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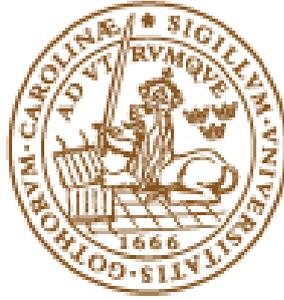
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## **ON EQUAL TREATMENT, POSITIVE ACTION AND THE SIGNIFICANCE OF A PERSON'S SEX**

### **1 INTRODUCTION**

The scope for so-called positive-action measures is regulated in Article 2.4 as compared to Article 2.1 in the Council Directive 76/207/EEC of 9 February 1976 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<sup>1</sup> (the Equal Treatment Directive). Since the mid-nineties, this regulation has been the object of a number of judgments by the European Court of Justice (ECJ)<sup>2</sup> and raised a lot of debate.

The judgment in *Kalanke*<sup>3</sup> caused, when it was presented, somewhat of a shock in Member States who regarded positive action as a both legitimate and desirable means, and it immediately started a debate on its correct interpretation. Did the ECJ reject quotas in general or *only* a quota system of the 'strict' Bremen model? The European Commission submitted an interpretation of the ECJ judgment arguing the latter.<sup>4</sup> Later on, a clarifying amendment proposal in respect of the Equal Treatment Directive was presented.<sup>5</sup> During the preparations of the Amsterdam Treaty, several possible redactions of a treaty rule on positive action were discussed.

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<sup>1</sup> OJ 1976 L 39, p. 40.

<sup>2</sup> See further Section 3. Article 2.4 has also been under scrutiny by the ECJ in the case 312/86 *Commission v France* [1988] ECR 6315, regarding special advantages given to women by collective agreements and individual employment contracts as regards maternity leave, shortened working hours, child leave, etc. A recent case is case C-79/99 *Julia Schnorbus v Land Hessen* (judgment 7.12.2000).

<sup>3</sup> C-450/93 *Eckhart Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051.

<sup>4</sup> See Communication by the Commission to the Council and the European Parliament on the Interpretation of the Judgment of the European Court of Justice on 17 October 1995 in case C-450/93, *Kalanke v Freie Hansestadt Bremen*, COM (1996) 88 final.

<sup>5</sup> COM(1996) 93 final.

No changes have yet been made to the Equal Treatment Directive.<sup>6</sup> After the Amsterdam Treaty, though, equal opportunities for men and women have been given an even more central place as regards Community regulation. Article 3.2 EC now states:

‘In all the activities ..., the Community shall aim to eliminate inequalities, and to promote equality, between men and women.’

And Article 141.4 EC states:

‘With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.’

Later on, the regulation in Article 141.4 EC has been followed up in other proposals – and now also directives – regarding non-discrimination of other groups in working life.<sup>7</sup> As was already indicated, the Commission has now also put forward a proposal amending the Equal Treatment Directive as regards, among other things, positive action.<sup>8</sup> The Commission’s conclusion is that Article 141.4 EC makes Article 2.4 of the Equal Treatment directive superfluous. The suggestion is that paragraph 4 be replaced by an obligation for the Commission to adopt and publish a report establishing a comparative assessment of the positive measures adopted by the Member States pursuant to Article 141.4 EC every three years, on the basis of information provided by the Member States.

In Sweden at the time of the *Kalanke* judgment positive action was a matter of special interest as a result of certain proposals regarding positive-action measures in higher education with a view to promoting equality – the so-called ‘Tham-package’ – that

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<sup>6</sup> However, on 7 June 2000 the Commission presented a proposal for a directive amending the Equal Treatment Directive considerably, COM (2000) 334 final. This proposal is only partly followed up in this article.

<sup>7</sup> See proposals regarding a directive establishing a general framework for equal treatment in employment and occupation, Article 6, COM (1999) 565 final, and a directive on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Article 6, COM (1999) 566 final. Now the Council’s Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation and the Council’s Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, respectively. See further Section 2 below.

<sup>8</sup> COM (2000) 334 final.

were only just being put forward.<sup>9</sup> The debate caused by the Tham-package has occasionally given the impression that its provisions on positive action implied a genuine innovation as regards Swedish regulations. This is not so. According to national legislation, the scope for positive action had appeared relatively uncomplicated for a long time.<sup>10</sup> However, the circumstance that positive action is legally permitted is of course no guarantee that it is also put into practice to any considerable extent. The question of the scope for positive action has hardly been put to the test in case law,<sup>11</sup> and my impression is that positive action has not been practised to any massive extent in the Swedish labour market. The controversies caused by positive action showed up in the debate on the Tham-professors. One might say that positive action in Sweden has proved to be – in a dual sense – a question for academics.

However, the 1991 Equal Opportunities Act and other Swedish regulations regarding positive action constitute the implementation of Community law, to be interpreted by the ECJ. And part of the Swedish regulations concerning positive action has now been rejected by the ECJ in the *Abrahamsson* case.<sup>12</sup>

The purpose of this article is to contribute to the normative analysis of equal treatment, the scope of positive action and legitimate considerations of sex in the light of Community law as reflected in the ECJ judgment in *Kalanke* and the following judgments. It is my opinion that an extension of the normative basis of positive action can be argued within the framework of the proportionality assessment, and that the acceptance of certain differential treatment apparently connected to sex can be extended by means of occasionally allowing for the justification of *direct* discrimination as well. In short, the article deals with the importance of freeing ourselves from the liberal strait-jacket which the traditional legislation against discrimination on the grounds of sex has imposed on us in that it is constructed on the basis of the stipulation that sex is of no significance.

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<sup>9</sup> See Government Bill 1994/95:164 and, especially, Regulation (1995:936) concerning certain professors' and research assistants' posts and further Section 3 below.

<sup>10</sup> See, for instance, Numhauser-Henning, Ann, Positiv särbehandling – EG-domstolen överraskar igen!, In: *Juridisk Tidskrift* 1997–98 pp. 814–834.

<sup>11</sup> However, as regards appeals in the state-employment sector, see Sigeman, Tore, *Tjänsteställning vid universitet och högskolor. Rättsfrågor i överklagandenämndens praxis*, Uppsala 1997. See also the Swedish Labour Courts judgments AD 1986 No. 103 and AD 1989 No. 122.

<sup>12</sup> C-407/98 *Abrahamsson and others v Elisabet Fogelqvist* (judgment 6.7.2000). See further Section 3.

## 2 COMMUNITY LAW AND POSITIVE ACTION

Before the Amsterdam Treaty, the scope of positive action was mainly regulated by Article 2.4 as compared to Article 2.1 of the Equal Treatment Directive. This is also the regulation scrutinised by the ECJ in the cases dealt with in Section 3, though the Court in *Abrahamsson* also examines the case in relation to Article 141.4 EC.

Article 2.1 articulates the principle of equal treatment, saying, 'there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status'. However, according to Article 2.4:

'This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1.1.'<sup>13</sup>

According to Article 2.2, the directive is also without prejudice 'to the right of Member States to exclude from its field of application those occupational activities, and where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor'.<sup>14</sup> According to Article 2.3, the directive is also without prejudice 'to provisions concerning the protection of women, particularly as regards pregnancy and maternity'.<sup>15</sup>

The need to adhere to positive action to achieve equality between the sexes is also

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<sup>13</sup> *Inter alia*, access to employment and promotion.

<sup>14</sup> However, derogations according to Article 2.2, so-called *bona fide occupational qualifications defence (bfoq-defence)* cases according to Article 9.2 require periodical assessment by the Member States to ascertain whether there is a justification for maintaining the exclusions concerned, assessments that shall be notified to the Commission. Relevant case law is 248/83 *Commission v Germany* [1985] ECR 1459, 165/82 *Commission v The United Kingdom* [1983] ECR 3431, 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651 and 318/86 *Commission v France* [1988] ECR 3559. As a derogation from the fundamental principle of equal treatment Article 2.2 must be construed strictly, 222/84 paragraph 36. See further Roseberry, Lynn, *The Limits of Employment Discrimination Law in the United States and European Community*, Copenhagen 1999 pp. 110ff. and Lundström, Karin, *Jämlikhet mellan kvinnor och män i EG-rätten. En feministisk analys*, Iustus förlag, Uppsala 1999 pp. 240ff.

<sup>15</sup> See cases 163/82 *Commission v Italy* [1993] ECR 3273, 222/84 *Johnston*, 312/86 *Commission v France* [1988] ECR 6315, C-345/89 *Ministère Public v Stoeckel* [1991] ECR I-4047, C-158/91 *Ministère Public and Direction du Travail et de l'Emploi v Jean-Claude Levy* [1993] ECR I-4287 and C-421/92 *Habermann-Beltermann v Arbeiterwohlfahrt* [1994] ECR I-1657. See also, for instance, Roseberry 1999 pp. 116ff. and Lundström 1999 pp. 240ff.

addressed in some other documents of a soft-law character. According to the third recital in the preamble to Council Recommendation 84/635/EEC of 13 December 1984 on the promotion of positive action for women,<sup>16</sup> 'existing legal provisions on equal treatment, which are designed to afford rights to individuals, are inadequate for the elimination of all existing inequalities unless parallel action is taken by governments, both sides of industry and other bodies concerned, to counteract the prejudicial effects on women in employment which arise from social attitudes, behaviour and structures'. Referring expressly to Article 2.4 of the Equal Treatment Directive, the Council recommends Member States to adopt a positive-action policy designed to eliminate existing inequalities affecting women in working life and to promote a better balance between the sexes in employment, comprising appropriate general and specific measures, within the framework of national policies and practices, while fully respecting the spheres of competence of the two sides of industry, in order a) to eliminate or counteract the prejudicial effects on women in employment or seeking employment which arise from existing attitudes, behaviour and structures based on the idea of a traditional division of roles in society between men and women; b) to encourage the participation of women in various occupations in those sectors of working life where they are at present under-represented, particularly in the sectors of the future and at higher levels of responsibility in order to achieve better use of all human resources.<sup>17</sup>

The 1989 Community Charter on the fundamental social rights of workers emphasises the need for equal treatment for men and women. In paragraph 16 it states that 'equal treatment for men and women is to be assured' and 'equal opportunities for men and women must be developed'. It goes on to say that for this purpose,

'action should be intensified to ensure the implementation to the principle of equality between men and women as regards in particular access to employment, remuneration, working conditions, social protection, education, vocational training and career development. Measures should also be developed enabling men and women to reconcile their occupational and family obligations'.

While the wording undeniably makes one think of substantial equality between the sexes, positive action is not explicitly referred to.

Since the Amsterdam Treaty, the promotion of equal opportunities has been given an even more crucial role. According to Article 2, the Community is now expressly said to be obliged to promote 'equality between men and women' throughout the Community, and according to Article 3.2 – a new paragraph – 'in all activities ... the Community

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<sup>16</sup> OJ 1984 L 331/34.

<sup>17</sup> The Council Recommendation is generally quoted by the ECJ in judgments on positive action.

shall aim to eliminate inequalities, and to promote equality, between men and women’.

Positive action is then expressly addressed in Article 141.4 as cited above.

The paragraph borrows its phraseology from Article 6.3 of the Agreement on Social Policy of Maastricht (MASP), which enabled Member States to maintain or adopt ‘measures providing for specific advantages in order to make it easier for women to pursue a vocational activity or to prevent or compensate for disadvantages in their professional careers’.

As part of Article 6 MASP – containing the principle of equal pay in almost identical terms to Article 119 in the EC Treaty – the rule on positive action also came across as being limited to the issue of pay. This is, however, no longer the case.<sup>18</sup> The new Article 141.4 EC expressly states the fundamental principle of equal treatment, and it is in this environment that the rule on positive action is articulated. The scope of application is reflected in the expression ‘(W)ith a view to ensuring full equality in practice between men and women in working life’. It is to be noticed, though, that the rule on positive action in the Treaty – unlike Article 6.3 MASP – speaks of measures providing specific advantages for *the under-represented sex*, not women. However, declaration No 28 on Article 141.4 EC, annexed to the Treaty of Amsterdam, states that when adopting measures referred to in Article 141.4 EC, Member States should, in the first instance, aim at improving the situation of women in working life.

The wording of Article 141.4 EC does not, however, copy the suggestions regarding the amendment of Article 2.4 in the Equal Treatment Directive that had been put forward by the Commission in every detail.<sup>19</sup> The proposal suggested that positive action be permitted in respect of

‘the giving of preference, as regards access to employment or promotion, to a member of the under-represented sex, provided that such measures did not preclude the assessment of the particular circumstances of an individual case.’

The background of the Commission’s proposal may have been the uncertainty after *Kalanke* as to whether Article 2.4 in the Equal Treatment Directive comprised ‘employment and promotion’, an uncertainty eliminated by the ECJ judgment in the *Marschall* case.<sup>20</sup>

Article 141.4 EC hardly gives us a clear-cut expression of the scope of positive

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<sup>18</sup> Betten, Lammy and Shrubbsall, Vivien, The Concept of Positive Sex Discrimination in Community Law – Before and After the Treaty of Amsterdam, In: *International Journal of Comparative Labour Law and Industrial Relations*, 1998 p. 77.

<sup>19</sup> OJ 1996 L 179/8.

<sup>20</sup> C-409/95 *Hellmut Marschall v Land Nordrhein-Westfalen* [1997] ECR I-6363.

action after Amsterdam. The wording 'providing special advantages in order to make it easier' as well as 'to prevent or compensate for disadvantages' is far from crystal-clear and does not necessarily mean anything more than Article 2.4 in the Equal Treatment Directive. However, there are also those who claim that Article 141.4 EC is significantly different from Article 2.4 in the Equal Treatment Directive, among other things with reference to the declared aim to 'promote full equality in practice between men and women in working life'. 'The new definition suggests that there is more to positive action than promoting opportunities for women to partake in vocational training'.<sup>21</sup> The conclusion drawn by the Commission is, as was already indicated, that Article 141.4 EC now makes Article 2.4 in the Equal Treatment Directive superfluous.

In *Badeck*<sup>22</sup> the ECJ touches upon the relation between Article 2.4 of the Equal Treatment Directive and Article 141.4 EC. The Court makes the observation that owing to the question referred, an interpretation of Article 141.4 EC is material for the outcome of the dispute only if the Court considers that Article 2 of the Equal Treatment Directive precludes national legislation such as that which was at issue in the case (paragraphs 13 and 14). This was not the case, and thus Article 141.4 EC was not given any interpretation in the *Badeck* case. In *Abrahamsson*, however, the Court had an opportunity to consider the scope of Article 141.4 EC as related to Article 2.4 in the Equal Treatment Directive. According to the ECJ, both articles preclude national legislation that automatically grants preference to candidates belonging to the under-represented sex.<sup>23</sup>

However, the Community Treaty after Amsterdam includes other provisional changes that trigger interest in the scope of positive action in Community law. According to Article 13 EC, '(w)ithout prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament,

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<sup>21</sup> Betten and Shruballs 1998 p. 78. The authors argue along both lines, though, in this article. For a Swedish debate, see Eklund, Ronnie and Nordling, Lotty, In: *Lag & Avtal* No. 6, 7, 8 and 9 1999.

<sup>22</sup> C-158/97 *Georg Badeck et al. v Hessischer Ministerpräsident und Landesanwalt beim Staatsgerichtshof des Landes Hessen* [2000] ECR I-1875 (French edition).

<sup>23</sup> In *Abrahamsson*, the point at issue was a quota system that granted preference to candidates belonging to the under-represented sex despite being less – though sufficiently – qualified as compared to their competitor of the opposite sex; see further Section 3 below. In former case law, 'strict' quota systems automatically granting preference for women have been held to be precluded by Article 2.4 in the Equal Treatment Directive, also in the case of equal qualifications – see *Kalanke* and, for instance, Prechal, Sacha, Case Note, 33[1996] *CML Rev.* 1996 p. 1256 – while the ECJ in *Badeck* accepted what was addressed as 'flexible result quota' systems (judgment, paragraph 28).

may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. In 1999 the Commission presented an 'Anti-discrimination Package' comprising a draft communication from the Commission to the Council and others on certain Community measures to combat discrimination, a proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation, a proposal for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and a Community Action Programme to combat discrimination 2001–2006.<sup>24</sup> The directive establishing a general framework for equal treatment comprises all grounds of non-discrimination stated in Article 13 EC with the exemption of sex and racial or ethnic origin, while the other directive, as its name spells out, deals only with racial and ethnic origin at the same time as it widens the scope of application to other sectors than working life. Both proposals include regulations on positive action. Article 7.1 in the directive establishing a general framework of equal treatment prescribes:

'With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.'<sup>25</sup>

A parallel wording has been given to Article 5 in Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.<sup>26</sup> In the preamble of the general framework directive it is stated that 'the prohibition of discrimination should be without prejudice to the maintenance or adoption of measures intended to prevent or compensate for disadvantages suffered by a group of persons of a particular religion or belief, disability, age or sexual orientation, and such measures may permit organisations of persons of a particular religion or belief, disability, age or

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<sup>24</sup> The Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin was adopted in June 2000 and the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation in November 2000.

<sup>25</sup> Article 7.2 contains a special rule on positive action with regard to disabled people: With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.

<sup>26</sup> Article 5 on positive action reads: 'With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin'.

sexual orientation where their main object is the promotion of the special needs of those persons' (recital 26). Even so, the Commission's explanatory memorandum stresses that 'positive action measures are a derogation from the principle of equality (and) they should be interpreted strictly, in the light of the current case-law on sex discrimination'. The wording of the articles is explicitly based on that of Article 141.4 EC.

### 3 ECJ CASE LAW ON POSITIVE ACTION

Since the judgment in the *Kalanke* case, the ECJ has had several opportunities to examine the scope of positive action according to Article 2.4 as compared to Article 2.1 in the Equal Treatment Directive.

In the *Kalanke* case,<sup>27</sup> the question at stake was whether the following rule in the Bremen Law was in accordance with Article 2.4 of the Equal Treatment Directive:

'In the case of an appointment which is not made for training purposes, women who have the same qualifications as men applying for the same post are to be given priority in sectors where they are under-represented.

There is under-representation if women do not make up at least half of the staff in the individual pay, remuneration and salary brackets in the relevant personnel group within the department.'

In its judgment of 17 October 1995, the ECJ answered this question in the negative:

'Article 2.1 and 2.4 of the Directive 207/76 ... precludes national rules such as those in the present case, which, where candidates of different sexes shortlisted for promotion are equally qualified, automatically give priority to women in sectors where they are under-represented, under-representation being deemed to exist when women do not make up at least half of the staff in the individual pay brackets in the relevant personnel group or in the function levels provided for in the organisation chart.'

The Court states (paragraph 16) that

'[a] national rule where ... women are automatically to be given priority ... involves discrimination on grounds of sex'

but that (paragraph 17)

'[i]t must however be considered whether [such a national rule is] permissible under Article 2.4'

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<sup>27</sup> C-450/93 *Kalanke v Freie Hansestadt Bremen*.

which article (paragraph 21)

‘[a]s a derogation from an individual right ... must be interpreted strictly’.

The two crucial paragraphs 22 and 23 ensue:

‘National rules which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and overstep the limits’

and

‘[f]urthermore, in so far as it seeks to achieve equal representation of men and women in all grades and levels within a department, such a system substitutes for equality of opportunity as envisaged in Article 2.4 the result which is only to be arrived at by providing such equality of opportunity’.

The judgment as such is much shorter – and thus lends itself to more interpretations – than the opinion of Advocate General Tesouro. The wording of the judgment – using some of the concepts used by Advocate General Tesouro – nevertheless leaves us with the impression that the Court did accept the argumentation articulated by Tesouro Court to a considerable extent.

Those who have wanted to give the judgment a ‘softer’ interpretation have pointed to the statement of the Court in paragraph 22 and the expression ‘absolute and unconditional priority’ as well as the word ‘automatically’ in paragraph 18. Those who feel that the ECJ in *Kalanke* rejects quota systems in general have pointed to its wording in paragraph 23, and the rejection of a system that ‘substitutes for equality of opportunity ... the result which is only to be arrived at by providing such equality of opportunity’.

*Marschall* was concerned with the question of whether Article 2.1 and 2.4 in the Equal Treatment Directive also precluded a national regulation stating that

‘(w)here in the sector of the authority responsible for promotion there are fewer women than men in the particular higher grade post in the career bracket, women are to be given priority for promotion in the event of equal suitability, competence and professional performance, unless reasons specific to another candidate predominate’.

In its judgment of 11 November 1997, the ECJ – going against the Advocate General Jacobs, who formulated his opinion in accordance with the more strict interpretation of the *Kalanke* case – held that

‘a national rule which, in a case where there are fewer women than men at the level of the relevant post in a sector of the public service and both female and male

candidates for the post are equally qualified in terms of their suitability, competence and professional performance, requires that priority be given to the promotion of female candidates unless reasons specific to an individual male candidate tilt the balance in his favour is not precluded by Article 2.1 and 2.4 of Council Directive 76/207/EEC ... provided that:

- in each individual case the rule provides for male candidates who are equally as qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate, and
- such criteria are not such as to discriminate against the female candidates.'

The Court stresses (paragraph 24) that, unlike the provisions concerned in *Kalanke*, the provision in question in this case contains a clause to the effect that women are not to be given priority in promotion if reasons specific to an individual male candidate tilt the balance in his favour – 'the saving clause'. However, the statements in paragraphs 29–31 seem just as important. Taking into consideration the arguments put forward in the case that 'it appears that even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding' (paragraph 29), the Court concludes (paragraph 30):

'For these reasons, the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances.'

The Court therefore holds (paragraph 31) that a national rule in terms of which, subject to the application of the saving clause, female candidates for promotion who are equally qualified as the male candidates are to be treated preferentially in sectors where they are under-represented may fall within the scope of Article 2.4 in the Equal Treatment Directive 'if such a rule may counteract the prejudicial effects on female candidates of the attitudes and behaviour described above and thus reduce actual instances of inequality which may exist in the real world'.<sup>28</sup>

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<sup>28</sup> For a more detailed presentation of the cases *Kalanke* and *Marschall*, see, for instance, Numhauser-Henning, JT 1997–98 pp. 814–834.

In *Badeck*,<sup>29</sup> again, the question at stake was the compatibility between a German regulation on positive action and Articles 2.1 and 2.4 of the Equal Treatment Directive. The relevant German regulation was the law of the Land of Hessen on equal rights for women and men and on the removal of discrimination against women in public administration, adopted in 1993 on a temporary basis. The national provisions included a number of detailed rules with an aim to promote equality for women as regards access to public employment, including advancement plans with binding targets with reference to the proportion of women in appointments and promotions.

In its judgment of 28 March 2000, the Court held that Articles 2.1 and 2.4 in the Equal Treatment Directive does not preclude a national rule which

- in sectors of the public service where women are under-represented, gives priority, where male and female candidates have equal qualifications, to female candidates where that proves necessary for ensuring compliance with the objectives of the women's advancement plan, if no reasons of greater legal weight are opposed, provided that that rule guarantees that candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates,
- prescribes that the binding targets of the women's advancement plan for temporary posts in the academic service and for academic assistants must provide for a minimum percentage of women which is at least equal to the percentage of women among graduates, holders of higher degrees and students in each discipline,
- insofar as its objective is to eliminate under-representation of women, in trained occupations in which women are under-represented and for which the State does not have a monopoly of training, allocates at least half the training places to women, unless despite appropriate measures for drawing the attention of women to the training places available there are not enough applications from women,
- where male and female candidates have equal qualifications, guarantees that qualified women who satisfy all the conditions required or laid down are called to interview, in sectors in which they are under-represented,
- relating to the composition of employees' representative bodies and administrative and supervisory bodies, recommends that the legislative provisions adopted for its implementations take into account the objective that at least half the members of those bodies must be women.'

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<sup>29</sup> C-158/97 *Georg Badeck and others v Hessischer Ministerpräsident und Landesanwalt beim Staatsgerichtshof des Landes Hessen* [2000] ECR I-1875 (French edition).

From the judgment, it is clear that although we are dealing with provisions containing 'binding targets' on the representation of women, these provisions are not applied automatically and unconditionally, but admit exceptions and take account of the specific personal situations of all candidates. It is underlined, both in the judgment and in the question referred for a preliminary ruling, that the men and women concerned are equally qualified. In paragraphs 23 and 24, the Court summarises Community law in the following way:

'It follows that a measure which is intended to give priority in promotion to women in sectors of the public service where they are under-represented must be regarded as compatible with Community law if

- it does not automatically and unconditionally give priority to women when women and men are equally qualified, and
- the candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates'

while

'it is for the national court to determine whether those conditions are fulfilled on the basis of an examination of the scope of the provision at issue'.

In the judgment, the Hessen Regulation is described as a system of 'flexible result quota' which does not necessarily determine 'from the outset – automatically – that the outcome of each selection procedure must, in a stalemate situation where the candidates have equal qualifications, necessarily favour the woman candidate' (paragraph 28).

The judgment in *Badeck* can be said to 'harmonise' fairly well with the judgments in *Kalanke* and *Marschall*. Nevertheless, it is difficult to get rid of the impression that here we are dealing with a regulation which is more far-reaching than in the two earlier cases. The regulation speaks of posts which 'are to be designated for filling by women' according to binding quota targets (compare the Hessen regulation Articles 3.3, 3.4 and 3.7). The appointment of a man requires special approval, and until a women's advancement plan has been drawn up no appointments or promotions whatsoever are allowed (Article 10). The Hessen law also contains a detailed regulation as regards selection decisions (Article 10), expressly taking into account the value of 'family work'. This regulation did not present any trouble to the Court in *Badeck* as regards the scope of positive action, and in *Abrahamsson* the issue was to be addressed again.

The *Abrahamsson* case<sup>30</sup> concerns the request for a preliminary ruling under Article 177 by the Swedish Universities Appeals Board (*Överklagandenämnden för Högskolan*)

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<sup>30</sup> C-407/98 *Katarina Abrahamsson and others v Elisabet Fogelqvist*.

regarding the implementation of the principle of equal treatment in relation to the Swedish regulations implying positive action that were introduced by the Tham-package, mentioned in the introduction to this article.<sup>31</sup>

According to Article 9 of Chapter 11 of the Swedish Constitution, regarding appointments to State posts, only objective criteria are to be taken into account, such as merits and abilities. Article 4 of the Swedish Act (1994:260) on public employment states that priority must be given to abilities if no particular reasons justify another course of action. Article 15 of Chapter 4 of the Swedish Regulation on universities (Regulation 1993:100) provides, in relation to the grounds for promotions and appointments to teaching posts, that ‘appointment ... must be based on merits of a scientific, artistic, pedagogical, administrative or other nature relating to the discipline covered by the post in question and its nature in general. Account must also be taken of the candidate’s ability in reporting on his or her research and development work’. However, account must also be taken ‘of objective reasons consistent with the general aims of policies relating to the labour market, equality, social matters and employment’. Article 15 a of Chapter 4 of Regulation 1993:100 establishes a specific form of positive discrimination for cases where a higher educational institution has decided that such discrimination is permissible in the filling of posts or certain categories of posts with a view to promoting equality in the workplace. In such cases ‘a candidate belonging to an underrepresented sex and possessing sufficient qualifications for the post *may be* (italics added) chosen in preference to a candidate belonging to the opposite sex who would otherwise have been chosen’. According to the special Regulation 1995:936 concerning certain professors’ and research assistants’ posts created with a view to promoting equality (a limited number of so-called ‘Tham-posts’), this specific form of positive action *shall be* used “where it proves necessary to do so in order for a candidate of the under-represented sex to be appointed”. In both cases, the following limitation applies: ‘provided that the difference in their respective qualifications is not so great that application of the rule would be contrary to the requirement of objectivity in the making of appointments’.

The Överklagandenämnden forwarded the following four questions to the ECJ:

1. Do Articles 2.1 and 2.4 of the Equal Treatment Directive preclude national legislation under which an applicant of the under-represented sex possessing sufficient qualifications for a public post is to be selected in priority over an applicant of the opposite sex who would otherwise have been selected (positive

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<sup>31</sup> The case also concerned the question whether the Universities Appeals Board was to be regarded as a court or tribunal within the meaning of Article 177 of the Treaty and the request thus admissible. This question was answered in the affirmative by the ECJ (paragraphs 28–38).

special treatment) if there is a need for an applicant of the under-represented sex to be selected and under which positive special treatment is not to be applied only where the difference between the applicants' qualifications is so great that such treatment would be contrary to the requirement of objectivity in the making of appointments?

2. If the answer to Question 1 is in the affirmative, is positive special treatment impermissible in such a case even where application of the national legislation is restricted to appointments to *either* a number of posts limited in advance (as under Regulation 1995:936) *or* posts created as part of a special programme adopted by an individual university under which positive special treatment may be applied (as under Article 15a of Chapter 4 Regulation 1993:100)?
3. If the answer to Question 2 means that treatment like positive special treatment is in some respect unlawful, can the rule, based on Swedish administrative practice and the second paragraph of Article 15 of Chapter 4 Regulation 1993:100 – approved by the Appeals Board – that an applicant belonging to the under-represented sex must be given priority over a fellow applicant of the opposite sex, provided that the applicants can be regarded as equal or nearly equal in terms of merit, be regarded as being in some respect contrary to Directive 76/207/EEC?
4. Does it make any difference in determining the questions set out above whether the legislation concerns lower-grade recruitment posts in an authority's sphere of activity or the highest posts in that sphere?<sup>32</sup>

In answer to the questions, the ECJ ruled:

- '1. Article 2.1 and 2.4 of Council Directive 76/207/EEC ... and Article 141.4 EC preclude national legislation under which a candidate for a public post who belongs to the under-represented sex and possesses sufficient qualifications for

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<sup>32</sup> The case concerns the appointment of a Professor of Hydrospheric Science at the University of Gothenburg according to Regulation 1995:936. The university selection board voted twice. On the first occasion, in relation to the candidates' scientific qualifications, a man, Mr Anderson, was held to be the most qualified. On the second vote, taking account both of scientific merits and of Regulation 1995:936, a woman, Ms Destouni, came first and was proposed for the appointment. After Ms Destouni withdrew her application, the matter was referred back to the selection board, which found the difference between Mr Anderson and another woman applicant, Ms Fogelqvist, to be considerable and hesitated as to the scope of Regulation 1995:936. Ms Fogelqvist was nevertheless appointed to the post by decision of the Rector of the University of Gothenburg, a decision against which an appeal was made to the Överklagandenämnden by Mr Anderson and by another applicant, Ms Abrahamsson.

that post must be chosen in preference to a candidate of the opposite sex who would otherwise have been appointed, where this is necessary to secure the appointment of a candidate of the under-represented sex and the difference between the respective merits of the candidates is not so great as to give rise to a breach of the requirement of objectivity in making appointments.

2. Article 2.1 and 2.4 of Directive 76/207 and Article 141.4 EC also preclude national legislation of that kind where it applies only to procedures for filling a predetermined number of posts or to posts created as part of a specific programme of a particular higher educational institution allowing the application of positive discrimination measures.
3. Article 2.1 and 2.4 of Directive 76/207 does not preclude a rule of national case-law under which a candidate belonging to the under-represented sex may be granted preference over a competitor of the opposite sex, provided that the candidates possess equivalent or substantially equivalent merits, where the candidatures are subjected to an objective assessment which takes account of the specific personal situations of all the candidates.
4. The question whether national rules providing for positive discrimination in the making of appointments in higher education are lawful cannot depend on the level of the post to be filled.'

The questions of the Appeals Board related to the 'Tham-regulation' as such – Questions 1, 2 and 4, were thus answered in the negative by the ECJ. The regulation is contrary to both the Equal Treatment Directive and Article 141.4 EC.

In accordance with Advocate General Saggio,<sup>33</sup> the ECJ has underlined that in *Abrahamsson* 'in contrast to the national legislation on positive discrimination examined by the court in its *Kalanke*, *Marschall* and *Badeck* judgments, the national legislation at issue in the main proceedings enables preference to be given to a candidate of the under-represented sex who, although sufficiently qualified, does not possess qualifications equal to those of other candidates of the opposite sex' (paragraph 45). The other cases mentioned regarded candidates with equal merits.

Initially, the Court states: 'As a rule, a procedure for the selection of candidates for a post involves assessment of their qualifications by reference to the requirements of the vacant post or of the duties to be performed' (paragraph 46). The Court then refers to *Badeck*, where the Court held that 'it is legitimate for the purposes of that assessment for certain positive and negative criteria to be taken into account which, although formulated in terms which are neutral as regards sex and thus capable of benefiting men

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<sup>33</sup> Opinion of the Advocate General paragraph 1.

too, in general favour women. Thus it may be decided that seniority, age and the date of last promotion are to be taken into account only in so far as they are of importance for the suitability, qualifications and professional capability of candidates. Similarly, it may be prescribed that the family status or income of the partner is immaterial and that part-time work, leave and delays in completing training as a result of looking after children or dependants in need of care must not have a negative effect' (paragraph 47). The Court continues: 'the clear aim of such criteria is to achieve substantive, rather than formal, equality by reducing *de facto* inequalities which may arise in society and, thus, in accordance with Article 141.4 EC, to prevent or compensate for disadvantages in the professional career of persons belonging to the under-represented sex' (paragraph 48). At the same time, the application of such criteria 'must be transparent and amenable to review in order to obviate any arbitrary assessment of the qualifications of candidates' (paragraph 49).

As regards the Swedish selection procedure, the Court held that 'it does not appear ... that assessment of the qualifications of candidates by reference to the requirements of the vacant post is based on clear and unambiguous criteria such as to prevent or compensate for disadvantages in the professional career of members of the under-represented sex' (paragraph 50). On the contrary, continues the ECJ, 'it follows that the legislation at issue in the main proceedings automatically grants preference to candidates belonging to the under-represented sex, provided that they are sufficiently qualified' (paragraph 52). It is not enough that the rules are subject to a provision that the difference must not be so great as to result in a breach of the requirement of objectivity in making appointments, since

'The scope and effect of that condition cannot be precisely determined, with the result that the selection of a candidate from among those who are sufficiently qualified is ultimately based on the mere fact of belonging to the under-represented sex, and that this is so even if the merits of the candidate so selected are inferior to those of a candidate of the opposite sex. Moreover, candidatures are not subjected to an objective assessment taking account of the specific personal situations of all the candidates. It follows that such a method of selection is not such as to be permitted by Article 2.4 of the Directive.'

Nor did the ECJ hold that the method of the selection at issue in the main proceedings can be justified by Article 141.4 EC, as it 'appears, on any view, to be disproportionate to the aim pursued' (paragraph 55).

The concept 'automatically' makes one think of the judgment in *Kalanke*, and I interpret the judgment as rejecting a procedure for the selection of candidates which is ultimately based on (belonging to the under-represented) sex and not subject to criteria transparent and amenable to review. In *Badeck*, a procedure based on so called 'flexible

result quotas' was accepted as long as it did not 'automatically and unconditionally give priority to women when women and men are equally qualified, and the candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates', while the Court simultaneously accepted that the selection process was regulated so as to generally favour women – to the disadvantage of men. In other words, the ECJ accepts that the evaluation-of-qualifications equation is 'cleaned up' by means of positive action within the framework of the concept of indirect discrimination, as long as the relevant criteria are transparent and amenable to review as well as justifiable in the context of the assessment, on the basis of the proportionality principle, that accompanies the concept of indirect discrimination or a review against the rules that permit positive action.

Unlike the judgment in *Kalanke*, there is no mention of 'absolute and unconditional priority', and the answer to Question 2 – that Community law also precludes such a national legislation where it applies only to procedures for filling a predetermined number of posts or posts created as part of a specific programme at a particular higher educational institution which permits the application of positive discrimination measures – indicates that it is of no importance whether the rule is absolute (as in Regulation 1995:936) or facultative (as in Article 15 a of Chapter 4 of Regulation 1993:100). What the Court does not accept is that (under-represented) sex is made the basis for selection.<sup>34</sup> Nor can the special character of the posts it refers to justify such a selection procedure, according to the answer to the fourth question. The quotation 'Community law does not in any way make application of the principle of equal treatment for men and women concerning access to employment conditional upon the level of the posts to be filled' (paragraph 64) reflects, in my opinion, the highly principle-oriented reasoning behind the judgment. What is rejected is a selection procedure which directly refers to (under-represented) sex and not to overt and transparent criteria. Such a method is by principle not acceptable and proportionate, nor can it be justified under Article 141.4 EC.

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<sup>34</sup> Nevertheless, we might observe the possibility of a misunderstanding as regards the second question and the answer to it. Astonishingly enough – taking account of the actual contents of Article 15 a of Chapter 4 of Regulation 1993:100 – the Court refers to its 'absolute and disproportionate nature' (paragraph 58), and in its judgment of the incompatibility with Community law of national legislation *of that kind* – that is the kind of regulation dealt with in regard to Question 1 under which a candidate *must be* chosen – even when part of a specific programme of a particular higher educational institution. The judgment seems to disregard the facultative character of the national regulation in these cases, probably owing to the way in which the Överklagandenämnden phrased its question. On closer scrutiny, the national regulation in question does indeed allow for the kind of assessment stipulated by the Court, which takes account of the specific personal situations of all candidates. It does not, however, stipulate any more transparent criteria for the selection process than Regulation 1995:936.

The ECJ answer to the third question, that Community law does not preclude a rule of national case-law under which a candidate belonging to the under-represented sex may be granted preference over a competitor of the opposite sex, provided the candidates possess equivalent or substantially equivalent merits, where the candidates are subjected to an objective assessment which takes account of the specific personal situation of all the candidates (paragraphs 60–62), can be said to harmonise with case-law so far, with the small nuance that in *Abrahamsson* we are dealing with ‘equivalent or *substantially equivalent* (italics added)’ merits.

#### 4 DISCUSSION

In *Badeck* the ECJ summarises positive action as being compatible with Community law if it does not automatically and unconditionally give priority to women when women and men are equally qualified, and the candidatures are the subject of an objective assessment which takes account of the specific personal situation of all candidates (paragraph 23 of the *Badeck* judgment). In *Abrahamsson*, the Court lays down a normative formula as regards appointments, saying that the selection of candidates for a post ‘involves assessment of their qualifications by reference to the requirements of the vacant post or of the duties to be performed’ (paragraph 46 of the *Abrahamsson* judgment), and rejects a selection method that “automatically grants preference to candidates belonging to the under-represented sex” subject only to the provision that the difference between the merits of the candidates of each sex is not so great as to result in a breach of the requirement of objectivity in making appointments (paragraph 52 of the judgment). However, the Court has – both in *Badeck* and *Abrahamsson* – accepted positive-action measures which imply that the underlying selection formula is modified by transparent criteria amenable to review ‘which, although formulated in terms which are neutral as regards sex and thus capable of benefiting men too, in general favour women’.

What are the normative implications of these statements as regards the scope of positive action? And is Community law thus comprehended the ultimate expression of the values and interests at stake here? My point of departure for the following discussion is a column written by Marie Söderqvist in one of the big Swedish daily newspapers, *Svenska Dagbladet*, where she comments on an evaluation of the Tham-package.<sup>35</sup> She focuses on what seems to her to be the poor logic behind the two statements, that the women actually appointed to the posts in question were also the ones best qualified, and, at the same time, that the package as such (*i.e.* positive special treatment) was considered as something beneficial and desirable. In my opinion, these statements do

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<sup>35</sup> Svenska Dagbladet, 26 September 1999.

not imply such poor logic. What we are dealing with here is – once again – the balancing of disparate normative considerations and interests.

*Non-Discrimination Legislation Is Built on a Contradiction ...*

Marie Söderqvist is right in drawing our attention to the ambiguity as regards the *importance of sex/gender* reflected in the position of the Social-Democrat legislator. A bottom-line in the Tham-package – as in the Swedish Equal Opportunities Act – is that women are being discriminated against in respect of access to employment in the university sector, despite the fact that *sex should be of no relevance* in these cases. Another line of argument is, however, that women *being different* are deprived of equal opportunities as compared to men with regard to academic competition, whilst at the same time constituting a much-needed resource in science, as they represent qualities and approaches to research that differ from men's.

This ambiguity as regards the importance of sex is hardly surprising. In feminist theory, the respective Sameness and Difference discourses have provided heaps of books and articles,<sup>36</sup> and yet no one side can be said to have won the battle. The present article may be said to be in line with more recent feminist thinking, which attempts to bridge the gap between the schools of sameness and difference by offering perspectives that are less clear-cut and more flexible.<sup>37</sup> Moreover, both Community law on equal treatment as regards men and women and the Swedish Equal Opportunities Act are built on/may be said to follow from the – apparent – contradiction inherent in the demand for *equal treatment irrespective of sex* coexisting with the need, in the first instance, to improve the situation of women in working life. As is the case with other legislation prohibiting discrimination, the regulation stems from the reaction of legislators, politicians and influential members of the public to the differential treatment of a certain group – women

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<sup>36</sup> For an introduction and overview, see, for instance, Weisberg, Kelly (ed.), *Feminist Legal Theory. Foundations*, Temple University Press, Philadelphia 1993, but also Roseberry 1999.

<sup>37</sup> Compare the following quotation from Scott: 'The solution of the "difference dilemma" comes neither from ignoring nor embracing difference as it is normatively constituted. Instead, it seems to me that the critical feminist position must always involve two moves. The first is the systematic criticism of the positions of categorical difference, the exposure of the kinds of exclusions and inclusions – the hierarchies – it constructs, and a refusal of their ultimate "truth". A refusal, however, not in the name of an equality that implies sameness or identity, but rather (and this is the second move) in the name of an equality that rests on differences – differences that confound, disrupt and render ambiguous the meaning of any fixed binary opposition ...', Scott, Joan, *Deconstructing Equality – Versus Difference: Or, the Uses of Post-Structuralist Theory for Feminism*, 14 *Feminist Studies* 33, Spring 1988 p. 48. See further, for instance, Weisberg 1993, part 3.

– as outdated and unacceptable. The enactment of this particular piece of legislation embodies the reaction to this differential treatment and a means of coming to terms with it. From this perspective, *sex* certainly *is of relevance*.

If the liberal (and Aristotelian) principle that all individuals are equal and should be treated equally when similarly situated had been sufficient, there would have been no need of special discrimination laws – a general principle on equal treatment would have done the trick. But despite the general adherence to such a principle in many countries ever since the French revolution, there is still no country where discrimination does not exist. In all societies, normative patterns and practices develop which make for individually discriminatory injustices as well as for differentiating structures at the macro level, marginalising certain groups of people. It is differential treatment detected at the macro – or the aggregated – level that has led to the enactment of special regulation prohibiting discrimination on the grounds of sex. The differential treatment may be the outcome of mere discrimination (built on prejudices with regard to sex) of women as compared to men. But differential treatment may also be due to actual differences between the sexes as regards preconditions, behaviour and preferences.<sup>38</sup> Whether such differences are accounted for by biological or social factors does not seem to be of prime importance in our case.<sup>39</sup> They do, however, to the extent that we choose to take them into account, have consequences in relation to the underlying norms of working life – and they imply the potential of reform.<sup>40</sup> They are also of importance in the context of the arguments that are to be made in relation to the application of the equal-treatment principle and the scope of positive action.

*... and a Right to Equal Treatment for the Individual in the Liberal Tradition*

Equal-treatment regulations are generally construed in the liberal legal tradition. Prohibitions on discrimination are articulated so as to elicit formal equal treatment in the individual case, implying a *stipulation* to the effect that sex is irrelevant.

However, this is not enough to achieve equality. There is – taking account of the fact that the function of such a regulation is to remedy the perceived differential treatment of a disadvantaged group – nothing irrational about letting the principle of equal treatment

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<sup>38</sup> See, for instance, le Grand, Carl, Empiriska problem och möjligheter med att belägga diskriminering i arbetslivet, In: *Diskriminering i arbetslivet – normativa och deskriptiva perspektiv*, Socialvetenskapliga forskningsrådet, Stockholm 1999.

<sup>39</sup> See, for instance, Littleton, Christine, Reconstructing Sexual Equality, *75 California Law Review* 1279–1296, 1987.

<sup>40</sup> Compare especially the concept of indirect discrimination. See further the article by Christensen in this anthology.

irrespective of sex, at the individual level, on some occasions and under certain conditions, give room and priority to the interest of coming to terms with differential treatment of women as a group, thereby taking sex into account. There is, however, a contradiction.

Here it is of crucial importance to note that systematic injustices between the sexes are not necessarily perceived at the individual level.

The effect, as to actual discrimination of the individual, of a rule on positive special treatment of the under-represented sex with regard to appointments in a case where the competitors, a man and a woman, are equally qualified, is something we can never know. *Had the employer chosen freely*, he could have appointed the man or the woman (not discriminating against either of them).<sup>41</sup> *Had he chosen as employers usually do* (that is within the framework of existing structures and prejudices), he would have chosen the man. Of course, these practices throughout the years have entailed injustices to – individual – women. There could also have been injustice done to a woman who would, had it not been for the positive special treatment, have been sidestepped in the case in question; but that we will never know for sure. The injustice would not be that she was not appointed – something she had no more right to than the man that actually got it – but that she was excluded, that is, did not enjoy equal opportunities.<sup>42</sup> This injustice, however, causes little or no indignation among liberal advocates of the equal-treatment principle, since it is not perceived in the individual case. We cannot detect whether prejudice really is the decisive factor in such a situation, and discrimination cannot be proved. The way in which prohibitions against discrimination are formed and implemented at the individual level thus ‘eliminates’ – or makes invisible<sup>43</sup> – this alternative. However, when an employer, according to a quota regulation, *has to choose* the woman, her male competitor is immediately perceived as discriminated against. That discrimination has actually taken place in the individual case is, however, not more necessary than in the case of any woman who lost to a male competitor. But an express rule giving priority to the under-represented sex is of course easier to observe than structures more or less hidden, although statistically *known to exist*.

Coming to terms with such discriminatory structures, which can only be perceived at the aggregated level, calls for administrative measures – for instance in the form of

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<sup>41</sup> Compare the judgment of the German Bundesarbeitsgericht in the *Kalanke* case, where the issue was referred back to the employer for a new decision without damages being paid due to the minor detriment which the application of the illegitimate quota rule was estimated to imply; BAG, judgment of 5 March 1996, I AZR 590/92, Betriebs-Berater 1996 p. 1332.

<sup>42</sup> Compare the Court’s argument in the *Marschall* case.

<sup>43</sup> Compare Julén’s article in this anthology.

positive special treatment. The German regulations scrutinised in the cases of *Kalanke*, *Marschall* and *Badeck* can all be seen as institutionalised measures at the administrative level with a view to promoting justice and equal opportunities at the individual level. Perhaps this is best perceived in the *Marschall* case. Such administrative measures may result in a male competitor's (all regulations expressly gave priority to women) actually being discriminated against; and – typically – they do of course reduce his opportunities with regard to employment.

This is where the conflict between the principle of equal treatment and the scope for administrative measures entailing positive action is articulated.<sup>44</sup> To what extent the equal opportunities of the non-prioritised sex are infringed – and thus the equality principle – depends on the scope of the 'saving clause', hitherto a *sine qua non* for the ECJ in its acceptance of positive action. One may conclude that the ECJ, by accepting positive action in these cases if, but only if, there is a saving clause guaranteeing an objective assessment which takes account of the specific personal situations of all candidates, has balanced the conflict by means of the proportionality principle.<sup>45</sup>

On closer scrutiny, however, it becomes clear that the contradiction we seem to witness in this case between the principle of equal treatment and the scope of positive special treatment is only apparent. Basically, the same normative pattern – Equal Treatment meaning Equal opportunities or competition on equal terms for the individual – is upheld by means of regulations at different levels. *Equal* treatment /at the individual level/of the individual according to Article 2.1 in the Equal Treatment Directive is set up against rules on positive *special* treatment according to Article 2.4 (Article 141.4 EC) at the administrative level; but both regulations are aimed at supporting the same basic normative pattern. Awareness of conditions in 'the real world' has led to the abandonment (within the limits of the saving clause and the principle of proportionality)<sup>46</sup> of the stipulated irrelevance of sex and the acceptance of positive action measures at the administrative level.<sup>47</sup>

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<sup>44</sup> See especially the line of argument in *Kalanke*, but also the Advocate General Jacobs' opinion in *Marschall*, where the individual right to equal treatment was ranked as being prior to positive special treatment.

<sup>45</sup> Although that the Court in *Marschall* retained to the assessment of Article 2.4 as an exemption from Article 2.1 in the Equal Treatment Directive, which necessarily led to a strict interpretation, a ranking of principles is no longer involved here. For a critique of the construction of Article 2.4 as an exemption from Article 2.1, parallel to the one in Article 2.2 in the Equal Treatment Directive, see Prechal 1996 p. 1255.

<sup>46</sup> Compare Roseberry, who sees the saving clause as 'a gender version of Bell's "Principle of Involuntary Sacrifice"', Roseberry 1999 p. 404 as compared to pp. 395ff.

<sup>47</sup> So far, the line of argument is compatible with the 'cleaning up' of the process of selection

*Other Justifications for Substantial Equal Treatment/Positive Special Treatment ...*

The normative picture is quite different when an individual of the under-represented sex is to be given *priority even when less qualified*. In these cases other normative patterns and interests come to the fore than when equal treatment, in the sense of equal opportunities, is concerned.

Marie Söderqvist makes it a little bit too easy for herself when she concludes, that the women appointed to the Tham-posts, being the better qualified, would have received these positions even without this reform at the administrative level. This is of course not the case: without the Tham-package these posts would not have been available. Given the equivalent financial resources, the relevant funds would probably have been allocated to other positions – in areas where well-qualified women were not equally represented. Thus, a considerable merit on the part of the reform was the creation of academic positions in areas where women were frequent among potential applicants. Appointments also have to do with the selection and evaluation of merits and how this relates to sameness *or difference* between the sexes. Here we are dealing with issues of power and distribution, and the example referred to shows that there is no such thing as abstract justice for the individual (whether man or woman). At a closer inspection we perceive a variety of conceptions of justice. We are also back to the discourse on difference. Do men and women take an interest in the same areas of research, and if there are differences, how do they relate to sex/gender?

To illustrate the normative arguments that come into play here, I have chosen to proceed from some concepts from representation theory.<sup>48</sup> This theory and the relevant concepts were primarily developed in relation to the issues of democracy and fair representation, but in my opinion the concepts are also useful with regard to the area at issue here – inclusion in or exclusion from the social structures of wage-work.<sup>49</sup>

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accepted by the ECJ in *Badeck* and *Abrahamsson* implying potential indirect discrimination. Once the criteria of selection are decided upon, we are concerned with priority of a candidate who is at least as qualified as his or her competitors of the opposite sex.

<sup>48</sup> See further, for instance, Hernes, Helga, *Welfare State and Women Power: Essays in State Feminism*, Norwegian University Press, Oslo 1987, Phillips, Anne, *The Politics of Presence*, Clarendon Press, Oxford 1995 and Wängnerud, Lena, *Politikens andra sida. Om kvinnorepresentation i Sveriges riksdag*, In: *Göteborg Studies in Politics* 53, Gothenburg 1998.

<sup>49</sup> Compare the extension of democracy to include substantial democracy, *i.e.* social and economic rights. See further, for instance, Numhauser-Henning, Ann, *Om rättens roll i en demokratisk samhällsutveckling*, In: Government White Paper *Maktdelning*, SOU 1999:76, Stockholm 1999. Wage-work is the main distributive order as regards the social good, to be complemented by social-security schemes, etc.

*The argument of fair representation or the justice argument* can be said to relate to participation rights (inclusion) in the sense of equal opportunities as discussed above; but it also relates to a more substantial notion of participation, meaning equal (or at least more equal) distribution as regards access to employment, status and social and economic conditions.<sup>50</sup> It is the normative pattern of Equal Distribution that is relevant here. This is where the line of argument concerning positive action as a compensation for historical 'wrongs' belongs, as do quota systems irrespective of merits. The normative pattern focuses on the collective level, or the group, to quite a different extent than the pattern of Equal Treatment does – the basis for distribution is, precisely, the person's sex.

*The conflict of interest argument* concerns the right to have your own/your group's interests and needs<sup>51</sup> satisfied within the development of activities. This line of argument is more closely connected to the democracy discourse than the other ones presented, but it is also fruitfully articulated in relation to working life. It is concerned with different preconditions (whether originally so or socially created) between the sexes and the (re-)formulation of underlying norms to guide working life. While the pattern of Equal Treatment is a matter of equal opportunities for the similarly situated, what we want to do here is to reformulate the situation and the relevant background norms.<sup>52</sup> The concept of indirect discrimination comes to the fore in this context. Here we part from the pattern of Equal Treatment in order to examine the Principle of Need, another distributive normative pattern. The Principle of Need seems to have a natural focus on the individual in common with Equal Treatment. The rule applied in *Marschall* and other cases, with a saving clause guaranteeing an objective assessment which takes account of the specific personal situations of all candidates, seems reasonably appropriate in this context, too. In these cases, however, it is also natural to bear the group concerned – that is sex – in mind, for instance with regard to working-time regimes making it possible to harmonise working life and family life. Though both men and women tend to have families – and at the same time, there are women who do not – working-time issues frequently present

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<sup>50</sup> Compare also the concept of social representation and quota systems, Wängnerud 1998 pp. 13ff.

<sup>51</sup> However, compare Wängnerud 1998 p. 114.

<sup>52</sup> See further especially Christensen in this anthology. Compare Prechal, remarking that the ECJ in relation to the concept of indirect discrimination has on some occasions held a more "substantive approach", as in case 170/84 *Bilka-Kaufhaus GmbH v Karin Weber von Hartz* [1986] ECR 1607, and C-116/94 *Jennifer Meyers v Adjudication Officer* [1995] ECR I-2131, whilst the Court in other cases seems to hold on to a more formal concept of equal treatment, as in C-297/93 *Rita Grau-Hupka v Stadtgemeinde Bremen* [1994] ECR I-5535 and C-278/93 *Edith Freers and Hannelore Speckmann v Deutsche Bundespost* [1996] ECR I-1165. Prechal 1996 p. 1250.

themselves as being matters of particular interest to women.<sup>53</sup>

*The resource argument* focuses even more on the differences between the sexes, and – unlike the interests of the individual and the group interests on the collective level – the chief interest involved here is the common interest ensuring that all kinds of resources are integrated/made of use in the development of social activities. Again, we encounter the quality argument as regards the composition of science behind a reform like the Tham-package. From the normative perspective, the central issue is the scope for recognising certain operational needs, even when these needs are seemingly related to sex.

*... and Their Relation to Community Law*

*The justice argument* is to a certain extent satisfied by Community case law on the scope for positive action. Equal treatment in the sense of equal opportunities for the similarly situated is one version of justice. The scope for justice in the sense implied by the pattern of Equal Distribution is far more restricted, though. True, the importance of substantive equality between the sexes is stressed in different soft-law programmes, etc.<sup>54</sup> But at least the Advocate General Saggio – and even more so Tesauro and Jacobs – deny that there is a scope for equal distribution according to Article 2.4 in conflict with the individual's right to equal treatment according to Article 2.1 of the Equal Treatment Directive. In *Marschall* the Court accepts positive legal action both at the individual and the administrative level as well as a solution of the normative conflict by means of the proportionality principle – there is a balancing-off. But the line of argument is restricted to equal opportunities for the similarly situated. In *Abrahamsson* the ECJ rejects a method of selection which 'automatically' grants priority to the under-represented sex, even though the selected person is sufficiently qualified and the appointment not in breach of the requirement of objectivity in making appointments as

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<sup>53</sup> Note here the case 312/86 *Commission v France*, though, where the ECJ held it to be incompatible with Article 2.4 as compared to Article 2.1 in the Equal Treatment Directive to grant positive special treatment as regards mothers' leave, etc.

<sup>54</sup> Compare Section 2 above. In this context, we might also note the opinion of the European Parliament as regards the draft proposal on equal treatment irrespective of racial or ethnic origin, where the Parliament suggests a new recital 12 a for the preamble on 'encouraging "proportional" participation' as 'a far-reaching addition to the principle of equal treatment'. The background is that 'the concept of equal treatment requires a pro-active approach if equal opportunities are to be achieved in practice', document A5-0136/2000, Report on the proposal for a council directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin COM (1999) 566. Compare also the Commission proposal on a directive amending the Equal Treatment directive, COM (2000) 334 final.

such. Despite the 'cleaning up' of underlying norms of selection within the concept of indirect discrimination<sup>55</sup> that can be regarded as permissive according to the judgments in *Badeck* and *Abrahamsson*, the legal application in these cases is compatible with the stipulation that sex cannot, by principle, be justified as the 'automatic' ground for selection. Once the formula for selection has been agreed upon, we deal with priority for an applicant who is at least as qualified as his or her competitors of the opposite sex. Fair representation (*i.e.* distribution) might, however, make up part of the intrinsic motives for accepting this type of positive indirect discrimination. Even so, the technique – within the concept of proportionality – of balancing two such different normative interests/patterns as the pattern of Equal Treatment and the pattern of Equal Distribution against each other has now been rejected by the Court, at least in cases where the method of selection is 'automatically' based on (adherence to the under-represented) sex, and labelled as being 'disproportionate to the aim pursued' whatever the circumstances.<sup>56</sup>

How about the *conflict of interest argument* and the Principle of Need, then? Here it should be pointed out that the ECJ in *Badeck*, and even more so in *Abrahamsson*, has left a certain scope for a regulation of the selection procedure as such, so as to make it better able to meet the needs of women than traditional criteria. By doing so, the ECJ has created – through the back door, as it were – a certain scope for the values underlying the Principle of Need and some kind of distributive justice. It is an arrangement which takes account of the special needs of women. The indirect discrimination created by such a measure of positive action as regards the non-prioritised sex may thus be compatible with Community law, according to the ECJ.<sup>57</sup>

*The resource argument* addresses other potential differences between the sexes than

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<sup>55</sup> Regarding the reform potential of indirect discrimination, see further Christensen's and Lundström's articles in this anthology.

<sup>56</sup> See the judgment in *Abrahamsson* paragraph 55, and also paragraphs 58 and 64.

<sup>57</sup> It should be observed, that in relation to Community law, the evaluation of merits is a judgment normally left to the national tribunals and not for the ECJ to decide upon. According to Swedish tradition, in *Kalanke* the male applicant would probably have been considered the better qualified in that competition and the issue presented to the ECJ not a case of two equally qualified competitors. Possibly, 'equally qualified' may refer to a case where the people in charge of the selection process have chosen to ignore 'superfluous' merits with regard to the requirements of the post in question, and so on. Compare *Badeck* and the regulation of the selection criteria 'to be assessed in accordance with the requirements of the post to be filled'. In the case of Swedish academic professorial posts, however, this freedom is restricted by Regulation 1993:100. Note here case C-184/89 *Helga Nimz v Freie und Hansestadt Hamburg* [1991] ECR I-297, too, and the potential discriminatory character of seniority rules.

the ones involving different opportunities as regards access to employment, etc., such as the quality arguments with regard to research put forward in relation to the Thampackage. What scope is there in Community law for this line of argument?

Section 2 above touched upon the exemption expressly articulated by Article 2.2 in the Equal Treatment Directive. Here we are dealing with *bfoq-defences* such as sex being decisive (actors), integrity (barmorskor) or safety reasons (police, prison warders); the rule is given a strict interpretation, and the exemptions are continuously scrutinised. The rule thus permits that certain professions or posts are reserved for men (or women), and it is usually criticised as having a conserving effect on existing gender stereotypes.<sup>58</sup> Furthermore, Article 2.3 in the Equal Treatment Directive offers scope for protective measures as regards women in conflict with the principle of equal treatment. This rule, too, has been strictly interpreted and is usually restricted to the provisions that protect women's biological needs and the mother-child relationship in the first months after birth. The exemption is thus best referred to the conflict-of-interest argument.

The concept of direct discrimination is based on differentiation *on the grounds of sex*. The stipulation of sex as irrelevant – and men and women as equal – behind the prohibition of direct discrimination has led to the rejection of any justification of direct discrimination outside the scope of Article 2 in the Equal Treatment Directive. This is clear from the *Dekker* case.<sup>59</sup> And though other cases such as *Webb* and *Habermann-Beltermann* have been interpreted as containing hints that the Court might, under certain conditions, be open to the idea that it is possible to justify direct discrimination as well,<sup>60</sup> there is no secure basis for such conclusions.

Rather, it seems as if the Court has confirmed its 'fundamentalist' position with the judgment in *Abrahamsson*, but this time within the framework of the rules on positive action.

Arguments built on considerations involving advantages to the working environment or to activities as such when the personnel in a workplace is equally distributed between the sexes, as well as the importance for research orientation, etc., of the representation of women in the academic world, do not agree well with Article 2 in the Equal Treatment Directive and even less well with its interpretation in case law so far.

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<sup>58</sup> See for instance Roseberry 1999 p. 401, Prechal 1996 p. 1255 and Lundström 1999 pp. 240ff.

<sup>59</sup> C-177/88 *Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-3941.

<sup>60</sup> In *Dekker* the ECJ held it to be direct discrimination on grounds of (female) sex to deny a woman an appointment on grounds of pregnancy. In *Webb* (C-32/93 *Webb mot EMO Air Cargo* [1994] ECR I-3567) and *Habermann-Beltermann*, dismissal related to pregnancy was regarded as discriminatory, but the Court suggested that the outcome might have been different had the employment not been permanent. See Roseberry 1999 pp. 108ff.

However, the creation of an opening for the resource argument does not primarily call for a change in the underlying rules; rather, the chief requirement is a readiness to contemplate the idea that there should – in certain situations – be a freedom to select characteristics felt to be needed, even when they may be related to a person's sex. In fact, the issue of whether we regard certain characteristics as sex-related or as qualities in themselves/expressions of more neutral resources/needs is the decisive factor when it comes to determining whether we are actually dealing with direct discrimination. These boundaries are by no means clear, nor is the boundary between direct and indirect discrimination.<sup>61</sup> The concept indirect discrimination implies recognition of the fact that justice for the individual cannot be judged independently of the group. The discriminatory potential of apparently neutral criteria – the underlying norms – has to be considered in relation to the effects they have on the group to which a disadvantaged individual belongs – are the effects detrimental and unjustified? Indirect discrimination can thus be justified and – as we have seen – also be viewed as an acceptable measure of positive action. Here, too, however, we appear to be caught up in the relevant stipulation in that the indirect discrimination must be excused by reasons which are unrelated to sex. In view of the blurred boundary between direct and indirect discrimination, but also between what is to be regarded as sex-related and what constitutes an independent need/quality in itself, there are no reasons for failing to treat direct discrimination as something that may occasionally be justified in the individual case, too; and in my view this applies even if there does seem to be a certain connection with a person's sex. On the contrary, this comes across as an arrangement which – in different ways – agrees well with the individually designed prohibitions against discrimination that are contained in the liberal order, even if it does presume that the relevant decision-making body disregards the stipulation that sex is irrelevant (as has, after all, actually happened in connection with positive action, as long as the forms in which it occurred were the appropriate ones). It is worth mentioning, that Community law nowadays presents several examples of direct discrimination as being justifiable. One is the Council Directive 1997/81/EC on part-time work, another the Council Directive 1999/70/EC on fixed-term work, and yet another the Council Directive 2000/78/EC establishing a general framework for equal treatment.

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<sup>61</sup> See, for instance, Nielsen, Ruth, Case Note, 29 *CML Rev.* 1992 pp. 160–169 in relation to *Dekker*.

*The Normative Field of Discrimination Law*

The theory on normative patterns is fundamental to the Norma programme of research and has been developed elsewhere.<sup>62</sup> The theory is based on the contention that different *basic normative patterns* can be distinguished in the multitude of legal norms. The basic normative patterns are held to reflect normative practices functional to society and human relationships. They thus reflect – and codify – social normative conceptions and practices aimed at making long-lasting human relationships and sustainable societies possible, and they are closely related to societal conditions. Since social life is quite complex, the basic normative patterns do not make up the ‘hierarchical legal system’ we usually picture. Instead, these patterns are brought into play in a *normative field* determined by the different basic patterns, which also act as *normative poles*. It is the changes in underlying societal conditions which provide explanations for the movements in the normative field and the new legal institutions which have arisen over time. However, the basic normative patterns all represent legitimate normative conceptions in society, and it is the task of legislators and courts to balance these conceptions within the framework of law.<sup>63</sup>

Within this normative model, we have frequently described the normative structure of the legal areas in the social dimension as a normative field with three dominating basic patterns or poles of attraction: Protection of the Established Position, Just Distribution and the Market-Functional Pattern. Behind the Market-Functional Pattern several patterns can be distinguished, all with the common denominator of articulating the scope of action related to the ‘free market’.

Behind the pole Protection of the Established Position we find – in the discrimination context – what may be called the pattern of Belonging and the reality that those who “belong” have had the privilege of articulating the underlying norms guiding the equal-

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<sup>62</sup> See *Norma 1996:1*, Normative Development within the Social Dimension. Studies on the Normative Patterns and Their Development in the Legal Regulation of Employment, Housing, Family and Social Security from a European Integration Perspective, Lund 1996. See also Christensen, Anna, Protection of the Established Position: A Basic Normative Pattern, In: *Scandinavian Studies in Law* 2000, pp. 285–324 and Numhauser-Henning, Ann, Den framtida arbetsrättens förutsättningar, In: *Arbetsmarknad & Arbetsliv*, Vol. 3, No. 2, 1997 pp. 97–108.

<sup>63</sup> This descriptive model on which the programme is based seems particularly suitable for describing the dynamics of the normative process in the perspective of European integration. The theory provides a common frame of reference where legal solutions in the different Member States can be described according to their position in relation to the different basic patterns in the normative field. The technique of teleological interpretation used by the ECJ, based on the functionality of national regulation implementing Community law relative Community aspirations, is also highly compatible with this theoretical framework.

treatment principle according to their conditions and interests. As is usually the case, behind this pole we detect stability in the sense of conservatism – the opposite to change. The pattern of Belonging – including the profound notion of willingness, but also the obligation, to admit to the group/share with (but only) people who are already in some way associated with the group, by virtue of which the pattern of Belonging also to some extent covers the pattern of Just Distribution – is in conflict with the individual's right to equal treatment, both as equal opportunities and as equal distribution of social goods. It is of fundamental importance that it is the group behind Protection of the Established Position that has to a considerable extent been in a position to create the rules of the game. After all, prohibitions against discrimination are characterised by their dependence on the background norms of the area of intervention.<sup>64</sup> With regard to discrimination on the grounds of sex, it is the regular norms of working life we relate to – norms created by and for the use of the men who have dominated the labour market for a very long time.<sup>65</sup>

The Pattern of Equal Treatment aims to provide equal opportunities in equal cases, that is competition on equal terms.<sup>66</sup> Such a pattern may be said to constitute part of the Market-Functional Pattern.

The pattern of Equal Distribution, on the other hand, is very clearly a distributive pattern characterised by solidarity rather than market values, and it attracts regulation in the opposite direction. It is situated by the pole of Just Distribution. The Principle of Need can be seen as another normative pattern for socially just distribution.

The interests behind the Resource Argument and the acceptance of differences between the sexes are not easily turned into a specific normative pattern. In relation to non-discrimination legislation, however, these are interests which depend on a certain freedom of action and scope for change, characteristics they have in common with the Market-Functional Pattern. In the Normative Field of Labour Law, Employer Prerogatives have been considered an expression of the Market-Functional Pattern. Here, too, the interests behind the Resource Argument and the acceptance of differences between the sexes may – but do not automatically have to – be satisfied/met within the framework of employer prerogatives. Here we are dealing with the freedom of the employer to articulate the needs of business in terms of qualities/resources, which might on occasion seem related to sex.<sup>67</sup>

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<sup>64</sup> Compare the article by Christensen in this anthology.

<sup>65</sup> Compare the article by Lundström in this anthology.

<sup>66</sup> Compare the judgment in *Marschall* paragraphs 26–27 and *Badeck* paragraph 19.

<sup>67</sup> Here one must not forget the primary reason for introducing prohibitions against discrimination in the first place: to restrict the freedom of employers to rely on prejudice.

Prohibitions against discrimination are in general aimed at breaking up old patterns of belonging, to the advantage and inclusion of a hitherto marginalised group. Our analysis has led to the conclusion that non-discrimination law is, first and foremost, about equal treatment seen as equal opportunities – competition of equal terms – where the interests behind the Protection of the Established Position dictate opportunities/conditions to a considerable extent. Even though competition on equal terms is part of the Market-Functional Pattern, this implies that the scope for conservatism may be assumed to be considerable.<sup>68</sup> The arguments advocating justice on the basis of the patterns of Equal Distribution and the Principle of Need are in a less than assured position. But then, what about the resource argument? We did say that it was about making changes. Well, as far as the interests and differences we want to address here harmonise with the frequently attractive Market-Functional Pattern there are certain prospects of success/impact. Even so, the picture of the normative field of anti-discriminatory legislation as essentially a tug-of-war between conservative patterns of Belonging and flexible Employer Prerogatives hardly inspires much hope for those keen to further equality between the sexes. Actually, anyone who moves into this area is walking into a minefield.

### *Conclusion*

Nevertheless, this minefield is one that I feel we ought to walk into. As we have seen, the essential conflict is between a conservatively orientated application of the Principle of Equal Treatment and more flexible normative structures. Within the framework of legal application, the question is whether the prohibitions against discrimination should be viewed as primarily restricted to a stipulated equal treatment in similar situations, or whether attempts should be made to move further along the road on which the first steps have in a sense already been taken by means of introducing the concept of indirect discrimination – a course which may mean that we must both re-formulate the situation and review the stipulation.<sup>69</sup> A minefield indeed! Still, the acknowledgement of differences in respect of needs and resources need not result in unacceptable differential treatment for women or for men. It does, however, call for much thoughtful and cautious work on weighing different values and interests against each other with the aid of objective (justifying) arguments and considerations of proportionality.<sup>70</sup> Practical equal-

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<sup>68</sup> The interests of dominating groups are of course also met within employer prerogatives, articulating functional conditions within a given context.

<sup>69</sup> Compare Roseberry, who argues that the ECJ is less 'caught up in' the interpretative values of liberalism than the courts in the U.S., Roseberry 1999 pp. 459f.

<sup>70</sup> Compare Prechal 1996 p. 1263.

opportunities politics must, like meaningful regulations on equality between the sexes, be based on the contention that an observable segregation between the sexes does exist – in the individual trades and industries, as well as in hierarchic structures – in the real labour market, and that there are differences in respect of needs and resources, too. Regardless of the causes of these differences, and regardless of how sex-related these differences really are, equality between the sexes cannot be attained simply by relying on an abstract principle of equal treatment. Instead, there may – in the paradoxical manner attacked by Marie Söderqvist – be reasons for maintaining the principle of equality between the sexes *at the same time as* admitting those differences with regard to needs and resources that actually exist, irrespective of whether these differences are intrinsic or socially conditioned, truly sex-related or created by the situations in which people find themselves.