protection of rights granted to individuals by EU law impossible or excessively difficult. According, in Danfoss, the Court found that the mere fact that the employer ran a non-transparent salary system sufficed to shift the burden of proof on the employer since otherwise the effective protection of the right to equal pay would be impossible.

In Enderby, the Court further reaffirmed its position regarding the distribution of the burden of proof in discrimination disputes. It found that when there is a case of prima facie discrimination, it is upon the employer to justify the difference in treatment by objective reasons.

745 For the ECJ’s doctrine of the effective judicial protection, see Case C-432/05 Unibet ECR 2007 I-02271 and the recent pregnancy discrimination decision Case C-63/08 Virginie Pontin v T-Comalux SA not yet reported.
747 Case C-127/92 Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health [1993] ECR I-05535.
Otherwise, the Court held that “[w]orkers would be unable to enforce the principle of equal pay before national courts if evidence of a prima facie case of discrimination did not shift to the employer the onus of showing that the pay differential is not in fact discriminatory.” Applying this notion to the concrete facts of that particular case, the Court found that the fact of “an appreciable” difference in pay between two jobs of equal value, each one performed predominantly by workers of one sex, sufficed to shift the burden of proof.

The CEE post-socialist courts have shown a clear resistance to the transfer of burden of proof. The *Eva B.* case is a good illustration. The case concerned a Roma woman who suffered harassment and was thrown out of a dental emergency room after she told her dentist about her Hepatitis C infection. She claimed before the court that she was discriminated against on the grounds of her race. During the proceedings, it was found that the dental emergency room had a formally proscribed procedure for these kinds of situations. Eva B. claimed that the procedure was not followed since she was asked to leave the emergency room immediately. Her claim was confirmed by her friend who accompanied her that day. The dentist and his assistant argued that they asked the plaintiff to wait in accordance with the procedure, but she refused. Even though it was dealing with a potential example of discrimination on several grounds, the court did not find it necessary to shift the burden of proof. It simply took into account the fact that Mrs. Eva B. was treated in the same emergency on several occasions before and argued that “as the Respondent consistently denied to have discriminated against the Plaintiff...it is up to the Plaintiff to prove

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748 Id. at para. 18.
749 Id. at para. 19.
that discrimination occurred.” It added that “the Respondent cannot be obliged to prove negative facts...Therefore the Plaintiff has to prove the occurrence of discrimination”.751

Primarily due to the interventions of their Supreme Courts, most post-socialist courts have, at least formally, accepted the legal requirement of reversing the burden of proof. In fact, taking into account the way in which many of the CEE Member States transposed this antidiscrimination instrument into their legal systems, it was difficult for post-socialist courts to ignore the burden of proof requirement. Many of the CEE legal systems regulated this issue in a rather formalistic manner that went significantly beyond the EU requirements.752

Although the legislative provisions ensured a rather easy transfer of the burden of proof to the benefit of potential victims of discrimination, however, the post-socialist courts have been shown to be rather quick in dismantling this instrument. The threshold that the defendants have to satisfy in discrimination proceedings in order to demonstrate that their actions have not been motivated by racial or sexist prejudice has been rather low.

In the Idea case, for instance, the Slovak court found that the refusal of service to two Roma guests was not racial discrimination since the court found the defendant’s claim that he usually serves guests of Roma origin (supported by few witness statements) to be convincing.753 In the G.P. Club case, concerning the refusal to serve two Roma brothers, the Hungarian courts

751 Id.
transferred the burden of proof and required the defendants to justify their actions. However, after the defendants provided a video-recording showing that the security guards at the club entrance required some other people to show their identification documents that day (even though those guests were not refused the entrance to the club), the courts found that there was no sufficient proof of racial discrimination.

Probably the most telling example of the low threshold demonstrating the dismantlement of the burden of proof requirement is the line of decisions in the *Julia Central Disco* case. The case involved a young Roma woman who was denied entrance to a popular disco club. She and her friends were refused because they did not have club membership cards. Being confident that membership was just a pretext for racial discrimination, she sought help from the local human rights NGO, which organized “situation testing”. On this occasion, she and two Roma activists were again denied access using the same excuse. At the same time, two non-Roma activists entered the club without any problems. The first instance court applied the transfer of the burden of proof and required the defendant to explain his action. The club manager claimed that the plaintiff was denied entrance the first time because the guards were convinced that she and her friends were drunk. He also claimed that, on the second occasion, the plaintiff was refused entrance due to the previous conflict with the guards, while the non-Roma NGO activist alone decided not to enter without the plaintiff.

The first instance court found this explanation unconvincing and concluded that “[t]he defendant did not manage to demonstrate that he was not obliged to observe the requirement of equal

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treatment.” The court of appeals reversed the decision of the first instance court arguing that “although the defendant might have been wrong to assume that the plaintiffs were drunk, from this it does not follow that he discriminated against them because of their ethnic affiliation. The motive behind the defendant’s actions was his assumption that the plaintiffs were drunk.”

Regarding the testing efforts, the court found the defendant’s explanation to be convincing and stated that the testing results cannot be accepted as evidence since “the two Romani testers never even tried to enter on their own”. The court also argued that the defendant’s club membership requirement “was obviously unreal, a pretence, but from this does not logically follow the fact established by the court of first instance that the cause of the denial of entry was their Romani origin.”

The Supreme Court agreed with the appeals court to a considerable extent. The Court accepted the defendant’s drunkenness argument as plausible. It also supported the appeals court in its conclusion that, consequently, there was insufficient evidence that the second incident constituted racial discrimination.

These decisions show that the post-socialist courts are not particularly concerned with the question which party proves which facts and to which level of probability. As the Croatian Supreme Court explained in a recent ethnic discrimination decision responding to the plaintiff’s argument that the court should have never required the plaintiff to submit the evidence since it was upon the defendant to prove objective reasons justifying the refusal of her employment

757 Judgment of the Regional Court of Debrecen No. Pf.II.20.513/2005/4. Id..
758 Id.
759 Id.
application: “[h]owever, the plaintiff has repeated her arguments stipulated in the appeal, claiming that the burden to prove the reasons due to which he refused to employ the plaintiff lies on the defendant. However, courts determine which facts they shall consider as proven according to their persuasion, based on conscious and careful evaluation of every proof separately and all evidence jointly, and on the basis of the results of the whole proceeding.”

This understanding undermines the standard of transfer of the burden of proof. It insists on the conventional notion that the court has a duty to establish and evaluate all facts of a particular case. Consequently, it denies the plaintiff the right to acquire a positive ruling on the grounds of facts that will not demonstrate discrimination with some certainty, but will allow the presumption that discrimination might have occurred.

The provided examples show that the CEE post-socialist courts look for evidence that can demonstrate the defendant’s prejudice with a significant degree of certainty. They are reluctant to find direct discrimination on grounds such as sex or race if they have evidence that merely makes it probable that the discrimination took place. In order to reach a conclusion that unfavorable treatment constituted discrimination, they require proof that demonstrates beyond reasonable doubt that a defendant’s action resulted from his prejudice. In that sense, as the above examples illustrate, if a defendant manages to provide the court with some plausible reason that could even only theoretically justify his actions, the court will tend to dismiss the discrimination claim.

This means that these courts were formally not ignoring the letter of law proscribing the transfer of the burden of proof in cases of prima facie discrimination. Their decisions show that something more profound is at work. In most cases, the courts actually followed the burden of proof requirement in the formal sense and required defendants to justify their actions. However,

the burden of proof requirement loses a great deal of its effectiveness as an antidiscrimination tool once discrimination is reduced to illicit motivation based on prejudice. The examples above show that, as long as these courts continue insisting on clear evidence of the defendant’s prejudice, they will be in a position formally to transfer the burden of proof to defendants but still reject discrimination claims simply because defendants managed to provide them with some conceivable justification of unfavorable treatment raising a sheer doubt that the treatment was maybe not motivated by prejudice after all.

This approach shows that the post-socialist courts either do not grasp or do not want to accept the normative purpose of the transfer of the burden of proof. In fact, it is possible that the notion of transfer of the burden of proof constitutes a challenge to the quasi-egalitarian self-perception of these legal systems discussed in the previous section. The transfer of the burden of proof implicitly rests on the premise that inequality of certain social groups is an every-day reality. More precisely, it operates on the assumption that discrimination against particular social groups is not something that is sporadic and limited to individual incidents. On the contrary, it is systematic, structural and frequent. Once this premise is accepted, it is no longer problematic to hold defendants responsible for sex (or race) discrimination simply because they failed to justify their actions by objective reasons that are in no way related to the suspect criteria. At the same time, however, it is not difficult to see why the post-socialist legal systems, especially the judiciary, would find this normative position problematical. An honest acceptance of the transfer of the burden of proof requires them to denounce their quasi-egalitarian perception and admit that sexism (or racism) is a part of their everyday life, which is something that they have been consistently denying. More importantly, questions entailed by this instrument force these courts
to confront or assume responsibility for negative implications that the dominant social arrangements have for women.

In any case, regardless of whether the preceding assumptions are correct, the fact remains that the manner in which the post-socialist courts tend to treat the burden of proof requirement makes it virtually impossible for individuals to effectively protect their EU right to equal treatment. This is not in accordance with the burden of proof requirements established by the ECJ.

**6.3.3. Procedural Formalism as a Status Quo Mechanism**

A different doctrinal feature of the post-socialist equality adjudication similarly reflects the reluctance of post-socialist courts to abandon the quasi-egalitarian understanding of discrimination that they inherited from real socialism.

A significant number of post-socialist equality decisions show that the post-socialist courts stress the importance of procedural consistency of the employer’s decision making. If an employer followed a formally prescribed decision making procedure, the post-socialist courts rarely engage in any deeper scrutiny of the substantive content of the decision making process regardless of how troubling its effects may be. This feature reflects the inherited notion that the equality between men and women in employment relations is primarily ensured through *consistent enforcement of existing rules and formal procedures* and the accompanying adjudicative principle that courts ought to defer to the decisions of the appropriate authority as long as its decisions satisfied procedural requirements prescribed by the positive law.

This type of procedural formalism has been one of the more visible features of the post-socialist sex equality decisions. For example, it has been a key feature of the pregnancy discrimination
decisions that I shall discuss in greater detail below. It has also played an important part in sex equality decisions such as the Forestry Project Manager or the Prague Brokerage Company discussed below.

In the Čauševičová v. Česká plynárenská dispute, the court found that the plaintiff was not discriminated against on the grounds of sex since she was treated according to the same evaluation procedure as other male candidates who applied for the position of financial director. More precisely, without any substantive scrutiny of the evaluation criteria, the court found that the plaintiff had an equal opportunity to apply for the position; that she was asked to satisfy the same professional qualifications; that she was interviewed in the same manner as other candidates, and finally, like other candidates from that round, she was not selected by the Board of Directors (BD).

The court simply ignored significant evidence that strongly suggested that the decision of the BD not to appoint the plaintiff was related to her sex. The court ignored that: 1) the plaintiff was recommended to the BD by a private employment agency as the most qualified candidate in the first round; 2) she was better qualified than the successful candidate at least in terms of one professional requirement; 3) the BD never explained their decision not to appoint the plaintiff and 4) one of the BD members who took part in the decision making openly expressed to the plaintiff the belief that her application was not successful because she was a woman. These facts were not sufficient for the court even to presume prima facie discrimination and require the BD to thoroughly explain their decision. Instead, the court accorded the crucial weight to the fact that the BD satisfied the required employment procedures.

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762 See text related to fns. 804804-814814.
763 See infra text related to fns. 772-775775, 790-791791.
764 Decision of the Prague District Court 7, No. 26 C 25/2006.
A similar deference can be seen in the recent decision of the Croatian Supreme Court. In *M.D. v. Croatian Postal Service*, the plaintiff claimed, without specifying the ground, that she suffered harassment and discrimination as compared to other workers in the same postal office. She claimed that she had been given tasks and responsibilities that were more extensive than those of her colleagues in the same position. In addition to responsibilities as a post controller, she also had to perform tasks related to statistical evaluation of data and fill in for two interns who were absent. Her colleagues were being promoted and rewarded, while her promotion points decreased. Moreover, her requests for an explanation of her position were consistently ignored.

The Supreme Court found that her discrimination claims were unfounded. The Court noted that the plaintiff was working in a position that required a higher degree of professional competence than that which formally corresponded to her acquired level. It also noted that the formal description of her position included statistical evaluation of data and that her salary corresponded to the salary that was formally prescribed by the employer’s internal regulation for that position. The court also found that her supervisors considered her to be diligent, but they believed that she was not capable of performing more complex tasks. Based on these findings, the Court agreed with the first instance court and concluded that “there can be found no elements of either direct or indirect discrimination in the employer’s behavior”.

Like their Czech colleagues above, the Croatian Supreme Court gave clear priority to procedural consistency over the substance of the employer’s actions. Thus the Court simply ignored several troubling features: 1) the inconsistency in the employer’s argument that the plaintiff was a good worker but her promotion points actually decreased over time, and 2) her colleagues were promoted although the scope of their responsibilities was often smaller. In accordance with its

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deference to the employer, the Court did not find it necessary to subject the employer’s reasons for the denial of promotion to the plaintiff to more intensive scrutiny.

Two recent sex equality decisions of the Hungarian Supreme Court further illustrate the connection between procedural formalism and the role of prejudicial motivation in the post-socialist equality decisions. The first decision concerned a female bus driver who was dismissed due to an illness-related absence and was not rehired after she recovered. Her application was rejected due to the sexist attitude of the personnel manager who explicitly “explained” to the plaintiff that “women should have a cooking spoon and not a steering wheel in their hands.” Persons close to the plaintiff who were present when the incident occurred testified in support of the plaintiff. The Court accepted their testimony and reversed the burden of proof. Since the defendant failed to provide convincing reasons to the contrary, the Court ruled against him.

The same court took a rather different approach in another case the same year. The case involved an unemployed female marketing manager who was denied participation in the subsidized training at the Labor Market Center after she had difficulties with scheduling her training sessions and after she declined an offer of a fixed-term job. The plaintiff claimed that she actually lost support due to her sex, age and a personal bias against her. The lower courts refused to reverse the burden of proof and found that her claim was unfounded “because the defendant made the decision within its discretionary power.” The Supreme Court agreed and argued that there was no need for reversal since there was no “strikingly grave unlawful

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768 Id.
“deliberation” in the employer’s decision-making. What distinguishes the two cases is the presence of evidence regarding the prejudicial motivation behind the harmful action of the employer.

Procedural formalism in equality decisions of post-socialist courts shows that these courts are reluctant to question the credibility of the employers’ actions as long as they provide reasons that seem plausible and are not obviously discriminatory. The concrete implications of the employers’ actions in question thus have very little, if any, significance for post-socialist courts.

Procedural formalism is yet another expression of the narrow intent-based approach to discrimination. The above decisions show that the CEE post-socialist courts use the fact that employers formally satisfied the proscribed decision making procedure as an objective justification of their unfavorable actions. They use it as a proof that there was no prejudicial motivation behind the decision. Accordingly, the fact that these courts so easily defer to the decisions of defendants regardless of the real-life implications of their decisions is yet another illustration of their reluctance to question and challenge existing social arrangements perpetuating the status quo.

6.3.4. Attenuating Direct Discrimination

The reluctance of post-socialist courts to assume responsibility for normative choices in direct discrimination disputes is further confirmed by a particular strategy of compensation. When they

\[769\] Id.

\[770\] As explained by one post-socialist court in the context of pay discrimination: “the decisions of the director or the board of directors concerning the salary corrections due to the effect, quality or result of the production, passed in accordance with the procedure prescribed by the relevant act of the defendant, are the exclusive right of the employer.” Decision of the Zagreb Regional Court No. XXIV Gzr-2181/02-4 dated 11.05.2004.
believe that there is no sufficient evidence of direct discrimination, post-socialist courts nevertheless often find that the defendant’s actions harmed the plaintiff in some other way.

I have argued that the quasi-egalitarianism that these legal systems and their courts inherited from the era of “really existing” socialism rests on a bi-polar understanding of direct discrimination. As explained, post-socialist courts tend to narrowly construct sex or race discrimination as harmful treatment motivated by prejudice. At the same time, as illustrated by the Hungarian School Farewell Ceremony decision, they perceive the general notion of unequal treatment as any difference in treatment between two individuals that cannot be explained by some “objective” reason. We can see the same widening of the notion of equal treatment in the equal pay decisions of Croatian courts. Thus, for example, the Zagreb County Court declared that “the difference in salary of the workers belonging to the same pay grade does not necessarily entail violation of the equal treatment principle if it is a consequence of the adjustment of salaries (due to the effect, quality and results of the production) in accordance with the decision of the employer.”771 The court thus implied in a rather egalitarian manner uncharacteristic for a market-based economy that any difference in pay that cannot be justified by objective professional reasons constitutes discrimination regardless of whether it is related to some suspect ground.

This dichotomy allows CEE post-socialist courts to escape responsibility for finding that a person committed an offence that is as serious and vulgar as sex or race discrimination. Thus, after they had declared that there was no sex or race discrimination, many courts still found that the defendant’s actions nevertheless constituted the difference in treatment that cannot be

771 Judicial Sentenca ŽS Zg Gžr 2181/2002-4. The sentenca was based on the court’s decision Gžr-2181/02-4 dated 11.05.2004. In this respect, see the analysis of the Prague Brokerage Company infra at fn.790.
justified by some objective reason (general discrimination) or that they harmed the plaintiffs’
honor and/or dignity, which are not as normatively charged and socially condemnable violations
as sex or race discrimination.

One such example is the Slovak Forestry Project Manager (the FPR) decision.\textsuperscript{772} The case
involved a female plaintiff who was a research worker in the field of forestry with more than 20
years of working experience. She was dismissed from the position of project coordinator even
though the employer won the financing for his project on the basis of her proposal and her name
(the project documentation stipulated that she would be the coordinator of the project). After he
won the project, the employer removed the plaintiff without any notice and appointed another
less experienced male employee to the position. The plaintiff claimed that the employer’s
decision violated her right to be treated equally under the Labor Law Act.

The court agreed and found that the employer’s decision constituted direct discrimination. Using
a somewhat confusing reasoning, the court pointed out that the employer discussed the
appointment with the less qualified male candidate while at the same time he “failed to discuss
with the plaintiff the fact that she would no longer stay in the research team, even though she
worked out the characteristics, objectives and the reasoning of the winning project.”\textsuperscript{773} The
court also argued that “[t]he decision of the defendant, who excluded the plaintiff from the
research team without discussing such change in the position with the plaintiff, represents a
decision which put the plaintiff from a moral point of view into a disadvantageous, as to her
research career, but also in terms of her wage level assignment. Such change was not necessary;

\textsuperscript{772} Decision of the Zvolen District Court No. 7C 190/02-309 dated 11. 06. 2003. Reported in DLUGOSOVA, Report
Republic, p. 6.
\textsuperscript{773} Id.
there was no real need for it. The Defendant knew that the project was accepted even though the implementation of the project was postponed...there was no reason to exclude the plaintiff from the position of the project manager and to assign any other person to solve tasks solved subsequently by the plaintiff.”

Based on this finding of unfavorable treatment, the court simply concluded that the employer’s behavior “does not prove that the principle of equal treatment has been observed and the defendant failed to prove that it was a necessary decision justifiable by objective reality”. However, the court failed to clearly explain the ground of discrimination. The reasoning suggests that the court considered that the plaintiff was discriminated against because the employer treated her unfavorably without a good professional reason. In other words, she was simply discriminated against.

It seems that even the Polish Supreme Court is not immune to such widening of the equal treatment guarantee. The Youthful Appearance Harassment case involved a female plaintiff who argued that she was harassed by her older female supervisor due to her “attractive” appearance. Unfortunately, the court did not accept this discrimination claim and found that mistreatment in employment on the grounds of appearance falls within the scope of the labor law provision implementing the prohibition of harassment included both in the Art 13 Directives

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774 Id.
775 Some have argued that this should be read as a case of age discrimination. However, the reasoning of the court does not provide strong support to this argument. See COLM O’CINNEIDE, Age discrimination and European Law. European Commission Publications, (2005) available at http://europa.eu.int/comm/employment_social/fundamental_rights/index_en.htm.
and the 2006/54 Recast Equal Treatment Directive. Consequently, the Court reduced the prohibition of harassment to the simple prohibition of mobbing or bullying in employment. This means that the Court never considered appearance in terms of gender discrimination. Instead, it treated appearance as an independent discrimination ground prohibiting in this way a different treatment between “unattractive” and “good looking” people. It is possible that the court failed to see an issue of gender discrimination because the dispute involved a female employee who was treated unfavorably by her female supervisor.

We can find a similar strategy in the context of race equality. For example, the Bross Security case involved a Roma man who applied for the job of a security guard. The security company rejected his application without examining his suitability and skills. It justified its decision by claiming that it “was looking for a more handsome person with a more impressive general appearance.” The plaintiff felt that he was discriminated against because he was visibly of Roma origin. The court did not agree. Although it reversed the burden of proof, the court accepted the defendant’s justification and found that “there was no evidence shown during the proceedings suggesting that the reason for not recruiting the Plaintiff was his Roma origin.” However, instead of racial discrimination, the court switched to the general notion of equal treatment and found that the plaintiff was discriminated against on the grounds of his personal physical appearance.


In the *Julia Central Disco* case, the Supreme Court found that, although there was no sufficient proof that the denial of access to the disco club was racially motivated, the defendant’s decision to deny entrance to the club that was open to *everybody else* was nevertheless insulting and thus violated her dignity.\(^{781}\) Similarly, in the *G.P. Club* case, after it rejected the claim of racial discrimination, the court nevertheless found that the policy of identifying customers at the entrance violated the plaintiff’s dignity since the club was not granted such “policing” power by the law.\(^{782}\) In the *Gypsy Street* case, the court found that the “Gypsy Street address” was not racially discriminatory, but it was insulting to Roma customers and violated their honor.\(^{783}\)

One feature of the described decisions is particularly interesting. These courts could have easily found that the plaintiffs were treated differently than some individual of the opposite sex or race in an identical situation. This would still not require them to rule in favor of the plaintiffs. They could have simply argued that the difference in treatment was not related to the prohibited criterion. This approach would even be in formal accordance with the ECJ’s approach to discrimination. However, they simply ignored the issue of sex or race discrimination altogether and chose to reason on the ground of some rather general notion of equal treatment.

How can one explain this post-socialist doctrine of insisting on the general notion of equal treatment at the expense of sex or race discrimination claims? As noted, the CEE post-socialist courts could have easily followed the ECJ’s doctrine of discrimination in these cases and rejected any sex or race discrimination allegations by arguing that there was some reason unrelated to sex or race that explained the different treatment of similarly situated individuals of different sex or

\(^{781}\) Judgment of the Supreme Court No. Pfv.IV.20.323/2006/6. Id.


race. Nevertheless, it is highly unlikely that the ECJ would have reached such a conclusion if faced with the same cases. In fact, I am convinced that what primarily distinguishes the ECJ from post-socialist courts is not so much a formal doctrine of discrimination. After all, both the ECJ and CEE post-socialist courts base their discrimination doctrines primarily on the Aristotelian notion that likes ought to be treated alike. What separates them is the level of tolerance that these courts have for decisions that are harmful to members of social groups that have been historically subject to unfavorable treatment and are in a disadvantaged position in a particular society. It is here that we should look for the explanation why the CEE post-socialist courts ignore group-based discrimination claims while hiding behind the abstract notion of equal treatment.

We saw in the context of decisions such as *Birds Eye*\(^{784}\) or *Hlozek*\(^{785}\) that the ECJ may “close one eye” in relation to different treatment based on a prohibited ground if it believes that its overall effects are socially desirable, especially if the dominant social group does not reinforce its position.\(^{786}\) It may tolerate unfavorable treatment in order to allow the Member States to preserve regulatory autonomy in socially sensitive regulatory areas and may be careful not to overtly restrain the economic effectiveness of employers. However, notwithstanding all its drawbacks, the ECJ would hardly tolerate unfavorable treatment merely because it is not easy to assume responsibility for holding individuals responsible for such socially charged acts such as sex or racial discrimination. In that respect, the decisions of the CEE post-socialist courts analyzed in this section are a particularly good illustration of the reluctance of these courts to confront the existing patterns of inequality in their societies.

\(^{784}\) Case C-132/92 *Birds Eye Walls Ltd. v Friedel M. Roberts* [1993] ECR I-05579.

\(^{785}\) Case C-19/02 *Viktor Hlozek v Roche Austria Gesellschaft mbH.* [2004] ECR I-11491.

\(^{786}\) For a detailed analysis of both decisions, see Chapter II.
However, the fact that these courts tend to switch to some vague abstract notion of equal treatment when faced with assertions of racial or sex discrimination also points to some other important features of their approach. I have argued that the CEE post-socialist courts tend to evade discrimination claims that require them to assume responsibility for decisions that cannot be easily justified by statutory wording but require value-based arguments. However, the fact that they insist on the general right to equal treatment and are willing to hold defendants responsible for violations of this abstract notion shows that these courts are willing to engage in value-based adjudication after all.\footnote{I am indebted to Professor D. Halberstam for this argument.}

In order to apply the notion that individuals ought to be treated the same unless there is some objective reason to treat them differently, these courts must make at least two decisions that are not specifically determined by statutory text. First, they need to decide which of the countless similarities and differences between two individuals are sufficiently important to make them comparable. Second, they need to decide which of the possible justificatory reasons are sufficiently important to be considered “objective”. For example, in the physical appearance discrimination cases discussed above, the courts simply assumed without any explanation that all workers were similarly situated regardless of their physical appearance. I have little doubt that the majority of population in the CEE post-socialist societies considers this position to be correct. However, the fact that the court’s decision enjoys public support only reveals its normative character since this support is primarily based on the popular assumption that it is fair to treat employees primarily in accordance with their professional merits.

Moreover, the fact that these courts do not accept physical appearance as an objective justification of different treatment of workers reveals that they assume that it is legitimate to...
restrain the decision making autonomy of employers in order to protect other social values that are not explicitly determined by the provisions of their statutory law. In these particular cases, the values that operated in the background of the courts’ formalistic arguments were likely the protection of some sense of personal self-respect of workers or some meritocratic understanding of fair distribution. Furthermore, the fact that these courts insist on the condition of objective justification of different treatment in employment relations presupposes that they are willing and capable of deciding which reasons are sufficiently “professional” to justify the actions of employers. In the context of a market-based economy, this is hardly a decision that can be made simply on the basis of legal text and legal logic.

Of course, the claim that these courts do engage in decision making that requires sensitive normative choices inevitably raises the question why they consistently insist on the reductive notion of sex or racial discrimination. The questions that sex or race discrimination doctrines primarily focused on the effects of unfavorable treatment instead of prejudicial motivation place before courts are not more complicated from those entailed by the abstract notion of equal treatment favored by the CEE post-socialist courts. The issue is even more interesting if we take into account the popular conviction that criteria such as sex or race are irrelevant for the majority of decisions, particularly those decisions that are work-related. In that sense, if they were truly consistent in the application of their equal treatment doctrine, the CEE post-socialist courts would have to conclude that any difference in treatment related to the criterion of sex or race constituted discrimination regardless of prejudicial intent. This doctrinal inconsistency suggests that these courts apparently do not perceive sex or race as “irrelevant” criteria of decision making. The decisions discussed above offer strong support to this argument.
First, the formalist manner of reasoning is rather telling in this instance. Their decisions show that the CEE post-socialist courts simply *take for granted* that employers have a duty to justify different treatment of their workers in terms of work-related reasons. In that sense, it is striking that none of these courts even tried to explain why any different treatment in employment that is not objectively justified constitutes discrimination notwithstanding the fact that their legal systems guarantee entrepreneurial freedom to (private) employers. Since they have not provided any plausible explanation, it is fair to note that their notion of equal treatment is strongly reminiscent of the egalitarianism characteristic for “really existing” socialism (which insisted that employers’ decisions had to be founded strictly on reasons that were necessary for the performance of a particular job).

Second, the same egalitarianism can help explain the described doctrinal inconsistency in approach. As argued in more detail above, due to specific ideological reasons, the CEE regimes of “really existing” socialism developed a bipolar understanding of equality that reduced the notion of group-based discrimination to prejudicial intent while at the same time insisting on a wide notion of equality in treatment that required that *all individual citizens* be treated the same unless different treatment was “objectively” justified by some legitimate reason. Moreover, these regimes insisted that they had achieved full equality between social groups through enactment of concrete rights tailored to their specific needs and different social roles. In that sense, group-based criteria such as sex were not considered “irrelevant” factors of decision making.

The decisions discussed in this section strongly suggest that the CEE post-socialist courts inherited such an understanding of equality. For example, in many decisions, the post-socialist courts insisted on the abstract notion of equal treatment even though the facts suggested that the
criterion of sex or race played some role in the employer’s decision. The courts ignored the fact that these group-based criteria played some role in the decision making process since they considered that the disputed decision was not motivated by prejudice. This reflects the reductionist notion of discrimination characteristic of the CEE “really existing” socialism. Moreover, the decisions clearly show that these courts also favor the other pole of the inherited notion of equality. In that sense, to evade the issue of sex or race discrimination looming in all these cases, the courts turned to the abstract notion of equal treatment. As the FPM court argued, the principle of equal treatment has not been observed because the defendant failed to prove that different treatment “was a necessary decision justifiable by objective reality.”

The inherited bipolar approach still favored by the CEE post-socialist courts illustrates their reluctance to challenge dominant social arrangements and bring change to the status quo. On the one hand, the fact that they take for granted that employers have a duty to justify any difference in treatment by some “objective” work-related reason shows that they are relying on the inherited quasi-egalitarian perception that is still popular in these societies. On the other hand, the fact that they are at the same time quick to accept almost any justification offered by an employer that is only remotely work-related without engaging in any deeper scrutiny suggests that they are equally reluctant to challenge the dominant position of this interest group.

Similarly, the fact that these courts keep enforcing the narrow notion of sex or race discrimination illustrates their inability to overcome the still prevailing quasi-egalitarian view that refuses to acknowledge the existence of systemic inequality of traditionally discriminated social groups. Moreover, the tendency of the CEE post-socialist courts to reduce the notion of discrimination to illicit prejudice regardless of the negative implications that such a doctrine has.

788 See supra fn. 772 and the related text.
on women illustrates that these courts are comfortable operating within the conventional
distribution of social responsibilities that places women in a disadvantaged social position. This
claim is nicely illustrated by the CEE post-socialist case law concerning unfavorable treatment of
pregnant women discussed below.

6.3.4.1. The Role of a Comparator

Before I move on to pregnancy case-law, I will point out one interesting effect of the
discrimination approach favored by the CEE post-socialist courts. These courts have not been
particularly concerned with the Aristotelian test of comparability.

This does not mean that the question of comparability is of no relevance for the post-socialist
courts. Rather, it was not the focus of their attention or their main strategy for justifying their
rulings. Nevertheless, their equality decisions show that the post-socialist courts have often,
consciously or not, manipulated the question of comparability to avoid the conclusion that a
particular action constituted direct discrimination when there was no indisputable evidence of
prejudice.

Some of the decisions from the race context clearly show this tendency. We have seen that, in
the G.P. Club case, the court found that there was no discrimination because some other non-
Roma guests were also asked to present their identification documents to the security guards.789
In the Idea case, the court found that the Roma customers who were not allowed entrance were
not discriminated against because the defendant usually served other Roma customers in the
same way as non-Roma customers. In other words, the courts found that the plaintiffs were

789Decision of the Metropolitan Court (Budapest) 52.Pf.633.360/2004/3 reported in NEKI, Report of the Legal
Defence Bureau for National and Ethnic Minorities (2005). See also report in the European Antidiscrimination Law
treated differently because they were not comparable either to other Roma or non-Roma customers.

The issue of comparability is likely to gain more importance in sex discrimination decisions since, in this context, the discriminatory practice is usually much more sophisticated. Women will more rarely be subject to openly prejudicial discrimination that is still frequent in the context of race. In that sense, the following exceptional equal pay decision is particularly telling.

The *Prague brokerage firm* case concerned a female plaintiff with 18 years of working experience as an economic expert in the banking sector. She discovered that her employer paid her substantially less compared to her retired male predecessor formerly employed in the same position. The employer claimed that the amount of salary in his company depended on factors such as responsibility, complexity, job difficulty, level of required education, organizational demands, level of liability for damage, and physical and mental stress involved. He did not dispute the fact that the plaintiff took over the position and work of the male economist when he retired. However, he argued that their work was not completely the same for several reasons.

Above all, the employer stressed that the quality of their performance was different due to the difference in their experience. He also stressed that the workload of the plaintiff was somewhat lower since the company gradually sold some of its investment funds. In addition, he noted that the salaries had a certain history attached to them since employees usually “brought” them from their former jobs.

Unsurprisingly, the court accepted the defendant’s justification and found that:

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“Regarding the remuneration discrimination on grounds of gender of the plaintiff, the appeal court came to the conclusion that there was no discrimination. It has to be admitted that Ing. Galonek had a higher salary than the plaintiff; however, during the process, factual findings justifying different levels of salary appeared, regardless of the gender of the employee. In this matter the appeal court considers, as the court of first instance did as well, the testimony of Ing. Štepánek, who as the supervisor of Ing. Galonek and later of the plaintiff have had the best overview of their work, to be crucial. It was found out from his testimony that the plaintiff formally took over all of the work from her predecessor; however, results of her work differed from those of Ing. Galonek mainly qualitatively.

The work of the plaintiff was also smaller in capacity as the company was selling its investment funds and thus the number of banking operations decreased. The abovementioned witness also noted that whilst Ing. Galonek was a really experienced knowledgeable employee, the plaintiff on the other hand, did many operations for the first time. […] It arises from the above-mentioned that the workload was qualitatively but also partly quantitatively different and it could not remain unseen that Ing. Galonek had been working in the company of the defendant for a number of years and within these years he had become knowledgeable in individual activities. Consequently, Ing. Galonek also acted as an assistant manager.”

The lack of any deeper scrutiny of the actual situation shows that the court was rather quick to accept the differences between the plaintiff and her predecessor and thus avoid the responsibility for finding that the defendant discriminated against women. The court thus ignored the rather

791 Id.
dubious quality of the differences separating the plaintiff and her predecessor.\textsuperscript{792} It stressed that the pay difference between the plaintiff and her predecessor was justified not merely by the difference in the workload but primarily by the differences in the \textit{quality} of their performance.

Such an analysis runs contrary to the ECJ's equal pay scrutiny that we have seen in the \textit{Brunnhofer} decision.\textsuperscript{793} In \textit{Brunnhofer}, the ECJ clearly established that the differences in pay for equal work cannot be justified on the basis of \textit{“the future assessment of the work of each employee”}.\textsuperscript{794} In other words, when the employer hired the plaintiff, he could not have predicted the quality of her work that he used as the justification of difference. In this particular dispute, this was even more relevant since the plaintiff had 18 years of valuable professional experience behind her. Moreover, \textit{Brunnhofer} required that any difference in pay for the same work performed by men and women must be justified by the real need of the employer unrelated to any discrimination linked to the difference in sex, and must be suitable and necessary for achieving that objective. If the employer fails in any of these requirements, the difference in pay constitutes direct discrimination on the grounds of sex. In that sense, the \textit{Brunnhofer} version of the ECJ’s neutrality doctrine leaves very little room for the post-socialist fascination with prejudicial motivation.

\textbf{6.4. Pregnancy and Discrimination}

The narrow understanding of discrimination inherited from the socialist era is also reflected in the pregnancy decisions of the post-socialist courts. As seen in Chapter I, the CEE regimes of

\textsuperscript{792} Havelkova suggested that the task of the courts was not made easier by the Czech Remuneration Act that was mixing objective and personal criteria for weighing equal work and as such was in conflict with the EU equal pay provisions. \textsc{Kühn}, et al., \textit{Rovnost a diskriminace}, p. 382.

\textsuperscript{793} Case C-381/99 \textit{Brunnhofer} \textit{[2001]} ECR I-04961.

\textsuperscript{794} Id., para 79.
“really existing” socialism offered extensive and rather determinate protection to pregnant workers. This was an important part of their particular understanding of equality between men and women, which insisted on different social roles for different sexes. While men were primarily expected to be workers, the regimes of “really existing” socialism expected women to carry a double role. “Really existing” socialism expected women to participate in the workforce in a manner that did not impair their primary social role of motherhood. To facilitate this gender distribution of social responsibilities, these regimes developed concrete positive pregnancy and maternity rules strictly prohibiting any treatment that would harm the acquired employment status of women during their pregnancy or maternity leave.

This notion of positive rules offering strict protection is still present in the equality decisions of the post-socialist courts. On the one hand, the post-socialist courts tend to perceive pregnancy and maternity rights in a rule-like manner as the absolute ban on unfavorable treatment of workers who are pregnant or who are using their maternity/parental rights. In principle, employers are not allowed to treat such workers unfavorably regardless of the legitimacy of the unfavorable treatment, unless the reduction of their employment rights has been explicitly allowed by the text of positive law.\footnote{All the CEE Member States kept very strict and limited exceptions from the protection of pregnancy and maternity rights inherited from the socialist labor legislation. The dismissal of a worker who is pregnant or on a maternity leave is thus usually allowed for very few strict reasons such as the liquidation of the enterprise, severe violations of working discipline, refusal to relocate or early return from military service of an employee who was substituted by a pregnant worker. See Art 333 of the Bulgarian LC; Art 54 of the Czech LC; Art 90 of the Hungarian LC; Art 177 of the Polish LC; Art 64 of the Slovak LC; Art 115 of the Slovenian LC; Art 60 of the Romanian Labour Code, \textit{no 10, 23 novembre 1972 p, Codul muncii, 1994, Uniunea Juristilor Din România, Editura Continent XXI, Bucarest, Roumanie, 81 p} and Art 21 of the Emergency Ordinance No. 96. See also EUROPEAN COMMISSION, Report on Pregnancy, Maternity, Parental and Paternity Rights (2007).}

For example, a Hungarian court held that a woman who was dismissed during her pregnancy could claim compensation for unfair dismissal on the grounds of pregnancy even though she did...
not inform her employer about the pregnancy, since she was not aware of it at the time of the
dismissal.\textsuperscript{796} Similarly, Slovenian courts have adopted the position that a dismissal is not valid if
a worker informed the employer of her pregnancy at the moment when she received the written
dismissal notice regardless of the fact that the employer was not aware of her pregnancy.\textsuperscript{797} The
Croatian Supreme Court has assumed the same position.\textsuperscript{798}

Even the Polish Supreme Court retained the socialist protectionist doctrine according to which
the mere “objective fact of the existence of pregnancy” is sufficient for the protection of a
pregnant worker from dismissal regardless of the worker’s or employer’s awareness of the
fact.\textsuperscript{799} Consequently, an employee who resigned or accepted termination of her employment
contract with notice may request its withdrawal once she becomes aware of her pregnancy or if
she becomes pregnant before the term of notice expires.\textsuperscript{800} In Bulgaria, courts will annul any
decision concerning dismissal without going into the merits of the case if the employer did not
strictly follow the prescribed formal procedures.\textsuperscript{801}

On the one hand, such a strict protectionist doctrine clearly goes well beyond the EU requirement
that the Member States take the necessary measures to prohibit the dismissal of workers who are
pregnant or on maternity leave during the period from the beginning of their pregnancy to the

\textsuperscript{796} The decision is reported in \textit{EUROPEAN COMMISSION, Bulletin of the Commission's Network of legal experts in the fields of employment, social affairs and equality between men and women} 1 (2006).
\textsuperscript{798} Decision of the Croatian Supreme Court No. Rev-1948/01-2 dated December 17, 2002.
\textsuperscript{799} Decision of the Polish Supreme Court No. I PRN 74/78 dated January 14, 1988. For an interesting sociological
analysis of the strong public support for pregnancy and maternity rights in Poland and Hungary, see GLASS &
\textsuperscript{800} Decisions of the Polish Supreme Court No. I PKN 330/00 and No. I PK 206/02. Moreover, the Court has found
that it is irrelevant for this protection whether the employee suffered a miscarriage before the term of notice expired.
Decision of the Polish Supreme Court No. I PKN 468/99 dated January 13, 2006. Decisions are reported in the
experts in the fields of employment, social affairs and equality between men and women, 2007, p. 99.
\textsuperscript{801} \textit{COMMISSION, Report on Pregnancy, Maternity, Parental and Paternity Rights of the Commission's Network of
end of the maternity leave, save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice. This position is also reflected in the ECJ’s case-law. For example, in the Melgar decision, the Court argued that “It is clear from the wording of [Art 10 of the Pregnant Workers Directive] that Directive 92/85 does not impose on the Member States any obligation to draw up a specific list of the reasons for dismissal...Nevertheless, that directive, which lays down minimum provisions, does not in any way prevent the Member States from providing for higher protection for those workers, by laying down specific grounds on which such workers may be dismissed.” Consequently, the ECJ left the responsibility for determining the reasons that are sufficiently important to justify the dismissal of a pregnant worker to the national courts.

On the other hand, the strict protection of pregnant workers offered by post-socialist courts is normatively much narrower that the ECJ’s Dekker doctrine. The post-socialist courts do not perceive unfavorable treatment on the grounds of pregnancy as a form of discrimination and particularly not as a form of sex discrimination. In their view, this type of unfavorable treatment is a “simple” violation of a labor right specifically granted to women. The doctrine of strict pregnancy protection is tightly related to the narrow notion of discrimination favored by the CEE post-socialist courts. Since they perceive discrimination through sexist prejudice, it is unlikely that these courts will view unfavorable treatment on the grounds of pregnancy as a form of discrimination.

This approach to unfavorable treatment of pregnant women is strongly reminiscent of the manner in which the regimes of “really existing” socialism protected pregnant women.

Moreover, the fact that the CEE post-socialist Labor Acts preserved the tradition of specific rules protecting pregnant women from unfavorable treatment in rather limited situations only facilitated the narrow doctrine of discrimination favored by the post-socialist courts. The specific rules inherited from socialist labor acts allowed these courts to develop different levels of protection against unfavorable treatment based on pregnancy. Thus, the CEE post-socialist courts are very protective of women who are pregnant or on maternity leave when it comes to explicitly regulated situations such as the prohibition of dismissal, the right to return to the same position, the right to be transferred to a less demanding job without pay implications, or the right to take time off for prenatal medical examinations etc. However, outside the scope of these conventional situations, we are likely to see judicial decisions that are not particularly favorable to pregnant workers. What is particularly disturbing is the manner in which these courts tend to deal with unfavorable treatment on the grounds of pregnancy in those instances where women do not have a stable employment status. The following decisions provide a good illustration of this problem.

The Slovenian case of Mrs. X v. Administrative Unit for Property Denationalization involved a female administrative official who claimed that she was not promoted because the head of her administrative unit (the supervisor) did not follow the prescribed procedure for employment to those positions that unexpectedly became vacant. She believed that, instead of hiring a new employee, the supervisor was legally obliged to appoint the best qualified official who was already employed within the administrative unit. Only if such an appointment was not possible was the supervisor legally allowed to employ a person who was not an administrative official.

The plaintiff argued that one of the reasons why the supervisor decided to employ a new person and ignore her application was his belief that she would not be immediately available for the job since she was on maternity leave. The claim was supported by the fact that the Ministry for Internal Affairs advised the unit supervisor to employ a person who could immediately start dealing with denationalization claims. The High Court for Labor and Social Disputes rejected the plaintiff’s claim that she ought to have been appointed.

The court found that the law did not oblige the unit supervisor to fill the vacancy by promoting one of the existing administrative officials. The court argued that the decision to open the employment call to outside candidates was within the supervisor’s discretion and the court had no competence to question the reasons behind the employer’s decision. After noticing that it has been established that all candidates who applied for the position satisfied the professional requirements specified by the tender, the Court found that the courts did not have the competence to question the employer’s decision concerning the suitability of a particular candidate, which is why “the reasons why the head [of the administrative unit] had not selected the plaintiff or any other of the candidates are not important except in the case if any of them was not selected for discriminatory reasons.” Accordingly, since the Court did not perceive pregnancy as a form of sex discrimination, it found nothing wrong with the fact that the lower court never required the supervisor to explain his decision not to appoint the plaintiff who seemed to be the most qualified candidate but was on maternity leave at the time of the appointment. The maternity leave issue played no role whatsoever in the Court’s reasoning despite the fact that the Court was aware of the well-known pattern of inequality due to pregnancy.
The Croatian case of *S.M.G. v. Zapresic Health Center* concerned a female doctor who was employed at a health institution as a substitute for the doctor who was on his specialization leave. Her fixed-term employment contract explicitly stated that her employment ended with the return of the absent doctor. In that sense, the plaintiff fell outside the scope of the standard permanent employment status. During her employment as a substitute, the plaintiff became pregnant and eventually asked for a maternity leave. Soon after the plaintiff went on maternity leave, the absent doctor returned to work. Consequently, her employment contract expired regardless of her pregnancy. However, the doctor’s return lasted only 9 days, after which he resumed his specialization leave. The plaintiff considered such developments to be a pretext for her dismissal due to pregnancy.

The first instance court agreed that the absent doctor’s return to his position was a fiction and found for the plaintiff. The appeals court reversed the decision arguing that the return of the absent doctor was the only relevant fact and the fact that he returned for only nine days was irrelevant for the termination of employment because “the employment ceased with the day of the doctor’s return to work, which was in accordance with the Agreement on mutual rights and obligations during the specialization training between him and the employer.” The appeals court also found that “the circumstances that occurred after the doctor’s return were irrelevant” and did not indicate discrimination on the grounds of pregnancy because such a conclusion can find “no realistic ground in the results of the procedure.”

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808 Decision of the Zagreb County Court No. Gž-10475/00 dated June 17, 2003.

809 Id.
The Supreme Court agreed with the court of appeals and dismissed the claim of discrimination.\textsuperscript{810} The Court recognized that the Labor Code explicitly prohibited unfavorable treatment of women who are pregnant “by way of prohibiting the employer from refusing to employ a woman because of her pregnancy, dismissing her or… transferring her to another position.”\textsuperscript{811} However, the Court found that the situation did not fall within the scope of this pregnancy provision since the plaintiff was not dismissed, but rather her fixed-term employment contract merely expired due to the return of the absent doctor. The Court thus found that the discrimination claim was unfounded since the plaintiff did not prove the existence of a secret agreement between the employer and the absent doctor concerning his return to work. In other words, she failed to demonstrate prejudice.

Both the Slovenian and Croatian examples are not reconcilable with the ECJ’s doctrine. In the already mentioned \textit{Melgar} decision, the ECJ indeed found “that non-renewal of a fixed-term employment contract, when it comes to the end of its stipulated term, cannot be regarded as a dismissal; as such, non-renewal is not contrary to Article 10 of Directive 92/85.”\textsuperscript{812} But, the Court also explicitly stated that “in certain circumstances, non-renewal of a fixed-term contract could be viewed as a refusal of employment. It is settled case-law that a refusal to employ a female worker, who is otherwise judged capable of performing the work concerned, based on her state of pregnancy constitutes direct discrimination on grounds of sex.”\textsuperscript{813} Moreover, the Court emphasized that “[i]t is for the national court to determine whether the non-renewal of an

\textsuperscript{810} Decision of the Croatian Supreme Court No. Revr 4/04-2 dated April 06, 2004.
\textsuperscript{811} Id.
\textsuperscript{812} C-438/99 Maria Luisa Jiménez Melgar v Ayuntamiento de Los Barrios [2001] ECR 06915, para 45.
\textsuperscript{813} Id. at para 46.
employment contract following a succession of fixed-term contracts was in fact motivated by the worker's state of pregnancy.”

Slovenian and Croatian courts have made it excessively difficult for women to protect their right not to be discriminated against on the grounds of pregnancy by overemphasizing the relevance of the employment procedure and the form of the employer’s actions. In that sense, they have failed to exercise the responsibility Melgar gave to national courts, as well as the ECJ’s explicitly elaborated burden of proof.

Similar problems concerning judicial enforcement of antidiscrimination rights of pregnant women have been reported in the majority of the CEE post-socialist legal systems. For example, the Hungarian courts allowed an employer to justify the dismissal of employees who returned from parental leave by invoking a supposed need for personnel cut-backs, while at the same time retaining the employees who were hired as substitutes for women on parental leave. It appears that the courts accepted the employer’s argument that the positions in question developed into two parallel positions and that only one of these positions could be retained. This is yet another example of the deference of post-socialist courts to the decision-making autonomy of employers. This kind of deference is especially troubling in light of the frequent reports about the

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814 Id.
815 Case 109/88 Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss [1989] ECR 3220; C-127/92 Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health [1993] I-05535; C-167/97 Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez [1999] I-00623; C-17/05; C-381/99 Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG [2001] I-04961; B. F. Cadman v Health & Safety Executive [2006] I-09583.
widespread employment practice of circumscribing employment guarantees provided to women who are pregnant or on maternity/parental leave.\textsuperscript{817}

Judging from these examples, there is little doubt that, as long as they perceive the protection of pregnant women primarily as an enforcement of specific labor rights tailored to their unique needs and reduce pregnancy-related discrimination outside these specific limited situations to prejudicial intent, the post-socialist courts will have great difficulties with the ECJ’s *Dekker* approach to sex discrimination and the line of cases that followed from the *Dekker* reasoning.

More importantly, the twofold approach of the CEE post-socialist courts to employment protection of pregnant women is probably the most vivid example of the lingering influence of the understanding of equality between men and women characteristic of the period of “really existing” socialism.

First, the fact that the CEE post-socialist courts insist on rule-like strict protection of pregnant women in those narrow situations where national statutes explicitly prohibited unfavorable treatment of pregnant women but nevertheless refuse to view such treatment as a form of discrimination is a clear remnant of the quasi-egalitarian understanding that full equality between men and women was actually achieved through a number of specific rules tailored to women’s

\textsuperscript{817} Saxonberg and Szelewa report that employers in the CEE post-socialist labor markets developed the practice of formally following the labor law pregnancy guarantees by allowing mothers to return to their jobs after which they would fire them after a rather short period of time. Saxonberg & Szelewa, *The Continuing Legacy of the Communist Legacy? The development of family policies in Poland and the Czech Republic*, p. 363. In their research, which involved 30 employers in the financial sector in Hungary, Glass and Fodor found that “to circumnavigate legal guarantees, employers rely on authorized stipulations that allow employers to dismiss workers if their job has been eliminated during the period of leave. Administrative renaming of positions enables employers to fire women with impunity. The employers in our sample estimated that 70–100% of workers are not rehired following maternity leave.” Glass & Fodor, *From Public to Private Maternalism? Gender and Welfare in Poland and Hungary after 1989*, p. 345. See also the accounts in Elein Fultz, et al., *The Gender Dimensions of Social Security Reform in Central and Eastern Europe: Case Studies of the Czech Republic, Hungary and Poland*, pp.72, 136, 138, 201, 321.
particular needs. Accordingly, the only task that was left for the courts was to faithfully enforce those specific rules.

Second, as argued in Chapter I, the primary purpose of employment protection offered to pregnant women by the CEE regimes of “really existing” socialism was to encourage women to assume responsibility for social procreation and childcare. The fact that the CEE post-socialist courts are willing to strictly enforce rules offering protection to women who have decided to become pregnant during their employment, while they are equally strict in limiting protection against pregnancy-related discrimination for those pregnant women who do not have a stable employment status or women who are returning to work after giving birth, suggests that they are comfortable operating within the inherited system of social distribution of childcare responsibilities between the sexes that expects women to subordinate their personal interests to the principal social role of motherhood.

Third, similar to their bipolar approach to discrimination, the twofold approach to protection of pregnant women favored by CEE post-socialist courts reveals their reluctance to challenge the existing social arrangements disadvantaging women. On the one hand, the strict protection that these courts offer in situations explicitly identified in statutory law indicates their reluctance to challenge the prevailing view in these societies that women ought to submit and adjust their carriers to their responsibility for childcare. On the other hand, the intent-based notion of pregnancy discrimination that these courts favor outside a limited but explicitly regulated number of employment situations indicates that they are equally reluctant to hold employers responsible for unfavorable treatment of women.
Chapter VII

Indirect Discrimination as a Challenge

7.1. Introduction

The previous chapter identified and explained key obstacles to the enforcement of EU equality guarantees in the CEE post-socialist legal orders. This chapter will focus in greater detail on the implications that these obstacles are likely to have on the enforcement of the most prominent EU equality guarantee: the prohibition of indirect discrimination.

I will show that the prospects for a successful enforcement of indirect discrimination are not particularly good. At the same time, I will point out several positive experiences concerning the enforcement of indirect discrimination in a legal system that has also been traditionally committed to a formalist perception of law. We can only hope that the CEE post-socialist courts will find this experience useful and eventually follow a similar path.

Since there are not many reasons to be optimistic at the moment, however, I will point to several ways in which it is possible to restrain the narrowing of this guarantee that will likely occur in the case law of the CEE post-socialist legal systems.

7.2. Evading Indirect Discrimination

7.2.1. Examples of Evasion

What is particularly striking about the equality jurisprudence of post-socialist courts is the paucity of decisions upholding claims of indirect discrimination. Furthermore, we can find that
post-socialist courts across the region have used the same approaches to evade the challenges entailed by this concept. This evasion is all the more noticeable since all of the post-socialist legal systems that have either joined the EU or are in the process of accession negotiations have transposed the concept of indirect discrimination into their positive statutory law years ago.

Post-socialist courts in at least four different national legal systems – Croatia, the Czech Republic, Hungary and Slovakia - have each had at least one clear chance to face the challenges of indirect discrimination and failed to do so. The (in)famous D.H. case is probably the best known example involving this type of evasion. However, I will primarily focus on other less familiar but equally good examples of evasion. I will use the Hungarian Miskolc Segregated Schools case and the Croatian Segregated Classes Policy case as paradigmatic examples of the kind of evasion relevant for our discussion.

The Miskolc Segregated Schools dispute involved a decision of the Miskolc local council to financially and administratively merge several schools in the area governed by the local government. However, the council’s decision did not merge the areas of registration that concerned every school individually. Consequently, children remained de facto segregated in different schools due to the residential segregation of the Roma and non-Roma populations in the area. The plaintiffs argued that the decision merging the local schools in the administrative and financial sense but falling short of merging their registration areas constituted indirect discrimination, since it perpetuated the already existing segregation between Roma and white children. Although it is not clear from the court’s decision how the plaintiffs argued that the segregation was a particular disadvantage for Roma children, it seems that they used two lines of argumentation. First, it seems that the plaintiffs viewed segregation as particularly harmful for

818 D.H and others v. the Czech Republic [2006] ECHR 57325/00.
Roma because the social segregation of non-Roma and Roma people traditionally denoted their inferiority. Second, they also argued that the quality of education was lower in schools with predominantly Roma children.

The first instance court simply ignored the indirect discrimination argument. It constructed the dispute along the lines of direct discrimination. In a formalist manner characteristic of the CEE post-socialist courts, the court held that the local government had not discriminated against Roma children since “the wording of the law unequivocally established” that discrimination “can result only from active conduct (and not omission).” Accordingly, the court simply ignored the argument that a school registration policy based on residence was “active conduct” producing disparate impact.

The appeals court partially reversed the decision finding that the lower court wrongly applied the burden of proof requirement. However, the appeals court also ignored the indirect discrimination claim. It constructed the dispute as a breach of the special provision of the national Antidiscrimination Act, which prohibited the maintenance of an educational environment “whose standards do not reach accepted professional requirements or do not meet professional rules, and thus do not ensure a reasonably expectable opportunity to prepare for


820 The very same line of argumentation can be found in the Bulgarian Roma segregation case Romani Baht Foundation and European Roma Rights Centre versus the 75th school Todor Kableskoy, Sofia District Court, Reference No. 9427/2003.

Based on this provision, the court concluded that, due to the text of statutory law, the omission constituted discrimination in this particular case.

It is important to point out that the court not only avoided the claim of indirect racial discrimination but it defused the claim of racial discrimination all together. The court’s judgment was that the actions of the local government constituted discrimination since it failed to provide an acceptable professional educational environment to a group of students who happened to be of Roma origin. Hence the authorities were responsible not because they discriminated on the grounds of race but rather because they did not provide the same level of quality to all students. The court achieved this diffusion by switching from the notion of race discrimination to a general notion of equal treatment that requires that any difference in treatment between individuals must be objectively justified. As argued in the previous chapter, this type of reasoning that reduces a group-based discriminatory treatment to a violation of a general equal treatment right granted to all citizens is reminiscent of the egalitarian ideology characteristic of the CEE “really existing” socialist systems.

The Croatian example is even more striking. In the Segregated Classes Policy case, the Croatian Constitutional Court faced the practice of primary schools that formed “special classes” for children who failed to demonstrate a sufficient knowledge of the Croatian language. The criterion was consistently applied to all children. Nevertheless, the special classes were exclusively Roma, since, on average, 60% of Roma children joining the system of primary education failed to satisfy the requirement. Once the classes were formed, they remained that way for eight years until the end of primary education. The plaintiffs argued that the special

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classes were primarily formed according to the racial and ethnic origin of the children and not according to the criterion of sufficient knowledge of the language. Alternatively, they argued that even if the linguistic criterion was the main reason, the special classes were inherently unequal since there is no room for “separate but equal” doctrine in public education.

The first instance court rejected the racial discrimination claim. It found that the policy of forming special classes for children who did not sufficiently understand the Croatian language did not constitute any form of discrimination even though these classes consisted of Roma children only. According to the court, it was clear that “the positive law prescribed” the Croatian language as the official language of primary education. Accordingly, the court found that insufficient knowledge of the language was a barrier to meaningful education. Consequently, it was “logical that the school classes consisting of children lacking in sufficient understanding of the Croatian language required more intensive work and engagement of teachers, especially when it came to the learning of the Croatian Language.” Therefore, the court found that there could be no discrimination. Furthermore, the court relied on the testimonies of several experts to find that the practice of keeping Roma children in classes that were formed on the day of enrolment for the duration of their primary education did not constitute discrimination. According to the court, this practice facilitated mutual relations of friendship among classmates. A policy of class reshuffling would be too stressful for children.

The appeals court confirmed the decision. It particularly stressed the finding of the lower court that it was “logical” to distribute children lacking in their knowledge of Croatian in special classes since they required more attention, time, and effort to learn the basic rules of the

825 Decision of the County Court in Čakovec No. IV-G?:539/02-2.
language. The court even implicitly suggested that the policy of class integration would place the children with sufficient knowledge of the Croatian language in an unfavorable position. According to the court, the integrated classes would reduce the quality of education of these children and consequently restrain them in their progress. As such, integration would be contrary to the prescribed policy of forming primary school classes in a manner that is motivating for all children.

The Croatian Constitutional Court (CCC) agreed with the lower courts and held that the discrimination claim was unfounded. According to the Court, “the distribution of children in primary school classes is a result of the abilities and needs of every child individually.” It also stressed that this individualized approach to the allocation of children was conducted in accordance with the “rules of the education profession” and with respect to “pedagogical standards”. Accordingly, the Court concluded that “the approach according to which the competent experts are exclusively responsible for decisions about the allocation of a particular child to a particular class” is the correct one. Since it found no reason to doubt the findings and expert opinions of the relevant school commissions consisting of competent experts (medical doctors, psychologists, pedagogues and teachers) responsible for enrollment, the Court concluded that the special classes did not constitute discrimination since the distribution of children in such classes was not “motivated or formed due to [the children’s] racial or ethnic origin.”

826 The CCC Segregated Classes Policy decision, section 7.3.
827 Id.
828 The CCC Segregated Classes Policy decision, section 7.3. The Court also argued that the practice of forming special classes served “a legitimate goal of necessary adjustment of the primary education to abilities and needs of the plaintiffs, where the determining factor has been their insufficient knowledge of the Croatian language in which the education takes place.” In that sense, the purpose of the special classes was not racial segregation. Rather, the
It is clear from its reasoning that the Court was aware of the issue of indirect discrimination. After it concluded that the practice in question did not constitute discrimination due to the absence of prejudicial motivation, the Court wrote that “[I]t is especially important to note that statistical data concerning the number of Roma children in special classes...are not sufficient indication based on which it could be concluded that the actions of the defendants could be regarded as discriminatory.” The Court found support for such a conclusion in the authority of two rather dubious decisions of the ECtHR.

The decision demonstrates a clear disinclination to implement the concept of indirect discrimination. The Court rejected the possibility that neutral and “professionally” objective rules can have a discriminatory impact on children of a different race since such rules respond to the objective “needs of every child individually”. However, the only need the Court was ready to recognize was the need to be educated in the language of the dominant social group. The Court thus never considered that Roma children may have a need to spend a significant and important part of their formative years in an environment that does not stigmatize them as inferior. Moreover, the Court showed no interest whatsoever in scrutinizing “the objective justification” of the supposedly neutral practice since that would require it to engage in a debate about the legitimacy of the Croatian language as the dominant norm. On the contrary, it simply assumed that the language of the dominant group is a “neutral” and “objective” standard of treatment unrelated to the social problem of racism.

policy of separated classes was a measure that “secured an intensified work with children with the purpose of their learning of Croatian language and the removal of the consequences of their earlier social deprivation.”

829 The CCC Segregated Classes Policy decision, section 7.3.

In a similar manner, the Court ignored the disparity in living conditions between Roma and non-Roma children. Ignoring the context of real-life racism against Roma people in Croatian society, especially their isolation from the rest of the local community, the Court placed itself in a position to assume that all children are alike and as such ought to be treated according to the same standards. Consequently, it even avoided the other side of the Aristotelian notion of equal treatment that perceives discrimination as the same treatment of those who are different. In that way, the schools were not even required to justify their policy of allocating children to classes. The schools never had to show that segregated classes were truly necessary to ensure a reasonable level of quality of education for Roma and non-Roma children. More to the point, the Court was not required to engage in a socially sensitive normative debate about the legitimacy of educational processes that forced racial minorities to choose between assimilation, on the one hand, and social segregation and inferiority on the other.

Just like their Hungarian colleagues in *Miskolc Segregated Schools*, the judges of the Croatian Constitutional Court effectively defused the claim of racial discrimination by switching to the general notion of equal treatment. The Court thus found that segregated classes constituted discrimination once the Roma children acquired a sufficient level of linguistic knowledge.\footnote{The *CCC Segregated Classes Policy decision*, section 8.2.} However, the Court never said that such unequal treatment constituted racial discrimination since the practice of having segregated classes was merely the result of an initial decision that was not based on racial prejudice. Moreover, the policy was supported by the “professional” opinion that breaking up established classes would have negative emotional consequences for children.

In this way, the Court turned discrimination into a simplistic rationality test that was concerned merely with the question of fit between the disputed means and its purpose. However, there is
something rather puzzling in the ruling that the policy of segregated classes constituted
discrimination once the children were successfully assimilated to the dominant norm. Since the
Court never suggested that the quality of education in segregated classes was different, we can
only assume that the Court considered that the mere fact of segregation constituted unfavorable
treatment. At the same time, it is highly unlikely that the Court considered that segregation
placed non-Roma children in an unfavorable position. In that sense, the ruling that the policy of
segregated classes constituted discrimination once Roma children acquired a sufficient
knowledge of the Croatian language implies that the application of “professional” and “neutral”
criteria of language knowledge did produce a disparate and adverse impact on Roma children. It
also shows that the Court simply decided that such a disparate and adverse impact does not
require any particular justification. More precisely, it simply assumed that, whatever the negative
effects of segregation of Roma children are, they were outbalanced by their “need” to be
educated in the Croatian language.

It is important to note the strong similarities in the reasoning of the Hungarian and Croatian
courts despite the fact that it is highly unlikely that these courts were aware of the decision of
their judicial counterparts across the border.

The decisions of the Hungarian and Croatian courts are permeated with implicit and concealed
normative choices. For example, the position of the Hungarian courts that all children must be
ensured the same level of quality of education is nothing more than a value-based choice. The
position is based on the court’s apparent conviction that a certain (not fully defined but
presumably high) level of education (that happened to be granted to children who happened to be
of non-Roma ethnicity) is of great value to every child. However, this is merely a normative
conviction. In that respect, there is nothing “objective” in the court’s reasoning that prevented the court from assuming some normatively equally convincing counter-position. For example, the Court could have assumed the position that quality of education ought to be determined through some market-based competitive mechanism. The position of the Croatian court that all children need to know the Croatian language in order to participate effectively in education is based on a similar normative choice. The Court’s premise that the Croatian language is essential for good education stems from the Court’s conviction that the Croatian language ought to have the exclusive position in the Croatian system of education and be not only the dominant but the absolute standard. Besides this particular conviction, there is nothing that prevents a counter-argument that children in mixed schools could be equally effectively educated in both Croatian and Roma languages.

Nevertheless, both the Hungarian and Croatian courts denied the normative character of their decisions and insisted on the “objectivity” and “neutrality” of their reasoning. The Hungarian court thus essentially argued that the same level of educational quality requirement is prescribed by statutory law. However, the court completely ignored the fact that the legal text did not prescribe any substantive standard of educational quality. The court simply assumed that the level of quality provided to the majority of non-Roma children would be extended to all children. In that respect, there is nothing in the court’s reasoning that would prevent an argument that the statutory standard of educational quality would be satisfied by extending the level provided to Roma children to all children. This gap reveals that there is nothing “objective” or “neutral” in the court’s decision.
The arguments of the Croatian courts are even more telling. The Croatian courts insisted not only that statutory law requires education in the Croatian language but they also stressed the empirical objectivity of the experts’ opinions. In that sense, similar to the direct discrimination decisions discussed in the previous chapter, these courts obscured the normative character of their decisions, insisting on the formal validity and professionalism of the selection procedures. To put it simply, they ignored the possibility that even experts might be relying on racially biased standards.

The purpose of the preceding arguments is not merely to show that the post-socialist courts do engage in value-based decision making despite their strong commitment to clear-cut rules. Instead, I want to show that their value-based decisions strongly coincide with the dominant normative convictions in their societies. In fact, it is this “harmony” that allows them to assume their normative positions without any elaborate explanation of their choices.

More importantly, the manner in which these courts obscure the true character of their decisions by presenting them as “objective”, “logical”, and “neutral” shows their disinclination to challenge the social arrangements favoring the dominant social group despite the negative effects on a particular racial minority. The Croatian courts ignored the real-life differences between children from different racial groups and treated them as “likes” because they were not willing to engage in a politically sensitive discussion about the real-life implications of the dominant position of the Croatian language on the socially disadvantaged position of Roma citizens. The Hungarian courts insisted on the equal right to education for all children because they wanted to avoid the discussion about the position of Roma children in the Hungarian school system. This reluctance reveals the inability of these courts to recognize that the societies in which they play
an important safeguarding and legitimizing role frequently treat a significant number of their citizens in a racist (or sexist) manner, a denial that is strongly reminiscent of the notion of equality characteristic of the period of “really existing” socialism.

As explained in more detail below, one of the main reasons why these courts avoided addressing the claims of indirect discrimination is its normative effect. This antidiscrimination instrument forces courts to confront and give their explicit judgment about the fact that dominant social arrangements do have negative implications on minority groups and do keep them in an unfavorable social position. As the Croatian and Hungarian examples show, instead of engaging in a discussion about the discriminatory character of the status quo, these courts find shelter in a general notion of equal treatment that allows them to reduce discrimination to a simple “reasonableness” test. The problems with reasonableness tests, however, are well known. Such tests are inherently dependent on the dominant standards and perception of fairness in a particular society. Consequently, they do not have the capacity to challenge the status quo.

It is hardly surprising, then, that the courts in these legal systems continue their evasion of indirect discrimination. The recent Sunday Trading decision is a good example.\textsuperscript{832} The case involved a ban on Sunday trading in Croatia.\textsuperscript{833} The government argued that the purpose of the ban was the protection of workers from exploitation. According to the government, workers were exploited primarily because a significant number of employers did not respect the labor law guarantee of higher salary rates for working on Sundays. The plaintiffs consisted of several traders, shopping centers, and store-chains that argued that the prohibition constituted discrimination contrary to the equal treatment clause of the Constitution. They claimed that the


\textsuperscript{833} Articles 58-60 of the Croatian Trading Act, Narodne Novine 87/08 [Official Gazette no. 87/08].
prohibition constituted discrimination for several reasons, two of which involved indirect discrimination. The plaintiffs argued that, although equally applicable to all traders, the prohibition placed traders that established their shopping centers and stores at the outskirts of populated areas at a particular disadvantage as opposed to traders who controlled smaller shops within the populated areas. Customers required a significant amount of time to visit the shopping centers on the outskirts, which made Sunday the second most important day of the week (after Saturday) for these traders. The prohibition of Sunday trading meant that a significant number of consumers would change their shopping patterns. Since they “lost” Sunday as a shopping day, they were more likely to do their shopping on workdays in those stores that were closer to their homes and workplaces. At the same time, most of the smaller and medium size shops within the populated areas were controlled by the largest domestic trading corporations, while the larger shopping centers at the outskirts were predominantly under the control of “foreign” companies.

The other indirect discrimination argument is more interesting for our purposes. The plaintiffs argued that the Sunday trading ban had a particularly unfavorable impact on women employed in trading. They presented data showing that more than 80% of the workers who lost their jobs due to the prohibition were women.\(^{834}\) Explicitly relying on EU sex equality law and the case law of the ECJ, the plaintiffs argued that such a disparate impact could not be justified since the measure was neither capable of, nor necessary for, achieving its aims. The argument that the measure served to protect workers was self-defeating in light of the number of workers who lost their jobs as a result. Moreover, the only reason why workers needed protection was because the state failed to enforce the existing labor law provisions that guaranteed higher pay-rates for work on Sundays. In addition, the plaintiffs argued that the government failed to respect the “gender

\(^{834}\) Approximately 8,000-12,000 out of the total of 80,000 workers lost their jobs.
mainstreaming” obligation that Croatia incorporated into its Sex Equality Act as a result of harmonization with the EU acquis. According to gender mainstreaming, any new law that could potentially have negative implications on the social position of women had to be accompanied by an analysis of its potential effects. Yet, the legislator passed the prohibition on Sunday trading without such an analysis.

The Court found that the prohibition violated the constitutional guarantee because the measure constituted a disproportionate limitation of the plaintiffs’ right to free enterprise. In other words, the prohibition was unconstitutional because it was not necessary for the realization of its purpose. The legislator could achieve the same goal of labor protection if it enforced more effectively the existing labor rights concerning work on Sundays. Moreover, since the prohibition contained a considerable number of exceptions, the Court noted that workers working in those stores without “special” protection, which was also the case with workers employed in other professions that usually conducted their business on Sundays, were left unprotected. Hence the measure failed the means-end scrutiny test. The Court ignored both indirect discrimination claims.

This strategy of simply ignoring the indirect discrimination claims can also be found in recent decisions in Slovenia and the Czech Republic. In the Non-profit Apartments dispute, the plaintiff argued that the provision stipulating that parents who had at least one child could not be older than 35 in order to be put on the priority list for a subsidized apartment lease was indirectly

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835 Art 3 of the Croatian Sex Equality Act, Narodne Novine 116/03 [Official Gazette no. 116/03].
836 The CCC Sunday Trading decision, section 10.2.
837 The CCC Sunday Trading decision, section 11.2.
discriminatory against men since they tended to have children at an older age. Although it seems that the claim was based on a rather misguided understanding of indirect discrimination and as such could have been easily dealt with, the Slovenian Administrative Court chose to ignore the indirect discrimination argument. Like their Hungarian and Croatian colleagues, the Court found that the disputed provision was not contrary to the equal treatment principle since it prescribed the same neutral conditions for all parents.

The Czech example involved a decision of the tax authority denying a married couple the benefit of the “common taxation of spouses”. This benefit was intended to provide financial support to those families with children in which neither of the spouses had access to “the caring” benefit provided by the state social support system.\textsuperscript{839} The problem was that the spouse could not avail himself/herself of this benefit since the social support system did not grant it to self-employed persons. The spouses argued that such a policy was indirect discrimination against self-employed workers caring for children. They used EU law extensively to support their claim and since it was clear that the Czech statutory and executive provisions had failed to transpose the EU provisions, they even invoked the principle of direct effect of the relevant EU Directives. The court simply ignored EU law, including the indirect discrimination claim. It simply held that the national provisions did not constitute discrimination without any elaborate explanation of its conclusion.

As one of the Czech commentators noted, “[t]his is one of the very rare cases in the Czech Republic where indirect discrimination has been argued. Therefore, it is very sad that the national court did not use the opportunity to discuss the matter properly and to compare this

national case with EC law and the vast body of ECJ case law. The tone of the decision only confirms that Czech judges need better training and need to be updated on current developments in EC law and ECJ case law.”

Of all the CEE post-socialist courts, the Slovak Supreme Court probably got closest to an accurate application of the concept of indirect discrimination. The case involved the dismissal of a pregnant worker due to her failure to fulfill the obligation of taking the oath of office. The plaintiff failed to take the oath because the employer provided the memo concerning the date when the oath was to be taken only to workers who were not absent from work. The Court found that such treatment constituted indirect discrimination because the defendant “put at a disadvantage a certain group of its employees on maternity or extended maternity leave, when it did not inform them, as it informed the other employees, about the date of taking the oath and about the changes in their employment.” The Court added that “indirect discrimination shall be taken to occur where an apparently neutral instruction, decision or practice puts at a disadvantage a substantially higher proportion of persons, when this instruction, decision or practice is not appropriate and necessary and cannot be justified by objective reasons.”

The decision was based on the antidiscrimination provisions that transposed EU sex equality guarantees into Slovak law prior to accession. Therefore, notwithstanding that the decision was delivered before the accession of Slovakia to the EU, it is worth noting that the decision diverged from the EU acquis in several ways. First, like their post-socialist colleagues across the region, the Court avoided identifying the grounds of indirect discrimination. It seems that the Court

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840 Id. at, p. 46.
actually assumed that the disputed measure disproportionately affected pregnant workers since they were more likely to be absent when the employer provided the relevant information. However, if the Court indeed assumed that pregnancy was the relevant ground of discrimination, then it misapplied the principle of equal treatment of men and women. According to the Dekker doctrine, the decision to dismiss the plaintiff constituted direct discrimination on the grounds of sex since the employer treated her unfavorably due to pregnancy. Second, once it constructed the situation as an instance of indirect discrimination, the Court still failed to apply the “objective justification” test.

7.3. The Open-ended Character of Indirect Discrimination

What are the reasons behind this pattern of substantial evasion in CEE post-socialist judicial systems? The aversion of post-socialist courts to complex legal instruments that entail politically sensitive normative choices is certainly one possible answer. Indeed, as argued in earlier chapters, each and every element of this antidiscrimination instrument confronts any court within the EU legal order with a serious challenge.

The notion of disparate impact confronts courts with two difficult questions. The first is the issue of comparability. In order to establish unfavorable treatment, in the form of a disparate impact of an ostensibly neutral measure, a plaintiff must identify comparable groups. Intuitively, this does not appear as a particularly troubling task. How and to what extent the disputed measure negatively affected women and how it negatively affected men seem like relatively straightforward questions of facts. Relatively recent ECJ case-law has shown, however, that the comparability issue can easily turn into a puzzling challenge that, once resolved, determines the
outcome of the case.\textsuperscript{842} For example, it is far from obvious why speech therapists with a doctoral degree in psychology and medical doctors trained for speech therapy are not considered comparable for the purpose of equal pay when performing exactly the same work.\textsuperscript{843} Similarly, it is not clear why it would be “objectively” wrong for the purpose of calculating redundancy payments to compare workers who are on parental leave with workers absent due to military service.\textsuperscript{844}

The second difficulty concerns the issue of disparity. This issue has puzzled domestic European courts since the moment the ECJ established that an ostensibly neutral measure must affect significantly more women than men but left the precise meaning of this requirement within the discretion of national courts. The ECJ has been rather consistent in leaving this question within the discretion of national courts.\textsuperscript{845} Hence, it never established a precise standard that could be useful in evaluating the normative significance of a statistical gap. On the contrary, the Court has on several occasions sent mixed signals.\textsuperscript{846}

The issue has become even more challenging since the introduction of the Art 13 Directives and the recasting of the sex equality Directives. Before these legislative reforms, it was believed that a disparity had to be shown through statistical evidence. After these reforms, the importance of statistics is not clear anymore. Thus the Recast Sex Equality Directive provides that few “persons of one sex” may demonstrate that a neutral measure placed them at a “particular

\textsuperscript{842} TOBLER, Indirect discrimination: a case study into the development of the legal concept of indirect discrimination under EC law, p. 265; DAGMAR SCHIEK, \textit{Indirect Discrimination, in} Cases, materials and text on national, supranational and international non-discrimination law (Dagmar Schiek, et al. eds., 2007), p. 436.

\textsuperscript{843} Case C-309/97 Angestelltenbetriebsrat der Wiener Gebietskrankenkasse v Wiener Gebietskrankenkasse [1999] ECR I-02865.


\textsuperscript{845} See TOBLER, Limits and potential of the concept of indirect discrimination.

\textsuperscript{846} Case C-167/97 R v Secretary of State for Employment ex parte Seymour-Smith and Perez [1999] ECR I-623.
Moreover, it insists that a disadvantage be shown through comparison with “persons of the other sex”. This wording allows for two approaches to establishing disparity. The traditional approach relying on statistics is one option and so far it has been the only one present in the ECJ’s case law. The other possibility is to show that a measure affected an interest of a particular individual that is particularly important in terms of her group membership or identity.

It is possible to argue that this second approach is not that different from the statistical approach since the easiest way for a court to recognize an interest that is of particular importance for the members of a particular sex is to do an “educated” estimate of the statistical effect of the measure on men and women as a group. This is certainly one possibility and it was probably the goal behind the legislative redefinition of indirect discrimination. However, the easiest way is not the only way. As it stands, the wording allows a judge to move completely away from the use of statistics and decide that a particular interest affected by the measure has a particular importance for women as a social group based on some general understanding of what constitutes female and male genders. As I argue below, the implications of this approach could be far-reaching, especially if the courts operate within a context that has traditionally perceived the differences between men and women as objectively predetermined and has accordingly attached to them different social roles, responsibilities and identities.

Once they surmount the difficulties raised by the requirement of disparate impact, the courts are likely to face even greater challenges entailed by the “objective justification” requirement. The requirement is basically a test of proportionality that the ECJ established as one of the

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fundamental principles of the EU legal order. The purpose of the proportionality test is to scrutinize the impairment of an individual right guaranteed by EU law. The courts are required to scrutinize the legitimacy of the aims of the measure; its capacity to achieve the aims and its necessity for the realization of the aims. As argued in previous chapters, notwithstanding their mechanical appearance, each of the three conditions involves a value-based balancing test. Due to the openness of each condition, the “objective justification” requirement can range from a lukewarm reasonableness test to strict scrutiny, depending on the (conscious or unconscious) normative preconceptions and goals of a particular court. This is particularly true given the ECJ’s preference to leave to national courts wide discretion regarding the concrete application of this requirement.

At the same time, however, the indirect discrimination guarantee is not judicially unmanageable. In fact, the open-endedness of the guarantee can, in some ways, facilitate its application.

What gives this essentially common-law instrument a uniquely “European” character is its (apparently) highly mechanical structure. The instrument consists of clearly distinguishable building blocks that courts can apply one-by-one in a “check-box” manner. This is particularly the case with the “objective justification” requirement, which essentially copied the structure of the principle from the German legal system. This mechanical structure implies a promise of

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849 In that respect, the idea is that a disparate impact indicates a breach of the principle of equal treatment between the sexes and as such ought to be justified as “proportional”. Those fond of the Aristotelian formula perceive it as an indication that those who are different have been treated the same.

legal objectivity based on logic and procedural justice. This is certainly a feature welcomed by almost any CEE positivist court.  

The combination of substantive openness and technical form can have a particular effect. The openness makes almost any normative position infused into the instruments seem plausible. Moreover, once the concrete position has been introduced, the form of the instrument takes over to provide the final conclusion with an aura of legal objectivity. This effect is particularly likely in legal systems that are committed to legal argumentation based primarily if not exclusively on a positive legal text. Because they are not accustomed to normative argumentation in judicial proceedings, the parties will not tend to question the “correctness” of the Court’s position, as long as the position seems plausible in light of the legal text.

The aversion of post-socialist courts towards complex and open-ended legal instruments has certainly been an important reason for the evasion of indirect discrimination. This has probably been exacerbated by the fact that until recently there has been a lack of comprehensive and trustworthy statistical data concerning the position of men and women in the labor market. However, the preceding arguments claiming that indirect discrimination can have a certain attraction even for formalist courts suggest that open-endedness may not be the only reason behind the evasion, and that the evasion may not last forever. After all, in light of their firm commitment to statutory law, it has become increasingly difficult for these courts to evade

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851 I use the term “positivist” in a manner that is characteristic for the Central European legal culture and is significantly different from the meaning that the term usually has in the American legal system. While in the American system the term usually includes any legal provision applied by courts regardless of its origin, in the Central European legal systems the term symbolizes loyalty to legal rules enacted in statutory law. As such, it reduces the notion of law to legislative acts and executive regulations. Accordingly, the phrase “positivist court” refers to courts that perceive adjudication exclusively as a loyal enforcement of legislative laws and executive by-laws.

indirect discrimination since all these legal systems more or less faithfully transposed this
guarantee from the EU acquis into the positive legal texts of their national statutory law.

7.3.1. A Positive Positivist Example

The claim that indirect discrimination can play an important role even in a positivist civil law
system finds support in the Austrian experience. The main reason why the Austrian experience
may be useful for our purposes is that the Austrian and the CEE post-socialist legal systems
belong to the same family of legal systems. This is not surprising since they were all part of
the Hapsburg Empire for a significant period of their history. Many of the laws that were and still
are central to these legal systems were established under the Hapsburg hegemony. In that sense,
it is fair to say that the basic modern framework of each of these legal systems was established
under Austro-Hungarian influence. The main characteristics of this group of legal systems are
the dominance of statutory law and loyalty to positive legal text.

What is striking about the Austrian experience is the firm presence of indirect discrimination in
national case-law. A simple search of the case-law of only the Austrian Supreme Court will
produce more than two dozen indirect discrimination decisions. A great majority of them involve
sex discrimination claims. However, there are also indirect discrimination decisions that involve
claims of nationality discrimination as well as free movement of goods and services claims. It is
also interesting that apparently there are no racial discrimination decisions, which tends to
support the argument about the importance of Roma NGOs for the development of

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853 See, for example, ANTAL VISEGRÁDY, Legal Cultures in the European Union, 42 Acta Juridica Hungarica
(2001), pp. 209-10; VARGA CSABA, Philosophy of Law in Central and Eastern Europe: A Sketch of History, 41 Acta
Juridica Hungarica (2000 ).

antidiscrimination case-law in the CEE post-socialist legal systems. Since the Supreme Court is the highest appeal instance in the Austrian legal system, the high number of indirect discrimination decisions at that level also shows that the instrument has been well accepted among the lower courts.

The key initial step in the establishment of indirect discrimination in the Austrian legal system was taken by the Constitutional Court. The Austrian Constitutional Court (ACC) enjoys considerable respect in the CEE positivist legal culture if for nothing else than due to the prominence of its Kelsenian origins. In that sense, its decisions concerning the concept of indirect discrimination in the Austrian legal system are even more interesting from our perspective.

In *Die Pharmazeutische Gehaltskasse*, the ACC considered the system of pay classification in the national system of public pharmacies, according to which full-time workers received a pay rise at a significantly faster rate than part-time workers. The Court found that the system was contrary to the constitutional principle of equal treatment, for two reasons.

The first reason is rather typical of the CEE positivist legal systems. The Court basically argued that the salary system was illegitimate because the difference in pay between part-timers and full-timers could not be justified. It rejected the arguments of the employer that the limited availability of part-timers, their limited relationship with customers, and their inferior experience compared to full-time employees justified the difference in pay. In a rather strange argument, the Court found that such factors were offset by the fact that part-timers provided better service as

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855 See Chapter 6, Section 2.
compared to full-timers due to a lack of fatigue. It also rejected as a mere generalization the justification that part-timers cannot assume managerial responsibilities. It argued that this reason was irrelevant since full-timers received a pay supplement for managerial work.

The first part of the reasoning concerning the general principle of equal treatment is rather similar to what can be found in the equality decisions of other CEE courts. These legal systems as well as their courts tend to perceive any difference in treatment as a form of potential illegal discrimination. Consequently, any difference in treatment can be potentially challenged and required to be justified. More importantly, however, these courts almost never discuss the criteria that they consider relevant for the application of the general equal treatment principle. They simply assume that two situations compared are either similar or different and leave the rest to formal logic. A good illustration of such reasoning is the argument of the ACC that the employer’s rather plausible explanation of the pay difference between part-timers and full-timers was a “mere generalization” since his reasons were offset by the higher quality of service provided by the more rested part-timers.

What distinguishes the decision of the ACC from the equality decisions found in the CEE post-socialist legal systems, however, is the part of the Court’s reasoning concerning indirect discrimination. After finding that the disputed salary scheme constituted general discrimination, the Court did not stop at that point. It went on to explain that the scheme was also contrary to the principle of equal treatment of men and women in light of EU sex equality law. As a response to the argument of the Federal Government, the Court first established that the Community character of the national statute whose constitutionality was being challenged did not completely prevent the Court from questioning its compliance with the national Constitution. The Court did
not question the supremacy and direct effectiveness of Community law. On the contrary, by arguing that national provisions contrary to Community acquis are also immediately inapplicable under the Austrian Constitution, it reaffirmed the position of Community law in the national legal system. Moreover, this position allowed the Court itself to evaluate the compliance of national law with Community obligations.

Using that power, the Court stressed that the well-established case law of the ECJ “precludes the application of the national provisions which although formulated in neutral wording actually disadvantage many more women than men in terms of percentage unless these measures are justified by objective criteria that have nothing to do with discrimination on grounds of sex.”857

The Court explained that the guarantee of indirect discrimination was established by the ECJ in the Jenkins/Kingsgate decision858 and was confirmed in (then) the latest ruling in the Hill/Stapleton case.859 In this way, the ACC de facto incorporated the guarantee of indirect discrimination (as interpreted by the ECJ) into the Austrian constitutional guarantee of equal treatment. As we have seen, post-socialist Constitutional Courts have largely avoided interpreting their constitutional equality clauses as including indirect discrimination whether as part of organic national law or as the requirement of EU accession.

Once it established the relevance of the guarantee of indirect discrimination, the Court turned to its concrete application. Again, contrary to the practice of post-socialist courts that rejected this type of evidence, the ACC first turned to the available statistics. The Court established that, out of the total number of female employees in the national pharmacy system, 33% worked full-time and 67% part-time. In contrast, 79.2% of men worked full-time and only 20.8 % worked part-

857 Die Pharmazeutische Gehaltskasse, section II.2.c.
time. The statistics allowed the Court to find that the measure fulfilled the conditions for a disparate impact claim without any further elaboration.

Once it had pointed out the statistical disparity, the Court turned to the more challenging question of “objective justification”. Here the Court faced a challenge from the Federal Government. Relying on the ECJ’s Helmig decision\textsuperscript{860}, the government argued that the difference in experience and efficiency between full-timers and part-timers in pharmacy justified the difference in pay rates.

The Court responded by pointing to several other ECJ’s decisions, namely Nimz\textsuperscript{861} and Hill & Stapleton. It interpreted these decisions as establishing that arguments of this type are “merely general statements.”\textsuperscript{862} Therefore, they “per se are not a criterion for disproportional remuneration.” The Court argued that, according to Hill & Stapleton, a difference in experience can serve as the justification of different pay between part-timers and full-timers only if it “results in differences of quality and quantity of work.”\textsuperscript{863} Since the disputed national law provided that both full-time and part-time pharmacists who completed their training could independently operate a pharmacy store, the Court concluded that even the legislator assumed that there was no such difference. In other words, the justification of the government was not only a mere generalization, it was also self-contradictory. As such, it could hardly satisfy the requirement of a legitimate aim that was in no way related to sex discrimination.

\textsuperscript{860} Joined Cases C-399/92, C-409/92, C-425/92, C-34/93, C-50/93 and C-78/93 Helmig and Others [1994] ECR I-5727.


\textsuperscript{862} Die Pharmazeutische Gehaltskasse, section II.2.d.

\textsuperscript{863} Id.
What is particularly striking in *Die Pharmazeutische Gehaltskasse* is the extent to which the ACC relied on the ECJ’s case-law. The ACC invested significant effort both in identifying the relevant ECJ decisions and in deliberating their central propositions.864 Whether the ACC properly interpreted the ECJ’s decision is open to discussion. Its reading of the relevant decisions certainly seems plausible. Furthermore, after *Die Pharmazeutische Gehaltskasse*, there was little doubt about the position of indirect discrimination in the Austrian legal system and about the appropriate manner of application of this guarantee. The ACC clearly showed that the application of indirect discrimination in the Austrian legal system was inseparable from the decisions of the ECJ.

That being said, the manner in which the ACC actually applied the guarantee of indirect discrimination was rather formalistic. The Court paid lip service to the importance of the principle of sex equality. It did not engage in much substantive argumentation. For example, the Court did not even attempt to explain what constitutes disparate impact and simply copied the ECJ’s arguments into its judgment without any consideration of the equivalence of the two situations. This leaves the finding of internal inconsistency of the government’s justification as the Court’s only independent argument. In that sense, the reasoning seems rather mechanical.

In *Die Pharmazeutische Gehaltskasse*, the ACC (consciously or not) established the mode of enforcement of indirect discrimination that has been followed by “regular” Austrian courts since that decision. Judging from the case-law of the Austrian Supreme Court (ASC) as the last “regular” appeals court, the number of indirect discrimination rulings in the Austrian legal system has been increasing since *Die Pharmazeutische Gehaltskasse*. Thus, before the ACC

864 *Die Pharmazeutische Gehaltskasse*, sections II.2.b-d.
decision, we find only three rulings of the ASC that dealt with the notion of indirect discrimination. The ASC delivered seven indirect discrimination rulings in 2002 alone.

The ASC’s indirect discrimination decisions show that Austrian courts do not shy away from the application of indirect discrimination. Their decisions are formally based on national statutory law. However, these courts regularly refer to the case-law of the ECJ. Moreover, their references to the ECJ’s decisions are almost always up to date. This is particularly visible in the decisions of the ASC, which leads to the conclusion that their decisions are *de facto* based on the ECJ’s doctrinal rules.

Furthermore, Austrian courts do not hesitate to use the option of the reference procedure provided in Art 234 ECT. Austrian courts have referred questions of interpretation involving the issue of indirect discrimination to the ECJ on at least ten occasions. At least six of those references involved indirect discrimination on the grounds of sex. Some of those references resulted in highly important ECJ rulings such as the famous *Mayr* decision or the *Hlozek, Wippel, Brunnhofer, Wiener Gebietskrankenkasse* and *Österreichischer Gewerkschaftsbund* decisions.

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866 OGH Geschäftszahl 9ObA178/01v delivered May 22, 2002; OGH Geschäftszahl 1Ob126/02i delivered June 25 2002; OGH Geschäftszahl 1Ob126/02i delivered July 11, 2002; OGH Geschäftszahl 8ObA277/01w delivered August 8, 2002; OGH Geschäftszahl 100bS416/01a delivered September 17, 2002; OGH Geschäftszahl 9ObA135/02x delivered November 13, 2002.
867 OGH Geschäftszahl 10ObS462/97g delivered March 31, 1998; OGH Geschäftszahl 100bS345/02m delivered May 27, 2003; OGH Geschäftszahl 100bS416/01a delivered September 17, 2002; OGH Geschäftszahl 8ObA277/01w delivered August 08, 2002; OGH Geschäftszahl 10ObS14/99b delivered March 30, 1999; OGH Geschäftszahl 8ObA250/01z delivered December 20, 2001; OGH Geschäftszahl 9ObA178/01v delivered May 22, 2002; OGH Geschäftszahl 6Ob132/02h delivered July 11, 2002.
However, if we look behind the form of the indirect discrimination decisions of Austrian courts, we can find features that are characteristic of positivist adjudication in the CEE civil-law systems. Austrian courts rarely engage in any normative argumentation regarding the concrete application of particular requirements of indirect discrimination. On the contrary, they frequently apply them as if their meaning is self-evident.

Thus, for example, I am not aware that Austrian courts have ever engaged in a discussion about the normative meaning to be drawn from statistical data. Consequently, we cannot find any criteria that would clarify how to measure the disparity of the impact necessary to establish a prima facie case of indirect discrimination. Instead, these courts simply tend to assume that a particular measure produced a disparate impact.

In a similar vein, Austrian courts do not engage in a discussion about the comparability of the affected groups of workers. They simply tend to assume that the workers who were affected by the measure in one way or another are comparable for the purposes of indirect discrimination scrutiny. In one instance where they had some doubts about the comparability of the affected groups - the Österreichischer Gewerkschaftsbund dispute - the ASC referred the case to Luxembourg, which resulted in the ECJ's comparability reasoning that is still disputed today.869

In Österreichischer Gewerkschaftsbund, the ASC assumed without further elaboration that female workers on maternity leave were comparable to male workers on mandatory military service leave.870 Nevertheless, it still wanted to verify its position at the ECJ. As seen from its
reference questions in the Wippel dispute (producing another complex comparability reasoning of the ECJ), the ASC was not at all focused on this question.

A similar approach can be found in the context of the “objectivity test”. The ASC’s indirect discrimination decisions show that Austrian courts rarely explain why they considered a particular disputed measure that produced a disparate impact to be justified or not. For example, in Kornelia K\textsuperscript{871}, the Court invested significant effort in describing in detail the national statutory law and Community law including the ECJ’s decisions regarding the prohibition of indirect discrimination. However, after the ASC assumed that the hardship allowance granted to workers who worked more than 20 hours a week affected many more women than men, the Court merely held that the measure was not justified.\textsuperscript{872} It argued that the employer’s claim (that more than 20 hours of work involving looking at a video display unit (VDU) each week constituted demanding labor) was “too general” and “did not enjoy scientific support”.\textsuperscript{873} The Court also pointed out that statutory law prescribed certain safeguards concerning VDU work. These safety provisions required that employees working with VDU should take regular hourly breaks after certain continuous periods of work.\textsuperscript{874} Based on the concrete meaning of this positive legal text, the Court simply concluded that less than twenty hours of VDU work per week could constitute demanding labor. Hence, the employer failed to justify objectively the discriminatory measure.

The experience of Austrian courts is important because it shows that indirect discrimination can be manageable even in positivist legal systems that are committed to the notions of determinacy of positive legal text and strict rule-boundness of judicial decision making. The Austrian courts

\textsuperscript{871} OGH Geschäftszahl 9ObA90/04g delivered December, 2004.
\textsuperscript{872} Id.
\textsuperscript{873} Id.
\textsuperscript{874} Id.
have more or less successfully succeeded in placing indirect discrimination under their control. Moreover, they have shown that even the EU prohibition on indirect discrimination can be enforced in a system committed to formalist adjudication. The formalist approach to the challenges entailed by this antidiscrimination guarantee taken by Austrian courts is certainly a legitimate target of criticism. However, their experience clearly shows that the open-endedness inherent in indirect discrimination does not necessarily “scare away” courts in strongly positivist legal systems. In that sense, the Austrian example suggests that the open-endedness of this antidiscrimination instrument may not be the only reason that can explain why the CEE post-socialist courts evade indirect discrimination claims.

7.3.2. A Negative Positivist Example

If the experience of Austrian courts is a positive example, then the experience of French courts is the opposite. The experience of French courts concerning the application of EU antidiscrimination guarantees is remarkably similar to what can be found in the CEE post-socialist systems. The similarities in the manner in which the courts in these systems “enforce” these guarantees are striking. These courts are similar not only in their styles of reasoning and their devotion to the text of national statutory law. More interestingly, they use almost identical strategies of evasion of EU antidiscrimination guarantees, particularly indirect discrimination. It is rather unlikely that such a high degree of resemblance is a coincidence.

The reluctance of French courts to deal with the guarantee of indirect discrimination is well known.875 Although the French legal system has been part of the Community’s legal order since the very beginning, findings of indirect discrimination by French courts are extremely rare. It is

875 See SCHIEK, Indirect Discrimination, p. 360.
not certain whether there has ever been a single finding of indirect discrimination by a French court. At the same time, there are several decisions where the French courts clearly showed their aversion towards this instrument. It seems that the aversion towards indirect discrimination in the French legal system is not limited to the courts. France has only recently introduced a comprehensive definition of indirect discrimination in its statutory law.\textsuperscript{876} What is interesting from our perspective is that the aversion of the French courts shows the same features that can be found in the approach of CEE post-socialist courts.

A frequent strategy used by French courts is to avoid indirect discrimination claims or even implicitly to deny the possibility of indirect discrimination. For example, in the \textit{Soufflet} dispute, the Cour de Cassation held that the employer’s promotion criterion requiring that the minimum period of professional experience necessary for promotion should be increased in proportion to the reduction in working time of part-time employees did not constitute indirect discrimination.\textsuperscript{877} The Court explained that such a rule falls within the scope of a particular provision of the Labor Code and as such “\textit{does not undermine the principle of equal rights between part-time employees and full-time employees laid down by the same text}”. The Court ignored the possibility of a sex related disparate impact of the disputed promotion rule. It merely held that “\textit{the Court of Appeal, upon investigating whether this provision could constitute discrimination, albeit indirect discrimination, quite rightly denied that this was the case}.”


A similar approach can be seen in the French “Sunday trading” cases.⁸⁷⁸ The cases involved employers who violated the criminal law protection of Sunday rest by employing female part-time workers for work on Sundays. In their defense, the employers argued that the prohibition of work on Sunday had particularly unfavorable implications on women since they were most likely to use this employment opportunity in order to improve their economic situation.⁸⁷⁹ In Baggio, the Cour de Cassation rejected this argument by simply stating that “the rule which sets Sunday as the weekly rest day was taken in the sole interest of workers, men or women, and constitutes a social advantage; that, consequently, its application cannot, by nature, involve a direct or indirect discrimination to the detriment of one or the other…”⁸⁸⁰

In Marrie, the same court argued that the prohibition of Sunday work “applies to female and male employees indistinctively, and does thus neither in law nor in fact qualify Sunday work as male work or disadvantage women in their access to employment…”⁸⁸¹ In this way, the court de facto established that a formally neutral measure supported by a legitimate legislative purpose cannot constitute indirect discrimination.

One similarity between the French and CEE post-socialist judicial approach to indirect discrimination is the style of reasoning. The arrangements used by the Cour de Cassation in the above examples strongly resemble the authoritative style of reasoning based on the strict commitment to positive statutory rules used by CEE post-socialist courts. In that sense, the Court presented its decision as necessarily predetermined by the legal text of a particular statutory rule.

Presented as a result of the logical process of deductive reasoning, the rulings are deprived of

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⁸⁷⁹ Id.
⁸⁸⁰ Case 92-82490, Baggio, Cour de Cassation, 10/01/95. Id., p. 361.
any normative considerations. This does not mean that a decision of a French court is normatively neutral. Normative choices are part of the process but only through the mediation of the positive legal text. They are built into the text of statutory rules by the national legislator and as such must be respected by French courts. It is for this reason that the Court found in the above examples that a generally applicable provision of national law serving a legitimate social goal determined by the national legislator cannot “by its nature” constitute indirect discrimination.

At the same time, the Court never described the concrete steps of this process of logical legal reasoning. Thus, it never clearly identified the supposedly textually predetermined premises that determined its final conclusion. Nor did the Court explain in any detail how legal logic led the Court to reach the concrete conclusion. Instead, the Court simply stated in a rather authoritative manner that the ruling follows from the text of the legislative rule.

The evasion strategies used by French courts in indirect discrimination cases are even more interesting. As seen in the above examples, the Cour de Cassation simply denied the possibility that a well-established provision of the Labor Code could result in indirect discrimination. However, the denial is based on the conceptual approach to discrimination that is familiar to us from the equality decisions of CEE post-socialist courts. The French courts tend to reduce discrimination to the general principle of equality according to which any difference in treatment must be justified by some legitimate goal. From this perspective, it is indeed difficult to find that a rule that is generally applicable to all and serves a widely accepted legitimate goal can constitute discrimination.
This narrowing of discrimination is nicely illustrated by the decision of the Rennes Court of Appeals in the *Ferre et autres* case.\(^{882}\) The case concerned the employer’s decision to reduce working hours. At the same time, he decided to keep the same salary for those workers who were employed prior to the reduction. Workers who were employed after the reduction were paid salaries that were adjusted to the reduced number of working hours. The Court found that such a pay practice was discriminatory because it “will have the effect of establishing unequal treatment between employees of the same category, doing the same work and of comparable seniority…” This salary scheme violated the obligation of “all employers…to assure equality of remuneration among all employees in the enterprise in equal condition, especially with equal work…and thus have to justify differences in remuneration among their employees by recourse to objective factors without any discrimination.”

It is interesting that for some reason the Court described this violation of the general principle of equal treatment as indirect discrimination. Moreover, instead of following the requirements of EU law, the Court molded them to its needs. Notwithstanding the fact that the dispute did not involve a claim of sex discrimination, the Court argued that the obligation of the employer “to assure equality of remuneration among all employees in the enterprise in equal condition” followed from Art 119 ECT and the Equal Pay (*between men and women*) Directive 75/117/EEC “which affirms the right of all workers to an equal remuneration for work of equal value, and the equality principle ‘equal pay for equal work’, established by Articles L 133-5-4 and L 136-2-8 *Code du Travail*…” The Court reinterpreted the EU equality law to fit the concept of equality that is characteristic for the French legal system. This strategy of using EU law in a simplistic

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formal manner as an “extra boost” to an already predetermined decision is also something that can frequently be seen in the equality decisions of the CEE post-socialist courts.

The widening of the prohibition on discrimination to the general principle of equal treatment has one very important implication that we have already seen in the equality decisions of the post-socialist courts. It allows the courts to avoid declaring that the discrimination occurred on some specific (group-based) ground. Simply put, by saying that somebody violated the requirement of equal treatment, the courts can avoid the declaration that someone’s actions constituted sex or race discrimination. This is particularly important in relation to the actions of the national legislator since they embody the will of French citizens. In that sense, the widening of the principle of equal treatment narrows the effectiveness of antidiscrimination guarantees.

In light of the French unease with indirect discrimination, it is interesting to observe the sex equality disputes that the French courts referred to the ECJ. Seven out of eight French sex equality references concerned provisions or practices that explicitly distinguished between men and women. Hence, they involved a question of direct discrimination. Five out of these seven direct discrimination references concerned situations where men were explicitly denied some benefit granted to women as a support to their role in the family; the remaining two concerned the prohibition of night-work for women.

The only reference in which a French court referred what it considered to be a question of indirect discrimination – the Thibault dispute883 - actually involved a situation of direct discrimination. Thibault concerned a female employee who was denied an employment benefit because she was absent from work for more than six months in the relevant year. The key reason

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for the absence was her maternity leave. The questions referred to the ECJ show that, in accordance with its practice of “neutralizing” discrimination claims, the Cour de Cassation structured the six months employment rule as an instance of indirect discrimination that placed workers on maternity leave in an unfavorable position. This was obviously contrary to the Dekker doctrine. Consequently, the ECJ found that the plaintiff was directly discriminated against on the grounds of sex.

Another strategy of evasion that French courts share with their CEE post-socialist colleagues is to structure discrimination disputes into violations of some other “more concrete” labor law provisions. One example of this type of evasion is to deal with discriminatory practices as violations of the employer’s labor law obligation to justify dismissal decisions according to the reasons prescribed by the Labor Code. This allows the courts to find a violation in terms of unfair dismissal and at the same time completely avoid the word “discrimination.”

Yet another shared evasion strategy is to dismiss discrimination claims on some formal procedural ground. For example, in the relatively recent AIDES decision, the Cour de Cassation rejected an indirect racial discrimination challenge to an executive decree submitted by an NGO for the promotion of racial equality arguing that the French civil-procedure rules do not provide for an “action populaire”.

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7.4. **Indirect Discrimination as a Normative Threat to the Post-socialist Understanding of Equality**

How can one explain this remarkable similarity between the way in which the French and CEE post-socialist courts approach indirect discrimination? The aversion of these highly formalist courts towards indeterminate legal instruments entailing sensitive normative choices is certainly an important factor. As one French commentator argued, “*The national judge is at times tempted to use other means or other legal techniques suitable to achieve equivalent effects as would using the concept of indirect discrimination. It [indirect discrimination] remains an alien element for the French judge who is little inclined to reason on a terrain that is by far too sociological.*”

However, in light of the Austrian experience, one wonders whether there is something more behind the strong aversion towards this “sociological” antidiscrimination instrument. If the comparative analysis of the Austrian and French judicial experiences with the enforcement of indirect discrimination guarantee showed something, it was that the aversion of post-socialist courts towards this instrument cannot be explained merely by their commitment to formalistic rule-bound adjudication. Austrian courts have shown that they can apply indirect discrimination even rather “mechanically” and still protect the interests of the disadvantaged group. In that sense, the Austrian experience suggested that the reason why CEE post-socialist courts avoid indirect discrimination claims lies perhaps in the realm of normative values these courts are trying to protect. This assumption received some support from the French example. The most striking parallel in this regard is the strategy of evading indirect discrimination claims by hiding

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886 See MARTIN, *Droit social at discriminations sexuelles: a props des discriminations generees par la loi.*
behind the more general notion that all individuals must be treated in the same manner unless different treatment is justified by some objective reason.

In light of the striking similarities in the functioning of the French and CEE post-socialist legal systems, we should add that both systems have a historically long and emotionally-charged experience with a strong ideological commitment to the ideal of equality. They both have been committed to particular understandings of egalitarianism that have become a part of their collective identity. Is it here that we should look for a significant part of the explanation of a remarkable resemblance between the aversion of French and post-socialist courts to indirect discrimination?

7.4.1. Indirect Discrimination as a challenge to (Quasi)Equalitarianism

The notion of indirect discrimination represents a clear normative challenge to particular understandings of the ideal of equality that are characteristic of the French and post-socialist legal systems. In the French context, a strong normative preference for social diversity underlying the guarantee of indirect discrimination is a threat to the French commitment to the notion of universal (republican) citizenship. According to this particular understanding, the Republic consists exclusively of individuals as citizens. As citizens of the Republic, they are provided with the same social status and the same individual rights. To protect its commitment to universal equality, the Republic cannot treat its citizens differently in accordance with their specific religious, ethnic or political commitments. Accordingly, the laws of the Republic cannot recognize any special status for any particular “minority” group. The Republic can treat its
citizens differently only if such treatment serves some goal that can be justified as beneficial to all citizens.\textsuperscript{887}

The idea that a neutral norm that serves some collectively positive goal can constitute discrimination because it has a particular effect on one specific group is a direct challenge to the notion of equality based on Republican citizenship. On a rather general level, indirect discrimination is a problem because it threatens to divide the Republic into specific social groups. Citizens are no longer individuals faithful to the Republic alone but rather members of different social groups with their own political goals, sets of normative values, and cultural identities. A group becomes an intermediary between the Republic and the individual. On a more specific level, indirect discrimination is a threat because it reveals the underlying character of supposedly objective rules that are equally applicable to all citizens. Since such norms tend to reflect one particular viewpoint and favor members of one particular social group, indirect discrimination exposes the hierarchical structure of social relations that lies behind the Republican claim of neutrality and objectivity.

In a similar manner, indirect discrimination poses a threat to the normative understanding of equality favored by the CEE post-socialist legal systems. The CEE societies are not so strictly committed to a notion of equality that recognizes only individual citizens. In that sense, the CEE notion of egalitarianism is different from the French understanding. Due to their diverse ethnic composition and, more importantly, their history of violent ethnic conflicts, the CEE societies have committed themselves to the protection of specific rights of ethnic minorities. Furthermore, these societies still do not perceive men and women primarily as individuals in charge of their

\textsuperscript{887} See, for example, A. \textsc{Geddes} & V. \textsc{Guiraudon}, \textit{Britain France and EU Anti-Discrimination Policy: The Emergence of an EU Policy Paradigm}, 27 West European Politics 334 (2004).
own personal welfare, but rather as members of different social groups with specific interests and needs. Accordingly, they have developed a system of legal rules and social benefits tailored to their specific group interests. However, the scope of these group-based rights is limited. In the context of ethnic groups, they are primarily targeted at the preservation of the political position of minority ethnic groups within a particular society and the preservation of their specific cultural identity. In the context of sex equality, they are primarily targeted at the protection of women’s childcare responsibilities.

More importantly, however, the CEE societies still favor a particular formalist understanding of equality that they inherited from the period of “real” socialism. According to this approach, equality depends primarily on positive legal rules. Once a society has enacted concrete positive rules tailored to the specific needs of a minority group, the social equality of its members has been established. Outside of these specific statutorily defined areas, members of minority groups must be treated like all other citizens. Accordingly, in most areas of societal life, the CEE legal systems remain firmly committed to the general principle of equality according to which different treatment of any citizen must be rationally justified.

Moreover, due to their socialist heritage, these societies perceive themselves as highly egalitarian. Their legal systems still insist on a broad scope of application of the equal treatment principle. They require not only that the State but also private individuals treat all citizens in a consistent manner unless different treatment is objectively justified. It goes without saying that the application of the statutory rule providing special treatment to members of some group is objectively justified. From such an egalitarian perspective, it is easy simply to assume that racism or sexism has been eliminated. If such acts do occur, they do not occur at the level of
society as a whole. Rather, they are isolated incidents committed by individuals who will be held responsible and punished for such serious acts individually.

Indirect discrimination threatens this egalitarian self-perception. By exposing the inherent bias of supposedly objective norms, indirect discrimination suggests that sexism or racism do not merely occur at the individual level. On the contrary, they are built deeply into the structure of daily social relations. Consequently, instead of being egalitarian, the structure of society is exposed as highly hierarchical.

The aversion of both the French and CEE post-socialist courts towards indirect discrimination can to a great extent be explained by the threat posed by indirect discrimination to the egalitarian commitment and self-purpose of these societies. It is not a coincidence that courts in these otherwise distinct legal systems frequently use the same strategy of switching to the general notion of equal treatment limited to individuals when they find themselves confronted with the group-based implications of indirect discrimination claims.

The normative conflict posited here is not merely theoretical. On the contrary, it has concrete practical implications. For example, indirect discrimination is above all a serious threat to the narrow approach to discrimination characteristic of CEE post-socialist courts. Since it establishes impact as the yardstick of the legality of a neutral measure, indirect discrimination suggests that the primary focus of antidiscrimination guarantees ought to be on the concrete effects of a particular act and not on the motivation of a decision maker. Consequently, indirect discrimination implies that the narrow approach of post-socialist courts is ineffective. Post-socialist courts are therefore placed under significant pressure to redefine their doctrinal approach to discrimination, especially the prohibition of direct discrimination. The refocusing
from the motives of the perpetrator to the effects of a particular action does not necessarily threaten the aspiration of post-socialist courts to the mechanical applicability of discrimination norm. However, it does require them to abandon their reluctance to declare that their compatriots are responsible for acts of sex or race discrimination. We may yet find a distinguishing feature between the French and CEE post-socialist discrimination doctrines. Especially in the Sunday trading cases, the French courts tend to reduce the notion of equal treatment of men and women to consistency. In that sense, a mere fact of different treatment of individuals of different sex (or ethnicity) who are otherwise similarly situated constitutes discrimination on the grounds of sex or race. The CEE post-socialist courts tend to be less accepting of such claims. Their decisions showed that unfavorable treatment of otherwise similarly situated members of disadvantaged groups is frequently not a sufficient ground for these courts to find sex or race discrimination. Rather, they perceive discrimination through prejudicial motivation. In that sense, indirect discrimination is a particularly strong challenge to the discrimination doctrine of the CEE post-socialist courts.

Indirect discrimination also challenges the way in which post-socialist courts perceive their own function in the legal order. Indirect discrimination often invites individuals to challenge actions of their government on the basis of real-life implications of these actions and regardless of the actual motives of the actors. Accordingly, it requires from courts to mediate in this conflict by scrutinizing decisions whose authority they had previously been expected to enforce. In other words, indirect discrimination requires them to reconsider their commitment to positive legal text and often challenges the rules of legislation on the grounds of their “sociological” implications.
Accordingly, there seem to be significant differences in the types of egalitarianism favored by the French and CEE post-socialist legal systems.

What distinguishes the CEE post-socialist systems from the French is perhaps the conviction that they managed to achieve social equality between social groups by developing a system of specific clear-cut legal rules and social benefits tailored to the distinctive needs of any particular social group. Consequently, the preservation of equality was reduced to the enforcement of positive legal rules. In the following section, however, I will use the specific context of sex equality to argue that a commitment to a particular set of egalitarian notions can only partially explain the aversion of the CEE post-socialist courts towards the notion of indirect discrimination. The complete explanation lies in a particular symbiosis of two features, both of which were inherited from the period of “really existing” socialism.

7.4.2. Challenging the Understanding of Equality between Men and Women

In addition to these challenges to the post-socialist understanding of equality in general, indirect discrimination also challenges the specific understanding of equality between men and women that is characteristic of these societies. CEE post-socialist societies are still influenced by an understanding of sex equality that they inherited from the socialist era. According to this view, the objective differences between the physical abilities of men and women, especially the differences in their procreative ability, to a great extent determine their personal needs, social aspirations and interests. Accordingly, these societies still favor the view that men and women have different social responsibilities and (gender) roles. Indirect discrimination is a direct challenge to this rather essentialist view of relations between men and women.
At a general level, indirect discrimination does not seem necessarily antagonistic to the post-socialist understanding of equality between men and women. Indirect discrimination recognizes the importance of groups after all.\textsuperscript{888} Furthermore, it is far from clear that this instrument opposes the idea of clearly distinguishable and separated social groups. In fact, many perceive indirect discrimination as an expression of the Aristotelian logic that those who are different ought not to be treated the same.\textsuperscript{889} The instrument thus implies that a just distribution of social goods must take into account objective differences between social groups. In both respects, the instrument seems favorable to an essentialist understanding of equality between men and women.

However, the correspondence is only apparent. As argued in previous chapters, indirect discrimination is focused on the effects of a particular measure on different social groups.\textsuperscript{890} More precisely, it is built around the notion of the disparity of impact of the measure. This disparity is seen as \textit{prima facie} undesirable. Therefore, the measure can survive only if a decision maker demonstrates that it serves some other valuable interest because of which we should tolerate the negative implications on the disadvantaged group.\textsuperscript{891}

From the post-socialist perspective, the importance of disparate impact is far from clear. On the contrary, the mere fact that an otherwise neutral measure differently affects men and women does not have negative normative connotations \textit{per se} since it can merely reflect desirable differences in their social roles and responsibilities. Moreover, it seems irrational to burden


\textsuperscript{889} See, for example, \textsc{Mark Bell}, \textit{Direct Discrimination}, \textit{in} Cases, materials and text on national, supranational and international non-discrimination law (Dagmar Schiek, et al. eds., 2007), p. 90.

\textsuperscript{890} See Chapter 2, Section 4.2.2.

\textsuperscript{891} However, see \textsc{Toabler}, Indirect discrimination: a case study into the development of the legal concept of indirect discrimination under EC law, p. 57.
employers with such a stigmatizing allegation since the effects of their measures are not results of their bias towards a particular group. On the contrary, they are the result of a socially favored distribution of social responsibilities.

For example, a particularly disadvantaging impact that measures disfavoring part-time workers have on women and that has been one of the central targets of indirect discrimination claims in the EU legal order is tightly related to women’s social role of motherhood. However, CEE post-socialist societies may singly still favor the concept of equality that perceives motherhood as the primary social role for women. The view that motherhood allows women to realize aspirations that are specific to their sex is particularly strong. Since they perceive motherhood as being vital for the self-realization of women, these societies still strongly favor measures that encourage women to assume responsibility for reproduction and childcare. Accordingly, all of the CEE post-socialist legal systems still nurture a whole set of specific legal rules and social benefits supporting women’s maternal role, which they inherited from the period of “really existing” socialism. However, from the perspective that favors separate social roles for the sexes, the claim that objective professional standards with disparate end-results for men and women, such as the measures disfavoring part-timers, constitute sex discrimination seems rather exaggerated. It seems exaggerated because these societies basically still believe that it is socially undesirable for women to participate in employment in the same manner as men since doing so would negatively affect women’s maternal responsibilities. Consequently, the mere fact that some objective professional standard of treatment favors more men than women is unlikely to be discriminatory since it probably simply reflects a socially favored distribution of social responsibilities between the sexes.
To be sure, this reluctance to accept citizens’ indirect discrimination claims because such claims challenge the socially favored distribution of gender roles may not be exclusive to the CEE post-socialist societies. One needs to be only vaguely familiar with the ECJ sex equality case law to know that many Member States, including France and Germany, favor or at least used to favor this sex-based distribution of social responsibilities. After all, the ECJ itself accepted the deterministic idea of a special bond between a mother and a child at one point and has not explicitly renounced it yet. Nevertheless, it would be hard to argue that any other Member State developed such an involved system of legal rules and social benefits that, on the one hand, encouraged women to assume primary responsibility for procreation and childcare while on the other protected their participation in economic production in a manner that corresponded to their role of motherhood. In other words, none of the Member States was so successful in justifying sex-based distribution of social roles as a guarantee of equality between men and women.

However, this particular understanding of equality alone is not what distinguishes the CEE post-socialist legal systems from other Member States or, more precisely, what prevents their courts from engaging in indirect discrimination arguments. Rather, it is a conjecture of two factors.

EU antidiscrimination guarantees have proven to be rather successful in combating the assumption that women ought to assume responsibility for childcare notwithstanding the cost that this responsibility has for their professional careers. However, as the comparative analysis of the Austrian and French experiences confirms, this success depended on the readiness of national courts (to choose) to interpret this open-ended instrument in a manner that should challenge the sex-based distribution of social responsibilities that is disadvantaging for women.
I have argued throughout this thesis that, due to their particular heritage and experience, CEE post-socialist courts frequently lack necessary knowledge and political will to confront and challenge traditional social arrangements that have wide support in their societies. At the same time, I have argued that these societies still strongly support inherited social arrangements that encourage women to subordinate their personal interests, especially their career plans, to the social role of motherhood denying the disadvantaging effects that such a distribution has for the position of women as a social group. Furthermore, they tend to support an ideology that perceives such a sex-based distribution of social roles as an expression of equality between men and women. Having in mind the power and approval of these sex-based social arrangements in the CEE post-socialist societies and the inability and unwillingness of the CEE post-socialist courts to assume responsibility for politically sensitive decisions, it is likely that the problems related to the enforcement of indirect discrimination in the CEE post-socialist legal systems will outmatch those found in other Member States, including France.

7.5. Narrowing Indirect Discrimination

I have tried to show that, in addition to the aversion of CEE post-socialist courts to an open-ended instrument that requires politically sensitive normative choices, their evasion of indirect discrimination can also be explained as a reaction against the profound normative challenges that this instrument entails for their particular understanding of equality. In that sense, the excessive formalism that these courts demonstrate in their decisions is to a great extent a defense mechanism against the normative threats of indirect discrimination.

It is unlikely that courts in CEE post-socialist legal systems will be able to keep bluntly evading indirect discrimination. All of these legal systems have incorporated more or less similar
definitions of indirect discrimination into their statutory law. Even if they failed in that respect or wrongly transposed this guarantee, indirect discrimination is directly applicable in national legal systems as part of Community law. Consequently, it is reasonable to assume that, over time, as individuals become aware of the potential of this guarantee, post-socialist courts will become more exposed to indirect discrimination arguments. Accordingly, it will become increasingly difficult for them to keep relying on their evasive strategies.

It is hard to say, however, to what extent this will be a positive development. We have seen, in the context of direct discrimination, that the CEE post-socialist courts used the open-ended nature of this guarantee to narrow its scope in accordance with their particular understanding of equality. Having in mind the serious challenges that indirect discrimination entails not only for their understanding of equality but also for their understanding of their own function in the legal system, it is likely that the CEE post-socialist courts will be strongly tempted to develop a similar narrowing doctrine in relation to indirect discrimination.

It is highly likely that, once they stop evading indirect discrimination, the CEE post-socialist courts will tend to interpret this instrument in accordance with the narrow understanding of discrimination based on prejudicial intent. In fact, due to the open-ended character of this EU antidiscrimination guarantee, the option of narrowing is fully available to the post-socialist courts. Moreover, as I argue below, the post-socialist narrowing of indirect discrimination may even to some extent be encouraged by certain theoretical interpretations of EU antidiscrimination instruments that have recently become more prominent in EU equality discourse.

An important feature of the guarantee of indirect discrimination is the plurality of normative rationales that have been seen to underpin this instrument. Thus, indirect discrimination can be
understood as an expression of a particular understanding of equality that insists on the proportional distribution of social goods among established social groups. Furthermore, according to this view, groups are a value per se. Therefore, a society ought to distribute social benefits proportionally in accordance with their size in order to promote group diversity.

Alternatively, we can understand indirect discrimination as an attempt to facilitate individual autonomy. The purpose of indirect discrimination is not merely to expose ostensibly neutral norms as inherently group-biased but also to point out the existence of structural barriers that prevent members of disadvantaged groups from accessing valuable social opportunities as individuals. By widening the access to valuable opportunities, indirect discrimination contributes to the empowerment of members of disadvantaged groups. They should insist on the elimination of social relations that are structured to perpetuate the subordinated position of disadvantaged groups. Moreover, insisting that an employer must at least objectively justify measures with a disparate impact further the idea that every individual ought to be treated according to his or her actual individual capacity.

None of the described normative rationales for indirect discrimination supports the narrowing of indirect discrimination. On the contrary, if anything, they tend to support the widening of its scope. However, indirect discrimination can also be understood primarily as an effort to prevent the circumvention of the prohibition of direct discrimination. According to this view, this instrument is merely an auxiliary support to the notion of direct discrimination and its underlying

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892 See, for example, R. TOWNSEND-SMITH, Justifying indirect discrimination in English and American Law: How Stringent should the Test be, 1 IJDL 103 (1995), p. 105.
893 See further McCRUDDEN, Theorising European Equality Law, pp. 27-8.
894 SCHIEK, Indirect Discrimination, p. 327.
896 TOBLER, Indirect discrimination: a case study into the development of the legal concept of indirect discrimination under EC law, p. 57.
goals. It is this rationale that offers support to a future doctrinal narrowing of indirect discrimination by the CEE post-socialist courts.

In order to neutralize the far-reaching implications that indirect discrimination has for their conventional understanding of equality, especially their understanding of the desirable relations between men and women, the post-socialist courts are likely to view indirect discrimination merely as a means of additional scrutiny of prejudicially motivated actions. We can consequently expect several methods of narrowing the scope of indirect discrimination.

7.5.1. Disparity, Statistics and Comparability

The tendency of post-socialist courts to view discrimination primarily through prejudicial motivation would have significant implications for the way in which these courts approach the question of disparate impact. There are two possible, although not equally probable, scenarios.

In the first scenario, post-socialist courts will approach the issue of disparate impact without any serious concern about statistical indicators. In fact, it would be more precise to say that they would not be particularly concerned with the issue of disparate impact at all. Instead, the post-socialist courts would use indirect discrimination to mask their current direct discrimination practice.

We have seen that these courts have consistently demonstrated a strong reluctance to hold defendants responsible for sex or race discrimination of any type. Accordingly, they welcomed any even remotely plausible justification offered by a defendant suggesting that his actions were not motivated by prejudice. Because they reduced direct discrimination to the existence of clear

prejudice, they ignored the possibility that the forbidden criterion of decision making
evertheless affected a particular decision for some other reason. This is what makes their direct
discrimination doctrine so problematic from the EU standpoint.

In order to preserve this narrow doctrine but give it a proper EU form, post-socialist courts can
assume the position that any decision that is not explicitly discriminatory in its wording is
necessarily a neutral measure that will have to be objectively justified, but only if it results in a
disparate impact. If they manage to construct the notion of disparate impact as a mere
unfavorable consequence suffered by some individual, they could immediately skip to the
objective justification test where they could continue their practice of deferring to the authority
of decision makers and accept as legitimate any even slightly plausible “objective” reason for a
particular measure. The decision of the Croatian Constitutional Court in the Segregated Roma
Classes case can be read in this way.898

Unfortunately, the new EU definitions of indirect discrimination open the door for this strategy.
Before the reform of the EU equality directives, disparate impact was constructed primarily
through an analysis of the statistical disparity of impact on different groups.899 The new
definitions, however, define disparate impact as involving a “particular disadvantage” to
“persons” of one sex/race.900 If read narrowly, this wording invites an argument that disparate
impact can be demonstrated by showing that two persons of one sex/race suffered some harm in
comparison to persons of the opposite sex/race.901 In a significant number of the direct

899 See BARNARD, EC Employment Law, pp. 324-331.
implementation of the principle of equal opportunities and equal treatment of men and women in matters of
employment and occupation (recast) [2006] OJ L 204.
901 BARNARD & HEPPE, Substantive Equality, p 568.
discrimination decisions that we have examined in the previous chapter, this narrow reading of the new definitions would allow post-socialist courts to view the disputed decisions as neutral practices that placed two or more individuals of a particular sex or race at a particular disadvantage. At this point they could simply turn their attention to the possibility of objective justification.  

At the same time, however, this approach would require post-socialist courts to engage in further scrutiny of the ostensibly neutral measure and test its ability and necessity to achieve a particular purpose. Although this is certainly not an insurmountable barrier to the preservation of a narrow understanding of discrimination based on prejudice, it does require a certain effort and it also entails the risk of unexpected complications. This in itself is a significant deterrent for courts that prefer mechanical simplicity and dread explicit value-based or policy driven argumentation. Therefore, it seems more likely that post-socialist courts will adopt the conventional approach to evaluating the disparity of an impact.

The second scenario involves the use of statistics. The use of statistics offers a strategy of narrowing that serves the notion of discrimination based on prejudicial motivation even more effectively. Prejudice aims to demonstrate the inferiority of a particular group by excluding as many of its members as possible from as many valuable social opportunities as possible. In that respect, taking into account the purpose and high emotional effect of a charge of prejudicial motivation, it is highly unlikely that a neutral measure that does not produce a truly wide statistical gap is underpinned by prejudicial motivation. Consequently, to post-socialist courts it seems only “logical” to insist on wide statistical disparity.

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902 See arguments under section 3.2.1 of this chapter.
Moreover, having in mind their tendency to refer to EU law when they consider it to be useful support for their preconceived conclusions, it would not be surprising that post-socialist courts find support for their narrow position regarding the disparity of an impact in those ECJ’s decisions that use language such as “much lower proportion of women than of men”\(^\text{903}\), “far greater number of women than men”\(^\text{904}\), or “much more women than men”\(^\text{905}\).

This method of narrowing the scope of indirect discrimination is likely to make statistics of crucial evidentiary importance for two reasons. First, only a concrete actual impact of a particular measure can indicate prejudicial motivation. Therefore, although the definitions of indirect discrimination in EU equality Directives allow for the use of a “common sense” or “eyeball” approach, inviting courts to make their own evaluation of the impact of a particular measure based on their knowledge and understanding of a particular context, post-socialist courts are unlikely to use this evidentiary method. The “eyeball” approach is relevant only if we perceive indirect discrimination as something more than scrutiny of prejudicial motivation. Courts are in a position to engage in an “eyeball” assessment only because they are aware how the structure of social relations makes it more difficult for members of a particular group to access a particular opportunity. In that sense, this approach contradicts the understanding of discrimination favored by the post-socialist courts.

Second, the use of statistics can effectively facilitate a continuing strategy of evading discrimination disputes by enabling courts to dismiss these claims for purely formal procedural reasons. In that sense, we can expect that the courts will insist on highly “formalized” statistical

evidence. Accordingly, they will interpret those decisions of the ECJ dealing with the quality of statistics strictly. For example, not only will they tend to dismiss the case if a plaintiff cannot present statistical evidence. They will also insist on the statistics satisfying a high professional standard of credibility. Thus, they may insist that the statistics cover a very high number of persons over a long period of time. Furthermore, relying on a simplified reading of the ECJ’s decisions, they may insist that statistics must show all four sides of an impact: the proportions of negatively and positively affected women on the one hand, and the proportions of negatively and positively affected men on the other.\textsuperscript{907} If a plaintiff fails to produce statistics in this form, they will refuse to engage in a substantive discussion of the dispute and will dismiss the claim, arguing that the plaintiff failed to prove \textit{prima facie} discrimination.

Similar evasive maneuvering can be expected in relation to the question of comparability. We have seen, in the context of direct discrimination decisions, that CEE post-socialist courts do not discuss the issue of comparability in their decisions. They treat the issue as self-evident and simply assume that two situations are comparable or not. More importantly, as was nicely illustrated by the \textit{Prague Brokerage Company} case,\textsuperscript{908} they tend to accept as relevant any plausible difference between the two situations that allows them to conclude that the motives behind the employer’s actions were not prejudicial. We have seen a similar tendency in the Hungarian and Croatian school segregation decisions in which post-socialist courts avoided indirect discrimination.\textsuperscript{909}

\textsuperscript{907} Case C-167/97 \textit{R v Secretary of State for Employment ex parte Seymour-Smith and Perez} [1999] ECR I-623.

\textsuperscript{908} Judgement of the Municipal court in Prague, 13 Co 399/2005-11, dated 01.03.2006 reported in KÜHN, et al., Rovnost a diskriminace, pp. 380-382.

\textsuperscript{909} See supra Section 4 of this Chapter.
There is a good chance that post-socialist courts will approach the issue of comparability in a similar manner in the context of indirect discrimination. Thus, having in mind their tendency to defer to the authority of a decision maker and the consequent willingness to accept any plausible difference between two situations as relevant, it is not unlikely that post-socialist courts will tend to deny the credibility of the submitted statistics on the grounds that they concern two groups of workers that these courts consider different for some reason.

We can use the *G.P. Club* dispute to demonstrate how this strategy of evasion may work.\(^{910}\) Although the Hungarian courts approached this dispute as a question of direct discrimination, they could easily have constructed it as a case of indirect discrimination. The courts could have assumed that the entrance policy enforced by the club staff was ostensibly neutral and focused on its impact on different racial groups. However, the outcome of this approach would very much depend on the way in which the courts would have used the available facts to evaluate a disparate impact of the disputed entrance policy. In that sense, there was nothing that could have forced the courts to accept the statistics showing the racial composition of the customers who were not allowed to enter that evening. Instead, the courts could have easily insisted that only those who refused to show their identification had to be compared. In the former case, the dispute would have never reached the “objective justification” stage.

7.6. Deflating Objective Justification

7.6.1. The General Context

Indirect discrimination rests on its requirement that an apparently neutral measure producing a disparate impact must be objectively justified in order to survive scrutiny. The requirement actually consists of three separate and rather open-ended conditions. Each condition is an independent element. The manner in which we apply each of the three independent elements in the test is intimately related to the normative goals we want to achieve through indirect discrimination.

For example, if we hope to use indirect discrimination as a guarantee of “substantive equality,” it is highly likely that we will tend to insist on a high threshold for each of these three elements. Thus, regardless of whether we aspire to promote the value of group-based diversity or we are trying to strengthen the individual autonomy of the members of socially disadvantaged groups, we will attempt to narrow significantly the decision maker’s ability to justify discriminatory measures. We will insist that, in order to survive scrutiny, a disputed measure must be capable of achieving a legitimate purpose to a very high degree. Similarly, we will require convincing proof that there is truly no other measure that can equally effectively achieve the same goal but with a lower burden for the disadvantaged group. Of course, such high thresholds for both of these tests imply that we are willing to require that a decision maker bears a considerable increase in his operational costs.

911 See LEADER, Proportionality and the Justification of Discrimination.


913 TOWNSEND-SMITH, Justifying indirect discrimination in English and American Law: How Stringent should the Test be, p. 105.
The key part of indirect discrimination is the “legitimate purpose” test. It is this element that actually determines its normative character and strength. If we believe that indirect discrimination serves the goal of substantive equality, we will not accept any purpose of a disputed measure as a legitimate reason capable of justifying a disparate impact simply because it is completely unrelated to the person’s membership in a particular group. Rather, we will insist on reasons that we consider of such importance for the welfare of society that they are capable of outweighing the value of substantive equality. In practice, this means we will be expected to balance competing values, policy aims and interests since not every disparate impact regardless of size will be equally important for our normative goals.\textsuperscript{914}

It is, however, highly likely that CEE post-socialist courts will pay proper attention to the requirement of objective justification in their attempt to narrow indirect discrimination to their particular understanding of equality.

The manner in which these courts approach the question of legitimacy of the goal of the measure will play a vital role in their narrowing efforts. We have seen from the segregation and direct discrimination decisions that CEE post-socialist courts are highly reluctant to hold individuals responsible for sex or race discrimination. Accordingly, they have consistently welcomed any justification offered by a defendant that somehow indicated that his actions were not motivated by the fact that a plaintiff belonged to a particular race or sex. I can see no reason why they would not keep the same low threshold when it comes to the legitimate goal test. Accordingly, if there is no clear evidence that a measure whose wording is neutral was nevertheless motivated by some prejudice, they will tend to accept as legitimate any plausible objective reason offered by a defendant. Moreover, as we have seen in the context of direct discrimination decisions, it is

\textsuperscript{914} See ALEXY, *Balancing, constitutional review, and representation*, pp. 572-3.
likely that these courts will not be particularly vigilant in scrutinizing how real the offered reason was, that is, how important it was for the defendant to achieve this aim.

Unfortunately, post-socialist courts can find some support for the low legitimacy threshold in the wording of the new EU definitions of indirect discrimination. Before the reform of the equality Directives, ostensibly neutral measures producing disparate impact had to be justified by legitimate goals that were in no way related to discrimination on the grounds of sex. This made it more difficult (although not impossible) to justify those measures that were motivated by prejudice or some stereotype. Moreover, it allowed a reading that any measure that was somehow related to the disadvantaged position of women in society could not be legitimate if the decision maker was aware of this connection.

The new definition requires that an ostensibly neutral measure “is objectively justified by a legitimate aim”. Such wording opens the door to an argument that measures that were motivated by prejudice can nevertheless be justified by some legitimate goal as long as they are neutral in their form.\(^\text{915}\) Consequently, the way in which we structure direct discrimination becomes even more important. The new definitions of indirect discrimination would make perfect sense if we interpreted the prohibition of direct discrimination as including any decision that was motivated (explicitly or covertly, consciously or unconsciously) by some sex-related reason. This would certainly be a more desirable understanding of discrimination for at least one practical reason. This approach would not require the plaintiffs to demonstrate that a neutral measure resulted in a particular disadvantage in order for the burden of objective justification to shift to the defendant.

\(^{915}\) SCHIEK, *Indirect Discrimination*, pp. 436-7, 474-5. Schiek calls this approach the “justification proper” approach as opposed to the causation approach to objective justification.
A similar deflation of scrutiny thresholds can be expected in relation to two other conditions of the “objective justification” requirement. It is highly unlikely that post-socialist courts will insist that the defendants demonstrate with a high level of certainty that their measure is really capable of achieving the legitimate aim that they offered as a justification. They will prefer some more minimalistic version of the reasonableness test, which will allow the measure to survive even if it is only remotely possible that it will somehow contribute to the realization of its legitimate aim.

Post-socialist courts will be equally generous in relation to the necessity test. Instead of insisting on a high level of certainty that there is indeed no other less harmful measure that could equally effectively achieve the legitimate goal, they are likely to use this particular requirement only if it is obvious that such a measure exists.

It is interesting to point out the similar manner in which the Croatian Constitutional Court and the Austrian Supreme Court applied the necessity requirement. In the Sunday Trading case, the CCC found that the prohibition of Sunday trading constituted a disproportionate restriction of the fundamental right to free enterprise.916 The CCC argued that the measure was not necessary for the protection of workers since the Labor Code already prescribed certain safeguards. Similarly, in the Kornelia K case, the ASC found that the hardship allowance granted to workers who did more than 20 hours of VDU work constituted indirect discrimination on the grounds of sex.917 The ASC argued that the measure was not necessary for the protection of workers since the labor law provided safeguards even for those workers who performed less than 20 hours of VDU work. In both examples, the courts basically held that the disputed measure was not necessary because this was determined by the text of positive law. The courts simply ignored the fact that

917 OGH Geschäftszahl 9ObA90/04g delivered December, 2004.
there were plausible reasons that could explain the need for additional protection. In that sense, one is left with the feeling that these positivist courts were actually more concerned with the consistency of their system of positive statutory law than with the concrete implications of discriminatory measures.

7.6.2. Sex Equality Specifics

By deflating the scrutiny thresholds in all three elements of the test, the CEE post-socialist courts would effectively turn indirect discrimination into a lukewarm “reasonableness” test. As long as the challenged measure can be justified by some plausible objective reason, it will survive regardless of the character and size of its disparate impact. This will allow post-socialist courts to effectively preserve their narrow understanding of discrimination focused primarily on prejudice and continue their practice of avoiding holding individuals with whom they can easily identify responsible for such stigmatizing acts as sex or race discrimination.

Unfortunately, if these predictions are correct, the narrowing of indirect discrimination will be of particular importance for these courts in the context of sex discrimination. I have argued that indirect discrimination is a direct threat to the understanding of equality inherited from the era of “really existing” socialism that strongly favors a sex-based distribution of social roles and responsibilities between men and women. Post-socialist societies are still highly tolerant of both irrational and “rational” sex-related stereotypes. They are particularly protective of women’s maternal role. Narrowing indirect discrimination to a mere reasonableness test will allow the conventional stereotypes to remain operational and unchallenged. This is particularly so if these courts start accepting as legitimate justifications such as the protection of motherhood or supporting the position of “breadwinners”.
Moreover, since they do not perceive disparate impact as wrong per se, we can expect that they will insist on a rather high statistical disparity in the context of those professions and jobs that they consider more appropriate for one sex. Similarly, we can also expect that they will be particularly sensitive if some neutral measure negatively affects pregnant workers. In that respect, it is interesting to note that the only known time when a post-socialist court found a breach of the indirect discrimination guarantee was in relation to unfavorable treatment on the grounds of pregnancy.  

7.7. Containing the Narrowing

If we assume that only half of my predictions concerning the likelihood of doctrinal narrowing of indirect discrimination in the post-socialist legal systems are likely, then it becomes important to consider how this possible development can be contained. I believe that certain preventive actions are still available.

The first wave of indirect discrimination cases, especially those that manage to reach the highest courts, will be of great importance. Since post-socialist courts are still unfamiliar with this instrument, they are likely to follow closely the example set by their highest courts. One of the reasons that make the Austrian experience interesting is the fact that both the Austrian Constitutional Court and the Supreme Court invested a significant effort to establish an approach that could be followed by lower courts.

Those who will be lucky enough to argue these first cases could find it useful to structure their arguments in a manner that seems to satisfy certain features of the post-socialist adjudication. In

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that sense, their arguments need to be above all straightforward. They need to appear logical. Most importantly, their position must appear as being easily applicable.

In addition, the arguments need to be convincingly supported by positive text. We have seen from the Austrian experience that positivist courts do not have problems either with EU Directives or with the rulings of the ECJ, which they frequently apply in a rule-like manner. In that sense, it is important to insist immediately on the recognition of the fundamental principles of the EU legal order – the principle of supremacy and the principle of direct effect of EU law. It will be much more difficult for post-socialist courts to narrow the scope of both direct and indirect discrimination doctrinally if they are constantly confronted with the developing case-law of the ECJ. As shown by the Austrian experience, it would be beneficial for plaintiffs to convince these courts sooner rather than later to use the Art 234 ETC procedure and refer the cases to the ECJ.

However, although one can never underestimate the importance of these formal steps, it will be even more important to convince these courts to accept certain rather straightforward substantive positions. It seems to me that the most effective way of containing the danger of narrowing indirect discrimination is to convince CEE post-socialist courts that direct and indirect discrimination are complementary on some general theoretical level. However, on a practical level, they are completely different instruments that serve different purposes. Having in mind the tendency of these courts to reduce discrimination to motivation, it would be useful for plaintiffs to present direct discrimination as a guarantee of procedural fairness. At the same time, indirect discrimination should be constructed as an instrument focused on social groups and concerned with distributive justice. The separation strategy would have several positive consequences.
First, it would to a great extent prevent the narrowing of indirect discrimination. A clear-cut distinction between the two instruments would entail that indirect discrimination is not merely an additional support for direct discrimination. Hence, it cannot be reduced to the level of scrutiny of prejudicial motivation. This would consequently make it easier for plaintiffs to support their position by a further set of important arguments.

Thus, plaintiffs should seek to convince the courts that it would be contrary to the distributive character of this instrument if they insisted on formal statistical evidence showing a wide disparity of impact. It would also make it easier to convince these courts to accept an “eyeball” approach to determining the disparity of impact. The fact that these courts are not used to thinking of discrimination in terms of complex social statistics combined with the fact that the positive legal text allows a “common sense” evaluation since it does not explicitly insist on statistical evidence could work to plaintiffs’ advantage. At the same time, plaintiffs should be very careful not to trivialize the importance of statistical data to avoid the risk of allowing post-socialist courts to convert their conventional direct discrimination practice into a form of indirect discrimination.

Moreover, a clear disjunction between indirect discrimination and subjective motivation will strengthen the objective justification test. If these courts start perceiving indirect discrimination as an instrument of distributive justice, it will be easier for plaintiffs to insist that the defendant must show that his proposed legitimate goal is not only real but also sufficiently important to outweigh the goal of distributive justice. In a similar manner, they will be in a position to insist on raising the scrutiny thresholds for the tests of capability and necessity.
The clear-cut separation of direct and indirect discrimination could also have some positive consequences on the approach of post-socialist courts to direct discrimination. Thus, if these courts accept the proposition that, in contrast to indirect discrimination as an instrument of distributive justice, direct discrimination is an instrument of procedural fairness, they may widen the scope of their narrow doctrine. In that sense, they could switch to an equally “mechanical” position that direct discrimination is determined by the simple objective fact that the decision was explicitly based on the forbidden criterion regardless of the subjective motivation of the decision maker.

However, plaintiffs should be aware that the sturdiest obstacle to their efforts to turn indirect discrimination into an effective antidiscrimination guarantee is most likely to be the inherited understanding of sex equality that strongly favors different social roles and responsibilities for men and women. As explained above, the argument that indirect discrimination is an instrument of distributive justice is likely to lose its force in situations where a more just distribution of opportunities between men and women collides with the conventional social distribution of gender roles and responsibilities. In those situations, the best chance for plaintiffs is to insist on a clear ruling from the ECJ.

However, having in mind the persistence and consistency that post-socialist courts have shown in relation to direct discrimination disputes, one should not have high hopes about the containment efforts if plaintiffs are left to fight for themselves before the post-socialist courts. In that sense, they could certainly use a helping hand from the ECJ.

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919 I use the term procedural fairness to describe a view that any decision satisfying prescribed conditions of decision-making (such as the prohibition of using sex-related criteria) satisfies the minimal requirements of fairness.
The ECJ should assume a clear position in relation to the importance of subjective motivation for direct discrimination. Some have suggested that motivation (intent) is completely irrelevant for the application of the EU direct discrimination guarantee.\textsuperscript{920} According to this view, only decisions that are a direct result of the explicit (and consistent) use of a forbidden criterion such as sex or race constitute direct discrimination. Accordingly, decisions that are not explicitly related to the criterion of sex do not constitute direct discrimination, notwithstanding the fact that they may be motivated by prejudice or related to some stereotypical view of women or members of some race. Such decisions, it is argued, should be dealt with under indirect discrimination.\textsuperscript{921}

In other words, what matters is the form of a particular act.\textsuperscript{922}

Although favored by some academics and experts, this position does not have support in the ECJ’s case-law. The Court has never assumed the position that neutral measures that are motivated by some prejudice or related to some stereotype do not constitute direct discrimination. As argued before, this would have undesirable practical implications on the position of discrimination victims. In fact, in a number of decisions, the ECJ has indicated that intent can be very important in direct discrimination considerations.

It would be desirable if the ECJ clearly stated that, in relation to direct discrimination, prejudicial motivation is relevant only when it comes to ostensibly neutral measures used by the decision maker to perpetuate the position of a particular social group as a perpetual underclass.\textsuperscript{923} Other than that, there is very little room for blameworthiness to play a role in direct discrimination.

\textsuperscript{920} See, for example, ELLIS, \textit{Gender Discrimination Law in the European Community}, p. 19. On the difference between the roles of motivation and intent in antidiscrimination law, see BELL, \textit{Direct Discrimination}, pp. 226-33.


\textsuperscript{922} See, for example, TOBLER, Limits and potential of the concept of indirect discrimination, p. 48.

\textsuperscript{923} For this view, see RUBENSTEIN, \textit{The Equal Treatment Directive and U.K. Law}. 

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disputes. On the contrary, the key question is to what extent we should hold decision makers responsible even for decisions when they were aware or should have been aware of the negative effects of those decisions on the position of a particular group.

Similarly, notwithstanding its consistent practice of leaving the application of the most sensitive elements of indirect discrimination to the discretion of national courts, it would be highly desirable if the ECJ assumed a clear position regarding the normative purpose of this instrument. The ECJ should clearly state that national courts should not treat indirect discrimination simply as a means of preventing the circumvention of the prohibition of direct discrimination, but instead as an instrument of substantive equality with far-reaching distributive consequences. Accordingly, although it could never provide national courts with a satisfying answer concerning the “disparity dilemma”, the Court could and should clearly state that national courts should not treat the “objective justification” requirement as a way of establishing a causal connection between the disparate impact and the bias of the decision maker’s act, but rather that they should view the requirement as a way of balancing between achieving benefits for the disadvantaged group, and other competing interests of value to society.
Conclusion

In seven previous chapters, I have attempted to demonstrate that prospects of successful enforcement of EU sex equality guarantees in the CEE post-socialist legal systems do not look promising at the moment. I have identified CEE post-socialist courts as the key reason for this gloomy picture. I have argued that CEE post-socialist courts cannot respond to requirements of EU sex equality law due to a lingering influence of their socialist past.

Supporting the claim has not been an easy task for a number of reasons, two of which were particularly daunting. First, sex equality (or equality in general) is not a popular object of legal interest in CEE legal communities. On the one hand, as seen in Chapters VI and VII, people do not tend to take their equality disputes before courts, and when they do, CEE courts often try to evade these disputes. On the other hand, CEE legal academics and experts have never been particularly interested in the topic of sex equality. It is remarkable how few academic legal texts dealing with the subject of sex equality can be found in these legal communities. Consequently, it was not easy to find materials that are the necessary building blocks for a thesis such as this.

Second, as far as I am aware, no one to date has examined the connection between ideas and practices that were characteristic for the version of socialism practiced in this part of Europe and the manner in which the CEE legal systems deal with the problem of sex inequality. In that respect, it has been difficult to acquire a “second opinion” that could either corroborate or disapprove my premises, arguments and conclusions.

In light of this, I had to build my case carefully, chapter-by-chapter, from “scratch”, using various methods of research and argumentations. As a result, the thesis has three distinctive
parts. The first part – Chapters I and II – is both analytical and descriptive. It aimed to describe and compare two profoundly different normative understandings of and legal approaches to sex equality. It is descriptive to the extent that it tried to explain how the CEE socialist regimes and the EU legal order perceived the ideal of sex equality and how they used law to turn that ideal into practice. It is analytical to the extent that it identified the features of these two normative perspectives and legal approaches that are particularly relevant for the premise that the CEE post-socialist courts have and will continue to have great difficulties in responding to the requirements of EU sex equality law.

The second part – Chapters III and IV – examined the manner in which the process of legal harmonization, which was a precondition for the EU accession of CEE post-socialist states, addressed the poor capacity of the CEE judiciary to deal effectively with the challenges posed by EU sex equality law. Again, this part was both descriptive and analytical. It showed how and why the harmonization process failed to prepare CEE post-socialist courts for the task of enforcement of EU sex equality law notwithstanding clear indications suggesting that these courts will have significant difficulties in responding to the requirements entailed by this task.

The third part primarily relied on a critical analysis. It provided an account of the approach to discrimination favored by CEE post-socialist courts. It identified its failures and, most importantly, explained them through the lingering influence of the concept of equality between men and women characteristic of “really existing” socialism.

What follows is a summary of the most important points and conclusions that can be found scattered through the seven chapters.
The first two chapters pointed out the differences in the manner in which the CEE socialist regimes and the EU legal order perceived and regulated the notion of sex equality. Two differences have been particularly important for this thesis. The first one concerns the deep discrepancy in normative backgrounds of the equality provisions favored by these different legal systems. The second one concerns the regulatory styles these systems used to define legally the ideal of sex equality and the ways in which they distributed responsibilities among legal institutions who were responsible for ensuring that equality guarantees achieve their purpose.

The conception of equality characteristic for the CEE socialist regimes was above all dogmatic. However, it was also rather coherent in terms of its normative premises and implications. The concept of equality between men and women favored by the CEE socialist regimes was built around the premise of biological (and, hence, “natural” or “objective”) differences between the sexes. It was particularly concerned with differences in the procreative capacity. The CEE socialist regimes considered that these “objective” differences determined social roles and responsibilities of men and women in a socialist society. They based their conception on the premise that men and women were equally expected to contribute to the common wellbeing of a socialist society. However, the manner in which they were supposed to perform this duty was not the same. Both men and women were expected to contribute to the wellbeing of a socialist society through their active participation in socialist economic production. Accordingly, the CEE socialist societies were famous for full employment of women. At the same time, however, these regimes never believed that women and men ought to participate in socialist production in the same manner, because that would bring women into conflict with the other important contribution that “really existing” socialism expected from them. In addition to being workers, women were also expected to assume responsibility for procreation and childcare. The CEE
socialist regimes perceived women’s role of motherhood as tightly related to the socialist principle of equality “from each according to her ability, to each according to her contribution”. They also portrayed motherhood as an important requirement of women’s self-realization.

In Chapter I, I have shown that the CEE socialist legal regimes faithfully followed this normative understanding of equality between men and women. CEE socialist labor laws provided an extensive and coherent set of very specific rules that ensured the participation of women in employment as long as this participation did not threaten the social responsibilities entailed by the socialist role of motherhood. The CEE socialist regimes also provided an extensive set of social benefits that encouraged women to assume this social responsibility. In short, these regimes did not perceive sex equality as a notion that promises individuals equal opportunities for participation in all spheres of social life, employment in particular, regardless of their membership in a particular sex. They considered that equality between men and women had to be realized through different treatment that was appropriate to their “objectively” different abilities and corresponding social responsibilities. Accordingly, these regimes never explicitly provided clearly defined and enforceable prohibitions of direct or indirect discrimination in their labor law. Moreover, those that did prohibit discrimination on the grounds of sex defined it as a criminal act and reduced discrimination to a conscious prejudicial treatment. Chapters VI and VII demonstrate that this legal narrowing of discrimination during the period of “really existing” socialism still negatively affects the ability of members of traditionally disadvantaged groups to use equality law in order to protect themselves effectively from discriminatory treatment.

Chapter II showed that the EU legal order favors a profoundly different understanding of sex equality. The analysis of the two most important EU sex equality guarantees quickly showed that
the EU understanding of sex equality cannot be reduced to one dominant view. In contrast to “socialist” coherence, the EU’s understanding of equality is much more “discursive”. It involves several theoretical views that are constantly competing to provide a persuasive explanation of EU sex equality law. As a result, EU sex equality guarantees are profoundly open-textured. The ECJ’s sex equality case-law confirms this character of EU law. The analysis of the Court’s direct, indirect and pregnancy discrimination case-law showed that it is difficult to classify the Court’s approach to these guarantees under any coherent theoretical conception of sex equality. The Court’s approach to sex equality law is best described as pragmatic. The Court’s sex equality rulings have primarily been a result of careful balancing between a variety of competing values, normative interests and goals.

This does not mean that it is impossible to provide any normative account of the ECJ’s sex equality rulings. The analysis of the Court’s sex equality law has revealed that some specific considerations are frequently re-emerging in its sex equality decisions. This suggests that they are clearly of particular interest to the Court. At the same time, however, it would be difficult to argue that any of these considerations have some a priori advantage over the others. The concrete weight of a particular concern that may decide an actual case depends primarily on the concrete factual predicate of each particular case and the broader political and social context in which a dispute happens to take place. In that respect, each decision must first and foremost be examined within its own context. Only then can one try to place it within some “higher” doctrinal framework. Moreover, doctrinal propositions (such as, for example, the principle that those similarly situated ought to be treated similarly or that suspect practices must be “objectively justified”) that the Court frequently employs to justify its sex equality rulings cannot be taken as clear-cut notions capable of resolving disputes in a straightforward fashion. At best,
these propositions present a methodological framework. Although they can provide a certain structure to the Court’s decisions, they do not determine their substantive outcome. The fact that the Court frequently uses these open-ended propositions to justify its rulings merely confirms that the ECJ did not develop a comprehensive doctrine that can provide a significant apparent meaning to EU open-textured sex equality guarantees. The outcome of an EU sex equality guarantee case is usually a result of the Court’s normative choice. This point is tightly related to the second feature of EU sex equality law that profoundly separates the EU’s approach to sex equality from the one favored by the CEE socialist regimes.

The Court’s pragmatic approach to sex equality disputes has had one particularly significant implication for judicial enforcement of EU sex equality guarantees in the national legal systems of EU Member States. In Chapter II, I have shown that the Court frequently leaves important value-based choices to national courts. This characteristic of the Court’s approach puts at a significant disadvantage those courts that perceive adjudication in terms of straightforward application of clear-cut rules. The ECJ’s approach invites national courts to assume responsibility for important normative decisions entailed by EU sex equality guarantees with implications that go far beyond one particular dispute. This approach seems to imply a particular type of litigation. It seems better fitted for judicial proceedings in which parties are expected to convince a court that a particular ruling is the right solution for a dispute at hand not because this solution is “objectively” commanded by one correct meaning of applicable legal text, but rather because courts have a duty to intercept applicable law having in mind the consequences of their decisions and in light of what they consider to be socially desirable in a particular context. This claim finds support in the fact that so far almost one third of national references to the ECJ related to the interpretation of sex equality law came from the national legal system in which this
type of litigation plays an important role (Great Britain), while another third of sex equality references came from the two “continental” legal systems that have to some extent accommodated this type of litigation (Germany and Netherlands).

I have also argued that the CEE post-socialist courts have not yet acquired the capacity to assume the responsibilities entailed by the ECJ’s approach to EU sex equality guarantees.

In Chapters III and IV, I argued that the relevant actors in the process of accession negotiations mostly ignored the question of substantive capacity of CEE post-socialist courts to respond successfully to requirements involved in the task of enforcement of EU sex equality law. The Commission, which was negotiating on behalf of the EU, basically assumed that the Candidate States carried the responsibility for preparing their courts for the task of enforcement of the EU acquis, including the sex equality acquis. The Candidate States, on the other hand, did not show any enthusiasm to go beyond what the Commission explicitly required. As a result, the negotiation process was almost exclusively focused on the transposition of positive sex equality guarantees into relevant national legislation. This formalistic approach to the harmonization process in the area of sex equality shows that, notwithstanding regular lip-service from both sides, the ideal of sex equality was not particularly high on the priority list of accession negotiations. Moreover, I have suggested that the formalistic approach to the harmonization of sex equality law, which dominated the accession negotiation process, perpetuated the formalistic perception of sex equality guarantees favored by CEE post-socialist courts. As a result, the process of harmonization of national legal systems of the Candidate States with the EU acquis left national courts in these systems unprepared for challenges entailed by the enforcement of EU sex equality law.
This failure of the harmonization process seems particularly problematic due to the fact that sex equality law and antidiscrimination guarantees in general are to a great extent foreign to many judges in the CEE post-socialist legal systems. A great majority of legal practitioners in these legal systems, including judges, had never studied any type of equality law as a part of their legal education. A great majority of them never encountered equality or discrimination claims in their legal practice since such claims are very rare in these legal systems. In that regard, there was hardly anything that could make CEE post-socialist courts aware of the threat to the successful enforcement of EU sex equality law entailed by the lingering influence of the conception of equality between men and women that these systems inherited from the period of “really existing” socialism. The process of legal harmonization that preceded the accession of the CEE post-socialist states to the EU failed to address this rather obvious problem.

Chapters V, VI and VII elaborate the claim that the concept of equality that was characteristic for the period of “really existing” socialism still affects the CEE post-socialist legal systems. Lingering implications of this concept obstruct the task of judicial enforcement of EU sex equality law in the CEE post-socialist legal systems. Courts across the CEE post-socialist legal systems still read transposed EU sex equality guarantees through the lens of their socialist past.

Chapter V showed that CEE post-socialist courts still perceive adjudication as a straightforward application of clear-cut rules whose meaning is objectively determined by their legal wording. Simply put, these courts are still strongly committed to the formalistic style of adjudication that was characteristic for the period of “really existing” socialism. This has far-reaching implications for the enforcement of EU sex equality guarantees. The direct discrimination decisions of the CEE post-socialist courts analyzed in Chapter VI show the tendency of CEE post-socialist courts
to narrow the notion of discrimination in order to simplify its application. Their strategy of narrowing rests on two central features. First, these courts still reduce the notion of discrimination to prejudicial intent. Second, they favor a high threshold of proof. More precisely, they frequently accept, without any meaningful scrutiny, a defendant’s slightly plausible justification that allows the court to conclude formally that the defendant’s actions were not motivated by some group-based prejudice. In that regard, CEE post-socialist courts have successfully dismantled the EU burden of proof guarantee in order to preserve their ability to evade those discrimination claims that require normative choices they perceive as controversial or socially “charged”.

The fact that the style of equality adjudication favored by most CEE post-socialist courts is formalist does not mean that these courts do not actually engage in value-based decision-making. The very decision to read the direct discrimination guarantee as a narrow prohibition of prejudicial intent is a value-based choice, especially since their statutory law does not insist on such a narrow meaning of discrimination. I consider their style of adjudication to be formalist because it frequently takes as a given the narrowest or most simplistic reading of open-textured equality guarantees. Although this may not necessarily be a conscious choice, it is somewhat difficult to understand why so many courts in these legal systems consistently fail to see the possibility of a different reading of antidiscrimination guarantees.

This question is even more puzzling in light of the fact that courts in other legal systems that have traditionally favored a formalist style of adjudication managed to align their understanding of EU antidiscrimination guarantees more closely with the understanding favored by the ECJ. To illustrate this dilemma, I have relied on the experience of Austrian courts, which managed to face
challenges entailed by EU sex equality law. In light of their more or less successful experience, I have argued that simple formalism cannot fully explain why CEE post-socialist courts favor the narrow understanding of antidiscrimination guarantees, which is clearly incompatible with the approach favored by the ECJ. In that respect, I have stressed that the key features of their narrow approach to discrimination correspond to the normative conception of equality characteristic for the period of “really existing’ socialism. First, the fact that CEE post-socialist courts insist on prejudicial intent in discrimination disputes is related to the fact that the CEE socialist legal systems defined sex or race discrimination primarily as a criminal act. In that regard, it is rather telling that the first case of sexual harassment in Croatia (and likely one of the first sexual harassment cases in the CEE post-socialist systems) was tried before a criminal court despite the fact that a provision on sexual harassment cannot be found anywhere in the Croatian Criminal Code. Instead, the Croatian law defined sexual harassment in the Gender Equality Act and placed its enforcement primarily within the competence of civil courts. Nevertheless, the case “found its way” to a criminal court where the claimants argued what was clearly the case of sexual harassment as a criminal violation of their right to dignified work. The first instance court found for the plaintiffs. The court accepted this construction and found for the claimants. It did not focus on the sexual character of the behavior and its relatedness to differences in power between male and female employees. Accordingly, it did not find that such behavior constituted sex discrimination, although the Gender Equality Act defines sexual harassment as a form of direct sex discrimination. In fact, being a criminal court, the court ignored the Act altogether. It rather focused on the intentionally humiliating character of the behavior in question and proceeded to conclude that such behavior violated the victim’s right to dignified work.
This example points to the second similarity between the narrow approach to discrimination favored by the CEE courts and the concept of equality characteristic of “really existing” socialism. I have argued that CEE post-socialist courts and legal practitioners in general frequently avoid sex or race antidiscrimination guarantees. If they see an opportunity to deal with a claim in some manner that does not involve the notion of sex or race discrimination, they will gladly use it. For example, they will purport to approach a sexual harassment case as a question of violation of a worker’s dignity than as a question of direct discrimination. Similarly, instead of getting involved in examining whether sex played some role in a defendant’s decision to dismiss a worker, they will limit their scrutiny to the question of whether reasons provided by the employer correspond to a list of legitimate reasons for dismissal defined by their labor law. Most strikingly, these courts developed a practice of redefining sex or race disputes into more general discrimination disputes. As shown in Chapter VI, they frequently reject a claim of race or sex discrimination only to find that a defendant violated a more general right to equal treatment. I have argued that this tendency to evade sex or race discrimination arguments is tightly related to the type of egalitarianism characteristic for the CEE “really existing” socialism.

As seen in Chapter I, the CEE socialist regimes favored very general declarations of equality between men and women that were never enforced by their courts. Moreover, compared to the EU legal order, the notion of equality favored by these regimes was a much wider concept in a socialist society. It was not limited to the prohibition of unfavorable treatment of members of some groups. Rather, it guaranteed the same treatment to all citizens who satisfied the criteria prescribed by the socialist state in all areas of social life regulated by the state. Such a broad concept of equal treatment applicable to all individuals in all areas of their lives made sense in a political system that recognized only one social class and subordinated individual interests and
preferences to the common wellbeing of a socialist society. However, this concept hardly makes sense in a political system that encourages individual autonomy as well as a healthy skepticism towards those who control state power. Yet, most CEE post-socialist legal systems kept in their laws the equal treatment guarantees with a very wide scope of application, both in terms of the suspect grounds of discrimination and in terms of the areas of social life to which that protection applies. So far, the CEE post-socialist courts have been relying on such an all-encompassing notion of equal treatment to avoid dealing with sex or race discrimination claims. Consequently, they have diluted the effectiveness of equality guarantees for those social groups that have traditionally carried the heaviest brunt of discrimination in these societies. Therefore, I have described this view of equality favored by the CEE post-socialist systems as quasi-egalitarianism.

Unfortunately, this quasi-egalitarianism merely perpetuates the approach to sex equality protection that was favored by the CEE socialist regimes. The CEE socialist regimes did not tolerate strong sex discrimination guarantees since they never accepted the notion of sex equality that insists on equal participation of women and men in all spheres of social life, especially employment. Men and women of “really existing socialism” were given distinctive social roles and responsibilities, which supposedly reflected their inherent differences and needs. Any notion of discrimination that went beyond intentional prejudice would have only threatened this concept. As a result, CEE societies tolerated and even encouraged a wide range of sex-based distinctions and gender-based stereotypes that are not acceptable in the EU legal order.

The narrow approach to sex or race discrimination claims favored by CEE post-socialist courts is tightly related to the inherited socialist concept of equality. In fact, when it comes to sex or race
direct discrimination, the quasi-egalitarianism allows the CEE post-socialist courts to “have their cake and eat it”. On the one hand, they have favored the narrow prejudice-based approach to sex or race discrimination claims, which allowed them to escape challenging questions entailed by sex or race equality guarantees that concerned structural barriers to real-life equality of women or ethnic minorities. On the other hand, they have still managed to hold defendants responsible for what they perceived as “unfair” treatment and in that way soothe their conscience. Such quasi-egalitarianism merely conceals that CEE post-socialist courts are not willing to challenge the status quo inherited from the period of “really existing” socialism.

The quasi-egalitarianism poses a particular threat to the indirect discrimination guarantee. Chapter VII has shown that, to the extent they do not simply ignore indirect discrimination, CEE post-socialist courts are likely to switch to a strategy of evasion and start diluting the guarantee of indirect discrimination. There are several reasons for this resistance. On the one hand, it is rather clear that this guarantee can hardly function outside the context of conventional discrimination grounds. For example, if applied in the context of a ground such as a person’s financial status, the guarantee would have far-reaching implications for market-based pricing of goods and services. Yet, many of the CEE post-socialist antidiscrimination laws allow precisely this type of interpretation. Of course, it is highly doubtful that CEE post-socialist courts would “dare” to apply this guarantee in such a controversial manner. It is much more likely that they will try to avoid such challenging dilemmas altogether by radically narrowing the notion of indirect discrimination. For example, they may simply insist on very clear statistical data or manipulate the comparability tests to dismiss indirect discrimination claims in a rather formalistic manner. I have argued that the example of French courts offers some support to this fear. French courts have already developed a reputation for avoiding indirect discrimination
claims. It has been argued that they find the type of adjudication entailed by this guarantee “overtly sociological” as opposed to “purely legal” because it involves challenging normative judgments that they do not consider appropriate for adjudication. This is probably a fair description that can be equally applied to the CEE post-socialist courts. However, both the French and CEE courts have operated in legal systems that have traditionally favored a broad understanding of egalitarianism. I have suggested that such systems may have special difficulties accommodating the guarantee of indirect discrimination in a form developed by the ECJ because the notion of indirect discrimination threatens to reveal the formalistic character of their commitment to the ideal of equality.

In light of this, I have pointed out that CEE post-socialist courts may actually use the guarantee of indirect discrimination to strengthen their narrow prejudice-based approach to discrimination. In that respect, I have argued that it is likely that these courts will lower the level of scrutiny entailed by the “objective justification” test to a point where they would be able to accept any even slightly plausible explanation provided by a defendant as a sufficient reason to dismiss a claim of sex or race discrimination.

In light of these arguments, we must ask ourselves whether judicial enforcement of EU sex equality guarantees in the CEE post-socialist legal systems is indeed going to be more problematic than in other Member States. There is no straightforward answer. Enforcement of EU sex equality law throughout national legal systems has been patchy at best. Moreover, sex equality case-law of national courts has not been an object of close academic scrutiny, as has been the case with the ECJ’s case-law. Accordingly, many researchers interested in actual effects of EU sex equality law would like to see considerably more data from this area. One could
perhaps possibly argue that CEE post-socialist courts simply fit into a broader gloomy picture. This is particularly true in light of data such as those from an influential EU Member State such as France.

Nevertheless, there are special indications that the manner in which CEE post-socialist courts deal with sex (or race) equality guarantees will be a particular challenge to EU sex equality law. The approach to discrimination claims favored by CEE post-socialist courts pushes to the extreme probably the two most significant challenges to successful application of EU sex equality law. First, it undermines the distribution of adjudicating responsibilities between the ECJ and national courts. The approach to sex equality law favored by the ECJ requires national courts to assume responsibility for challenging value-based decisions, which are tightly related to the redistribution of social power between members of the dominant social group and those who have been traditionally kept in a disadvantaged social position. The narrow-minded type of formalist adjudication favored by many CEE post-socialist courts directly undermines this distribution of judicial responsibilities within the EU legal order.

Second, the notion of discrimination favored by CEE post-socialist courts rests on a normative concept of equality that cannot be reconciled with the ECJ’s approach to EU sex equality law. As open-textured as the ECJ’s approach may be, the Court has frequently acknowledged that women’s opportunities in the labor market are not equal to men’s due to structural inequalities that are built deep into the texture of social relations. Therefore, the Court’s main dilemma has been how to gradually restructure the conventional social practices that keep women at a disadvantaged position in the labor market without overburdening employers with the cost of such restructuring. In contrast to this, the narrow approach favored by the CEE post-socialist
courts does not even recognize either structural inequality or systemic discrimination. On the contrary, the post-socialist approach is underpinned by a deterministic understanding of the socially desirable distribution of social roles between the sexes, which is inherited from the socialist past. Consequently, these courts cannot move beyond the notion of discrimination based on prejudicial intent. This form of narrow approach to discrimination has never been embraced by the ECJ and it does not seem to hold a dominant position in any other national legal system that is part of the EU legal order.

Does all this mean that the CEE post-socialist courts cannot eventually adjust to the requirements of EU sex equality law? No. But, it does mean that they need “outside” guidance. To put it bluntly, CEE post-socialist courts do not have the capacity to become aware of their failures on their own. This is hardly something for which they should carry the responsibility alone. The responsibility rests on the entire legal community within which they operate. Post-socialist judges have very little opportunity to learn about requirements of EU sex equality law in any organized fashion. Moreover, most law schools in the CEE post-socialist systems still evidence a considerable resistance towards any adjustment of their curricula that would respond to concerns of this type. Consequently, post-socialist judges cannot count on their domestic legal systems for any significant support in this area. Guidance will therefore have to come from an institution that is in the best position to provide it or, more precisely, that is sufficiently powerful to incite the change. In the Austrian example, the “push” came from the two highest national courts. In the case of CEE courts, it will have to come directly from the ECJ.

In my view, it would be prudent for the Court to use the first opportunity to confront openly the narrow approach to discrimination favored by CEE post-socialist courts. It would be particularly
useful if the Court explicitly stated that direct discrimination goes beyond mere prejudice. This is especially important since there are certain features of the Court’s approach that the CEE post-socialist courts may perceive as a validation of their understanding of direct discrimination. In that respect, the Court should provide a more substantive explanation of direct discrimination from that offered by its three open-textured approaches. Having in mind the ECJ’s tendency to avoid giving clear-cut answers that could restrain its maneuvering capacity in future cases, it should not be expected that the Court will clearly define the limits of direct discrimination any time soon. However, the mere statement that direct discrimination includes those decisions and practices that are not based on prejudice or that it forbids those practices that are not intentional or practices of which a defendant might have been unaware will capture the attention of the CEE post-socialist courts and force them to engage in some self-analysis and “soul searching”.

Similarly, it would also be prudent if the ECJ explicitly stated that it designed the notions of direct and indirect discrimination to address different types of barriers to women’s equal position in the labor market. This would prevent the narrowing of the indirect discrimination guarantee, which is likely to occur in the CEE post-socialist systems without such intervention.

If the ECJ does not confront the approach to discrimination favored by the CEE post-socialist courts soon, these courts will simply continue denying effective antidiscrimination protection to women, which will at some point threaten the legitimacy of EU sex equality guarantees in that part of the Union. Therefore, the Court will have to intervene eventually. But the intervention that comes later rather than sooner will come at a high cost not only for victims of discrimination but also for those post-socialist judges that will dare to confront the existing status quo and challenge the implications of the still dominant understanding of sex equality inherited from the
socialist past that has betrayed its own ideal of equality of women. It would be shameful if the Court left these victims and judges without much needed support.
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