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The Many Meanings of Equality and Positive Action in Favour of Women under European Community Law – A Conceptual Analysis

*Anne Peters**

Abstract: *The principle of equality of men and women as understood by Community institutions covers four distinguishable aspects. The first is* equal treatment, *defined in Community texts as the absence of legal gender discrimination. This concept focuses on individual rights and does not take into account the social context in which rules function. Second, the Community seeks to realise* equal opportunities, *understood as factual equality of chances. Third, Community law displays a concern for* factually equal outcomes. *The institutions accept legally different treatment that seeks to equalise unequal living conditions and inversely admit that facially neutral rules can have discriminatory effects. Finally, various documents conceive of gender equality as* equal representation *of the sexes in professional and public life. In the* Kalanke *decision of October 1995, the Court for the first time dealt with quotas in favour of women. It held that a national provision granting female candidates an automatic preference is incompatible with the right to equal treatment. The Court failed to acknowledge the tensions that arise from the coexistence of paradigms. An awareness of the multiplicity of concepts of equality, exhibited in Community law and rooted in the common constitutional heritage of the Member States, is however a prerequisite for a more sophisticated discussion of the issue of positive action.*

I Introduction

'Equality of men and women' is one of the basic rules of Community law, the European Court of Justice stated in a recent decision[1]. Obviously, the Court cannot have intended that men and women are equal in a biological sense. But what exactly does the equality principle in the Community's legal order involve? Does it mean – to mention only some of the possible understandings of gender equality – equal rights, comparable opportunities for social and personal advancement, equal standing in society, or equal representation in public and professional life?

* Dr jur, LLM (Harvard), Walther-Schücking-Institut für Internationales Recht, Christian-Albrechts-Universität Kiel (Germany).

[1] Case C-343/92 *Roks v Bestuur van de Bedrijfsvereniging voor de Gezondheid* [1994] ECR I-587, para 36 of the judgment. See for comprehensive treatment of the issue in scholarship C. Langenfeld, *Die Gleichbehandlung von Mann und Frau im Europäischen Gemeinschaftsrecht* (Nomos, 1990); S. Prechal and N. Burrows, *Gender Discrimination Law of the European Community* (Dartmouth, 1990); E. Ellis, *European Community Sex Equality Law* (Clarendon Press, 1991).

One particularly controversial issue which is obfuscated by the variable meaning of equality is positive action in favour of women. Positive action under Community law includes all kinds of measures such as dissemination of information, consciousness-raising, incentives for the recruitment of women, special vocational programmes and maternity leave. Measures that seek to reconcile family and work, a new focus of Community sex equality policy[2], are also called positive action by some[3]. Positive action encompasses benign or reverse discrimination[4]. Reverse discrimination can take different forms ranging from guidelines, the non-achievement of which shifts the burden of proving non-discrimination to the employer, to time-goals for the attainment of female participation, and to weighing sex as a plus factor in personnel decisions and set-asides or quotas for women. Quotas for the recruitment and promotion of women are legally and politically the most debated type of positive action because they apply in a situation where only one scarce slot is available for one of the applicants; the quota necessarily and immediately excludes the competitor. Thus, although other types of preferences also indirectly disadvantage members of the non-preferred group, these preferences do not create a similarly sharp conflict as does preferential hiring, promotion or school admission on the basis of a quota. Such quotas can be introduced in the work context (access to jobs, promotion and lay-offs), in education (applications to university, for instance), with respect to state contracts or funding offered to private businesses and in many other settings, such as access to unions or access to broadcasting slots. The authors of quota policies may be the legislature on federal, state or local level, agencies, or other executive entities such as school boards; but quotas may also be imposed by courts or voluntarily introduced by private employers. Finally, it is useful to distinguish between weak and strong quotas. A weak quota means a preference is given to a woman only when she is as qualified as the competing man. A strong quota reserves positions to women even when they are less qualified (above a certain minimum qualification) than male candidates.

While the European Parliament considers quotas a means of realising 'genuine equality'[5], the Court of Justice recently found that national rules that grant 'automatic' preferences for women violate the fundamental right to equal treatment[6].

This paper does not claim to show the legality or illegality of quotas in Community law. It merely attempts to demonstrate that both the written law and the case law rely on various paradigms of equality, which in turn are based on different theories on the

[2] The promotion of such policies will be one of the six objectives of the envisaged fourth medium-term programme of action on equal opportunities of women and men. See the Commission proposal of 27 November 1995 for a Council resolution on the endorsement of the programme, Art 2 (COM (95) 602 final).

[3] Opinion of 6 April 1995 of Advocate General Tesauro in Case C-450/93 *Eckhard Kalanke v Freie Hansestadt Bremen*, nyr, para 9.

[4] Cf Ellis, *op cit* n 1, p 208. 'Positive action' in Community law corresponds to what Americans call 'affirmative action'. Some authors use positive action and reverse discrimination as synonyms. See Vogel-Polsky, 'Positive Action Programmes for Women', 124 *International Labour Review* 253 and 264, no 2 (1985); McCrudden, 'The Effectiveness of European Equality Law: National Mechanisms for Enforcing Gender Equality Law in the Light of European Requirements', (1993) 13 *Oxford J Leg Stud* 320, p 333. This, however, does not correspond to the Community terminology.

[5] Resolution of 17 January 1984 on the situation of women in Europe, OJ 1984 C46/42, Chapter III (Equal responsibilities between men and women in political, cultural, social and family life) under heading III (Women in the decision-making centres), No 67, p 53.

[6] Case C-450/93 *Eckhard Kalanke v Freie Hansestadt Bremen*, judgment of 17 October 1995, nyr, reprinted in 6 EuZW 762 (1995), para 24. Opinion AG Tesauro of 6 April 1995. See in detail *infra*, part III.

relation between state and individual. It is hoped that an increased awareness of the variable use of the term 'equality' in Community law and the respective underlying assumptions will contribute to a more rational discourse on the issue of quotas for women.

II Coexisting Concepts of Equality

Four notions of gender equality exist in Community law: first, the prescription of equal treatment, second, the offering of equal opportunities, third, the guarantee of equal effects of rules and measures for both men and women, and finally the quest for equal representation of the sexes.

A Equal Treatment

After Community law exceeded its initial restriction of guaranteeing equal pay for men and women[7], the two Council directives that are the major Community documents in the field of gender equality sought to realise 'equal treatment' for men and women in employment and in matters of social security[8]. The right to equal treatment is meanwhile acknowledged as an unwritten principle of Community law[9]. The directives themselves explain that 'the principle of equal treatment' means that 'there shall be no discrimination whatsoever on grounds of sex'[10]. The European courts call the elimination or prohibition of sex discrimination a fundamental right of Community law[11]. Discrimination here primarily means the enactment of laws and other measures that explicitly differentiate according to sex. Based on the idea that gender is for most purposes not a rational ground for different treatment, such classifications are prohibited unless they can be justified with regard to the objective of the measure. A second type of discrimination, which can arise from facially gender-neutral rules (so-called indirect discrimination), will be dealt with later[12].

The principle of equal treatment was in most cases invoked by women who claimed to be disadvantaged by gender-specific rules. But equal treatment in the sense of

[7] Article 119 EC and Council Directive of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (75/117/EEC), OJ 1975 L45/19.

[8] Council Directive 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 (76/207/EEC), OJ 1976 L39/40 (Equal Treatment Directive); Council Directive of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (79/7/EEC), OJ 1979 L6/24 (Social Security Directive).

[9] Case 149/77 *Defrenne v Société anonyme belge de navigation aérienne Sabena* [1978] ECR 1365, para 27 ('Defrenne III').

[10] Cf Art 2, No 1 of the Equal Treatment Directive, Art 4 No 1 of the Social Security Directive, *supra* n 8. These provisions, which codify the right not to be discriminated against on the ground of gender, are directly applicable so that the individual can rely on them before national courts. Case 152/84 *Marshall v South Hampton and South-West Hampshire Area Health Authority* [1986] ECR 723, para 52; Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1663, para 56.

[11] See Case 149/77 'Defrenne III', *supra* n 9, para 27: 'There can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights'. Case T-45/90 *Alicia Speybrouck v European Parliament* [1992] ECR II-33, para 47: '[T]he principle of the prohibition of any direct or indirect discrimination on grounds of sex forms part of the fundamental rights the observance of which the Court of Justice and the Court of First Instance must ensure.'

[12] *Infra*, Part II C.

gender-blind treatment also protects men and thereby precludes specific advantages for women, unless they can be reasonably justified. Many scholars call this understanding of equality the Court's formal theory of sex equality[13]. In fact, some decisions of the ECJ appear to manifest a formal, if not formalist approach. In the important *Barber* case, for instance, the Court found it 'contrary to Article 119 to impose an age condition which differs according to sex in respect of pensions paid under a contracted-out scheme'[14]. The strictly gender-blind treatment of men and women in this matter does not correspond to the previous policies in some Member States. The German Constitutional Court, for example, had held that lower pensionable ages for women may be constitutionally justified as a compensation for factual disadvantages that typically burden women who often have a double task as mothers and bread-winners[15]. The *Barber* decision has been criticised for not taking into account substantial differences between men and women[16]. In fact, the perceived need for compensation for socially constructed handicaps can hardly be dismissed as a completely irrational ground for differential treatment. On the other hand, one can reasonably argue that an earlier retirement age is the result of stereotypes about the weaker sex and produces competitive disadvantages for women[17]. Seen in this light, *Barber* does not necessarily stand for a rejection of all types of compensatory preferential treatment that contribute to a better integration of women in the workforce.

Fortunately, only very few rules which unduly classify according to sex persist in the Member States. Consequently, the elimination of legal gender discrimination is no longer a primary objective of Community law and politics. However, in virtually all Member States, women are underrepresented in professional and public life. The Community organs, too, lack female participation in higher offices. Obviously, equal treatment has not (yet) brought about a real change. This observation invites reflection about the theoretical underpinning of the concept of equal treatment.

Equal treatment understood as absence of legal discrimination means the application of one standard to men and women. However, the uniform and ostensibly neutral standard is regarded with suspicion by some feminists because it is developed almost exclusively by and for men[18]. Second, the focus on individual rights tends to

[13] Colneric, 'Verbot der Frauendiskriminierung im EG-Recht – Bilanz und Perspektiven', in W. Däubler, M. Bobke, K. Kehrmann (eds), *Arbeit und Recht. Festschrift für Albert Gnade zum 65. Geburtstag* (Bund-Verlag, 1992) 627, p 639; Bouchard, 'Le Concept d'Egalité des Sexes en Droit Européen Communautaire: une Perspective Feministe', (1993) 31 *Osgoode Hall Law Journal* 625, p 641; McCrudden, *op cit* n 4, p 328; Prechal and Burrows, *op cit* n 1, pp 319–20; Ellis, *op cit* n 1, p 206. Fenwick and Hervey argued that in recent case law on pregnancy, pensions and equal value, the Court favoured a formal equality approach, or at least implicitly accepted it, while it supports substantive equality (equality in fact) only where the impact on the market is marginal. Fenwick and Hervey, 'Sex Equality in the Single Market: New Directions for the European Court of Justice', (1995) 32 CMLRev 443, in particular pp 450, 457, 468–70.

[14] Case C-262/88 *Douglas Harvey Barber v Guardian Royal Exchange* [1990] ECR I-1889, para 32.

[15] BVerfGE 74, 163, 178–80 (1987).

[16] Clever, 'Rechtsprechung des EuGH im Sozialbereich auf dem Prüfstand', in Bundesministerium für Arbeit und Sozialordnung (ed), *Der EG-Binnenmarkt und die Sozialpolitik* (Bundesministerium für Arbeit und Sozialordnung 1992, reprint 1995) pp 70, 71.

[17] Ebsen, 'Zur Koordinierung der Rechtsdogmatik beim Gebot der Gleichberechtigung von Männern und Frauen zwischen Europäischem Gemeinschaftsrecht und innerstaatlichem Verfassungsrecht', (1993) 46 *Recht der Arbeit* 11, p 16.

[18] Becker, 'Four Faces of Liberal Legal Thought', (1988) 34 *University of Chicago Law School Record* 11, p 15.

neglect the social context in which equal rights may generate very different material outcomes. The underlying premise is that the state and society are two distinguishable entities. This distinction, in turn, is linked to a narrow notion of governmental causation and responsibility: the state is not asked to redress situations which are not of its making. Consequently, the state must abstain from levelling 'natural' differences. But what those are is particularly problematic in the context of gender discrimination because characteristics, attitudes and activities that appear to be gender-specific result from multiple biological and cultural factors. The second equality paradigm in Community law perhaps avoids these shortcomings.

B Equal Opportunities and their Safeguarding through Positive Action

The term 'equal opportunity' appears only once in a legally binding text. Article 2(4) of the 1976 equal treatment directive states that '[t]his 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 . . .'[19]. Although equal opportunity is not mentioned as a statutory objective in the Preamble or in Article 1, it can be inferred from the allowance that the Directive recognises equal opportunity as a positive value[20]. However, equal opportunity is nowhere defined in the Directive, in contrast to the legal definition of equal treatment. Also the politically important Community Charter of the Fundamental Social Rights of Workers of 9 December 1989[21] enumerates both equal treatment and equal opportunities as goals without defining them[22].

Equal opportunity is an opaque notion. It can mean that people should have the same starting-positions from which to pursue their professional objectives, but it might also mean that people should have equal prospects to reach a goal.[23] The latter understanding requires the levelling of social disadvantages[24], or – in an egalitarian version – even the correction of natural disabilities[25].

The Court of Justice explained equal opportunity as factual equality of chances[26]. In a setting where legal sex discrimination is all but abolished, while at the same time

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[19] Equal Treatment Directive, *supra* n 8 (emphasis added).

[20] In Case 79/83 *Harz v Deutsche Tradax GmbH* [1984] ECR 1921, para 17, the Court assumed that equal opportunity is an objective of the Directive.

[21] COM (89) 568 final, text reprinted in A. Byre, *EC Social Policy and 1992: Laws, Cases and Materials* (Kluwer, 1992) 9.

[22] *Ibid*, No 16. Adopted by the Heads of State or Government of 11 Member States as a non-binding, solemn declaration of social policy aims and principles, the Charter is not a formal source of Community law. Cf Byre, *op cit* n 21, pp 4–5. See also Ellis, *op cit* n 1, p 122.

[23] See eg D. Rae *et al*, *Equalities* (Harvard University Press, 1981) pp 65–6, 73, distinguishing between means- and ends-regarding opportunity.

[24] This is probably what Rawls calls genuine equality of opportunity. J. Rawls, *A Theory of Justice* (Harvard University Press, 1971) p 100, see also 73.

[25] See on the possible meanings of equal opportunity A. H. Goldman, *Justice and Reverse Discrimination* (Princeton University Press, 1979) pp 170–174, who points out the 'radical ambiguity in the concept'. *Ibid* p 170.

[26] Case 14/83 *Colson v Land Nordrhein-Westfalen* [1984] ECR 1891, para 17. See also Case 79/83 *Harz v Deutsche Tradax GmBH* [1984] ECR 1921, para 17 where the Court described the objective of Directive No 76/207 as giving male and female workers '*real* equality of opportunity as regards access to employment' (emphasis added). The same phrase is used in the Parliamentary Resolution of 17 January 1984 on the situation of women in Europe, OJ 1984 C46/42, p 43, No 6a.

factually unequal starting-positions for women and men exist, the legal obligation to ensure equal opportunity goes beyond the mere abstention from legally discriminatory treatment. The implementation of the Court's formula of factual equality of opportunity would require governmental intervention in order to influence the factual setting. The approval of such intervention presupposes some kind of governmental responsibility for social conditions and ultimately precludes a neat distinction between state and society[27].

Reference to social reality and the negation of a merely formal view of equality is indeed the prevailing understanding of equal opportunity in Community documents. Similarly to the Social Charter, the various other texts dealing with equal opportunities, such as programmes of action and resolutions, find themselves on the legally non-binding level. Nevertheless, they have the effect, through the medium of the Community legal order, of influencing the conduct of Member States and institutions. Some authors therefore call these documents soft law[28]. Scholars describe the equal opportunity approach as a second step in Community politics that moves beyond the equal treatment principle[29]. This step was taken by the Commission at the beginning of the 1980s, and the Commission has to date adopted three programmes of action on equal opportunities for women[30]. In its 'new Community Action Programme on the promotion of equal opportunities for women, 1982–85'[31] the Commission contrasted equal opportunities with equal treatment as follows: While '[a] first set of actions aim at strengthening the right of the individual as a way of achieving equal treatment... [32] [t]he second set of actions concerns the *achievement of equal opportunities in practice* ...'[33]. Not explicitly, but clearly implicitly, the Commission contrasted the individual right with the collective right to equality, and equality in law to equality in fact. While equal treatment is understood as an individualist, legalist concept, equal opportunity denotes collective and factual equality. The factual dimension of equal opportunity is again emphasised in the third medium-term Community action programme, which stated in its introduction; 'Implementation of the *law*, however, *cannot alone* secure *de facto* equality of opportunity'[34].

The instrument to realise factual equal opportunities is positive action. In 1981, when the Commission first used this term, it particularly endorsed 'positive action programmes to overcome or counteract the non-legal obstacles to equal oppor-

[27] See critically on this picture of the state eg Greenawalt: 'A fair or equal opportunity justification, even in its more modest versions, gives government a duty to correct conditions for which neither it nor its general citizenry may be to blame.' K. Greenawalt, *Discrimination and Reverse Discrimination* (Knopf, 1983) p 58.

[28] See Wellens and Borchardt, 'Soft Law in the European Community', (1989) 14 ELR 267, p 296.

[29] Vogel-Polsky, *op cit* n 4, p 256, G. Kyriazis, *Die Sozialpolitik der Europäischen Wirtschaftsgemeinschaft in bezug auf die Gleichberechtigung männlicher und weiblicher Erwerbstätiger* (Duncker & Humblot, 1990) pp 73–4; Raetsen, 'Positive Measures', *Social Europe, Supplement* 2/86, pp 76, 77; U. Maidowski, *Umgekehrte Diskriminierung* (Duncker & Humblot, 1989) p 95.

[30] First Programme of Action by the Commission of 14 December 1981 for 1982–85, communication to the Council, *Bull Suppl* 2/86, 9; Second Programme of Action of 19 December 1985 for 1986–90, COM (85) 801 final = *Bull Suppl* 3/1986; Third Programme of Action of 6 November 1990 for 1991–95, COM (90) 449 final, p 1. At the time of writing, the fourth medium-term Programme of Action for equal opportunities of women and men (1996–2000) is in the process of being adopted. See the Commission proposal for a Council decision of 27 November 1995, COM (95) 602 final.

[31] Programme of 14 December 1981, Commission communication to the Council, *Bull Suppl* 2/82.

[32] *Bull Suppl* 2/82, 8, No 14.

[33] *Bull Suppl* 2/82, 9, No 19.

[34] Third Programme of Action of 6 November 1990 for 1991–95, COM (90) 449 final, 1 (emphasis added).

tunities'[35]. Subsequently, Community organs enacted numerous documents of differing normative force that call for positive action in favour of women, to be implemented both within the Community organs and the Member States. The Second Programme of Action for 1986–90 recommended to the Member States the promotion of women's employment by means of positive action[36], and also the Commission itself gave its commitment to positive action[37]. In November 1995, the Commission submitted a modified proposal for a Council resolution on the fourth medium-term programme of action (1996–2000) in which it particularly mentioned positive action as a model practice that the Community may suggest in order to enrich the Member States' policies on the promotion of equal opportunities[38]. Moreover, the proposal foresees[39] that the programme builds on the Beijing platform for action of the 1995 UN World Conference on Women[40], which in turn calls for positive action[41]. The Council endorsed both the objective of creating equal opportunities and positive action as the instrument to this end. With regard to the Commission's communication of its First Programme of Action, a Council resolution stated that the Council 'approves the general objectives of this communication, namely the stepping up of action to ensure the observance of the principle of equal treatment for men and women and the promotion of equal opportunities in practice by positive measures; expresses the will to implement appropriate measures to achieve them'[42]. Subsequent Council resolutions likewise approved the second and third Commission programmes of action[43].

In terms of equality paradigms, positive action can be characterised as supplementing the liberal model of equal rights for individuals in two respects. It first aims at factual, substantial equality as opposed to legal, formal equality[44]. Second, it implies a collective, not individualist vision of equality[45]. The concept of positive action therefore implies increased governmental intervention into societal developments in the interest of women as a group.

C Equality in Fact

We have seen that the idea of equal opportunity in Community law adds a factual dimension to the concept of equal treatment. An even stronger concern for equal effects of rules and measures is displayed in other parts of the relevant Community

[35] First Programme of Action by the Commission of 14 December 1981 for 1982–85, communication to the Council, *Bull Suppl* 2/86, 9, No 19.

[36] COM (85) 801 final = *Bull Suppl* 3/1986, Title C. (employment), No 1b.

[37] COM (85) 801 final = *Bull Suppl* 3/1986, Title C. (employment), No 23b.

[38] COM (95) 602 final, p 8.

[39] *Ibid*, Preamble, p 6.

[40] UN Doc A/CONF.177/20 of 17 October 1995.

[41] *Ibid*, Chapter IV, Section B, Strategic objective B3, action 82. h), Chapter IV, Section F, Strategic objective F1, action 165(o).

[42] Council Resolution of 12 July 1982 on the promotion of equal opportunities for women, OJ 1982 C186/3.

[43] Council Resolution of 24 July 1986 on the promotion of equal opportunities for women, OJ 1986 C/203/2; Council Resolution on the Community's third medium-term Programme of Action on equal opportunities for men and women (1991–1995) of 21 May 1991, OJ 1991 C142/1.

[44] Cf Vogel-Polsky, *op cit* n 4, p 257; Raetsen, *op cit* n 29, p 77; Mazey, 'European Community Action on Behalf of Women: The Limits of Legislation', (1988) JCMS 63, p 77.

[45] Opinion of the Advocate General in Case C-450/93 *Kalanke*, *supra* n 3, para 8. See also Kyriazis, *op cit* n 29, p 196.

documents. With the help of gender-conscious norms, various texts seek to realise equality in fact, meaning living conditions of equal worth. This is what Community organs apparently mean when they speak of 'real equality'[46], 'substantive equality'[47], or 'genuine equality'[48]. The terminology suggests that equality in law alone is a fake equality.

Substantive equality purports to consider persons in context, and '[t]he greater the equality of consideration, the greater the differentiation in treatment'[49]. The problem of this type of equality is that it leaves open the criteria and the limits for the deviation from legal equality. The justification for unequal treatment in order to achieve a 'just' outcome may, for instance, be need, but it may also be merit or utility[50]. With respect to women, substantive equality has been described as demanding 'that the real situation of many women which may place them in a weaker position in the market should be addressed'[51]. More precisely, women's 'real situation' may call for special treatment in order to remedy the effects of past discrimination, or to neutralise biological disadvantages by offering maternity leave provisions, child care assistance, or seniority guarantees. Special consideration might also be justified with the necessity to counterbalance social expectations and practices, such as those that steer women into lower-paying occupational categories and encourage their economic dependence[52]. Apart from the variety of justifications for unequal treatment, various degrees of deviation from legally equal treatment are possible, and this openness makes a consensus about when substantive or factual equality is attained exceedingly difficult, if not impossible.

Nonetheless, this understanding of equality forms part of Community law, too. One example is the Council's 1978 Social Security Directive, which allows the Member States to 'adopt specific provisions for women to remove existing instances of unequal treatment'[53]. 'Unequal treatment' here must mean inequality in fact, not in law. Legally different treatment is supposed to overcome factual inequalities and guarantee equal outcomes for both sexes[54]. The 1992 Agreement on Social Policy[55] allows the Member States to adopt or maintain 'measures providing for specific advantages in order to make it easier for women to pursue a vocational activity or to prevent or

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[46] 'The implementation of positive action programs in enterprises, aiming to ensure *real equality* of work for women . . ., represents a complementary approach which is essential to the occupational integration of women.' Commission Third Programme of Action of 6 November 1990 for 1991–95, COM (90) 449 final, 1, p 13 (emphasis added).

[47] Case C-450/93, para 14 of the opinion of the Advocate General, *supra* n 3.

[48] Parliamentary Resolution of 17 January 1984 on the situation of women in Europe, OJ 1984 C46/42, Chapter III (Equal responsibilities between men and women in political, cultural, social and family life) under heading III (Women in the decision-making centres), No 67, p 53.

[49] Benn, 'Equality, Moral and Social', in P. Edwards (ed), 1 *The Encyclopedia of Philosophy* (Macmillan 1967) 38, p 41.

[50] Cf eg, Rae *et al*, *op cit* n 23, p 93.

[51] Fenwick and Hervey, *op cit* n 13, p 445.

[52] K. T. Bartlett, *Gender and Law* (Little, Brown & Company 1993) pp 249–50.

[53] Council Directive of 19 December 1978 on the progressive implementation of the principles of equal treatment for men and women in matters of social security (79/7/EEC), OJ 1979 L6/24 (emphasis added).

[54] Despite its general language, this particular provision applies only to the protection of women on the ground of maternity.

[55] Concluded between the Member States of the European Community with the Exception of the United Kingdom of Great Britain and Northern Ireland, added as Protocol No 14 to the Treaty on European Union of 7 February 1992, OJ 1992 C191/91.

compensate for disadvantages in their professional careers'[56]. Both specific advantages and compensation for disadvantages mean special treatment with a view to arriving at equal results.

Various other non-binding, but nonetheless legally relevant texts (recommendations[57], programmes and resolutions[58]) reveal the same concern. In its Third Action Programme, the Commission recalled under the heading 'The integration of women in the labour market', that the previous Action Programme had attempted to encourage women's access to employment 'not only by implementation of the law, but also by specific measures to promote women's employment . . .'[59] The Council Recommendation of 13 December 1984 on the promotion of positive action for women[60] recommended the Member States to adopt a positive action policy. The third consideration of the preamble stated that '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 . . . to counteract the prejudicial effects on women in employment which arise from social attitudes, behaviours and structures'[61]. The recommendation clearly aims at *de facto* equality in social reality. Moreover, by speaking of the inadequacy of individual rights guarantees, it adopts a group-perspective. In a resolution of 1981 the European Parliament stated that 'the Community should act not only to combat juridical and legislative inequalities in respect of women but should also remove the structural obstacles which are preventing the effective implementing of the principles laid down in the EEC Treaty'[62]. Structural obstacles are here contrasted to discrimination in law. They are something apart from intentional discriminatory acts. To attack such obstacles implies that legal equality alone is insufficient. Moreover, the acknowledgement of structural obstacles leads to favouring policies which go beyond the individual rights-responsibility paradigm in the context of discrimination[63] and favours a group-perspective.

The Court of Justice, too, accepted different treatment which seeks to equalise unequal living conditions. In a 1988 decision[64], the Court was first asked to interpret

[56] Art 6(3) (emphasis added). Although Art 6 deals with the principle of equal pay, the exception's language is general.

[57] While recommendations are not intended to produce binding effects, '[t]he national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national means adopted to implement them or where they are designed to supplement binding Community provisions.' Case 322/88 *Grimaldi v fonds des maladies professionelles* [1989] ECR 4407, para 18.

[58] See on the soft-law character of resolutions and programmes of the institutions Wellens and Borchardt, *op cit* n 28, p 301.

[59] Third Programme of Action of 6 November 1990 for 1991–95, COM (90) 449 final, 1 p 10 (emphasis added).

[60] (84/635/EEC), OJ 1984 L331/34.

[61] *Ibid*, third recommendation (emphasis added).

[62] Resolution of 11 February 1981 on the position of women in the European Community, OJ 1981 C50/35, consideration No 13, p 39.

[63] E. Benda, *Notwendigkeit und Möglichkeit positiver Aktionen zugunsten von Frauen im öffentlichen Dienst. Rechtsgutachten erstattet im Auftrag der Senatskanzlei – Leitstelle Gleichstellung der Frau – der Freien und Hansestadt Hamburg* (Institut für öffentliches Recht, 1986) pp 7–8 explains structural discrimination as the result of multiple factors in employment, independent of verifiable individual discriminatory acts.

[64] Case 312/86 *Commission v France* [1988] ECR 6315.

Article 2(4) of the Equal Treatment Directive[65]. The referring Court had to apply a French statute amending the Labour Code with a view to ensuring the application of the Equal Treatment Directive. The statute contained a provision by which existing usages, terms of contracts or employment or collective agreements granting special rights for women, such as maternity leave, additional days of annual leave in respect of each child, time off work on Mother's day, extra points for pension rights in respect to children, were continued. The question was whether this was covered by the exception provided for in Article 2(4). The Court described the provision as 'specifically and exclusively designed to allow measures which, although *discriminatory in appearance*, are in fact intended to eliminate or reduce actual instances of *inequality which may exist in the reality of social life*'[66]. By stating that gender-conscious measures may be justified as a means of redressing factually unequal living conditions, the Court rejected a formal understanding of equal treatment as gender-blind treatment. It acknowledged that formally equal treatment may perpetuate social inequality. However, the Court did not go far in that direction. In particular, it did not accept the French government's defence that these privileges 'derive from a concern to protect women and to ensure their *effective* equality with men'[67]. The Advocate General rejected the argument 'that because women in general have been discriminated against then any provisions in favour of women in the employment field are *per se* valid as part of an evening-up process'[68]. The Court then concluded that 'a *generalized* preservation of special rights for women' does not correspond to the situation envisaged in the provision[69]. It thus did not depart from an individualist perspective.

In *Hofmann v Barmer Ersatzkasse*, the Court did not take a position on the permissibility of differential treatment that might be necessary to ensure equally meaningful living conditions for both sexes. The case dealt with optional leave granted to mothers, but not fathers, under German law. A German court referred to the Court of Justice to ask whether this gender preference was in conformity with Article 2(3) of the Equal Treatment Directive. This provision allows national measures to protect women as regards pregnancy and maternity. The Court stated that the optional leave was closely linked to the general system of social protection of the Member States, and that therefore the Member States have a margin of discretion in granting such leave[70]. And in *Habermann-Beltermann*, the Court found that the German statutory prohibition on night work for pregnant women is doubtlessly covered by Article 2(3) of the Directive[71]. It also held that the principle of equal treatment precludes the annulment of a contract on the ground that a woman is temporarily not allowed to work due to the protective legislation[72].

These few cases on preferential treatment of women should suffice to demonstrate that equal treatment is not understood by the Court of Justice so as to categorically exclude gender-specific measures. But the Court's ready acceptance of special measures

[65] Art 2(4) allows 'measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities.'

[66] *Ibid*, para 15 of the judgment (emphasis added).

[67] *Ibid*, para 7 of the judgment (emphasis added).

[68] [1988] ECR 6315, 6329.

[69] [1988] ECR 6315, para 15 of the judgment.

[70] C-184/83, [1984] ECR 3047, para 27.

[71] Case C-421/92 *Habermann-Beltermann v Arbeiterwohlfahrt, Bezirksverband Ndb./ Opf eV* [1994] ECR I-1668, para 18.

[72] *Ibid*, para 23–6 of the judgment.

under Article 2(3) and of the underlying concept of special protection also risks disadvantaging women. Both maternity leave and protective legislation for pregnant workers illustrate that it is necessary to balance the advantages and dangers of ostensibly benign discrimination: while such measures may help women overcome factual difficulties resulting from their double task as mother and professional, they bear the danger of perpetuating stereotypes and of producing competitive disadvantages for women. The Court did not take into account these risks when refusing to narrowly construe the exception clause in Article 2(3) of the Equal Treatment Directive. This stands in contrast to its declared principle of narrowly construing the exception clause of Article 2(4)[73], a construction which forecloses the possibility of using quotas.

The flip-side of legally different treatment which equalises unequal living conditions is gender-neutral legislation with disparate impact on one sex. This problem is the subject of the Court's case law dealing with indirect discrimination[74]. Indirect discrimination arises where an apparently neutral provision, criterion or practice disproportionately disadvantages the members of one sex and is not objectively justified by any necessary reason or condition unrelated to the sex of the person concerned[75]. The Court first recognised this type of discrimination with respect to nationality, where it used the terms 'overt' – 'covert' discrimination: 'The rules regarding equality of treatment ... forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, *lead in fact to the same result*'[76]. As we can see, the emphasis of this judicially created concept is on facts and effects. The reasoning was soon applied to gender discrimination[77]. First, the Court interpreted Article 119 so as to proscribe not only direct, but also indirect discrimination[78]. Then, the notion of indirect discrimination entered subsequent legislation[79], but was not defined there. It was filled with meaning by the Court in a line of cases. Many decisions relate to disadvantages imposed on part-time workers, who are for the most part female in all

[73] Case 222/84 *Johnston*, *supra* n 10, para 36; Case C-450/93 *Kalanke*, *supra* n 6, para 21.

[74] See in scholarship G. Wisskirchen, *Mittelbare Diskriminierung von Frauen im Erwerbsleben. Die Rechtsprechung des Bundesarbeitsgerichts, des Europäischen Gerichtshofes und des U.S. Supreme Court* (Duncker & Humblot, 1994); S. Rating, *Mittelbare Diskriminierung der Frau im Erwerbsleben nach europäischem Gemeinschaftsrecht* (Nomos, 1994) pp 53–109; C. Fuchsloch, *Das Verbot der mittelbaren Geschlechtsdiskriminierung* (Nomos, 1995).

[75] This is the definition in a Commission proposal for a Council Directive concerning the burden of proof in the area of equal pay and equal treatment for men and women, COM (88) 269 final, OJ 1988 C176/5, Art 5 (1). See also Prechal and Burrows, *op cit* n 1, p 20.

[76] Case 152/73 *Sotgiu v Deutsche Bundespost* [1974] ECR 153, para 11 (emphasis added).

[77] In Case 96/80 *Jenkins v Kingsgate* [1981] ECR 911, p 937, the Advocate General saw no reason why not to apply the Sotgiu principle to sex discrimination, and subsequent jurisprudence picked up the analogy (see references in Kyriazis, *op cit* n 29, p 76, note 20).

[78] In Case 43/75 *Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976] ECR 455, para 18, ('Defrenne II') the Court stated that 'a distinction must be drawn within the whole area of application of Article 119 between, first, direct and overt discrimination ... and secondly, indirect and disguised discrimination ...' The *Defrenne*-court made the distinction with regard to the question of the direct applicability of Art 119. The Court deemed Art 119 as directly applicable only for cases of direct discrimination, which it defined as those 'which ... may be detected on the basis of a purely legal analysis of the situation.' Paras 22, 24 of the judgment. This was a different test than the one which was later established. See on the confusion caused by the terminology Advocate General Warner in Case 96/80 *Jenkins v Kingsgate* [1981] ECR 911, pp 937–8.

[79] Art 2, No 1 of the Equal Treatment Directive, *supra* n 8; Art 4, No 1 of the Social Security Directive, *supra* n 8.

Member States. Consequently, women are in fact disproportionately affected by the apparently gender-neutral classification between part-time and full-time workers. Examples are part-time work which is paid at an hourly rate lower than for full-time work[80], or the exclusion of part-time workers from the occupational pension scheme[81]. In a decision dealing with the exclusion of payment in the event of illness for part-time employees[82], the Court used effects-oriented language. It stated that, when in percentage terms considerably fewer women work the minimum hours required, such a provision 'results in discrimination against female workers in relation to male workers and must, in principle, be regarded as contrary to the aim of Article 119 of the Treaty'[83]. This case law was consolidated in a line of decisions[84].

It is important to realise that the Court's concept of indirect discrimination presupposes a specific understanding of equality. First, it conceives of equality as a collective right[85] because the discrimination is defined by a measure's impact on groups and can be proven by statistics only. Second, it takes into account the effects of rules and practices. Third, by looking at facially gender-neutral practices, indirect discrimination relies on a substantial notion of equality, meaning equality in fact, and not in law[86]. The collective, result-oriented and factual understanding of equality is apt to justify positive action, notably in the form of quotas. Quotas are linked to group membership, they guarantee equal results for both sexes, and they constitute a legally differentiating treatment in order to redress factual inequalities and to arrive at equality in fact.

D Equal Representation

Gender equality can be understood as equal representation of men and women in public and professional life. This idea is expressed in various Community documents.

For instance, the Commission's Third Programme of Action seeks to 'encourage . . .

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[80] Case 96/80 *Jenkins v Kingsgate* [1981] ECR 911. Here the Court found that this does not amount *per se* to discrimination prohibited by Art 119, but stated: '[I]f it is established that a considerably smaller percentage of women than of men perform the minimum number of weekly working hours required in order to be able to claim the full-time hourly rate of pay, the inequality of pay will be contrary to article 119 of the Treaty, where, regard being had to the difficulties encountered by women in arranging to work that minimum number of hours per week, the pay policy of the undertaking in question can be explained by factors other than discrimination based on sex'. Para 13 of the judgment.

[81] Case 170/84 *Bilka-Kaufhaus GmbH v Weber v Hartz* [1986] ECR 1607. 'If, therefore, it should be found that a much lower proportion of women than of men work full-time, the exclusion of part-time workers from the occupational pension scheme would be contrary to Article 119 of the Treaty where, taking into account the difficulties encountered by women workers in working full-time, that measure could not be explained by factors which exclude any discrimination on the grounds of sex.' Para 29 of the judgment.

[82] Case 171/88 *Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co KG* [1989] ECR 2743.

[83] *Ibid*, para 12 of the judgment (emphasis added).

[84] See eg Case 237/85 *Rummler v Dato-Druck GmbH* [1986] ECR 2101; Case C-229/89 *Commission v Belgium* [1991] ECR I-2205, para 13; Case C-226/91 *Molenbroek v Bestuur van de Sociale Verzekeringsbank* [1992] ECR I-5943, para 13; Case C-343/92 *Roks v Bestuur van de Bedrijfsvereniging voor de Gezondheid* [1994] ECR I-587, para 333–6; and recently Case C-317/93 *Nolte v Landesversicherungsamt Hannover*, para 28 and Case C-444/93 *Megner v Innungskasse Vorderpfalz*, para 24, both judgments of 14 December 1995, nyr, reprinted in 7 EuZW 75–9 (1996).

[85] Kyriazis, *op cit* n 29 p 76; McCrudden, op cit n 4 p 328; Herrmann, 'Vereinbarkeit der Quotenregelung zur Frauenförderung mit nationalem und europäischem Recht', (1995) *Sammlung arbeitsrechtlicher Entscheidungen* 229, p 241.

[86] Ellis, *op cit* n 1, p 206; Fenwick and Hervey, *op cit* n 13, note 23 and accompanying text, pp 448, 461.

[women's] access to jobs where they are *under-represented*'[87]. The Council Recommendation of 13 December 1984 on the promotion of positive action for women states that a positive action policy is 'designed . . . to promote a better *balance between the sexes* in employment'[88]. Positive action should have a bearing on 'encouraging women candidates and the recruitment and promotion of women in sectors and professions and at levels where they are *underrepresented*, particularly as regards positions of responsibility'[89]. The envisaged Fourth Programme of Action has as one objective the promotion of a balanced participation of women and men in decision-making processes[90]. Moreover, this programme will build on the UN Platform for Action as enacted at the 1995 Beijing World Conference on Women[91], which sets as a strategic objective that special measures be taken to ensure women's equal access and full participation in power structures and decision-making and to this end asks governments to '[c]ommit themselves to establishing the goal of gender balance in governmental bodies and committees, as well as in public administrative entities, and in the judiciary, including, inter alia, setting specific targets and implementing measures to substantially increase the number of women with a view to achieving equal representation of women and men, if necessary through positive action, in all governmental and public administration positions'[92].

The European Parliament pronounces itself decidedly in favour of quotas as a means of realising equal representation. The Parliamentary Resolution of 16 March 1995 on equal treatment and equal opportunities for women and men[93] regrets that women are still under-represented in public and professional life[94] and '[c]alls on the European institutions and the Member States, in their capacity as employers, to set target figures for the recruitment of women to positions of responsibility; calls likewise on the Member States to urge the two sides of industry and the political parties also to apply these target figures'[95]; and '[c]alls on the Commission to ensure that in its officially appointed bodies and representations are at least 30% women'[96]. Already in a resolution of 1984 the Parliament explicitly urged the Member States 'to bring about genuine equality by ensuring the balanced representation of women on all levels; while women continue to be under-represented in leading positions at all levels, they should be given temporary preferential treatment whenever they possess the requisite qualifications'[97].

The vision of the state that best corresponds to the idea of equal representation is a distributive one. Ratios for the allotment of scarce goods suggest that the respective groups are actually entitled to proportionate shares. But equal representation can also

[87] Third Programme of Action of 6 November 1990 for 1991–95, COM (90) 449 final, 1, 10 (emphasis added).

[88] (84/635/ EEC) OJ 1984 L331/34, first recommendation (emphasis added).

[89] *Ibid*, fourth recommendation, dash 6 (emphasis added).

[90] See the Commission proposal for a Council resolution, Art 2 (COM (95) 602 final, p 9.

[91] *Ibid*, Preamble, p 6.

[92] UN Document A/CONF.177/20 of 17 October 1995, Chapter IV, Section G, Strategic objective G1, action 190 (a). See also strategic objective B4 action 83(f) and F1 action 165(d).

[93] OJ 1995 C89/143.

[94] *Ibid*, No 3.

[95] *Ibid*, No 4.

[96] *Ibid*, No 5.

[97] Resolution of 17 January 1984 on the situation of women in Europe, OJ 1984 C46/42, Chapter III (Equal responsibilities between men and women in political, cultural, social and family life) under heading III (Women in the decision-making centres), No 67, p 53.

be imagined in a basically negative state where government may freely choose to award advantages or benefits. Only if it does, it must do so proportionately.

With regard to the different shades of meaning that equality has in Community law, we can note that quests for a gender balance or for equal representation imply that equality has a collective dimension because here equality is defined with regard to groups. Being so, the concept of equal representation seems irreconcilable with equal opportunity, understood in the minimal sense explained above. It seems that the proportionate distribution of social, economic and political power precludes the due consideration of individual claims on their own merits[98]. On the other hand, it is argued that under conditions of fairness (the absence of gender discrimination), positions would be awarded indiscriminately to men and women, so that individual rights can at least initially be calculated by reference to ratios[99]. This argument presupposes that sufficient numbers of qualified women are available in the labour pool and that their underutilisation is solely due to gender discrimination. Reality, however, is more complicated. Female underrepresentation is due to a variety of factors, such as open discrimination and unspoken role expectations (internalised also by women) as well as individually chosen life patterns. Because these factors are difficult to sort out, the strategic problem is to steer a middle course that avoids on the one hand perpetuating stereotypes and on the other hand pressing women into 'male' schemes that they do not want and which are perhaps not worth being copied. The quota is certainly the most straightforward way to realise equal representation in a numerical fashion, but it is debatable whether this is always the best option for the women involved, or whether it merely serves as window dressing and thereby prevents a fundamental restructuring of the workplace that would contribute to the well-being of both women and men.

III The *Kalanke* Decision of October 1995

The case law of the Court of Justice does not elucidate whether the Court is aware of the varying notions of equality and to what extent it attaches importance to the fact that different concepts coexist in Community law. An important recent decision – the first one to deal with quotas in favour of women – illustrates the Court's lacking readiness to acknowledge the tensions arising from the multiplicity of paradigms.

The *Kalanke* decision of 17 October 1995[100] was rendered upon a reference for preliminary ruling by the German Federal Labour Tribunal[101]. The litigation arose with respect to the 1990 statute on gender parity of the city of Bremen, which contained a quota provision for recruitment and promotion to all public offices of the city. In all fields in which female employment is under 50 per cent, female candidates possessing the same qualification as male competitors need to be preferred[102]. Relying

[98] Abram, 'Fair Shakers and Social Engineers', in R. Nieli (ed), *Racial Preference and Racial Justice* (Ethics and Public Policy Center, 1991) 29, p 35; B. Gräfrath, *Wie gerecht ist die Frauenquote? Eine praktisch-philosophische Untersuchung* (Königshausen & Neumann, 1992) pp 134–5; Greenawalt, *op cit* n 27 p 53.

[99] R. J. Fiscus, *The Constitutional Logic of Affirmative Action* (Duke University Press 1992) p 50.

[100] Case C-450/93 *Kalanke*, *supra* n 6. See on the case Charpentier, 'L'arrêt "Kalanke", expression du discours dualiste de l' égalité', (1996) *Rev Trim Dr Europ*, July (forthcoming).

[101] Order of 22 June 1993, reprinted in 11 NZA 77 (1994).

[102] § 4 of the Gesetz zur Gleichstellung von Frau und Mann im öffentlichen Dienst des Landes Bremen of 20 November 1990, *Gesetzblatt der Freien Hansestadt Bremen* 1990, 433.

on this provision, the competent authority had promoted a woman – equally qualified as her male competitor Kalanke – to be director of the city's department for horticulture. Kalanke claimed that he should be appointed because the city's quota provision violated his constitutionally guaranteed right to equal treatment and right to equal access to public office. Initially, the plaintiff did not rely on European Community law at all[103]. It was only at the second level of appeal that the Federal Labour Tribunal questioned whether quotas for the recruitment and promotion of women violate the fundamental right to equal treatment that is *inter alia* codified in Article 2(1) of the Equal Treatment Directive[104], or whether the exception clause in Article 2(4) of the said Directive, allowing 'measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities' covers such quotas. This question had been controversial, both in scholarship[105] and among German courts[106]. Following the opinion of the Advocate General, the Court of Justice denied the permissibility of automatic preferences. The judgment is laconic and fails to pick up most of the themes the Advocate General Tesauro discussed. But all of what is said by the Justices can be traced back to the opinion. So the Advocate General's opinion does shed some light on the Court's decision.

The Advocate General's reservation regarding quotas is not surprising given the fact that he considered quotas as a purely compensatory policy[107]. Indeed, the need for compensation for past injustices committed by former generations of men against former generations of women can hardly justify gender preferences because it is difficult to argue that women now should be the beneficiaries of such compensation and that men are now collectively liable for the sins of the past. Apart from being unconvincing, the compensatory rationale is particularly unhelpful because it implies that discrimination is a phenomenon of long ago. While this may be true for openly discriminatory acts, latent prejudices and internalised role expectations still exist and are reflected in the organisation of the workplace and of family life. If at all, quotas can be justified with the necessity to combat existing discriminatory structures, and this objective is obfuscated by the focus on past discrimination. Another shortcoming of the Advocate General's discussion is that it implied that the male is the norm. The opinion understood substantive equality as placing women in the position to reach the same results as men[108]. The judgment, too, relied on the male referent and thereby failed to take into account the complexity of women's aspirations[109].

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[103] See the decision of the State Labour Tribunal, *Der Personalrat* 529 (1992).

[104] *Supra* n 8.

[105] For the coverage of quotas by Art 2(4) Maidowski, *op cit* n 29 p 95; Kyriazis, *op cit* n 29 p 36; Shaw, 'Positive Action for Women in Germany: The Use of Legally Binding Quota Systems', in B. Hepple and E. M. Szyczak (eds), *Discrimination: The Limits of Law* (Mansell, 1992) pp 386, 404 and 407, note 7; Colneric, *op cit* n 13 p 644; Ebsen, *op cit* n 17, p 15. Doubts as for the admissibility of quotas under Art 2(4) are expressed by Langenfeld, *op cit* n 1, pp 273–4, Benda, *op cit* n 63, p 89. See also Prechal and Burrows, *op cit* n 1 p 112, deeming quotas justifiable only as 'ultimum remedium in a specific situation, for example, where there is a very serious and structural underrepresentation of women, and ... for a limited period only.' Against the admissibility of quotas under Art 2(4) Herrmann, *op cit* n 85, p 240.

[106] The referring Federal Labour Tribunal tended to consider quotas as admitted under Art 2(4) of the Directive. 11 NZA 77 (1994). But see the Superior Administrative Tribunal (*Oberverwaltungsgericht*) of the German state Lower Saxony for the contrary opinion. 110 DVBl 1254, 1257 (1995).

[107] *Ibid*, paras 7, 9, 11.

[108] *Ibid*, para 15.

[109] Case C-450/93 *Kalanke*, *supra* n 6, para 19 of the judgment.

Tesauro arrived at the rejection of the quota after a lengthy discussion of conflicting concepts: formal equality versus substantive equality, individual justice versus group justice[110], equality of opportunity versus equality of results[111]. He acknowledged that the ultimate goal of equal opportunity is substantive equality[112], and that mere formal equality is a negation of equality[113]. So in contrast to the judgment, the Advocate General's opinion did not lack consideration for the different concepts of equality. The point is rather that it did not consider quotas as supportive of substantive equality, for a quota system cannot resolve the factual difficulties that women working both in and outside the home face[114]. In his eyes, quotas guarantee only numerical, formal equality at the price of violating the basic principle of equal rights for each individual[115]. While it is of course true that a social and cultural pattern cannot be modified through figures alone, quotas may well have an indirect impact on existing structures, for instance by ruling out the impact of unconscious bias on decision procedures, by making the public accustomed to women on a superior professional level, and by placing women in the position to decide personnel matters. Whether quotas can achieve the desired change is an empirical question, but to negate it beforehand means to call into question the very ability of law to regulate societal relations.

The Justices simply stated that an absolute preference for women goes beyond the implementation of equality of opportunity, and establishes instead equality of result, which is not intended by Community law[116]. The dichotomy 'opportunities – results' shows that the Court understood equal opportunity in the minimal sense of being able to attain goals according to performance, irrespective of morally irrelevant traits of the competitors[117]. We have seen, however, that preceding case law on equal opportunities rather demanded the rectification of socio-economic disadvantages[118]. Second, the blunt rejection of equality of results does not do justice to preceding Community law, including the case law, as the documents and decisions relating to substantive equality show[119]. Because various understandings of equality exist in Community law, the Court's outcome, by concentrating on equal treatment and on a particularly narrow notion of equal opportunity, would have needed some additional justification to be convincing.

Kalanke might be characterised as a typical liberal holding, giving absolute priority to the individual right not to be discriminated against, without discussing whether this right might be subject to limitations for the purpose of reconciling it with the social policy goal of ameliorating women's position in society. This conflict cannot be solved by clinging to terms that highlight only some of the various aspects that form the conceptual patchwork of Community sex equality law. The quota implements equal representation and equality in fact at the cost of equal treatment.

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[110] *Ibid*, para 7 of the Opinion.

[111] *Ibid*, para 13.

[112] *Ibid*, para 14.

[113] *Ibid*, para 17.

[114] *Ibid*, para 18.

[115] *Ibid*, para 28.

[116] *Ibid*, paras 22–3 of the judgment.

[117] The Court here apparently followed the Advocate General who interpreted the granting of equal opportunities as creating equal conditions with regard to the starting-positions, *supra* n 3, para 13.

[118] *Supra*, part II B. See on both understandings of equal opportunity Goldman, *op cit* n 23 p 171.

[119] *Supra* part II C.

Whether this is allowable must be determined by balancing the conflicting values. With due respect for legislative policy choices, it remains the judiciary's task to do so. Accordingly, both the Advocate General and the Commission in oral arguments discussed the proportionality of the quota at stake[120]. Judicial balancing would have required the Court to look at the concrete features of the disputed quota provision (scope, binding force, temporariness, size of the quota, requirement of equal qualification, and so forth). As a general matter, balancing means opening up the discussion for utility arguments, which are crucially important for the moral and political assessment of quotas and invariably influence their legal evaluation as well. Arguments for the utility of quotas are, for instance, the positive effects of diversity on the job, the desirability of specific female skills, the need for role models; while on the other hand efficiency losses, the creation of resentment, reinforcement of the idea that women cannot compete, possible damage to women's self-esteem, the assimilation of women in the male world and the devaluation of women's sphere, the danger of tokenism and window-dressing are utility arguments that speak against quotas. While the balancing approach does not guarantee unquestionable outcomes, it rules out unsatisfactory blanket prohibitions in the style of the Court's holding. It is ironic that the Court refused to enter into balancing and thereby was unfaithful to the archetypal liberal style of reasoning in order to reach an individualistic, i.e. typical liberal result.

Finally, the very brief dictum can be criticised for leaving too much room for interpretation. The Court did not explicitly dismiss quotas, but only rejected 'automatic' preferences without explaining what this covers. Consequently, one could argue that quotas in the form of mere recommendations, or quotas that allow for exceptions in the case of social hardship on the side of male competitors are not automatic and thus not forbidden in terms of Community law. This is in fact the controversy that *Kalanke* triggered in Germany. At issue, in particular, is the statute on the civil service of Northrhine-Westphalia[121]. Under this statute, equally qualified female candidates must be preferred, but only as long as considerations relating to the person of the competitor are not of overriding importance[122]. While the state's *Frauenministerin* thinks that this quota provision is not rendered inapplicable by *Kalanke*[123], the state's superior administrative tribunal found the European ruling supportive of its own long-standing rejection of the statutory quota[124]. The tribunal argued that *Kalanke* applied also to national quota laws that provide for exceptions because the referring federal labour tribunal had interpreted the Bremen statute so as to contain such an unwritten exception, and the Court had not taken this into account. However, the fact that the European Justices did not comment on the interpretation given to the national statute by the national court does not mean that the Court also meant to invalidate flexible quota provisions. On the contrary, such a conclusion would fail to take into account the scope of a decision under Article 177

[120] Opinion of the Advocate General, *supra* n 3, para 25 (finding the quota disproportional), Commission in oral arguments, *supra* n 6, paras 27–29 (arguing that the quota is proportional).

[121] Landesbeamtengesetz (LBG NRW) i. d. F. des Gesetzes zur Förderung der beruflichen Chancen für Frauen im öffentlichen Dienst of October 31, 1989 (Gesetz- und Verordnungsblatt für Nordrhein-Westfalen (GVBl NRW) 1989, 567).

[122] § 25(5) LBG NRW: '*... sofern nicht in der Person eines Mitbewerbers liegende Gründe überwiegen*'.

[123] *Focus* No 43, 23 October 1995, p 23. See also Fastenrath in FAZ No 287, December 9, 1995, p 14.

[124] OVG Münster, order of 19 December 1995, 7 EuZW 158, p 159 (1995). Shortly after, a lower administrative tribunal (*Verwaltungsgericht Gelsenkirchen*) referred to the Court of Justice to clarify this question. 49 NJW XXXVIII (1996).

EC. Here the Court interprets Community law in an abstract fashion and does not pronounce judgment on the validity of the national norm. The national courts and all other national institutions must themselves draw concrete consequences from the Court's dictum and abstain from applying law which is incompatible with European norms as interpreted by the Court[125].

IV Conclusion and Outlook

The examination of Community documents and case law revealed that all Community institutions oscillate between different concepts of equality. Although most of the analysed texts are not binding in a narrow sense, they are not devoid of all normative value. In particular, they constitute guidelines for the interpretation of hard and fast Community rules[126], which means in our context that they explain the terms 'equal treatment' and 'equal opportunity' used in the EC Treaty and in the Equal Treatment Directive. Moreover, the programmes of action and resolutions can justify Member State conduct – for instance, a national positive action policy – which is in conformity with the rules laid down therein[127].

Given the multiplicity of concepts of equality in the Community, the inadmissibility of quotas is far from obvious. The Court is bound to apply the written law with its coexisting notions of equality. Its jurisprudence in the field of gender equality is not and cannot be based on one single concept of equality. Relying on former case law and on written law, it might well have arrived at a differentiating assessment of the issue of quotas.

The terms equal treatment, equal opportunities, equal effects, and equal representation describe different approaches to the problem of unequal distribution of rights, status, power and wealth between men and women, which reflect different assumptions about the role of the governing political entity and the structure of society. The underlying political visions range from a purely liberal, negative order (guaranteeing equal treatment) to full-scale governmental intervention in all areas of life (making sure that the application of the law results in equal outcomes for both sexes). Similarly, society is regarded either as an assembly of autonomous rights-bearing individuals or rather as a community of socially interdependent members.

Article F(2) TEU which refers to the common constitutional heritage of the Member States[128] suggests that Community organs, and in particular the Court, should take into account the historical concepts of equality. The differing concepts of the state and society form part of traditional European political and legal thought, and each of the various meanings of equality arising from these concepts has historical

[125] See the seminal Case 6/64 *Costa v ENEL* [1964] ECR 1251. Specifically with regard to the Equal Treatment Directive: Case 222/84 *Johnston, supra* n 10, para 32 ('It is for the competent national court to see whether that option has been exercised in provisions of national law and to construe the content of those provisions.') and Case 79/83 *Harz v Deutsche Tradax GmBH* [1984] ECR 1921, para 26 ('the national court is required to interpret its national law in the light of the wording and the purpose of the directive ...'). In the case of *Kalanke*, the Federal Labour Tribunal now decided that the competent authority must reconsider the appointment without resorting to the Bremen quota provision which is incompatible with Community law. Judgment of 5 March 1996, see FAZ No 56 of 6 March 1996, p 6.

[126] Wellens and Borchardt, *op cit* n 28, p 318.

[127] *Ibid*, p 310.

[128] See also Mayer-Tasch, 'Europäische Verfassungshomogenität als politisches Erbe', in P. C. Mayer-Tasch (ed), *Die Verfassungen der nicht-kommunistischen Staaten Europas 1*, (2nd ed Beck, 1975) 1 on European constitutional homogeneity as our political heritage.

roots. Equality before the law is certainly an important element of the rule of law as it evolved in Europe[129]. But at the end of the 19th century, socialism arose and its protagonists criticised, as in one of Anatole France's novels, '*la majesteuse égalité des lois, qui interdit au riche comme au pauvre de coucher sous les ponts*'[130]. Of course, the quest for substantive equality was not formulated with regard to the situation of women in comparison to men, but had in mind the living conditions of the poor in contrast to the rich. However, the basic idea of substantive equality as a principle of distribution that takes into account the materially different situation of the powerful and the powerless is what inspires the current talk of substantive gender equality or gender equality in fact. The correction of pure liberalism, the process of levelling social differences and extending state functions that began at the turn of the century has probably not yet come to an end throughout Europe[131]. In all Member States, a merely negative understanding of fundamental rights is outdated, given the rise of states throughout Europe that actively shape the social order[132]. We have a basic consensus that the state should create the material conditions for the meaningful exercise of fundamental rights, although there are diverging views in the Member States about the scope and binding force of so-called social rights[133]. This perception cannot be without impact on the conception of gender equality because the more governmental intervention seeking to counteract social disadvantages is generally accepted, the more positive action in favour of women appears legitimate, too.

Acknowledgement of the historically grown concepts of equality and the corresponding facets in the Community approach to gender discrimination as well as an awareness of the tensions arising from this multiplicity could contribute to a more sophisticated analysis of the problem of positive action.

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[129] For instance, the European Convention on Human Rights contains an equal protection clause (Art 14) that was interpreted by the Court of Human Rights as guaranteeing equality in law, not in fact. Belgian Linguistics Case (Merits), 6 Eur CtHR (Ser. A), pp 33–34 (1968). Under Art F(2) of the TEU, the Union and – within it – the Community organs are bound to respect the Convention's fundamental rights.

[130] A. France, *Le Lys rouge* (Editions Gallimard, 1992 (1894)) p 129.

[131] Mayer-Tasch, *op cit* n 128, p 14.

[132] Kimmel, 'Verfassungsrechtliche Rahmenbedingungen: Grundrechte, Staatszielbestimmungen und Verfasungsstrukturen', in O. W. Gabriel and F. Brettschneider (eds), *Die EU-Staaten im Vergleich* (Westdeutscher Verlag, 2d ed, 1994) 23, p 31.

[133] See in detail Kimmel, *op cit* n 132, pp 35–38. See on the concept of the welfare state and on social policies in the Member States Hradil, 'Sozialstruktur und gesellschaftlicher Wandel' in O. W. Gabriel and F. Brettschneider, *op cit* n 132, pp 52, 88–92.

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